

HOUSE OF LORDS

Merits of Statutory Instruments Committee

5th Report of Session 2010-11

Drawing special attention to:

**Draft Misuse of Drugs Act
1971 (Amendment No. 2)
Order 2010**

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The Select Committee on the Merits of Statutory Instruments

The Committee has the following terms of reference:

- (1) The Committee shall, subject to the exceptions in paragraph (2), consider—
 - (a) every instrument (whether or not a statutory instrument), or draft of an instrument, which is laid before each House of Parliament and upon which proceedings may be, or might have been, taken in either House of Parliament under an Act of Parliament;
 - (b) every proposal which is in the form of a draft of such an instrument and is laid before each House of Parliament under an Act of Parliament,with a view to determining whether or not the special attention of the House should be drawn to it on any of the grounds specified in paragraph (3).
- (2) The exceptions are—
 - (a) remedial orders, and draft remedial orders, under section 10 of the Human Rights Act 1998;
 - (b) draft orders under sections 14 and 18 of the Legislative and Regulatory Reform Act 2006, and subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001;
 - (c) Measures under the Church of England Assembly (Powers) Act 1919 and instruments made, and drafts of instruments to be made, under them.
- (3) The grounds on which an instrument, draft or proposal may be drawn to the special attention of the House are—
 - (a) that it is politically or legally important or gives rise to issues of public policy likely to be of interest to the House;
 - (b) that it may be inappropriate in view of changed circumstances since the enactment of the parent Act;
 - (c) that it may inappropriately implement European Union legislation;
 - (d) that it may imperfectly achieve its policy objectives.
- (4) The Committee shall also consider such other general matters relating to the effective scrutiny of the merits of statutory instruments and arising from the performance of its functions under paragraphs (1) to (3) as the Committee considers appropriate, except matters within the orders of reference of the Joint Committee on Statutory Instruments.

Members

The members of the Committee are:

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| Rt Hon. the Baroness Butler-Sloss GBE | The Lord Methuen |
| The Lord Eames OM | Rt Hon. the Baroness Morris of Yardley |
| Rt Hon. the Lord Goodlad (<i>Chairman</i>) | The Lord Norton of Louth |
| The Baroness Hamwee | The Lord Rosser |
| The Lord Hart of Chilton | Rt Hon. the Lord Scott of Foscote |
| The Lord Lucas | |

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Declared interests for this Report are in Appendix 2.

Publications

The Committee's Reports are published by the Stationery Office by Order of the House in hard copy and on the internet at www.parliament.uk/parliamentary_committees/merits.cfm

Contacts

If you have a query about the Committee or its work, please contact the Clerk of the Merits of Statutory Instruments Committee, Delegated Legislation Office, House of Lords, London SW1A 0PW; telephone 020-7219 8821; fax 020-7219 2571; email merits@parliament.uk. The Committee's website, www.parliament.uk, has guidance for the public on how to contact the Committee if you have a concern or opinion about any new item of secondary legislation.

Statutory instruments

The Government's Office of Public Sector Information publishes statutory instruments on the internet at www.opsi.gov.uk/stat.htm, together with an explanatory memorandum (a short, plain-English explanation of what the instrument does) for each instrument.

Fifth Report

INSTRUMENT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the following instrument and has determined that the special attention of the House should be drawn to it on the ground specified.

Draft Misuse of Drugs Act 1971 (Amendment No. 2) Order 2010

Summary: This draft Order in Council makes a further group of cathinone derivatives (including naphthylpyrovalerone, commonly known as naphyrone or NRG1) subject to control as Class B drugs under the Misuse of Drugs Act 1971. This is the result of an assessment by the Advisory Council on the Misuse of Drugs (ACMD) which concluded that the harms associated with naphyrone and related compounds are commensurate with those of mephedrone and therefore recommends those substances be added to Class B. The policy development processes behind this draft Order in Council raise a number of issues which the House may wish to explore further. These include: whether the current analysis of impact supports the need for legislation; the scope of consultation required for this type of instrument; the speed with which the legislation is being taken through Parliament; and the need for an effective post implementation review. The draft Order in Council is complemented by two consequential negative SIs.

