PARLIAMENT OF NEW SOUTH WALES

Legislation Review Committee

LEGISLATION REVIEW DIGEST

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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”.

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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. CRIMES (CRIMINAL ORGANISATIONS CONTROL) AMENDMENT BILL 2013

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

Presumption of innocence

The Committee has previously noted its concerns in relation to presumption of innocence issues arising out of the *Crimes (Criminal Organisations Control) Bill 2009, Crimes (Criminal Organisations Control) Bill 2012, Crimes (Criminal Organisations Control) Amendment Bill 2012.* The Committee reiterates the comments already made in relation to those Bills and notes similar concerns in relation to this Bill. Specifically, the Committee notes that the broadening of the definition of serious criminal activity to include individuals who have neither been convicted of, nor charged with, a serious indictable offence – and potentially placing control orders on these individuals – breaches the presumption of innocence, as well as freedom of association and movement, and the right to work. The Committee refers to Parliament whether Schedule 1[5] trespasses on personal rights and liberties.

Access to justice

The Committee is concerned that the process for responding to an application for an organisation to be declared a criminal organisation for the purposes of the Act may not commence within the statutory period because an affected unincorporated association or group may not be aware of the public notice announcing the Commissioner's application to have that organisation so declared. The Committee refers to Parliament whether the scheme outlined in the proposed Part 2 trespasses on access to justice.

Judicial Review

The Committee appreciates that declarations and control orders originating in New South Wales require the Court to satisfy itself in relation to a number of substantive criteria before making the declaration or control order. The Committee is concerned that the Court has no capacity to decline the declaration or control order if such a declaration or control order has been validly made interstate and is of a kind outlined in the regulation. The Committee refers to Parliament the issue of requiring the NSW Court to recognise and enforce declarations and control orders without first satisfying themselves that substantive criteria have been met.

Procedural fairness

The Committee notes the object of Part 3B is to allow evidence that is or contains criminal intelligence to be admitted whilst avoiding prejudicing criminal investigations, avoiding the discovery of the existence or identity of confidential sources and avoiding endangering anyone's life or physical safety. However, the Committee also notes that excluding respondents from 'special closed hearings' (section 28K) impacts on procedural fairness.

The Committee is also concerned that criminal intelligence may be admitted in evidence despite any rule relating to the admission of hearsay evidence. The Committee refers to Parliament whether enabling criminal intelligence to be tendered despite the hearsay rule trespasses on rights and liberties.

Duration of declaration

The proposal to extend the duration of a declaration from three to five years – and in the case of interstate orders and declarations recognised in NSW that can be made indefinitely - with its attendant effects that control orders are placed on individuals who may have neither been charged nor convicted of any serious indictable crime, may be considered a breach of the presumption of innocence, and pre-judicial punishment. The Committee refers this matter to Parliament for its consideration.

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

Limited right of appeal

The Committee notes limiting appeals in relation to matters of fact, particularly in circumstances where declarations that an organisation is criminal can be made within 35 days of application with notice only being through public notice for unincorporated associations or groups, may constitute limiting an organisation's right of appeal. The Committee also considers that limiting appeals to within 28 days may be considered as providing a limited right of appeal. The Committee refers these matters to Parliament for its consideration.

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

Matters in the regulation that ought to be set out in the legislation

The Committee notes that the scheme with respect to declaring an organisation to be a criminal organisation in New South Wales is clearly set out in the new Part 2 of the Act and that the scheme with respect to subjecting an individual to a control order is set out in Part 3 of the Principal Act. The Committee considers that providing for interstate schemes to be outlined in the regulations removes from Parliament its ability to scrutinise whether those interstate schemes are appropriate in New South Wales. This removal of the Parliament's ability to scrutinise schemes that provide for declarations and orders that may be registered in New South Wales via Divisions 2 and 3 of Part 3A is referred to Parliament for its consideration.

2. GAME AND FERAL ANIMAL CONTROL AMENDMENT (PINK-EARED DUCKS) BILL 2013*

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

3. INTOXICATED PERSONS (SOBERING UP CENTRES TRIAL) BILL 2013

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

Mandatory detention

The Committee notes that intoxicated individuals may be subject to mandatory detention in circumstances where those individuals have not been arrested for, or charged with, an offence. The Committee notes the intent of the Bill to promote the safety of public places and reduce alcohol-related violence and other anti-social behaviour. The Committee also notes that an individual detained in the Sydney City sobering up centre may be released earlier than specified if the individual is no longer intoxicated or is released into the care of a responsible person.

The Committee refers to Parliament for consideration whether mandatory detention in such circumstances constitutes an undue trespass on an individual's right against arbitrary detention.

Right to privacy

The Committee notes that there are some safeguards provided for in clause 26, including that: only specified agencies and individuals may enter into such information sharing arrangements; limitations have been placed on the type of information that may be shared; and the Privacy Commissioner must be consulted where the Minister recommends the making of a regulation that allows further individuals or bodies to enter into information sharing arrangements or specifies other types of information to be shared as part of those arrangements.

The Committee refers to Parliament for consideration whether clause 26 of the Bill constitutes an undue trespass on an individual's right to privacy.

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

No review of circumstances or lawfulness of detention

The Committee refers to Parliament whether the Bill's failure to provide individuals with a review right relating to the circumstances or lawfulness of their detention is appropriate in the circumstances.

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

Powers of the judiciary

The Committee refers to Parliament whether an Act that specifies that a fine is taken to have been imposed by a court is appropriate.

Commencement by Proclamation

The Committee notes that the administrative arrangements associated with setting up the sobering up centres may take some time to finalise. For this reason, the Committee does not consider the commencement by proclamation to be an inappropriate delegation of legislative power in these circumstances.

4. PUBLIC INTEREST DISCLOSURES AMENDMENT BILL 2013

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

PART TWO - REGULATIONS

1. LIQUOR AMENDMENT (KINGS CROSS) REGULATION 2013

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

Freedom of Association

The Committee notes that excluding individuals from premises based on identifying clothing, jewellery or accessories may trespass on personal rights and liberties. However, the Committee notes that those individuals would still be permitted to enter the licensed premises if the identifying clothing, jewellery or accessories are not worn. As such, the Committee makes no further comment on this issue.

