

PSYCHOACTIVE SUBSTANCES BILL
EUROPEAN CONVENTION ON HUMAN RIGHTS
MEMORANDUM BY THE HOME OFFICE

Introduction

1. This memorandum addresses issues arising under the European Convention on Human Rights (“ECHR”) in relation to the Psychoactive Substances Bill. The memorandum has been prepared by the Home Office. On introduction of the Bill in the House of Lords, the Minister of State (Lord Bates) has made a statement under section 19(1)(a) of the Human Rights Act 1998 that, in his view, the provisions of the Bill are compatible with the Convention rights.

Summary

2. The Bill:

- provides a definition of a psychoactive substance and exempts certain substances from the provisions of the Bill (clauses 2 and 3 and Schedule 1);
- provides for new offences of producing a psychoactive substance; supplying or offering to supply a psychoactive substance; possessing a psychoactive substance with intent to supply; importing and exporting a psychoactive substance and provides for making exceptions to those offences. Provision is also made for the supply of a psychoactive substance in the vicinity of a school to be treated as an aggravating factor by a court when sentencing an offender for that offence (clauses 4 to 10);
- provides a power to the police or local authorities to issue a prohibition notice or premises notice requiring a person to desist from continuing activities prohibited under the Bill or to take reasonable steps to prevent such activities taking place on specified premises; and a power for a court to make a prohibition order or premises order imposing similar requirements – only the court orders will carry any direct sanction (clauses 11 to 31);
- provides for powers of entry, search and seizure (clauses 32 to 44 and Schedule 2);
- provides for the retention and forfeiture of seized psychoactive substances and items associated with offences under the Bill (clauses 45 to 50);
- contains minor and consequential amendments to other enactments and general provisions, including commencement (clauses 51 to 57 and Schedules 3 and 4).

Prohibition notices, premises notices, prohibition orders and premises orders

3. Clause 12 makes provision for either a senior police officer or National Crime Agency officer (defined as an officer of at least the rank of Inspector or equivalent) or a local authority to serve a prohibition notice on a person carrying on a prohibited activity in relation to psychoactive substances (the definition of

prohibited activity covers the conduct elements of the offences in clauses 4, 5 or 8 of the Bill, together with the secondary offences of assisting and encouraging those offences). The notice will require the person to desist from the activity in question. Clause 13 enables a senior officer or local authority to issue a premises order requiring the respondent to take reasonable steps to prevent any, or specific, prohibited activities taking place on premises owned, leased, occupied, controlled or operated by the respondent. There is no direct sanction for non-compliance of these notices.

4. Clause 17 allows for an application to be made to the court for a prohibition order directing a person not to carry on a prohibited activity. Provision is also made for a criminal court to make a prohibition order on conviction of a person for an offence under the Bill or an associated secondary offence (clause 18). Clause 19 allows for an application to be made to the court for a premises order requiring the respondent to take reasonable steps to prevent any, or specific, prohibited activities taking place on premises owned, leased, occupied, controlled or operated by the respondent. These orders may contain such prohibitions, restrictions and requirements as the court considers appropriate. Such prohibitions may include a prohibition prohibiting access to specified premises; such a prohibition will initially last for up to three months but may be extended for a maximum of six months. Applications will be on notice and the respondent will be entitled to attend and make representations. The court will apply the civil standard of proof when determining whether an order should be made. Breach of an order will be a criminal offence punishable by up to two years' imprisonment.

Article 6: Right to a fair trial

5. Article 6 is relevant in relation to clauses 17 and 19; the power for a court to make a prohibition order or premises order on application. As these are civil matters, Article 6(1) applies. Before issuing an order the court will need to be satisfied (on the balance of probabilities) that a prohibition notice or premises notice has not been complied with; or, if no notice has been given, that a person is carrying on a prohibited activity and the person will not comply with a notice; and that an order is necessary for the purpose of preventing a person from carrying on a prohibited activity. Prohibited activities are those to which the offences in clauses 4, 5 and 8 relate - production, supply, offering to supply or importation/exportation of a psychoactive substance. Failure to comply with an order will be a criminal offence.
6. Consideration of an application for an order will be carried out by a court with a full judicial procedure including a public hearing. The respondent may attend and make representations should he or she wish to do so. Any application for an order will need to set out the grounds for the application and be provided to the respondent. A respondent will be entitled to be legal represented should he or she wish to be so. Clause 26 also provides a right of appeal against the making of an order. A court determining an appeal may affirm, vary or revoke the prohibition order made by the court below.

