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Psychoactive Substances Bill Public Bill Committee
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PSYCHOACTIVE SUBSTANCES BILL: GOVERNMENT AMENDMENTS FOR COMMONS COMMITTEE STAGE

I am writing to let members of the Public Bill Committee have details of the Government amendments for Committee which I have tabled today (copy attached).

New offence of possession of a psychoactive substance in a custodial institution (amendments to clauses 1, 9, 35, 42 and 53 and new clause "*Possession of a psychoactive substance in a custodial institution*")

As I indicated at Second Reading in response to interventions from Steve Brine and others, we have been considering carefully the case for a limited possession offence to tackle the particular problems associated with the use of psychoactive substances in prisons (and other custodial institutions). As recommended by the Expert Panel which reported last autumn, the Bill focuses on tackling the trade in psychoactive substances and the offences in clauses 4 to 8 are directed to that end. Under the Bill, the simple possession of a psychoactive substance (as opposed to possession with intent to supply) is not criminalised. This approach reflects the fact that these substances have not had their harms assessed by the Advisory Council on the Misuse of Drugs. If a psychoactive substance's harms are felt to be severe enough to warrant a possession offence it can be controlled under the Misuse of Drugs Act 1971 which would then engage the possession offence provided for in that Act.

We have concluded that the problems associated with the use of psychoactive substances in prison (and other custodial institutions) justify a different approach in that context. The use of psychoactive substances in prisons is particularly destructive. Their use has been linked to mental health problems and disturbed behaviour by prisoners, including violence and it is therefore important that there are appropriate sanctions in relation to the possession of these substances. In a bulletin published in July, the Prisons and Probation Ombudsman identified 19 deaths in prison between April 2012 and September 2014 where the prisoner was known, or strongly suspected, to have been using psychoactive substances before their death.

It is clear that the use of psychoactive substances is having an increasingly destructive impact on security and order in prisons, on the welfare of individual prisoners and on the safety of officers. Control and order is fundamental to prison life. Without it, staff, prisoner and visitor safety cannot be guaranteed and the rehabilitation of prisoners cannot take place.

It is already the case that possession of a psychoactive substance by prisoners constitutes an offence against discipline in England and Wales under the Prison Rules, but the maximum penalty that may be imposed under the prison adjudication system is 42 added days to the offender's time in custody. We do not believe that this has an adequate deterrent effect and in any event such sanctions have no effect on visitors, staff or others who possess a psychoactive substance in a prison (but who may not do so in a way that constitutes intent to supply). The introduction of a criminal offence for possession of a psychoactive substance in a custodial institution would complement the continuing work by the National Offender Management Service to educate prisoners, staff and visitors about the harms caused by psychoactive substances and also enable firm measures to be taken to punish those who possess psychoactive substances in prison. The amendment to clause 9 of the Bill provides for a maximum penalty for the new offence of two years' imprisonment on conviction on indictment. The definition of a custodial institution includes adult and juvenile prisons, the immigration detention estate and service custody premises.

Aggravation of offence under clause 5 (amendment to clause 6)

At Report stage in the House of Lords, the House agreed amendments to clause 6 of the Bill moved by Lord Rosser. These amendments required the court sentencing an offender to an offence under clause 5 of the Bill (supplying, or offering to supply, a psychoactive substance) to treat the fact that the supply, or offer to supply, was committed on prison premises as an aggravating factor. In the Report stage debate, Lord Bates made it clear that the Government was sympathetic to the principle behind these amendments, but indicated that such matters were now properly a matter for the Sentencing Council when developing their sentencing guidelines. Whilst it remains our view that the generality of aggravating factors should be determined by the Sentencing Council, having reflected carefully on the debate in the Lords we are content to accept these Lords amendments. However, it is necessary to make some technical and drafting changes to the Lords amendments, in particular to define the types of prison and other custodial premises to which the provision will apply. The amendment adopts the term "custodial institution" and defines this to include adult and juvenile prisons, the immigration detention estate and service custody premises.

Exempted substances – definition of medicinal products (amendments to Schedule 1)

Schedule 1 to the Bill sets out various exempted substances, including "medicinal products", which fall outside the definition of a psychoactive substance. At Lords Report stage, Baroness Chisholm of Owlpen undertook to consider further an amendment tabled by Baroness Meacher seeking to broaden the definition of medicinal products (Official Report, 14 July 2015, column 492-493). Baroness Chisholm acknowledged that, for example, the existing definition did not capture

“specials”, that is medicinal products which have been specially manufactured or imported to the order of a doctor, dentist, nurse independent prescriber, pharmacist independent prescriber or supplementary prescriber for the treatment of individual patients to meet their special clinical need. Following consultation with the Medicines and Healthcare products Regulatory Agency and the Department of Health, we have concluded that the appropriate course is to import into the Bill the definition of a medicinal product in regulation 2 of the Human Medicines Regulations 2012. Regulation 2 defines a medicinal product as follows:

- (a) any substance or combination of substances presented as having properties for treating or preventing disease in human beings; or
- (b) any substance or combination of substances that may be used in, or administered to, human beings, with a view to:
 - i. restoring, correcting or modifying physiological functions by exerting a pharmacological, immunological or metabolic action; or
 - ii. making a medical diagnosis.

