

CHAPTER 20

Drafters, Drafting and the Policy Process

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Introduction

Henry Thring's initial approach that the drafting office does not consider policy or substance just form has been quite prevalent amongst drafters – especially in common law jurisdictions – for most of the 20th century. Experts, of course, have noted that it is inevitable for drafters to involve themselves with substance as well as form:

At first glance the purists' belief that a drafter should leave policy decisions entirely to others is attractive. Certainly a drafter has not been elected or appointed to make policy. However, if drafters deferred to elected and appointed officials on every policy issue, those persons would spend an inordinate amount of time making picayune decisions and drafters would do very little drafting.¹

Indeed some experts have explicitly exposed Henry Thring's approach as a 'myth' which had adverse consequences for policy making, especially in the developing world.² The link between drafters, drafting and the policy process is made in practically every textbook on legislative drafting. Yet, with few exceptions, discussion tends to be reserved to the 'legislative process' (which is a part of the wider policy process) and not the policy process as a whole³ (see Graph 1).

¹ J. Stark, *The Art of the Statute* (Colorado: Rothman and Co, 1996) at 17.

² See A. Seidman, R.B. Seidman and N. Abeyesekere, *Legislative Drafting for Democratic Social Change* (The Hague: Kluwer Law International, 2001) 30-41.

³ See for example: V.C.R.A.C. Crabbe, *Legislative Drafting*, (London: Cavendish, 1993) Chapter 2, 19-36. Also see G.C. Thornton, *Legislative Drafting*, 4th edition (London: Butterworths, 1996) Chapter 7; D. Greenberg (ed), *Craies on Legislation* (London: Sweet and Maxwell, 2004) 201-302, section on the Legislative Process.

This chapter will attempt to examine the drafter's input on the wider policy process. Strictly speaking, according to Henry Thring's approach the role of the drafter should be confined to just one stage of the policy process: Formulation. However, in practice, the role of the drafter spills over into other stages. In this chapter I will examine the role of drafters in each of the stages of the policy process in an attempt to show that drafters' input and involvement spans across most – if not all – of these stages. Moreover, I argue that what determines the extent of the drafters role are: (a) the size of the jurisdiction and (b) the nature of the drafter's appointment, e.g. does the drafter work for a central drafting office or a ministry or local government.

I should point out here that I am not taking a prescriptive approach. In other words, I do not imply that the drafter should usurp the opportunity and make policy behind the backs of legislators (not that a drafter would encounter much opposition since 'going along is easy, for the legislator generally lacks information to support a dissent'⁴). I am simply documenting an on-going involvement between drafters and the wider policy process that most drafters take for granted but experts tend to bypass.

The Policy Process

'A policy is a broader notion than a decision...a policy covers a bundle of decisions...it reflects an intention to decide in a particular way in the future'.⁵ The policy process refers to the series of stages/steps that policy must go through in order to be completed. Graph 1 shows the stages of the policy process as well as the stages of the legislative

⁴ J. Davies, *Legislative Law and Process*, 2nd edition (St Paul: West Publishing, 1986) at 7.

