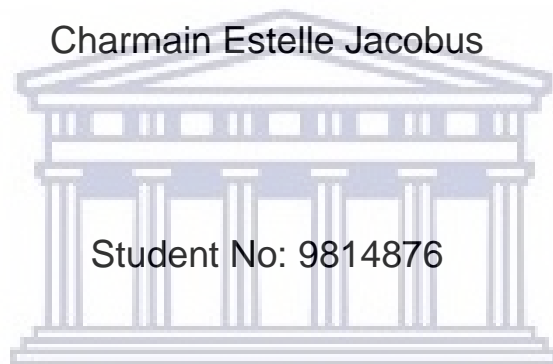


**Revisiting the definition of a firearm in South Africa: a need  
for reform?**

**UNIVERSITY OF THE WESTERN CAPE**



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UNIVERSITY *of the*  
WESTERN CAPE

Mini- Thesis submitted in partial fulfilment of the requirements for the  
degree LLM (Constitutional Rights and Criminal Justice) in the  
Faculty of Law, University of the Western Cape

**Supervisor: Dr RD Nanima**

**2020**

<http://etd.uwc.ac.za/>

## ABSTRACT

South Africa's definition of a firearm is quite broad, yet it excludes various devices that have the same lethal effects as a firearm. This is informed by the various principles that have been developed by the courts in interpreting the said definition. It is argued that a good definition informs the extent to which other aspects like licensing and usage may be instructive. The central research question as regards the context of the definition of a firearm, leads to an examination of three interrelated questions. These include the definition of a firearm in South Africa, the relevance of experiences from other jurisdictions and the need for a new definition of a firearm. This study evaluates the definition of a firearm under the Firearm Control Act and draws on experiences from the United Kingdom, Australia and Canada. Based on the desktop review, it is proposed that the definition of a firearm should not only be informed by its characteristics, but the lethal effect and the harm that can be caused to a person. Proposals for an amendment to the definition are offered.

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## KEY WORDS

Crime

Definition

Firearm

Firearms Control Act

Human rights

Jurisprudence

Jurisprudential framework


Normative framework



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## LIST OF ACRONYMS AND ABBREVIATIONS

<b>CFSC</b>	Canadian Firearms Safety Course
<b>Constitution</b>	Constitution of the Republic of South Africa, 1996
<b>CRFC</b>	Canadian Restricted Firearms Safety Course
<b>FCA</b>	Firearms Control Act
<b>FCA Reg</b>	Firearms Control Act Regulations
<b>NCPS</b>	National Crime Prevention Strategy
<b>NSW</b>	New South Wales
<b>SAPS</b>	South Africa Police Services
<b>SCC</b>	Supreme Court of Canada.
<b>UDHR</b>	Universal Declaration of Human Rights.
<b>UK</b>	United Kingdom
<b>UN</b>	United Nations
<b>UNCAT</b>	United Nations Convention Against Torture
<b>USA</b>	United States of America



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## LIST OF CASES

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*DPP vs Masiya* 2007 (5) SA 30 (CC).

*Grace v DPP* (1989) Crim. L.R.365.

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*Mohamed and Another v President of the Republic of South Africa and Others* [2001]

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*Moore v Gooderham* [1960] 3 All E.R. 575.

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- Arms and Ammunition (Amendment) Act 60 of 1998.
- Arms and Ammunition (Amendment) Act 65 of 1993.
- Arms and Ammunition (Amendment) Act 7 of 1995.
- Arms and Ammunition (Amendment) Act 79 of 1991.
- Arms and Ammunition Act 75 of 1969.
- Authorizations to Carry Restricted Firearms and Certain Handguns Regulations  
(SOR/98-207).
- Authorizations to Transport Restricted Firearms and Prohibited Firearms Regulations  
(SOR/98-206).
- Canadian Criminal Code, RSC 1985, c C-46.
- Conditions of Transferring Firearms and Other Weapons Regulations (SOR/98-202).
- Constitution of the Republic of South Africa, 1996.
- Firearms Act (S.C. 1995, c. 39)
- Firearms Act 1968 Chapter 27 (United Kingdom).
- Firearms Act 1996 (NSW) No. 46.

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Firearms Control Act 60 of 2000.

Firearms Control Regulations, 2004.

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Firearms Information Regulations (Non-restricted Firearms) (SOR/2012-138).

Firearms Licences Regulations (SOR/98-199).

Firearms Records Regulations (Classification) (SOR/2014-198).

Firearms Records Regulations (SOR/98-213).

Firearms Registration Certificates Regulations (SOR/98-201).

Shooting Clubs and Shooting Ranges Regulations (SOR/98-212).

Special Authority to Possess Regulations (Firearms Act) (SOR/98-208).

Storage, Display and Transportation of Firearms and Other Weapons by Businesses  
Regulations (SOR/98-210).

Storage, Display, Transportation and Handling of Firearms by Individuals Regulations  
(SOR/98-209).

Storage, Display, Transportation and Handling of Firearms by Individuals Regulations  
(Firearms Act), SOR/98-209.



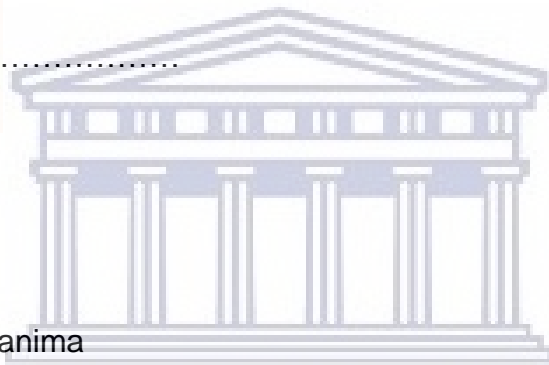
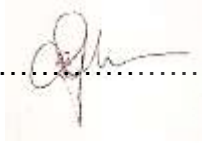
## DECLARATION STATEMENT

I declare that the study entitled, "*Revisiting the definition of a firearm in South Africa: a need for reform?*" is a result of my own research. All the sources used in this study, have been indicated and fully acknowledged, by means of complete references.

**Name:** Ms Charmain Estelle Jacobus

**Date:** 15 October 2020.

**Signed:** .....




### SUPERVISOR

**Name:** Dr Robert Doya Nanima

**Date:** 15 October 2020.

**Signed:** .....



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## DEDICATION

To my husband, Mr Andre P Botman and our sons, Elijah Andre Botman and Malakai Andre Botman, thank you for being the driving force in life. Due to your unconditional love, respect, patience and selflessness, towards me, you've made this challenging journey worthwhile.



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## ACKNOWLEDGEMENTS

I thank God for giving me life, health and wisdom, to complete the Masters' Degree research.

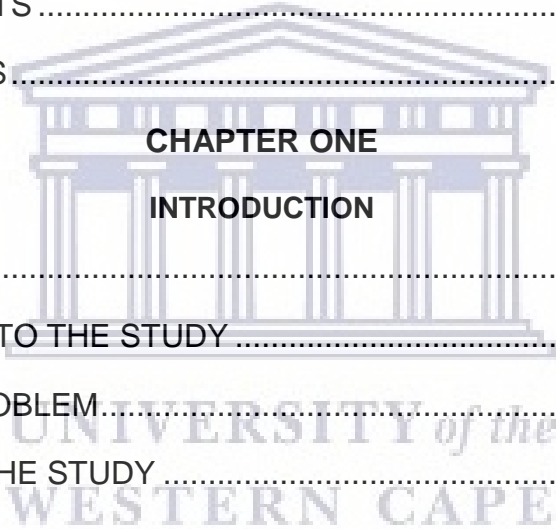
I recognize and appreciate the guidance of my supervisor, Dr RD Nanima for his excellent guidance and phenomenal insight throughout this work; to this form.

To my husband, Mr AP Botman, many thanks for standing in the gap. You did fit the universal meaning of a 'better half'. You have been my greatest inspiration and rock throughout this time.

Many thanks to my parents, Mr Gavin Mark Erasmus and Mrs Rachel Erasmus for the support, for believing and praying for me. I am forever grateful. I could not have done this without you.

Gratitude is extended to Legal-Aid South Africa, Bellville Office, led by the Head of Office, Ronelle Arendse and the staff for the enabling environment to engage in this course. My Manager; Nontombi Zukiso and Neesha Cupido thank you for your daily encouragements and unwavering confidence in me. Magistrate, Ms Nonkosi Saba, of Bellville Regional Court; your motivation inspired me to remain steadfast in accomplishing this goal.

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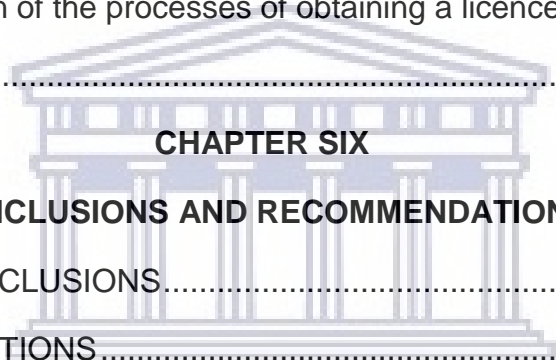
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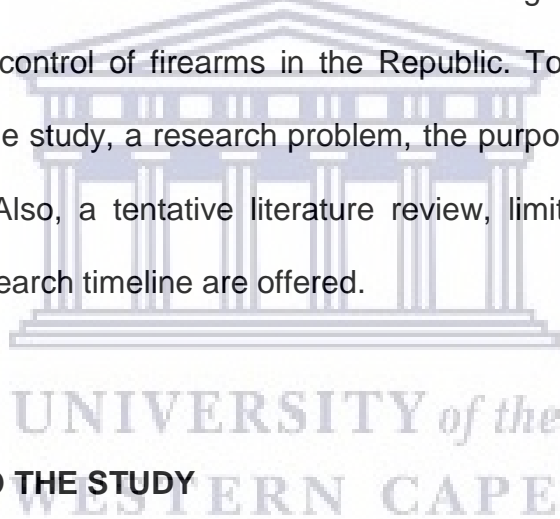
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## CHAPTER ONE

### 1.1 INTRODUCTION

This study contextualises the definition of a firearm as one of the conditions precedent to the development of jurisprudence around instances of crimes that revolve around a firearm. It evaluates the context of the current definition concerning its scope. This questions whether is overly inclusive or exclusive, leading to a wide array of application. The study evaluates the position that there is a need to contextualise the definition of a firearm such that it is given distinct limits to aid the current regime on the development of jurisprudence on the control of firearms in the Republic. To this end, this chapter offers a background to the study, a research problem, the purpose of the study and the research methodology. Also, a tentative literature review, limitations to the study, a chapter outline and a research timeline are offered.



### 1.2 BACKGROUND TO THE STUDY

Amnesty International reports that on a global scale, more than 500 people die every day from gun violence.<sup>1</sup> This is an indication that about 44 per cent of all homicides are due to gun violence, following a study that established that between 2012 and 2016

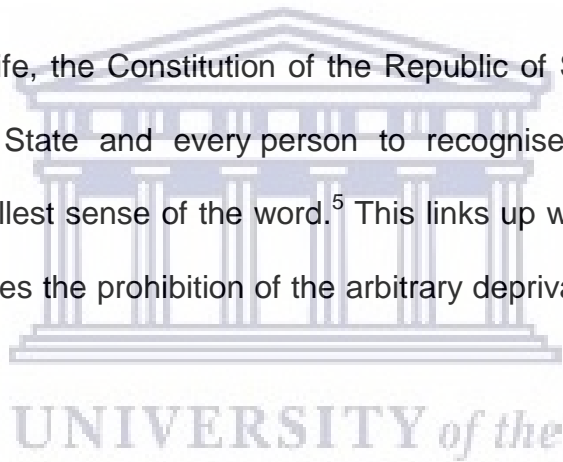
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<sup>1</sup> Gun violence-key facts (2020) Amnesty International, available <https://www.amnesty.org/en/what-we-do/arms-control/gun-violence/#:~:text=More%20than%20500%20people%20die,other%20marginalized%20groups%20in%20society> (accessed 5 October 2020).



there were 1.4 million firearm-related deaths across the globe.<sup>2</sup> South Africa ranks at 12<sup>th</sup>, due to the 6.9 per cent of deaths on account of gun violence in 2016.<sup>3</sup> These statistics call for the need to question the regulation of gun ownership in South Africa but on the basis of the definition of a firearm. In international law, human rights law places explicit obligations on States to protect their citizens, through the guarantees like the right to life, security of the person and the prohibition against torture, cruel, inhuman and degrading treatment.<sup>4</sup>

Concerning the right to life, the Constitution of the Republic of South Africa places an obligation on both the State and every person to recognise their commitment to everyone to live in the fullest sense of the word.<sup>5</sup> This links up with the right to security of a person, which includes the prohibition of the arbitrary deprivation of the right to life,



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<sup>2</sup> Gun Violence- Key facts available at <https://www.amnesty.org/en/what-we-do/arms-control/gun-violence/> (accessed 1 August 2020).

<sup>3</sup> Businesstech 'Global ranking of gun deaths: here's where South Africa stands' available at <https://businesstech.co.za/news/lifestyle/268167/global-ranking-of-gun-deaths-heres-where-south-africa-stands/> (accessed 1 October 2020).

<sup>4</sup> This is reiterated by the courts. See *S v Jordaan and 4 others* Case Number CC20/2017 High Court of South Africa Western Cape Division Judgement Delivered on 16 November 2017, para Sadat LN and George M 'Guns and Human Rights: U.S. Violates International Human Rights Law' available at <http://sites.law.wustl.edu/WashULaw/harris-lexlata/guns-and-human-rights-u-s-violates-international-human-rights-law/> (accessed 1 August 2019). The International Covenant on the Civil and Political Rights 999 UNTS 171, articles 6, 9 and 7.

<sup>5</sup> Serfontein EM 'The Mammoth Task of Realising the Right to Life: A South African Perspective' in Anna AVB *Quality of Life and Quality of Working Life*, (2017) 165. The right to life and its deprivation are discussed in *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.

and the prohibition of torture.<sup>6</sup> To this end, an arbitrary use of guns amount to abuse through the violation of the rights of victims.<sup>7</sup>

It is also argued that everyone has the right to own property, under section 25 of the Constitution.<sup>8</sup> The section states that:

'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'<sup>9</sup>

There are various kinds of property that can be owned in South Africa. These include both movable and immovable property.<sup>10</sup> While immovable property refers to property such as land and building, this thesis places emphasis on movable property to which ownership of guns is situated. From a general perspective, the right to property can only be deprived as an exception to the nature of the application of the law. As such where the law is of limited application, the enjoyment of the right to property cannot be

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<sup>6</sup> See *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18.

<sup>7</sup> Bopape S 'An analysis of the firearms control measures used by the South African Police Service' (Unpublished doctoral thesis University of South Africa 2017) generally.

<sup>8</sup> Constitution of the Republic of South Africa, 1996.

<sup>9</sup> Section 25 (1).

<sup>10</sup> Pienaar G 'The effect of the original acquisition of ownership of immovable property on existing limited real rights' (2015) 18(5) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1479-1505.

deviated from. However, this position is still subject to the constitutional provision on the limitation of rights under South Africa's democratic dispensation.<sup>11</sup>

It is thus important to categorise the ownership of a gun as a piece of property within the context of section 25. Its position as property is encapsulated in its nature as a tangible object that can be owned.

A 2018 study indicates that there are about 3 million registered and 2.35 million unregistered firearms.<sup>12</sup> A reconciliation of these figures with South Africa's population indicates that there are 9.65 firearms every 100 persons in the country.<sup>13</sup> That is an indication that there are 5.35 million firearms for a population of 58 million people in South Africa.<sup>14</sup> The perception that one out of every ten people possesses a gun leads to the need to question the laws that allow for the ownership of a gun.

There is research that has been done to establish a connection between firearm prevalence and crime. Cook and Ludwig state that the increased prevalence of firearms may deter criminal predation.<sup>15</sup> They, however, hasten to add that the ownership of

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<sup>11</sup> Section 36 generally. A detailed discussion is beyond the scope of this paper. See Rautenbach IM 'Proportionality and the limitation clauses of the South African Bill of Rights' (2014) 17(6) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 2229-2267 generally.

<sup>12</sup> Karp A (2018) *Estimating global civilian-held firearms numbers* (2018) 1-12 generally.

<sup>13</sup> Karp A (2018) 1-12 generally.

<sup>14</sup> Karp A (2018) 1-12 generally.

<sup>15</sup> Cook P & Ludwig J (2006) 90 'The social costs of gun ownership' *Journal of Public Economics*, 379-391.

guns is indicative of possible misuse by owners or the illegal and unmonitored transfer of the guns to dangerous people through theft or unregulated sale.<sup>16</sup> In this regard in light of the high number of unregistered guns, statistics indicate that firearms become the weapons of choice in the commission of violent crimes such as murder, robbery with aggravating circumstances and business and home robberies.<sup>17</sup> There is no doubt that the 2.35 million unregistered firearms do not contribute to these statistics. Besides, the threat of the use of a firearm without firing at a victim is still proof of its use despite the reluctance to fire it at someone.<sup>18</sup> As such, the link between the ownership of a gun and crime is informed by the existence of unregistered guns which often place the owners in a position not to display due diligence before they use them to commit a crime.

This calls for a balance between the right to own property on one part and the obligation to respect the rights to life, the security of person and prohibition against torture on the other part. The right to own property like a firearm has to be subject to the various rules that guide its ownership such as licencing, storage, transportation.<sup>19</sup> These rules should to the logical end speak to the protection of the right to life. This discussion will come

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<sup>16</sup> Cook & Ludwig (2006) 379.

<sup>17</sup> According to safer spaces, The 2015/16 National Murder Study released at the time of the annual crime statistics shows that 16 people were shot and killed every day, just under 6000 people a year. This is a significant reduction in gun deaths, from 1998, when 12,298 people were shot and killed, averaging 34 people a day. See similar research by Chetty R. *Firearm Use and Distribution in South Africa* (2000) 20

<sup>18</sup> See Matzopoulos R (2015) 'Injury-related mortality in South Africa: a retrospective descriptive study of postmortem investigations' available at <http://dx.doi.org/10.2471/BLT.14.145771> (accessed 3 October 2020).

<sup>19</sup> This informs the discussion of these aspects and the definition of a firearm across the various jurisdictions. See chapters two, three, four and five. This approach is a deliberate move to appreciate the various contexts and not a move to duplicate the same information across the various jurisdictions.

out clearly in the evaluation of the approaches that various countries give to the ownership and possession of a firearm. It is argued that a discussion on the regulation of the ownership, renewal of licences concerning a gun is instructive. This informs the need to have a watertight regime that uses the definition of a firearm to inform its regulation.

Besides, the Firearms Act limits the use of guns when it adds that '(e)veryone has the right peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions'.<sup>20</sup> This reiterates the fact that every person in South Africa has a fundamental human right to safety. This position is in tandem with the National Crime Prevention Strategy (NCPS) that shows the need to deal with the causes of violent crime in South Africa, such as accessibility of firearms culminating into high levels of violence associated with robbery, rape and car theft.<sup>21</sup> In addition, item 5 of the NCPS calls for an engagement with firearm-related crimes through 'an interagency approach to improve the legislative controls of firearms, track smuggling routes and syndicates, co-operate with neighbouring states, tighten controls on state-owned weapons and restrict illegal importation of firearms'.

Subsequent legislation has been enacted to add value to these constitutional virtues by providing a normative framework through which an individual may own a firearm. The

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<sup>20</sup> Firearms Act, s 17.

