

LEGISLATIVE DRAFTING 'SAILING THE 7Cs''

Oleh :

**INSTITUT LATIHAN KEHAKIMAN DAN
PERUNDANGAN
(ILKAP)**

*(REPRODUCED WITH THE CONSENT OF THE DRAFTING DIVISION,
ATTORNEY GENERAL'S CHAMBERS)*

Effective Legislative Drafting

(Penggubalan Perundangan Berkesan)

- Effective legislative drafting produces precise, intelligible and easily understood legislation
- Policy of the government is well translated into legislation
- No ambiguity and vagueness
- Can be achieved by adhering to 7Cs

The 7Cs

1. Clarity (*Jelas*)
2. Complete (*Lengkap*)
3. Comprehensible (*Boleh difahami*)
4. Concise (*Pendek*)
5. Consistent (*Konsisten*)
6. Certain (*Pasti*)
7. Communicates (*Komunikasi*)

1. Clarity

(Jelas)

Clarity

Faedah

- Agar kumpulan sasaran perundangan dapat memahami dengan lebih baik maksud sebenar perundangan itu
- mengelakkan silap faham
- menyingkap kesamaran
- menjimatkan masa pembaca perundangan

Clarity

Semantic ambiguity

- a single word has more than one meaning
- there is disagreement over the meaning of very common and very small words

e.g: “*light truck*” refers to the weight or colour?

“paper” may refer to newspapers, documents, learned dissertation or examination questions

“family member” may refer to many people i.e mother, father, wife, husband, sister, brother...

Ambiguity at the sentence level

- unclear sentence structure
- poor placement of phrases and clauses
- problems with modifiers (misplaced, dangling, squinting)

Clarity

■ Ambiguity at the sentence level – cont.

e.g: *Public* hospital or school

Note: Does the word “public” refers to both hospital and school?

e.g: A resident shall be examined by a *registered* dentist or medical practitioner

Note: Does the word “registered ” refer to both dentist and medical practitioner?

Clarity

- **Ambiguity at the sentence level – cont.**

e.g:

Upon the lodging of a notice of appeal, the Commissioner must require the appellant *immediately* to submit returns.

Note:

Is the Commissioner *immediately* to require the appellant to submit returns upon the lodging of a notice of appeal, OR is the appellant *immediately* to submit the returns?

Clarity

How to be clear?

- 1. Define the word – you can specialize/narrow the meaning, extension or multiplication of meaning**
- 2. Make it a habit to refer to dictionary or synonym dictionaries to determine word that most exactly conveys the intended meaning and context. Chose the exact word.**

Clarity

How to be clear?

3. Modifier should be arranged as near as possible to the element it modifies
4. Use of punctuations (comma, semi colon etc)
5. Paragraphing
6. Use plain language. Avoid using-
 - (a) archaic and *legalese* words (perkataan usang)
 - (b) foreign language (perkataan dari bahasa lain)
 - (c) unnecessary words/superfluous words
 - (d) words which have the same meaning (perkataan yang mempunyai makna yang sama)
 - (e) words which have redundant meaning (perkataan yang maknanya bertindan)
 - (f) lofty language (bahasa yang tinggi)

Clarity

How to be clear?

Define the word – you can specialize/narrow the meaning, extension or multiplication of meaning

e.g:

Section 2 of the Income Tax Act 1967 [Act 53]

“body of persons” means an unincorporated body of persons (not being a company), including a Hindu joint family but excluding a partnership;

Clarity

How to be clear?

Malaysian Qualifications Agency Act 2007 [Act 679]

“credit” means a representative measure to reflect the academic load;

“certificate” means the certificate awarded to a person after successful achievement by the person of a set of learning outcomes which is designed to lead the award of such certificate or the equivalent thereof”

Credit Reporting Agency Act 2010 [Act 710]

“credit” means—

- (a) any Islamic financing facility in whatever form or by whatever name called whether or not such facility involves a sale, purchase, sale and repurchase, lease, sale and lease back, sale and buy back arrangement, joint venture arrangement, deferred payment sale, return sharing arrangement and any other financing arrangements or dealings involving assets or properties made in accordance with Islamic law;

Clarity

How to be clear?

