This confidential report summarises our evidence-informed conclusions and is intended to offer constructive advice and recommendations with regards to the operation of the two legislative regimes.

The ACMD has identified a number of significant differences between the MDA and the PSA, which are detailed in this report. Of these, two are of principal importance:

- the differential legal treatment of the offence of possession of drug substances for personal use between the PSA and the MDA; and
- the lack of a 'harms test' under the PSA, anomalies of assessment of harm of substances under the MDA, and how these issues may impact on the future use of TCDOs.

Further evidence-informed analysis of those two anomalies led to the conclusions that:

- The criminalisation of possession for personal use is not mandated by the UK's obligations as a signatory to international conventions on drug control.
- There is little consistent international evidence that the criminalisation for possession of drugs for personal use is effective in reducing drug use.
- The absence of the 'harms test' under the PSA has raised concerns of inconsistent and even disproportionate sentencing, which will remain a concern until the judicial sentencing guidance is reviewed in 2019 and/or the Court of Appeal undertakes test cases.
- Diversion away from the criminalisation of possession of drugs for personal use is under test in different regions of the UK.
- The ACMD consider that the future use of TCDOs is no longer meaningful, if not otiose, in light of the enactment of the PSA.
- The parallel use of TCDOs and PSA leads to an inequitable applicable of the possession offence for personal use.
- The ACMD can still play an important role in bringing particularly harmful drugs to the attention of Government using an evidence-based alert letter accompanied by a recommendation for control under the MDA without a possession offence.
- The NPS Committee should continue in its current form and role to evaluate NPS.

Therefore the ACMD recommends that:

1. The Home Office reviews the Personal Possession Offence (MDA). The review could result in the offence of possession for personal use being repealed.
2. In the event that possession for personal use is not repealed under section 5(2) of the MDA, we recommend that any drug substance or drug product that is added to schedule 2 to the Act (by Statutory Instrument) is: (i) exempted from section 5(2) of the Act (by a combination of a new regulation 4C to the Misuse of Drugs Regulations 2001, and the inclusion of the drug in a new schedule 9 to the regulations), and (ii) the drug is initially classed as Class C pending a commitment by the ACMD to a full assessment of its harmful effects (if any)
3. In the alternative, if the Government does not repeal the possession offence under the MDA, the Home Office and `Department of Health should explore, evaluate and implement effective interventions to divert drug users from the criminal path and reduce drug use, including initiatives to actively refer people into drug treatment if needed and drugs awareness initiatives). Such an intervention should be cognisant of ACMD's recommendations on prevention and sensitive to possible unintended consequences.
4. The Home Office should consider the introduction of the expedited "Ministerial Alert Letter" accompanied by a recommendation for control under the MDA without a possession offence should replace TCDOs.
5. As a consequence of the introduction of a statutory role for ACMD in the PSA the Home Office and the ACMD should consider a joint review of the Working Protocol

We anticipate that our advice will prove to be particularly helpful in regards to the Government's '30 month review' of the PSA. Meanwhile a timely response to this report will be greatly appreciated.

Yours sincerely,

Professor Les Iversen — Kyrie LI James

Chair of ACMD — **Co-Chair of MDA/PSA Working Group**

Substances controlled under the MDA[13] have proven harms, or risk of harm, associated with them (be it mental, physical or social harms). By contrast, the PSA is silent as to harms (if any) that might be associated with the psychoactive substances that it captures.

The medicines legislation introduces another concept: that of a substance being safe and/or beneficial when used as directed by a medical or allied health practitioner but not being safe enough for an individual to be allowed to purchase and use without appropriate supervision.

1.2.3 Criminalisation and international law

Three United Nations conventions are relevant to the question of whether Parties to the agreements are mandatorily required to make it a criminal offence to possess scheduled drugs for personal use (see Appendix B):

- The 1961 Single Convention on Narcotic Drugs;
- The 1971 Convention on Psychotropic Substances; and
- The 1988 Convention against Illicit Trafficking in Narcotics and Psychotropic Substances.

However, the precise reach of these Articles is contentious. The UN articles have an 'inbuilt' flexibility:

- Their implementation and enforcement are subject to a Party's constitutional limitations and principles;
- The provisions of the agreements are subject to savings and exceptions clauses;
- Given that the three United Nation Conventions cannot be directly imposed on a country, the interpretation of the provisions is ultimately a matter for sovereign states, which retain their 'margin of appreciation'.