<sup>21</sup> The National Crime Prevention Strategy available at [www.polity.org.za](http://www.polity.org.za) (accessed 18 July 2020).

supporting legislative framework includes the Firearms Control Act of 2000 (FCA),<sup>22</sup> and the Firearms Control Regulations (FCA Regulations).<sup>23</sup> The National Commissioner of the South African Police Service (SAPS), is the designated authority in South Africa with a statutory mandate to function as the National Commissioner of Registrar of Firearms (the Registrar).<sup>24</sup>

Also, there are procedural aspects that create a framework for the acquisition and use of firearms. The first procedural aspects deal with a person who seeks to acquire a firearm whereby there are limits within or beyond which one may own or fail to own a firm. For instance where the firearm is within the prohibited bracket subject to exceptional circumstances,<sup>25</sup> the process for obtaining a licence for a firearm,<sup>26</sup> where renewal is subject to requisite steps,<sup>27</sup> or where the firearm is for shooting sports.<sup>28</sup> The second procedural requirement speaks to an individual who seeks to acquire a licence to deal in firearms. As such, an application to deal in firearms has to be accompanied by a competency certificate, which is dependent on evidence that shows that applicant

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<sup>22</sup> Firearms Control Act 60 of 2000.

<sup>23</sup> Firearms Control Regulations, 2004.

<sup>24</sup> Firearms Control Act 60 of 2000.

<sup>25</sup> Section 14.

<sup>26</sup> Applying for a new firearm licence. Available at [https://www.saps.gov.za/services/flash/firearms/faq\\_applying\\_for\\_new\\_licence.php](https://www.saps.gov.za/services/flash/firearms/faq_applying_for_new_licence.php) (accessed 1 August 2019).

<sup>27</sup> One is required to fill Form 518(a). see <https://www.saps.gov.za/services/flash/firearms/forms/english/e518a.pdf> (accessed 1 August 2020).

<sup>28</sup> Firearms Control Act 60 of 2000, section 15.

does not have a history of violence or substance abuse, (s)he had displayed competencies in safe and efficient handling of firearms,<sup>29</sup> and demonstrates the safe custody of firearms.<sup>30</sup> In addition, it is incumbent upon a person who seeks to deal in firearms to maintain records of all firearms and ammunition in stock, all firearms kept in his or her possession on behalf of other licensees, and to make such records available for inspection upon a request by any police official.<sup>31</sup>

Although these substantive and procedural controls are in place, the State has to ensure the safety of the persons who are within the vicinity of areas where there are persons with firearms.<sup>32</sup> This responsibility is not limited to the use of strict control measures that ensure non-abuse and criminal proliferation of firearms; but how violent injuries and firearms-related deaths are minimised. To this end, it is argued that different kinds of firearms call for different regulations and restrictions on their sale and purchase.<sup>33</sup> As such, while there is a wealth of research that answers questions of ownership, regulation, proliferation and policing of firearms,<sup>34</sup> there is a need to take a step backwards and examine the current definition of a firearm regarding its inclusive or rather exclusive criteria on matters of adequate safeguards concerning ownership, regulation, proliferation and policing of firearms in South Africa. It is argued that a

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<sup>29</sup> Chapters 4, 5.

<sup>30</sup> Firearms Control Act 60 of 2000, section 146.

<sup>31</sup> Section 106-109.

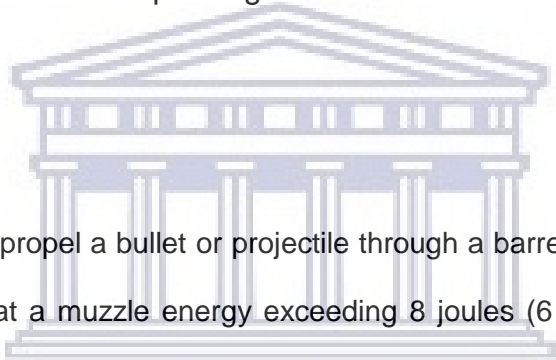
<sup>32</sup> Jaynes and Meek (2010) 1.

<sup>33</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>34</sup> Wellford, Pepper & Petrie (2005) 2.

working resolution to this question has to be informed by the experiences from other jurisdictions.

It should be noted that before 2000, there was no statutory definition of a firearm. The FCA did not have a definition and this was solved by the amendment to section 1 in 2000.<sup>35</sup> The current definition of a firearm is provided for in Firearms Control Act 60 of 2000, thus creating a need to have a definition to aid the ownership, regulation, control the proliferation and deal with the policing of firearms. A broad definition is adopted thus, a firearm includes



any device that can propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs); anything with the capacity to discharge rim-fire, centre-fire or pin-fire ammunition; any device that can be readily altered to be any of the above-listed firearms; any device designed to discharge any projectile of at least .22 calibre at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas; or any barrel, frame, or receiver of a device mentioned above.<sup>36</sup>

The fallacy with this definition is that despite the rather broad definition, it excludes various devices that would, in all probability require safeguards about ownership, regulation, proliferation and policing. Devices such as explosive-powered tools used by

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<sup>35</sup> Firearms Control (Amendment) Act 60 of 2000

<sup>36</sup> Section 1(xiii) (a)-(e).



industries,<sup>37</sup> stun bolts used in slaughterhouses,<sup>38</sup> antique firearms,<sup>39</sup> air guns,<sup>40</sup> and deactivated firearms<sup>41</sup> all have the lethal effect of a firearm yet they are simply dealt with under the law of delict. This is exacerbated by the power of the Minister of the Department of Safety and Security to exclude a device from the lists of firearms.<sup>42</sup> Without prejudice to the foregoing, the fallacy of this approach is evident in the counter-argument that these explosive-powered tools need not be regulated by the Fire Arms law as far as they are regulated by other legislation. This study argues that in instances of abuse, these devices have to be treated as though they are firearms and be regulated by the Firearms Act.

In addition, this definition is vague as far as it embodies various aspects that could otherwise mean various things. For instance, the reference to the firearm as any device that can propel a bullet or a projectile is wide. Projectiles generally refer to any object that can be cast, fired, flung, heaved, hurled, pitched, tossed, or thrown.<sup>43</sup> Also, one has to prove that the projectile is propelled through a barrel or a cylinder through a barrel or cylinder, through a burning propellant at muzzle energy. This is an indication that where the prosecution fails to discharge the onus of proving these aspects of the definition, then the proof of the existence of a firearm fails. This is an indication that imitations of

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<sup>37</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>38</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>39</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>40</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>41</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>42</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>43</sup> A catapult for instance, that propels a stone, qualifyinf the later as a projectile. In addition,

firearms do not pass this test even if they are used to threaten violence in the course of the commission of an offence.<sup>44</sup>

As will be shown in Chapters two to five, the different jurisdictions present various interpretations of a firearm in light of various contexts.<sup>45</sup> It is further argued that these experiences provide separate sets of legislation in the need to distinguish firearms from other modes of equipment used in other occupations.

As will be shown in detail, recent court decisions are instructive in this regard. Some cases elucidate the dangers of using this definition. In *S v Fulani*, the issue was whether the State properly charged the appellant with unlawful possession of firearm and ammunition.<sup>46</sup> In response to the definition of a firearm under the Firearm Control Act, the Court stated that the charge was dependent on whether the firearm fell within the definitional bounds of the Act.<sup>47</sup> In setting aside the appellant's convictions, the Court stated that it was incumbent

'on the state to adduce evidence establishing that the device used fulfilled the technical criteria in the definition of 'firearm'.<sup>48</sup>

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<sup>44</sup> The commission of an offence is deemed complete where a person holds out to the other to be using a firearm. This aspect is not covered by the current definition, for purposes of commission of an offence involving firearms.

<sup>45</sup> See Chapters 2, 3, 4 and 5 for the development of this thought.

<sup>46</sup> *S v Filani* 2012 (1) SACR 508(EGC).

<sup>47</sup> Firearm Control Act, sec 1(xiii) (a)-(e).

<sup>48</sup> *Filani*, p.515f-g.

The prosecution asserted that the small hole on the wall occasioned by the force or velocity of the weapon qualified it as a firearm. The Court rejected this position and stated that

'given the increased technical nature of the various definitions of 'firearm' contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.'<sup>49</sup>

This creates a danger where there is no loss of life, yet the State fails to get an expert to testify as to the fact that the gun in issue is a firearm within the meaning of the Act. This danger was heightened in *S v Nkomo*.<sup>50</sup>

In *S v Ndebele*, the court was still faced with a similar issue, save that a ballistic expert was called to testify. While the expert evidence was tendered, it was neither seriously challenged nor rebutted concerning the conclusions based on the facts. The Appellant argued that the firearm did not have a firing pin, the centre-pin and that the expert witness did not test whether the firearm could be readily altered, fixed or manipulated to discharge ammunition.<sup>51</sup> This was a clear indication that the requirements about the propulsion of a bullet or projectile through a barrel and the discharge of rim-fire, centre-

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<sup>49</sup> *Filani*, p.515f-g.

<sup>50</sup> *S v Nkomo* (158/2016) [2018] ZAGPJHC 48 (26 January 2018), para 76-79.

<sup>51</sup> *Ndebele v S* (A197/2018) [2019] ZAGPJHC 111, para 35.

fire or pin-fire ammunition were not proved.<sup>52</sup> However, due to the uncontested evidence by the expert witness, that the device was in line with the definition of a firearm.

### 1.3 RESEARCH PROBLEM

The current description of a firearm is highly prescriptive and it places a burden on the prosecution to prove the existence of a firearm in the definition other than a full engagement of forensic evidence.<sup>53</sup> This is a stark departure from definitions from other jurisdictions that embrace definitional, descriptive and prohibitive aspects to ensure that a well-reasoned definition is used.

The current definition as such offers a vague platform on which to gauge the existence of a firearm in the commission of offences.<sup>54</sup> This is exacerbated by the statistics that indicate the nexus between the high numbers of unregistered guns in South Africa, coupled with the high use of a firearm as a weapon of choice over other weapons. The

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<sup>52</sup> Firearm Control Act, sec 1(xiii) (a)-(b).

<sup>53</sup> See *S v Filani* 2012 (1) SACR 508(ECG), *S v Nkomo* (158/2016) [2018] ZAGPJHC 48 and *Ndebele v S* (A197/2018) [2019] ZAGPJHC 111 above.

<sup>54</sup> The vagueness is in the breadth of application that would seemingly place most devices under this bracket. However, as will be shown, this greatly affects by the exclusion of other devices like antique guns, among others.

crux of this nexus is the glaring statistic that there are 9.65 firearms per every 100 persons in the country.<sup>55</sup>

If this study is not done, the effect of the definition on the ownership, regulation, proliferation and policing of firearms in the context of crime is left in abeyance. This affects the role of the stakeholders in the fight against misuse of firearms to wit, the police, prosecution, judiciary in the sector of justice, law and order. This study adds knowledge to the already existing scope of firearms. A definitional perspective is instructive in aiding the appreciation of a good definition as a keep input in the ownership, regulation, proliferation and policing of firearms.

#### **1.4 PURPOSE OF THE STUDY**

The study seeks to evaluate the efficacy of the current definition of a firearm concerning its ability to aid the ownership, regulation, control the proliferation and deal with the policing of firearms. It is argued that a definition that is limited or overly broad affects the role of the legislation and emerging jurisprudence on the intent of either the court or parliament. As such, this lends credibility to the need to revisit the definition and evaluate whether it is inclusive or exclusive in carrying forward the statutory mandate.

The purposes of the study are threefold:

1. To examine the context of the definition of a firearm in South Africa.

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<sup>55</sup> Karp A (2018) 1-12 generally.

2. To draw on the experiences of other jurisdictions with regard to the definition of a firearm.
3. To recommend a new definition of a firearm.

## 1.5 RESEARCH QUESTION

The central research question of this study is:

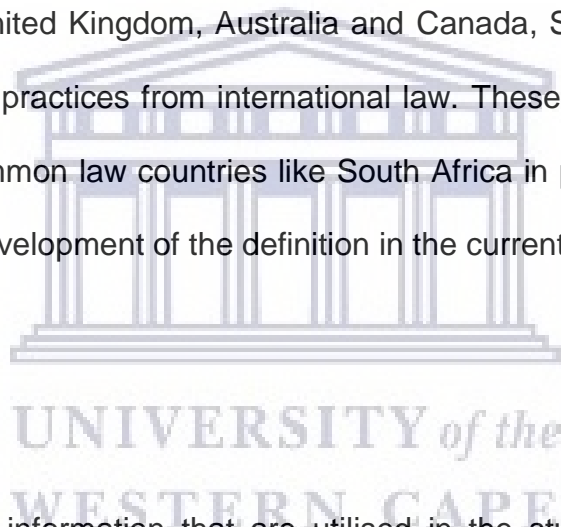
What is the context of the definition of a firearm?

To respond to this question, the study examines three interrelated secondary questions, which are:

1. What is the definition of a firearm in South Africa?
2. Whether experiences of other jurisdictions regarding the definition of a firearm may aid the understanding of the South African definition?
3. Whether there is a need for a new definition of a firearm?

## 1.6 RESEARCH METHODOLOGY

This study identifies a definitional problem of a firearm in South Africa leading to a spiral effect on the role of the legislation and emerging jurisprudence. As a result, the study reviews and analyses the literature and case law that is relevant to the study. The methodology used is desktop research based on the review and analysis of literature and case law that are relevant to the subject of the study. While it may be taken to be a comparative study, it is safer to state that the study draws on experiences from various countries such as South Africa, the United Kingdom, Australia and Canada. The sources that are examined included the legislation of South Africa and selected countries such as the United Kingdom, Australia and Canada, South African case law, selected jurisdiction and practices from international law. These countries are selected because they are all common law countries like South Africa in part and that their laws were instructive in the development of the definition in the current FCA.<sup>56</sup>



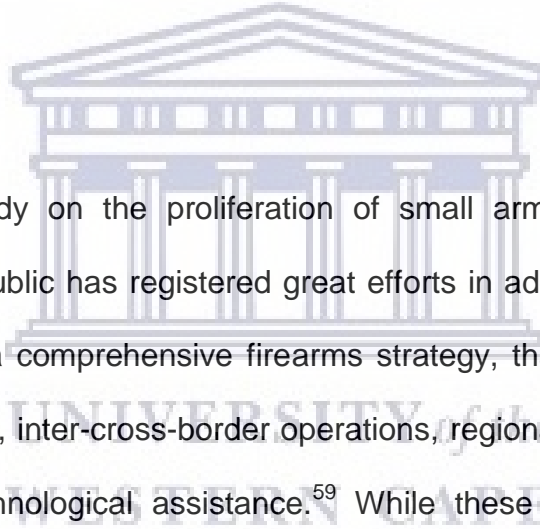
The primary sources of information that are utilised in the study include legislation, policy documents, while the secondary sources include scholarly journal articles and academic books relevant to the definition of firearms.

## 1.7 LITERATURE REVIEW

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<sup>56</sup> A detailed discussion of these countries is provided for in Chapter Four.

Available literature recognises the fact that firearms have had important influences on Africa's history, with little evaluation of the nuances that inform a uniform regulation.<sup>57</sup> Pillosof (2007) examines the role of firearms in warfare and conflict and the considerable changes that have occurred.<sup>58</sup> The emphasis on the pre-colonial period indicates the use of the firearms to conquer and subjugate with recourse to the implication that follows the use of a firearm with a proper and corresponding definition to delimit the item before use and legislative regulation. The other challenge with this literature is that it speaks to Africa as a block without an emphasis on South Africa's history.



Keegan conducts a study on the proliferation of small arms in South Africa and establishes that the Republic has registered great efforts in addressing this problem in light of the adoption of a comprehensive firearms strategy, that embraces tough new firearm control legislation, inter-cross-border operations, regional sharing of information and other forms of technological assistance.<sup>59</sup> While these have focussed on the stimulation of stricter gun control, the study is limited to small arms, and sources illegal guns. The research falls short of contextualising the role of the international community concerning proliferation, let alone the definition. These have focused on stimulating stricter gun control measures throughout the region, on tracking down the sources of

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<sup>57</sup> Storey WK *Guns, Race, and Power in Colonial South Africa* (2008), 1. White G 'Firearms in Africa: An Introduction' (1971)12(2) *Journal of African History* 173, 173.

<sup>58</sup> Pillosoff R (2007) 'Guns Don't Colonise People ...' The Role and Use of Firearms in Pre-Colonial and Colonial Africa in *African Military History* J Lamphear (ed) 266-277, 268.

<sup>59</sup> Keegan M (2005) 'The Proliferation of Firearms in South Africa, 1994-2004' A Gun Free South Africa Report, Oxfam Canada.



illegal guns, and identifying and destroying weapons caches. It is hard to appraise to what extent this has addressed the problem; however, these activities will likely have to continue long into the future.

Thomasson identifies the need for training of law enforcement officers in the handling of firearms to ensure that the public's expectation of protection and the potential liability is not abused.<sup>60</sup> While such a perceived necessity of realistic training is important, it is prudent to engage other people who handle guns, albeit illegally, such that the guns are systematically removed from undeserving members. Training of the officers is not a holistic engagement of the firearm problem as it is not instructive enough in dealing with issues of public safety.<sup>61</sup>

Bopape offers an analysis of the firearms control measures used by the South African Police Service. He establishes that if the police can improve on the enforcement of the FCA, crimes involving firearms and violent crimes, in general, can be prevented and reduced.<sup>62</sup> He proposes enforcement through the reduction of administrative obstacles that impede the effectiveness of the FCA in policing firearms are addressed.<sup>63</sup> He is

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<sup>60</sup> Thomasson J 'An Analysis of Firearms Training Performance among Active Law Enforcement Officers' (2013 unpublished master's thesis Henderson State University 2013) generally.

<sup>61</sup> Klein ME 'The Second Amendment in the 21st Century: An In-Depth Examination of Firearm Freedoms and their Relationship with Public Safety and Interests' (2016 Honors Undergraduate unpublished theses) generally.

<sup>62</sup> Bopape (2017) 183.

<sup>63</sup> Bopape (2017) 183.

optimistic that this will lead to positive management of firearms and the subsequent reduction of firearm-related incidents in South Africa.<sup>64</sup> It is argued that any recommendation that does not contextualise the definition of a firearm needs to be re-evaluated against a study that interrogates the current definition.

## **1.8 LIMITATIONS OF THE STUDY**

The scope of this study is the interpretation of a firearm in the normative and jurisprudential aspects of a firearm in South Africa. It draws insights on how the courts have defined a firearm and how this has affected the outcome of decisions under this definition. While other aspects such as ownership, regulation, proliferation and policing of firearms are key aspects, a conscious decision not to deal with them extensively is taken. The study engages the danger of this definition to the criminal justice process about the victim, accused and the court.



## **1.9 CHAPTER OUTLINE**

Chapter One offers a background to the study, a research problem, the purpose of the study and the research methodology. Also, a tentative literature review, limitations to the study, a chapter outline and a research timeline are offered.

Chapter Two examines the normative position of the definition of a firearm in the context of all legislation that speaks to implied and actual definitions of a firearm. With the aid of

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<sup>64</sup> Bopape (2017) 183.

statutory developments from during apartheid, the period from 1996 to 2000, and post-2000 is engaged.

Chapter Three evaluates the jurisprudence of the South African courts concerning the challenges presented by the definition of a firearm in section 1 to the FCA. It analyses the extent to which the section has been interpreted as either an inclusive or an exclusive definition, and how it speaks to ownership, regulation, control and policing of firearms.

Chapter Four examines the current trends in dealing with the jurisprudence of the other jurisdictions on the definitions of a firearm and how it speaks to South Africa's position. The experiences of other jurisdictions such as the United Kingdom, Canada and Australia. This is contrasted with international practices in the definition of firearms.

Chapter Five draws on the various developments from the other jurisdictions to identify and strengths and weaknesses of the current definition in South Africa. This informs the need for change in the definition of a firearm. This chapter is informed by the findings in Chapters Two, Three and Four.

Chapter Six provides a conclusion and recommendations of the study.

