



THIRTY-EIGHTH PARLIAMENT

REPORT 78

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

**CLASSIFICATION (PUBLICATIONS, FILMS AND
COMPUTER GAMES) ENFORCEMENT
AMENDMENT BILL 2012**

Presented by Hon Adele Farina MLC (Chairman)

November 2012

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“5. Uniform Legislation and Statutes Review Committee

5.1 A *Uniform Legislation and Statutes Review Committee* is established.

5.2 The Committee consists of 4 Members.

5.3 The functions of the Committee are –

- (a) to consider and report on Bills referred under Standing Order 126;
- (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
- (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
- (d) to review the form and content of the statute book; and
- (e) to consider and report on any matter referred by the Council.

5.4 In relation to function 5.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill, proposal or agreement may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

Members as at the time of this inquiry:

Hon Adele Farina MLC (Chairman)

Hon Donna Faragher MLC (Deputy Chairman)
(did not participate due to leave being granted)

Hon Robin Chapple MLC

Hon Nick Goiran MLC

Staff as at the time of this inquiry:

Irina Lobeto-Ortega (Advisory Officer (Legal))

Pamela Pohe (Committee Clerk)

Kimberley Ould (Advisory Officer (Legal))

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222

lcco@parliament.wa.gov.au | Website: <http://www.parliament.wa.gov.au/uni>

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LIST OF ABBREVIATIONS AND DEFINED TERMS

ALRC	Australian Law Reform Commission
Bill	<i>Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012</i>
Classification categories	G General PG Parental Guidance M Mature MA 15+ Mature Accompanied R 18+ Restricted RC Refused Classification
Code	<i>National Classification Code, Schedule to the Classification (Publications, Films and Computer Games) Act 1995 (Cth)</i>
Commonwealth Classification Act	<i>Classification (Publications, Films and Computer Games) Act 1995</i>
Guidelines	<i>Guidelines for the Classification of Films and Computer Games (as published in the Commonwealth Gazette)</i>
IGA	Intergovernmental Agreement dated 28 November 1995
NCCS	National Co-operative Classification Scheme
Regulations	<i>Censorship Regulations 1996</i>
SCAG	Standing Committee of Attorneys-General
Senate Committee	Commonwealth Senate, Legal and Constitutional Affairs Legislation Committee
Senate Committee Report	Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012 [Provisions] report (tabled on 22 March 2012)
WA Enforcement Act	<i>Classification (Publications, Films and Computer Games) Enforcement Act 1996</i>

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS OF THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW
IN RELATION TO THE
CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT
AMENDMENT BILL 2012

EXECUTIVE SUMMARY

- 1 The *Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012* “the Bill” forms part of a uniform national scheme, the National Co-operative Classification Scheme, which deals with the classification of publications, films and computer games. The Bill provides for the enforcement of classifications in this State.
- 2 The Committee has inquired into the Bill and considered issues of Parliamentary sovereignty and law-making power.
- 3 The *Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012* (Cth), assented to on 6 July 2012, provides for a new R 18+ classification for computer games, effective 1 January 2013.
- 4 The creation of this new classification of computer games necessitates that Western Australia amend the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* to provide for the enforcement of the new classification.
- 5 If enforcement legislation is not in place when the Commonwealth’s legislation commences on 1 January 2013, minors in Western Australia will be able to access R 18+ computer games. The potential detrimental effect on children is of significant concern and should not be ignored.

FINDINGS AND RECOMMENDATIONS

- 6 Recommendations are grouped as they appear in the text at the page number indicated:

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Finding 1: The Committee finds that the consequence of this Bill not being passed, assented and proclaimed by 1 January 2013 is that R 18+ computer games will be able to be purchased by minors.

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Finding 2: The Committee finds that current clause 2(b) has the effect of delegating the sovereignty and law-making power of the Parliament to the Executive in circumstances where Commonwealth legislation will have a material effect on the laws of Western Australia from 1 January 2013.

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Recommendation 1: The Committee recommends that clause 2(b) of the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012 be amended to provide certainty with respect to the commencement of the Act. This may be effected in the following manner:

Page 2, lines 6 to 9 – To delete the lines and insert:

- (a) sections 1 and 2 come into operation on the day on which this Act receives the Royal Assent (*assent day*);
- (b) the rest of the Act –
 - (i) comes into operation on 1 January 2013 if assent day is not later than that day; or
 - (ii) is deemed to have come into operation on 1 January 2013 if assent day is later than that day.

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Recommendation 2: The Committee recommends that the Attorney General explain to the Legislative Council why different penalties apply in different States and Territories which is inconsistent with the stated aim of the NCCS to make censorship laws more uniform.

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Recommendation 3: The Committee recommends that the Attorney General clarify to the Legislative Council the reason for the 12 month and 90 day time periods specified in clause 15 of the Bill and the reason for the inclusion of this clause in the Bill, given its lack of uniformity with other States and Territories.

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Finding 3: The Committee finds that some material currently within the scope of the RC category will be classified as R 18+ from 1 January 2013, in that item 4.1(d) of the Code will form the R 18+ category from that date.

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Finding 4: The Committee finds that the statement in the Second Reading Speech for the Bill that “*RC material will not be included in the proposed R 18+ classification*” is misleading as to the effect and application of the new R 18+ category.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES
REVIEW**

IN RELATION TO THE

**CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER GAMES) ENFORCEMENT
AMENDMENT BILL 2012**

1 REFERENCE

- 1.1 On 19 September 2012, the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012 (**Bill**) was referred to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**).¹
- 1.2 The Bill amends 11 sections of the *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA Enforcement Act)* and inserts a transitional provision, to give effect to the Commonwealth's new R 18+ classification for computer games in Western Australia.
- 1.3 The inquiry was advertised in *The West Australian* on Saturday 22 September 2012. The Committee also invited submissions from the Commissioner for Children and Young People WA and a total of two submissions were received by the closing date. Eight submissions were received after the closing date and could not be considered by the Committee. Stakeholder and submission details are listed at **Appendix 1**.
- 1.4 The Committee considered the Bill at public hearings held in Perth on 15 October 2012. The submissions and transcripts of evidence may be accessed through the Committee's website at <http://www.parliament.wa.gov.au/uni>.

2 CLASSIFICATION IN WESTERN AUSTRALIA

The National Censorship Scheme

- 2.1 On 28 November 1995, Western Australia became a party to an intergovernmental agreement (**IGA**) between the Commonwealth and all States and Territories relating to censorship in Australia.² The IGA introduced the "National Co-operative

¹ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 September 2012, p6117a.

² The full title of the agreement signed on 28 November 1995 is the *Agreement between the Commonwealth of Australia, the State of New South Wales, the State of Victoria, the State of Queensland, the State of Western Australia, the State of South Australia, the State of Tasmania, the Australian Capital Territory and the Northern Territory of Australia*.

Classification Scheme” (NCCS) which deals with the classification of publications³, films and computer games.

2.2 According to the recitals to the NCCS, the aim of the scheme is to:

*make, on a co-operative basis, Australia’s censorship laws more uniform and simple with consequential benefits to the public and the industry.*⁴

2.3 Under the NCCS, the Commonwealth is responsible for classification of publications, films and computer games in accordance with the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* (**Commonwealth Classification Act**), the National Classification Code (**Code**) (a Schedule to the Commonwealth Classification Act) and the Guidelines for the Classification of Publications, Films and Computer Games (**Guidelines**).

2.4 In 1995 when the scheme was established, Western Australia and Tasmania opted not to fully participate in the NCCS, by retaining the classification of publications. In 2002, however, Western Australia became a full participant in the scheme, although the Agreement was not amended to reflect this.

2.5 Part III of the NCCS requires each participating State to enact legislation to enforce the decisions made by the Commonwealth Classification Board and the Classification Review Board.

2.6 Under the NCCS, the Standing Committee of Attorneys-General (**SCAG**) may amend the Code or Guidelines at any time in accordance with the procedures set out in Part VI of the IGA. The NCCS procedures do not provide for scrutiny of amendment to the Code or Guidelines by the Commonwealth, State or Territory Parliaments. Accordingly, this means that the nation’s Attorneys-General can amend the classification categories at any time, with no reference to the Western Australian Parliament.⁵

³ “Publication” is defined in section 4 of the *Classification (Publications, Films and Computer Games) Act 1995 (Cth)* as any written or pictorial matter, but expressly excludes films, computer games and all advertisements.

⁴ NCCS, p1.

⁵ Refer to sections 6 and 12 of the *Classification (Publications, Films and Computer Games) Act 1995* and clause 9(a) of the NCCS. Clause 9(d) of the NCCS provides that the Attorney General must table the amended Code or amended Guidelines in the Parliament within 30 sitting days after gazettal.

