In the Wigan and Leigh Magistrates' Court

In the matter of:

R

V

Alan Taylor

Application for a stay due to an Abuse of Process, or an adjournment of these proceedings to await the determination of the Divisional Court – 15 May 2009

Documents Enclosed

1. Particulars of this Application including draft high court claim dated 3 April 2009

2. Application submitted on 24 March to this court and the CPS

3. Letter of authority for Mr Darryl Bickler to act as McKenzie friend

4. Bundle of documents detailing responses pertaining to the application for permission for Judicial Review by Edwin Stratton (CO/10629/2008):
   (i) CPS's grounds for contesting the claim (13 December 2008)
   (ii) Claimant's response to CPS submission (30 December 2008)
   (iii) Notification of the Judge's decision (05 March 2009)
   (iv) Claimant's renewal of his application

1.

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Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law.

– *Pretty v United Kingdom* [2002] 35 EHRR 1 at 77

Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

– *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 113

The Courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.

– *Connelly v. Director of Public Prosecutions* [1964] AC 1254 at 1354

I. Background and Introduction

1. This application concerns Alan Carl TAYLOR who faces charges concerning the production and possession of four cannabis plants at his home.

2. A preliminary Abuse of Process application was served on the Court and the CPS by Taylor's former solicitor at the first hearing on 24th March 2009 at Wigan & Leigh Magistrates' Court.

3. The defendant (through his 'McKenzie friend' together with his former solicitor) invited the court to consider various options to progress this application expediently. It was submitted that the form of the alleged abuse is a matter that can be properly determined only by the high court.

4. The clerk to the court, Peter Lowe ruled that this issue was complex and ought to be considered by the District Judge – proceedings were then adjourned pending this hearing.

5. The instant issue for determination by the District Judge is submitted to be the jurisdictional question - whether an application that alleges an Abuse of Process arising from an Abuse of Power by the executive can be determined by the magistrates' court. To secure an adjournment for the determination of the high court, it is submitted that the defendant must demonstrate a *prima facie* case that is consistent with the allegation of 'unconscionable conduct by the executive'. He is not required to satisfy this court as to the *merits* of the claim, as that is submitted to be the sole responsibility of the high court. This Court's attention is drawn to the submission made on 24 March (Item 2 in this bundle) that provides authority for this proposition, and indeed this view is supported in the CPS's own guidance.

6. A further question arises concerning the requested adjournment and the responsibility of the defendant to actively pursue the matter to conclusion. The defendant notes that the high court process can be lengthy, and there is a heavy workload at the administrative court. There is a case already before the high court that makes substantially similar claims (see enclosed bundle pertaining to the progress of the case of *Stratton*). Taylor asks this court to determine whether they might adjourn these criminal proceedings pending the outcome of those Judicial Review proceedings, or, adjourn in order for him to initiate his

own proceedings (possibly seeking to join with the aforementioned matter presently before the court later).

7. Mr Taylor was legally represented for his first hearing on 24 March 2009, but due to his solicitor's concerns over this category of case not qualifying for public funding, he withdrew from the case on the 31st March having offered no further assistance. Taylor was left without legal representation and obliged to serve this submission within a week.

8. The defendant remains a litigant in person and requests that the court assists him with procedural matters and advice where necessary, and grants him permission to use a 'McKenzie friend' from a supporting organisation (the *Drug Equality Alliance*) to assist him.

II. The outline proposed claim for the Divisional Court to determine

9. Cm 6941, a Government Command Paper,[1] elucidates abuses of power by the Secretary of State for the Home Department ("SSHD") in the administration of the Misuse of Drugs Act 1971 c.38 ("the Act") grounded in illegality, irrationality and unfairness. The subsequent intended criminal proceedings against Taylor manifest two inequalities of treatment:

   1) a failure to treat like cases alike, *viz* the unequal application of the Act to those concerned with equally harmful drugs without a rational and objective basis; and

   2) a failure to treat unlike cases differently, *viz* the failure to treat those who use controlled drugs peacefully as a different class from those who do not.

10. These two inequalities of treatment would apply unequal deprivations of liberty at common law and discrimination contrary to Article 14 of the Human Rights Act 1998 ("HRA") within the ambit of Articles 5, 8, 9 & Protocol 1 Article 1 on the grounds of "property" and "legal status" to Taylor if the criminal proceedings were allowed to continue.

11. On page 24 of Cm 6941, the SSHD unconsciously admitted abusing the Act's powers whilst defending the two inequalities of treatment on subjective and/or incoherent grounds not rationally connected to the Act's policy and/or objects.[2]

12. Scrutiny of the Act conjunct Cm 6941 shows that the abuses occur because: (1) the Parliament has neither stated an explicit policy nor fixed any triggering circumstances to guide the SSHD in exercising s2(5) of the Act, which prompts the control of a drug; (2) HM Government has fettered the SSHD to an overly-rigid and predetermined policy; (3) the SSHD has failed to understand and give effect to the Act's policy and objects; and (4) the SSHD has arbitrarily exercised s2(5) and the incidental discretionary powers.

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[1] Cm 6941 (2006) *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?*, October 13th 2006

[2] *Cf. Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030

13. Lord Nicholls of Birkenhead affirmed the role of the court to protect citizens from such abuse in *R v Looseley*, *Attorney General's Reference* (No 3 of 2000) [2001] UKHL 53:

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law. By recourse to this principle courts ensure that executive agents of the state do not misuse the coercive, law enforcement provisions of the courts and thereby oppress citizens of the state".

III. The Misuse of Drugs Act 1971 c.38 – First Principles

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

15. 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)

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

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

18. A drug is liable to control under s2(2) of the Act if it is "being or appear[s] … likely to be misused <u>and</u> [this] misuse is having or appears … capable of having harmful effects sufficient to constitute a social problem", s1(2). (*NB* emphasis added)

19. The Act regulates human action with respect to controlled drugs.

20. The self-administration of controlled drugs is <u>lawful</u> under the Act, bar opium, s9.

21. The Act aims to prevent, minimise or eliminate the "harmful effects sufficient to constitute a social problem", s1(2), that <u>may</u> arise via the self-administration of dangerous or otherwise harmful drugs.

22. The Act targets these "harmful effects" indirectly 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.

23. 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.

