



WA Rangers Association Inc.

ABN: 15 827 359 591

Legal Opinion Pepper Sprays

Legal Opinion

Possession Capsicum/ Pepper Spray By Rangers

President WA Rangers Association.

WA Rangers Association (Inc)

PO Box 334

North Beach 6920

WESTERN AUSTRALIA

Tuesday, 22 April 2003

Attention: Mr B.Watkins.

Dear Sir

POSSESSION OF CAPSICUM SPRAY BY RANGERS.

The recent case of *Hall -V- Collins* [2003] WASCA 74 (4 April 2003) has prompted the President of the WA Rangers Association, Mr Watkins, to ask for my advice in respect of the carrying of a weapon commonly referred to as "pepper spray" by Rangers for the purpose of subduing dogs or other dangerous animals. The question is whether carrying "pepper spray" for this purpose is permitted under the *Weapons Act 1999* (the Act).

It should be noted that the Act binds persons individually and, also binds the Crown, extending to Local Government Officers. Section 5 of the Act states "*This Act binds the Crown in right of the State and, so far as the legislative power of Parliament permits, in all its other capacities.*" It is for that reason that the Act clearly considers persons working for the Crown in any capacity to fall under the provisions of the Act, unless they are explicitly exempted, or excluded by the provisions of the Act.

The Act divides weapons into two categories; Prohibited Weapons, and Controlled Weapons. Prohibited weapons include weapons such as: an acoustic shock weapon, ballistic knife, blow pipe, butterfly knife, catapult (with an arm brace) or a disguised knife or sword. A full list of Prohibited Weapons is found in Schedule 1 of the *Weapons Regulations 1999* (Regulations) attached to this opinion.

It is an offence to possess, carry, purchase, sell or manufacture Prohibited Weapons, and there are no exemptions provided under the Act to possess, carry, purchase, sell, or manufacture such weapons.

The second category of weapons is Controlled Weapons. These are defined in the Act, and contained in Schedule 2 of the Regulations:

Pursuant to the Act a 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) for attack or defence in the practice of a martial sport, art or similar discipline;

You will find a list of the Controlled Weapons prescribed by Regulation attached to this opinion. As will be noted the list considers weapons that are those that can cause injury to a person.

Without being an exempt person the Act makes it an offence to carry or possess a Controlled Weapon without a lawful excuse. Police officers, are excepted and able to carry Controlled Weapons, licensed Security Guards can carry approved extendable batons, and Prison Officers are exempted through different provisions of the Act and Regulations. It is also interesting to note that museum personnel are exempt, obviously to cover museum personnel when moving exhibits and the like.

It is worth including the exception for Prison Officers and certain contract workers, contained in Regulation 10, having been inserted by Western Australian Government Gazette dated 28 July 2000, at page 4027. This regulation states:

10. Exception for prison officers and certain contract workers

A person does not commit an offence under section 6, 7 or 8 of the Act only because of something done by the person in the performance of the person's functions as —

- (a) a prison officer as defined in the Prisons Act 1981; or
- (b) a person authorised to exercise a power set out in Division 1, 2 or 3 of Schedule 2 to the Court Security and Custodial Services Act 1999 or a power set out in Schedule 3 to that Act.

[Regulation 10 inserted in Gazette 28 Jul 2000 p. 4027.]

It is further an offence pursuant to Section 8 of the Act to possess, whether or not for defence, any article with the intention of using it:

- (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,

It is, however, possible to carry Oleoresin capsicum spray for the purpose of defence in circumstances that the carrier has reasonable grounds to apprehend they may need to defend themselves against an attack, see section 7 of the Act below:

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.

However, it must be emphasised that it may only be carried for the purpose of self-defence in circumstances prescribed by regulation, see regulation 7 set out below:

Regulation 7 of the Weapons Regulations 1999

7. Oleoresin capsicum spray weapon prescribed under section 7(4)

(1) A spray weapon made or modified to be used to discharge oleoresin capsicum is prescribed for the purposes of section 7(4) of the Act.

