

Parliamentary Briefing

Psychoactive Substance Bill (2nd Reading House of Lords)

09 June 2015

This is a joint briefing paper from Release and Transform Drug Policy Foundation in respect of the Government's proposed legislation, the Psychoactive Substances Bill.

Release is the UK's centre of expertise on drugs and drug laws (www.release.org.uk)

Transform is a UK registered charity and think tank undertaking analysis and advocacy in the field of drug policy and law reform (www.tdpf.org.uk)

Lack of consultation

- Given the broad scope of this legislation, the sweeping new police powers proposed, the scientific and legal complexity implicit in its implementation, the potential for criminalisation of young people, and the serious implications for a range of industries and scientific research agendas, it is imperative that civil society and a range of industries are consulted. This is too complex an area, with too wide a range of impacts and stakeholders to not have the level of formal public scrutiny accorded to other new legislation and recognised by the Cabinet Office's Consultation Principles¹.
- For reasons that are unclear, The Home Office did not consult the ACMD on the development or drafting of the Bill despite its obvious competence and authority, and indeed its specific legal remit under the Misuse of Drugs Act 1971 ('MDA') to advise on precisely such matters. By way of political context, the ACMD notably saw its recommendation *not* to ban the 'legal high' khat ignored by the Government last year. The ACMD also, earlier this year, recommended that Nitrous Oxide ('laughing gas') *not* be banned – and yet it will be captured within the proposed blanket ban of new psychoactive substances (NPS).
- Instead of the established process of consulting the ACMD the Home Office convened an entirely new expert group, effectively fettering the duty of the ACMD "to keep under review the situation in the United Kingdom with respect to drugs"².
- The ACMD has only now been belatedly consulted *after* the text of the Bill has been drafted (the Bill was laid on 28 May 2015, two days after the request to the ACMD):
 - In a letter soliciting the ACMD's advice dated 26 May, 2015, the Home Secretary wrote: 'There are a number of aspects of our proposed approach that would greatly benefit from the Council's input... for example, in regard to the need to strengthen forensic capacity and capability. I would welcome the Council's views on how best we can establish a comprehensive scientific approach for determining psychoactivity for evidential purposes.'
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- It is possible that legitimate industries could be affected by a blanket ban on psychoactive substances. Nitrous oxide, for example, is a product widely used by the catering and food services industry – to make the whipped cream served with the strawberries at Wimbledon,

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255180/Consultation-Principles-Oct-2013.pdf

² Section 2, Misuse of Drugs Act 1971

for example. Medical researchers, many who already face significant hurdles researching drugs covered by the MDA, have raised concerns about the impact of a blanket ban on their ability to develop and test new drugs for medicinal use, many of which may be psychoactive and therefore caught in the Bill's arbitrary dragnet.

- The Bill appears to effectively end future statutory consultation with the ACMD on drug classification of NPS, unless a substance is considered for classification under the MDA. Oddly, the ACMD is not specifically mentioned in the Bill at all – even in reference to harm assessments to establish exemptions. This removes the formalised evidence-based element of the process to determine policy and legal responses to drugs according to the risks they present.

Procedural Disparities and Implications:

- This Bill was introduced under the 'precautionary principle'³ – which 'assumes the worst' about harm to its extreme without assessing actual harm. Ultimately, this Bill bans **everything** that has the potential to have a psychoactive effect; substances will have to be exempted from the Bill so as not be subject to the proposed offences. The precautionary principle falls between an approach and a principle. It is ambiguous and absolutist in meaning and is based on the common sense adage that it's better to be safe than sorry. Some legal commentary explains that 'proponents of the precautionary principle see power in its ambiguity'; however, we are seriously concerned about the lack of legal certainty – a principle recognised by national and international law.
- The use of the precautionary principle means the Bill is procedurally different to legislation set before, and therefore undermines the whole harm rational principle that currently exists within our drugs laws – how effective this is is debateable but it is at least based on a principle of assessment of harm.

