



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

REPORT OF THE

STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

FIREARMS AMENDMENT BILL 2003

Presented by Hon Adele Farina MLC (Chairman)

Report 16
June 2004

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“7. Uniform Legislation and General Purposes Committee

7.1 *A Uniform Legislation and General Purposes Committee* is established.

7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.

7.3 The functions of the Committee are –

- (a) to consider and report on bills referred under SO 230A;
- (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
- (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
- (d) to consider and report on any matter referred by the House.

7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

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REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

IN RELATION TO THE

FIREARMS AMENDMENT BILL 2003

1 REFERRAL OF THE BILL

- 1.1 On Tuesday, March 30 2004 the Firearms Amendment Bill 2003 (**Bill**) stood referred to the Uniform Legislation and General Purposes Committee (**Committee**) pursuant to standing order 230A. Standing order 230A(4) requires that the Committee report to the Legislative Council (**Council** or **House**) within 30 days of the first reading of the Bill. Pursuant to standing order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee. The Committee was due to report the Bill by Wednesday, April 28 2004. However, an extension was sought and granted to June 22 2004.
- 1.2 The purpose of the Bill, as indicated by the Long Title, is to amend the *Firearms Act 1973* (**Act**) and for related purposes.

2 INQUIRY PROCEDURE

- 2.1 The Committee was aware that the Bill would be subject to standing order 230A when it was introduced into the Council and would probably stand referred to the Committee. In anticipation of such referral the Committee, of its own motion, commenced preliminary research into the background of the Bill.¹
- 2.2 On November 28 2003, the Committee first wrote to the Hon Michelle Roberts MLA, Minister for Police and Emergency Services (**Minister**) seeking information about the Bill and documents supporting its implementation. The Committee specifically sought any relevant Memorandum of Understanding, Minutes, Resolutions, Communique or Inter-governmental Agreement. The Committee wrote again to the Minister on March 3 2004 and on a third occasion on April 6 2004. The Minister replied on April 8 2004 and apologised for the delay in providing the formal documentation. The Minister submitted:
- a copy of the Commonwealth and States and Territories Agreement on the Accountability and Administrative Procedures for the Hand-gun Buy-back 2003;

¹ The Committee's Term of Reference 7.3(b) states "*The functions of the Committee are...(b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;*".

- relevant Resolutions of the Australasian Police Ministers' Council Firearms (Hand-guns) Resolutions November 2002;
 - relevant Council of Australian Governments' (COAG) Resolutions of the COAG Meeting, December 6 2002; (**Extract of COAG Agreement**)
 - an Attachment to the relevant COAG Resolutions of the COAG Meeting, December 6 2002; and
 - an Extract of the COAG Agreement on Hand-guns - Matters Agreed Out of Session.
- 2.3 The Committee did not advertise for or invite submissions because of the strict reporting timeframes. However, details of the inquiry were placed on the parliamentary website at: www.parliament.wa.gov.au.

Availability of Documents

- 2.4 From its own research and preceding the production of formal documentation from the Minister, the Committee ascertained that some of the amendments in the Bill are a result of a commitment to a number of COAG Resolutions dated December 6 2002 to which Western Australia was a party. The Committee initially and independently, identified the relevant COAG *Communique* from a website.²
- 2.5 The Committee has, on many occasions, reported its concerns to the House where there is little or no written material which records the original agreement between the Commonwealth, State and Territories when uniform legislation is proposed.³ The Committee again emphasises the importance of the existence and timely availability of documents supporting the implementation, justification, understanding and interpretation of uniform legislative schemes.
- 2.6 A request for additional information concerning a number of discrete clauses in the Bill went unanswered for a month and 10 days. The Minister apologised for the delay in responding.

² <http://www.pmc.gov.au/docs/coag061202.cfm>. This was titled "*Ministerial; Council on the Administration of Justice - Australasian Police Ministers' Council Special Meeting on Firearms (Handguns) November 2002, Sydney NSW, Consolidated Resolutions*".

³ For example, Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purpose, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, November 2002, p1. In the case of that bill there were no documents available to the Committee on the National Crime Authority (State Provisions) Amendment Bill 2002. In addition there was no state held record of why that bill had been introduced, whether its provisions accord with the Inter-Governmental Committee's agreement and whether other options had been considered.

3 UNIFORM LEGISLATION

Scrutiny of Uniform Legislation by the Western Australian Parliament

- 3.1 The scrutiny of uniform legislation is not new to the Western Australian Parliament. Since 1991 both the Council and Legislative Assembly have established procedures to assist Parliament in the scrutiny of uniform legislation.⁴
- 3.2 More recently during the Thirty-Sixth Parliament until the appointment of the Committee, the scrutiny of uniform legislation fell within the terms of reference for the Council Standing Committee on Legislation. In November 2001 the relevant Council standing order (standing order 230A) was amended to consolidate matters relevant to uniform legislation and to facilitate automatic referral of such bills to the Committee for inquiry and report within 30 days.

Legislative Structures

- 3.3 National legislative schemes of uniform legislation were addressed in a 1996 Position Paper on the Scrutiny of National Schemes of Legislation by the Working Party of Representatives of Scrutiny Committees throughout Australia (**1996 Position Paper**). The 1996 Position Paper emphasised that it does not oppose the concept of legislation with uniform application in all jurisdictions across Australia. However, it does question the mechanisms by which those uniform legislative schemes are made into law and advocates the recognition of the importance of the institution of Parliament.
- 3.4 A common difficulty with most forms of national scheme legislation is that any proposed amendments may be met by an objection from the Executive that consistency with the legislative form agreed among the various Executive Governments is a “given”.⁵
- 3.5 National legislative schemes, to the extent that they may introduce a uniform scheme or uniform laws throughout the Commonwealth (refer to standing order 230A(1)(b)), can take a number of forms. Nine different categories of legislative structures promoting uniformity in legislation, each with a varying degree of emphasis on

⁴ For discussion of the history behind the scrutiny of uniform legislation and standing order 230A refer to: Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 2: The Work of the Committee during the First Session of the Thirty-Sixth Parliament – May 1 2001 to August 9 2002*, Western Australia, August 2002, pp5-6.

⁵ Working Party of Representatives of Scrutiny of Legislation Committees throughout Australia, *Scrutiny of National Schemes of Legislation Position Paper*, October 1996, pp7-12 attached as Appendix 1 to Western Australia, Legislative Assembly, Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Position Paper: Scrutiny of National Schemes of Legislation*, October 17 1996.

national consistency or uniformity of laws and adaptability have been identified. The legislative structures are summarised in Appendix 1.⁶

- 3.6 The Bill is “uniform legislation” within the meaning of standing order 230A by virtue of it being pursuant to an intergovernmental agreement to which the Government of the State is a party: standing order 230A(1)(a).

Scrutiny Principles

- 3.7 One of the recommendations of the 1996 Position Paper was the adoption of the following uniform scrutiny principles:

- does the Bill trespass unduly on personal rights and liberties;⁷
- and
- does the Bill inappropriately delegate legislative powers?⁸

- 3.8 In addition, in recent times, the Committee has considered the impact of any proposed legislation on the application of parliamentary privilege.⁹ Although not adopted formally by the Council as part of the Committee’s terms of reference, the scrutiny principles can be applied as a convenient framework for the scrutiny of legislation.

4 BACKGROUND TO THE BILL

- 4.1 *A Leaders’ Summit on Terrorism and Multi-Jurisdictional Crime (Leaders’ Summit)* was held in Canberra on April 5 2002. At the Leaders’ Summit, the Prime Minister announced plans to consider a new national framework to deal with transnational crime and terrorism.¹⁰ Following the Leaders’ Summit, the Commonwealth Justice Minister, Senator Chris Ellison, wrote to all Police Ministers seeking their support for the development of a National Firearms Trafficking Policy Agreement.

⁶ Ibid. Also see reports of the Parliament of Western Australia, former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements.

⁷ For example: strict liability offences, reversal of the onus of proof, abrogation of the privilege against self-incrimination, inappropriate search and seizure powers, decision-making safeguards (that is: written decisions and reasons for decisions), personal privacy, decisions unduly dependent on administrative decisions.

