Submission on NSW Tattoo Industry Regulation 2023

INFORMATION AND RECOMMENDATIONS SUBMITTED BY THE AUSTRALIAN TATTOOISTS GUILD (ATG)

JUNE 2023

AUSTRALIAN TATTOOISTS GUILD

Public Consultation

NSW Tattoo Industry Regulation 2023

INFORMATION SUBMITTED BY THE AUSTRALIAN TATTOOISTS GUILD

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EXECUTIVE SUMMARY

The Australian Tattooists Guild (ATG) is a registered not for profit organisation formed by a group of professional tattooists in 2013 in response to the implementation of the *Tattoo Parlours Act 2012 NSW*.

Since this time the ATG has grown to include a membership of professional tattooists and business members from across Australia. The ATG requires its members to adhere to a code of conduct and a set of industry professional standards that maintain a high level of practice in the Australian tattoo industry.

The ATG thank the NSW Police Force for this opportunity to provide a submission that will inform this important review of current licensing regulations. Our organisation supports efforts made by Government to curb criminal elements that may exist in relation to the tattoo industry and the wider community. However, we ask that the NSW government considers the advice and recommendations of this submission when drafting regulation that has the potential to unfairly or unnecessarily inhibit or constrain the working practices and livelihoods of tattoo artists, complicate their business practices, and potentially threaten the future of this unique industry.

In this submission we offer information to the NSW Police Force in aid of a clear assessment and understanding of the concerns the industry has with the current legislative policy, the regulatory regime, and the proposed amendments as are stated within the draft regulations as outlined for this consultation.

Our advice can be summarised as follows:

1. The ATG are against restraints to trade potentially incurred due to oversights within the Act(s) and, the currently proposed regulations.

Recommendation: The ATG recommends that future amendments to existing policy and its related regulations should be evidence based, and that industry consultation should occur at every point during the drafting of any new amendment legislation and/or regulations to ensure it supports the current working practices of the profession.

2. The ATG submit that the regulatory burden of the Tattoo Industry Act(s) are disproportionate to the risks posed to the community, and do not reflect the current culture and practice of the tattoo industry in NSW.

Recommendation: The ATG recommends that the policy represented by the Acts and any available GIPA be closely scrutinised, and that recommendations be made that ensure any legal or administrative burdens placed on industry are evidence based. There should also be the capacity for a reduction or removal of some administrative burdens to licensees where evidence collected over time would suggest it is no longer needed, or constitutes a duplication of information for no benefit.

3. The ATG are against the restraints to trade incurred by the regulation of the Act(s).

Recommendation: The ATG recommend that the advice submitted by our organisation within this submission be considered prior to the finalising of the proposed regulations and that amendments be made to support the industry and its business practices.

4. The ATG submit that international artists who enter Australia with a visa granted to them by the Commonwealth which entitles them to working rights for a specified period should be entitled to apply for a full license to work within the State of NSW

Recommendation: The ATG recommend that the proposed regulations be amended to cater for international artists entering Australia with a visa status that entitles them to working rights. Where there is no restriction on the type of work they are performing, they should be eligible for licensure under the scheme.

5. The ATG submit that the licensing fee requirements for licensure are excessive, and that the licensing fee structure, as is presented within the draft regulations, exceeds that of other more robust regimes under the Ministers portfolio for no justified reason.

Recommendation: The ATG recommend that the fee structure of the tattoo licensing regime be reduced, and thus brought into line with other licensing regimes of a similar probity based nature within the State.

6. The ATG submit that tattoo businesses in NSW are unnecessarily burdened by fees imposed under different sets of local and State level regulations.

Recommendation: The ATG recommend that State and local regulations and fees be harmonised in order that tattoo businesses seeking to operate legally, professionally and under licensure are not unfairly burdened.

7. The ATG submit that proposed additional grounds for refusing to grant Master and Tattooists Licenses's on the basis that an applicant holds, or has held, a license, permit or other authority under legislation administered by the Minister, that has been suspended, canceled or revoked, are unjust. This is excessive, unnecessary, and holds practitioners to a standard of probity above and beyond a standard required to meet the policy objectives of the Act.

Recommendation: The ATG recommend that requirements for tattoo industry participants be subject solely to the requirements of the industry's own licensing scheme, and that this measure not be adopted.

8. The ATG submit that the use of a fit and proper persons test, as well as a list of mandatory disqualifying offenses, and the proposed additional grounds for refusing to grant licensure is excessive and disproportionate to the risks posed by the industry and its professional participants. We also assert that the bars for exclusion outlined in many of the mandatory disqualifiers are set alarmingly low, and have high potential to capture unintended applicants for petty offenses unrelated to organised crime or relevant to present pattern of criminality.

Recommendation: The ATG submit that the additional grounds for refusing licensure as stated in Schedule 4 of the consultation draft are excessive and hold no relevance to the principle policy objectives of the Act. We recommend that the level of offence outlined in each Mandatory Disqualifier should be adjusted accordingly in order to capture only the intended type of person, and not a broader spectrum of legitimate industry participant. Of most concerning are levels of offence relating to Drug Offenses, Riot, Robbery, and Fraud.

9. The ATG submit that industry participants in NSW are burdened by excessive record keeping obligations, which hold no clear purpose or value to industry or regulators.

Recommendation: The ATG submit that the requirement for tattooists and operators to complete procedure logs, which are a duplication of the requirements of State Health Guidelines under the *Public Health Act 2010* be removed or merged with State Guidelines in order to achieve a more streamlined process for industry participants.

10. The ATG submit that the requirement under Division4/Sec24 of the Act to display license numbers on all advertising material is excessive. Due to there being no publicly accessible license registry, there is no reference point to determine the advertising of unlicensed operators, and therefore the requirement holds no value or purpose for the general public or industry.

Recommendation: The ATG recommend that a publicly accessible license registry be created, or that the requirement to display license numbers be removed. We also recommend that if this requirement is to be kept, that promotional merchandise (such as t shirts, clothing, etc) be removed from the definition of “advertising material”.

11. The ATG submit that the requirement for licensed operators/ Master license holders to hold a separate tattooists license in order to work at another licensed business within the State places an unnecessary financial burden on operators and does not reflect the current practices of the industry.

Recommendation: The ATG recommend that Master license holder be permitted to work across the State that they are licensed in without having to obtain a separate tattooists license. This may be in the form of an artist license being granted free of charge to an artist master license holder, or that the entitlements of an artist license be built into the master license.

12. The ATG submit that restrictions to the licensing of out-of-state tattooists are unnecessarily inhibitory and cause damage to individual practitioners, small businesses and the profession at large. The current requirement that out-of-state tattooists must travel to NSW to provide finger and palm prints, and then return to their State of origin to await approval before being permitted to conduct tattoo work in NSW, places an unfair burden on practitioners, and is a deterrent for out-of-state talent to visit the State. This requirement does not support the conditions or culture of the profession .

Recommendation: The ATG recommend that restrictions upon the licensing of out of State practitioners be reviewed and that future structures be developed in consolation consultation with industry. We favour the consideration of a short term permit scheme as an additional alternative channel to the current full licensure requirement for interstate tattooers seeking to work in NSW. Also we recommend a pre approval system whereby the applicant can apply online and then provide prints when they enter the State to work, eliminating the need to travel into NSW prior to license approval.

13. The ATG submit that the current system of mutual recognition between NSW and QLD does not reflect the policy principals of the *Mutual Recognition Act 1992*.

