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Pre-legislative scrutiny as a way of ensuring the quality  
of legislation

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**PRE-LEGISLATIVE SCRUTINY AS A WAY OF  
ENSURING THE QUALITY OF LEGISLATION**

**CANDIDATE N° F1053-IALS**

**LLM in Advanced Legislative Studies**

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*To my lovely children Alain Norbert, Antonio Blaise, Samantha Gihozo and Stephen Yannick  
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## CHAPTER ONE: INTRODUCTION

### 1.1 Overview

In many countries, policy-making is a fundamental function of the government whose objectives in most cases include taking some measures to orient citizen's behaviors, making changes in the society or achieving some objectives in different domains. In other words, the most effective way of achieving government's desired purpose is to transform political vision into policies depending on political priority of issues. Therefore, the government defines outcomes that the policy is designed to achieve; which outcomes will be the enhancement of the legal system, to the benefit of the country as a whole as well as to the citizens to whom the legislation is addressed. Government policy depends on the legislation enacted as the policy will not be well executed if the legislation is not properly and effectively drafted.<sup>1</sup>

Legislation is very important for governments that seek to achieve their purposes; it is an instrument of social guidance and control used to attain cultural, economic, political and social policies. Thus, every country has to legislate in order to accomplish certain political objectives and particular public policies.<sup>2</sup> Indeed, where legislation is required, it is necessary to print out a draft bill in conformity with the policy in order to give effect to policy aims, especially to improve things for citizens in ways that are defined by the political priorities that the government has to pursue. It may be to fulfill a promise or, perhaps, to provide a response to events. The policy makers often find themselves needing a bill to cover their political vision. From their perspectives, the bill will constitute a number of discrete

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<sup>1</sup> Stephen Laws, 'Giving Effect to policy in legislation: How to avoid missing the point' (2011) 32 (1) Statute Law Review 1

<sup>2</sup> VCRACC Crabbe, 'The ethics of legislative drafting' (2010) 36 (1) Commonwealth Law Bulletin 11



fragments from a bigger picture. It is the function of the legislative drafter to be aware of this and, if necessary, to arrange those fragments in a way that can best be presented as contributing to the bigger picture.<sup>3</sup>

Certainly, the success of a legislative drafter is measured largely by his or her ability to know how to translate the policy purpose into a law which can be implemented effectively through persuasive communication. He or she has to translate the policy makers' thought into law in an intelligible, clear and precise manner in order to make legal thinking visible, and avoid situations where enacted legislation will open to a series of conflicts of interpretation. In order to express the policy maker's intention in a language free from ambiguity, a legislative drafter has to make legislation as clear, simple, concise and comprehensible as possible.

It is through the legislative drafter's awareness and understanding of what the policy maker wants to achieve that he or she can make an effective draft related to a given issue. In order to fulfill his or her mission, a legislative drafter needs to be clear about what the policy maker is seeking to achieve for citizens. Nevertheless, the task may become more difficult because if the legislative drafter does not understand the intention of the policy maker, hence, he or she may not achieve the expected results and can lose his or her confidence and the policy maker's trust because of the lack of quality in legislative drafting.

The understanding of the policy maker's intention may help the legislative drafter to keep obtuseness in legislation to a minimum. Thus, it is essential for a legislative drafter to have a clear understanding of how translating policies into legislation may produce obtuseness, and how to produce a law which can be implemented effectively. As expressed by Peter Ziegler,

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<sup>3</sup> Laws (n 1)

legislation is regarded as effective if it appears capable of satisfying the legislative policy, and it becomes ineffective if it does not achieve the purpose of policy.<sup>4</sup> Once the instruction has been received, a particular legislative drafter must give effect to the policy in the draft. The legislative drafter's role is to examine the legislative proposal in order to ensure that it is appropriate and practicable. As drafting requires being careful, the analysis process of the relevant policies is considerable before drafting stage in order to translate them into workable legislative measures presented in a way that allows them to be effective as possible.<sup>5</sup>

All the time, the need of each country is to have better laws. However, some authors emphasize that better laws must be characterized by clarity, simplicity, brevity, etc. but legal certainty should be paramount. This depends on the quality of legislation and would be achieved by a legislative drafter who has to prepare carefully the draft bill for ensuring the effectiveness of legislation. Thus, good quality legislation promotes legal certainty and lead to better implementation. To achieve this, it is necessary to think first to the drafting effectiveness which may depend on the pre-legislative scrutiny.

Internationally, pre-legislative scrutiny is an established process where citizens are encouraged to give their comments on proposed legislation. Thus, in many countries it becomes a central aspect in the legislative process because it allows an opportunity to the public to provide a real input to the proposed legislation.<sup>6</sup> The process of pre-legislative scrutiny is far more open to analysis of legislative proposal and debate, and, as a consequence, makes for a far better law.

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<sup>4</sup> Peter Ziegler, 'Information collection techniques for the Evaluation of the legislative process' (1988) *Statute Law Review* 160

<sup>5</sup> Roger Rose, 'Basic requirements of good legislative drafting' (2010) 14 (3) *Jersey and Guernsey Law Review* 303

<sup>6</sup> Zione Ntaba, *Pre-legislative scrutiny*, in Constantin Stefanou and Helen Xanthaki, *Drafting legislation: A modern approach* (Ashgate 2008) 119

From what we have mentioned above, the process of pre-legislative scrutiny is considered as an important practice in many countries, but its nature varies to some extent according to different countries. In the United Kingdom and other commonwealth countries, the legislative process begins with consultation, moving on to the drafting of legislative proposals, followed by the parliamentary process and finally to the post-enactment efficacy of legislation.<sup>7</sup> At the beginning of every Parliamentary session, the Government has to publish a list of bills subject to pre-legislative scrutiny. Draft bills are published as “Command Papers” and submitted for scrutiny by the concerned departmental select committees, other committees of either House of Parliament, ad-hoc select committees of either House of Parliament or the joint committees of both Houses. At the time of bill consideration, the concerned Committee calls upon external experts to give written and oral evidence to support their views. The consultation of outside interests is encouraged and facilitated during the pre-legislative scrutiny.<sup>8</sup>

In the Netherlands, the pre-legislative scrutiny is known as the *ex ante* evaluation promoted in order to avoid the lack of transparency. It allows the concerned government the opportunity to collect from different experts views concerning future effects of new pieces of legislation. For an effective influence on the legislative process, *ex ante* evaluation must be conducted at an early stage of the policy process before consideration of one of different alternatives. The importance of carrying out *ex ante* evaluation early in the policy process is certainly not unique to the Netherlands, it is also considered in the European Union where the

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<sup>7</sup> Michel Rush, ‘Making better law: A review of the Hansard Society Commission on the legislative process’ (1993) 14 (2) Statute Law Review 75

<sup>8</sup> Ibid

development of the legislative or policy proposal reaches an advanced stage.<sup>9</sup> Whereas, in India, the process of pre-legislative scrutiny is considered as a transparency in law making; it is a process whereby draft legislation is considered by a select committee or group of Members of Parliament before a bill is formally introduced in Parliament.<sup>10</sup>

Unlike in Commonwealth countries, in France it is a responsibility of the “Conseil d’Etat” to give advice to the government on all administrative matters, especially in drafting bills and regulations. Once a bill is introduced to the “Conseil d’Etat”, it is assigned to one of the four sections depending on the ministerial initiator. The President of the section chooses one of section’s members as a “rapporteur” who must analyze the file concerning the bill, and the scrutiny period should be no less than four weeks. Before scrutiny, the “rapporteur” checks if the file includes all obligatory documents such as those establishing the compulsory requirements for preliminary consultation. If the consultation has not been done, the examination of a bill is adjourned until the “Conseil d’Etat” receives the result of the required consultation.<sup>11</sup>

It follows that, best practice to achieve greater legislative effectiveness is to allow the importance of pre-legislative scrutiny at the pre-drafting stage as it represents an important step towards a more effective drafting process given that it helps to analyze the legislative proposal through public consultation at an early stage. As a vital process, pre-legislative scrutiny starts where the need for a new legislation is expressed, and can play an important role in improving the quality of the bill and enhance the legislative drafter’s performance. In

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<sup>9</sup> Rob Van Gestel and Marie-Claire Menting, ‘Ex Ante Evaluation and alternatives to Legislation: Going Dutch’ (2011) 32 (3) Statute Law Review 209

<sup>10</sup> Mandakini Devasher Surie, ‘Transparency in Law Making: Pre-Legislative Scrutiny’, <info@accountabilityindia.org> accessed 13 July 2012

<sup>11</sup> Jean Massot, ‘Legislative drafting in France: The role of the Conseil d’Etat’ (2001) 22 (2) Statute Law Review 96

fact, the purpose of pre-legislative scrutiny is to make better laws by improving the quality of legislation and drawing the wider public more effectively into the pre-drafting stage. Hence, it is necessary to provide an opportunity for more debate and analysis of legislative proposal, and build a link between citizens and the policy maker before drafting a bill.

