

PSYCHOACTIVE SUBSTANCES BILL [HL]

EXPLANATORY NOTES

What these notes do

These Explanatory Notes relate to the Psychoactive Substances Bill [HL] as brought from the House of Lords on 21 July 2015 (Bill 63).

- These Explanatory Notes have been prepared by the Home Office in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by Parliament.
- These Explanatory Notes explain what each part of the Bill will mean in practice; provide background information on the development of policy; and provide additional information on how the Bill will affect existing legislation in this area.
- These Explanatory Notes might best be read alongside the Bill. They are not, and are not intended to be, a comprehensive description of the Bill. So where a provision of the Bill does not seem to require any explanation or comment, the Notes simply say in relation to it that the provision is self-explanatory.

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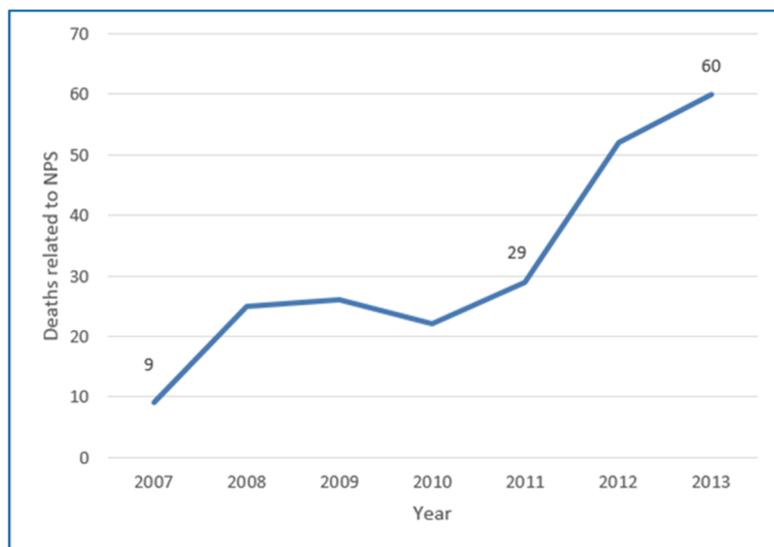
Overview of the Bill

- 1 This Bill creates a blanket ban on the production, distribution, sale and supply of psychoactive substances in the United Kingdom.
- 2 Clause 2 defines a "psychoactive substance" for the purposes of the Bill. Schedule 1 lists substances, such as food, alcohol, tobacco, caffeine, medical products and controlled drugs, which are excluded from the definition.
- 3 Clauses 4 to 9 make it an offence to produce, supply, offer to supply, possess with intent to supply, import or export psychoactive substances. The maximum sentence is seven years' imprisonment. Clause 10 enables regulations to be made to provide for exemptions to these offences.
- 4 Clauses 11 to 34 provide for four civil sanctions – prohibition notices, premises notices, prohibition orders and premises orders (breach of the two orders will be a criminal offence) – to enable the police and local authorities to adopt a graded response to the production, supply etc of psychoactive substances in appropriate cases.
- 5 Clauses 35 to 53 provide for powers to stop and search persons, vehicles and vessels, to enter and search premises (under warrant) and to forfeit seized psychoactive substances and other items.

Policy background

- 6 Since around 2008/09, the UK has seen the emergence of new substances or products that are intended to mimic the effects of traditional drugs that are controlled under the Misuse of Drugs Act 1971 ("the 1971 Act") such as cannabis, cocaine, amphetamine, MDMA (ecstasy) and, more recently, opioids. These are collectively known as new psychoactive substances ("NPS").
- 7 These new substances - together with other substances that have been used as intoxicants for many years (for example, nitrous oxide) - are often referred to as "legal highs": which in the Government's view is inappropriate given that the chemicals in them are often neither legal nor safe for human consumption.
- 8 NPS are difficult to identify and currently have to be regulated on a substance by substance, or even group by group, basis because of their diversity and the speed with which they are developed to replace drugs that are controlled under the 1971 Act. Chemical structures can be modified to create a new substance which falls outside any existing drug controls. They are also coming onto the market before a full understanding of their health and social harms can be developed. According to the European Monitoring Centre for Drugs and Drug Addiction, 101 new substances were identified in the European Union in 2014, continuing a five year upward trend, from 24 in 2009. Not all these substances reach the UK; 11 new substances were identified in the UK in 2013.
- 9 Many NPS are only legal because they have not yet been assessed for their harms and considered for control under the 1971 Act – not because they are inherently safe to use. Most will not have been tested on either humans or animals, and the purity of the products is unknown. The Home Office's Forensic Early Warning System tested 968 samples of NPS in 2013/14, of which, 19.2% of NPS found within the samples were controlled drugs. And there are examples where products with the same brand name (like "Black Mamba" or "Sparklee") purchased from the same supplier did not necessarily contain the same mixtures of ingredients. Many of these substances are labelled "not for human consumption" and advertised as "research chemicals", but it is clear that this is not their real purpose.

- 10 The threat to public health of some new substances may be comparable to that caused by controlled illicit drugs. Deaths related to NPS in England and Wales doubled in the past four years from 26 in 2009 to 60 in 2013. In 2013, there were also 113 deaths in Scotland where NPS were present in the body.
- 11 This table highlights the increase in the numbers of deaths related to NPS in England and Wales between 2007 and 2013:



- 12 In addition to the health risks, a number of local authorities have expressed concern that "head shops" (commercial retail outlets specialising in the sale or supply of NPS together with equipment, paraphernalia or literature related to the growing, production or consumption of cannabis and other drugs) in their areas are causing increases in anti-social behaviour. The local authorities are concerned that customers purchase psychoactive substances, and in some cases use them close by, with the resulting loss of inhibition causing them to act in an anti-social and sometimes criminal manner.
- 13 While the emergence of new drugs is not in itself a new phenomenon, the speed and scale at which substances are now emerging distinguishes the current situation from previous years in which the drugs market was relatively stable. In order to address this issue, in 2013 the Government commissioned the New Psychoactive Substances Review Expert Panel to review the existing legislative approach (see below). They stated that: "...after years of stable and declining drug use, the emergence of NPS has been a "game changer"".
- 14 In response to this threat the UK has a number of measures currently in place. Under the 1971 Act, substances can be controlled on an individual or on a group basis, following an assessment of their physical and social harms by the Advisory Council on the Misuse of Drugs ("ACMD"). Over 500 psychoactive substances have been permanently controlled since 2010, using the existing mechanism provided under the 1971 Act. One additional measure is the introduction of temporary class drug orders ("TCDO") in 2011, specifically to temporarily control NPS through a faster parliamentary mechanism (see below). Alongside this, a range of existing alternative legislation such as consumer protection and anti-social behaviour legislation has also been used (with limited success) to tackle the availability of non controlled NPS and associated issues. Despite these measures, the Government considers that the current approach to tackling psychoactive substances is both piecemeal and disjointed. In the view of the Government, the ineffectiveness of the current approach is demonstrated by the fact that head shops and online retailers continue selling NPS openly.

- 15 Against this background, the Government announced, on 12 December 2013, the appointment of an Expert Panel to undertake a review into NPS (House of Commons, Official Report, columns 57WS-58WS).
- 16 The Expert Panel comprised representatives from: medicine, social science, forensics, law enforcement agencies (police, Border Force and the National Crime Agency), local authorities, prosecution, and education/prevention including from the voluntary sector. Several international representatives from a similar range of fields were also included.
- 17 The Expert Panel's terms of reference (as set out at page 4 of the Panel's report) were to:
 - analyse the problem to address and consider:
 - the nature of the NPS market;
 - the effectiveness and issues of the UK's current legislative and operational response;
 - identify legislative options for enhancing this approach;
 - consider the opportunities and risks of each of these approaches, informed by international and other evidence; and
 - make a clear recommendation for an effective and sustainable UK-wide legislative response to NPS.
- 18 In addition, the Panel was asked to consider the education, prevention and treatment response to NPS and make recommendations.
- 19 In its September 2014 report, the Panel found that the current UK legislative approach was unlikely to get ahead of developments in the NPS market. It concluded that the control process for substances under the 1971 Act was now a repetitive advisory and parliamentary process with significant resource implications. The process requires evidence of physical or social harms caused by a substance (or evidence that it is capable of causing such harm) to justify its banning under the 1971 Act, which is currently lacking, given how quickly psychoactive substances appear. It argued that the end result was an inevitable time lag between an NPS coming onto the market and a response under the 1971 Act.
- 20 The Panel considered that TCDOs have afforded the Government an additional legislative tool where there is a pressing need to legislate fast (that is, in weeks, not months), but that they were not designed to deal with the volume of NPS that continue to be identified. The Panel found that the use of consumer protection legislation has not provided a complete solution to tackle availability as it was not designed to deal with the particular issues that are associated with NPS. Whilst there have been some successes, there are a number of barriers preventing its effective use, and consequently it was not providing a sustainable response to this issue.
- 21 This led the Expert Panel to recommend that the Government should legislate to prohibit the distribution of non-controlled NPS, focusing on the supply, rather than those using NPS. The Panel also recognised the importance of building on the work of central and local government, the third sector and other providers to enhance the response to the challenges in relation to intervention and treatment, prevention and education, as well as information sharing. In its response to the Panel's report, the Government announced its intention to develop proposals for a blanket ban similar to that introduced in Ireland in 2010 (House of Commons, Official Report, 30 October 2014, columns 28WS-29WS).

- 22 In May 2015, the Government was elected with a manifesto commitment to "create a blanket ban on all new psychoactive substances, protecting young people from exposure to so-called legal highs".
- 23 The Scottish Government separately appointed its own Expert Review Group in June 2014 to review the current legal framework available to govern the sale and supply of NPS. The Review Group's report was published in February 2015 and concluded that there were a number of benefits to the Irish model, which could strengthen the tools that are currently available and being used by agencies to tackle NPS supply in Scotland. The Review Group recommended that the Scottish Government and the Home Office should work in partnership to create new legislation that will be effective in Scotland. The Minister for Community Safety and Legal Affairs (Paul Wheelhouse) indicated that, on behalf of the Scottish Government, he was minded to accept the recommendations of the report (Scottish Parliament, Official Report, 26 February 2015, column 40).
- 24 The National Assembly for Wales Health and Social Care Committee launched an inquiry into NPS in June 2014. In its report, published in March 2015, the Committee welcomed the Home Office's Expert Panel's recommendation of a ban on the supply of NPS in the UK, similar to the approach introduced in Ireland. The Committee recommended that the Minister for Health and Social Services work closely with the UK Government to ensure early action is taken to progress the Expert Panel's recommendation (see recommendation 13 on page 76 of the report).

Legal background

The Misuse of Drugs Act 1971

- 25 The 1971 Act provides the legislative framework for the regulation of dangerous or otherwise harmful drugs in the UK. The 1971 Act applies to "controlled drugs" - there are two categories of controlled drugs. First, substances or products specified in Schedule 2 to the Act. That Schedule divides controlled drugs into one of three Classes – A, B and C – broadly based on their relative harms, with Class A drugs considered the most harmful. Examples of each class of drug are: Class A - cocaine, methadone and opium; Class B - amphetamine, cannabis and ketamine; Class C - khat and temazepam. The second category of controlled drugs is any substance or product specified in a temporary class drug order as a drug subject to temporary control (see below).
- 26 The 1971 Act provides for a range of offences in relation to controlled drugs, including:
 - importation and exportation (section 3);
 - production, supply or offering to supply (section 4); and
 - possession and possession with intent to supply (section 5).
- 27 Section 7 of the 1971 Act enables regulations to be made exempting specified activities from the scope of the above offences, for example where controlled drugs are produced and supplied for medicinal purposes.
- 28 The maximum penalties for the offences under sections 3 to 5 of the 1971 Act vary according to the class of the controlled drugs, with higher maxima applying for the more or most harmful drugs. The maximum penalties are set out below.