2. RAIL SAFETY (ADOPTION OF NATIONAL LAW) REGULATION 2012

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

Personal Physical Integrity

Despite the public health and safety interests that underpin the objects of this Regulation, the Committee still notes that requiring a rail safety worker to subject themselves to these types of tests, especially blood or urine tests, could constitute a violation of their personal physical integrity. The ability for police to use force as considered necessary to facilitate in obtaining a sample may constitute a further violation of the rail safety worker's physical integrity.

That the objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Inappropriate delegation of legislative power

The Committee considers the creating of serious offences in a Regulation, together with the setting of significant penalties as a consequence, could constitute an inappropriate delegation of legislative power. In such circumstances, the Committee ordinarily prefers such provisions to be included in the Principal Act of a Regulation.

3. UNIVERSITIES GOVERNING BODIES (MACQUARIE UNIVERSITY) ORDER 2012

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Order amending an Act

The Committee notes that the *Universities Governing Bodies (Macquarie University) Order 2012* amends the *Macquarie University Act 1989* and that section 4 of the *Universities Governing Bodies Act 2011* authorises such an order to amend a University Act.

However, the Committee draws Parliament's attention to the comments that the Committee made about the then *Universities Governing Bodies Bill 2011* (now an Act) in the Legislation Review Digest 6/55 of 18 October 2011. In particular, the Committee referred to Parliament whether allowing for Acts to be amended by a resolution of a governing body and publication of an order by a Minister was an inappropriate delegation of legislative powers.

Part One - Bills

1. Crimes (Criminal Organisations Control) Amendment Bill 2013

Date introduced	21 March 2013
House introduced	Legislative Assembly
Member responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Justice

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the Principal Act:

(a) to adopt the model in the Queensland Act for the Supreme Court to make declarations that organisations are criminal organisations (in place of declarations by eligible Judges), and

(b) to adopt the model in the Queensland Act for the Supreme Court (in place of the Police Commissioner) making a determination whether information is criminal intelligence, and appointing a monitor to assist the Court, and

(c) to provide for the recognition and enforcement in New South Wales of comparable declarations and orders made in other States and Territories in relation to criminal organisations and their members, and

(d) to elaborate on the facts about which the Supreme Court must be satisfied before making a declaration of a criminal organisation, and

(e) to redefine *serious criminal activity* consistently with the definition of *serious criminal offence* within the meaning of the *Criminal Assets Recovery Act 1990*, and

(f) to provide for declarations of criminal organisations to be in force for five (instead of three) years as in the Queensland Act.

BACKGROUND

2. The *Crimes (Criminal Organisations Control) Act 2012* (the *Principal Act*) provides that an eligible Judge of the Supreme Court may, on the application of the Commissioner of Police, declare an organisation to be subject to that Act if its members associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the organisation represents a risk to public safety and order in New South Wales. As a consequence of the declaration of an organisation, the Supreme Court has jurisdiction to make a control order against a member of the organisation that prevents

the person from associating with other controlled members of the organisation and from holding a number of statutory authorities such as firearms and liquor licences.

3. The Principal Act was re-enacted in 2012 to require the eligible Judge to give reasons for any decision following a High Court decision (*Wainohu*) that it was invalid because the eligible Judge had a discretion but not an obligation to give reasons.

4. Following a recent High Court decision (*Pompano*) the High Court has upheld the validity of the corresponding *Criminal Organisation Act 2009* of Queensland (the *Queensland Act*) despite a challenge to the use of criminal intelligence information.

5. That Queensland Act uses the model of the Supreme Court (rather than an eligible Judge) making declarations of criminal organisations.

OUTLINE OF PROVISIONS

6. Clause 1 sets out the name (also called the short title) of the proposed Act.

7. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Crimes (Criminal Organisations Control) Act 2012 No 9

Declarations of criminal organisations by Court

8. Schedule 1 [7] substitutes Part 2 of the Principal Act to achieve the object described in paragraph (a) of the Overview above. The proposed Part substantially re-enacts Part 2 of the Principal Act in similar terms to the Queensland Act so that declarations of criminal organisations are made by the Supreme Court.

9. Proposed section 7 achieves the object described in paragraph (d) of the Overview above. The proposed section makes it clear that the Supreme Court need only be satisfied that members of an organisation in New South Wales associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity, not members wherever the organisation has a presence. Proposed section 7 also makes it clear that it is not sufficient for the Supreme Court to be satisfied that the organisation represents an unacceptable risk to the safety, welfare or order of the community in New South Wales—the Court must be satisfied that the continued existence of the organisation represents such a risk.

10. Proposed section 9 achieves the object described in paragraph (f) of the Overview above.

11. Schedule 1 [1]–[3] and [15] contain consequential amendments.

Criminal intelligence

12. Schedule 1 [9] inserts proposed Part 3B into the Principal Act to achieve the object described in paragraph (b) of the Overview above. The proposed Part enables the Supreme Court to declare certain information to be criminal intelligence (at present under the Principal Act the Commissioner determines whether information is criminal intelligence). If, in any part of the hearing of an application under the Principal Act, declared criminal intelligence is to be considered, the Court must order that part of the

hearing to be a closed hearing. The proposed Part also creates an offence of unlawful disclosure of criminal intelligence (with a maximum penalty of $11,000 or imprisonment for 12 months, or both).

13. Division 2 of proposed Part 3B makes provision for the appointment and functions of the criminal intelligence monitor.

14. Schedule 1 [13] enables declared criminal intelligence to be admitted in proceedings under the Principal Act despite rules relating to hearsay evidence, but without affecting other rules and discretions relating to court proceedings Schedule 1 [2], [4], [8] and [10]–[12] contain consequential amendments.

Mutual recognition of declarations and orders

15. Schedule 1 [9] inserts proposed Part 3A into the Principal Act to achieve the object described in paragraph (c) of the Overview above. The proposed Part provides for a Supreme Court Registrar to register declarations and orders made in other States and Territories in relation to criminal organisations and their members.