As it will be expressed below, pre-legislative scrutiny is one of the key advantages because of its facilitation of greater public participation and consultation; it provides a legitimate opportunity for stakeholder views and perspectives and enables citizens to influence legislation at a formative stage. Pre-legislative scrutiny can stimulate debate and create greater public awareness before starting draft bill. As the purpose of legislation is to regulate various freedoms, to confer and protect important rights, it is important to communicate at the early stage the intention from the policy making authority to the members of the public such as interest groups and other community representatives or relevant organizations; and in particular to those who will be affected by the law. Once those persons are involved in the pre-drafting stage, they can certainly influence effectively the draft legislation and help to improve its quality toward the legislative effectiveness.

The most fundamental reason for consulting during the pre-drafting stage is to help develop solutions through legislation which will work and gain acceptance in practice. This is because from public participation and consultation, the policy making authority will take advantage of incorporating some elements and perspectives from different ideas, and in some cases achieving a broad success amongst citizens through quality legislation.

The reality is that no one can ignore that legislation frequently affects liberty, relations between persons, property, and all aspects of human conduct within a society. Hence, as the

main purpose of a policy maker is to achieve political objectives through effective legislation, successful legislation depends on how the policy and draft bill are made. In fact, the process of pre-legislative scrutiny should provide an emphasis upon and an opportunity of achieving a greater degree of drafting effectiveness.

## **1.2 Hypothesis**

My hypothesis is that pre-legislative scrutiny at the pre-drafting stage enhances the drafter's performance in the first and second of Thornton's stages of drafting process thus leading to greater effectiveness of legislation.

## **1.3 Methodology**

In order to prove my hypothesis, I will demonstrate how the Thornton's first and second stages of drafting process affect the effectiveness of legislation. The aim will be to show how the stages of understanding and analysis of a legislative proposal allow the legislative drafter the ability to achieve his or her drafting function in the same way as expected by the policy maker. I will also show how pre-legislative scrutiny at pre-drafting stage enhances the drafter's performance in relation to Thornton's first and second stages of drafting process. After indicating the necessity of the process of pre-legislative scrutiny, I will demonstrate how this process enhances the legislative drafter's performance and the quality of legislation.

## 1.4 Structure

The next series of chapters turns to the previous methodology which proves our hypothesis. The first of these chapters concerns the introduction which comprises an overview on pre-legislative scrutiny, the hypothesis in relation to our topic and the methodology used. The second chapter provides an explanation of how Thornton's first and second stages of drafting process contribute to effectiveness of legislation. The third attempts to show how pre-legislative scrutiny enhances the performance of a legislative drafter in relation to Thornton's first and second stages of the drafting process. The final chapter will draw a conclusion by indicating how pre-legislative scrutiny at pre-drafting stage enhances the drafter's performances in order to achieve effectiveness of legislation.

## **CHAPTER II: THE ROLE OF THORNTON'S FIRST AND SECOND STAGES OF DRAFTING PROCESS TO EFFECTIVENESS OF LEGISLATION**

According to G.C. Thornton, the drafting process involves five analytically distinct stages: understanding, analysis, design, composition and development, and scrutiny and testing.<sup>12</sup>

This chapter aims to justify that Thornton's first and second stages of drafting process provides to a legislative drafter a perfect way of attaining legislative effectiveness. In this chapter, the first and second stages will be analyzed successively, and demonstrate how it is important to resort to them during pre-drafting stage due to their significance in relation to the legislative drafter's performance in understanding and analyzing the legislative proposal. In other words, it will be shown how understanding and analysis stages are likely to help a legislative drafter to understand the policy purpose and discover fundamental aspects of a legislative proposal that the policy maker overlooked.

### **2.1 Understanding the legislative proposal**

According to Thornton, the first stage of the drafting process is focused on two main points which concern the understanding of drafting instructions and drafter consultation with the instructing officer.<sup>13</sup>

#### **2.1.1 Understanding the draft instructions**

The principle is that a legislative drafter does not participate in policy making; his or her role starts when he or she is invited to translate the policy purpose into the law. Since a legislative

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<sup>12</sup> G.C. Thornton, *Legislative drafting* (4<sup>th</sup> edn, Butterworth 1996) 128

<sup>13</sup> *Ibid* 128-29



drafter is not involved early, he or she needs to be aware about what is intended by the policy maker and what is expected to be done. As a legislative drafter is subjected to some expectations from the policy maker, the understanding of the policy purpose may help him or her to fulfill his or her hard task as well as possible by making a draft bill which is in harmony with the policy maker's thinking. The instructing officer also plays a crucial role during the stage of understanding the legislative proposal because he or she has to draft understandable instructions in order to direct a legislative drafter who was not involved in policy making.

***a) Requirements of a legislative drafter prior to the drafting stage***

As highlighted above, the formulation of a legislative proposal is undertaken by the civil servant of the responsible government department. After defining a policy by political authorities, officials in the concerned ministry or other government body must formulate a detailed programme which attempts to implement that policy. Once a legislative proposal is formulated, its translation into a bill is undertaken by the legislative drafter who is requested to put that programme into the bill's concrete form. Indeed, D.R. Miers and A.C. Page argue that the legislative drafter's function and *raison d'être* are to ensure that the government's policies are given legal effect.<sup>14</sup>

All the time, the concerned government department expects that the legislative drafter will express its intention as accurately as possible in the bill. The author describes this expectation as the requirement of legal effectiveness.<sup>15</sup> Ann Seidman and co-authors argue that the legislative drafter plays a crucial role in the legislative process; he or she has to make

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<sup>14</sup> D. R. Miers and A.C. Page, *Legislation* (Sweet & Maxwell 1982) 78

<sup>15</sup> *Ibid* 79

reasoned inputs to the law-making process because of his or her important function in helping to shape a bill's content effectively as possible in response to the requirements of a Government department<sup>16</sup>.

In my view, legislative drafting is a form of communication which requires a legislative drafter to translate properly and clearly the policy maker's desired purpose and make legislation as understandable as possible with utmost care and caution unlike many other documents. In order to achieve this requirement, a legislative drafter needs to understand the drafting instructions from the policy maker before producing a draft of a piece of legislation. Before beginning to work on legislative proposal, a legislative drafter must clearly understand the policy intention and objectives of the initiator of the policy. It is the legislative drafter's primary task to study drafting instructions and make sure that he or she fully understands what the instructing body wishes to achieve.

It is often only at the stage of understanding that the policy is tested in detail in order to see how it is to be effected. As said by Sandra Unerman, a legislative drafter must analyze the proposal thoroughly, so that he can understand the underlying concepts, in order to determine how best to achieve the policy intention, to structure the resulting draft and to frame it in clear, simple and effective words.<sup>17</sup>

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<sup>16</sup> Ann Seidman, Robert B. Seidman and Nalin Abeysekere, *Legislative drafting for democratic social change: A manual for drafters* (Kluwer Law International 2001) 28. See also Reed Dickerson, *Materials on legal drafting* (West Publishing CO. 1981) 91. See also N.K. Nampoothiry, 'The role of Parliament Counsel in legislative drafting' (2010) 36 (1) Commonwealth Law Bulletin 57

<sup>17</sup> Sandra Unerman, 'From draft to law' (2005) 155 (7195) *New Law Journal* 1499. See also Miers D.R. and Page A.C. (n 14) 87

It is necessary to specify that a legislative drafter needs to seek all clarification upon receiving a legislative proposal. As a 'journalist in determining the policy maker's goal'<sup>18</sup>, it is helpful for a legislative drafter to have an understanding of the problem the concerned body seeks to address. Indeed, an effective legislative drafter should do whatever is necessary to understand properly the legislative proposal before drafting in order to carry the same meaning to that given by the policy maker. Otherwise, the legislative drafter may interpret the legislative proposal in a way different to that intended by the policy maker and make communication impossible. In this case however, a legislative drafter may shape a bill of a piece of legislation which is precise and clear, but if it is not what was desired by the concerned department, it will not be legally effective.

Reed Dickerson argues that a legislative drafter has a strong interest in substantive policy and can help to mold it.<sup>19</sup> This is why a legislative drafter has to understand and analyze policies before putting them in legal form what the policy maker wants in substance. He must find out as much as possible about what the policy maker is trying to accomplish and the factual environment in which the matter arises.