Offence	Maximum penalty on conviction on indictment: Class A drug involved	Maximum penalty on conviction on indictment: Class B drug involved	Maximum penalty on conviction on indictment: Class C drug involved
Production	Life imprisonment	14 years' imprisonment	14 years' imprisonment
Supply or offering to supply	Life imprisonment	14 years' imprisonment	14 years' imprisonment
Possession	7 years' imprisonment	5 years' imprisonment	2 years' imprisonment
Possession with intent to supply	Life imprisonment	14 years' imprisonment	14 years' imprisonment

Temporary Class Drug Orders

- 29 The Police Reform and Social Responsibility Act 2011, which inserted sections 2A and 2B into the 1971 Act, confers powers on the Secretary of State to make TCDOs if two conditions are met.
- 30 The first condition is that the substance is not a Class A, B or C drug. The second condition is that the Secretary of State has either consulted the ACMD, or in cases of urgency the chair of the ACMD, and has determined that the order should be made, or otherwise has received a recommendation to that effect from the ACMD. After carrying out such consultation the Secretary of State can only proceed to make the order if it appears that the drug is one that is being, or is likely to be, misused, and that misuse is having, or is capable of having, harmful effects. A corresponding requirement applies before the ACMD may make a recommendation for the making of such an order.
- 31 A TCDO expires at the end of 12 months unless, if earlier, the temporary class drug is brought under the permanent control of the 1971 Act by virtue of an Order in Council under section 2(2) of the 1971 Act or if the TCDO is revoked.
- 32 The restrictions on importation and exportation, production and supply apply to a temporary class drug (with the maximum penalty being those applicable to a Class C drug), but it is not an offence to have a temporary class drug in a person's possession, unless that possession is in connection with an offence or prohibition under other provisions of the 1971 Act. So the offence of possession with intent to supply applies to a temporary class drug.
- 33 Four TCDOs have been made to date:
- The Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2012 (SI 2012/980) came into force on 5 April 2012. This Order covered a group of substances commonly known as methoxetamine. Following this, the ACMD provided advice in October 2012 which concluded that the harms posed by these substances were commensurate with those posed by Class B substances. The Misuse of Drugs Act 1971 (Amendment) Order 2013 (SI 2013/239), which came into force on 26 February 2013, duly classified these substances as Class B controlled drugs.
 - The Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2013 (SI 2013/1294) came into force on 10 June 2013. This Order covered substances, including 251-NBOMe, 5 and 6-APB (benzofuran compounds) and other related substances. The ACMD then reviewed the harms posed by these substances and recommended that 251-NBOMe should be a Class A controlled drug and that the

benzofuran compounds should be Class B controlled drugs. The Misuse of Drugs Act 1971 (Ketamine etc.)(Amendment) Order 2014 (SI 2014/1106), which came into force on 10 June 2014, gave effect to these recommendations.

- The Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2015 (SI 2015/1027) came into force on 10 April 2015. This Order covered methylphenidate-related materials and specified derivatives. This TCDO lapsed on 27 June 2015 and was replaced by a further order (see below).
 - The Misuse of Drugs Act 1971 (Temporary Class Drug) (No. 2) Order 2015 (SI 2015/1396) came into force on 27 June 2015. This Order covered seven methylphenidate-based compounds and specified derivatives. The majority of these substances and products were made the subject of temporary control by the Misuse of Drugs Act 1971 (Temporary Class Drug) Order 2015. That Order was made whilst Parliament was dissolved and lapsed on 27 June 2015 as there was insufficient Parliamentary time available for each House of Parliament to approve the Order. This Order replaced that Order and lists two additional substances.
- 34 The Bill is not a replacement for the 1971 Act and it is expected that some psychoactive substances will continue to be classified under it in circumstances where there is evidence of harms, assessed by the ACMD, and considered sufficient to justify control with the application of the higher penalties and the offence of simple possession.

Territorial extent and application

- 35 The provisions of the Bill extend to the whole of the United Kingdom. In the view of the UK Government, the matters to which the provisions of the Bill relate are not within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly; accordingly no legislative consent motions are required.
- 36 There is a convention that Westminster will not normally legislate with regard to matters that are within the legislative competence of any of these legislatures without the consent of the legislature concerned. If there are amendments relating to such matters that fall within the convention, the consent of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly (as appropriate) will be sought for them.

Commentary on provisions of Bill

Clause 1: Overview

37 This clause provides an overview of the structure of the Bill.

Clause 2: Meaning of "psychoactive substances" etc

38 *Subsection (1)* defines a "psychoactive substance" for the purposes of the Bill as any substance which is capable of producing a psychoactive effect in a person who consumes it and is not an exempted substance (as defined in clause 3).

39 *Subsection (2)* provides that a substance produces a psychoactive effect in a person if, by stimulating or depressing the person's central nervous system, it affects the person's mental functioning or emotional state. The main effect of psychoactive substances is on a person's brain, the major part of the central nervous system. By speeding up or slowing down activity on the central nervous system, psychoactive substances cause an alteration in the individual's state of consciousness by producing a range of effects including, but not limited to: hallucinations; changes in alertness, perception of time and space, mood or empathy with others; and drowsiness.

40 *Subsection (3)* provides that an individual consumes a substance if the individual causes or allows the substance, or fumes given off by the substance, to enter the individual's body in any way. For example, this includes injecting, eating or drinking, snorting, inhaling and smoking.

Clause 3: Exempted substances

41 *Subsection (1)* defines an "exempted substance" for the purposes of the Bill as a substance listed in Schedule 1. These are substances which are capable of producing a psychoactive effect in an individual when consumed (and would therefore fall within the definition of a psychoactive substance in clause 2), but do not constitute psychoactive substances for the purpose of the provisions in the Bill. Exempted substances are included in Schedule 1 either because they are already controlled through existing legislation (alcohol, tobacco, medicines and controlled drugs) or because their psychoactive effect is negligible (caffeine and foodstuffs such as nutmeg and chocolate).

42 *Subsection (2)* confers a regulation-making power on the Secretary of State (in practice, the Home Secretary) to add to or vary the list of exempted substances and to remove any substance added to the list through the regulation-making power. It will therefore not be possible, under the regulation-making power, to remove any entry in its entirety from the list in Schedule 1 to the Bill as enacted. The regulation-making power is subject to the affirmative resolution procedure (*subsection (5)*). The Secretary of State must consult the ACMD and such other persons as she or he considers appropriate before making any such regulations; such additional consultees may, for example, include regulatory bodies or other relevant experts (*subsection (3)*).

Schedule 1: Exempted substances

43 This Schedule lists exempted psychoactive substances.

44 *Paragraph 1* covers controlled drugs, namely a substance or product for the time being specified in Part 1, 2 or 3 of Schedule 2 to the 1971 Act, that is Class A, B or C drugs.

45 *Paragraphs 2 to 5* cover medicinal products, as follows:

- Medicinal products for which either a marketing authorisation or an Article 126a authorisation is in force. These terms are defined by reference to the Human

Medicines Regulations 2012 ("the 2012 Regulations"). Those Regulations define a "marketing authorisation" as: (a) a UK marketing authorisation; or (b) an EU marketing authorisation. A "UK marketing authorisation" is then defined as a marketing authorisation granted by the licensing authority under: (a) Part 5 of the 2012 Regulations; or (b) Chapter 4 of Title III to Directive 2001/83/EC of the European Parliament and of the Council on the Community Code relating to medicinal products for human use. An "EU marketing authorisation" is a marketing authorisation granted or renewed by the European Commission under Regulation (EC) No 726/2004. An "Article 126a authorisation" means an authorisation granted by the licensing authority under Part 8 of the 2012 Regulations.

- Investigational medicinal products, namely a pharmaceutical form of an active substance or placebo being tested, or to be tested, or used, or to be used, as a reference in a clinical trial, and includes a medicinal product which has a marketing authorisation but is, for the purposes of the trial: (a) used or assembled (formulated or packaged) in a way different from the form of the product authorised under the authorisation; (b) used for an indication not included in the summary of product characteristics under the authorisation for that product; or (c) used to gain further information about the form of that product as authorised under the authorisation.
- Homoeopathic medicinal products, namely a medicinal product prepared from homoeopathic stocks in accordance with a homoeopathic manufacturing procedure described by: (a) the European Pharmacopoeia (that is, the European Pharmacopoeia published by the European Directorate for the Quality of Medicines); or (b) in the absence of such a description in the European Pharmacopoeia, in any pharmacopoeia used officially in an European Economic Area State.
- Traditional herbal medicinal products, namely one to which Regulation 125 of the 2012 Regulations applies. Regulation 125 applies to products in respect of which all of the following conditions are satisfied:
 - Condition A is met by virtue of the product's composition, and that it is appropriate for use, without the need for a medical practitioner to diagnose the condition to be treated by the product, or prescribe and/or monitor its use.
 - Condition B is met if the product is intended to be administered at a particular strength and in accordance with a particular posology.
 - Condition C is met if the product is intended to be administered externally, orally or by inhalation.
 - Condition D is met if the product has been in medicinal use for a continuous period of at least 30 years, and in the European Union for a continuous period of at least 15 years.
 - Condition E is met if there is sufficient information about the use of the

product as mentioned in condition D. This means that it has been established that the traditional use of the product is not harmful and that the pharmacological effects or efficacy of the product are plausible, based on longstanding use and experience.

- 46 *Paragraph 6* relates to alcohol or alcohol products.
- 47 *Paragraphs 7 and 8* relates to nicotine and tobacco products. Tobacco products are defined, in part, by reference to section 1 of the Tobacco Products Duty Act 1979 (*paragraph 8(a)*). That section defines “tobacco products” as any of the following products, namely: cigarettes; cigars; hand-rolling tobacco; other smoking tobacco; and chewing tobacco, which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco. *Paragraph 8(b)* exempts any other product which contains nicotine, so long as it does not contain a psychoactive substance. This would include products which contain nicotine but do not contain any tobacco, for example e-cigarettes.
- 48 *Paragraph 9* covers caffeine or caffeine products.
- 49 *Paragraph 10* covers food (including drink), that is, any substance which is ordinarily consumed as food and does not contain a prohibited ingredient. The definition of a prohibited ingredient is such that naturally occurring substances which have a psychoactive effect, such as nutmeg and cocoa, fall outside the definition. Also excluded from the definition of prohibited ingredients are other substances the use of which in or on food is authorised under EU legislation. Such legislation relates to, amongst other things, extraction solvents and food flavourings. Nitrous oxide is authorised by EU legislation for use as a propellant, for example, to administer whipped cream given that it will leave traces in the cream and, as such, would not constitute a prohibited ingredient when used in this way. But the consumption of nitrous oxide gas from a canister for its psychoactive effect would not fall within the food exemption and therefore would constitute a psychoactive substance under the Bill.
- 50 The list in this Schedule does not include psychoactive substances not intended for human consumption such as those contained in veterinary medicines or in industrial products. When produced, supplied etc for their intended purpose such conduct would not fall within the offences in clauses 4 to 8, but when produced, supplied etc for human consumption those offences would be engaged.

