GENERAL PRINCIPLES OF LEGISLATIVE DRAFTING
FOR FIRST NATIONS

National Forum On the Technical Aspects of Matrimonial Real Property

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PREPARED

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PART 1

THE DRAFTING PROCESS

RECEIVING INSTRUCTIONS

The Instructing Officer

1. The drafter should identify exactly who will be giving instructions and making policy decisions on the draft.

2. Does that person have sufficient authority to make final decisions on the draft? Inevitably, matters will arise during the drafting that will need to be resolved. If the instructing officer does not have the authority to resolve them, find out who does.

Problem Diagnosis

1. The drafter must fully understand the problem that is to be solved by the law.

2. It is very risky to rely on paper instructions for this purpose. It is better to discuss it in person to gain a more complete understanding of the issues and the situation. Discussion will also provoke the instructing officer into grasping the problem and defining it.

3. The drafter will often be presented with the proposed solution rather than the problem itself. Unless the drafter comprehends the problem, he or she cannot offer any advice on the appropriateness of the proposed solution. Moreover, it is not uncommon to have false problems, i.e. situations that do not really require legislative action.

   e.g. It may be sufficient to prepare an administrative manual to regulate internal government behaviour.

Analysis of the Proposed Solution

1. The drafter must fully understand the proposed legislative solution.

2. How clear are the ideas of the instructing officer? Are they fixed or are they flexible? Is advice sought from the drafter on the proposed solution?

3. Will the proposal actually solve the problem? It is not uncommon for the proposed
solution to be incomplete.

4. Will the proposal work in practice or is it too cumbersome, expensive or complicated?

5. Consider alternative means to achieve the same ends. There may be other legislative techniques that the drafter is aware of but with which the instructing officer is not familiar.

6. Avoid creating law as education. Occasionally, the instructions include material that is not mandatory but merely in the nature of friendly guidance. This material is best left out. It can be published and distributed in another form if it is really needed.

**Deadlines**

1. The date for implementation of the Law must be identified at the beginning.

2. When assessing whether the deadline can be met, consider all the steps that are required for the Law.

   e.g. drafting, typing, proofreading, review, approval, signing and publishing

3. It is often the unfortunate duty of a drafter to advise the client that the deadline cannot be met. The earlier the bad news is delivered the better.

**ROLE OF THE DRAFTER**

1. The drafter is by definition a communicator. One who communicates governmental policy into law by means of words. Usually, the drafter is not involved in the formation of policy. But in practice, the drafter does get involved because he or she is often experienced in legislation. However, final policy is not the responsibility of the drafter and the drafter should be careful not to assume too much authority over the content of the draft.

2. The role of the drafter is very complex and subtle. It is a combination of confessor, advisor, servant, cross-examiner devil's advocate and trusted colleague. The drafter must strike a delicate balance among these traits. Above all, the drafter must be honest but not servile.

3. Ethical problems can occur when there is confusion over the identity of the client. Working in government is superficially straightforward: the client is the government. Therefore the drafter owes his or her duty to the government. But it is not always clear who represents the government when there is a conflict over policy.
e.g. Is it the drafter's supervisor, the Head of the Department, the Chief, the Council or the members?

BACKGROUND WORK

Legal Research

1. The drafter must identify the Laws Acts and regulations that relate to the draft. Often this appears easy, but be aware of other possibilities.
   
   e.g. Any Applicable Treaty
   
   \textit{Indian Act}
   
   \textit{First Nations Land Management Act}
   
   Any Applicable Self Government Act

2. Are other laws affected? If the drafter does not find out the answers to these questions, a serious risk of a conflict between laws is being taken. If the drafter is a lawyer, the client will be relying on the drafter's legal training for this information.

3. The drafter must conduct legal research to get this information. This means reviewing the relevant statutes and regulations. Most laws are available online.

4. To get an accurate picture of the current law the drafter must also consider whether the legislation has been interpreted by the courts in the case law.

5. It is important to ask the instructing officer if any legal opinions have been rendered on the matter. Get copies of these opinions if they exist. They will save time and effort and shed light on the issues involved. Also, if they are obtained at the beginning, it avoids the embarrassment that can arise from any conflicting legal opinion that the drafter may have.

