

LEGISLATION BILL 2021

EXPLANATORY MEMORANDUM

Overview of the Bill

This Bill proposes to modernise the processes for publishing WA legislation. It will enact a new *Legislation Act* that sets out the responsibilities for publishing WA legislation, provides for the official status of both hard copy and electronic versions of WA legislation and gives Parliamentary Counsel's Office (PCO) a more useful set of editorial powers so that WA legislation can be kept up-to-date, modernised and simplified, and errors in it can be corrected, without the need for the changes to be enacted by Parliament. Important restrictions on the exercise of those editorial powers will remain. The *Reprints Act 1984* will be repealed. In line with conferring official status on electronic versions of WA legislation, the electronic version of the *Gazette* will also be given official status.

This Bill, with one minor substantive change to clause 33 and some other minor drafting changes, is the same as the *Legislation Bill 2018* (the **2018 Bill**) that was passed by the Legislative Assembly without amendment, and introduced into the Legislative Council, in 2018. The 2018 Bill lapsed on the prorogation of the Legislative Council on 7 December 2020.

Part 1 – Preliminary

Clause 1 Short title

Clause 1 provides that the Bill, once enacted, will be called the *Legislation Act 2021*.

The naming of the Act is consistent with the naming of similar legislation in many other Australian jurisdictions and New Zealand.

Clause 2 Commencement

Clause 2 provides for the commencement of the Act.

Part 1 comes into operation on the day of Royal Assent.

The rest of the Act will come into operation on a day fixed by proclamation. The 2018 Bill provided for different days to be fixed for different provisions, but this is no longer considered necessary.

Provision for commencement by proclamation is to enable administrative arrangements to be put in place between PCO and other government agencies to enable subsidiary legislation to be published on the WA legislation website instead of in the *Gazette*. Regulations are also required for a number of purposes. These include:

- (a) specifying the particular subsidiary legislation that will be published on the WA legislation website (see clause 10(1)(c) and (d));
- (b) prescribing the recognised formats for official electronic versions of legislation (see clause 15);
- (c) prescribing the ways in which the official status of electronic and hard versions of legislation will be indicated (see clauses 15 and 16).

Clause 3 Object of this Act

Clause 3 states that the object of the Act is for Western Australian legislation to be easy to find, use and understand. That object is to be achieved by:

- (a) providing for Western Australian legislation to be publicly available; and
- (b) giving official status to Western Australian legislation in both hard copy and electronic form; and
- (c) conferring power on the Parliamentary Counsel to make certain editorial changes so that Western Australian legislation can be kept up-to-date, modernised and simplified, and errors corrected, without the need for Parliament to enact the changes.

The provision for public availability of WA legislation arises from the responsibility of government to provide public access to accurate, up-to-date and reliable versions of legislation in a timely and efficient manner. This responsibility stems from the principles that everybody is presumed to know the law, and that ignorance of the law is no excuse. Neither of these principles can operate fairly and effectively if the law is not made publicly accessible.

Only hard copy versions of WA legislation currently have official status. Giving official status to both hard copy and electronic versions of WA legislation recognises the public expectation that government information will be easily accessible in electronic form, and falling demand for legislation in hard copy form.

The proposed enhancements to editorial powers will support PCO's commitment to clear drafting: that is, legislation that is drafted as clearly and simply as possible. Clear drafting is an aspect of the accessibility of the law. Those to whom the law applies and who are expected to comply with it are entitled to have access to it not only in a physical sense, but also in the sense of being able to read and understand it so that they know what their rights and obligations are.

There is also an economic aspect to clear drafting. The time and resources that have to be devoted to reading and understanding draft or enacted legislation can be expected to vary according to the clarity of the legislation. Legislation that is unnecessarily hard to understand will as a consequence require the diversion of valuable time and resources on the part of those involved in the legislative process (such as Ministers and members of Parliament) and those who have to apply and interpret the legislation as passed or made (such as administering agencies, lawyers and the courts).

The proposed enhancements to editorial powers will also support the desirability of consistency in the style, structure and format of the statute book. Because the content of the WA statute book spans nearly 200 years of legislative activity, it has a variety of styles, structures and formats. This reflects the adoption of different approaches to legislative drafting over that time scale.

Consistency in the style, structure and format of legislation is very important, for 2 reasons. First, and most importantly, this consistency helps to promote a coherent and accessible statute book. Consistency in structure and format assists regular users of legislation to access individual items of legislation more efficiently because the location of particular legislative components, and the layout and appearance of the text, will be predictable and familiar.

Second, consistency in the structure and format of legislation enables PCO to utilise computer technologies to assist in the drafting process, and to ensure that WA legislation is made publicly

available in a timely way in both printed and electronic formats. Standard structure and format are essential if computer technologies are to be used efficiently.

Through editorial powers, PCO can update some older approaches appearing in legislation so that the style, structure and format of the statute book is more consistent. Current editorial powers cannot be exercised to alter or otherwise affect the substance or operation of any written law. The Bill continues this restriction.

Clause 4 Terms used

Clause 4 sets out terms that are defined for the purposes of the Bill.

Of particular importance is the definition of **law**. The Bill provides for the publication of the laws of WA as originally enacted or made, and updated versions of laws incorporating their amendments.

The *Reprints Act 1984* applies to “written laws”, as defined in the *Interpretation Act 1984* section 5. This means all Acts and subsidiary legislation for the time being in force. Acts are defined as Acts and Ordinances passed by the Parliament of Western Australia, or any Council previously having authority or power to pass laws in Western Australia. “Written law” also includes rules made under the Royal Prerogative.

The definition of **law** in the Bill is wider in scope. It includes written laws, but also includes Imperial enactments (as defined in clause 4) that are part of the law of WA. Proclamations that bring 1 or more provisions of Acts into operation are also included. Proclamations of this nature would not otherwise be included because they are not subsidiary legislation having legislative effect. They are important documents in the lifecycle of Acts. Instruments made under the Royal Prerogative that apply in WA and have legislative effect are also included.