(2) Section 7(3) of the Act does not apply to a spray 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 words bolded and underlined above were the subject of the appeal in *Hall -v- Collins* [2003] WASCA 74 (4 April 2003). The background to the case is relevant and worth considering:

The appellant operated what was referred to as a "budget motel" and would have troublesome guests at least one or twice a week. These guests would behave on occasion in an extremely anti social manner, for example by smashing windows and fighting. There had been assaults at the motel. The appellant himself had suffered significant injury to his head at the motel which left him in danger of lasting harm in the event of him being struck in the same area of the head again.

The appellant had owned the pepper spray for what he described as "quite a while", being perhaps three or four years. He normally kept it at the office in case of hold-ups. On the particular night referred to in the complaint, he was called to a disturbance in one of the motel rooms and had taken the spray with him. Finding a person engaged in a violent scuffle with a guest, he had discharged the spray at that person. He was not charged with assault or with the unlawful use of the spray.

Hall was charged, the wording of the complaint was as follows: "not being a person exempted under s 10 of the *Weapons Act 1999*, without lawful excuse possessed a controlled weapon." (I attach the full case to this opinion, as it is worthwhile reading.) The focus of the appeal was whether or not Mr Hall had a defence to an offence for carrying the *Oleoresin Capsicum Spray*.

The Magistrate convicted the appellant because he found that there was no immediate threat against which Hall needed to defend himself. To use the words of the regulation, the Magistrate considered that regulation 7 (3) required an imminent threat to be present. The Magistrate derived this from the words of the regulation "*that the person has reasonable grounds to apprehend may arise.*"

The Judge in hearing the matter on appeal concluded that the threat did not need to be one that was imminent in order to have a defence to a charge for carrying the spray. After tracing the history to the Act the Judge hearing the matter on appeal concluded: "*In the view which I take of the Weapons Act and Regulations, then, it is not necessary that there be an imminent threat, before such a spray can be possessed or carried. It is enough that a person has reasonable grounds to believe that circumstances in which it may be necessary to use the spray for that purpose may arise.*"

The Judge obtains support for the opinion that the threat did not need to be imminent from Hansard. The Judge considers the elderly, the frail or women going for a walk at night to be able to carry pepper spray, it is worth quoting the paragraph from the judgement:

"Hon Attorney General, who introduced the legislation into the Legislative Council on behalf of the Government, made it plain that it was the Government's intention that people should be able to carry such sprays for the purposes of defence. He noted that the actual protection provided by such a spray may not be great, but that it was considered important that people should be able to "perceive" themselves as being safer. That appears also to have been the view taken by those other members of Parliament, from all parties, who referred to this issue: eg 20 October 1998 page 2263, 2269; 23 March 1999 page 6836 – 6837; 2 June 1999 page 8673 – 8674. It was plainly intended that women carrying sprays when they go out in the evening, or older and frailer members of the community carrying them in situations where they felt themselves to be in danger, would not be committing an offence under the legislation."

Ultimately the test to determine whether or not a defence to carrying or possessing pepper spray applies is whether there are reasonable grounds to believe that the person carrying or possessing the spray may come under attack. It should be noted that in the case of **Denton -V- Bodycoat**[2000] WASCA 424 security guards were held to be in breach of the act when carrying spray. It should be noted that the defence in that case was run on different lines from the case of Hall, it would be interesting to see if in the future security guards who worked in places where they may consider themselves as coming under attack would be excused from carrying spray. In my opinion the defence used in **Denton -V- Bodycoat** was not as forceful as the defence in **Hall v Collins**. The defence in **Denton v Bodycoat** was that the security guard had an honest reasonable but mistaken belief for possession of the spray, believing his licence enabled him to possess the spray, in **Hall v Collins** the defence was that Hall had an apprehension of an immediate threat in being called to a disturbance at the motel.

Justice Wheelers judgement should not be read so broadly as to qualify anyone to carry spray who believes they are in some danger of attack. Justice Wheeler provides examples of how narrowly the test will be constructed: *"the threat which he [Hall] anticipates is obviously one which may arise from time to time at the motel. If he were to carry the spray in the supermarket in the middle of the day, there would be no reason to anticipate any threat in those circumstances and it would not therefore appear that the inference could be drawn that his purpose in doing so was for defence."*

Justice Wheeler clearly extends the defence to carrying spray to women, the elderly and the frail in the community, it would also seem that the Judgement extends to those persons in occupations where there are reasonable grounds that some actual purpose of defences in the circumstances, which are reasonably anticipated might arise.