## CHAPTER TWO

### DEVELOPMENTS IN SOUTH AFRICA'S NORMATIVE FRAMEWORK ON THE DEFINITION OF A FIREARM

#### 2.1 INTRODUCTION

The previous chapter offered a background to the study, the research problem, the purpose of the study and the research methodology. Also, a tentative literature review, limitations to the study, a chapter outline and a research timeline were offered. The current chapter examines the normative position of the definition of a firearm in the context of all legislation that has been enacted in South Africa. It looks at legislation on firearms from the apartheid to the democratic dispensation. To this end, it covers the period under apartheid, the period from 1996 to 2000, and the period after 2000.

#### 2.1 CONTEXTUAL BACKGROUND

The chapter engages the first research question regarding the context of the definition of a firearm in South Africa. This research question is crucial because the definition of a firearm enables legislation, a court or relevant authority to create an inclusion criteria in using the firearm to establish the liability of an individual, the gravity of the offence.<sup>1</sup> Also, the definition aids the interpretation of the rules that govern the licencing and ownership of firearms.<sup>2</sup> An examination of this question requires that an evaluation of

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<sup>1</sup> Bopape LS & Snyman R 'An analysis of the measures used to control firearms in South Africa: looking back and looking forward' (2015) *Acta Criminologica: African Journal of Criminology & Victimology* 114-130.

<sup>2</sup> Robinson AL & Maxwell CD 'Typifying American Exceptionalism' (2017) in *the Handbook of Homicide*, 368.

the understanding of firearm from earlier legislation other than the current law governing firearms.

The purpose of the study of the evolution is to take stock of the progress that has been made in improving the ownership, use and licencing of firearms in South Africa. Besides, the purpose is to look for a trend in the legislation concerning the development of the definition of firearms.<sup>3</sup> This is based on the perspective that a good definition organises the subject matter in such a way as to help one to grasp the fundamental patterns in a given area of the law.<sup>4</sup>

To this end, a definition should clarify whether the item in question is a firearm or not. This informs the processes of examining the firearm using forensic firearm examinations. These examinations are informed by the characteristics of a firearm and they enable the court to arrive at an informed decision.<sup>5</sup> Secondly, the definition adds value to the control and protection attached to the firearm.<sup>6</sup> Thirdly, the

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<sup>3</sup> For more insights on this, see Matzopoulos RG Thompson ML & Myers JE 'Firearm and non-firearm homicide in 5 South African cities: A retrospective population-based study (2014) 104(3) *American Journal of Public health* 455-460. This is however, a quantitative empirical study, that lacks an indepth evaluation of the existing legislation.

<sup>4</sup> Morris RC *Reason and Law* (1950) 78. See also Winston KI *The ideal element in a definition of law* 89.

<sup>5</sup> Heard B *Forensic Ballistics in Court: Interpretation and Presentation of Firearms Evidence* (2013) 41

<sup>6</sup> This speaks to issues of ownership. For a thematic insightful study on gun ownership, see Abrahams N, Jewkes R & Mathews S. 'Guns and gender-based violence in South Africa' (2010) 100(9) *South African Medical Journal* 586-588.

definition informs the holder of the obligation and possible sanctions that may arise from the use of the firearm or abuse thereof.<sup>7</sup>

## 2.2 THE ARMS AND AMMUNITION ACT 75 OF 1969

The Arms and Ammunition Act was enacted in 1969. It did not provide for a definition of a firearm. However, it defined an 'arm' to mean

any firearm other than a cannon, machine gun or machine rifle, and includes – a) subject to the provisions of ss (2) and (3) – i) a gas rifle of .22 of an inch or larger calibre or a gas pistol or revolver; ii) an air rifle of .22 of an inch or larger calibre or an air pistol other than a toy pistol; iii) an alarm pistol or revolver; iv) a gas rifle or an air rifle of .177 of an inch or larger calibre.”<sup>8</sup>

This section starts by excluding specific forms of firearms like a canon, a machine gun or a machine rifle. It then goes on to elucidate other characteristics like the size of the calibre. While the use of the characteristics as the defining aspects is a good approach, the exclusion of the specific forms of firearms as indicated above eludes a victim of protection under the law because of the exclusion in the definition. Besides, this definition was contrary to the United Nations (UN) position on firearms that rather lays out the firearms and shows the types, while maintaining them as firearms.<sup>9</sup> In light of this limitation, it is important to look at other aspects like licensing to see whether they

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<sup>7</sup> See the discussion on the Firearms Control Act, below.

<sup>8</sup> Section 1(1) of Act 75 of 1969

<sup>9</sup> See United Nations Office of Drugs and Crime- Classification of firearms available at [https://www.unodc.org/documents/organized-crime/Firearms/Firearms\\_classification.pdf](https://www.unodc.org/documents/organized-crime/Firearms/Firearms_classification.pdf) (accessed 29 September 2020).

aid this definition. It is yet to be seen how the various aspects such as licencing, persons who deal in, manufacture, import and export firearms, the powers of the police to search and seize and offences and penalties, may be instructive. This section evaluates the law as it was then, to establish if despite the lack of a definition of a firearm, these aspects added value to the restriction on the acquisition, and irresponsible use of the firearms.

### **2.2.1 Licencing of arms**

Concerning licencing, the Act required prospective gun owners to do a couple of things in the application for a licence to own a firearm. These include; taking into consideration the requirements such as the age of the applicant to be sixteen, pay the prescribed fee, and not to be a 'disqualified person'.<sup>10</sup> It is argued that the requirement on their own did little to solve the conundrum of the lack of a definition to a firearm because it placed a lower age of responsibility to 16 years other than the 18-year majority rule. This can be understood in the context of the fact that various laws at the time provided for 16 as a majority age concerning contractual obligations, marriage contracts inter alia. It should also be noted that none of the amendments to this Act ever raised the age from 16 to 18. This public's discomfort with this position was evident in the discussions by the South African Law Commission on the protection of children.<sup>11</sup>

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<sup>10</sup> Arms and Ammunition Act 75 of 1969, sec 3.

<sup>11</sup> The protection of children as consumers available at [http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/childrens\\_act/salrc/15-dp103-ch12.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/childrens_act/salrc/15-dp103-ch12.pdf) (accessed 6 October 2020). Various organisations such as the National Council of Children, the Durban Committee and the Cape Law Society aggitated for more stringent measures to support children. This is very instructive in articulating the age bracket that can use a firearm.

The other major control is the prescribed fee, which had the effect of deterring a person from owning a gun where (s) he could not afford to pay the requisite fee to own a gun.<sup>12</sup> Regarding the declaration of fitness of a person, the Act defined a disqualified person as one who had been declared by the police commissioner as unfit to possess a licenced firearm on such grounds as suffering from a mental condition; an inclination to violence; dependence on drugs or alcohol; someone who failed to keep safe a firearm when in lawful possession; or one who had expressed an intention to kill or injure oneself or any person.<sup>13</sup> It was commendable that the law allowed a court to disqualify a person from gun ownership where (s)he was convicted for an offence relating to firearms,<sup>14</sup> or other serious offences such as murder, treason, rape and robbery.<sup>15</sup> The danger with the use of the fitness of the person was that it could only be applied after a person was of a questionable criminal character.

In conclusion, licencing controls the ownership of a firearm based on the age of the applicant, the antecedents in terms criminal history, However, the use of 16 other than 18 as the age to own a firearm is problematic as this allows a minor to own a dangerous weapon that may lead to the loss of life.<sup>16</sup>

### **2.2.2 Dealers, manufacturers and gunsmiths**

<sup>12</sup> Arms and Ammunition Act 75 of 1969, sec 15(1).

<sup>13</sup> Arms and Ammunition Act 75 of 1969, sec 15(2).

<sup>14</sup> Section 12(1).

<sup>15</sup> Section 12(2).

<sup>16</sup> For instance see, Krugersdorp News, 2018, 'Local police worried about number of firearms in wrong hands "Two murders in two nights is too much' available <https://krugersdorpnews.co.za/359724/local-police-worried-about-number-of-firearms-in-wrong-hands-2/> (accessed 29 September 2020).



The failure by the Arms and Ammunition to restrict the number of firearms that an individual can own over an indefinite period was another aspect of its laxity.<sup>17</sup> This had the propensity to lead to irresponsible gun ownership. This study adds voice to this cause and states that this irresponsibility coupled with the lack of a definition of a firearm would only exacerbate the situation. The lack of clarity on what constituted a dangerous weapon could mean for a lack of adequate control over the ownership of firearms. According to Meek (2002) and Masanzu (2006), this laxity would lead to the movement of firearms in illegal circles; a loophole that the legislation did not adequately engage.<sup>18</sup> A study by the Open Society Foundation (OSF) shows that a couple of time, firearms have always ended up in the wrong hands this has exacerbated crime.<sup>19</sup>

The eminent danger as such, is in the lack of control, though not related to the definition of the gun would be in the fact that dealers, manufacturers, gunsmiths would be able in light of this loophole to deal in, manufacture and repair or alter arms.<sup>20</sup> The study takes note of the effect of alteration of a firearm and how this may inform its conformity to the definition of a firearm in light of its ability to propel, or discharge projectiles.<sup>21</sup> It argued that this has both positive and negative connotations, especially where the context of

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<sup>17</sup> See the discussion on the definition above.

<sup>18</sup> Jayness N & Meek S (2010) *Firearms control as a human right*. Cape Town: Institute for Security Studies 2010 generally. See also Masanzu K 'Of guns and laws': a South African perspective in light of United Kingdom and United States gun laws' (2006) 39(1) *Comparative and international law Journal of Southern Africa* 131-151.

<sup>19</sup> Anthony A, Jolene A, Gail W, Themba S, Kadija R and Cathy C 'Are South Africans Responsible Firearm Owners? Evidence from 1,000 dockets' available [www.csvr.org.za/docs/arms/aresouthafricans.pdf](http://www.csvr.org.za/docs/arms/aresouthafricans.pdf) (accessed 29 September 2020).

<sup>20</sup> Jayness & Meek (2002) 1; Masanzu (2006) 131-151.

<sup>21</sup> Chapter 3 analyses the various cases that have highlighted the dangers of lack of a definition, and a vague definition of a firearm

the evaluation is between a victim of a firearm and an accused who is entitled to a fair trial. Without prejudice to the foregoing, the failure to have a definition that speaks to what a firearm is would then lead to lots of grounds for defences or excuses or qualification concerning a questionable firearm.<sup>22</sup>

The Commissioner had various powers under the Arms and Ammunition Act to carry out various acts that were related to the regulation and management of firearms in the context of dealers, manufacturers and gunsmiths. The Commissioner was empowered under the Act to grant such licence on specified premises subject to specified conditions of safe storage being met.<sup>23</sup> Besides, this licence would be granted to dealers who were in partnership with other persons or dealing with companies unless one of the partners or managing directors became a disqualified person.<sup>24</sup> While ensured that stringent conditions were kept, it should be recalled that these conditions were only subject to items that were included in the definition of a firearm.

On their part, the dealers had an obligation to keep an Arms Stock Book containing details of all arms and ammunition handled, which had to be submitted to the commissioner at intervals.<sup>25</sup> The manufacturers and gunsmiths too had to ensure that they kept registers and rendering of returns carried out in the course of trading.<sup>26</sup> It is argued that despite such regulation by the law, the non-cumbersome requirements it

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<sup>22</sup> See note 21 above.

<sup>23</sup> Arms and Ammunition Act 75 of 1969, s 19(1).

<sup>24</sup> Section 19.

<sup>25</sup> Section 23.

<sup>26</sup> Section 19(3).

placed on these three parties to obtain a licence at no extra cost was a danger that would lead to the possible irresponsible use of such arms in the commission of crime.

### 2.2.3 Search and seizure

The powers of search and seizure extended to and were limited to offences committed in terms in the Act.<sup>27</sup> There had to be a set of conditions under which the police officer would invoke the power to search and seize. To this end, once there was reason to suspect, a policeman could search a residence, vessel, structure or vehicle at any time without a warrant and seize such weapon or ammunition.<sup>28</sup> One may argue that the reason to suspect was quite subjective as it involved the discretion on the part of the police officer.<sup>29</sup> This position remains instructive in all matters of arrest and it is usually followed by objective criteria like the existence of the fact to warrant possible arrest and subsequent prosecution.<sup>30</sup> Upon seizure of such article, it was to be dealt with as it would under the Criminal Procedure Act.<sup>31</sup> It has been argued that these powers of the police were the main context of monitoring under the Act. However, the downside to this was in the fact that the monitoring too was affected but the vague and unclear

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<sup>27</sup> Section 41.

<sup>28</sup> This was grounded in the ordinary rules that govern search and seizure under the law of criminal procedure.

<sup>29</sup> Scholars and courts suggest that the validity of police actions depends not on their subjective intent, but upon the objective existence of facts constituting probable cause, reasonable suspicion, or, in other situations, how a reasonable policeman would think or act. See Bradley CM 'The Reasonable Policeman: Police Intent in Criminal Procedure' (2006) 76 *Missouri Law Journal* 339-354, 340.

<sup>30</sup> Courts have been quick to hold that the other safeguards to an accused have to be involved to avoid a violation of the rights of the accused. See para 168. See also Constitution of the Republic of South Africa, s 12(1)(a), 35(1)(d) and the Criminal Procedure Code Act, s 50(1)(c)

<sup>31</sup> Section 41(3).

understanding that a party to the case would have about whether the implement found in his or her possession amounted to a firearm, an illegal weapon or ammunition. As such the implementation of the powers of the police officer who be as such be limited to the offences committed in terms of the Act.

#### **2.2.4 Offences and penalties**

The Act also provided for offences and penalties, where an individual failed to comply with the parts of the Act. Some of the offences included the failure to comply with provisions of the Act, forging, making unauthorised alterations in a licence, permit, certificate; false entries in a register; wilful pointing of a firearm; failing to lock away arm in a prescribed safe; losing firearm whilst in lawful possession; failure to take reasonable steps to prevent loss or theft of a firearm; the discharging of a firearm and negligently injuring another person; and handling a firearm whilst under the influence of an intoxicating substance were some of the offences in terms of the Act.<sup>32</sup> While these offences provided solace in criminal law to offer solutions, they failed to define a firearm that forms the centre of various offences under the Act. It is appreciated that there were custodial sentences that could be handed down without the option of a fine like involving possession of prohibited ammunition under section 36, unauthorised importation, supply or possession of certain firearms or classes of articles.<sup>33</sup> However, an important aspect of a definition of what constituted a firearm in the context of these offences was important.

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<sup>32</sup> Section 39.

<sup>33</sup> Section 39.

### 2.2.5 Implementation

The overly broad provisions of the Arms and Ammunition Act under which licences could be obtained was a great weakness that affected the implementation of the Act.<sup>34</sup> For instance, section 11(1) enabled the commissioner to hold an inquiry where the competence of a licence holder was questionable. This would involve examining the antecedents of the applicant before granting a licence. To implement this provision, the Court had to impress upon the State the positive obligation to effectively police the possession of firearms.<sup>35</sup> In the same vein, the automatic declaration of unfitness of a person upon conviction of an offence related to firearms and the provision of a discretionary declaration of unfitness on conviction of a Schedule 2 offence was hard to apply.<sup>36</sup> The courts and the prosecution did not readily enforce declarations of unfitness due to a lack of appreciation of their understanding of the effectiveness and implementation of declarations of unfitness.<sup>37</sup>

### 2.3 AMENDMENTS TO THE ARMS AND AMMUNITION ACT 75 OF 1969

The amendments to the Arms and Ammunition Act related to the various aspects discussed above. In light of the position that the Act did not define a firearm, as such prospective design would be to look out for amendments that spoke to the definition of a firearm. To this end, the first substantive amendment was the General Law Amendment

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<sup>34</sup> The decision in *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 is instructive on this matter.

<sup>35</sup> Note 20 above.

<sup>36</sup> Section 12 (1) and (2) of Act 75 of 1969.

<sup>37</sup> *Minaar A & Mistry D 'Declared unfir to own a firearm'* (2003) 6 SA *Crime Quarterly* 31.

Act,<sup>38</sup> which required that a holder of a firearm notified the licencing office of a permanent change in the ordinary place of residence or the postal address,<sup>39</sup> or where there was the transportation of arms or ammunition.<sup>40</sup> While this amendment spoke to the close monitoring of the movement of arms and ammunition due to change of residential or postal address or transportation of firearms, it did not deal with the problem of what constituted a firearm for purposes of monitoring, use, licencing and prosecution of perpetrators.<sup>41</sup> The same rhetoric is evident in the subsequent amendments to the various between 1974 and 1995.<sup>42</sup> The Ammunition Act has been described by the Gun Control Alliance as an 'indecipherable mess' due to the various amendments occasioned to it.<sup>43</sup> While this led to the creation of complex legislation, it was rather unfulfilling as far as it failed to contextualise or define the meaning of a firearm.

In conclusion, an evaluation of the Arms and Ammunition Act 75 of 1969 and the subsequent amendments did not cover the grey area that spoke to the lack of a definition of a firearm. The various aspects such as licencing, persons who deal in, manufacture, import and export firearms, the powers of the police to search and seize and offences and penalties that were covered did little to solve the challenge of the lack

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<sup>38</sup> Act 80 of 1971.

<sup>39</sup> Section 43 of Act 80 of 1971.

<sup>40</sup> Section 43 of Act 80 of 1971.

<sup>41</sup> An analysis of the Arms and Ammunition Act, 1969 is done. See Masanzu (2006) 131-151.

<sup>42</sup> See Arms and Ammunition Amendment Acts 35 of 1973, 19 of 1983, 60 of 1998, 30 of 1990, 79 of 1991, 117 of 1992, 65 of 1993, 177 of 1992, 7 of 1995, and 35 of 1973.

<sup>43</sup> Available at [www.pmg.org.za/firearmsbill](http://www.pmg.org.za/firearmsbill) (accessed 7 December 2019).

of a definition as a guiding factor in understanding the context of a firearm. It is thus instructive to establish whether the subsequent legislation solved this problem.

## 2.4 THE FIREARMS CONTROL ACT 60 OF 2000

The Firearms Control Act (FCA) 60/2000 was enacted in 2000 and implemented in 2004 to replace the out-dated Arms and Ammunition Act 75/1969 in line with the Constitution of South Africa and the Police Act. The enactment of the FCA was done to provide for a To establish a comprehensive and effective system of firearms control; through other incidental matters like the provision of an adequate definition of a firearm.<sup>44</sup> The Constitution of the Republic of South Africa provides for the rights to life,<sup>45</sup> the security of a person,<sup>46</sup> and dignity and freedom from torture.<sup>47</sup> With regard to the right to life, the State and every living person and every living person are obligated to recognise their commitment to one another to such an extent that everyone can live life in the fullest sense of the word.<sup>48</sup> This links up with the right to security of a person, which includes the prohibition of the arbitrary deprivation of the right to life, and the prohibition of

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<sup>45</sup> The Constitution of the Republic of South Africa, sec 11.

<sup>46</sup> Section 10.

<sup>47</sup> Section 12(1) (d)-(e).

<sup>48</sup> Serfontein EM (2017) 'The Mammoth Task of Realising the Right to Life: A South African Perspective' in Anna AVB *Quality of Life and Quality of Working Life*, 165- 180, 165. The right to life and its deprivation are discussed in *S v Makwanyane and Another* (CCT3/94) [1995] ZACC 3.



torture.<sup>49</sup> To this end, the lack of an adequate law that regulates the use of guns inhibits the abuse of the same to the violation of the rights of victims.<sup>50</sup>

Besides, the Constitution provides for the right to dignity.<sup>51</sup> To this end, the principles on human dignity show the agency to respect the right on the part of the victim and the accused or perpetrator. To this end, case law and research that shows that the recognition of the dignity of an individual is not only a preserve of the State alone but everyone who places himself in a position that may ostensibly lead to the violation of the rights of an individual.<sup>52</sup>

It is also argued that everyone has the right to own property, to which a gun falls.<sup>53</sup> However, the question is, how does one balance between the right to own property on one part and the obligation to respect the rights to life, the security of person and prohibition against torture on the other part. It is argued that a discussion on the

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<sup>49</sup> See *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18.