- 2.7 The Committee notes that at the time the Legislative Assembly's Standing Committee on Uniform Legislation and Intergovernmental Agreements first inquired into Western Australia's participation in the NCCS, the IGA had not yet been signed.⁶

Western Australia's censorship legislation framework

- 2.8 Western Australia had been operating its own State-based classification regime since 1973 when the NCCS came into operation in 1995.⁷ In a continuation of this approach, the *Censorship Act 1996* provided that Western Australia would not adopt decisions made under the Commonwealth's classification legislation, but rather that the Commonwealth Classification Board (formerly the Censorship Board) would make its decisions under Western Australian legislation.⁸
- 2.9 Until it became a full member of the NCCS through the operation of the *Censorship Amendment Act 2002*, Western Australia had also retained classification of publications and the ability to vary or set aside classification decisions made by the Classification Board in relation to computer games and films (essentially a classification *veto* power).⁹ The amendment of the *Censorship Act 1996* in 2002 resulted in the State referring the power to classify publications to the Commonwealth whilst abolishing the Censorship Advisory Committee and the Minister's *veto* power.¹⁰
- 2.10 Since 2002, Western Australia has fully participated in the NCCS by referring the power to make laws relating to the classification of films, computer games and publications to the Commonwealth. This referral therefore extends to any subsequent amendments made to the Commonwealth legislation while Western Australia remains a party to the NCCS.

⁶ Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 11, *Consideration of the Western Australian Censorship Bill*, 28 November 1995, p1.

⁷ Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 June 2002, p11896. Publications were historically classified by the State Minister, acting on the advice of Western Australia's Censorship Advisory Committee, established under section 118 of the *Censorship Act 1996*.

⁸ The *Censorship Bill 1995* was the product of two agreements relating to classifications and censorship: the NCCS and a separate agreement between the Commonwealth and the State, which enabled the appointment of the Commonwealth censor as the State's decision maker: Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, Report 11, *Consideration of the Western Australian Censorship Bill*, 28 November 1995, p1.

⁹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, Report 3, *Censorship Amendment Bill 2002*, 17 October 2002, p5.

¹⁰ Hon Kim Chance MLC, Leader of the House, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 25 June 2002, pp11896-11897: "there is no longer any reason for Western Australia to maintain a separate classification regime for publications. Indeed, as I have indicated, there are sound reasons for Western Australia to fully participate in the national cooperative censorship scheme ... The Western Australian Government has confidence in ... the national cooperative scheme."

- 2.11 The WA Enforcement Act, which came into operation on 10 October 1996, is the principal legislation which supports the Commonwealth Classification Act and classification regime in Western Australia.

Introduction of R 18+ classification category

- 2.12 The *Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012* (Cth), proposing amendments to the Commonwealth Classification Act to introduce an R 18+ classification category for computer games, passed both Houses on 18 June 2012 and was assented to on 6 July 2012 to commence on 1 January 2013.
- 2.13 The Bill under consideration amends the WA Enforcement Act to bring it in line with amendments to the Commonwealth Classification Act.

Scope of Parliamentary sovereignty and law-making power in relation to enforcement

- 2.14 In 1995, when Western Australia entered into the NCCS and referred power to classify computer games to the Commonwealth, there was no R 18+ classification for computer games and no indication that such a classification would be created in the future. As a result of the NCCS, the Standing Committee on Law and Justice (formerly SCAG) has the power to agree to the creation of new classification categories, and such decisions are not subject to scrutiny by the Commonwealth, State or Territory Parliaments. This impacts the Western Australian Parliament's sovereignty and law-making power.
- 2.15 Under the NCCS, the Parliament of Western Australia (and all other States and Territories) retains the authority to exercise its law-making power as it wishes with regard to the enforcement of R 18+ classified computer games. This authority includes the power to prohibit or restrict the sale, supply or demonstration of this category of computer games.
- 2.16 As previously stated, the Commonwealth has passed legislation which will introduce an R 18+ classification for computer games effective 1 January 2013 regardless of what Western Australia does in relation to enforcement of the new classification category.
- 2.17 Importantly, if the Western Australian Parliament does not pass enforcement legislation (either to prohibit or restrict) with effect from 1 January 2013, the consequence will be that R 18+ computer games will be available for purchase by minors in this State by virtue of our enforcement laws remaining silent with respect to this new classification category of R 18+.
- 2.18 In relation to the scope of the Western Australian Parliament's law-making power, the Committee notes that the Western Australian Parliament (as with the Parliaments of

all other States) prohibits the sale, supply or demonstration of X 18+ classified films.¹¹ Enforcement legislation in the Northern Territory and Australian Capital Territory in contrast permits, on a restricted basis, the sale, supply and demonstration of X 18+ classified films.

- 2.19 The Committee has had regard to the comments of the former Attorney General, Hon Christian Porter MLA, in his submission to the Australian Law Reform Commission (ALRC) inquiry into the NCCS in 2011/12, that:

*a further suggested problem with the Co-operative Scheme is “anomalies in the treatment of media content between different states and territories, such as inconsistent laws relating to the sale and distribution of sexually explicit adult content”. Of course, in a federal system there will always be differences of view and room to accommodate those views in laws and regulations. This is especially necessary in censorship matters where local communities and States may, for very good reasons, have differing views on what classification levels ought to apply. An example of this is the permissible sale of X18+ rated films in the ACT and NT, but not in other jurisdictions.*¹²

- 2.20 In its submission to the Committee, Family Voice Australia proposed that:

it is open to Western Australia while remaining a fully participating State in the national classification scheme to prohibit the sale of the new R 18+ computer games

by inserting ‘or R 18+’ into the sections of the WA Enforcement Act which prohibit RC computer games.

- 2.21 The Committee notes, however, the policy decision of the Executive in this instance to restrict, as opposed to prohibit, the sale, supply and demonstration of R 18+ computer games.¹³

¹¹ In Western Australia, s 73 of the WA Enforcement Act.

¹² The full submission is attached to this report as **Appendix 2**.

¹³ The Second Reading Speech outlined the scope of the Bill as:

- *giving recognition to R 18+ computer games;*
- *prescribing various restrictions on the demonstration, display, sale or supply and advertising of R 18+ computer games; and*
- *prescribing offences and penalties, similar to those which apply to R 18+ films, which make it illegal to allow children to access adults-only computer games [Committee emphasis added], Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 September 2012.*

3 ISSUES RELATING TO PARLIAMENTARY SOVEREIGNTY, LAW-MAKING POWER AND UNIFORMITY IN THE BILL

Clause 2(b) – Commencement and proclamation

- 3.1 Clause 2(b) of the Bill provides for sections 1 and 2 to come into operation on the day on which it receives Royal Assent and for the rest “*on a day fixed by proclamation*”.
- 3.2 The Committee has previously considered the impact of similar commencement mechanisms on the Parliament’s sovereignty and law making power because at one extreme, commencement may never be proclaimed.

The proclamation method of commencement involves a Minister exercising the ultimate discretion, that is, whether or not to prepare a proclamation for consideration by the Executive.

The proclamation method means the Parliament gives the Executive discretion to indefinitely suspend the operation of laws passed by the Parliament. The Committee noted that where unfettered control is given to the Executive to decide the commencement of a particular Act, this can usurp the power that lies at the heart of the role of the Western Australian Parliament.¹⁴

- 3.3 The Department of the Attorney General advised that:

The reason for the proclamation commencement is to ensure flexibility, given that it is not known when the Bill will be passed by Parliament and assented to by the Governor.

If the Bill was to be enacted after 1 January 2013, a 1 January 2013 commencement date would suggest that the amendments have retrospective application. As the amendments relate to criminal offences, it is highly undesirable that they should apply retrospectively.

The proclamation commencement also ensures that consequential amendments to the regulations can be made before the Bill commences. As the amendments relate to criminal offences, it can be proclaimed to commence on 1 January 2013.¹⁵

¹⁴ Western Australian Parliament, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 35, *National Gas Access (WA) Bill 2008*, 10 March 2009, p22.

¹⁵ Response to Questions on Notice, Mr Frank Morisey and Mr Mark Hainsworth, Department of the Attorney General, 19 October 2012, p3.

3.4 In its scrutiny of the Bill, therefore, the Committee draws the attention of the Legislative Council to the consequences of this legislation not being operational by 1 January 2013:

Mr Morisey: On 1 January, they [the Classification Board of the Commonwealth] will start —

Mr Hainsworth: —classifying material. If we have no enforcement legislation with respect to that material, then my presumption is that a minor under the age of 18 could in fact ... purchase an R18+ computer game and we would not be able to take any proceedings against the individual who sold it to them.

...

The CHAIRMAN: ... if this bill is not passed before 1 January 2013, what consequences would flow?