It is necessary for Rangers carrying the spray to establish that there is an actual purpose of defence in circumstances which are reasonably anticipated.(Section 11 of the Act) There is an averment in the legislation requiring the defence to demonstrate that they fall within the defence provisions of the Act. The responsibility of proving a defence on balance rests on the shoulders of the Ranger.

Thus if a Ranger were in reasonable apprehension of attack and carried pepper spray to avert such an attack it is likely that the court will consider the possession of such spray to be a defence to a charge. However, a word of caution is in order. The court will consider all the circumstances of the case, the circumstances include how often the Ranger has been attacked in the past, what was the incident that was being responded to, how likely was an attack, is it day time or night time. In my view instead of having Rangers running the gauntlet on these matters the Association ought to make application to the Minister to be exempted from the Act by being included in the list of persons who are able to carry pepper spray. The case of **Hall v Collins** cannot be read as extending the exemption provisions of the Act, although it does point out that the threat does not need to be imminent, but nevertheless there needs to be a threat of attack. So carrying a pepper spray to an old peoples home to discuss dog care would not provide reasonable grounds to apprehend coming under attack, and therefore the Ranger would not have grounds for a defence to a charge, however, working late on a Friday night and having to take a dog off an owner in a less than savoury neighbourhood, where the Ranger has previously come under attack, may well provide the grounds for a defence to a charge of possessing pepper spray.

The question then arises whether such a defence is available to a Ranger responding to a dog attack? It would seem on the face of it that where there are reasonable grounds that circumstances might arise where they need capsicum spray for self defence against an attacking dog. Can Rangers carry with them a spray for that purpose?

It would seem that Act and Regulations do not overtly intend that a defence for carrying capsicum spray be available to Rangers to subdue dangerous dogs or other animals. In ***Cooke v South Australian Police*** [2000] SASC 343 (16 October 2000) the Magistrate convicted the defendant Cooke in the first instance for possessing capsicum spray to defend himself against a possible attack by a dog of a friend that was left with him. The Magistrate in the first instance expressed the view that it is not a defence to establish that the purpose of possession was 'keeping dogs at bay'.

The Judge in hearing this matter on appeal stated "*There may be an issue as to whether possession for the purposes of subduing a dog, should the need arise, amounts to a lawful excuse.*"

ITEM	ARTICLE	DESCRIPTION
1.	Acoustic shock weapon	An article made or modified to be used to emit sound so as to injure or disable a person.
2.	Ballistic knife	An article made or modified to be used to discharge a knife and includes the knife.
3.	Blow pipe	An article made or modified to be used to discharge a missile by air expelled from the mouth and includes the missile.
4.	Butterfly knife	<p>A knife —</p> <p>(a) having a 2 piece handle which folds together to cover both edges of the blade; and</p> <p>(b) made or modified to be used to injure or disable a person or as a martial arts weapon,</p> <p>and includes the martial arts weapon known as the butterfly knife or balisong.</p>
5.	Catapult (with an arm brace)	A catapult made or modified to be used with an arm brace that fits or rests on the forearm to support the wrist from the tension of the elastic material used to discharge the missile (e.g. the article commonly known as the “Saunders Falcon Hunting Sling”).
6.	Commercially produced catapult (without an arm brace)	<p>A catapult —</p> <p>(a) made or modified to be used without the arm brace referred to in item 5; and</p> <p>(b) made for commercial distribution.</p>
7.	Disguised knife or sword	<p>A knife or sword disguised as part of another article and includes —</p> <p>(a) a knife disguised as part of a belt (e.g. the article commonly known as the “Bowen” knife belt); or</p> <p>(b) a sword disguised as a cane or stick.</p>
8.	Electric shock weapon	An article made or modified to be used to discharge an electric current so as to injure or disable a person but does not include an approved electric shock case.
9.	Electromagnetic weapon	An article made or modified to be used to emit electromagnetic radiation so as to injure or disable a person.
10.	Extendable baton	A baton made or modified so that the length of the baton extends by gravity or centrifugal force or by any pressure applied to a button, spring or device in or attached to the handle of the baton.