24. The SSHD may not recommend that a drug be controlled under s2(2) of the Act except after consultation with or on the recommendation of the ACMD, s2(5).

25. The SSHD may not make any regulations under the Act except after consultation with the ACMD, s31(3).

26. The Act proscribes the enumerated activities re controlled drugs by default, however, the SSHD may – by regulations – authorise their exercise for any purpose, s7, or exclude the application of any provision of the Act which creates an offence, s22(a)(i).

27. The Act explicitly authorises the SSHD to 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).

28. The Act's discretionary powers are not fettered to any regulatory regime; however, any regulatory regime created under the Act's discretionary powers is fettered to the Human Rights Act 1998 and the Rule of Law.

29. The sections of the Act relevant to this case are neutral and generally applicable.

IV. Brief excerpts from the evidence – an Historic Artificial Divide

30. The following précis of the documentary evidence, in chronological order, situates Cm 6941 in context.

31. On May 22nd 2002, having concluded a wide-ranging inquiry into 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 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)

32. On January 19th 2006, the then Secretary of State for the Home Department promised a 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)

33. On July 31st 2006, after rigorously investigating the use of scientific advice and evidence in the classification of drugs under 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 concluded that the current classification system is not fit for purpose and should be replaced with a more scientifically based scale of harm". […] we urge the Home Secretary to honour his predecessor's commitment to review the current system, and to do so without further delay. (Summary, emphasis added)

The Science and Technology Committee report HC 1031 continued:

"The stated purpose of the classification system is to classify harmfulness so that the penalties for possession and trafficking are proportionate to the harm associated with a particular drug". (Paragraph 78)

"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)

34. On September 14th 2006, the Advisory Council on the Misuse of Drugs 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 they 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 […] 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. […] these distinctions are based on historical and cultural factors and lack a consistent and objective basis". (Overview, paragraph 1.13, emphasis added)

35. Faithful to this, the ACMD 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)

36. Then, on October 13th 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 SSHD admitted abusing the Act's powers whilst attempting to defend the inequalities of treatment on subjective and/or incoherent grounds not rationally connected to the Act's policy and/or objects:

"Government [believes that] 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)

37. And, on March 22nd 2007, while defending a claim for judicial review, CO/687/2007, of the SSHD's decision in Cm 6941 "not to pursue a review of the classification system at this time", the SSHD again admitted the inequalities of treatment:

"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)

V. Scrutiny of the evidence elucidates abuses of discretionary power

38. The new evidence shows that the SSHD has abused the Act's powers on the grounds of illegality, irrationality and unfairness. The subsequent application of the Act to individuals like Taylor manifests unequal treatment under criminal penalty. Reconstructing the new evidence briefly sustains this claim:

1) The July 31st 2006 Science and Technology Committee report, *Drug classification: making a hash of it?* found "a regrettable lack of consistency in the rationale used to make classification decisions". Thus, with respect to 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".

2) The September 14th 2006 ACMD report, *Pathways to Problems*, stated unequivocally that because of "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 drugs present to public welfare and individual autonomy. This, the ACMD said, has 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 drugs. Thus, they called for an integrated approach, and said that alcohol and tobacco should be "explicitly included" in their remit.

3) The October 13th 2006 *Government reply* to *Drug classification: making a hash of it?* **Cm 6941**, admits that the SSHD administers the Act unequally without a rational and objective basis connected to the Act's policy and/or objects. This admission is "scarcely veiled"[3] within the SSHD's three incoherent and/or subjective attempts to justify excluding alcohol and tobacco from the Act:

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

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 [alcohol and tobacco] responsibly and would conflict with the existence of a deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning". (Emphasis added)

39. Taylors's scrutiny of these three justifications follows. He elucidate the abuses of power and shows that the intended 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 those concerned with equally harmful drugs without a rational and objective basis; and

2) a failure to treat unlike cases differently, *viz* the failure to treat those who use controlled drugs peacefully as a different class from those who do not.

40. The first justification the SSHD gives in Cm 6941 for the first inequality of treatment admits an abuse of power. It 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 material 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".

41. 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)

42. 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 claims a power, which in law the SSHD does not possess, to exclude the harmful drugs alcohol and tobacco from the Act's remit and thus "exempt individuals or classes of individuals from the operation of the law".[4]

2) 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".[5]

43. Re the first 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 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".[6]

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

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[4] *Pretty v United Kingdom* [2002] 35 EHRR 1 at para 77
[5] Home Office response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk
[6] Misuse of Drugs Act 1971 c.38, Preamble conjunct s1(2), emphasis added

1) The SSHD's 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 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).

45. In this manner, the SSHD has failed to appreciate that Parliament embodied in the Act a beautifully evolutive and dynamic legal framework with inherent regulatory flexibility, s31(1), suitable to all dangerous drugs, classes of persons and circumstances.

46. 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)

47. Re the third error of law, the SSHD believes that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal". A decision maker who holds this belief does not understand the Misuse of Drugs Act 1971 correctly.

48. A drug is either "controlled" under the Act, s2(1)(a), or it is not. If a drug is controlled under the Act, only the unauthorised exercise of the enumerated activities re that drug is made unlawful. This error of law is found in all three of the SSHD's justifications.

49. 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)

50. 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"[7] of unjustifiable majoritarian discrimination equally applicable to homophobia, sexism and racism.

51. And while "historical precedent" has an objective basis, "cultural preference"[8] can only mean the subjective preference of the majority as the SSHD has not consulted affected minorities – who cannot reply anyway for fear of sanction – and so unfairly treats as irrelevant their cultural preferences. Understanding this, the ACMD declared in *Pathways to Problems* that "historical and cultural" factors re drugs "lack a consistent and objective basis".[9]

52. 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 principle targets of today's anti-drug messages – the young".[10] (Emphasis added)

53. Truly, the SSHD's allegiance to "historical and cultural precedents" is not credible because it diverts the Act's measures from the "harmful effects sufficient to constitute a social problem" that arise via alcohol and tobacco use. This thwarts the Act's policy by denying equal protection to the public from the harmful effects caused by alcohol and tobacco use whilst denying equal liberty to those concerned in the peaceful exercise of the enumerated activities re controlled drugs.

