

10 February 2010

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Re: Advisory Council remit & Legal Advice

Dear Professor Iverson,

Welcome to what you already know is a difficult job. Thank you for volunteering and thank you for your courage and wisdom.

This letter intends to communicate the key understandings I have gleaned from five years of legal scholarship on the purpose and objects of the Misuse of Drugs Act 1971 ("the Act") and the key discoveries about the Advisory Council on the Misuse of Drugs ("Council") revealed in Freedom of Information Act 2000 responses from your predecessors, particularly the discovery that since the Act's inception the Council have not taken or received independent legal advice re the purpose and objects of the Act or the Council's remit.

It is my sincere hope that you, the new Council Chair, will procure and make public this desperately needed legal advice. Short of that, I lay out below my interpretation of the Act. In so doing I highlight notable passages of Council scholarship, compare and contrast these with Government declarations and show how they led to the confused dismissal of your predecessor by the Secretary of State for the Home Department ("SSHHD"). I implore you, Professor; only full legal advice will enable you to discharge the Council's duty to protect the public effectively. Please have a current copy of the Act to hand.

a. The Misuse of Drugs Act 1971 - The Preamble & Section 1 in brief

The preamble indicates that the Act's area of competence is public protection re "dangerous or otherwise harmful drugs" i.e. harm minimisation or harm reduction:

"An Act to make new provision with respect to dangerous or otherwise harmful drugs and related matters, and for purposes connected therewith."

Nowhere in the Act are the terms "dangerous or otherwise harmful drugs" defined. The closest I find in the Act is found in s1 which creates the Council and then defines its duty. In s1(2), it can be found that the Act concerns:

"drugs which are being or appear to [the Council] likely to be misused and of which the misuse is having or appears to [the Council] capable of having harmful effects sufficient to constitute a social problem".

Thus, it is for the Council to define what "dangerous or otherwise harmful" means and so too the meaning of "harmful effects sufficient to constitute a social problem". I suggest that any drug use that impacts on the public purse in any way is "sufficient to constitute a social problem". With that quick intro, let us step back for a wide view.

b. The Misuse of Drugs Act 1971 - The Principles of Law

Recognising that the exercise of various activities re "dangerous or otherwise harmful drugs" may result in a variable likelihood of risks and benefits to public welfare and individual autonomy and that these must be consciously balanced, Parliamentarians embodied four principles of law in the Misuse of Drugs Act 1971:

- 1) A determination, read from the Act's preamble, s1(2) and the offences stated in the Act, to employ education, health and police power measures to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via any self-administration of "dangerous or otherwise harmful drugs".
- 2) A determination, read from ss1, 2(5), 7(7) & 31(3) of the Act, to employ an independent Advisory Council to help the Secretary of State exercise the Act's discretionary powers in a rational and objective manner, particularly when making contingent subordinate legislation and interstitial administrative rules and when considering regulatory options.
- 3) A determination, read from s1(3), to employ an independent Advisory Council to consider any matter relating to drug dependence or the misuse of drugs that may be referred to them by any Minister and to advise them as required or requested.
- 4) A determination, read from ss1(2)(a)-(e), to enable persons affected by drugs misuse to obtain advice and secure health services; to promote stakeholder co-operation in dealing with the social problems connected with drugs misuse; to educate the public in the dangers of misusing drugs, and to give publicity to those dangers; and to promote research into any matter which is relevant to prevent drugs misuse or deal with any connected social problem.

Crucially, this first principle of law is neutral and generally applicable, coherent with s31(1)(a) of the Act, and based on outcome, irrespective of the drug, the agent's status, class, or intent, or the circumstances in which the drug-related activities occur.

The second principle of law facilitates Due Process and seeks to ensure that the Act's police power measures are employed proportionate to available objective evidence of the potential risk each drug presents when used and are suitably targeted to achieve the Act's objective.

The third and fourth principles facilitate a coherent social conversation for minimizing harms risked by drug use through the intelligent use of education, health and ministerial services.

c. The Object of Regulation - People not Drugs

The Act concerns itself with public health and safety; however, the Act does not concern itself with absolute safety. Rather the Act seeks to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via any self-administration of "dangerous or otherwise harmful drugs".