It is a responsibility of a legislative drafter to be able to ascertain whether the legislative proposal enables the achievement of the policy purpose. Thus, he or she must decide how to reach an understanding of the legislative proposal requirements and designing of specifications. The most straightforward alternative is to simply review the documented legislative intention and the instructions given by the instructing body to the legislative drafter as the basis for the draft legislation. By reviewing these documents and instructions, the legislative drafter will be able to determine how to translate the stated intention into law.

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<sup>18</sup> Robert J. Martineau and Michael B. Salerno, *Legal, Legislative, and rule drafting in plain English* (Thomson/West 2005)93

<sup>19</sup> Dickerson (n 16) 91

The legislative drafter can also seek to comprehend the policy requirements before designing his or her draft by consulting wider sources of information.

When a legislative drafter is reasonably clear about what is wanted, he or she must at a fairly earlier stage decide on a suitable set of concepts in which to embody the basic ideas with which the bill is concerned, and must work out an appropriate legislative structure for the bill as a whole. Hence, a legislative drafter must try to understand carefully the policy maker's intention for producing the desired result in the correct form and in a language that is aptly chosen to produce the legal effect intended.<sup>20</sup> To attain this understanding, a legislative drafter needs to discuss particular aspects of the instructions with the government department concerned; and these discussions may result in immediate modification of details of the proposals.

***b) The role of the instructing department***

Undoubtedly, there is need for a legislative drafter to obtain maximum information in order to understand the issue and how the policy maker intends to resolve it, the overall purpose, objective or philosophy behind the legislative proposal. In fact, the government department's role is to develop workable and acceptable policies and the legislative drafter plays a leading part in shaping the bill. Thus, it is helpful if the purpose of a proposed legislation is stated clearly in drafting instructions depending on how the thought is expressed by the officer in charge of drafting instructions.

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<sup>20</sup> Michael Zander, *The law-making process* (6<sup>th</sup> edn, Cambridge 2004) 17

Effective drafting instructions should be clear, complete and comprehensive and help the legislative drafter to understand what the policy maker expects to do through proposed legislation and what the proposed legislation intends to resolve once enacted. In other words, in order to help a legislative drafter to produce a comprehensive draft bill towards an effective legislation, drafting instructions have to be written in plain language and in narrative form. The principal objectives to be achieved by the proposed legislation must be stated by the instructing officer in order to direct the legislative drafter on what has to be done.

Indeed, effective drafting instructions need to use words consistently throughout the instructions, and avoid as possible the use of jargon or technical words and variation, as well as elegance for the sake of clarity. If instructions are not clear, the legislative drafter will have to spend more time in discovering the intention of the policy maker, whereas good instructions enhance the quality in legislation and reduce drafting time.<sup>21</sup> For achieving this, Thornton advises that it is necessary to guide those who draft instructions in order to help the legislative drafter to be aware about the intention of the proposed legislation.<sup>22</sup> The instructing officer must put the policy maker's objective in common terms to avoid the misunderstanding from a legislative drafter. Robert J. Martineau and Michael B. Salerno affirm that 'clarity of expression is more likely to produce clarity of thought than the latter is likely to produce the former'.<sup>23</sup> With the help of the departmental officials, a legislative drafter may have sufficiently clarified the situation to enable him to prepare the draft of the bill.

Additionally, in order to help a legislative drafter to accomplish his or her mission, the instructing officer must prepare drafting instructions which should consist of a detailed brief

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<sup>21</sup> Thornton (n 12) 130

<sup>22</sup> Ibid 129

<sup>23</sup> Martineau and Salerno (n 18) 10

to the legislative drafter in a narrative form setting out the full details of the scheme and attaching all relevant background material.<sup>24</sup> Instructions should contain sufficient background information relating to the solution proposed by the instructing body; including background papers of what the proposed legislation intends to overcome, to enable the legislative drafter to understand how the policy intention and legislative solution is being proposed, and to see in perspective and in context the facts and problems which the legislative proposal intends to meet. In fact, issues intended to be dealt with by the legislation must be precise.

It is necessary to affirm that the stage of understanding the legislative proposal plays a crucial role in legislative drafting. It should be noted that for drafting effectiveness, instructions must be drafted in understandable and clear manner to allow the legislative drafter resources to be used in drafting task and help him or her to be more effective and efficient. One of the principle reasons which can be the source of the legislative drafter's failure is the lack of understanding of drafting instructions. It is important that before a legislative drafter begins drafting a bill, he or she must be in possession of all information concerning the legislative proposal. In the event a legislative drafter does not understand the intended purpose of the legislation, he or she does not translate the policies into an effective and implementable legislation. Thus, it is helpful for a legislative drafter to know the purpose of the proposed legislation in order to understand properly what intention need to be achieved before analyzing all proposed legislation's outlines.

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<sup>24</sup> Lucy Marsh-Smith, 'The production of legislation in the crown dependencies' (2010) 14 (1) Jersey and Guernsey Law Review 70

### 2.1.2 Drafter consultation with the instructing department

As it has been mentioned above, a legislative drafter is not a policy initiator, but a translator of the policy maker's purpose into the law. Therefore, in accomplishing his or her task, a legislative drafter needs to keep in touch with the responsible government department and the instructing officer in order to be clear on what he or she has to do. Where a legislative drafter does not understand the legislative proposal or is unsure about an aspect, he or she must meet the instructing officer or civil servant who prepared the drafting instructions for discussion in order to obtain further information needed for analysis and identify aspects of the legislative proposal which are likely to cause misunderstanding or difficulties when it is the right time to be translated into legal provisions. The purpose of the meeting with the instructing body is to anticipate drafting and legal difficulties. According to Jack Stark, the meeting with the instructing body may help the legislative drafter because he or she can ask the policy maker to clarify his or her intent and specify the ways in which the proposed new law would operate in it.<sup>25</sup>

Consultation with a legislative drafter is not only useful for a drafter who needs to get some information about the legislative proposal, but also it serves the policy maker. Even though some people think that it is not necessary to consult with a legislative drafter because he or she is considered as a simple writer only, it is not a good perception because in my view, the drafter's task is not just writing words as expressed by Thornton<sup>26</sup>, but he or she has to uncover the policy maker's intention. It is true that a legislative drafter's function is not to initiate policy, but his or her vast knowledge and expertise in law is an asset that can make him or her involved for earlier participation at the policy stage. Donald L. Revell argues that

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<sup>25</sup> Jack Stark, *The art of the statute* (Rothman & Co. 1996) 13. See also Charles B. Nutting and Reed Dickerson, *Cases and materials on legislation* (5<sup>th</sup> edn, West publishing CO 1978) 682

<sup>26</sup> Thornton (n 12) 125

a legislative drafter can question the concerned government department on how legislation would impact on government policies.<sup>27</sup>

The legislative drafter's involvement at early stage may contribute in improving substantive policy. It is possible that the instructing body may have never seen a particular problem before, but the chances that a legislative drafter who has experience in law may see them are maximized. As a legislative drafter may have a restricted role in policy making; he or she is not himself a policy-maker but he or she nevertheless advocates early the policy maker about alternative ways of achieving policy objectives. As said Donald L. Revell consultation with legislative drafter allows for quick solutions of problems that could baffle the policy maker.<sup>28</sup>

The legislative drafter is more likely to be engaged not only in using his drafting experience but also in advising on policy, and even to participate in the policy making. Hence, as Jack Stark argues, it is necessary for a requester of a draft bill to consult with a legislative drafter because a legislative drafter is able to discover certain kind of flaws in the legislative proposal, such as internal inconsistencies, administrative problems and damage inadvertently done to current law that would outweigh the benefits of the new law.<sup>29</sup>

Robert J. Martineau and Michael B. Salerno consider legislative drafting as a collaborative process where a legislative drafter by engaging in a dialogue with the policy maker will clarify the goal of the drafting assignment, the complexity in achieving that goal, and the various alternatives.<sup>30</sup> In both United States and Canada the legislative drafter is frequently consulted at the policy making stage for his views on what is legally necessary and possible in the implementation of policy. In the UK, Parliamentary Counsel Office may be consulted

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<sup>27</sup> L. Revell (n 27)

<sup>28</sup> Donald L. Revell, 'Enhancing the legislative process: The value of the Legislative Drafter' (2011) 32 (2) Statute Law Review 149. See also Reed Dickerson (n 16) 92

<sup>29</sup> Stark (n 25) 18

<sup>30</sup> J. Martineau and B. Salerno (n 18) 86. See also Stark (n 25) 14



occasionally, in particular on the constitutionally propriety of a proposal or when the government is face with an emergency which it thinks necessitates swift legislative intervention, but such occasions appear to be rare. Parliamentary Counsel Office has both experience and the authority to be able to challenge the policy by asking whether ‘we should be starting from here’. This is of the important policy function; it has in practice and needs to be discharged early in the process.<sup>31</sup> In my view, during consultation the policy maker and the legislative drafter may discuss the result sought by the proposed change in law, policy, and legal issues raised by that change, and alternative methods of achieving the intended result.

