

19 November 2010

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The Honourable John Rau MP
Attorney-General
DX 336
ADELAIDE SA

Attn: Mr Daniel Romeo

Dear Mr Attorney

Summary Offences (Weapons) Bill 2010

Thank you for the opportunity to comment on the Summary Offences (Weapons) Bill 2010.

The Society would like to make three over-arching comments before commenting specifically on the provisions of the Bill, namely

- 1 the Bill invests the police with extraordinary powers (particularly the Commissioner), powers which in our view more properly reside with the court.
- 2 a number of new sections reverse the onus of proof. There is a creeping tendency in legislation of this kind for the reversal of the onus of proof and we reject it out of hand.
- 3 the Bill goes beyond the 'boundaries' of other criminal offences and many provisions are not consistent with the rule of law to provide the citizen full procedural fairness.

In relation to specific provisions, we comment as follows

- considerable legal sanctions are imposed that have never been previously utilised; that there has not been any discussion, education or public notice;
- they invest the police with extraordinary powers in respect of search in certain circumstances which may be too intrusive;
- they criminalize conduct in respect of a number of matters and which are concerned with the supply or possession of a prohibited weapon and are criminalized in circumstances which impose criminal sanctions on persons that are not disposed to violence or have anything to do with a prohibited weapon;
- in the absence of the regulations identifying the items to be declared as prohibited weapons it is difficult to know the scope of the legislation;

- there are a number of features that are appropriate and beneficial including declaring persons on notice to be subject to a prohibited weapons order; provisions relating to prohibiting carrying of weapons into schools and licensed premises empower police to use metal detectors to conduct searches which are ostensibly designed for the purposes of searches at public places and licensed premises in respect of prohibited weapons but which will be intrusive in that many people who are not concerned with weapons will be subjected to such intrusive powers and required to submit to a search because metal detectors of course detect many things other than a knife or a weapon;
- the new criminal offences created should be treated the same as all other criminal offences in this State in the majority of cases whereby the prosecution must prove all of the elements of an offence including the existence of knowledge or criminal intent. A number of new sections do not appear to do that but rather reverse the onus of proof.

We all understand the desirability of reducing the incidence of violent offences involving weapons. The more difficult issue is where to draw the line between acceptable preventative conduct by the State and conduct which unduly infringes on the liberty and rights of privacy of the citizen. More specifically, our principal concerns are:

1 Section 21G - The weapons prohibition order issued by Commissioner

We do not support this provision in its present form. The consequences of a weapons prohibition order are so great that only a judicial body should have the authority to issue the order. The order exposes the person to further offences of traditionally non-criminal conduct (this is another concern - below) and to the risk of arrest and detention in custody for non-criminal conduct as follows

- deprivation of liberty for an indefinite period for no wrong-doing: s21G(3)(a);
- arrest and detention in custody without warrant or charge or the commission of an offence for up to two hours: s21G(3)(b);
- at jeopardy of committing an offence of being present at premises and of association: s21H(4)(a) and (b); and
- at jeopardy of committing the onerous offence of failing to inform and inquire: s21H(8).

Additionally, the person will be the subject of the order for five years, which is a very lengthy period of time. Only a court (an independent body that is bound to act judicially) should have the power to make an order with such significant consequences on the individual and set the length of the order during which the citizen is at jeopardy. We submit that such a power should not reside with the Commissioner of Police or any other non-judicial body. The factors that must be taken into account when considering whether to make the order are in the nature of those taken into account in a judicial proceeding. The Commissioner is not properly equipped to embark on that exercise. Indeed, the maker of the order must be independent. The Commissioner of Police is not.

In relation to the length, five years is too long. The maximum length of bonds to be of good behaviour for people who have committed offences is three years. It is suggested that the weapons prohibition order (which is not part of a sentence) should be no more than three years. The Court should have the

power to extend the order if cause is shown (eg, non-compliance with the order, commission of offence of violence etc).

If the order may be made *ex parte* (assuming a court is to issue it), the order should be reviewable by the court that made the order. This is consistent with the rule of law to provide the citizen full procedural fairness. The citizen is otherwise procedurally and substantively disadvantaged if the first stage of accountability for the first instance decision maker is an appeal. In other words, the citizen starts on the back foot. An appeal presumes regularity of the first instance decision. This is unjust where the first instance decision was made *ex parte*.

If the power to make the order remains with the Commissioner, then at the very least the order should be an interim one which must then be confirmed by a court within a set time (say, 72 hours after service of the order) with the person the subject of the order a party to the proceeding.