⁸ For example: “Henry VIII clauses”, insufficient parliamentary scrutiny of the exercise of legislative power.

⁹ Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report No 5: National Crime Authority (State Provisions) Amendment Bill 2002*, Western Australia, November 2002, pp7–10; and Report No 11: *Higher Education Bill 2004*, Western Australia, September 2003, pp24–34.

¹⁰ National Crime Authority, *Transition to the Australian Crime Commission, Fact Sheet (2002)*, www.nca.gov.au at p1. The Leaders’ Summit also considered what constitutional power the Commonwealth had to support a national response to organised crime and terrorism and the reformation or abolition of the National Crime Authority.

- 4.2 The National Firearms Trafficking Policy Agreement had its genesis in a Report from the *Firearms Policy Working Group* established by the Australasian Police Ministers' Council (APMC)¹¹ in 2001 to provide advice on firearms policy matters.¹²
- 4.3 At a meeting of the APMC in Darwin on July 17 2002, the various Police Ministers resolved to agree that under the National Firearms Trafficking Policy Agreement, all jurisdictions would make further provision for the control of the illegal trade in firearms in Australia through 17 Resolutions and an Action Plan.¹³
- 4.4 The National Firearms Trafficking Policy Agreement deals with a range of matters including:
- a commitment by the Commonwealth, States and Territories to ensure that substantial penalties are in place for the illegal possession of a hand-gun;
 - the introduction of consistent regulation of firearms manufacturing;
 - the introduction of serious offences for the illegal manufacture of firearms;
 - increased recording, reporting and inspection of firearm part transactions; and
 - the introduction of laws designed to restrict the illegal supply of firearms and making it an offence to conspire to commit an interstate firearm offence.
- 4.5 On October 21 2002, there was a shooting incident at Monash University in Victoria by a licensed hand-gun owner. Two people were killed and others injured.

¹¹ The APMC was established in 1980 to promote a coordinated national response to law enforcement issues and to maximise the efficient use of Police resources. Its initial role was to establish the National Common Police Services and to develop a coordinated approach to Police policy and operations. The APMC broadened its role, in May 1986, to include the coordination of the national attack on organised crime and the co-operative efforts needed to achieve that goal. More recently, its agenda has extended to include a wide range of national law enforcement policy development and implementation activities including: DNA legislation, national sex offenders registry and gun control. The APMC comprises the Ministers responsible for police from the Commonwealth, each of the States and Territories and New Zealand. The APMC has two scheduled meetings per year. Special meetings on subjects of high sensitivity and/or urgency are called as required. Some APMC business is also handled out-of-session. A standing committee of officials, the Senior Officers Group meets at least twice per year prior to the APMC meetings. Australian Government, Attorney-General's Department, Website: www.ag.gov.au/criminaljusticeHome.nsf (viewed at April 5 2004).

¹² Minister for Justice & Customs, Senator, the Hon. Chris Ellison, Website <http://law.gov.au/WWW/JUSTICEMINISTERHOME.nsf/Web+Pages/C80D9BDB1BBBCF9FCA256B9F0008CF34?OpenDocument> (viewed at April 5 2004).

¹³ Agenda Item 5(ii).

- 4.6 In November 2002, the APMC held a special meeting in Sydney making 28 *Firearms (Hand-guns) Consolidated Resolutions* which were endorsed by COAG in a *Communique* dated December 6 2002.¹⁴

The COAG Communique

- 4.7 Following endorsement, COAG agreed that legislative and administrative measures to implement the Resolutions should be in place by June 30 2003. It agreed on a national approach to restrict the availability and use of hand-guns, particularly concealable weapons. The agreement aimed to reduce the number of hand-guns in the Australian community and significantly strengthen controls over access to hand-guns.
- 4.8 The Resolutions included:
- a system of graduated access to hand-guns for legitimate sporting shooters, based on training, experience and event participation;
 - giving shooting clubs greater access to information by requiring a prospective member to produce a police clearance prior to acceptance as a member, information on other shooting clubs a person belongs to, and their current ownership of firearms;
 - more stringent requirements to prevent club shopping by potential members of gun clubs, including better access for clubs to information from licensing authorities; and
 - allowing the Commissioner of Police in each jurisdiction, subject to appropriate safeguards, to refuse and revoke firearms licences and applications on the basis of criminal intelligence and other relevant information.
- 4.9 COAG agreed to restrict the classes of legal hand-guns that can be imported or possessed for sporting purposes to those meeting recognised sporting shooter classifications in the Olympic and Commonwealth Games and other accredited events.
- 4.10 COAG agreed that reducing the number of hand-guns held legally in the community should be accompanied by a compensation scheme for licensees who are compelled to surrender hand-guns. COAG also agreed that an amnesty would be in force from July 1 2003 until January 1 2004, during which time owners of illegally held hand-guns could surrender those weapons to authorities without incurring a criminal penalty for possession of that weapon.

¹⁴ Council of Australian Governments' (COAG) Communique of Agreed Outcomes of the Discussions Meeting, Canberra, 12th meeting comprising the Prime Minister, Premiers and Chief Ministers and the President of the Australian Local Government Association.

5 THE LEGISLATIVE RESPONSE OF OTHER PARTICIPATING JURISDICTIONS

5.1 As at March 18 2004 the legislative response in other participating jurisdictions to the COAG *Communique* was as follows:

- ACT: *Firearms (Prohibited Pistols) Amendment Act 2003* - enacted July 2 2003.
- NSW: *Firearms (Prohibited Pistols) Act 2003* - enacted October 1 2003.
- NT: *Firearms Act 2003* - enacted July 1 2003.
- QLD: *Weapons (Handguns and Trafficking) Amendment Act 2003* - enacted June 2 2003.
- SA: *Firearms (COAG Agreement) Amendment Bill 2003* - still before Parliament as of September 24 2003.
- Tasmania: *Firearms Amendment Act 2003* - enacted June 4 2003.
- Victoria: *Firearms (Trafficking and Handgun Control) Act 2003* - enacted May 20 2003 and *Firearms (Amendment) Act 2003* - enacted December 9 2003.

6 THE WESTERN AUSTRALIAN RESPONSE

6.1 The Second Reading Speech of Hon Nick Griffiths MLC, the Minister for Housing and Works representing the Minister for Police and Emergency Services in the Council explained the context of the Bill. Amendments in the Bill address seven of the 28 COAG *Communique* Resolutions. These are:

- Resolution Number 4: Accrediting of historical societies of historical firearms.
- Resolution Number 5: Improving the requirement for historical collectors to demonstrate a genuine need for collecting hand-guns by being a member of an accredited historical society.
- Resolution Number 6: Registering of all hand-guns, other than those that are pre-percussion.¹⁵
- Resolution Number 13: The Police Commissioner to revoke licences on the basis of criminal intelligence.

¹⁵ A pre-percussion hand-gun is an antique firearm which is muzzle loading, activated by a fuse, matchlock, wheel lock, snaphaunce, flintlock or miquelet lock.