Constitutional Issues

1. There are a host of constitutional issues that can affect almost any law.

   e.g. \textit{Canadian Charter of Rights and Freedoms}

2. This is an area of legal specialization and even a legally trained drafter may not be competent to do more than identify any constitutional issue and seek expert advice.
First Nation Policy

1. Are there First Nation statements or directives related to the issues in the draft? Ask the instructing officer. It could be very important to know what the expectations are at this level.

3. Do the issues in the draft affect other areas of the First Nation? If so, is the instructing officer going to advise them?

Policy Clarification

1. At this point the drafter may have questions about the policy that require clarification.

2. The policy may have been based on an inaccurate picture of the law. The drafter may have developed some new ideas after canvassing other laws. Finally, some new issues may have arisen from the research that need to be addressed.

3. All these matters must be referred back to the instructing officer for further instructions. In fact, this is an ongoing process that can be expected to continue throughout the drafting of the Law.

Legislative Action Needed

1. Identify the legislative action that is needed.

   e.g. the laws that need to be created or changed.

2. More than one law may be affected. Remember that the law-making procedures may be different for making different laws.

3. Collect precedents where possible. These might be internal precedents or other laws for other places.

4. When using a precedent, be aware that it may not have been created under ideal circumstances. It may have been developed in a hurry and without regard to all possible options. Do not hesitate to improve a precedent, unless it is one that has been developed after much consideration.
AUTHORITY FOR LAWS

1. Laws must have a legislative source. The First Nations must have the power to make the law.

2. Identify and study the exact source of the authority for any laws that are to be drafted.

3. Is there a federal statute to authorizes the making of the law?
   
   e.g. *Family Homes on Reserves and Matrimonial Interests and Rights Act* (Canada)

4. Is the inherent power of the First Nation being used? If so, will it be challenged?

5. After considering this issue, is there sufficient authority to enact what the client wants? If not, the scope of the regulation must be reduced or modified or an amendment to the Act must be sought.

6. Finally, consider whether there are any "conditions precedent" that must be satisfied before the regulation is enacted.
   
   e.g. after approval by the members.

ORGANIZING THE DRAFT

1. The first stage in drafting the Law should be to list all the elements of the Law. Group the elements together according to their type.

   e.g. definitions, application section, prohibitions, procedural matters, rules of conduct, administrative matters, offences, transitional and coming into force sections.

2. After all the elements are listed, they should be organized into an outline form. There are several choices as to the method of organization. The following are some of the possible methods:

   (a) chronological order (this is good for procedural matters where one step follows another in sequence);

   (b) going from the general to the specific (this is good when the issues all relate to the same subject);
(c) stating the general principle first and following with the exceptions (this is a logical sequence);

(d) order of descending importance (this promotes comprehension of the main purposes of the Law);

(e) frequently used provisions to the less well used;

(f) permanent provisions before the temporary;

(g) technical matters last.

3. The methods in #2 may produce a conflict in the order of the elements methods, so the choice must be based on other paramount considerations. The test is always ease of comprehension. To meet this test the order of the draft must meet the following criteria:
- it must be a logical sequence;
- it must be systematic;
- it must flow and not be discordant;
- it should be the most efficient and simple organization of the elements;
- there should be little repetition of provisions;
- it should be easy to find provisions.

4. If the draft is not organized to meet the criteria in #3, consider redrafting it. A poorly organized draft can confuse the reader and lead to misunderstanding, even if the individual provisions are well drafted.

5. Consider the audience that will be using the Law. Their expectations should be a factor in the organization. They may be used to certain types of organization.

6. Above all try to keep its organization practical. Avoid organization that is perfectly logical but not efficient or simple.

   e.g. There are 5 types of licences to be established. Should they be grouped individually so that there are 5 parts that are parallel but separate? Alternatively, they could be grouped together and the draft separated into parts dealing with the various aspects of the licence process. The answer lies in the degree to which the licences are similar. The more similar they are the more they should be grouped together.

7. Recurring provisions are difficult to organize. Repetition is inefficient but very precise. Every place the issue arises it can be repeated to ensure the reader does not overlook it. Grouping them all together into a more general provision is efficient but may create the need for
internal cross-referencing to prevent the reader from missing the idea. The drafter will have to use his or her own judgment and the criteria in #3 to resolve this dilemma.

