

LEGISLATIVE DRAFTING GUIDE: A PRACTITIONER'S VIEW

**A RESOURCE FOR
PEOPLE WORKING ON
INTERNATIONAL TECHNICAL
ASSISTANCE PROJECTS**

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Introduction: What this guide is and is not

This is a style guide for legislative drafting in international legal assistance projects. It will serve as an introduction for those who do not usually draft legislation and checklist and review for experienced drafters.

Good legislation has prerequisites. One is to have a **good policy** base. Sometimes the drafter's colleagues or clients set the policy; sometimes the drafter is also a policymaker. In either case, the drafter must understand the policy down to the practical details.

A second is that the policy springs from **good process**, involving the affected interests. Seeking stakeholder involvement is not always the drafter's task, but in international legal assistance projects the drafter often plays a role in vetting the policy and capturing public reaction.

A third is that the legislation reflects **good politics**. The legislation must be acceptable to those in power and able to pass the legislature easily. That may mean avoiding issues that would raise political questions, stir up rival ministries, or force referral to multiple parliamentary committees.

A fourth prerequisite is **good form**. The legislation must follow the conventions that the legislature or government demands of bills, resolutions, or rules. That means using the proper enacting clauses, numbering systems, and so forth.

A fifth is **good fit**. The new law must be consistent with the constitution and with the country's obligations under international law. It must also be consistent with laws governing related activities and basic governmental functions such as taxation, procurement, or public administration.

A sixth prerequisite is **good style**. Drafters should write laws that are free from ambiguity, that capture policy accurately, and that are reasonably simple to understand, apply, and eventually amend.

This guide is mostly about form, fit, and style, and of those, mostly about style. Policy, process, and politics vary widely depending on local context. Form and fit are less variable. Style is the most nearly universal and so easiest to discuss in a general guide.

After offering guidance on form, fit and style, this guide offers a few suggestions on matters of good professional practice. Some of these suggestions concern the overall approach to drafting and some concern the most basic matters of producing a clean and error-free text.

The author's study and practice has been in English in common law systems. This guide may be most helpful in similar circumstances, but many points have universal application.

Box 1: A Personal Note

Every drafter has style preferences and prejudices. I will disclose a few of mine. First, in the debate between the “plain language” school and the “precision” school, I lean towards plain language. The precision school says that capturing policy exactly is more important than capturing it in simple language. That may be true, but it is not impossible to be precise with simple language; it is just difficult. If you cannot be both precise and simple, by all means be precise, but strive to be both.

Second and more idiosyncratically, computer programming theory has influenced my philosophy of drafting. This is admittedly odd. Human languages are far more complex and prone to ambiguity than computer languages. Writing an algorithm for a computer is not the same as writing rules for people. And I don’t claim to understand computer-programming theory particularly well.

However, computer programmers and legislative drafters both strive to avoid hidden errors. In the 1970s computer scientists developed a theory called structured programming. Structured programmers abjured some common programming techniques because they made the flow of programs more complex and so more capable of hiding “bugs”.

Similarly, a wise drafter avoids some common patterns of language because they have the potential to conceal ambiguity. The prime example is the use of passive voice. A careful drafter can write a passive sentence that has the same meaning as an active sentence, but doing so takes discipline. It is too easy to leave out the actor in the passive sentence and open the door to ambiguity. (See the main text of this guide for examples.) Other ambiguity-hiding habits to avoid are over-reliance on pronouns and use of non-parallel lists.

Third, I used to be a true believer in logic over convention in legal writing. I once wrote a three-page letter to a legal editor explaining that “if and only if” really means something different from “if” and every student of symbolic logic knows it. I have urged colleagues to abandon the traditional but multi-meaning “shall” in favor of “must”. I have been known to exhibit strong opinions about the most logical way to express prohibition.

Writing this guide has forced me to admit that many logical arguments about drafting crumble in the face of the conventional way people use language. Do not use “no person shall” advises one learned drafter, because it logically applies to no person. Do not use “a person shall not” advises another, and use instead “a person may not” since it deprives the actor of authority and is logically stronger. Do not use “a person may not”, advises a third, because it literally means “a person has the discretion not to” and so is no prohibition at all. In reality, a judge would have to be particularly dense or devious not to recognize that “no person shall”, “a person shall not”, and “a person may not” all express prohibition.

So does the sign that says “No Parking” or that just has a “P” in a circle with a slash through it. Convention carries the message.

In several places, however, this guide falls back to invoke logic over conventional use. Conventional speech is surprisingly filled with double meanings and vagueness. Sometimes the drafter needs logic to avoid those pitfalls.

Part I: Form

Form refers to the layout of a piece of legislation. The broadest rules of form are usually set out in constitutions, legislative rules, and other written laws. These determine things like whether the legislation should take the form of a bill, a resolution, or something else and whether the legislation needs formalities such as an enacting clause or an effective date. The smaller aspects of form are often unwritten. These include things like the standard ways to number sections, capitalize nouns, or use punctuation. These small rules promote consistency, which in turn tends to promote clarity.

On matters of form, remember the Roman rule: When in Rome, do as the Romans do.¹ Learn about local drafting practice and follow it.

1. If the jurisdiction has a form manual for legislation, get it and follow it.

2. If not, find existing legislation and copy the form.

In an ideal world, you would fall under the wing of an experienced drafter, and in the course of an apprenticeship you would be exposed to relevant passages of the constitution and rules of the legislature. Your work would be closely critiqued, and you would learn the minutiae of practice through mistake and correction. In the world of the occasional or itinerant drafter, there is no time for slow accumulation of knowledge. The quickest way to pick up form is to copy from past legislation.

Looking at sample bills, you may be able to determine what kind of legislative vehicle you need to draft. Usually it is an act, but the rules of the legislative body may require drafters to frame particular types of legislation in other formats, for example, as a resolution or amendment.

Look at the general layout of bills. Notice how they are divided into titles, articles, and so forth and how those divisions are numbered. Compare a few different laws. Is there a standard form?

See how drafters name acts and regulations: do they use straightforward names (“the Forest Law”), more descriptive names (“the Forest Sustainability and Community Forestry Act of 2006), or no names at all beyond the act or regulation number (Forest Regulation No. 23)? Do they give bills both a formal and a short title?

Look at the form used to amend existing law. A few jurisdictions require bills to set out the repealed words in full.

Look for boilerplate items, such as enacting, savings, and severability clauses and copy them as necessary.

See if the jurisdiction requires acts to specify their effective dates.

One caveat to these suggestions: be careful when working in countries transitioning to new constitutions or structures of governance. You still may find worthwhile information in past legislation, but it would be dangerous to copy the past automatically, without consideration of the changed situation.

¹ Lawrence E. Filson, *The Legislative Drafter’s Desk Reference* (1992), at 81.

3. If the jurisdiction does not have a form manual, create a form sheet for the project, particularly if more than one drafter will be working on the texts.

The form sheet can provide guidance on topics like these:

- How to number titles, parts, sections, subsections, paragraphs, subparagraphs, and so forth.
- How to use indentation to distinguish subsections, paragraphs, and further subdivisions. (Indenting can make a text easier to read.)
- When to use numerals and when to use words in referring to numbers.
- When to capitalize words, especially words that refer to parts of the government, such as ministry, agency, department, or court and words in cross-references, such as act, law, part, or section.
- How to refer to dates (e.g., 10 June, June 10, or June 10th).
- How to refer to sums of money.
- How to resolve common punctuation issues, such as whether to use a comma before the conjunction in a series.

4. Be aware of idiom and translation issues.

The international drafter does not always speak the same language or dialect as the people who will be living under the law. Sometimes the drafter is unfamiliar with local usage. In other cases, the drafter is working in one language for translation into others.

Feedback can overcome language issues. Work closely with local speakers. Encourage them to ask questions about the draft and offer criticism. If a draft comes back with suggestions for wording that seems awkward or odd, get to the root of the concern. Remember that even when both sides apparently speak the same language, small differences in word usage can lead to misunderstandings.

When working across languages, the value of a good translator is enormous. Most drafters have seen a bad translation of a law into their native language. Consider what a bad translation of your own work into another language would look like.

If you have a choice, hire the best translator you can find or afford. Look for someone who understands both legal terminology and the terminology of the subject at hand, such as agriculture or finance. Give preference to a native speaker of the target language. Generally translators do a better job translating into their native language than out of their native language.

If a phrase in a translated law is causing unexpected concern, ask a different translator to translate it back into the original language, to verify the original translation.

