



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES**

IN RELATION TO THE

CENSORSHIP AMENDMENT BILL 2002

Presented by Hon Adele Farina MLC (Chairman)

Report 3
October 2002

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

The following are extracts from Schedule 1 and Standing Order 230A of the Legislative Council Standing Orders:

“7. Uniform Legislation and General Purposes Committee

- 7.1 A Uniform Legislation and General Purposes Committee is established.
- 7.2 The Committee consists of 3 members with power in the Committee to coopt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
- (a) to consider and report on bills referred under SO 230A;
 - (b) of its own motion or on a reference from a Minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like Committee of a House of the parliament of the Commonwealth, a State or a Territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

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CONTENTS

EXECUTIVE SUMMARY AND RECOMMENDATIONS	I
EXECUTIVE SUMMARY	I
RECOMMENDATIONS	II
REPORT	1
1 REFERENCE AND PROCEDURE.....	1
2 UNIFORM LEGISLATION	1
Scrutiny of Uniform Legislation in the Western Australian Parliament.....	1
Legislative Structures	2
Scrutiny Principles.....	2
3 INQUIRY PROCEDURE.....	3
4 STRUCTURE OF THE REPORT.....	3
5 BACKGROUND.....	3
Censorship/Classification in Australia	3
Current Uniform Scheme.....	4
Non-Binding National Standards Model.....	4
Western Australia.....	5
The Commonwealth Act.....	6
What does the Commonwealth Act do?.....	6
National Classification Code and the Classification Guidelines.....	6
The classification system	7
Changes to the NCCS	8
6 OVERVIEW OF THE BILL.....	9
7 COMMENT ON SELECTED CLAUSES OF THE BILL.....	10
Clause 7 – Parts 2, 3, 4, 5 and 6 Repealed.....	10
Clause 8 – Section 57 Amended.....	10
Clause 9 – Division 2 – Replaced – Publications, Sections 61-65E Amended	10
Strict Liability Offences.....	11
Reversal of the Onus of Proof.....	12
Clause 12 – Section 79 Amended.....	12
Clause 14 – Section 88 Amended.....	12
Typographical Error in Censorship Act 1996.....	12
Clause 14 of the Bill	12
Clause 16 – Section 91 Amended.....	13
Clauses 23 – 28.....	14
Clause 31 – Section 116 Amended.....	14
Clauses 32 & 33 – Forfeiture.....	14
Clause 34 – Infringement Notices	15
Clause 35 – Censorship Advisory Committee and Clause 40 – Section 138, Schedule 1 Repealed.....	15
Clause 41 – Various Penalties Amended.....	17

Clause 44 – <i>Co-operative Schemes (Administrative Actions) Act 2001</i> Amended ...	18
8 INTERGOVERNMENTAL AGREEMENT	19
APPENDIX 1 IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION	21

EXECUTIVE SUMMARY AND RECOMMENDATIONS FOR THE
REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES
IN RELATION TO THE
CENSORSHIP AMENDMENT BILL 2002

EXECUTIVE SUMMARY

- 1 The Uniform Legislation and General Purposes Committee (Committee) was appointed by the Legislative Council on April 11 2002. The Committee is dedicated, amongst other matters, to the scrutiny of uniform legislation standing referred pursuant to Standing Order 230A.
- 2 The Censorship Amendment Bill 2002 (Bill) forms part of a national scheme of legislation. The Bill makes Western Australia a full participant in the National Co-operative Censorship Scheme (NCCS) and makes WA's censorship legislation consistent with that in other States and Territories.
- 3 In its consideration of the Bill, the Committee had regard to scrutiny principles, and gave particular consideration to the concepts of strict and absolute liability and the reversal of the onus of proof.
- 4 The Committee notes that, in providing for full participation in the national uniform scheme, this Bill abolishes the State Minister's ability to vary or set aside classification decisions made by the Commonwealth. However, under the Commonwealth *Classification (Publications, Films and Computer Games) Act 1995*, the State Minister has a right to require that the Federal Minister request a review of a classification decision.
- 5 The Committee also notes that full participation in the NCCS renders redundant the function of the State's Censorship Advisory Committee, which is abolished by this Bill.
- 6 The Committee makes two recommendations.

RECOMMENDATIONS

Page 13

Recommendation 1: The Committee recommends that clause 14 of the Censorship Amendment Bill 2002 be amended in the following manner –

Page 16, after line 10 – To insert the following new subclause –

“(1) Section 88(2) is amended by deleting “ subsection (2) ” and inserting instead –

“ subsection (1) ” ”.

Page 16, line 11 – To insert before “After” the following –

“ (2) ”.

Page 16, line 13 – To insert after “not” the following –

“ sell or ”.

Page 19

Recommendation 2: Subject to Recommendation 1, the Committee recommends that the Censorship Amendment Bill 2002 be passed.