11.	Flick knife or Switchblade	<p>A knife —</p> <p>(a) having a blade that is concealed when folded or recessed into the handle and that opens by gravity or centrifugal force or by any pressure applied to a button, spring or device in or attached to the handle of the knife; and</p> <p>(b) made or modified to be used to injure or disable a person or as a martial arts weapon.</p>
12.	Knuckle dusters	<p>An article made or modified to be worn across the knuckles of a hand so as —</p> <p>(a) to increase the force at the point of impact of a punch or blow when striking another with those knuckles; or</p> <p>(b) to protect the knuckles from injury when striking another with those knuckles.</p>
13.	Knuckle knife	<p>A knife made or modified to be held so that the blade protrudes between the knuckles or fingers of a hand (e.g. the article commonly known as the “Urban Pal” knife).</p>
14.	Pistol crossbow	<p>An article made or modified to be used with one hand to discharge a missile by an elastic force across a stock grooved to direct the missile and includes the missile.</p>
15.	Spray weapon (not oleoresin capsicum)	<p>A spray weapon made or modified to be used to discharge a substance other than oleoresin capsicum.</p>

The use of a spray for such purpose may amount to ill-treatment of a dog and may, therefore, be unlawful. In addition, possession in such circumstances could be seen as similar to possession for the purposes of possible future self-defence.” In South Australia self-defence is not a defence to the possession of a weapon, this is the position at common law that the Act overcomes to some extent.

It seems that there is some support for the concept of possessing capsicum spray for the purpose of defence against a dog in South Australia. However, reliance on what a Judge said in South Australia in *orbiter* ought not to be taken as creating a precedent to be followed by Western Australian Courts. In my view a defence to a charge of possessing pepper spray against a dog attack is fraught with danger. Justice Wheeler has given the interpretation to defences for the possession of capsicum spray a narrow meaning extending to people, the elderly, frail, women and those who are in danger because of their job. It would be difficult to argue that a defence of carrying capsicum spray for defence against a dog attack applied to Rangers defending themselves against dog attack. I say it would be difficult, but certainly not impossible. Again it would not be wise for Rangers to run the gauntlet and submissions ought to be made by the Association to the relevant Ministers based on scientific evidence.

Further, Rangers should not believe that this case gives a general right to carry capsicum spray. It is no defence to a charge for the possession of a capsicum spray to that there was an honest reasonable but mistaken belief that the Ranger could possess capsicum spray (Section 24 of the Criminal Code & ***Denton -V- Bodycoat*** [2000] WASCA 424 (19 December 2000) Although there may well be some support for the proposition that carrying capsicum spray in case of a dog attack may create a defence, it would not be something I would recommend a Ranger to rely on.

ITEM	ARTICLE	DESCRIPTION
1.	Approved electric shock case	Any approved electric shock case.
2.	Baton flail	<p>An article consisting of 2 or more batons joined by a cord, rope or chain so as to form a flail and includes $\frac{3}{4}$</p> <p>(a) the martial arts weapon known as the nunchaku; and</p> <p>(b) a baton constructed in such a way that it can be unscrewed or broken to form a flail.</p>
3.	Bow	An article made or modified to be used to discharge an arrow by an elastic force and includes the arrow.
4.	Crossbow	An article made or modified to be used to discharge a missile by an elastic force across a stock grooved to direct the missile and includes the missile.
5.	Dagger	<p>A sharp pointed stabbing knife having $\frac{3}{4}$</p> <p>(a) a flat blade, exceeding 8 cm in length with non-serrated cutting edges along the length of both sides; or</p> <p>(b) a needle-like blade, the cross section of which is elliptical or has 3 or more sides, and includes a bayonet.</p>
6.	Double end knife	<p>A knife $\frac{3}{4}$</p> <p>(a) having fixed blades at both ends of the handle; and</p> <p>(b) made or modified to be used to injure or disable a person or as a martial arts weapon, (e.g. the martial arts weapon known as the suan ywe gou).</p>
7.	Fixed baton	Any baton other than an extendable baton or a baton flail and includes the martial arts weapon known as the tonfa.
8.	Halberd	<p>An article (other than a spear) $\frac{3}{4}$</p> <p>(a) consisting of a stick or pole with a blade at the end; and</p> <p>(b) made or modified to be used to injure or disable a person or as a martial arts weapon, (e.g. the martial arts weapon known as the naginata).</p>
9.	Hand or foot claws	An article consisting of claws that are made or modified to be attached to or worn on the hands or feet (e.g. the martial arts weapons known as the ninja climbing claws, ninja hand claws and ninja foot claws).
10.	Imitation firearm	An article, not being an article that is clearly a toy, that has the appearance of being a firearm but is not capable of discharging a missile.
11.	Metal whip	<p>An article $\frac{3}{4}$</p> <p>(a) consisting of or incorporating a chain or a combination of a chain and metal pieces or rods; and</p> <p>(b) made or modified to be used as a whip,</p> <p>(e.g. the martial arts weapons known as the Chinese whip, whip spear, 7 or 9 piece iron chain, bian tzu chiang and lien tzu chiang).</p>

