

**CONSULTATIONS ON DRAFT REGULATIONS: ALIBI FOR A
NONCOMMITTAL ATTITUDE OR INCENTIVE TO ACT?
*AN INVENTORY OF THE DUTCH CONSULTATION PRACTICE***

SUMMARY

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Research question

“How does the current practice of consultation on draft regulation look like in a quantitative and a qualitative sense?” This is the main research question posed by the Ministry of Justice (WODC), in the framework of the program “Bruikbare rechtsorde”. The goal of this research is more specifically to gather, in the context of a legislative policy “systematized information on the extent and content of the current practice of (formal and informal) consultation on draft statute laws and draft governmental and ministerial regulations”, in the phase preceding discussion in the council of ministers.

Approach

The research starts with a discussion of the literature concerning consultation on policy and regulation. Before empirical research can start, we need to define “consultation” and examine which quality criteria consultation proceedings should meet. From the study of international literature and the Canadian, Irish, Flemish and EU consultation guides, a list of ‘*best practices*’ is drawn.

The research also consists of an empirical part. This report brings forward the results of a survey in all Dutch departments (with exception of the Dutch Antilles) and the results of the following in-depth interviews in six departments. The government-wide survey can strive after representative quality. It results in an exploratory study, which offers some orientation for the in-depth interviews. These interviews are less representative, but enable researchers to grasp social reality in a more profound way. In-depth-interviews thus confer critical potential on the research. The main criterium for the selection of six departments was the weight of a department in the national production of rules. In addition two other departments were selected because of interesting and remarkable results which followed from the survey.

For this research all Dutch departments were questioned about their consultation practice. A reservation stems from this approach. Only consultation officials were questioned about the practice of consultation and its impact on final decisions. This leads up to a one-sided picture, since the consulted persons were not asked to give their opinion on the impact of their contribution.

The empirical part results in a portrait of the current consultation practice in the Dutch departments. This view is tested against the best practices from the theoretical framework.

Part I. Theoretical Section

In this part the notion ‘consultation’, the importance of proper consultations and the course of the consultation process are clarified.

What is consultation?

Consultations are procedures in which the government asks interested parties and specialists, who are external to the decision making body, for input in the further development of policy or draft regulation, by means of a consultation or a demand for advice.

Why consult?

Consultations are an important part of regulatory management, aimed at guaranteeing the quality of legislation. Five functions can be distinguished, namely:

1. improvement of the distribution of information to the law maker on intentional and unintentional effects of proposed regulations (*empirical function*)
2. supervision of the soundness of the administrative preparation of policy and regulation (*supervisory function*)
3. picturing potential alternatives for and in legislation (*policy-analytical function*)
4. identifying various interests and search for support, with a view to the internalization of rules and to compliance behaviour (*democratic function*)
5. informing enforcement bodies and the public (*notification function*).

Conditions for a proper consultation procedure

The theoretical research brings to light that, in order to bring added value to the law making process, consultation procedures must meet some conditions:

1. Provide for an **open, balanced** but **well-defined** consultation, in which all stakeholders are identified and involved.

2. Organize a **multilayered consultation process**. Start consulting in an **early phase** of the decision making process, followed by more tailored consultations.
3. Choose a **consultation technique** adapted to the aim and object of consultation and to the size and nature of the consulted persons.
4. Provide for a **reasonable term** for consultation, taking into account the time an organisation needs to take the pulse of its members
5. Keep the **threshold** for participation in the consultation process **low**.
6. Be **informative, clear and concise** about the objective of the consultation, the problem, the questions, the proposed measures, the procedure and the time schedule.
7. Be **transparent** about the consulted persons, the consultation method, the questions and the results, amongst others by means of internet publications accessible to the public.
8. Give **feedback** to respondents about the impact of their contribution on decisions.
9. Fit consultations in with a **consultation policy**, including a consultation plan, monitoring, trainings, consultation guides or codes, annual reports and evaluations.
10. Fit consultations and the consultation policy in with a more comprehensive **legislation- and evaluation policy**.

Part II. Empirical Section

The empirical research makes it clear that departments consult rather often. There is a preference for informal consultations based on fixed practice. The type of regulation does not influence the decision to consult. The departments are convinced that consultations are useful and see few negative unintentional effects. So there definitely is a consultation culture. However there is no consultation management. There are no consultation codes. Consultations usually proceed in the same form and towards the same respondents. It is striking that in the Netherlands there exists no systematic consultation policy. Every department more or less develops its own practice. The danger is that consultations lead to unnecessary formalization, extension of the policy chain, delay in the law making process, and false expectations. Also the primacy of political performance can get disturbed because consultations draw a biased picture of reality. To prevent this as much as possible, consultations must meet some conditions. Also the decision to consult and the choice of consultation technique and respondents have to be considered carefully.

