

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.4 Statute law revision amendments

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Part 1—Introduction

1 This Drafting Direction deals with the processes by which amendments in the nature of statute law revision (*SLR*) amendments are handled, and the way in which those amendments should be drafted.

Part 2—Processes

Notification and fixing of mistakes

Mistakes found by drafters

2 If you come across a mistake in a Commonwealth Act that you think should be corrected and you are not able to correct it in a Bill that you are currently drafting, please:

- note it down or mark it on a copy of the relevant page(s); and
- initial and date it; and
- send it to First Parliamentary Counsel (*FPC*).

3 However, if the mistake is in a tax Act, a brief email to FPC's special assistant is sufficient. The special assistant maintains a record of technical amendments required and passes them on to Treasury, who will in turn instruct OPC from time to time to include the amendments in tax Bills. Once you include an amendment in a tax Bill, please let FPC's special assistant know so that he or she can remove it from his or her records. If Treasury asks you to fix a misdescribed amendment, see FPC's special assistant to get a copy of Consol's notification of the misdescription.

4 It is useful to have the suggestions attributed, in case the problem is not clear to the person who is eventually asked to draft the amendment. Drafters are not required to draft amendments to deal with mistakes they notify, since this might be a disincentive to drafters to investigate and notify apparent mistakes.

Mistakes found by CONSOL staff

Notification of mistake to FPC

5 Mistakes in Acts are also notified to FPC by the staff of CONSOL in the Attorney-General's Department (the area that prepares consolidated versions of Commonwealth Acts). Occasionally mistakes are notified to FPC by other people, and these are dealt with in much the same way as described below.

Advice on mistake

6 When a notification comes from the CONSOL staff, FPC sends the notification to a drafter for advice. If possible, this is the drafter who drafted the Bill concerned. The drafter's advice to FPC should cover:

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- whether the mistake notified by the CONSOL staff is a real mistake; and
- whether it needs to be fixed (some real mistakes are overtaken by subsequent events and don't need to be fixed); and
- whether it is already being fixed by a Bill in the Parliament or being drafted.

7 The drafter's advice about the mistake is faxed to CONSOL by an Executive Assistant in the Executive Service Centre.

Amendment to fix mistake

8 If the notified mistake is a real mistake that needs to be fixed and that is not already being fixed, the drafter should also prepare a draft amendment to fix the mistake, and attach it to the advice to FPC. The draft amendment should:

- be saved in a Bill insert document that is headed "Statute Law Revision Bill (OPC Provisions) 200X: [name of Principal Act]" and should not be saved as a "Bill bit"; and
- show the name of the Act amended in the "ActHead 9, aat" style; and
- include a commencement provision; and
- be included in the Folio Acts and Bills database.

Explanatory statement

9 The drafter should also attach to the advice to FPC an explanatory statement relating to the draft amendment for possible inclusion in an explanatory memorandum for a Statute Law Revision Bill (see paragraph 11). You should see FPC's special assistant who has copies of standard wording for explanatory statements for various types of SLR amendments.

Request for SLR approval

10 The drafter should also attach to the advice to FPC a request for FPC to give SLR policy approval for the draft amendment (see paragraphs 15 to 17).

Statute Law Revision Bill

11 FPC gives all mistake notifications that require further action, and any draft amendments and related material, to his or her special assistant. It is likely there will be a Statute Law Revision Bill in each Spring Sittings, that FPC's special assistant will co-ordinate. OPC will be responsible for providing the Attorney-General's Department with a proposed explanatory memorandum for the Bill. FPC will decide which drafters need to be available for attending debate in Parliament on the Bill.

Allocation of SLR notifications

12 FPC, or FPC's special assistant after consultation with FPC, may allocate mistake notifications to a drafter for inclusion in a Bill that is not a Statute Law Revision Bill.

Mistake notification with draft amendment attached

13 If you receive a mistake notification with a draft amendment to include in your Bill, you need to:

- check that the mistake still needs fixing (ie that it hasn't already been fixed, or overtaken by repeal of the provision, etc); and
- draw the amendment to your instructors' attention (see paragraphs 18 and 19), but on the basis that they don't have to obtain policy approval; and
- give to your instructors a copy of the explanatory statement attached to the mistake notification and suggest that your instructors include this statement in the explanatory memorandum.

