

Instructions to Draft Legislation

A Study on the Legislative Drafting Process in Malaysia

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Abstract

The importance of legislation is beyond any dispute. Legislation governed us perhaps even before our birth, certainly during our life and until our death. Even after our death there is still the Estate Duty Act to worry about, although of course the burden passes on to our executors or administrators. But day after day, many more new laws have been proposed and many existing laws have been revised and amended for various reasons and motives. The need for legislation has never diminished but continues to increase. Governments need legislation to govern, by which they achieve their political objectives and public policies. In other words, legislation is needed to affect changes in the law, to interfere with vested rights and interests, and to impose taxes, duties, excise and imposts. Such need originates from one or more of a great many sources such as a commission of inquiry, politicians, a particular pressure group or the public as a whole and also a reaction to social situations which seemingly develop independently or deliberately

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A. Introduction

The importance of legislation is beyond any dispute. Legislation governed us perhaps even before our birth, certainly during our life and until our death. Even after our death there is still the Estate Duty Act to worry about, although of course the burden passes on to our executors or administrators.¹ But day after day, many more new laws have been proposed and many existing laws have been revised and amended for various reasons and motives. The need for legislation has never diminished but continues to increase. Governments need legislation to govern, by which they achieve their political objectives and public policies.² In other words, legislation is needed to affect changes in the law, to interfere with vested rights and interests, and to impose taxes, duties, excise and imposts.³ Such

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1 K.E. Tian, 'The Drafting of Statutes', (1974) *Malaya Law Review*, pp. 196-203, at p. 196.

2 V.C.R.A.C. Crabbe, *Legislative Drafting*. Cavendish Publishing Limited, London 1993. 1. See also Pius P. Biribonwoha, 'Efficiency of the Legislative Process in Uganda', 7 *EJLR* 2005, pp. 135-163, at p. 135.

3 Crabbe (2005).

need originates from one or more of a great many sources such as a commission of inquiry, politicians, a particular pressure group or the public as a whole and also a reaction to social situations which seemingly develop independently or deliberately.⁴

For less-developed Commonwealth countries, the greater need for legislation arises because more consideration is given for development after a period of instability, engagement in major privatization programs and regional economic integration.⁵ The increasing demand for more and more laws in Malaysia likewise is necessitated by its rapid development. Thus, it is probably true to say that the most important rules that govern human behaviour will be found in written laws that have been passed in the form of legislation by an elected law-making body.⁶

When the need for legislation is accepted by the government as part of its policy, it is transformed into legislative shape by means of the drafting process, and eventually passes through the legislative machinery to reach the statute book as law.⁷ The process is called legislative process or law-making process. The process involves numerous people with different roles and tasks and various steps to be followed. In a wider sense it is part of policy process. Seidman relates the law-making process to development and opines that ineffective legislative drafting both reflects and contributes to broader social problems.⁸ Thus, in order for the law to be able to meet the aspirations of the different facets of society that it serves, time, effort and thought are dedicated to its making.⁹ It has been claimed that as far as the science of government is concerned, the important part of legislation is not only the regulatory aspect but the law-making process itself.¹⁰

As the number of legislation multiplies, Elliot suggested that courts spend more time in interpreting and applying legislation than in any other function and noted that in 1981 the British Columbia Court of Appeal dealt with issues of stat-

4 Crabbe (2005), p. 4. There are some broad similarities in the origin of legislation across liberal democratic countries such as political manifesto, obligations arising from international treaties, new scientific developments, emergencies and media pressures. See C. Stefanou, 'Drafters, Drafting and the Policy Process', in C. Stefanou and H. Xanthaki (Eds.), *Drafting Legislation: A Modern Approach*. England: Ashgate 2008, pp. 321-333. See also J. Ludlow, 'The Queen's Speech 2005: How Government Laws are Initiated in the United Kingdom', 31 *Commw. L. Bull.* 2005, pp. 61-67.

5 B.H. Simamba, 'Improving Legislative Drafting Capacity', (2002) 28 *Commw. L. Bull.*, 2002, pp. 125-1141, at p. 1129.

6 R.C. Nzerem, 'The Role of the Legislative Drafter in Promoting Social Transformation', in Stefanou et al. 2008, pp. 131-149, at p. 131. See also R. Martineau & J. Robert, *Legal, Legislative, and Rule of Drafting in Plain English*, Thompson West 2005, p. 4.

7 G.C. Thornton, *Legislative Drafting* (3rd edn.), Butterworths, London 1987, p. 110.

8 A. Seidman et al., *Legislative Drafting for Democratic Social Change: A Manual for Drafters*. Kluwer Law International, London 2001, p. 6. Patchet took a wider view and opined that the law and the legal institutions should embody essential human values related to justice and fairness and to due process of law and the rule of law, thus proper development of the law and the institutions is itself central to the well-being of the society. See K. Patchet, 'The Role of Law in the Development Process', 13 *Commw. L. Bull.* 1987, pp. 662-666, at p. 666.

9 Seidman (2001).

10 Crabbe (2005), p. 135.

utory interpretation in at least 75% of the cases heard by it.¹¹ In 1983 nine out of ten cases heard by the Court of Appeal and House of Lords in Britain either turned upon or involved interpreting the meaning of words contained in enactments of primary or secondary legislation.¹² It can hardly be less today or a lower percentage in other jurisdictions including Malaysia. Moreover, poor laws encourage poor regulatory practices which lead to public cynicism, fail to meet policy objectives, result in non-compliance, impose unnecessary bureaucratic requirements, and impose unnecessary costs for both the regulated and the regulator.¹³ Hence, the fact that legislation affects every individual in the jurisdiction in which it operates makes it important for all persons involved in its making to appreciate not only the law, but also the process so as to effectively participate in that process and make meaningful contributions.¹⁴

Be as it may, one significant step in the law-making process is the legislative drafting process or policy formulation stage¹⁵ with the key roles played by policy makers, departmental lawyers and legislative drafters. This may be said to begin with the receipt of drafting instructions and end with completion of an agreed draft.¹⁶ Based on the drafting instructions, drafters begin their work of converting policies into provisions which comply with the relevant formal conventions and are capable of being applied effectively in practice.¹⁷ However, before a drafter can produce a legislative text, the drafter must know what to say. The drafter knows what to say if the drafter understands the proposal. Thus, understanding the proposal is the first and the most important stage in the legislative drafting process and it depends on the quality of drafting instructions. Elliot opined that one way in which the quality of legislation can be improved is if legislative counsel gets good drafting instructions in a timely manner.¹⁸

Driedger suggested that drafting instructions should never be in the form of draft bills because the drafting of legislation does not consist in polishing what others have written. Driedger explained that if a draftsman receives a draft, he must construe and interpret what may be an imperfect statement, and he may misunderstand what is intended and if the draft is prepared by an inexperienced person, the draft is usually defective, thus the draftsman must spend much time undoing what has been done.¹⁹ Thornton shared the same view and opined that the sole aim of drafting instructions is to communicate information to the drafts-

11 D.C. Elliot, 'Getting Better Instructions for Legislative Drafting', <www.davidelliott.ca/legislative_drafting.htm>, accessed 1 June 2010.

12 *Ibid.* See also G. Drewry, 'Public General Acts: Now and a Hundred Years Ago', *Stat. L.R.* 1985, pp. 152-161.

13 D. Elliot, 'Preparing Drafting Instructions for Legislation', <www.davidelliott.ca/legislative_drafting.htm>, accessed 1 June 2010.

14 C. Kyokunda, 'Parliamentary Legislative Procedure in Uganda', 31 *Commw. L. Bull.* 2005, pp. 17-27, at p. 17.

15 Stefanou (2008), p. 333.

16 Thornton (1987).

17 I. McLeod, *Principles of Legislative and Regulatory Drafting*, Hart Publishing, USA 2009, p. 33.

18 *Supra* n. 13.

19 E.A. Driedger, *The Composition of Legislation*, (2nd edn.) Department of Justice, Ottawa 1957, pp. xix-xx.

men and most draftsmen do not favour drafting instructions in the form of draft legislation because it is less successful than straightforward prose for the purpose of communication. He then suggested that a manual on the preparation of drafting instructions should be available for public service use.²⁰

Simamba reiterated that the quality of drafting instructions is one obvious area that needs to be addressed and suggested that instructing officers must understand the role of drafters and must know how they can facilitate that role by giving good drafting instructions.²¹ Ian McLeod on the other hand suggested that drafting instructions in narrative forms are preferred in English common law practice of legislative drafting because of the tradition of having specialist legislative drafters. He observed that drafters in short-staffed drafting offices welcomed instructions in the form of draft bills for the reasons of maintaining the drafting office's productivity and just confined their work to refining and polishing the draft. In such a situation he said that the quality of the draft is compromised.²² Thus, drafting instructions in the form of draft legislation will be the focus of this paper.

B. Hypothesis and Methodology

I. Hypothesis

In Malaysia, the detailed drafting instructions are usually in the form of a draft bill. There are rare instances when drafting instructions are prepared in complete prose forms attached to a draft bill. When drafting instructions are in the form of a draft bill, a good deal of the drafter's time is spent figuring out and then sorting out exactly what the policies are, or else settling on the best questions to ask to elicit the policies. Undoubtedly, this requires intellectual ability, creativity, knowledge of law, critical appraisal and judgment and it can be an enormous challenge to drafters because the inability to correctly and fully understand the legislative proposal will adversely affect the other processes in drafting legislation such as the analysis, design, composition and verification processes and ultimately the quality of legislation is at stake. Thus, this paper proposes to prove that draft legislation is insufficient as drafting instructions in the legislative drafting process in Malaysia. The paper investigates the flaw in this practice and establishes that it could undermine the quality of legislation in Malaysia; hence recommendations for improvement are necessary.

II. Methodology

To firstly prove the hypothesis, this paper looks at the available literature in legislative drafting to identify the theoretical foundation on the quality and sufficiency of drafting instructions in the legislative drafting process. Secondly, this paper examines the actual drafting process in Malaysia. The sufficiency of draft

20 Thornton (1987), p. 111.

21 B.H. Simamba, *The Legislative Process: A Handbook for Public Officials*, Author House, Indiana 2009, p. 13.

22 Thornton (1987), p. 39.

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legislation as drafting instructions is investigated by looking at the preparation of draft legislation by instructing officers at the initial policy formulation stage and the flaws in the preparation process. Further, this paper examines how drafters deal with drafting instructions in the form of draft legislation and analyzes how it actually affects the legislative drafting process and the quality of legislation.

Therefore, I conduct a study among the main players in the legislative drafting process in Malaysia, namely the instructing officers in various ministries and drafters in the Drafting Division of the Attorney General's Chambers. The respondents are chosen based on their expertise, experience and practical knowledge in legislative drafting. For that purpose, I distribute questionnaires to ten respondents from the ministries and twenty respondents from the Drafting Division.²³ A different set of questionnaires is administered to instructing officers and drafters. Moreover, I also correspond via emails with the Parliamentary Draftsman and the Deputy Parliamentary Draftsman to get their views as the final authorities in approving bills prepared by drafters. This method of study is chosen primarily because of the lack of available literature and information on the legislative drafting process in Malaysia.

From the feedback of the instructing officers, I gain information on how they prepare the drafting instructions or draft legislation and understand their constraints and difficulties based on their experience in the respective ministry. From the feedback of the drafters, I grasp their habits, conduct, practices and their views about their drafting works which enables me to link between the quality of drafting instructions they receive and the quality of their work and performance in the drafting process. The input from the Parliamentary Draftsman and the Deputy Parliamentary Draftsman supports the link that I attempt to establish. From all the feedback, I analyze and answer the research questions and it becomes the basis of my recommendations for improvement.

