

2004

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**CLASSIFICATION (PUBLICATIONS, FILMS AND COMPUTER
GAMES) (ENFORCEMENT) AMENDMENT BILL 2004**

EXPLANATORY STATEMENT

Circulated with the authority of
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Outline

Changes for consistency with the National Classification Code

The amendments implement recent changes to the National Classification Code. The amendments primarily involve replacing all references to:

- (i) “X” with “X 18+” (film only)
- (ii) “R” with “R 18+” (film only)
- (iii) “MA” for films and “MA(15+)” for computer games with “MA 15+”
- (iv) “M(15+)” for computer games with “M”
- (v) “G(8+)” for computer games with “PG”

Removal of references to “reasonable excuse”

A great number of the offence provisions of the *Classification (Publications, Films and Computer Games) (Enforcement) Act 1995* (Classification Act) included “reasonable excuse” as a defence. For example, old section 6(1) of the Act stated that:

- (1) A person shall not, *without reasonable excuse*, exhibit a film in a public place unless the film is classified.

The reasonable excuse defence has not been retained in these offences as in most cases any such excuse would already be covered by the general defences in the Criminal Code. In addition, for other cases, excuses were articulated and included as specific defences to the proposed offence. An example of a specific defence which was inserted is the defence of holding reasonable belief that the film would not be given a restricted classification (for example, new section 11). In another case, the defence that an illegal advertisement was published on behalf of another person was included (for example, new section 53C, 53E). In another case, the wording of the offence was overly broad, and consequently the section was recast and therefore reasonable excuse was not necessary (new section 10, new section 42). In a further case, provision was made for the temporary absence of a parent or guardian who was accompanying a child (new section 15(2)).

Provision of strict liability to a specific element of the offence

The Bill includes a number of offences where strict liability applies to a specific element of the offence or to the offence. Section 23 of the Criminal Code provides that if a law that creates an offence provides for strict liability, there are no fault elements for the physical elements of the offence. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, if strict liability applies, the defence of mistake of fact is available where the person considered whether or not facts existed and was under a mistaken but reasonable belief about the facts. Other defences, such as intervening conduct or event (section 39), are also available.

Offences incorporating strict liability elements are carefully considered when developing legislation and generally arise in a regulatory context where for reasons

such as public safety or protection of the public revenue, the public interest in ensuring that regulatory schemes are observed requires the sanction of criminal penalties. In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental, or fault, element can justifiably be excluded. The rationale is that professionals engaged in producing or distributing films, videos or publications as a business, as opposed to members of the general public, can be expected to be aware of their duties and obligations. The provisions are drafted so that, if a particular set of circumstances exists, a specified person is guilty of an offence. Unless some knowledge or intention ought be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time is irrelevant. The penalties for offences cast in these terms are lower than for those requiring proof of fault.

Provision of absolute liability for a specific element of an offence

Absolute liability is similar to strict liability in its nature, but also removes the defence of mistake of fact. Essentially, this means that conduct alone is sufficient to make the defendant culpable. However, some defences, such as intervening conduct or event (section 39), are also available. Absolute liability has been provided for an element where mistake of fact by the defendant would not be the appropriate defence in the circumstances. However, in all cases where absolute liability has been applied, a particular defence, with either a legal burden or an evidential burden, has been specified in the further provisions of the offence. For example, absolute liability is provided for new section 13(1)(b) and (d):

(b) a child is present during any part of the exhibition

However, a specific defence mitigates the application of absolute liability at new section 13(4):

(4) It is a defence to a prosecution for an offence against this section if the defendant proves that the defendant believed on reasonable grounds that the child was an adult.

Alteration of onus of proof provisions

A number of provisions in the existing Act have specific defences that require a defendant who wishes to rely on the defence to prove the existence of the circumstances of the defence – i.e the defendant bears a legal burden of proof. Imposing the legal burden of proof on the defence, even if those burdens operate only within defined exceptions, *prima facie* infringes the presumption of innocence, which is protected by section 22(1) of the *Human Rights Act 2004* (HRA). In assessing whether such burdens fall within permissible limits under section 28 of the HRA, the courts are likely to consider the objective of the offence, and whether the legal burden is proportionate to the objective served by the offence provision

To facilitate consistency with the HRA, the legal burden on the defendant in sections 13, 20, 23, 36, 37, 43, 45 and 48 have been altered so that an evidential burden rather than a legal burden is imposed on the defendant. An evidential burden means that the defendant need only point to evidence that suggests a reasonable possibility that the matter in

question exists. It is lower than a legal burden which, for the defendant, requires that a matter be proved on the balance of probabilities. These changes also reflect criminal law policy that reversing the onus of proof is only appropriate in exceptional circumstances.

