

Joint submission to the Home Affairs Committee's Short Inquiry into the Psychoactive Substances Bill

[Release](#) is the UK's centre of expertise on drugs and drug laws, providing free and confidential legal and drug services to people who use drugs and/or those caught up in the criminal justice system. The organisation campaigns for evidence-based drugs policies and for reform of the UK's current drug policy, with a specific call for the end of criminal sanctions for possession offences. Release has Consultative Status with the UN Economic and Social Council

[Transform](#) is a UK-based charity and think tank producing policy analysis on, and advocating for, an end to the failed, enforcement-based 'war on drugs' and its replacement with a responsible system of market regulation, for almost 20 years. Transform operates in the UK and internationally and has been awarded Consultative Status with the UN Economic and Social Council.

We welcome the Committee's short inquiry into the Psychoactive Substances Bill. We acknowledge the potential health harms associated with Novel Psychoactive Substances ('NPS') and the inadequacy of the current legislative response to these emerging substances. However, we are of the view that the Government's proposed blanket ban of such substances is unworkable, likely to be counterproductive, and that the legislation itself is imprecise and unwieldy. It is Transform's and Release's opinion that far more could be done to reduce the harms of these substances through a review of drug policy as a whole, looking at both controlled substances and NPS, examining how the markets interact and finding solutions that are firmly based on principles of public health and human rights.

Before addressing the Committee's questions, and providing recommendations (page 14), we would like to provide a legal analysis of the Bill to demonstrate why the proposed law is unworkable in its current state and address the fundamental question of whether the proposed legislation will effectively suppress the trade in NPS, delivering the dual goal of protecting the nation's health and welfare. We specifically highlight five key related issues for the HASC to consider:

1. The Bill will not achieve its stated aims of disrupting the trade in NPS and protecting UK citizens from their associated harms

Evidence from two other countries that have implemented a blanket NPS ban demonstrates that such legislation does not reduce prevalence and can lead to increased social and health harms.

Ireland's 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'. In its explanatory note, the UK government specifically cites Ireland as the Bill's model: '*the Government announced its intention to develop proposals for a blanket ban similar to that introduced in Ireland in 2010*'.¹ Despite these head

¹ UK Home Office, 'Psychoactive Substances Bill [HL]: Explanatory Notes,' May 28, 2015, <http://www.publications.parliament.uk/pa/bills/lbill/2015-2016/0002/en/16002en.pdf>

shop closures, use of NPS amongst young people aged 15-24 years in Ireland is today the highest in the EU, and has increased since the 2010 ban, from reported lifetime use of 16% in 2011 to 22% in 2014². Rather than disappear, reports indicate that the market has simply shifted to illicit street and online markets.

After banning the manufacture, sale and advertising of NPS in 2010, Poland saw the number of NPS-induced poisonings rise dramatically from 562 cases in 2010 to 1,600 cases in the first ten months of 2014.³ The emergence of an unregulated online market, as well as the incorporation of the NPS trade into the traditional criminal market is thought to be behind this increase. The case of Poland highlights that banning these substances has done nothing to alleviate their potentially serious health harms, or to protect vulnerable younger users who comprise most of the market. Questions should be asked as to whether the informally regulated 'head shops' at least served as some sort of filter, reducing access for underage customers, limiting access to more unknown substances and potentially providing harm reduction advice to users on how to consume more safely (even though this would potentially place them at greater risk of prosecution).

The outcomes in Poland and Ireland are unsurprising. The evidence on the impact of prohibition has increasingly established that this policy has little or no impact on levels of use. In fact, the Home Office's own report, 'Drugs: International Comparators' (October 2014), stated, '*Looking across different countries, there is no apparent correlation between the "toughness" of a country's approach and the prevalence of adult drug use*'⁴. Similar conclusions have been drawn by the World Health Organisation, The Organisation of American States, and the European Monitoring Centre on Drugs and Drug Addiction (as well as previous reports from the HASC). Despite this evidence, a blanket ban is being proposed as the corner stone of the Government's response to NPS.

2. The Bill is poorly drafted and will be unworkable on a number of legal grounds including the difficulty in proving the psychoactivity of a substance in court proceedings

"Whilst acknowledging the obvious need to prevent the dogs which are, or have become, savage from injuring people, yet it seems to me that the Dangerous Dogs Act 1991 bears all the hallmarks of an ill-thought-out piece of legislation, no doubt in hasty response to yet another strident pressure group."
Justice Rougier, R. v. Ealing Magistrates' Court ex parte Fanneran [1996] 160 JP 409

The above quote, although pertaining to the Dangerous Dogs Act 1991, could equally apply to the Psychoactive Substances Bill in that it is an '*ill thought out piece of legislation*'. The Bill has largely arisen as a result of the Government responding to media reports of the tragic deaths of young people

² European Commission, 'International Day against Drug Abuse: new study shows increasing use of 'legal highs' among young Europeans,' June 26, 2014, http://europa.eu/rapid/press-release_MEMO-14-445_en.htm

³ Polish REITOX Focal Point. '2014 National Drug Report: Poland – New developments, trends, and in-depth information on selected issues,' EMCDDA, 2015, p. 131. <http://www.emcdda.europa.eu/publications/national-reports/poland-2014>

⁴ Home Office, 'Drugs: International Comparators,' October, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf pg. 51

that are linked to NPS. More often than not, though, it has turned out that these deaths either involve no drugs, or at least no NPS. As usual we are seeing a legislative sledgehammer to crack a nut.