Clause 5 Act binds Crown

Clause 5 provides that the Bill binds the Crown.

Clause 6 Application of this Act

Clause 6 makes it clear that the Bill applies to all laws (as defined in clause 4), whenever they were passed or made. The publication requirements and editorial powers in the Bill will therefore apply to laws existing before the enactment of the Bill. For example, the requirement in clause 10(1)(a) that all Acts as originally passed must be published on the WA legislation website will apply to all Acts enacted in WA, as far back as 1832.

Clause 7 Relationship with other Acts

Clause 7 makes it clear that the Bill is not intended to be a comprehensive statement of the law relating to the publication or effect of Western Australian legislation. It is in addition to, and does not limit the operation of, other Acts relating to these matters. Such Acts include the *Interpretation Act 1984*, *Evidence Act 1906* and *Local Government Act 1995*.

Part 2 – Publication of legislation

Division 1 – Publication responsibilities

The order of clauses 8 and 9 in the 2018 Bill has been reversed. The new order is considered to be more logical.

Clause 8 WA legislation website

Clause 8 requires the Parliamentary Counsel to maintain a website for the publication of the laws of Western Australia. The uniform resource locator (URL) of the website is to be www.legislation.wa.gov.au. This URL is already in use, and follows the standard format for legislation websites in Australasia and other comparable jurisdictions overseas. If this URL cannot be used for technical or other reasons, an alternative URL may be prescribed by regulation.

Clause 9 Purpose of WA legislation website

Clause 9 sets out the purpose of the WA legislation website. It is to provide for free public access to accurate, up-to-date and reliable official versions of laws. It is intended to be a central, complete, authoritative and accessible permanent repository of laws as originally passed or made, and updated versions of laws with their amendments incorporated.

Clause 10 What is published on WA legislation website

Clause 10 requires certain material to be published on the WA legislation website, and also authorises other material to be published there.

Subclause (1) requires the publication of Acts as originally passed and up-to-date versions of Acts in operation with their amendments incorporated.

Subclause (1) also requires the publication of prescribed subsidiary legislation as originally made and with its amendments incorporated, and any other prescribed laws. Provision for prescribing the subsidiary legislation to be published on the website is because PCO proposes to take a staged approach to changing the way in which WA subsidiary legislation is published.

A large proportion of the subsidiary legislation that is currently published in the *Gazette* consists of material drafted by PCO. This includes regulations, rules for WA courts and tribunals, various orders, by-laws and most proclamations. Because this material is in a standard style and format, it can easily be published on the WA legislation website.

However, a significant amount of subsidiary legislation (such as local laws) and other material that is currently required to be published in the *Gazette* is not drafted by PCO. It is not in a standard style and format, and publication on the WA legislation website would not necessarily be straightforward. Further, there may be alternatives to publication in the *Gazette*, other than publication on the WA legislation website, that would better suit the nature of the material or provide a better way of making it available to users (such as publication on a departmental website).

It is intended that the material that PCO drafts will be moved from the *Gazette* to the WA legislation website as a first step. PCO will also undertake consultation with other agencies responsible for the

subsidiary legislation that PCO does not draft, such as local laws. This consultation will be designed to determine whether this material should continue to be published in the *Gazette*, moved to the WA legislation website or published in some other way.

An example of laws that might be prescribed is a collection of the Imperial enactments that are part of the law of WA. PCO does not currently have a comprehensive collection of this material.

Subclause (2) authorises the Parliamentary Counsel to publish on the WA legislation website material that is not a law. The material may be prescribed by regulations, or other material that the Parliamentary Counsel considers appropriate for publication on the website.

Subclause (3) relates to material published on the WA legislation website that are not laws. The Bill is to apply to this material as if references to a law were references to this material. This means that the editorial powers set out in Part 3 could be exercised in relation to the material, and official versions of it could be made available.

Clause 11 Versions showing effect of uncommenced amendment or modification or law as modified

Clause 11 permits the publication on the WA legislation website of various versions of a law that are not simply the law as originally enacted or made with its amendments incorporated.

A version could show the effect of amendments or modifications that have not come into operation. This would make it easier for people to see how the law will apply when those amendments or modifications come into operation.

A version could show a law as it is modified by the law or another law. Many laws provide that another law is to be read as if it were modified in specified ways. An example is the *Limited Partnerships Act 2016*, which provides that references in the *Partnership Act 1895* to certain things are to be read as if they were references to other things. See the *Limited Partnerships Act 2016* section 9. Clause 11 would permit the publication of a version of the *Partnership Act 1895* showing how it is modified by the *Limited Partnerships Act 2016*.

Versions of laws produced under clause 11 must indicate that fact, and also indicate whether or not the amendments or modifications shown in them are in operation.

Clause 12 When law published on WA legislation website

Clause 12 identifies when a law is published on the WA legislation website and how that is notified.

Currently, for subsidiary legislation, the day of publication in the *Gazette* very often determines when the subsidiary legislation, or particular provisions of it, come into operation. Current drafting practice is generally for the preliminary provisions of subsidiary legislation to come into operation on the day of publication in the *Gazette*, and for substantive provisions to come into operation on the day after that day, or a certain number of days after that day. It is therefore important to know when the subsidiary legislation is published in the *Gazette*. The day of publication is stated in each edition of the *Gazette*.

When subsidiary legislation is able to be published on the WA legislation website instead of in the *Gazette*, current drafting practice will need to change so that commencement provisions refer to the day of publication on the website instead of the day of publication in the *Gazette*. It will therefore be important to know when that publication takes place.

While an edition of the *Gazette* is a static document where the date of publication can be precisely identified, a website is organic and changes continuously as material is added or changed. A way of identifying when material is first published on a website is therefore required.