This instrument is drawn to the special attention of the House on the ground that it gives rise to issues of public policy likely to be of interest to the House.

1. This draft Order in Council adds a further group of cathinone derivatives (including naphthylpyrovalerone, commonly known as naphyrone or NRG1) to Part 2 of Schedule 2 of the Misuse of Drugs Act 1971 (“the 1971 Act”). They will therefore be subject to control as Class B drugs under the 1971 Act. The draft Order in Council follows an assessment by the Advisory Council on the Misuse of Drugs (ACMD)¹. The ACMD say that the public health response to naphyrone, related compounds and other so-called ‘legal highs’ is a pressing issue². They believe that naphyrone is likely to exhibit a similar spectrum of harmful effects as the other previously controlled cathinones³. The ACMD recommended to the Home Secretary that naphyrone and related compounds should be controlled as Class B substances under the 1971 Act by way of a generic definition⁴. The Explanatory Memorandum (EM) says that by using the generic definition, the draft Order in Council will capture a range of naphthylpyrovalerone analogues and therefore both current and future trends (EM paragraph 7.3).

¹ The ACMD report ‘Consideration of the naphthylpyrovalerone analogues and related compounds’ is available on the Home Office website at:

<http://www.homeoffice.gov.uk/publications/drugs/acmd1/naphyrone-report>

² ACMD report: paragraph 8.1

³ Letter from Professor Les Iverson (Chair of ACMD) to Home Secretary of 7 July 2010 (attached to ACMD Report)

⁴ Letter above

2. The draft Order in Council is complemented by two consequential negative SIs. The first of these is the Misuse of Drugs (Amendment No. 2) (England, Wales and Scotland) Regulations 2010 (SI 2010/1799) which make it unlawful to possess, supply, produce, import or export the drugs except under licence. The second is the Misuse of Drugs (Designation) (Amendment No. 2) (England, Wales and Scotland) Order 2010 (SI 2010/1800) which designates these drugs as substances which have no recognised medicinal use.
3. The draft Order in Council follows earlier advice from the ACMD on other cathinone derivatives. These included 4-methylmethcathinone, commonly known as mephedrone. As a result of that advice, in March this year the previous Government laid the Misuse of Drugs Act 1971 (Amendment) Order 2010 which made mephedrone and other cathinone derivatives subject to Class B control under the 1971 Act. The Committee identified that Order as an instrument of interest in our 17th Report of Session 2009-10 (HL Paper 113). The Committee noted in our report that the speed with which the then Government wished to proceed with the SI meant that the Committee had not had the opportunity to make a detailed assessment of the instrument. The Committee is therefore disappointed that the current Government has repeated this approach; the draft Order in Council was laid on 12 July and is scheduled to be debated on 21 July, thereby reducing the usual period for Parliamentary scrutiny.
4. The ACMD Report looks at the chemical structure and the pharmacy of naphyrone, as well as the prevalence and physical and societal harms. The Committee is aware that Professor David Nutt, the previous Chair of the ACMD has raised a number of questions about the ACMD's recommendation to ban naphyrone⁵. It is not the role of the Committee to comment on the underlying policy in an instrument. However, the policy development processes behind this draft Order in Council raise a number of issues which the House may wish to explore further in the debate. This is particularly pertinent as further information provided by the Home Office suggests the possibility of other so-called 'legal highs' being the subject of similar control (see Appendix 1).

Impact

5. The EM and Impact Assessment (IA) make repeated reference to the lack of information about the current prevalence of these drugs (eg EM paragraph 10.1 and IA page 2). The IA says that there is no population or household survey data collection for naphyrone and other naphthylpyrovalerone analogues (IA page 5). It also says that there is no direct evidence that naphyrone causes any significant social harms such as acquisitive crime and anti-social behaviour (IA page 8). The lack of information about the prevalence of the drug and social harms clearly presents challenges in assessing the costs and benefits of the implementation of this legislation. The House may therefore wish to satisfy itself that the current analysis and evidence supports the need for legislation in this area, particularly as the IA suggests that the prevalence of the drug is currently relatively low (IA page 7).

