

LEGISLATION BILL 2021

Committee

Resumed from 17 August. The Deputy Chair of Committees (Hon Steve Martin) in the chair; Hon Matthew Swinbourn (Parliamentary Secretary) in charge of the bill.

Clause 3: Object of this Act —

Progress was reported after the clause had been partly considered.

Hon NICK GOIRAN: As the parliamentary secretary and his advisers are getting ready, I take the opportunity to note that we are now considering clause 3. However, a number of things were sought at clause 1, and I ask whether any of that information is available because now would be a convenient time to provide it.

Hon MATTHEW SWINBOURN: A number of matters were raised yesterday during consideration of clause 1. Significantly, they went to consultation. I can advise that there were two consultation phases leading up to the Legislation Bill in 2018. The first occurred in 2015, with what I will term the justice sector stakeholders. We received nine responses in relation to that. The responders were the Law Society of Western Australia, the State Solicitor's Office, the Solicitor-General, the Director of Public Prosecutions and the heads of jurisdictions. The outcome of that engagement was that the responders indicated overwhelming support for the proposed reforms.

The second occurred in December 2016 and was initiated by the Parliamentary Counsel's Office issuing a public discussion paper concerning the enhanced reprint powers for Western Australian Legislation. This discussion paper was made available online and is still available on the Western Australian Legislation website, on the information page. If people want to search, they can just search "enhanced reprint powers for Western Australian Legislation". Responses can be made via an online survey, email or letter. The discussion paper set out 12 proposals regarding enhanced reprint powers and requested feedback on each of the 12 proposals. A media release about the discussion paper was also issued by the Department of the Attorney General, and emails inviting submissions were sent widely to legal stakeholders and others considered to have an interest in the proposals. Following that, 21 responses were received and the outcome of the 21 responses was overwhelming support for the 12 proposals.

I can advise that no further consultation was undertaken before preparing the Legislation Bill 2021 because the changes in the 2021 bill were of a minor nature. I will point out what the four key changes are from the 2018 bill to the 2021 bill. Clause 2 provides for a single day of proclamation, which we have already covered in the course of committee debate; clauses 8 and 9 have been reordered, and that is dealt with in the explanatory memorandum; the inclusion of clause 33(2) was mentioned in the second reading speech; and changes to clause 44 reflect current drafting practice, which again is mentioned in the explanatory memorandum.

Hon Nick Goiran asked whether the submissions could be tabled. The government is not going to table the submissions as they are either not in an appropriate form for tabling, or it is not appropriate to do so because there may be issues of cabinet confidentiality. I will give an example of one of the reasons why they are not in an appropriate form: some of those submissions were done, as I said, by survey on a SurveyMonkey-type thing. One of the issues that arose was the nature of the feedback received on the editorial pages, and who gave that feedback. The feedback came from a mix of anonymous respondents via the online survey, using SurveyMonkey, and government agencies such as the Mental Health Commission, Treasury, the then Housing Authority, the Department of Lands, the Department of Local Government, Sport and Cultural Industries, and the Department of Justice.

Hon Nick Goiran also asked questions in relation to what impact the bill would have on the State Law Publisher and on Parliament. Some responses were given in relation to Parliament, but in relation to the State Law Publisher, the bill does not impact upon it because it no longer exists. I will read an extract from the wa.gov.au website about the government printer and the winding up of the State Law Publisher. This quote is from that website and states —

In 2020, the Governor appointed the Parliamentary Counsel as Government Printer, commencing 14 September of that year.

With the Government Printer authorising Lit Support (TIMG) Pty Ltd, a commercial printing company, to print the legislation of Western Australia from 1 July 2021, the State Law Publisher has continued to provide printing services through to 30 June 2021. The ceasing of State Law Publisher operations at 30 June ends over 150 years of Government-run printing services in WA.

The Department of the Premier and Cabinet continues to produce the Western Australian Government Gazette which is published on the WA legislation website www.legislation.wa.gov.au

The bill does not impact on the publication and printing processes of Parliament. The Parliamentary Counsel's Office manages the bill printing process through a contracted printer, Lit Support. The bill has nothing to say about those processes.

