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Published in:
The impact of legislation

Publication date:
2009

[Link to publication](#)

Citation for published version (APA):
Vranken, J. B. M., & van Gestel, R. A. J. (2009). Assessing the accuracy of ex ante evaluation through feedback research: A case study. In J. M. Verschuuren (Ed.), *The impact of legislation: A critical analysis of ex ante evaluation* (pp. 199-277). Martinus Nijhoff Publishers.

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Chapter 10

Assessing the Accuracy of Ex Ante Evaluation through Feedback Research: A Case Study

Rob van Gestel and Jan Vranken

I. The Black Box of Ex Ante Assessment of Legislative Drafts

Most legal publications concerning the quality of legislation are focused on the parliamentary phase of the lawmaking process.¹ What happens during the preparatory phase inside and between ministries and government agencies largely takes place in a ‘black box’ although this is in fact the place where the action is.² This is remarkable because that is where the policy problem underlying a Bill is first defined, where the data/information is gathered through consultations or otherwise, where alternative regulatory options (non-regulation, self-regulation, co-regulation) are explored, and where trade-offs between those options are discussed etcetera. It is during this pre-parliamentary phase that all kinds of ex ante assessments of the quality of legislative drafts will take place.

But what do we know about the accuracy and reliability of these assessments and their effect on the quality of legislation after enactment? One way of finding out is by conducting so-called ‘feedback research’.³ This type of research aims to compare the results from ex ante

¹ See, for example, R.W. Bauman & T. Kahana, *The Least Examined Branch: The Role of Legislatures in the Constitutional State*, Cambridge: Cambridge University Press 2006. For the Netherlands, G. Visscher, *Parlementaire invloed op wetgeving* (dissertation Leiden), Den Haag 1994 and more recently: J.Th.J. van den Berg, J.L.W. Broeksteeg & L.F.M. Verhey (eds.), *Het parlement, Staatsrechtconferentie 2006*, Nijmegen: Wolf Legal Publishers 2007.

² These words are taken from one of the few Dutch scholars who have done research on the pre-Parliamentary phase of the legislative process, L.J.M. d’Anjou, *Actoren en factoren in het wetgevingsproces*, Zwolle: W.E.J. Tjeenk Willink 1986, p. 274 (dissertation with an English summary).

³ Not much has been written on the methodology of feedback research. An exception is: E.H. Mory, *Feedback Research Revisited*, in: H. Jonassen (eds.), *Handbook of Research on Educational Communications and Technology*, Mahwah: Lawrence Earlbaum Associates 2004, pp. 745-784. See especially p. 745, where it is stated that feedback research allows the comparison of actual performance with some set standard of performance. Mory argues that information presented via feedback in instruction might include not only answer

evaluations and advisory opinions concerning the quality of legislative drafts with the outcomes of ex post evaluations to find out which judgements and predictions were (not) correct in retrospect and which essential flaws were overlooked.

In this chapter, we will focus on the ex ante review of legislative drafts by the Dutch Council of State.⁴ The reason for this is that the position of the Council of State in the Netherlands is vital when it comes to ex ante evaluation. Other than most of the surrounding countries, the Netherlands does not yet have an integrated system of regulatory impact assessment or an impact assessment board. The Council of State, however, does something reasonably similar to ex ante evaluation, namely, assess the policy-analytical aspects⁵ of legislative drafts before they are sent to parliament. There is no other institution that has the same authority, the same expertise (the House of Representatives is first of all a political arena), or the same strategic position (the Senate is at the far end of the lawmaking process and has little opportunity to demand amendments to legislative proposals) to be successful in scrutinizing the quality of legislative drafts.

Section II is about the Council of State and its exact role in the review of legislative drafts. In section III, the focus of this study will be specified, leading to the research questions in section IV. Our research involves a pilot study of two cases for which we developed an analytical framework (V-VIII). Finally, in sections IX and following, the research questions will be answered: what observations and conclusions can be drawn from the study?

II. The Council of State as the Principal Advisor on Legislative Quality

Together with the House of Representatives, the Senate, the National Chamber of Audit and the National Ombudsman, the Council of State belongs to the High Councils of State. These are government agencies of which the independence is regulated by the Constitution because they fulfil an important role in the constitutional system of checks and balances.⁶ Similar to,

correctness, but other information such as precision, timeliness, learning guidance, motivational messages, lesson sequence advisement, critical comparisons, and learning focus. See also Section III.

⁴ A detailed overview of the advisory tasks of the Council of State can be found in: T. Borman, *Wetgevingsadvisering door de Raad van State in Nederland*, Deventer: W.E.J. Tjeenk Willink 2000.

⁵ See Section II.

⁶ For a brief introduction to the Dutch constitutional system we refer to C. Kortmann, J. Fleuren & M. Kindlová, *Constitutional Law of 10 EU Member States: The 2004 Enlargement*, Deventer: Kluwer Law International 2006.

for instance, the French *Conseil d'État*,⁷ the Dutch Council of State (*Raad van State*) has two main functions. First, it is responsible for assisting the executive with legal advice. Secondly, the Council is the highest administrative court with general jurisdiction in administrative law cases. The legal basis for this double mandate can be found in Articles 73, 74, and 75 of the Constitution.⁸ In its role as independent legal advisor, the Council of State has to be consulted on legislative drafts before they are sent to Parliament, i.e., the House of Representatives and the Senate.

Our study only concerns the Council's role in scrutinizing the quality of legislative drafts. In that capacity, it provides the government with advice on:

- all bills the government intends to present to Parliament,
- international agreements which the government intends to submit to Parliament for approval,
- orders in council promulgated by the Crown.⁹

The House of Representatives also seeks the Council's advice on bills initiated by members of Parliament before considering them in the House. Both for the government and the House of Representatives, the Council's advice is compulsory, i.e., without the Council's advice Parliament cannot consider bills and the government cannot promulgate orders in council. This privileged position of the Council of State in the legislative process is even strengthened following a significant reduction of the number of advisory bodies on the central government level over the last ten years. Currently, the Council of State is the last and most important advisory body in line before legislative drafts are sent to the House of Representatives. Reports from other government advisory bodies, such as ACTAL (the agency responsible for the assessment of administrative burdens),¹⁰ the Social and Economic Council, or, for

⁷ See <<http://www.conseil-etat.fr/ce/home/index.shtml>>. More information on the competences of different Councils of State in Europe can be found through the European association of Councils of State and Supreme Administrative Jurisdictions of which the secretariat is established at the Belgium Council of State <http://www.juradmin.eu/en/home_en.html>.

⁸ The text of the Dutch Constitution can be found at the website of the Ministry of the Interior and Kingdom Relations: <http://www.minbzk.nl/contents/pages/6156/grondwet_UK_6-02.pdf>.

⁹ See <www.raadvanstate.nl> (English).

¹⁰ See <www.actal.nl> (English).

example the National Health Council,¹¹ have to be sent to the Council of State together with the legislative draft.

In preparing its advisory opinions the Council has traditionally paid particular attention to both the legal and the technical aspects of legislation. Assessing the *legal* aspects means answering such questions as: will the bill fit in the existing legal system? Is the bill in accordance with higher law such as the Constitution, international treaties, e.g., human rights conventions, and European law? Is the bill in accordance with principles of democracy, equality before the law, proportionality, legal certainty, and the rule of law?¹² Assessing the *technical* aspects of legislation concerns, for instance, matters of logical consistency, use of terminology, and transitional provisions.

In the last decade, a third aspect has also become more and more important in the advisory opinions of the Council: assessing legislation from a policy-analytical perspective. In 2003, the Council even developed and published a special ‘checklist for policy-analytical scrutiny of draft legislation’.¹³ This checklist is quite detailed and covers a wide range of topics. They vary from:

- the definition of the policy problem that is addressed in the draft and the question of whether legislation is really necessary, the availability of alternative modes of regulation (self-regulation, co-regulation, economic incentives) in order to be certain that legislation is the best possible or least troublesome way of solving the problem, to
- the chance that the proposed legislation will prove to be effective, efficient and well-balanced regarding costs and benefits, and

¹¹ More information about the Social and Economic Council of the Netherlands can be found in English at <<http://www.ser.nl/en.aspx>>. The same goes for the National Health Council at <<http://www.gr.nl/index.php>>.