⁵ 'Banning naphyrone will get us nowhere': Guardian.co.uk: 9 July 2010

Consultation

6. The EM says that in the light of the urgent need to act to protect public health, no public consultation has been carried out prior to the laying of this draft Order in Council (EM paragraph 8.1). The Committee notes that the EM for the Order in Council classifying mephedrone as a Class B drug gave the same reason for not carrying out a public consultation⁶. The Committee is aware that the Secretary of State must consult with the ACMD before making this type of Order in Council. The Committee also recognises the breadth of the membership of the ACMD. However, the nature of drugs policy is often complex; and in developing effective solutions to problems there could be benefit in seeking out a wider range of views than is provided by the ACMD. The House could explore this issue further in the debate.

Review/monitoring

7. The EM says that the Government will: monitor the control measures as part of its drug strategy; and review its public health messages to ensure that they are appropriately targeted and informative (EM paragraph 12.1). The IA adds to this, saying that the Government is considering options for a new evaluation framework; and information for the purposes of evaluation will be gathered from criminal justice and national surveys in each UK country to evaluate effects on use and enforcement (IA page 9). The Home Office has said that in the short term, with law enforcement, they will monitor “head shops” and internet sellers to assess compliance with the law. The Home Office adds that test purchasing results will also provide an insight, and seizure data from UK Border Agency will provide an indication of the success of controls (see Appendix 1). In considering the adequacy of plans for reviewing this current Order, the House may wish to invite the Government to outline any evidence that has been gathered since the banning of mephedrone earlier in the year.
8. The Committee notes that the Coalition Agreement committed the Government to introduce a system of temporary bans on new ‘legal highs’ while health issues are considered by independent experts. However, the Home Office have said that this requires primary legislation which should be in place by late 2011 (see Appendix 1). The delay in developing the provisions for temporary bans underlines the importance of effective review of new bans of a permanent nature. The House may therefore wish to satisfy itself that the Government has a coherent and effective plan for assessing whether this legislation will achieve its policy objectives.

OTHER INSTRUMENTS OF INTEREST

Draft Electricity and Gas (Carbon Emissions Reduction) (Amendment) Order 2010

9. This draft SI amends the Electricity and Gas (Carbon Emissions Reduction) Order 2008 (SI 2008/188) (“the CERT Order”) as amended by the Electricity and Gas (Carbon Emissions Reduction) (Amendment) Order 2009 (SI 2009/1904) (“the 2009 Order”). The CERT Order placed an

⁶ Draft Misuse of Drugs Act 1971 (Amendment) Order 2010: Explanatory Memorandum paragraph 8.1

obligation on gas and electricity suppliers with over 50,000 domestic customers to achieve carbon reduction targets through promoting low carbon and energy efficiency measures (“CERT”). The 2009 Order, which increased CERT by 20%, was drawn to the special attention of the House by the Committee on the ground that it gave rise to issues of public policy likely to be of interest to the House (24th Report of Session 2008-09, HL Paper 140). This draft SI has been laid following a consultation on extending CERT. It makes various amendments to the existing framework, including: increasing the overall carbon emissions reduction target to 293 million lifetime tonnes of carbon dioxide (MtCO₂) from 185 MtCO₂; setting a new overall insulation target as part of the extension; and creating a super priority group of vulnerable households; and setting a new overall super priority group target. The draft SI has been laid with a detailed Impact Assessment (IA) running to 77 pages. The IA identifies significant installation costs for suppliers and households as a result of the amendments to CERT; the IA also identifies significant benefits, such as reduced energy consumption and increased comfort. However, given the speed with which the Government wishes this SI to proceed, the Committee has not had the opportunity to make any detailed assessment of the instrument.