12.	Pressure point weapon	An article made or modified to be used to injure or disable a person by application to the pressure points of the human body and includes the martial arts weapon known as the kubotan.
13.	Pronged weapon	An article $\frac{3}{4}$ (a) having 2 or more prongs; and (b) made or modified to be used to injure or disable a person or as a martial arts weapon, (e.g. the martial arts weapons known as the sai and jitte).
14.	Sickle or scythe weapon	A sickle or scythe made or modified to be used to injure or disable a person or as a martial arts weapon (e.g. the martial arts weapons known as the kama and kusarigama).
15.	Spear	Any spear (e.g. the martial arts weapon known as the yari).
16.	Spear-gun	An article made or modified to be used to discharge a spear.
17.		Spray weapon (oleoresin capsicum) A spray weapon made or modified to be used to discharge oleoresin capsicum.
18.	Studded weapon	An article fitted with raised pointed studs that is made or modified to be $\frac{3}{4}$ (a) used to injure or disable a person or as a martial arts weapon; and (b) worn as an article of clothing, (e.g. a studded glove).
19.	Sword	Any sword (e.g. the martial arts weapons known as the butterfly sword, katana and wakizashi) and includes the martial arts weapon known as the tanto.
20.	Throwing blade or knife	A blade or knife made or modified to be thrown and includes an article consisting of a blade attached to a cord, rope or chain so as to enable the blade to be thrown and retrieved (e.g. the martial arts weapon known as the shoge, ninja kyokeysu shoge or kyotetsu shoge).
21.	Throwing star	A sharpened, star-shaped article made or modified to be thrown (e.g. the martial arts weapon known as the shuriken or shaken) and includes a throwing star that is attached to a belt buckle.
22.	Weighted chain or cord weapon	An article $\frac{3}{4}$ (a) consisting of or incorporating a chain or cord made of any material and weighted at both ends; and (b) made or modified to be used to injure or disable a person or as a martial arts weapon, (e.g. the martial arts weapons known as the kusari fundo, manrikigusari and surujin).

In my view the WA Rangers Association ought to lobby the Minister for Police to have an exemption extend to Rangers to carry capsicum sprays for the purpose of carrying out their duty of suppressing dangerous animals. This ought to be grounded on scientific evidence including reports from vets, animal behaviourists, and the RSPCA. At the same time the Association ought to

give consideration to lobbying the Minister for Rangers to be included in a class of persons exempted generally from an offence for carrying capsicum sprays.

Should you wish to discuss any aspect of this advice do not hesitate to contact me.

Yours faithfully

T.Houweling.

Schedule 1 — Prohibited weapons

Schedule 2 — Controlled weapons

[r. 5]

HALL -v- COLLINS [2003] WASCA 74

CORAM : WHEELER J

BETWEEN : ROBERT WILLIAM HALL

Appellant

AND

HARLEY CRAIG COLLINS

Respondent

Catchwords:

Criminal law – Weapons Act 1999 – Controlled weapon – Lawful excuse – No requirement for imminent threat of violence – Sufficient that there are reasonable

grounds to apprehend that circumstances may arise in which it may be necessary to use the spray for the purposes of defence – Proof that substance oleoresin

capsicum – Appeal allowed

Legislation:

Weapons Act 1999 (WA), s 7, s 8, s 10, s 11

Weapons Regulations 1999 (WA), Sch 2, reg 7

Result:

Appeal allowed

WHEELER J:

The facts

1 On 27 March 2003 I allowed the appellant's appeal, and entered a judgment of acquittal in his favour. I did not at that time deliver reasons for judgment. These are my reasons for the orders which I then made.