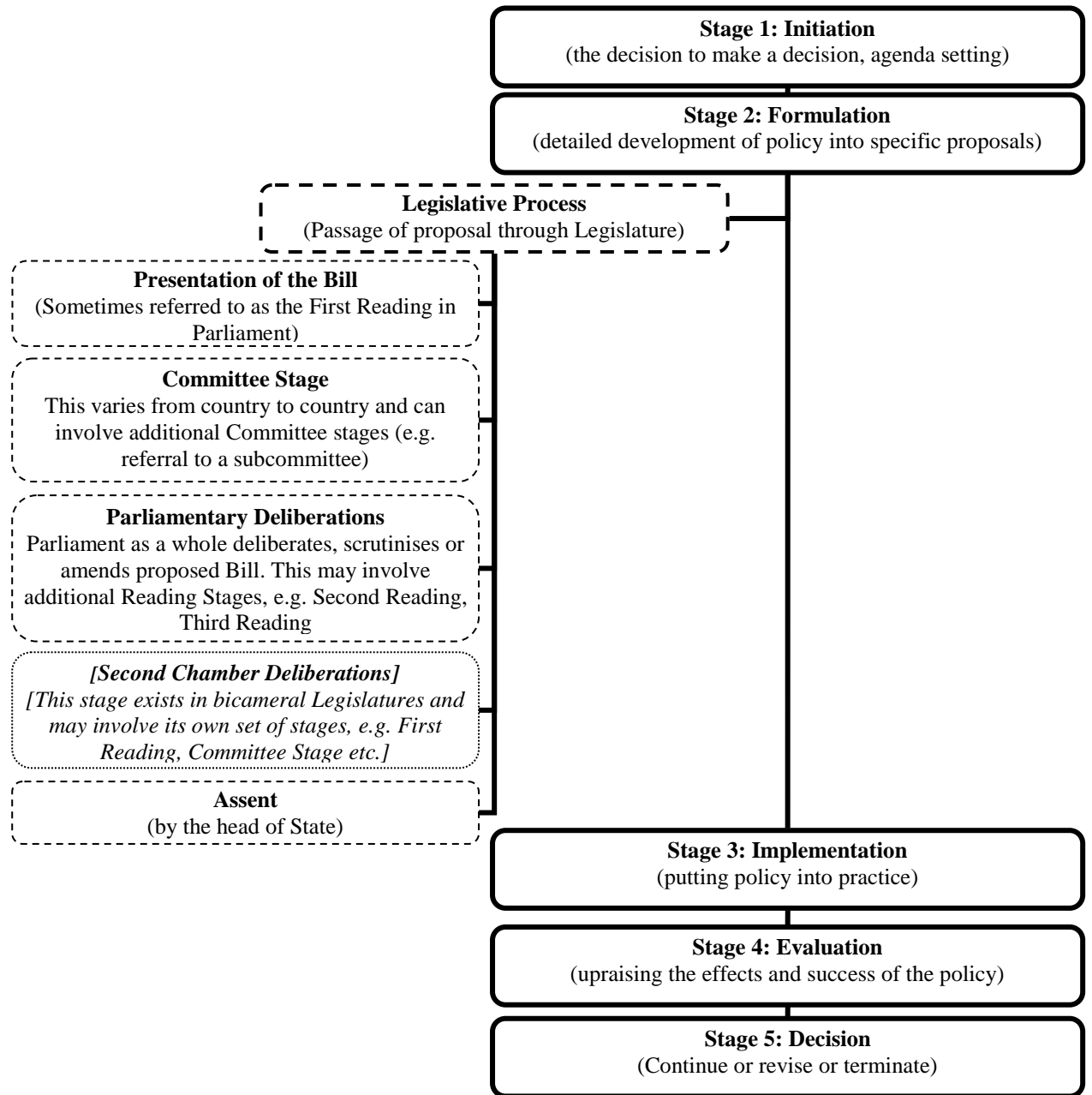
⁵ R. Hague and M. Harrop, *Comparative Government and Politics*, 6th edition (Basingstoke: Palgrave 2004) at 309.

process.⁶ The reason for including the stages of the legislative process is very straightforward. As already mentioned most experts refer to the input of drafters in policy making with reference to the ‘legislative process’. As can be seen in Graph 1 the legislative process is a part of policy making in the sense that it is part of the policy process located between the formulation stage and the implementation stage. It is, though, by no means the only part of policy making that drafters are involved.

Graph 1: The Stages of the Policy Process and the Legislative Process⁷

⁶ The stages of the legislative process do vary in different jurisdictions, The Graph indicates basic stages of the legislative process that exist in all jurisdictions.

⁷ Adapted from Hague and Harrop (2004) at 256 and 309; also see G. Mahler, *Comparative Politics an Institutional and Cross Cultural Approach* (NJ: Pearson, 2003) table 4.9.



Large and Small Jurisdictions

Spare a thought for the Attorney General’s office of Lesotho in the late 1990s. With a total staff of three (including the Attorney General himself) the same three public servants liaised with government, provided legal advice and opinions, drafted

legislation and then proceeded to prosecute offenders on the basis of their own drafts. Was it possible – or indeed even prudent under the circumstances – for the drafting office of Lesotho to avoid considering policy or substance just concentrating on form?

