

# **FIREARMS AND THE LAW**

**JULY 2015**

**Rudi Fortson Q.C.**

**25 Bedford Row,  
London. WC1R 4HD**

**Visiting Professor of Law, Queen Mary University of London**

This paper has been commissioned by the Law Commission for England and Wales. The paper is confined to those topics addressed by the Commission in its Scoping Paper. The analysis contained herein is that of the author and not of the Commission.

# CONTENTS

<b>THE CASE FOR REFORM</b> .....	<b>6</b>
<b>CHAPTER 1: DEFINING A “FIREARM”</b> .....	<b>9</b>
<b>I. BACKGROUND</b> .....	<b>9</b>
“FIREARM”: A MISNOMER? .....	9
<b>LEGISLATION</b> .....	<b>11</b>
Gun Licence Act 1870.....	11
Pistols Act 1903.....	11
Firearms Act 1920 .....	13
The Firearms and Imitation Firearms (Criminal Use) Act 1933 .....	14
The Firearms Act 1934 .....	15
The Firearms (Amendment) Act 1936.....	15
The Firearms Act 1937 .....	18
The Firearms Act 1965 .....	18
The Firearms Act 1968 .....	19
Air weapons .....	19
Prohibited weapons.....	19
Firearms (Amendment) Act 1982.....	20
The Firearms (Amendment) Act 1988.....	21
Firearms (Amendment) Act 1992.....	21
Firearms (Amendment) Act 1994.....	21
The Firearms (Amendment) Act 1997.....	21
The Firearms (Amendment) No.2 Act 1997 .....	22
The Anti-Social Behaviour Act 2003.....	22
Violent Crime Reduction Act 2006.....	23
Anti-social Behaviour Crime and Policing Act 2014 .....	23
<b>II. BARREL THAT CAN DISCHARGE A MISSILE</b> .....	<b>23</b>
“BARREL” .....	23
“DISCHARGE” .....	23
Discharge ineffective: defective barrels.....	24
<b>DEVICES NOT ‘LETHAL BARRELLED’ WITHOUT MODIFICATION</b> .....	<b>25</b>
(1) From an imitation - to a firearm .....	25
Cafferata v Wilson .....	26
R v Freeman.....	27
Muir v Cassidy.....	28
Kelly v MacKinnon .....	28
The Firearms Act 1982 – readily convertible imitations .....	29
Overview.....	29
Interpretation issues in respect of the 1982 Act .....	30
When is an imitation firearm “readily convertible”?.....	32
How the 1982 Act came to end the Cafferata and Freeman approach .....	33
R v Bewley.....	33
Bewley, the 1982 Act, and imitation prohibited weapons .....	34
Is an imitation that is not readily convertible, a “component part” of a firearm? .....	35
The chequered history of convertible imitations.....	35
The Bewley ‘sting in the tail’ .....	36
Divergence between the law of England and Scotland.....	36
(2) Whether a “firearm” can be made to work as a firearm .....	37
Items that do not function: “designed or adapted” to function in a certain way.....	37
(a) R. v. Jobling.....	37
(b) R v Pannell.....	38
(c) R v Clarke (Frederick).....	39
(d) Jessop v Stevenson .....	40
Whether the intention of the “designer” is relevant .....	40
(a) R v Law: - weapon could discharge “two or more missiles” .....	40
(b) R v Rhodes: - vital words are “[missile] can be discharged” .....	41

(3) Device is a firearm, but of a different type when modified.....	42
(4) Device is a firearm, but modification alters authorisation to have it .....	42
“Component parts” of a non-firearm.....	43
<b>III. “LETHAL BARRELLED” – LETHALITY .....</b>	<b>43</b>
<b>PRACTICAL PROBLEMS .....</b>	<b>43</b>
Distinguishing between toys and firearms: the “weapons” criterion .....	43
Exempting air weapons as “firearms” – unless “specially dangerous” .....	44
The position c.1920 and c.1937 .....	44
The position under the Firearms Act 1968 .....	45
<b>CASE LAW: MEANING OF “LETHAL BARRELLED WEAPON” .....</b>	<b>46</b>
The test of “causing more than trifling and trivial injury when misused” .....	46
Read v Donovan [1946] .....	46
Moore v Gooderham [1960] .....	47
R v Thorpe.....	47
Is there a scientific, evidence-based test, for lethality?.....	48
Toy guns and replicas .....	50
Weapons with a muzzle energy that varies over time.....	51
The problem of ‘realistic imitation firearms’ and lethality .....	51
Can a shot-discharging gun be a “firearm” without being “lethal”?.....	53
Comment .....	53
Does the word “weapon” add anything to the definition of “firearm”?.....	54
Cases where the word “weapon” was not irrelevant .....	55
<b>‘LETHAL FIREARM’: DEFINITION APPLIED PRAGMATICALLY.....</b>	<b>57</b>
Home Office Guidance .....	57
Whether the inclusion of non-weapons in the 1968 Act is logical or desirable.....	58
<b>IV. “COMPONENT PARTS”.....</b>	<b>58</b>
Identifying parts that are “component parts” .....	59
Judicial opinion of what constitutes a “component part” .....	59
Home Office Guidance .....	59
“Component parts” – further points.....	60
Parts of shot guns and air weapons .....	60
Deactivated weapons?.....	61
The device is neither “lethal barrelled weapon” nor a “prohibited weapon” .....	61
Changed character of the device: whether parts are “component parts”.....	62
Parts of a non-lethal weapon that are usable in a lethal weapon .....	63
Parts that could not be used in any section 57 “firearm” .....	63
Components not to be confused with ‘accessories’ or extras .....	64
Whether a telescopic sight is a ‘firearm’ .....	64
3D Printing of component parts.....	64
The Firearms (Northern Ireland) Order 2004.....	65
<b>V. ACCESSORIES.....</b>	<b>65</b>
Accessory Designed or Adapted to Diminish Noise or Flash .....	65
<b>CHAPTER 2: IMITATION FIREARMS.....</b>	<b>68</b>
<b>INTRODUCTION.....</b>	<b>68</b>
<b>LEGISLATION .....</b>	<b>69</b>
Pistols Act 1903 and Firearms Act 1920.....	69
Firearms and Imitation Firearms (Criminal Use) Act 1933 .....	69
Firearms (Amendment) Act 1936.....	70
Firearms Act 1937 .....	71
Firearms Act 1965 .....	71
Firearms Act 1968.....	71
The ‘Firearms Acts’ 1982, 1994, 1997; the ASBA 2003, and VCRA 2006.....	72
<b>SECTION 57(4): DEFINITION OF “IMITATION FIREARM” .....</b>	<b>73</b>
‘Appearance of Being a Firearm’ .....	73
Device Must Be a ‘Thing’ that is Distinct from the Holder of It.....	74
The thing need not be adapted to look like a firearm, or replica .....	76

<b>CONVERTING AN IMITATION: s.4(3), FA.1968 .....</b>	<b>76</b>
<b>READILY CONVERTIBLE IMITATIONS: 1982 ACT.....</b>	<b>77</b>
Overview .....	77
Who decides whether an item is “readily convertible imitation”? .....	78
“Readily convertible” .....	79
Do the words “imitation firearm” refer to section 57(4) of 1968 Act? .....	79
Burden of proof: the section 1(5) defence .....	80
Who shoulders the burden of proof .....	80
“ <i>No reason to suspect</i> ” .....	81
<b>REALISTIC IMITATION FIREARMS.....</b>	<b>82</b>
Definition of a “realistic imitation firearm” .....	83
Offences and defences under the VCRA 2006 .....	85
Offences.....	85
Defences.....	85
<b>OTHER MEASURES RELATING TO IMITATION FIREARMS .....</b>	<b>86</b>
Specification for imitation firearms: section 39 VCRA 2006 .....	86
“ <i>Supplying imitation firearms to minors</i> ” .....	87
Defining “imitation firearm” for new statutory measures .....	88
<b>CHAPTER 3: AIR WEAPONS.....</b>	<b>89</b>
<b>WHAT IS AN “AIR WEAPON”? .....</b>	<b>89</b>
INTRODUCTION .....	89
THE CASE OF R V ‘L’ .....	92
The problem of construction .....	92
The Court of Appeal analysis in R v L .....	94
<b>FURTHER ISSUES .....</b>	<b>95</b>
Weapons powered by gas other than carbon dioxide .....	95
“ <i>Specially dangerous</i> ” and strict liability.....	95
Non-lethal air weapons.....	95
Types of air weapon prohibited by section 5 of the 1968 Act .....	96
Determining muzzle energy levels .....	96
The ‘back-conversion’ of air weapons .....	96
Prohibited [air] weapons .....	97
Section 1 firearms.....	97
Registered firearms dealer exemption .....	98
Issues .....	98
<b>CHAPTER 4: ANTIQUES, TROPHIES, ITEMS OF HISTORIC INTEREST, AND COLLECTIONS .....</b>	<b>99</b>
<b>I. ANTIQUE FIREARMS.....</b>	<b>99</b>
BACKGROUND .....	99
<b>II. THE CURRENT LAW.....</b>	<b>101</b>
THE FIREARMS ACT 1968 AND RELATED LEGISLATION .....	101
ANTIQUÉ FIREARMS: SECTION 58(2) .....	102
Home Office Guidance .....	103
Whether the word “antique” can be defined .....	104
Judicial construction .....	105
R v Howells: “antique” is a matter of objective fact .....	105
Richards v Curwen: issue is a question of fact and degree .....	105
R v Burke: issue is a question of fact.....	106
Bennett v Brown: - not antique if made in “this century” .....	106
CPS v Thomson: - issue one of fact and degree .....	107
Jury trial outcomes .....	107
Comment.....	108
Burden of proof that the firearm is antique .....	108
“ <i>Curiosity or ornament</i> ”.....	108
Defining “curiosity” and “ornament” .....	108

Ornament – place where the firearm is kept.....	109
Even if not an ornament, the firearm may be a curiosity .....	109
Intended or actual use of the firearm: acquisition of ammunition.....	109
The exemption as ‘antique’ is not fixed.....	110
European Union issues.....	110
<b>III. TROPHIES (OF WAR)</b> .....	<b>111</b>
BACKGROUND .....	111
HOME OFFICE GUIDANCE.....	114
Heirs in possession of trophies of war .....	114
<b>IV. FIREARMS (HANDGUNS) OF HISTORIC INTEREST</b> .....	<b>115</b>
BACKGROUND .....	115
First category: section 7(1), F(A)A 1997 .....	115
Second category: section 7(3), F(A)A 1997 .....	116
<b>V. COLLECTIONS: “PROHIBITED” ITEMS: SECTION 5(1A)</b> .....	<b>117</b>
<b>VI. PROBLEMS WITH THE CURRENT LAW</b> .....	<b>118</b>
Disaggregated legislation .....	118
Lack of definitions .....	118
Historic Interest Firearms are controlled: Antiques are exempt.....	119
Statutory savings; ‘good reason’ discretion; and certificate conditions .....	119

## THE CASE FOR REFORM

- i. At the turn of the 20<sup>th</sup> century there were few statutory controls on the importation, manufacture, carrying or use of a firearm. The Pistols Act 1903 was a weak attempt to control the acquisition and use of pistols with a barrel length no greater than nine inches. The Act was soon circumvented. But the measure belies the strong division of opinion that had been expressed in Parliament in the ten years leading up to that Act, and after two attempts (in 1893 and 1895) to introduce a Pistols Act had failed. However, by the end of the 1914-1918 Great War, there was considerable concern within government circles that the “world’s stock of rifles and pistols” had greatly increased and that many firearms had come into the possession of private persons, “notably discharged soldiers and their relatives”.<sup>1</sup> The concern was not limited to the irresponsible or criminal use of guns, but extended to a fear of armed civil unrest.<sup>2</sup>
- ii. The Firearms Act 1920 enacted a system of gun control by which the purchase, possession and use of firearms was restricted to persons fit to hold a firearm certificate. The certificate was evidence that the holder was a person who had “good reason” for requiring the certificate, who could be trusted to have the firearm “without danger to the public safety”, and whose identify and address were known to the police by virtue of the application for the certificate. The 1920 Act specified only one weapon as a “prohibited weapon”, namely, any device that was designed to discharge a noxious substance or thing (e.g. CS gas).<sup>3</sup> The Act did not legislate in respect of imitation firearms, and it was not until the Firearms and Imitation Firearms (Criminal Use) Act 1933 that criminal offences (of limited ambit) were created concerning the use of things which had “the appearance of being a firearm”.
- iii. Following a detailed review in 1935 by the Bodkin Committee<sup>4</sup> of firearms and legal controls over their use, Parliament made substantial amendments to the 1920 Act<sup>5</sup> and the legislation was consolidated in the Firearms Act 1937. Since that time, no fewer than twelve Acts of Parliament and their related secondary legislation have been introduced to amend the law relating to firearms, ammunition, and imitation firearms. And no fewer than nine of those Acts were passed since the current principal Act (the Firearms Act 1968) came into force. The result is a complex and confusing structure of rules.
- iv. The word “firearm” has taken on a meaning far removed from that in everyday use. There are “firearms” as defined by section 57(1) of the 1968 Act, and “real firearms” as defined by section 38(7) of the Violent Crime Reduction Act 2006. The former will often be “lethal barrelled”, but they can also be “prohibited weapons”<sup>6</sup> or “component parts”<sup>7</sup> or “accessories” of a firearm.<sup>8</sup> By the time that the Firearms Act 1937 came into force, there were two types of “prohibited weapons”,<sup>9</sup> whereas there are now eight under

<sup>1</sup> Report of Committee on the Control of Firearms; 15th November, 1918.

<sup>2</sup> See Chapter 4, paras.4.63 and 4.64.

<sup>3</sup> Firearms Act 1920, section 6.

<sup>4</sup> 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758].

<sup>5</sup> By the Firearms (Amendment) Act 1936.

<sup>6</sup> Section 57(1)(a) of the Firearms Act 1968.

<sup>7</sup> Section 57(1)(b) of the Firearms Act 1968

<sup>8</sup> Section 57(1)(c) of the Firearms Act 1968.

<sup>9</sup> See section 17(1) of the Firearms Act 1937

section 5(1),<sup>10</sup> and two under section 5(1A).<sup>11</sup> Most prohibited weapons are barrelled and lethal, but a device that discharges a noxious thing such as electricity from a stun gun, or CS gas, or pepper,<sup>12</sup> is also a “prohibited weapon” and thus a “firearm”.<sup>13</sup> Some items are “firearms” notwithstanding that they are designed for purposes other than causing damage to persons or property (e.g. some signalling kits). Sensibly, the Secretary of State has taken the view that devices listed in the Home Office Guide (such as ‘captive-bolt stunning devices’ and ‘nail guns’) “should not be regarded as firearms within the definition of the Act” (but this may not be what the 1968 Act actually provides).<sup>14</sup>

- v. What might loosely be styled ‘imitation firearms’, fall into four categories: (i) “imitation firearms’ as defined by section 57(4), (ii) “readily convertible imitation firearms”,<sup>15</sup> (iii) “realistic imitation firearms”<sup>16</sup> and, (iv) things which “though having the appearance of being a firearm” are incapable of discharging a missile.<sup>17</sup>
- vi. Some words and phrases are not defined in the 1968 Act, such as “antique”, “trophy of war”, and “component part”. The expression “air weapon” is at best ambiguous (see *R v L*<sup>18</sup>). The description of something that is “lethal barrelled” is of uncertain scope because although there is a legal test for lethality (as a matter of case-law) there is no statutory test under the 1968 Act. What is more, the legal test is at odds with muzzle-energy velocity thresholds that have been set in secondary legislation for “air weapons” that are “specially dangerous”<sup>19</sup> (as well as advisory energy levels mentioned in Home Office Guidance in respect of airsoft BB guns).<sup>20</sup>
- vii. Not all amendments made to the firearms legislation are incorporated into the principal firearms Act, namely, the Firearms Act 1968. As a result, firearms legislation has become disaggregated, which not only makes the law difficult to comprehend, but carries with it the potential for serious errors in its application. For example, although the lists of “prohibited weapons” and “prohibited ammunition” are set out in 1968 Act, statutory exemptions are divided between that Act and the Firearms (Amendment) Act 1997. Rules relating to “realistic firearms” are set out in the Violent Crime Reduction Act 2006, but insofar as that Act refers to “firearm” and “imitation firearm”, the meaning of the latter two expressions are derived from section 57 of the 1968 Act. Determining whether a device is a “firearm”, notwithstanding that in its existing form it is ineffectual as a “lethal barrelled weapon”, will depend on the ease with which the device can be made effectual. But this requires a consideration of the provisions of the Firearms Act 1982 (‘readily convertible’ imitation firearms, noting *R v Bewley*<sup>21</sup>) read together with the 1968 Act.

<sup>10</sup> See section 5(1)(a)-(b) of the Firearms Act 1968 [section 5(1)(c) is “prohibited ammunition”].

<sup>11</sup> See section 5(1A)(a) and (c); section 5(1A)(c) can also be classified as “prohibited ammunition”.

<sup>12</sup> Section 5(1)(b) of the Firearms Act 1968.

<sup>13</sup> *R v Weaver* [2007] EWCA Crim 3485.

<sup>14</sup> See the Home Office Guide on Firearms Licensing Law, March 2015, para.2.55.

<sup>15</sup> Firearms Act 1982.

<sup>16</sup> Violent Crime Reduction Act 2006, sections 36 to 38.

<sup>17</sup> See section 4(3) of the Firearms Act 1968 (conversion of a weapon).

<sup>18</sup> [2015] EWCA Crim 5; and see Chapter 3; para.3.10.

<sup>19</sup> See the Firearms (Dangerous Air weapons) Rules 1969, SI 1969/47.

<sup>20</sup> See the Home Office Guide on Firearms Licensing Law, March 2015, para.2.6.

<sup>21</sup> [2012] EWCA Crim 1457.

- viii. The legislation has justifiably been described as “labyrinthine” by the Court of Appeal in *R v L*, and criticised by Professor Ashworth.<sup>22</sup> The Home Office, by way of its Guide to Licencing Law, has made a commendable attempt to address a range of issues that ought to be addressed in the firearms legislation. But the Guide is not without its critics and it does not have the force of law.
- ix. In over one hundred years, only two statutes have consolidated firearms legislation, namely, the Firearms Acts of 1937 and 1968. But, what is required is something more – a single, carefully crafted code, which can be updated as occasion requires without fundamentally altering its structure. A model, that is worthy of consideration (it is submitted) is the South Australian Firearms Act 1977, by which firearms are grouped into Classes (A, B, C, D, etc) according to type and the intensity of control to be applied in respect of firearms within each Class.
- x. This document does not detail all areas of UK firearms legislation. Its purpose is to focus on those topics addressed by the Law Commission as part of its Scoping exercise.

<sup>22</sup> Editorial, ‘Firearms and Justice’ [2013] Crim. L.R. 447.



# CHAPTER 1: DEFINING A “FIREARM”

## I. BACKGROUND

### “FIREARM”: A MISNOMER?

1.1 Section 57(1) of the Firearms Act 1968 defines “firearm” to mean:

(1) ... a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes--

(a) any prohibited weapon, whether it is such a lethal weapon as aforesaid or not; and

(b) any component part of such a lethal or prohibited weapon; and

(c) any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon;

and so much of section 1 of this Act as excludes any description of firearm from the category of firearms to which that section applies shall be construed as also excluding component parts of, and accessories to, firearms of that description.

1.2 The above definition (section 57(1)(a)-(c)) is far removed from the popular notion of a “firearm”,<sup>23</sup> or even the Oxford English Dictionary definitions of a “gun”, as “a weapon from which missiles are propelled by the combustion of gunpowder or other explosive”,<sup>24</sup> or a “firearm” as:

A weapon incorporating a metal tube from which bullets, shells, or other missiles are propelled by explosive force, typically making a characteristic loud, sharp noise.<sup>25</sup>

1.3 The 1968 statutory definition of “firearm” is not limited to barrelled weapons from which missiles can be discharged by way of an explosive propellant.<sup>26</sup>

1.4 The definition includes “prohibited weapons” of types specified in section 5 of the Act. Not every specified “prohibited weapon” is barrelled from which a projectile can be discharged, but includes, “any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing”.<sup>27</sup> Thus, the definition is sufficiently wide to include (for example) ‘stun guns’,<sup>28</sup> pepper sprays, or devices that discharge CS gas.<sup>29</sup> Given the breadth of the statutory definition, although not every

<sup>23</sup> The point was made by the Court of Appeal in *R v Weaver* [2007] EWCA Crim 3485: that the definition of “firearm” as it appears in section 57(1) of the 1968 Act “...is a definition for all purposes within the Act. It may be at odds with the everyday use of the word ‘firearm’, but that is Parliament’s privilege.” (per Hallett LJ, [18])

<sup>24</sup> Oxford English Dictionary (online).

<sup>25</sup> Oxford Dictionary of English, 3<sup>rd</sup> edition.

<sup>26</sup> In *Seamark v Prouse* [1980] WLR 698, Lord Widgery CJ., having referred to the Shorter Oxford Dictionary definition of a “firearm” (as a “weapon from which missiles are propelled by an explosive, e.g. gunpowder”), remarked (albeit in the context of the Licensing Act 1872) that “I venture to think that the modern meaning of ‘firearm’ at all events is somewhat wider than that”.

<sup>27</sup> See section 5(1)(b), Firearms Act 1968.

<sup>28</sup> *Flack v Baldry* [1988] 1 WLR 397.

<sup>29</sup> In *R v Weaver* [2007] EWCA Crim 3485, the trial judge accepted a submission that the features of a firearm were that it was barrelled and capable of discharging shot, bullet or other missile. The Court of Appeal held (correctly it is submitted) that he erred in that regard. The judge was concerned that somebody found in possession of a CS gas canister should not find themselves facing the minimum sentence provisions of s.51A, FA 1968 [17]. It is submitted that a CS canister alone is not the “weapon”: the weapon is the device by which the gas is discharged (perhaps nothing more than a ‘spray’ nozzle that can be depressed: consider *R v Bradish* (1990) 90 Cr.App.R. 271, B was found in possession of a metal spray canister, marked “Force 10 Super

firearm is a “prohibited weapon”, every “prohibited weapon” is a “firearm” (*R v Weaver*).<sup>30</sup>

- 1.5 The parts of a “lethal barrelled weapon” (e.g. a cylinder) or of a “prohibited weapon”, will be “firearms” if they fall within the section 57(1) definition of “component parts”: and this would appear to be the case notwithstanding that other parts are needed to complete the device, and which are not in a person’s possession (consider *Ashton*).<sup>31</sup>
- 1.6 ‘Sound moderators’ (popularly styled ‘silencers’ or ‘sound suppressors’) and ‘flash eliminators’, are “accessories” which, by section 57(1), fall within the statutory definition of a “firearm”. It remains to be decided whether an accessory that is possessed separately, is sufficient to bring it within section 57(1): see *Yong*.<sup>32</sup>
- 1.7 This rolled-up (and somewhat artificial) definition of “firearm” requires careful application. For example, if it is alleged that a person was in possession of an “imitation firearm”, section 57(4) of the Firearms Act 1968 provides a general definition of that expression,<sup>33</sup> namely, a thing that has the “*appearance of being a firearm...whether or not it is capable of discharging any...missile*”. A fixed-pronged electronic stun-gun does not discharge a missile, but it is a “prohibited weapon” (section 5(1)(b)), and thus a “firearm” by virtue of section 57(1). But just because something “has the appearance of” being a stun-gun, it does not follow that it falls within the general definition of an “imitation firearm” because section 57(4) describes imitations “*other than...*” a section 5(1)(b) weapon. Although section 57(1) includes - as a “firearm” - any “component part” [section 57(1)(b)] or an “accessory” [section 57(1)(c)], each of those provisions is disapplied in respect of a “*readily convertible*” imitation firearm” by virtue of section 1(4) of the Firearms Act 1982.<sup>34</sup>
- 1.8 A number of issues thus fall to be considered:
  - (1) Whether the existing definition of “firearm” is too broadly drawn;
  - (2) What would be an appropriate definition of a “firearm”?
  - (3) What is meant by “lethal”, and how is lethality to be determined?
  - (4) What is the significance of the word “weapon” in the current definition of a “firearm” (section 57(1), FA 1968)?
  - (5) What does “weapon” mean? Does that word import a mental ingredient, (namely, purpose) on the part of the person who designed, adapted, or manufactured the device? Or, does that word relate to the purpose of the person who is in possession of the device?
  - (6) What distinguishes a “part” from a “component part” (if there is a distinction)?
  - (7) Should “firearms”, “prohibited weapons”, “accessories” and “component parts” be treated discretely under legislation rather than being ‘rolled up’ and termed “firearms”?

Magnum C.S” and held to be a section 5(1)(b) prohibited weapon). *Quaere* whether a mere CS gas canister is “ammunition” within section 5(1A)(a).

<sup>30</sup> *R v Weaver* [2007] EWCA Crim 3485.

<sup>31</sup> *R v Ashton* [2007] EWCA Crim 234.

<sup>32</sup> [2015] EWCA Crim 9; and see chapter 1, para.1.252 *et seq.*, “Accessories”.

<sup>33</sup> There is more than one definition of an “imitation firearm” for the purposes of the Firearms Acts: see chapter 2, para.2.5.

<sup>34</sup> Section 1(4)(b) of the Firearms Act 1982.

(8) Should “component parts” and/or “accessories” be controlled at all?<sup>35</sup>

- 1.9 Only some of the aforementioned issues (insofar as they involve questions of law) are considered in this chapter.
- 1.10 Many of the ambiguities that have arisen in the construction of section 57 of the 1968 Act (and the incoherence that exists in the current statutory regime relating to firearms) have been the result of attempts to consolidate (rather than to codify) legislation that has been enacted piecemeal since 1870. *Street v DPP*<sup>36</sup> and *R v L*<sup>37</sup> are telling examples of the complex problems of construction that this approach has caused. In *Street*<sup>38</sup> an experienced Lord Justice of Appeal said “it does seem to me that in some respects the use of the expression ‘firearm’ in the Firearms Act [1968] is not in every respect entirely consistent” (per May LJ).

## LEGISLATION

### Gun Licence Act 1870

- 1.11 Prior to the enactment of the Pistols Act 1903, there were very limited controls over what might loosely be called ‘firearms’.<sup>39</sup> The Gun Licence Act 1870 was principally a revenue-raising instrument.<sup>40</sup> It defined “gun” as including:<sup>41</sup>
- ...a firearm of any description and an air gun or any other kind of gun from which any shot, bullet, or other missile can be discharged.
- 1.12 A licence was required (to be obtained annually on payment of Excise duty<sup>42</sup>) by every person who would “use or carry” a gun in the United Kingdom.<sup>43</sup> The penalty for using or carrying a gun outside the curtilage of a dwelling house was the forfeiture of a specified sum.<sup>44</sup>
- 1.13 Where a gun was carried “in parts” by two or more persons in company, each of those persons was deemed to “carry the gun”.<sup>45</sup> The principle purpose of the provision was to defeat excise duty avoidance. By contrast, later enactments that included in the definition of a “firearm”, “parts” or “component parts”, appear to have done so as part of the strategy for curtailing the availability of guns in the United Kingdom.

### Pistols Act 1903

- 1.14 The Pistols Act 1903<sup>46</sup> made it unlawful<sup>47</sup> (and an offence) to sell, auction, or to “let on
- <sup>35</sup> Suppose a person possesses a 6-chambered cylinder to use as a pencil holder or paperweight. Should such actions and purposes attract criminal liability and punishment?
- <sup>36</sup> [2004] EWHC 86 (Admin).
- <sup>37</sup> [2015] EWCA Crim 5; see Chapter 3, para.3.10.
- <sup>38</sup> See Chapter 1, para.1.200
- <sup>39</sup> A game licence might be required.
- <sup>40</sup> Excise duty was payable annually (section 4).
- <sup>41</sup> Section 2, Gun Licence Act 1870.
- <sup>42</sup> Section 4.
- <sup>43</sup> Section 3, Gun Licence Act 1870.
- <sup>44</sup> Section 7: ten shillings was specified in the Act (as originally drafted).
- <sup>45</sup> Section 8.
- <sup>46</sup> Read for the first time: HC Deb 21 January 1902 vol 101 c.452; read for the second time: HC Deb 20 February 1903 vol 118 cc.404-5.
- <sup>47</sup> The first paragraph of section 3 provided: “It shall be unlawful to sell by retail or by auction or let on

hire”, a “pistol” to any person who was not in possession of a game licence, or an excise licence granted under the Guns Licence Act 1870, or who could not give “reasonable proof” that he was entitled to “use and carry” a gun. A further restriction was placed on persons under the age of eighteen from buying, hiring, using or carrying a “pistol” (a breach of which attracted a financial penalty and forfeiture or disposal of the weapon).<sup>48</sup>

1.15 The Act defined “pistol” (section 2) to mean:

...a firearm or other weapon of any description from which any shot, bullet or other missile can be discharged, and of which the length of barrel, not including any revolving detachable or magazine breach, does not exceed nine inches.

1.16 Neither the word “firearm” nor “weapon” were further defined in the 1903 Act. Section 2 was not expressed to be limited to projectiles discharged by way of an explosive charge.

1.17 The definition applied to a limited range of “weapons”, namely, all pistols and revolvers with a short barrel (not exceeding nine inches),<sup>49</sup> but it did not include component parts or accessories. Subject to barrel length, the Act did not apply to rifles or ‘sporting guns’<sup>50</sup> and it was not intended to catch a toy gun even if it was one from which shot or a bullet could be discharged.

1.18 The provisions of the Act did not apply to an “antique pistol” that was sold “as a curiosity or ornament”.<sup>51</sup> For a discussion regarding antique firearms, see Chapter 4.

1.19 The 1903 Act did not expressly exclude air weapons from its reach.

1.20 The question of whether an article was a ‘toy’ or a ‘firearm’ was a question of fact. However, differentiating between the two, tended to turn on whether or not the article was a “weapon”. Thus, in *Bryson v Grange Ltd.*,<sup>52</sup> (a gun from which darts or pellets were discharged by means of a spring, and capable of inflicting a slight wound), Darling J said [emphasis added]:

I think [the magistrate] should carefully inform his mind as to what a weapon is and what it is meant for *in the way of offence and defence*, and then if he decides it is a weapon, it obviously discharges a bullet and would therefore be within the statute; if it is not a weapon, it could not be within the statute.

1.21 Thus, the purpose for which the device was designed and constructed was a material consideration. Following the introduction of the Firearms (Amendment) Act 1936, the

hire a pistol to any person, unless at the time of sale or hire such person either produces a gun or game licence then in force, or gives reasonable proof that he is a person entitled to use or carry a gun without a gun or game licence by virtue of section seven of the Gun Licence Act, 1870, or that, being a householder, he proposes to use such a pistol only in his own house or the curtilage hereof, or that he is about to proceed abroad for a period of not less than six months, and produces a statement to that effect, signed by himself and by a police officer of the district within which he resides, of rank not lower than that of inspector, or by himself and by a justice of the peace.”

<sup>48</sup> Section 4, Pistols Act 1903.

<sup>49</sup> The 1903 Act was easily circumvented by making the barrel slightly longer than nine inches: and see the 1934-35 “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758]

<sup>50</sup> That is to say, typically smooth-bore shotguns.

<sup>51</sup> Section 8.

<sup>52</sup> [1907] 2 K.B. 630; Lord Alverstone C.J., Darling and A. T. Lawrence JJ.

relevance of the word “weapon” lessened.

- 1.22 Lethality was not expressed to be an ingredient of the section 2 definition of “pistol” (PA 1903). One explanation for its absence may be that Parliament assumed that it was open to a court to take into account the potentially lethal effect of the device in question when deciding whether it was a toy or a “weapon”. In *Campbell v Hadley*,<sup>53</sup> a case decided under the Gun Licence Act 1870, the Court inspected the pistol and decided that it was “not a mere toy but a firearm” of small size for the pocket, “but nevertheless when fired it might be fatal at a distance if aimed either at men or animals and at certain parts of the body”.<sup>54</sup>

### Firearms Act 1920

- 1.23 The Firearms Act 1920 was enacted in the wake of the Great War and in the light of the recommendations of the Blackwell Report.<sup>55</sup> The Committee was troubled by the proliferation of firearms in the hands of persons who might use them irresponsibly, criminally, or (adopting the observations from the Report of the Sub-Committee on Arms Traffic) by “the anarchist or ‘intellectual’ malcontent of the great cities, whose weapons are the bomb and the automatic pistol”.<sup>56</sup>
- 1.24 By section 12(1), the 1920 Act [as originally drafted] defined the expression “firearm” which, for the first time, included the element of lethality of the device:
- The expression “firearm” means any lethal firearm or other weapon of any description from which any shot, bullet, or other missile can be discharged, or any part thereof....
- 1.25 The 1920 Act definition - unlike the 1903 Act - made no reference to a device that was ‘barrelled’, and (as Greenwood has pointed out) the definition remained vague “and could possibly have included such things as crossbows or catapults”.<sup>57</sup> The definition included “any part” of a firearm.
- 1.26 The 1920 Act drew a clear distinction between rifled and smooth bore firearms (at least, smooth bore shot-guns).<sup>58</sup> Accordingly, smooth bore *shot-guns*, were *deemed* not to be “firearms” save for limited situations stated in the proviso to section 12(1) of the 1920 Act.<sup>59</sup> By contrast, smooth-bored *pistols* (which fell within the 1903 Act) were *not* so

<sup>53</sup> 1876; cited in the 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758]; para.88.

<sup>54</sup> Per Grove J.

<sup>55</sup> Report of Committee on the Control of Firearms’; 15th November 1918; and see Jan A. Stevenson, ‘Firearms Legislation in Great Britain’, *Handgunner*, Mar.-Apr. 1988.

<sup>56</sup> ‘Report of Committee on the Control of Firearms’, 15<sup>th</sup> November 1918.

<sup>57</sup> Colin Greenwood, ‘Firearms Control in England and Wales’; Part 1; chapter 3 (Between Committees).

<sup>58</sup> ‘Statutory Definition and Classification of Firearms and Ammunition’: Cmd 4758/1934; para.46. Smooth bore shotguns were sometimes referred to as “sporting guns”. The Bodkin Committee noted that “doubtless, that shot-guns are more frequently used than other types of firearms in cases of murder, attempted murder and manslaughter, but it is noteworthy that they are, nevertheless, not the favourite weapons of criminals of the bandit and burglar type” [para.61]. However, it noted that smooth-bore shotguns were, “the only type of firearm (apart from smooth bore pistols) which has been sold without restriction, that in rural districts it is a common and necessary weapon, and that accordingly the numbers in almost daily use by private persons far exceed those of any other type of firearm” [para.61],

<sup>59</sup> The proviso to section 12(1) of the Firearms Act 1920 read: “Provided that a smooth bore shot-gun or air-gun or air-rifle (other than air-guns and air-rifles of a type declared by rules made by a Secretary of State under this Act to be specially dangerous) and ammunition therefor shall not in

deemed. The 1920 Act was aimed at controlling, as “firearms”, *all* pistols and revolvers.<sup>60</sup>

- 1.27 Air-guns and air-rifles were also deemed not to be “firearms” *unless* particular types were declared by the Secretary of State to be “specially dangerous”.<sup>61</sup> That proviso, and its wording, survives in the Firearms Act 1968.<sup>62</sup> Air-pistols were especially problematic because the section 12 definition was not intended to catch toy guns. Thus, the word “weapon” in section 12 remained of importance when a court was required to determine whether a gun was a toy or not (noting *Bryson v Grange Ltd.*,<sup>63</sup> albeit a pre-1920 Act decision).
- 1.28 *Separate provision* was made (by section 6) in respect of “prohibited weapons”, in respect of which (as originally enacted) there was only one kind, namely, “*any weapon, of whatever description, designed for the discharge of any noxious liquid, gas, or other thing*”.<sup>64</sup> Accordingly, the 1920 Act did not (as originally enacted) treat prohibited weapons as “firearms”. Arguably, this was logical given that section 6 was clearly directed to the discharge of things other than “shot” or “bullets”. It was not until the Firearms (Amendment) Act 1936 that the definition of “firearm” for the purposes of *that* Act, was substituted (by the 1936 Act) to include “prohibited weapons”. The revised definition of “firearm” in the 1920 Act<sup>65</sup> was virtually identical to that which appears in section 57(1) of the 1968 Act.

### **The Firearms and Imitation Firearms (Criminal Use) Act 1933**

- 1.29 The 1933 Act (which applied only to England and Wales) made it a criminal offence for a person to make use<sup>66</sup> of a “firearm” or “imitation firearm” to resist (or to prevent) the lawful apprehension or detention of himself or any other person.<sup>67</sup> It was also an offence for a person to have in his possession a “firearm” at the time of his committing an offence or at the time of being apprehended for an offence (unless he could show that he had the firearm in his possession for a lawful object).<sup>68</sup> However, as originally enacted, the definition of “firearm” *for the purposes of the 1933 Act*, was the definition

Great Britain be deemed to be a firearm and ammunition for the purpose of the provisions of this Act other than those relating to the removal of firearms and ammunition from one place to another or for export: The expression “offence under this Act” includes any act, omission, or other thing which is punishable under this Act”.

<sup>60</sup> 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758]; para.66.

<sup>61</sup> See section 12(1) of the Firearms Act 1920.

<sup>62</sup> See section 1(3)(b) of the Firearms Act 1968.

<sup>63</sup> [1907] 2 K.B. 630; Lord Alverstone C.J., Darling and A. T. Lawrence JJ.

<sup>64</sup> Section 6(1), Firearms Act 1920. Such weapons required the authority of the Admiralty, the Army Council, or the Air Council, to manufacture, sell, purchase, carry, or possess (or any ammunition containing or designed or adapted to contain any such noxious thing).

<sup>65</sup> The definition of “firearm” in section 12 was substituted to read: “...any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and shall include any prohibited weapon, whether it is such a lethal weapon as aforesaid or not, any component part of any such lethal or prohibited weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon;” The proviso to section 12(1) was repealed. See sections 15(2), 16(2), Firearms (Amendment) Act 1936; and schedule 3.

<sup>66</sup> Or attempt to make use of such a firearm.

<sup>67</sup> Section 1(1) of the 1933 Act.

<sup>68</sup> Section 2(1) of the 1933 Act.

provided by section 5(2) of the 1933 Act (which included a “prohibited weapon” as defined by section 6 of the 1920 Act [devices discharging a noxious thing]):

In this Act the expression "firearm" means any *lethal firearm* or other weapon of any description from which any shot, bullet or other missile can be discharged, and includes...a prohibited weapon as defined by section six of the Firearms Act, 1920...  
....and the expression "imitation firearm" means anything [except a 'prohibited weapon'] which has the appearance of being a firearm whether it is capable of discharging any shot, bullet or other missile or not.

- 1.30 The Firearms (Amendment) Act 1936 repealed the above definitions,<sup>69</sup> and by section 15(6) of the 1936 Act, the definitions were revised and applied *for the purposes of the 1933 Act only*.<sup>70</sup> For the purposes of the FA 1920, the expression “lethal firearm” gave way to “lethal *barrelled* weapon”.<sup>71</sup>

### **The Firearms Act 1934**

- 1.31 The 1934 Act was passed to amend the 1920 Act for a limited purpose, namely, to restrict the purchase of firearms by persons under 17 years, and to restrict the possession, carrying and use of firearms by persons under 14 years. The provisions are complex. By virtue of the proviso to section 12 of the 1920 Act, smooth-bored shotguns were *deemed* not to be “firearms” within the meaning of that section and, similarly, airguns and air-rifles were *deemed* not to be firearms (unless they were specified by the Secretary of State to be “specially dangerous”). The ammunition for such weapons was similarly exempted. Section 1(2) of the 1934 Act (as originally drafted)<sup>72</sup> removed that saving if the gun in question was “a lethal weapon” (albeit an airgun that was not ‘specially dangerous’) and thus it became a firearm for the purpose of section 3(1A) of the 1920 Act<sup>73</sup> so as to prohibit a person under 17 years of age from acquiring a “firearm or ammunition”. Section 3(1A) also prohibited any person from selling, letting or hiring, such items to a person whom he knew (or had reasonable grounds for believing) to be under that age. Section 1(2) of the 1934 Act was repealed by the Firearms (Amendment) Act 1936<sup>74</sup> having regard to the scheme of the Firearms Act 1920 (as amended).

### **The Firearms (Amendment) Act 1936**

- 1.32 The 1936 Act was introduced in the light of the many recommendations made by the Bodkin Committee.<sup>75</sup> The Committee’s remit was to consider:

<sup>69</sup> The Firearms (Amendment) Act 1936: section 16(3).

<sup>70</sup> Section 15(6) of the 1936 Act provided that the definition of “firearm” meant “*any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and shall include any prohibited weapon, whether it is such a lethal weapon as aforesaid or not*”; and that the expression “imitation firearm” meant “*anything which has the appearance of being a firearm as defined in [s.15(6) of the 1936 Act] (other than such a prohibited weapon as is mentioned in subsection (1) of section six of the [1920 Act]) whether it is capable of discharging any shot, bullet or other missile or not*”.

<sup>71</sup> Note, sections 15(1), (2), 16(3) and schedule 3, of the Firearms (Amendment) Act 1936; and see para.1.37 below; and see para.1.64 (relevance of the word “barrelled”).

<sup>72</sup> Section 1(2) of the 1934 Act was repealed by the Firearms (Amendment) Act 1936: section 16(3).

<sup>73</sup> Section 3(1A) was substituted for section 3(1) of the 1920 Act.

<sup>74</sup> Section 16(3) of the 1936 Act.

<sup>75</sup> 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758].

....the various types of firearms and similar weapons capable of being used for the discharge of missiles or noxious substances, and ammunition therefor, and enquire and report whether, in the interests of public safety, any amendment of the law is necessary or desirable in respect of the definition or classification of such weapons and ammunition”.

- 1.33 The Bodkin Committee recommended that thought be given to consolidating the provisions of the 1933 and 1934 Acts (which did not happen under the 1936 Act); that the category of “prohibited weapons” should be extended to include automatic weapons (continuous fire),<sup>76</sup> and that a silencer should be deemed to be a “part” of a firearm;<sup>77</sup> and that all smooth bore weapons (of whatever calibre) having a barrel length less than twenty inches in length, should be subject to control under the 1920 Act.<sup>78</sup>
- 1.34 The Bodkin Committee did not recommend a change in the law relating to “air weapons” (subject to any rule declaring a particular air weapon to be “specially dangerous” where the penetrative power of a projectile exceeded a specified standard).<sup>79</sup>
- 1.35 The Committee saw no necessity to regard as “firearms” certain burglar alarms that discharged a cartridge, or “line throwing guns” (e.g. used by vessels at sea), or “cement guns” (shooting cement into fissures).<sup>80</sup> However, it did recommend that it “would be expedient” to bring within the 1920 Act some devices that discharge signal lights (e.g. the Verey light pistol)<sup>81</sup> which could be used for firing bullets of a calibre of about one inch.<sup>82</sup>
- 1.36 The Committee was divided in respect of “toys” or “safety pistols” that were designed for firing blank cartridges. The majority of the Committee recommended that it should be an offence to alter or to adapt for use, as a firearm, any type of toy, safety pistol, or imitation pistol.<sup>83</sup>
- 1.37 In giving effect to the above recommendations, Parliament:
- (a) **Revised** the definition of “firearm” (for the purposes both of the 1936 Act<sup>84</sup> and the 1920 Act<sup>85</sup>) to mean (section 15(1)):
- “...any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and shall include any prohibited weapon, whether it is such a lethal weapon as aforesaid or not, any component part of any such lethal or prohibited weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon”;* [this definition is virtually identical to that which appears in section 57(1) of the 1968 Act].

<sup>76</sup> Subject to the trophies held under dispensation: see recommendation IV (Summary of conclusions and recommendations) and see para.39-40.