Mr Morisey: The consequences are ... the R18 computer games, which are suitable for adults only, would be able to be purchased by children, and retailers would be able to sell them with impunity to children.¹⁶

3.5 The current *Censorship Regulations 1996 (the Regulations)* set out modified penalties applicable for offences committed under the WA Enforcement Act (including restricting the sale, supply or demonstration of certain categories of computer games). According to the Department of the Attorney General, the Bill will require two changes to be made to the Regulations:

- the title of the Regulations will be changed to align with the WA Enforcement Act (to remove the reference to ‘censorship’); and
- a consequential amendment will be made to include a modified penalty for the offence of selling or supplying an R 18+ computer game to a minor (to be in line with similar offences in the WA Enforcement Act for the MA 15+ category).¹⁷

3.6 The Department advised the Committee that its intention is to gazette both of these amendments only after the Bill has been passed.

¹⁶ Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, Mr Mark Hainsworth, Manager, Advisory Services, Department of the Attorney General and Hon Adele Farina MLC, Chairman, Standing Committee on Uniform Legislation and Statutes Review, *Transcript of Evidence*, 15 October 2012, pp6-7.

¹⁷ Response to Questions on Notice, Mr Frank Morisey and Mr Mark Hainsworth, Department of the Attorney General, 19 October 2012, p2.

- 3.7 If the Regulations are not amended prior to 1 January 2013, the Committee has heard evidence that this would have no material effect on the operation of the Bill:

Hon NICK GOIRAN: What would be the effect of that amended regulation not being in effect on 1 January but this amended legislation being in effect? Would it simply be the case that the modified penalty would not be available for a period of time?

... in this particular instance, given that the matter is urgent and we do not want to have to have the problems that you outlined earlier post 1 January, is it the case that if that amended regulation was not in force on 1 January, the only disadvantage is that there would not be a modified penalty available?

*Mr Morisey: That is correct.*¹⁸

- 3.8 The effect of commencement occurring after 1 January 2013 is that computer games could be classified as R 18+ and be legally sold or supplied in this State from 1 January 2013, with no Western Australian legislation in place to ensure that only adults can access these games. Whether this is a matter of one day or of several months, the potential detrimental effect on children is of significant concern and should not be ignored. In this respect the Committee notes the opposition of the Australian Children's Commissioners and Guardians to the mere creation of the R 18+ classification category from the perspective of the wellbeing of children. The WA Commissioner for Children and Young People WA's submission to the Committee is attached as **Appendix 3**.
- 3.9 The Committee is of the view that clause 2(b) of the Bill impacts Parliamentary sovereignty and law-making power as it constitutes a delegation to the Executive of the power of the Western Australian Parliament to determine when the important enforcement provisions of the Bill come into effect. In this instance such delegation may result in detriment to children of the State which should be avoided. The Committee makes the following findings:

Finding 1: The Committee finds that the consequence of this Bill not being passed, assented and proclaimed by 1 January 2013 is that R 18+ computer games will be able to be purchased by minors.

¹⁸ Hon Nick Goiran MLC, Member, Standing Committee on Uniform Legislation and Statutes Review and Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 15 October 2012, p10.

Finding 2: The Committee finds that current clause 2(b) has the effect of delegating the sovereignty and law-making power of the Parliament to the Executive in circumstances where Commonwealth legislation will have a material effect on the laws of Western Australia from 1 January 2013.

- 3.10 The Committee notes that an amendment to clause 2(b) of the Bill to propose a commencement date of 1 January 2013, regardless of the date of Royal Assent, may result in the Act having retrospective effect.¹⁹
- 3.11 The Committee is of the view, however, that due to the nature of the uniform scheme and the serious risk to the interests of minors in Western Australia, there is a strong and compelling justification for the possible retrospective operation of the Bill between 1 January 2013 and the date of Royal Assent. It remains within the sovereignty of Parliament to express a clear intention to make laws which operate retrospectively if the circumstances or policy require it.
- 3.12 The Bill proposes new offences relating to the sale, supply or demonstration of R 18+ classified computer games. The Committee has considered the evidence of the Department of the Attorney General that it is “*highly undesirable*” that amendments creating new criminal offences should apply retrospectively,²⁰ but has concluded that a situation in which computer games classified R 18+ would be available to minors with impunity would be even less desirable.
- 3.13 The Committee has reported previously on the serious nature of criminal liability operating retrospectively and recognises that Parliament must express a clear and unambiguous intention to impose such a liability.²¹
- 3.14 The Committee is of the view that there is strong justification for the possible retrospective imposition of criminal liability for the following reasons:
- 3.14.1 The Bill is part of a uniform scheme, under which the new R 18+ classification category for computer games will apply from 1 January 2013;
- 3.14.2 The amendments to the Commonwealth legislation creating the new R 18+ category have been under discussion since at least 2010 and passed the Commonwealth Parliament in June 2012.

¹⁹ There are no limits on Parliament making laws that are retrospective in operation, if it sees fit to do so: *R v Kidman* (1915) 20 CLR 425 per Higgins J at 451 (majority concurring).

²⁰ See paragraph 3.3, above.

²¹ Western Australia, Legislative Council, Standing Committee on Uniform Legislation and Statutes Review, Report 66, *Criminal Appeals Amendment (Double Jeopardy) Bill 2011*, 1 November 2011, p13 onwards, referring to *Coco v The Queen* (1994) 179 CLR 427, *Bropho v Western Australia* (1990) 171 CLR 1 and *Davern v Messel* (1983) 155 CLR 21.

- 3.14.3 Computer games classified R 18+ will potentially be available in Western Australia from 1 January 2013 and will be clearly marked as having an R 18+ classification.
- 3.14.4 Unless the WA Enforcement Act is amended by 1 January 2013 to provide restrictions on the availability of R 18+ computer games, they will be freely available to minors.
- 3.15 The Committee has taken special note that an amendment to the Bill in the terms outlined in paragraph 3.10 above will only have retrospective effect if Royal Assent is not granted until after 1 January 2013. The Committee notes the evidence of the Department of the Attorney-General that it is “*essential*” to have the legislation in operation by that date.²² The Committee therefore concludes that it is unlikely that an amendment to the Bill to propose an absolute commencement date of 1 January 2013 will result in retrospective effect as it is within the ability of the Executive to avoid retrospectivity.
- 3.16 The Committee therefore makes the following recommendation in relation to clause 2(b):

Recommendation 1: The Committee recommends that clause 2(b) of the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012 be amended to provide certainty with respect to the commencement of the Act. This may be effected in the following manner:

Page 2, lines 6 to 9 – To delete the lines and insert:

(c) sections 1 and 2 come into operation on the day on which this Act receives the Royal Assent (*assent day*);

(d) the rest of the Act –

(i) comes into operation on 1 January 2013 if assent day is not later than that day; or

(ii) is deemed to have come into operation on 1 January 2013 if assent day is later than that day.

²² Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 15 October 2012, p6.

Clauses of the Bill creating new penalties*Clause 6*

- 3.17 Clause 6 creates the new offence of buying as a minor aged 15 years or older, a computer game classified R 18+ (Penalty: \$200).

Clause 7

- 3.18 Clause 7 creates the following new offences:

- Demonstrating a computer game classified R 18+ in a public place (Penalty: \$5,000).
- Demonstrating a computer game classified R 18+ so that it can be seen from a public place (Penalty: \$2,000); and
- Demonstrating a computer game classified R 18+ in a place that is not a public place in the presence of a minor (unless the person demonstrating is a parent or guardian of the minor) (Penalty: \$2,000).

Clause 8

- 3.19 Clause 8 creates the new offence of displaying in a public place a computer game classified R 18+ (or its container, wrapping or casing) with the intention of selling or supplying it (except in an area conspicuously identified) (Penalty: \$500).

Clause 9

- 3.20 Clause 9 creates the new offence of selling or supplying a computer game classified R 18+ to a minor (Penalty: \$5,000).

Clause 10

- 3.21 Clause 10 creates the following new offences:

- Possessing or copying an unclassified computer game that would, if classified, be classified R 18+ with the intention of selling or supplying it or demonstrating it in a public place (Penalty: \$10,000); and
- Possessing or copying a computer game classified R 18+ with the intention of demonstrating it in a public place (Penalty: \$5,000).

Clause 11 to 14 (inclusive)

- 3.22 Clauses 11 to 14 (inclusive) create offences regarding the exhibition of advertisements in a public place and the sale of films and computer games accompanied by

advertisements for other films or computer games. (Penalties: \$2,000 for each offence).

- 3.23 The Committee has received evidence in relation to corresponding penalties applicable in other States and Territories and has also undertaken its own analysis. A comparative table of the penalties for offences relating to sale and supply and public demonstration of R 18+ computer games is attached to this report as **Appendix 4**.
- 3.24 The Committee notes that the penalties are far from uniform and that the penalties applicable in Western Australia are at the low end of the range of penalties for comparable offences.
- 3.25 The Committee accordingly makes the following recommendation:

Recommendation 2: The Committee recommends that the Attorney General explain to the Legislative Council why different penalties apply in different States and Territories which is inconsistent with the stated aim of the NCCS to make censorship laws more uniform.