**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES**

IN RELATION TO THE

CENSORSHIP AMENDMENT BILL 2002

1 REFERENCE AND PROCEDURE

- 1.1 On June 25 2002, the Censorship Amendment Bill 2002 (Bill) was referred to the Standing Committee on Uniform Legislation and General Purposes (Committee) by resolution of the Legislative Council (Council) pursuant to Standing Order 230A(3). Standing Order 230A ordinarily requires that the Committee report to the Council within 30 days of the first reading of the Bill.
- 1.2 The adjournment and subsequent prorogation of the Parliament on August 9 2002 resulted in the Bill lapsing from the Notice Paper together with the referral to the Committee. The Bill was reinstated in the Council on August 14 and referred to the Committee on that date.
- 1.3 The Committee was due to report to the House on the Bill by September 13 2002; however, on August 21 2002, under Standing Order 230A(4), the Committee sought and was granted an extension of time to report to the House on the Bill by October 17 2002.
- 1.4 Pursuant to Standing Order 230A(5), the policy of the Bill is not a matter for inquiry by the Committee.

2 UNIFORM LEGISLATION

Scrutiny of Uniform Legislation in the Western Australian Parliament

- 2.1 The Bill is an example of 'uniform legislation'. Uniform legislation arises out of national uniform schemes of legislation and intergovernmental agreements.
- 2.2 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991, both the Council and the Legislative Assembly have established procedures to assist Parliament in the scrutiny of national schemes of legislation.
- 2.3 Scrutiny of uniform legislation was previously conducted by the Legislative Council Standing Committee on Constitutional Affairs (SCCA) and the Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements (SCULIA). Neither Committee was reappointed in the Thirty-Sixth Parliament. The terms of reference for SCCA and SCULIA were, in part, initially incorporated into the

terms of reference for the Standing Committee on Legislation on that Committee's appointment at the commencement of the Thirty-Sixth Parliament in May 2001. When this Committee was appointed in April 2002, it was referred the task of the scrutiny of legislation.

Legislative Structures

- 2.4 National legislative schemes have been addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (1996 Position Paper). The 1996 Position Paper emphasises that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. It does, however, question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 2.5 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various Executive Governments is a 'given'.¹
- 2.6 National legislative schemes can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on national consistency or uniformity of laws and adaptability, have been identified. The legislative structures are summarised in Appendix 1 to this report.²

Scrutiny Principles

- 2.7 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:
- Does the Bill trespass unduly on a person's rights and liberties?³
 - Does the Bill inappropriately delegate legislative powers?⁴

¹ For example refer to the Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp 7-12. Also refer to Parliament of Western Australia, Legislative Council Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Report No 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*.

² Ibid. Also see reports of the Parliament of Western Australia, Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

³ For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is, written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

⁴ For example, 'Henry VIII clauses', insufficient parliamentary scrutiny of the exercise of the legislative power.

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- 2.8 The principles have been applied by the Committee as a convenient framework for the scrutiny of uniform legislation.⁵

3 INQUIRY PROCEDURE

- 3.1 An advertisement seeking public comment on the Bill was placed in *The West Australian* newspaper on June 29 2002 and submissions were to be returned by July 15 2002. Details of the inquiry were placed on the parliamentary website. One submission was received from the National Viewers and Listeners Association of Australia Inc.

4 STRUCTURE OF THE REPORT

- 4.1 The Bill contains 49 clauses in three Parts:
- i) Part 1 – Preliminary;
 - ii) Part 2 – Amendments to *Censorship Act 1996*; and
 - iii) Other amendments, transitional and savings provisions.
- 4.2 Details of selected clauses of the Bill are provided together with Committee comment where appropriate at section 7 of this report.

5 BACKGROUND

- 5.1 This Bill amends the *Censorship Act 1996*. The *Censorship Act 1996* was passed by the Western Australian Parliament as part of the revised censorship scheme introduced throughout Australia in 1996.
- 5.2 The revision of the censorship laws and administration throughout Australia arose out of a report of the Australian Law Reform Commission in 1991, *Censorship Procedure*, which included draft legislation.⁶

Censorship/Classification in Australia

- 5.3 Censorship in Australia involves a co-operative Commonwealth, State and Territories scheme (the national scheme) that, in its present form, has been in force since January

⁵ Parliament of Western Australia; Legislative Council Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Report No. 1: Offshore Minerals Bill 2001, Offshore Minerals (Registration Fees) Bill 2001 and Offshore Minerals (Consequential Amendments) Bill 2001*.

⁶ Australian Law Reform Commission, *Report No. 53, Censorship Procedure*, 1991.

1 1996.⁷ The *Classification (Publications, Films and Computer Games) Act 1995* (Cth) (the Commonwealth Act) is the legislative centrepiece of the national classification scheme for publications, films and computer games. Western Australia (WA) joined the national co-operative censorship scheme (NCCS) in 1996 (see paragraphs 5.6-5.11 of this report).⁸

5.4 Under the current scheme, the Commonwealth classifies material (publications, films and computer games). The enforcement of classification decisions is the responsibility of the States and Territories, some of which have also reserved certain censorship powers.⁹

5.5 Any change to the co-operative national legislative scheme requires the agreement of all participating jurisdictions. States and Territories are required to enact complementary legislation.