¹² These principles concerning the quality of legislation can be found in such guidelines (Legislation in perspective, *Kamerstukken II* 1990-1991, 22008, nos. 1-2 (available in English)) and in the so-called *Aanwijzingen voor de regelgeving*, which are available in English as “Directives on legislation” at <<http://www.kc-wetgeving.nl/>> (the website has restricted access but a guest account can be obtained through the Ministry of Justice). The Directives on legislation are also on archive with the authors (r.a.j.vanGestel@uvt.nl and j.b.m.vranken@uvt.nl).

¹³ Published in the Council of State’s Annual Report 2003, Annex 4, pp. 151-152, and also available at <www.raadvanstate.nl> (English).

- the possibility of monitoring and enforcing the law, and the side effects, bottlenecks, and problems that may be expected in these respects once the law has entered into force.

At the end of the report that contains the advisory opinion, the Council states its conclusion (*dictum*). This may be negative in that it recommends reconsidering the bill and not submitting it to Parliament, or it may recommend that, before submitting the bill to Parliament, some amendments or improvements have to be made, in the text of the bill or in the Explanatory Memorandum. If the Council's *dictum* is negative, the draft has to be re-discussed by the Cabinet. Apart from this, the Minister responsible for the legislative draft always has to present a Report to the Queen (*Nader rapport*) containing a motivated reply to the comments by the Council of State. The Council's advisory opinion and the *Nader rapport* have to be published as soon as the bill is submitted to the House of Representatives.¹⁴ Today the reports are easily accessible both in the national database on legislation and through the Council's website. The *Nader rapport* is supposed to make clear whether the Council's remarks have induced the Minister to amend the bill or to alter or supplement the Explanatory Memorandum.

III. Focus of the Study

We will concentrate on the accuracy of the Council's advice in uncovering policy-analytical failures and hidden mistakes in legislative drafts. To determine the accuracy, we will compare the Council's advices with an ex post evaluation of the relevant bill, which usually takes place several years after its enactment. This feedback research involves three aspects. First, it has to be determined whether the Council of State made an accurate assessment of the problems in advance. What bottlenecks and side effects did the Council foresee and were the predictions accurate according to the ex post evaluation? Secondly, it has to be established whether the ex post evaluation indicates that there is reason to reconsider and adapt (a) the procedure in which the Council prepares its advisory opinions, i.e., its working method, and (b) the checklist concerning the policy-analytical review. Thirdly, and most importantly, which lessons can the legislator learn for the quality system of ex ante assessment of legislative drafts in general, including the phase before the drafts are sent to the Council of State? More

¹⁴ See Article 25a of the Council of State Act 1962 (*Wet op de Raad van State van 9 maart 1962*).

specifically, we will address the possible implications for the methodology of ex ante assessment, and the timing and expertise that is required. On that basis we are able to evaluate the potential contribution of feedback research to enhance the Ministries' quality system of ex ante assessments of legislative drafts, and therefore the quality of legislation. To answer the third question, we will briefly turn to scholarly literature on ex ante evaluation because, on the one hand, we expect that in our evaluation we can probably rely on theories or methods that are used to assess the regulatory impacts of draft legislation, whereas, on the other hand, we will be able to add our findings about the potential contribution of the feedback research we conducted in this project to the current body of knowledge on regulatory evaluation.

By 'the Council's procedure or working method', we mean the approach of the Council in preparing advisory opinions. Does the Council proceed in a transparent and consistent way and with a well-established idea about its own role in the process of preparing legislation? What data were available? Were they sufficient and reliable or should the Council have been more active in gathering information? Considering the preparatory phase of the advice, we will also pay attention to the style of argumentation and the way opinions are underpinned with consultations, empirical research, or other scientific evidence. What we already know from the start is that the Council usually keeps its comments as brief as possible, among other things, by keeping silent about topics in the bill it agrees upon, not giving any comments on possible good practices, and by being hesitant to refer to external sources outside the legislative file as it is presented to the Council. Furthermore, the Council prefers not to enter into debates with other advisors or commentators.¹⁵

The 'checklist on policy-analytical assessment of legislative drafts' was already mentioned. What role do the criteria in this checklist play in the daily practice of the Council's advisory opinions? Bearing in mind that the list is quite detailed and covers a wide range of topics, it seems almost impossible for the Council to keep a close track of the list and run through it item per item for each and every draft.

¹⁵ This information is drawn from previous empirical research concerning the way the Council of State uses its advisory competence. In general, all these reports conclude that the Council relies heavily on intuition, experience, and practical wisdom. See, for example, Ph. Eijlander & W. Voermans, *Evaluatie regeerakkoord 1998 uit wetgevingsperspectief*, Tilburg 2002 <<http://till.uvt.nl/articles/voermans/internet.pdf>>; B.R. Dorbeck-Jung, *Beelden over de wetgevingsadvisering van de Raad van State. Hoe wetgevingskwaliteit gemaakt wordt*, Den Haag: BOOM 2003; and J.L.W. Broeksteeg, E.M.J. Hardy, S. Klosse, M.G.W.M. Peeters & L.F.M. Verhey, *Zicht op wetgevingskwaliteit: een onderzoek naar de wetgevingsadvisering van de Raad van State*, WODC: Den Haag 2005 (available at <www.wodc.nl> with a summary in English).

IV. Research Question

The foregoing leads to the following central research question:

What do ex post evaluations reveal about the accuracy of the policy-analytical review of legislative drafts by the Council of State and what lessons can be learnt for the quality system of ex ante assessment of draft legislation in general?

Sub-questions are:

- *In retrospect, has the Council of State conducted an accurate assessment of the problems, bottlenecks, effects, and side effects of bills before they entered into force according to the results of ex post evaluation?*
- *Do the ex post evaluations indicate that there is a reason to reconsider and adapt (a) the procedure in which the Council prepares its advisory opinions and/or (b) the Council's checklist on policy-analytical review?*
- *What lessons can the legislator learn for the ex ante assessment of legislative drafts in general? More specifically, what are the possible implications for the methodology and criteria of ex ante assessment, and the timing and required expertise?*
- *Considering the answers on the three sub-questions: what is the potential contribution of feedback research to enhance the system of ex ante assessment of legislative drafts in order to support the quality of legislation?*

V. Pilot Study

The kind of feedback research we want to conduct ideally requires at least ten to twelve different case studies. We think it impossible to cover all types of files the Council has to deal with in its advisory function, but a certain diversity is needed. Aiming at a realistic variety, our selection criteria are (1) politically controversial or more legal-technical bills, (2) large or small size of the file, (3) establishing national law or implementing European directives, (4) a division of files over the classical areas of law (private law, criminal law, administrative law), and (5) a spread over the various governmental departments (economics, interior, foreign affairs, health, welfare, sport, employment, culture, law, spatial planning, housing,

integration, education, science). A precondition is of course that the bill has been properly evaluated ex post.

In order to know already at an early stage whether feedback research will be a useful method, we decided to start with a pilot of two case studies. We have chosen one large, politically controversial statute in the area of private law (the Youth Care Act 2005), and one relatively small and technical statute in the area of administrative law (the Act for the Compensation of Costs in the Administrative Objection Procedure 2002). The *dictum* of the Council's advice in the first case was the most negative one, i.e., not to submit this proposal to Parliament, and in the second case rather moderate, i.e., to make some necessary amendments to the bill before submitting it to Parliament.

VI. Three Definitions

A. Policy-Analytical Review

The Council itself defines the policy-analytical review as a systematic description, analysis, and review of policy aspects of legislative drafts on the basis of three indicators: problem definition, approach in tackling the problem, and effectiveness and efficiency.¹⁶ For an explanation of these criteria, we refer to section II of this report.

B. Ex Post Evaluation of Legislation

Not each collection and evaluation of data concerning the working of a bill can be considered an academic ex post evaluation.¹⁷ The latter requires at least a well-defined research problem and research questions, a methodologically well-founded collection of relevant data, a research strategy including a solid academic analysis and interpretation of relevant data, and a report that shows the results of the evaluation. It is important to realize that an ex post

¹⁶ See the article written by the Vice-President of the Council of State on the policy-analytical review: H.D. Tjeenk Willink, 'De beleidsanalytische toetsing door de Raad van State', *RegelMaat* 2005, no. 2, pp. 51-59.