Clearly there is a difference in the way drafting offices operate in large and small jurisdictions. Large jurisdictions usually have dedicated units or individuals who specialise on drafting. It is, therefore, possible for drafters to ‘insulate’ themselves from the different stages of the policy process. In contrast, in small jurisdictions the drafters’ position is more ‘sui generis’ – depending on the idiosyncrasies of the jurisdiction and, of course, the volume of work.

From a practical point of view, in small jurisdictions, the involvement of drafters with the different stages of the policy process is almost self evident. Professional drafters who have worked in small jurisdictions tend to take it for granted that their involvement will go beyond pure drafting and do not perceive this involvement as a conflict of interest. No doubt necessity dictates slightly different roles between drafters in small and large jurisdictions.

Drafting and the Policy Process

Policy Initiation and the Drafter

Strictly speaking in most liberal democracies policy initiation is usually the domain of the executive (Government). The origins of legislation vary from country to country according to its constitution; however, there are some broad similarities which exist across liberal democracies:

- Government legislation can often be traced to the political manifesto of the party which won the general elections.
- Obligations arising from International treaties or agreements.

- Legislation introduced by other bodies specifically allowed to do so in that country (e.g. in some countries the Central Bank has the right to propose legislation).
- Routine legislation, which is passed every year whichever government is in power (e.g. finance Bills).
- Recommendations from Commissions established for a particular purpose.
- Individual Members of Parliament can propose Bills concerning local/constituency issues (e.g. Bills concerning local or regional hospitals).
- Science (new scientific developments).
- Technology (the application of scientific developments).
- Emergencies (e.g. earthquakes, floods etc).
- Media pressures.

Depending on the jurisdiction the role of the drafter might range from no involvement to major involvement. As Tommy Neal put it: ‘Ultimately, decisions are made by elected officials, but those decisions may be heavily influenced by the input of staff.’⁸

In some large jurisdictions the drafter will have no role in policy initiation. Having said this, in the US often the help of a drafter is sought at an early stage as parliamentarians tend to be ‘ideas persons’ and Legislative Counsel offices in both the Senate and the Congress have teams of trained drafters who provide parliamentarians with impartial advice.⁹ In small jurisdictions, however, the drafter might even be the one

⁸ T. Neal, *Lawmaking and the Legislative Process* (Phoenix: Oryx Press, 1996) at 24.

⁹ A.E. Black, *From Inspiration to Legislation How an Idea Becomes a Bill* (NJ: Pearson Prentice Hall, 2007) at 65-66. However, as Strokoff points out, Legislative Counsel is bound by statute not to try to influence policy. See S. Strokoff, ‘How our Laws are made: A Ghost Writer’s View’, US House of

who commences the process for new legislation or revision of existing legislation, e.g. in small jurisdictions drafters are often solely responsible for the introduction of some types or routine legislation.

We must make a distinction here between brand new legislation and reform of existing legislation. Most drafters in most jurisdictions revise existing legislation. Opportunities to draft brand new legislation are relatively rare and tend to come in batches. For example, decolonization of Africa offered drafters the opportunity to create brand new legislation in African jurisdictions. Similarly, the collapse of the eastern bloc and the USSR offered drafters the opportunity to create brand new legislation in eastern Europe and the former Soviet Republics. In established large jurisdictions it is quite rare for drafters to be asked to produce brand new legislation. For example, in the UK the last time this happened was the drafting of the 1998 Human Rights Act and, as Sir Edward Caldwell noted, it required consultations which cut across existing structures and involved numerous government departments over a prolonged period of time.¹⁰ In other words, a key feature of the ‘political decision’ to proceed with a Human Rights Act was the *feasibility* of the proposal not merely in terms of a draft text but with reference to whether or not such an Act can become an organic part of the existing system. The view of the drafter on the feasibility of such policy proposals plays an important role in the final decision to proceed with a particular policy or with the timing of the introduction of a new policy. As Thornton put it:

Involvement and input by an experienced drafter before the policy has been fully developed and

Representatives, Office of the Legislative Counsel, August 2003,
http://legcoun.house.gov/drafting_public.htm.

