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Effective Drafting for Effective Legislation:
Utilising Thornton's Five Stages of Drafting
in Papua New Guinea

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Effective Drafting for Effective Legislation: Utilising Thornton's Five Stages of Drafting in Papua New Guinea

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Student's Declaration

I confirm that this dissertation is entirely my own work. All sources and quotations have been acknowledged. The main works consulted are listed in the bibliography.

The total length of the dissertation is 14, 960 words.

Signed:

A handwritten signature in black ink on a light-colored background. The signature is cursive and appears to be 'D. J. ...'.

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Signed: _____

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Supervisor

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Dedication

To my dear wife Roseanne and our lovely children Waiambun and Olovu

And to my parents Martin and Pate Wayne

With love

Begin with the end in mind

– Stephen Covey

CHAPTER 1—INTRODUCTION

INTRODUCTION

Law-making in Papua New Guinea (PNG) can sometimes be planned and executed carefully. It can be passed almost spontaneously and instantaneously, or can be dragged on over so many years. It can involve single actor in Government, or any number of actor that somehow finds himself in the process. Actors can range from civil community activists and lobbyists, cronies of Members of Parliament, private lawyers, international consultants and lawyers, international organisations, government agencies, in-house lawyers, attorney general's office, parliamentary counsel and central drafting services.

The term *drafter* is a deceptive, because drafting involves so much more than writing words in a legislative form. Thring's dictum that "*a drafting office does not consider policy or substance just form*"¹ is not absolute. Indeed, some consider it a myth², but it defines the substantive sphere of influence of the drafter. In most jurisdictions, the drafter is a lawyer first, and a drafter second³. As such his responsibilities encompass a great deal of lawyering. The drafter acts beside policy initiators and makers, technical officers, politicians and other various stakeholders also contribute to this process. He applies legal skills of reasoning and research

¹ Constantin Stefanou, 'Drafters, Drafting and the Policy Process' in C. Stefanou and H. Xanthaki (eds.), *Drafting Legislation: A Modern Approach* (Ashgate, 2008), 321

² Ann Seidman, Robert B Seidman and Nalin Abeysekere, *Legislative Drafting for Democratic Social Change* (Kluwer Law International 2001) 26

³ Elmer A. Driedger, *The Composition of Legislation* (2nd edn Department of Justice Ottawa, 1976), xv

during this process, separate to his mere writing abilities. As a lawyer he is expected to provide sound legal advice where necessary. At the fore of the drafter's mind is the question of how the law he is asked to devise will impact the world in which it is applied. This underpins the choices he makes, the strategy he takes, the cooperation creates, and the language and structure utilised, not to mention the guidance he provides to his client(s).

The drafter is confined by numerous limitations; not the least of all is that his role is confined to the precincts of the policy being proposed to him to translate into good law. Driedger makes the point that while it is not the function of the drafter to originate or determine legislative policy, they "*must critically examine the policy he has been asked to express in legislative language, not as a draftsman, but as a lawyer.*"⁴ Stefanou argues that the extent of the drafter's role is determined by two factors: (i) the size of the jurisdiction; and (ii) the nature of the drafter's appointment⁵. On the former, he argues that smaller jurisdictions with less capacity to fund a fully-dedicated drafting office, often have lawyers who do drafting, policy and legal advising, and implementation functions as well. This is relatively true for PNG where the official drafting office does not have adequate capacity. As for nature of appointment, the question is whether the drafter works for a central drafting office or a ministry in which he has a wider responsibility than just drafting. Whatever little influence the drafter has over the policy that drives a draft bill, he must be fully involved to the fullest extent possible.

⁴ Driedger (n 3)

⁵ Stefanou (n 1), 321-322

HYPOTHESIS

This paper examines the responsibility of the drafter, acting beyond the narrow definition, to contribute to effective law-making process which will can churn out effective legislation. The aim of this paper is to show that *the drafter in Papua New Guinea, applying Thornton's Five Stages of drafting, must utilise certain tools available to him, and to contribute to creating effective legislation*. The arguments in this paper lead to the conclusion that the drafter in PNG has to be very much dynamic, as the field and practice, is a dynamic process. It is fluid in that the practice is not static and completely systematic.

METHODOLOGY

To establish this argument, the paper analyses the essence of Thornton's Five Stages. A brief description is made of the law-making context of PNG. It was necessary to collect data and information regarding the legislative drafting and development process, as there was generally a lack of literature on the subject of legislative drafting and legislative studies in PNG. The paper further analyses the meaning of effectiveness of legislation, identifying particular elements of effectiveness. This would provide the context within which to apply principles of Thornton's Five Stages and effectiveness of legislation. Finally the paper links these themes and identifies key tools, techniques and conditions required for an effective drafting process, and subsequently effective legislation.

Persons interviewed were officers of the Office of Legislative Counsel (OLC), Department of Justice and Attorney General (DJAG), the Office of the State Solicitor (OSS) the Department

of Treasury (Treasury), the Public Solicitor's Office (PSO), the Constitution and Law Reform Commission (CLRC), and the Acting Clerk and other senior officers of the National Parliament. Non-governmental actors interviewed include were the Business Council of PNG (BCPNG) and think-tank National Research Institute (NRI).

STRUCTURE

This paper continues in Chapter 2 with a background into the law-making process in PNG—from the policy process, the drafting process, and the legislative (parliamentary) process. This sets the context for the following discussions. Chapter 3 discusses each of the Five Stages, with brief examples of the applicable practice in the PNG process in which the respective stages occur. Chapter 4 provides a discussion on the essential meaning of effectiveness of legislation, and identifies some key elements. Chapter 5 provides an analysis of the preceding chapters by linking the Five Stages, as practised in PNG, with the nature of effectiveness. In particular it suggests some key preconditions and preliminary tools necessary to set the foundation for an effective drafting process. Chapter 6 provides for tools directly at the drafter's hand to achieve effectiveness. The Conclusion will show how all these arguments prove the hypothesis that an efficient practice of the Five Stages by the drafter, utilising certain tools aimed at achieving certain elements of effectiveness of legislation, can indeed achieve effectiveness of legislation in Papua New Guinea.

CHAPTER 2— LAW-MAKING IN PAPUA NEW GUINEA

POLICY PROCESS

To appreciate the impact that a drafter can have on effectiveness of legislation, it is imperative to consider his impact in the policy process. Subsequently, this means it is important to properly define and contextualise the policy process. A *policy* is a bundle of decisions for a particular path for the future⁶. According to the 2001 Report by the UK Comptroller and Attorney General, policy is the “*translation of government's political priorities and principles into programmes and courses of action to deliver desired changes*”⁷.

Stafanou describes the policy process as “*a series of stages/steps that policy must go through in order to be completed*”⁸” A policy may undergo several evaluations and reviews even after it is translated into law and implemented.

Generally, policy can originate from various parties, and from different platforms, but have to be adopted by Government in order to be carried forward to Parliament. Stafanou lists some methods of originating policy, especially in liberal democracies, such as a political manifesto

⁶ Stafanou (n 1)

⁷ National Audit Office, *Modern Policy-Making: Ensuring Policies Deliver Value for Money—Report by Comptroller and Auditor General*, HC 289 Session 2001-2002: 1 November 2001 <http://www.environmental-auditing.org/Portals/0/AuditFiles/gbeng01ar_modernpolicy_ft.pdf> accessed 5th August 2016

⁸ Stafanou (n 1)

of the party that wins the elections, international obligations, recommendations by independent Commissions, and private members of Parliament⁹.

The current government, formed after the last elections in 2012, is a coalition government. The parties to the coalition had signed a political manifesto known as the “Alotau Accord” immediately before forming government. This spells out priorities of the Government, setting the foundation for the Government’s policies and activities, including legislative programs in the last 4 years¹⁰. The Alotau Accord makes reference to the country’s medium term plans such as the *Medium Term Development Plan (MTDS)*, and a long-term plan known as *Vision 2050*¹¹. Underpinning these guiding documents are Constitutionally-enshrined ideals known as the *National Goals and Directive Principles*¹².

Most policies are proposed and formulated by government. Government NEC Handbook provides that the formulation of policy is the responsibility of Ministers and the departments or agencies that fall within their respective portfolio responsibilities. In particular, Ministers are responsible for “*initiating, formalising, and overseeing implementation of policies relating to their Ministries*”¹³.

⁹ Stefanou (n 1)

¹⁰ See “Alotau Accord”, source: <<https://dfat.gov.au/about-us/publications/Documents/papua-new-guinea-alotau-accord-summary-oneill-gov-priorities.pdf> accessed 21st July 2016> accessed 21st July 2016

¹¹ National Strategic Plan Taskforce, PAPUA NEW GUINEA VISION 2050, source: <<https://sustainabledevelopment.un.org/content/documents/1496png.pdf>> accessed 6th August 2016

¹² *Constitution of Papua New Guinea*, Preamble

¹³ NEC Handbook 2004, 1.10-1.12 (Formulation of Policy)

Policy can also originate in response to *international obligations*. For instance it was found that a recent passage of anti-money laundering laws was in direct response to PNG's membership in the Financial Action Task Force (FATF) of the United Nations¹⁴. Following several reviews of PNG's anti-money laundering and anti-terrorist financing laws, the FATF determined the PNG was not compliant with international anti-money laundering standards, and was in danger of being blacklisted. To that end DJAG initiated policy development, getting the endorsement of the Government, for legislation to meet this international obligation. The initial drafts were modelled on model UN FATF laws used for the purpose of developing AML/CTF laws around the world, but modified significantly to make it appropriate for the PNG context.

Policy can originate from *special purpose commissions*, such as PNG's CLRC. Through its legislative mandate of reforming laws in the country¹⁵, CLRC can initiate reviews of various laws in the country, or be instructed to do so by the Attorney General. After reviewing a law, the CLRC creates a report that is presented to the Attorney General¹⁶. The Report normally contains a set of recommendations for reform, which the Government can then, after careful consideration, take forward and convert into legislation, or disregard. Occasionally, the Report is accompanied by a draft bill which is drafted by either in-house lawyers in CLRC or by consultants engaged in the review process.