Hon NICK GOIRAN: I thank the parliamentary secretary for that comprehensive response, and I thank all those who contributed to making that information available. With regard to the nine responses received in the 2015 phase of consultation, did any of those nine responses result in concerns being raised?

Hon MATTHEW SWINBOURN: No; the only issue, if we can describe it as that, is a continuing availability of hard copies of legislation, and I think we will cover that as we go through the different parts of the legislation—that is, hard copies of legislation still being available.

Hon NICK GOIRAN: Does it then follow that the concerns raised about the renumbering flowed from the 2016 phase of consultation and came from one or more of the 21 responses to the discussion paper?

Hon MATTHEW SWINBOURN: Yes.

Hon NICK GOIRAN: Last night when we finished on this bill, we were looking at clause 3 and the possibility of the government providing some examples of appropriate cases, as foreshadowed at clause 3(2)(c). Might those examples now be available?

Hon MATTHEW SWINBOURN: I think I have a comprehensive answer to that point, with the benefit of consideration overnight. With appropriate cases, the point emphasised is that the exercise of powers in part 3, division 2, will very much be on a case-by-case basis. The mere existence of a power does not mean that it would be appropriate to exercise it in every case. An example might be the clause 36 incorporation of homeless transitional or savings provisions in a principal law. Although the Parliamentary Counsel's Office has the power, whether or not it is exercised will depend on the law in question and whether the incorporation of such provisions is a useful addition to the law. It is the same kind of discretionary judgement that the PCO currently makes in exercising existing powers under the Reprints Act.

Hon NICK GOIRAN: Finally, clause 3(2)(c), apart from referring to Parliamentary Counsel having this power in appropriate cases, refers to a few scenarios. The first of these is where there is a view that Western Australian legislation can be kept up to date, which is the phrase used; secondly, where it can be modified and simplified; and, thirdly, where errors can be corrected. We previously discussed under clause 1 that as a result of this bill, the powers given to Parliamentary Counsel will be enhanced. Which of those three things currently exist and which will be added by way of enhancement?

Hon MATTHEW SWINBOURN: The current Reprints Act allows PCO to perform the things referred to in that clause such as modifying and all that stuff. If it is of assistance, I will go through what the additional enhanced powers will be. I have a preparation here. They are to update references to the laws of Australasian jurisdictions where the citations of the laws have been changed; to update the reference to a law, including a law of another Australasian jurisdiction or a provision of a law where the law or provision has been replaced; to change expressions indicating gender to conform to current drafting practice, which is to draft in gender-free terms; to number or renumber provisions; to update references to things that have been replaced such as statutory bodies; to change grammar, spelling or punctuation to conform with current drafting practice; to change the way a provision of a law is referred to for conformity with current drafting practice; to omit obsolete or redundant provisions of WA legislation; to incorporate validation, saving, transitional or similar provisions when contained in amending legislation in the legislation to which the provisions relate; to make changes that are consequential on either changes in the exercise of editorial powers; and to make format or layout changes to ensure conformity with current drafting practice.

Hon NICK GOIRAN: That is a comprehensive list, and includes some interesting things. For example, if I am not mistaken, there is a review of the legislation contemplated in this bill at clause 44, "Review of the Act", which is the statutory review clause. It is currently drafted in what I would describe as the customary fashion. However, there is an amendment on the supplementary notice paper standing in my name at 4/44 that seeks to add another three subclauses to the statutory review clause. The wording of these three subclauses comes from the form of words routinely used by Parliamentary Counsel at the end of the fortieth Parliament. The parliamentary secretary already indicated in debate on clause 1 that the government would not support any amendments standing in my name on the supplementary notice paper, as is the right of government. I simply make the observation that between the fortieth Parliament and the forty-first Parliament one or more individuals in Parliamentary Counsel's Office have decided to abandon the drafting convention that they were using in the fortieth Parliament to insert these three subclauses. They are what I would describe as the out-of-session tabling provisions, so if a statutory review was required to be tabled on a certain date and Parliament was not in session, it could be tabled by way of provision to the Clerk. I have subsequently been told by someone in government, I cannot recall whom, that since 15 June, when I gave notice of these amendments, Parliamentary Counsel has since reverted to its old practice; that is, it no longer feels it is necessary to have these out-of-session tabling provisions. I find that interesting only because in the fortieth Parliament I raised this exact point with the government. If I recall correctly, it was with the Leader of the House, who was handling the bill. The response I was given was that it was the updated drafting convention of Parliamentary Counsel. In the fortieth Parliament, we would routinely try to make sure that there was a consistency and have these out-of-session tabling provisions added to all statutory review clauses. Now in the forty-first Parliament, I am looking to do exactly the