- Modifier should be arranged as near as possible to the element it modifies/repetition of modifier

e.g: *Public hospital or school* (X)

1. Public hospital or public school (✓)
2. Hospital or public school (✓)

e.g: **A resident shall be examined by a *registered dentist or medical practitioner.*** (X)

1. A resident shall be examined by a registered medical dentist or registered medical practitioner. (✓)
2. A resident shall be examined by a medical practitioner or a registered dentist. (✓)

Clarity

How to be clear?

e.g: Upon the lodging of a notice of appeal, the Commissioner must require the appellant *immediately* to submit returns. (X)

1. Upon the lodging of a notice of appeal, the Commissioner must immediately require the appellant to submit returns. (✓)
2. Upon the lodging of a notice of appeal, the Commissioner must require the appellant to submit returns immediately. (✓)

Clarity

How to be clear?

■ Use of punctuations

- Provides a notional split second pause in the reading of the sentence
- To mark of separate clauses in a sentence
- To divide a compound sentence
- To separate items in a sequence
- To prevent repetition
- To facilitate understanding

e.g: comma, semi colon, hyphen, colon

Note: Must be used sparingly. Punctuation should be simple, justified and uniformed.

Clarity

How to be clear?

Use of punctuations

e.g:

The board may make a grant to a person from its general fund or from any of its other funds *with the approval of the Minister.*(X)

The board may, with the approval of the Minister, make a grant to a person from its general fund or any of its other funds. (✓)

Clarity

How to be clear?

■ Paragraphing

- Structure of the sentence is made more apparent to the reader
- Analytical tool for the drafter (don't need to waste time to study and analyze the sentence structure)
- Needless repetition is avoided
- Semantic ambiguity is removed
- Rule of thumb – a sentence should not be more than 7 lines

Clarity

How to be clear?

■ Paragraphing

e.g:

The application form shall be accompanied by *three copies* of the plans of the proposed building, the original documents of title and the names and addresses of all directors and partners. (X)

The application form shall be accompanied by—

- (a) three copies of the plans of the proposed building;
- (b) the original documents of title; and
- (c) the names and addresses of all directors and partners. (✓)

Clarity - How to be clear

Caution!

Don't overdo paragraphing!

eg: If a person –

**(a) is injured; or
(b) falls ill,**

and there is nobody to-

**(i) care for; or
(ii) feed**

the person, then.....

Note: 1. The paragraph is too short and unnecessarily interrupts the normal flow of the sentence.

2. The sentence can be digestible in one single sentence.

Clarity

How to be clear?

- Use plain language. Avoid using—

(A) archaic (perkataan usang) and legalese words

e.g: aforementioned, herein, aforesaid, forthwith, whosoever, thenceforth, lessee, master

Replace as follows:

aforesaid	= the
hereby	= [<i>simply delete</i>]
lessee	= tenant
master	= employer
thenceforth	= then
whosoever	= a person who

e.g: **Paragraph 60A(aa) of the Employment Act 1955 [Act 265]**

Any person who is dissatisfied with any decision of the Director General made under paragraph (a) may, within thirty days of such decision being communicated to him, appeal in writing therefrom to the Minister.

2. Complete

(Lengkap)

Complete

- Legislation cannot assume
- must cover all reasonable foreseeable circumstances likely to arise
- ensure that all relevant provisions necessary to give effect to the enforcement of the Act are included
- **for example, savings and transitional provisions should be considered when enacting a new legislation or repealing an existing Act**

Complete

e.g.-

“No person shall smoke”

- Not to smoke what? (cigarettes? cigar? marijuana?)
- when?(at all times?)
- where?(public place? enclosed place?)

Note: Never leave rules dangling in mid-air

Complete

e.g: In establishing a statutory body, the legislation should contain the following provision:

- 1. Establishment of the Corporation**
 - 2. Common seal**
 - 3. Membership of the Corporation**
 - 4. Tenure of office**
 - 5. Remuneration of allowance**
 - 6. Revocation of appointment and resignation**
 - 7. Vacation of office**
 - 8. Temporary exercise of functions of Chairman**
 - 9. Corporation may establish committees**
 - 10. Functions of the Corporation**
 - 11. Powers of the Corporation**
 - 12. Delegation of the Corporation's functions and powers**
 - 13. Funds (and other financial provisions)**
 - 14. Employees of the Corporation**
 - 15. General provisions**
- Etc..**

Note: These provisions will ensure that the Act can be well implemented.