¹⁰ Sir Edward Caldwell, ‘Who did the Act? And How?’, Lecture at the Institute of Advanced Legal Studies, 16 October 2006.

accepted are likely to avoid delays during the drafting process.¹¹

In smaller jurisdictions discussions with drafters concerning the ability of the drafting office itself to deal with brand new and complex policies are quite regular and not regarded as a breach of democratic processes. In fact, in smaller jurisdictions the *feasibility* question often becomes a decisive element in the introduction of a policy. For example, in the 1990s many small jurisdictions were urged to introduce legislation to combat money laundering. Despite urges by the US and the EU to do so quickly for many of these jurisdictions the problem was an objective one, i.e. the ability of their drafting offices to produce such draft legislation quickly. Eventually, some simply copied legislation from other jurisdictions while others had to employ the services of professional drafters who had experience in drafting anti-money laundering legislation.

What becomes obvious is that drafters do have a role in policy initiation. It is not an ‘institutionalised’ role nor is it present for every singly policy initiation decision. Obviously drafters in small jurisdiction jurisdictions are more – and more often – involved. But what is certain is that once again it appears that the notion that drafters consider neither policy nor substance is a myth.

Policy Formulation and the Drafter

Irrespective of jurisdiction this stage is dominated by drafters in the sense that they are the ones who will translate instructions or broad ideas into actual drafts. In fact, this stage of the Policy Process is often referred to as *Drafting of Legislation*. Depending on the jurisdiction the drafter might have detailed instructions or very broad instructions. This means that sometimes it is the drafter’s responsibility to ‘devise’ appropriate legislation. In fact in some jurisdictions drafting instructions are so vague that:

¹¹ See Thornton (1996) at 26.

The policy objectives of the vast majority of draft proposals are poorly, ex post or even not formulated at all, and as such are not clear or are inadequate for the drafting of quality regulations and policies...., the fact that many of the basic choices end up in the hands of the drafters alone means that the drafting can develop in a political vacuum...¹²

Another example, often repeated as an anecdote by professional drafters of that era, come in the aftermath of African decolonisation when it was not uncommon for politicians to give drafters instructions such as ‘I want clean water in every household of every village in the land’.

As is well understood by now, there are different styles of drafting depending on the jurisdiction. In the past distinctions were made between the common law and civil law styles of drafting. Indeed Sir William Dale himself noted the two different styles and although clearly preferring the common law style he, nevertheless, saw some of the merits of the civil law style.¹³ Broadly speaking the main distinction between common law and civil law jurisdictions is that common law jurisdictions tend to have a centralised drafting unit sometimes part of the Attorney General’s office often called Parliamentary Counsel’s Office (PCO). In contrast in civil law jurisdictions drafting is decentralised and mostly done by committees comprising civil servants, academics and sometimes parliamentarians. There are other differences of course,¹⁴ most notably in the ‘first draft’ of a Bill, which in common law jurisdictions is usually the work of the PCO while in civil law jurisdictions it can be the work of a lawyer in the relevant ministry or an academic at the request of a minister or even the work of a private law firm.

¹² World Bank Document, ‘Administrative Capacity in the EU 8: Slovakia Country Report’, Background Paper, World Bank Poverty Reduction and Economic Management Unit Europe and Central Asia, September 2006, at 2-3.

¹³ Sir William Dale, *Legislative Drafting: A New Approach* (London: Butterworths, 1977) at 331-341.

¹⁴ See for example P-P. Pigeon, *Drafting and Interpreting Legislation* (Toronto: Carswell, 1988) 7-11.

Once again we must make a distinction between large and small jurisdictions. In large jurisdictions the first draft tends to come from the relevant government department, e.g. ministry or PCO. In contrast in small jurisdictions first drafts are sometimes the work of a donor country or organisation or even the work of professional drafters who sell the same draft to different small jurisdictions. In some cases even capable and efficient small jurisdictions are simply overwhelmed by the volume of work required for the completion of a task. For example, when Cyprus had to transpose the 81,000 pages of the *acquis communautaire* into its national legal system – in view of its accession to the EU – the volume of work was such that the AG’s drafting unit had to employ and train more drafters and even then some of the transposing drafts had to be written by private law firms.¹⁵

