



## Legislation Review Committee

### LEGISLATION REVIEW DIGEST

NO. 16/55 – 8 May 2012



New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Assembly.

Legislation Review Committee Legislation Review Digest, Legislation Review Committee, Parliament NSW [Sydney, NSW]: The Committee, 2012, ix, 19p 30 cm

Chair: Mr Stephen Bromhead MP

8 May 2012

ISSN 1448-6954

1. Legislation Review Committee – New South Wales

2. Legislation Review Digest No. 16 of 55

I Title.

II Series: New South Wales. Parliament. Legislation Review Committee Digest; No. 16 of 55

The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

# Contents

Membership	ii
Functions of the Committee	iii
Guide to the Digest	v
Conclusions	vii
<b>PART ONE - BILLS</b>	<b>1</b>
1. TATTOO PARLOURS BILL 2012	1
<b>PART TWO - REGULATIONS</b>	<b>12</b>
1. HOME BUILDING AMENDMENT (THRESHOLD FOR HOME WARRANTY INSURANCE) REGULATION 2012	12
2. JAMES HARDIE FORMER SUBSIDIARIES (WINDING UP AND ADMINISTRATION)AMENDMENT (STATUTORY RECOVERY CLAIMS) REGULATION 2012	14
3. LOCAL GOVERNMENT (GENERAL) AMENDMENT (ELECTION PROCEDURES) REGULATION 2012	15
<b>APPENDIX ONE – INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS</b>	<b>18</b>
<b>APPENDIX TWO – INDEX OF CORRESPONDENCE ON REGULATIONS ON WHICH THE COMMITTEE HAS REPORTED</b>	<b>19</b>

# Membership

CHAIR	Mr Stephen Bromhead MP, Member for Myall Lakes
DEPUTY CHAIR	Dr Geoff Lee MP, Member for Parramatta
MEMBERS	Mr John Flowers MP, Member for Rockdale Ms Tania Mihailuk MP, Member for Bankstown Mr Gareth Ward MP, Member for Kiama The Hon. Shaoquett Moselmane MLC The Hon. Dr Peter Phelps MLC Mr David Shoebridge MLC
CONTACT DETAILS	Legislation Review Committee Parliament of New South Wales Macquarie Street Sydney NSW 2000
TELEPHONE	02 9230 3050 / 02 9230 2096
FACSIMILE	02 9230 3052
E-MAIL	<a href="mailto:legislation.review@parliament.nsw.gov.au">legislation.review@parliament.nsw.gov.au</a>
URL	<a href="http://www.parliament.nsw.gov.au/lrc">www.parliament.nsw.gov.au/lrc</a>

# Functions of the Committee

The functions of the Legislation Review Committee are set out in the *Legislation Review Act 1987*:

## 8A Functions with respect to Bills

- 1 The functions of the Committee with respect to Bills are:
  - (a) to consider any Bill introduced into Parliament, and
  - (b) to report to both Houses of Parliament as to whether any such Bill, by express words or otherwise:
    - i trespasses unduly on personal rights and liberties, or
    - ii makes rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, or
    - iii makes rights, liberties or obligations unduly dependent upon non-reviewable decisions, or
    - iv inappropriately delegates legislative powers, or
    - v insufficiently subjects the exercise of legislative power to parliamentary scrutiny
- 2 A House of Parliament may pass a Bill whether or not the Committee has reported on the Bill, but the Committee is not precluded from making such a report because the Bill has been so passed or has become an Act.

## 9 Functions with respect to Regulations

- 1 The functions of the Committee with respect to regulations are:
  - (a) to consider all regulations while they are subject to disallowance by resolution of either or both Houses of Parliament,
  - (b) to consider whether the special attention of Parliament should be drawn to any such regulation on any ground, including any of the following:
    - i that the regulation trespasses unduly on personal rights and liberties,
    - ii that the regulation may have an adverse impact on the business community,
    - iii that the regulation may not have been within the general objects of the legislation under which it was made,
    - iv that the regulation may not accord with the spirit of the legislation under which it was made, even though it may have been legally made,

- v that the objective of the regulation could have been achieved by alternative and more effective means,
  - vi that the regulation duplicates, overlaps or conflicts with any other regulation or Act,
  - vii that the form or intention of the regulation calls for elucidation, or
  - viii that any of the requirements of sections 4, 5 and 6 of the *Subordinate Legislation Act 1989*, or of the guidelines and requirements in Schedules 1 and 2 to that Act, appear not to have been complied with, to the extent that they were applicable in relation to the regulation, and
- (c) to make such reports and recommendations to each House of Parliament as it thinks desirable as a result of its consideration of any such regulations, including reports setting out its opinion that a regulation or portion of a regulation ought to be disallowed and the grounds on which it has formed that opinion.

2 Further functions of the Committee are:

- (a) to initiate a systematic review of regulations (whether or not still subject to disallowance by either or both Houses of Parliament), based on the staged repeal of regulations and to report to both Houses of Parliament in relation to the review from time to time, and
- (b) to inquire into, and report to both Houses of Parliament on, any question in connection with regulations (whether or not still subject to disallowance by either or both Houses of Parliament) that is referred to it by a Minister of the Crown.

The functions of the Committee do not include an examination of, inquiry into or report on a matter of Government policy, except in so far as such an examination may be necessary to ascertain whether any regulations implement Government policy or the matter has been specifically referred to the Committee under subsection (2) (b) by a Minister of the Crown.

