
# REPORT OF THE

# STANDING COMMITTEE ON LEGISLATION

## IN RELATION TO THE

# *Weapons Bill 1998*

Presented by Hon Bill Stretch (Deputy Chairman)

Report 44

## STANDING COMMITTEE ON LEGISLATION

**Terms of Reference:**

1 There is hereby appointed a standing committee to be known as the *Legislation Committee.*

2 The Committee consists of 5 members.

3 A Bill originating in either House, other than a Bill which the Council may not amend, may be referred to the Committee after its second reading or during any subsequent stage by motion without notice.

4 A referral under clause 3 includes a recommittal.

5 The functions of the Committee are to consider and report on

(a) Bills referred under this order;

(b) what written laws of the State and spent or obsolete Acts of Parliament might be repealed from time to time;

(c) what amendments of a technical or drafting nature might be made to the statute book;

(d) the form and availability of written laws and their publication.

**Members at the time of this inquiry:**

Hon Bruce Donaldson MLC (Chairman)
Hon Bill Stretch MLC (Deputy Chairman)
Hon John Cowdell MLC
Hon Derrick Tomlinson MLC
Hon Giz Watson MLC
Hon Norm Kelly MLC (participating member)
Hon Simon O'Brien MLC (participating member)

**Staff at the time of this inquiry:**

Mr Michael Coleman, Advisory/Research Officer
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# CHAPTER 1

# EXECUTIVE SUMMARY AND RECOMMENDATIONS

## 1.1 Executive Summary

This report sets out the results of this Committee's inquiry into the *Weapons Bill 1998* ("**Bill**"), referred by the Legislative Council of Western Australia on 20 October 1998 to the Committee for consideration and report.

### What the Bill does

Currently, section 65(4a) of the *Police Act 1892* is the central provision in Western Australian law dealing with the carrying of weapons. In replacing that provision, the Bill expands the ambit of weapons laws in a number of ways, the most significant being to:

- create **new categories of weapons** and other articles, and to detail different offences relating to each category;
- **increase penalties** for offences relating to weapons and other articles;
- prohibit, in most circumstances, a person possessing a weapon or other article for purposes of **defence**;
- make it an offence to carry or possess an article other than a weapon with the **intention** of using it, whether or not for defence, to injure or disable;
- partially **reverse the burden of proof** for weapons offences, so that where (a) a person is in possession of a "controlled weapon" or (b) there are reasonable grounds for suspecting that the person has the intention of using an article other than a weapon to injure or disable, it is presumed that an offence is committed unless the person can prove otherwise;
- empower a member of the police force to **search** persons and **seize** weapons; and
- provide for **forfeiture** of a weapon to the Crown or **retention** by a member of the police force in a range of circumstances.

### Definitions of "prohibited weapon" and "controlled weapon"

The Bill defines a "prohibited weapon" and one type of "controlled weapon" to be whatever the regulations prescribe. The argument for this approach is that first, it is appropriate for the articles to be listed in regulations as listing them in a schedule to the Act would be too cumbersome, and secondly that defining in detail what articles can be prescribed would make the regulations vulnerable to challenge on the ground that they are beyond power.

It is appropriate that prohibited and controlled weapons should be prescribed by regulation. However, it is reasonable to set some parameters indicating what can be prescribed. The Bill clearly differentiates in its operative provisions between prohibited weapons, controlled weapons and other articles. It is appropriate that the definitions reflect this differentiation.

**Weapons collectors**

The Bill makes it an offence for anyone other than a member of the police force or an employee of a recognised museum, in the performance of their respective functions, to possess a prohibited weapon, unless delivering it to the police. This means that a person who has a weapons collection which includes a prohibited weapon will commit an offence, unless regulations providing an exception are introduced.

The Bill should recognise the existence of weapons collectors by specifically providing for regulations allowing an exception in their favour, subject to appropriate safeguards. Further, regulations should be prepared to this effect.

**Definition of "controlled weapon"**

"Controlled weapon" is defined to cover weapons similar to those covered by existing section 65(4a) of the *Police Act*, and in addition specifies that articles for use in the practice of a martial sport and the like are controlled weapons. Defining the term broadly is appropriate, with the qualification that not all articles used in martial sports, but only articles used for defence or attack, should be included.

**"Lawful excuse" for possessing a controlled weapon**

The Bill allows that a person can have a "lawful excuse" for possessing a controlled weapon. **Under current law, "defence"** of self, others and property can be a lawful excuse where, for example, a person has a realistic and well-founded fear of attack. The Bill, in contrast, specifies that **"defence" cannot be a lawful excuse** for possessing a controlled weapon. The House should consider whether the Bill's removal of the right to carry a controlled weapon for defence is appropriate.

There is considerable support for allowing the carrying of controlled weapons which are specifically designed for defence, such as pepper sprays. Although the Bill itself does not allow this, an exception can be effected by way of regulations. The Committee supports preparation of regulations which would allow persons **at all times** (ie whether or not there is a "realistic and well-founded fear of attack") to carry such weapons.

The Bill, like current law, provides that a person carrying a controlled weapon bears the burden of proving that they have a lawful excuse for doing so. On balance, this reversal of the usual burden of proof is justified, but it has the potential to cause injustice where a person carries a weapon for a legitimate purpose but has difficulty proving the purpose. The provision relies heavily on the good judgment and common sense of the police and the courts.

**"Reasonable grounds for suspecting" intention to use an article to injure**

In addition to dealing with prohibited weapons and controlled weapons, the Bill includes a "catch-all" clause 8 making it an offence to carry or possess **any article** with the **intention** of using it to injure or disable a person, whether or not for defence. Where there are "reasonable grounds for suspecting" such intention, there is a statutory presumption that the person has the intention and the person must seek to prove the contrary.

Unlike the provisions discussed above, which in essence reproduce existing law with some modifications, clause 8 creates a new type of criminal offence, one which operates on a statutory presumption of guilt upon a mere suspicion of a person's intention. While on balance there is some justification for the creation of the offence, it is of concern that the threshold for laying a charge under the provision is a very low one.

**Possessing an article for defence**

Clause 8 substantially restricts the right to possess an article other than a weapon, such as a baseball bat or crowbar, for defence. A person can carry or possess an article for defence only at a "dwelling" and only for use "in circumstances that the person has reasonable grounds to apprehend may arise".

It is of concern that keeping an article for defence at places such as on a property but outside the dwelling, at a workplace or in a vehicle will become an offence. Similarly, picking up an article in an instinctive act of defence could become an offence. Confusingly, in many circumstances it will be legal under the *Criminal Code* to **use** an article for defence, while **at the same time** it is an offence under clause 8 to **possess** the article.

The defence to a charge under clause 8 should be broadened. This could be most simply done by allowing a person to possess or carry an article for defence where the person has a "lawful excuse". Alternatively, or in addition, the defence available for a person at a dwelling could be expanded to include other places, or by removing the limitation relating to "reasonable apprehension".

**Search and seizure provisions**

The Bill introduces new powers for a police officer to search a person whom the officer believes on reasonable grounds to be committing an offence under the Bill, and to seize weapons. There is some concern that because the offences under the Bill are so broad, the "reasonable grounds" test is so easily satisfied that it would be almost impossible to prove that an officer conducting a search did not have such reasonable grounds, for the purpose of disciplinary action or charges being laid against the officer.

The Bill makes no provision, unlike other search powers, for searches of women to be carried out by a female police officer or female member of the public authorised by a police officer. The Bill should be amended to include such provision.

## 1.2 Recommendations

Recommendations are grouped as they appear in the text at the page numbers indicated.

Page 16:

**Recommendation 1: that the definition of "prohibited weapon" in clause 3 be amended to incorporate a description of the general characteristics of a prohibited weapon.**

Page 18:

**Recommendation 2: that the Bill be amended by the insertion of a new clause 10(3) to provide for the preparation of regulations which will allow a bona fide weapons collector to maintain a collection including prohibited and controlled weapons, subject to suitable safeguards.**

**Recommendation 3: that the Government prepare appropriate regulations under the new clause.**

Page 24:

**Recommendation 4: that consideration be given to amending paragraph (a) of the definition of "controlled weapon" in clause 3 to incorporate a description of the general characteristics of a controlled weapon.**

Page 26:

**Recommendation 5: that paragraph (b)(iii) of the definition of "controlled weapon" in clause 3 be amended to read as follows:**

***" . . . (iii) for attack or defence in the practice of a martial sport, art or similar discipline. "***

Page 33:

**Recommendation 6: that the Government prepare regulations which would allow persons to carry or possess at all times particular types of controlled weapons designed for defence.**

Page 47:

**Recommendation 7: that clause 8 be amended to provide a broader defence (or set of defences) to a charge under clause 8(1).**

**Recommendation 8: that the House consider whether the defence to a charge under clause 8(1) should be broadened:**

- **so that a person is allowed to carry or possess an article other than a weapon for defence in circumstances where the person has a "lawful excuse"; or**
- **to enable a person to carry or possess an article for defence in a specified range of circumstances.**

Page 52:

**Recommendation 9: that Part 3 be amended to provide for searches of women to be conducted by a female police officer or a female member of the public authorised by a police officer, similarly to section 53B(2) of the *Police Act*.**

## CHAPTER 2

# BILL'S HISTORY AND REFERENCE TO COMMITTEE

The Bill was introduced into the Legislative Council on 19 August 1998 and read a first time, on a motion of the Attorney General, Hon Peter Foss MLC.[1]

The Bill was debated and read a second time on 20 October 1998, on a motion of the Attorney General.[2]

Immediately following second reading the Bill was referred to this Committee on a motion of Hon Nick Griffiths MLC in the following terms:

> " *Referral to Standing Committee on Legislation*
>
> ***HON N.D. GRIFFITHS:*** *I move -*
>
> *That the Weapons Bill be referred to the Standing Committee on Legislation for consideration and report, and that the Committee report no later than 10 November 1998."*[3]

The Committee commenced its consideration of the Bill at its meeting of 28 October 1998.

On 10 November 1998 the Chairman of the Committee sought and was granted by the House an extension of time in which to report on the Bill until 26 November 1998.

On 25 November 1998 the Chairman of the Committee sought and was granted by the House a further extension of time in which to report on the Bill until 3 December 1998.

[1]Hansard, Legislative Council 19/8/1998, p450
[2]Hansard, Legislative Council 20/10/1998, p2256-2270
[3]Hansard, Legislative Council 20/10/1998, p2270

## CHAPTER 3

# PROCEDURE OF THIS INQUIRY

Because of the short reporting period for the inquiry, the Committee did not seek public submissions on the Bill.

The Committee conducted hearings with the following witnesses on 2 November 1998:

- Mr Haydn Green
  Superintendent (Legal and Policy)
  W.A. Police Service

- Mr Richard Sims
  Legislation Officer
  W.A. Police Service

Superintendent Green and Mr Sims are responsible for the preparation of the Bill and appeared on behalf of the W.A. Police Service.

- Mr William Millar
  Assessor, Criminal Injuries Compensation

Mr Millar prepared a commentary on the Bill on behalf of the Law Society (WA) and appeared on behalf of the Law Society.

The Committee conducted a hearing with the following witnesses on 18 November 1998:

- Hon Peter Foss MLC, Attorney General
- Mr Haydn Green
- Mr Richard Sims

The Committee thanks the witnesses for offering their time and expertise to the inquiry.

