

Scrutiny of legislative drafting by the Legislature: The role of the legal Advisers of the Hong Kong Legislative Council

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Abstract:

The present legislature of Hong Kong is set up by the Basic Law in 1997 but retains the structure of its pre-1997 predecessor. This article gives an account of the Hong Kong legislative scrutiny process, and the role played by legal advisers of that legislature. The author highlights some unique features of the Hong Kong system and describes the hands-on experience of his team of legal advisers in operating in a bilingual context under the new constitutional regime established by the Basic Law.

Introduction

1. The last time I attended a CALC Conference was in 2005. To participants that I talked to at that conference, it seemed that the mechanism that Hong Kong had put in place to assist legislators to scrutinise legislation was rather unique. It appears to be little heard of that the drafter of a government Bill has to appear before the committee set up to study the Bill to explain and sometimes defend his or her drafting. What is more, the legal adviser to that committee also makes a routine appearance and is expected to comment on the drafting as well as on the legislative counsel's defence of his or her drafting. That is very much our way of doing things here. It works well and most importantly, it is generally accepted by our legislators.
2. There may well be other features that you may find unique in the following account of the scrutiny system in the Legislative Council (LegCo) of the Hong Kong Special Administrative Region and the part played by my team of legal advisers. In this paper, I propose to first set out the legislative process on Bills and subsidiary legislation in Hong Kong and the mechanism put in place to assist LegCo to perform its legislative role effectively. Next, I will discuss the general

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approach adopted by my team of legal advisers in assisting legislators to scrutinise legislation. Last but not least, I will say a few words on the interaction between my team of legal advisers and legislative counsel of the Department of Justice. My focus will be on the operational and practical aspects of the work of my team in the scrutiny process.

The legislative process

3. The present LegCo is set up by the Basic Law, which came into effect on 1 July 1997 when Hong Kong became a Special Administrative Region of China. There are 60 LegCo Members, divided into two halves of 30 Members, representing respectively 5 geographical constituencies and 28 functional constituencies. This division is a significant feature of the legislative process which I will come to later.

4. There are two Articles of the Basic Law which I would mention at this point. Article 73 provides for the powers and functions of LegCo. These include the enactment, amendment or repeal of laws in accordance with the Basic Law and legal procedures. Article 75 empowers LegCo to make rules of procedure on its own, provided that they do not contravene the Basic Law.

5. For those who are not familiar with the legislative set up of Hong Kong in colonial times, the then LegCo did not actually enact laws. They were enacted by the Governor, with the advice and consent of LegCo. So LegCo became a legislature with real legislative power, although a regional one for that matter, only on 1 July 1997. It is a relatively youthful legislature, but the *Rules of Procedure* of the new LegCo have inherited and preserved many procedural rules from the pre-1997 era, including the three-reading procedure that Hong Kong has long been accustomed to.

6. I do not think I need to explain the three-reading procedure as I believe it should be familiar to you. However, an important feature is introduced by Annex II of the Basic Law and is reflected in the *Rules of Procedure*. That is the separate voting procedure. For the passage of Bills introduced by the government, a simple majority vote of Members present is required. But for the passage of motions, Bills or amendments to government Bills introduced by individual Members, a simple majority vote of Members present of each of the two groups is required, i.e. Members returned by functional constituencies and Members returned by geographical constituencies. So, as far as voting on a matter initiated by a Member is concerned, we have a unique procedure which has been described as a bicameral voting system.

7. Another feature which you may find interesting is the referral of a Bill to the House Committee after the motion for its second reading has been moved but before a full debate takes place. The referral gives the House Committee opportunity to consider whether to set up a Bills Committee. This arrangement enables Members to set up a Bills Committee to consider in depth the general merits and principles of the Bill before they are adopted by the Council through passing the second reading motion. And, as a consequence, proceedings at Bills Committee could become prolonged as debates over policy will very often involve consideration of much broader

issues than purely drafting or technical ones, and the engagement of the public over the merits or otherwise of the relevant policy becomes the norm.

