To the House of Commons Home Affairs Committee

Written Evidence submitted by Rudi Fortson QC

THE PSYCHOACTIVE SUBSTANCES BILL

SUBMISSIONS

1. I am grateful for the opportunity to make representations to the Committee in respect of this important Bill (the "PSB").

2. Given the extent to which my views and concerns have been expressed elsewhere (see the debates in the House of Lords),[1] I propose to limit my representations to three key topics, namely,

    a. The lack of a clear definition of "psychoactive", which might result in a very broad interpretation and application of the statutory regime;

    b. The difficulty in proving psychoactivity; and

    c. Absence of the concept of harm from the terms of the Bill.

General remarks

3. The PSB, if enacted, will provide a further statutory regime with regards to the production, distribution and use of drug substances and drug products.

4. While it is true that the Bill does not criminalise the simple possession or use of a "psychoactive substance", it does criminalise persons who produce a psychoactive substance for their own use (see clause 4(1)(c)(i)), or who import or who export such a substance for their own use (see clause 8(1)(d)(i),and clause 8(2)(d)(i)).

5. Although the PSB may be said to supplement the provisions of the Misuse of Drugs Act 1971 ("controlled drugs") and the Human Medicines Regulations 2012 ("medicinal products"), there are significant differences in the structure and operation of the PSB and the MDA 1971.

    a. The MDA is directed to specific drugs that are named and identified in schedule 2 to that Act as "controlled drugs" (albeit that generic definitions of a particular family of drugs are increasingly being used). By contrast, the PSB seeks to impose prohibitions on specified activities in respect of *any* psychoactive substance that is not exempted[2] – i.e. blanket prohibitions.

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1 Hansard: 30th June 2015, col 1961; Hansard 14th July 2015, col. Column 453, 464, 538, 539,

2 See clause 3, and schedule 1 of the Psychoactive Substances Bill.

b. The PSB creates a fiction (undesirably[3]) by which an exempted substance (listed in schedule 1) is deemed *not* to be a "psychoactive substance". It is a fiction because an exempted substance would otherwise meet the PSB definition of a "psychoactive substance" (as stated in clause 2).

c. The PSB makes no attempt to prohibit or to control drug substances or products by reference to a threshold of harm (or relative harm) whereas the MDA 1971 does seek to say something about the relative harm of specific substances by way of Classes A, B and C to schedule 2 to that Act.

d. Whereas the MDA 1971 provides more than just a hint that the object of the Act is to control only those drugs "*which are being or appear to [the ACMD] likely to be misused and of which the misuse is having or appears to them capable of having harmful effects <u>sufficient to constitute a social problem</u>…*",[4] the PSB criminalises (or otherwise controls by way of quasi-civil measures) certain actions regardless of whether the substance in question has any harmful effect or not, and regardless of whether the misuse is sufficient to constitute a "social problem".

e. The *exclusion* of substances in schedule 1 such as "alcohol", "nicotine and tobacco products", and "caffeine", is capable of conveying the message that – notwithstanding the known harms that the misuse of each substance can cause (including death) - the PSB does not apply to those substances that are enjoyed by the greatest number of persons in society.

f. The PSB provides statutory maximum penalties, but a scale of penalties is not set against the harm or relative harm of a given drug substance. By contrast, one object of the three Classes of controlled drugs under the MDA 1971 is to do precisely that.

g. The MDA 1971 and the PSB deal with psychoactive substances, and each measure creates criminal offences, not least with regards to the production, supply, possession with intent to supply, importation and exportation of a given substance. However, the ingredients of the offences (and their mental elements) are markedly different under each statutory measure.

6. The PSB has been based on (but it is by no means identical to) the Criminal Justice (Psychoactive Substances) Act 2010 (Eire).

7. The Minister for Policing, Crime and Criminal Justice and Victims (Rt Hon Mike Penning MP) has asserted that the Irish legislation is "working very well" [oral evidence, 15th September 2015, HAC, Q.126]. In fact there has been a

[3] As a matter of drafting, the PSB could exclude (e.g.) alcohol from the statutory regime without creating the fiction that alcohol is not a "psychoactive substance" for the purposes of the PSB.

[4] Section 1(2) of the Misuse of Drugs Act 1971.

lamentable paucity of reliable information concerning the operation of that Act and its effectiveness or otherwise.

