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Psychoactive Substances Bill: Committee Stage

During Committee I undertook to write to you to follow up a number of points raised. I am also taking this opportunity to provide further explanation of the Government's position on various amendments that were the subject of debate.

Exempted substances

The Committee agreed Government amendment 3, which broadens the definition of a "medicinal product". What is now paragraph 2 of Schedule 1 defines a medicinal product by reference to the definition of a medicinal product in regulation 2 of the Human Medicines Regulations 2012. In the debate (Official Report, 27 October 2015, column 33), you expressed concern that the breadth of the definition might allow someone to make spurious claims that a recreational psychoactive substance was caught by the exemption for medicinal products. Andrew Gwynne also asked (at column 34) for assurance that the Bill did not open up a loophole where homeopathic medicines with certain psychoactive qualities could be abused and misused.

I would like to reassure you and the rest of the Committee that the revised exemption for “medicinal products” does not create a loophole, nor does it make lawful any activity which is already unlawful by virtue of other legislation.

We do not think that people are likely to attempt to deliberately bring themselves within the exemption for medicinal products as a way of evading the Bill, because a person who attempted to do so would put themselves at risk of prosecution under the Human Medicines Regulations for offering an unauthorised medicinal product for sale. Offences under these Regulations carry a maximum two year prison sentence. If a substance was presented as having medicinal properties, but it did not in fact have such properties, the medicinal claims would have to give a genuine impression of therapeutic value before the substance would be within the definition of medicinal product. And although the definition of “medicinal product” includes substances which may be used on human beings with a view to modifying physiological functions, case law has established that this would exclude products which are not intended to have any beneficial effects on health and are simply consumed in order to induce a state of intoxication.

In summary, if a psychoactive substance is genuinely within the definition of a medicinal product, it would be susceptible to the enforcement regime of the Human Medicines Regulations (including the relevant criminal offences contained in those Regulations), and therefore within the regulatory remit of the Medicines and Healthcare Products Regulatory Agency. This would include homeopathic medicinal products. If a product is not a medicinal product, it would not benefit from the exemption for such products and would instead be within the scope of the Bill.

Social supply

As I indicated in response to your amendment 46 on social supply (columns 42 to 48), nobody wants to see young people criminalised without good reason. However, this Bill seeks to tackle the trade in psychoactive substances and social supply is central to how that trade operates.

Social supply by friends was identified by the Expert Panel as one of the three most common sources for acquiring psychoactive substances. In

addition, the recent Crime Survey for England and Wales 2014/15¹ identified that social supply and supply from head shops were equally the most used supply networks.

In recommending the creation of a general prohibition, the Expert Panel did not suggest excluding social supply, nor has social supply been excluded in other jurisdictions. Moreover, the Bill in this respect mirrors the position in respect of substances subject to a temporary class drug order.

Excluding social supply would also send out confusing messages. We want to change the perception that these substances are legal because they are safe. These substances are potentially dangerous and so we want to remove them from our communities, not facilitate their use amongst friends. Therefore to exclude social supply from the offences in this Bill would fundamentally undermine the whole principle and expose our young people to potential harm.

The approach taken in the Bill does not mean that enforcement action will focus on social supply networks, nor does it follow that someone arrested for a social supply offence would necessarily face prosecution.

The police and Crown Prosecution Service will exercise their professional discretion when considering whether to arrest, warn or prosecute, taking into account all the circumstances of the offence and offender and the public interest. Ultimately, however, if the circumstances justify a prosecution, that option should remain open.

Importantly, the Bill contains both criminal and civil sanctions which enable law enforcement agencies to adopt a proportionate response to each offence.

Rather than a criminal prosecution, cases of social supply could be disposed of by simple forfeiture of the substance coupled with a warning to the individual about their behaviour, or by the use of civil sanctions. I anticipate that criminal prosecutions will be reserved for cases of persistent offending or for higher end supply cases involving significant quantities.

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462885/drug-misuse-1415.pdf, Figure 4.2.

Finally, I believe excluding social supply in the Bill will also make the task of the police and prosecutors in tackling commercial suppliers that much harder. The amendments, if made, would add another element to these offences which would need to be proven and could create loopholes, with drug dealers attempting to evade justice by seeking to argue that they received no payment for the transaction in question, or that they were supplying them to a wider group of friends.