# CHAPTER 4

# OVERVIEW OF THE BILL

## 4.1 General intention of the Bill

The Attorney General stated in the second reading speech for the Bill that:

> *"The Bill replaces section 65(4a) of the Police Act, which has provided police with the only powers they have had, until now, to deal with the problems of non-firearm weapons in the community. This section may have been adequate to deal with the problems in 1956 when it was introduced but it has been found wanting in recent times.*
>
> *Day after day members will have seen and read of knives and other offensive weapons being used in robberies and assaults, and of gangs fighting in our streets with nunchakus, knives, machetes, baseball bats, pickets and so on. The lack of specific powers in relation to these weapons has made it difficult for police to contain these offences. For example, under current laws, when police have cause to suspect a person is armed for inappropriate purposes they are powerless to act unless they actually sight a weapon."*[4]

As the Attorney General notes, currently the principal provision under Western Australian law dealing with possession of dangerous articles other than firearms is section 65(4a) of the *Police Act 1892*. That section reads as follows:

> "***Miscellaneous offences***
>
> ***65.*** *Every person who shall commit any of the next following offences shall on summary conviction be liable to a fine not exceeding $500 or to imprisonment for any term not exceeding 6 calendar months -*
>
> *...(4a) Every person who, without lawful excuse, carries or has on or about his person or in his possession any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon or truncheon, or any other article made or adapted for use for causing injury to the person, or intended by him for such use by him.*"

In debate on the Bill in the Legislative Council, all parties supported the general intention of the Bill, accepting that section 65(4a) is not adequate to deal with all aspects of weapons possession and new legislation is appropriate. For example, Hon N. D. Griffiths commenced his remarks as follows:

[4]Hansard, Legislative Council 19/8/1998, p450

> *"The Australian Labor Party is pleased to support the Bill, because it is about time that a Bill was introduced into this Parliament to effectively clamp down on the use of replica firearms and non-firearms weapons. . . The Australian Labor Party's approach to this Bill is consistent with its bipartisan approach to issues of public safety. We support the principles of the Bill. . . It is proper that the Parliament of Western Australia, as expeditiously as it can, consistent with making sure that the legislation is workable, deals with this real issue of public safety."*[5]

### 4.2 How the Bill alters existing law

Leaving aside changes in the detail of particular offences, dealt with in the appropriate paragraphs below, the key changes which the Bill makes to existing law are:

- to create new **categories** of weapons and other articles, as discussed in [4.3] below (clauses 6, 7 and 8);

- to increase **penalties** for dealing with weapons and other articles (clauses 6(1), 7(1) and 8(1));

- to prohibit, in most circumstances, a person possessing a weapon or other article for purposes of **defence** (clauses 7(3) and 8(1));

- to make it an offence to carry or possess an **article other than a weapon** with the **intention** of using it, whether or not for defence, to injure or disable (clause 8(1));

- to partially reverse the burden of proof for weapons offences, so that where (a) a person is in possession of a "controlled weapon" or (b) there are reasonable grounds for suspecting that the person has the intention of using an article other than a weapon to injure or disable, it is presumed that an offence is committed unless the person can prove a lawful excuse (clauses 7(1) and 8(1)).

- to empower a police officer to **search** persons and **seize** weapons (clause 13); and

- to provide for **forfeiture** of a weapon to the Crown or retention by a member of the police force in a range of circumstances (clauses 15, 16 and 17).

A notable feature of the arrangement of the Bill is that it is self-contained. That is, it does not rely on existing provisions of the *Police Act 1892* or the *Criminal Code*, but stands alone as the law covering all aspects of carrying or possessing weapons (other than firearms), including weapons offences, related offences involving other articles, searching of suspects, seizure and forfeiture of weapons.

The Bill does not, however, affect the law relating to **use** of weapons. The laws of assault, self defence, defence of property and the like remain in the *Criminal Code*.

[5]Hansard, Legislative Council 20/10/1998, p2256

## 4.3 Classification of articles under the Bill

The Bill creates several classes of weapons and other articles, each of which is subject to different restrictions. The classes created, and the restrictions to which they are subject, can be summarised as follows. Each class is dealt with fully in following chapters.

- **Prohibited weapons** are articles prescribed as such by regulations. It is an offence for anyone, other than a member of the Police Force, a person delivering the article to a member of the Police Force or a person working for a recognised museum, to bring or send into the State, carry, possess, purchase, sell, supply or manufacture a prohibited weapon. See Chapter 5.

- **Prescribed controlled weapons** are articles prescribed as such by regulations. It is an offence for a person other than a member of the Police Force or a person working for a museum to carry or possess a controlled weapon, unless the person has a lawful excuse to do so. Defence is not a lawful excuse. See Chapter 6.

- **Other controlled weapons** are any article made or modified to be used: to injure or disable; to cause a person to fear such use; or in the practice of a martial art. It is an offence to carry or possess such a weapon, as for a prescribed controlled weapon. See Chapter 6.

- **Any other article** that is carried or possessed by a person, where the person intends to use it to injure or disable or cause a person to fear such use. See Chapter 7.

## CHAPTER 5

# CLAUSE 6 - PROHIBITED WEAPONS

### 5.1 Offences relating to prohibited weapons

The most restricted category of articles under the Bill is "*prohibited weapons*". A "*prohibited weapon*" is defined by section 3 of the Bill as follows:

> *' "**prohibited weapon"** means an article prescribed by regulations to be a prohibited weapon;'*

The Bill does not restrict in any way what type of article may be prescribed by regulations to be a prohibited weapon, meaning that the Government can prescribe any article it sees fit to be a prohibited weapon.

Clause 6 of the Bill creates offences relating to prohibited weapons and reads as follows:

> *"**6. Prohibited weapons***
>
> *(1) Except as provided in subsection (2) and section 10, a person who -*
>
> *(a) brings or sends a prohibited weapon into the State;*
>
> *(b) carries or possesses a prohibited weapon;*
>
> *(c) purchases, sells or supplies a prohibited weapon; or*
>
> *(d) manufactures a prohibited weapon,*
>
> *or attempts to do any of those things, commits an offence.*
>
> *Penalty: $8,000 or imprisonment for 2 years.*
>
> *(2) A person does not commit an offence under subsection (1)(b) if the person carries or possesses the prohibited weapon only so as to deliver it to -*
>
> *(a) a member of the Police Force; or*
>
> *(b) an employee of the Police Service."*

The chief effects of clause 6 can be summarised as follows.

- The clause 6 prohibition against dealing with prohibited weapons is absolute (apart from the narrow exceptions in clauses 6(2) and 10, and any matters prescribed by regulations). In contrast to section 65(4a) of the *Police Act* and to the other categories of weapons covered by the Bill, there is no defence of "reasonable" or "lawful" excuse which would allow a person to deal with a prohibited weapon in some circumstances.

- Section 65(4a) of the Police Act deals only with **carrying** or **having** a weapon on or about the person. Clause 6 expands the offence to include possessing (in a broadly defined sense), bringing or sending into the State, purchasing, selling, supplying or manufacturing a prohibited weapon.

- Clause 6 introduces substantial penalties for these offences.

In the course of the inquiry the Committee considered the following issues in relation to prohibited weapons.

## 5.2 Should "prohibited weapon" be defined?

The Bill places no restriction on what may be prescribed by regulations as a prohibited weapon. What articles are prohibited weapons will therefore be determined by the Governor on the advice of the Government of the day. The regulations will be subject to disallowance by either House of Parliament under section 42 of the *Interpretation Act 1984*.

The issue for the Committee's consideration is whether it is appropriate for the Bill to give unrestricted power to determine what is a "prohibited weapon" to the Executive. Arguments against and for defining "prohibited weapon" in greater detail are canvassed in the following paragraphs.

### 5.2.1 Arguments AGAINST defining "prohibited weapon"

The Committee asked the Attorney General to explain why the Bill did not define in some way what type of article could be a prohibited weapon:

> "*Under the Bill there is no restriction on what can be prescribed by the regulations as a "prohibited weapon". Do you see any difficulty arising if the Bill is amended either to include a schedule of prohibited weapons, or to define what type of article can be prescribed as a prohibited weapon?*"

The Attorney General responded as follows:

> "*It would be very bad to define what type of articles can be prescribed as a prohibited good. As soon as we do that we end up with arguments of ultra vires. We know, as a matter of policy, the sorts of items that will be prescribed. They will have no alternative use except as an offensive weapon of attack. If we put that in the Act, one of the first things we will*

*have to do is to face in every case an argument that the regulation is ultra vires. I do not think there is a great deal to be gained by that, because the real certainty comes with the fact that the item is in there and therefore it is a prohibited weapon . . .*

*As far as prohibited weapons are concerned, I do not know that any great change by way of deletion will occur. One deletion resulted from a suggestion of members of Parliament that it was appropriate that daggers were controlled. It seemed appropriate that they go under "controlled weapons" rather than "prohibited weapons". However, if a new weapon plainly should be prohibited it should be done quickly. It is a matter of the best method to proceed, and the easiest method is regulation.*"[6]

The approach taken by the Bill, in providing for the Executive to determine a matter in its absolute discretion, is not unusual. By way of comparison, section 50(1) of the Commonwealth *Customs Act 1901* sets out the fundamental power allowing restriction of imports into Australia in the following simple terms:

"***Prohibition of the importation of goods***

***50 (1)*** *The Governor-General may, by regulation, prohibit the importation of goods into Australia.*"

The advantage of this approach is that the Government of the day is able to cater for any contingency which may arise, without limitation. Leaving significant matters to be determined by the Executive by way of regulations is often argued to be the most practical way of making laws, on the basis that an overly prescriptive Act becomes unwieldy and difficult to use over time.

In support of this approach is the clear intention of clause 6 to focus on the nature of certain **articles** rather than on the **behaviour** of persons as is the case under the *Criminal Code.* While the Bill does create criminal offences, it is arguable that these offences are in some ways more akin to an offence under the *Customs Act 1901* than to an offence under the *Criminal Code*, and therefore that the non-prescriptive approach of the former is appropriate.

Finally, it is not the case that Parliament will have no opportunity to review regulations setting out what are "prohibited weapons". Parliament has the capacity under the *Interpretation Act 1984* to disallow any such regulations.

5.2.2 Arguments FOR defining "prohibited weapon"

Mr William Millar of the Law Society (WA) argues against the Bill's failure to define "prohibited weapon":

[6]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p1

> "*The main concern of the Law Society is that the legislation does not draw any distinction or guidelines on what will be prohibited, what will be controlled, and the rest. One can understand the reasons the police want to be able to adapt the legislation as circumstances change. However, it seems very unsatisfactory from the public's point of view that, in effect, Parliament will be giving carte blanche to the Governor - in effect, the Executive - to declare what will be prohibited and controlled without any guidelines whatsoever. If the real concern of the police is a nunchaku, for example, why not spell it out and say so. If they have other weapons in mind, they should be spelt out in the legislation.*"[7]

It is argued against the approach taken by the Bill that, in accordance with the doctrine of Parliamentary supremacy over the Executive, it is desirable for substantive laws to be made by Parliament unless there is good reason otherwise. Unrestricted power to determine the substance of a law should only be given to the Executive where the case for doing so is clearly made out.

In this light, the Bill can be distinguished from the *Customs Act 1901*. In the case of that Act, the list of goods subject to import restrictions is so large as to make it impractical for Parliament to have an ongoing role in maintaining the list. Giving unrestricted power to the Executive to control import of goods is therefore justified. The list of prohibited weapons under the Bill, in contrast, is not likely to be extensive. It does not appear impractical for Parliament to establish, and from time to time review, the list.

A further consideration is that import controls, unlike weapons offences, do not raise civil liberties issues. While it may be appropriate for Parliament to hand over substantial powers to the Executive in relation to import of **goods**, it does not follow that it is appropriate in relation to police powers affecting **persons**.

It is possible to define in broad terms what is a "prohibited weapon". The Attorney General in his second reading speech indicated what type of articles would be included in the category:

> "*The first category is prohibited weapons. These are weapons that have no other purpose than to cause injury and include most of the non-firearms weapons of the type defined in schedule 2 of Federal Customs (Prohibited Imports) Regulations.*"[8]

5.2.3 Options for defining "prohibited weapon"

In considering the question of whether "prohibited weapon" should be defined in greater detail, the Committee considered options for doing so. Some possible approaches are as follows, from the most to the least restrictive.