# Guide to the Digest

## COMMENT ON BILLS

This section contains the Legislation Review Committee's reports on Bills introduced into Parliament on which the Committee has commented against one or more of the five criteria for scrutiny set out in s 8A(1)(b) of the *Legislation Review Act 1987*.

### Ministerial Correspondence – Bills previously considered

This section contains the Committee's reports on correspondence it has received relating to Bills and copies of that correspondence. The Committee may write to the Minister responsible for a Bill, or a Private Member of Parliament in relation to his or her Bill, to seek advice on any matter concerning that Bill that relates to the Committee's scrutiny criteria.

## COMMENT ON REGULATIONS

The Committee considers all regulations made and normally raises any concerns with the Minister in writing. When it has received the Minister's reply, or if no reply is received after 3 months, the Committee publishes this correspondence in the Digest. The Committee may also inquire further into a regulation. If it continues to have significant concerns regarding a regulation following its consideration, it may include a report in the Digest drawing the regulation to the Parliament's "special attention". The criteria for the Committee's consideration of regulations are set out in s 9 of the *Legislation Review Act 1987*.

### Regulations for the special attention of Parliament

When required, this section contains any reports on regulations subject to disallowance to which the Committee wishes to draw the special attention of Parliament.

### Regulations about which the Committee is seeking further information

This table lists the Regulations about which the Committee is seeking further information from the Minister responsible for the instrument, when that request was made and when any reply was received.

### Copies of Correspondence on Regulations

This part of the Digest contains copies of the correspondence between the Committee and Ministers on Regulations about which the Committee sought information. The Committee's letter to the Minister is published together with the Minister's reply.

## APPENDIX 1: INDEX OF MINISTERIAL CORRESPONDENCE ON BILLS

This table lists the recipient and date on which the Committee sent correspondence to a Minister or Private Member of Parliament in relation to Bills reported on in the calendar year. The table also lists the date a reply was received and the Digests in which reports on the Bill and correspondence appear.

## APPENDIX 2: INDEX OF CORRESPONDENCE ON REGULATIONS REPORTED ON

This table lists the recipient and date on which the Committee sent correspondence to a Minister in relation to Regulations reported on in the calendar year. The table also lists the date a reply was received and the Digests in which reports on the Regulation and correspondence appear.



# Conclusions

## PART ONE - BILLS

### 1. TATTOO PARLOURS BILL 2012

Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Strict liability*

The Committee is concerned when a previous legal activity becomes illegal and also a strict liability offence. The Committee is also concerned that those individuals currently performing the activity legally may not receive sufficient notice that this activity will be made illegal without a licence, and as the offence is the one of strict liability, those affected will not be permitted to argue a lack of *mens rea*. The Committee refers these issues to Parliament.

#### *Personal physical integrity*

The Committee refers to Parliament whether requiring an applicant for a licence to consent to having their fingerprints and palm prints taken trespasses on personal rights and liberties. Further, the Committee refers to Parliament whether granting police the power to enter any licensed premises with a dog trespasses on personal rights and liberties.

#### *Privacy*

The Committee refers to Parliament whether the power to use fingerprints and palm prints taken for any purpose that the Commissioner thinks fit trespasses on personal rights and liberties.

#### *Non-Discrimination*

The Committee refers to Parliament whether the inability for a foreign national to apply for a tattooist's license is a discriminatory provision.

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

#### *Merits review*

The Committee refers to Parliament whether the restriction placed on individuals who are controlled members of a declared organisation from applying for a licence and also removing their rights of appeal makes rights dependent upon non-reviewable decisions.

#### *Closed Justice*

The Committee notes that applications for an operator's license or a tattooist's license, or their suspension or cancelling, could be made without reasons being provided to the applicant. However, the Committee also notes the public interest in ensuring that criminal intelligence that police and law enforcement agencies have on a suspect individual party, is not shared with that individual or party.

#### *Denial of Compensation*

The Committee will always note provisions in legislation that deny compensation to individuals as a result of administrative powers, especially when those powers could be used to close down businesses where no criminal wrongdoing has been demonstrated.

Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA

*Commencement by proclamation*

The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, given the delay in commencement is to allow for the new regulatory scheme to be put in place the Committee does not consider there to be an inappropriate delegation of legislative power in this instance.

*Inappropriate delegation of power – Regulations*

The Committee is concerned that the regulation-making powers of this Bill may deny Parliament its proper role in scrutinising alterations to legislation. Further, the Committee is concerned that the ability for a Minister to prescribe offences and penalties by regulation may constitute an inappropriate delegation of legislative power. The Committee refers to Parliament its concerns.

*Inappropriate delegation of power - Delegations*

The Committee is concerned that the delegations powers of this Bill may be too wide and ill-defined, and refers to Parliament its concerns.

PART TWO - REGULATIONS

1. HOME BUILDING AMENDMENT (THRESHOLD FOR HOME WARRANTY INSURANCE) REGULATION 2012

The regulation trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

*Consumer protection*

The Committee is concerned that the effect of amending the Regulation to enable an undischarged bankrupt – or an individual who has been discharged from bankruptcy in the previous three years - to undertake work to the value of \$20,000 is that consumers who suffer a breach of contract will not be covered by home warranty insurance. The Committee resolves to write to the Minister in relation to this aspect of the Regulation.

2. JAMES HARDIE FORMER SUBSIDIARIES (WINDING UP AND ADMINISTRATION)AMENDMENT (STATUTORY RECOVERY CLAIMS) REGULATION 2012

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

*Denial of compensation*

The Committee resolved to write to the Minister as the effect of the Regulation is to rank compensation claims which may have an unfair consequence.