For example, it is arguable that the relationship between Articles 36(1)(a) and 2(5)(b)[14] of the 1961 Convention means that in respect of certain scheduled drugs, a Party need only impose criminal sanctions for possession for personal use if it is thought necessary to do so on public health grounds. UN treaty obligations to impose prohibitions and criminal sanctions for actions that include drug possession depend, crucially, on the balancing exercise required to assess proportionality and the effectiveness for public health.

It is thus open to the UK to amend the MDA (and the PSA insofar as it criminalises actions in respect of the personal consumption of a psychoactive substance[15]) by removing criminal penalties for possession of drugs without the UK breaching its obligations under international conventions.

Conclusion

The criminalisation of possession for personal use is not mandated by the UK's obligations as a signatory to international conventions on drug control.

1.3 How effective is the criminalisation of possession?

In order to assess whether or not the outcome of criminalisation of possession has led to a reduction in use of drugs, the underlying rationale for such a paradigm requires examination.

1.3.1 One size fits all?

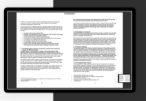
One of the difficulties in trying to find a uniform 'one size fits all' response to the issue of possession is that drug use is a complex concept and a dynamic process. Users are not homogenous in their characters or motivations. There is no typical user. Some people are curious and wish to experiment, some are recreational users with a specific reason to take a specific drug/type of drug, and others are dependent on a drug/range of drugs. As a consequence, users will assess the level of 'risk' of being criminalised for the possession of a drug for personal use in different ways. For example, some users will 'move' from drugs that attract a criminal punishment for possession to those which do not, regardless of the harms associated with the drug. This displacement effect is one unintended negative consequence of the anomaly of the offence of possession between the two statutes. Such complexity in user types, motivations and perceptions of risk impacts on the degree to which criminalisation of possession will be effective. However, criminalisation of possession for personal use is predicated on a rational model of motivation by users assuming a logical decision matrix i.e. that assessing the risk of punishment will divert persons away from using drugs. That users are not homogenous undermines the model upon which the possession offence is based.

In addition, in regard to whether or not criminalisation of possession for personal use is effective in reducing use of drugs, the term 'effective' refers to impacts on both prevalence of use and quality or degree of harm. Hence the relevance of the 'harms test' under the MDA and our concern of the lack of a 'harms test' under PSA, particularly in relation to ACMD's statutory duties e.g. section 1(2) MDA "It shall be the duty of the Advisory Council to keep under review the situation in the United Kingdom with respect to drugs which are being or appear to them likely to be misused and of which the misuse is having or appears to them capable of having harmful effects sufficient to constitute a social problem."

1.3.2 Measuring effectiveness

What is the evidence from other countries that punishing possession is effective in reducing the use of drugs?

The lack of effectiveness of the impact of criminalisation on levels and prevalence rates of possession has been confirmed by a number of studies and countries. In other words, criminalising possession for personal use has not led to a reduction in such offences.



[13] including those controlled following recommendations made by the ACMD

[14] "The drugs in Schedule IV shall also be included in Schedule I and subject to all measures of control applicable to drugs in the latter Schedule, and in addition thereto: a) A Party shall adopt any special measures of control which in its opinion are necessary having regard to the particularly dangerous properties of a drug so included; and b) A Party shall, if in its opinion the prevailing conditions in its country render it the most appropriate means of protecting the public health and welfare, prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party."

[15] See section 4(1)(c)(i), section 8(1)(d)(i), and section 8(2)(d)(i).

In particular, the Home Office's own international comparative research on drug policy[16] found that increased levels of punishment for drug offences did not have a consistent effect in reducing drug use and confirmed there was a lack of a clear correlation between sentencing and levels of drug use.[17] A rigorous, academic review of knowledge in this area also found that whilst interpretations of the evidence were contested, "evidence that tougher sanctions deter drug use or criminal offending more generally is, at best, weak." [18]

Portugal decriminalised the possession of illicit drugs for personal use in regards to possession offences in July 2001. It has since seen reductions in levels of drug use in the general population.[19] Following expansion of treatment and welfare services for drug users, Portugal has also seen substantial reductions in the public health consequences of drug use, including deaths and HIV infections, and in the social cost of drug use.[20]

On the other hand, although Czechoslovakia had decriminalised drugs at the end of the Soviet era, by 1998 the Czech Republic reversed this decision and criminalised the possession of drugs. A national evaluation showed that the criminalisation of possession of drugs did not reduce drug use, but it did increase costs to the criminal justice system. The Czech Republic then changed this policy again in 2010, so that possession of small amounts of drugs is no longer a criminal offence. [21] Drug use has since been stable in the country.[22]

Poland moved in the opposite direction to Portugal in December 2000 by ending the de-penalisation of drugs; and possession became a crime subject to mandatory prosecution.[23] This approach did not see a general reduction in drug use prevalence.