<sup>77</sup> Recommendation XX; para.114.

<sup>78</sup> Recommendation IX; para.72 and 73.

<sup>79</sup> Recommendation XIII; para. 97.

<sup>80</sup> See para.112 of the Report.

<sup>81</sup> The Verey pistol has a long history of use on ships (and aircraft) to signal distress.

<sup>82</sup> See para.113, page 44 of the Report.

<sup>83</sup> Recommendation XV; para.107.

<sup>84</sup> Section 15(1), Firearms (Amendment) Act 1936.

<sup>85</sup> Sections 15(2), 16(2), Firearms (Amendment) Act 1936; and schedule 3.



- (b) **Classified** as a “prohibited weapon” (for the purposes of the Acts of 1920 and 1936) any automatic weapon (continuous fire).<sup>86</sup>
- (c) **Excepted** from the 1920 Act (as weapons), (a) a smooth bore gun having a barrel not less than twenty inches in length; (b) an air gun, air rifle or air pistol not being of a type declared by rules made by the Secretary of State to be “specially dangerous”, as well as their component parts and accessories.<sup>87</sup>
- (d) **Deemed** that actions (specified in section 1(6) of the 1936 Act) in relation to “signalling apparatus” (e.g. possession on a ship) were not offences under section 1(1) of the 1920 Act.
- (e) **Made it an offence**, contrary to section 9(2) of the 1936 Act, for a person other than a registered firearms dealer to convert into a firearm “anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through the barrel thereof”.<sup>88</sup>

1.38 The revised definition of “firearm” was a marked departure from earlier enactments. It now rolled-up ‘lethal barrelled weapons’, ‘prohibited weapons’, ‘component parts’, and ‘accessories’ into a single definition. This may (at the time) have seemed like tidy drafting, but it has given rise to problems of construction and created a degree of incoherence in the structure and operation of a statutory regime that was intended to control a range of weapons of very different kinds. Two consequences of the revised definition need to be emphasised:

- (a) The word “weapon” in the definition of “firearm” lost some (if not most) of its relevance. Until the 1936 Act, the word “weapon” served to distinguish toys, replicas and imitations, from ‘real’ firearms: see *Bryson v Grange Ltd.*<sup>89</sup> But, after the enactment of the 1936 Act, the structure of the firearms legislation changed significantly, and it no longer controlled only those devices that were “weapons” of attack or defence. For example:
  - (i) “**Signalling apparatus**” was brought within the definition of “firearm”, without a distinction being drawn between devices that were held or used as a “weapon”, and devices that were used for the purposes for which they had been designed (e.g. for safety at sea).
  - (ii) **Starting guns**: section 1(6) of the 1936 Act provided that no offence was committed under section 1 of the 1920 Act (restriction on purchase, possession, and use of firearms) “in the case of any person, by having in his possession a firearm at an athletic meeting for the purpose of starting races at that meeting”.<sup>90</sup>
  - (iii) **Replicas** that could be converted into a firearm. Parliament (consistent with the Bodkin Committee proposals) did not *deem* blocked hollow-barrelled ‘toy’ pistols, to be “firearms”. However, by section 9(2) of the 1936 Act, it was unlawful and an offence to convert anything “having the

<sup>86</sup> “...a firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty”: s.7, of the 1936 Act.

<sup>87</sup> Section 15(4) of the 1936 Act.

<sup>88</sup> See the speech of the Earl of Feversham: HL Deb 13 February 1936 vol 99 c 602.

<sup>89</sup> [1907] 2 K.B. 630.

<sup>90</sup> The provision was inserted into the 1936 Bill by a Commons amendment approved in the House of Lords: HL Deb 23 July 1936 vol. 102 c.192.

appearance of a firearm”, into a “firearm”. But this left unanswered the question of whether, in relation to a converted replica, it was necessary to show (taking the *Bryson v Grange Ltd.*,<sup>91</sup> approach) that the item was “meant for in the way of offence and defence” (i.e., that it was a “weapon”).

- (b) The revised definition of “firearm” drew no distinction between barrelled weapons and non-barrelled weapons, and included both “parts” and “accessories”. As a result, it became necessary to make provision in the legislation that excluded parts and accessories for specified purposes (e.g. the definition of an “imitation firearm”).

### **The Firearms Act 1937**

- 1.39 The 1937 consolidated earlier enactments. Section 32(1) of the Act replicated the definition of “firearm” as it appeared in section 15(1) of the 1936 Act. For the purposes of Part I of the Act (regulation of the purchase, possession, manufacture and sale of certain firearms and ammunition), the Act preserved the pre-existing exceptions from the definition of “firearm”, namely,<sup>92</sup> a smooth bore gun (having a barrel not less than twenty inches in length); airguns, air rifles or air pistols (unless of a type declared by rules to be specially dangerous); and their component parts. As originally enacted, the devices specified as “prohibited weapons” remained two in number<sup>93</sup> (i.e., devices that discharged noxious things [1920 Act] and continuous fire weapons [1936 Act]<sup>94</sup>).

### **The Firearms Act 1965**

- 1.40 The Act (among other things) created further offences in connection with the use of ‘firearms’. Section 2 made it an offence for a person to have with him in a public place “any loaded shot gun or loaded *air weapon* or any *other firearm* (whether loaded or not) together with<sup>95</sup> ammunition suitable for use in that firearm”.
- 1.41 Section 10 defined “air weapon” as (in effect) “an air gun, air rifle or air pistol *not* being of a type declared by rules made by a Secretary of State under that Act to be specially dangerous”. By section 11(3), the 1965 Act was to be construed “as one with the principal Act”.
- 1.42 The use of the expression “*other firearm*” in section 2 was open to three interpretations:
- (1) That only a “lethal barrelled” air weapon was to be treated as a “firearm” for the purposes of the section (and hence the significance of the words “*other firearm*” in section 2), or
  - (2) Any air weapon, whether lethal barrelled or not, came within section 2.
  - (3) That Parliament did not intend the expression “*other firearm*” to refer to “air

<sup>91</sup> [1907] 2 K.B. 630.

<sup>92</sup> Section 16(1), Firearms Act 1937.

<sup>93</sup> Section 17, Firearms Act 1937.

<sup>94</sup> See section 7 of the Firearms (Amendment) Act 1936.

<sup>95</sup> In *R v Cleaver* [1967] EWCA Crim J1006-3, Lord Parker CJ was ‘happy’ that C did not pursue a point argued at trial that “together with” meant that the offence required a person to be in possession of a firearm as well as ammunition (separately carried by the accused): “it seems to me unarguable, that if you find a revolver loaded with five live rounds, whatever else it is, it is a firearm together with ammunition suitable for its use.”

weapons” at all, but to firearms that used an explosive propellant.

- 1.43 The aforementioned interpretations are set out (above) given that section 2 was re-enacted in section 19 of the 1968 Act (the construction of which has proved highly problematic: see *Street v DPP* (discussed below)).<sup>96</sup>

### **The Firearms Act 1968**

- 1.44 The 1968 Act defined “firearm” in terms almost identical to those that appeared in the Acts of 1936 and 1937.
- 1.45 A “shot gun”<sup>97</sup> and an “air weapon”<sup>98</sup> were excepted as “firearms” for which a firearm certificate was required under section 1 of the 1968 Act. However, the 1968 Act consolidated requirements (introduced under Part V of the Criminal Justice Act 1967) for shot guns to have a “shot gun certificate”.<sup>99</sup>

#### *Air weapons*

- 1.46 “Air weapon” had the meaning assigned to it by section 1(3)(b), namely, an “air weapon (that is to say, an air rifle, air gun or air pistol *not of a type declared by rules made by the Secretary of State under section 53 of this Act to be specially dangerous*)”.<sup>100</sup>
- 1.47 Section 1(3)(b) was amended by section 39 of the Anti-social Behaviour Act 2003 by the insertion of the words “which does not fall within section 5(1)”, the effect of which is to disapply the exception for a firearm certificate if the air pistol, rifle, or gun, is a “prohibited weapon” of the type described in section 5(1) of the 1968 Act.<sup>101</sup>
- 1.48 This seemingly simple definition of an “air weapon” is in fact highly ambiguous (or at least unsatisfactory) especially in the light of the Court of Appeal decision in *R v L*<sup>102</sup> (see Chapter 3, para.3.10; ‘Air Weapons’).
- 1.49 Following the decision in *R v Thorpe*,<sup>103</sup> which held that the word “air” was to be strictly construed, Parliament enacted section 48 of the Firearms (Amendment) Act 1997, the effect of which was to clarify that any reference to an “air rifle”, “air pistol” or “air gun” in the 1968 Act and the Firearms Acts (and the Firearms (Dangerous Air Weapons) Rules 1969) included those “powered by compressed carbon dioxide”.<sup>104</sup>

#### *Prohibited weapons*

- 1.50 Section 5 of the 1968 Act, *as originally enacted*, specified two weapons as “prohibited weapons” (effectively re-enacting earlier legislation):

(1) ...any firearm which is so designed or adapted that two or more missiles can be

<sup>96</sup> [2004] EWHC 86 (Admin); see Chapter 1, para.1.200

<sup>97</sup> Section 1(3)(a) of the Firearms Act 1968.

<sup>98</sup> Defined by section 1(3)(b); and see section 57(4) of the Firearms Act 1968.

<sup>99</sup> See section 85 of the Criminal Justice Act 1967, and section 2 of the Firearms Act 1968.

<sup>100</sup> Section 1(3)(b) of the Firearms Act; and section 57(4).

<sup>101</sup> Section 39 of the Anti-social Behaviour Act 2003.

<sup>102</sup> [2015] EWCA Crim 5; see Chapter 3, para.3.10.

<sup>103</sup> [1987] 2 All ER 108.

<sup>104</sup> It is submitted that it would have been preferable had this amendment been inserted into section 57 of the 1968 Act [interpretation].

successively discharged without repeated pressure on the trigger”: section 5(1)(a) FA 1968.

- (2) ...any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing”.<sup>105</sup> section 5(1)(b) FA 1968.<sup>106</sup>

1.51 Unless exempted by statute, persons may only handle “prohibited weapons” with the authority of the Secretary of State (but a firearm certificate will be required).

1.52 Section 5 has been heavily amended, resulting in a substantial widening of the range of devices categorised as “prohibited weapons”.<sup>107</sup> Most of the weapons would be “firearms” as popularly understood and they manifestly fall within the definition of being “lethal barrelled weapons”. Some devices that would otherwise be treated as “prohibited weapons” are expressed *not* to be for example (italicisation in square brackets added):

- (1) Any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, [*other than an air weapon, a muzzle-loading gun or a firearm designed as signalling apparatus*]: section 5(1)(aba).
- (2) Any self-loading<sup>108</sup> or pump-action<sup>109</sup> smooth-bore gun [*which is not an air weapon or chambered for .22 rim-fire cartridges*] and either has a barrel less than 24 inches in length<sup>110</sup> or is less than 40 inches in length overall: section 5(1)(ac).
- (3) Any rocket launcher, or any mortar, for projecting a stabilised missile, [*other than a launcher or mortar designed for line-throwing or pyrotechnic purposes or as signalling apparatus*]: section 5(1)(ae).

1.53 The fact that some devices are taken out of the category of “prohibited weapons” does not mean that they are not “firearms” within the meaning of section 57(1) of the Act. As stated earlier in this chapter, it is partly by reason of references to items such as “signalling apparatus”, “launcher...designed for line-throwing”, or “mortar designed for...pyrotechnic purposes” (see para.1.52(1) and (3) above), that the relevance of the word “weapon” as it appears in the definition of “firearm” in section 57(1) of the 1968 Act, has been significantly lessened.

### **Firearms (Amendment) Act 1982**

1.54 Subject to certain exclusions stated in the 1982 Act, the 1968 Act applies to those “imitation firearms” that are “readily convertible” into firearms of a kind that require a

<sup>105</sup> Note that in *R v Hurley* [2013] EWCA Crim 1008, the Court – without deciding the point – had some doubts whether “other thing” necessarily meant a “noxious thing”. If the answer to that question is in the negative, it follows that this paragraph could reach widely.

<sup>106</sup> It seems likely that internet sales constitute a major importation ‘route’ in respect of prohibited weapons falling with section 5(1)(b) FA 1968: consider *R v Bando* [2015] EWCA Crim 425, where some 50 ‘taser’ stun guns, disguised as mobile phones, knuckle dusters, 50 CS gas sprays (disguised as lipsticks), were delivered to the defendant’s home address. The consignment had been intercepted and seized, and examined by duly authorised Firearms Officers, who pronounced them to be prohibited weapons.

<sup>107</sup> Section 5 has been amended by the Firearms (Amendment) Act 1988; the Firearms (Amendment) Act 1997, the Firearms (Amendment) (No.2) Act 1997, the Anti-social Behaviour Act 2003, and the Anti-Social Behaviour, Crime and Policing Act 2014.

<sup>108</sup> Section 57(2A) of the Firearms Act 1968.

<sup>109</sup> Section 57(2A) of the Firearms Act 1968.

<sup>110</sup> Section 57(6)(a) of the Firearms Act 1968.

'firearm certificate' under section 1 of the 1968 Act applies (see Chapter 2, para.2.47 *et seq.*).

### **The Firearms (Amendment) Act 1988**

- 1.55 The Government introduced the 1988 Act in the wake of the murders in Hungerford in 1987 at the hands of Michael Ryan, and following the publication of the Government's White Paper "Firearms Act 1968: Proposals for Reform".<sup>111</sup>
- 1.56 Among other provisions, the 1988 Act enacted the following:
- (a) Extended the class of "prohibited weapons" and "prohibited ammunition" (the possession, purchase, acquisition, manufacture, sale or transfer of which requires the authority of the Secretary of State);<sup>112</sup>
  - (b) Placed restrictions on the sale of ammunition for smooth-bore guns;<sup>113</sup>
  - (c) Made it an offence to shorten to a length less than 24 inches, the barrel of any smooth-bore gun (i.e. guns to which section 1 of the 1968 Act applies<sup>114</sup>) *other than* one which has a barrel with a bore exceeding 2 inches in diameter; and
  - (d) Enacted that certain "prohibited weapons" shall continue to be treated as such "notwithstanding anything done for the purpose of converting it into a weapon of a different kind".<sup>115</sup>

### **Firearms (Amendment) Act 1992.**

- 1.57 The 1992 Act was of limited effect, and empowered the Secretary of State to extend the period for which firearm and shot gun certificates are granted or renewed.

### **Firearms (Amendment) Act 1994**

- 1.58 The Act inserted<sup>116</sup> into the 1968 Act, the offence of possessing a firearm or imitation firearm with intent to cause fear of violence;<sup>117</sup> and extended the offence of 'trespassing with a firearm'.<sup>118</sup>

### **The Firearms (Amendment) Act 1997<sup>119</sup>**

- 1.59 This substantial Act consisting of fifty-three sections and three schedules, enacted provisions that included:

- (a) Extending the category of "prohibited weapons" under section 5 of the 1968 Act

<sup>111</sup> Cm 261.

<sup>112</sup> Section 1 of the 1988 Act; including section 5(1)(a) [substituted], (ab), (ac), (ad), (ae), (c) [substituted].

<sup>113</sup> Section 5 of the 1988 Act.

<sup>114</sup> "Shot-guns" as described by section 1(3)(a) of the 1968 Act are smooth bore, and excepted from section 1 by subs.(3)(a), but a shot gun certificate may be required (section 2, FA 1968). Section 4 (conversion of weapons) applies in respect of a "shot gun".

<sup>115</sup> Section 7 of the 1988 Act.

<sup>116</sup> By section 1(1) of the 1994 Act.

<sup>117</sup> Section 16A, Firearms Act 1968.

<sup>118</sup> Section 20 of the Firearms Act 1968.

<sup>119</sup> For background information, see 'Controls on Firearms: The Firearms (Amendment) Bill'; Research Paper 96/102; 8 November 1996, which considered the background to and provisions of the Bill, which arose from measures proposed by the Government in response to the report of The Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996 Cm 3386.

by inserting section 5(1)(aba), to include certain small firearms (but exempted “air weapons” and “small calibre” firearms);<sup>120</sup>

- (b) Made special exemptions in respect of the prohibitions on small firearms (e.g. slaughtering instruments;<sup>121</sup> races at athletic meetings;<sup>122</sup> trophies of war;<sup>123</sup> firearms of historic interest<sup>124</sup>); as well as making detailed provision relating to small-calibre pistols for target shooting at licensed pistol clubs; and
- (c) Imposed a general prohibition in respect of expanding ammunition (section 5(1A)(f))<sup>125</sup> subject to specified exemptions.<sup>126</sup>

### **The Firearms (Amendment) No.2 Act 1997**

- 1.60 Within months of the passing of the 1997 Act, the No.2 Act effectively imposed a general ban on the possession and use of “small-calibre pistols” (save as authorised in tightly prescribed circumstances). Section 5(1)(aba) was amended to remove the saving in respect of such pistols, and thus they became “prohibited weapons” for the purposes of the 1968 Act.<sup>127</sup>

### **The Anti-Social Behaviour Act 2003<sup>128</sup>**

- 1.61 Several important amendments were made to the 1968 Act by the ASBA 2003:

- (a) The offence of carrying a firearm in a public place (section 19, FA 1968) was extended to include *unloaded* “air weapons”, and “imitation firearms”. The question of whether an “air weapon” needed to be ‘lethal barrelled’ (which concerned only those air weapons that were declared to be “specially dangerous” under the Firearms (Dangerous Air Weapons) Rules 1969) was answered in the negative in *Street v DPP*.<sup>129</sup>
- (b) Age limits in respect of actions with air weapons were modified (in essence, the limits were raised to 17 in sections 22-24 of the 1968 Act; the age limits were raised again by the Violent Crime Reduction Act 2006).<sup>130</sup>
- (c) Section 5(1)(af) was inserted into the 1968 Act<sup>131</sup> in respect of “any air rifle, air

<sup>120</sup> Section 5(1)(aba) [as originally enacted under the 1997 Act], “any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon, a small-calibre pistol, a muzzle-loading gun or a firearm designed as signalling apparatus.” In *Lawrence* [2013] EWCA Crim 1054, a shot gun that was initially thought to be a “prohibited weapon” under this provision was not: there appears to have been confusion between section 1 which is expressed in inches, and s.5(1)(aba) which is expressed in centimetres.

<sup>121</sup> Section 2 of the 1997 Act.

<sup>122</sup> Section 5 of the 1997 Act.

<sup>123</sup> Section 6 of the 1997 Act.

<sup>124</sup> Section 7 of the 1997 Act.

<sup>125</sup> Section 9 of the 1997 Act.

<sup>126</sup> Section 10 of the 1997 Act.

<sup>127</sup> The Government of the day decided that there should be a general ban on all handguns: “The background is well known...We fought the last general election on a manifesto commitment for a free vote on whether the ban introduced by the last Government should be extended to all handguns. There was a free vote in another place. There was a majority of 203 in favour of the extension of the ban”: Lord Williams of Mostyn *HL Deb 27 October 1997 vol 582 cc946-947*.

<sup>128</sup> Usefully summarised by Home Office Circular 001/2004: “Anti-social Behaviour Act 2003: Firearms”

<sup>129</sup> [2004] EWHC 86 (Admin).

<sup>130</sup> Section 38 of the Anti-social Behaviour and Crime Act 2003.

<sup>131</sup> By section 39, of the Anti-social Behaviour and Crime Act 2003.

gun or air pistol which uses, or is designed or adapted for use with, a self-contained gas cartridge system”.

### **Violent Crime Reduction Act 2006**

1.62 The 2006 Act amended the 1968 Act by (among other things):

(a) Creating offences of:

- (i) firing an air weapon beyond premises (section 21A, FA 1968),<sup>132</sup> and
- (ii) supplying imitation firearms to minors,<sup>133</sup>

(b) Modifying age requirements (in respect of, for example, sections 22-24 of the 1968 Act); imposed restrictions on the manufacture, importation and sale of “realistic imitation firearms” (sections 36-38 of the 1986 Act);

(c) Empowered the Secretary of State to make regulations requiring imitation firearms to conform to specifications (with criminal liability for breaching the regulations).<sup>134</sup>

### **Anti-social Behaviour Crime and Policing Act 2014**

1.63 The 2014 Act strengthened section 5 of the 1968 Act in respect of the manufacture or sale of “prohibited weapons” or “prohibited ammunition” without the authority of the Secretary of State;<sup>135</sup> and amended the 1968 Act to prohibit persons who are subject to the provisions of section 21 of the 1968 Act [possession of firearms by persons previously convicted of crime], from possessing “antique firearms” as a curiosity or ornament under section 58 of that Act.<sup>136</sup>

## **II. BARREL THAT CAN DISCHARGE A MISSILE**

### **“BARREL”**

1.64 The Firearms (Amendment) Act 1936 clarified an ambiguity that had existed in the definition of “firearm” under the 1920 Act, so as to put beyond doubt that “weapon” - from which any shot, bullet or other missile can be discharged - was a “barrelled weapon” (and not, for example, a crossbow).<sup>137</sup>

1.65 The question of whether an article is “barrelled” is a question of fact for the jury to determine: see *R v Singh*<sup>138</sup> where there was a dispute between experts as to whether a launcher for an army signalling kit was barrelled or a ‘cup’ used to discharge the flares.

### **“DISCHARGE”**

1.66 It is submitted that the word “discharged” in section 57(1) [“firearm”], and the word “discharge” in section 5(1)(b) of the 1968 Act,<sup>139</sup> are to be given their ordinary meaning.

<sup>132</sup> Section 34(1), (2), of the Violent Crime Reduction Act 2006.

<sup>133</sup> Section 40(1) of the Violent Crime Reduction Act 2006.

<sup>134</sup> Section 39 of the Violent Crime Reduction Act 2006.

<sup>135</sup> Section 108 of the 2014 Act.

<sup>136</sup> Section 110 of the 2014 Act.

<sup>137</sup> See, Colin Greenwood, ‘Firearms Control in England and Wales’; Part 1; chapter 3 (Between Committees).

<sup>138</sup> [1989] EWCA Crim J0522-14; [1989] Crim.L.R. 724-1.

<sup>139</sup> Section 5(1)(b) provides: “any weapon of whatever description designed or adapted for the

- 1.67 In *Flack v Baldry*,<sup>140</sup> neither the House of Lords nor the Divisional Court appear to have rejected the defendant's submission that the natural and ordinary meaning of the word "discharge" is the "physical ejection from the weapon of a physical object or substance which had been loaded into the weapon, and which was contained within the weapon until it was ejected or released from it".<sup>141</sup> What their Lordships were not prepared to accept, was the submission that *electricity* was not ejected (discharged) from an electric stun-gun (the device was alleged to have been a "prohibited weapon").
- 1.68 It is therefore arguable that a "lethal barrelled weapon" from which a projectile is not *fully* ejected ("discharged") from the barrel does not satisfy the definition of a "firearm" in section 57(1) of the 1968 Act.<sup>142</sup> The point is not academic because some devices (e.g. used in slaughtering) are of the 'captive bolt' type (that is to say, a bolt is thrown forward by firing a blank cartridge (or by pneumatic action) but the bolt is not fully ejected from the barrel). For this reason alone, the 1934 Bodkin Committee doubted whether such a device was a "firearm" as then defined by section 12 of the 1920 Act,<sup>143</sup> but – even if it was – the Committee questioned whether it should be brought within the Firearms Act:
- So far as the captive bolt type is concerned, it may be doubted whether it is a firearm within the definition in section 12, since the missiles i.e., the bolt, is not entirely discharged from the weapon, and in any event, we do not consider it necessary that the view should be adopted that the Act applies. If, however, any new description of captive bolt...is invented in which the bolt completely leaves the weapon and is then retrieved for further use, there would appear to be but little doubt that it should be regarded as a firearm.
- 1.69 The definition of "firearm" in section 57(1) of the 1968 Act lends itself to the same analysis; and thus (from at least 2002) the Secretary of State has stated in the Home Office Guide that the view is taken that 'captive-bolt' devices (among others) "should not be regarded as firearms within the definition of the Act".<sup>144</sup> This aspect of the Guide is discussed further in this chapter.

### **Discharge ineffective: defective barrels**

- 1.70 The word 'discharged' may mean more than that a missile is merely capable of passing down a barrel. A distinction may need to be drawn between a "lethal barrelled weapon" from which 'any shot, bullet or other missile could be discharged' and a defective barrel (issues of conversion aside) from which no such missile can be 'discharged'. This may be because (for example) the barrel is incapable of withstanding pressure from the propelling gas or where – as in *Rogers*<sup>145</sup> - the internal diameter of the barrel is too wide

discharge of any noxious liquid, gas or other thing;"

<sup>140</sup> [1988] 1 WLR 214.

<sup>141</sup> [1988] 1WLR 393, 395F.

<sup>142</sup> The point might also arise in cases where (eg) the internal diameter of a home-made barrel was too small for the calibre of the projectile, or where the diameter of the barrel is too large (causing the gases to escape past the projectile with the result that the projectile is barely ejected from the barrel": consider *Rogers* [2011] EWCA Crim 1459.

<sup>143</sup> "Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition"; p.4 [Cmd. 4758]; para.49.

<sup>144</sup> Firearms Law: Guidance to Police: Home Office 2002, chapter 2, page 8: "(a) captive-bolt stunning devices (where the bolt remains attached to the barrel) used in the slaughter of animals, operated by blank cartridges or pneumatically..."

<sup>145</sup> [2011] EWCA Crim 1459.



for the calibre of ammunition such that the missile “just rattles down the barrel and often comes out with a very low velocity”.

## DEVICES NOT ‘LETHAL BARRELLED’ WITHOUT MODIFICATION

- 1.71 The definitions of a “firearm” in the Acts of 1920<sup>146</sup> and 1968<sup>147</sup> use the expression “[missile] *can be discharged*”. In a series of cases the question has arisen whether those three words mean that the weapon in question must (at the time that the alleged offence was committed) be actually able to discharge a missile, or whether it was sufficient to prove that the device *could* do so by adapting, converting, or repairing it.
- 1.72 The case-law can be divided into four groups:
- (1) Devices (such as ‘toy guns’, replica guns, and other imitation guns) that cannot, as originally constructed, discharge a missile; but modifications have been made (or could be made) to convert them into “lethal barrelled weapons”.
  - (2) Devices constructed as “lethal barrelled” weapons, but something more needs to be done to them in order to make them function as such.
  - (3) A device which is a firearm of one kind, but which has been modified to be a firearm of a different kind.
  - (4) A device is a firearm, but its modification affects a person’s authority to have it.

### (1) From an imitation - to a firearm

- 1.73 A typical case is where D is in possession of a gun which (at the time it was seized by the police) is incapable of firing bulletted ammunition by reason only of the barrel being blocked, but which could be removed by drilling out the blockage. Is such a weapon a “firearm” as defined by the relevant enactment or not?
- 1.74 The decisions of *Cafferata v Wilson*<sup>148</sup> and *Freeman*<sup>149</sup> (discussed below) are too easily read as having decided merely that the definition of “firearm” includes every instrument that can be easily adapted for use as a firearm (i.e., from which a missile *can* be discharged).<sup>150</sup> Indeed, in *Freeman*, the trial judge’s direction to the jury appeared to be to that effect.<sup>151</sup> However, in each case, the relevant enactments encompassed within the definition of a “firearm”, the “parts thereof” (FA 1920) or “the component parts” (FA 1968). The reasoning of the Courts in *Cafferata* and in *Freeman* appears to have been that (e.g.) a starting pistol (which would be strong enough to discharge a bullet with lethal force if the barrel could be drilled out), is itself a ‘part’ (or a collection of assembled parts) and thus falls within the definition of a “firearm”.
- 1.75 This rather strict analysis has been tempered by the decision of the Court of Appeal in

<sup>146</sup> Section 12(1), Firearms Act 1920.

<sup>147</sup> Section 57(1), Firearms Act 1968.

<sup>148</sup> [1936] 3 All ER 149.

<sup>149</sup> [1970] 2 All ER 413.

<sup>150</sup> See, for example, Colin Greenwood, ‘Firearms Control in England and Wales’; Part 1; chapter 4 (4 The Bodkin Committee)

<sup>151</sup> "...the barrel was blocked up. An inch of it is still solid. And you may say to yourselves, 'That is not a revolver, it is really a starting pistol.' All I can say is, gentlemen, that an article like this, that can be adapted to fire bullets by drilling the barrel and making some other alterations, is a firearm under the meaning of the Act. This is the law."

*Bewley*.<sup>152</sup>

If the item can be easily adapted into a lethal weapon...with the use of equipment described in section 1(6) of the [Firearms Act 1982; e.g., articles in common use],<sup>153</sup> then it will, subject to the statutory defence,<sup>154</sup> fall within the 1968 Act.

- 1.76 The Court decided that whether an item falls within section 57(1) of the 1968 or not, should no longer be answered by reference to the decisions of *Cafferata v Wilson*,<sup>155</sup> or to *Freeman*.<sup>156</sup> The Court held that after the 1982 Act came into force, section 57(1) of the 1968 Act refers to the capacity of the weapon to discharge a missile without regard to its potential conversion, *unless* that conversion falls within the scope of the 1982 Act.<sup>157</sup> The Court could not determine whether the gun in that case came within the 1982 Act because no facts were placed before it to enable it to do so, and no opportunity had been given to B put forward a defence under section 1(5) of the 1982 Act.
- 1.77 But for the Court's analysis of the 1968 Act (read in the light of the 1982 Act) it seems clear that the Court would have been compelled to apply *Freeman*.<sup>158</sup>
- 1.78 The question that arises is whether *Bewley* goes far enough, or whether the case-law has unhelpfully blurred the distinction that should have been drawn as early as *Cafferata*, between something that is a mere "component part" ("part thereof"), and a barrelled weapon from which a missile "can be discharged [without being adapted]"?

*Cafferata v Wilson*<sup>159</sup>

- 1.79 C sold a "dummy revolver" fitted with a solid barrel. Its cartridge chambers had been only partially bored. A vent hole in the barrel allowed gases to escape. By using an electric drill for five minutes the weapon was capable of firing a bullet which could kill a person at a distance of five feet. The case turned on the definition of "firearm" in section 12(1) of the Firearms Act 1920.<sup>160</sup> Lord Hewart LCJ, dismissed the appeal stating [emphasis added]:

The magistrate has held that the article as a whole is part of a firearm within the meaning of the definition. That is quite a tenable proposition. If something had had to be added to the dummy to make it into a complete revolver, the dummy might be said to be part of a revolver. It seems to make no difference that the decisive part was not to be an addition but an adaptation of what was already there. It is easier to support the

<sup>152</sup> [2012] EWCA Crim 1457; judgment, para.28.

<sup>153</sup> "For the purposes of this section an imitation firearm shall be regarded as readily convertible into a firearm to which s.1 of the 1968 Act applies if – (a) it can be so converted without any special skill on the part of the person converting it in the construction or adaptation of firearms of any description; and (b) the work involved in converting does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes."

<sup>154</sup> Section 1(5) of the Firearms Act 1982 provides, "In any proceedings brought by virtue of this section for an offence under the 1968 Act involving an imitation firearm to which this Act applies, it shall be a defence for the accused to show that he did not know and had no reason to suspect that the imitation firearm was so construed or adapted as to be readily convertible into a firearm to which section 1 of that Act applies."

<sup>155</sup> [1936] 3 All ER 149.

<sup>156</sup> [1970] 2 All ER 413.

<sup>157</sup> Judgment, para.31.

<sup>158</sup> See the judgment at para.20.

<sup>159</sup> [1936] 3 All ER 149.

<sup>160</sup> Prior to the amendments made to that Act by the Firearms (Amendment) Act 1936.

decision from another point of view. *The dummy contains everything else necessary for making a revolver except the barrel, and therefore all the other parts of it except those which required to be bored are “parts thereof” within the meaning of the section.*

- 1.80 Thus, strictly speaking, the decision did not turn on the words “missile *can* be discharged” but whether the thing was simply “part” of a firearm. This was a question of fact and (arguably, on the Court’s reasoning) one of degree.<sup>161</sup> The Court’s attention had been drawn (by counsel) to section 9(2) of the 1936 Act, which made it an offence to convert an article into a firearm. If the Court was concerned about the mischief that might result if something was converted into a firearm, then Parliament had (arguably) addressed that concern. However, the provision was not discussed (or even referred to) in the judgment of the Court.
- 1.81 The Court made no reference to the Bodkin Committee Report, which had recommended the enactment of an offence of converting a weapon in order to address cases of this type. In making this recommendation, the Committee did not refer to the expression “parts thereof” as it appeared in section 12(1) of the 1920 Act (as originally drafted) – presumably because it assumed that the expression had no application in respect of toy guns and replicas that were incapable of discharging a bullet or other missile (i.e. they were not regarded to be “firearms”).
- 1.82 In *Cafferata*, the Court does not appear to have applied its mind to the point made in *Bewley* that the definition of “firearm” cannot include a part of a weapon from which a missile *cannot* be discharged.<sup>162</sup> A similar point (but viewed from a slightly different angle) was made in *Kelly v MacKinnon*,<sup>163</sup> where it was said by the Lord Justice-General:

.... the part must be identified as a component of something which is in fact a lethal weapon. A component part of something which is not a lethal weapon cannot, by itself, be a firearm and it is nothing to the point that parts of that which is not a lethal weapon could be stripped therefrom and used in the construction of something which, when completed, would become a lethal weapon. It is nothing to the point either that a part is a component of an article which, not being a lethal weapon, might in various ways be converted or adapted in order to become such a lethal weapon.

*R v Freeman*<sup>164</sup>

- 1.83 *Cafferata* was applied in *Freeman*, where F was found in possession of a starting pistol. The facts were very similar to *Cafferata* in that the constrictions in the barrel “readily could be removed by drilling”<sup>165</sup> so that the pistol would have been capable of firing bulleted ammunition. In dismissing the appeal against conviction for an offence contrary to section 1(1)(a) of the 1968 Act (possessing a firearm without a firearm certificate) – and in declining the invitation to overrule *Cafferata* - the Court observed that there had been no challenge to *Cafferata* throughout the history of the legislation from 1920 to 1968. The Court referred to *Muir v Cassidy*<sup>166</sup> (decided in the context of the 1937

<sup>161</sup> See *Freeman* (1970) 54 Cr.App.R.251; but note the criticism of *Freeman* by the Lord Justice-General in *Kelly v MacKinnon* 1983 SLT 9, that this could be a question of “fact or degree”.

<sup>162</sup> *Bewley* [2012] EWCA Crim 1457, para.34.

<sup>163</sup> [1982] SCCR 205.

<sup>164</sup> (1970) 54 Cr.App.R.251.

<sup>165</sup> Per Sachs LJ. (who gave the judgment of the Court). It is submitted that the word “readily” may be significant (rather than the word “easily”).

<sup>166</sup> 1953 SLT 4.

Firearms Act) which, in the Court's view, showed that *Cafferata* had continued to govern the law (at least in Scotland). The Court cited a passage in the judgment of Lord Parker C.J. in *Jackson and Hart*<sup>167</sup> that:

"...when Parliament has re-enacted the same words with full knowledge of an earlier decision, it is perfectly clear that this Court, observing the intention and seeking to honour the intention of Parliament, must inevitably uphold the principles of the earlier decision."

- 1.84 The Court remarked that there may be cases when "it is a question of fact and degree" whether the subject-matter of the charge does or does not fall within the ambit of the Act and that "in such cases the issue must be left to the jury".<sup>168</sup> The Court added that it was "useful to remember" that it was held in *Read v. Donovan*<sup>169</sup> that the intention of the manufacturer of the subject-matter of the charge is irrelevant to the issue which a jury must try.

*Muir v Cassidy*<sup>170</sup>

- 1.85 The case (heard before a Sheriff-Substitute at first instance) concerned a two-barrelled pistol having holes pierced in the sides of the barrels so as to make it ineffective for the purpose of firing live (but not blank) ammunition. The pistol would have been capable of firing live ammunition had the side-holes been blocked. The material enactment was the Firearms Act 1937, which – by section 32(1) – defined "firearm" in terms almost identical to those that appear in section 57(1) of the 1968. The Sheriff (applying the reasoning in *Cafferata v. Wilson*) ruled that the pistol was a "lethal weapon": it had "everything required for making it into a lethal weapon except the barrels". The accused was convicted.

*Kelly v MacKinnon*<sup>171</sup>

- 1.86 The case concerned two revolvers to which section 1 of the 1968 Act applied. The first gun was a replica Colt 0.45 calibre revolver, which could fire blank cartridges, but could be easily converted to fire live ammunition. The second gun was a starting pistol. It was capable of easy conversion to firing bulletted ammunition.
- 1.87 The High Court of Justiciary held that neither weapon was a firearm within the meaning of the 1968 Act. The Court was scathing in its criticism of the decisions of *Cafferata* and *Freeman*, and it declined to approve *Muir*:

*Muir v. Cassidy* cannot be regarded as any more than a decision by a single Sheriff-substitute in one of the sheriffdoms of Scotland. It was not in any sense an authoritative declaration of the law as it was understood and applied in Scotland as a whole.....

.... I cannot bring myself to impute to Parliament the intention that the word "firearm" in the Act of 1968 should, in spite of the plain intendment of the language of section 57(1) and section 4(3), be interpreted to mean what *Cafferata* said it meant. The legislation is United Kingdom legislation. *Cafferata* was a decision which, on its face, was not only suspect but obviously wrong. (Per the Lord Justice-General)

<sup>167</sup> [1969] 2 W.L.R. 1339, at p. 1345.

<sup>168</sup> But note the criticism of *Freeman* by the Lord Justice-General in *Kelly v MacKinnon* 1983 SLT 9, that this could be a question of "fact or degree".

<sup>169</sup> [1947] K.B. 327.

<sup>170</sup> 1953 S.L.T. (Sh. Ct.) 4.

<sup>171</sup> [1982] SCCR 205.

- 1.88 In Lord Cameron’s opinion, the judgment in *Cafferata* was essentially directed to issues of fact and it was “not concerned to give an authoritative ruling on the construction of the section of the Firearms Act or to review earlier authorities such as *Bryson v. Gamage* which would appear to point in an opposite direction.”
- 1.89 The Court pointed to section 4(3) of the 1968 Act, which made it an offence for a person (who was not a registered firearms dealer) to convert into a firearm an article that had been incapable of discharging a missile. The “corollary of this”<sup>172</sup> was that “if a person possesses something which, although having the appearance of a firearm, is also constructed as to be incapable, without conversion, of discharging any missile through its barrel, he does not possess a ‘firearm’ within the meaning of the Act”.<sup>173</sup>
- 1.90 The Court had no hesitation in rejecting the reasoning in *Freeman*. The Court did not cast doubt upon the general rule in *Jackson and Hart* (see above), but “it must not be applied blindly in such a way as to produce a wholly absurd result”.
- It is, on the other hand, calculated to mislead one as to Parliament’s intention in a United Kingdom statute, where all that can be said is that the re-enactment took place when there was recorded....what was, in my opinion, an obviously unsound decision of a Divisional Court which was....simply followed by a Sheriff-substitute in Scotland who did not trouble himself with any independent examination of the language of the relevant definition, in *Muir v. Cassidy*.” (Per the Lord Justice-General)
- 1.91 For Lord Cameron, the decisions of *Cafferata* and *Freeman* were, “at the kindest”, decided upon their “own particular facts”.

### **The Firearms Act 1982 – readily convertible imitations**

#### *Overview*<sup>174</sup>

- 1.92 Put shortly, the 1982 Act applies to any “imitation firearm” that has the appearance of a ‘section 1 firearm’,<sup>175</sup> and which is readily convertible into a “firearm”.<sup>176</sup> By section 1(5) of the 1982 Act, it is a defence to an offence under the 1968 Act for the accused to show that “*he did not know and had no reason to suspect that the imitation firearm was so construed or adapted as to be readily convertible into a firearm to which section 1 of [the 1968 Act] applies.*”
- 1.93 The 1982 Act did not directly amend the definition of “firearm” in section 57(1), but the effect of section 1(2) of the 1982 Act<sup>177</sup> is that a “readily convertible imitation firearm” is treated in the same way as a ‘section 1 firearm’ (subject to certain exclusions). Thus, the two Acts operate as a single code: see *Bewley* (below). Accordingly, a ‘readily convertible imitation firearm’ will require a firearms certificate if the actual firearm needs one (i.e., other than imitation ‘smooth-bore shot guns’<sup>178</sup> and specified ‘air weapons’).<sup>179</sup>

<sup>172</sup> Per Lord Cameron.

<sup>173</sup> Per the Lord Justice-General.

<sup>174</sup> The Home Office Guide, helpful as it is, provides only brief information concerning the practical effect of the 1982 Act.

<sup>175</sup> Section 1(1)(a) of the 1982 Act.

<sup>176</sup> See section 1(1)(b) of the 1982 Act.

<sup>177</sup> Section 1(2) of the 1982 Act reads: “Subject to section 2(2) of this Act and the following provisions of this section, the 1968 Act shall apply in relation to an imitation firearm to which this Act applies as it applies in relation to a firearm to which section 1 of that Act applies”.

<sup>178</sup> As defined by section 1(3)(a) of the 1968 Act: “...a smooth-bore gun (not being an air gun) which (i) has a barrel not less than 24 inches in length and does not have any barrel with a bore

If a readily convertible imitation firearm would – if converted – be capable of automatic fire, then it will be a “prohibited weapon” under section 5 of the 1968 Act.

- 1.94 Certain provisions of the 1968 Act do *not* apply to a ‘readily convertible imitation firearm’,<sup>180</sup> notably, section 4(3) of the 1968 Act (conversion of weapons)<sup>181</sup> and section 4(4) of the 1968 Act (conversion of weapons in aggravated form).<sup>182</sup> Furthermore, the 1968 Act does not include ‘readily convertible imitations’ in respect of provisions of the 1968 Act that “*relate to, or to the enforcement of control over, the manner in which a firearm is used or the circumstances in which it is carried*”,<sup>183</sup> but “*without prejudice, in the case of [sections 16 to 20 and section 47]*<sup>184</sup> to the application to such an imitation firearm of such of those provisions as apply to imitation firearms apart from this Act”: see section 2(2) of the 1982 Act.
- 1.95 The aforementioned provision (section 2(2)) appears to mean that if D possesses a “readily convertible imitation firearm” it is not permissible to charge him with using or carrying a “firearm” – see, for example, section 17 (using a firearm), section 18 (carrying a firearm with intent) or section 19 (carrying a firearm in a public place). But, it would be permissible to charge D with using or carrying an “*imitation firearm*” provided that the section creating the offence expressly includes an “imitation firearm”. Similarly, section 47 of the 1968 empowers constables to stop and search (in prescribed circumstances) for “firearms”. A readily convertible imitation firearm is not a “firearm” for the purposes of section 47.

#### *Interpretation issues in respect of the 1982 Act*

- 1.96 Section 1(3) and (4) of the 1982 provide:
- (3) Subject to the modifications in subsection (4) below, any expression given a meaning for the purposes of the 1968 Act has the same meaning in this Act.
  - (4) For the purposes of this section and the 1968 Act, as it applies by virtue of this section--
    - (a) the definition of air weapon in section 1(3)(b) of that Act (air weapons excepted from requirement of firearm certificate) shall have effect without the exclusion of any type declared by rules made by the Secretary of State under section 53 of that Act to be specially dangerous; and

exceeding 2 inches in diameter; (ii) either has no magazine or has a non-detachable magazine incapable of holding more than two cartridges; and (iii) is not a revolver gun”.

<sup>179</sup> An “air weapon” is defined by section 1(3)(b) of the 1968 Act: “...(that is to say, an air rifle, air gun or air pistol [which does not fall within section 5(1) and which is] not of a type declared by rules made by the Secretary of State under section 53 of this Act to be specially dangerous).”

<sup>180</sup> See section 2(2)(a) of the 1982 Act.

