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Consultation: a contribution to efficiency of drafting
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**CONSULTATION: A CONTRIBUTION TO EFFICIENCY OF DRAFTING PROCESS IN
MALAYSIA**

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CHAPTER 1

INTRODUCTION

*'Laws are the essential threads that bind together our society. They provide the framework of democratically inspired and enforced rules that define us as a nation and mediate relations between each of us as citizen. Though we may not be readily conscious of it, a wide variety of laws impinge on our public and private lives each every day.....And yet, despite their fundamental importance to us all, the process by which we make laws in this country is deeply flawed.'*¹

In a country, where there are people with different ideologies, interests, concerns and faiths living together, a set of rules which regulates, guides and controls their conducts is crucially important and significant. Without such a rule, the people with conflicting interests and faiths would be free to make their decisions based on their principles and act as they wish. The consequence of this is that, it might cause chaos and disorder in the society, which in the end could result the society to collapse.

It is undoubtedly that governments with their powers and capacity may issue directions, orders and guidelines regarding its policy over any matter. But, without such a force of law, the directions, orders and guidelines issued may be in vain. Therefore, governments need legislation to give effects to their decided policies.² In other terms, governments have to translate their policies into legislation because of the demands of legitimacy and also the governments cannot govern without laws.³ A government has to legislate to fulfill its political objectives and public policies.⁴

¹ See Ruth Fox and Matt Korris, *Making Better Law: Reform of the legislative process from policy to Act* (Hansard Society 2010) at 13.

² Miers and Page argue that the government "needs legislation to give legal effect to its policies, to clothe them with the force of law". See David R. Miers and Alan C. Page, *Legislation* (Second Edition, Sweet & Maxwell 1990) at 11.

³ See Ann Seidman, Robert B. Seidman and Nalin Abeyesekere, *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (Kluwer Law International 2001) at 13-14. See also Crabbe

Legislation is a form of communication from the government to the people; it 'is enacted not, primarily, for those who enact it; it is enacted for the people in a given jurisdiction'.⁵ Thus, legislation is like the skeleton of a society. Sometimes, on the one hand it confers rights but on the other hand it seizes rights⁶; it tells the people what to do and not to do. It provides avenues for dispute settlement and governs new technologies and developments.

Legislation does not appear all of a sudden. According to Tanner, 'legislation is the product of many minds and hands well before it comes before a legislature'.⁷ It means that, the government whose policies are primarily belong to is not the sole player in making legislation, there are other people or parties that might be involved in the shaping and moulding of the law. Basically, the journey of legislation begins with the shaping, moulding and refining the policies and ends with the passing of the legislation by the legislature. There are steps or stages in the process that should ideally be followed in order to come up with a good quality of legislation.

The Thornton's renowned five-stage drafting process is a widely accepted formula that serves as a guide and rule for the production of good quality legislation. The process not only shows the journey of a bill from the beginning, starting as a

where he states that "Generally speaking, legislation is the normal means by which the government is able to govern.....no government could last long without the power to make laws for the good order and governance of a particular jurisdiction in accordance with political exigencies. It may indeed be said that legislation and government are complementary aspect of the same social process. However little a part it plays, legislation is still an important, if not a critical, aspect of process of modern government.", V.C.R.A.C. Crabbe, *Legislative Drafting* (Cavendish Publishing Limited 1993) at 4.

⁴ See Crabbe (n3) at 1.

⁵ See Crabbe (n3) at 5-6.

⁶ According to Crabbe, "we need legislation to effect changes in the law; we need legislation to interfere with vested rights and interest". See Crabbe (n2) at 1.

⁷ See George Tanner QC, 'Confronting the Process of Statute-Making' in Rick Bigwood (eds), *The Statute: Making and Meaning* (LexisNexis 2004) 54.

plain white paper, but it also emphasises the importance of every person that is involved in the drafting process.

The quality of legislation is determined by several factors of which efficiency of drafting process and main players involved in the process are two of the main factors. Like in any production line of factories producing goods, the quality of product or output is very dependant on the workers who are involved in its productions. If the workers do not carry out their tasks efficiently, the quality of the output will certainly be affected. The same reasoning applies to legislative drafting work. Roles and functions of the main players in legislative drafting such as the policy makers, the public and non-governmental organisations and the drafters cannot be treated lightly. The whole system might be affected if one of them does not perform his roles as he should be, thus rendering the process inefficient and consequently the quality of legislation being compromised.

Lately in Malaysia, there were occasions where Bills presented before Parliament has to be postponed on the grounds that the Bills failed to take into considerations the interest of affected parties. The main criticism that has been brought up was that the sponsors of the Bills failed to consult the relevant stakeholders or interested parties when the drafting process was being done. Should consultation have taken place before the Bills were presented, the Bills would not be under such great criticism which resulted in the postponement. When this happens, it is also very unfair to the drafters who have worked on the Bills day and night to meet the deadline. They believe that all policy matters have been trashed out with the stakeholders or interested parties before they receive the instructions. To make it even worst, the Drafting Division sometimes is accused for not giving opportunity to the stakeholders or interested parties to take part and contribute to the Bills.

Although it is not a new thing, recently consultation issue has been given a prominence and emphasized in the drafting process. The importance, value and usefulness of consultation are widely acknowledged. Many jurisdictions in the world have now taken extra measures in fostering consultation during the early legislative drafting process. Apart from its existing consultation method i.e. the Green and White Papers, the Government of the United Kingdom has recently launched a project called 'public reading stage': a type of public consultation which gives the public an avenue to comment on proposed legislation.⁸ Albeit with the critiques and comments it has invited, this project aims to improve the consultation, to scrutinise the legislation system and to make better legislation. In Finland, consultation with stakeholders has been an established part of Finnish legislative drafting process.⁹ It views consultation as promoting effective drafting and decision making, provided that the consultation is well planned and implemented. In the United Kingdom, the Hansard Society also recognised the importance of consultation in policy development of legislation by 'providing a check on whether the proposed measure is technically adequate for its purpose, and whether it might have unforeseen and unacceptable side effects.'¹⁰

With all those importance and benefits in consultation, the question then arises; what is the contribution of consultation in drafting process? Does consultation with those stakeholders who are affected or interested parties, contribute to the efficiency of drafting process? Does consultation play any part in determining an efficient drafting process? In view of these questions therefore, this dissertation aims to examine the influence of consultation in drafting process in Malaysia.

⁸ See Cabinet Office of the Government of United Kingdom website, <<http://publicreadingstage.cabinetoffice.gov.uk/what-is-a-public-reading-stage>> accessed on 27.7.2011. See also Home Office website <<http://www.homeoffice.gov.uk/media-centre/news/parliament-opened-up>> accessed 27.7.2011.

⁹ See Ministry of Justice, Finland's website <<http://www.om.fi/en/Etusivu/Parempisaantely/Kuuleminen>> accessed 27.7.2011.

¹⁰ See Fox and Korris (n1) at 53.

CHAPTER 2

HYPOTHESIS AND METHODOLOGY

This dissertation intends to examine and discuss on consultation practises during the drafting process, and to analyse and consider the influence of consultation to the efficiency of the drafting process in Malaysia. The question that has to be answered here is does consultation has any influence on efficiency of drafting process in Malaysia. Does consultation contribute to the efficiency of drafting process in Malaysia in any way? Acknowledging that there are many factors contributing and determining the efficiency of drafting process, I intend to examine the weight and effect of consultation practise in relation to efficient drafting process; to see how far it influences the efficiency of drafting process. The objective is to prove that consultation does have an influence on the efficiency of the drafting process in Malaysia. At the end of this paper, I want to show that apart from any other factors affecting and determining the efficiency of drafting process, consultation does contribute to and influence the efficiency of drafting process in Malaysia.

To prove my statement, a survey on the drafters in the Drafting Division of the Attorney General's Chambers is conducted. For that purpose, a survey in the form of questionnaire is distributed. This method of study is chosen mainly because due to lack of available literature and information on drafting process and its relation to consultation. The respondents are chosen based on their expertise, experience and practical knowledge in drafting process. They are also the people who are responsible to translate policies into legislation and in some situation they are also involved in policies formulation stage, whether directly or indirectly. Furthermore, drafting process itself concerns with the drafters.¹¹ Hence, their views and feedbacks are definitely relevant. The survey questionnaire consists of questions related to

¹¹ See Varen Vanterpool, *A Critical Look at Achieving Quality in Legislation* (2007) 9 European Journal of Law Reform 167-204, at 170.

efficiency of drafting process. All feedbacks obtained will be analysed and used to prove the hypothesis.

Chapter 3 of this dissertation examines literatures in legislative drafting to assess the theoretical basis of drafting process. The scope of this dissertation is defined by, first and foremost differentiating the drafting process from the legislative process. Next, the drafting process introduced by Thornton will be elaborated further. Then, the present drafting process in Malaysia is briefly analysed with a special focus on the peculiarity of drafting process in Malaysia, namely receiving drafting instructions in the form of bill. After that, explanations will be given on what constitutes to be an efficient drafting process and the reasons why the process must be efficient.

Chapter 4 deals with consultation in drafting process. The objectives, advantages and disadvantages of consultation are discussed. In this Chapter, a few examples of Malaysian bills that have been withdrawn or criticised heavily due to failures to have consultation are discussed in order to show how consultation affect legislation in particular, and drafting process in general.

Chapter 5 discusses the relationship between consultation and drafting process by looking at how consultation influences drafting process and contributes to the efficiency of drafting process. In Chapter 6, findings from the survey questionnaire are analysed, assessed and evaluated to support and approve the hypothesis. The last chapter, which is Chapter 7, deals with conclusion.

Ultimately, the objective of this study is to analyse and evaluate the current practice of consultation in drafting process in Malaysia and to learn its influence and contribution to the efficiency of drafting process.

CHAPTER 3

DRAFTING PROCESS AND EFFICIENT DRAFTING PROCESS

‘Once begins the dance of legislation, and you must struggle through its mazes as best you can to its breathless end, - if end there be.’¹²

Before this dissertation goes any further, it is very crucial to define what is meant by “drafting process” and to differentiate between the “drafting process” and the “legislative process”. To some people, there is no difference between the two terms¹³ but to some, the terms convey distinctive meanings.

According to Thornton, ‘the process of drafting legislation may be said to begin with the receipt of drafting instructions and end with the completion of an agreed draft.’¹⁴ Thus, the procedures and processes preceding the tabling of Bills in Parliament are referred to as drafting process.¹⁵

On the other hand, legislative process is the passage of legislation through legislature.¹⁶ In other words, legislative process refers to ‘those procedures that a bill goes through in Parliament or legislative body’.¹⁷ It is a process embodied in policy

¹² See Tanner (n7) at 53.

¹³ Biribonwoha defines legislative process “as covering the different procedures from the conception of the need for a law, whether in the form of an amendment or a nascent law, to the time when the conceptualization is crystallized as a gazetted Act of a legislative body of that particular jurisdiction.”. See Pius Perry Biribonwoha, ‘Efficiency of Legislative Process in Uganda’ (2005) 7 *European Journal of Law Reform* 135-164, at 135-136.

¹⁴ See G.C. Thornton, *Legislative Drafting* (Tottel Pub. Ltd. 1996) at 124.

¹⁵ See Biribonwoha (n13) at 136.

¹⁶ See Constantin Stefanou, ‘Drafters, Drafting and the Policy Process’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach* (Ashgate Publishing Limited 2008) at 323.

¹⁷ See Biribonwoha (n13) at 136.

process that taken place between the formulation stage and the implementation stage.¹⁸

In summary, it can be concluded that 'drafting process' and 'legislative process' are two different parts of the whole law-making process and should not be treated as the same. So, for the purpose of this dissertation, 'drafting process' is a reference to the procedures and processes of drafting a legislation that take place before the legislation is brought before the Parliament.