[7]Mr William Millar, 2/11/1998, transcript of evidence, p25

[8]Hansard, Legislative Council 19/8/1998, p450

- The Act could set out an **exclusive list** of prohibited weapons. There would be no capacity for the Executive to add a new type of article to the list. To add a new type of article to the list would require amendment by Parliament. This approach is favoured by the Law Society (WA).

- The Act could set out a **list plus definition** of prohibited weapons. This is the approach of current section 65(4a) of the *Police Act*, which lists a number of weapons then adds "*or any other article made or adapted for use for causing injury to the person*". (This is more restrictive than the mechanism below, as the definition could be read down by analogy to the articles in the list.)

- The Act could **define** what articles can be prohibited weapons, **without listing** any articles or providing for a list in regulations. The disadvantage of this approach is that providing a list, whether in the Bill or in regulations, adds to certainty from the point of view of both the police and the general public. Further, it appears from the Parliamentary debate that there is general agreement that listing prohibited weapons is desirable, so as to send a clear message to the community about what weapons are not acceptable.

- The Act could **define** what articles can be listed as "prohibited weapons" under the **regulations**. This is the approach which, as noted above, the Attorney General believes will inevitably lead to dispute as to whether particular prescribed articles legitimately fall within the definition. Nevertheless, for the reasons set out below, this is the Committee's recommended approach.

- The Act could set out a **non-exclusive list** of prohibited weapons, providing at the same time that without restriction further articles could be added to the list by regulations. This approach places virtually no restriction on the Executive, while allowing Parliamentary scrutiny of the initial list.

**COMMITTEE FINDINGS ON DEFINITION OF "PROHIBITED WEAPON"**

The penalties for dealing with a prohibited weapon are serious. The Committee therefore considers it important that there is some certainty in the community as to what is a prohibited weapon, and that this is best achieved by setting out in the Act and/or its regulations a definitive list of prohibited weapons. The Committee agrees with the approach of the Bill in this regard.

The power to determine what is a prohibited weapon for the purposes of the Bill is clearly a substantive power, critical to the operation of the Bill. The question is whether Parliament should place some restriction on what can be a prohibited weapon.

Certainly, there is force to the argument that it is impractical for Parliament to amend the law every time a new weapon is to be listed as a prohibited weapon. The option of listing prohibited weapons in a Schedule to the Bill is not appropriate. The Executive should be able to prescribe by regulation a prohibited weapon.

However, it is practical for Parliament to set some parameters for the Executive.

The Committee notes the Attorney General's argument that defining what can be prescribed as a prohibited weapon makes the law unnecessarily vulnerable to challenge on the basis of vires.

However, the Attorney General in the second reading speech gives a meaningful description of what types of weapon will be prescribed as a "prohibited weapon". The Bill clearly differentiates in its provisions between prohibited weapons, controlled weapons and other articles. It is appropriate that the definitions of the terms reflect this differentiation.

On the basis of the above considerations, the Committee recommends that the definition of "prohibited weapon" in the Bill should include an indication as to the general characteristics of a prohibited weapon.

**Recommendation 1: that the definition of "prohibited weapon" in clause 3 be amended to incorporate a description of the general characteristics of a prohibited weapon.**

### 5.3 Weapons collectors

The only exceptions to possession of a "prohibited weapon" being an offence are where:

- the possessor is delivering the weapon to a police officer (clause 6(2));
- the possessor is performing their function as a police officer or similar (clause 10(1));
- the possessor is performing their function as, or as a staff member of, the Western Australian Museum or other museum recognised under the *Museums Act 1969* (clause 10(2)); or
- the circumstances fall within a prescribed exception under the regulations.

It can be seen that a weapons collector will not fall into any of these categories except possibly "prescribed exceptions". Once clause 6 commences (under clause 2(2), 6 months after the Bill comes into operation), possession of any article prescribed by regulations as a prohibited weapon will become an offence **unless** regulations have been promulgated allowing a collector to retain a collection including a prohibited weapon.

The Committee asked the Attorney General and Mr Sims of the W.A. Police Service why the Bill does not include an exception allowing collectors to maintain prohibited weapons, with the following response:

*"Hon PETER FOSS: That can be done by regulation . . . so we can set the conditions which have to be satisfied.*

*. . . Hon J.A. COWDELL: The committee was supplied with a draft copy of the [regulations]. The draft does not give any consideration at this stage to allow bone fide collectors of certain classes.*

*Hon PETER FOSS: No.*

*Hon J.A. COWDELL: Will that be allowed? Will that be put in the regulations, and why is it not in the initial round of regulations?*

*Mr SIMS: We decided to include the flexibility to do it by regulation. The decisions as to whether these regulations would be enacted would be left to the Government, upon application from bone fide collectors. If a considerable number of collectors contacted the Minister for Police and wished to be exempted from the offence provisions of the Act we would consider whether to do that on an individual basis, or treat them as a class of persons. We felt that would be enough when it was coupled with the six months' amnesty period.*

*Hon PETER FOSS: The intent is to have something which is practical. It is fair to say that the size and nature of problem and the solution are not known. It would be a matter of people putting forward what they see is required before we can find a practical solution to it. We do not have the history of regulation under the Weapons Act, in the way we have with firearms. Even with firearms we can have problems, but we have some idea as to the nature and size of the problem and how we might fix it. In this case, if we could put regulations in we would probably have to repeal them and review them once people came out of the woodwork and said that they were no good. There is nothing to stop them going in now, but I suspect they would not be the regulations that would ultimately apply."*[9]

The argument in favour of allowing an exception is that there are no doubt some collectors who never use or intend to use the weapons in their collection and who will be adversely affected by the Bill. They could legitimately argue that their collections pose minimal risk to the community and should not be regulated unless there is a clear need to do so.

In response it could be said that allowing an exception in favour of collectors is impractical, makes the Bill harder to implement and diminishes the effectiveness of weapons control. The policy of clause 6 is that there are some weapons which are so undesirable that possession should be outlawed, regardless of the circumstances in which they are possessed.

[9]Hon Peter Foss MLC, Mr Rick Sims, 18/11/1998, transcript of evidence, p2-4

**COMMITTEE FINDINGS ON WEAPONS COLLECTORS**

The policy evident in clause 6 is that certain weapons are so inherently undesirable that it should not be lawful under any circumstances for an ordinary member of the community to possess them. The question for the Committee is whether, in the face of this policy, it is acceptable for persons fitting the category of "weapons collector" to possess such weapons when it is not acceptable for other persons to do so.

There is concern that an exception would detract from the general policy and effectiveness of the Bill. If there is to be an exception in either the Bill or the regulations, it should be carefully crafted in favour of bona fide collectors and incorporate suitable safeguards.

The Committee accepts the Attorney General's contention that it is not practical to set out in detail the terms of such an exception in the Bill itself. The details would be appropriately set out in the regulations. The Bill, however, could at least recognise weapons collectors and indicate that an exception in their favour can be prescribed by regulation.

The Committee proposes two steps. First, the Bill should include, as a new clause 10(3), specific provision for regulations allowing weapons collectors to maintain their collections, subject to suitable safeguards. Secondly, the Government should prepare for the commencement of clauses 6 and 7 by preparing appropriate regulations under this new clause.

**Recommendation 2: that the Bill be amended by the insertion of a new clause 10(3) to provide for regulations which will allow a bona fide weapons collector to maintain a collection including prohibited and controlled weapons, subject to suitable safeguards.**

**Recommendation 3: that the Government prepare appropriate regulations under the new clause.**

## 5.4 Penalties under clause 6

The maximum penalty for an offence under clause 6 is $8,000 or 2 years' imprisonment.

In the second reading debate it was noted that this penalty is significantly heavier than penalties under both the current Western Australian law and Victoria's *Control of Weapons Act 1990*, on which the Bill is loosely based. The penalty for breach of section 65(4a) of the *Criminal Code* is up to $500 or 6 months' imprisonment, while penalties under the Victorian Act are 60 penalty units (currently $6,000) or 6 months' imprisonment.

The Committee asked the W.A. Police Service why the penalties in the Bill differ from comparable laws:

> *"Mr SIMS: . . . Each State has a different regime of penalties. Victoria uses penalty units. It tends to have large fines and short imprisonment. In Western Australia, in similar legislation enacted in recent times we have used a regime of two years' imprisonment and $8 000 fine. An $8 000 fine equates to two years' imprisonment; one year's imprisonment equates to a $4 000 fine. In the initial instance we have taken the Victorian regime and converted it to a Western Australian penalty from the perspective that people will be fined for these offences. If we went the other way and said six months, you would be looking at a fine of $1 000. How does that equate to the Victorian six months and $6 000? It does not equate and the same question would be raised. Having established that, we thought a $4 000 fine was appropriate based on recent legislation such as the firearms amendments and what is in other Acts.*
>
> *We then looked at the relative seriousness of the offences. We felt that the possession of a straight-out killing instrument which is a prohibited import was more serious than possession of any of the "other articles" which could have a lawful use but may be misused."*[10]

The Committee asked Mr Millar of the Law Society (WA) whether the Society has any concerns about the penalty structure under the Bill:

> *"Hon NORM KELLY: Does the Law Society have any comments on the penalty provisions? There are some arguments that apparently the Victorian legislation has three categories which have the same level of penalty whereas [the Bill] has differing levels. . . Do you have any comments about that?*
>
> *Mr MILLAR: Our lawyers generally see penalty provisions as the maximum. They realise that, subject to other legislation that is going through the House, how serious an offence is graded and this is merely the maximum. If a chap is a little bit guilty but has an understandable situation, he will not receive the maximum penalty. Therefore, we do not worry too much about the penalties."*[11]

The second point raised concerning penalties under clause 6 is that penalties under clause 7 are lower than those under clause 6, even though a particular controlled weapon can be more dangerous than a particular prohibited weapon. The Committee asked the W.A. Police Service to explain the reasoning behind the disparity in penalties:

> *"Mr GREEN: Where the Parliament says "these articles are prohibited, you will not possess them within society at all", the penalty ought to be greater. If you go against the wishes of the people and possess that particular item, a greater sanction is needed. I concede that the baseball bat with the nails is as much a killing implement as a butterfly knife, but the knife is much easier to hide. You can walk into the store you wish to rob with the knife hidden and not draw attention to yourself; you cannot do that with the baseball bat. In the legislation we are saying to people that these*

[10]Mr Richard Sims, 2/11/1998, transcript of evidence, p10
[11]Mr William Millar, 2/11/1998, transcript of evidence, p39

*things are absolutely prohibited; you will not be allowed to have them in society as our society will not tolerate it."*[12]

The Attorney General in response to the same question from the Committee essentially made two points. First, once the Government has decided that something is a prohibited weapon, it becomes an offence to carry or possess it in almost all circumstances. It is appropriate to impose a heavier penalty to signal that the Government is absolutely opposed to such weapons being found in the community, whereas Government opposition to controlled weapons is conditional.

Secondly, the Attorney General accepts that not all offences involving prohibited weapons are worse than all offences involving controlled weapons. However, he argues that the Bill gives the courts adequate discretion to cater for this, so that despite the maximum penalties for prohibited weapons being greater, judicial discretion enables a **minor** offence involving a **prohibited** weapon to be less heavily penalised than a **serious** offence involving a **controlled** weapon.

**COMMITTEE FINDINGS ON PENALTIES UNDER CLAUSE 6**

The question for the Committee is whether the penalties under clause 6 are appropriate. It has been argued that they are not, for two reasons:

- that they are significantly heavier than existing penalties under comparable legislation both in Western Australia and elsewhere; and

- that they are significantly heavier than penalties under clause 7, which could involve equally serious offences.

Looking at the first point, the Committee does not agree with the W.A. Police Service argument that comparison with Victorian laws is invalid simply because the correspondence between fines and gaol terms is different in this State. Western Australia is obviously not bound to consistency with other jurisdictions. Nevertheless, a fourfold discrepancy between the maximum **gaol terms** in Victoria and Western Australia is worth noting, regardless of whether the corresponding **fines** are more or less equal.