<sup>181</sup> Section 4(3) of the 1968 Act provides: “It is an offence for a person other than a registered firearms dealer to convert into a firearm anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through its barrel.”

<sup>182</sup> Section 4(4) of the 1968 Act provides: “A person who commits an offence under section 1 of this Act by having in his possession, or purchasing or acquiring, a shot gun which has been shortened contrary to subsection (1) above or a firearm which has been [converted as mentioned in subsection (3) above] (whether by a registered firearms dealer or not), without holding a firearm certificate authorising him to have it in his possession, or to purchase or acquire it, shall be treated for the purposes of provisions of this Act relating to the punishment of offences as committing that offence in an aggravated form.”

<sup>183</sup> Section 2(2)(b) of the 1982 Act.

<sup>184</sup> Proviso to section 2(2)(b) of the 1982 Act.

(b) the definition of firearm in section 57(1) of that Act shall have effect without paragraphs (b) and (c) of that subsection (component parts and accessories).

1.97 Two points can be dealt with briefly:

- (1) An “air weapon” (even if it is not of the type declared by the Secretary of State to be “specially dangerous”<sup>185</sup> and it is not a “prohibited weapon”) is subject to the provisions of the 1982 Act.
- (2) Section 1 of the 1982 Act does not apply to the “component parts” or “accessories” of a firearm (see section 1(4)(b) of the 1982 Act). Thus, the 1982 Act is not concerned with parts, that have ‘the appearance’ of being “component parts” that are readily convertible into such parts (i.e., “firearms”, applying section 57(1)(b)). This is not a mere ‘academic’ issue.

*R v Rogers*<sup>186</sup>

A bag contained the component parts of what was (originally) a blank firing revolver, namely, a barrel, trigger and frame. There were four live 9mm rounds of ammunition. The cylinder was missing. The barrel had been modified allowing a missile to be discharged down it. The inside barrel diameter was approximately 9.3mm. The prosecution alleged that the parts were “component parts” of a “prohibited weapon” as defined in section 5(1)(aba)<sup>187</sup> of the 1968 Act. The forensic experts disagreed as to the status of the parts. The defence expert asserted that they were component parts of an *imitation* firearm. The difference in size between a 9mm bullet, and a 9.3mm barrel, might result in a loss of pressure from the propelling gas and “basically, the missile just rattles down the barrel and often comes out with a very low velocity...”

The Court, considered the Firearms Act 1982, and noted that section 1(4)(b) provides that the definition of firearm in section 57(1) of the 1968 Act “shall have effect *without paragraphs (b) and (c)* of that sub-section (component parts and accessories).” Thus, the component parts subject to the charge could not be subject to a charge either under the 1982 Act or under the 1968 Act.

The Court held that the conviction was unsafe, and doubted whether the parts were capable of being regarded as “component parts”. There was no evidence of the existence of a cylinder compatible for firing purposes with the modified barrel. At lowest, there was an issue of fact for the jury as to whether the removal of the obstruction from the barrel converted the components in the manner alleged. There would also have been a factual issue on the related question of whether it had been proved that a bullet could have been “discharged” from the device (a necessary requirement under section 1 of the 1968 Act, read with sections 5 and section 57).

1.98 A more difficult question is whether Parliament intended that the expression “imitation firearm”, as it appears in the 1982 Act, should have its own meaning – and not the meaning stated in section 57(4)<sup>188</sup> of the 1968 Act. At first sight, section 1(3) of the 1982

<sup>185</sup> See the Firearms (Dangerous Air weapons) Rules 1969: SI 1969 No.47.

<sup>186</sup> [2011] EWCA Crim 1459.

<sup>187</sup> Section 5(1)(aba) of the 1968 Act (so far as it was material): “...any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon...”

<sup>188</sup> Section 57(4) of the 1968 provides: “imitation firearm” means any thing which has the appearance of being a firearm (other than such a weapon as is mentioned in section 5(1)(b) of this Act) whether

points in the direction of section 57(4). In *Bewley*,<sup>189</sup> the Court certainly assumed that this was so.<sup>190</sup> However, it is submitted that this would lead to results that Parliament was unlikely to have intended. Section 57(4) excludes imitations of weapons mentioned in section 5(1)(b) of the 1968, namely, those that discharge any noxious thing. There exist multiple-purpose pistols that may act as a starter pistol, a CS gas cartridge firing pistol, or if fitted with the appropriate thread, be capable of firing a flare: see *R v Rhodes*.<sup>191</sup> It is conceivable that there will be pistols of the aforementioned type which have the appearance of a 'section 1 firearm' and are readily convertible into a "firearm" as defined by section 57(1) of the 1968 Act. In *The Queen v McKenzie*<sup>192</sup> police seized an Italian produced Model 85 *replica* pistol, the barrel of which was partially blocked, but allowed 9mm blank cartridges with a CS gas lachrymatory component to be discharged.<sup>193</sup> Had the replica been "readily convertible" into a firearm, it seems unlikely (it is submitted) that this was an imitation which Parliament envisaged would not be caught by the 1982 Act (and see Chapter 2, para.2.47 *et seq.*: 'Imitation Firearms')

*When is an imitation firearm "readily convertible"?*

- 1.99 For the purposes of the 1982 Act, an "imitation firearm" shall be regarded as readily convertible into a section 1 firearm if it can be so converted "without any special skill on the part of the person converting it", involving work that "does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes" (see section 1(6) of the 1982 Act). But, how much skill is required for it to constitute "special skill", and is this provision out-of-date?
- 1.100 The Home Office Guide states that guidelines have been issued (albeit intended primarily for the gun trade) which advise on the technical measures that can be taken to prevent an imitation firearm from being readily convertible into a lethal barrelled weapon.<sup>194</sup> In *Bewley*,<sup>195</sup> the Court opined that a reading of the 1968 Act together with the 1982 Act assisted in understanding what is meant by "conversion":

The words in s.1(1)(b) "readily convertible into a firearm" are sufficiently broad to include the use of equipment or tools in conjunction with the use of an imitation firearm in a way which enables it to be used to discharge a missile as much as if those tools are used permanently to alter its construction. There is no reason to restrict the application of the Firearms Act 1982 to a conversion which permanently alters the construction of the imitation firearm in question. The 1982 Act contemplates converting an item from which a missile cannot be discharged into one from which a missile can be discharged. It matters not whether that process involves the permanent alteration of the construction of the firearm such as by drilling or by some other more temporary means. An item may be converted not merely by changing its capacity or by altering its

or not it is capable of discharging any shot, bullet or other missile;" Note that it was held in *R v Debreli* [1963] EWCA Crim J1104-1, that "imitation firearm" does not mean merely something which is "fabricated to imitate a lethal weapon".

<sup>189</sup> [2012] EWCA Crim 1457.

<sup>190</sup> Judgment, para.24.

<sup>191</sup> [2015] EWCA Crim 155.

<sup>192</sup> [2005] NICA 7; Court of Appeal in Northern Ireland.

<sup>193</sup> The appellant had been charged under the Northern Ireland equivalent of section 5(1)(b) of the 1968 Act (namely, Article 6(1)(b) of the Firearms (Northern Ireland) Order 1981.

<sup>194</sup> Guide on Firearms Licensing Law (March 2015), para.2.23.

<sup>195</sup> [2012] EWCA Crim 1457 [30].



construction, but also by adapting the way it can be used.

- 1.101 On the facts in *Bewley*, the use of extraneous tools by the forensic examiner was (in the view of the Court) “a process of conversion”,<sup>196</sup> but no facts were advanced to show that the starting pistol could have been *readily* converted in accordance with the 1982 Act.

#### How the 1982 Act came to end the *Cafferata* and *Freeman* approach

- 1.102 *Cafferata v Wilson*<sup>197</sup> and *Freeman*<sup>198</sup> decided that the definition of “firearm” includes devices that can be easily adapted for use as a firearm (i.e., from which a missile *can* be discharged); and that, in any event, so much of the device that could be applied to a working firearm was itself a “component part” (and thus a “firearm”) for the purposes of the 1968 Act. This analysis (quite apart from the discussion in *Kelly v MacKinnon*<sup>199</sup>) does not sit easily with the provisions of the 1982 Act, for the reasons discussed in *Bewley*.

#### *R v Bewley*<sup>200</sup>

- 1.103 B was convicted of an offence of unlawfully possessing a “prohibited weapon” falling within section 5(1)(aba)<sup>201</sup> of the 1968 Act. The pistol was a starting pistol originally designed to fire blank cartridges. The barrel had been partially drilled leaving a small section of the original blockage through which ran an off-centre hole. The top part of the hammer was broken off. A forensic scientist was able to fire the pistol by mounting it in a vice or clamp and loading it with a specially selected lead pellet which he hammered through the muzzle tightly against the mouth of the hole within the barrel. He discharged that projectile using an 8 mm calibre blank cartridge, and striking the firing pin with a hammer and punch.
- 1.104 The Court observed that if it was compelled to apply *Freeman* then there was no escape from the conclusion that the gun in the instant case fell within the meaning of a “firearm” (section 57(1), FA 1968) and thus within section 5(1)(aba) of the 1968 Act. The Court had considered the trenchant criticism expressed by the High Court of Justiciary in *Kelly v MacKinnon*, but concluded that however compelling its reasoning, it was not open to the Court to apply it “unless the statutory scheme is different from that which was in force at the time of those decisions”.<sup>202</sup>
- 1.105 However, the Court held that although the 1982 Act did not directly amend the Firearms Act 1968, it was to be regarded as an Act which enlarges its reach to those imitation firearms that fall within the provisions of section 1(1) of the 1982 Act.<sup>203</sup> If the item can be “easily adapted into a lethal weapon....with the use of equipment described in section 1(6) of the 1982 Act, then it will, subject to the statutory defence, fall within the 1968

<sup>196</sup> Judgment, para.31.

<sup>197</sup> [1936] 3 All ER 149.

<sup>198</sup> [1970] 2 All ER 413.

<sup>199</sup> [1982] SCCR 205.

<sup>200</sup> [2012] EWCA Crim 1457.

<sup>201</sup> “any firearm which either has a barrel less than 30 cm in length or is less than 60 cm in length overall, other than an air weapon, a muzzle-loading gun or a firearm designed as signalling apparatus.”

<sup>202</sup> Per Moses LJ, judgment, para.22.

<sup>203</sup> Judgment, para.25.

Act”.<sup>204</sup> Those sub-sections raise questions of fact, which the finders of fact have to resolve.

- 1.106 Accordingly, the Court concluded that whether or not an item falls within section 57(1) should no longer be answered by reference to *Freeman* or to *Cafferata*, but courts should look to the 1982 Act read with the 1968 Act.<sup>205</sup>

It would be absurd to allow the prosecution to sidestep the safeguards within the 1982 Act merely by construing firearm as meaning an item which could “easily” be converted into a lethal-barrelled weapon, capable of discharging a missile, in the application of the principle in *Freeman*.<sup>206</sup>

- 1.107 The Court achieved its result by (in part) applying the principle stated in *Bennion on Statutory Interpretation*,<sup>207</sup> supported by a passage in the judgment of Blackburne J. in *R. (on the application of Morgan Grenfell) v Special Commissioner*,<sup>208</sup> that where a later Act covers the same material as an earlier Act, the former may be used to aid the construction of the earlier Act in order to determine whether Parliament intended to alter the meaning of that Act. By adopting the approach that it did, the Court in *Bewley*, neither held, nor needed to hold, that either of the English cases had been wrongly decided.<sup>209</sup>

- 1.108 *Bewley* was applied in *R v TW*<sup>210</sup> (the issue being conceded by the prosecution on the facts of that case) where a converted blank-firing pistol had no capacity itself to discharge any shot, bullet or other missile, but required other tools extraneous to itself in order to do so. In *Williams (Orette)*,<sup>211</sup> the Court did not demur from the proposition (as stated in *Bewley*) that the Acts of 1968 and 1982 may be regarded as a single code. It was common ground at the trial in *Williams*, that it was for the prosecution to prove to the criminal standard (as an element of the offence) that the weapon in question was a ‘readily convertible imitation firearm’ within the ambit of section 1(1) of the 1982 Act.

#### *Bewley, the 1982 Act, and imitation prohibited weapons*

- 1.109 The vast majority of “prohibited weapons” are of the “lethal barrelled” type. But, included in section 5 of the FA 1968 is any weapon “of whatever description” that is designed or adapted for the discharge of a noxious thing” (section 5(1)(b), FA 1968). By section 57(1)(a) such a weapon is a “firearm”. The question arises whether an *imitation* stun gun (for example), or an empty canister marked “CS Gas”, is caught by the 1982 Act if it can be readily converted into a section 5(1)(b) device? The answer would appear to be in the affirmative unless the words “imitation firearm” in the opening sentence to section 1(1) of the 1982 Act derive their meaning from section 57(4) of the 1968 Act: see Chapter 2, paras.2-61 and 2.62.

<sup>204</sup> Judgment, para.28.

<sup>205</sup> Judgment, para.28.

<sup>206</sup> Per Moses, LJ, judgment, para.28.

<sup>207</sup> 5th edn (London: LexisNexis, 2010).

<sup>208</sup> [2002] UKHL 21; [2003] 1 A.C. 563 at 592.

<sup>209</sup> And see the commentary to *Bewley* [2013] Crim. L.R 54, at 56.

<sup>210</sup> [2012] EWCA Crim 2114.

<sup>211</sup> [2012] EWCA Crim 2162.

*Is an imitation that is not readily convertible, a “component part” of a firearm?*

- 1.110 As to whether an imitation firearm that is incapable of discharging a missile, may nevertheless fall within the definition of a “firearm” as a “component part”, the Court agreed with the Lord Justice-General in *Kelly v McKinnon* that the proposition that all parts of a dummy gun, which did not require to be bored should be regarded as parts of a lethal weapon, was “untenable”.<sup>212</sup>

The definition of firearm cannot include a component part of a lethal-barrelled weapon of any description from which any shot, bullet or other missile *can* not be discharged.

- 1.111 The difficulty about this conclusion (it is submitted) is that if an imitation firearm, which is not “readily convertible” into a firearm, is not a “component part” for the purposes of the 1968 Act (notwithstanding that parts of it could be utilised in a working firearm), then when would a ‘part’ be a “component part”? Suppose D has only a cylinder on his table, which came from an “imitation firearm”, but which could be fitted and used in a working firearm. Would the cylinder be a “component part” of a (potential) firearm?

### **The chequered history of convertible imitations**

- 1.112 Legal problems in respect of convertible imitations continue to exist notwithstanding that the same problems had been identified and discussed in the Bodkin Committee Report in 1934.<sup>213</sup>

...a practical difficulty in the way of prohibiting or restricting convertible safety pistols is the difficulty of distinguishing for the purpose of legislation between the convertible and the non-convertible type.”<sup>214</sup> The Committee was not able to provide a suitable definition or test. It recognised that to speak in terms of “capable of conversion” would give rise to “much difficulty in practice”.

- 1.113 The majority of the Committee considered that it would be sufficient to introduce strict controls on bulleted ammunition, and that it should be an offence to alter or to adapt for use (as a firearm) any type of ‘toy’ or ‘imitation’. In addition, such unauthorised conversion would result in a breach of the firearm certification procedure under the 1920 Act. However, the majority saw no necessity (at that time) to prohibit or restrict convertible imitations.
- 1.114 Parliament gave effect to the majority’s recommendation by enacting section 9(2) of the Firearms (Amendment) Act 1936 [converting an imitation] – an offence cited by counsel in argument in *Cafferata*,<sup>215</sup> but not mentioned by the Court in its judgment. The offence was re-enacted in section 24(2) of the 1937 Act; and again in section 4(3) of the 1968 Act.
- 1.115 However, the *minority* of the Committee were of the view that the plugged hollow-barrel type ‘imitations’ should be brought under statutory control by providing, for example, that the definition of “firearm” in the Act of 1920 should be “deemed to include” such imitations.<sup>216</sup> Arguably, this is the approach that Parliament adopted when it enacted the

<sup>212</sup> Judgment, para.34.

<sup>213</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [1934; Cmd. 4758]

<sup>214</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758]; para.107.

<sup>215</sup> [1936] 3 All ER 149.

<sup>216</sup> Para.108: “In their view it is desirable that the plugged hollow barrel type....should be brought

1982 Act, and indeed, there is a difference between *treating* a convertible imitation *in the same way as a "firearm"* for the purposes the 1968 Act, and creating a fiction that such an imitation *is* a "firearm". Significantly, the 1982 Act did not amend the definition of "firearm" in section 57(1) of the 1968 Act.<sup>217</sup> Accordingly, the 1982 Act did not (arguably) give statutory effect to the decisions in *Cafferata* and *Freeman* that *did* bring within the definition of a "firearm" a device that can be easily adapted or converted for use as such.

#### *The Bewley 'sting in the tail'*

- 1.116 It is important not to lose sight of the fact that what the 1982 Act provides - which the *Cafferata* and *Freeman* approach did not - is the defence (set out in section 1(5) of the 1982 Act) that the accused neither knew nor had reason to suspect that the imitation firearm was readily convertible into a 'section 1 firearm'. If, applying the *Bewley* analysis, the defence under section 1(5) of the 1982 fails, *the result appears to be that the device is a "firearm"*, as defined by section 57(1). The Court said:

28. Whether an item falls within s.57(1) should no longer be answered by reference to *Freeman* or to *Cafferata*. Courts should look to the 1982 Act read with the 1968 Act.

31...For the reasons we have given, after the 1982 Act came into force, s.57(1) refers to the capacity of the weapon without regard to its potential conversion, unless that conversion falls within the scope of the 1982 Act.

34. The question then arises as to whether the starting pistol could be regarded as a component part of "such a lethal or prohibited weapon". The Divisional Court in *Cafferata* would, no doubt, have concluded that it could be so regarded. That seems to us to be an impossible construction of s.57(1)(b). The definition of firearm cannot include a component part of a lethal-barrelled weapon of any description from which any shot, bullet or other missile can not be discharged. Any other construction would ignore the use of the word "such". If the starting pistol does not fall within the definition of firearm within s.57(1), no part of it could do so.

#### **Divergence between the law of England and Scotland**

- 1.117 *Kelly v MacKinnon* was decided in May 1982, some two months before the 1982 Act received Royal Assent.<sup>218</sup> However, it cannot be assumed that following the decision in *Bewley*, the law as it is applied in Scotland will be the same.
- 1.118 In *Kelly v MacKinnon*, the High Court of Justiciary totally rejected the reasoning in *Cafferata* and *Freeman*. It held (in effect) that either the device is a lethal barrelled weapon from which a missile *can* be discharged, or it is not:

If an article is not a lethal barrelled weapon from which any shot, bullet or other missile can be discharged or a component part of such weapon, it is not a "firearm" for the purposes of the Act.

under control, by providing for example that the definition of 'firearm' in the Act of 1920 should be deemed to include any toy or safety or imitation pistol or revolver designed or adapted for firing blank cartridges, the barrel of which is not made of solid metal of one piece throughout its entire length, or alternatively, any such pistol or revolver the hollow barrel of which is for part of its length plugged or obstructed, and which can, by removal in any manner of such obstruction or plug, be rendered capable of discharging through the barrel any shot, bullet, or other missile. The effect of this proposal would be to restrict sales of the more readily convertible type."

<sup>217</sup> In section 57(1) of the 1968 Act.

<sup>218</sup> That decision was considered and distinguished by the High Court of Justiciary in *Jessop v Stevenson* 1988 SLT 223, but it was unnecessary for the Court to discuss the 1982 Act.

- 1.119 Accordingly, in *Kelly v MacKinnon*,<sup>219</sup> the Lord Justice-General found “astonishing” the observation in *Freeman* that the question of whether something is, or is not, a “firearm” may be a question of “fact or degree”:

Whether it would be easy or difficult to convert such an article into such a lethal weapon is quite irrelevant and where one is dealing with, let us say, an object which is not a component part of such lethal weapon but which could be used in the construction of such a lethal weapon, it cannot be seriously suggested that it is, for that reason, a “firearm” in its own right, or might be held to be so treating the matter as one of fact and degree.

- 1.120 The Scottish law position (as stated in *Kelly v MacKinnon*) is thus in marked contrast to the approach taken in *Bewley*, namely, that whether an item is a “firearm” or a “readily convertible imitation firearm” is a matter of fact and degree.

## **(2) Whether a “firearm” can be made to work as a firearm**

- 1.121 The situation that is considered under this heading is whether a device that had been an effectual firearm (as designed and constructed), but which ceases to function as such (e.g. because of a broken part), is nonetheless a “firearm” as defined in section 57(1) of the 1968 Act.

### **Items that do not function: “designed or adapted” to function in a certain way**

- 1.122 As the law currently stands, a “firearm” (whether a “lethal barrelled weapon” or a “prohibited weapon”) remains a “firearm” even if it is not in working order by reason of (e.g.) a temporary fault. Thus, it was held by the Divisional Court in *Brown*,<sup>220</sup> that a ‘stun gun’ was a “prohibited weapon” even if was not working properly because of some unknown fault. It remained a stun gun having been “designed or adapted” to discharge a noxious thing.<sup>221</sup>

#### *(a) R. v. Jobling*<sup>222</sup>

- 1.123 In a decision at first instance, J was charged with possessing a “prohibited weapon” of a type described by section 5(1)(a) of the Firearms Act 1968,<sup>223</sup> - a Bren sub-machine gun - which had originally been designed and manufactured for automatic or single-shot firing. The weapon had been modified (not by J) by the removal of metal that linked the trigger and the bolt to prevent it being fired when the automatic mode was selected and allowing only single shots. The Crown contended that it would be a relatively simple matter (taking some 45-60 minutes) to either rebuild the disconnecter or further modify it by removal of a further small quantity of metal so as to allow only continuous fire. It was contended by J that the words “is so designed or adapted” in section 5(1)(a) refer to the *present* condition of the weapon.

<sup>219</sup> 1983 SLT 9.

<sup>220</sup> The Times, 27th March 1992.

<sup>221</sup> And see *R v Hurley* [2013] EWCA Crim 1008.

<sup>222</sup> [1981] Crim.L.R. 625. No transcript appears to be available of the ruling by Mr Justice Taylor (as he then was) but only the details as noted in the Criminal Law Review.

<sup>223</sup> Section 5(1)(a) of the 1968 Act (as originally drafted) provided: “(a) any firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty;”. The provision was substituted by section 1(1) of the F(A)A 1988 to read, “any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;”.

1.124 Mr Justice Taylor (as he then was) directed an acquittal. Discerning the true ratio of this decision is hampered by the absence of a full transcript of the judge's ruling (although a copy appears to have been before the Court in *R v Clarke*<sup>224</sup>). However, an extract of the transcript was cited by the Court in *Clarke*. The following principles can be extracted from the ruling (emphasis added):

- (a) The relevant time, when considering whether the weapon offends against (section 5), is the time of the alleged offence.
- (b) The Act does not restrict the design of the thing to its original design, and thus it is "insufficient, even if it is not wholly irrelevant, to ask whether the weapon was originally designed to fire continuously. One must ask whether it remains so"
- (c) However, "*If all that prevents the gun at the relevant time from firing continuously is a temporary fault, such as lack of lubrication or a broken part, it would still be a prohibited weapon.* Likewise, if, for example, a piece of wire restricting movement of the trigger, or some other superficial device, was applied so as to prevent normal function".
- (d) "...*the proper test is as follows: assuming its parts to be in working order, would this firearm by reason of its design (whether original or modified) or by reason of any adaptation, fire continuously if pressure were applied to the trigger at the time of the alleged offence?*"

(b) *R v Pannell*<sup>225</sup>

1.125 *R v Jobling* (despite being a "test case") was not cited in the judgment in *Pannell*. P was an arms dealer with a certificate entitling him to possess guns under section 1 of the Firearms Act 1968.<sup>226</sup> He possessed the component parts of three 9mm Sterling Carbines that had been stripped down. The weapons had been designed for military use to fire either automatically or one shot at a time, but the trigger mechanisms had been adapted to fire only single shots. However, it was possible to fire successive shots by holding the trigger in a particular position, but it was difficult to maintain this position against the recoil of the weapon. Any departure from the precise pressure on the trigger caused it to cease to fire automatically. P was convicted of possessing "prohibited weapons" specified in section 5(1)(a) of the Firearms Act 1968 (as originally drafted; i.e. automatic continuous fire).<sup>227</sup> The appeal was dismissed.

1.126 P advanced three arguments, namely:

- (i) That section 5(1)(a) of the 1968 Act did not relate to "component parts" because if that expression was substituted (in that provision) for "firearm", it would not make any sense;
- (ii) The provision related to the state of the weapon at the time of the alleged offence; and
- (iii) The modification to the trigger mechanisms resulted in the weapons losing their

<sup>224</sup> [1986] 1 WLR 209.

<sup>225</sup> (1983) 76 Cr.App.R.53.

<sup>226</sup> However, the authority of the Secretary of State will usually be required in order to possess a "prohibited weapon": see section 5 (subject to statutory exceptions).

<sup>227</sup> Section 5(1)(a) of the 1968 Act (as originally drafted) provided: "(a) any firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty;"

character of an automatic firearm.

1.127 In rejecting those arguments, the Court held that the words of section 5 are descriptive of the kind of firearm which is prohibited and that nothing had been done in the instant case to convert the weapon to one of a different character.<sup>228</sup> The weapons were less efficient but they had not ceased to be ones designed as automatic weapons.

1.128 A similar point had arisen in *Jessop v Stevenson* (above)<sup>229</sup> where the High Court of Justiciary stated that the language of section 5(1)(a) is descriptive of the kind of firearm that is subject to a prohibition and it is not descriptive of any individual weapon at the time it is found to be in the possession of a member of the public.

(c) *R v Clarke (Frederick)*<sup>230</sup>

1.129 C was charged with possessing a “prohibited weapon” (contrary to section 5(1)(a) of the FA 1968 as originally drafted)<sup>231</sup> namely a Carl Gustav sub-machine gun which was incomplete in that it had no trigger, pivot pin or magazine. The weapon had been *designed* for fully automatic fire only. The police examiner stated that, (a) he had been unable to fire the incomplete gun until he had tied a piece of string across the “sear” and round the trigger guard so that tension on the string could depress the “sear” and operate the gun; (b) that he had filled a magazine with ammunition and was able to achieve continuous fire by tension on the string; and (c) he had been able to discontinue firing by taking his finger off the string. Without a magazine, the gun was useless as a weapon even if the expedient of a piece of string to replace the trigger was adopted; it would be possible to make a replacement trigger in a matter of hours or less, and it would take about two days to manufacture a magazine.

1.130 In dismissing the appeal, the Court said that *Pannell* must be taken as overruling the decision in *Jobling*, and agreed with the Court in *Pannell* that “the words in the section are descriptive of the kind of firearm which is prohibited” rather than descriptive of an individual weapon at the very time that an accused is alleged to have been in possession of it.

1.131 The Court did not overlook the possibility that a firearm which is designed or adapted to perform in the manner set out in section 5(1)(a) may cease to be so because (e.g.) it is so damaged or altered whether by accident, or design, or by the removal of so many components that it was no longer something that could be fairly described as a “weapon.” However, a firearm which is designed or adapted for automatic fire still remains so designed, despite the fact that an essential component such as the trigger may be missing.

1.132 The Court rejected the argument that the words of section 57(1)(b) [“component parts”] do not make sense if applied to a firearm which is prohibited by section 5(1)(a). If the words of section 57(1)(b) are read into section 5(1)(a), then it provides: “A person commits an offence if, without the authority of the Secretary of State, he has in his

<sup>228</sup> Consider now, section 7 of the Firearms (Amendment) Act 1988 that legislates against the ‘back-conversion’ of firearms except in the circumstances specified in the Act.

<sup>229</sup> 1988 S.L.T. 223.

<sup>230</sup> [1986] 1 WLR 209.

<sup>231</sup> Section 5(1)(a) of the 1968 Act (as originally drafted) provided: “(a) any firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty;”.

possession...any component part of any firearm which is so designed that, if pressure is applied to the trigger, missiles continue to be discharged until..." C had in his possession (at the very least) a component part of a prohibited weapon.

(d) *Jessop v Stevenson*<sup>232</sup>

- 1.133 S was in possession of a Bren light machine gun of .303 calibre, designed for military use to fire both single shots and bursts. A minor modification had been made to it so that it would fire only single shots, but it would only have taken two or three minutes' work to restore the Bren's capacity to fire in bursts. The sheriff acquitted S having decided that for the purposes of section 5(1)(a) of the 1968 Act (as originally drafted),<sup>233</sup> he had to consider whether the gun was capable of firing in bursts when it was seized. He relied on *Kelly v. MacKinnon*,<sup>234</sup> and *R. v. Jobling*.<sup>235</sup>
- 1.134 The High Court of Justice held<sup>236</sup> that the question in this case was not whether the weapon or article was a "firearm": it clearly was. The question was whether that firearm was a "prohibited weapon" within the meaning of section 5(1) of the 1968 Act. The Crown's appeal was allowed.

#### Whether the intention of the "designer" is relevant

- 1.135 In *R v Law*, and in *R v Rhodes*, the Court of Appeal held that it is sufficient for the purposes of section 5 of the 1968 Act that the weapon *can function* as described by the provision in question (e.g., section 5(1)(a)). The section does not import either explicitly or implicitly any intention on the part of the designer or the adaptor.

(a) *R v Law*:<sup>237</sup> - weapon could discharge "two or more missiles"

- 1.136 L was convicted of offences charged under section 5(1)(a)<sup>238</sup> of the 1968 Act (as amended). Section 5(1)(a), as amended, read "any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger". The case concerned three MAC 10 automatic weapons. The parties agreed that each of the relevant weapons was capable of burst fire, in that two or more missiles could be discharged when the gun was in the hands of an expert.
- 1.137 In dismissing the appeal, the Court held that on the agreed facts, two or more missiles could be successfully discharged without repeated pressure on the trigger. Once that is proved then, the firearm is so "designed or adapted". Given the agreed facts (and the Court's construction of section 5(1)(a)) it did not need to go further.<sup>239</sup> However, it went on to hold that section 5 does not import either explicitly or implicitly any intention on the part of the designer or the adaptor; the section is not framed using words such as

<sup>232</sup> 1988 SLT 223.

<sup>233</sup> Section 5(1)(a) of the 1968 Act (as originally drafted) provided: "(a) any firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty,".

<sup>234</sup> 1983 SLT 9.

<sup>235</sup> [1981] Crim LR 625.

<sup>236</sup> The constitution of the Court consisted of the Lord Justice-General (Lord Emslie) who delivered the lead judgment in *Kelly v MacKinnon*.

<sup>237</sup> [1999] EWCA Crim 210.

<sup>238</sup> The Court made several references to section 5(1A), but this must have been a slip (it is submitted) and that the Court was actually referring to s.5(1)(a) of the 1968 Act.

<sup>239</sup> A point made by Professor Di Birch, in her commentary to this case: see [1999] Crim.L.R.837, 838.



designed or adapted “for the purpose of” burst fire or repeated fire; and that the central and vital words are the words “can be successfully discharged”.

(b) *R v Rhodes*:<sup>240</sup> - vital words are “[missile] can be discharged”

- 1.138 R (in February 2014) pleaded ‘guilty’ (after a ruling) to 22 counts of possessing, purchasing or acquiring, manufacturing, selling or transferring a prohibited weapon, contrary to the Firearms Act 1968, section 5(1)(b).<sup>241</sup> R sold blank firing pistols that were described as “front venting multi-purpose pistols with partially blocked barrels”.
- 1.139 The Crown’s expert stated that the barrels would not permit the passage of a bullet, but would allow irritant gases and hot burning gases fired from either a blank or a gas cartridge to pass through them. R adduced expert evidence that while the pistols were capable of discharging gas cartridges, this was not what they had been designed for. The manufacturers had developed a gas cartridge of the same calibre, so as to allow it to fit the pre-existing design of a blank firer. It was common ground that this was a multi-purpose pistol that could discharge a gas cartridge to act as a starter pistol, a CS gas cartridge firing pistol and - if fitted with the appropriate thread - capable of firing a flare.
- 1.140 The trial judge ruled that he would direct the jury that if they were satisfied that the guns in question had the features which had been described as part of their design (that is to say, forward venting, enabling the discharge noxious liquids and gases) then they should consider the offence made out and find the appellant guilty.
- 1.141 R contended that the learned judge erred and should have ruled that the mere fact that a weapon, which had not been designed for the purpose of discharging noxious gasses but which was capable of doing so, was not sufficient to bring it within the legislation, and that this was so even if the weapon might be sold with that ability, and specifically for that purpose, in countries where it was lawful to do so.
- 1.142 The Court of Appeal, in dismissing an appeal against conviction, noted the words of Swinton Thomas LJ in *R v Law* that “[s]ection 5 does not import either explicitly or implicitly any intention on the part of the designer or the adapter....The central and vital words....are....'can be successfully discharged'”. The Court held that the same analysis in respect of the phrase “designed or adapted for the discharge of any noxious liquid, gas or other thing” (as it appeared in section 5(1)(b)) was equally apposite in the instant case; and the Court found it difficult to see how the words “designed or adapted” could be construed differently within different subsections of the same statutory provision.
- 1.143 The Court noted that the same conclusion had been reached in *Turek v Regional Court In Gliwice Poland*,<sup>242</sup> an extradition case concerning the possession of a gas gun, and the relevant UK offence was an alleged breach of section 5(1)(b) of the 1968 Act. Silber J had stated in *Turek* (para.26):

<sup>240</sup> [2015] EWCA Crim 155.

<sup>241</sup> At the time of the alleged offences, the Firearms Act 1968, section 5(1)(a) and (b), provided that: “A person commits an offence if, without [the] authority... he has in his possession, or purchases or acquires [, or manufactures, sells or transfers] - (a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;.... (b) any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing ... ”. The words in square brackets were inserted by the Anti-social Behaviour, Crime and Policing Act 2014 amending section 5 (from July 14, 2014).

<sup>242</sup> [2011] EWHC 1556 (Admin).

"...the very fact that these weapons can be used for the discharge of gas and emergency bullets shows that they must have been designed for that purpose, otherwise it is difficult to see why they are capable of fulfilling this function, which seems to be an integral part of it."

- 1.144 In *Law*, *Turek*, and *Rhodes*, the principal contention advanced by the accused in each case was (in essence) that the expression "design or adapted" implies that the functions of the weapon are those *intended* by the designer or adapter. The point was undoubtedly arguable, and indeed, the words of Silber J in *Turek* (see above) are open to the interpretation that he was ready to *infer* a subjective intention on the part of the designer that the weapon in question had been designed for the discharge of gas and emergency bullets. But, given what one presumes had been the intention of Parliament when it enacted section 5 of the 1968 Act (strict liability in the interests of public safety) it is easy to understand why the courts in *Law* and in *Rhodes* strove to find grounds for rejecting that contention.
- 1.145 Until one reaches para.19 of the judgment in *Rhodes*, the decision might be taken to be stating unequivocally that a subjective element on the part of the designer or the adaptor is not required for the purposes of (at least) section 5(1)(a) or (b). But (at [19]) the Court speaks both of a "design capability" and a "*deliberate* design capability" (emphasis added): the latter *does* imply the existence of a mental element on the part of the designer.

### **(3) Device is a firearm, but of a different type when modified**

- 1.146 There will be cases, such as *Jessop v Stevenson*, where the item was originally constructed as a section 1 firearm but it was then modified to be a firearm of a different kind (e.g. a smooth-bore weapon rather than rifled) but it remains a firearm within the definition in section 57(1) of the 1968.
- 1.147 Note (for the sake of completeness) that the effect of section 7(1) of the Firearms (Amendment) Act 1988, is that any weapon which had been a "prohibited weapon" under section 5(1) or section 5(1A) of the 1968 will remain a "prohibited weapon" notwithstanding that the weapon was modified (or attempted) with the intention that its specifications would no longer satisfy either of those sections. Similarly, section 7(2) of the 1988 Act makes provision in respect to "any weapon" which had been subject to the certification procedures under section 1 of the Firearms Act 1968, and has or had a rifled-barrel of less than 24 inches. Such a weapon will continue to require a section 1 firearm certificate even if it had been modified to bring it within the exceptions in section 1(3)(a) [shot gun exception] or section 1(3)(b) [air weapon exception]. Thus, a failed attempt to make the device either an imitation, or an air weapon that is not "specially dangerous", or not a "prohibited weapon" may fall foul of the Acts of 1988 and 1968.

### **(4) Device is a firearm, but modification alters authorisation to have it**

- 1.148 The decision of *Shahabi-Shack*,<sup>243</sup> illustrates that modifications to a firearm may be such as not to be in compliance with the terms of a firearm certificate. Thus, where a certificate permitted the holder to possess and to use a 0.38 pistol "for destruction of injured deer in the course of stalking and the gun's shot shall be restricted to two shots only", those conditions were breached when three of five chambers were blocked by a

<sup>243</sup> [2014] EWCA Crim 2842.

soft substance that were easily removed by just poking them out so that the gun could easily and quickly be loaded and fired in each of the three chambers. In the opinion of the Court,

“...whether any plug or restriction in the barrel amounts to a restriction so as to satisfy the condition of the firearms certificate is necessarily a question of fact and degree depending on all the circumstances of the case”.<sup>244</sup>

- 1.149 The Court added that there is an important distinction to be drawn “between conditions that relate to the nature and functioning of the firearm itself and to other conditions relating, for example, to the use or secure storage of the firearm”.<sup>245</sup> It is not the breach of every condition upon the certificate that will render a firearm (in this instance) a prohibited weapon.
- 1.150 Had all five chambers been similarly blocked, the question might have arisen whether the gun was an “imitation” (section 57(4)), or a “readily convertible imitation” (1982 Act), and/or a “firearm” for the purposes of the 1968 Act. The answer to that question might well turn on whether the material used to block the chambers was soft or hard, or easily removed or not.

#### **“Component parts” of a non-firearm**

- 1.151 In *Kelly v MacKinnon*, and in *Bewley*, it was held that a ‘part’ is not a “component part” of a lethal barrelled “firearm” if it cannot be identified as a component of something which is in fact lethal. Although *Matthews*,<sup>246</sup> was not expressly analysed in those terms, the result in that case can be explained on the same basis (it is submitted). M was in possession of a home-made copy of a submachine gun, but it was not then a functioning gun and it required rectification before being capable of firing bullets. M was convicted on the basis of the judge’s ruling that the parts (namely, a barrel, a lower receiver, an upper receiver, and a breech block) were “component parts” of a firearm (section 57(1)(b) of the 1968 Act). The expert evidence was that none of the parts of the item would ever fit any other gun. On appeal, the Crown conceded that the judge’s ruling could not be sustained.
- 1.152 The reasoning in *Kelly*, *MacKinnon* and *Bewley* is logical (it is submitted) but it leaves a loose end as to the circumstances in which part of an imitation could constitute a “component part” of a ‘firearm’ as that expression appears in section 57(1).

### **III. “LETHAL BARRELLED” – LETHALITY**

#### **PRACTICAL PROBLEMS**

##### **Distinguishing between toys and firearms: the “weapons” criterion**

- 1.153 The definition of “firearm” in section 57(1) of the 1968 Act - insofar as it concerns a “barrelled weapon” - is one that must be “lethal” in character. Accordingly, there must be evidence before the court of the weapon’s lethality. Convictions were quashed in the

<sup>244</sup> Per Openshaw J., judgment, para.12.

<sup>245</sup> Judgment, para.13; see also *R v Cleaver* [1967] EWCA Crim J1006-3, where C had a firearm certificate for his .22 revolver for use at “approved ranges” and not for use in a yard which C used with the permission of a friend.

<sup>246</sup> [2013] EWCA Crim 120.

cases of *Grace v DPP*,<sup>247</sup> and in *Wareing*,<sup>248</sup> where no evidence was given as to whether the weapon in question was lethal or not.

1.154 The word “lethal” is not defined in the 1968 Act, and its precise meaning is an area of considerable uncertainty notwithstanding that the word has appeared in firearms legislation since the Firearms Act 1920.

1.155 Since 1946, the judiciary has interpreted the word “lethal” broadly,<sup>249</sup> whereas the Executive and law enforcement agencies have endeavoured to be pragmatic as to the thresholds of lethality and the types of weapons which are more or less likely to be lethal.<sup>250</sup>

1.156 The word “lethal” was not used in the Pistols Act 1903, and its use in later legislation is perhaps explained as an attempt by Parliament to distinguish between a mere toy or a low-powered barrelled device,<sup>251</sup> and/or (as suggested by the Bodkin Committee) to accentuate the word “weapon”. The Bodkin Committee said:<sup>252</sup>

Probably the word "lethal" was introduced into the Firearms Act, 1920, to accentuate the word, "weapon" and to indicate that the Act applied to such firearms as were likely to inflict death or serious injury if fired at some range, not merely point-blank. A mere toy might inflict death or serious injury if it were accidentally discharged at very close range and the missile struck a vital part, for instance the eye, but it would not, we suggest, in such circumstances be regarded as a lethal weapon in view of [the judgments in *Bryson v Gamage Ltd*]

1.157 The Committee cited *Campbell v Hadley* (1876), in which the Court inspected a small pistol so that the Court could judge whether it was “a mere toy or a firearm”. Having done that, Grove J said that the pistol “might be fatal” when fired at certain parts of the body of a person or animal.<sup>253</sup> It was held to be a firearm that required a licence under the Gun Licence Act 1870. The Committee noted the “many types of air weapons” that then existed, none of which had a force “at all comparable with that found in ordinary firearms firing shot cartridges or single bulletted cartridges”.<sup>254</sup>

### **Exempting air weapons as “firearms” – unless “specially dangerous”**

#### *The position c.1920 and c.1937*

1.158 The 1920 Act deemed *air-guns* and *air-rifles* not to be firearms (except for specified provisions of the legislation)<sup>255</sup> – unless they were of a type “*declared by the Secretary of State....to be specially dangerous*”. The decision of *Saint v Hockley* (1925) held that an *air-pistol* must be regarded as an air-gun within the meaning of section 12 of the

<sup>247</sup> [1989] Crim LR 365.

<sup>248</sup> [1989] EWCA Crim J1002-3.

<sup>249</sup> See *Read v Donovan* [1947] K.B. 326; and *Moore v Gooderham* [1960] 1 WLR 1308.

<sup>250</sup> See the Home Office ‘Guide on Firearms Licensing Law’, March 2015.

<sup>251</sup> In *Bryson v Gamage Ltd.*, the question of whether a gun was a mere toy or fell within the 1903 Act, turned on whether it was a “weapon”.

<sup>252</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758]; para. 87.

<sup>253</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; [Cmd. 4758]; para.88. The Act then applicable was the Gun Licence Act 1870.

<sup>254</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; [Cmd. 4758]; para.89.

<sup>255</sup> See section 12(1) of the Firearms Act 1920; and section 1(3)(b) of the Firearms Act 1968.

