

LRC

LEGAL RESOURCES CENTRE

NPO No. 023-004

PBO No. 930003292

3rd Floor Greenmarket Place • 54 Shortmarket Street • Cape Town 8001 • South Africa • www.lrc.org.za

PO Box 5227 • Cape Town 8000 • South Africa • Tel: (021) 481 3000 • Fax: (021) 423 0935

Your Ref:

Our Ref: CMMM/1051610C

8 February 2013

The Committee Secretary
The Portfolio Committee on Police
Ms. Babalwa Mbengo

email: bmbengo@parliament.gov.za

fax: 086 6655444

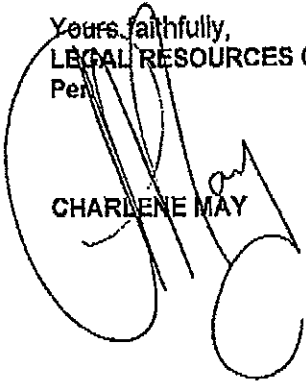
Dear Madam,

WRITTEN SUBMISSIONS ON THE DANGEROUS WEAPONS BILL 37 OF 2012

Please find enclosed the submissions of the Legal Resources Centre (LRC) on the above Bill.

We thank you for affording us the opportunity to make written submissions.

Yours faithfully,
LEGAL RESOURCES CENTRE
Per



CHARLENE MAY

National Office:
Cape Town:
Durban:
Grahamstown:
Johannesburg:
Constitutional Litigation Unit:

J Love (National Director), K Reinecke (Director: Finance)
S Magardie (Director), WR Kerfoot, A Andrews, S Kahanovitz, C Hay, HJ Smith, M Mudzankwa
MR Chetty (Director), C Penn,
S Sephton (Director) C McConnachie
N Fakier (Acting Director), Y Van Leeve
T Ngoukzabi (Head of OLU), G Bizoos SC, J Bridgall, S Nindl, W Wicomb, B Sibiya

1. INTRODUCTION TO THE ORGANISATION MAKING THIS SUBMISSION

The **Legal Resources Centre (LRC)**, established in 1979, is a South-African based human rights organisation with regional offices in Johannesburg, Durban, Grahamstown and Cape Town. The organisation uses the law as an instrument of justice for the vulnerable and marginalised, including poor, homeless, and landless people and communities who suffer discrimination by reason of race, class, gender, and disability or by reason of social, economic, and historical circumstances. The strategies employed to secure the protection and promotion of human rights include impact litigation, law reform, participation in partnerships and development processes, education, and networking within South Africa, the African continent and at the international level.

The LRC through its Gender Rights Project ("the project") focuses on empowering women by providing: legal advice; legal representation and negotiation to victims of gender violence; and by participating in advocacy and law reform in the public space. In relation to domestic violence matters, paralegals, candidate attorneys and attorneys working in the project assist victims of domestic violence with :1) applying for interim protection orders; 2) finalising protection orders; 3) reporting acts of domestic violence to the police; 4) following up on domestic violence complaints with the police, prosecutors and the IPID; 5) providing legal representation in domestic violence matters; and 6) referrals of complainants to shelters and non-governmental organizations (NGO's) for counseling.

The Legal Resources Centre ("LRC") welcomes the opportunity to make submissions on the Dangerous Weapons Bill, 37 of 2012 ("the Bill").

2. CONTEXT OF THE BILL

2.1 *S v Thunzi* and in *S v Mlonzi* (Case CCT/81/09).

2.1.1 The Constitutional Court considered a matter referred for confirmation by the Eastern Cape High Court, Mthatha (High Court). The High Court declared the "applicability" of section 4 of the Dangerous Weapons Act 71 of 1968 (Transkei Act) unconstitutional based on the basis that it unfairly discriminated against perpetrators of crime in the former Transkei who were subject to its harsher sentencing regime.