Like the Dangerous Dogs Act, the Psychoactive Substances Bill was introduced under the ‘precautionary principle’ – it ‘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, meaning substances will have to be exempted from the Bill so as not to be subject to the proposed offences. The precautionary principle falls between an approach and a principle. It is based on the common sense adage that it’s better to be safe than sorry, but is ambiguous and absolutist in meaning. Some legal commentary explains that ‘Proponents of the precautionary principle see power in its ambiguity. It gives regulators and courts unlimited discretion, and its ambiguity undermines transparency, accountability and fundamental principles of jurisprudence. Inevitably, the “precautionary principle” provides a shaky foundation for Europe’s legal decision-making. It will collapse on itself — but not before it does serious harm to Europe’s economy and society.’⁵ However, we are seriously concerned about the lack of legal certainty – a principle which is recognised by national and international law (discussed at point 3). 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 debateable - but it is at least based on the principle of assessment of harm. As the Advisory Council on the Misuse of Drugs (‘ACMD’) has highlighted, meaningful harm assessments are now entirely absent from the new legislation.⁶ In fact, it is this lack of consultation with the ACMD, civil society and industry in the pre-drafting process that has contributed to the problems created by the Bill.

The definition of psychoactivity 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, bodily fluids, and household and industrial products. 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 citing historical and cultural reasons for the anomaly. The absurdity of the situation was highlighted in the House of Lords at the Committee Stage of the Bill where Baroness Chisholm, Government Whip, stated “Alcohol is an exempted substance and so is not a psychoactive substance for the purposes of the Bill”⁷.

Apart from the arbitrary separation of substances there is a much more pertinent legal problem of establishing that a substance is psychoactive for the purposes of the Bill. We would agree with the

⁵ <http://www.cfact.org/2007/11/08/dr-gary-marchant-on-arbitrary-and-capricious/>

⁶ Advisory Council on the Misuse of Drugs, ‘ACMD letter to the Home Secretary: Psychoactive Substances Bill,’ 13 July 2015 <https://www.gov.uk/government/publications/acmd-letter-to-the-home-secretary-psychoactive-substances-bill-13-july-2015>

⁷ House of Lords debate on Psychoactive Substances Bill, 30 June 2015, <http://www.publications.parliament.uk/pa/ld201516/ldhansrd/text/150630-0002.htm> (column 1976)

ACMD and its very simple conclusion that ‘psychoactivity cannot be definitively proven’⁸. In fact, this is the experience of Irish authorities. Detective Sergeant Tony Howard from Ireland’s Drug and Organised Crime Bureau told BBC journalist Mark Easton when discussing the 2010 Act ‘There are problems. It is not perfect legislation’. In the report, Detective Sergeant Howard said that police scientists were having problems proving the ‘psychoactive’ nature of a substance, and went on to say ‘We are relying on scientists to assist us with these prosecutions and, unfortunately, they haven’t been able to provide the evidence to us’⁹. There is no reason to think that the same problem will not occur in relation to the legislation currently before the House.

As the Expert Panel (originally convened by the Home Office to make recommendations on NPS legislation rather than consulting the ACMD) acknowledges, for new and untested substances, legally establishing that something is psychoactive is a real challenge that likely requires randomised controlled trials on humans, which would be impractical (particularly for the 100s of new substances emerging each year) and unethical. Clearly, in vitro or animal testing would not be sufficient to establish the legal test of psychoactivity, and whilst common sense may indicate that a substance is psychoactive this is not a sufficient threshold for legal proceedings.

The reality is that attempts to clarify the definition are a legal and scientific 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. The use of the terms ‘it [NPS] affects the person’s mental functioning or emotional state’ will likely be subject to the *De Minimis*¹⁰ rule, and it appears that no discussion has been had on this matter.

3. In its current state the legislation lacks legal certainty surrounding what substances may lead to commission of an offence.

Legal certainty is an established principle of international law contained within Article 7 of the European Convention of Human Rights, which states that:

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.”

⁸Advisory Council on the Misuse of Drugs, ‘Re: Definitions for Psychoactive Substances Bill’ 17 August 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/454039/Definitions_report_final_14_august.pdf

⁹ Easton M, 22 June 2015, ‘Call to halt legal highs ban based on ‘flawed’ Irish’, BBC News, <http://www.bbc.co.uk/news/uk-33226526>

¹⁰ *De minimis* is a legal term which dictates that the law should not be concerned with trifling matters. In the context of the PSB there is a real risk that when establishing whether a substance is psychoactive for the purposes of the Act, some attention must be given by the Courts to the degree it ‘affects the person’s mental functioning or emotional state’. If the substance has a fleeting effect like, for example, poppers and nitrous oxide, the Court may decide that the *de minimis* rule will apply.