REVISING AND CHECKING THE FINAL DRAFT

1. The final draft must be complete, proofread and properly edited.

2. CHECK that the sections and subsections in the draft are numbered consecutively.

3. CHECK that no section is numbered as a subsection, which can happen when a section previously had subsections.

4. CHECK that paragraphs, subparagraphs, clauses and subclauses are numbered consecutively.

5. CHECK that a commencement provision is included as the last section of the draft if the Law does not come into force in the usual way.

6. CHECK that the internal section references remain correct. It is generally a good practice to highlight internal section references from draft to draft in order to conduct this check continuously.

7. CHECK that all references to other Acts or regulations are still accurate.
PART 2

TECHNICAL MATTERS

ACTIVE AND PASSIVE VOICE

1. The drafter should use the "active voice" instead of the "passive voice" wherever possible. The active voice clarifies if there is a duty or a power and who is obliged or entitled to do it.

   e.g. Use: "the officer shall issue the certificate"
   rather than: "the certificate shall be issued by the officer"

2. The passive voice can never be used as authority to exercise a power or perform a duty. The passive voice is only descriptive. It is not enabling. In the following example the inspector is given no power to do anything, instead the reader is merely given some information.

   e.g. Licences may be issued by the officer.

3. The passive voice can be avoided by using the sentence structure of subject-verb-object. This is also a simpler and more direct style.

   e.g. Instead of: The order shall be complied with by the licensee.
   Use: The licensee shall comply with the order.

4. The passive voice is legitimate in the following cases:

   (a) titles;

      e.g. This Act may be cited as...

   (b) legal fictions;

      e.g. The notice shall be deemed to be sent on the 10th day after...

   (c) adjectival clauses;

      e.g. A notice that is sent...

   (d) where the drafter intentionally does not want there to be a duty or a power.

      e.g. Every application must be in Form 1.
PREAMBLES

1. Preambles are generally inserted into a draft for political reasons. They can create ambiguities for the substantive provisions when the political situation that gave rise to the preamble fades and new circumstances arise. Therefore most drafters resist incorporating them into the draft.

TITLES

1. At common law the title of a Law is considered to be part of the Law. It is the same as the substantive provisions in this way.

2. A title is relevant to the interpretation of the Law. Any doubt about the meaning of a substantive provision can be resolved by considering it in the light of the title of the Law as a whole.

3. Therefore care must be taken in drafting the title to avoid it conflicting with or casting doubt on the meaning of the substantive provisions.

4. A title should be:
   - concise;
   - not too narrow;
   - descriptive of the contents of the Law.

APPLICATION SECTIONS

1. An application section sets out the scope of the whole Law. These sections can be very tricky and should only be used when the whole Law is subject to the same circumstance.
   - e.g. a specific time, territory or legal subject
CIRCUMSTANCES AND CONDITIONS

1. The circumstances or conditions modify the rest of the provision in which they occur. They describe the circumstances or conditions under which the sentence or rule operates.

2. They come in many forms.

   e.g. - Where...
   - When...
   - Except...
   - Unless...
   - If...
   - Upon...

They can also be in the form of prepositional phrases:

   e.g. - in a public place
   - A document that...
   - A person who...
   - A vehicle being...

3. The traditional approach to the placement of circumstances and conditions in a legislative sentence is as follows:

   (a) If the operation of a provision is limited to a particular circumstance (the "case") or by a certain condition, the circumstance or condition should be set out at the beginning of the provision:

       Circumstance or case:

       e.g. If an officer finds a prohibited drug, the officer may confiscate the drug.

       Condition:

       e.g. Unless the applicant pays the prescribed fee, the officer shall not issue a licence.

   (b) If the operation of a provision is limited to a particular circumstance and by a particular condition, the circumstance should be set out before the condition. Traditionally, both are to be set out at the beginning of the provision, but this often results in an awkward sentence:

       e.g. If an application is approved by the officer, unless the applicant does not
pay the prescribed fee, the officer shall issue a licence.

In this example it would be better to have the condition at the end, as follows:

e.g. If an application is approved by the officer, the officer shall not issue a licence, unless the applicant pays the prescribed fee.

See: "Coode on Legislative Expression" in The Composition of Legislation.

4. Do not apply the traditional rules if the meaning of the sentence will be misunderstood. There are some disadvantages in applying these rules.