¹⁴ Interview with Ruth Koddy, Serena Sumanop and Louisiana Pep, Senior Legal Officers, Legal Policy and Governance Branch, DJAG (24th June 2016)

¹⁵ *Law Reform Commission Act 1975*

¹⁶ Interview with Dr. Eric Kwa, Secretary, Constitution and Law Reform Commission, (11th July 2016)

Another method of policy initiating is by civil society. The *Family Protection Act 2013* (FPA) is an example of a law coming out of a policy originating from civil society. This was a law created to stem the epidemic of domestic violence in the country, following public uproar over domestic violence. Riding on the wave of the nationwide outrage on domestic violence, a non-government organisation called the Coalition for Change (CFC) began lobbying for the introduction of specialised legislation to address the issue. The bill eventually passed in parliament in 2013¹⁷.

Following the originating of foundational policy, the actual work of developing a policy is carried out by the technocrats in government agencies. As Page puts it “*the dominant view of policy-making remains top-down: a policy is “made”, in the sense of general principles agreed, approved and legitimised by leading politicians, bureaucrats, interest group members or judges; and then it is carried out (or not carried out) by those lower down*”¹⁸. Once Government decides to pursue a policy, it is consulted on by government agencies, to be refined before being converted into draft legislation. Often times a drafter is engaged during the policy development stage to commence drafting a bill.

¹⁷ Koddy, Sumanop, and Pep (n. 14)

¹⁸ Edward C. Page, *Their Word Is Law: Parliamentary Counsel and Creative Policy Analysis*, source: <http://studyonline.sas.ac.uk/pluginfile.php/6348/mod_resource/content/0/Policy_process/parliamentary_counsel_and_creative_policy_analysis.pdf> accessed 5th August 2016

DRAFTING PROCESS

Technically, the OLC is the only official drafting office for PNG, headed by the First Legislative Counsel (FLC)¹⁹. Its main function, under the *Legislative Drafting Services Act 1972* (“*LDS Act*”), *inter alia* is to draft proposed laws for introduction into Parliament, subordinate legislation, statutory instruments (having the force of law).²⁰ As the official drafter, the OLC is responsible for drafting every proposed law. But as discussed below, other persons and offices are involved in drafting as well.

Theoretically, the drafting process follows the policy process, after which the policy is final and complete. However, clearly this is not the case in many jurisdictions, including PNG. Once a policy is finalised by the responsible department, it seeks the approval of Cabinet for legislation to be drafted. Upon approving the finalised policy, Cabinet instructs the FLC to draft the appropriate legislation. This officially marks the commencement of the drafting process. Once FLC receives instructions from NEC, it proceeds to draft legislation, in consultation with the sponsoring agency. This means that the work of the FLC is reduced to merely editing and formatting the proposed legislation, ensuring compliance with ‘house-styles’²¹. If there are major policy changes instructed by the NEC, then the FLC, in consultation with the sponsoring department, inserts the changes into the draft law. Once the FLC is satisfied

¹⁹ The OLC is equivalent to the Office of Parliamentary Counsel in the UK.

²⁰ *Legislative Drafting Services Act 1972*, s. 16 (a) – (e)

²¹ Interview with Marleen Arkop, Acting First Legislative Counsel, and Alice Hwana, Assistant Legislative Counsel, Office of Legislative Counsel (29th June 2016)

with the draft bill, they issue a Certificate of Compliance (COC) is issued, marking the readiness of the bill to proceed to Parliament.

Despite this process appearing straightforward on paper, the reality is that drafting happens in so many different places. However, the reality is quite different from the theory.

The OSS, created under the *Attorney General Act 1989* (“AGA”), has as its primary function the provision of legal advice to State agencies and instrumentalities²². The State Solicitor (SS) also has the function to “*consider and provide legal clearance on the necessity of – (i) proposed legislation; and (ii) proposed amendments to existing legislation; and (iii) proposed regulations; and (iv) proposed amendments to existing regulations*”²³. This clearance comes in the form of a Certificate of Necessity (CON). Following the development of policy, a sponsoring department must seek the clearance of the State Solicitor for a proposed law²⁴. Although not a legal requirement, the State Solicitor’s CON is considered mandatory by recent and current governments. A CON must be issued on a policy submission before NEC can consider it.

The request for CON is usually accompanied by the policy submission to the NEC, which contains the fundamental policy principles, accompanied by supporting documents comprehensively explaining the policy. The draft submission must also be accompanied by Drafting Instructions. Before issuing a CON, the State Solicitor must be satisfied that the proposed policy cannot be implemented in any other way but through legislation, and that no

²² *Attorney General Act 1989* s. 13B(1)(a)

²³ *AGA* s. 13B (1)(d)

²⁴ *AGA* s. 13B (1) (d)

legislation exists that already addresses the matter being addressed, in the manner being proposed. The State Solicitor also assesses the constitutionality of the policy and the proposed law.

Over the years, as this function of clearing proposed laws has been practiced, this service has over time evolved into the provision of drafting services²⁵. It is within this function OSS ends up drafting legislation. First, whilst analysing draft legislation, OSS officers often make considerable changes in consultation with the policy sponsoring agency and its drafter. Secondly, if the sponsor does not have a lay draft, the OSS is usually requested to draft legislation. Involvement of OSS lawyers in the early stages of policy development effectively meant drafting legislation²⁶. Other drafters are private consultants (including international drafters), in-house agency lawyers, DJAG lawyers, and lawyers within the Internal Revenue Commission (IRC). When a person other than OLC drafts legislation, it is usually done alongside the policy-development process. When the CLRC carries out reviews of legislation and recommends changes, it usually provides a draft bill, prepared by its in-house lawyers, with its reports²⁷.

²⁵ Interview with Blanche Vitata, Principal Legal Officer, Office of the State Solicitor, (27th June 2016)

²⁶ Vitata (n 25)

²⁷ Kwa (n 16)

THE LEGISLATIVE PROCESS

The legislative process is used here in the narrow sense to refer to the Parliamentary process. Once a bill has been finalised and certified as compliant by the FLC and approved by the NEC, it proceeds to the national Parliament. The National Parliament's Bills and Papers Division is responsible for preparing bills to be tabled in Parliament. If any issues are raised, they are usually issues of the form of the bill, rather than any substantive matter²⁸.

A bill goes through three readings. The first reading is just an introduction to the house by the responsible Minister, during which only the (short and long) title of the bill is read. After this, the bill must be circulated to all members of Parliament²⁹. The second reading occurs thereafter. Following the second reading, Parliament can resolve that the bill be referred to Committee³⁰, or proceed to pass the bill. After the committee stages, amendments can be introduced to the bill. The FLC is responsible for drafting any amendments proposed and agreed to by Parliament³¹.

The committee system is one of the most important aspects of the legislative (and particularly the Parliamentary) process. The *Constitution* makes allowance for a Committee System (ss. 118—123). This was in response to the Constitutional Planning Committee's "*most significant proposals for the legislature...to ensure that the National parliament will be a truly effective*

²⁸ Interview with Kala Aufa, Acting Clerk of Parliament, National Parliament, (13th July 2016)

²⁹ The PNG Parliament is unicameral.

³⁰ *Parliamentary Standing Order* 203 (b)

³¹ *LDS Act* s. 16 (b)

body” and that Parliament has a very constructive role³². As such, the Standing Orders creates 12 permanent parliamentary committees³³, with allowance for *ad hoc* committees.

Unfortunately, the Committee system is not functioning as well as it was intended to in the first place. There are multiple reasons for this. First is the lack of resources allocated to the activities of the Committees. Where committees are required to carry out any examinations and consultations outside of the Capital, much funding is required. Also, committees are not adequately supported by the appropriate, adequate and qualified staff. Parliament itself does not have a proper research office and the staff do not have qualifications in law or other related expertise³⁴. Secondly, the lack of relevant expertise in the committee membership reduces the effectiveness of the committee. For instance, the Committee on Acts and Legislation is currently chaired by a non-lawyer, which makes it difficult to lead the committee. Parliamentary committee members are not usually appointed with any consideration for their professional background or competence.

Last but not least, is the lack of understanding of Parliamentarians regarding their roles as lawmakers? Many first-time MPs do not see the importance of being fully involved in the Parliamentary process of making laws. Despite Parliament’s efforts to host training and orientation programs for MPs, there is almost nil attendance by MPs³⁵. Generally there is a lack

³² Constitutional Planning Committee, *Constitutional Committee Planning Report 1974*, par 66 ...

³³ *Parliamentary Standing Orders* 19 – 24F (Permanent Parliamentary Committee)

³⁴ Interview with Werner Cahill, Manager, Committee Secretariat, National Parliament (28th June 2016)

³⁵ Aufa (n 28)

of political will to utilise the committee system to provide parliamentary scrutiny over proposed bills. Even the Committee of the Whole has not been utilised. Parliamentary Counsel noted that in the last 10 years or more he has not seen Parliament convert itself into a Committee of the Whole³⁶.

Due to this weakness the parliamentary scrutiny function, it is “*incumbent on the drafters and policy developers to ensure that a bill that reaches Parliament is in the most prepared and comprehensive form possible*”³⁷. As such the importance of responsible drafting cannot be emphasised enough. Generally, bills entering Parliament have passed mostly unchanged, and debates have rarely been comprehensive.

After a law is passed, the Office of the Parliamentary Counsel (OPC)³⁸ assess the law for final editing. Occasionally the parliamentary may pick up a significant error in the law that may affect the policy and the implementation of the law. However, when such an error is identified, and a mere edit cannot fix it, the Parliamentary Counsel advises that formal amendments will have to be made later and the current bill should be progressed and certified as it is. Any editing or formatting issues are done by the FLC on the recommendation of the Parliament OPC.

³⁶ Interview with Richard Whitchurch, Parliamentary Counsel, National Parliament, (13th July 2016)

³⁷ Interview with Leslie Mamu, Principal Legal Officer, Public Solicitor’s Office (30th June, 2016)

³⁸ The OPC is not the same as the FLC. The former is an office of the National Parliament while the latter is an office under the Executive Government, responsible for drafting bills. Both are established under different Acts of Parliament.

CHAPTER 3—THORNTON’S FIVE STAGES OF THE DRAFTING PROCESS

STAGE 1: UNDERSTANDING

Thornton considered that that first step in the drafting process is to *understand* the policy. This starts with the initial communication of intention to create legislation from the policy sponsor. The primary mode of communication between the policy sponsor and the drafter is the Drafting Instructions. The *Drafting Instructions* is the document (or set of documents) that sets out in the proposed policy framework. The secondary method for gaining understanding is *consultation* between the drafter and the sponsor.