In order for this to be realised an offence must be clearly and precisely defined. The House of Lords, in *R v. Rimmington and R v. Goldstein* [2005] UKHL 63 confirmed this, with Lord Bingham stating:

*“There are two guiding principles: no one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no one should be punished for any act which was not clearly and ascertainably punishable when the act was done.”*¹¹

This Bill fails to meet either of these requirements. This is despite the fact that the principles of legal certainty have been firmly recognised by domestic jurisprudence, which establishes that ‘an offence must be clearly defined in law’¹² and also that ‘a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’¹³. In its current form the Bill makes it impossible for:

- An individual to understand whether many substances will be considered psychoactive;
- The police to determine whether a substance is psychoactive and an offence has been committed;
- The CPS to establish whether it is appropriate to charge with an offence;
- A lawyer to properly advise their client on plea and potential sentence; and
- A Judge or jury to determine guilt or otherwise

In addition, there are problems with the Schedule of exemptions. For example, if something is considered exempted, is it indefinitely exempted regardless of whether it is consumed for its psychoactive properties? To put this into context the exemption for food is:

‘Any substance which— (a) is ordinarily consumed as food, and (b) does not contain a prohibited ingredient. In this paragraph— “food” includes drink; “prohibited ingredient”, in relation to a substance, means any psychoactive substance— (a) which is not naturally occurring in the substance, and (b) the use of which in or on food is not authorised by an EU instrument.’

If we take nutmeg, a substance that is thought to have very potent psychoactive properties¹⁴, as an example, it should be exempted from the Act as it is ‘ordinarily consumed as food’ and the psychoactive element is ‘naturally occurring’. However, what if it is being consumed for its psychoactive effect? Does it still fall within the ‘ordinarily consumed’ definition, or does it become a psychoactive substance which is caught by the legislation?

¹¹ *R v. Rimmington and R v. Goldstein* [2005] UKHL 63 at Paragraph 33

¹² *S.W. v. United Kingdom: C.R. v. United Kingdom* (1995) 21 EHRR 363 at Paragraph 35

¹³ *Sunday Times v. United Kingdom* 91979) 2 EHRR 245 at Paragraph 49

¹⁴ Dorsey, S, ‘Effects of Nutmeg & Myristicine’ Erowid

https://www.erowid.org/plants/nutmeg/nutmeg_info3.shtml

4. The PSB is in contravention of the ‘Good law initiative’, introduced by the Government under the previous Coalition.

The Office of Parliamentary Counsel states that ‘good law’ is law that is¹⁵:

- Necessary
- Clear
- Coherent
- Effective
- Accessible

It is our position that the Bill meets none of these objectives and is unworkable in practice.

Necessary

Whilst the emergence of NPS is worrying, especially in light of the unknown harms associated with a specific new substance or group of substances, the media and political attention given to the issue potentially outweighs the realities of the situation in terms of prevalence. An estimated 6.1% of 16 – 24 year olds have admitted trying NPS, and of that number 2.8% tried an NPS over the previous 12 months.¹⁶ To put this into context, 16.3% of 16 – 24 year olds reported using cannabis in the last year¹⁷. This is not to downplay the issue of NPS, but it is important to expose the scale of the problem and to consider a proportionate response. It is our view that the problem could be much more effectively tackled by focusing resources on education and health initiatives rather than criminal justice responses that have proven ineffective in both Ireland and Poland. The proposed legislation is likely to create more harm by driving the market underground into criminal networks, or create a new group of young social suppliers who are willing to buy on the internet and distribute to their friends. Either way, the market will become more harmful under the proposed legislation, not less harmful as intended.

Clear

The definition of the psychoactivity has been explored above (point 2), but it will undoubtedly be difficult, if not impossible, for people to know the degree of psychoactivity, if any, of a substance in their possession. In addition there are some concerns over the various tests of *mens rea*¹⁸ in the Bill. Firstly, the person accused of an offence will have to have knowledge that the substance is psychoactive, which, as discussed, will be difficult to establish. Secondly, there is a lack of clarity as to the subjective and objective nature of the mental element of the offence in relation to the various offences. For example, in production a person commits the offence if they ‘intentionally produce a psychoactive substance’ and they ‘know or suspects that the substance is a psychoactive substance’.

¹⁵ Cabinet Office and Office of the Parliamentary Counsel, ‘Government Guidance - Good Law,’ 16 April 2013 <https://www.gov.uk/guidance/good-law>

¹⁶ Home Office, 2015, Crime Survey for England and Wales: Drug Misuse Declared, <https://www.gov.uk/government/statistics/tables-for-drug-misuse-findings-from-the-2014-to-2015-csew>

¹⁷ Ibid

¹⁸ *Mens rea* is the mental element of the offence. In most criminal offences the prosecution must establish that the person had knowledge, or at least was reckless, that their actions would result in the offence being committed.

It would appear here that a subjective test is being applied and the defendant's actual behaviour is being assessed. However, the test to establish a supply offence is that the 'person knows or suspects, or ought to know or suspect' that the substance is psychoactive, meaning the second limb of that definition allows for an objective test i.e. a reasonable person test.