Part II: Fit

Fit refers to how legislation squares with other laws. Drafters need to watch two areas of fit: general fit with the laws governing legislation (which merges in some aspects with matters of form) and specific fit with laws that govern the subject matter of interest.

A. General Fit

1. Look for general legislative powers and requirements in the constitution.

For example, some constitutions forbid bills to cover multiple subjects. Usually in such jurisdictions, a bill must declare its subject. In that case legislation declaring itself “A bill to establish controls on rice marketing” could not deal with wheat, but “A bill to establish controls on grain marketing” could.

Constitutions may forbid the legislature from exercising judicial powers (for example, through a bill declaring someone guilty of a crime) or executive powers (for example, through a bill giving a legislative committee veto power over actions of a ministry). On the other hand, some constitutions grant unexpected powers to the legislature. Read the constitution to better understand what legislation can and cannot do. The nature of constitutional law is such that learning the subtleties would require years of study and practice. Still, reading the basic document can be a help.

2. Have a rough sense of the process of enacting a bill, including the committee process that a bill must follow.

In some jurisdictions, the drafter can speed the progress of a bill by limiting the subject matter to the jurisdiction of a single committee, or by shaping the subject matter to fit the jurisdiction of committees inclined to advance the bill. This borders on politics, and the international drafter often keeps deliberate distance from internal politics, but sometimes political awareness is essential to achieve reform.

3. Keep in mind the inherent limits of what legislation can do.

The commonest mistake here is the simplest: to try to bind a future legislature through a direct order in an ordinary bill:

NOT:

The legislature shall re-examine the agricultural commodity export tax levels in 2010 and make appropriate revisions.

Who will enforce this provision? What will happen if the legislature fails to act? In most jurisdictions, neither the courts nor the executive has the power to force the legislature to enact a law. In effect, one legislature cannot bind a future legislature with an ordinary statute.

There are ways around this, but none are perfect. A rough approach is to use a “sunset” provision: have the current legislation expire and force the future legislature to deal with it:

ARGUABLY BETTER, BUT POTENTIALLY WORSE:

The export tax in this section shall expire at the end of 2010.

If the future legislature cannot come to agreement on replacement legislation, the country will have no export tax. That may be bad policy. But at least the executive can implement the provision and the courts can enforce it.

Another approach is to amend the constitution or to amend the rules of the legislature to force the legislature to take particular procedural steps in the future. Both of these are usually impractical.

Not every provision of a law needs to be normative and enforceable. Statements of policy and aspiration have their place. Just be careful not to draft an unenforceable requirement when you really want an enforceable one.

4. Check to see if the jurisdiction has enacted a general statutory interpretation law.

The jurisdiction may have adopted standard definitions for common terms like “person”. The jurisdiction may have a provision concerning use of pronouns (“Unless the context requires otherwise, provisions using male pronouns apply to both males and females.”) or plurals (“As the context requires, provisions using singular nouns and pronouns also apply to groups.”) The jurisdiction may have a standard severability rule that makes individual severability clauses unnecessary.²

5. If the jurisdiction codifies its laws and you plan to amend existing law, find out which is the official version of the law: the bill as first enacted or the codification.

If the enacted law is still the official version, you must frame your amendments as changes to that law. You can let the codifiers worry what the effect of the change is on the code. If the code is the official version, you must frame your amendments and perhaps your entire bill as changes to the code itself.

B. Specific Fit

1. Besides looking at the existing statute that you expect to amend or replace, also look at statutes with closely related subject matter.

You may discover specialized terms, such as “watershed” or “livestock”, that have the same definition in every statute covering the subject, and you may want to follow that practice to avoid confusion. You may note specific legal mechanisms (permit systems, compounding of offenses, etc.) that you will want to preserve, modify, or use as models.

You may also find cross-references that you need to be aware of, as when a tax law incorporates by reference the definition of “farm produce” from the agricultural law that you are about to revise. In this example, if you change the term, you must keep in mind the effects in both the new agriculture law and the old tax law.

² A severability clause instructs courts that if they find a defect in the statute, they should strike down only the defect and not the whole statute. In some jurisdictions these are also called savings clauses, but in other jurisdictions, “savings clause” means something quite different: a clause that preserves rights that existed before passage of the statute.

2. If the jurisdiction has historical legal ties with other jurisdictions, or if it likes to stay consistent with neighboring states, look at their statutes on the subject.

You will learn the jurisdiction’s usual ways of shaping laws and institutions, which may be worth preserving. You may also make your draft more politically acceptable if it parallels other efforts in the region.

3. Research applicable international obligations.

Be consistent with treaties that the nation has ratified but also look to those that it may ratify. For example, if a country is considering joining a local trading block, you may want to review the basic requirements for membership.

Look for treaties that directly address the subject matter of your draft, but also consider treaties that might have indirect effects. Trade treaties, for example, may affect how you structure domestic health and safety laws that apply to products in international commerce. Regional political treaties may affect how you structure preferences for local ownership or citizenship in licensing and procurement laws. Analyzing these treaties by yourself can take time. Seeking the opinion of someone from the national government who is familiar with these treaties is often an option.

4. Get a sense of how “fuzzy” or “fussy” the local laws are when dealing with your subject.³

Some jurisdictions traditionally have laws that make broad grants of authority, without a lot of detail, leaving much discretion to ministries and courts in interpreting the law. Some jurisdictions have specific and narrow grants of discretion, with the legislature exercising more authority in shaping agencies and how they regulate resource use. The drafter should acquire a sense of how detailed the laws generally are and should draft with more or less that level of detail, unless there is good reason to do otherwise.

³ See generally Lisabeth Campbell, Legal Drafting Styles: Fuzzy or Fussy?, 3 E LAW | Murdoch U. Electronic J. of Law, <http://www.murdoch.edu.au/elaw/issues/v3n2/campbell.htm> (1996).

Part III: Style

Style refers to the manner of expression. The rules of style aim to improve the precision, accuracy, and clarity of drafting. Precise drafting is unambiguous. Accurate drafting captures the desired policy. Clear drafting is easy to understand.

Box 2: Precision, Accuracy, and Clarity

Here is a non-drafting example that illustrates the differences between precision, accuracy, and clarity. If I tell you that I am 279 years, 3 months, and 22 days old, I am being precise but rather inaccurate. If I told you I am in my 50s, I am being accurate but not particularly precise. If I told you that 18 years from today I will be one month shy of being twice as old as the minimum age a person needs to be to hold the office of President under Article III, section 1 of the Constitution of the United States, I may be accurate and precise, but I am not stating things in the simplest of ways. I certainly could be clearer.

In drafting, accuracy refers to how well you capture the intended policy. For example, if country’s forest policy is to schedule harvests at a rotation age that maximizes the volume of wood produced over the long run, you could write:

The Agency shall set the rotation age for harvesting trees at thirty years.

This is precise, but it does not capture the policy accurately.

The Agency shall set the rotation age for harvesting trees at the culmination of mean annual increment.

This captures the policy accurately, but it uses a technical term that may not be clear. A definition of “culmination of mean annual increment” could help. Or alternatively:

The Agency shall schedule harvests at a rotation age that maximizes the volume of wood produced sustainably over time.

This seems to capture the policy, but is it clear and precise enough? Does it matter how the Agency measures volume, for example? That is partly a technical question, and the drafter may want to discuss it with the foresters who will be implementing the law.

It also may be partly a policy question. It could be that the policymakers themselves have not thought their policy through to the precise details. Or it could be that the policymakers want to leave flexibility in the law and give the executive and judiciary some leeway for interpretation later on.

Constitutions, legislative rules, and other written law may determine fit and form, but tradition is usually the main source of style. Honor tradition if it contributes to good drafting, but don’t follow past practice slavishly. After all, one of the purposes of legislative revision is change. You will come across drafting that is hopelessly archaic and some that is just plain bad. Strive to do better.

A. Aim for Simplicity in Your Overall Approach

The ideal piece of legislation makes a complex subject seem simple.

1. Outline and organize before you start to draft specific sections.

Get a good understanding of the policy that the law is to implement and the mechanisms that are available to embody that policy. Then outline the flow and substance of the bill. Ask the policymakers for feedback on your outline, to ensure you are proceeding on the right course.

2. Ordinarily, start with general matters and progress to specifics.

That means that unless local practice dictates otherwise, you will want provisions like these at the beginning of the law:

- Title or Short Title.
- Statement of goals, purposes, or objectives.
- General definitions.

