

CENSORSHIP AMENDMENT BILL 2005

EXPLANATORY MEMORANDUM

This Bill amends the *Censorship Act 1996 (WA)* (the Act) to ensure that the name of the Act reflects its revised purpose, as a result of the amendments that made Western Australia a full member of the National Classification Scheme. It addresses deficiencies in certain forfeiture, evidentiary and infringement notice provisions contained in the Act. Finally, it amends the Act so as to incorporate the new combined classification categories for films and computer games.

PART 1 – PRELIMINARY

Clause 1-Short title

Citation of the Act.

Clause 2 - Commencement

Clause 2 makes provision for the commencement of the Act, other than Part 4, on a day fixed by proclamation. Part 4 is deemed to have commenced, on 26 May 2005 which is the same day that the new combined classification categories for films and computer games came into effect in the *Classification (Publications, Films and Computer Games) Act 1995 (Cwlth)*.

Clause 3 – The Act amended

Clause 3 provides that the Act to be amended is the *Censorship Act 1996 (WA)*.

Clause 4 – Section 1 amended, consequential amendments, transitional and validation

Section 1 of the Act contains the short title of the Act.

Western Australia is now a full participant in the National Classification Scheme and is no longer involved in the classification of publications, films and computer games. The State's role primarily now involves enforcing Commonwealth classification decisions.

Subclause 4(1) changes the name of the Act from the *Censorship Act 1996 (WA)* to the *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)*.

Subclause 4(2) gives effect to Schedule 1 of this Bill. It contains consequential amendments to the *Co-operative Schemes (Administrative Actions) Act 2001 (WA)*, the *Criminal Code (WA)* and the *Prostitution Act 2000 (WA)*. Schedule 1 amends these Acts so that references to the *Censorship Act 1996 (WA)* are replaced with the new title of the Act, namely the *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)*.

Subclause 4(3) provides that a reference to the *Censorship Act 1996 (WA)* in any Act or regulation shall, unless the context otherwise requires, be construed as a reference to the *Classification (Publications, Films and Computer Games) Enforcement Act 1996 (WA)*.

Subclause 4(4) provides that the reference in Schedule 2 of the *Community Protection (Offender Reporting) Act 2004* (WA) to the *Classification (Publications, Films and Computer Games) Enforcement Act 1996* (WA) is to mean and always to have meant a reference to the *Censorship Act 1996* (WA) while the Act was known by that title.

PART 2 – CHANGES RELATING TO INVESTIGATION OF CHILD PORNOGRAPHY

Clause 5 - Section 117 amended

Section 117(2a) currently provides for the forfeiture of films classified RC or X, publications or computer games classified RC, or child pornography, seized under this Act, if no person has been charged after 12 months.

As the films, publications and computer games referred to in this subsection have been classified, it is clear-cut whether or not they come within the scope of this subsection. However, as it is necessary for the court to determine whether something is child pornography, and this subsection deals with the forfeiture of things where no person has been charged, this subsection does not have application to material which is highly likely to be or contain child pornography.

This provision only applies if an object is seized under this Part of the *Censorship Act 1996* (WA). However, section 112(2) of this Act, which deals with entry, inspection and seizure, only relates to businesses. In practice, computers and other material thought to contain child pornography will usually be seized under a section 711 *Criminal Code* search warrant.

Subclause 5(1) amends section 117(2a)(c) by including reference to “an article highly likely to be, or highly likely to contain, child pornography”, and thereby enabling the police to make a judgment regarding the material rather than requiring a determination by the Court that the material is or contains child pornography. This amendment enables things which are highly likely to be or contain child pornography to come within the scope of this subsection.

Subclause 5(2) amends section 117(2a) by deleting reference to “under this Part” so that objects described in section 117(2a)(a), (b), or (c) and seized under common law or under a section 711 *Criminal Code* search warrant are forfeited if after 12 months no person has been charged.

Section 117(3) provides that if a thing, other than a thing referred to in subsection (2a)(a), (b), or (c) or section 117A(1) (which deals with the forfeiture of copies of seized products) has been seized under section 112 or search warrant, and no person has been charged, a police officer must apply for a summons within 60 days of seizure.

Subclause 5(3) amends section 117(3) by deleting reference to “seized under section 112 or under a search warrant” and inserting “lawfully seized”. This change brings any material lawfully seized within the scope of this provision.

Section 117(6) provides the court with the option of forfeiting the seized thing to the Crown (if an offence has been committed) or ordering that the thing be returned to the person who possessed it prior to seizure. As it typically takes more than 60 days for a computer to be analysed, subsection 117(6) can hinder police investigations.

Subclause 5(4) amends section 117(6) by also giving the court the option of allowing the seized thing be held in the custody of the police for “such further period as the court thinks fit”, if the court is satisfied that it is appropriate for the police to be given more time to investigate or analyse evidence.

Subclause 5(5) inserts a new subsection which provides that “lawfully seized” pertains to an offence under this Act

Clause 6 - Section 141 amended

Section 141 of the Act provides that the Director or Deputy Director of the Office of Film and Literature Classification (OFLC) can issue a certificate relating to the classification of a film, publication or computer game. Under section 87 of the *Classification (Publications, Films and Computer Games) Act 1995* (Cwlth), the Director of the OFLC can issue evidentiary certificates regarding actions taken or not taken under that Act. However, courts in both Victoria and Western Australia have disallowed such evidentiary certificates as evidence to prove that a film had been classified at the time of seizure. In January 2003, a Western Australian magistrate held that under section 141 of the Act, while a section 87 certificate could be used to prove that a film ‘is’ classified on the date the certificate was issued, it could not be used to prove that a film ‘was’ classified on the date of the seizure or alleged contravention.

Clause 6 amends section 141 of the Act so that section 87 certificates issued by the OFLC can be accepted into evidence in relation to the classification of films, publications and computer games at the time of the alleged offence.

PART 3 – CHANGES RELATING TO INFRINGEMENT NOTICES

Clause 7 – Section 117F amended

Section 117D of the Act provides that a member of the police force or a designated person can issue an infringement notice to a person who has committed a prescribed offence under the Act. At this stage, it is not intended for any person other than a police officer to be able to issue an infringement notice.

Section 117F provides for a designated person to extend the period of 28 days within which the modified penalty may be paid.

Unlike other statutes, for example the *Road Traffic Act 1974* (WA), the Act does not currently enable a police officer to extend the period of payment for an infringement notice.

Clause 7 amends section 117F of the Act to also enable a member of the police force authorised by the Commissioner of Police to extend the period of 28 days within which the infringement notice penalty may be paid.

Clause 8 – Section 117G amended

Section 117G(1) provides for a designated person to withdraw an infringement notice whether or not the penalty has been paid.

Unlike other statutes, for example the *Road Traffic Act 1974* (WA), the Act does not currently enable a police officer to withdraw an infringement notice.

Clause 8 amends section 117G(1) of the Act to also enable a commissioned officer of the police force authorised by the Commissioner of Police to withdraw an infringement notice.

Clause 9 – section 117J amended

Section 117J(4) is a new section which has been inserted as a result of the amendments to sections 117F and 117G(1). This section precludes the member of the police force who has been authorised by the Commissioner of Police under section 117F or 117G from exercising the powers in those sections in respect of an infringement notice the officer has issued.

PART 4 – CLASSIFICATION CHANGES REFLECTING NATIONAL SCHEME

Clauses 10 to 33 (inclusive) – classification categories for films and computer games

On 26 May 2005, the new combined classification categories for films and computer games came into effect in the *Classification (Publications, Films and Computer Games) Act 1995* (Cwlth). These new combined classification categories replace the existing separate classification categories for films and computer games. The existing separate classification categories for films and computer games, and those which came into effect on 26 May 2005 are set out in the table below.

Film Classification Types up to 25 May 2005	Computer Games Classification Types up to 25 May 2005	New combined Film and Computer Game Classification Types as at 26 May 2005
G (General)	G (General)	G General
PG (Parental Guidance)	G (8+) (General)	PG Parental Guidance
M (Mature)	M (15+) (Mature)	M Mature
MA (Mature Accompanied)	MA (15+) Mature Restricted)	MA15+ Mature Accompanied
R (Restricted)		R18+ Restricted <i>(this category applies to films only)</i>
X Restricted		X18+ Restricted <i>(this category applied to films only)</i>
RC (Refused Classification)	RC (Refused Classification)	RC – Refused Classification

In order for Western Australia to remain an effective participant in the National Classification Scheme, and for enforcement purposes, those provisions in the *Censorship Act 1996* (WA), which refer to the classifications of films and computer games have to be amended to incorporate the new combined classification categories for films and computer games so that they will be consistent with those referred to in the *Classification (Publications, Films and Computer Games) Act 1995* (Cwlth).

The use of combined classifications for films and computer games, based on the current classifications for films, will create simple and well known classification categories for the public, and will assist parents in determining suitable material for their children. It will also create a more effective distinction between those classification types that are advisory in nature (G, PG and M) and those to which legally enforceable restrictions apply (MA15+, R18+ and X18+). This distinction will be achieved by the removal of

age references from the unrestricted classification categories and the use of age references for the restricted classification categories only.

While the Bill renames the classification categories, it does not relax the content of material that is permitted within each classification, nor does it introduce an R classification for computer games.

Clauses 10 to 33 (inclusive) amend those sections of the *Censorship Act 1996* (WA), which refer to the classifications for films and computer games, so that they will be the same as the combined classifications for films and computer games referred to in the above mentioned Commonwealth Act.

Clause 34 – Transitional

Schedule 2 contains two (2) transitional provisions, one for films and advertisements for films, the other for computer games and advertisements for computer games.

The effect of those provisions is to ensure that the ratings for the films, computer games and advertisements are seamlessly re-rated in accordance with the new style of rating, despite Western Australia's legislative changes being later than 26 May 2005.

Without these provisions, there would be a temporal break in the enforceability of the ratings of films, computer games and advertisements.