The Bill quadruples the maximum term of imprisonment for possession of weapons in Western Australia. While the increase is substantial, it is consistent with the Bill's intention to strengthen laws against possession of weapons.

Turning to the second point, the Committee agrees with the Attorney General that it is appropriate that the Bill distinguishes between offences relating to prohibited weapons, on one hand, and controlled weapons and other articles on the other hand.

However, it could be said that the distinction is adequately expressed in the **detailed terms of the respective offences**. The argument is that as the provisions relating to prohibited weapons

[12]Mr Haydn Green, 2/11/1998, transcript of evidence, p10

are in much stricter terms than those relating to controlled weapons and other articles, it is not necessary to reiterate the distinction in the penalties.

The Committee views with concern the possibility that any differentiation in penalty with respect to type of weapon may shift the emphasis from applying an appropriately harsher penalty on the basis of the circumstances in which the article is carried or possessed.

# CHAPTER 6

# CLAUSE 7 - CONTROLLED WEAPONS

## 6.1 Two types of controlled weapon

The Bill creates two types of "controlled weapon", offences in relation to which are set out in clause 7. Controlled weapons are defined by clause 3 as follows:

> ***"controlled weapon"*** *means -*
>
> *(a) an article prescribed by regulations to be a controlled weapon; or*
>
> *(b) any other article, not being a firearm or a prohibited weapon, made or modified to be used -*
>
> *(i) to injure or disable a person;*
>
> *(ii) to cause a person to fear that someone will be injured or disabled by that use; or*
>
> *(iii) in the practice of a martial sport, art or similar discipline.*"

Offences in relation to controlled weapons are set out in clause 7 as follows:

> "***7. Controlled weapons***
>
> *(1) Except as provided in section 10, a person who, without a lawful excuse, carries or possesses a controlled weapon commits an offence.*
>
> *Penalty: $4,000 or imprisonment for one year.*
>
> *(2) Except as provided in section 10, a person who has a lawful excuse to carry or possess a controlled weapon commits an offence if the person carries or possesses it in a manner that could reasonably be expected to cause someone -*
>
> *(a) to be injured or disabled; or*
>
> *(b) to fear that someone will be injured or disabled.*
>
> *Penalty: $4,000 or imprisonment for one year.*

*(3) In this section a lawful excuse to carry or possess a controlled weapon does not include the excuse that the weapon is carried or possessed for defence.*

*(4) Subsection (3) does not apply to a controlled weapon of a kind prescribed for the purposes of this subsection as long as it is carried or possessed in such circumstances, if any, as the regulations may prescribe.*

*(5) Regulations under subsection (4) may apply generally or to a particular person or class of persons."*

The chief effects of clause 7 can be summarised as follows.

- It provides the Government with the power to prescribe any article as a controlled weapon, potentially increasing the range of articles covered by law.
- It removes the possibility that "defence" can be a lawful excuse for possessing a controlled weapon.
- It introduces substantial penalties for carrying or possessing a controlled weapon.

In the course of the inquiry the Committee considered the following issues in relation to controlled weapons.

## 6.2 "Controlled weapon" - paragraph (a) - regulations

Paragraph (a) of the definition in clause 3 of "controlled weapon" gives the Executive unrestricted power to prescribe what type of article is a controlled weapon.

The absence from paragraph (a) of the definition of "controlled weapon" of any restriction on what may be prescribed as a "controlled weapon" raises issues similar to those raised by the definition of "prohibited weapon", discussed in paragraph [5.2] above.

A difference between the two definitions is that the definition of "controlled weapon" also contains a paragraph (b), discussed in [6.3] and [6.4] below, describing what a controlled weapon is. However, this does not impede the Executive's power under paragraph (a) to prescribe whatever article it sees fit as a controlled weapon.

### COMMITTEE FINDINGS ON "CONTROLLED WEAPON" PARAGRAPH (a)

The issues relating to paragraph (a) of the definition of "controlled weapon" are similar to those considered at [5.2] above in relation to the definition of "prohibited weapon".

The absence of a description of "controlled weapon" in paragraph (a) of the definition is not of major concern, as paragraph (b) gives some indication as to what a controlled weapon is. Nevertheless, as paragraph (a) is not restricted in any way by paragraph (b), the House should consider whether some description in paragraph (a) would be appropriate. One possible approach would be to require prescribed controlled weapons to fall within the description in paragraph (b).

**Recommendation 4: that consideration be given to amending paragraph (a) of the definition of "controlled weapon" in clause 3 to incorporate a description of the general characteristics of a controlled weapon.**

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### 6.3 Controlled weapon - paragraph (b)(i) - "made to injure"

Paragraph (b) of the definition in clause 3 of "controlled weapon" includes, under subparagraph (i), any article made or modified to be used to injure or disable a person.

There is some concern that this definition is unnecessarily broad. Read together with the rest of the Bill, it means that anything which is made to injure a person can be the subject of an offence. Examples of the kind of article which would be caught by this provision are ornamental swords, knives, daggers and so on, whether possessed by a collector, imported as a souvenir or presented as part of an exhibition other than in a museum recognised under Part IV of the *Museums Act 1969*.

On the other hand, as Supt Green informed the Committee, the provision is closely based on existing section 65(4a) of the *Police Act*, which refers to articles "*made or adapted for use for causing injury to the person*". It therefore cannot be said that the provision represents a substantial toughening of the law relating to weapons.

#### COMMITTEE FINDINGS ON "CONTROLLED WEAPON" PARAGRAPH (b)(i)

The potential difficulty with including in the definition of "controlled weapon" any article made or modified to injure or disable, is that this brings a wide range of articles within the ambit of the Bill. It is acknowledged that in many circumstances a person should be able to possess an article falling within the definition without risking prosecution.

At the same time, it is consistent with the intention of the Bill that any article made or modified to injure or disable a person should be capable of being dealt with by law.

To reconcile these two aims of the Bill, it is appropriate to have a definition which catches a wide range of weapons, while setting out well crafted provisions as to the circumstances when it will not be an offence to possess an article caught by the definition. Paragraph (b)(i) provides the broad definition of "controlled weapon" and is therefore appropriate.

Paragraphs [6.5] to [6.8] below consider the second question of whether the terms of the offence under clause 7 are appropriate.

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## 6.4 Controlled weapon - paragraph (b)(iii) - "martial arts"

Paragraph (b)(iii) of the definition of "controlled weapon" brings within the ambit of the Bill any article made to be used in a martial art, sport or other discipline. This catch-all provision indicates that the drafters of the Bill regard such articles as generally undesirable in themselves.

It is notable that because the definition is in terms of "articles" generally, all items of martial arts equipment will be caught by the definition. Tumbling mats, padding, items of clothing and other articles used in martial arts with little inherent potential to be used as weapons are all controlled weapons. It is presumably unlikely in practice that a person would be prosecuted for carrying an item of martial arts clothing or a mat. Nevertheless, it is generally undesirable for laws to be drafted on the basis that they will need to be selectively applied to produce the intended result.

The Committee asked the Attorney General whether paragraph (b)(iii) is intended to catch all such articles and received the following response:

> *"I accept there is a problem in the drafting. The suggestion is that section (b)(iii) should be amended to read "for attack or defence in the practice of a martial sport, art or similar discipline". "*[13]

### COMMITTEE FINDINGS ON "CONTROLLED WEAPON" PARAGRAPH (b)(iii)

The principle of the Bill is that martial arts weapons are potentially dangerous and ought to fall within the framework of legislation dealing with controlled weapons.

Similar considerations apply to this paragraph as to paragraph (b)(i) discussed immediately above. The Committee agrees with the Bill's approach of giving the Bill broad application and crafting appropriately targeted offences within this ambit.

However, paragraph (b)(iii) is too broadly drafted in its present form. It would appear an unintended result of the definition in its present form that all articles used in martial arts are caught by the definition. The Committee recommends that the definition be amended to reflect the intention of the Bill that articles capable of being used as weapons are caught. A suitable form of words (with the Committee's proposed added words in capitals) would be as follows:

> ' ***"controlled weapon"*** *means -*
>
> *. . . (b) any other article, not being a firearm of prohibited weapon, made or modified to be used -*
>
> *. . . (iii) FOR ATTACK OR DEFENCE in the practice of a martial sport, art or similar discipline. '*

[13]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p11

**Recommendation 5: that paragraph (b)(iii) of the definition of "controlled weapon" in clause 3 be amended to read as follows:**

***" . . . (iii) for attack or defence in the practice of a martial sport, art or similar discipline. "***

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## 6.5 "Without a lawful excuse"

6.5.1 Introduction

Under clause 7 a person who carries or possesses a controlled weapon without a lawful excuse commits an offence. The provision is very similar to section 65(4a) of the *Police Act*, apart from its treatment of "defence", discussed below.

Because of the breadth of the definition of "controlled weapon" there are many everyday circumstances where a person will be in possession of a controlled weapon. The question of what is a "lawful excuse" is therefore critical.

In the second reading debate the Attorney General gives the following explanation of why the Bill requires a person to have a lawful excuse to carry or possess a controlled weapon:

> "*A person might have a baton flail because he says he is a martial arts expert and he is just about to attend his martial arts course. If somebody is found in the middle of the night in Northbridge with a baton flail, it may be that it is reasonable to ask for an explanation and not to believe that explanation. The police should be able to say to people like that, "I don't particularly like your excuse. I am going to charge you." . . .*
>
> *It is perfectly reasonable to have a bow. My son does archery every Saturday. I am sure most policemen would not be disturbed to see a 13-year-old boy going to an archery class to shoot arrows, and I do not think he would ever be called upon to explain. However, if he were in Northbridge at two o'clock in the morning - which I very much doubt, knowing my son - it would not be unreasonable to say to him in those circumstances, "What is your reason for having that bow? What is your excuse?" That is not a change of the onus. We are saying in advance that if a person is found carrying these things, that person will legitimately be asked to explain why. That is not a change of the onus of proof. The onus of proof is still on the prosecution to prove all these elements. However, the person is told that if the prosecution can show that he was carrying one of those listed items and the excuse he offered was not a lawful excuse, he*

> *will be guilty of an offence. Therefore, a person knows perfectly well that if he goes out carrying one of these objects, that is the situation.*"[14]

6.5.2 "Defence" is not a lawful excuse

It is notable that clause 7(3) specifically excludes "defence" as a lawful excuse. In this way the clause is significantly different from section 65(4a) of the *Police Act*, which is silent on the question of defence.

A brief discussion of case law is required to explain how the defence of "lawful excuse" operates at present, and consequently how the Bill alters existing law.

A recent Australian case discussing what is a "reasonable excuse" for possessing a weapon is *Taikato v The Queen*[15], a 1996 High Court decision. The case concerned section 545E(2) of the *Crimes Act (NSW)*, which refers to "reasonable excuse" as opposed to the Western Australian term in section 65(4a) of the *Police Act*, "lawful excuse". Nevertheless, the principle decided is applicable to the Western Australian law.

The High Court sets out its test for what is a "reasonable excuse" at p466 as follows:

> "*. . . a plea of reasonable excuse could not succeed by relying on mere belief that the person needed the prohibited object for self-defence. Whatever else was needed to make a plea of self-defence a 'reasonable excuse' for possession of the dangerous item, a well-founded fear of attack in the public place in question would have to be a minimum requirement. Otherwise, the purpose of the section would be too easily defeated*."

The Supreme Court of Western Australia recently considered this case in *Trower v Martin*, an unreported decision of Scott J delivered on 11 November 1998.[16] The Court applied the "*well founded fear of attack*" principle of *Taikato v The Queen* together with earlier cases referring to "*imminent particular threat*" and concludes at p8 as follows:

> "*The question for consideration . . . is whether, in all the circumstances of the case, there was any basis for the respondent to consider that he was in danger of "imminent attack" in the sense of a "realistic and well-founded fear" of attack*".