Follow these with the operative provisions of the act. Again, start with general provisions and move to the specific. Keep like provisions together. Don’t hide a provision on plant disease prevention in the chapter on veterinary health.

It often makes sense to put enforcement and penalty provisions towards the end of an act, but they can also fit neatly in a set of provisions on government powers and duties in administration of the law.

As an exception to the rule, put items dealing with general legal mechanics at the end of the act. These may include the following:

- Severability clauses.
- Repeals and grandfather provisions.
- Transitions and effective dates.

You may end up writing the provisions in a different order than they appear in the law. For example, some drafters put off writing the definitions until the law is nearly finished. They flag the terms that need definitions as they draft, then come back and draft the definitions when they have a clear picture of what kind of definition the law needs.

However, the bill should be arranged in a way that makes most sense to the reader, not necessarily in the order that you drafted the sections.

3. Avoid tricks.

If you can do things in a clever way or a simple but somewhat longer way, choose the simple way. Don’t be too tricky – you may end up tricking yourself or the next person who comes to amend the law.⁴

⁴ Another way to look at this is, “It’s more important to be careful than to be brilliant.” William N. Eskridge, Jr. and Philip P. Frickey, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (2d ed. 1995) at 115.

For example, say you have this problem: “Tribal members” (i.e., members of indigenous tribes) are currently exempt from the requirement to obtain marine fishing licenses. The policymakers would also like residents of rural areas who are fishing for non-commercial purposes to be exempt.

What if we define the term “tribal members” to include residents of rural areas who are fishing for non-commercial purposes? Are we cleverly saving repetitive drafting, or are we inviting trouble?

There are at least three reasons not to expand the definition. First, the new text would no longer be using the common meaning of “tribal members”, and readers who did not carefully consult the definitions might be misled. Second, the term “tribal members” may be used somewhere else in the law, and changing the definition may have unintended consequences. Third, we have created a problem for the future drafter who wants to add a provision that applies only to actual tribal members, not to rural residents.

The better approach is to write a separate provision that exempts rural residents.

B. Use Plain Language

Drafters should aim to make the law understandable to the people it affects. Plain language is easier for most people to understand.

Some drafters are afraid to innovate. Using time-tested words is low-risk. These drafters write laws filled with archaic constructions and unnecessary words.

Some drafters take a strange pride in writing text that only another lawyer can understand. These drafters give us jargon and sentences that run on without end.

Do not follow these bad examples. Use plain language.

1. Omit unnecessary words.

Avoid noun phrases when a simple verb will do:

make arrangements for	=	arrange
give payment to	=	pay
prepare an evaluation of	=	evaluate
shall have the power to	=	may

Avoid traditional paired phrases when a single member of the pair will do:

null and void	=	void
without force or effect	=	without effect
establish and ordain	=	establish

2. Avoid unnecessary jargon.

Legal jargon is often unnecessary. Do not use it if you can capture the same ideas easily without it. For example, you can often drop “hereby” without changing the meaning of the sentence.

NOT:

The Small Animal Authority is hereby directed to promulgate rules governing the importation of mongooses.

BETTER:

The Small Animal Authority is directed to promulgate rules governing the importation of mongooses.

AND EVEN BETTER:

The Small Animal Authority shall issue rules governing import of mongooses.

Avoid “hereinafter”, “aforesaid”, and similar legal-sounding terms. Ordinary people do not use those words, and the words seldom add clarity.

NOT:

The Small Animal Authority (hereinafter “the Authority”) ...

If the legislation is short or the term occurs in only a single area of the legislation, just drop the “hereinafter”:

BETTER:

The Small Animal Authority (“the Authority”) ...

If the term occurs throughout a long piece of legislation, a definition may be easier for the reader to find than a parenthetical:

“Authority” means the Small Animal Authority.

Another often superfluous word is “aforesaid”:

NOT:

The farmer shall submit a claim for damages from wild game in writing, and the Authority shall inspect the damage alleged in the aforesaid claim within three days.

BETTER:

The farmer shall submit a claim for damages from wild game in writing, and the Authority shall inspect the damage described in the claim within three days.

Use “the” or “that” or “those” instead of “such” or “said”.

NOT:

If a member attends the entire meeting, the Ministry shall pay said member ten dollars.

BETTER:

If a member attends the entire meeting, the Ministry shall pay the member ten dollars.

Do use legal terms that have made their way into ordinary speech or that convey meanings that ordinary speech does not otherwise easily capture. For example, seeking substitutes for legal terms like “liability”, “damages”, or “negligence” could just cause confusion.

3. Use short sentences.

Readers find short sentences easier to understand.

Each of your sentences should convey a single idea. If you have two ideas in a sentence, splitting the sentence will make the law easier to read and will also make the separate ideas easier to cite. To take an example from the last section:

The farmer shall submit a claim for damages from wild game in writing, and the Authority shall inspect the damage described in the claim within three days.

There are really two obligations here, although they are clearly related. Separating these obligations may cost a few more words, but the result is a little easier to read, and readers will be able to cite the two obligations differently, as subsections (a) and (b) of the section:

(a) If a farmer wishes compensation for damages from wild game, the farmer shall submit a written claim to the Authority.

(b) The Authority shall inspect the damage described in the claim within three days.

If you are describing a complex process or series of actions, consider breaking it down into steps:

NOT:

The Authority shall pay the farmer the market value of the crops destroyed as projected for the time of harvest based on the price at harvest in the previous year as adjusted by current market trends, less the amount saved by the farmer in not tending the crops through to harvest, less any salvage value of the crops, less any value the Authority expects the farmer to gain from alternative uses of the land between the time of damage and the expected time of harvest, plus in the case of perennial crops such as coffee or rubber, the cost of replacement of damaged shrubs or trees and the present value of estimated lost harvests in future years.

Admittedly, this would be too much detail in many jurisdictions. But for the sake of illustration, assume we wanted to constrain the Authority in this manner. Here is an approach that adds even more detail but makes the whole thing more readable:

BETTER:

To find the amount due to a farmer for damages from wild animals, the Authority shall:

(a) Estimate the expected volume or weight the damaged crop would have produced at harvest.

(b) Estimate the harvest price, based upon the price at harvest in the previous year, adjusted by current market trends.

(c) Calculate the harvest income by multiplying the estimated volume or weight times the estimated price.

(d) Subtract from the harvest income any savings that the farmer will gain from not having to tend the crop, harvest the crop, and deliver it to market.

- (e) Further subtract any salvage value of the damaged crops.
- (f) Further subtract any amount that the farmer can expect to gain by putting the land to other uses between now and the normal harvest date.
- (g) In the case of perennial crops such as coffee or rubber, add any costs of replacement of the damaged shrubs or trees and the present value of estimated lost harvests in future years.

The formula here is imaginary and not worth copying. Copy the idea of expressing a complex process as a series of simpler steps.

4. State requirements clearly and specifically.

“Concentrate on the who and the what.”⁵ Make the person who must meet the requirement the subject of the sentence.

NOT:

The fees shall go to the Central Bank.

BETTER:

The Finance Ministry shall deposit the fees in the Central Bank.

State the duty explicitly; don’t just imply it through the enforcement power:

NOT JUST:

The Authority may order contractors that harvest trees outside their contract area to jump in the sea.

BUT FIRST:

Contractors may not harvest trees outside their contract area.

5. Draft exceptions clearly, and do not hide them.

Multiple and complex exceptions make a law easy to misread. If you find yourself writing large exceptions, maybe your rule is too broad. See if you can redraft the rule.

When you must use exceptions, give the reader warning in the excepted portion:

NOT:

(a) All cows must moo.

(b) Notwithstanding the provision above, purple cows may refrain from mooing.

Some readers will stop at (a) and miss the exception.

BETTER:

⁵ Robert J. Martineau, *Drafting Legislation and Rules in Plain English* (1991) at 65.

(a) Except as provided in subsection (b), all cows must moo.

(b) Subsection (a) does not apply to purple cows.

When you have only one exception, put the exception before the rule:

EVEN BETTER:

Except for purple cows, all cows must moo.

You can overdo the flagging of exceptions, so exercise some judgment on the matter. If there are exceptions that apply broadly across the law, such as waiving requirements in an emergency to avoid loss of life, or tolling a deadline because of *force majeure*, it would be annoying to the reader to mention them before every provision of the act. In that case, you might include a provision near the beginning of the act flagging the exceptions:

Section 4. All requirements of this Law are subject to the exemptions in Sections 304, dealing with emergencies, and 305, dealing with *force majeure*.