More close to home, following the introduction of Ireland's 2010 Psychoactive Substances Act, the recent published data on drug prevalence in Southern and Northern Ireland found NPS usage significantly down from 3.5% to 0.8%.[24]

Conclusion
There is little consistent international evidence that the criminalisation for possession of drugs for personal use is effective in reducing drug use.

1.3.3 The Absence of a 'harms test' in the PSA
ACMD's statutory duty under section 1(2) MDA confirms the need to review and assess misuse of drugs "capable of having harmful effects sufficient to constitute a social problem."

The MDA sets down statutory maximum penalties in respect of the offences it creates. The actual penalties imposed in a given case are informed by the sentencing guidelines issued by the Sentencing Council as applied by the judiciary. The statutory penalties

[16] 'Drugs: International Comparators'; Home Office; October 2014
[17] Ibid: 52
[18] Babor et al., 2010
[19] SICAD, 2014; Stevens & Hughes, 2016
[20] Gonçalves, Lourenço, & Silva, 2015; Hughes & Stevens, 2010, 2012
[21] Csete et al., 2016.
[22] Mravčík et al., 2014
[23] Krajewski, 2004.
[24] www.drugsandalcohol.ie/26364/1/Bulletin-1.pdf

applicable are related to the class of drug to which the offence relates (each ascending class being indicative of increased potential for harm, from C to A). For possession alone, this ranges from a disposal of a conditional discharge for a class C drug, up to seven years custody for a class A drug.

By contrast, the PSA does not make any reference to harm or the different classes of drug, upon which the seriousness of the offence of possession for personal use is assessed. As the PSA does not specify a criterion or hierarchy of harm these deficiencies are a matter of concern for the purposes of imposing fair and proportionate sentences (or enforcement). This disparity raises a concern regarding the proportionality of sentence imposed, which is solely dependent on the relevant statutory framework applicable i.e. MDA or PSA.

The recent seizure of "poppers" by the police under the PSA, which had to be returned to the owners based on advice from ACMD (that "poppers" are not caught under the PSA's definition of a "psychoactive effect") indicates that the complexity of the legislation may determine the success or otherwise and the outcomes of civil, as well as criminal, proceedings taken under the PSA.

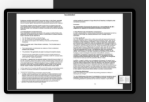
In regards to sentencing, the CPS view is that *"it is anticipated the courts must assume that all psychoactive substances are equally harmful."* However, without a harms test to refer to in order to assess the seriousness of the offence under the PSA legislation, the judiciary are faced with difficulties in deciding a proportionate and consistent approach to sentencing.

The Sentencing Guidelines set down the starting point for all judges undertaking a sentencing exercise for the disposal of offences upon conviction, together with aggravating and mitigating circumstances. But the current drug offence guidelines do not refer to the PSA (or its differences from controlled listed drugs under the MDA).

In response to our request for information, the Sentencing Council stated:

> *"As with all new offences courts will have no sentencing guidelines and no established sentencing practice to refer to. This may lead to some inconsistency in sentencing . . . If the Council were to seek to develop a guideline for sentencing PSA offences (see further below) it would have to take a view as to how to assess the harm arising from the offence. In the absence of any evidence of the likely harm caused by the drug, it is likely that the quantity of the substance would be the crucial factor in determining the 'harm' element of seriousness. It is likely that in assessing culpability, a similar approach would be considered to that in the drugs guideline."*

This simple interim approach would clearly lead to differences in sentencing disposals regarding 'custodial possession' and non-possession offences under the PSA, because, in 'chemical reality' quantity is not commensurate with harm. Although for the purposes of the MDA quantity is also the typical criterion of harm under the drug guidelines, the sentencing range is informed by the class of controlled drug applicable. However, the Sentencing Council will not begin to review the current drugs guidance on sentencing to specifically include drugs under the PSA until 2019.



During ACMD consultations with statutory stakeholders, the Crown Prosecution Service, the National Police Chiefs' Council and Sentencing Council supported the expert input of ACMD regarding the drafting of their guidance in respect of drug offences.

In summary, the absence of the 'harms test' under the PSA has raised concerns of inconsistent and even disproportionate sentencing, which will remain a concern until the judicial sentencing guidance is reviewed in 2019 and/or the Court of Appeal undertakes test cases.