3. LOCAL GOVERNMENT (GENERAL) AMENDMENT (ELECTION PROCEDURES) REGULATION 2012

The regulation trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

*Freedom of political association and right to privacy*

The Committee acknowledges that there are certain circumstances in which an individual who is a member of a political party may wish to pursue candidacy in an election without aligning themselves to that political party. However, the Committee considers transparency and disclosure to be important in the context of free and fair elections and as such does not make any further comment in relation to this issue.

*Freedom of political speech*

The Committee notes that restricting an individual from displaying electoral matter may impact on an individual's implied freedom of political communication. However, the Committee notes that the addition of these clauses is to ensure that newer forms of political communication are regulated in a manner similar to more traditional forms of political communication and as such does not make any further comment in relation to this issue.

*Right to vote*

The Committee is concerned that the Regulation provides the election manager with the capacity to appoint polling places and pre-poll voting offices outside the area or ward concerned.

The Committee notes that these amendments follow those made to the *Parliamentary Electorates and Elections Act 1912* regarding the conduct of State elections. Under section 98 of that Act, in cases where the Electoral Commissioner is satisfied that the convenience of a large number of electors of any district would be furthered by appointing polling places outside such district, may appoint such polling places.

The Committee resolves to write to the Minister to note its concern that the Regulation does not include a proviso similar to that featured in section 98 of the *Parliamentary Electorates and Elections Act 1912*.

*Rule of law*

The Committee is concerned that providing the election manager with the power to include information in a Notice of a Contested Election as the election manager thinks fit provides an overly broad and subjective power to the election manager. The Committee is of the opinion that such powers should include an objective element.

The Committee resolves to write to the Minister to enquire as to whether the Minister had considered making the power outlined in the new clause 300(5) of the *Local Government (General) Regulation 2005* subject to a reasonableness test, or some other objective measure.

The Committee notes that the Regulations provide that election materials are to be kept in circumstances where an individual has disputed an election or return through the Court of Disputed Returns. However, the Committee is concerned that removing clause 392 has the effect of limiting access to election materials to those who have lodged a dispute and resolves to write to the Minister highlighting this concern.



# Part One - Bills

## 1. Tattoo Parlours Bill 2012

Date introduced	Thursday 3 May 2012
House introduced	Legislative Assembly
Minister responsible	The Hon. Anthony Roberts
Portfolio	Fair Trading

### PURPOSE AND DESCRIPTION

1. The object of this Bill is to create a licensing and regulatory scheme for the carrying on of body art tattooing businesses and the performing of body art tattooing procedures.

### BACKGROUND

2. Prompted by concerns about the influence of outlaw motorcycle gangs on the tattoo industry in NSW, the Government announced that legislation would be introduced to give the police and other authorities powers to stop or limit money laundering, as well as drug and firearm trafficking.
3. More broadly, the Bill also introduces a licensing and regulatory regime for tattoo parlours and tattooists generally.

### OUTLINE OF PROVISIONS

#### Preliminary

4. Clause 1 sets out the name (also called the short title) of the proposed Act.
5. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act, except for Part 2 (Offences relating to unlicensed body art tattooing). Part 2 will commence on a day or days to be appointed by proclamation.
6. Clause 3 defines certain words and expressions used in the proposed Act. In particular, the following expressions are defined.
7. The expression tattooing procedure is defined to mean any procedure involving the making of a permanent mark on or in the skin of a person by means of ink, dye or any other colouring agent.
8. The expression body art tattooing procedure is defined to mean a tattooing procedure performed for decorative purposes, but not to include a cosmetic tattooing procedure.
9. The expression cosmetic tattooing procedure is defined to mean any of the following:
  - (a) a tattooing procedure performed for the purpose of providing the individual on whom it is performed with an eyeliner, eyebrows or any other make up effect on a permanent basis,

- (b) a tattooing procedure performed by a medical practitioner or for a medical reason (for example, to hide, disguise or correct a medical condition or a post-operative outcome),
  - (c) any tattooing procedure performed for any other purpose, or in any other circumstances, prescribed by the regulations.
10. The expression body art tattooing business is defined to mean a business involving the carrying out of body art tattooing procedures (whether or not in combination with other tattooing procedures or with other activities).
11. The expression Director-General is defined to mean:
- (a) the Commissioner for Fair Trading, Department of Finance and Services, or
  - (b) if no such position exists—the Director-General of the Department of Finance and Services.
12. Clause 4 defines who is a close associate of an applicant for a licence or licensee under the proposed Act.
13. Clause 5 provides that nothing in the proposed Act limits any requirement imposed by or under the Environmental Planning and Assessment Act 1979, the Public Health Act 2010 or any other Act or law with respect to the carrying out of tattooing procedures or the carrying on of body art tattooing businesses.

## Part 2 Offences relating to unlicensed body art tattooing

14. Clause 6 makes it an offence for:
- (a) a person to carry on a body art tattooing business (whether on the person's own behalf or on behalf of another person) at any premises unless the person is authorised to do so by an operator licence, or
  - (b) a person to require, allow or permit a body art tattooing business to be carried on at premises on the person's behalf in contravention of the requirement referred to in paragraph (a).
15. The maximum penalty for the offence will be:
- (a) in the case of a corporation—100 penalty units (currently, \$11,000) and in addition, in the case of a continuing offence, 100 penalty units for each day the offence continues, and
  - (b) in any other case—50 penalty units (currently, \$5,500) and in addition, in the case of a continuing offence, 50 penalty units for each day the offence continues.
16. Clause 7 makes it an offence for an individual to perform any body art tattooing procedure for fee or reward unless authorised to do so by a tattooist licence. The maximum penalty for the offence will be a maximum penalty of 50 penalty units in the case of a first offence (currently, \$5,500) and 100 penalty units for a second or subsequent offence (currently, \$11,000).

