

Plain English Tax Law Drafting

Legal Department

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A number of jurisdictions whose laws are written in English have been moving over the past several years to what has been called “plain English drafting.” The emphasis is on using language that is simple and understandable. The contrast is to an older style of drafting that is often quite legalistic. While plain English drafting applies to all legislation, it may be particularly important for tax legislation, which needs to be written in a way that is both understandable and precise and involves a large potential audience. This note discusses specific guidelines that can be used in drafting laws. Guidelines such as these might be referred to or endorsed by officials responsible for drafting of laws.

These guidelines are intended to apply to all tax legislation (and can be equally used in other areas), with the possible exception of amendments to existing laws that are drafted in a different style. The guidelines are not a complete drafting manual, but rather focus on specific relevant issues. Drafters are assumed to be familiar with general drafting and style principles.

These guidelines specifically focus on the English language. For whatever reason, legal drafting in other languages has typically not been as plagued as English with problems of legalistic drafting style. In any case, the specific style guidelines that might be applied in other languages differ from those that apply for the English language, and are not covered in this note.

It is not expected that all countries will want to adopt all of these guidelines. Some of them are rather innovative and some countries may want to stick to how they are doing things, because they do not see a compelling need for change. Legislative drafting style tends to be fairly uniform within a given country, and to change relatively slowly. It is up to the relevant officials of each country to decide what changes they want to make and under what schedule.

1. Use of “shall”

The present tense should be used wherever possible. “Must” should be used when it is stated that a particular person is required to do something.

The general principle is that “shall” should be used only to express a requirement or command. A practical test is that it should be possible to substitute “is required to” or “must.” For example, if a definitions section states:

“person” shall mean an individual, corporation, or partnership;
it can be seen that “shall” should not be used here, because it would not make sense to say “person” *is required to* mean an individual, corporation, or partnership. Instead, just say:

“person” means an individual, corporation, or partnership.

It is more in line with plain English to express a prohibition by saying “may not”. For example, “a director may not” rather than “no director shall”.

Guidelines:

Avoid using “shall.” When expressing an obligation to do something, use instead expressions like “must”, “is required to” or other constructions.

When using “may” in relation to a discretion to be exercised by the executive, consider specifying the criteria to be used in exercising the discretion.

[Some countries may want to continue using “shall”. In this event, it is suggested that the use of “shall” be confined to cases where a requirement is being stated – i.e. usually “shall” should be used only where “must” could be substituted.]

2. Use of active voice

The active voice helps assure that the actor is being identified. For example, don’t say something like: “A return must be filed.....” Instead say: “A taxpayer must file a return...” The active voice is also preferable from a style point of view.

Guideline:

A drafter should use the active voice unless it is inappropriate.

3. Use of the singular

Where possible, the singular should be used rather than the plural. This often makes for a more precise statement. For example, instead of “Persons walking dogs must keep them on a leash.” Say “A person walking a dog must keep the dog on a leash.”

Guideline:

Use the singular except for cases where the plural is clearly indicated.

4. Provisos

It should be possible to avoid use of provisos: “Provided that.....”. Instead of a proviso, the material that is part of the proviso is better integrated into the sentence to which it relates so that the reader can see its logical function better. For example, consider the following:

“A person may deduct

(n) any expenditure incurred by that person during the tax year by way of a leave passage to any employee at the termination of a contract of service:

Provided that a leave passage is not granted to the same person at intervals of less than 4 years;”

It is more understandable to say:

“A person may deduct...

(n) any expenditure incurred by that person during the basis period by way of a leave passage to an employee at the termination of a contract of service, other than to an employee to whom a leave passage was granted by that person during the same tax year or any of the preceding three tax years;”

Guideline:

Do not use the expression: “provided that.”

There are several ways of indicating that one provision prevails over another. For example, one can begin subsection (1) of a section by saying “Subject to this section....” or “Subject to subsections (2) and (3)....” Another technique is to say “a corporation (other than a corporation described in subsection (5))....” If you don’t want to clutter up subsection (1) by saying “subject to subsection (5)”, you can start the exception in subsection (5) by saying “Notwithstanding subsection (1)...” to make it clear that subsection (5) prevails over subsection (1). Finally, in some cases it will be obvious that subsection (5) provides an exception to subsection (1) so you don’t even need this kind of introductory language.

5. Gender neutral drafting

The basic idea of gender neutral drafting is quite simple: avoid use of the masculine pronoun (he, him, his). There are various ways this can be done but perhaps the easiest is to substitute a noun for the pronoun. For example, instead of saying: “A minor child may file suit in the name of his guardian” say: “A minor child may file suit in the name of the child’s guardian.” Substituting a noun in this fashion often enhances understandability and clarity of a provision, since the reader does not have to go back and figure out what the antecedent of a pronoun is.

Sometimes a pronoun can just be omitted. For example, instead of saying: “The Minister may not appoint any of his relatives to the position of Deputy Minister” you can say “The Minister may not appoint a relative to the position of Deputy Minister.”