54. This is irrational and unfair.

55. 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:

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[7] *San Antonio School District v Rodriguez* (1973) 411 U.S. 1, 29 'the traditional indicia of suspectness'
[8] Cm 6941 (2006) page 15; *Cf. Hansard* HC Deb July 16th 1970 vol 803 col 1801
[9] ACMD (2006) *Pathways to Problems*, paragraph 1.13
[10] UNODC (1997) UN World Drug Report 1997, p 198, www.unodc.org/adhoc/world_drug_report_1997/CH5/

"A classification system that applies to [alcohol, tobacco and controlled drugs] would be unacceptable to the vast majority of people who use [alcohol and tobacco] responsibly". (Emphasis added)

56. This justification shows that the SSHD is afraid of the political cost of applying the "policy of prohibition"[11] to alcohol and tobacco and has "shut his eyes" to evidence:

1) that the peaceful use of controlled drugs is both possible and common place; and

2) that the permanent proscription of the enumerated activities re controlled drugs, bar medical and scientific purposes, is equally "unacceptable" to the millions who use controlled drugs peacefully.

57. 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)

58. The second clause of the SSHD's third justification for the first inequality of treatment embodies the second 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)

59. This illuminates a deep, unsettled legal controversy in which access to certain drug mediated mental states is facilitated by law, whilst access to other drug mediated mental states is obstructed by law. This violates freedom of thought.

[11] Home Office response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk

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

1) a duty to respect an individual's "free and informed choice"[12] in the peaceful use of "[drugs] that alter mental functioning" ; and

2) a duty to differentiate the peaceful 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 the commerce in all "[drugs] that alter mental functioning" to reasonable, necessary and proportionate regulations.

61. Yet, Government executes these duties only re the mind-altering drugs used by the "vast majority", alcohol and tobacco. Consequently, the SSHD fails to distinguish under the Act those who peacefully use controlled drugs as a different "class", s31(1)(a), from those who do not. This is the second inequality of treatment.

VI. The Common Law Argument

62. Mr Taylor asserts that the Misuse of Drugs Act 1971 c.38 is a generally applicable Act of Parliament administered unequally by the SSHD because of errors of law, irrationality and unfairness. The subsequent intended application of the Act to Taylor would violate his common law right to equality of treatment and might deprive him of his liberty, security and property without Due Process.

63. Taylor experiences two inequalities of treatment:

1) a failure to treat like cases alike, *viz* the unequal application of the Act to those concerned with equally harmful drugs without a rational and objective basis; and

[12] Cm 41 *Smoking Kills,* www.archive.official-documents.co.uk/document/cm41/4177/contents.htm

2) a failure to treat unlike cases differently, *viz* the failure to treat those who use controlled drugs peacefully as a different class from those who do not.

64. Taylor characterises this unequal treatment as a majoritarian abuse of executive power. Taylor is thus entitled to the Court's protection.

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

65. Courts uphold the Rule of Law through the doctrine of Due Process, which respectfully "contemplates a civil society under equal and just laws"[13] that necessarily determine the scope of Government power and the manner of its exercise. By fearlessly administering Due Process, this Court protects individuals against the "oppressions and usurpations" of Government power in executing law's rules.

66. 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".[14] 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".

67. 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:

> "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

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

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."

68. This salutary doctrine encapsulates both the problem and the remedy in this case.

b. The Principles of Law

69. 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 the 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.

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.

70. 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.

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

72. 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

73. 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 the self-administration of "dangerous or otherwise harmful drugs".[15]

74. 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.

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

d. Reasonable differentiations fairly related to the object of regulation

76. With the exception of opium smoking, s9, drug use is not an offence under the Act or at common-law. And while the difference between the activities enumerated in the Act and personal drug use might seem insignificant, the legal line is drawn here.

[15] s1(2) conjunct Preamble

77. Moreover, because the Act's object of regulation is "harmful effects sufficient to constitute a social problem" that may arise via the "misuse" of "dangerous or otherwise harmful drugs",[16] differentiations should distinguish *use* from *misuse*.

78. Section 37(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)

79. Thus, with respect to drug use, i.e. "the taking of a drug", 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 yet 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 yet follows competent informed choice and drug use harmful only to the agent and does not follow competent informed choice.

80. These "reasonable differentiation[s]" are based on the outcome of drug use and are neutral with respect to the drug, the agent's intent, and the setting in which drug use occurs. 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

[16] s1(2) conjunct Preamble & Title

81. Four antecedent conditions, in two complementary pairs, cause the two inequalities of treatment Taylor experiences:

1) The drug of Taylor's concern is controlled under the Act; so, the Act's police power measures are applied to him;

2) The SSHD refuses to control the drugs alcohol and tobacco under the Act; so, the Act's police power measures are not applied to people concerned with them.

3) The SSHD does not afford the three "reasonable differentiation[s]" available under the Act re drug use to people concerned with controlled drugs.

4) Because the SSHD refuses to control alcohol and tobacco under the Act, the three "reasonable differentiation[s]" are afforded to people who use them.

f. So as to Avoid Political Retribution

82. The equality-of-treatment question has been referred to but not answered from the earliest moments of debate on the Misuse of Drugs Bill 1970. One excellent example 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?"[17]

83. Now, with reckless precision, the SSHD has finally declared the political answer: 'applying the "policy of prohibition" to alcohol and tobacco "would be unacceptable to the vast majority of those who use [alcohol and tobacco] responsibly"'.

g. Arbitrary and Unreasonable Government

84. Taylor believes that the antecedent conditions, which directly manifest the unequal treatment he experiences under the Act, are rooted in five crucial factors:

[17] *Hansard* HC Deb July 16th 1970 vol 803 col 1754

1) Parliament has neither stated an explicit policy nor fixed any triggering circumstances to guide the SSHD in exercising s2(5) of the Act, which prompts the control of a drug; however, the ACMD exists to advise the SSHD.[18]

2) The SSHD has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]"[19] and therefore that 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.[20]

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.

85. 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. unfettered.

86. This lack of explicit standard or rule re the s2(5) power allows the denial of Due Process under the Act to take root via the first pair of antecedent conditions articulated in paragraph 81. The remaining four factors offer a plausible explanation for the denial of Due Process under the first factor and the second pair of antecedent conditions; nevertheless, Parliament presumably did not intend to authorise abuses.