If common sense or the layout of the text will lead readers to find the exceptions anyway, then exemptions may stand without any flagging.

6. Keep lists in parallel grammatical form.

This helps keep your thinking clear and makes the draft easier to read.

NOT:

Contractors shall record (a) the number of trees harvested, (b) the dates the trees were harvested, (c) that they submitted a list of trees to the Authority.”

The last subsection is not parallel to the first two. If you cannot naturally rewrite it in parallel form, maybe it does not belong in this list. Maybe it is a different kind of obligation and should have its own section.

BETTER:

Contractors shall record (a) the number of trees harvested and (b) the dates the trees were harvested.

Contractors shall submit a copy of those records to the Authority.

7. Use cross-references to clarify, not to complicate and confuse.

Naked cross-references as shorthand can be confusing:

NOT:

The contractor shall pay taxes assessed in Regulation 24, at the place prescribed in Article 99 of the National Procurement Law, before April 1 of each year, unless the deadline is tolled under the conditions listed in Section 3 of Regulation 26.

That’s impossible to understand on first reading.

BETTER:

Unless the contractor invokes the *force majeure* provisions in section 3 of Regulation 26, the contractor shall pay the annual land rent to the Central Bank before April 1 of each year.

At least the reader will not have to track down three different references. Knowing a little about *force majeure*, the reader may be comfortable proceeding without looking up the cross-reference at all.

Including a cross-reference in the definition of a term can help the reader understand the function of the term:

ACCEPTABLE:

“Tariff” means the tax on export of agricultural products set under this Act.

ARGUABLY BETTER:

“Tariff” means the tax on export of agricultural products set under Section 34 of this Act.

Admittedly, cross-references complicate revisions. The drafter must verify cross-references after every change in the text. A simple renumbering or minor edit to the content of a target section can ruin a cross-reference hiding in another section.

Also, if you regularly use cross-references to incorporate substance, you may end up with a section that refers to another section that refers to another section that refers to another section. These chains of references drive readers crazy.

For these reasons, you should use cross-references with forethought. Use them to help the reader understand the text. Avoid references that force the reader to read several places in the law to understand what you could just as easily put in a single place. And remember that keeping cross-references accurate will add work to later revisions.

C. Limit Variety to Avoid Ambiguity

The points below all promote plain language, but they also help you reduce the chance of ambiguity in your text. They direct you to give up some common writing practices that may unintentionally hide second meanings.

1. Use the same word or phrase for the same concept.

Great writers intentionally vary their words to keep the reader interested. Legal drafters cannot afford to do that.

“Never change your language unless you wish to change your meaning and always change your language if you wish to change your meaning.”⁶

NOT:

After the Board approves a permit application, the Director shall issue a permit that is effective for one year after its award.

⁶ Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2001) at 49.

Does “award” refer to approval or issuance? Does the permit expire one year after the Board approves it or one year after the Director signs it? Using the same word or a form of the same word would make the text clear:

BETTER:

After the Board approves a permit application, the Director shall issue a permit that is effective for one year after the approval.

OR:

After the Board approves a permit application, the Director shall issue a permit that is effective for one year from its date of issue.

Using the same words can make the text seem dull. Do not worry about it. Value consistency over art, even if the potential for ambiguity isn’t immediately obvious.

NOT:

If the contractor owes community development obligations, the contractor shall pay money to the Central Bank, which shall hold community funds in a special account.

BETTER:

If the contractor owes community development fees, the contractor shall pay the fees to the Central Bank, which shall hold those fees in a special account.

A common drafting mistake is to use one word or phrase to mean more than one thing. If the law creates two different kinds of authorizations, give them different names. Call one a permit and the other a license, or call one an import permit and the other an export permit.

In the second case, be careful when you write “permit” by itself. For example,

DO NOT WRITE:

Applicants may appeal the denial of permits to the Minister.

IF YOU ONLY MEAN:

Applicants may appeal the denial of export permits to the Minister.

2. Adopt a consistent style for basic expressions like creation of powers, duties, prohibitions, and conditions.

This guideline is an extension of the idea of using the same words to mean the same thing.

A simple and nearly universal way in English of granting powers is with the verb “may”:

NOT:

The Department is hereby empowered to inspect a dairy for compliance at any time.

BETTER:

The Department may inspect a dairy at any time.

You will find more variation in the way drafters express duties. There is no single correct way, but the best ways are the simplest ones. Good drafters choose one way to express duties and use it consistently throughout the draft.

A common choice is the verb “shall”:

NOT:

The Department is directed to establish sanitation guidelines for the production and transport of dairy products.

BETTER:

The Department shall establish sanitation guidelines for the production and transport of dairy products.

If you use “shall” in this way, try to restrict its use to grants of duties to people or institutions, or to direct prohibitions.

NOT:

“Census” shall mean the census of agriculture.

The Ministry shall prepare the annual census, and the census shall include data on areas under production.

In the first sentence, the “shall” is unnecessary.

The second sentence uses shall twice. The first time is proper, but the second shall really expresses a condition of the Ministry’s duty. The law cannot direct an inanimate census to act. In many cases, this kind of fine distinction is not going to confuse the reader. However, if you want to be consistent in using “shall” in a single sense, it is easy to revise the text:

BETTER:

“Census” means a written report on agricultural production during the previous year.

The Ministry shall conduct an annual census to gather data on areas under cultivation.

“Shall” is not the only way to express duties. At least one jurisdiction prefers the phrase “is to” when expressing duties of high officials:

The Minister is to establish a system for licensing dairies.

Many drafters prefer “must”:

The Department must establish a system for licensing dairies.

Using “must” instead of “shall” follows the trend of using modern language. “Shall” is an “archaic and formal” way to express a command.⁷

Still, both “must” and “shall” are widely understood. Either is fine for most drafting. Local practice may influence your choice. Just choose a style and use it consistently.

Styles diverge more when it comes to prohibitions. You might find:

⁷ Tobias A. Dorsey, *Legislative Drafter’s Deskbook: A Practical Guide*, §6.55 (2006).

- (1) A person may not apply restricted pesticides without a license.
- (2) A person shall not apply restricted pesticides without a license.
- (3) No person shall apply restricted pesticides without a license.
- (4) No person may apply restricted pesticides without a license.
- (5) Applying restricted pesticides without a license is illegal.
- (6) It is an offense to apply restricted pesticides without a license.
- (7) It is hereby declared unlawful to apply restricted pesticides without a license.

Most plain-language drafters favor example (1). Some jurisdictions favor (2) or (3), usually because of tradition. In a rare case, a jurisdiction may make a substantive distinction between (1) and (2), for example, using “may not” to express general prohibitions and “shall not” to express criminal prohibitions. You discover this by noticing the pattern in existing law or by asking an experienced local drafter. Much more common are jurisdictions where (1), (2), (3), and (4) all mean the same thing. In those jurisdictions, the drafter should choose one form and stick with it.

The other examples get poor reviews from modern drafting critics. They fail to put the actor as the subject of the sentence. The “It is” construction of examples (6) and (7) is wordy, and you could strike “hereby declared” without changing the effect of the provision.

Some drafters advocate using different verbs to express duties and conditions of those duties. For example, you could use “shall” to express duties and “must” to express conditions:

- (a) Subject to the requirements of subsections (b) and (c) of this section, the Minister shall appoint a nine-member Agricultural Policy Advisory Board.
- (b) The appointees must have expertise in a field related to agriculture, such as ranching, farming, veterinary science, food processing, nutrition, marketing, economics, agricultural extension, or law.
- (c) The appointees must include at least three owners of farmland, at least one member of the faculty of the National Agricultural College, and at least one representative of the National Farmworkers Guild.

In this example, only the Minister has a true duty, expressed in subsection (a). Subsections (b) and (c) do not create obligations for the members so much as they condition the duty of the Minister to make appointments. The situation is even clearer when the conditions concern inanimate objects:

- (a) The Department shall publish an annual census of agriculture.
- (b) The census must contain aggregate information on agricultural production in the country, including the number of hectares under cultivation for various major crops and the total harvest of those crops.

The drafter can also express conditions more directly. If the list is short, conditions can go in a subordinate clause:

The Department shall publish an annual census of agriculture containing aggregate information on agricultural production in the country, including the number of hectares under cultivation for various major crops and the total harvest of those crops.

