

EXPLANATORY MEMORANDUM

Legal Deposit Bill 2011

OVERVIEW

The purpose of the Legal Deposit Bill is to facilitate the preservation of the State's published documentary heritage for current and future generations by requiring the deposit with the State Librarian of copies of certain published material as well as relevant material published on the Internet.

Legal deposit is a statutory provision that obliges publishers to provide copies of their publications to libraries in the country/state in which they are published. It was first implemented in 1537 in France and dates back to the seventeenth century in Britain. Legal deposit extends to commercial publishers, as well as private individuals and organisations.

In the past legal deposit applied only to printed materials but as the means by which information is disseminated has expanded, the scope of legal deposit has also expanded to include sound recordings, films and digital information, whether in a physical format or made available on the internet. The capture of digital information to record the State's history and culture is now critically important.

As legal deposit provisions are updated in various jurisdictions, the provision for the deposit of digital information is being included, most significantly for Western Australia this includes New Zealand, the United Kingdom and the Northern Territory.

Since the repeal of the *Copyright Act 1895* in 1994 and the *Newspaper Libel and Registration Act 1884* (s16) in 2005, there has been no legislative provisions for the legal deposits of State publications in Western Australia. Western Australia is the only Australian State or Territory that does not have legislation that requires legal deposit. At a National level, under section 201 of the *Copyright Act 1968*, a copy of any work published in Australia must be deposited with the National Library of Australia.

The key features of the *Legal Deposit Bill 2011* are:

- a) Requiring publishers to deposit with the State Librarian a copy of Western Australian public documents;
- b) Requiring publishers to deposit with the State Librarian, copies of Western Australian Internet documents;
- c) Providing for regulations for the administration of the legal deposit provisions.
- d) Making consequential provisions to the *Library Board of Western Australia Act 1951*.

Legal deposit excludes public records as defined by the *State Records Act 2000*, but includes published government information.

While the proposed amendments will provide for a penalty for non-compliance and the ability for the Library Board to pursue legal proceedings, the State Library's objective is to acquire relevant publications rather than to impose penalties. The State Library will selectively pursue publishers that fail to provide publications if such publications are of significant value to Western Australia's documentary heritage.

To allow publishers and members of the public time to prepare for its introduction, there will be a phased introduction with information provided to publishers about the provisions of the Act and consultation undertaken in developing the regulations.

CLAUSE NOTES

Outlined below is a brief description of each clause of the *Legal Deposit Bill 2011*.

Part 1 — Preliminary

This part contains the title of the Act, the relevant commencement provisions, the purpose of the Act, definitions of the terms used within the Bill and the statement which binds the Crown to the provisions of the Act.

Clause 1 — Short title

Clause 1 cites the short title of the Act.

Clause 2 — Commencement

This clause provides for the commencement of the Bill. Sections 1 and 2 come into operation on the day on which the Bill receives Royal Assent. The remainder of the Bill comes into effect on a day to be fixed by proclamation.

Different provisions will come into effect on different days. Because there has been previous legal deposit legislation and practices regarding the deposit of public documents (Part 2) are well established Australia-wide, this part will come into effect prior to Part 3 (Deposit of WA Internet documents).

Prior to commencement, extensive regulations will be drafted and adequate time will also be provided to ensure that publishers are prepared for the implementation of the legislative requirements.

Clause 3 — Purpose of the Act

Sub-clause (1) states the primary purpose of the Act which is to ensure that Western Australia's documentary heritage is preserved for current and future generations.

Sub-clause (2) explains the method by which this will be achieved:

- (a) requiring documents published in Western Australia to be deposited with the State Librarian; and
- (b) authorising the State Librarian to require certain documents published on the Internet to be deposited with the State Librarian.

Clause 4 — Terms used

Sub-clause (1) contains definitions of the terms used in the Act. The following are of particular significance.

