

Straddling a barbed wire fence: reflections of a gamekeeper, turned poacher, turned gamekeeping poacher

Stephen Argument

An explanation

I should begin by explaining the strange title to this paper. At a previous conference, I said that I felt like a “game keeper turned poacher”, because I had recently left my position as Secretary to the Senate Standing Committee for the Scrutiny of Bills and joined an Australian Commonwealth department where, instead of scrutinising legislation, I was assisting in the development of legislation that ultimately found its way before the Committee.

Since that time, I have mostly worked on the side of the poachers. This changed in 2006, however, when I was pleased to accept the opportunity to work as Legal Adviser (Subordinate Legislation) to the ACT Standing Committee on Legal Affairs (performing the duties of Scrutiny of Bills and Subordinate Legislation Committee). From that point in time, I have had a foot squarely back in the gamekeeper’s fold (though I still largely worked for the poachers in my “other” job).

Earlier this year, the situation became more complicated, when I accepted an opportunity to work, as a legislative drafter, in the Commonwealth’s Office of Legislative Drafting and Publishing. This has meant that, in one role, I scrutinise delegated legislation made by ACT departments and agencies. In my other role, I draft legislation (for Commonwealth departments and agencies) that is scrutinised by the Senate Standing Committee on Regulations and Ordinances.

It is for that reason that I start with the (uncomfortable) proposition that I am currently “straddling a barbed wire fence”.

Drafters as “the first bulwark”

Poaching and barbed wire fences aside, I have been asked today to talk, in particular, about the role of drafters in legislative scrutiny. It is with some trepidation that I begin by disagreeing with something that the late Emeritus Professor Douglas Whalan (who was, I am sure well-known to many of the participants of this conference) wrote in 1990.

In its *Eighty-seventh Report*, the Senate Standing Committee on Regulations and Ordinances published a Special Report by its (then) Legal Adviser, Professor Whalan, on subdelegation of powers. In that Report, Professor Whalan suggested that the Senate Standing Committee for the Scrutiny of Bills was “the first bulwark” in certain aspects of legislative scrutiny.¹

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My primary contention today is that I believe that it is legislative drafters (and, by that, I mean persons employed in the offices of the various Parliamentary Counsel around Australasia) who are the first bulwark in legislative scrutiny.

In making this assertion, I concede that it is neither a novel nor a revolutionary proposition. I note, for example, that Ms Rowena Armstrong QC, (then) Victoria's Chief Parliamentary Counsel, told the Fourth Australasian and Pacific Conference on Delegated Legislation and First Australasian and Pacific Conference on the Scrutiny of Bills (held in Melbourne from 28 to 30 July 1993) that it is certainly the very existence of the Parliamentary Committee that often gives the drafter the sanction that is needed – you know what the Committee will say if you try that one.²

The point to note here is not the role of the Parliamentary Committee but the fact that the drafter would both refer to the Committee and rely upon it for authority in advising client agencies that legislation might offend the legislative scrutiny principles that our various committees seek to uphold.

A similar point was made by the Commonwealth's (then) First Parliamentary Counsel, Mr Ian Turnbull QC, at a seminar held in 1991, to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills. Mr Turnbull said:

I think it is safe to say that the provisions that get into Bills and that come before the Scrutiny of Bills Committee are the tip of the iceberg. I think that a far greater number that would have offended have not been put in Bills because we have advised the departments and the departments have had the sense to withdraw them. After all, when we say that the Scrutiny of Bills Committee does not like something, that is a very important weapon in our armoury.³

Mr Turnbull's point was acknowledged by the (then) Deputy Chair of the Scrutiny of Bills Committee, Senator Amanda Vanstone, who thanked the Office of Parliamentary Counsel for its role in assigning "certain unwelcome legislative practices ... to the legislative equivalent of Siberia".⁴

How does this occur? It may assist to begin by considering the role of the legislative drafter.