If the list is long, conditions can go in a numbered series:

The Department shall publish an annual census of agriculture that contains all of the following:

- (a) General information on agricultural production in the country.
- (b) Aggregate information on the number of hectares under cultivation for various major crops and the total harvest of those crops.
- (c) ...

3. Draft primarily in the present tense.

Using the present tense is simple and, in English, allows you to restrict the word “shall” to indicate a duty or obligation.

NOT:

A person who shall harvest a tree without permission from the landowner shall pay the landowner twice the market value of the harvested tree.

BETTER:

A person who harvests a tree without permission from the landowner shall pay the landowner twice the market value of the harvested tree.

Note that the remaining “shall” is expressing obligation, not future tense.

This is not an absolute rule. To express sequences of events, consequences, or prerequisites, you may sometimes find it necessary to resort to past or future tense. In those cases in English, consider using “will” rather than “shall” to indicate future tense.

The past tense holds a greater danger for ambiguity. Using it carelessly may make a law apply retroactively. Courts in many jurisdictions presume that laws do not apply retroactively, but use of the past tense may be enough to overcome that presumption.

NOT:

Any license issued without following the procedures in this regulation is invalid.

The intent here is to prevent a court from ruling that failure to follow a procedural requirement is harmless error. What the wording unintentionally does is cast doubt over every license issued before the regulation took effect.

A court would be less likely to apply the following retroactively:

BETTER:

Any license that the Government issues without following the procedures in this regulation is invalid.⁸

⁸If the drafter has any doubts in the matter, the surest way to avoid any ambiguity is to add a savings clause to the regulation:

The procedures in this regulation do not apply to licenses issued before the regulation took effect.

4. Avoid the passive voice.

If you wanted to create a provision for honoraria for board members, you might find yourself thinking or writing:

Members shall be paid ten dollars for attending a meeting.

This is passive. Rewrite it in the active voice, naming the missing actor, the Ministry.

BETTER:

The Ministry shall pay a member ten dollars for attending a meeting.

The use of passive can lead to ambiguity:

NOT:

If an operator fails to pay the annual fee before 1 June, the operator’s permit shall be cancelled.

The name of the actor is missing. You could supply it with a phrase beginning with “by”. Is the missing phrase “by operation of law”, i.e. automatically and without human intervention? Or is the missing phrase “by the Ministry”, i.e., requiring positive action from a bureaucrat? Not a trivial distinction if the operator is later charged with operating without a permit.

BETTER:

If an operator fails to pay the annual fee before 1 June, the Ministry shall cancel the operator’s permit.

OR:

If an operator fails to pay the annual fee on or before 1 June, the operator’s permit is void.

5. Use pronouns with care.

The problem here is the ambiguous antecedent. In ordinary speech, people often use pronouns casually. The pronoun may refer to a noun far back in the stream of words. In statutory drafting, that kind of use can leave the reader guessing at the meaning of the text.

NOT:

If the President orders the Administrator to revise the irrigation management plan, he shall publish a notice in the Official Gazette announcing the revision and inviting public comment.

Who must file the notice, the President or the Administrator?

The solution is usually to repeat the noun:

BETTER:

For more on the use of present tense, including an example of a poor use of past tense that ended up in court, see Office of Legislative Counsel, U.S. State of Oregon, Bill Drafting Manual, ch. 3 at 3.8 to 3.9 (<http://www.lc.state.or.us/pdfs/BillDraftingManual/dmchp3.pdf>).

If the President orders the Administrator to revise the irrigation management plan, the Administrator shall publish a notice in the Official Gazette announcing the revision and inviting public comment.

Some jurisdictions discourage the use of gender-specific pronouns such as “he” or “she”. You can usually avoid those pronouns by repeating the antecedent nouns. The result may seem a little stilted, but it is unambiguous.

6. Watch out for straying modifiers.

This is a problem of reference, related to the pronoun problem. When you use a phrase or word as a modifier, be sure it refers to what you wish it to modify and only that:

NOT:

A farmer may label a crop as “super eco-ganic” if no one has applied hormones or pesticides containing synthetic chemicals to the crop.

What does “containing synthetic chemicals” modify? Clearly it applies to “pesticides”, but does it also apply to “hormones”?

If you want the modifier to refer only to the last item in a series, sometimes the solution is to move the modified term to the start of the series:

A farmer may label a crop as “super eco-ganic” if no one has applied pesticides containing synthetic chemicals or hormones to the crop.

In this case, however, the example still has a problem. Now the phrase could be read to mean “pesticides containing synthetic chemicals or pesticides containing hormones”. A better solution is to use a list:

A farmer may label a crop as “super eco-ganic” if no one has applied any of the following:

- (a) Hormones.
- (b) Pesticides containing synthetic chemicals.

The modifier problem can also occur across prepositional phrases:

NOT:

The grading standards apply to all shipments of frozen juice concentrate made after 31 December 2006.

Does “made after December 31, 2006” modify “shipments” or “frozen juice concentrate”? In other words, what about concentrate made on 30 December and shipped on 2 January?

BETTER:

The grading standard applies to all frozen juice concentrate shipped after 31 December 2006.

7. Beware of negative conjunction/disjunction traps.

In informal speech, people do not always honor logic. Drafters try to honor logic, but when they use complex logical constructions, they may confuse readers or even themselves.

A common problem involves using negatives like “not” with conjunctions like “and” or disjunctions like “or”. In logic textbooks you will find,

$\text{not}(A \text{ or } B) = (\text{not } A) \text{ and } (\text{not } B).$

Similarly,

$\text{not}(A \text{ and } B) = (\text{not } A) \text{ or } (\text{not } B).$

For drafters, that means,

DO NOT WRITE:

The contractor shall not
(a) eat spinach, and
(b) drink beer.

IF YOU REALLY MEAN:

(a) The contractor shall not eat spinach.
(b) The contractor shall not drink beer.

A contractor who eats spinach without beer can argue it is in compliance with the first provision. The contractor is clearly in violation of the second. If you want to separately prohibit each item in a list, use “or” ...

The contractor shall not
(a) eat spinach, or
(b) drink beer.

... or repeat the “not” and use “and”.

The contractor shall
(a) not eat spinach, and
(b) not drink beer.

Not every reader of your draft will intuitively grasp the logical fine points of combining “not” with a conjunction or disjunction. An alternative approach is to avoid the use of “and” or “or”:

The contractor shall not do any of the following:
(a) eat spinach.
(b) drink beer.

8. Take special care with numbers.

Something about language or the human mind leads us to speak of numbers loosely. While numbers themselves are so given to precision, we tend to use ambiguous words and phrases to describe them.

Nowhere is this more apparent than in how we express time. Is midnight the first or last moment of the day? If a deadline is in thirty days, do we begin counting “Day One” today or

tomorrow? These are such common problems that the jurisdiction may have already addressed them, either through a precedent-setting court ruling or through a general law on interpretation of statutes. Look into it.

When specifying deadlines and other critical dates, some prepositions can hide ambiguities. If something is due “by 30 June” or if something can be submitted “between 1 January and 30 June”, is a 30 June submission timely?

The prepositions “before” and “after” are generally safer to use:

Persons shall pay the annual registration fee before 1 July of each year.

Farmers may file a request for subsidy payment after December 31 of the harvest year.

Think twice if you find yourself using phrases like “immediately” or “at once”. Often, these add nothing to the law, particularly if you are describing an action that happens by operation of the law rather than by human intervention.

NOT:

A person convicted of a felony is immediately disqualified from receiving subsidy payments.

BETTER:

The Department may not make subsidy payments to convicted felons.

If the words “immediately” or “at once” set a time limit for human action, the resulting standard may be literally impossible. In that case, the agency or courts may take the wording figuratively, to mean something like “without delay” or “as soon as possible”. If you want the law to express a loose standard, write a loose but literal standard. If you want the law to express a tight standard, write a tight but reasonable standard:

NOT:

If pesticides, fertilizer, or manure spill into surface waters on a farm, the farm owner shall notify the Department immediately.

BETTER, less figurative, but still a loose standard:

If pesticides, fertilizer, or manure spill into surface waters on a farm, the farm owner shall notify the Department as soon as possible.

BETTER, in the sense of being more specific, and so more enforceable:

If pesticides, fertilizer, or manure spill into surface waters on a farm, the farm owner shall notify the Department within 24 hours.

But do not seek precision for its own sake. Be precise to serve clarity. If a definite time limit like “24 hours” does not fit the rural context, do not use it.