Clause 15 of the Bill – Change of classification of computer games from MA 15+ to R 18+

- 3.26 Proposed new section 153A is a transitional provision which outlines the following if a computer game is classified as MA 15+ immediately before 1 January 2013:
- if the computer game is reclassified to R 18+ **within 12 months** of 1 January 2013; and
 - **within 90 days** of that reclassification, a person commits one of the offences set out in the WA Enforcement Act (relating to the sale, supply or demonstration of R 18+ computer games); and
 - the person would not have committed the offence if the computer game had still been classified MA 15+;

then that person is taken not to have committed an offence under the WA Enforcement Act.

- 3.27 Under section 38 of the Commonwealth Classification Act, a computer game may only be reclassified in limited circumstances: that is, after two years have elapsed from the date on which the original classification decision was made. This restriction

applies no matter who requests the reclassification, including the affected publisher, the Classification Board or the relevant Minister.²³

3.28 The Commonwealth Attorney-General's Department has advised that when the R 18+ category commences on 1 January 2013, "*all computer games already classified in Australia will retain their existing classification ... no games will be 'automatically' reclassified*".²⁴ This statement accords with section 21 of the Commonwealth Classification Act which provides that, unless a classified computer game is modified, it retains its classification as determined by the Classification Board.

3.29 The Committee inquired as to the reason for specifying "12 months" in clause 15 of the Bill and was advised by the Department of the Attorney General that:

*12 months is considered a reasonable period of time in which an existing MA 15+ computer game can be reviewed and become classified under the Commonwealth Act as most reviews and subsequent changes in a classification occur within a short period of time after the material is originally classified.*²⁵

3.30 The Committee inquired as to the reason for specifying "90 days" in clause 15 of the Bill and was initially advised by the Department of the Attorney General at hearing that:

*Mr Morisey: ... We use the period of 90 days when we changed the act back in 2003 to give suppliers of publications a certain period of time to adjust their stock markings and that. That was just the reasonable period of time that was selected, so we just picked the same period.*²⁶

3.31 The Department later clarified in its written response to the Committee that "*90 days is considered a reasonable period of time for a person to comply with any legal requirements resulting from a change in classification.*"²⁷

3.32 The Commonwealth Attorney-General's Department has confirmed that classification decisions take effect when notice of the decision is provided to the applicant (section 28 of the Commonwealth Classification Act), but that compliance with State or

²³ Section 39, Commonwealth Classification Act.

²⁴ Ms Jane Fitzgerald, Assistant Secretary Classifications Branch, Commonwealth Attorney-General's Department, *Responses to questions raised by Committee*, 22 October 2012, p2.

²⁵ Response to Questions on Notice, Mr Frank Morisey and Mr Mark Hainsworth, Department of the Attorney General, 19 October 2012, p6.

²⁶ Mr Frank Morisey, Senior Policy Officer, Department of the Attorney General, *Transcript of Evidence*, 15 October 2012, p27.

²⁷ Response to Questions on Notice, Mr Frank Morisey and Mr Mark Hainsworth, Department of the Attorney General, 19 October 2012, p6.

Territory laws regarding the marking, advertising, sale or distribution of classified content is a matter for State enforcement legislation.²⁸ According to section 87A(1) of the Commonwealth Classification Act, the Classification Board must make a decision on an application for the classification of a computer game (other than an enforcement application) within 20 business days.

- 3.33 The Committee has confirmed that no other State or Territory has a similar clause in any amendments dealing with R 18+ computer games.
- 3.34 Proposed new section 153A therefore appears unnecessary for the operation of the WA Enforcement Act, given the sections of the Commonwealth Classification Act dealing with reclassification outlined above.

Recommendation 3: The Committee recommends that the Attorney General clarify to the Legislative Council the reason for the 12 month and 90 day time periods specified in clause 15 of the Bill and the reason for the inclusion of this clause in the Bill, given its lack of uniformity with other States and Territories.

4 ‘DILUTION’ OF THE REFUSED CLASSIFICATION CATEGORY

Second Reading Speech

- 4.1 Hon Michael Mischin MLC, Attorney General, said in the second reading speech for the Bill:

*Importantly, ministers have agreed that there shall be no dilution of the RC classification and RC material will not be included in the proposed R 18+ classification.*²⁹

- 4.2 The word “dilution” was first used by SCAG at a meeting in 2010. Ministers agreed to consider the possibility of creating a new R 18+ category in relation to computer game classification but did not support the “*dilution of the refused classification category*”.³⁰
- 4.3 The Committee is concerned, based on evidence presented to the inquiry, that while it was SCAG’s intent that there should be no dilution of the RC category, the RC

²⁸ Ms Jane Fitzgerald, Assistant Secretary Classifications Branch, Commonwealth Attorney-General’s Department, *Responses to questions raised by Committee*, 22 October 2012, p2.

²⁹ Hon Michael Mischin MLC, Attorney General, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 19 September 2012, p6118.

³⁰ SCAG Communiqué, 10 December 2010.

category will, in fact, be diluted in that some RC material will be included in the proposed R 18+ classification category.³¹

Will ‘RC Material’ be included in the proposed R 18+ category?

4.4 The Code currently provides that computer games that:

- (a) depict, express, or otherwise deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults to the extent that they should not be classified; or
- (b) describe or depict in a way that is likely to cause offence to a reasonable adult, a person who is, or appears to be, a child under 18 (whether the person is engaged in sexual activity or not); or
- (c) promote, incite or instruct in matters of crime or violence; or
- (d) are otherwise unsuitable for a minor to see or play,

are to be classified RC.

4.5 On 1 January 2013, item 4.1(d) will be moved from the RC category to form the sole descriptor of the new R 18+ category.

4.6 Further guidance for the Classification Board in its implementation of the Commonwealth Classification Act (including the Code) is provided by the Guidelines.

4.7 The Committee notes that the Guidelines, and not the primary legislation, detail the specific material that falls within each of the broad categories that are outlined in the Code.

4.8 The Committee sought clarification from the Department of the Attorney General as to where the classification content for the R 18+ computer game category would be drawn from. There was evidence that some games which will fall under the new R 18+ category would, under the current classifications, be classified MA 15+:

The CHAIRMAN: They have got to come from somewhere. You are telling me that either there are currently computer games that are classified MA 15+ which should not have been classified MA 15+ and should be R 18 ... or, alternatively, they have got to be coming out of the RC category.

...

³¹ See discussion at paragraph 4.10 in this report.

Mr Morisey: *It is my understanding that some of the material which has been forced down into MA 15+, with the emergence of the new category, would probably float into R 18+.*

...

Hon NICK GOIRAN: *And I think that is consistent with the second reading speech of the Attorney General, where he says —*

“Therefore, the introduction of an R 18+ classification is a new, adults-only classification that can be applied to some of the more extreme material that may currently fit within the MA 15+ classification.”

*So no-one has got an issue with that; in fact, it is entirely logical that that is where the R 18 games will come from.*³²

- 4.9 This evidence accords with the statement of the Senate Legal and Constitutional Affairs Legislation Committee (**Senate Committee**) in its report into the *Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill* (Cth) 2012 that:

A departmental officer also highlighted that some computer games which have received an adults only classification overseas have to date been classified MA 15+ in Australia:

*[...] “because the Classification Board applies the guidelines that currently exist at the MA 15+ level, whilst the overseas requirements for a non-adult computer game may well be more restrictive, if that makes sense. It would therefore be true to say that there are games that are currently on the market that, were they released in February next year under a new set of guidelines, would be more likely to fall into an adult category than if they were classified three years ago.”*³³

- 4.10 Significantly, the Commonwealth Attorney-General’s Department acknowledged to the Senate Committee that some computer games currently Refused Classification could be expected to be reclassified R 18+, but that this would “*entirely depend on the reasons for the Refused Classification*”:

³² Hon Adele Farina MLC, Chairman and Hon Nick Goiran MLC, Member, Standing Committee on Uniform Legislation and Statutes Review and Mr Frank Morisey, Senior Policy Officer, Department of Attorney General, *Transcript of Evidence*, 15 October 2012, p17.

³³ Commonwealth, Senate, Legal and Constitutional Affairs Legislation Committee, *Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012*, 22 March 2012, (**Senate Committee Report**), paragraph 2.34.

It is not proposed to amend Items 4.1(a) – 4.1(c) of the Code. Item 4.1(a) prohibits computer games that offend against generally accepted community standards. Item 4.1(b) prohibits computer games that depict child abuse. Item 4.1(c) prohibits computer games that promote, incite or instruct in matters of crime or violence.³⁴

- 4.11 The Department of the Attorney General, in its evidence to the Committee, confirmed that some material which would under the current classifications be classified RC, would, under the new classifications, be classified R 18+:

Hon NICK GOIRAN: *It seems to me that the R 18+ guidelines fit somewhere between the current MA 15+ and the current RC.*

Mr Hainsworth: *Yes, that would be a reasonable assumption.*

Hon NICK GOIRAN: *And because it is midway between the two and things that were midway between the two would have normally automatically gone into RC, there has to be a dilution.*

Mr Hainsworth: *It would not necessarily have automatically gone into RC; it may have been at the top end of MA. These propositions are untested.*

...