Given the wide steps in the legislative drafting process, this paper focuses on the early stage of the drafting process and examines how the quality of drafting instructions influences the drafting process. This paper narrows down the investigation further by focusing on primary legislation at Federal level. Ultimately, the objective of this study is to analyze and evaluate the current practice in legislative drafting in Malaysia and to suggest improvement in matters relating to drafting instructions so that the quality of legislation can be improved.

C. Background

I. Legislative Drafting Process

Generally, there are two basic and broad approaches of the legislative drafting system, either a decentralized or centralized model.²⁴ Malaysia adopts the latter

23 The questionnaire for instructing officers, the questionnaire for drafters and the list of respondents are attached as Appendix A, B and C respectively.

24 For more elaborate discussion on these two models see S. Lortie, 'Providing Technical Assistance on Law Drafting', 31 *Stat L.R.* 2010, pp. 1-18.

model. All Federal legislation²⁵ is prepared by a small body of lawyers called Parliamentary Draftsmen,²⁶ operating from an office in the Drafting Division, under the general supervision of the Attorney General. The formal source of power is derived from Article 145(2) of the Federal Constitution. It confers upon the Attorney General the duty to advise the King, the Cabinet or any minister on any legal matters and to perform such other duties of a legal character. The Drafting Division was then established to undertake all drafting exercises of Federal legislation with the main aim of ensuring that Federal legislation complies with the Federal Constitution.²⁷ However in practice, the Drafting Division takes a much broader view of its role and authority. Ensuring the constitutionality of Federal legislation is just one of its many facets of functions.²⁸

The well-established drafting process begins with decisions on which ideas are developed into legislative proposals made by ministers on the advice of officials in their organization. The minister then introduces the legislative proposal to the government and Cabinet approval is obtained. It is imperative that the legislative policy be approved by the Cabinet before its transformation into a bill can begin. The legislative scheme is discussed and consultation is held with other interested ministries, agencies and non-governmental organizations. After all these stages, the ministry officials together with legal advisors prepare drafting instructions for the bill or draft a proposed bill and submit it to the Parliamentary Draftsman. The Parliamentary Draftsman then assigns a drafter to examine the draft bill.

Consultations between drafters and ministry officials are a norm in order to refine and finalize the bill. The finalized bill is then submitted to the ministry for preparation of a Cabinet Paper and for the further lengthy process of printing and tabling the bill in Parliament before the bill can be finally transformed into a statute and binding law.²⁹ This paper does not discuss the entire details of the legislative process but only focuses the investigation on the early drafting process which began with the preparation of drafting instructions and ends when the draft bill

25 Federal legislation includes all Federal subsidiary legislation such as regulations, rules, orders and notifications.

26 Parliamentary Counsel in the United Kingdom, Australia and New Zealand and Legislative Counsel in Canada.

27 The role of the Attorney General as constitutional adviser on legislation is significantly different from his role as public prosecutor where as public prosecutor he has exclusive authority to make decisions. The position is similar to Canada and Sri Lanka. See I. G. Scott, 'The Role of the Attorney-General and the Canadian Charter of Rights', 13 *Commw. L. Bull.* 1987, pp. 252-260, at p. 255; and K.M.M.B. Kulatunga, 'Attorney-General of Sri Lanka as Adviser to Government and as Guardian of the Public Interest', 10 *Commw. L. Bull.* 1984, pp. 1881-1890.

28 'The Functions of Drafting Division', <www.agc.gov.my/agc/index.php?option=com_content&view=article&id=50&Itemid=149&lang=en>, accessed 1 June 2010.

29 Historically in the UK, legislation was initiated by petition and by the 17th century the petition incorporated a draft of the law. See D.C. Elliott, 'Who Holds the Pen', <www.davidelliott.ca/legislativedrafting.htm>, accessed 12 June 2010. For complete drafting process in the UK, see D. Greenberg (Ed.), *Craies on Legislation*, (8th edn.). Sweet & Maxwell, London 2004, pp. 203-302. For the USA see T. Neal, *Lawmaking and the Legislative Process: Committees, Connections and Compromises*. Oryx Press, USA 1996, pp. 32-49 and C.P. Nutting *et al.*, *Legislation Cases and Materials*, West Publishing Company, Minnesota 1978, pp. 200-207.

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is finalized. However, this alone is a long process which involves various drafts that are continuously amended, and numerous consultations between the drafters, the responsible ministry, and in some instances, the Attorney General, the Solicitor General as well as some stakeholders.³⁰ Moreover, drafting legislation is not, as some people perceive it, a simple process where a particular unit of input is matched by a corresponding unit of output.³¹ The drafting process primarily involves two key groups of individuals: instructing officers and the legislative drafters. Thus, the paper proceeds to discuss the role of instructing officer and legislative drafter in the legislative drafting process.

II. *The Role of Instructing Officer and Drafter*

Elliot has rightly argued that the fundamental elements of a good legislative product remain a collaborative effort with good teamwork between the instructing officers and drafters.³² Both have their own roles and they are equally important in the legislative drafting process. The best bill may result from full co-operation between the departmental and the drafting division. Both the instructing officers and the drafters need to play their respective roles to the fullest. In order for drafters to be as effective as possible, the knowledge and expertise of public officials (who act as conduits to convey and flesh out legislative proposals decided by ministers) is absolutely crucial for any legislative process.³³ The basic role of officials in terms of the legislative process is generally to flesh out policy directives given by the government and pass them to the drafter as instructions.³⁴ Thus, the instructing officer needs to know what to provide to the drafter in order for the work of the drafter to be facilitated. The drafter on the other hand, has to rely on the expertise of instructing officers to dispose his duty which has been described as follows:

The draftsman is an architect of social structures, an expert in the design of frameworks of collaboration for all kinds of purposes, a specialist in the high art of speaking to the future, knowing when and how to try to bind it and when not to try at all. The difference between a legal mechanic and a legal craftsman turns largely on awareness of this point.³⁵

The average drafter is a lawyer with training in legislative expression, the interpretation of statutes, constitutional and administrative law. However a drafter is not generally likely to have special training in the substantive areas of the law he may be drafting. The drafter will not have special expertise in the law relating to

30 Kyokunda (2005).

31 G. Tanner QC, 'Imperative in Drafting Legislation a Brief New Zealand Perspective', 31 *Commw. L. Bull.* 2005, pp. 33-39, at p. 33.

32 *Supra* n. 13.

33 Simamba (2002), p. 1130.

34 *Ibid.*

35 Thornton (1987). Lord Goldsmith described the role of a drafter as translating policy into legal text. See Lord Goldsmith QC, 'Parliament for Lawyers: An Overview of the Legislative Process', 4 *Eur. J.L. Reform* 2002, pp. 511-523, at p. 513.

fisheries, the environment, transportation of any kind (road, air or aquatic), or any other specialized area. If he happens to have specialized knowledge in some subjects, this will not necessarily be by virtue of his training as a drafter.³⁶ Rarely the development of policy, preparation of instructions and drafting of a bill is a straightforward matter. It is an iterative process because drafters have a crucial role to question and probe the policy, not to question the merits, but so as to be sure of the intended effects³⁷ and play a creative function by offering workable solutions.³⁸ The basic idea is to find out what the client wants, analyze it to ensure that it stands up, and express what is needed in language that is as precise and clear as possible.³⁹ To make an in-depth and sound analysis the drafter needs good and clear drafting instructions. If the analysis is sound, and the thinking is clear, clarity of expression will automatically follow.⁴⁰ Accuracy and precision of language may proceed from an innate habit of mind.⁴¹ While good drafting instructions are a tool to facilitate drafters to effectively perform their roles, drafters are expected to have critical, enquiring, imaginative and systematic minds, orderliness in the formulation of thoughts and the ability to pay meticulous attention to details.⁴² Good drafting instructions are useless without good analyses from a good drafter who should be able to add value to the proposed legislative scheme and to produce legislation of high quality.

C. The Quality of Drafting Instructions

I. *The Importance*

The philosophy of drafting can be summed up in two rules, one – decide what you want to say, two – say it.⁴³ Nevertheless, this simple philosophy of drafting is not as simple as it looks because the policy makers have to decide what they want, the drafter has to transform their will into legal words and the communication between the policy makers and drafter is through drafting instructions with the instructing officer as the intermediary. Drafting instructions are a set of data the policy makers make available to drafters to help the drafters to draft an effective legislation within the confines and parameters developed by the policy makers.⁴⁴ The importance of drafting instructions in the legislative drafting process is enormous. If the drafter fails to grasp the basic fundamentals of legislative proposals, it is impossible for the drafter to get their draft right. The fate of legislation

36 Simamba (2002), p. 1131.

37 Goldsmith (2002).

38 G. Bowman, 'The Art of Legislative Drafting', 7 *Eur. J.L. Reform* 2005, pp. 3-17, at p. 3.

39 *Ibid.*

40 Bowman (2005), p. 17.

41 V.C.R.A.C Crabbe, 'The Role of Parliamentary Counsel in Legislative Drafting', 'UNITAR Sub-Regional Workshop on Legislative Drafting for African Lawyers', Kampala, Uganda, 20-31 March 2000. 8.

42 *Ibid.*

43 Bowman (2005).

44 J.G. Kobba, 'Criticisms of the Legislative Drafting Process and Suggested Reforms in Sierra Leone', 10 *Eur. J. L. Reform* 2008, pp. 219-249, at p. 229.

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depends on the experience of the drafter to continue to ask questions until the drafter gets sufficient information to carry out their duty and play their role effectively. The possible danger if the quality of drafting instructions is compromised is summed up as follows:

Unless the legislative drafting instructions and the theory and methodology that underpins them guides the drafters in making an adequate empirical study of their countries' relevant social realities, their bills impact in changing problematic behaviours will depend on plain luck.⁴⁵

Thus, drafting instructions are the key elements to set the right bearing for the drafter to produce clear and sound legislative text.⁴⁶ Moreover, clear drafting instructions have been identified as one of the ways to overcome many problems concerning the ability of the drafter to convert broad statements made by the government into specific statutes.⁴⁷ Martin Mayer could not agree more when he said that to draw up an Act of Parliament well requires an extraordinary understanding of everything they are supposed to accomplish.⁴⁸

II. *The Contents*

As suggested by many authors, the quality of drafting instructions depends on their contents. Thornton described drafting instructions as 'an essay of communication' and suggested that drafting instructions will be of most assistance if they:

- a Contain sufficient background information to enable the draftsmen to see in perspective and in context the facts and problems which the legislative proposal is intended to meet.
- b State the principle objects of the legislation clearly and fully.
- c Provide a picture of how legislation will actually work in practice, the machinery envisaged and the necessary powers and duties should be described in detail.
- d Refer to all known implications and difficulties whether legal, social or administrative.⁴⁹

Ian McLeod on the other hand suggested that drafting instructions should make clear both the policy which the policy is required to implement and the details of the proposal itself. He also agreed with Thornton when he suggested that drafting instructions should explain any foreseeable problems arising from the way in

45 M. Mayer, *The Lawyers*. Harper & Rowe, London 1967, p. 50.

46 Referred to as 'the weapon to meet the policy target' by Caldwell. See E. Caldwell, 'Comments', in A. Kellerman *et al.* (Eds.), *Improving the Quality of Legislation in Europe*, Kluwer Law International, The Hague London 1998, p. 89.

47 C. Stefanou, 'The Policy Process and Legislative Drafting', in C. Stefanou and H. Xanthaki (Eds.), *Manual in Legislative Drafting*. University Press, UK 2005, p. 5. See also S.L. Trusty, 'The Value of Clear Instructions', 15 *U. Kan. City L. Rev.* 1946-1947, pp. 9-19, where the author discussed the value of clear instructions not in legislative drafting but in trial by jury and said that 40% of the reversals of cases are caused by faults in instructions thus spotlighting the need for better understanding of the purposes, value and method of drawing clear instructions.