Clause 4: Producing a psychoactive substance

- 51 This clause provides for an offence of producing a psychoactive substance. The conduct (*actus reus*) element of the offence is satisfied if a person produces a psychoactive substance. By virtue of clause 58(2)(a), production for these purposes covers manufacture, cultivation or any other method of production.
- 52 There are then three mental (*mens rea*) elements of the offence. First, the prosecution must show that the production is intentional, so if a psychoactive substance was inadvertently created (for example, as an unintended by-product of research) the offence would not be made out. The defendant must also have intended to produce a psychoactive substance rather than any other substance. Second, the defendant must have known or suspected that the substance is a psychoactive substance. Third, the defendant must either intend to consume the psychoactive substance for its psychoactive effects, or know, or be reckless as to whether, the psychoactive substance is likely to be consumed by another person for its psychoactive effects.
- 53 For a person to have known that a substance is a psychoactive substance, the knowledge must be founded on a true belief; a person cannot be convicted of this offence on the basis that he or she “knew” the substance is a psychoactive substance if, in fact, it was another substance.

- 54 Suspicion is a subjective test and need not be based on reasonable grounds. There must be a possibility, which is more than fanciful, that the relevant facts exist. The courts have held that "a vague feeling of unease" would not suffice. But the suspicion need not be "clear" or "firmly" grounded and targeted on specific facts or based upon reasonable grounds (Da Silva [2006] EWCA Crim 1654).
- 55 A person acts recklessly when he or she is aware of a risk that it exists or will exist and, in the circumstances known to him or her, it was unreasonable to take the risk but nonetheless he or she did so. The onus will be on the prosecution to prove that this is the case. The recklessness test would therefore capture circumstances where a defendant claims he or she was manufacturing, say, "plant food" but knows that there is a substantial risk that the substance will in fact be consumed (indeed, that is the real intention) and proceeds to produce the substance heedless of that risk.
- 56 The offence does not apply where production is covered by an exemption provided for in regulations made under clause 10 (*subsection (2)*).
- 57 The generic secondary offences will apply to the offences in this clause (and clauses 5, 7 and 8) as they apply to any offence. Accordingly it will be an offence to encourage or assist the offence of production of a psychoactive substance (see Part 2 of the Serious Crime Act 2007), to attempt to produce a psychoactive substance (see section 1 of the Criminal Attempts Act 1981), or to conspire to commit the offence of production of a psychoactive substance (see section 1 of the Criminal Law Act 1977).

Clause 5: Supplying, or offering to supply, a psychoactive substance

- 58 This clause provides for two separate offences, namely supply of a psychoactive substance and offering to supply a psychoactive substance.
- 59 For the supply offence, the conduct element is satisfied if a person supplies a substance to another person and that substance is a psychoactive substance. By virtue of clause 58(2)(b), supplying for these purposes covers distribution. The transaction does not need to result in payment or reward and would include social supply between friends.
- 60 There are three mental elements of the supply offence. First, the prosecution must show that the supplying of the substance is intentional. Second, the defendant must have known or suspected, or ought to have known or suspected, that the substance is a psychoactive substance. Third, the defendant must know, or be reckless as to whether, the psychoactive substance is likely to be consumed by the person to whom it is supplied or another person for its psychoactive effects. The recklessness test would prevent a head shop proprietor escaping liability by arguing that because the psychoactive substances sold in his or her shop were labelled as "plant food", "research chemicals" or "not for human consumption", he or she did not know that the substances were likely to be consumed.
- 61 The conduct element of the offering to supply offence is that the defendant offers to supply a psychoactive substance to another person. Such an offer could take the form of an advertisement, including a catalogue of psychoactive substances on display on a website with the facility to purchase online.
- 62 There is one mental element to the offer to supply offence, namely that the defendant knows, or is reckless as to whether, the substance that is being offered is likely to be consumed by the person to whom it is supplied or by another person for its psychoactive effects. This element of the offence is constructed in such a way so that it would capture circumstances where a person purports to offer to supply a psychoactive substance to another person but, in fact, either has no intention of fulfilling his or her side of the deal or intends to pass off some other substance as a psychoactive substance. *Subsection (3)* ensures that such conduct would still be caught by

the offering to supply offence.

- 63 These offences do not apply where the supply or offer to supply is covered by an exemption provided for in regulations made under clause 10 (*subsection (4)*).

Clause 6: Aggravation of an offence under clause 5

- 64 This clause provides for a statutory aggravating factor when sentencing an offender for an offence of supplying, or offering to supply, a psychoactive substance and the supply or offer to supply took place at, or in the vicinity of, a school, involved the use of a courier under the age of 18 or took place on prison premises. This clause only applies where the offender was aged 18 or over (*subsection (1)*). Where one of three conditions is satisfied, the court is required to treat the condition as an aggravating factor when determining the sentence. The effect of this would be to increase the severity of the sentence passed, whether it is a custodial or community sentence, or a fine, or both (subject to the sentence maximum as provided for in clause 9). In determining the appropriate sentence in such cases, the court would also take into account other aggravating or mitigating factors, including (in England and Wales) those set out in Sentencing Council guidelines.
- 65 The first condition is met when a person supplies a controlled drug on or in the vicinity of school premises (as defined in *subsection (9)*) when they are being used by children and young people and within one hour of any such time (*subsections (3) and (4)*). If the school day starts with a breakfast club at 07:30 and there are after-school sporting or other activities until 18:00, the relevant time would therefore be 06:30 to 19:00. The out of hours use of the school premises by a third party, for example, a yoga club for adults would not fall within the relevant time.
- 66 The second condition is met when a person causes or permits a child or young person under 18 to deliver a substance to a third person (for the reasons set out in paragraph 62 above the substance may not be a psychoactive substance) or to deliver a drug-related consideration to himself or herself, or to a third person, in connection with the offence of supply of a psychoactive substance (*subsections (5) and (6)*).
- 67 *Subsection (7)* defines a drug-related consideration. Such a consideration could be either a cash payment or a payment in kind.
- 68 The third condition is met when the offence was committed on prison premises (*subsection (8)*).

Clause 7: Possession of a psychoactive substance with intent to supply.

- 69 This clause provides for an offence of possession with intent to supply psychoactive substances. The conduct element of the offence is satisfied if the defendant is in possession of a psychoactive substance with a view to supplying it to another person for consumption. There are two mental elements of the offence. First, the defendant must know or suspect that the substance is a psychoactive substance. The second mental element is that the defendant must intend to supply the psychoactive substance to another person for its psychoactive effects. Inadvertently dropping a packet containing a psychoactive substance on the street which is then picked up by another person would not be caught by the offence. It is immaterial whether the psychoactive substance that is intended to be supplied is to be consumed by the immediate intended recipient or by a third person. Accordingly, the offence would be committed if the intended supply was to a go-between who then proposed to pass the substance on to a third person.
- 70 Whilst this is a possession offence, it is aimed at those in the supply chain. Simple possession of a psychoactive substance for personal use would not be caught by this offence and is not otherwise criminalised by the Bill. This replicates the position with substances subject to a TCDO. The offence in this clause would, however, cover social supply, that is circumstances

where a person acquires a psychoactive substance on behalf of a group of friends and then supplies the substance to those friends.

- 71 This offence does not apply where the possession with intent to supply is covered by an exemption provided for in regulations made under clause 10 (*subsection (2)*).

Clause 8: Importing or exporting a psychoactive substance

- 72 This clause provides for two offences of importing or exporting a psychoactive substance. The conduct and mental elements are the same in each case, save that one relates to importation and the other to exportation.
- 73 The conduct element of the offences is satisfied if the defendant imports or exports, as the case may be, a substance and the substance is a psychoactive substance. There are three mental elements of the offences. First, the importation or exportation of the substance must be intentional. Second, the defendant must know or suspect, or ought to know or suspect, that the substance is a psychoactive substance. Third, the defendant must either intend to consume the substance him- or herself for its psychoactive effects, or must know, or be reckless as to whether, the substance is likely to be consumed by other individuals for its psychoactive effects. These offences therefore cover importation and exportation of psychoactive substances for personal use as well as for the purpose of supplying others.
- 74 Given the requirement of the conduct element of these offences, they do not cover the situation where a person imports or exports a controlled drug wrongly believing it to be a psychoactive substance. *Subsection (3)* provides that, in such a case, a person can still be convicted of the relevant offence in *subsection (1)* or *(2)* provided that the other elements of the offence are established.
- 75 *Subsection (4)* applies section 5 of the Customs and Excise Management Act 1979 for the purposes of this clause. Section 5 of that Act defines how the point in time when goods are said to be imported or exported is to be determined, for example, in the case of items imported by sea, the time of importation is when the ship carrying the item comes within the limits of a port.
- 76 These offences do not apply where the importation or exportation is covered by an exemption provided for in regulations made under clause 10 (*subsection (5)*).

Clause 9: Penalties

- 77 This clause sets out the maximum penalties for the offences in clauses 4 to 8 as detailed in the table below:

Offences	Maximum penalty on summary conviction in England and Wales	Maximum penalty on summary conviction in Scotland	Maximum penalty on summary conviction in Northern Ireland	Maximum penalty on conviction on indictment
Clause 4 (production), 5 (supply and offering to supply), 7 (possession with intent), 8 (importation/exportation)	Six months' imprisonment (rising to 12 months once section 154 (1) of the Criminal Justice Act 2003 is commenced), an unlimited fine, or both.	12 months' imprisonment, a fine not exceeding the statutory maximum (currently £10,000), or both.	Six months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both	Seven years' imprisonment, an unlimited fine, or both.

Clause 10: Power to provide for exceptions to offences

- 78 Each of clauses 4, 5, 7 and 8 provides that those clauses operate subject to any exceptions to the offences as provided for in regulations made under this clause. *Subsection (1)* confers on the Secretary of State (in practice the Home Secretary) the power to specify exceptions by regulations, subject to the affirmative procedure (*subsection (5)*).
- 79 Such regulations may provide that it is not an offence under clauses 4 to 8 for any person, or any person of a specified description, to do an act, or an act of a specified description, in specified circumstances or if specified conditions are met. In effect, any such regulations would make lawful conduct which would otherwise be unlawful under clauses 4 to 8. This exemption mechanism complements that provided for in Schedule 1. That Schedule excludes from the ambit of these offences psychoactive substances which either have legitimate everyday usages or are controlled through other legislation. The regulation-making power in this clause would enable certain activities to be exempted from the ambit of the offences, rather than the substances themselves. Such regulations could, in particular, enable those who are conducting or supporting legitimate research into psychoactive substances to do so by excluding specified research activity from the ambit of the offences. Section 7 of the 1971 Act makes parallel provision in respect of the possession and supply of controlled drugs. In addition, regulations under this clause might provide for the exclusion from the ambit of the offences healthcare professionals (and those in the distribution chain) when acting in their professional capacity supplying to a patient a psychoactive substance which falls outside the exemption list.
- 80 Before exercising the regulation-making power, the Secretary of State is under a duty to consult the ACMD and such other persons as she considers appropriate (*subsection (2)*). Such other persons might, for example, include regulatory bodies or other relevant experts as well as persons likely to be affected by the proposed regulations.

Clause 11: Meaning of "prohibited activity"

- 81 Clauses 11 to 34 provide for four civil sanctions: a prohibition notice, premises notice, prohibition order and premises order. These civil powers afford law enforcement agencies an alternative route to criminal proceedings as a means of tackling the production, supply etc. of psychoactive substances. The use of these powers will enable law enforcement officers to take action swiftly to nip a problem in the bud or to adopt a more proportionate approach to low-level offending. It will be a matter for the relevant law enforcement agency to determine which approach to adopt in any given circumstances. Where there is evidence of a criminal offence under clauses 4 to 8, there is no requirement to apply the civil sanctions in the first instance as a criminal prosecution may be the appropriate action to take. Equally, if a prohibition notice or premises notice has been served and is then breached, the relevant law enforcement agency might proceed to a criminal prosecution or pursue a prohibition order or premises order, as the case may be.
- 82 This clause defines the term "prohibited activity" for the purposes of the Bill. The definition essentially covers the conduct elements of the offences in clauses 4, 5 and 8, together with the secondary or inchoate offences of assisting and encouraging those offences. The definition does not include the act of possession with intent to supply a psychoactive substance given that, in practice, it would be difficult to demonstrate whether a respondent found to be still in possession of psychoactive substances had or had not stopped intending to supply them. Accordingly, it is sufficient that a prohibition notice or order would prohibit the supply of a psychoactive substance.