The Chairman: *... but you have to accept that there are some games that have been classified RC which, with the introduction of the R 18+ category, could now fall into the R 18+ category. Otherwise, what is the point of having it?*

Mr Morisey: *It just depends on what is in them, but that is a distinct possibility, yes. I am not a classifier.³⁵*

- 4.12 The Committee has prepared a comparative table of the current and new Guidelines applicable to the MA 15+, RC and the new R 18+ classification categories for computer games, which is attached to this report as **Appendix 5**. On the basis of its own analysis, together with the evidence given to the Committee and the above comments in the Senate Committee Report, the Committee makes the following finding:

³⁴ *Ibid*, paragraph 2.35.

³⁵ Hon Nick Goiran MLC, Member, Standing Committee on Uniform Legislation and Statutes Review, Mr Mark Hainsworth, Manager, Advisory Services and Mr Frank Morisey, Senior Policy Officer, Department of Attorney General, *Transcript of Evidence*, 15 October 2012, pp20-21.

Finding 3: The Committee finds that some material currently within the scope of the RC category will be classified as R 18+ from 1 January 2013, in that item 4.1(d) of the Code will form the R 18+ category from that date.

“Dilution” of the RC category

4.13 In light of this evidence, the Committee attempted to clarify the concept of dilution of the RC category as referred to in the Second Reading Speech.

4.14 The Senate Committee Report referred to the Code and noted the advice of the Commonwealth Attorney-General’s Department that:

*the current refused classification category for computer games will not be diluted by relocating item 4.1(d) – computer games unsuitable for a minor to see or play – from that category to comprise the broad description of the R 18+ (Restricted) category.*³⁶

4.15 The Senate Committee Report articulates no analysis or finding as to whether there is a dilution of the RC category by virtue of the introduction of the R 18+ category (whether by reference to the Code or the Guidelines) as the new guidelines were not available at the time of the Senate inquiry. The Senate Committee noted that “*until the final Guidelines for the Classification of Computer Games is available, there will be some uncertainty as to the practical implementation of the R 18+ (Restricted) classification category.*”³⁷

4.16 The final *Guidelines for the Classification of Computer Games* incorporating the R 18+ category have since been released on 12 September 2012.³⁸

4.17 The Classification Branch of the Commonwealth Attorney-General’s Department advised the Committee that:

It is important to note that only computer games previously classified RC on the basis that they were unsuitable for a minor (but otherwise were suitable for adults), could be reclassified under the adults-only R18+ category. In other words, a computer game that was classified

³⁶ Commonwealth, Senate, Legal and Constitutional Affairs Legislation Committee, *Classification (Publications, Films and Computer Games) Amendment (R 18+ Computer Games) Bill 2012*, 22 March 2012, paragraph 2.39.

³⁷ *Ibid.*, paragraph 2.40.

³⁸ Press Release, Hon Jason Clare MP, Minister for Home Affairs, *New Computer Game Guidelines finalised*, 12 September 2012, available from <http://www.ministerhomeaffairs.gov.au/MediaReleases/> (viewed on 2 November 2012).

*RC under the provisions of 1a, 1b or 1c of the National Classification Code would still be classified RC.*³⁹

- 4.18 The Committee is not satisfied that the creation of a new R 18+ category for the classification of computer games will not result in any ‘dilution’ of the RC category.
- 4.19 The Committee attempted to obtain copies of the Minutes of the meetings of SCAG held on 10 December 2010, 4-5 March 2011 and 21-22 July 2011 to assist in its understanding of the concept of dilution. The Committee was advised that, as not all Attorneys-General agreed to the release of the Minutes, they could not be released.⁴⁰ The Committee draws this to the attention of the House.
- 4.20 The Committee is of the view that the wording used in the Second Reading Speech, while correct in its advice as to SCAG’s intent, is misleading as to the effect and application of the new R 18+ category.
- 4.21 The Committee and the Western Australian Parliament need to have confidence in the explanatory materials relating to a bill that the Parliament is asked to consider.
- 4.22 The Committee endorses the Standing Committee on Legislation’s recent statement that:

*the House should not be required to make decisions on any legislation on the basis of inaccurate information.*⁴¹

In the Committee’s view, the same principle applies to assertions made in the Second Reading Speech of a Member introducing a bill, especially as it articulates the policy, and sets the scope, of the bill.

- 4.23 Asking Parliament to make law on the basis of inaccurate and incomplete information, while it does not technically limit Parliament’s sovereignty and law-making powers, impedes Parliament’s exercise of those powers.

Finding 4: The Committee finds that the statement in the Second Reading Speech for the Bill that “RC material will not be included in the proposed R 18+ classification” is misleading as to the effect and application of the new R 18+ category.

³⁹ Ms Jane Fitzgerald, Assistant Secretary Classifications Branch, Commonwealth Attorney-General’s Department, *Responses to questions raised by Committee*, 22 October 2012, p4.

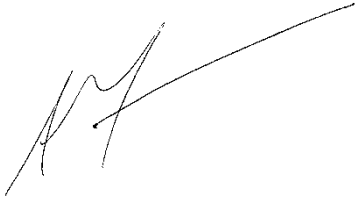
⁴⁰ Emails from Mr Mark Hainsworth, Manager, Advisory Services, Department of the Attorney General, 19 and 23 October 2012.

⁴¹ Western Australia, Legislative Council, Standing Committee on Legislation, Report 19, *Revenue Laws Amendment Bill 2012*, 12 September 2012, p9.

5 CONCLUSION

5.1 The Committee commends its report and recommendations to the Legislative Council.

5.2 In particular, for the reasons set out in paragraphs 3.4 to 3.9, the Committee urges that its report and the Bill be considered on an urgent basis.



Hon Adele Farina MLC

Chairman

6 November 2012

APPENDIX 1

LIST OF STAKEHOLDERS AND SUBMISSIONS

Stakeholders
Ms Michelle Scott, Commissioner for Children and Young People Submission Number 2 (Appendix 3)

Submissions received before closing date
Dr David Phillips, National President, Family Voice Australia Submission Number 1

Other Submissions Received
Sam Timmins, private citizen
John Boardman, private citizen
Nicholas Atherley, private citizen
Simon Waters, private citizen
Chris Reese, private citizen
Marcelo Ferreira, private citizen
Nathan Moro, DVStudios.com.au, SSPhotography.net.au
Ron Curry, CEO, Interactive Games & Entertainment Association

APPENDIX 2

**SUBMISSION FROM HON CHRISTIAN PORTER MLA TO THE
ALRC NATIONAL CLASSIFICATION SCHEME REVIEW**



Treasurer; Attorney General

Our Ref: 35-17965

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By e-mail: classification@alrc.gov.au

Dear Ms Wynn

National Classification Scheme Review: Discussion Paper

The Australian Law Reform Commission (ALRC) Discussion Paper responds to the Commonwealth Attorney-General's reference to the ALRC to inquire and report on "matters relating to the extent to which the Classification (Publications, Films and Computer Games) Act 1995 (the Classification Act), State and Territory Enforcement legislation, Schedules 5 and 7 of the Broadcasting Services Act 1992, and the Intergovernmental Agreement on Censorship and related laws continue to provide an effective framework for the classification of media content in Australia."

That Discussion Paper makes a number of significant proposals including:

- That there be new and comprehensive Commonwealth legislation (a Classification of Media Content Act) which will provide, for example, "what types of media content may, or must be classified"; "who should classify different types of media content"; "a single set of statutory classification categories and criteria applicable to all media content"; and "the enforcement of the National Classification Scheme, including through criminal, civil and administrative penalties for breach of classification laws."
- That the Commonwealth Parliament should exercise its legislative powers to the fullest in order to support the constitutional validity of a Classification of Media Content Act.
- That where those Commonwealth legislative powers would not be sufficient (for example, in relation to material published by individuals or unincorporated entities, and sold or distributed only within one State), there should be a referral of State legislative power to the Commonwealth Parliament.
- That the Commonwealth Government should be responsible for the enforcement of classification laws unless, for political or pragmatic reasons, the States should retain some enforcement powers.

As you will be aware, the current censorship arrangements entail a cooperative Commonwealth/State/Territory scheme where there is Commonwealth legislation (*Classification (Publications, Films, and Computer Games) Act 1995* (Cth)) which provides for Commonwealth Boards to classify material on behalf of the States and Territories; State and Territory enforcement legislation (for example, the *Classification (Publications, Films, and Computer Games) Enforcement Act 1996* (WA)) which enables State and Territory enforcement agencies to enforce those classification decisions; and an intergovernmental agreement which establishes the National Classification Scheme and, for example, provides that substantive amendments to the Classification Guidelines can only be implemented with the unanimous agreement of Ministers.

