

PSYCHOACTIVE SUBSTANCES BILL

DELEGATED POWERS MEMORANDUM

MEMORANDUM BY THE HOME OFFICE

Introduction

This Memorandum identifies the provisions of the Psychoactive Substances Bill which confers powers to make delegated legislation, and explains in each case why the power has been taken and the nature of, and reason for, the procedure selected.

2. The Bill gives effect to the Conservative Party's manifesto commitment to "create a blanket ban on all new psychoactive substances [NPS], protecting young people from exposure to so-called legal highs".

3. The Bill:

- Makes it an offence to produce, supply, offer to supply, possess with intent to supply, import or export psychoactive substances; that is, any substance intended for human consumption that is capable of producing a psychoactive effect. The maximum sentence, on conviction on indictment, is seven years' imprisonment. (Legitimate substances, such as food, alcohol, tobacco, caffeine and medical products, will be excluded from the scope of the offence, as will controlled drugs which would continue to be governed by the Misuse of Drugs Act 1971.)
- Includes provision for civil sanctions – prohibition notices, premises notices, prohibition orders and premises orders (breach of the orders will be a criminal offence) – to enable the police and local authorities to take swift action to stop the supply of NPS. The civil powers will also enable law enforcement agencies to adopt a graded response to the supply of NPS in appropriate cases.
- Provides powers to stop and search persons, vehicles and vessels, to enter and search premises (under warrant) and to forfeit seized psychoactive substances and other items.

Clause 3(2): Power to add or vary any description of exempted substance

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

4. The purpose of the Bill is to introduce a blanket ban on new psychoactive substances. Clauses 4 to 8 of the Bill achieves this by making it an offence to produce, supply, offer to supply, possess with intent to supply, import or export a psychoactive substance for human consumption. The term psychoactive substance is defined in clause 2(1)(a) to mean a substance which is capable of producing a psychoactive effect in a person who consumes it.

By virtue of clause 2(2), a substance produces a psychoactive effect in a person if, by stimulating or depressing the person's central nervous system, it affects the person's mental functioning or emotional state. The nature of that definition is such that it would capture psychoactive substances that have legitimate everyday uses. To ensure that persons who produce, supply etc. such substances for human consumption do not fall foul of the offences in the Bill, clause 2(1)(b) introduces the concept of an "exempted substance". As a result, no offence is committed where the substance in question is an exempted substance. Clause 3(1) defines an exempted substance as a substance listed in Schedule 1 to the Bill. That Schedule lists controlled drugs, medicinal products, alcohol, nicotine and tobacco products, caffeine and food. The nature of these substances is that they either do not pose a serious threat to public health and safety or they are separately subject to statutory control. Because one of the components of the definition of a psychoactive substance is that it is consumed by a person, it is not necessary to include in the Schedule of exempted substances those substances which are intended for, for example, industrial or veterinary uses. However, were such substances to be mis-appropriated for the purposes of human consumption, the supply etc. of the substances would then be caught by the relevant offence.

5. The list of exempted substances needs to be robust and kept up to date so as not to unintentionally criminalise the production, supply etc. of psychoactive substances which may legitimately be consumed. The regulation-making power affords the necessary flexibility to make such changes relatively speedily should it be appropriate to do so. Clause 3(2) confers a power on the Secretary of State to amend Schedule 1 so as to add or vary any description of substance and to remove any description of substances added through the regulation-making power. The power is most likely to be used to add a new substance to the list of exempted substance or to vary an existing entry (for example, if the regulations mentioned in paragraphs 2 to 5 of the Schedule were revoked and replaced with new regulations). The regulation-making power cannot be exercised so as to remove one of the substances specified in the Schedule to the Bill as enacted, but the regulation-making power allows for the possibility that it might be necessary to remove from the Schedule a substance which had previously been added to the Schedule by means of the delegated power.

6. Before exercising the power, the Secretary of State is under a duty to consult such persons as she considers appropriate. Such persons might, for example, include regulatory bodies, the Advisory Council on the Misuse of Drugs or other relevant experts as well as persons likely to be affected by the proposed regulations.

