# We have a problem – Part 2: a call for a paradigm shift by Casey Hardison


## Abstract

In Part 1 I declared a breakdown in Government's handling of the 'drug problem'. And, whilst pointing toward an understanding of what I believe lies at the core of the actual drug problem, I asserted Government's failure to deal effectively with the problem lies largely in the explanatory model, belief system or mindset with which Government approaches the conversation. Here I continue to evolve an understanding developed in Part 1 and begin to point towards an interpretation which may suggest a new and effective paradigm for intervention.


## Proem

In July 2007, HM Government willingly extended themselves to expand their explanatory model or belief system re the drug problem via the consultation paper: *'Drugs: Our Community, Your Say'*. Not to be underestimated, this document declares it lies at the heart of "the largest single consultation exercise on the future of tackling drugs this country has seen" (p.7).

In the Home Secretary's foreword to the consultation paper, the Rt Hon Jacqui Smith MP assured us: "We have moved on from a polarised debate and single approaches to a balanced strategy focused on outcomes, based on evidence and delivered through partnership". Yet, via critical analysis of the consultation paper and the Home Secretary's foreword, I can elucidate Government's pre-consultation explanatory model of the 'drug problem' and show how it contradicts the Home Secretary's above declaration whilst exposing the smoke and mirrors obfuscating the historical and cultural fettering and unconscious bias of a Government and, by democratic extension, a majority committed to protecting its dependence on the dangerous or otherwise harmful drugs alcohol and tobacco.

Of course, for many, dependence is a bold declaration; it's accusatory, declamatory, and even inflammatory. Still, I mean it in political, economic and psychophysiological contexts. Moreover, I wholeheartedly believe it is a justified declaration which evidence bears out.

## Toward a Deeper Understanding – a brief recapitulation with clarifications

Before moving on to the nitty-gritty of the consultation paper I want to represence the core arguments of Part 1 with evolutive clarifications suggested by this journal's readers. First, my three conclusions:

1. The consumption of psychoactive drugs have been used for millennia with the mental intention of amelioration of perceived dis-ease, be it stress, boredom, social ineptitude, [genetic] or the psychospiritual pathologies of the modern day "dysfunctional" family/society.

2. For some individuals, and regardless of any initial intention of drug use to ameliorate perceived dis-ease, their drug use can get out of hand and lead to harmful effects sufficient to constitute a social problem for themselves and others.

3. Government's Drug Strategy can be seen as an attempt to ameliorate the social aspect of the 'drug problem' via politics and law.

Conclusion 2 provides the justification for Government intervention via the regulation of property rights to reduce individual and societal harm, whilst increasing benefits, from the use of dangerous or otherwise harmful psychoactive drugs. This intervention can be, but emphatically is not now, an exemplary manifestation of the Home Secretary's promise of "a balanced strategy focused on outcomes, based on evidence and delivered through partnership".

Second, I declared that contrary to Government's repeated assertions, the exceptionally well designed and beautiful Misuse of Drugs Act 1971 ("the Act") categorically does not "regulate drugs which are classified as illegal or controlled" (BRE, 2007), rather, the Act regulates the people's exercise of property rights re controlled drugs. Thus, I asserted that the Act is fully competent to regulate the exercise of property rights in all "dangerous or otherwise harmful drugs" which the people are known to misuse, including alcohol and tobacco. And accordingly, Government has a duty to apply the Act's principles where the misuse of these drugs by the people "is having or appears … capable of having harmful effects sufficient to constitute a social problem", s1(2).

Third, I revealed how the administration of the Act was designed by Parliament to evolve along the lines of the Home Secretary's assurance, "focused on outcomes, based on evidence and delivered through partnership", with the primary outcome being the minimisation of drug consumption risks and harms. In this manner, the drafters of the Act envisaged a quintessentially flexible, s31(1)(a), and evolutive instrument, s1(2), s2(5) & s31(3), not fettered to the prohibition regime of the three UN drug Conventions; yet, regardless of Parliamentary sovereignty or intention, the Executive administers the Act as if it is actually fettered to the UN Conventions.