There are a number of provisions in the Bill which retain a legal burden of proof on the defendant. These provisions are sections 13(4), 14(4), 15(5), 23(4), 23(8), 23(12), 35(7), 43(4), 46(4), 46(7), and 62(2). The retention of the legal burden of proof on the defendant in these provisions is appropriate because:

- the objective of the provisions, the protection of children, is a legitimate purpose
- the use of a legal burden is a proportionate measure to achieve this purpose

The purpose of the provisions

The importance of the general objective of protection of minors is recognised in the HRA itself, section 11(2): Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind. The objective of the Classification Act is to give effect to the principles in the National Classification Code as follows:

- adults should be able to read, hear and see what they want;
- minors should be protected from material likely to harm or disturb them;
- everyone should be protected from exposure to unsolicited material that they find offensive;
- the need to take account of community concerns about:
 - depictions that condone or incite violence, particularly sexual violence; and
 - the portrayal of persons in a demeaning manner.

There is a high degree of importance to this objective. These principles are supported not just by the Classification Act but also by equivalent legislation in all of the States and the Northern Territory. The Office of Film and Literature Classification makes classification decisions in accordance with the National Classification Code and these classification decisions are enforced by the States and Territories.

Proportionality of the provisions

The provisions do require a high standard of care of exhibitors and persons dealing in the legally restricted classifications, which is proportionate to the important objective of the protection of children. Such a person is in a position to take action to avoid criminal liability by taking reasonable steps to ascertain that the persons they are dealing with are not children – eg. requesting proof of age and putting in place procedures for all employees to check the age of patrons before admitting them to legally restricted films.

An alternative would be to change the legal burden to an evidentiary burden in the relevant defence provisions. This would be less of a limitation on the presumption of innocence as the defendant would only need to point to a reasonable possibility that they had, for example, requested proof of age and had reasonable grounds for believing the person was not a child. An evidentiary burden has a higher degree of tolerance for a mistake of fact about the age of a child. While this would still require due diligence on the part of the defendant, it does not require the same high standard of care as a legal burden defence. Given the importance of these provisions to the objective of the protection of children, the higher standard imposed by a legal burden defence has been retained to emphasise the requirement of maintaining a high standard of due diligence in these matters.

Of necessity, the application of the Human Rights Act in circumstances such as this does require some value judgments to be made. In this case, a judgement must be made by the Assembly about the value to society of the presumption of innocence as opposed to the protection of children. The limitation on the presumption of innocence as a result of retaining a legal burden of proof in these provisions is justified by the greater protection from exposure to violent and sexually explicit material it affords to children. The protection of children from exposure to unsuitable and explicit content is an important objective of the Australian classification system.

Clause Notes

Clause 1 – Name of Act. This clause provides the name of the Act.

Clause 2 – Commencement. Commencement by written notice is necessary to synchronise with Commonwealth amendments to the National Classification Code.

Clause 3 – Legislation amended. This clause refers to the principal Act which is to be amended by the amending Act.

Clause 4 – Section 4 and 5. The renumbering is a consequential amendment.

Clause 5 – New sections 5 and 6. These explanatory provisions describe the non-binding aspect of notes in the Act, and the applicability of the *Criminal Code 2002* to the offence provisions in the Act.

Clause 6 – Parts 2 to 5

New Section 7. Reasonable excuse defense has been removed from what was previously Section 6 (see ‘outline’ comments above).

New Section 8. Renumbered – was previously section 7.

New Section 9. Renumbered – was previously section 8.