Looking at nutmeg as an example, suppose a group of young people go into a supermarket and purchase a quantity of nutmeg – which is of course exempt from the Bill under the 'food' exemption - and when paying for the nutmeg they talk about consuming it to get high, as explored above this disclosure may end the exemption. If so, is there then an onus on a supermarket cashier in those circumstances to know or suspect, or ought to know or suspect, that the substance is psychoactive simply from the overheard conversation? Or, can they reasonably put it down to a joke between friends and continue with the sale? Whilst for some people the psychoactive properties of nutmeg may be well known, it cannot necessarily be inferred that this is knowledge that all or most people ought to possess. If that level of knowledge were to be implied across the board, supermarket cashiers would have to be educated about what foodstuffs would ordinarily be exempted but may also be used for their psychoactive effect. Considering the difficulty in establishing psychoactivity it is difficult to see how this would work in practice.

Finally, in order to fully protect themselves against any prosecution for supply, the cashier may feel the need to question all customers about their intended use of nutmeg (and other products), as the final test for supply returns to a subjective one that 'the person knows, or is reckless as to whether, the psychoactive substance is likely to be consumed by the person to whom it is supplied, or by some other person, for its psychoactive effects'.

There are a number of other aspects of the Bill that lack clarity, much of which we covered in detail in our amendments to the Bill at the Lords stage¹⁹.

Coherent

The points raised for the discussion on clarity above could also apply to this discussion; but, to focus on one clear example of the lack of coherent reasoning behind the Bill we need only look at the issue of offences related to personal use. Whilst it is welcomed that the Government has decided not to criminalise possession of NPS, heeding the position of the Expert Panel that acknowledged the criminalisation of possession/use of NPS would have a negative impact on young people, the decision to criminalise importation for personal use is at odds with this position. Since online purchases are one of the main sources for these substances, this could put a lot of young people who obtain NPS via such sources at risk of prosecution, something the Expert Panel and Government were at pains to avoid.

Additionally contributing to the Bill's incoherence is the fact that it makes production of NPS for personal use an offence. Despite this similarly being contrary to the Government's position of not

¹⁹ Release, 'Psychoactive Substances Bill – proposed amendments'
http://www.release.org.uk/sites/default/files/pdf/publications/Psychoactive%20Substances%20Bill%20amendments%20FINAL_0.pdf

wanting to criminalise young people, these drugs in reality are produced en masse; to produce an amount within the realms of personal consumption is highly improbable.

Effective

Please see the sections above on the feasibility of proving psychoactivity (point 2) and the impact of similar bans in Ireland and Poland (point 1), both of which demonstrate the inefficacy of a blanket ban approach.

Accessible

The importance of accessibility is directly linked to Article 7 of the ECHR and the principle of legal certainty discussed above (point 3). This is effectively demonstrated in *Rimmington*²⁰ where Lord Bingham states:

*‘Article 7 therefore sustains his [the defence counsel’s] contention that a criminal offence must be clearly defined in law, and represents the operation of the ‘principle of legal certainty’.*²¹

Lord Bingham goes on to cite *S.W. v United Kingdom: C.R v United Kingdom*²²:

‘The principle enables each community to regulate itself “with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible. An individual must have an indication of the legal rules applicable in a given case and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law’.

Which groups will be particularly affected by a ban on psychoactive substances?

Young People

Young people, who comprise the main demographic of NPS users, will face criminal sanctions for purchasing NPS for personal use from the internet if they are imported, as many legal highs are, from abroad. This legislation will not protect young people as demonstrated by analogous legislation in Ireland in 2010 which has been accompanied by an increase in NPS use among young people.

As stated, Release and Transform welcome the Government’s decision not to criminalise people for possession of substances falling under the Bill, and we endorse their position that a criminal record can be very damaging to a young person. However, this legislation threatens to harm young people both through its sanctioning of NPS importation, which does not take into account the growing role of the internet in drug sales. As stated, after Ireland’s ban on head shops the number of young people who had ever tried NPS rose from 16% in 2011 to 22% in 2014 indicating increased engagement with the illegal drug market, both traditional and online, after legal sales were banned.²³

²⁰ *R v. Rimmington and R v. Goldstein* [2005] UKHL 63

²¹ Ibid at page 23, line 34

²² (1995) 21 EHRR 363

²³ Eurobarometer, ‘Youth Attitudes on Drugs: Analytical Report,’ July 2011

http://ec.europa.eu/public_opinion/flash/fl_330_en.pdf

The removal of headshops could, therefore, increase the number of young people buying NPS from the internet, forcing them to become their own and their friends' dealers. This potential adaptation in the market, responding to the closure of shops and domestic online suppliers, could lead to young people committing more serious offences; for example, importation or supply of NPS. The increase in young people using NPS following the 2010 headshop ban in Ireland demonstrates irrefutably the need to put this legislation on hold until the consequences of Ireland's ban can be fully and rigorously examined. Currently there is a strong possibility that this legislation will have similar results to Ireland, with increased use and consequent harms to young people in the UK.

Men who have sex with men

Banning alkyl nitrites ('poppers') will have serious negative consequences for the gay community and could increase both the rate of sexually transmitted infections as well as encouraging diversion to more risky drugs. Release and Transform endorse the submission of the National AIDS Trust which clearly outlines the possible negative impact of banning these substances.