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[18] *Cf.* Section 811 *US Controlled Substances Act*, 21 U.S.C. 811, "Authority and criteria for classification of substances"

[19] Home Office Response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk

[20] *See* ACMD Freedom of Information Act 2000 request replies dated August 14th 2007 at para 2; November 13th 2007 at para 1; March 5th 2008 at para 1

87. Accordingly, the SSHD's actions in manifesting the inequalities of treatment under the Act must be anxiously scrutinised for their legality, rationality and fairness; but first, a few preliminaries.

h. Preliminaries – Human dignity and Judicial deference to Government Treaty & Policy

88. In *R (Carson) v Secretary of State 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".

89. 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"[21] is a fundamental right because it is the foremost way to avoid disregard for human dignity.

90. Thus, 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 Secretary of State for the Home Department, 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".

91. As the sections of the Act at issue in this case are neutral, generally applicable and do not indicate inequality of treatment is intended, this Court must assume Parliament did not intend for the SSHD to override Taylor's basic right to equal treatment via the Act's discretionary powers.

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

92. And since Parliament has not incorporated the UN Conventions directly, the Act and its discretionary powers remain unfettered to the UN drug control regime. Still, previous Courts have dismissed rights-based challenges to the Act by relying on "inferences"[22] drawn from Government's subscription to the UN drugs Conventions.

93. 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 laws of the United Kingdom. The courts must enforce those laws; judges have no power to grant specific performance of a Treaty … or misconstrue legislation 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)

94. For clarity, Taylor's rights-based challenge is to administrative action under the Act and the subsequent application of that mal-administered Act to him, not the Act's policy and/or objects; hence, judicial deference to Government's treaty obligations and/or the SSHD's fundamentally unequal "policy of prohibition"[23] would be indefensible.

95. Taylor therefore requests that the Court rule on whether the SSHD has abused the Act's powers, and if so, declare that his prosecution would be an Abuse of Process.

A. Illegality

96. The evidence demonstrates that the SSHD has plainly misdirected himself in law with respect to the Misuse of Drugs Act 1971 and its regulation of the SSHD's decision-making powers, particularly the circumstances in which the permissive exercise of the s2(5) 'controlling' power becomes a duty.[24]

97. According to Lord Diplock, illegality in administrative action arises where "the decision maker [does not] understand correctly the law

[22] *Cf. R v Taylor* [2001] EWCA Crim 2263 at 14 *&* 31; *R v Hardison* [2006] EWCA Crim 1502 at 9 *&* 10
[23] Home Office Response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk
[24] *Cf. Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1033-1034

that regulates his decision-making power and [does not] give effect to it".[25] Thus, illegality has two facets: failing to understand the law correctly and failing to give effect to it.

i. Failing to Understand the Act

98. A pernicious error of law obfuscating decision-making re "dangerous or otherwise harmful drugs" is the belief that some drugs or "substances" are "legal" whilst the Act makes other drugs or substances "illegal". A decision maker who holds this belief does not understand the Misuse of Drugs Act 1971 correctly.

99. A drug is either "controlled" under the Act, s2(1)(a), or it is not. If a drug is controlled under the Act, only the unauthorised exercise of the enumerated activities re that drug is made unlawful. This means that the Act regulates human action, not drug action.

100. It is therefore nonsensical for the SSHD to assert, in Cm 6941, that the Act "is not a suitable mechanism for regulating legal substances such as alcohol and tobacco".

101. Crucially, though, this non-sense elucidates the SSHD's failure to give effect via s2(5) to two jurisdictional 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 SSHD declared in Cm 6941: "alcohol and tobacco account for more health problems and deaths than illicit drugs".

102. Taylor asserts that the SSHD's failure or refusal to give effect to these facts via s2(5) occurs because the SSHD applies an overly-rigid and predetermined "policy of prohibition" to the facts re alcohol and tobacco rather than applying a correct understanding of the Act's policy. Hence, the SSHD wrongly asserts that:

> "[The Act] focuses on prohibiting illicit and harmful drugs".[26] (Emphasis added)

[25] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374

103. The Act focuses not on "prohibiting … drugs" but on protecting the public from the "harmful effects sufficient to constitute a social problem", s1(2), that may arise via the use of "dangerous or otherwise harmful drugs". And to achieve this the Act seeks to "restrict" ss3-6, "prohibit" ss8-9 and/or "regulate" ss7, 10 & 22, the exercise of the enumerated activities re controlled drugs whilst generating a society-wide harm minimisation conversation.

104. So again, the Act focuses not on prohibiting drugs but on regulating human action.

ii. Failing to give Effect to the Act

105. The SSHD asserts that the Act "is not a suitable mechanism for regulating legal substances such as alcohol and tobacco". This unveils two errors of law:

1) The SSHD claims a power, which in law the SSHD does not possess, to exclude the harmful drugs alcohol and tobacco from the Act's remit and thus "exempt individuals or classes of individuals from the operation of the law".[27]

2) The SSHD 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]".[28]

106. Re the first error of law, once it was established that alcohol and tobacco "misuse" is "having harmful effects sufficient to constitute a social problem", s(1)2, the SSHD had a duty to instigate their control under s2(5) of the Act. The SSHD's failure to do so denies equal protection to those affected by alcohol and tobacco misuse and denies equal rights to those concerned in exercising the enumerated activities re controlled drugs. This thwarts the Act's policy and creates the inequality of treatment.

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[26] Home Office Response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk

[27] *Pretty v United Kingdom* [2002] 35 EHRR 1 at para 77

[28] Home Office Response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk

107. If, however, the SSHD 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 Taylor and believes that there is a rational and objective basis for doing so, the proper process is to control alcohol and tobacco under s2 of the Act and then apply s22(a)(i) as required. Section 22(a)(i) states:

> "22. Further powers to make regulations.
>
> The Secretary of State may by regulations make provision –
>
> (a) for excluding in such cases as may be prescribed –
>
> 1. "the application of any provision of this Act which creates an offence".

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

1) The SSHD's 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).

2) The SSHD's 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).