2 Mr Hall, the appellant, was charged on a complaint alleging that on 4 July 2002 he, not being a person exempted under s 10 of the Weapons Act, without lawful excuse possessed a controlled weapon. Although it was not particularised in the complaint, it is plain that the prosecution case was that the weapon in question was an oleoresin capsicum spray, which by virtue of Sch 2 of the Weapons Regulations 1999 is a controlled weapon. The evidence which was accepted by his Worship was broadly to the effect that the appellant had in his possession at the relevant time a spray canister labelled "Pepper Spray" and referred to by the appellant as "Pepper Spray". The appellant had had occasion to use it previously.

3 The appellant operated what was referred to as a "budget motel" and would have troublesome guests at least one or twice a week. These guests would behave on occasion in an extremely anti social manner, for example by smashing windows and fighting. There had been assaults at the motel. The appellant himself had suffered significant injury to his head at the motel which left him in danger of lasting harm in the event of him being struck in the same area of the head again.

4 The appellant had owned the pepper spray for what he described as "quite a while", being perhaps three or four years. He normally kept it at the office in case of hold-ups. On the particular night referred to in the complaint, he was called to a disturbance in one of the motel rooms and had taken the spray with him. Finding a person engaged in a violent scuffle with a guest, he had discharged the spray at that person. He was not charged with assault or with the unlawful use of the spray.

Grounds of appeal

5 There are two grounds of appeal. The first is to the effect that there was no sufficient evidence from which his Worship could have inferred that the spray weapon was one which discharged oleoresin capsicum, so as to find it a controlled weapon. The second was that his Worship erred in law in failing to hold that the evidence established a defence pursuant to reg 7(2) of the Weapons Regulations 1999. In my view it is convenient to deal with the second of these grounds first.

The Weapons Act 1999

6 Although it appears to me that the regulation in question is tolerably clear on its face, the meaning of a number of provisions of the Weapons Act and of the Regulations appears even more plainly when considered against the background of the pre-existing law, and I briefly outline that background.

7 In the United Kingdom the closest analogous legislation appears to have been the Prevention of Crime Act 1953 which provided by s 1(1) that:

"Any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence."

The question of whether a weapon might be carried for the purposes of defence was considered in *Evans v Hughes* [1972] 1 WLR 1452. The Divisional Court held that the fact that the carrier of a weapon intended to use it defensively did not prevent it from being an "offensive weapon". However, it could be a reasonable excuse for the carrying of an offensive weapon that the carrier was anticipating imminent attack and intended to use it for self-defence. In a consideration of earlier authority, Lord Widgery CJ at 1455 referred to and approved earlier decisions in which it had been said that "reasonable excuse" was intended to refer to the circumstances "immediately prevailing" at the time at which the weapon was carried. In the particular circumstances of that case, the defendant had been carrying an iron bar because he had been attacked by three men a week before, and was carrying it with the intention of using it for self-defence should he be attacked again.

The court considered that it might be open to the justices to find a reasonable excuse in those circumstances but that because of the length of time since the attack, the case was "borderline".

8 A similar provision existed in South Australia in s 15 of the Summary Offences Act 1953 which provided that:

"(1) Any person who without lawful excuse –

(a) carries any offensive weapon ... shall be guilty of an offence ... "

In *Ford v Lindholm* (1987) 45 SASR 445, this provision was considered by Millhouse J. His Honour in effect applied the English line of authority. He did so with some reluctance, in circumstances where the defendant in that case had been carrying two knives, one a Swiss Army knife and the other a short bladed knife. He used the knives partly for camping purposes but also explained that he carried them because he was involved in the live music industry, and that was an industry in which he considered it was desirable to carry them for personal protection.

9 In considering the requirement for imminence of attack, Millhouse J suggested that the law "has reached the edge of absurdity" (at 450). His Honour considered that most people would be surprised to be told that it was unlawful to carry anything for the purpose of using it for self-defence, and remarked that there was an argument that it was appropriate to permit law-abiding citizens to carry at least some items for that purpose.

10 In Western Australia, prior to the Weapons Act 1999, the relevant provision was s 65(4a) of the Police Act 1892. That read:

"Every person who, without lawful excuse, carries or has on or about his person or in his possession any ... other article made or adapted for use for causing injury to the person or intended by him for such use by him ... ". [Commits an offence.]