Alkyl nitrites, commonly known as poppers, are widely used by men who have sex with men (MSM). According to Gay Men's Health Collective ('GMHC'), '[In] 2013, 300 people filled in a short anonymous survey for GMFA about using drugs while having sex ... 70.1% [of which reported use of] poppers during sex'.²⁴ The Global Drugs Survey 2014 recorded that after Nitrous Oxide (20%), poppers was the second most used NPS (9.7%).²⁵ Poppers are considered a relatively safe drug, as long as they are inhaled and not ingested. According to the British Crime Survey, only 11 deaths over 20 years cite alkyl nitrites as a contributory cause, and those deaths were in all probability not using the alkyl nitrite now commonly used – isopropyl nitrite.²⁶

Poppers are inhaled to give the user a short-term high or 'rush', producing euphoria and relaxing voluntary and involuntary muscles. The combination of lubricant and poppers significantly reduces potential tearing or damage to the anal canal during sex, a key route of infection transmission between MSM. If poppers are banned then sexual health groups like Gay Men's Health Collective believe the likelihood of the transmission of HIV, hepatitis C and other STIs will increase. This is a serious concern in a community where 1 in 17 MSM are estimated to be HIV positive, rising to 1 in 8 in London.²⁷ The ban is likely to divert MSM towards more 'readily available' but risky drugs like cocaine, ecstasy, ketamine, and amphetamines including methamphetamine ('crystal meth'), to create a similar high and for their muscle relaxant properties.

The Gay Men's Health Collective has stated that '*banning poppers will result in (1) increased class A and B drug use, particularly among first time users and (2) increased transmission of STIs, namely HIV and hepatitis C*'.²⁸

²⁴ Email exchange with GMHC, 6 August 2015

²⁵ Global Drugs Survey, 'Last 12 Months Prevalence of Top 20 Drugs,' <http://www.globaldrugssurvey.com/wp-content/uploads/2014/04/last-12-months-drug-prevalence.pdf>

²⁶ National AIDS Trust. Submission to the House of Lords Psychoactive Substances Bill Committee Stage.

²⁷ National AIDS Trust, 'Men who have sex with men,' <http://www.nat.org.uk/HIV-in-the-UK/HIV-Statistics/Latest-UK-statistics/Men-who-have-sex-with-men.aspx>

²⁸ Email exchange with Gay Men's Health Collective, 6 August 2015.

What steps can the Government take to educate these groups about the dangers of these substances?

It is concerning that the Government's reaction to the emergence of NPS has been to draft this legislation before considering whether educational measures could achieve the Government's stated aims without unnecessary criminalisation. This reflects the problematic process through which the legislation has been generated – without pre-drafting consultation with the public or the ACMD.

The education spend on NPS is shockingly inadequate. In a response to a written question on June 2, 2015, Minister of State Mike Penning gave total government spend on education and prevention campaigns for NPS from 2013 to 2015 as £180,556 (Hansard reference: HC Deb, 2 June 2015, cW).²⁹ These underwhelming figures show the Government's first response to tackling NPS has been to ban them rather than implementing public information campaigns or targeted health warnings to young people. This lopsided approach to tackling drug use is evident in how successive Governments have prioritised ineffective criminalisation and supply-side drug enforcement at the expense of proven treatment and education interventions, with £1.5 billion spent annually on traditional drugs enforcement, more than twice the amount spent on treatment (£600 million) and a derisory £7million on education.³⁰

How will the Government explain the change in the legal status of these substances?

The ability to explain the change in legal status is hampered from the start by the ambiguity arising from the definition of psychoactivity used within the Bill, which was discussed in detail at the start of this submission, making the task at best problematic and at worst impossible. The ACMD, comprised of expert scientists and academics, has stated that 'The psychoactivity of a substance cannot be unequivocally proven'³¹ – if amongst this group *they* are unable to define or explain it in laypersons terms, then who is able to?

This situation, where people are punished without even knowing in advance that they may be liable for prosecution, is inevitable regardless of any attempts to simplify the legislation. Without the ability to explain what will and won't be psychoactive, and therefore criminalised, there is no hope of being able to explain the change in legislation to the wider public (particularly the most affected groups discussed above). Consequently, people will not be able to make fully informed decisions in order to protect themselves from potential criminal sanctions.

The only acceptable explanation would be a definitive list of substances that will or won't be considered to be psychoactive under the legislation (alongside a verifiable means for individuals to

²⁹ Drugs – Home Office written question 2 June 2015 <http://www.theyworkforyou.com/wrans/?id=2015-05-27.269.h&s=penning+legal+high#g269.r0>

³⁰ HM Government, 'Drug Strategy 2010 Evaluation Framework – evaluating costs and benefits,' 2013 pg. 21 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265393/Drug_Strategy_Evaluation_Framework_FINAL.pdf

³¹ Advisory Council on the Misuse of Drugs, 'ACMD letter to the Home Secretary: Psychoactive Substances Bill,' 2 July 2015 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/441400/2-7-15-ACMD_advice_on_PS_Bill.pdf

ascertain whether a particular substance is one of those on those list), and that is something that the Government are unable to provide.

What specialist treatment do users of psychoactive substances require?