It can be seen that under section 65(4a) it is a "lawful excuse", and therefore a defence to a charge of possession of a weapon, that the possession is for the purposes of defence where the possessor has a **realistic and well-founded fear of attack**, or (more restrictively) **imminent** attack.

[14]Hansard, Legislative Council 20/10/1998, p2267
[15](1996) 186 CLR 454
[16]Unreported, Supreme Court of Western Australia File No: Appeal SJA 1126 of 1998

Under the Bill this defence will no longer be available.

6.5.3 Vagueness of "lawful excuse"

Turning to the general application of the term "lawful excuse", there is some concern that the phrase is too vague to enable the public to be confident as to whether they are obeying the law. Generally speaking it is undesirable for a law, particularly a law with criminal sanctions, to be drafted in such a way that its impact is uncertain until representative cases have been brought under the law.

On the other hand, the difficulty of prescribing what is and what is not a legitimate reason for carrying a weapon is evident. In the circumstances it is arguable that the determination of what is a lawful excuse should be left to the courts rather than spelt out in the Bill.

In response to a question from the Committee as to what types of excuses would be lawful, the Attorney General made the following comments:

> "*Hon PETER FOSS: The committee has asked for an example and every example is dependent upon the circumstances of the case. What happens if someone is visiting the State or has given up martial arts? It depends on the circumstances. In any given instance, one must have all the facts. If a person comes into this State and is wandering down a street in Northbridge late at night with a number of nunchakus in his pocket, one would have to ask why. It does not matter whether he is from interstate or a local. If he is from interstate, one must asked what he is doing travelling with nunchakus. It is commonsense as to what would be accepted by a reasonable person as a good reason to be carrying something like that.*"[17]

The W.A. Police Service appears confident that the defence will be applied appropriately in a wide range of circumstances by the courts:

> "*Mr SIMS: It still comes back to time, place and circumstance. We are talking lawful excuse so that can be lawful activity, it can be that it has historical value, it can be that it is used for martial arts and the person has not bothered to get rid of the weapon. If the person has it there for defence, he may have a problem, but other than that, he has a lawful excuse. He may like to hang it on the wall; that would be a lawful excuse.*
>
> *. . . Mr GREEN: . . . If the police go into a house for some reason and there is a ceremonial sword hanging on the wall, the person probably would not be asked what is his lawful excuse because it is clearly there as an ornament. If the police were to go into the premises of some gangs around the town, and find other paraphernalia sitting around the place,*

[17]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p8

*clearly the police would be asking questions about why those things are there.*"[18]

6.5.4 "Defence" under the *Criminal Code*

Sections 243 - 261 of the *Criminal Code* deal amongst other things with defence of self, others, vehicles and property. A person using a controlled weapon in the circumstances in which defence is permitted under those sections clearly has a valid defence to a charge of assault under the *Criminal Code*. This aspect of the law is unchanged by the Bill.

Clause 7(3) of the Bill, however, creates an interesting and arguably anomalous situation vis a vis the *Criminal Code*, as follows:

- the clause removes the possibility that **possessing** a weapon for defence can be a lawful excuse; while

- the *Criminal Code* continues to allow that actually **using** a weapon for defence can be lawful.

Broadly speaking, **under the law at present**, a person who:

- has a realistic and well-founded fear of imminent attack;
- carries a controlled weapon for defence;
- is attacked; and
- uses the weapon with reasonable force in defence of self, others or property,

has not committed an offence under the *Criminal Code* or under section 65(4a) of the *Police Act*.

**If the Bill is enacted**, the person still will not have committed an offence under the *Criminal Code* but will have committed an offence under clause 7 of the Bill.

6.5.5 Pepper sprays

In the second reading debate Members discussed whether it is appropriate that the Bill makes it an offence for a person to carry or possess **any article** made to injure or disable. Articles designed for use predominantly by women in self defence, such as acoustic devices and pepper sprays, are likely to fall into this category and it will become an offence to carry or possess such articles.

The only way in which this result would be avoided under the Bill would be if such articles were prescribed by regulations under clause 7(4) as exceptions to the general prohibition. The Committee has seen draft regulations which prescribe pepper spray for this purpose in the following terms:[19]

[18]Mr Richard Sims, Mr Haydn Green, 2/11/1998, transcript of evidence, p18

[19]Regulation 6, Draft 11, 13 August 1998, *Weapons Regulations 1998*

> *"**6. Oleoresin capsicum spray weapons prescribed under section 7(4)***
>
> *(1) Spray weapons made or modified to be used to discharge oleoresin capsicum are prescribed for the purposes of section 7(4) of the Act.*
>
> *(2) Section 7(4) of the Act does not apply to a weapon referred to in subregulation (1) if it is carried or possessed by a person for the purpose of being used in lawful defence in circumstances that the person has reasonable grounds to apprehend may arise."*

The draft regulations are not in effect and were distributed only to indicate the Government's intended approach to regulations. There is no guarantee **under the Bill** that women will be able to use pepper spray for self defence.

The Committee questioned the W.A. Police Service as to what effect the Bill would have on a person's ability to carry articles for use in self defence:

> *"The CHAIRMAN: How does the Bill affect a person carrying an item for personal self-defence, if we set aside capsicum sprays or pepper sprays? Does the Bill interfere with people's rights?*
>
> *Mr SIMS: The general intent of the Bill is that people should not be carrying anything purely for self-defence.*
>
> *The CHAIRMAN: Many women carry small aerosol packs in their purses.*
>
> *Mr SIMS: In recognition of that, OC spray has been exempted in the regulations to provide that a person can carry that for lawful defence in reasonable circumstances.*
>
> *Hon GIZ WATSON: Why was that chosen? Some of the alarm-type devices are probably less damaging -that is, not to people's eyes -and is as effective.*
>
> *Mr SIMS: There is nothing in the legislation that would prohibit those sorts of devices."*[20]

Mr Sims' final statement is questionable. Clause 7 prohibits carrying of any article made to be used to injure or disable a person. The Macquarie Dictionary defines

[20]Mr Haydn Green, 2/11/1998, transcript of evidence, p14

"disable" to include the meanings "*to make unable; weaken the capacity of*". It would seem very difficult to argue that any item expressly designed for use in self defence is not made to injure or disable a person.

The Committee asked the Attorney General why pepper spray is not permitted under the Bill itself. His response was as follows:

> "*Hon PETER FOSS: The police are not happy about pepper sprays, so it has gone into the regulations rather than the Act. That is the Government's intention.*"[21]

If Parliament wishes to ensure that women are allowed to carry such articles as pepper spray or acoustic weapons for purposes of self defence, the Bill needs to be amended to provide for this.

6.5.6 Who will be able to prove "lawful excuse"?

A specific concern arising from the need to provide a lawful excuse is that it is possible that a person who makes consistent, organised use of controlled weapons will be accepted as having a lawful excuse for possessing them, while a person whose use is less organised will not. For example, a court might accept that a person who collects controlled weapons, is an expert in their use, and is in possession of a large number of them has a lawful excuse for possessing them.

Evidence to the inquiry from the W.A. Police Service tends to support this possibility:

> "*Hon J.A. COWDELL: You look at your list of controlled weapons under possession and some of these things are in the house. Does a person presumably commit an offence by having them in the house?*
>
> *Mr GREEN: The person can do, yes.*
>
> *Hon J.A. COWDELL: In what circumstances does possession of those weapons in a house become an offence? Is it an offence per se?*
>
> *Mr GREEN: No, it comes back to "without lawful excuse". If the police were to go into a house and find a collection of daggers in the possession of a person who is a member of a military type body, clearly that person could say he has those daggers because he is a member of this body; he likes these things and collects them as a hobby.*"[22]

It is arguably anomalous that such a person is entitled to continue to collect weapons while a non-collector commits an offence for possession of a single controlled weapon. Such a result appears antithetical to the notion underlying the Bill that controlled weapons are to be discouraged.

[21]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p7
[22]Mr Haydn Green, 2/11/1998, transcript of evidence, p18

The Committee asked the Attorney General whether it would be difficult for police and courts to formulate a rule for distinguishing a bona fide collector of controlled weapons from a person who has an "arsenal" of weapons. His response was as follows:

> "*There is . . . the example I gave to the police of two collectors. Perhaps one is a Vietnam veteran who picked up some articles in Vietnam, has added to that collection over time and has been a responsible member of the community. The other collector might have a most unsavoury reputation, a tendency to carry knives and visit places of ill-repute. One would perhaps require a more detailed explanation from that person than from an upstanding citizen. It depends on the circumstances. If a person is behaving reasonably, it is fine.*"[23]

A further consideration is that once the public becomes aware of the new laws relating to weapons, the need to prove a lawful excuse or face substantial penalties might have an effect on the behaviour of persons who possess weapons.

For example, if the courts accept that being a collector of weapons or belonging to a historical society are lawful excuses to possess a controlled weapon, will this provide an incentive for owners of weapons to become collectors or join historical societies?

Conversely, if courts determine, say, that inheriting an antique dagger is not a lawful excuse for possessing it, executors and beneficiaries might need to seek legal advice as to the legality of their unexpected ownership of weapons.

The Bill is clearly intended to modify behaviour in Western Australian society, but it might be that this occurs in unintended ways.

**COMMITTEE FINDINGS ON "LAWFUL EXCUSE"**

The Attorney General correctly notes that the Bill's requiring a person in possession of a controlled weapon to provide a lawful excuse for possessing it is not a substantial change to current law. However, particular aspects of the Bill's approach require consideration.

The first matter for consideration in respect of the defence of "lawful excuse" is the critical change made by the Bill that it will cease to be a lawful excuse to possess or carry a controlled weapon for defence.

Under the law at present, a person who has a well-founded fear of imminent attack thereby has a lawful excuse to carry or possess a controlled weapon for defence. Clause 7(3) of the Bill specifically removes such lawful excuse. If clause 7(3) were deleted, the law as to what is a "lawful excuse" would remain much as it is at present. Parliament should give serious consideration to whether clause 7(3) is appropriate.

[23]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p8

A second matter for consideration is that the Bill does not allow persons to carry or possess articles specifically designed for defence, such as pepper spray and acoustic devices. However, such articles could be permitted by way of exception under the regulations. The Committee notes the willingness of Government to prepare such regulations and supports the preparation of such regulations.

The Committee supports the regulations being in general terms which would allow a person to carry the spray or device at all times, regardless of whether they have a well-founded fear of attack. The Government appears to share this view. The draft regulation allows a pepper spray to be carried or possessed for the purpose of being used "in lawful defence in circumstances that the person has reasonable grounds to apprehend may arise". In preparing the regulations, the Government should consider whether this form of words is adequate to clearly permit the carrying of sprays for defence at all times.

The other matters raised in relation to "lawful excuse" concern the fact that the phrase is difficult to apply with certainty and requires case by case consideration by the courts. In particular:

- if the W.A. Police Service is correct in suggesting that weapons collectors will generally have a lawful excuse to possess a controlled weapon, a person with a collection of weapons might be less likely to breach the law than a person with a single weapon;

- it might be difficult for police and courts to formulate a rule distinguishing between a collection and an undesirable "arsenal" of weapons;

- the increased penalties under the Bill will provide an incentive for persons possessing weapons to formalise a collection, seeking to establish a "lawful excuse" for the possession.

In the Committee's view it would be preferable if a form of words could be found which would provide clear guidance to the public, police and courts as to what constitutes a "lawful excuse". However, it would be difficult to include in the Bill a prescriptive explanation of what is a "lawful excuse". On balance the Committee accepts that the question of what is a lawful excuse is an appropriate matter for the courts' determination and should not be further defined by the Bill.

**Recommendation 6: that the Government prepare regulations which would allow persons to carry or possess at all times particular types of controlled weapons designed for defence.**

## 6.6 Burden of proof

Clause 11 of the Bill provides that in proceedings for an offence under clause 7, among others, the defendant bears the burden of proof if he or she seeks to rely on the defence available under clause 7(1) that he or she has a lawful excuse for carrying or possessing a controlled weapon.

