Drug Equality Alliance
Legal Arguments

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Table of Contents

Part One. The Misuse of Drugs Act 1971, c38: Relevant Considerations

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What follows is a synopsis of how the Misuse of Drugs Act is designed to operate, towards the objective of protecting the public from the harmful effects occasioned by the misuse of dangerous or otherwise harmful drugs.

1. Drugs are substances self-administered to alter one's thinking, feeling or behaviour.

2. The Misuse of Drugs Act 1971 c.38 ("the Act") is an Act to make "provision with respect to dangerous or otherwise harmful drugs". (Preamble)

3. The term "misuse", as used in the Act, means misuse by self-administration, s37(2).

4. The term "drug", as used in the Act, is not synonymous with the phrase "controlled drug", s2(1); thus, "drug" means any drug irrespective of its chemical structure, delivery method, legal status and/or purpose of use.

5. The Act does not specify explicit criteria determinative of drug control and classification, s2(2); but, s1(2) implies that a drug is liable to control under s2(2) of the Act if the drug is "being or appear[s] … likely to be misused and [this] misuse is having or appears … capable of having harmful effects sufficient to constitute a social problem". (*NB* emphasis added)

6. The self-administration of controlled drugs is lawful under the Act, bar opium, s9.

7. The Act's object is to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem", s1(2), that may arise via any self-administration of dangerous or otherwise harmful drugs.

8. The Act indirectly targets these "harmful effects" by imposing "restrictions" ss3-6, "prohibitions" ss8-9, and/or "regulations" ss7, 10 & 22, on the exercise of enumerated activities re controlled drugs, e.g. import, export, production, supply, possession, etc.

9. Thus, the Act regulates human action with respect to controlled drugs.

10. Section 1 of the Act creates the Advisory Council on the Misuse of Drugs ("ACMD"), a non-departmental public body, and charges them with: (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, "whether or not involving alteration of the law", thought necessary to achieve the Act's purpose.

11. The SSHD "shall not" recommend the control of a drug under s2(2) "except after consultation with or on the recommendation of the [ACMD]", s2(5).

12. The SSHD "shall not make any regulations under the Act except after consultation with the [ACMD]", s31(3).

13. The SSHD "may make different regulations in relation to different controlled drugs, different classes of persons, different provisions of [the] Act or other different cases or circumstances", s31(1)(a).

14. The SSHD "may by regulations", s7(1)-(2), "except" any controlled drug from the restrictions on the enumerated activities in ss3-5, or make it "lawful for persons to do things" that under ss4-6 "it would otherwise be unlawful for them to do".

15. The SSHD "may by regulations make provision for excluding in such cases as may be prescribed the application of any provision of [the] Act which creates an offence", s22(a)(i).

16. The Act is not fettered to any regulatory regime; however, any regime created under the Act is fettered to the Human Rights Act 1998 and the Rule of Law.

a. The Principles of Law

17. Recognising that the exercise of the enumerated 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".
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> 2) A determination, read from ss1, 2(5), 7(7) & 31(3) of the Act, to employ an independent advisory body 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.
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> 3) A determination, read from s1(3), to employ an independent advisory body 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.
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> 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.

18. 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.

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

20. The third and fourth principles facilitate a coherent social conversation for minimising harm through the intelligent use of education, health and ministerial services.

b. The Object of Regulation

21. 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".[1]

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

23. Accordingly, the Act does not regulate drugs; rather, the Act regulates the person.

c. Reasonable Differentiations Fairly Related to the Object of Regulation

24. 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 the Act and drug use might seem insignificant, the legal line is drawn here.

25. 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". (Emphasis added)

26. 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.

27. With respect to drug use, i.e. "self-administration", the Act's principles of law afford three "reasonable differentiation[s] 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;

[1] *Misuse of Drugs Act* 1971 c.38, s1(2) conjunct Preamble

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;

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.

28. These "reasonable differentiation[s]", 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.

d. Officials Picking and Choosing Only a Few to Whom They Will Apply Legislation

29. Four antecedent conditions, in two complementary pairs, cause the two inequalities of treatment experienced by persons peacefully concerned with controlled drugs:

1) The drugs of their concern are controlled under the Act; so, the Act's police power measures are applied to them;

2) The SSHD refuses to seek the control of alcohol and tobacco under the Act; so, the Act's police power measures do not apply to persons concerned with them.

3) The SSHD does not afford the three "reasonable differentiation[s]" available under the Act to persons concerned in the peaceful, amateur use of controlled drugs.

4) The SSHD refuses to seek the control of alcohol and tobacco under the Act, so the three "reasonable differentiation[s]" are afforded by default to persons concerned with them.

30. There is no rational and objective basis for these inequalities of treatment.

e. So as to Avoid Political Retribution

31. The equality-of-treatment question appeared in the early moments of debate on the Misuse of Drugs Bill 1970 but it remained unanswered until recently. One excellent question was set forth by the then Home Secretary during the Bill's Second Reading:

"One young man said to me, 'You like whisky. I like pot. Why can you have whisky while I cannot smoke pot? They are both mildly addictive, but they both do little harm when taken in small quantities. They both do great harm when taken in large quantities. Why is one prohibited and the other allowed?'".[2]

[2] *Hansard*, HC Deb, Misuse of Drugs Bill 1970, 16 July 1970 Vol. 803 Col. 1754

32. All of a sudden and with reckless precision, the SSHD finally declared the political answer: 'applying "our policy of prohibition" to alcohol and tobacco "would be unacceptable to the vast majority of those who use [alcohol and tobacco] responsibly"'.[3]

f. Arbitrary and Unreasonable Government

33. The four antecedent conditions, expressed in paragraph 29, are rooted in five critical factors:

> 1) The Parliament has neither stated an explicit policy nor fixed any determining criteria[4] to guide the SSHD's decision-making re drug control and classification under s2(5) of the Act; however, the ACMD exists to advise the SSHD on these matters.
>
> 2) The SSHD has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]"[5] and that therefore the Act permits only the medical and/or scientific use of controlled drugs.
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> 3) Until most recently, the ACMD held a longstanding erroneous belief that the Act permits only the medical and/or scientific use of controlled drugs.
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> 4) A significant portion of the electorate use alcohol and/or tobacco.
>
> 5) Proscribing the enumerated activities re alcohol and/or tobacco would deny all meaningful use of alcohol and tobacco whilst costing votes and tax revenue.