7. Given that the list of exempted substances is central to the scheme in the Bill and that in enacting the legislation Parliament will have approved the list in Schedule 1 and recognising that this is a Henry VIII power, it is considered appropriate that the affirmative procedure should apply (as provided for in clause 3(5)).

8. The Irish legislation on which the approach taken in the Bill is partially modelled contains a similar list of exempted substances and a delegated power to add other substances to that list— see section 2 of the Criminal Justice (Psychoactive Substances) Act 2010¹.

¹ The Irish legislation is available at <http://www.irishstatutebook.ie/pdf/2010/en.act.2010.0022.pdf>.

Clause 10(1): Power to provide that certain activities are not an offence under the Act

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary procedure: Affirmative procedure

9. Clauses 4 to 8 of the Bill make it an offence to produce, supply, offer to supply, possess with intent to supply, import or export a psychoactive substance. In each case, the relevant clause provides that it is subject to regulations made under clause 10. That clause provides that regulations may provide that it is not an offence under the Bill for any person, or any person of a specified description, to do an act, or an act of a specified description, in specified circumstances or if specified conditions are met. In effect, any such regulations would make lawful conduct which would otherwise be unlawful under clauses 4 to 8. This exemption mechanism will complement that provided for in Schedule 1 as described above. That Schedule excludes from the ambit of these offences psychoactive substances which either have legitimate every day usages or are controlled through other legislation. However, there is also a requirement to exempt certain activities from the ambit of the offences, rather than the substances themselves. In particular, provision is needed to enable those who are conducting or supporting legitimate research into psychoactive substances to carry out their work. The regulation-making power would enable specified research activity to be excluded from the ambit of the offences. Section 7 of the Misuse of Drugs Act 1971 makes parallel provision in respect of the possession and supply of controlled drugs. In addition, regulations could be needed to ensure that healthcare professionals (and those in the distribution chain) are taken out of the ambit of the offences when acting in their professional capacity supplying to a patient a psychoactive substance which falls outside of the exemption list.

10. In addition to research activities, regulations could provide that no offence is committed where the supply or offer to supply of psychoactive substances was necessary for a purpose related to the prevention or detection of crime. Such a provision would be relevant to police officers acting in the course of an investigation of offences under the Bill.

11. Given that there could be a variety of both current and future research projects or other activities which would require exemption and be subject to bespoke conditions, it is appropriate that such exemptions are set out in secondary legislation rather than on the face of the Bill. It is also possible that new exemptions need to be introduced at regular intervals (the equivalent regulation- and order-making powers in section 7 of the Misuse of Drugs Act 1971 have been extensively exercised) which again argues for the ability to introduce exemptions through secondary legislation.

12. Before exercising the power, the Secretary of State is under a duty to consult such persons as she considers appropriate. Such persons might, for example, include regulatory bodies, the Advisory Council on the Misuse of Drugs or other relevant experts as well as persons likely to be affected by the proposed regulations.

13. Given that the scope of the offences in clauses 4 to 8 is central to the scheme in the Bill, it is considered appropriate that the exemption of any activities from the ambit of these offences should be subject to Parliamentary debate and approval and that accordingly, the affirmative procedure should apply (as provided for in clause 10(5)).

Clause 31(2) and (3): Power to make rules of court.

Power conferred on: *In England and Wales: Civil Procedure Rules Committee (under section 2 of the Civil Procedure Act 1997) and the Lord Chief Justice (under section 144A of the Magistrates' Courts Act 1980)*

In Northern Ireland: Magistrates' Courts Rules Committee (under Article 13 of the Magistrates' Courts (Northern Ireland) Order 1981)

Power exercisable by: *Rules of court made by Statutory Instrument*

Parliamentary procedure: *Negative resolution*

14. Clauses 17 and 18 provide for the making of prohibition orders – a civil sanction which enables law enforcement agencies to adopt a graded response to the production, supply etc of psychoactive substances. Where a respondent is under the age of 18 years, applications for the making, variation or discharge of a prohibition order will be heard in the youth court in England and Wales and Northern Ireland. Where there are ongoing proceedings in the youth court and the respondent turns 18, clause 31 enables rules of court to determine which court continues to have jurisdiction for the case; such rules may either provide for the case to continue to be heard in the youth court or be transferred to a magistrates' court (or, in Northern Ireland, a court of summary jurisdiction). It is appropriate that these procedural matters are dealt with in rules of court, the procedure for which is well established. Similar provision is contained in section 18(3) of the Anti-social Behaviour, Crime and Policing Act 2014.