The Act targets these "harmful effects" only indirectly through "restrictions" ss3-6, "prohibitions" ss8-9 and/or "regulations" ss7, 10 & 22, on the exercise of enumerated activities re controlled drugs: import/export, production, supply, possession, etc., whilst generating a harm minimisation conversation at all levels of society via education, research and the provision of specific health services.

Accordingly, the Act does not regulate drugs; the Act regulates human action.

d. General Provisions as to Regulations - Section 31(1)-(3)

"31. General provisions as to regulations. (1) Regulations made by the Secretary of State under any provision of this Act - (a) may make different provision in relation to different controlled drugs, different classes of persons, different provisions of this Act or other different cases or circumstances; and (b) may make the opinion, consent or approval of a prescribed authority or of any person authorised in a prescribed manner material for purposes of any provision of the regulations; and (c) may contain such supplementary, incidental and transitional provisions as appear expedient to the Secretary of State. (2) Any power of the Secretary of State to make regulations under this Act shall be exercisable by statutory instrument, which shall be subject to annulment in pursuance of a resolution of either House of Parliament. (3) The Secretary of State shall not make any regulations under this Act except after consultation with the Advisory Council". (My emphasis)

This means the Council is in the driving seat and that the Council's advice or recommendations are not limited to scientific or medical matters re drug harm and classification. Section 31 conjunct ss7 & 22 would allow a completely regulated legal commerce in controlled drugs.

e. Section 7 - Authorization of activities otherwise unlawful under foregoing provisions

Section 7 of the Misuse of Drugs Act 1971 shows Parliament's intent not to implement Article 4(c) of the 1961 UN Single Convention on Narcotic Drugs by the creation of the Act. Only HM Government, the executive, is a "party" to the UN drug Conventions. Only they are bound; and this is a matter of international law not domestic law. The Council, Parliament and the Judiciary are all independent of HM Government.

In creating global "prohibition", Article 4(c) of the 1961 UN Single Convention states:

"The parties shall take such legislative and administrative measures as may be necessary: (a) to give effect to and carry out the provisions of this Convention within their own territories; (b) to co-operate with other States in the execution of the provisions of this Convention; and (c) subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs". (My emphasis)

Parliament did not intend to implement Article 4(c) fully because s7(1) states:

"(1) The Secretary of State may by regulations: (a) except from section 3(1)(a) or (b), 4(1)(a) or (b) or 5(1) of this Act such controlled drugs as may be specified in the regulations; and (b) make such other provision as he thinks fit for the purpose of making it lawful for persons to do things which under any of the following provisions of this Act, that is to say sections 4(1), 5(1) and 6(1), it would otherwise be unlawful for them to do". (My emphasis)

Section 7(2) builds on and qualifies s7(1)(b):

"Without prejudice to the generality of paragraph (b) of subsection (1) above, regulations under that subsection authorising the doing of any such thing as is mentioned in that paragraph may in particular provide for the doing of that thing to be lawful - (a) if it is done under and in accordance with the terms of a licence or other authority issued by the Secretary of State and in compliance with any conditions attached thereto; or (b) if it is done in compliance with such conditions as may be prescribed". (My emphasis)

According to ss7(1) & 7(2) the SSHD "may" by regulation "except" a controlled drug from restrictions on their import/export, production, supply, possession and/or make it "lawful" for anyone, within reason, to produce, supply, possess, or cultivate controlled drugs.

Conjunct s31(1)(a), above, this means the SSHD can do whatever the SSHD wants provided (1) the regulation promotes the purpose and object of the Act, *viz* harm reduction; (2) the Council have been consulted; (3) Parliament does not oppose it; and (4) the regulation is not open to judicial review. This is a very broad power! In legal speak this power is "unfettered".

This means the Act does not mandate "prohibition". The Act does not intend to "limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs". Sections 7(3)-(4) make this distinction.