Part III. Conclusions and points of specific attention

Conclusions

Five main conclusions can be drawn from the empirical research.

1. The departments are rather satisfied with the proceeding of their consultations and consider them useful. The danger is that this contentment leads to acquiescence. Consultations are often limited to a standard practice. The question arises whether this suffices to get the full potential from consultations. Despite critical sounds in former reports, consultations have not yet resulted, for example, in permanent attention for the practicability and maintainability of laws and reinforcement of the learning ability of the law maker. De impression rises that departments insufficiently make use of consultations for the organisation of self-critical capacity.

2. Consultations do not always prevent regulatory capture by influential interest groups. Consultations can offer democratic surplus value, by offering a voice to underrepresented and vulnerable groups. In practice however departments often consult the same, selective club of respondents. A consequence is that consultations do not offer a representative reflection of opinions and interests in the domain concerned.

3. Departments do not always seem willing to let reality take them by surprise. Consultations are often the product of a standard practice. The risk is that departments (unconsciously) look for confirmation by consulting groups with viewpoints which are already known. This may explain why this research confirms the assessment that consultations usually do not lead to alternatives for or in laws or to the cancelling of proposed regulations.

4. Legal obligations to consult have been abolished, but in practice new rituals have been established. The departments are favourable to the operation which took place in the end of the 1990's and which lead to a simplification of advisory bodies and to the abolishment of legal obligations to ask for advice. The operation has not diminished the amount of consultations. On the contrary, a real consultation culture has revealed itself. Nevertheless the departments warn for new formalism. At this moment however, this formalism is created by the departments. They do not always make sufficiently use of the scope for policymaking offered by the new legal framework. Ministerial decisions, protocols and practice establish new ritualism. In practice departments sometimes decide automatically to consult, without having sufficiently regarded to the surplus value of consultation in each specific case.

5. The choice of consultation techniques is not properly thought through. There is a preponderant use of fixed practices. Departments therefore do not consider so much the question whether a consultation is needed and do not seem to carry out a proportionality test. When a consultation is performed, departments often use the same, familiar instruments. There is a need for diversity of techniques especially in departments which make laws affecting less organised citizens. In order to incite to better-considered consultation of specialists and stakeholders, a policy is needed including consultation codes, trainings and monitoring. The core of that policy however should not result in an “escape into procedures”. The main issue is that consultations should aim at organising criticism in order to strengthen the object of consultation (the regulation). This requires first and for all an open attitude towards the outcomes of a consultation process.

Points of specific attention

The consultation practice can be tested against the list of best practices, in the light of the objectives of the consultation and of the foregoing conclusions. Deviations from these criteria often have to do with a culture of ‘informal pragmatism’. In view of the best practices in literature and consultation codes in various countries points of specific attention can be formulated which are useful for Dutch practice. These points of specific attention are:

Point of specific attention 1

Open up consultations, by aiming them also at smaller and less well organised stakeholders and – where needed – at larger sections of the population. Check beforehand whether the bodies you want to consult, sufficiently cover the field. Be transparent about the choice of stakeholders or experts consulted, so that possible forgotten stakeholders can still give input.

Point of specific attention 2

Let tailored consultations build on earlier consultations, which leave open options and consultations.

Point of specific attention 3.

Provide for a written consultation policy which gives hold for strategic choices regarding the persons or bodies to be consulted and the methods for consultation, taking into account the specific features of the target group and the policy area.

Point of specific attention 4.

Provide for a more explicitly imbedded consultation process in the law making process, so that longer consultation term can be rendered available to organisations with a large backing or when a larger public is consulted.

Point of specific attention 5.

Provide for a low threshold for participation when consulting smaller and less organised stakeholders or individual citizens in public consultations.

Point of specific attention 6.

Be informative, clear and concise about the objectives of consultation, the problem, the questions, the proposed measures, the procedure and the time schedule.

Point of specific attention 7.

Be transparent concerning the results of the consultation. Attend to the communication towards parliament and consulted (enforcement) bodies of a truthful report of the outcomes of the consultation. See that the explanation note makes clear who got consulted and which critical comments have been made concerning anticipated bottle-necks.

Point of specific attention 8.

Attend where possible to personal and timely feedback to respondents on the impact of their input.

Point of specific attention 9.

Develop a consultation policy, aimed at an ongoing critical investigation of one's own consultation practice and the methods used. Trainings and evaluation of specific consultations are part of such a consultation policy. See that consultation methods and techniques become a fixed part of the training of legal drafters.

Point of specific attention 10.

Pay closer attention to other forms of ex ante evaluation, in addition to consultations or to strengthen their quality. Link a monitoring system of specific consultations to a system of evaluation of the law. This way the predicting value of consultation reports can be measured by means of ex post evaluation. Make this evaluations public, to subject them to formal criticism.