Definition: "psychoactive effect"

8. Crucial to the operation of the PSB is proof that the substance in question has "psychoactive effect". For the purposes of the principal criminal offences under the PSB (clauses 4-8), the burden will be on the prosecution to prove this element (as an issue of fact) to the criminal standard of proof.[5]

9. Quite apart from the potential reach of clause 2(2) – that includes a substance *affecting* a person's "mental functioning *or emotional state*" – there is the question of **how** this is to be proved in the absence of human clinical trials.

10. It is conceivable that this element could be proved by an admission made by an accused person who used the substance in question. But, it is unlikely that a user would testify against third parties (there is no guarantee that he /she would do so) and, in any event, the testimony would only be probative if it was referable to the precise drug substance in question (substances can be misdescribed).

11. An analytical test of psychoactivity must be reliable and capable of independent verification (notably by the defence or by a third party).

12. Professor Les Iversen has stated that 'brain-targeting' could be considered:[6]

> What we are suggesting is that there would be a limited number of targets in the brain that psychoactive drugs act upon and activate. It would be quite easy for the Government to set up a contract laboratory to test any new substance against any one of these five—or not more than five or six key—targets in the brain and if drug X were to activate any one of these, it would be considered to be an active psychoactive drug for the purposes of the Bill we would say. Maybe this could be argued. [Emphasis added]

13. This is an interesting proposal but it raises a number of questions:

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[5] Note that clause 25 makes it an offence to fail to comply with either a "prohibition order" or a "premises order" (these are quasi civil orders made by apply the civil standard of proof). On Report, Lord Bates said -"....*I can certainly give him the assurance that before any criminal sanction could be made under Clause 25, there would need to be proof to the criminal standard of "beyond reasonable doubt" that the substance involved was indeed psychoactive*." However, it is submitted that this is an error. The offence is merely a failure to comply with an order (subject to the 'defences' in cl.25(3) - reasonable steps - reasonable excuse). Clause 25 does not include a requirement that it must be proved that the substance in question is psychoactive - let alone that this should be proved to the criminal standard of proof.

[6] House of Commons, Home Affairs Committee; Oral evidence, 15th September 2015, HAC, Q.126.

a. How speedily can *reliable* test results be obtained in this way (between the moment that the substance is submitted for analysis and obtaining the final results)?

b. How potent must the substance be in order for a 'target' to be activated, and for the test-result to be declared "positive"? Expressed somewhat differently, how much of a drug may be applied during a test until a psychoactive effect is obtained (if any)? And what degree of intensity of effect would be regarded as being sufficient to constitute a "psychoactive effect"? The point has added relevance given that the PSB is intended to include *emotional* states such as depression, happiness, etc. Thus:

   (i) Would it be sufficient that any psychoactive effect is detected (albeit using sophisticated laboratory equipment), or must the effect be significant (e.g. that there is significant / manifest / externally visible impairment or change in respect of a given bodily or mental function)?

   (ii) Would the test be satisfied notwithstanding that the intended dosage (e.g. a specified quantity of powder, or a tablet) would produce no discernible effect but a significantly larger quantity would do so (albeit not in the dosage form marketed/supplied)?

   (iii) Is it possible to establish thresholds of potency / intensity of "psychoactive effect" for the purposes of satisfying the statutory definition of "a psychoactive effect" as it appears in clause 2(2) of the PCB?

   (iv) Would there be consensus within the expert scientific community in respect of (iii) above: and if not, who would set the relevant thresholds?

c. Bearing in mind that criminal offences are created under the PCB (most of which attract confiscation under POCA 2002 in the event of conviction), what opportunities will be given to the defence to independently verify the analysis undertaken by the "contract laboratory"? How would this be organised (more than one 'contract laboratory')?

14. The existing proposed definition of "psychoactive effect" is exceedingly broad [clause 2(2)]. The definition not only encompasses drug substances that are in fact harmful, but also those substances which may be beneficial to a person's well-being.

15. To what extent can the government be confident that substances which are of low risk, no risk, or beneficial, will not be criminalised? Or are such

considerations to be treated as being irrelevant? Does the government seek to rely on prosecutorial discretion as a 'filter' in respect of unmeritorious cases? Would this be the subject of guidelines, and if so, who would issue them and by what process?