<sup>50</sup> Bopape (2017) generally.

<sup>51</sup> Constitution of the Republic of South Africa, 1996, s 10.

<sup>52</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999, 2000 (2) SA 1 para 28. Steinmann R 'The core meaning of human dignity' (2016) 19(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1-32. See also Liebenberg S 'The value of human dignity in interpreting socio-economic rights' (2005) 21(1) *South African Journal on Human Rights* 1-31, 1.

<sup>53</sup> It is argued that by inference, a reading of section 25 of the South African Constitution, together with the Firearms Control Act 60 of 2000, does actually provide for our Constitutional right to lawful firearms ownership. See <https://www.news24.com/MyNews24/South-Africans-Constitutional-Right-To-Keep-And-Bear-Arms-SAs-Second-Amendment-20140502> (accessed 1 August 2020). See also '6 questions answered about gun ownership' available at <https://www.news24.com/Analysis/6-questions-answered-about-gun-ownership-in-sa-20181022> (accessed 1 August 2020).



regulation of the ownership, renewal of licences concerning a gun is instructive. However, this fails to speak to the need to have a watertight regime that defines a gun with clarity.

As such, the purpose of the FCA was among others to enhance the constitutional rights to life and bodily integrity of everyone in the country, to prevent the proliferation of illegally possessed firearms by making provisions for the removal of those firearms from the society.<sup>54</sup> The FCA sought to improve control over legally possessed firearms; to enable the state to control the supply, possession, safe storage and to detect negligent and/ or criminal usage.<sup>55</sup> Besides, it sought to establish an effective system of firearm control and management.<sup>56</sup> While these are good objectives, it is important to question to what extent the nature of the definition enabled the seamless engagement of this objective. It is instructive to note that the FCA still maintained the conditions on the right to possess a firearm is not guaranteed by law. It is on this basis that the various provisions about the existence of a definition of a firearm; licensing; engaging dealers, manufacturers and gunsmiths; powers of the Commissioner, search and seizure and offences and penalties are engaged.

#### **2.4.1 Definition of a firearm**

It should be noted that before 2000, there was no statutory definition of a firearm. Lack of a definition of a firearm in the Arms and Ammunition Act was solved by the new

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<sup>54</sup> Firearms Control Act s 2.

<sup>55</sup> Section 2.

<sup>56</sup> Section 2.

section 1 to the Firearms Control Act.<sup>57</sup> The current definition of a firearm is provided for in Firearms Control Act 60 of 2000, thus creating a need to have a definition to aid the ownership, regulation, control the proliferation and deal with the policing of firearms. A broad definition is adopted thus, a firearm includes

any device that can propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs); anything with the capacity to discharge rim-fire, centre-fire or pin-fire ammunition; any device that can be readily altered to be any of the above-listed firearms; any device designed to discharge any projectile of at least .22 calibre at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas; or any barrel, frame, or receiver of a device mentioned above.<sup>58</sup>

It is worth appreciating that this definition of a firearm is a point of departure from the earlier definition of an arm in the Arms and Ammunition Act. This definition is indubitable wide as it moves from the limited reference to an arm to reference to any device. Besides, the definition underscores the characteristics of this device that include propulsion, a degree of velocity and the capacity to discharge specific forms of fire like rim, centre and pinfire. This capacity and velocity of the device applies to projectiles and is by means of compressed gas, a barrel, frame, or receiver of a device mentioned above. It is worth noting that the FCA is silent on the excluded devices under the Arms and Ammunition Act.

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<sup>57</sup> Firearms Control (Amendment) Act 60 of 2000

<sup>58</sup> Section 1(xiii) (a)-(e).

Without prejudice to the foregoing, the fallacy with this definition is that despite the rather broad definition, it excludes various devices that would, in all probability require safeguards concerning ownership, regulation, proliferation and policing. To this end, therefore, explosive-powered tools used by industries,<sup>59</sup> stun bolts used in slaughterhouses,<sup>60</sup> antique firearms,<sup>61</sup> air guns,<sup>62</sup> and deactivated firearms<sup>63</sup> all have the lethal effect of a firearm yet they simply dealt with under the law of delict despite the life-threatening consequences. This is exacerbated by the power of the Minister of the Department of Safety and Security to exclude a device from the lists of firearms.<sup>64</sup>

Before other aspects are looked at, it is imperative to look at some scholarly definitions to relate with this definition in the interim. This is based on the perspective that subsequent chapters engage other jurisdictions to take the conversation forward. To this end, some scholars define a firearm

as a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, including a component part or any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, but excludes antique firearms.<sup>65</sup>

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<sup>59</sup> Wellford, C.F., Pepper, J.V. & Petrie, C.V. 2005. *Firearms and violence: A critical review*. Washington, D.C.: National Academies Press, 2

<sup>60</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>61</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>62</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>63</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>64</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>65</sup> English J & Card R *Police Law* (10 ed) (2007) 754.

This approach takes on a descriptive approach of a weapon that can discharge three major components like a shot, bullet or other missile can be discharged. However, it goes on to exclude antique firearms.<sup>66</sup> At least at a bare minimum, the definition only excludes antique guns.

Another scholar defines a firearm as

- (a) any portable lethal weapon that expels, or is designed to expel, a shot, bullet or projectile by the action of burning propellant, excluding antique firearms or their replicas that are not subject to authorization in the respective state parties;
- (b) any device which may be readily converted into a weapon referred to in paragraph (a);
- (c) any small arms and light weapons designed and operating as indicated in paragraph (a).<sup>67</sup>

This second approach continues a descriptive approach of a weapon that can discharge three major components like a shot, bullet or other missile can be discharged. Besides, it refers to any device that can be converted- this would cover other devices like stun bolts, stun belts, stun shields, stun batons and stun guns. In light of the previous scholarly positions and the definition under the FCA, there is a gap in the law concerning items that are lethal in the sense of bodily harm that can be caused yet are not covered in the law. A recent report by the Institute for Security Studies shows that this gap in legislation extends to the control of law enforcement equipment that may be

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<sup>66</sup> Antique firearms are defined in section 1 of the FCA as 'antique firearm' means any muzzle loading firearm manufactured before 1 January 1900, or any replica of such a firearm.

<sup>67</sup> Stott (2003) 9.

used to facilitate torture and ill-treatment.<sup>68</sup> Some of the gadgets include stun belts, stun shields, stun batons and stun guns; that have used by the law enforcement officials in serious abuses, resulting in torture, cruel, inhuman or degrading treatment, injury and at times to death.<sup>69</sup>

#### **2.4.2 Licensing of a firearm**

Under the FCA, only firearm applicants who have a competency certificate may apply for a firearm licence.<sup>70</sup> Applicants must provide genuine reasons to possess a firearm, which include hunting, target shooting, collection, personal protection and/or security.<sup>71</sup> There is a need for applications for possession of a firearm on account of firearms collection, target shooting and hunting to substantiate their application by attaching additional documentation from respective associations of farm owners of the farms where the applicants intend to hunt.<sup>72</sup> A point of departure from the Arms and Ammunition Act is the minimum age of gun ownership as 21 years, unless the applicants carry out or are gainfully employed in the firearm industry, as dedicated hunters or sportspersons, or are private firearm collectors.<sup>73</sup> Other background checks that the applicant has to underscore include his or her criminal, mental, medical,

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<sup>68</sup> Omega Research Foundation 'Manufacturing torture? South Africa's trade in electric shock equipment' available <https://media.africaportal.org/documents/PolicyBrief84.pdf> (accessed 29 September 2020).

<sup>69</sup> Omega Research Foundation 'Manufacturing torture? South Africa's trade in electric shock equipment' available <https://media.africaportal.org/documents/PolicyBrief84.pdf> (accessed 29 September 2020).

<sup>70</sup> Firearms Control Act 60 of 2000, s 6(2).

<sup>71</sup> Section 6(2).

<sup>72</sup> Bopape (2008) 168.

<sup>73</sup> Firearms Control Act 60/2000, s 9(2).

domestic violence, addiction, employment, and previous firearm history.<sup>74</sup> The background check is corroborated by a character reference for each firearm licence the applicant requires. As such, a mentally unstable person may be considered a danger to others.

The number of firearms that an individual can own is also instructive to the final grant of the licence. In South Africa, firearm applicants are allowed one firearm per firearm licence for civilian private ownership.<sup>75</sup> This is an indication that there is a separate licence for each firearm. Some of the other controls that inform licensing are that only one firearm in the form of a handgun, or shotgun may be issued for self-defence,<sup>76</sup> a rifle may be issued in exceptional cases for restricted self-defence,<sup>77</sup> a maximum of four firearms may be issued for occasional hunting and/or sports shooting.<sup>78</sup> Categories of individuals dedicated to hunting, shooting allows professional hunters and collectors to possess more than four firearms, depending on individual motivation for the need.<sup>79</sup> Firearm applicants need to renew their firearm licences every 5 to 10 years depending on the category, for control purposes.

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<sup>74</sup> For instance, a past refusal of competency certificate or an unfitness declaration could suffice, a background check and character reference consider, among others, the involvement of the applicant in domestic violence and the generic misuse of firearms may be revisited. See sec 9(2) (l) of Firearms Control Act 60 of 2000.

<sup>75</sup> Firearms Control Act 60 of 2000, s 13.

<sup>76</sup> Section 13.

<sup>77</sup> Section 14.

<sup>78</sup> Section 15.

<sup>79</sup> Section 16-18.

### 2.4.3 Dealers, manufacturers and gunsmiths

The FCA and the Arms and Ammunition Act offer similar provisions in this regard. However, the FCA offers new conditions under which the licence is being issued especially where they pertain to a unique aspect of the particular category, for example, the affixing of serial numbers concerning manufacturers. The stricter requirements under the FCA improve the control of firearms under the control of dealers, manufacturers and gunsmiths. For instance, the FCA provides a requirement that a licence can only be granted to 'fit and proper' person.<sup>80</sup> This requirement 'for a fit and proper' person is an inquiry into the skill and expertise of the applicant, whether as a dealer, gunsmith or manufacturer supported by a recommendation.<sup>81</sup> The new Act institutes strict monitoring of trade by requiring temporal authorisations to be granted when one wishes to conduct business at alternative premises. Also, where the licence holder's details have changed the Registrar must be notified. The transferability of the licence, unlike under the Ammunition Act is slightly curtailed in the Firearms Act. This is done by holding that the licence issued may not be transferred.<sup>82</sup> Storage requirements for dealers, manufacturers and gunsmiths have been tightened under the new Act by requiring a precise description as to the construction of the strong-room where arms and ammunition are kept. The regulations provide for construction requirements that include the installation of a burglar alarm.<sup>83</sup> The most unique and efficient feature of the new Act is the establishment of a centralised database in respect of each category of

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<sup>80</sup> Section 32.

<sup>81</sup> Government Gazette 26156/2004 part 3.

<sup>82</sup> Part 2,3.

<sup>83</sup> The Firearms Control Act, s 36.

persons. Each category of persons is meant to have a work station with links to their particular centralised database.<sup>84</sup> Although, the previous Act did provide for the keeping of registers and rendering of returns to be submitted to the Commissioner, the centralised database under the new Act is a novel and more efficient means of monitoring the transactions taking place, through the easy access to the details concerning firearms. Since the Registrar can monitor transactions as they are being conducted, thus adding to transparency within the system.

#### **2.4.4 Search and seizure**

Concerning search and seizure, the Act makes amendments to the Criminal Procedure Act, 1977. In doing so it adds a proviso to section 20 of the Criminal Procedure Act which caters for scenarios where on reasonable grounds, police officials can search for and seize a firearm where such arm is under the control of a person incapable of proper control because of physical or mental condition.<sup>85</sup> Any police officer in the course of official policing operations in terms of the South African Police Service Act 1995 can search any premises, vessel or aircraft and seize any firearm, imitation firearm, airgun or ammunition is reasonably suspected to be held contrary to the Act. This can be engaged to determine whether or not the provisions of the Act have been complied with in respect of the seized article.<sup>86</sup> These powers are not substantially different from the Ammunition Act since the underlying requirement is that of searching without a warrant on reasonable grounds. The main difference is that the powers are articulated more

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<sup>84</sup> Section 30.

<sup>85</sup> Section 110.

<sup>86</sup> Section 111.



clearly and in particular, are not restricted to offences committed in terms of the Act as they were under the Ammunition Act. Based on a special warrant, a search and seizure for inquiry or investigation relating to the application of this Act may be made where it appears on reasonable grounds that the premises or dwelling may have a bearing on the subject-matter of the inquiry or investigation.<sup>87</sup> Incidental discovery is also provided for, such as in cases wherein the course of a lawful search for anything other than firearms or ammunition, the person executing the search finds a firearm or ammunition.

Furthermore, based on reasonable suspicion of illegality or illegal possession, such person may seize the firearm or ammunition and then deal with it or dispose of it in terms of the Act.<sup>88</sup> Therefore, with the previous legislation, the current Act draws up broad powers of search and seizure that will enable the salvaging of illegal weapons. Such powers of search and seizure are necessary to strike a balance with the restriction of firearm possession on law-abiding citizens

#### **2.4.5 Offences and penalties**

The FCA draws a lot of offences from the previous Act and adds a broader ambit to them. This offers greater protection to the public through sanctions that follow the abuse of firearms. It goes further to provide strict penalties that generally do warrant a custodial sentence. Administrative fines are limited to offences that carry a custodial sentence of a period not exceeding five years.<sup>89</sup> It suffices to state that the FCA maintaining a strong ethos against the flagrant and irresponsible use of firearms and

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<sup>87</sup> Section 115.

<sup>88</sup> Section 116.

<sup>89</sup> Section 122.

ammunition. The offences include the failure to comply with any of its provisions, a condition of a licence, permit or authorisation or any direction or requirement of a notice issued under the Act,<sup>90</sup> and the failure to report without delay to a police official, the location of a firearm or ammunition in unlawful possession where any person is aware of the existence of such, will be an offence.<sup>91</sup> The offences cover negligent handling of firearms resulting in injury or endangering the safety or property of any person, or the handling of a firearm whilst under the influence of an intoxicating or narcotic substance, giving control of a firearm to a mentally ill person.<sup>92</sup>

The most identifiable offence under the FCA is the commission of an offence using a toy gun.<sup>93</sup> While toy guns are not regarded as firearms under the Firearms Control Act 60 of 2000, however the drawing or pointing a toy gun at a person constitutes an offence. It is based on these provisions that there is a current debate to enact the Dangerous Weapons Act to prohibit *inter alia*, the use of replica firearms and toy guns in the commission of an offence. This comes amidst various occurrences where guns have been used to commit crime.<sup>94</sup>

#### **2.4.6 Implementation**

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<sup>90</sup> Section 120.

<sup>91</sup> Section 120(2)(a).

<sup>92</sup> Section 120 (3) & (5).

<sup>93</sup> Section 120.

<sup>94</sup> In 2006, the man who held a Department of Home Affairs employees hostage with a toy gun was sentenced to one year behind bars. Another toy gun caused a man his life in Willowvale in the Eastern Cape when police shot and killed him for pointing a toy firearm which they believed to be a real gun at them.

The Firearms Act largely incorporates most aspects of the previous legislation but goes further to 'clarify the legal and illegal uses and ownership of firearms' through a layered licencing system expressed in simple terms. Unlike the previous legislation, it places stringent requirements on the acquisition of licences that act as a filter to the possible individuals qualifying to possess firearms. It introduces a framework in the form of a centralised database set to provide for transparency and accountability by establishing links with licensees' work stations, which was non-existent in the previous legislation. The limited duration of licences imposes on the firearm holder an obligation to have the licence renewed which ensures up to date details of licence holders particulars in the firearms registry. This should address the out of date details contained in the registers under previous legislation.

## **2.5 CONCLUSION**

The current chapter has examined the normative position of the definition of a firearm in the context of all legislation that has been enacted in South Africa. It emphasized legislation that has governed firearms from the apartheid to the democratic dispensation. It is established that while the Arms and Ammunition Act and its subsequent amendments did not have a definition of a firearm, the FCA has a definition of the same and it puts stricter measures to deal with licencing, persons who deal in, manufacture and act as gunsmiths, and places stricter offences and penalties about the use, dealing, and handling of firearms.

As earlier mentioned, the first research question regarding the context of a definition of a firearm in South Africa's legislation. Concerning this research question, this chapter

has established the despite the lack of a definition of a firearm under the Arms and Ammunition Act, there was a reference to an arm. This informed general aspects of firearms. This position, however, had a limited definition of a firearm that excluded firearms. Subsequently, a definition is accorded under the current law- the FCA but it is in the interim contextualised as a very wide definition.

Besides, the definition still excludes various devices, that places them beyond the legal safeguards that speak to firearms in terms of ownership, regulation, proliferation and policing. To this end, devices with a lethal effect are not regulated despite these consequences.

It thus suffices to state that the stricter measures regarding licencing, persons who deal in, manufacture and firearms; added stricter offences and penalties and offered better implementation of the Act may elude certain devices. As such, there must be a reconciliation of the definition and stricter measures to establish their efficacy. To this end, there is a need to establish how this definition as embraced by stricter legislation has been interpreted by the Courts in the subsequent chapter.

## CHAPTER THREE

### JURISPRUDENCE FROM THE COURTS IN ENGAGING THE DEFINITION OF A FIREARM UNDER THE FIREARMS ACT

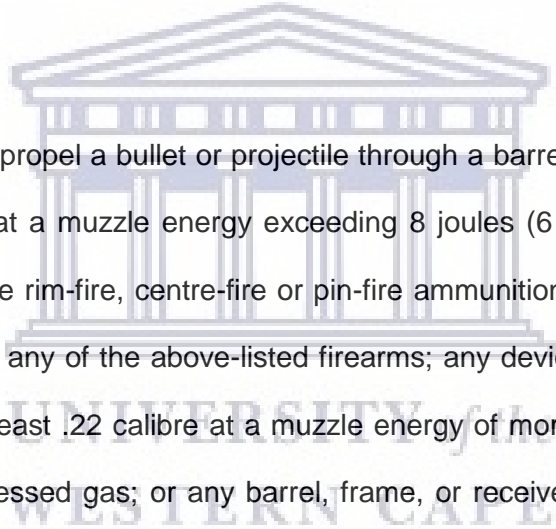
#### 3.1 INTRODUCTION

The previous chapter engaged the first research question concerning the normative definition of a firearm in South Africa. It evaluated the evaluation of the understanding of firearm from the earlier to current legislation governing firearms. The chapter evaluated the evolution of the definition of a firearm from earlier to current legislation. It was established that while there was no definition before the adoption of the FCA, the current definition was found to be very wide.

The current chapter attempts to reconcile the definition and stricter measures to establish their efficacy. To this end, there is a need to establish how this definition as embraced by stricter legislation has been interpreted by the Courts. The chapter continues to engage the first research question in respect to the definition of a firearm, save that it looks at the definition emanating from the Courts. The chapter engages the first research question and evaluates the jurisprudence of the South African courts concerning the challenges presented by the definition of a firearm in section 1 to the FCA. It proceeds to analyse the extent to which the section has been interpreted as either an inclusive or an exclusive definition, and how it speaks to the prosecution of offences; ownership, regulation, control and policing of firearms.