48 Mayer (1967).

49 Thornton (1987), p. 114.

which the proposal will impact on existing statutory provisions.⁵⁰ In addition, he opined that good drafting instructions should draw attention to any official reports, judicial decisions and academic opinions.⁵¹ Another author suggested that good drafting instructions should aim to provide the drafter with as much information as possible to enable the drafter to best understand the purpose of the legislation.⁵² Driedger reinforced that a drafter must be brought to the point where he is qualified to deal with the subject matter from a legislative point of view.⁵³ Elliot formulated a more practical test on the quality of drafting instructions and summarized that good drafting instructions enable a drafter to know the answer to the questions of what is?, what will be?, and why?. These questions are important to help to show up issues from different points of view and often help create new ideas for a better legislative solution.⁵⁴

Thus good quality drafting instructions should be able to put into perspective the whole ideas of the legislative proposals. They tell the drafter what is to be achieved by legislation and how the legislation is to achieve it. To put it simply, good drafting instructions provide information on the historical background of the proposal, its purpose, the means to achieve the purpose and its impact on the existing law and circumstances. Thus, there is no clear boundary as to the contents of good drafting instructions, they are very subjective and very wide but it is crystal clear that they should convey the policy, the purpose, the background, the means and the effect of the policy measures.

III. The Form

The form of good drafting instructions is as important as their contents. In 1948 the UK Treasury issued some notes on the writing of memoranda to be submitted to Cabinet or Cabinet Committee for review and approval of drafting instructions:

Those who are concerned with the preparation of memoranda of this kind should be careful to avoid casting them in a form which bears the slightest resemblance to a draft bill. Nothing is more hampering to the legislative counsel, when the drafting stage is reached, than to be obliged to build what is usually a complex structure around 'sacred phrases', or forms of words that have become sacrosanct by reason of their having been agreed upon in Cabinet or in one of its committees.⁵⁵

50 McLeod (2009).

51 *Ibid.*

52 *Supra* n. 21 at 31. Simamba opined that it must be made available to the drafter as much material as he would avail to someone who is totally unfamiliar with the proposals or the areas it deals with and let the drafter be the judge of what to use or eschew.

53 Simamba (2009).

54 *Supra* n. 11. David Elliot also suggested that a legal brief of the existing and proposed law should become accepted as a normal part of drafting instructions. The requirement should be waived only in exceptional circumstances and it is so much better if this requirement can be endorsed by the Attorney General or Cabinet Committee and can only be waived by them.

55 Elliot quoted Notes on Government Organization No. 3: The Preparation of Bills, Treasury, March 1948, p. 8. *See supra* n. 11.

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This direction clearly rejects the notions of presenting a legislative proposal in a form of draft bill. Prominent authors in legislative drafting such as Thornton and Driedger shared the similar thought that drafting instructions should be in the form of straightforward prose account and plain statement, and drafting instructions in the form of draft legislation are not desirable.⁵⁶ On the contrary, Elliot tends to disagree and opined that departmental draft should not be discouraged because the draft supplemented by comments and meetings can be extremely useful for both legislative counsel and the department writing it if the departments understand that the draft bill is legislative counsel's responsibility and the legislative counsel is not bound to follow the organization or the language of a departmental draft.⁵⁷ However he maintained that although most Canadian jurisdictions and New Zealand Parliamentary Counsel Office accept instructions in the form of a draft, no jurisdiction encourages drafts.⁵⁸ Simamba is nevertheless of the opinion that the requirement of the drafting instructions to be given in prose form and that no draft should be attempted by the instructing officer is over-generalized and fails to take into account a number of practical considerations such as the complexity of the legislative proposal.⁵⁹ But he also concurred with other authors that draft legislation should not take entirely the place of prose drafting instructions and suggested to the extreme that drafters should be supplied with all the materials and information that may have been used to produce the draft and anything else that forms part of the background materials. On the other hand, if the background materials and facts supplied are unlimited, Lord Renton warned about the tendency on the part of officials and drafters to cover every contingency that might arise when laws have been passed, rather than state the principle to be applied.⁶⁰ Thus, discretion and good judgment by drafters is crucial.

Clearly, the quality of drafting instructions depends not only on their contents, but also on their forms and how they are presented to drafters. Good drafting instructions are able to tell drafters what is to be achieved and how it is to be achieved. Authors unanimously agree that drafting instructions should not be entirely in the form of draft legislation prepared by instructing officers or ministry officials. Although some authors do not totally reject drafting instructions in the form of draft legislation, all are agreed that draft legislation is not a good form of drafting instructions. Furthermore, the narrative style of the drafting instructions should not use technical, legalistic and archaic words and winding sentences.⁶¹ It has to be systematic and consistent using the same language for

56 Sir William Dale echoed similar opinion. See Sir W. Dale, 'Canadian Draftsmanship, and the French Connection', 10 *Commw. L. Bull.* 1984, pp. 1865-1875, at p. 1866.

57 *Supra* n. 11.

58 *Ibid.*

59 B.H. Simamba, 'Improving Legislative Drafting Capacity', 28 *Commw. L. Bull.* 2002, pp. 1125-1141, at p. 1132.

60 Lord Renton QC, 'Current Drafting Practices and Problems in the United Kingdom', 11 *Statute L. R.* 1990, pp. 11-17, at p. 13.

61 Kobba (2008).

the same concept.⁶² In totality, the quality of drafting instructions has long been set out by the Lagos Cabinet Office as follows:

Drafting instructions should set out the requirement in plain language. They should give as fully as possible the purpose and background of the decree and should state what existing legislation affects the subject. They must not take the form of a layman's draft decree. Where a proposal is based on an existing piece of legislation, whether of Nigeria or United Kingdom or another country, this fact should be stated, and the instructions should refer the draftsman to the legislation.⁶³

Against this ideal theoretical background, this paper investigates the drafting process in Malaysia where the tradition is quite the opposite. Draft legislation is commonly and indiscriminately used and taken as drafting instructions. The paper makes a concrete finding that a draft bill is insufficient and indeed not good drafting instruction, the reasons for it are identified and the best way to improve the drafting process by improving the drafting instructions with the ultimate aim to improve the quality of legislation in Malaysia is proposed.

D. Striving for Quality in Legislation: Why?

Efficacy has been acknowledged as the highest virtue to be achieved in legislation but it is not the level of quality that can be achieved by legislative drafters because drafters are only involved at the drafting process.⁶⁴ Efficacy is one of three criteria for evaluation of legislation other than efficiency and effectiveness.⁶⁵ Malder defined efficacy as the extent to which legislators achieve their goal⁶⁶ and Delnoy measured efficacy by the degree to which the laws give rise to litigation.⁶⁷ According to Delnoy, the better law between two laws of equal efficacy is the one whose application gives rise to less litigation.⁶⁸ To ensure that the law does not give rise to litigation, it must not conflict with any other norm of the same or higher hierarchical level and it should have no deficiencies.⁶⁹ Since efficacy is not achievable by drafters because it requires common effort of all the people involved in the

62 *Ibid.*

63 *Ibid.*

64 H. Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', in Stefanou *et al.* (2008), pp. 1-18, at p. 5.

65 L. Malder, 'Evaluating the Effect: A Contribution to the quality of Legislation', 22 *Statute L. R.* 2001, pp. 119-131.

66 *Ibid.*

67 P. Delnoy, 'The Role of Legislative Drafters in Determining the Content of Norms', <www.justice.gc.ca/eng/pi/icg-gci/norm/index.html>, accessed 11 June 2010.

68 *Ibid.* See also B. Hunt, 'The Origins of the Office of the Parliamentary Draftsman in Ireland', 26 *Stat. L.R.* 2005, pp.171-188, at p. 181 where the author narrated about Arthur Matheson was complimented by Senator Brown for his work because out of a number of laws he has drafted, only one case in which the meaning of a section has had to be interpreted by the court. See Hunt (2005), pp. 171-188, at p. 181.

69 *Supra* n. 67.

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policy process such as policymakers, interpreters, applicators and enforcers of legislation,⁷⁰ Xanthaki opined that effectiveness is a common pursuit and a common search for quality in legislation among legislative drafters around the globe.⁷¹ According to Xanthaki, the prerequisites to achieve effectiveness are clarity, precision and unambiguity in legislation.⁷²

Although efficacy in legislation is beyond the reach of drafters, ideally efficacy remains the virtue to be achieved by legislature. Karpen opined that quality legislation depends on the legal environment of drafting and implementing the law and it depends, among other things, on the procedural, formal and substantive quality of the law.⁷³ In totality, high quality legislation endures, does not need frequent amending, gives effect to the government's policies, reduces fiscal risks to the government, avoids the court having to decide what it means, reduces compliance costs for users and limits the scope for avoidance.⁷⁴ Drafters can contribute to the efficacy of legislation by ensuring its effectiveness by producing clear, precise and unambiguous statute and not becoming the authors of incomprehensible, complex and inaccessible laws because bad laws are the worst sort of tyranny.⁷⁵ Crabbe tried to envision the extreme effect of bad law (in terms of ambiguities and complexities) by quoting a cynical criticism by L.J. Mackinnon as follows:⁷⁶

If the judges now had anything to do with the language of Acts they are to administer, it is inconceivable that they would have to face the horrors of the Rent and Mortgage Interest Restrictions Act – horrors that are hastening many of them to a premature grave.⁷⁷

The above criticism may be exaggerated. More importantly though, clear and precise legislation will lead to predictability and encourage compliance. In Malaysia, a common complaint among the people is that there are too many laws with no implementation. For example, on the government's measure to impose a licence requirement for traders selling controlled items such as sugar, flour and cooking oil, a citizen commented that "in Malaysia, we are always fast in coming up with new laws for this and that but with no serious implementation and control mechanism to enforce the laws".⁷⁸ Similarly, a lecturer pointed out that despite com-

70 U. Karpen, 'The Norm Enforcement Process', in U. Karpen & P. Delnoy, *Contributions to the Methodology of the Creation of Written Law*, Nomos Verlagsgesellschaft Baden-Baden, Germany 1996, pp. 1996, pp. 51-61, at p. 55.

71 Xanthaki (2008), at p. 16.

72 *Ibid.*, p. 11.

73 U. Karpen, 'Improving Democratic Development by Better Regulation', in Stefanou *et al.* (2008), pp. 151-at p. 163, 156.

74 LAC: Guideline on Process and Content of Legislation, <www2.justice.govt.nz/lac/pubs/2001/legislative_guide_2000/chapter_2.html>, accessed 7 June 2010.

75 Edmund Burke quotes <www.quotedb.com/quotes/341>, accessed 26 June 2010.

76 Crabbe (2000), p. 7.

77 *L. Q. R.* 62. 1946, p. 34.

78 L.K. Chai, 'Why Make Life More Difficult for Traders?', <<http://thestar.com.my/news/story.asp?file=/2010/6/9/focus/6426662&sec=focus>>, accessed 9 June 2010.

mitments to the objective of preserving and enhancing environmental quality and the passing of laws and regulations to achieve the means, Malaysia still faces the problem in conserving the environment and the actual problem lies in implementing and enforcing the measures.⁷⁹ Obviously, a law that does not induce its own effective implementation hardly merits the characterization 'good law' and constitutes evidence of poor drafting.⁸⁰

Bad law from bad policies is not the fault of drafters and the role of drafters is not even visible to the public. Drafters seem a distance away from the policy process. However, there are instances when drafters were partly blamed for it. For example a lawyer claimed that the proponents of the Cooperative Amendment Act 1993, passed by Parliament in 1997, including the Parliamentary Draftsmen, has misled Parliament during the amendments to the Act to allow members of school cooperatives to enter into a contract which is contrary to the Age of Majority Act 1971.⁸¹ Furthermore, in the Drafting Internal Circular Number 1 of 1984,⁸² the Malaysian Parliamentary Draftsman then reminded his subordinates about the need to draft clear, precise and unambiguous bills particularly in matters involving capital punishment. The Circular was issued as a result of criticism by a Member of Parliament when debating amendment to the Dangerous Drug Act in 1984.