Section 7(3)-(4):

"(3) Subject to subsection (4) below, the Secretary of State shall so exercise his power to make regulations under subsection (1) above as to secure - (a) that it is not unlawful under section 4(1) of this Act for a doctor, dentist, veterinary practitioner or veterinary surgeon, acting in his capacity as such, to prescribe, administer manufacture, compound or supply a controlled drug, or for a pharmacist or a person lawfully conducting a retail pharmacy business, acting in either case in his capacity as such, to manufacture, compound or supply a controlled drug; and (b) that it is not unlawful under section 5(1) of this Act for a doctor, dentist, veterinary practitioner, veterinary surgeon, pharmacist or person lawfully conducting a retail pharmacy business to have a controlled drug in his possession for the purpose of acting in his capacity as such.

(4) If in the case of any controlled drug the Secretary of State is of the opinion that it is in the public interest - (a) for production, supply and possession of that drug to be either wholly unlawful or unlawful except for purposes of research or other special purposes; or (b) for it to be unlawful for practitioners, pharmacists and persons lawfully conducting retail pharmacy businesses to do in relation to that drug any of the things mentioned in subsection (3) above except under a licence or other authority issued by the Secretary of State, he may by order designate that drug as a drug to which this subsection applies; and while there is in force an order under this subsection designating a controlled drug as one to which this subsection applies, subsection (3) above shall not apply as regards that drug". (My emphasis)

Sections 7(3) & 7(4) closely resemble HM Government's obligation re Article 4(c) of the 1961 Single Convention. Prohibition is therefore a regulatory option not a command.

Please note, the "classes of persons" in terms of s31(1)(a) that ss7(3)-(4) distinguish are professionals who would be unable to carry on their professions without the SSHD making provision for them. This is the reason for the "shall" in s7(3); it is mandatory that the SSHD provide for these professionals work with controlled drugs.

The "may" in other clauses of the Act, such as in ss7(1) & 31(1) are merely permissive, however, the Courts have held that if relevant and sufficient evidence exists, that goes to the jurisdiction of a permissive statutory discretion, then the permissive "may" will be read as a "must" and the Courts will require the decision-maker to exercise the discretion.¹

So, what are the Council's duties? What discretions must the Council exercise?

¹Padfield v Minister for Agriculture, Fisheries & Food [1968] AC 997, 1039; Julius v Lord Bishop of Oxford (1880) LR 5 App Cas 214

f. Section 1(2) - Whether or not involving alteration of the law

"(2) It shall be the duty of the Advisory Council to keep under review the situation in the United Kingdom with respect to drugs which are being or appear to them likely to be misused and of which the misuse is having or appears to them capable of having harmful effects sufficient to constitute a social problem, and to give to any one or more of the Ministers, where either the Council consider it expedient to do so or they are consulted by the Minister or Ministers in question, advice on measures (whether or not involving alteration of the law) which in the opinion of the Council ought to be taken for preventing the misuse of such drugs or dealing with social problems connected with their misuse, and in particular on measures which in the opinion of the Council ought to be taken - (a) for restricting the availability of such drugs or supervising the arrangements for their supply; (b) for enabling persons affected by the misuse of such drugs to obtain proper advice, and for securing the provision of proper facilities and services for the treatment, rehabilitation and after-care of such persons; (c) for promoting co-operation between the various professional and community services which in the opinion of the Council have a part to play in dealing with social problems connected with the misuse of such drugs; (d) for educating the public (and in particular the young) in the dangers of misusing such drugs, and for giving publicity to those dangers; and (e) for promoting research into, or otherwise obtaining information about, any matter which in the opinion of the Council is of relevance for the purpose of preventing the misuse of such drugs or dealing with any social problem connected with their misuse". (My emphasis)

Section 1(2) charges the Council with the "duty" of: (1) keeping the drugs "situation" and relevant law "under review"; (2) giving ministers advice on exercising the Act's powers; and (3) giving ministers advice on any measure or measures thought necessary by the Council to achieve the Act's purpose, "whether or not involving alteration of the law".