8. To complete the picture, let me also mention briefly the making of subsidiary legislation. The procedure is stipulated in the *Interpretation and General Clauses Ordinance* (Cap. 1) and has remained largely intact since 1997. Depending on the enabling provision in the primary legislation, subsidiary legislation is either made under the negative vetting procedure of section 34 of Cap. 1 or under the positive vetting procedure of section 35. The difference is that under the former, the subsidiary legislation is made by the delegated authority, gazetted and then tabled in LegCo, which then has the opportunity to amend or repeal it within a fixed period of time, whereas the latter procedure requires that after the subsidiary legislation is made it has to be approved by resolution in LegCo for validation. This is similar to the affirmative or negative resolution in the United Kingdom Parliament.

Scrutiny mechanism

9. Scrutiny of legislation by LegCo, whether primary or subsidiary, is in effect carried out by committees set up for specific legislation. In the case of a Bill, as I have mentioned, it is as a rule referred to the House Committee after its second reading has been moved. The House Committee, consisting of all Members with the exception of the President, is responsible for house-keeping matters and will decide whether a Bills Committee needs to be set up to study the Bill in detail. If a Bills Committee is set up, it will meet to scrutinise the policy and drafting aspects of the Bill. After completing its work, it will make a report on the outcome of its deliberations to the House Committee and recommend that the Bill is ready for resumption of second reading debate.

10. The House Committee is also responsible for appointing, if necessary, a subcommittee to study a piece of subsidiary legislation that has been tabled for negative vetting or submitted for LegCo's approval. A subcommittee functions in the same way as a Bills Committee.

11. It has become an accepted practice that before introducing any Bill (other than the purely technical ones) the Administration consults the relevant policy panel of LegCo on the legislative proposals being considered for introduction. Usually, an outline of the proposals with only the essential details is provided. Only occasionally will a draft Bill be provided. There is a similar practice for the more important subsidiary legislation.

Role of the legal advisers in legislative scrutiny

12. As far as my team of legal advisers is concerned, scrutiny of a Bill starts as soon as the copy of the Bill is received by LegCo before it is formally introduced at first reading. A legal adviser is assigned to work on the Bill at the first opportunity and will oversee, from our perspective, the passage of the Bill through the entire legislative process. Our scrutiny of the Bill has to be undertaken as soon as practicable to enable the adviser to write up a report on the bill for the House Committee meeting next following the Bill's first reading. In the report, we are expected

to highlight for Members salient points about the Bill that they would be interested to know, whether the Bill concerns any significant policy or measure or is just technical in nature, the effectiveness of its provisions as drafted in achieving its avowed objectives and whether there are any underlying legal issues that need to be canvassed. The report also encapsulates any concerns that Members might have expressed when they were consulted earlier on the legislative proposals in the relevant policy panel. If we genuinely feel that a Bills Committee is called for, we will recommend one in our reports. The Members then make their own decisions on whether to form a Bills Committee, with or without any recommendation from us.

13. Even if no Bills Committee is set up, our work may still go on. We will continue to sort out the problems arising from our scrutiny, if any is still outstanding. Where necessary, a legal adviser will make a further report to Members to draw attention to any matter on which the adviser fails to get a satisfactory response from the Administration. It is then up to Members to decide whether a Bills Committee is necessary after all to follow up the matter raised by the legal adviser. Committee stage amendments are sometimes proposed by the Administration, whether as an afterthought or as a result of our queries. Members may also propose such amendments for one reason or another. These will also be scrutinised by the legal adviser in the usual way. A report may be made to Members on these amendments.