The role of the drafter

The current Commonwealth First Parliamentary Counsel, Mr Peter Quiggin, recently made the following statement about the role of a drafter:

- The core function of a drafter is to draft legally effective, clearly expressed legislation that best achieves the instructors' policy intentions and does so, as far as possible, within the timetable set down by the government.

¹ Senate Standing Committee on Regulations and Ordinances, "Special report on subdelegation of powers" - Eighty-seventh Report (November 1990), p. 4).

² Armstrong, R.M., "Drafting: Should delegated legislation be drafted by a specialist drafting office?", p. 4.

³ Turnbull, I, in "Ten years of Scrutiny – A seminar to mark the tenth anniversary of the Senate Standing Committee for the Scrutiny of Bills" (held on 25 November 1991 – available at http://www.apf.gov.au/Senate/Committee/scrutiny/10_years/report.pdf), p. 62.

⁴ Vanstone, A, in "Ten years of Scrutiny" (note 4), p. 57.

- It is worthwhile articulating the parameters within which an Australian Commonwealth drafter works.
- The drafter’s role is collaborative—the drafter is expected to work with the instructing area to analyse policy, flesh out alternatives and resolve problems.

.....⁵

Speaking in 1991, one of Mr Quiggin’s predecessors, Mr Turnbull, said (of drafters):

We are boffins of a sort. Our primary role is to put into legal effect the policy proposals of the Government, and this means that we have no role whatsoever in the formulation of policy. We are part of the Executive described by Senator Vanstone but we are rather a part of the Executive with a difference. As we have no say in the formulation of policy, we tend to adopt possibly a more objective approach to the making of law.

Mr Turnbull then went on to say:

However, we do regard it as part of our role to advise on the legal principles that are involved in legislation. In particular, since the arrival of the Scrutiny of Bills Committee, we regard it as our duty to advise the departments on the Scrutiny of Bills Committee’s principles and also the way in which the Committee interprets those principles. At the end of the day, if we have given this advice and the department still wants to go ahead with a provision which we think may be criticised by the Committee, we are bound by the decision of the department, as our function really is to put into legislative form what they want. The result of this, anyway, is that in practice the Scrutiny of Bills Committee and Parliamentary Counsel work together for the same ends, but we do have different points of view.⁶

I will say some more about Mr Turnbull’s “working together” point below.

While Mr Turnbull’s comments were directed specifically at the role of drafters in the Commonwealth Office of the Parliamentary Counsel in relation to the work of the Scrutiny of Bills Committee, I believe that it is uncontroversial to say that this applies to drafters of both primary and subordinate legislation in the various jurisdictions in which legislative scrutiny committees operate. It is a fact of life that any drafter worth his or her salt will warn their clients against the potential difficulties for provisions that are likely to attract attention from a legislative scrutiny committee.

Indeed, that is my experience as both a drafter and as an instructor of drafters. In my experience as an instructor, I have received (literally) hundreds of comments from drafters about the likelihood of particular provisions attracting the attention of one or other of the Senate’s legislative scrutiny committees. If anything, I have found drafters to raise matters out of an abundance of caution.

My experience as a drafter is very slight, so I do not propose to say too much from that perspective. I do not think I am talking out of school, however, when I say that (in my limited experience) drafting manuals and check-lists highlight the work of the various legislative scrutiny committees and the kinds of issues that are likely to attract comment and that drafters are

⁵ Quiggin, P, “Training and development of legislative drafters”, *The Loophole*, July 2007, p. 14.

⁶ Turnbull, I, “Ten years of Scrutiny” (note 4), p. 59.

required to consider legislative scrutiny committee issues in their drafting. I can also say (based on my recent induction into the dark art of legislative drafting) that discussion of the role of legislative scrutiny committees is a key component in the training of drafters.

None of this is new or revolutionary. It is common sense. It is about drafters doing what they can to assist in putting into legal effect the Government's policy proposals. Dare I say, it's about *good client service*??

“Working together”

I would like to pick up on Mr Turnbull's point about drafters and legislative scrutiny committees working together. These comments relate to my role with the ACT Committee, rather than my role as a drafter for the Commonwealth.