16. An interstate declaration is treated on registration as if it were a declaration under proposed section 7 of the Principal Act. Accordingly, control orders may be made under the Principal Act with respect to members of that organisation in New South Wales.

17. An interstate control order may be registered in New South Wales with such adaptations or modifications as the Supreme Court considers are necessary or desirable for its effective operation in New South Wales. The registered interstate control order will operate in New South Wales as if it were a control order made under Part 3 of the Principal Act and can be enforced accordingly.

Meaning of "serious criminal activity"

18. Section 3 of the Principal Act defines *serious criminal activity* by reference (among other things) to the obtaining of material benefits from conduct constituting a serious indictable offence or committing a serious violence offence.

19. Schedule 1 [5] and [6] redefine *serious criminal activity* to achieve the object described in paragraph (e) of the Overview above by reference instead to the definition of *serious criminal offence* in section 6 of the *Criminal Assets Recovery Act 1990* and by omitting the definition of *serious violence offence*. The amendments will ensure, for example, that serious offences that do not necessarily involve material benefits and offences involving violence punishable by 5 or more years' imprisonment (not only 10 years' or more as is currently the case) are covered by the definition.

Miscellaneous amendments

20. Schedule 1 [15] provides (in line with the Queensland Act) that parties to proceedings for a declaration under Part 2 of the Principal Act bear their own legal costs.

21. Schedule 1 [14] contains an amendment by way of statute law revision.

Schedule 2 Consequential amendment of other Acts

22. Schedule 2 makes consequential amendments to other Acts relating to criminal intelligence under the Principal Act.

ISSUES CONSIDERED BY COMMITTEE

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

Presumption of innocence

23. The Committee noted with respect to the *Crimes (Criminal Organisations Control) Amendment Bill 2012* that the Bill proposed to remove the existing definition of serious criminal activity, and replace it with a different standard. Specifically, the existing standard provides that serious criminal activity means committing a serious violence offence or engaging in conduct that would constitute a serious indictable offence. Meanwhile, the proposed standard would provide that a serious criminal activity means committing a serious criminal offence within section 6 of the *Criminal Assets Recovery Act 1990,* or obtaining material benefits from conduct that constitutes any such offence. Importantly, the new provision will further provide that the new definition of serious criminal activity is to apply regardless of whether any person has been charged or convicted of any such offence.

24. Schedule 1[5] of this Bill proposes the same amendment.

> **The Committee has previously noted its concerns in relation to presumption of innocence issues arising out of the *Crimes (Criminal Organisations Control) Bill 2009, Crimes (Criminal Organisations Control) Bill 2012, Crimes (Criminal Organisations Control) Amendment Bill 2012.* The Committee reiterates the comments already made in relation to those Bills and notes similar concerns in relation to this Bill. Specifically, the Committee notes that the broadening of the definition of serious criminal activity to include individuals who have neither been convicted of, nor charged with, a serious indictable offence – and potentially placing control orders on these individuals – breaches the presumption of innocence, as well as freedom of association and movement, and the right to work. The Committee refers to Parliament whether Schedule 1[5] trespasses on personal rights and liberties.**

Access to justice

25. Subschedule 1[7] of the Bill replaces Part 2 of the *Crimes (Criminal Organisations Control) Act 2012.* The proposed Part 2 outlines the process to be undertaken in order to have an organisation declared to be a criminal organisation for the purpose of the Act. Following an application from the Commissioner to have an organisation declared to be a criminal organisation, the respondent organisation has 30 days to file a response. The respondent may be unaware that the 30 days has commenced for seven days if personal service is practicable. If personal service is not practicable, or if the respondent is an unincorporated association or group, the respondent may be informed by way of public notice up to 10 days into the 30 day period.

> **The Committee is concerned that the process for responding to an application for an organisation to be declared a criminal organisation for the purposes of the Act may not commence within the statutory period because an affected unincorporated association or group may not be aware of the public notice announcing the Commissioner's application to have that organisation so declared. The Committee refers to Parliament whether the scheme outlined in the proposed Part 2 trespasses on access to justice.**

Judicial Review

26. The proposed Part 2 of the Principal Act, and the existing Part 3 of the Principal Act, provide an outline of what the Court must satisfy itself with in relation to declaring an organisation to be a Criminal Organisation or issuing a Control Order. This criteria includes the court satisfying itself that members of the organisation in NSW associate for the purpose of organising, planning, facilitating, supporting or engaging in serious criminal activity and the continued existence of the organisation is an unacceptable risk to the safety, welfare or order of the community in NSW (proposed section 7).

27. Proposed Part 3A will require the Courts to provide a declaration or a control order if such a declaration or control order exists interstate and is of a kind outlined in the regulations.

> **The Committee appreciates that declarations and control orders originating in New South Wales require the Court to satisfy itself in relation to a number of substantive criteria before making the declaration or control order. The Committee is concerned that the Court has no capacity to decline the declaration or control order if such a declaration or control order has been validly made interstate and is of a kind outlined in the regulation. The Committee refers to Parliament the issue of requiring the NSW Court to recognise and enforce declarations and control orders without first satisfying themselves that substantive criteria have been met.**

Procedural fairness

28. Schedule 1[9] inserts Part 3B, relating to criminal intelligence, in the Principal Act. This provides a scheme by which the Court may decide that intelligence meets the criteria for criminal intelligence and enable evidence in relation to criminal intelligence to be provided to the Court without the respondent being aware of the substance of that information.

> **The Committee notes the object of Part 3B is to allow evidence that is or contains criminal intelligence to be admitted whilst avoiding prejudicing criminal investigations, avoiding the discovery of the existence or identity of confidential sources and avoiding endangering anyone's life or physical safety. However, the Committee also notes that excluding respondents from 'special closed hearings' (section 28K) impacts on procedural fairness.**
>
> **The Committee is also concerned that criminal intelligence may be admitted in evidence despite any rule relating to the admission of hearsay evidence. The Committee refers to Parliament whether enabling criminal intelligence to be tendered despite the hearsay rule trespasses on rights and liberties.**

Duration of declaration

29. In its consideration of the *Crimes (Criminal Organisations Control) Amendment Bill 2012,* the Committee noted that that Bill provided for the increase in the duration that a declaration can remain in force from three years to five years. This clause is also included in this Bill at Schedule 1[7] in new Part 2, section 9.