In my view, the current Co-operative Classification Scheme ought not to be replaced by a centralised Commonwealth regime. In addition to the fact that my experience on the Ministerial forum for

Level 21, Governor Stirling Tower, 197 St Georges Terrace, Perth Western Australia 6000
Telephone: +61 8 9222 8800 Facsimile: +61 8 9222 8801 Email: Minister.Porter@dpc.wa.gov.au

classification indicates to me that this Co-operative Scheme operates satisfactorily, there are several other reasons for not replacing it with the proposed Classification of Media Content Act.

First, the Discussion Paper indicates that a number of industry submissions to the ALRC "were almost universal in condemning the current National Classification Scheme for not responding adequately to the challenges of media convergence." I agree that the Classification Scheme ought to adequately deal with the emerging issue of media convergence. This could be legislatively and administratively implemented and regulated within the framework of a co-operative scheme.

Second, submissions to the ALRC also suggested that there was a problem with "the need for Commonwealth, state and territory ministers to reach unanimous agreement on any amendments to the National Classification Code or to classification guidelines". I suspect that this perceived problem has arisen from the recent discussions regarding the creation of an R18+ classification for computer games. In my view, this R18+ debate does not represent a problem. Rather, it demonstrates the strength of the co-operative arrangements in that there were considerable public consultations, account was taken of a diverse range of differing views and Ministers were able to reach an informed agreement. It was not a solution imposed by one government or Minister.

Third, a further suggested problem with the Co-operative Scheme is "anomalies in the treatment of media content between different states and territories, such as inconsistent laws relating to the sale and distribution of sexually explicit adult content". Of course, in a federal system there will always be differences of view and room to accommodate those views in laws and regulations. This is especially necessary in censorship matters where local communities and States may, for very good reasons, have differing views on what classification levels ought to apply. An example of this is the permissible sale of X18+ rated films in the ACT and NT, but not in other jurisdictions.

This is in marked contrast to the ALRC Proposal 6-4 that "if the Australian Government determines that X 18+ content should be legal in all states and territories, the Classification of Media Content Act should provide that media content that is likely to be classified X 18+ (and that, if classified, would be legal to sell and distribute) must be classified before being sold, hired, screened or distributed in Australia." This clearly suggests that the proposed Commonwealth legislation would enable the Commonwealth Government to determine whether X18+ films should be legal in Western Australia and, if that occurs, that such films could be legally sold in this State. This would be contrary to the current provisions in the Western Australian legislation which prohibit the sale and distribution of X18+ films.

In my view, your Final Report ought to more clearly set out the federal co-operative alternative to a centralised classification scheme. That is, it should not, for example, assume that States will refer legislative power to the Commonwealth and it should articulate a co-operative regime which facilitates media convergence while recognising that there are, and will continue to be, differing views concerning classification across the States and Territories. Governments, Ministers, industry and the public will then be in a position to evaluate an appropriate range of recommendations.

Yours sincerely



Hon C. Christian Porter MLA
TREASURER; ATTORNEY GENERAL

16 NOV 2011

Cc – *All Attorneys General (State, Territory and Commonwealth)*
Ms Cheryl Gwilliam, Director General, WA Department of the Attorney General

APPENDIX 3

SUBMISSION FROM Ms MICHELLE SCOTT, COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE WA



Commissioner for Children and Young People
Western Australia

All enquiries

Telephone: (08) 6213 2221
Email: caron.irwin@ccyp.wa.gov.au
Our reference: 12/7309

Hon Adele Farina MLC
Chairman
Standing Committee on Uniform Legislation and Statutes Review
Legislative Council
Parliament House
PERTH WA 6000

Dear Ms Farina

Submission: Inquiry into Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012

Thank you for the opportunity to make a submission on the Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012. In the short timeframe allowed I am able to provide a summary of my views. I have also provided copies of previous submissions on this matter, refer to Appendix 1.

I was appointed as Western Australia's (WA) inaugural Commissioner for Children and Young People in December 2007 pursuant to the *Commissioner for Children and Young People Act 2006* (my Act). Under my Act my role is to advocate for the half a million Western Australian children and young people under the age of 18, specifically having responsibility for advocating for, promoting and monitoring their wellbeing.

Under the Act I must observe the following guiding principles:

- Children and young people are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation.
- The contributions made by children and young people in the community should be recognised for their value and merit.
- The views of children and young people on all matters affecting them should be given serious consideration and taken into account.
- Parents, families and communities have the primary role in safeguarding and promoting the wellbeing of their children and young people and should be supported in carrying out their role.

In performing my functions the best interests of children and young people must be my paramount consideration. I must give priority to, and have special regard for, the interests and needs of Aboriginal and Torres Strait Islander children and young people, and to children and young people who are vulnerable or disadvantaged for any reason.

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I am also required to have regard to the *United Nations Convention on the Rights of the Child*.

It is with these responsibilities in mind that I make this submission.

I note that the Commonwealth Government has responsibility for determining whether an R18+ classification is lawful, and in developing the guidelines for that classification. The State's responsibility is regarding the advertising, display and sale of computer games. In this matter, I believe the State's proposed legislation is in line with the Commonwealth's and no conflict exists.

However, I would take this opportunity to reiterate my concerns about the possible effects of the availability of games classified as R18+ from the perspective of the wellbeing of children.

The Australian Children's Commissioners and Guardians,¹ of which I am a member, has consistently opposed the introduction of the R18+ classification for computer games on three grounds:

The increased availability of, and risk of exposure to, high impact content including violence, domestic and sexual violence and illicit drug use

The increase in the allowable threshold of content would increase the possibility of children's and young people's exposure to games with inappropriate content, through incidental exposure through other family members playing games in the same household. In this regard I consider that material had been classified as inappropriate for children and young people for good reasons, and so their incidental exposure to this material seems counter-intuitive to protecting their welfare and wellbeing, and undermines the intent of the classification system being intended to keep such games out of the hands of children and young people.

The potential negative impacts of exposure to R18+ computer games, particularly for vulnerable or at-risk children

Although the research on the impact of violent computer games is not conclusive, the Byron review² reports that for some children, particularly those who are most vulnerable, the broader biological, psychological and social context in which computer games are played may contribute to a negative impact on children.

¹ Children and Young People Commissioner, Australian Capital Territory; Commissioner for Children and Young People, New South Wales; New South Wales Children's Guardian; Children's Commissioner, Northern Territory; Commissioner for Children and Young People and Child Guardian, Queensland; Guardian for Children and Young People, South Australia; Commissioner for Children, Tasmania; Child Safety Commissioner, Victoria; Commissioner for Children and Young People, Western Australia.

² Byron T 2008, *Safer children in a digital world – the report of the Byron review*, <http://www.dcsf.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf>

A literature review by the Commonwealth Attorney General's Department on the impact of violent games on aggression concluded that '*research into the effects of VVGs [violent video games] on aggression is contested and inconclusive.*'³

However, my Act states at section 3 that

*'in performing a function under this Act the Commissioner or any other person must regard the best interests of children and young people as the paramount consideration.'*⁴

While there is no conclusive evidence that violence in computer games will have a negative impact on children and young people, neither has it been proven that there is no effect. It is therefore possible that violence in computer games might have a negative impact on children and young people, and so I remain opposed to the implementation of the R18+ classification for computer games.

The difficulties parents and regulators experience in monitoring and controlling children's access to computer games

While I remain opposed to this classification, if the Bill becomes law, it will be important to reinforce to retailers, parents and young people:

- The provisions of section 85A of the existing *Classifications (Publications, Films and Computer Games) Enforcement Act 1996* and the proposed amendments to that section regarding the display of MA15+ and R18+ games.
- The need for parents to take an active role in assessing the games used by their children, and that the classification system can only function effectively if its decisions are supported by purchasers.
- That possession or distribution of RC (Refused Classification) material is and remains an offence.

In summary, based on the overriding principle that the best interests of children and young people must be paramount, I continue to oppose the implementation of the R18+ classification for computer games.

Yours sincerely ,



MICHELLE SCOTT

Commissioner for Children and Young People WA

5 October 2012

³ Attorney-General's Department 2010, *Literature Review on the impact of playing violent video games on aggression*, Commonwealth of Australia, p.42

⁴ *Commissioner for Children and Young People Act 2006*, section 3



Commissioner for Children and Young People
Western Australia

All enquiries

Telephone: (08) 6213 2210
Email: leanne.pech@ccyp.wa.gov.au
Our reference: 12/1439; 12/1405; 12/1438

Ms Julie Dennett
Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs

Dear Ms Dennett

**Inquiry into the Classification (Publications, Films and Computer Games)
Amendment (R+18 Computer Games) Bill 2012**

I welcome the opportunity to provide comment to the Senate Standing Committee on Legal and Constitutional Affairs on the Inquiry into the *Classification (Publications, Films and Computer Games) Amendment (R+18 Computer Games) Bill 2012*.