Why is it important to have an efficient drafting process? As with any other processes in other fields, drafting process is very important as it provides for 'a better means of achieving quality of legislation'.¹⁹ In legislative work, process seriously affects substance²⁰ and it should not be given a light treatment.²¹ Drafting process is the most important activity in the creation of legislation for its high skills and techniques demands.²² Thus, drafting process must be carried out efficiently due to its importance towards the substance and quality of legislation.

¹⁸ See Stefanou (n16) at 322-323 where he states that, "The reason for including the stages of the legislative process is very straight forward. As already mentioned most experts refer to the input of drafters in policy-making with reference to the 'legislative process'. As can be seen in Graph 1, the legislative process is a part of policymaking in the sense that it is part of the policy process located between the formulation stage and the implementation stage. It is, though, by no means the only part of policymaking where drafters are involved."

¹⁹ See Joseph G. Kobba, *Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone* (2008) 10 *European Journal of Law Reform* 219-249, at 219.

²⁰ See Tanner (n7) at 49.

²¹ Summers argues that in modern societies, less emphasis has been given to processes than to results. See Robert S. Summers, 'Evaluating and Improving Legal Process – A Plea for "Process Values"' (1974-1975) 60 *Cornell Law Review* 1-52, at 4.

²² See Miers and Page (n2) at 57.

Thornton's Drafting Process

Thornton's drafting process has been acknowledged and used by drafters as the foundation of their legislative drafting work.²³ Good quality legislation would be produced if a proper and structured process is used as guidance in drafting legislation.²⁴

According to Thornton, there are five stages in drafting process; *understanding, analysis, design, composition and development, and scrutiny and testing*.²⁵ Each of the stage explains steps that should be taken by drafters in composing or drafting legislation. By having this systematic guidance, it is hoped that legislation composed or drafted is of high and good quality. A draft of high and good quality composed by a drafter is crucially important as it 'directly linked to the quality of the future Act'.²⁶

The first stage is for a drafter to understand the legislative proposal received from the sponsor. At this stage, it is very important for the drafter to understand what the proposal is all about 'as the quality of the output is directly related to the quality of the input at this stage'.²⁷ A drafter who extensively understands a proposal would then have a clear picture of what is intended by the proposal and consequently making the drafting exercise more easily done. Without such an understanding, it would be difficult for the drafter to transform the policy instruction into a legislative form. At this point of time, a lot of reading, scanning and examining

²³ Vanterpool asserts that "It is noteworthy that this formula has essentially been retained in Thornton's successive works, and it is this formula which continues even today to form the basis of the structuring of many legislative drafting exercises throughout the Commonwealth. This being the basic formula by which many modern drafters carry out their work.". See Vanterpool (n11) at 171.

²⁴ See Kobba (n19).

²⁵ See Thornton (n14) at 128.

²⁶ See Fox & Korris (n1) at 86.

²⁷ See Vanterpool (n11) at 173.

have to be done by the drafter in order to fully comprehend the proposal.²⁸ There are two main things that might contribute to and enhance the drafter's understanding on the proposal, i.e. clear and precise drafting instructions and discussion and consultation with the instructing officer.²⁹ Good drafting instructions are written straightforwardly with jargon-less, clear and plain language and in narrative forms, not in the form of bill.³⁰ An early discussion or consultation with the instructing officer enables the drafter to require further explanation on unclear matters, especially when the proposal involves complex, problematic and technical matters.³¹

The second stage is where a drafter has to analyse the legislative proposal.³² At this stage, the drafter is expected to study and examine how the proposal affects current legal framework of the society, especially existing laws including common laws. This analysis is vital because of the fear of repeating, clashing or contradicting with existing laws. By having the proposal analysed at this very beginning stage, the drafter would have the chance to assess the correctness and implication of the proposal and alert the instructing officer about it. Thus, policy modification and refinement can be done. As Thornton rightly points out, although it is not the concern of the drafter over policy matters of legislative proposals, due to the drafter's position however, the drafter is responsible to ensure that the proposal complies with basic principles of the legal and constitutional system, especially when

²⁸ Thornton states this stage requires a lot of patience, time and great care and a drafter might have to work hard to completely and accurately understand the goals of a proposal. See Thornton (n14) at 129. See also Kobba (n19) at 227; Vanterpool (n11) at 172.

²⁹ See Thornton (n14) at 129. Vanterpool, however, adds an extra element that could help a drafter in understanding a proposal. He argues that in order to have sound understanding of a proposal, a drafter should at times involve in matters of policy. See Vanterpool (n11) at 173.

³⁰ Thornton asserts that, "Good instructions are pearl beyond price and not only improve the quality of the Bill but also reduce drafting time. Bad instructions are the bane of the drafter's life.". See Thornton (n14) at 129.

³¹ See Thornton (n14) at 132. See also Kobba (n19) at 230.

³² According to Thornton, the analysis to be made is in relation to existing law, special responsibility area and practicality. See Thornton (n14) at 133.

it comes to special or danger areas.³³ Furthermore, by carefully analysing the proposal, the practicality and enforceability of the legislative proposal could be assessed and considered. Consequently, the analysis would reveal whether or not the objectives of the proposal are best attained through legislation of this kind.³⁴

The next stage is designing or planning stage. This stage is about designing and planning the structure of proposed legislation. In other words, this is the stage where a drafter shapes the framework of the proposed legislation by determining the form of legislation that should be introduced; the clauses that should be provided in the proposed legislation, including their logical sequence and so forth.³⁵ By designing an initial framework before the actual drafting exercise starts, it enables the drafter to visualise the whole concept of proposed legislation and to use it as a checklist for composing the actual draft.³⁶ At this point of time, discussion and communication with the instructing officer about any issues relevant or what should or should not be in the proposed legislation would be useful as the drafter could outline the design effectively.³⁷

After having designed a skeleton or initial structure of proposed legislation, the next thing to do is to compose or draft the actual provisions, clause by clause, to effect and respond to the policies required. At this stage, the skills and abilities of a drafter is actually tested and challenged. While complying and adhering to the

³³ Thornton points out some danger areas that a proposal might affect, for examples personel rights, private and property rights and international obligations and standards. See Thornton (n14) at 133-138.

³⁴ See Vanterpool (n11) at 178.

³⁵ According to Thornton, by designing the structure of proposed legislation, it gives the drafter to consider the material as a whole and assess the relative importance of topic, to link all related elements in mind and to see the best way to present all the material. See Thornton (n14) at 138; see also Kobba (n19) at 236-239; Keith Patchett, 'Preparation , Drafting and Management of Legislative Projects' (a paper presented at the Workshop on the Development of Legislative Drafting For Arab Parliaments, 3-6 February 2003, Beirut. Copy of paper is available online at <<http://www.undp-pogar.org/publications/legislature/legdraft/kpe.pdf>>.) at para 41-44.

³⁶ Ibid.

³⁷ See Kobba (n19) at 236-239.

conventional drafting practise and local language and grammar are emphasized³⁸, the drafter should also compose the draft plainly, precisely and accurately, so as to ensure the effectiveness of the legislation produced.³⁹ Discussions and deliberation with the instructing officer over draft legislation at this stage is important as the officer is not only able to point out any inaccuracy or inadequacy of the draft, but the drafter is able to discover any loopholes or defects in the policies as well.⁴⁰

The fifth stage is scrutiny and testing of the draft. At this stage, the final draft composed by the drafter is subject to verification and testing; to ensure it reflects and manifests the policies and aimed objectives to be achieved. In the process of composing and developing, some errors might occur; some critical points might be overlooked or some provisions might contradict each other. All of these incidents are expected to occur as in the process of composing, the draft is subject to several amendments due to constant refinement or policy modification.⁴¹ Although the drafter himself has scrutinised his draft during composing and developing stage, but by having another pairs of fresh eyes looking at the final draft is encouragable as it serves as a double-checking system.⁴² The draft is then subject to revision and amendment when consultation between the instructing officer with the drafter on one side and any interested or affected parties on the other side takes place.⁴³

Having discussed all stages of drafting process laid by Thornton, it can be concluded that there are two important aspects of drafting process: the relationship between the drafter and the instructing officer and the actual drafting of legislation. The relationship between the instructing officer and the drafter does not confine to

³⁸ See Thornton (n14) at 144.

³⁹ Patchett lists some of the principles of legislative composition, such as avoid long sentences and use terminology consistently. See Patchett (n35) at para 45.

⁴⁰ See Kobba (n19) at 240.

⁴¹ See Miers and Page (n2) at 64.

⁴² In some countries, draft legislation must be submitted to an administrative tribunal for review. See Patchett (n35) at para 48.

⁴³ See Kobba (n19) at 241. See also Thornton (14) at 173.

the first stage only. Communication between the instructing officer and the drafter throughout the drafting process is crucial as they are dependant on each other. The instructing officer needs the drafter to help in transforming the policy into legislative text and the drafter needs the instructing officer to provide him with sufficient, clear, accurate and precise instructions. Thus, the critical or vital element governing their relationship is “drafting instructions”. No relationship in the first place exists between them without such instruction. Discussion, deliberation and communication between them exist for the purpose of clarification and further explanation of such instruction. So, drafting instructions play a major part in drafting process and therefore, the instructions must be good drafting instructions. What is meant by good drafting instructions is that the instructions must be complete, precise, accurate, comprehensible and must take into account all necessary points and issues pertaining to the legislative proposal.⁴⁴ Good drafting instructions can only be obtained through a well-developed and well-prepared policy at the policy formulation stage – the stage before the drafting process starts. Hence, it can be said that policy formulation stage could affect the drafting process; it is either facilitating the process or delaying the process. Unless the instructions are clear on the idea and objectives of the proposal, ‘it is sheer waste of time to embark upon drafting a piece of legislation.’⁴⁵ To start drafting a piece of legislation, the drafter must understand the concept behind the proposed legislation or otherwise, the drafter would

⁴⁴ St. John Bates argues that an ideal instruction is an instruction that contains ‘a clear detailed account of the policy which is to be implemented by the legislation, existing legislation which relates to this and similarly any relevant judicial decisions.’ See T. St. J. N. Bates, ‘Legislative Drafting in the United Kingdom’ (a workshop paper presented in Different Approaches to Legislative Drafting in the EU Member States Workshop on 14 December 2009. Copy available online at <<http://www.oecd.org/dataoecd/58/49/44577527.pdf>>). But, in reality, most of the times the instruction received is incomplete and comes in chunks, especially when a certain deadline is to be met. A good instruction is the one that is well-thought. See observation by Edward C. Page, ‘Their Word is Law: Parliamentary Counsel and Creative Policy Analysis’ (2009) Public Law Oct. at 790-811.

⁴⁵ See Crabbe (n3) at 14.

'produce garbage'.⁴⁶ Thus, the policy formulation stage and drafting instructions seem to have a big influence on the efficiency of drafting process.⁴⁷

Malaysian Drafting Process

Like in any other countries, the vast majority of statute introduced in Malaysia is by the Government (in fact, up until today, there is no private bill that has been successfully introduced in Parliament).⁴⁸ When a Ministry proposes to come up with a Bill, it must first obtain the approval from the Cabinet. To do that, the Ministry will submit a memorandum to the Cabinet explaining and defending the needs for the Bill. When the approval is obtained, a detailed legislative proposal is prepared. The policy that underpins the proposal will be formulated and refined by holding discussion and consultation with any interested or affected parties, such as other governmental departments or agencies, experts or non-governmental organizations. After having a number of intense discussions and deliberations on the proposal, the Ministry officials will prepare drafting instructions to be submitted to the Parliamentary Draftsman.