17. Clause 8 makes it an offence for a person to employ an individual to work as a body art tattooist unless the individual is the holder of a tattooist licence.
18. The maximum penalty for the offence will be:
  - (a) in the case of a corporation—100 penalty units (currently, \$11,000) and in addition, in the case of a continuing offence, 100 penalty units for each day the offence continues, and
  - (b) in any other case—50 penalty units (currently, \$5,500) and in addition, in the case of a continuing offence, 50 penalty units for each day the offence continues.

### Part 3 Licensing scheme

#### *Division 1 General*

19. Clause 9 provides that 2 types of licence may be issued under the proposed Act: an operator licence (which authorises the carrying on of a body art tattooing business at a single set of specified premises) and a tattooist licence (which authorises its holder to perform body art tattooing procedures on other individuals).
20. Clause 10 provides that a licence is subject to such conditions as may be imposed on it by the Director-General or by the proposed Act or the regulations. A failure to comply with a licence condition will be an offence punishable by a maximum penalty of 20 penalty units (currently, \$2,200).

#### *Division 2 Licence applications and granting of licences*

21. Clause 11 provides for licence applications to be made to the Director-General and sets out the procedure (including eligibility requirements) in relation to the making of licence applications. In particular, licence applications may only be made by individuals and not by non-natural persons such as corporations.
22. Clause 12 requires an applicant for an operator licence to provide a statement with his or her application setting out certain information about the applicant's close associates.
23. Clause 13 requires an applicant for a licence to consent to being fingerprinted and palm printed as a precondition to having his or her application determined by the Director-General.
24. Clause 14 authorises the Director-General to conduct investigations and inquiries into licence applications. It also requires the Director-General to refer each duly made licence application to the Commissioner of Police for an investigation, determination and report as to whether the applicant is a fit and proper person to be granted the licence or whether it would be contrary to the public interest for a licence to be granted to the applicant.
25. Clause 15 enables the Director-General and the Commissioner of Police to require further information to be provided in connection with a licence application.
26. Clause 16 authorises the Director-General to grant or refuse to grant a licence for which a person has applied. It also sets out the circumstances in which the Director-General must or may refuse to grant a licence.

27. Clause 17 provides that a licence remains in force for a period of 3 years unless sooner surrendered or cancelled or it otherwise ceases to be in force.
28. Clause 18 provides that a licence is to be in the form approved by the Director-General.

*Division 3 Role of Commissioner*

29. Clause 19 enables the Commissioner of Police to inquire into, determine and report to the Director-General on whether an applicant for a licence is a fit and proper person to be granted the licence or whether it would be contrary to the public interest for a licence to be granted to the applicant. It also enables the Commissioner to determine and report on these matters on a continuing basis with respect to licensees.
30. Clause 20 ensures that there is no obligation on the Director-General or the Commissioner of Police to give reasons for refusing to grant a licence (or for suspending or cancelling a licence) if to do so would result in the disclosure of any criminal intelligence report or other criminal information.

*Division 4 Special conditions relating to operator licences*

31. Clause 21 makes it a condition of an operator licence that the licensee permit the financial records of the body art tattooing business conducted at the licensed premises to be inspected by an authorised officer.
32. Clause 22 makes it a condition of an operator licence that the licensee notify the Director-General of changes in particulars in connection with the licence.
33. Clause 23 makes it a condition of an operator licence that the licensee notify the Director-General of changes in the employment of staff members at the licensed premises.
34. Clause 24 makes it a condition of an operator licence that the licensee ensure that a copy of the licence be conspicuously displayed at the licensed premises and that the licence number be included in advertisements for the business conducted at the premises.

*Division 5 Suspension and cancellation of licences*

35. Clause 25 enables the Director-General to suspend a licence if satisfied that there are grounds to cancel the licence. The Director-General must permit the licensee to show cause why the licence should not be cancelled when notifying the licensee of the suspension. A suspension period imposed under the proposed section may not be more than 60 days.
36. Clause 26 sets out the circumstances in which the Director-General must or may cancel a licence.

*Division 6 Review of licensing decisions*

37. Clause 27 enables certain decisions of the Director-General in connection with the refusal to grant a licence, the imposition of licence conditions and the suspension and cancellation of a licence to be reviewed by the Administrative Decisions Tribunal on the application of an applicant for a licence or a licensee (or former licensee).



## Part 4 Enforcement

### *Division 1 Closure orders*

38. Clause 28 enables the Commissioner of Police to make an interim closure order in relation to specified premises:
- (a) if the Commissioner is satisfied that a body art tattooing business is being carried on at those premises without the authority of an operator licence, or
  - (b) if the Commissioner reasonably suspects that any serious criminal offences are being committed at the premises.
39. Clause 29 enables the Commissioner of Police to apply to the Local Court for a long term closure order with respect to premises. The Local Court may make such an order if satisfied that:
- (a) a body art tattooing business is being carried on at those premises without the authority of an operator licence, or
  - (b) there have been, or there are likely to be, serious criminal offences committed at or in connection with the premises.
40. Clause 30 makes it an offence for a person, while a closure order is in force with respect to premises, to:
- (a) carry on a body art tattooing business at those premises, or
  - (b) work as a body art tattooist at those premises.
41. The maximum penalty for the offence will be:
- (a) in the case of a corporation—100 penalty units (currently, \$11,000) and in addition, in the case of a continuing offence, 100 penalty units for each day the offence continues, and
  - (b) in any other case—50 penalty units (currently, \$5,500) and in addition, in the case of a continuing offence, 50 penalty units for each day the offence continues.