Current Uniform Scheme

Non-Binding National Standards Model

5.6 The former Standing Committee on Uniform Legislation and Intergovernmental Agreements of the Legislative Assembly of Western Australia identified the legislative structure currently being used for promoting or achieving uniform national censorship standards in Western Australia as being a non-binding national standards model:

*Under this model, national standards are agreed to by all jurisdictions. The Western Australian Parliament passes its own legislation. A national authority is appointed to make decisions for Western Australia under the State legislation. The Western Australian Minister has the authority to vary any decision of the appointed authority.*¹⁰

⁷ For a summary on the pre 1996 system, see Gareth Griffith, *Censorship in Australia: Regulating the Internet and other recent developments*, Briefing Paper No. 4/02, NSW Parliamentary Library Research Service, February 2002, pp. 4-12.

⁸ The Commonwealth Act took effect on January 1 1996 at the same time as supporting State legislation came into force.

⁹ For example, Western Australia and South Australia retain a secondary level of classification for films, computer games and (in the case of South Australia) publications. Tasmania similarly had retained State-based review of decisions in relation to films for sale. For more details see Griffith, Op. Cit., pp. 17-18.

¹⁰ Eleventh Report of the Standing Committee on Uniform Legislation and Intergovernmental Agreements *Censorship Bill*, Legislative Assembly of Western Australia, Thirty-Fourth Parliament, November 28 1995, p. 11.

- 5.7 The model ensures scrutiny by the Parliament of Western Australia. That Committee commented that:

*In essence, the model chosen by the Government of Western Australia achieves the desirable objectives of national standards and at the same time preserves the Parliament of Western Australia's right to properly scrutinise, vary or amend the agreed legislation.*¹¹

Western Australia

- 5.8 All States adopted the Commonwealth Act as their own, except WA. Western Australia set up an arrangement whereby it enacted its own legislation, the *Censorship Act 1996*, and enabled Commonwealth officers to classify films and computer games under WA legislation.
- 5.9 Western Australia currently does not adopt decisions made under the Commonwealth Act. Under an Agreement, the Commonwealth Censorship Board is appointed censor for Western Australia and makes decisions under the WA legislation.¹²
- 5.10 Under the current legislation, the WA Minister may vary or set aside a Commonwealth classification decision and act as the censor in WA.
- 5.11 In relation to publications, WA has operated its own classification regime since 1973.¹³ Publications are currently classified by the State Minister, acting on advice of the Censorship Advisory Committee.¹⁴ The National Classification Code and Classification Guidelines are taken into account in the classification process (see paragraph 5.15 of this report).

¹¹ Ibid, p. 4.

¹² This Agreement, between the State of Western Australia and the Commonwealth of Australia, dated October 31 1996, enables the appointment of the Commonwealth censor as censor and appeal censor for WA. The agreement sets out the mechanisms by which the Commonwealth will carry out the censorship process. The State Minister may terminate the agreement at any time. See paragraph 8.1 of this report.

¹³ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, June 25 2002, p. 11896.

¹⁴ The Censorship Advisory Committee (CAC) is a State body established by the *Censorship Act 1996*. The Censorship Amendment Bill 2002 provides for the abolition of the CAC as a consequence of full integration into the NCCS. See paragraphs 7.28-7.38 of this report.

The Commonwealth Act

What does the Commonwealth Act do?

- 5.12 The Commonwealth Act establishes the Classification Board and the Classification Review Board.¹⁵ The Classification Board's role is to classify publications, films and computer games submitted to it. The Classification Review Board reviews decisions of the Classification Board. The Commonwealth Act provides that, in appointing members to both Boards, regard is to be had to the desirability of ensuring that the membership of the Boards is broadly representative of the Australian community. Further, the Commonwealth Minister must, before recommending the appointment of the members, consult with participating State and Territory Ministers.
- 5.13 The Commonwealth Act provides that publications, films and computer games are to be classified in accordance with the criteria established in the National Classification Code, set out in the Schedule to the Act, and the Classification Guidelines. The Code and the Guidelines may be amended from time to time with the agreement of the Commonwealth Minister and each participating State and Territory Minister. The National Classification Code's purpose is to set out broad criteria for each of the classification categories and to formulate principles, which should inform classification decisions.¹⁶ The details of what material falls within each of those categories are provided by the more comprehensive Classification Guidelines. Other matters to be considered in making classification decisions are also set out in the Commonwealth Act.
- 5.14 The Commonwealth Act sets out in ascending order the types of classification for publications, films and computer games. Review of a decision of the Classification Board lies with the Classification Review Board at the instigation of: the Commonwealth Attorney-General; the applicant for classification; the publisher of the film, publication or computer game concerned; or any person aggrieved by the decision.¹⁷ If a participating State or Territory Minister asks the Commonwealth Minister to apply for review of a decision the Commonwealth Minister must do so.¹⁸

National Classification Code and the Classification Guidelines

- 5.15 The National Classification Code (Code) is contained in the schedule to the Commonwealth Act. This Code has been negotiated between the Commonwealth and

¹⁵ The Classification Board is a full-time statutory body located at the Office of Film and Literature Classification in Sydney that classifies material on a daily basis. The Classification Review Board is a separate statutory body whose members meet, on an as-required basis, to consider review applications.

¹⁶ Op. Cit., Griffith, p.15.

¹⁷ *Classification (Publications, Films and Computer Games) Act 1995* (Cth), section 42(2).

¹⁸ *Ibid*, section 42(1).

the States. The Code sets out the principles to be followed in classification decisions and the general criteria for the various classification categories (G, PG, M, MA, R, X, RC, etc).