30. As the Bill proposes to extend the duration of the declaration from three to five years, it follows that the effect of being a controlled member of a declared organisation, and the restrictions imposed on that person, would also be extended.

31. As previously noted, given that these orders can be imposed on individuals who have neither been convicted nor charged with an offence, these control orders could potentially have a punitive impact on individuals who have not committed any crime. This may be considered a breach of the presumption of innocence, and pre-judicial punishment.

32. Furthermore, the Committee notes that at Schedule 1[9], the new Part 3A inserts sections 27E and 27R that outline that control orders or declarations that are made interstate for an indefinite period can be made by the Registrar in NSW for an indefinite period.

> **The proposal to extend the duration of a declaration from three to five years – and in the case of interstate orders and declarations recognised in NSW that can be made indefinitely - with its attendant effects that control orders are placed on individuals who may have neither been charged nor convicted of any serious indictable crime, may be considered a breach of the presumption of innocence, and pre-judicial punishment. The Committee refers this matter to Parliament for its consideration.**

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

Limited right of appeal

33. Schedule 1[7] of the Bill inserts a new Part 2 in the Principal Act. Section 13 of the new Part 2 outlines that appeals are to follow the process outlined in section 24 of the Principal Act. Section 24 provides that appeals may be made in relation to matters of law as a right, but can only be made with leave in relation to matters of fact. Section 24 also limits the period in which an appeal can be lodged to within 28 days of a decision of the Court, unless leave is granted.

> **The Committee notes limiting appeals in relation to matters of fact, particularly in circumstances where declarations that an organisation is criminal can be made within 35 days of application with notice only being through public notice for unincorporated associations or groups, may constitute limiting an organisation's right of appeal. The Committee also considers that limiting appeals to within 28 days may be considered as providing a limited right of appeal. The Committee refers these matters to Parliament for its consideration.**

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

Matters in the regulation that ought to be set out in the legislation

34. Schedule 1[9] inserts a new Part 3A into the Principal Act. Part 3A provides a scheme by which declarations with respect to Criminal Organisations or Control Orders made in another state can be registered in New South Wales. The types of interstate declarations or control orders are to be prescribed in the regulations (proposed section 27A).

The Committee notes that the scheme with respect to declaring an organisation to be a criminal organisation in New South Wales is clearly set out in the new Part 2 of the Act and that the scheme with respect to subjecting an individual to a control order is set out in Part 3 of the Principal Act. The Committee considers that providing for interstate schemes to be outlined in the regulations removes from Parliament its ability to scrutinise whether those interstate schemes are appropriate in New South Wales. This removal of the Parliament's ability to scrutinise schemes that provide for declarations and orders that may be registered in New South Wales via Divisions 2 and 3 of Part 3A is referred to Parliament for its consideration.

2. Game and Feral Animal Control Amendment (Pink-eared Ducks) Bill 2013*

Date introduced	21 March 2013
House introduced	Legislative Assembly
Member responsible	Mr Alex Greenwich, MP
	*Private Member's Bill

PURPOSE AND DESCRIPTION

1. As a result of the *Game and Feral Animal Control Further Amendment Act 2012*, native game birds (which includes various species of native ducks) will be able to be killed by licensed game hunters on private land under the authority of a native game bird management licence.

2. The object of this Bill is to remove pink-eared ducks from the list of native game birds that may be killed under the authority of such a licence.

BACKGROUND

3. The pink-eared duck is a small duck with distinctive colouring. The pink-eared duck is found in timbered areas near water. It prefers shallow, temporary waters, however open wetlands support large flocks. It is a highly dispersive and nomadic species.

4. Bird watchers and environmentalists have agitated to remove this distinctive duck from the list of native game birds that may be killed under the authority of a native game bird management licence.

OUTLINE OF PROVISIONS

5. Clause 1 sets out the name (also called the short title) of the proposed Act.

6. Clause 2 provides for the proposed Act to commence on the date of assent or on the date on which the list of native game birds is inserted into the *Game and Feral Animal Control Act 2002* (whichever is the later).

7. Clause 3 amends the *Game and Feral Animal Control Act 2002* (as amended by the *Game and Feral Animal Control Further Amendment Act 2012*) for the purposes described in the above purpose and description.

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

3. Intoxicated Persons (Sobering Up Centres Trial) Bill 2013

Date introduced	19 March 2013
House introduced	Legislative Council
Minister responsible	The Hon. Michael Gallacher MLC
Portfolio	Minister for Police and Emergency Services, Minister for the Hunter, Vice-President of the Executive Council, Leader of the Government in the Legislative Council

PURPOSE AND DESCRIPTION

1. The object of the Bill is to facilitate a trial of a scheme for the temporary detention or care (or both) of certain intoxicated persons to enable those persons to sober up.

BACKGROUND

2. The Bill seeks to address alcohol-related violence and anti-social behaviour in public places by determining whether providing safe environments for noticeably intoxicated individuals has an effect on public safety and amenity.

3. The ACT's Sobering Up Shelter and the legislation that supports it have been considered in developing the Sobering Up Centres Trial in NSW and this Bill. The trial will involve sobering up centres with both mandatory and non-mandatory approaches.

OUTLINE OF PROVISIONS

Part 1 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 a day or days to be appointed by proclamation.

6. Clause 3 sets out the object of the proposed Act.

7. Clause 4 defines certain words and expressions used in the proposed Act. For the purposes of the proposed Act, a person is an ***intoxicated person*** if:

   (a) the person is of or above 18 years of age, and

   (b) the person's speech, balance, co-ordination or behaviour is noticeably affected, and

   (c) it is reasonable in the circumstances to believe that the affected speech, balance, co-ordination or behaviour is the result of the consumption of alcohol or any drug.