¹⁷ About ex post evaluation of legislation: U. Karpen (ed.), *Evaluation of Legislation, Proceedings of the Fourth Congress of the European Association of Legislation*, Baden-Baden: Nomos 2002. Also H.B Winter, *Evaluatie van wetgeving: Structureren en institutionalisering van wetsevaluatie in Nederland*, Deventer: Kluwer 2002; K. van Aeken, *Proeven van wetsevaluatie* (dissertation), Antwerpen: Universiteit van Antwerpen 2002; L. Mader, *L'évaluation législative: pour une analyse empirique des effets de la législation*, Lausanne: Payot 1985.

evaluation about the working of a bill can serve different aims, and can therefore stress different questions for which different data are needed. Aims may include, for example, measuring the effectiveness of the bill or its legitimacy; determining bottlenecks and effects of the bill compared with what the legislator intended to achieve; learning about the process of implementing a bill in terms of, e.g., costs and benefits; early warning of possible side effects or administrative burdens; and so forth. The ex post evaluations of both the Youth Care Act and the Act for Compensation of Costs of the Administrative Objection Procedure¹⁸ are early warning studies intended to monitor the working of these statutes in practice as soon as possible in order for the government to be able to adjust them if and where necessary.

C. Legislative File

A file comprises the text of the bill, its Explanatory Memorandum, the reports of advisory bodies which are sometimes compulsory, and, if applicable, (scientific) reports, proceedings of expert meetings and of other consultations which are held by the government before or during the drafting process, data from comparative research, and also all information the Council itself has gathered while preparing its advisory opinion. It is to some extent problematic that the personal knowledge and experience of the members of the Council or its supporting staff about the issue at hand, based on experiences with preceding bills or comparable problems in other policy areas, usually remains hidden for the readers of the advice, unless it is somehow documented in the file. The file also contains the notes of the Council's staff and the proceedings of the deliberations between the members of the Council who prepared the draft advice, including their names, in order to be able to contact them if clarification of certain points is necessary. Not part of the file, but necessary for our feedback research, are the Council's advisory report itself, the report to the Queen (*Nader rapport*), and the text of the ex post evaluations.

VII. Analytical Framework

The first sub-question of the study concerns a comparison of the Council's advice with the ex post evaluation as regards its accuracy. To ensure that the comparison in the pilot phase – and

¹⁸ See Chapter 7 of the General Administrative Law Act concerning objections and administrative appeal. The Act can be found in English at <http://www.justitie.nl/onderwerpen/wetgeving/awb/Wettekst_awb/index.aspx>.

afterwards in all the files of the main study – will be conducted in the same way in both cases, we need an analytical framework. This framework provides the lens through which we will look at the object of study. It points out how to go through the legislative file step by step in order to obtain the relevant data. It is purely limited to establishing what happened and what was done, and does not involve any judgements concerning the data collected.

1. First Step

What remarks did the Council make and what was its advice on the definition of the problem, the problem approach, and the effectiveness and efficiency of the bill? How did this influence the Council's final opinion?

These data can easily be extracted from the Council's advice. As to complex and extensive files, it may not be so easy, but if that turns out to be the case, we will distinguish per item.

2. Second Step

On what data did the Council base its findings? Did the Council restrict itself to the data collected by the government? Were they sufficient and reliable? Did it consult other sources of information, and if so, which ones and why?

We should be able to find these answers in the Council's advice, but a problem already mentioned is that the Council usually does not refer to sources of information nor does it enter into debates with other advisors or commentators. This complicates the reconstruction of the information base. The notes of the Council's staff might be more informative in this respect, but if they are not, interviews with the members of the Council and the supporting staff who prepared the advice will perhaps yield more information. The same applies to the knowledge and experience of the Councillors, which we already mentioned in section VI (C).

The background of the queries on data collection is the importance of an adequate, reliable, and solid factual basis of the bill. It belongs to the key responsibilities of the Council as an advisory body to check whether the relevant information has been or will be taken into account as much as possible. This task is difficult for various reasons. The first reason is the broad range of topics the Council has to attend to. The Council cannot be expected to be able to compete on each topic with the special expertise available inside the different Ministries. Secondly, the Council generally has to deliver its advice within three months and in complex files; this time span is too short. Thirdly, a lack of solid factual evidence, needed to check the assumptions underlying the legislative draft, might complicate things. It is a situation legislators, judges, and legal scholars all have to cope with, not only in the Netherlands but in

other countries as well. Rarely is it possible to (empirically) test the factual basis of many legislative assumptions or intended societal effects, except with hindsight in ex post evaluations. The same applies to the factual basis of judicial decisions, and of conclusions or recommendations in legal literature. Empirical legal research and inter- or multidisciplinary approaches to law, which could offer testable facts and figures, is still scarce in civil law countries. The Council has neither the time nor the means to do this type of research itself and does not see it as its task.

3. Third Step

How did the Council proceed when preparing its advice on the problem definition, the problem approach, and the effectiveness and efficiency of the bill?

For example, did the Council critically review the problem definition of the government or did it run through the quality of policy analysis checklist item per item? These are crucial questions because the way the Council proceeds indicates to a certain extent what it considers to be its main task in the legislative process in which so many actors are involved. Especially, its attitude towards various forms of ex ante evaluation, which the government has to carry out when preparing the bill – see the Directives on Legislation (*Aanwijzingen voor de regelgeving*) – is meaningful.

We already alluded to the Council's policy to keep its advice as concise as possible, among others things by not spending a word on topics in the bill it agrees upon, or by only stressing the most important critical points to make sure that the attention will not be distracted by its remarks on less important issues. In these cases, the Council reviewed the bill on a larger scale than mentioned in its advice. If necessary, interviews with the members of the Council and its staff who prepared the advice can clarify this.

4. Fourth Step

Did the government and/or Parliament adopt the Council's remarks and advice? Did the Council explain its opinions and, if so, how?

As to the government, the answer to both questions can easily be found in the report to the Queen (*Nader rapport*). For Parliament, we intend to carry out a quick scan of the Parliamentary documents that do not belong to the file. With the help of official legislative databases on the Internet, such a quick scan is not too difficult. Regarding the reliability of the quick scan results, it must be borne in mind that Parliament might discuss the Council's advice more extensively due to critical comments that were made, but the various parties in

Parliament do not necessarily share the opinions expressed in the remarks. Therefore, it might sometimes be difficult to determine whether a parliamentary amendment has its basis in the Council's advice.

5. Fifth Step

Did the Council conduct an accurate assessment of the problems, bottlenecks, effects, and side effects of the legislative drafts, according to the ex post evaluation?

For the answer to this question, we need to compare the results of the first step of the analytical framework with the findings of the ex post evaluation. One of the problems we might face emerges from the fact that ex post evaluations do not evaluate the Council's advice, but the bill itself as it eventually entered into force. Often this bill was amended or adapted in Parliament. Moreover, evaluation commissions do not necessarily study all aspects of the bill. This impedes a pure comparison between the Council's advice and the ex post evaluation, but with the help of a quick scan of the parliamentary considerations, we are at least able to determine whether amendments and adaptations were made. Another problem is that, in practice, a bad law might be implemented or enforced in such a way that it is hard to distinguish what exactly caused what problems; was it the bill itself or perhaps the way it was implemented that influenced the final outcomes of the evaluation? This problem is more serious because, in our research design, we do not have the tools to even recognize it. Therefore we can only mention it as a warning to be borne in mind, when answering this question.

6. Sixth Step

Provided that the answer to the first sub-question is answered predominantly in the negative, does the ex post evaluation indicate that this is or might (partly) be caused (a) by the procedure in which the Council prepares its advisory opinions and/or (b) by the checklist on policy-analytical issues applied by the Council: What can be learned about (a) and (b) from the scholarly literature on ex ante evaluation of legislation?

The sixth and last step of the analytical framework is the feedback from ex post evaluation to the Council's assessment in advance. What do ex post evaluations reveal about the accuracy of the Council's advice and what do they, and the scholarly literature on evaluation, indicate on whether it could be of help to reconsider and adapt the procedure pursued by the Council and its checklist, at least the way it applies the list?