The Drafter and the ‘Travaux Préparatoires’ In recent years the useful civil law practice of attaching travaux préparatoires¹⁶ to the final draft has become quite fashionable.¹⁷ This extensive report contains an analysis which includes the intent of the legislators, the rationale of the legislative solution and even model laws from other jurisdictions that have been used by the drafters. In common law jurisdictions we have had the parallel development of the *explanatory notes* which replaced the ‘explanatory

¹⁵ For details of Cyprus’ effort to transpose the EU *acquis* and the work that Cypriot drafters had to undertake see: C. Stefanou (ed), *Cyprus and the EU: The Road to Accession* (Aldershot: Ashgate, 2005).

¹⁶ In some civil law jurisdictions these are also known as the ‘Introductory Report’. The French term here is used generically to reflect the practice in civil law jurisdictions.

¹⁷ This point has also been made by: K. Patchett, ‘Preparation, Drafting and Management of Legislative Projects’, *Workshop on The Development of Legislative Drafting For Arab Parliaments*, Beirut, 3-6 February 2003, at 28.

memorandum' and are published alongside Acts.¹⁸ However, unlike the travaux préparatoires which tend to be lengthy and may include detailed sociolegal explanations of the legislators intentions,¹⁹ the explanatory notes are much shorter in length (rarely over 2-3 pages) and not considered to be authentic interpretations of the law. From a practical point of view, in common law jurisdictions the explanatory notes are written by the drafters (and revised as the bill moves through the Legislative Process) and in some jurisdictions have become stylised one-page summaries that merely state the broad intention of the law.

One point to note here is that in some small jurisdictions (or in jurisdictions where drafting takes place inside a Ministry) the drafters are even expected to complete relevant Regulatory Impact Assessment (RIA) checklists or even (for minor Bills) a rudimentary cost-benefit analysis.²⁰ This is not the case in large common law jurisdictions where RIAs are prepared by specialists in the relevant ministries.

The Legislative Process and the Drafter Irrespective of the size of the jurisdiction the Drafter is at his/her most active during this period. e.g. in the US drafting officers assist legislators with their proposals, make the initial and middle drafts while they are

¹⁸ Sir Christopher Jenkins, 'Bills and Acts – Explanatory Notes' http://www.parliamentary-counsel.gov.uk/bills_and_acts/explanatory_notes_article.aspx.

¹⁹ See the *avant garde* suggestions in: A. Kasemets and M-L. Liiv, 'The Use of Socio-Legal Information in the Draft Acts' Explanatory Memoranda: A Precondition for *Good Governance*', 12th NISPAcee Annual Conference, *CEE Countries Inside and Outside the EU: Avoiding a New Divide*, Vilnius, 13-15 May 2004.

²⁰ See for example the SIGMA-OECD Report where the various checklists for drafters include a list for 'Cost and Economic Impact'. SIGMA-OECD, *Law Drafting and Regulatory Management in Central and Eastern Europe*, Sigma Papers No.15, (Paris: OECD, 1997) at 11.

also involved in the so-called *horizontal* editing of a Bill. In most jurisdictions drafting officers will assist the Minister in Parliament while their Bill is discussed and will also do overnight re-drafts if proposed amendments are agreed by Parliament. Although drafters obviously do not take an active part in the actual decision making they are involved with most aspects of the Legislative Process.

Policy Implementation and the Drafter

Strictly speaking, in common law jurisdictions, drafters should not be – and under normal circumstances are not – directly involved in policy implementation. When it comes to policy implementation the drafters ‘involvement’ is indirect and one-sided. By ‘one-sided’ I mean that it is usually the drafter him/herself who will take an active interest in observing the implementation of a complex Bill to identify possible errors or lacunae identified by enforcement agencies and the courts. By ‘indirect’ I mean that drafters are under a general obligation (same as all civil servants) to implement wider government policy on issues such as human rights or gender equality or indeed the implementation of international agreements – although as a result of their position drafters could be seen as key civil servants in the implementation of broad government policy.