Recommendation: The ATG recommend that a fee reduction be incurred by existing licence holders when applying to work in a licensed State under Mutual Recognition arrangements.

OPENING STATEMENT

The relatively short history of tattoo licensure and industry regulation in NSW has seen an incremental increase in the bar of probity for existing industry participants and new entrants as well as an increase in police powers that sit outside the normal function of laws and rights . We have also seen the proposed widening of the scope for industry exclusion based on past offenses.

The aims of the regulations are to eliminate organised criminal involvement from the tattoo industry. However many of the offenses listed are only peripherally relevant to organised crime, and in many of the proposed mandatory disqualifiers, the bar for exclusion is set so low as to potentially exclude many presently legitimate practitioners with no pattern of criminality or involvement in organised crime.

The vast majority of the criminal element the legislation seeks to exclude from the tattoo industry appears to have left according to police claims, licensing statistics, and anecdotal evidence from within the industry.

The burden of this regime is carried by the legitimate practitioners who form by far the overwhelming majority. Aside from the restriction to business imposed by the administrative hurdles involved, it must be stated that the increasing scope and ambiguous nature around conditions for industry exclusion are a serious and unjust stress to impose on a creative profession comprising of career-oriented artists.

There appears to be no scope for a reduction in regulatory measures despite promising claims from the NSW Police Force about the huge reduction in criminal involvement.

The ATG ask that measures designed to exclude elements of organised crime do in fact stick to this brief, and don't lose site of the relationship between the excessive burden of a regulatory regime, as bourn by all legitimate participants, and the actual level of threat the regulation is trying to eliminate.

In relation to unnecessary hurdles involved in tattoo license and permit applications for interstate and international artists, it appears that most of this is due to administrative oversight, and likely a lack of industry consultation on how the application process functions in the real world.

The current application process, and many of the permit conditions, have been a constant source of frustration for the industry since 2012, and are directly responsible for a restriction on talent entering NSW and the ensuing impacts to business. In many instances, the regulations constitute the sole barrier to participation for artists who are legitimately eligible to work in NSW in accordance with all other existing state and federal work conditions.

We ask that our suggestions in these areas be considered, and more consultation be had on the matter.

Mr. Alexander Cairns, President Australian Tattooists Guild

OVERVIEW

The ATG continue to hold serious concerns about breaches of fundamental legislative principals within both the primary *Tattoo Parlors Act 2013 NSW* and the T*attoo Parlors Amendment Act 2017 NSW*, as well as a lack of judicial review. This concern now extends to the proposed regulations as are outlined by the NSW Police Force within the draft regulations provided for this consultation.

We are concerned over the deployment of criminal intelligence, its potential to infringe on natural justice, and its potential to breach the rights enshrined within Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICCPR) to which Australia is a signatory.

The ATG has further concerns regarding the powers the NSW Act grants to police that enables them to bypass the checks and balances that ordinarily apply to police investigations. By granting powers to investigate close associates, the Act extends the existing regulatory scheme in a manner that appears to breach Article 17 of the ICCPR.

The ATG considers the NSW Act to be a potential abrogation of the privilege against self-incrimination because of the limitations it places on safeguards for a person to object to information being used against them. This too appears to breach Article 14 of the ICCPR.

The ATG holds general concerns regarding the lack of evidence gathered to support both the Acts and the proposed regulations as well as the lack of industry consultation that transpired across the board until this date.

Overall, the majority of the additions or changes proposed in this draft amount to a drastic increase in the probity measures applied to license holders, and emerging industry entrants. None of the concerning proposed changes are related to the professional practice of the industry, but rather relate to criminal acts, or the perceived potential for them.

The ATG is gravely concerned that many minor acts, or past acts, could easily come under the umbrella of conditions for license refusal, and will hold tattoo industry participants to an excessive and ambiguous standard that has no relevance to the profession or public safety.

Furthermore the ATG submit that there appears to be a number of regulatory gaps within the existing and proposed regulation for the administration of the *Tattoo Industry Act* in NSW. This is despite a review of the ACT and its regulations by the NSW Police Force in 2020, and a recently stated commitment in the NSW Parliament from Minister Yasmin Catley that the Police are committed to ensuring regulation is tailored to the current landscape in which the tattoo industry operates.

Our advice is as follows;

NSW POLICE FORCE PUBLIC CONSULTATION - DRAFT REGULATION

PART 1. LICENSING AND PERMIT STRUCTURE FOR OUT-OF-STATE AND INTERNATIONAL ARTISTS

1.2 OUT-OF-STATE LICENSING REQUIREMENTS

The ongoing issue being experienced by out-of-state tattooists through requirements for licensing to enter the State of NSW have not been addressed within Division 1 of the draft regulations.

Currently, the reality for an interstate applicant is that they must complete the online application, pay a fee, then wait an indeterminate amount of time for the Department of Fair Trading to complete the administrative tasks and notify the applicant that finger/palm prints need to be provided then travel to NSW to provide the prints, wait an indeterminate amount of time for the approval, and then having to physically return to NSW to pick up the physical license within 60 days or it is forfeited.

The requirement is for two interstate trips with no reliable recommendations around time frame, and the threat of forfeiture of the entire endeavour if deadlines aren't met.

A workable suggestion would be that practitioners are provided with a pre approval status based on the probity checks made by SLED, and that when they enter the State to work there is a time frame given in which finger and palm prints must be submitted in order to obtain full licensure to work in the State.

Our organisation have had multiple reports of practitioners attending Police stations to submit their finger and palm prints only to be informed that the staff on duty at the station were unaware of any such requirements, which incurred lengthy wait times as staff found the relevant policy. We also have multiple reports of interstate artists being told their physical license is available for pick-up (within 60 days or the application is canceled), only to be told upon arrival that there have been delays in printing the license and that it is not available.

More recently it has been brought to our organisation's attention that when out-of-state tattoo artists renew their licenses they are sometimes required to re-submit an identity photograph.

Furthermore the only current option for out-of-state practitioners is full licensure, for a minimum period of one year.

The cultural practice of tattooers visiting other tattoo businesses for short periods of time to facilitate the conferencing and sharing of knowledge has been a beneficial tradition in the industry for decades. This tradition as it relates to interstate artists is greatly impeded by the current regulations when viewed in light of the application process outlined above, affecting not only the interstate would-be applicant, but also NSW tattoo businesses. In short, the financial and time burdens act as a deterrent for interstate talent to practice in NSW.

The ATG submit that addressing the inefficiencies in the full licensure application process, as well as an alternative option for a short term permit system for out-of-state practitioners would encourage the flow of talent into NSW and support small business across the State.

PART 2 - PERMITS

DIVISION 2 AUTHORISED PARTICIPANTS

The language of 6. Authorised Participants of a Tattooing Show, is vague in nature and it is unclear who the authorised participant is. Are we correct to assume that the term 'participant' refers to tattoo artists?

Does this provision apply to licensed artists in NSW?

Does it apply to artists who only hold a QLD tattoo license?

Does this provision apply to unlicensed artists who normally operate in unlicensed states?

Why are permits for tattooing shows only accessible two times per year? And does this apply to holders of a full NSW tattoo license? And if so, why?

The proposed framework for international visiting artists allows for two permits per year for a duration of 3 months each. No provision allows for individuals entering Australia on a visa, granted to them by the Commonwealth which entitles the holder to full rights for a specified period, most often longer than 3 or 6 months.

The ATG submit that If an individual holds a visa which entitles them to working rights within the Commonwealth of Australia that the individual should be entitled to apply for a full license to work within NSW. The license or the visa could act as the limiting factor on the overall duration of their permission to work, and no extra measures or special conditions would be required.

