

Appendix B – Proposed Amendments to Psychoactive Substances Bill

Release and Tranform do not support this Bill but have proposed amendments to lessen the disproportionate impact on human rights and the harmful impact of the bill. Below details Release’s proposed amendments and the basis for the proposals.

Clause	Proposed Amendment	Basis for amendment
1	After Clause 1 insert “Impact Assessment” “(1) The Secretary of State must on commencement of this Act conduct an annual impact assessment of this Act, including deaths and other harms caused by all controlled substances and banned substances and (2) if it is deemed that the Misuse of Drugs Act 1971 and/or the Psychoactive Substances Act 2015 has contributed to increased health and social harms this Act will cease to have effect from 01 January 2018, unless further legislative action is taken by the Secretary of State.”	There is concrete evidence from Ireland and Poland, both countries which have banned NPS, that there have been increased rates of use of these drugs since the bans have been introduced – lifetime use of NPS in Ireland has increased from 16% of young people (2011) to 22% (2014). There has also been an increase number of deaths (Ireland) and increased hospital admissions (Poland). An impact assessment would ensure that Parliament can assess whether the Government’s approach to controlled drugs and banned drugs reduces or increases harm. Government states that it is their duty to protect the public, an assessment of their approach is necessary to ensure that duty is being met. Clearly, if harm increases the approach should be terminated.
2	Page 1, Line 14, Before ‘psychoactive’ insert ‘synthetic’ to read: “In this Act “ synthetic psychoactive substance” means any substance which – a) is capable of producing a <i>psychoactive effect</i> in a person who consumes it, and [insert] b) Produced by chemical synthesis, especially not of natural origin, and c) is not an exempted substance”	We endorse the amendment proposed by the ACMD ¹ and additionally/alternatively propose <i>this</i> amendment. The Government’s manifesto pledge commits to banning ‘new psychoactive substances’ (‘NPS’). All of the substances identified by the EMCDDA have been of a synthetic nature. This proposed revision of the definition ensures that the legislation tackles the problem that Government is aiming to address without introducing a disproportionate ban on all substances capable of having a psychoactive

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470421/ACMD_definitions_advice_final-23-October-2015.pdf

		effect and which are not NPS. Such a disproportionate ban would undermine the rule of law and engender an intolerable degree of legal uncertainty as demonstrated by the exemptions already identified as necessary by the Government. The NPS is dominated by synthetic drugs with the EMCDDA stating that just two groups – synthetic cannabinoids and synthetic cathinones – account for 63% of all new psychoactive substances reported for the first time by the EU Early Warning System, and 73% of all seizures in 2013/14.
3	Page 2, Line 10, insert after Clause 3 (2) a new Clause 3 (3) “The Secretary of State will establish a mechanism whereby substances may be independently submitted to the Advisory Council on the Misuse of Drugs to consider a) whether the substance is of low risk of harm and b) whether the substance should be added, varied or removed from Schedule 1 subject to regulations under section 3(2)” and c) any recommendation by the ACMD should be binding on the Secretary of State” .	Currently the Bill has no framework for adding substances to Schedule 1 Exempted Substances bar a duty for the Secretary of State to consult those parties whom the Secretary of State deems it appropriate to consult. In the absence of any purposive framework such delegated powers are unwieldy and may imperfectly achieve the policy objectives of the primary legislation which is to prevent harm from NPS. The Government advocates for an evidenced based approach to policy making, this amendment would support the Government in its endeavour.
4	Delete Clause 4 (1)(c) (i)	The Government decided not to make possession of NPS a criminal offence based on the advice of the NPS Expert Panel who did not think it was necessary to criminalise young people. Clause 4 (1)(c)(i) makes production of a NPS for personal use a criminal offence.
8	Delete Clause 8 (2)(d)(i)	The Government have proposed an amendment which ensures that those importing for personal use are not criminalised. Clause 8 (2)(d)(i) makes exportation for personal use an offence which clearly is odd in and of itself but also undermines the Government’s