### 3.2 THE CURRENT DEFINITION

As earlier noted, the definition of a firearm is provided for in section 1 of the FCA. Secondly, It should be noted that before 2000, there was no statutory definition of a firearm. The FCA did not have a definition and this was solved by the amendment to section 1 in 2000.<sup>1</sup> The current definition of a firearm as provided for in the FCA, thus creating a need to have a definition to aid the ownership, regulation, control the proliferation and deal with the policing of firearms. A broad definition is adopted thus, a firearm includes



any device that can propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ft-lbs); anything with the capacity to discharge rim-fire, centre-fire or pin-fire ammunition; any device that can be readily altered to be any of the above-listed firearms; any device designed to discharge any projectile of at least .22 calibre at a muzzle energy of more than 8 joules (6 ft-lbs), by means of compressed gas; or any barrel, frame, or receiver of a device mentioned above.<sup>2</sup>

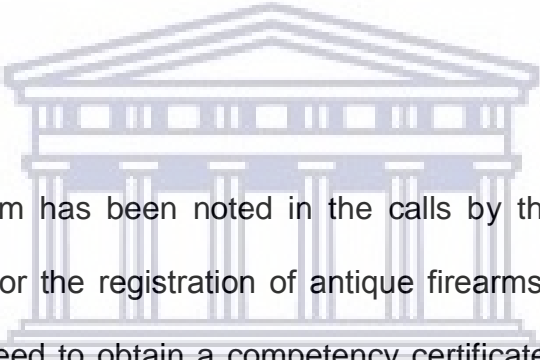
The fallacy with this definition is that despite the rather broad definition, it excludes various devices that would, in all probability require safeguards concerning ownership, regulation, proliferation and policing. To this end, therefore, explosive-powered tools

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<sup>1</sup> Firearms Control (Amendment) Act 60 of 2000

<sup>2</sup> Section 1(xiii) (a)-(e).

used by industries,<sup>3</sup> stun bolts used in slaughterhouses,<sup>4</sup> antique firearms,<sup>5</sup> air guns,<sup>6</sup> and deactivated firearms<sup>7</sup> all have the lethal effect of a firearm yet they simply dealt with under the law of delict despite the life-threatening consequences. This is exacerbated by the power of the Minister of the Department of Safety and Security to exclude a device from the lists of firearms.<sup>8</sup> Without prejudice to the foregoing, the fallacy of this approach is evident in the counter-argument that these explosive-powered tools need not be regulated by the Fire Arms law as far as they are regulated by other legislation. This study argues that they should be added to the list of firearms and regulated by the Firearms Act as well.



A crucial practical problem has been noted in the calls by the South African Police Services (SAPS) calling for the registration of antique firearms because they are 'still lethal and their owners need to obtain a competency certificate to prove that they are competent to own such weapons'.<sup>9</sup> This point of contention is the paradox between the definition in the FCA and the continued practical engagement by the SAPS.

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<sup>3</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>4</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>5</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>6</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>7</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>8</sup> Wellford, Pepper & Petrie (2005) 2 .

<sup>9</sup> Hosken G (2011) Register antique guns , or else, available at <https://www.iol.co.za/news/register-antique-guns-or-else-1009108> (accessed 29 September 2020).

In addition, this definition is vague as far as it embodies various aspects that could otherwise mean various things. For instance, the reference to the firearm as any device that can propel a bullet or a projectile is wide. Projectiles generally refer to any object that can be cast, fired, flung, heaved, hurled, pitched, tossed, or thrown.<sup>10</sup> Besides, one has to prove that the projectile is propelled through a barrel or a cylinder through a barrel or cylinder, through a burning propellant at muzzle energy. This is an indication that where the prosecution fails to discharge the onus of proving these aspects of the definition, then the proof of the existence of a firearm fails. This is an indication that imitations of firearms do not pass this test even if they are used to threaten violence in the course of the commission of an offence.<sup>11</sup> As such, the foregoing discussion contextualises the Court's Approach.

### 3.3 THE COURTS APPROACH TO THE DEFINITION OF FIREARMS

Some cases elucidate the dangers of using this definition. This section engages three major cases which include *S v Shezi*, *S v Thulani*, *S v Matinisi*, *S v Fulani*, and *S v Ndebele*. The study employs the desktop approach and looks at various sources of South Africa case law. The results of an online search offered various cases on firearms pointed to various sites such as SAfii, LexisNexis, Juta quarterly reviews of South

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<sup>10</sup> A catapult for instance, that propels a stone, qualifyinf the later as a projectile. In addition,

<sup>11</sup> The commission of an offence is deemed complete where a person holds out to the other to be using a firearm. This aspect is not covered by the current definition, for purposes of comission of an offence involving firarms.



African Law.<sup>12</sup> The study zeroed on SAflil and used its search engine to find cases on the definition of a firearm. Using keywords such as firearm, definition, Firearms Control Act led to 348 results, most of which were legislation from the entire Southern Africa, as well as cases that dealt with other aspects like licencing, dealing in firearms, and offences and penalties.<sup>13</sup> A closer look at the databases from South Africa indicated cases from provincial High Courts, the Supreme Court of Appeal and the Constitutional Court. A closer look through reading at length led the study to concentrate on the five cases listed above. It was further established that these cases deal the need for expert evidence, and the extent of repairs for inoperable firearms.

### 3.3.1 S V SHEZI

The case of *S v Shezi* is one of the few cases that engaged the dictionary definition of a firearm.<sup>14</sup> As such, in *Shezi*, the court recognised that the

“The Act contains no definition of ‘firearm’ as such, and one must, therefore, conclude that the Legislature intended it to bear its ordinary meaning.”<sup>15</sup>

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<sup>12</sup> See results at [https://www.google.com/search?q=south+african+cases+online&rlz=1C1JZAP\\_enZA823ZA823&oq=south+african+cases&aqs=chrome.6.69i57j0l7.11059j1j9&sourceid=chrome&ie=UTF-8](https://www.google.com/search?q=south+african+cases+online&rlz=1C1JZAP_enZA823ZA823&oq=south+african+cases&aqs=chrome.6.69i57j0l7.11059j1j9&sourceid=chrome&ie=UTF-8) (accessed 12 October 2020).

<sup>13</sup> See results at <http://www.saflii.org/cgi-bin/sinosrch-adw.cgi?query=DEFINITION%20OF%20A%20FIREARM;submit=Search;view=relevance;offset=0;collapse-level=0> (accessed 12 October 2020).

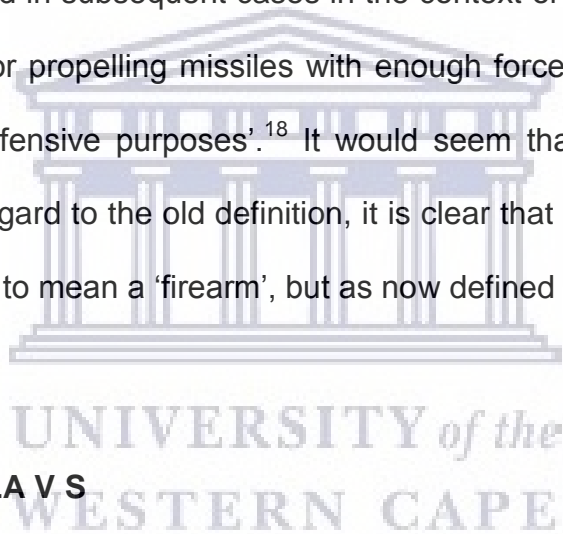
<sup>14</sup> 1980 (4) SA 494 (N)

<sup>15</sup> 495 D – E:

Following the dictionary, 'firearm' was defined in the Oxford English Dictionary as 'a weapon from which missiles are propelled by an explosive, like gunpowder'.<sup>16</sup>

The court thus arrived at the conclusion that the legislature intended the word to bear this connotation in the Act is borne out by the fact that the provisions whereby its scope is extended to include weapons from which missiles are propelled by means other than an explosive, were deemed necessary.<sup>17</sup> As such, before the enactment of the FCA, a firearm was given the meaning accorded to it in the English Dictionary.

This position was followed in subsequent cases in the context of a firearm as a weapon 'capable of discharging or propelling missiles with enough force or velocity for it to be used for offensive or defensive purposes'.<sup>18</sup> It would seem that although 'arm' is no longer defined, having regard to the old definition, it is clear that the legislative intention was to interpret 'arm' still to mean a 'firearm', but as now defined in the new Act.<sup>19</sup>



### 3.3.2 THULANI MADALA V S

In *Thulani Madlala v S*,<sup>20</sup> the accused in that case was found in possession of a firearm where a firing pin was missing or had a defect. The issue was whether in light of this defect the firearm was within the bounds of the definition. The Court referred to a case

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<sup>16</sup> Oxford Learners Dictionary (1980).

<sup>17</sup> 495 D – E:

<sup>18</sup> *S v Hlongwa* 1990 (2) SACR 262 (N) at 263h.

<sup>19</sup> *S v Hlongwa* 1990 (2) SACR 262 (N) at 263h.

<sup>20</sup> Case No AR1407/03

of *Ntsama*<sup>21</sup> where the accused was found in possession of a firearm of which the hammer spring and the magazine were missing. The court then had to decide as to whether this now still qualifies as a firearm and it found that the replacing or refitting of a part or two of the missing or defective part(s) did not deprive the article from being described as a firearm, but when the alterations and repairs required were extensive to put the article a condition of being capable of discharging a shot, the article might be derelict matter and therefore not a firearm.

As such, if the defects on the firearm are not so extensive, these can be done and the device will still be tested to either bring it within the bounds of or exclude it from being a firearm. This is line with the earlier position identified in the legislative analysis where the court may still either bring a firearm within the bounds or exclude it from the definition. At the end of the day, there is still a disservice to either the victim or the accused where the assessment is shrouded in a lot of discretion by the Court.

### 3.3.3 S V MATINISI

In *S v Matinisi*,<sup>22</sup> the appellant was charged with murder and with the unlawful possession of a firearm in contravention of Act 60 of 2000. The cause of death of the deceased was a gunshot wound to the head. The facts to the cases indicated that no firearm was recovered from the appellant, who, it was common cause, had no licence to possess a firearm. The issue was whether the failure to adduce the firearm in evidence

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<sup>21</sup> 1945 (1) Prentice Hall H95 (T)

<sup>22</sup> 2010 JDR 1334 (ECG)

was fatal to the prosecution's case. It is instructive to note that the appeal against the murder conviction failed. The court stated:

"Regarding the submission that the appellant was never found in possession of an unlicensed firearm, as I have stated, the record reveals that the firearm that was used to kill the deceased was never found, either on the appellant or anywhere else. But my view is that once the evidence of Mgxekwa, Noyo and Godlo was accepted, together with the common cause fact that no firearm licence had ever been issued to the appellant, such evidence constituted conclusive proof that the appellant was, at the time of the shooting at the deceased, in 'actual' possession of a firearm and that the firearm with which he shot the deceased was a firearm as defined in the Firearms Control Act."

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The Court found that the person who killed the deceased must have been in possession of a firearm. Based on this circumstantial evidence backed by the fact that the accused persons had never had a licence, the bullet wound to the head was conclusive proof that a firearm was used. It should be noted that there were no firearms to be tested to establish their bounds within the definition. One can deduce from this case that the Court relied on the effect of the firearm as the cause of death, supported by the medical evidence of the bullet wound. These pieces of evidence proved to be sufficient to create the irresistible assumption that the missing firearm was in tandem with the definition in section 1 of the FCA.

In principle, where the use of the firearm is evident in the circumstantial evidence, notwithstanding the lack of a firearm and incriminating evidence from the accused

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<sup>23</sup> 2010 JDR 1334 (ECG)

person can collectively be used to create the irresistible assumption that it falls within the definition. The danger with this approach is that other measures in place such as the licencing seem to take the back seat as there is no evidence of their existence but rather the circumstantial evidence of the use of the firearm. For what it is worth, justice is still dispensed despite the existence of the actual firearm. This means that if the Court is to take this position, then it can surely take the same position where the device that has the same effects like a firearm is used to cause harm for purposes of ensuring that justice is seen to be done.<sup>24</sup>

### 3.3.4 S V FILANI

In *S v Filani*, the appellant was charged in the Port Elizabeth Regional Court with robbery with aggravating circumstances on one count of unlawful possession of a firearm in contravention of section 3 of the FCA. The second count was a charge of unlawful possession of ammunition in contravention of section 90 of the FCA, while the third and fourth count were on kidnapping.<sup>25</sup>

The facts leading to these counts are that complainant on count 1, Mrs. Sam, testified that in the early hours of the morning of 2 April 2006 she was asleep, together with her three children, in a house in Motherwell when she was awoken by a sound of a door banging.<sup>26</sup> Three men were in the doorway who demanded money or they would take her property. One of them signaled to one Lifa to shoot. Because of the floodlight from

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<sup>24</sup> See chapter 2, text for notes 66-68.

<sup>25</sup> *S v Filani* 2012 (1) SACR 508(ECG), 2.

<sup>26</sup> At pg. 2.

the street, she was able to sufficiently for her to identify the men. Although one of the men was unknown to her, she knew the other two due to previous engagements.<sup>27</sup> The moment the appellant fired a shot and a bullet struck the wall behind her just above her head, leaving what she called “a little, small hole” in the wall, the complainant ran into the children’s room. The men then took certain items belonging to her including a television, a DVD player, a hi-fi, a two-burner stove, two cell phones and a duvet and sheet.<sup>28</sup>

The court noted that the issue of whether the firearm was within the bounds of the definition in the FCA, was not dealt with by the lower court. The issue in the Appellate court was whether in light of forensic evidence, the firearm fell within the bracket of the definition of a firearm. The subsequent issue was whether the State properly charged the appellant with unlawful possession of firearm and ammunition.<sup>29</sup>

Various aspects were raised by the court that require attention. First, the court stated that in response to the definition of a firearm under the Firearm Control Act, the charge was dependent on whether the firearm fell within the definitional bounds of the Act.<sup>30</sup> In setting aside the appellant’s convictions, the Court stated that it was incumbent

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<sup>27</sup> At pg. 2.

<sup>28</sup> At pg. 2.

<sup>29</sup> *S v Filani* 2012 (1) SACR 508(ECG).

<sup>30</sup> Firearm Control Act, sec 1(xiii) (a)-(e).

'on the state to adduce evidence establishing that the device used fulfilled the technical criteria in the definition of 'firearm'.<sup>31</sup>

Secondly, the technical nature of the definition of the firearm required forensic or expert evidence. The prosecution asserted that the small hole on the wall occasioned by the force or velocity of the weapon qualified it as a firearm. The Court rejected this position and stated that

... given the increased technical nature of the various definitions of 'firearm' contained in the later and current Act, such a finding cannot be made in the absence of expert evidence to that effect. Certainly, it is not a matter of which this court may take judicial notice. The state failed to lead any such expert evidence and accordingly failed, in my view, to discharge the onus upon it.<sup>32</sup>

Thirdly, the court hastened to add that the silence of the defence counsel did not oust the role of the court in evaluating the evidence adduced before it. The court stated that

Not surprisingly, the defence attorney did not address any questions to van Eck in this regard. Had the bullet point and cartridge been subjected to forensic analysis then, depending on the results of such analysis, the State may well have been able to establish that the projectile had been fired from a device falling within the ambit of the definition of "firearm". In the absence of such forensic evidence the submission of Ms. Hendricks was in effect that, because the weapon in possession of the appellant discharged or propelled a missile with enough force or velocity for it to be used for

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<sup>31</sup> *Filani*, p.515f-g.

<sup>32</sup> *Filani*, p.515f-g.

offensive purposes, it must therefore fall within the ambit of the definition of a firearm in s 1 of Act 60 of 2000.<sup>33</sup>

In my view, however, given the increased technical nature of the various definitions of “firearm” contained in the later and current Act such a finding cannot be made in the absence of expert evidence to that effect.<sup>34</sup>

Fourthly, where the state failed to lead any such expert evidence it accordingly failed in the discharge of the onus upon it.<sup>35</sup> This heightens the onus on the State as far as it starts running from the definitional stage of the firearm. If the definition of a firearm does not tally with section 1 of the FCA, then onus has not been discharged. This was a departure from the earlier principle in *Matinisi* where the court stated that where the use of the firearm is evident in the circumstantial evidence, notwithstanding the lack of a firearm and incriminating evidence from the accused person can collectively be used to create the irresistible assumption that it falls within the definition.

### 3.3.5 NDEBELE V S

In *Ndebele v S*, the Appellant was charged in the Regional Court, Regional Division of Gauteng, with one count of contravention of section 4(1)(f)(iv) of the FCA, and the possession of a prohibited firearm with an altered serial or identification number without permission of the Registrar. The second count was being in possession of ammunition,

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<sup>33</sup> *Filani*, p.515f-g.

<sup>34</sup> *Filani*, p.515f-g.

<sup>35</sup> *Filani*, p.515f-g.



in contravention of section 90 of the FCA.<sup>36</sup> The other relevant facts that speak to the definition of the firearm were that it lacked a firing pin and subsequently could not be test-fired by the forensic experts.<sup>37</sup>

The issue was whether the inoperable gun that was not subjected to the required examination because of the alteration amounted to the meaning of a firearm under the FCA. This issue is quite instructive as it presents interesting contrasts with *Filani* as far as; while in *Filani* no forensic examination or expert evidence was called; *Ndebele* engaged forensics who could not carry out the tests because the firearm was altered. As such the expert evidence on an inoperable firearm was an interesting twist in the developing jurisprudence of the definition of firearms.

It is also worth noting that the expert evidence was neither seriously challenged nor was the prima proof of the conclusions based on the facts found, rebutted in the slightest by the defence.<sup>38</sup> The failure to contest the submission by the Appellant that the firearm did not have a firing pin, the centre-pin was missing and the expert witness did not test whether the firearm could be readily altered, fixed or manipulated. This was heightened by the fact that the non-contestation of evidence that the firearm was within the bounds of the definition in section 1 of the FCA.<sup>39</sup> The Court of Appeal was also referred by Appellant's counsel to the case of *Thulani Madlala*; the accused in that case was found in possession of a firearm where a firing pin was missing or had a defect. It had to be decided whether this firearm in the absence of the firing pin still qualifies as a firearm.

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<sup>36</sup> *Ndebele v S* (A197/2018) [2019] ZAGPJHC 111, para 1.

<sup>37</sup> Paragraphs 35-39.

<sup>38</sup> Paragraph 35

<sup>39</sup> Paragraph 36.

The Court referred to a case of *Ntsamai* where the accused was found in possession of a firearm with a missing hammer spring and a magazine.<sup>40</sup> The Court there had to decide as to whether this now still qualifies as a firearm. It found that the replacing or refitting of a part or two of the missing or defective part(s) does not deprive the article from being described as a firearm, but if the required alterations and repairs are extensive to put the article in a condition of being capable of discharging a shot, the article might be miss the bounds of the definition.

As such, the failure to conduct a forensic examination was fatal to the prosecution case; unless the alterations required extensive work as indicated in *Thulani*. The court found that the pistol did not require such extensive repairs that rendered derelict and/or for all intents and purposes, irreparable. What is baffling, however, is that despite the failure to conduct the repairs and test the firearm, the Court went ahead to find that the inoperable firearm was within the meaning of the definition on section 1 of the FCA.

So, while the Appellant argued that the firearm did not have a firing pin, the centre-pin and that the expert witness did not test whether the firearm could be readily altered, fixed or manipulated to discharge ammunition, the Court found otherwise.<sup>41</sup> This was a clear indication that the requirements concerning the propulsion of a bullet or projectile through a barrel and the discharge of rim-fire, centre-fire or pin-fire ammunition were not proved.<sup>42</sup> However, due to the uncontested evidence by the expert witness, that the

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<sup>40</sup> 1945 (1) Prentice Hall H95 (T)

<sup>41</sup> *Ndebele v S* (A197/2018) [2019] ZAGPJHC 111, para 35.

<sup>42</sup> Firearm Control Act, sec 1(xiii) (a)-(b).

device was in line with the definition of a firearm. In principle, a firearm has to be tested and if it is inoperable for any reason, the nature of repairs to make it operable inform the decision of the court to qualify it as a firearm. It thus follows that even where the firearm is not test-fired according to the expert, it falls within the meaning of a firearm, the court may agree with the expert.

### 3.4 CONCLUSION

A look at the case law on the definition of a firearm reveals an interesting trend. First, that before the enactment of the FCA, the courts used the dictionary meaning of a firearm due to the lack of a corresponding definition in the Arms and Ammunition Act.<sup>43</sup>

This has changed to the use of the technical definition of a firearm in the FCA.