### *Division 2 Other enforcement provisions*

42. Clause 31 enables a police officer to enter at any reasonable time any licensed premises, or any other premises that the police officer reasonably suspects are being used to perform body art tattooing procedures for fee or reward, for the purpose of:
- (a) carrying out general drug detection (within the meaning of Division 2 of Part 11 of the Law Enforcement (Powers and Responsibilities) Act 2002) using a dog, or
  - (b) carrying out general firearms or explosives detection (within the meaning of Part 13 of that Act) using a dog.
43. Clause 32 makes it an offence for a licensee, without reasonable excuse, not to produce his or her licence on demand by an authorised officer. The maximum penalty for the offence will be 20 penalty units (currently, \$2,200).

- 44. Clause 33 makes it an offence for a person, without reasonable excuse, to hinder or obstruct an authorised officer in the exercise of a function under the proposed Act. The maximum penalty for the offence will be 20 penalty units (currently, \$2,200).
- 45. Clause 34 provides that proceedings for an offence against the proposed Act or the regulations may be dealt with summarily by the Local Court and the Supreme Court. The maximum penalty that the Local Court will be permitted to impose for an offence will be 200 penalty units (currently, \$22,000).
- 46. Clause 35 enables an authorised officer to issue penalty notices for offences against the proposed Act or the regulations if those offences are prescribed as penalty notice offences by the regulations.

## Part 5 Miscellaneous

- 47. Clause 36 enables information to be exchanged between agencies for the purpose of assisting in the exercise of functions under the proposed Act.
- 48. Clause 37 provides that no compensation is payable for the exercise of certain regulatory functions under the proposed Act.
- 49. Clause 38 enables the Director-General and the Commissioner of Police to delegate their functions under the proposed Act to certain persons.
- 50. Clause 39 provides for how documents may be served or given to a person for the purposes of the proposed Act.
- 51. Clause 40 provides for how notices and other documents may be served on, lodged with or given to the Director-General.
- 52. Clause 41 enables the Governor to make regulations for the purposes of the proposed Act.
- 53. Clause 42 provides for the review of the proposed Act in 5 years.

## Schedule 1 Savings, transitional and other provisions

- 54. Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

## Schedule 2 Amendment of legislation

- 55. Schedule 2.1 amends the Crimes (Criminal Organisations Control) Act 2012 to provide for the carrying on of a body art tattooing business or performing body art tattooing procedures within the meaning of the proposed Act to be prescribed activities for the purposes of section 27 (Prohibition on carrying on of certain activities when interim control order or control order takes effect) of that Act.
- 56. Schedule 2.2 amends the Law Enforcement (Powers and Responsibilities) Act 2002 to enable police officers to use dogs to carry out general drug detection in connection with persons at, or seeking to enter or leave, any part of premises that police officers are authorised to enter under proposed section 31 of the proposed Act for that purpose.

57. Schedules 2.3 amends the Road Transport (Driver Licensing) Act 1998 to facilitate the taking and use of photographs in connection with the granting of licences under the proposed Act and the identification of applicants and licensees.

## ISSUES CONSIDERED BY COMMITTEE

### Trespasses on personal rights and liberties: s 8A(1)(b)(i) of the LRA

#### *Strict liability*

58. The Bill contains strict liability offences for individuals who perform body art tattooing procedures for a fee or award without a licence. Strict liability offences are those in which penalties are prescribed for actions regardless of the culpability. In circumstances where a licensing regime will commence on proclamation, the Committee is concerned that the current legal act of performing body art tattooing will be made illegal without a licence, on proclamation.

**The Committee is concerned when a previous legal activity becomes illegal and also a strict liability offence. The Committee is also concerned that those individuals currently performing the activity legally may not receive sufficient notice that this activity will be made illegal without a licence, and as the offence is the one of strict liability, those affected will not be permitted to argue a lack of *mens rea*. The Committee refers these issues to Parliament.**

#### *Personal physical integrity*

59. Clause 13(1) of the Bill provides that an applicant for a licence under the Act must consent to having his or her fingerprints and palm prints taken by a police officer in order to confirm their identity.
60. Meanwhile, clause 31 of the Bill provides police officers the power to enter any licensed premises with a dog for the purposes of carrying out general drug, firearms and explosives detection.
61. The Committee considers that the above clauses may represent a trespass on personal rights and liberties. The mandatory provision of fingerprints and palm prints may potentially interfere with a person's physical integrity and, in particular, the searching of premises by a dog may be considered confronting for some individuals. The Committee is also concerned by the existence of a provision in which consent is mandatory. Consent should always be provided free from interference, and by its nature should be voluntary.

**The Committee refers to Parliament whether requiring an applicant for a licence to consent to having their fingerprints and palm prints taken trespasses on personal rights and liberties. Further, the Committee refers to Parliament whether granting police the power to enter any licensed premises with a dog trespasses on personal rights and liberties.**

#### *Privacy*

62. As noted, clause 13(1) of the Bill provides that an applicant for a licence under the Act must consent to having his or her fingerprints and palm prints taken by a police officer.

