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PSYCHOACTIVE SUBSTANCES BILL: GOVERNMENT AMENDMENTS FOR LORDS REPORT STAGE

I am writing to let you have details of the Government's amendments for Report stage that I have tabled yesterday (copy attached).

Consultation with the Advisory Council on the Misuse of Drugs (ACMD) (amendments to clauses 3 and 10)

In Committee, I undertook to consider amendment 20 tabled by Baroness Hamwee to which you had added your name (Official Report, 30 June 2015, column 1943). This amendment sought to require the Secretary of State to consult the ACMD before making regulations under clause 3 of the Bill to amend the list of exempted substances in Schedule 1 (I note that you have retabled this amendment for Report). I also undertook to consider a similar amendment from Baroness Hamwee to clause 10 of the Bill which confers a power to specify by regulations exceptions to the offences in clauses 4 to 8 of the Bill. Both these provisions already require the Secretary of State to consult such persons as she considers appropriate before exercising the relevant regulation-making power. As indicated in the Explanatory Notes to the Bill, we always envisaged that the ACMD would be one of the organisations that would be consulted. We recognise that as the Government's statutory scientific advisors in respect of the Misuse of Drugs Act 1971, the ACMD has a particular standing in relation to such matters and, accordingly, we agree that it is appropriate to amend the Bill to make the Council a statutory consultee in respect of these two regulation-making powers.

Review of the Act (new clause "*Review*")

On the first day of Committee, Baroness Chisholm undertook to reflect on the debate on separate amendments which you and Baroness Meacher tabled to provide for an annual report on the operation of the Act (Official Report, 23 June 2015, column 1527). As Baroness Chisholm indicated, we are not persuaded of the case for an ongoing requirement to produce an annual report on the operation of the Act (we already report annually on the Government's drugs strategy), but we agree that in

this instance there is a case for a one-off duty to review the operation of the Act and to lay a report on the review before Parliament. New clause “*Review*” requires such a report to be prepared and laid before Parliament within 30 months of the coming into force of clauses 4 to 8 of the Bill. This timetable would allow for the collection of two years’ worth of data on the operation of the Act (of the kind set out in your amendment 105 at Committee stage) with which to inform the review.

Meaning of “prohibited activity” (amendments to clause 11)

Clause 11 defines a prohibited activity for the purposes of the Bill. A person does not carry out a prohibited activity if the person assists or encourages the carrying on of an activity by another person that is itself not a prohibited activity because that other person benefits from an exception created by regulations made under clause 10. These drafting amendments make this position clearer.

Means of giving a prohibition notice or premises notice (amendments to clause 15)

These amendments make it clear on the face of the Bill that a prohibition order or premises order takes effect when it is given. In the case of a notice sent by electronic means, it is to be treated as having been given at 9am on the working day immediately after it was sent. The definition of a working day excludes Saturdays, Sundays and public holidays.

Applications for variation and discharge of prohibition orders made following conviction (amendments to clause 27)

Clause 27(2) specifies the relevant law enforcement agencies that may apply to the court to vary or discharge a prohibition order made under clause 18 following conviction. In Scotland such applications should properly be made by the prosecution (the Lord Advocate or a procurator fiscal), these amendments modify clause 27(2) to provide for this.

Appeals about the making of, variation or discharge of prohibition orders and premises orders (amendments to clauses 29 and 30)

The Bill provides for a right of appeal against the making of a prohibition order or premises order and against the variation of such an order. Where a prohibition order or premises order is made or varied on conviction of an offender (under clauses 18 and 28 respectively), the decision is appealed as if it formed part of the sentence. This approach is already achieved through the operation of existing statutory provisions whether the appeal is against a decision of a youth court, a magistrates’ court or the Crown Court (see section 108(3) of the Magistrates’ Courts Act 1980 and section 50(1) of the Criminal Appeals Act 1968). Accordingly, on reflection, clauses 29(5) and 30(7) do not need to draw a distinction as between, on the one hand, appeals from a youth court and a magistrates’ court and, on the other hand, appeals from the Crown Court. The technical amendments to clauses 29(5) and 30(7) remove that distinction.

The table in clause 30(1) provides for the appeal routes in respect of variation and discharge decisions on prohibition orders and premises orders made under clause 17 to 19. In Scotland, a sheriff will hear cases in both a civil capacity (in the case of prohibition orders on application (clause 17) and premises orders (clause 19) and in a criminal capacity (in the case of prohibition orders following conviction (clause 18)). In civil cases, the Sheriff Appeal Court will hear any appeals from a sheriff court. Whilst the appeal routes from a sheriff in civil cases are reflected in the Bill, the routes of appeal from a sheriff sitting in a criminal capacity are not fully reflected. Where a sheriff is sitting in a criminal capacity in relation to summary criminal proceedings, the appeal route is to the Sheriff Appeal Court. Where the sheriff is sitting in a criminal capacity in relation to indictment proceedings, the appeal route is not to the Sheriff Appeal Court but to the High Court of Justiciary sitting as a court of appeal. The amendments to clause 30(1) and (2) make the position clear.