		approach which is to avoid the unnecessary and harmful impact of criminalising young people.
Defence Clause	<p>Page 5, Line 25, insert new clause: “(1)This section applies to offences under any of the following provisions of this Act, that is to say section (4) and (5), section 7 and (8)</p> <p>(2) In any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that the psychoactive substance which is the subject of the charge has been consumed by significant numbers of people over the course of a significant amount of time in the absence of significant harmful effects.</p> <p>(3)Nothing in this section shall prejudice any defence which is open to a person charged with an offence to which this section applies to raise apart from this section.”</p>	<p>The Government’s manifesto pledge commits to banning ‘new psychoactive substances’ (‘NPS’). The United Nations Office on Drugs and Crime has defined New Psychoactive Substances as “substances of abuse, either in a pure form or a preparation, that are not controlled by the 1961 Convention on Narcotic Drugs or the 1971 Convention on Psychotropic Substances, but which may pose a public health threat”. This new defence clause recognises that not all substances fall within the Government’s aim of banning NPS and as such defendants should be afforded a defence for substances caught up by the Bill which are not harmful or not NPS and not listed in Schedule 1. The proposed defence places the legal burden on the defendant to prove that the substance is not harmful.</p>
12	<p>Page 6, Line 18, delete Clause 12(1) and replace with “A senior officer or a local authority may give a prohibition notice to a person if conditions A, B and C are met.” <u>AND</u></p> <p>Page 6, Line 28, Insert after Clause 12(4) a new Clause 12(5) “Condition C is that the person to whom the notice is given is informed that failure</p>	<p>Where Court proceedings (and ultimately a Prohibition Order) may result from failure to comply with the Notice, the recipient must be made fully aware of the consequences.</p>

	<p>to comply with the notice may result in Court proceedings.”</p> <p>Page 6, Line 32, In Clause 12(6) delete “given to an individual who is under the age of 18”.</p> <p>Additionally, provide for a process to appeal to Court for withdrawal of the Notice – <u>see Appeal Clause for specific details.</u></p>	<p>The distinction created between by the current Clause means that a Notice to someone over the age of 18 is indefinite – this is not just or proportionate.</p> <p><u>See Appeal Clause for specific details.</u></p>
13	<p>Page 7, Line 2, delete Clause 13(1) and insert a new Clause 13(1) “A senior officer or a local authority may give a premises notice to a person if conditions A, B and C are met.” <u>AND</u></p> <p>Insert after Clause 13(4) a new Clause 13(5) “Condition C is that the person to whom the notice is given is informed that failure to comply with the notice may result in Court proceedings.”</p> <p>Page 7, Line 26, insert after Clause 13(6) a new Clause 13(7) “A premises notice – (a) must specify the period for which it has effect, and (b) may not have effect for more than 3 years.”</p> <p>Page 7, Line 24, insert after new Clause 13(7) a new Clause 13(8) “For the purposes of this section, patrons of entertainment</p>	<p>Where Court proceedings (and ultimately a Premises Order) may result from failure to comply with the Notice, the recipient must be made fully aware of the consequences.</p> <p>It is not just or proportionate for a premises notice to be made indefinitely, particularly as there may be a negative impact on legitimate business.</p> <p>It is not just or proportionate for liability to be incurred in circumstances where the premises owner/manager does not have direct control over the activities on the premises, or where activities</p>