Finally, a weapons prohibition order is in the nature of a penalty. Questions will arise as to whether a court should take a weapons prohibition order into account in determining sentence. This should be specifically addressed by the Bill. We suggest the fairest means by which the order should be implemented is at the sentencing stage (or Part 8A supervision stage). In other words, the order should be considered and made, or not as the case may be, as part of the proceedings that give rise to the power to make an order.

In this scenario, we propose that the order can only be made on the application of the prosecutor or by the Court of its own motion. This would overcome the problem of providing notice of the order to the citizen and thereby avoid the plainly unjust scenario of a *de facto* house arrest or an arrest and detention in custody just so the order may be served.

If the order is made in these circumstances, the Court will sentence the citizen taking into account the weapons prohibition order (if permitted to by Parliament). Furthermore, the sentencing Court will be in the best position to make the order after having presided over the sentence hearing (and the trial where there was a not guilty plea).

2. Section 21H – Effect of weapons prohibition order

This section contains several offences that a person against whom an order is made is in jeopardy of. Some of them are not traditionally criminal conduct. Section 21H(4)(a) criminalises (in certain situations) a person's presence at a place of business. It is a great concern to criminalise someone for one's mere presence at a premises. As indicated, only a court should expose someone to such jeopardy. The other factor is that there is no statutory defence of not knowing that the premises were the place of business (cf s21H(4)(b) - such a defence is available in s21H(5)). This indicates that Parliament may have intended for the offence to be one of strict liability – that would be very harsh, particularly given that the maximum penalty is two years imprisonment and a fine of \$10,000. We suggest that a statutory defence in the nature of s21H(5) should also apply to s21H(4)(a).

Section 21H(4)(b) criminalises association. This is controversial and is best avoided. We do not support this provision in its current form. The purport of this provision may be better achieved by broadening the definition of "possession" to include being in company with a person who has a prohibited weapon. In other words, the prohibition of not possessing a prohibited weapon would extend to that situation where the citizen is deemed to be in *de facto* possession provided that the s21H(5)

statutory defence is available (ie, that the citizen did not know nor could reasonably have been expected to know that the person he/she is in company with possessed a prohibited weapon).

Section 21H(6) criminalises residing in a premises at which a prohibited weapon is kept. We do not support s21H(6) without the inclusion of other provisions that would make s21H(6) workable. This ties in with our concerns about s21H(8) below. Section 21H(6) imposes an intolerable burden on the citizen of having to move out of his/her premises. If the citizen becomes aware of a prohibited weapon, owned by a co-tenant or his/her landlord, the citizen may not literally be able to ensure that the weapon is removed from the premises. That being so, the only way to avoid an offence is to move out. Whether intended or otherwise, it cuts at the heart of the liberty of the citizen to have to move from one's home. Other scenarios of concern would be where the citizen is the owner of the premises (or lessee) and, short of removal of the weapon, must take steps to cause the owner of the weapon to move out. Notice must be provided. Even on a best case scenario the citizen may be residing with a weapon for 60 days without being able to do anything about it (and therefore be committing an offence).

If s21H(6) is to remain, the legislation should reflect and deal with these types of scenarios. For example, provision should be made for the citizen to avoid being at jeopardy where all reasonable steps to avoid residing with a prohibited weapon are taken (similar points can be made about s21H(8)). In certain circumstances, they may include contacting police.

In our view s21H(8) goes too far and should be deleted. It seeks to impose a positive obligation on the person the subject of the order at pain of penalty for non-compliance. Firstly, given the other provisions of the Bill, it is unnecessary. In particular, the s21H(6) offence (together with the s21H(7) statutory defence) is sufficient. In-built in the s21H(6) offence (with the s21H(7) defence) is the obligation to make due inquiry. Secondly, and following on from the first point, it exposes the citizen to a double jeopardy (ie, double offence and double punishment) for essentially committing the offence of s21H(6). Indeed, it is unlikely that a s21H(8) offence will be charged without also charging the citizen with a s21H(6) offence. In this event, we suggest that the citizen may not be convicted of the s21H(8) offence because the conduct is subsumed within the s21H(6) offence (autrefois convict). Thirdly, and importantly, it is not conduct that should give rise to a crime. It is in the nature of conduct from which a state of mind might be inferred in certain situations (ie, whether a s21H(7) defence could be made out).

Section 21H(14) provides too much power to the Commissioner. If Parliament creates offences, the Commissioner should not be given the power to exempt people from them. Only a court should be given the s21H(14) power. As above, it is one that should be exercised judicially. We submit that it is wholly inappropriate for the Commissioner of Police to be the repository of such a significant power.