8. Other words and expressions defined in the provision include the following:

(a) ***sobering up centre*** means premises used for the purposes of the proposed Act as a place of detention or care or both for a temporary period to enable intoxicated persons to return to a state of sobriety.

(b) ***authorised sobering up centre*** means:

i the Sydney City sobering up centre, or

ii an accredited sobering up centre.

(c) ***accredited sobering up centre*** means a sobering up centre identified in an accreditation granted under Part 3 of the proposed Act.

(d) ***Sydney City sobering up centre*** means the sobering up centre operated by the NSW Police Force located at the Central Local Court cell complex or such other place as may be prescribed by the regulations.

(e) ***catchment area***, for an authorised sobering up centre, means the geographical area specified for the sobering up centre in the regulations.

(f) ***health assessment officer*** means a person engaged at an authorised sobering up centre who is:

i a registered medical practitioner, or

ii a registered nurse, or

iii in relation to the Sydney City sobering up centre, a registered health practitioner (within the meaning of the *Health Practitioner Regulation National Law*) of a class prescribed by the regulations, or

iv in relation to an accredited sobering up centre, a person with first aid, drug and alcohol treatment or health skills or qualifications of a class prescribed by the regulations.

Part 2 Detention and transport of intoxicated persons to sobering up centres

Division 1 Detention in catchment area

9. The proposed Division provides for the detention of intoxicated persons found in a public place in the catchment area for an authorised sobering up centre and their transport to the relevant centre. Under the scheme of the proposed Act, there are to be two types of authorised sobering up centre—the Sydney City sobering up centre and accredited sobering up centres. Each sobering up centre will have a catchment area prescribed by the regulations. Different provisions will govern the operation of the proposed Act with respect to the different types of centre.

10. Clause 5 provides that a police officer may detain an intoxicated person found in a public place in a catchment area for the Sydney City sobering up centre:

(a) if the person:

i has refused or failed to comply with a move on direction, and

ii persists in engaging in the relevant conduct that gave rise to the direction or any other relevant conduct, or

(b) if the person is:

i behaving in a disorderly manner or in a manner likely to cause injury to the person or another person or damage to property, or

ii in need of physical protection because the person is intoxicated.

11. The intoxicated person detained by a police officer under the proposed section is to be taken directly to the Sydney City sobering up centre.

12. Clause 6 provides that a police officer may detain an intoxicated person found in a public place in a catchment area for an accredited sobering up centre:

(a) if the police officer believes that the person is a public nuisance, or

(b) if the person is in need of physical protection because the person is intoxicated, or

(c) in such other circumstances as may be prescribed by the regulations.

13. A person is a ***public nuisance*** for the purposes of the provision if the person is behaving in an offensive or disorderly manner and the person's behaviour is interfering, or is likely to interfere, with the peaceful passage through, or enjoyment of, a public place by a member of the public.

14. The intoxicated person detained by a police officer under the proposed section is to be taken directly to the accredited sobering up centre for the catchment area.

15. Clause 7 provides that a police officer is not to detain a person under the proposed Division because of behaviour that constitutes an offence under any law, other that if the behaviour constitutes an offence under:

(a) proposed section 8 relating to a failure or refusal to disclose a person's identity to a police officer, or

(b) section 9 (Continuation of intoxicated and disorderly behaviour following move on direction) of the *Summary Offences Act 1988*, or

(c) section 199 (Failure to comply with direction) of the *Law Enforcement (Powers and Responsibilities) Act 2002*.

16. Clause 8 provides that a police officer may require a person detained under the proposed Division to disclose his or her identity. It will be an offence to fail or refuse, without a reasonable excuse, to comply with the requirement or to give a name that is false in a material particular or give an address other than the person's full and correct address.

17. A police officer may also request a person who is required under this proposed section to disclose his or her identity to provide proof of that identity. It will not be an offence to fail to comply with any such request.

18. Clause 9 provides that an intoxicated person detained under the proposed Division may be detained under such reasonable restraint as is necessary to protect the intoxicated person and other persons from injury and property from damage.

19. Clause 10 provides that certain safeguard provisions contained in section 201 of the *Law Enforcement (Powers and Responsibilities) Act 2002* extend to the power under proposed sections 5 and 6 to detain a person and the power under proposed section 8 to request a person to disclose his or her identity.

Division 2 Admission to sobering up centre

20. Clause 11 contains provisions governing the admission of intoxicated persons to authorised sobering up centres.

21. As soon as is practicable after arriving at an authorised sobering up centre, an intoxicated person must be informed of certain matters relating to his or her detention or care in the centre.

22. Before being admitted to an authorised sobering up centre, an intoxicated person must:

    (a) in relation to an accredited sobering up centre—consent to being assessed by a health assessment officer and to being monitored by the staff of the centre, and

    (b) be assessed by a health assessment officer to determine whether there are any apparent health reasons to refuse admission to the centre, and

    (c) be searched.

23. If the health assessment officer determines that there are health reasons to refuse the intoxicated person admission to the centre, the person must not be admitted to the centre.

24. The person in charge of an accredited sobering up centre is to refuse admission of an intoxicated person for the following reasons:

    (a) the capacity of the centre under its accreditation has been reached,

    (b) the intoxicated person is behaving or is likely to behave so violently that the staff of the centre would not be capable of taking care of and controlling the intoxicated person,

    (c) any other reason prescribed by the regulations.

25. Clauses 12 and 13 deal with detention in and release from the Sydney City sobering up centre.

26. Clause 12 provides that a person who has been admitted to the Sydney City sobering up centre may be detained there by an authorised officer. The person:

    (a) must be given a reasonable opportunity by the person in charge of that centre to contact a responsible person, and

(b) must, as far as is reasonably practicable, be kept separately from any person detained at that centre in connection with the commission or alleged commission of an offence, and

(c) must be provided with food, drink, bedding and blankets appropriate to the person's needs.

27. The person may be detained by an authorised officer under such reasonable restraint as is necessary to protect the person and other persons from injury and property from damage.

28. Clause 13 provides that a person who has been admitted to the Sydney City sobering up centre is to be released from the centre if:

(a) the person in charge of the centre is satisfied that the person has ceased to be an intoxicated person, or

(b) a responsible person present at the centre is willing to accept the care of the intoxicated person and take the person to a residence or other safe place.