While many drafters in other countries reject drafting instructions in the form of draft Bill, it is not the case in Malaysia. Drafting instructions that have to be submitted to the Parliamentary Draftsman must be in the form of draft Bill. The

⁴⁶ See Page (n44) at 801.

⁴⁷ Biribonwoha argues that the efficiency of the first stage of drafting process (in relation to instructing the drafter) very much dependant on efficiency in which the instruction is made. See Biribonwoha (n13) at 145.

⁴⁸ In order to be able to govern the affairs of the country and society, a Government must be able to legislate. As the body to whom the executive authority is entrusted, the Government recommends to the legislature any policy and measure it should adopt and having it supported by legislation. See Miers and Page (n2) at 6. As a matter of fact, legislation has been greatly influenced by politics. As Tanner puts it: "Legislating is not a clinical process. It is intensely political. Politics plays a major part in determining what legislation is enacted, when it is enacted, and the substance of it when it is enacted. Legislation reflects policy choices. Those choices are influenced overtly by political, economic, and moral philosophies." See Tanner (n7) at 52.

English common law practice demands drafting instructions be written in narrative style, rather than in the form of draft Bill. In Malaysia however, drafting instructions must be in the form of draft Bill. Many opinions have been voiced on the advantages or disadvantages of having drafting instructions in the form of draft Bill.⁴⁹

According to Stark⁵⁰, receiving drafting instructions in the form of draft Bill is considered unlucky for some reasons, such as the absence of intent statement. The drafter has to study the draft Bill clause by clause, trying to penetrate and figure out what it is all about and to assume the intention of the instructing officer towards the draft Bill.⁵¹ Drafting instructions in narrative form are more clear and straightforward as to what the problems that giving rise to the proposed Bill are, the intention of the Bill and the objectives and aims the Bill trying to achieve.⁵² Ideally, drafting instructions would contain background information, the purpose of the proposed legislation and the means to achieve it and the impact on existing circumstances and law.⁵³

When receiving the draft Bill, the Parliamentary Draftsman will assign the drafters responsible for the draft Bill, and usually a pair of drafters is assigned for one Bill. The drafting process will then begin. It is worth mentioning that every draft that has been vetted by the responsible drafter must be submitted to the Parliamentary Draftsman or the Deputy Parliamentary Draftsman for approval. The approved draft will then have to be submitted to the Solicitor General for second final approval. This

⁴⁹ See Ian McLeod, *Principles of Legislative and Regulatory Drafting* (Hart Publishing 2009) at 38.

⁵⁰ See Jack Stark, *The Art of The Statute* (F.B. Rothman, 1996) at 19.

⁵¹ See Thornton (n14) at 129. See also EA Driedger, *The Composition of Legislation* (2nd Edition, Department of Justice, Ottawa 1957) at xix-xx.

⁵² Ibid.

⁵³ See Thornton (n14) at 130.

is to ensure that the final product is 'constitutionally and legally sound and error-free in every aspect.'⁵⁴

Efficient Drafting Process

What is efficient drafting process? What constitutes efficiency in drafting process? The critical point that has to be sorted out before proceeding with this dissertation is what would be the criteria in measuring and evaluating efficiency of drafting process?

While there are many literatures that discuss on the efficiency of legislation and legislative process, it is not the case for drafting process. No specific literature discussing on efficiency of drafting process has been done. Due to this lack of study on efficiency of drafting process, it is important to establish the criteria that can be used and applied in assessing and evaluating efficiency of drafting process.

To do this, I will refer literatures on efficiency in other fields, particularly efficiency of management in public sector and efficiency of policy formation. These two fields are mainly chosen and analogised because to me drafting process is about service rendered by public sector and the drafting exercise itself involves policy formulation and development. The Drafting Division is attached to the Attorney General's Chamber, the office under the Prime Minister's Department which is considered as a public sector. The drafting job undertaken by the Drafting Division is a combination of policy and legal matters. Drafting process starts with the moulding and shaping of policies by the ministries officials. Though policies formulation and

⁵⁴ Client's Charter of the Drafting Division.

<http://www.agc.gov.my/index.php?option=com_content&view=article&id=50&Itemid=112&lang=en> accessed 26.7.2011.

development should ideally be dealt with by the ministries officials, in most cases, these policies would be polished up and refined during the drafting of legislation.

From the literatures references, I will examine and analyse the given interpretation of efficiency and utilise the criteria of efficiency to drafting process.

Efficiency is one of the higher values promoted in the legislative drafting.⁵⁵ The Concise Oxford English Dictionary⁵⁶ defines *efficient* as ‘working productively with minimum wasted effort or expense’ and *efficiency* as ‘the state or quality of being efficient’. According to Pius⁵⁷ efficiency reflects ‘the extent to which perceived best practices are utilised in the process of the development of legislation’. Best practise is ‘finding and using the best ways of working to achieve your business objectives’.⁵⁸

In their book, *Efficacy and Efficiency in Multilateral Policy Formation*⁵⁹, Jurrjens and Sizoo said ‘efficiency of a given means is determined by its ability to reach a given end at the lowest possible costs in terms of financial and human resources, time or the risk of failure’. Lon Roberts⁶⁰ defined efficiency as ‘to the degree of economy with which the process consumes resources – especially time and money.’.

⁵⁵ See Helen Xanthaki, ‘On Transferability of Legislative Solutions: The Functionality Test’ in Constantin Stefanou and Helen Xanthaki (eds), *Drafting Legislation: A Modern Approach*, (Ashgate Publishing Limited 2008) 4.

⁵⁶ *Concise Oxford English Dictionary* (Oxford University Press 2005).

⁵⁷ See Biribonwoha (n13) at 138.

⁵⁸ Business Link website

<<http://www.businesslink.gov.uk/bdotg/action/detail?itemId=1074450434&type=RESOURCES>>

accessed 16.6.2011.

⁵⁹ See Rudolf Th. Jurrjens and Jan Sizoo, *Efficacy and Efficiency in Multilateral Policy Formation: The Experience of Three Arms Control Negotiations: Geneva, Stockholm, Vienna* (Kluwer Law International 1997) 372.

⁶⁰ Lon Roberts, *Process Reengineering: The Key to Achieving Breakthrough Success* (Milwaukee, WI: ASQC Quality Press 1994) 19.

It is also called efficiency when a desired outcome is made with a minimum 'energy, time, money, materials, or other costly inputs'.⁶¹ In other terms, 'efficiency is the measure of the speed and accuracy with which work is completed'.⁶² In relation to human action, 'efficiency involves the adoption of the means most suited to securing a particular end, without reference to sacrifice of other ends (cost) and without any restriction on the selection of means except that of intrinsic relationship to the end.'⁶³

Below is the summary of elements of efficiency as discussed above:

Table 1: Element of efficiency

	Elements of efficiency
Concise Oxford English Dictionary	<ul style="list-style-type: none"> - productive - minimum wasted effort - minimum wasted expense
Pius	<ul style="list-style-type: none"> - utilisation of best practices
Jurrjens and Sizoo	lowest possible costs in terms of: <ul style="list-style-type: none"> - financial resources - human resources - time - risk of failure
Waldt	<ul style="list-style-type: none"> - minimum energy, time, money, materials, or other costly inputs - speed and accuracy
Moore	<ul style="list-style-type: none"> - suitable means - no sacrifice of cost - no restriction on the selection of means (except of no value to the end)

⁶¹ Geritt van der Waldt, *Managing Performance in the Public Sector: Concepts, Considerations and Challenges* (Juta and Co. Ltd. 2004) 70.

⁶² Ibid, at 71.

⁶³ Wilbert Ellis Moore, *Industrial Relations and the Social Order* (Arno Press 1977) 185.

As can be seen from Table 1, it can be said that efficiency is when cost and failure is minimised, producing a quick and accurate output. In terms of cost, it is not only related to monetary or financial aspect, but is also connected to time and human resources.

Therefore, efficient drafting process is when a quality bill is produced with minimum risk of failure by using a minimal financial and human cost. Thus, wasted time, costs and effort can be reduced. The efficient drafting process also means the bill will eventually progress with speed without any interruption or delay. But this does not mean getting it done quickly. So, for the purpose of this dissertation, efficiency of drafting process is determined when:

- (a) wasted financial cost is minimised;
- (b) wasted human resources or effort is minimised;
- (c) wasted time is minimised;
- (d) risk of failure is minimised; and
- (e) progress is unobstructed or no delay (“clear-sailing”).

CHAPTER 4

CONSULTATION: WHAT AND WHY?

*'Additionally, there is widespread criticism that the quality of policy preparation and public consultation by departments – particularly the involvement of experts with specialist knowledge that could usefully be deployed in the policy development process – is inadequate and weak.'*⁶⁴

What is the foundation of good legislation? The answer is no one specific answer to that question. The foundation of good legislation can be varied. But one of the foundations of good legislation is 'sound policy development and policy decision making'.⁶⁵

The manner of which the policy is developed and prepared not only has an impact on legislation but it has a direct effect on the overall drafting process as well. Why is it so? The reason being is that policy and drafting process have a very intimate relationship that they are inseparable. The drafting process is a process of which a policy is translated or reduced into a legislative language, and unless and until the policy is clear and adequate, the drafting process would not go smoothly and efficiently.⁶⁶

Next, what determines 'sound policy development and policy decision making'? In other words, what does make a policy well and soundly made? What should the instructing officers or departments do in order to make the policy being developed effectively and of quality so as to ensure the policy is beautifully shaped and refined?

⁶⁴ See Fox & Korris (n1) at 13.

⁶⁵ See Tanner (n7) at 58.

⁶⁶ See Crabbe (n3) at 14.

According to Staronova and Matheronova⁶⁷, a quality policy process can be achieved by, *inter alia*, fuller use of consultation with the public and affected groups. In suggesting the best practise in policy formulation, Patchett stresses the importance of consultation in the policy making process that for him, although consultation comes at a price, if effectively conducted, it would bring benefits and become useful.⁶⁸ The Merits of Statutory Instruments Committee in the House of Lords has made it clear by saying that ‘analysis of the results of consultation is vital for good policy making and proper scrutiny’.⁶⁹

Thus, one of the ways to have a good policy development and decision making process is by having consultation during the process. Consultation is about ‘gathering of views, information and experiences of the stakeholders about the matter that is being prepared.’⁷⁰ Inasmuch as the root of a legislative proposal is to overcome a public policy issue; it is therefore befitting for stakeholders or affected parties to have their views and opinions heard through consultation.⁷¹ The views and information from the stakeholders especially the experts and affected parties are valuable and useful as they know the shortcomings or potential consequences of the legislative proposals.⁷² Just as important, consultation shows good governance of the

⁶⁷ See Katarina Staronova and Katarina Matheronova, ‘Recommendations for the Improvement of Policy Making Process in Slovakia’ at 9. (A Policy Paper under the International Policy Fellowships. Copy available online at <<http://www.policy.hu/staronova/FinalPolicyPaper.pdf>> accessed on 1.8.2011.

⁶⁸ See Patchett (n35) at para 18-22.

⁶⁹ See Fox & Korris (n1) at 62.

⁷⁰ See Ministry of Justice, Finland’s website (n9).

⁷¹ See Biribonwoha (n13) at 136. See also Catherine Kyokunda, ‘Parliamentary Legislative Procedure in Uganda’ (2005) 31 Commonwealth Law Bulletin 17-27, at 17 where she states, ‘..the fact that legislation affects every individual in the jurisdiction in which it operates, make it important for all persons involved in its making to appreciate not only the law, but also the process so as to effectively participate in that process and make meaningful contributions.’