109. Taylor asserts that these two powers show that the Act's policy does not intend to "limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs".[29]

110. Accordingly, the facts and law with respect to alcohol and tobacco do not justify the SSHD's failure to exercise the s2(5) power instigating their control under the Act. The inequality of treatment Taylor experiences is a consequence of this illegality.

B. Irrationality

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

111. 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".[30]

112. Taylor's critical examination of the evidence and the Act shows that the failure of the SSHD to instigate the control of alcohol and tobacco under s2(5) is the decision directly responsible for the inequalities of treatment Taylor experiences.

113. More, in making decisions under the Act relevant to this case, the SSHD has:

1) fettered decision-making to UN drug policy;

2) acted inconsistently with respect to people similarly situated;

3) considered irrelevant factors and disregarded relevant factors;

4) pursued an improper purpose; and

5) abused a dominant position.

i. Fettered Discretion – A Policy of Prohibition

114. Rather than exercise the s2(5) discretion as the public interest requires, Government has fettered the SSHD to the UN drug control regime by treaties based in large part on the historical and cultural precedents of the industrialised West.

115. 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)

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

116. Yet, in Cm 6941, the SSHD 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)

117. The SSHD's September 27th 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)

118. These statements indicate that HM Government has fettered the SSHD's "freedom of action" under the Act to the unincorporated UN Conventions, effectively surrendering the Act's policy to an unaccountable international body.

119. This thwarts the Act's policy and cannot be lawful.[31] Further, the SSHD has expressly and repeatedly pre-empted drug classification outcomes and future policy *before* the required consultation with the ACMD; such fettering of discretion negates the very purpose of the ACMD and of the consultation process entirely.

ii. Administrative Consistency – Manifest Absurdity

120. No sensible person would exclude the dangerous or otherwise harmful drugs alcohol and tobacco from the scope of an Act designed to "make provision for dangerous or otherwise harmful drugs", particularly when the SSHD declared in Cm 6941 that "alcohol and tobacco account for more health problems and deaths than illicit drugs".

121. Not only is this inconsistent with the Act's policy, this exclusion of alcohol and tobacco is "so outrageous in its defiance of logic"[32] because it conflicts with the general principle at the heart of this case: like cases should be treated alike.[33]

122. Adding insult to injury, the SSHD stated in Cm 6941 that:

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[31] *Cf. Ellis v Dubowski* [1921] 3 KB 621.
[32] *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410
[33] *Matadeen v Pointu* [1999] AC 98 at 109

> "[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". (Paragraph 7, emphasis added)

123. Taylor asserts that the SSHD obviously takes the harms caused by alcohol and tobacco misuse significantly less seriously, as those producing alcohol and tobacco are not subject to a maximum penalty of fourteen years imprisonment, whilst, for producing "controlled drugs", Taylor is.

iii. Relevant/Irrelevant Considerations – Unacceptability

124. In not giving effect to s2(5) re alcohol and tobacco, the SSHD has disregarded the relevant facts re alcohol and tobacco whilst considering the irrelevant factors of "historical precedence", "cultural preference", and/or "political vision", etc.[34]

125. Yet, Lord Greene said in *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 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".

126. Against this standard, the SSHD's third justification in Cm 6941 for failing to give effect to s2(5) re alcohol and tobacco is *Wednesbury* irrational:

> "A classification system that applies to [alcohol, tobacco and controlled drugs] would be unacceptable to the vast majority of people who use [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". (Emphasis added)

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

127. Accordingly, neither "unacceptab[ility]", "responsible use" or "historical tradition" are relevant considerations to the exercise of the SSHD's s2(5) power re the "dangerous or otherwise harmful drugs" alcohol and tobacco.

iv. Improper Purpose/Motive – Electoral Success

128. Taylor 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 SSHD acts for a purely political motive rather than in the public interest. 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".[35]

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

130. The Act grants the SSHD the s2(5) power so that the exercise of certain enumerated activities re 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", can be brought under the Act's control.[36] If these implicit criteria are satisfied, the SSHD must act to control the drug.[37]

131. So, in refusing to exercise the s2(5) power re alcohol and tobacco because the SSHD believes that "[The Act] focuses on prohibiting illicit and harmful drugs",[38] the SSHD has acted on purely political considerations and thus for an improper purpose.

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[35] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112
[36] Misuse of Drugs Act 1971 c.38, Preamble conjunct s1(2), emphasis added
[37] *R v Tithe Commissioners* (1849) 14 QB 459 at 474; *Julius v Lord Bishop of Oxford* (1880) LR 5 App Cas 214
[38] Home Office Response to Better Regulation Executive, September 27th 2007, www.betterregulation.gov.uk

v. Abuse of Discretion – Abuse of a Dominant Position

132. The SSHD's total inactivity re alcohol and tobacco, amounts to an abuse of the s2(5) discretion.[39] This abuse occurs because:

1) Parliament has neither stated an explicit policy nor fixed any triggering circumstances to guide the SSHD in exercising s2(5) of the Act, which prompts the control of a drug.

2) The SSHD has erroneously come to believe that the "policy of prohibition [is] reflected in the terms of the [Act]" and therefore that 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.

133. Accordingly, the SSHD's refusal to exercise the s2(5) power is a majoritarian abuse of executive discretionary power which sets up the inequalities of treatment, i.e. in administering the Act, the SSHD unfairly favours the electoral majority.

C. Unfairness

134. 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.[40]

135. Cm 6941, however, shows that the SSHD administers the Act unfairly by:

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

[39] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997
[40] *R v Secretary of State for the Home Department ex p Pierson* [1998] AC 539 at 591

2) exercising s2(5) 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 alcohol and tobacco commerce and consumption.

i. Failing to administer the Act in an evidenced-based manner

136. Successive SSHDs 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".[41] (Emphasis added)

137. 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 SSHD advice on exercising the Act's powers; and (3) giving the SSHD advice on any measure or measures, "whether or not involving alteration of the law", thought necessary to achieve the Act's purpose.

138. Parliament then made the ACMD's advice or consultation a prerequisite to every exercise of the SSHD's discretion under the Act re drug control, classification, or regulation, ss2(5), 7(7) & 31(3).

139. These sections powerfully indicate that Parliament intended the Act's administration to evolve "in the light of new scientific knowledge", above all decisions respecting liberty.