Mistake notification without draft amendment attached

14 If you receive a mistake notification without a draft amendment to include in your Bill, you need to:

- check that there really was a mistake; and
- check that it still needs fixing (ie that it hasn't already been fixed, or overtaken by repeal of the provision, etc); and
- draft the amendment and submit it to FPC for policy approval (see paragraphs 15 to 17); and
- draw the amendment to your instructors' attention (see paragraphs 18 and 19), but on the basis that they don't have to obtain policy approval.

“Policy” authority for SLR amendments

15 In June 1996, the Parliamentary Business Committee gave FPC power to authorise technical corrections, of the kind that would otherwise be suitable for inclusion in a Statute Law Revision Bill, for inclusion in appropriate Bills in the government's ordinary legislation program. This has been interpreted as applying also to parliamentary amendments to make technical corrections to Bills (to the extent that such amendments cannot be made as Chairman's amendments). FPC is also able to authorise the repeal of legislation that is clearly spent.

16 FPC can therefore give “policy” authority for amendments to make such corrections or repeals. This means that instructing agencies do not need to approach their Ministers, and their Ministers do not need to approach the Prime Minister, for authority to include these amendments in Bills or as parliamentary amendments. However, any such amendments must

still be included in the text of the Bill or parliamentary amendments that the Minister ultimately approves (see Drafting Direction 4.6 dealing with Legislation Approval Process).

17 Receiving a mistake notification from FPC doesn't amount to an implicit grant of policy authority by FPC. An amendment to correct a mistake should be put to FPC with an express request for SLR policy approval (including attaching a copy of the provision being amended and any other provision that is relevant to the amendment). Amendments to repeal spent legislation should be accompanied by an explanation as to why the legislation is spent. Amendments covered by policy authority from FPC should be identified as such in the LAP memo, with a reference to the date on which FPC's authority was given.

Rights of instructing agency

18 Of course, FPC's power to give policy approval for technical amendments does not override the instructing agency's right to decide whether it wants the amendments included in its legislation at all.

19 Where a technical amendment initiated within OPC is proposed to be included in a Bill or in a batch of parliamentary amendments, the drafter involved must ensure that the amendment is discussed with instructors (and, if necessary, explained to them) well before the Bill is finalised. This ensures that the instructors' expertise is also brought to bear on the amendment (instructors may, for instance, know that the mistake will be overtaken by a Bill currently in the Parliament), and that the instructors are aware of the need to refer to the amendment in the explanatory memorandum.

Part 3—Form of amendments

What to amend

Errors in Principal Acts

20 In general, an error in a Principal Act should be corrected by an amendment of the Principal Act. This applies whether the error occurred in the original form of the Principal Act or was contained in text added later. This covers such things as spelling, punctuation or cross-reference errors in the text of the Principal Act.

Misdescribed amendments

21 In general, a misdescribed amendment should be corrected by an amendment of the amending Act in which the misdescription occurred. This covers such things as incorrect descriptions of words to be omitted or replaced and references to non-existent provisions in the locating words.

22 It is possible to imagine a case in which correcting a misdescribed amendment by amending the incorrect amending Act is not the best approach, for instance if the position has been complicated by the passage of later amendments overtaking, or relying on, the original misdescribed amendment. If you come across such a case, you should raise it with FPC.

Provisions with duplicated numbers

23 Recently, there have been cases in which 2 provisions with the same number have been inserted in the same Act by different amending Acts. Correcting these raises special difficulties, because of the need to identify which of 2 identically numbered provisions you are referring to.

24 The expression “first/second occurring” should not be used in these cases, because it requires readers to work through various commencement provisions to determine which provision finished up where in the Act. This may be especially confusing given that the provision inserted first is likely to finish up as the “second occurring”.

25 Rather, the identification should include a reference to the amending Act that inserted the provision you want to renumber, along the lines of the following examples:

14 Section 160APA (paragraph (a) of the definition of *frankable dividend*) (the paragraph (a) inserted by item 4 of Schedule 4 to the *Taxation Laws Amendment (Company Law Review) Act 1998*)

Reletter as paragraph (aa).