In conclusion, whilst the government shares the aim of not unduly criminalising young people, I am satisfied that there are enough checks and balances to ensure that only the most serious of behaviour will be criminalised by this Bill.

Importation for personal use

Similarly, it was suggested at Second Reading, and again during Committee (at columns 60 to 63), that there was an inherent contradiction between, in effect, criminalising the purchase of psychoactive substances from foreign-based websites (albeit that the actual offence is one of importation), whilst continuing to permit the purchase of psychoactive substances from domestic websites or head shops.

I do not believe that this is contradictory. As I have explained, this Bill is about tackling the trade in psychoactive substances. The importation of such substances is one element of that trade, alongside production and supply. Those who intentionally import psychoactive substances through a foreign-based website are part of that trade, whether they are importing for themselves, their friends or for the purpose of onward supply.

The Misuse of Drugs Act makes no distinction between importation for personal use or for other purposes, and nor should we here. To do so would open up a significant loophole for dealers to exploit. They could import a number of small amounts of a psychoactive substance, claiming that each package was for personal use, and then put them all together for substantial gain. Or, they could import a large amount of a psychoactive substance, and claim that it was a year's worth for personal use.

We must also consider the practical implications for policing the border. If these amendments were to be accepted, it would make it very difficult

for Border Force to clamp down on the importation of psychoactive substances. It would increase their workload significantly. Whenever a parcel containing psychoactive substances is seized at the border, Border Force would have to investigate whether or not the contents were intended for personal use only. This would, quite simply, be highly impractical.

As I have indicated, the aim of this Bill is to tackle each element of the supply chain for psychoactive substances, from production through to distribution. To do that effectively, we cannot allow the intentional importation or exportation of psychoactive substances for personal use.

Statutory aggravating factors

You asked how often the statutory aggravating factors provided for in section 4A of the Misuse of Drugs Act have been applied (column 49). The Sentencing Council collects data, through its Crown Court Sentencing Survey, on how often statutory (and other) aggravating (and mitigating) factors are used by sentencers in the Crown Court. This is published by the Sentencing Council in its record level datasets for drug offences, which can be found on its website at: <http://www.sentencingcouncil.org.uk/analysis-and-research/crown-court-sentencing-survey/record-level-data/>.

As regards your amendment 48 to make it an aggravating factor to supply a psychoactive substance which the accused knew or suspected to be harmful, I would refer you to the Government response to recommendation 10 of the Home Affairs Select Committee report which will be published shortly. As promised, I will be writing to the Sentencing Council to draw its attention to the debate in Public Bill Committee and to the Home Affairs Select Committee's recommendation.

Prevention and education

On the second day of Committee, you underlined the importance of preventing young people from becoming involved in drug use in the first place (Official Report, 29 October 2015, columns 73 to 86). I agree wholeheartedly that the enforcement powers in this Bill can never be the totality of our response to the harms caused by psychoactive substances.

Prevention and education is a key strand of our balanced Drug Strategy and it is vital that we prevent people, especially young people, from using drugs in the first place and intervene early with those who do start to develop problems. This is as true for psychoactive substances as for controlled drugs.

We take a broad approach to prevention, in line with international evidence and recent evidence provided by the Advisory Council on the Misuse of Drugs (ACMD). It combines universal action with targeted action for those most at risk or already misusing drugs.

Our approach moves beyond merely raising awareness about specific drugs and providing information via schools. We recognise that in order to resist drug use, young people and others need support in building the resilience and life skills required to tackle the range of factors which make them vulnerable to misusing drugs.

The ACMD's report, *Prevention of drug and alcohol dependence*, highlighted the importance of embedding universal drug prevention actions in wider strategies that aim to support healthy development and wellbeing in general. It also recognised that targeted, drug-specific prevention interventions remain a valid approach to those individuals considered to be at a high risk of harm.

The ACMD report also acknowledges that there is strong evidence that some prevention approaches are ineffective at reducing drug misuse. These include standalone school-based curricula designed only to increase knowledge about illegal drugs, fear arousal approaches, and stand-alone mass media campaigns.