3. Comprehensible

(boleh difahami)

Comprehensible

- Every statute passed by Parliament should be expressed in such words that all those affected by them should understand them (*difahami oleh orang yang membaca terutamanya kumpulan sasaran*)
- In order to enact such statute, a drafter should grasp the whole concept of the policy to be implemented by the proposed legislation before attempting to draft (*dapatkan gambaran mengenai polisi yang dicadangkan*)
- Understanding of policy- know the subject matter through research and consultation with policy maker

Comprehensible

- Identify the target audience/address the target audience

e.g: Notice at a park:

“A dog shall not enter a public park unless it wears a dog’s licence”

More appropriate if—

“ A person shall not bring a dog into a public park unless the dog wears a dog’s licence

Note: The target audience is a person not a dog.

Comprehensible

- **Draft in present tense**

- An act speaks in present tense
- A legislation is regarded as always speaking

e.g : if any person shall give notice, the person may appeal (X)
if any person gives notice, the person may appeal (✓)

e.g : if any balance shall have been found to be due...(X)
if any balance is found to be due....(✓)

Comprehensible

- **Prefer the active voice to passive voice**
- name the performer of the action
- avoid accidental omission and call for the attention of the person given the statutory responsibility
- expression in the passive voice may lead to a lack of directness

e.g: **“Receipt of the said payment as prescribed in section 4 of this Act must be given to the applicant within 14 days” (X)**

“*The Registrar* shall issue a receipt to the applicant within 14 days of the receipt of the payment as prescribed in section 4 of the Act” (✓)

e.g: **“Notice of the sale or disposal of a licensed printing press must be given to the Registrar within 20 days” (X)**

“*The transferor* must give notice to the Registrar within 20 days of the sale or disposal of a licensed printing press” (✓)

Comprehensible

- **Prefer affirmative statement to negative statement**

- More direct and straightforward/more intelligible
- easier to comprehend

e.g: A payment of money must not be made by the Council unless it has been authorized by a prior resolution (X)

Every payment of money by the Council must be authorized by a prior resolution (✓)

e.g: Employers, other than those who do not employ apprentices, shall....(X)

Employers who employ apprentices shall....(✓)

Comprehensible

Note:

In certain situations, negative statements are more effective!

e.g: Do not walk on the grass
Walk only on the path?

e.g: No smoking!

Comprehensible

- **Avoid double negatives and beyond**

- two or more forms of negation are used in the same sentence
- Examples: not, never, unless, few, seldom, scarcely, little

e.g: **The registrar *must not* certify that the podiatrist *has not* been suspended.(X)**

The registrar must certify that the podiatrist has been suspended. (✓)

e.g: **The application for a licence made under subsection (1) *shall not be inconsistent* with this Act. (X)**

The application for a licence made under subsection (1) shall be consistent with this Act. (✓)

4. Concise

(Pendek)

Concise

***“gives a lot of information clearly
and in few words”***

-Concise Oxford English Dictionary

Concise

- No unnecessary or repetitious words- omit needless or superfluous language
- Avoid circumlocution (if a word has the same meaning as a phrase, use the word)
- Use the shortest sentence that conveys the intended meaning
- Avoid nominalizations (a noun derived from the verb)
- Define the word
- Paragraphing

Concise

1. Omit unnecessary/superfluous words—

e.g: A license issued under *the provision of subsection (6)* is not transferable. (X)

A licence issued under subsection (6) is not transferable.(√)

e.g: The Corporation has *full power to.....*(X)

The Corporation has power to.....(√)

Concise

1. Omit unnecessary/superfluous words—contd.

e.g: Any payment made under subsection (1) *above* shall be subject to conditions

The word “above” is not necessary

e.g: **Subsection 56(2) of the Malaysia Co-operatives Societies Act 2006**

(2) Any money paid to the Commission pursuant to the provisions of subsection (1) shall be paid into and form part of the operating fund of the Commission.