63. Clause 13(3) also provides that any fingerprints or palm prints obtained from an applicant who is granted a licence may be used by the Commissioner for any purpose the Commissioner thinks fit.
64. The Committee is concerned that granting the Commissioner the power to use fingerprints and palm prints for any purpose the Commissioner thinks fit trespasses on a person's right to privacy, especially given the sensitive nature of biometric data like fingerprints.

**The Committee refers to Parliament whether the power to use fingerprints and palm prints taken for any purpose that the Commissioner thinks fit trespasses on personal rights and liberties.**

#### *Non-Discrimination*

65. Clause 11(4)(b) provides that an application for an operator's licence for a tattoo parlour or a tattooist's license may not be made by an individual who is not an Australian citizen or resident.
66. The effect of this will be to exclude foreign nationals, including those working in Australia temporarily on a working visa. In particular, the requirement that all tattooists be licensed – and the inability of foreign nationals to apply for such a license – will forcibly deny such individuals the ability to continue to work in their chosen field. The Committee refers to Parliament whether this clause inappropriately discriminates against foreign nationals.

**The Committee refers to Parliament whether the inability for a foreign national to apply for a tattooist's license is a discriminatory provision.**

Makes rights, liberties or obligations dependent upon non-reviewable decisions: s 8A(1)(b)(iii) of the LRA

#### *Merits review*

67. The Bill contains provisions which relate to individuals who are controlled members of a declared organisation under the *Crimes (Criminal Organisations) Control Act 2012*.
68. Clause 11(4)(c) of the Bill restricts an individual who is a controlled member of a declared organisation from applying for both an operator's licence and a tattooist licence.
69. Clause 27(1) of the Bill restricts a controlled member of a declared organisation from seeking review from the Administrative Decision Tribunal of decisions made under the Act.
70. In Digest 10/55 of the Legislation Review Committee, the Committee referred to Parliament a number of issues in relation to control orders under the *Crimes (Criminal Organisations) Control Act 2012*. Such comments related to:
  - The appropriateness of interim control orders and control orders as they erode the presumption of innocence by controlling the association of individuals not necessarily found guilty of an offence;

- The appropriateness of limiting appeal rights in relation to control orders from an appeal as of right to an appeal to be made within 28 days; and
  - The appropriateness of the requirement of a "substantial change" as a prerequisite of an application for a variation or revocation of a control order.
71. The Committee considers that by restricting individuals who are controlled members of a declared organisation from applying for a licence and also removing their rights of appeal, the Bill is in effect extending provisions within the Crimes (Criminal Organisations) Control Act 2012 and is making rights dependent on non-reviewable decisions.

**The Committee refers to Parliament whether the restriction placed on individuals who are controlled members of a declared organisation from applying for a licence and also removing their rights of appeal makes rights dependent upon non-reviewable decisions.**

#### *Closed Justice*

72. Clause 20(1) provides that the Commissioner is not required to give any reasons for determining a matter related to security determinations about applicants and licensees if the giving of those reasons would disclose the existence or content of any criminal information. Similarly, clause 20(2) provides that the Director-General is not required to give any reasons for not granting a licence to a person on the basis of an adverse security determination made by the Commissioner about the person if the giving of those reasons would disclose any criminal information. The effect of these provisions may be to deny an applicant the option for preparing an application to have that decision reviewed before the Administrative Decisions Tribunal and otherwise limit any right of reply.
73. Similarly, clause 27(4)(b) provides that in determining an application for a review of any decision to refuse to grant a licence, or to suspend or cancel a license that was based on the ground of an adverse security determination, the Administrative Decisions Tribunal may receive evidence and hear argument in the absence of the applicant for review or their representative in circumstances where an open hearing would disclose criminal information.
74. These provisions enable decisions to be made about the application of a licence without reasons being provided. They also deny the applicant the ability to hear arguments against their licence application in which decisions would be based. The Committee will always note instances of administrative decisions that are made in secret, in the absence of concerned parties, or where applicants are denied reasons for those decisions that are made.
75. However, the Committee also recognises the public interest in containing information about criminal organisations, and in particular, ensuring that suspects in criminal matters are not given notice of the criminal intelligence police and other law enforcement authorities have on suspect individuals or parties.

**The Committee notes that applications for an operator's license or a tattooist's license, or their suspension or cancelling, could be made without reasons being provided to the applicant. However, the Committee also notes the public**

**interest in ensuring that criminal intelligence that police and law enforcement agencies have on a suspect individual party, is not shared with that individual or party.**

*Denial of Compensation*

76. Clause 37 provides that no compensation is payable to any person or body for the closure of tattoo parlours, or to suspend or cancel a tattoo operator's license or tattooist license.
77. Given the effect of these administrative powers could be to close down a tattoo parlour, either temporarily or permanently, significant financial detriment could be incurred by the proprietors of these premises, even in circumstances where no wrongdoing was proven. In particular, the Committee notes that powers in the Bill will enable the authorities to close down tattoo parlours at short notice.

**The Committee will always note provisions in legislation that deny compensation to individuals as a result of administrative powers, especially when those powers could be used to close down businesses where no criminal wrongdoing has been demonstrated.**

*Inappropriately delegates legislative powers: s 8A(1)(b)(iv) of the LRA*

*Commencement by proclamation*

78. The Bill provides that Part 2 of the Act will commence on a day or days to be appointed by proclamation. Part 2 encompasses offences relating to unlicensed body art tattooing.
79. In the Second Reading Speech to the Bill the Minister indicated that the Bill provides for a transitional period before offences commence to allow time for the NSW Police Force, NSW Fair Trading and other relevant agencies to put the scheme into place.

