Firearms Law Review (August 2015)

The Law Commission published a 'scoping consultation paper' on 21st July and expects replies from interested parties to reach them by 21st September; that means the whole 'consultation' exercise will fit into the Parliamentary summer recess.

In a video introduction to the 108-page paper, David Ormerod QC stressed four areas of concern, viz;

- Lack of definition; terms used in firearms legislation are not defined in the legislation itself.
- Ambiguity – the word antique is not defined.
- Not keeping pace with developments – the 1982 Act definition of when an imitation firearm becomes readily convertible does not take account of professional engineering tools now available on the Internet.
- Firearms legislation is to be found in 34 Acts of Parliament and uncounted bits of secondary legislation, some of it dating back to the nineteenth century; which makes it difficult for everyone involved to follow and understand it.

We will be sending a full comment to the Law Commission in due course. Meanwhile, we can help David Ormerod and you, the gentle reader, with a few initial thoughts.

Lack of Definition

Where a term is not explicitly defined in a piece of legislation, the ordinary dictionary definition pertains. In the video, the term used as an example was 'lethal'. OK, it's not defined in the Firearms Act, but is to be found in most English dictionaries and has received careful judicial scrutiny. In Read v Donovan (1947) 'lethal' meant 'capable of causing injury' to the three judges. In Moore v Gooderham (1960) the judge tightened the definition somewhat to causing more than a trivial injury.

The issue in 1947 was a flare pistol with an adapter to fire shotgun cartridges and in 1960 a shopkeeper had sold the air pistol to a juvenile, which was OK if it was a toy but not OK if it was a firearm.

Those definitions both make the supposedly non-lethal TASER 'lethal', as the barbs cause injury and death (usually from a pre-existing medical condition) may result. It only matters if one is trying to prosecute possession of a worn-out air gun, a paintball or airsoft gun, trying to 'make a difference'. The Scottish Parliament definition of an air gun picked a low enough threshold to catch airsoft and paintball guns in their planned air gun 'licensing' net.

We assume that a 'scientific' definition – a number in foot pounds or the French equivalent (due to metrication) is the objective, because that would give the powers that be carte blanche to fill up the forensic science laboratories with

airsofts etc., ‘cos each one would have to be tested at public cost to meet the ‘fact and degree’ test in the courts. The proposal is a ‘jobs for the boys’ solution.

Ambiguity

Antique is not defined, he says. Well, not the whole truth. The Court of Appeal ruled that two 1890s .455” revolvers were antiques after rejecting the Crown’s argument about the availability of ammunition. The court said that they could not envisage firearms made in this (the twentieth) century as being antiques. In 1994, (R.v. Brown) the judge said that time had moved on and so must the definition. She was allowing an appeal in respect of possession of a 1906-dated .22” War Office pattern rifle. And guess what! We’re passing through the centenary of the Great War at the time of writing. Every design of firearm used in that was is now over a hundred years old.

So we have a working definition of what an antique firearm is; it doesn’t matter what ammunition it takes, but it has to be a bygone (i.e. superseded) and possessed solely as a curiosity or ornament. The trouble is, the Home Office don’t like that definition and still remain wedded to the availability of ammunition idea that the Court of Appeal rejected nearly forty years ago. The Law Commission’s beef is that occasionally ‘antique’ firearms turn up in crimes, including homicide.

No they don’t: an antique firearm is possessed solely as a curiosity or ornament. When loaded and carried in the furtherance of crime, it’s a firearm, not an antique.

No blanket definition works; the ‘fact and degree’ test works well enough. The defence has to satisfy the court that the exhibit was possessed solely as a curiosity or ornament – and that can be tricky – then the onus is on the prosecution to prove that it’s not an antique. That’s a fair test. The basic problem with the bygone argument is that many firearms designs enjoy considerable longevity. The Lee Metford/Enfield series of rifles start in 1889 and continued into the 1950s. They were superseded in front line service progressively after 1954 and some are probably still in reserve. If you’re a prosecutor trying to drum up more firearms crime statistics, this may be a problem, but if you’re a collector, your problem is finding, buying and storing the twenty-seven major variants without starting a panic at your local police station.

Not Keeping Up

Following an incident in 1981 when blank shots were fired near Her Majesty the Queen during the ‘Trooping the Colour’ ceremony, the Home Office introduced what became the 1982 Firearms Act. They’d had this waiting in the pending tray for a suitable legislative opportunity and that was it. The problem they sought to address was that of Spanish-made flintlock and percussion guns that were imported as replicas. These were fully functional rifled-barrel weapons made of suitable materials on which the touchhole was not bored through. Converting one to live firing was thus a simple matter of combining guilty knowledge with a hand-drill.

The video argument was that advances in the sophistication of tools that one can acquire for use at home means that more replicas – hitherto not readily convertible – should be caught in this trap. The problem with that argument is that the 1982 Act provides a statutory defence, which is that one is deemed not to have guilty knowledge – and acquitted – if no conversion has been attempted.

So it seems to us that it does not matter if you buy a CNC machine shop for your garage, as long as you don't program it to try boring the blockage out of your replica revolver. For those who do come before the courts for trying, it's a straightforward case of fact and degree. Did they succeed in making the replica into a lethal barrelled weapons from which a shot, bullet or missile can be discharged? If successful, the jury will convict them and if they failed, they weren't caught in possession of a firearm after all.