⁷² The Ministry of Justice, Finland also shares this view by stating that: ‘The goals of consultation are openness and high quality of statute drafting. Consultation aims at finding out the different views, impacts and opportunities for practical implementation relating to the matter being prepared. With the help of consultation, the trust in statutes and in the democratic decision-making are also

government. Good governance of a government takes into account non-arbitrary decision making which means making the government business conducted openly and allowing persons affected by its decision take part or participate in governmental decisions.⁷³ Eventually, the acceptance of the people and the credibility and legitimacy of the government's action can be improved.⁷⁴ Without such participation, the government would be seen as 'a rigid and ignorant tyranny' and public administration as 'a rigid and stupid bureaucracy'.⁷⁵

To simply put, the objectives of consultation, to involve public in government decision making process, is best summarised by Walters, Aydelotte and Miller as follows:

- (a) discovery : a search for definitions, alternatives, or criteria;
- (b) education : to inform and educate the public about an issue and proposed alternatives;
- (c) measurement : to assess public opinion on a set of options;
- (d) persuasion : to persuade the public toward a preferred option;
- (e) legitimisation : to comply with public norms or legal requirements.⁷⁶

improved. When consultation is conducted, the aim is that the key stakeholders participate in the drafting process or that their views are otherwise heard to a necessary extent during the drafting process. In the consultation, open and constructive interaction between the drafters and the stakeholders is pursued.' See Ministry of Justice, Finland's website (n9).

⁷³ See Seidman (n3) at 8. Biribonwoha also shares the same idea on good governance by saying that public consultation is 'one of the demands of good governance; especially in as far as it is regarded as an example of public accountability. See Biribonwoha (n13) at 144.

⁷⁴ See Legislation Advisory Committee of New Zealand Guidelines (LAC Guidelines) (2001 ed as amended) para 1.4.2. as quoted in J.F. Burrows, *Statute Law in New Zealand* (3rd Edition, LexisNexis 2003) at 64.

⁷⁵ See Mackintosh, *The British Cabinet* (3rd Edition, 1977) at 578 as quoted in Miers and Page (n2) at 41.

⁷⁶ See Lawrence C. Walters, James Aydelotte and Jessica Miller, 'Putting More Public in Policy Analysis' (2002) 60(4) *Public Administration Review* 349-359, at 352 as quoted in Fox and Korris (n1) at 56.

While there are differing opinions and views about the value of consultation, some commentators are rightly stating the advantages or benefits of consultation. The OECD has summarised the benefits that can be obtained if consultation on legislative proposal is done during the law making process.⁷⁷ According to the OECD, by holding consultation, not only the range of policy proposal can be widened, the opportunities to collect necessary data and information and to verify results of analysis are present as well. This may result in more informed choices with regard to the legislative solutions that to give effect to the policy. Consultation also can be a means of explaining to the people on the problems to be solved and the activities to be regulated, thus ensuring better understanding of the issues in hand. Consequently, this would make the policy and law making process more transparent and the government would be seen more responsive to the interests of affected parties. Eventually, all of these would encourage compliance of legal solution and would improve communication of legal requirements.

Miers and Page view the benefits of consultation from two different angles which are from the government's perspective and the stakeholders' perspective.⁷⁸ If consultation is carried out, the government's policy would be finely formulated with the expertise, skills and experience of the stakeholders, resulted in a highly workable policy. The involvement of the stakeholders, whether passive or active, would assure the acceptance and acquiescence of the stakeholders of the proposed legislative action. As another point of view, stakeholders who involve in the policy formulation would feel appreciated as they have the opportunity to channel their views and opinions on matters being discussed.

⁷⁷ Organisation For Economic Co-Operation and Development (OECD), 'Law Drafting and Regulatory Management in Central and Eastern Europe' SIGMA Papers No. 18, at 19. See <<http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=OCDE/GD%2897%29176&docLanguage=En>> accessed 6.8.2011.

⁷⁸ See Miers and Page (n2) at 41.

It is commonplace for many jurisdictions, including Malaysia, to carry out consultation with other government departments or agencies when legislative proposals impact on the jurisdictions or responsibilities of the departments or agencies. The purpose of holding or carrying out consultation within government departments or agencies is to make sure that interest of the government is taken into account comprehensively and the stands of the departments or agencies on the proposed subject matter is not contradicting each other. This is however not the case for agencies or parties outside the government. Consultation with those agencies or parties takes place at the discretion of the government.⁷⁹ This means that the government can choose whether to consult or not to consult; or who to consult or who not to consult; or to what extent the consultation should be made. Having mentioned the benefits of consultation above, the question arises is, why does this happen? Why does the government, in some cases (or perhaps in all cases), seem to be reluctant to have its legislative proposals open for consultation?

Amongst the critiques of consultation is time constraint. It is claimed that consultation takes up a great deal of time and thus would slow down the policy making process.⁸⁰ Not to mention when a bill is needed urgently, there is more unlikely that the government would allow consultation as this would consume a lot of time and prolong the drafting process. Apart from that, it is the government's belief that 'government knows best' and the government's hesitation to disclose its policy before the policy has been fully shaped up.⁸¹ It is also argued that the views and opinions of the stakeholders or public be channelled through Parliament when legislation has been tabled.⁸² Moreover, the genuine views and opinion of the

⁷⁹ See Miers and Page (n2) at 40. See also Michael Zander, *The Law-Making Process* (Sixth Edition, Cambridge University Press 2004) at 8.

⁸⁰ See Biribonwoha (n13) at 142; Burrows (n74) at 64; Patchett (n35) at para 18.

⁸¹ See Patchett (35) at para 18.

⁸² Zander says that 'The traditional Whitehall view was that outside persons and bodies should not normally be consulted at this stage – that the time for consultation is later when the bill has been introduced in Parliament.' See Zander (n79) at 8. But, in a system where there is no pre-legislative

stakeholders on matters being discussed are doubted because the real objectives of the stakeholders are difficult to be determined,⁸³ for they representing and pleading arguments and opinions in favour of their interest, resulted in the interest of other party would be ignored.⁸⁴ Furthermore, consultation is regarded as an expensive exercise.⁸⁵

Having mentioned the reasons above, we can see that both arguments on the advantages and disadvantages of consultation are valid. On one hand, consultation is seen as a quality contributory factor to the formulation and refinement of policy and thus assuring the quality of legislation produced. On the other hand, it is regarded as an encumbrance and burden to the government. As rightly stated by Ash:

‘Some civil servants may see consultation as an undesirable delay in the difficult business of establishing policy; an unwelcome intrusion into the purview of an elected government that consumes resources without product. From the NGO perspective, consultation may appear a perfunctory exercise designed to lend a cloak of respectability to an unrepresentative decision process dominated by the few. In fact, while public consultation is a matter of degree, all stakeholders stand to benefit, although not always in a direct manner.’⁸⁶

scrutiny, including Malaysia, this view is not really applicable. Though a bill may be referred to a special select committee thorough normal legislative process of Parliament, but this is subject to a motion approved by the House where in most cases, this motion always be rejected by the overwhelm majority of government members.

⁸³ Ibid.

⁸⁴ See Miers and Page (n2) at 41.

⁸⁵ See Biribonwoha (n13) at 143.

⁸⁶ See article by John Ash (University of Cambridge), ‘Greenpeace v. DTI: Courts may also have their say in nuclear development’ (March 2007). Copy available online at <http://www.energypolicyblog.com/2007/03/22/greenpeace-v-dti-courts-may-also-have-their-say-in-nuclear-development/> accessed 1.8.2011.

The conflict between the demands of the stakeholders and the interest of the government in consultation issue is not unknown to many jurisdictions. Under the pressure of time and commitment, it is agreed that it is impossible for the government to satisfy the interest of every single individual. But this does not mean that the government can totally ignore any view and opinion of the people, especially the affected and minority parties. In this regard, it is worth mentioning the thought from Redlich:

‘The majority holds the great advantage of being able to realise its wishes in the institutions of government; but, on the other hand, for this very reason the minority ought to have all conceivable rights of expressing its views and aims,.....’⁸⁷

Failure of the government to conduct consultation may result in court actions be brought against it. While this case never happens in Malaysia, it did happen in the United Kingdom.⁸⁸ The value and significance of consultation has been recently endorsed by the United Kingdom’s court through the Greenpeace case.⁸⁹ In this case, the government’s failure to conduct “the fullest public consultation” was held to be “very seriously flawed”. This successful challenge by the Greenpeace has proved that a flawed consultation exercise, that is an inadequate and incomplete exercise, would deprive the chance of the stakeholders to give their ‘intelligent response’.

In Malaysia, the importance of opinion from public or stakeholders in the output of drafting process has recently been evident when several bills presented before the Parliament were criticised because of the government’s failure to take

⁸⁷ See Redlich, *The Procedure of the House of Commons* (1908), Vol. 1, at 131, as quoted in Miers and Page (n2) at 73.

⁸⁸ See Fox and Korris (n1) at 59.

⁸⁹ See *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC (Admin) 311.

into consideration views and opinions from the public, especially the stakeholders and experts. In some cases, bills were postponed for policy review and refinement.

The recent bill passed by Parliament, the National Wages Consultative Council Bill 2011 was condemned for not giving the chance for two major stakeholders, the Malaysian Trade Union Congress (the MTUC) and the Malaysian Employers' Federation (the MEF), to give their views and objections. They claimed that they were not invited and consulted about the Bill. Inasmuch as the passed law doesn't fulfill the interest of employers and employees as a whole, the MTUC and the MEF was reported to demand the Government to make amendments to the law.⁹⁰ This was not the first time the MTUC and the MEF claimed that they were not consulted about proposed laws concerning their speciality and interest. In 2007, they opposed to the Industrial Relations (Amendment) Bill 2007 and the Trade Union (Amendment) Bill 2007. Both Bills had raised an outcry amongst the employers and employees when the provisions were claimed as unconstitutional and didn't bring any benefits to the employees. The MTUC claimed that the Minister gave the impression that the MTUC was consulted when the fact was no consultation been made by the Ministry regarding the amendments.⁹¹

Another instance where a bill was postponed due to objection and resistance from the public especially stakeholders was the Goods and Services Tax Bill 2009. When this Bill was tabled in Parliament for the first reading on December 2009, it had generated much interest and outcry of the public. The Federation of Malaysian Manufacturers was in the view that Malaysia was not ready for goods and services

⁹⁰ See Hansard dated 30.6.2011. Copy available at the Malaysian Parliament website <<http://www.parlimen.gov.my/files/hindex/pdf/DR-30062011.pdf>> accessed 18.8.2011. See also an article by G. Manimaran, 'MTUC, MEF say no to new minimum wage Bill' [The Malaysian Insider 2011] at <<http://www.themalaysianinsider.com/malaysia/article/mtuc-mef-say-no-to-new-minimum-wage-bill/>> accessed 18.8.2011.