Fourth, I asserted this fettering lay at the root of the breakdown I declared in Government's efforts to reduce harm from drug misuse and reinforces their failure to make the same four conscious risk-benefit distinctions re 'controlled drugs' which we afford drugs used by the majority:

1. Beneficial use: encourage – *versus* – non-beneficial use: → distinction 2;

2. Reasonably safe use: tolerate – *versus* – unreasonably harmful use: → distinction 3;

3. Unreasonably harmful use resulting in harm to others: legislate against, protect autonomy and provide opportunities for health and emergency services – *versus* – unreasonably harmful use harming only the user: → distinction 4;

4. Unreasonably harmful use harming only the user who is a consenting adult exercising free and fully informed choice: respect autonomy, educate against and provide opportunities for health and emergency services – *versus* – unreasonable harmful use harming only the user who is unable to exercise free and fully informed choice, i.e., 'vulnerable groups' – the young, drug dependant users, persons of diminished responsibility, etc: legislate against, protect autonomy, educate against and provide opportunities for health and emergency services.

Instead, Government or, more precisely, the Home Secretary makes only distinction 5:

5. Unfamiliar drugs: prohibit as "harmful and no-one should use them" – *versus* – equally harmful familiar drugs: protect taxable market, users' rights and depreciate evidence of harm. Familiarity leads to acceptability and then to legal status; unfamiliarity creates fear, irrationality and scapegoating – all grounds for an unjustified discrimination and a selective prohibition.

Finally, I showed how Government admitted their allegiance to distinction 5 in just five sentences on page 24 of the October 13th 2006 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?*:

> "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 …"

A veritable treasure trove of information is embedded in the above five sentences: majoritarian bias conjunct historical, cultural and legal fettering, unjustifiable inconsistency and discrimination; predictable from a Governmental explanatory model rooted in distinction 5. As a bonus, it comes complete with three errors of law showing that Government does not understand the Misuse of Drugs Act 1971 which they must administer whilst cleverly allowing Government to "escape the political retribution that might be visited upon them if larger numbers were affected" (USSC, 1949) by the Act. These three errors of law are encapsulated in Government's belief system:

1. Government believes some drugs or 'substances' are 'illegal', yet, under the Misuse of Drugs Act 1971 only the exercise of property rights by persons with respect to "controlled drugs", s2(1)(a), "may", not "shall", be made illegal; so, the Act regulates people not drugs;

2. Government believes the application of the Act's classification system to a drug mandates the extinction of property rights for all but medical and scientific purposes, (this follows 1961 UN drug Convention Article 4(c) but not the Act and not Parliament's intention); and

3. Government believes they have the power to exclude two unquestionably harmful drugs from the controls of the Act, thereby exempting (*de facto* and *de jure*) certain individuals or classes of individuals from the application of the principles of a neutral law.

So, having evolved with fidelity to readers' suggestions my core arguments re Government's response to the drug problem, above all distinction 5, the *axis mundi* around which Government constellates their current Drug Strategy interventions and by which Government justifies their three errors of law, which I say they must persist in to avoid exposure of the majorities dependence on and "deeply embedded historical tradition and tolerance of consumption" (Home Office, 2006) of alcohol and tobacco, let us look closer at the Drug Strategy consultation paper.

## The Drug Strategy Consultation Paper – ("the DSCP")

The DSCP, *'Drugs: Our Community, Your Say'*, was launched in July 2007 by the Home Secretary, the Rt Hon Jacqui Smith MP. She assured us in her foreword that the DSCP was an opportunity for an "open debate" on how to deal with "drugs" in the UK. Yet, it is easily demonstrated that she and Government are not at all interested in an open debate on "drugs" but rather in protecting their faith in distinction 5.

And so the paper focused instead on the minor "tactical successes" of the current polarized strategy and how this strategy could be developed still further, whilst spinning statistics (TDPF, 2007), failing to consider alternative regulatory strategies and failing to refer to extensive qualitative research conducted by both statutorily empowered and independent non-governmental bodies (Police Foundation, 2000; HCHASC, 2002; PMSU, 2003; ACMD, 2006; HCSATC, 2006; RSA, 2007; UKDPC, 2007).This research has elucidated the abject failure of the current drugs strategy whilst undermining the philosophical foundation of the global 'war on drugs'. Not including this relevant new evidence, which impugns the key assumptions of the Drug Strategy, seriously undermines the credibility of Government.