- Resolution Number 15: Shooting clubs to notify licensing authorities about concerns they have with a club member's suitability to hold a licence.
 - Resolution Number 19: Allowing doctors, nurses, social workers to report on a person's suitability to hold a licence without fear of liability.
 - Resolution Number 26: New penalties for illegal possession of a firearm.
- 6.2 Initially and in the absence of confirming documents, the Committee presumed that the remaining 21 COAG *Communique* Resolutions had been dealt with either by the Commonwealth assuming responsibility for particular matters or Western Australia amending its *Firearms Regulations 1974*.
- 6.3 After the Minister supplied the *Extract of COAG Agreement*, it was discovered that nine COAG *Communique* Resolutions had been deleted from the original document. These were Resolutions Numbers 2, 7, 20, 22, 23, 24, 25, 27 and 28.¹⁶ However, the Committee can confirm that those deletions concerned matters strictly in the purview of the Commonwealth or other matters not necessarily requiring a legislative response.
- 6.4 The Committee further noted that the *Firearms Amendment Regulations (No. 2)*, gazetted on August 12 2003 which passed the scrutiny of the Joint Standing Committee on Delegated Legislation in October 2003, were a legislative response to seven of the COAG *Communique* Resolutions. These were Resolutions Numbers 1, 6, 7, 8, 9, 12 and 20. For example:
- schedule 3 of the *Firearms Regulations 1974* was amended so that sporting shooters must satisfactorily complete an approved firearm safety training course and must have been a member of an approved shooting club for at least six months before they will be granted a firearm licence;
 - an approval or permit granted, or a licence issued to a sporting shooter, now specifies that the shooter must use their hand-guns in a prescribed number of competitions during the year; and

16 Resolution 2 concerned the Commonwealth funding a hand-gun buy-back scheme. Resolution 7 concerned the Commonwealth accelerating uniform national standards for registering and tracking firearms. Resolution 20 concerned the development of a national firearms safety training program. Resolution 22 concerned all jurisdictions reviewing the adequacy of their compliance audit arrangements for safe storage of firearms. Resolution 23 concerned all jurisdictions considering the adequacy of their educational literature on storage to ensure that it emphasises the risk of firearms theft, the legislated requirements for safe storage, and highlights compliance monitoring activities and the jurisdictions rigorous prosecution policy for non-compliance. Resolution 24 concerned a review of firearms storage and security requirements. Resolution 25 concerned the Firearms Policy Working Group consulting with security industry regulatory authorities and industry representatives on developing national standards for industry training, competency and licensing. Resolution 27 concerned the need for general education and an awareness campaign to implement agreed changes. Resolution 28 concerned reporting for further action.

- firearms Dealers must now notify the Police Commissioner, when applying for a Dealer's Licence, of the name and address of any person who is able to exercise a significant influence over the conduct of the business, and the nature of that person's association with the business. Such notice must also be made if such a person ceases to have that influence over the business, or if another person assumes such a position.

Residue of Extract of COAG Agreement Resolutions

6.5 The Committee noted that the majority of the 19 *Extract of COAG Agreement Resolutions* have been implemented either by:

- the *Firearms Amendment Regulations (No. 2)*;
- amendments to this Bill; or
- legislation currently providing for a subject matter.¹⁷

6.6 However, four of the 19 *Extract of COAG Agreement Resolutions* remained unaccounted for in the Explanatory Memorandum. These are:

- Number 10 which states:

To prevent "club shopping" introduce requirements that a person wishing to join a club provide details to the club of any other shooting clubs to which they belong and firearms they own. In addition, clubs to be empowered to request information from the licensing authorities on a member's or applicant's ownership of handguns and membership of other clubs;

- Number 11 which states:

Develop a requirement that a person applying to join a shooting club must provide the club with two character references from people they have known for at least 2 years;

- Number 18 which states:

Jurisdictions should cancel a licence where it can be shown that the loss or theft of a firearm was due to negligence or fraud on the part of the licensee; and

- Number 21 which states:

¹⁷ For example, Resolution 16 is already provided for in section 18 of the Act. Resolution 17 is already provided for in section 11(3)(a)(iv) of the Act.

Require that shooting clubs provide licensing authorities with an audited annual report providing member details, firearms owned, and participation rates.

- 6.7 The Committee asked the Minister to explain the status of the four residual COAG Resolutions. The Minister said that Resolutions Numbers 10, 11, 18 and 21 have been implemented by virtue of section 21(1) of the Act.¹⁸ This states:

A licence, permit or approval issued or granted under this Act may be made subject to restrictions, limitations or conditions which shall be:

(a) either specified in the licence, permit or document evidencing the approval or, whether imposed at the time of issue or grant or subsequently, specified in a supplementary document; and

(b) entered in the Register.

- 6.8 The “supplementary document” referred to in section 21(1), is a conditional letter sent to all approved shooting clubs and associations by the Police Service Operations Manager on November 4 2003. This is attached at Appendix 2.

- 6.9 The conditional letter provides for compliance with Resolutions Numbers 10, 11 and 21, but not 18. The Minister said that Number 18 is covered by means of both compliance with the conditional letter and section 20 of the Act.¹⁹ Section 20 essentially states that the Police Commissioner can refuse to renew or revoke a licence if satisfied that the person obtained it by fraud or deception. There is no express provision covering negligence. However, it is arguable that:

- section 21(1)(a)(ii) - “*has breached or failed to observe a restriction, limitation or condition*”;
- section 21(aa) - “*that harm may be suffered by any person as a result of a person retaining or regaining possession of a firearm or ammunition*”;
- section 21(b) - “*that a particular firearm is unsafe or unfit for use*”; and
- section 21(d) - “*that the circumstances in which his approval under this Act was given in relation to any person or matter no longer prevail*”;

may constitute scenarios of negligence by implication.

¹⁸ Letter from Hon Michelle Roberts MLA, Minister for Police, dated June 4 2004, received June 9 2004, p1.

¹⁹ Letter from Hon Michelle Roberts MLA, Minister for Police, dated June 4 2004, received June 9 2004, p2.

7 OVERVIEW OF THE BILL

7.1 The Bill contains 31 clauses in three Parts:

- Part 1– Preliminary.
- Part 2 – Amendments about paintball.
- Part 3 – Amendments about hand-guns and other matters.

8 CLAUSES IN THE BILL ADDRESSING COAG RESOLUTIONS

8.1 Under its terms of reference the Committee scrutinised the Bill to determine whether the amendments are compliant with the *Extract of COAG Agreement Resolutions*. According to the Explanatory Memorandum, clauses 15, 16 and 17 address Resolutions Numbers 4 and 5.

Resolution 4

8.2 It states:

APMC agrees that:

a. States/Territories will accredit historical societies;

b. historical societies be required to notify police of a member's expulsion and the reasons for expulsion; and

c. accredited historical societies be indemnified from civil or legal liability where they notify police in good faith of their belief that a person is unfit to hold a collector's licence.

8.3 Proposed new section 15A in clause 16 of the Bill is headed: "Accredited Society of Collectors" and expressly provides for (a). Proposed new section 15B(1) in clause 16 of the Bill expressly provides for (b) and proposed new section 15B(4) expressly provides for (c). The Committee concluded that these amendments are compliant with Resolution 4.

Resolution 5

8.4 It states:

APMC agrees that a genuine historical collector:

a. be a member of a State/Territory accredited historical firearm collectors' society;

b. have his/her licence application endorsed by an accredited historical firearms collectors' society;

c. comply with strict storage requirements;²⁰ and

d. to collect or retain post 1946 handguns, must display a commitment as a 'student of arms'.²¹

8.5 The Explanatory Memorandum indicates that with respect to Resolution 5, the Commonwealth did not consider the regime proposed by Western Australia in relation to historical firearms collectors to be compliant with the *Extract of COAG Agreement Resolutions*. For example, the amendments do not require a genuine historical collector to be a member of a State accredited historical firearm collectors' society. Further, the Forms in the Schedule to the *Firearms Regulations 1974* do not require a genuine historical collector to have his or her licence application endorsed by an accredited historical firearms collectors' society.

8.6 The Committee noted clause 14 which inserts proposed new section 15(9) into the Act. Clause 14 states that:

In considering whether or not it would be appropriate for a person to obtain, or continue to hold a Firearm Collector's Licence, the Commissioner may take into account any information provided about that person by a person or body designated under section 15A as an accredited society of collectors.

Thus, it is arguable that the Police Commissioner, in considering whether to grant a licence, may be influenced by the fact that an applicant is not a member of an accredited society.

8.7 The Explanatory Memorandum indicates that Resolutions 5(a) and (b) were problematic during State and Commonwealth negotiations but a model to achieve State compliance was finally agreed. Nevertheless, the Bill is not compliant with the *Extract of COAG Agreement Resolutions* in that it does not make membership compulsory or require a licence to be endorsed under section 9A of the Act. For this reason, the Committee asked the Minister to explain the non-compliance with COAG Resolutions 5(a) and (b).

8.8 The Minister said that Western Australia has a history of licensing historical firearms and their owners with a rigorous control regime that ensures only fit and able people

²⁰ Current sections 23(9) (a) to (e) make express provision in relation to the storage of firearms and ammunition. Section 23(9) does not distinguish between historical or modern firearms.