However, in small jurisdictions (see the example of Lesotho in the late 1990s) the drafters’ membership of the civil service means that they might be called to implement their own drafts. In fact in small jurisdictions it is not uncommon for the AG (who might also be the drafter of a particular Bill) to explain policy and help Ministries with the implementation of the legislation he/she had drafted. While direct involvement of the Drafter with policy implementation is rare, indirect involvement is less rare, e.g. drafting legislation for implementing agencies (public or private/quango) or drafters at

local/regional government level who may then routinely be called upon to implement their own drafts.

For most drafters in large common law jurisdictions the mere idea that drafters might be involved in policy implementation will sound extraordinary. However, in civil law jurisdictions where the drafting of legislation is not centralised in dedicated drafting units and is the result of multimember committees, which include civil servants from relevant ministries, the idea is not extraordinary at all.²¹ If anything, it makes sense for the ministerial appointees to the drafting committee to be individuals who will later be involved in policy implementation exactly because it is prudent for them to have a very good understanding of the new law, its rationale, its details and intricacies. A good example of this practice was the involvement of Ukrainian civil servants in the drafting of money laundering legislation (2003-2004). Many of the civil servants who were members of the committee that drafted the Bill were subsequently transferred to relevant implementing and enforcement agencies because they were Ukraine's *de facto* experts in the field.²²

When it comes to policy implementation it is clear that there are differences between common law and civil law jurisdictions as well as small and large jurisdictions.

²¹ A possible exception here is Canada where drafting takes place at state/territory level (Legislative Counsel Office) and Federal level (where there are centralised drafting services as well as drafters in some specific ministries and the Parliament). See: Department of Justice, Canada, *National Survey for Legislative Drafting Services 2002*, (Ottawa: The International Cooperation Group, 2002).

²² The Institute of Advanced Legal Studies (University of London) has had firsthand experience of Ukraine's efforts to develop expertise in drafting and had at the time a close relationship with the Centre for Law Reform and Legislative Drafting of the Ministry of Justice of Ukraine, which assisted in the drafting of Ukraine's money laundering legislation. See: http://www.ials.sas.ac.uk/postgrad/cls_uldip.htm.

What is also clear is that even though policy implementation is not the main task of drafters (always depending on the type of jurisdiction), nevertheless, it can be part of their duties as civil servants.

Policy Evaluation and the Drafter

Policy evaluation has become an important element of the policy process to the point that in some jurisdictions Bills must include clauses relating to their evaluation – including expenditure specifically allocated to ‘evaluation’. The need for regular evaluation is a one of the main themes in modern public administration²³ and, of course, in modern computer aided drafting evaluation of legislation is a central theme:

Evaluation of legislation is central to the task of legislative drafting: To build a knowledge management system for legislative drafters one needs to understand how legislation compares to its alternatives.²⁴

Although in large common law jurisdictions it is unusual for individual drafters to be invited to Ministerial policy evaluation sessions it is quite usual for central drafting offices, e.g. PCO’s or AG’s chambers, to hold their own evaluation sessions either at the end of the ‘political year’ (usually at the beginning of the summer recess) or at the end of a particularly difficult draft. A possible exception are US state legislatures where drafters²⁵ are often invited to attend policy evaluation sessions of the legislature so that

²³ See for example: W. Parsons, *Public Policy An Introduction to the Theory and Practice of Policy Analysis* (Brookfield: Edward Elgar, 1999). For an even more recent approach see: I. Sanderson, ‘Evaluation, Policy Learning and Evidence-Based Policy Making’, 80 (2002) *Public Administration* 1-22.

²⁴ A. Boer, R. Winkels, R. Hoekstra and T. M. van Engers, ‘Knowledge Management for Legislative Drafting in an International Setting’ in D. Bourcier (ed), *Legal Knowledge and Information Systems: Jurix 2003: The Sixteenth Annual Conference* (Amsterdam: IOS Press, 2003) at 93.

²⁵ In US state legislatures drafters are ‘staff attorneys’ often part of an Office of Legislative Legal Services. See Neal (1996) at 25.

they become fully aware of legislators' concerns about a particular policy. The logic is that they will then be in a better position to make changes in the original law should the legislators decide so.