Clause 12(1) provides that a law is published on the WA legislation website if it is made accessible in full on the website, or if notice of its enactment, making or publication is made accessible on the website and it is made accessible separately in full on the website or in any other identified location. There might be circumstances when it is technically difficult to publish a law in full on the website, and it needs to be made available somewhere else. Or publication on some other website might be preferable because the other website provides users with features that cannot be provided on the WA legislation website. An example of the latter might be a website (such as that provided by Landgate) that provides interactive maps.

Clause 12(2) provides for the notification of the day on which a law is published on the WA legislation website. This can be done by showing it on the website, or showing it in a version of the law published on the website, or in both ways.

Clause 12(3) provides that the day notified must be the day on which the law is first published on the website. The exception is when a law is published in an alternative way under clause 13.

What evidence can be used to establish the day of publication of a law is dealt with in clause 19.

Clause 13 WA legislation website unavailable

Clause 13 deals with the situation when, for technical or other reasons, the WA legislation website is unavailable. The Parliamentary Counsel can then publish a law in any alternative manner considered appropriate. In that case, the law must be published on the WA legislation website as soon as practicable, and the day of publication notified on the website is the day on which it is first published in the alternative manner.

Clause 13(3) provides that a law published in an alternative manner has the same status as a law published on the WA legislation website. So, for example, a copy of such a law would have official status.

The *Interpretation Act 1978* (NSW) section 45C(4) makes similar provision in cases where the New South Wales legislation website is temporarily unavailable.

Clause 14 Technical or other requirements for publication on WA legislation website

Clause 14 empowers the Parliamentary Counsel to determine requirements for laws to be accepted for publication on the WA legislation website, and to make these requirements publicly available. The provision does not apply to Acts.

This provision is necessary because of the wide variety of subsidiary legislation not drafted by PCO that may have to be published on the WA legislation website. The design of the website requires that material for publication conforms to certain basic technical requirements, such as the format of material. The Parliamentary Counsel will be able to determine these requirements, which may change from time to time in line with changes in website and publishing technology.

The *Interpretation Act 1978* (NSW) section 45C(6) empowers the New South Wales Parliamentary Counsel to determine similar requirements in relation to material for publication on the New South Wales legislation website.

Division 2 – Official versions

This Division provides for official status to be given to electronic and hard copy versions of legislation. The effect of official status is that the evidentiary and judicial notice provisions in Division 3 will apply.

The provisions of the *Evidence Act 1906* that currently provide for judicial notice of, and give evidential status to, among other things copies of WA Acts and subsidiary legislation, and to the *Gazette*, will continue to apply as they also have a wider application to other material. These are sections 53, 58 and 61 of that Act. Sections 53 and 58 are amended by clauses 58 and 60 to extend their application beyond printed material.

The *Reprints Act 1984* section 8 currently provides for judicial notice of, and attributes evidential status to, reprints of written laws produced under that Act. The provisions of this Bill mean that this section will no longer be necessary, and along with the rest of that Act it is repealed by clause 45.

Clause 15 Official electronic versions

Clause 15 confers official status on certain electronic versions of laws. To be an official version, a version of a law must be accessed at, or downloaded from, the WA legislation website in a prescribed format, and it must indicate in a prescribed way that it is an official version, or the website must indicate that fact in a prescribed way.

Regulations will prescribe the formats that will be recognised as official, and how versions of laws or the website will indicate official status. These are technical matters that are likely to change over time.

Clause 16 Official hard copy versions

Clause 16 confers official status on certain hard copy versions of laws. To be an official version, a hard copy version must indicate, in a prescribed way, that it is an official version, or it must be produced directly from an official version of the law. A copy printed directly from an official hard copy or official electronic version would therefore itself be official.

Regulations will prescribe how hard copy versions will indicate official status. This is likely to change over time.

Division 3 – Evidentiary matters

Division 3 deals with the legal and evidential status of official versions of legislation, evidence of the day of publication of laws and of the day of Royal Assent to an Act, and judicial notice of laws.

Clause 17 Legal status of official versions

Clause 17 enacts presumptions that official versions of laws correctly set out the text of the laws. Subclause (1) relates to official versions of laws as originally passed or made. Subclause (2) relates to official versions of laws with their amendments incorporated.

Clause 17(3) provides that an official version of a law is evidence that any editorial changes made under Part 3 are authorised by that Part. This subclause is a replacement for the *Reprints Act 1984* section 7(6). That subsection provides for the issue, by the Attorney General, of a certificate to the effect that an amendment included in a reprint under the *Reprints Act 1984* section 7 has been effected in accordance with that section. The certificate is evidence that the amendment has been lawfully made. As far as can be ascertained, no certificate has ever been requested for submission to a court in WA.

Clause 18 Evidence of official versions

Clause 18 enacts a presumption that an electronic or hard copy version of a law that purports to be an official version is an official version. The onus would be on anyone who wishes to dispute the status of the version to prove the contrary.

Clause 19 Evidence of day of publication of laws

Clause 19 deals with evidence of the day of publication of a law. An official version of a law that shows the day of publication, or a notification on the WA legislation website of the day of publication of a law, are both evidence that the law was published on that day.

Clause 20 Evidence of day of Royal Assent

Clause 20 deals with proof of the day on which an Act received the Royal Assent. An official version of an Act that shows the day of Royal Assent is evidence that the Act was assented to on that day.

Clause 20 replaces the *Interpretation Act 1984* section 24, which is repealed by clause 52.

Clause 21 Judicial notice

Clause 21 provides that all courts and persons acting judicially must take judicial notice of all laws (as defined in clause 4).

Taking judicial notice of a fact means that the parties to a judicial proceeding do not need to prove the fact.

The *Evidence Act 1906* section 53(1)(b) requires all courts and persons acting judicially to take judicial notice of all Acts of the Parliament of the United Kingdom and of the Commonwealth, and of any State, and of any Australasian colony, passed before or after the commencement of that Act. This therefore covers WA Acts. There is no provision in WA legislation for judicial notice to be taken

of subsidiary legislation. Clause 21 therefore enacts a comprehensive provision relating to judicial notice of the laws of WA.