⁹¹ See Hansard dated 27 and 28 August 2007. Softcopy version is not available at the Malaysian Parliament website.

tax and the proposed Bill should be deferred.⁹² Later in March 2010, the Government decided to postpone the second and third readings of the Bill so as to enable the Government to collect opinions and views of the public.⁹³

The same was happened to the Road Transport (Amendment) Bill 2010. Not only the public protested loudly when the Bill was introduced for the first reading, but the government backbenchers were also opposing the proposed amendment. Acknowledging the fact that the Bill was a burden to the people and would likely cause unjust to them, the Minister withdrew the Bill for the relevant government agency to refine the policy behind the proposed amendment so as to ensure that the amendment to be 'people-friendly'.⁹⁴ Consultation with the public, public authority and legal experts was suggested in order to learn their views and opinion.⁹⁵

All the above instances show that lack of consultation has rendered bills produced being greatly criticised and made the sail of the bills difficult. All efforts put and time used in drafting the bills also become in vain when the bills have to be withdrawn or postponed. If consultation was taken place before or during the drafting process, the possibility of the proposed bills being deferred due to failure to consider public interests and opinions would be avoided. This was evident in the drafting of the Wildlife Conservation Bill 2010. Although another consultation and meeting with the stakeholder (the World Wildlife Foundation, Malaysia, "the WWF") were held after the first reading of the Bill, but at least views and opinions from the

⁹² See Bernama, 'FMM Says Malaysia Not Ready for GST, Suggest Retail Sales Tax' *Bernama* (Malaysia, 9.3.2010) <<http://kpdnkk.bernama.com/news.php?id=481112&vo=30>> accessed 18.8.2011.

⁹³ See Hansard dated 16.3.2010. Copy available at the Malaysian Parliament website <<http://www.parlimen.gov.my/files/hindex/pdf/DR-16032010.pdf>> accessed 18.8.2011.

⁹⁴ See New Strait Times, 'Road Transport Act amendments put off' *New Strait Times* (Malaysia, 22.4.2010) <http://www.bnbbc.com.my/bi/news.php?act=view&berita_id=131> accessed 19.8.2011.

⁹⁵ See Bernama, 'Kerajaan Tarik Balik Rang Undang-Undang Pengangkutan Jalan (Pindaan) 2010' *Berita Harian* (Malaysia, 21.4.2010) <http://www.bharian.com.my/bharian/articles/KerajaantarikbalikRangUndang-UndangPengangkutanJalan_Pindaan_2010/Article> accessed 19.8.2011.

WWF which was regarded as experts and of high interest could be taken into account before the second and third readings. In this case, a few suggestions from the WWF were accepted by the Ministry and amendment in committee was subsequently made to the Bill during the second reading.⁹⁶ Advantages of doing this were, firstly, it helped smooth and clear the passage of the Bill in Parliament, and secondly, it could avoid subsequent amendment to the Bill later on.

After discussing the importance of consultation and the good and bad things it brings, it is clear to us that consultation is a government's discretion; thus any recommendation or opinion is not necessarily must be accepted by the government. The government is at liberty whether or not to accept it. But, when the government has made a promise to carry out consultation, then only the government must honour its promise, as rightly stated by learned Law LJ in the case of *R (Nadarajah and Abdi) v Secretary of State for the Home Department*⁹⁷:

'Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so.'

To me, consultation is a good practice to be applied in drafting process as it would gather opinions from the public and experts. Good consultation is about 'asking the right people the right questions at the right time'.⁹⁸ Good consultation requires both parties, the government and the parties consulted, to genuinely participate in the consultation process with the view of fine-tuning and polishing the policies so that good quality laws would be produced. The only thing that becomes a

⁹⁶ See Hansard dated 13.7.2010 at 97. Copy available at the Malaysian Parliament website <<http://www.parlimen.gov.my/files/hindex/pdf/DR-13072010.pdf>> accessed 20.8.2011.

⁹⁷ [2005] EWCA Civ 1363 at para 68.

⁹⁸ See Fox and Korris (n1) at 57.

hindrance to good and effective consultation is the negative perception that has been set in minds of both the government and parties consulted. It is a great mistake for the parties consulted to think that whatever opinions and views given must be taken into account by the government. This type of false expectation makes the government felt displeased and chooses not to hold consultation. On the other hand, when the intention of the government carrying out consultation is just to legitimise its proposal while the policy has been finalised and made up or the consultation is just a formality, it can become a total offense to the parties consulted when they think the government is not genuine and does not need their opinions.⁹⁹

Thus, this predicament can only be overcome when the government and the parties consulted are ready to give and take for policy betterment. The outcome of a consultation should drive policy, not to be an afterthought.¹⁰⁰

⁹⁹ See Fox and Korris (n1) at 58-59.

¹⁰⁰ See House of Lords Merits of Statutory Instruments Committee (2007-08), *The Management of Secondary Legislation: follow-up*, HL70, at 7 as quoted in Fox and Korris (n1) at 62.

CHAPTER 5

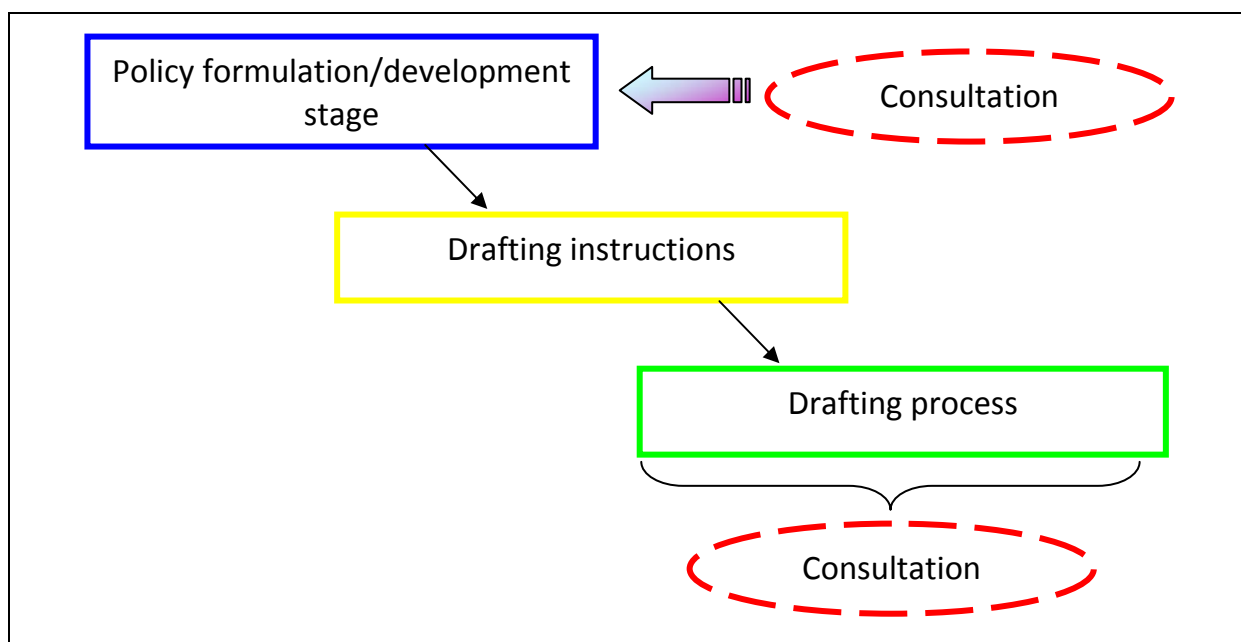
CONSULTATION AND DRAFTING PROCESS: THE RELATIONSHIP

*'If the legislative processes are to work efficiently, the work of professional drafters will have to be supplemented by a cadre of public officials who fully understand their role in the legislative process and play it adequately.'*¹⁰¹

In the previous Chapters, I have explained and discussed about drafting process and its roles in guiding drafters to produce high quality legislation efficiently; and also consultation – the importance, advantages and disadvantages. In this Chapter, the discussion is centred on the relationship between consultation and drafting process as well as the influence of consultation on the efficiency of drafting process.

How consultation relates to drafting process?

Table 2: Relationships between drafting process and consultation



¹⁰¹ See Bilika H Simamba, 'Improving Legislative Drafting Capacity' (2002) 28 Commonwealth Law Bulletin 1125, at 1129-1130.

How does consultation relate to drafting process? In my opinion, consultation relates to or affects drafting process in two ways; firstly through drafting instructions and secondly during drafting process.

Drafting process is a process whereby government policies are converted into enforceable laws. As mentioned earlier, drafting process begins with the receipt of drafting instructions from an instructing officer. Without such instructions, no drafting will take place. Therefore, it can be said that drafting instructions are the important element that relate a drafter and an instructing officer. In Chapter 3, we have already discussed that the relationship between a drafter and an instructing officer is mainly pivoted on drafting instructions. Drafting instructions are one of the main ingredients in law making process. The importance of good drafting instructions cannot be denied as Thornton puts it:

‘Good instructions are a pearl beyond price and not only improve quality of the bill but also reduce drafting time’.¹⁰²

Therefore, good and effective drafting instructions are significant and valuable in drafting process. Drafting instructions are the outcome of policy formulation and development at the very early stage of legislative drafting. As stated earlier, a good and sound policy formulation and development does take into account views, opinions and feedbacks from the public, especially stakeholders and those affected by the legislative proposal. Views, opinions and feedbacks can only be effectively obtained by carrying out consultation.

So, as we can see from Table 2, if at the policy formulation stage consultation is carried out, views, opinions and feedbacks from the public can be gathered and formed as parts of the policy. Consequently, fine-tuned and polished policy that has

¹⁰² See Thornton (n14) at 129.

taken into account the views, opinions and feedbacks will then be transformed into drafting instructions. These drafting instructions are those given to drafters; for the drafters to translate them into legally sound legislation. Therefore, it can be said that through drafting instructions, consultation indirectly relates and affects drafting process. In other words, consultation affects drafting instruction and drafting instructions affects drafting process.

Therefore, we can suggest that ideally consultation is best done during the policy formulation and development stage. By having consultation as early as at the policy formulation and development stage, it would eliminate problems concerning a legislative proposal and thus would give a clearer guidance to drafters as to the objectives and purposes of the policy behind the legislative proposal.¹⁰³ Clear and resolved policy guidance would definitely be useful to drafters as this would make their job goes smoothly with minimal problems and difficulties. Consequently, this would contribute to the efficiency of drafting process.

The importance of having an effective policy making process is thus obvious in ensuring the overall drafting process works smoothly. This is because the policy moulds the shape and substance of the instructions of which drafters heavily relied upon in drafting legislation. Consequently, bad drafting instructions owing to improper or ineffective policy making process influence and affect the drafting process adversely and thus making the drafting process inefficient.

The second scenario whereby consultation relates to drafting process is when consultation is carried out during the drafting process. Obviously, this is a kind of direct relationship. Practically, not all government departments or agencies would

¹⁰³ Fox and Korris opine that ideally, consultation should be done as early as at the policy formulation and development stage. This practise is recommended as it would give drafters a clear picture of the aims and objectives of legislative proposals when receiving drafting instructions. Additionally, the more problems settled early on, the smoother the law's passage should be. See Fox and Korris (n1) at 45.

carry out consultation at the policy formulation and development stage for various reasons as discussed before. Some of them prefer to wait until drafting process begins. Too frequently, such an approach results in the involvement of drafters in consultation process. Although the classical theory has been that drafters should not involve in policy matters,¹⁰⁴ the fact that some involvement which would enhance the understanding on legislative proposal or to address any issues or loopholes in policy intended should not be denied. Collaboration between the instructing officers, drafters and parties consulted during the drafting process would be of useful and fruitful if effectively conducted.

Although there is a view that consultation should not confine at any particular drafting stage,¹⁰⁵ I would prefer to hold that it should be limited to the *understanding, analysis and design* stage only; and shouldn't be done at later stage. The reason being is to me, when a drafter has embarked on composing and developing a bill, it would be too late and difficult for the drafter to make changes taking into consideration the basic structure and conceptual elements of the bill have been established. Consultation at this stage would unnecessarily disturb the smoothness of drafting legislation.

Having said the above, it can be summarised that consultation relates to drafting process in two ways: through drafting instructions and through consultation during the drafting process itself.