Drafting Instructions is an important source for the drafter’s complete understanding of the intention behind the proposal³⁹. It is the request from policy and legal officers to drafting officers to draft legislation within the parameters set by the instructions⁴⁰. Marcia argues for the importance of drafting instructions in contributing to quality legislation, noting that in Grenada the “*lack of instructions or none at all poses a difficulty for the drafter to understand*

³⁹ Professor Helen Xanthaki, *Thornton’s Legislative Drafting* (5th edn, Bloomsbury, 2013), 146

⁴⁰ Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (2014, Hart, Oxford and Portland, 2014) 23

the rationale behind the drafting of legislation”⁴¹. Fa’asau also identifies the lack of comprehensive drafting instructions as a significant challenge for drafters in the Pacific⁴².

However, the obvious problem with drafting instructions is that the drafter has little or no control over it, especially where the drafter is confined to a specialised drafting office. As such, in the strictest sense the drafter cannot assist the instructor in writing drafting instructions. Of course, this does not preclude the drafter from having an influence over the quality of the drafting instructions. In the spirit of good working relationships it is possible for a drafter in a government drafting office to be involved early in the policy stage. There is no absolute line between the function of drafting legislation and providing timely advice that will lead to the creation of quality law. To that extent, either through the existence of guiding documents such as manuals, or through ad hoc pre-drafting consultation, the drafting office can influence the quality of the drafting instructions.

Thornton’s four primary principles prescribe the desired contents of drafting instructions are: (i) background information on the problem or mischief being addressed; (ii) the purpose(s) of the proposed legislative framework; (iii) the means by which those purposes can be achieved; and (iv) the impact of the proposed legislation on existing legislation.

⁴¹ Christine Marcia, ‘Influence of Drafting Instructions on Quality of Legislation in Grenada’ LLM ALS Dissertation 2014

⁴² Mary Victoria Petelo Fa’asau, ‘Challenges Faced by Legislative Drafters in Samoa and Other USP Member Countries’ (2012) 14 Eur. J.L. Reform 191

In relation to *background* information, the drafting instruction should clearly state the particular problem or mischief in society that has been identified, and by what means it has been identified. Such activity may include consultations, research papers or other groundwork such as the proceedings of a commission, or advisory body inquiry⁴³. The drafting instructions also have to succinctly provide the purpose of the proposed legislation. That is, the particular and specific outcomes envisioned by the sponsors. Without a clear purpose the drafter may not know where to begin drafting, a legislation that can be effective, and cannot accurately give structure to the product⁴⁴.

Next the drafting instructions must specify the *means* by which the objectives are to be achieved. If an administrative body is to be established, it must be clear how it will be set up—its internal structures, its functions and powers, and other administrative features to be given. If there is to be compliance with new directions coming from the law, it should be clear what are the proposed measures for ensuring compliance and how will any breach be dealt with.

The instructions must also, as far as can be attained by the sponsors, prescribe the *impact*, potential or actual, of the proposed legislation on other laws (either legislative or common law) currently in operation or known to be proposed. The drafting instructions should describe the place of the new regulatory scheme within the existing circumstances. The drafting instructions

⁴³ Professor Xanthaki (n 39) 148

⁴⁴ Professor Xanthaki (n 39) 149

should do its best to explain legal, social or administrative arrangements which may challenge or be challenged or interfered with by the new legislation.

The significant challenge to OLC's work, apart from the lack of staff, was the high volume of draft legislation, rather than drafting instructions⁴⁵. The drafters at OLC prefer to deal with drafting instructions so that the broad aspects and objectives of the policy can be understood. It can serve as a proper starting point for drafting. However, OLC admitted that due to the lack of capacity it conceded that having to start fresh drafts would be problematic and impractical in light of the timing required for some legislation.

The second means for gaining understanding, *consultation* is the bedrock for achieving full communication and clarity and understanding, as well as to provide for refinement through the later stages of drafting. Where drafting instructions fall short on the information required to clarify the proposal and all its elements, the drafter and the instructors (sponsor) should talk to each other to ensure the details are communicated comprehensively. Hashim makes the argument for the importance of consultation among stakeholders, stating that the lack of consultation leads to very poorly written and inefficient laws in Malaysia. Hashim notes that in recent times the importance of taking the opinion of the public and from stakeholders has come to the fore when some bills coming before the Parliament were criticised for the lack of views taken from those parties. Bills were even postponed as a result of the lack of consultation, to allow for review and refinement⁴⁶.

⁴⁵ Arkop and Hwana (n 21)

⁴⁶ Noor Azlina Hashim, 'Consultation: A Contribution to Efficiency of Drafting Process in Malaysia' (2012) 14 Eur. J.L. Reform 142

Drafting Instructions and *Consultations* are but two means mentioned by Thornton to foster understanding. The drafter is not precluded for applying his own initiative in research and investigation in order to improve his grasp on the task at hand. Apart from the drafting instructions and the consultations, the drafter can utilise other to aid understanding. Such other information could be any material that is relevant to the proposal, and may include public statements by the Minister or government officials, discussion papers, academic papers, or other policy papers that may not have been provided by the officials of the sponsor but can be easily accessed by the drafter. The bottom line objective is that the drafter gains and understanding of the proposal.

STAGE 2: ANALYSIS

The drafter, having gained a comprehensive understanding of the proposal, must then sit down to consider carefully, and analyse the proposal before him. As one can imagine, there may be a blurred line between Stage 1 (understanding) and Stage 2 (analysis). While *understanding* is back-looking and one-off, *analysis* of the proposal is a forward-looking exercise that seeks to place the proposed legislation in the larger scheme of things (mostly legal) within the jurisdiction. *Understanding* is relevant to the policy *per se*. It is relevant to gaining an contextual view before moving forward with the task at hand. Page proposes that the drafting stage is the likely to be the first opportunity for *rigorous scrutiny* of the policy⁴⁷. This supports

⁴⁷ Edward C. Page, 'Their Word Is Law: Parliamentary Counsel And Creative Policy Analysis', source <http://studyonline.sas.ac.uk/pluginfile.php/6348/mod_resource/content/0/Policy_process/parliamentary_counsel_and_creative_policy_analysis.pdf> accessed 5th August 2016

the argument that the role of the drafter is tremendously important for the purpose of refining a policy.

Thornton proposes that the particular steps to be taken in this analysis are: (i) existing law relating to the subject matter; (ii) the special responsibility areas within which the new scheme will fall into; and (iii) the practicality of the scheme in the real world⁴⁸.

Thring suggests that once the instructions are received, the drafter's first step is to acquaint himself with the whole of the existing law in relation to the subject matter of the act which he is directed to prepare⁴⁹. This involves looking both into legislation and into common law. Why is it necessary to look into existing legislation and common law? The New Zealand Legislation Advisory Committee Guidelines⁵⁰ provides the following key objectives for analysing existing law:

- i. Any existing legislation that relates to the same matters or implements similar policies to those of the proposed legislation should be identified.*
- ii. Any conflict or interactions between new and existing legislation should be explicitly addressed in the new legislation.*
- i. New legislation should not re-state matters that are already addressed in existing legislation.*

⁴⁸ Professor Xanthaki (n 39) 151

⁴⁹ -- "Instruction for Draftsman" 2 Alb. L.J. 81 1870-1871

⁵⁰ New Zealand Legislation Advisory Committee, *Legislation Advisory Committee Guidelines*, 2014, <<http://www.lac.org.nz/guidelines/lac-revised-guidelines/>> accessed 6th August 2016 [NZ LAC]

- ii. *New legislation should as far as practicable be consistent with fundamental common law.*
- iii. *The interaction between the new law and common law should be properly and explicitly addressed.*
- iv. *New legislation should not address matters that are already satisfactorily dealt with by the common.*
- v. *Precedents should only be used if consistent with the proposed legislative scheme and purpose⁵¹.*

There are several vitally important reasons to investigate existing laws in PNG. First, to ensure Constitutionality. The constitutionality of the proposed law will determine its validity and hence its survival. Hence its ultimate effectiveness. Section 11 of the *Constitution* provides that all legislative acts (and even executive or judicial acts), must be consistent with the constitution. If any act is inconsistent, it is invalid to the extent of the inconsistency. Secondly, laws must be consistent and coherent. A law that detracts from legal principles well-established, can cause confusion in the minds of the users and implementers. This would inevitably lead to lack of action and implementation. Inconsistent laws, as we discussed below, can lead to abusive interpretations resulting in violation of the rule of law.

Thornton also suggests that within this stage of analysing the proposal, the drafter can consider comparable laws in other jurisdictions to take some assistance⁵². This is particularly important

⁵¹ Legislation Advisory Committee, *Legislation Advisory Committee Guidelines*, 2014, 11 <<http://www.lac.org.nz/guidelines/lac-revised-guidelines/>> accessed 6th August 2016

⁵² Professor Xanthaki (n 39) 152

when the proposal is a completely new scheme that would be a new area for the jurisdiction. The drafter may have to look for model laws to assist him in drafting a similar scheme for the jurisdiction, of course with the appropriate contextualizing.

In respect of special responsibility areas, the drafter is required to consider carefully whether certain Constitutional principles are complied with in the proposed legislation, especially in light of the fact that legislation naturally interferes with people's rights and freedoms,⁵³. Proposed laws that interfere with personal rights such as access to law, due process, natural justice⁵⁴ should be made only within the limits of constitutional laws. The failure to make a careful analysis of these provisions may give rise to the law being struck down or declared inconsistent to human rights laws. The drafter, being in a position to assess the proposed legal scheme, is responsible for ensuring that legislation is consistent with these principles and that the interference with people's rights is correctly executed.

STAGE 3: DESIGN THE LAW

The *design* stage involves planning the scheme and structure of the proposed legislation. Design of legislation refers to two spheres: first is the fitting of the proposed legislation within the legal system, and second is the internal structure of the bill. The first task naturally flows

⁵³ Professor Xanthaki (n 39) 152

⁵⁴ Professor Xanthaki (n 39) 153

out of the *analysis* stage. Driedger refers to this as the *legislative plan*—the legislative method by which the policy is to be achieved⁵⁵. In respect of the second task, Crabbe refers to this as the *legislative scheme*, the architectural plan of the building that is called an Act of Parliament⁵⁶.