As the title to this paper indicates, my initial thought about taking on, simultaneously, the role of a drafter of delegated legislation in one jurisdiction and the role of a scrutineer of delegated legislation in another was that I would be, in effect, straddling a barbed wire fence. Within the first few weeks of starting work at OLDP, one of my new colleagues put it slightly better. They suggested to me that I must feel “schizophrenic”. Oddly, my immediate reaction was that, in fact, I *didn't* feel schizophrenic at all. On reflection, I realised that this was because, to a large extent, the ultimate goal of both roles was essentially the same: to produce “better” legislation.

Again, that seems like common sense but I wonder whether that is the case.

“Better” legislation

What do I mean when I refer to “better” legislation? From a legislative scrutiny perspective, I mean legislation that does not offend against the principles of the relevant legislative scrutiny committee. Taking the ACT Committee's scrutiny of subordinate legislation as an example, the Committee considers whether such legislation:

- is in accord with the general objects of the Act under which it is made;
- unduly trespasses on rights previously established by law;
- makes rights, liberties and/or obligations unduly dependent upon non-reviewable decisions; or
- contains matter which in the opinion of the Committee should properly be dealt with in an Act of the Legislative Assembly.

The Committee also considers whether any explanatory statement or explanatory memorandum associated with legislation and any regulatory impact statement meets the technical or stylistic standards expected by the Committee. I will say more about the Committee's scrutiny of explanatory statements below.

As to the subordinate legislation itself, however, surely it is in everyone's interests if subordinate legislation is in accordance with the general objects of the Act under which it is made. Indeed, part of a drafter's responsibility is to draft only legislation that is within the relevant legal limitations. If legislation is not “within power”, there is always the potential for the subordinate legislation to be found to be invalid. “Better” subordinate legislation, therefore, is within the general objects of the Act under which it is made.

Similarly, it is in everyone's interests that subordinate legislation not trespass unduly on rights previously established by law. While departments and agencies might not have quite the same interest in this issue as the Committee, a failure to pay heed to this principle might also be a potential basis for subordinate legislation being found to be invalid, particularly in jurisdictions (such as the ACT) with a Human Rights Act or equivalent.⁷ So "better" legislation does not interfere unduly with existing rights.

In the same vein, legislation that makes rights, liberties, etc unduly dependent on non-reviewable decisions runs the risk of challenge in the courts, on the basis that the legislature could not possibly have intended that decisions in relation to significant rights, etc were not subject to review. So it is "better" that review is provided for.

It is a bigger stretch for me to make an argument about legal validity and the term of reference that relates to matters that are more appropriately dealt with in primary legislation. That said, from a legitimacy perspective (at least), surely it is "better" for all concerned if problematic initiatives are dealt with in primary legislation, rather than subordinate legislation, if only because, if the legislation is challenged, those defending the validity of the legislation can point to the *Hansard* and argue that, in fact, the legislature *did* intend to make legislation with that effect.

These elements of "better" legislation are not inconsistent with what a drafter is trying to achieve. From a drafter's perspective, "better" legislation is legislation that is within power (and that does not get challenged in the courts) and does its job, preferably in a way that everyone can understand. There is (of course) the added imperative that legislation not get slowed down or tripped-up by comments from a legislative scrutiny committee. The real point, however, is that (in my view) drafters do not want their legislation queried by a legislative scrutiny committee as much because they do not want to risk the legal consequences mentioned above as because they do not wish to attract the ire of a committee.

So we're all working towards the same general goals.

Explanatory statements

I will now depart from my allotted topic and talk about some things that arise from my work with the ACT Committee.

First, I will say something about explanatory statements. As I have already noted, the ACT Committee has a role in ensuring that explanatory statements meet "the technical or stylistic standards expected by the Committee". In my work with the Committee, I have taken a keen interest in the content of explanatory statements, largely because I consider that not enough use is made of them, by the makers of subordinate legislation. The end result is that they are often of little or no use. Which makes them a waste of everyone's time.

