



Instructor Guidance Note— Application, saving and transitional provisions

Amending or repealing legislation

1 An amendment or repeal of legislation, or a provision of legislation, may create a need to deal with the changeover from the “old law” to the “new law”. This sort of issue is dealt with by *transitional provisions* (sometimes also called *application provisions* or *saving provisions*). A reference to transitional provisions is usually taken to include application provisions and saving provisions.

2 Transitional provisions are a way of achieving a smooth transition from the “old law” to the “new law”. Resolving transitional issues requires policy decisions to be made and this is part of the instructor’s role. There can be a range of legal, practical, political and administrative issues that need to be considered when determining how the transition should be managed.

Are transitional provisions necessary?

3 The first step is to consider whether transitional provisions are necessary. In principle, laws generally operate prospectively. Transitional provisions might not be necessary in either of the following cases:

- the amendments have a natural application only to future conduct—for example, the amendments create a new power for a Commission to make an order, and an offence of contravening the order. Conduct constituting the offence can *only* occur after commencement of the amendments;
- section 7 of the *Acts Interpretation Act 1901* might already deal with the matter and give the desired policy outcome—for example, legal proceedings have been started, but not concluded, against a person for committing an offence which is then repealed. The effect of section 7 is that the legal proceedings may continue, despite the repeal of the offence.

Application provisions

4 Application provisions clarify the persons, things or circumstances in relation to which new legislation will apply. For example, a taxation amendment is stated to apply in relation to the 2025-2026 income year and later income years. Or a migration amendment imposing a condition on a visa is stated to apply whether the visa is granted before or after the amendment commences.

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5 Application provisions are different to commencement provisions. Commencement provisions are about when the text of the law physically changes on the statute book. Commencement occurs at a particular *point in time*. Application provisions are about how, when and to whom the law applies. Application provisions are required because processes or events contemplated by legislation extend over a *period of time* (for example, the process of making an application for a licence, then making a decision to grant or refuse the licence, possibly followed by an application seeking review of that decision is a process that occurs over a period of time).

Saving provisions

6 Saving provisions save or preserve something that would otherwise lapse or cease to have effect when amending or repealing legislation commences. For example, if a power in an Act to make an instrument is repealed, it usually follows that an instrument made under that power is also repealed. This is the case even if the amending legislation re-enacts the power in substantially the same form.

7 Sometimes this represents the desired policy outcome, because the existing instruments are no longer required and will be re-made under the new power. However, if it is intended to continue the existing instruments in force, then a saving provision will be needed.

8 Three common examples of instruments that may need saving if the enabling provision in an Act is repealed and re-enacted are:

- legislative instruments (including regulations);
- instruments of appointment;
- delegations.

Other transitional provisions

9 As part of the smooth transition from the old law to the new law, it is necessary to consider how existing legal concepts under the old law will continue (if at all) and be treated under the new law. Transitional provisions can be used to adjust the old or new law to allow the desired operation. For example, the main options when moving from an existing permit regime to a new licence regime are the following:

- an existing permit ceases to be of any legal effect, so that a person must make a fresh application for a licence to conduct the regulated activity;
- an existing permit continues in force under the old law and may be dealt with as if the old law continued in force (with the result that, for a period after commencement, there will be 2 different regimes in force at the same time—the permit regime under the old law, and the licence regime under the new law);

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- an existing permit is treated as if it were a licence granted under the new law, and may be dealt with as if it had been granted under the new law (for example, suspended, made subject to conditions, revoked etc).

10 Transitional provisions could be used in the second option to address any issues arising. A transitional provision would be used to give effect to the third option.

Expectations for drafting instructions

11 Resolving the approach to transitional issues can be complex. OPC does not expect drafting instructions to identify the *type* of transitional provisions that will be required. However, it is expected that the drafting instructions identify the transitional *issues* raised by the instructions, and the desired policy outcomes for each of these issues.

Tips for developing drafting instructions

12 First, consider the transitional approach at a high level. What is the broad policy about moving to the new law? Considerations may include the following:

- Should the new law apply only to certain people or situations?
- Should the old law continue to apply to certain people or situations? Note that this could mean having 2 different legal schemes operating at the same time.
- Are special rules needed to transition certain people or situations from the old law to the new law? For example, do things done under the old law need to be “plugged in” to the new law? Is a licence or permit issued under the old law to be treated as if it were a licence or permit issued under the new law?
- What are the administrative consequences of the transition?
- Should there be a staged application of the new law?
- Is there a goal of not disadvantaging people under the new law who were covered under the old law?

13 Based on the policy considerations, formulate a broad description of the transitional policy. For example, “new events should be dealt with under the new law, old events should continue to be dealt with under the old law”. Include a summary of the broad policy for transition in the drafting instructions.

14 Once the high-level transitional approach has been determined, consider how that approach applies in the particular circumstances so as to develop specific drafting instructions. Look at each change being made to the legislation to assess whether

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potential transitional issues arise and, if so, consider how they should be addressed. Things to look for include:

- processes that have started but not finished (for example, applications made but not yet decided, meetings convened but not yet held, court proceedings instituted but not yet determined, claims made but not yet determined, steps in a procedure that have been taken etc.);
- conduct that occurs partly before and partly after the new law commences;
- time periods that have started before the commencement of the new law but will finish after that time;
- rights or entitlements that accrue before the commencement of the new law and that should be preserved;
- obligations or requirements that arose under the old law but which must be met or fulfilled after the commencement of the new law;
- whether there are gaps or unintended consequences (for example, an annual report has to be given twice in one year or a year will be missed altogether).

Transitional provisions in amending Bills

15 Much of the legislation drafted by OPC is amending legislation. The usual approach is to include any transitional provisions for amending Bills as freestanding provisions in the amending legislation (rather than as amendments of the principal legislation).

16 The freestanding transitional provisions might appear in the same Schedule as the amendments to which they relate, or they might appear in a separate transitional Schedule or even in a separate transitional Bill. The exact location of the transitional provisions will vary according to the length and complexity of the measures in question.

Transitional provisions in instruments

17 Transitional provisions for amending instruments are included in the body of the principal instrument being amended, usually in a separate Chapter or Part. This differs from the approach for Bills (where the transitional provisions are included in the amending Bill itself). The reason for the different approach with instruments is to allow section 48A of the *Legislation Act 2003* to automatically repeal amending instruments.

More information

- OPC drafters will often help to identify transitional issues during the drafting process and to suggest possible solutions.

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- Previous Bills or instruments amending the principal legislation in question are also a good source for identifying necessary transitional provisions.

The purpose of Instructor Guidance Notes is to assist agencies with general legislative drafting issues and preparing drafting instructions for Bills and instruments. The series is intended to be a starting point for instructors' own engagement with the matters covered. Instructor Guidance Notes are not statements of official policy and are not intended to be a comprehensive statement of the law. This Instructor Guidance Note should not be relied on as a substitute for legal advice.