Sometimes multiple repetition of a noun would lead to an awkward sounding sentence. In such cases, the sentence could be restructured to remove the awkwardness.

Guideline:

- 1. Avoid using the masculine pronoun exclusively.***
- 2. Do this where possible by omitting the pronoun or using a noun instead.***
- 3. Where this cannot conveniently be done use “his or her” or “his, her, or its” or the like (this should be rare).***

6. Use of “includes”

In a definition, “includes” is generally used to indicate that the meaning of a term must be ascertained by reference to its ordinary meaning and that, in addition to that ordinary meaning, the term covers certain things. For example: “ ‘person’ includes a government agency or a partnership.” This is sometimes appropriate, but if the drafter can accurately formulate a definition without using “includes,” it is normally preferable to do so since then a reader who is not a well-trained lawyer will have a better chance of understanding it.

Normally, “includes” is the opposite of “means”, in the sense that “means” indicates an exhaustive definition, while “includes” indicates only a partial definition.

Under this approach, “means and includes” is contradictory.

Example:

“body of persons” means any association of persons, but does not include an incorporated company or a partnership

Can be rewritten –

“body of persons” means any association of persons other than an incorporated company or a partnership.

“cattle” means a bovine animal and includes a pig

Can be written –

“cattle” means a bovine animal or pig.

It should rarely be necessary to use “means” and “includes” together.

Guidelines:

1. *If a definition can be accurately formulated without using “includes” then do so as a matter of preference.*
2. *Avoid using “and includes” in a definition unless it would be awkward or there is a good reason for using this expression.*

7. Use of “any”

In most cases, “any” should be replaced with “a” or “an”, as more in fitting with a plain English style.

Guideline:

“Any” should be reserved for those situations where “a” or “an” would be awkward, and for phrases such as “if any” and “in any other case”.

8. “Where” and “if”

If a draftsman intends to state a condition, the draftsman should use “if” rather than “where”. In some cases, it is best to avoid the “where” or “if” altogether, if this results in a simple sentence construction.

For example,

Instead of saying: “Where a company has been approved...” say “A company that has been approved ...”

Guideline:

Do not use “where” in the sense of “if” (i.e. use where only to refer to location).

9. Latin phrases

Avoid the use of Latin where possible.

Guideline:

Use Latin only where a specific legal concept that is generally referred to in Latin is involved (e.g. subpoena, usufruct, fideicommissum).

10. Legal jargon

Avoid legal jargon where possible (for example, said, such, whereas, hereby, the aforesaid, or hereinafter mentioned). “Such” can usually be replaced by “the”.

Guideline:

Try to use language that is simple and does not sound legalistic.

11. “Described in”

The expressions “mentioned in”, “referred to”, “described in”, and “contemplated in” are generally synonyms but confusion can result if all are used in the same Act since then the question may arise as to whether any difference in meaning is intended. It is best to use only one of these expressions in any given law.

Guideline

For new legislation use “described in”. In any event, adopt a consistent usage.

12. Punctuation

(a) Serial comma

In an expression like “A, B, and C” the serial comma (sometimes referred to as the Oxford comma) is the comma just before “and.”

Guideline:

Use the serial comma to connect each element of a series connected with “and” or “or”.

(b) Other commas and punctuation

Use commas appropriately and consistently. Check consistency of comma and other punctuation usage throughout a given draft law before finalising it.

Guideline:

Use commas to set off an expression like: “deposit”, in relation to a bank, means ...

13. Parentheticals

Guidelines:

Use parentheticals for the expression “(other than...)”. Keep what is in the parenthetical short. (If it gets too long, you can use a technique like (other than a corporation described in subsection (3)), which allows you to put the detail in subsection (3)).

Avoid “(in this section referred to as)”. Instead, define the term.

14. Footnotes

Tax laws typically involve a lot of cross-referencing. This goes along with a precise drafting style. However, cross references reduce readability because the reader often has no idea what the cross-referenced provisions are about and whether they apply to the particular situation faced by the reader. The reader can look them up, but this is a distraction. A way to help the reader is to include an explanatory footnote with a cross reference. For example: “A corporation described in section 63¹.....” This gives the reader an idea of the subject matter of the provision being referred to, so the reader can get the context without interrupting the flow to actually look up that provision.

Guideline:

Where it would be helpful to the reader, use a footnote to explain the subject matter of a section being referred to. An alternative is to use a brief parenthetical instead of a footnote.

15. Organisational issues

(a) Sections/ subsections/ sentences

A section should consist of a single subject. A good test of this is the possibility of finding a brief name for the section. The name should be appropriate for everything that is contained in the section. If it is not possible to find a name, then it may be because the section should be divided into separate sections. Once it is determined what material should go into a particular section, the draftsperson must decide how to divide the section into subsections. In the case of a short section that consists of a single thought, there may not be any division into subsections. If subsections are used, there should not be too many, usually between 2 and 5. Often, the best arrangement is something like –

(1) General rule.