Again, the Act's purpose and object is to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem" that may arise via any self-administration of "dangerous or otherwise harmful drugs". The Act contains various mechanisms for doing this. The foremost is the creation of the independent Advisory Council whose "duty" is to give ministers (and the public) advice on any measure or measures thought necessary "whether or not involving alteration of the law".

But what law? The phrase "whether or not involving alteration of the law" does not say "the Act" nor does it say "this law", "this section", or even "these regulations". If, in the opinion of the Council, a clause in the Medicines Act 1968 needs changing, the Council can and should say so; so too with other relevant legislation, including regulations re alcohol and tobacco.

Obviously, the phrase "whether or not involving alteration of the law" applies to the Act. Thus, it is the Council's "duty" to provide advice to the SSHD, and other ministers on regulations, regulatory strategies and regulatory options. This is supported by s31(3) which shows that the Council's advice is not limited to scientific matters, e.g. drug risks, drug harms, drug classification; nor to the regulatory option of "prohibition".

Thus, I believe that Alan Johnson was wrong to censure Dr Nutt for criticising Government policy. It was indeed the entire Council's duty to criticise Government policy, if "the Council consider it expedient to do so". All the more so because the Council is one of three procedural safeguards on arbitrary and unreasonable government; the other two are Parliament, in ss2(5), 7(6) & 31(2), and the Judiciary via judicial review.

This highlights a possible legal challenge against the Council.

g. Pathways to Problems- a Neglect for Duty

On 14 September 2006, the Council published a commanding report, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*, in which the Council declared unequivocally that the artificial divide in drugs policy lacks rationality:

"We believe that policy-makers and the public need to be better informed of the essential singularity in the way in which psychoactive drugs work: acting on specific parts of the brain to produce pleasurable and sought-after effects but with the potential to establish long-lasting changes in the brain, manifested as dependence and other damaging physical and behavioural side-effects. At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol and various other drugs which can be bought and sold legally (subject to various regulations), drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines, some of which are also covered by the Act. The insights summarised [here] indicate that these distinctions are based on historical and cultural factors and lack a consistent and objective basis". (Paragraph 1.13, p22, my emphasis)

A few pages earlier the Council admitted "neglect[ing]" their duty under the Act by discriminating between "harmful psychoactive drugs' on the ground of 'legal status":

"The scientific evidence is now clear that nicotine and alcohol have pharmacological actions similar to other psychoactive drugs. Both cause serious health and social problems and there is growing evidence of very strong links between the use of tobacco, alcohol and other drugs. For the ACMD to **neglect** two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate". (Introduction, p14, my emphasis)

Consistent with this, the Council's first recommendation in *Pathway to Problems* reads:

"As their actions are similar and their harmfulness to individuals and society is no less than that of other psychoactive drugs, tobacco and alcohol should be explicitly included in the terms of reference of the Advisory Council on the Misuse of Drugs". (My emphasis)

I believe that Dr Nutt was on the Prevention Working Group that led this report. To this day, the Government has not replied to this report or its recommendations!

In 2007 I reminded Sir Michael Rawlins that alcohol and tobacco are implicitly included in the Act's remit as the term "drug", as used in the Act, is not synonymous with the phrase "controlled drug" found in s2(1); thus, "drug" means any drug irrespective of its chemical structure, delivery method, legal status and/or purpose of use.

Sir Michael apparently accepted this as page two of the Council's 20 October 2008 contribution to Me Department of Health's 2008 alcohol consultation paper, "Safe, Sensible, Social - consultation on further action", stated the Council's remit and then said:

"This therefore implicitly includes alcohol and tobacco"

Accordingly, an important question for you to consider which has legal ramifications: Why is the Council still neglecting its duty re the so-called "legal highs" alcohol and tobacco? I believe the answers lie in "historical and cultural factors [that] lack a consistent and objective basis" and I have discovered a thought-provoking way of demonstrating this.

h. Reasonable Differentiations Fairly Related to the Object of regulation

With the exception of opium smoking, s9, drug use is not an offence under the Act or at common-law. And whilst the difference between the activities enumerated in ss3-6 of the Act and drug use might seem insignificant, Parliament drew the line here.