7. Given these protections and safeguards, the Government is satisfied that these provisions are compatible with the requirements of Article 6.

Article 8 – Right to respect for private and family life

8. Both the power to issue a prohibition notice and premises notice and the power to make a prohibition order and premises order engage Article 8. Although these notices and orders will more commonly be applied to commercial premises, there will potentially be the need to serve a notice or make an order to prevent activities relating to psychoactive substances from being carried on at residential addresses. A prohibition order or premises order may include a prohibition prohibiting access to specified premises, including by those who habitually reside on the premises; such a prohibition may last for a maximum of six months.
9. The Government considers that any such interference will, however, be justified under Article 8(2). The interference will be in accordance with the law as any notice or order which is served or issued will need to be in accordance with the powers provided by provisions in primary legislation. The issue of a notice or order, again in accordance with the provisions of the Bill, will pursue the legitimate aims of preventing criminal activity and protecting public health; and will be proportionate to those aims. Under the Bill, notices and orders will be limited only to prohibiting activities banned under the Bill or preventing such activities taking place on specified premises. Where the circumstances merit it this will at times include the need to prohibit access to the premises – only the court will have the power to impose such a restriction.
10. Although a notice may be issued without any court process, there is no direct sanction attached to non-compliance. When issuing a notice police or local authority officers will be obliged to act compatibly with ECHR rights pursuant to the Human Rights Act 1998. The same requirement applies equally to any court which is asked to issue a prohibition order or premises order.

Article 1 of Protocol 1 – Protection of property

11. As with Article 8, these provisions may potentially affect an individual's enjoyment of his or her possessions by requiring him or her to desist from a prohibited activity. This interference is justified for the reasons explained above in relation to Article 8.
12. Where an access prohibition is attached to a prohibition order or premises order, such a prohibition is a justified control of possessions; it is for a limited period of time and is in accordance with the general interest of preventing disorderly, anti-social, nuisance or criminal behaviour.

United Nations Convention on the Rights of the Child (the Convention)

13. Under the law of England and Wales and Northern Ireland criminal responsibility arises from the age of 10 as it is considered that children aged 10 and over are

able to understand that they are doing something wrong¹. Involvement in activities which cause danger to public health and criminality is behaviour which is wrong.

14. Article 3 of the Convention requires the best interests of the child to be a primary consideration. By seeking to prevent a child's involvement in activities prohibited by the Bill the Government believes this will protect the best interests of the child. Given that many children will have been coerced into such activities as the result of threats or violence this measure also assists with Article 19 of the Convention – protecting children from all forms of violence. The ability to impose prohibition notices and orders on children makes them less likely to be used as a way of avoiding these powers if they applied only to adults. These measures also assist in the Government's commitment to protect young people against drug abuse (Article 33 of the Convention).

Entry, search and seizure

15. Clauses 32 to 50 provide powers to stop and search individuals, vehicles and vessels and enter and search premises in accordance with a warrant. Provision is also made for powers of seizure. Under clause 44 it is an offence to obstruct a search.
16. Before issuing a search warrant, clause 35 requires a justice of the peace (in Scotland and Northern Ireland, a sheriff and lay magistrate respectively) to be satisfied that there are items on the premises that are relevant evidence and that it is not practicable to communicate with a person entitled to grant access to the address or items; or that access will require a warrant; or that immediate entry is required to avoid prejudice to an investigation. There is a power to require the production of documents and other information (clause 38) and clause 39 allows an enforcement officer to seize and detain items from the property. Provision is made to protect items subject to legal privilege and journalistic material.

Article 5 – Right to liberty and security

17. The power to stop and search an individual clearly engages Article 5. This power will be exercised only by police officers (who are well versed in the use of such powers). It will not be available to local authority officers.
18. Before exercising this power an officer will need to have reasonable grounds to suspect that a person is in possession of a psychoactive substance and has committed or is likely to commit an offence under clauses 4 to 8 or 23 of the Bill. This interference is therefore compatible with Article 5(1)(c) which permits the detention of a person when it is reasonably considered necessary to prevent

¹ In Scotland the age of criminal responsibility is 12 which will be the age applicable under the Bill in relation to offences in Scotland and the use of the powers to issue a prohibition notice or prohibition order in that jurisdiction.

him or her committing a crime. The Code of Practice on stop and search issued under the Police and Criminal Evidence Act 1984 (PACE) will apply and, as such, the safeguards provided for in that Code will be applicable. Obstructing a stop and search in the street will be a summary only offence punishable by the maximum term of imprisonment available to the magistrates' court (and equivalents in Scotland and Northern Ireland). For these reasons, the Government considers that the provisions in relation to stop and search are compatible with Article 5.