same thing, which is to ensure consistency, but I am told that Parliamentary Counsel has decided to abandon that convention and revert to its former practice. All that said, I provide that by way of example because the parliamentary secretary indicated a whole range of things that Parliamentary Counsel will do with these editorial changes, including removing obsolete provisions, which I think is one of the examples the parliamentary secretary gave.

I note that clause 3, where we are at the moment, references simplifying the legislation. Language that is also used is “modernised”. One could argue that maybe Parliamentary Counsel of the day in the forty-first Parliament has decided that the more modern way of drafting statutory review clauses is to revert to the version that we used previously. Alternatively, Parliamentary Counsel might say it is a more simplified version of it, or otherwise it wants to keep it up to date. Is that something that Parliamentary Counsel would see in its remits within its power to use as an editorial change? I think that that is a substantial change. I do not think it is a mere editorial change. It just highlights the difficulty in ascertaining what is in scope as an editorial change and what is out of scope.

The parliamentary secretary explained yesterday in fairness that a process is embarked upon in Parliamentary Counsel’s Office: somebody will identify the problem, somebody will identify the fix and they will then escalate it to one of three senior officers who will make the final call, but all of this is still subject to some level of discretion. Somebody at the end of the day has to determine what is in, what is out, what is considered to be a conservative change, what is an editorial change and the like. Can the parliamentary secretary do two things here? First, can he confirm that that example that I have given, which would be the removal of three subsections in a statutory review clause, would not be captured by these type of editorial powers? Secondly, will there be some kind of policy document or guideline prepared in PCO to guide officers, including these three senior officers, in their decision-making duties?

Hon MATTHEW SWINBOURN: In relation to the member’s first point, it is absolutely out of the scope of what this act is. It would be a substantial change to the law and so that would not be within the four walls of this bill. In relation to the second point, which was about a policy document, there is not currently a policy document for this bill. There is a reprints manual that relates to the existing law and I am advised that PCO would review that document on the passage of this legislation to incorporate the issues that arise here.

Hon NICK GOIRAN: That is excellent. Can the parliamentary secretary confirm that this policy document or guideline document—whatever it is—that will guide the decision-making process will be updated and in place prior to the day fixed by proclamation?

Hon MATTHEW SWINBOURN: I cannot guarantee that it would happen before proclamation. The advice that I am receiving from PCO is that after the passing of this bill, if it is the will of the house, it will have to draft the regulations and all those sorts of things, then it would have to update its documents and undertake training with its staff of its new enhanced powers. It is its intention not to proceed with any changes from those powers until all those things have been put in place. Proclamation is obviously a point in time, but its intention is to not exercise them until it has the assurity that it has those policies in place and those procedures all sorted out.

Hon NICK GOIRAN: Will that preparation work also include the review of the debate of this bill?

Hon MATTHEW SWINBOURN: I am advised, yes.

Hon NICK GOIRAN: My last question on clause 3 is that the parliamentary secretary indicated that there were certain clauses that differed from the 2018 version to the 2019 version. I would be happy, by way of interjection, for the parliamentary secretary to provide those clause numbers again. I think there were only four of them from memory.