The evidence shows that blanket bans do not have the desired effect of reducing prevalence and instead can increase social and health harms

- The Irish blanket ban under its 2010 Psychoactive Substances Act has been held up as a precedent as it ended most retail shop sales, and led to the closure of many so-called 'head shops'. But use of NPS amongst young people (aged 16-24) in Ireland is today the highest in the EU⁴, and has *increased* since the 2010 ban, from reported lifetime use of 16% in 2011 to 22% in 2014, with reports of a shift to street and online markets.
- In Poland, a similar blanket ban was temporally followed by a rapid decrease⁵ in the number of reported 'legal-high related poisonings'. However, three years after the ban the number of poisonings reports had increased above pre-ban levels. Polish officials have suggested this is partly due to the continued availability of NPS via international online markets.
- Historically when a substance (or a group substances) is controlled it tends to result in the displacement of use from one market to another, or from one drug to another – rather than

³ <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52000DC0001>

⁴ http://europa.eu/rapid/press-release_MEMO-14-445_en.htm

⁵ http://europa.eu/rapid/press-release_MEMO-14-445_en.htm

eradicating the market or having an impact on overall drug prevalence. Previous NPS bans have either:

- Created a void in the market for new, potentially more risky NPS about which we know even less;
- Created a more risky illegal market for established products;
- Or, displaced use back to illegal substances for which legal NPS may have been substitutes.

Drug use is a complex issue, with prevalence among different demographics diverse. The NPS mephedrone is demonstrative of how drug users are undeterred by the legal classification, with use rising from 27% to 41% in the year after it was banned. Use only started to decrease among certain users once the availability and purity of cocaine and MDMA returned. It must be noted, however, that many users are poly-drug users and as such supplement NPS with other well established drugs.⁶

- There is no evidence from other blanket bans to suggest this form of prohibition will somehow be different and result in demand-led markets just disappearing.
- In a global online market and faced with the powerful tools of e-commerce and darknet⁷ marketplaces, a country-specific ban on NPS will fail to have a great impact on new product innovation and global retail. The EMCDDA has warned that a blanket ban will push NPS into the 'grey marketplace'; that is, online and on to the darknet.

The distinctions made between psychoactive substances covered by the Bill and those that are exempt - including alcohol and tobacco - are inconsistent, arbitrary and illogical

- A range of substances – most obviously alcohol and tobacco - that clearly come within the given definition of 'psychoactive substances', and are certainly of equal or greater risk than most NPS, are exempt.
- This reflects a fundamental legal and logical inconsistency, raising issues around fairness, proportionality and equality before the law. The rare occasions when the Government has attempted to account for the distinction between alcohol/tobacco and illicit drugs have only underlined this fundamental legal inconsistency:

"The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis".
"It is ... based in large part on historical and cultural precedents".
"A classification system that applies to [alcohol, tobacco and 'controlled drugs'] would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and

⁶ Measham et al. 2012, "Our favourite drug!: prevalence of use and preference for mephedrone in the London night-time economy 1 year after control", Journal of Substance Use, Volume 17, Issue 2

⁷ <http://www.palgrave.com/page/detail/drugs-on-the-dark-net-james-martin/?isb=9781137399045>

would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning".⁸⁹

The NPS Bill does not criminalise possession for personal use – raising questions about why possession of other illicit drugs is being dealt with differently

- The expert group acknowledges the criminalisation of possession/use of NPS would have a negative impact particularly on young people, and it is welcome that the Government have heeded this advice.
- This raises the obvious question of why, if criminalisation of use is deemed harmful and inappropriate for NPS, the same reasoning is not applied to drugs covered by the MDA. Between 2009 and 2013, 59,742 young people aged 20 and younger were criminalised for the possession of drugs. This represents 29% of the total number of people criminalised for that period.¹⁰
- Whilst simple possession is not an offence, importation for personal use is. Given that online purchase of NPS from offshore sources is likely to be one of the main supply routes this could put a lot of young people at risk of criminalisation, something the Expert Panel, ACMD and Government have been rightly keen to avoid.
- The UK will potentially now have a three tier system under which drugs of equivalent risks are either fully prohibited/criminalised (under the MDA), prohibited/criminalised for supply but not possession (under the NPS Bill and the -- presumably soon to be defunct – Temporary Class Drug Orders (TCDOs)), or legally regulated (alcohol and tobacco).