G.C. Thornton declares that the involvement and input of a legislative drafter before the policy has been fully developed and accepted are likely to avoid delays during the drafting process because the need for supplementary drafting instructions will be reduced. The experience and expertise of legislative drafters are likely to avoid wasted time and effort on the part of the policy makers as a result of their being steered away from blind alleys and dangerous precipices. It is also a benefit for a legislative drafter because it is the opportunity for him or her at this early stage to gain knowledge about the underlying principles and the technicalities of the proposals. This means that he or she gains more knowledge about legislative proposals expressed both in the submission for policy approval and in the drafting instructions. The result is that the legislative drafter is likely to be able to produce a draft more quickly and more in harmony with the intentions of the policy makers.<sup>32</sup>

Certainly, that kind of consultation may help a legislative drafter and the policy maker because it allows two parties to have the same understanding of the effects of the legislative

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<sup>31</sup> J. Martineau and B. Salerno (n 18) 86. See also Laws (n 1)

<sup>32</sup> Thornton (n 12) 126

proposal. As a result, the policy maker can decide to adjust the legislative proposal, make changes on it or not to legislate because it is not necessary considering the legislative drafter explanations and advices.

## **2.2 Analysis of the legislative proposal**

In general, expressing policy concepts is easy but giving them legal effect can be challenging. Sometimes, the instructing departments may explain the policy but they frequently do not understand the problem of expressing that policy in law. This is a duty a good legislative drafter has to perform. A legislative drafter must take into account that legislation is a means of control used by the concerned jurisdiction for a general interest. Thus, a legislative drafter must subject the department's instructions to rigorous analysis, particularly in relation to their practicality, their necessity, and their impact on the existing legal framework.

### **2.2.1 Analysis of the necessity and practicality of the legislative proposal**

In general, an idea considered to require action is formulated from an initiative within a government department, and legislation is the chosen method to give effect to that action. As stated above, with the aim of achieving a good result, a legislative drafter has to carry out his or her work in a clear and practical manner because he or she plays a key role in ensuring the effectiveness of legislation once it comes into force. Hence, it is important for a legislative drafter to analyze the legislative proposal in order to identify possible solutions and ensure the necessity, implications and feasibility of policy maker's desired purpose.

Legislative drafting is not a simple written document; it is an art for a legislative drafter who has to put a legislative proposal into an effective law.<sup>33</sup> This function also is not simple; it requires the legislative drafter to pay attention and take the time to analyze drafting instructions. This is why, once the legislative proposal has been understood; a legislative drafter has to carry out the analysis. Analysis means to look at the policy and analyze the potential effects of planned legislation. Luzius Mader defines analysis as ‘a pragmatic effort to improve the legislator’s assumptions and knowledge about the effects of legislation’.<sup>34</sup> Hence the main purpose of analysis is to assist in ensuring the necessity of legislation and choosing the appropriate provisions for solving a legislative problem in order to ensure the quality of legislation and ensure its effectiveness once it comes into force.

There are certain legislative proposals to which a legislative drafter must be sensitive, and to which it is his or her duty to draw the attention of the law officers: Proposals which affect personal rights and liberties, proposals affecting property rights, proposals to delegate to the executive a power to impose taxation, proposals for retrospective legislation, proposals offending against international law, proposals of doubtful constitutional competence, proposals which are unnecessarily bureaucratic, proposals affecting the interest of other government department or public bodies and proposals affecting prerogative powers.<sup>35</sup>

On every occasion, a legislative drafter must be clear if the request is to draft a new piece of legislation or to make amendments of existing legislation. If new regulation is needed, it is the responsibility of the legislative drafter to read and test all alternatives in order to verify if

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<sup>33</sup> Government of the Hong Kong Special Administration Region: Department of justice, <<http://www.doj.gov.hk>, *Legislative drafting in Hong Kong*, (2<sup>nd</sup> Edn) 3> accessed 27 January 2012. See also B. Nutting and Dickerson (n 25).

<sup>34</sup> Luzius Mader, ‘Evaluating the Effects: A contribution to the quality of legislation’ (2001) 22 (2) Statute Law Review 119

<sup>35</sup> Thornton (n 12) 134-37

it is necessary to enact the new legislation to give effect to the policy maker's desired purpose or whether there is a possibility to make amendments to existing law. Analysis done before drafting can be described as future oriented research into the expected effects and side-effects of the policy maker desired purpose. Such analysis tries to highlight the possible effects and side-effects of alternatives, including the alternative of not regulating at all.

In pursuance of legal effectiveness, the legislative drafter needs to analyze the legislative proposal<sup>36</sup>, and he or she must give particular attention to the legislative proposal and consider its practicability, namely whether it is capable of being implemented effectively. It will not be reasonable if a legislative drafter is engaged in drafting without having a look at to the fundamental principles of the legislative proposal as argued by Thornton.<sup>37</sup> As expressed by D. R. Miers and A.C. Page, legislative drafters often become familiar with the administrative implications of different kind of proposals of which the policy maker is generally unaware, and rely upon the experience of civil servants to inform them of what is involved in the day to day implementation of particular provisions.<sup>38</sup> This exchange of information is one of the purposes of the various communications between a legislative drafter and the concerned government department.

Where the new legislation is needed and considered as a unique solution, the primary responsibility of the legislative drafter is to ensure the proposed legislation will give effect to the legislative proposal and achieve the policy purpose in a legally effective way. Moreover, before drafting a piece of legislation, a legislative drafter must examine and analyze the

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<sup>36</sup> Daniel Greenberg, *Craies on legislation* (9<sup>th</sup> edn, Sweet & Maxwell 2008) 336

<sup>37</sup> Thornton (n 12) 125

<sup>38</sup> Miers and Page (n 14) 88. See also Dickerson (n 16) 92

legislative proposal to ensure that it will be capable of implementation and fit into the scheme of existing legislation<sup>39</sup>.

### **2.2.2 Analysis of the legislative proposal in relation to the existing legislation**

In general, the Government expects that a legislative drafter is able to translate the policy intention into effective legislation in harmony with the existing legislation. When a legislative drafter is translating the policy into law, he or she needs to check if the legislative proposal is consistent with the existing legal framework. He is also expected to ensure that the bill as drafted will be compatible with the existing law. Almost every new bill directly or indirectly refers to, or assumes the existence, of a wider legal context. The legislative drafter must try therefore to locate all existing laws and common law provisions which may be affected by the bill and take steps to make clear the precise nature of that effect, to present amendments to statutory provisions in as clear and orderly a fashion as possible and to adopt consistent terminology and linguistic usage where appropriate.

According to G.C. Thornton, legislative proposal should be analyzed in relation to existing law, special responsibility area and practicality.<sup>40</sup> Therefore, a legislative drafter has to do research and examine the existing legislation in order to avoid all kinds of inconsistency with others laws. Also, he or she cannot ignore at all to look at other pending draft legislation or whole of Government policies in order to be aware of what is happening in the whole system. As said by Ann Seidman and co-authors, a legislative drafter drafts within a cage of constraints.<sup>41</sup> Thus, he or she needs to know the relationship between the legislative proposal and existing legislative provisions or other laws through analysis of the impact of the

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<sup>39</sup> Zander (n 20)

<sup>40</sup> Thornton (n 12) 133

<sup>41</sup> Seidman, B. Seidman and Abeyesekere (n 16) 279

proposed legislation in relation to existing legislation and ensure that there is no inconsistency between proposed legislation and others laws in force. New laws need to be consistent with the respective constitutional arrangements of the countries concerned, as well as being consistent with the general principles of law.