Crucially, s37(2) of the Misuse of Drugs Act 1971 states:

"References in this Act to misusing a drug are references to misusing it by taking it; and the reference in the foregoing provision to the taking of a drug is a reference to the taking of it by a human being by way of any form of self-administration, whether or not involving assistance by another". (My emphasis)

Therefore, in ensuring consistency with the Act's object of preventing, minimising or eliminating the "harmful effects sufficient to constitute a social problem" that may arise via "the taking of a drug" differentiations should distinguish drug use from drug misuse.

With respect to drug use, i.e. "self-administration", I believe the Act's principles of law afford three reasonable differentiations fairly related to the object of regulation:

1. A primary differentiation between drug use that is reasonably safe to the agent and does not result in harm to others and drug use that is reasonably safe to the agent and results in harm to others; (e.g. drinking in a pub versus drinking and driving)
2. A secondary differentiation between drug use that is reasonably risky to the agent and does not result in harm to others and drug use that is reasonably risky to the agent and results in harm to others; (e.g. smoking outside versus smoking in enclosed public spaces)

3. A tertiary differentiation between drug use harmful only to the agent following competent informed choice and drug use harmful only to the agent not following competent informed choice. (e.g. smoking by adults versus smoking by minors)

These reasonable differentiations, based on the outcome of drug use, are neutral with respect to the drug, the agent's intent, and the setting in which drug use occurs, and consistent with s31(1)(a) of the Act. Only in this way are autonomous individuals separable from the public interest and education and health measures separable from the need for police power.

Yet, because of historical accident, cultural factors and political vision, the Government only affords these reasonable differentiations to the use of drugs preferred by the majority, alcohol and tobacco. As a result, they are familiar to us. This familiarity has led to irrationally, which in turn has led the SSHD and the council to exclude them from the Act.

This denies equal protection to the public from the "harmful effects sufficient to constitute a social problem" caused by alcohol and tobacco use whilst denying equal liberty to persons who produce, commerce, and use controlled drugs for peaceful, amateur purposes. This is an abuse of power by the SSHD. For persons prosecuted for unauthorised activities with "controlled drugs", this ultimately manifests two inequalities of treatment:

1. a failure to treat like cases alike, viz the unequal application of the Act to persons concerned with equally harmful drugs without a rational and objective basis; and
2. a failure to treat unlike cases differently, viz the failure to regulate persons concerned peaceful activities re controlled drugs differently from persons causing harm.

I believe the source of these two inequalities of treatment lay in Government's interpretation of the Act; and Government's interpretation has become the Council's interpretation.

i. The Government's interpretation of the Act

On 13 October 2006, Government let loose their interpretation in **Cm 6941**, *The Government Reply to the Filth Report from the House of Commons Science and Technology Committee Session 2005-6 HC 1031 Drug classification: making a hash of it?*, where the Government said:

"the classification system under the Misuse of Drugs Act is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning [...]. Legal substances are therefore regulated through other means. [...] However, the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs". (p24, emphasis added)

These six sentences from **Cm 6941** admit that the SSHD administers the Act unequally without a rational and objective basis fairly related to the Act's policy and/or objects. These admissions pare from within the SSHD's three incoherent and/or subjective attempts to justify excluding alcohol and tobacco from the Act:

1. "[T]he Misuse of Drugs Act is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". (Emphasis added)
2. "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is ... based in large part on historical and cultural precedents". (Emphasis added)
3. "A classification system that applies to legal as well as illegal substances would be unacceptable to the vast majority of people who use, for example alcohol, responsibly and would conflict with the existence of a deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Emphasis added)

My analysis of these three justifications follows. This analysis elucidates three errors of law supporting an abuse of power and shows that the subsequent application of the Act in the courts has manifested the two inequalities of treatment under criminal penalty, here repeated:

- 1) a failure to treat like cases alike, *viz* the unequal application of the Act to persons concerned with equally harmful drugs without a rational and objective basis; and
- 2) a failure to treat unlike cases differently, *viz* the failure to regulate persons concerned in peaceful activities re controlled drugs differently from persons causing harm.