Conclusion

The absence of the 'harms test' under the PSA has raised concerns of inconsistent and even disproportionate sentencing, which will remain a concern until the judicial sentencing guidance is reviewed in 2019 and/or the Court of Appeal undertakes test cases.

1.3.4 In praxis?
This view is confirmed by official criminal statistics, that over the last 30 years the number of possession offences for personal use has increased year on year, unabated by the criminalisation of such activity, and despite a fall in overall drug use amongst both young people and adults in recent years.[25]

In recent years, there has also been a movement away from the application of the full panoply of court proceedings for possession offences. This is mirrored by the rise in the proportion of people who received a warning or police caution for a drug offence as opposed to a formal court disposal, and in consequence not receiving a formal criminal record (albeit disclosed under disclosure and barring service checks).[26] Police cautions for theft and drug offences accounted for 73% of all indictable offence cautions.[27]

In addition the overall cautioning rate for 2015 was 16%, a decline from 31% in 2007 and down from 19% in 2014. There were 46,700 cannabis and khat warnings issued in the 12 months up to March 2015 and the largest decline in 'out of court' disposals has been for cannabis and khat warnings; a decrease of 26% compared with the previous year. This attrition rate is strongly indicative of a trend and a movement away from both formal and informal reporting procedures 'on the ground' by police as well as diversion away from formal court mechanisms by the prosecution services, for persons in possession of drugs for personal use. The data confirms for whatever reason (e.g. change on social mores, wider use of diversionary schemes, turning away from a punitive approach to users to a more therapeutic rehabilitative perspective, a focusing of limited resources on specified offences such as supply with particular targeting of criminal networks, and lack of or limited resources in times of prolonged austerity measures), there has been a cultural shift in how drug users are viewed and processed in the Criminal Justice System, albeit glacial not seismic. The Government now has the opportunity to formalise this *de facto* arrangement and consider repealing the offence of possession for personal use.

[25] Drug Misuse Declared reports from The Crime Survey for England and Wales
[26] Handbook on Crime edited by Brookman, Maguire, Pierpoint and Bennett, Willan Publishing, 2010
[27] Criminal Justice Statistics bulletin March 2015

In summary, there appears to have been a diversion of users away from criminalisation for possession offences.

1.3.5 Diversion from the Criminal Justice System
An example of this movement away from more formal mechanisms of policing and prosecution, is the Bristol Drug Education Programme (DEP) undertaken by Avon and Somerset Police, presents as an intermediate approach to this particular issue (see Appendix E). Users are diverted into a drugs education intervention on similar lines to the Government's 'speed awareness course' for drivers, and upon successful completion are not reported for a possession offence and do not acquire a criminal record. Furthermore no identifying data is retained for 'disclosure and barring service' purposes if the course is successfully completed.

In addition, Durham Constabulary has introduced a diversion programme named Checkpoint where personal drug users have their prosecution suspended subject to a completion of a four month contract. The terms of the contract include recidivism and drug awareness, restorative justice and community work programmes. To date, only 3 out of 74 persons have failed to successfully complete their contract whereas the other 71 have had their criminal record for these drug offences expunged.

Devon and Cornwall Police are reported to be considering introducing the Checkpoint diversionary scheme to their policing area.

ACMD fully supports the diversion of users from a criminal intervention onto a therapeutic pathway, where there is an emphasis on healthcare. However any diversionary scheme needs to be sensitive to issues, which funnel and potentially increase the penetration of users and potential users into both formal and informal schemes, and should consider potential unintended negative consequences of engagement. [28]

The ACMD is of the view that a fully evaluated national diversionary scheme, along the lines of the Bristol DEP and Durham's Checkpoint, should be considered as an alternative to prosecuting possession offences for personal use under the MDA.

Both the Border Force and the National Police Chiefs' Council were generally supportive of the introduction of a national 'drugs awareness course'. Such an intervention would lead to a decrease in recidivism[29] and reduce court costs by diverting users away from the Justice System (whether criminal or civil).

ACMD's preferred approach however, remains the revocation of possession under MDA in order to harmonise the legal framework on possession offences with the PSA.

Conclusion

[28] Such an intervention should be cognisant of the ACMD's recommendations on prevention, see https://www.gov.uk/government/publications/prevention-of-drug-and-alcohol-dependence
[29] interventions that aim to divert youth away from the criminal justice system can be effective in reducing recidivism, particularly for 'low risk youth' see, for example, Wilson and Hodge, 2013 The effect of youth diversion programs on recidivism a meta-analytic review. Criminal Justice and Behaviour, Vol. 40, No. 5, May 2013, 497-518

Diversion away from the criminalisation of possession of drugs for personal use is under test in different regions of the UK.