In small common law jurisdictions, especially in the developing world, things are slightly different in that policy evaluation is not always performed by the Ministry – let alone the small drafting office. Yet, exactly because the drafting office is small and the drafters are multitaskers rather than pure drafters, serving the AG's chambers in different capacities, informal involvement in evaluating policy, e.g. in discussing possible amendments to existing legislation with ministerial legal services, is a regular occurrence.

In civil law jurisdictions, especially in European states with large welfare programmes, policy evaluation has been rather slow in arriving and has not always been successful.²⁶ As with policy implementation civil servants who took part in relevant drafting committees would probably be given preference in committees performing policy evaluation. Obviously drafting issues arising out of the implementation of a particular law would be an important element of policy evaluation. However, again, as with small common law jurisdictions, drafters' involvement in policy evaluation is a by-product of these civil servants multitasking rather than an institutionalised or formal requirement for drafters to be involved in policy evaluation. What is interesting though is that increasingly empirical studies come to the conclusion that drafters should be involved in both implementation and evaluation of policy:

Legislative handbooks that deal with formal and technical aspects of law drafting should be accompanied by handbooks on policy development stage. Thus, the essential elements of policy

²⁶ See for example: A. Schilder, *Government Failures and Institutions in Public Policy Evaluation* (The Netherlands: Van Gorcum, 2000).

development should be regulated by law and be part of the legislative handbooks, accompanied by set of standards and practical examples. Even when basic standards are set by this instrument, there is a value in developing supplemental handbooks and manuals for civil servants on tools and techniques of analysis, monitoring and evaluation, implementation, etc.²⁷

Post-Legislative Scrutiny The concept of retrospective evaluation of legislation and ‘if necessary or appropriate, the adaptation of legislation on the basis of the retrospective evaluation’²⁸ is not new.²⁹ However, although provisions for post-legislative scrutiny are present in some common law and civil law jurisdictions,³⁰ they are absent from most. This is a form of evaluation which is clearly of interest to drafters and one that will increase drafters’ involvement in the formal evaluation of policy.

Policy Decision and the Drafter

It is an axiom in modern liberal democracies that decisions are taken by those elected. So strictly speaking appointed civil servants cannot possibly have a role in the final decision about the fate of a particular policy. When it comes to the final stage of the policy process the legislature, can only take one of three decisions: to continue, terminate or revise the policy. It goes without saying that, since termination of a policy

²⁷ K. Staronova and K. Mathernova ‘Recommendations for the Improvement of the Legislative Drafting Process in Slovakia’ (Budapest: OSI IPF, 2003) at 17.

²⁸ L. Mader, ‘Evaluating the Effects: A Contribution to the Quality of Legislation’, 22 (2001) 2 *Statute Law Review*, at 121.

²⁹ For example, in the UK this issue was first discussed in the early 1970s when the House of Commons Select Committee on Procedure published a report, ‘The Process of Legislation’ which noted the need for post-legislation committees. See: House of Commons, ‘The Process of Legislation’, Session 1970-1971, HC 538.

³⁰ For a brief description of how other jurisdictions deal with post-legislative scrutiny see: The Law Commission, ‘Post-Legislative Scrutiny A Consultation Paper’, Law Commission Consultation Paper No. 178, 22 December 2005, 24-29.

is an implicit admission of failure by a government, policies are rarely terminated. Even when a policy has not achieved its goals the usual response of a government is to revise – often by throwing more money at the problem it is trying to address.

The decision of any government about the fate of a policy will be influenced – amongst others – by its formal evaluation. The drafters' input in the evaluation process might influence the final decision about a policy not so much in terms of the drafters' direct input but in terms of the drafters' input in post-legislative scrutiny or general policy evaluation as civil servants. Clearly drafters' view on a policy are not going to influence the philosophy of a government's approach to policy making. However, the views of drafters on the shortcomings of a particular Bill – i.e. when the legislature invites the drafters of a Bill to attend and comment on the evaluation of a specific Bill – might influence individual legislators or the majority party in Parliament. In large common law jurisdictions this is highly unlikely – except for US state legislatures – unless one takes into consideration the informal interaction between drafters and high-ranking government officials. However, in small common law jurisdictions the role of the AG in the evaluation and decision about a particular policy might play a crucial in determining its fate but once again it would be in an 'informal' capacity.