The occasions when drafters were directly blamed for ineffective, inconsistent and ambiguous legislation in Malaysia are not very common and as opposed to the EU,⁸³ the call for clear, precise and unambiguous legislation has never been made by any formally established bodies or committees. The issue of quality of legislative texts generally seems to have been ignored until now. This is attributed to the political landscape of the country where legislature is dominated by members from a formal coalition of political parties, thus bills successfully passed with superficial if not meaningless debates. Moreover, there is no formal mechanism for post-legislative scrutiny⁸⁴ of Acts of Parliament in place and no independent

79 A.J. Maidin, 'Challenges in Implementing and Enforcing Environmental Protection Measures in Malaysia', <www.malaysianbar.org.my/environmental_law/challenges_in...>, accessed 11 June 2010. See also Y. Ai, 'Malaysia: An Ambitious Start toward the formulation of a Biosafety Law', <www.biotech-info.net/ambitious_start.html>, accessed 12 June 2010 where the author criticized the enforcement of the bill. See also R. Tan, 'Function of Law Put to the Test' <<http://thestar.com.my/news/story.asp?file=/2010/7/4/focus/6603930&sec=focus>>, accessed 4 July 2010.

80 Seidmann (2001), p. 125.

81 K. Zubin, 'Illegal School Co-ops?', <www.mmail.com.my/content/23108-illegal-school-coops>, accessed 11 June 2010. See also A. Bakar Munir & S. Hajar Mohd Yasin, 'Another Law with Flaws: Lesson Never Learnt', 4 *Current Law Journal*, p. xvii, where authors highlighted various flaws in the Electronic Government Activities Act 2007 and opined that the flaws showed the lack of knowledge, thoroughness and quality in the Act.

82 The Circular is unpublished and not available externally.

83 See H. Xanthaki, 'Standards of Quality in Legislation: The EU as a Case Study' (unpublished article); and 'Drafting at the EU Level', in C. Stefanou et al. (Eds.), *Manual in European Union Approximation*. DFID, London 2005, pp. 7-8.

84 For detailed discussion on post-legislative scrutiny of legislation generally, see L.-Clapinska, 'Post-Legislative Scrutiny of Acts of Parliament', 32 *Commw. L. Bull.* 2006, pp. 191-204.

and authoritative law reform⁸⁵ agency has been established. As a result, the quality of Acts of Parliament in Malaysia generally never takes a centre stage.

Nevertheless, it should not be the reason for drafters in Malaysia to feel complacent, by assuming the silence or inaction as an indication that the legislation they produced is of excellent quality and thus abandoned to pursue the virtue of effectiveness in legislation.⁸⁶ Additionally, a state which does not have a developed tradition of legislative drafting stands to see the rights of the individual taken away without proper scrutiny and a shift of power from citizen to state;⁸⁷ and the forces at play in the global market are such that the legislative process must constantly be improved upon.⁸⁸ It has been established that the chances of clearer legislation will be improved if, before drafting starts, the policy of the legislation has been clearly thought out, has been framed to make it easy to understand, and is widely accepted.⁸⁹ Therefore, in pursuing clear, precise and unambiguous legislation drafters have a vital role to play because clarity of substance comes from the right blend or right concepts, clear understanding, not chaotic thought and coherence in substance expressed in good style.⁹⁰ It is a role that starts with the conception and the birth of an Act of Parliament and it justifies me to proceed with this study with the sole aim of improving the drafting of legis-

85 The Law Reform Commission has played a significant role in shaping the law by maintaining a continuous overview of Australian law with a view to drawing attention to those which do not appear to be working satisfactorily. See Sir A. Mason, 'Changing the Law in a Changing Society', 18 *Commw. L. Bull.* 1992, pp. 1166-1172, 1170. For other jurisdictions, see Sir T. Etherton, 'Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision', 10 *Eur. J. L. Reform* 2008, p. 135; W.H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada*, Edmundton, Juriliber 1986, p. 25; D. Bean (Ed.), *Law Reform for All*, Blackstone Press, London 1996, p. 27; and A. Macdonald, 'Once Reform, Twice Commission, Thrice Law', *Can. L.J. & Soc.* 2007, pp. 117-143.

86 For example, in pursuit for quality in legislation, the Republic of Moldova introduced the Law on Legislative Acts 2001 to legislate drafting of laws, but it is doubtful for the measure to be successful. See J.N. Bates, 'Legislating for Drafting: The Moldovian Experience', 30 *Stat. L. R.* 2009, pp. 123-139. Leslie Blake suggested the introduction of a new tort for grounding a claim of legislative negligence (failure of a government department or legislative draftsman to attend to obvious adverse consequences of the legislation which the department is promoting). He opined that it would provide legislators with a powerful incentive to ensure that legislation is soundly based and correctly formulated and a potential liability in damages would help to tighten up the drafting process and improve the quality of legislation. See L. Blake *et al.*, 'Over-regulation and Suing the State for Negligent Legislation', 28 *Stat. L. R.* 2007. 218-234, 227. In the UK, it is not uncommon for the Parliamentary Draftsman to appear before a committee inquiring into the preparation of legislation to explain drafter's roles and contributions in the legislative process and ensuring the quality of legislation generally. See P. Graham, 'The Role of the Parliamentary Draftsman in the Legislative Process', 1 *P.C.B.* 58-62. 1994. Lord Hailsham urged the Statute Law Society to continue to invigilate the form of UK statutes, work for improved concision and clarity and prescribe good practice in drafting legislation. See Lord Hailsham, 'Addressing the Statute Law', *Stat. L.R.* 1985. 4-10.

87 M. Arden, 'Modernising Legislation', *P.L. Spr.* 1998. 6 5-76, 76.

88 R.C. Bergeron, 'Globalisation of Dialogue on the Legislative Process', 23 *Stat. L.R.* 2002. 85-89.

89 'Clearer Commonwealth Law', Australia Parliamentary Paper, September 1993, xiii. See also Sir W. Dale, 'A London Particular', *Stat. L.R.* 1985. 11-20; 'Statutory Reform: The Draftsman and the Judge', 30 *I.C.L.Q.* 1981. 141-164.

90 C.K. Jain, *A Guide to Legislative Drafting*, Commercial Law Publishers, Delhi 2004, p. 1.

lation in Malaysia particularly in matters relating to drafting instructions because the drafting process starts when drafters receive their drafting instructions.

E. Analyzing Questionnaires and Findings

In the previous chapters, I laid down the foundation and the theoretical interconnection between the qualities in legislation and the importance of good drafting instruction in the legislative drafting process. The drafting process involves a few actors and an important tool of communication between the actors in this process is the drafting instructions. The hypothesis of this paper is that draft legislation is insufficient as drafting instructions in the legislative drafting process in Malaysia. Authors and experts in legislative drafting strongly suggest that drafting instructions in the form of a draft bill are not good drafting instructions. Thus, this study explores what is the basis for this theory by examining the real situation in Malaysia where drafting instructions are normally in the form of draft legislation. For that purpose, a set of questionnaires was administered to instructing officers and another set of questionnaires was administered to drafters. The complete data and feedback gathered from the respondents are attached as Appendix D and Appendix E. The analysis and findings in this chapter are based on these data and some points to support the findings are based on my own experience as a legislative drafter in Malaysia.

I. *Instructing Officers*

First, I deal with the questionnaire to the instructing officers and make my finding on the quality of draft bills they produced. Although most questions are closed ended questions, a few respondents give elaborate answers and share their experience. The instructing officers from five ministries and five federal departments participate in the exercise and they choose to remain anonymous. The instructing officers that took part in this study are legal advisors and legal counsels to the ministries and departments and they are under direct supervision from the Head of Advisory Division of the Attorney General's Chambers and answerable to the Attorney General. They are legally trained and qualified lawyers with different numbers of years of experience in the government legal service.

All respondents echo a similar answer to the question how they initially get the instructions to proceed with a legislative plan. The ideas come from the minister or the minister decides based on the advice from his officials. Basically the instructing officer's involvement at the early stage of developing ideas and proposals is varied because there are no standard and written procedures on when the legal advisor should come into play. However the common practice is when there are legal matters or legal issues involved. They certainly get involved if the initial decision to legislate was made. Thus, it is expected that the instructing officer should have an in-depth knowledge of the legislative proposal because they are responsible for thrashing out any legal issues and they must ensure that the proposal is legally sound.

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Some ministries are large and have many agencies under their control thus, it is very likely that the instructing officer does not get involved from the early stage of policy decision and the initial draft of the bill is prepared by the ministry officials. Nevertheless, it is the instructing officer's duty to scrutinize the legislative proposal and to ensure no legal ramifications will entail from the legislative proposals. The instructing officer refines the bill before presenting it to the Parliamentary Draftsman. If there is no initial draft, the instructing officers put the ideas in the form of a draft bill with the help from the ministry official responsible for setting up the policy details and sometimes they themselves work on the details of the policy.⁹¹ On whether they are aware of any directions that they have to comply with in preparing the draft bill or the drafting instructions, 80% of the respondents gave a negative answer. One respondent gave an honest account when the respondent disclosed that sometimes draft legislation was prepared because they want to be seen as doing something to settle a particular issue. Thus, not much thought is put into it with the hope that any defects in the proposals will be spotted and eventually can be improved when the draft is scrutinized by drafters.

Save for three respondents who have experience in legislative drafting, instructing officers are unskilled drafters. They work their drafts in the way they think best to convey all the proposals intended to be implemented through legislation. Some of them have attended short courses relating to legislative drafting such as the course on translating policy into law and regulatory drafting but they admitted that drafting skills are impossible to develop over short courses although they are useful for general knowledge. All respondents welcomed any guide for them to produce good drafting instructions and they find that it is tough to prepare draft legislation even with some experience and knowledge in legislative drafting. It is time-consuming and they work within limited references on legislative drafting as one respondent eloquently put that he does not know what to look for and what to provide for in a piece of legislation. His concern is to produce a draft bill in accordance with his best endeavour and efforts to represent the policy that the ministry wanted to implement. The instructing officers are more concerned about the legality of the measures that the policy makers decide to implement or in some instances they find ways to make the proposed measure legally acceptable.

A few respondents expressed their frustration over the lack of input from the ministry officials in developing details of the legislative proposals. One respondent says "they do not know what they want and hence don't ask how. They only want to make law because it is the easiest and the visible measure to any prob-

91 T.W. Cain, QC quoted E. Lenfestey who described this situation as a 'policy vacuum' where he was given general instructions and was expected to fill it with the help of departmental civil servants who offered little assistance. See T.W. Cain QC, 'The Legislative Draftsman in a Small Jurisdiction', 19 *Commw. L. Bull.* 1993, pp. 1237-1245, 1238.

lems they encounter".⁹² It is indeed an extreme comment but it is not uncommon. Thus the instructing officers are forced to be multi-functional.⁹³ They undertake the duty not only as legal advisor but also as policy maker, think tank and drafter at the same time and there are instances when they are caught in a dilemma and trapped between the minister's political ambitions and the legal and social reality.⁹⁴ On the question whether they encourage a thorough study to be done before a draft bill is prepared, some respondents give a negative answer and cited lack of time as a reason.

To gauge the quality of the substance of the draft legislation formulated by the instructing officers, I listed down the important matters that should be taken into consideration when drafting legislation. The list⁹⁵ is general in nature and focuses on the substance not on the form. I asked them to tick on matters they consider in formulating the policy details. From the feedback, all respondents considered the issues of constitutionality and human rights. For commencement, application and savings and transitional matters a large number of the respondents said that they did not really consider the matters and in drafting they follow the available precedent they can get and what they think suitable for their proposal. On other issues, such as the need for consultation, the administrative discretion and the retrospection, I had mixed reactions with some saying they considered it and some not.

