

First Supplement to Memorandum 2019-38

California Public Records Act Clean-Up: Conforming Revisions

As reported in Memorandum 2019-38,¹ special approval requirements might apply to the conforming revisions of the following provisions:

- (1) Health and Safety Code Sections 125290.30 and 125290.50.
- (2) Welfare and Institutions Code Section 14165.

Those matters are discussed below, as well as a few typographical corrections.

HEALTH AND SAFETY CODE SECTIONS 125290.30 AND 125290.50

Health and Safety Code Sections 125290.30 and 125290.50 each contain a cross-reference to the California Public Records Act (“CPRA”),² which would become incorrect if the Commission’s proposed CPRA recodification is enacted and becomes operative. Thus, the staff draft tentative recommendation presented in Memorandum 2019-38 (hereafter, the “CPRA Conforming Revisions Staff Draft TR”) includes a conforming revision of each of those sections. The conforming revision of Health and Safety Code Section 125290.50 would just update the CPRA reference. The conforming revision of Health and Safety Code Section 125290.30 would update the CPRA reference and make a few other technical changes (deletion of the disfavored word “such”; replacement of “which” with “that” in several places).

Both of these sections were added to the codes in 2004 by an initiative measure, the California Stem Cell Research and Cures Act.³ Under the California Constitution, the Legislature “may amend ... an initiative statute by another statute that becomes effective only when approved by the electors *unless* the initiative statute permits amendment ... without their approval.”⁴ Put differently, the Legislature “may not amend an initiative statute without subsequent voter approval unless the initiative permits such amendment, ‘and

1. See 2018 Cal. Stat. res. ch. 158 (SCR 91 (Roth & Chau)).

2. Gov’t Code §§ 6250-6276.48.

3. Prop. 71, approved Nov. 2, 2004, § 5.

4. Cal. Const. art. II, § 10(c) (emphasis added).

then only upon whatever conditions the voters attached to the Legislature's amendatory powers.'"⁵

In the California Stem Cell Research and Cures Act, the voters imposed the following conditions regarding amendment:

The statutory provisions of this measure, except the bond provisions, may be amended *to enhance the ability of the institute to further the purposes of the grant and loan programs created by the measure*, by a bill introduced and passed no earlier than the third full calendar year following adoption, *by 70 percent of the membership of both houses* of the Legislature and signed by the Governor, provided that at least 14 days prior to passage in each house, copies of the bill in final form shall be made available by the clerk of each house to the public and news media.⁶

Any proposal to "amend" Health and Safety Code Sections 125290.30 and 125290.50 within the meaning of the above-quoted paragraph would have to satisfy these strict approval requirements.

Importantly, however, merely updating the CPRA cross-reference in each of those sections might not constitute "amending" those sections in a manner that triggers the special approval requirements. Such revisions would be purely technical, not substantive in nature.

As yet, the staff has not found a case or other authority expressly stating that the Legislature may make a purely technical, nonsubstantive revision of a code section added by an initiative measure without satisfying special approval requirements. That is perhaps unsurprising, because litigation on this point seems unlikely.

There are, however, a number of cases in slightly different contexts that support such an interpretation. For example, in *People v. Superior Court (Pearson)*,⁷ the California Supreme Court held that a Penal Code section allowing postconviction discovery (Penal Code Section 1054.9) was not an "amendment" of an initiative measure relating to pretrial discovery, and thus was not subject to a two-thirds vote requirement. In so doing, the Court said that an "amendment" is "'a legislative act designed to change an existing initiative statute by adding or

5. *People v. Superior Court (Pearson)*, 48 Cal. 4th 564, 568, 227 P.3d 858, 107 Cal. Rptr. 3d 265 (2010), *quoting* Proposition 103 Enforcement Project v. Quackenbush, 64 Cal. App. 4th 1473, 1483-84, 76 Cal. Rptr. 2d 342 (1998).

6. Prop. 71, approved Nov. 2, 2004, § 8 (emphasis added). In 2010, Health and Safety Code Sections 125290.30 and 125290.50 were substantively amended, in compliance with the special approval requirements quoted in the text. See 2010 Cal. Stat. ch. 637, §§ 3, 5 (SB 1064 (Alquist)).

