Book Reviews

Legislative Drafting-An Introduction to Theories and Principles by Tonye Clinton Jaja

Reviewed by Eamonn Moran

Despite the breadth of its title this book has quite a narrow focus. It adopts a definition of effectiveness of legislation attributed to an academic writer, Dr. Helen Xanthaki, and argues that this can best be achieved by adopting a regulatory framework for legislative drafting.

The definition of "effectiveness" adopted from Xanthaki is that the legislation "manages to introduce adequate mechanisms capable of producing the desired regulatory results". Xanthaki sees this definition as applying to the drafting aspect of legislation and that, by achieving it, legislative counsel contribute to the efficacy of legislation (its ability to produce a desired or intended result). The author further adopts Xanthaki's views that efficiency, clarity, precision and unambiguity are tools, below effectiveness in the hierarchy but equal in standing among themselves, that contribute to the effectiveness of legislation with the legislative counsel free to choose in any particular case the best tool to serve the paramount drafting goal of effectiveness. Further down the hierarchy are simplicity and gender-neutral language, which Xanthaki sees as instruments to achieve clarity, precision and unambiguity.

I would have thought it beyond contention that the ultimate goal of legislative counsel is to produce an item of legislation that gives effect to the desired policy. If legislation is not drafted with clarity, precision and without ambiguity, that goal is unlikely to be achieved or may only be achieved after an expensive and time consuming litigation process.

The author argues that the quest for effectiveness inevitably leads to the need for a regulatory framework for drafting legislation. As far as I could discern the author sees that framework as being comprised partly by legislation (particularly interpretation legislation) and partly by non-enacted material such as drafting manuals and directives. The author refers throughout to "Patchett's paradigm" as being the model regulatory framework. This is identified in a footnote on page 4 as a statement made by Keith Patchett, in a specified publication jointly edited by Dr. Xanthaki, that

common standards and uniform practices for preparing and drafting legislation are set most effectively through the provision of a single set of directives, which have behind them the authority of Government and, as needed Parliament. In the present circumstances of many Central and European countries, the essential elements are most likely to be regulated by law. Not only is this the most powerful means by which reforms can be effected, but for the time being it may be the only sure way by which a single set of standards can be set to bind both Government and the Parliament. Those provisions can be amplified by secondary instruments, such as Standing Orders, made by Government or the Parliament to deal with matters that are of separate concern to them.

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This statement would seem to me to be non-controversial.

An important point to make about this book is that, despite the general nature of its title, its focus is very much on Nigeria - its legislation and legislative entities. In particular Nigeria's oil and gas legislation is used as a case study and perceived failings in that legislation are used to justify the proposition that the failings are as a result of a lack of knowledge on the part of Nigeria's legislative counsel of the legislative drafting theory and methods that are the subject of the book.

Unfortunately this book itself has many failings. It is based on work done for a PhD thesis in Legislative Drafting Law. In this regard it even contains material justifying the research methods used in its compilation. The book would have clearly benefited from close editing before publication as it bears many grammatical and typographical errors and is highly repetitious in parts, even on the same page (see page 31). A frequently recurring example of a typographical error is the use of "ambiguity" when "unambiguity" is clearly intended. The headings are printed wholly in capital letters which greatly detracts from their effectiveness and the basic index printed at the back is not accurate. The running headers in Chapter Four identify it as Chapter Three.

I felt that the book is unfairly critical of Nigerian legislative counsel and overemphasises the importance of legislative counsel’s awareness of theory and methodology as postulated by certain academic writers as compared with their critical need to be skilled in drafting techniques and aware of the role they play in the legislative system. While I do believe that the in-house apprenticeship method of training legislative counsel needs to be supplemented with a course of formal training (whether conducted externally or in-house), it seemed to me that the book is unfair when at page 41 it describes Nigerian legislative counsel as having "low education and experience" and at page 43 as incompetent merely because they had not attended formal training.

Further, legislative counsel should not be expected to accept responsibility for the policy ultimately reflected in their work and it is unfair to criticise them for any aspect of that policy (for example, the non-availability of judicial review). Nor is any inadequacy in the institutional arrangements within their jurisdiction their fault. It also seems unfair at page 131 for the legislative drafting department at the Nigerian Federal Ministry of Justice to be criticised on the basis that none of the legislative counsel was a qualified economist.

I read nothing in the book that to my mind justified its proposition that the key reason for inadequacy in legislation is over-reliance or total dependence on a legal framework, as opposed to a regulatory framework, for legislative drafting. It seems to me that if a jurisdiction chooses to include within primary legislation, such as an Interpretation Act, rules about the format, content and style of legislation that might otherwise have been included in a drafting manual or other non-legislative text, it has taken a viable option. Whether those rules are legislative or non-legislative will not affect the quality or effectiveness of the legislation produced in that jurisdiction. There is no doubt, though, that, as argued in the book, having detailed style rules in a manual or similar document lends
itself to greater flexibility in amending and updating them and it is an approach that I too would support.

The book gives no detail about what might be included in the regulatory framework recommended for Nigeria. There is a generalised diagram on page 42 which is reflective of the diagram included in an article published by Dr. Xanthaki in the February 2011 issue of *The Loophole* (the Duncan Berry special edition).

Nigeria's *Interpretation Act* of 1964 is heavily criticised at page 76 as being an impediment to effective legislation because it does not "contain provisions on the elements of the definition of effectiveness, such as clarity, precision and unambiguity." Precisely what kind of provisions the author believes that Act should contain is not clear. Its provision about words importing the masculine gender as including females is criticised as a roadblock to gender-neutral drafting. However, there is no acknowledgement of the fact that legislative counsel do not need to rely on such a provision but can draft gender-neutrally in any event.

The book is critical of the Nigerian Constitution for “[not having] concrete provision(s) for undertaking drafting instructions on the one hand and holding Consultations on the other hand" (at page 95) and at pages 128 and 139 for not identifying the bodies responsible for drafting legislation. I would have thought it unusual for a Constitution to identify who is responsible for drafting legislation and to detail the general drafting process to be followed, as opposed to setting out the consultative procedure to be followed if there is a deadlock in the Parliament or with the Executive. I was also startled by the proposition at page 148 that the practice in Nigeria of hiring private legal legislative counsel might be illegal and unconstitutional as the Constitution "does not categorically authorise such sub-delegation of drafting functions by the Attorney-General following the common law rule of non-delegation of a delegated power as expressed in the Latin maxim *delegatus non potest delegare*". In the common law jurisdictions with which I am familiar there is no obstacle to an attorney general or other responsible minister engaging members of the private bar to provide legal services to the government.

I very much agree with the statement at page 123 that one method of achieving consistency in drafting is through the use of uniform drafting rules. However, as a legislative counsel with long experience of working in Australia I was struck by the misunderstanding shown at page 124 where the *Legislation Act 2001* passed by the Australian Capital Territory is cited as being an example of uniform legislative drafting principles being adopted within a federation. That Act only applies to the Australian Capital Territory and not throughout Australia.

The extensive literature review carried out by the author does make the book a useful reference guide to texts about legislative drafting and in focussing on the framework within which drafting is carried out it is a useful addition to the limited number of texts that up to now have dealt with this area.