When prescribing periodic duties, avoid “bi” words. They can be ambiguous.

NOT:

The agency shall publish a biyearly summary of regional harvest data.

“Biyearly” could mean twice a year or every other year.

BETTER:

Every six months, the agency shall publish a summary of regional harvest data.

OR:

Every two years, the agency shall publish a summary of regional harvest data.

When dealing with ranges, beware of gap traps.

NOT:

- a. For farms of 100 hectares or more, a Class A license.
- b. For farms of 1 to 99 hectares, a Class B license.

Sooner or later, a farm of 99.5 hectares will come along. If the quantity is continuously variable, don’t leave gaps.

NOT:

- a. For farms of more than 100 hectares, a Class A license.
- b. For farms of less than 100 hectares, a Class B license.

This leaves out the farm of exactly 100 hectares.

AND NOT:

- a. For farms of 100 hectares or more, a Class A license.
- b. For farms of 100 hectares or less, a Class B license.

This creates an overlap; it puts the 100-hectare farm in both classes.

BETTER:

- a. For farms of 100 hectares or more, a Class A license.
- b. For farms of less than 100 hectares, a Class B license.

Or even:

- a. For farms of 100 hectares or more, a Class A license.
- b. For all other farms, a Class B license.

A related gap issue arises with ages. When referring to age, “over twenty” is ambiguous. Does it include the person aged twenty years and a day? If that is the intent, “Twenty years of age or older” would be clearer; if not “Twenty-one years of age or older” is better.

D. Avoid Two Specific Legal Pitfalls

The following two points concern ambiguities that arise more because of the nature of law than because of the nature of language.

1. Be aware of incorporation by reference issues.

Incorporation of a set of standards by reference is inherently ambiguous if the standards are subject to change. Take for example:

Farmers who receive assistance shall follow the International Union of Soil Sciences best practices standard for conservation of tropical soils.

What happens if the Union amends its standard? Does the language adopt the exact standard in place on the date the law is enacted or the current standard however the Union changes it? Some jurisdictions have general statutory interpretation rules that create a presumption on this point, one way or the other. You can also avoid this ambiguity by writing “the standard in effect on 1 October 2003” or “the standard, as it may be from time to time amended”.

Incidentally, incorporation by reference often also raises an issue of fit. In some jurisdictions, an open-to-amendment incorporation is considered a delegation of legislative authority. In such countries, giving the power to change a legal standard to an organization outside the national government may be unconstitutional.

2. Be cautious with repeals.

Before you draft a repeal, be sure that you are not creating orphans of cross-references in other laws and regulations. Verifying this can be difficult, but it is necessary.

Does the law you are repealing contain a repeal? Repealing a repeal can raise a question of whether you intended to reinstate the previously repealed provision. State your intent:

The Land Reform Act of 1999 is repealed, and the Land Reform Act of 1992, repealed by the Land Reform Act of 1999, is reinstated.

OR:

The Land Reform Act of 1999 is repealed, and the Land Reform Act of 1992 is not reinstated.

Has the government written regulations or other subsidiary legislation under the repealed law? If so, you may want to state whether the repeal also eliminates those regulations or whether they continue in effect under the new law.

E. Create Definitions to Serve the Law

Pay close attention to your definitions; they are crucial to the understanding of your draft.

1. Do not define words without a good reason.

Define terms to prevent confusion or ambiguity. Avoid defining terms needlessly. If the dictionary definition of a term will do, do you really need to repeat it in the law?

2. Do not create definitions that stray too far from the ordinary meaning of a word.

Most people will assume you are using words in their everyday sense, and if you get far from the everyday sense, you will confuse people. For example, do not write,

“Grain” includes all meats and vegetables.

The parts of the law dealing with “grain” will confuse anyone who misses that definition.

These first two rules may seem to call for writing no definitions at all. If a drafter should not define words without good reason and should not write definitions that stray too far from ordinary meanings, why define any words?

Sometimes a word will have a range of possible meanings, and the definition will narrow its use down to a single clear meaning. For example, does the word “farm” include coffee plantations, cattle ranches, or orchards? A good definition could settle that question.

Sometimes you will have a complex concept that you need to refer to repeatedly, and defining a term will create a simple way to do that. For example, you could define “Administrator” to mean “the Administrator of the National Finfish and Shellfish Conservation and Harvest Regulation Commission” rather than use the long title again and again.

3. Except for short forms, avoid using the defined word in the definition.

The definition of “Administrator” in the previous section is short form where confusion is unlikely. Ordinarily, though, using the defined word in the definition is circular and invites confusion.

NOT:

“Animals” means animals, birds, insects, fish, and invertebrates.

The author here was probably trying to say that “animals” means more than just “mammals”. The result, though, will leave some readers wondering.

BETTER:

“Animals” means mammals, birds, and all other vertebrates, and also insects and all other invertebrates, but does not include humans.

4. Shape definitions to fit the law, not to fit other contexts.

For example, here is a dictionary definition of “forest”:

“Forest” means an area of land dominated by trees.

This would be too vague to be useful in a law where we want a term that describes precisely what lands are under the control of the Forest Department. A forester might suggest a more biological definition:

“Forest” means an ecosystem or landscape dominated by trees and other woody vegetation where the tree canopy covers at least sixty percent of the area.

This second definition is more precise, but it still does not fit the purposes of the law. It is both too narrow (excluding cut-over lands) and too broad (including city parks and farmers’ orchards).

Here is a third definition:

“Forest” means an area identified in the official cadastral survey as forestland.

It borders on the circular and it has no biological validity, but it might be exactly the definition required in the law.

The point is, do not adopt a definition because it is technically or scientifically correct. Adopt a definition because it makes the law work.

You may find in vetting a law that people will suggest changes to a definition before they understand what the definition does. When someone proposes changing a definition, always ask the person to explain why. Be sure the proposed change makes legal sense in light of the desired policy.

5. Be aware of the difference between the two common forms of definitions — exact definitions and definitions by example — and where practical, write exact definitions.

Typically, the word “means” or “is” indicates an exact definition, and “includes” indicates a definition by example. Here is an exact definition:

“Grain” means wheat, barley, or rye.

This definition excludes rice, maize, and other common edible grass seeds.

Here is a definition by example:

“Grain” includes wheat, barley, and rye.

Note that this definition is open-ended. Definitions by example are never as precise as exact definitions. Writing an exact definition is not always possible. However, if you have a choice, you should prefer exact definitions over definitions by example.

6. Try not to hide operative provisions in the definition section.

NOT:

“Liaison officer” means an official of the department appointed to coordinate tax assessments with the Finance Ministry and who shall maintain an office in the Finance Ministry Headquarters.

....

Section 10. The Minister shall appoint a liaison officer.

BETTER:

“Liaison officer” means a person appointed under Section 10 of this Law to coordinate tax assessments with the Finance Ministry.

....

Section 10. (a) The Minister shall appoint an official of the department as liaison officer to coordinate tax assessments with the Finance Ministry.

(b) The liaison officer shall maintain an office in the Finance Ministry Headquarters.

The second version is much kinder to the reader. Yes, there is some repetition, but only in the service of clarity.

7. If you use a definition in only one section or one short part of an act, place the definition where it is used.

Ordinarily all definitions will go in a single “definitions” or “interpretation” section. These are sometimes called the “global definitions”. If a term is only used in one section or part of the law, however, you can serve the reader by placing it at the beginning of that section or part, with an introductory phrase indicating its limited use (e.g., “As used in this section, “regulated farm” means”).

Part IV: Professional Practice

The following guidelines concern how you approach the task of drafting. Some of them touch on matters of form and style, but the motivation behind them goes beyond matters of form and style.

A. Draft for the Next Drafter

Laws are imperfect. Societies change. No matter how good your draft is, the time will come to revise it. You owe it to the next drafter to make the law easy to amend and, where possible, to anticipate change.

1. Write explanatory notes.

No matter how clearly you draft, a set of informal notes can clarify what you did and why you did it. If you need to report on your work to a sponsoring agency, your notes can form the foundation for your report. If your work must go on to other drafters in a ministry or legislature for consideration and revision, your notes can help the next drafter understand your approach more easily. And if you ever have to return to the legislation after time spent on other work, your notes will prove invaluable in refreshing your memory.

Your notes should include a general background to the process. What are the problems that the law needs to address? Why are you drafting a reform bill?

Walk through the law, section by section. Explain the intent and impetus behind the words.