¹⁰⁴ Henry Thring views that drafters must not consider policy or substance of law, they must only concentrate on form of the law. See Stefanou (n16) at 321. In this respect, Stefanou suggests that in determining the extent of drafters' involvement in policy matters the size of one jurisdiction, whether small or large, does matter. See Stefanou (n16) at 322.

¹⁰⁵ See Miers and Page (n2) at 42.

Consultation and efficient drafting process

In Chapter 3, I have identified the elements that constitute efficient drafting process which are:

- (a) wasted financial cost is minimised;
- (b) wasted human resources or effort is minimised;
- (c) wasted time is minimised;
- (d) risk of failure is minimised; and
- (e) clear-sailing.

These five elements are used for the purpose of evaluating and assessing the influence and contribution of consultation on efficiency of drafting process. The following are explanation on how consultation influences the efficiency of drafting process.

(a) Wasted financial cost is minimised.

Drafting process costs money in the sense of it involves the use of stationery, utility, materials and equipment. A draft of bill prepared by a drafter can be numerous due to amendments, refinement and finalisation. A lot of material resources are used in the process of coming up with a final version of a draft bill. Not to mention when drafting is done in two languages, like Malaysia. If correction has to be made, it has to be made on both versions. This would definitely contribute to the budget of the Drafting Division.

So, if consultation is not carried out or omitted or bypassed, there is a possibility a proposed bill might have issues that still need to be discussed with stakeholders even though the drafting process has already at the end of the drafting stage or completed. By right, this should not happen if consultation is done in the

first place. Any amendment or change in policies due to second thought of instructing officers after a lot of noises being done by stakeholders or interested parties would result in draft of bill prepared by a drafter subjected to a redesign and reconstruction. This turning back would cause unnecessary or extra financial cost when redrafting has to be done to accommodate the stakeholders. It is even worst if the proposed legislation has been finalised through several vetting and redrafting stages. All costs that have been incurred would be wasted and in vain.

In Malaysia, the normal practice when a bill is withdrawn for policy refinement or for further consultation is the instructing officers or departments prefer to have a brand new bill, rather than using the withdrawn bill, all the more so if a bulk of amendments has to be done. Without doubt, extra costs in preparing new drafts and blue-prints would be incurred.

So, in effect, if consultation is carried out, it would help to minimise the drafting cost because the overall cost of drafting process could be reduced. The above explanation is what is meant by minimum cost.

(b) *Wasted human resources or effort is minimised.*

The shortage of drafters, coupled with more legislation to draft is a common problem, especially where a jurisdiction has a small drafting unit. In some jurisdictions, including Malaysia, drafters are tasked to draft both primary legislation and subsidiary legislation. One drafter may be loaded with loads of workload with deadlines. Therefore, drafters should use their efforts, skills and energy wisely without unnecessary waste. To waste efforts, skills and energy means to waste time in drafting as well.

If consultation is carried out before the actual writing begins, this would help a drafter to have a clear picture of the directions of the legislative proposals, thus making it easier for the drafter to plan his work accordingly so that the drafter could work on the draft efficiently and timely. If a drafter has put all his efforts, skills and energy on one particular bill and the bill subsequently withdrawn or rejected by the legislature due to failure to consult, this would certainly frustrate the drafter. The drafter's efforts in drafting and producing the bill are in vain. The wasted efforts, skills and energy could be more useful if were used in drafting other legislation.

(c) *Wasted time is minimised.*

In legislative drafting, time is of essence and drafting consumes time heavily. Unremarkably, drafting job is done under pressure of time as there is always deadline to be met. Time constraint is a serious enemy of drafters. It is therefore very important for drafters to utilise their time wisely so as to ensure that every given minute in producing draft bills is not wasted. Hence, one way to ensure that drafting is done without any wasted time is by having all issues and problems settled beforehand. Accordingly, it would be easier for drafters to carry out their job timely.

As explained earlier, consultation relates to drafting instructions and it is worthwhile to reaffirm what Thornton says, 'good drafting instructions can reduce drafting time'.¹⁰⁶ Like has been argued before, if consultation is done at an earlier stage, a drafter could concentrate on drafting so that the drafter could finalise the bill on time and meet any deadline set. If the process of writing and composing a bill is interrupted due to problems and disputes concerning any stakeholder or interested party, this would disrupt the drafting process and consequently more time needed for entertaining the stakeholder or interested party's concerns. There is also a possibility that the drafter couldn't finalise the bill on time. Should consultation be

¹⁰⁶ See Thornton (n14) at 129.

done earlier, time to draft can be fully utilised to do the job done timely, satisfactorily and efficiently.

It is worth to mention that in Malaysia, it is the Attorney General's Chambers and Drafting Division's mission to complete the drafting of principal legislation within 40 working days after all legal and policy issues are resolved. Too often, when the countdown on days starts to begin, drafting job is interrupted by changes in policies due to various reasons which one of them is accommodating the stakeholders or interested parties. At the late stage of drafting, changing directions in policy are unpleasant and unwelcome.

(d) *Risk of failure is minimised.*

Drafters' tasks are not simple and easy. Too often, a legislative proposal involves highly technical matters; or affects the interest of a sector of society. Drafters do not draft for nothing. They are responsible to transform policies into effective and enforceable laws. They have to make sure that every draft they produce is not at any risk of being defective or deferred by the legislature. If their drafts are being at risk of being deferred or rejected by the legislature, then again, all of their efforts, time and cost would be in vain. One way to avoid it is through consultation.

Consultation is very significant in determining the risk of failure in drafting process. As Miers and Page put it:

'A failure to consult may make the passage of the legislation more difficult; more importantly, it may prejudice its successful implementation and thereby the attainment of the government's

objectives. The brute fact is that these groups possess the capacity to 'limit, deflect and even frustrate government initiatives.'¹⁰⁷

(e) *Clear-sail.*

Consultation before or at an early stage of drafting process would contribute to and make smooth and clear-sail of drafting process. This is because all issues and problems with regard to the legislative proposal which affect the interest of the public or any particular group or party have been trashed out and eradicated. This is undoubtedly would make drafters' job easier when no interruptions, obstacles or problems crop-up during the drafting process. The clearer the policy is at the beginning, the smoother the drafting process shall be.

To sum up, it can be said that consultation does influence the policy behind a legislative proposal. By having all issues sorted out from stakeholders or interested parties and gaining their mutual understanding and agreement before the actual drafting starts, it would manifestly influence and contribute to the efficiency of drafting process.

¹⁰⁷ Miers and Page (n2) at 41.

CHAPTER 6

ANALYSING QUESTIONNAIRE AND FINDINGS

The study is on the contribution of consultation to the efficiency of drafting process in Malaysia. A total of 34 questions¹⁰⁸ (although the total number of questions was 35, actually there was no question number 15 because of numbering error) was posed to the respondents. The respondents were drafters currently working in the Drafting Division of the Attorney General Chambers' of Malaysia.¹⁰⁹ Out of the 36 strong drafters, only 24 responded to the questionnaire. Hence, this study represents the views of two-thirds or 67% of Malaysian drafters. In term of experience, they range widely from just a year to 22 long years with the average of 5.5 years.

The questions were divided into three parts i.e. (A) particulars of drafters, (B) consultation practices in Malaysia, and (C) efficiency criteria in the drafting process. As for the answers for parts (B) and (C), the respondents were provided with two types of answers one in the form of Likert scale with 5 point options to choose of strongly disagree, disagree, neither disagree nor agree, agree and strongly agree. The other type is a yes or no answer. For the tabulation purposes of the results shown in Appendix 1, the answers for the Likert scale are represented by numbers 1 to 5 for strongly disagree to strongly agree respectively. As for the yes or no answers, they are represented by Y or N respectively. Respondents are identified as R1 to R24 even though there are some who are willing to have their names made known.

Some of the questions are not answered and left blank by the respondents. It is not known if the respondents do it intentionally or otherwise. But, there are respondents who forget to tick the Y box because they answer the following related question which means the previous answer has to be a Y.

¹⁰⁸ See Appendix 1.

¹⁰⁹ See Appendix 2.

The aim of the study is to prove whether consultation could contribute to the efficiency of the drafting process. To prove this hypothesis, drafters are asked whether consultation affects the efficiency criteria of the drafting process. Drafters are the right persons to ask since they are directly involved in the drafting process. They have wide experiences and certainly in the know about the influence of consultation on any previous legislation which they have drafted before. Answers from drafters would indicate positive or negative impacts of consultation on the efficiency criteria. If the total effects are positive, then it can be said consultation does contribute to the efficiency of drafting process.

As mentioned in the earlier chapter, there is no definite efficiency criteria in the drafting process per se. Efficiency criteria used in this study are adopted from the public management and policy formulation studies. Five efficiency criteria have been ascertained namely risk of failure, minimum cost, minimum human resources, time and clear sailing. To determine if consultation facilitates an efficient drafting process, we have to calculate the scores for each criterion from the results of the survey. The point of neither disagree nor agree becomes the cut-off point. Anything above it i.e. agree or strongly agree will be considered as concurring with the suggestion.

The results are classed into three groups as no, neutral and yes. The no group consists of strongly disagree and disagree points which are represented as points one and two. The neutral group consists of neither agree nor disagree point and is represented as point three. The yes group consists of agree and strongly agree points which are represented as points four and five. All the results are shown in Appendix 3.

For a given efficiency criterion, if the percentage of the yes group is more than the no group, it means consultation affects positively to the efficient drafting

process. On the other hand, consultation fails to contribute to the efficient drafting process if the percentage of the yes group is less than the no group.

The logic behind this rationale is because the neutral group is not considered siding with any group. They also cannot be treated as giving do not know answers since the respondents are drafters who work and deal with the subject matter. So, based on this premise, if those who agree are more than those disagree, it means consultation contributes positively to the efficient drafting process.

The Current Practice of Consultation

In this study, consultation is defined as consultation with affected or interested parties or stakeholders. However, the scope of stakeholders is confined to parties who are affected or have interest in the proposed legislation. On consultation in general, the result shows that 95.8% of the Malaysian drafters say it is important in the drafting process. In fact, 14 drafters say they strongly agree with the matter. This shows almost all drafters believe consultation is important in the drafting process except one who could not make up his/her mind (neither agree nor disagree). Although the drafters think very highly of the role of consultation, only 62.5% of them say the existing framework provides the sponsor to consult the stakeholders. Worse still, only 47.8% of drafters think the current approach on consultation in the drafting process is suitable.

On the timing of the consultation, 83.3% of drafters believe it should take place at the start or at the beginning of the policy formulation stage. This stand is supported based from their experience where 82.4% say consultation takes place at the start of the policy formulation stage. Although consultation should not be restricted at the start of the policy formulation stage only, 92.3%, 85.7% and 92.3%

say from experience consultation does happen at the middle, end and from the beginning to the end stages respectively. This clearly shows consultation is lacking at the initial stage of policy formulation. One possible reason could be issues are not trashed out properly that have to be addressed at later stages.

All the drafters also agree wholeheartedly (100%) that policy makers or the sponsor of the bill is best to lead the consultation. However, only 69.2% of respondents agree when asked, if drafters instead should lead the consultation. It is obvious the policy makers should lead the consultation since they will be the one who will be responsible in implementing and managing the bill. The drafters are merely facilitators to get the policy translated into laws. But, when asked if drafters should be present during the consultation, about 83.3% would agree with the move. Probably, they think it is better for them to be involved so that they could understand the proposal better. Nevertheless, only 50% of the drafters believe stakeholders are always consulted. This assumption is supported when 61.9% of them have experienced cases where stakeholders are not consulted at all.