	<p>establishments and those responsible for health and social care services and prisons are exempt from liability for their clients' use of psychoactive substances on their premises within the meaning of the Act."</p> <p>Additionally, provide for a process to appeal to Court for withdrawal of the Notice – <u>see Appeal Clause for specific details.</u></p>	<p>may be more likely than on other premises because of the nature of business on those premises.</p> <p>In relation to entertainment establishments, there are already provisions within licencing laws to deal with substances on premises – it is unnecessary to have additional control through this Act. If the current licencing regime does not allow for psychoactive substances to be covered, the proper course of action would be for amendment of that rather than the introduction of new legislation.</p> <p>In relation to social care services, we can look to the situation of occupier's liability for drug offences on premises under section 8 of the Misuse of Drugs Act. This does not have provision for premises notices or orders, and there is no justification for applying a different regime to psychoactive substances. At Page 6, Line 10, Clause 11(f) provides that "assisting or encouraging the carrying on of" which can be used to cover instances of substantive offences where premises owners and occupiers contribute positively to the commission of an offence.</p> <p>In relation to prisons, again the additional powers would be unnecessary for these institutions given the strict framework within in which they already operate.</p> <p><u>See Appeal Clause for specific details.</u></p>
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<p>Appeal Clause</p>	<p>Page 7, Line 27, insert after Clause 13 a new Clause</p> <p>“Appeals against making of prohibition and premises notices</p> <p>(1) A person issued with a notice may appeal to a magistrates’ court against the notice on any of the following grounds.</p> <p style="padding-left: 40px;">1. That the conduct specified in the notice -</p> <p style="padding-left: 80px;">(a) did not take place,</p> <p style="padding-left: 80px;">(b) is not likely to take place</p> <p style="padding-left: 80px;">(c) is conduct that the person cannot reasonably be expected to control or affect.</p> <p style="padding-left: 40px;">2. That any of the requirements in the notice, or any of the periods within which or times by which they are to be complied with, are unreasonable.</p> <p style="padding-left: 40px;">3. That there is a material defect or error in, or in connection with, the notice.</p> <p style="padding-left: 40px;">4. That the notice was issued to the wrong person.</p> <p>(2) An appeal must be made within the period of 21 days beginning with the day on which the person is issued with the notice.</p>	<p>It is essential that judicial oversight is built into the process of issuing notices to ensure that police discretion is not exercised unfettered, and to prevent potential abuses of power.</p> <p>Comparable Anti-Social Behaviour legislation has a similar appeal process in relation to the issuing of community protection notices.</p>
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	<p>(3) While an appeal against a notice is in progress— (a) a requirement imposed by the notice to stop doing specified things remains in effect, unless the court orders otherwise, but (b) any other requirement imposed by the notice is of no effect. For this purpose an appeal is “in progress” until it is finally determined or is withdrawn. (4) A magistrates’ court hearing an appeal against a notice must— (a) quash the notice, (b) modify the notice (for example by extending a period specified in it), or (c) dismiss the appeal.”</p>	
14	<p>Page 7, Line 31, insert after Clause 14(2)(b) a new Clause 14(2)(c) “Explain what specific prohibited activity is alleged or is sought to be prevented.”</p>	<p>It is essential that any Notice clearly specifies the activity for which the Notice is being issued, particularly in light of court proceedings being a consequence of non-compliance.</p>
17	<p>Page 9, Line 11, delete Clause 17(2) and insert a new Clause 17(2) “Condition A is that the court is satisfied so that they are sure that – (a) issuing a notice was necessary, and (b) the requirements within any notice were reasonable in all the circumstances, and (c) that the person has failed to comply with a prohibition notice.”</p>	<p>Proceedings take place in criminal courts, and breach of an order is considered a criminal offence – as such the standard of proof should be the criminal standard. The situation is comparable to anti-social behaviour where the House of Lords has previously ruled that the relevant standard of proof applicable to the determination of whether anti-social behaviour has occurred under section 1(1)(a) Crime and Disorder Act 1998, is the equivalent of the criminal standard of beyond reasonable doubt (Clingham (formerly C (a minor)) v Royal Borough of</p>

	<p>Page 9, Line 29, in Clause 17(7) delete “made against an individual who is under the age of 18 at the time the order is made”.</p>	<p>Kensington & Chelsea, R v Manchester Crown Court ex parte McCann [2002] UKHL 39; [2003] 1 AC 787).</p> <p>There must be judicial oversight regarding whether it was necessary to issue a notice and that the requirements within it were not unreasonable/impossible to comply with.</p> <p>The distinction created by the current Clause means that a Notice to someone over the age of 18 is indefinite – this is not just or proportionate.</p>
18	<p>Page 10, Line 14, in Clause 18(4) delete “who is under the age of 18 at the time the order is made”.</p>	<p>The distinction created by the current Clause means that a Notice to someone over the age of 18 is indefinite – this is not just or proportionate.</p>
19	<p>Page 10, Line 36, delete Clause 19(3) and insert a new Clause 19(3) “Condition A is that the court is satisfied so that they are sure that –</p> <ul style="list-style-type: none"> (a) issuing a notice was necessary, and (b) the requirements within any notice were reasonable in all the circumstances, and (c) that the person has failed to comply with a premises notice.” 	<p>Proceedings take place in criminal courts, and breach of an order is considered a criminal offence – as such the standard of proof should be the criminal standard. The situation is comparable to anti-social behaviour where the House of Lords has previously ruled that the relevant standard of proof applicable to the determination of whether anti-social behaviour has occurred under section 1(1)(a) Crime and Disorder Act 1998, is the equivalent of the criminal standard of beyond reasonable doubt (Clingham (formerly C (a minor)) v Royal Borough of Kensington & Chelsea, R v Manchester Crown Court ex parte McCann [2002] UKHL 39; [2003] 1 AC 787).</p> <p>There must be judicial oversight regarding whether it was necessary to issue a notice, and that the requirements within it were not unreasonable.</p>