- 5.16 There are separate Classification Guidelines (the Guidelines) for film and video, publications and computer games. The Guidelines contain detailed criteria for each classification category.¹⁹
- 5.17 Under the Commonwealth Act, with certain limited exceptions, all films and computer games are classifiable.
- 5.18 For publications, the previous ‘voluntary scheme’²⁰ is replaced by a partially compulsory scheme under which publications are classified by the Classification Board, and not departmental officers as was previously the case. A partially compulsory scheme is achieved by State and Territory legislation making it an offence to sell a submittable publication that has not been classified. ‘Submittable publication’ is defined under the Commonwealth Act to mean:

*An unclassified publication that, having regard to the Code and Classification Guidelines, to the extent that they relate to publications, contains depictions or descriptions of sexual matters, drugs, nudity or violence that are likely to cause offence to a reasonable adult to the extent that the publication should not be sold as an unrestricted publication.*²¹

As the publications scheme is only partially compulsory, the Commonwealth Act enables the Director of the Classification Board to give a notice to a publisher requiring the publisher to apply for classification.

- 5.19 The Commonwealth Act also allows for approval of advertisements for publications, films and computer games and, because that scheme is voluntary, gives power to the Director to call-in advertisements for approval.

The classification system

- 5.20 In place under the Commonwealth Act is a scheme in which:

¹⁹ Parliament of Australia, Library, *Social Policy Group – censorship and classification in Australia*, E-brief, October 2001. [http://www.aph.gov.au/library/intguide/sp/censorship_ebrief.htm]

²⁰ Griffith, Op. Cit., p. 14.

²¹ *Classification (Publications, Films and Computer Games) Act 1995*, section 5.

- i) Classifiers are directed to take certain matters into consideration.²² These matters include:
- the standards of morality, decency and propriety generally accepted by reasonable adults;
 - the literary, artistic or educational merits (if any) of the film, publication or computer game;
 - the general character of the film, publication or computer game, including where it is of medical, legal or scientific character; and
 - the persons or class of person to or amongst whom it is published or is intended or likely to be published.
- ii) Classification decisions are to give effect to certain principles (under the Code). As stated above, the Code is the product of an agreement between all the participating jurisdictions. The Code's purpose is to set out the classification categories and criteria, as well as to formulate the principles that should inform classification decisions. These principles are:
- adults should be able to read, hear and see what they want;
 - children should be protected from material likely to harm or disturb them; and
 - everyone should be protected from exposure to unsolicited material they find offensive.
- iii) Arrangement is made for the making of classification guidelines, setting out in more detail what may be permitted under each of the classification categories.
- iv) Classification decisions are made in accordance with the Code and Guidelines.

Changes to the NCCS

5.21 In March 2001, the Senate passed amendments to the *Classification (Publications, Films and Computer Games) Act 1995*.²³ The amendments came into effect in March

²² Griffith, Op. Cit., pp. 14-15.

²³ Attorney General, Hon Darryl Williams, *Classification of Publications, Films and Computer Games to be Streamlined*, News Release, February 28 2001.
[http://law.gov.au/aghome/agnews/2001newsag/929_01.htm]

2002. All States have already passed complementary amendments to classification enforcement laws. (Queensland has yet to proclaim its amending legislation.)

- 5.22 The amendments effectuated many improvements of a procedural and technical kind to streamline the classification procedure. Under the new arrangements, the range of films that are exempt from classification have been expanded to include certain current affairs, hobbyist, sporting, family, live performance, musical presentation and religious films. The exemptions apply to material that is suitable for children at the 'G' or 'PG' level. Additionally, the Classification Board has the power to determine whether or not a film is exempt from classification where there is doubt about its legal status.
- 5.23 As a result of the amendments, the Classification Board is able to issue a serial classification for certain submittable publications and to require, in some cases, that publications only be sold in a sealed or opaque wrapper.
- 5.24 The new arrangements have clarified who may apply to the Classification Review Board for the review of a classification decision. This allows organisations or persons with a particular pre-existing interest in the contentious aspects of the subject matter or theme of the material concerned to seek a review as 'a person aggrieved'.²⁴
- 5.25 The amendments to the Commonwealth Act reflect five years experience of operation of the national classification scheme.

6 OVERVIEW OF THE BILL

- 6.1 The purpose of the Censorship Amendment Bill 2002 is to amend the *Censorship Act 1996* to provide for the full integration of Western Australia into the national co-operative censorship scheme (NCCS) and to make WA's censorship legislation consistent with that in other States and Territories.
- 6.2 As WA will be adopting the classification decisions made under the Commonwealth Act, the purpose of the *WA Censorship Act 1996* will be amended to be the enforcement of classification decisions.
- 6.3 Many of the amendments extend the offence provisions currently applying to films and computer games to publications, which have been the subject of a separate classification scheme in WA since 1973.
- 6.4 The Bill also enhances provisions in relation to enforcement of classification decisions by creating new offences, removing obstacles to prosecution for offences and, in some cases, increasing penalties to act as a deterrent in relation to more serious offences.

²⁴ *Classification (Publications, Films and Computer Games) Act 1995*, section 42(1)(d).