Clause 12: Prohibition notices

- 83 *Subsection (1)* enables a senior officer or local authority (the definition of a local authority in clause 58 covers county, district and unitary councils) to issue a prohibition notice to a person if

conditions A and B are met. A person in this context may be an individual over the age of criminal responsibility (see *subsection (5)*) or a body, such as a company. The definition of a senior officer in *subsection (7)* covers senior officers in territorial police forces in the UK, the British Transport Police, the National Crime Agency ("NCA") and Border Force.

- 84 The relevant conditions are set out in *subsections (3)* and *(4)*. Condition A is that the person issuing the notice reasonably believes that the respondent is carrying on, or is likely to carry on, a prohibited activity. Condition A might apply, for example, in relation to a company marketing psychoactive substances through a website or selling psychoactive substances through a head shop. Condition B requires the issuing officer to be satisfied that it is necessary and proportionate to issue the prohibition notice in order to prevent the respondent carrying on any prohibited activity. The police or a local authority may, for example, identify evidence of prohibited activity at one head shop and use a prohibition notice to tackle the supply of psychoactive substances from other, or all, head shops in the same retail chain.
- 85 A prohibition notice would require a person on whom it is served to desist from carrying out a prohibited activity (*subsection (2)*). Such a notice may be in general terms or be specific, for example, it could direct an online company to stop offering to supply psychoactive substances from a named website.
- 86 A prohibition notice will be of indefinite duration unless withdrawn (under the provisions in clause 14, 17(5) or 18(3)) save in the case of a notice given to an individual under 18 years, in which case the notice must be for a maximum period of three years (*subsection (6)*).

Clause 13: Premises notices

- 87 This clause provides for premises notices. Premises notices provide a further means to tackle prohibited activity taking place from premises, for example, a head shop. Where the operator of such premises is known, the relevant law enforcement agency is expected to issue a prohibition notice to that person. But where the operator is unclear, or where the activities of the head shop in supplying psychoactive substances is tolerated by the owner of the premises, it will be open to the relevant law enforcement agency to serve a premises notice on any person who owns, leases, occupies, controls or operates the premises.
- 88 Once the senior officer or local authority has formed a reasonable belief that prohibited activity is being carried out on particular premises (Condition A), Condition B affords latitude to the issuing officer to take into account the need to deal with prohibited activity not just at the premises to which Condition A relates, but at other premises owned, leased, occupied, controlled or operated by the respondent.
- 89 Given that the respondent in relation to a premises notice will not normally be directly involved in a prohibited activity, the terms of such an order will be to require the respondent to take reasonable steps to prevent any, or specific, prohibited activities taking place at premises specified in the notice (*subsection (2)*). So, for example, if the respondent was the owner of premises being used by a third party as a head shop, a premises notice could be used to compel the owner to take action against the tenant operating the head shop.
- 90 Unlike prohibition notices, a premises notice may only be given to an individual aged 18 or over (*subsection (5)*).

Clause 14: Prohibition notices and premises notices: supplementary

- 91 *Subsection (2)* sets out the information that must be included in a prohibition notice or premises notice: this would include the grounds for giving the notice (for example, evidence of the supply of psychoactive substances from particular retail premises) and an explanation of the possible consequences of breaching the notice. Such consequences could include, in particular,

a prosecution for the relevant offence under the Bill or the making of an application for a prohibition order or premises order, as appropriate. There are no direct consequences for breach of a notice in that there is no criminal offence or civil sanction attached to a failure to comply.

- 92 *Subsection (3)* provides for the withdrawal of a notice. A notice may be withdrawn if, say, the person and premises to which it relates are no longer trading as a head shop. It would be open to the respondent to make representations to the relevant enforcement agency to argue for the withdrawal of a notice where the circumstances which led to the issue of the notice had changed. A defective notice could also be withdrawn and *subsection (4)* ensures that, in such a case, a replacement notice could be issued. A new notice could also be issued in any other circumstances where an earlier notice had been withdrawn.

Clause 15: Further provision about giving notices under clauses 12 to 14

- 93 This clause makes further provision about the service of a prohibition notice or premises notice or the withdrawal of such a notice. It is intended that notices will be given in writing. A notice takes effect when it is given (*subsection (2)*). Where the notice is handed to the respondent or left at the respondent's proper address, this means that it takes effect immediately. Service of a notice by post attracts the provisions of section 7 of the Interpretation Act 1978 which provides that the service is deemed to be effected by properly addressing, pre-paying and posting a letter containing the document and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Where a notice is served by electronic means (and it may only be served by such means if the respondent has consented to service by this method), it will be deemed to have been given at 9am on the working day (the definition of which excludes weekends and public holidays in any part of the UK) after it was sent.

Clause 16: Meaning of "prohibition order"

- 94 This clause defines a prohibition order for the purposes of the Bill. As with a prohibition notice, a prohibition order will include either a general prohibition on the respondent carrying out any prohibited activity, that is conduct to which the offences in clauses 4 to 8 relate (or assisting or encouraging such conduct), or a prohibition on carrying out a specified prohibited activity (for example, a prohibition on an online company offering to supply psychoactive substances from a named website or on a retailer supplying psychoactive substances from a specified head shop). There are two routes for the making of a prohibition order, either an application to the courts by a relevant law enforcement agency under clause 17, or on conviction of a person before the criminal courts for an offence under clauses 4 to 8 (or an associated secondary offence).

Clause 17: Prohibition orders on application

- 95 *Subsection (1)* enables the appropriate court (as defined in *subsection (9)*) to make a prohibition order against a person if either condition A or B is met and also condition C is met. A person in this context may be an individual over the age of criminal responsibility (*subsection (6)*) or a body, such as a company.
- 96 The relevant conditions are set out in *subsections (2) to (4)*. Condition A is that the court is satisfied to the civil standard, namely the balance of probabilities, that the respondent has failed to comply with a prohibition notice. Condition B applies where no prohibition notice has been given or such a notice is no longer in force because it has been withdrawn. In such a case the court may make an order if satisfied, to the civil standard, that the respondent is carrying on, or is likely to carry on, a prohibited activity and the court considers that the respondent would fail to comply with a prohibition notice. Condition C, which must be met alongside either condition A or B, requires the court to be satisfied that it is necessary and proportionate

to issue the prohibition order in order to prevent the respondent carrying on any prohibited activity.

- 97 Where condition A applies and a court makes a prohibition order, the relevant prohibition notice will cease to have effect (*subsection (5)*).
- 98 A prohibition order will be of indefinite duration unless discharged (see clause 27) save in the case of an order against an individual under the age of 18, in which case the order must be for a maximum period of three years (*subsection (7)*). This three year limit is absolute and cannot be extended by a court exercising its powers under clause 27 or 28 to vary a prohibition order (whatever the age of the individual at the time of the variation).

Clause 18: Prohibition orders following conviction

- 99 This clause enables a criminal court when sentencing an offender for an offence under clauses 4 to 8 (or associated secondary offences) to make a prohibition order in addition to any custodial or non-custodial sentence which the court may pass. The test for making an order is that the court considers it necessary and proportionate to make an order for the purpose of preventing the offender from carrying on any prohibited activity. The court may make an order of its own volition, but it will be open to the prosecution to make representations to the court in this regard.

Clause 19: Premises orders

- 100 *Subsection (1)* enables the appropriate court (as defined in *subsection (9)*) to make a premises order against a person if either condition A or B is met and condition C is met. As with a premises notice, a premises order may only be made against an individual aged 18 or over (*subsection (7)*); an order may also be made against a body, such as a company.
- 101 The relevant conditions are set out in *subsections (3) to (5)*. Condition A is that the court is satisfied to the civil standard, namely the balance of probabilities, that the respondent has failed to comply with a premises notice. Condition B applies where no premises notice has been given or such a notice is no longer in force because it has been withdrawn and the court is satisfied (to the civil standard) that a prohibited activity is taking place on particular premises. In such a case, the court may make an order against the owner, lessee, occupier, controller or operator if the court considers that the person would fail to comply with a premises notice.
- 102 Condition C, which must be met alongside either condition A or B, requires the court to be satisfied that it is necessary and proportionate to make a premises order in order to prevent any prohibited activity being carried out on premises owned, leased, occupied, controlled or operated by the respondent. As with a premises notice, a premises order is intended to compel persons who have some responsibility for premises being used to carry on prohibited activity, for example as the owner of retail premises being used to sell psychoactive substances, to take action to stop such activity taking place on those premises.
- 103 Where condition A applies and a court makes a premises order, the relevant premises notice will cease to have effect (*subsection (6)*).

Clause 20: Applications for prohibition orders and premises orders

- 104 This clause makes provision about the persons who may apply for a prohibition order or a premises order and the form of such an application. Applications to the appropriate court for a prohibition order or a premises order may only be made by a chief officer of police of territorial forces in the UK, the chief constable of the British Transport Police (for example, in relation to premises at mainline train stations), the Director General of the NCA (for example, against serious and organised criminals involved in the importation of psychoactive substances), the Secretary of State insofar as he or she exercises functions in relation to customs (in practice,

applications would be made by Border Force which has no separate legal persona from the Home Secretary), or a local authority (*subsection (1)*).

105 *Subsection (2)* provides that where an application is made to a court for a prohibition order or premises order following a breach of a prohibition notice or premises notice, the application must be made by the organisation which issued the original notice.

Clause 21: Provision that may be made by prohibition orders and premises orders

106 In addition to a prohibition against the carrying on of prohibited activity (in the case of a prohibition order) or to a requirement to take reasonable steps to prevent prohibited activity taking place on relevant premises (in the case of a premises order), a prohibition order and premises order may contain such other prohibitions, restrictions or requirements as the court considers appropriate (*subsection (1)*).

107 *Subsections (3) to (6)* set out specific examples of the type of prohibitions, restrictions or requirements that may be attached to a prohibition order or premises order; the provisions of this clause operate without prejudice to the ability of the court to attach any such prohibitions, restrictions and requirements to an order as it considers appropriate (*subsection (2)*).

108 Prohibitions, restrictions or requirements that may be attached to either a prohibition order or a premises order may relate to the respondent's business dealings (*subsection (3)*). In the case of a prohibition order, such requirements may include, for example, a requirement on a respondent trading from retail premises or online to surrender unsold supplies of psychoactive substances or other items that have been, or are likely to be, used in carrying out a prohibited activity, for example, laboratory equipment used to produce psychoactive substances (*subsection (4)*). Any items handed over in accordance with such a requirement may not be disposed of until the time for lodging an appeal has elapsed and, if an appeal is lodged, until the appeal has been determined (*subsection (5)*).

109 *Subsections (6) to (9)* enable a prohibition order or a premises order to include an "access prohibition" closing the premises in question for initially up to three months (clause 27(3) to (5) allows this to be extended for up to a further three months). Such an access prohibition can prohibit access by anyone, including the landlord, owner or habitual residents, but the court would have the discretion to frame the prohibition order or premises order in such a way to allow continued access for specified descriptions of persons, for example, habitual residents.