	<p>Page 11, Line 9, after Clause 19(7) insert a new Clause 19(8) “A premises order – (a) must specify the period for which it has effect, and (b) may not have effect for more than 3 years.”</p> <p>Page 11, Line 9, after new Clause 19(8) insert a new Clause 19(9) “For the purposes of this section, patrons of entertainment establishments and those responsible for health and social care services and prisons are exempt from liability for their clients’ use of psychoactive substances on their premises within the meaning of the Act.”</p>	<p>It is not just or proportionate for a premises notice to be made indefinitely, particularly as there may be a negative impact on legitimate business.</p> <p>Please see explanation at Clause 13 above as to why these specific groups should be excluded.</p>
22	<p>Page 13, Line 46, after Clause 22(4) insert “provided use of that force is necessary and proportionate.”</p>	<p>It is essential that powers of those enforcing access prohibitions are not used disproportionately.</p>
31	<p>Page 19, Line 32, in Clause 31(1) delete “civil” and insert “criminal”</p> <p>Page 19, Line 33, in Clause 31(2) delete “balance of probabilities” and insert “the criminal standard.”</p> <p>Page 13, Line 36, in Clause 31(3) delete “not”.</p>	<p>Proceedings take place in criminal courts – as such the standard of proof should be the criminal standard.</p> <p>The court should only be able to hear evidence that would have been admissible during the criminal proceedings. This ensures, along with other amendments, that criminal rules of evidence apply in these proceedings, and that the admission of hearsay evidence is limited.</p>

	Page 19, Line 39, after Clause 31(3) insert “although it may not have been available during those criminal proceedings.”	
35	Page 22, Line 5, in Clause 35(1) delete “or section 25.”	Section 25 contains an offence relating to failure to comply with a prohibition order or premises order – it is not necessary to have further search powers specifically for this. If the alleged breach relates to a separate substantive offence there will already be powers in place to deal with that.
35	Page 22, Line 40, in Clause 35(4) delete “or section 25.”	Section 25 contains an offence relating to failure to comply with a prohibition order or premises order – it is not necessary to have further search powers specifically for this. If the alleged breach relates to a separate substantive offence there will already be powers in place to deal with that.
44	Page 26, Line 37, after Clause 44(1) insert “or section 44.”	Any provisions relating to seizure of items under section 42 must also be equally applied to items seized under section 44 (albeit that this is an extension to seizure powers detailed in section 42).
45	Page 27, Line 21, after Clause 45(1) insert “or section 44.”	As above
49	Page 29, Line 23, delete Clause 49(2). Page 29, Line 25, delete Clause 49(3) insert new Clause 49(3) “If in exercise of the power conferred by sub-paragraph (1) of this section the officer seizes and retains a psychoactive substance or controlled drug, he must, if the person from whom it was seized maintains that he was lawfully in possession of it, tell the person where inquiries about its recovery may be made.	Officers should not have the power to dispose of substances based solely on reasonable belief, without that having been confirmed by independent testing, particularly where a person asserts that it is a substance which is lawfully in their possession.

Schedule 1 Exempted Substances	Page 38, line 23, at end insert “Low non-psychoactive doses of psychoactive substances” .	
Schedule 1 Exempted Substances	<p>Page 39, Line 24, insert:</p> <p>Cosmetic Products</p> <p>11 Any substance which is ordinarily used as a cosmetic product and which complies with EU Regulation 1223/2009 (Cosmetics Regulation)</p> <p>Aromatherapy products</p> <p>12 Any substance which is ordinarily used as an aromatherapy product</p> <p>13 Any substance naturally produced by the human body</p> <p>14 Substances traditionally used in religious ceremonies</p>	<p>Currently all of these groups are caught by the Bill. Perfume, as with aromatherapy (such as lavender oil), can have a psychoactive effect. In respect of substances naturally occurring in the body this would include bodily fluids such as semen which has a psychoactive effect (see: http://www.newscientist.com/article/dn2457-semen-acts-as-an-antidepressant.html). Research also suggests that incense, such as frankincense, used in religious ceremonies has psychoactive effect (http://www.sciencedaily.com/releases/2008/05/080520110415.htm). Clearly it is unlikely that police or the CPS would take a prosecution in either the case of bodily fluids or frankincense but well drafted legislation should be explicit on what is and what is not exempted.</p>
Schedule 4 Consequential Amendments	Page 48, Line 28, in amendments to Proceeds of Crime Act’ at 1 (2) after 1A(D) insert “1A (e) a person found guilty of an offence under section 4 or section 8 shall be excluded from Section 1 A of this Act if the offence was one where the substance was for personal use” .	If the deletion of the personal use aspects of production and exportation are not deleted the reach of the POCA amendments needs to be limited to trafficking type offences.

Schedule 4 Consequential Amendments	Lifestyle offences insert () “para () does not include production or exportation for personal use’	Same principle as amendment above.
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