14. The role of the legal adviser becomes more prominent when a Bills Committee is formed. We attend all its meetings to offer assistance to Members, upon request and at any appropriate time with, of course, the permission of the Chairman. Our involvement in the deliberations of the committee varies, depending on the nature of the Bill. Generally, we offer our views on legal and drafting matters that arise during the deliberations. In particular, during the clause-by-clause examination of the Bill, the legal adviser is expected to provide a marked-up copy (a form of keeling schedule) of an amending Bill, showing the ordinance as proposed to be amended by the Bill to facilitate the examination. The on-the-spot legal support provided to a Bills Committee is of course complemented, very often, by correspondence with the Administration over any queries that the legal adviser may raise and wish to tackle outside of meetings to save Members' time, plus any written advice submitted upon the request of the committee or as needed.

15. At this point, I must be quick to correct the impression that our service is confined to Bills Committees. Whilst it is true that our priority is accorded to the Bills Committee, we do provide legal support to individual Members on all LegCo matters. For instance, Members may need a legal adviser to advise on particular matters arising from Bills that are of special interest to them or to assist them on particular Bill amendments they are considering to propose. Very often, a Member who wishes to propose an amendment will seek the support of the Bills Committee for a proposed amendment. If the Member succeeds in getting majority support, the proposed amendment may eventually be moved by the chairman of the Bills Committee on behalf of the committee. If this happens, the legal adviser to the committee will have to take on an additional role as drafter of the amendment.

16. If a Member finds it necessary to consider proposing an amendment or for that matter, the Bills Committee wishing to consider the same, very often the legal adviser will be called on to advise, or at least give a preliminary view on whether the proposed amendment could actually be admitted for debate under the LegCo's *Rules of Procedure*. The question usually revolves around whether the proposed amendment may have charging effect or is within the scope of the Bill. Under our *Rules of Procedure*, the President has to rule on whether a proposed Committee Stage amendment is admissible under the *Rules of Procedure* and there is a body of previous rulings which the President will give weight to in making his ruling. The scope rule is an important means by which Members' amendments may be made to stay within certain parameters.

17. It is an established practice that the President will invite the Member who wishes to propose the amendment and the Administration to each make representations on the question of admissibility if it is in issue. As Counsel to the Legislature, I would also be asked to advise. The point I wish to make here is that there is an aspect of our scrutiny in relation to giving that advice that is quite different from normal legislative scrutiny. I am sure different legislatures may have different practices but I doubt that this aspect of our work is wholly unique.

Approaches to Legislative Scrutiny

18. I have perhaps said enough about our role in legislative scrutiny. It would not be complete without saying something on the general approaches that we take in that work. From time to time, parliamentary counsel have written or spoken on principles of legislative scrutiny. Whatever the common law jurisdiction of their origin, or whether they were talking from their own perspective as parliamentary counsel or from that of the parliamentary committee which conducted the scrutiny, there is much that is universal in these principles and which I find familiar in my own experience. I would group the general principles or standards that my team follow in practice in their scrutiny of legislation into 3 heads, namely—

- (a) whether the legislation reflects the declared policy objectives or intent of the Bill;
- (b) whether it is effective in implementing such objectives or intent; and
- (c) whether it would give rise to legal issues that need to be canvassed.

19. It is obvious that the first thing that has to be ascertained about a Bill is its policy objectives. It is not our job to pass judgment on the merit of the policy objectives of a Bill. However, it is essential that the policy objectives of the Bill can be made reasonably clear so that we can understand the provisions properly and assess their proper function in the Bill. We will raise a query if we find a provision that does not seem to relate to the objectives of the Bill as we understand them to be. Sometimes, the problem is rather that the objectives of the Bill are not made clear enough so that we have to seek elaboration from the Administration to help us understand how the provisions relate to them.

20. There is a good example of a Bill not reflecting fully its policy intent in the *Education (Miscellaneous Amendments) Bill 2003*. The Bill sought to repeal a provision in the principal Ordinance which requires the registration as a separate school of any evening school run by an

educational institution. The purpose was to remove duplication of work, speed up the processing of applications and create a more business-friendly environment. However, it transpired during the scrutiny of the Bill that it was the Administration's policy with regard to a private evening session of a school that received a subsidy from the Government that it should still be required to be registered as a separate school. We observed that the simple repeal of the provision would be against the latter policy. As a result, a committee stage amendment had to be made for rectification.