There is no distinction between NPS associated with different levels of harm

- A blanket ban is a blunderbuss approach that makes no distinction between extremely potent and risky NPS such as some of the synthetic opiates, for example, and the relatively safe ones such as Nitrous Oxide.
- This arbitrary and absolutist approach can only lead to poor policy through the misallocation of enforcement resources towards largely non-problematic substances/behaviours implemented alongside missed opportunities to focus on genuinely harmful activities.
- The proposed ban prevents the ability to explore regulatory models for some lower risk NPS which will potentially lead to a displacement to more harmful products, markets and using behaviours.

It is almost impossible to provide a scientifically or legally meaningful definition of a psychoactive substance

- The definition in the draft Bill is extremely vague and broad, and, if taken literally, potentially encompasses thousands of plants, spices, herbal remedies, over-the-counter medicines, and household and industrial products. Attempts to clarify the definition are a legal and scientific

⁸ <http://rt.com/uk/264993-legal-high-sales-underground/>

⁹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272360/6941.pdf

¹⁰ <https://www.gov.uk/government/statistics/criminal-justice-statistics-quarterly-december-2013>

- minefield that will cause confusion and wasted resources across the criminal justice system as they are tested by experts in court.
- There are also a range of important outstanding questions relating to the *degree* of psychoactivity needed to qualify it under the ‘psychoactive’ definition, and how this will in turn relate to different effects on different individuals, as well as to issues of dosage and potency.
- As the expert group acknowledges, for new and untested substances, legally establishing that something is psychoactive is a real challenge that likely requires placebo controlled trials on humans, which would be impractical (particularly for the 100s of new substances emerging each year) and unethical.
- The expert group did not form a strong conclusion on how to define ‘psychoactive substances’ and the ACMD has similarly struggled.

The Proposed Bill will see scarce resources placed under greater pressure and at the expense of important interventions such as health and education

- The UK Government already spends £1.5 billion on drug law enforcement annually. Less than half of that sum -- £600 to £700 million -- is spent on drug treatment, and just £7 million is spent on drug education. This imbalance in priorities will be further established if the Bill passes. It is unfortunate there has been little commitment from the Home Office to invest in effective education strategies, including harm reduction interventions.¹¹
- The implementation cost for the Bill will almost certainly be greater than the Government’s estimate of 5 cases per year each costing approximately £8,900¹². Enforcement projections have not been given by the government for either police force, borders and customs, or prison service budgets.
- The Government has not given any source for their prosecution costs projection, hence, accuracy of the estimated cost is difficult to measure. This is particularly crucial since total police force budget cuts across the UK are projected at 25% between 2010-2011 and 2015-2016.¹³
- In a response to a written question on 2 June, 2015, Minister of State Mike Penning stated that the total Government spend on education and prevention campaigns for NPS from 2013 to 2015 was £180,556 (Hansard reference: HC Deb, 2 June 2015, cW).¹⁴
- These underwhelming figures show the Government’s first response to tackling NPS has not been public information campaigns or targeted health warnings to young people. Instead they are following a criminal justice approach that the Home Office itself has described as having little impact on drug use. The Home Office acknowledged in its 2014 report *Drugs: International Comparators* that ‘Looking across different countries, there is no apparent correlation between the “toughness” of a country’s approach and the prevalence of adult drug use’.¹⁵

Concerns about the extension and application of powers to stop and search:

¹¹https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265393/Drug_Strategy_Evaluation_Framework_FINAL_pdf.pdf

¹²<http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0002/en/16002en.pdf>

¹³<http://www.nao.org.uk/report/financial-sustainability-of-police-forces-in-england-and-wales/>

¹⁴<http://www.theyworkforyou.com/wrans/?id=2015-05-27.269.h&s=penning+legal+high#g269.r0>