DIVISION 3 VISITING TATTOOISTS PERMITS

The ATG perceive that the tattoo industry in NSW will benefit from the introduction of a permit system for international visiting artists. However, this proposed stream of permit should a) not replace the existing allowances for international visiting artists as authorised participants in a tattoo show, b) not be an additional requirement for visiting artists who are authorised participants of a tattoo show, and c) only apply to visiting artists not attending a tattoo show.

Under the proposed regulations artists visiting from overseas are only entitled to a permit which allows them to work within the State for a duration of three months, with a limit of two permits allowed within any twelve month period.

This structure does not cater for international practitioners who enter Australia on a visa issued by the Commonwealth which entitles the holder to working rights within Australia beyond 6 months. Additionally, It is unclear if a visiting practitioner can apply for the whole six month period, or if the individual must reapply, and if so, at what point is this done.

The ATG suggest that a workable solution would be to make non residents with a visa permitting work for longer than six months eligible for an artist license (while remaining ineligible for a master license, as is currently the case).

International practitioners holding a visa with working rights could then apply for a full tattoo artist license, enabling them to utilise the permissions granted by the working visa.

Furthermore it is unclear within the proposed regulations if a visiting artist requires a visiting artist permit if they are attending a tattoo show and are listed as an authorised participant? We would strongly argue that this should be an alternative channel, and not an additional admin burden for the listing artist.

The draft proposal states grounds for refusing to grant a visiting tattooists permit if the Commissioner is not satisfied that the applicant is a fit and proper person, and it would be contrary to the public interest and the applicant has within the previous ten years been convicted in any jurisdiction of a disqualifying offence, and as stated within Division 1 the applicant has committed offenses under the proposed Schedule 4 Disqualifying offenses.

The ATG submit that the proposed bench mark for probity appears to be excessive, and in light of the growing confidence of regulators in the industry, is unwarranted.

PART 3 - LICENSING

MASTER LICENSE PARAMETERS

An ongoing issue being experienced by Master license holders is their inability to work at other licensed businesses within the State without first obtaining a separate tattooists license to do so.

This requirement places an unfair financial disadvantage on owner/operator studios and as such creates a barrier to trade for many of the industry's most senior artists.

It would seem reasonable to assume that because the benchmark for probity for a Master license applicant is higher than that of a tattoo artist license, Master license holders would automatically qualify for a tattoo artist license.

In previous discussions with the Minister's office, the ATG were informed that the logic behind this structure was that Master License numbers were attached to the physical location of the business.

The ATG submit that this seemingly small oversight on behalf of regulators as to how the licensure actually functions for an artist/business owner has had a significant impact on NSW tattoo artists. It is worth noting here that the vast majority of tattoo businesses are owned and operated by a practicing tattoo artist. The ATG suggest that a tattoo artist license could be automatically issued to a Master license holder on approval of the Master License application. And since there exists a small number of Master License holders who are not industry practitioners, the tattoo artist license could be optional on application.

PART 3 LICENSING DIVISION 2 (21) (B) AND (22) (A) (B) ADDITIONAL GROUNDS FOR REFUSING TO GRANT MASTER/TATTOOISTS LICENSE APPLICATIONS

Within these provisions the Commissioner may refuse to grant a tattooists license if satisfied that an applicant holds, or has held, a license, permit or other authority under legislation administered by the Minister that has been suspended, canceled or revoked.

The requirements above would hold an applicant for tattoo licensure to the same measures of probity as ALL classes of license simultaneously (including but not limited to Master Class Security Licenses and Firearm Licenses).

Why are tattoo industry participants being held to the probity bench marks of other more robust licensing regimes, which are also irrelevant to the tattoo industry? The ATG asserts that this measure is excessive in its reach, and disproportionate to the risks at hand. The ATG strongly objects to these additional grounds for refusing to grant master or tattooists licenses.

SCHEDULE 1 FEES

COST

No cost benefit analysis has been provided to the industry to justify the cost requirements being imposed.

No available evidence pertaining to the administrative cost incurred by NSWPF can clarify the high cost and hence barrier to entry.

It could be suggested that the high cost of licensing fees are being used to control the growth, and constrict the numbers of practitioners entering the industry as a blunt instrument in crime prevention. This burden on all legitimate licensed practitioners effectively constitutes discrimination towards a professional creative arts based Industry.

The potential exists for high licensing fees to push artists out of the State at the detriment to the NSW Economy, and prevent longevity of the Creative Arts in NSW- known to provide significant culture and social value to a robust society.

Currently costs to enter the industry are estimated at around $12k for the individual artist with machine, full set of pigments, consumables/needles/wraps and professional body memberships and at least $75K for a shop fit out.

When the obvious comparison is made to the security industry licensing scheme, we see that equivalent classes of tattoo licenses are excessively more expensive. There are many parallels that can be drawn in terms of the administrative burden on the regulator, and it could be reasonably argued that the burden is slightly higher in the case of the security industry given the requirements for additional pieces of training by the applicant to be sited. There has been no real justification provided for the high user cost of tattoo licensing to date, and comparisons to the security industry suggest there isn't one.

Furthermore, the cost of tattoo licensure should take into account the additional financial and time costs associated with council and public health regulations, as well as the negative effect the criminal probity aspect of licensure has on building and contents insurance costs for business owners. And this is before one considers the rising costs associated with foreign supply chains upon which the Australian tattoo industry is reliant.

Therefore, the ATG proposes a reduction of fees That accounts for what is reasonable and affordable, and also seems comparable to other licensing regimes with a similar probity based licensing scheme.

The ATG acknowledges the tattoo licensing scheme likely played a role in the reduction of organised criminal involvement in the tattoo industry over the last decade since its inception. However, the scheme has also created unnecessary business administration, excessive cost, preventative barriers to new talent, amongst the plethora of unintended consequences.

SCHEDULE 4. DISQUALIFYING OFFENSES

In the drafting of the primary Act a decision was made by legislators not to include a set of mandatory disqualifying offenses into the *Tattoo Parlors Act 2021* with the intention to provide the licensing regime with sufficient discretion to provide existing industry participants a reasonable chance of obtaining a license. The second reading speech of the then proposed Bill 2012 states:

> *This Bill provides for the commissioner of police to conduct investigations into license applicants and licensees to ensure that only fit and proper persons are granted and able to hold such licenses.*

The impact on industry participants of the undefined fit and proper test meant that numbers of applicants were denied licensure based on a pattern of offenses that had no relationship to OMCGs, organised crime, or the principle policy objective of the Act.

What was initially designed as a system to ensure flexibility quickly became an approach that added complexity in the way security determinations were assessed and consequently not only saw participants denied, waiting sometimes years for a license decision, but also saw individuals denied for minor offenses relating to property damage and/or historic drug and civil offenses.

The ATG in consultation with our members have in previous submissions to the NSW Government supported the introduction of mandatory disqualifying offenses as it was understood that a set list of disqualifiers would provide greater transparency for industry participants who would be better able to understand the scope of the probity test. It would also reduce processing times for security determinations and reduce the burden on administrators and their resources. It must be noted that this support was based on the understanding that the mandatory disqualifiers would replace the ambiguous fit and proper person test.

In its 2018 Submission to the Statutory Review the NSWPF proposed that the inclusion of mandatory disqualifying offenses would serve to reduce time and administration required to assess each application.