A legislative drafter must also be aware of the relevant existing legislation, notably international conventions ratified, national laws in *pari materia*, other national laws, foreign laws and judicial instruments. In considering foreign laws, a drafter cannot attach to them more importance instead of other internal sources of rules, because the foreign law can be in contrary with realities of the country. A legislative drafter can transplant some elements from foreign laws if those laws 'can only serve his or her system well'.<sup>42</sup> As Ann Seidman and co-authors declare, 'foreign law never offers a set of alternative solution, from which, like diners at a buffet of goodies, the legislative drafter can choose one or another. Before adopting even an idea for a solution derived from another country, a legislative drafter must understand not only the foreign law's black letter text, but how it actually worked in its home country's unique context'.<sup>43</sup>

Looking at the existing legal framework may help a legislative drafter to avoid all kinds of incompatibilities with the existing legal framework.<sup>44</sup> He must analyze how existing laws and the proposed legislation will work together. There may be a number of substantial or consequential amendments or an old regime is to be replaced. If it is important to make necessary change, legislative drafters have to verify if potential amendments will not affect the existing laws, especially the primary legislation if the concern is the delegated legislation.

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<sup>42</sup> Helen Xanthaki, *On the transferability of legislative solutions: The functionality test*, in Constantin Stefanou and Helen Xanthaki, *Drafting legislation: A modern approach* (Ashgate 2008) 3

<sup>43</sup> Seidman, B. Seidman and Abeyesekere (n 16) 10

<sup>44</sup> Robert C. Dick, *Legal drafting in plain language* (3<sup>rd</sup> edn, Carswell 1995) 38. See also Stark (n 25) 13. See also B. Nutting and Dickerson (n 25) 681

In certain circumstances, to give effect to the policy maker's decision can require using powers in existing primary legislation to make secondary legislation, regulation, orders, etc. If the action is outside the scope of those powers, new primary legislation is needed to extend them.<sup>45</sup> The legislative drafter has to do the best to see that all relevant areas are covered, the necessary powers provided for details to be prescribed in regulations and orders; if appropriate, and that nothing is objectionable in terms of human rights requirements.

The lack of analysis before drafting can contribute to unconstitutionality, impracticality, incompatibility, ineffectiveness of legislation, and passes over the principle of legal uncertainty, and as a consequence legislation will be subject to criticism and reject. At the early stage, a legislative drafter has to analyze different aspects of the legislative proposal and analyze its applicability.<sup>46</sup> Of course, the inapplicability of legislation is an evidence of the legislative drafter's weakness. As D. Dyzenhaus confirms, 'the virtue of law is its effectiveness in guiding human planning, a virtue which it has because law communicates to legal subjects through rules of determinate content'.<sup>47</sup> In fact, the analysis stage enables a legislative drafter to perform in drafting because he or she may identify both ineffectiveness and inefficiency within a legislative proposal, and determine the implications of the deficiency on legislative effectiveness and efficiency.

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<sup>45</sup> Marsh-Smith (n 24)

<sup>46</sup> Thornton (n 12) 138

<sup>47</sup> David Dyzenhaus, *The Constitution of law, Legality in a Time of Emergency* (University Press 2006) 220

## **CHAPTER III: CONTRIBUTION OF PRE-LEGISLATIVE SCRUTINY AT THE PRE-DRAFTING STAGE TO LEGISLATIVE DRAFTER'S PERFORMANCE IN RELATION TO THORNTON'S FIRST AND SECOND STAGES OF DRAFTING PROCESS**

In this chapter, the aim is to show how consultation is important during the pre-drafting stage as it allows the public to scrutinize the proposed legislation. After analyzing the necessity of pre-legislative scrutiny, the chapter will show its impact by pointing out how it enhances legislative drafter's performance and the quality of the legislation.

### **3.1 The necessity of the pre-legislative scrutiny process**

The need for citizens of a democratic society is to understand generally what is going on in his or her government and to participate to some degree in its decision-making processes. Pre-legislative scrutiny is one of the few ways the average citizen can relate himself to his society as a whole because it opens policy maker up to those outside affected by legislation.

As expressed above, the process of pre-legislative scrutiny means the involvement of the public in the legislative process through consultation. For a long time, the process of pre-legislative scrutiny has been considered as a necessity in the legislative process but most often draft bills have been made public only after they have been tabled in Parliament giving individuals, civil society groups, the media and other stakeholders limited opportunities to influence the legislative process. Nevertheless, to involve people at earlier stage may reflect the extent and nature of previous scrutiny and debate.



The lack of transparency and public consultation in the drafting of legislation has been a subject of criticism. Thus, in its wide-ranging report on the legislative process (*Making the law*) issued in 1992 the Hansard Society said that many organizations in their evidence emphasized the fundamental importance of consultation.<sup>48</sup> Also, during the seminar attended by some 50 participants including judges, lawyers, law teachers and legal activists held in Asia, it has been adopted a memorandum which consists of a critique and recommendations on the law making process. The memorandum said that-

‘The passing of written laws by our respective law making bodies, particularly the promulgation of martial law decrees, are essential non-participatory. A small group of law makers, to which the majority of the population have little or no access, determines the laws to be administered’.<sup>49</sup>

They complained that most people are only concerned with the end product of the legislative process that is the law and regulation, when they or their interest are directly affected.

Moreover, on July 13, 1978, Mr. Ivan Lawrence MP put a parliamentary question to the Lord President of the Council, asking whether, in the interests of the better drafting of legislation, he will consider allowing parliamentary drafters to have consultation with responsible representative groups of those organizations affected by proposed legislation.<sup>50</sup> In fact that means that the process of pre-legislative scrutiny is a fundamental practice which serves in legislative process to improve the quality of legislation.

As stated earlier, the actual process of pre-legislative scrutiny differs from jurisdiction to jurisdiction but the objective is the same; to make better laws. Indeed, some countries apply

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<sup>48</sup> Zander (n 20) 8

<sup>49</sup> Karl T. Hudson-Phillips, ‘A case for greater public participation’ (1987) *Statute Law Review* 76

<sup>50</sup> Dorothy Johnstone, C.B.E, ‘Role of the Administrator in the preparation of United Kingdom Legislation’ (1980) *Statute Law Review* 67

pre-legislative scrutiny before legislative drafting and in others pre-legislative scrutiny may take place at pre-drafting stage, but in any case, the process of pre-legislative scrutiny attempts to make better laws. Thus, in the United Kingdom and other commonwealth countries, pre-legislative scrutiny is considered and done in Parliament before the bill is introduced formally before the full house at the drafting stage. On the other hand, for the Netherlands and the European Union, pre-legislative scrutiny is done early as an ex ante evaluation at the policy process, before drafting.

It is important to note that the purpose of pre-legislative scrutiny is not to disrupt the Government's legislative programme, but rather to make better laws by improving the scrutiny of legislative proposal and drawing the wider public more effectively into the legislative process. It may be the occasion to connect with the public by involving outside bodies and individuals in the legislative process. For the government, the public expertise and advice may be crucial to the formulation of workable legislative proposals and their acquiescence, if non active co-operation may be equally vital to the successful implementation of proposals. For outside bodies and public representatives or individuals, their involvement constitutes a procedural guarantee that their interests and views will be given a hearing if not reflected in the content of proposals.<sup>51</sup>

In very general terms, it may be said that as the purpose of the Government is the establishment in written form of rules for the regulation and control of future social conduct, the involvement of the public to take some measures is a good practice to congratulate. In fact, consultation is an important stage and an important way for everyone to have a direct say in the policy making process. It is important to specify that in a democracy, citizens

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<sup>51</sup> Miers and Page (n 14) 58

should be able to make their views, and an accessible legislative process provides access to the smaller groups as well as to the larger and better-organized interests.

The government department with responsibility for the legislative project will need to decide who and how to consult at the pre-drafting stage. The people to whom the communication of legislative proposal is relevant may be classified in different broad groups to whom the policy maker cannot afford to lose sight of the interests and standpoints of any of them. There are legislative drafters, who have a hand in the preparation of draft legislation, and officials who take part in the development of policies and other persons to whom legislation in draft form is submitted for consultative purpose. The responsible department must be also in consultation with other departments or governmental agencies whose responsibilities and interest may be affected by the proposed legislation. Another group is composed of the persons who will be concerned with or affected by the law. This group may be said to receive the communication transmitted by the lawmakers, and its members are concerned to contribute in construction of the law by giving their views on the legislative proposal. The last group contains the persons who are personally affected by the law, the persons who advise and assist those persons affected by the law, and those who are charged by the law with the duty of administering and enforcing it and the judiciary where its members are invited to construe and apply the law. In every practical sense, the legislative proposal has to be communicated to these persons; and the result from consultation may lead to the modification, deferment or even abandonment of the legislative proposal.