In *SI bhnf CC v. KS bhnf IS*, Chief Justice Higgins of the ACT Supreme Court stated that a particular explanatory memorandum, "consistently with the apparent purpose of such documents of explaining as little as possible", merely stated the effect of the provision that he was

⁷ See the decision of the ACT Supreme Court in *SI bhnf CC v. KS bhnf IS* [2005] ACTSC 125 (2 December 2005), in which Higgins CJ (among other things) used the ACT's Human Rights Act 2004 to determine the proper limits of certain legislation.

considering and did “little justice to the ambiguities and apparent draconic effect” of the relevant provision.⁸ The Chief Justice’s views on the helpfulness of explanatory material are not unusual. Nor are they inaccurate. As someone who reads more than his fair share of explanatory statements, I think I can speak with a certain amount of authority on this issue.

Part of what I am trying to do in my advice to the ACT Committee is to reverse this trend. As I discuss further below, my view is that it is in everyone’s best interests if those who make subordinate legislation make proper use of explanatory statements. Furthermore, it should go without saying that properly-drafted explanatory statements have an even more important role in assisting those who have to use, comply with and interpret the legislation to which explanatory statements relate.

“Gotcha!!”

One of the things that I decided early on in my tenure as adviser to the ACT Committee is that I *would not* be adopting a “gotcha!!” approach to legislative scrutiny. That is, I decided that it would not be a primary object of the exercise to catch the legislators out and to embarrass them. It remains my view that that approach does not help anyone.

Instead, I have taken an approach suggested by Mr Turnbull’s “working together” comment. This has meant that a large part of what I do (through the Committee) is to point out mistakes (so that they can be corrected) and to suggest ways in which things can be done better.

There is a two-fold logic in my approach. The first limb is a recognition that (to a certain extent) we’re all trying for the same thing. We’re all trying to ensure that valid and effective legislation is produced that (as much as possible) is accessible and intelligible by everyone. The second limb is a recognition that we all make at least the occasional mistake and that no-one is right *all the time*. Not even governments. Not even legal advisers. Not even drafters. So my approach is, in some part, self-preserving. My theory is that if I don’t say “gotcha!!” every time I think I’ve detected a stuff-up by the legislators then they won’t do the same if/when I get something wrong.

I think this is just common sense and it seems to be working so far.

Scorecards

Another element of the “gotcha!!” approach is what I might call the “scorecard” method of measuring the effectiveness of legislative scrutiny committees. Speaking at the 1993 conference, the then Victorian Chief Parliamentary Counsel, Ms Armstrong, said:

Parliamentary Committees that review delegated legislation may sometimes measure their performance by the number of instruments upon which they have reported. Parliamentary Counsel or drafters of delegated legislation are not necessarily sympathetic with that measure of achievement. Indeed, one ought to be able to say that the less that is reported on, the better the achievements because the system is working well. Instructing departments are not trying to slip tricky provisions through or professional drafters are successful in ensuring that unacceptable concepts are not included.⁹

⁸ [2005] ACTSC 125 (2 December 2005), paras 82-3.

⁹ Armstrong, R.M. (note 3), p. 4.

Ms Armstrong makes a good point, picking up an issue that I have considered myself in my legislative scrutiny work over 15 years. Is a low number of “hits” necessarily a point of concern? Does it demonstrate that the committee (or the legal adviser) isn’t doing its job properly? I think not. Indeed, I think that the continuation of negative comments at relatively high levels can, in fact, suggest that a committee **isn’t** doing its job. While it may be a raw indicator that mistakes are being picked up, the bigger issue (in my view) is that the continuation of negative comments at high levels can indicate that agencies either aren’t listening to a committee or that they aren’t taking any notice of what the committee says. If that is the case, the committee isn’t doing its job.

I should stress at this point that I do not believe that this is an issue for the ACT Committee and that, to the contrary, the Committee does from time to time observe that particular issues on which the Committee has consistently made comments have appeared to diminish in number.