This is clearly the stage of the policy process with the weakest and practically always indirect input by drafters. Although the final decision might be influenced by the evaluation, which in turn will be affected by implementation, with the exception of the possible direct influence of the Attorney General in small common law jurisdictions I have not found evidence of drafters' involvement.

Conclusions

What this chapter attempted to show is that drafters are involved in more stages of the

policy process than the oft-repeated legislative process. Whether or not this is warranted or ethically acceptable is a different discussion altogether. There are certainly experts who welcome and even advocate drafters' involvement with policy and substance:

We usually consider that legistics only deals and may only deal with questions of writing in the strict sense of the term, that is: grammar, style, vocabulary, appropriate language and structure of texts. In my opinion, legistics should *also deal with the content* of the norm; by 'content of the norm'...The legist – the drafter – should not only man the form, but also man the content of the written norm.³¹

Similarly, there are experts who regard direct involvement of the drafter with the substance of policy as 'usurping':

...it is important that Parliamentary Counsel do not usurp the role of a policy maker. The interest in substantive policy is not denied. Their expertise must be conceded but they must appreciate their own limitations and they should not seek to dictate policy.³²

Of course, there are also experts who take a more conciliatory approach:

He [the drafter] does not make substantive policy in the sense of having the responsibility for its wisdom or of making the final decision on what is to be done and its desirability. On the other hand, in the drafting of many kinds of legal instruments the draftsman's advice on policy is often earnestly sought and properly given. The practical problem is to discharge this duty without encroaching on the prerogatives of the client.³³

What I hope this chapter has shown is that, irrespective of one's attitude, the involvement of drafters with the different stages of the policy process is on-going and in most instances happens in a matter-of-fact manner. What has certainly become evident is that there is no expressed wish by drafters to 'usurp' the role of elected politicians.

It is easy to argue, at this stage, that there seem to be no general rules and

³¹ P. Delnoy, 'The Role of Legistics and Legists in the Determination of the Norm Content' in U. Karpen and P. Delnoy (eds), *Contributions to the Methodology of the Creation of Written Law* (Baden-Baden: Nomos Verlagsgesellschaft, 1996) at 25.

³² Crabbe (1993) at 21.

³³ R. Dickerson, *The Fundamentals of Legal Drafting* (Boston: Little Brown, 1986) at 10.

that each country has its own institutional idiosyncrasy. Such an argument would be too simplistic. There are obvious differences between common law and civil law jurisdictions as well as small and large jurisdictions. In small jurisdictions there is more relaxed mingling of drafters and policymakers mainly as a result of the drafters' multitasking in their capacity as civil servants. Many small jurisdictions do not have the luxury of large jurisdictions in having enough experts who can 'specialise' in their precise field and be exclusively a drafter or ministerial legal advisor etc. Being part of the AG's chambers in small jurisdictions means that one is sometimes a drafter, sometimes a prosecutor and sometimes a government legal advisor. Similarly, being the drafter of a Bill in small jurisdiction does not mean that involvement with policy making will be reserved to the Formulation stage. Again this is 'a fact of life' for small jurisdictions and does not appear to have made a difference in the democratic processes; nor is there an outcry by elected politicians that their role is being usurped by drafters.

In contrast, large common law jurisdictions have the luxury of experts/specialists at every step of the policy process. So, it is easier – and expected – for the drafter to remain a drafter at all times without ever worrying about having to prosecute on behalf of the Crown or offer legal advice to ministries. And yet, despite the fact that the drafter can remain insulated from other stages of the policy process, in large civil law jurisdictions the drafter can be involved in more stages of the policy process often exactly because he/she was part of the drafting committee – which, ironically, is the reason why the drafter in large common law jurisdictions are not involved in other stages of the policy process.

Given that very little has been written about drafting and the policy process this article showed that there is link between the two that goes beyond the formulation stage

(which ends with the legislative process). More research is required to identify specific instances of drafters' involvement with the different stages of the policy process in specific jurisdictions with a view to conducting a larger and more comprehensive comparative study which will hopefully draw some general conclusions. At the moment the only certainty is that the hypothesis that drafters consider neither policy nor substance just form has been disproven.