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

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

141. This has resulted in: (1) the arbitrary exclusion of alcohol and tobacco from the Act; (2) a failure to evolve a penalty structure proportionate to the risk of harm each controlled drug presents when misused; (3) the failure to consider the least restrictive regulatory options; and (4) the two inequalities of treatment Taylor experiences.

142. Accordingly, the SSHD's failure to ensure that decisions under the Act are evidence-based and consistent with the Act's policy and objects negates the possibility of a fair trial; the criminal process is flawed *ab initio*.

ii. The Arbitrary Exercise of s2(5)

143. By excluding alcohol and tobacco from the Act on the grounds of "historical and cultural precedents",[42] the SSHD 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".[43] This creates the first inequality of treatment: the failure to treat like cases alike, *viz* the unequal application of the Act to those concerned with equally harmful drugs without a rational and objective basis.

144. More, 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 SSHD'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 those concerned in the peaceful exercise of the enumerated activities re controlled drugs.

145. 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".

[42] Cm 6941 (2006) page 24
[43] *Railway Express Agency, Inc v New York* (1949) 336 US 106 at 112

146. The conspicuous unfairness at issue here is easy to see and "leaps up from the page".[44]

iii. Failing to evolve a proportionate penalty structure

147. The Act differentiates "controlled drugs" listed in Schedule 2 into three classes indicating risk of harm when misused. These classes determine the maximum penalties set out in Schedule 4 for the offences enumerated under the Act, s25. And since these penalties concern deprivation of liberty, it is 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).

148. Accordingly, Parliament charged the ACMD with scientifically evaluating the risk of harm inherent in a controlled drug's misuse. Nevertheless, the political responsibility for ensuring that the penalty fits the risk falls squarely on the SSHD.

iv. The Failure to Implement Reasonable and Proportionate Regulations under ss7 & 22

149. The SSHD's failure to implement reasonable and proportionate regulations, within the limits of ss7(1)-(2), 22 & s31(1)(a), creates the second inequality of treatment:

2) the failure to treat unlike cases differently, *viz* the failure to treat those who use controlled drugs peacefully as a different class from those who do not.

150. This inequality of treatment means that those who use controlled drugs peacefully, like Taylor, are not afforded them same respect as the SSHD and Government afford the "vast majority who use [alcohol and tobacco] responsibly".[45]

151. Thus, through the "policy of prohibition", the SSHD denies the peaceful use of controlled drugs, irrespective of the risk of harm, bar medical and scientific use, whilst facilitating the peaceful, non-medical, and non-scientific use of alcohol and tobacco.

[44] *R v SSHD, ex p Rashid* [2005] EWCA Civ 744 at 23
[45] Cm 6941 (2006) page 24

152. This is unfair and contrary to the Act's policy and objects, which concerns itself not with absolute safety, nor even 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 the use of "dangerous or otherwise harmful drugs".[46]

153. Accordingly, with respect to drug use, ss7(1)-(2) & 22 afford the following three "reasonable differentiation[s proportionately] related" to the harmful effects that may arise via 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 yet 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 yet follows competent informed choice and drug use harmful only to the agent and does not follow competent informed choice.

154. 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 the autonomous individual separable from the public interest and education and health measures separable from the need for police power.

155. The SSHD would be entirely justified in implementing these "reasonable differentiations" via regulations under ss7(1)-(2) & 22 of the Act. This would allow for the control of alcohol and tobacco under the Act, without the "unacceptab[ility]" of the "policy of prohibition", whilst allowing a lawfully regulated commerce in controlled drugs for peaceful use to gradually emerge from the evidence base.

[46] s1(2) conjunct Preamble

156. Accordingly, the SSHD has not sought the least restrictive means of targeting the "harmful effects sufficient to constitute a social problem". This is unfair.

v. The SSHD's Apparent Bias toward Alcohol and Tobacco Commerce

157. Whilst the SSHD is entitled to have regard to "broader considerations of a public character",[47] in not applying the Act to alcohol and tobacco because it "would be unacceptable to the vast majority who use [alcohol and tobacco] responsibly", the SSHD appears biased in three ways:

1) Political bias – The SSHD acts favourably towards the drug preferences of the "vast majority" as the SSHD's political power depends on it and biased against a "tiny minority"[48] whose preferences do not affect the SSHD's political power.

2) Bias by association – the SSHD is associated with the "vast majority" who consume the drugs alcohol and tobacco as the various SSHDs administering the Act over the years have also consumed the drugs alcohol and tobacco.

3) Economic bias – Government receives approximately £20 billion in annual tax revenue from the commerce in alcohol and tobacco. Combining this with the SSHD's belief that the Act's policy is the "policy of prohibition", applying the Act to alcohol and tobacco would cost Government revenue.

158. Any fair-minded observer who considers the facts herein can only conclude that there is a real possibility that successive SSHDs administering the Act have been, and are now, biased.[49]

D. The principles of law that officials impose upon Taylor must be imposed generally

159. Taylor asserts that this analysis of the evidence and argument shows that the Act is not applied equally and in proportion to the risks posed to individuals and society, but is instead applied unequally based on a

[47] *R v SSHD, ex p Doody* [1994] 1 AC 531 at 559
[48] Bagehot (2009) 'The tiny minority", *The Economist*, March 21st 2009, Vol. 390 No. 8623, page 40
[49] *Magill v Porter* [2001] UKHL 67

hitherto unrecognised form of discrimination as severe as racism and sexism yet considerably more perverse due to its unconscious character and near-global social acceptance.

160. But this inequality before the law is unfair to Taylor who is denied equal rights in the exercise of the enumerated activities re the drug he prefers. It is also unfair to the general public who are denied equal protection from the harmful effects caused by alcohol and tobacco use.

161. This all comes down to the SSHD's overly-rigid and predetermined "policy of prohibition" of some but not all drugs used for non-medical and non-scientific purposes. Thus, Taylor's behaviour has been over-regulated while the "vast majority" who commerce and consume alcohol and tobacco is under-regulated.

162. In this manner, the SSHD's "policy" is a closed system that leads to abuses of the legal powers granted under the Act – where both the SSHD's "policy" and majoritarian public attitudes are self-reinforced through the exclusion, even denial of evidence indicating individuals like Taylor suffer inequalities of treatment under the Act.