5. If the circumstances or conditions are very lengthy, the sense of the sentence may be lost on the reader by the time the legal subject is reached. In these cases, it may be clearer to begin the sentence with the legal subject followed by the legal action and then set out the circumstances and conditions in the form of paragraphs:

e.g. The officer shall issue a licence if
(a)
(b)

6. If a participle is too abrupt it can create an ambiguity.

e.g. a burning substance = one that is on fire? = one that is flammable?

7. The drafter must be precise in using the proper word.

"When" is limited to the time of the event so that it implies that the rule must be simultaneous with the case.

e.g. The limitation period shall commence when the notice is issued.

"Where" or "If" are very general and can apply to both time and circumstance.

e.g. If the notice is issued, the officer may issue the permit.
COMING INTO FORCE

1. Laws come into force on
   (a) the day of they are made (e.g. after third reading);
   (b) a day fixed by the Law (e.g. this Law comes into force on January 1, 2015).

2. Laws cannot come into force retroactively (i.e. in the past).

TRANSITIONAL AND SAVINGS PROVISIONS

General

1. When a new law comes into force, particularly when it replaces an existing law, special provisions may be required.

2. A law or right that was created by the law being repealed or that would otherwise be destroyed by the coming into force of the new law may need to be saved. This is called a savings provision.

3. It may also be necessary to address how the new law will apply to the legal and administrative situation that existed before it comes into force. This is called a transitional provision.

4. Sometimes one provision may have the aspects of both a savings provision and a transitional provision.

5. The drafter must examine the existing law and determine if anything is required to ensure a smooth legal and administrative transition to the new law. It may help to think of what would happen on the very day that the new law comes into force.

6. The drafter should also consider if the new Law would cause any confusion that could be avoided by including a transitional or savings provision. Also consider if anyone or anything may be adversely, but unintentionally, affected by the new law.

7. It may be necessary to include what is known as a "grandfather clause" to preserve a right or an obligation under the old law.
   e.g. If the basis for issuing a licence is more onerous, it might be good policy to
"grandfather" existing licence holders and allowed them to renew their licences on the same terms as when their licences were originally issued.

8. The drafter must raise any possible transitional problems with the client and obtain instructions. The resolution of these problems is a matter of policy.

9. Be very careful when drafting these provisions. They are often extremely complex and abstract.

Other Methods of Dealing with Transitional Problems

Transitional problems may sometimes be dealt with through the use of commencement provisions or application provisions. These are placed at the end and beginning of the Law respectively.

  e.g. These Regulations do not apply to transactions made before January 1, 1988.
PART 3

DRAFTING STYLE

PLAIN LANGUAGE

1. The best practice is called a "plain language" drafting style. It is a reaction against legal writing that is overly technical and formal. Fortunately, legislative drafting has advanced farther than its cousins in private practice, but there is always room for improvement in style. Legislative drafters must be careful not to be too smug about their style.

2. The essence of good style is clarity of expression. This topic is an ancient one, going back to Aristotle and other writers on rhetoric. The goal is to communicate in a way that will be readily understood.

3. Use familiar words instead of obscure ones. There is no need to impress the reader with esoteric vocabulary or to force the reader to scramble for a dictionary. There is enough scope for misunderstanding in legislation without adding to it.

4. Omit surplus words that are merely a gloss on the substantive words in the rest of the sentence. These words take up space and add nothing to the meaning.

   e.g. Instead of:

   "In the event of any inconsistency between the provisions of section 83.1 of this Act and the provisions of the Federal Court Act, the provisions of this Act prevail to the extent of the inconsistency."

   the same idea can be expressed as:

   "Section 83.1 of this Act prevails over any inconsistent provisions in the Federal Court Act."

5. Use concrete words not abstractions.

   e.g. Use "decide" rather than "make decisions"

6. Use simple and short sentences. Avoid long-winded pompous sounding sentences than make the reader fall asleep halfway through the sentence.

7. Avoid using unnecessary words of emphasis.
8. Remember that a reader of legislation is only doing it because he or she has to. In a sense the reader is an unwilling one who would probably prefer to be reading a novel. Therefore, consider anything that the drafter can do to make it easier for the reader.

**NON-SEXIST DRAFTING STYLE**

1. All governments have adopted the principle of non-sexist drafting.

2. The only issue is the method used to implement this principle.

3. It is preferable to avoid using male words or words with a specific sexual connotation.
   
   e.g. Use: "police officer" rather than "policeman"
        "spouse" rather than "widow and widower"

4. Avoiding the use of personal possessive adjectives will not only improve clarity but will conform to a non-sexist legislative drafting style. It is not necessary to draft using the phrase "his or her".
   
   e.g. Use: "the officer's order" rather than "his order".