Article 8 – Right to respect for private and family life

19. Given that a search warrant may be issued for the search of a person's home as well as commercial properties, those provisions engage Article 8.
20. The Government considers that any such interference with Article 8 will be justified. Such interference will be in accordance with the law as a warrant will be issued by a court pursuant to provisions in primary legislation. A search warrant will only be capable of being issued by a justice of the peace (in Scotland and Northern Ireland, a sheriff and lay magistrate respectively) who will need to be satisfied that there are reasonable grounds to suspect evidence of an offence will be found on the premises to be searched.
21. Any interference arising from execution of a search warrant will therefore pursue the legitimate aim of preventing crime by allowing enforcement officials access to premises where illegal activity appears to be being carried on or evidence of such activity is likely to be found. Search and seizure activity will be proportionate to that aim as the powers may only be exercised for the purposes of determining whether an offence has been committed or in relation to items reasonably believed to be relevant evidence. The Government therefore considers that any interference with Article 8 arising from the search warrant provisions will be justified.

Article 1 of Protocol 1 – Protection of property

22. Powers to search and seize properly clearly engage Article 1 of Protocol 1. The Government considers any such interference to be justified for the same reasons as those set out above in respect of Article 8.

United Nations Convention on the Rights of the Child (the Convention)

23. The power to stop and search a child over the age of 10 engages Article 16 of the Convention (the right to privacy). Any interference is justified for the reasons explained above. The measures also support the United Kingdom's commitments under Article 33 (protection from drug abuse) of the Convention.

Retention and disposal

24. Clauses 45 to 50 provide for the retention of seized items and forfeiture and disposal of such items. This allows law enforcement officials to retain items for

the purpose of investigation or trial and to dispose of harmful psychoactive substances or other items used in the commission of an offence under the Bill. Clause 46 provides for a fast track procedure for the disposal of seized psychoactive substances (for example, where the quantity is consistent with personal use) where a psychoactive substance is seized during a search, carried out without a warrant, of a person, vehicle, vessel or aircraft under clauses 32 to 34. Clause 47 provides a mechanism whereby an application may be made to the court for forfeiture and disposal of seized items where the procedure in clause 46 or clause 50 does not apply.

25. Clause 50 provides the power to forfeit and dispose of such items after a person is convicted of an offence under the Bill. Before making such an order in respect of items which are not psychoactive substances, the court must give an opportunity to any person, in addition to the offender, who claims to be the owner of the property or has an interest in it to make representations.

Article 6 – Right to a fair trial

26. Any determination of an application for forfeiture and disposal will be carried out by a court with a judicial procedure including a public hearing. A respondent will have the right to legal representation and have the ability to make representations to the court with regard forfeiture of non-psychoactive substance (for example, a computer or scales). Forfeiture and disposal of such property is only permissible if a court so orders and the court must be satisfied that the item is either a psychoactive substance or used in the commission of an offence under the Bill. Provision is made for a person affected by such an order to appeal the decision of the court.
27. The Government therefore believes that these powers are compatible with Article 6.

Article 1 of Protocol 1 – Protection of property

28. The power to forfeit and dispose of a person's property clearly engages Article 1 Protocol 1. Any interference will be justified by the public interest in preventing criminal activity and safeguarding public health. The fast track power to seize and dispose of a substance, for example where the quantity is consistent with personal use, is also justified on public health grounds as it avoids returning to an individual a potentially harmful substance which may adversely affect their health.
29. Property will only be forfeited and disposed of in accordance with the tightly drawn clear legal framework set out in primary legislation. The forfeiture powers only relates to harmful psychoactive substances which have no legitimate use and other items used in the commission of an offence under the Bill. The Government therefore considers that the provisions are compatible with Article 1 Protocol 1.

Home Office
29 May 2015