Clause 55(1): Power to make further consequential amendments

Power conferred on: *Secretary of State*

Power exercisable by: *Regulations made by statutory instrument*

Parliamentary procedure: *Negative resolution (if it does not amend primary legislation), otherwise affirmative resolution*

15. Clause 55(1) confers power on the Secretary of State to make such consequential provision as he or she considers appropriate for the purposes of the Bill. The powers conferred by this clause are wide but they are limited by the fact that any amendments made under the regulation-making power must be genuinely consequential on provisions in the Bill. But there are various precedents for such provisions including section 59 of the Crime and Courts Act 2013, section 181 of the Anti-social Behaviour, Crime and Policing Act 2014 and section 85 of the Serious Crime Act 2015. The Bill already includes, at Schedule 4, significant changes to other enactments as a consequence of the provisions in the Bill and it is possible that not all of the necessary consequential amendments have been identified in the Bill's preparation. The Government considers that it would therefore be prudent for the Bill to contain a power to deal with these in secondary legislation. If regulations under this clause do not textually amend primary legislation they will be subject to the negative resolution procedure (by virtue of subsection (4)). If regulations under this clause do amend, repeal or

revoke provision in primary legislation it will be subject to the affirmative resolution procedure (by virtue of subsection (3)) as befitting a Henry VIII power of this type. It is considered that this provides the appropriate level of parliamentary scrutiny for the powers conferred by this clause.

16. In accordance with the Government's now standard drafting practice, consequential amendments which "otherwise modify" primary legislation can be made by regulations which are subject to the negative procedure. The Government's view is that the kinds of modification which can be made to primary legislation are very diverse; and within this wide spectrum there are many in respect of which, because the modification of primary legislation is only very indirect, or because it only operates for limited purposes, it is inappropriate that it should be treated as equivalent to an amendment of the primary legislation and therefore made subject to the affirmative procedure. Indeed, it is the Government's contention that it will only be very rarely that a non-textual modification of primary legislation is made that is akin to a textual amendment. On those exceptional occasions when it is appropriate that a non-textual consequential amendment is made to primary legislation which has the same weight as a textual amendment, the regulation-making power enables such an amendment to be made subject to affirmative scrutiny by including it within an instrument which includes textual consequential amendments. The Government intends to operate this approach in this instance. In coming to this view, the Government has considered carefully the views of the Delegated Powers and Regulatory Reform Committee as expressed in a number of its reports in the 2014/15 session. The approach taken in this Bill reflects the Government's position in response to the Committee's reports last session on the Counter Terrorism and Security Bill and the Small Business, Enterprise and Employment Bill.

Clause 57(2): Commencement power.

Power conferred on: Secretary of State

Power exercisable by: Regulations made by statutory instrument

Parliamentary Procedure: None

17. Subsection (2) of clause 57 contains a standard power for the Secretary of State to bring provisions of the Bill into force by commencement regulations. As usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at a convenient time.

18. Subsection (3) confers power on the Secretary of State to make such saving, transitional or transitory provisions as he or she considers appropriate in connection with the coming into force of the provisions in the Bill. This is a standard power to enable the changes made by the Bill to be implemented in an orderly manner. Such powers are often included, as here, as part of the power to make commencement regulations (for example, section 88(9) of the Serious Crime Act 2015) and, as such, are not subject to any parliamentary procedure on the grounds that Parliament has already approved the principle of the provisions in the Bill by enacting them.

Home Office
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