VIII. The Litmus Test: Results of Two Case Studies

In this section, we will summarize the most important findings of the two case studies that formed the pilot phase for a possibly more comprehensive study into the accuracy of the Council of State's policy-analytical assessments of legislative drafts. The two files that we have studied are, as mentioned before, the Youth Care Act 2005 (hereafter abbreviated as YCA) and the Act for the Compensation of Costs in the Administrative Objection Procedure 2002 (hereafter abbreviated as ACCOP). In reporting on the results, we will follow the six analytical steps that we have distinguished in the previous sections.

A. Analysis of the Youth Care Act¹⁹

Preliminary remarks: The YCA entered into force on January 1, 2005. The first draft was sent to twenty different advisory bodies before it was received by the Council of State on July 17, 2001. It took until November 21, 2001, before the Council gave its advisory opinion, while the reply by the government followed on December 14, 2001. For the benefit of our research project, the Council provided us with two ex post evaluations, both finished in 2006. A consulting agency conducted the first evaluation, which was requested by Parliament, while an official working group installed by the Cabinet Office performed the second study, especially concerned with the financial structure of the youth care system in the future.²⁰ Since the second study is not predominantly an evaluation of the YCA, we will not take it into consideration. The first evaluation study has to be characterized as an early warning evaluation because a huge project such as the YCA will take at least three to five years to get rid of its teething troubles. Moreover the results of the first full-size ex post evaluation are not to be expected before the end of 2009.²¹

¹⁹ *Wet van 22 april 2004, houdende regeling van de aanspraak op, de toegang tot en de bekostiging van jeugdzorg (Wet op de jeugdzorg), Stb.(Netherlands Bulletin of Acts and Decrees) 2004, 306 (for a number of corrections, see Stb. 2004, 700).*

²⁰ *Het kind en de rekening. Eindrapportage van de werkgroep IBO financiering jeugdbeleid, 2005-2006, no. 2.*

²¹ *Kamerstukken II 28 168, F (Senate).*

The Council's advice identifies twelve general items to comment upon.²² From these twelve items, only six concern the policy-analytical aspects of the YCA. The other items and the Council's comments on specific articles are not relevant for our study.

Step one: Expectations, comments, and critical remarks concerning the problem definition, approach, effectiveness, and efficiency of the bill

The Council does not systematically assess these aspects of the bill. Problem definition and approach can be considered to be included in the remarks on the aims of the new bill compared with those of its predecessor, the Youth Assistance Act (*Wet op de Jeugdhulpverlening*).²³ Effectiveness and efficiency are not dealt with in a specific section of the advice, but the Council's relevant remarks have to be extracted and combined together from its comments on the various items.

As to the problem definition and approach, the Council was downright sceptical on whether the draft would be capable of providing a remedy for the major problems of the Youth Assistance Act. Its scepticism was fed, among other things, by the fact that there appeared to be much unclarity about what kind of implementation measures would follow from delegated laws and regulations as soon as the bill entered into force. Because of this, the Council had the feeling to be in the blind. Furthermore the Council seriously questions whether the Youth Care Act was capable to overcome the problems that its predecessor had met in practice since an overview of previous shortcomings and their causes was missing in the file. The Council signalled, for instance, that overcoming fragmentation in the youth care system had already been a goal of the Youth Assistance Act. However, the Explanatory Memorandum did not provide any information on why that Act had failed in this respect and to what extent the proposed bill would be likely to offer a better remedy here.

The Council also commented on a number of issues related to the expected effectiveness and efficiency of the Youth Care Act. The most serious one had to do with the creation of an individual right to youth care.²⁴ The Council wondered how such a right could be enforced in court if government budgets proved to be insufficient, or if there were not enough facilities, or in case of a lack of qualified personnel. Another doubt concerned the financial and organizational structure of the youth care system, which was likely to prove to

²² *Kamerstukken II 28 168, A* (the Council's advice and the 'Nader Rapport'). Items 1-5 and 8 concern the political-analytical aspects.

²³ Item 1 of the Council's advice (*Kamerstukken II 28 168, A*).

²⁴ Item 2 of the Council's advice (*Kamerstukken II 28 168, A*).

be defective, because of its complexity. Complex structures generally did not invite the actors in the field to cooperate closely and that was disastrous because tailoring youth care – one of the objectives of the YCA – could not become successful without channelling the efforts of all actors involved.

Step two: What data did the Council base its findings upon?

From the file, it follows that the Council exclusively based its findings on the data which the government had provided, including the opinions of the twenty different advisory bodies on an earlier draft of the bill. No indication can be found of whether the Council explicitly tested the adequacy, reliability, and soundness of the information. Preparatory notes from the supporting staff refer to several sources, more specifically to one paper in a legal journal, one judicial decision, one of the twenty advisory opinions included in the file, and one other advisory opinion, which were not contained in the file. The Council's final report only refers to one of the opinions in the file and, without any further specification, to 'existing case law'.

Step three: How did the Council proceed when preparing its advice on the problem definition, the problem approach, and the effectiveness and efficiency of the bill?

Two staff notes can be found in the file. However, the file does not reveal, explicitly or implicitly, any relevant information about the cooperation between the State Councillors and the Council's staff, nor among the State Councillors themselves, nor on any other aspect of the working method. Therefore we cannot say whether the supporting staff was instructed by (one of) the State Councillors – e.g., the State Councillor *Rapporteur* who is responsible for preparation of a draft advice for the Plenary Council meeting –, whether the notes were discussed in (informal) meetings, which items were considered the most important ones, and what was left out in the final version of the advice. Although it does not follow from the Council's advice, it is certain that the draft advice was on the agenda of the Plenary Council, because this is compulsory. Whether the draft was accepted without debate cannot be ascertained because there are no records of that plenary meeting in the file.

As to the way the Council handled the checklist, the picture is the same: the advice does not explicitly comprise relevant information about this subject. Nevertheless, from what was said above in step one, it seems safe to conclude that the Council paid much attention to the definition of the problem, the approach, the effectiveness and efficiency, especially regarding the availability of sufficient, qualified personnel, financial means, and a well-structured organisation. It also seems safe to state that, in this file, the Council probably did

not systematically go through its checklist, but writing this, it must be recalled that, because of its policy not to waste any words on issues it agrees upon, the bill may have been reviewed on a larger scale or more systematically than mentioned in the advice.

Step four: The attitude of government and Parliament towards the Council's remarks and advice

The government remains silent on the Council's fundamental scepticism and doubt on whether the aim of the bill, to provide a remedy for the major problems of its predecessor, the Youth Assistance Act, will be feasible. Summarizing, it could be said that the government stuck to its views and choices²⁵ and was only prepared to adapt or supplement the Explanatory Memorandum in order to clarify certain arguments. As to Parliament, a quick scan of the parliamentary documents that did not belong to the file disclosed that especially the House of Representatives supported the Council's fundamental scepticism and doubt, using qualifications like 'severe' or 'crushing', and complaining that the government had given too little weight to the Council's advice. The parliamentary considerations in the House of Representatives led to many amendments, proposed by members of the House, and to three extensive ministerial memoranda of amendment (*Nota's van wijziging*). Whether and to what extent these amendments were prompted by the Council's advice is hard to say.

Step five: The findings of the evaluation report

In the first ex ante evaluation report,²⁶ seven items were studied, three of which were the result of amendments in Parliament supplementing or tightening the bill. They were not part of the Council's advice and therefore cannot play a role in our assessment of the accuracy of the Council's advice. The four items which were reflected in the Council's advice are subsequently: (a) the youth care agency (*bureau jeugdzorg*) as the exclusive way of access to youth care; (b) the complex financial structure of the bill; (c) the right to youth care; and (d) the Council's fundamental scepticism and doubt on the necessity and feasibility of the bill. The findings of the evaluation report on each item can be summarised as follows:

- (a) The introduction of an exclusive youth care agency caused many problems and bottlenecks. The list in the evaluation report was too long and too detailed to

²⁵ See *Kamerstukken II 28168, A* ('Nader Rapport', answers to items 1-5 and 8).

²⁶ Bestuur & Management Consultants, *Evaluatieonderzoek Wet op de Jeugdzorg. Eindrapport* (Evaluation Youth Assistance Act. Final report), November 2006.

summarize here, but the report's recommendations clearly indicated what was at stake: there was a need for improving the quality of personnel and the process of decision making; improving the cooperation between the agency and the many other actors involved; improving the exchange of policy documents; and improving the openness of the agency for hints from the public about (potential) youth care abuses.