Superintendent Green of the W.A. Police Service gives the following explanation of why in his view the current law is not adequate in this regard:

> "*Mr GREEN: It comes back to where the onus of proof lies and what is a "lawful excuse". We find that predominantly younger people in the community are carrying knives and so on. It does not take long for the word to spread that if someone has a knife in his pocket he can say to the police that he has it to peel his orange, and there is little the police can do. If people stand mute, there is virtually nothing the police can do the way the current legislation stands. While there are provisions in the Justice Act that tend to reverse the onus, this Bill seeks to reflect that completely and positively and to put the onus back on the person to give a just reason for carrying whatever he is carrying; that is, he must have a lawful excuse.*"[24]

In fact, as Superintendent Green mentions, current law does place on the defendant the burden of proving "lawful excuse" for carrying a knife or similar weapon. Section 72 of the *Justices Act 1902* reads as follows:

> "***Proof of negative, etc.***
>
> ***72.*** *If the complaint in any case of a simple offence or other matter negatives any exemption, exception, proviso, or condition contained in the Act on which the same is framed, it shall not be necessary for the complainant to prove such negative, but the defendant shall be called upon to prove the affirmative thereof in his defence.*"

The existing provision dealing with weapons, section 65(4a) of the *Police Act*, by using the term "without lawful excuse", falls within this category of requiring "proof of negative". The burden of proof of the defence therefore falls on the defendant.

The Law Society (WA) accepts that it may be appropriate to shift the burden of proof in specific circumstances to the defendant:

> "*Mr MILLAR: When the Law Society looked at this, there was some criticism levelled about changing the onus. It was not seen as being so vital because it is appreciated by a lot of people, including lawyers, that it is difficult to prove an intent so you often have to rely upon a presumption and then you throw the burden of disproving that intent on to the other person. It is a trend in legislation. It is not the ideal but in certain circumstances the person who can best say -and the only person who can say -what his intent was is the alleged offender. Therefore, throwing*

[24]Mr Haydn Green, 2/11/1998, transcript of evidence, p4

> *the burden of proof on to him is perhaps justified but . . . I can see how this burden of proof can be abused and that is one of the criticisms of it. However, one has to be realistic and in some instances you have to accept that the burden should be on the alleged offender.*"[25]

Despite the fact that under current law the burden of proof is already on a person in possession of a weapon to prove a lawful excuse, the Bill's placing the burden of proof on the defendant was of concern to some Members in the second reading debate. A reason for this may be that the provisions of the Bill relating to controlled weapons are broader than those of section 65(4a) of the *Police Act*. The range of circumstances in which a person might be required to prove a lawful excuse under the Bill is therefore broader than under existing law.

To take an example, a person may be in possession of a dagger purchased overseas as a souvenir. A dagger is a controlled weapon under the clause 3 definition of that term. Under clause 7(1) the person commits an offence unless he or she can prove that they have a lawful excuse to possess the weapon. If the person were charged under clause 7(1) it might be difficult for them to prove to a court that they have a lawful excuse.

It will be critical for all persons in possession of a **martial arts article** that they have **at all times** a lawful excuse for the possession. In many cases the defence will presumably be straightforward. It will no doubt apply where a person has a martial arts article in the car but can prove that they are driving to an organised class or tournament, and where the person keeps articles at the home and can show regular participation in an organised class.

However, even in the most clear-cut cases of lawful excuse it might be difficult for a person to actually **prove** the excuse. The Committee has not inquired into the record keeping practices of martial arts schools but it is likely that in at least some cases no records are kept of names of participants. To prove participation on a particular occasion might be extremely difficult, both at the time of the offence and even more so at a hearing some months later.

There is also a wide range of circumstances where the question of whether a person has a lawful excuse is by no means straightforward. For example, it is difficult to be sure whether a person has a lawful excuse where the person:

- previously practised a martial art but no longer does so;
- has recently moved to or is visiting Western Australia and claims to be a regular practitioner in another State or country;
- practises only with friends rather than in a formal class; or
- otherwise could not provide evidence of ongoing attendance at a martial arts school.

In each of these cases, even if it were accepted that the excuse was lawful in theory, it could be extremely difficult for a defendant to **prove** the excuse on a particular occasion, as the law requires them to do.

**COMMITTEE FINDINGS ON BURDEN OF PROOF**

[25]Mr William Millar, 2/11/1998, transcript of evidence, p37

The question for the Committee is whether it is appropriate that clause 11 of the Bill places the burden of proof on a defendant to prove a lawful excuse for possession of a controlled weapon. It might appear that clause 11 merely reproduces section 72 of the *Justices Act 1902* in taking this approach. However, because the ambit of "controlled weapon" is broader than under current law, the circumstances where a person could be required to prove lawful excuse are broader than under current law. It needs to be considered whether clause 11, read together with the rest of the Bill, places an unacceptable burden on the defendant.

It appears generally agreed that it is a difficult task for the prosecution to prove beyond reasonable doubt that a person does not have a lawful excuse for possession of a controlled weapon. In many cases where a person is in possession of a weapon it would be the case that the person does not have a lawful excuse but that this cannot be proved beyond reasonable doubt. To enable successful prosecutions to be brought in this situation, the Committee notes that there is an argument for placing part of the burden of proof on the defendant where they are in possession of a controlled weapon.

The Committee adds the caveat that placing the burden of proof on the defendant has the potential to cause injustice where a person carries or possesses a controlled weapon for a legitimate purpose, but has difficulty **proving** the purpose. The provision relies heavily on the good judgment and common sense of the police and the courts.

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### 6.7 "Carries or possesses"

Under clause 7 it is equally an offence to **carry** a controlled weapon and to **possess** a controlled weapon. "Possess" is defined under clause 3 as follows:

> *' **"Possess"** includes to have control or dominion of and to have the order or disposition of; '*

To possess can therefore include keeping an item in storage, in a car, at a holiday house, in a safe, in a shed, at another person's property, on a boat or in any of a range of circumstances involving varying degrees of access to the article.

It could be regarded as a potential anomaly that the Bill treats these actions with the same degree of severity as being physically in possession of the article. While carrying an article evinces immediate and direct control over the article, mere possession does not necessarily do so.

The potential for anomalous treatment may not be significant in practice. It is likely that both police working with and courts applying the provision would take the general view that possession is not as serious as carrying. Nevertheless it is generally undesirable for laws to be drafted on the basis that they will need to be selectively applied to produce the intended result.

**COMMITTEE FINDINGS ON "CARRIES OR POSSESSES"**

The general tenor of the second reading debate and evidence to the Committee indicate that the chief concern of the Bill is to provide police with powers to deal with the **carrying** of weapons in public places. Powers to deal with **possession** of weapons in other circumstances are less central to the Bill's intention.

At first glance, it is of some concern that the Bill does not distinguish between the two types of offence, carrying and possessing. It stands to reason that a person carrying a weapon in a public place is of more concern than a person who keeps the same weapon in the home. **There is a good argument that the law should recognise the distinction, say by providing for lower penalties in respect of possessing than carrying.**

The concern is mitigated, at least to a degree, by two factors. First, under clause 14 of the Bill it remains the case, as under current law, that the police need a warrant before entering a premises. In practice, the degree of difficulty involved in obtaining a warrant means that the Bill will be applied more to persons carrying weapons in a public place than persons merely possessing a weapon at a premises. Secondly, it must be assumed that police and courts will use their discretion appropriately in evaluating the seriousness of a charge.

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## 6.8 Penalties under clause 7

The maximum penalty for an offence under clause 7 is $4,000 or one year's imprisonment.

As is the case for prohibited weapons, this penalty is significantly heavier than penalties under both the current Western Australian law and Victoria's *Control of Weapons Act*, on which the Bill is loosely based. The penalty for breach of section 65(4a) of the *Criminal Code* is up to $500 or 6 months' imprisonment, while penalties under the Victorian Act are 60 penalty units (currently $6,000) or 6 months' imprisonment.

### COMMITTEE FINDINGS ON PENALTIES UNDER CLAUSE 7

The Committee's findings for penalties under clause 6 are also applicable to penalties under clause 7. See paragraph [5.4] above.

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## CHAPTER 7

# CLAUSE 8 - OTHER ARTICLES AS WEAPONS

### 7.1 Intention to use an article as a weapon

Prohibited weapons (clause 6) and controlled weapons (clause 7) are subject to restrictions based on the nature of the article itself. Clause 8, however, is based not on the nature of an article but the **intention** of the person carrying or possessing the article. Any article can therefore attract the application of the clause in certain circumstances.

Clause 8 of the Bill reads as follows:

> *"**8. Other articles carried or possessed as weapons***
>
> *(1) Except as provided in subsection (3) and section 10, a person who carries or possesses an article, not being a firearm, a prohibited weapon or a controlled weapon, with the intention of using it, whether or not for defence -*
>
> *(a) to injure or disable any person; or*
>
> *(b) to cause any person to fear that someone will be injured or disabled by that use,*
>
> *commits an offence.*
>
> *Penalty: $4,000 or imprisonment for one year.*
>
> *(2) A person is presumed to have had the intention referred to in subsection (1) if -*
>
> *(a) the article was carried or possessed in circumstances that give reasonable grounds for suspecting that the person had the intention; and*
>
> *(b) the contrary is not proved.*
>
> *(3) A person does not commit an offence under subsection (1) if the person carries or possesses the article at the person's dwelling for the purpose of using it in lawful defence at the dwelling in circumstances that the person has reasonable grounds to apprehend may arise.*
>
> *(4) In subsection (3) -*

***"dwelling"*** *has the same meaning as in section 1 of The Criminal Code.*"

"Dwelling" is defined in section 1 of the *Criminal Code* as follows:

> "*The term* ***"dwelling"*** *means any building, structure, tent, vehicle or vessel, or part of any building, structure, tent, vehicle or vessel, that is ordinarily used for human habitation, and it is immaterial that it is from time to time uninhabited.*"

Clause 8 is related to but different from the existing offence of assault under the *Criminal Code*. Section 222 of the *Criminal Code* defines assault in part as follows:

> "***Definition of assault***
>
> ***222.*** *A person who . . . by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently the present ability to effect his purpose, is said to assault that other person . . .*"

Clause 8 also bears some relation to section 43 of the *Police Act*, under which a police officer may apprehend "*all persons whom he shall have just cause to suspect of having committed or being about to commit any offence*". However, unlike clause 8, section 43 does not in itself create an offence.

It can be seen that, unlike clauses 6 and 7, clause 8 creates a substantially new type of offence under Western Australian law and in this sense is the most significant clause of the Bill. The Attorney General commented as follows when the Committee asked how important clause 8 is to the Bill:

> "*We cannot delete clause 8 because it will gut the Bill.*"[26]

Clause 8 of the Bill creates an offence which is broader, ie more easily committed, than the offence of assault under the *Criminal Code* in two ways.

- Assault under the *Criminal Code* occurs only where the person "*by any bodily gesture attempts or threatens*" to apply force. An offence is committed under clause 8 if a person **intends** to injure or disable a person, regardless of whether the person makes a bodily gesture.

- Under the *Criminal Code* a conviction for assault cannot be obtained unless it is proved that the person intended to commit the offence, ie to attempt or threaten to apply force. Clause 8 partially reverses the burden of proof so that a person is presumed to have the prohibited intention where there are reasonable grounds for suspecting this is the case. The defendant must seek to overturn this presumption.

[26]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p17

To obtain a conviction, the only element which the prosecution must prove beyond reasonable doubt is that there are **reasonable grounds for suspecting a person intends to use an article to injure a person**.

The maximum penalties for an offence under clause 8 are substantially less than the maximum penalties for assault. The Bill appropriately recognises that mere intention to use an article to injure a person is a lesser offence than actually attempting or threatening to injure a person.

In the course of the inquiry the Committee considered the following issues in relation to other articles carried or possessed as weapons.