Miller J had occasion to consider the question of whether pepper spray or capsicum spray fell within that provision in *Waterhouse v Pas*, unreported; SCT of WA; Library No 980495; 1 September 1998. His Honour traced the history of certain amendments to that provision, and noted (at pages 7 – 8) that the Law Reform Commission of Western Australia in its report on Police Act Offences (Project No 85), considered that the scope of the section was "very wide". The Law Reform Commission commented that the provision was not confined to possession in a public place, as were the English provisions, nor to carriage, but included possession at home, so that those for example who kept a cricket bat in their home for protection, without fear of imminent attack, could commit an offence under the section.

The Law Reform Commission assumed, as did Miller J (in my respectful view correctly) that the English line of authority which permitted carriage only where there was an anticipation of "imminent attack" was applicable to s 65(4a).

11 Finally, it should be noted that the question of "reasonable excuse" under the somewhat similar provisions of s 545E of the Crimes Act 1900 (New South

Wales) was considered by the High Court in *Taikato v The Queen* (1996) 186 CLR 454. The majority of their Honours considered that a fear of attack, if well-founded, could constitute a "reasonable excuse" for possession of a dangerous item under that provision. Their Honours took the view that in determining whether the purpose of self-defence was reasonable in the circumstances, the court must consider all of the circumstances including the immediacy of the perceived threat, circumstances such as the time and location in which the weapon was possessed, the type of weapon possessed, and the age, characteristics and experiences of the person charged. A somewhat different view was taken by Dawson J, who considered that it was sufficient

to establish the defence pursuant to s 545E, if the possession was by way of precaution against the possibility of an attack which would justify the use of the article.

12 Against the background of the pre-existing law, it seems clear that the Weapons Act 1999 was intended to alter the law in some respects. Dealing with possession of items such as baseball bats in a dwelling in order to defend persons at that dwelling, s 8 of the Weapons Act 1999 specifically provides that a person does not commit an offence if the person carries or possesses the article at the person's dwelling for such a purpose. The excuse of self-defence as a "reasonable excuse" is specifically excluded, in relation to controlled weapons, by s 7(3) of the Act. To that extent, the Act is more restrictive than the common law. However, s 7(4) provides that subs (3), excluding self-defence as a reasonable excuse, "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".

13 Regulation 7 provides that in respect of oleoresin capsicum, "s 7(3) of the Act does not apply ... if it is carried or possessed by a person for the purpose of being used in lawful defence in circumstances that a person has reasonable grounds to apprehend may arise".

14 Against the background of the pre-existing law, it appears to me to be significant that reg 7 does not make any reference to "imminent" defence, or to any form of temporal nexus between the possession and the possible need for defence. It is also noteworthy that the "circumstances" which are to be considered under that regulation are not the circumstances existing at the time of the possession or carriage; rather, they are circumstances which "may" arise in future. It appears to me that the wording chosen was, deliberately, somewhat broader than any of the formulations of the circumstances in which self-defence would be a reasonable excuse which are to be found in the cases dealing with earlier legislation both in the United Kingdom and in Australia. The reference to circumstances which a person has reasonable grounds to apprehend "may" arise appears to me to be close to the view of Dawson J in *Taikato*, that possession would be permissible if it was by way of precaution against the "possibility" of an attack, rather than to any other pre-existing formulation of what might constitute a reasonable excuse.

15 If it were necessary to seek confirmation of the view which I take of the intended meaning of reg 7, it appears to me to be amply confirmed by a reference to the relevant parliamentary debates. As well as having the Bill for the Weapons Act before it, it appears that Parliament also had, at the time of debating that Bill, a draft schedule of proposed Regulations. In this context, there was considerable debate about pepper sprays or capsicum sprays. It was noted that the police did not wish them to be generally available. However, the Hon Attorney General, who introduced the legislation into the Legislative Council on behalf of the Government, made it plain that it was the Government's intention that people should be able to carry such sprays for the purposes of defence. He noted that the actual protection provided by such a spray may not be great, but that it was considered important that people should be able to "perceive" themselves as being safer. That appears also to have been the view taken by those other members of Parliament, from all parties, who referred to this issue: eg 20 October 1998 page 2263, 2269;

23 March 1999 page 6836 – 6837; 2 June 1999 page 8673 – 8674. It was plainly intended that women carrying sprays when they go out in the evening, or older and frailer members of the community carrying them in situations where they felt themselves to be in danger, would not be committing an offence under the legislation.