**The Committee will always be concerned where commencement of an Act is delegated to the Executive, once passed by the Legislature. However, given the delay in commencement is to allow for the new regulatory scheme to be put in place the Committee does not consider there to be an inappropriate delegation of legislative power in this instance.**

*Inappropriate delegation of power – Regulations*

80. Clause 41(f) provides that regulations may make provisions for or with respect to exemptions from the operation of the Act or specified provisions of the Act. The Committee notes that the possible effect of this provision is to enable regulations made by the Minister to effectively suspend provisions of the enabling legislation.
81. The Committee will always note clauses in regulations, referred to as Henry VIII clauses, that confer power to a Minister to add, amend, suspend or repeal provisions in a primary statutory instrument. Through Henry VIII clauses, amendments can be made to legislation without introducing an amending bill in Parliament. As such, the use of Henry VIII clauses may be seen as denying the Parliament its proper role of scrutinising alterations to legislation.
82. In addition, section 35(7) provides that regulations can be made which may prescribe an offence and the amount of penalty payable. The penalty payable is capped at an amount

so that it does not exceed the maximum amount of penalty that could be imposed for the offence by a court. Despite the capping of the penalty, the Committee notes that offences and penalties are generally best prescribed by Parliament through legislation. The ability for a Minister to prescribe offences and penalties through the making of regulations may constitute an inappropriate delegation of legislative power.

**The Committee is concerned that the regulation-making powers of this Bill may deny Parliament its proper role in scrutinising alterations to legislation. Further, the Committee is concerned that the ability for a Minister to prescribe offences and penalties by regulation may constitute an inappropriate delegation of legislative power. The Committee refers to Parliament its concerns.**

*Inappropriate delegation of power - Delegations*

83. Clause 38 provides that the Director-General of the Department of Finance and Services, or Commissioner of Fair Trading, can delegate to an authorised delegate any of the functions under the Bill, apart from the power of delegation. Authorised delegates are defined to include a police officer, member of staff of a Department within the public service or any other party prescribed by regulation.
84. Given the significant powers to be created and conferred by this legislation, the Committee is concerned that the power of delegation is wide and ill-defined, and may constitute an inappropriate delegation of power in this instance.

**The Committee is concerned that the delegations powers of this Bill may be too wide and ill-defined, and refers to Parliament its concerns.**

## Part Two - Regulations

### 1. Home Building Amendment (Threshold for Home Warranty Insurance) Regulation 2012

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to provide that:
  - (a) the exemption for certain holders of contractor licences from statutory provisions relating to the form and content of home building contracts is also to apply to “small jobs” home building contracts (that is, contracts for home building work valued between \$1,000 and \$5,000), and
  - (b) certain contractor licences, subject to other requirements of the *Home Building Regulation 2004*:
    - (i). may be issued to, and may be held by, an undischarged bankrupt but only if the licence concerned is subject to a condition that the holder does not carry out work of a value greater than \$20,000 (rather than the current \$12,000), and
    - (ii). may be issued to a person discharged from bankruptcy within the previous 3 years (or be renewed or restored to such a person) subject to the same condition, and
  - (c) a person is eligible to be issued with and hold a contractor licence without holding home warranty insurance if the licence concerned only authorises the holder to carry out building work of a kind that is not required to be covered by home warranty insurance.
2. This Regulation is consequent on the commencement of the *Home Building Amendment Act 2011* which provided that a written, short form home building contract is required for certain “small jobs” work and also raised the threshold for the requirement for home warranty insurance for residential building work from \$12,000 to \$20,000.

#### ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *Consumer protection*

3. In Digest 6/55, the Committee commented on the effect of increasing the threshold for work under the home warranty insurance scheme from \$12,000 to \$20,000.
4. The effect of the amended Regulation is to increase from \$12,000 to \$20,000 the value of work that can be conducted by an undischarged bankrupt or a person who has been discharged from bankruptcy in the previous three years. The Committee notes that the



*Home Building Amendment Act 2011* raised the threshold for the requirement for home warranty insurance for residential building work from \$12,000 to \$20,000.

**The Committee is concerned that the effect of amending the Regulation to enable an undischarged bankrupt – or an individual who has been discharged from bankruptcy in the previous three years - to undertake work to the value of \$20,000 is that consumers who suffer a breach of contract will not be covered by home warranty insurance. The Committee resolves to write to the Minister in relation to this aspect of the Regulation.**

## 2. James Hardie Former Subsidiaries (Winding up and Administration)Amendment (Statutory Recovery Claims) Regulation 2012

### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to amend the *James Hardie Former Subsidiaries (Winding up and Administration) Regulation 2007* to make provision for the payment (and the deferral of the payment) of statutory recovery claims during financial years in which the available funding is not sufficient to pay all of the claims in full.
2. This Regulation is made under the *James Hardie Former Subsidiaries (Winding up and Administration) Act 2005*, including sections 32 (3) (b) and (4) and 69 (the general regulation-making power).

### ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses unduly on personal rights and liberties: s 9(1)(b)(i) of the LRA

#### *Denial of compensation*

3. The Regulation amends the *James Hardie Former Subsidiaries (Winding up and Administration) Regulation 2007* to provide for the distribution of funds in circumstances where the available annual funding is insufficient to pay the claims.
4. The effect of the Regulation is to prioritise new claims over existing claims.