Education (Pupil Registration) (England) (Amendment) Regulations 2010 (SI 2010/1725)

10. The Education (Pupil Registration) (England) Regulations 2006 (“the 2006 Regulations”) prescribe the content of the school attendance register, including the exceptional circumstances where a pupil may be marked as unable to attend. These Regulations amend the 2006 Regulations to include a new exceptional circumstance; that a pupil may be marked as unable to attend if a “local or national emergency has resulted in widespread disruption to travel which has prevented the pupil from attending school”. Paragraph 7.7 of the Explanatory Memorandum (EM) explains that this definition is intended to capture a range of circumstances, including “extreme weather conditions, flooding, natural disaster, or disruption to the supply of fuel”. Paragraph 7.8 of the EM explains that the Department’s guidance on absence and attendance will be updated to reflect the change. The Committee is not convinced that the definition in the Regulations will implement effectively the policy objective as set out in the EM. For example, it is far from clear that a heavy snowfall, which could well constitute an exceptional circumstance preventing attendance, could accurately be described as an “emergency”. It is important that the Department ensures that the Guidance is effective in explaining the intended application of the change brought about by the Regulations.

Firearms (Amendment) Regulations 2010 (SI 2010/1759)

11. These Regulations amend the current firearms legislation in order to implement the requirements of a recent EC Directive. The Regulations will increase from 17 to 18 the age at which a person can lawfully purchase or hire all firearms (currently only air weapons are subject to the threshold of 18 years). The maximum sentence for the offence of purchasing or hiring a firearm under the age of 18 years will be six months imprisonment on summary conviction. An Explanatory Memorandum outlining the effect of the EU Commission proposals was considered by the Lords European Union Committee (Explanatory Memorandum (EM) paragraph 4.4), and the

changes were subject to consultation with shooting, trade and enforcement interests (EM paragraph 8.1). The Home Office will circulate information about these changes to Chief Constables, shooting organisations and other Government departments.

Merchant Shipping (Ship to ship Transfers) (Amendment) Regulations 2010 (SI2010/1769)

12. In our first report of this session the Committee drew attention to the Merchant Shipping (Ship to Ship Transfers) Regulations 2010 (SI 2010/1228). Due to the increased volume of oil being transported from Baltic ports, these regulations tightened controls on the transfer of oil between ships to require that transfers only take place where harbour authorities have suitable contingency plans and equipment in place to protect the environment from spills. The measure has been controversial with industry and the Impact Assessment was criticised because the costs and benefits appeared disproportionate. The amending regulations issued by the new Government defer implementation for six months while the position is reviewed. The Department for Transport is inviting representations from interested parties until 30 September 2010.

INSTRUMENTS NOT DRAWN TO THE SPECIAL ATTENTION OF THE HOUSE

The Committee has considered the instruments set out below and has determined that the special attention of the House need not be drawn to them.

Draft Instruments requiring affirmative approval

Draft Electricity and Gas (Carbon Emissions Reduction) (Amendment) Order 2010

Draft Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010

Instruments subject to annulment

SI 2010/1618 General Pharmaceutical Council (Transfer of Property, Rights and Liabilities, Fees and Grants) Order of Council 2010

SI 2010/1619 Pharmacy Order 2010 (Registration - Transitional Provisions) Order of Council 2010

SI 2010/1620 Pharmacy Order 2010 (Approved European Pharmacy Qualifications) Order 2010

SI 2010/1621 Pharmacy Order 2010 (Commencement No. 2) Order of Council 2010

SI 2010/1723 Armed Forces and Reserve Forces (Compensation Scheme) (Amendment) Order 2010

SI 2010/1725 Education (Pupil Registration) (England) (Amendment) Regulations 2010

- SI 2010/1727 National Health Service (Charges for Drugs and Appliances) and (Travel Expenses and Remission of Charges) Amendment Regulations 2010
- SI 2010/1758 Products of Animal Origin (Third Country Imports) (England) (Amendment) Regulations 2010
- SI 2010/1759 Firearms (Amendment) Regulations 2010
- SI 2010/1760 Animals and Animal Products (Import and Export) (England) (Amendment) Regulations 2010
- SI 2010/1769 Merchant Shipping (Ship-to-Ship Transfers) (Amendment) Regulations 2010
- SI 2010/1799 Misuse of Drugs (Amendment No. 2) (England, Wales and Scotland) Regulations 2010
- SI 2010/1800 Misuse of Drugs (Designation) (Amendment No. 2) (England, Wales and Scotland) Order 2010

APPENDIX 1: DRAFT MISUSE OF DRUGS ACT 1971 (AMENDMENT NO.2)
ORDER 2010: GOVERNMENT RESPONSE

Information from the Home Office

Q1. *These drugs are similar to the cathinones which were classified earlier this year. Why didn't that classification include these drugs also?*

A1. The Home Office is required to consult and is advised by the Advisory Council on the Misuse of Drugs (ACMD).