NPS should not be addressed as an issue in isolation from controlled drugs. These substances are, by and large, designed to mimic the effects of controlled drugs meaning any treatment or harm reduction intervention can be based on existing experience and best practice.

In its 2014 NPS toolkit for local authorities, Public Health England (PHE) stated: *'Drug treatment services can largely adapt current approaches to existing drugs rather than invent new ones. The key is to focus more on individuals and their symptoms than the specific drugs they are taking'*.³² The number of people attending specialist drug treatment programs for NPS use is small. Though little is known about the dependence-forming potential of some NPS, most people who use these substances are more likely to seek help for acute problems -- for example, palpitations, seizures, or agitation -- and present to A&E, primary care, or mental health services.³³

In spite of the increasing number of new substances identified, NPS broadly fall into the following categories: stimulant-type drugs, hallucinogenic drugs, sedative-type drugs, dissociative drugs, and synthetic cannabinoids.³⁴ For almost all of these - which controlled substances also fall into, bar synthetic cannabinoids - there are well-established harm reduction and treatment interventions.

There is a risk that if NPS are falsely determined to require specialist treatment then certain providers may see this as a financial incentive to create 'new' treatment programs tailored specifically to these substances. This would be both unnecessary due to the aforementioned options available, and also diverge from best treatment practice of focusing on individuals rather than the drugs themselves.

What can be done to counter a shift to using controlled drugs once there is a ban?

The premise of this question is somewhat flawed in its implicit view of poly-drug use and displacement between drugs in responses to changes in drug market dynamics.

The rate of poly-drug use has been on the rise in recent years, increasing from 7% (2010/11 and 2011/12 combined) among people who reported using drugs in the past year to 9% (2013/14 and

³² Public Health England, *New Psychoactive Substances: A toolkit for substance misuse commissioners*, PHE: London, November 2014 pg. 12 <http://www.nta.nhs.uk/uploads/nps-a-toolkit-for-substance-misuse-commissioners.pdf>

³³ Ibid. pg. 11

³⁴ UK Home Office, 'New Psychoactive Substances (NPS): Resource pack for informal educators and practitioners,' March 11, 2015 pg. 6 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/412168/150311_Psychoactive-drugs11-colour_18-33-44_-_1_.pdf

2014/15 combined).³⁵ When focusing on certain illicit substances for the 2014/15 period, this rate of simultaneous poly-drug use increases markedly to 68% for mephedrone, 57% for ecstasy, and 33% for cocaine.³⁶ For most people who use drugs, poly-drug use (including alcohol) is the norm, not the exception.

Similarly the question does not grasp the complexities of drug market and use dynamics. If accepting the view that people will simply switch between substances, such a shift rarely happens based solely on the legality or illegality of a substance as much of the debate around NPS incorrectly assumes. People use NPS for many reasons, including the status of the market for controlled drugs. For example, use of mephedrone -- a drug that mimics the effects of stimulants such as MDMA – rose above ecstasy use among 16-24 year olds for past year use in 2010/11 at 4.4% compared to 3.8%.³⁷ This was due in large part to low purity levels of ecstasy at the time in the UK. As MDMA purity levels have increased, past year mephedrone use has fallen and ecstasy use risen among this age group to 1.9% and 5.4% respectively for 2014/15.³⁸

Underscoring the point that the legality or illegality of a substance has little impact on prevalence rates, research found that, one year after mephedrone was made a Class B drug 2010, use levels had increased among some populations. In 2010, 27% of the surveyed club-going population had used or planned to use mephedrone that night; this jumped to 41% the following year, despite it being newly illegal.³⁹

Any attempt to positively influence trends in drug use and protect people from the associated harms has to stem from accurate, targeted drug education, something the Government has historically failed to adequately fund. As highlighted above, whilst the Government spent at last estimate £1.5 billion annually on drug law enforcement, just £7 million is being channelled into drug education.⁴⁰ This imbalance would be further established should the Bill pass. It is unfortunate that the Home Office is concerned about prevalence, yet is intent on maintaining a law enforcement-led approach at the expense of proven harm reduction and education interventions – despite its own admission that a punitive approach has little effect on use levels.⁴¹

³⁵ Home Office, 'Drug Misuse: Findings from the 2014/15 Crime Survey for England and Wales,' July, 2015, pg. 22 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450181/drug-misuse-1415.pdf

³⁶ Ibid. pg. 24

³⁷ Home Office, *Drug Misuse Declared: Findings from the 2010/11 Crime Survey for England and Wales*, July 2011, pg. 17 & 22 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116333/hosb1211.pdf

³⁸ Home Office, *Drug Misuse: Findings from the 2014/15 Crime Survey for England and Wales*, July, 2015, pg. 7 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450181/drug-misuse-1415.pdf

³⁹ Dargan, P, Measham, F, & Wood, D, "'Our favourite drug": prevalence of use and preference for mephedrone in the London night-time economy 1 year after control,' *Journal of Substance Use* 17(2): 2012

⁴⁰ HM Government, *Drug Strategy 2010 Evaluation Framework – evaluating costs and benefits*, 2013 pg. 21 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/265393/Drug_Strategy_Evaluation_Framework_FINAL.pdf

⁴¹ Home Office, 'Drugs: International Comparators,' October, 2014, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/368489/DrugsInternationalComparators.pdf pg. 51

There is in reality, very little the Government can do to control or prevent displacement between different drugs, regardless of legality, whilst demand for the effects of such drugs remains. Accepting this simple fact – that demand for drugs will be met one way or another – inevitably points at the need for a sensible discussion on options for legally regulating markets for certain lower risk drugs, as part of a rational harm minimisation strategy. This is a debate the HASC has not shied away from in the past and should now re-engage with.