### a. Drugs or substances – is there a difference?

Entitled *'Drugs: Our Community, Your Say'*, there was no indication in the letter to stakeholders or the DSCP foreword that the consultation was limited to drugs controlled under the Misuse of Drugs Act 1971; indeed, the DSCP did not even mention the Act. Thus, consultees had a legitimate expectation that all drugs which can cause harm to individuals and society when misused would be consulted upon and that no drugs would be excluded, particularly alcohol and tobacco, the two drugs Government had acknowledged less than a year earlier "account for more health problems and deaths than illegal drugs" (Home Office, 2006).

Yet, because the DSCP used the term "drugs" incorrectly, inconsistently and ambiguously, there was insufficient information for consultees to ascertain the drugs included or excluded in the consultation process and the drugs referred to each time the term "drugs" was employed in the DSCP proposals and response form questions. I believe this to be an intentional attempt by Government to obfuscate their faith in an explanatory model afforded by distinction 5.

In due course this faith will fail because our young people have been taught the official UN Office on Drugs and Crime ("UNODC") definition of "drugs" as part of the National Curriculum via the Personal, Social and Health Education framework (DfES, 2004). This definition embraces human behaviour and has been adopted by both the statutorily empowered Advisory Council on the Misuse of Drugs and the World Health Organisation. Most significantly, the UNODC definition of "drug" is consistent with the definition given for "controlled drug" in s2(1)(a) of the Misuse of Drugs Act 1971 and the definition for "drug" in Black's Law Dictionary 8th Ed. It reads:

> "A substance people take to change the way they feel, think or behave".

A few examples from the DSCP illustrate this issue:

i) Correct use – "We know that there will always be some people who abuse legal and illegal drugs" (p.14); (but see error of law 1 above re the legal/illegal distinction)
ii) Incorrect use – "These groups include: children whose parents misuse drugs or alcohol" (p.9); (this implies alcohol is <u>not</u> a drug; distinction 5?)
iii) Inconsistent use – "Alcohol, cannabis and solvents, rather than Class A drugs such as heroin and cocaine, are the substances most commonly used by young people" (p.8); (this identifies *Cannabis* as a substance. Is this distinction important? Is *Cannabis* becoming a familiar drug?)
iv) Ambiguous use – "Question 28: What role should the community play in tackling drug dealers and drug supply?" (p.26) (Are publicans and tobacconists included? If not, why not?)

So, unless Government intended the prohibition of commerce in the drugs alcohol and tobacco by stealth, Question 28, above, could <u>not</u> be given "intelligent consideration and an intelligent response" (EWCA, 2001); neither could these:

i) Q27a – "How can police forces best build confidence that drug supply is being effectively tackled locally?" (Surely they don't mean alcohol and tobacco supply, or do they?)
ii) Q36 – "How can we further reduce the supply of drugs and improve detection and the prevention of importation?" (Does this mean an end to the 'booze cruise'?)

The clearest indication of the drugs included in the DSCP is found on page 8:

> "It is more effective to address all substances that are misused by young people, including illegal drugs, alcohol and volatile substances, rather than focus on one type".

Although consistent with the UNODC definition, this statement distinguishes some "illegal" drugs as drugs, the drug alcohol by name and volatile substances, when used as a drug, as <u>not</u> drugs whilst omitting tobacco, the drug which directly contributes to the most human deaths and the drug which more young people use than any other including alcohol.

If the two most lethal drugs, alcohol and tobacco, were intentionally excluded from the DSCP then the use of the term "drugs" in the DSCP meant neither all drugs nor simply drugs controlled by the 1971 Misuse of Drugs Act but rather a new arbitrary and hybrid definition of drugs to mean 'all drugs except alcohol and tobacco'. This hybrid definition ensured ambiguity each time the term "drugs" was referenced in the Drug Strategy consultation paper.

Here again it is important to recall a September 2006 report from the statutorily empowered Advisory Council on the Misuse of Drugs, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy*. This report stated unequivocally that no objective justification exists for the apparent distinction made in the DSCP between drugs distinguished as "drugs" and drugs distinguished as "substances":

> "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. […] these distinctions are based on historical and cultural factors and lack a consistent and objective basis" (Para 1.13).

Ultimately, I believe this artificial distinction shows an intentional attempt by Government to obfuscate their failure to treat like cases alike by implying that somehow drugs distinguished as "drugs" in the DSCP are inherently different from drugs distinguished as "substances". This is distinction 5 in action whereby familiar "good" drugs are termed "substances" and unfamiliar "bad" drugs are termed "drugs" in pejorative.