Role of Commissioner for Children and Young People WA

I was appointed as Western Australia's (WA) inaugural Commissioner for Children and Young People in December 2007 pursuant to the *Commissioner for Children and Young People Act 2006* (the Act). Under the Act my role is to advocate for the half a million Western Australian children and young people under the age of 18, specifically having responsibility for advocating for, promoting and monitoring their wellbeing.

Under the Act I must observe the following guiding principles:

- Children and young people are entitled to live in a caring and nurturing environment and to be protected from harm and exploitation.
- The contributions made by children and young people in the community should be recognised for their value and merit.
- The views of children and young people on all matters affecting them should be given serious consideration and taken into account.
- Parents, families and communities have the primary role in safeguarding and promoting the wellbeing of their children and young people and should be supported in carrying out their role.

In performing my functions the best interests of children and young people must be my paramount consideration. I must give priority to, and have special regard for, the interests and needs of Aboriginal and Torres Strait Islander children and young people, and to children and young people who are vulnerable or disadvantaged for any reason.

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I am also required to have regard to the *United Nations Convention on the Rights of the Child*.

It is with these responsibilities in mind that I make my submission.

Position on the introduction of an R+18 Computer Games classification

I have previously contributed to several submissions by the joint Australian Children's Commissioners and Guardians (ACCG) regarding the Commonwealth's proposal to amend the Australian National Classification Scheme to introduce an R 18+ classification and the draft Guidelines for the Classification of Computer Games.

I do not support the introduction of an R 18+ classification category for computer games because of:

- the increased availability of, and risk of exposure to, high impact content including violence, domestic and sexual violence and illicit drug use;
- the potential negative impacts of exposure to R 18+ computer games, particularly for vulnerable or at risk children; and
- the difficulties parents and regulators experience in monitoring and controlling children's access to computer games.

Additionally the ACCG recommended that the introduction of an R 18+ classification be delayed until the completion of the Australian Law Reform Commission's (ALRC) review of the National Classification Scheme to enable any recommendations arising from it to be implemented. The final ALRC report was tabled in Parliament on 1 March 2012. While public consultation during the two years of the ALRC review reportedly "...demonstrated strong support in favour of the introduction of an R+18 category for computer games"¹, I would like to take this opportunity to reiterate the shared concerns of the Australian Children's Commissioners and Guardians outlined above.

Other previous submissions of relevance

As Commissioner for Children and Young People I have contributed to and endorsed several other submissions relevant to this Inquiry. They are as follows:

1. Submission to the Discussion Paper on the ALRC's Review, November 2011

This submission supported the inclusion and intent of the eight guiding principles for reform. However I recommended that guiding principle 3: 'Children should be protected from material likely to harm or disturb them' should be strengthened in accordance with Article 3.1 of the *Convention on the Rights of the Child*, with the best interests of the child being the driving consideration. This should be the principle that is explicitly recognised in laws, regulations and policies affecting them. I do not believe it is sufficient to only

¹ Explanatory Memorandum, *Classification (Publications, Films and Computer Games) Amendment (R+18 Computer Games) Bill 2012*. The House of Representatives, The Parliament of the Commonwealth of Australia, p. 1.

recognise children and the impact of material on them without considering their best interests.

Including a 'best interests of children' principle in the guiding principles would ensure they are taken into account in the development of a National Classification Scheme. In this way better consideration will be given to the safety, protection and wellbeing of children and young people when balancing competing principles, including guiding principle 1: 'Australians should be able to read, hear, see and participate in media of their choice'.

In this submission, I also expressed my concern about a National Classification Scheme that includes a co-regulatory approach. I am of the view that industry codes of practice and self-regulation currently in place, for example in advertising and print media, are not sufficient to ensure the safety, protection and wellbeing of children and young people. This is particularly so in regards to alcohol and food advertising and the sexualisation of children in a range of media. For example, there is strong evidence that the current self-regulatory approach to alcohol advertising does not effectively protect young people.^{2 3} Similarly recent research commissioned by the South Australian Government has found that self-regulatory food industry initiatives regarding 'junk food' advertising during children's television viewing times have not been successful in reducing this type of advertising to children and young people generally.⁴

If co-regulation is pursued then I would wish to see, as a minimum, that the 'best interests of the child' principle is incorporated into the industry classification codes of practice. Additionally, to ensure the 'best interests of the child' are considered in an informed way the 'authorised industry classifiers' (classifiers of all media content other than that to be classified by the Classification Board) should include experts in the field of child wellbeing, development, psychology or similar.

2. Joint submission with three other Children's Commissioners to the ALRC's Issues Paper on the Review, July 2011

This submission focused on the importance of acting in the best interests of children and of their rights under the *United Nations Convention on the Rights of the Child*, in particular their rights of participation (including in the Review), to access information and to the protection from harm.

² McCusker Centre for Action on Alcohol and Youth 2011, *Alcohol and Young People: Solutions*, Available: <http://www.mcaay.org.au/component/attachments/download/4.html>

³ Foundation for Alcohol Research and Education *Marketing and Promotions*, Available: <http://www.fare.org.au/policy-advocacy/alcohol-markting-and-promotions/>

⁴ CSIRO 2011, *Television food Advertising to Children in South Australia*, Available: <http://www.sahealth.sa.gov.au/wps/wcm/connect/378f4e80490e0c47b03ff47675638bd8/CSIRO-TV-food-ads-children-SA-PHCS-HPB-201103.pdf?MOD=AJPERES&CACHEID=378f4e80490e0c47b03ff47675638bd8>

3. Submission to the Senate Legal and Constitutional Affairs References Committee's Inquiry into the Australian film and literature classification scheme, March 2011

My submission focused on:

- The importance of directly involving children and young people in decisions that impact on them and taking their views into account in the development of laws, policies and programs.
- The important role the classification scheme has in enabling consumers, including children, young people and parents, to make informed choices about what they watch, read and listen to.
- The safety, protection and wellbeing of children and young people under 18 years should be paramount.

These issues are also relevant to this Inquiry and I therefore reiterate their importance.

Improving legislation for children and young people

One of my legislated responsibilities is to review and monitor laws which may affect the wellbeing of children and young people. With this responsibility in mind I have published guidelines to help government agencies assess draft legislation, regulations and policies from the perspective of children and young people's wellbeing, with the intent of producing laws that better meet their needs and interests. My publication *Improving legislation for children and young people* is available on my website www.cryp.wa.gov.au

Thank you for the opportunity to provide comment on the Inquiry into the *Classification (Publications, Films and Computer Games) Amendment (R+18 Computer Games) Bill 2012*. Should you require any further information on the issues I have raised I am more than happy to assist.

Yours sincerely



MICHELLE SCOTT

Commissioner for Children and Young People WA

7 March 2012

The Commission for Children and Young People and Child Guardian

promoting and protecting the rights, interests and wellbeing of all Queenslanders under 18

Advice to: Australian Government Attorney-General's Department and the Standing Committee of Attorneys-General
Topic: Commonwealth Guidelines for the Classification of Computer Games
Date due: 15 July 2011

Thank you for providing the Australian Children's Commissioners and Guardians (the ACCG)¹ with the opportunity to comment on the draft Commonwealth Guidelines for the Classification of Computer Games (the guidelines), which include the proposed criteria for an R18+ category for computer games. The Commissioners and Guardians collectively have a legislated responsibility to promote and protect the rights and wellbeing of Australian children and young people under the age of 18.

The 2010 submission made by the ACCG in relation to the classification of computer games did not support the introduction of an R18+ category. While the ACCG still has concerns about the introduction of an R18+ classification, it notes that the guidelines have made some positive attempts to consider the interests of children and young people in classifying computer games. However, it is the ACCG's firm view that more work needs to be done in developing clear guidelines for depictions of particular types of violence. To this end, the ACCG notes the *Review of the National Classification Scheme: achieving the right balance* report from the Senate Legal and Constitutional Affairs References Committee, which highlighted concerns in relation to the inadequate protection of children under the current National Classification Scheme and the ineffectiveness of enforcement mechanisms.

Summary of the Australian Children's Commissioners and Guardians' position:

The ACCG supports the specification in the guidelines that descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years will be refused classification.

The ACCG recommends that:

1. in relation to depictions of sexual violence across the M, MA15+ and proposed R18+ classification, the guidelines be reviewed to ensure that the M classification category is subject to a stricter test regarding what is acceptable under the guidelines. The current wording of the proposed guidelines implies a potentially weaker threshold for acceptable depictions of sexual violence in the M category compared to the MA15+ and the R18+ category

¹ Contributing members of the Australian Children's Commissioners and Guardians are: Commissioner for Children and Young People and Child Guardian, Queensland, Ms Elizabeth Fraser; Children and Young People Commissioner, Australian Capital Territory, Mr Alasdair Roy; Guardian for Children and Young People, South Australia, Ms Pam Simmons; Commissioner for Children, Tasmania, Ms Aileen Ashford; Commissioner for Children and Young People, New South Wales, Ms Megan Mitchell; Office for Children – Acting Children's Guardian, New South Wales, Mr David Hunt; Child Safety Commissioner, Victoria, Mr Bernie Geary; Commissioner for Children and Young People, Western Australia, Ms Michelle Scott and Children's Commissioner, Northern Territory, Mr Howard Bath.