**The Committee resolved to write to the Minister as the effect of the Regulation is to rank compensation claims which may have an unfair consequence.**

### 3. Local Government (General) Amendment (Election Procedures) Regulation 2012

#### PURPOSE AND DESCRIPTION

1. The object of this Regulation is to make amendments to the Local Government (General) Regulation 2005 (the Principal Regulation) relating to the conduct of local council elections for councillors and mayors. The Regulation deals with the following matters:
  - (a) making various provisions of the Principal Regulation consistent with corresponding provisions that regulate State elections under the Parliamentary Electorates and Elections Act 1912;
  - (b) requiring paid electoral advertisements published on the internet during the regulated period for an election to show the name and address of the person who authorised the advertisement (in a similar manner to the requirement relating to other electoral material in clause 356G of the Principal Regulation and the requirement relating to internet advertising in section 328A of the Commonwealth Electoral Act 1918);
  - (c) making other miscellaneous amendments of a minor or machinery nature.
2. This Regulation is made under the Local Government Act 1993, including section 748 (the general regulation-making power) of, and item 14 (Elections) of Schedule 6 to, that Act.

#### ISSUES CONSIDERED BY COMMITTEE

The regulation trespasses on personal rights and liberties: s 9(1)(b)(i) of the LRA

##### *Freedom of political association and right to privacy*

3. Clause 5 of Schedule 1 of the Regulation outlines that the new clause 290(1)(c) of the *Local Government (General) Regulation 2005* will require candidates to indicate whether they are a member of any registered political party and, if so, the name of the party.

**The Committee acknowledges that there are certain circumstances in which an individual who is a member of a political party may wish to pursue candidacy in an election without aligning themselves to that political party. However, the Committee considers transparency and disclosure to be important in the context of free and fair elections and as such does not make any further comment in relation to this issue.**

*Freedom of political speech*

4. Clause 46 of Schedule 1 of the Regulation has the effect of inserting new clauses 356GA and 356GB in the *Local Government (General) Regulation 2005*. Clause 356GA restricts a person from displaying electoral matter on an electronic billboard, digital road sign or other similar device unless the matter contains the name and address of the person on whose instructions the matter was displayed. Clause 356GB restricts a person from publishing an advertisement containing electoral matter on the internet if the name and address of the person does not appear at the end of the advertisement.

**The Committee notes that restricting an individual from displaying electoral matter may impact on an individual's implied freedom of political communication. However, the Committee notes that the addition of these clauses is to ensure that newer forms of political communication are regulated in a manner similar to more traditional forms of political communication and as such does not make any further comment in relation to this issue.**

*Right to vote*

5. Clauses 7 and 8 of Schedule 1 of the Regulation outline that an election manager may appoint a place as a polling place or a pre-poll voting office whether or not the place is within or outside the area or ward concerned.

**The Committee is concerned that the Regulation provides the election manager with the capacity to appoint polling places and pre-poll voting offices outside the area or ward concerned.**

**The Committee notes that these amendments follow those made to the *Parliamentary Electorates and Elections Act 1912* regarding the conduct of State elections. Under section 98 of that Act, in cases where the Electoral Commissioner is satisfied that the convenience of a large number of electors of any district would be furthered by appointing polling places outside such district, may appoint such polling places.**

**The Committee resolves to write to the Minister to note its concern that the Regulation does not include a proviso similar to that featured in section 98 of the *Parliamentary Electorates and Elections Act 1912*.**

*Rule of law*

6. Clause 9 of Schedule 1 of the Regulation inserts a new clause 300 in the *Local Government (General) Regulation 2005*, which relates to the content of the Notice of a Contested Election. The new subclause 300(5) outlines that a Notice under this clause may include such other information relating to the election as the election manager thinks fit.
7. The Committee notes that similar provisions outlined in Part 5 of the *Parliamentary Electorates and Elections Act 1912* which pertain to State elections do not provide for the Electoral Commissioner to include "such other information" as the Electoral Commissioner thinks fit.

**The Committee is concerned that providing the election manager with the power to include information in a Notice of a Contested Election as the election**

manager thinks fit provides an overly broad and subjective power to the election manager. The Committee is of the opinion that such powers should include an objective element.

The Committee resolves to write to the Minister to enquire as to whether the Minister had considered making the power outlined in the new clause 300(5) of the *Local Government (General) Regulation 2005* subject to a reasonableness test, or some other objective measure.

8. Clause 52 of Schedule 1 of the Regulation has the effect of omitting clause 392 of the Local Government (General) Regulation 2005, which provided that if a court so directed or the election manager so decided, the election manager was to allow any person to inspect any of the election materials with the exception of the sealed parcels of marked ballot-papers after an election. Election materials are kept for six months unless the election manager decides to keep them for longer.
9. The Committee notes that the omission of clause 392 of the Local Government (General) Regulation 2005 provides for consistency with the *Parliamentary Electorates and Elections Act 1912* regarding the conduct of State elections.

The Committee notes that the Regulations provide that election materials are to be kept in circumstances where an individual has disputed an election or return through the Court of Disputed Returns. However, the Committee is concerned that removing clause 392 has the effect of limiting access to election materials to those who have lodged a dispute and resolves to write to the Minister highlighting this concern.

# Appendix One – Index of Ministerial Correspondence on Bills

The Committee is not in receipt of Ministerial Correspondence with respect to Bills.

## Appendix Two – Index of Correspondence on Regulations on which the Committee has reported

1. In Digest 9/55, the Committee reported on the *Work Health and Safety (Savings and Transitional) Regulation 2011*, and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 17 April 2012 which addresses to the Committee's satisfaction the issues raised.