### b. The DSCP's three laudable aims and one illuminating means

On page 7 the DSCP states, with emphasis: "We aim to make further progress on:

> [1] reducing the harms drugs cause to the development and well-being of young people and families;
>
> [2] bringing the full force of law enforcement to bear on drug dealers at all levels;
>
> [3] reducing the harms drugs cause to the health and well-being of individuals and families;
>
> [4] reducing the impact of drugs on local communities – reducing drug related crime and associated antisocial behaviour" (Emphasis added).

Aims 1, 3 and 4 are laudable and consistent with the Government's duty under the 1971 Misuse of Drugs Act to reduce harm from drug use whose harmful effects are "sufficient to cause a social problem". Yet, qualitatively different from the other proposed aims, the second proposed aim ("the 2PA") is actually an implementation or regulatory method for achieving the legitimate aim of harm reduction.

I found this rather illuminating as the DSCP references alcohol. And since it seems very unlikely, even absurd, that the 2PA would be applied equally to all drugs referenced within the DSCP, particularly alcohol, the 2PA itself elucidates a difference of treatment where physical liberty will be radically affected for some but not all "drug dealers"; more on this thread shortly.

### c. No coherent reasoning and a surprising admission of failure

The 2PA appears to be the central pillar of Government's Drug Strategy, yet, I found no reasoning or evidence in the DSCP to support its unequal and arbitrary application, *viz* "bringing the full force on law enforcement to bear on [some] drug dealers at all levels". Nor could I find evidence or reasons to support the assumptions which underpin the 2PA's alleged effectiveness at minimising risks and harms from controlled drug consumption. In fact, somewhat surprisingly, the DSCP goes on to admit a distinct lack of evidence for the 2PA's effectiveness whilst presenting no reasoning for supporting the 2PA over alternative, less restrictive regulatory options; in fact, alternative regulatory options made no appearance. So, let's look at this admission.

First, the DSCP indicates the unequal application of the 2PA is intended to reduce harms caused to individuals and the community by drug misuse:

> "In the final analysis, reducing supply means causing shortages of drugs", (ostensibly less use means less harm), "In those circumstances we would expect the prices of drugs to rise and the purity to reduce", (yet, under the current regime, reduced purity means increased adulteration) "Sustaining those changes should, in conjunction with other elements of the drug strategy, contribute to a reduction of harms caused to individuals and the community by drug misuse and lead to reduced demand" (p.23). (parenthetical comments mine)

And then, after 36 years, the DSCP admits the lack of evidence for the 2PA's effectiveness:

> "The fact that we have not yet reached a position in the UK where there has been an appreciable and sustained shortage of drugs means that we do not have direct experience of such effects" […] "the effort that has been put into reducing the supply of drugs has not so far resulted in increased street prices" […] "It has been difficult to discern a connection, which must exist to some extent, between the tactical successes (e.g. drugs seizures and arrests) and the shape of the market" (pps.23-24). (Emphasis added)

But Government knows that the extraordinary mark-up on the price of controlled drugs is a direct result of the prohibition of their possession, production and supply, and that "the drugs trade is resilient and able to respond flexibly to the pressures that are applied to it by the law enforcement authorities" (p.23), and thus to make any noticeable effect on the controlled drug market by supply side intervention, the 2PA, Government must increase its success rate ten-fold at minimum (PMSU, 2003). But even if supply interventions did successfully increase price, the evidence is not sufficiently strong to prove this would reduce drug use or harm. This makes the Home Secretary's declaration that the Drug Strategy is "based on evidence" absurd.

So, it is this lack of reasoning and lack of consideration of alternative regulatory options, conjunct the above frank admission of failure, which resulted in many consultees being so confused and dismayed that they were unable to give the questions asked about the second propose aim "intelligent consideration and an intelligent response" (EWCA, 2001).

### d. Unequal treatment exposed

Although Government admits a lack of evidence to support the 2PA, the DSCP elucidates that Government intends to persist in unequal treatment via the unequal application of it to "dealers" of drugs distinguished as "drugs" and drugs distinguished as "substances". Yet, this unequal treatment contradicts the Home Secretary's foreword which assured us: "We have moved on from a polarised debate and single approaches to a balanced strategy focused on outcomes, based on evidence and delivered through partnership".