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2. the potential impact of depictions of domestic and family violence is expressly taken into account when classifying or refusing to classify material
3. a public education campaign be implemented to develop awareness about the types of material which may be present in computer games available for purchase in Australia, and
4. a final decision in relation to the introduction of an R18+ classification for computer games be delayed until completion of the Australian Law Reform Commission's (ALRC) National Classification Scheme Review. Furthermore, in the event that a decision is made to adopt an R18+ classification for computer games, its introduction should be delayed to enable any recommendations made as a result of the ALRC Review, which provide for the safety and wellbeing of children to be implemented.

1. Require a stricter test for M classifications regarding depictions of sexual violence in computer games

The guidelines indicate that some level of sexual violence is acceptable in not only the proposed R18+ category of games, but also in the MA15+ and the M categories. The M category has no legally enforceable age restriction on who can buy these games, whereas MA15+ classified games are available for purchase by young people aged 15 and over. In effect, this would mean that children and young people could have access to video games containing depictions of sexual violence.

The guidelines also appear to contain a possibly weaker threshold for acceptable depictions of sexual violence in the M classification category compared to the legally restricted MA15+ and R18+ categories. The guidelines specify that for the M classification, sexual violence should be *very limited and justified by context*. Conversely, the MA15+ AND R18+ guidelines specify that *sexual violence may be implied, if justified by context*. This appears to allow for sexual violence to be actually exhibited in M rated games, yet possibly only implied in games subject to stricter classification.

Although the ACCG notes that the hierarchy of impact detailed in the guidelines means that the impact of particular material in the M classification can only be *moderate*, the ACCG recommends that greater clarity is provided in relation to acceptable depictions of sexual violence across the various categories and that a stricter test for acceptable depictions of this type of violence be applied for the M and MA15+ categories than for the R18+ category (should this category be introduced).

The ACCG supports the guidelines' specification that gratuitous, exploitative or offensive depictions of sexual violence or sexual violence related to incentives and rewards will be Refused Classification.

2. Expressly consider the potential impact of domestic and family violence when classifying video games

The ACCG is concerned that the guidelines do not contain any particular detail on how domestic and family violence will be considered for classification purposes. The

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introduction of an R18+ category of video games could potentially result in high impact domestic violence content games being legally distributed in Australia.

The ACCG recommends that the guidelines provide guidance on how this type of violence would be dealt with for classification purposes and that the potential impact of this type of violence is expressly taken into account when classifying (or refusing to classify) material.

3. Public education campaign to explain the nature of material in computer games

A public education campaign should be undertaken to provide consumers, particularly parents and care givers, with information about the nature of material which may be present in computer games sold in Australia.

The education campaigns should be tailored for particular contexts, for example taking into account how an R18+ classification category might have implications for the restrictions on classified material imposed on prescribed areas in the Northern Territory by the Commonwealth government intervention.

4. A final decision on the introduction of an R18+ classification be delayed until the completion of the ALRC's National Classification Scheme Review and if the R18+ classification is to be adopted, its introduction be delayed to enable any recommendations made as a result of the ALRC review to be implemented

The ACCG notes the specific mention in the Australian Law Reform Commission's terms of reference for its National Classification Scheme Review of *'the impact of media on children and the increased exposure of children to a wider variety of media including television, music and advertising as well as films and computer games'*.

In the event that the decision is made to implement an R18+ classification for computer games, the introduction of this category should be delayed until the completion of the Australian Law Reform Commission's National Classification Scheme Review. This would enable any recommendations from this review which provide for the safety and protection of children and young people to be taken into account.

Please do not hesitate to contact Clea Viney, AVSenior Policy Officer, Policy, Strategic Policy and Research Program (ph:07 3211 6954; e-mail Clea.Viney@ccypcg.qld.gov.au) should any aspects of this advice require clarification.

APPENDIX 4

COMPARATIVE TABLE OF SELECTED PENALTIES

State/ Territory	Act/Bill details	Penalty for private demonstration of R 18+ computer game to a minor	Penalty for sale or supply of R 18+ computer game to a minor
WA	<i>Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012</i>	\$2,000	\$5,000
NSW	<i>Classification (Publications, Films and Computer Games) Enforcement Amendment (R 18+ Computer Games) Act 2012 (No 65 of 2012)</i>	50 penalty units (\$5,500)	100 penalty units (\$11,000)
ACT	<i>Classification (Publications, Films and Computer Games) (Enforcement) Amendment Act 2012 (No 44 of 2012)</i>	50 penalty units (\$5,500)	50 penalty units (\$5,500)
SA	<i>Classification (Publications, Films and Computer Games) (R 18+ Computer Games) Amendment Bill 2012</i>	\$5,000	\$5,000
Vic	<i>Classification (Publications, Films and Computer Games) (Enforcement) Amendment Bill 2012</i>	40 penalty units (\$5,633.60)	60 penalty units (\$8,450) or imprisonment for 6 months
Tas	<i>Classification (Publications, Films and Computer Games) Enforcement Amendment Bill 2012</i>	20 penalty units (\$2,600)	20 penalty units (\$2,600)
NT	<i>Classification of Publications, Films and Computer Games Amendment Bill 2012</i>	100 penalty units (\$14,000)	100 penalty units (\$14,000)
Qld	<i>Classification of Computer Games and Images and Other Legislation Amendment Bill 2012</i>	50 penalty units (\$5,000)	100 penalty units (\$10,000)

APPENDIX 5

COMPARATIVE TABLE: CURRENT AND PROPOSED CLASSIFICATION GUIDELINES

Note: Comments in relation to the MA 15+ and R 18+ categories are subject to the impact test applicable to each of those categories as follows:

MA 15+ Impact should be no higher than “strong”.
R 18+ Impact should not exceed “high”.

Current Guidelines	THEMES	New Guidelines
RC	<i>Strong themes not justified by context</i>	R 18+

Current Guidelines	VIOLENCE	New Guidelines
RC	<i>High Impact Violence that is frequently gratuitous, exploitative and offensive to a reasonable adult</i>	RC
RC	<i>Other High Impact Violence</i>	R 18+
MA 15+ if justified by context (Otherwise RC)	<i>Strong and Realistic Violence that is frequent and unduly repetitive</i>	R 18+
MA 15+ if justified by context (Otherwise RC)	<i>Strong and Realistic Violence that is infrequent and not unduly repetitive</i>	MA 15+
MA 15+ or less	<i>Lesser impact violence if justified by context</i>	MA 15+ or less

Current Guidelines	SEXUAL VIOLENCE	New Guidelines
RC	<i>Depictions of Actual Sexual Violence</i>	RC
RC	<i>Implied Sexual Violence that is visually depicted, interactive, not justified by context or related to incentives or rewards</i>	RC
MA 15+ (if justified by context and impact no higher than “strong”)	<i>Implied Sexual Violence</i>	R 18+ (unless visually depicted, not justified by context or related to incentives or rewards)

Current Guidelines	SEX	New Guidelines
RC	<i>Depictions of Actual Sexual Activity</i>	RC
RC	<i>Depictions of Simulated Sexual Activity that are Explicit or Realistic</i>	RC
RC	<i>Depictions of Simulated Sexual Activity that are not Explicit or Realistic</i>	R 18+
MA 15+	<i>Implied Sexual Activity where impact is “strong” or less</i>	MA 15+ (if not related to incentives or rewards – otherwise RC)

Current Guidelines	DRUG USE	New Guidelines
RC	<i>Interactive drug use that is detailed and realistic</i>	RC
RC	<i>Drug use related to incentives and rewards</i>	RC
RC	<i>Other drug use not justified by context</i>	R 18+
RC	<i>Detailed instruction in the use of proscribed drugs</i>	No specific guideline. Likely RC – See Code item 4.1(c)
RC	<i>Material promoting or encouraging proscribed drug use</i>	No specific guideline. Likely RC – See Code item 4.1(c)
MA 15+	<i>Other drug use which is justified by context</i>	MA 15+

Current Guidelines	LANGUAGE	New Guidelines
RC	<i>Frequent Aggressive or Very Strong Coarse Language</i>	R 18+
MA 15+	<i>Infrequent Aggressive or Very Strong Coarse Language</i>	R 18+
MA 15+	<i>Infrequent Aggressive or Strong Coarse Language</i>	MA 15+ (unless exploitative or offensive) Otherwise R 18+ (subject to limitations)

Current Guidelines	NUDITY	New Guidelines
RC	<i>Nudity related to incentives or rewards</i>	R 18+
RC	<i>Other nudity not justified by context</i>	R 18+
MA 15+	<i>Nudity which is justified by context</i>	MA 15+