Recommendations

Therefore ACMD recommends that:

The Home Office reviews the Personal Possession Offence (MDA). The review could result in the offence of possession for personal use being repealed.

In the event that possession for personal use is not repealed under section 5(2) of the MDA, we recommend that any drug substance or drug product that is added to schedule 2 to the Act (by Statutory Instrument) is: (i) exempted from section 5(2) of the Act (by a combination of a new regulation 4C to the Misuse of Drugs Regulations 2001, and the inclusion of the drug in a new schedule 9 to the regulations), and (ii) the drug is initially classed as Class C pending a commitment by the ACMD to a full assessment of its harmful effects (if any)

In the alternative, if the Government does not repeal the possession offence under the MDA, the Home Office and `Department of Health should explore, evaluate and implement effective interventions to divert drug users from the criminal path and reduce drug use, including initiatives to actively refer people into drug treatment if needed and drugs awareness initiatives). Such an intervention should be cognisant of ACMD's recommendations on prevention and sensitive to possible unintended consequences.

2. Is there a continuing role for the ACMD Novel Psychoactive Substances Committee and for Temporary Class Drug Orders?

The ACMD convened the Novel Psychoactive Substances Working Group in October 2009 to respond to the emerging threat of novel psychoactive substances, which enabled the ACMD to produce its comprehensive report in October 2011.[30] The Working Group became a Standing Committee in 2013 and has been the mechanism by which ACMD has provided advice on the harms of emerging novel psychoactive substances under the MDA. ACMD would collect and collate information to produce a substantive report based on the available evidence of harms associated with the substance(s) and advise on its classification.

Previously, if the Minister accepted the recommendation of the ACMD regarding the potential harm of a novel substance, the process to include this substance under the MDA the review and legislative process would typically take up to two years before a drug may be included in schedule 2 to the Act. Automatically users in possession of such substances would then be subject to the offence of possession for personal use.

To address this delay, the Police Reform and Social Responsibility Act 2011 introduced 'temporary class drug orders' (TCDOs). TCDOs were introduced to protect the public, especially young people who are the main users of novel psychoactive substances, and target suppliers and manufacturers who advertise harmful substances as 'legal' and 'safe'. The effect of which is to bring within the MDA (for a period of one-year) specified drug substances (including those which were inaptly styled 'legal highs') that are, or are likely to be misused. In the light of evidence and experience, such substances may subsequently be added to the list of "controlled drugs" and be subject to the offence of possession for personal use. Although under a TCDO possession for personal use of an NPS is not an offence, nevertheless the introduction of a TCDO on a specific substance(s) gives the police the power to search for and seize the substance(s) (and to dispose of it there is no evidence of an offence under the MDA: sections 23A(4) and (5), MDA).

The ACMD must be consulted by the Home Office or may make a recommendation of its own volition for TCDOs to be introduced, which is by secondary legislation under the negative procedure i.e. it will automatically become law unless there is an objection from either House. Routinely ACMD makes such recommendations within six to 10 weeks and the order is usually made about 40 days later. The TCDO will generally expire at the end of 12 months or earlier if it is revoked. Or the substance is added to the list of "controlled drugs" under the MDA i.e. "if it is, or is likely to be, misused, and that misuse is having, or is capable of having, harmful effects."

Since the introduction of TCDOs the following matters have been addressed:

- Based on advice from ACMD, applying the "harms test' under the MDA, some novel psychoactive substances subject to TCDOs have been added to the schedule of

[30] https://www.gov.uk/government/publications/novel-psychoactive-substances-report-2011

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Introduction

This report arose as a result of the ACMD's involvement in its constructive 'closed' debate with the Home Office regarding the development of the Psychoactive Substances Bill during its passage through to becoming the Psychoactive Substances Act 2016 (PSA). ACMD raised a number of issues during that important exercise and we also submitted some further commentary as part of the consultation on the next Drug Strategy. Since that time ACMD has had extensive internal discussions, which led to the establishment of a specialised working party to review matters which arose in some detail. In the same spirit of informed debate, the ACMD now submits this confidential report drafted as a result of our independent review.

Prior to the introduction of the PSA, the ACMD had operated under the Misuse of Drugs Act 1971 (MDA), with the Temporary Class Drug Order (TCDO) as a mechanism to expedite action on emerging substances capable of having harmful effects sufficient to constitute a social problem.