Document means a document in any form and includes —

- (a) any writing on any material (for example books, periodicals, newspapers, magazines, reports, newsletters, calendars, handbooks, guidebooks, sheet music, maps, plans and pamphlets); and
- (b) information recorded, stored or communicated by means of an electronic recording device, computer or other electronic medium (for example, audio cassettes, video cassettes, multimedia kits, computer magnetic tapes, computer optical discs, floppy discs, compact discs, CD-ROMs and DVDs); and
- (c) information recorded or stored by means of any other kind of device or medium (for example, a film, microfilm, microfiche or vinyl record); and
- (d) information on a website.

This definition describes the various means by which the documentary heritage of the State may be published and, while examples are provided, it is designed to cover future means of storing information.

Public document

(a) means a document —

(i) that is printed or produced by any other means in the State or is commissioned to be printed or otherwise produced outside the State (including outside Australia) by a person who is resident in the State or whose principal place of business is in the State; and

(ii) of which one or more copies are published in the State; but

(b) does not include —

(i) a document on the Internet; or

(ii) a State record (as defined in the *State Records Act 2000* section 3(1)); or

(iii) a document, or a document belonging to a class of document, that is prescribed by the regulations not to be a public document;

This definition ties the public document to the State by means of the document being produced in the State or produced by a person within the State. This definition would include documents that are published by a person within the State but produced or printed outside the State.

For the purposes of this definition, documents on the Internet are separately defined in Clause 5, State records are defined in the State Records Act and by their nature are not published. There are classes of documents that by their prolific nature are not required to be covered by the Act and these will be prescribed in regulations.

Publish means —

(a) in relation to a document other than a document on the Internet, to make the document publicly available by —

- (i) issuing one or more copies of the document to the public; or
- (ii) making one or more copies of the document available to the public upon request;

or

(b) in relation to a document on the Internet, to make the document available to the public on the Internet, whether or not there is any restriction on members of the public acquiring, accessing or using the document.

This definition provides the distinction between published and unpublished documents for the purposes of this Bill. As has already been defined above, a State Record is not a public record, but other documents that are issued to the public by government either in print, sound, film or on the Internet are considered published public documents and should be deposited with the State Librarian.

The key criteria for this definition are that documents are made available to the public whether or not a cost is involved.

Publisher means —

(a) in relation to a document other than a document on the Internet, the person who publishes the document; or

(b) in relation to a document on the Internet, the person who has control over the content of the website, or the part of the website, on which the document is located;

For the purposes of this Act, the publisher is the person or body who arranges for a publication to be issued to the public and has the overall control of the content and format of the document.

Subclause (b) defines the publisher in relation to a website, as the person who has control over the intellectual content on the website as distinct from the technical control of the website such as a website administrator.

restriction, in relation to acquiring, accessing or using a document —

(a) means a physical, technical or mechanical restriction such as the requirement to pay a fee or price, or some other requirement such as the use of a password, which prevents or restricts free public access to the document;

but

(b) does not include a legal restriction recorded in or claimed for the document;

This definition identifies that some documents which are available to the public are only accessible to those who have paid a fee, have been issued a password or a piece of software to access the document. Many of these documents are important to the State's documentary history and are only unavailable to be accessed because of the use of technology to distribute them.

Subclause (2) states that if the document is a non-print document and is published in a format that uses a device to contain the information, the deposit of a copy of the document includes the deposit of that device or medium.

Clause 5 — Term used: WA Internet document

This clause defines a Western Australian Internet document as distinct from a public document which is published in some physical format. Much information about Western Australia and by Western Australians is currently made available in digital form on the internet and in no other form. This will increase in the future and it is important that these documents be preserved for the future.

Sub-clause (1) defines the geographical links that makes a document a Western Australian internet document. While a website may be hosted in any jurisdiction, to be a WA Internet document the person who controls the content must be resident in the State or have their principal place of business in the State.

There may be further clarification of a WA Internet document, and those classes of documents that are not considered WA Internet documents will be prescribed in regulations.