Designing the law starts with a question of whether a law is necessary. This is a perfect bridge between the analysis and design stage. Whilst it may be counter-intuitive to specific instructions to draft legislation, the drafter may discover that the particular solution being offered is not necessary as the problem (mischief) is adequately addressed either by administrative or existing legislative means⁵⁷. Having reached an understanding of the objectives of the policy, the drafter may realise that administrative action, rather than legislative, could be more effective and efficient. This stems from the notion that legislation should be the last resort, or rather that it should only be the means when absolutely necessary. It is the duty of the drafter to advise policy sponsors of better means of achieving the desired policy outcome⁵⁸. Unnecessary legislation can cause misunderstanding and consequently increase the risk of misapplication⁵⁹, not to mention the substantial financial and time cost of creating the law and implementing it.

In PNG the official responsibility of establishing the *necessity* of legislation is in the OSS, as discussed briefly in Chapter 2. To make this call, the State Solicitor reviews the proposed

⁵⁵ Driedger (n 3) xvii

⁵⁶ Crabbe: Legislative Drafting (Cavendish:1993) p. 16, in H. Xanthaki presentation <<http://studyonline.sas.ac.uk/mod/resource/view.php?id=590>> accessed 10th August 2016

⁵⁷ Professor Xanthaki (n 39) 157

⁵⁸ Driedger (n 3) xv

⁵⁹ Professor Xanthaki (n 39) 157

legislative actions against the Constitution, existing legislation and subordinate legislation. Apart from assessing the proposal as a whole, particular features are also considered. Where the State Solicitor is not satisfied that a proposed law is not necessary, then a CON can be refused and a recommendation can be made for review and reconsideration. Government has placed in high regard the State Solicitor's recommendations so that if the CON is withheld, a proposal will not be considered by Cabinet⁶⁰. However, at times when the government is determined to pass a law, it may disregard the State Solicitor's recommendation and proceed with a law. The fact that the State Solicitor is legislatively responsible for determining the necessity of propose legislation does not remove the responsibility of drafters early on in the process from making a prudent investigation into the matter as part of the drafting function.

After determining necessity of legislation, it is then important to determine whether the law would be a stand-alone legislation that does not amend any legislation, or an amending bill. While Thornton does not necessarily consider this to be the immediate next step⁶¹, it seems to naturally follow on from the determination of whether a law is necessary. This determination will affect the structure of the proposed law, which is the next thing for the drafter to consider. The structure is important as it will assist the drafter to determine important contents and

⁶⁰ Vitata (n)

⁶¹ Professor Xanthaki (n 39) 159

elements of the law, giving a visual of the finished product⁶². If it is more appropriate to do so, an amending act is more preferable than a new legislation⁶³.

Thornton offers several high-level principles that apply when designing the structure of a draft bill⁶⁴. First there is simplicity—the structure should be as simple as possible, without affecting the objectives of the law. Drafter should avoid creating legal concepts and structures that may not add value to the legal scheme that is being created to give effect to the policy objectives. Secondly, the drafter must adhere to conventional (jurisdictional) practice regarding technical provisions such as commencement clause, definitions, purpose provisions, etc. For instance, for bills in PNG that will or may affect special areas such as human rights or constitutional law, there must be a provision for “Constitutional Compliance” as one of the first clauses. The OLC is responsible for ensuring that bills are compliant with “house styles”. Even where it receives drafts bills from sponsoring agencies, it is authorised to restructure a bill where it considers appropriate. Consistency with the current conventions of drafting is the basis for the FLC’s Certificate of Compliance⁶⁵. Thirdly, the drafter must bear in mind that he may have to compromise regarding the arrangement of the content if political expedience requires it⁶⁶.

⁶² Professor Xanthaki (n 39) 157

⁶³ Professor Xanthaki (n 39) 158

⁶⁴ Professor Xanthaki (n 39) 158

⁶⁵ Arkop and Hwana (n 21)

⁶⁶ Professor Xanthaki (n 39) 158

STAGE 4: COMPOSITION AND DEVELOPMENT

This is the actual drafting stage, where the drafter begins to put “pen to paper” and start drafting the law. It is recommended that a first draft is best done by a single drafter rather than by a drafting committee, as a committee can be bogged down by endless discussion over trivialities⁶⁷. Apart from Thornton’s principles relating to definitions, purpose provisions and supplementary aids, in this section discussion is also had in relation to the Xanthaki’s second set of tools for effectiveness which is precision, ambiguity and clarity⁶⁸.

The first draft is very important as it will be the basis for further consultation with sponsors, providing a clear backdrop for identifying legal issues. While some issues are matters of form which can be sorted out internally by refining the draft, others will require consultation and discussion externally on the policy and legal framework, and may lead to drastic substantive changes.

There are five important elements the drafter should note when composing a draft. Thornton provides several rules for those five important elements of drafting a bill: the definitions, purpose provisions, supplementary aids, use of precedents (legal transplants) and referential legislation. For the purpose of this paper, focus is given *purpose provisions*, use of *legislative precedents* and *supplementary aids*, as this will be useful for discussions below on tools for drafting effective laws.

⁶⁷ Driedger (n 3) xvii

⁶⁸ Xanthaki (n 40)

In relation to definitions, Thornton proposes the following 10 rules: (i) a word or expression should be defined only if the definition assists readers; (ii) a definition should not include a substantive rule or matter; (iii) a definition should not stipulate an outrageous or extravagant meaning; (iv) a definition should be complete in itself; (v) a definition should not indulge in avoidable or unjustifiable referential legislation; (vi) a term manufactured for the purposes of a definition should be as descriptive and helpful to readers as possible; (vii) a term or phrase already defined in the interpretation provision should not be included if it is to carry the same meaning; (viii) a definition need not state that it applies to the grammatical variations of the defined term; (ix) a definition should define only one word or expression; and (x) a word or expression that is not used in the bill should not be defined⁶⁹.

The important thing for the drafter to bear in mind when drafting definitions is that the key purpose of those rules for definitions is to avoid ambiguity and confusion, and tedious repetition. Definitions should not be overused but must add important value, especially in regard to comprehending the text of the enactment, by easing the communication⁷⁰. The function, style and positioning of definitions in an enactment should remain consistent with the conventional use within the jurisdiction. Within the sphere of the avoiding ambiguity, are three specific functions: (i) *delimiting* definitions (giving a limited definition to a term); (ii) *extending* definitions (giving a meaning that goes beyond the meaning of common usage); and (iii) *narrowing* definitions (reduce the meaning of a term). In addition, definitions function as label for concepts that carry multiple words, the repetition of throughout the legislation would

⁶⁹ Professor Xanthaki (n 39) 170-172

⁷⁰ Professor Xanthaki (n 39) 165

be tedious. In order to write a good a definition provision, a drafter must know the function of each term to define, in order to determine the value they bring to the legislation, and how to construct each definition⁷¹.

In relation to *purposive provisions*, it is becoming increasingly important for the drafter to include them in legislation, due to the judiciary's increased use of the purposive approach to statutory construction⁷². A purpose provision is a “*clear statement of the overall purpose of an act*”⁷³. It provides for the reader an understanding of the objectives and forecasted outcomes of the law. Where there is a dispute regarding the interpretation of any provision in a bill, the soundest interpretation would be that which is most consistent with the purpose of the bill. According to Sir William Dale, a well-constructed purpose provision can also help clear the mind of the legislator too⁷⁴. This would allow them to make a more informed scrutiny and decision in regard to the bill.

At best a purpose provision should be drafted in cooperation with instructing officer, ensuring that the policy goals are articulated by legislation⁷⁵. Thornton provides 5 rules for drafting a purpose provision. (i) it must be drafted early in the drafting process, so that the objectives can be refined as the process continues; (ii) it must state the purpose and objective as accurately and unambiguously as possible; (iii) the language must be consistent with language of

⁷¹ Professor Xanthaki (n 39) 167

⁷² Professor Xanthaki (n 39) 176

⁷³ Professor Xanthaki (n 39) 176

⁷⁴ Professor Xanthaki (n 39) 176

⁷⁵ Professor Xanthaki (n 39) 179

substantive provisions; (iv) it is better to state the purpose in specificity rather than in general; and (v) purpose provisions should not be substantively inconsistent with subsequent provisions⁷⁶.

The fourth element of composition according to Thornton is the use of *supplementary aids*. These are tools that aid a reader or user of law to understand or navigate legislation, such as explanatory and sign-posting of provisions, explanatory notes, examples, flow-charts, graphics such as formulas, diagrams, pictures, and indexes. The drafter should be careful in considering whether to include supplementary aids. Factors to consider are the complexity of the subject matter and the volume of information contained in the bill, and should try to empathise with the reader—asking whether the aids will help or impede understanding⁷⁷. A law should not be any more complex than necessary and should not have more information than necessary.

PNG does not practise the use of supplementary aids as of date, except for occasional explanatory notes which accompany bills on the floor of parliament. However, the recent enactment of the *Organic Law on Sovereign Wealth Fund* contains a formula that illustrates a certain rule in the law⁷⁸. As the practice of legislative drafting evolves and matures, the use of supplementary aids may increase significantly over time in PNG.

⁷⁶ Professor Xanthaki (n 39) 178-180

⁷⁷ Professor Xanthaki (n 39) 183

⁷⁸ See *Organic Law on Sovereign Wealth Fund*, s. 12

Finally, *legal transplants*. Lockert quotes Chen Lai that transplantation occurs “*where law travels from one jurisdiction to another by way of transposition, imposition, reception, or intended borrowing.*”⁷⁹ It can refer to both to the legal norm (i.e. the idea) and the legislative text. There are two key benefits. Firstly, the drafter does not have to “reinvent the wheel” so it saves time. Secondly, the effectiveness of the foreign legislation can be assess *ex post*, giving the drafter a clear picture or vision regarding the effectiveness of the proposed legislation. It can also provide a comprehensive checker or proofing tool on all the matters to be considered in regard to the matter⁸⁰.