In the same submission however the NSWPF also proposed that the inclusion of mandatory disqualifying offenses should not negate the need to continue to apply “fit and proper” and “public interest” tests because “there is still an element of analysis of risk assessment required” [12] Therefore the mandatory disqualifiers constitute an additional measure, increasing the administrative burden of regulators, and contradicting the claim about reduced application processing times.

The NSWPF state in their submission:

> *There is still a need to consider convictions for offenses that are not mandatory disqualifying offenses, in terms of seriousness, frequency, recency and context*[1]

This perceived need sits in conflict however with the available data which clearly indicates that licenses on application or renewal are not being denied with high frequency and that there are many more approvals than denials.

1 *NSW Police Force Submission Tattoo Parlours (Statutory Review) 2012, 2020*

Within the 2018 call for submissions to inform the Statutory Review of the *Tattoo Parlors Act* by the NSW Justice Department respondents were invited to answer a series of questions amongst which was the following question:

> *Should the Act list a set of mandatory disqualifying offenses, as in, for example, the Security Industry Act 1997 if so, is a "fit and proper person" test still required?*[2]

At no point within the terms of reference for the review was it stated or suggested that the potential existed for both a set of mandatory disqulifiers and the fit and proper test to exist within the same regime.

The response from the professional industry upon learning that this provision had been added to the Tattoo Parlors Statutory Review Amendment Bill 2021 was one of dismay and frustration.

SCHEDULE 4 DISQUALIFYING OFFENSES

Schedule 4 of the public consultation draft outlines a new set of mandatory disqualifying offenses which are proposed in addition to the existing fit and proper probity test.

The schedule outlines offenses that may disqualify a person from holding a license under the Act.

> **4.(1/3/4/5/6/7)** *outline offenses which appear reasonable to be included within a set list of mandatory disqualifying offenses, within a probity based licensing regime who's primary policy objective is to remove organised and serious crime groups and offenders.*

> **4.(2)** *outlines offenses relating to prohibited drugs with penalties prescribed which appear to represent a minimum penalty which may issued by a court.*

> **4(2)(b) (ii) (iii)** *describes penalties of;*
>
> **(ii)** *a community service work condition, or*
>
> **(iii)** *a penalty of $500 or more*

This proposed disqualifier suggests that an individual who is arrested with a minimum amount of a prohibited plant or other prohibited drug, and who receives a minimum fine or minimum community service order from the court can be disqualified from working in the profession. This is excessive considering that this definition encompasses a range of minor drug offenses that have no relation to organised crime.

2 *Justice Department Terms of Reference Statutory Review Tattoo Parlours Act 2019*

Punishment of a 10 year ban from an individuals career is not commensurate with the crime, and preventing the ability for a person to earn an income over a minor misdemeanor has the potential to push someone to work underground and defeat the purpose of the Legislation.

4(8) *outlines offenses relating to riot under the Crimes Act 1900, section 93B*

The definition and use of charges relating to riot in legal prosecution over the last few years is too broad to be used as a disqualifying offence. The definition of riot is too open, and the circumstances that become classed as acts involving riot is too broad. When looking at the stated aims of the legislation, this type of offence has no bearing on the kinds of people this legislation seeks to exclude.

2. BACKGROUND AND CONTEXTS

The tattoo industry globally is in a period of growth. Appropriate regulation has the potential to support the industry and enhance public safety. In Australia, the tattoo industry is at a critical juncture as some state governments have regulated the industry under the false assumption that a high level of criminality exists. Whilst a reduction in the level of criminality associated with the industry has been sited by police since the inception of the licensing regime in NSW, the damage to this unique craft through policies and regulations that do not reflect the culture and working practices of the profession has far outweighed the benefits. The vast majority of professional participants perceive there is little to no value in the licensing regime to them, that the fees are excessive, businesses have been burdened by red tape, and that restrictions to trade have damaged the ability of practitioners and small business operators to thrive.

The focus on the monitoring of crime in the implementation of occupational licensing in NSW and QLD has significantly affected the working practices and culture of the tattoo industry. Since the introduction of the Acts a growing number of government and independent reports indicate that organised crime does not operate to the extent initially presumed by governments in the tattoo industry.

Statistics from 2018 from the Department of Fair Trade NSW and the NSW Police Force, who have previously collaboratively administered the Act indicate that only a small percentage of applicants for licensure were denied since the inception of the regulatory regime's (see figure 1). These statistics support the tattoo industry's ongoing request that government review the structure of the current regimes, and, in doing so, consult further with industry in order that a more workable and less invasive structure may be developed, and one that might add value for all stakeholders.

Information has recently been sought again by the ATG under the *Government Information (Public Access) Act 2009* but unfortunately could not be made available in time for our organisation to utilise it within this submission.

As an alternative the data from our organisations 2018 GIPA request has been revisited. The information gathered indicates that the high level of criminality and organised crime purported to exist in the tattoo industry by the NSW government simply does not exist.

Figure 1

	A	B	C	D	E	F
1		Applications lodged	Application refused by NSW Fair Trading	Applications to appeal decision lodged with NCAT	Decisions overturned by NCAT	Denied because of outlaw biker connections/ associations
2	**Operator**	465	49	31	10	Not held by DFSI
3	**Tattooist**	1550	64	25	5	Not held by DFSI

2.2 ALLEGED CRIMINALITY WITHIN THE INDUSTRY

Interest from OMCs in the practice of tattooing has diminished significantly over the last ten to fifteen years as individuals who display a genuine interest in tattooing as an art form and professional practice have joined the industry.

The ATG recognise that a small degree of criminality continues to associate itself with parts of the tattoo industry. However, the ATG submit that the instance of links to organised crime does not occur to a large enough extent as to warrant many of the measures of the licensing regime and their effects on the entire industry in NSW and by extension the broader industry Nationally.

Police agencies do have sufficient powers under other legislation to identify and police existing or perceived criminal activity.

Despite shifts in the industry, as observed by police, the assumption of government has remained that a high level of criminality continues to exist in the tattoo industry. This mindset has informed legislation as was illustrated during the second reading of the *Tattoo Amendment Act 2017* in Parliament when the member for Epping, Mr. Damien Tudehope said:

> *In 2012 the O'Farrell-Stoner Government could not sit back and allow the tattoo industry to be owned or controlled by outlaw bikie gangs. At that time tattoo parlors were either owned and operated by bikies or were forced to pay protection money to their local gang for the privilege of doing business in "their territory". I remind the House of some examples of activities of outlaw motorcycle gangs and their involvement with tattoo parlors.* [3]

In response to MP Tudehope's comments, the ATG assert that the phenomena of industry participants being approached by criminal groups to pay protection monies and/or being extorted, occurred far less than the above statement assumes. Furthermore, we would assert that where it continues today, it is but a tiny fraction of what it was in 2012.

More recently statements made by the Hon. Walt Secord as the shadow Minister for Police and Shadow Minister for Counter Terrorism during the debate on the Tattoo Parlors Amendment (Statutory Review) Bill 2021 in 2022 in the NSW parliament incorrectly linked the tattoo industry and its professional participants to gang crime, making a dishonest and inappropriate comparison of the profession by stating:

> *Labor does not oppose the bill. However, I note that it does not go nearly far enough in terms of addressing the root problem of gang crime in this State, particularly in western Sydney. There is strong community concern about gang activity in recent months in New South Wales. Therefore, I would say that this is what I believe to be just one in a number of reforms that must be made by the Perrottet Government to eradicate the scourge of violent gang crime that has strangled New South Wales, particularly the people of Sydney and especially the hardworking families of the city's west and south-west. Those reforms must include, at the very least, a prohibition on the granting of bail to those who are charged with serious sexual offenses, commercial drug trafficking and serious firearms offenses. The revolving door of gang-related crime must stop now.*[4]

The ATG strongly object to the comparisons made by the Minister that tattoo industry participants necessarily have gang affiliations, are involved in gang and violent crime and/or

3 *Mr. Damien Tudehope MP, NSW Parliament second reading Tattoo Parlours Amendment Act 2017*
4 *Hon. Walt Secord, Shadow Minister Police debate Tattoo Parlours Amendment (Statutory Review) Bill 2021, 2022*

sexual offenses and submit that there is no evidence to suggest that this is the case.