All the cases after the enactment of the FCA require that an expert testifies and the forensic test are done on the firearm before it is adduced in court. Where a firearm is inoperable, even it repairs leading to its testing are not done, the court will confirm that it aligns with the definition in section 1 provided the expert stated that the repairs were not extensive.<sup>44</sup> As such, if the defects on the firearm are not so extensive, these can be done and the firearm will still be tested to either bring it within the bounds of or exclude it from being a firearm.

Furthermore, it is argued, that in principle, where the use of the firearm is evident in the circumstantial evidence, notwithstanding the lack of a firearm and incriminating

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<sup>43</sup> *S v Shezi* (1980) para 495 D – E:

<sup>44</sup> *Thulani Madlala v S* Case No AR1407/03

evidence from the accused person can collectively be used to create the irresistible assumption that it falls within the definition.<sup>45</sup> The failure by the state to lead any such expert evidence is a failure in the discharge of the onus upon it.<sup>46</sup> This heightens the onus on the State as far as it starts running from the definitional stage of the firearm. As long as the definition of a firearm does not tally with section 1 of the FCA, then onus has not been discharged. This was a departure from the earlier principle in *Matinisi* where the court stated that where the use of the firearm is evident in the circumstantial evidence, notwithstanding the lack of a firearm and incriminating evidence from the accused person can collectively be used to create the irresistible assumption that it falls within the definition.

In principle, a firearm has to be tested and if it is inoperable for any reason, the nature of repairs to make it operable inform the decision of the court to qualify it as a firearm. It thus follows that even where the firearm is not test-fired according to the expert, it falls within the meaning of a firearm, the court may agree with the expert. The researcher is not aware of any case that qualifies whether this is an objective or a subjective evaluation by the Court to treat repairs as extensive or not. This is due to the fact the qualification is based on the subjective assessment of the expert witness.

While this is yet to be tested, it can be stated in the interim that, first, the definition in the FCA tilts to the inherent characteristics of a firearm as a device that discharges a projectile at a given velocity and energy other than its lethal nature. Secondly, the FCA and the courts are silent on the need for training before one can apply for a firearm

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<sup>45</sup> *S v Matinisi* 2010 JDR 1334 (ECG)

<sup>46</sup> *Filani*, p.515f-g.

licence. It is instructive to look at other jurisdictions to establish how they engage the definition of a firearm in regulating the use of the same.



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## CHAPTER FOUR

### DRAWING ON EXPERIENCES FROM OTHER JURISDICTIONS: CANADA AND THE UNITED KINGDOM.

#### 4.1 INTRODUCTION

The previous chapter reconciled the definition of a firearm and the stricter measures that are in place and whether these establish an efficacy ensuring the apportionment of liability. It was established that there is a trend that has followed the definition of a firearm in the context of the legislation dealing with firearms and the courts' interpretation of the definition.

First, that before the FCA was enacted, the courts used the dictionary meaning of a firearm due to the absence of a definition in the Arms and Ammunition Act.<sup>1</sup> Secondly, following the introduction of a definition under the FCA, the decisions from the courts have been varied. Some decisions have reiterated that an expert has to testify following a forensic test that is done on the firearm before it is adduced in court. The decision of the court to use the forensic evidence to qualify that the exhibit is a firearm within the meaning of the FCA may depend on the extent of repairs that need to be carried out on the firearm for it to be operable. Thirdly, the failure by the state to lead expert evidence is a failure in discharging its onus beyond reasonable doubt especially if the firearm in question is not produced in court at the trial. As such, the definition of a firearm in itself

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<sup>1</sup> See discussions in Chapters 2 and 3 above.

forms part of the onus that the State should discharge beyond reasonable doubt.<sup>2</sup> Where the prosecution is not able to prove that the device in question is a firearm, any other ingredients relating the use of that device automatically fail. The only point of departure is where the use of the firearm is circumstantially evident that this is used to prove the participation of the accused in the commission of an offence.<sup>3</sup>

This chapter engages the second research question to evaluate the position of other jurisdictions on the definition of a firearm, and how this aids the appreciation of the South African definition. It looks at the legislative and judicial practices from selected countries, thus, the United Kingdom, Canada and Australia. The chapter looks out for instances of other checks in place to complement the definition of a firearm. These countries are selected because they are all common law countries like South Africa in part and that their laws were instructive in the development of the definition in the current FCA.

## **4.2 THE POSITION IN CANADA**

### **4.2.1 The legislative position**

Canada has various legislation that regulates the use of firearms. This includes the Firearms Act,<sup>4</sup> the Criminal Code, and various regulations.<sup>5</sup> While the Criminal Code

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<sup>2</sup> *Filani*, p.515f-g.

<sup>3</sup> *S v Matinisi* 2010 JDR 1334 (ECG).

<sup>4</sup> Firearms Act (S.C. 1995, c. 39)

<sup>5</sup> Aboriginal Peoples of Canada Adaptations Regulations (Firearms) (SOR/98-205), Authorizations to Carry Restricted Firearms and Certain Handguns Regulations (SOR/98-207), Authorizations to

defines a firearm, the regulation of the same is governed by the Firearms Act. As such, the definition of a firearm in Canada is provided for in the Criminal Code and it was introduced into the legislation in the Revised Edition of 1953-54.<sup>6</sup> This has been subsequently maintained in the current edition of 1985.<sup>7</sup> To this end, the Canadian Criminal Code defines a firearm to mean

a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.<sup>8</sup>

From the foregoing definition, various pointers are clear. First, the firearm is limited to a weapon. This is very instructive in light of other definition that might refer to a firearm as a device. This later position questions the use of 'weapon' other than any other word. While this answer is not evident in the Criminal Code, a weapon is defined to offer direction. It is referred to as

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Transport Restricted Firearms and Prohibited Firearms Regulations (SOR/98-206), Conditions of Transferring Firearms and Other Weapons Regulations (SOR/98-202), Firearms Fees Regulations (SOR/98-204), Firearms Information Regulations (Non-restricted Firearms) (SOR/2012-138), Firearms Licences Regulations (SOR/98-199), Firearms Records Regulations (SOR/98-213), Firearms Records Regulations (Classification) (SOR/2014-198), Firearms Registration Certificates Regulations (SOR/98-201) and the Importation and Exportation of Firearms Regulations (Individuals) (SOR/98-215). Other regulations include, the Public Agents Firearms Regulations (SOR/98-203), Shooting Clubs and Shooting Ranges Regulations (SOR/98-212), Special Authority to Possess Regulations (Firearms Act) (SOR/98-208), Storage, Display and Transportation of Firearms and Other Weapons by Businesses Regulations (SOR/98-210) and the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations (SOR/98-209).

<sup>6</sup> The Criminal Code (RSC., 1953-54, c. 51. s.1, sec 82(1).

<sup>7</sup> The Criminal Code (1985, c. C-46, sec 1.

<sup>8</sup> Section 1



anything used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person and without restricting the generality of the foregoing, includes a firearm.<sup>9</sup>

This is a wide scope of application as it goes beyond the usual reference to a firearm as a weapon or a device. The use of the term 'anything' includes items that would be excluded – like in South Africa's legislation that does not extend to stun bolts, antique guns as firearms.<sup>10</sup> The definition is greatly inclined to the effect of the device on an individual in addition to the characteristics associated with it as a firearm. Notwithstanding this argument, it seems clear that the legal obligation that flows from the abuse of a firearm should be the effectual basis for apportioning liability, other than an exclusive approach that removes some devices from this list.

As earlier noted in Chapter one, the definition of a gun has a great effect on items that do not fall within this scope.<sup>11</sup> As a result, it affects other aspects such as the licencing, dealing, manufacturing, searches and seizures, offences and penalties. This further extends to other aspects like its possession, registration and transportation.<sup>12</sup> While one may argue that the scope of the thesis relates to the definition of a firearm, items that do not fall within the definition of a firearm cannot be subjected to the legislative control.<sup>13</sup>

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<sup>9</sup> Section 2

<sup>10</sup> The FCA, s 1.

<sup>11</sup> Compare the definition in the FCA that speaks to the characteristics of a firearm as a device.

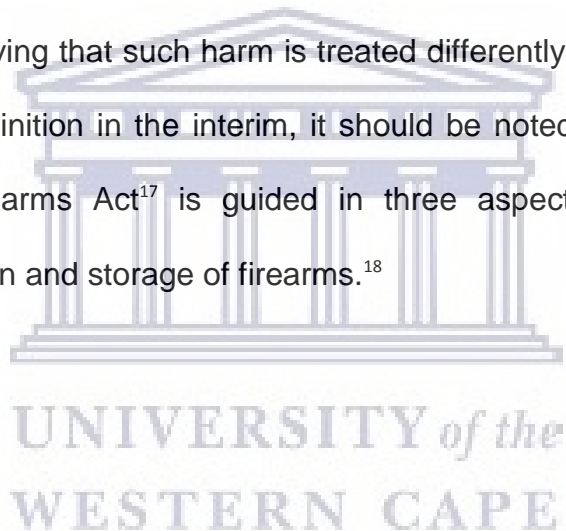
<sup>12</sup> This discussion is evident in Canada's jurisprudence on firearms

<sup>13</sup> Compare how the SA courts grappled with the definition of a firearm before the enactment of the FCA. See chapter 2, subsection 3.3.

In Canada's law, where an item does not fall within the meaning of a firearm, other aspects are affected like the laws that govern the purchase, storage, transportation and use of the devices that do not fall in these categories.<sup>14</sup> Some scholars have stated that,

'devices that do not produce projectiles with "a shot, bullet or other projectile at a muzzle velocity exceeding 152.4 m per second or at a muzzle energy exceeding 5.7 Joules" are "deemed not to be firearms."<sup>15</sup>

This reverse interpretation indicates that 'pseudo-firearms' that do not ascribe to the need for licencing, registration, storage regulations connote to some extent a degree of unreasonability in perceiving that such harm is treated differently, like air guns.<sup>16</sup> Before leave is taken of the definition in the interim, it should be noted that the regulation of firearms under the Firearms Act<sup>17</sup> is guided in three aspects; thus the mode of possession, transportation and storage of firearms.<sup>18</sup>



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<sup>14</sup> Midroni G 'More on firearm injuries among children and youth' (2017) 189(21) *CMAJ* E754-E754.

<sup>15</sup> Midroni (2017) E754-E754.

<sup>16</sup> Midroni (2017) E754-E754.

<sup>17</sup> Firearms Act (S.C. 1995, c. 39)

<sup>18</sup> Possession is under sections 5-16 of the Firearms Act. Transportation is from sections 17- 34. Storage is governed by some sections of the Firearms Act and the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations (Firearms Act), SOR/98-209, available at <https://bit.ly/2H6aGsM> (accessed 7 October 2020).

## 4.2.2 Licencing of arms

The licencing of firearms is governed by the Firearms Act<sup>19</sup> which in a nutshell guides the possession, transport, and storage of firearms.<sup>20</sup> It follows that where the device does not fall within the definition above, these stringent measures do not apply.

Firearms are classified into three groups which are identified by the Criminal Code and regulated by the Firearms Act. These categories include: restricted,<sup>21</sup> prohibited,<sup>22</sup> and non-restricted firearms.<sup>23</sup> Some of the non-restricted firearms include ordinary shotguns and rifles and are used majorly for hunting,<sup>24</sup> while the prohibited category includes military firearms like some rifles and shotguns. Other firearms like handguns, semi-

<sup>19</sup> Firearms Act (S.C. 1995, c. 39).

<sup>20</sup> Library of Parliament, Legislative Summary, Legislative Summary of Bill C-19: An Act to Amend the Criminal Code and the Firearms Act para. 1.2.

<sup>21</sup> A restricted firearm under section 84 (1) of the Criminal Code refers to (a) a handgun that is not a prohibited firearm, (b) a firearm that (i) is not a prohibited firearm, (ii) has a barrel less than 470 mm in length, and (iii) is capable of discharging centre-fire ammunition in a semi-automatic manner, (c) a firearm that is designed or adapted to be fired when reduced to a length of less than 660 mm by folding, telescoping or otherwise, or (d) a firearm of any other kind that is prescribed to be a restricted firearm.

<sup>22</sup> A prohibited firearms under section 84 (1) of the Criminal Code means (a) a handgun that (i) has a barrel equal to or less than 105 mm in length, or (ii) is designed or adapted to discharge a 25 or 32 calibre cartridge, but does not include any such handgun that is prescribed, where the handgun is for use in international sporting competitions governed by the rules of the International Shooting Union, (b) a firearm that is adapted from a rifle or shotgun, whether by sawing, cutting or any other alteration, and that, as so adapted, (i) is less than 660 mm in length, or (ii) is 660 mm or greater in length and has a barrel less than 457 mm in length, (c) an automatic firearm, whether or not it has been altered to discharge only one projectile with one pressure of the trigger, or (d) any firearm that is prescribed to be a prohibited firearm.

<sup>23</sup> A non-restricted firearm under section 84(1) of the Criminal Code refers to a firearm that is neither a prohibited firearm nor a restricted firearm; (*arme à feu sans restriction*).

<sup>24</sup> A non-restricted firearm under section 84(1) of the Criminal Code refers to a firearm that is neither a prohibited firearm nor a restricted firearm; (*arme à feu sans restriction*).

automatic long guns are either restricted or prohibited. This list is by no way a conclusive list, but rather a platform to extend the conversation on how this characterization affects the regulation of firearms from the perspective of its definition.

The relevant section on licencing provides:

A person is not eligible to hold a licence if it is desirable, in the interests of the safety of that or any other person, that the person not possess a firearm, a crossbow, a prohibited weapon, a restricted weapon, a prohibited device, ammunition or prohibited ammunition.<sup>25</sup>

While the section introduces other prohibited items like devices and ammunition, restricted weapons, it should be noted that the general intent of the section is to regulate the eligibility to own a licence to possess or to own a firearm. This section, adds value to the rather limited definition of a firearm by creating an atmosphere that presents a strict mode through which a firearm can be owned. This is evident in the fact that the grant of a licence is subjected desirability, interests of safety, not only of the applicant but of other persons to possess a firearm.<sup>26</sup> These are very subjective terms that may mean anything as any time in the course of an application for the firearm.<sup>27</sup>

The first subjective part of the criteria requires a judge to look into the antecedents of the applicant to establish if, in five years before the application, he or she has been convicted of any offence involving violence,<sup>28</sup> offences under the Firearms Act,<sup>29</sup> criminal

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<sup>25</sup> Firearms Act sec 5 (1).

<sup>26</sup> Firearms Act sec 5 (1).

<sup>27</sup> The use of a subjective evaluation of the application makes it stringent to obtain a firearm. This concretises the would be short definition of a firearm by ensuring that owning it is a long process.

<sup>28</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(i).

harassment,<sup>30</sup> abuse of controlled drugs,<sup>31</sup> or cannabis.<sup>32</sup> Besides, other antecedents that the judge looks at include whether in the previous five years, the applicant has been treated for a mental illness, and whether this illness was associated with the use or attempt to use violence against any person.<sup>33</sup> The fact that one has to have a clean record before owning the firearm, buttresses the short definition above.

The second subjective criteria is the completion of a course before an applicant applies for the firearm.<sup>34</sup> The process of application for the firearm has as a matter of practice been streamlined to six key steps. The first step is, which include; undergoing a safety course followed by the taking of an examination. The third step is the application to legally possess or own the firearm. This is followed by a waiting period which gives the chief firearm officer time to do background checks before the authorization is given. The individual is expected to be above 18 years of age, has to do a test called the Canadian Firearms Safety Course (CFSC)<sup>35</sup> to acquire a license for non-restricted firearms are required to pass tests. Where the applicant seeks to obtain a licence for a restricted or a

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<sup>29</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(ii).

<sup>30</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(iii).

<sup>31</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(iv).

<sup>32</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(iv).

<sup>33</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(b) & (c). The existence of a court order prohibiting a person from owning a firearm is ground to be denied the chance to own or possess a firearm. Section 6.

<sup>34</sup> Section 7 (a)- (e).

<sup>35</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

prohibited firearm, he or she has to do another test for the called the Canadian Restricted Firearms Safety Course (CRFC).<sup>36</sup>

Some rules regulate critical aspects on firearms like the storage, transportation and the display of firearms.<sup>37</sup> The purpose of these rules is to avoid losses, theft or accidents that may result from the poor handling of Firearms.<sup>38</sup> These regulations also mitigate other aspects like the safely to deter loss, theft and accidents. Generally, all firearms should be unloaded when stored.<sup>39</sup> The exception relates to non-restricted firearms which have to be secured with a locking device and have to be kept away in a cabinet.<sup>40</sup> Non-restricted firearms have to be unloaded during transportation and secured with locking devices, locked in a sturdy, non-transparent container.<sup>41</sup> The point of departure relates to restricted and prohibited firearms, which require one to have the authorisation to transport them.<sup>42</sup> This is an indication that when one acquires the firearm, a lot of responsibility comes with the process through which the firearm is obtained.

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<sup>36</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

<sup>37</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

<sup>38</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

<sup>39</sup> Storage, Display, Transportation and Handling of Firearms by Individuals Regulations SOR/98-209, pursuant to section 118 of the Firearms Act.

<sup>40</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

<sup>41</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

<sup>42</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 October 2020)

The courts have been keen to raise some rules to guide instances where missing firearms are not recovered.<sup>43</sup> The prosecution does not have an obligation to produce testing results to prove that a weapon is a firearm.<sup>44</sup> As such, circumstantial evidence is good enough to indicate from the harm caused that the weapon used was a firearm.<sup>45</sup> This is a departure from the South African position, where the courts insist on a forensic examination and an expert's testimony concerning the ability of the firearm to be within the descriptive aspects of Firearms Control Act.<sup>46</sup> This position has been upheld in several cases that indicate that the person who seeks to prove that the weapon is a firearm may make an inference based on the testimony of the witnesses and the actions of witnesses and actions of accused.<sup>47</sup>

### 4.3 THE POSITION IN AUSTRALIA

#### 4.3.1 The legislative position

In Australia, the sale, possession, and use of firearms is regulated by federal law in the Australian states and territories, with cross-border trade matters addressed at the

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<sup>43</sup> *R v Cater*, 2014 NSCA 74.

<sup>44</sup> *R v Cater*, 2014 NSCA 74 (CanLII), per Saunders JA, at para 46

<sup>45</sup> *R v Wills*, 2014 ONCA 178 (CanLII), per Doherty JA, at para 50

<sup>46</sup> See chapter 2 above. For the Canadian position, see *R v Gordon*, 2017 ONCA 436 (CanLII), per Doherty JA, at para 31

<sup>47</sup> *R v Abdullah*, [2005] OJ No 6079 (ONSC), *R v Charbonneau*, [2004] OJ No 1503 (ONCA), *R v Carlson*, 2002 CanLII 44928 (ON CA), per curiam.

federal level.<sup>48</sup> As such, there are some overlaps concerning the regulation in some states. A firearm is defined as

a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include a paintball marker within the meaning of the Paintball Act 2018 or anything declared by the regulations not to be a firearm.<sup>49</sup>

From this provision, various pointers are clear. First, the firearm includes a gun or any other weapon. This grants an expansive definition that goes beyond the position in Canada, which limits the firearm to a weapon. Secondly, the definition engages the descriptive capabilities of the firearm, thus propels a projective or an explosive, including blank fire firearm and an airgun.<sup>50</sup> This is a departure from the definition of Canada that places the descriptive capabilities as a shot, bullet or projective. What is all-encompassing is the fact that the firearm propels something that explodes. The resultant effect of the firearm is not contextualised. This bends the question, what happens if the projectile is not capable of causing harm and whether this informs the

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<sup>48</sup> As such , the various laws across the states include the following: the New South Wales: Firearms Act 1996, Weapons Prohibition Act 1998, and associated regulations, Victoria: Firearms Act 1996, Control of Weapons Act 1990, and associated regulations, the Queensland: Weapons Act 1990 and associated regulations, the Western Australia: Firearms Act 1973 and associated regulations[. Others include the South Australia: Firearms Act 1977 and associated regulations, the Tasmania: Firearms Act 1996 and associated regulations and the Northern Territory: Firearms Act and associated regulations. In addition, there is also the Australian Capital Territory: Firearms Act 1996, Prohibited Weapons Act 1996, and associated regulations.