²¹ Proposed new section 15(3)(a) and (b); and 15(4) to be inserted by clause 16 of the Bill.

are able to own or collect historical firearms.²² Further, the Minister said the geographical spread of collectors made it impractical for these persons to attend regular meetings of accredited societies.

8.9 To meet the COAG objective in Resolutions 5(a) and (b) of ensuring only appropriate persons hold a collector's licence, the Minister said Western Australia will:

- reduce the licence period from five to three years;
- use section 21(1)(a) of the Act to place additional conditions on licences;
- require licensees to provide a statutory declaration stating the continuing lawful reasons for maintaining their licence or require licensees to attend at a local police station to provide documentation substantiating their ongoing need for a licence with police officers interviewing those applicants;
- amend police firearm licensing procedures so as to incorporate all of the above and centralise applications to ensure consistency in the application process; and
- enable, but not require the Police Commissioner to accredit historical societies.²³

8.10 According to the Minister, the Commonwealth has accepted that the licensing regime described above will achieve similar outcomes to the requirements for historical collectors to be members of accredited societies and endorse their applications.

8.11 The Committee takes the view that if the Commonwealth is satisfied with the licensing arrangements in lieu of the specific requirements under COAG Resolutions 5(a) and (b) then, Western Australia's unique circumstances make full compliance with those Resolutions unachievable.

Resolution 6

8.12 It states:

*APMC agrees that all handguns other than pre-percussion handguns be registered.*²⁴

²² Letter from Hon Michelle Roberts MLA, Minister for Police, dated June 4 2004, received June 9 2004, p2.

²³ Ibid.

²⁴ A pre-percussion hand-gun is an antique firearm which is muzzle loading, activated by a fuse, matchlock, wheel lock, snaphaunce, flintlock or miquelet lock.

8.13 Clause 11 of the Bill provides a legislative response to Resolution 6 in the form of an amendment to section 8 of the Act. The heading to section 8 is titled: “Exemptions from licensing requirements” and provides that no licence is required “*by a person who is in possession of, or carries, but does not use, an antique mechanism firearm*”.²⁵ Under the section an antique mechanism firearm means a muzzle loading firearm, including a percussion lock hand-gun that is muzzle loading, that uses black powder to propel a shot, bullet, or other missile.

8.14 The Committee concluded that clause 11 is compliant with Resolution 6.

Resolution 13

8.15 It states:

National adoption of laws allowing the Commissioner of Police to refuse and revoke handgun licenses and applications on the basis of criminal intelligence or any other relevant information with consideration to appropriate safeguards including expert advice.

8.16 Clause 13 of the Bill inserts proposed new section 11(3)(c) into the Act as a response to Resolution 13. Currently, section 11 is headed: “Exercise of Commissioner’s discretion” and essentially provides that the Police Commissioner cannot issue a licence to a person if the Police Commissioner is of the opinion that the applicant is not a fit and proper person. As a result of the amendment, in forming an opinion, the Police Commissioner can take into account any suspicions he/she may have, as a result of an intelligence report or other information, that the applicant is a threat to public safety.

8.17 The Committee noted that Resolution 13, the Second Reading Speech and the Explanatory Memorandum to the Bill all refer to “criminal” intelligence but neither the Minister’s letter to the Committee nor (relevantly) the amendment itself, uses the term “criminal” and refers only to “intelligence” or “other information”.

8.18 Under section 11A of the Act, a licence cannot be issued until the Police Commissioner forms an opinion that the applicant has a genuine reason for acquiring or possessing a firearm or ammunition. Additionally, current section 18(4a) requires the Police Commissioner to form an opinion regarding the fitness of a person to hold a licence by checking criminal records,²⁶ considering the applicant’s mental or physical fitness,²⁷ and considering:

²⁵ Proposed new section 8(1)(mc).

²⁶ sub-section 4a(a).

²⁷ sub-section 4a(b).

(c) if there is any apparently reliable indication that for any other reason the person may not be a fit and proper person to hold the licence, ..., sufficient evidence has been provided to the Commissioner to satisfy the Commissioner that the person is a fit and proper person to hold the licence...

- 8.19 Subsection (4d) states that (c) has effect despite any duty of confidentiality, and the provision of information in good faith as requested under that subsection does not give rise to a criminal or civil action or remedy. Section 18(4a) appears to concern evidence provided by medical practitioners whereas the proposed amendment to section 11 will enable the Police Commissioner to access a broader range of information or intelligence when forming an opinion.
- 8.20 The Committee does not have a problem with this concept per se, but doubted that the “criminal” intelligence referred to in Resolution 13, the Second Reading Speech and the Explanatory Memorandum to the Bill has in fact translated into the required amendment. Given that the *Extract of COAG Agreement* stipulates a provision for “criminal” sources of intelligence, the Committee queried why that particular term has been excluded from the amendment.
- 8.21 The Minister said the term “intelligence” does not infer that a decision may be based on rumour or innuendo, but valid, verifiable information which may include criminal records or other sources that will withstand an appeal against the Police Commissioner’s decision.²⁸
- 8.22 The Police Service advised the Minister that in its view, there is no discernible difference between “intelligence” and “criminal intelligence” based on the dictionary definition of the term “intelligence”.²⁹ Intelligence that in any way deals with common and statute law, criminals, criminal activity or unlawfulness becomes “criminal intelligence”. Essentially, all holdings of intelligence within the Police Service is criminal intelligence using its ordinary meaning.
- 8.23 The Committee is satisfied with the Minister’s explanation concerning COAG Resolution 13.

Resolution 15

- 8.24 It states:

²⁸ Letter from Hon Michelle Roberts MLA, Minister for Police, dated June 4 2004, received June 9 2004, p3.

²⁹ The Macquarie Dictionary has nine definitions. These include: “*an aptitude for grasping truth, facts, meaning; knowledge of an event; circumstance received or imparted; news, information; interchange of information, thoughts or communication*”.

Require clubs to notify licensing authorities of concerns about club members suitability to hold a licence. Indemnify clubs for providing such information to licensing authorities about the suitability of club members to hold a license.

In particular jurisdictions will:

a. require sporting shooting clubs to report to police their concerns that a person may pose a danger if in possession of a handgun (firearm);

b. require sporting shooting clubs to notify police of a member's expulsion and the reasons for expulsion;

c. indemnify sporting shooting clubs from civil or legal liability if they notify police in good faith of matters identified in (a) and (b) above; and

d. require sporting shooting clubs to ensure that a person whose licence has been revoked or suspended does not use a handgun (firearms) at the sporting club.

8.25 Section 11A contains the initial mention of sporting, shooting clubs in the Act. It provides that although a licence cannot be issued unless a person has a genuine reason for acquiring or possessing a firearm or ammunition, this could be demonstrated, for example, by an applicant being an active financial member of an approved shooting club.

8.26 The Committee considers that Resolutions 15(a) and (c) have achieved compliance in Western Australia. Generally, Resolution 15 requires that “clubs” notify licensing authorities of concerns about a club member’s suitability to hold a licence and be provided with an indemnity for the information. That has been achieved by clause 16 which inserts a proposed new section 15B. Specifically, clause 25 which inserts proposed new section 23BA provides for the disclosure of certain information by approved club and organisation members which may assist the Police Commissioner to form an opinion as to an applicant’s suitability to hold a licence. One such club or organisation is a shooting club.

Resolution 19

8.27 It states:

Reporting provisions for medical authorities be improved by:

a. indemnifying medical authorities from civil or criminal liability for reporting in good faith to police their concerns

that a person may pose a danger if in possession of a firearm or applying for a firearm licence; and

b. providing that “medical authorities” include medical practitioners, nurses, social workers, psychologists and professional counsellors.

- 8.28 Clause 25 of the Bill inserts proposed new section 23BA into the Act as a response to Resolution 19. By the amendments, the term “medical practitioner” is deleted and “health professional” inserted. This latter term is then further defined as meaning (rather than including) medical practitioners, nurses, social workers, psychologists and professional counsellors. This Committee notes that this is an exhaustive definition but does not dispute such a definition because it is fully compliant with Resolution 19.

Resolution 26

- 8.29 It states:

Having regard to the National Firearms Trafficking Policy Agreement of July 2002,³⁰ jurisdictions agree, as a matter of priority, to establish substantial penalties for the illegal possession of a firearm.