Thus, from the feedback I find that sometimes the policy considerations are not really thorough and there are certain important aspects left to be tackled at the very late stage that is when the proposal is sent to the Parliamentary Draftsman for approval. Knowing the situation and the circumstances under which the instructing officers have to work, the constraints and the pressure they face, one certain conclusion to be made is that the draft legislation they produce as draft-

92 Crabbe held the view that most politicians, of whatever hue or persuasion believe that legislation can be used to achieve great changes in society and anything can be achieved by legislation. To politicians a parliament can do anything but make a man a woman, and a woman a man. See Caldwell (1998). See also D.A. Marcello, 'The Ethics and Politics of Legislative Drafting', 70 *Tul. L. R.* 1995-1996, pp. 2437-2464; G. Murphy, 'Political Control Over Policy Development', 24 *Stat. L. R.* 2003. 157-168; Editorial, 'Whose Intention is it Anyway?', 25 *Stat. L. R.* 2004, pp. ii-v and Editorial, 'Multi-option Drafting', 25 *Stat. L. R.* 2003, pp. iii-iv and F.A.R. Bennion, *Understanding Common Law Legislation: Drafting and Interpretation*, Oxford University Press, New York 2001, p. 9.

93 The other duties of instructing officers are to advise on all legal matters which do not necessarily involve drafting legislation, vetting contracts or attending court's proceedings.

94 G. Bowman suggested that in such a situation, it is better to work around the obstacle and try to surmount it. See Sir G. Bowman, First Parliamentary Counsel's Answer to Comments and Observations in the Minutes of his Evidence to the House of Lords Select Committee on the Constitution, 23 June 2004 (Q.341-343).

95 The matters enumerated in the list are 1) the necessity to legislate; 2) the alternative to legislation; 3) constitutionality of the legislation; 4) the practical implication of the legislation; 5) the commencement of the legislation; 6) the retrospection of the legislation; 7) the application of the legislation; 8) savings and transitional matters; 9) administrative discretion and its review; 10) human rights issue; 11) the need for consultation. The list is created based on *Legislation Handbook* <www.dpmmc.gov.au/guidelines/docs/legislation_handbook.pdf Chapter 6>, accessed 7 June 2010.

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ing instructions is far from perfect. Their limited capability, references, guides and directions as drafters and instructing officers compounded with working under pressure and constraints are the clear indications that drafting instructions in the form of a draft prepared by a non-drafter is insufficient and some improvement is needed.

Sufficient time and consideration has not been given and there is no available guideline to instructing officers to consult in the preparation of a draft bill. The shift of focus in preparing draft bills rather than concentrating on working and thinking on the details of the implementation machinery of the legislative proposal at the conceptual level should be discouraged because of the likely disadvantage to the drafting process and the adverse effect on the quality of legislation. The requirement for the instructing officers to provide draft legislation may make them good at none, except encourage some of them to produce lousy drafts and lousy policy details. It is unfair to generalize and undeniably there are well thought-out policies and good drafts prepared by instructing officers, however the details behind the policies are not properly conveyed to drafters.

II. Drafters

One of the commitments of drafters in Malaysia as specifically stated in their mission statement is to ensure that all legislation is of the highest quality, constitutionally and legally sound and error-free in every aspect.⁹⁶ This aspiration can be achieved only with immense efforts in the drafting process where any legislative proposals or ideas will become the concern of drafters. The process begins when drafters receive draft bills from the ministries or departments.⁹⁷ The policy of the Drafting Division is that the instructing officers should provide drafting instructions in the form of draft legislation but other supporting documents are not discouraged. The rationale for this practice is that the instructing officers and the ministry officials are technically the owners and the executors of the law, thus they are the best people to see how new proposals will fit into the existing law under their responsibilities. In addition, it will be more convenient for the drafters because they need not start the drafting from zero and thus save their time.⁹⁸

Twenty drafters with different lengths of experience in the government legal service and in drafting primary legislation ranging from two years to fifteen years took part in this study. All respondents first received a draft bill as drafting instructions with a covering letter briefly explaining the draft bill. The first thing they do after they receive a draft bill is try to understand the policies behind it and the respondents sensibly do not rush to vet the draft bill. Nevertheless, 25% of the respondents also vet the draft bill simultaneously while trying to figure out the policies behind it. 75% of the respondents made inquiries to the instructing

96 Drafting Division Client's Charter <www.agc.gov.my/agc/index.php?option=com_content&view=article&id=50&Itemid=59&lang=en>, accessed 7 June 2010.

97 ISO Quality Manual. July 2009 at para. 4.1.1.2. The Manual has not been published and is not available externally.

98 Drafters also responsible to draft subsidiary legislation, thus draft legislation as drafting instructions eases their workload. In addition there are inadequate drafters and they are not specialized.

officers in order to gather, learn and understand more about the background of the proposal and 60% of the respondents could not get satisfactory answers from the instructing officers. Therefore from this data, it is clear that drafters encounter difficulties grasping the bigger picture of the proposal. It looks very basic and just a little inconvenience which can be settled by a phone call, however it may give rise to another practical problem if the drafter in charge of the bill left the Drafting Division and the information was not properly recorded. The drafter who takes over the project has to start to make inquiries to the instructing officers all over again.

After understanding the basic idea of the proposals, drafters then start their analysis. During this process they start to discover deficiency, inconsistency and all sorts of problems from policy issues and legal issues, not to mention the drafting issues.⁹⁹ Therefore, correspondences, meetings and conferences¹⁰⁰ begin to take place to iron out the spotted issues and clear any doubt or misunderstanding, if any. This process is tedious and sometimes endless depending on the issues to be resolved. In the meantime, when drafters are confronted with all these flaws, they are forced to research not only legal issues, which is their job, but also the substantive issues of the legislation. Practically, this will slow down their progress and the bill may not be in their priority list as compared to other urgent assignments which need less significant research.¹⁰¹

Therefore, clearly the quality of the draft bill prepared by instructing officers is immaterial at analysis stage because no matter how perfect the draft bill is, the nature of the job of drafters is to question every measure, big or small, controversial or non-controversial and make them want to know the reason behind it. For example concerning a simple proposal to shorten the length of tenure of members of a board, the first question to come to the mind of the drafters is why and the drafters could not get such information just from reading the draft. After that more questions arise such as the effect of the measure on the present member holding the office, are they entitled for reappointment, and the list of question goes on. Hence, from a simple proposal, there is a lot of background information behind every word that is needed by drafters but concealed behind the draft and only known to the policy makers and instructing officers and kept somewhere in their files. Why do drafters need all this information? Because they need to know the true intention of the policy maker and then they have to make sure what is expressed in the draft is really their true intention and further they have to make sure such a proposal is workable and effective.

Nevertheless, an imperfect, verbose, incomprehensible draft makes it more difficult for drafters to spot the issues, they spend time correcting the imperfection without correctly directing their minds to the bigger issue behind the com-

99 All respondents discovered these issues in the draft bills they received. Fundamental policy issues such as who to exercise the enforcement powers, the licensing regimes and the overlapping jurisdiction between government agencies are not uncommon.

100 At times meetings and conferences raise more doubt and issues about the proposal.

101 70% of the respondents choose to settle assignment with no significant research as compared to assignment which needs extensive research.

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plex provision they are looking at.¹⁰² Later on drafters spend more time in meetings and conferences to settle issues¹⁰³ which more often than not should have been settled during policy decision.¹⁰⁴ Thus, very often the drafting stage where any gaps in the proposal should be patched and turned into perfect proposals by drafters becomes a platform for initial policy formulation stage.

In the questionnaire, I asked the respondents about matters they consider when drafting their bills and I find it astonishing that only 50% of the respondents look at savings and transitional matters, and on the necessity for delegated legislation also a small percentage of the respondents really look into it. This finding is interesting because in my questionnaire to instructing officers, these two matters are also not under their consideration when they draft the bill. If instructing officers miss the points and the drafters also overlook them, who will look into them? Most probably, it will end up in court for interpretation and clarification. A significant number¹⁰⁵ of bills are made to amend existing legislation and any failure to properly address savings and transitional matters may affect the smooth transition between the old laws to the new laws. Thus, I deduced from this fact that draft legislation as drafting instructions to drafters clearly clouded their minds from comprehensively looking into not only legal and policy aspects but also the crucial part of drafting legislation and it is safe to say that this may affect the quality of legislation.

From the above information, I also find that good as well as bad draft legislation is insufficient as drafting instructions in the legislative drafting process. A good draft left drafters puzzled for lack of explanation about it, and a bad draft, which is very common, made them more puzzled. If Thornton equalized the process of drafting laws with the children's game of snakes and ladders,¹⁰⁶ I equalize the drafting of laws which begins with a draft bill as drafting instructions as playing two games at the same time: the games of snakes and ladders and a big jigsaw puzzle with one thousand tiny pieces of information left to drafters to put together in order to get the whole complete picture,¹⁰⁷ and at the same time they have to work on perfecting the policy proposals. Hence, draft legislation is insufficient as drafting instructions and it leads to a greater uncertainty in the drafting process. Drafters need complete explanations because they want to discharge their duties and not just assume that the draft before them is a properly con-

102 75% of the respondents agreed that one of the flaws in the draft prepared by instructing officers is that the draft is difficult to comprehend. They also discovered legal and policy issues very often unsettled in the proposal.

103 For example who is the person to carry out the powers under the proposal, the consultation with state authorities if the matter falls under the concurrent list of the Federal Constitution and the need for licensing for an activity.

104 It is common for drafters to attend endless meetings and just to find themselves in the middle of arguments and tussles over policy decision between the ministry officials.

105 See Appendix C for complete statistical data.

106 Thornton (1989), p. 112.

107 The drafters have to interpret the text of the draft legislation to extract the policy objectives before they can begin to formulate their own drafts.

ceived legislative plan and that proper provisions have been chosen to carry out the plan.¹⁰⁸

Drafters in Malaysia do not confine their activities to just refining and polishing somebody else's draft and they are expected to produce legislation of the highest quality, thus draft legislation as drafting instructions does not help them towards achieving the objectives. They have to interpret the text to extract policy objectives before they can begin to formulate their own draft and time is wasted on discussion and argument on what a non-drafter's draft means.

Moreover, the practice of having a draft bill as drafting instructions has the danger of turning novice drafters to performing superficial duty and fails to give comprehensive analysis on the proposed scheme from the ministries and departments; as a result they cannot be clearer because they do not really know what they are addressing.¹⁰⁹ Drafters also become too attached to the draft and fail to use their own creativity and judgment to produce clear, precise and unambiguous legislation.¹¹⁰ This point was supported by the Parliamentary Draftsman and the Deputy when they disclosed that the finalized draft bills they received from drafters always have common mistakes which originated from the lack of understanding of the proposals by drafters.¹¹¹ Consequently, even at the final stage of the drafting process, drafters have to go back to the instructing officers for clarifications and to settle issues spotted by the Parliamentary Draftsman or the Deputy. Thus, contrary to the popular belief that draft bills prepared by instructing officers can save the drafters time obviously it does not expedite the drafting process.

F. Suggestions for Improvement

The main problem in legislative drafting today is the tendency of legislators to legislate too quickly and on too many topics. In the face of sustained pressure for legislation, it is difficult both to maintain a high standard and to take stock of the effectiveness of existing techniques. The pressure affects both Parliamentary Counsel and the officials who give instructions to Parliamentary Counsel.¹¹² A bill passed in haste hinders clarity and when launched as an Act of Parliament cannot

108 In the law-making process, contrary to popular belief, the drafter plays an important role with respect to both the form and content of a law. See W. Iles CMG, QC, 'Legislative Drafting Practices in New Zealand', 12 *Stat. L.R.* 1991, pp. 16-30.

109 V.F. Nourse & J.S. Schacter, 'The Politics of Legislative Drafting: A Congressional Case Study', 77 *New York University Law Review*. 2002, pp. 575-624, at p. 595.