Grounds for forfeiture of seized items (amendments to clauses 49 and 50)

Clause 49 enables an officer to dispose of a psychoactive substance seized during a search if: (a) the officer reasonably believes it is a psychoactive substance but is not evidence of any offence under the Bill, and (b) the officer has no reason to believe that it was being used in connection with an activity exempted from the scope of the Bill by regulations made under clause 10. The intention is to enable forfeiture and destruction of psychoactive substances found in a person's possession where none of the offences in the Bill was made out.

However, as drafted clause 49 would allow the forfeiture of psychoactive substances in respect of which an offence could never have been committed because they were not intended or likely to be used for consumption for their psychoactive effects. So, for example, if an officer stopped a young person with a tube of glue, clause 49 enables the forfeiture and destruction of the glue irrespective of whether the person intends to consume it himself as a psychoactive substance but is not committing any offence under the Bill or whether the person has no intention to consume it but is going to use it in, say, a woodwork project.

The amendment to clause 49 accordingly narrows the circumstances in which the forfeiture power applies to cases where an officer reasonably believes that the item is a psychoactive substance which is likely to be consumed by an individual for its psychoactive effects but which is not evidence of any offence under this Act. The amendments to clause 50, which deals with forfeiture by a court on application, have an equivalent effect.

Appeal against forfeiture of seized items under clause 50 (amendment to clause 51)

This amendment simply ensures that the time limit for lodging an appeal under clause 51 (against a forfeiture decision under clause 50) is consistent with the time limit for making an appeal under clause 29 or 30, namely 28 days rather than 30 days.

Seizure and forfeiture powers of Border Force (new clause “*Application of Customs and Excise Management Act 1979*”)

As I indicated at Committee stage (Official Report, 30 June 2015, columns 1983-1984), this new clause ensures that Border Force officers can access the powers under the Customs and Excise Management Act 1979 (CEMA) when they intercept psychoactive substances coming into or out of the UK, particularly by post. Border Force customs officials routinely rely on CEMA powers to enforce restrictions on the importation (or exportation) of particular items. A number of the CEMA powers would automatically apply in any event, for example the power in section 159 of CEMA to examine any imported goods, but this new clause will ensure that other CEMA provisions are engaged, in particular, the powers in section 139 and Schedules 2A and 3 to detain, seize and forfeit any thing “liable to forfeiture”. The new clause will make a psychoactive substance liable to forfeiture if it is imported or exported to or from the UK and it is likely to be consumed by any individual for its psychoactive effects (reflecting the language in the offences in clause 8 and elsewhere).

Section 139 of CEMA provides that goods which are liable to forfeiture may be seized or detained. Schedule 2A to CEMA makes provision in respect of detained goods – essentially allowing Border Force time to investigate whether the goods in question are indeed liable to forfeiture. Schedule 3 to CEMA governs the process of seizure and forfeiture of goods. The CEMA provisions include similar safeguards regarding the issue of notices of seizure as are included with powers of seizure in the Bill and also provide for judicial oversight. In summary, if, after a one month period from the time of seizure there has been no challenge to the legality of seizure, the goods are automatically condemned as forfeit. If someone challenges the legality of seizure, Border Force must bring condemnation proceedings to obtain an order for condemnation of the goods. By engaging these provisions, the new clause will enable customs officials to tackle the trade in psychoactive substances at the Border by operating a standard and familiar set of powers in relation to psychoactive substances as that already available to them in respect of other goods subject to customs control. Crucially, by applying the CEMA framework of enforcement powers, it will mean customs officials have the requisite lawful authority to intercept and take appropriate enforcement action in respect of psychoactive substances contained in international postal packets.

Exempted substances

At Committee stage of the Bill, Baroness Chisholm signalled in response to amendments tabled by Baroness Meacher and others that the Government was looking again at the definition of medicinal products in Schedule 1 to the Bill to ensure that it was fully aligned with existing medicines legislation. Baroness Chisholm further indicated that we were also examining whether the exemption for investigational medicinal products needs to be expanded to ensure that *bona fide* scientific research is not impeded by the Bill (Official Report, 30 June 2015, column 1965). The Advisory Council on the Misuse of Drugs has touched on these issues in their advice to the Home Secretary on the Bill (see Professor Iversen’s letter of 2 July on the ACMD website). So that we can properly consider the ACMD’s advice, we now propose to defer tabling Government amendments on these issues until the

Commons stages. The House of Lords will, in the usual way, have the opportunity to consider these amendments when the Bill returns from the Commons in the autumn.

I am copying this letter to all Peers who spoke at Committee stage and to Lord Laming. I am also placing a copy in the library of the House and on the Bill page of the Government website.

The Right Honourable Lord Bates