Clause 22: Enforcement of access prohibitions

110 This clause makes further provision in relation to the enforcement of a prohibition order or a premises order which includes an access prohibition. An authorised person (as defined in *subsections (2) and (3)*) is empowered to take necessary steps to secure the premises against entry (*subsection (1)(b)*). A power of entry is provided to enable access to the premises for such purposes (*subsection (1)(a)*). An authorised person can also enter the premises to carry out essential maintenance or repairs, for example to fix a leak (*subsection (6)*). Where necessary, an authorised person can use reasonable force in the exercise of the powers under this clause, for example, to secure entry into the premises (*subsection (4)*).

Clause 23: Access prohibitions: reimbursement of costs

111 This clause enables the law enforcement agency (or its funding body, if different) managing premises subject to an access restriction to apply to the court for an order providing for the reimbursement of costs incurred as a result clearing, securing or maintaining the premises (*subsection (1)*). An application for such an order must be served on the person against whom the prohibition order or premises order imposing the access prohibition was made (*subsection (5)*); this will then afford that person the opportunity to make representations to the court as to

why an order for the reimbursement of costs should not be made or about the amount of such an order.

Clause 24: Access prohibitions: exemption from liability

112 This clause exempts law enforcement officers, and the relevant law enforcement agency, from liability for damages as a result of anything done (for example, damage to property), or not done (for example, failure to fix a leak), in the exercise of powers under clause 22. The exemption from liability does not apply where the act or omission was in bad faith or was unlawful by virtue of section 6(1) of the Human Rights Act 1998 (that is, acting in a way that is incompatible with the Convention rights).

Clause 25: Offence of failing to comply with a prohibition order or premises order

113 *Subsection (1)* makes it an offence to fail to comply with a prohibition order or premises order. The offence will be triable either way. *Subsection (3)* provides for a defence where the defendant can show that he or she took all reasonable steps to comply with the order or otherwise had a reasonable excuse for his or her failure to comply. The maximum penalty is as follows -

Maximum penalty on summary conviction in England and Wales	Maximum penalty on summary conviction in Scotland	Maximum penalty on summary conviction in Northern Ireland	Maximum penalty on conviction on indictment
Six months' imprisonment (rising to 12 months once section 154(1) of the Criminal Justice Act 2003 is commenced), an unlimited fine, or both.	12 months' imprisonment, a fine not exceeding the statutory maximum (currently £10,000), or both.	Six months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both	Two years' imprisonment, an unlimited fine, or both.

Clause 26: Offence of failing to comply with an access prohibition, etc

114 The offence in clause 25 applies where the person against whom a prohibition order or premises order that contains an access prohibition fails to comply with the terms of that access prohibition. This clause makes it an offence for any other person, without reasonable excuse, to remain on or enter premises in contravention of an access prohibition. The offence is summary only, with a maximum penalty of six months' imprisonment (12 months in Scotland) or a fine (up to the statutory maximum in Scotland and Northern Ireland or unlimited in England and Wales), or both.

Clause 27: Variation and discharge on application

115 This clause provides the courts with a power to vary or discharge a prohibition order or a premises order. An application to vary or discharge an order may be made by the person who applied for the order (that is, in the case of a prohibition order or a premises order made on application, the relevant law enforcement agency), by the appropriate law enforcement agency (in Scotland, the Lord Advocate or a procurator fiscal) in the case of a prohibition order made on conviction, by the respondent or by any other person significantly adversely affected by the order (*subsections (1) and (2)*). Generally, any application to vary or discharge a prohibition order or premises order should be made to the court that made the order. The only exceptions to this is where the order was made by the Court of Appeal (when determining an appeal against sentence), where the jurisdiction reverts to the Crown Court, and where the order was made in the youth court in England and Wales or Northern Ireland and the respondent has attained the age of 18 years, in which case the jurisdiction moves to the magistrates' court or court of summary jurisdiction (*subsection (6)*).

116 *Subsections (3) to (5)* enable an access prohibition included in a prohibition order or a premises order to be extended, or further extended, beyond the initial three month limit, but the overall duration of an access prohibition may not exceed six months. Subject to this limitation, and the three year limitation on a prohibition order made against an individual under the age of 18 (see clauses 17(7) and 18(4)), a prohibition order or premises order will have indefinite effect unless discharged.

Clause 28: Variation following conviction

117 This clause enables a criminal court, when sentencing a person for an offence under clauses 4 to 8 (or an associated secondary offence) or clause 25, to vary any prohibition order or premises order made against the offender which is currently in force. The court may act on its own motion but it would be open to the prosecution to make representations to the court in this regard.

Clause 29: Appeals against making of prohibition orders and premises orders

118 *Subsection (1)* sets out the avenue of appeal by a respondent against a prohibition order made on application under clause 17 or a premises order made on application under clause 19. There is no right of appeal for the police or other law enforcement agency against the refusal of a court to make a prohibition order or premises order. Any appeal must be made within 28 days of the making of an order (*subsection (2)*).

119 The court hearing an appeal will consider the case afresh and either confirm, vary or revoke the original order (*subsection (3)*).

120 A prohibition order made on conviction may be appealed to the normal higher court as if it was part of the sentence imposed by the court (*subsection (5)*).

Clause 30: Appeals about variation and discharge

121 This clause provides for a right of appeal against the decision of a court to vary a prohibition order or premises order, or to decline to do so. There is also a right of appeal against a refusal to discharge an order. *Subsection (1)* specifies the appropriate appellate court in the case of an appeal against a decision of a court under clause 27.

122 In Scotland, a sheriff will hear cases in both a civil capacity (in the case of prohibition orders on application (clause 17) and premises orders (clause 19)) and in a criminal capacity (in the case of prohibition orders following conviction (clause 18)). In civil cases, the Sheriff Appeal Court will be the appellate court to hear any appeals from a sheriff. Where a sheriff imposes a prohibition order sitting in a criminal capacity in relation to summary criminal proceedings, the Sheriff Appeal Court will be the appropriate appellate court. Where the sheriff imposes a prohibition order sitting in a criminal capacity in relation to indictment proceedings, the appropriate appellate court is the High Court of Justiciary sitting as a court of appeal.

123 *Subsection (2)* confers the right of appeal upon the subject of the prohibition order or premises order in question and on any other person significantly adversely affected by the order. So, for example, if on an application by a chief officer of police a prohibition order was varied so as to add one or more prohibitions, restrictions or requirements, the subject of the order would be able to appeal that decision, but the chief officer would not be able to appeal a decision by the court not to vary the prohibition order. Any appeal must be made within 28 days of the making of the decision (*subsection (4)*).

124 *Subsection (5)* sets out the powers of the court when determining an appeal. It will be open to the court to revoke the order or to amend its provision.

125 *Subsection (7)* enables an offender to appeal against the variation on conviction of a prohibition

order or premises order; the avenue of appeal will be the same as that for an appeal against sentence.

Clause 31: Nature of proceedings under clauses 18 and 28, etc

126 This clause provides that proceedings under clauses 18 or 28 in respect of the making of a prohibition order on conviction or the variation on conviction of a prohibition order or premises order are civil proceedings to which the civil standard of proof applies (subsections (1) and (2)); however, the criminal procedure rules would apply in the Crown Court in England and Wales (*subsection (7)*). The court can consider evidence which was not admissible in the criminal proceedings. This could include hearsay or bad character evidence (*subsection (3)*). It is open to the court to adjourn proceedings in respect of the making or variation of a prohibition order or the variation of a premises order, for example, if it was necessary to hear further evidence at a later date about the appropriate prohibitions, restrictions or requirements to attach to a prohibition order. Accordingly it would be possible to consider the making of a prohibition order, or the variation of a prohibition order or premises order, after the offender has been sentenced for an offence under clauses 4 to 8 (*subsection (4)*).

Clause 32: Special measures for witnesses: England and Wales

127 This clause enables a court in England and Wales to give a special measures direction to protect vulnerable or intimidated witnesses in proceedings in respect of prohibition orders and premises orders. Such measures may include giving evidence behind a screen or by video link or in private. In relation to England and Wales, the relevant provisions of the Youth Justice and Criminal Evidence Act 1999 are modified for the purposes of this Bill.

Clause 33: Special measures for witnesses: Northern Ireland

128 This clause makes equivalent provision to that in clause 32 for the use of special measures in relation to proceedings in Northern Ireland. In Scotland, the provisions of the Vulnerable Witnesses (Scotland) Act 2004 will apply without the need for express provision in the Bill.

Clause 34: Transfer of proceedings from youth court

129 Where a respondent is under the age of 18 years, applications for the making, variation or discharge of a prohibition order will be heard in the youth court in England and Wales and Northern Ireland. Where there are ongoing proceedings in the youth court and the respondent turns 18, this clause enables rules of court to determine which court continues to have jurisdiction for the case; such rules may either provide for the case to continue to be heard in the youth court or be transferred to a magistrates' court (or, in Northern Ireland, a court of summary jurisdiction).

Clause 35: Power to stop and search persons

130 *Subsections (1) and (2)* confer powers to stop and search persons on a police or customs officer. The power is engaged where the officer has reasonable grounds to suspect that a person has committed, or is likely to commit, an offence under any of clauses 4 to 8 and 25 of the Bill. As the Bill does not provide for a simple possession offence, there is no power to stop and search where an officer suspects that a person has in his or her possession a psychoactive substance intended for personal use; the officer will need to have reasonable grounds to suspect that the person has committed or is likely to commit an offence under the Bill, for example, the person is likely to commit the offence of possession with intent to supply a psychoactive substance. A police or customs officer may also detain a stopped person for the purpose of carrying out the search.

131 The term "police or customs officer" is defined for the purposes of the Bill in *subsection (4)* to include NCA officers designated with the powers and privileges of a constable or officer of

Revenue and Customs (see the definition in clause 58(1)) and authorised by the Director General of the NCA to exercise the powers of a police or customs officer under the Bill. The intention is that NCA officers designated with the powers and privileges of a constable and/or the powers of an officer of Revenue and Customs (under section 10 of the Crime and Courts Act 2013) will have access to the powers contained in the Bill. The scheme in the Crime and Courts Act 2013 operates in such a way that an NCA officer designated with the powers and privileges of a constable, officer of Revenue and Customs, or both would automatically be able to exercise the powers of a constable and/or Revenue and Customs officer (as the case may be), as conferred under statute or common law. The reference to an NCA officer in *subsection (4)* is drafted in such a way as to ensure that it is consistent with that general approach.

132 The stop and search powers are exercisable in any place to which the police or customs officer has access, this will include any public place and any premises that are the subject of a search warrant issued under clause 38 or under any other enactment (for example, the Police and Criminal Evidence Act 1984 ("PACE")).

133 The power of a constable in England and Wales to stop and search under this clause engages certain safeguards under Part 1 of the Police and Criminal Evidence Act 1984 ("PACE") or, in Northern Ireland, under Part II of the Police and Criminal Evidence (Northern Ireland) Order 1989 ("PACE NI"), including:

- The constable need not search a detained person if it subsequently appears to him or her: (i) that no search is required; or (ii) that a search is impracticable (section 2(1) of PACE and Article 4(1) of PACE NI).
- Where the constable contemplates a search, he or she is under a duty to take reasonable steps before he or she commences the search to bring to the attention of the detained person (section 2(2) and (3) of PACE and Article 4(2) and (3) of PACE NI) —
 - If the officer is not in uniform, documentary evidence that he or she is a constable; and whether he or she is in uniform or not, the matters specified below:
 - the constable's name and the name of the police station to which he or she is attached;
 - the object of the proposed search;
 - the constable's grounds for proposing to make it; and
 - the detained person's right to receive a record of any search conducted (section 3(7) of PACE and Article 5(7) of PACE NI).
- A constable has no power to require a detained person to remove any of his or her clothing in public other than an outer coat, jacket or gloves (section 2(9)(a) of PACE and Article 4(10) of PACE NI).
- A constable must make a record of the search in writing unless it is not practicable to do so. Where it is not practical to make a record at the time, the constable must do so as soon as practicable after the completion of the search (section 3(1) and (2) of PACE and Article 5(1) and (2) of PACE NI).
- The provisions of the Code of Practice made under section 66 of PACE or Article

Clause 36: Power to enter and search vehicles

134 *Subsections (1) and (2)* confer powers to stop and search vehicles on a police or customs officer.

