

Written evidence submitted by Amber Marks

Is the proposed law effectively shaped to meet its policy objective?

1. Parliament should question whether the criminal law is the most suitable vehicle for tackling the problems posed by NPS. The social problem is the widespread consumption of substances by humans when their safety for human consumption has not been evaluated and in relation to which there is some evidence of harm. As criminal law has to be specific when defining an offence, this means that any criminal drug law should clearly list all substances under its control.¹ The length of time entailed in criminalizing specific substances makes it ineffective in meeting the policy objectives for NPS and actually compounds the problem by fuelling the production of a larger and larger variety of new psychoactive substances. The proposed legislation seeks to get round this problem by creating a vague and unclearly defined series of criminal offences that create an absurdly wide scope of liability. This is an inappropriate use of the criminal law. When criminal law is used, it should be precise in its targeting of conduct and such targeting should be proportionate to the public health goal in question. Respect for the principle of legal certainty requires the conduct entailing the individual's criminality to be clearly set out in law.

2. The government is to be applauded for acknowledging the danger of what has become a 'cat and mouse' game between legislators banning specified substances and producers creating novel psychoactive substances to evade such bans and satisfy the demand for psychoactive

¹ European Monitoring Centre for Drugs and Drug Addiction 'Perspectives on Drugs: Legal Approaches to Controlling New Psychoactive Substances' (28/5/15) (available at <http://www.emcdda.europa.eu/topics/pods/controlling-new-psychoactive-substances>).

substances. It is however wrong in principle for the government to adopt a ‘sledgehammer to crack anything that looks like it could be a nut’ approach as its legislative solution.

3. The foundation of the entire edifice of the proposed legal framework is the concept of psychoactivity. Psychoactivity is the cornerstone of both the *actus reus* and the *mens rea* of the proposed criminal offences. I will subsequently address the immense practical difficulties and problems of principle this entails. The first issue I submit for the Committee's consideration is the extent to which the motivation for consumption of NPS (their psychoactive effect) has muddied the waters between the legislative vehicle and the policy objective. The government’s key articulated objective is to *reduce the harm* caused by new psychoactive substances ² and yet the concept of harm does not feature anywhere in the proposed legislation despite the fact that not all psychoactive substances are harmful.

4. The first practical difficulty entailed by the legislative definition of psychoactive substances (which is entirely sound scientifically) is its over-extensive scope. This is immediately evident from the nature of the exemptions that have been specified in Schedule 1 to the bill and which include food and drink. As the law is currently drafted, the production of lavender, to cite just one of several possible substances assumed not to fall within the government’s intended targets but which has not been included on the list of exemptions and which scientific research suggests

² “To put it quite simply success would mean reducing the harms caused by new psychoactive substances through tackling their supply and sending the clearest possible message that these are not safe.” Lord Rosser Letter to ACMD, 15 June 2015.

has a psychoactive effect³, would amount to a criminal offence wherever the producer knows or suspects the substance is capable of having a psychoactive effect and which the producer knows or is reckless as to whether it will be consumed for this effect. The *mens rea* of the offence of production requires the producer to have subjective knowledge or suspicion of the substance's potential for psychoactivity. In relation to the offence of supply it will suffice for the prosecution to prove that the supplier of the substance 'ought to have known' that such substances are capable of having a psychoactive effect. Will the supplier of lavender oil be guilty of an offence under section 5 whenever they supply a customer who has informed them that they wish to purchase the lavender for its calming effects, even though they were unaware that soothing is a psychoactive effect? Is Parliament content for this conduct to amount to a criminal offence in law and place their trust in the police and prosecution services to take no action in such circumstances? To what extent is it appropriate for suppliers to question and evaluate an adult consumer's motive for purchasing an otherwise legal substance? Does 'reckless' here mean subjective or objective recklessness? If the latter, what sort of behavior or characteristics in a consumer would a supplier be expected to be suspicious of?

5. The breadth of the offence of production in section 4 is such that it would criminalise the person who produces a substance for their *own consumption* and that they *suspect* is *capable of affecting their emotional*

³ See for example Sayorwan et al., 'The Effects of Lavender Oil Inhalation on Emotional States, Autonomic Nervous System, and Brain Electrical Activity', *J Med Assoc Thai* 2012; 95 (4): 598-606 (available at http://www.researchgate.net/profile/Tapanee_Hongratanaworakit/publication/225051306_The_effects_of_lavender_oil_inhalation_on_emotional_states_autonomic_nervous_system_and_brain_electrical_activity/links/0fcfd51257861db82700000.pdf).

state. The proposal for such a wide scope of liability begs an important question of principle: to what extent are we willing to criminalise the exercise of an individual's autonomy over their central nervous system? Should the production of a substance with the potential for psychoactivity be a sufficient basis for criminal liability? What is *the culpable wrong* that the defendant performs which warrants the criminal sanction? Arguably the same challenge could be posed to offences in the Misuse of Drugs Act 1971 but at least these refer to specific substances suspected of being harmful or proven to be harmful rather than any substance capable of having a psychoactive effect that has not been specifically exempted from criminal liability by the government.