As you note, the ACMD's advice in March 2010 relating to mephedrone and related cathinone derivatives did not cover the group of drugs now subject to the Order before Parliament. These derivatives contain mono- or fused- polycyclic ring systems, more commonly referred to as naphthylpyrovalerone analogues. They are similar but sufficiently different to mephedrone and the other cathinone derivatives that the ACMD needed to consider them separately. The ACMD undertook to do so as a priority to the then Home Secretary, the outcome of which is their advice of 7 July.

Q2. *Are you aware of any other similar drugs in existence which haven't yet been classified?*

A2. The ACMD's work on new psychoactive substances is ongoing. The nature of this area of work is such that it is difficult to predict what new psychoactive substances are being developed or when these will reach the market.

Q3. *Your papers say the ACMD is doing more work on 'legal highs'.*

A3. Is that likely to lead to the classification of other similar drugs?

So called "legal highs" or new psychoactive highs are a relatively new phenomena having risen to prominence over the life of the last Parliament. Together with the ACMD we are closely monitoring this change in the drug market. In particular, we are looking to identify emerging substances that are being deliberately manufactured to subvert our laws.

If the ACMD advise that such drugs are sufficiently dangerous or otherwise harmful to warrant control, it is likely that the Government will seek to control these drugs under the Misuse of Drugs Act 1971.

Q4. *I believe that prior to the General Election the Conservative*

A4. Party said that if they got into Government they would seek only to classify such drugs on a temporary basis to allow for evaluation of the effects of the classifications? If this is correct, why hasn't that policy been followed here?

The Coalition Agreement committed the Government to introduce a system of temporary bans on new 'legal highs' while health issues are considered by independent experts. This requires primary legislation and the Home Secretary is looking to this in the Police Reform and Social Responsibility Bill. Legislation should be in place by late 2011.

Where we have advice to control a drug from the ACMD following its full assessment of the use, pharmacology, physical and societal harms of a drug, as we have here, - whether or not a drug has been subject to a temporary ban - as a general principle, it remains the Government's intention to proceed to call on Parliament to control these drugs permanently as we have done since the Act was introduced in 1971.

Q5. *Your papers repeatedly say that the current prevalence of the drug is unknown. You are considering adding questions to the BCS and considering options for a new evaluation framework. However, what will the Government be doing in the short term to find out if the changes achieve their policy objectives?*

A5. With mephedrone and related cathinone derivatives, many suppliers self regulated and withdraw those drugs when they become prohibited. We would expect to see a similar response. In the short term, with law enforcement, we will monitor “head shops” and internet sellers to assess compliance with the law. Test purchasing results will also provide an insight and seizure data from UK Border Agency will provide an indication of the success of controls.

Q6. *The EM says that no public consultation was carried out because of the urgent need to protect public health. Please could you expand on why the public health issues were so urgent?*

A6. The EM recites the ACMD’s assessment of the harms of naphyrone (and other naphthylpyrovalerone analogues). These are both physical and psychological, similar to other Class B drugs. However, the more concerning aspect of the ACMD’s advice from a public health aspect is that naphyrone has a much higher potency than mephedrone, suggesting that its use is likely to be associated with a higher risk of accidental overdose. It is thought that the prevalence of naphyrone is currently low. The Government considers that urgent legislative action is required. If naphyrone became as rapidly established as mephedrone did before it was controlled under the Misuse of Drugs Act 1971, those public health implications amplify.

July 2010

APPENDIX 2: INTERESTS AND ATTENDANCE

Committee Members' registered interests may be examined in the online Register of Lords' Interests at www.publications.parliament.uk/pa/ld/ldreg.htm. The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the meeting on 20 July 2010 Members declared no interests on any of the instruments of interest.

Attendance:

The meeting was attended by B. Butler-Sloss, L. Goodlad, B. Hamwee, L. Hart of Chilton, L. Lucas, B. Morris of Yardley and L. Scott of Foscote.