

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.4 Changes using FPC's editorial powers and statute law revision amendments

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Part 1—Introduction

1 This Drafting Direction deals with the processes by which changes using FPC's editorial powers and amendments in the nature of statute law revision (*SLR*) are handled, and the way in which SLR amendments should be drafted.

Part 2 —Overview of FPC's editorial powers

Overview of FPC's editorial powers

2 Section 15V of the *Legislation Act 2003* gives FPC the power to make certain editorial changes in preparing a compilation of an Act, legislative instrument or notifiable instrument.

3 FPC may make editorial changes if he or she considers it desirable to:

- (a) bring the Act or instrument into line, or more closely into line, with legislative drafting practice being used by the Office of Parliamentary Counsel; or
- (b) correct an error, or ensure that a misdescribed amendment of the Act or instrument is given effect to as intended.

4 FPC may also make changes to the Act or instrument that affect the format, layout, printing style or other presentation if he or she considers the change to be desirable to bring the Act or instrument into line, or more closely into line, with legislative drafting practice being used by the Office of Parliamentary Counsel.

5 A change under either of these powers must not change the effect of the Act or instrument.

6 Section 15X of the *Legislation Act 2003* defines editorial change.

Kinds of changes that may be made using FPC's editorial powers

7 FPC's editorial powers are to be used sparingly.

8 The kinds of changes that will most commonly be made under the power in section 15V are:

- (a) changes in spelling (such as replacing “authorize” with “authorise”—see paragraph 15X(2)(a));
- (b) changes in punctuation that do not affect the meaning (such as replacing “income year.” with “income year;”—see paragraph 15X(2)(a));
- (c) correcting obvious grammatical errors (such as replacing “A a permanent” with “A permanent”—see paragraph 15X(2)(a));
- (d) adding a conjunction (so that each paragraph ends with the same conjunction) (see paragraph 15X(2)(a));

- (e) changing the short title of an Act (such as changing the *Air Accidents (Commonwealth Liability) Act 1963* to the *Air Accidents (Commonwealth Government Liability) Act 1963*—see subparagraph 15X(2)(b)(i) and paragraph 15X(2)(c));
- (f) changing a reference to a person, body or other entity (such as replacing “Public Service Commissioner” with “Australian Public Service Commissioner”—see subparagraph 15X(2)(b)(ii));
- (g) making minor changes to numbering (such as relettering paragraph (f) as paragraph (da)—see paragraph 15X(2)(d));
- (h) changing the order of definitions (see paragraph 15X(2)(e));
- (i) removing a definition that is not used (see paragraph 15X(2)(k));
- (j) removing a reference to a provision where the provision no longer exists (see paragraphs 15X(2)(k) and (p) and subsection 15X(4));
- (k) incorporating a misdescribed amendment (such as by omitting “the making of claims” from a compilation where the amending Act or instrument directed “making claims” be omitted—see paragraph 15X(2)(o));
- (l) correcting an error in a cross-reference where there is no doubt as to the cross-reference being referred to (see paragraphs 15X(2)(p) and (4)(c)).

9 Consequential amendments that are required to be made as a result of changes made by a Bill, such as when the name of an Act is changed, should continue to be done by a consequential Bill or instrument, rather than relying on FPC's editorial powers. Other changes that would generally be more appropriately done by a statute law revision or other Bill or instrument would be repealing redundant provisions (other than definitions) and Acts.

Part 3—Processes for notification of mistakes

Designated drafter

10 FPC will nominate an SES drafter to be the designated drafter in relation to minor editorial and other statute law revision errors. The designated drafter is the person who recommends to FPC whether a change should be made using FPC's editorial powers, by a statute law revision amendment or otherwise.

Identification of mistakes

Mistakes found in Bills

11 If a minor textual error is identified while a Bill is in Parliament, then the drafter should consider whether the error can be corrected using the process of Clerk's and Chair's amendments set out in Drafting Direction 4.7, or by parliamentary amendment. If it is determined that it would not be appropriate to fix the error using a Clerk's or Chair's amendment, then it will not be appropriate to fix the error using the FPC's editorial power.

