

ACMD

Advisory Council on the Misuse of Drugs

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20th September 2010

Dear Minister for Crime Prevention,

Re: 'Legal Highs' – Temporary Banning Power

Thank you for your letter of 20 August 2010, in which you ask the Advisory Council on the Misuse of Drugs (ACMD) to consider issues concerned with the proposed introduction of a Temporary Banning Power. There are several issues that are raised in your letter that I would like to deal with in turn: 1) the Temporary Banning Power - framework and ACMD input, 2) trigger points for the Temporary Banning Power, 3) a working protocol – agreed between the ACMD and government and 4) proposed changes to the constitution of the ACMD.

The ACMD consider that in tackling the issue of 'legal highs' the Temporary Banning Power legislation (and of course the Misuse of Drugs Act 1971) should not be viewed in isolation. The ACMD believe that other legislation (for example, the Medicines Act 1968, Trade Descriptions 1968) also have a role to play in curbing the supply of harmful 'legal highs' drugs. The ACMD will be providing you with further advice on such broader issues in due course.

1. Temporary Banning Power – framework and ACMD input.

Introduction: The ACMD have considered the proposed Temporary Banning Power in the context of new psychoactive substances ('legal highs') as you explained in your letter. The ACMD stress that the Temporary Banning Power, whilst having an important role, should be used in exceptional circumstances, where swift action to prevent harm is the imperative, and it is not used as a substitute for full control. The ACMD are pleased that you state that your preferred approach will remain a full assessment by Council; following the approach that is currently the norm.

Seeking ACMD advice and timeframes: The ACMD consider that the most robust (enduring) drug policy decisions are taken with full knowledge and consideration of the evidence base that is available. It is therefore imperative that the ACMD are consulted before invoking a temporary banning power and it should be within the auspices of the ACMD to provide you with advice as to whether a full assessment of a drug(s) - as is current process - or invoking a temporary banning is most appropriate. Therefore, we recommend that in referring a substance to the ACMD, you ask the ACMD to consider all options for control on reflection of the available evidence.

In your letter you explain that drugs subject to a temporary classification would be placed under the temporary order for a period of twelve months. There are two timescales of importance where it is proposed there is ACMD input – at the point of referral and after a temporary ban has been invoked. The ACMD will, upon referral, strive to provide advice at the earliest opportunity, taking into account the need to protect the public, whilst balancing the need to provide the best advice on the available evidence. In respect of both the ACMD's initial consideration and that after a ban has been invoked the ACMD would not want the timescales to be too prescriptive as the time to collate and consider the evidence would depend greatly on the nature of the substance under consideration. However, the ACMD proposes that on a case-by-case basis the timeframe is agreed between you and the ACMD Chair from the outset.

The ACMD understand that it may be possible to re-invoke a temporary banning power, but acknowledge this is not a satisfactory solution and also is not commensurate with the purpose of the proposed legislation. The ACMD consider that there should be flexibility in the legislation and contingency should it be required.

Penalties: The ACMD have given careful consideration to your proposal that the Temporary Banning Power only carries supply-related offences – commensurate with Class B current maximum penalties. The ACMD believe that such supply side activity is a key area to target. To ensure that dealing smaller quantities is covered it is important that 'possession with intent to supply' is part of the legislation and robustly enforced to prevent harms to those who may purchase these drugs. A particular issue the ACMD identify is what is known as 'social supply'. In this scenario, individuals A & B agree that B gives A £10 and A buys £20 worth of drugs for the pair of them. A then 'supplies' £10 worth of drugs to B. In the legal sense of 'supply' the charge of supply is made out against A. However, the Court of Appeal in R -v- Denslow 1998 EWCA CRIM 437 found that in the above instance the proper charge is possession. This case is not well known to Prosecuting Authorities; the ACMD consider that the Home Office Guidance accompanying the legislation should make it clear that to prosecute as in the given scenario (i.e. possession) would not be in keeping with the legislative intent.

In communicating the penalties relating to the Temporary Banning Power, the ACMD recommend that the relationship to the penalties to current class B drugs is removed. This will prevent any confusion or unwanted messages that

the substances are likely to be included in class B and any perception should a substance eventually become a class C substance that a substance has been 'downgraded'. The ACMD recommends that the specific sentences are written out in full.