The power is engaged where the officer has reasonable grounds to suspect that the vehicle contains evidence of an offence under any of clauses 4 to 8 and 25 of the Bill. The power does not apply where the vehicle is a dwelling (*subsection (1)(b)*); in such circumstances the provisions of clause 38 would apply. A dwelling is not defined but is intended to be given its natural meaning; the exclusion would, for example, apply to a residential caravan. The power applies to vehicles whether or not a driver or other person is in attendance of the vehicle.

Where it is impractical for a stopped vehicle to be searched in the place it has been stopped, the officer may require the vehicle to be moved to another place before conducting the search (*subsection (3)*). This provision would apply, for example, where the vehicle has been stopped on a busy road and it would be safer to conduct the search in another location.

135 *Subsection (4)* places a duty on any person travelling in the vehicle or the registered keeper to facilitate the exercise of an officer's powers under this clause, for example, the driver of the vehicle might be required to open a locked glove box or boot.

136 These stop and search powers are exercisable in any place to which the officer has lawful access, this would enable a vehicle parked in a garage on premises that are the subject of a search warrant under clause 38 to be searched (*subsection (5)*).

137 The power of a constable in England and Wales to stop and search a vehicle under this clause engages certain safeguards under Part 1 of PACE or Part II of PACE NI, including:

- The constable need not search a detained vehicle if it subsequently appears to him or her: (i) that no search is required; or (ii) that a search is impracticable (section 2(1) of PACE and Article 4(1) of PACE NI).
- Where the constable contemplates a search of an attended vehicle, he or she is under a duty to take reasonable steps before he or she commences the search to bring to the attention of the detained person (section 2(2) and (3) of PACE and Article 4(2) and (3) of PACE NI) —
 - If the officer is not in uniform, documentary evidence that he or she is a constable; and whether he or she is in uniform or not, the matters specified below:
 - the constable's name and the name of the police station to which he or she is attached;
 - the object of the proposed search;
 - the constable's grounds for proposing to make it; and
 - the right of the owner or person in charge of the vehicle to receive a record of any search conducted (section 3(8) of PACE and Article 5(8) of PACE NI).
- A constable not in uniform has no power to stop a vehicle (section 2(9)(b) of PACE and Article 3(10)(b) of PACE NI).
- A constable must make a record of the search in writing unless it is not practicable

to do so. Where it is not practical to make a record at the time, the constable must do so as soon as practicable after the completion of the search (section 3(1) and (2) of PACE and Article 5(1) and (2) of PACE NI).

- The provisions of the Code of Practice made under section 66 of PACE or Article 66 of PACE NI.

Clause 37: Power to board and search vessels or aircraft

138 This clause contains powers to board and search vessels or aircraft analogous to those in clause 36 in respect of entry and search of vehicles. A vessel is defined in clause 58(4) and includes any ship, boat or hovercraft. The powers do not apply where the vessel or aircraft is used as a dwelling, for example, a house boat. Again, the provisions of sections 2 and 3 of PACE apply where the powers are exercised by a constable in England and Wales (*subsection (10)* of sections 2 and 3 of PACE apply the provisions of those sections to vessels, aircraft and hovercrafts as they apply to vehicles).

Clause 38: Power to enter and search premises

139 This clause provides for prior judicial authorisation of powers to search premises for evidence of an offence under any of clauses 4 to 8 and 25 of the Bill ("premises" is defined in clause 58 and includes both residential and commercial premises and vehicles or vessels). Applications for a search warrant must be made, in England and Wales and Northern Ireland, by a relevant enforcement officer, or, in Scotland, by a relevant enforcement officer or the procurator fiscal. Unlike the powers to stop and search persons, vehicles and vessels in clauses 35 to 37, the power to apply for and execute search warrants extends to local authority officers as well as police or customs officers (see *subsection (6)*). As the definition of premises (see clause 58(1)) includes vehicles, vessels and aircraft, it is open to a local authority to apply for a search warrant to search vehicles, vessels and aircraft whether or not they are being used as a dwelling.

140 *Subsection (1)* enables a justice to issue a search warrant to a relevant enforcement officer that authorises that officer to enter premises specified in the warrant and search them for such evidence. A justice is defined in clause 58 as a justice of the peace, sheriff and lay magistrate in England and Wales, Scotland and Northern Ireland respectively. There is a two-stage test for the grant of a search warrant (*subsections (4) and (5)*). The first element of the test is that the justice must be satisfied that there are reasonable grounds to suspect that evidence of an offence under any of clauses 4 to 8 and 25 of the Bill is to be found on premises covered by the warrant. In determining whether the "reasonable grounds to suspect" test has been satisfied, the justice will apply the civil standard of proof, namely the balance of probabilities. The second element of the test is that any of the conditions in *subsection (5)* are met. The nature of those conditions are such that a relevant enforcement officer should, where possible, secure entry into premises or access to items on the premises with the co-operation of the owner or occupier and only seek a warrant where such co-operation is unlikely to be forthcoming or where the purpose of the search would be frustrated or seriously prejudiced if immediate entry to the premises could not be secured using the authority of a warrant.

141 As with the provisions for search warrants in section 15 of PACE, a warrant issued under this clause may be in relation to a single set of premises (a "specific-premises warrant") or an "all-premises warrant" where it is necessary to search all premises occupied or controlled by an individual, but it is not reasonably practical to specify all the premises at the time of applying for the warrant (see *subsection (3)*). An all-premises warrant will allow access to all premises occupied or controlled by that person, both those that are specified on the application, and those that are not; this allows for follow-up searches where evidence at one

premises controlled by the named person identifies a second associated with that person.

Clause 39: Further provision about search warrants

142 *Subsection (1)* enables a search warrant to be executed by any relevant enforcement officer and not just the officer who applied for the warrant. If the search warrant so provides, *subsection (2)* enables authorised persons to accompany a relevant enforcement officer when executing a warrant. Such a person, for example, a Police Community Support Officer, has the same powers as those conferred on the relevant enforcement officer (*subsection (3)*). *Subsection (4)* gives effect to Schedule 2 which makes further provision about applications for and the execution of search warrants. Failure to comply with the requirements in Part 2 of Schedule 2 in respect of the execution of warrants would render the entry and search of premises unlawful (*subsection (5)*).

Schedule 2: Search warrants

143 Part 1 of Schedule 2 sets out the procedure for applying for a search warrant under clause 38 and various safeguards. Applications for a warrant may be made without notice to any affected person (for example, the owner or occupier of the premises or the owner of the substances in question) to avoid forewarning such a person of the impending search thereby affording an opportunity to remove or otherwise hide the psychoactive substances or other evidence of an offence (*paragraph 1(1)*). In coming to a judgment as to whether the test for the grant of a warrant is made out (see clause 38(4)), a justice would weigh up the information supplied in the application (*paragraph 1(2)*) or in oral evidence (*paragraph 1(3)*). Paragraph 2 sets out the information that must be provided in an application.

144 *Paragraphs 3 and 4* set out the information that must be contained in a search warrant, including whether the warrant authorises single or multiple entries into relevant premises. A warrant may authorise entry to and search of premises on more than one occasion if, on the application, the justice is satisfied that it is necessary to authorise multiple entries in order to achieve the purpose for which it was granted, for example, the search of a large warehouse.

145 *Paragraph 5* provides for the making of copies. These provisions are analogous to those in section 15(5) to (8) of PACE.

146 Part 2 of Schedule 2 makes provision for the execution of search warrants.

147 Where premises are entered and searched in pursuance of a warrant and such premises are not specified in the warrant, entry must be authorised by a relevant enforcement officer of the appropriate grade, as defined in *paragraph 7*. Where a warrant authorises multiple entries into a set of premises, any second or subsequent entry must be similarly authorised (*paragraph 8*).

Clause 40: Powers of examination, etc

148 This clause enables a relevant enforcement officer, when searching a vehicle or vessel (with or without a warrant) or any premises (under a warrant), to examine anything in the vehicle or vessel or on the premises. Such examination may extend to testing substances found (*subsection (3)*). The ability to test such a substance, for example to determine whether or not it is a psychoactive substance, will help avoid unnecessary seizures. *Subsection (6)* places a duty on any person in or on the premises to facilitate or assist the exercise of an officer's powers under clauses 36 to 38 or under this clause, for example, to open any locked container. If there is no such person on the premises to assist in such manner or that person refuses to do so, *subsection (5)* confers a power on a relevant enforcement officer to use force to break open a container or other locked thing (for example, a locked store room).

Clause 41: Power to require production of documents, etc

149 This clause enables a relevant enforcement officer, when searching a vehicle or vessel (with or without a warrant) or any premises (under a warrant), to require any person in the vehicle or vessel or on the premises to produce any document or record that is in the person's possession or control. The power is so defined as to extend to requiring a person to produce information held in electronic form, for example on a computer, so that it can be read. Such an examination may assist in providing additional evidence of criminal conduct, for example spreadsheets detailing various trades and supplies.

Clause 42: Powers of seizure, etc.

150 This clause enables a relevant enforcement officer to seize and detain any substance found in the course of a search which the officer reasonably believes to be a psychoactive substance or evidence of an offence under any of clauses 4 to 8 and 25 of the Bill. Items may also be seized for the purpose of determining whether any such offence has been committed. The power also extends to taking copies or extracts of any documents or records found on the premises that could be used as evidence of an offence. The power to seize and detain, remove, or take copies of or extracts from a document or record, extends to documents or records produced to the relevant enforcement officer under the powers in clause 41. These powers apply to a relevant enforcement officer searching a vehicle or vessel (with or without a warrant) or any premises (under a warrant) or to a relevant enforcement officer who is lawfully on premises for some other purpose. The powers of seizure in this clause do not extend to excluded items as defined in clause 43.

Clause 43: Excluded items

151 This clause defines excluded items which fall outside the powers of seizure in clause 42. In England and Wales, excluded items are:

- Items subject to legal privilege as defined in section 10 of PACE, broadly communications between a professional legal adviser and his or her client in connection with the giving of legal advice to the client or in connection with legal proceedings and for the purpose of such proceedings. Items held with the intention of furthering a criminal purpose are not subject to legal privilege.
- Excluded material as defined in section 11 of PACE, broadly personal records which a person has acquired or created in the course of any trade, business, profession or other occupation and which he or she holds in confidence; human tissue or tissue fluid which has been taken for the purpose of diagnosis or medical treatment and which a person holds in confidence; or journalistic material (that is, material acquired or created for the purpose of journalism) which a person holds in confidence.
- Special procedure material as defined in section 14 of PACE, broadly material acquired or created in the course of any trade, business, profession or other occupation or for the purpose of any office and held subject to an express or implied undertaking to hold it in confidence or subject to a restriction on disclosure or an obligation of secrecy contained in any enactment; and journalistic material, other than excluded material.

152 Schedule 1 to PACE makes special provision for obtaining judicially authorised access to excluded material or special procedure material for the purpose of a criminal investigation.

153 *Subsections (3) and (4)* make analogous provision for Scotland and Northern Ireland.