Mistakes found by drafters

12 If you come across a mistake in a Commonwealth Act or instrument that you think should be corrected, please:

- (a) note it down or mark it on a copy of the relevant page(s); and
- (b) initial and date it; and
- (c) send it to General Manager Publishing (GMP).

13 It is useful to have the suggestions attributed, in case the problem is not clear to the person who is eventually asked to deal with the mistake. 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 publications and editorial staff

14 Mistakes in Acts or instruments are also notified to GMP by publications and editorial staff in accordance with paragraphs 12 and 13. Occasionally mistakes are notified to publications by other people, and these are also notified to GMP.

GMP recommendation on mistake

15 When GMP is notified of a mistake, GMP identifies whether the mistake needs to be fixed using FPC's editorial powers or by amendment.

16 If the mistake needs to be fixed in this way, GMP then recommends in writing to the designated drafter whether the mistake should be corrected:

- (a) using FPC's editorial power; or
- (b) by an amendment in a Statute Law Revision Bill or Statute Law Revision Regulation; or
- (c) by an amendment in another kind of Bill or instrument.

Designated drafter recommendation on mistake

17 After receiving GMP's recommendation, the designated drafter will recommend to FPC whether the change should be made:

- (a) using FPC's editorial power; or
- (b) by an amendment in a Statute Law Revision Bill or Statute Law Revision Regulation; or
- (c) by an amendment in another kind of Bill or instrument.

18 FPC will then decide which of those 3 approaches should be adopted. GMP should be notified of the decision. The coordinator of the next Statute Law Revision Bill or Statute Law Revision Regulation should also be notified of a change that will be made by the Bill or

Regulation. For a change required to be made by a Bill or instrument that is not a Statute Law Revision Bill or Statute Law Revision Regulation, see paragraph 26.

19 Records should be kept of the recommendations in paragraphs 16 and 17 and the decision in paragraph 18.

Part 4—Process for making changes using FPC's editorial powers

20 Once it has been decided that it is appropriate to make a change using FPC's editorial powers, the change can be made in preparing the next compilation of the Act or instrument. The compilation may be prepared as a result of a required compilation event, a discretionary compilation event or under subsection 15T(6) of the *Legislation Act 2003*.

21 When an editorial change has been incorporated into a compilation of an Act or instrument, a new endnote will be included in the compilation in which the editorial changes are made. The endnote will record that editorial changes have been made to the Act or instrument in the compilation and give a brief outline of the changes in general terms. This is required for the purposes of paragraph 15P(1)(b) of the *Legislation Act 2003* and is intended to provide a clear explanation of the editorial change in one place.

22 In addition, once an editorial change has been incorporated into a compilation of an Act or instrument, the amendment history for the Act or instrument in the endnotes (which is a section by section history of all amendment to all sections in the Act or instrument) will record the compilation number in which the editorial change. As the amendment history remains in the compilation permanently, readers using later compilations will be alerted to, and able to find, the information about the editorial change.

23 The Department or agency that is responsible, or primarily responsible, for administering the Act or instrument is to be advised of the editorial change. This is to be done by email to the relevant Legislation Liaison Officer.

24 In addition, FPC will report each year on the use of the FPC's editorial powers in the annual report for the Office of Parliamentary Counsel.

Part 5—Process of making statute law revision amendments in statute law revision and other Bills and instruments

Statute Law Revision Bill or Statute Law Revision Regulation

25 FPC gives all mistake notifications that require further action to his or her special assistant. It is likely there will be a regular Statute Law Revision Bill, and Statute Law Revision Regulation, 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 and explanatory statement for the Regulation. FPC will provide policy authority for a Statute Law Revision Bill. The Attorney-General is responsible for approving the text of the Statute Law Revision Bill or Statute Law Revision Regulation.