- (b) Different financing sources obviously caused problems as to responsibility, accountability, transparency, and applicability, because each of them had, among other things, its own criteria, tariffs, and policies. Nevertheless, the evaluation report did not recommend to integrate the sources immediately, but to start with harmonising their preconditions and policies as much as possible and to wait until the 2009 final evaluation of the bill before definitely deciding upon this issue.
- (c) The still existing waiting lists and the relatively long completion time showed that realization of the right to youth care had not been attained, despite the many extra millions of Euros the government had spent since 2005 and continued to spend to cope with the most severe bottlenecks. Partly, this was the consequence of an unexpectedly high increase of the number of clients who sought the help of the youth care agency. Partly, it was the consequence of problems such as a lack of sufficient tailored youth care, not knowing the effects of youth care yet, and, again, a lack of cooperation between the actors involved.
- (d) Although the evaluation report showed that the problems and bottlenecks of the Youth Care Act were numerous and severe, and undoubtedly required new policy measures, the evaluation report did not recommend to drastically reform the Youth Care Act system of youth care (and therefore did not recommend to forget about improving the bill, and starting to prepare a new and better one).

The government quite agreed with the analysis and recommendations of the evaluation report and announced to take responsibility for the rapid implementation of the recommendations.²⁷

Step six: Comparison of the evaluation report and the Council's advice as to the four items. Was the Council accurate?

On items where the many amendments strongly revised the bill, a pure comparison of the ex post evaluation and the Council's advice is not reliable. This holds true especially for (a) and

²⁷ In a letter to the Parliament (DJB/JZ-2721942).

(d): exclusive access to the youth care agency (*bureau jeugdzorg*) and the Council's fundamental scepticism and doubt on the necessity and feasibility of the bill, respectively. Also relevant is that the essential delegated laws and regulations which the Council had missed while preparing its advice and which was one main reason for its scepticism and doubt, of course, were promulgated (and were often even supplemented and adjusted) once the bill entered into force.

As to the other two items, the financial structure and the right to youth care, a comparison seems justified. The parliamentary debate was extensive and profound, the House of Representatives asked the government to reconsider its view, but the government stuck to its position. The comparison conclusively showed that the Council's critical remarks and advice on the two items were borne out by the ex post evaluation and were, therefore, accurate. Although not with the same details as the ex post evaluation could do, in retrospect, the Council correctly identified the (very nature of the) problems with these two items.

B. Analysis of the Act for the Compensation of Costs in the Administrative Objection Procedure

Preliminary remarks: The ACCOP entered into force on March 12, 2002.²⁸ The Act partly resulted from an evaluation of the General Administrative Law Act (GALA, *de Algemene wet bestuursrecht*). This evaluation made it clear that there was no consensus about the possibilities for compensation of costs in the objection procedure, which is normally an obligatory step for access to an administrative court.²⁹

According to the case law of the Netherlands Supreme Court (*Hoge Raad*) compensation was possible. Most administrative courts, however, denied this except for situations in which the disputed administrative order was so blatantly in conflict with existing law that the authorities must have known this. As a consequence, the state Commission for Codification of Administrative Law was asked to find out whether adjustments to the GALA were necessary. In its report, the Commission stated that there were two major reasons to give an affirmative answer in this respect. First, it was considered undesirable if the Supreme Court's case law and that of the Council of State continued to diverge. Secondly, the

²⁸ Wet kosten bestuurlijke voorprocedures van 24 januari 2002, *Stb.* 2002, 55.

²⁹ Verslag van de Commissie evaluatie algemene wet bestuursrecht, *Toepassing en effecten van de Algemene wet bestuursrecht 1994-1996*, Den Haag 18 december 1996. See also *Kamerstukken II 1997-1998*, 25 600 VI, no. 46, p. 40.

Commission argued that continuation of the Supreme Court's approach would create a counterproductive formalisation of the objection procedure and increase the threshold for a flexible settlement of legal conflicts.

In relation to this file, we studied two evaluative documents. The first one contained an official evaluation resulting from a request by the Senate to the Minister of the Interior. The Groningen University Faculty of Law conducted this evaluation in the period between June 2004 and January 2005, i.e., within two and a half years after the Act had entered into force.³⁰ The second study was not a real evaluation but a study by two individual legal scholars three and a half years after enactment, focusing on an inventory of national and European case law.³¹ This study was taken into account because it was explicitly meant to be an update of the Groningen study on the aspect of case law.

Step one: Expectations, comments, and critical remarks concerning the problem definition, approach, effectiveness, and efficiency of the draft

The remarks by the Council concentrated on the argument that the Supreme Court should no longer be able to rule on compensation for costs in the objection procedure. By doing so, the Council appeared to agree with the drafters of the law to the effect that excluding this topic from the jurisdiction of civil law courts was the best way to solve the problem. The Explanatory Memorandum, however, also mentioned other elements of the problem definition, such as the risk of formalising the supposedly informal objection procedure and the risk of increasing the costs for the administration due to the fact that plaintiffs would want to safeguard their claim for compensation by resorting to pro forma appeal.

Step two: On what data did the Council base its findings?

Our first impression is that the Council predominantly based its findings on the information available in the legislative file. Studying the internal communication between State Councillors, however, reveals that its experience as the highest administrative court seems to have had a significant influence on the Council's position in the assessment of the legislative draft. In one of the internal notes from the supporting staff addressed to the State Councillor

³⁰ H.B. Winter, P.O. de Jong & R. van Dijk, *Evaluatie Wet kosten bestuurlijke voorprocedures*, Groningen 2004. The full report is available at <<http://rechten.eldoc.ub.rug.nl/FILES/departments/Algemeen/Recht1/2005/evaluatieWkbv/EvaluatieWkbv.pdf>>.

³¹ R. Ortlep & R.J.G.M. Widdershoven, 'De Wet kosten bestuurlijke voorprocedures in de rechtspraak', *JB plus* 2005, pp. 147-167.

Rapporteur, it is stated that “the bureau notices that there has been a lot of criticism from different sides towards the Council’s case law that is now being codified in the draft. The same goes for the arguments used to justify the current draft in the Explanatory Memorandum” (our translation).

The bureau also summarized the three most important critical comments in the scholarly literature on the draft.³² First, some scholars argued that the administrative authority might benefit from a further juridification of the objection procedure because this could increase the pressure to settle disputes without entering into a formal legal discussion. Secondly, some experts felt that it was unfair to expect from an individual citizen to carry the costs of an administrative order that was not only a wrong decision but also an unlawful one. Thirdly, the obligation to pay the costs of the objection procedure in order to retain the right to compensation on appeal might lead to negative side effects, such as an increasing number of pro forma appeals. None of these reservations from the supporting staff were reflected in the final version of the advice.

Step three: How did the Council proceed when preparing its advice?

The file clearly indicates that the draft had led to a lively discussion inside the Council, especially in relation to its own case law. It is rather remarkable that the State Councillor *Rapporteur* opposed to this case law, which, in practice, boiled down to a standard refusal to grant compensation for costs except in cases where the authorities deliberately disregarded applicable rights or obligations. In this context, the State Councillor wrote: “This is an *Alocorp* or in other words a reversed *Procola* matter.³³ If the Council feels its own case law is untenable, it should say so. The ‘against better judgement’ criterion is unfortunate if it also applies to cases of misinterpretation of current laws and regulations” (our translation)

Other Councillors, however, begged to differ in this respect. One of them concluded that the Council’s case law left no room to manoeuvre whatsoever here. Another one claimed that the decisive criterion in the draft, i.e. ‘severe carelessness’, was far too vague to offer any

³² They draw attention to publications such as J.J. Simon, ‘Kosten van voorprocedures’, *JB* 1998, p. 68 ff; R.J. Tjittes, ‘Bestuurlijke proeftuin’, *RM Themis* 1998, pp. 1-2, and N.S.J. Koeman, ‘Proceskosten voorprocedures: voorontwerp gepresenteerd’, *NTB* 1998/9, pp. 290-293, and furthermore the case note by Van Ravels in *Bouwrecht* 1998, p. 522.

³³ This remark refers to the case law of the ECtHR, *Procola vs. Luxembourg* judgment of 28 September 1995, Series A, no. 326 (14570/89), concerning the double mandate of the (Luxembourg) Council of State in relation to the requirement of judicial independency as laid down in Article 6 of the ECHR.

guidance here. To this he added: “But apparently no criticism on this matter is allowed inside this house”. (our translation).