1920 Act.<sup>256</sup>

- 1.159 The significance of an air weapon that is “specially dangerous” is – as the Bodkin Committee noted – that “before any general rule could properly be made, the Secretary of State had to be satisfied that the weapons included were in fact specially dangerous *and likely to be regarded by the Courts as lethal weapons*”<sup>257</sup> [emphasis added].
- 1.160 However, by 1934, no rules had been made by the Secretary of State specifying any air weapon as being “specially dangerous”. This was because there were difficulties in doing so. However, the Home Office “took the view that the right course would be to fix a degree of penetrative power at a determined range of distance”:<sup>258</sup>
- .... and that if any weapon whose power exceeded the prescribed degree came to notice the question of declaring it to be specially dangerous within the meaning of the section would arise.
- 1.161 Various tests had been undertaken to determine the penetrative power of a gun, including a test based on one used in India to distinguish between toys and firearms, using strawboards.
- viz.; penetration from a range of 5 feet of a number of strawboards, each 3/64 inches thick, packed closely together in a frame, and the number of straw-boards decided upon, after consultation between the Department, the Chief Inspector of Explosives and Messrs. Webley & Scott, who are large manufacturers of air pistols, was seven. If the pellet from the air-pistol does not completely penetrate this target, the weapon is not regarded as “specially dangerous.”
- 1.162 At the Committee’s request, further experiments were conducted using different types of wood including strawboards.<sup>259</sup> In the event, the Committee concluded that there was insufficient evidence against air weapons to justify subjecting them to the provisions of the 1920 Act, but recommended that the Secretary of State’s power to declare an air weapon as “specially dangerous” should be retained.<sup>260</sup>

#### *The position under the Firearms Act 1968*

- 1.163 The *principal* purpose in declaring an air weapon to be “specially dangerous” under the 1968 Act, is that a firearm certificate must be held in respect of it by virtue of section 1 of the 1968 Act.<sup>261</sup> But, another purpose (subject to the case of *R v L*:<sup>262</sup> see chapter 3, para.3.10) is that air weapons that are “specially dangerous” may also be “prohibited weapons” within (e.g.) section 5(1)(aba) and (ac) – and possibly section 5(1)(a) [burst fire].

<sup>256</sup> See para.89 of the “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; [Cmd. 4758].

<sup>257</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; [Cmd. 4758]; para.89.

<sup>258</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; [Cmd. 4758]; para.89.

<sup>259</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758], para.90.

<sup>260</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758], para.95.

<sup>261</sup> Section 1(3)(a) “applies to every firearm except” (by s.1(3)(b)) an air weapon which is not specially dangerous; and see *Brannan v Crowe* 1994 SLT 728.

<sup>262</sup> [2015] EWCA Crim 5.

- 1.164 No rules were made by the Secretary of State until 1969, when the following air weapons were declared to be “specially dangerous” under the Firearms (Dangerous Air Weapons) Rules:<sup>263</sup>
- (1) an air rifle, or an air gun, which is capable of discharging a missile with a kinetic energy in excess of 12ft lb (on being discharged from the muzzle);
  - (2) in the case of an air pistol: 6ft lb.
- 1.165 Greenwood has suggested that the levels were “convenient” figures.<sup>264</sup>
- Eventually it was decided to specify a kinetic energy for the projectiles, and the level was fixed at 6 ft-lbs for air pistols and at 12 ft-lbs for air rifles. This was a convenient figure which left domestic products unaffected, but imposed the weighty firearm certificate procedure on some imported weapons which were capable of being pumped up to pressures which would produce rather more than the prescribed energy levels.
- 1.166 No provision has ever been made in the firearms legislation that *deems* the permitted limits stated in the 1969 Rules to be thresholds for determining lethality. Neither has any appellate court declared such thresholds to be determinative of lethality (or that they should be treated as being highly persuasive). Indeed, between 1946 and 1960, two decisions (*Read v Donovan* (1946)<sup>265</sup> and *Moore v Gooderham* (1960))<sup>266</sup> laid down a legal test for lethality that sets a very low threshold at which a device is a “firearm” for the purposes of the principal Firearms Act, namely:
- “if [the weapon] is capable of causing more than trifling and trivial injury when misused...” [*Moore v Gooderham*; per Lord Parker CJ]
- 1.167 There have been cases where a person has been convicted under the Firearms Act 1968 in respect of a lethal barrelled air weapon, notwithstanding that it was not one that was “specially dangerous”: see *Street v DPP*,<sup>267</sup> *Herron v Flockhart*,<sup>268</sup> and *Brannan v Crowe*.<sup>269</sup>

## **CASE LAW: MEANING OF “LETHAL BARRELLED WEAPON”**

### **The test of “causing more than trifling and trivial injury when misused”**

*Read v Donovan* [1946]

- 1.168 In a short judgment, Lord Goddard CJ said in *Read v Donovan*,<sup>270</sup> that a “lethal” weapon is one that is “capable of causing injury”. He added that “the question simply is whether the weapon is capable of inflicting harm”. The case (decided under the Firearms Act 1937<sup>271</sup>) concerned a double-barrelled signal pistol which fired an explosive cartridge containing a phosphorous and magnesium flare. It was capable of killing at short-range, and could be fatal up to twenty feet. The device had not been designed as a weapon,

<sup>263</sup> The Firearms (Dangerous Air Weapons) Rules 1969; SI 1969 No.47. Rule 2 was substituted by SI 1993/1490, to include disguised items. Excluded are air weapons designed for use only when submerged in water. Included are air weapons disguised as another object.

<sup>264</sup> Colin Greenwood, “Firearms Control In England and Wales”.

<sup>265</sup> [1946] K.B. 326.

<sup>266</sup> [1960] 1 WLR 1308; [1960] 3 All ER 575.

<sup>267</sup> [2004] EWHC 86 (Admin).

<sup>268</sup> 1969 SLT (Sh.Ct) 37.

<sup>269</sup> 1994 SLT 728.

<sup>270</sup> [1946] K.B. 326.

<sup>271</sup> The definition of “firearm” under the Act of 1937 and 1968 are almost identical.

although it had been used as such, and it had been used during the Second World War against enemy troops with fatal results. The magistrate ruled that the signalling pistol was a “lethal weapon” as defined in the Firearms Act 1937.<sup>272</sup> On a case stated, the Divisional Court agreed that the signal pistol was a firearm within the meaning of the 1937 Act.

*Moore v Gooderham* [1960]

- 1.169 In *Moore v Gooderham* (also decided under the 1937 Act),<sup>273</sup> Lord Parker C.J., did not feel that too much attention could be paid to the definition given in *Read v Donovan* because that weapon was “clearly a lethal weapon”. But, he was “far from saying that it is wrong” if one considered that all that it is necessary to find is “that the weapon is capable of doing something more than trivial harm”.<sup>274</sup>

“... because, in those circumstances, death *may well result* if it is fired at a particularly vulnerable point.” [emphasis added]

- 1.170 In an earlier passage (to similar effect) the Lord Chief Justice said [emphasis added]

“if [the weapon] is *capable of causing more than trifling and trivial injury when misused*, then it is a weapon which is capable of causing injury from which death may result.”<sup>275</sup>

- 1.171 Gooderham sold an airgun to a youth. The gun was the least powerful which could be obtained, and discharged plastic or metal pellets or small darts. It was capable of causing some injury *but* - according to the Justices - *it was incapable of causing death to human beings*, and incapable of causing more than trivial injury except, probably, to the eye at extremely close range. No evidence was adduced by the prosecution as to the relative resistance to penetration by the missiles of plywood and human skin. The Justices concluded that the weapon was not a “lethal weapon”, and consequently not a firearm.

- 1.172 The striking feature on the facts in *Moore v Gooderham*, is the finding of the Justices that, in their opinion, the weapon was not a “lethal weapon”. In neither *Read v Donovan* nor *Moore v Gooderham*, did the Court focus on whether the weapon had been designed or intended to be lethal, but rather that lethality was to be considered in terms of the possible lethal consequence of *misusing* it.

*R v Thorpe*

- 1.173 In *Thorpe*,<sup>276</sup> the Court of Appeal declined to overrule either *Read* or *Gooderham* noting that the Divisional Court had been presided over by two Lord Chief Justices and that those two decisions (but “particularly that in *Moore v. Gooderham*) were made and reported before the present Firearms Act 1968 was passed:

That, of course, leads to the obvious inference that the draftsman of the Act of 1968 had well in mind the decisions in those two cases. (per Kenneth Jones J)

- 1.174 The court could find “no warrant for changing the test which was laid down in 1960 by Lord Parker and which has since then and through the Firearms Act 1968, carried the

<sup>272</sup> The 1937 Act used the expression “lethal barrelled weapon”.

<sup>273</sup> [1960] 1 WLR 1308; [1960] 3 All ER 575.

<sup>274</sup> [1960] 1 WLR 1308, at 1311.

<sup>275</sup> [1960] 1 WLR 1308, at p.1310.

<sup>276</sup> (1987) 85 Cr App R 107.

day now for over 25 years”.<sup>277</sup>

- 1.175 However, this stance does nothing to address the question which a juror in *Thorpe*, had asked the trial judge during the course of their deliberations:

*“In a definition of 'lethal' how remote can the chance of lethality be on the basis that anything can be lethal?”*

The learned recorder answered: *“The test is this. It must be capable of causing injury from which death might – and the word is 'might' – result if it is misused.”*

- 1.176 T had been found in possession of a .177 pellet gun (revolver) powered by compressed carbon dioxide. The pellets, if fired at close range, would penetrate to about three quarters of an inch (at least their own length); and could penetrate skin and shatter an eye; and could cause an injury from which death could result. The kinetic energy released from the cylinder would amount to 2ft.lb. The air gun was not of a kind declared by the 1969 Rules as being “specially dangerous”. T was convicted of possessing a firearm without a firearm certificate.

- 1.177 Counsel for T had submitted that the test of lethality should be:

...to give "lethal" its natural meaning in the context of the phrase "lethal weapon" in section 57 of the Act, such a weapon should be proved to be one capable of causing injuries of a more than trivial nature and of a kind which it might reasonably be expected could lead to death.

- 1.178 The Court saw “obvious difficulties...in importing into the definition the conception of reasonable expectation”. The question is whether - if lethality is retained at all as an element of the definition of “firearm” - a more acceptable test for lethality can be formulated.

### **Is there a scientific, evidence-based test, for lethality?**

- 1.179 The problem for fact-finders is that disputed issues of lethality must be determined on admissible evidence - which will often include expert opinion evidence.<sup>278</sup> In *Gooderham*, the Divisional Court did not explain the basis on which it was able to say that an injury, which is more than trifling or trivial, may (or “may well”) result in death. The gun was the “the least powerful which could be obtained”, but tests showed that when the gun was fired at a piece of 5/32 inch [3.97mm] plywood, at a range of a few inches, a metal pellet became embedded and which was visible from the remote side; and, the *point* of a dart had penetrated the wood. The Justices concluded that the gun was *incapable* of causing death to a human being. The Divisional Court took a different view.
- 1.180 The Home Office and the Forensic Science agencies have undertaken studies in relation to barrelled weapons in order to determine their potential for inflicting a “penetrating wound”. Unfortunately, there appears to be no consensus as to the muzzle-energy velocity required in order for a missile to inflict a wound that (within the bounds of reason and science) would be likely to prove lethal to a person.

<sup>277</sup> Per Kenneth Jones J.

<sup>278</sup> In *Castle v DPP* [1998] EWHC Admin 309, the magistrates were entitled to draw the inference that the guns were lethal barrelled weapons, having regard to assertions made by a salesman that the guns were working and for what purpose they would be suitable.



1.181 The 2000 Home Affairs Select Committee (2<sup>nd</sup> Report), states.<sup>279</sup>

26. The Home Office and the Forensic Science Service considers that the lowest level of muzzle energy capable of inflicting a penetrating wound is one foot pound (or about 1.35 joules): below these power levels, weapons are "incapable of penetrating even vulnerable parts of the body, such as the eye".

However, more recent analysis by the Forensic Science Agency for Northern Ireland has indicated that a more reasonable assessment of the minimum muzzle energy required to inflict a penetrating wound lies between 2.2 and 3.0 ft/lb (3-4 J).....

1.182 As the HASC noted, energy levels vary according to the weight and velocity of the projectile to be fired:

For comparison, a low-powered air rifle using standard ammunition has a typical muzzle energy of between ¾ ft/lb and 12 ft/lb;...a .22 rifle may generate between 35 and 160 ft/lb;... a Colt .45 revolver 420 ft/lb and a .303 rifle 2400 ft/lb....The Deer Act 1991... stipulates that rifles used to kill deer must be of at least .240 calibre or must deliver a muzzle energy of 1700 ft/lb or over....The eventual effect of the projectile on its target is also affected by its aerodynamic efficiency and its shape.

1.183 It will be seen that the aforementioned muzzle-energy levels are significantly lower than those stated in the 1969 Rules (but they still exceed the muzzle energy of the BB gun possessed by the defendant in *Street v DPP*<sup>280</sup>: see Chapter 1, para.1.200).

1.184 The HASC stated that the law on firearms does not recognise different levels of lethality,<sup>281</sup> and that it suspected that "no practical formula can be devised to provide a ready assessment of the relative dangerousness of a firearm".<sup>282</sup> The difficulty about the first of those two statements is that there is no established level of lethality for the courts to apply (beyond the test stated in *Moore v Gooderham*, discussed above).

1.185 In March 2002, the Firearms Consultative Committee (FCC) in its 11<sup>th</sup> Annual Report, recommend (albeit in the context of air weapons) that "a statutory threshold of one joule (0.7376 ft/lbs.) muzzle energy should be embodied in primary legislation on the basis that any air weapon which exceeded this limit would be deemed to be a firearm for the purposes of the Firearms Acts".<sup>283</sup> At Appendix F, the FCC set out its reasons for that conclusion (but those reasons are arguably telling of the difficulties involved in providing a workable formula of "specially dangerous" or "lethal"; see in particular, para.18, 22-23):

18. To be of real value, a declared "lethal threshold" must be expressed as unambiguously as possible, and be capable of being determined by anyone with a suitable chronograph and weighing apparatus. It must not be a simple "rule of thumb" which might easily be overturned in the courts.

19. ...

20. Expressing the threshold in terms of energy density....is scientifically sound but is not in line with the kinetic energy limits used in current firearm and toy legislation, and would add an undesirable, complication to an issue we are seeking to simplify.

21. It would certainly be possible to express the threshold in terms of velocity....This approach, while undoubtedly valid, is not as intrinsically unambiguous as a single

<sup>279</sup> Session 1999-2000; Home Affairs - Second Report (6<sup>th</sup> April 2000); para.26.

<sup>280</sup> [2004] EWHC 86 (Admin).

<sup>281</sup> Report, para.28.

<sup>282</sup> Para.29.

<sup>283</sup> Firearms Consultative Committee, 11<sup>th</sup> Report, 19<sup>th</sup> March 2002, para.10.3.

kinetic energy value and the level would necessarily vary with the calibre and type of projectile.

22. *Probably the only way to establish the level at which an air weapon becomes a firearm simply and unambiguously without having to rely upon the courts, is to establish in law, a pragmatic limit above which an air weapon becomes a firearm and express it in terms of Kinetic Energy....*

23. *This could be done by endorsing the 1 Joule limit, which the Home Office has advocated for some time, as being both practical and at a level below which it is extremely unlikely that a lethal injury might be inflicted, whatever the weapon and projectile. A limit of 1 Joule takes account of projectiles that have intrinsically high penetrative qualities, such as darts, and is significantly above the limit of 0.08 Joules contained in the European Standard for the Safety of Toys. Such an approach would not only be unambiguous and accessible but would bring the point at which an air weapon becomes a firearms into line with the way in which other "limits" are expressed in current legislation. [Emphasis added]*

### *Toy guns and replicas*

- 1.186 The aforementioned reference to the limit of "0,08 joules" in the European Standard for the Safety of Toys,<sup>284</sup> is reflected in a statement made by Mr Charles Clarke MP in the House of Commons in March 2001 [emphasis added]:<sup>285</sup>

Replicas which fire small plastic pellets or, in some cases, steel ball bearings with insufficient energy to penetrate the skin are not regarded as lethal barrelled weapons. Nor are blank firing replicas which cannot readily be converted to fire a live round, and realistic non-firing replicas. Such guns do not fall under the controls of the Firearms Act 1968 as amended and may freely be bought by anyone.

*Under the Toys (Safety) Regulations 1989 any toy gun which discharges a hard projectile must not have an energy level in excess of 0.08 joule.*

The Government recognise the concerns which have been expressed in relation to the misuse and ready availability of realistic replica guns and are looking carefully at the possibility of introducing additional controls. This is a difficult and complex matter, not least because of difficulties of definition, and the Firearms Consultative Committee have been asked to consider the detailed implications of any changes and to report back.

- 1.187 In fact, neither the 1989 Regulations nor the current 2011 Regulations make express reference to an energy level of "0.08 J", but such a reference does appear in the European Standard:

Toys capable of discharging a projectile with a kinetic energy greater than 0,08 J shall carry the following warning on the toy and/or its packaging and in the instructions for use: "Warning. Do not aim at eyes or face."<sup>286</sup>

- 1.188 Although 0.08 Joules, is *below* the aforementioned 'forensic' level, it cannot be assumed (despite the words of Mr Clarke MP) that this will not be sufficient to satisfy the *Moore v Gooderham* test for lethality.

<sup>284</sup> See paragraph 23, Appendix F, in the Firearms Consultative Committee's 11th Annual Report.

<sup>285</sup> House of Commons; debate; 27 Mar 2001: c.594W; and see "Statutory Controls on Firearms"; Note SN/HA/3639; Home Affairs, House of Commons, Jacqueline Beard.

<sup>286</sup> EN 71-1:2011+A3:2014; para.7.7.2; Safety of toys - Part 1: Mechanical and physical properties.

*Weapons with a muzzle energy that varies over time*

- 1.189 The problem is illustrated in *R v Puttick*.<sup>287</sup> P pleaded guilty to possessing a .22 air rifle (unloaded) without a firearm certificate contrary to section 1 of the Firearms Act 1968. P told police that he had owned the air rifle for about 20 years. Upon testing, the highest muzzle energy velocity was 13.7ft/lb, and therefore above the permitted level of 12ft/lb stated in the 1969 Rules (as an air rifle declared to be “specially dangerous”). However, in mitigation, P adduced an expert’s report that at the time of purchase, the rifle had been “within the limits” such that no certificate would have been needed for it. *The experts agreed (prosecution and defence) that with ordinary use over time, an air rifle which was manufactured within the legal limits might creep over the limit without further modification, “and that appeared to have happened in this case”.*
- 1.190 The section 1 offence is one of strict liability, and thus, on the facts in *Puttick*, it seems that a person in possession of an air weapon can creep in and out of the ‘legality zone’ depending on the condition of the gun.<sup>288</sup>
- 1.191 P’s counsel informed the Court of Appeal<sup>289</sup> that, with expert assistance, the air rifle could be brought back within the limits laid down by the 1969 Rules. The point is of interest in that some regard would need to be had (it is submitted) to section 7 of the Firearms (Amendment) Act 1988 that restricts the ‘back conversion’ of specified firearms.

*The problem of ‘realistic imitation firearms’ and lethality*

- 1.192 A search on internet websites reveals a wealth of imitation firearms that are available. Many are realistic in appearance to a ‘real’ firearm, being styled as pistols, rifles, or automatics, from which BB pellets (plastic and metal of varying weights) can be discharged by air or gas propulsion. Many such devices are used for sporting purposes (‘Airsoft’<sup>290</sup>/‘skirmishing’); or at historical re-enactments.<sup>291</sup>
- 1.193 It has been reported that experience has shown that the potential wounding capacity of full-auto fire exceeds that of semi-auto fire when the pellets are targeted on a single area.<sup>292</sup> Thus, even if the muzzle energy of the gun is below that specified by the 1969 Rules, it does not follow that the gun is not “lethal barrelled” either as a matter of science or by applying the *Moore v Gooderham* test. Moreover, were a court to rule that an semi-automatic or fully-automatic air/gas powered BB gun was “lethal barrelled”, the weapon would also be a “prohibited weapon” by virtue of section 5(1)(a) of the 1968 Act (being a “firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger”). A conviction under this provision attracts minimum terms of imprisonment (5 years’ imprisonment in respect

<sup>287</sup> [2000] EWCA Crim J0720-9.

<sup>288</sup> See [http://www.justairguns.co.uk/source/airgun\\_know\\_how\\_booklet.pdf](http://www.justairguns.co.uk/source/airgun_know_how_booklet.pdf) - a useful publication by the British Association for Shooting and Conservation, which includes information concerning this topic as well as the use of chronographs (and their limitations).

<sup>289</sup> An application was made by P for the order for forfeiture of the weapon to be revoked. The application failed.

<sup>290</sup> But not limited to Airsoft guns.

<sup>291</sup> See the Explanatory Memorandum to the Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007 (SI 2007 No. 2606); the Home Office.

<sup>292</sup> Letter from the Forensic Science Service, dated 24<sup>th</sup> March 2001:  
<https://frenchie35.files.wordpress.com/2014/06/fss-fps-report-2011-09-05.pdf>

of a person aged 18 and over).<sup>293</sup>

1.194 The problem has come into sharper focus by reason of the Violent Crime Reduction Act 2006,<sup>294</sup> which creates offences (subject to statutory defences)<sup>295</sup> in respect of the manufacture, import and sale of “realistic imitation firearms”.<sup>296</sup>

1.195 A “realistic imitation firearm” [‘RIF’] is defined by section 38 of the VCRA 2006 as one that “has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a real (but “modern”<sup>297</sup>) firearm; and it is neither a de-activated firearm nor itself an antique”. The VCRA 2006 does not create an offence of unlawfully possessing a “realistic imitation firearm”. The provisions of the VCRA 2006, relating to *imitation* firearms, are discussed in chapter 2, paras.2.73-98.

1.196 Section 36 of the VCRA 2006 provides:

36(1) A person is guilty of an offence if—

- (a) he manufactures a realistic imitation firearm;
- (b) he modifies an imitation firearm so that it becomes a realistic imitation firearm;
- (c) he sells a realistic imitation firearm; or
- (d) he brings a realistic imitation firearm into Great Britain or causes one to be brought into Great Britain.

1.197 The Home Office Guide points out (correctly it is submitted) that, provided a “realistic imitation firearm” is not a “lethal barrelled weapon”, it is not one “required to be sold by a Registered Firearms Dealer”. However, “the other control provisions provided by the Violent Crime Reduction Act would apply”.<sup>298</sup>

1.198 Testing has been carried out by the Forensic Science Service on the “lethality thresholds for airsoft BB 6 mm plastic pellets (0.2 grams)”, namely, 1.3 joules (automatic fire) and 2.5 joules (single shot).<sup>299</sup>

2.6 Based on that work, we think it is safe to conclude that fully automatic airsoft guns operating at 1.3 joules or less and single shot (or semi-automatic) airsoft guns operating at 2.5 joules or less would not engage the lethality threshold crossing over into stricter controls under the Firearms Act....*Please note that this has not yet been tested by the courts.* [emphasis added]

1.199 The above limits, while pragmatic, are not in line with the recommendations of the Firearms Consultative Committee in 2002 (but the latter may be too low). In any event, the Guide does not have the force of law.

<sup>293</sup> See section 51A of the 1968 Act.

<sup>294</sup> Read together with the Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007 (SI 2007 No.2606); and noting the Violent Crime Reduction Act 2006 (Specification for Imitation Firearms) Regulations 2011 (SI 2011 No.1754).

<sup>295</sup> See section 37(1), and (3) of the 2006 Act; and regulation 3 of the 2007 Regulations.

<sup>296</sup> A useful Guide has been produced by the Association of Chief Police Officers and the British Association for Shooting and Conservation: “Guide To The Violent Crime Reduction Act 2006”; 2008; and see Home Office circular 031/2007: The Violent Crime Reduction Act 2006 (Commencement No 3) Order 2007: firearms measures.

<sup>297</sup> By section 38(8) of the VCRA 2006, “modern” is defined as a firearm “the appearance of which would tend to identify it as having a design and mechanism of a sort first dating from before the year 1870”.

<sup>298</sup> Guide on Firearms Licensing Law (March 2015), para.2.6.

<sup>299</sup> Guide on Firearms Licensing Law (March 2015), para.2.6.

*Can a shot-discharging gun be a “firearm” without being “lethal”?*

- 1.200 The problem arose in *Street v DPP*,<sup>300</sup> where S’s air weapon (a BB gun) was found on test firing to have a muzzle energy of only 0.49 ft.lb., and which was therefore not “specially dangerous” under the 1969 Rules. S had been charged with an offence under section 19 of the 1968 Act of having with him in a public place<sup>301</sup> a loaded air weapon.
- 1.201 At the time of the alleged offence,<sup>302</sup> section 19 read [emphasis added]:
- A person commits an offence if, without lawful authority or reasonable excuse (the proof whereof lies on him) he has with him in a public place a loaded shot gun or loaded air weapon, or any *other firearm* (whether loaded or not) together with ammunition suitable for use in that firearm.
- 1.202 The Justices convicted S on the basis that the “air weapon” – although not lethal – was within section 19 of the Act. On appeal, S contended that the words “*other firearm*” in section 19 were indicative that an “air weapon” had also to be a “firearm” as defined by section 50 of the 1968 Act. S pointed out that section 1 opened with the words “This section applies to every firearm” except “an air weapon....which is not of type declared...to be specially dangerous” (section 1(3))(b)). S’s weapon was not “specially dangerous”.
- 1.203 The Divisional Court held that notwithstanding the opening words of section 1(3), subsection (3)(b) is *not* to be read “as, by implication, limited to air weapons which are also firearms”.<sup>303</sup> Accordingly, section 19 of the Act includes an “air weapon” which may not be lethal (and therefore not a firearm within the definition of section 57(1)).<sup>304</sup> The Court remarked that “in some respects the use of the expression ‘firearm’ in the Firearms Act is not in every respect entirely consistent”.<sup>305</sup>
- 1.204 It had been open to the Court to give section 19 a purposive construction, and there is little doubt (it is submitted) that Parliament intended the reach of that provision to include any air/pistol/rifle/gun. Had the section been drafted such that the words “other weapon” appeared after “shot gun” and before “air weapon”,<sup>306</sup> the Court’s task in *Street v DPP* might have been less difficult. The ideal would be to clarify definitions for given provisions if an expression is not to have a uniform meaning throughout the relevant legislation.

*Comment*

- 1.205 The information reported by the Home Affairs Select Committee in 2000,<sup>307</sup> regarding

<sup>300</sup> [2004] EWHC 86 (Admin).

<sup>301</sup> For a consideration of what is meant by “public place”, see *McKenzie v Director of Public Prosecutions* [1996] EWHC J0312-7.

<sup>302</sup> Shortly after this case was decided, section 19 was amended by the Anti-social Behaviour Act 2003, but it is submitted that the decision in *Street v DPP* remains relevant for the purposes of section 19 of the 1968 Act.

<sup>303</sup> Judgment, para.53.

<sup>304</sup> Judgment, para.57.

<sup>305</sup> Per May LJ, judgment, para.52.

<sup>306</sup> In other words: “A person commits an offence if, without lawful authority or reasonable excuse (the proof whereof lies on him) he has with him in a public place a loaded shot gun [*or any other firearm (whether loaded or not)*] or loaded air weapon, together with ammunition suitable for use in that firearm.”

<sup>307</sup> Session 1999-2000; Home Affairs - Second Report (6<sup>th</sup> April 2000).

muzzle-energy thresholds for projectiles that can inflict a “penetrating wound” has been, and remains, of value for the following reasons:

- (1) Such information has informed (inferentially) the formulation of the muzzle kinetic-energy limits in the Firearms (Dangerous Air Weapons) Rules 1969.
- (2) The information has informed the Home Office when setting the “lethality threshold” in its Guide in respect of “realistic imitation firearms”.<sup>308</sup>
- (3) The data could provide an acceptable (if imperfect) objective basis for determining the threshold of lethality for the purpose of defining a “lethal barrelled weapon” in the Firearms Act.
- (4) It was said in *R v Singh*,<sup>309</sup> and in *Wareing*,<sup>310</sup> that whether the equipment in question amounts to a firearm or not, within the meaning of the Act, is a question of mixed law and fact: it is for the judge to decide whether the equipment is capable of amount to a “lethal barrelled weapon”. It is submitted that in carrying out that function, a judge would be assisted by a statutory threshold of lethality.

#### **Does the word “weapon” add anything to the definition of “firearm”?**

- 1.206 In *Bryson v Grange Ltd.*,<sup>311</sup> and in *Campbell v Hadley*,<sup>312</sup> the question of whether an item was a ‘toy’ or a ‘firearm’ for the purposes of the Pistols Act 1903, might turn on whether it was a “weapon” or not. The Bodkin Committee opined<sup>313</sup> that the word “lethal” was probably introduced into the Firearms Act 1920, to accentuate the word, “weapon”, and to indicate that the Act applied to such firearms as were likely to inflict death or serious injury if fired at some range, not merely point-blank.
- 1.207 However, successive amendments to the Firearms Acts since the Pistols Act, and in particular, since 1920, have resulted in the relevance of the word “weapon” being marginalised – if not rendered almost wholly redundant. The point is illustrated by the case of *Read v Donovan*,<sup>314</sup> where the apparatus was an army signalling kit. The Divisional Court noted that section 4 of the 1937 Act exempted signalling apparatus from the requirement to obtain a “firearm certificate” if certain conditions were met.<sup>315</sup> It reasoned that if such devices are not “lethal barrelled weapons” for the purposes of the Act, then they would not be “firearms”, and consequently there would be no need for a firearm certificate – which would make the statutory exemption pointless.
- 1.208 Furthermore, in *Read*, and in *Moore v Gooderham*,<sup>316</sup> the Divisional Court held that the

<sup>308</sup> See Guide on Firearms Licensing Law (March 2015), para.2.5.

<sup>309</sup> [1989] EWCA Crim J0522-14; [1989] Crim.L.R. 724-1.

<sup>310</sup> [1989] EWCA Crim J1002-3.

<sup>311</sup> [1907] 2 K.B. 630; Lord Alverstone C.J., Darling and A. T. Lawrence JJ.

<sup>312</sup> 1876; cited in the 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758]; para.88.

<sup>313</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758]; para. 87.

<sup>314</sup> [1946] K.B. 326.

<sup>315</sup> The exemption first appeared in section 1(6) of the Firearms (Amendment) Act 1936 following the recommendations of the Bodkin Committee in 1934; 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758]. The same exemption applies in respect of the 1968 Act (s.13).

<sup>316</sup> [1960] 1 WLR 1308, at p.1310

intention of the designer or manufacturer of the article is immaterial, and yet, the word “weapon” arguably does import a mental element (i.e. to design, construct, adapt, or use) a gun for the purpose of causing harm to a person or animal and/or causing damage to property (i.e. a “weapon”).

*Cases where the word “weapon” was not irrelevant*

1.209 Given the above, it may be tempting to suggest that the word “weapon” can be omitted from section 57(1), as being redundant. However, circumstances can arise where the word “weapon” continues to have relevance. In *McKirdy v Procurator Fiscal*,<sup>317</sup> the question for the High Court of Justiciary was whether a 90mm length of bamboo cane, reinforced along its length with copper wire, from which a .22 calibre bullet could be (and M intended would be) discharged, was a “firearm” as defined by section 57(1) of the 1968 Act. If it was a firearm, then M was required to possess a firearm certificate under section 1(1)(a) of the Act. M told police that he had attempted to make a “zip-gun” [which is popularly understood to mean an ‘improvised device’]. The Court held that the item was a firearm.

1.210 The decision turned on whether the item was a weapon “or whether it lacks an essential part of what would be necessary for the description of it as a weapon to be appropriate”:

....It appears to us that there are things which would be called weapons even without having built into them either any propellant or striking mechanism, or for example any means of igniting a propellant which is contained either within the item or within the missile.... It is significant that the definition provides that it must be a weapon of any description **from** which any shot can be discharged. The section does not describe the weapon as one **by** which any shots can be discharged. It appears to us that the concentration is not upon whether the object itself brings about the discharge: the question is whether it is something from which, in one way or other, a shot or bullet can be discharged. Concentrating on those words it appears to us that this is something from which a shot or bullet could be discharged. *It is undoubtedly barrelled, and properly described as lethal. Taking these characteristics into account, along with the purpose or function with which the object had been constructed, the use of the ordinary word “weapon” is in our opinion appropriate.* That being so we are satisfied that the definition is met and that this was to be regarded as a weapon. [Italics added; bold font is the Court’s emphasis]

1.211 The Court’s reference to taking account of “*the purpose or function with which the object had been constructed*” does not sit comfortably (arguably) with decisions such as *Read v Donovan* and *Moore v Gooderham* (discussed above) in which the intention of the designer or the user of the object was held to be immaterial. The question that arises for policy makers is whether the purpose (intention) of the designer or user should be a relevant consideration.

1.212 In *Formosa*,<sup>318</sup> a Fairy Liquid washing-up bottle containing 400 millilitres of hydrochloric acid was held not to be a ‘prohibited weapon’ within the meaning of the section 5(1)(b) of the 1968 Act, because the bottle was not altered by being filled with the acid and, therefore, *it was not a weapon* ‘designed or adapted’<sup>319</sup> for the discharge of any noxious

<sup>317</sup> [1999] Scot HC5.

<sup>318</sup> [1991] 2 QB 1.

<sup>319</sup> In *Formosa*, the Court held that the word “adapted” means, for the purposes of section 5(1)(b) that the object has been altered so as to make it fit for the use in question. The Court rejected the Crown’s contention that “designed” meant no more than “intended”. The commission of the

liquid within the meaning of the section. Lloyd LJ, remarked that a contrary construction:

“...would mean that a householder who filled a milk bottle with acid in order to destroy a wasps’ nest would be in possession of a weapon adapted for the discharge of a noxious liquid and would therefore be guilty of the offence of possessing a prohibited weapon; until, of course, he had used the acid for the purpose in question when the milk bottle would revert to its pristine innocence. That could not be right.”

1.213 In his commentary to that case,<sup>320</sup> Professor John Smith QC remarked that the judgment gave no weight to the use of the word “weapon” in section 5(1)(b):

Can the hypothetical milk bottle properly be considered to be a "weapon" in the context of the Firearms Act? Certainly it is a weapon in the fight against garden pests. If the court is right in saying that the absurdity envisaged is avoided only because the bottle is not "adapted" there are many other equal absurdities which would be unavoidable under the definition in the Act. Many domestic products are "noxious" in the sense that they would be harmful if applied to the eye or skin and they frequently carry warnings to that effect. The spray container in which such substances are frequently contained is certainly designed for their discharge. But it can hardly be an offence to possess such articles without the authority of the Defence Council! The answer surely is that the articles are not "weapons" - nor is the Court's hypothetical milk bottle filled with acid. It would be hazardous to attempt an off-the-cuff definition of "weapon" but perhaps it requires something designed or adapted for use against the person of another.

1.214 Although words and phrases in a statute are to be construed in the context of the legislation as then enacted, it is relevant to note that section 5(1)(b) has its origins in section 6(1) of the Firearms Act 1920.<sup>321</sup>

1.215 In *R v Titus*,<sup>322</sup> (a first instance decision) the judge ruled that water pistols filled with ammonia were not “weapons” that had been “designed or adapted for the discharge of any noxious liquid” for the purposes of section 5(1)(b) of the 1968 Act. This scenario had been anticipated by the 1934 Bodkin Committee [emphasis added]:

34....our attention has been drawn to the fact that there are many different types of articles which may be used for the discharge of noxious substances. Some of these articles (e.g. water pistols) are harmless toys though susceptible of misuse; others, such as fire extinguishers, are useful and necessary appliances. *The question whether the section applies to such articles depends primarily on the answer to the question whether they are “weapons,” actual or potential....Articles which are not “weapons” do not come within [section 6, FA 1920]......*

35.It has however been suggested to us that the language of the section is less

offence should be capable of objective verification. In *Titus* [1971] Crim.L.R.279, the Crown contended that "designed" meant "designed by the manufacturer of the weapon" and "adapted" required more than simply filling with a noxious liquid. The learned trial judge appears to have accepted that submission as correct and ruled accordingly.

<sup>320</sup> [1990] Crim L.R. 868.

<sup>321</sup> Section 6(1) of the FA 1920 (as originally enacted) provided “It shall not be lawful for any person without the authority of the Admiralty or the Army Council or the Air Council to manufacture, sell, purchase, carry, or have in his possession any weapon, of whatever description, designed for the discharge of any noxious liquid, gas, or other thing, or any ammunition containing or designed or adapted to contain any such noxious thing, and such a weapon is in this Act referred to as a prohibited weapon.” Section 6(2) provided the statutory penalty.

<sup>322</sup> [1971] Crim.L.R. 279.



comprehensive than it should be....The difficulty lies in the word "designed", which appears to imply that the purpose or intent in making the weapon must be that it should be used for the prohibited purpose, whereas there are articles capable of use as weapons for that purpose although not designed therefor.

.... We think that if the expression "adapted for" be inserted after the word designed," with a view to preventing the adaptation, as weapons for the discharge, of noxious substances, of articles not designed for that purpose, the section would be extended as far as reasonably necessary....

## **‘LETHAL FIREARM’: DEFINITION APPLIED PRAGMATICALLY**

### **Home Office Guidance**

- 1.216 Notwithstanding the judicial interpretation of “lethal”, the Secretary of State has adopted a practical stance so that items specified in the Guide, when used in certain circumstances, ought not to be considered “lethal barrelled weapons”. Such items have been listed in published Home Office Guides for many years, and the list has been updated from time to time. As at March 2015 the Guide states [emphasis added].<sup>323</sup>

When considering whether a particular weapon should be regarded as a firearm to which sections 1, 2 or 5 of the 1968 Act applies or which is covered by the 1982 Act, it is important to remember that the purpose of the legislation is to control the supply and possession of all rifles, guns and pistols which could be used for criminal or subversive purposes while recognising that individuals may own and use firearms and other devices for legitimate purposes. *In the absence of a decision by a court, the Secretary of State takes the view that the following devices should not be regarded as firearms within the definition of the Act:*

- a) captive-bolt stunning devices (where the bolt remains attached to the barrel) used in the slaughter of animals, operated by blank cartridges or pneumatically;<sup>324</sup>
- b) nail guns, designed as tools for the insertion of nails, metal pins and threaded bolts into solid objects;
- c) alarm guns, which are devices operated by a trip wire for the detonation of small explosive charges;
- d) line throwing implements used for saving life of those in vessels in distress;
- e) net throwing guns which are devices designed for the live capture of birds and animals (but not those net throwing guns which are designed for law enforcement purposes);
- f) rocket signal and illuminating devices (but not signalling pistols or hand-held devices using cartridges, and which discharge a signal or illuminating load from a fixed barrel);
- g) fuse igniting pistols designed to ignite a slow burning pyrotechnic fuse or shock cord by firing a primer or blank cartridge;
- h) cable cutters and cable spikers (designed to earth the residual electronic charge held in high voltage cables) fired by blank cartridges;
- i) harpoon guns utilising a spigot and fired by blank cartridge, such as the Greener harpoon gun;
- j) dummy and target launchers (designed to project a dummy for dog training or an

<sup>323</sup> Home Office Guide (March 2015); para.2.55.

<sup>324</sup> Item (a) may not be a “firearm” within the meaning of section 57(1) of the FA 1968 because a captive bolt is one that is not fully “discharged” from a barrel.

artificial target for shooting), utilising a spigot and powered by blank cartridges;

- k) armoured fighting vehicle (AFV) smoke dischargers used to project pyrotechnics for smoke screening; and
- l) smoothbore sleeve type chamber inserts for use in a shotgun or rifle (chamber adaptors which incorporate rifling and chambered for any cartridge are subject to Section 1 control.).

1.217 Items (a)-(f) featured in the Home Office Guide 2002 (para.2.28). The list has since been extended considerably.

1.218 Many of the above items are of the type which the Bodkin Committee saw no necessity to regard as “firearms”,<sup>325</sup> but it (arguably) erred in recommending (on the grounds of expedience) that some devices that discharge signal lights (e.g. the ‘Verey’ light pistol)<sup>326</sup> should be brought within the 1920 Firearms Act.<sup>327</sup> The Legislature gave effect to this recommendation - as section 1(6) of the Firearms (Amendment) Act 1936 (re-enacted in section 4 of the 1937 Act). It was the latter provision to which the Divisional Court made reference (in *Read v Donovan*) in support of its construction of the expression “lethal barrelled weapon”.

#### **Whether the inclusion of non-weapons in the 1968 Act is logical or desirable**

1.219 The aforementioned list in the Home Office Guide exemplifies the arguably illogical structure of the existing firearms legislation. Distress parachute (‘rocket’) flares are a case in point. These powerful devices discharge a flare by pyrotechnic action from a hard tube measuring some 20.8cm in length and 4.5cm in diameter. But, they are widely regarded as essential survival equipment by commercial and pleasure mariners. In recent years, there have been “flare amnesties” during which out-of-date flares may be delivered to responsible persons. But the word “amnesty” in this context is inapt (and liable to confuse) as distress flares are routinely obtained and held without a firearm certificate being required (at least, as matter of practice, noting (f) in the Guide, above); and this is despite the ominous portent sounded in cases such as *Read v Donovan*, and *R v Singh*.<sup>328</sup> Although signalling flares have been possessed and misused by persons who are not mariners,<sup>329</sup> improper use might appropriately be dealt with by specific offences (arguably, these already exist) other than by treating the devices as ‘firearms’.

#### **IV. “COMPONENT PARTS”**

1.220 Section 57(1)(b) of the Firearms Act 1968 includes within the definition of “firearm”, “any component part of such a lethal or prohibited weapon”. Component parts (other than those which are excepted under statute) are subject to section 1 of the 1968 Act (requirement for a “firearm certificate”).

1.221 The expression “component part” is not defined in the 1968 Act. As noted by the Court

<sup>325</sup> 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758]; para.112.

<sup>326</sup> The Verey pistol has a long history of use on ships (and aircraft) to signal distress.

<sup>327</sup> See para.113, page 44 of the Report.

<sup>328</sup> [1989] EWCA Crim J0522-14; [1989] Crim.L.R. 724-1.

<sup>329</sup> See *R v Ahmet*; tried and acquitted at the Central Criminal Court, in respect of a military flare launcher found at A’s home: <http://news.bbc.co.uk/1/hi/england/london/6958958.stm>

of Appeal in *R v Weaver*,<sup>330</sup> a “component part” does not necessarily have a barrel, and it is not necessarily capable of firing a missile but, for the purposes of the 1968 Act, it is nevertheless defined as a “firearm” in section 57(1).

## Identifying parts that are “component parts”

### Judicial opinion of what constitutes a “component part”

1.222 In *Secretary of State for the Home Department, ex parte Impower Ltd*,<sup>331</sup> Jowitt J said that the words in section 57(1)(b) are ‘ordinary English words’, and that:

- (a) A component part of a firearm “is likely to be a part used to make the firearm operate as it is designed or modified to operate”.
- (b) A component part “may be an assembly of individual parts which make up a composite assembly used to make the firearm operate, as it is designed or modified to operate”.
- (c) The part “which is separated from other parts and in that separate form would have other uses, would not in that separate state be likely to be a component part”.
- (d) “There obviously is a margin of appreciation, because there may be cases in which it is not easy to say whether something is or is not a component part for a gun. It is not suggested....that ordinary screws, washers and the like should be regarded as component parts.”

1.223 In *R v Ashton*<sup>332</sup> the parties had agreed that the words “component part” have their ordinary meaning. However, the Court gave some general guidance.<sup>333</sup>

.... [C]omponent part for present purposes must as a matter of reasonable interpretation, mean a part that is manufactured to the purpose, in this sense of general purpose screw or washer, would not be a component part for present purposes. Similarly, a component part must be a part that if it were removed, a General Purpose Machine Gun could not function without it.

### Home Office Guidance

1.224 The Home Office Guide (2015)<sup>334</sup> states that

The term “component part” may be held (according to case law) as including (i) the barrel, chamber, cylinder, (ii) frame, body or receiver, (iii) breech, block, bolt or other mechanism for containing the charge at the rear of the chamber (iv), any other part of the firearm upon which the pressure caused by firing the weapon impinges directly. Magazines, sights and furniture are not considered component parts. The 9th report of the Firearms Consultative Committee provides additional information on this subject.

1.225 The 9<sup>th</sup> FCC Report<sup>335</sup> (at para.42), while recognising that the term “component part” is not defined by statute, states that there is “clear consensus” that “the frame and other major components of a gun, such as the barrel, slide or revolver cylinder, are clearly

<sup>330</sup> [2007] EWCA Crim 3485.

<sup>331</sup> [1999] EWHC 309 (Admin).