Provision to the same effect as clause 21 is included in the *Evidence Act 1977* (Qld) section 43 and the *Legislation Act 2019* (NZ) section 81. The evidence laws of those jurisdictions in Australia that have implemented the uniform evidence law contain similar provisions.

Division 4 – Publication or notification on WA legislation website instead of *Gazette*

Clause 22 Requirement or authority to publish or notify in *Gazette*

Clause 22 enables instruments that would otherwise be required to be published or notified in the *Gazette*, and instruments that are authorised to be published or notified in the *Gazette*, to be published or notified instead on the WA legislation website.

This will enable the WA legislation website to be an alternative means of publishing or notifying instruments without having to amend a large number of Acts that currently require or authorise publication or notification in the *Gazette*. In this way, clause 22 will facilitate the staged approach that PCO intends to adopt with respect to making the WA legislation website the place where, in appropriate cases, subsidiary legislation is published.

Part 3 – Editorial changes to legislation

Part 3 authorises the Parliamentary Counsel to make certain editorial changes to WA legislation. This is intended to enable WA legislation to be kept up-to-date, modernised and simplified, and errors in it to be corrected, without the need for the changes to be enacted by Parliament. The overriding constraint on the exercise of the editorial powers is that they cannot change the effect of a law.

Part 3 updates, clarifies, simplifies and enhances the editorial powers currently contained in the *Reprints Act 1984*.

All Australian jurisdictions, New Zealand and a number of other comparable jurisdictions such as Ontario (Canada) empower the exercise of editorial powers as part of producing updated versions of the law. The powers in New South Wales and the Northern Territory are very limited.

The relevant laws of these jurisdictions are as follows:

Commonwealth: *Legislation Act 2003*

Australian Capital Territory: *Legislation Act 2001*

New South Wales: *Interpretation Act 1987*

New Zealand: *Legislation Act 2019*

Northern Territory: *Interpretation Act 1978*

Queensland: *Reprints Act 1992*

South Australia: *Legislation Revision and Publication Act 2002*

Tasmania: *Legislation Publication Act 1996*

Victoria: *Interpretation of Legislation Act 1984*

Ontario (Canada): *Legislation Act, 2006*.

Division 1 – Power to make editorial changes

Clause 23 Parliamentary Counsel authorised to make editorial changes

Clause 23 provides that the Parliamentary Counsel can make editorial changes to a law in producing a version of a law. The term **editorial change** is defined in clause 4 as meaning a change authorised by Part 3 Division 2.

Clause 23(2) makes it clear that a version of a law in which editorial powers have been exercised can be produced, even though the law has not been amended at all, or has not been amended since the previous version was produced.

Clause 23(3) imposes an important restriction on the exercise of the editorial powers. A change to the text of a law cannot be made if it would change the effect of the law. This is subject to clause 29(2), which relates to changes authorised under a Clerk's amendment to an Act.

The *Reprints Act 1984* section 7(2) has the same effect as clause 23(3).

All jurisdictions that empower the making of comparable editorial changes impose a similar restriction on their exercise. The restriction is unnecessary in those jurisdictions (such as New South Wales and the Northern Territory) with more limited editorial powers.

Clause 24 Delegation

Clause 24 permits the Parliamentary Counsel to delegate the exercise of editorial powers to another officer of PCO.

Division 2 – Editorial changes

Clause 25 Updating of references to law of WA or other jurisdictions

Clause 25 permits the updating of references to laws, or provisions of laws, that have been changed or replaced, or that are to be read or to be taken to be amended to read as a reference to another law or provision.

Clause 25(1) extends the definition of **law** in clause 4 for the purposes of this clause.

Clause 25(2) permits the updating of references, in WA laws, to other WA laws and to the laws of the Commonwealth, other States and Territories, and New Zealand. Currently, only references to WA laws can be updated under the *Reprints Act 1984* section 7(3)(gb).

Clause 25(3) permits references to a law, or a provision of a law, to be updated if a law provides that the original reference is to be read, or to be taken to be amended to read, as a reference to another law or provision. The *Reprints Act 1984* section 7(3)(g) confers a similar power.

Clause 25(4) permits references to laws, or provisions of laws, that have been replaced to be changed to references to the replacement laws or provisions. There is no corresponding power in the *Reprints Act 1984*.

Clause 26 Things that have been changed or replaced

Clause 26 permits the updating of a range of things referenced in WA laws where they have been changed or replaced.

Clause 26(1) permits the updating of references to the name or title of a body, office, person, place, locality or other thing that has been changed.

Clause 26(2) permits the updating of references to a body, office, person, place, locality or other thing that has been replaced.

The *Reprints Act 1984* section 7(3)(h) currently authorises only the updating of changed references to the name, style or title of a person, office, officer, authority, department, place, locality or thing. A reference to something that has been replaced by something else cannot be updated.

Clause 26(3) permits the updating of contact details such as an address, a telephone number, an email address or a website address.

The *Reprints Act 1984* section 7(5)(ab) currently authorises the updating of addresses, telephone numbers or other contact details to reflect changes or additions to those details.

Clause 27 Deemed amendments

Clause 27 permits a law to be changed to give effect to a provision of another law that provides that other laws are deemed to have been amended in a specified way.

The *Reprints Act 1984* section 7(5)(a) confers a similar power.

Clause 28 References to provision of law

Clause 28(1) permits a law to be changed so that the way in which provisions are referred to is consistent with current drafting practice. For example, previous drafting practice was to spell out references in long form, such as “Division 5 of Part 2”. Current drafting practice is to use the shorter form “Part 2 Division 5”.

The *Reprints Act 1984* section 7(3)(i) confers a similar power.

Clause 28(2) permits the omission of referential words. These are defined in subclause (3) as words that identify the whole or part of a provision as a provision or part of a provision, of the law in which they appear. Examples are “of this Act”, “the said” and “hereof”. Current drafting practice is not to include referential words because they are unnecessary.

The *Reprints Act 1984* section 7(4)(a) confers a similar power.