The introduction of the PSA marked a fundamental change in the drugs legislation landscape in the UK and prompted the ACMD to re-examine how it might best operate within the new framework given that the MDA and PSA use different criteria - harms and psychoactivity respectively.

This confidential report summarises our evidence-informed conclusions and it is intended to offer constructive advice and recommendations to the Government with regards to the operation of the two Acts. It is presented in order to fulfil ACMD's statutory duties under Section 1(2) of the Misuse of Drugs Act 1971, that include:

> *"advice on measures (whether or not involving alteration of the law) which in the opinion of the Council ought to be taken for preventing the misuse of such drugs or dealing with social problems connected with their misuse."*

The ACMD has also taken into consideration its wider remit of considering harmful effects which constitute a social problem, to enable "persons affected by the misuse of such drugs to obtain proper advice, and for securing the provision of proper facilities and services for the treatment, rehabilitation and after-care."[1] This dovetails with the purposes of sentencing, *inter alia*, the reduction of crime and the reform and rehabilitation of offenders, as well as the protection of the public.[2]

We are grateful to the statutory stakeholders who responded to our request for information on these pertinent and live issues (see Appendix A).

1. The legal framework and structural differences between the MDA and PSA

Since 26 May 2016 the UK has three principal statutory drug control measures in place, namely:

[1] Section1(2)(b), MDA
[2] Section 142 Criminal Justice Act 2003

1) The Misuse of Drugs Act 1971 (controlled drugs)("MDA");
2) The Human Medicines Regulations 2012 (medicinal products)("HMR");
3) The Psychoactive Substances Act 2016 (psychoactive substances)("PSA").

The Medicines Regulations allow for some substances being named as medicines yet deemed safe enough to be sold to the general public through outlets such as supermarkets, some which are medicines that can be sold to the public under the supervision of a pharmacist and some which can only be supplied to the public after prescription by medical or allied healthcare practitioners (i.e. prescribers who are not medical doctors which includes pharmacists, nurses, physiotherapists etc.). This type of hierarchical control could also be applied to substances used recreationally and indeed is to some extent used already to control access to alcohol and tobacco.

It should be noted that although a "controlled drug" can also be a "medicinal product", neither form is a "psychoactive substance" for the purposes of the PSA.[3] There is possible confusion in that the EU definition of "psychoactive substance" as expressed in EMCDDA communications includes some registered medicines that are being misused. It is important to correctly identify the drug substance or drug product in question in order to determine which of the three Acts is engaged, if at all.

Since the introduction of the PSA, the ACMD has extensively debated how it should operate in future under two different Acts of Parliament designed to control the unauthorised use of drugs: the MDA and the PSA. We have identified what we regard to be anomalies between these two statutes, which arise due to the structure of each regime and their inter-relationship, such that legal certainty tends to be obfuscated and in turn negatively impacts on public confidence.

However, this report is not a comprehensive review of UK legislation for regulating the production, distribution and possession of drug substances and products, although the Government may wish to appoint an independent body to undertake such an important task in view of the passage of time since the MDA was introduced; nigh on half a century ago.

In reviewing the MDA and PSA, the following points and differences between them should be appreciated:

- Whereas the MDA specifies particular drug substances and products by name (or by generic definition), the PSA does not do so;
- The PSA makes no distinction between drugs according to their potential for causing harm (or relative harm) if misused;
- Other than the possession of a "psychoactive substance" in a custodial institution by a person who intends to consume that substance for its psychoactive effect, it is not a specific offence under the PSA to use or to be in possession of such a substance for personal use;