Hon MATTHEW SWINBOURN: Yes, member, there was. There was the reordering of clauses 8 and 9, and to be clear, as I understand it, they have just been swapped around in terms of the order of them. Then there is the inclusion of clause 33(2), and changes to clause 44 to reflect current drafting practices. They are the substantial changes. I am also advised that there are some minor formatting changes, but they are not considered to be of consequence between the two bills.

Clause put and passed.

Clauses 4 to 32 put and passed.

Clause 33: Definitions and items —

Hon NICK GOIRAN: The parliamentary secretary indicated in response to an earlier clause that clause 33 differs from the version that was introduced into this place almost three years ago. Can the parliamentary secretary clarify what the distinction is?

Hon MATTHEW SWINBOURN: I will take the member back to my second reading speech. I will read it out for the member’s benefit, because it put it a little easier. I stated —

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.

Hon NICK GOIRAN: Has this additional subclause received any consultation?

Hon MATTHEW SWINBOURN: No.

Hon NICK GOIRAN: I will make an observation and then we will move on. What we have here is a law that will be passed by the Parliament of Western Australia; a law that will give the Parliamentary Counsel's Office extra powers. Guess who drafts that law? It is PCO. Does anyone consult anybody in Western Australia? No; only people within PCO consult with each other. It is a very, very cosy arrangement. In this particular instance, not much great magnitude flows from it, but it does highlight the point I intend making in a moment about the importance of oversight and why the opposition believes that PCO should have a duty to provide to the Parliament a summary of the changes it makes. I know that yesterday the position of the government was that it would not support that. I strongly urge the government to reconsider that position. Officers in the Parliamentary Counsel's Office are incredibly hardworking. I have had the good fortune to work with them for many years now and they have consistently provided impartial, quality advice, and drafting services. However, they are only human and humans make errors, and that is why we have oversight. Just as the government of Western Australia, which is elected by the people, has oversight in the form of the Parliament and also the judiciary, I do not think we are asking too much for Parliamentary Counsel's Office, full of integrity and competence as it may well be, to have a modest amount of scrutiny provided to the changes it will make. That said, the opposition supports the passage of this newly amended clause.

Clause put and passed.

Clauses 34 to 36 put and passed.

Clause 37: Numbering and renumbering —

Hon NICK GOIRAN: We had an extensive discussion about the two phases of the consultation process in 2015 and 2016. It has been identified that concerns were raised about the renumbering process; not in the 2015 version, we are told, with the nine responses, but during the 2016 consultation phase. Out of the 21 submissions received in 2016, some of them were from unspecified anonymous individuals and others raised issues about numbering and renumbering. To what extent does this clause address those concerns?

Hon MATTHEW SWINBOURN: The clause itself does not deal with those concerns. I will give the member context as to what concerns were raised, which will hopefully satisfy him in relation to the issue. Concerns were raised by other government agencies about the impact of renumbering on their own forms and documents when they would have to reproduce them. An example has been given of the department of lands in terms of some documents or forms that might refer to a specific provision of an act. It is really about ensuring how PCO deals with that when it proposes to renumber and then how it communicates that. PCO appreciates those concerns that were raised with it and will take them into account in considering the appropriateness of the exercise of the powers in each individual case and the consultation that should be undertaken as part of that consideration. I think that is a fair concern that was raised by those agencies. Hon Nick Goiran and I are both lawyers and we know that when things change, the references need to be correct if it is a legal form, and PCO is extremely conscious of the impact of those things.

Hon NICK GOIRAN: Does that renumbering power currently exist with PCO?

Hon MATTHEW SWINBOURN: No, it is a new power.

Clause put and passed.

Clauses 38 to 41 put and passed.

Clause 42: Annual report to include summary of editorial changes —

Hon NICK GOIRAN: I move —

Page 19, after line 23 — To insert —

- (3) The Parliamentary Counsel must, within 30 days after the end of each financial year, give a summary of editorial changes made to laws in the financial year to the Standing Committee on Uniform Legislation and Statutes Review of the Legislative Council.