According to Claire Archbold, consultation is the key of modern policy-making and legislation because when it works well, it builds democracy and makes for open, accountable

and effective legislation.<sup>52</sup> I should confirm that once the public will be involved at pre-drafting stage, it may be a sign of transparency and public participation in any jurisdiction. The same author declares again that consultation is necessary in view of the fact that it grants to improve decision making by ensuring decisions have a strong evidence base, take account of the views of those affected by them, and consider innovative and creative solutions. It is also the opportunity to improve the openness and accountability of government, and ensure that everybody concerned feel that they had their say. Indeed, people whose lives will be affected by the policy are the ones who know best what will work and what will cause problems.<sup>53</sup> They relate to practical questions of the implementation and enforcement of legislation. It is also an occasion to get some broader inputs at the formative stage of the legislative process and it could be helpful for all those concerned by the proposed legislation.

As indicated by Helen Xanthaki, consultation is a very important aspect in the legislative process as it helps the instructing body with focused and specialized inputs or advice from a panel of experts. In many circumstances, the latter are invited to present their opinion at the early stage of the legislation process. In this regard, the issue of acceptance of the proposed legislation may also be examined early.<sup>54</sup> For example, in the case of the European Union with the view to ensure that the legislative proposal meet people's demands and needs, the Commission can use the experience at the pre-drafting stage by requesting exploratory comments and ideas. In addition, under these circumstances, the Commission can also provide useful information whenever the European Union's position on an international issue is not very clear or needs to be widely discussed, drawing on the views of the people. It is believed that by doing so, the committee can serve as an early warning system for socio-

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<sup>52</sup> Claire Archbold, *The pre-legislative consultation process, equality, human rights and social need division*, in Dr Constantin Stefanou and Dr. Helen Xanthaki, *Manual in Legislative Drafting* (University Press Cambridge 2005) 24

<sup>53</sup> Ibid

<sup>54</sup> Helen Xanthaki, 'The Slim Initiative' (2001) 22 (2) *Statute Law Review* 108

political development issues and provide concrete policy recommendations for action at the early stage, before challenges and conflicts arise.<sup>55</sup> In fact, in the European Union, consultation is a right under the treaties, and failure to comply can amount to a material breach of irregularity leading to annulment.<sup>56</sup>

We concur with the idea that the process of pre-legislative scrutiny is considered as a prerequisite.<sup>57</sup> As earlier alluded, policy is typically described as a principle to guide decisions and achieve rational outcomes. For this reason, it is necessary to provide an opportunity to stimulate public debate and comment in a way that it would help to improve the legislative proposal and leave potential obscurity and unsatisfactory elements during the formative stage. The concerned government body should consider holding some seminars or organizing other alternative channels for consultation to help individuals and organizations in the wider community in formulating their responses, views or comments. The most fundamental reason for consulting in formulating policy is to help develop solutions which will work and gain acceptance in practice. For instance, in the New Zealand the absence of any open inquiry before the introduction of the Broadcasting Bill in 1989 before Parliament led to many late changes.<sup>58</sup>

Indeed, consulting with key stakeholders at an earlier stage may help to build greater consensus around policy and some of them may be able to help find innovative policy solutions. Stakeholders or other public members who have an interest in practical and enforceable legislation and who can give insights on how to achieve the policy purpose should be consulted in a timely manner to ensure that relevant experience on practicability

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<sup>55</sup> Xanthaki (n 54)

<sup>56</sup> Greenberg (n 35) 821

<sup>57</sup> NTABA (n 6) 119

<sup>58</sup> Zander (n 15) 8

and enforceability of a proposed legislation. The process of pre-legislative scrutiny may cause a legislative proposal to be challenged on a greater number of issues precisely because of the level of knowledge gained by stakeholders as a result of the inquiry; which may contribute effectively to the legislative drafter's performance.

### **3.2 The contribution of pre-legislative scrutiny to the legislative drafter's performance and the quality of legislation**

As stated above, the process of pre-legislative scrutiny at pre-drafting stage is helpful in legislative drafting because of its ability to scrutinize the legislative proposal. This can help the legislative drafter to achieve properly his or her objectives and achieve the quality of legislation.

#### **3.2.1 Impact of pre-legislative scrutiny in respect to the legislative drafter's performance**

In achieving his or her objectives, a legislative drafter is always subject to government and public expectations based on the quality of legislation. Thus, the government's expectations are subordinated to the realization of legal effectiveness and timeliness. Whereas, the ultimate users of legislation such as groups and individuals, officials and those who routinely apply and interpret legislative provisions such as courts, tribunals, local authorities and public corporations, and private individuals such as barristers and solicitors, have some expectations of the legislative drafter and their demands are principally that legislation should be intelligible.<sup>59</sup> This means that it must be possible for the user to assimilate and understand the

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<sup>59</sup> Miers and Page (n 14) 79-81

legislation without undue difficulty, and legally certain, that is precise and clear. There is no doubt that the process of pre-legislative scrutiny at pre-drafting stage can help the legislative drafter to respond to all of those expectations. It remains for us to examine hereafter how the process of pre-legislative scrutiny would enhance the legislative drafter's performance in drafting legislation and serve the policy maker in achieving his or her intended purpose.

Without a doubt, in many countries the process of pre-legislative scrutiny is considered today an integral part of the legislative process. However, as we have seen, some of them prefer to run the process of pre-legislative scrutiny after drafting stage; this means that outside persons and bodies should not normally be consulted at pre-drafting stage. The time for consultation is later when the bill has been drafted, and the effect is that consultation only starts when it is generally too late to influence the basic shape of the legislation. Chilenye Nwapi argues that the danger of public consultation not starting at an early stage is that the chances of all the concerns of the public being considered at a later stage are not high, since they may entail considerable overhauling of the result of what is often a long and arduous process.<sup>60</sup>

It is realistic to confirm that the process of pre-legislative scrutiny done at the pre-drafting stage is a real benefit to the policy maker and the legislative drafter, and useful in allowing greater and more considered attention to be given to the legislative proposal. The process of pre-legislative scrutiny is useful given that it is an effective way of drawing all those who have a point of view to put across into the legislative draft. When the process of pre-legislative scrutiny is done at pre-drafting stage, it may become helpful because legislation must significantly be able to pass strict scrutiny tests by all parties concerned before it can

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<sup>60</sup> Chilenye Nwapi, 'A legislative proposal for public participation in oil and gas decision-making in Nigeria' (2010) 54 (2) *Journal of African Law* 184

become effective.<sup>61</sup> In fact, it is important to push for greater public participation in the law making process particularly at the pre-drafting phase because the process of pre-legislative scrutiny allows the opportunity to analyze and debate, and, as a consequence, helps to shape workable legislation. As confirmed by Jennifer Smookler, the process of pre-legislative scrutiny is intended to produce better law.<sup>62</sup> This process provides an opportunity for more detailed and considered analysis of a legislative proposal and its contents given that it provides a legitimate space for the stakeholders' views and perspectives and enables citizens the opportunity to influence legislation at a formative stage.

Further, through the process of pre-legislative scrutiny, a legislative drafter can achieve the policy purpose and ensure that the legislation produced for the country is of good quality. He may also use it as an advantage as he or she is in position to hear many ideas from the persons involved in the consultations, and results from those consultations can play an important role in improving the draft's quality. In fact, an effective consultation can greatly guide the legislative drafter because it can help him or her to identify drawbacks in the legislative proposal which can require its rethinking, and as a consequence the process of pre-legislative scrutiny could play a significant part in improving the quality of legislation, and lead to a better legislation and reduce the likelihood of subsequent amendment of the legislation.

### **3.2.2 Contribution of pre-legislative scrutiny process to the quality of legislation**

Over the years, the quality of legislation was considered as irrelevant; for instance in the European Union where legislative drafters had only to achieve the passing of legislation

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<sup>61</sup> Ntaba (n 6) 120

<sup>62</sup> Jennifer Smookler, Making a difference: The effectiveness of pre-legislative scrutiny, <<http://pa.oxfordjournals.org>> accessed 11 June 2012



agreed by member States. However, in 1993, the European Union Council adopted a Resolution on the quality of drafting legislation covering a number of issues, ranging from the wording and structure of the text to its consistency with the content of existing legislation and the role of the preamble. As confirmed by Helen Xanthaki, in the European Union, the issue in relation to the quality of legislation affects both citizens and jurisdictions, and bad legislation may be the obstacle of certainty and security in the law.<sup>63</sup>

Helen Xanthaki argues again that public consultation can be used as a measure of quality for the legislation<sup>64</sup> because it should assist in identifying errors within a policy. Consultation is widely regarded as an effective way of improving the quality of legislation given that it allows outside experts to comment on the detail of a proposed legislation.<sup>65</sup> Through the process of pre-legislative scrutiny done at pre-drafting stage, the legislative drafter can assess the effectiveness and efficiency in legislative drafting. Helen Xanthaki defines effectiveness as the ability of the law to produce effects, and efficiency as the ability for the law to produce the desired purpose with minimum wasted effort or expense.<sup>66</sup>

Apart from clarity, precision and unambiguity, efficiency is also a value that helps the legislative drafter to access to effectiveness of legislation. Thus, optimal efficiency can be expected if the process of pre-legislative scrutiny is carried out because consultation may appear to save much time later for a legislative drafter who will start his or her job with the necessary information. There is no doubt that the necessity of understanding and analyzing legislative proposals before drafting can cause delay. Robert J. Martineau and Michael B.

