



*Responsible and Accountable
Firearms Ownership*

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General,

COMMENTS ON THE DRAFT DANGEROUS WEAPONS BILL

This document is in response to the Draft Dangerous Weapons Bill, published as Notice 606 of 2011, in Government Gazette 34579 of 2 September 2011.

1. Purpose of Bill

1.1 In the Memorandum on the Objects of the Dangerous Weapons Bill, 2011, attached as Annexure to the Draft Bill in the above mentioned Government Gazette, the purpose with the Bill is *inter alia* stated as follows:

"1.1 The Constitutional Court, in S v Thunzi and S v Mlonzi (Case CCT 81/09) ("the Thunzi case"), found the applicability of section 4 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968) (Transkei) ("the Dangerous Weapons Act (Transkei)", which is similar to section 4 of the Dangerous Weapons Act, 1968 (Act No. 71 of 1968) ("the Dangerous Weapons Act (South Africa)", in the area of the former Republic of Transkei only to be unconstitutional. The Constitutional Court, in the Thunzi case, required the Speaker of the National Assembly, the Chairperson of the National Council of Provinces and the Minister of Justice and Constitutional Development to notify the Court, by 8 November 2011, of the legislative steps that have been taken in fulfilment of their undertaking to rationalise the Dangerous Weapons Acts of the former Republics of South Africa, Transkei, Bophuthatswana, Venda and Ciskei.

1.3 *The Dangerous Weapons Act (South Africa) and related legislation still in force in the areas mentioned in paragraph 1.1, are outdated and it is proposed that a new*

Dangerous Weapons Bill be introduced, taking into account Constitutional principles as well as present policing needs in respect of the possession and carrying of dangerous weapons and related issues. A huge number of murders, robberies as well as other violent crimes are being committed annually with dangerous weapons such as knives, but also with replicas or imitations of firearms which cannot be easily distinguished from real firearms”.

- 1.2 Whereas the Draft Bill might be appropriate for the purpose stated in the above quoted paragraph 1.1, NSA is of the opinion that the purpose stated in the second sentence of the above quoted paragraph (1.3) is already adequately covered in existing Criminal Procedures legislation, as well as in Common Law and in the Firearms Control Act (2000). Its inclusion here as a purpose of the Draft Bill's adaptation seems out of place.
- 1.3 Apart from what is submitted in the first half of paragraph 1.1 of the explanation for the need for the Draft Bill (in the Annexure), no evidence is set forth by the South African Police Service as to how many crimes, divided into what categories and using what types of dangerous weapons had led them to believe that this legislation is necessary.

2. Principle of Legality

- 2.1 It is an open question as to whether the Draft Bill really fits into social circumstances of the current South African law when compared to principles set out in the Constitution (Act 108 of 1996). The Constitution enacts rights of privacy (Section 14), rights of assembly (Sections 17 and 18), political rights (Section 19) and access to courts and rights for arrested, detained and accused persons (Sections 34 and 35).
- 2.2 A number of these rights are seemingly disregarded in the Draft Bill for as far as a person has the right to remain silent when accosted by a police official for one or other alleged criminal activity. In accordance with the content of sections 2(1) and 2(2) of the Draft Bill, this right seems to be negated, as it is stated that a person is guilty of an offence if s/he cannot “...*provide a reasonable explanation for his or her possession or the carrying thereof [the so-called dangerous weapon]...*” or if s/he would “...*raise a reasonable suspicion that the person intends to use the dangerous weapon or replica or imitation of a firearm for an unlawful purpose*”.
- 2.3 It is submitted that the mere possession of a fast racing car does not constitute the fact that the owner will transgress any speed limit, irrespective of whether s/he “...*raises a reasonable suspicion...*” that he or she could break the speed limit because of the possession of such a vehicle. Therefore possession of a perceived weapon that could be dangerous, does not constitute the fact that a

crime will be committed (intent has to be shown and later proven). This aspect also speaks to the following point of submission, namely the severely undefined and open nature of the discretion awarded police officials and the Minister of Police through the Draft Bill.

3. **Undefined Discretion**

- 3.1 There is a difference between discretion as exercised by a court, which is usually in line with the interpretation of sets of legislation and or possibly of the Constitution. Conferring such a broad undefined discretion upon a SAPS official as is done in the Draft Bill (Sections 2(1) and 2(2)), without describing guidelines for such discretion is courting disaster and leaves room for any interpretation a SAPS official would want to make at a given time and place. Despite a citizen having the right in accordance with the Draft Bill to explain himself or herself, it has never been “healthy” for any citizen to get involved in any argument with any SAPS official, even if the citizen should be right.
- 3.2 This situation could lead to involuntary contravention of the Bill of Rights (Section 35(3)(h) which describes the right to remain silent) by a SAPS official. The current wording of the Draft Bill’s Sections 2(1) and 2(2), compels a person to offer an explanation as to their conduct or state of mind, before that person knows whether s/he is an accused, or is a suspect or is being detained. What the Draft Bill introduces is thus a situation where if one possess an object that in the subjective discretion of the SAPS official seems to be a dangerous weapon, one is potentially guilty of an offence, unless one can explain oneself and possibly be convicted for three years imprisonment for perceived, yet not necessarily proven intent. Or at the very least be unlawfully taken into custody on perceived intent and be subjected to everything which goes with being placed in a SAPS cell for a day or two.
- 3.3 It is submitted that in its current form without clear cut described discretion in terms of the contents of the Draft Bill, the number of instances where individuals could become subjected to the whims of a SAPS official increases dramatically. Especially as section 2(3) of the Draft Bill makes the legal possession and carry of a firearm for self protection illegal whenever a SAPS official would deem it to be so. This makes no sense in interpretation of different sets of legislation regarding criminal law, common law, and or the Firearms Control Act.
- 3.4 NSA submits that members of the South African Police Service are not trained and equipped properly to afford them such wide a discretion as implied by the Draft Bill. One would expect at the least that the discretion implied by the Draft

Bill will be clearly defined in the Regulations which will govern the implementation of the Draft Bill should it become Law.