It is interesting to note that 71.4% and 81.0% of drafters experience cases where not all the stakeholders were consulted and stakeholders were consulted partially respectively. This clearly shows consultation is not carried out in toto. Despite all that, 66.7% of drafters think stakeholders are sufficiently consulted. This shows policy makers and drafters try their best to have and provide consultation even though with the flawed approach.

The results of the survey on consultation practices in Malaysia are summarised in Table 3.

Table 3: Results of the survey on consultation practices in Malaysia

NO.	QUESTIONS	% OF AGREE / STRONGLY AGREE
1	Do you think consultation is important in the drafting process?	95.8
2	Do you think the current framework provide for the sponsor to make consultation during the drafting process?	62.5
3	Do you think the current approach on consultation in the drafting process is appropriate/suitable?	47.8
4	In your opinion, at which stage(s) of drafting process should consultation take place? Please indicate. Start / formulation stage Middle / understanding proposal End / composition Beginning to end / all of the above	83.3 78.6 69.2 68.8
5	Who is best to lead the consultation in the drafting process? Policy makers/sponsors Drafters	100.0 69.2
6	Would it be right/fitting for drafters to be involved in the consultation?	83.3
7	Do you think that stakeholders are always consulted in the drafting process?	50.0
8	From your experience, at which stage(s) are stakeholders normally consulted? Please state, if applicable. Start / formulation stage Middle / understanding proposal End / composition Beginning to end / all of the above	82.4 92.3 85.7 92.3
9	Have you experienced any case (bill, regulation, etc.) where stakeholders were not consulted at all in the drafting process?	61.9
10	Have you experienced any case (bill, regulation, etc.) where not all the stakeholders were consulted ?	71.4

NO.	QUESTIONS	% OF AGREE / STRONGLY AGREE
11	Have you experienced any case (bill, regulation, etc.) where <u>stakeholders were consulted partially</u> ?	81.0
12	In your opinion about the current drafting process, do you think stakeholders are sufficiently consulted in drafting of legislation?	66.7

Efficiency Criteria of Drafting Process

Table 4 shows the result on the influence of consultation on efficiency criteria of drafting process. The percentages for yes are greater than for no on all the efficiency criteria. 87.5%, 58.3%, 41.7%, 66.7% and 50.0% of drafters agree consultation contributes to efficient drafting process as compared to 4.2%, 16.7%, 33.3%, 16.7% and 8.3% of drafters who disagree for efficiency criteria of risk of failure, minimum cost, minimum human resources, time and clear sailing respectively. This simply means consultation influences positively to the efficiency criteria of drafting process and thus contributes to the efficient drafting process.

It is interesting to note that no neutral percentage is greater than the yes percentage for each efficiency criteria. Three efficiency criteria have significantly high neutral percentages of 25%, 25% and 41.7% for minimum cost, minimum human resources and clear sailing respectively. This implies quite a number of drafters think consultation would not give any positive or negative impacts to the efficiency of drafting process. No obvious reason could be found on those who give the neutral stand. According to Garland, a study done by Worcester and Burns suggested that 'respondents tend to give a more positive reply to questions in order to be helpful or to please the interviewer or to guess what might be the socially acceptable

answer'.¹¹⁰ Another possibility also is the drafters might be aware on the importance of consultation, but they might not fully understand the concept of consultation with respect to efficient drafting process. This might lead to answers given without serious thoughts. It is because, for all this while consultation with stakeholders is handled by policy makers. This is reflected in Question 5 where drafters 100% believe that policy makers are best to lead the consultation.

Anyway, the results could be different if options for answers are on 4 points only where no neutral stand available. According to Garland, if 4-point Likert scale is used instead of five points and where neutral stand is not available, respondents tend to agree or vote positively.¹¹¹

Table 5 and Chart 1 show the contribution of consultation to the efficient drafting process adjusted to 100%. Rank wise from highest to lowest, the contribution of consultation for efficiency criteria of drafting process is 29%, 22%, 19%, 16% and 14% for Risk of Failure, Minimum Cost, Minimum Human Resources, Time and Clear Sailing respectively. The results make sense since drafters are more concern if the bill is rejected rather than using minimum cost or human resources to prepare it.

When asked about the best practice i.e. using the best method of working to achieve the business objectives, 83.3% of drafters say consultation in the drafting process make the legislation progresses smoothly while 70.8% say consultation in the drafting process make the legislation less problematic. However, on overall, 73.9% of Malaysian drafters believe consultation contributes to the efficient drafting process

¹¹⁰ See Ron Garland, 'The Mid-Point on a Rating Scale: Is it Desirable?' (Marketing Bulletin, 1991, 2, 66-70, Research Note 3). Copy available online <http://marketing-bulletin.massey.ac.nz/v2/mb_v2_n3_garland.pdf> accessed 25.8.2011.

¹¹¹ Ibid.

with 26.1% stay neutral while none says no. Thus, this proves the hypothesis of this dissertation that consultation contributes to the efficiency of drafting process.

Table 4: Influence of consultation on efficiency criteria of drafting process

NO.	EFFICIENCY CRITERIA	PERCENTAGE OF NO	PERCENTAGE OF NEUTRAL	PERCENTAGE OF YES	CONSULTATION CONTRIBUTES POSITIVELY (✓) / NEGATIVELY(✗)
1	Risk of Failure	4.2	8.3	87.5	✓
2	Minimum Cost	16.7	25.0	58.3	✓
3	Minimum Human Resources	33.3	25.0	41.7	✓
4	Time	16.7	16.7	66.7	✓
5	Clear Sailing	8.3	41.7	50.0	✓
6	Overall (Q34)	0.0	26.1	73.9	✓

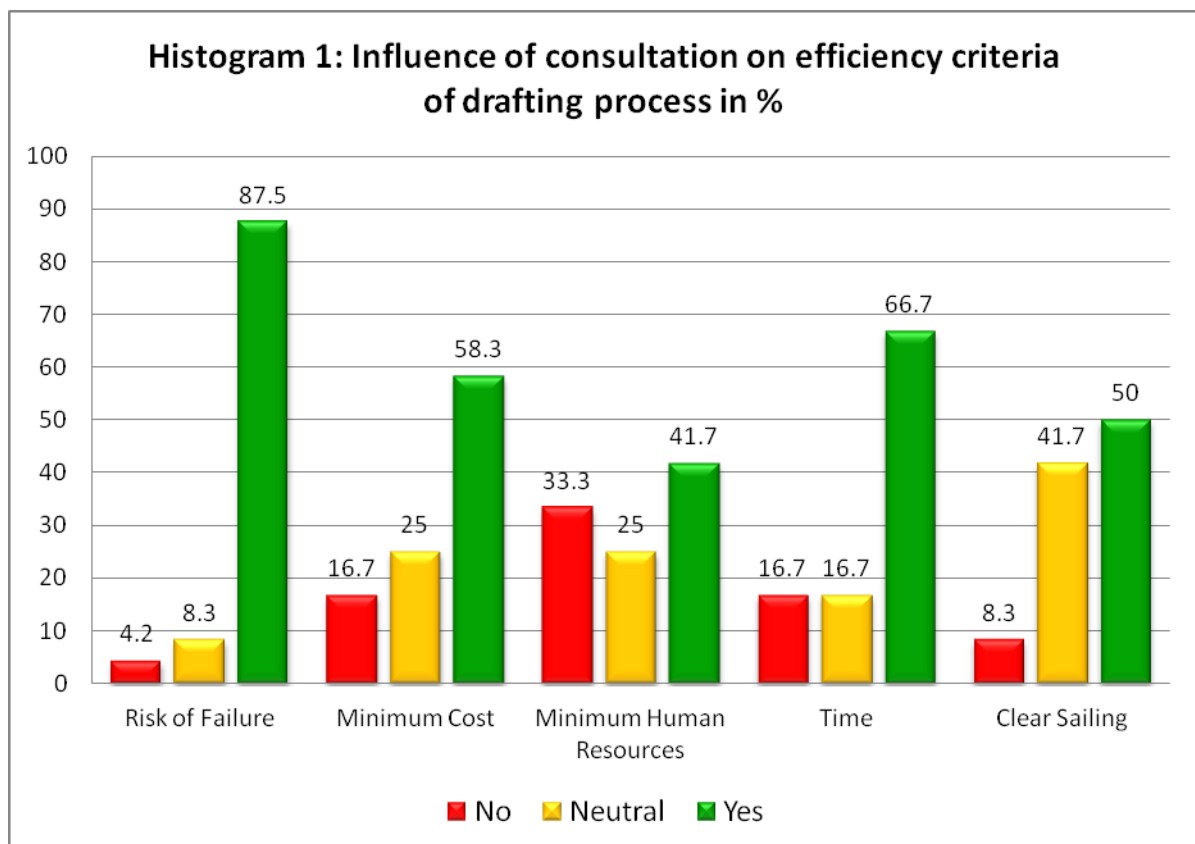
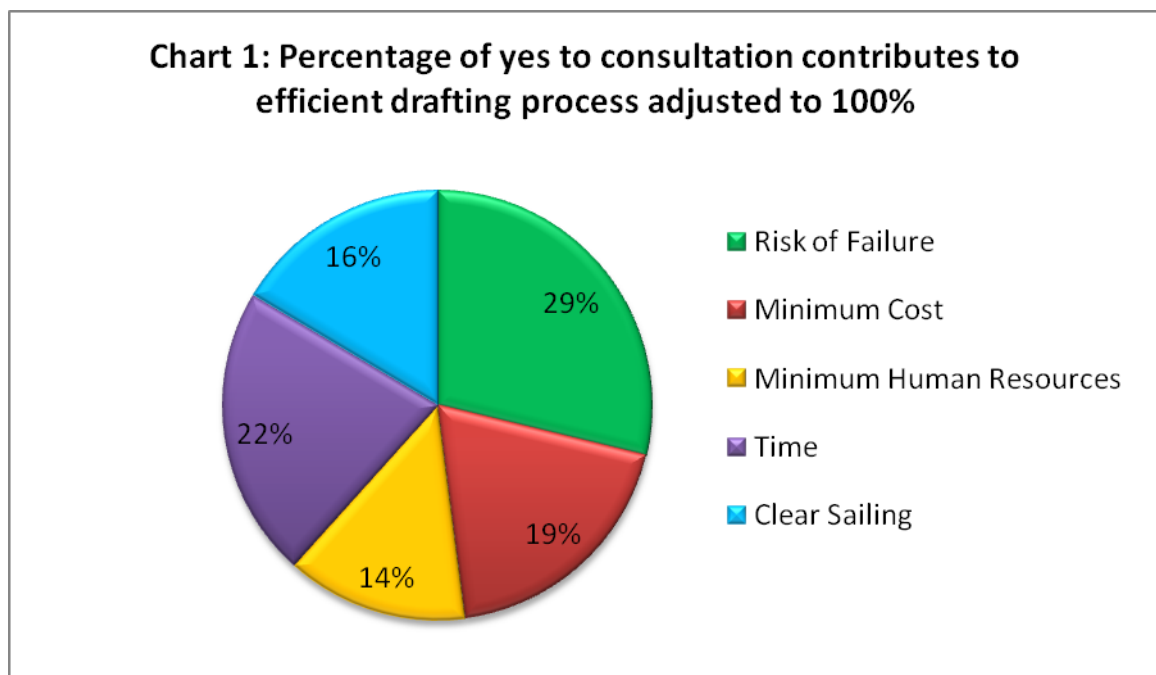


Table 5: Percentage of yes to consultation contributes to efficient drafting process adjusted to 100%

NO.	EFFICIENCY CRITERIA	PERCENTAGE OF YES	ADJUSTED TO 100%
1	Risk of Failure	87.5	29
2	Minimum Cost	58.3	22
3	Minimum Human Resources	41.7	19
4	Time	66.7	16
5	Clear Sailing	50.0	14



CHAPTER 7

CONCLUSION

*'In an ideal world the system would no doubt work smoothly; Ministers would reach policy decisions on the content of a Bill at an early stage; the department would send clear and precise instructions to the draftsman in good time; a polished Bill would be prepared for presentation to Parliament on the due date; and it would pass into law with little amendment. In practice, of course, things do not work out like that. Policy decisions are delayed, instructions are delivered late, the draftsman has to prepare the Bill in a hurry and large numbers of amendments are subsequently made.'*¹¹²

Legislative drafting is a serious business. Making law that is effective, enforceable and of high quality is not as simple as one would perceive. Legislation could only be 'as clear as the policy that shapes it.'¹¹³ In this regard, emphasis must be given to policy formulation and development. Thus, the policy makers are responsible to formulate, develop and produce good policy. On the other hand, drafters should not waste their time working on unworkable or unacceptable policy. For this reason, the policy makers must bear in mind that drafters have a reasonable expectation that their policy is well-formed and well-developed by taking into account all necessary matters, including views and opinions from the people, especially the stakeholders or interested parties.¹¹⁴

Efficient drafting process is important in producing quality legislation. Many factors could influence or contribute the efficiency of drafting process; and one of them is consultation. Consultation, for whatever form or means it could be, should be an integral part of policy formulation and development stage for its significant value in overall drafting and legislative process. Although there are mixed views on

¹¹² Robert Andrew, *Review of Government Legal Services* (1989) para 7.7.