<sup>49</sup> The Firearms Act 1996 (NSW) No. 46, sec 4.

<sup>50</sup> The Firearms Act 1996 (NSW) No. 46, sec 4.



meaning of the firearm.<sup>51</sup> In the same vein, before leave is taken of the definition in the interim, it should be noted that the regulation of firearms under the Firearms Act 1996<sup>52</sup> is guided in three aspects; thus the mode of possession, registration, storage, dealers in firearms and offences.<sup>53</sup>

#### 4.3.2 Licencing of arms

The licencing of a firearm to lead to the possession of the same is guided by the Firearms Act 1996. It creates licence schemes which include Category A licence to cater for air rifles, rimfire rifles (other than self-loading), shotguns (other than pump action, lever action or self-loading), and shotgun/rimfire rifle combinations.<sup>54</sup> Under Category B licence the firearms include muzzle-loading firearms (other than pistols), centre-fire rifles (other than self-loading), and shotgun/centre-fire rifle combinations. Other types of firearms include lever-action shotguns with a magazine capacity of no more than 5 rounds.<sup>55</sup> It should be noted that the license authorizes one to possess or use a registered firearm of the kind to which the licence applies, but only for the purpose

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<sup>51</sup> This question will form part of the conversation in the course of engaging decisions by the courts on the interpretation of the definition.

<sup>52</sup> Firearms Act (S.C. 1995, c. 39)

<sup>53</sup> Possession is under sections 5-16 of the Firearms Act. Transportation is from sections 17- 34. Storage is governed by some sections of the Firearms Act and the Storage, Display, Transportation and Handling of Firearms by Individuals Regulations (Firearms Act), SOR/98-209, available at <https://bit.ly/2H6aGsM> (accessed 7 October 2020).

<sup>54</sup> Section 8(1).

<sup>55</sup> Section 8(1).

established by the licensee as being the genuine reason for possessing or using the firearm.<sup>56</sup>

Under the Category C licence are the prohibited firearms which only attract a licence for particular purposes. These firearms include self-loading rimfire rifles with a magazine capacity of no more than 10 rounds.<sup>57</sup> The other group includes self-loading shotguns with a magazine capacity of no more than 5 rounds and pump-action shotguns with a magazine capacity of no more than 5 rounds.<sup>58</sup>

There are certain prerequisites that an applicant has to fulfil in the course of submitting his application. The applicant has to be 18 years or older<sup>59</sup> and should provide proof of his identity as required under the Financial Transaction Reports Act 1988.<sup>60</sup> In addition, the applicant has to, at the time of lodging the application, be provided with information concerning a safety course, which he must take before the application for the licence is considered.<sup>61</sup> It is reiterated that just like Canada, Australia requires that applicants for a licence take a safety course and show a genuine reason for owning a firearm. The reason of self-defence does not feature as a genuine reason to own a firearm. The Commissioner of Police may refuse to grant a firearm where there is reliable evidence of a mental or physical condition that renders the applicant unsuitable for owning, possessing or using a firearm.

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<sup>56</sup> Section 8(1).

<sup>57</sup> Section 8(1).

<sup>58</sup> Section 8(1).

<sup>59</sup> Section 10(1).

<sup>60</sup> Section 10(2).

<sup>61</sup> Section 10(3).

## 4.4 THE POSITION IN THE UNITED KINGDOM

The law guiding the use of firearms in the United Kingdom has its roots in the late 1960s, which was passed and subsequently amended to restrict gun ownership following massacres that were being carried out involving lawfully acquired.<sup>62</sup> This section offers a glimpse of the position in the United Kingdom and relates to the same position in Canada and Australia. This section, therefore, evaluates the definition of a gun and the rules that inform its licencing or similar factors that either speak to a watertight or problematic regime on firearms in the United Kingdom.

### 4.4.1 The legislative position

In the United Kingdom, a firearm is "a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged".<sup>63</sup> In comparison with the definition from Canada and Australia, a few points are worth noting.

The definition of a firearm in the United Kingdom inculcates the lethal effect of a firearm, a position that is shared with Canada, which embraces harm as the effect of the use of

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<sup>62</sup> The restrictions followed the Dunblane school massacre in of 1996, Sotos, Peter (2006). *Predicate: The Dunblane Massacre – Ten Years After*. Creation Books, 192. Notwithstanding insightful principles have been in place. In cases such as *Moore v Gooderham* (1960), only a court can decide whether a particular weapon is capable of causing a lethal injury and would therefore be considered a firearm for the purposes of the Acts.

<sup>63</sup> Firearms Act 1968, section 57 (1).

a firearm.<sup>64</sup> The UK definition refers to shots and bullets as the dischargeable aspects of the firearm and the point of departure is the failure to use the phrase 'projectile'. The potentially brief definition is concretised by the developments in common law that speak to the organic development of the definition of a firearm.

The issue of lethality has been guided by case law that indicates that it remains a subjective matter due to its complexity and only a court can decide whether any particular weapon is capable of causing "more than trifling and trivial" injury and is a "firearm" under the Act.<sup>65</sup> As such, while the evidence of the expert as a person who can explain the forensic aspects of the firearm is necessary, the court remains the expert of experts and decides concerning the issue of lethality.<sup>66</sup>

The meaning of a barrelled weapon is not defined in the Firearms Act 1960. The courts have indicated that this is a question of mixed law and fact.<sup>67</sup> What complements that barrelled weapon the capability from it to launch a shot, bullet or missile.<sup>68</sup> As such, if there is evidence that the weapon cannot fire, then it is not a firearm.<sup>69</sup> This is departure from the South African position that indicates that even if the firearm is incapable of discharging a projectile, bullet or shot, what matters is the extent of repairs that would have to be carried out for it to conform to the definition under the FCA.<sup>70</sup>

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<sup>64</sup> See discussion on Canada and Australia (4.2 and 4.3 respectively, above).

<sup>65</sup> *Moore v Gooderham* [1960] 3 All E.R. 575

<sup>66</sup> *R v Thorpe* 85 Cr. App. R. 107 CA.

<sup>67</sup> *R v Singh* (1989) Crim. L.R. 724, CA,

<sup>68</sup> *Grace v DPP* (1989) Crim. L.R.365

<sup>69</sup> *Grace v DPP* (1989) Crim. L.R.365

<sup>70</sup> *Thulani Madala* (2003) discussed in chapter 3, section 3.3.2.

The courts have extended the meaning of a prohibited weapon to include its individual components, despite the lack of statutory direction.<sup>71</sup> The court stated that

The term "component part" may be held to include (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.<sup>72</sup>

In *R v Ashton*, the Court suggests that any part that stops the weapon functioning as it was designed would be a component part:

Whether in fact this particular gas plug is a component part of a prohibited weapon, is a matter of fact for the court to decide the words have their ordinary natural meaning. [A]s a matter of reasonable interpretation it means a part that is manufactured to the 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, the Gun could not function without it.<sup>73</sup>

The courts have also been keen to state that even imitation weapons can pass off as firearms depending on the intent of the person in possession of the imitation weapon and the possibility of its conversion to subsequently discharge shots. For instance, in *R v Bewley*, the Court of Appeal held that

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<sup>71</sup> *R v Clarke* (F), 82 Cr. App. R. 308, CA para 13.70.

<sup>72</sup> Paragraph 13.70

<sup>73</sup> CA, 1 October 2007

[I]f an imitation firearm is to be treated as a firearm to which section 1 of the Firearms Act 1968 applies, the prosecution must prove that it can be readily converted so that it can discharge a shot, bullet or other missile.<sup>74</sup>

This effectively changed the earlier position, which required only that a weapon was designed or adapted to discharge such a missile, and that it could discharge a shot, bullet or other missile. Imitation firearms which can only be converted by the use of equipment or tools that are not in common use fall outside the definition of a firearm in section 57(1) Firearms Act 1968.<sup>75</sup> About the intent, it remains a defence to an accused person who shows that he did not know and had no reason to suspect that the imitation firearm was so constructed or adapted as to be readily convertible into a firearm.<sup>76</sup>

#### 4.4.2 Licencing of arms

To obtain a licence, the applicant fills a prescribed form and provide a passport photograph and two referees.<sup>77</sup> One of the referees, according to the established practice, has to be a holder of a shotgun certificate. Other aspects include the payment of the prescribed fee that is usually determined by the firearms licensing unit.

The general position is that only police officers, members of the armed forces, or individuals with written permission from the Home Secretary may lawfully own a

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<sup>74</sup> [2012] EWCA Crim 1457,

<sup>75</sup> *Cafferata v Wilson* [1936] All ER 149 and *R v Freeman* [1970] 54 Cr App 251.

<sup>76</sup> *R v Williams* [2012] EWCA Crim 2162

<sup>77</sup> Firearm Act 1968, s 1-2.

handgun.<sup>78</sup> Concerning private individuals, various checks are in place to ensure restrictions are followed to the letter.

Individuals prohibited from obtaining a firearm or shotgun certificate include those who have been sentenced to any form of custody or preventive detention for three years or more.<sup>79</sup> In addition, it is expected that those persons with sentences longer than three months but less than three years cannot possess firearms or ammunition for five years after the date of release.<sup>80</sup> Where one is not authorised to have a firearm, he or she is liable to a five-year mandatory minimum jail sentence.<sup>81</sup> The chief officer of police in the district the applicant lives with the authority to issue licenses.<sup>82</sup>

#### 4.5 CONCLUSION

There are varying definitions of a firearm but they are guided by the nature of the weapon, the effect of the same. These definitions are complemented by the licensing principles that guide the different jurisdictions and make it hard for a person to obtain a license to own or possess a gun. This is an indication that the process of obtaining a firearm seeks to ensure that the deserving person who genuinely needs a firearm, void of the the need to defend oneself can obtain a licence. With regard to the research question, it has been established that the second research question has been answered

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<sup>78</sup> Firearm Act 1968, s 1-2.

<sup>79</sup> Firearms Act 1968, s 21.

<sup>80</sup> Firearms Act 1968, s 21.

<sup>81</sup> Firearms Act 1968, s 21.

<sup>82</sup> Firearms Act 1968, s 21.

in part. The part being, the evaluation of the position of other jurisdictions on the definition of a firearm. The later part of the second research question, to wit, how the position in other jurisdictions aids the appreciation of the South African definition; will be engaged in the subsequent chapter.





## CHAPTER FIVE

### AN ENGAGEMENT OF DEFINITIONS FROM OTHER JURISDICTIONS TO INFORM THE NEED FOR A CHANGE IN THE DEFINITION OF A FIREARM

#### 5.1 INTRODUCTION

Chapter Four examined the current trends in dealing concerning the jurisprudence of the other jurisdictions on the definitions of a firearm and how it speaks to South Africa's position. It drew on experiences from other jurisdictions, thus the United Kingdom, Canada and Australia. It was established that their jurisdictions had varying definitions of a firearm which were guided by the nature and effect of the weapon. In addition, the definitions were complemented by the licensing principles that guided the different jurisdictions that rather made it an uphill task for a person to obtain a license to own or possess a gun.

Chapter five draws on the various developments from the other jurisdictions to identify and strengths and weaknesses of the current definition in South Africa. This subsequently informs the need for change in the definition of a firearm following the granulation of the findings in chapters 2, 3, and 4. This chapter addresses the second part of the research question, thus; how the position in other jurisdictions can aid the appreciation of the South African definition; will be engaged in the subsequent chapter. In addition, based on the findings on the second research question, the chapter also engages the third research question: whether there is a need for a new definition.

## 5.2 AN APPROACH TO THE NEED TO REVISIT SOUTH AFRICA'S DEFINITION

There is research that points to need to ask the rights questions other than just any questions as a way of obtaining informative answers. While research engaging this principle is not on firearms, it presents a principle that requires the placing of problem at the centre as a reference point such that any interventions directly and practically inform the problem. To this end, Dorujaye and Oluduro evaluate the African Commission's development of jurisprudence on the rights of women.<sup>1</sup> They argue that as the African Commission develops its jurisprudence on the rights of women, it does not just ask the woman question but the African woman question.<sup>2</sup> This principle has been subsequently applied in different thematic settings.

In addressing the African Commission's engagement of the evidence obtained through human rights violations, Nanima argues that one should place the not just an accused, but the African accused person at the centre of interventions that should protect him or her from the admission of impugned evidence.<sup>3</sup> As a result, he proposes the need for a victim-centred approach in dealing with such evidence.<sup>4</sup> In the context of the definition of a firearm, it is argued that the person who owns the firearm at the end of the day should be at the centre of the development of the definition.<sup>5</sup> This will lead to the

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<sup>1</sup> Dorujaye E & Oluduro O 'The African Commission on Human and People's Rights and the woman question' (2016) 24(3) *Feminist Legal Studies* 315 at 315.

<sup>2</sup> Dorujaye (2016) 315.

<sup>3</sup> Nanima 'A critique of the jurisprudence of the African Commission regarding evidence in relation to human rights violations: A need for reform?' (2018 Unpublished LLD Thesis University of the Western Cape) 246.

<sup>4</sup> Nanima (2018) 246.

<sup>5</sup> This informs the approaches by Canada, Australia and the United Kingdom.

identification of the persons who do not deserve to own a firearm and measures that speak to a working definition that regulates the abuse of firearms will be placed into context.

### **5.3 AN EVALUATION OF THE SOUTH AFRICAN DEFINITION IN RELATION TO OTHER JURISDICTIONS.**

#### **5.3.1 An evaluation of the import of the various definitions**

It should be noted from the onset that other than the United Kingdom that refers to shots and bullets as the dischargeable elements of a firearm, the definition across the three selected countries, that is South Africa, Canada and Australia have one element in common. First, all the definitions refer to something that can propel a projectile.<sup>6</sup> It is rather clear that the projectile is a key aspect that informs the nature of a firearm. There is a scholarly uptake that proposes the view that projectiles mean or include a shot, bullet at a muzzle velocity that exceeds 152.4 m per second or at muzzle energy exceeding 5.7 joules.<sup>7</sup> As such the exclusion or inclusion of the velocity and the energy in a definition may not necessarily take away the effect of the firearm as far as it is its inherent characteristic.<sup>8</sup>

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<sup>6</sup> See the foregoing definitions in Chapter 4 above.

<sup>7</sup> Midroni (2017) E754.

<sup>8</sup> Midroni (2017) E754.

It is argued that the exclusionary criteria should be emphasised not on the already known characteristic of the firearm but other aspects. This section attempts to visit the various definitions to evaluate the other aspect to lead to an informed position.

As noted earlier, South Africa's definition excludes various devices that have a lethal effect but are not considered firearms. To recall this, the re-engagement of the provision is instructive.<sup>9</sup>

What stands out from the definition is that it is too specific. This is evident in its broad approach to a firearm yet it excludes various devices that would, in all probability require safeguards concerning ownership, regulation, proliferation and policing. To this end, therefore, explosive-powered tools used by industries,<sup>10</sup> stun bolts used in slaughterhouses,<sup>11</sup> antique firearms,<sup>12</sup> air guns,<sup>13</sup> and deactivated firearms<sup>14</sup> all have the lethal effect of a firearm yet they simply dealt with under the law of delict despite the life-threatening consequences. The effect of this definition is that devices that would otherwise tantamount to being firearms are excluded and a person grossly affected by their use cannot get protection under the FCA.

In contrast, the Canadian definition takes a different approach. A look at its definition of a firearm presents a definition that points to a different approach to the regulation of

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<sup>9</sup> Section 1(xiii) (a)-(e).

<sup>10</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>11</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>12</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>13</sup> Wellford, Pepper & Petrie (2005) 2.

<sup>14</sup> Wellford, Pepper & Petrie (2005) 2.

firearms. It should be recalled that the Canadian Criminal Code defines a firearm to mean

a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person, and includes any frame or receiver of such a barrelled weapon and anything that can be adapted for use as a firearm.<sup>15</sup>

From this definition, it is clear that definition is also quite broad but it lacks an exclusionary list. Secondly, the definition speaks to the lethal effect of the firearm on individuals, or the effect it carries where it is used to intimidate a person. This is a strong position that indicates that a firearm should be capable of leading to harm. This is further fortified by the definition of a weapon as

anything used, designed to be used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person and without restricting the generality of the foregoing, includes a firearm.<sup>16</sup>

One may argue that by the time a firearm is brought up as evidence in court, they should be harm. While this is true, the desired protection is diluted if the device with such capabilities is excluded from the inclusive list of firearms. Other than its effectiveness to discharge a bullet or a projectile, the requirement for the lethal effect or its use is important.

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<sup>15</sup> Section 1.

<sup>16</sup> Section 2.

Australia's definition is similar to the Canadian one as far it identifies a firearm as either a gun or a weapon that performs a certain function. It should be recalled that a firearm is defined as

a gun, or other weapon, that is (or at any time was) capable of propelling a projectile by means of an explosive, and includes a blank fire firearm, or an air gun, but does not include a paintball marker within the meaning of the Paintball Act 2018 or anything declared by the regulations not to be a firearm.<sup>17</sup>

The only exclusion in this definition is a paintball maker, which present a rather limited list unlike South Africa's definition. Of course it has to be recalled that this list can be extended by way of declaration in the regulations. The author has looked at the regulations and has established that the exclusionary list does not present limitations. It should be recalled that

A firearm is "a lethal barrellled weapon of any description from which any shot, bullet or other missile can be discharged".<sup>18</sup>

These foregoing definitions do not point to the inherent character of a Firearm in its ability to discharge a projectile at a specific velocity and energy as the bare minimums. It imperative to look at the definition from the United Kingdom to have a clear picture. It should be noted that although the UK definition refers to shots and bullets as the dischargeable aspects of the firearm, developments in common law still point to the lethal effect of a firearm regardless of the trifling and trivial" injury that may arise.<sup>19</sup>

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<sup>17</sup> The Firearms Act 1996 (NSW) No. 46, sec 4.

<sup>18</sup> Firearms Act 1968, section 57 (1).

<sup>19</sup> *Moore v Gooderham* [1960] 3 All E.R. 575

It is worth noting that the different interpretations use words such as 'device' or 'weapon'. It is argued that the use of this word is inconsequential despite that fact that they point to this item that discharges or propels projectiles. While South Africa uses device, Canada and the United Kingdom use the term 'weapon' while Australia uses the terms 'gun' and 'weapon'. It is argued that these definitions point to the emphasis on the effect of the item, other than its character.

In the interim, there is a need to develop an approach that South Africa could use towards the improvements or the continued use of its definition. It should be recalled that the South African definition emphasises the nature of the firearm other than its effect on a person. This is a point of departure from Canada, Australia and the United Kingdom that emphasis the possible effect of harm on an individual as the guiding factor in the definition. It thus correct to state that following Durojaye & Oluduro<sup>20</sup> and Nanima's approach<sup>21</sup> in asking the right questions. It is important that the question should be whether a definition that points to the effect of the firearm of a person should be adopted, other than one that point to the inherent characteristics. It should be recalled that the inherent characteristics are the propulsion of a projectile at a given velocity and energy. It is argued that the effect of a firearm will lead to the identification of the persons who do not deserve to own a firearm and measures that speak to a working definition that regulates the abuse of firearms will be placed into context.

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<sup>20</sup> Dorujaye & Oluduro (2016) 315.

<sup>21</sup> Nanima (2018) 246.

### 5.3.2 An evaluation of the processes of obtaining a licence

As earlier noted in chapter one, while the definition of a gun has a great effect on items that do not fall within this scope, the same applies to the nature of the process of obtaining a licence. The various jurisdictions have different approaches that require evaluation as to the ease with which one can acquire a licence.