Clause 29 Clerk's amendment to Act

Clause 29 permits a wrong reference in a provision of an Act to another provision of the Act (an internal cross-reference) to be amended if the Clerk of the Parliaments issues a certificate to the Parliamentary Counsel identifying the need for the amendment. The Clerk can issue the certificate only if the internal cross-reference became incorrect because of other amendments during passage of the Bill through Parliament, it should have been changed by way of a clerical amendment before the Act received the Royal Assent, and the amendment is necessary in order for the Act to have the operation and meaning that Parliament intended.

Clause 29 is an exception to the restriction in clause 23(3) that an editorial power cannot be used if it would change the effect of a law.

The *Reprints Act 1984* section 7(5b) and (5c) confer a similar power, which can be exercised even if it affects the operation or meaning of the Act that is amended. No example of the exercise of the power has been identified.

Clause 30 Gender

Clause 30 permits language that indicates, or could be taken to indicate, a particular gender to be expressed in a different way so as to be consistent with current drafting practice. So, for example, the words “he” or “she” could be replaced with the relevant noun. The following is an example:

Current provision:

A person must not obstruct a police officer in the exercise of his or her powers under this Act.

This could be changed to:

A person must not obstruct a police officer in the exercise of the officer's powers under this Act.

PCO has for many years had a policy of drafting new legislation in gender-neutral terms, and removing gender-specific terms from existing legislation as it is amended when appropriate to do so. All other Australasian drafting offices have the same policy. This policy means that, unless strictly gender-free language is used, both male and females must be recognised as the subject of legislation. Gender-neutral drafting was adopted to overcome the male-centric approach to legislative expression adopted for many centuries, which referred only to males. Interpretation legislation then provided that references to males included females.

The 2014 decision of the High Court of Australia in *Registrar of Births, Deaths and Marriages (NSW) v Norrie* [2014] HCA 11 led a number of Australian drafting offices to reconsider their policy of gender-neutral drafting. This decision recognised that not all human beings can be categorised as either male or female, and therefore a person's sex could be registered in a births register as “non-specific”.

In the light of that decision, PCO (along with several other drafting offices) have adopted a policy of gender-free drafting, on the basis that gender-neutral drafting still assumes that every individual has a specific gender. This means that PCO no longer uses such language as “he or she”, and adopts other currently-used drafting devices to avoid any reference to gender (unless this is appropriate in

the circumstances). Gender-free drafting is intended to avoid any perception that persons who do not identify as any particular gender, or whose gender is indeterminate, are excluded.

There is no equivalent provision in the *Reprints Act 1984*.

Similar provision is made in the legislation of many comparable jurisdictions. See *Legislation Act 2001* (ACT) section 116(1)(i), *Legislation Act 2003* (Cwlth) section 15X(2)(h), *Legislation Act 2019* (NZ) section 87(a), *Reprints Act 1992* (Qld) sections 24 and 25, *Legislation Publication Act 1996* (Tas) section 14.

Clause 31 Numbers, dates, times, quantities, measurements and similar matters

Clause 31(1) permits changes to numbers, dates, times, quantities, measurements and similar matters, ideas or concepts so as to be consistent with current drafting practice. For example, the words “per centum” could be replaced with the symbol “%”.

The *Reprints Act 1984* section 7(3)(a), (b), (c), (ca), (d), (e) and (ea) confer similar powers.

Clause 31(2) specifically permits references to the 20th century to be replaced with references to the 21st century where the reference is for the purposes of a formality (such as part of a date on a form).

The *Reprints Act 1984* section 7(3)(da) confers a similar power.

Clause 32 Conjunctives and disjunctives

Clause 32 permits conjunctives (such as “and”) and disjunctives (such as “or”) to be inserted, omitted or changed so as to be consistent with current drafting practice.

The *Reprints Act 1984* section 7(4A) to (4D) confer a more limited power.

The main circumstance in which this power is intended to be used is where there is a series of paragraphs (which includes items, subitems or similar provisions), and not all of the paragraphs end with a conjunction. Previous drafting practice was to include a conjunction only after the second to last paragraph, on the basis that the same conjunction was implied before each of the earlier paragraphs. Current drafting practice is to include a conjunction after every paragraph for clarity.

Errors in the use of conjunctives and disjunctives could be corrected under clause 34(2).

Clause 33 Definitions and items

Clause 33(1) permits changes to the order of definitions and the order of items in a list, schedule or similar arrangement.

The *Reprints Act 1984* section 7(5)(aa) provides only for changes to the sequence in which definitions are listed.

Errors in alphabetical, numerical or alphanumerical ordering could be corrected under clause 34(2).

Clause 33(2) relates to definitions that begin with a definite or indefinite article, and permits the article to be deleted or the appearance of the text changed so that the article is not formatted as a

definition. It is no longer PCO drafting practice to include or format definite or indefinite articles as part of definitions.

The *Reprints Act 1984* section 7(5)(d) confers a similar power. The power in clause 33(2) was not expressly included in the 2018 Bill, but has now been included for clarity and certainty.

Clause 34 Minor errors and inconsistencies

Clause 34 permits the correction of minor errors, and changes to grammar, spelling and punctuation so as to be consistent with current drafting practice.

Subclause (1) defines **minor error** for the purposes of this clause. The term means the following:

- (a) a typographical or clerical error;
- (b) a grammatical error;
- (c) a spelling error;
- (d) a punctuation error;
- (e) an error in the use of conjunctives or disjunctives;
- (f) a cross-referencing or numbering error;
- (g) an error in alphabetical, numerical or alphanumerical ordering;
- (h) an error in a reference to a law or a provision of a law;
- (i) an error in or arising out of an amendment to a law, including an error relating to the number of times an amendment is expressed to be made;
- (j) an error of a similar nature to those mentioned above.

Subclause (2) provides that a law can be changed to correct a minor error (as defined).

Subclauses (3) and (4) provide that grammar, spelling and punctuation can be changed so as to be consistent with current drafting practice.