Sub-clause (2) recognises that internet documents, particularly websites, change over time and that the deposit of a document at one time may need to be repeated if there are significant changes.

Subclause (3) defines documents that are not considered WA Internet documents and these have been discussed at the definition of a publication and in Subclause (1).

Clause 6 — Crown bound

This clause binds the Crown to the provisions of this Act. Public documents published by the Western Australian Government and its agencies are covered by this Act.

Part 2 — Deposit of public documents with State Librarian

This part sets out the requirement for the deposit of public documents with the State Librarian that are in a physical format. It includes the number of copies to be deposited and the steps which the State Librarian may take if copies are not deposited. It also provides for the State Librarian to grant exemptions for certain persons or documents in regulations.

Clause 7 — Application of Part

Subclause (1) provides that the provisions of Part 2 relate to public documents that are published on or after the date on which this Part comes into operation and will be fixed by proclamation.

Subclause (2) recognises that some documents are published in a number of formats and this part will apply to those documents that are in a physical format, notwithstanding that it may also be published on the Internet.

Clause 8 — Copies of public documents to be given to State Librarian

This clause embodies the main requirement for this part which is the deposit of the prescribed number of copies of a public document as defined in clause 4 to the State Librarian.

Regulations will provide the detail for the deposit of these documents including the number of copies to be provided, the manner of delivery, the timeliness of the deposit and other matters. The specification for the deposit of up to two copies is so that for some classes of materials there is one copy that is kept as a preservation copy and one copy is made available for members of the public to access.

Clause 9 — Direction to comply with s.8

Subclause (1) states the action that the State Librarian may take if a public document is not deposited within the prescribed time-frame. It is anticipated that in the first instance this will be a communication informing the publisher of the requirements of the Act and asking that a copy be deposited. If a copy is not deposited within the required time-frame a directive may be issued. The

State Library already has extensive experience in the implementation of legal deposit provisions for physical documents.

Subclause (2) provides that the direction might be for a single document, a number of documents if the publisher is prolific, or different types of documents.

Subclause (3) states that the direction must be in writing to the publisher and signed by the State Librarian.

Subclause (4) provides more detail of the contents of the direction by the State Librarian including the specification of the public document or class of documents that the direction applies to and the time by which the publisher must respond. Regulations will provide more detail for directions.

Subclause (5) provides for penalties if a publisher does not comply with a direction. The State Library is primarily concerned with receiving the relevant documents so that they can be preserved for future generations and penalties would only be pursued for significant items after extensive negotiation failed.

Clause 10 — State Librarian may grant exemption from s. 8

This clause allows the State Librarian to exempt a specified person or class of persons from the provision of section 8 or the relevant regulations. This would occur if the nature of the publications produced were not required to be collected in their entirety.

Subsection (1) provides for the State Librarian to exempt a person or class of persons.

Subsection (2) allows conditions for such as exemptions.

Subsection (3) states that if the conditions for an exemption are not met by the publisher then the exemption is of no effect.

Subsection (4) states that an order under Subsection (1) is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

Part 3 — Deposit of WA Internet documents with State Librarian

This part sets out the requirement for the deposit of WA Internet documents with the State Librarian. It includes the number of copies to be deposited and the steps which the State Librarian may take if copies are not deposited. Provisions for the deposit of Internet documents were included in a separate part because of the different methods of deposit and to draw attention to the nature of the publications.

Clause 11 — Application of Part

This clause provides that the provisions of Part 3 relate to WA Internet documents that are published on or after the date on which this Part comes into operation and will be fixed by proclamation. It applies to documents that are published on the Internet, notwithstanding that they may also be published in a physical format (Covered in Part 2).

Clause 12 — Publishers to provide location of WA Internet documents to State Librarian

Subclause (1) requires the publisher of a WA Internet document (as defined in section 5) to inform the State Librarian of the Internet location of that document or documents (e.g. the URL or URI) within 30 days of it being published. This will allow staff from the State Library to assess the value to the heritage collections of that document.