34. Re the first factor, whilst the ACMD can urge the SSHD to exercise the s2(5) power, the SSHD is not required to follow the ACMD's recommendations or advice. This leaves the matter of exercising the s2(5) power to the SSHD without standard or rule to be dealt with as the SSHD thinks fit, i.e. fettered only by *Wednesbury*,[6] *Padfield* [7] and the *ultra vires* doctrine.

35. This lack of explicit standard or rule re the SSHD's decision-making under the Act allows the denial of Due Process to those concerned in the peaceful, amateur use of controlled drugs to take root via the first pair of antecedent conditions articulated in paragraph 29. The remaining four critical factors offer a plausible explanation for the denial of Due Process under the first critical factor and the second pair of antecedent conditions; nevertheless, Parliament presumably did not intend to authorise abuses.

36. Accordingly, the decisions manifesting the inequalities of treatment under the Act must be anxiously scrutinised for their legality, rationality and fairness.

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[3] Home Office (2007) *Response to Better Regulation Executive* 27 September 2007 conjunct Cm 6941 (2006) page 24
[4] *Cf.* s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975
[5] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[6] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223
[7] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030

Part Two. A Timeline of Evidence Exposing the Artificial Divide

The following précis of the new evidence is in chronological order; but it is first placed in context.

a. International Background

1. In 1994, in the Opening Statement to the 37th Session of the Commission on Narcotic Drugs, the Executive Director of the UN International Drug Control Program said:

> "[It is] increasingly difficult to justify the continued distinction among substances solely according to their legal status and social acceptability. Insofar as nicotine-addiction, alcoholism, and the abuse of solvents and inhalants may represent greater threats to health than the abuse of some substances presently under international control, pragmatism would lead to the conclusion that pursuing disparate strategies to minimise their impact is ultimately artificial, irrational and uneconomical". (Emphasis added)

2. In 1997, under the heading "The Regulation-Legalization Debate", the United Nations World Drug Report articulated the contradiction inherent in "cultural and historical justifications" re dangerous drugs legislation:

> "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 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". (Chapter 5, page 198, emphasis added)

b. Domestic Background

3. On 22 May 2002, in concluding a wide-ranging inquiry into HM Government's drug policy,
the Third Report from the House of Commons Home Affairs Committee Session 2001-2002 HC-318 *The Government's Drug Policy: is it working?* declared:

> "Legal drugs, such as tobacco and alcohol, are responsible for far greater damage both to individual health and to the social fabric in general than illegal ones".

The 2002 Home Affairs Committee report HC-318 continued:

> "Substance misuse is a continuum perhaps artificially divided into legal and illegal activity". (Introduction, paragraphs 8 & 9, emphasis added)

4. On 19 January 2006, the Secretary of State for the Home Department promised a public consultation suggesting a review of the Act's drug classification system:

> "The more I have considered these matters, the more concerned I have become about the limitations of our current system. Decisions on classification often address different or conflicting purposes and too often send strong but confused signals to users and others about the harms and consequences of using a particular drug and there is often disagreement over the meaning of different classifications. […] I will in the next few weeks publish a consultation paper with suggestions for a review of the drug classification system, on the basis of which I will make proposals in due course. […] one needs to proceed on the basis of evidence […] I want to emphasise to the House the importance of evidence and research on this subject". (Hansard, HC Deb, 19 Jan 2006, Col 983, emphasis added)

c. The Principal New Evidence

5. On 31 July 2006, after rigorously investigating the production and use of scientific advice and evidence in making drug control and classification decisions under s2 of the Act, the Fifth Report of the House of Commons Science and Technology Committee Session 2005-06 HC 1031 *Drug classification: making a hash of it?* declared:

> "With respect to the ABC classification system, we have identified significant anomalies in the classification of individual drugs and a regrettable lack of consistency in the rationale used to make classification decisions. […] We have found no convincing evidence for the deterrent effect, which is widely seen as underpinning the Government's classification policy. […W]e have concluded that the current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm. […] In light of the serious failings of the ABC classification system that we have identified, we urge the Home Secretary to honour his predecessor's commitment to review the current system". (Summary, emphasis added)

The 2006 Science and Technology Committee report HC 1031 finished thusly:

> "We conclude that, in respect of this case study, the Government has largely failed to meet its commitment to evidence based policy making". (Paragraph 108, emphasis added)

6. On 14 September 2006, the Advisory Council on the Misuse of Drugs ("ACMD") 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 ACMD 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 similarity 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, emphasis added)

A few pages earlier the ACMD had 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, emphasis added)

Consistent with this, the ACMD's first recommendation in *Pathways 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 within the terms of reference of the Advisory Council on the Misuse of Drugs".

7. Less than a month later, on 13 October 2006, in Cm 6941, The Government Reply to the Fifth Report from the House of Commons Science and Technology Committee Session 2005-06 HC 1031 *Drug classification: making a hash of it?*, the Home Secretary unconsciously revealed three errors of law supporting the abuse whilst attempting to defend the inequality of treatment on subjective and/or incoherent grounds not rationally connected to the Act's policy and/or objects:

> "Government [believes] the classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. However, it should not be imputed that Government takes the harms caused by these drugs any less seriously. […] 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". (Para 7 & p24, emphasis added)

8. Then, on 22 March 2007, while defending the decision "not to pursue a review of the classification system at this time", the Home Secretary admitted the inequality of treatment again whilst attempting to justify it on subjective and/or incoherent grounds:

> "The Government's policy is to regulate drugs which are classified as illegal through the 1971 Act and to regulate the use of alcohol and tobacco separately. This policy sensibly recognises that alcohol and tobacco do pose health risks and can have anti-social effects, but recognises also that consumption of alcohol and tobacco is

historically embedded in society and that responsible use of alcohol and tobacco is both possible and commonplace". (Emphasis added)

9. Two days later, on 24 March 2007, a paper by Professor David Nutt, the current ACMD Chairman, and Professor Colin Blakemore, the former Chief Executive of the Medical Research Council, appeared in *The Lancet* entitled *Development of a rational scale to assess the harm of drugs of potential misuse*. This paper describes the first scientific ranking of the relative harmfulness of the most commonly used drugs and fatally undermines Government's subjective rational for their arbitrary administration of the Act's classification system.