[3] being 'excluded' by virtue of section 3 and schedule 1 to that Act

- However, should a TCDO be raised in regards to a psychoactive drug which is then substantiated under the MDA, users of psychoactive substances will then be liable for the criminal offence of possession;
- The maximum sentence (on indictment) for 'trafficking' offences created under the MDA is life imprisonment (for class A drugs) or 14 years' imprisonment (for class B and C drugs). The maximum sentence on indictment for similar offences under the PSA is seven years' imprisonment. The MDA sentence is a concerning and material difference;
- There is no offence in the PSA that is equivalent to section 8 of the MDA (occupier or person concerned in the management of any premises who knowingly permits or suffers specified activities to take place on those premises);
- There is no offence in the PSA that is equivalent to section 19 of the MDA (i.e. inciting the commission of an offence under the Act, although we note that a person can be guilty or encouraging or assisting in the commission of a PSA (or an MDA) offence under Part 2 to the Serious Crime Act 2007)[4];
- Whereas the requisite psychoactive effect of a given substance is an element of the principal offences created under the PSA, the actual effect of a 'controlled drug' on a person (e.g. pharmacologically) is immaterial for the purposes of the MDA;
- The mental elements or *mens rea* required for the PSA offences are more extensive than is the case under the MDA.
- The PSA includes provision for the exercise of civil powers and sanctions (prohibition notices, premises notices, prohibition orders in respect of which a breach of an order constitutes a criminal offence);
- The PSA imposes a general prohibition on the production and distribution of all non-exempted substances that are capable of producing a psychoactive effect in a person (Section 2). The exemptions, specified in Schedule 1 to the Act, include "controlled drugs" (under the MDA), "medicinal products" (under the Human Medicines Regulations 2012), substances and products that contain alcohol, nicotine, and caffeine, as well as "food" (when ordinarily consumed as such). Although a "controlled drug" can also be a "medicinal product", neither form can be a "psychoactive substance" for the purposes of the PSA (being 'excluded' by virtue of Section 3 and Schedule 1 to that Act). It is therefore important to correctly identify the drug substance or drug product in question in order to determine which of the three legislative schemes is engaged (if any).
- The different criminal sentencing disposals of the MDA and PSA, and how this differs from breaches of the Medicines Act in the misuse of medicinal products, has the potential to create significantly inequitable sanctions under the different statutory regimes.

[4] although we note that a person can be guilty or encouraging or assisting in the commission of a PSA (or an MDA) offence under Part 2 to the Serious Crime Act 2007

It follows, in summary, that there will often be different prosecuting and sentencing outcomes in respect of "controlled drugs" under the MDA and non-exempted "psychoactive substances" under the PSA.

To aid its discussions on differences and any anomalies between the MDA and PSA, the ACMD sought the views of relevant statutory stakeholders in the Criminal Justice System on the operation of the MDA and PSA (Appendix A). The main issues that arose include, *inter alia*: [5]

- The lack of a 'harms test' under the PSA;
- Anomalies in the assessment of harm of substances under the MDA at each stage of policing, prosecuting and sentencing offences;
- The time taken to obtain a chemical reference standard;
- The need to "prove" psychoactivity beyond reasonable doubt for PSA offences;
- *In vitro* testing is not suitable for all substances;
- The possibility of dispute with the forensic issue;
- It is more difficult to prosecute under the PSA than the MDA;
- Powers to seize, retain and destroy substances are limited under the PSA;
- PSA orders are also complex and open to challenge compared to notices.

1.1 The differential legal treatment of possession of psychoactive substances between the MDA and the PSA

The MDA makes it a criminal offence[6] to possess, without lawful authority, drug substances and drug products listed in schedule 2 as "controlled drugs" by name or generic definition. There is no such general possession offence for personal use under the PSA, save for possession in a custodial setting (which includes secure children's homes). The ACMD consider this to be an important and concerning anomaly, which requires harmonisation by way of repeal for the reasons set out in this report.

The question whether children should be subject to the risk of prosecution for possession of drugs for personal use in custodial settings, in particular those especially vulnerable children within the state 'care' system, falls outside the narrow remit of this report, albeit an important consideration in the wider context of this debate.

In addition, a related matter for consideration in this debate is the negative impact of the criminalisation of young persons or adults for a possession offence which includes damage to educational and employment prospects, harm to social relationships, and potential limitations on international travel.

[5] Substantive submissions were received by the ACMD from the CPS, Metropolitan Police, Sentencing Council, and the Magistrates Association
[6] Section 5(2) MDA

As a consequence of the introduction of a statutory role for ACMD in the PSA the Home Office and the ACMD should jointly review the Working Protocol in 2017.

As an aside, it should be noted that the police are able to 'stop and search' potential drugs offenders (regarding for example supply offences) under the PSA and this power will remain *in situ* should our primary recommendation be accepted by the Government to remove the possession offence for personal use (save for possession in a custodial setting) under the MDA.

1.2 Criminalisation of possession

Although the MDA has not created a *general* offence of using a controlled drug, one object of the Act is to deter unauthorised use by way of coercive legal sanctions, including the offence of possession for personal use.