By way of explanation to members, although we have touched on this earlier, this amendment, if supported by members of this place, would achieve one thing: it would provide some form of oversight for these enhanced powers that are being given to the Parliamentary Counsel's Office. At the moment, if the law of Western Australia is to be changed, it cannot be done without the agreement of a majority of members of this house. Once this bill passes, some form of changes will be able to be made without oversight from this place. The government says that that will be mere editorial power and that there will be a process in place that includes officers of Parliamentary Counsel's Office identifying a problem, identifying a fix to it and elevating it to one of their three superiors to make a final decision. If this amendment passes, once a year parliamentary counsel will need to provide a summary of those

editorial changes to the Standing Committee on Uniform Legislation and Statutes Review. That committee can then consider those changes. If all is well and mere editorial changes have been made, then no-one need have any concern. However, if a problem has been identified, we will be able to rely on the hardworking members of the Standing Committee on Uniform Legislation and Statutes Review to report to the house and identify a problem. This seems to me to be an appropriate balance to increasing the power to Parliamentary Counsel's Office by increasing the level of oversight. I seek the support of the government and members.

Hon Donna Faragher interjected.

Hon MATTHEW SWINBOURN: The interjection from Hon Donna Faragher is not of any assistance, thank you. As I think we have indicated, the government does not support the amendment. The government is of the view that there is oversight within clause 42(2) that provides an obligation on the accountable authority, the Department of Justice, to include a summary of editorial changes made by PCO to laws in a financial year in the department's annual report that is required to be prepared and that the Attorney General is to cause to have tabled before each house of Parliament under section 64 of the Financial Management Act 2006. I note it is already a function of the Standing Committee on Uniform Legislation and Statutes Review, of which I am a member, to review the form and content of the statute book. That is function 6.3(c) of the standing orders. I also note that annual reports can be considered by the Standing Committee on Estimates and Financial Operations. I accept we are not at the standard that the member expects, but we do make the argument that there will be oversight of the changes that will be undertaken by the —

Hon NICK GOIRAN: I will make this observation: it seems to me that there will be no extra work required of Parliamentary Counsel's Office because the parliamentary secretary has helpfully pointed out that it will already have to provide a summary of the editorial changes in the annual report. All that will be required is somebody from the Parliamentary Counsel's Office to deliver the document to the Chair of the Standing Committee on Uniform Legislation and Statutes Review, by way of email, through Australia Post, carrier pigeon, however they want to get the document provided to the chair, and we are just asking them to do one thing, but apparently that is asking too much: to ensure there is some kind of oversight rather than the summary being buried in an annual report that we all know full well there is limited prospect of somebody picking up. If it is actually drawn directly to the attention of a parliamentary committee, we would have great confidence that it will be picked up. Once again, I call on members to support this amendment.

Division

Amendment put and a division taken, the Deputy Chair of Committees (Hon Steve Martin) casting his vote with the ayes, with the following result —

Ayes (7)

Hon Martin Aldridge
Hon Peter Collier

Hon Donna Faragher
Hon Nick Goiran

Hon Steve Martin
Hon Tjorn Sibma

Hon Colin de Grussa (*Teller*)

Noes (19)

Hon Klara Andric
Hon Dan Caddy
Hon Sandra Carr
Hon Stephen Dawson
Hon Kate Doust

Hon Sue Ellery
Hon Peter Foster
Hon Lorna Harper
Hon Jackie Jarvis
Hon Ayor Makur Chuot

Hon Kyle McGinn
Hon Sophia Moermond
Hon Shelley Payne
Hon Martin Pritchard
Hon Samantha Rowe

Hon Matthew Swinbourn
Hon Dr Sally Talbot
Hon Dr Brian Walker
Hon Pierre Yang (*Teller*)

Pairs

Hon Dr Steve Thomas
Hon Neil Thomson
Hon James Hayward

Hon Alannah MacTiernan
Hon Stephen Pratt
Hon Darren West

Amendment thus negated.