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<sup>63</sup> Helen Xanthaki, 'The problem of quality in EU Legislation: What on Earth is really wrong?' (2001) 38 *Common Market Law Review* 651

<sup>64</sup> *Ibid*

<sup>65</sup> Robert Blackburn and Andrew Kennon *Griffith & Ryle on Parliament: functions, practice and procedures* (2nd edn, Sweet & Maxwell 2003) 727

<sup>66</sup> Xanthaki (n 42) 5. See also Mader (n 33)

Salerno have pointed out that usually the legislative drafter's work must be done in a hurry and under pressure.<sup>67</sup> This means that most legislative drafters have a deadline to respect and often there is pressure associated with time constraints, while people even authorities may not realize how a legislative drafter has to accomplish their hard work in short period of time with multiple requests due at the same time. The fact is that consultation may reduce the time used in analysis because a legislative drafter will not need more time later on to understand and analyze again the proposed legislation. This has been confirmed by Zione Ntaba who argues that a legislative drafter might not be able to achieve effectiveness due to the very nature of legislation and have had means of ensuring cost effectiveness and good time management.<sup>68</sup> When assessing the drafting effectiveness, a legislative drafter can be sure that there is a quality in legislation and it is implementable.

According to Helen Xanthaki, a good law is one who is able to produce the regulatory results required by policy-makers. She also argues that the quality is synonymous to effectiveness<sup>69</sup>. The effectiveness is in fact the extent to which the observable attitudes and behaviors of the target population (individuals, enterprises, public officials in charge of the implementation or enforcement of legislation) are based.<sup>70</sup> According to Zione Ntaba, the legislative drafter's role is to ensure the effectiveness of legislation and confirm that legislation will be of high quality.<sup>71</sup> Hence, the effectiveness of legislation is very clearly the centre of interest and a condition in legislative drafting. Peter Ziegler affirms that legislation is regarded as effective

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<sup>67</sup> J. Martineau and B. Salerno (n14) 96. See also Stark (n24) 13. See also Geoffrey Kolts, OBE, QC, *The legislative draftsman as problem solver* in David St L Kelly, *Essays on legislative drafting* (1<sup>st</sup> edn, University of Adelaide 1988) 101

<sup>68</sup> Ibid 125

<sup>69</sup> Xanthaki (n63). See also Helen Xanthaki, 'Duncan Berry: A visionary of training in legislative drafting' (2011) Special issue, <<http://www.opc.gov.au/calc/docs/loophole>> accessed 31 August 2012

<sup>70</sup> Mader (n 33)

<sup>71</sup> Ntaba (n 6) 128

if it appears capable of satisfying the legislative policy, and becomes ineffective if it does not achieve the purpose of policy.<sup>72</sup>

All above mentioned authors emphasize the need of effectiveness of legislation as a contributor to efficacy of legislation. If pre-legislative scrutiny is done, it is likely that the process has a direct link with quality as well as efficiency and effectiveness of legislation, as the process aims at ensuring that draft legislation is necessary and more importantly that it meets the intended results.<sup>73</sup> Therefore, once a legislative proposal has been properly scrutinized, and all matters of concern raised in consultation have been taken into account, the quality of legislation is an assured result. Zione Ntaba concludes that the process of pre-legislative scrutiny must take centre stage in the legislative drafters' work and should be given as much attention as the preparation of the legislative proposal.<sup>74</sup> For him, pre-legislative scrutiny is a very necessary tool for the legislative drafter as it promotes and protects the rule of law because quality legislation ensures the justice system is not delayed with too many legal challenges.<sup>75</sup>

On the other hand, Helen Xanthaki defines quality in two different ways, quality in the substance of the law and quality in the form of the law. 'Quality in the substance of the law refers mainly to issues of legislative policy and covers tests of subsidiarity and proportionality, choice of appropriate instrument, duration and intensity of the intended instrument, consistency with previous measures, cost/benefit analysis and analysis of the impact of the proposed instrument on other important areas of Policy. Quality in the form of the law concerns accessibility, namely transparency in the decision-making process, and

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<sup>72</sup> Ziegler (n 4)

<sup>73</sup> Mader (n 33)

<sup>74</sup> Ntaba (n 6) 129

<sup>75</sup> Ibid

dissemination of the law'.<sup>76</sup> For making guidance in European Union, the same author argues that 'quality legislation takes into account the views of interested parties, all of which must be consulted before the proposed measure is put forward in compliance with the Regulatory Policy Guidelines of the commission'.<sup>77</sup>

In regard of these assertions, we can conclude that the aim of the policy maker being to produce a good legislation capable of being implemented with ease, it is necessary to think how to achieve the desirable purpose and strengthen the legal certainty and reducing the implementation gap by contributing to the quality in legislation. The principle of legal certainty is in the sense of protecting the legitimate interests of individuals who are confronted with unexpected changes. This is one of the characteristics which people can rely on and be able to trust the new legislation and feel more protected in terms of their privileges and rights.

The process of pre-legislative scrutiny may be considered as one of the aids which help to produce good quality in legislation. This process is intended to produce quality legislation depending on the way in which it is undertaken. In fact, it is necessary to consider the views from interested parties who must be consulted. JF Burrows and RI Carter affirm that 'a well-designed and implemented consultation programme can contribute to higher quality legislation, identification of more effective alternatives, lower administration costs, better compliance, and fast regulatory responses to changing conditions. Just as important, consultation can improve the credibility and legitimacy of government action, win the

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<sup>76</sup> Xanthaki (n 54)

<sup>77</sup> Ibid

support of groups involved in the decision process, and increase acceptance by those affected'.<sup>78</sup>

Moreover, involving citizens in the pre-drafting stage not only helps Government to ascertain public sentiment on a particular issue but also helps to strengthen the drafting process. Pre-legislative scrutiny thus strengthens legislative drafter's competences in translating policies into effectively implementable legislation, because it gives the opportunity to hear expert views and perspectives on a particular issue. Addressing issues and concerns before a bill is drafted can also help in building consensus around a particular legislative proposal which can facilitate its implementation later. As a consequence in some cases, pre-legislative scrutiny may reduce the time spent by the legislative drafter who is in possession of ideas from concerned people and bodies before drafting a piece of legislation.

It has been confirmed that the process of pre-legislative scrutiny is necessary to enable citizens to debate and provide useful feedback to the government body, and may serve the legislative drafter who has to draft a piece of legislation. Depending on the need, the concerned government department can choose the way in which people can be given more opportunities for participation. Making legislative proposals available for public scrutiny before drafting is a mechanism by which citizens can be invited to participate in the law making process. Proactive disclosure of legislative proposals on government websites for public comments, for example, is one way in which the public can be informed about the government's proposals. It is also possible if government departments publish all facts when formulating policies or announcing decisions.

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<sup>78</sup> JF Burrows and RI Carter, *Statute Law in New Zealand* (4<sup>th</sup> edn, LexisNexis 2009) 64

## **CHAPTER IV: CONCLUSION AND RECOMMENDATIONS**

Most administrative decisions are taken at the top government level by policy makers when there is need to achieve the political programmes and objectives. After identifying an issue or a subject matter which requires action, government department formulates policies. In other words, a direct route for a policy maker to change a political idea into an action is to make policies. Policies can be understood as political, management, financial, and administrative mechanisms arranged to reach explicit goals. They guide actions towards those that are most likely to achieve a desired outcome. It is important to remember that legislation is needed by every country to implement such policies and to make them effective. Therefore, there is a necessity to respond through the enactment of legislation.

Once it has been decided that legislation is desirable, a detailed legislative proposal must be formulated and undertaken within the responsible government department, and the drafting instructions will normally be transmitted to a legislative drafter who has to translate the intention from the concerned government department into a workable law. A legislative drafter has the most crucial role in the whole legislative drafting process because he or she contributes to the efficacy of legislation by providing his or her expertise. He or she has to carry out the work of drafting in a clear manner and ensure that legislation will be properly and easily complied with and enforced.