29. The person in charge of the Sydney City sobering up centre, as soon as is practicable after a period of 4 hours has elapsed since a person was admitted to the centre, must:

(a) arrange for the person to be assessed by a health assessment officer, and

(b) consult with that health assessment officer regarding that assessment, and

(c) release the person unless the person in charge believes that it is not safe to do so for health reasons or any other reason.

30. The person in charge of the Sydney City sobering up centre is not to permit a person admitted to the centre to remain in the centre for a period that exceeds 8 hours.

31. Clauses 14 and 15 deal with the care of persons in and departure from accredited sobering up centres.

32. Clause 14 provides that an intoxicated person who is admitted to an accredited sobering up centre:

(a) must be given a reasonable opportunity by the person in charge of that centre to contact a responsible person, and

(b) must be provided with food, drink, bedding and blankets appropriate to the person's needs.

33. Clause 15 provides that a person who has been admitted to an accredited sobering up centre may leave the accredited sobering up centre at any time.

34. The person in charge of an accredited sobering up centre must use his or her best endeavours to ensure that a person admitted to the centre is assessed by a health assessment officer before leaving the centre.

35. The person in charge of an accredited sobering up centre must, as soon as is practicable after a period of 4 hours has elapsed since a person was admitted to the centre, arrange for the person to be assessed by a health assessment officer.

36. The person in charge of an accredited sobering up centre is not to permit a person admitted to the centre to remain in the centre for a period that exceeds 8 hours.

37. Clause 16 provides that the person in charge of an authorised sobering up centre must ensure that each person admitted to the centre is regularly monitored.

38. If, at any time, the person in charge of an authorised sobering up centre, a health assessment officer or an authorised officer believes that a person who has been taken to an authorised sobering up centre by a police officer or who has been admitted to a centre is in need of urgent medical treatment, the person in charge, health assessment officer or authorised officer is to make arrangements to transport the person to a hospital.

Division 3 Cost recovery charge

39. Clause 17 provides that a person who has been admitted to the Sydney City sobering up centre must pay a cost recovery charge.

40. Clause 18 provides for the enforcement of the cost recovery charge under the *Fines Act 1996* as if the charge was a fine imposed by a court. However, Divisions 3 (Driver licence or vehicle registration suspension or cancellation) and 6 (Imprisonment) of Part 4 of that Act will not apply in relation to the enforcement of the cost recovery charge.

41. Clause 19 enables a person to apply to the Local Court to have a cost recovery charge waived or reduced. The Local Court, in determining the application, is to have regard to the following:

    (a) the applicant's remorse (if any),

    (b) the hardship that payment of the cost recovery charge would impose on the applicant (if any),

    (c) any attendance by the applicant at a drug or alcohol treatment program,

    (d) any other matter as may be prescribed by the regulations.

Part 3 Accreditation of sobering up centres

42. Part 3 of the proposed Act deals with the accreditation of persons to operate a sobering up centre.

43. Clause 20 deals with applications for accreditation.

44. Clause 21 deals with the determination of such applications by grant or refusal. If granted, an accreditation may be unconditional or subject to conditions.

45. Clause 22 provides for the variation of conditions of accreditation.

46. Clause 23 deals with the suspension or cancellation of accreditation.

Part 4 Miscellaneous

47. Clause 24 provides that development for the purposes of the first 2 accredited sobering up centres accredited under the proposed Act does not require development consent and is not subject to Part 5 of the *Environmental Planning and Assessment Act 1979*.

48. Clause 25 provides that no action lies against any police officer, any authorised officer, any health assessment officer or any other person in respect of anything done or omitted to be done by the police officer, authorised officer, health assessment officer or any such other person in good faith in the execution or purported execution of the proposed Act.

49. Clause 26 provides for certain information sharing arrangements between relevant agencies for the purposes of the proposed Act.

50. Clause 27 makes it clear that nothing in the proposed Act limits a police officer from detaining an intoxicated person under section 206 of the *Law Enforcement (Powers and Responsibilities) Act 2002* and dealing with the person in accordance with that Act.

51. Clause 28 enables the Governor to make regulations for the purposes of the proposed Act.

52. Clause 29 provides that proceedings for an offence under the proposed Act may be dealt with summarily before the Local Court.

53. Clause 30 provides that the proposed Act is repealed on 1 July 2014 or such later date as is prescribed by the regulations.

54. Clause 31 provides for a review of the proposed Act as soon as possible after 1 July 2016 if the proposed Act has not been repealed before then.

Schedule 1 Savings, transitional and other provisions

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

ISSUES CONSIDERED BY COMMITTEE

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

Mandatory detention

56. The Bill, in particular clauses 5 and 6, provides for the mandatory detention of intoxicated persons at the Sydney City sobering up centre in certain circumstances. Clause 11(1)(iii) provides that the period of detention will be for not less than four hours but not more than eight hours except in certain circumstances, where an individual may be released earlier. Clause 17(1) of the Bill requires a person who has been admitted to the Sydney City sobering up centre to pay a cost recovery charge. Clause 18(1) provides that this charge is taken to be a fine under the *Fines Act 1996*.

> **The Committee notes that intoxicated individuals may be subject to mandatory detention in circumstances where those individuals have not been arrested for, or charged with, an offence. The Committee notes the intent of the Bill to promote the safety of public places and reduce alcohol-related violence and**

other anti-social behaviour. The Committee also notes that an individual detained in the Sydney City sobering up centre may be released earlier than specified if the individual is no longer intoxicated or is released into the care of a responsible person.

The Committee refers to Parliament for consideration whether mandatory detention in such circumstances constitutes an undue trespass on an individual's right against arbitrary detention.

Right to privacy

57. Clause 26 of the Bill will permit specified government agencies and other individuals to enter into information sharing arrangements with each other to share certain personal or health information relating to intoxicated persons who are assessed for admission or admitted to sobering up centres.

58. Parties to such information sharing arrangements are authorised to request, receive, use and disclose information held by other parties. Clause 26(4) of the Bill states that this is despite any other Act or law of the State.