163. These two inequalities of treatment constitute unequal deprivations of liberty at common law and discrimination contrary to Article 14 of the Human Rights Act 1998 ("HRA") within the ambit of Articles 5, 8, 9 *&* Protocol 1 Article 1 on the grounds of "property" and "legal status".

164. Accordingly, the SSHD's implementation of the Act unjustifiably discriminates between equally harmful drugs instead of legitimately discriminating by regulations, between drug use and drug misuse, as the Act advocates in both title and text.

165. In so doing, Government appears biased as it uses the Act's legal powers for the political purpose of gaining the support of the electoral majority rather than for the legal purpose of tackling the "harmful effects sufficient to constitute a social problem" that may arise via the use of "dangerous or otherwise harmful drugs".[50]

166. In practice, the SSHD has a closed mind to the possibility that the policy should change to suit the public interest and to ensure equality before the law.

[50] s1(2) conjunct Preamble

167. This is majoritarianism; the majority have more political power than minorities, land can deny such persons equal rights and equal protection. As such, Taylor's indictment is flawed because it is founded upon an abuse of power, indeed, an abuse of the criminal jurisdiction in general. If allowed to continue, this would lead to an abuse of the Courts process and to an unfair trial with only one possible outcome.

VII. The Human Rights Act 1998 Argument

Article 14 – Prohibition against Discrimination

168. The Misuse of Drugs Act 1971 controls the exercise of enumerated activities in "dangerous or otherwise harmful drugs". The list of drugs "controlled" by the Act includes the drug the subject of Mr Taylor's charges, but excludes alcohol and tobacco, the two drugs which Government has acknowledged cause the most harm to society.

169. This results in persons with interests in alcohol and tobacco being able to lawfully exercise *full* property rights in the dangerous drugs alcohol and tobacco, as the executive have exempted (*de facto* not *de jure*) them from the scope of the Act, whilst concomitantly persons with interests in drugs "controlled" by the Act are prohibited under severe criminal penalty from exercising property rights in those drugs even when they are found by objective evidence to be less harmful when used peacefully.

170. Mr Taylor asserts that this difference of treatment is disproportionate, unlawful, unfair and unnecessary in a democratic society and results from an apparent bias, irrationally fettering executive discretion via a majoritarian abuse of legal power threatening human dignity, basic human rights and the Rule of Law.

171. In *Pretty v United Kingdom* [2002] 35 EHRR 1 at 77, the Strasbourg Court said:

> "Strong arguments based on the rule of law could be raised against any claim by the executive to exempt individuals or classes of individuals from the operation of the law".

172. This is especially so where the exemption is contrary to the legitimate aim and principles for which the legislation was created and intended.

173. And so, whilst asserting that the "search for balance" … constitutes the foundation of a "democratic society", in *Chassagnou and Others v France* [1999] 29 EHRR 615 at 112, the Strasbourg Court described the crux of such matters:

> "Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".

174. More, in *Thlimmenos v Greece* [2000] 31 EHRR 411 at 44 the Strasbourg Court said:

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different".

175. Yet, as applied by the executive, the Act fails to justifiably distinguish the relevant differences between differing use risks and/or outcomes of controlled drugs use, *viz* responsible versus irresponsible use, i.e. use versus misuse.

176. In summary, as applied by successive Governments, the Act discriminates on the grounds of property, drug orientation, legal status, association with a national minority, and political power within the *ambits* of several Convention rights: Article 1 Protocol 1, Articles 8, 9, 5 and 6.

Protocol 1 Article 1– Respect for Property

177. The Misuse of Drugs Act 1971 is clearly directed at controlling the use of drugs property *and* associated activities: importation and exportation, s3; production, manufacture, extraction, preparation, supply, s4; possession, possession with intent to supply, s5; cultivation of the genus *Cannabis*, s6; operation of premises where such property activities take place, s8; smoking *Opium,* s9; etc.

178. Thus, the implementation of the Act's measures is clearly within the *ambit* of Protocol 1, Article 1 of the ECHR.

179. And, whilst Parliament set prohibition of the exercise of property rights vis-à-vis "controlled" drugs as the default state of the Act, where it has been fettered for 36 years, sections 7(1)-7(2) explicitly make provision for Government to create by statutory instrument, after consultation with the ACMD, a progressively less restrictive control scheme analogous to the Medicines Act 1968, i.e. tailored to each "controlled" drug's objective potential to harm individuals and society whilst allowing for the measures to evolve with the evidence base, thereby allowing for the reasonably safe or responsible exercise of property rights vis-à-vis 'controlled drugs' for non-medical and non-scientific purposes, s31(1)(a), i.e. "for doing things … that would otherwise be unlawful for them to do".

180. Accordingly, blanket prohibition of property rights, irrespective of the harmfulness of a controlled drug, cannot be reasonably incidental to the Act's legitimate aim of reducing risks to the public from harmful drug consumption.

181. Alternately, if such restriction on property rights vis-à-vis controlled drugs are proportionate and in the public interest then Government is failing to protect the public by allowing the exercise of property rights in relation to the equally or more harmful drugs alcohol and tobacco.

182. Taylor's Article 1, Protocol 1 claim is not freestanding but conjunct discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention" on the grounds of property, drug orientation, association with a minority and legal status.

183. Government therefore denies all meaningful use of controlled drugs, bar medical and scientific purposes, whilst facilitating the meaningful use of alcohol and tobacco. A rational and objective explanation does <u>not</u> exist for this disparity.

Article 9 – Freedom of Thought

184. Article 9 is engaged and infringed due to the nature of the property controlled under the Act; in SSHD's own words, "substances that alter mental functioning". And since freedom of thought is an absolute right, any interference in or limitation upon thought engages it.

185. Government respects the right of consumers of the harmful drugs alcohol and tobacco to "alter mental functioning" but denies this right

to consumers of cannabis and other "controlled" drugs despite the evidence that many such drugs are lesser or equally harmful than alcohol and tobacco.

186. Alternately, if such restrictions on Article 9 rights vis-à-vis controlled drugs are proportionate and in the public interest then Government is failing to protect the public from the equally or more harmful drugs alcohol and tobacco.

