

PARLIAMENTARY COUNSEL

Drafting Direction No. 4.4 Minor, technical and editorial changes (including changes using FPC’s editorial powers)

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Part 1—Identification of mistakes

Mistakes found in Bills

1 Anyone in OPC who identifies a minor or technical error in a Bill that is before the Parliament should notify the drafter of the Bill.

2 The drafter should consider whether the error can be corrected:

- (a) using the process of Deputy Speaker's and Chair's amendments set out in Drafting Direction No. 4.7; or
- (b) by parliamentary amendment.

3 If the error cannot be corrected in the ways mentioned in paragraph 2, the drafter should notify the General Manager Publishing (GMP):

- (a) of the error; and
- (b) if the Senate or the House of Representatives have been asked, but have declined, to make the changes as Deputy Speaker's or Chair's amendments—that the error should not be corrected using FPC's editorial powers (see paragraph 14(b)).

Mistakes found in Acts or instruments

4 Anyone in OPC who identifies a minor or technical error in an Act or instrument that should be corrected should notify the GMP of the error.

5 Drafters are not required to draft amendments to deal with errors they notify.

Part 2—Changes using FPC's editorial powers

Overview of FPC's editorial powers

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

7 FPC may make editorial changes if FPC 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.

8 FPC may also make changes to the Act or instrument that affect the format, layout, printing style or other presentation if FPC 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.

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

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

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

11 For advice about whether a change should be made using FPC's editorial powers, talk to FPC or the GMP.

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

12 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)).

Kinds of changes that should not be made using FPC's editorial powers

13 Consequential amendments that are required to be made as a result of changes made by a Bill or instrument, 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.

14 FPC's editorial powers will not be used to make changes:

- (a) if, were the changes to be made using an Act or a legislative or other instrument instead of using FPC's editorial powers, the changes would require consultation under an intergovernmental agreement (see Drafting Direction No. 4.3); or
- (b) if the Senate or the House of Representatives have been asked, but have declined, to make the changes as Deputy Speaker's or Chair's amendments (see Drafting Direction No. 4.7).

15 Paragraph 14(a) does not apply to incorporating misdescribed amendments. This is because a misdescribed amendment will have been consulted on with States and Territories during the drafting of the Bill or instrument containing the misdescribed amendment.

16 Repealing redundant Acts or instruments, or redundant provisions (other than definitions), would generally be more appropriately done by a statute update or other Bill or instrument.

Process for making changes using FPC's editorial powers

17 Once it has been decided that it is appropriate to make a change to an Act or instrument 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*.

18 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 change is made. The endnote will record that an editorial change has been made to the Act or instrument in the compilation and give a brief outline of the change 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.

19 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 was incorporated. 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.

20 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 3—Changes using Bills and instruments

Introduction

21 This Part deals with editorial changes, or other corrections of a technical nature, that for some good reason are being fixed using a Bill or instrument (including a statute update Bill or instruments update Regulations) and not using FPC's editorial powers.

Note: Statute law revision Bills were previously used for making these types of fixes to Acts.

Statute update Bills and instruments update Regulations

22 It is likely there will be a regular statute update Bill and instruments update Regulations.

23 For each statute update Bill or instruments update Regulations:

- (a) A drafter (such as FPC's special assistant) will coordinate the Bill or Regulations; and
- (b) OPC will provide the Attorney-General's Department with a proposed explanatory memorandum for the Bill or explanatory statement for the Regulations; and
- (c) for a statute update Bill—the Attorney-General will be asked to provide policy authority for the Bill; and
- (d) the Attorney-General is responsible for approving the text of the Bill or Regulations.

“Policy” authority

24 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 what were then known as statute law revision Bills, 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 Deputy Speaker's or Chair's amendments). FPC is also able to authorise the repeal of legislation that is clearly spent.

Note: Legislation is not clearly spent merely because it is considered redundant.

25 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.

26 A drafter should not treat FPC as having granted authority to correct a mistake merely because FPC has notified the drafter of the mistake. Instead, this authority should be requested expressly. Requests relating to amendments to repeal spent legislation should be accompanied by an explanation as to why the legislation is spent.

27 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.

Note: See also Drafting Direction No. 4.6 dealing with the Legislation Approval Process.