2.1.2 In the majority judgment, Skweyiya J found that in declaring the "applicability" of section 4 of the Transkei Act to be unconstitutional, rather than the provisions themselves, the order of the High Court was not subject to confirmation by the Constitutional Court in terms of sections 167(5) and 172(2)(a) of the Constitution. However, because the High Court had confined its order of invalidity to cases where the accused had not yet pleaded, leaving the order intact would perpetuate an injustice against those who had already pleaded in terms of section 4 of the Transkei Act. The Court exercised its inherent power under section 173 of the Constitution to correct the High Court's order to the extent that it perpetuates an injustice.

2.1.3 While considering the matter, it transpired that there was also parallel legislation regulating the use of dangerous weapons in the former homelands of Venda, Bophuthatswana and Ciskei. Unlike the Transkei Act, none of these Acts created differential sentencing regimes for persons sentenced. The Court raised the question whether there was a constitutional obligation on Parliament to establish uniform legislation on the use of dangerous weapons. Section 4 of the Transkei Act imposed minimum sentences which are applicable to offences involving dangerous weapons committed in an area designated by the Minister of Justice and Constitutional Development.

2.2 The Bill will repeal and substitute the Dangerous Weapons Act in South Africa and will establish uniform legislation on the use of dangerous weapons that have

been used in the commission of offences especially against those most vulnerable in our society namely women and children.

2.3 This submission will assess how this Bill can be utilized to protect women and children when ordinary items become dangerous weapons and are used in the commission of an unlawful act and whether any changes to the draft of the Dangerous Weapons Bill could be implemented that would improve its impact in protecting women and children.

2.4 We base our comments on the experiences shared by the more than a hundred domestic violence victims that we have provided litigation support and legal advice to over the past two years. Our submissions are also informed by the Constitution and South Africa's regional and international obligations to ensure the safety and security of women and children.

3. SUBMISSIONS ON THE BILL

Section by Section Analysis

3.1 The Preamble

We suggest that the following paragraph should be added to the current Preamble:

The preamble of the bill could read something like "WHEREAS South Africa has committed to take appropriate legislative measures to prevent, punish and eliminate all forms of violence against women and children."

3.2 Section 1: Definition of *Dangerous Weapon*

- a. Dangerous weapon is defined as '*any object, other than a firearm, designed as a weapon and capable of producing death or serious bodily harm.*' This definition is perhaps too limiting and not broad enough. We know for instance that simple household objects are used in cases of assault, and which have the potential to cause serious bodily harm. We therefore propose that the definition be amended to the following '*any object, other than a firearm, made or modified, to kill or cause serious bodily harm or used or intended for use in*

*killing or causing serious bodily harm.*¹ This definition would allow for charges to be brought against a perpetrator who has turned a simple object (which was not designed as a weapon) but which the individual has used to cause serious bodily harm.

b. This definition we propose place dangerous weapons in three distinctive categories:

- a. those that were made for killing or to cause serious bodily harm,
- b. those that were adapted for killing or to cause serious bodily harm, or
- c. those that were neither made, nor adapted for killing or causing serious bodily harm, but are likely to cause serious bodily harm or death if it were used to commit an assault.

According to the definition in the Bill an object is deemed to be dangerous in law if it is designed as a weapon and capable of causing death or serious bodily harm. Effectively this would only include category (a) and (b) above. As the definition is limited, it implies that those objects that are not designed and capable² of producing death or cause serious bodily harm, but carried and

¹ Adopted from the United Kingdom definition which states that "offensive weapon" as "any article made or adapted for use to causing injury to the person, or intended by the person having it with him for such use" in Section 1 (a) of the United Kingdom Prevention of Crime Act of 1953.