> "The current classification system has evolved in an unsystematic way from somewhat arbitrary foundations with seemingly little scientific basis. […] Our findings raise questions about the validity of the current Misuse of Drugs Act classification, despite the fact that it is nominally based on an assessment of risk to users and society. The discrepancies between our findings and current classifications are especially striking in relation to psychedelic type drugs. Our results also emphasise that the exclusion of alcohol and tobacco from the Misuse of Drugs Act is, from a scientific perspective, arbitrary. We saw no clear distinction between socially acceptable and illicit substances. The fact that the two most widely used legal drugs lie in the upper half of the ranking of harm is surely important information that should be taken into account in public debate on illegal drug use. Discussions based on a formal assessment of harm rather than on prejudice and assumptions might help society to engage in a more rational debate about the relative risks and harms of drugs". (The Lancet 369: 1047-1053, emphasis added)

10. Finally, on 27 September 2007, the Home Office reiterated verbatim the Home Secretary's statement of 22 March 2007 re Government's policy of "regulat[ing] the use of alcohol and tobacco separately" in their *Response to the Better Regulation Executive re Misuse of Drugs Act Proposal*.

Part Three. The Misuse of Drugs Act 1971 and Cm 6941: Three Errors of Law

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1. A critical analysis of the Cm 6941 will show that the SSHD has abused the 1971 Misuse of Drugs Act's powers on the grounds of illegality, irrationality and unfairness and that the subsequent application of the Act to individuals manifests unequal treatment under criminal penalty. The analysis starts with reconstructing the principal new evidence:

> 1) The 31 July 2006 Fifth Report of the Science and Technology Committee Drug classification: making a hash of it? found "a regrettable lack of consistency in the rationale used to make classification decisions". Thus, re drug classification and control, they said, "Government has largely failed to meet its commitment to evidence based policy making". The Committee concluded, "[T]he current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm".
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> 2) The 14 September 2006 ACMD report *Pathways to Problems* stated unequivocally that due to "historical and cultural factors [that] lack a consistent and objective basis", the risk management distinctions the SSHD makes whilst administering the Act fail to target the actual risks "harmful psychoactive drugs" present to public welfare and individual autonomy. The ACMD said this had led to "neglect" for the Act's policy and objects and that the ACMD share responsibility as the principal advisors to the SSHD re dangerous or otherwise harmful drugs. Thus, they called for an integrated approach and said that alcohol and tobacco should be "explicitly included" in their remit.
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> 3) The 13 October 2006 *Government reply to Drug classification: making a hash of it?*, Cm 6941, admits that the Act is administered unequally without a rational and objective basis fairly related to the Act's policy and/or objects. This admission is "scarcely veiled"[8] within the SSHD's three incoherent and/or subjective attempts to justify excluding alcohol and tobacco from the Act:
>
> > a) "[T]he Misuse of Drugs Act is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". (Emphasis added)
> >
> > b) "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)
> >
> > c) "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". (*Mutatis mutandis*, emphasis added)

[8] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1061

2. A critical analysis of these three justifications follows. This analysis elucidates three errors of law supporting the abuse of power and shows that the subsequent application of the Act to him has manifested two inequalities of treatment under criminal penalty:

> 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.

a. The First Justification

3. 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".

4. 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)

5. 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".[9]
>
> 2) The SSHD claims a power, the SSHD does not possess, to "exempt individuals or classes of individuals from the operation of the law"[10] by excluding *de facto* the "dangerous or otherwise harmful drugs" alcohol and tobacco from the Act's control.

6. 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:

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[9] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[10] *Pretty v United Kingdom* (2002) 35 EHRR 1 at 77

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).

7. 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".[11]

8. These two errors show the SSHD's failure to understand the Act's beautifully evolutive and dynamic framework and its suitability to all dangerous drugs, persons and circumstances.

b. The Second Justification

9. The second justification the SSHD gives 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)

10. The third error of law is the SSHD's belief in the "illegality of certain drugs",[12] 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.

11. 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.

12. Without this error the second justification reads:

> "The distinction between […] 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)

[11] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added
[12] Cm 6941 (2006) page 18

13. 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"[13] of unjustifiable majoritarian discrimination equally applicable to homophobia, sexism and racism.

14. And whilst "historical precedent" may have an objective basis, "cultural preference"[14] 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".[15]

15. 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 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".[16] (Emphasis added)

16. 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 in the exercise of enumerated activities re controlled drugs for peaceful, amateur purposes. This is irrational, unfair and it thwarts the Act's policy.

c. The Third Justification

17. 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)

18. This justification shows the SSHD fears the political cost of applying a "policy of prohibition"[17] to alcohol and tobacco and thus the SSHD has "shut his eyes" to evidence:

> 1) that peaceful, amateur use of controlled drugs is both possible and commonplace; and

[13] *San Antonio School District v Rodriguez* (1973) 411 US 1 at 29 'the traditional indicia of suspectness'
[14] Cm 6941 (2006) page 15; *Cf. Hansard*, HC Deb, Misuse of Drugs Bill 1970, 16 July 1970 Vol. 803 Col. 1801
[15] ACMD (2006) *Pathways to Problems*, paragraph 1.13
[16] UNODC (1997) UN World Drug Report 1997, p198, www.unodc.org/adhoc/world_drug_report_1997/CH5/
[17] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk

2) that the permanent proscription of the enumerated 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.

19. On this, the Third Report from the House of Commons Home Affairs Committee Session 2001-2002 HC-318 *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)

20. 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)

21. This illuminates the deep, unsettled legal controversy herein whereby the State facilitates access to certain drug mediated mindstates whilst concomitantly obstructing access to other drug mediated mindstates. This violates freedom of thought, aka *Cognitive Liberty*.

22. 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"[18] 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), i.e. 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.

23. 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. This is the second inequality of treatment.

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

Part Four. The Common Law Argument

In this section, the Drug Equality Alliance presents a set of legal arguments arising from the previous three sections.

1. The Drug Equality Alliance asserts that the Misuse of Drugs Act 1971 c.38 is a generally applicable Act of Parliament administered unequally by the Home Secretary because of errors of law, irrationality and unfairness. The subsequent application of the Act to individuals violates their common law right to equality of treatment and deprives them of liberty, security and property without Due Process.

2. This gives rise to 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 in peaceful activities re controlled drugs differently from persons causing harm.

3. We characterise this unequal treatment as a majoritarian abuse of executive power, thus we assert that individuals subjected to it are entitled to the protection of the Courts.

a. Due Process, the Rule of Law and Equality of Treatment

4. Courts uphold the Rule of Law through the doctrine of Due Process, which respectfully "contemplates a civil society under equal and just laws"[19] that necessarily determine the scope of Government power and the manner of its exercise. By fearlessly administering Due Process, the Courts protect individuals against the "oppressions and usurpations" of Government power in executing law's rules.

5. At the heart of Due Process, equality of treatment means that the "laws of the land should apply equally to all, save to the extent that objective differences justify differentiation".[20] In *Matadeen v Pointu* [1999] AC 98 at 109, Lord Hoffmann referred to "equality of treatment" as "one of the building blocks of democracy" stating that:

> "…treating like cases alike and unlike cases differently is a general axiom of rational behaviour".

6. In his well-known judgment, *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112, Supreme Court Justice Jackson described the equality-of-treatment doctrine and how to apply it to protect the few against majoritarian abuses of power:

[19] Lord Steyn (2002) Democracy Through Law, Robin Cooke Lecture, Victoria University of Wellington, September 2002
[20] Lord Bingham of Cornhill KG (2006) The Rule of Law, Sir David Williams Lecture, House of Lords, November 2006

> "Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. […T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation".

7. This salutary doctrine encapsulates both the problem and the remedy. For this reason alone, the Drug Equality Alliance develops its arguments through that lens.

b. The Principles of Law

8. Recognising that the exercise of the enumerated 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 body 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 body 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.

9. 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.

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

11. The third and fourth principles facilitate a coherent social conversation for minimising harm through the intelligent use of education, health and ministerial services.

c. The Object of Regulation

12. 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".[21]

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

14. Accordingly, the Act does not regulate drugs; rather, the Act regulates the person.

d. Reasonable Differentiations Fairly Related to the Object of Regulation

15. 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 the Act and drug use might seem insignificant, the legal line is drawn here.

16. 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". (Emphasis added)

17. 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.

18. With respect to drug use, i.e. "self-administration", the Act's principles of law afford three "reasonable differentiation[s] 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;

[21] Misuse of Drugs Act 1971 c.38, s1(2) conjunct Preamble

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;

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.

19. These "reasonable differentiation[s]", 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.

e. Officials Picking and Choosing Only a Few to Whom They Will Apply Legislation

20. Four antecedent conditions, in two complementary pairs, cause the two inequalities of treatment experienced persons prosecuted under the government's current drugs regime:

1) The drugs of their concern are controlled under the Act; so, the Act's police power measures are applied to them;

2) The Home Secretary refuses to seek the control of alcohol and tobacco under the Act; so, the Act's police power measures do not apply to persons concerned with them.

3) The Home Secretary does not afford the three "reasonable differentiation[s]" available under the Act to persons concerned in the peaceful, amateur use of controlled drugs.

4) The Home Secretary refuses to seek the control of alcohol and tobacco under the Act, so the three "reasonable differentiation[s]" are afforded by default to persons concerned with them.

21. There is no rational and objective basis for these inequalities of treatment.

f. So as to Avoid Political Retribution

22. The equality-of-treatment question appeared in the early moments of debate on the Misuse of Drugs Bill 1970 but it remained unanswered until recently. One excellent question was set forth by the then Home Secretary during the Bill's Second Reading:

"One young man said to me, 'You like whisky. I like pot. Why can you have whisky while I cannot smoke pot? They are both mildly addictive, but they both do little harm

when taken in small quantities. They both do great harm when taken in large quantities. Why is one prohibited and the other allowed?'".[22]

23. All of a sudden and with reckless precision, the Home Secretary finally declared the political answer: 'applying "our policy of prohibition" to alcohol and tobacco "would be unacceptable to the vast majority of those who use [alcohol and tobacco] responsibly"'.[23]

g. Arbitrary and Unreasonable Government

24. The four antecedent conditions, expressed in paragraph 99, are rooted in five critical factors:

> 1) The Parliament has neither stated an explicit policy nor fixed any determining criteria[24] to guide the Home Secretary's decision-making re drug control and classification under s2(5) of the Act; however, the ACMD exists to advise the Home Secretary on these matters.
>
> 2) The Home Secretary has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]"[25] and that therefore the Act permits only the medical and/or scientific use of controlled drugs.
>
> 3) Until most recently, the ACMD held a longstanding erroneous belief that the Act permits only the medical and/or scientific use of controlled drugs.[26]
>
> 4) A significant portion of the electorate use alcohol and/or tobacco.
>
> 5) Proscribing the enumerated activities re alcohol and/or tobacco would deny all meaningful use of alcohol and tobacco whilst costing votes and tax revenue.

25. Re the first factor, whilst the ACMD can urge the Home Secretary to exercise the s2(5) power, the Home Secretary is not required to follow the ACMD's recommendations or advice. This leaves the matter of exercising the s2(5) power to the Home Secretary without standard or rule to be dealt with as the Home Secretary thinks fit, i.e. fettered only by *Wednesbury*[27], *Padfield* and the *ultra vires* doctrine.

26. This lack of explicit standard or rule re the Home Secretary's decision-making under the Act allows the denial of Due Process to take root via the first pair of antecedent conditions articulated in paragraph 20 above. The remaining four critical factors offer a plausible explanation for the denial of Due Process under the first critical factor and the second pair of antecedent conditions; nevertheless, Parliament presumably did not intend to authorise abuses.

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[22] *Hansard*, HC Deb, *Misuse of Drugs Bill* 1970, 16 July 1970 Vol. 803 Col. 1754
[23] Home Office (2007) *Response to Better Regulation Executive* 27 September 2007 *conjunct* Cm 6941 (2006) page 24
[24] Cf. s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975
[25] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[26] See *Freedom of Information Act* 2000 replies from ACMD dated 14 August 2007 at para 2; 13 November 2007 at para 1; and 5 March 2008 at para 1
[27] *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223

27. Accordingly, the decisions manifesting the inequalities of treatment under the Act must be anxiously scrutinised for their legality, rationality and fairness; but first, a few preliminaries.

h. Human Dignity and Judicial Deference to Government Treaty and Policy

28. In R *(Carson) v SS for Work and Pensions* [2005] UKHL 37 at 49, Lord Walker of Gestingthorpe stated that inequality of treatment or:

> "discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law".

29. Consequently, the requirement that "the law, or administrative action under the law, should treat everyone equally unless there [is] a sufficient objective justification for not doing so"[28] is a fundamental right because it is the foremost way to avoid disregard for human dignity.

30. Hence, the Courts have said that legislation is not capable of abrogating fundamental rights unless the statute explicitly declares so in unambiguous wording. In *R v SSHD, ex p Simms* [1999] UKHL 33, Lord Hoffman stated:

> "Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. […] But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. […] In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual".

31. And since the sections of the Act at issue are neutral, generally applicable and do not indicate inequality of treatment is intended, the Courts must assume Parliament did not intend for the Home Secretary to override the basic right of individuals to equality of treatment, via abuse of the Act's discretionary powers.

32. Further, because Parliament has not incorporated the UN Conventions directly, the Act and its discretionary powers remain unfettered to the UN drug control regime. Even so, previous Courts have dismissed rights-based challenges to the Act by relying on "inferences"[29] drawn from HM Government's subscription to the UN Drugs Conventions.

33. But, as Lord Templeman said in *JH Rayner (Mincing Lane) Ltd v DTT* [1990] 2 AC 418 (HL) at 476 & 500, this is the wrong approach:

> "The Government may negotiate, conclude, construe, observe, breach, repudiate or terminate a Treaty. Parliament may alter the laws of the United Kingdom. The courts

[28] *Matadeen v Pointu* [1999] AC 98 at para 7 (Emphasis added)

[29] Cf. *R v Taylor* [2001] EWCA Crim 2263 at 14 & 31; *R v Hardison* [2006] EWCA Crim 1502 at 9 & 10

must enforce those laws; judges have no power to grant specific performance of a Treaty … or to invent laws or misconstrue legislation in order to enforce a Treaty … So far as individuals are concerned … it is outside the purview of the court … because, as a source of rights and obligations, it is irrelevant". (Emphasis added)

34. For clarity, the Drug Equality Alliance challenges the *ultra vires* administration of the Act and the inequality of treatment created by the subsequent application of that abused Act to individuals, but not the Act's policy and/or objects; accordingly, judicial deference to Government's treaty obligations and/or the Home Secretary's fundamentally unequal "policy of prohibition"[30] would be inexcusable.

35. We therefore seek rulings on whether the Home Secretary has abused the Act's powers, and if so, declarations by the Courts that the convictions of individuals under the government's drugs regime are unsafe and the release of prisoners ordered.

A. Illegality

36. The new evidence shows that the inequalities of treatment are caused by: (1) the Home Secretary's failure to correctly understand the Act and its regulation of the Home Secretary's decision-making powers; and (2) the Home Secretary's failure to give effect to the Act, particularly where established and relevant facts make the permissive exercise of the Home Secretary's s2(5) discretion a duty.[31]

37. In the *GCHQ* case, *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401, Lord Diplock formulated a classic statement on illegality as a ground of judicial review:

> "By 'illegality' … I mean the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable".

38. In their critical analysis of Cm 6941 conjunct the Act, the Drug Equality Alliance identifies three errors of law; each is a failure by the Home Secretary to understand the Act correctly and each contribute in their own way to the Home Secretary's failure to give effect to the Act's policy:

> 1) The Home Secretary believes that the Act permanently proscribes the enumerated activities re a controlled drug, bar medical and scientific purposes, i.e. "our policy of prohibition [is] reflected in the terms of the [Act]".[32]
>
> 2) The Home Secretary claims a power the Home Secretary does not possess, to "exempt individuals or classes of individuals from the operation of the law"[33] by

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

[31] Cf. *E & R v SSHD* [2004] EWCA Civ 49; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034

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

[33] *Pretty v United Kingdom* (2002) 35 EHRR 1 at 77

excluding *de facto* the "dangerous or otherwise harmful drugs" alcohol and tobacco from the Act's control.

3) The Home Secretary believes in the "illegality of certain drugs",[34] i.e. that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal".

i. The First Error of Law

39. The Home Secretary's first error of law exists in the belief that the Act permanently proscribes the enumerated activities re controlled drugs, bar medical and scientific purposes. Hence, the Home Secretary wrongly declared in the Home Office *Response to the Better Regulation Executive* that:

"[The Act] focuses on prohibiting illicit and harmful drugs".[35]

40. This declaration shows that the Home Secretary has failed to understand and give effect to:

1) The Home Secretary'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 Home Secretary'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).

41. These two powers contradict the Home Secretary's "policy of prohibition" and show that the Act does not intend to "limit exclusively to medical and scientific purposes the production, manufacture, export, and import, distribution of, trade in, use and possession of drugs".[36]

ii. The Second Error of Law

42. The Home Secretary's second error of law concerns the assumed power to exclude alcohol, tobacco and persons concerned with them from the Act's remit. But implicit in the Act's policy is the jurisdiction to regulate the exercise of the enumerated activities re alcohol and/or tobacco:

"An Act 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

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[34] Cm 6941 (2006) page 18

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

[36] Article 4(c) of the *UN Single Convention on Narcotic Drugs* 1961

having or appears … capable of having harmful effects sufficient to constitute a social problem".[37]

43. The second error of law thus elucidates the Home Secretary's failure or refusal to give effect via s2(5) to two established and relevant facts:

> 1) Alcohol and tobacco are drugs within the Act's remit 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 the Home Secretary declared in Cm 6941: "alcohol and tobacco account for more health problems and deaths than illicit drugs".

44. Combined with the first error of law, the Home Secretary's belief that the "policy of prohibition [is] reflected in the terms of the [Act]",[38] the Home Secretary's failure or refusal to control and classify alcohol and tobacco is understandable; it would mean "prohibition"; and knowing this is "unacceptable to the vast majority", the Home Secretary excludes alcohol, tobacco and persons concerned with them from the Act's remit whilst branding the Act "not a suitable mechanism for regulating legal substances".[39] However, this reveals a third error of law.

iii. The Third Error of Law

45. All three of the Home Secretary's justifications in Cm 6941 for the inequalities of treatment contain the third error of law, the Home Secretary's belief in the "illegality of certain drugs";[40] i.e. that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal".

46. 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 enumerated activities re that drug is unlawful.

47. This means that the Act regulates persons not drugs; and, therefore it was nonsensical for the Home Secretary to justify the exclusion of alcohol and tobacco from the Act because the Act "is not a suitable mechanism for regulating legal substances such as alcohol and tobacco".[41]

48. Nevertheless, if the Home Secretary is committed to excluding persons concerned in the exercise of any of the enumerated activities re alcohol and tobacco from the sections of the Act applied to individuals exercising identical activities with 'controlled' drugs, and the Home Secretary believes that there is a rational and objective basis for doing so, Due Process and *Padfield* mandate the application of s2 to alcohol and tobacco and then the application of s22(a)(i) as required. Section 22(a)(i) states:

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

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

[39] Cm 6941 (2006) page 24

[40] Cm 6941 (2006) page 18

[41] Cm 6941 (2006) page 24

"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".

B. Irrationality

49. A critical examination of Cm 6941 conjunct the Act shows that the Home Secretary's adherence to the three errors of law has caused irrational decision-making under the Act and that these decisions are responsible for the inequalities of treatment experienced by persons who exercise the enumerated activities re controlled drugs.

50. In the GCHQ case, Lord Diplock stated that irrationality "applies to a decision which is so outrageous in its defiance of logic or of acceptable moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".[42]

51. Accordingly, the Drug Equality Alliance asserts that the Home Secretary has acted irrationally by:

1) fettering decision-making to United Nations' drug policy;

2) acting inconsistently with respect to persons similarly situated;

3) considering irrelevant factors and disregarding relevant factors;

4) pursuing an improper purpose; and by

5) abusing a dominant position.

i. Fettered Discretion – A Policy of Prohibition

52. Rather than promote the Act's policy and objects, as required by *Padfield*, Government has fettered the Home Secretary to the UN drug control regime by treaties based in large part on the historical precedents and cultural preferences of the 1950s industrialised west.

53. But, in *Redereaktiebolaget Amphitrite v The King* [1921] 3 KB 500 at 503, it was said:

"…it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State". (Emphasis added)

54. Yet, in Cm 6941, the Home Secretary relied on the UN Conventions to justify the overly-rigid and predetermined "policy of prohibition":

"Government is not free to legislate entirely as it pleases. It must do so within the parameters set by the [UN drug] Conventions". (p5, emphasis added)

[42] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410

55. The Home Secretary's 27 September 2007 *Response to the Better Regulation Executive* echoes this obligatory language:

> "The 1971 Act transposes our obligations under the UN Drugs Conventions into domestic law". (Emphasis added)

56. These two sentences indicate that HM Government has fettered the Home Secretary's "freedom of action" under the Act to the unincorporated UN Conventions, effectively surrendering the Act's policy to an unaccountable international body.

57. Accordingly, the Home Secretary's "policy of prohibition" is irrational, gives rise to the inequalities of treatment, thwarts the Act's policy and objects and cannot be lawful.[43]

ii. Administrative Consistency – Manifest Absurdity

58. Excluding alcohol and tobacco denies equal protection to persons affected by alcohol and tobacco misuse and denies equal rights to persons who exercise the enumerated activities re controlled drugs. This is manifestly absurd and inconsistent.

59. No sensible person would exclude the two drugs, alcohol and tobacco, that the Home Secretary declared "account for more health problems and deaths than [controlled] drugs"[44] from the scope of an Act designed to "make provision for dangerous or otherwise harmful drugs".

60. Not only is it inconsistent with the Act's policy, this exclusion of alcohol and tobacco by the Home Secretary is "so outrageous in its defiance of logic"[45] because it conflicts with the general principle at the heart of this case: like cases should be treated alike.[46]

61. Thus, in a blatant denial of logic embodying the third error of law, the Home Secretary made a most inconsistent statement:

> "[T]he classification system under the Misuse of Drugs Act 1971 is not a suitable mechanism for regulating legal substances such as alcohol and tobacco. However, it should not be imputed that Government takes the harms caused by these drugs any less seriously".[47] (Emphasis added)

62. The Drug Equality Alliance asserts that the Home Secretary obviously takes the harms caused by alcohol and tobacco misuse significantly less seriously as persons producing alcohol and tobacco are not subject to punitive criminal sanctions, whilst persons who exercise the enumerated activities re controlled drugs are.

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[43] Cf. *Ellis v Dubowski* [1921] 3 KB 621; *R v SSHD, ex p Venables* [1998] AC 407
[44] Cm 6941 (2006) page 24
[45] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410
[46] *Matadeen v Pointu* [1999] AC 98 at 109
[47] Cm 6941 (2006) page 4, paragraph 7

iii. Relevant/Irrelevant Considerations – Unacceptability and Cultural Preference

63. The Home Secretary's third justification in Cm 6941 for the first inequality of treatment, i.e. failing to give equal effect to s2(5) re alcohol and tobacco, is *Wednesbury* irrational:

> "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, for example alcohol [and tobacco], responsibly and would conflict with the existence of a deeply embedded historical tradition and tolerance of consumption of [some] substances that alter mental functioning". (*Mutatis mutandis*, emphasis added)

64. In *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223, Lord Greene said that:

> "If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters". (Emphasis added)

65. Accordingly, it is submitted that "unacceptab[ility]", "responsible use", "historical tradition", "political vision, historical precedence, cultural preference",[48] etc., are not germane to the Home Secretary's exercise of the s2(5) power re alcohol and tobacco control.

iv. Improper Purpose/Motive – Electoral Success

66. The Drug Equality Alliance asserts that in appealing to the "acceptability" of the "vast majority who use [alcohol and tobacco] responsibly" by not seeking to control these drugs under s2 of the Act, i.e. not applying the "policy of prohibition" to alcohol and tobacco, the Home Secretary creates the first inequality of treatment whilst acting for a purely political motive.

67. This improper motive was summed up precisely in *Railway Express Agency v New York*:

> "[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected".[49]

68. Consequently, the Courts hold that a power granted to a decision-maker for one purpose must not be exercised for a different purpose, here, electoral success.

69. The Act grants the Home Secretary the s2(5) power so that the exercise of certain enumerated activities re dangerous or otherwise harmful drugs, "which are being or appear …

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[48] Cm 6941 (2006) pages 15 & 24

[49] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112

likely to be misused and of which the misuse is having or appears … capable of having harmful effects sufficient to constitute a social problem", can be brought under the Act's control.[50] If these implicit criteria found in s1(2) are satisfied, the Home Secretary has a duty to control the drug.[51]

70. So, in failing to exercise the s2(5) power re alcohol and tobacco because the Home Secretary believes that "[the Act] focuses on prohibiting illicit and harmful drugs",[52] not only has the Home Secretary created the inequality of treatment, the Home Secretary has acted for an improper purpose.

v. Abuse of Discretion – Abuse of a Dominant Position

71. The Home Secretary's total inactivity re alcohol and tobacco, creates the first inequality of treatment, and amounts to an abuse of the s2(5) discretion.[53] This abuse occurs because:

1) Parliament has neither stated an explicit policy nor fixed any determining criteria[54] to guide the Home Secretary re drug control and classification under s2(5) of the Act.

2) The Home Secretary has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]" and that therefore the Act permits only the medical and/or scientific use of controlled drugs.

3) The ACMD held a longstanding erroneous belief that the Act permits only the medical and/or scientific use of controlled drugs.

4) A significant portion of the electorate use alcohol and/or tobacco.

5) Proscribing the enumerated activities re alcohol and/or tobacco would deny all meaningful use of alcohol and tobacco whilst costing votes and tax revenue.

72. On these easily ascertainable facts, the Home Secretary's "partial and unequal"[55] exercise of the s2(5) power is a majoritarian abuse of executive discretionary power. This is inherently unfair.

C. Unfairness

73. A severe substantive law like the Misuse of Drugs Act 1971 is acceptable if administered fairly and impartially. Accordingly, "the rule of law enforces minimum standards of fairness, both substantive and procedural".[56]58

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[50] *Misuse of Drugs Act* 1971 c.38, Preamble conjunct s1(2), emphasis added
[51] *R v Tithe Commissioners* (1849) 14 QB 459 at 474; Julius v Lord Bishop of Oxford (1880) LR 5 App Cas 214
[52] Home Office (2007) *Response to Better Regulation Executive*, 27 September 2007, www.betterregulation.gov.uk
[53] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997
[54] Cf. s811 *US Controlled Substances Act* 1970, 21 USC 811; and, s4B *NZ Misuse of Drugs Act* 1975

[55] *Kruse v Johnson* [1898] 2 QB 91 at 99, per Lord Russell CJ
[56] *R v SSHD, ex p Pierson* [1998] AC 539 at 591

74. Here, however, Cm 6941 shows that the Home Secretary administers the Act unfairly by:

1) failing to administer the Act in an evidenced-based manner;

2) exercising the s2(5) discretion arbitrarily;

3) failing to evolve a proportionate penalty structure;

4) failing to implement reasonable regulations under ss7 & 22; and by

5) showing apparent bias toward persons concerned with alcohol and tobacco.

75. This unfairness creates and maintains the inequalities of treatment experienced by persons who exercise the enumerated activities re controlled drugs.

i. Failing to Administer the Act in an Evidence-based Manner

76. Successive Home Secretaries and the ACMD have dashed the expectation created in 1970 of:

> "drugs … divide[d] according to their accepted dangers and harmfulness in the light of current knowledge … provid[ing] for changes to be made in the classification in the light of new scientific knowledge".[57] (Emphasis added)

77. Section 1 conjunct Schedule 1 of the Act created the Advisory Council on the Misuse of Drugs ("ACMD") composed of experts from drugs related disciplines, and charged them with: (1) keeping the drugs "situation" and relevant law "under review"; (2) giving the Home Secretary advice on exercising the Act's powers; and (3) giving the Home Secretary advice on any measure or measures, "whether or not involving alteration of the law", thought necessary to achieve the Act's purpose.

78. Parliament then made the ACMD's advice or consultation a prerequisite to every exercise of the Home Secretary's discretion under the Act re drug control, classification, and/or regulation, ss2(5), 7(7) & 31(3). This powerfully indicates that Parliament intended the Act's administration to evolve "in the light of new scientific knowledge", particularly where decisions may imperil life or liberty.

79. Nevertheless, the ACMD has only made recommendations consistent with the "policy of prohibition", which the Home Secretary generally accepts. This closed feedback loop has shut both the Home Secretary's and the ACMD's eyes to the Act's true policy and objects.

80. This has resulted in: (1) the arbitrary exclusion of alcohol and tobacco from the Act; (2) the failure to evolve a penalty structure proportionate to the risk of harm each controlled drug presents when misused; (3) the failure to consider less restrictive regulatory options; and (4) the two inequalities of treatment experienced by persons who exercise the enumerated activities re controlled drugs.

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[57] *Hansard*, HC Deb, *Misuse of Drugs Bill* 1970, 25 March 1970, Vol. 798, Col. 1453

81. Accordingly, the Home Secretary's failure to ensure that decisions under the Act are evidence-based and consistent with the Act's policy and objects has resulted in severe substantive consequences for many thousands of people. This abuse of power cannot be fair.

ii. The Arbitrary Exercise of s2(5)

82. By excluding alcohol and tobacco from the Act on the grounds of "historical and cultural precedents",[58] the Home Secretary has arbitrarily exercised s2(5) with the intention of "escap[ing] the political retribution that might be visited upon [Government] if larger numbers were affected".[59] This created the first inequality of treatment:

> 1) the 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.

83. This inequality of treatment affords persons exercising the enumerated activities re alcohol and/or tobacco the liberty to do so, whilst denying equal liberty to persons exercising the enumerated activities re controlled drugs. So whilst many thousands serve sentences of imprisonment for identical activities re controlled drugs, it is possible for persons who produce and commerce alcohol and tobacco to receive "a peerage or a Queen's award for industry".[60]

84. But, because alcohol and tobacco are drugs within the Act's remit and alcohol and tobacco misuse is "having harmful effects sufficient to constitute a social problem", s(1)2, the Home Secretary's refusal to instigate the control of alcohol and tobacco via s2(5) is illogical and immoral. It denies equal protection to the public from the harmful effects caused by alcohol and tobacco misuse whilst denying equal liberty to persons concerned in the peaceful exercise of the enumerated activities re controlled drugs for amateur purposes.

85. In *R v Inland Revenue Commissioners, ex p Unilever Plc* [1996] STC 681 at 695 Simon Brown LJ stated that:

> "'Unfairness amounting to an abuse of power' … is unlawful because … it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power".

86. The conspicuous unfairness at issue here is easy to see and "leaps up from the page".[61]

iii. The Failure to Evolve a Proportionate Penalty Structure

87. The Act differentiates "controlled drugs" listed in Schedule 2 into three classes indicating risk of harm when used. These classes determine the maximum penalties set out in Schedule 4 for the offences enumerated in the Act, s25. As these constitute deprivations of liberty, it is

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[58] Cm 6941 (2006) page 24
[59] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112
[60] *Hansard*, HC Deb, *Government Drug Strategy*, 9 November 2001, Vol. 374, Col. 486
[61] *R v SSHD, ex p Rashid* [2005] EWCA Civ 744 at 23

crucial that each drug is classified on the basis of empirical evidence, i.e., penalties must be proportionate to the objective risk of harm involved in a drug's "misuse", s37(2).

88. Crucially, whilst Parliament charged the ACMD with scientifically evaluating the risk of harm inherent in a controlled drug's misuse, the political responsibility for ensuring that the penalty fits the risk of harm falls squarely on the Home Secretary.

89. Yet, in pursuing the "policy of prohibition", the Home Secretary has failed to ensure that penalties are proportionate to the risk of harm inherent in a controlled drug's misuse.

90. As such, the Home Secretary classified certain drugs (LSD, MDMA, etc.) as having the highest risk of harm even when the evidence base indicates that the risk of harm is equal to or less than the risk of harm from alcohol and/or tobacco misuse.[62] This is arbitrary and unfair.

iv. The Failure to Implement Reasonable and Proportionate Regulations

91. With respect to drug use, ss7(1)-(2), 22 & 31(1)(a) of the Act afford the following three "reasonable differentiation[s proportionately] related"[63] to the harmful effects that may arise via any use of controlled drugs:

> 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;
>
> 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;
>
> 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.

92. These "reasonable differentiation[s]", based on the outcome of drug use, ask whether the drug use is having "harmful effects" and then whether those "harmful effects" are "sufficient to constitute a social problem". Only in this manner is use separable from misuse. Only in this manner is the autonomous individual separable from the public interest and education and health measures separable from the need for police power.

93. The Drug Equality Alliance asserts that the Home Secretary would be entirely justified in implementing these "reasonable differentiations" via regulations under ss7(1)-(2) & 22 of the Act. This would allow for alcohol and tobacco control under the Act, without the "unacceptab[ility]" of the "policy of prohibition",[64] and allow a lawfully regulated production

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62 Nutt et al (2007) *Development of a rational scale to assess the harm of drugs of potential misuse*, The Lancet 369: 1047-1053

63 *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112

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

and commerce of controlled drugs for peaceful, amateur use to gradually emerge from the evidence base.

94. The Home Secretary's failure to implement these "reasonable differentiations" by regulations, within the limits of ss7(1)-(2), 22 & 31(1)(a), creates the second inequality of treatment:

> 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.

95. Through this inequality, the Home Secretary effectively denies all peaceful and meaningful use of controlled drugs for amateur purposes, irrespective of the risk of harm, whilst Government facilitates and taxes the peaceful, amateur (mis)use of alcohol and tobacco.

96. Concomitantly, the Home Secretary denies persons who facilitate the peaceful, amateur use of controlled drugs the same respect the Home Secretary and Government affords persons who facilitate the peaceful, amateur use of alcohol and tobacco by the "vast majority".[65]

97. This is substantively unfair and contrary to the Act's policy, which is concerned neither with absolute safety nor with preventing controlled drug use, as drug use is not an offence, but rather with preventing, minimising or eliminating the "harmful effects sufficient to constitute a social problem" that may arise via any use of "dangerous or otherwise harmful drugs".[66]

98. Accordingly, the Home Secretary has not sought the least restrictive means of targeting the "harmful effects sufficient to constitute a social problem". This is disproportionate and unfair.

v. The Home Secretary's Apparent Bias toward Alcohol and Tobacco

99. Whilst the Home Secretary is entitled to have regard to "broader considerations of a public character",[67] in not applying the Act to alcohol and tobacco and persons concerned with them because, as expressed in Cm 6941, it "would be unacceptable to the vast majority who use [alcohol and tobacco] responsibly", the Home Secretary appears biased in three ways:

> 1) Politically – The Home Secretary acts favourably towards the "cultural preference"[68] of the "vast majority" as the Home Secretary's political power depends on it and biased against a "tiny minority"[69] whose preferences do not affect the Home Secretary's political power.

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[65] Cm 6941 (2006) page 24
[66] s1(2) conjunct Preamble
[67] *R v Home Secretary*, ex p Doody [1994] 1 AC 531 at 559
[68] Cm 6941 (2006) page 15
[69] Bagehot (2009) '*The tiny minority*', The Economist, 21 March 2009, Vol. 390 No. 8623, page 40

2) Economically – Government receives many billions in annual tax revenue from alcohol and tobacco commerce. This revenue would be lost if the Home Secretary applied the "policy of prohibition" to alcohol and tobacco.

3) Associatively – the Home Secretary is associated with the "vast majority" who consume the drugs alcohol and tobacco as the various Home Secretaries administering the Act have also consumed the drugs alcohol and tobacco.

100. Any fair-minded observer can conclude that there is a real possibility that the Home Secretaries administering the Act have been, and are now, biased.[70] This is fundamentally unequal.

D. The Court's Role in Matters of Common Law is to Concentrate on Principles

101. Rooted in the deeply emotive issue correctly identified by the Home Secretary in Cm 6941, drugs that "alter mental functioning", the question is unavoidably raised as to the balance between the judiciary, the legislature and the executive in matters of common law.

102. Having recognised that the use of such drugs results in a variable likelihood of risks and benefits to the public and individuals alike, and that these require conscious balancing, Parliament embodied beautifully neutral principles of general applicability in the Act.

103. Yet, as administered by the executive, the Drug Equality Alliance shows that the Act denies equal rights to persons exercising the enumerated activities re controlled drugs equivalent to the rights granted to persons who use, commerce and/or produce alcohol and/or tobacco whereas the executive denies the public equal protection under the Act from the harmful effects of alcohol and tobacco misuse. This is contrary to the Act's policy and contrary to the equality-of-treatment doctrine.

104. It therefore falls to the judiciary to refuse to countenance the executive's "partial and unequal"[71] administration of the Act. And in so doing, we request that the Courts respect Lord Scarman's words in *McLoughlin v O'Brien* [1983] AC 410 at 430:

> "By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path". (Emphasis added)

[70] *Magill v Porter* [2001] UKHL 67
[71] Kruse v Johnson [1898] 2 QB 91 at 99, per Lord Russell CJ