110 50% of the respondents were not sure whether they can produce draft bills from scratch even on the assumption that they have complete drafting instructions. It is uncommon for new drafters when looking at draft legislation, to find nothing is wrong with the draft except purely drafting mistakes such as spelling and grammatical errors. They fail to see the policy behind the draft and beyond. See also the observation by E.C. Page, 'Their Word is Law: Parliamentary Counsel and Creative Policy Analysis', *P.L.* 2009, pp. 790-811.

111 Personal emails from the Parliamentary Draftsman dated 15 July 2010 and from the Deputy Parliamentary Draftsman dated 8 July 2010.

112 W. Iles CMG, QC, 'Legislative Drafting Practices in New Zealand', 12 *Stat. L.R.* 1991, pp. 16-30.

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be 'steered' to the right target: it has to have been well aimed before being launched because if it misses its target it may take years to put things right.¹¹³ In the meantime, the government's policy will not be delivered, the law may be producing the wrong result, litigation may be required to clarify its effect with the imposition of a very considerable extra and wasteful burden of expenditure on those involved in the litigation and, conceivably, more generally on one or more sectors of the national economy.¹¹⁴ In order to avoid these strings of domino effects painted by Stephen Laws, it requires nothing short of just good, effective and workable planning in the bill drafting process.

The most important stage in bill drafting is the initial stage that is when formulating the policy, drawing of drafting instructions and the designing of the bill. From the study conducted among the key players in the drafting process in Malaysia, it is clear that drafting instructions in the form of a draft bill caused many undesired effects and disrupted the whole process of legislative drafting. Thus some improvement is necessary. This chapter is dedicated to suggesting improvement in the legislative drafting process in Malaysia with specific reference to drafting instructions since it is the identified loophole although it could be many other loopholes. The aim is not to find fault but solely to improve and contribute to the legislative drafting process by encouraging well thought-out policies and well drafted legislation in order to achieve better legislation because better legislation supports development.¹¹⁵

Malaysia is fortunate enough to have a fine tradition of dedicated Parliamentary Draftsmen and dedicated instructing officers in all ministries, but if they do not continue to take an active lead in making legislative improvements, either no significant improvement will be made or others will impose changes. A common criticism by drafters is that the drafting instructions they receive are inadequate, the draft legislation they get is in shambles and the time they have is very tight. On the other contrary, the instructing officers and ministry officials perceived drafters as obstructive, inconsistent and sometimes elitist and thus they sometimes deliberately avoid dealing with drafters for as long as they can.

By presenting draft legislation as drafting instructions, the instructing officers and the ministry officials expect that they can get an approval quickly. However, as the nature of their work requires a meticulous approach, drafters sometimes need to say 'no' and 'what about'. Drafters need to put the draft under the microscope, to examine and analyze every detail of the proposal. They may need to dismantle the draft, and to reassemble and to determine any missing part and try to fill any gaps. Thus, the fact that a draft is readily available does not mean that the drafters just only need to cross the 't's' and dot the 'i's' or act only as proof readers or editors looking for misplaced commas and dots. Thus, the first issue to be tackled is an understanding of each other's role. This can be done either formally through periodic meetings between instructing officers and drafters or informally through available mechanisms such as between the heads

113 S. Laws, 'Drawing the Line', in Stefanou (2008). pp. 19-34, at p. 21.

114 *Ibid.*

115 Karpen (2008), p. 151.

of both divisions since drafters and instructing officers are all legal officers serving the Attorney General. Thus, understanding each other is easily done.

The next issue is how the instructing officers and the drafters can play their roles better. Departments and ministries may involve in a regulatory project only once in a decade, are unlikely to involve in a significant legislative drafting very often, thus they need information about preparing new law but find it hard to get. From the study, it is clear that the instructing officers do not know what they should provide to drafters and they tend to provide draft legislation without explanations about the draft. When the draft is received by the drafters they first try to understand the proposal and they take a long time to understand the whole scheme by reading the draft and that forces them to do their own research for complete background information. Thus, it is crucial that the instructing officers know what to provide in drafting instructions. To overcome this problem, I suggest that instructing officers should provide proper drafting instructions and a guideline on preparation of drafting instructions is issued to instructing officers. The focus of the guideline should be on the substance of legislation highlighting what are the issues that instructing officers must address at the early stage. For example, since the Federal Constitution is the supreme law of the country, it should be made known to the drafters if there are any issues or non-issues about it. This will avoid drafters going in search of information elsewhere such as trying to trace the Cabinet Paper where the initial policy approval was made. To have a look at a Cabinet Paper is not easy and subject to internal security procedure since a Cabinet Paper is an official secret document. I am not in any way suggesting that the Cabinet Paper should be made readily available to drafters but the necessary information should be made known to the drafter in the drafting instructions.

The importance of sufficient background information for statutory interpretation was emphasized by a judge as follows:

A statute is best understood if we know the reason for it. The reason for statute is the safest guide to its interpretation. The words of statute take their colour from the reason for it.¹¹⁶

Thus, I emphasize that such information being made available at the earliest possible time to drafters is even more crucial.

Since drafting instructions in the form of a draft bill is insufficient, and to expect the instructing officers to produce a perfect draft is not possible, providing a guideline to instructing officers can facilitate them to focus and deliver what is expected by drafters. The guideline will help the instructing officers to lead the ministry officials to think through their proposal, put their thoughts in writing and plan their project. It will be a guide for the instructing officers to provide comprehensive instructions and to understand the roles and responsibilities of drafters in advance of a drafting project, thus it is more likely the drafting project will proceed smoothly. All major issues then will be systematically tackled and necessary consultation will be held at the very early stage of the drafting process which will allow more time for better legislative drafting. The drafter's time is not

116 *Utkal Contractors and Joinery P Ltd. & Ors v. State of Orissa & Ors* (1987) 3 AIR SCC 279.

well spent if a draft is prepared with limited consultation and, after the process is at an advanced stage, a major stakeholder comes on the scene, for the first time, making drastic new proposals or disagreeing with what is in the draft.¹¹⁷ Fraser opined that more extensive high analysis, a more comprehensive and strategic approach at an earlier stage and a more measured pace of reform would have avoided much uncertainty and difficulty and resulted in simpler and clearer legislation.¹¹⁸ Simamba concurred that the quality of the bill depends in large measure on the time available to the draftsman to familiarize himself with the objectives sought and to determine the means of attaining them.¹¹⁹ Ashworth supported this view and said that well-conceived instructions from the government department are the key to a good drafting and it would be quite wrong to assume that the fault lies with the quality of work in the Office of Parliamentary Counsel.¹²⁰

In Appendix G, I attempt to provide a guideline on how and what should be included in drafting instructions for the legislative drafting process in Malaysia. The important caveat is that the list is not exhaustive and needs a lot more improvements. It is based on a few models from other jurisdictions such as the United Kingdom,¹²¹ Canada,¹²² New Zealand¹²³ and Australia¹²⁴ but with necessary changes to suit Malaysia. I strongly believe that a guideline to prepare drafting instructions is useful and can improve the legislative drafting process in Malaysia. It will benefit not only the instructing officers but drafters alike.

There will be criticism against this proposal as adding extra paper-work to the already over-burdened and over-stressed instructing officers and ministry officials who work against time and due date. However, urgency and time constraint should not be an excuse. It may be so in certain matters but not in every matter and it may be necessary to work out exceptions.¹²⁵ The guideline will make the policy makers and the instructing officers think about the feasibility of their plan to legislate, help them to strategize and perfect their plan while preparing the draft legislation. Furthermore, if they can produce draft legislation and the policies behind it are well thought-out, there should be no difficulty in explaining their plan in the form of narrative writing.

117 Simamba (2009), p. 3.

118 R. Fraser, 'The Making of Tax Policy and the 2008 Budget: More Haste, Less Speed', 4 *B.T.R.* 2008, pp. 307-311, at p. 311. *See also* D.W. Williams, 'The Finance Act 1993: Incredible Drafting, Extraordinary Prose', 6 *B.T.R.* 1993, pp. 483-495.

119 Simamba (2009), p. 3. *See also* R. Journeault-Turgeon and R. Tremblay, 'The Draftman's Role in the Preparation of Quebec Statutes', 10 *Commw. L. Bull.* 1984, pp. 1875-1881, at p. 1877.

120 A. Ashworth, 'A Crystal Mark for Lawmakers', *Mar Crim. L.R.* 1996, pp. 149-151, at p. 149.

121 Guide to Making Legislation <www.cabinetoffice.gov.uk/making-legislation-guide/drafting_the_bill.aspx>, accessed 25 June 2010.

122 Guide to Making Federal Acts and Regulations <www.pco-cp.gc.ca/index.asp?doc=legislation/table>, accessed 5 June 2010.

123 Cabinet Manual 2008 <www.cabinetmanual.cabinetoffice.govt.nz/7.19>, accessed 6 June 2010.

124 Giving Written Instructions <www.opc.gov.au/about/docs/drafting_instructionsv05.pdf>, accessed 29 May 2010.

125 It should be made mandatory when the law or amendments to be made are legally complex, require complex drafting or when the legislative has a limited time frame to implement a policy. *See* U. Karpen, 'Instructions for Law Drafting', 10 *Eur. J.L. Reform* 2008, pp. 163-182, at p. 169.

G. Conclusion

J. Stephen articulated that:

...it is not enough [for the drafter] to attain to a degree of precision which a person reading in good faith can understand, but it is necessary to attain if possible to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.¹²⁶

It seems impossible to achieve such a degree of precision in legislation since lawyers as described by Jonathan Swift are “a society of men... bred up from their youth in the art of proving by words multiplied by for the purpose, that white is black, and black is white, according as they are paid”.¹²⁷ Despite the vulnerability of legislation to challenges in court, to be clear, precise and unambiguous in drafting laws is not an option but a must for legislative drafters. This mission is achievable if drafters have clear, complete and adequate drafting instructions. In addition, the only time for a legislative proposal to be put under rigorous and objective scrutiny is during the drafting stage.¹²⁸ Thus, ensuring good quality drafting instruction is one way to safeguard the quality of legislation.

Good drafting instructions can give more time and space for drafters in the actual drafting of laws, they put drafters in a better position to understand the proposal, they facilitate drafters to carry out their duties and help them to compose clear, precise and unambiguous legislation and thus policy effectively achieves its objective. These are all the foreseen advantages. However, most importantly the whole idea of having good drafting instructions is to have good and well thought-out policy which may be seen as too idealistic in the real world of legislative drafting where time is always short. Although it is only ideal in theory as pessimists may advocate, the responsibility to produce highest quality legislation must be fulfilled by drafters within the time they have or within the time they may not have.¹²⁹ As a result, the importance of having good drafting instructions is not overstated.

126 *In re Castioni*, 1 QB. 1891, pp. 149, 167.

127 McLeod (2009, p. 8) quoting J. Swift, *Gulliver's Travels: A Voyage to the Country of the Houyhnhnms*.

128 In Canada, the initial drafting instructions to a proposed bill are considered by a Cabinet Committee before going to the full Cabinet. However, the scrutiny is just a formality because the Committee report is essentially based on ministerial recommendation. See Murphy (2003). This is similar to Malaysia and the UK where the Cabinet's approval is based on minister's recommendation and the scrutiny is only a formality. Thus the scrutiny is not as thorough as before the legislative drafters. However, Memorandum to Cabinet system is a tool for order, certainty and predictability in the political decision-making process.

129 Pressure of time is a common difficulty for draftsman. See N.K. Chakrabarti, *Principles of Legislation & Legislative Drafting*, (2nd edn.). R. Cambay & Co., Calcutta 2007, p. 424. See also M. Zander, *The Law-Making Process*, (6th edn.), Cambridge University Press, Cambridge 2004, p. 98.