It is precisely because of these inequalities, and Government's three justifications for them that the Council needs to procure independent legal advice. It is the Council's duty to interpret properly the Act's powers and to advise Government on how to use them to reduce harm.

a. The First Justification

The first justification the SSHD gives in Cm 6941 for the first inequality of treatment admits an abuse of power. In effect, the SSHD says, "[The Act] is not a suitable mechanism for regulating ... alcohol and tobacco". This is manifestly absurd and shows *inter alia* that the SSHD has failed to give effect to two established and relevant facts:

- 1) Alcohol and tobacco are harmful drugs within the Act's scope as the term "drug", s1(2), is not synonymous with the phrase "controlled drug", s2(1)(a).

2) Alcohol and tobacco misuse is "having harmful effects sufficient to constitute a social problem", s(1)2; or as Government declared in Cm 6941: "alcohol and tobacco account for more health problems and deaths than illicit drugs".

These two facts appear to underpin the ACMD admission in *Pathways to Problems*:

"For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate". (p14, emphasis added)

The SSHD's failure to act on these two facts conjunct the claim that the Act "is not a suitable mechanism for regulating legal substances" unveils two errors of law:

1) The SSHD believes that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes, i.e. "our policy of prohibition [is] reflected in the terms of the Misuse of Drugs Act 1971".²

2) The SSHD claims a power, the SSHD does not possess, to "exempt individuals or classes of individuals from the operation of the law"³ by excluding *de facto* the "dangerous or otherwise harmful drugs" alcohol and tobacco from the Act's control.

Re the first error of law, the SSHD's belief that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes. This belief shows that the SSHD has failed to understand and give effect to two powers:

1) The SSHD's unfettered power to authorise the exercise of any of the enumerated activities re any controlled drug by any class of person for any purpose, i.e. "for doing things . . . it would otherwise be unlawful for them to do", s7(1)(b) & 31 (1)(a); and

2) The SSHD's unfettered power for "excluding in such cases as may be prescribed ... the application of any provision in [the] Act which creates an offence", s22(a)(i).

Re the second error of law, the SSHD's assumed power to exclude alcohol and tobacco from the Act's remit, the Act has jurisdiction to regulate the exercise of the enumerated activities re alcohol and/or tobacco. So, the SSHD's failure to give effect to the two established and relevant facts re alcohol and tobacco thwarts the Act's policy:

"to make ... provision with respect to dangerous or otherwise harmful drugs ... which are being or appear ... likely to be misused and of which the misuse is having or appears ... capable of having harmful effects sufficient to constitute a social problem".⁴

² Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007
www.betterregulation.gov.uk

³ *Pretty v United Kingdom* (2002) 35 EHRR 1 at 77

⁴ *Misuse of Drugs Act 1971* c.38 Preamble conjunct s1(2), emphasis added

b. The Second Justification

The SSHD's second justification, given in Cm 6941, for the first inequality of treatment exposes a third error of law while declaring that the inequality is "based in large part on historical and cultural precedents". It reads:

"The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is ... based in large part on historical and cultural precedents". (Emphasis added)

The third error of law is the SSHD's belief in the "illegality of certain drugs",⁵ i.e. the belief that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal". A decision maker holding this belief does not understand the Act correctly.

A drug is either "controlled" under the Act, s2(1)(a), or it is not. If the Act controls a drug, only the unauthorised exercise of the enumerated activities re that drug is unlawful. All three of the SSHD's justifications for the inequality of treatment contain this error of law.

Without this error the second justification reads:

"The distinction between [. . .] substances is . . . based in large part on historical and cultural precedents". (Emphasis added)

Re the "historical and cultural precedents" at the heart of the "distinction", this and other related phrases found in Cm 6941 are not rational and objective grounds relevant to the Act's policy and/or objects; rather, they are suspect "indicia"⁶ of unjustifiable majoritarian discrimination equally applicable to homophobia, sexism and racism.