For definitions, note where in the law the key definitions are used. Note where provisions tie into other laws. If a provision draws on another law as a model, note that.

Note significant policy issues and how they were resolved during the drafting. For example, knowing that a citizen advisory committee debated and rejected an alternative may convince the next drafter not to suggest that alternative.

If a provision is particularly controversial and you are serving as drafter rather than advocate, consider offering an alternative provision in your notes.

Write with tact and objectivity. Presume that your notes may become public.

Writing thorough notes can take as long as drafting the law. When you are pressed for time, abridge. Even shortened notes can help the next person understand and improve the draft.

2. Unless local practice requires that all sections have consecutive numbers, leave space for inserting new sections.

How you do this, or whether you need to do this, depends on the local numbering scheme. Some numbering schemes provide for this automatically, because section numbering restarts with one with each new article or title of the law. In other cases you can save room for amendments by starting each article or title with a section number of the next highest multiple of 10, 100, or even 1000 (e.g., if the first portion of the law starts with section 1 and ends with section 15, the next portion of the law can begin with section 101, the third with 201, and so forth). Another option is to state in the draft, “Sections 16–100: Reserved”. Again, the approach should follow local practice if there is one.

3. Rather than repeating a numeric amount throughout a draft, set it once in a definition or other provision.

If you make multiple references to a particular numeric amount, whether that amount is an acreage, a length of time, an amount of money, or something else, consider redrafting so that the specific amount is mentioned only once. This will make it easier for others to change later.

Usually the easiest way to do this is to create a defined term:

RATHER THAN:

All operators of farms of two hectares or more must register with the Agricultural Ministry.

...

The Agricultural Ministry shall conduct a census every ten years of farms of two hectares or more.

...

All operators of farms of two hectares or more shall comply with the reporting and use requirements for businesses found in section 27 of the Pesticide Act.

CONSIDER:

“Regulated farm” means a farm with two hectares or more in cultivation during any given calendar year.

...

All operators of regulated farms must register with the Agriculture Ministry.

...

The Agriculture Ministry shall conduct a census of regulated farms every ten years.

...

All operators of regulated farms shall comply with the reporting and use requirements for businesses found in section 27 of the Pesticide Act.

Now the next drafter can change the size limit by amending a single definition.

Another use of this technique is to divide offenses into classes and specify penalties for each class in a separate portion of the act:

Hunting or attempting to hunt without a license is a Class A offense.

Killing non-game species or killing game out of season is a Class B offense.

...

Buying non-game animal meat is a Class A offense.

Selling meat from non-game animals is a Class C offense.

...

The penalty for conviction of a Class A offense is a fine of up to 1000 euros and a prison term of up to 30 days.

The penalty for conviction of a Class B offense is a fine of up to 2000 euros and a prison term of up to 60 days.

The penalty for conviction of a Class C offense is a fine of up to 5000 euros and a prison term of up to 180 days.

This allows readers to easily compare offenses and their punishment, and it allows future drafters to adjust whole classes of penalties with ease.

4. Anticipate that offices, institutions, processes, and standards set by other laws may change.

The commonest problem is ministries. Ministry jurisdictions tend to change over the years. Today agriculture and forestry are in the same ministry; tomorrow forestry may go to the new environment ministry and agriculture may gain fisheries. In the definitions a drafter might be tempted to write something like this:

“Minister” means the Minister of Agriculture.

It would be better to follow one of these styles:

“Minister” means the minister whose portfolio includes forestry.

“Minister” means the cabinet officer having primary jurisdiction over forest lands and forestry.

“Minister” means the minister responsible for forestry.

Similar issues may arise when naming a particular court or a particular officer within an agency, other than the agency head, unless the law you are drafting creates the position.

5. Do not “patch” a really bad piece of law if you can safely rewrite it.

From a style standpoint, a really badly written piece of legislation deserves to be repealed and rewritten. Doing so will help the people who have to interpret and apply the law. Also, you will be setting an example of better drafting, and you will save the next drafter the misery of working with bad drafting.

However, you must consider more than style before you commit to rewriting a law. You must have the time and resources to understand exactly what the law does and how it relates to other laws before you try to replace it. If you do not completely understand the existing law, you can easily cause a change beyond what you intend.

Rewriting offers political pitfalls as well. It opens opportunities for others to change passages that you only wish to clarify. Once a comprehensive revised text is before the legislature, opponents of the existing law may seize the chance to offer amendments.

A comprehensive revision also demands more political will than targeted amendments do. The present law may represent an uneasy compromise that opponents lack the strength to repeal and supporters lack the enthusiasm to revise. In this case, a small set of amendments may be a practical alternative to a new law.

B. Reread and Review Your Draft

All the readers of your text may not appreciate the care that it takes to produce a really “clean” draft of a law, however they will notice if you fail to produce a clean draft. As a courtesy to those who will work with your text, take these precautions:

1. Remove definitions of unused terms.

After a draft goes through several revisions, review the definitions to make sure you have no orphans – terms defined but no longer actually used anywhere in the revised draft. The advent of word processors and searchable text has simplified this task.

2. Review your numbering of subdivisions.

Look through the numbering of parts, titles, chapters, articles, and sections to make sure that you have not given two provisions the same number or inadvertently skipped numbers.

Look for extraneous subdivisions. If you see only one subdivision – an (a) without a (b) or a (1) without a (2) – you do not need to indicate a subdivision at all.

When inserting a new provision into an existing law, make sure it has a unique new section number. Do not give a new provision the same number as an existing provision that you do not intend to repeal.

3. Double-check cross-references.

If you are using a computer to track cross-references, make sure that it has updated them.

4. Review the law substantively.

The idea is to anticipate all the possible situations in which the law could be applied and eliminate any possible confusion or unwanted result. This is impossible. But it does help to try.

Often the impetus for reform comes from a handful of examples of failures of the law, while the focus of drafting is on how ordinary business should proceed. In reviewing the draft, try to think beyond the anecdotes and the ordinary. Look for loopholes. Weigh your draft against human behavior at the extremes. Plug the gaps before any oddballs, manipulators, or criminals have a chance to exploit them.

A Closing Note

The art of drafting is difficult to master and impossible to capture in a short set of guidelines. Please take these guidelines as a starting point. Explore the other drafting manuals cited in the bibliography. Discuss drafting problems with colleagues. Experience and study will make you a better drafter. There is always more to learn.

Bibliography

Treatises, Texts, and Essays on Drafting

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*Internet Drafting Resources*⁹

Indexes and Sets of Links

AKOMO NTOSO: Legislative Drafting

http://www.akomantoso.org/index.php?option=com_content&task=view&id=86&Itemid=98

This is the legislative drafting page of a United Nations Department for Economics and Social Affairs project, “Strengthening Parliaments’ Information Systems in Africa”. The links are mainly to English-speaking parliamentary drafting offices in developed countries.

Canada, Privy Council Office

http://www.pco-bcp.gc.ca/default.asp?Language=E&Page=Publications&doc=legislation/lmgappendix_e.htm

This page from a government drafting guide includes a table of references on “Preparing Legislation”. Unfortunately, many of the references written for professional drafters are unavailable via the web.

⁹ Valid as of September 2006.

International Law Institute

http://www.ili.org/ld/online_resources.htm

This page indexes a series of pages with links to resources on legislative drafting, including links to legislatures and on-line compilations of statutes.

National Council of State Legislatures (United States)

<http://www.ncsl.org/programs/legman/legalsrv/resource.htm>

This page contains links and a bibliography. The links are primarily to sources of existing law in the United States. The bibliography focuses on drafting guides.

The Plain Language Association International

<http://www.plainlanguagenetwork.org/Legal/>

This page contains links to articles on legal plain language on the association’s site and also links to plain language pages on other sites.

Republic of South Africa, State of Kwazulu-Natal, Department of the Premier, State Law Advisory Services

<http://cdslas.bravepages.com/id9.htm>

This page offers a list of links to drafting resources, mostly outside South Africa.

United States House of Representatives, Office of the Legislative Counsel

<http://legcoun.house.gov/drafting.html>

This features a table of links to resources on legislative drafting, mostly in the United States.

United States, National Archives, Office of the Federal Register

<http://www.archives.gov/federal-register/write/plain-language/>

This is the index to a set of publications on plain language drafting. Some are for general writing and some for legal writing. The link “Drafting Legal Documents” leads to a page with useful links on definitions, ambiguity, and principles of clear writing.