21. Only after ascertaining the policy objectives and satisfying ourselves that the provisions of the Bill do have a functional relationship with those objectives are we in a position to assess the effectiveness of the provisions or measures contained in the Bill to implement the policy objectives. We have to look at the nature of the measures that are provided for, for example, what duties are imposed, what powers are exercisable, whether and how non-compliance is sanctioned, what rights are reserved and what remedies are available. The legal and, as far as we can, the practical effect of these various measures, individually and as a whole, have to be analysed legally to see if such measures are excessive or ineffectual in relation to what they are designed to achieve. I expect my colleagues, who sometimes also receive specific requests from Members, to identify weaknesses as such in the Bill and to suggest ideas for improvements. However, we always caution ourselves to be circumspect in making these suggestions, which must be strictly on a professional and non-partisan basis.

22. When viewed against the policy intent, the effectiveness of some proposed measures could sometimes become quite questionable. The *Trade Descriptions (Amendment) Bill 2007* was meant to strengthen the protection of consumers against certain undesirable trade practices. One of the undesirable trade practices to be tackled was misleading price indication. The Bill proposed to prohibit the display, in the course of any trade or business, of signs that failed to give clear information as to the price of the goods set by reference to a weight unit. A query was raised on the effectiveness of the provision in the situation where the price of goods was set not by weight unit but by other units, such as a unit of quantity. In the end, the Administration agreed to widen the reference to weight unit to other units of measurement.

23. A legislative proposal may sometimes be over-inclusive in its effect. This is the case with the *Trade Descriptions (Provision of Information on Regulated Electronic Products) Order* made in 2008. The Order as tabled required any person who supplied any regulated electronic product in the course of trade or business at retail level to issue to a purchaser an invoice or receipt containing specified particulars at the time of supply. These particulars included a description of the relevant electronic product, its core features, availability or otherwise of after-sale services and information relating to such services if available. Failure to comply was made an offence. As drafted, there was no exemption to retailers running small second-hand stalls on the streets, although these stalls usually sold low price products and the stall owners might not have adequate knowledge to provide the prescribed information. The obvious compliance difficulties faced by them could undermine the effectiveness of the Order. The matter was raised and discussed during

the deliberations of the subcommittee formed to study the Order. An amendment was subsequently made to provide that the requirement would only apply to retailers whose trade or business is conducted on premises included in the valuation list under the *Rating Ordinance*. The effect is that retailers operating small stalls on the streets would be exempted.

24. Another aspect about the effectiveness of legislation concerns of course the drafting of the provisions. It is of fundamental importance that they must be effective in imparting their intended meaning with clarity and certainty. Actually, clarity and certainty within the context of the particular provision or the particular Ordinance may be affected by the style of drafting of legislation in general. So we do concern ourselves with any changes in style or arbitrariness in style that may have an impact on interpretation of the statutes. However, we realise there is a need to modernise the style of legislative drafting so that it uses plainer language and becomes easier to understand. This is a trend that we will certainly support.

25. There is an additional dimension to our scrutiny of the drafting aspects of legislation caused by the requirement that every Bill or piece of subsidiary legislation be bilingual. In addition to the usual issues of clarity and certainty, this gives rise to the problem of “matching”, that is, to match the corresponding Chinese and English clauses as far as possible in form and structure as the vast differences in the two languages would allow.

26. Legislative counsel know better than us the importance of clarity and certainty in drafting legislation and what the standards are. Our practical concern as legal advisers is that the drafting would not create unnecessary interpretation difficulties. While each bilingual text should follow the same standards of clarity and certainty, the two texts, as between themselves, should not differ in meaning and effect. However, due to the wide differences between the Chinese and English languages in syntax, diction and context, this is not easily or always achievable. In 2001, the LegCo Panel on Administration of Justice and Legal Services discussed the drafting policy on bilingual legislation. There was a suggestion at the Panel meeting that both the Chinese and English texts should also match language-wise as far as possible.