In stark contrast the following comments were made by Mr David Shoebridge on behalf of The Greens during the same reading of the Tattoo Parlors (Statutory Review) Bill 2022:

> *The regime has been so ineffective that the bill is the eleventh time the Government has brought amendments to its original 2012 legislation to try and strap up what has always been an absolute dog's breakfast of having the police regulate a creative industry.*[5]

> *To give the Government credit, I think only six of those amending pieces of legislation have been substantive, but each time the Government has come to the Parliament and said, "You know what? Our cunning plan in 2012 to attack organised crime through the tattoo industry is not working for us." And there is a reason for that. If you want to attack organised crime, start with their criminal activities. That is a good idea.*[5]

The ATG agree that the principle policy objectives of the Act do not support the tattoo industry and its professional participants.

5 *Mr.David Shoebridge, MP Tattoo Parlours Amendment (Statutory Review) Bill 2021, 2022*

OVERVIEW OF NSW LEGISLATION

THE TATTOO PARLOURS ACT NSW 2012

On 3 May 2012 Mr. Anthony Roberts, Minister for Fair Trading, stated in his introduction of the Tattoo Parlous Bill to the NSW Parliament:

This bill is part of the Government's continued response to gang crime in New South Wales. It follows on from the *Crimes Amendment (Consorting and Organised Crime) Act 2012* and the *Crimes (Criminal Organisations Control) Act 2012*, which the Government brought before this House and the Parliament earlier this year. The *Tattoo Parlors Bill 2012* aims to break the stranglehold that outlaw motorcycle gangs have over the tattoo industry in New South Wales.

The ATG submit that this analysis of the tattoo industry is incorrect. The vast majority of industry participants have no connections to OMCs. This is supported by data available from the Department of Fair Trade that tracks licensing.

Information released to the ATG in 2018 under the *Government Information Act 2009* which tracks license data since the inception of the licensing regime in 2012 shows that 465 applications for operator licenses were lodged.

> *From among those 49 were refused by Fair Trading NSW.*

> *From those 31 applications to appeal were lodged and 10 of these were overturned by NCAT.*

Information on whether these were denied because of an association with outlaw biker associations is not held or made available.

Similarly 1150 applications for tattooist's licenses were lodged. Of these 64 of were refused by Fair Trading; 25 applications to appeal were lodged with NCAT and 5 of the refusals were overturned by NCAT.

The numbers do not support the government's assertion that the tattoo industry was infiltrated or controlled to such a degree as quoted above. For this to be accurate, one would expect that a far higher proportion of tattoo business would have been forced to closed due to license refusals, or for simply operating without a license.

According to the explanatory notes for the *Tattoo Parlors Bill 2012 NSW*:

> *The principle policy objective of the Bill is to introduce a new occupational licensing and regulatory framework which eliminates and prevents infiltration of the NSW tattoo industry by criminal organisations, including criminal motor cycle gangs and their associates.*

The Act encompasses both legal and public policy principals that are complex and multifaceted. Despite this complexity many individuals, including Civil Liberties and Legal organisations, academics, industry participants, individuals and journalists have expressed concerns about elements of the Act.

TATTOO PARLOURS AMENDMENT ACT NSW 2017

The *Tattoo Parlors Amendment Act NSW* was introduced by the Minister for Police and Emergency services, Mr. Troy Grant, to the NSW Parliament in March 2017. The Act received assent on 9 May 2017. No consultation with the ATG on behalf of the tattoo industry was sought during the drafting of this Bill. Because of this lack of consultation, the ATG has been compelled to comment on Minister Grant's comments in Parliament and those comments published on his website in order to develop an understanding of the policy direction being undertaken and its implications for industry.

Minister Grant writes that:

> *After 22 years experience in the NSW Police Force, I know that tattoo parlors are commonly places heavily associated with organised crime and in particular outlaw motorcycle gangs.*[6]

Minister Grant's statements appear to be largely anecdotal, lacking figures that would constitute an evidence-based argument for appropriate legislation.

The ATG submit that public policy cannot be fairly or effectively developed and implemented based on anecdotal assertions. We feel that only evidence based policy changes should be developed.

The Amendments to the Act also imply that the NSW Police Force have had difficulty investigating crime effectively. This implication is evidenced in the Act itself, which reduces the standards to include criminal intelligence being used against applicants that also cannot be disclosed to them during a hearing at NCAT if their application has been denied. The *Tattoo Parlors Amendment Bill 2017* (NSW) states:

> *Section 27 (4) (a) Omit the paragraph. Insert instead: (a) is to ensure that it does not, in the reasons for its decisions or otherwise, disclose the existence or content of any criminal intelligence report or other criminal information without the approval of the Commissioner."* [7]

and:

> *Furthermore, the Act extends the existing regulatory scheme for the licensing of tattoo parlors from one of a 'fit and proper person' test for the operator, to one in which the same test has to be applied to both the operator and his or her close associates (see sections 19(1)(a1); 19(2)(a1)).*

The Act allows police to enter premises without a warrant (section 30A). The Act expands this power to:

> *Section 30C (1)(c1) make such examinations and inquiries as the authorised officer considers necessary.* [7]

6 *Mr. Troy Grant, Minister for Police comments to Parliament, Tattoo Parlours Amendment Act 2017*
7 *Tattoo Parlours Amendment Act 2017 NSW*

Normally, powers are to be exercised in a manner that is "reasonably necessary". This is an objective test that Courts frequently decide on: whether a fair-minded person in the position of the officer would take the same decision. The omission of the 'reasonableness' test removes any semblance of objectivity.

The Bill removes a person's privilege against self-incrimination. Provisions relating to requirements to furnish records or information or answer questions (2) Self-incrimination not an excuse A person is not excused from a requirement under section 19A or 30C to furnish records or information or to answer a question on the ground that the record, information or answer might incriminate the person or make the person liable to a penalty.

The inserted provision s. 33A (2) is a significant infringement on an individuals civil rights. Ss. 33A (1), (3), (4) and (5) indicate that a compromise has been reached with 'safeguards' that qualify the use of information gathered in criminal proceedings. However, one of the purposes of the licensing scheme is for the NSW police force to use the process to gather intelligence. Thus, the information gained is less likely to be admissible as evidence in criminal proceedings.

It is the function of the NSW police force to collect evidence and present that evidence to a court. If the Minister for Police had confidence in the ability of the NSW police force to execute its evidence gathering function, why would the standard need to be lowered? This addition of an arbitrary power appears to breech Article 17 of the International Covenant on Civil and Political Rights, which protects against arbitrary interference with privacy or correspondence.

The Covenant to which Australia became a signatory in 1972 commits its parties to respect the civil and political rights of individuals, including rights to due process and a fair trial. Article 17 states that:

> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation;* [8]

> *2. Everyone has the right to the protection of the law against such interference or attacks.* [8]

The Act abrogates the privilege against self-incrimination by extending the requirement to provide further information during the execution of a warrant. It is an offence to obstruct, hinder or fail to comply with such a request.