Being a relatively young country, many of PNG’s law are transplants from the Australia. It still looks to other jurisdictions for precedents. For example the FPA was drafted from models of neighbouring countries of Vanuatu and Fiji. However, using legal transplants has its dangers if the drafter is not careful as it can create inconsistency in style and language⁸¹. A transplant may not be applicable in the receiving context and therefore may be ultimately ineffective. The FPA is proving difficult to implement and enforce, due to the contrasting context of PNG⁸² which makes enforcement very difficult, unlike in Fiji or Vanuatu with small populations.

⁷⁹ Dr. Martin Cai Lockert, ‘Transplanting and Customizing Legal Systems: Lessons from Namibian Legal History’ (2014-2015) 13 Rich. J. Global L. & Bus 173

⁸⁰ Lockert (n 79)

⁸¹ Professor Xanthaki (n 39) 192

⁸² Koddy, Sumanop and Pep (n 14)

STAGE 5: SCRUTINY AND TESTING

The final stage is the *scrutinising and testing* of a bill. In this stage which the ‘final’ draft is reconsidered critically and objectively, in all its aspects, especially in regard to both its form and substance⁸³. This final stage usually follows the point during the development process in which the drafter, and maybe the sponsoring policy officers are satisfied that the draft is complete and ready to progress to Parliament. This is when the drafter must raise some vital questions regarding the bill. It could be applied to hypothetical situations to check its applicability and usability and effectiveness.

Scrutiny and testing of a draft bill can occur on two levels: first, the policy level; and second the form.

Thornton provides the following key questions for the drafter to ask when reviewing the draft on the *policy* level. Firstly, will the propose law achieve the stated objectives of the policy? That is, would the draft be providing that legislative means to achieve the policy outcome? This is an example of a harmonious flow from the first stage of analysis and understanding. Secondly, does the draft law fit harmoniously into the general body of the law? Whilst it is possible that the OSS has looked careful into the relationship of the proposed law with other laws, the scrutiny and testing stage could provide the feedback necessary to refine the draft law. Thirdly, does it comply with basic principles of the legal and constitutional system?

⁸³ Professor Xanthaki (n 39) 199

Fourthly, does it form a coherent well-structured whole, and does it flow logically? Fifthly, are the content and language of the draft as clear and comprehensible as the drafter can make them?⁸⁴

This process of scrutinising and testing can be done in collaboration with policy and instructing officers. It requires in-depth look into the possible effects and interpretations of the provisions. The drafter needs to isolate the legal provision he has drafted, explain it back to the instructing officer and ask the instructing officer whether the resulting interpretation or meaning of the provision is acceptable and consistent with the intention.

In PNG this occurs on the different stages of drafting, in between the main offices that consider draft bills—the OSS and the OLC. The OSS’s clearance function allows it to look at draft bills and query the meaning and interpretation of draft provisions. Final drafts can also be scrutinised when being presented formally to the policy sponsors before being sent to the State Solicitor for clearance⁸⁵.

When scrutinizing the draft bill on the *form* level, the drafter has to consider things such as consistency of language, references to other legislation, use of definitions, numbering and lettering, spelling, capitalisation, punctuation, arrangement of provisions, parts, divisions, and other matters of form⁸⁶.

This exercise can best be done with the assistance of a drafting colleague who has “fresh eye” on the bill—that is, has no previous involvement in the policy or the drafting process. They can

⁸⁴ Professor Xanthaki (n 39) 200

⁸⁵ The author has personally experienced this in drafting of the *Organic Law on Sovereign Wealth Fund*

⁸⁶ Professor Xanthaki (n 39) 200-201

be invaluable in spotting weaknesses or mistakes in a draft bill, thus allowing for a very effective refining process. The OLC of PNG provides such sets of eyes on bills in many cases. They do not see the bills until they are brought to them for checking, which is when many mistakes can be identified and the national style and format can be ensured⁸⁷.

In addition, consulting stakeholders and the public in general, can raise issues previously unnoticed by the drafters and policy officers. Workshopping a bill in order to hypothesise its implementation can provide the much-needed testing.

Parliamentary scrutiny could also play a vital role in scrutinizing and testing proposed legislation. However, as discussed in previous chapter, that function has not been effectively dispensed. An effective committee system, as envisioned by the CPC, would have ensured that the Parliament's role in scrutinising bills was properly enacted.

⁸⁷ Arkop and Hwana (n 21)

CHAPTER 4—EFFECTIVENESS OF LEGISLATION

As the purpose of this paper is to prove the necessity of drafters in PNG to fully utilise the Five Stages to create effective law, it is necessary to appreciate the essence of effectiveness of legislation. Knowing what makes effective legislation would impact the method of drafting and law-making.

Xanthaki posits that the aim of a drafter is to create legislation with high *efficacy* and high *effectiveness*⁸⁸. Efficacy is the ability or extent of legislation to achieve its “regulatory objectives”. That is, to attain whatever legal effect it is supposed to have within the legal system in which it is enacted. Efficacy does not necessarily bring into consideration the actual societal effect of the enactment. Such is the province of effectiveness. Standing alone, it is not a relevant matter for the legislation, to consider whether the environment is actually cleaner due to improved human behaviour as a result of an enactment to ban and punish littering, but merely that the required system put in place to influence such behaviour has been established and enabled with the necessary power to influence human behaviour. In this narrow sense, in a way the law is a means to a means, not necessarily a means to an end. The law is efficacious when it legitimises a regulatory action. But this does not necessarily mean that it is effective. While the drafter may resign himself to creating whatever legal framework required by policy

⁸⁸ Xanthaki (n 40) 5

sponsors, thereby ensuring efficacy, a proper regard for the purpose of law would motivate a drafter to strive for effectiveness—making a real impact in society.

According to Mousmouti, effectiveness of legislation cannot be universally defined, but that the various stakeholders interpret it in different ways⁸⁹. Mader posits that effectiveness has to do with the real socio-economic effects of legislation. Effectiveness is the “*extent to which the observable attitudes and behaviours of the target population (individuals, enterprises, public officials in charge of the implementation or enforcement of legislation) correspond to, and are a consequence of, the normative model; that is, to the attitudes and behaviours prescribed by the legislator.*”⁹⁰ Snyder suggests that effectiveness is driven by the reality that law affects political, social and economic life, not simply the elaboration of the legal doctrine⁹¹. It is therefore effectual not on its own disciplinary strengths but on the cooperation and participation of disciplines outside of the law. Effectiveness therefore includes *implementation, enforcement, impact and compliance*⁹².

Effectiveness of legislation is identified by noting the actual changes that happen in society as a result of the implementation of the law. It is important to recognise particular elements of effective legislation in order to identify drafting methods and tools to make effectiveness a reality. As mentioned, most of the drafter’s impact is in drafting. But since effectiveness is

⁸⁹ Maria Mousmouti ‘Operationalising Quality of Legislation through the Effectiveness Test’ (2012) 6:2 *Legisprudence*, 191-205

⁹⁰ Luzius Mader, ‘Evaluating the Effects: A Contribution to the Quality of Legislation’ (2001) 22 *Statute L. Rev.* 119–131, 126

⁹¹ Francis Synder, ‘The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques’ (1993) 56 *Mod. L. Rev.* 19

⁹² Synder (n 91)

mostly influenced by the soundness of the policy, the extent of the drafter's impact on effectiveness is limited (or extended) by his impact on final policy, embodied in legislation. Other elements are attributable to the actual text and structure of the legislation, including the design and scheme of it, so the drafter has more impact on those features. Needless to say, there is often an overlap between policy and legislative effects on the legislation.

Mousmouti does provide the "effective test", which is discussed below, as a means of achieving quality legislation as it allows a holistic view of quality of legislation⁹³. Mousmouti argues that effectiveness of legislation occurs when the *objective*, the *means* and the *outcomes* of the legislation are in harmony⁹⁴. First, the objective must be clearly articulated in legislation, in explanatory notes and capable of being clearly articulated in any Regulatory Impact Analysis done post enactment. Second, the Means must be appropriate, proportional and coherently stated in the legislative text. The mechanisms must be realistic and enforceable, and must provide for clear indicators for measuring impact and outcomes. This would facilitate the assessment of causal relationships between legislative action and outcome. Lastly, the Outcomes are capable of comprehensive and detailed assessment in post-legislative evaluations, including from reports of cases, independent studies, or major judicial decisions⁹⁵.

⁹³ Mousmouti (n 89)

⁹⁴ Mousmouti (n 89) 203

⁹⁵ Mousmouti, (n 89) 204

Snyder, looking into the context of law-making in the European Union, considers that there must be certain preconditions that will aid or contribute to effective law⁹⁶. The principal means for achieving effectiveness of legislation is compliance, implementation, impact and enforcement⁹⁷.

The Organisation for Economic Co-operation and Development (OECD) encourages improvement by member countries in developing, implementing, evaluating and revising regulations⁹⁸. Among the many forms of regulation is parliament-enacted legislation⁹⁹, which is the focus of this paper. As such the OECD guidelines can be applied, to the appropriate extent, to PNG's legislative development process. The OECD's Reference Checklist for Regulatory Decision-making ("Checklist") suggests several criteria that can be used to assess the quality of a "regulatory decision". The relevant criteria are, (i) correct definition of the problem; (ii) proper legal basis for regulation; (iii) regulation must be clear, consistent, comprehensible, and accessible to users; (iv) all interested parties must have had the opportunity to present their views; (v) the appropriate method of ensuring compliance¹⁰⁰. In regard to legislation, most of these criteria fall within the realm of policy-development, however, some are still relevant for the purpose of drafting and developing legislation and can be taken as valuable guidelines to the drafter.

⁹⁶ Snyder (n 91)

⁹⁷ Snyder (n 91)

⁹⁸ OECD, "Recommendation of the Council on Improving the Quality of Government Regulation", <<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=128>> accessed 30th July 2016

⁹⁹ OECD (n 98)

¹⁰⁰ OECD (n 98)

From the above we can deduce some key indicators of effective legislation, which are relevant for the purposes of this paper. These indicators include: specific outcomes and clear means to achieve outcomes; rapid and accurately comprehensive; ease of implementation and appropriate compliance and enforcement mechanisms; inherently testable; minimal risk of litigation; minimal amendments over time; well-consulted; consistent with other laws and internally; and compliance with Constitutional law. These are qualities that can directly result from the drafting of the text and structure of the draft legislation, or from the substantive legal norms created by the text in the bill. From these the drafter will be able to identify key tools and techniques that can be utilised to produce the intended effects—thereby improving the effectiveness of legislation.