We have implemented a range of activities to support our approach. In Committee, I undertook to provide details of this work.

The Government has invested in resources to support schools. For example, Mentor UK runs the Alcohol and Drug Education and Prevention Information Service which provides practical advice and tools based on the best international evidence, including briefing sheets for teachers on best practice.

The Department for Education has also published an evidence paper for teachers on PSHE, reviewing the impact and summarising the best

evidence on effective PSHE practice for teachers, including on drugs education.

We have developed a new online resilience building resource, 'Rise Above', aimed at 11- to 16-year-olds, to help develop skills to make positive choices for their health, including avoiding drug use.

We continue to update the national drug information service - FRANK - which supports young people, as well as teachers and other adults, to consider the risks, consequences and harms associated with psychoactive substances.

We have developed the role of Public Health England to support local areas by sharing evidence to facilitate commissioning and the delivery of effective public health prevention activities. In November 2014, Public Health England published a toolkit to help local areas prevent and respond to the use of psychoactive substances.

Finally, we also launched a resource pack on psychoactive substances for informal educators and frontline practitioners working with young people. Written in partnership with practitioners, it enables those working with young people – for example in schools, social services and youth offending teams – to have informed conversations, prompting young people to consider the risks, consequences and harms associated with the use of psychoactive substances.

Going forward, we are developing a strategic communications plan to support the implementation of the Bill in April 2016. In developing our plans, we are recognising the value of raising public awareness of the harms of drug misuse, but we need to be mindful of the evidence base. As the ACMD noted, it is clear that mass media campaigns on their own are ineffective and - at worst - are associated with increased drug use. It is therefore critical that any such awareness raising activity is targeted and part of a wider strategy.

For example, the Government has run two summer communications campaigns on psychoactive substances, raising awareness of the risks, consequences and harms of these substances and signposting FRANK as a source of information about them. The campaign was targeted towards those already contemplating or dabbling in psychoactive substances.

In addition, every year since 2009, Ministers have written to approximately 50 music festival organisers highlighting the dangers of psychoactive substances, and calling on them to adopt a 'no-legal highs' policy at their festivals.

Statutory PSHE

New clause 4 sought to put PSHE education on a statutory footing. This echoes a recommendation by the Education Select Committee made in a report on PSHE education published last session. In the Government's response to the Select Committee's report, we made a commitment to improving PSHE provision and the Department for Education is currently working with a group of head teachers to consider how best to do this. As part of this work we will consider the teaching of specific subjects, such as drugs education.

It would not be appropriate to legislate in advance of this work being completed or to specify a PSHE topic, such as drugs education, without considering the subject as a coherent whole. The Department for Education is committed to making significant progress during this Parliament and to report on progress to the Education Select Committee by the end of the year.

I can assure you that we recognise that effective drugs education plays a critical role in helping to ensure that young people are equipped with the information they need to make informed, healthy decisions and to keep themselves safe.

We want to see all young people leave school prepared for life in modern Britain. This means ensuring that young people receive a rigorous academic education and helping them to develop personal and emotional wellbeing.

In addition to drugs education being part of national curriculum for science at key stages 2 and 3, many schools include drugs education as part of their PSHE education. We do not, however, want to prescribe exactly which issues schools should have to cover in PSHE or other related parts of the curriculum, nor to specify which resources they should use. Teachers are best placed to understand the needs of their pupils and we believe that it is for schools to tailor their local PSHE programme to reflect the needs of their pupils.

Statutory Review

Finally, amendment 57 sought to include within the statutory review of the operation of the Act an assessment of the progress made in improving the reach and quality of education about psychoactive substances.

We have deliberately kept the requirement to undertake a post-legislative review as open as possible. As provided for in clause 58, it is appropriate that the review focuses on the operation of this legislation; there are other mechanisms for reporting on our wider drugs strategy. This is not to say, however, that the report of the review would not also address wider issues, including the work on prevention and education. We are committed to working with the ACMD to determine the appropriate scope for the review, and how to make best use of existing data and evidence.