The *Reprints Act 1984* section 7(5)(b), (ba) and (c) empower the correction of the following errors and inconsistencies:

- (a) errors in spelling, grammar, punctuation, the use of upper or lower case and the typing or printing of a written law;
- (b) any inconsistency within a written law in respect of those matters;
- (c) any error or anomaly in the way a written law is referred to, or the way in which a provision is designated.

The powers conferred by clause 34 would expand the range of errors and inconsistencies that can be corrected under the *Reprints Act 1984* to bring them more into line with the broader powers available in other comparable jurisdictions.

Clause 35 Obsolete or redundant provisions

Clause 35 permits the omission of provisions that have expired or are spent or have had their effect, and certain other material that no longer serves a useful purpose. This consists of the following:

- (a) a provision that has expired or is spent or has had its effect;
- (b) a repealing provision, including any list of repealed laws;
- (c) words of enactment;
- (d) words of attestation or authentication of the making of the law;
- (e) any signature of the maker of the law;
- (f) a provision as to the commencement of the law;
- (g) a provision that consists only of a statement showing the manner in which a law is arranged into Parts or other divisions;
- (h) a transitional, savings, validation or other similar provision that applies only to a time or event that has passed;
- (i) a provision that is obsolete or redundant because of the making, operation or effect of a law.

The *Reprints Act 1984* section 7(4) empowers the omission of the following material:

- (a) words of enactment, and in the case of subsidiary legislation, words of attestation or authentication of its making, and any signature of the maker or makers;
- (b) a provision as to the commencement of a written law;
- (c) a provision that consists only of a statement showing the manner in which a written law is arranged into Parts or other divisions;
- (d) a provision that has expired or become spent or had its effect;
- (e) any repealing provision, including any list of repealed laws;
- (f) any saving, transitional or validation provision which can conveniently be omitted by reason of its having application only to a time or events which have passed.

The powers conferred by clause 35 would expand the range of circumstances in which obsolete, redundant and similar material can be omitted under the *Reprints Act 1984* to bring them into line with the broader powers available in other comparable jurisdictions.

Clause 36 Incorporation of certain provisions contained in amending legislation

Clause 36 permits transitional, savings, validation and other similar provisions that are contained in an amending law to be relocated to the law to which they relate. This will usually be the principal law that is amended by the amending law.

Historically, these kinds of provisions have been included in an amending law rather than the law being amended. Current drafting practice is to avoid provisions of this nature (called “homeless” provisions) in an amending law. They are “homeless” because they remain in an amending law even though the amending provisions are spent. Current drafting practice is to insert any non-amending provisions into the principal law being amended. The exercise of the power in clause 36 will make the relocated homeless provisions easier to find.

There is no equivalent provision in the *Reprints Act 1984*. The legislation of some other comparable jurisdictions, such as the Commonwealth, Tasmania and New Zealand, contains a similar power.

Clause 37 Numbering and renumbering

Clause 37(1) permits the numbering or renumbering of provisions so as to be consistent with current drafting practice. An example of its intended use is where a law has been extensively amended so

that it contains complex and confusing numbering. This can happen where a large number of new provisions are inserted into a law, necessitating provision numbers that include many letters.

Clause 37(2) provides that, where there is a cross-reference in a law to a provision that is numbered or renumbered under this clause, the cross-reference is taken to refer to the numbered or renumbered provision. This provision will only apply if the power in clause 39 to make changes that are consequential on editorial changes cannot for some reason be exercised where provisions are numbered or renumbered.

There is no equivalent provision in the *Reprints Act 1984*. The legislation of some other comparable jurisdictions, such as the Commonwealth, the ACT, Queensland, Tasmania and New Zealand, contains a similar power.

Clause 38 Format and printing style changes

Clause 38 permits the format and printing style of a law to be changed so as to be consistent with current drafting practice.

This clause recasts in simpler terms, and expands, the very limited existing powers in the *Reprints Act 1984* to change format and printing style. These are set out in section 7(5)(ba) and (d).

The legislation of some other comparable jurisdictions, such as the Commonwealth, the ACT, Queensland, South Australia, Tasmania and New Zealand, contains broader powers to make changes to format and printing style.

Clause 39 Consequential changes

Clause 39 permits a change to a law that is consequential on any other editorial change made to that law or any other law. Without this power, some editorial changes could not otherwise be exercised in a law because they would have an effect on other parts of the law or other laws. The power to renumber is an example.

There is no equivalent provision in the *Reprints Act 1984*.

The legislation of some other comparable jurisdictions, such as the Commonwealth, the ACT, Queensland and New Zealand, contains power to make changes that are consequential on the exercise of other editorial powers.

Division 3 – Other matters

Clause 40 Effect of editorial changes

Clause 40 provides that an editorial change made to a law is treated in the same way as an amendment. It has the same effect as if the law had been amended by another law commencing on the day on which the change is made.

This is a clearer statement of the effect of the exercise of an editorial power than that set out in the *Reprints Act 1984* section 8(2). It is intended to ensure that versions of the law in which editorial changes have been made can be amended on the basis that the changes are actually incorporated in the text of the law. Otherwise, amendments would have to be drafted and enacted or made on the

basis of the original unchanged text and reincorporate the editorial changes. This would be inconvenient and highly confusing.

Similar provision is made in the *Legislation Act 2001* (ACT) section 117, *Legislation Act 2003* (Cwlth) section 15W, *Legislation Act 2019* (NZ) section 90, *Legislation Revision and Publication Act 2002* (SA) section 8(5), *Reprints Act 1992* (Qld) section 9, *Legislation Publication Act 1996* (Tas) section 11, *Interpretation of Legislation Act 1984* (Vic) section 54A(3)-(4).

Clause 41 Recording of editorial changes

Clause 41(1) requires the Parliamentary Counsel to ensure that editorial changes made to a law are indicated in a suitable way.

Subclause (2) provides examples of ways in which this might be done.