**NUMBERING SYSTEM**

1. The provisions of a Law are divided into sections numbered consecutively by numbers.

2. A section may be composed of two or more sentences having closely related subject matters. These are subsections.

3. A section that is not divided into subsections and a subsection are always composed of just one sentence.

4. Avoid long and un-subdivided sentences.

5. Generally, a section should not contain more than 4 subsections. If it does, it may mean that the ideas are distinct enough to be separated into different sections. In any event, it means that the reader will have more difficulty comprehending the meaning.

6. A section or subsection may contain two or more paragraphs, which may be further divided into subparagraphs, clauses and subclauses.
7. Use a simple numbering system is the easiest to use. Avoid the MS-Word complex numbering.

8. A simple decimal system is the following:

   1.1

   1.2

      (a)

      (b).

9. You can also use the common federal / provincial system:

   1. (1)

      (2)

      (a)

      (i).

10. Definitions don't need to be numbered.

    1.1 The following terms are defined in this Law:

        "aardvark" means …

        "zebra" means …

CONJUNCTIONS

1. If paragraphs, subparagraphs, clauses or subclauses are to be read disjunctively, "or" should appear at the end of the second-last paragraph, subparagraph, clause or subclause. "Or" does not appear after each paragraph, subparagraph, clause and subclause because the "or" is understood to be read in after each one.

   e.g. (a) ;

   (b) ; or

   (c) .
2. If the paragraphs, subparagraphs, clauses and subclauses are to be read **conjunctively**, "and" should appear at the end of the penultimate one only, for the reasons stated in #1.

3. If the paragraphs, subparagraphs, clauses and subclauses are in the nature of a list, "or" and "and" do not follow the penultimate paragraph, subparagraph, clause or subclause.

4. "And" follows the penultimate paragraph in a list of powers such as regulation-making powers and the powers of corporations.

5. "And" does not follow the penultimate paragraph in a definition section that is in the form of a list.

6. Whether to use "and" or "or" is sometimes a difficult decision. The proper uses of these conjunctions is discussed in *The Composition of Legislation* at pages 35, 49, 130 and 131 and in *Fowler's Modern English Usage*.

7. **Never use: "and/or".**

8. Generally, "and" is conjunctive and "or" is disjunctive or alternative.

9. "And" and "or" are often ambiguous with respect to whether they are inclusive or exclusive,

   e.g.   "A or B" = A or B or both?  
          = A or B, but not both?  

          "A and B" = A and B together only?  
          = A and B or severally?

10. Generally, "or" is inclusive and "and" is several, not joint. Beware of the context.

11. This problem also arises with the application of adjectives to nouns.

   e.g.  "charitable and educational institution"

          = an institution that is both charitable and educational?  
          = a charitable institution and an educational institution together?  
          = a charitable institution or educational institution?
DEFINITIONS

Purpose of Definitions

1. A word or expression should be defined only where:

   (a) it is used to clarify its ordinary meaning;
       e.g. "vehicle" means a self-propelled vehicle;

   (b) it is not being used in its ordinary meaning;
       e.g. "document means information recorded or stored by means of any device;

   (c) the definition is intended to limit or extend its ordinary meaning;
       e.g. "vehicle" means an all-terrain vehicle;

   (d) it is used as an abbreviation of a lengthy expression;
       e.g. "Commission" means the Claims Commission;

   (e) defining it will avoid repetition of words.
       e.g. "securities" means notes, bonds, debentures or other evidences of indebtedness issued by a company, whether secured or unsecured;

2. Do not start drafting your law with the definition section. The drafter should instead list the words or phrases when it looks like they will probably be defined. The list can then be revised as it becomes clear what words recur. Eventually the definitions can be filled out as the needs of the draft as a whole become clear. To commence this task too early in the draft will only result in wasted effort as the content of the definitions are constantly revised.

Ordinary Meaning

Words that are not defined are given their ordinary meaning. Do not define a word or expression if the definition is simply a reiteration of its ordinary meaning.

Consistency
Once a word is defined it must be used with absolute consistency. Be aware of the grammatical form of the word too.

   e.g. adjective, adverb, verb or noun.