- 8.30 A number of clauses in the Bill are a legislative response to Resolution 26. For example:

- clause 10 concerning current section 6 of the Act deals with the penalty applying to regulations concerning the acquisition, sale, possession or use of a firearm, silencer or ammunition for which no specific penalty is provided. That section is amended to provide for a second offence carrying 10 years imprisonment.³¹ The summary conviction penalty has been doubled from 18 months or a fine of \$6,000 to three years or \$12,000;
- clause 18 concerning current section 19 of the Act, which deals with licensing offences, contains substantial penalties such as imprisonment for 14 years if a person is selling three or more firearms without the relevant licence to sell any of them.³² There is no summary conviction penalty. Similarly, where a person is carrying both a firearm and a prohibited drug or money, 14 years

³⁰ See paragraph 4.4.

³¹ Currently the Act only carries five years imprisonment with no mention of whether it is a first or second offence.

³² Proposed new section 19(1aa).

imprisonment is the penalty and again, no summary conviction penalty is available;³³ and

- clause 23 concerning “general offences” penalties. For example, a person using, carrying or in possession of a loaded firearm or carrying ammunition whilst affected by drugs or alcohol, if found guilty, may be liable to a penalty of two years or a fine of \$8,000.³⁴ This has been increased from 18 months or a fine of \$6,000.

8.31 The Committee concluded that the penalties in these clauses and especially clause 18 are compliant with the requirement of *Extract of COAG Agreement* Resolution 19, that penalties for the illegal possession of a firearm be substantial. However, the harshness of Resolution 19 has, in part, been mitigated by clause 19 which inserts proposed new section 19AA, providing for a less severe penalty in the situation where a person may illegally possess a firearm simply because the licence has expired. In that circumstance, an infringement notice may be issued for those who fail to re-new the licence.

9 OTHER CLAUSES IN THE BILL

9.1 The Committee noted that other amendments in the Bill are opportunistic. That is, whilst the Act is being amended for COAG purposes, amendments have also been made to provide for such matters as:

- the recreational activity known as “paintball”;³⁵
- repealing the Firearms Advisory Committee as suggested by Machinery of Government Review of Boards and Committees in 2001; and
- amendments which now require “written” permission from a landowner that an applicant is permitted to use the land for hunting. Previously this was just a policy, criticised by the Ombudsman for being beyond the power of the *Firearms Act 1973*.

9.2 Of these matters, the Committee makes no comment.

³³ Proposed new section 19(1ab).

³⁴ Proposed amendment to current section 23(2)(a).

³⁵ Paintball has been described as “*like a living chess game*”. It is a strategic team sport, first played in 1981 which involves close cooperation and teamwork in order to win. The typical game consists of two teams who mark their opponent with a paintball pellet expelled from a special gas powered marker. If tagged, the opponent is ruled out of further participation. The goal is to such as capture an opponent's flag. According to Paintball Australia, 200,000 Australians have played on 60 estimated Play Sites both commercial and private. The annual growth rate of the industry has been estimated by Paintball Australia at between 15% and 20%.

10 CLAUSES OF INTEREST IN THE BILL

Clause 18

- 10.1 Clause 18 amends section 19 of the Act by firstly making a person who sells, delivers, disposes of, purchases or is in possession of a firearm or ammunition without the relevant licence, guilty of a “crime” as opposed to the more milder and current “offence”. The gravity of hand-gun control is reflected in this change of terminology. An “offence” provision generally only requires the presence of a guilty intention whereas a crime, generally requires both a guilty act and a guilty mind.³⁶
- 10.2 Secondly, proposed new section 19(1aa) provides that a person found guilty of the crime of selling, delivering or disposing³⁷ of any “*firearm or ammunition*” is liable to imprisonment for 14 years if the person was selling only three or more “firearms” without the relevant licence. However, the proposed new section does not include the term “ammunition”. This appeared to be inconsistent with current section 19(1) which clearly refers to “*any firearm or ammunition*”.
- 10.3 The Committee noted a similar problem with proposed new section 19(1ab). Under proposed new section 19(1ab), where a person has carried a firearm in combination with either a prohibited drug or an amount of prescribed money, then a penalty of 14 years imprisonment attaches to this crime. This means that to be found guilty under section 19(1ab) the prosecution has to establish all the constituent elements of the crime in current section 19(1). That is, the person must have been:
- selling, delivering, disposing of, purchasing or is in possession of a firearm or ammunition without the relevant licence; and
 - be carrying a firearm, the subject of the offence, in conjunction with either drugs or money.³⁸
- 10.4 Again, there is no mention of “ammunition” in proposed new section 19(1ab), but current section 19(1) refers to “*any firearm or ammunition*”.
- 10.5 The Minister explained that “ammunition” is specifically excluded from proposed new sections 19(1aa) and 19(1ab). Penalties relating to ammunition are dealt with under section 19(1ad). Proposed new sections 19(1aa) and 19(1ab) are drafted so as to ensure consistency with other jurisdictions that have not included ammunition in their

³⁶ Butterworth’s Legal Dictionary.

³⁷ As opposed to purchasing or possessing.

³⁸ These are identified in the Second Reading Speech as a criminal’s “tools of trade”.

trafficking offences. According to the Minister, “*for national consistency reasons, it was decided to proceed in a similar line*”.³⁹

- 10.6 The Police Service view is that sections 19(1aa) and 19(1ab) only relate to firearms and not ammunition and that there is therefore no need to specifically exclude ammunition from the provision.

Clause 21

- 10.7 Clause 21 inserts proposed new section 22AA which concerns appeals against the Police Commissioner’s decisions, for example, a decision not to issue a licence. Proposed new section 22AA deals with information, forming part of the Police Commissioner’s decision, which is not disclosed to the aggrieved appellant.

- 10.8 Essentially a magistrate may order that such information remains confidential and is not to be disclosed to the appellant, the appellant’s representative or any other person if, on an application by the Police Commissioner, the magistrate is satisfied that the disclosure might, for example:

- prejudice the safety of a person, the effectiveness of an investigation or prosecution;
- reveal the identity of a police officer acting as an undercover officer; or
- be contrary to the public interest.⁴⁰

- 10.9 At common law there is a duty on a decision maker required to act judicially or quasi-judicially, to give reasons for a decision. The reasons must disclose adequately the intellectual process which resulted in a particular determination.⁴¹

- 10.10 In our judicial system, the duty to give reasons is an adjunct to or in some respects a part of the overall obligation to give litigants, procedural fairness. Thus, in addition to securing the statutory right of appeal, the obligation to give adequate reasons is part of the fairness to a litigant who comes to court to know why it is that he or she succeeded or has been unsuccessful.

- 10.11 However, as was said in *Lester v Booth*, (relevantly) a Western Australian case involving the unauthorised possession of a firearm, this does not mean that “*every piece of evidence, every exhibit, every word that has fallen from counsel during submissions must be alluded to expressly or even by implication in the course of*

³⁹ Letter from Hon Michelle Roberts MLA, Minister for Police, dated June 4 2004, received June 9 2004, p4.

⁴⁰ The same applies to an order of the Firearms Appeal Tribunal.

⁴¹ *Garret v Nicholson* (1999) 21 WAR 226, particularly the observations of Owen J at 248.

giving reasons."⁴² It would neither be necessary nor feasible for an obligation of that nature to be imposed on trial courts.

- 10.12 *Lester v Booth* indicates that it is sufficient if the reasoning process which led to a result is disclosed with sufficient certainty to enable the litigant to know why it is that the result ensued and to ensure that the statutory right of appeal has been secured.⁴³ Thus it appears to the Committee that even though the magistrate can order the suppression of the relevant information, the statutory right of appeal, remains intact.

- 10.13 Proposed new section 22AA(4) further adds that:

The room or place in which the magistrate or the firearms appeals tribunal hears and determines an application...is not to be regarded as an open court, and the magistrate or tribunal may order that no person is to be in the room or place without the magistrate's or tribunal's permission.