It’s not rocket surgery

I have been at pains so far in this paper to point out that I do not regard anything that I say here as being new or revolutionary. Can I also stress that it’s also basic common sense (or, as an Australian television presenter recently observed, “it’s not rocket surgery”). If I, as a Legal Adviser to the ACT Committee, identify an issue in a piece of subordinate legislation, I write about it in my report to the Committee. If the Committee agrees with me, the issue goes into the Committee’s Scrutiny Report. That then generates a letter to the Minister responsible for the subordinate legislation, seeking the Minister’s views. Unavoidably, the Committee’s comments make their way to the relevant area of the Minister’s department, which must then prepare a response to the Committee’s comments, for the Minister’s signature.

Having worked in a government department, I know that the process that I have described above involves a significant amount of work. Letters for the Minister’s signature are rarely drafted and cleared in one go and invariably must be accompanied by briefs, memoranda, etc. It is a painful process.

All this being so, my view is that departments should be doing their darnedest to avoid having their subordinate legislation commented on. To achieve this, departments should ensure that none of the things that the Committee doesn’t like to see in subordinate laws are included in *their* subordinate laws and also to ensure that the Committee’s (modest and logical) requirements in relation to what it likes to see in explanatory statements are met.

Sometimes, it is simply not possible for departments to avoid a Committee comment. Sometimes, the Government requires that things go into subordinate laws that legislative scrutiny committees do not like. I have no problem with that. It is in the nature of how governments and legislatures work.

In my experience, however, many of the comments made by the ACT Committee are eminently avoidable, if departments only follow the Committee’s reports and educate themselves about the Committee’s requirements. In a surprising number of instances, for example, the Committee makes a comment about a piece of subordinate legislation simply because of the omission of a paragraph (or even a sentence) from the explanatory statement to a piece of subordinate legislation.

“This is not a public servant appointment”

The best example that I can give is in relation to statutory appointments. In the ACT, Part 19.3 of the *Legislation Act 2001* requires that most statutory appointments be made by disallowable instrument. As a result of these instruments of appointment being disallowable, they come before the ACT Committee.

There is a significant exception to the general rule that instruments of appointment are disallowable by the Legislative Assembly. Section 227 of the *Legislation Act* provides that the disallowance provisions, etc *do not* apply to the appointment of a public servant to a statutory position (whether or not the Act under which the appointment is made requires that the appointee be a public servant). This means that, in order to be sure that an instrument before the Committee is, in fact, disallowable under Part 19.3 the *Legislation Act*, the Committee (and, ultimately, the Legislative Assembly) needs to be sure that the person being appointed is *not* a public servant.

In a surprising number of cases, explanatory statements to instruments of appointment contain *no* indication as to whether or not the person being appointed is a public servant. In the absence of such an indication, the Committee is bound to ask the relevant Minister “Is this a disallowable instrument?” Without such an answer, the Committee has no way of knowing whether or not, in fact, the instrument of appointment is disallowable.

So the Committee writes to the Minister and the process that I have discussed above is set in train, leading (hopefully) to the Minister writing to the Committee to advise whether or not the person appointed was, in fact, *not* a public servant. I have often wondered about the person-hours involved in the Committee obtaining this answer. Whatever the number of hours, however, I can say with certainty that the time involved is a many-times-multiple of the amount of time involved in inserting in the explanatory statement to the instrument of appointment a sentence along the following lines:

This is not a public servant appointment.

As I said, it’s not rocket surgery.

Outreach, etc

Part of the non-gotcha approach that I have set out above is that I think it is important to do a certain amount to assist departments and agencies in meeting the standards required by a legislative scrutiny committee. As part of this, the ACT Committee regularly commends departments and agencies for taking an approach that meets the Committee’s requirements. The Committee regularly re-states its requirements in relation to particular issues (the content of explanatory statements is a prime example), so that departments and agencies cannot say that they are unaware of what it is that the Committee requires.