Similar requirements to identify the exercise of editorial powers are imposed by the relevant laws of the Commonwealth, the ACT, Queensland, New Zealand and Ontario (Canada).

Clause 42 Annual report to include summary of editorial changes

Clause 42 requires every annual report of the agency principally assisting in the administration of the Bill to include a summary of editorial changes made to laws in the financial year covered by the report.

Part 4 – Miscellaneous

Clause 43 Regulations

Clause 43 empowers the making of regulations for the purposes of the Bill.

Provisions of the Bill that contemplate regulations are clauses 8(3), 10(1)(c), (d) and (e), 10(2)(a), 15 and 16.

Clause 44 Review of Act

Clause 44 requires the Minister to whom the administration of the Bill is allocated to undertake a review of its operation and effectiveness as soon as practicable after the 5th anniversary of the commencement of clause 44. The Minister is required to prepare a report based on the review and cause it to be laid before both Houses of Parliament as soon as practicable after it is prepared, but not later than 12 months after that 5th anniversary. The 12-month time limit was not included in the 2018 Bill, but is now standard drafting practice for review clauses of this kind.

Part 5 – Repeal of *Reprints Act 1984*

Clause 45 *Reprints Act 1984* repealed

Clause 45 repeals the *Reprints Act 1984*. That Act is replaced by the provisions in Part 2 of the Bill relating to the publication of WA laws with their amendments incorporated, and the editorial powers set out in Part 3.

Clause 46 Status of reprints under repealed Act

Clause 46 is a transitional provision, and provides that, on the repeal of the *Reprints Act 1984*, reprints of written laws produced under that Act are given the status of official versions under the Bill.

Part 6 – Other Acts amended

Division 1 – *Interpretation Act 1984* amended

Division 1 contains amendments to the *Interpretation Act 1984*.

Clause 47 Act amended

Clause 47 identifies the Act that is amended by Part 6 Division 1.

Clause 48 Section 5 amended

Clause 48 makes a number of amendments to the *Interpretation Act 1984* section 5, which is the section that defines a number of terms for the purposes of written laws in WA.

The definition of ***Gazette*** or ***Government Gazette*** is replaced with a new definition of the same terms. The current definition is as follows:

Gazette or ***Government Gazette*** means the government gazette of Western Australia printed and published, or purporting to be printed and published, by the Government Printer and includes any supplement to that gazette;

The current definition means that a reference to the *Gazette* in written laws is limited to the version of the *Gazette* in a printed form. The electronic version that is currently published therefore has no official status. The new definition recognises both hard copy and electronic versions.

The new definition also omits the reference to the Government Printer as the publisher of the *Gazette*. Instead, it simply refers to the *Gazette* published, or purporting to be published, “under the authority of the Government”. This allows for the possibility that, as is already the case in other Australasian jurisdictions, the *Gazette* might in future be published under other arrangements.

It is also made clear that electronic versions of the *Gazette* published before the Bill comes into operation are given official status.

The definition of ***Government Printer*** is replaced with a new definition. The current definition is as follows:

Government Printer means the Government Printer of the State and any other printer authorised by or on behalf of the Government to print any written law or any other document of the Government;

The current definition is limited to the printing of written laws and other documents of the Government. That limits the definition to hard copy material. The new definition recognises that the Government Printer also publishes material in electronic form.

A new definition of **WA legislation website** is inserted. This links to the definition of that term in clause 8 of the Bill.

The definition of **proclamation** is amended. Currently, the definition provides that a proclamation is made by the Governor and published in the *Gazette*. The amendment recognises that, under Part 2 of the Bill, proclamations may in future be published on the WA legislation website instead of in the *Gazette*.

Clause 49 Section 10 amended

Clause 49 amends the *Interpretation Act 1984* section 10 by replacing the current paragraph (a).

This section relates to references in written laws that relate to gender or number, and is as follows:

10. Gender and number

In any written law —

(a) words denoting a gender or genders include each other gender;

[(b) deleted]

(c) words in the singular number include the plural and words in the plural number include the singular.

Paragraph (a) of the section is the updated expression of the rule contained in the *Interpretation Act 1918* section 26(a) that references to the masculine gender are to be construed as including the feminine gender. Legislative drafting practice has long since abandoned relying on references to males as including females. Gender-neutral drafting was introduced many years ago, and this meant referring to both the female and male genders where both were intended to be covered.

More recently, in WA and some other Australian jurisdictions, there has been a change in legislative drafting practice to adopt “gender-free” drafting. The reason for this is explained above under clause 30.

The current section 10(a), by providing that words denoting gender or genders “include each other gender”, assumes that everyone has a specific gender. To avoid any perception that persons who do not identify as any particular gender, or whose gender is indeterminate, are excluded, the new section 10(a)(i) provides that words that indicate, or could be taken to indicate, a person of a particular gender or sex include “any individual, regardless of gender or sex”. The reference to “individual” recognises that this provision is not relevant to legal persons such as companies.

In addition, the new section 10(a)(ii) makes it clear that words that indicate, or could be taken to indicate, a person of a particular gender or sex include “any person that is not an individual”. This change will ensure that, where applicable, references in written laws to individuals include non-human persons. The reference to “person” will rely on the definition of that term in the *Interpretation Act 1984* section 5. While that definition of “person”, in applying to references to a person or “any word or expression descriptive of a person” most likely already means that gender-

specific references such as “he” or “she” would include non-human persons, the new section 10(a)(ii) is intended to put that beyond doubt. The particular context in which a gender-specific reference occurs in a written law might, as now, exclude its application to non-human persons. In that respect, no change in the law is intended.

Clause 50 Section 19 amended

Clause 50 amends the *Interpretation Act 1984* section 19. That section relates to the use by the courts of extrinsic material (such as reports of Royal Commissions or Law Reform Commissions, reports of Parliamentary committees and explanatory memoranda to Bills) in interpreting a written law. Section 19(2)(a) includes, in that list of extrinsic material, matters not forming part of the written law but set out in a document containing the text of the written law “as printed by the Government Printer”.

