

Chapter 16

Amending Legislation

The following principles regarding amendment are stated as they would apply to Acts of Parliament, but the same principles apply to amending subsidiary legislation.

16.1 How may statutes be amended?

In one of two ways:

- expressly, by an amending Act or, where so allowed by the legislation being amended, by subsidiary legislation
- impliedly, because of inconsistencies in different statutes that cannot stand together; but note that courts will attempt to interpret statutes, or provisions in them, so that both can remain in being, by, for example:
 - distinguishing their application; or
 - applying the maxim that general provisions do not repeal specific ones,
 and **do not** readily construe an implied amendment or repeal.

However, a drafter should never rely on implied amendment.

16.2 Direct (or textual) and indirect methods of amending

Under the ‘**direct**’ or ‘**textual amendment**’ system, the legislation to be amended (usually referred to as ‘the principal Act/Regulations/Rules’ etc.) is affected directly, so that its text is altered by instructions in the amending legislation:

- for the required treatment of certain of its provisions, with or without replacement text;
- for the insertion of new provisions into the existing text.

Note in the following example the conventional use of inverted commas both to designate a definition term and to indicate text to be considered, added, amended or deleted:

Section 5 of the Children’s Homes Act 1999, in this Act called “the principal Act”, is amended:

- (a) in subsection (1), by deleting "within 30 days" and inserting "within a reasonable time having regard to the particular circumstances of the case";
- (b) by deleting subsection (2) and inserting:
"(2)...";
- (c) in subsection (3), by adding immediately after "the Minister" where it first appears, "or the Director-General";
- (d) by substituting for the definition of "working day" in subsection (5):
""working day" means a day other than a Saturday, a Sunday or a public holiday, except in relation to a person required by terms of his or her employment to work on one or more of those days."

Note in paragraph (d) of this latter example the necessity for double inverted commas. This is avoided in some jurisdictions by using single ones for the first set:

- (d) by substituting for the definition of "working day" in subsection (5):
"working day" means a day other than a Saturday, a Sunday or a public holiday, except in relation to a person required by terms of his or her employment to work on one or more of those days.'

Under the 'indirect' system (more used in the past in the United Kingdom than elsewhere in the Commonwealth), new provisions are enacted or made which do not directly replace previous legislation but are intended to be read in tandem with it.

A reference in section 36 of this Act, or in section 25 the Housing Act 1997, to a grant for repairs or improvements includes a reference to a loan for the same purposes.

Although the direct system is the one in general use in Commonwealth jurisdictions, there are nevertheless still uses for indirect amending techniques, especially where general amendments are to be made to a large number of statutes (e.g. by altering designations or titles, or references to metric systems of weights or measures):

A reference in a written law to the Director of Public Prosecutions is to be construed as if it were a reference to the Chief Public Prosecutor.

A reference in a written law to a linear measurement in inches, feet, yards, miles, or other non-metric measurement, is, unless otherwise indicated, to be construed as a reference to the equivalent measurement in millimetres, centimetres, metres or kilometres according to the conversion tables set out in the Schedule.

In practice the second of these would be no more than a temporary measure, as many measurements would probably need to be replaced with metric measurements in round figures.

Most of the advantages of the alternative amending systems lie with the direct one (the law can then remain in one piece of legislation and consolidation becomes a running exercise) but the indirect system does tend to make the amending legislation easier to understand on its own.

16.3 Substantive and consequential amendments

Substantive amendments make the changes necessary to implement proposed changes in policy.

Consequential amendments make necessary changes (including grammatical changes) to the same and other provisions of the legislation being amended, or to other legislation, consequent on the substantive amendments. If sufficiently numerous, these can be gathered together and placed in a Schedule.

As an example, the following section needs to be amended:

5. A person who, with the intention of causing or enabling another person's animal to trespass, interferes with the animal, or with an enclosure by which it is confined, commits an offence.

The amendment required is to delete the reference to intention and create a strict liability offence. A **substantive** amendment would thus be needed to delete the expression 'with the intention of causing or enabling' and replace it with 'causes or enables'. But if that alone is done the resulting sentence will not make sense:

5. A person who, causes or enables another person's animal to trespass, interferes with the animal, or with an enclosure by which it is confined, commits an offence.

Consequential amendments are therefore needed to restructure the sentence to delete the comma after "who" and clarify the fact that there remains a link between the interference and the trespass:

5. A person who interferes with another person's animal, or with an enclosure by which it is confined, and by that action causes or enables the animal to trespass, commits an offence.

Although applying principles of the order in which elements of a legislative sentence are presented (see Chapter 4), it might be better style to restructure the new provision to give prominence to the legal action:

5. A person commits an offence if he or she interferes with:
 (a) another person's animal, or
 (b) an enclosure by which it is confined,
 and by that action causes or enables the animal to trespass.

16.4 Amendment, or repeal and replacement?

A decision sometimes has to be made, where there is a significant number of proposed amendments to legislation, as to whether it would be better to repeal the existing legislation and replace it. The latter course enables a fresh start to be made in an up-to-date drafting style, but it needs to be remembered that it can lead to the putting in issue in Parliament of provisions in legislation which are not being changed.