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Obviously, in theory as advocated by many authors and in practice as proven by this study, draft legislation is not a good and not a sufficient form of drafting instructions and the tradition of having a draft bill as drafting instructions influences the quality of legislation. Thus, my suggested solution to this scenario is to impose on the instructing officers to write a complete narrative explanation of their bill and make it available to drafters at the earliest possible time, that is when the draft bill is sent to the drafters. However, it is imperative to state clearly that there is no magic wand to solve the problem of achieving quality in legislation. Therefore, I want to further explore another option which relates to involvement of drafters in the policy process in Malaysia because it could be another way to achieve quality in legislation.

Too often, drafters fail to translate policies into effectively implementable legislation because of the persistence of the myth¹³⁰ that drafters do not deal with the law's substance, but only its form.¹³¹ Following this myth, the British drafting tradition assumes that ministry officials provide the 'policy' and 'substance', while the central office drafters merely put it into form,¹³² thus drafters' involvement is relatively late. Thornton and Professor Grad supported this tradition. According to Thornton, a drafter needs to know nothing about substance, but only how to use words to communicate what the person who designed the substance had in mind. For Grad, the words follow from the substance which presumably the drafter receives from the line ministry.¹³³

Nevertheless, Seidman rightly argued that form and substance are like words and thought, so intimately intermingled and linked with each other that a change in words alters the thought, just as a change in thought requires changing words. By analogy, Seidman argued that a drafter is just like a pastry cook. The pastry cook does not first think about how to make an apple pie and then make it; a pastry cook makes apple pies. In the same way, a drafter does not first conceive legislation and then put it into words; a drafter does the bill.¹³⁴ Thus, if drafters carry on believing in the myth, it fosters gaps between policy makers and central drafters who have access to the essential facts as to the probable causes of the actors' problematic behaviours and drafters who have to translate ministry policies into a bills' detailed measures are likely to alter or eliminate those causes and as a result the laws they draft often fail to facilitate government's proposed transformation, good governance and development.¹³⁵ In short, Seidman opined that a drafter has the responsibility not only for a bill's form, but also for its substance

130 Henry Thring's initial approach that the drafting office does not consider policy or substance just form has been quite prevalent among drafters – especially in common law jurisdiction – for the most of the twentieth century. See Stefanou (2008), p. 321.

131 Seidman opined that another principal reason for drafters' failure to translate policy into effective implementable legislation are the weaknesses of the drafting institutions within which drafters function and the drafters' innocence of a theory or methodology for making that translation. See Seidman (2001), p. 29.

132 Seidman (2001), p. 25.

133 *Ibid.*

134 *Ibid.*, p. 26.

135 *Ibid.*, p. 49.

and drafters should involve from the very beginning of policy formulation, then only the drafter can contribute to produce effective and implementable bills as well as formally correct bills.¹³⁶ Separating the formulation of a bill's detailed legislative measures from the words which describe them is partly the reason for the ineffective legislation.¹³⁷

In Malaysia, as in many other jurisdictions, the prevalent view is that drafters are only responsible for the form and not the substance of law. In the UK, whilst they prescribe to this belief, drafters produce bills based on instructions and in Malaysia, drafters technically take the draft bill as drafting instructions and improve the draft bill prepared by instructing officers. Both traditions have the disadvantage and compromise the quality of legislation because it partly depends on the quality of drafting instructions or the quality of the draft bill. Thus, Seidman's suggestion for expert drafters to be involved from the very beginning of policy formulation is most plausible because of the reality that drafting instructions are always in general terms and force the drafters to work out the details and the draft bill as drafting instructions also does not dispense with the need for the drafters to fill any gaps in the proposal and most of the time sends them back to the initial policy consideration stage. Driedger supported this practice and said:

...if brought in early enough, a draftsman, as a legal architect and engineer, can help the policy makers formulate a better and more workable area...If the draftsmen are not brought in until the end, they cannot be as helpful as they might be,...when the matter begins to crystallize in its general architecture, the draftsman should be on hand to help formulate this, because the mechanics of formulating general structure...floats to the surface many overlaps, gaps and discrepancies that it is valuable to discover at the outset.¹³⁸

Thus, involvement of drafters from the initial stage will make better legislation because the framework of legislation as well as all its details are simultaneously developed and expressed by drafters. Furthermore, to produce an effectively implementable bill, drafters must focus attention, not only on its form, but also on the facts and logic that under-grid its detailed substantive measures.¹³⁹ Hence,

136 Seidman suggested that a drafter should write a substantial research report that details the facts and logic on which the bill rests and justify every detail measure taken or the substance of the proposed bill so that legislature and cabinet are fully informed of the effect of the bill and assess the likelihood that the bill will help to overcome the social problem it purports to address. See *Ibid.* In France, the tradition is that the text of every draft law must be prefixed by statements of reasons which contain explanations of general motives, historical setting and detailed exposition of the principal provisions. See Sir W. Dale, *Legislative Drafting: A New Approach*, Butterworths, London 1977, p. 87.

137 Seidman (2001), p. 49. See also W.P. Stasky, *Legislative Analysis and Drafting*, (2nd edn.) West Publishing Company, USA 1984, p. 162, where he opined that substance comes before form, but the two run together. See also R. Dickerson, *The Fundamental of Legal Drafting*, Little, Brown and Company, Boston 1986, p. 9, where he opined that like the architect and the engineer, the draftsman must be brought into the particular problem long before he picks up his pencil.

138 Driedger (1957), p. 46.

139 Driedger (1957), p. 87.

forget about drafting instructions in the conventional way, and let drafters do their job in the team and produce a report along with the bill to be submitted to the approving authority. Furthermore, the technical aspects of drafting are straightforward objective matters, but getting the policy right is how drafters justify their existence. The ability to effectuate policy, rather than mere stylistic facility, is what defines a skilled drafter.¹⁴⁰

The case against this method is that drafters may not be able to give objective views and critical analysis on the measures proposed by the policy makers because they are so close and involved with the project. Moreover, other practical difficulties such as shortage of expert and specialized drafters also hinder the implementation of this method. Nevertheless, this is the best solution to achieve thorough policy consideration, well thought-out policy and effective legislation. It may be resisted simply because it is against the tradition, the road is less travelled and the constraint is so great. Malaysia has started this practice¹⁴¹ and planned to have expert drafters in every ministry but shortage of experienced drafters halted the plan for the time-being. I strongly believe that this is a wise plan and the success of this method depends on the active involvement and dedication of drafters in the drafting team from the very beginning. Careful consideration of the intent, the tools, effects and side-effects of the policy should be taken into account by the drafters. The legislative drafter should play an active role in the early policy formulation stage and make a meaningful contribution by putting the policy ideas to a rigorous intellectual analysis rather than just pretend to be an innocent bystander.

In conclusion, no significant study has been done on the impact of drafting instructions in the form of draft legislation on the legislative drafting process and on the quality of legislation. All available literatures on this subject are based on the experience of the individual author and not supported with concrete data. This paper makes a link between the theory laid down by the authors in the field and the actual practice by legislative drafters. From the academic point of view, this study would add to the effort to understand the importance of good drafting instructions in the legislative drafting process and its relative influence on the quality of legislation. Besides, this study contributes to the field by pointing out the flaw in the tradition of having draft legislation as drafting instructions. By building knowledge on this subject matter, drafting offices can use the knowledge to make wise decisions in managing their legislative drafting process, manpower capacity and ultimately improve the quality of legislation.

140 L.E. Filson *et al.*, *The Legislative Drafter's Desk Reference*, (2nd edn.) CQ Press, Washington 2007, p. 14.

141 Ministry sometimes requests drafter's presence at the early policy formulation stage. However drafters are seldom interested in getting involved mainly because they fail to see how they can contribute to the process.

H. Appendix A

QUESTIONNAIRE FOR INSTRUCTING OFFICERS

1. Years in service
2. Years in the Ministry
3. Any experience in drafting legislation Y/N
4. Any training in legislative drafting Y/N
5. How do you first receive instructions to prepare draft bill/legislative plan?
 - a- oral
 - b-written
6. Who usually gives the instructions?
 - a. minister
 - b. ministry's official
 - c. others (please specify)
7. Do you also receive draft bill? Y/N/Sometimes
8. Are you involved in policy decision? Y/N/Sometimes
9. Are you involved in developing policy details? Y/N/Sometimes
10. Do you have any guidelines on when you should involve in policy matters?
Y/N/Not sure
11. Do you advise on the appropriateness of the decision to legislate? Y/N/Sometimes
12. Do you ensure a complete study has been done before a legislative plan to proceed?
Y/N/Sometimes/Not sure
13. When do you begin to draft?
 - a. after determine the policy details
 - b. simultaneously when developing the policy details
14. If you prepare draft bill, do you also prepare written justification/background/explanation etc. about the bill? Y/N/Sometimes
15. Do you find it difficult to prepare draft bill? Y/N
16. Do you correspond with drafters about your draft bill? Y/N/Sometimes
17. Do you have guideline in preparing draft bill or drafting instructions? Y/N/Not sure
18. Do you need guideline to prepare draft bill or drafting instructions? Y/N/Not sure

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19. Do you have sufficient time to prepare your draft bill or drafting instructions?

Y/N/Sometimes

20. Tick the matters you look for /consider when you prepare draft bill. (You may tick more than one). Feel free to add more if you have any.

- Necessity to legislate/alternative to legislation
- Any other relevant law
- Commencement
- Application
- Human rights issues
- Administrative discretion
- Transitional matters
- Constitutional issues
- Financial and practical implications
- Whether consultation has been done
- Necessity for delegated legislation

21. Describe briefly your other functions at the ministry.

I. Appendix B

QUESTIONNAIRE FOR DRAFTERS

1. Years in service

2. Years in Drafting Division

3. Any training in legislative drafting Y/N
4. How do you first receive instructions to draft from ministries?
a- oral instructions b-written (letter) and draft bill attached c-written with no draft bill
5. First thing you do when receive instructions:
a- understanding the proposal b- vetting the draft c- both a and b
6. Can you get the whole picture of the proposal from the draft? Y/N/Sometimes
7. If NO, how do you find the details/information about the proposal?
a- own research b- ask colleagues c- ask the instructing officers
8. Do you always find all the information you need? Y/N
9. Do you correspond with the instructing officer? Y/N
10. Are you satisfied with the draft from the ministry? Y/N/Sometimes
11. If NO, what are the common flaws you encounter?
a- Unsettled legal issue b- Difficult to understand c- Unsettled policy issue
d. all a, b, and c
e. Others (feel free to specify)
12. You resolve the issues through:
a- meetings b- letters/emails c- phone calls
13. Do you prioritize your work? Y/N
14. Which one do you give priority?
a. assignment that needs significant research b. assignment with no/little research
15. Which form of drafting instructions do you prefer most?
a. draft bill b. draft bill and complete explanation
c. just written instructions in prose form

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16. Tick the matters you look for /consider when you draft or vet your bill. (You may tick more than one). Feel free to add more if you have any.

- Any other relevant law
- Human rights issues
- Transitional matters
- Constitutional issues
- Financial and practical implications
- Whether consultation has been done
- Necessity for delegated legislation

17. Assuming that you have complete/detailed written drafting instructions in prose form, can you come up with a draft bill?