Concise

2. Avoid circumlocution (if a word has the same meaning as a phrase, use the word)

- to promote directness and straightforwardness
- more economical

e.g:

all and every

final and conclusive

complete and full

have and hold

save and except

null and void

cease and desist

aid and abet

force and effect

perform and discharge

residue and remainder

fit and proper

sole and exclusive

if and when

undertake and agree

true and correct

Concise

3. Use short sentence that conveys the intended meaning

e.g: It shall be the duty of the local education authority to make and enforce bylaws for their area respecting the attendance of children at school .(X)

The local education authority shall make and enforce bylaws for their area respecting the attendance of children at school.(√)

Concise

4. Avoid nominalizations (a noun derived from the verb)

e.g: A person may **make** *an application* for a licence to the Registrar .
(X)

A person may apply to the Registrar for a licence. (✓)

e.g: The Commissioner shall **conduct** *an investigation of every complaint* lodged in writing. (X)

The Commissioner shall investigate every complaint lodged in writing.
(✓)

Concise

■ Define the word

- **Avoid repetition of the meaning of the word**
- **economical**

■ Paragraphing

- **To avoid long sentences, the use of paragraphs is encouraged**

Concise

Paragraphing – contd.

e.g: Keeping of registers by dealers

8. (1) Every licensed dealer shall keep registers in the prescribed form properly written in the English language and shall record therein such particulars as may be prescribed in respect of all second-hand goods as he may from time to time be possessed of, and the time at which and the person whom he purchased or received such goods , adding in respect of every such last mentioned person a description of his address and business.

(2) Any person failing to comply with the provisions of the last preceding subsection shall be guilty of an offence.(X)

Keeping of register

8.(1) A licensed dealer shall keep a register in the prescribed form legibly written in English, and shall record in it prescribed particulars of all second hand goods he obtains by way of business, including-

- (a) the date and time at which;
and
- (b) the name, address and description of the person from whom,

he obtained those goods.

(2) A dealer who contravenes subsection (1) commits an offence.(√)

Concise

Please note however:

- Clarity should never be compromised for the sake of conciseness
- Try to cramp too many thoughts into a single sentence will only lead to confusion

5. Consistent

(Konsisten)

Consistent

“ It is a **guide to good drafting** that the same words should be consistently used to mean the same thing in drafting legislation. This is what Lord Simon referred to as the presumption against a change in terminological usage. **Inconsistency in the use of words or expressions would create ambiguity**, if not obscurity. The courts will look for consistency. The same words or expressions should therefore be used to mean the same thing.”

-VCRAC Crabbe, Legislative Drafting-

Consistent

- Different words must not be used to **express the same idea**. Likewise, the same word must not be used to express different ideas
- Consistency in the use of words is desirable. A reader may assume that the intention is different if different words are used
- The terminology in subsidiary legislation must not differ from that used in the enabling Act
- Consistency is also required in terms of **style of drafting**- numbering, spelling, capital usage and presentation
- Consistency with other statutory provision . e.g: penal provision

Consistent

1. Different words must not be used to express the same idea. Likewise, the same word must not be used to express different ideas

e.g: oceans and seas
committee and council
inquire and investigate

eg. **ACT 53**
INCOME TAX ACT 1967 (REVISED - 1971)
PART I – PRELIMINARY

Section 2. Interpretation.

"building" includes any structure erected on land (not being plant or machinery);

"premises" means a building (or, where a building is divided into separate parts used or capable of being used as separate residential flats or otherwise as separate tenements, any one of those parts) and includes-

- (a) any other building or part of a building used or intended to be used in conjunction therewith as domestic offices or for some other ancillary purpose; and
- (b) any land attached thereto for use by way of amenity as garden or grounds;

Consistent

2. Consistency in the use of words is desirable. A reader may assume that the intention is different if different words are used

e.g:

- If one provision of a statute requires that a notice be **'given'**, other provisions of the statute should not require notices to be **'furnished'**, **'lodged'**, **'submitted'**, **'delivered'** or **'filed'**.
- If one provision of a statute refers to the **'issue'** of a licence, another should not refer to the **'grant'** of a licence.