16 In the view which I take of the Weapons Act and Regulations, then, it is not necessary that there be an imminent threat, before such a spray can be possessed or carried. It is enough that a person has reasonable grounds to believe that circumstances in which it may be necessary to use the spray for that purpose may arise.

17 However, this does not in my view mean that such spray can be carried at all times and in all circumstances. It is necessary for the person carrying the spray (the proof of lawful excuse being upon them pursuant to s 11 of the Act) to establish that there is an actual purpose of defence in circumstances which are reasonably anticipated. Looking, for example, at the circumstances of this appellant, the threat which he anticipates is obviously one which may arise from time to time at the motel. If he were to carry the spray in the supermarket in the middle of the day, there would be no reason to anticipate any threat in those circumstances and it would not therefore appear that the inference could be drawn that his purpose in doing so was for defence. Similarly, if he were to cease managing the motel, he would not be able to retain the spray simply on the basis that it had once been lawful for him to possess it. However, where a person envisages on reasonable grounds that circumstances requiring the use of the spray for self-defence may arise from time to time, it appears to me that possession on an ongoing basis must be envisaged.

18 It is plain that the appellant did have, based on the nature of the motel and his past experiences, reasonable grounds to apprehend that there would arise from time to time circumstances in which he might well be required to use the spray for the purpose of self-defence. His Worship accepted that the appellant possessed the spray for that purpose. On the day in question he not only possessed it, but also carried it. He carried it from the office only when advised that there was a disturbance of some kind, and it appears that based upon the history which he gave of incidents at the motel, and upon his description of the actual incident which met him when he attended at the room in question, that there were reasonable grounds for him to have apprehended that he may need to use the spray for defence of himself or of his guest.

19 His Worship took the view that, because of the earlier authorities to which I have referred, which dealt with somewhat different legislation, possession was only lawful when there was an imminent threat of violence. For that reason, his Worship considered that the appellant's possession of the spray for the long periods during which he did not actually use it would have encompassed a significant period of time when there was no imminent threat. It was for that reason that his Worship convicted the appellant.

20 It appears to me that the only reason that his Worship convicted the appellant was because of the finding that there was no imminent threat operating throughout the entire period of the appellant's possession of the item. For the reasons which I have endeavoured to explain, there was no requirement of imminence. Based upon the evidence which his Worship clearly accepted, it is my view that the only inference open was that the appellant did possess and carry the spray on the day in question for the purpose of lawful defence in circumstances which he had reasonable grounds to apprehend might arise.

Failure to prove the substance was oleoresin capsicum.

21 It is my view that the conviction should be quashed and a judgment of acquittal substituted based upon ground (2) of the grounds of appeal. It is strictly unnecessary, therefore, to consider ground (1). However, for the sake of completeness, I observe that I would also have allowed the appeal on this ground.

22 It is only a spray which discharges oleoresin capsicum which is a controlled weapon under the Weapons Regulations 1999. There was no testing of the item carried out by the appellant so as to establish what substance, if any, it did discharge.

23 It was sought to argue before me that "a pepper spray" and "capsicum spray" were necessarily the same substance. It is true that in the parliamentary debates the terms are often used interchangeably. It is also true that in common parlance a "pepper" is often used as another name for a capsicum. However, there are a variety of substances commonly described by the word "pepper" including the common spices known as black and white pepper. It is my view that it was

not open to his Worship to take judicial notice of any proposition that pepper spray and oleoresin capsicum spray were synonymous terms. Judicial notice is only taken of something which is "so generally known that every ordinary person may be reasonably presumed to be aware of it" (Holland v Jones (1917) 23 CLR 149).

24 In view of the fact that there are a variety of irritant substances which in the general community are capable of being known by the name of "pepper", and in the absence of any evidence as to whether only one of them is capable of being modified so as to produce an irritant spray, it is my view that even the appellant's apparent admission that the substance was "pepper spray" was not sufficient to establish that the substance was a controlled weapon.