Three arguments have been advanced for creating the criminal offence of possession of a drug substance or product without lawful authority. First, that coercive compliance with the criminal law leads to a reduction of illicit drug misuse (or at least 'contains' or restricts it). Secondly, that the drugs in question are dangerous (or at least not free of harm). Thirdly, that the UK is bound by international treaties (notably three United Nations Conventions) to criminalise the simple possession of specified drug substances or products.[7]

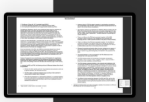
1.2.1 Coercive compliance

The authoritative report of the House of Commons Science and Technology Committee [8] noted that the stated purpose of the classification system was to classify harmfulness, so that the penalties for possession and trafficking are proportionate to the harm associated with a particular drug.[9] In consequence, following the Sentencing Council's Guideline for drug offences, which specifically refers to harm[10] and the relevant class of drug involved, there is a need for consistency of decision-making in sentences imposed by the judiciary that are 'just and proportionate to the offending behaviour.'[11] Although it was implicit in this policy that placing drugs in a higher class has an element of commensurate deterrence, thus leading to an increase in the punishment tariff imposed, the Committee found little evidence to support a deterrent effect, i.e. the increase in sentencing tariff did not lead to a decrease in such offences occurring.[12]

1.2.2 The dangerousness of drugs

It is unarguable that certain substances are harmful and are required to be controlled and/or subject to regulatory oversight. That is a distinct argument from the criminalisation of persons possessing such drugs for personal use in order to reduce the rate of such offences occurring. For example, it is arguable that the diversion of such persons away from the Criminal Justice System onto a therapeutic pathway may prove more effective at reducing the use of such drugs and sit more comfortably with the policies established under the public health paradigm.

[7] UN Office of Drugs and Crime, 1961,1972, 1988
[8] 'Drug classification: making a hash of it?' Fifth Report of Session 2005–06
[9] Ibid., chp.6, p.6; fn.152 Q 109
[10] albeit by reference to quantity and weight
[11] Sentencing Council, Drug Offences Definitive Guideline, 2012
[12] Ibid., chp.6, p.6



ACMD
Advisory Council on the Misuse of Drugs

The interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016

An internal report from the ACMD to the Home Office

December 2016

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The move away from the criminalisation of possession of drugs has gathered pace in the past few years:

"Illicit drug use is a public health issue that jeopardizes not only our well-being, but also the progress we have made in strengthening our economy—contributing to addiction, disease, lower student academic performance, crime, unemployment, and lost productivity. Therefore, we continue to pursue a drug policy that is effective, compassionate, and just. We are working to erase the stigma of addiction, ensuring treatment and a path to recovery for those with substance use disorders."

President Obama
2015 National Policy for Drug Control

"The war on drugs has failed: doctors should lead calls for drug policy reform. Evidence and ethics should inform policies that promote health and respect dignity."

Fiona Godlee
Editor in Chief
The BMJ (2016)

"In June the BMA quietly set policy that moves toward supporting an end to criminal penalties for non-medical drug use. An emergency motion at its Annual Representatives Meeting supported "legislative change so treatment and support are prioritised over criminalisation and punishment of individual drug users."

Richard Hurley, Features & Debates Editor
BMJ (2016) 355:6067

UN attempt to decriminalise drugs foiled

"A paper from the UN Office on Drugs and Crime (UNODC) has been withdrawn after pressure from at least one country. The document, which was leaked, recommends that UN members consider "decriminalising drug and possession for personal consumption."

M.Easton
BBC News
19 October 2016

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ACMD
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Rt Hon. Amber Rudd MP
Home Secretary
Home Office
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1 December 2016

Dear Home Secretary,

Interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016

The Advisory Council on the Misuse of Drugs were involved in constructive 'closed' debate with the Home Office regarding the development of the Psychoactive Substances Bill during its passage through to becoming the Psychoactive Substances Act 2016 (PSA). We raised a number of issues during that important exercise and we also submitted some further commentary as part of the consultation on the next Drug Strategy. Since that time, the ACMD has had extensive internal discussions on how it should operate within the new legislative landscape which led to the establishment of a specialised working party to review matters in some detail.

Prior to the introduction of the PSA, the ACMD had operated under the Misuse of Drugs Act 1971 (MDA), with the Temporary Class Drug Order (TCDO) as a mechanism to expedite action on emerging substances of harm. The introduction of the PSA marked a fundamental change in the drugs legislation landscape in the UK and prompted the ACMD to re-examine how it might best operate within the new framework given that the MDA and PSA use different criteria - harms and psychoactivity respectively.

In the same spirit of informed debate, the ACMD now submit this confidential report drafted as a result of our independent review and would welcome a meeting to progress matters further, once you have had an opportunity to reflect on its contents. This report summarises the conclusions and recommendations of ACMD and it is designed to help inform and initiate discussion between Ministers and the ACMD.