Clause 44: Further provision about seizure under clause 42

154 This clause contains an ancillary power to seize any containers in which seized items are stored (*subsection (1)*). Such containers may be packets in which psychoactive substances are sold or boxes containing relevant documents. *Subsection (2)* provides for the subsequent return of seized containers save where one of the conditions in *subsection (3)* is satisfied. *Subsection (4)* caters for circumstances where it is not practicable to seize all items at the time of the search of premises, for example, because the task proved to be more time consuming than expected or because of the volume of items that need to be removed. In such cases, the relevant enforcement officer can impose a duty on the person from whom an item is seized or any person on the premises to secure the items and not to tamper with them.

Clause 45: Notices and records in relation to seized items

155 This clause makes provision for the issue of a written notice, where an item is seized under clause 42, to affected persons as defined in *subsection (2)*. If no such person is present on premises subject to a search warrant, a copy of the notice must be left on the premises (*subsection (3)*). This is to ensure that all persons with an interest in the seized items are properly informed of the seizure and of the provisions in clauses 48, 49, 50 and 52 in respect of the retention and forfeiture or return of seized items. In addition to the notice of seizure issued at the time of the seizure, a record must be made of the items seized; such a record could be compiled after the search has taken place, for example, once the seized items have been taken to a police station (*subsections (5) and (6)*).

Clause 46: Powers of entry, search and seizure: supplementary provision

156 *Subsections (1) and (2)* enable a relevant enforcement officer (or a person authorised to accompany them when executing a search warrant) to use reasonable force, if necessary, when exercising powers under clauses 35 to 44, for example, to search a person or to enter premises to execute a search warrant (this mirrors section 117 of PACE).

157 *Subsection (3)* provides that the powers of entry, search and seizure conferred by the Bill are without prejudice to the continued operation of any other powers conferred by or under any enactment or under common law.

Clause 47: Offences in relation to enforcement officers

158 *Subsection (1)* makes it an offence for a person, without reasonable excuse, intentionally to obstruct a relevant enforcement officer in the exercise of his or her powers under clauses 35 to 44.

159 *Subsection (2)* makes it an offence for a person, without reasonable excuse, to fail to comply with a reasonable requirement made or direction reasonably given by a relevant enforcement officer under clauses 36 to 44. It is also an offence to prevent another person from complying with such a requirement or direction. Such a requirement or direction may be, for example, to open a locked door of a room within premises subject to a search warrant or to open a locked cabinet.

160 These offences extend to the obstruction of, or failure to comply with a requirement or direction given by, a person authorised to accompany a relevant enforcement officer (such as a police community support officer) to effect a search of premises (*subsection (3)*).

161 *Subsection (4)* provides for the maximum penalties for both offences, as follows -

Maximum penalty on summary conviction in England and Wales	Maximum penalty on summary conviction in Scotland	Maximum penalty on summary conviction in Northern Ireland
Six months' imprisonment (rising to 51 week once section 281(5) of the Criminal Justice 2003 comes into force), unlimited fine, or both.	12 months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both.	Six months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both.

Clause 48: Retention of seized items

162 This clause authorises the retention of items seized under clause 42 for as long as is necessary and, in particular, either for use as evidence in a trial or to enable forensic examination (for example, to determine whether a seized substance is a psychoactive substance), or as part of an investigation for an offence under the Bill.

Clause 49: Power of police, etc to dispose of seized psychoactive substances

163 This clause provides for a fast track procedure for the disposal of seized psychoactive substances where a psychoactive substance is seized during a search, carried out without a warrant, of a person, vehicle, vessel or aircraft under clauses 35 to 37. Where, following the stop and search, the officer reasonably believes that there is no evidence of an offence under the Bill (for example, where the officer concludes that the psychoactive substance seized is intended for personal use by the subject of the search), and the seized psychoactive substance was not being used for the purposes of, or in connection with an exempted activity (see clause 10), the officer may dispose of the substance as he or she thinks fit, that is without the judicial process provided for in clause 50. The procedure provided for in this clause broadly mirrors that for temporary class drugs under section 23A(4) and (5) of the 1971 Act.

Clause 50: Forfeiture of seized items by court on application

164 This clause provides for the forfeiture and disposal of seized psychoactive substances and other items where the procedure in clause 49 or clause 53 does not apply. *Subsection (3)* requires a magistrates' court (in England and Wales), a sheriff (in Scotland) or a court of summary jurisdiction (in Northern Ireland) (see *subsection (11)*) to order the forfeiture of an item if the court is satisfied that it is a psychoactive substance likely to be consumed for its psychoactive effects (provided its use was not covered by an exemption specified in regulations made under clause 10) and enables such a court to order the forfeiture of any other item if it has been used in the commission of an offence under the Bill. The civil standard of proof, namely on the balance of probabilities, will apply to such proceedings. Where the court is so satisfied it is for the applicant (namely, an officer from the relevant enforcement agency) to arrange for the disposal of the forfeited item (*subsection (5)*). However, any action to dispose of the item is stayed pending the outcome of any appeal (*subsection (6)*). *Subsections (7) to (9)* detail the circumstances under which the item must be returned to the person entitled to it. The clause also makes further provision, authorising the continued retention of an item, pending the outcome of an application for forfeiture, or any appeal against a decision by the court to order the substance to be returned to the person from whom it was seized, or the owner of the item (*subsections (2) and (10)*).

Clause 51: Appeal against decision under clause 50

165 This clause confers a right of appeal (see *subsection (3)* as to the appropriate higher court in each jurisdiction) against a decision under clause 50 either to order the forfeiture of an item or to order its return to the person entitled to it. An appeal must be lodged within 28 days of the decision by the lower court (*subsection (4)*). The parties to the original proceedings and any persons entitled to the items (defined in *subsection (8)*) – if not present or represented at the

original hearing – will be entitled to be heard at the appeal. On hearing the appeal, the court will determine the question afresh.

Clause 52: Return of item to person entitled to it, or disposal if return impracticable

166 Where the retention of a seized item is no longer authorised under the Bill, this clause provides for the return of the item to the person entitled to it; if necessary, the appropriate court (as defined in *subsection (5)*) may make an order to this end (*subsection (1)(b)*). In any case where it has proved impossible to find the owner, or it is impractical for some reason to return the item (for example, because the owner refuses to accept receipt or it has deteriorated so that it has become dangerous), *subsection (4)* allows for the item to be disposed of by a relevant enforcement officer.

Clause 53: Forfeiture by court following conviction

167 This clause provides that where a person has been convicted for an offence under any of clauses 4 to 8 and 25 of the Bill (or an associated secondary offence), the sentencing court must make a forfeiture order in respect of any psychoactive substances relating to the offence and may make one in respect of other items that were used in the commission of the offence (*subsections (3) and (4)*). The convicted person and any other person who claims ownership of the items are entitled to make representations to the court (*subsection (6)*), and a forfeiture order does not take effect until the time for lodging an appeal has lapsed or until the outcome of any appeal (*subsection (7)*). *Subsections (8) to (10)* enable the court to make supplementary provision to give effect to a forfeiture order.

Clause 54: Application of Customs and Excise Management Act 1979

168 This clause ensures that Border Force officers can exercise the powers under the Customs and Excise Management Act 1979 (“CEMA”) when they intercept psychoactive substances entering or leaving the UK, particularly by post. Border Force customs officials routinely rely on CEMA powers to enforce restrictions on the importation (or exportation) of particular items. A number of the CEMA powers would automatically apply in any event, for example the power in section 159 of CEMA to examine any imported goods, but this clause provides that other CEMA provisions are engaged.

169 *Subsection (1)* applies section 164 of CEMA which confers powers on customs officials to search persons where there are reasonable grounds to suspect that the person is carrying any article with respect to the importation or exportation of which any prohibition or restriction is for the time being in force under or by virtue of any enactment. By virtue of this subsection, psychoactive substances are deemed to be subject to such a prohibition or restriction for the purposes of section 164 of CEMA.

170 *Subsection (2)* makes a psychoactive substance liable to forfeiture if it is imported to or exported from the UK and it is likely to be consumed by any individual for its psychoactive effects. This has the effect of engaging other CEMA powers, in particular, the powers in section 139 and Schedules 2A and 3 to detain, seize and forfeit any thing “liable to forfeiture”. Section 139 of CEMA provides that goods which are liable to forfeiture may be seized or detained. Schedule 2A to CEMA makes provision in respect of detained goods – essentially allowing Border Force time to investigate whether the goods in question are indeed liable to forfeiture. Schedule 3 to CEMA governs the process of seizure and forfeiture of goods. The CEMA provisions include similar safeguards regarding the issue of notices of seizure as are included with powers of seizure in the Bill and also provide for judicial oversight. In summary, if, after a one month period from the time of seizure there has been no challenge to the legality of seizure, the goods are automatically condemned as forfeit. If someone challenges the legality of seizure, Border Force must bring condemnation proceedings to obtain an order for condemnation of the goods.

171 *Subsection (4)* applies section 5 of CEMA for the purposes of *subsection (2)*. Section 5 of CEMA defines the time of importation or exportation of goods for the purposes of the powers in CEMA, for example, in the case of items imported by sea, the time of importation is when the ship carrying the item comes within the limits of a port.

Clause 55: Offences by directors, partners, etc.

172 In the case of an offence under the Bill committed by a body corporate, this clause extends liability for the offence to a person who is an officer of the body corporate (as defined in *subsection (2)*) where the offence has been committed with the connivance of that person, or was a consequence of any neglect attributable to that person (*subsection (1)*). This clause mirrors provisions in section 21 of the 1971 Act.

Clause 56: Providers of information society services

173 This clause gives effect to Schedule 3 which contains provisions about the application of this Bill in relation to persons providing information society services.

Schedule 3: Providers of information society services

174 Schedule 3 is designed to ensure that the provisions of the Bill are compatible with the UK's obligations under the E-Commerce Directive.

175 Under Part 1 of Schedule 3 providers of information society services who are established in the UK are covered by the new offence of offering to supply psychoactive substances even when they are operating in another European Economic Area state. *Paragraphs 3 to 5* of the Schedule provide exemptions for information service providers from this offence in limited circumstances, such as where they are acting as mere conduits for any offer to supply (by facilitating an email) or are storing it as caches or hosts (for example, hosting a website). Part 2 of Schedule 3 similarly ensures that the Bill in respect of prohibition notices and prohibition orders insofar as they impact on information service providers is compatible with the terms of the E-Commerce Directive.

Clause 57: Review

176 This clause places a duty on the Secretary of State to review the operation of the Bill and lay a report of the review before Parliament within 30 months of the coming into force of clauses 4 to 8. Accordingly, if those clauses were commenced on 1 April 2016, the report would need to be laid before Parliament by 30 September 2018.

Clause 58: Interpretation

177 This clause defines various terms used in the Bill.

Clause 59: Consequential amendments

178 This clause gives effect to Schedule 4 which makes amendments to other enactments consequential upon the provisions of the Bill.

Schedule 4: Consequential amendments

179 *Paragraph 1* amends Schedules 2 (which applies to England and Wales), 4 (which applies to Scotland) and 5 (which applies to Northern Ireland) to the Proceeds of Crime Act 2002 ("POCA") to add the offences in clauses 4 to 8 of the Bill to the list of "lifestyle offences" contained in each of those Schedules.

180 Part 2 of POCA provides for the making of confiscation orders to confiscate assets gained through criminal activity from offenders, after conviction. The purpose of confiscation proceedings is to recover the financial benefit that an offender has obtained from his or her criminal conduct. The court calculates the value of that benefit and orders the offender to pay

an equivalent sum (or less where a lower sum is available for confiscation).