8 International Covenant on Civil and Political Rights. Article 17(1) (f) The Law Society NSW open letter 29th May 2017.

The Act provides a limited safeguard in that:

> *Section 33A (4) if a person objects then the answer cannot be used against them.*

The *Journal of the Australian Institute of Professional Intelligence Officers* published a peer-reviewed article by Author Ian Wing, which examines the use of evidence, and intelligence in modern day law enforcement. According to Wing:

> *Intelligence is also subject to the prejudices of its authors and the agendas of its customers. Intelligence, unlike evidence, is not based in legal principles or guidelines... [I]ntelligence can only be the "best estimate" of a given situation based on the available information, which will almost always be incomplete and often ambiguous.*[9]

Wing argues that the use of intelligence rather than evidence to determine whether a person is a 'fit and proper person' to be licensed to operate a tattoo business in NSW, is to operate outside of ordinary law.

In an open letter regarding the *Tattoo Parlors Amendment Act 2017* to the Hon. Mark Speakman SC MP Attorney General dated 29 May 2017, the Law Society of NSW reiterated these concerns with the Act. An excerpt from the letter reads:

> *The Law society has serious concerns with the Act. While the legislation is limited to those involved in tattoo parlors, it gives police extraordinary powers, which bypass the safeguards applying to the Crime Commission and ordinary police investigations. The Law society has concerns about the precedent value of the provisions, particularly given that these significant powers, originally conceived for use in counter terrorism laws, have been incorporated into ordinary areas of criminal law enforcement and business regulation.* [10]

9 *Ian Wing, (2004) "Maintaining Security with Justice: the Intelligence versus Evidence Dilemma", Journal of the Australian Institute of Professional Intelligence Officers 13: 1. 28-39. Available at <search.informit.com.au/documentSummary;dn=357608114803105;res=IELHSS> 1039-1525.*

10 *Open Letter Law Society of NSW to Hon. Mark SpeakmannSC MP May 2017*

THE TATTOO PARLOURS AMENDMENT (STATUTORY REVIEW) ACT NSW 2022

The Tattoo Parlors Amendment (Statutory Review) Bill 2021 was introduced on motion by Mr David Elliott, Minister for Police and Emergency Services to the NSW Parliament in 2021. The intention of the Bill, as stated by Mr David Elliot during the second reading of the Bill in the Parliament was to improve the efficiency and effectiveness of the tattoo industry regulatory scheme in NSW. Mr David Elliott said;

> *This bill will strengthen the regulatory framework for the tattoo industry, which was introduced to curb infiltration of the industry by organised criminal groups. Since the current Act commenced in 2012, gang and organised criminal activity in the tattoo industry has dramatically reduced. For example, in the 2010-11 financial year, the NSW Police Force recorded a total of 136 offenses committed within a tattoo business. However, when the licensing scheme began under the Tattoo Parlors Act 2012, the total offenses recorded at tattoo businesses dropped to just 27 offenses for the 2011-12 and 2012-13 financial years combined. This is a significant drop in offenses, which have remained consistently low. However, there is still more work to be done.*[11]

Despite Mr Elliot providing no insight into what the recorded offenses in 2010 - 11 were, and if the incidences in question were related to organised crime or not these figures appear to form the basis of Mr Elliots argument to introduce further mechanisms to curb the perceived ongoing organised crime infiltration of the industry, despite the cited and now evidentiary reduction in these numbers.

Mr Elliot further states;

> *The bill will limit infiltration of the body art industry by organised criminal groups by creating a new offence for advertising body art tattooing procedures without a licence. It will improve transparency in relation to grounds for refusal of a licence under the Act and provide further opportunities for international artists to trade in New South Wales.*[11]

Schedule 1[15] inserts an offence for advertising the carrying on of a body art tattooing business at premises unless the person is a holder of a master license. It is also an offence for the advertisement not to contain the license number.

The ATG submit that due to the lack of any publicly accessible license registry the displaying of license numbers under this provision play no function in the ability of industry participants or the general public to identify and subsequently report unlicensed operators.

Schedule 1[31] extends licensing provisions to encompass permits.

As stated within this submission in section…. Permits, regulators have neglected to cater for international visiting artists who hold visa's with working rights granted to them by the Commonwealth.

Schedule 1[5] inserts the definition of disqualifying offence to provide a regulation-making power for particular offenses to be mandatory disqualifying offenses.

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11 Mr. David Elliott, Minister for Police and Emergency Services, second reading Tattoo Parlours Amendment (Statutory Review) Bill 2021NSW 2021

The ATG submit that a gross lack of transparency occurred during the consultation process by the NSW Justice Department of Statutory Review of the *Tattoo Act 2021* in 2018, during which time public consultation was sought regarding the proposed use of a set list of mandatory disqualifying offenses for use within the licensing regime. The potential for both mandatory disqulifiers and the current fit and proper test to be included at the same time was not disclosed and no industry consultation on this matter occurred.

The ATG support the renaming of the Act as the *Tattoo Industry Act*.

POLICY IMPLICATIONS OF THE ACTS

A growing body of evidence has emerged that indicates that the methods being employed by governments to restrict members of criminal associations from participating in certain occupations are not working entirely as planned.

In order to assess the policy of the regime governing the tattoo industry in NSW and whether the direction taken within crime control legislation has been effective, a number of Government reports have been reviewed and referenced.

REVIEW OF THE CRIMES (CRIMINAL ORGANISATIONS CONTROL) ACT 2012

On 9 March 2017, acting NSW Ombudsman, Professor John McMillan, completed his review of the NSW police force's use of the *Crimes (Criminal Organisations Control) Act 2012*. The Act included a provision requiring the Ombudsman 'to keep under scrutiny the exercise of powers conferred on police officers under this Act' for the period of four years from the date of commencement of the ACT.

The Ombudsman's report contains only one recommendation: that the *Crimes Act 2012* be repealed: 'The *Crimes (Criminal Organisations Control) Act* was intended to enable police to restrict members of criminal associations from associating with each other, recruiting new members, and participating in certain occupations', said Professor McMillan. 'However, our review found that the Act does not provide police with a viable mechanism to do this. We think it is unlikely that police will ever be able to use it.' Professor McMillan added: 'in my view, given the problems identified by police that have prevented them from exercising the powers under this Act, and the fact that police have alternative powers to disrupt the activities of criminal organisations, it would be in the public interest for the Act to be repealed. I have made this the only recommendation in my report'.[12]

REPORT OF THE TASKFORCE ON ORGANISED CRIME LEGISLATION 2016

The Taskforce on Organised Crime Legislation QLD ('the Taskforce') was established to review legislation introduced in Queensland in late 2013 as part of an extensive crackdown on organised crime. The Taskforce was required to refer to the findings of the Organised Crime Commission of Inquiry and the findings of the Review of the *Criminal Organisation Act 2009*.