These types of remarks indicate that the draft led to fierce internal debate. Nonetheless, the criteria on the checklist for policy-analytical review by the Council apparently did not seem to play a role in these debates. No evidence can be found in the file that such topics as the problem definition, approach, or programme theory behind the draft received systematic attention. First and foremost, the Council seemed to focus on the perceived legal necessity of the draft in order to rule out any further legal uncertainty caused by the fact that both the Supreme Court and the Council of State claimed jurisdiction on this matter.

Step four: The attitude of government and Parliament towards the Council’s advice

With respect to the government’s position, we can be brief: on almost all points the government stuck to its guns. More interesting, however, was the debate in the House of Representatives. There, the criterion used in the draft, viz., compensation only if the contested administrative decision appeared to be unlawful and severely careless was amended.³⁴ The rather strict criterion in the draft was toned down in the sense that a revocation of the order because of careless decision-making that could be attributed to the authority is enough to qualify for compensation of costs. According to the Minister of Justice, this came down to a significant broadening of the criterion in the draft. Furthermore he repeated his fear that this might cause an undesirable formalisation and juridification of the objection procedure which ran against the intentions of the legislature as laid down in the GALA. Therefore some members of Parliament asked for a renewed opinion by the Council of State on the amended text but in his formal reply, the Minister advised against this and the House of Representatives ultimately agreed on that point.³⁵ In response to the fears of some members of Parliament that the amendment was going to lead to a disruption of the informal character of the objection procedure together with increasing costs for the administration, the Minister of Justice did promise an early evaluation of the ACCOP, even ahead of next periodical evaluation of the GALA in 2007.

Step five: Comparison of the Council’s advice with the results of the ex post evaluations

³⁴ *Kamerstukken II* 2000-2001, 27 024, nr. 14.

³⁵ *Kamerstukken II* 2001-2002, 27 024, nr. 17.

The findings in the ex post evaluation conducted by experts from Groningen University show some interesting results. First of all, the empirical part of the evaluation revealed that, in the sample of administrative bodies that had been studied, petitioners requested a compensation of costs in only 5 to 10% of the objection cases. Especially people without legal assistance did not even seem to know about the possibility to get compensation. This did not come as a surprise since most authorities do not notify those who file objections of this possibility. For the rest, the law appeared to have been implemented according to the intentions of the legislature, resulting in very few awards for compensation. Only 1 to 2 % of the requests were granted.

What is even more important is that the alleged side effect of juridification failed to materialize. Administrative bodies did not put more emphasis on legal aspects than before the Act entered into force in settling disputes with citizens. Besides this, no extra objections seemed to have occurred as a result of pro forma claims. Some authorities did try to bypass the rules for compensation by taking a new decision instead of replying to the objections but this practice already existed before the ACCOP and has in the meantime been blocked by the courts. All in all, there were no signs that the ACCOP had led to a formalisation of the supposedly informal administrative objection procedure. Most authorities still seemed to believe that the fixed compensation rates were not significant enough to fight over in court. As a consequence, the authorities continued to be eager to settle disputes out of court as much as possible.

Step six: Comparison of the evaluation report and the Council's advice as to the four items. Was the Council accurate?

In retrospect, it could be said the Council of State does not appear to have been very accurate in its policy-analytical review. However, it is difficult to draw hard conclusions here for a number of reasons. First of all, we already mentioned that the ACCOP was amended in Parliament. What we do not know, however, is whether the amendment would have stood a chance had the Council been more specific in its criticism towards the decisive criterion in the draft. Secondly, it is not so easy either to conclude what effects the Council overlooked. With hindsight it could be argued, for instance, that it was a good choice that the Council did not warn of possible side effects, such as the juridification of the objection procedure, serious cost increases for the administration, and a growing number of pro forma claims, because they did not occur. This does not seem to be quite correct, however, since the Council's bureau pointed to scholarly literature criticizing the draft of the ACCOP. Particularly because the

Council overstated these risks, it seems more likely that it agreed with the government here and therefore implicitly underlined the same wrong assumptions of the government. Besides, it might be argued that the policy-analytical assessment of legislative drafts is especially intended to uncover unjustified claims about these kinds of risks.

IX. Feedback: The Council's Working Methods and its Checklist of the Policy-Analytical Review

Our second sub-question is whether the ex post evaluations indicate that there is a reason to reconsider and adapt the way the Council proceeds in preparing its reports or follows its checklist. Looking back at the two case studies, and keeping in mind the limited scope of our study, we can conclude that the accuracy of the current review by the Council does not seem to depend very heavily on the working methods applied in the assessment or on the checklist. After all, although roughly the same working methods and exactly the same checklist were applied in both cases, the accuracy of the Council's advice differs. As to the YCA, the Council made accurate observations about some weak spots in the draft whereas, with regard to the ACCOP, it overlooked important weaknesses in the draft or was perhaps too easily convinced by the arguments of the government.

The latter might be a consequence of the fact that the Council does not systematically follow its own checklist. From contacts with staff members, we know that there is some sort of implicit proportionality test, meaning that not every legislative draft is put through the same in-depth assessment, but there are no official guidelines for this selection process. Another conclusion is that the working method being used to assess legislative drafts seems to depend to a large extent on the individual staff members and the State Councillors, especially the *Rapporteur*, who happens to prepare the advice. Sometimes other Councillors are consulted, as in the ACCOP file, or even outside experts, but there is no policy on how to proceed in these matters.

On other issues, there are established practices but it may be doubted sometimes whether they be counterproductive. To name just a few: the Council is usually as brief as possible in commenting, no remarks are made about good practices or possible ways to improve the draft, there is almost no reference to sources and no motivation as to the grounds of the Council's criticism. Besides, it is impossible to find out whether and, if so, on what points the Council ignored minor flaws or agreed with choices made in the draft. As a

consequence, the assessment process is neither transparent nor systematic. Personal experience, practical wisdom, common sense, and intuition are given free play.

Although our pilot study does not present hard evidence that the accuracy of the Council's review would benefit from a change in the working method or by following the checklist, we believe that a more systematic and transparent approach in both respects will show positive (side) effects. Existing literature on (ex ante) evaluation of legislation seems to reveal that relying too heavily on experience, practical wisdom, common sense and intuition is a hazardous approach because legislative flaws, unrealistic assumptions or, as the ACCOP file shows, biased positions,³⁶ arbitrariness, and subjectivity can easily be overlooked. Moreover, without a systematic assessment with transparency as to the methods, arguments, sources, and evidence which underpin the advisory opinions, an opportunity is missed to challenge those who are responsible for the preparation of the bill to rethink parts of the draft. For them, such an opinion is just an opinion, regardless of the institutional authority of its author.³⁷ Sometimes they will probably feel taken by surprise because they do not know what to expect from a policy-analytical review which rests so heavily on idiosyncrasies.³⁸ The same goes for members of Parliament who cannot use the Council's advice as ammunition against legislative mistakes if the advice is unclear or not backed up with facts, arguments, or evidence that uncovers legislative flaws or failures.³⁹ It is more difficult for the drafters not to take well-articulated, sound arguments seriously, especially when they come from the most important advisor in the legislative process. In the latter case: even if the drafters ultimately

³⁶ In that file the Council of State missed the openness to critically assess its own case law. For the methodological pitfalls concerning ex ante evaluation, see, for example, F.L. Leeuw, *Reconstructing Program Theories: Methods Available and Problems to be Solved*, *American Journal of Evaluation* 2003, Vol. 24, no. 1, pp. 5-20.

³⁷ The idea that ex ante assessments of legislative drafts can simply serve as a way of speaking truth to power is refuted by, for instance, A. Meuwese, *Impact Assessment in EU Lawmaking* (dissertation), Leiden 2008.

³⁸ There is anecdotal evidence that this feeling of being taken by surprise really exists. See, for instance, T.C. Borman, 'Zeven stellingen over de (her)structurering van de Raad van State en de wetgevingskwaliteit', in; T. Barkhuysen, T. Borman & R. van Gestel, *De wetgevingsadvisering door de Raad van State*, Den Haag: BJU 2008, p. 7.