- 181 Section 6 of POCA makes provision for the making of confiscation orders by the Crown Court in England and Wales. In accordance with section 6, where the defendant is identified as having a “criminal lifestyle”, the proceeds of the defendant’s “general criminal conduct” are liable to confiscation. This means that an offender in relation to whom there are reasonable grounds to believe that he or she is living off crime will be required to account for his or her assets, and will have them confiscated to the extent that he or she is unable to account for their lawful origin. The criminal lifestyle tests are therefore designed to identify offenders who may be regarded as normally living off the proceeds of crime.
- 182 Under section 75 of POCA, a person has a criminal lifestyle if he or she satisfies one or more of the tests set out in that section. The first test is that he or she is convicted of an offence specified in Schedule 2 to POCA. Schedule 2 lists the offences which are so closely linked to a life of crime that a conviction for any of them will lead to the defendant being deemed to have a criminal lifestyle for the purposes of the confiscation regime in POCA. By including the offences in clauses 4 to 8 of the Bill in Schedule 2 to POCA, *paragraph 1* ensures that defendants convicted of these offences will be deemed to have a criminal lifestyle and will therefore be subject to the stricter regime in respect of calculating confiscation orders under the 2002 Act. Parts 3 and 4 of POCA make parallel provision for confiscation orders in Scotland and Northern Ireland respectively.
- 183 *Paragraph 2* amends Schedule 4 to the Police Reform Act 2002 so as to extend the powers of police community support officers (“PCSO”). Where a PCSO is conducting a search of a person and finds a psychoactive substance, the substance may be seized and retained if the PCSO reasonably believes that it is unlawful for the person to have the substance in his or her possession. This is not of itself a power to search a person, but only a power to seize and detain a psychoactive substance where a search is being conducted under other powers conferred by Schedule 4 to the Police Reform Act 2002. The PCSO may also in such circumstances require the person to provide his or her name and address. The power to require a person to give his or her name and address also applies where the PCSO reasonably believes that the person is unlawfully in possession of a psychoactive substance. Failure to comply with a requirement to provide a person's name and address is an offence (subject to a maximum penalty of a level 3 fine). These powers are similar to those in relation to controlled drugs as provided for in paragraphs 7B and 7C of Schedule 4 to the Police Reform Act 2002.
- 184 *Paragraph 3* makes a like amendment to that made by paragraph 2 to Schedule 2A to the Police (Northern Ireland) Act 2003 which sets out the powers and duties of police community support officers in Northern Ireland.
- 185 *Paragraph 4(2)* amends section 97 of the Licensing Act 2003. That section provides that a constable may enter and search club premises where he or she has reasonable cause to believe that an offence in respect of controlled drugs has been, is being, or is about to be, committed there or there is likely to be a breach of the peace. The amendment to section 97 extends the power of a constable to enter and search club premises where the officer has reasonable cause to believe that an offence of supplying or offering to supply psychoactive substances has been, is being, or is likely to be committed on the premises.
- 186 *Paragraph 4(3)* amends Schedule 4 to the Licensing Act 2003 so as to add the offences of producing, supplying, offering to supply, possession with intent to supply, importing and exporting psychoactive substances to the list of relevant offences contained in that Schedule. The significance of designation as a “relevant offence” is that a conviction for such an offence (or a comparable foreign offence), unless spent (under the terms of the Rehabilitation of Offenders Act 1974), must be taken into account by a licensing authority in its consideration of

an application for the grant or renewal of a personal licence (in accordance with sections 120 and 121 of the Licensing Act 2003). If an existing personal licence holder is convicted of a relevant offence, his or her licence may be forfeited or suspended (see section 129 of the Licensing Act 2003).

187 *Paragraph 5* adds the offences of producing, supplying, offering to supply, possession with intent to supply, importing and exporting psychoactive substances to the list of relevant offences in Part 1 of Schedule 7 to the Gambling Act 2005. Under Part 5 of that Act, the Gambling Commission has power to take relevant offences into account when considering applications for operating and personal licences. Where an offence is a relevant offence, the Commission may consider such offences during the application process, even though they are spent under the terms of the Rehabilitation of Offenders Act 1974.

188 *Paragraph 6(2)* amends section 75 of the Armed Forces Act 2006 which confers powers on service police officers to stop certain persons and vehicles to search them for specified things, including controlled drugs. The amendment extends this power so that it also covers psychoactive substances. *Paragraph 6(4)* adds a definition of psychoactive substance to section 77 of the Armed Forces Act 2006.

189 *Paragraph 7* adds the offences of producing, supplying, offering to supply, possession with intent to supply, importing and exporting psychoactive substances to the list of serious offences in Schedule 1 to the Serious Crime Act 2007. Conviction for, or involvement in, one of these offences can trigger the making of a serious crime prevention order. Serious crime prevention orders are a form of civil order aimed at preventing serious crime. These orders are intended to be used against those involved in serious crime, with the terms attached to an order designed to protect the public by preventing, restricting or disrupting involvement in serious crime.

190 *Paragraph 8* amends section 34 of the Policing and Crime Act 2009. Part 4 of that Act makes provision for injunctions to prevent gang-related violence (“gang injunctions”). Gang injunctions are a preventative civil order that enable the police or a local authority to apply to a youth court, county court, or the High Court, for an injunction against an individual to prevent gang-related violence. Gang injunctions allow courts to place a range of prohibitions and requirements (including supportive requirements) on the behaviour and activities of a person (aged 14 or over) involved in gang-related violence. These conditions could include prohibiting someone from being in a particular place or requiring them to participate in rehabilitative activities. Section 51 of the Serious Crime Act 2015, which came into force on 1 June 2015, amended section 34 of the Policing and Crime Act 2009 to extend the circumstances in which a gang injunction may be made to include cases where a gang is involved in “drug-dealing activity”. This paragraph amends the definition of drug-dealing activity so that it covers the unlawful production, supply, importation or exportation of both controlled drugs (as now) and psychoactive substances.

Clause 60: Power to make further consequential amendments

191 This clause enables the Secretary of State (in practice, the Home Secretary), by regulations, to make further provision consequential upon the Bill, including consequential amendments to other enactments. Any such regulations which amend, repeal or revoke provisions in primary legislation are to be subject to the affirmative resolution procedure, otherwise the negative resolution procedure applies.

Clause 61: Extent

192 This clause sets out the extent of the provisions of the Bill (see Annex B for further details).

Clause 62: Commencement and short title

193 *Subsections (1) and (2)* provide for commencement (see paragraph 194 for further details). *Subsection (3)* enables the Secretary of State by regulations to make transitional, transitory or saving provisions in connection with the coming into force of the provisions of the Bill. Such regulations are not subject to any parliamentary procedure.

Commencement

194 The general provisions in clauses 58 and 60 to 62, along with the regulation-making powers in clauses 3(2) and 10(1) come into force on Royal Assent. The remaining provisions of the Bill will come into force by means of commencement regulations made by the Secretary of State. Subject to parliamentary approval of the Bill and any necessary secondary legislation, it is intended to commence the provisions of the Bill on 1 April 2016.

Financial implications of the Bill

195 The figures set out in the paragraphs below are based on a number of assumptions about implementation which are subject to change. Further details of the costs and benefits are set out in the impact assessment.

196 Clauses 4 to 8 provide for offences of production, supply, offering to supply, possession with intent to supply, importation and exportation of psychoactive substances. The estimated average cost for criminal justice agencies is £8,900 per defendant. It is estimated that there will be some five prosecutions per year resulting in an annual cost of £44,000.

197 Clauses 16 to 19 provide for prohibition orders and premises orders. It is estimated that 50, 25 and 5 prohibition orders and premises orders will be applied for in 2016/17, 2017/18 and 2018/19 respectively at a cost of £20,000, £10,000 and £2,000 for criminal justice agencies.

198 It is not expected that police forces and local authorities will incur additional costs as resources are already employed in dealing with the problems caused by psychoactive substances. The general ban is not expected to increase the resources dedicated to the issue, but instead give those currently working on the problem bespoke additional powers to tackle it.

Parliamentary approval for financial costs or for charges imposed

199 The additional expenditure arising from the Bill is not significant enough to require a Money Resolution. The Bill does not impose any charges, so no Ways and Means resolution is required.

Compatibility with the European Convention on Human Rights

200 Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in either House of Parliament to make a statement before Second Reading about the compatibility of the provisions of the Bill with the Convention rights (as defined by section 1 of that Act). The Home Secretary, the Rt Hon Theresa May MP, has made the following statement:

"In my view the provisions of the Psychoactive Substances Bill [HL] are compatible with the Convention rights."

201 The Government has published a separate ECHR memorandum with its assessment of compatibility of the Bill's provisions with the Convention rights (see related documents below).

Related documents

202 The following documents which are relevant to the Bill are available at or from the Bill page on the Home Office website at:

<https://www.gov.uk/government/collections/psychoactive-substances-bill-2015>

- New Psychoactive Substances Review: Report of the Expert Panel, September 2014.
- Government response to new Psychoactive Substances Review Expert Panel report, October 2014.
- New Psychoactive Substances in England: A review of the evidence, Home Office, October 2014.
- New Psychoactive Substances Expert Review Group: review of the current legal framework available to govern the sale and supply of New Psychoactive Substances, Scottish Government, February 2015.
- Inquiry into New Psychoactive Substances, Health and Social Care Committee, National Assembly for Wales, March 2015.
- Impact assessment
- European Convention on Human Rights Memorandum
- Delegated Powers Memorandum

Annex A - Glossary

1971 Act	Misuse of Drugs Act 1971
ACMD	Advisory Council on the Misuse of Drugs
Affirmative procedure	Statutory instruments that are subject to the "affirmative procedure" must be approved by both the House of Commons and House of Lords to become law.
CEMA	Customs and Excise Management Act 1979
NCA	National Crime Agency
Negative procedure	Statutory instruments that are subject to the "negative procedure" automatically become law unless there is an objection from the House of Commons or House of Lords.
PACE	Police and Criminal Evidence Act 1984
PACE NI	Police and Criminal Evidence (Northern Ireland) Order 1989
PCSO	Police Community Support Officer
POCA	Proceeds of Crime Act 2002
TCDO	Temporary Class Drug Order

Annex B - Territorial extent and application

Provision	England	Wales		Scotland		Northern Ireland	
	Extends to E & W and applies to England?	Extends to E & W and applies to Wales?	Legislative Consent Motion required?	Extends to Scotland?	Legislative Consent Motion required?	Extends to Northern Ireland?	Legislative Consent Motion required?
Clauses 1 to 62 and Schedules 1 to 3	In full	In full	No	In full	No	In full	No
Paragraph 1(2) of Schedule 4	In full	In full	No	No	No	No	No
Paragraph 1(3) of Schedule 4	No	No	No	Yes	No	No	No
Paragraph 1(4) of Schedule 4	No	No	No	No	No	Yes	No
Paragraph 2 of Schedule 4	In full	In full	No	No	No	No	No
Paragraph 3 of Schedule 4	No	No	No	No	No	Yes	No
Paragraph 4 of Schedule 4	In full	In full	No	No	No	No	No
Paragraph 5 of Schedule 4	In full	In full	No	In full	No	No	No
Paragraph 6 of Schedule 4	In full	In full	No	In full	No	In full	No
Paragraph 7 of Schedule 4	In full	In full	No	In full	No	In full	No
Paragraph 8 of Schedule 4	In full	In full	No	No	No	No	No

PSYCHOACTIVE SUBSTANCES BILL [HL]

EXPLANATORY NOTES

These Explanatory Notes relate to the Psychoactive Substances Bill [HL] as brought from the House of Lords on 21 July 2015 (Bill 63).

Ordered by the House of Commons to be printed, 21 July 2015

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PUBLISHED BY AUTHORITY OF THE HOUSE OF COMMONS

LONDON - THE STATIONERY OFFICE LIMITED

Printed In the United Kingdom by The Stationery Office Limited

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