CHAPTER 5—PRECONDITIONS AND PRELIMINARY TOOLS

QUALIFICATION AND TRAINING OF DRAFTER

Much of the inefficiencies of the drafting process can be alleviated if the drafter has the adequate training and/or is sufficiently experienced in legislative development. Fa'asau notes that many Pacific countries lack experienced and qualified drafters, thus stretching lawyers in respective Attorneys General offices¹⁰¹. According to Markman this shortage of legislative drafters is a worldwide problem¹⁰² citing a statement by Commonwealth Law Ministers,

Law Ministers considered the perennial problem of the shortage, recruitment and retention of legal drafters and acknowledged that it was not enough to focus on training alone.

There are multiple reasons for such shortage. One reason is the general unattractiveness of the field of legislative drafting. Fa'asau notes this in her jurisdiction of Samoa, noting that the technical nature of the field makes it 'boring' and less exciting than litigation, not mentioning society's high regard for litigators makes that field more attractive¹⁰³. As mentioned, Papua New Guinea faces this same challenge. The OLC has only 5 drafters. The OSS and DJAG does

¹⁰¹ Fa'asau (n 42)

¹⁰² Sandra C. Markman, Training of Legislative Counsel: Learning to Draft without Nellie, 36 Commw. L. Bull. 25, 2010

¹⁰³ Fa'asau (n 42) 212

not have trained and qualified drafters except for a handful who have done several short trainings. In most cases private lawyers in PNG engaged to do drafting do not necessarily have the training and the technical expertise to carry out such a function. The Parliamentary Counsel acknowledged that he did not have any legislative drafting qualifications, and would therefore pass on drafting tasks (especially for private MPs) to any other lawyer in National Parliament who had the necessary qualifications¹⁰⁴.

Another reason alluded to in the Commonwealth Law Ministers' statement above is that legal drafters are not easily retained. Retention of drafters is not easy for the same reasons that make it difficult to attract them. A drafter may need to be very dedicated to such a task in the long run in order to remain in it. With high turnovers, it is only natural that a drafting office, especially in small jurisdictions, will suffer from shortage of highly skilled staff. Fa'asau noted that the majority of the 39 drafters identified in the 'USP' countries she investigated have less than 3 years' experience¹⁰⁵. But this is at least an improvement from many years ago.

As a result of this shortage of trained drafters, drafters tackle drafting tasks with limited understanding of the techniques and tools required to prepare legislative that will be effective.

The Commonwealth Law Ministers' statement continues:

¹⁰⁴ Whitchurch (n 36)

¹⁰⁵ Fa'asau, pg 212

*This problem required a more sustainable approach based on the adoption of different strategies under broad headings which included: institutional strengthening, recruitment and retention of drafters and capacity building.*¹⁰⁶

Training programs have to be contextualised to meet the requirements of drafting offices, and the jurisdictions they are located in¹⁰⁷. As Mader puts it, “*the practical training of legists, persons involved in the preparation of legislation, is closely associated with their institutional and legal environment*”¹⁰⁸. It is thus important to establish a proper training, and to set up institutional backing for effective cultivation of drafters and the drafting skill.

Traditional training methods include, on one extreme, instructor-driven delivery—where an instructor lectures the trainee—and on the other extreme, observational apprenticeship—where the apprentice is expected to learn from the master just by watching them work¹⁰⁹. The formal training of drafters has been advocated by the likes of Xanthaki¹¹⁰, Berry and Jaja. Xanthaki and Berry in particular have advocated for formal training to supplement the traditional master-apprentice approach, primarily because it ensures the learning of universally general principles to be appreciated apart from particular jurisdictional conventions.

¹⁰⁶ Communique, Meeting of Commonwealth Law Ministers, Edinburg, 2008, in Markman (n 102)

¹⁰⁷ Markaman (n 102) 26

¹⁰⁸ Mader (n 90) 121

¹⁰⁹ Markaman (n 102) 26

¹¹⁰ Helen Xanthaki, ‘Duncan Berry: A Visionary of Training in Legislative Drafting’, No. 1 of 2011 Loophole, 18-26

The vision for a well-trained drafting office would be to have skilled personnel with the ability to draft legislation within the time required with minimal supervision. While general qualification as lawyers allows them to address the *understanding* stage, the other four stages requires particular skills and techniques that comes from drafting qualifications. A highly skilled drafter will add value to a drafting process that would in turn add value to the quality of the legislation being churned out.

The master-apprenticeship system has worked well for centuries, and is still relevant. Working in a drafting office is arguably still the best way to learn drafting¹¹¹. But there is room for legal education based on the evolving profession of law practice, and legislative drafting—the “*sub-discipline of law*”¹¹².

DRAFTING INSTRUCTIONS GUIDE

The importance of drafting instructions has been discussed above. Drafters prefer drafting instructions rather than draft bills¹¹³. Drafting instructions are usually prepared by an *instructing officer* within the sponsoring agency or department, or non-state actors. As such, they are not the drafter’s responsibility. Yet the drafter is faced with the responsibility of gaining a comprehensive understanding of the intentions of the policy sponsors. The quality of

¹¹¹ Tonye Clinton Jaja, ‘Teaching Legislative Drafting: The Necessity for Clinical Legal Education’, (2012) 14 Eur. J.L. Reform 104

¹¹² Xanthaki (n 110)

¹¹³ Driedger(n 3) xix

drafting instructions and the communication skills of the drafter affects the time required and the quality of the drafting process.¹¹⁴ There is currently no standard for proper drafting instructions in PNG; with instructing officers providing instructions to the drafter on piecemeal bases and mostly verbally. The less comprehensive the instructions are, the more time it would take for the drafter to understand and then to analyse, thereby increasing the time taken to draft legislation. This leads to a less efficient law-making process.

Despite being removed from the drafting instructions, and in light of the drafter's understanding of a quality drafting instruction, the drafter (i.e. the FLC) can influence the form of drafting instructions by issues a guideline for drafting instructions. The issuance of proper guidelines would improve the quality of drafting instructions, subsequently improving the quality of legislation.

The guide would contain the necessary tools, and even templates to assist instructing officers to prepare a comprehensive draft that meets the drafter's needs. It would articulate the necessary elements that need to be covered, some of which are discussed in Chapter ... above. The Queensland Government provides an example of such a guide, stating that an instructing officer "*needs to be familiar with political and administrative considerations, the legislative context and things required to be dealt with in legislation*"¹¹⁵.

¹¹⁴ Department of Premier and Cabinet, 'The Legislation Handbook', (Queensland Government, 2004), 3.4.1 <https://www.legislation.qld.gov.au/leg_info/publications/legislation_handbook.pdf> accessed 25th August 2016

¹¹⁵ Office of Queensland Parliamentary Counsel, *A Guide for Effective Legislative Drafting Instructions*, <<http://bit.ly/2aMmVeE>> accessed 10th August 2016

From the interviews with the OLC and the OSS, it was clear that the lack of proper drafting instructions can cause misunderstanding and be restrictive in terms of actual designing and drafting legislation¹¹⁶. It cost considerable time to clarify instructions on objectives and actual intentions when a lay-draft was presented rather than drafting instructions.

A drafting instruction guide meets the challenge of poor policy instruction, highlighted by Fa'asau as prominent challenge in the Pacific¹¹⁷. Poor policy instruction can lead to poor understanding which can lead to poor drafting. This inevitable increases the risk of resulting in ineffective legislation. Along with this, proper training and awareness in respect of drafting instructions carried out for instructing officers will assist in addressing this challenge. Since drafting instructions are a pre-requisite for understanding and analysis, the drafter would do well to influence the quality of drafting instructions coming from sponsoring agencies and instructing officers.

Thornton provides guidelines on contents for drafting instructions, which can easily be adopted and contextualised for any jurisdiction. The relevant elements have been discussed in Chapter Three in the *understanding* and need not be repeated here.

¹¹⁶ Interview OLC; and Interview OSS

¹¹⁷ Fa'asau (n 42)

LEGISLATIVE PROGRAM

A legislative program, such as that practiced by the United Kingdom¹¹⁸, is not a regular and systematic practice in PNG. The OLC does issue a legislative schedule according to the instructions it has received from Government. From time to time it issues an update on its legislative work, informing Cabinet as to the progress of each of the proposed law it is drafting¹¹⁹. However, the lack of a proper legislative program for the year, which could guide the OLC in understanding the priorities of government, causes delays and prevents the proper allocation of time and resources to serve the appropriate sponsors¹²⁰.

To set up a condition for effective law-making, the Government could be advised by the FLC and the State Solicitor to systematically produce a legislative program for each year. With a proper list of priority legislation, the FLC is able to estimate the time required for each of the proposed laws. With it the FLC can pre-empt the work it will be facing and can involve itself in early policy discussions. As discussed above, with the drafter's involvement early on, with the appropriate expertise in drafting, can guide proper policy making. When the drafting stage occurs, it can be expedited through the understanding and analysis stage due to the drafter's early involvement.

¹¹⁸ Daniel Greenberg, *Craies on Legislation: A Practitioner's Guide to the Nature, Process, Effect and Interpretation of Legislation*, (2004, Sweet and Macwell, London) 256

¹¹⁹ Arkop and Hwana (n 21)

¹²⁰ Arkop and Hwana (n 21)

EFFICIENCY TESTING

Efficiency is advocated by Xanthaki as a key tool-set for effectiveness¹²¹. Efficiency takes into account the balance of benefits gained against the costs of carrying out a certain legislative action. Legislation is highly efficient if it takes minimum costs to achieve optimal benefits¹²². Falling within the analysis stage but also during the testing stage, this requires an economic analysis and financial forecasting. A proper analysis must be made regarding the proposed legislation. In this context the cost refers to economic or monetary cost.

In PNG, this responsibility falls within the purview of the financial managers of the country. The *Fiscal Responsibility Act 2006 (FRA)*, s. 5(b) provides clearly NEC submission (including a submission for a legislative policy and bill) having any financial implication, must be first submitted to the Treasurer for scrutiny. However, this requirement has not been followed systematically or consistently¹²³, mainly because it is not a legal requirement. When Treasurer does receive such submissions, it cannot be scrutinised for budgetary purposes. But would not necessarily be knocked back for failing to be financially viable¹²⁴.