The amendment replaces the reference to a document of that kind with a reference to an official version of the law under the Bill. It will therefore extend to all official versions and not just hard copy versions.

Clause 51 Section 23 amended

Clause 51 amends the *Interpretation Act 1984* section 23. That section provides that, unless express provision is made to the contrary in a written law, a power to fix a day on which an Act comes into operation does not include power to fix a day before the day on which the proclamation fixing the day is published in the *Gazette*, or to fix different days for different provisions.

The amendment recognises that the Bill, in Part 2, will provide for such proclamations to be published on the WA legislation website instead of in the *Gazette*.

Clause 52 Section 24 deleted

Clause 52 repeals the *Interpretation Act 1984* section 24. That section provides for judicial notice of the date of Royal Assent to Acts. This matter is dealt with in clause 20 of the Bill, making section 24 unnecessary.

Clause 53 Section 26 amended

Clause 53 amends the *Interpretation Act 1984* section 26, which makes provision for the citation of written laws.

Section 26 (3) currently provides that the citation of or reference to a written law is to be made according to a copy of the written law printed, or purporting to be printed, by the Government Printer. The replacement subsection (3) recognises that, under Part 2 of the Bill, official versions of written laws may be either in hard copy or electronic format.

Section 26 (4) relates to a long-abandoned practice of including 2 years in the citation of an Act. It is repealed as it is unnecessary.

Clause 54 Section 41 amended

Clause 54 amends the *Interpretation Act 1984* section 41. Subsection (1) of that section provides that where a written law confers power to make subsidiary legislation, all subsidiary legislation made under that power must be published in the *Gazette* and comes into operation on the day of publication or another specified day.

The amendment to section 41(1)(a) recognises that, under Part 2 of the Bill, subsidiary legislation will be able to be published on the WA legislation website instead of in the *Gazette*.

Clause 55 Section 42 amended

Clause 55 amends the *Interpretation Act 1984* section 42.

Section 42(1) provides that all regulations (as defined in subsection (8)) must be laid before each House of Parliament within 6 sitting days of such House next following publication of the regulations in the *Gazette*. Because, under Part 2 of the Bill, subsidiary legislation (including regulations) will be able to be published on the WA legislation website instead of in the *Gazette*, subsection (1) is amended so that the laying requirement will apply when either of those publication mechanisms is used.

Section 42(4)(a) and (b) and (5) are consequentially amended to recognise that, under Part 2 of the Bill, regulations will be able to be published on the WA legislation website instead of the *Gazette*. In particular, notice of a resolution of a House of Parliament under subsection (2) disallowing any regulations, or under subsection (4) amending any regulations or substituting other regulations for disallowed regulations, will be able to be published on the WA legislation website instead of in the *Gazette*. This will recognise the desirability of having all events relating to the lifecycle of particular regulations in one location.

The changes to section 42 will make no change to the supervisory power of either House of Parliament over regulations.

Division 2 – Evidence Act 1906 amended

Division 2 contains amendments to the *Evidence Act 1906*. The overall effect of the amendments is to amend particular provisions of that Act that currently contemplate documents in printed form so that they also apply in relation to documents in electronic form.

Clause 56 Act amended

Clause 56 identifies the Act that is amended by Part 6 Division 2.

Clause 57 Section 3 amended

Clause 57 amends the definition of **Government Printer** in the *Evidence Act 1906* section 3. That definition currently contemplates that a Government Printer as identified in that definition prints material in hard copy. The amendments extend the definition so that it also contemplates publication of material in electronic form.

Clause 58 Section 53 amended

Clause 58 amends the *Evidence Act 1906* section 53(2), which relates to copies of Acts of the Parliament of the United Kingdom or of the Commonwealth, or any State or Australasian colony. Such copies, if purporting to be printed by a Government Printer, are prima facie deemed to be correct copies without further proof.

The amendment recognises that such copies may now be published in hard copy or electronic form.

Clause 59 Section 57 amended

Clause 59 amends the *Evidence Act 1906* section 57(1)(b), which relates to the evidential status of certain copies of UK proclamations, orders, regulations and certain other instruments. That provision currently refers to copies purporting to be printed by the Government Printer.

The amendment recognises that such copies may now be published in hard copy or electronic form.

Clause 60 Section 58 amended

Clause 60 amends the *Evidence Act 1906* section 58(1)(b), which relates to the evidential status of certain copies of Commonwealth, State or other kinds of proclamations, orders, regulations and certain other instruments. That provision currently refers to copies purporting to be printed by the Government Printer.

The amendment recognises that such copies may now be published in hard copy or electronic form.

Clause 61 Section 69A amended

Clause 61 amends the *Evidence Act 1906* section 69A, which relates to the evidential status of certain State registers or any document purporting to be a copy of such a register. That provision currently refers to copies purporting to be printed by the Government Printer or by the authority of the Government of the State.

The amendment recognises that such copies may now be published in hard copy or electronic form.

Clause 62 Section 74 amended

Clause 62 amends the *Evidence Act 1906* section 74, which relates to the evidential status of the *Gazettes* of various jurisdictions, such as the UK, the Commonwealth and the States. That provision currently applies only to paper copies.

The amendment recognises that such copies may now be published in hard copy or electronic form.

Clause 63 Section 75 amended

Clause 63 amends the *Evidence Act 1906* section 75, which relates to the evidential status of documents purporting to be printed by a Government Printer of the State or certain other jurisdictions, or by the authority of certain governments. That provision currently applies only to paper copies.

The amendment recognises that such copies may now be published in hard copy or electronic form.

Clause 64 Section 78 amended

Clause 64 amends the *Evidence Act 1906* section 78, which relates to the evidential status of certain local laws, by-laws and regulations. That provision currently applies only to paper copies purporting to be printed by the Government Printer or by the authority of certain governments.

The amendment recognises that such copies may now be published in hard copy or electronic form.