The Committee notes that there are some safeguards provided for in clause 26, including that: only specified agencies and individuals may enter into such information sharing arrangements; limitations have been placed on the type of information that may be shared; and the Privacy Commissioner must be consulted where the Minister recommends the making of a regulation that allows further individuals or bodies to enter into information sharing arrangements or specifies other types of information to be shared as part of those arrangements.

The Committee refers to Parliament for consideration whether clause 26 of the Bill constitutes an undue trespass on an individual's right to privacy.

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

No review of circumstances or lawfulness of detention

59. Clause 19(1) of the Bill allows a person subject to mandatory detention in the Sydney City sobering up centre to apply to the Local Court to have their cost recovery charge waived or reduced. However, clause 19(6) provides that such an application does not permit a review of the circumstances or lawfulness of the detention that gave rise to the imposition of the cost recovery charge.

The Committee refers to Parliament whether the Bill's failure to provide individuals with a review right relating to the circumstances or lawfulness of their detention is appropriate in the circumstances.

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

Powers of the judiciary

60. Clause 18(1) of the Bill states that a cost recovery charge is taken to be a fine imposed by a court for the purposes of the *Fines Act 1996*.

The Committee refers to Parliament whether an Act that specifies that a fine is taken to have been imposed by a court is appropriate.

Commencement by Proclamation

61. Clause 2 provides for the commencement of the proposed Act on a day to be appointed by proclamation. The Committee has previously expressed a preference that Acts commence on either a designated date or on assent.

The Committee notes that the administrative arrangements associated with setting up the sobering up centres may take some time to finalise. For this reason, the Committee does not consider the commencement by proclamation to be an inappropriate delegation of legislative power in these circumstances.

4. Public Interest Disclosures Amendment Bill 2013

Date introduced	20 March 2013
House introduced	Legislative Assembly
Minister responsible	The Hon. Greg Smith SC MP
Portfolio	Attorney General and Justice

PURPOSE AND DESCRIPTION

1. The object of this Bill is to amend the *Public Interest Disclosures Act 1994* to clarify that an employee or officer of a corporation that is engaged by a public authority under a contract to provide services to or on behalf of a public authority, is a public official for the purposes of the Principal Act. The Bill includes a non-exhaustive list of the types of officers to be covered by the Act.

2. The Bill also proposes a variety of other miscellaneous amendments, including the addition of the Public Service Commissioner to the Public Interest Disclosures Steering Committee, and removes the requirement that a public interest disclosure be made voluntarily for protection to be afforded.

3. Lastly, passage of the Bill will remove the requirement for public authorities to undertake certain procedural requirements relating to public interest disclosures, in relation to disclosures by public officials in performing their day to day functions as such public officials or under a legal obligation.

BACKGROUND

4. The *Public Interest Disclosures Act 1994* was enacted to encourage and facilitate the disclosure of wrongdoing in the public sector in the public interest. It does this by protecting public officials who disclose wrongdoing in the public interest, and by making it a criminal offence to take detrimental action against a public official substantially in reprisal for making a public interest disclosure.

5. Disclosures can be made about corrupt conduct, maladministration, or a serious and substantial waste of public money, as well as certain other matters.

6. Amendments to update and broaden the scope of the Act were passed in 2011. The amendments provided for in this Bill add to those reforms.

OUTLINE OF PROVISIONS

7. Clause 1 sets out the name (also called the short title) of the proposed Act.

8. Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

9. Schedule 1 [1] substitutes the definition of *public official* to separate out an independent category of public official, the basis for which is engagement by a public authority under a contract to provide services to or on behalf of the public authority. The item clarifies that this category of public official extends to employees and officers of a corporation that is so engaged by a public authority, who provide or are to provide the contracted services or any part of them. The item also inserts a provision containing particular examples of public officials.

10. Schedule 1 [2] includes the Public Service Commissioner as a member of the Public Interest Disclosures Steering Committee established by the principal Act.

11. Schedule 1 [3] makes a consequential amendment relating to the quorum for a meeting of the Steering Committee.

12. Schedule 1 [4] excepts public authorities from the requirement that their public interest disclosure policy require an acknowledgement of receipt of a disclosure and a copy of the policy to be provided to the public official making the disclosure, in relation to any disclosures made by public officials in performing their day to day functions as such public officials or under a legal obligation.

13. Schedule 1 [5] removes the requirement that a disclosure be made voluntarily to be protected by the principal Act.

14. Schedule 1 [6] extends (from 2 years to 3 years) the time for instituting proceedings for the offence of taking detrimental action against a person substantially in reprisal for the person making a public interest disclosure.

15. Schedule 1 [7] enables savings and transitional regulations to be made as a consequence of the enactment of the proposed Act or any other Act that amends the principal Act.

16. Schedule 1 [8] inserts transitional provisions as a consequence of the amendments made by Schedule 1 [1] and [6].

ISSUES CONSIDERED BY COMMITTEE

The Committee makes no comment on the Bill in respect of issues set out in s8A of the Legislation Review Act 1987.

Part Two - Regulations

1. Liquor Amendment (Kings Cross) Regulation 2013

PURPOSE AND DESCRIPTION

1. The objects of this Regulation are as follows:

   (a) to prescribe additional licence conditions in respect of licensed premises in the Kings Cross precinct (being the area described in Schedule 2 to the *Liquor Act 2007*),

   (b) to provide that premises in the Kings Cross precinct are to be regarded as a small venue only if the premises are not authorised to trade beyond 2 am on any day of the week (small venues have a patron capacity of no more than 60 and are exempt from some of the additional licence conditions and from the liquor licence and development consent freeze that applies to premises in the Kings Cross precinct),

   (c) to require persons who carry out supervisory duties in relation to the responsible service of alcohol on licensed premises in the Kings Cross precinct to hold a RSA competency card.

2. This Regulation is made under the *Liquor Act 2007*, including sections 47AA and 116A (as inserted by the *Liquor Amendment (Kings Cross Plan of Management) Act 2012*) and section 99 (2) (c).