The fact is that legislative drafting is known as a complex process involving a number of many different imperative factors. It is considered as a much wider process encompassing the formulation and transformation of policy proposal into legislative form towards its enactment into law. In general, a legislative drafter has to follow the classical route of understanding,

analysis, design, composition and development, and scrutiny and testing. Although, all of these steps are not herein analyzed rather the understanding and analysis the legislative proposal stages have been considered as important in the dissertation.

Indeed, the stages of understanding and analysis of legislative proposal play a crucial role for a legislative drafter who needs to attain a good result in legislative drafting. As said by Reed Dickerson, a legislative drafter has to earn the confidence of the policy maker<sup>79</sup>. This means that a legislative drafter might be able to translate effectively the legislative proposal and produce the greatest clarity about the intention of the policy maker to lead achievement of effectiveness of legislation. In fact, legislative effectiveness always presumes the effective implementation of the legislative proposal. To achieve this, there is a preliminary need to understand the drafting instructions by a legislative drafter before reaching the legislative drafting task. What can be done in advance by the instructing body is to try to maximize the chances of the success of a policy by clarifying its purpose before giving instructions to the legislative drafter. It is essential to note that a legislative drafter has the most crucial role in the whole legislative drafting process because he or she must contribute to the efficacy of legislation by providing his or her expertise. Efficacy always presumes the effective implementation of the legislative proposal.

In general, the success of the legislative drafter may broadly be affected by misunderstanding the legislative proposal. It is thus a responsibility of a civil servant who has to draft instructions to be precise and clear in his or her drafting because when the policy is vague, it results in misunderstanding. Consequently, clarity is important for effective communication between the government department that pronounces the policy and the legislative drafter

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<sup>79</sup> Dickerson (n 16) 92

who has to shape it into the law. Of course the legislative instructions must contain sufficient information, state clearly and fully the principal objects of the proposal in order to let the legislative drafter see what is wanted, and as a consequence to provide a target at which the clauses may be aimed. A legislative drafter has, therefore, a responsibility to put policy purpose into a straightforward and understandable manner. But if the legislative drafter does not understand the intended purpose, there is a clear risk of obtuseness and he or she may probably not explain the subject matter as well.

Once a drafting instruction is well understood, a legislative draft must follow the substantive analysis which involves many requirements which leads to effective drafting. It is a stage that comprises the evaluation of the effects of legislation as a fundamental prerequisite, and ensures that the legislative proposal is responsive to give effect to a political action which intends to solve a given matter. During the analysis of the legislative proposal, a legislative drafter has to analyze the necessity of legislation and its impact in relation to existing laws. His or her task is to do the analysis and balance the effects of the legislative proposal in order to check if the new law will be compatible with the existing laws either the constitution if any, or other national laws or international conventions ratified.

Apart from understanding and analysis of the legislative proposal, the process of pre-legislative scrutiny at pre-drafting stage may also serve a legislative drafter as a platform of fulfilling his or her mission. The contribution of the process of pre-legislative scrutiny which involves consultation with individuals, stakeholders and other public representatives is recognized as a crucial aid for achieving the policy purpose. As legislation is the most important body of rules that provides for the conduct of any society or the conduct of a



particular section of a society, it has been proved that public participation and consultation is necessity in the legislative process.

According to Michael Supperstone, it is generally accepted, for good administrative practice that those affected by administrative decisions have to be consulted at the time when proposals are still at formative stage, before the final decision is made.<sup>80</sup> Hence, good government body responds to the need to inform those who will be affected by the rules, and those who are to administer or enforce them, as far as possible exactly what they must do or not do in given circumstances, or how far their power or discretion to do or not to do things in given circumstances extends.<sup>81</sup> In exercising that responsibility, the concerned government department must mobilize the participation of individuals or groups affected by the legislative proposal at pre-drafting stage. This stage is characterized by a continuous interplay between government and outside groups. Sometimes a citizen is able to participate in the making of the decision, and through this way there is an opportunity to see that the decision is satisfactory or not.

Public participation can be considered as a preventive remedy which allows a challenge to action before it is taken with a view to rectifying it given that it allows a say to citizen by the way of consultation. It would be utopian to involve all citizens but the concerned government department could ever have some public representatives participating actively in legislative process at pre-drafting stage. This participation means that there is pre-legislative scrutiny because citizens have rights to access to legislative proposal before it becomes effective.

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<sup>80</sup> Michael Supperstone, James Goudie QC and Paul Walker, *Judicial Review* (Helen Fenwick ed, LexisNexis 1992) 303

<sup>81</sup> Rose (n 5)

By considering the idea that law is a mirror of the society, and the function of law is to maintain social order<sup>82</sup>, it is necessary that government departments have to allow citizens the opportunity to reflect what is happening in their own societies and contribute to assume the shape of these societies. The involvement of the affected interests is highly desirable in order to make the bill most effective in practice, something very like a compromise may be struck and undertakings may given on both sides. The extent of the consultation with outside interests during the preparatory stages of bills and the forms which it takes also vary greatly. In some countries, the process of pre-legislative scrutiny is undertaken after drafting stage, whereas in other countries it takes place before drafting. However, in this dissertation it is considered that consultation done before pre-drafting stage is a prerequisite for drafting effectiveness.

Indeed, attaining a degree of achievement of government policy purpose requires that the views of stakeholders, outside and interests groups and public representatives, and other affected departments must be taken into account in the preparation of legislative proposals. Consultation with a legislative drafter, who applies his or her knowledge and expertise in law, and the civil servant in charge of drafting of instructions, is also needed because they play a crucial role in the legislative process. The process of pre-legislative scrutiny provides an opportunity for the policy makers to have a real input on the proposed legislation before the Bill is drafted.

The process of pre-legislative scrutiny may be a real benefit to the Government and a right in principle for citizens subject to the circumstances and nature of the legislation. It is in fact a vehicle used to provide an opportunity for the policy makers to have a real input on the

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<sup>82</sup> Brian Z. Tamanaha, *A general jurisprudence of law and society*, (1<sup>st</sup> edn, Oxford University Press Inc. 2001)  
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proposed legislation before the bill is drafted and this enables citizens to have a say on the decisions which affect their day to day lives in a given society through their comments, different views and perspectives at an early stage. In fact, the concerned government department has to do consultation in an effort to reach agreement or minimize disagreement by proceeding by consultation with interested persons to whom the opportunity to comment during the formative stage is given. The lack of consultation may incite people to refuse to agree on the nature of legislation or on what responses are appropriate and the consequence is that they can consider legislation as raising no issue or problem at all. Nevertheless, pre-legislative scrutiny is an indispensable element which tries to contribute to the material quality of legislation as an instrument of societal regulation. The involvement of the affected interests is highly desirable in order to make the bill most effective in practice.

Indeed, the ultimate wish of a legislative drafter in fulfilling his or her mission is to ensure the production of quality legislation. Thus, pre-legislative scrutiny in its essence is a good practice which enhances the legislative drafter's performances and helps him or her to improve effectiveness and efficiency of legislation leading to a better legislation, due to its ability to make the legislative process more open and effective. By providing an opportunity for citizens to voice their opinions, a legislative proposal is scrutinized and as a result a legislative drafter will not need to spend more time in understanding and analyzing the legislative proposal.

This study has sought to present and defend the thesis that the process of pre-legislative scrutiny at pre-drafting stage becomes synonymous with good practices which aims to improve effectiveness and efficiency of legislation. Therefore, the process of pre-legislative scrutiny at pre-drafting stage can be appreciated as a very considerable tool for the legislative

drafter given that it promotes and protects the rule of law because the quality of legislation ensures the new legislation will be immune to many legal challenges.

In order to gain legislative effectiveness towards the quality of legislation, it is recommended in the dissertation that government departments; which need to give effect to their policy purpose, should consider the process of pre-legislative scrutiny as an essential means that offers more opportunity to public consultation given that it may help to improve the quality of legislation. To a certain extent, the concerned government departments may consult with the public and seek their comments on proposed legislation at the pre-drafting stage because it is so far a great way to assess the legislative proposal and relate to practical questions of the implementation and enforcement of legislation.

In conclusion, this study is not itself an end to issues of legislative drafting; it only constitutes a means and tools that subsequent researchers may need to use for further studies in the area. It recognizes that some areas such as the quality of legislation itself need to be explored. Subsequent researchers may be interested in exploring this area and supplement a few findings that this study has come up with.

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