Where legislation is in constant use (e.g. Penal Code, Criminal Procedure Act, Income Tax Act, Companies Act) users would be likely to oppose the restructuring which replacement would almost certainly involve, as this course of action would necessitate a relearning process to identify exactly where constantly used provisions are to be found.

16.5 Retrospectivity of amendments

Generally amendments may, as with legislative provisions generally, be made to operate retrospectively, but subject to constitutional safeguards regarding, for example, offences and penalties, and vested rights. The use and extent of retrospective provisions is considered in Chapter 17.

16.6 Drafting textual amendments

The following general rules apply to direct textual amending:

- Use express provisions: amendments must not be left to implication
- Use a standard expression when referring to the statute being amended; this is usually ‘the principal Act’, but there are other possibilities, especially where the Act concerned has an essentially one-word short title (Companies Act; Insurance Act)
- Identify provisions being amended as simply as possible, by reference, for example, to ‘**section 36(1)(b)**’ (this is to be preferred to a reference to ‘**paragraph 36(1)(b)**’ for the same provision, a usage found in some Commonwealth jurisdictions) rather than ‘paragraph (b) of subsection (1) of section 36’
- Place the reference to the section being amended at the beginning of the amending provision or as near as possible to it

Section 30(1) of the principal Act is (note, not “shall be”) amended by...
rather than:

The principal Act is further amended in section 30(1) by...

- Use precise and concise directions for amendment; do not use unnecessary or archaic words:

Section 16(2) of the principal Act shall be hereby amended by the addition thereto immediately after the words “calendar year” of the following comma and words, “if the Director so certifies”.

rather state:

Section 16(2) of the principal Act is amended by adding, “if the Director so certifies” after “calendar year”.

- Maintain consistency of language for directions; typically these are given either by addressing the user in effect in the second person: ‘add’, ‘insert’, ‘substitute’, ‘delete’, etc.:

In section 3(1) of the principal Act, delete “or other persons affected”.

or, more usually, by using the slightly longer passive form:

Section 3(1) of the principal Act is amended by deleting “or other persons affected”.

- It is unnecessary to give over-elaborate directions for amending; for example, where it is desired to add a new paragraph to a sequence, state simply:

Section 5(2) of the principal Act is amended by adding:
“(d) where the taxpayer is not ordinarily resident.”.

It is unnecessary and confusing to state what has literally to take place to effect the amendment:

Section 5(2) of the principal Act is amended by:
(a) deleting the word “or” at the end of paragraph (b);
(b) deleting the full stop after paragraph (c) and inserting a semi colon and the word “or”; and
(c) inserting a new paragraph as follows:
“(d) where the taxpayer is not ordinarily resident.”.

and the instructions in (a) and (b) in this example may reasonably be left to be implied

- Although what follows is sometimes regarded as unduly pedantic, strictly speaking one cannot delete a provision and then substitute something for it (as after the deletion there is nothing to be substituted), so to be precise draft either:

Delete paragraph (f) and insert
“(f)...

or

Substitute for paragraph (f)
“(f)...

rather than

Delete paragraph (f) and substitute...

- As a general rule, one section in amending legislation should not amend more than one section in the principal Act, although an exception to this might be where more than one section itself is to be deleted (and where this happens the house style sometimes requires divisions consisting of a section or more to be ‘repealed’):

Sections 4, 5 and 8 of the principal Act are repealed.

- Bear in mind the desirability of the use of parenthesis to describe the effect of a provision being amended:

Section 46 of the principal Act (*service of documents*) is amended...

- Remember that the **long title** may need to be amended to stay in line with, and hence adequately reflect, new amendments.

16.7 Renumbering

It is not good practice to renumber provisions after others have been deleted or new ones have been inserted, as this causes confusion, especially in cross references outside the legislation being amended.

The problem is that where a statute is often amended (e.g. an Income Tax Act) over a long period of time, the designation of sections can become very complicated:

106	Deductions by Treasury
106A	Deductions by employer from wages
106B	Certificates of deduction
106BAA	Failure to make deductions
106BA	Rates of deduction
106BB	Employer to furnish statement
106C	Group employers

In such cases a repeal and re-enactment process could be instituted.

16.8 Punctuation

Note the two levels of punctuation: firstly in the provisions introducing amendments, and secondly within the new provisions themselves:

In section 26(1) of the principal Act, paragraph (b) is deleted and replaced by: "(b) the Commissioner, or a person designated by the Commissioner;"

16.9 Indentation and spacing

Presentation, following the conventional layout for legislation, is very important as an aid to comprehension, especially as amending legislation tends to be difficult to read and understand by itself. This is all the more so where a number of insertions of different kinds (e.g. new sections, subsections or paragraphs) have to be made into the enactment being amended.

16.10 Style

When amending statutes that have been in existence a long time, the style of the original needs to be maintained. This will probably mean that some principles of good modern drafting have to be discarded in the interests of consistency.