Subclause (2) states that it is not an offence under the *Criminal Code* section 177 if this action is not undertaken. While the State Librarian wishes to be informed of new WA Internet documents there is recognition that failure to do so by the many people who publish on the Internet is not an offence.

Clause 13 — Direction to give WA Internet documents to State Librarian

Subclause (1) provides the State Librarian with the authority to direct the publishers of WA Internet documents to provide a specified number of copies of a document(s) (not exceeding 3) to the State Librarian.

Treating WA internet documents in the same manner as documents published in a physical form is due to the restrictions of the Commonwealth *Copyright Act 1968*, which does not allow the State Librarian to copy documents directly from the Internet without the copyright holder's permission.

One way in which a publisher may comply with this clause is to provide the State Librarian with the permission to make copies of WA Internet documents. The State Library has worked with publishers for many years to voluntarily collect and make available Internet documents through the National Library of Australia's Pandora site.

The number of copies is specified as not exceeding 3 so that if required, derivatives of these documents can be made to provide access (e.g. a thumbnail copy, a preservation copy and an access copy).

Subclause (2) provides that the direction might be for a single Internet document (e.g. a report), a number of Internet documents (e.g. stories, poems or issues of an e-journal), or different classes of Internet documents (e.g. documents and websites).

Subclause (3) refers to the fact that some Internet documents are not static documents and the publisher may be required to provide the State Librarian with copies, or authorise the State Librarian to make copies of Internet documents at intervals if there are substantial changes.

Subclause (4) provides the publisher with assurance that the work involved in providing copies of WA Internet documents to the State Librarian should not be unreasonable.

Subclause (5) states that the direction must be in writing to the publisher and signed by the State Librarian.

Subclause (6) states that the State Librarian must specify the particular Internet documents required under the direction or the class of documents the direction refers to. For an Internet document this would be the location of the document on the Internet. Regulations will provide more detail for directions.

Subclause (7) provides for penalties if a publisher does not comply with a direction. The State Library is primarily concerned with receiving the relevant documents so that they can be preserved for future generations and penalties would only be pursued for significant items after extensive negotiation failed.

Subclause (8) sets out the means by which a publisher can comply with the direction. This includes authorizing the State Librarian to make copies of the WA Internet document to which the direction applies or by providing the State Librarian with the means to make a copy if there is a restriction on the document.

Part 4 — Legal proceedings

This part authorises civil action to be undertaken to obtain copies of public documents and / or WA Internet documents if a publisher does not follow a direction, or if a publisher fails to provide reasonable assistance in respect of a non-print public document or a WA Internet document. As has been stated previously, the State Library of Western Australia is primarily concerned with obtaining the relevant documents so that they can be preserved for future generations. Legal proceedings would be pursued as a last resort for significant items after extensive negotiation failed.

Clause 14 — Civil action to obtain copies of public documents

Subclause (1) authorises the Library Board of Western Australia to take civil action in the District Court for an order if a publisher fails to comply with a direction from the State Librarian to provide copies under the relevant sections of the Act. This order may be for the publisher to provide the copies that should have been provided, or the reasonable costs incurred by the State Librarian to obtain copies.

Subclause (2) authorises the Court to make such an order if they are satisfied that the publisher failed to follow the State Librarian's direction to provide copies without a reasonable excuse.

Subclause (3) provides for the Court to set terms and conditions on the order.

Subclause (4) provides for enforcement of the order.

Subclause (5) provides that a court order under this section does not affect the liability of a publisher for the penalties specified in previous sections.

Clause 15 — Civil action to require publishers to provide assistance to State Librarian

Subclause (1) authorises the Library Board of Western Australia to take civil action in the District Court for an order to provide the required assistance if a publisher fails to comply with a direction from the State Librarian to provide assistance in respect of a non-print or WA Internet document.

Subclause (2) authorises the Court to make such an order if they are satisfied that the publisher failed to follow the State Librarian's direction to provide assistance without a reasonable excuse.