- 10.14 The Committee alerts the House to that principle of the common law which holds that trials should take place in open court.⁴⁴ Chief Justice Street in *R v Brady* referred to this as:

*...a deeply rooted principle that justice must not be administered behind closed doors - court proceedings must be exposed in their entirety to the cathartic glare of publicity. There are limited exceptions to the observance of this principle but these are well defined and sparingly allowed. Statutes are made by public processes. They are judicially administered in public proceedings. It is only thus that the right of representation and of due hearing of all legitimate submissions can be seen to have been accorded to parties subjected to the judicial process. Moreover, publicity of proceedings is one of the great bastions against the exercise of arbitrary power as well as reassurance that justice is administered fairly and impartially.*⁴⁵

- 10.15 This principle holds that the public, including the media, may attend all stages of a trial provided they are respectful and orderly.⁴⁶ Under common law, a court may not be closed, even if the presiding judge considers that in the interests of decency the evidence should be given in private, the only exception being where justice cannot be

⁴² *Lester v Booth* [2000] WASCA 155 at paragraph 10.

⁴³ *Lester v Booth* [2000] WASCA 155.

⁴⁴ *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 299-301.

⁴⁵ *R v Brady* (NSW Court of Criminal Appeal, July 29 1977, unreported).

⁴⁶ *Russell v Russell* (1976) 134 CLR 495 at 520.

secured otherwise than by ordering the court to be cleared. This is because the privilege to see what the courts do and say belongs to the public generally.⁴⁷

- 10.16 The right to a public hearing extends to all courts, including proceedings before a magistrate.⁴⁸ However, there is an exception where the interests of justice require,⁴⁹ and the relevant factors may include the need for security checks or the prominence of the people charged and the public interest in the proceedings.⁵⁰ The Committee alerts the House that clause 22AA(4) abrogates this common law principle and gives legislative sanction to the common law exception. However, the public interest consideration is a cogent rationale.

- 10.17 In *Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission*⁵¹ the High Court of Australia said:

*Courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities that the courts have recognised as fundamental unless the legislation does so in unambiguous terms... In construing legislation, the courts begin with the presumption that the legislature does not interfere with these fundamental rights, freedoms and immunities unless it makes its intention to do so unmistakably clear.*⁵²

- 10.18 The Committee concludes that clause 22AA(4) is unmistakably clear in abrogating the fundamental common law right to have an appeal heard in open court.

Clause 28

- 10.19 Clause 28 concerning current section 32 of the Act requires the holder of a Dealer's, Repairer's or Manufacturer's Licence to keep all firearms and ammunition in a strongroom or in safe keeping, securely fastened during any period when the premises are not open for trade. Currently the penalty is a fine of \$2,000.
- 10.20 The Committee noted that this is the only current provision of the Act to have its penalty provision amended so as to provide, for the first time, a term of imprisonment. All other offences currently have imprisonment as part of the penalty and as an alternative to a fine. Under the proposed amendment, the penalty for a first offence

⁴⁷ per Samuels JA in *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 310.

⁴⁸ *David Syme & Co Ltd v General Motors-Holden's Ltd* [1984] 2 NSWLR 294 at 299-301.

⁴⁹ *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254; [1916-17] All ER Rep Ext 1218; *Scott v Scott* [1913] AC 417 at 436-7; [1911-13] All ER Rep 1 per Viscount Haldane, LC.

⁵⁰ *Glennan v Hornibrook* (unreported, Court of Appeal, September 19 1985, distinguishing *R v Governor of Lewes Prison; Ex parte Doyle* [1917] 2 KB 254; [1916-17] All ER Rep Ext 1218).

⁵¹ (2002) 77 ALJR 40.

⁵² (2002) 77 ALJR 40 at 43 per Gleeson CJ, Gaudron, Gummow and Hayne JJ, at 49 per McHugh J, and at 65-66 per Callinan J.

against section 32 is a fine of \$4,000. However, for a subsequent offence, imprisonment for two years or a fine of \$8 000 is proposed.

- 10.21 Imprisonment is a serious penalty involving the fundamental right to personal liberty in circumstances where the holders of Dealer's, Repairer's or Manufacturer's Licences are engaging in a high risk commercial activity, constituting their livelihood. The Second Reading Speech states that the proposed new amendment "*more than doubles the existing penalty*" but this is inaccurate.⁵³ The Committee queried the rationale behind imposing a term of imprisonment for a subsequent breach of section 32 by holders of Dealer's, Repairer's or Manufacturer's Licences. If passed, section 32 will be on a par with the penalty for example, in section 23(9a) concerning a person who discharges any firearm in a manner to cause fear to the public or any person.
- 10.22 The Committee noted from the Second Reading Speech that the increase in penalties is a policy decision of the government and pursuant to standing order 230A(5) the policy of a Bill is not a matter for inquiry by the Committee. Thus, the Committee accepts that increased penalties, generally, is a subject matter, beyond its terms of reference. However, given the gravity of the proposed new penalty, the Committee requested from the Minister, the rationale for imposing a term of imprisonment for this particular offence.
- 10.23 The Minister explained that the new penalty is comparable to those prescribed for similar offences in other jurisdictions.⁵⁴ The Minister said the amendment is opportunistic in that whilst the Act is being amended to implement COAG Resolutions, it was considered timely to review all penalties to ensure Western Australia maintained its reputation for robust firearms legislation.

Clause 29

- 10.24 Clause 29 inserts proposed new section 34(2)(ea) into the Act. This permits regulations to be made about Dealers providing the Police Commissioner with information about persons involved in the management of a firearms business.
- 10.25 According to the Explanatory Memorandum, doubt was expressed about the ability of the Governor to make regulations 6C, D, E, F and G when they were gazetted on

⁵³ Second Reading Speech, p4.

⁵⁴ Letter from Hon Michelle Roberts MLA, Minister for Police, dated June 4 2004, received June 9 2004, p5. The nearest equivalent provision is section 17 of the Northern Territory's *Firearms Act 1993*. The penalty there is 50 penalty units or imprisonment for 12 months. For Queensland, this is section 60 of the *Weapons Act 1990 (Qld)*, maximum penalty is 100 penalty units or 2 years imprisonment. For Victoria, this is section 92 of the *Firearms Act 1996 (Vic)*, penalty is 120 penalty units or two years imprisonment. But compare with the Australian Capital Territory, section 71 of the *Firearms Act 1996 (ACT)*, maximum penalty: 50 penalty units. Also section 48(1) of the *Firearms Act 1996 (NSW)* maximum penalty: 50 penalty units and section 97 of Tasmania's *Firearms Act 1996 (Tas)*, the penalty is a fine not exceeding 50 penalty units.

August 12 2003.⁵⁵ The Committee appreciates that an amendment has now been proposed to clarify the status of those recently gazetted regulations, but requested the Minister explain:

- the origin of the doubt;
- whether the regulations were validly made from the time of gazettal to the time of the proposed amendment;
- why, during the previous six months and given the seriousness of the doubt, the *Firearms Regulations 1974* were not amended so as to repeal the offending regulations; and
- whether in the previous six months, those regulations have been operationalised by Dealers and the Police Service, or relied upon by the Police Service to deny issuing or renewing a Dealer's Licence.⁵⁶

10.26 In response, the Minister said that it was originally intended that regulations would provide a specific penalty for Dealers who employed "prescribed persons", but Parliamentary Counsel was of the view that the regulation making power would not allow the creation of that offence. The regulation never proceeded.

10.27 The Minister pointed out that the *Firearms Amendment Regulations (No. 2) 2003* have been held to be valid from the time of gazettal and were not beyond the power of the Act. Therefore, there is no need to repeal or amend those Regulations. The Minister reported that there have been no breaches of the amending Regulations since gazettal.

10.28 The Committee finds that despite Parliamentary Counsel's view, the very fact of clause 29 being proposed suggests there is a problem with the *Firearms Amendment Regulations (No. 2) 2003* and that when proposed new section 34(2)(ea) is passed, the matter will be rectified.