This definition includes investigational medical products as well as homeopathic and herbal medicinal products. This therefore supersedes paragraphs 3 to 5 which are duly removed by the second amendment to Schedule 1.

Exempted activities (amendments to clauses 1, 4, 5, 7, 8, 11, 49, 50 and 54, new clause “*Exceptions to offences*” and new Schedule “*Exempted activities*”)

At Lords Report stage, Baroness Chisholm also indicated, in response to an amendment from Lord Rosser, that the Government would bring forward amendments to ensure that *bona fide* research would be unaffected by the provisions of the Bill (Official Report, 14 July 2015, column 492); a point also raised by Andrew Gwynne at Second Reading.

New clause “*Exceptions to offences*” provides that it is not an offence under the Bill for a person to produce, supply, offer to supply, possess with intent to supply, import or export a psychoactive substance, or possess such a substance in a custodial institution if, in the circumstances in which it is carried on by that person, the activity is an exempted activity as listed in new Schedule “*Exempted activities*”. The new clause gives effect to new Schedule “*Exempted activities*”. New clause “*Exceptions to offences*” also provides a power to add or vary any description of activity specified in the new Schedule; this regulation-making power replaces that in clause 10 of the Bill. I attach a supplementary delegated powers memorandum in respect of the new regulation-making power.

New Schedule “*Exempted activities*” lists exempted activities. This Schedule covers two distinct type of activities, namely research and healthcare-related activities.

The exemption for research will cover “approved scientific research”, namely research carried out by a person who has approval from a relevant ethics review body to carry out that research. The definition of a relevant ethics review body

includes a research ethics committee recognised or established by the Health Research Authority, as well as NHS bodies and research institutes (the definition of which includes universities). It should be noted that a considerable amount of scientific research falls outside the scope of the Bill in any case – only research involving the consumption of a psychoactive substance would be caught.

The exemption for healthcare-related activities recognises the fact that there may be cases when health care professionals may want to prescribe (and pharmacists will therefore need to dispense, or other health-care professionals will need to supply or administer) substances that are not medicinal products (as defined in the Human Medicines Regulations). We expect the exemption for medicinal products in Schedule 1 to the Bill will ensure that, in the overwhelming majority of cases, the clinical practice of health care professionals is not impeded by this Bill. But the exception for the professional activities of health care professionals (and those involved in the supply chain for substances prescribed by such a professional) will provide absolute certainty that this is the case.

For similar reasons, we are also exempting activities in respect of active substances. An active substance is defined in regulation 8 of the Human Medicines Regulations 2012 as:

“any substance or mixture of substances intended to be used in the manufacture of a medicinal product and that, when used in its production, becomes an active ingredient of that product intended to exert a pharmacological, immunological or metabolic action with a view to restoring, correcting or modifying physiological functions or to make a medical diagnosis”.

Active substances are therefore, in effect, the precursor substances used in the manufacture of medicinal products. The exemption will protect persons registered under the Human Medicines Regulations involved in the manufacture, importation or distribution of such active substances.

The other amendments are consequential on new clause “*Exceptions to offences*” and new Schedule “*Exempted activities*”.

Repeal of the Intoxicating Substances (Supply) Act 1985 (amendment to Schedule 4)

The Intoxicating Substances (Supply) Act 1985 (the 1985 Act) (which does not extend to Scotland) makes it an offence to supply or offer to supply an intoxicating substance to a person under 18. The legislation was enacted to tackle the emergence of glue sniffing and covers predominately glues and solvents. The conduct element of the offence in the 1985 Act is covered by the offences of supplying or offering to supply a psychoactive substance in clause 5 of the Bill. In the interest of good law we should not have directly overlapping criminal offences on the statute book, accordingly the amendment to Schedule 4 repeals the 1985 Act.

Further amendments to take account of Scots law and policing practice (amendments to clauses 23, 27, 38, 39, 47, 53 and 58 and Schedule 2)

These amendments ensure that the Bill properly reflects separate Scots law and judicial and policing practice. Further details are provided in the explanatory statements which accompany these amendments. In relation to the amendments to clauses 38 and 39 and Schedule 2 (which relate to search warrants), the amendments recognise that those provisions are based on policing practice in England and Wales (and Northern Ireland) derived from provisions in the Police and Criminal Evidence Act 1984. In Scotland, police powers are not governed by one codified statutory scheme, but by a combination of the Criminal Procedure (Scotland) Act 1995 and common law principles. These amendments therefore disapply a number of the provisions in clauses 38 and 39 and Schedule 2 to Scotland and thereby allow the usual common law approach to govern the process around applications for and the execution of search warrants in that jurisdiction.

I am copying this letter to the members of the Public Bill Committee, Lord Rosser, Lord Paddick, Baroness Hamwee, Baroness Meacher and Lord Howarth of Newport. I am also placing a copy on the Bill page of the Home Office website.

Rt Hon Mike Penning MP