7 COMMENT ON SELECTED CLAUSES OF THE BILL

7.1 The full integration of WA into the NCCS means that WA will now adopt all classification categories for publications, films and computer games as expressed in the Commonwealth Act. This is similarly the case in relation to reclassification and review of classification decisions.

Clause 7 – Parts 2, 3, 4, 5 and 6 Repealed

7.2 Clause 7 of the Bill repeals Parts 2, 3, 4, 5, and 6 of the *Censorship Act 1996* as they mirrored the classification categories contained in the Commonwealth Act. As a result, the *Censorship Act 1996* will no longer contain any definitions in relation to classification categories. Reference will need to be made to the Commonwealth Act.

Clause 8 – Section 57 Amended

7.3 Under the *Censorship Act 1996* there are two categories for publications: unrestricted and restricted. The proposed amendment in Clause 8 amends the categories by dividing the restricted category into category 1 restricted and category 2 restricted, as these are the categories contained in the Commonwealth Act. The Classification Guidelines (the Guidelines) explain the major differences between the two categories, which in summary are that category 1 publications may contain explicit nudity and simulated sexual activity, while category 2 publications may contain explicit nudity and consensual sexual activity. This terminology will now be used in enforcement provisions in the *Censorship Act 1996*.

Clause 9 – Division 2 – Replaced – Publications, Sections 61-65E Amended

7.4 Part 7, Division 2 relating to publications is replaced with new offence provisions relating to the new categories for classification of publications: submittable, category 1 restricted, category 2 restricted and RC. While the Division has been redrafted to accommodate the new categories of classification, the principles relating to the sale or supply of restricted publications to minors, the copying of restricted publications and leaving publications in certain places are all consistent with Division 2 in the current *Censorship Act 1996*.

7.5 The new offence provisions contained in sections 61-65E include strict liability offences, rebuttable presumptions²⁵ and, in some cases, a reversal of the onus of proof.

²⁵ A rebuttable presumption is a presumption that may be disproved by evidence contradicting the proof offered by the basic facts or the presumed facts. Proposed s.63(3) provides for the rebuttal of presumed facts.

Strict Liability Offences

- 7.6 Strict liability offences are offences which do not require any proof of *mens rea* (criminal intent) but to which the common law defence of honest and reasonable mistake of fact applies.²⁶ Proposed sections 61(1), 62, 64(1), 65(1), 65D(1) and 65D(2) are examples of strict liability offences, where it is not necessary to prove the person's intent.
- 7.7 The Committee notes that strict liability offences may be appropriate in some circumstances, such as:
- offences of a regulatory nature – particularly offences designed to discourage careless non-compliance with a statute;
 - offences dealt with under an infringement notice, such as those with relatively low penalties – the greater the penalty the less likely that strict liability will be appropriate.²⁷
- 7.8 The Senate Standing Committee for the Scrutiny of Bills (the Senate Committee) considered the issue of strict and absolute liability offences in its report *The Work of the Committee during the 39th Parliament, November 1998 – October 2001*.²⁸ The Senate Committee noted that it will draw the Senate's attention to provisions which create strict and absolute liability offences and expressed the view that, where a Bill creates such an offence, the reasons for its imposition should be set out in the Explanatory Memorandum which accompanies the Bill.²⁹
- 7.9 The Senate Committee's report also noted that "[I]n general terms, the Criminal Code requires that legislation must now explicitly state that strict liability applies to an offence or to an element of an offence – strict liability can no longer be deemed to apply to an offence."³⁰

²⁶ Strict liability offences, which provide for the common law defence of honest and reasonable mistake of fact, are different from absolute liability offences in which there is a legal responsibility for a breach of law, not dependent on a particular state of mind, and for which no defence is available, except an Act of God. Nygh, P., and P. Butt, (eds), *Australian Legal Dictionary*, Butterworths, 1997, p. 9 and p. 1121.

²⁷ See Senate Standing Committee for the Scrutiny of Bills, *The Work of the Committee during the 39th Parliament November 1998 – October 2001*, June 2002, pp. 31-37.

²⁸ The Senate Committee is required to report on whether legislation trespasses unduly on personal rights and liberties.

²⁹ Senate Committee, Op. Cit., p. 35.

³⁰ Senate Committee, Op. Cit., p. 37.

Reversal of the Onus of Proof

- 7.10 At common law, it is ordinarily the duty of the prosecution to prove all the elements of an offence. The accused is not required to prove anything. Some provisions in legislation reverse the onus and require the person charged with an offence to prove or disprove some matters to establish his or her innocence.
- 7.11 Proposed sections 61(2), 63(2), 65D(3), 65D(4), 65E(2), 65E(4) and 65E(5) all reverse the common law onus of proof so that in a proceeding, under any of these sections the defendant will be required to prove or disprove some matters to establish his or her innocence.
- 7.12 The Committee notes that the proposed sections place an evidential burden on the defendant to disprove one or more matters to establish his or her innocence or a reasonable possibility that the matter exists or does not exist. In the case of proposed sections 61(2), 63(2), 65E(2)(a), 65E(2)(b) or 65E(4), the defendant may be required to apply to the Classification Board for classification of the publication, which may require paying applicable fees.