Definitions Are Not Substantive

1. A definition **should not include any rule of law or conduct**.

   e.g. "permit" means a permit that the officer may issue for a term of 4 years after receiving an application in Form 1 and an application fee in the amount of $10, but should not issue if the applicant is not eligible.

2. In this example, there should be a section in the Law that gives authority for the officer to issue permits and a provision on the related terms and conditions.

   Instead say "permit" means a permit issued under section x"

"means and includes"

1. Never use the expression "means and includes" in a definition.

2. "Means" indicates that the defined word or expression has the meaning stated and no other meaning. It is used to restrict a meaning.

3. "Includes" indicates that the word or expression also has a meaning beyond its ordinary meaning. It is used to extend a meaning.

   e.g. "person" includes a corporation;

4. "Includes" or "including" can be used in the same definition with "means" to remove any doubt as to whether something is included in the stated meaning.

   e.g. "shaft" means a long vertical or slanting passage providing access to a mine and includes a winze;

"in relation to"

1. The phrase "in relation to" is used only when the defined word is used in more than one context.

   e.g. "owner" means, in relation to a vessel, the registered owner and, in relation to
cargo, the person with the right to possession of the cargo;

2. If the word or expression is comes from another law, use "within the meaning of" or "as defined in".

   e.g. "chief" means a chief within the meaning of the Indian Act.

Definitions in Brackets

Avoid the archaic technique of creating a definition inside the first sentence in which it appears. It used to be common to do this by placing the definition in brackets as a parenthetical phrase. This style also makes it difficult to locate a definition.

   e.g. The Immigration Appeal Division (hereinafter referred to as the "Division") shall...

Placement of Definitions

1. Definitions that apply to the whole Law are placed at the beginning, after the title.

2. If there is only one definition, the definition is not listed but forms part of the sentence.

   e.g. In these Regulations, "broker" means a licensed broker.

3. Where there is more than one definition in a section, the definitions are listed in alphabetical order and are not lettered as paragraphs. Definitions are not lettered for ease of amendment and because the corresponding definitions in French will not likely take the same letter in alphabetical order.

4. A word or expression begins with a capital letter only where the word or expression in the substantive provisions of the Law begins with a capital letter.

5. If definitions do not apply to the whole Law, those definitions should appear at the beginning of the Part, division or section to which they apply. In the case of a Part or division, the definitions constitute the first section of the Part or division. In the case of a section, the definitions constitute the first subsection of the section.

Conjunctions

1. Where one definition means several things, "and" or "or" may be used. "And" means that all things mentioned are included. "Or" means that any of the things mentioned are included.
"Or" is generally preferable but, whichever one is chosen, the drafter must be consistent.

2. Where a series of items are listed following the word "includes", they should be joined by "and".
   
   e.g. "machinery" includes steam and other engines, boilers and crushing apparatus used in a mine.

3. Where a series of items are listed following the expression "does not include", they should be joined by "or".
   
   e.g. "medicine" includes surgery and obstetrics but does not include homeopathy, osteopathy, veterinary surgery or veterinary medicine.

Artificial or Unnatural Meaning: "Humpty Dumptyism"

A word or expression should not be defined in such a way that it is given an artificial or unnatural meaning. Be aware of the reader's psychological habits. The reader will resist adopting any unnatural meaning.

   e.g. "vehicle" includes a horse;

Terms of Art

Laws dealing with matters of a technical nature may use terms of art, i.e. words that are commonly understood in the industry, without defining those terms.

Application Sections

An application section can sometimes be used to define the scope of a law instead of a definition,

   e.g. These Regulations apply to used vehicles.  

   vs.

   In these Regulations "vehicles" means used vehicles.

   e.g. ...as the judge considers (not "deems") appropriate.
DUTIES AND POWERS

1. A duty is an obligation that is imposed on a person by the Law. Breach of a duty may or may not result in an offence, that depends on the terms of the offence section.

2. A power or a right is discretionary for the person who is given it. It may or may not be exercised depending on the degree of discretion that the person is given or the, in the case of a right, the desire of the person.

3. Distinguish between the two by using "shall" for duties and "may" for powers or rights.

4. Powers are "exercised" and duties are "performed".

   e.g. The Minister may exercise the powers and shall perform the duties under these Regulations.

