

Briefing Paper for upcoming parliamentary debate on 'Government policy on new psychoactive substances'

WESTMINSTER HALL - 16:30 – 17:30, WEDNESDAY 23RD MAY 2018

[Release](#) is the UK's centre of expertise on drugs and drugs law. We have been providing free and confidential specialist advice to the public, and campaigning for the reform of drug policy, since 1967. Release has also done extensive policy work on the Psychoactive Substances Bill prior to its implementation.¹

The Precautionary Principle:

- By banning everything that has the potential to have a psychoactive effect (except for specifically exempt substances), the Psychoactive Substances Act 2016 'assumes the worst' about harm to its extreme without assessing actual harm. This 'precautionary principle'² introduced under the Act is ambiguous and absolutist in meaning and is based on the common sense adage that it's better to be safe than sorry. We are seriously concerned about the lack of legal certainty.

Difficulties proving psychoactivity in legal proceedings:

- The bulk of cases making it to court appear to be in relation to the supply of nitrous oxide – a substance which the ACMD recommended should not be controlled.³
- The unworkable nature of the Act has been uncovered in a number of these cases which collapsed due to the gas being deemed a medical product, which is a specified exemption within the legislation. This ultimately led to a challenge in the Court of Appeal⁴ by defendants who had already been convicted of the offence. Whilst the court ruled against the arguments put forward in relation to the medical exemption, the issue of psychoactivity of nitrous oxide was not heard as part of the proceedings. This aspect continues to be challenged in the lower criminal courts, with Professors arguing on both sides, utilising time and resources in a court system that is stretched by cuts.
- Proving psychoactivity to the accepted criminal standard is fraught with difficulty, and it has not necessarily occurred where there have been convictions resulting from guilty pleas. In these instances defendants may have chosen to plead guilty knowing they would get a non-custodial sentence rather than take the case to trial on an untested point around psychoactivity and risk a prison sentence.

Wrongful application of the law:

- The confusion created by the Act is apparent in enforcement mistakes made by police on the street, and the fact that of those arrested since the Act came into force only one third were actually cautioned or charged. Release has received anecdotal reports of police officers

stopping and searching people for suspected possession of a substance controlled under the PSA. In addition, Freedom of Information requests to 41 police forces⁵ revealed that of the 805 arrests made under the Act between May 2016 and September 2017 only 274 cases proceeded to a caution or charge. The rate was lower for the Met Police, with 68 charges resulting from 313 arrests. It is not known how many cases actually led to a conviction.

Institutional confusion around the law:

- Similar confusion around criminal offences under the Act is apparent in external institutions, such as Universities. Research by Release and the National Union of Students revealed that some Universities are incorrectly advising students that possessing a drug controlled under the Psychoactive Substance Act 2016 constitutes a criminal offence. Given that at least 16 per cent (24) of Universities in the UK discipline students for possessing a drug controlled under the Psychoactive Substances Act 2016, it is likely that students are being punished due to institutional confusion around the Act.⁶

Evaluation:

- It is worrying that the government has knowingly pursued a drug control policy that cannot be assessed for its effectiveness and that has harmful consequences.
- In an evaluation of its drug strategy, published last year, the government admitted that “It is not possible to assess the overall impact of enforcement ... Illicit drug markets are resilient and can quickly adapt to even significant drug and asset seizures ... drug seizures, ha[ve] little impact on availability” and found that “there are potential unintended consequences of enforcement activity such as violence related to drug markets and the negative impact of involvement with the criminal justice system”⁷.
- The government has also acknowledged similar limitations are predicted for the PSA evaluating due in November 2018.⁸
- Nevertheless, the inevitable displacement towards the illicit market (including online sales⁹) and the ongoing use of SCRAAs (e.g. so-called ‘Spice’) in vulnerable communities (e.g. homeless, prisoners, young people in deprived areas) in the context of substantial funding cuts to drug treatment¹⁰ suggests that the current policy approach is not effective and can only serve to maximise health and social harms.

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¹ <https://www.release.org.uk/publications/policy-responses>

² Commission of the European Communities (2000) 'Communication from the Commission on the Precautionary Principle', *Brussels, 2.2.2000 COM(2000) 1*, Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52000DC0001&from=EN>

³ Letter from Professor Les Iversen, Chair of the ACMD to the Home Secretary, Theresa May and Jeremy Hunt on the issue of nitrous oxide abuse, 4 March 2015, Available at:

<https://www.gov.uk/government/publications/acmd-advice-on-nitrous-oxide-abuse>

⁴ R v. Chapman & Others [2017] EWCA Crim 1743, Available at:

<http://www.bailii.org/ew/cases/EWCA/Crim/2017/1743.html>

⁵ Mercer D. (2017) '800 people arrested after ban on legal highs', *Sky News*, Available at:

<https://news.sky.com/story/800-people-arrested-after-ban-on-legal-highs-11186079>

⁶ Release and the National Union of Students (2018) *Taking the Hit: Student drug use and how institutions respond*, Available at: <https://www.release.org.uk/publications/taking-hit-student-drug-use-and-how-institutions-respond>

⁷ Her Majesty's Government (2017) Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628100/Drug_Strategy_Evaluation.PDF

⁸ Home Office (2017) *The Psychoactive Substances Review Framework*, Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/627692/Psychoactive_Substances_Act_Review_Framework.pdf; ACMD (2015) *ACMD comments on the draft review framework document for the Psychoactive Substances Bill*, Available at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/628095/ACMD_Impact_WG_-_Evaluation_framework_comments_23_October.pdf

⁹ Winstock A.R. et al. (2018) *Global Drug Survey (GDS) 2018 Key Findings Report*, Available at:

<https://www.globaldrugsurvey.com/gds-2018/>

¹⁰ ACMD Recovery Committee (2017). Commissioning impact on drug treatment: The extent to which commissioning structures, the financial environment and wider changes to health and social welfare impact on drug misuse treatment and recovery. Advisory Council on the Misuse of Drugs.

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/642811/Final_Commissioning_report_5.15_6th_Sept.pdf; Adfam & Recovery Partnership (2017) State of the Sector: Beyond the Tipping Point, http://www.recovery-partnership.org/uploads/5/1/8/2/51822429/state_of_the_sector_2017_-_beyond_the_tipping_point.pdf