Clause 12 – Section 79 Amended

- 7.13 Clause 12 proposes to insert a new provision in section 79 creating an offence for any person supplying a minor with a film classified X or RC, or an unclassified film, which if classified would be classified X or RC. An offence against the proposed section will attract a penalty of \$15,000 or 18 months imprisonment.
- 7.14 The Committee notes that this is the creation of a new offence with substantial penalties, which the committee considers to be commensurate with the nature of a breach of the provision.

Clause 14 – Section 88 Amended

Typographical Error in Censorship Act 1996

- 7.15 The Committee notes that there is a typographical error in section 88(2) of the *Censorship Act 1996*. The words “an offence against subsection (2)” should be “an offence against subsection (1)” as the offence relates to subsection (1) and not subsection (2).

Clause 14 of the Bill

- 7.16 Clause 14 amends section 88 of the *Censorship Act 1996*, by creating a new offence for a person *supplying* a computer game classified RC to a minor. Proposed section 88(3) refers only to the supply of certain computer games to a minor. The Committee considers that it is the intention of the section to refer to both the sale and supply of

certain computer games to minors. The clause notes to the Bill, in this instance, use the words ‘supply’ and ‘sale’ interchangeably, stating:

Proposed section 88(2) [sic] is a new provision which creates an offence for a person to supply an RC computer game to a minor...

*The sale of RC material to a minor is a serious offence. Therefore the penalty is \$15 000 or imprisonment for 18 months.*³¹

Recommendation 1: The Committee recommends that clause 14 of the Censorship Amendment Bill 2002 be amended in the following manner –

Page 16, after line 10 – To insert the following new subclause –

“(1) Section 88(2) is amended by deleting “ subsection (2) ” and inserting instead –

“ subsection (1) ””.

Page 16, line 11 – To insert before “After” the following –

“(2) ”.

Page 16, line 13 – To insert after “not” the following –

“ sell or ”.

Clause 16 – Section 91 Amended

7.17 Under the current *Censorship Act 1996*, the power to grant a certificate of exemption in relation to a film is granted by the censor. As WA has opted to become a full participant in the national scheme, this power will be vested in the Commonwealth Classification Board and exemptions will be granted under the Commonwealth Act and not the State Act.

7.18 This clause also creates a new offence for publishing a submittable publication or a publication classified RC, in accordance with the NCCS.

³¹ See Clause Notes, *Censorship Amendment Bill 2002*, p.7. Note, in addition, there is a typo in the Clause Note to Clause 14 – Section 88 amended: The paragraph should commence “Proposed section 88(3)” and not “88(2)”.

Clauses 23 – 28

- 7.19 Each of these clauses deletes reference to the “censor” and replaces the term with the “Director”. This is due to the abolition of the position of censor as the Director of the Classification Board will act as the censor for WA as a result of WA’s full participation in the national scheme.

Clause 31 – Section 116 Amended

- 7.20 The Committee endorses the provisions in clause 31 in relation to the ability to expedite prosecution in relation to offences committed, where the defendant agrees that, had the item at the centre of the prosecution been classified, it would have been the classification agreed. The Committee considers that tremendous time and cost-savings will result from the inclusion of this provision in section 116(1)(a) of the Act.

Clauses 32 & 33 – Forfeiture

- 7.21 The Committee notes that under the proposed new provisions in section 117 of the Act, ‘things’ lawfully seized will be forfeited to the Crown at the expiry of 12 months, even where no person has been charged. Similarly, proposed new section 117A provides that where 10 or more products³² are lawfully seized, at the expiry of the prescribed period, even those ‘products’ not the subject of proceedings are forfeited to the Crown. The committee notes that there are provisions for the owner of the seized products liable to forfeiture to apply, within two months, to have the seized items returned.
- 7.22 Hon Kim Chance MLC explained the new provisions as follows:

*The Bill provides that when multiple products are seized on the same day from the same premises, and the defendant is convicted of specific offences in respect of 10 or more different items that are then forfeited, all the other items seized at the same time are also forfeited.*³³

- 7.23 These provisions have been included to act as a “...stronger deterrent to commercial dealing in illegal items.”³⁴ The forfeiture of ‘seized products’ to the Crown must be seen in the light of striking a balance between public rights and private rights. In this

³² ‘Products’ in this proposed new section refers to publications, films or computer games and includes a combination of these (see proposed section 117A(8)). Also note that copies of the same product do not constitute different products, proposed section 117A(9).

³³ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, June 25 2002, p. 11897.

³⁴ Ibid.

instance, the public's right to protection from these seized items is accepted as paramount.

- 7.24 The committee also notes that, subject to the new provisions included in proposed section 117B, a defendant may wish to make an application for the classification of seized products; however, proposed section 117B(2) provides that the prosecution may refuse to forward the application until all classification and postage fees associated with the application are paid.

Clause 34 – Infringement Notices

- 7.25 In accordance with the desire to provide for greater enforcement of the *Censorship Act 1996*, clause 34 inserts a new section, Division 2 – Infringement Notices. Proposed sections 117D-117J provide for the issuing, within 35 days of a deemed offence, by designated persons, of an infringement notice.
- 7.26 A defendant may choose to pay a modified penalty, within the prescribed time, in response to the infringement notice, which will prevent the need for the issuing of proceedings in respect of the same matter.
- 7.27 The committee supports the introduction of infringement notices, which can be issued on the spot in response to offences of a less serious nature.³⁵ The introduction of provisions to issue infringement notices should assist in the enforcement of the Act and provide a significant reduction in costs and time-delays that are the result of bringing forth proceedings for minor offences.