27. Last but not least is the multitude of superior and related law, constitutional and legal principles and procedural law that we have to be constantly aware of as they may impinge in some way on certain provisions of a Bill. I will include under this head such matters as consistency with the Basic Law, impact on the constitutional role of and accountability to the legislature, effect on common law principles and other statutes, human rights considerations and procedural fairness.

28. It is the practice of the Administration to include in a LegCo Brief its views on the Basic Law and human rights implications with a statement to the effect that the legislation in question is compatible. My colleagues have to come to their own views independently on the compatibility as well as on the other implications. If any problem is perceived, sometimes with a fine-tooth comb as the problem may not be readily apparent and it may come in the form of an unintended side-effect, it will be reported to Members. Ultimately, it is up to Members to form their own

view about whether it is safe to enact the legislation as it is, with the understanding that the while the legislature may make laws, it is the judiciary which determines the legality of any of the laws made if ever it is challenged.

29. The Basic Law, in particular, presents unique problems of interpretation and application, not the least because it is a piece of national law made by the National People's Congress of the People's Republic of China under a system that is entirely different from that of Hong Kong. In addition, the jurisprudence on many of the rights protected by it has still to be built up. For instance, Article 6 stipulates that the "Hong Kong Special Administrative Region shall protect the right of private ownership of property in accordance with law". Article 105 further provides that the Region "shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property". Questions about whether legislative proposals were able to comply with those two articles have come up from time to time.

30. When the *Land Titles Bill* was introduced in 2002, an issue arose as to whether the proposed cap on indemnity in cases of fraud was consistent with those articles. Again, in the *Smoking (Public Health)(Amendment) Bill 2005*, compliance with the two articles was raised when it was proposed to ban the use of misleading descriptors, such as "mild" and "light" on cigarette packages. There was a view that the proposed amendment would cause deprivation of the tobacco brands which contained "mild" or "light" in their registered trade marks. In 2006, as a preventive measure against avian flu, the *Waste Disposal Ordinance (Amendment of Fourth Schedule) Notice 2006* and the *Public Health (Animals and Birds) (Licensing of Livestock Keeping) (Amendment) Regulation 2006* were made to ban backyard poultry keeping. Unsurprisingly, the issue of whether the ban violated Article 105 arose again. In each of these instances, we had to provide and present our views to Members. Whilst Members appreciate that very often on such issues, there can be no definitive legal advice, the analysis that we provide assists them to understand the issues better and to make their own judgments accordingly on a better informed basis.

Interaction with Hong Kong legislative counsel

31. By way of conclusion, I must mention the role played by the legislative counsel of the Hong Kong Department of Justice in our work. It is the experience of every member of my team that an important, if not the most important, facilitator of our work on legislative scrutiny is the legislative counsel of that Department who actually draft the Bills and assist the officials from the policy bureaux in ensuring that the Bills pass through the legislative process. This includes attending the meetings of the Bills Committees to answer queries on drafting matters and drafting any committee stage amendments. We find it necessary to establish contact with the legislative counsel at the first opportunity and to maintain contact throughout the passage of the Bill. When necessary, this takes the form of formal communication, but we find it always very fruitful to carry on a professional dialogue on an informal basis with the counsel concerned whereby we would exchange our views on particular drafting points or incidental legal issues.

32. Although the legislative counsel and the LegCo legal advisers have to serve different interests, experience has shown that there is enough common and neutral ground on which we can work together, particularly in the technical drafting aspects, and facilitate each other's work without compromising our respective positions. After all, irrespective of our different clients, I think we share a common goal and the mutual responsibility to improve the professional quality of the laws that are made.