ISSUES CONSIDERED BY COMMITTEE

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

Freedom of Association

3. Clause 53K of the Regulation provides that any individual wearing clothing, jewellery, or accessories featuring the name of any one of 22 motor-cycle related organisations must not be permitted to enter licensed premises situated in the Kings Cross precinct.

> **The Committee notes that excluding individuals from premises based on identifying clothing, jewellery or accessories may trespass on personal rights and liberties. However, the Committee notes that those individuals would still be permitted to enter the licensed premises if the identifying clothing, jewellery or accessories are not worn. As such, the Committee makes no further comment on this issue.**

2. Rail Safety (Adoption of National Law) Regulation 2012

PURPOSE AND DESCRIPTION

1. The object of this Regulation is to re-make, with minor variations, the provisions contained in the *Rail Safety (Drug and Alcohol Testing) Regulation 2008,* which is repealed by the *Rail Safety (Adoption of National Law) Act 2012.* These provisions:

   (a) Enable random and targeted testing of rail safety workers for drug and alcohol use, and

   (b) Set out the procedures for breath testing and breath analysis of rail safety workers, and for the taking, testing and analysis of blood, oral fluid and urine samples from rail safety workers, for the purpose of testing for drugs and alcohol, and

   (c) Establish offences relating to refusals to be tested under the Regulation, interference with testing or samples and other related matters, and

   (d) Provides for the use of evidentiary certificates related to testing in proceedings against rail safety workers for drug and alcohol offences.

ISSUES CONSIDERED BY COMMITTEE

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

Personal Physical Integrity

2. This Regulation contains numerous clauses that relate to the taking of breath, oral fluid, blood, and urine samples from rail safety workers where there is a reasonable belief that, by the way in which a rail safety worker was acting, the worker might be under the influence of alcohol or a drug. The Regulation also provides the other circumstances in which samples can be taken.

3. The Regulation also allows – in certain circumstances – a police officer to take the worker with such force as may be necessary to a police station or other such place to detain the worker, and for the purposes of providing certain samples for testing.

> **Despite the public health and safety interests that underpin the objects of this Regulation, the Committee still notes that requiring a rail safety worker to subject themselves to these types of tests, especially blood or urine tests, could constitute a violation of their personal physical integrity. The ability for police to use force as considered necessary to facilitate in obtaining a sample may constitute a further violation of the rail safety worker's physical integrity.**

That the objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Inappropriate delegation of legislative power

4. Clause 22 provides that a rail safety worker who interferes with the results of breath, blood, oral fluid, or blood test, can be subject to a maximum penalty of imprisonment for nine months.

> **The Committee considers the creating of serious offences in a Regulation, together with the setting of significant penalties as a consequence, could constitute an inappropriate delegation of legislative power. In such circumstances, the Committee ordinarily prefers such provisions to be included in the Principal Act of a Regulation.**

3. Universities Governing Bodies (Macquarie University) Order 2012

PURPOSE AND DESCRIPTION

1. The objects of this Order are:

   (a) to give notice of the terms of a governing body resolution made by the Council of Macquarie University under section 4 of the *Universities Governing Bodies Act 2011*; and

   (b) to set out the resultant amendments and necessary changes to the *Macquarie University Act 1989* and the by-laws made under it specified in section 4(4)(b) and (c) of the *Universities Governing Bodies Act 2011*.

2. This Order is made under section 4 of the *Universities Governing Bodies Act 2011*.

ISSUES CONSIDERED BY COMMITTEE

The objective of the regulation could have been achieved by alternative and more effective means: s 9(1)(b)(v) of the LRA

Order amending an Act

3. Schedule 1 of the *Universities Governing Bodies (Macquarie University) Order 2012* amends the *Macquarie University Act 1989* to adopt the standard governing body provisions from Schedule 1 of the *Universities Governing Bodies Act 2011*.

4. Section 4 of the *Universities Governing Bodies Act 2011* allows the governing body of a University to adopt the standard governing body provisions in Schedule 1 of that Act, by a resolution of two-thirds of its members. The resolution takes effect on the date of publication of an order made by the Minister for Education on the NSW legislation website. Section 4 of the Act authorises the resolution to make appropriate amendments to the University's enabling legislation.

> **The Committee notes that the *Universities Governing Bodies (Macquarie University) Order 2012* amends the *Macquarie University Act 1989* and that section 4 of the *Universities Governing Bodies Act 2011* authorises such an order to amend a University Act.**
>
> **However, the Committee draws Parliament's attention to the comments that the Committee made about the then *Universities Governing Bodies Bill 2011* (now an Act) in the Legislation Review Digest 6/55 of 18 October 2011. In particular, the Committee referred to Parliament whether allowing for Acts to be amended by a resolution of a governing body and publication of an order by a Minister was an inappropriate delegation of legislative powers.**

Appendix One – Index of Ministerial Correspondence on Bills

The Committee does not report on any Ministerial Correspondence on Bills in this Digest.

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.

2. In Digest 12/55, the Committee reported on the Water Management (General) Amendment (Water Sharing Plans) Regulation (No 2) 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.

3. In Digest 16/55, the Committee reported on the Home Building Amendment (Threshold for Home Warrant Insurance) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister dated 29 May 2012 which addresses to the Committee's satisfaction the issues raised.

4. In Digest 12/55, the Committee reported on the Local Government (General) Amendment (Election Procedures) Regulation 2012 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 21 June 2012 which addresses to the Committee's satisfaction the issues raised.

5. In Digest 15/55, the Committee reported on the Police Amendment (Death and Disability) Regulation 2011 and subsequently wrote to the Minister. The Committee is in receipt of a response from the Minister received 9 July 2012 which addresses to the Committee's satisfaction the issues raised.

6. On 8 May 2012 the Committee wrote to the Attorney General in relation to James Hardie Former Subsidiaries (Winding up and Administration) Amendment (Statutory Recovery Claims) Regulation 2012. The Committee was in receipt of a response from the Attorney General dated 10 August 2012 which addressed to the Committee's satisfaction the issues raised. Further information in relation to this can be found in Digest 23/55.