Most obviously the Government could undermine the whole synthetic cannabinoid market by regulating cannabis – a policy model that is no longer purely theoretical having now been adopted in multiple jurisdictions around the world including in Europe, Latin America, and the USA. The Netherlands has permitted the *de facto* legal supply and use of cannabis through the ‘coffee shops’ since the 1970s and has little recorded use of synthetic cannabinoids.⁴² This reflects rational consumer choice; why would people access something synthetic, unpredictable, less enjoyable, more potent risky and toxic, when they can legally access something that produces more desirable effects, and is safer and better understood? Likewise, emerging evidence in the USA from University of Michigan’s Monitoring the Future study has shown decline in the use of the synthetic cannabinoid Spice in college students falling from 7.4% in 2011 to 0.9% in 2014.⁴³ Conversely, synthetic cannabis use is on the rise in the UK especially amongst young people and certain vulnerable groups including prisoners. This group of substances is thought to be much more dangerous than the home grown variety, with some manufacturers claiming that the potency is 20 – 30 times higher than cannabis⁴⁴.

It is our current drug policy that has fuelled the emergence of the NPS phenomenon. We know that continuously banning drugs rarely diminishes overall use, never makes the problem go away, and can actually increase health and social harms. Yet, that is what successive Governments have done and continue to do despite the evidence and expert advice.

Do enforcement agencies have the necessary powers and resources to effectively enforce the proposed new laws?

As laid out above, Ireland’s experience with its own blanket ban, and the admission by its police force that the nature of the legislation is problematic at best, highlights that the proposed Bill will be virtually unenforceable. Irish Detective Sergeant Tony Howard’s statement, ‘We are relying on scientists to assist us with these prosecutions and, unfortunately, they haven’t been able to provide the evidence to us,’⁴⁵ must serve as a forewarning to the UK Government. If Ireland’s authorities have so far been unable to prove psychoactivity after five years of the law being put into place, there is no reason to suggest that the Government’s Bill would not encounter the same problems if passed into law.

⁴² http://www.huffingtonpost.co.uk/2015/05/21/synthetic-cannabis-more-potent-increasing_n_5404453.html

⁴³ <http://www.monitoringthefuture.org/pressreleases/15collegepr.pdf>

⁴⁴ Release, ‘Synthetic Cannabinoids (Spice, K2)’ <http://www.release.org.uk/drugs/synthetic-cannabinoids-salvia-spice-k2/harm-reduction>

⁴⁵ Easton M, ‘Call to halt legal highs ban based on ‘flawed’ Irish’, BBC News, 22 June 2015 <http://www.bbc.co.uk/news/uk-33226526>

Relying on scientists in the UK will be increasingly problematic given the lack of forensic services available. Since the closure of the Forensic Science Service in 2010, there has been reduced capacity for analysis of controlled substances, with many police forces bringing the testing in-house and bearing the cost of this from their own dwindling budgets.

Aside from the enormous legal and practical problems we have outlined with enforcing the proposed laws, consideration must be given to the capacity of police forces throughout the country. During an age of planned austerity measures, it is projected that police forces in England and Wales could see their numbers cut by anywhere between 22,000 and above 30,000 over the coming five years; a reduction of at least 25% of the force thanks to budget cuts⁴⁶. This will no doubt cause some police forces to reassess which crimes are deemed to be priorities out of necessity. In such a scenario, the proposed NPS laws, given the aforementioned problems with legal and practical enforceability, are unlikely to be placed at the top of the policing list.

Indeed, this scenario is already playing out with regards to certain existing controlled substances. Durham Police Crime Commissioner ('PCC') Ron Hogg announced this year that the Durham force had 'deprioritised' prosecuting those who use cannabis or grow plants for personal use, telling the Guardian 'There's a resource issue, we must also be clear about that, but we are doing it because it's the right approach'⁴⁷. Two further PCCs from Derbyshire and Dorset openly backed this approach, with the Derbyshire PCC stating 'Our top priority must be those people at risk [of abuse or violence]. When we are moving resources into that it does mean that we can't keep policing every single issue as we have done in the past'⁴⁸.

Inevitable personnel cuts will ensure that enforcement agencies are without the required resources to enforce the proposed laws and indeed should not make these a priority at the expense of policing more serious crimes such as assault, rape, domestic violence and theft. Even if police forces were not facing cutbacks to the predicted extent, the proposed laws are still unenforceable in practice.

Conclusions and Recommendations

Transform and Release have argued strongly that the Bill is unworkable, unwieldy, and that it will increase health and social harms rather than delivering its intended goals. These failings reflect a highly problematic policy development process that entirely bypassed both pre-drafting public consultation (despite Cabinet Office guidelines) and even consultation with the Government's own expert advisory body, the ACMD, despite advice on such matters clearly being the latter's specific remit and area of expertise.