Y/N/Not sure

J. Appendix C

LIST OF RESPONDENTS

Instructing officers

1. Anonymous 1 Legal Advisor, Ministry of Women, Family and Community Development
 2. Anonymous 2 Legal Advisor, Department of Islamic Development
 3. Anonymous 3 Assistant Legal Advisor, Public Service Department
 4. Anonymous 4 Senior Federal Counsel, Ministry of International Trade and Industry
 5. Anonymous 5 Legal Advisor, Ministry of Human Resources
 6. Anonymous 6 Federal Counsel, Ministry of Home Affairs
 7. Anonymous 7 Federal Counsel, Ministry of Defence
 8. Anonymous 8 Legal Advisor, Prison Department
 9. Anonymous 9 Senior Federal Counsel, Ministry of International Trade and Industry
 10. Anonymous 10 Federal Counsel, Department of Islamic Development
-

Drafters, Drafting Division, Attorney General's Chambers

1. Anonymous 1 Senior Assistant Parliamentary Draftsman
 2. Anonymous 2 Senior Assistant Parliamentary Draftsman
 3. Anonymous 3 Senior Assistant Parliamentary Draftsman
 4. Anonymous 4 Senior Assistant Parliamentary Draftsman
 5. Anonymous 5 Senior Assistant Parliamentary Draftsman
 6. Anonymous 6 Senior Assistant Parliamentary Draftsman
 7. Anonymous 7 Senior Assistant Parliamentary Draftsman
 8. Anonymous 8 Senior Assistant Parliamentary Draftsman
 9. Anonymous 9 Senior Assistant Parliamentary Draftsman
 10. Anonymous 10 Senior Assistant Parliamentary Draftsman
 11. Anonymous 11 Senior Assistant Parliamentary Draftsman
 12. Anonymous 12 Senior Assistant Parliamentary Draftsman
 13. Anonymous 13 Senior Assistant Parliamentary Draftsman
 14. Anonymous 14 Senior Assistant Parliamentary Draftsman
 15. Anonymous 15 Assistant Parliamentary Draftsman
 16. Anonymous 16 Assistant Parliamentary Draftsman
 17. Anonymous 17 Assistant Parliamentary Draftsman
 18. Anonymous 18 Assistant Parliamentary Draftsman
 19. Anonymous 19 Assistant Parliamentary Draftsman
 20. Anonymous 20 Assistant Parliamentary Draftsman
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K. Appendix D*Response from instructing Officers (Total Respondents N=10)*

No	Question	Variable	Frequency	Percentage
1	Experience in legal service	0-10 yrs	2	20%
		>10yrs	8	80%
2	Experience in Ministry	0-5 yrs	6	60%
		> 5 yrs	4	40%
3	Experience in legislative drafting	Yes	3	30%
		No	7	70%
4	Training in legislative drafting	Yes	8	80%
		No	2	20%
5	How receive instructions to prepare draft	Oral	1	10%
		Written	9	90%
6	Who gives instructions	Minister	1	10%
		Ministry's official	9	90%
7	Whether also receive draft bill from ministry's official	Yes	4	40%
		No	6	60%
8	Involvement in policy decision	Yes	2	20%
		No	5	50%
		Sometimes	3	30%
9	Involvement in developing policy details	Yes	5	50%
		No	2	20%
		Sometimes	3	30%
10	Any guidelines about involvement in policy	Yes	5	50%
		No	5	50%
11	Advice on decision to legislate	Yes	10	100%
		No	0	-
		Sometimes	0	-
12	Ensure complete study	Yes	3	30%
		No	4	40%
		Sometimes	3	30%
13	When you begin to draft	after determine the policy details	0	-
		simultaneously when developing the policy details	10	100%
14	Whether prepare justification/background/explanation	Yes	5	50%

No	Question	Variable	Frequency	Percentage
		No	5	50%
15	Whether difficult to prepare draft bill	Yes	10	100%
		No	0	-
16	Correspond with drafters	Yes	9	90%
		No	1	10%
17	Have guidelines in preparing draft bill/drafting instructions	Yes	2	20%
		No	8	80%
18	Need guidelines	Yes	10	100%
		No	0	-
19	Sufficient time to prepare draft	Yes	8	80%
		No	2	20%
*20	Matters considered	Necessity to legislate/alternative to legislation	8	80%
		Any other relevant law	10	100%
		Commencement	4	40%
		Application	5	50%
		Human rights issues	7	70%
		Administrative discretion	5	50%
		Transitional matters	2	20%
		Constitutional issues	10	100%
		Financial and practical implications	8	80%
		consultation	3	30%
		Necessity for delegated legislation	5	50%
21	Other functions	Advisory	10	100%
		Litigation	4	40%

* Respondents choose more than one answer

L. Appendix E

Response from Drafters (Total Respondents N= 20)

No	Question	Variable	Frequency	Percentage
1	Experience in legal service	0-10 yrs	12	60%
		>10yrs	8	40%
2	Experience as drafter	0-5 yrs	11	55%
		> 5 yrs	9	45%
3	Training in drafting	Yes	20	100%

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No	Question	Variable	Frequency	Percentage
		No	0	-
4	How receive instructions	Oral	0	-
		Letter+draft bill	20	100%
		Written but without draft bill	0	-
5	First thing do after receive instructions	Understanding the proposal	15	75%
		Vetting the draft	0	-
		Both simultaneously	5	25%
6	Understand the proposal from the draft	Yes	2	10%
		No	18	90%
7	How find details of the proposal	Own research	5	25%
		Ask colleague	0	-
		Ask instructing officer	15	75%
8	Find the information needed	Yes	7	35%
		No	12	60%
		Sometimes	1	5%
9	Corresponding with instructing officer	Yes	20	100%
		No	0	-
10	Satisfaction with the draft	Yes	2	10%
		No	17	85%
		Sometimes	1	5%
*11	Common flaws in the draft	Unsettled legal issues	1	5%
		Hard to comprehend	15	75%
		Unsettled policy issues	4	20%
		All the above	15	75%
*12	How resolving issues	meetings	18	90%
		letters	5	25%
		phone calls	2	10%
13	Prioritizing work	Yes	20	100%
		No	0	-
14	Which one give priority	assignment that needs significant research	6	30%
		assignment with no/little research	14	70%
15	Preferred form of drafting instructions	draft bill	0	-
		draft bill and complete explanation	20	100%

No	Question	Variable	Frequency	Percentage
		just written instructions in prose form	0	-
*16	Matters considered in drafting bill	Any other relevant law	19	95%
		Human rights issues	11	55%
		Transitional matters	10	50%
		Constitutional issues	20	100%
		Financial and practical implications	11	55%
		Whether consultation has been done	12	60%
		Necessity for delegated legislation	9	45%
17	Ability/confidence to produce draft on their own	Yes	9	45%
		No	1	5%
		Not sure	10	50%

* Respondents choose more than one answer

M. Appendix F

Bills Received by Drafting Division and Published as Statutes (2000-2009)

Year	Bills Received by Drafting Division	Bills Tabled in Parliament	Published as statute		
			Amendment Bills	New Bills	Total
2000	66	54	23	9	32
2001	46	51	42	8	50
2002	44	40	50	8	58
2003	74	53	32	8	40
2004	50	30	18	6	24
2005	55	31	24	6	30
2006	56	52	20	11	31
2007	48	58	47	20	67
2008	54	31	15	6	21
2009	44	37	21	10	31
Total	537	437	282	92	374

Rozmizan Muhamad

N. Appendix G

Proposed Guidelines on Preparation of Drafting Instructions

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- | | |
|---|---|
| 1. The form and format | <ul style="list-style-type: none"> - Written in narrative form, used clear and straightforward language - Free from jargon and technical language as the substance allows. If technical language is necessary, a glossary or other explanatory material should be provided - Consistent language. Same word for the same thing - Topic should be dealt with in logical and chronological sequence - The relative importance of different issues should be made clear |
| 2. What to include in drafting instructions | <ul style="list-style-type: none"> (a) The background information (b) The purposes of the legislation (c) The means by which those purposes are to be achieved (d) The impact on the existing law and circumstances |
| (a) Background information | <ul style="list-style-type: none"> - Sufficient information to enable the drafter to see in perspective and in context the circumstances and problems which the legislation is intended to meet - History that has contributed to the shape of the proposed legislation - The result and the extent of consultations that have taken place - Reference should be made to any papers, documents or other desirable reading materials for the drafter and copies should be provided - If the proposals have stemmed from or been considered by a commission or other advisory body, the proceedings and report should be annexed to the instructions - If the proposal is a consequent of a judicial decision, a copy of the judgment or a reference to it should be given |
| (b) Purposes | <ul style="list-style-type: none"> - Give clear, precise and exact purpose of the proposed legislation - For amending bills that are intended to accomplish a number of different purposes, explain these purposes separately in relation to the provisions that are to be amended. |
| (c) Means | <ul style="list-style-type: none"> - Describe how the purposes are to be achieved - Important issues of principle must be declared - Describe in detail the proposed administrative machinery - Provide hypothetical examples of how the scheme will work - Outline the matters of administrative detail, structures, administrative powers and duties, and matters to be dealt with in regulations - State any power to delegate any function if required - Describe the conduct to be prohibited or regulated and the nature of the sanctions - Describe the consequences of breaches of proposed obligation - State who is to have the function of making decisions and exercising discretion - Specify the nature of appeal or review, which body or person is to hear and the procedure to be followed |

- (d) Impact on circumstances and law
- Describe how the proposed law will fit into existing circumstances
 - Specify all anticipated difficulties and problems, whether legal, social or administrative
 - Specify any conflicting legislation
 - State the extent to which existing laws need to be repealed or altered, either to achieve the objects of the proposals or as a consequence of those objects
 - In amending law, every provision requires amendment must be identified
 - State when the new law should commence
 - State the administrative or other actions that will be necessary before the law can come into effect
 - Specifically indicate any proposal that is intended to have retrospective operation
 - Specify the impact on people and circumstances when the proposed law first comes into force
 - Specify any constitutional obligations or standards that might be affected by the proposals
 - State the financial considerations/impacts and whether the necessary approval within the government has been obtained
- (3) Matters to be considered in preparing drafting instructions
- LEGAL MATTERS**
- Does Parliament have constitutional authority to enact the legislation
 - Will it affect matters within state jurisdiction
 - Is it consistent with the Federal Constitution
 - Does the proposal raise any gender or other equality issues
 - Is it consistent with Acts of general application
 - Do any of the proposed provisions unnecessarily duplicate provisions of other Acts
 - Do any elements of the proposal conflict with other legislation
 - Does the proposal deal with matters that are dealt with by another bill that is being prepared or has been introduced in Parliament
 - Does the proposal respond effectively to any court decisions or legal opinions that gave rise to the legislation or any of its elements
- POLICY MATTERS**
- Do any government policies affect the proposal
 - Who will incur cost as a result of the legislation
 - How will the policy objectives of the proposal be accomplished
 - What should be included in a single bill
 - What type of legal instruments should be used
 - What should be in the Act
 - What should be in regulations
 - Should some matters be dealt with through documents or laws incorporated by reference
 - What should be dealt with through administrative instrument
 - Who should powers be given to

PARTICULAR MATTERS

- What will be the title of the bill
- Should there be a preamble or purpose clause
- Should the application of the Act be confined or expanded in any way
- What public bodies or office will be needed
- Will the Act authorize the appointment of members of boards and tribunals and other senior officials
- Will there be provisions involving the collection or disposition of public money
- Will the legislation restrict or require the disclosure of information
- Should there be provisions for monitoring compliance with the legislation
- Will penalties or other sanctions be needed to ensure compliance with the legislation
- Should the Act authorize searches, seizure and other action to support prosecution of offences
- Should there be procedure for appealing or reviewing decision of administrative bodies created or authorized to make decisions under the Act
- Does the proposal include any extraordinary provisions requiring specific Cabinet approval

TECHNICAL LEGISLATIVE MATTERS

- Should provisions be included for the expiry or review of the Act
- Are there any Acts or regulations that have to be repealed as a result of the legislation
- Are there any Acts or regulations that will have to be amended as a result of the legislation
- Will any transitional provisions be needed to deal with matters arising before the Act comes into force
- When should the Act come into force

OTHER MATTERS

- Will any other affected ministers, departments or agencies have to be consulted on drafting the bill
 - Will any consultation with other governments, non-governmental bodies or the public be needed on drafting the bill
 - How should drafting and implementation time frame be established
 - Are there any matters that still have to be resolved
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