<sup>332</sup> [2007] EWCA Crim 234.

<sup>333</sup> Judgment, para.5.

<sup>334</sup> Home Office Guide on Firearms Licensing Law (2015); para.13.74.

<sup>335</sup> Report of the Firearms Consultative Committee for 1997-1998; 23<sup>rd</sup> July, 1998.

'components', whereas a common screw, used in a variety of machines, is not a 'component'."

- 1.226 The FCC set up a sub-group to discuss the question of what ought to constitute "component parts" of a "firearm", and its conclusions appear at Appendix C of the 9<sup>th</sup> Report. The Appendix is too long to justify including herein, but at C.6, the Sub-Group set out the following list of component parts that "would cover most of the parts at issue":

The term 'component part' shall apply to (i) any barrel, chamber or cylinder: (ii) any frame, action, body or receiver: (iii) any breech, block, bolt, or other mechanism for containing the pressure of discharge at the rear of the chamber: (iv) any other part of the firearm upon which the pressure caused by firing the weapon impinges directly. In addition, it would also apply to those items which are more or less unique to firearms, which are not readily replaced by items found in general use (such as coil springs, screws, washers and the like), and without which a person of reasonable skill could not create a firearm or repair a scrap or deactivated firearm.

In particular, the term 'component part' should include the following:

- (1) Sears;
- (2) Automatic Sears;
- (3) Hammers;
- (4) Trigger Groupings;
- (5) Locks;
- (6) Firing pins or strikers;
- (7) Ejectors;
- (8) Extractors;
- (9) Disconnectors and tripping lever;
- (10) Safety catches (which often separate or connect the working elements of the gun);
- (11) Any fire-selector switch
- (12) Any gas piston or roller-bearing locking unit;

The Secretary of State should be given an order-making power to add to the list of component parts as necessary, to deal with new or unusual designs which might arise over the years.

- 1.227 The FCC remarked<sup>336</sup> that its aim was to "draw a clear divide between those components which should be subject to strict controls and those to which a *de minimis* approach, albeit with a suitable degree of control, might be applied". Interestingly, the FCC recommended<sup>337</sup> that its proposals "should be made statutory when a suitable opportunity arises".<sup>338</sup>

## **"Component parts" – further points**

### **Parts of shot guns and air weapons**

- 1.228 Excepted from the definition of a "firearm" are the "component parts" of a "shot gun" (as defined by section 1(3)(a)), or an "air weapon" (as defined by section 1(3)(b)) of the 1968 Act.<sup>339</sup>

<sup>336</sup> Paragraph 4.5.

<sup>337</sup> See the FCC 9th Report (1998).

<sup>338</sup> Paragraph 4.5.

<sup>339</sup> See the closing words of section 57(1), Firearms Act 1968.

### Deactivated weapons?

- 1.229 By section 8 of the Firearms (Amendment) Act 1988, a “deactivated firearm” ceases to be a “firearm”.<sup>340</sup> But it was held in *R v Ashton*<sup>341</sup> that this exception does not apply to the “component parts” of a *disassembled* deactivated weapon. The appellant was convicted before a General Court Martial of an offence of attempting to sell a “prohibited weapon”, namely, a “gas plug” that formed a necessary part of a general purpose machine gun and was in working order.
- 1.230 In dismissing the appeal against conviction, the Courts-Martial Appeal Court held that Parliament intended to “restrict tightly” the exception in section 8 F(A)A 1988, which did not apply to a “component part” of a deactivated weapon:<sup>342</sup>
- ....it is clear that Parliament intended to restrict tightly the operation of that exception. So long as a de-activated weapon remains in its complete state, there is therefore a justification in permitting it to be possessed or indeed traded on the open market. But it is clear from the exception that it is not intended to apply to any component part of such a weapon and that must be for the good public policy reason that once a weapon, de-activated or not, is disassembled then the parts which are then made available are capable of being re-assembled into a working weapon. The mischief to which section 57 in particular is directed therefore exists whether or not the origin of the component part is a working or a de-activated weapon.

### The device is neither “lethal barrelled weapon” nor a “prohibited weapon”

- 1.231 The law appears to be that a “component part” of a device that is neither a “lethal barrelled weapon” nor a “prohibited weapon”, is not within the definition of “firearm” in section 57(1) of the 1968 Act.
- 1.232 In *Kelly v MacKinnon*,<sup>343</sup> the Lord Justice-General (High Court of Justiciary) held that the part “must be identified as a component of something which is in fact a lethal weapon”:
- .... A component part of something which is not a lethal weapon cannot, by itself, be a firearm...
- 1.233 Similarly, in *Bewley*,<sup>344</sup> - in which *Ashton* is not cited - the Court of Appeal held that, if the item in question is not a ‘lethal-barrelled weapon of any description from which any shot, bullet or other missile can be discharged’ (FA 1968, section 57(1)), then neither the item nor any part of it constitutes a ‘component part of *such* a lethal weapon’ (section 57(1)(b)). The Court (in *Bewley*) remarked that any other construction “would ignore the use of the word ‘such’. If the starting pistol does not fall within the definition of firearm within section 57(1), no part of it could do so” (per Moses LJ at [34]). Presumably, the

<sup>340</sup> Section 8 of the Firearms (Amendment) Act 1988 provides: “For the purposes of the principal Act and this Act it shall be presumed, unless the contrary is shown, that a firearm has been rendered incapable of discharging any shot, bullet or other missile, and has consequently ceased to be a firearm within the meaning of those Acts, if it bears a mark which has been approved by the Secretary of State for denoting that fact and which has been made either by one of the two companies mentioned in section 58(1) of the principal Act or by such other person as may be approved by the Secretary of State for the purposes of this section; and that company or person has certified in writing that work has been carried out on the firearm in a manner approved by the Secretary of State for rendering it incapable of discharging any shot, bullet or other missile.”

<sup>341</sup> [2007] EWCA Crim 234.

<sup>342</sup> Judgment, para.7; per Lord Justice Latham.

<sup>343</sup> [1982] SCCR 205.

<sup>344</sup> [2012] EWCA Crim 1457; judgment, para.34.

same reasoning applies when determining whether a part of a ‘prohibited weapon’ falls within section 57(1). The Court remarked that although the Divisional Court in *Cafferata* would doubtless have concluded that the pistol could be regarded as a ‘component part’, that was “an impossible construction of section 57(1)(b)”:

The Lord Justice-General in *Kelly v McKinnon* said that the proposition that all parts of the dummy which did not require to be bored should be regarded as parts of a lethal weapon was “untenable” (page 210). We agree. We do not think that *Cafferata* accurately expresses the law.

- 1.234 The decisions in *Kelly* and *Bewley* are logical but, if they are correct, it is arguable that the result should be the same in the case of a disassembled deactivated weapon.

### **Changed character of the device: whether parts are “component parts”**

- 1.235 In *R v Clarke (Frederick)*,<sup>345</sup> the Court did not “overlook the possibility” that a firearm which is “designed or adapted” to perform in a prohibited manner (e.g. section 5(1)(a)) may cease to do so:

Thus, a lethal barrelled weapon might be so damaged or altered whether by accident or design or by the removal of so many components that it was no longer something that could be fairly described as a “weapon.”

- 1.236 However, given the Court’s decision that the item in question (an incomplete sub-machine gun) had not ceased to be a “prohibited weapon” within the terms of section 5(1)(a),<sup>346</sup> the Court did not need to go on to consider whether – had its conclusion been different – the parts were nevertheless “component parts” caught by section 57(1).

- 1.237 It seems clear that if a device does not satisfy the statutory description of a specified “prohibited weapon” (e.g. section 5(1)(a)), but it remains a “lethal barrelled weapon”, then its “component parts” are also within the definition of section 57(1).<sup>347</sup> However, where a weapon has been modified to bring it into an excepted category in section 1(3) of the 1968 Act<sup>348</sup> (for example, as in *Hucklebridge*,<sup>349</sup> where rifling had been removed from the barrels of two Enfield rifles so that their barrels were smooth-bored), its component parts are also excepted by virtue of the closing words in section 57(1) of the Act.

<sup>345</sup> [1986] 1 WLR 209.

<sup>346</sup> Section 5(1)(a) of the 1968 Act (as originally drafted) provided: “(a) any firearm which is so designed or adapted that, if pressure is applied to the trigger, missiles continue to be discharged until pressure is removed from the trigger or the magazine containing the missiles is empty;”. The provision was amended by the F(A)A 1988 to read, “any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;”.

<sup>347</sup> For example, a weapon is incapable of successively discharging two or more missiles “without repeated pressure on the trigger” (section 5(1)(a)), but it can discharge single shots.

<sup>348</sup> By section 1 of the Firearms Act 1968: “(1) Subject to any exemption under this Act it is an offence for a person, (a) to have in his possession...a firearm to which this section applies without holding a firearm certificate in force at the time...(3) This section applies to any firearm except - (a) a shotgun (that is to say a smooth-bore gun with a barrel not less than 24 inches in length, not being an airgun)...”

<sup>349</sup> (1980) 71 Cr.App.R.171; overruling *Creaser and Lazenby v. Tunnicliffe* (1978) 66 Cr.App.R.66; [1977] 1 W.L.R. 1493; but note section 7 of the Firearms (Amendment) Act 1988 insofar as it applies to ‘back-conversions’ of firearms.

### **Parts of a non-lethal weapon that are usable in a lethal weapon**

- 1.238 In *Kelly v MacKinnon*,<sup>350</sup> the Lord Justice-General said it was “nothing to the point” that parts of something that is “not a lethal weapon could be stripped therefrom and used in the construction of something which, when completed, would become a lethal weapon”. Nor was it to the point that “a part is a component of an article which, not being a lethal weapon, might in various ways be converted or adapted in order to become such a lethal weapon”.
- 1.239 In the same case, Lord Cameron, found it “extremely difficult” to understand the Court’s interpretation, in *Cafferata v Wilson*,<sup>351</sup> of the definition of “firearm” in section 12 of the Firearms Act 1920,<sup>352</sup> and (having referred to the judgment of Lord Hewart CJ.) remarked that if the latter’s construction were accepted, that:
- ... any part of an imitation pistol or revolver which could be identified and could be fitted into other parts, not necessarily of the same article, so as to make an operative weapon capable of discharging shot, bullet or other missile would constitute a "firearm."
- 1.240 In *Kelly v MacKinnon*, the Court appears not to have made a distinction between component parts which were usable (or even essential) in an “operative weapon” and those which would either not be fit for that purpose or would need to be adapted or converted in order to make them usable. If the foregoing correctly states the law as it is applied in Scotland, then this appears to diverge from the law in England (subject to *Bewley* insofar as that case touches on the meaning of “component parts”) – noting *R v Ashton*,<sup>353</sup> where the appellant attempted to sell one part – a gas plug (in working order) - of a general purpose machine gun. It is not apparent from the judgment that Ashton had been in possession of other parts of the gun at the time of the alleged offence.

### **Parts that could not be used in any section 57 “firearm”**

- 1.241 There may be rare cases where parts are so unique that they would not be usable in any firearm. In *Matthews*,<sup>354</sup> M was in possession of a home-made copy of a submachine gun, but which was not then a functioning gun and required rectification before being capable of firing bullets. M was convicted on the basis of the judge’s ruling that the parts (namely, a barrel, a lower receiver, an upper receiver, and a breech block) were “component parts” of a firearm (section 57(1)(b) of the 1968 Act). The expert evidence was that *none of the parts of the item would ever fit any other gun*. On appeal, the Crown conceded that the judge’s ruling could not be sustained.
- 1.242 On facts less extreme than in *Matthews*, the question of whether it is contrary to the Firearms Act to convert a part into a usable “component part” remains open: consider *R v Rogers* (see Chapter 1; para.1.97).<sup>355</sup>

<sup>350</sup> [1982] SCCR 205.

<sup>351</sup> [1936] 3 All ER 149.

<sup>352</sup> Section 12(1) of the Firearms Act 1920 (definition of a “firearm”).

<sup>353</sup> [2007] EWCA Crim 234.

<sup>354</sup> [2013] EWCA Crim 120.

<sup>355</sup> [2011] EWCA Crim 1459.

### **Components not to be confused with ‘accessories’ or extras**

- 1.243 It was said by the Divisional Court in *Broome v Walter*<sup>356</sup> that there is “a distinction between a component and an accessory”:

So far as an accessory is concerned, normally it is an accessory to an article which is capable of its ordinary use with or without the accessory, and the accessory is normal readily removable.

- 1.244 In *Broome*, the barrel of firearm rifle, which was enclosed with a sound moderator, had been manufactured in two sections with a screw thread for assembly. The detachable section of the barrel could not be attached to any other firearm barrel. The firearm was capable of being fired without the detachable part of the barrel. The Court held that the justices had been entitled to conclude that the moderator in question was so integrated into the design of the rifle that it could not be regarded as an accessory.

### **Whether a telescopic sight is a ‘firearm’**

- 1.245 In *Watson v Herman*,<sup>357</sup> the appellant was in possession of a .22 rifle with a removable telescopic sight. He held a firearm certificate authorising him to possess a rifle and a silencer, but he did not hold a certificate relating to the telescopic sight. The headnote to the All England Report reads:

The sight was not a “firearm” within the definition of that term in the Firearms Act, 1937, s.32(1), and, therefore, it was not necessary that the appellant's certificate should expressly authorise him to possess it.

- 1.246 However, it is submitted that the above note may be a misreading of the judgment. There was no dispute that the appellant held a “firearm” in respect of which he possessed a firearm certificate. The Court was addressing a procedural issue (the content of the firearm certificate). It held that “[the] certificate for the rifle must extend to its component parts.”<sup>358</sup> The judgment is open to the interpretation that the Court merely held that the sight was a component part of the rifle in question for which a certificate existed.

If one required a certificate for every component part of a rifle I do not know how many certificates one would want. (Per Lord Goddard CJ)

### **3D Printing of component parts**

- 1.247 Some media reports have cast doubt on the extent to which the 3D printing of firearms is likely to be prevalent or successful.<sup>359</sup> However, other reports suggest that working

<sup>356</sup> Judgment, transcript (25 May 1989), per Woolf LJ (as he then was).

<sup>357</sup> [1952] 2 All ER 70.

<sup>358</sup> “If [the sight] is merely a part of a complete rifle then, of course, a separate certificate is not required. If one required a certificate for every component part of a rifle I do not know how many certificates one would want. The justices thought that, because the telescopic sight improved the lethal quality of the weapon, therefore a separate certificate for it was required or the sight had to be separately mentioned in a certificate. I can find no justification for that. The certificate for the rifle must extend to its component parts. If one has a component part which is not made up into, so as to be part of, the rifle, it may be that one requires a certificate for it, but the only accessory which requires to be mentioned is an accessory ‘designed or adapted to diminish the noise or flash caused by firing the weapon’.” (per Lord Goddard CJ; Devlin and Gorman JJ with him)

<sup>359</sup> <http://www.bbc.co.uk/news/uk-england-manchester-24666591>.



firearms can be designed and manufactured in this way.<sup>360</sup>

- 1.248 The position of the Home Office is that the “manufacture, purchase, sale and possession of 3D printed firearms, ammunition or their component parts is fully captured by the provisions in section 57(1) of the Firearms Act 1968.<sup>361</sup> However, this is subject to case-law confirming that the definition of “component part” in section 57(1) is apt to include 3D printing of mere parts as opposed to operative “lethal barrelled weapons”. It is self-evident that unless the item falls within the definition of a “firearm” in section 57(1) the remainder of the 1968 Act is not engaged. The alternative approach is for specific legislation to be introduced in relation to this form of production.
- 1.249 3D printing may have implications in respect of rules relating to “realistic imitation firearms”.

#### **The Firearms (Northern Ireland) Order 2004**

- 1.250 The step has been taken in Northern Ireland, to define the “component part” of a firearm. Thus, Article 2(2) of the Firearms (Northern Ireland) Order 2004,<sup>362</sup> states that “‘component part’, in relation to a firearm, means”:
- (a) any barrel, chamber or cylinder;
  - (b) any frame, action, body or receiver;
  - (c) any breech block, bolt or other mechanism for containing the pressure of discharge at the rear of the chamber;
  - (d) any part of a firearm which directly bears the pressure caused by firing; and
  - (e) any magazine;
- 1.251 The opening words to Article 2(2) – and in particular, the word “means” – suggests that the list is exhaustive.

## **V. ACCESSORIES**

### **Accessory Designed or Adapted to Diminish Noise or Flash**

- 1.253 The word “accessory” is not defined by the Firearms Act 1968. But, in ordinary usage the word ‘accessory’ denotes something readily detachable from an article that is capable of ordinary use with or without the accessory (see *Hedges*,<sup>363</sup> and note *Broome v Walter*<sup>364</sup>).
- 1.254 In 1934, the Bodkin Committee recommended that a sound moderator should be “deemed to be a ‘part’ of a firearm” (for the purposes of the Firearms Act 1920).<sup>365</sup>

Having regard to the illegitimate purposes to which firearms fitted with effective silencers might be put, and as it is a debatable point whether a silencer is a “part” of a firearm, we recommend that it should for the purposes of control, be deemed to be a

<sup>360</sup> <http://www.bbc.co.uk/news/science-environment-22421185>.

<sup>361</sup> Home Office Guide on Firearms Licensing Law (2015); para.13.25.

<sup>362</sup> 2004 No. 702 (N.I.3).

<sup>363</sup> [1997] EWCA Crim 958.

<sup>364</sup> Judgment, transcript (25 May 1989), per Woolf LJ (as he then was).

<sup>365</sup> “Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition”; p.4 [Cmd. 4758], 1934; para.114, recommendation XX.

"part" of a firearm [within section 12, FA 1920].

- 1.255 Whether a sound moderator ('silencer' or 'sound suppressor') is an accessory to a firearm within the meaning of the FA 1968, section 57(1)(c), is a question of fact (see *Buckfield*),<sup>366</sup> to be answered by considering whether the device, (a) can be used with the accused's firearm, and (b) whether the accused has the device *for that purpose* [emphasis added]. The Court said:

Where the silencer has been manufactured for use on the particular firearm in the defendant's possession, no further evidence will be required to establish that the silencer is an accessory to that weapon and should be shown on a firearm certificate. Where the silencer, as here, was manufactured for a weapon other than that in the defendant's possession, then the prosecution, to obtain a conviction under section 1(1)(a) of the Act, will have to prove that the device can be used with the defendant's firearm and that the defendant has the device for that purpose. The fact that the silencer may have been designed for quite a different weapon, such as a shotgun, does not prevent it being an accessory to a firearm if it can be used as such.

- 1.256 Professor Sir John Smith QC criticised the reasoning in *Buckfield* on the grounds that the material question is whether the moderator was 'made or adapted' for use with the firearm in question, and not whether it 'can be used' with a weapon.<sup>367</sup>
- 1.257 Note that section 57(1)(c) says nothing about the *purpose* of the possessor of the firearm or accessory. Accordingly, if the purpose of the possessor is an issue that must be proved, then this imports an element of *mens rea* in connection with offences under the Firearms Acts that would otherwise be offences of strict liability (e.g., FA 1968, ss. 1, 2 and 5). It is unlikely that the Court intended to imply the existence of such a mental element in respect of these offences.
- 1.258 In *R v Yong*,<sup>368</sup> Y pleaded guilty (following a ruling by the trial judge on a point of law) to possessing firearms (namely 2 flash eliminators) without a firearm certificate contrary to section 1(1)(a) of the Firearms Act 1968. Y was not in possession of any prohibited weapon or firearm as defined in section 57 of the 1968 Act. The case would have been of particular interest and value had the Court been in a position to decide whether the possession of an accessory *alone* (i.e. in respect of which the appellant was not, and did not intend to be, in possession of any firearm to which such "accessory" could be attached) amounted to possessing a "firearm" for the purposes of the 1968 Act. In the event, trial counsel for Y told the judge that, for the purposes of his submission, he did not dispute that the two flash eliminators were designed to be fitted to a firearm other than to a shotgun or any other article outside section 5 of the 1968 Act.<sup>369</sup> By the date of the full hearing of the appeal, Y put forward an argument that had not been advanced at trial, namely, that there was insufficient evidence to exclude 'mixed use' of the items (i.e. for weapons subject to section 1 or 5 of the 1968 Act or for weapons outside those controls).<sup>370</sup>

We have considered *R v Buckfield*<sup>371</sup> and are satisfied that, in a case where there is an

<sup>366</sup> [1998] EWCA Crim 1322.

<sup>367</sup> [1998] Crim LR 673.

<sup>368</sup> [2015] EWCA Crim 852.

<sup>369</sup> Judgment, para.12.

<sup>370</sup> Judgment, para.21 (per Treacy LJ).

<sup>371</sup> [1998] EWCA Crim 1322.

evidential basis for doing so, the matter should be left to the jury to determine whether the items were in the circumstances accessories to a section 1 or section 5 controlled weapon, or whether they were accessories to a non-controlled item. There was some discussion in the written submissions made to us as to the part which a defendant's intention can play in the determination of such a question when the statutory scheme is one of strict liability. This point which derives from a passage at the foot of page 4 and the top of page 5 of the transcript in *Buckfield* was not developed in oral argument, and, being unnecessary for the determination of this appeal, we say no more about it. We would however comment that if the "mixed-use" issue is to go to a jury, there must be a proper evidential basis for it.

- 1.259 However, on the evidence placed before the judge, there was nothing to show that there was a potential mixed use for those flash eliminators<sup>372</sup> (and consider *Secretary of State for the Home Department, ex parte Impower Ltd*<sup>373</sup> (above)).

<sup>372</sup> Judgment, para.22.

<sup>373</sup> [1999] EWHC 309.

## CHAPTER 2: IMITATION FIREARMS

### INTRODUCTION

- 2.1 The history of the legislation shows that the focus has tended to be on the *criminal use* of firearms and their imitations; but, legislative control has intensified (particularly since 1982) in relation to the *design and production* of imitation firearms.
- 2.2 Controlling imitation firearms poses particularly difficult drafting problems because the aim of the firearms legislation has not been to outlaw ‘toy guns’, all replicas, or *unrealistic* imitations. The difficulty is in differentiating between such articles and ‘real’ firearms (given that they often share similar characteristics, e.g. appearance and capacity to discharge projectiles). Drafting problems are compounded by developments in materials and production methods for constructing firearms and their imitations (consider, for example, 3D printing techniques).
- 2.3 Accordingly, what are loosely styled ‘imitation firearms’ (for the purposes of the firearms legislation) are in fact categories of things that are distinguishable more by context than by a description of the thing in question. Unfortunately, piecemeal legislation has resulted in the categories of imitation firearms being split across no less than three statutes (see below). Not only does this make the law less comprehensible and less accessible, but it also creates the impression that each statute operates discretely. *R v Bewley* usefully illustrates the risks inherent in legislation that is disaggregated.
- 2.4 An improvement (it is submitted) would be to bring categories of ‘imitation firearms’ together in a statutory code. Some streamlining of terminology would be helpful. For example, an expression such as “having the appearance of being a firearm” might be used once (as part of a general definition of an “imitation firearm”) rather than being repeated in one or more enactments.
- 2.5 Imitation firearms fall into four main categories:
- i. The general definition of an “imitation firearm” as defined in section 57(4) of the Firearms Act 1968:

"imitation firearm" means any thing which has the appearance of being a firearm (other than such a weapon as is mentioned in section 5(1)(b) of this Act) whether or not it is capable of discharging any shot, bullet or other missile;
  - ii. A thing converted into a firearm (section 4(3), Firearms Act 1968): namely:

“...anything which, though *having the appearance of being a firearm*, is so constructed as to be incapable of discharging any missile through its barrel”.<sup>374</sup>
  - iii. “Readily convertible” imitation firearms (section 1(1), Firearms Act 1982): that is to say

“...an imitation firearm [that] has the appearance of being a firearm to which section 1 of the 1968 Act (firearms requiring a firearm certificate) applies; and...it is so constructed or adapted as to be readily convertible into a firearm to which that section applies”.

<sup>374</sup> Section 4(3) provides: “It is an offence for a person other than a registered firearms dealer to convert into a firearm anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through its barrel.”

- iv. A “realistic imitation firearm” within the meaning of section 38 of the Violent Crime Reduction Act 2006:

“...an imitation firearm which...has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a real firearm; and...is neither a de-activated firearm nor itself an antique.

## LEGISLATION

### Pistols Act 1903 and Firearms Act 1920

- 2.6 The Pistols Act 1903 made no express provision in respect of imitation firearms. The distinction drawn between toys, replica pistols, and firearms, for the purpose of that Act, turned largely on whether or not the device in question was a “weapon”: see *Bryson v Grange Ltd.*<sup>375</sup>
- 2.7 As originally enacted, the Firearms Act 1920 similarly made no express provision for ‘imitation firearms’. The word “firearm” was narrowly defined and (as originally enacted) made separate provision for the only “prohibited weapon” that was then specified in the 1920 Act (i.e. devices that discharge a noxious thing).

### Firearms and Imitation Firearms (Criminal Use) Act 1933

- 2.8 Concern about the prevalence of crime committed with the use of firearms and their imitations led to the enactment of the Firearms and Imitation Firearms (Criminal Use) Act 1933. The Act did not amend the 1920 Act, but it was largely ‘free-standing’ in that it created its own offences, and provided its own definitions of “firearm” and “imitation firearm” for the purposes of the 1933 Act.
- 2.9 The 1933 Act:
- I. Prohibited the use (or attempted use) of a firearm or “*imitation firearm*” with intent to resist or prevent the lawful apprehension of himself or another,<sup>376</sup>
  - II. Prohibited the possession of a firearm or *imitation firearm* at the time of committing certain offences specified in the 1933 Act.<sup>377</sup>
  - III. Provided that a firearm (even if unloaded), or an *imitation firearm* (whether capable of discharging a missile or not), was “deemed to be an offensive weapon or instrument” for the purposes of specified enactments.<sup>378</sup>
- 2.10 An “imitation firearm” was defined in section 5(2) as, “...*anything which has the appearance of being a firearm whether it is capable of discharging any shot, bullet or other missile or not*”.<sup>379</sup> But it excluded an imitation of a “prohibited weapon”.<sup>380</sup> This may have been because most devices that discharged a noxious thing (e.g. CS spray) did not have the appearance of a lethal barrelled weapon.

<sup>375</sup> [1907] 2 K.B. 630; Lord Alverstone C.J., Darling and A. T. Lawrence JJ.

<sup>376</sup> Section 1 of the 1933 Act.

<sup>377</sup> Section 2 of the 1933 Act.

<sup>378</sup> Section 4 of the 1933 Act.

<sup>379</sup> Section 5(2) of the 1933 Act.

<sup>380</sup> By section 5(2), the definition of a “firearm” omitted reference to “any parts thereof”, but it included a “prohibited weapon” (specified in section 6 of the 1920 Act, namely, anything which could discharge a noxious thing).

## Firearms (Amendment) Act 1936

- 2.11 The 1936 Act was not a consolidating measure. Its purpose was to give effect to a number of recommendations made by the Bodkin Committee (1934).
- 2.12 The definition of a “firearm” in the 1920 Act was revised<sup>381</sup> for the purpose of both the 1933 Act and the principal Act of 1920. The revised definition was virtually identical to that which now appears in section 57(1) of the 1968 Act;<sup>382</sup> and included “lethal barrelled weapons”, “prohibited weapons”, and their “component parts” and “accessories”.
- 2.13 Section 15(6) of the 1936 Act (as originally drafted) enacted a revised limited definition of “firearm” *for the purpose of the 1933 Act only*, which omitted reference to “component parts” and “accessories”:
- For the purpose of the Firearms and Imitation Firearms (Criminal Use) Act 1933, the expression ‘firearm’ shall mean any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and shall include any prohibited weapon, whether it is such a lethal weapon as aforesaid or not....
- 2.14 The expression “imitation firearm” was given a corresponding limited meaning for the purposes of the 1933 Act, namely (by section 15(6)) anything that had “the appearance of a firearm” other than a “prohibited weapon” [i.e. one that was designed to discharge a noxious thing]:<sup>383</sup>
- ...and the expression "imitation firearm" shall mean anything which has, the appearance of being a firearm as defined in this subsection (other than such a prohibited weapon as is mentioned in subsection (1) of section six of the principal Act) whether it is capable of discharging any shot, bullet or other missile or not.”
- 2.15 It is important to remember that the 1920 Act (as originally enacted) did not legislate in respect of “imitation firearms” at all, and thus, no separate / general definition of that expression appeared in the 1920 Act.
- 2.16 Section 9(2) of the 1936 Act created a new offence, namely, that no person “other than a registered firearms dealer shall convert into a firearm anything which, though *having the appearance of being a firearm*, is so constructed as to be incapable of discharging any missile through the barrel thereof.” The words “having the appearance of being a firearm” were not referable to the definition of “imitation firearm” in section 15(6) of the Act notwithstanding that the side-note to section 9 reads “guns and converting *imitation firearms* into firearms”.

<sup>381</sup> See section 15(1) of the Firearms (Amendment) Act 1936: “Firearm” means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and shall include any prohibited weapon, whether it is such a lethal weapon as aforesaid or not, any component part of any such lethal or prohibited weapon and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon.” By a combination of sections 15(1), and 16(2), and the third schedule, this definition of “firearm” largely substituted that which had appeared in section 12 of the 1920 Act.

<sup>382</sup> Section 57(1) of the 1968 Act, provides: “...a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes, (a) any prohibited weapon, whether it is such a lethal weapon as aforesaid or not; and (b) any component part of such a lethal or prohibited weapon; and (c) any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon;”.

<sup>383</sup> Section 15(6) of the 1936 Act; section 5(2) of the 1933 Act was repealed (section 16(3), of the 1936 Act).

- 2.17 It will be seen that the 1936 Act created a twin-fold position in relation to ‘imitations’: (i) an express definition of “imitation firearm” for the purposes of the 1933 Act only, and (ii) an ‘implicit definition’ for the purposes of the ‘converting’ offence.

### Firearms Act 1937

- 2.18 The 1937 was a consolidating statute that repealed the Acts of 1920, 1933, 1934 and 1936. It therefore re-enacted the 1933 Act offences<sup>384</sup> along with the qualified definitions of “firearm” and “imitation firearm (section 23(6)) *that applied to those offences only*.”<sup>385</sup> It is again important to note that the 1937 Act did not enact a general definition of “imitation firearm”.
- 2.19 The offence created by the 1936 Act (section 9(2)) of ‘converting an imitation firearm’ was re-enacted as section 24(2). Once again, the section was headed with the words “...converting imitation firearms into firearms”, but it did not adopt the statutory definition of “imitation firearm” in section 23(6) of the 1937 Act.

### Firearms Act 1965

- 2.20 The Firearms Act 1965 created new offences. Section 1 made it an offence for a person to “*have with him*” a firearm or an “imitation firearm” with intent to commit an indictable offence, or to resist or prevent arrest. In respect of all those offences, the expression “imitation firearm” was defined by section 10(1) in terms virtually identical to that which appeared in the Acts of 1933 and 1936 (namely, “anything having the appearance of being a firearm” other than a “prohibited weapon”).
- 2.21 Other offences were created by the 1965 Act (i.e. carrying firearms in a public place;<sup>386</sup> trespassing with firearms in a building;<sup>387</sup> trespassing with firearms on land<sup>388</sup>). The 1965 Act therefore enlarged the range of offences created by the 1933 Act (in respect of the criminal *use* of firearms) but those offences did not – at that time – extend to ‘imitation firearms’.

### Firearms Act 1968

- 2.22 Section 57(4) enacts a general definition of “imitation firearm”,<sup>389</sup> but (once again) it principally applies to offences in respect of the *criminal use* of a “firearm” or “imitation firearm”. These were the offences created by the Acts of 1933 and 1965 but re-enacted in the 1968 Act as follows:

- I. Section 17: Use of a firearm *or imitation firearm* to resist arrest;

<sup>384</sup> See sections 23(1) and (2) of the 1937 Act.

<sup>385</sup> Section 23(6) of the Firearms Act 1937: “In this section - (a) the expression “firearm,” means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, and includes any prohibited weapon, whether it is such a lethal weapon as aforesaid or not; and (b) the expression - “ imitation firearm ” means anything which has the appearance of being a firearm within the meaning of this section (other than such a prohibited weapon as is mentioned in paragraph (b) of subsection (1) of section seventeen of this Act), whether it is capable of discharging any shot, bullet or other missile or not.”

<sup>386</sup> Section 2 of the 1965 Act.

<sup>387</sup> Section 3 of the 1965 Act.

<sup>388</sup> Section 4 of the 1965 Act.

<sup>389</sup> Reproduced above.

II. Section 18: carrying a firearm or *imitation firearm* with intent to commit an indictable offence or to resist arrest (etc);

- 2.23 Consistent with earlier enactments, the general definition of an “imitation firearm” did not include a “prohibited weapon” of a type designed or adapted to discharge a noxious thing.
- 2.24 Section 4(3) of the 1968 Act re-enacts the offence of ‘converting’ a thing into a “firearm”<sup>390</sup> (any firearm). Like the Acts of 1936 and 1937, things that are caught by the section are those that have “*the appearance of being a firearm...[and] incapable of discharging any missile through its barrel*”. The section does not adopt the general definition of an “imitation firearm” enacted in section 57(4).
- 2.25 It follows that the 1968 Act (as originally drafted) re-enacted provisions in respect of two kinds of ‘imitation firearms’, namely, “imitation firearms” as defined by section 57(4), and those articles that had “the appearance of being” a firearm.

#### **The ‘Firearms Acts’ 1982, 1994, 1997; the ASBA 2003, and VCRA 2006**

- 2.26 Since 1982, statutory controls over ‘imitation firearms’ have intensified markedly.
- 2.27 The Firearms Act 1982 enacted a further category of ‘imitation firearms’, namely, devices that are “*readily convertible*” into firearms to which section 1 of the 1968 Act applies [requirement for a firearm certificate]: see chapter 2, para.2.47 *et seq.*
- 2.28 The Firearms (Amendment) Act 1994, made it an offence for a person to have in his possession any firearm *or imitation firearm* with intent by means thereof to cause (or to enable another person to cause) any person to believe that unlawful violence will be used against him or a third party<sup>391</sup> (inserted as section 16A of the 1968 Act). The 1994 Act also extended the offence of trespassing with a firearm (section 20) to include an “imitation firearm”.<sup>392</sup>
- 2.29 Section 37(1) of the Anti-social Behaviour Act 2003 substituted paragraphs (a)-(d) in section 19 of the 1968 Act [carrying a firearm in a public place] to include (among other amendments) an “imitation firearm”. Section 19 therefore read:<sup>393</sup>
- (a) A loaded shot gun,
  - (b) An air weapon (whether loaded or not),
  - (c) Any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm, or
  - (d) *An imitation firearm*
- 2.30 Yet another category of imitation firearms was enacted by sections 36 to 38 of the Violent Crime Reduction Act 2006, namely, “*realistic imitation firearms*” in respect of

<sup>390</sup> Which may include cases where D converts a deactivated firearm into an operational firearm: consider *R v Greenwood and Greenwood* [2005] EWCA Crim 2686.

<sup>391</sup> Inserted into the 1968 Act by section 1(1) of the 1994 Act.

<sup>392</sup> Section 2(1) of the 1994 Act.

<sup>393</sup> This therefore answered a criticism made of the legislation as it previously existed: see B. Tonner, “Innovation for Imitations?: A Call for Change in the Law Relating to Imitation Firearms”; [2003] Crim L.R. 618.



which controls are placed on their manufacture, modification, sale, or importation into Great Britain.

- 2.31 Section 39 of the VCRA 2006 empowers the Secretary of State to impose specifications on “imitation firearms” by way of regulations, and section 40 inserted a new criminal offence into the 1968 Act (section 24A), namely, purchasing and supplying “imitation firearms” to minors.

## **SECTION 57(4): DEFINITION OF “IMITATION FIREARM”**

- 2.32 Section 57(4) enacted a general definition of an “imitation firearm” as.<sup>394</sup>

“imitation firearm” means any thing which has the appearance of being a firearm (*other than such a weapon as is mentioned in section 5(1)(b) of this Act*) whether or not it is capable of discharging any shot, bullet or other missile; [emphasis added]

- 2.33 The exclusion of one type of “prohibited weapon”, namely under section 5(1)(b) [device that discharges a noxious thing] has long history, but it is questionable whether it can continue to be justified. Although many weapons, such as stun-guns and CS sprays, will often not look like barrelled weapons, there are some that do, including multi-purpose weapons that have the appearance of a pistol but which can discharge CS gas or, if fitted with an attachment, can discharge a small flare (see, for example, *R v Rhodes*<sup>395</sup>).

### **‘Appearance of Being a Firearm’**

- 2.34 In *Debreli*,<sup>396</sup> the Court of Criminal Appeal held that whether something is an “imitation firearm” is to answer the question: “does it look like a firearm?” The issue is one to be decided by the tribunal of fact, taking an objective view (*K v DPP*).<sup>397</sup> It is permissible for the court to take into account the perception of the witnesses who saw the item.

#### Examples

- I. In *K v DPP*,<sup>398</sup> the offence charged was section 16A of the 1968 Act,<sup>399</sup> in respect of which it was necessary for the prosecution to prove that K acted to cause a “person to believe that unlawful violence will be used against him or another person.” The Justices had found that the BB gun had the potential to cause serious injury, and concluded that K had in his possession an imitation firearm. Presumably, it was by virtue of that finding that the Divisional Court

<sup>394</sup> Section 57(4), “works in practice by virtue of the fact that it is subject to a qualifier, relating either to its design (whether or not it is readily convertible), or to its misuse (whether or not it is possessed to cause fear of unlawful violence)”: Explanatory Memorandum to the Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007 (SI 2007 No. 2606); prepared by the Home Office.

<sup>395</sup> [2015] EWCA Crim 155.

<sup>396</sup> [1963] EWCA Crim J1104-1; a case decided in connection with an offence charged under section 23(2) of the Firearms Act 1937, which provided, “If any person, at the time of his committing, or at the time of his apprehension for, any offence specified in the Third Schedule to this Act, has in his possession any firearm or imitation firearm, he shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence”. The definition of “imitation firearm” appeared in section 23(6) of that Act (see above).

<sup>397</sup> [2006] EWHC 2183 (Admin).

<sup>398</sup> [2006] EWHC 2183 (Admin).

<sup>399</sup> Section 16A(1)(a) of the 1968 Act.

held that it was immaterial that the complainant knew that the gun was an imitation firearm.

- II. In *Morris and King*,<sup>400</sup> the accused was charged under section 18 of the 1968 Act [‘has with him’ an imitation firearm intending to commit an indictable offence].<sup>401</sup> Two metal pipes had been bound together, giving the appearance of being a double-barrelled shot gun. The Court of Appeal held that the jury had to focus on the appearance of the thing at the time when the defendant had the thing with him. The jury was entitled to have regard to the evidence of any witnesses who actually saw the thing at that time, “*together with their own observation of the thing* itself, if they have seen it...” [emphasis added]
- III. In *Williams*<sup>402</sup> (another case decided under section 18 of the FA 1968), W told the victim that he had a gun (which was in fact a bottle in a plastic bag). The Court of Appeal held that what a witness saw at the time is material to illustrate to the jury the appearance that the thing had at the time, but it is not dispositive.

2.35 Note that where a defendant is charged with possessing, carrying (or ‘having with him’) an imitation firearm, the jury must direct their minds not as to whether there was any reason to believe (or believed) that D *carried* (etc) an imitation, but whether they were sure that he did so: *Vigo*<sup>403</sup>

#### **Device Must Be a ‘Thing’ that is Distinct from the Holder of It**

2.36 In *Bentham*,<sup>404</sup> B broke into a house where A was sleeping. B had his hand inside his zipped-up jacket, forcing the material out so as to give the impression that he had a gun, pointing towards A. He demanded money and jewellery and threatened to shoot A if he did not comply. A was in fear, and he handed over some money whereupon B left.

2.37 In dismissing the appeal against conviction, the Court of Appeal considered the question that the jury had to answer. It held that it was immaterial whether the thing that has “the appearance of being a firearm”, was a piece of wood, or fabric stiffened by a finger:

If the matter had gone to trial...the jury would have had to consider whether at the critical time when threatening [Mr A] and his partner the appellant had in his possession an imitation firearm. That is to say, having regard to the statutory definition, anything which had the appearance of a firearm. We cannot see that it mattered whether or not that item was made of plastic, or wood, *or simply anorak fabric stiffened by a finger*, if in the opinion of the jury at the relevant time *it* had the appearance of a firearm then, in our judgment, they were entitled to find that the offence was made out. [Emphasis added]

2.38 The decision of the Court of Appeal (reversed on appeal) had been criticised,<sup>405</sup> and it was held by the House of Lords to be “insupportable”. Their Lordships concluded that,

<sup>400</sup> (1984) 79 Cr App R 104.

<sup>401</sup> Section 18(1) of the Firearms Act 1968: provided (so far as was material): "It is an offence for a person to have with him a firearm or imitation firearm with intent to commit an indictable offence...while he has the firearm or imitation firearm with him."

<sup>402</sup> [2006] EWCA Crim 1650.

<sup>403</sup> Court of Appeal (Criminal Division); 16th July 1998.

<sup>404</sup> [2005] 2 All ER 65.

<sup>405</sup> [2003] EWCA Crim 3751, [2004] 1 Cr. App. R. 37. See J. Richardson (Criminal Law Week Issue 45, 15 December 2003, para 6 and Comment) and by Professor Spencer ("Is that a gun in your

for a person to be in possession of an imitation firearm (FA 1968, section 17(2)), the 'thing' must be separate or distinct from himself. Their Lordships' reasoning entailed legal rules pertaining to the concept of possession. Thus, Lord Bingham said, "*An unsevered hand or finger is part of oneself. Therefore, one cannot possess it*"<sup>406</sup> or, as Lord Rodger expressed it, "*Dominus membrorum suorum nemo videtur: no-one is to be regarded as the owner of his own limbs, says Ulpian in D.9.2.13.pr.*"<sup>407</sup>

2.39 Following that decision, a conviction<sup>408</sup> was quashed by the Court of Appeal in *Gibson*.<sup>409</sup>

2.40 However, the strict legal position might not be as settled or as straightforward as appears to be widely assumed, for the following reasons:

I. In order to answer the '*Debreli* question' ("does *it* look like a firearm?"), it is necessary to identify what the "*it*" is that has the appearance of being a firearm. Bentham had pleaded guilty on the basis that:

"...it was his fingers inside his jacket that gave the appearance to the witnesses [A and K] that the defendant had in his possession a gun. The defendant denies that he had any object inside his jacket."

II. In his commentary to the House of Lords decision, Professor Ormerod has made the point that "D could be found to be in possession of an imitation firearm where he manipulates with his hands an item of property in such a way to resemble a firearm", but he added:

...in this case it was not the item of property - the anorak - that was alleged to have the appearance of the firearm; it was what lay beneath it.

III. However, the trial judge, in her ruling, *did* appear to be identifying the puckered cloth, rather than the finger, as the 'imitation firearm' [emphasis added]:

"Of course, an unadorned finger cannot have the appearance of being a firearm. *But any piece of cloth which was puckered or gathered in such a way that could, to the eye of a terrified person, look like being a firearm is another matter entirely...*"

IV. Had the case focussed solely on the article of clothing, would the result have been different? Where a garment is so shaped that it gives the appearance that D has a firearm with him, does it make any difference that the garment was shaped by a wooden 'pistol', or by a banana, or by the defendant's finger?

2.41 Their Lordships observed that "Parliament might have created an offence of falsely pretending to have a firearm (although not an imitation firearm). But it has not done so."<sup>410</sup>

pocket or are you purposively constructive?" [2004] CLJ 543). On appeal to the House of Lords, their Lordships found that criticism to be "unanswerable"; per Lord Bingham, Opinion, para.8.

<sup>406</sup> Opinions, para.8.