5. For further information see: "shall" and "may".

INTERNAL CONSISTENCY

1. It is better to be consistent and boring than inconsistent and literary. Consistency breeds precision.

2. A Law must be internally consistent. The same word or expression that is used to describe a particular thing should be used the same way each time.

   e.g. "the Inspector" and "the Chief Inspector" should not be used in an Act if the Chief Inspector and the Inspector are the same person.

3. There should also be internal consistency in the use of words and expression between the Act and the regulations.

4. The risk of using more than one word or expression for the same thing is that they may be misinterpreted in order to give a different effect to each word and expression. It also complicates the draft unnecessarily.

5. There should be consistency in the use of grammatical forms of the same words.

6. The drafter should do a word search when a draft is nearing completion to check for internal consistency.
JARGON AND WORDS NOT TO USE

1. Jargon must be avoided. It is often a disguise for incomplete thoughts or is a product of just bad style.

2. Avoid "lawyerisms". These words are formal, often useless and give a false sense of precision. The use of these words as reference words often creates ambiguity. Use the English equivalent, for example, "in the Regulations" for "herein".

   e.g. "said", "aforesaid", "same", "beforementioned", "whatever", "whatsoever", whomsoever" "heretofore", "hereafter", "herein", "hereunder", "hereby", "therein", "thereunder", "thereto", "thereof"

3. Avoid tautologies (duplicate words). These are the repetition of two or more synonyms. Instead use only one word.

   e.g. 
   "unless and until" = unless
   "save and except" = except
   "null and void" = void
   "of no force or effect" = of no effect

4. Avoid "bureaucratize". These are pseudo-terms of art, often created by bureaucracies tired of using simple language. Often they are a list of adjectives and nouns strung together.

   e.g. 
   "use requirements"
   "mass-density method"
   "border importation control measures"
   "priorize"
   "strategize"
   "pro-active"

5. Don’t use the expression "provided that". In the 19th century it was used in its various forms to denote a proviso.

6. Unnecessary adjectives and adverbs should be avoided.

"NOTWITHSTANDING" OR "DESpite" AND SUBJECT TO

1. The expressions "notwithstanding" or "despite" and "subject to" are used where there is a conflict between the provisions of a Law.

2. Before using them consider whether the resolution of the conflict will be clear from the
context. The rule that the particular overrides the general often will resolve any doubt. A Law must be read as a whole and the relationship between provisions can usually be discerned without using "notwithstanding" or "subject to". This is especially true within a section.

3. The over-use of "notwithstanding" or "despite" and "subject to" confuses the reader and makes a Law very complex. However, if there is a serious risk that the conflict will not be resolved in the way intended, the expressions should be used.

4. "Notwithstanding" or 'despite" indicates that the provision in which it occurs prevails over the conflicting provision that is referred to. Use it if it is a minor exception to a general rule.

5. "Subject to" indicates that the provision in which it occurs is subordinate to the provision that is referred to. Use it if the exception(s) is(are) major.

6. Do not use the phrase "notwithstanding any other law". This is a dangerous and unhelpful device. If this device is used in more than one law, it creates confusion as to which one is to prevail. If there is a conflict with other laws, the drafter should identify those conflicts and address them specifically in the draft. To use the "notwithstanding" device places an unfair burden on the reader to identify the specific conflicts in other laws.

SENTENCE STRUCTURE

1. Try to keep the sentence structure as uncomplicated as possible. Simple sentences are much easier to comprehend than long complex ones.

2. Avoid stringing too many clauses together in one sentence. If there are too many, it probably means that there are several ideas that should be separated into subsections.

3. Try to adhere to the order of subject-verb-object.

TENSE

1. The law is "always speaking". This means that the legislation will be given the tense it requires in the context, i.e. in its application to the facts.

2. In practice this principle means that the Law can normally be phrased in the present tense. The circumstances and the context will be used to find the appropriate meaning.

   e.g. Use:
"A person who receives an order shall obey it."

Rather than:

"A person who received an order shall obey it."

3. The drafter need only use a tense other than the present tense when it is necessary to understand the sentence or when the action will always have that tense.

   e.g. The employee shall file a report when the work is completed.

4. When using the past tense the "past perfect tense" is to be preferred.

   e.g. Use:

   "Where a notice is issued..."

   Rather than:

   "Where a notice has been issued..."