### 7.2 Presumption of intention and burden of proof

Clause 8, read together with clause 11, raises similar concerns to clause 7 in relation to the Bill's reversal of the burden of proof.

In addition to the general concerns discussed in relation to clause 7 about the undesirability of reversing the burden of proof, three further elements of clause 8 require consideration.

- Unlike for clause 7, there is no offence equivalent to clause 8 under current law. It therefore cannot be said that clause 11 merely reproduces section 72 of the *Justices Act 1902*.

- Clause 8(2) provides that a positive **presumption of intention** may be made where an article is carried or possessed in circumstances that give reasonable grounds for suspecting that the person has the intention of using it to injure a person. To defend a charge, the person must seek not merely to provide an excuse as under clause 7, but to overcome a statutory presumption.

- Under clause 8 the range of articles which might be the subject of the offence is not limited. A person carrying any article whatsoever can be charged with an offence under the clause, where in the view of a police officer there are reasonable grounds for suspecting that the person has the intention of using it to injure any person.

The Law Society (WA) raises its general concern that clause 8 is too broad:

> "*Mr MILLAR: There is reason to have this kind of legislation to deal with things which are being regularly used and misused as weapons and with that you must have search powers and so on. However, this legislation covers so many innocuous things. Our society does not require those innocuous things to be legislated on. Items which are being regularly used as weapons like the nunchakus and if as a matter of policy it is decided that pepper sprays should not be used in self-defence as they can be used as an offensive weapon, it is fair enough to list them. These are the ones we are concerned about. Do not have this catch-all situation.*"[27]

[27]Mr William Millar, 2/11/1998, transcript of evidence, p38

Given the presumption of innocence operating within Western Australian criminal law, the reversal of the burden of proof must be amply justified. The argument used by the proponents of the Bill to justify the reversal of the burden of proof is that it is difficult for the prosecution to prove an intention to commit an offence under the current law.

In response it could be said that it is equally difficult, under the Bill, for the defendant to prove that they did **not** have the relevant intention. Even if it is accepted that removing an obstacle from the prosecution's ability to prosecute for weapons offences might be appropriate, it could be argued that the Bill's shifting the obstacle to the defendant is equally inappropriate.

The Law Society (WA) also suggests that the Bill enables successful prosecution without any requirement of outward manifestation of the person's inner intention:

> "*Hon DERRICK TOMLINSON: The problem is demonstrating intent. It is a notion formulated or intellectualised. It does not become a problem until there is a manifestation of the intent. You do not know my intent if I do not tell you or I do not behave in a particular way to demonstrate it.*
>
> *Mr MILLAR: That is true. If that is the criterion, and I understand that that should be a feature of the legislation - there should be something to create the offence - one should not only intend but should also manifest one's intention. . .*
>
> *In effect, this legislation is designed to allow the prosecution authorities to prove their case. All they are required to do is produce evidence that the accused took the baseball bat into that situation. A woman walking into a pub with a baseball bat is presumed to have the intent to use it to injure someone because of the circumstances. The burden of proof is thrown on to that person to say she was at baseball practice and wanted a drink on the way home. She did not want to leave the bat in the car because the car does not lock and she felt it was insecure. She therefore legitimately brought it into the pub. She must persuade the magistrate that that is a legitimate excuse. That might be difficult and credibility becomes an issue. I would have preferred a clause providing that anything can create the situation. There should not only be the possession plus intent provision but a possession, manifestation and intent provision."*[28]

Mr Millar's argument is that there is not, but should be, some requirement that the person's intention is objectively manifest. However, on close examination of clause 8 this criticism cannot be sustained. The offence under clause 8(1) can be proved in either of two ways, each of which requires some manifestation of intent, as follows.

- First, relying solely on clause 8(1), the prosecution can seek to prove that a person has the **intention** of using an article to injure or disable. As is generally agreed, it is a difficult task for the prosecution to prove a person's intention. A clear manifestation of intent, such as a confession, a statement of intention or an actual

[28]Mr William Millar, 2/11/1998, transcript of evidence, p30

assault, would probably be required to convince a court that a person has the intention of using an article in this way.

- Secondly, under clause 8(2) the prosecution in certain circumstances can take advantage of a **presumption that the person has the intention** required for an offence under clause 8(1). The circumstances are that there are reasonable grounds for suspecting a person has the intention of injuring or disabling. The prosecution must prove such reasonable grounds exist by pointing to a manifestation of intent.

Accordingly, it cannot be said that clause 8 includes no requirement that a person's intent be manifest in their behaviour.

Nevertheless, the Law Society (WA) does raise the legitimate point that the test "reasonable grounds for suspicion" is easily met. The test would presumably be met in a case such as the woman with the baseball bat. It needs to be considered whether the relatively low test for objective manifestation has the potential to lead to inappropriate charges.

There is also concern that the law could be selectively applied by police officers. It is up to officers to determine at first instance what are "reasonable grounds for suspecting" a person has an intention to injure or disable. This is a heavy responsibility to discharge and relies on sensible use of discretion.

**COMMITTEE FINDINGS ON PRESUMPTION OF INTENTION AND BURDEN OF PROOF**

The question for the Committee is whether it is appropriate that clause 11 of the Bill places the burden of proof under clause 8 on a defendant to prove that they did not have the intention of using an article to injure or disable.

The reversal of the burden of proof under clause 8 raises more serious issues than the reversal under clause 7. Clause 8, unlike clause 7, is a new type of offence. Under clause 8, a person in possession of **any article** could be required to prove in certain circumstances that they did not intend to use it to injure a person.

It is agreed that it would be a difficult task for the prosecution to prove beyond reasonable doubt that a person has the intention of using an article to injure or disable. If the clause is to have any practical effect, it is necessary that clause 8(2) raise such presumption of intention.

The Committee has considered whether the need for this presumption makes the whole concept of clause 8 an unworkable one. To put it in stark terms, clause 8 creates a criminal offence which operates on a statutory presumption of guilt upon a mere suspicion of a person's intention. It could be argued that the notion of such an offence is inherently antithetical to the tenets of Western Australia's criminal law.

However, on balance the Committee notes that there is some justification for the creation of the offence under clause 8.

The Committee has some concerns in relation to clause 8's heavy reliance on the discretion of police officers to determine what are "reasonable grounds for suspicion" of intent to use an

article to injure or disable. An offence under clause 8 can be committed using any article whatsoever. It is evident that the clause could easily be used by a police officer to cause difficulties for members of the public, by charging a person who is in possession of any article with an offence under the clause. The threshold for laying such a charge is a very low one, even if the charge were not pursued or were defeated in court.

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### 7.3 "Carries or possesses"

Clause 8, like clause 7, treats **carrying** an article in the same way as **possessing** an article. Concerns about this, which are identical for the two clauses, are discussed at [6.7].

#### COMMITTEE FINDINGS ON "CARRIES OR POSSESSES"

The Committee's views on the Bill's lack of distinction between "carrying" and "possessing" are the same for clause 8 as for clause 7. See paragraph [6.7].

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### 7.4 Possessing an article for defence

Clause 8(1) provides that carrying or possessing an article with the intention of using it to injure a person is an offence **whether or not** the intention is to use it for defence.

It is notable that sections 25, 31 and 243 - 261 of the *Criminal Code* provide defences against assault and similar charges in a range of circumstances, relating to defence of self, others, vehicles, land, workplace and property. It might be thought that if these provisions indicate the circumstances where it is acceptable **to use force for defence**, the Bill would allow a similar range of circumstances where it is acceptable **to possess an article for defence**.

However, this is not the case. Clause 8(3) does provide an exception to clause 8(1), but the exception is much narrower than the defence provisions under the *Criminal Code*. Under clause 8(3), a person carrying or possessing an article in contravention of clause 8(1) commits an offence except in the narrow circumstances where all the following elements are present:

- at the person's "dwelling" as defined;
- for the purpose of using it in lawful self defence; **and**
- for use in circumstances the person has reasonable grounds to apprehend may arise.

A person could commit an offence under clause 8 in a number of everyday situations which intuitively might be thought to warrant the availability of a defence. Some situations where an offence might be committed are where a person:

- keeps an article other than a weapon, such as a baseball bat or length of pipe, for the purpose of defence at a place of employment,

- keeps such an article on the person's property but outside the dwelling, say in a garage, barn or shed;
- keeps such an article in a vehicle;
- in any circumstances outside the dwelling, picks up an article with the intention of using it for defence; or
- legitimately picks up an article at the dwelling but then leaves the dwelling to search for a suspected intruder.

In some "circumstances of sudden or extraordinary emergency", section 25 of the *Criminal Code* will apply to excuse a person's acts where "an ordinary person possessing ordinary powers of self-control could not reasonably be expected to act otherwise". Whether such circumstances exist and apply to the acts will be a matter for case by case determination.

A literal reading of clause 8 leads to the even more problematic result that a person acting entirely in self defence, using the first article which comes to hand and acting only in direct response to an attack, could commit an offence. The person has a watertight defence to any charges under the *Criminal Code*, but this does not affect the operation of clause 8. Looking at the elements of clause 8, the person clearly has the intention of using the article, for defence, to injure or disable and therefore commits an offence. The only arguable defence, the operation of which is uncertain, is the *Criminal Code* section 25 defence that an ordinary person could not reasonably be expected to act otherwise.

The Attorney General comments as follows on this point:

> "*Hon JOHN COWDELL . . . For example, if the owner of the local video shop that has been burgled half a dozen times has a baseball bat under the counter with clear intent, and if the police ask him why he has a baseball bat, is he gone?*
>
> *Hon PETER FOSS: No. He does not have to say that it is for defence. He says it is for the purpose of preventing a commission of an offence. . . Section 243 [of the Criminal Code] states -*
>
> > *"It is lawful for any person to use such force as is reasonably necessary in order to prevent the commission of an offence; or in order to prevent any act from being done as to which he believes, on reasonable grounds, that it would, if done, amount to an offence. . ."*
>
> *That would apply to the person in the video shop. His lawful excuse is that his intent is to prevent the commission of an offence.*"[29]

The Attorney General's reading of the interaction between the Bill and the *Criminal Code* is questionable. It is correct that where the owner of the video shop uses reasonable force in defence of self, others or property, or to prevent the commission of an offence, the owner has a **defence to a charge of assault under the *Criminal Code***. However, the fact that the owner

[29]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p15

has a defence to a charge of assault under the *Criminal Code* does not give rise to a **defence to a charge of possessing an article with intent to injure, under clause 8.** This is because:

- clause 8 is a later enactment than the *Criminal Code* defences and so will prevail over them to the extent of inconsistency; and

- clause 8, unlike section 65(4a) of the *Police Act*, does not provide a defence of "lawful excuse" which would make the clause 8 offence subject to the *Criminal Code* defences.

If the Attorney General were correct in saying that a person could successfully defeat a charge under clause 8 by claiming that "I intend to use the baseball bat to prevent the commission of an offence", the purpose of clause 8 would be defeated. If the argument is available to video shop owners it should logically be available to all. A person carrying a baseball bat in a high crime area late at night would be equally well placed to make the claim that they intend to use the article "to prevent the commission of an offence", the offence being assault under section 222 of the *Criminal Code*. In practice, courts might be more sympathetic to video shop owners than to such a person, but on the face of the clause there is no distinction.

The Law Society (WA) has concerns about the narrowness of the defence:

> *" . . . there is a catch-all situation in clause 8 which provides that, in effect, if a person is intending to use a weapon to cause injury, that person will be committing an offence simply by being in possession of the weapon. It goes on to say that applies whether or not the possession is for defence. Let us take the situation of a person who is threatened and who decides that he will take up a baseball bat or whatever as some sort of protection based on his fear of being assaulted. Under these provisions that person is committing an offence as soon as he take possession of that article with that intention, although he is intending only to protect himself."*[30]

Even in relation to a person's dwelling, it would appear difficult to establish a defence under clause 8(3). To establish the defence, a person must prove they intend to use the article "in circumstances the person has reasonable grounds to apprehend may arise". The courts may not accept that Western Australians are generally entitled to possess an article in the dwelling for defence, but may instead require that the defendant proves that particular circumstances have arisen which give rise to such apprehension. The Committee questions the need for the qualification "in circumstances the person has reasonable grounds to apprehend may arise".