Drafting Manuals

Most of these manuals deal with matters of local form or process. They will be of highest use to a person drafting in that jurisdiction. They may also serve as models for a person writing a form manual in another jurisdiction.

Several of these manuals contain some broadly applicable material on style, although that content is often mixed in with local form and process information.

Most of these sites come from an index on a private web page, <http://www.geocities.com/forstat/lrhp14.html>. The author of this paper has updated the links and added the commentary below.

Commonwealth of Australia, Office of Parliamentary Counsel:

<http://www.opc.gov.au/about/docs/pem.pdf>

This “Plain English” guide is an excellent resource not only on style but also on organization and approach in legislative drafting. A companion drafting manual, http://www.opc.gov.au/about/docs/Drafting_manual.pdf, deals with local form.

Australia, Australian Capital Territory, Parliamentary Counsel’s Office

<http://www.pco.act.gov.au/pages/draftpubstand.htm>

This is a page of links to the Parliamentary Counsel’s publications. These include a drafting manual, which deals with form. In early September 2006, the link to a “Words and Phrases” document led to a page stating that a plain-language style guide was in preparation.

Australia, State of New South Wales, Parliamentary Counsel’s Office

<http://www.pco.nsw.gov.au/pdf/mpl.pdf>
<http://www.pco.nsw.gov.au/pdf/man-ngd.pdf>

These links are to a pair of “drafting manuals” which are really manuals for people using the services of the drafters in the Parliamentary Counsel’s Office. As such, they are more process manuals than form or style manuals. This approach seems to reflect an attitude prevalent among the Australian state parliaments — that citizens and officials do not need to know about form and style, because the parliamentary counsel’s office prepares all drafts.

Australia, State of Queensland, Office of the Parliamentary Counsel

http://www.legislation.qld.gov.au/Leg_Info/info_publications.htm

This page contains links to the publications of the Parliamentary Counsel. The guides here are mostly about process and fit.

Australia, State of Tasmania, Office of the Parliamentary Counsel

<http://www.dpac.tas.gov.au/divisions/opc/>

A link on the left margin of this page leads to a guide for drafting statutory rules. This is largely a process guide for government officials using the drafting services of the Parliamentary Counsel.

Australia, State of Western Australia, Department of the Attorney General, Parliamentary Counsel

http://www.justice.wa.gov.au/portal/server.pt/gateway/PTARGS_0_2_323_201_0_43/http%3B/justicecontent.extranet.justice.wa.gov.au/_files/legislation.pdf

This manual on getting legislation drafted and enacted is another process guide.

Canada, Privy Council Office

http://www.pco-bcp.gc.ca/default.asp?Page=Publications&doc=legislation/lmgtoc_e.htm&Language=E

This “Guide to Making Federal Acts and Regulations” is mostly a process manual.

European Parliament, the Council, and the Commission

http://europa.eu.int/eur-lex/en/about/techleg/guide/index_en.htm

A form and style manual, the EU’s “Joint Practical Guide” is for persons involved in the drafting of legislation within the community institutions. This is the first page of the English-language version, but the page contains links to versions of the manual in all the languages of the EU.

India, State of Himachal Pradesh, Law Department

<http://himachal.nic.in/law/default.htm>

This is the index page for a process manual.

United States, House of Representatives, Office of the Legislative Counsel

<http://www.thecapitol.net/Research/images/HOLC.Manual.on.Drafting.Style.1995.pdf#search=%22drafting%20style%22>

The link is to a private business that has posted a copy of the House Legislative Counsel’s 1995 drafting manual. The first “Title” of the manual includes style points. Much of the rest covers form, mixed with style now and then. In places the writing is surprisingly light-hearted for a government publication.

United States, State of Alabama, Legislative Reference Service

http://www.lrs.state.al.us/style_manual/style_manual.html

This is a short manual with a mix of form and style points.

United States, State of Arizona, Legislative Council

<http://www.azleg.state.az.us/alisPDFs/council/bdmwog2006.pdf>

This is an extensive form and process manual, but the chapter titled “General Instructions as to Form and Style” includes some broadly applicable style provisions.

United States, State of Colorado, General Assembly, Office of Legislative Legal Services

http://www.state.co.us/gov_dir/leg_dir/olls/HTML/legislative_drafting_manual.htm

This is largely a local form manual, however the last few pages of Chapter 5 and much of Chapter 11 give guidance on style and use of plain language.

United States, State of Connecticut, General Assembly, Legislative Commissioners’ Office

http://www.cga.ct.gov/lco/Docs/Drafting_Manual_Public.pdf

A Guide to Drafting Legislation, mostly about process and form, also has some style pointers. It is not a proponent of plain language drafting.

United States, State of Hawaii, Legislative Reference Bureau

<http://www.hawaii.gov/lrb/rpts96/dftman.pdf#search=%22legislative%20drafting%22>

This is largely a form manual.

United States, State of Illinois, Legislative Reference Bureau

<http://www.ilga.gov/commission/lrb/lrbguide.htm>

This is a short guide, mostly on process and form, with some style points.

United States, State of Indiana, General Assembly

<http://www.in.gov/legislative/session/manual/chap02/index.html#draftingrules>

This short manual offers a mix of form and style points.

United States, State of Maine, Office of the Revisor of Statutes

<http://janus.state.me.us/legis/ros/manual/contents.htm>

This is the index to the State of Maine’s official legislative drafting manual. Much of the manual covers matters of local form, but Part III of the manual, on style and grammar, includes guidance applicable to drafting generally.

United States, State of Maryland, General Assembly, Department of Legislative Services

http://dls.state.md.us/side_pgs/legislation/drafting_manual/draft_contents.html

This is a web-based drafting manual. It refers to the official state style manual, but apparently does not include it.

United States, Commonwealth of Massachusetts, Senate

<http://www.mass.gov/legis/drafting.htm>

This short form and style manual begins with some broadly applicable style tips.

United States, State of Minnesota, Office of the Revisor of Statutes

http://www.revisor.leg.state.mn.us/revisor/pubs/bill_drafting_manual/Cover-TOC.htm

Chapter 10 of this drafting manual (“Clarity in Drafting”) addresses style issues of general application.

United States, State of Montana, Legislative Services Division

http://leg.state.mt.us/content/publications/2004_bill_drafting_manual.pdf

Chapter 2 on style and language will be the most useful part for those outside Montana.

United States, State of Nebraska, Legislative Reference Bureau

<http://www.rootsweb.com/~neresour/OLLibrary/Legislature/1933/pages/nelj0121.htm>

This private historical site offers a copy of the state legislative manual from 1933. The manual largely deals with form.

United States, State of North Dakota, Legislative Branch, Legislative Council

<http://www.legis.nd.gov/information/bills/draft-manual.html>

See Chapter 7 on style.

United States, State of Oregon, Legislature, Office of the Legislative Counsel

<http://www.lc.state.or.us/draftingmanual.htm>

Chapters 3 and 4 of this drafting manual contain well-written and useful material on style. The state also publishes a form and style manual, <http://www.lc.state.or.us/form-stylemanual.htm>, which deals almost entirely with form.

United States, State of South Dakota, Legislature

<http://legis.state.sd.us/general/DraftingManual.pdf>

A form manual, but the chapter on “Word Selection” is useful for its list of wordy phrases to avoid.

United States, State of Texas, Legislative Council

<http://www.tlc.state.tx.us/legal/dm/contents.htm>

The provisions in this manual on drafting rules, Chapter 7, Subchapter B, will be of the most interest to those outside of Texas.

United States, State of Utah, Legislature

<http://www.livepublish.le.state.ut.us/lpBin22/lpext.dll?f=templates&fn=altmain-nf-contents.htm&cp=DraftingManual&2.0>

Again, largely a form manual, but Chapter 7 includes some notes on style.

United States, State of Washington, Legislature, Office of the Code Reviser

<http://www1.leg.wa.gov/CodeReviser/Bill+Drafting/>

Another form manual, but Part IV discusses style and there are discussions and examples throughout the manual touching on style.

United States, State of West Virginia, Legislature, Joint Committee on Government and Finance, Legislative Services Division

http://www.legis.state.wv.us/Joint/Bill_Drafting/Drafting_Manual.pdf

The style provisions begin on page 26 of the manual as printed, page 29 of the PDF document.

Journals

Clarity: <http://www.clarity-international.net/journals/default.htm>

The Legislative Lawyer: <http://ncsl.org/programs/legman/legalsrv/pubs.htm>

The Loophole: <http://www.opc.gov.au/calc/papers.htm>