Clause 35 – Censorship Advisory Committee and Clause 40 – Section 138, Schedule 1 Repealed

- 7.28 As a result of becoming a full participant of the NCCS, WA will enforce classification decisions made by the Office of Film and Literature Classification (OFLC) under the Commonwealth Act. Full participation in the NCCS renders redundant the role and function of the WA Censorship Advisory Committee (CAC).
- 7.29 The abolition of the CAC, together with the proposed elimination of the State Minister's ability to vary or set aside classification decisions of the OFLC, are the most controversial aspects of the Bill.
- 7.30 Clause 35 abolishes the Censorship Advisory Committee. Clause 40 repeals various provisions in the *Censorship Act 1996*, including the Minister's power to exercise his or her discretion, in relation to the public interest in the State of Western Australia, to

³⁵ Hon Kim Chance MLC noted in his second reading speech that “[I]nfringement notices will not apply to serious offences, such as the possession of child pornography”. See Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, June 25 2002, pp. 11898-11899.

- veto classification decisions, advertisement approvals or exemptions handed down by the Commonwealth and the Constitution and Proceedings of the Censorship Advisory Committee (Schedule 1).
- 7.31 The Committee notes that the abolition of the CAC will provide a cost-saving to the State of approximately \$27,500 per annum.³⁶
- 7.32 In its submission to the Committee, the National Viewers and Listeners Association of Australia Inc. (NVLAA) expressed its concern in relation to the ‘integrity’ of the Commonwealth Classification Board. The NVLAA noted the recent controversy over the French film *Baise Moi*, which was initially classified by the Classification Board R18+ and distributed with consumer warnings and which was later given an RC classification by the Classification Review Board.³⁷
- 7.33 Mrs Gail Gifford, on behalf of NVLAA, stated “[T]here does not appear to be any pressing reason why the discretionary power of the State Minister to set aside or alter the classifications handed down by the Commonwealth should not be retained.”³⁸ Mrs Gifford also expressed the view that there is greater accountability under the current system: “[T]he fact that the State Minister has such discretionary power also makes the State Minister more accountable to the WA electorate regarding how he responds to community concerns about controversial material in the media.”³⁹
- 7.34 In his second reading speech, Hon Kim Chance MLC noted, in relation to the removal of the State Minister’s discretionary power, that “[S]uch a discretion may have been necessary in the past. However, the national classification scheme is fully developed and its integrity is accepted by all State, Territory and Commonwealth Ministers who are responsible for censorship.”⁴⁰

³⁶ Attorney General, Hon Jim McGinty MLA, *WA moves to ensure uniform national censorship laws*, Press Release, January 18 2002.

³⁷ On September 19 2001, the Classification Board viewed the film *Baise Moi* and, in a 6-5 majority decision, classified the film R18+ with the consumer advice “strong sexual violence, high level violence, actual sex and adult themes”. The R18+ category for films is legally restricted to adults. On April 21 2002, the Commonwealth Attorney General requested a review of the Classification Board’s decision. On May 10 2002, the Classification Review Board (which is a separate statutory body from the Classification Board, comprising four members who meet as required to consider review applications) met to review the classification and unanimously classified the film RC (refused classification). A RC film cannot legally be shown in Australia. The film was being shown in Melbourne and Sydney when the R18+ classification was replaced by the RC classification. Premiers of both NSW and Victoria were concerned that their participation in the national scheme meant that they could not over-rule or request a further review of the Review Board’s decision, and as such were unfortunately bound by the Review Board’s decision. In this instance, both Premiers argued that the film should have retained the R18+ classification together with the consumer advice.

³⁸ National Viewers and Listeners Association of Australia (Inc.), Submission, p. 2.

³⁹ Ibid.

⁴⁰ Western Australia, *Parliamentary Debates (Hansard)*, Legislative Council, June 25 2002, p. 11896.

- 7.35 The Committee notes that, in relation to the current power to vary or set aside decisions made by the Classification Board, this power was last exercised in 1993, nearly ten years ago.⁴¹
- 7.36 While the State Minister's discretionary power is removed, the Minister will retain the ability to request the review of a classification decision. Section 42(1) of the Commonwealth Act states categorically that where a participating Minister writes to the Commonwealth Minister to apply for a review of a decision "...the [Commonwealth] Minister must do so."
- 7.37 The Committee notes that the ability to request a review by the Commonwealth and the ability to exercise a veto over the Commonwealth's decision are very different powers. By becoming a full participant in the national scheme WA is relinquishing this veto power. Being a full participant in the national scheme will mean, for example, that in cases where WA believes that a film should be classified RC and not R18+, but also where it is believed a film should be classified R18+ and not RC, the State Minister's powers will be limited to requesting that a classification decision be reviewed. The inclusion of a requirement that the Commonwealth Minister forward an application for a review of a classification decision to the Review Board, is an effective counterbalance to the loss of the veto power.
- 7.38 The Committee also notes that there are significant benefits to both the industry and the community by becoming a full participant in a national uniform scheme, which will provide for certainty in relation to laws relating to publications, films and computer games in different jurisdictions throughout Australia.