187. Taylor's Article 9 claim is freestanding *and* conjunct discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention" on the grounds of property, drug orientation, association with a national minority and legal status.

Article 8 – Respect for Privacy

188. In *Pretty v United Kingdom* [2002] 35 EHRR 1 at 62, the Strasbourg Court observed:

> "… even where […] conduct poses a danger to health or, arguably, where it is of a life-threatening nature, the case-law of the Convention institutions has regarded the State's imposition of compulsory or criminal measures as impinging on the private life of the applicant."

189. Thus, the compulsory criminal measures of the 1971 Act engage Article 8. And since Mr Taylor's *activities* were confined to his domicile they should be respected in the same manner as alcohol and tobacco producers are, i.e. subject only to necessary, reasonable and proportionate restrictions that facilitate freedom of contract, and proportionate controls on harmful modes of property use.

190. Alternately, if such restrictions on Article 8 rights vis-à-vis controlled drugs are proportionate and in the public interest then Government is failing to protect the public from the equally or more harmful drugs alcohol and tobacco.

191. Taylor's Article 8 claim is not freestanding but conjunct discrimination in "the enjoyment of the rights and freedoms set forth in [the] Convention" on the grounds of property, drug orientation, association with a national minority and legal status.

Article 6 – Due process and Fair Trial Rights

192. Article 6 is engaged by the continuing failure of Government to exercise the duty to review regulations contrary to the intentions of the Parliament which designed the Misuse of Drugs Act 1971 to evolve with new evidence – a procedural safeguard to ensure proportionality, consistency and effectiveness. This has resulted in a 'blatant and obvious' discriminatory application of the Act, denying due process, and making a fair trial impossible; thus, it should never have taken place.

Article 5 – Liberty

193. In making the exercise of property rights in certain controlled drugs criminal acts whilst excluding alcohol and tobacco – drugs used by the majority – from the scope of the Act, the SSHD discriminates against minority drug property users within the ambit of Article 5. The outcome of this abusive exercise of the criminal jurisdiction by the SSHD is *arbitrary* investigation, harassment and detention of persons with interests in controlled drugs.

194. In *Kurt v Turkey* (1998) 27 EHRR 373 at 122, Strasbourg referred to "the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from *arbitrary* detention at the hands of the authorities" and to the need to interpret narrowly any exception to "a most basic guarantee of individual freedom". The Act, as applied, violates this principle.

Article 3 – Degrading Punishment and Treatment

195. Taylor asserts that the difference of treatment in his case, and generally, is "grounded upon a predisposed bias" on the part of decision-makers, and the "vast majority" of their constituents, fiercely dedicated to defending their drug property interests to the detriment of persons oriented towards or otherwise having interests in other drug property used to alter mental functioning.

196. In *Smith and Grady v United Kingdom* [2000] 29 EHRR 493 at 121, the Strasbourg Court noted it would not exclude the possibility that treatment "grounded upon a predisposed bias on the part of a … majority against a … minority" could, in principle, fall within the scope of Article 3.

VIII. Public interest

197. Government has yet to demonstrate an overriding public interest in providing for the blanket prohibition of the exercise of property rights in some potentially dangerous drugs but not other drugs such as alcohol and tobacco which "Government acknowledge[d] … account for more health problems and deaths than illegal drugs".[51]

198. And, since 1971, the unequal treatment of drugs and their users has caused immense harm to society. Under-regulation of alcohol and tobacco have contributed to over a million deaths in the United Kingdom whilst the attempted over-regulation of controlled drugs has contributed to the imprisonment of hundreds of thousands of otherwise law abiding citizens and to the growth of an unregulated black market governed only by the law of unintended consequences.

199. Strict licensing of all drugs used for non-medical and non-scientific purposes would significantly reduce the risks from both groups of drugs without unduly infringing the basic liberties or Convention rights.

IX. Conclusion

200. The Misuse of Drugs Act 1971 makes a distinction between drug use and drug "misuse which is having or appears to them capable of having harmful effects sufficient to constitute a social problem". Otherwise, it would be entitled the 'Use of (some) Drugs Act'.

201. In this manner, Parliament has created a neutral, strict liability Act; yet, Government has excluded the two most harmful drugs, both to the individual and society – alcohol and tobacco – from the sanctions which are imposed on those persons who exercise interests in drugs controlled by the Act.

202. But there can hardly be more palpable discrimination against a class than making the conduct *and* property which defines that class criminal. "Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation": *Railway Express Agency, Inc v New York* (1949) 336 U.S. 206, 113

[51] Cm 6941 (2006) page 24

203. Accordingly, if the threats presented by alcohol and tobacco *misuse* can be addressed without infringing the peoples' basic liberties or Convention rights, it has not been shown why similar measures cannot adequately address the threats presented by controlled drug *misuse*.

X. Remedy Sought

204. In *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, HL, at 62, Lord Griffiths said that this Court is empowered to interfere with the executive as:

> "the judiciary accept a responsibility for the maintenance of the Rule of Law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic Human Rights or the Rule of Law."

And Lord Lowry at 76 said:

"… the court, in order to protect its own process from being degraded and misused, must have the power to stay proceedings which have come before it and have only been made possible by acts which offend the court's conscience as being contrary to the rule of law. Those acts by providing a morally unacceptable foundation for the exercise of jurisdiction over the suspect taint the proposed trial and, if tolerated, will mean that the court's process has been abused".

205. In this context the Court is invited to act, "not so much against an abuse of procedure that has built up to enable the determination of a criminal charge [but] against a much wider and more serious abuse of the criminal jurisdiction in general". *Moevao v Department of Labour* [1980] 1 NZLR 464, 475-476, Woodhouse J.

206. Section 8(1) of the Human Rights Act 1998 enables this Court to give any remedy within its power if it considers it just and appropriate to do so.

207. Accordingly, Taylor seeks a stay of the proceedings, and moves to quash the charges on the basis that these offences are incompatible with the Rule of Law and basic Human Rights.

208. Taylor also seeks, under Section 4 of the Human Rights Act 1998, a declaration that the Misuse of Drugs Act 1971, as applied, is incompatible with his rights under the European Convention.

Presented by Alan Taylor, Darryl Bickler (McKenzie Friend to the defendant) and the Drug Equality Alliance

3 April 2009