82 Clause 110 of Schedule 1A (the clause 110 inserted by item 43 of Schedule 3 to the *Social Security and Veterans' Affairs Legislation Amendment (Budget and Other Measures) Act 1998*)

Renumber as clause 110A.

26 If you are correcting a duplicated number problem, remember to check for cross-references to the duplicated number. Any cross-references that refer to the number that is being changed will also need to be corrected.

Spent legislation

27 You should repeal the legislation that is spent.

When amendments should commence

Corrections

28 In general, it will be reasonable to assume that the “slip rule” would have applied to the original error and that therefore our correction is merely correcting the text rather than the actual state of the law. For amendments to make corrections, the basic principle is that amendments should commence on Royal Assent to the SLR Act containing the correction.

29 If you think that the basic principle should not apply to a mistake you are correcting, and that the amendment to correct the mistake ought to commence retrospectively, you should raise this with FPC. Such a correction might not really be suitable for statute law revision treatment at all, and might instead need to be raised with the policy agency for further consideration.

Misdescribed amendments

30 In general, amendments to correct misdescribed amendments will need to commence immediately after the intended commencement of the misdescribed amendment, as in the following example:

Original provision

23 Notice to be given

The applicant must give notice to the Secretary and the Minister in the prescribed form.

Misdescribed amendment [Schedule 1 to the XYZ Amendment Act 2001]

10 Section 23

Omit “the Secretary or the Minister”, substitute “the Commission”.

SLR correction

XYZ Amendment Act 2001

xx Item 10 of Schedule 1

Omit “or”, substitute “and”.

Commencement provision

Immediately after the time specified in the *XYZ Amendment Act 2001* for the commencement of item 10 of Schedule 1 to that Act.

Spent legislation

31 In general, amendments to repeal legislation that is spent should commence on Royal Assent to the SLR Act containing the amendments.

Part 4—Explanatory notes

Basic principle

32 You should include an explanatory note after an amendment if it is not clear on the face of the amendment that it is an SLR amendment. This will assist FPC to decide whether to give policy approval for the amendment as an SLR amendment. It will also provide relevant information to Parliament when the Bill containing the amendment is being debated.

Examples of when explanatory notes are not required

33 You do not need to include an explanatory note after an amendment if it is clear on the face of the amendment that it is an SLR amendment. The following are some examples of such amendments.

Amendments to correct duplicated numbers

1 Clause 110 of Schedule 1A (the clause 110 inserted by item 43 of Schedule 3 to the *Social Security and Veterans' Affairs Legislation Amendment (Budget and Other Measures) Act 1998*)

Re-number as clause 110A.

Amendments to correct grammatical errors

1 Section 43-240 (step 2)

Omit “amounts amount”, substitute “amounts”.

1 Section 16-195 in Schedule 1 (note)

Omit “a administrative”, substitute “an administrative”.

Form of explanatory note

34 The explanatory note should be a note appearing immediately after the relevant amendment. The following are some examples of amendments that require explanatory notes and of the notes to be included.

Amendments to fix incorrect cross-references

1 Section 52-75 (table item 7)

Omit “Division 3”, substitute “Division 4”.

Note: This item fixes an incorrect cross-reference.

Amendments to correct misdescribed amendments

1 Item 8A of Schedule 2

Repeal the item.

Note: This item repeals an item that amends a provision that does not exist.

1 Item 2 of Schedule 4

Repeal the item.

Note: This item repeals an item that omits words that do not exist in the relevant provision.

1 Item 30 of Schedule 4

Repeal the item.

Note: This item repeals an item that contains an amendment that had already been made.

Amendments to correct duplicated definitions

1 Subsection 995-1(1) (definition of *taxable importation*) (the definition inserted by item 15 of Schedule 5 to the *A New tax System (Tax Administration) Act (No. 2) 2000*)

Repeal the definition.

Note: This item repeals one of 2 identical definitions.

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Amendments to repeal spent legislation

1 The whole of the Act

Repeal the Act.

Note: This item repeals spent legislation.

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