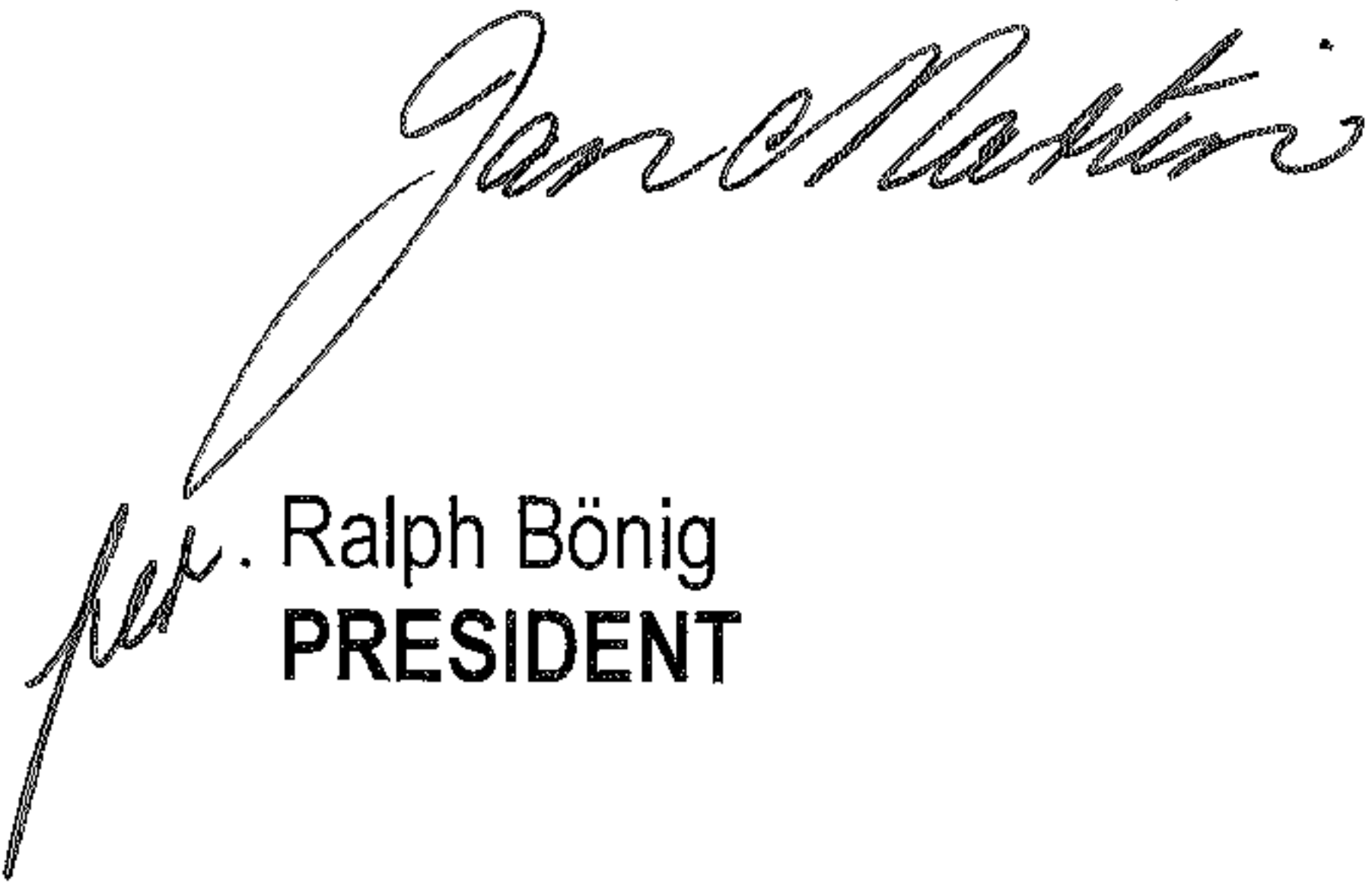
3. SS21J and 72A - The search provisions

In relation to the search provisions (ss21J & 72A) we express considerable concern that the s21J search powers, which are significant, may be exercised on someone who is not the subject of a weapons prohibition order (refer s21J(a)). We do not support s21J(a) and suggest it be deleted. A search under s21J(1) is a major trespass on the rights of a citizen. The qualifying criteria before the search is authorized should not involve guess work. The police should be required to be satisfied that the person the subject of the search is in fact subject to a weapons prohibition order, in the same way that police must be so satisfied before executing outstanding warrants.

The test of suspicion on "reasonable grounds" is wholly inappropriate for this type of scenario where certainty can be achieved.

I trust these comments are of assistance. Please do not hesitate to contact me should you wish to discuss any aspect of this submission.

Yours sincerely


per. Ralph Bönig
PRESIDENT