Consistent

2. Consistency in the use of words is desirable. A reader may assume that the intention is different if different words are used

e.g:

(1) The Minister shall publish in the *Gazette* a copy of every *order or regulation* proposed to be made under this Act.

(2) No *order, regulation or other instrument* is required to be published more than once under subsection(1).”

Consistent

4. The terminology in subsidiary legislation must not differ from that used in the enabling Act

Definition of 'person'

e.g: **S.2 Income Tax Act [ACT 53]**

Section 2. Interpretation.

"person" includes a company, a body of persons and a corporation sole;

e.g: **para 4 Public Ruling 1/2001**

Interpretation.

"person" includes a company, a co-operative, a club, an association, a Hindu joint family, a trust, an estate under administration, a partnership and an individual.

e.g: **para 4 Public Ruling 2/2001**

Interpretation.

"person" includes a company, a co-operative society, a partnership, a club, an association, a Hindu joint family, a trust, an estate under administration, and an individual, but excludes a unit trust to which section 63A of the Act applies.

Consistent

5. Consistency is also required in terms of style of drafting- numbering, singular/plural, spelling, capital usage and presentation

e.g:

INCOME TAX ACT 1967
PART III - ASCERTAINMENT OF CHARGEABLE INCOME
Chapter 8 - Special cases

Successive partnerships

56. (7) For the purposes of subsection (5) of this section, the amount of any remuneration or interest shall be ascertained whenever necessary by applying subsection 19(3) as if references therein to Chapter 4 were references to subsection (5) of this section

Income receivable by partnership otherwise than from partnership business

- 58.(2) For the purposes of subsection (1), in the application of section 55 or section 55 in conjunction with section 56, as the case may be, the provisional adjusted income shall be taken to be the divisible income

6. Certain

(Pasti)

Certain

“.....the primary objective in legislation must always be certainty.”

-VCRAC Crabbe, Legislative Drafting, pg 53-

Certain

- Legislation is certain when there is **no ambiguity**
- those to be affected are **left in no doubt** as to the extent of their duties, obligations, powers, discretion or rights, or the procedures required to be followed in given circumstances
- The drafter must ensure that the words and sentences used are **certain and clear in its meaning**
- **uncertainty may cause loopholes** and subject the interpretation of the words to the court's interpretation – which may not be the drafter's intention

Certain

How to make legislation certain?

1. Avoid words that require a subjective evaluation
2. Avoid emotive words
3. Avoid faulty reference of pronouns
4. Use of cross references

Certain –

1. Avoid words that require a subjective evaluation

e.g: The Dato' Bandar may impose a **reasonable fine** on a person who fails or neglects to fulfill his or her obligation under this Act....”

Note: i) What is reasonable fine?

ii) When do we consider such a fine excessive or not?

- Here certainty is crucial as the offender needs to know for certain how much he has to pay.
- May also lead to abuse of power

Certain

Governance Council

7. (1) The Agency shall be administered by a council to be known as the "Governance Council".

(2) The Council shall consist of the following members:

(a) the Prime Minister as the Chairman;

Agensi Inovasi Malaysia

9

- (b) the Minister charged with the responsibility for science, technology and innovation;
- (c) the Minister charged with the responsibility for domestic trade, cooperatives and consumerism;
- (d) the Minister charged with the responsibility for higher education;
- (e) the Minister charged with the responsibility for finance;
- (f) the Minister in the Prime Minister's Department charged with the responsibility for the Economic Planning Unit;
- (g) the Chief Executive Officer; and
- (h) ten other members who, possess the relevant qualifications, special knowledge or experience in the subject of innovation, science, technology, business, economics or government policies.

Notes: Who decides that the ten members in paragraph (h) "possess the relevant qualification, special knowledge or experience in the subject of innovation, science, technology, business, economics or government policies"?

What if we insert "in the opinion of the Prime Minister"?