And whilst "historical precedent" may have an objective basis, "cultural preference"⁷ can only mean the subjective preference of the majority as the SSHD has not consulted affected minorities and so unfairly treats as irrelevant their cultural drug preferences. Understanding this, the ACMD declared in *Pathways to Problems* that these "historical and cultural" factors re drugs and drug policy "lack a consistent and objective basis".⁸

Similarly, a decade ago, the 1997 United Nations World Drug Report recognized the contradiction inherent in "cultural and historical justifications" re harmful drugs:

"The discussion of regulation has inevitably brought alcohol and tobacco into the heart of the debate and highlighted the apparent inconsistency whereby use-of some dependence creating drugs is legal

⁵ Cm 6941 (2006) page 18

⁶ San Antonio School District v Rodriguez (1973) 411 US 1 at 29 'the traditional indicia of suspectness'

⁷ Cm 6941 (2006) page 15; *Cf. Hansard*, HC Deb, Misuse of Drugs Bill 1970, 16 July 1970 Vol. 803 Col 1801

⁸ ACMD (2006) *Pathways to Problems*, Para 1.13

and of others is illegal. The cultural and historical justifications offered for this separation may not be credible to the principal targets of today's anti-drug messages - the young".⁹ (Emphasis added)

Truly, the SSHD's allegiance to "historical and cultural precedents" lacks credibility because it diverts the Act's measures from the "harmful effects sufficient to constitute a social problem" that arise via alcohol and tobacco misuse. This denies equal protection to the public from the harmful effects caused by alcohol and tobacco misuse whilst denying equal liberty to persons concerned with controlled drugs for peaceful, amateur purposes.

c. The Third Justification

The first clause of the third justification the SSHD gives in Cm 6941 for the first inequality of treatment exposes the second inequality of treatment. It claims:

"A classification system that applies to [alcohol and tobacco] as well as [controlled substances] would be unacceptable to the vast majority of people who use [alcohol and tobacco] responsibly'. (*Mutatis mutandis*, emphasis added)

I believe this justification shows the SSHD fears the political cost of applying a "policy of prohibition"¹⁰ to alcohol and tobacco and thus the SSHD is close-minded to evidence: (1) that peaceful, amateur use of controlled drugs is both possible and commonplace; and (2) that the permanent proscription of production and commerce activities re controlled drugs, bar medical and scientific purposes, is equally "unacceptable" to the millions who are concerned in the peaceful, amateur use of controlled drugs.

On this, the Third Report from the House of Commons Home Affairs Committee Session 2001-2002 HC-3 18 *The Government's Drug Policy: is it working?* stated:

"Around four million people use [controlled drugs] each year. Most of these people do not appear to experience harm from their drug use, nor do they cause harm to others as a result of their habit". (Para 20, emphasis added)

The second clause of the SSHD's third justification for the first inequality of treatment embodies the first error of law, the belief that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes. Essentially, this clause declares that the SSHD's "policy of prohibition":

"conflict[s] with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Emphasis added)

⁹ UNODC (1997) UN World Drug report 1997, p198 www.unodc.org/adhoc/world_drug_report_1997/CH5/

¹⁰ Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

This illuminates a deep, unsettled legal controversy whereby the State facilitates access to certain drug mediated mindstates whilst concomitantly obstructing access to other drug mediated mindstates. This would appear to violate freedom of thought.

Overall, the SSHD's third justification for the first inequality of treatment suggests three general duties re the use of "[drugs] that alter mental functioning":

- 1) a duty to respect an individual's "free and informed choice"¹¹ in the peaceful, amateur use of "[drugs] that alter mental functioning"; and
- 2) a duty to differentiate the peaceful, amateur use of "[drugs] that alter mental functioning" from the use of "[drugs] that alter mental functioning" ... "having harmful effects sufficient to constitute a social problem", s1(2). This is use *versus* misuse; and
- 3) a duty to subject all commerce and production of "[drugs] that alter mental functioning" to reasonable, necessary and proportionate regulations.

Yet, Government only executes these general duties re the drugs preferred by the "vast majority", alcohol and tobacco. Hence, the SSHD fails to regulate persons concerned in peaceful activities re controlled drugs differently from persons causing harm. The SSHD fails to target regulations at the problem: misuse. This creates the second inequality of treatment.

j. So, where do we go from here?