<sup>407</sup> Opinions, para.14; but see S. Willmer, "Armless gun?", S.J. 2005, 149(15), 440.

<sup>408</sup> By virtue of a guilty plea, entered prior to the decision in the House of Lords in *Bentham*.

<sup>409</sup> [2006] EWCA Crim 704.

<sup>410</sup> Per Lord Bingham, Opinion, para.9.

### The thing need not be adapted to look like a firearm, or replica

- 2.42 It is not necessary to show that the thing had been adapted or altered to 'look like a firearm',<sup>411</sup> or that it had to have the appearance of a "replica": *Williams*.<sup>412</sup> A similar contention (that an "imitation firearm" was something which is *fabricated* to imitate a lethal weapon) was rejected in *Debreli*,<sup>413</sup> where an automatic pistol, with its firing pin removed so that it could not fire, was held to be an "imitation firearm".

### CONVERTING AN IMITATION: s.4(3), FA.1968

- 2.43 Section 4(3) of the 1968 Act provides:

It is an offence for a person other than a registered firearms dealer to convert into a firearm anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through its barrel.

- 2.44 The heading to section 4 ("Conversion of weapons") is liable to mislead because section 4(3) is limited in scope. Section 4(3) does not describe itself as being concerned with "imitation firearms", and its application does not depend on the thing in question being of a kind that falls within the general definition of an "imitation firearm" in section 57(4). Furthermore, section 4(3) does not apply to a 'readily convertible' imitation firearm to which the 1982 Act applies (see the Firearms Act 1982, section 2(2) and section 2(2)(a)).

- 2.45 Crucial to the operation of section 4(3) is the requirement that the thing is *incapable* of discharging any missile through its barrel. Incapacity may be the result of a solid or blocked barrel. Not encompassed by section 4(3) (it is submitted) are devices which cannot function merely because an essential part is missing (e.g. the trigger) or a mechanism is defective. In such cases, the device is ineffectual in discharging a missile for a reason other than its construction. Less clear are cases where the construction of the device is deficient (such as a defective moulding, or where the internal diameter of the barrel was machined wider or narrower than was designed for the calibre of shot).

- 2.46 In *Greenwood and Greenwood*,<sup>414</sup> the appellants (who were convicted of conspiracy to contravene section 4(3)), habitually sold deactivated weapons, told the purchasers how to reactivate them, and on some occasions provided them with the parts which had been removed, or with a kit to enable them to undertake the reactivation. Presumably, the process of *deactivating* a firearm is an act of "construction" for the purposes of section 4(3), and therefore, reactivating a firearm is to "convert it" for the purposes of that section.

<sup>411</sup> Presumably the submission was that the imitation should 'look like' a firearm of a familiar type (e.g. a shotgun, or pistol).

<sup>412</sup> [2006] EWCA Crim 1650.

<sup>413</sup> [1963] EWCA Crim J1104-1; a case decided in connection with an offence charged under section 23(2) of the Firearms Act 1937, which provided, "If any person, at the time of his committing, or at the time of his apprehension for, any offence specified in the Third Schedule to this Act, has in his possession any firearm or imitation firearm, he shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence". The definition of "imitation firearm" appeared in section 23(6) of that Act (see above).

<sup>414</sup> [2005] EWCA Crim 2686.

## READILY CONVERTIBLE IMITATIONS: 1982 ACT

### Overview

2.47 Section 1(1) of the Firearms Act 1982 provides:

“...an imitation firearm [that] has the appearance of being a firearm to which section 1 of the 1968 Act (firearms requiring a firearm certificate) applies; and...it is so constructed or adapted as to be readily convertible into a firearm to which that section applies”.

2.48 A “readily convertible” imitation includes an air weapon (whether declared “specially dangerous” or not under the Firearms (Dangerous Air Weapons) Rules). The 1982 Act is not concerned with the “component parts”,<sup>415</sup> or “accessories”,<sup>416</sup> of a firearm, and therefore the definition of a “firearm” in section 57(1) is to be read without reference to section 57(1)(b) and (c): see section 1(4) of the 1988 Act.

2.49 The Firearms Consultative Committee’s 11th Annual Report explained that the 1982 Act was passed to:

“...prevent the sale of blank-firing imitation guns of a kind that could be converted to fire live ammunition by fairly simple changes (for example cutting off a blanked-off barrel). The police and the Forensic Science Service had found that some imitations had been converted by criminals to fire potentially lethal missiles and used in crime”.<sup>417</sup>

2.50 By “readily convertible” is meant that the imitation can be “*converted without any special skill on the part of the person converting it*”<sup>418</sup> and “*the work involved*” in doing so “*does not require equipment or tools other than such as are in common use by persons carrying out works of construction and maintenance in their own homes*”.<sup>419</sup>

2.51 It is important to stress that a “readily convertible” imitation firearm will be treated under the Firearms Act “*as if it were an actual firearm for most of the purposes of the 1968 Act*” including the requirement for a firearm certificate under section 1 of the 1968 Act (see section 1(2)).<sup>420</sup>

2.52 The item might be of a description that falls within section 5 of the 1968 Act and thus be a “prohibited weapon”. Depending on the type of prohibited weapon in question, the minimum penalty may be one of 5 years’ imprisonment. Thus, for example, an *imitation* weapon that is “readily convertible” into a firearm from which “two or more missiles [could] be successively discharged without repeated pressure on the trigger” would be treated as if it fell within section 5(1)(a) of the 1968 Act (a “prohibited weapon”).

2.53 In *R v Williams (Orette)*,<sup>421</sup> it was common ground that it was for the prosecution to prove to the criminal standard of proof that the article was a “readily convertible

<sup>415</sup> Section 57(1)(b) of the Firearms Act 1968.

<sup>416</sup> Section 57(1)(c) of the Firearms Act 1968.

<sup>417</sup> Firearms Consultative Committee, 11<sup>th</sup> Annual Report (March 2002), para.3.10.

<sup>418</sup> Section 1(6)(a) of the Firearms Act 1982.

<sup>419</sup> Section 1(6)(b) of the Firearms Act 1982.

<sup>420</sup> Lord Renton: HL Deb 11 June 1982 vol 431 cc412; section 1(2) provides: “Subject to section 2(2) of this Act and the following provisions of this section, the 1968 Act shall apply in relation to an imitation firearm to which this Act applies in relation to a firearm to which section 1 of that Act applies.

<sup>421</sup> [2012] EWCA Crim 2162, [2013] 1 W.L.R.1200; judgment, para.18.

imitation”. However, it is important for persons not to be misled as what this means. The principle applies where there is a criminal trial, but it does *not* mean that a person may safely assume that an imitation firearm is not a “readily convertible” imitation firearm unless a court has declared otherwise. A person who handles an imitation firearm without giving thought to whether or not it is a “readily convertible” imitation, does so at his own risk. It is immaterial that the person did not take any steps to convert it into a ‘section 1 firearm’, nor need it be shown that he intended to do so. But for section 1(5) of the 1982 Act (below), it would be immaterial that a person neither knew, nor believed, nor suspected the thing to be a “readily convertible” imitation firearm. If charged with being in unlawful possession of a firearm (albeit a “readily convertible” imitation) without a firearm certificate, his mistake would only be as to the *quality* of the article, which would not negate the fact of possession. However, section 1(5) provides a limited defence if the accused can show (the legal burden of proof being on him)<sup>422</sup> “that he did not know *and had no reason to suspect* that the imitation firearm was so construed or adapted as to be readily convertible into a firearm to which section 1 of [the 1968 Act] applies.” The defence is discussed in greater detail below.

- 2.54 The 1982 Act creates no additional offences: enforcement being achieved through the 1968 Act. The Government believed that few certificates would be issued in respect of readily convertible imitation firearms, “because it will be difficult for an applicant to show that he had good reason for having such an imitation rather than one that was incapable of being readily converted into a firearm.”<sup>423</sup>
- 2.55 Although a “readily convertible” imitation is treated as if it were an actual firearm for most of the purposes of the 1968 Act, there are exceptions<sup>424</sup> (summarised in Chapter 1, para.1.92-95: ‘*The Firearms Act 1982 – readily convertible imitations*’), notably section 4(3) of the 1968 Act (conversion of weapons),<sup>425</sup> and section 4(4) of the 1968 Act (conversion of weapons in aggravated form),<sup>426</sup> as well as provisions of the 1968 Act that “relate to, or to the enforcement of control over, the manner in which a firearm is used or the circumstances in which it is carried”.<sup>427</sup>

### **Who decides whether an item is “readily convertible imitation”?**

- 2.56 Ultimately, it is for a judge to decide whether (as a matter of law) something is *capable* of being a “readily convertible” imitation, and for fact-finders to decide whether (as a matter of fact) it is such an imitation, or not. However, as stated above, the scheme of the 1982 Act is to place a burden on those who handle imitation firearms to satisfy themselves as to whether the imitation falls within the 1982 Act or not.

<sup>422</sup> *R v Williams (Orette)* [2012] EWCA Crim 2162.

<sup>423</sup> Lord Renton: HL Deb 11 June 1982 vol 431 cc412.

<sup>424</sup> See section 2(2)(a) of the 1982 Act.

<sup>425</sup> Section 4(3) of the 1968 Act provides: “It is an offence for a person other than a registered firearms dealer to convert into a firearm anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any missile through its barrel.”

<sup>426</sup> Section 4(4) of the 1968 Act provides: “A person who commits an offence under section 1 of this Act by having in his possession, or purchasing or acquiring, a shot gun which has been shortened contrary to subsection (1) above or a firearm which has been [converted as mentioned in subsection (3) above] (whether by a registered firearms dealer or not), without holding a firearm certificate authorising him to have it in his possession, or to purchase or acquire it, shall be treated for the purposes of provisions of this Act relating to the punishment of offences as committing that offence in an aggravated form.”

<sup>427</sup> Section 2(2)(b) of the 1982 Act.

- 2.57 In its 3<sup>rd</sup> Report (“Firearms Control”), the House of Commons Home Affairs Committee, reported that in 2009, the Metropolitan Police Service raised concerns about the illegal conversion and criminal use of the Olympic .380 BBM blank-firer. The Forensic Science Service concluded that the items were ‘readily convertible’ applying section 1(6) of the Firearms Act 1982,<sup>428</sup> and “*therefore open to classification as a prohibited weapon*. But, in April 2010, the Association of Chief Police Officers issued a Press Release, stating in its “notes to editors” that “*The gun now falls under the classification of a prohibited weapon within the provisions of Section 5 of the Firearms Act 1968, for which there is a five year mandatory prison sentence.*”<sup>429</sup>
- 2.58 The House of Commons Committee then stated, “*As of April 2010 it is illegal for anyone to be in possession of one of these items without an appropriate license*”.<sup>430</sup> The question arises whether this statement is over-assertive and goes beyond being merely advisory in nature.

### “Readily convertible”

- 2.59 This topic has been discussed in some detail in relation to the definition of a “lethal barrelled weapon”: see Chapter 1, para.1.92-95.
- 2.60 The 1982 Act uses the expression “*readily convertible*” rather than “*easily convertible*”. However, section 1(6) of that Act is open to the criticism that although its drafting might well be explained by the prevalence for ‘DIY’ in the 1970’s and 1980’s (and the proliferation of DIY stores), the market has developed to the extent that equipment (including those of a specialist nature) materials and tutorials (including online videos), have become readily available (e.g. via the internet).

### Do the words “imitation firearm” refer to section 57(4) of 1968 Act?

- 2.61 The issue under consideration is whether the words “imitation firearm”, as they appear in the opening line to section 1(1) of the 1982 Act, take their meaning from section 57(4) of the 1968 Act or whether section 1(1) provides a freestanding definition for the purposes of the 1982 Act. The issue comes about because section 1(3) of the 1982 Act states that (save for “air weapon” and “firearm”),<sup>431</sup> “*...any expression given a meaning for the purposes of the 1968 Act has the same meaning in this Act*”. Thus, at first sight, it would seem that an “imitation firearm”, which is “readily convertible”, is one that falls within section 57(4). This, indeed, is the assumption that the Court of Appeal made in *Bewley*.<sup>432</sup>
- 2.62 However, if the Court in *Bewley* was right, then it leads to a result which Parliament may not have intended. This is because the section 57(4) definition of an “imitation firearm” excludes a “prohibited weapon” of the type described in section 5(1)(b) of the 1968 Act, namely, devices that are “designed or adapted for the discharge of any noxious liquid, gas or other thing”. Such a weapon can be multi-purpose in its design (having the

<sup>428</sup> House of Commons Home Affairs Committee, “Firearms Control”; Third Report of Session 2010–2011; Volume I; (20<sup>th</sup> December 2010), HC 447-I; para.116.

<sup>429</sup> And see the CPS Guidance *Classification of the Olympic BBM*; [http://www.cps.gov.uk/legal/d\\_to\\_g/firearms/](http://www.cps.gov.uk/legal/d_to_g/firearms/)

<sup>430</sup> House of Commons Home Affairs Committee, “Firearms Control”; Third Report of Session 2010–2011; Volume I; (20<sup>th</sup> December 2010), HC 447-I; para.116.

<sup>431</sup> See section 1(3) and (4) of the 1982 Act.

<sup>432</sup> [2012] EWCA Crim 1457 [24].

appearance of [e.g.] a pistol) which can discharge CS gas or, if fitted with an attachment, a small flare (see, for example, *R v Rhodes*<sup>433</sup>). If such a device can be readily converted into a section 1 firearm, then there seems no logical reason for excluding it from the reach of the 1982 Act (other than to say that the effect of such an omission is ‘academic’ because such a device would be a “prohibited weapon” in any event – and thus a firearm). The reference to section 5(1)(b) in section 57(4) is a relic of earlier legislation (i.e., from the Act of 1933).

## **Burden of proof: the section 1(5) defence**

### **Who shoulders the burden of proof**

2.63 Section 1(5) of the 1982 Act provides:

In any proceedings brought by virtue of this section for an offence under the 1968 Act involving an imitation firearm to which this Act applies, it shall be a defence for the accused to show that he did not know and had no reason to suspect that the imitation firearm was so construed or adapted as to be readily convertible into a firearm to which section 1 of that Act applies.

2.64 The question that arose in *R v Williams (Orette)*<sup>434</sup> was whether the burden of proof on the defendant was evidential only (i.e., that sufficient evidence is placed before the court to raise the defence that must be rebutted by the prosecution to the criminal standard of proof), or whether the defendant shoulders the legal/persuasive burden of proof (on a balance of probabilities).

2.65 W was convicted of possessing a prohibited weapon contrary to section 5(1)(a)<sup>435</sup> of the Firearms Act 1968 (as amended). The weapon in question was a *blank-firing imitation* 9 mm calibre gun, which W had fired from behind a door as the police were about to enter his address. The gun was designed to fire in semi-automatic and full-automatic mode, and had an overall length of 39.9 centimetres. The Crown’s expert saw no evidence of any attempt to convert the gun into one that could fire projectiles. W accepted that he carried out DIY and was “a bit of a handyman”. If the device was a “readily convertible” imitation firearm (within the meaning of the 1982 Act) then it fell to be treated as a “firearm” for the purposes of the 1968 Act and as a “prohibited weapon” (being capable of burst fire) under section 5(1)(a) of the same Act.

2.66 The trial judge ruled that the defence under section 1(5) of the 1982 Act imposed a legal burden on the accused.

2.67 The Court of Appeal<sup>436</sup> held that as a matter of construction, section 1(5) of the Firearms Act 1982 imposed a reverse, legal burden on a defendant to prove on the balance of probabilities the statutory defence, for the following reasons:

- I. The defence related to the state of mind of the defendant, and accordingly placing the legal burden on the defendant made an inroad into the presumption of innocence guaranteed by article 6.2 of the ECHR;

<sup>433</sup> [2015] EWCA Crim 155.

<sup>434</sup> [2012] EWCA Crim 2162, [2013] 1 W.L.R.1200;

<sup>435</sup> “(a) any firearm which is so designed or adapted that two or more missiles can be successively discharged without repeated pressure on the trigger;”

<sup>436</sup> Davis LJ, Foskett, Sweeney JJ. The Court considered (among other cases): *Lambert* [2002] 2 AC 545, *R v Johnstone* [2003] 1 WLR 1736, and *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264.



- II. The inroad into the presumption of innocence would be incompatible with article 6.2 *unless* it was justified as representing a reasonable and proportionate response. This entailed balancing the importance of what was at stake for the public with the maintenance of the normal rights of the defendant (having regard to the statutory context and the particular circumstances of the case);
- III. That, having regard to the seriousness of problems associated with firearms offences and the need to protect the public, the statutory defence in section 1(5) defence:
  - (i) involved facts that were readily available to the defendant;
  - (ii) those facts might be very difficult for the prosecution to disprove,
- IV. The prosecution had to first prove (to the criminal standard) that the defendant had been in possession of a “readily convertible” imitation firearm;
- V. There was (given the above) a lack of obvious unfairness or unreasonableness in requiring the defendant to justify his possession of it;
- VI. The maximum sentence was 10 years’ imprisonment – not life.<sup>437</sup>
- VII. The imposition of a legal reverse burden was justified as a necessary, reasonable and proportionate derogation from the presumption of innocence; and that, accordingly the judge had been correct to conclude that section 1(5) of the 1982 Act placed a legal, persuasive burden on the defendant.

2.68 The Court’s conclusions and analysis have been criticised by Professor Andrew Ashworth,<sup>438</sup> and see the commentary to this case.<sup>439</sup>

### “No reason to suspect”

2.69 To what extent is the expression “no reason to suspect” (as it appears in section 1(5) of the 1982 Act) to be objectively and subjectively determined? The issue has arisen in the context of section 28 of the Misuse of Drugs Act 1971 in which the words “nor had reason to suspect” appear. That section provides a defence to several offences under the Misuse of Drugs Act 1971 (which would otherwise be ones of strict liability) if the accused can prove “that he neither believed nor suspected nor had reason to suspect” the existence of a specified fact or matter. The case-law decided in relation to that provision is not wholly consistent. In *R v Rice*,<sup>440</sup> the appellant contended that the words “nor had reason to suspect” were capable of two meanings – one subjective and one objective:

The objective interpretation would arise if the words were taken to mean that the defendant could simply prove that there was not in existence any reason to suspect that the substance was a controlled drug. The subjective interpretation would arise if

<sup>437</sup> But note the criticism by Professor Andrew Ashworth concerning this point, in his Editorial, “Firearms and Justice” [2013] Crim. L.R. 447., citing Attorney-General’s Reference No.4 of 2002 [2004] UKHL 43; [2005] 1 A.C. 264.

<sup>438</sup> Editorial, ‘Firearms and Justice’ [2013] Crim. L.R. 447; “The time has come for a cool look at firearms legislation: a law that requires courts to imprison people who have no *mens rea* and who have failed to discharge a reverse burden of proof is highly questionable, and it is inadequate and fundamentally wrong to expect the “exceptional circumstances” exemption to furnish full protection for the innocent.”

<sup>439</sup> R. Fortson Q.C., *R v Williams* [2013] Crim.L.R.983-987.

<sup>440</sup> *R v Rice* (20th November 2000; [2000] EWCA Crim J1120-2); Court of Appeal (Criminal Division); Laws LJ [16].

the words are taken to mean that the defendant must prove that for his part he was not aware of any reason to suspect that the substance or product was a controlled drug.

2.70 The Court held that it was not aware of the “so-called objective approach”:

We are not aware that the first of these possibilities, the so called objective approach, has ever been suggested before in the context of this statute’s construction. *It seems to us quite plain that the statute is looking at the presence or absence of a reason known to the defendant.* The words are “if he proves that he neither believed nor suspected nor had reason to suspect”, not “if he proves that there was no reason to suspect.”

2.71 However, not cited in *Rice*, was the decision of the Courts-Martial Appeal Court in *R v Young*<sup>441</sup> where Y had relied on the statutory defence under section 28(3)(b)(i)<sup>442</sup> of the Misuse of Drugs Act 1971, the third limb of which was for the accused to prove that had “no reason to suspect...” the relevant fact or matter. The Court held that this involved a consideration of “objective rationality”:

The remaining question is whether a reason is something entirely personal and individual, calling for an entirely subjective consideration, or involves the wider concept of an objective rationality. We are of the opinion that it is the latter.

2.72 Leaving aside issues of intoxication – which was an issue in *R v Young* – two questions that arise are, (i) whether a defence of having “reason to suspect” should be determined by applying notions of “objective rationality”, and (ii) whether it should be relevant or irrelevant that the accused did not know of the material circumstance (i.e. the “reason”) that would have aroused suspicion in the mind of an average person that the thing was a “readily convertible” firearm?<sup>443</sup>

## REALISTIC IMITATION FIREARMS<sup>444</sup>

2.73 At the time that the Government introduced the Violent Crime Reduction Act 2006, one of its stated aims with regards to “realistic imitation firearms” [“RIFs”]<sup>445</sup> was to “curb the manufacture, import and sale of realistic imitation firearms, not toys”.<sup>446</sup> The reason for the curb was given by the then Minister for Policing, Security and Community Safety (Hazel Blears):<sup>447</sup>

...to cap off the future supply of realistic imitation firearms, which are all too often used to scare and threaten people and to help to commit serious crimes. We want to stop

<sup>441</sup> *R v Young* [1984] 1 W. L. R. 654; per Kilner Brown J. Y convicted of possessing LSD with intent to supply: see section 5(3), Misuse of Drugs Act 1971.

<sup>442</sup> By section 28(3)(b)(i) of the Misuse of Drugs Act 1971, it is a defence if the accused proves “that he neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled “drug...”

<sup>443</sup> See R. Fortson, ‘Law on the Misuse of Drugs and Drug Trafficking Offences’; “Does section 28(2) and section 28(3)(b)(i) contain an objective element?”, chapter 8-020; Sweet & Maxwell, 2012.

<sup>444</sup> A useful Guide has been produced by the Association of Chief Police Officers and the British Association for Shooting and Conservation: “Guide To The Violent Crime Reduction Act 2006”; 2008; and see Home Office circular 031/2007: The Violent Crime Reduction Act 2006 (Commencement No 3) Order 2007: firearms measures.

<sup>445</sup> The problems posed by RIFs, and the balance that the Government has endeavoured to strike between competing interests (crime, sporting, exhibitions, and historical re-enactments), are summarised in the *Explanatory Memorandum to the Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007* (SI 2007 No. 2606); the Home Office.

<sup>446</sup> Per Ms Dawn Butler; HC, Standing Committee B, 25 October 2005, c.263.

<sup>447</sup> HC, Standing Committee B, 25 October 2005, c.256.

people selling them, except for certain limited purposes, and to stop people importing them.

### Definition of a “realistic imitation firearm”

- 2.74 A “realistic imitation firearm” [‘RIF’] is defined by section 38(1) of the VCRA 2006 as one that has an appearance that is so realistic as to make it indistinguishable, for all practical purposes, from a “real firearm” (but it must be “modern”<sup>448</sup>), *and* that the RIF is neither a “de-activated firearm”<sup>449</sup> nor an “antique”.
- 2.75 A “real firearm” is defined by section 38(7) to mean:
- (a) a firearm of an actual make or model of modern firearm (whether existing or discontinued); or
  - (b) something falling within a description which could be used for identifying, by reference to their appearance, the firearms falling within a category of actual modern firearms which, even though they include firearms of different makes or models (whether existing or discontinued) or both, all have the same or a similar appearance.
- 2.76 The matters that must be taken into account when determining whether or not an “imitation firearm” is a RIF (i.e. undistinguishable from a “real firearm”), “include” (but are presumably not confined to) any differences between the *size, shape* and *principal colour* of the imitation firearm, when compared to the same attributes in respect of which “the real firearm is manufactured” (section 38(3)(a), VCRA 2006.)
- 2.77 An “imitation firearm” is not to be regarded as distinguishable from a “real firearm” if the distinction would be apparent *only*:
- I. to an expert; or
  - II. on a close examination; or
  - III. as a result of an attempt to load or to fire it.<sup>450</sup> Account must be taken of any differences between the size, shape and principal colour of the imitation firearm and the size, shape and colour in which the real firearm is manufactured.<sup>451</sup>
- 2.78 However, an imitation is to be regarded as *distinguishable* if its size, shape or principal colour is *unrealistic* for a real firearm.<sup>452</sup>
- 2.79 By regulations 6 and 7 of the Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007,<sup>453</sup> an imitation is to be regarded as *unrealistic* if it’s “size” is

<sup>448</sup> By section 38(8) of the VCRA 2006, “modern” is defined as a firearm “the appearance of which would tend to identify it as having a design and mechanism of a sort first dating from before the year 1870”.

<sup>449</sup> As defined by section 38(7) of the VCRA 2006: “‘de-activated firearm’ means an imitation firearm that consists in something which (a) was a firearm; but (b) has been so rendered incapable of discharging a shot, bullet or other missile as no longer to be a firearm”.

<sup>450</sup> Section 38(2) of the VCRA 2006.

<sup>451</sup> Section 38(3)(a) of the VCRA 2006.

<sup>452</sup> Section 38(3)(b) of the VCRA 2006.

<sup>453</sup> SI 2007 No 2606 (as amended).

less than 38mm in height and 70mm in length, or its “colour” is one of the bright colours listed in regulation 7.<sup>454</sup>

2.80 Section 50(2) of the VCRA 2006 provides:

“Expressions used in this Part and in the 1968 Act have the same meanings in this Part as in that Act.”

2.81 The effect of section 50(2) of the VCRA 2006, is that expressions such as “firearm” and “imitation firearm”, as they appear in the VCRA and in the Firearms Act 1968, have the same meaning. In other words, the expressions “firearm” and “imitation firearm” derive their meaning from section 57(1) and section 57(4) respectively.

2.82 The assumption that Parliament appears to have made in the VCRA is that a “real firearm” is of the ‘lethal *barrelled*’ type. In practice, this will often be the case, but (in theory at least) there are no words in the 2006 Act that expressly exclude “component parts” or “accessories” of a “lethal barrelled weapon” or a “prohibited weapon” – both of which are defined as “firearms” in section 57(1) of the 1968 Act.

2.83 Given the combined effect of section 50(2) VCRA 2006 and section 57(4), it is important to understand that a RIF may be capable or incapable of discharging a missile (a fact that the statutory definition of a RIF, in section 37, does not make clear). The following scenarios might therefore arise:

- I. The RIF is *incapable* of discharging a missile, but it has the “appearance of being a firearm”. In this situation it may also be an “imitation firearm” as defined by section 57(4) of the 1968 Act.
- II. The RIF is *incapable* of discharging a missile, but it is “readily convertible” into a ‘section 1’ firearm. The device may also be caught by the 1982 Act.
- III. The RIF is *capable* of discharging a missile from a barrel *and* it satisfies the test for ‘lethality’. In this instance, the device is a “firearm” within the meaning of section 57(1) of the 1968 Act; and unless it is an “air weapon” as defined by section 1(3)(b) of the 1968 Act (not being “specially dangerous”), or the RIF is otherwise excepted, section 1 of that Act applies (requirement for a firearm certificate). Depending on the function of the RIF (e.g. capable of automatic fire) it may also be of a description listed in section 5 (that is to say, it may be a “prohibited weapon”).
- IV. The RIF is *capable* of discharging a missile from its barrel, but it has not crossed the ‘lethality’ threshold. It will not be a “lethal barrelled weapon” but it may still be a section 57(4) “imitation firearm” if used in ways that are forbidden by the 1968 Act (e.g. sections 16A, 17, 18, 19, or 20).

2.84 Presumably it was with the above considerations in mind, that testing has been conducted by the Forensic Science Service on the “actual lethality thresholds for airsoft BB 6 mm plastic pellets (0.2 grams)”:<sup>455</sup>

Based on that work, we think it is safe to conclude that fully automatic airsoft guns operating at 1.3 joules or less and single shot (or semi-automatic) airsoft guns operating at 2.5 joules or less would not engage the lethality threshold crossing over

<sup>454</sup> Bright red/orange/yellow/green/pink/purple/blue.

<sup>455</sup> Guide on Firearms Licensing Law (March 2015), paras.2.25 and 2.26.

into stricter controls under the Firearms Act. This would mean that airsoft firearms that are also realistic imitation firearms operating at or below these thresholds would, nonetheless, not be required to be sold by a Registered Firearms Dealer but that the other control provisions provided by the Violent Crime Reduction Act would apply. Please note that this has not yet been tested by the courts.

## Offences and defences under the VCRA 2006

### Offences

2.85 The following offences are created under the 2006 Act<sup>456</sup> (subject to statutory defences, below):<sup>457</sup>

36 (1) A person is guilty of an offence if—

- (a) he manufactures a realistic imitation firearm;
- (b) he modifies an imitation firearm so that it becomes a realistic imitation firearm;
- (c) he sells a realistic imitation firearm; or
- (d) he brings a realistic imitation firearm into Great Britain or causes one to be brought into Great Britain.

2.86 Note that the 2006 Act does not create an offence of unlawfully possessing a “realistic imitation firearm”, nor does it make it an offence to supply (for no consideration) a RIF.

2.87 A RIF that is “brought into Great Britain” is liable to forfeiture under the “customs and excise Acts” (section 36(7), (8)). The use of the expression “brings...into Great Britain” was deliberate. The section does not impose a prohibition on the importation of RIFs *in rem* (i.e. for the purposes of the Customs and Excise Acts)<sup>458</sup>. Accordingly, section 36(7), and (8) were inserted into the section in order to provide a power of forfeiture under the Customs Act.<sup>459</sup>

### Defences

2.88 Three defences to a charge under section 36, are provided by:

- I. **Section 37(1), (2) VCRA 2006:** D may show (evidential burden)<sup>460</sup> that he acted (e.g. manufactured a RIF) with the intention<sup>461</sup> of making the imitation

<sup>456</sup> Read together with the Violent Crime Reduction Act 2006 (Realistic Imitation Firearms) Regulations 2007 SI 2007 No.2606; and noting the Violent Crime Reduction Act 2006 (Specification for Imitation Firearms) Regulations 2011 (SI 2011 No.1754).

<sup>457</sup> See section 37(1), and (3) of the 2006 Act; and regulation 3 of the 2007 Regulations.

<sup>458</sup> See section 1 of the Customs and Excise Management Act 1979; and see section 36(8) of the VCRA 2006.

<sup>459</sup> See *Hansard*, House of Lords, 22 May 2006; c.620. “Although [s.36] makes it an offence to bring into Great Britain a realistic imitation firearm, it does not specifically prohibit the importation of the goods. We have been advised by Her Majesty’s Revenue and Customs that the absence of a prohibition *in rem* means it would be unable to seize such an imitation if it discovered it while it was being brought into the country. Similar considerations apply in relation to [s.39] under which it is an offence to import imitation firearms which fail to conform to specifications aimed at making it impossible for them to be converted into real firearms. These amendments seek to redress the situation by establishing that these goods are liable to forfeiture under the Customs and Excise Acts...a Customs officer will be able to use his discretion...in deciding whether it is necessary to seize particular goods. It also means that ...it might not always be necessary to prosecute. The sort of case where this might be appropriate is that of young people returning from a school trip abroad with items which are prohibited in this country”; per Lord Bassam of Brighton.

<sup>460</sup> See section 37(4) of the VCRA 2006.

<sup>461</sup> Section 37(1) uses the expression “for the purpose of”.

firearm available for the purposes of (a) a museum or gallery;<sup>462</sup> (b) theatrical performances and of rehearsals;<sup>463</sup> (c) the production of films;<sup>464</sup> (d) the production of television programmes;<sup>465</sup> (e) organising or holding historical re-enactments<sup>466</sup> organised by persons specified by regulations made by the Secretary of State;<sup>467</sup> or (f) functions that a person has in his capacity as a person in the service of Her Majesty.<sup>468</sup>

II. **Section 37(3), VCRA 2006:** D may show (evidential burden)<sup>469</sup> that he, in the course of a trade or business, acted for the purpose of modifying a RIF in a way that would result in it ceasing to be such (e.g. by painting it bright pink).

III. **Regulation 3 of the 2007 Regulations:** D may show (evidential burden only)<sup>470</sup> that his conduct was only for the purpose of organising and holding “*permitted activities*”<sup>471</sup> for which public liability insurance is held in relation to liabilities to third parties arising from or in connection with the organisation and holding of those activities”; or for the purposes of a display at a “*permitted event*”<sup>472</sup>.

2.89 Given the above, it will be seen that Parliament has sought to control RIFs in a somewhat unusual way. Rather than exempting or excluding specified conduct (for example, that a RIF is to be used for a ‘permitted activity’) – subject, perhaps, to a certificate being obtained - the Act imposes prohibitions enforced by statutory criminal offences which can be answered by way of a ‘defence’ – and yet, this is in respect of conduct that Parliament does not seek to prohibit!

## OTHER MEASURES RELATING TO IMITATION FIREARMS

### Specification for imitation firearms: section 39 VCRA 2006

2.90 This short provision, hidden among many others, belies its potential importance in the overall strategy for controlling the production, distribution and use of imitation firearms that can be converted or adapted into barrelled weapons of the more dangerous kind. The provision is currently limited to blank-firing imitation firearms.

<sup>462</sup> Section 37(2)(a). By section 37(7), VCRA 2006: “museum or gallery” includes any institution which, (a) has as its purpose, or one of its purposes, the preservation, display and interpretation of material of historical, artistic or scientific interest; and (b) gives the public access to it.

<sup>463</sup> Section 37(2)(b).

<sup>464</sup> Section 37(2)(c).

<sup>465</sup> Section 37(2)(d).

<sup>466</sup> Section 37(2)(e). By section 37(7), VCRA 2006: “historical re-enactment” means any presentation or other event held for the purpose of re-enacting an event from the past or of illustrating conduct from a particular time or period in the past.

<sup>467</sup> Regulation 5 of SI 2007 No.2606 provides: “(1) The persons described for the purposes of section 37(2)(e) of the 2006 Act and paragraph 5(2)(e) of Schedule 2 to that Act are those mentioned in paragraph (2)...(a) a person or persons holding public liability insurance in relation to liabilities to third parties arising from or in connection with the organisation and holding of historical re-enactments; (b) two or more persons, at least one of whom holds such public liability insurance.”

<sup>468</sup> Section 37(2)(f).

<sup>469</sup> See section 37(4) of the VCRA 2006.

<sup>470</sup> See regulation 4 of SI 2007 No.2606.

<sup>471</sup> SI 2007 No.2606. Reg 2: “‘permitted activities’ means the acting out of military or law enforcement scenarios for the purposes of recreation...”

<sup>472</sup> SI 2007 No.2606; Reg.2: “a commercial event at which firearms or realistic imitation firearms (or both) are offered for sale or displayed”.

- 2.91 Section 39 of the VCRA 2006 empowers the Secretary of State to make regulations requiring “imitation firearms” (defined by section 57(4) of the 1968 Act)<sup>473</sup> to conform to prescribed specifications. Such regulations were made in 2011<sup>474</sup> in respect of:
- (a) “blank-firing imitation firearms”<sup>475</sup> (other than ‘blank-firing imitation revolvers’ and imitations where cartridges are loaded 90 degrees to the dummy barrel), and;
  - (b) “blank-firing imitation revolvers”<sup>476</sup>.
- 2.92 The specifications concern (a) above, the purpose of which is to prevent their conversion into working firearms, or that their essential parts “cannot be used to form the basis of a firearm without significant repair or addition”<sup>477</sup>
- 2.93 Section 39(2) of the VCRA 2006, makes it an offence for a person to:
- (a) Manufacture an imitation firearm which does not conform to the specifications required of it by regulations under this section;
  - (b) Modify an imitation firearm so that it ceases to conform to the specifications so required of it;
  - (c) Modify a firearm to create an imitation firearm that does not conform to the specifications so required of it; or
  - (d) “bring...into Great Britain” an imitation firearm which does not conform to the specifications so required of it, or causes such an imitation firearm to be brought into Great Britain.
- 2.94 There is an exemption in respect of (d) above, namely, that the importer’s purpose was *only* to make the imitation available for one (or more) purposes specified in section 37(2) of the 2006 Act (e.g., for a museum, gallery, or theatrical performance (see above))<sup>478</sup>
- 2.95 There is no jurisprudence as to whether or not any of the above offences have a *mens rea* element. Offences (a) and (d) may be offences of strict liability. But, a fault element is arguably implicit in respect of (b) if the words “so that it ceases to conform” are construed to mean that this was a result that D had intended. Similar considerations arise in relation to (c), having regard to the words “to create”.

### “Supplying imitation firearms to minors”

- 2.96 Section 40 of the VCRA 2006 inserted section 24A into the Firearms Act 1968 by which two offences are enacted. In each case, the expression “imitation firearm” has the meaning assigned to it by section 57(4) of the Firearms Act 1968.<sup>479</sup>

<sup>473</sup> Section 50(2) of the VCRA 2006.

<sup>474</sup> Violent Crime Reduction Act 2006 (Specification for Imitation Firearms) Regulations 2011 (SI 2011 No.1754).

<sup>475</sup> SI 2011 No.1754; reg.3 and 4.

<sup>476</sup> SI 2011 No.1754, reg.5 and 6.

<sup>477</sup> See, for example, the wording of reg.6(e), SI 2011, No.1754.

<sup>478</sup> Mr Colin Greenwood has described this aspect of the legislation “a mess”: ‘When imitations are more regulated than real guns’; Thursday, 24 May 2012; Tackle & Guns Magazine: <http://www.tandgmagazine.com/comment/colin-greenwood/item/399-when-imitations-are-more-regulated-than-real-guns>

<sup>479</sup> See section 50(2), VCRA 2006.

- I. It is an offence under section 24A(1) for a person under the age of eighteen years to *purchase* an “imitation firearm”.
  - II. It is an offence under section 24A(2) to *sell* an imitation firearm to a person under eighteen year.
- 2.97 A statutory defence is afforded by section 24A(3), under which the defendant may show (evidential burden only)<sup>480</sup> that he believed, on reasonable grounds, that the other person was aged over eighteen years.
- 2.98 The offences have a narrow reach. They appear to be engaged only where there is (or has been) a contract of sale. The heading to the section 24A offence (“supplying imitation firearms to minors”) is therefore overstated: it is not an offence under the section to “supply” or to “distribute” a RIF (other than under a contract of sale).

### **Defining “imitation firearm” for new statutory measures**

- 2.99 The Firearms Consultative Committee, in its 11<sup>th</sup> Report (March 2002), considered whether and to what extent the definition of an “imitation firearm” in section 57(4) could be applied in respect of further controls on imitations. In 2002, the options were considered to be limited. It is submitted that there currently exist too many descriptions of an “imitation firearm” and some streamlining is required.

3.18 The Firearms Act 1968 section 57 defines an imitation firearm as ‘any thing which has the appearance of being a firearm whether or not it is capable of discharging any shot, bullet or other missile.’ The Gun Control Network (GCN) would support this as a satisfactory basis for any new measures in this field. The Courts would be obliged to exercise discretion in deciding the status of particular items, as they do in relation to offensive weapons, obscene publications etc. A body of precedent is likely to be built up to assist them. The definition would apply to its appearance, rather than to how it was disguised, so the Courts would not be called upon to pronounce on whether everyday items concealed in bags were ‘firearms’.

3.19 However, other FCC members, including the police service and the Forensic Science Service, have expressed concerns about applying this definition beyond its present use. In the two cases where it is already used in law, it is subject to a qualifier either as to its design (readily convertible) or its misuse (to cause fear of unlawful violence). To apply such a definition without further clarification may present problems. For example, a person who produced a novelty cigarette lighter in the shape of a pistol, pointed it at a person and threatened to shoot them might reasonably be held to possess an ‘imitation firearm’ for these purposes. It is less clear that the Courts would find that a person innocently carrying such an item to light cigarettes was in possession of an ‘imitation’ firearm.

3.20 A majority of the FCC, therefore, felt that further controls on imitation firearms, if adopted, should be carefully defined. Apart from any development of the law in this area, it might be possible for the police and the Crown Prosecution Service to adopt a clear prosecution policy to avoid bringing the more dubious cases before the Courts.

<sup>480</sup> See section 24A(4) of the Firearms Act 1968.



## CHAPTER 3: AIR WEAPONS

### WHAT IS AN “AIR WEAPON”?

#### INTRODUCTION

- 3.1 By section 57(4) of the Firearms Act 1968, the expression “air weapon” has the meaning assigned to it by section 1(3)(b), which reads (as amended);

....an air weapon (that is to say, an air rifle, air gun or air pistol [*which does not fall within section 5(1) and which is*]<sup>481</sup> not of a type declared by rules made by the Secretary of State under section 53 of this Act to be specially dangerous).

- 3.2 Rules have been made by the Secretary of State under the Firearms (Dangerous Air Weapons) Rules 1969.

- 3.3 An “air weapon” is declared to be specially dangerous<sup>482</sup> in the circumstances described by Rule 2(1) [as amended<sup>483</sup>]:

2(1) Subject to paragraph (2) ...an air weapon (that is to say, an air rifle, air gun or air pistol)--

- (a) which is capable of discharging a missile so that the missile has, on being discharged from the muzzle of the weapon, kinetic energy in excess, in the case of an air pistol, of 6ft lb or, in the case of an air weapon other than an air pistol, of 12ft lb, or
- (b) which is disguised as another object.

- 3.4 Rule 2(2) excludes from the Rules underwater weapons (e.g. harpoons).<sup>484</sup>

- 3.5 The following general points should be noted:

- (1) References to “air”/gun (etc.) include weapons powered by carbon dioxide.

This is the result of the decision of the Court of Appeal in *R v Thorpe*<sup>485</sup> which had ruled that “air” meant “air”, and not “carbon dioxide”. Parliament enacted section 48 of the Firearms (Amendment) Act 1997, which provides that “any reference to “an air rifle, air pistol or air gun” in the Firearms Acts 1968 to 1997; or in the Firearms (Dangerous Air Weapons) Rules 1969,<sup>486</sup> “shall include a reference to a rifle, pistol or gun powered by compressed carbon dioxide”.<sup>487</sup>

<sup>481</sup> The italicised words “which does not fall within section 5(1) and which is” having been inserted by section 39(1), (2) of the Anti-Social Behaviour Act 2003.

<sup>482</sup> See Rule 3: “An air weapon to which this Rule applies is hereby declared to be specially dangerous.”

<sup>483</sup> As substituted by SI 1993 No.1490, r.2 (in effect, adding Rule 2(1)(b)).

<sup>484</sup> Rule 2(2) provides: “Rule 3 of these Rules does not apply to a weapon which only falls within paragraph (1)(a) above and which is designed for use only when submerged in water.”

<sup>485</sup> [1987] 1 WLR 383.

<sup>486</sup> Or in the Firearms (Dangerous Air Weapons) (Scotland) Rules 1969.

<sup>487</sup> It is submitted that it would have been preferable had Parliament amended section 1(3)(b) of the 1968 Act to make this clear without having to look to another enactment (the existence of which might be passed over by lay persons and practitioners alike).

- (2) A *barrelled* “air weapon” (air pistol, air rifle, or air gun) that is neither “specially dangerous” nor a “prohibited weapon”<sup>488</sup> can be a “lethal barrelled weapon” if the threshold of lethality is passed.
- (3) An air weapon of *any* description (whether or not it is an “air pistol”, “air rifle” or “air gun”) can be a “lethal barrelled weapon” within the meaning of section 57(1), FA 1968 *provided* that the threshold of lethality is reached: see chapter 1, para.1.152 *et seq* (consider, for example, a blow pipe and poisonous dart).
- (4) There is nothing in the Firearms Act 1968 that *expressly* excludes a *non-lethal* “air weapon” from that Act. There is at least one statutory provision, namely, section 19 of the 1968 Act in respect of which a *non-lethal* air weapon is described as a ‘firearm’ but which does not have the meaning stated in section 57(1).