Certain

2. Avoid emotive words

- It is quite wrong to set a standard in legislation based on emotional effect
- e.g: The landing may be prohibited of a person who is suffering from a contagious disease which is **loathsome** or dangerous.(X)
 - The landing may be prohibited of a person who is suffering from a contagious disease. (✓)
 - Note: You may define the phrase “contagious disease”.

Certain

3. Faulty reference of pronouns

e.g: In the event of the purchaser giving notice to the vendor of his intention to purchase the property, he shall deliver to the Registrar all documents relating to the property which are in his possession.”

Note: “he” refers to **purchaser** or **vendor??**

e.g: In the event of the council giving notice to the corporation of its intention to purchase the property, *it* shall immediately deliver to the Registrar all documents relating to the property which are in its possession.

Note: “it” refers to the council or corporation?

Certain

4. Use of cross references

- essential to achieve certainty
- to be used with restraint

Agensi Inovasi Malaysia Act 2010 [Act 718]

Acquisition of intellectual property

29. (1) The intellectual property in any research finding or project which is fully or partially funded by the Government and any private body or organization may be acquired by the Agency

Agensi Inovasi Malaysia

21

subject to the terms of any agreement between the Agency and the private body or organization.

(2) The Agency may acquire any intellectual property in any research finding or project which is privately owned by entering into agreement with the owner and the intellectual property acquired under this subsection shall be registered with the national intellectual property central depository.

Right to promote, develop and commercialize intellectual property

30. (1) Subject to subsection (2), the Agency shall have the right to promote, develop or commercialize any of the intellectual property which is registered with the national intellectual property central depository.

(2) The Agency shall, before promoting, developing or commercializing the intellectual property under section 29, obtain the consent from the owner of the intellectual property.

7. Communication

(Komunikasi)

Communication

“An Act of Parliament expresses legal relationships. It is a **form of communication**. It lays down our rights and our obligations, our powers, our privileges and our duties. It is a command or series of commands in many respects.And our aim is that an Act of Parliament should be drafted in accordance **with the principles that govern language as a means of communication** in our respective jurisdictions.”

-Crabbe, A Developing Discipline, a paper presented at the Commonwealth Association of Legislative Council, April 2010

Communication

- **Legislation is a communication of a special kind - affects personal liberty, commercial and industrial relations between persons, property, marriage, taxes, indeed all aspects of human conduct within society**
- **The essence of the work of the legislative drafter is to communicate the policy maker's intention**
- **Good communication of legislation can be achieved by adhering to the earlier 7Cs principles**
- **Communication of legislation by the legislative drafter are particularly to—**
 - (a) the law makers**
 - (b) the persons who are concerned with or affected by the law**
 - (c) the members of the judiciary**

Communication

The lawmakers

- members of the Parliament or other lawmaking authority
- include persons who participate in the preparatory and legislative process e.g. officers in the Policy Division in Ministries

The members of the judiciary

- Its members interpret the law, although the interpretation made by a particular court may be subject to review and possible reversal by a higher court.

The persons who are concerned with or affected by the law

- This group may be said to receive the communication transmitted by the lawmakers. The group contain three distinct sub-groups–
 - (i) the persons who are personally affected by the law (e.g: the persons obliged by law to pay tax);
 - (ii) the person who advise and assist those persons affected by the law (e.g.: accountants, tax accountants, lawyers);
 - (iii) The persons, usually public officials, who are charged by the law with the duty of administering and enforcing it.

CONCLUSION

1. It is the paramount duty of a legislative drafter to ensure that the legislative intent and policy are **easily understood** via legislation he drafted
2. The bottom line of the 7Cs: A drafter should make his draft as **intelligible** as possible. The drafter must as much as possible adhere to the rules of 7Cs
3. Legislation of high quality is **understandable and accessible**. Poor-quality legislation is often neither and can incur heavy political, economic, social and environmental costs

CONCLUSION

“It is impossible to give anything like an exhaustive account of how legislation should be drafted.”

*“While there are occasional rules of thumb that may assist, they will do so only **if applied flexibly** and with an eye **constantly on achieving the most clear, simple and effective result** in each context.”*

Craies on Legislation, pg 303

Thank you