(2) If needed, details of how the general rule works.

¹ Relating to insurance companies.

(3) Cases where the general rule does not apply.

(4) Special rules.

(5) Procedural and technical provisions.

Just as with the section, each subsection should contain one subject. For example, if there is a special rule for banks and another special rule for insurance companies, then there should most likely be two subsections setting forth these special rules.

While each subsection typically consists of one sentence, this is not a requirement. Two or three sentences may be used in a subsection instead of one sentence if this makes the provision easier for the reader to follow. Remember that long sentences are generally more of a struggle for the reader to understand.

Where an example will assist the reader in understanding a provision, it may be inserted at the end of a section or subsection. Examples should be kept short, should be carefully written, and should not be over-used.

Guidelines:

While most subsections will consist of one sentence, two and (although more rarely) more than two sentences may be used where appropriate.

Use examples where appropriate. They will be part of the Act. They could follow either a subsection or a section. Keep them short. They should be headed "Example" or, where there is more than one, "Example 1" "Example 2" etc. [Some countries will find this too innovative, but it is worth considering as a best practice to make legislation understandable.]

16. Tables and graphics

While tables are found in existing legislation in many countries, graphics are more innovative. Several Commonwealth countries have found that graphics, if properly used, can help assist understanding of laws.

Guidelines:

Tables and graphics may be used where helpful, although the use of graphics and flowcharts should be kept minimal. Graphics (showing ownership relation of companies or representing a transaction) may be especially helpful in examples).

17. Schedules

Tax acts of Commonwealth countries have historically often contained a number of schedules. The cleanest approach in terms of organisation would be to drop the use of schedules altogether. This provides the best chance to maintain the coherent organisation of the Act. Where a schedule involves a laundry list, the material can be included in a section that appears at the end of the relevant subdivision, so as not to break up the flow of material.

Guidelines:

Avoid schedules.

18. Definitions

Definitions in a general definitions section of a tax act are often quite lengthy and difficult to follow. Some of them may really be in the nature of substantive rules. It would be much more intuitive to include definitions of this kind in the body of the Act in the relevant place, and for the definitions section to just act as a cross reference (“gross income” has the meaning given in section –“). The definitions section should accordingly contain only definitions that are short, either because the term can be defined without using many words, or because the cross reference technique is used. The preference should be to put a definition in the body of the Act if it fits within the organisational structure. It does not fit, then it should go in the Definitions section unless it is too long. There can be a catch-all subdivision for terms and concepts that don’t fit elsewhere and which are too long to be conveniently included in the definitions section.

The use of a special typeface for defined terms guides the reader, disciplines the drafter, and makes clear situations where a word is not being used in its defined meaning (for example, the word “interest” might be a defined term, but in the expression, “an interest in a partnership”, “interest” is not being used in its defined sense). Most user-friendly would be for the special typeface to also be a hyperlink, so that in an electronic version of the law, the reader could just click on (or hold the mouse over) a word to find its definition.

Modern drafting principles suggest that a definitions section is best placed at the end of an Act, in order to avoid overwhelming the reader with a lengthy definitions section as the reader is beginning to confront the law. The more traditional approach in many countries, however, is for definitions to come at the beginning, on the theory that the reader needs to know how terms are defined before being able to understand how they are used. With a lengthy definitions section, it is really not possible, however, for the reader to read the whole definitions section and keep it in mind before beginning to read the Act. A better approach is to use a special typeface, hyperlinks, or other tools to identify for the reader which terms are defined, so that the reader can consult the definitions section as needed.

Guidelines:

Use a special typeface (e.g. underlining) throughout the Act for defined terms (which can be enhanced with a hyperlink in electronic copies of the Act).

Specialised definitions of terms that are only used in a small subset of the law can be inserted into the part of the law in which they apply, rather than the general definition section, locating them at the end of the relevant section, chapter, etc.

Readability of an Act is enhanced if the general definitions section is located at the end of an Act rather than at the beginning, since then the reader can focus immediately on the operative general rules (which should be located at the beginning of the Act).

19. Numbering

There are various alternative numbering systems for sections, for example:

Traditional (consecutive numbering; simple numbers)

New Zealand (compound, starting with letters)

Australia (compound: division and section)

A compound system has the advantage that the section number identifies the Part of the Act in which it appears. Of course this works only if the Parts are consecutively numbered throughout the Act, instead of starting afresh with each new Chapter.

Guidelines:

Best practice in terms of understandability is to use compound numbering, as in “section 13-02”, which means the second section in chapter 13 of the Act. This goes along with consecutive numbering of chapters throughout the Act.

Leaving gaps between section numbers facilitates future insertions.

20. Section names**Guideline:**

Use a name for each section and subsection. Keep each name short (usually no more than 3 words). The first subsection of a given section should normally be named “In general” or “General rule”.

21. “Deemed”**Guideline:**

Say “is treated as” rather than “is deemed”, but try to avoid using this construction by appropriate use of definitions and formulations of rules which make it unnecessary.