³⁹ This of course does not mean that if the assessment is underpinned by scientific evidence, Parliament will automatically adopt the conclusions that follow from the evaluation report. The interface between evaluation and public policy is far more complicated than that. See, for example, C.H. Weiss, *The Interface between Evaluation and Public Policy*, *Evaluation* 1999, pp. 468-486.

do not agree with these arguments, they nevertheless may improve the draft, because they are forced to engage in a serious discussion to explain why they wish to stick to their proposal.

Does all this mean that experience, practical wisdom, common sense, and intuition are no longer useful? Definitely not. Although a systematic approach in the assessment of drafts and more clarity about the Council's own working methods would possibly improve the quality of the advisory opinions, this certainly does not imply that these capacities are no longer to be used. On the contrary, we would say. The fact that most State Councillors know the legislative process from different angles (as former politicians, judges, and ministers, etcetera) certainly has great advantages. However, because most members of the Council of State have themselves experienced how resistant lawmaking is to unwelcome factual information or institutional changes, the Council could consider it to be a challenge to strengthen the evidence base of its own role as a guardian of the quality of legislation.⁴⁰

X. Feed Back: The Methodology and Criteria of Ex Ante Assessments, the Timing, and the Required Expertise

Our third sub-question is what lessons the legislator can learn from the ex ante assessment of legislative drafts *in general*, and more specifically, what the possible implications are for the methodology and criteria of ex ante assessments as such, the timing, and the required expertise. The first lesson – Conclusion I – follows from the foregoing:

A transparent and systematic methodology is indispensable to be able to prevent arbitrariness and subjectivity, and to avoid overlooking legislative flaws, or unrealistic assumptions or biased positions of the assessment body. Nevertheless, experience, practical wisdom, common sense, and intuition seem to be just as important in order to avoid a tick-box mentality in the assessment of legislative drafts.

The case studies have shown that, while the Council of State does not go about in a systematic way in preparing its advisory opinions and does not possess the methodological expertise to

⁴⁰ The plea for more evidence-based lawmaking in the Netherlands seems to have become stronger lately. See, for instance, P. Eijlander, 'Het wetgevingsbeleid na de bruikbare rechtsorde', in: P. Popelier & Ph. Eijlander, *Preadviezen Vereniging voor wetgeving en wetgevingsbeleid 2007*, Den Haag: BJU 2008, p. 52. See also the call from the Senate in its latest annual report to make more use of experiments and sunset clauses in the process of drafting new legislation. See <<http://www.eerstekamer.nl/>> (search for: jaarbericht).

perform state of the art ex ante evaluations, its judgments and predictions, especially in the first case study, are often remarkably accurate. This puts the importance of methodological purity in the assessment process into perspective. Apparently there is more to ex ante evaluation than ‘going by the book’. The ‘soft’ side of the assessment process should not be underestimated. Methodology, practical experience, intuition, and common sense are inextricably intertwined, as also appears from what the empirical part of our study revealed about the interface between methodology and communication. Those who want to scrutinize the quality of legislative drafts, and cannot explain how they proceed or account for the methods they have used to estimate the impact of a bill before its enactment, will probably have extra trouble in convincing policymakers and politicians to take their advice on board. This does not imply that ex ante evaluation is simply a matter of ‘speaking truth to power’. Ultimately, those with political power will have to make up their own minds in deciding what weight should be given to the outcomes of ex ante evaluations. A more evidence-based approach in preparing new legislation cannot and should not replace political judgment.

The second lesson concerns the timing of the ex ante assessment. Looking at our pilot study and the international literature on ex ante evaluation, it is not surprising that the Dutch Council of State’s policy-analytical review of legislative drafts has relatively little effect. The main reason for this is that the Council of State is positioned too late in the legislative process to be able to bring about fundamental changes in legislative drafts. The most likely explanation for this, we think, is what might be called the *path dependency* in the lawmaking process. As soon as there is agreement inside the administration about a proposal for a new law, it will become extremely hard for ‘outsiders’ such as the Council of State to persuade those who are responsible for the draft to adopt serious changes. Conclusion II is therefore:

Path dependency of the lawmaking process implies that the later critical remarks from ex ante assessments are brought up in the process, the more difficult it will become to have them taken into account.

This conclusion is not new, but our pilot study empirically confirms what is prevailing in most publications on ex ante evaluation, viz., to stress the importance of timely review of alternative policy choices and regulatory options because otherwise they will not stand a

chance.⁴¹ However, having said this, the question immediately arises what is meant by “timely”. A clear-cut answer will probably be hard to get. On the one hand, a fruitful ex ante evaluation requires that a legislative draft should already have a certain level of maturity, especially with regard to collecting the relevant data (which are sometimes not yet available at that time or hard to obtain), the policy choices to be made, the regulatory options to consider, the assessment of the consequences, and the effectiveness and efficiency of the proposed rules. On the other hand, there should still be a genuine openness to other possible policy choices, different regulatory options such as self-regulation or co-regulation, the expected working of the proposed rules, and also, if necessary, sufficient time and willingness to reconsider and adapt the draft in question.

Does the latter mean that the draft to be sent to the ex ante evaluator should explicitly consider and balance the advantages and disadvantages of various policy choices, alternative regulatory options and expectations as to the effectiveness and efficiency of a bill, each of which based on sound factual information? At present, such a way of proceeding is unusual and there are some good reasons for that. First, it would burden the legislator with a very heavy, if not rather unbearable workload. Secondly, it could bring the ex ante evaluator in a position that interferes too much with the legislator’s responsibilities, which impedes its neutrality, impartiality, and objectivity. However, there is no scientific certainty that these risks will occur. All in all, there is an urgent need for further (empirical) study to determine the most appropriate moment for ex ante evaluations, among other things, by comparing and analysing experiences in several countries, and on the EU level. Therefore we would like to add to Conclusion II:

Determining the most appropriate moment in the legislation process for an ex ante evaluation still needs further (empirical) investigation from a comparative perspective.

⁴¹ See, for example, R. Baldwin, Is Better Regulation Smarter Regulation?, *Public Law*, Autumn 2005, pp. 485-511. S. Jacobs, *Current Trends in Regulatory Impact Analysis: The Challenges of Mainstreaming RIA in to Policymaking*, Jacob & Associates Inc, Washington DC, 2006. For an overview of the international literature on this and other common problems in ex ante evaluation see, for example, SERV, *Reguleringsimpactanalyse in Vlaanderen, Evaluatie en aanbevelingen*, Brussel, 22 November 2006. See also, in this volume, the contribution by Larouche.

The third possible lesson follows naturally from this line of argument. It concerns questions like who is best equipped to carry out ex ante evaluations, what sort of expertise is required, and what type of assessment methods are most suited for different types of legislation. Several authors in this volume have already dealt with these questions. We refer to them and, of course, to the authors of relevant, international literature as well.⁴² In this contribution we will confine ourselves to what we have learned from the pilot study in this respect and what we would like to add to the existing body of knowledge on this topic. Conclusion III reads as follows:

It is generally accepted that an ex ante assessment should be carried out as early as possible in the legislative process (see Conclusion II). The subsequent questions to be answered are: who is best equipped to carry out ex ante evaluations, what kind of expertise is needed, and what assessment methods are most appropriate in relation to different types of laws.⁴³ These questions need further research, also from a comparative perspective, but from our pilot study we have learned four important lessons that may be kept in mind.

First, a professional evaluation board should consist not only of lawyers, economists and social scientists, familiar with the methodology of evaluation research but should also include people with experience in the public administration. The latter are more likely to be blessed with the aforementioned practical wisdom, common sense, and intuition about what works and why. This means that, on the one hand and from an institutional perspective, such a professional board must keep a certain distance towards the political process, while on the other hand, as to the personnel composition of the board, there should be a close commitment.

At the same time, a multidisciplinary setting will probably complicate communications between members of the board, due to their different backgrounds. In our case studies, the Council of State did not have these problems because the majority of its

⁴² See, for instance, J. Hertin, J. Turnpenny, A. Jordan, M. Nilsson, D. Russel, and B. Nykvist, *Rationalising the Policy Mess? Ex Ante Policy Assessment and the Utilisation of Knowledge in the Policy Process*, FFU report, Freie Universität Berlin, Fachbereich Politik- und Socialwissenschaften, Berlin 2007. See, in this volume, the contributions by Bohne, Hoppe, and Veit.