12 *Ombudsman recommends repeal of the Crimes (Criminal Organisations Control)*

The Chair of the Taskforce, the Honorable Alan Wilson QC, former Supreme Court Judge, presented the final report of the Taskforce to the Attorney-General and Minister for Justice and Minister for Training and Skills on 31 March 2016. Similar to the findings made by the acting NSW Ombudsman in his review of the *Crime Control Act 2012*, the Taskforce made recommendations to repeal many of the amendments made to the *Police Powers and Responsibilities Act 2000* (QLD) .[13]

The following recommendations were made in relation to the *Tattoo Parlors Act 2013*:

- Licenses (etc.) should only be refused or canceled on the basis that there is evidence specific to the individual that demonstrates that the individual (and not those with whom they associate with) is not a suitable person to hold a license (etc.). This was an unanimous recommendation.
- Extensive consultation must occur on an industry-by-industry basis to determine how best to frame the 'fit and proper person' applicable to each of the respective industries in recognition that what constitutes a 'fit and proper person' may differ significantly from industry to industry. This was a unanimous recommendation.
- The requirement that Chief Executives refer every application for a license to the Commissioner of Police requires a deployment of QLP and government resources that are disproportionate to the risk posed by the potential infiltration of organised crime groups to the respective industry, and to community safety. This requirement should be replaced with a mechanism that allows the Commissioner of Police to supply relevant information to the Chief Executive when a licensee comes to the attention of the QLP and, therefore, on a case-by-case basis only. This was a unanimous recommendation.

The unanimous findings and recommendations of this report appear to be significant for informing evidence based public policy formulation in NSW.

13 *VLRC Regulatory regimes Report, p. 8.*

REPORT OF THE VICTORIAN LAW REFORM COMMISSION INTO IMPACTS OF ORGANISED CRIME ON INDUSTRIES 2015

In October 2014, the Victorian Government charged the Victorian Law Reform Commission with the task of reviewing the use of regulatory regimes to help prevent organised crime and criminal organisations infiltrating lawful occupations and industries. Through its consultation process the Commission sought to establish a deeper understanding of the efficacy of a range of regulatory tools and the costs and benefits of their use for regulators, business operators and other stakeholders. Based on its research and the fruits of its consultations, the Commission developed a framework of overarching principals for assessing the risks of organised crime and for developing suitable regulatory responses.

Chapter 2 (2.1) of the VLRC report "Overarching principals" states that:

- The following overarching principles should be considered in developing a regulatory response to organised crime infiltration of lawful occupations and industries:
- The regulatory response should be specific to the occupation or industry at risk of infiltration.
- A collaborative approach should be taken in responding to organised crime infiltration.
- Government agencies should seek to maximise information sharing.
- A regulatory regime should promote good administrative decision-making.

10 VLRC Regulatory regimes Report, p. 8.

- Government agencies should pursue nationally consistent best practice in regulatory responses.
- A uniform concept of organised crime is necessary for effective regulatory responses.

The ATG agrees with these principals.

The VLRC report also states that:

> *Liberty Victoria cautioned that there would be, in fact, significant risk in adopting generalised regulatory responses to infiltration, insofar as a generic approach would disregard the different purposes for which particular occupations and industriesare infiltrated, the different scales and characteristics of diverse occupations and industries, and the utility of any existing regulatory regimes within an occupation or industry.*[14]

As this report proposes, policymakers should tailor the regulatory response to organised crime infiltration by a) examining the particular form that infiltration takes in an occupation or industry and the specific opportunities and vulnerabilities that organised crime groups exploit; and b) considering the most beneficial regulatory strategies to reduce those opportunities and vulnerabilities.

14 *VLRC Regulatory regimes Report, p. 8.*

In developing an occupation- or industry-specific regulatory response, it is important that policymakers both address the risks of organised crime infiltration and avoid undue impediments to the entry and operation of legitimate occupation/industry participants. In other words, the regulatory regime should endeavour to let the 'right' people in, as much as it seeks to keep the 'wrong' people out.

As noted at numerous points in this report, a well-functioning, flourishing legitimate business sector can help to marginalise illegitimate operators within a particular occupation or industry and make infiltration by organised crime groups more difficult.[15]

Furthermore the ATG submit that members of a legitimate occupation or industry are unlikely to support regulatory measures that they perceive as unfair or lacking in credibility.

USE OF CRIMINAL INTELLIGENCE

Criminal intelligence is a term used to describe a legal stratagem, created by legislative bodies, allowing secret evidence to be used in legal proceedings whilst excluding or substantially impairing the operation of traditional common law rules of procedural fairness.

The definition most commonly used by Australian legislatures is reiterated on section 59 of the *Criminal Organisations Act 2009* (QLD) (COA), which defines criminal intelligence as information that might:

- Prejudice a criminal investigation; or
- Enable the discovery of the existence or identify of a confidential source of information relevant to law enforcement; or
- Endanger a person's life or physical safety.

If information accords with one arm of this definition it may qualify as criminal intelligence and be permitted for use in stipulated proceedings, even if the outcome has serious consequences for the person against whom it is presented – for example, an application to withhold rights or privileges from them, or make a particular order against their interests, without the information ever needing to be disclosed to them.

For those raised in our kind of legal system the notion that a person mite suffer an adverse outcome in legal proceedings from 'evidence' they do not, and can not see is an alarming one.

The *Tattoo Parlors Act 2012 NSW* encompasses this use, but its legislative components either do not define 'criminal intelligence' at all, or define it merely as information gathered by the Commissioner of Police. The result of this lack of definition means that information no longer needs to possess any special qualities to justify the withdrawal of the person's common law rights to know the nature of the allegations made against them and be able to challenge those allegations.

The ATG submit that criminal intelligence is not evidence and therefore should not be used in the determination of whether a person is fit and proper to hold a license to tattoo.

15 *VLRC Regulatory regimes Report page 9. http://www.lawreform.vic.gov.au/con- tent/3-infiltration- organised-crime-groups-lawful-occupations-and-industries*

The COA review described the essential differences between criminal intelligence and evidence:

> *Intelligence, and the information and material of which it is comprised, is not (usually) evidence as the word is traditionally used in the judicial sphere. It can at the highest be said to lead to evidence or to facilitate the collection of it.*

> *Intelligence is, by definition, 'patchy' – fragmentary or highly circumstantial – information bearing on possibly remote risks. Suspicion is its animating criterion. It is predictive in nature, for its primary aim is the prevention of hypothesised harm.*

> *Evidence on the other hand is explanatory. It seeks to identify truth (guilt) for the purposes of apprehension, adjudication and retribution. It is wholly reactive – by definition, it only exists after a crime has been committed.*

Ultimately, evidence and intelligence might be seen as diametrically opposed in that the former operates in a culture in which the desideratum is to avoid a 'false positive' (wrongful conviction) as manifested in Blackstone's famous maxim that 'the law holds that it is better that ten guilty persons escape, than that one innocent suffer'.

The ATG submit that, based on the definition summarised in the COA, criminal intelligence is not evidence and therefore should not be used in the determination of whether a person is fit and proper to hold a license to tattoo.

IMPACTS ON INDUSTRY

USE OF PROBITY TESTS / MANDATORY DISQUALIFIER'S

In NSW Legislation 'fit and proper person" tests feature predominantly in industries heavily regulated by occupational licensing schemes.

A review by the QLD Taskforce on organised crime legislation examined the industries and occupations affected by the use of fit and proper tests within that State. This examination showed that whilst there are some similar aspects to occupational licensing frameworks, each framework remains unique in order to meet legislative objectives and maintain the integrity of the particular industry – in other words, while an individual or organisation may not be considered a 'fit and proper person' for one particular industry, that same individual may be a 'fit and proper person' for another.

The Taskforce concluded that a person's past or current involvement in criminal activity may be a factor relevant to whether a person is a 'fit and proper person' but, the type of criminal history, which makes a person unsuitable, may differ from industry to industry.