¹¹³ See Fox and Korris (n1) at 86.

¹¹⁴ See Thornton (n14) at 125.

the value of consultation, but in this new era where people are much aware and enlightened of their rights, consultation cannot be seen as of little significance or value. In a democratic system where a government is elected and chosen by the people, the involvement of the people whether directly or through their representatives in policy making process is a demand. Moreover, when a legislative proposal in any way touches the people's rights, this demand becomes stronger. It is however acknowledged that in some instances, consultation would not be appropriate to be conducted. For example, there should be a limitation in legislative proposals relating to budget or minor amendments to existing legislation.¹¹⁵

From this dissertation, it has been proved that in Malaysia, consultation does influence and contribute to the efficiency of drafting process. Although only recently the issue on consultation in drafting process got its attention and not much discussion has been made yet, but at least, the drafters know and appreciate the value and significant of consultation in drafting process.

To become a contributory factor to the efficiency of drafting process, consultation must be a good consultation. Good consultation is when the right questions are asked to the right people at the right time'.¹¹⁶ In other words, an 'effective consultation is a key part of the policy making process.'¹¹⁷ At present, there are no standard codes or guidelines on external consultation exist in Malaysia as consultation is regarded as at the discretion of the Ministry. It is therefore suggested that a set of codes or guidelines, or at least an outline, on consultation practice that is applicable to all government's external consultation is prepared for a uniform and better conduct of consultation. In this regard, the United Kingdom's Code of practice

¹¹⁵ See Australian Legislation Handbook, at para 1.10. Copy available online http://www.dpmc.gov.au/guidelines/docs/legislation_handbook.pdf accessed 25.8.2011.

¹¹⁶ See Fox and Korris (n1) at 57.

¹¹⁷ See Zander (79) 10.

on consultation could be served as a guide.¹¹⁸ The Code outlines the seven consultation criteria on how consultation exercises are best run.¹¹⁹

In the light of the above, it is important for all parties to change attitudes towards the value and true purpose of consultation. Consultation is not a device to be used as a tactical weapon; to get hold of vested interest. For the government, it is a tool to develop and fine-tune its policy by gaining and collecting views and expertise from the public. For the public, it is a means to voice their concerns and anxieties on government's policy that might affect their interest. And last but not least, for drafters, it is one of the valuable and expedient factors that contributes to the efficiency of drafting process.

Finally, from the survey conducted on Malaysian drafters, it is proven that in Malaysia consultation does contribute to the efficiency of drafting process.

¹¹⁸ See HM Government (2008), *Code of Practice on Consultation*. Copy available online <<http://www.bis.gov.uk/files/file47158.pdf>> accessed 28.11.2011.

¹¹⁹ See Appendix 4.

QUESTIONNAIRES ON “CONSULTATION: A CONTRIBUTION TO EFFICIENCY OF DRAFTING PROCESS IN MALAYSIA”

Kindly fill up the following details/questions.

A. PARTICULARS

Name: _____.

Age: _____.

Gender: Male () Female ()

Number of years in the drafting service: _____.

Do you permit your name to be made known as a respondent of this survey? Yes () No ()

B CONSULTATION

Consultation means consultation with affected/interested parties (“stakeholders”)

		Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
1	Do you think consultation is important in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2	Do you think the current framework provide for the sponsor to make consultation during the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3	Do you think the current approach on consultation in the drafting process is appropriate/suitable?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
4 In your opinion, at which stage(s) of drafting process should consultation take place? Please indicate.					
Start / formulation stage	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Middle / understanding proposal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
End / composition	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Beginning to end / all of the above	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5 Who is best to lead the consultation in the drafting process?					
Policy makers/sponsors	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Drafters	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO			
6 Would it be right/fitting for drafters to be involved in the consultation?	<input type="checkbox"/>	<input type="checkbox"/>			
7 Do you think that stakeholders are always consulted in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>			

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
8 From your experience, at which stage(s) are stakeholders normally consulted? Please state, if applicable.					
Start / formulation stage	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Middle / understanding proposal	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
End / composition	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Beginning to end / all of the above	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO			
9 Have you experienced any case (bill, regulation, etc.) where <u>stakeholders were not consulted at all</u> in the drafting process? Please state the number, if applicable.	<input type="checkbox"/>	<input type="checkbox"/>			
	1 <input type="checkbox"/>	2 to 4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 to 8 <input type="checkbox"/>	9 and more <input type="checkbox"/>
	YES	NO			
10 Have you experienced any case (bill, regulation, etc.) where <u>not all the stakeholders were consulted?</u> Please state the number, if applicable.	<input type="checkbox"/>	<input type="checkbox"/>			
	1 <input type="checkbox"/>	2 to 4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 to 8 <input type="checkbox"/>	9 and more <input type="checkbox"/>
	YES	NO			
11 Have you experienced any case (bill, regulation, etc.) where <u>stakeholders were consulted partially?</u> Please state the number, if applicable.	<input type="checkbox"/>	<input type="checkbox"/>			
	1 <input type="checkbox"/>	2 to 4 <input type="checkbox"/>	5 <input type="checkbox"/>	6 to 8 <input type="checkbox"/>	9 and more <input type="checkbox"/>

- | | Strongly disagree | Disagree | Neither agree nor disagree | Agree | Strongly agree |
|---|--------------------------|--------------------------|----------------------------|--------------------------|--------------------------|
| 12 In your opinion about the current drafting process, do you think stakeholders are sufficiently consulted in drafting of legislation? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

C EFFICIENCY CRITERIA

Risk of failure - legislation drafted at risk of being defective or deferred by the legislature.

- | | Strongly disagree | Disagree | Neither agree nor disagree | Agree | Strongly agree |
|--|--------------------------|--------------------------|----------------------------|--------------------------|--------------------------|
| 13 Do you think consultation in the drafting process would minimise the risk of failure? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

- | | YES | NO |
|--|----------------------------|-------------------------------------|
| 14 Have you ever had your bill being deferred because of risk of failure?
Please state the number if applicable . | <input type="checkbox"/> | <input type="checkbox"/> |
| | 1 <input type="checkbox"/> | 2 to 4 <input type="checkbox"/> |
| | 5 <input type="checkbox"/> | 6 to 8 <input type="checkbox"/> |
| | | 9 and more <input type="checkbox"/> |

- | | Strongly disagree | Disagree | Neither agree nor disagree | Agree | Strongly agree |
|--|--------------------------|--------------------------|----------------------------|--------------------------|--------------------------|
| 16 Do you think minimising risk of failure can be an efficiency criterion in the drafting process? | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> |

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
16 Do you think minimising risk of failure can be an efficiency criterion in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Minimum cost

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
17 Do you think consultation would minimise financial cost in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
18 Do you think consultation could reduce wasted financial cost in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
19 Do you think minimum financial cost can be an efficiency criterion in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
20 In your opinion, how would consultation with stakeholders minimise financial cost and contribute to an efficient drafting process?	_____.				
	_____.				
	_____.				

Minimum human resources

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
21 Do you think consultation would minimise human resources in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
22 Do you think consultation could reduce wasted effort/human resources in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
23 Do you think minimum effort/human resources can be an efficiency criterion in the drafting process?	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

24 In your opinion, how would consultation minimise effort/human resources and consequently contribute to an efficient drafting process?

Time

25 Do you think consultation would save time in the drafting process?

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

26 Do you think consultation could reduce wasted time in the drafting process?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

27 Do you think saving time can be an efficiency criterion in the drafting process?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

28 In your opinion, how would consultation with stakeholders save drafting process time and consequently contribute to an efficient drafting process?

Clear sailing

29 Do you think consultation would “clear-sail” the drafting process?

	Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

30 Do you think clear sailing can be an efficiency criterion in the drafting process?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

31 In your opinion, how would consultation with stakeholders “clear-sail” the drafting process and consequently contribute to efficiency?

Best practice – finding and using the best ways of working to achieve your business objectives.

32 From your experience, does consultation in the drafting process make your legislation progresses / works smoothly?

Strongly disagree	Disagree	Neither agree nor disagree	Agree	Strongly agree
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

33 From your experience, does consultation in the drafting process make your legislation less problematic?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

34 Do you think consultation contributes to the efficiency of the drafting process?

<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
--------------------------	--------------------------	--------------------------	--------------------------	--------------------------

35 Are there any more criteria for efficiency in the drafting process apart from those listed above?
Please state your reason, if applicable.

Thank you

LIST OF RESPONDENTS

Legislative Drafters, Drafting Division, Attorney General's Chambers		
1.	R 1	Legislative Drafter
2.	R 2	Legislative Drafter
3.	R 3	Legislative Drafter
4.	R 4	Legislative Drafter
5.	R 5	Legislative Drafter
6.	R 6	Legislative Drafter
7.	R 7	Legislative Drafter
8.	R 8	Legislative Drafter
9.	R 9	Legislative Drafter
10.	R 10	Legislative Drafter
11.	R 11	Legislative Drafter
12.	R 12	Legislative Drafter
13.	R 13	Legislative Drafter
14.	R 14	Legislative Drafter
15.	R 15	Legislative Drafter
16.	R 16	Legislative Drafter
17.	R 17	Legislative Drafter
18.	R 18	Legislative Drafter
19.	R 19	Legislative Drafter
20.	R 20	Legislative Drafter
21.	R 21	Legislative Drafter
22.	R 22	Legislative Drafter
23.	R 23	Legislative Drafter
24.	R 24	Legislative Drafter

RESULTS OF QUESTIONNAIRE

(SEE THE SEPARATE FILE ATTACHED)

THE SEVEN CONSULTATION CRITERIA (EXTRACTED FROM THE UK CODE OF PRACTICE ON CONSULTATION 2008)

THE SEVEN CONSULTATION CRITERIA

Criterion 1 When to consult

Formal consultation should take place at a stage when there is scope to influence the policy outcome.

Criterion 2 Duration of consultation exercises

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.

Criterion 3 Clarity of scope and impact

Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

Criterion 4 Accessibility of consultation exercises

Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.

Criterion 5 The burden of consultation

Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.

Criterion 6 Responsiveness of consultation exercises

Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.

Criterion 7 Capacity to consult

Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

These criteria should be reproduced in consultation documents.

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