



Burgess, Nicholas Stephen (2021) *An evaluation of the Psychoactive Substances Act 2016*. LL.M(R) thesis.

<http://theses.gla.ac.uk/82112/>

Copyright and moral rights for this work are retained by the author

A copy can be downloaded for personal non-commercial research or study, without prior permission or charge

This work cannot be reproduced or quoted extensively from without first obtaining permission in writing from the author

The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the author

When referring to this work, full bibliographic details including the author, title, awarding institution and date of the thesis must be given

Enlighten: Theses

<https://theses.gla.ac.uk/>
research-enlighten@glasgow.ac.uk

An Evaluation of the Psychoactive Substances Act 2016

Nicholas Burgess LLB (Hons)

Submitted in fulfilment of the requirements of the Degree of LLM (by Research)

School of Law

College of Social Sciences

University of Glasgow

February 2021

Abstract

This thesis evaluates the Psychoactive Substances Act 2016 (PSA) from practical, theoretical and developmental perspectives. The PSA was created in response to the rise of New Psychoactive Substances (NPS), otherwise variously known and marketed as 'legal highs', 'bath salts', 'research chemicals', and 'plant food'. In contrast to previous attempts to control recreational drugs – which individually list banned substances – the PSA employs a 'blanket ban' approach whereby all 'psychoactive substances' are proscribed, subject to limited exemptions.

The Government's review of the PSA's operation concluded that, overall, the Act has succeeded in its main goals of: ending NPS sales; ending the game of cat and mouse (whereby new substances are created faster than the Government can ban them); reducing psychoactive substance use; and reducing psychoactive substance-related harms. Chapter one of this thesis argues that the PSA has, in fact, failed to achieve these goals. Chapter two critiques the PSA from a primarily theoretical standpoint. It is argued that the Act conflicts with numerous normative principles of criminalisation (namely harm prevention, criminalising only conduct which is wrongful, and fair labelling) and of the rule of law (namely maximum legal certainty and proportionate sentencing). It is also argued that the PSA is an illegitimate exercise of state power, and some alternative (and more appropriate) means of regulating NPS are sketched. Chapter three considers the PSA's continuing relevance in light of political and technological developments post-enactment, and its coherence with both international and domestic drug legislation and policy. It is argued that although the Act is coherent with international and domestic drug legislation, its justificatory rationale is threatened by technological advancements, and it may soon be superseded by changing priorities at the political/policy level.

Contents

Declaration and Acknowledgements

List of Abbreviations

Tables of Primary Legal Sources

Introduction	1
Chapter 1: Effectiveness	3
1(1) End Sales	3
1(1)(a) Open Sales	4
1(1)(b) Pre-PSA 'Invisible' Sales	5
1(1)(c) Enforcement	6
1(1)(d) Post-PSA	8
1(1)(e) Summary	9
1(2) Cat and Mouse	10
1(2)(a) Pre-PSA Emergence	10
1(2)(a)(i) Mephedrone and New Dissociatives	11
1(2)(a)(ii) Synthetic Cannabinoid Receptor Agonists	12
1(2)(b) The Blanket Ban	13
1(2)(c) Post-PSA Innovations	16
1(2)(d) Summary	17
1(3) Reduce Use	18
1(3)(a) Generally	18
1(3)(b) Children	20
1(3)(c) Homeless	21
1(3)(d) Prisons	22
1(3)(e) Chemsex	22
1(3)(f) Sex Workers and Sexual Exploitation	24
1(3)(g) Summary	24
1(4) Reduce Harms	26
1(4)(a) Mortality	26
1(4)(b) Damage	27
1(4)(b)(i) Damage: Acute Toxicity	27
1(4)(b)(ii) Damage: Mental Functioning	28
1(4)(b)(iii) Damage: Numbers in Treatment	29
1(4)(b)(iv) Damage: Injecting and Blood-Borne Viruses	30
1(4)(c) Dependence	31
1(4)(d) Loss of Tangibles/Relationships	32
1(4)(e) Crime	33
1(4)(f) Economic and International Harms	33
1(4)(g) Summary	34

Declaration and Acknowledgements

This thesis is the result of my own work and has not been submitted for any other degree at any institution. Where information or ideas are obtained from any source, that source is acknowledged in the footnotes and/or text.

The sources used are up to date as of August 2020; all cited URLs were accessed and functioning on 13 August 2020. Short-form citations of European Union legislation are used in the footnotes; the full citations are provided in the tables of primary legal sources.

Special thanks are due to my supervisor, Professor James Chalmers, for his invaluable advice throughout the writing of this thesis.