Whilst these considerations were made by the Taskforce the fact remains that the use of a fit and proper test in ascertaining the probity of applicants for licensure under both the QLD and NSW tattoo industry licensing schemes has not fully ensured that the policy objectives of the Bills has been met nor has the integrity of the profession been maintained.

The current use of fit and proper tests has seen numbers of persons denied licensure for offenses which hold no perceived relevance to either the policy of the principal Act, links to organised crime, or to the profession itself.

Numbers of individuals have been denied for a perceived pattern of criminality, some with charges, having occurred over 10 years prior, or being listed from their juvenile record. We have seen cases of individuals being denied for property offenses, such as graffiti, as well as denials for individuals with fewer than 3 criminal offenses over a 10 year period, and none of which had incurred a custodial sentence or substantial fine. An examination of the case files taken to NCAT also reveals that driving fines and other civil offenses have been used within the security determination of whether a person is fit and proper.

The ATG in its 2018 submission to the Statutory Review of the *Tattoo Parlors Act 2012* conducted by the NSW Justice Department did support a set list of mandatory disqualifying offenses.

It was perceived that by setting a publicly available list of mandatory offenses the vague nature of the current 'fit and proper persons' test would be replaced and therefore benefit industry and regulators alike. It was also perceived that if an appropriate time frame was set around a set list of disqulifiers, entrants would not be prevented from their chosen career path as a tattoo artist unless the disqualifying offence was recent enough to complicate the potential for reform.

The ATG are not aware of any consultation conducted by either the NSWPF or the Justice Department around the potential recommendation or inclusion of both probity mechanisms to be inserted into the Act.

In the NSWPF submission to the Statutory Review of the *Tattoo Parlors Act 2012* dated July 2020 the Police state:

> *From any industry perspective, including a set of mandatory disqualifying offenses will provide greater transparency for industry participants, who will be able to better understand the scope of the probity test conducted on license applicants.*[16]

and

> *NSWPF state that they should be able to continue using a "public interest" test and criminal intelligence reports and other criminal information, as part of the process of conducting security determinations. Such information should continue to be protected from public disclosure* [16]

The impact on industry participants of the undefined fit and proper test meant that numbers of applicants were denied licensure based on a pattern of offenses that had no relationship to OMCGs, organised crime, or the principle policy objective of the Act.

What was initially designed as a system to ensure flexibility quickly became an approach that added complexity in the way security determinations were assessed and consequently not only saw participants denied, waiting sometimes years for a license decision, but also saw individuals denied for offenses such as property damage and/or historic drug and civil offenses.

The ATG in consultation with our members have in previous submissions to the NSW Government supported the introduction of mandatory disqualifying offenses as it was understood that a set list of disqualifiers would provide greater transparency for industry participants who would be better able to understand the scope of the probity test and it would reduce processing times for security determinations and reduce the burden on administrators and their resources. It must be noted that this support was based on the understanding that the mandatory disqualifiers would replace the ambiguous fit and proper person test.

In its 2020 Submission to the Statutory Review the NSWPF proposed that the inclusion of mandatory disqualifying offenses would serve to reduce time and administration required to assess each application.

In the same submission however the NSWPF also proposed that the inclusion of mandatory disqualifying offenses should not negate the need to continue to apply "fit and proper" and "public interest" tests because "there is still an element of analysis of risk assessment required"

Therefore the mandatory disqualifiers constitute an additional measure, increasing the administrative burden of regulators, and contradicting the claim about reduced application processing times.

The NSWPF went on to state in their submission:

> *There is still a need to consider convictions for offenses that are not mandatory disqualifying offenses, in terms of seriousness, frequency, recency and context* [16]

This perceived need sits in conflict however with the available data which clearly indicates that licenses on application or renewal are not being denied with any frequency and that there are many more approvals than denials.

16 *NSW Police Force submission to the Statutory Review of the Tattoo Parlours Act 2012, 2020*

Within the 2018 call for submissions to inform the Statutory Review of the *Tattoo Parlors Act* by the NSW Justice Department respondents were invited to answer a series of questions amongst which was the following question:

> *Should the Act list a set of mandatory disqualifying offenses, as in, for example, the Security Industry Act 1997 if so, is a "fit and proper person" test still required?*[17]

At no point within the terms of reference for the review was it stated or suggested that the potential existed for both a set of mandatory disqulifiers and the fit and proper test to exist within the same regime.

The response from the professional industry upon learning that this provision had been added to the Tattoo Parlors Statutory Review Amendment Bill 2021 was one of dismay and frustration.

The ATG submit that the use of both a set list of mandatory disqualifying offenses and a fit and proper persons test, and a public interest test, and the myriad of disqulifying icenses offenses within the Act consititues an excessive and unsubstantiated overreach on behalf of the Government in NSW.

INDUSTRY CONSULTATION

There has been an ongoing lack of consultation with the industry since 2012.

During the Statutory Review of the *Tattoo Parlors Act 2012* in 2020 the NSW Police force 14 made a number of recommendations designed to provide greater clarity about the operation of the Act.

NSWPF Recommendation 9 states " a mechanism be established to conduct regular, practical consultation with the tattoo and body art industry in NSW".

The ATG welcome the development of a mechanism by which industry bodies and/or industry participants can participate and contribute to any dialogue around the regulation of the tattoo industry.

17 *Terms of reference Statutory Review Tattoo Parlors Act 2012*

MUTUAL RECOGNITION

The current system of mutual recognition between NSW and QLD does not reflect the principles of the *Mutual Recognition Act 1992*[18]. Currently license holders from both States are required to re-apply and pay full application fees to obtain a full license in the State they wish to enter to work.

The sole concession granted to a license holder under the current model of mutual recognition is that they can commence work prior to the license being granted.

The current system imposes significant unfair costs and administrative burdens, and acts as a deterrent to practitioner mobility and the flourishing of industry networks, collaboration and professional development across States.

The ATG submit that the current model of mutual recognition between the licensed states of NSW and QLD be restructured to align with the principles of the *Mutual Recognition Act 1992*[18] and in doing so support licensed practitioners and reduce barriers to trade.

18 "Mutual Recognition of licensed occupations", Licence Website, <www.licencerecog- nition.gov.au/Mutual%20recognition/Pages/default.aspx>.

RECOMMENDATIONS

The ATG recommend that future amendment to existing regulations be evidence based and made in consultation with industry

The ATG recommend that restraints to trade within the proposed regulations be amended in order that the regulations support industry growth

The ATG suggest that visiting overseas tattoo artists who enter Australia with working rights granted by the Commonwealth for a duration longer than 6 months have the ability to apply for a full tattooist license to work in NSW.

The ATG recommend the reduction of licensing fees and that the potential for a licensing fee scale be considered for an interim period during the post covid era.

The ATG recommend that Part 3 (22) additional grounds for refusing to grant licenses be removed.

The ATG recommend that the list of mandatory disqualifiers, and the level of offence referred to within, be reviewed in light of the glaring potential to exclude legitimate industry participants.

The ATG recommend that record keeping requirements be reviewed and merged with record keeping obligations under the Public Health Act 2010.

The ATG recommend the development and maintenance of a publicly accessible license registry

The ATG recommend that a industry practitioner who applies for a Master License be automatically granted a tattooists license to work within the State

The ATG recommend that a permit system be considered for out of state practitioners who wish to enter NSW to work for short periods of time be developed

and

A pre-approval system be considered whereby an out of state applicant can apply online, have criminal history checks preformed and then pre approval granted in order that the applicant can enter the State with a time frame to submit finger prints.