Penalties

10.29 The Committee noted that generally, penalties in the Act have not been increased since 1996. Many are significantly increased. For example:

⁵⁵ Explanatory Memorandum to the Bill at p12. Under regulation 6E for example, the Police Commissioner must not issue or renew a Dealer's Licence if the Police Commissioner (a) is not satisfied that the applicant is to be the person primarily responsible for the management of the business to be carried on under the authority of the licence; or (b) is of the opinion that a person who will be (if the licence is issued or renewed) a close associate of the applicant is not a fit and proper person to be a close associate of the holder of a Dealer's Licence.

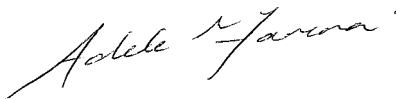
⁵⁶ Under regulation 6E, the Police Commissioner must not issue or renew a Dealer's Licence if the Police Commissioner (a) is not satisfied that the applicant is to be the person primarily responsible for the management of the business to be carried on under the authority of the licence; or (b) is of the opinion that a person who will be (if the licence is issued or renewed) a close associate of the applicant is not a fit and proper person to be a close associate of the holder of a Dealer's Licence.

- defacing or removing a firearm's identification mark is amended to three years imprisonment or a fine of \$12,000, increased from 18 months or a fine of \$6,000; and
- clause 23 - general offences penalties such as the fine associated with carrying or using a firearm to commit an indictable offence is increased from \$4,000 to \$16,000 and the term of imprisonment is increased from 18 months to four years.⁵⁷

10.30 The Committee noted from the Second Reading Speech that the increase in penalties is a policy decision of the government as part of a COAG agreement and pursuant to standing order 230A(5) the policy of a Bill is not a matter for inquiry by the Committee. Thus, the Committee accepts that increased penalties is a subject matter, beyond its terms of reference.

11 CONCLUSION

11.1 The Committee commends its Report to the House for consideration.



Hon Adele Farina MLC
Chairman
June 22 2004

⁵⁷ Proposed amendment to current section 23(3)(b).

APPENDIX 1
IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

APPENDIX 1

IDENTIFIED STRUCTURES FOR UNIFORM LEGISLATION

The former Legislative Assembly Standing Committee on Uniform Legislation and Intergovernmental Agreements identified and classified nine legislative structures relevant to the issue of uniformity in legislation which were endorsed by the 1996 Position Paper. A brief description of each is provided below.

- Structure 1:** *Complementary Commonwealth-State or Co-operative Legislation.* The Commonwealth passes legislation, and each State or Territory passes legislation which interlocks with it and which is restricted in its operation to matters not falling within the Commonwealth's constitutional powers.
- Structure 2:** *Complementary or Mirror Legislation.* For matters which involve dual, overlapping, or uncertain division of constitutional powers, essentially identical legislation is passed in each jurisdiction.
- Structure 3:** *Template, Co-operative, Applied or Adopted Complementary Legislation.* Here a jurisdiction enacts the main piece of legislation, with the other jurisdictions passing Acts which do not replicate, but merely adopt that Act and subsequent amendments as their own.
- Structure 4:** *Referral of Power.* The Commonwealth enacts national legislation following a referral of relevant State power to it under section 51 (xxxvii) of the Australian Constitution.
- Structure 5:** *Alternative Consistent Legislation.* Host legislation in one jurisdiction is utilised by other jurisdictions which pass legislation stating that certain matters will be lawful in their own jurisdictions if they would be lawful in the host jurisdiction. The non-host jurisdictions cleanse their own statute books of provisions inconsistent with the pertinent host legislation.
- Structure 6:** *Mutual Recognition.* Recognises the rules and regulation of other jurisdictions. Mutual recognition of regulations enables goods or services to be traded across jurisdictions. For example, if goods or services to be traded comply with the legislation in their jurisdiction of origin they need not comply with inconsistent requirements otherwise operable in a second jurisdiction, into which they are imported or sold.

- Structure 7:** *Unilateralism.* Each jurisdiction goes its own way. In effect, this is the antithesis of uniformity.
- Structure 8:** *Non-Binding National Standards Model.* Each jurisdiction passes its own legislation but a national authority is appointed to make decisions under that legislation. Such decisions are, however, variable by the respective State or Territory Ministers.
- Structure 9:** *Adoptive Recognition.* A jurisdiction may choose to recognise the decision making process of another jurisdiction as meeting the requirements of its own legislation regardless of whether this recognition is mutual.

APPENDIX 2
LETTER FROM MINISTER ATTACHING
CLUB/ASSOCIATION CONDITIONAL LETTER

APPENDIX 2

LETTER FROM MINISTER ATTACHING CLUB/ASSOCIATION CONDITIONAL LETTER



Hon Michelle Roberts BA DipEd MLA
MINISTER FOR POLICE AND EMERGENCY SERVICES; JUSTICE; COMMUNITY SAFETY
MEMBER FOR MIDLAND

Our Ref: 18053

Ms Anne Turner
Advisory Officer (Legal)
Uniform Legislation and General Purposes Committee
Legislative Council Committee Office
Parliament House
PERTH WA 6000

Dear Ms Turner

Reference is made to your correspondence of 23 April 2004 requesting additional information on the *Firearms Amendment Bill 2003*. Please accept my apology for the delay in responding, however, it was not possible to obtain the necessary advice to respond to the Committee's queries within the nominated six days.

The following advice and information are provided in response to the Committee's queries.

Notably, prior to the Inter-Governmental Agreement being signed, extensive negotiations were held between the State and Commonwealth that resulted in the Commonwealth recognising Western Australia's unique demographics and existing regulatory regime and agreeing to a number of COAG resolutions being implemented by policy.

COAG Resolutions 10, 11, 18 and 21

These resolutions have been implemented by virtue of Section 21(1) of the *Firearms Act 1973*, which gives the Commissioner the power to impose conditions, limitations and restrictions on any licence, permit or approval issued or granted under this Act.

To ensure compliance with these resolutions, the Police Service has issued a 'conditional letter', stating the requirements of the resolutions, to each club and association has been issued (please see Attachment A).

The Police Service advise implementation of resolution 18 is by means of both compliance with the "conditional letter" and section 20 of the Act. Resolution

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18 provides that jurisdictions should cancel a licence where it can be shown that the loss or theft of a firearm was due to negligence or fraud on the part of the licensee. The Police Service contend that adherence to the terms of the 'conditional letter' in conjunction with section 20 of the Act fulfils Resolution 18, that is if a person's firearm is lost/stolen due to negligence or a firearm licence is obtained by fraud, the firearm licence can be revoked pursuant to section 20 of the Firearms Act. Section 20 provides many avenues for the Commissioner to revoke licenses in the case of negligent loss of a firearm. The Police Service advise that section 20 is used extensively in instances of unnecessary loss of a firearm.

COAG Resolution 5

Negotiations were held with the Commonwealth, with regard to recognising options within the current regulatory framework to achieve compliance with APMC/COAG Resolution 5. Western Australia has a history of licensing historical firearms, and their owners, within a rigorous control regime that ensures that only fit and proper people are able to own/collect historical firearms. Furthermore, the geographical spread of West Australian collectors made it impractical for these persons to attend regular meetings of accredited historical societies, which, it was anticipated, would predominantly be based in the metropolitan area.

To meet the COAG objective of ensuring that appropriate individuals hold a collectors' license, not only at the time of initial issue, but over the passage of time, an ongoing checking mechanism will be established. To this end, Western Australia will:

- reduce the license period from 5 to 3 years in Section 9A of the *Firearms Act*;
- use Section 21(1)(a) of the *Firearms Act* to place additional conditions on renewal of licences:
- require provision of a statutory declaration stating the continuing lawful reasons for maintaining their license and associated firearms; or
- require attendance at the local police station to provide documentation or a statement to police substantiating their ongoing need for the license. (Police officers will interview applicants);
- amend police firearm licensing procedures to:
 - incorporate the above; and
 - centralise all license application, addition and renewal processing in the Police Firearms Branch to ensure consistency and compliance in the application of these processes; and
- enable, but not require the Commissioner to accredit historical societies..

The Commonwealth has accepted that this more rigorous licensing regime will achieve similar outcomes to the requirement for historical collectors to be members of accredited societies and endorse their licence applications. (ie Resolution 5a – 5b).