In addition, both Legal Advisers participate in a certain amount of “outreach”, in that we have both been involved in seminars for the ACT public service, organised (mainly) by the ACT Parliamentary Counsel’s Office, in which the operation and the requirements of the ACT Committee are described and in which we tell public servants what the Committee expects of them. This can only be a good thing and it is something which I encourage all committees to do as much of as they can.

This touches on a point that I have made in presentations to previous conferences. It has long been my view that legislative scrutiny committees need to do as much as they can to publicise the work that they do. The obvious reason for this is that it helps to make public servants aware of what they have to do to avoid having their legislation the subject of a negative comment by the committee. The less obvious reason is that it is a way of letting the wider community know about the tremendous amount of good (and largely unrecognised) work that legislative scrutiny committees do in protecting the interests of citizens.

I suggest that part of the reason why not much is known about the good work done by legislative scrutiny committees is that legislative scrutiny is far from being “sexy”. This point is underlined in a 2003 editorial in *Statute Law Review*, where the editors stated that an obstacle to the greater involvement of parliamentary committees in the United Kingdom in legislative scrutiny was:

...certainly...that technical scrutiny of legislation is more demanding and less politically rewarding for parliamentarians than evaluation of its underlying policy.¹⁰

Clearly, this is something that ought also to be addressed. The rewards of legislative scrutiny need to be appreciated and understood more widely.

I was struck by the importance of outreach earlier this year, when reading some comments by Professor George Williams, in the context of the ongoing debate about whether or not Australia should have a Bill of Rights. In an article in the *Sydney Morning Herald*, Professor Williams stated:

A national charter of human rights could shape how all citizens understand their place in society and their relationship with government. This is one reason, around the world, charters have become a key part of what it means to have a modern democratic system of government.¹¹

I do not propose to enter into the Bill of Rights debate here. The bottom line is that, realistically, for practical/political reasons, we cannot expect Australia, in the foreseeable future, to follow New Zealand’s lead in this regard.

What I can say, however, is that if one of the objectives of a Bill of Rights is to “shape how all citizens understand their place in society and their relationship with government” then, surely, this is an objective that can be met without having to wait for a Bill of Rights. I would have thought that it was uncontroversial to say, in this forum, that a large part of what legislative scrutiny committees do is to safeguard human rights and to manage the relationship between governments and their citizens, insofar as those rights and relationships are expressed through and affected by legislation. If that is the case, why can’t committees do more to make the general public more aware of that role and, in so doing, help citizens understand their place in society and their relationship with government, as Professor Williams asks?

What about legislation that is drafted in-house?

If I can return (briefly) to the topic that I was asked to address, what I have said about the importance of drafters to legislative scrutiny begs the question as to what happens if legislation is

¹⁰ *Statute Law Review*, 24 (3), p. iv.

¹¹ Williams, G, “Australia’s freedom goes on trial”, *Sydney Morning Herald*, March 31 - April 1, 2007, p. 32.

drafted other than by professional drafters. It should not be a surprise that I now put my drafter's cap very squarely back on and say that in-house drafting can have some significant draw-backs.

In demonstrating this point, I will again refer back to what Ms Armstrong told the 1993 conference. Ms Armstrong's topic was "Should delegated legislation be drafted by a specialist drafting office?" Unsurprisingly, Ms Armstrong concluded that it should. In reaching that conclusion, Ms Armstrong stated:

In order to carry out the task [of drafting], the drafting office must have certain resources. It must have legally trained staff who specialise in constitutional and administrative law, statutory interpretation and who develop a particular and specialised knowledge of the statute book and of the scope of delegated legislation within the jurisdiction. The skills of this group of people will include a specialised knowledge of Parliamentary procedures.