Scientific issues: The issue is complicated in the field of 'legal highs' because very often branded forms of the drug do not contain the purported constituents. The recent UK experience of naphyrone (branded as NRG-1 among other names) is an example of a product that, upon analyses by test purchasing, was found to show wide inter sample variability with a diversity of psychoactive compounds – including many that were illegal. It is only possible to legislate for named compounds under the Misuse of Drugs Act; therefore, before consideration of invoking a Temporary Banning Power there will have to have been preceding analysis of test purchases or seizures of branded products which are believed to contain the drug(s) of concern.

The introduction of the Temporary Banning Power will put certain demands on the evidence required by the ACMD in order to provide its advice, either before advising on the Temporary Banning Power and after it has been invoked and before giving further advice in relation to classification under the Misuse of Drugs Act. For example, whilst for recent examples of so-called 'legal highs' there have been analogous substances already controlled by the Misuse of Drugs Act for which there has been a substantial scientific evidence base for the harms, this might not always be the case. If a completely novel substance comes to the attention of the ACMD, it may be that basic pharmacological research may be required in order to understand its psychoactive properties and potential harm. We therefore recommend that the Home Office maintains a research capacity that the ACMD can request is used for research to inform its advice.

2. Trigger points for the Temporary Banning Power.

The ACMD does not believe the point at which consideration is given to invoking a Temporary Banning Power should be too prescriptive. The purpose of the temporary banning power should be the prevention of harms. Therefore, the ACMD considers that the trigger point should be '[on the available evidence] there are *reasonable grounds* for considering that a substance does, or has, the *potential* to cause harm'. As part of the ACMD's initial consideration as to whether a temporary banning power should be invoked it will look to understand the identity of the substance, consider related substances, consider any legitimate uses and gather evidence internationally and locally regarding the substance and its harms (including, for example, A&E admissions, known pharmacology, dependency and social harms etc.). However, it is not possible to detail the 'level' of evidence that would be required, nor what that evidence would be – evidence, and the relative importance of each type of evidence, will depend on the substance being considered.

3. Working Protocol.

The ACMD welcomes developing a document that reflects the working relationship envisaged between the Coalition Government and the ACMD.

The protocol should reflect expectations of advice from the ACMD and its receipt by government and should be a basis of the ACMD's engagement in invoking the Temporary Banning Power.

The ACMD will need to put in place procedures that facilitate working to the proposed Temporary Banning Power. This would need to include the expertise on the Council and also the mechanisms within which both the ACMD and Government would be expected to work.

The ACMD note that consideration of legitimate uses of new psychoactive substances can take time, including consultation with industry. The ACMD welcome the proposal that when considering a temporary ban the Home Secretary will seek parallel advice from the Department for Business, Innovation and Skills on legitimate uses, and will develop any impact assessment required to inform her decision on whether to impose a temporary ban on that drug.

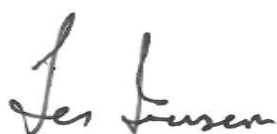
I would appreciate working with your officials in the development of the working protocol and would request that we meet with them soon to discuss further.

4. Proposed constitutional changes to the ACMD.

The ACMD believes that the current six statutory positions provide a list of some of the (but not the only) 'core expertise'; therefore the naming of positions on the ACMD has an important purpose. However, the ACMD acknowledges that the Misuse of Drugs Act is nearly 40 years old and it is questionable whether the statutory positions identified in the Act now correlate with what is required. The ACMD propose that the working protocol identifies areas of expertise that should, under normal circumstances, be members of the ACMD in a non-statutory capacity. I understand from your letter that the Home Office Chief Scientific Adviser is consulting more widely on this issue and I would be grateful to see the outcome of this consultation before making any final decision.

The ACMD considers that changes to the constitution are particularly important at this time, as the introduction of the Temporary Banning Power and the need to provide advice within short time frames may necessitate a re-configured base of expertise upon which to draw. We recommend that it would also be of benefit if the Home Secretary consulted the Chair of the ACMD, at appropriate intervals, as to the future expertise required on the ACMD.

Yours sincerely,

A handwritten signature in cursive script, appearing to read "Les Linsen".

Professor Les Iversen FRS