Rights of administering agency in relation to including amendments in portfolio legislation

28 Of course, FPC’s power to give policy authority for technical amendments does not override the relevant administering agency’s right to decide whether it wants the amendments included in its legislation at all.

29 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 the administering agency (and, if necessary, explained to them) well before the Bill or instrument is finalised. This ensures that the agency’s expertise is also brought to bear on the amendment (administering agencies may, for instance, know that the mistake will be overtaken by a Bill currently in the Parliament).

30 In the case of technical amendments proposed to be included in a piece of legislation that is already being drafted for some other purpose, it is enough to discuss the technical amendments with the instructors of that legislation. A benefit of this is that the instructors will be aware of the need to refer to the amendment in the explanatory memorandum or explanatory statement.

Form of amendments: what to amend

Errors in principal Acts or principal instruments

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

Misdescribed amendments

32 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. For example:

Original provision [XYZ Act 2018]

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 2019]

10 Section 23

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

33 Misdescribed amendments can be incorporated using FPC's editorial powers (see paragraph 15X(2)(o) of the *Legislation Act 2003*).

34 However, if a misdescribed amendment is not being incorporated using FPC's editorial powers, the misdescribed amendment should not be corrected by amending the Act or instrument that contained the misdescribed amendment. Instead, it should be corrected by the drafting of a completely new amendment.

35 As a result of the rule in paragraph 34, misdescribed amendments must not be corrected in a statute update Bill or instruments update Regulations. This is because it would not be appropriate for OPC to prepare:

- (a) an explanatory memorandum / explanatory statement and statement of compatibility under the *Human Rights (Parliamentary Scrutiny) Act 2011* that deal with the new amendment; or
- (b) a Regulation Impact Statement for the new amendment.

Spent legislation

36 Legislation that is spent should be repealed.

Form of amendments: commencement

Errors in principal Acts or principal instruments

37 The basic principle is that the amendments should commence 28 days after Royal Assent to the Bill containing the correction, or 28 days after registration of the legislative instrument containing the correction.

38 This is because:

- (a) in general, it will be reasonable to assume that the “slip rule” would have applied to the original error and that therefore the correction is merely correcting the text rather than the actual state of the law, so the commencement of the correction is not legally critical; and
- (b) 28 days allows publications staff time to prepare compilations.

Misdescribed amendments

39 In general, new amendments replacing misdescribed amendments in accordance with paragraph 34 should commence on the later of:

- (a) the intended commencement of the misdescribed amendments; and
- (b) the day after the Act containing the new amendments receives the Royal Assent, or the day after registration of the instrument containing the new amendments, whichever is applicable.

40 If for some reason the rule in paragraph 34 is not being applied and the misdescribed amendments are being corrected by amending the Act or instrument that contained the

misdescribed amendments, it is likely that the correcting amendments will need to commence immediately before the intended commencement of the misdescribed amendments, in accordance with the following example. Paragraphs 42 to 44 will apply to such a commencement if it could be retrospective.

Correction

XYZ Amendment Act 2019

xx Item 10 of Schedule 1

Omit “or”, substitute “and”.

Commencement provision

Immediately before the time specified in the *XYZ Amendment Act 2019* for the commencement of item 10 of Schedule 1 to that Act.

Spent legislation

41 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 repeals. This is to allow publications staff time to deal with the repeals.

Retrospective commencements

42 Before a drafter uses a retrospective commencement for a technical correction under this Part, the drafter must discuss the commencement with FPC. A retrospective correction might not really be suitable to be made in accordance with this Drafting Direction and might instead need to be raised with the policy agency for further consideration.

43 A drafter who is considering a retrospective commencement of an instrument should also have regard to section 12 of the *Legislation Act 2003*.

44 If a retrospective commencement of a Bill or instrument is used, the reason why the retrospective commencement is appropriate should be included in the explanatory memorandum or explanatory statement.

Duplicated numbers

45 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 is being referred to. The Amending Forms Manual contains rules for the form of an amendment correcting a duplicated number problem.

46 When 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.

47 These corrections should commence in accordance with paragraph 37.

EM and ES text

48 The special assistant to FPC keeps standardised options for EM and ES text which are used for statute update Bills and instruments update Regulations and are available if needed for other projects.

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Note: Before the issue of the current series of Drafting Directions, this Drafting Direction was known as Drafting Direction No. 13 of 2005.