¹⁵<https://www.gov.uk/government/publications/drugs-international-comparators>

- To establish 'reasonable suspicion' for a stop and search of someone for an offence under the proposed legislation will be extremely difficult. An officer will have to reasonably suspect someone of having a psychoactive substance on their person or in their property with the intent to supply, import or produce. Thus, not only will the police have to identify the prohibited item, but also the activity. There needs to be a clear definition of what a 'psychoactive substance' is. As explored above, there have been major unresolved problems in defining this for panels of experts, let alone police on the street
- If found to be in possession of an unidentified drug, how will the officers know whether it is a psychoactive substance or not, and if it is which legislation it is covered by?
 - There is no further information on the next stages of a search if this happens for someone who is stopped and searched in the street.
 - This may lead to more stop and search outcomes resulting in an arrest in order to establish what the substance is, and whether it is covered by the MDA or the new NPS Act
 - Many individuals are likely to be deprived of their liberty at arrest stage and whilst on police bail for the alleged offence
- A likely outcome of this Bill is therefore a situation where anyone caught with any 'suspicious' substance has to go through this process.
- This will put a strain on already difficult police/ community relations, something senior police, including the Her Majesty's Inspectorate for Constabulary, are trying actively to address.
- Police and forensic services required to enforce the drug laws are consequently facing both confusion and significant additional workload as they attempt to negotiate confused parallel legal structures applied to -- on the face of it -- almost identical white powders and pills, associated with comparable harms but very different legal responses. With much of the work of forensics now the remit of private companies this will place even greater burdens on police and prosecution budgets at a time when they are already under significant stress.
- To avoid these foreseeable problems and ensure proportionate, equitable, practical and consistent enforcement, it would therefore be far more responsible to remove criminal sanctions for the possession of drugs, including those covered by the MDA. If, as agreed by the expert panel and Government, this is the right thing to do for NPS, it should be more widely applied -- as indeed it has been in much of Europe, Latin America and elsewhere.

Wider policy considerations and suggested ways to move forward:

The NPS phenomenon is driven by prohibition in the first place

- NPS products have emerged as mimics of more established illicit drugs such as cannabis and MDMA, with the legal NPS having a competitive advantage over their illicit counterparts.
- If certain established and well understood lower risk drugs -- for example cannabis, MDMA and magic mushrooms -- were legally available under a responsible regulatory framework, the incentive to develop and market new NPS would be dramatically diminished.
- Illustrating this point: In the Netherlands, where cannabis is de-facto legal to buy from licensed shops, there is no market for (more risky) synthetic cannabinoids, one of the most popular NPS products in the UK, where cannabis remains illegal.

There is no option to regulate

- Up until now there have been two options available for NPS -- an unregulated market subject only to informal and inconsistently applied voluntary controls; or, prohibition either under a temporary banning order or via scheduling under the misuse of drugs act.
- No options are available to explore the spectrum of regulated market models that exist between unregulated free markets or total prohibition. Such regulated models are familiar for other potentially risky psychoactive substances such as alcohol, tobacco, solvents, and pharmaceuticals, or for cannabis in the US, Uruguay, the Netherlands and Spain.
- The historical and ongoing absence of any legislative mechanisms to regulate NPS is not an evidence-based or rational position -- it reflects political/ideological positioning only.
- New Zealand -- following the long term failure of prohibition-based responses -- has established a mechanism for licensing the sale of NPS that can be shown by manufacturers to be below a certain safety threshold. This policy has recently struggled with technical and political challenges¹⁶, but at least illustrates how pragmatic new thinking is possible with the expert group report acknowledging the potential benefits of the New Zealand regulation model. Whilst not recommending the model they did suggest it be closely monitored, and left the door open for possible regulation of certain lower-risk NPS in the UK. This is not reflected in the new NPS Bill.

RECOMMENDATION:

- That the legislative process is postponed:
 - To allow for formal public consultation as outlined in the Cabinet Office's Consultation Principles.
 - So that the ACMD can be fully consulted on all aspects of the proposed legislation before either House considers this legislation.
 - In order to consider more effective alternatives. In fact we are of the view that the issue of NPS should not be seen in isolation and that this provides an opportunity to consider the evidence for alternative approaches to all substances currently controlled by the MDA and those emerging NPS not currently subject to control.

¹⁶ <http://drugfoundation.org.nz/matters-of-substance/psycho-psychoactive-legislation>