Thus, in *Street v DPP*,<sup>489</sup> the Divisional court held that for the purposes of section 19 of the 1968 (as then drafted)<sup>490</sup> an “air weapon” defined by section 1(3)(b) is - by implication - not limited to air weapons which are also “firearms”.<sup>491</sup> The Court said that the expression “firearm” in the Act “is not in every respect entirely consistent”.<sup>492</sup>

On the facts in *Street v DPP*, the air weapon (a BB gun) was found on test firing to have a muzzle energy of only 0.49 ft.lb. It was not “specially dangerous” under the 1969 Rules.

*[On that reasoning, it may be that, for the purposes of section 21A (firing an “air weapon” beyond premises), the offence includes air weapons that are both lethal barrelled and non-lethal barrelled.]*

The result in *Street v DPP* may be an accident of drafting inasmuch as section 19 of the 1968 Act appears not to have incorporated all aspects of earlier legislation with regards to air-weapons:

- (a) Lethal air-guns and air rifles were deemed by s.12 of the Firearms Act 1920 (as originally drafted) not to be “firearms”,<sup>493</sup> other than those declared by rules to be “specially dangerous”.
- (b) By an amendment made to section 3 of the 1920 Act, by the Firearms Act 1934,<sup>494</sup> a person under the age of 17 years was prohibited from purchasing or hiring a “firearm”. *For this purpose*, an “air gun or air

<sup>488</sup> For example, that it is not prohibited by section 5(1)(af).

<sup>489</sup> [2004] EWHC 86 (Admin); [2004] L.L.R. 365.

<sup>490</sup> Section 19 of the Firearms Act 1968 (the 1968 Act) provided [prior to be amended by the ASBA 2003]: “A person commits an offence if, without lawful authority or reasonable excuse (the proof whereof lies on him) he has with him in a public place a loaded shot gun or loaded air weapon, or any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm.”

<sup>491</sup> Judgment, para.53.

<sup>492</sup> Judgment, para.52.

<sup>493</sup> As (originally) defined by section 12 of the Firearms Act 1920: “The expression ‘firearm’ means any lethal firearm or other weapon of any description from which any shot, bullet, or other missile can be discharged, or any part thereof,...Provided that a smooth bore shot-gun or air-gun or air-rifle (other than air-guns and air-rifles of a type declared by rules made by a Secretary of State under this Act to be specially dangerous) and ammunition therefor shall not in Great Britain be deemed to be a firearm and ammunition for the purpose of the provisions of this Act other than those relating to the removal of firearms and ammunition from one place to another or for export...”

<sup>494</sup> Section 1(1) of the 1934 Act substituted section 3(1A) and (1B) for section 3(1) of the Firearms Act 1920.

rifle” that was a “lethal weapon” was deemed to be a “firearm” (section 1(2), Firearms Act 1934).

- (c) However, for specified purposes of the 1920 Act,<sup>495</sup> an “air-gun, air rifle, or air pistol (not being of a type declared by rules...to be specially dangerous”) were “deemed not to be firearms” (section 15(4)).
- (d) Section 1(2) of the 1934 Act (see above) was repealed by section 16(3) of the Firearms (Amendment) Act 1936. This would appear to be as a result of observations made by the Bodkin Committee.<sup>496</sup>
- (e) The Firearms Act 1937 consolidated earlier enactments. For the purposes of Part 1 [firearm certification and registration procedures], section 16(1) provided that Part 1 applied to “all firearms” (i.e. ‘lethal barrelled weapons’, etc.<sup>497</sup>) *except for* specified weapons that included an “air gun, air rifle, or air pistol not being of a type declared by rules...to be specially dangerous” (section 16(1)(b)).
- (f) The expression “air weapon” seems to have made its first appearance in the Air Guns and Shot Guns Act 1962. Section 4 defined “air weapon” as an “air gun, air rifle, or air pistol not being of a type declared by rules...to be specially dangerous” (mirroring section 16(1)(b) of the 1937 Act).

Section 1 prohibited a person under the age of 14 years to accept as a gift any “air weapon” or ammunition for an air weapon.

- (g) The Firearms Act 1965 made it an offence to carrying a firearm, including an “air weapon”, in a public place (a forerunner to section 19 of the 1968 Act). “Air weapon” was defined by section 10 to be one of the weapons specified in section 16(1)(b) of the 1937 Act.

*The inference that can be drawn from the drafting of firearms legislation enacted prior to the 1968 Act, is (it is submitted) that Parliament intended to regulate only air-guns, air rifles, and air pistols that were lethal, or specially dangerous – not non-lethal types of air weapons.*

- (5) It cannot be assumed that the expression “air weapon” has a consistent meaning throughout the firearms legislation (for the reasons given below).

3.6 The principal reason for placing the definition of “air weapon” in section 1 of the 1968 Act appears to be to identify those air weapons in respect of which a firearm certificate is mandated by that section. Thus, an “air rifle, air gun or air pistol” does not require such a certificate *unless* it is either “specially dangerous” or a “prohibited weapon” (section 1(3)(b)).

<sup>495</sup> Namely, section 1 [restriction on purchase, possession, and use of firearms], section 2 restrictions on manufacture and sale of firearms], section 3(1B) [person under 14 years of age not to possess, use or carry a firearm or ammunition; see FA 1934], section 8 [registration of persons manufacturing or selling firearms]; and section 10 [production of firearm certificates]....of the Firearms Act 1920.

<sup>496</sup> 1934-35 Report of the Departmental Committee on the Statutory Definition and Classification of Firearms and Ammunition [Cmd. 4758]; para.124: “there is one definition of firearms for the general provisions of the 1920 Act; another in respect of persons under seventeen who seek to purchase or hire a firearm, and the law reverts to the original definition where the use or carrying of a firearm by a person under seventeen is concerned.”

<sup>497</sup> “Firearm” was defined by section 32(1) of the 1937 Act in terms almost identical to section 57(1) of the 1968 Act.

3.7 The only occasion on which the phrase “specially dangerous” appears in the 1968 Act is in section 1(3)(b) [exceptions for a firearm certificate]. By contrast, the expression “air weapon” appears in the Act in several places, for example:

- (1) section 3 [business and other transactions with firearms and ammunition];
- (2) section 5 [prohibited weapons];
- (3) section 11(4) [exemption from holding a firearm certificate in respect of a shooting gallery at which no firearms other than ‘air weapons’ are used];
- (4) section 19 [carrying a firearm in a public place];
- (5) section 21A [firing an air weapon from beyond premises];<sup>498</sup>
- (6) sections 23 and 24 [acquisition and possession of firearms by minors];
- (7) section 24(4)(a) [gifting an air weapon to a person under 18 years of age];
- (8) section 24ZA [Failing to prevent minors from having air weapons];<sup>499</sup>
- (9) section 46(4) [powers of search with a warrant; restricted in respect of an offence relating specifically to ‘air weapons’];<sup>500</sup>

3.8 It is therefore important to know whether the definition of “air weapon” in section 1(3)(b) is to be applied consistently throughout the Act, or not. But, it is also important to know how many words in section 1(3)(b) actually define what an “air weapon” is. Thus:

- (1) Did Parliament intend that the expression should mean only an “*air rifle, air gun or air pistol*”?
- (2) If the answer is in the affirmative, what purpose is served by the remaining words in section 1(3)(b), that is to say, “*which does not fall within section 5(1) and which is not of a type declared by rules made by the Secretary of State...to be specially dangerous*”?

3.9 Those questions have gained particular importance as a result of the decision of the Court of Appeal in *R v ‘L’*,<sup>501</sup> which appears to hold that an “air pistol” that is “specially dangerous” is not an “air weapon” as defined by section 1(3)(b) of the 1968 Act, and therefore, it is capable of being a “prohibited weapon” if the remaining requirements of the relevant provision (e.g. section 5(1)(a)) are satisfied. Presumably, the judgment is not confined to “air pistols” but applies to air-rifles and air-guns as well. But, if an air-pistol/rifle/gun that is “specially dangerous” is not an “air weapon”, what impact does this have in respect of other provisions in the Firearm Acts that relate to “air weapons”?

## THE CASE OF *R v ‘L’*<sup>502</sup>

### The problem of construction

3.10 L possessed a modified Crossman 2250B *carbon dioxide powered* .22 calibre gun. It was not in dispute that it was a barrelled weapon (less than 60 centimetres in length

<sup>498</sup> Section 34 of the Violent Crime Reduction Act 2006.

<sup>499</sup> Inserted by the Crime and Security Act 2010, section 46.

<sup>500</sup> See also restrictions in relation to the prosecution and punishment of offences (section 51(4)), and powers of forfeiture and disposal of firearms (section 52(1)(a)); By section 57(3) of the 1968 Act, “For purposes of sections 45, 46, 50, 51(4) and 52 of this Act, the offences under this Act relating specifically to air weapons are those under sections 22(4), 22(5), 23(1)[, 24(4) and 24ZA(1)]”.

<sup>501</sup> [2015] EWCA Crim 5.

<sup>502</sup> [2015] EWCA Crim 5.

overall)<sup>503</sup> from which that 0.22 air pellets could be discharged, and that it had sufficient power to be lethal. Although powered by CO2, it was still an “air pistol”: section 48 of the F(A)A 1997.

- 3.11 L was charged with three offences under the Firearms Act 1968, of which two were: (count 1) possessing a firearm without a certificate contrary to section 1(1)(a); and (count 2) possessing a “prohibited weapon” (a “firearm”) contrary to section 5(1)(aba).
- 3.12 The trial judge ruled that the weapon in count 1 was *capable* of being “specially dangerous”,<sup>504</sup> but it was for the jury to decide whether this was proved as a fact.<sup>505</sup>
- 3.13 However, on count 2, the judge ruled that as a matter of law, no reasonable jury could properly conclude that L was in possession of a prohibited “firearm” of the kind described in section 5(1)(aba), and he granted leave to appeal. His principal concern was the “insolvable logical flaw” in the wording of the legislation (particularly section 1(3)(b), and section 5(1)(aba)).
- 3.14 Section 5(1)(aba)<sup>506</sup> provides:  
“...any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, *other than an air weapon* [...]”<sup>507</sup> a muzzle-loading gun or a firearm designed as signalling apparatus”
- 3.15 Although L’s weapon was ‘air’ powered, the question arose whether it was excepted from (aba). The answer was of particular importance because a conviction under section 5(1)(aba) carries a minimum sentence of 5 years’ imprisonment unless there are “exceptional circumstances”: see section 51A of the 1968 Act.
- 3.16 When the judge read the definition of “air weapon” in section 1(3)(b), together with section 5(1)(aba), he saw what appeared to be “*an infinite circularity of reasoning as to what ‘an air weapon’ is*”.<sup>508</sup>  
19. ....Putting it another way: an article is not ‘an air weapon’ under s.1(3)(b) if it is prohibited under s.5(1), but you can only come to a conclusion as to whether it is prohibited under s5(1)(aba) if you have decided that it is not ‘an air weapon’, which produces an unsolvable set of circular propositions.
- 3.17 The learned judge’s point had merit (it is submitted) if one applies the following path of reasoning:  
(1) D has an ‘air pistol’.  
(2) Prima facie, it is an “air weapon” and thus excepted from (aba).  
(3) But section 1(3)(b) says that it will not be excepted as an “air weapon” if it is a prohibited weapon.  
(4) The prosecution say that the weapon is prohibited under (aba).

<sup>503</sup> Trial judge’s ruling (para.32).

<sup>504</sup> Whether this was a matter in issue is not clear from the judgment. One would anticipate expert evidence about the muzzle energy of the gun in question.

<sup>505</sup> Judgment, para.2.

<sup>506</sup> Inserted by the Firearms (Amendment) Act 1997, section 1(2).

<sup>507</sup> The words “a small-calibre pistol” were omitted by the Firearms (Amendment) Act 1997, section 2(7) and schedule. This was done to bring such pistols with the provision as “prohibited weapons”.

<sup>508</sup> Ruling para.19.

- (5) Yet (aba) says that the weapon will not be “prohibited” if it is an “air weapon”.
- 3.18 In *R v L*, the trial judge could not accept the Crown’s contention that section 5(1)(aba) sought to except only low-powered air weapons.<sup>509</sup> And he found “no less tenable” the defence contention that “any” air rifle/gun/pistol was to be excluded from section 5(1)(aba).
- 3.19 While it is easy to make the assumption that Parliament intended to exclude from section 5(1)(aba) only air weapons that are neither “specially dangerous” nor prohibited, there is little in the legislation (section 1(3)(b) aside) to put the matter beyond doubt.

### The Court of Appeal analysis in *R v L*

- 3.20 In quashing the decision of the trial judge, the Court of Appeal held that there was no circularity in the provisions for the following reasons:
- (1) The definition [of “air weapon”] in section 1(3)(b) excludes two different kinds of air weapon: (a) those specifically prohibited under section 5(1) **and**<sup>510</sup> (b) those specially dangerous.
  - (2) An air pistol which is specially dangerous *is not an air weapon*, and if it met the other terms of section 5(1)(aba) it would be prohibited. The words [“which does not fall within section 5(1) and which is”] were inserted to guard against a prohibited firearm from winning exemption from the requirement for certification.<sup>511</sup>
  - (3) An air pistol is an “air weapon” only if the section 1(3)(b) exemptions do not bite.
  - (4) Were the jury to conclude that the weapon is an air pistol then it would be specially dangerous. Because the other requirements of section 5(1)(aba) are met, it would be a prohibited weapon.<sup>512</sup>
  - (5) The use in section 1(3)(b) of the word “and”, does no more than set up a list of the type of air pistols *which are not air weapons*. That conclusion is fortified by, for example, section 1 that provides that every firearm requires a certificate except certain shotguns “**and**” [the Court’s emphasis] certain air rifles, air guns or air pistols.<sup>513</sup>
- 3.21 The Court described the provisions of the legislation as “labyrinthine”<sup>514</sup> – which they are. However, it is respectfully submitted that the Court’s analysis does not provide a satisfactory solution to the problem that confronted the trial judge in that case.
- 3.22 It is submitted that the problems that arose in *R v L* might have been avoided had Parliament adopted a two-step approach:
- (1) “Air weapon” means, for the purposes of the 1968 Act, “...an air rifle, air gun or air pistol”. This would be consistent with the wording of the Firearms (Dangerous Air Weapons) Rules 1969.

<sup>509</sup> Ruling, para.35.

<sup>510</sup> The Court’s emphasis; judgment para.17.

<sup>511</sup> Judgment, para.18.

<sup>512</sup> Judgment, para.19.

<sup>513</sup> Judgment, para.21.

<sup>514</sup> Judgment, para. 22.

(2) *For the purposes of particular provisions in the Firearms legislation (e.g. section 1 and section 5) further words of qualification are required:*

(a) *[e.g., for the purposes of section 1] "...an air weapon (that is to say, an air rifle, air gun or air pistol) not being of a type declared by rules made by the Secretary of State under section 53 of this Act to be specially dangerous or which falls within section 5(1)"*

(b) *[e.g., for the purposes of section 5(1)(aba)] "...any firearm which either has a barrel less than 30cm in length or is less than 60cm in length overall, other than....an air weapon not being of a type declared by rules made by the Secretary of State under section 53 of this Act to be specially dangerous or which falls within section 5(1)(a) or section 5(1)(af)....(b) a muzzle-loading gun...(etc)".*

## FURTHER ISSUES

### Weapons powered by gas other than carbon dioxide

3.23 Section 48 of the Firearms (Amendment) Act 1997 extends references to "air weapon" to include weapons that are powered by carbon dioxide. Weapons powered by other gases are not similarly included and thus, if they are lethal barrelled, will fall within section 1 of the Firearms Act 1968 (firearm certificate required).

### "Specially dangerous" and strict liability

3.24 It has been pointed out (correctly) by the authors of the British Firearms Law Handbook,<sup>515</sup> that the owner and the user of an air weapon cannot tell the power of the weapon simply by firing it. Liability under section 1 of the Firearms Act 1968 is strict. The question arises whether it ought to be, or whether there should be a defence of (at least) "reasonable excuse", if (for example) the owner has a document issued by an accredited body or person that certifies the muzzle energy to be below the limits declared for air weapons that are "specially dangerous".

3.25 In *R v Puttick*.<sup>516</sup> P was convicted of possessing an air rifle without a firearm certificate (section 1, Firearms Act 1968), which he had owned for about 20 years. At the time of purchase, the rifle had been "within the limits" (no certificate needed), but it was possible that over time, a rifle could creep over the limit without modification as "appeared to have happened in this case": P was 'conditionally discharged'.

### Non-lethal air weapons

3.26 In *Street v DPP*,<sup>517</sup> the Divisional court held that for the purposes of section 19 of the 1968 (as then drafted)<sup>518</sup> an "air weapon" defined by section 1(3)(b) is - by implication - not limited to air weapons which are also "firearms".<sup>519</sup> In other words, it appears that

<sup>515</sup> The British Firearms Law Handbook, 7<sup>th</sup> ed., Saunbury et al., Sweet & Maxwell, chp.3-04.

<sup>516</sup> [2000] EWCA Crim J0720-9.

<sup>517</sup> [2004] EWHC 86 (Admin); [2004] L.L.R. 365.

<sup>518</sup> Section 19 of the Firearms Act 1968 (the 1968 Act) provided [prior to be amended by the ASBA 2003]: "A person commits an offence if, without lawful authority or reasonable excuse (the proof whereof lies on him) he has with him in a public place a loaded shot gun or loaded air weapon, or any other firearm (whether loaded or not) together with ammunition suitable for use in that firearm."

<sup>519</sup> Judgment, para.53.

section 19 may catch air weapons of a non-lethal kind. The question is whether the word “firearm” should be given a uniform, consistent, meaning across the firearms legislation.

### **Types of air weapon prohibited by section 5 of the 1968 Act**

3.27 The outcome in *R v L*, is less than satisfactory not least because section 5 should be clear as to the air weapons which are either excepted, or included, within any of the definitions of a “prohibited weapon” stated in that section.

3.28 In a bulletin published in 2012 by the British Association for Shooting and Conservation (BASC) the following passages appear:

NB: Although it was not Parliament’s intention that any low powered air weapons should be banned by the 1997 Acts, *there is now considerable uncertainty as to whether a rifled airgun of the description covered by 5(1)(ab) has become prohibited even though it may be a very low powered weapon not hitherto held on certificate.*

The Home Office have consulted ACPO and the Crown Prosecution Service about the legal status of these weapons and have agreed, in the absence of a court ruling, that the issue should be resolved formally at the next legislative opportunity. In the meantime chief officers are advised that self-loading or pump-action rifled airguns should continue to be regarded as falling outside the certification process provided that they are low powered and do not fall within the Firearms (Dangerous Air Weapons) Rules 1969. [Emphasis added]

3.29 Suffice to say that such legal uncertainty should not arise under the legislation, particularly having regard to the fact that severe penalties (including minimum sentences) can be imposed – and frequently are – in respect of convictions under section 5 of the 1968 Act.

### **Determining muzzle energy levels**

3.30 See chapter 1, para.1.153 *et seq.* – lethality.

3.31 The determination of muzzle energy velocity is increasingly important not just in respect of air weapons, but also in relation to any firearm where the issue is whether a barrelled weapon was “lethal”. The *Moore v Gooderham* test is not consistently applied and it is arguably ‘out of step’ with greater reliance being placed on expert forensic opinion evidence.

### **The ‘back-conversion’ of air weapons**

3.32 Section 7 of the Firearms (Amendment) Act 1988 provides (as amended):

#### *7 Conversion not to affect classification*

(1) Any weapon which--

(a) has at any time (whether before or after the passing of the Firearms (Amendment) Act 1997) been a weapon of a kind described in section 5(1) or (1A) of the principal Act (including any amendments to section 5(1) made under section 1(4) of this Act);

(b) is not a self-loading or pump-action smooth-bore gun which has at any such time been such a weapon by reason only of having had a barrel less than 24 inches in length,

shall be treated as a prohibited weapon notwithstanding anything done for the purpose of converting it into a weapon of a different kind.



- (2) Any weapon which--
- (a) has at any time since the coming into force of section 2 above<sup>520</sup> been a weapon to which section 1 of the principal Act applies; or
  - (b) would at any previous time have been such a weapon if those sections had then been in force,
- shall, if it has, or at any time has had, a rifled barrel less than 24 inches in length, be treated as a weapon to which section 1 of the principal Act applies notwithstanding anything done for the purpose of converting it into a shot gun or an air weapon.
- (3) For the purposes of subsection (2) above there shall be disregarded the shortening of a barrel by a registered firearms dealer for the sole purpose of replacing part of it so as to produce a barrel not less than 24 inches in length.

*Prohibited [air] weapons*

- 3.33 The effect of section 7(1) of the 1988 Act is that any weapon which had been a “prohibited weapon” under section 5(1) or section 5(1A) of the 1968 will remain a “prohibited weapon” notwithstanding that the weapon was modified<sup>521</sup> with the intention that its specifications would no longer satisfy either of those subsections. Thus, for example, an air pistol declared to be “specially dangerous” and falling within section 5(1)(aba) [barrel length less than 30 centimetres], will continue to be a prohibited weapon even if it was modified to reduce its muzzle energy to below the limit provided under the Firearms (Dangerous Air weapons) Rules 1969.
- 3.34 An exception is made in respect of a self-loading or pump-action smooth-bore [airgun] that has a barrel of less than 24 inches, and which has been modified so that its muzzle energy falls below the level specified in the 1969 Rules. It will thus no longer be of a type declared to be “specially dangerous”. Thus a weapon which had been a “prohibited weapon” (by virtue of section 5(1)(ac)) can be lawfully ‘back-converted’ to take it out of that classification.

*Section 1 firearms*

- 3.35 Section 7(2) concerns “any weapon” which had been subject to the certification procedures under section 1 of the Firearms Act 1968, and which has (or had) a rifled-barrel of less than 24 inches. Such a weapon will continue to require a section 1 firearm certificate even if it had been modified to bring it within the exceptions in section 1(3)(a) [shot gun exception] or section 1(3)(b) [air weapon exception].

Example

If an air rifle was of a type declared to be “specially dangerous”, but it was not a “prohibited weapon”, it would fall outside the section 1(3)(b) exceptions, and it would require a section 1 firearm certificate. An attempt to ‘back-convert’ it, so that its muzzle energy was less than the level specified in the 1969 Rules, would not exempt it from the requirement for a firearm certificate.

<sup>520</sup> Section 2: “Re-definition of exempted shot guns”; in force from 1 July 1989: see SI 1989 No.853.

<sup>521</sup> Or there had been an attempt to modify it.

*Registered firearms dealer exemption*

- 3.36 Section 7(3) exempts a registered firearms dealer from the provisions of section 7(2) above, where he shortens a barrel to (e.g.) complete a repair the effect of which is to replace a barrel exceeding 24 inches.

*Issues*

- 3.37 Section 7 of the 1988 Act is of questionable value in that it looks to form rather than substance. Furthermore, as the case of *R v Puttick*<sup>522</sup> demonstrates, the current law can produce harsh outcomes given that muzzle energy levels of a given firearm may change depending on the age and usage of the weapon in question. If, by happenstance, an air powered weapon exceeds the limits specified in the Rules rather than on purpose, it arguably makes good sense to repair the gun in order to restore its muzzle power and status.
- 3.38 The drafting of section 7 of the 1988 Act is difficult to comprehend, and its precise scope is uncertain. The expression “*anything done for the purpose of*” in section 7(1), (2), is capable of being understood to encompass
- (i) Completed ‘back-conversions’ (i.e. that, but for section 7 of the 1988 Act) would result in the status of the weapon changing); and
  - (ii) Attempts to achieve that result.
- 3.39 Section 7 of the 1988 Act does not create a stand-alone offence if it is breached. However, a person who acquires a back-converted weapon (unwittingly), which falls within section 7(2) or 7(3), and which therefore continues to be a “prohibited weapon” or a section 1 firearm (as the case may be) will be saddled with that deemed fact notwithstanding that the offence in question is one of strict liability (e.g. section 1 or section 5 of the 1968 Act).

<sup>522</sup> [2000] EWCA Crim J0720-9.

# CHAPTER 4: ANTIQUES, TROPHIES, ITEMS OF HISTORIC INTEREST, AND COLLECTIONS

## I. ANTIQUE FIREARMS

### BACKGROUND

- 4.1 Beyond the requirement of the Gun Licence Act 1870 that a person had to obtain a licence<sup>523</sup> (from the Post Office) to “use and carry” a gun<sup>524</sup> outside the curtilage of his dwelling-house in the United Kingdom, any person could purchase or possess a gun (or any number of such weapons) without any restriction.<sup>525</sup>
- 4.2 The Pistols Act 1903<sup>526</sup> made it unlawful<sup>527</sup> (and an offence) to sell, auction, or to “let on hire”, a “pistol” to any person who was not in possession of a game licence, or an excise licence granted under the Guns Licence Act 1870, or who could not give “reasonable proof” that he was entitled to “use and carry” a gun. A further restriction was placed on persons under the age of eighteen from buying, hiring, using or carrying a “pistol” (a breach of which attracted a financial penalty and forfeiture or disposal of the weapon).<sup>528</sup>
- 4.3 Although the 1903 Act focussed on the point of sale, Parliament’s clear aim was to limit the carrying and use of firearms to persons whose identity and place of residence was known to (at least) the Commissioners of the Inland Revenue who were required under the 1870 Act to maintain a register of licence holders.
- 4.4 Exempted from the provisions of the 1903 Act was an “antique pistol” that was sold “as a curiosity or ornament”.<sup>529</sup> The Act did not define the words “antique”,<sup>530</sup> “curiosity” or “ornament”, and there appears to have been little discussion in Parliament about the scope of the exemption.<sup>531</sup> However, there are clear indications that the exemption was intended to be limited in scope by the combination of at least three factors:
- (1) The age of the firearm (as an “antique”);
  - (2) That the purpose of acquiring the firearm was either as an “ornament” or as a “curiosity”. It is submitted that the latter expression was intended to have its

<sup>523</sup> Excise duty was payable annually: section 4.

<sup>524</sup> Defined in section 2 of the 1870 Act to mean “includes a firearm of any description and an air gun or any other kind of gun from which any shot, bullet, or other missile can be discharged”.

<sup>525</sup> Report of Committee on the Control of Firearms (the “Blackwell Report”); 15<sup>th</sup> November 1918.

<sup>526</sup> Read for the first time: HC Deb 21 January 1902 vol 101 c452; read for the second time: HC Deb 20 February 1903 vol 118 cc404-5.

<sup>527</sup> The first paragraph of section 3 provided: “It shall be unlawful to sell by retail or by auction or let on hire a pistol to any person, unless at the time of sale or hire such person either produces a gun or game licence then in force, or gives reasonable proof that he is a person entitled to use or carry a gun without a gun or game licence by virtue of section seven of the Gun Licence Act, 1870, or that, being a householder, he proposes to use such a pistol only in his own house or the curtilage hereof, or that he is about to proceed abroad for a period of not less than six months, and produces a statement to that effect, signed by himself and by a police officer of the district within which he resides, of rank not lower than that of inspector, or by himself and by a justice of the peace.”

<sup>528</sup> Section 4, Pistols Act 1903.

<sup>529</sup> Section 8.

<sup>530</sup> However, the third paragraph to section 2 of the Pistols Act 1903 stated that the term “antique pistol” shall not include any pistol with which ammunition is sold, or which there is reasonable ground for believing is capable of being effectually used.”

<sup>531</sup> See the debates of the Bill’s Second Reading in the House of Lords, HL Deb 09 July 1903 vol 125 cc129-31.

narrow traditional meaning, namely, a strong desire to learn about something<sup>532</sup> (worthy of collection) – not acquired on a whim as something of passing interest.

- (3) Importantly (noting the third paragraph of section 2 to the 1903 Act), the term "antique pistol" was not to include "any pistol with which ammunition is sold", or "which there is reasonable ground for believing is capable of being effectually used".

4.5 During an earlier attempt in 1893 to introduce a Pistols Act, the question had been raised<sup>533</sup> whether "a pistol of modern make, but intended purely for ornament, would come within the restrictions of the clause?" This was answered in the negative, on the grounds that "unless the exemption was strictly limited to 'antique' pistols it would be liable to abuse".<sup>534</sup> As for the word "antique", a suggestion made by another Member of Parliament that the word "historical" be introduced into the Bill (1893), was not accepted by the government of the day.<sup>535</sup>

4.6 The Pistols Act 1903 was repealed by the Firearms Act 1920.<sup>536</sup> Section 13(1) of that Act provided that:

Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, bought, carried or possessed as a curiosity or ornament.

4.7 The 1920 Act, like the 1903 Act, did not define "antique". The Act retained the exemption ("saving") in respect of antique firearms, but it did not re-enact the third paragraph to section 2 of the 1903 Act (stated above) that would have disapplied the saving in respect of a firearm for which ammunition was commercially available, or where there were reasonable grounds for believing the 'antique' to be capable of being effectually used.

4.8 It is not clear why Parliament did not re-enact that proviso. The issue had been raised when the 1920 Act was debated as a Bill. Earl Winterton invited the government to put down an Amendment to make the words 'antique firearm' clearer as "they will be very difficult to interpret, and may lead to litigation", and he suggested that the expression might be qualified "to the effect that it should be something which is not capable of being used with modern ammunition, or something of that sort."<sup>537</sup> Parliament's thinking may have been that the scheme of the 1920 Act was to prohibit a person from possessing, using or carrying ammunition without holding a "firearm certificate" – which he could only do if, (a) he had "good reason" for requiring such a certificate *and* (b) he would use the gun "without danger to the public safety or to the peace".<sup>538</sup> But a simpler explanation may be that the disqualification of a firearm as an exempted "antique" on the grounds

<sup>532</sup> Concise Oxford English Dictionary; 12<sup>th</sup> ed., Oxford University Press.

<sup>533</sup> By Sir R. Temple.

<sup>534</sup> Mr Asquith.

<sup>535</sup> H.C. Deb. 12 September 1893 vol. 17 cc.1052.

<sup>536</sup> It is evident from the Blackwell Report [Report of Committee on the Control of Firearms'; 15th November 1918] that the 1920 Act was passed in the wake of the Great War that had added "enormously to the world's stock of rifles and pistols....that will have come into the possession of private persons..." The Report stated that it was "revolvers and pistols of every kind, and ammunition therefor....that especially needs to be dealt with by stringent regulation": The number of persons who can urge any reasonable ground for possessing a revolver or pistol is extremely small; the danger attending the indiscriminate possession of such weapons is obvious; and the attempt made by the Pistols Act of 1903 to regulate their sale has been ineffective.

<sup>537</sup> H.C. Deb. 10 June 1920 vol. 130 c.667.

<sup>538</sup> See section 1(1), (2) of the Firearms Act 1920.

that it could be “effectually used” was (as Greenwood has pointed out) ambiguous, because “even an old flintlock pistol was capable of being effectually used by a person with a moderate knowledge, and such weapons were then....in production, primarily for the African market”<sup>539</sup>.

- 4.9 By contrast, a saving was made in respect of firearms that were possessed as “trophies”, which was conditional to the extent that, by section 13(2), trophies “shall not be used or carried, and that no ammunition therefor may be purchased”.<sup>540</sup> The saving was removed by the Firearms (Amendment) Act 1936 (see below).
- 4.10 The Firearms Act 1937 consolidated the Acts of 1920,<sup>541</sup> 1933,<sup>542</sup> 1934<sup>543</sup> and the Firearms (Amendment) Act 1936. The latter Act was a consequence of the ‘Bodkin Report’.<sup>544</sup> The Bodkin Committee recommended that antique firearms should remain exempt, but it was of the opinion that it was not possible to exhaustively define “antique”. It noted the ‘partial definition’ of “antique” in the Pistols Act 1903, as a pistol in respect of which there was “no reasonable ground for believing it capable of being effectually used.” It regarded that consideration as likely to be relevant to the “determination of the meaning of antique in section 13 [of the 1920 Act]”. It did not recommend that possessors of antiques should be required to “take steps to render them unserviceable” as no evidence had been adduced that required this course to be taken in the interests of public safety.<sup>545</sup>
- 4.11 Section 33(5) of the 1937 Act used similar wording to earlier statutes in excluding antique firearms from its provisions. The only difference being that the word ‘carried’ was omitted.

## II. THE CURRENT LAW

### THE FIREARMS ACT 1968 AND RELATED LEGISLATION

- 4.12 The Firearms Act 1968 is a largely consolidating measure that repealed (among other enactments) the 1937 Act, the Air Guns and Shot Guns Act 1962, and the Firearms Act 1965. The 1968 Act has been heavily amended, and the statutory regime has been supplemented by a number of legislative measures. It is important to remember that under the 1968 Act a particular weapon can be described in one (or more) ways, namely, as (i) a “lethal barrelled weapon”,<sup>546</sup> (ii) a “prohibited weapon”,<sup>547</sup> and (iii) an “air weapon”.<sup>548</sup>

<sup>539</sup> Colin Greenwood: ‘Firearms Control In England and Wales’: <http://www.hoplophobia.info/wp-content/uploads/2013/11/Greenwood.pdf>

<sup>540</sup> The provision was added to the Firearms Bill by an amendment moved by the Earl of Onslow: HL Deb 29 April 1920 vol 40 cc41-44. Admitted a condition that “ammunition is not to be purchased” is not the same as saying that ammunition of a certain type is not commercially available or produced.

<sup>541</sup> The Firearms Act 1920.

<sup>542</sup> The Firearms and Imitation Firearms (Criminal Use) Act 1933.

<sup>543</sup> The Firearms Act 1934.

<sup>544</sup> ‘Statutory Definition and Classification of Firearms and Ammunition’: Cmd 4758/1934.

<sup>545</sup> ‘Statutory Definition and Classification of Firearms and Ammunition’: Cmd 4758/1934; para.109.

<sup>546</sup> Section 57(1), of the Firearms Act 1968.

<sup>547</sup> Section 57(1)(b) of the Firearms Act 1968.

<sup>548</sup> Section 57(4) and section 1(3)(b) of the Firearms Act 1968.

- 4.13 It is also important to note that the 1968 Act makes provision not only in respect of “antique firearms”, but also in respect of weapons of “historic interest”, and “trophies of war”. Thus, each category has an historical element to it, and a degree of overlap exists between them.
- 4.14 The pre-existing saving in respect of an “antique firearm” has been largely (but not entirely) preserved by section 58(2) FA 1968 which (as originally enacted) provided:
- Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament.
- 4.15 However, this provision was amended by the Anti-social Behaviour, Crime and Policing Act 2014,<sup>549</sup> the effect of which is<sup>550</sup> to prohibit, or restrict (for a specified period of time) the possession of an antique firearm by persons who have received any of the sentences specified in section 21 of the 1968 Act.<sup>551</sup>
- 4.16 In order for a person to possess, purchase or to acquire a “prohibited weapon”, the authority of the Secretary of State is required. But, “prohibited weapons” – “being firearms” - are also subject to the ‘antiques’ exemption afforded by section 58(2) of the 1968 Act. In 1997, the list of prohibited weapons was extended<sup>552</sup> to include most handguns (see FA 1968, section 5(1)(aba)).<sup>553</sup> However, quite apart from the ‘antique’ firearm exemption, the authority of the Secretary of State to possess a handgun (falling within section 5(1)(aba)) is not required if it is of “historic interest” (and if the conditions of section 7 of the 1997 Act are met). Accordingly, the ‘historic interest’ exemption is expressed as having effect “without prejudice to section 58(2) of the 1968 Act (antique firearms)”.<sup>554</sup> This is discussed in greater detail under a separate heading (‘Firearms of historic interest’), below.

### **ANTIQUE FIREARMS: SECTION 58(2)**

- 4.17 None of three crucial terms in section 58(2) - antique, curiosity and ornament - are defined by the 1968 Act.
- 4.18 Greenwood reports that during a debate in the House of Lords, in respect of what was then the Firearms Bill (1920), the Earl of Onslow stated [emphasis added]:

I must confess that a precise definition of that word [antique] is beyond the powers of Her Majesty's Government. *I can only say that the definition must be left to common sense.*

<sup>549</sup> Section 110(2) of the 2014 Act, and see SI 2014 No.949, article 6(c).

<sup>550</sup> From the 14th July 2014: SI 2014 No.949.

<sup>551</sup> Section 58(2) FA 1968, now reads: “Apart from- (a) section 21 and Schedule 3, and (b) any other provision of this Act so far as it applies in relation to an offence under section 21, nothing in this Act] relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament.”

<sup>552</sup> Section 1 of the Firearms (Amendment) Act 1997.

<sup>553</sup> “....any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon,...a muzzle-loading gun or a firearm designed as signalling apparatus”: section 5(1)(aba), Firearms Act 1968 (as amended by the Firearms (Amendment) (No 2) Act 1997. Note that by s.5(8) of the 1968 Act, “any detachable, folding, retractable or other movable butt-stock shall be disregarded in measuring the length of any firearm” for the purposes of s.5(1)(aba) [and 5(1)(ac)].

<sup>554</sup> Section 7(4), Firearms (Amendment) Act 1997.

- 4.19 This begs the question “whose sense?” Judicial guidance is limited and there remains a significant lack of clarity and certainty.

### Home Office Guidance

- 4.20 “Guidance” has been published by the Executive, principally by the Home Office, the most recent of which is “Guide on Firearms Licensing Law” (2015).<sup>555</sup> Such guidance has not been without its critics,<sup>556</sup> and it does not have the force of law.<sup>557</sup> It is therefore open to the Courts to accept or to reject that guidance. Determining whether a person is entitled to a statutory saving or exemption under the Firearms Acts is of considerable importance not least on the question of sentence.<sup>558</sup>
- 4.21 The essence of the Home Office guidance with regards to “antique firearms” appears at para.2.40:<sup>559</sup>
- The person in possession of a particular firearm should be able to demonstrate to the satisfaction of the chief officer of police that it can be treated as an antique for certification purposes, although it would be for the prosecution to prove otherwise in the event of the matter coming to court.
- 4.22 The Guide provides factors which, in the opinion of the Home Office, would constitute “evidence of antique status”,<sup>560</sup> and include:
- (a) An “indication of date of manufacture”,
  - (b) Details of “technical obsolescence”,
  - (c) A “lack of commercial availability of suitable ammunition”, or
  - (d) A “written opinion by an accredited expert”.
  - (e) “If there is any indication that a firearm is to be used (that is, not held purely as a curiosity or ornament), it should not be regarded as an antique firearm for the purposes of the Firearms Acts and normal certification procedures apply”.
- 4.23 The Guide further states that the Home Office has “always taken the view that”:
- “...‘antique’ should be taken to cover those firearms of a vintage and design such that their free possession does not pose a realistic danger to public safety”.<sup>561</sup>
- 4.24 Furthermore, it is clear from the terms of the Guide that the fact that a firearm was manufactured in the twentieth century does not necessarily mean that it cannot be classified as an antique (this differs from the stance taken by the Court in *Bennett v Brown*,<sup>562</sup> see below).

<sup>555</sup> Home Office, March 2015. Earlier publications included, 'Firearms Law: Guidance to the Police' (1989); circular letter to chief officers (19 November 1992); Letter to Chief Officers 'Firearms Act 1968: Antique Firearms' (11<sup>th</sup> January 2001); 'Firearms Law: Guidance to the Police' (2002); 'Guide on Firearms Licensing Law' (2013); 'Guide on Firearms Licensing Law' (2014).

<sup>556</sup> Not least by the British Association for Shooting and Conservation (BASC).

<sup>557</sup> In a Memorandum by the Home Office, to the Home Affairs Committee (Second Report; April 2000), the Government saw “some merit in providing a statutory definition of ‘antique’ guns tied to [the HO Guide] principles”.

<sup>558</sup> See, for example, *R v Barber* [2005] EWCA Crim 2217.

<sup>559</sup> And see Chapter 8 and Appendix 5 of the 2015 Guide.

<sup>560</sup> See para. para.2.40; noting chapter 8 and Appendix 5 of the 2015 Guide.

<sup>561</sup> Para.8.3.

<sup>562</sup> (1980) 71 Cr. App. R. 109.

- 4.25 The Guide produces a list of pre-1939 firearms the Home Office believes ought to benefit from the exemption. It also produces a list of those firearms which ought not to be exempted as ‘antiques’. In each instance what is decisive is whether a person’s possession of a firearm poses a risk to public safety. The Guide also contains an “obsolete calibre” list, that is to say, ammunition that is no longer readily available.<sup>563</sup>
- 4.26 There has been no re-enactment of the proviso to section 2 of the Pistols Act 1903 under which a firearm is deemed not to be “antique” if there are reasonable grounds for believing it to be “capable of being effectually used” whether by way of available ammunition or otherwise. Arguably, cases such as *CPS v Thompson*<sup>564</sup> (below) would had to have been decided differently if provisos of the kind enacted in section 2 of the 1903 Act had been replicated in the 1968 Act. Furthermore, there is no reported judicial decision of an appellate court that has approved the aforementioned factors stated in the Guide.

### Whether the word “antique” can be defined

- 4.27 The problems inherent in defining the word “antique” are exemplified by Bennion:<sup>565</sup>

The term ‘antique’ is vague. The drafter might seek precision by referring instead to a weapon ‘manufactured more than 100 years before the passing of this Act’. But that would be illogical. If the Act were passed in 1968 a gun made 105 years earlier would be exempt. By 1978 however, a gun made 105 years earlier would not be exempt, because it would have been made only 95 years before the passing of the Act.

What is wanted is a rolling period, so that at any moment the Act will exempt guns which at that moment are 100 years old. The drafter of the Firearms Act 1968 s. 58(2) did not adopt this course. Instead, he provided a flurry of broad terms: ‘Nothing in this Act relating to firearms shall apply to an antique firearm which is sold, transferred, purchased, acquired or possessed as a curiosity or ornament’. No definitions were provided for ‘antique’, ‘curiosity’ or ‘ornament’.

The question of the legal meaning of ‘antique’ in s. 58(2) came before the Divisional Court.<sup>[27]</sup><sup>566</sup> The prosecutor appealed from magistrates’ acquittal of a defendant in relation to three guns ‘dating from possibly 1886, and after 1905 and 1910’. He told the court that prosecuting authorities needed guidance on what was ‘antique’ for this purpose. Eveleigh LJ said it was a question of fact, but guns manufactured in the twentieth century ‘could not be antique’ in 1980. The court directed the magistrates to convict in relation to the guns made after 1905 and 1910. Regarding the gun possibly made in 1886, Eveleigh LJ said that the magistrates were entitled to come to their conclusion, though he would not have done so himself. This judgment seems to put excessive weight on the arbitrary division of time into centuries.

- 4.28 In *Howells*,<sup>567</sup> the trial judge sought to derive assistance (and to assist the jury) by reference to the dictionary definition of “antique”:

As to what an antique means, if one looks in the Oxford dictionary, one gets perhaps a little help on that because there are phrases there which claim that it means something

<sup>563</sup> See Appendix 5 of the 2015 Guide.

<sup>564</sup> [1994] EWHC J1219-11.

<sup>565</sup> Francis Bennion, “*Jaguars and donkeys: distinguishing judgment and discretion*”, p.7; 2000, 31 U. West. L.A.L., rev.1; F. Bennion, “Understanding Common Law Legislation: Drafting and Interpretation” (Oxford University Press).

<sup>566</sup> Footnote 27 reads, “*Bennett v Brown* (1980) Times, 12 April.”

<sup>567</sup> [1977] Q.B. 614.



in olden times, something old-fashioned, something of longstanding, something ancient, something of bygone days, but essentially it is going to be a matter for you; it is in your hands whether or not you decide whether one gun or other here is properly to be described as an antique firearm.

- 4.29 The Court of Appeal did not comment on the appropriateness or otherwise of this description of an “antique” firearm.