- 3.5 With all respect possible, we submit that the discretion afforded the Minister to declare “...*any object belonging to a class, type, kind or category or object which, in the opinion of the Minister, is a dangerous weapon and which is specified in such notice*”, as is stipulated in Section 2(4) of the Draft Bill, is too wide and needs clearer description as to what object(s) may constitute such a dangerous weapon. In comparison, the Firearms Control Act, obliges the Minister to advise Parliament of his intention to publish such a notice, the Draft Bill does not. This gives the Minister unrestrained power to act should he deem so fit.

4. **Definition**

- 4.1 In Section 1 of the Draft Bill the definition for firearm is stated as: “*firearm*” means a firearm, a muzzle loading firearm or an airgun as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000).

- 4.2 In the Firearms Control Act an airgun is defined as: “*airgun*” means any device manufactured to discharge a bullet or any other projectile of a calibre of less than 5.6mm (.22 calibre), by means of compressed gas and not by means of burning propellant;”.

- 4.3 Also in the Firearms Control Act airguns described as firearms are defined as follows: “*firearm*” means any- (d) device manufactured to discharge a bullet or any other projectile of .22 calibre or higher at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas and not by means of burning propellant;”.

- 4.4 NSA submits that the reference to airgun as a dangerous weapon in the Draft Bill even while referring to Section 1 of the FCA, is dangerous in itself. No person who does not really understand airguns and calibre differences of airguns, is easily able to make a correct distinction between the airguns which are perceived not to be firearms, and those that are perceived to be firearms. Therefore the reference to airgun as a firearm in the Draft Bill is ambiguous and will cause wrong deductions to be made by police officials within the wide undefined discretions afforded them in this Draft Bill (see paragraph 2 above).

- 4.5 NSA suggests that the definition for firearms in the Draft Bill be changed to read: “firearm” means a firearm, as defined in section 1 of the Firearms Control Act, 2000 (Act No. 60 of 2000). This reformulation will at least pre-empt any wrong

interpretations regarding airguns as dangerous weapons. Only those SAPS officials who are knowledgeable about the FCA will then be able to try and make the distinction between airguns which are perceived to be firearms and those that are not.

5. Wording of Bill

- 5.1 Constitutional Court decisions of 2001 and 2006 have made it clear that legislation should be written in clear and understandable terms so that the layman should also be able to understand the content, but more importantly also the implications of transgressions. NSA submits that the wording of the proposed Bill is difficult and ambiguous and should be reformulated so that all can understand the intended meaning of the wording in all sections of the Draft Bill.

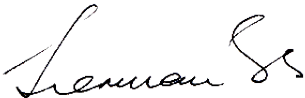
6. Conclusion

- 6.1 It remains difficult to comment on any form of proposed legislation without knowledge of the Regulations in terms of which that legislation will be implemented, as this will make commenting much more appropriate.
- 6.2 As the current situation stands, the comments that are made in respect of the Draft Dangerous Weapons Bill (2011) sounds very familiar and can be directly related to the comments made in respect of the content of Notice 158 of 2008, published in Government Gazette 30717 of 1 February 2008 (*Proposed Notice under Sections 2 and 3 of the Dangerous Weapons Act, 1968 [Act no. 71 of 1968]*).
- 6.3 As far as NSA knows, no implementation of the contents of the 2008 proposed notice was ever implemented. One must thus ask why the SAPS did not just do, with this Draft Bill, what the Constitutional Court requested them to do, namely to take “...*the legislative steps ... in fulfilment of their undertaking to rationalise the Dangerous Weapons Acts of the former Republics of South Africa, Transkei, Bophuthatswana, Venda and Ciskei*”.
- 6.4 It seems as if there is no end to the same aspects of proposed legislation for which public comment is requested over and over again without these comments, in many instances not being taken into account in implementation. The situation with the Firearms Control Act is no different in that the proposed 2007 amendments to that Act was never implemented despite it being signed into Act by the President (i.e. Act 26 of 2008); while virtually the exact same set of amendments were again tabled for public comment early in 2011 (and is still

ongoing). This begs the question as to how serious the SAPS is to put the proposals of this Draft Bill into operation.

- 6.5 Lastly, NSA submits that it supports the need for legislation regarding the **Threatening Use of Dangerous Weapons** rather than the proposed legislation that purports to be all inclusive while seemingly being unconstitutional and definitely extremely difficult to police realistically. Especially if policing is sought without opportunity for serious misunderstanding resulting because of unbounded discretions leading to a even wider rift being caused between the law abiding public and the SAPS.

Yours faithfully



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Chair: Executive Committee

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