Allocation of SLR notifications

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

Revision Bill or Statute Law Revision Regulation. The notification may or may not be accompanied by a draft amendment and explanatory statement.

Mistake notification with draft amendment attached

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

- (a) check that the mistake still needs fixing (ie that it hasn't already been fixed, or overtaken by repeal of the provision, etc); and
- (b) draw the amendment to your instructors' attention (see paragraphs 32 and 33) (but on the basis that they don't have to obtain policy approval if the amendment is to be included in a Bill); and
- (c) if an explanatory statement accompanied the draft amendment, give a copy of the explanatory statement to your instructors and suggest that your instructors include this statement in the explanatory memorandum or the explanatory statement.

Mistake notification without draft amendment attached

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

- (a) check that there really was a mistake; and
- (b) check that it still needs fixing (ie that it hasn't already been fixed, or overtaken by repeal of the provision, etc); and
- (c) draft the amendment; and
- (d) if the amendment is to be included in a Bill, submit it to FPC for policy approval (see paragraphs 29 to 31); and
- (e) draw the amendment to your instructors' attention (see paragraphs 32 and 33) (but on the basis that they don't have to obtain policy approval if the amendment is to be included in a Bill).

“Policy” authority for SLR amendments in Bills

29 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 Chair's amendments). FPC is also able to authorise the repeal of legislation that is clearly spent.

30 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).

31 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

32 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.

33 Where a technical amendment initiated within OPC is proposed to be included in a Bill or instrument 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 or instrument 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 or explanatory statement.

Part 6—Form of statute law revision amendments

34 This Part deals with the form of statute law revision amendments that are not being fixed by FPC's editorial powers.

What to amend

Errors in Principal Acts or instruments

35 In general, an error in a Principal Act or instrument should be corrected by an amendment of the Principal Act or instrument. This applies whether the error occurred in the original form of the Principal Act or instrument 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 or instrument.

Misdescribed amendments

36 Misdescribed amendments cover such things as incorrect descriptions of words to be omitted or replaced and references to non-existent provisions in the locating words.

37 In general, a misdescribed amendment that occurs in an amending Act should be corrected by an amendment of the amending Act.

38 However, it may not be possible for a misdescribed amendment that occurs in an amending instrument to be corrected as the amending instrument may have been repealed under Part 5A of the *Legislation Act 2003*. Instead, a completely new amendment may be required.

39 It is possible to imagine other cases in which correcting a misdescribed amendment by amending the incorrect amending Act or instrument 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

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

41 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 or instrument. This may be especially confusing given that the provision inserted first is likely to finish up as the “second occurring”.

42 Rather, the identification should include a reference to the amending Act or instrument 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.

43 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

44 You should repeal legislation that is spent.

When amendments should commence

Corrections

45 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.

46 The basic principle for SLR amendments (including for SLR amendments in Statute Law Revision Bills or Statute Law Revision Regulations) is that the amendments should commence 28 days after Royal Assent to the Statute Law Revision Act, or 28 days after

registration of the Statute Law Revision Regulation, containing the correction. This is to allow the publications staff to prepare compilations.

47 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. If you are considering a retrospective commencement of an instrument, you should also consider section 12 of the *Legislation Act 2003*. If a retrospective commencement is included, the reason why the retrospective commencement is appropriate should be included in the Explanatory Memorandum or Explanatory Statement.

Misdescribed amendments

48 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

49 In general, amendments to repeal legislation (including amendments done in bulk repeal Bills or Regulations) should commence 28 days after Royal Assent to the Acts, or 28 days after registration of the Regulations, containing the amendments. This is to allow the publications staff to deal with the repeals.

Part 7—Explanatory notes for statute law revision amendments

Basic principle

50 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.

Examples of when explanatory notes are not required

51 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*)

Renumber 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

52 If you are including an explanatory note, the note should appear immediately after the relevant amendment. The notes can be inserted using the macro which is found under “OPC Macro”, “Standard Provisions”, “Insert SLR Notes”.

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