Most importantly, the members of a drafting office learn from each other. Certain aspects of drafting are skills that are acquired through experience and practice. Drafters are like any other professional group in their interchange with each other. They meet together, criticise each other, discuss current issues and problems and, at least to some limited extent, try to establish a national network in Australia and New Zealand. This also makes it easier to deal with uniform legislation, where that is required, and to address issues about drafting practices, including public comment and criticism.¹²

An even more flattering view on the role of drafters has been expressed by VCRAC Crabbe:

The training given to parliamentary counsel, their vast knowledge of existing law, their experience of the probable consequences of a piece of legislation, all these matters place them on a pedestal from which they have to be consulted on policy issues and from which they have to advise and warn.¹³

In making her comments to the 1993 conference, Ms Armstrong did not rule out a role for in-house drafters. Indeed, she stated that the role of in-house drafters was, in certain circumstances, "particularly important".¹⁴ I do not disagree with that proposition. I would, however, make two additional comments.

First, one of the advantages of a specialist drafting office that Ms Armstrong does not refer to is its tendency towards longevity. Drafters do not tend to be the most mobile of lawyers. The nature of drafting and the nature of people who are attracted to drafting is that drafters are ordinarily in it for at least the medium haul. This means that drafting offices can be great repositories of experience and "corporate knowledge". This is one of the reasons that they are so important to legislative scrutiny.

Instructors, on the other hand, come and go. Increasingly, they move from one project to the other. Among other things, this means that, in their dealings with instructors, drafters continually have to reinforce the kinds of principles that emanate from legislative scrutiny committees. Drafters cannot rely on their instructors to be aware of the committees' requirements because of

¹² Armstrong, R.M. (note 3), p. 2.

¹³ Crabbe, VCRAC, *Legislative Drafting*, (1993).

¹⁴ Armstrong, R.M. (note 3), p. 3.

previous experiences. This means that an added advantage of drafters is that they are, in effect, keepers of the faith.

My second point relates to the implications of all that I have said above in relation to legislation drafted outside of a specialist drafting office. It is quite unlikely that someone outside of a specialist drafting office will have the sort of knowledge of the work and requirements of legislative scrutiny committees that a drafter would have. Not impossible but quite unlikely. That being so, the kind of pre-legislative scrutiny that I have discussed above will not take place. The “first bulwark” is not there. This is less than ideal.

That leaves the question of how to ensure that there is a “first bulwark” if legislation is drafted in-house. It follows from what I have said above that I think it is unlikely that the same level of expertise and corporate knowledge will develop in departments as has developed in drafting offices. There are exceptions to this rule (the Civil Aviation Safety Authority, which has both a long history of using internal drafting resources and a high volume of output) but I think that it is generally unwise to rely on in-house drafters to do the same job as drafters in an office such as the one in which I currently work.

In her 1993 paper, Ms Armstrong suggested that specialist drafting offices could assist in-house drafters by being available to advise and to assist and by preparing drafts, where resources permitted. She suggested that drafting offices might also assist by preparing guidelines and setting standards.¹⁵

I agree. In the Commonwealth arena, this is not only done but it is required to be done, as a result of section 16 of the *Legislative Instruments Act 2003*, which gives the Secretary of the Attorney-General’s Department a statutory responsibility to do the very things that Ms Armstrong suggests.

I think that the other part of the answer is “outreach”. Legislative scrutiny committees need to make their work and their requirements known to everyone who produces legislative material that comes before them. Drafters need to do the same (and the office in which I work certainly does). Given the turnover of staff in departments, the information-sharing process needs to be repeated. Regularly.

Back to bulwarks

I began this paper by disagreeing with one of New Zealand’s (and legislative scrutiny’s) favourite sons. I conclude by saying that I don’t think we’re really in disagreement at all. Scrutiny of bills committees *are*, as Professor Whalan said, an important bulwark against various types of legislative nasties. So too are legislative drafters. But drafters have the opportunity to weed out (at least some of) the nasties *before* they get to scrutiny committees. So I think drafters really are the *first* bulwark.

The real point, however, is that this is not a competition. We’re all (more-or-less) on the same side. We’re all trying to ensure that “better” legislation is made and passed.

¹⁵ Armstrong, R.M. (note 3), p. 3.