7. 48 Cal. 4th 564, 568, 227 P.3d 858, 107 Cal. Rptr. 3d 265 (2010).

taking from it some particular provision.”⁸ The Court further explained that in deciding whether a particular provision amends an initiative statute, “we simply need to ask *whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits.*”⁹

Under that test, a purely technical, nonsubstantive revision of a code section added by an initiative measure would not seem to constitute an “amendment” of the initiative measure. The revision would not result in a substantive change, and thus would not “prohibi[t] what the initiative authorizes, or authoriz[e] what the initiative prohibits.”

Other cases, arising in contexts similar to the one in *People v. Superior Court (Pearson)*, also focus on the substantive impact of a reform in determining whether it constitutes an “amendment” of an initiative and is thus subject to special approval requirements.¹⁰ In *People v. Kelly*, for example, the California Supreme Court observed that “[t]he purpose of California’s constitutional limitation on the Legislature’s power to amend initiative statutes is to protect the people’s initiative powers by *precluding the Legislature from undoing what the people have done, without the electorate’s consent.*”¹¹ A purely technical, nonsubstantive revision (replacing an outdated CPRA cross-reference with an updated cross-reference to the same body of law) would not “undo” an initiative measure in any respect of importance to the electorate, and thus would not seem to warrant, or be subject to, any special approval requirements.

In light of such authorities, **one possibility would be to include the following Note immediately after the conforming revision of Health and Safety Code Section 125290.30:**

Note. Section 125290.30 was added to the codes in 2004 by an initiative measure, the California Stem Cell Research and Cures Act (Prop. 71, approved Nov. 2, 2004, § 5.) The California Constitution limits the Legislature’s ability to “amend” such a statute. See Cal.

8. *Id.* at 571, quoting *People v. Cooper*, 27 Cal. 4th 38, 44, 37 P.3d 403, 115 Cal. Rptr. 2d 219 (2002).

9. *People v. Superior Court (Pearson)*, 48 Cal. 4th at 571 (emphasis added).

10. See, e.g., *Brown v. Superior Court*, 63 Cal. 4th 335, 354, 371 P.3d 223, 203 Cal. Rptr. 3d 1 (2016) (with respect to Legislature’s power to “amend” initiative statute, “amendment” is any change of scope or effect of existing statute); *Greene v. Marin County Flood Control & Water Conservation Dist.*, 49 Cal. 4th 277, 291 n.4, 231 P.3d 350, 109 Cal. Rptr. 3d 620 (2010) (Gov’t Code § 53753 does not “significantly burden or undermine any article XIII D authorization or prohibition. Therefore, it does not constitute an improper legislative amendment of an initiative.”).

11. 47 Cal. 4th 1008, 1025, 222 P.3d 186, 103 Cal. Rptr. 3d 733 (2010) (emphasis added; internal quotation marks omitted).

Const. art. II, § 10; see also Prop. 71, approved Nov. 2, 2004, § 8 (specifying special requirements for “amending” Prop. 71).

In this context, the term “amend” does not appear to include a purely technical, nonsubstantive revision like the one proposed above. See, e.g., *People v. Kelly*, 47 Cal. 4th 1008, 1025, 222 P.3d 186, 103 Cal. Rptr. 3d 733 (2010) (purpose of California’s constitutional limitation on legislative power to amend initiative statute is to protect initiative powers of public by precluding Legislature from undoing what public has done, without electorate’s consent.”); *People v. Superior Court (Pearson)*, 48 Cal. 4th 564, 571, 568, 227 P.3d 858, 107 Cal. Rptr. 3d 265 (2010) (in deciding whether particular provision amends initiative statute, “we simply need to ask whether it prohibits what the initiative authorizes, or authorizes what the initiative prohibits”).

The Commission thus believes that its proposed technical revision of Section 125290.30 (shown above) would not be subject to any special voting requirements.

The Commission welcomes input on any aspect of this tentative recommendation, but it would especially appreciate public comment on this matter.