There's more to firearms legislation than the 1968 Act

Yes; most of the rest is various knee-jerk governments dicking around with definitions, largely without knowing what they are doing or caring about the unintended consequences. If one goes back to basics, the possession of arms for the defence of life, liberty or property is a common law right or obligation. The use of arms for sporting purposes is not a right, as such, and has been legislatively controlled or taxed over the centuries. Robin Hood was obliged to keep a longbow and to practice with it on Sundays, but was not allowed to poach the King's deer with it.

Successive governments put limitations on the possession of arms; Charles II limited the use of crossbows to people of sufficient wealth to entertain him. The Pistols Act, 1903, imposed a tax on the possession of handguns to drain money from people who – to that point – hadn't had to buy a game licence or a gun licence. You only needed one of the three.

The 1920 Act was intended to restrict the possession of arms to friends of the government; so it seems the government has few friends these days. It's constitutionally OK to have a tax on something, or a qualifying threshold, but firearms legislation has gone way beyond that in becoming a barrier to the citizen owning and keeping his private property. Which is unconstitutional, as explained in the 2008 case of District of Columbia v Heller in the US Supreme Court. The second amendment right to keep and bear arms was defined as an individual right in that judgment by reference to English common law and statutes.

The Problem

Successive bits of knee-jerk legislation have had unintended consequences. There are some twenty million firearms in the UK and barely ten per cent of them are registered on firearm and shot gun certificates. We thought it weird when the Home Affairs Select Committee concentrated their review (in 2010-11) on that 10% instead of looking at the bigger picture.

Passing retrospective legislation about who can continue to own what does not reduce the pool of arms in the UK. The 1920 Act wasn't retrospective, so one only

had to get a certificate to acquire a firearm after its introduction. Later amendments, such as the retrospective introduction of shot gun certificates in 1968 only attracted support from a minority of owners. Much of the 'increase' in certificate numbers between 1968 and 1988 was shotgun owners taking up the requirement belatedly.

Each time something in the legitimate market is legislated against, it simply transfers stuff from the legal pool to the illegal or unregistered pool. Logic suggests that a proper government would seek to reverse this trend.

The Solution

We proposed a national licensing agency in our book 'does the trigger pull the finger' in 2011. We deal, day in and day out, with the administrative problems caused in police firearms departments. These are caused by staff being inadequately legally trained for the job and the all-pervading objective of those departments to avoid doing their jobs whenever possible.

The 1966 case of Joy v chief constable of Dumfries and Galloway made it clear that those dealing with certificate applications should do so from the point of view of the applicant and not from the perspective of a possible objector. You will struggle to find that anywhere in current practice.

As an example, consider magazine restrictions. The powers that be were 'concerned' about repeating shotguns in the 1950s. The problem was that they were affordable. By 1988 they'd changed horses and set about demonising magazine capacity, but as they couldn't afford to buy them all in, the compromise position was restricting the magazine to two shots.

Wind forwards to 1997 and 'small firearms' were prohibited, with exemptions for various purposes; basically everything they were already used for, except target shooting. There's nothing in the Act about restricting magazines (or cylinders) – that's a police invention – with all sorts of ramifications. It's imposed as a condition on the firearm certificate, so Sportsmen's Association Mike Wells was prosecuted for restricting magazines to two-shot, 'cos when the police said two-shot on the condition they meant one shot in the magazine and one in the chamber (so how does the one in the chamber get there?)

One chap was convicted for the obstructions in his chambers being inadequate, which for some reason means he possessed it without a certificate and got the mandatory five year gaol term, while in Scotland Mr Lomax convinced a sheriff that the police were wrong to require any obstruction to the capacity of his revolver.

The function of the handguns mentioned above is as humane killers when hunting large mammals – deer, wild boar etc. The Metropolitan Police have proved empirically that one needs more than two shots to put a large mammal down (eight seems to be the going rate), so for safety's sake – and if this limited capacity business takes hold – one would have to carry three or four modified pistols instead of one.

None of this would be happening if a national agency with clear rules and properly trained staff processed certificate applications. The trouble is, that would increase the number of certificates on issue. Older readers may remember wild fluctuations in the number of shot gun certificates disclosed by the Metropolitan Police – the number jumped by 5,000 one year. The reason is that certificates which had expired and were, on the data date, sitting in a New Scotland Yard in-tray, didn't get counted at all; so an 'increase' showed that the staff were catching up and a 'decrease' showed that they were falling behind.

Last year, Essex Police revoked a re-enactor's certificate on the grounds that he had no GP. Obviously, there was no alternative for the protection of the public. He got a GP and re-applied, only to be told that now his card was marked it was unlikely that he would get a certificate again and in any event, it would be twenty-eight weeks before his application reached the top of the pile. Whatever's going on there doesn't sound like a public service to us.

It's part of the 'white noise' that policing generates when dealing with people who want to have guns legally. As the only tool for preventing the legitimate possession of arms is the criminal law, that's what they use to try to diminish certificate numbers, without being particularly scrupulous about what they are doing.

This 'hunt-sab' approach to people trying act lawfully causes most of the problems that the Law Commission want to make worse with more legislation. It's going to be a long summer.