

# CHAPTER 4

## ANTIQUES

### INTRODUCTION

- 4.1 This chapter will outline the current law relating to antique firearms, specify the problems the current law is causing and suggest some possible solutions to them. This issue is one of the most difficult to resolve and yet it is one of most pressing problems. At present, fully functioning firearms are freely held without any control simply on the basis of their age and because the person in possession treats the article as a curiosity or ornament. The problem is that although the legislation exempts 'antique firearms' that in many cases would otherwise be prohibited weapons from its scope, there is no definition of that term. At the outset it is important to point out that the exemption for antiques is primarily relied upon by legitimate collectors. There is evidence to suggest, however, that criminal exploitation of the exemption is on the rise. This makes it crucial to be able to tell which firearms fall within the exemption.
- 4.2 As this chapter will explain, the current law poses the following problems:
- (1) public safety is put at risk when working firearms that can be acquired without any form of restriction fall into the possession of criminals;
  - (2) the police cannot be certain whether a suspect is unlawfully in possession of a prohibited weapon;
  - (3) the CPS have difficulty deciding whether to charge an individual with an offence;
  - (4) experts rely upon different criteria when giving evidence on whether a firearm is an antique which confuses juries and leads to inconsistent trial outcomes; and
  - (5) legitimate collectors are unable to know with certainty whether they are complying with the law.
- 4.3 At the end of this chapter, there is a flowchart which may be of assistance in understanding the present law in relation to antique firearms.

### BACKGROUND

- 4.4 The Pistols Act 1903 was the first attempt at firearms control in the United Kingdom. The Act required anyone who wished to purchase a pistol to first obtain a licence. The licence was obtainable on demand from a Post Office. It is for this reason that the 1903 Act has been characterised as an ineffective control on the circulation of firearms.<sup>1</sup> An antique pistol sold as a curiosity or ornament was exempt from the provisions of the Act.

<sup>1</sup> C Greenwood, *Firearms Control* (1972), 28. It is unclear whether the true purpose of the Act was curtailing the circulation of dangerous firearms or whether it was to raise revenue.

- 4.5 Section 2 specified what was not to be considered an antique pistol for the purposes of the act:

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.

- 4.6 It seems that the Pistols Act 1903 sought to define an antique not solely by reference to the age of the article, but also by reference to whether it posed a danger to the public. It is important to emphasise that the Act only regulated sales of pistols, not possession or ownership.

- 4.7 The Pistols Act 1903 was repealed by the Firearms Act 1920. 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.

- 4.8 What immediately distinguishes this provision from section 2 of the Pistols Act 1903 is that it does not provide any criteria for determining whether a firearm is an antique, other than it being held as a curiosity or ornament. The method that had been adopted by section 2 of the 1903 Act was abandoned, although not completely. To fall within section 13(1) the firearm still had to be held as a curiosity or ornament.
- 4.9 The 1920 Act also made an attempt to regulate the possession of firearms, rather than just their acquisition. The exemption for antiques therefore also applied not just to those that were bought and sold, but also to those that were carried or otherwise possessed.
- 4.10 The lack of certainty in section 13(1) did not go unnoticed. During debate in Parliament, the Earl Winterton stated that, “I hope that before the Committee stage the Government will put down an Amendment making those words a little clearer, because I think they will be very difficult to interpret, and may lead to litigation.”<sup>2</sup>
- 4.11 The Firearms Act 1937 replaced the 1920 Act. Section 33(5) used similar language in excluding antique firearms from its provisions, the only difference being that ‘carried’ was omitted. This amendment had the effect of exempting antique firearms from the certification requirements specified by the legislation.

#### **THE CURRENT LAW**

- 4.12 As Chapter 1 explained, the principal Act setting out the law relating to firearms is Firearms Act 1968. This was a consolidating measure and therefore incorporates many of the provisions contained in previous legislation.
- 4.13 Section 58(2) incorporates the saving that had previously been found in section 33(5) of the Firearms Act 1937. Section 58(2) provides:

<sup>2</sup> HC Deb 10 June 1920 vol 130 cc 666-667.

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.

- 4.14 The effect of this provision is to exempt antique firearms from the provisions of the 1968 Act. This means, for example, that an antique firearm can be possessed without first having to obtain a firearm certificate.
- 4.15 There are three crucial terms in section 58(2), none of which is defined: antique, curiosity and ornament. The lack of clarity in this definition was criticised by Francis Bennion who stated that the drafter used “a flurry of broad terms”.<sup>3</sup>
- 4.16 The section specified 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 is not possessed as a curiosity or ornament then section 58(2) does not apply. This could be the case if the firearm were possessed with the purpose of being fired, for example – indeed, this is the Home Office’s view. It must be emphasised that this is not necessarily the law, just one interpretation of the phrase “curiosity or ornament”. It is arguable that something can still be a curiosity even if it is possessed with the purpose of being occasionally fired. There is significant ambiguity here.
- 4.17 It is questionable whether some of the terms in the section are of relevance today. For example, given the high value of some antique firearms, it is unlikely that they would be out on permanent display. If not, it might be unclear whether they could be characterised as being ornaments. This issue arose in the case of *Burke*.<sup>4</sup> The Court of Appeal held that the trial judge should have left the issue of whether the firearm was an ornament to the jury.
- 4.18 In the absence of statutory definitions, it has been left to the courts to determine how these key terms ought to be understood.
- 4.19 It is fair to say that an assessment of the case law reveals a significant lack of certainty on what characteristics a firearm must have before it can be considered an antique for the purposes of section 58(2).

#### **The approach of the courts**

- 4.20 The first reported case to touch upon this issue was *Howells*.<sup>5</sup> In this case the Court of Appeal confirmed that once the defendant (D) has adduced sufficient evidence to raise the issue, it is for the prosecution to prove that a firearm is not an antique. The trial judge, in directing the jury on how to assess whether the firearm in question was an antique, had stated that:

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

<sup>3</sup> F Bennion, “Jaguars and donkeys: distinguishing judgment and discretion” (2000) 31 *The University of West Los Angeles Law Review* 7.

<sup>4</sup> (1978) 67 Cr App R 220.

<sup>5</sup> [1977] QB 614.

which claim that it means something 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.<sup>6</sup>

- 4.21 The Court of Appeal did not comment on the appropriateness or otherwise of this direction. It was held that D could be guilty of possessing a firearm without a certificate even though he had an honest belief that the firearm in question was an antique. It was held that this was purely a question of fact and that D's belief was irrelevant.
- 4.22 What this case confirms is that it is no defence for an individual to have a genuine belief that the firearm was an antique. It is therefore possible for an individual to commit an offence which now carries a mandatory minimum five-year custodial<sup>7</sup> sentence *even if* the firearm was purchased from an antiques dealer who sold it as an antique and both the seller and buyer believed that it was one.
- 4.23 Stakeholders have reported to us that this lack of clarity is a concern for legitimate collectors.<sup>8</sup> They have said the trade in antique firearms is significant and, as this chapter will demonstrate, in addition to posing a risk to public safety, the current state of the law has the potential to undermine this trade.
- 4.24 In *Richards v Curwen*<sup>9</sup> D possessed two revolvers made in the late nineteenth century. These hung on his wall and were capable of being fired, although it was accepted that D had no intention of doing so. On behalf of the prosecution it was submitted that these 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 of three counts of possessing a firearm without a certificate.
- 4.25 On appeal to the High Court, counsel for the Crown suggested that there existed three ways of approaching the issue as to how antique ought to be defined.<sup>10</sup>
- (1) The first was to hold that the question was a matter of 'fact and degree' for the jury.
  - (2) The second was to select an age which a firearm had to exceed before it could be considered an antique. Mr Justice Wien, however, 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.
  - (3) 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. Mr Justice

<sup>6</sup> [1977] QB 614, 619, quoting HHJ Phelan.

<sup>7</sup> If the purported antique is otherwise eg a s 5(1)(aba) FA 1968 prohibited handgun.

<sup>8</sup> See also <http://www.antiquestradegazette.com/news/2012/jun/26/firearms-law-causes-confusion/> (last visited 7 July 2015).

<sup>9</sup> [1977] 1 WLR 747.

<sup>10</sup> [1977] 1 WLR 747, 751-752.

Wien 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. Second, his lordship held that it was impermissible to look at an earlier Act for guidance where the words had not been repeated in subsequent legislation.

4.26 Mr Justice Wien favoured the first of the three approaches enumerated by counsel, and dismissed the Crown's appeal.

4.27 In agreeing that the appeal ought to be dismissed, Mr Justice Eveleigh 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.<sup>11</sup>

4.28 Finally, in that case Lord Widgery CJ expressed some sympathy with the argument that the term antique ought to be defined with greater certainty but observed 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."<sup>12</sup> The Lord Chief Justice agreed that the issue of whether a particular firearm is an antique ought to be left to the jury.

4.29 By 1977 it seems that the term antique had been deemed to be an ordinary English word. It had therefore become a question of fact, not law. Such an approach would permit the jury to attribute to antique any meaning they deem to be appropriate. This is because the Divisional Court was reluctant to define the term in the absence of any legislative attempt to do so.

4.30 This approach has been confirmed in subsequent cases, for example in *Burke*.<sup>13</sup> In this case, the court reiterated what was decided in *Howells*, namely that once the defendant has raised the matter, the burden is on the prosecution to prove beyond reasonable doubt that the firearm is not an antique.

4.31 No further light is shed by the case of *Bennett v Brown*.<sup>14</sup> Police found three firearms in D's home, two from the early twentieth century and one from the late nineteenth. The magistrates acquitted D of possessing a firearm without a certificate and the Crown appealed. The sole question for the Divisional Court was whether the magistrates had been entitled to conclude that the weapons in D's possession were antiques. Counsel for the Crown contended that no reasonable bench of magistrates could have arrived at the conclusion that the firearms in question were antiques.

4.32 Lord Justice Eveleigh observed that it would be reasonable to assume that two of the weapons had been used in the First World War. The judge then stated that:

<sup>11</sup> [1977] 1 WLR 747, 752.

<sup>12</sup> [1977] 1 WLR 747, 752.

<sup>13</sup> [1978] Criminal Law Review 431.

<sup>14</sup> (1980) 71 Cr App R 109.

It seems that 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.<sup>15</sup>

4.33 In agreeing with this outcome, Mr Justice Watkins said:

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.<sup>16</sup>

4.34 These authorities were considered more recently by the Divisional Court in *Thompson*.<sup>17</sup> Lady Justice Butler-Sloss confirmed that the issue of whether a firearm is an antique is a question of fact for the jury. The firearm in question was a rifle that was manufactured in 1906, some 88 years before the defendant was convicted of possessing a firearm without a certificate. The judge held that it was not for the Divisional Court to question the judgment of the magistrates that the firearm was an antique.

4.35 In relation to whether the firearm was held as a curiosity or ornament, Lady Justice Butler-Sloss agreed with counsel for the Crown that the firearm was not treated as an ornament, given that it was tucked away in a wardrobe. Her ladyship also observed that the firearm was not being kept as a firearm that was intended to be used. This was inferred from the fact the firearm had sentimental value, as it had belonged to the defendant's uncle.

4.36 Given that the firearm was inherited, was old, was useless for the purpose for which it was made and the surrounding circumstances the magistrates concluded that the firearm was held as a curiosity. Lady Justice Butler-Sloss saw no reason to depart from this finding.

4.37 There are more recent examples of first instance decisions in which a jury has found that firearms less than 100 years old were antiques.<sup>18</sup>

(1) In *Garfield Stacey*<sup>19</sup> the jury decided that a .455" calibre Webley Revolver made in 1918 was an antique.

(2) In *Kevin Schofield*<sup>20</sup> the jury decided that a 9mm Parabellum calibre Lanchester sub-machine gun made in 1940 was an antique firearm.

4.38 The latter case was highlighted by NaBIS as being of particular concern, given that ammunition for the firearm in question remains readily available.<sup>21</sup> This could

<sup>15</sup> (1980) 71 Cr App R 109, 112.

<sup>16</sup> (1980) 71 Cr App R 109, 112.

<sup>17</sup> CO/1572/94.

<sup>18</sup> L Saunbury and N Doherty, *The British Firearms Law Handbook* (2011), 1-26 to 1-30.

<sup>19</sup> Bournemouth Crown Court, 5 October 2006.

<sup>20</sup> Leeds Crown Court, 18 March 2008.

<sup>21</sup> NaBIS Submission for the 12<sup>th</sup> Programme of Law Reform.

be detrimental from a public safety perspective. That firearms of this nature can be freely held could undermine the public's sense of security.<sup>22</sup>

- 4.39 The cases analysed in this section are important in several ways. First, they confirm the fact that a firearm is less than 100 years old has been decisive in some instances, but not necessarily in others. Secondly, tribunals of fact continue to be left to decide for themselves whether the firearm in question is an antique. As the next section will discuss, this has the potential to be deeply problematic both for investigating authorities and for legitimate collectors of antique firearms. The former may not know whether a firearm that is in the possession of a potential suspect is unlawful and the latter will be unable to know – without a full criminal trial taking place – whether they are complying with the law or potentially committing a serious offence carrying a mandatory minimum five-year prison sentence.

### **The Home Office Guide**

- 4.40 The Home Office's *Guide on Firearms Licensing Law*<sup>23</sup> takes a different approach from the one adopted in both *Richards v Curwen*<sup>24</sup> and *Bennett v Brown*.<sup>25</sup> According to the *Guide*, the fact that a firearm was manufactured in the twentieth century does not necessarily mean that it cannot be classified as an antique.<sup>26</sup> In the *Guide*, the Home Office states that, "antique" should cover those firearms of a vintage and design such that their free possession does not pose a realistic danger to public safety." The *Guide* produces a list of firearms the Home Office believes ought to benefit from the exemption and those that ought not to.<sup>27</sup> In each instance what is decisive is not the age of the firearm, but whether its possession is deemed to pose a risk to public safety. There are parallels between this approach and the one adopted in the Pistols Act 1903.
- 4.41 The *Guide* contains what is known as the 'obsolete calibre list'. This is a list of types of firearm that are chambered for specified types of ammunition and which retain that original chambering. The *Guide* states that these ought to be considered antique for the purposes of the law.
- 4.42 The *Guide* has recently been updated to include a list of those air weapons the Home Office believes ought to benefit from the exemption for antique firearms.
- 4.43 Given that the *Guide* does not have the force of law, when determining whether a firearm is an antique, the jury remains free to conclude that something is an antique even though the Home Office believes it should not be classified as such. The converse is also true. This could be potentially unfair to those who possess what they believe to be an antique, having relied on the Home Office's *Guide*.

<sup>22</sup> As suggested by various newspaper reports examining the use of antique firearms in crime.

<sup>23</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015). Available at <https://www.gov.uk/government/publications/firearms-law-guidance-to-the-police-2012> (last visited 8 July 2015).

<sup>24</sup> [1977] 1 WLR 747.

<sup>25</sup> (1980) 71 Cr App R 109.

<sup>26</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015), para 8.3.

<sup>27</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015), para 8.12 and appendix 5.

The fact that the offence is one of strict liability means that, as a matter of law, it makes no difference that the legitimate collector relied on the *Guide* in good faith. He or she is guilty by virtue of the fact that the jury has deemed the firearm not to be an antique. The potential for unfairness is self evident. If the *Guide* is treated as being an authoritative statement of the law, then there is the argument that it ought to have the force of law and should be placed on a statutory footing.

- 4.44 There is the potential for even greater unfairness to the legitimate collector. The Department for Business, Innovation and Skills and the UK Border Force adopt a different definition of antique from the one contained in the Home Office's *Guide*. Until recently their guidance stated that a firearm is an antique if it is 100 years old.<sup>28</sup> Therefore, if a firearm is at least 100 years old, it is deemed to be an antique and outside the import controls that apply to other firearms. There is no mention in the guidance of the necessity for the firearm to be one that does not pose a danger to public safety. There is no mention of the requirement that the firearm be held as a curiosity or ornament.
- 4.45 The guidance was amended in March 2015. The amended guidance states that a firearm manufactured on or before 31 December 1899 does not require an import licence. Even if the firearm is chambered for an obsolete calibre, the guidance states that an import license is still required if the firearm was manufactured after 31 December 1899.<sup>29</sup>
- 4.46 This change ensures the guidance is in accordance with the United Nations' Vienna Firearms Protocol, which is concerned with the manufacture and trafficking of firearms.<sup>30</sup> This was ratified by the EU in 2013 and the UK opted in to its provisions, meaning it is bound by them. Article 3(1) provides:

Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899.

#### **Firearms of historic interest**

- 4.47 The relationship between antique firearms and firearms of historic interest is also relevant when analysing this area of law. Section 1 of the Firearms (Amendment) Act 1997 amended section 5 of the 1968 Act to extend the list of prohibited weapons to include most handguns. Prohibited weapons can only be possessed under the authority of the Secretary of State. An exception is made in section 7 of the 1997 Act for certain types of historic firearm, provided specific conditions are met.<sup>31</sup>

<sup>28</sup> Border Force Manual, "Customs Guidance – Firearms Import Policy" (December 2011), para 6.7.

<sup>29</sup> Department for Business, Innovation and Skills, "Do I need a BIS Import licence?" (March 2015), p 34, paras 88 to 89.

<sup>30</sup> <http://www.poa-iss.org/FirearmsProtocol/FirearmsProtocol.aspx> (last visited 4 June 2015).

<sup>31</sup> Although section 7 refers to firearms, in fact only handguns fall within these provisions. This means that section 7 only applies to a relatively narrow class of firearm and does not include, for example, rifles.



- 4.48 Section 7(1) of the 1997 Act provides that the authority of the Secretary of State is not needed<sup>32</sup> in order to possess<sup>33</sup> a firearm: (a) manufactured before 1919 and (b) of a type for which ammunition is not readily available. Criterion (b) will be satisfied if the firearm is chambered for ammunition of a kind set out in the Firearms (Amendment) Act 1997 (Firearms of Historic Interest) Order 1997.<sup>34</sup> This is provided for by section 7(2). In its *Guide*, the Home Office provides examples of firearms that stopped being made before 1919 as well as those that continued to be manufactured.<sup>35</sup>
- 4.49 The terms of section 7(1) provide that the person must be authorised by a firearm certificate to possess the firearm, subject to the condition that they only possess it for the purpose of it being kept or exhibited as part of a collection. '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, such as coherence of the collection (that is to say, whether all the firearms in the collection have something in common) and number of guns held.<sup>36</sup>
- 4.50 In addition to this exception, section 7(3) provides that it is not necessary to obtain the authority of the Secretary of State to possess a firearm that (a) is of 'particular rarity, aesthetic quality or technical interest' or (b) is of 'historical importance.' These terms are undefined, but the *Guide* lists some criteria that might be relevant in evaluating whether the firearm in question falls within either of these categories.<sup>37</sup>
- 4.51 The relationship between these two categories of firearm and how they both relate to antique firearms is difficult to understand. For a firearm to come within section 7(1), it cannot be one for which ammunition is readily available. On the other hand, firearms that are permitted under section 7(3) can be fired, although only at Home Office approved sites, where they must also be kept. There are only eleven of these in England and Wales at present.<sup>38</sup>
- 4.52 Section 7(4) provides that the provisions of section 7 have effect without prejudice to section 58(2). The main difference between the regimes that apply to antiques and to section 7 firearms is that the former can lawfully be possessed without a firearm certificate, whereas the latter cannot lawfully be possessed without one. A large number of firearms that could possibly be deemed to be antique by a jury could also fall within the section 7(1) exception.<sup>39</sup> This would be so provided that they are held as a curiosity or ornament. A flowchart at the end of this chapter sets this out in diagrammatical form.

<sup>32</sup> As it otherwise would be for section 5 prohibited weapons.

<sup>33</sup> Although they must be held on certificate.

<sup>34</sup> SI 1997 No 1537.

<sup>35</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015), Chapter 9.

<sup>36</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015), 9.19 to 9.23.

<sup>37</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015), 9.26 to 9.40

<sup>38</sup> Home Office, *Guide on Firearms Licensing Law* (March 2015), 9.37.

<sup>39</sup> A point also made in L Saunbury and N Doherty, *The British Firearms Law Handbook* (2011), pp 21.

- 4.53 This overlap seems illogical and could lead to practical difficulties. It could be difficult to determine whether a given firearm is an antique and therefore exempt from the provisions of the Firearms Act altogether, or whether it is one that is of historic importance and which therefore must be held under certificate by virtue of section 7(1). This has the potential to cause difficulty in both enforcing the law and complying with it.
- 4.54 For example, if a handgun was manufactured after 1919 it cannot benefit from the section 7(1) exception. It is possible, however, that it could nevertheless be regarded as an antique and therefore exempt from the provisions of the Firearms Act 1968 altogether.
- 4.55 Section 7(1) contains a very narrow exception to the general prohibition on handgun ownership. As already pointed out, section 7 (1) requires the handgun in question to be held on a firearm certificate. It is counterintuitive for a firearm that cannot take advantage of this narrow exception potentially to fall within the broad exemption in section 58(2). This is especially the case given that in the latter instance the firearm would not need to be held on certificate. The Lanchester sub-machine gun discussed earlier is an example of a firearm that would be unable to take advantage of section 7,<sup>40</sup> but was nevertheless deemed to be an antique. Therefore not only did its owner avoid the absolute prohibition on the possession of automatic weapons but he could possess such a firearm without it even being entered on a firearm certificate.<sup>41</sup>

#### **PROBLEMS WITH THE CURRENT LAW**

- 4.56 It is crucial to emphasise at the outset that the exception the legislation provides for antique firearms is primarily relied upon by legitimate collectors.
- 4.57 There is, however, evidence to suggest that the exception is being exploited by those who seek to use firearms for criminal purposes. For example, an individual was recently sentenced to 16 years' imprisonment for shooting a police officer through the hand with what was subsequently discovered to be an old Belgian .32 calibre pocket revolver.<sup>42</sup>
- 4.58 Recent legislative amendments have recognised the danger antique firearms can pose. On 14 July 2014, new firearms provisions in section 110 of the Anti-social Behaviour, Crime and Policing Act 2014 came into effect: these first lower the severity of sentence D must receive before becoming a person prohibited from possessing firearms,<sup>43</sup> and secondly bring possession of antique firearms into the scope of that prohibition for the first time.<sup>44</sup>

<sup>40</sup> Due to its age and the fact it is not a handgun.

<sup>41</sup> Section 7 only applies to handguns, but this does not detract from the point that is being made.

<sup>42</sup> <http://www.standard.co.uk/news/crime/police-officer-shot-through-the-hand-wrestling-gun-from-man-who-threatened-to-blow-his-colleagues-head-off-10142686.html> (last visited 7 July 2015).

<sup>43</sup> Firearms Act 1968, s 21(2C).

<sup>44</sup> Firearms Act 1968, s 58(2) as replaced.

- 4.59 The reason given in the explanatory notes for this provision was the perception that there exists a growing interest in antique firearms on the part of criminal groups.<sup>45</sup>
- 4.60 Taken together, the successive changes made to the Firearms Act 1968 mean that a person who has served a term of imprisonment of at least three months and less than three years, cannot possess a firearm, including an antique firearm, for five years following his or her release from prison. A person who is sentenced to a suspended term of imprisonment of three months or more cannot possess a firearm for five years beginning from the second day after the date on which sentence was passed. A person who has served a term of imprisonment of over three years can never possess a firearm or antique firearm.
- 4.61 Since the Firearms (Amendment) Act 1997 effectively prohibited the acquisition of handguns, the only lawful way to possess such a weapon without first applying for authority from the Secretary of State is for it to be an antique or a handgun meeting the criteria in section 7(1) or 7(3). If it is an antique, not only can the handgun be possessed but it can be acquired without any kind of certification. Given that section 58(2) exempts antique firearms from the entirety of the scheme in the Firearms Act 1968,<sup>46</sup> there is no requirement to acquire them from a registered firearms dealer.
- 4.62 The fact the legislation lacks clarity on what is meant by ‘antique’ poses practical difficulties. The current state of the law causes difficulty not only for those who enforce it, but also for those who make a concerted effort to comply with it. For example, in order for an firearm to come within section 58(2) is it sufficient for it to be over 100 years old, or must it also be one for which ammunition is not readily available? The lack of clarity creates difficulty for expert witnesses, as it is unclear what they are being asked to give evidence on. The inconsistent reliance placed upon the Home Office *Guide* adds an extra layer of uncertainty.
- 4.63 The cumulative impact of these factors is that trials are made longer, more complex and ultimately more costly than they might otherwise be. The police also face difficulty in ascertaining whether a suspect is committing an offence. As will be explained, this leads to increased costs for the police and is detrimental for legitimate collectors also.

#### **The increasing criminal use of antique firearms and the consequent threat to public safety**

- 4.64 Records held at the Metropolitan Police Service Forensic Firearms Unit (MPSFFU), indicate that from 1 January 2011 to 31 Dec 2014, at least ninety-four (94) firearms were examined at the MPSFFU that were of a calibre considered obsolete according to the Home Office *Guide*. Most dated from the late 19th century into the early 20th century. All these firearm recoveries were made in criminal circumstances (that is to say, none were surrendered firearms). Two had been found to have been used in shooting incidents; one in a shooting incident

<sup>45</sup> <http://www.legislation.gov.uk/ukpga/2014/12/notes/division/3/3> (last visited 7 July 2015), at para 26.

<sup>46</sup> Save for the section 21 regime for persons not permitted to possess firearms.

that resulted in gunshot injuries to two people and one in the shooting of a police officer.

- 4.65 Fourteen of these guns were recovered in 2011, twenty in 2012, twenty-eight in 2013, and thirty-two in 2014; this suggests that the criminal possession and, in some cases use, of such firearms is increasing.
- 4.66 In addition to the obsolete calibre firearms described above, a number of other firearms were submitted to the laboratory for analysis within this time frame that, based on previous experience, were of a sufficient age that their status as antiques would be arguable in court. Again, these guns primarily date from the late 19th and early 20th century; examples would include the Webley British service-issue revolver.
- 4.67 From examination of fired bullets recovered from the scene of shooting incidents in the Metropolitan Police District, the use of an obsolete calibre gun was indicated in thirty-one shooting incidents that occurred between 1st January 2011 and 31st December 2014. This included three fatal shooting incidents. An additional eight incidents were likely to have involved the discharge of an 'old' firearm such as a Webley Service revolver or a M1895 Russian Nagant revolver, including one fatal shooting incident.
- 4.68 This situation has led the police to comment that:

The lack of an explicit statutory definition results in the situation whereby criminals are able to exploit the loophole that allows the sale and ownership of these original lethal purpose obsolete calibre firearms to be held as 'curiosities or ornaments'. There are many reported cases which demonstrate that ammunition suitable for use in these firearms is being used in criminal use of firearms in the UK.

- 4.69 This is exacerbated by the fact that according to the police:

Fifty-two per cent of antique firearm recoveries from police intervention or criminal circumstances are made in combination with suitable ammunition.

- 4.70 Whilst these data are far from conclusive, they do suggest that old firearms are being encountered by the police with increasing frequency.

#### **Investigative difficulties**

- 4.71 As a result of the current state of the law, the police cannot know whether an individual who purchases an old firearm commits an offence at the point of purchase. This leads to investigative difficulties. The police have commented that:

While proactive investigations, using sensitive evidence gathering methods, can be undertaken, they are a resource intensive form of policing and can be intrusive. The current legal situation also presents challenges to police in relation to the management of physical risk in armed operations, because the current law does not provide clarity as to when transfer of a firearm ostensibly as an antique is illegal. This

creates situations where an armed policing operation with the potential for recourse to lethal force may be authorised, and yet the transfer of a firearm (antique) may not itself be a criminal act.

- 4.72 The failure to define “antique firearm” has the potential to be detrimental to public safety in addition to having tangible resource implications for the police.

#### **Problems for legitimate collectors**

- 4.73 The current regime also poses difficulties for legitimate collectors. Someone who acquires a firearm he or she genuinely believes to be an antique cannot conclusively know whether the firearm in his or her possession is in fact an antique until they have been prosecuted and a jury has delivered its verdict.

- 4.74 The National Target Shotgun Association has said to us that:

[The current law] is not a desirable state of affairs, as different Police Forces might have differing views, resulting in a ‘postcode lottery’ of an item being deemed to be an antique (benefiting from s.58(2) status under the 1968 Act) in one Area but being defined as a firearm in another Area and resulting in the prosecution of an individual.

- 4.75 Anecdotal evidence suggests that there have been prosecutions in instances such as this. This is a corollary of the fact the legislation does not define antique and the courts have decided that the matter is a question of fact and not law.

- 4.76 As has already been highlighted, the fact that the border and custom agencies use different criteria from the Home Office to determine whether a firearm is an antique exacerbates the problem faced by the legitimate collector, who may be able legitimately to possess a certain firearm but may require an import licence to import it. This is compounded by the inconsistent reliance on the Home Office *Guide*. Practitioners have confirmed that this lack of certainty also makes it difficult for them to advise their clients on what their potential liability might be.

#### **Increased need for expert evidence**

- 4.77 The combination of the legislation’s silence on what features make a firearm an antique and the fact the courts have decided that the question is one of fact necessitates greater expert involvement than would otherwise be the case. This makes trials longer and also more expensive, both for the prosecution and the defence.<sup>47</sup> Figures obtained from MPSFFU indicate that 10% of the defence examinations<sup>48</sup> at their laboratory between 2011-2014 concerned antique firearms.

- 4.78 Given the nature of the subject matter, it is unsurprising that expert evidence is crucial. Problems arise due to the fact the legislation does not provide a point of reference for the experts. Anecdotal evidence suggests that it is possible for the experts to be addressing separate issues in their reports. For example, the focus of the expert instructed by the prosecution could be on the issue of whether

<sup>47</sup> See for example *R v Aristidou* (Inner London Crown Court, March 2015).

<sup>48</sup> Where expert witnesses employed by the defence go to examine the weapon(s) that are the subject of the charge against the defendant.

ammunition for the firearm is readily available. Meanwhile, the expert instructed by the defence could be focusing on whether the firearm is over 100 years old. Whilst both experts are addressing the same question – is this firearm an antique? – they might invoke different criteria when arriving at the answer to that question. This can cause confusion for jurors.

- 4.79 Further, the approaches taken by both experts might be equally valid. This is because the courts have decided that the definition of antique is solely for the jury, and they choose the criteria they will rely upon in evaluating whether the firearm is an antique. So, for example, one expert may discuss age and another expert whether the Home Office considers the calibre of the weapon to be obsolete, and the jury must decide whether to use one, other or both approaches in reaching their conclusion. As has already been indicated, this leads to inconsistent outcomes, dependent upon which expert the jury finds more credible. It is important to bear in mind that if a defendant is found not guilty, the firearm is ordinarily returned to him or her.

### **Provisional proposal 5**

- 4.80 **The failure to define antique firearm is a significant omission which causes problems in practice and therefore it is necessary to provide a set of statutory criteria for determining which firearms can benefit from the exemption in section 58(2).**

**Do consultees agree?**

### **POSSIBLE SOLUTIONS**

- 4.81 Given that the Firearms Act 1968 contains an exemption for antiques and in this part of the scoping exercise the Law Commission is working within the constraints imposed by the current legislative landscape, this section will suggest some possible methods for determining whether a firearm ought to fall within the statutory exception. The guiding principle underlying each of these suggestions is to maximise the protection of the public. By remedying the uncertainty that currently prevails, it is hoped that legitimate collectors of antique firearms will also be able to feel confident that they are complying with the law and to ensure that they do not inadvertently fall foul of it. The aim is not to criminalise collectors, but to make prosecution of those with criminal intent more efficient and effective.
- 4.82 Broadly speaking, these solutions can be placed into two categories. First, there are those that focus upon the age of the firearm. Alternatively, there are solutions that focus upon the functionality of the firearm. For the reasons that will be explained below, we take the view that any solution ought to focus upon the firearm's functionality.

### **A rolling 100 year definition**

- 4.83 Using the Criminal Justice Act 1988 (Offensive Weapons) Order 1988<sup>49</sup> as a model, the law could specify that an antique firearm is simply one that is over 100 years old. Whilst such an approach would provide certainty, it has the potential to

<sup>49</sup> SI 2019 No 1988. The Order specifies descriptions of weapons to which section 141 of the Criminal Justice Act 1988 applies.

undermine public safety given that there are many firearms that are over 100 years old but for which ammunition remains readily available, and which can be fired to lethal effect. To compensate for this, greater emphasis could be placed on the additional requirement that the firearm be held as a curiosity or ornament. If, for example, suitable ammunition were stored with the firearm, then this could lead to the inference that, whilst it is an antique, it is not held as a curiosity or ornament.<sup>50</sup> Such an approach would focus more on why the firearm is held than on its characteristics.

- 4.84 We do not believe this solution is an appropriate one. The basic design of firearms has remained unchanged for decades. Depending upon the type of firearm, one that was manufactured in 1915 could be almost indistinguishable from one manufactured in 2015.<sup>51</sup> The latter would be a prohibited weapon and therefore unlawful to possess except in the most exceptional circumstances and with the authority of the Secretary of State, whilst the former could be possessed without any certification requirements at all. This would remain the case despite the fact they are identical in terms of functionality. Such a state of affairs would be wholly irrational and would fail adequately to protect the public.
- 4.85 Following this approach, within a couple of decades automatic weapons would also be able to benefit from the exemption. This would not be a desirable state of affairs for obvious reasons.
- 4.86 We believe that the determining factor for what ought to benefit from the exemption is *functionality*. The term ‘antique’ is misleading: an old firearm can be just as deadly as one that was manufactured today.

#### **Provisional proposal 6**

- 4.87 **The deciding factor for determining which firearms can benefit from the exemption in section 58(2) ought to be functionality.**

#### **Do consultees agree?**

- 4.88 In the event that consultees agree, we turn to examine how functionality ought to be determined for these purposes. In short, we provisionally propose that only *obsolete* firearms ought to benefit from the exemption. Rather than the “antique firearm” exemption, it would be an exemption for “obsolete firearms”. Obsolescence in this context can refer to one of two things: ammunition or firing mechanism. The following sections will explain these in more detail.

#### **Obsolete cartridge**

- 4.89 One approach that focuses upon obsolescence is to place the obsolete calibre list contained within the Home Office *Guide* on a statutory footing. If the firearm in question is chambered for a type of cartridge contained on the obsolete list, then

<sup>50</sup> This could pose difficulties for those who (entirely legitimately) both have extensive collections of antique weapons and a large number of guns on certificate. It would be quite likely that there would be coincidental matchings of lawfully held ammunition which would be capable of fitting into an antique weapon.

<sup>51</sup> An example would be the Colt M1911 pistol, which has been manufactured virtually unchanged since 1911 and is presently in service with various US police departments and special forces units.

as a matter of law it would be an antique, provided it is held as a curiosity or ornament.

- 4.90 For this approach to be a viable one, the method for updating the obsolete calibre list would need to be formalised.
- 4.91 Basing the criteria for whether a firearm is an antique upon whether it is chambered for an obsolete calibre poses four difficulties, however:
- (1) it is complex and requires significant time and expertise to determine whether any particular firearm submitted for investigation is chambered for an obsolete cartridge and what is not;
  - (2) a cartridge that is 'obsolete' may not remain obsolete: the internet provides access to manufacturers who can make 'old' ammunition to order;
  - (3) there is evidence from the police to suggest that 'obsolete cartridge' firearms are being modified to chamber modern ammunition; and
  - (4) there is evidence from the police to suggest that criminals are purchasing obsolete cartridge firearms and manufacturing ammunition suitable for use in them.
- 4.92 For these reasons, this approach would not provide a perfect solution. There are, however, some ways of mitigating the effect of these problems. For example, there is evidence to suggest that certain types of old firearm are particularly vulnerable to criminal misuse. These could be taken off the list, for example.

#### **The 'Canadian approach'**

- 4.93 A second option is what we might call the 'Canadian approach'. This is the inverse of the obsolete cartridge approach, in that Canadian law specifies those cartridges that *cannot* be considered antique firearms. These are contained in the Regulations Prescribing Antique Firearms 1998.<sup>52</sup> This approach would give rise to the same difficulties as the obsolete cartridge approach, however, although perhaps not to the same extent.

#### **Year of manufacture conclusive of functionality**

- 4.94 Thirdly, an antique firearm could be any firearm manufactured before a fixed date. While such an approach would provide a relative degree of certainty, it can be difficult to determine the precise date when a firearm was manufactured. It could also be considered somewhat arbitrary for one firearm not to be an antique while a firearm of the same model produced a year earlier would benefit from the exemption.
- 4.95 It would also be necessary to determine the cut-off date and justify why that date was considered to be an appropriate one. Section 38(8) of the Violent Crime Reduction Act 2006, for example, defines a "modern firearm" as "any firearm other than one the appearance of which would tend to identify it as having a

<sup>52</sup> SOR/98-464.



design and mechanism of a sort first dating from before the year 1870.” By way of another example, the United Nations Firearms Protocol provides that, “in no case, shall antique firearms include firearms manufactured after 1899.”

- 4.96 Justifications for a specific date could include the year chosen being one before which only obsolete ignition systems for the cartridge or powder charge were produced. These are complicated to load and fire, and ultimately less lethal in criminal hands.
- 4.97 If the date were early enough, this approach could be a viable one from a public safety perspective. This, however, would represent a significant restriction of the type of firearm that can benefit from the exemption.