As such, it is the responsibility of the drafter, especially during the *analysis* stage, to seek or ensure that the sponsor seeks the analysis from Treasury in relation to bills involving significant financial implications. Sponsors may not realise the need to assess financial implications of a

¹²¹ Xanthaki (n 40) 8

¹²² Xanthaki (n 40) 8

¹²³ Interview with Rhoda Karl, Senior Economist, Department of Treasury (date?)

¹²⁴ Karl (n 123)

proposed law until a drafter points such out. The awareness of financial implications would inform prudent decisions regarding the bill, leading to efficiency and effectiveness.

CHAPTER 6—TOOLS AND TECHNIQUES FOR EFFECTIVENESS

SYSTEMATIC CONSULTATION

This follows from the precursor that an effective law is one that has been borne out of an effective law-making process. One that includes comprehensive consultations. The importance of consultation cannot be emphasised enough. Every single actor interviewed for this paper noted that the biggest challenge in developing legislation was the lack of consultation. The NRI, being a national think-tank organisation and research institute, was critical of many laws not having been sufficiently consulted on. It has over the years tried to stimulate discussion on important bills by facilitating workshops and seminars on proposed laws¹²⁵. The lack of consultation has many negative impacts, not least of which is the lack of acceptance by, or rather ignorance of, the implementing agencies, who may struggle due to the inconsistency of the law to existing practice. NRI itself prefers to be more involved in consultations so as to provide expert review on related subject matters.

As consultation is an important part in the understanding stage, it is vital for PNG to improve on its consultation process. The drafter's role in consultation is to prepare, according carefully and thoughtfully before any engagement¹²⁶ to ensure that as much accurate information as

¹²⁵ Interview with Dr. Sanida, Deputy Director and Senior Research Fellow, National Research Institute (15th July 2016)

¹²⁶ Driedger (n 3) xvii

possible is obtained from the policy officers. This is important especially when speaking to Ministers, as they are extremely busy people. The drafter must be prepared to cover as much ground as possible in order to get as much guidance as possible regarding any policy aspect that requires clarification. However, the drafter cannot take up a lot of time and therefore must ensure that vital questions are prepared. Queries to policy sponsors must be as specific as possible. General feedback, especially from politicians, may not be helpful at all in writing legal provisions.

A possible measure to make consultation effective and comprehensive would be to make consultation reports mandatory for any bill being put forward for consideration by government¹²⁷. This would be required from the drafter. An inherent part of quality legislation according the NZ LAC, a law is a high quality legislation if it does not require or has not undergone too many amendments¹²⁸. Amendments can be avoided if adequate consultation occurs which allows for as many stakeholder input as necessary to make the law complete and comprehensive.

ENSURE CONSISTENCY

Noting from above that consistency of legislation is a vital element of effective legislation, the text of legislation has to be consistent not just within itself, but in relation to other legislation in the statute book.

¹²⁷ Fa'asau (n 42)

¹²⁸ NZ LAC (n 50)

An example for PNG's *Attorney General Act 1996* (AGA) provides a perspective on the importance of this tool in ensuring a law is comprehensive and not inherently ambiguous. The AGA provides several scenarios in which private lawyers may be involved in representing the State. In three different provisions, reference is made implying that the AG can enter into an arrangement with a private lawyer to provide legal services to the State. They are sections 7(i), 8(4), and 8A(1). The AGA is internally inconsistent as it uses the following three phrases:

- i. *The duties, functions...of the Attorney General are ... (i) to **instruct** lawyers...to **appear for the State in any matter.** (s. 7(i))*
- ii. *On matters...where legal issues arise or might arise, legal advice shall be provided by the Attorney-General...to the exclusion of all other lawyers unless the Attorney-General, in his absolute discretion, **authorises the giving of legal advice** by any other person.*
- iii. *The Attorney-General may...issue instructions...in relation to the **acquisition** by the State...**of legal services** of the type provided by the State Solicitor.*

These provisions are internally inconsistent as they suggest three different types of arrangements between the AG and any private lawyer, albeit they may have different meanings. However, the former two have been interpreted by recent successive AGs to mean that the AG is allowed to procure legal services independently—i.e without following procurement rules established in the *Public Finances (Management) Act 1995 (PFMA)*. The provisions of the AGA imply an absolute discretionary power vested in the AG create an arrangement with private lawyers. However it is unclear from ss. 7(i) and 8(4) whether this involves a procurement of services, which is prescribed by the PFMA. The mandatory requirement for

the PFMA to be complied with when contracting with private service providers (including lawyers) has been affirmed by the National and Supreme Court¹²⁹. As such, the use of the above provisions by the AGs to enter into contractual relations with private lawyers is a breach of the settled law and therefore contrary to the rule of law.

Drafting in consistent language, or with more clarity and precision regarding the words and phrases in those offending provisions, would have avoided such misconception. Noting that an effective law is one which is less ambiguous and upholds the rule of law, such inconsistency does not help the rule of law. Inconsistent use of language leads to unintended interpretations. Through the analysis and design stages, the drafter can ensure consistency.

COMPLIANCE AND ENFORCEMENT PROVISIONS

Law is often always made to be complied with. Compliance is a bedrock for implementation and effectiveness. A legal provision that does not have compliance mechanisms will result in ineffectiveness. The required objective of a legislative action will fail as a result. The drafter is responsible for ensuring that the policy objective is supported.

An example of an ineffective law due to this failure, is *PNG's Fiscal Responsibility Act 2006*, which is completely unenforceable. The FRA provides that its purpose is to provide “*guiding principles for the conduct of fiscal policy*” (s. 1(1)(a)), and a “*framework for fiscal management*

¹²⁹ See *Patterson v National Capital District Commission* [2001] PGNC 71; N2145 (5 October 2001); and *Keboki Business Group Inc v Morobe Provinseal Gayman, The State* [1985] PNGLR 369 (3 December 1985), [1985] PGSC 6;

based on principles of sound fiscal management, and for transparent reporting of the national fiscal position against this framework” (s. 1(1)(b)). It further provides that “*Nothing in this Act (c) creates rights or duties that are enforceable in judicial or other proceedings*” (s. 1(2)(a)). This defeats the entire purpose of the Act which can be, and indeed has been, disregarded completely.

A drafter’s responsibility is to advise the Government to reconsider enacting an inherently unenforceable law. A law with no legal effect might as well not be a law at all, but is what Mader describes as mere “*expression of political constraints rather than as an attempt to solve a problem by changing the behaviour of those to whom it is addressed*”¹³⁰. The drafter has the responsibility of identifying such nature of the proposed legislation that allows for an inherently ineffective law, which may simply be an expression of certain ideals of government, and suggest alternate cost-saving methods to promote such ideals.

Compliance mechanisms ensure that action is taken on the legal norms articulated in the legislation. Since legislation creates rights and obligations (except for laws such as PNG’s FRA), there must legal consequences for breaching a prescribed right or failing a legal duty. If there are no consequences, there will be no action resulting in no impact on society.

¹³⁰ Mader (n 90) 122

IMBEDDED TESTABILITY

A drafter should strive to draft legislation in such a way so as to ensure that it is testable in the future. Legislation should be capable of being assessed through a regulatory impact analysis or other means of *ex post* evaluation. Evaluation, as Mader describes, is the “*the analysis and assessment of the effects of legislation*”¹³¹. This is easier when there is a clear linkage between the legislation and the impact on society. Part of reviewing legislation is evaluating the causal relations between the provisions of the bill and social reality¹³². This is to prove that “*the extent and consequences of changes in attitude, behaviour and circumstances that are potentially [in ex ante evaluation] or actually due to legislative action*”¹³³.

Setting the legislation for comprehensive evaluation involves the following tools. First, the objectives must be clearly stated. They must be relatively specific, stating the outcome expected to be achieved through the legislative actions taken. Objective provisions are discussed above in Thornton’s composition stage, and is supported by Mousmouti’s effectiveness test in which the objectives must be in harmony with the means and the outcomes. A well-constructed purpose provision sets the basis for effective evaluation. It is the basis by which legislation is steered, and it is therefore extremely important to get it right before a law is enacted. As Sir Stephen Laws puts it, when laws are eventually launched they need to be

¹³¹ Mader (n 90) 123

¹³² Mader (n 90) 123

¹³³ Mader (n 90) 123

effective and clear because once “*launched they cannot be steered to the right target: they have to have been well aimed before having been launched*”¹³⁴.

Secondly, explanatory notes and supplementary aids (as discussed above in the composition stage) can be utilised to provide clarity regarding the intention and expectations of specific provisions. This facilitate in-depth understanding for evaluators in the future. It helps to assess implementation and compliance.

Thirdly, the use of express provisions to trigger evaluations. These include review provisions or sunset clauses. Schaeffer argues that legislators should set time-limits in legislation, especially where there is a specific objective to be attained within a certain time¹³⁵. This counters complacency in government, pushing it to review legislation.

CLARITY AND PRECISION

Apart from efficiency, the second set of tools for effectiveness according to Xanthaki is *clarity*, *precision* and *unambiguity*¹³⁶. The aim of these principles is to achieve *rapid comprehension* of legislation¹³⁷. The measure for effectiveness here is the measure of time it takes for the

¹³⁴ Stephen Laws CB, ‘Drawing the Line’, in C. Stefanou and H. Xanthaki (eds.), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 19

¹³⁵ Schaeffer, ‘Evaluation and Assessment of Legal Effects Procedures: Towards a More Rational and Responsible Lawmaking Process’(2001) 22 (2) Statute L. Rev. 132–153

¹³⁶ Xanthaki (n 40) 8

¹³⁷ Jack Stark, ‘Should the Main Goal of Statutory Drafting by Clarity or Accuracy?’ (1994) 15 Statute L. Rev. 207

intended audience of legislation to understand what they read, thus the rate of implementation or compliance. The drafter's responsibility is therefore to know the audience of the legislation being drafted in order to accurately choose the appropriate language. Xanthaki acknowledges that where precision and clarity are in conflict with each other (that is, the use of a word for clarity sake may reduce precision), precision should prevail¹³⁸.