**COMMITTEE FINDINGS ON POSSESSING AN ARTICLE FOR DEFENCE**

The availability of a defence against a charge of possessing or carrying an article in the circumstances dealt with by clause 8(1) is important, for the reason that people in a wide variety of circumstances are likely to be in breach of the section unless a defence is made out.

[30]Mr William Millar, 2/11/1998, transcript of evidence, p25

The question for the Committee is whether the defence in its current form under clause 8(3) is broad enough to allow persons to engage in legitimate defence.

The Committee is particularly concerned that intuitively legitimate acts of defence could become prohibited under clause 8. For example, if a person hears a noise at a dwelling and leaves the dwelling to check the back lane, carrying an article for defence, the inhabitant commits an offence unless they can show that an ordinary person could not reasonably be expected to act otherwise. A person who is attacked at a workplace and picks up a pencil for defence commits an offence unless they can show similarly, despite the fact that they have a clear defence in respect of charges under the *Criminal Code*. A person who keeps an article for defence at the workplace or in a vehicle or otherwise outside a dwelling commits an offence.

The Committee is of the view that clause 8 should be amended to provide a broader defence (or set of defences) to a charge under clause 8(1).

This could be done most simply by providing that a person should be allowed to carry or possess an article for defence in circumstances where, as under section 65(4a) of the *Police Act*, the person has a "lawful excuse".

In addition or as an alternative, the House may wish to consider other options for broadening the defence under clause 8(3), such as:

- expanding the scope of the defence to include not only a "dwelling" but also the "curtilage" of a dwelling, defined by the MacQuarie Dictionary 1991 Edition as "the area of land occupied by a dwelling and outbuildings, actually enclosed or considered as enclosed";

- allowing a person to carry or possess an article in specific places other than a "dwelling", such as a place of employment, on a property (as well as a dwelling), in a car and the like;

- allowing a person to carry an article where the article is initially at the dwelling but the person leaves the dwelling with the suspicion that an offence has been or is about to be committed at or near the dwelling; or

- removing the limitation that a person can carry or possess an article only for defence "in circumstances that the person has reasonable grounds for apprehending may arise".

**Recommendation 7: that clause 8 be amended to provide a broader defence (or set of defences) to a charge under clause 8(1).**

**Recommendation 8: that the House consider whether the defence under clause 8(3) to a charge under clause 8(1) should be broadened:**

- **so that a person is allowed to carry or possess an article other than a weapon for defence in circumstances where the person has a "lawful excuse"; or**
- **to enable a person to carry or possess an article for defence in a specified range of circumstances.**

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## 7.5 Penalties under clause 8

The maximum penalty for an offence under clause 8 is $4,000 or one year's imprisonment.

As is the case for prohibited and controlled weapons, this penalty is significantly heavier than penalties under both the current Western Australian law and Victoria's *Control of Weapons Act*, on which the Bill is loosely based. The penalty for breach of section 65(4a) of the *Criminal Code* is up to $500 or 6 months' imprisonment, while penalties under the Victorian Act are 60 penalty units (currently $6,000) or 6 months' imprisonment.

### COMMITTEE FINDINGS ON PENALTIES UNDER CLAUSE 8

The Committee notes that under the Bill in its present form, the threshold for committing an offence under clause 8 is a very low one. There is a good argument that for this reason, maximum penalties under clause 8 should be lower than under clause 7. In addition, articles caught by clause 8 are not designed to injure, meaning that carrying or possessing them is inherently not as undesirable as carrying or possessing a controlled weapon.

The Committee's concern as to the low threshold for committing an offence under clause 8 would be lessened if the amendments recommended in Recommendations 7 and 8 are made.

On the other hand, it could be said that a person committing an offence under clause 8 has the **intention** of injuring someone, and thereby merits a penalty similar to a person merely carrying or possessing a controlled weapon under clause 7.

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# CHAPTER 8

# PART 3 - ENFORCEMENT

## 8.1 Power of search and seizure

Part 3 of the Bill sets out the enforcement powers associated with offences under Part 2.

Neither the *Criminal Code* nor the *Police Act* gives police officers a general power to search a person who has not been charged with an offence, or to seize weapons without a warrant. Clause 13 of the Bill, the central provision relating to enforcement, is therefore a new development in WA law.

Clause 13 is headed "**Search and seizure without a warrant'** and gives a member of the police force power, without a warrant, to:

- stop, detain and **search** anyone who the member suspects on reasonable grounds to be committing an offence under the Bill; and
- **seize** any weapon that the member suspects on reasonable grounds relates to an offence.

A warrant is still required, under clause 14 of the Bill, to search a place and seize weapons from that place.

In the second reading debate the Attorney General offered the following justification for the power to seize weapons:

> "*Firstly, the policeman will take the weapon from the person, because he will not want the person to go off with it and then later have to prove that that person had possession of it. For the safety of the people in the area, the policeman will take possession of the baton flail and charge the person with not giving a proper excuse for being in possession of it.*"[31]

## 8.2 Potential abuse of search powers

As speakers noted in the second reading debate, whenever a Bill is introduced which broadens or increases the powers of the police force it is important to consider whether the powers are open to misuse and are subject to adequate safeguards.

[31]Hansard, Legislative Council 20/10/1998, p2267

Under clause 13(1) of the Bill a police officer can search a person who the officer "*suspects on reasonable grounds . . . to be committing an offence [or] carrying a weapon relating to an offence*", where "offence" is restricted to mean an offence under the Bill.

This provision amounts to a considerable expansion of police search powers. It could be said that the "reasonable grounds" test is so easily satisfied, in respect of both clause 7 and clause 8 offences that it would be almost impossible to prove that a police officer did not have such reasonable grounds, for the purpose of disciplinary action or charges being laid against the police.

The Committee questioned representatives of the W.A. Police Service about the circumstances when the powers granted under the Bill would be used:

> "*Hon DERRICK TOMLINSON: In what circumstances would you talk to a young person or any person and ask him why he is carrying a pocketknife?*
>
> *Mr GREEN: Generally because the police officer has seen something that gives cause for concern. A group of young people might be reported as having knives. It is not uncommon for our people on the beat to be told that two people in a group of young people have a knife or something they should not have. That would cause some suspicion in the minds of the police officers. Police officers will not go on the street and stop people at random and ask them whether they are carrying a knife, or prohibited or controlled weapons. This relates to information received or something the police officer has observed. Of course, some information is provided from City Watch. Perth City Council officers might see something on the cameras and they relay that to the officers at the street level for them to take some follow-up action.*
>
> *Hon DERRICK TOMLINSON: Let us take the extreme case. My concern is the abuse of such powers. Officers can ask people only two questions -their names and addresses. If they do not answer they can be taken into custody. We are told by young people that sometimes that power is used excessively by police officers. If they see a group of young people, particularly Aboriginal people, congregated in a park, that is used as an excuse -they are simply congregating. That is characterised as a form of abuse of police authority. You now want the legislation to provide that a person who without a lawful excuse carries or possesses a controlled weapon commits an offence. . . ?*
>
> *Mr GREEN: In relation to demanding the name and address, there is case law and people are trained along those lines. Before an officer can ask someone for his name and address, there must be a quantifiable reason for that request. In other words, a police officer cannot go to someone in the street and ask for his name and address and, if he does not give it, charge and arrest him.*"[32]

The W.A. Police Service sought to assuage fears about the possibility that the search powers could be abused by police officers:

[32]Mr Haydn Green, 2/11/1998, transcript of evidence, p4-6

> "*Mr GREEN: It is important to note that under clause 13, if the police officer randomly and without good cause went into a group of people and said, "I am going to search you to see whether you are carrying some weapon" and subsequently found a weapon, it would be open to court to examine that police officer's action. If the police officer did not act in accordance with the law, there would be a case which would support the proposition that the court could disregard that evidence that has been almost unlawfully obtained. That works as a protection to the defendant in that type of case. It would obviously come to the notice of the court and if it is then brought to the notice of the supervisors and managers of that police officer, he must be taken to task about those actions. It must be pointed out that that is not acceptable conduct for a police officer.*"[33]

Essentially Superintendent Green's response is that a police officer who disobeys the law could fail in a prosecution and could be disciplined.

However the Committee's concern is not whether police will disobey the law, but whether the law gives the police powers which are too broad. The fear expressed in the course of parliamentary debate and this inquiry is that the Bill will provide police with such broad search powers that they will be able to search persons within the law (that is, without committing an assault) in an unacceptably broad range of circumstances.

On balance, the Committee thinks the search powers are consistent with the intention of the Bill. However, the search powers rely heavily on the good judgment and common sense of the police and the courts.

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### 8.3 Other police search powers

A concern raised by Mr Millar of the Law Society (WA) is that the powers of search and seizure under the Bill are different from other police powers of search and seizure under other legislation. The concern is that setting out different but similar laws in different Acts is confusing for police officers, persons working with the laws and the general public.

> "*Mr MILLAR: . . . our criticism is that the powers of search should really be in separate legislation. Again, speaking from my vast experience in other countries, there is criminal procedure legislation, for example, which deals with arrest. The Commonwealth has that in its Crimes Act, but in a separate part. Western Australia needs a Criminal Procedure Act as to how police should go about arrest, detention and search and warrants for search. That should all be in one Act dealing with the preliminary aspects rather than bits and pieces in separate legislation, which is undesirable.*"[34]

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[33]Mr Haydn Green, 2/11/1998, transcript of evidence, p13
[34]Mr William Millar, 2/11/1998, transcript of evidence, p35

Perusal of the *Police Act* and *Criminal Code* reveals a range of different provisions applying to different offences. There is under Western Australian law no general provision setting out the circumstances and manner in which searches and seizure may be undertaken. It is therefore not possible to point to a standard form provision which might be used as a model for the Bill.

The police witnesses before the Committee explained to the Committee that it is thought desirable to set out all provisions relating to **weapons**, including these enforcement provisions, in a single Act so that persons seeking to understand the law in this area need not refer to more than one Act.

However, it could equally be said to be desirable to set out all the provisions relating to **search and seizure** in a single Act. The Committee asked the Attorney General his view:

> *"Hon PETER FOSS: We would agree with that, and when we deal with the criminal investigation and procedures legislation, that will be the case. That will be consistent with the Bill."*[35]

**COMMITTEE FINDINGS ON OTHER POLICE SEARCH POWERS**

It would be beneficial for police officers, persons dealing with the law and members of the public if police powers relating to searching persons and seizure of articles were consistent across different pieces of legislation. There are advantages to setting out these provisions in a single Act.

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## 8.4 Police searches of women

The provisions of the Bill giving police powers to search suspects do not, unlike many search powers, provide for women to be searched by a female police officer or a female member of the public. An example is the power under section 53B of the *Police Act* to search a person detained for intoxication under section 53A. Section 53B(2) reads as follows:

> *"(2) Where a female person is detained under section 53A and there is no female police officer available to exercise the powers conferred by subsection (1) a police officer who wishes to exercise those powers shall for that purpose authorize another female person to do so."*

There would appear to be no difficulty in amending the Bill to provide similarly.

**COMMITTEE FINDINGS ON POLICE SEARCHES OF WOMEN**

The Bill should be amended to include provision for women to be searched by a female police officer of a female member of the public authorised by a police officer, similarly to section

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[35]Hon Peter Foss MLC, 18/11/1998, transcript of evidence, p18

53B(2) of the *Police Act*.

**Recommendation 9: that Part 3 be amended to provide for searches of women to be conducted by a female police officer or a female member of the public authorised by a police officer, similarly to section 53B(2) of the *Police Act*.**

Hon Bill Stretch MLC
Deputy Chairman

Date: