

In the High Court of Justice
Queen's Bench Division
Administrative Court

CO/12291/2010

In the matter of an Application for Judicial Review

The Queen on the Application of

CASEY WILLIAM HARDISON

Claimant

– v –

ADVISORY COUNCIL ON THE MISUSE OF DRUGS

Defendant

DRAFT STATEMENT OF FACTS

“The ACMD has not discussed the possibility of recommending to the Secretary of State the control of alcohol and tobacco under s2(5) of the Act in formal meetings of the Full Council or any of its working groups or sub-committees between the years 2003-2010”.

Letter to Claimant

Advisory Council on the Misuse of Drugs

22 October 2010

Prepared By

Casey William HARDISON

15 November 2010

– v –

Draft Statement of Facts

1. This statement of facts accompanies an application by the Claimant, Mr Casey William Hardison, requesting permission for judicial review of:
 - 1) the 16 August 2010 decision (“the decision”) by the Advisory Council on the Misuse of Drugs (“the Defendant”) not to advise the Secretary of State for the Home Department (“SSHd”) on the possibility of controlling the dangerous drugs alcohol and tobacco under s2 of the Misuse of Drugs Act 1971, c38 (“the Act”); and
 - 2) the Defendant’s policy, stated 18 June 2010: “Wherever drugs are used outside of medical and scientific use, and may have or appear capable of having harmful effects sufficient to constitute a social problem, they are regarded as dangerous or otherwise harmful drugs for which prohibitive controls are in place”, and substantially similar past statements.
2. The Claimant, a self-litigant, requests judicial review in the public interest as this claim raises public law issues of general importance to the nation’s health and welfare: alcohol and tobacco kill more than 120,000 citizens annually; and it is vital that dangerous drugs legislation operates as intended.
3. The Claimant has been actively involved in drug policy and law reform since December 1993; his interest in the structure, function and purpose of the Misuse of Drugs Act 1971 began in earnest with his imprisonment for contravention of the Act’s provisions relating to the unauthorised production, supply and possession of controlled drugs that alter mental functioning.
4. Through diligent study of English constitutional law, Hansard, the Act, and public documents including the Defendant’s 2006 *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy* and 2009 *Pathways to Problems: A follow-up report on the implementation of recommendations from Pathways to Problems* the Claimant has come to believe that the Defendant misconstrues their remit and the Act, and that this sustains the arbitrary exclusion of alcohol and tobacco from the Act’s measures and their advice.

Statement of Facts

The Defendant, their Remit and the Act

5. The Misuse of Drugs Act 1971 c38 is a neutral and generally applicable Act of Parliament making provision for activities with “*dangerous or otherwise harmful drugs*”. Section 1 of the Act creates the Advisory Council on the Misuse of Drugs, the Defendant, as a non-executive and non-departmental public body. The relevant portion of s1 states:

“1. The Advisory Council on the Misuse of Drugs

(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; [...] (d) for educating the public (and in particular the young) in the dangers of misusing such drugs, and for giving publicity to those dangers; [...] (4) In this section “the Ministers” means the Secretary of State[s] for the Home Department ... health ... education”.

6. Schedule 1 of the Act commands that the Defendant shall be composed of not less than twenty members including one member from each of the following practices: medicine, dentistry, veterinary medicine, pharmacy, the pharmaceutical industry, chemistry other than pharmaceutical chemistry.
7. As their departmental sponsor, the Secretary of State for the Home Department (“SSHD”) is responsible for the Defendant’s independence, effectiveness and efficiency, and for the appointment of the Defendant’s members and their chair. The SSHD is also the Defendant’s primary advisee, obliged by the Act to consult the Defendant before making: any drug control and classification decisions s2(5); any s7(4) designation Orders, s7(7); and any regulations, s31(3).
8. The Act currently regulates, on advice from the Defendant, the import, export, production, supply, and possession of over 650 drugs. Section 2 of the Act defines these drugs as “*controlled drugs*” and provides the mechanism of control. Schedule 2 classifies these controlled drugs into three classes A, B and C, ostensibly reflecting the relative harms of the drug, if misused, and the maximum penalties that their unauthorised import/export, production, supply, and possession attract.

9. In the First Day Debate on the Address, respecting the 1969 Queen’s Speech, whilst introducing the Misuse of Drugs Bill, the Prime Minister provided illumination as to the Act’s structure, function and purpose:

“My Rt Hon Friend’s new bill will not only bring all the existing powers under one Act, but will give him powers on advice from ... experts in this country to devise appropriate regimes of control for any drug, new or old, according to its legitimate use, its dangers and its social effects”. (*Hansard*, HC Deb, 28 Oct 1969, Vol. 790 Col. 37, emphasis added)

10. In broad outline the above statement describes the Act: it puts the Defendant at the heart of an evidenced-based, dynamic and evolutive mechanism for controlling, classifying and regulating “any drug, new or old”: *Cf.* ss1, 2(5), 7(7), 31(3) and Schedule 1.
11. And as the Act “does not define “drugs” (it only defines controlled drugs)”,¹ it is neutral and generally applicable; the Act can “make ... provision with respect to [any] dangerous or otherwise harmful drug”,² “new or old”.
12. At the Bill’s (first) second reading, the then SSHD said:

“I want now to make a few comments about Clause 2 and Schedule 2. These establish a three-tier classification of drugs for the purposes of the penalties provided by Clause 25 and Schedule 4. The object here is to make, so far as possible, a more sensible differentiation between drugs. It will divide them according to their accepted dangers and harmfulness in the light of current knowledge and it will provide for changes to be made in the classification in the light of new scientific knowledge”. (*Hansard*, HC Deb, 25 March 1970, Vol. 798 Col. 1453, emphasis added)

13. Alcohol and tobacco were known then to be harmful; however, they were regarded as “the devil we know”.³ So, they were not controlled under the Act. But as our knowledge and experience of alcohol and tobacco has grown, it remains the Defendant’s continuing “*duty ...to keep under review the situation in the United Kingdom with respect to*” to alcohol and tobacco and to advise the SSHD accordingly. The Claimant alleges that the Defendant has failed spectacularly in this “*duty*” because, in their own words:

“The ACMD does not believe that the Misuse of Drugs framework is appropriate for the regulation of alcohol and tobacco”.⁴

¹ Home Office (2010) letter to Claimant T7234/10, FOI 14725, 21 May 2010

² Misuse of Drugs Act 1971 c38, Preamble

³ Home Office/ACDD (1968) *Report on Cannabis*, Hallucinogens Sub-Committee, HMSO, para 63; *Cf. Hansard*, HC Deb, *Misuse of Drugs Bill 1970*, 25 March 1970, Vol. 798 Col. 1446, 1471, 1516, etc.

⁴ ACMD (2010) letter to Claimant, 22 October 2010

Statement of Facts

HC 1031

14. On 31 July 2006, after a rigorous investigation into the production and use of the Defendant's advice in the SSHD's decisions to control and classify drugs under s2(5) 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?* ("HC 1031") opined, with emphasis:

"We have identified a number of serious flaws in the way the [Defendant] conducts its business...and a disconcerting degree of confusion over its remit. [...] 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 concluded that the current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm". (Summary)

"One of the most striking findings highlighted in the paper drafted by Professor Nutt and his colleagues was the fact that, on the basis of their assessment of harm, tobacco and alcohol would be ranked as more harmful than LSD and ecstasy (both Class A drugs). The Runciman Report also stated that, on the basis of harm, "alcohol would be classed as B bordering on A, whilst cigarettes would probably be in the borderline between B and C". Various memoranda argued that the exclusion of tobacco and alcohol from the classification system was an anomaly". (Paragraph 106)

15. The "paper drafted by Professor Nutt and his colleagues" on the Defendant's Technical Committee was published as Appendix 14 to HC 1031. In their expert opinion, the Technical Committee made clear that:

"Our findings raise questions about the validity of the current MDA classification, despite the fact that this is nominally based on an assessment of risk to users and society. [...] They also emphasise that the exclusion of alcohol and tobacco from the MDA is, from a scientific perspective, arbitrary. [...] Moreover, our findings reveal no clear distinction between socially accepted and illicit substances". (Emphasis added)

16. Reflecting this, recommendation 42 of HC 1031 said:

"We understand that the ACMD operates within the framework of the Misuse of Drugs Act 1971 but, bearing in mind that the Council is the sole scientific advisory body on drugs policy, we consider the Council's failure to alert the Home Secretary to the serious doubts about the basis and effectiveness of the classification system at an earlier stage a dereliction of its duty". (Emphasis added)

Misuse

17. On 26 August 2006, the Claimant wrote the Defendant seeking to understand the concept “misuse” as found in their literature and the Act; in essence the claimant wanted to know who or what determined “misuse”.
18. On 18 September 2006 the Defendant replied that:

“The criteria for control is based on the drug being “dangerous or otherwise harmful” either to individuals or to society when misused. [...] Use of a controlled drug is not itself misuse as many controlled drugs have a legitimate medicinal purpose/use when taken appropriately [...]. The Act does not define misuse and we can only presume that this was a conscious decision. It is therefore for the Advisory Council on the Misuse of Drugs (ACMD) in the first instance to assess and judge misuse when considering each substance and the differing circumstances in which its use is or might be designated as misuse. [...] misuse, as interpreted by the ACMD, is the act of inappropriate or dangerous drug-taking of a drug by the individual, which is not an offence under the Act”. (Emphasis added)

The Defendant then directed the Claimant to their latest report, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy* (“*Pathway to Problems*”), which defines “drug misuse” as:

“drug-taking which is judged to be inappropriate or dangerous”.

Pathways to Problems

19. On 14 September 2006, the Defendant published *Pathways to Problems* which declared unequivocally:

“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, emphasis added)

Statement of Facts

20. In *Pathways to Problems*, the Defendant went on to admit “neglect[ing]” their legal “*duty*” with respect to alcohol and tobacco:

“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”.⁵

21. Consistent with this, Recommendation 1 of *Pathways to Problems* read:

“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”. (Emphasis added)

22. At the time, the SSHD did not respond publicly to this but the Claimant would later read in the Defendant’s July 2009 document (oddly not made public until 29 March 2010) *Pathways to Problems: A follow-up report on the implementation of recommendations from Pathways to Problems*, at 4.2, that:

“the Home Office considered alcohol and tobacco to be implicit in the ACMD’s terms of reference, as these are substances that can be misused”.

HC 1031 Appendix 14

23. On 1 October 2006, the Claimant wrote the Defendant, under the Freedom of Information Act 2000 (“the FoI Act”), to confirm that HC 1031 Appendix 14 was intended for publication in *The Lancet* and to ask, *inter alia*, when the Defendant became conscious of the “serious doubts about the basis and effectiveness of the classification system” as described in Recommendation 42 of HC 1031 and Appendix 14, (see paragraphs 15 & 16 above).

24. On 30 October 2006 the Defendant confirmed that Appendix 14 was “the same paper referred to in para 97 of HC 1031”, the same paragraph containing Recommendation 42; but, the Defendant asserted:

“the ACMD have never said that they have “serious doubts about the basis and effectiveness” of the classification system, simply that they would welcome the review [announced by the then SSHD on 19 January 2006].

25. Yet *Pathways to Problems* had just said: “The current system for classifying and controlling drugs in the UK has a number of shortcomings”.⁶

⁵ ACMD (2006) *Pathways to Problems*, Introduction, page 14, emphasis added

⁶ ACMD (2006) *Pathways to Problems*, Key Points, page 18

Cm 6941

26. On 13 October 2006, the SSHD issued Command Paper 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?* On page 24 of Cm 6941, the SSHD stated:

“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. 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”.

27. These six sentences from Cm 6941 convinced the Claimant that the SSHD did not understand the Act regulating the SSHD’s decision-making powers and therefore had not given proper effect to it. Each of these sentences created more questions, respectively enumerated below, than they answered:
- 1) Is the Act suitable or not? Has the SSHD misconstrued the Act?
 - 2) Does the SSHD actually mean the distinction between alcohol/tobacco and ‘controlled drugs’? Is this another misconception of the Act?
 - 3) Are “historical and cultural precedents” relevant grounds for not applying a neutral law generally? Is the Act neutral?
 - 4) Has the SSHD confused ‘control’ under the Act with ‘prohibition’, otherwise, why would it be unacceptable to apply the Act to those concerned with alcohol and tobacco? And how would this conflict with tradition? Has the SSHD misconstrued the Act’s function and purpose?
 - 5) Are separate systems rational? Did Parliament intend that alcohol and tobacco be regulated through other means? Is the Act not fully capable?
 - 6) If “alcohol and tobacco account for more health problems and deaths than illicit drugs”, then why are they not controlled drugs?

Statement of Facts

28. The Claimant believes that these six sentences from Cm 6941 show the SSHD's persistent misconstruction of the Act, the SSHD's regard for irrelevant considerations, and the SSHD's disregard for relevant considerations; they fail to show good reasons for not applying the Act to persons concerned with alcohol and tobacco whilst showing excellent reasons for applying it. This belief motivates the judicial review CO/11538/2010.

The Nutt Matrix

29. On 24 March 2007, Appendix 14 to HC 1031, the paper by Professor David Nutt, the Defendant's (now) former (the then future) Chairman, Professor Colin Blakemore, the (now) former and then Chief Executive of the Medical Research Council, and Dr Les King, lead chemist for the Forensic Science Service, appeared in *The Lancet*, 369: 1047-1053, entitled *Development of a rational scale to assess the harm of drugs of potential misuse*. This paper described the first ever scientific ranking ("the Nutt Matrix") of the relative harmfulness of the 20 most commonly used drugs. The paper said:

"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". (Emphasis added)

30. On 3 April 2007, the Claimant continued to investigate the Defendant's discharge of their "*duty*" by asking questions relating to Government reviews of the Defendant, the Act, and the drug classification system.

31. On 12 June 2007, the Defendant replied, *inter alia*:

"the Government has not reviewed the drug classification system [...] the Government have never asked the ACMD to review the drug classification system [...] the Government have not reviewed the ACMD consistent with its NDPB guidance". (Emphasis added)

The inner-connections of ss1(2), 7(1)-(2) & 31(1)(a)

32. On 5 July 2007, the Claimant began questioning, under the FoI Act, the Defendant's relationship with the Act's sections concerning regulatory options for controlled drug activities. Three questions are pertinent here:

- 1) "does the phrase, found in s1(2), "to give ... advice on measures (whether or not involving alteration in the law) which in the opinion of the Council ought to be taken ... for restricting the availability of such drugs or supervising arrangements for their supply" impose a statutory duty on the Council to proffer advice to the SSHD on regulatory options, to be made under ss7(1)-7(2), re reasonably safe or responsible exercise of property rights in 'Controlled Drugs' for non-medical and non-scientific purposes?"
- 2) "...why has the Council not "consider[ed] it expedient" to exercise their statutory duty ... to advise Government on alternative regulatory options, consistent with ss7(1)-7(2), re the reasonably safe or responsible exercise of property rights in 'Controlled Drugs' for non-medical and non-scientific purposes?"
- 3) "Or alternately, why has the Council not "consider[ed] it expedient" to advise Government to prohibit outright the exercise of property rights in alcohol and tobacco when not used for medical, scientific or "other special purposes" as per ss7(3)-7(4)?"

33. On 14 August 2007, the Defendant replied to the first question thusly:

"the reasonably safe or responsible exercise of property rights in 'Controlled Drugs' for non-medical and non-scientific purposes' ... are not permitted in so far as the UN drug Conventions impose restrictions on drugs [which are specified as 'controlled drugs' under the Misuse of Drugs Act 1971] and limit their use to medical and scientific purposes, as the Misuse of Drugs Act therefore does in its application".

This statement appears to suggest that international treaties signed by the executive fetter the Defendant even though they are of no domestic effect.

34. Regarding the second question, the Defendant's 14 August letter stated:

"there are no purposes outside of medical and scientific purposes and within the context, purpose and intent of the 1971 Act under which, to use your terms 'the reasonably safe or responsible exercise of property rights in 'Controlled Drugs' for non-medical and non-scientific purposes' can be regulated by virtue of the Misuse of Drugs Act 1971".

Statement of Facts

35. Regarding the third question, the Defendant's 14 August 2007 letter stated:

“Section 7 of the 1971 Act explicitly relates to controlled drugs and that section therefore excludes application to alcohol and tobacco, which are not controlled drugs. But the Council can advise, and has advised the Government on the hazardous use of alcohol and tobacco predicated on the available evidence; taking into account both scientific and social evidence (Pathways to Problems, 2006). The report recommended that ‘...tobacco and alcohol should be explicitly included within the terms of reference of the Advisory Council on the Misuse of Drugs’. The prohibition ‘outright [of] the exercise of property rights in alcohol and tobacco ... as per ss7(3)-7(4)’ was not part of the ACMD's advice and nor could it be as that section only relates to ‘controlled drugs’”.

The Defendant appears to miss that s7 would apply to alcohol and tobacco were they declared “*controlled drugs*”.

36. Another statement is relevant from the Defendant's 14 August letter:

“the Council has never advised the Home Secretary, nor has the Home Secretary consulted the ACMD about ‘the reasonably safe or responsible exercise of property rights in ‘Controlled Drugs’ for non-medical and non-scientific purposes’ as they are ‘dangerous or otherwise harmful drugs’ which the government has no intention of legalising. There is no prospect of change”. (Emphasis added)

This “no prospect of change” appears to fetter the Defendant's advice.

37. Finally, as far as the Claimant is aware, the Defendant stated for the first time what appears to be a policy position fettering their advice as to the width of the ss7(1)-(2) regulatory discretions:

“Wherever controlled drugs are used outside of medical and scientific use they are regarded as dangerous or otherwise harmful drugs for which prohibitive controls are and will remain in place”. (Emphasis added)

38. So, on 30 August 2007, the Claimant wrote again, first asking to be directed to the clause in the Defendant's remit that “feters” their “*duty*” to the commands of the three UN drug Conventions and then asking:

“if there are ‘no purposes outside of medical and scientific purposes and within the context, purpose and intent of the 1971 Act...’ then what are Sections 7(1)-7(2) & 31(1)(a) of the Act for? And why can this not be extended to a licensed distribution of controlled drugs for non-medical and non-scientific use purposes?”

39. On 13 November 2007, the Defendant replied to the first question:

“I have not declared that the Council’s duties are fettered to the constraints of the United Nations drugs Conventions but rather the purposes of use of controlled drugs that you describe are not permitted”. (Original emphasis)

With respect to the second question the Defendant simply restated what was said before: “there are no purposes outside of medical and scientific purposes and within the context, purpose and intent of the 1971 Act...”

Target Acquisition

40. At this point, and after some legal research, it became clear to the Claimant that the Defendant did not understand their remit so they could not possibly give proper effect to it. Hence, on 11 February 2008, the Claimant wrote again, this time with the knowledge that this was quite probably heading for litigation. The Claimant first asked:

- 1) “Please direct me to the section(s) within the Misuse of Drugs Act 1971 (“the Act”), or the ACMD’s terms of reference, whether published or not, which state that non-medical and non-scientific purposes of use of ‘controlled drugs’ are “not permitted”, will never be permissible and can never be made permissible under the Act?”

The Claimant then asked a series of questions about various aspects of their remit and the Act and whether the Defendant has ever taken or received independent legal advice on these. These were intercalated with two more relevant questions:

- 2) “Must a drug be scheduled under s2(2) of the Act as a “controlled drug” before it is considered by the ACMD as a “dangerous or otherwise harmful drug?”
- 3) “Are any drugs which may be misused, and of which the misuse is have “harmful effects sufficient to constitute a social problem”, including alcohol and tobacco, immune from the controls of the Act?”

41. On 5 March 2008, the Defendant made clear that they had “not sought, nor received” independent legal advice on any aspect of their remit or the Act. the Defendant then answered the first question above thusly:

“The Misuse of Drugs Act (1971) states that it is unlawful to possess a controlled drug without authorisation: it is therefore of no relevance whether the drug is to be used (for whatever purpose)”. (Emphasis added)

Statement of Facts

42. With respect to the second and third question stated in paragraph 40, above, the Defendant's 5 March 2008 letter stated:

“the ACMD considers any drug(s) 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”.

“there are no drugs that are immune from the Act, i.e. it is within the duty of the ACMD to keep under review the situation in the UK with respect to 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”. (Emphasis added)

43. Having felt it had been established that: 1) there are no barriers to the Defendant offering advice on ‘the reasonably safe or responsible exercise of property rights in ‘Controlled Drugs’ for non-medical and non-scientific purposes’; 2) that any drug may be considered by the Defendant before it is controlled under s2(2) of the Act; and 3) no drugs are immune from the possibility of control under the Act, the Claimant let it rest, praying the Defendant would move in the proper direction with their change of chair.

44. Earlier, on 18 February 2008, the Claimant asked the Defendant:

- 1) “Has the Advisory Council made, under Schedule 1, Section 3 of the Misuse of Drugs Act 1971, any rules or directions as to procedure and to the matters to be taken into account by the Council, its members and committees, in discharging their functions?”
- 2) “Has the Secretary of State promulgated any rules or directions, including any restatement of statutory remit, as to procedure and to the matters to be taken into account by the Advisory Council, its members and committees in discharging its functions?”

45. To which, on 5 March 2008, in a separate letter, the Defendant answered both of the questions in the negative. Though, the second answer would be contradicted by evidence revealed on 21 May 2010, when the SSHD wrote the Claimant, T7234/10, attaching a 2006 document, FOI 14725, entitled “*Draft response to Recommendation 1 of ACMD’s Pathways to Problems Report calling for the explicit inclusion of alcohol and [tobacco] in the ACMD’s terms of reference*”.

46. In the 21 May 2010 letter, the SSHD declared that the document FOI 14725 “explains the reasoning which has been inherent from the outset of the Act’s provisions, as to the absence of applying control of alcohol and tobacco under the Misuse of Drugs Act”.

47. After quoting the Defendant's remit verbatim, FOI 14725 said:

“Whilst the ACMD was established by an Act, the main function of which is to provide a framework within which criminal penalties are set with reference to the harm caused by a drug, their terms of reference are already sufficiently wide to include alcohol and tobacco. The penalty-linked framework has no place in the regulation of alcohol and tobacco, but this does not displace ACMD's remit to include these substances, as notably the 1971 Act does not define “drugs”, (it only defines controlled drugs). Its current remit gives full scope for making recommendations that do not [sic] include an alteration of the law (i.e. Classification) and they are specifically charged with giving advice to prevent misuse of drugs”. (Emphasis added, parenthetical expressions preserved)

Perhaps the above underlined “not” is a drafting error: it contradicts the Defendant's remit under the Act. The SSHD continued:

“There may be practical problems for ACMD in its current form to take a greater interest and responsibility in alcohol and tobacco. For instance its current membership may need to be revised significantly to provide the necessary expertise. The Government may welcome the ACMD's advice [...] though it must be confident that the ACMD is equipped to give that advice and also, that ACMD is not distracted by what is considered to be its main function – advice on illegal drugs or those that can (realistically) be brought under the control of the 1971 Act”. (Emphasis added)

48. The Claimant is uncertain what the SSHD intended to convey by what appears an attempt to constrain the Defendant's advice to drugs that can “realistically” be brought under the Act's control; perhaps the SSHD was suggesting that, “realistically”, alcohol and tobacco cannot.

The Nutt sack fiasco

49. On 7 February 2009, the Defendant's new chair, Professor David Nutt, the principle author of HC 1031 Appendix 14, attempted to open a debate about comparative risk-taking by publishing an academic paper saying the risks of taking ecstasy are no greater than the risks of “equasy”,⁷ a neologism he coined to describe people's addiction to horse-riding. He said:

“The point was to get people to understand that drug harm can be equal to harms in other parts of life. There is not much difference between horse riding and ecstasy”.⁸

⁷ Nutt, D (2009) Equasy – An overlooked addiction with implications for the current debate on drug harms, *J Psychopharmacology*, 23(1) 3-5

⁸ *The Telegraph* (2009) Ecstasy ‘no more dangerous than horse riding’ – Taking ecstasy is no more dangerous than riding a horse, according to head of the Government's drug advisory body, 7 February 2009

Statement of Facts

50. On 9 February 2009, the then SSHD, Jacqui Smith MP, under intense media pressure, compelled Professor Nutt to apologise for his “equasy” article:

“I made clear to Professor Nutt that I felt his comments went beyond the scientific advice that I expect of him as chair of the Advisory Council on the Misuse of Drugs. He apologised to me for his comments and I’ve asked him to, as well, apologise to the families of the victims of ecstasy”.⁹

51. Also, on 9 February 2009, the SSHD upgraded *Cannabis* from class C to class B and declined to downgrade ecstasy/MDMA from class A to class B. Both decisions went against the Defendant’s advice and recommendations.

52. On 11 February 2009, Professor Nutt, in his capacity as the Defendant’s chair, accused the Government of making drug classification decisions under media pressure. Having rejected the Defendant’s scientific advice concluding that MDMA is not as dangerous as other class A drugs such as heroin and cocaine and so should be downgraded to class B, the result of a 12-month study of 4,000 academic papers, Professor Nutt pointed out:

“The decisions we came to were not made by a committee one morning sticking their fingers in the air and seeing which way the wind was blowing”.¹⁰

53. Later that day, Professor Nutt further clarified the Defendant’s ‘job’:

“Our job is not to send messages to the public but to advise the home secretary and the prime minister on the relative harms of drugs. I suspect they accepted our evidence but made a political decision not to reclassify”.¹¹

54. On 29 October 2009, the King’s College Centre for Crime and Justice Studies (“the CCJS”) published a briefing paper of the Eve Saville Lecture on their website. This lecture, entitled *Estimating Drug Harms: a risky business*,¹² had been delivered by Professor Nutt in July 2009 with the SSHD’s approval. Professor Nutt had repeated what Appendix 14 of HC 1031 had said:

“Alcohol ranks as the fifth most harmful drug after heroin, cocaine, barbiturates and methadone. Tobacco is ranked ninth [...] Cannabis, LSD and ecstasy, while harmful, are ranked lower at 11, 14 and 18 respectively”.

⁹ *The Guardian* (2009) *Jacqui Smith slaps down drugs adviser for comparing ecstasy to horse riding*, 9 February 2009

¹⁰ *Bloomberg News* (2009) *Ecstasy Penalty Kept in UK as Brown Rejects Advice*, 11 February 2009

¹¹ *The Guardian* (2009) *Government criticised over refusal to downgrade ecstasy*, 11 February 2009

¹² CCJS/Nutt, D (2009) *Estimating Drug Harms: a risky business*, Eve Saville Lecture, Kings College London, 29 October 2009

55. With the publication of the paper on the CCJS website, Professor Nutt was again in the news headlines.
56. Professor Nutt's lecture had also discussed the differing opinions between the Defendant, the SSHD and the public regarding recent drug classification decisions, nevertheless, the headlines screamed variants of:

‘Ecstasy and LSD less dangerous than alcohol and tobacco’

57. Throughout the day, Professor Nutt answered all manner of questions regarding the Defendant's role and his lecture but it often returned to alcohol and tobacco being more harmful to users than some currently class A drugs.
58. On 30 October 2009, wound up by the media storm, the then SSHD, Alan Johnson, sacked Professor David Nutt as the Defendant's chair. He said:

“I have concerns regarding your recent comments that have received so much media attention. It is important that I can be confident that advice from the ACMD will be about matters of evidence. Your recent comments have gone beyond such evidence and have been lobbying for a change of government policy. This goes against the requirements on general standards in public life required by your position. As chair of the ACMD you cannot avoid appearing to implicate the Council in your comments and thereby undermine its scientific independence. When you wrote previously around the harms of drugs comparing ecstasy with the risks of horse riding my predecessor made clear that it is not the job of the chair of the Government's advisory Council to comment or initiate public debate on the policy framework for drugs. Given this I was surprised and disappointed by your further comments to the press this week. As Home Secretary it is for me to make decisions, having received advice from the ACMD. It is vitally, important that the public understands the Council's role and also understand what government is trying to achieve. It is important that the government's messages on drugs are clear and as an advisor you do nothing to undermine public understanding of them. [...] I cannot have public confusion between scientific advice and policy and have therefore lost confidence in your ability to advise me as Chair of the ACMD. I would therefore ask you to step down from the Council with immediate effect”. (Emphasis added)

59. After Professor Nutt's sacking, Richard Garside, the CCJS Director, said:

“I'm shocked and dismayed that the home secretary appears to believe that political calculation trumps honest and informed scientific opinion. The

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- message is that when it comes to the Home Office’s relationship with the research community, honest researchers should be seen but not heard”.¹³
60. On 1 November 2009, the Defendant’s statutorily required chemist, Dr Les King, resigned in protest at Dr Nutt’s dismissal, saying:
- “I’m not going to say just how many will resign but there is an extremely angry feeling among most council members. Amongst the scientists, I think a number will resign [...] the classification of drugs is about harm. It doesn’t need to be politicised in the way that it is”.¹⁴
61. Later that day, the Defendant’s requisite Royal Pharmaceutical Society member, Marion Walker, Clinical Director of Berkshire Healthcare NHS Foundation Trust’s substance misuse service, resigned.
62. On 2 November 2010, the SSHD announced Sir David Omand would conduct a ‘snap review’ “to satisfy ministers that the [Defendant], for which they are accountable, are discharging the function that they were set up to deliver and that they represent value for money for the public”.¹⁵ A year on and the ‘snap review’ report, if it exists, has yet to be made public.
63. On 10 November 2009, after a meeting between the SSHD and the Defendant to discuss their concerns, psychologist Dr John Marsden, pharmaceutical consultant Dr Ian Ragan, and synthetic organic chemist Dr Simon Campbell CBE resigned.¹⁶

Independent Legal Advice

64. On 13 January 2010, Professor Les Iversen was appointed by the SSHD as the Defendant’s interim chair. Recognising this opportunity, on 10 February 2010, the Claimant posted a detailed, 13 page letter¹⁷ to the Defendant’s chair imploring him to get independent legal advice as to their remit and the Act:

“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

¹³ *The Guardian* (2009) *Government drug adviser David Nutt sacked – Professor David Nutt asked to resign after his claims that ecstasy and LSD were less dangerous than alcohol*, 30 October 2009

¹⁴ *BBC News* (2009) *Second drugs adviser quits post*, 1 November 2009

¹⁵ *The Guardian* (2009) *Alan Johnson orders swift review of drugs advice body*, 2 November 2009; Home Office (2009) letter to Claimant, 17 November 2009

¹⁶ *The Times* (2009) *Three more members of drugs advisory panel resign after sacking of David Nutt*, 11 November 2010; *Cf. SSHD/ACMD (2009) Joint Statement from the Home Secretary and the Advisory Council on the Misuse of Drugs*, 10 November 2009

¹⁷ Hardison, C (2010) *The misuse of drugs and the ACMD: an open letter to Professor Iversen*, *Drugs and Alcohol Today*, Vol. 10, Issue 2, pp13-23, Pier Professional (DOI:10.5042/daat.2010.253)

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". (Original emphasis)

Target on horizon

65. On 15 March 2010, the Claimant wrote the Defendant under the FoI Act requesting hardcopies of any Council minutes that make reference to alcohol and/or tobacco, in particular:

“Has the Council discussed at any time, in formal meetings of the full Council or any of its working groups or sub-committees, the possibility of recommending to the Secretary of State the control of alcohol and/or tobacco under s2(5) of the Act?”

66. This question would eventually generate the 22 October 2010 quote on the cover of this Statement of Facts directly contradicting the Defendant's 4 October 2010 Letter of Response.

Mephedrone Madness

67. On 29 March 2010, in the midst of the ‘moral-panic’ about the Defendant's imminent advice on classifying the “legal high” mephedrone, Dr Polly Taylor resigned when presented with a ‘revised’ Code of Practice for Scientific Advisory Committees requiring “‘mutual trust’ backed up by sanctions irrespective of whether the code of practice has been complied with”:

“We had understood that the requirement of us, as advisers, was to comply with the Code of Practice for Scientific Advisory Committees, and not to maintain the favour of a minister with our advice and its communication. [...] I feel that there is little more we can do to describe the importance of ensuring that advice is not subjected to a desire to please ministers or the mood of the day's press”.¹⁸

68. On 1 April 2010, two days after the SSHD announced that the mephedrone would be “*controlled*”, s2(5), and “*designated*”, s7(4), under the Act, the Defendant's seventh member resigned; Mr Eric Carlin said:

“Our decision was unduly based on media and political pressure. [The mephedrone decision] was seen as a quick fix so that the home secretary could be seen to be acting tough on drugs before an election”.¹⁹

¹⁸ BBC News (2010) *Drug advisers resignation letter*, 29 March 2010

¹⁹ BBC News (2010) *Adviser resigns over mephedrone*, 2 April 2010

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69. Contrary to paragraph 3(iii) of the 10 November 2009 *Joint Statement*, the Defendant's draft mephedrone report was still being discussed when the chair, Les Iversen, rushed out of the meeting to brief the SSHD on their advice in time for the SSHD's scheduled press briefing.²⁰

²⁰ *The Lancet* (2010) A collapse in integrity of scientific advice in the UK, Vol. 375, Issue 9723, p1319; *Cf.* note 14 above

Pathways to Problems: A Follow-Up

70. On 29 March 2010, under cover of mephedrone madness, the Defendant's July 2009 report *Pathways to Problems: A follow-up report on the implementation of recommendations from Pathways to Problems* was quietly made public. The introductory letter to *Pathways to Problems: A follow-up* revealed a pivotal contradiction in the Defendant's understanding of their remit:

"Although the Government receives evidence from a number of sources on alcohol and tobacco use, and on their harms, the ACMD has concerns that there is no equivalent independent expert body, similar to the ACMD, to advise on these issues". (Emphasis added)

71. Then at paragraph 4.2, the Defendant declares they are the relevant body:

"the Home Office [said] that it considered alcohol and tobacco to be implicit in the ACMD's terms of reference, as these are substances that can be misused. The view of the ACMD is that alcohol and tobacco come within the terms of reference". (Emphasis added)

72. And then at paragraph 6.17, the Defendant abdicates responsibility whilst asserting that they are not capable of discharging their remit effectively:

"While the Government seeks the views of relevant stakeholders on matters relating to alcohol and tobacco, there is no equivalent independent expert body to undertake a role similar to that of the ACMD in advising the Government. Despite the response received from the Home Office [FOI 14725] in answer to [Recommendation 1 of *Pathways to Problems*], the ACMD is not routinely consulted on matters relating to alcohol and tobacco, nor does it have the necessary resources or expertise to undertake the role it does for illicit drugs". (Emphasis added)

Range-finding

73. Paragraph 4.2 of *Pathways to Problems: A follow-up* moved the Claimant to request, on 6 April 2010, the Home Office document communicating its "consider[ation]" of the Defendant's remit. The Home Office responded, on 21 May 2010, by disclosing FOI 14725, discussed above in paragraphs 45-48, which prompted the Claimant to ask the Defendant on 27 May 2010:

"On what rational and objective basis does "[t]he penalty linked framework ha[ve] no place in the regulation of alcohol and tobacco"²¹? What makes these drugs so special?"

²¹ Home Office (2010) FoI Act 2000 response to Claimant T7234/1021 May 2010, disclosing FOI 14725

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Legal Advice Reprise

74. On 18 June 2010, the Defendant's chair responded to the Claimant's 10 February 2010 request that they procure independent legal advice saying:

"I can assure you that both I and all ACMD members are fully committed to out remit under the Misuse of Drugs Act. I am satisfied that the ACMD does correctly discharge its legal duties under the Act".

The Defendant's chair continued:

"The ACMD interprets the legislation as including alcohol and tobacco issues, whilst retaining a focus on illicit drugs".

Then the chair made a political statement, the subject of this judicial review, directly contradicting the above sentence and echoing the Defendant's previous policy statement made on 17 August 2007, see paragraph 37 above:

"Wherever drugs are used outside of medical and scientific use, and may have or appear capable of having harmful effects sufficient to constitute a social problem, they are regarded as dangerous or otherwise harmful drugs for which prohibitive controls are in place".

A question of logic arises: if alcohol and tobacco are "used outside of medical and scientific use, and may have or appear capable of having harmful effects sufficient to constitute a social problem", then why are "prohibitive controls" not in place for them?

Target acquired – The Request

75. Exasperated and "extremely disappointed", on 9 July 2010, the Claimant specifically requested, even "begged", the Defendant to "advise the Home Secretary about the feasibility of creating under the Act via ss7(1)-(2), 22(a)(i) & 31(1)(a) a coherent regulatory structure for alcohol and tobacco production and commerce allowing for, at minimum:

- 1) Regulating and licensing under s7(1)-(2) the import and export of alcohol and tobacco;
- 2) Regulating and licensing under s7(1)-(2) the production and supply of alcohol and tobacco;
- 3) Regulating and licensing under s7(1)-(2) premises and persons for the safe supply and consumption of alcohol and tobacco;
- 4) Excluding the operation of s5 [possession] re alcohol and tobacco under s22(a)(i) for all persons over the age of 18".

Zeroing in – The Decision

76. The relevant portion of the Defendant’s 16 August 2010 decision letter (“the decision letter”) misconstrued the Act and put the cart before the horse:

“I have been clear that the ACMD interprets the legislation as including alcohol and tobacco issues whilst retaining a focus on illicit drugs. [...] I understand ... that the Coalition Government has no intention of seeking the classification of alcohol and tobacco under the Misuse of Drugs Act (the 1971 Act) for the purposes of controlling these substances under the Act. It is important that I make clear from the outset that the ACMD does not intend to provide advice to ministers on alcohol and tobacco that is concerned with classification under the [Act]”.

The LBC

77. On 25 August 2010, the Claimant posted a Letter Before Claim (“LBC”) to the Defendant, requesting reconsideration within 14 days and setting out the relevant legal issues and the points of law that might arise in addressing them.

Windage

78. On 3 September 2010, after the Information Commissioner’s assistance, it became clear to the Defendant that the Claimant’s requests under the FoI Act of 15 March 2010, 27 May 2010 and 11 August 2010 on the Defendant’s alcohol and tobacco policy had got lost because the Defendant had move floors in the Home Office and their mail was not forwarded.
79. On 25 September 2010, the Defendant’s 3 September 2010 letter arrived informing the Claimant of this fact and requesting that he consolidate and narrow down the FoI Act request to the years 2003-2010.
80. On 27 September 2010, the Claimant narrowed the FoI Act request down and the two most relevant questions were:
- 1) “Has the Council discussed at any time, in formal meetings of the full Council or any of its working groups or sub-committees, the possibility of recommending to the Secretary of State the control of alcohol and/or tobacco under s2(5) of the Act between the years 2003-2010?”
 - 2) “The Home Office draft response to Recommendation 1 of Pathways to Problems stated: “[t]he penalty linked framework has no place in the regulation of alcohol and tobacco”. Does the Council agree with this statement?”

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The LOR

81. On 4 October 2010, Ms Geraldine Haack, for the Treasury Solicitor, responded on behalf of the Defendant. The Letter of Response (“LOR”) reiterated the Defendant’s remit and then stated:

“The ACMD is not under a duty to obtain legal advice regarding the purpose and objects of the Act. The ACMD took the decision not to offer advice to the Home Secretary in its professional expert opinion. It has not fettered its discretion in this regard in any manner, and considered whether it was appropriate to provide such advice. ACMD did not feel that this was a matter it needed to advise the government on at this time”.

Exhale & Squeeze

82. On 22 October 2010, the Defendant responded to the new questions put to them on 27 September 2010 by the Claimant. The Claimant had asked:

“Has the Council discussed at any time, in formal meetings of the full Council or any of its working groups or sub-committees, the possibility of recommending to the Secretary of State the control of alcohol and/or tobacco under s2(5) of the Act between the years 2003-2010?”

To which the Defendant replied:

“The ACMD has not discussed the possibility of recommending to the Secretary of State the control of alcohol and tobacco under s2(5) of the Act in formal meetings of the Full Council or any of its working groups or sub-committees between the years 2003-2010”. (Emphasis added)

83. But a question of integrity arises as the Defendant’s LOR had said:

“The ACMD took the decision not to offer advice to the Home Secretary in its professional expert opinion”. (Emphasis added)

If the Claimant’s 9 July request was not discussed by the Defendant as a body, then the Defendant did not take “the decision not to offer advice to the Home Secretary in its professional expert opinion”; in the Claimant’s opinion the chair decided “from the outset” to go with the prevailing political wind.

84. The Defendant’s reply to the second question in paragraph 80 above explained why:

“The ACMD does not believe that the Misuse of Drugs framework is appropriate for the regulation of alcohol and tobacco”.

Prayer

85. Ultimately, the Claimant, Mr Casey William Hardison, wants to vindicate the rule or law; he wants the Defendant confidently established in their rightful position at the heart of evidence-based policy, unshackled from the SSHD’s “policy of prohibition”. To this end, he prays that this Honourable Court grants him permission for judicial review of the Defendant’s decision and policy as regards the Misuse of Drugs Act 1971 and that this Court gives it the scrutiny it deserves.

I firmly believe that the facts stated in this Statement of Facts are true.

– fiat lux, fiat justitia, ruat cælum!

Casey William Hardison
Claimant

Date