Subclause (3) provides for the Court to set terms and conditions on the order.

Subclause (4) provides for enforcement of the order.

Subclause (5) provides that a court order under this section does not affect the liability of a publisher for the penalties in sections 18(6).

Clause 16 — Who may commence criminal proceedings

The Library Board of Western Australia is the body corporate under section 7 of the *Library Board of Western Australia Act 1951* and under this section has the power to sue and be sued. The Board has management responsibility for the State Library of Western Australia and delegates to the State Librarian the operational management of the Library.

Clause 17 — Other powers of court in criminal proceedings

Subsection (1) authorises the Court to direct a person convicted of not complying with a direction in respect to a public document or a WA Internet document, to give to the State Librarian the documents in question, or to order the offender to pay to the Board reasonable costs incurred in obtaining the documents.

Subsection (2) authorises the Court to direct a person convicted of not complying with a direction to provide reasonable assistance in respect to a non-print public document or a WA Internet document, to provide the State Librarian with the required assistance.

Subsection (3) details other powers of the Court in respect to this Act.

Part 5 — General

This part details the assistance publishers may be required to provide to the State Librarian in order to preserve and access certain documents due to the use of technology to restrict access.

It also outlines the regulations that will be developed to implement the provisions of this Act and the requirement for consultation on the development of those regulations.

Clause 18 — Publishers to assist State Librarian to preserve and access deposited copies of certain documents

Subclause (1) defines the scope of this clause which is for non-print public documents and WA Internet documents. These forms of documents use technology to store information and some of those documents may have restrictions in place to access the information.

Subclause (2) provides the State Librarian with the authority to direct publishers to provide reasonable assistance to preserve and access these documents.

Subclause (3) states that this direction might be for one or more specified documents or different classes of documents.

Subclause (4) states that the direction must be in writing and signed by the State Librarian.

Subclause (5) specifies the matters to be included in a direction.

Subclause (6) provides for penalties if the publisher does not comply with the direction.

Subclause (7) allows regulations to be made that identify circumstances where a computer program may need to be supplied in order for the State Librarian to preserve and access copies of the document.

Clause 19 — Regulations

Subclause (1) provides for the Governor to make regulations for the purposes of the Act.

Subclause (2) provides that regulations made under subsection (1) may:

- a) prescribe the number of copies of a public document to be provided to the State Librarian;
- b) specify the period within which copies must be provided;
- c) provide for the manner in which copies must be given;
- d) provide the circumstances where reprints or subsequent editions are not required;
- e) specify the standard of the copy to be provided;
- f) specify requirements in relation to the format of the copies given;

- g) determining the medium in which a document must be supplied if it is published in more than one medium;
- h) specify what accompanying materials must be supplied; and
- i) provide for the issuing of a receipt.

Subclause (3) provides that regulations may be made regarding the use of or access to documents acquired under this Act including providing for limitations for use.

Subclause (4) allows regulations to be made on matters not detailed in this section.

Clause 20 — Regulations: consultation

Subclause (1) provides for consultation with persons likely to be affected by the regulations prior to the regulations being made.

Subclause (2) ensures that consultation will be appropriate in regard to the number of persons affected by the regulations.

Part 6 — Consequential amendments to *Library Board of Western Australia Act 1951*

This part lists the sections of the *Library Board of Western Australia Act 1951* that require amendment this Act.

Clause 21 — Act amended

This clause states that there are amendments to the *Library Board of Western Australia Act 1951*.

Clause 22 — Section 12 amended

This clause amends the section on the “Power of an officer to represent the Board” by adding the ability of an officer to represent the board at proceedings under this Act.

Clause 23 — Section 13 amended

This clause amends the section on “Proof of matters not required” by including the provisions of this Act.

Clause 24 — Section 15 amended

This clause amends the section on “Functions and powers of the Board” by including functions conferred under this Act.

Clause 25 — Section 16 amended

This clause amends the section on “Financial provisions” by including this Act to the purposes for which funds may be used.