The Government is committed to a balanced Drug Strategy where measures to combat supply are matched by programmes to reduce demand, including through work on prevention and education. There are promising signs that our approach is working in the long term downward trend in drug use in England and Wales over the last decade; and more specifically among 11 to 15 year olds, drug use has continued to fall since a peak in 2003.

Repeal of the Intoxicating Substances (Supply) Act 1985

In the debate on Government amendment 39, which provided for the repeal of the Intoxicating Substances (Supply) Act 1985, you expressed concern about the impact on retailers (columns 86 to 88). The 1985 Act restricts the sale of intoxicating substances to children. However, the provisions of the 1985 Act are replicated by those in this Bill, so it can safely be repealed.

The 1985 Act makes it an offence to supply or offer to supply an intoxicating substance to a person under 18. The legislation was enacted to tackle the emergence of glue sniffing and covers predominantly glues and solvents. The conduct element of the offence in the 1985 Act is covered by the offences of supplying or offering to supply a psychoactive substance in clause 5 of the Bill. You recognised that in the interest of good law we should not have directly overlapping criminal offences on the statute book.

Prosecutions under the 1985 Act are very rare; Ministry of Justice figures report that there were just 11 cases brought between 2010 and 2014.

Importantly, when considering whether to repeal the 1985 Act the Home Office consulted with relevant National Policing Leads; the Local Government Association and trading standards representatives; Re-Solv, a charity to tackle volatile substance abuse; the Crown Prosecution Service; the devolved Administrations; and retail representatives. Whilst the need for legislation to tackle solvent abuse was recognised, all were happy to see the 1985 Act repealed if this Bill were passed.

We will work with retailers to ensure they are aware of this legislative change as part of our implementation plan for the Bill. Indeed, we are already committed to working with the British Retail Consortium and the Association of Convenience Stores to ensure that their members have appropriate guidance on the provisions of the Bill.

Breach of premises/prohibition notices

Finally, I undertook to look again at John Woodcock's new clause 1 which sought to give local authorities and senior police officers the power to compel specified premises, for example a head shop, to stop trading until the application for a premises order has been determined (columns 89 to 91).

I fully sympathise with the aims of this new clause: to stop dangerous psychoactive substances being sold on our high streets and the internet as quickly as possible. However, I hope I can reassure you and John Woodcock that such a provision is unnecessary.

Prohibition notices and premises notices are designed to act as a final warning. Whilst there is no direct sanction attached to the breach of a notice, the clear expectation is that a failure to comply will lead to further action, whether it is a prosecution for an offence under clauses 4 to 8 or an application for a prohibition order or premises order.

The assumption behind new clause 1 is that the process for obtaining a prohibition or premises order will be a lengthy one. This will not be the case. We have designed the application process for prohibition and premises orders to be as simple as possible. We are working with the Courts and Tribunals Service to ensure that, where there is a need to

get an application considered by the courts as soon as possible, procedures are in place to enable this to happen. Experience with other civil orders, for example closure orders and injunctions under anti-social behaviour legislation, show that the courts are perfectly able to consider and determine applications expeditiously.

There is a further important consideration here. Imposing a requirement on a head shop or other commercial premises to cease trading is a significant step by any measure. It is for this reason that prohibition orders and premises orders are made by the courts. This new clause would remove proper judicial oversight of what are substantial powers.

Finally, the Bill contains other enforcement powers which could well be utilised in the situation for which the new clause is intended. If the police or a local authority has evidence that a head shop or other premises are continuing to sell psychoactive substances in defiance of a prohibition or premises notice, they can apply to the courts for a search warrant – which are considered in a matter of hours. Once armed with a warrant they can search the premises and seize any psychoactive substances or other items that are evidence of an offence under the Bill.

I hope I have been able to assure the Committee that we have the processes in place to ensure that, where necessary, applications for prohibition and premises orders will be considered by the courts very quickly and that if there is a need for immediate action, enforcement agencies can resort to the more traditional powers provided by the Bill.

As was again evident during Committee, there is very broad consensus over almost all aspects of the Bill. I hope that my further explanation of the amendments contained in this letter will address any outstanding concerns about the remaining few areas of contention.

I am copying this letter to the other members of the Public Bill Committee and placing a copy in the library of the House and on the Bill page of the Home Office website.

Rt Hon Mike Penning MP