In *Pathways to Problems*, the Council nailed the solution in their Recommendation 11:

"A fully integrated approach should be taken to the development of policies designed to prevent the hazardous use of tobacco, alcohol and other drugs". (Emphasis added)

What would this require?

- 1) The Council needs to agree, under Schedule 1 Section 3 of the Act, a inclusive set of procedural guidelines¹² for risk assessment, particularly the specific criteria prompting the Council to recommend that the SSHD seek to control and classify a drug and proportionately regulate activities re that drug. This helps ensure due process and creates unimpeachable decisions, advice and recommendations based on best practice.

¹¹ Cm 41 (1998) Smoking Kills, at 1.26, "the right to smoke"; Cf. *Wockel v Germany* (1998) 25 EHRR CD156 smoker's "interests"

¹² Via Freedom of Information Act 2000 requests of your predecessors, I established that no such procedural guidelines exist for the Council. Cf. s811 *US Controlled Substances Act* 1970, 21 USC 811; and s4B *NZ Misuse of Drugs Act* 1975

2) The Council and the SSHD need to agree, "whether or not involving alteration of the law", a proportionate regulatory structure similar to the 5 tiers of the Medicines Act 1968. This would allow for:

a) more familiar drugs - those drugs the general population have demonstrated their ability to manage the risks of harm to a substantial degree - to have proportionately less restrictive regulations re production, commerce and possession; and for

b) less familiar drugs - where understanding of the risks of harms and the means of ameliorating them have not reached the majority of the general population - to have progressively and proportionately restrictive regulations re production, commerce and possession.

3) The Council needs to recommend and the SSHD needs to control under s2 alcohol and tobacco.

a) On the other hand if the SSHD and the Council are committed to excluding persons concerned in the production and commerce of alcohol and tobacco from the sections of the Act applied to those concerned with controlled drugs and the SSHD and the Council believes that there is a rational and objective basis for doing so, Due Process, and the Act mandates that the SSHD apply s2 to alcohol and tobacco and then ss7(1), 7(2) & 22(a)(i) as required. Section 22(a) (i) states:

"22. Further powers to make regulations. The Secretary of State may by regulations make provision . . . (a) for excluding in such cases as may be prescribed . . . (i) the application of any provision of this Act which creates an offence". (Emphasis mine)

However, if the SSHD and the Council choose this route, an inevitable question arises, why are those who produce and commerce the dangerous drugs alcohol and tobacco excluded when those concerned with other less harmful controlled drugs are not?

b) Here again, s22(a)(i), like ss7(1) & 7(2), reveals Parliament's intent not to implement Article 4(c) of the 1961 UN Single Convention on Narcotic Drugs by the Act.

Having said all the above, Professor Iverson, I again implore you to procure independent legal advice, and to do so immediately.

And in doing so, please attend closely to ss7(1), 7(2), 22(a)(i) and 31(1)(a). These sections allow for a path out of the intractable mess of current prohibitionist drug policy. These sections allow for a completely regulated drug control system that properly targets the "harmful effects sufficient to constitute a social problem" that may result from the self-administration of drugs.

And all of this is within the power of the Council to recommend - "whether or not involving alteration of the law". Whether the Government of the day bows to the rationality is another matter.

I leave you with a quote by Richard Brunstrom QPM, B.Sc., M Sc., former Chief Constable North Wales Police from his 9 October 2007 document *Drugs Policy: a radical look ahead?*

"If policy on drugs is in future to be pragmatic not moralistic, driven by ethics not dogma, then the current prohibitionist stance will have to be swept away as both unworkable and immoral, to be replaced with an evidenced based unified system (specifically including tobacco and alcohol) aimed at the minimisation of harms to society. [. . .] This logical, rational and consistent approach will inevitably lead to the legalisation and regulation of all harmful drugs".

Thank you for your time! Please share this letter with other Council members. And, if you have any questions please do not hesitate to contact me.

— Fiat Lux!

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