A similar Note could be inserted immediately after the conforming revision of Health and Safety Code Section 125290.50. The Commission recently took such an approach in its proposed recodification of the Fish and Game Code.¹²

Another possibility would be to simply delete the conforming revisions of Health and Safety Code Sections 125290.30 and 125290.50 from the Commission’s proposal. That would eliminate any possibility that they would trigger a special voting requirement for the bill that will contain those revisions.

How would the Commission like to handle this matter?

If the Commission decides to go forward with conforming revisions of Health and Safety Code Sections 125290.30 and 125290.50, it might be safest just to update the CPRA cross-references in those provisions, without making any other technical revisions (like eliminating “such” or replacing “which” with “that” in Section 125290.30). **Does the Commission want to follow that approach?**

WELFARE AND INSTITUTIONS CODE SECTION 14165

Welfare and Institutions Code Section 14165 is another provision in the CPRA Conforming Revisions Staff Draft TR that might be subject to special amendment

12. See Tentative Recommendation on *Fish and Wildlife Code: Conforming Revisions* (Feb. 2019), pp. 2, 3, 5, 106, 146, 204-07, 275.

procedures. That section is part of the Medi-Cal Hospital Reimbursement Improvement Act of 2013.¹³

Under Section 3.5 of Article XVI of the California Constitution,

No statute amending or adding to the provisions of the Medi-Cal Hospital Reimbursement Improvement Act of 2013 shall become effective unless approved by the electors in the same manner as statutes amending initiative statutes pursuant to subdivision (c) of Section 10 of Article II, except that the Legislature may, by statute passed in each house by roll call vote entered into the journal, two-thirds of the membership concurring, amend or add provisions that further the purposes of the act.

The staff is not sure what the term “amending” means in this context. Importantly, the same constitutional provision defines “nonsubstantive amendments” to mean “minor, technical, grammatical, or clarifying amendments.”¹⁴ But it does not say whether “nonsubstantive amendments” of the Medi-Cal Hospital Reimbursement Improvement Act of 2013 are subject to the special vote requirements shown above. Rather, it says that the term “act” includes “the Medi-Cal Hospital Reimbursement Improvement Act of 2013 (enacted by Senate Bill 239 of the 2013-14 Regular Session of the Legislature, *and any nonsubstantive amendments to the act enacted by a later bill in the same session of the Legislature*).”¹⁵ The constitutional provision goes on to define what constitute “provisions that further the purposes of *the act*.”¹⁶ It also specifies rules for repealing “the act.”¹⁷

The constitutional provision thus recognizes the existence of “minor, technical, grammatical, or clarifying amendments,” yet it fails to expressly exclude all such revisions from its special vote requirements. In fact, its definition of “nonsubstantive amendments” arguably implies that only nonsubstantive amendments made in the 2013-14 Regular Session of the Legislature are excluded from those requirements.

Given this situation, the staff’s conforming revision of Welfare and Institutions Code Section 14165 might trigger the two-thirds vote requirement and other special approval rules set forth in Section 3.5 of Article XVI of the California Constitution. It is also possible that those special voting requirements

13. See 2013 Cal. Stat. ch. 657, § 2 (SB 239 (Hernandez & Steinberg)).

14. Cal. Const. art. XVI, § 3.5(b)(2).

15. Cal. Const. art. XVI, § 3.5(b)(1).

16. Cal. Const. art. XVI, § 3.5(b)(3) (emphasis added).

17. Cal. Const. art. XVI, § 3.5(c).

will be deemed to apply to the entire bill that contains the CPRA conforming revisions.

Under these circumstances, it might be best to omit the conforming revision of Welfare and Institutions Code Section 14165 from the Commission's proposal.

Is that approach acceptable to the Commission?

TYPOGRAPHICAL CORRECTIONS

The staff spotted the following mistakes in the CPRA Conforming Revisions Staff Draft TR:

- There are no line numbers in the proposed legislation.
- Footnote 10 incorrectly refers to Government Code Section 6200, instead of Government Code Section 62001.
- The pagination needs adjustment.

We will fix these problems before finalizing a tentative recommendation. If you are aware of any additional problems of this nature, please bring them to the staff's attention.

Respectfully submitted,

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