In South Africa, a licence can only be granted to firearm applicants who have a competency certificate.<sup>22</sup> The applicants are expected to provide genuine reasons to possess a firearm, which include hunting, target shooting, collection, and personal protection and/or security.<sup>23</sup> They have to be 21 years, unless they employed in the firearm industry, as dedicated hunters or sportspersons, or are private firearm collectors.<sup>24</sup> Other background checks that have to be carried out include their criminal, mental, medical, domestic violence, addiction, employment, and previous firearm history.<sup>25</sup> The background check is corroborated by a character reference for each firearm licence the applicant requires. Once the Commissioner has obtained this information, applicants may apply for additional firearms<sup>26</sup> a rifle may be issued in

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<sup>22</sup> Firearms Control Act 60 of 2000, sec 6(2).

<sup>23</sup> Firearms Control Act 60 of 2000, sec 6(2).

<sup>24</sup> Firearms Control Act 60/2000, sec 9(2).

<sup>25</sup> For instance, a past refusal of competency certificate or an unfitness declaration could suffice, a background check and character reference consider, among others, the involvement of the applicant in domestic violence and the generic misuse of firearms may be revisited. See sec 9(2) (l) of Firearms Control Act 60 of 2000.

<sup>26</sup> Section 13.



exceptional cases for restricted self-defence.<sup>27</sup> Another category of persons such as dealers, manufacturers and gunsmiths may obtain a specific licence about their respective premises.<sup>28</sup>

It is argued that the FCA is silent on the applicants taking a course on the handling of firearms before the application for the same is considered. It is argued that this approach emphasises the ability of the applicant to be a good and proper person to own and manage a firearm. This is further evident in the powers of the police to search. The Criminal Procedure Act enables police officials to search for and seize a firearm where such arm is under the control of a person incapable of proper control because of physical or mental condition.<sup>29</sup> Any police officer in the course of official policing operations in terms of the South African Police Service Act 1995 can search any premises, vessel or aircraft and seize any firearm, imitation firearm, airgun or ammunition is reasonably suspected to be held contrary to the Act.

In addition, the provision of offences such as the failure to comply with any of its provisions, a condition of a licence, permit or authorisation or any direction or requirement of a notice issued under the Act,<sup>30</sup> is still an attempt to largely regulate the person as the licensee other than the device on account of its lethal effects.

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<sup>27</sup> Section 14.

<sup>28</sup> Section 32

<sup>29</sup> Section 110.

<sup>30</sup> Section 120.

To a small extent, the FCA places emphasis on the nature of the weapon. This is evident with the restriction on dealers, manufacturers and gunsmiths, to transfer their licences.<sup>31</sup> This is further seen in the storage requirements for dealers, manufacturers and gunsmiths to construct strong-rooms where arms and ammunition should be kept and installation of burglar alarms.<sup>32</sup> These provisions do provide for measures that underscore the need to regulate the availability and storage of firearms based on their possible effect. It is argued that this should be the position concerning all licences.

In Canada, as earlier noted, the definition of a firearm receives value addition through the licencing criteria.<sup>33</sup> The first subjective part of the criteria requires a judge to look into the antecedents of the applicant to establish if, in five years before the application, he or she has been convicted of any offence involving violence,<sup>34</sup> offences under the Firearms Act,<sup>35</sup> criminal harassment,<sup>36</sup> abuse of controlled drugs,<sup>37</sup> or cannabis.<sup>38</sup> Also, other antecedents that the judge engages in include whether in the previous five years, the applicant has been treated for a mental illness and whether this illness was

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<sup>31</sup> Part 2,3.

<sup>32</sup> At 36.

<sup>33</sup> The use of a subjective evaluation of the application makes it stringent to obtain a firearm. This concretises the would be short definition of a firearm by ensuring that owning it is a long process.

<sup>34</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(i).

<sup>35</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(ii).

<sup>36</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(iii).

<sup>37</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(iv).

<sup>38</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(a)(iv).

associated with the use or attempt to use violence against any person.<sup>39</sup> The fact that one has to have a clean record before owning the firearm, buttresses the short definition above.

The second subjective criteria is the completion of a course before an applicant applies for the firearm.<sup>40</sup> As indicated earlier, the process of application for the firearm has as a matter of practice been streamlined to six key steps. The first two steps include undergoing a safety course followed by the taking of an examination. The third step is the application to legally possess or own the firearm. This is followed by a waiting period which gives the chief firearm officer time to do background checks before the authorization is given. The individual is expected to be above 18 years of age, has to do a test called the Canadian Firearms Safety Course (CFSC)<sup>41</sup> to acquire a license for non-restricted firearms are required to pass tests. Where the applicant seeks to obtain a licence for a restricted or a prohibited firearm, he or she has to do another test for the called the Canadian Restricted Firearms Safety Course (CRFC).<sup>42</sup>

A similar approach as eluded in the Canadian position is evident in Australia. As earlier indicated, the applicant has to attend a course before the submission of an application.

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<sup>39</sup> Firearms Act (S.C. 1995, c. 39), sec 5(2)(b) & (c). The existence of a court order prohibiting a person from owning a firearm is ground to be denied the chance to own or possess a firearm. See sec 6.

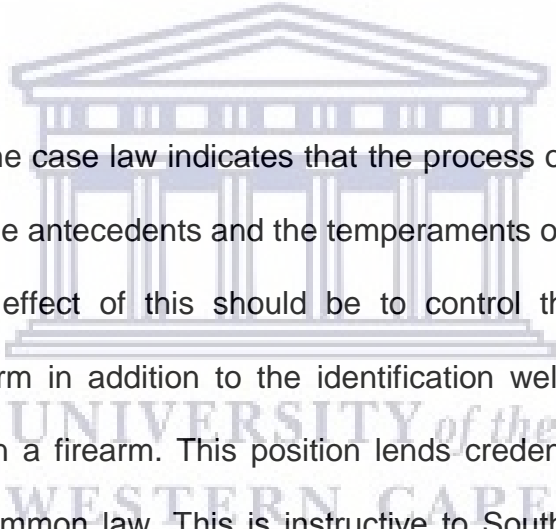
<sup>40</sup> Sec 7 (a)- (e).

<sup>41</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 February 2020)

<sup>42</sup> Available at <https://www.loc.gov/law/help/firearms-control/canada.php> (accessed 5 February 2020)

Other similar aspects speak to the age of the applicant,<sup>43</sup> and his or her financial transactions.<sup>44</sup>

As such, the rigorous process of attending a course before applying for a licence. It is argued that this approach envisages the lethal dangers of a firearm in addition to the person of the applicant and ensures that the applicants are rigorously prepared before they can apply. As such, this dual approach creates an optimal process that balances the readiness of an individual to possess the requisite licence and the obligation to prevent the abuse of the firearm in the context of its lethal effects.



In the United Kingdom, the case law indicates that the process of applying for a licence places an emphasis on the antecedents and the temperaments of the person who finally obtains the result. The effect of this should be to control the inherent and lethal characteristics of a firearm in addition to the identification well-deserving persons to obtain the licence to own a firearm. This position lends credence to the fact that the United Kingdom uses common law. This is instructive to South Africa's constitutional position that enables the court to develop the common law. The relevant section provides that

The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own

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<sup>43</sup> Section 10(1).

<sup>44</sup> Section 10(2).

process, and to develop the common law, taking into account the interests of justice.<sup>45</sup>

In light of the findings above, it is instructive that according to the third research question the definition of a firearm be amended to reflect a dual approach. It is argued that the definition of a firearm need not be left as to when the Parliament will consider it but rather, the courts should be able to develop a definition to firearms, and corresponding licencing provisions. These would serve to offer a dual approach that creates an optimal process that balances the readiness of an individual to possess the requisite licence and the obligation to prevent the abuse of the firearm in the context of its lethal effects.

On the basis of the approach of Durojaye and Oluduro, the effects of a firearm and the fitness of the applicant should inform the development of the definition. It is proposed that the amendment to section 1(xiii) (a)-(e) of the FCA should be section 1(xiii) (a)-(b) to read as follows:

A firearm is any device

- a) that can propel a bullet or projectile through a barrel or cylinder; anything with the capacity to discharge rim-fire, centre-fire or pin-fire ammunition;
- b) that can be readily altered to be a firearm; that is designed to be used or intended for use
  - i. in causing death or injury to any person, or
  - ii. for the purpose of threatening or intimidating any person.<sup>46</sup>

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<sup>45</sup> The Constiotution, sec 173.

This definition recognises the inherent characteristic of a firearm and its lethal consequences.

About licencing, there should be an adoption of the Canadian approach with the necessary modifications to cater for training that forms a basis for the application of a licence to own a firearm. The section may read:

### **6 (2A) Successful completion of safety course**

In addition to the competency Certificate under section 6(2)(1) above, an individual is eligible to hold a licence only if the individual

- (a) successfully completes a course on the handling of firearms, duly given by an instructor who is designated by the Commissioner of Firearms under the South African Police Service Act and passes the tests, as administered by designated instructor;
- (b) passed, before the commencement day, the tests, as administered by an instructor who is designated by the Commissioner of Firearms, that form part of that Course.

The new definition and the need for training will greatly enhance the implementation of the dual approach regarding the definition of a firearm.

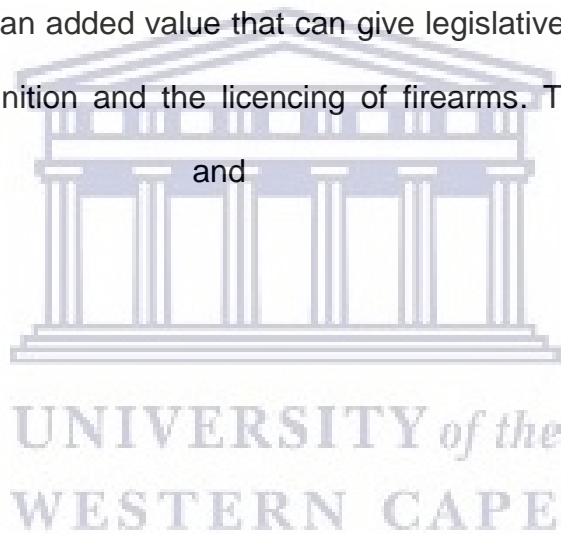
## **5.4 CONCLUSION**

Chapter five has evaluated various approaches to the definition of firearms in Canada, Australia and the United Kingdom. It has engaged the second part of, and the third research questions concerning how the position in other jurisdictions can aid the

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<sup>46</sup> This is based on the definition in the FCA, the Canadian Criminal Code and Australian Firearms Act.

appreciation of the South African definition. Two principles can be deduced from the study. First, that their definitions engage the lethal effect and the harm a firearm can cause to a person. Secondly, the use of a dual approach that places the lethal effect of a firearm, and the need to have a fit and proper person to obtain the licence. This is evident in the need to undergo training before applying for a licence - a missing link in South Africa's dispensation. In the addition, the definition of a firearm is greatly informed by the licencing as far approach is more evident when dealing with the dealers, manufacturers and gunsmiths. It also been established that South Africa's ability to develop common law is an added value that can give legislative solutions, pending the consideration of the definition and the licencing of firearms. The next chapter offers conclusions and recommendations.

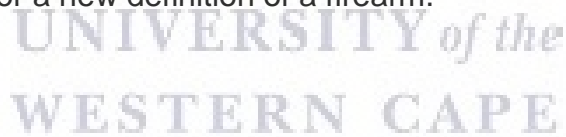


## CHAPTER SIX

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 GENERAL CONCLUSIONS

The study sought to evaluate the efficacy of the current definition of a firearm concerning its ability to aid the ownership, regulation, control the proliferation and deal with the policing of firearms. The study was guided by the argument that the definition that is limited or overly broad affects the role of the legislation and emerging jurisprudence on the intent of either the court or parliament. It was guided by one research question; what is the context of the definition of a firearm? The study used three interrelated secondary questions. First, what is the definition of a firearm in South Africa. Secondly, whether experiences of other jurisdictions with regard to the definition of a firearm may aid the understanding of the South African definition. Thirdly, whether there is a need for a new definition of a firearm.

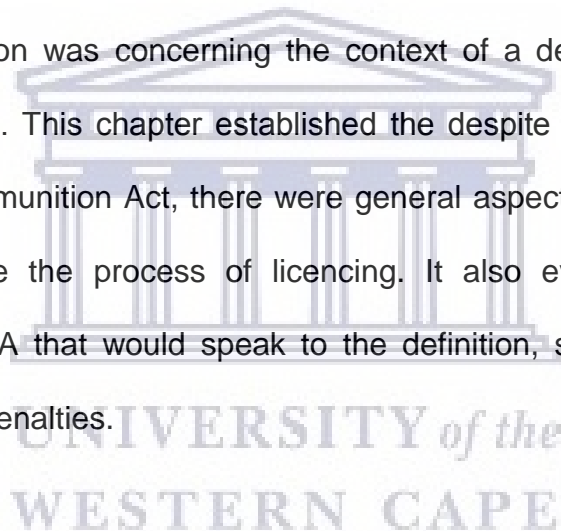


The first research question was engaged in Chapters 2 and 3. Chapter 2 evaluated the definition of a firearm under the legislative provisions of the Republic. Chapter 3 evaluated the position of the courts in dealing with the definition of a firearm in the FCA. The second research question was addressed in part in Chapters 4 and 5. Chapter 4 broadly evaluated the experiences in selected countries, thus Canada, Australia and the United Kingdom. Chapter 5 evaluated these differences and reiterated a model that uses a dual approach that contextualises not only the fitness and worthiness of the person who applies for a licence but the inherent nature of a firearm as a lethal device.



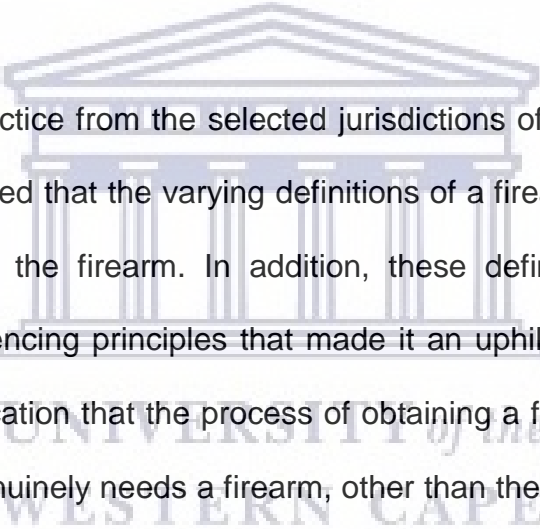
Finally, Chapter 5 addressed the third research question by proposing an amendment to the relevant sections that deal with the definition and licencing of firearms. All the chapters have their conclusions, and as such, most of them will not be repeated here. Conclusions that merit attention in the context of study will be briefly reiterated here.

An examination of the normative position of the definition of a firearm in chapter two showed that the normative position of the definition of a firearm in the context of all legislation that spoke to implied and actual definitions of a firearm. As earlier mentioned, the first research question was concerning the context of a definition of a firearm in South Africa's legislation. This chapter established the despite the lack of a definition under the Arms and Ammunition Act, there were general aspects of the Act that aided the use of firearms like the process of licencing. It also evaluated the available measures under the FCA that would speak to the definition, such as transportation, licencing, offences and penalties.



A look at the emerging jurisprudence from the South African courts added value to the current definition of a firearm under the FCA. The emerging jurisprudence reconciled the definition of a firearm as part of the measures that regulate the ownership of a firearm. However, the restrictions addressed the fitness of a person to own a firearm other than the lethal nature of the firearm. Drawing on the development of the legislation on the meaning of a firearm, case law suggested that before the FCA was enacted, the courts used the dictionary meaning of a firearm. Following introduction of a definition under the FCA, the decisions from the courts introduced various principles. First, that an

expert has to testify following a forensic test that is done on the firearm before it is adduced in court. Secondly, the decision of the court to use the forensic evidence to qualify a device as a firearm may depend on the extent of repairs that need to be carried out on the firearm for it to be operable. Thirdly, the failure by the state to lead expert evidence constitutes a failure in discharging its onus beyond reasonable doubt especially where the firearm is not produced in court at the trial. This led to the position that the definition of a firearm in itself forms part of the onus on the state to discharge proof beyond reasonable doubt.<sup>1</sup>



A look at the law and practice from the selected jurisdictions of Canada, Australia and the United Kingdom showed that the varying definitions of a firearm were guided by the nature and the effect of the firearm. In addition, these definitions were practically complemented by the licencing principles that made it an uphill task for one to own a firearm. This was an indication that the process of obtaining a firearm ensured that the deserving person who genuinely needs a firearm, other than the need to defend oneself was a key consideration.

Subsequently, an evaluation of the various approaches to the definition of firearms in Canada, Australia and the United Kingdom indicated two points. First, that the definition inculcated the lethal effect and the harm they could cause to a person as crucial; and secondly, the use of a dual approach that placed the lethal effect of a firearm, and the need to have a fit and proper person to obtain the licence. In contrast to South Africa,

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<sup>1</sup> *Filani*, p.515f-g.

the missing link still related to two aspects. First, the definition tilted to the inherent characteristics of a firearm as a device that discharges a projectile at a given velocity and energy other than its lethal nature. Secondly, the lack of a training in the Republic that would form the basis of consideration of one's application for a licence. In addition - a missing link in South Africa's dispensation. The point of departure the showed the use of the dual approach was in the licencing aspects with regard to dealers, manufacturers and gunsmiths. It was also noted that the South African courts' ability to develop common law ought to be used as an incentive to develop common law to deal with the definition and the licencing of firearms, a move that could inform the steps to be taken by the legislature.

## **6.2 RECOMMENDATIONS**

The current definition of a firearm requires the prosecution to prove the inherent characteristics of a firearm in the discharge of a projectile. While this make the evidence watertight, the court would be better off using its precious time to establish where the firearm is capable of causing harm, or it can (or an immutation or a toy) instill fear or apprehension of harm in a person if it is used for that purpose. It is not in doubt that an expert would still address the court on the inherent characteristics of a firearm in addition to his analysis of the harm that it has caused to a victim.

As a result the definition to be developed should place the victim of a firearm at its centre other than the inherent characteristics of the firearm. This is in tandem the dual

approach elucidated in chapter five. As such, the use of a victim centred approach looks at the dangers of the firearm and how these dangers can be mitigated. This would go a long way in ensuring that the dignity of the individual form part and parcel of the definition that is used to contextualise a firearm.

An empirical study by the government in conjunction with South African Police Services that questions the exclusion of devices that have a lethal effect and the inherent characteristics of a firearm should be done. This will create an informed mode of adding or removing from the list that excludes various devices from the definition of firearms. This will be instructive in ensuring that due protection and the recognition of rights that would be accorded to a victim is not lost due to an exclusionary list.

The stringent measures that are accorded to receiving a licence by manufacturers, dealers and gunsmiths of non-transferability, storage should extend to all holders of licences. It is argued that would help in the regulation and mitigation of the abuse of firearms by persons without licences who would erstwhile abuse the possession of a firearm.

Following the empirical study, training in the handling of firearms by the South African Police Service has to be done as a means of ensuring that a person is fit and proper to have a licence to own a firearm. An application for the licence should follow the training and the decision should not be automatic based on one's completion of the training.

While there are various checks made by South African Police Services, the use of training would ensure that an individual is fit and proper and recognises the characteristics of the firearm.

The courts should engage the use of section 173 in the development of laws that speak to the definition and the licencing of the possession of firearms. It is practice in South Africa that a procedure has to be followed in the context of developing case law, especially where the legislation is inadequate to create law. It is also on record that the court usually gives the Parliament the time to effect changes to legislation.<sup>2</sup>



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<sup>2</sup> See *DPP vs Masiya* 2007 (5) SA 30 (CC) on the development of a definition on rape.

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