² Our Courts have interpreted this point in the following way: Whether a weapon is likely to cause serious bodily harm must be judged by looking at the object itself. The court must examine the nature and properties of the object (*S v Mkhwazi*, *S v Xaba*, *S v Matherjwa supra*; *S v Diedericks supra*; *S v Xaba 1975 4 All SA 478 (O)*; *1975 4 SA 354 (O)*; *Minister of Police v Mthlano 1978 3 All SA 568 (N)*; *1978 3 SA 542 (N)*; *S v Sekharume 1978 1 PH H25 (O)*.) If it is inherently likely to cause serious bodily harm, it is by definition a dangerous weapon. Whether it is or not may be adduced either by its production in court or from evidence describing the object (*S v Cobothi 1978 3 All SA 196 (N)*; *1978 2 SA 749 (N) 752*; *S v Vuthala 1991 1 SACR 529 (Tk)*.) The court must not allow itself to be influenced by the seriousness and extent of the injuries inflicted. The answer must be sought in an ex nunc examination of the object, and not an ex post facto examination of the object in the light of the injuries actually inflicted (*S v Diedericks supra*; *S v Seleke supra*; *S v Mchunu 1974 4 All SA 34 (N)*; *1974 3 SA 785 (N)*; *S v Mkhwazi*, *S v Xaba*, *S v Matherjwa supra*; *S v Bezuidenhout supra*; *S v Mosia supra*; *S v Gwele 1991 1 SACR 107 (Tk)*.) The use of the phrase "if it were used to commit an assault" indicates a hypothetical examination regarding a possible future assault and does not require or allow an examination of injuries suffered. This rule is relaxed where a complainant is unable to describe the weapon with any degree of accuracy. Here, if the nature of the wound is such that no inference other than that a dangerous weapon was employed in the assault is possible, this evidence may be used as proof of the use of a dangerous weapon (*S v Xaba supra*; *S v Pietersen supra*; *S v Matseare supra*; *S v Mnguni supra*; *S v Cobothi supra*; *S v Mosia supra*.) Where other interpretations or inferences are possible, the wounds inflicted should not determine whether an object is a dangerous weapon in terms of the Act (insufficient evidence was led in the following cases to establish that a stick was a

used with this intention would not be classified as dangerous weapons.

c. The clarity of the definition would play a central rôle in the prohibition of the possession of dangerous weapons as it would set out the elements of the crime. Thus according to the definition proposed above, the elements of the prohibition would be:

- possession of an object
- made or adapted for killing or inflicting bodily harm or
- that was neither made, nor adapted for killing or causing bodily harm, but are carried with this intent

3.3 Section 2: Prohibition of possession of dangerous weapons, firearms and replicas or imitation firearms

- a. A person is only guilty of an offence in terms of Section 2(1) if they are in possession of a dangerous weapon, firearm and replica or imitation firearm 'under circumstances which may raise a reasonable suspicion that the person intends to use any one of these weapons'.
- b. Currently Section 3 of the Firearms Control Act 60 of 2000 prohibits the possession of firearms unless the bearer has a license, permit or authorization or registration certificate in terms of this Act. Possession without a permit is in itself an offence regardless of the intended use of the firearm. Section 2(1) of this Bill therefore limits the contents of the Firearms Control Act to the extent that it pertains to firearms. It is imperative to leave the control and enforcement of firearms, imitated firearms and replicas to the Firearms Control Act, provided that the firearms fall within the definition of a firearm in that Act. This could simply be done by inserting a clause in the Bill that says that even though a firearm is a dangerous weapon its regulation and enforcement remains under the laws set out in the Firearms Control Act.

dangerous weapon: *S v Diedericks supra*; *S v Seleke supra*; *S v Van der Lith 1977 4 All SA 36 (T)*; *1977 4 SA 233 (T) 234E (a sjambok)*; *S v Cobothe supra*.

- c. Section 2(2) of the Bill some of the factors that could be considered in determining and assessing the intended use of the dangerous weapon or firearm include;
- a. Carrying an object for cultural purposes as the constitution recognizes cultural rights
 - b. Carrying an object for personal safety

3.4 Section: Amending the Gathering Act

In light of the recent violent protests we understand the need to have legislation that deals with the use of dangerous weapons or items that could be considered as dangerous weapons - during protests. It is our submission that, the Gatherings Act deals with and outlines the law in respect of gatherings lawful and otherwise the Department should rather consider a comprehensive review of the implementation of that legislation, and its potential shortcomings so as to deal comprehensively with law regarding gatherings and protests. We therefore recommend that this Section of the Bill be removed.