### Judicial construction

*R v Howells*:<sup>568</sup> “antique” is a matter of objective fact

- 4.30 Whether a firearm is an “antique” is one of objective fact – a person’s belief that it is antique is irrelevant. H possessed a firearm which he thought had been manufactured as a “continental Colt” in 1862 or 1865. He was charged with contravening section 1(1) of the Firearms Act 1968 [requirement for a firearm certificate]. His defence was that he honestly thought that the firearm was an antique, but that if it was not an antique, it was a very good fake. H’s appeal against conviction was dismissed: section 58(2) relates to “facts and not beliefs”.<sup>569</sup>

- 4.31 Although the decision may be thought to have stated the obvious, H had been charged with an offence of strict liability and thus H’s real purpose in advancing the submission that he did was (as the Court pointed out) to introduce an element of *mens rea* into that offence.

*Richards v Curwen*:<sup>570</sup> issue is a question of fact and degree

- 4.32 The Court declined to specify an age at which a firearm is an “antique”. The issue was one of fact and degree.
- 4.33 D possessed two revolvers made in the late nineteenth century that were kept on the living room wall. The guns were capable of firing, but it was accepted that D had no intention of firing them. The prosecution submitted that the firearms could not be antiques, as they remained capable of firing and were no more than 85 years old. The magistrates found that the firearms were antiques and D was acquitted. The prosecutor’s appeal to the Divisional Court was dismissed.
- 4.34 Counsel for the Crown had submitted that there were three ways of approaching the issue as to how antique ought to be defined.

- I. The first was to hold that the question was a matter of fact and degree for the tribunal of fact.  
Wien J, favoured this approach and so held.
- II. The second was to select an arbitrary age (for example, one hundred years) over which a firearm had to be before it could be considered an antique.  
Wien J, expressed unease with this approach on the basis that it would have the effect of defining something that Parliament had not seen fit to define.

<sup>568</sup> [1977] Q.B. 614.

<sup>569</sup> Per Browne LJ.

<sup>570</sup> (1977) 65 Cr.App.R. 95.

- III. The third possibility, and the one counsel suggested ought to be adopted, was to import into section 58(2) the definition of antique pistol that had previously been contained in section 2 of the Pistols Act 1903.

Wien J rejected this approach for two reasons. First, that it would be an absurdity to say that a firearm that was 300 years old, but which was nevertheless capable of being used, was not an antique. Secondly, it was impermissible to look at an earlier act for guidance where the words had not been repeated in subsequent legislation.

- 4.35 In agreeing that the appeal ought to be dismissed, Eveleigh J stated that:

“Primarily one would think that an antique is something that has peculiar value because of its age, in addition to its other attributes. But to lay down what that age should be I think is quite impossible.”

- 4.36 Lord Widgery CJ, whilst he understood the argument that the term ‘antique firearm’ warranted a more precise definition than Parliament had seen fit to give, stated that, “It would be entirely wrong for us to specify a particular age and say that everything over that age was antique, and everything below that age was not.”

*R v Burke*.<sup>571</sup> *issue is a question of fact*

- 4.37 The case of *Burke* is further support for the proposition that the question of whether or not a firearm is “antique” is one of fact. In that case, the relevant firearms were a .303 rifle and a shotgun, which B had in the airing cupboard of his flat. He did not possess a firearm certificate. The conviction was quashed on the grounds that the judge had not left to the jury the question of whether they were sure, as a matter of fact, that the firearms in question were antiques.<sup>572</sup>

*Bennett v Brown*.<sup>573</sup> - *not antique if made in “this century”*

- 4.38 In *Bennett v Brown*, police found three firearms in D’s home, namely, (i) a 8mm. Mauser rifle, which was dated post-1905, (ii) a self-loading Mauser pocket pistol, which was initially designed for a .32 cartridge then modified to fire .22 cartridges manufactured from 1910 onwards, and (iii) a .476 revolver (an Enfield Mk. 2) dating from the late nineteenth century. The magistrates acquitted D and the Crown appealed.

- 4.39 In allowing the appeal (in relation to the 8mm rifle and the Mauser self-loading pistol), the Divisional Court did not dissent from the principles stated in *Richards v Curwen*, but opined that a weapon manufactured in the century in which that case was decided, could not be said to be “antique”. However, the two judges expressed themselves somewhat differently than the Court in *Richards v Curwen*:

“...it would be quite impossible to say that any weapon that could reasonably be envisaged as available for use in a war in this century could properly be regarded as an antique” (per Eveleigh LJ).

<sup>571</sup> (1978) 67 Cr.App.R. 220.

<sup>572</sup> It is submitted that the headnote in the Criminal Appeal Reports goes too far in asserting that it was held that “section 58(2) was inapplicable because there was no evidence that the appellant had acquired them as a curiosity or ornament”. Whether the firearms were “antique” (as that word appears in section 58(2)) was the issue that the jury had to decide. Whether the appellant had each of them as a “curiosity or ornament” was a discrete issue but also one of fact.

<sup>573</sup> (1980) 71 Cr. App. R. 109.

- 4.40 Watkins J<sup>574</sup> said that whilst “it is not possible to be of specific assistance, which can be applied generally when asked [whether a firearm is antique]...I think this Court should be able to say if not what does, then what does not make good sense in attempting to define the word antique”:

Thus I am prepared to say that no reasonable bench of justices could conclude, regardless of whether or not a firearm could be used in a war at any time, that a firearm which has been manufactured during this century is an antique.

- 4.41 The decision is open to the criticism that it had departed from the general principle that whether a firearm was an antique or not, was a question of fact and degree. However, the Court did not assert that a firearm of less than 100 years old, could not be antique. Indeed, in *Richards v Curwen*, none of the firearms was of that age, yet the prosecutor’s appeal in respect of the third weapon was dismissed.

*CPS v Thomson*.<sup>575</sup> - issue one of fact and degree

- 4.42 The Divisional Court dismissed an appeal against T’s acquittal for possessing a .22 rifle to which section 1 of the 1968 Firearms Act applied. Lady Justice Butler-Sloss (with whom Latham J<sup>576</sup> agreed) concluded that whilst not wishing to disagree with Watkins J in *Bennett v Brown*, “one has to graduate this matter and look towards the fact that we are looking at a .22 rifle built in 1906 at the very beginning of the century, and we in 1994 are six years from the turn of the next century”. The Magistrates had carried out their function under the Act (as expressed in *Richards v. Curwen*), and had determined, as a question of fact and degree, whether the firearm was an antique or not. The Court added, that “It is not for this court, looking broadly at this matter, some 88 years after this gun was made, to say that the magistrates were wrong”.

*Jury trial outcomes*

- 4.43 There are reports of first instance decisions in which juries have acquitted defendants on the basis that the firearm in their possession, although less than 100 years old, was nevertheless an antique.<sup>577</sup>
- 4.44 In *R v Garfield Stacey*,<sup>578</sup> the jury decided that a .455” calibre Webley Revolver made in 1918 was an antique.
- 4.45 Similarly, in *R v Kevin Schofield*,<sup>579</sup> the jury decided that a 9mm Parabellum calibre Lancaster sub-machine gun made in 1940 was an antique firearm. The defendant was therefore acquitted despite the fact that ammunition for this type of firearm is readily available.
- 4.46 In *R v Shepherd*,<sup>580</sup> the jury acquitted S of 13 charges relating to some 900 firearms, including a Belgian revolver, a French service revolver, a Smith and Wesson which had been altered to fire Russian military issue .44 bullets, and a British Bulldog .32 calibre

<sup>574</sup> As he then was.

<sup>575</sup> [1994] EWHC J1219-11.

<sup>576</sup> As he then was.

<sup>577</sup> See, “Antique Firearms: The Classification Problem”, Dr. P.H.V. Alexander, September 28th 2012.

<sup>578</sup> Bournemouth Crown Court, 5 October 2006.

<sup>579</sup> Leeds Crown Court, 18 March 2008.

<sup>580</sup> Central Criminal Court, 2007.

pistol.<sup>581</sup> His defence appears to have been that section 58(2) applied to the firearms in question.

#### *Comment*

- 4.47 The lack of clarity that exists in this area of the law undermines legal certainty. It also makes trials longer and more expensive, as it necessitates greater expert involvement. It also creates the potential for putting at risk public safety in cases where a firearm that is “antique” is nonetheless capable of being lethal using ammunition that is readily available.

#### **Burden of proof that the firearm is antique**

- 4.48 In *Burke*,<sup>582</sup> the Court of Appeal opined that there was “some burden” on the accused to show that the firearm in question was held by him as an antique,<sup>583</sup> but that the legal burden of proof was on the Crown to prove that it was not an antique.<sup>584</sup>

In the view of this Court there is some burden on the appellant to show that he bought these firearms as antiques. The appellant told the police and he told the Court that the weapons were antiques and he bought them because they were antiques. The prosecution were fully aware that the appellant had said this to the police in the first place. Having regard to what the appellant had said to the police and what he said in the Court it was certainly upon the prosecution, in the view of this Court, to establish that these firearms were not antiques and that they required a certificate. Whether or not this was a matter for the prosecution in the first place, the fact remains that it was for the jury to decide this particular issue, and they would only decide against the appellant if they were convinced - if they were sure - that the firearms were not antiques.

#### **“Curiosity or ornament”**

- 4.49 Section 58(2) mandates that the firearm in question must be an antique that is possessed as a “curiosity or ornament”. If the firearm is not an antique, section 58(2) will not apply, even if it is possessed as a curiosity or ornament. Similarly, if the firearm is an antique but it is not possessed as a curiosity or ornament then section 58(2) does not apply.

#### *Defining “curiosity” and “ornament”*

- 4.50 The British Association for Shooting and Conservation has asserted that the words “curiosity” and “ornament” should be construed in their ordinary sense.<sup>585</sup> There is some judicial support for that view. In *Howells*,<sup>586</sup> the trial judge had directed the jury (without criticism from the Court of Appeal) to that effect:

I am not going to attempt to go to a dictionary and define for you what keeping something as a curiosity means and what keeping something as an ornament means. I am going to assume that you know perfectly well what that means.

<sup>581</sup> BBC News: <http://news.bbc.co.uk/1/hi/uk/6223750.stm>

<sup>582</sup> (1978) 67 Cr.App.R. 220.

<sup>583</sup> By which the Court presumably meant “as a curiosity or ornament” (s.58(2), FA 1968). The Court was undoubtedly referring to the accused shouldering an evidential burden only.

<sup>584</sup> That is to say, the legal burden of proof.

<sup>585</sup> ‘Antique Firearms and the Law’, BASC, February 2014.

<sup>586</sup> [1977] Q.B. 614.

- 4.51 However, it is submitted that the word “curiosity”, in modern use, often means something that momentarily fascinates or is mildly intriguing – rather than its actual meaning as something that is worthy of being collected for the purposes of learning about it.<sup>587</sup>
- 4.52 The question of whether a firearm (assuming it is antique) is a “curiosity or an ornament” will be context-specific (see the examples below).

*Ornament – place where the firearm is kept*

- 4.53 In *Burke*,<sup>588</sup> B kept a .303 rifle and a shotgun in the *airing cupboard* of his flat. B told police that he kept them as antiques. There was no clear identification of the persons from whom the appellant had purchased or acquired the firearms.
- 4.54 The decision in *Burke* is not authority for the proposition that a firearm not on display cannot be an “ornament”. The question of whether a firearm is an ornament (or a “curiosity” – note the disjunctive “or”) – as well as the credibility of any explanation given by the accused as to the circumstances in which he has the firearm - are matters of fact.

*Even if not an ornament, the firearm may be a curiosity*

- 4.55 In *CPS v Thomson*,<sup>589</sup> the Divisional Court accepted that the firearm (a .22 rifle) was not an “ornament”, but it was prepared to accept that the justices were entitled to conclude that it was held by T as a “curiosity”:

[It] is entirely right to say that it cannot be an ornament because it is not treated as such by the respondent. He had put it away for future consideration and it was tucked into the wardrobe. On the other hand, he was not treating it as a gun and he was a man who owned and used firearms, that is to say, shotguns. He clearly thought it was of interest. He also had a sentimental attachment to it because it came from his uncle. I accept...that sentimental attachment does not make it a curiosity, but it does tend to show the purpose why it was kept. It clearly was not kept as a firearm which was intended to be used. The combination of having inherited, the fact that it was old, the fact that it was useless for the purpose for which it was made, and the surrounding circumstances led the Justices to come to the conclusion... that it was held by this respondent as a curiosity. In all the circumstances, I can see no reason to differ from the findings of fact and the conclusions of the Justices.

*Intended or actual use of the firearm: acquisition of ammunition*

- 4.56 The Home Office Guide states that “if there is any indication that a firearm is to be used (that is, not held purely as a curiosity or ornament), it should not be regarded as an antique firearm for the purposes of the Firearms Acts and normal certification procedures apply”.<sup>590</sup> It further states that:<sup>591</sup>

“An indication of an intent to fire the gun concerned which may be signalled by the possession of suitable ammunition or even blank charge used for the purposes of historical re-enactment displays *may well mean that the gun cannot be said to be held solely as an object of ‘curiosity or ornament’*”. [Emphasis added]

<sup>587</sup> The Concise Oxford English Dictionary, define “curiosity” as “1. A strong desire to know or learn something”; 12<sup>th</sup> ed., Oxford University Press.

<sup>588</sup> (1978) 67 Cr.App.R. 220.

<sup>589</sup> [1994] EWHC J1219-11.

<sup>590</sup> Guide on Firearms Licensing Law (2015); para.2.40.

<sup>591</sup> Guide on Firearms Licensing Law (2015); para.8.2.

- 4.57 However, the word “solely” does not appear in section 58(2), and ever since the enactment of the Firearms Act 1920, the legislation (while exempting antique firearms from the principal enactment) does not exempt ammunition. The thinking of the Legislature may have been (at least in decades past) that if a responsible person (evidenced by the grant of a firearm certificate) is entitled to possession ammunition, then he or she can be taken to act responsibly if that person also holds an antique firearm albeit as a “curiosity”.
- 4.58 For its part, the BASC has stated that it goes too far to suggest that “because somebody possesses ammunition suggestion that “because somebody possesses ammunition suitable for use in a firearm then he does not possess it as a curiosity or an ornament”.<sup>592</sup>

*The exemption as ‘antique’ is not fixed*

- 4.59 As Saunbury *et al* have pointed out, a firearm can change status as an antique when, for example, possession is transferred, or where the person in possession changes his or her mind as to the purpose for which it is used (e.g. no longer as an ornament).<sup>593</sup>

**European Union issues**

- 4.60 Council Directive (91/477/EEC)<sup>594</sup> exists to partially harmonise rules relating to the control of the acquisition and possession of weapons. However, as the ‘Report from the Commission to the European Parliament and the Council makes clear, antique weapons are regulated by national law:<sup>595</sup>

(112) The Directive leaves antique weapons to be regulated by national law. According to the interested parties, in most Member States antique weapons do not need a licence, although it is sometimes necessary to be registered as a collector to be able to have them in large numbers. When defining an antique firearm many countries use a date, but the definition is different in every country. The Schengen acquis provides a definition in Article 82 (which has remained in force) by referring to the date of 1870. However, it allows exceptions, which has led to differences at national level.

(113) According to collectors associations the free movement of collectors’ weapons is hampered, because formalities are subject to the discretion of each Member State and because a weapon which is regarded as antique in one Member State might not be considered as such in another. Problems can arise when weapons are bought outside the state of residence or when a person is travelling with such a weapon from one state to another. The Commission considers that here too<sup>13</sup> the option of using the procedure in Article 12 (1), which should solve certain transfer difficulties, has apparently been ignored.

(114) Since a proportion of collectors’ items are neutralised weapons, many of the problems faced by their holders could be solved by an agreement between Member States or by adoption at Community level of common standards on neutralisation.

(115) As for other antique weapons, some interested parties would prefer a definition which would not only refer to a date, but would be based on more detailed technical criteria (guns using black powder/smokeless powder). Nevertheless, they would prefer not to extend the Directive to these weapons. Some interested parties are, on the other

<sup>592</sup> ‘Antique Firearms and the Law’, BASC, February 2014.

<sup>593</sup> British Firearms Law Handbook; Saunbury, Docherty, Dobby; Sweet & Maxwell, 7<sup>th</sup> ed., para.1-29.

<sup>594</sup> As amended by Directive 2008/51/EC; 18 June 1991.

<sup>595</sup> Brussels, 15.12.2000 COM (2000) 837 final; para. 4.2.2. “Antique firearms”.

hand, completely satisfied with the Directive as it stands, but are, nevertheless, ready to examine the proposals of those that are not satisfied with its provisions.

(116) The majority of Member States seem to show a preference for a definition by date reference, but consultations that have taken place until now, have not led the Commission to waive the possibility of a new definition combining technical, objective and enforceable criteria with a reference to a specific date.

### III. TROPHIES (OF WAR)

#### BACKGROUND

- 4.61 None of the current Firearms Acts define the expression “trophies of war”.
- 4.62 There is a long history of combatants in armed conflicts retaining ‘souvenirs’ or “trophies of war”.<sup>596</sup> No provision was made in the Pistols Act 1903 regarding such trophies, but the statutory controls placed on the carrying and use of firearms, were exceedingly limited in any event.
- 4.63 By the end of the First World War the position had markedly changed. The Blackwell Committee was much troubled by the fact that the war would have “added enormously to the world's stock of rifles and pistols, that large numbers of pistols, and possibly other weapons, will have come into the possession of private persons, notably discharged soldiers and their relatives, and that the number of men skilled in the use of firearms will have greatly increased.”<sup>597</sup> The Committee cited passages from the Report of the Sub-Committee on Arms Traffic:

We start with the assumption that, whatever the military results of the war, its conclusion will leave all the belligerent countries in the possession of vast quantities of arms, ammunition, and war material of every description, for the greater part of which the Governments concerned will presumably have no further use. The world's total stocks of destructive weapons will in fact be infinitely greater than at any previous period in history; and the difficulty in preventing these weapons from reaching undesirable hands will be proportionately increased. Every belligerent government will be faced with the temptation to recoup itself in some small degree for its heavy war expenditure by selling its surplus arms to private dealers; and, in some cases at all events, there will be no counteracting motive of self-interest to serve as a deterrent.

- 4.64 The Blackwell Committee was also concerned about the possibility of violent and armed civil unrest, and it shared the views expressed by the Sub-Committee (in language that is unpalatable today):

3. We regard the whole position as one of considerable gravity. There are two distinct categories of person from whom danger is to be apprehended, viz., (1) the savage or semi-civilised tribesmen in outlying parts of the British Empire, whose main demand is for rifles and ammunition, and (2) the anarchist or ‘intellectual’ malcontent of the great cities, whose weapons are the bomb and the automatic pistol. There is some force in the view....that the latter will in future prove the more dangerous of the two. At any rate, his activities will call for unceasing vigilance, and very special precautions will be necessary to control the trade in automatic pistols, which, apart from their extreme

<sup>596</sup> See, for example, the paper by Mark Clayton, “To the victor belongs the spoils: a history of the Australian War Trophy Collection, 1914-1993”, Mark Clayton. Monash University M.A. (Public History) Thesis submitted 1993.

<sup>597</sup> ‘Report of Committee on the Control of Firearms’; 15<sup>th</sup> November 1918, para.2.

deadliness, are, by reason of their size and shape, more easily smuggled than any other type of weapon. As regards the tribesman, he already possesses rifles in abundance, and, desirable as it is to prevent him from adding to their number, it is, in our opinion, of still greater importance to check his supplies of ammunition, without which his weapons are useless to him...

4.65 The Firearms Act 1920 placed restrictions and prohibitions on the acquisition, possession, use, and carrying of firearms. Central to the legislative regime was the mechanism for granting firearm certificates by a chief police officer if he was satisfied that the applicant was a person who had *good reason* for requiring such a certificate,<sup>598</sup> that his possession and use of the firearm would not be a danger to the public, and that the officer had no reason to believe the applicant to be of “intemperate habits or unsound mind” or otherwise “unfitted to be entrusted with firearms”.<sup>599</sup>

4.66 The “good reason” requirement afforded a degree of discretion to chief police officers, but (as originally drafted) section 13(2) of the 1920 Act enacted a saving in respect of trophies of war, by which no certificate was needed at all to *possess* “trophies of the present or any former war” provided that the owner had given notice of that fact to the chief officer of police, *and* that the latter signified that a certificate could be dispensed with unless the chief officer was of the opinion that the owner was not a person to whom a firearm certificate would be granted.” Section 13(2) was subject to a proviso that “such firearms possessed as trophies shall not be used or carried, and that no ammunition therefor may be purchased”.<sup>600</sup>

4.67 The position was reviewed by the Bodkin Committee in 1934:

Under the existing law, once a dispensation is granted under section 13(2) of the Act of 1920 no further communication in regard to it need be made by the possessor, and the police accordingly lose touch of "trophies" many of which, possibly weapons of quite serviceable character, get into the hands of persons other than those to whom the dispensations were originally granted. In order that the police should be able to keep track of these weapons and their holders it has been suggested that dispensations should be operative for three years and then renewable by the owner. The dispensations should, it was suggested, contain such conditions as would ensure the safe custody of the trophy. We agree with these proposals and we recommend their adoption.

We further recommend that in view of the very large numbers of firearms. which were given up to the police in 1933 when an appeal was issued requesting persons in possession of such weapons to surrender them, the appeal should be renewed in due course and should refer to trophies as well as to other firearms.

4.68 In the event, the Firearms (Amendment) Act 1936, provided that the saving in section 13(2) of the 1920 Act (and any dispensation that had been granted before the passing of

<sup>598</sup> Section 1(2) of the Firearms Act 1920.

<sup>599</sup> Section 1(2), proviso (a) of the Firearms Act 1920.

<sup>600</sup> The proviso was inserted into the Act when debated as a Bill (the Earl of Onslow; HL Deb 29 April 1920 vol 40 c.44.



the 1936 Act<sup>601</sup>), would cease to have effect,<sup>602</sup> and that no further dispensation would be granted.<sup>603</sup>

4.69 The legislation was consolidated a few months later in the Firearms Act 1937.<sup>604</sup> The saving for firearms as trophies of war was not re-enacted,<sup>605</sup> and accordingly, such firearms were brought under the firearms certification procedure. In other words, the possession of so-called ‘trophies of war’ was permissible subject to a firearm certificate being granted by a chief officer of police. No fee was payable for a certificate granted or renewed which related “solely to a firearm” that was shown “to the satisfaction of the chief officer of police to be kept by the applicant as a trophy of a war”.<sup>606</sup>

4.70 The 1968 Act enacted a similar regime in relation to trophies of war, and by section 32(4)(a) of that Act, no fee is payable for the grant or renewal of a firearm certificate in respect of such trophies.

4.71 In 1997, the government decided to impose a general prohibition on short barrelled weapons subject to specified exceptions, and accordingly, the Firearms (Amendment) Act 1997 amended the list of “prohibited weapons” by adding paragraph (aba) to section 5(1) of the Firearms Act 1968:

(aba) ...any firearm which either has a barrel less than 30 centimetres in length or is less than 60 centimetres in length overall, other than an air weapon, [a small-calibre pistol],<sup>607</sup> a muzzle-loading gun or a firearm designed as signalling apparatus...

4.72 However, because many trophies of war were handguns, Parliament enacted section 6 of the 1997 Act with reference to such trophies in order to maintain the status quo at least in relation to trophies of war acquired before the 1<sup>st</sup> January 1946:

The authority of the Secretary of State...is not required by virtue of subsection (1)(aba) of section 5 of the 1968 Act for a person to have in his possession a firearm which was acquired as a trophy of war before 1st January 1946 if he is authorised by a firearm certificate to have it in his possession.

4.73 It follows that a *replica* of such a weapon does not receive the protection of this provision, nor does it extend to trophies acquired in later wars.

4.74 Unlike section 13(2) of the 1920 Act (as originally enacted), no provisos to section 6 were enacted that expressly prohibit firearms that are possessed as trophies from being used, or that ammunition may not be purchased in respect of them, but there is no reason why a firearm certificate cannot impose conditions of that kind.

<sup>601</sup> Royal Assent was the 31<sup>st</sup> July 1936.

<sup>602</sup> After a three months from the 1936 Act receiving Royal Assent.

<sup>603</sup> Section 1(8), of the Firearms (Amendment) Act 1936.

<sup>604</sup> Royal Assent, 18<sup>th</sup> February 1937.

<sup>605</sup> There was a three month transitional period: see section 31 of the Firearms Act 1937.

<sup>606</sup> Section 3(4) of the Firearms Act 1937.

<sup>607</sup> As originally enacted by the Firearms (Amendment) Act 1997, paragraph (aba) (inserted into section 5(1) of the 1968 Act) included the words “a small-calibre pistol” (see above). However, within months of this provision coming into force, the Government passed the Firearms (Amendment) No.2 Act 1997, with the effect that from the 1st February 1998, the words “small-calibre pistol” were omitted from section 5(1)(aba). The above amendment did not affect section 6 of the earlier 1997 Act in relation to trophies of war.

## HOME OFFICE GUIDANCE

- 4.75 The Home Office Guide suggests that the term “trophy” is “generally held to refer to firearms either carried on active service or captured from the enemy”.<sup>608</sup> Whilst this may be the view of the Executive (and probably correct) it is not one that has yet been approved in the courts. The Guide states that the expression may be interpreted fairly widely when persons of good repute wish to retain possession of a firearm without the associated ammunition, providing that it is not government property.<sup>609</sup> The question of whether it is “permissible” to possess a firearm that is “government property” is of importance:

Weapons issued or captured after the Second World War are government property and their retention is not permitted. This applies to weapons brought back from other conflicts, for example, the Falklands campaign in 1982 and the Gulf War in 1990-91, or more recently Afghanistan (2001 to present) or Iraq (2003 to 2011).<sup>610</sup>

- 4.76 The above extract is not specific to section 6 of the 1997 Act (but appears in the context of what constitutes ‘good reason’ for having a firearm for when a firearm certificate is under consideration). However, in the context of section 6 of the 1997 Act, the question may still arise whether a handgun acquired as a trophy before the 1<sup>st</sup> January 1946 was UK government property or, at least, that it belonged to another government or person - or whether the issue is irrelevant to the operation of the section 6 exemption.

### Heirs in possession of trophies of war

- 4.77 The terms of section 6 of the 1997 Act are not limited to the person who first acquired the handgun. Accordingly, it is arguable that it applies to a person who had, for example, inherited the trophy. However, this is not the view expressed in the Home Office Guide:<sup>611</sup>

Firearms acquired from the original holder and no longer held as family heirlooms should not normally be regarded as “trophies of war” and should be subject to the normal firearm certificate procedure. They may qualify for Section 7.1 or 7.3 status [antique firearms]....The provisions of section 6 of the 1997 Act make no mention of the inheritance of handguns held as trophies of war so these cannot be inherited directly under those provisions. However, the Home Office is prepared, in principle, to grant the Secretary of State’s authority to allow new heirs to inherit such weapons, and they may then be entered on the heir’s certificate as “trophies of war” in the usual way.

- 4.78 For what the point may be worth, it is to be noted that when the 1997 Act was being debated as a Bill, the Government was then minded to table an amendment to “enable the heirs of people who have held trophies of war likewise to be exempt”.<sup>612</sup>

<sup>608</sup> Guide on Firearms Licensing Law 2015, para.13.62.

<sup>609</sup> Guide on Firearms Licensing Law 2015, para.13.62.

<sup>610</sup> Guide on Firearms Licensing Law 2015, para.13.62.

<sup>611</sup> Guide on Firearms Licensing Law 2015, para.13.63.

<sup>612</sup> Miss Widdecombe: HC Deb 19 November 1996 vol 285 c.866.

## IV. FIREARMS (HANDGUNS) OF HISTORIC INTEREST

### BACKGROUND

- 4.79 The general prohibition on the acquisition, purchase and possession of handguns,<sup>613</sup> introduced by the Firearms (Amendment) Act 1997, and the extension of that ban to small-calibre pistols by the Firearms (Amendment) No.2 Act 1997, encompassed many firearms of historic interest.
- 4.80 To address this issue, Parliament enacted section 7 of the 1997 Act (No.1) under which the authority of the Secretary of State is not required in order for a person to purchase, acquire or to possess a firearm of “historic interest” provided certain conditions are met. Those conditions fall into two categories of historic handguns,<sup>614</sup> namely, (i) “those which may be kept at home without ammunition, and (ii) “those which may be kept and fired at a designated secure site.”<sup>615</sup>

#### First category: section 7(1), F(A)A 1997

- 4.81 The essential conditions for the purposes of section 7(1) of the 1997 Act are:
- (1) The firearm in question was manufactured before 1st January 1919.<sup>616</sup>
    - (a) The Home Office Guide provides examples of firearms that stopped being made after 1919 (which include the Enfield Mk I and Mk II .476 service revolvers),<sup>617</sup> as well as those made only after that date.<sup>618</sup>
    - (b) Where the production of a particular model of a firearm spans the 1<sup>st</sup> January 1919, the Home Office Guide states (correctly it is submitted) that section 7 F(A)A 1997 requires proof that the firearm in question was made before that date (evidenced, for example, by the serial number of the firearm).
  - (2) The firearm is of a *description* specified by the Secretary of State (by Statutory Instrument).<sup>619</sup>

This has been done by virtue of the Firearms (Amendment) Act 1997 (Firearms of Historic Interest) Order 1997, by embracing any handgun that is *not* chambered for the types of ammunition specified in the Order<sup>620</sup> (replicated in the Home Office Guide<sup>621</sup>).
  - (3) The ammunition for the firearm is of a type that is not readily available.<sup>622</sup> This condition will be satisfied if the handgun is not chambered for the types of ammunition specified in the 1997 Order.

<sup>613</sup> Subject to the authority of the Secretary of State being obtained.

<sup>614</sup> That is to say, other than antiques and muzzleloaders.

<sup>615</sup> Guidance on Firearms Licensing Law (March 2015); para.9.5.

<sup>616</sup> Section 7(1)(a), Firearms Amendment Act 1997.

<sup>617</sup> Guidance on Firearms Licensing Law (March 2015); para.9.12. Note, that in *Bennett v Brown*, the Divisional Court was prepared not to disturb the finding of the justices that an Enfield Mk II held by the respondent, was an “antique” for the purposes of section 58(2) FA 1968.

<sup>618</sup> Guidance on Firearms Licensing Law (March 2015); para.9.13.

<sup>619</sup> Section 7(1)(b), and section 2, of the 1997 Act.

<sup>620</sup> Firearms (Amendment) Act 1997 (Firearms of Historic Interest) Order 1997 (SI 1997 No.1537).

<sup>621</sup> Guidance on Firearms Licensing Law (March 2015); para.9.9.

<sup>622</sup> Section 7(2)(b), of the 1997 Act.

- (4) The person in possession (etc) is authorised by a firearms certificate to have the firearm only for the purpose of its being kept or exhibited as part of a “collection”.<sup>623</sup> The words ‘collection’ is not defined, but the Guide lists the factors that police ought to take into consideration when assessing whether the firearm is genuinely to be kept as part of a collection.

### **Second category: section 7(3), F(A)A 1997**

4.82 The essential conditions for the purposes of section 7(3) of the 1997 Act are:

- (1) The firearm is of *particular rarity*,<sup>624</sup> *aesthetic quality*<sup>625</sup> or *technical interest*,<sup>626</sup> or it is of *historical importance*.<sup>627</sup>

None of these expressions is defined, but the Guide lists<sup>628</sup> criteria that the Home Office suggests might be relevant in evaluating whether the firearm in question falls within each of these categories. These include:

- (i) A ‘collection’ of firearms will normally have to consist of several related firearms of historic interest, rather than only one or two guns (but see (iii) below about being part of a larger collection of other artefacts)...These should all be part of a coherent collection, rather than held for game-shooting or other purposes”.
- (ii) The collection would be expected to be of historic interest, rather than simply of personal or sentimental interest to the owner. Owners would normally be expected to produce supporting evidence, for example a letter from a national museum or a relevant society or interest group, that the collection was of genuine historic value.
- (iii) A firearm could be possessed under this section if it is part of a collection of other artefacts so long as the firearm is a significant component of the collection. This may be the case where the firearm forms a small part of a larger and established collection of related historic items, for example those relating to a famous historical figure. The police may reject ‘collections’ of other artefacts put forward mainly to support the possession of a single firearm;
- (iv) Genuine collectors of firearms for their own interest will often, though not always, be established members of the learned societies in this field, for example the Historical Breech loading Small arms Association or the Vintage Arms Association;
- (v) The collection will usually need to be established and substantial before a firearm certificate, or Section 7 variation, is granted. The police will not normally grant a certificate for a single gun to begin a collection, unless there is very strong evidence that this will, in a short period of time, form part of a larger collection (although some collectors may have smaller collections). It should be recognised that since 1997, the availability of this category of firearm is much reduced and hence it may not be easily or quickly acquired;
  - (i) If a firearm certificate is granted in respect of a collection, the police will wish to consider applications to acquire further historic firearms on

<sup>623</sup> Section 7(1) of the 1997 Act.

<sup>624</sup> Guidance on Firearms Licensing Law (March 2015), para.9.32.

<sup>625</sup> Guidance on Firearms Licensing Law (March 2015), para.9.27.

<sup>626</sup> Section 7(3)(a) of the 1997 Act; Guidance on Firearms Licensing Law (March 2015), para.9.30.

<sup>627</sup> Section 7(3)(b) of the 1997 Act; Guidance on Firearms Licensing Law (March 2015); para.9.26

<sup>628</sup> Guidance on Firearms Licensing Law (March 2015); para.9.20.

individual merits. In particular, the police will wish to be satisfied that any new guns will form a proper part of the existing collection which may have more than one theme;

(ii) Anyone wishing to begin a collection will have to provide evidence of a genuine and well-established interest in historic firearms (see also (v) above).

(2) The person is authorised by a firearm certificate to have the firearm in his possession subject to a condition requiring it to be kept and used only at a place designated for the purposes of section 7(3) by the Secretary of State [or the Scottish Ministers (by virtue of provision made under section 63 of the Scotland Act 1998)].<sup>629</sup>

4.83 Although the aim of the Guide is laudable, the reality is that section 7 of the 1997 Act imposes no criteria (or factors) of the kind stated in the Guide. The expression “historic interest” is not defined, still less that “historic *value*” is required, nor is it a statutory criterion that a collector will typically be an “established member” of a “learned society” in the field.

## V. COLLECTIONS: “PROHIBITED” ITEMS: SECTION 5(1A)

4.84 By section 5A of the 1968 Act, the authority of the Secretary of State is not required for a person to possess, purchase, acquire, sell or transfer, an item specified in s.5(1A) if he has a firearm certificate in respect of it “*for the purpose of its being kept or exhibited as part of a collection*”. Such a person will be required to comply with the certification procedures enacted in Part II of the 1968 Act [firearm and shotgun certificates].

4.85 Section 5(1A) includes (among other items) any firearm which is disguised as another object (for example, a stun gun disguised as a torch); missiles for military use that are designed to explode on or immediately before impact; launchers for use with specified rockets or ammunition; armour-piercing ammunition for military use; and expanding ammunition.

4.86 Section 5(1A) of the 1968 Act, was inserted by regulation 3 of the Firearms Acts (Amendment) Regulations 1992,<sup>630</sup> in order to comply with Council Directive No. 91/477/EEC (article 6, Annex I, Category A).<sup>631</sup>

4.87 By section 5A(3) of the Act, a person - who is recognised by the law of another EU Member State to be a “collector of firearms or a body concerned in the cultural or historical aspects of weapons” - may possess, purchase or acquire (but not to sell or dispose of) an item specified in section 5(1A). Such a person must be able to show (to a constable) that he is entitled to possess the item under section 5A(3) and, if he fails to do so, the constable may demand from that person the production of a valid document that was issued to him in another member State “under any such corresponding provisions”, which identifies the firearm.

4.88 The exemptions were evidently drafted to give effect to article 2 of the Council Directive.<sup>632</sup>

<sup>629</sup> Section 7(3) of the 1997 Act.

<sup>630</sup> SI 1992 No.2823.

<sup>631</sup> See Guide on Firearms Licensing Law 2015, Appendix 10, where the categories A-D are set out.

## VI. PROBLEMS WITH THE CURRENT LAW

### Disaggregated legislation

- 4.89 Since the repeal of the Firearms Act 1920, the Acts of 1937 and 1968 have largely consolidated a large number of measures introduced piecemeal.<sup>633</sup> The 1968 Act has itself been heavily amended and the regime supplemented by enactments which need to be read together with the 1968 Act. For example:
- i. Whereas the 1997 Act inserted section 5(1)(aba) into section 5(1) of the 1968 (and thereby included handguns to the list of “prohibited weapons”), a number of exemptions from the requirement to obtain the authority of the Secretary of State are *not* incorporated in the 1968 Act but remain in the 1997 Act. Accordingly, the two Acts must be read together. By way of contrast, section 5(1A) was inserted into section 5 of the 1968 Act by the 1992 Statutory Instrument, but exemptions (from the requirement to obtain the authority of the Secretary of State) were incorporated into the 1968 Act (section 5A).
  - ii. In *R v Bewley*<sup>634</sup> the Court of Appeal held (correctly it is submitted) that although the Firearms Act 1982 does not directly amend the Firearms Act 1968, it is to be regarded as having done so by enlarging its reach to those imitation firearms which fall within the provisions of section 1(1) of the 1982 Act.
- 4.90 As this chapter demonstrates, the same handgun might fall to be considered as “antique” (section 58(2) FA 1968), or one of “historic interest” (section 7, 1997 Act), or a “trophy of war” (section 6, 1997 Act), or – if it falls within section 5(1A) – it may be subject to an exemption set out in section 5A of the 1968 Act.

### Lack of definitions

- 4.91 Key expressions such as “antique”, “curiosity”, “ornament”, “trophy of war” (among others), are not defined in the legislation.
- 4.92 There tends to be an assumption that provisions relating to “antique firearms” relates to a weapon that is complete, but section 57(1) FA 1968 defines “firearm” broadly, and includes a “component part” of a “lethal barrelled weapon” or a “prohibited weapon”, as well as “accessories” falling within section 57(1)(c). Accordingly, it is arguable that an (e.g.) 19<sup>th</sup> century “component part” – such as a cylinder – could constitute an “antique” for the purposes of section 58(2). It is submitted that a matter as fundamental as this, ought not to be left unclear, but should be dealt with in a statutory code.

<sup>632</sup> Article 2 provides: “This Directive shall not apply to the acquisition or possession of weapons and ammunition, in accordance with national law, by the armed forces, the police, the public authorities or by collectors and bodies concerned with the cultural and historical aspects of weapons and recognized as such by the Member State in whose territory they are established. Nor shall it apply to commercial transfers of weapons and ammunition of war.”

<sup>633</sup> The 1937 Act repealed the Firearms Act 1920, the Firearms and Imitation Firearms (Criminal Uses) Act 1933, the Firearms Act 1934, and the Firearms (Amendment) Act 1936. The 1968 Act repealed (among others) the Firearms Act 1937, the Air Guns and Shot Guns Act 1962, and the Firearms Act 1965.

<sup>634</sup> [2012] EWCA Crim 1457.

## **Historic Interest Firearms are controlled: Antiques are exempt**

- 4.93 A person who holds a firearm of “historic interest” is afforded an exemption under section 7 of the 1997 Act, from obtaining the authority of the Secretary of State. But a person who acquires, possesses, sells or transfers, such a firearm, will still be subject to the certification regime enacted in Parts I and II of the 1968 Act. By contrast, a firearm that is “antique” and falls within section 58(2) will not be subject to regulation under the 1968 Act at all. The latter saving appears to apply to any “firearm” regardless of whether it is in good working order or not, and regardless its type (handgun, or a Great War mortar).
- 4.94 The Home Office Guide includes suggested criteria which touch upon various exemptions and savings set out in the legislation, including firearms possessed or acquired as part of a “collection” and in respect of “trophies of war”.<sup>635</sup> The Guide does not confine the use of the expression “trophies of war” to the ‘section 6 exemption’<sup>636</sup> (i.e. to possess (etc) handguns falling within section 5(1)(aba) of the 1968 Act), but employs that expression more widely. This is not surprising given that the 1968 Act does not provide a statutory definition of a ‘trophy of war’. However, the absence of a statutory definition leads to confusion when the same firearm might also fall to be considered as “antique”, a “trophy of war”, or is “of historic interest”.
- 4.95 The mischiefs of legal uncertainty are that injustice can result and creates difficulties of enforcement or compliance. Legal uncertainty also permits abuse: there are anecdotal accounts, and media reports, that section 58(2) [antique firearms] is being abused by criminals who seek to justify their possession of a firearm without a certificate as a firearm that is “antique”.<sup>637</sup>

## **Statutory savings; ‘good reason’ discretion; and certificate conditions**

- 4.96 There is a degree of overlap between the conditions that must be satisfied in respect of statutory exemptions or savings, and the grounds on which a ‘firearm certificate’ may be granted or refused under section 27 of the 1968 Act (as amended). Under section 27, the chief officer of police must be satisfied (among other things) that the applicant has “good reason” for having the firearm (section 27(1)(b)). “Good reason” is not an expression which is explained or clarified in the Act by way of (for example) a statutory list of factors or criteria (or a statutory code of practice). Yet, chapter 13 of the Home Office Guide (2015) is devoted to factors that, in its opinion, constitute “good reason”.
- 4.97 A firearm certificate may specify conditions (section 27(2), FA 1968), but there are no statutory words of limitation as to the kind of conditions that may be specified. It was said in Parliament (at the time that the 1997 Act was being debated as a Bill) that the “police are able to specify that a weapon must be dismantled”:

That often depends on the same issues that are raised when considering whether guns are being kept securely - how old the guns are, whether they are capable of being fired,

<sup>635</sup> Guidance on Firearms Licensing Law (March 2015); para.13.62.

<sup>636</sup> Section 6 of the Firearms Act 1997 under which the authority of the Secretary of State is not required by virtue of section 5(1)(aba) if the person has in his possession a ‘trophy of war’.

<sup>637</sup> Daily Mail (July 2014): <http://www.dailymail.co.uk/news/article-2690874/Law-tightened-antique-guns-Loophole-allows-criminals-working-weapons-closed.html#ixzz3Pdog1oU1>

who is keeping them and under what conditions and whether dismantling would be sensible.<sup>638</sup>

- 4.98 There is no express power in the 1968 Act (or in the Firearms Rules 1988, as amended)<sup>639</sup> for a condition of “dismantling” to be specified in the granting of a firearm certificate.<sup>640</sup> Conditions attached to a ‘firearm certificate’ that, (a) a firearm should be dismantled (whether it is of “historic interest”, or a “trophy of war”, or otherwise valuable) or (b) that it is to be rendered incapable of being fired (e.g. by the barrel being blocked), are not ones that should be imposed lightly (and which, arguably, should only be imposed if there is statutory authority to do, and subject to approval or review by a court). Were “antique firearms” to be brought within the certification regime enacted under Part II of the 1968 Act, conditions of this sort would doubtless be viewed with great concern by collectors and by those persons who have an intellectual interest in such items. It is unclear whether section 44 of the 1968 Act [“Appeals against police decisions”] grants the applicant power to appeal against a decision of the chief officer to impose a given condition.<sup>641</sup>

<sup>638</sup> Miss Widdicombe; HC Deb 19 November 1996, vol 285 c 867.

<sup>639</sup> SI 1998 No 1941.

<sup>640</sup> Rule 3(5), of the 1988 Rules provides, “Where a chief officer of police is satisfied on an application for the grant or renewal of a firearm certificate in relation to any firearm, weapon or ammunition that it is a firearm, weapon or ammunition to which section 5A(1) or (4) of the principal Act or section 3, 4, 5, 7 or 8 of the 1997 Act apply and that it is to be used only for the purpose or purposes specified in those sections, the certificate shall be subject to an additional condition restricting the use of that firearm, weapon or ammunition to use for that purpose or purposes.”

<sup>641</sup> See *The British Firearms Law Handbook*, Saunbury et al, Sweet & Maxwell, 7<sup>th</sup> ed., para.3-24, p.39.