6. The enormous breadth of the definition of psychoactivity, that shoulders the burden of proving criminality in the offences contained in this bill, does not lessen the difficulties of enforcement of this offence in relation to its principal targets (producers and suppliers of novel psychoactive substances that have not been scientifically tested on humans). The burden will rest on the prosecution to prove beyond reasonable doubt that the substances are psychoactive. This will be a “difficult and unworkable task, as little or no evidence is available regarding their pharmacological activities *in vivo* in humans and expert witnesses may be reluctant to extrapolate data from animal models, *in silico* or *in vitro* studies.”⁴ The author of this submission does not have access to the expert reports relied upon in the prosecutions pursuant to Ireland's Criminal Justice (Psychoactive Substances) Act 2010 but the Inquiry might seek access to these and consider whether such evidence

⁴ P.V. Kavanagh and J.D. Power, 'New psychoactive substances legislation in Ireland – Perspectives from academia', *Drug Test. Analysis* 2014, 6, 884–891.

would be capable of supporting a conviction in the absence of a guilty plea.

7. Because the question of whether the substance is psychoactive will be for the tribunal of fact to decide in each case, the offences may fall foul of Article 7 of the European Convention on Human Rights which proscribes retrospective criminalization. The proposed offence as presently drafted opens the way to retrospective standard setting which derogates from the rule of law because the defendant will not have had the opportunity to adjust their conduct to the standard.

It is not suggested that the concept of harm would be an easy one to establish objective criteria for but I submit it would provide a far more appropriate linchpin for the proposed offences than the concept of psychoactivity and for the following reasons:

- (i) it is generally accepted that intrusions by criminal law into the liberty of a subject must be justified by the harm caused by the conduct criminalized
- (ii) the key objective of the government is to reduce the harm associated with new psychoactive substances and so to make the potential for harm the nub of the offence rather than its psychoactivity would provide a more targeted and proportionate approach;
- (iii) it is clear that the enactment of this legislation will require the dedication of financial resources into the forensic research that will be required to support prosecutions. Fuelling research into the effect on health of novel psychoactive substances would be of far greater benefit to society than the politicization of the scientific concept of psychoactivity that dedicated forensic

research on the psychoactive capabilities of novel substances is likely to entail.

8. At the very least Parliament should consider amending the bill to afford a defence where the defendant can prove that consumption of the substance in question is unlikely to pose a risk of significant harm.

An alternative policy direction?

9. It is clear that the demand for psychoactive substances has reached such a high level that the enforcement of drug laws is causing significant public disturbance and the risk of harm to public health. In 1971 the Misuse of Drugs Act was not considered to constitute a substantial interference with the liberty of the individual because the number of people using drugs at the time was very small. Little was known about the substances being proscribed: the Government acted out of caution. Possession offences were created but the principal strategy was one of supply reduction; the only explanation for the use of drugs among the general population was the existence of a large supply of drugs on the market. It was hoped that if this supply could be eradicated, drug use would desist. The Home Office was careful to note at the time that:

“Laws which seek to control the personal consumption of individuals are notoriously hard to enforce. We have to recognise that there comes a point at which public pressures become so powerful that it is idle to keep up attempts to resist them, the classic example in this context being the American Prohibition on the consumption of alcohol. Prohibition of the consumption of a substance which has become the normal accompaniment of social intercourse must involve significantly more

public disturbance than the continuance of a ban on the use of drug, which in this country, is not and never has been in general use. “⁵

10. The Misuse of Drugs Act 1971 today constitutes a substantial interference with individual liberty because drug use is regarded as a normal part of leisure by today’s younger generation.⁶ The NPS market is a result of the prohibition of controlled drugs. It is time for the government to acknowledge the harmful consequences of the policy of drug prohibition and develop policies that protect the drug consumer by providing them with the information required to make an informed choices about the substances they choose to put in their bodies.

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⁵ Advisory Committee on Drug Dependence, Home Office, 1968 at page 9.

⁶ H. Parker, J. Aldridge, F. Measham, *Illegal Leisure: The Normalisation of Adolescent Recreational Drug Use*, Routledge, 1998 at 154.