⁴⁶ Dodd, V, 'Police force could lose 22,000 jobs under new spending cuts,' The Guardian, 31 August 2015 <http://www.theguardian.com/uk-news/2015/aug/31/police-force-new-spending-cuts-22000-jobs>

⁴⁷ Gayle, D, 'Durham police stop targeting pot smokers and small-scale growers,' The Guardian, 22 July 2015 <http://www.theguardian.com/society/2015/jul/22/durham-police-stop-targeting-pot-smokers-and-small-scale-growers>

⁴⁸ Gayle, D, 'Police won't target pot smokers and small-scale growers, say commissioners,' The Guardian, 22 July 2015 <http://www.theguardian.com/society/2015/jul/22/police-wont-target-pot-smokers-small-scale-growers-commissioners>

Given this, we hope that the HASC will support our recommendation for the Bill to be abandoned in its current form, and that a full review, consultation and evidence-based policy development process be implemented that informs a comprehensive new policy and legislative response to NPS in the UK. It is essential that any policy review include a meaningful impact assessment of Ireland's policy response, something that the Home Office's Expert Panel were not specifically able to deliver in the absence of relevant data.

Furthermore, it is clear that development of such potentially significant new drug legislation around NPS needs to be part of a more comprehensive independent review of the malfunctioning and outdated Misuse of Drugs Act. Such a review has indeed been supported in previous reports by the HASC, as well as by the ACMD, and has had broad support from organisations across the country working on drugs and related issues.

We do, however, recognise that the Government appears determined to push through the blanket ban, despite its near universal lack of support and objections from key centres of expertise. Should this be the case, we hope that a number of key amendments can be made to the Bill to at least curtail or minimise the inevitable negative costs of some of the more egregious elements of the legislation. These have been detailed in the proposed amendments that have been produced by Release⁴⁹. In addition we propose that:

- Given the previous discussion of the importance of poppers for the sexual health of MSM, poppers should be exempted from this Bill and educational efforts should focus on preventing problematic use and encouraging safe consumption practices.
- Nitrous Oxide ('laughing gas') has been found by the ACMD to have 'few, if any, short term adverse effects'. The ACMD confirmed that 'deaths linked to nitrous oxide are rare (1 in UK in 2011, 5 in 2010)', that 'there is no firm evidence of physical dependence,' and have specifically recommended against a ban⁵⁰. As such, Nitrous Oxide should also be exempt from the Bill; it is a low risk drug, and efforts should be focused on education as to safer consumption practices and the potential dangers of more intensive long-term use.
- Broadening out from the focused nature of the two previous recommendations, there must be a greater shift in the Government's drugs strategy away from an enforcement-led approach to one that is centred on public health and education. The woeful lack of investment in NPS education strategies by Government must be remedied immediately, to spend less than £200,000 over the last 3 years is shocking. We would recommend that before implementing any criminal justice approach the Government explore the impact of a comprehensive fully funded education strategy that encompasses both prevention and harm reduction.

⁴⁹ Release, 'Psychoactive Substances Bill – proposed amendments'
http://www.release.org.uk/sites/default/files/pdf/publications/Psychoactive%20Substances%20Bill%20amendments%20FINAL_0.pdf

⁵⁰ Advisory Council on the Misuse of Drugs, 'ACMD letter to the Home Secretary on nitrous oxide abuse,' March 2015 <https://www.gov.uk/government/publications/acmd-advice-on-nitrous-oxide-abuse>

The evidence for effective prevention interventions is growing stronger with most commentators recognising that media campaigns and school programmes which focus on deterrence having little impact. However, interventions that look to build protective factors, for example, peer-based interventions or those that address the underlying reasons for use have shown to have some success.⁵¹ Harm reduction programmes that aim to reduce the harm associated with consumption of various substances have proven to have a significant impact in minimising the risks. The UK has historically been a leader in harm reduction interventions, during the 1990s local Drug Action Teams funded by the Department of Health, launched a number of initiatives aimed at recreational users of drugs, such as MDMA and cocaine, which whilst discouraging use was realistic that some people will use drugs and so provided information on how to use safely. Unfortunately, such programmes no longer seem to be a priority for Government with the FRANK website providing oblique ‘just say no’ type information. For example, no information is given about dosage in the section on MDMA despite such information potentially saving lives. If the Government is serious about protecting young people’s health and keeping them safe then it is unfortunate that their dedicated drugs site does not give the type of information that will achieve this. As such we would like to see serious and significant investment in evidence based education programmes to address NPS use.

- Any new legislation on NPS should be subject to rigorous independent evaluation with key impact indicators agreed in advance. Should the legislation – as predicted – fail to deliver on its intended goals, and/or be associated with serious negative outcomes, it should then be terminated, and alternative policy models developed based on appropriate evidence, review and expert consultation, as should have happened in the first instance.

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⁵¹ International Drug Policy Consortium, 2012, ‘Drug Policy Guide’, IDPC London, <http://idpc.net/publications/2012/03/idpc-drug-policy-guide-2nd-edition>