I believe this is why Government did not set out in the DSCP the recent and relevant "evidence" contained in the 2006 reports of the statutory ACMD, *Pathways to Problems*, and the Parliamentary Science and Technology Committee, HC 1031, *Drug classification: making a hash of it?.* These reports expose Government's "polarised" belief system, manifested primarily via the 2PA, whilst informing consultees that the unequal treatment of persons based on Government's and the majority's "historical and cultural" (Home Office, 2006) distinction between drugs termed 'drugs' or 'substances' in fact "lack[s] a consistent and objective basis" (ACMD, 2006).

Moreover, the resulting unequal treatment is contrary to the common law principle of the equal applicability of neutral laws and unlawful in terms of Government's statutory duties under the Misuse of Drugs Act 1971. This unequal treatment denies equal rights and equal protection to all citizens whilst contributing to tens-of-thousands of unnecessary deaths and imprisonments each year on both sides of the legal distinction. I do not believe that the people or the Parliament intended these consequences. So why does Government persist in this unequal treatment?

## e. Government has embraced a scapegoat strategy

A defining factor of unequal treatment or discrimination which is *prima facie* offensive is a gross disrespect for human dignity founded upon the dichotomous segregation of an inclusive group into opposites based on stereotypical assumptions of good, right, acceptable vs. unacceptable, wrong, bad, dirty, evil, shameful, etc. This creates a power group, often the majority in number, and a powerless group, often the minority in number. Responsibility for the 'ill of society' is then attributed, by the decision-makers and the majority, to the minority "subject[ing them to … purposeful unequal treatment … [and] … relegate[ing them] to … a position of political powerlessness" (USSC, 1973). In this manner, the 'bad/out' group acts as a scapegoat for the 'good/in' group. Unconsciously, the social exclusion of the 'bad/out' group is intended to remove the harm, now identified with 'it/them', from the group. But alas, scapegoating is not a fair method or "balanced strategy" for solving the problem of harmful drug use and its effects on individuals and society. It increases social coherence of the majority at the expense of minorities. Besides, it cannot logically or even theoretically ameliorate the problem.

Crucially, in the context of the 1971 Misuse of Drugs Act, 'scapegoat' hides a blisteringly relevant etymological connection between the English word *pharmacy* and the Greek words *pharmakos* and *pharmakon* (Szasz, 1985). Whilst the Greeks used the word *pharmakon* to designate both healing and toxic drugs, at its origin it appears to have referred primarily to purgative medicaments. This is discernable because of the survival of the Greek word *pharmakos* as 'scapegoat' – the one who *must be purged* to make the social body healthy (Lenson, 1995).

And so, I declare, it is via a scapegoat strategy that Government fails to take into account and/or under-weighs the "cultural preferences" (Home Office, 2006) of minorities and takes into account and/or over-weighs the cultural preferences of the majority when administering the Act. In this manner, Government appears biased in favour of the majority of the electorate whose preferences their political power and budget depends on and biased against minorities whose attitudes do not directly affect their political power or budget. On these thoughts and findings, I assert Government *depends* on the majority who consume or otherwise have interests in alcohol and tobacco; for the majority of Government ministers, officers and servants, interpreting and implementing the Act also consume or otherwise have interests in these drugs.

## Are we still in denial?

Whether what I have exposed here amounts to political, economic and/or psychophysiological dependence for *each* constituent of the majority is ultimately unknown. What I do know is that doing the same thing over and over and expecting different results is a hallmark of irrationality. This may be why Sir Michael Rawlins, the Chairman of the statutory Advisory Council on the Misuse of Drugs, told the 2005-2006 Parliamentary Science and Technology Committee, HC 1031, *'Drug classification: making a hash of it?*', on February 15th 2006, that we must accept reality:

> "Q166: What we have to do though is realize that over the last 30 years the use of drugs has dramatically increased in this country, and that the criminal justice system has not prevented that in any way".

In the next instalment I propose an empowering interpretation which when coupled with Government guidance on risk management, better regulation and better policy making immediately suggests a practical and workable solution. This solution requires no new primary legislation, it only requires the willingness of Government to implement the Misuse of Drugs Act 1971 within the four corners of the law and with fidelity to the Home Secretary's assurance of "a balanced strategy focused on outcomes, based on evidence and delivered through partnership".

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