### **Mechanism**

- 4.98 Finally, functionality could be determined by reference to mechanism. This approach has been adopted in Western Australia, where no licence is required for the acquisition of a firearm with an ‘antique firearm mechanism’.<sup>53</sup> This is defined as a ‘muzzle loading firearm (including a percussion lock handgun that is muzzle loading) manufactured before 1900 that uses black powder to propel a shot, bullet, or other missile except that it does not include a breech loading firearm, a firearm with revolving chambers or barrels, or a cannon.’
- 4.99 Similarly, in a Green Paper published in 1973, it was recommended that firearms capable of firing self-contained centre-fire cartridges should not be classified as ‘antique’.<sup>54</sup>
- 4.100 This approach does not focus upon the exact type of ammunition the firearm is chambered for, but on its ignition system. Drafting a list of specific types of firearm that ought to benefit from the exemption has the benefit of providing certainty for both legitimate collectors and law enforcement whilst also maximising public safety. The latter would be satisfied by the fact that firearms contained on the list could be those that are difficult to load and/or have a very slow rate of fire. This approach would, however, restrict the types of firearms that at present can benefit from the exemption. Arguably this is the purest form of functionality test. It differs from the age-based test, as it is more prescriptive in that it identifies those firing mechanisms that can benefit from the exemption rather than simply stating a date.

### **Consultation question 5**

- 4.101 **We would welcome consultees’ views on the following options for a criterion to determine which firearms benefit from a new obsolescence exemption:**

- (1) obsolete cartridge list;**
- (2) modern cartridge list (Canadian);**

<sup>53</sup> Section 8(1)(mc) of the Firearms Act 1973. The Western Australian Law Commission is currently conducting a review of the state’s firearms legislation.

<sup>54</sup> *Green Paper: Control of Firearms in Great Britain* (Cmnd 5297, 1973).

- (3) **year of manufacture conclusive of functionality; or**
- (4) **antique firearm mechanism.**

#### **NON-DEFINITIONAL ISSUES IN RELATION TO ANTIQUE FIREARMS**

4.102 Aside from the uncertainty surrounding which firearms can benefit from the antique firearms exemption, stakeholders have suggested that there are two further problems with the current law.

##### **The ability to buy antique firearms for cash**

4.103 The police have suggested that it is irrational to impose greater obligations upon scrap metal dealers than upon those who sell firearms, albeit antique ones. At present an antique firearm can be bought for cash with no verification of the identity of the purchaser. This means there is no way of tracing who has purchased an antique firearm.

4.104 This state of affairs seems unsatisfactory when one considers that by virtue of section 12 of the Scrap Metal Dealers Act 2013, a scrap dealer must not pay for scrap metal except by cheque, or by electronic funds transfer (including by credit or debit card). Additionally, by virtue of the Scrap Metal Dealers Act 2013 sections 11 to 15, scrap metal dealers must record each transaction, the method of payment, and to whom the payment was made (having verified their identity).

4.105 The benefit of imposing a similar obligation upon those who sell antique firearms is that it would aid the investigation of crimes that occur using such items. We do not believe it would place a significant burden upon legitimate dealers in antique firearms, since stakeholders suggest most comply with these practices anyway.

##### **Provisional proposals 7 and 8**

4.106 **Any purchase of an antique firearm must be paid for by cheque or electronic funds transfer.**

**Do consultees agree?**

4.107 **Any sale of an antique firearm must be recorded.**

**Do consultees agree?**

##### **Exempting antique firearms from *all* the provisions of the Firearms Act 1968**

4.108 Section 58(2) states

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.

4.109 As has already been discussed, this provision exempts antique firearms from the licensing regime. On one interpretation, it also exempts them from every other provision in the Firearms Act 1968, including the offences contained in sections 16 – 25. This part of the Act is entitled *Prevention of crime and preservation of public safety*. The relevant offences are:

- (1) Section 16A of the Firearms Act 1968 – possession of a firearm with intent to cause any person to believe that unlawful violence will be used against him or her.
  - (2) Section 17 of the Firearms Act 1968 – use of a firearm with intent to resist or prevent the lawful arrest or lawful detention.
  - (3) Section 18 of the Firearms Act 1968 – carrying a firearm with intent to commit an indictable offence.
  - (4) Section 19 of the Firearms Act 1968 – carrying a firearm in a public place.
  - (5) Section 20 of the Firearms Act 1968 – trespassing with a firearm.
  - (6) Section 22 - purchasing or selling firearms to minors.
  - (7) Section 24 – supplying a firearm to a minor.
  - (8) Section 25 – supplying a firearm to a person drunk or insane.
- 4.110 To take one example, the effect of section 58(2) might be that it would not be an offence contrary to section 17 to use an antique firearm to resist arrest.
- 4.111 This strikes us as a loophole that ought to be closed. If it is an offence to use an imitation firearm to resist arrest, then it should also be an offence to use an antique firearm. Remedying this problem would be relatively straightforward. The offences in section 16 – 25 could be amended to put beyond doubt that they can also be committed by someone with an antique firearm.
- 4.112 This would have the benefit of closing a loophole, but we believe it would have no detrimental impact upon legitimate antique firearms collectors.

#### **Provisional proposal 9**

- 4.113 **The offences in sections 16 – 25 ought to be amended to put beyond doubt that they can be committed by someone in possession of an antique firearm.**

#### **Do consultees agree?**

#### **CONCLUSION**

- 4.114 This chapter has explained the problems caused by the fact the legislation fails to define ‘antique firearm’. These problems are tangible and can have implications both for public safety and for legitimate collectors. Remedying this problem is not straightforward, which is why the Law Commission has proposed a range of options for reform.
- 4.115 On the next page is a flowchart of the present law in relation to antique firearms, to assist with understanding the legislative scheme examined in this chapter.