Hon NICK GOIRAN: As we conclude the consideration of clause 42, I simply call on the four members of the Standing Committee on Uniform Legislation and Statutes Review to take it upon themselves during this forty-first Parliament to familiarise themselves once a year with the annual report that will be submitted, which will include a summary of the editorial changes made by Parliamentary Counsel's Office. Albeit the government decided that it will not require this level of oversight, nothing stops that hardworking parliamentary committee from doing that work, which seems to me entirely appropriate. As the parliamentary secretary has already identified, there is even a convenient term of reference for the committee to be able to do that work.

Clause put and passed.

Clause 43 put and passed.

Clause 44: Review of Act —

Hon NICK GOIRAN: There is an amendment standing in my name at 4/44 on the supplementary notice paper. Before I consider whether to move that or not, I will explain it. As we touched on a little earlier, I think when we were discussing clause 3, this amendment was put on the supplementary notice paper because it was consistent with the practice of parliamentary counsel in the fortieth Parliament, certainly towards the end of the fortieth Parliament, to have these out-of-session tabling provisions. Is that still the practice of parliamentary counsel; and, if not, why not?

Hon MATTHEW SWINBOURN: It is not its routine practice but it will consider it on a bill-by-bill basis.

Hon NICK GOIRAN: I find that extraordinary. The provision we are talking about is whether the house of Parliament is sitting or not during the period of 21 days after finalisation of the report. It is trying to deal with situations in which these reviews might be required to be done during long winter recesses or long summer recesses. Parliamentary Counsel's Office cannot possibly have a crystal ball and know, in each and every instance, whether or not that period will occur when Parliament is in session. It is either an important provision or it is not. I do not think it can be a case of, "We'll see on a case-by-case basis." This troubles me more than it did before. I understood that the provision was unnecessary; that practices already exist that allow for such reports to be provided to the Clerk. That was the point I raised in the fortieth Parliament. I was told at the time, "No; PCO has decided this is the new way." I was told it was the new way of drafting statutory review clauses. Up until a few moments ago, we were told that is no longer the case; now we are told it will be on a case-by-case basis. Why is it that in this instance it is not considered appropriate?

Hon MATTHEW SWINBOURN: I can only really speak about this particular instance. The rationale is that under clause 44 the minister has 12 months within which to prepare and table the review report. This should give ample time for tabling the report when Parliament is sitting. Tabling out-of-session provisions such as those proposed are only appropriate—this is the rationale I have been given—when a short time frame is allowed for tabling and tabling on a non-sitting day in order to meet that time frame is a matter of public importance. In this particular instance, it is viewed that the prorogation of Parliament or anything of that nature, or out of session, would be no longer than 12 months.

Hon NICK GOIRAN: I will finish on this point, parliamentary secretary. On this issue, there is gross inconsistency inside the Parliamentary Counsel's Office. If we look at the family violence legislation we dealt with in the last Parliament, we will see that there was insistence by the government at the time that this type of provision needed to be in the legislation. Yet, it was exactly the same insofar as there was a 12-month period for the minister to conduct the review and table the report. The rationale provided moments ago was apparently not the rationale in the fortieth Parliament. Now we are told it will be done on a case-by-case basis. I do not want to labour this point any further. I will simply say for the benefit of government—otherwise, we will have groundhog day for the entire forty-first Parliament when we look at statutory review clauses in every single bill—that it would be good if someone spoke to the PCO people and said to them, "For the sake of the forty-first Parliament, how will statutory review clauses be tabled, and in what circumstances will the out-of-session tabling provisions be used?" That could be a memorandum that could be circulated to members of Parliament for all our benefit, so that we know whether it is necessary to pursue these issues.

I offer that as some advice to facilitate the passage of future bills so we do not end up in this situation. At the moment, we find ourselves in a situation of inconsistency. That said, I will not move the amendment standing in my name in the hope that somebody in government will take up this advice and provide a memorandum to members sometime in the next few weeks.

Clause put and passed.

Clauses 45 to 64 put and passed.

Title put and passed.

Report

Bill reported, without amendment, and the report adopted.

Third Reading

Bill read a third time, on motion by **Hon Matthew Swinbourn (Parliamentary Secretary)**, and passed.