COAG 13

Under existing legislation the Commissioner may refuse or revoke a firearms licence pursuant to sections 11 or 20 where it is in the public interest to do so. The Police Service advise that the inclusion of the term *intelligence* serves to better describe the process by which police may determine what is in the public interest. Intelligence in this sense does not infer that a decision may be based on rumour or innuendo, but rather valid, verifiable information which may include criminal records or other sources that will withstand an appeal against the Commissioner's decision.

The Police Service further advise that it is an accepted rule of statutory construction that where a word is not defined in relevant legislation, the ordinary meaning of the word as determined by a dictionary should be used. In this context it is submitted there is no discernable difference between intelligence and criminal intelligence as intelligence that in any way deals with common and statute laws, criminals, criminal activity or unlawfulness becomes criminal intelligence. Essentially all holdings of intelligence within the Police Service is criminal intelligence using the ordinary meaning.

The current provisions contained in section 20(ac) provide that where the Commissioner is satisfied that the issues of a firearm licence is not in the public interest, he can revoke the licence. Not being in the public interest may include lawful acts that are none the less contrary to the good operation of the community. Examples include instances such as when the licence holder may be involved with organised crime groups.

However, should the Commissioner revoke the firearm licence due to the person being involved with an organised crime group and the person appeals, the Commissioner must reveal the reason in an open court, which could jeopardise an undercover operative and disclose to the organised crime operations the extent of police holdings on their unlawful activities.

The new provision provides that where the Commissioner uses intelligence to revoke a licence an order can be sought from a magistrate that the intelligence should not be disclosed in prescribed circumstances. Essentially, the new provision allows the Commissioner to appeal to a magistrate to protect the source of the information should it be necessary.

Clause 16

The Police Service advise that while the proposed amendment referred to in this clause does not expressly include the Commissioner in the regulation making process, the *Firearms Act* already adequately provides a role for the Commissioner in the making of regulations through the Minister. The existing protocol allow for the Commissioner to make recommendation to the Minister on regulations and remains the most effective means of administering the Act. It is not considered necessary therefore to include an express provision relating to regulations concerning accredited societies of collectors. I support this position.

Clause 18

Your comments in relation to section 19 concerning 'offence' and 'crime' are noted. The purpose of the amendment is to upgrade the offence from a 'simple offence' that is determined by a Magistrate to a "crime" that is determined by a jury. The Police Service advise that the proposed penalty of five years imprisonment in sub section 19(1ad) is beyond the sentencing restraints of a Magistrate and in the case of serious breaches only the superior court could issue an appropriate penalty. It should be noted that a person charged pursuant to section 19(1) other than the circumstances set out in sections 19(1aa) and 19(1ab) can be dealt with summarily.

This stance is supported in COAG resolution 26, related to Penalties for Illegal Possession of Firearms;

R26. Having regard to the National Firearms Trafficking Policy Agreement of July 2002, jurisdictions agree, as a matter of priority, to establish substantial penalties for the illegal possession of a firearm.

Ammunition has been specifically excluded from this provision. Penalties relating to ammunition are dealt with under s19(1ad). The increase in penalties relate to the threat of firearms trafficking in particular, and the use of firearms in drug related offences. The Police Service advise that during drafting, the amendments of other jurisdictions were examined to establish how the issue of trafficking had been handled. It became apparent that none of the other jurisdictions had included ammunition in their trafficking offence. Therefore, for national consistency reasons it was decided to proceed in a similar line. Furthermore the Police Service considers that while a case could be made to include ammunition, any attempt at defining the quantity necessary to be deemed to be trafficking would be extremely subjective as there is no reliable information on which to base this.

The Police Service submit that section 19(1aa) is quite clear in that the offence only relates to firearms and not ammunition and there is therefore no need to specifically exclude ammunition from the provision.

With regard to section 19(1ab), the inclusion of this provision is designed to send a very clear message to those involved in the drug trade that the use of firearms in conjunction with their criminal activity will not be tolerated. It would seem that to include ammunition as an element of the offence would fail to recognise that ammunition on its own does not pose the same threat as a firearm.

The Police Service considers that section 19(1ab) is quite clear in that the offence only relates to firearms and not ammunition and that there is therefore no need to specifically exclude ammunition from the provision.

With regard to Section 19(ac), this new provision relates to where a person has contravened section 19(1) in circumstances that only relate to firearms and not ammunition. The proposed amendments to section 19(1) would still

provide a substantial penalty for the unlawful distribution and possession of ammunition (ie 5years imprisonment).

Section 19(1) creates offences pertaining to dealing in or possession of either firearms or ammunition. In respect to this offence, the penalty provisions for firearms are dealt with under 19(1aa) – (1ad) and the penalty provisions for ammunition is dealt with under 19(1ad).

Clause 28

With the Firearms Act 1973 being amended to implement the COAG resolutions, it was considered an opportune time to review all penalties contained within the Act to ensure Western Australia maintained its reputation for robust legislation to control the possession and use of firearms.

Dealer's, Repairer's and Manufacturer's who have been previously convicted of failing to store and secure their firearms in accordance with this section should be liable to penalty of 2 years imprisonment or an \$8 000 fine. This penalty is comparable to penalties prescribed for similar offences in other jurisdictions.

Clause 29

It was originally intended that the regulations would provide a specific penalty for Dealer's who employed "prescribed persons". The draftsperson was of the opinion that the regulation making powers provision contained in the Act did not allow the creation of this offence.

The regulations have been held to be valid from the time of gazettal. Parliamentary Counsel has advised that the Firearms Amendment Regulations (No.2) 2003 are not "ultra vires". As the amending regulations are not ultra vires there was no need to repeal or amend.

Since the amending regulations came into operation on 12 August 2003, there have been no breaches of these provisions reported.

I trust the above advice and information is of assistance to the Committee.



**HON MICHELLE ROBERTS MLA
MINISTER FOR POLICE AND EMERGENCY SERVICES**

04 JUN 2004

Attachment

WESTERN AUSTRALIA POLICE SERVICE
FIREARMS BRANCH
(TRAFFIC & OPERATIONS SUPPORT)
210 ADELAIDE TERRACE
EAST PERTH WA 6004
TELEPHONE: (08) 9223 7009
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Approved Shooting Club/Association

CLUB / ASSOCIATION CONDITIONAL LETTER

In accordance with the Council Of Australian Governments (COAG) 'Handgun Reforms' of 6th December 2002, which resulted in 28 resolutions being passed for implementation by all state and territory firearm licensing authorities, the Firearms Branch of the Western Australian Police Service has implemented some of these resolutions within the *Firearms Act 1973* and Firearms Regulations, while others will be conditions imposed on approved shooting clubs/associations.

Therefore, in accordance with Section 21(1) of the *Firearms Act 1973*, the following conditions are for strict compliance by your club/association and are in addition to any approved conditions currently enforced by legislation. These conditions only apply to handguns for target shooters.

Where applicable, the Club Committee or Association shall:-

- Where deemed necessary, require new applicants for membership to provide a Police Clearance Certificate prior to such membership being approved. Confirmation of the production of a Police Clearance Certificate is to be endorsed upon the club support letter;
- Where deemed necessary, require new applicants for membership to provide two written character references from people they have known for at least two years prior to such membership being approved;
- Provide a written report to the police as soon as is practicable of any serious concerns relating to a member's fitness to hold a firearm license;
- Provide a written report to the police as soon as is practicable of the expulsion of any member and the reasons for the expulsion;
- When the club/association becomes aware that a member's firearm license has been revoked or suspended as a result of the improper use of a firearm, a violent offence or the issue of a Violence Restraining Order (VRO), deny the member the use of any firearm at the club;

- Maintain an audited register showing members' details, handguns owned and participation rates. This report shall be provided to the police on request;
- Where available, provide information of a member's multiple club/association membership with any club/association handgun support letter;
- Provide handgun support letters detailing the particular discipline for which the firearm is required;
- Provide club organised competitions to enable its members to comply with the legislated participation rates for handguns.

Failure to comply with any of these conditions may cause your club/association to be in breach of Section 21(1) of the Firearms Act and further, it may be cause for the Commissioner of Police to rescind the 'approved' status of your club/association.

Inspector
Operations Manager
Response and Specialist Support

4 November 2003