The drafter in PNG must be aware of the audience of a particular legislation, and ensure that the legislation is communicable to that audience. For instance, the *Organic Law on Sovereign Wealth Fund* was passed with the intention that the primary users of that legislation would be economists in Treasury department. As such, a particular provision to determine amounts of money to deposit into the SWF included a complex mathematical formula. The formula would be completely uncomprehensive to non-economists, but for the sake of communicating precisely and accurately what the intention was, to the minute detail, and to avoid a wrong calculation, the formula was inserted¹³⁹. This was in supplementary aid to the narrative describing the calculation. It is a precise rule providing a means to achieving a certain policy objective, which can also serve as a tool for evaluating the rule in future. However, this has not been received well outside the Treasury. The NRI for instance, commented that the use of the formula was confusing and should not have been used¹⁴⁰. This raised the issue of accountability. The government can only be held accountable if stakeholders can correctly

¹³⁸ Xanthaki (n 40) 9

¹³⁹ *Organic Law on Sovereign Wealth Fund* s. 12(3)

¹⁴⁰ Interview with Dr. Osborne, Deputy Director, National Research Institute.

perceive its obligations under legislation. Hence balance regarding clarity and precision requires careful consideration by drafter.

The drafter must therefore take significant care in choosing whether to trade precision for clarity, a balance must be struck in light of the consequences of what action the drafter takes. As there is a danger of defeating the purpose of a provision by making it quickly misunderstood. Stark describes this danger so eloquently:

If they write a statute that is rapidly comprehensible and fulfils the requester's intent, they have done well, although the rapid comprehension is only a minor addition to the statute's value. If they write a statute that is not rapidly comprehensible but fulfils the requester's intent, they have done their job, although they will slow down readers, which is a trivial consideration. If they write a statute that is rapidly comprehensible and does not fulfil the requester's intent, they have failed. In fact, the rapid comprehension, by lulling readers into believing that the statute is properly drafted and inducing them not to spend much time analysing it, may delay the discovery of the failure until it is too late to remedy it¹⁴¹.

¹⁴¹ Stark (n 137) 209

Clarity, precision and unambiguity are important textual tools to ensure effectiveness¹⁴², unlike other tools which are mostly useful in the form of the context of legislation. Ensuring that language is clear, precise and unambiguous ensures that legislation is readily understandable, but more importantly, predictable¹⁴³. Predictability aids effectiveness. The words need to have exact meanings, instead of being left to very wide interpretation which may lead to abusive interpretations.

¹⁴² Xanthaki (n 40) 8

¹⁴³ Xanthaki (n 40) 8

CHAPTER 7—CONCLUSION

This paper has discussed the essence of effectiveness of legislation, posing the question “*what makes law effective?*” With the wide array of scholars offering opinions on this concept, it was not easy to identify the most appropriate definition to suit the context of PNG. However, some of the basic qualities of effectiveness, which could be said to be universal, were raised.

The essence of each respective quality identified was discussed in-depth as well. This was important to paint an appropriate picture and set an expectation in the mind of the potential legislative drafter for PNG. Having an understanding of each of the varying qualities of effectiveness of legislation allows the drafter to build a certain technique and tool into the drafting process in order to meet that quality.

Due to the fact that the Papua New Guinean “drafter” is not any one single person (although officially that person does exist in the First Legislative Counsel) or office, this paper provides the guidance needed to any person in the *bill team* that is given the responsibility of drafting legislation. Thornton’s Five Stages can still be applied and can be used dynamically to produce an effective piece of legislation.

By identifying the current processes of developing legislation in PNG, this paper was able to identify the various parts in the process in which each of Thornton’s Stages can be effected. As Thornton himself and various other scholars have consistently stated, each of these stages are never truly exhausted. Each of those stages are on-going. What’s more, each of those stages

never truly start and never truly end at any formal point in the process. It has been acknowledged that drafting is a process of to-ing and fro-ing¹⁴⁴, during which the drafting is constantly refined and refined. Yet even the final product may prove unsatisfactory to the drafter and/or another party.

At this point of the paper drafters would appreciate their responsibility to give effect to each of the Five Stages during their entire involvement. As one senior lawyer, since Parliament's scrutiny function is ineffective at best and non-existent at worst, it is imperative on the drafters to do their very best to ensure that the final product that goes to the floor of Parliament is the best possible product under the circumstances¹⁴⁵. This indictment on the Parliamentary process places a heavy responsibility on the drafter, as a key player in the legislative development process, to utilise every tool and technique available to ensure that the law-making process is as effective and efficient as possible.

Drawing from the experiences of key actor in PNG's law-making process, this paper was able to identify key challenges and areas to improve significantly. The interviews demonstrated that the Five Stages can be operationalised with particular techniques, processes and principles to give effect to quality legislation.

In the current PNG process it be seen clearly that there are significant obstacles that prevent drafters from ensuring that the legislation is the best possible product, in respect of effectiveness. One of the biggest challenges identified is the political demand for legislation.

144 Zione Ntaba, 'Pre-Legislative Scrutiny' in C. Stefanou and H. Xanthaki (eds.), *Drafting Legislation: A Modern Approach* (Ashgate, 2008) 119

¹⁴⁵ Mamu (n 37)

One key effect of this political demand is the very tight time-frames to be met by the drafter and other technocrats to deliver on the product. This prevents the drafter from putting the required attention, and other technocrats from providing the necessary support, feedback or information required to polish up on a bill. Another key effect of political pressure is the reduced opportunity for input by possible stakeholders and implementing agencies for the bill. Without their input, their preparedness to implement a law can be grossly impaired. This naturally leads to the law being ineffective.

The discussion was able to point out the importance of quality legislative drafting processes and drafters. Having shown that the drafter can play a more involve drafting role—that is, being involved as far as possible in shaping policy—it is clearly proven in the arguments above that a drafter can have significant impact in legislative effectiveness. Each technique can be utilised to improve each of the Five Stages.

Understanding. To facilitate effective understanding, the drafter could set the stage by encouraging his colleagues who are giving instructions, to do so in a comprehensive and systematic manner. This can be achieved with the use of a published guideline for quality drafting instructions. A further pre-condition would be to encourage government to issue complete legislative programs for the year, which would mentally prepare the drafting offices to deal with the oncoming traffic of instructions to draft. The achievement of a full understanding of the policy objectives allows the drafter to begin drafting the objectives of the proposed law. As discussed above, there is significant benefit in have purpose provisions done early as it provides for clearer discussions and refining as the drafting and consulting activities carry on. Operationalising these tools early sets the foundation for effective legislation.

Analysis. This stage can be adequately supported by ensuring adequate and systematic consultations. A full utility of the drafter's lawyering skills also comes into play as he is required to consider existing law, both statute and common law, carefully in order to properly place the proposed law in line with existing law. This reduces the risk of inconsistency, and litigation based on disputes. These are qualities of effective legislation.

Design. In designing the law, the drafter could set the foundation by ensuring that he has acquired the necessary skills and qualifications to deliver quality drafting. In the design the drafter's objective is to achieve a structure of the law that aids comprehension by being simple, consistent with PNG's conventions, logical, and easy on the eye. Within this stage the drafter also sets up the legislation for effective evaluation by imbedding testability into the law.

The drafter would do well to ensure that the external design, that is the scheme or the legal framework should fit harmoniously with the general scheme of law in the country. Consistency with other laws dealing with the same subject matter is vital to ensure there is no duplicity, as this would cause confusion. Confusion will lead to misapplication and non-compliance. Thereby rendering the law ineffective.

Composition and development. In this stage the drafter must utilise his word-crafting skills to compose language that is clear and understandable. He must bear in mind the future readers of the legislation; try to envision their level of intelligence. He must use language that is also precise, so that he does not lose the true intention of the policy. Language must be consistent with the language of other laws. If a new concept is to be created, it must be clearly and properly defined. Underpinning the drafter's method of composition is the aim to make the law as

comprehensive as possible—i.e. being both communicable as well as accurately translate policy.

Scrutiny and testing. The drafter must allow his drafts to be scrutinised and tested heavily, even if it may be hurt his pride to have his mistakes pointed out. It is necessary for achieving effective legislation. Testing could involve testing for efficiency—a cost/benefit analysis would help ensure that the law would be efficient, and thereby effective. Parliamentary scrutiny could be improved so that more effective scrutiny takes place on proposed bills.

As such, this study proves that the drafter in PNG can utilise the above conditions and tools, among others, while operating within the Five Stages, to create an effective law-making process that would result in the enactment and implementation of effective laws.

Due to the obvious constraints of space and time, this study could not explore many other dimensions of the drafter's role in PNG. The area is still ripe for study and evolution. As demonstrated, the drafting capacity and role is small and unexplored. There is some semblance of systemic practice, but it is mostly *ad hoc* and unguided. In the investigations done in-country, it was obvious that the lack of literature and data could not prove conclusively the impact of legislation in PNG. General views from persons interviewed were taken in good faith, noting the lack of empirical studies to back up statements. However, this is offset by the experience and involvement of persons involved in law-making and law-reviewing. More can be done to improve the making effective law in Papua New Guinea.

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- Marleen T. Arkop, Acting First Legislative Counsel, Office of Legislative Counsel
- Alice Hwana, Assistant Legislative Counsel, Office of Legislative Counsel
- Ruth Koddy, Principal Legal Officer, Legal Policy and Governance Branch, Department of Justice and Attorney General
- Serena Sumanop, Senior Legal Officer, Legal Policy and Governance Branch, Department of Justice and Attorney General
- Louisiana Pep, Legal Officer, Legal Policy and Governance Branch, Department of Justice and Attorney General
- Douveri Henao, Executive Director, Business Council of PNG
- Blanche Vitata, Principal Legal Officer, Office of the State Solicitor
- Kala Aufa, Acting Clerk of Parliament, National Parliament
- Werner Cohill, Manager, Committee Secretariat, National Parliament
- Richard Whitchurch, Parliamentary Counsel, National Parliament
- Dr. Osborne Sanida, Deputy Director, National Research Institute
- Leslie Mamu, Principal Legal Officer, Office of the Public Solicitor
- Rhoda Karl, Senior Economist, Department of Treasury
- Dr. Eric Kwa, Constitution and Law Reform Commission