16. The PSB definition of a "psychoactive substance" (clause 2) is significantly wider than the definition as it appears in the Criminal Justice (Psychoactive Substances) Act 2010 (Eire):

> "psychoactive substance" means a substance, product, preparation, plant, fungus or natural organism which has, when consumed by a person, the capacity to—
> (a) produce stimulation or depression of the central nervous system of the person, resulting in hallucinations or a significant disturbance in, or significant change to, motor function, thinking, behaviour, perception, awareness or mood, or
> (b) cause a state of dependence, including physical or psychological addiction;

17. The above definition is not without criticism for its breadth, but it does at least refer to an effect that is "significant" or which results in "hallucinations". The PSB has no such words of limitation.

Definition: "psychoactive substance"

18. As drafted (as at 21st July 2015), the PSB applies to any 'psychoactive substance' other than those that are specified in schedule 1. This leaves ample scope for the unintended inclusion of substances that do not appear in that schedule.

19. The proposal of the ACMD to limit the substances to those "*produced by **synthesis**, or metabolites thereof*"[7] has much to commend it as a step in the right direction.

Harm

20. The PSB – unlike the MDA 1971 – contains 'civil' measures as well as creating criminal offences.

21. Although there may be a case for certain civil measure to be invoked as interim measures (where a risk of harm from the substance is unknown), criminal offences attract different considerations not least by reason of the penalties which may be imposed (with or without the making of a confiscation order under POCA 2002).

[7] ACMD Advice on Definitions of Scope for the "Psychoactive Substances Bill"; Letter, 17th August 2015.

22. While the government states that it is conscious "not to be disproportionate with the sentencing",[8] it seems slow to acknowledge that a sentencing court would doubtless wish to determine a just penalty, commensurate with the offence, having regard to the harm associated with the drug in question.

23. In the absence of drug classification, or an expert's opinion (if accepted) as to harm, the courts will have little option but to assume that all psychoactive substances are equally harmful. It may be said that this is no different from the fact that the courts do not differentiate between drugs within a given Class (see *R v Parekh*,[9] and *R v Aranguren*[10]) and that the maximum penalty on indictment under the PSB is seven years' imprisonment (not 14 years' imprisonment as is the case for trafficking in a Class B or C controlled drug under the MDA).

24. However:

    a. As previously stated, the MDA *does* attempt to say something about relative harm of drugs;

    b. The ACMD will only recommend the inclusion of a drug in schedule 2 of the MDA if the drug misuse "is having or appears to them capable of having harmful effects sufficient to constitute a social problem" (noting s.1(2) of the MDA 1971);

    c. The Secretary of State may only make a Temporary Class Drug Order if it appears to [him/her] that (a) the substance or product is a drug that is being, or is likely to be, misused, and (b) "<u>that misuse is having, or is capable of having, harmful effects</u>" [section 2A(4), MDA 1971].

25. Thus, it will be seen that under the MDA, harm is drug-specific.

26. It might be useful to know whether testing in respect of the five or six 'brain targets' (Professor Iversen, [Q35])[11] could also provide an indicator of harm associated with the activity resulting from the psychoactive substance in question.

Two drafting errors

27. There are two major drafting errors which the government did not correct during the passage of the Bill through the House of Lords.[12]

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8 House of Commons, Home Affairs Committee; Oral evidence, 15th September 2015, HAC, Q.127.

9 [2006] EWCA Crim. 1268

10 [1995] 16 Cr. App. R.(S) 211

11 House of Commons, Home Affairs Committee; Oral evidence, 15th September 2015, HAC, Q.35.

12 These errors have been pointed out elsewhere by the writer, but remain unaddressed.

28. The errors concern two "offences" specified in clauses 18(5)(d), (e),[13] and 53(11)(c), (d)[14] - namely '*inciting'* (presumably a reference to the common law offence of incitement), and '*aiding, abetting, counselling or procuring*'. Neither offence exists; the former was repealed by section 59 of the Serious Crime Act 2007, and the latter is purely *procedural* by virtue of the Accessories and Abettors Act 1861.[15]

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[13] Clause 18(5) states: "In this section "relevant offence" means …. (d) an offence of inciting a person to commit an offence under any of sections 4 to 8; (e) an offence of aiding, abetting, counselling or procuring the commission of an offence under any of sections 4 to 8".

[14] Clause 53(11) states, "In this section "ancillary offence" means…(c) an offence of inciting a person to commit an offence under any of sections 4 to 8 and 25; (d) an offence of aiding, abetting, counselling or procuring the commission of an offence under any of sections 4 to 8 and 25".

[15] A secondary party (accessory) will commit a substantive offence if he or she "aids, abets, counsels or procures" its commission.