Clause 41 – Various Penalties Amended

- 7.39 Clause 41 amends penalties in various clauses throughout the Bill. In most instances where the penalty is or includes a fine, that fine remains the same as currently contained in the Act; however, imprisonment penalties are deleted in all cases where the fines were \$5,000 or \$10,000. In two instances, penalties are dramatically increased, in accordance with penalties in other jurisdictions.⁴² In the case of more serious offences, a fine of \$15,000 or 18 months imprisonment remains.
- 7.40 The Committee notes section 40(5) of the *Sentencing Act 1996* provides that "...a body corporate convicted of an offence which is or includes a fine, is liable to a fine of five times the maximum fine that could be imposed on a natural person convicted of

⁴¹ Attorney General, Hon Jim McGinty MLA, *WA moves to ensure uniform national censorship laws*, Press Release, January 18 2002.

⁴² Hon Kim Chance MLC, second reading speech, *Hansard*, June 25 2002, p. 11897. The penalty for selling or supplying a minor with a category two restricted publication will be \$15,000 or 18 months in prison. The penalties for leaving a submittable, restricted or refused publication on private premises without the owner's consent, have been increased from \$1,000 to \$10,000.

the same offence”. The *Censorship Act 1996* currently provides penalties for an individual or ‘in any other case’ fines which are five times the penalty applying to individuals. In all instances, the ‘in any other case’ prescribed penalties have been amended to delete reference to ‘in any other case’ and the figure that followed.

Clause 44 – Co-operative Schemes (Administrative Actions) Act 2001 Amended

- 7.41 For many years, the States have, with Commonwealth consent, conferred a variety of non-judicial powers and functions on Commonwealth officers and authorities under so called ‘co-operative schemes’. Challenges to such schemes had been made, but the law confirming their validity had been settled back in 1983 by the High Court of Australia in *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd.*⁴³ However, two High Court cases from June 1999 and May 2000 cast doubt on the constitutional underpinnings of a specific co-operative scheme known as the National Corporations Law Cooperative Scheme.⁴⁴ The two cases were *The Queen v Hughes*⁴⁵ (*Hughes*) and *Re Wakim; Ex parte McNally*⁴⁶ (*Wakim*).⁴⁷
- 7.42 In the *Hughes* case, the High Court established that a conferral power on Commonwealth authorities or officers coupled with a duty by a State law, must be able to be referred to a Commonwealth head of power.
- 7.43 The Commonwealth considered that the *Hughes* decision clearly jeopardised the operation of the National Corporations Law Co-operative Scheme and if the reasoning in *Hughes* was generally applied to other co-operative schemes, then their constitutional framework would also be in question.
- 7.44 In 2001, the Western Australian Government legislated to end the uncertainty over the exercise of State powers and functions by Commonwealth officers or authorities through the operation of various co-operative schemes by passing the Co-operative Schemes (Administrative Actions) Bill 2001.⁴⁸
- 7.45 Because of WA’s particular form of participation in the national co-operative censorship schedule prior to this Bill, WA had entered into arrangements with the

⁴³ (1983) 158 CLR 535.

⁴⁴ The Standing Committee on Legislation of the Legislative Council scrutinised the legislation supporting the constitutional framework of the Corporations Law Co-operative Scheme in its first report to the Legislative Council.

⁴⁵ (2000) 171 ALR 155.

⁴⁶ (1998) 198 CLR 511.

⁴⁷ For a fuller discussion of the *Hughes* and *Wakim* cases and the Co-operative Schemes (Administrative Actions) Bill 2001, please see *Report 2, Report of the Standing Committee on Legislation in relation to the Co-operative Schemes (Administrative Actions) Bill 2001 and the Agricultural and Veterinary Chemicals (Western Australia) Amendment Bill 2001*.

⁴⁸ *Ibid.*

Commonwealth that allowed Commonwealth officers to classify films and computer games under Western Australian legislation. The High Court decision in the *Hughes* case created uncertainty concerning the validity of such an arrangement.

- 7.46 Clause 44 of the Bill proposes to amend *the Co-operative Schemes (Administrative Actions) Act 2001* by inserting into that Act an express reference to the *Censorship Act 1996* and retrospectively validating actions taken by the Commonwealth officers under the *Censorship Act 1996* pursuant to the co-operative arrangements.

8 INTERGOVERNMENTAL AGREEMENT

- 8.1 The Committee notes that the Agreement between the Commonwealth of Australia and the State of Western Australia⁴⁹ dated October 31 1996, which enables the appointment of the Commonwealth censor as the censor and appeal censor for WA, will no longer be required, subsequent to the enactment of this legislation.

Recommendation 2: Subject to Recommendation 1, the Committee recommends that the Censorship Amendment Bill 2002 be passed.



Hon Adele Farina MLC
Chairman

October 17 2002

⁴⁹ Agreement between the Commonwealth of Australia and the State of Western Australia for an Arrangement under section 4 of the *Classification (Publications, Films and Computer Games) Act 1995* of the Commonwealth and section 126 of the *Censorship Act 1996* of the State, October 31 1996.

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

- Structure 7:** *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.
- Structure 8:** *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.
- Structure 9:** *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.