4. Critical Omissions in the Bill

4.1 Domestic Violence and Dangerous Weapon

Domestic violence is a systematic, pervasive and over-whelmingly gender specific crime which brings in different constitutional concerns for women in particular.³ In our interaction with domestic violence victims/survivors we have noted that in a number of cases objects such as hotplates, stoves, kettles, knives, belts amongst others are used when the offence is committed. Section 9 of the Domestic Violence Act⁴ makes provision for the removal of dangerous weapons at the scene of domestic violence. In the definition section, the Domestic Violence

³ S v Baloyi 2000 (2) SA 425 (CC) paragraph 12.

⁴ 116 of 1998.

Act relies on the definition as provided for in the Dangerous Weapons Act.⁵ This Bill should therefore also seek to amend the Domestic Violence Act to ensure that it is in line with what is envisaged in this Bill and that there is also an extension of this prohibition on possession of dangerous weapons in domestic violence.

4.2 Personal Safety

With the increasing rate of gender based violent crimes in South Africa, many women carry certain items that would, with the introduction of this Bill, be classified as 'dangerous weapons' for self-defense, an example of this would be pepper spray. This Act should make carrying dangerous weapons as a measure of self-defense a relevant consideration in terms of section 2(2) of the Bill. We would therefore suggest some consideration be given to including a list of objects that one can carry for personal safety purposes like pepper spray in order to ensure that women who are seeking to protect themselves are not effectively breaking the law and face the prospect of prosecution for the possession of a dangerous weapon.

4.3 The manufacture, sale or supply of dangerous weapons

Section 3⁶ of the Dangerous Weapons Act 71 of 1968 prohibited the

⁵ 71 of 1968.

⁶ 3. *Prohibition of the manufacture, sale or supply of dangerous weapons.*—(1) *The Minister may from time to time by notice in the Gazette prohibit the manufacture, sale or supply of any object belonging to a class or kind of object which, in his opinion, is a dangerous weapon, and which is specified in such notice.*

(2) *The Minister may by notice in the Gazette and subject to such conditions as he may determine, exempt any person or class of persons specified in such notice, or any person or class of persons other than any person or class of persons so specified, either generally or under such circumstances as may be so specified and either indefinitely or for such period as may be so specified, from the operation of any or all of the provisions of any notice issued in terms of subsection (1).*

(3) *Any person who manufactures, sells or supplies any object in contravention of the provisions of any notice issued in terms of subsection (1), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.*

[Sub-s. (3) amended by s. 3 of Act No. 29 of 1990 and substituted by s. 3 of Act No. 156 of 1993.]

manufacture, sale or supply of dangerous weapons as defined in this Bill. It is prudent in the prohibition of possession of dangerous weapon to also criminalize those that manufacture, sale or supply dangerous weapons. This should be included in this Bill together with the fines and sentences that can be placed on a person who manufactures; sales or supplies dangerous weapons. This section should particularly prohibit the sale or supply of dangerous weapons as defined in this Bill to minor children.

4.4 Possession of dangerous weapons at schools

Given the high prevalence of violence and use of dangerous weapons at school in South Africa the Department might want to consider including a section that deals specifically with the prohibition of possessing dangerous weapons at schools.

Prepared by

The Legal Resources Centre:

Charlene May, Mandivavarira Mudarikwa and Yana van Leeve

February 2013

(4) For the purposes of subsections (1) and (3), "sell" includes to offer for sale, to keep for sale or to keep in a place where goods are sold, offered or kept for sale.

(5) The Minister may at any time by notice in the Gazette amend or repeal any notice issued in terms of this section.