New Section 10. A technical difficulty was identified in relation to the operation of old section 9 of the ACT Classification Act. The current wording of what is now section 10 has been amended by the use of the concept of a ‘controlled space’, as the original was too broad, and was lacking in legal certainty. A defence (evidential burden) was inserted where there is a reasonable belief that the film would not be given a restricted classification – which compensates for the removal of the reasonable excuse reference.

New Section 11. Renumbered – was previously section 10. The reference to “minor” has been changed, in the interests of consistency, to “child” which is defined in the *Legislation Act 2001*. A defence (evidential burden) was inserted where there is a reasonable belief that the film would not be given a restricted classification – which compensates for the removal of the reasonable excuse reference.

New Section 12. Renumbered – was previously section 11. The reference to “minor” has been changed, in the interests of consistency, to “child” which is defined in the *Legislation Act 2001*.

New Section 13. Renumbered – was previously section 12. The reference to “minor” has been changed, in the interests of consistency, to “child” which is defined in the *Legislation Act 2001*. A defence (evidential burden) was inserted where there is a reasonable belief that the film would not be given a restricted classification – which compensates for the removal of the reasonable excuse reference.

New Section 14. Renumbered – was previously section 13. The reference to “minor” has been changed to “child”. Strict liability has been applied to 14(1)(b) on the basis that the offence will apply to commercial operators, and that there is no prison sentence attached to the penalty.

New Section 15. Renumbered – was previously section 14. The reference to “minor” has been changed to “child”. Strict liability has been applied to 15(1)(b) on the basis that the offence will apply to commercial operators, and that there is no prison sentence attached to the penalty.

New Section 16. Renumbered – was previously section 15. Reference to reasonable excuse removed.

New Section 17. Renumbered – was previously section 16. Reference to reasonable excuse removed.

New Section 18. Renumbered – was previously section 17. Reference to reasonable excuse removed.

New Section 19. Renumbered – was previously section 18. References to reasonable excuse removed.

New Section 20. Renumbered – was previously section 19. Some clarification of wording.

New Section 21. Offences from previous section 20 are split into new sections 21 and 22.

New Section 22. Offences from previous section 20 are split into new sections 21 and 22.

New Section 23. Renumbered – was previously section 21. The reference to “minor” has been changed to “child”. Reference to reasonable excuse removed. A defence (evidential burden) was inserted where there is a reasonable belief that the film would not be given a restricted classification – which compensates for the removal of the reasonable excuse reference.

New Section 24. Offence was included in previous section 21.

New Section 25. Renumbered – was previously section 22. A defence (evidential burden) was inserted where there is a reasonable belief that the film would not be given a restricted classification – which compensates for the removal of the reasonable excuse reference.

New Section 26. Renumbered – was previously section 23.

New Section 27. Renumbered – was previously section 24.

New Section 28. Renumbered – was previously section 25.

New Section 29. Renumbered – was previously section 26. Reference to reasonable excuse removed.

New Section 30. Renumbered – was previously section 27. References to reasonable excuse removed.

New Section 31. Renumbered – was previously section 27A. Reference to reasonable excuse removed.

New Section 32. Renumbered – was previously section 27B. Reference to reasonable excuse removed.

New Section 33. Renumbered – was previously section 28. Reference to reasonable excuse removed.

New Section 34. Renumbered – was previously section 29. References to reasonable excuse removed.

New Section 35. Renumbered – was previously section 30. “Minor” replaced with “child”.

New Section 36. Renumbered – was previously section 31.

New Section 37. Renumbered – was previously section 32.

New Section 38. Renumbered – was previously section 33. Reference to reasonable excuse removed.

New Section 39. Renumbered – was previously section 34. Reference to reasonable excuse removed.

New Section 40. Renumbered – was previously section 35. Reference to reasonable excuse removed.

New Section 41. Renumbered – was previously section 36. Reference to reasonable excuse removed.

New Section 42. Renumbered – was previously section 37. Reference to reasonable excuse removed. The section has been modified in a similar manner to new section 10, using the ‘controlled space’ concept, as the original provision was overly broad.

New Section 43. Renumbered – was previously section 38. “Minor” replaced with “child”.

New Section 44. Renumbered – was previously section 39. References to reasonable excuse removed.

New Section 45. Renumbered – was previously section 40. Some clarification of words.

New Section 46. Renumbered – was previously section 41. “Minor” has been replaced with “child”. A defence (evidential burden) was inserted where there is a reasonable belief that the film would not be given a restricted classification – which compensates for the removal of the reasonable excuse reference.

New Section 47. Renumbered – was previously section 42. Reference to reasonable excuse removed.

New Section 48. Renumbered – was previously section 43.

New Section 49. Renumbered – was previously section 44. References to reasonable excuse removed.

New Section 50. Renumbered – was previously section 45. References to reasonable excuse removed.

New Section 51. Renumbered – was previously section 46. Reference to reasonable excuse removed.

New Section 52. Renumbered – was previously section 47. Reference to reasonable excuse removed.

New Section 53. Renumbered – was previously section 48. Reference to reasonable excuse removed.

New Section 53A. Renumbered – was previously section 49. Reference to reasonable excuse removed.

New Section 53B. Renumbered – was previously section 50. Reference to reasonable excuse removed.

New Section 53C. Renumbered – was previously section 51. Reference to reasonable excuse removed, however the specific exception (evidential burden) of publication on behalf of another person has been included.

New Section 53D. Renumbered – was previously section 52. References to reasonable excuse removed.

New Section 53E. Renumbered – was previously section 53. References to reasonable excuse removed, however the specific exception (evidential burden) of publication on behalf of another person has been included.

New Section 54. Reference to reasonable excuse removed.

Clause 7 – Part 6 heading. Replacing X with X 18+.

Clause 8 – Section 54A, definition of *registrar*. Changes made for consistency with National Classification Code.

Clause 9 – Division 6.2 heading. Changes made for consistency with National Classification Code.

Clause 10 – Section 54B etc. Changes made for consistency with National Classification Code.

Clause 11 – Section 54K(3). Reference to reasonable excuse removed.

Clause 12 – Section 54K. Consequential amendment.

Clause 13 – Sections 54L and 54M.

New Section 54L. Reference to reasonable excuse removed. Changes made for consistency with National Classification Code.

New Section 54M. Reference to reasonable excuse removed. Changes made for consistency with National Classification Code.

Clause 14 – Sections 54P and 54Q

New Section 54P. Reference to reasonable excuse removed. Changes made for consistency with National Classification Code.

New Section 54Q. Reference to reasonable excuse removed.

Clause 15 – Section 54T. Changes made for consistency with National Classification Code.

Clause 16 – Section 54V. The amendments to this section set out standard provisions regarding the requirements for identity cards and the inspection of identity cards. Reference to reasonable excuse removed.

Clause 17 – Section 54W and (3) (a) and (c). Changes made for consistency with National Classification Code.

Clause 18 – Section 54W(4). Reference to reasonable excuse removed.

Clause 19 – Section 54YB etc. Changes made for consistency with National Classification Code.

Clause 20 – Sections 62 and 63

New Section 62. Reference to reasonable excuse has been removed. The defence that the person showed proof of age and it was reasonable to believe that the person was an adult has been inserted.

New Section 63. This amendment has been introduced into the Bill in response to the recent Western Australian Magistrate’s Court decision of *Douglas v Classique Health Products P/L* which is now on appeal with the Western Australian Supreme Court. In the *Douglas* decision the prosecution was not permitted to make use of an evidentiary certificate created by the Commonwealth Office of Film and Literature Classification (OFLC) as evidence that the film was previously classified at a certain classification at the time that the offence was allegedly committed. The court found, instead, that because of the wording of the relevant provision in the Western Australian legislation, the certificate could only be used as evidence that the film is classified at a certain classification from the date it was assessed by the OFLC. In the interests of greater certainty the Bill includes amendments to the ACT Classification Act to make it explicit that an OFLC certificate is capable not only of proving a film “is” classified on the date the certificate was issued, but that it could be used to prove that a film “was” classified on an earlier date.

Clause 21 – Section 65(a). Changes made for consistency with National Classification Code.

Clause 22 – Dictionary, new definition of *at*. Terminology clarified.

Clause 23 – Dictionary, definition of *guardian*. Replaces “minor” with “child”.

Clause 24 – Dictionary, definitions of influential person, license, registrar and X film. Changes made for consistency with National Classification Code.