⁴³ With different types of laws, we mean temporary versus permanent legislation, politically sensitive laws versus more technical ones, strictly national laws and regulations versus bills that are used to implement European directives at a member state level, etcetera.

members share the fact that they have a law degree and therefore speak the same type of language.

Secondly, a professional board should be entitled to recommit poor quality legislative drafts to the legislator in order to make sure that the decisions that are being made rest on reliable information and, if necessary, state of the art scientific evidence. Without such power, the board will be toothless and remains the plaything of political institutions in the legislative process. So, only a strong board with real power to enforce adaptation and improvement of draft bills can counterbalance the often preponderant political rationality.

The third observation suggested by our pilot study is that a professional evaluation board should develop a proportionality test to determine which drafts should be evaluated more thoroughly than others. This implies that criteria will have to be developed to distinguish between various types of legislative drafts.

A fourth observation concerns one of the most striking problems, i.e., the fit between the methods to be used – see Van Aeken in this volume – and the kind of legislation at stake. It is often said that methodological flaws are the Achilles heel of ex ante evaluation. The importance of ex post evaluation for the ex ante evaluation will be discussed in section XI.

XI. Feed Back: Evaluating the Relevance of Feedback Research for Improving the Quality of Ex Ante Assessments of Legislation

As to the fourth sub research question, we start by stating that evaluation research normally involves assessing the strengths and weaknesses of programmes, policies, personnel, products, or organisations to improve their effectiveness. The idea behind most evaluations is to provide useful feedback to those who designed the rules or to people or organisations otherwise affected by the rules. However, taking feedback into account is not axiomatic.

First of all, ex ante evaluation is by nature more future-oriented than most other types of evaluation research and does not automatically include monitoring of predictions that were made earlier in the process or introduce learning loops through feedback by itself.⁴⁴ Secondly, the relationship between evaluations and their impact is not a simple one. Scientific studies that seem critical sometimes fail to influence short-term decisions because the policy cycle revolves more quickly than the research cycle,⁴⁵ and studies that initially seem to have no

⁴⁴ See also, in this volume, the contributions by Popelier and Verlinden, Larouche, Bohne, and Hoppe.

⁴⁵ R. Pawson, *Evidence-Based Policy: A Realist Perspective*, London: SAGE 2006, p. 8.

influence might have a delayed impact when more favourable conditions arise.⁴⁶ As a result, the quest for evidence-based law and policy has turned increasingly to systematic reviews of the results of previous inquiries into a certain policy domain in order to learn more about how legal interventions work instead of just measuring effects, often not knowing what has caused those effects (laws, organisations involved in the implementation and enforcement, social pressure, coincidence, etcetera).⁴⁷ Unfortunately, drawing lessons from previous evaluations, either ex post or ex ante, through a systematic meta-analysis of a larger sample of studies often suffers from the fact that it is impossible to locate the origin of mistakes or miscalculations in the process of legislative drafting. Hence the lessons to be learned often remain rather abstract (“In what sort of context do certain intervention types have the best chance of succeeding?”).

This problem also affects other possible methods that could be used to improve the quality of ex ante evaluations, such as learning from previous impact assessments in the same policy domain in other jurisdictions (comparative legal research);⁴⁸ trying to generalize the effects of the same type of interventions in different policy areas (horizontal learning); reconstructing the programme theory that lies behind laws or regulations in order to be able to translate underlying assumptions into hypotheses that can be tested by using existing empirical research or factual information (programme evaluation).⁴⁹ None of these methods can serve as a real-life litmus test of the prospective value of ex ante evaluations. It does not follow that they are worthless, on the contrary. These methods are useful to ensure that the causal assumptions underlying legislative action are as explicit and precisely formulated as possible and based on the most reliable scientific information that is reasonably available.⁵⁰

Nonetheless, monitoring and evaluation of ex ante assessments is essential to measure the accuracy of methods for the scrutiny of legislative drafts. This is an important *conditio*

⁴⁶ C.H. Weiss, The Interface Between Evaluation and Public Policy, *Evaluation* 1999, Vol. 5, No. 4, pp. 468-486 (p. 472).

⁴⁷ R.A.J. van Gestel, Evidence-based Lawmaking and the Quality of Legislation: Regulatory Impact Assessments in the European Union and the Netherlands, in: H. Schäffer & J. Iliopoulos-Strangas (eds.), *State Modernization in Europe*, Ant. N. Sakkoulas-Berliner Wissenschafts-Verlag-Bruylant 2007, pp. 139-165.

⁴⁸ See C. Kirkpatrick & D. Parker (eds.), *Regulatory Impact Assessment. Towards Better Regulation?*, Cheltenham: Edward Elgar 2007.

⁴⁹ F. Leeuw, Trends and Developments in Program Evaluation in General and Criminal Justice Programs in Particular, *European Journal on Criminal Policy and Research* 2005, Vol. 11, pp. 18-35.

⁵⁰ L. Mader, Evaluating the Effects: A Contribution to the Quality of Legislation, *Statute Law Review* 2001, Vol. 22, No. 2, pp. 119-131 (p. 124).

sine qua non for creating a ‘learning legislator’, especially now that many problems with legislation are not only a matter of analytical failures or legal technicalities but also of institutional difficulties.⁵¹ As long as those who are responsible for ex ante evaluation or policy-analytical scrutiny of legislative drafts do not match their research findings with the outcomes of ex post evaluations, they will continue to be in the dark about the accuracy of their own criticism. For this reason, our fourth and final conclusion is:

Feedback research which links the results of ex post evaluation with the outcomes of ex ante evaluation can be a fruitful method, in the preparatory phase, to test the prospective value and consequences of legislative drafts, and therefore deserves more systematic attention.

That it might be worthwhile to monitor the results of ex ante evaluations is of course not a new observation. Many guidelines on how to conduct regulatory impact assessments stress the importance of monitoring the outcomes of ex ante evaluations after a bill has entered into force. Very little has been written, however, on the methodology that is needed to perform this feedback research and the benefits that it might or might not have. Further research is necessary here but our study has proven that feedback research might serve at least three goals.

First, a regular and more systematic comparison of ex post and ex ante evaluations could help to develop more sophisticated methods of regulatory impact assessment and make predictions about future effects and side effects of legislative drafts more accurate. It shows in retrospect which observations that were made somewhere in the assessment process (data collection, interpretations of findings from consultations, alternatives modes of regulation and so forth) were right or wrong, and sometimes even what caused a certain mistake. Secondly, more regular feedback research can stimulate learning from evaluation results in adjacent policy domains (horizontal learning). Currently this does not happen very often, at least not in the Netherlands, because it calls for a more systematic approach towards evaluation research, which is less concentrated on measuring the (direct) effects of legislation and more on the underlying mechanisms and pathways determining the impact of legal rules. Reconstructing the programme theory behind laws through ex ante evaluation and afterwards comparing the results with the outcomes of ex post evaluations increases the chance of discovering the

⁵¹ J.B. Wiener, Better Regulation in Europe, *Current Legal Problems* 2006, Vol. 59, pp. 447-518 (p. 476).

rationale behind different types of regulatory interventions such as permit systems, taxation schemes, or subsidies. It also encourages reflecting on why certain identical legislative interventions might work in one policy context and not in another.

Thirdly, feedback research is an excellent means to uncover a biased position of those responsible for drafting a bill or for conducting an ex ante evaluation.⁵² Questions such as what possible (side) effects have been overlooked or overstated during the pre-parliamentary phase can only be answered with hindsight.

Nevertheless, our pilot study has also shown that an essential condition for proper feedback research is that the questions that are raised ex post and ex ante match. That is why we follow Mader where he states that ex post and ex ante evaluations should be seen as complementary because the more explicit and differentiated prospective evaluation is, the easier it will become to perform a solid ex post evaluation that will provide relevant and reliable feedback.⁵³

⁵² The case of the compensation of costs in the administrative objection procedure can serve as an example here. In retrospect both the commission who prepared the working draft as the Council of State itself focused too much on the case law and overlooked signs indicating that juridification of the objection procedure might not be a realistic threat.

⁵³ L. Mader, Evaluating the Effects: A Contribution to the Quality of Legislation, *Statute Law Review* 2002, Vol. 22, No. 2, pp. 124-125.