Nicholas Burgess

List of Abbreviations

ACMD:	Advisory Council on the Misuse of Drugs
BBV:	Blood-Borne Viruses
CNS:	Central Nervous System
CPO:	Civil Preventative Order
CPS:	Crown Prosecution Service
CSEW:	Crime Survey for England and Wales
EC:	European Commission
EMCDDA:	European Monitoring Centre for Drugs and Drug Addiction
EU:	European Union
FEWS:	Forensic Early Warning System
HCV:	Hepatitis C Virus
HIV:	Human Immunodeficiency Virus
HOR:	Home Office Report
MDA:	Misuse of Drugs Act 1971
NCA:	National Crime Agency
NPS:	New Psychoactive Substances
PSA:	Psychoactive Substances Act 2016
PWID:	People Who Inject Drugs
SCJS:	Scottish Crime and Justice Survey
SCRA:	Synthetic Cannabinoid Receptor Agonist
SOC:	Serious and Organised Crime
TCDO:	Temporary Class Drug Order
UN:	United Nations
UNGASS:	United Nations General Assembly Special Session of the World Drug Problem

Tables of Primary Legal Sources

Cases from England and Wales:

Bush [2013] EWCA Crim 1164
Chapman [2018] 1 WLR 726
Finn [2018] EWCA Crim 2125
Grigas [2017] EWCA Crim 1819
Halpin [2019] EWCA Crim 892
Hughes [2013] 1 WLR 2461
Knüller v DPP [1973] AC 435
Miah [2019] EWCA Crim 1476
Montila [2004] UKHL 50
R (McCann) v Manchester Crown Court [2003] 1 Cr App R 27
Rochester [2018] EWCA Crim 1936
Sunday Times v United Kingdom (1979) 2 EHRR 245
Taonis (1974) 59 Cr App R 160
Waka [2018] EWCA Crim 125
Ware [2017] EWCA Crim 1266

Cases from Scotland:

Khaliq v HM Advocate 1984 JC 23
McGaw (Scott) v HM Advocate [2019] HCJAC 78
Quinn v Cunningham 1956 JC 22
Scotch Whisky Association v Lord Advocate [2017] UKSC 76
Ulhaq v HM Advocate 1991 SLT 614

UK and Scottish Legislation:

Alcohol (Minimum Pricing) (Scotland) Act 2012
Drugs Act 2005
Forgery and Counterfeiting Act 1981
Intoxicating Substances (Supply) Act 1985
Magistrate's Courts Act 1980
Misuse of Drugs Act 1971
Rehabilitation of Offenders Act 1974
Police Reform and Social Responsibility Act 2011
Psychoactive Substances Act 2016
Psychoactive Substances Bill 2015
Scotland Act 1998

UK Statutory Instruments:

Misuse of Drugs Act 1971 (Amendment) Order 2005, SI 2005/3178
Misuse of Drugs Act 1971 (Amendment) Order 2009, SI 2009/3209
Misuse of Drugs Act 1971 (Amendment) Order 2010, SI 2010/1207
Misuse of Drugs Act 1971 (Amendment) Order 2013, SI 2013/239
Misuse of Drugs Act 1971 (Amendment) Order 2016, SI 2016/1109
Misuse of Drugs Act 1971 (Amendment) Order 2017, SI 2017/634
Misuse of Drugs Act 1971 (Amendment) Order 2019, SI 2019/1323
Misuse of Drugs Act 1971 (Ketamine Etc.) (Amendment Order) 2014, SI 2014/1106
The Controlled Drugs (Drug Precursors) (Intra-Community Trade) Regulations 2008, SI 2008/295
The Human Medicines Regulations 2012, SI 2012/1916
The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, SI 2019/742

United Nations Treaties and Resolutions:

Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, 20 December 1988, 1582 UNTS 95
Convention on Psychotropic Substances 1971, 21 February 1971, 1019 UNTS 175
Protocol Amending the Single Convention on Narcotic Drugs 1961, 25 March 1972, 976 UNTS 3
Single Convention on Narcotic Drugs 1961, 30 March 1961, 520 UNTS 151
UN CND Res 57/9 on enhancing international cooperation in the identification and reporting of new psychoactive substances and incidents involving such substances (2014)

European Union Legislation:

Commission Decision (EU) 2017/388 of 6 March 2017 confirming the participation of the United Kingdom of Great Britain and Northern Ireland in Regulation (EU) 2016/794 of the European Parliament and of the Council on the European Union Agency for Law Enforcement Cooperation (Europol) [2017] OJ L59/39
Council Decision 2000/365/EC of 29 May 2000 concerning the request of the United Kingdom of Great Britain and Northern Ireland to take part in some of the provisions of the Schengen acquis [2000] OJ L131/43
Council Decision 2004/926/EC of 22 December 2004 on the putting into effect of parts of the Schengen acquis by the United Kingdom of Great Britain and Northern Ireland [2004] OJ L395/70
Council Decision 2005/387/JHA of 10 May 2005 on the information exchange, risk-assessment and control of new psychoactive substances [2005] OJ L127/32.
Council Decision 2014/857/EU of 1 December 2014 concerning the notification of the United Kingdom of Great Britain and Northern Ireland of its wish to take part in some of the provisions of the Schengen acquis which are contained in acts of the Union in the field of police cooperation and judicial cooperation in criminal matters and amending Decisions 2000/365/EC and 2004/926/EC [2014] OJ L345/1
Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking [2004] OJ L335/8

Council Recommendation EU Drugs Strategy 2013-20, [2012] OJ C402/01.

Council Regulation (EEC) 302/93 of 8 February 1993 on the establishment of a European Monitoring Centre for Drugs and Drug Addiction [1993] OJ L36/1.

Decision (SCH/Com-ex (93)14) of 14 December 1993 on improving practical judicial cooperation for combating drug trafficking [1993] OJ L239/427

Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of 'drug' and repealing Council Decision 2005/387/JHA [2017] OJ L305/12

Joint Action 97/396/JHA of 16 June 1997 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, concerning the information exchange, risk assessment and the control of new synthetic drugs [1997] OJ L167/1

Procedure 2013/0305/COD: Proposal for a Regulation of the European Parliament and of the Council on new psychoactive substances [2013] COM 619

Protocol (No 19) on the Schengen acquis integrated into the framework of the European Union [2012] OJ C326/290

Protocol (No 21) on the position of the United Kingdom and Ireland in respect of the area of freedom, security and justice [2016] OJ C202/295

Regulation (EC) 1920/2006 of the European Parliament and of the Council of 12 December 2006 on the European Monitoring Centre for Drugs and Drug Addiction (recast) [2006] OJ L376/1

Regulation (EU) 2017/2101 of the European Parliament and of the Council of 15 November 2017 amending Regulation (EC) No 1920/2006 as regards information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances [2017] OJ L305/1.

Treaty on the European Union, 7 February 1992 [2002] OJ C 325/5.

International Legislation:

Cannabis Act 2018 (Canada)

Criminal Justice (Psychoactive Substances) Act 2010 (Ireland)

Psychoactive Substances Act 2013 (New Zealand)

After passing through customs [the appellant's] baggage was examined, and it was found to contain ... a substance which was then new to the drug scene in this country.

[Counsel for the appellant], who has understood very well that the first quality of any submission is brevity, described the situation as almost beyond belief. Speaking for myself, I wish I could think it was beyond belief.

Taonis (1974) 59 Cr App R 160, 160 (Scarman LJ).

Introduction

The Psychoactive Substances Act 2016 (hereinafter ‘the PSA’ and/or ‘the Act’) is the latest iteration of prohibitive drug policy in the United Kingdom, designed to control myriad substances that have escalated from being a novel anomaly in the early 2000s to the basis for media sensationalism, moral panic, a multi-million pound industry, and increasing harms including fatalities in the last decade. These drugs can be collectively referred to as ‘New Psychoactive Substances’ (NPS). Defining this term further is challenging, as definitions ‘vary across organisations and ... are often time dependent in two ways: firstly being recently detected, available or used, and secondly not classified in ... drug control statutes’.¹ The PSA defines a ‘psychoactive substance’ as:

any substance which ... is capable of producing a psychoactive effect in a person who consumes it ... if, by stimulating or depressing the person’s central nervous system, it affects the person’s mental functioning or emotional state.²

In this thesis, NPS are drugs that have recently emerged on the recreational market (regardless of the date of first synthesis) and have at some point been controlled under the PSA. This is in contrast to ‘traditional’ recreational drugs i.e. those prohibited by any UN Convention or (in the UK) substances controlled by the Misuse of Drugs Act 1971 (MDA) before the PSA came into force on 26 May 2016.³ This definition of NPS is employed to facilitate analysis of legal approaches to NPS in the UK, unhindered by, e.g., the post-PSA reclassification of certain NPS under the MDA (and the associated difficulties in disentangling the effects of the two concurrent frameworks), while focussing on those substances which the PSA was intended to proscribe.

The PSA criminalises the production, supply, importation/exportation, and possession in a custodial institution – although not simple possession – of psychoactive substances for human consumption, and also the breach of prohibition/premises orders and access prohibitions.⁴ The range of substances prohibited is subject to limited exemptions, including food, ethyl-alcohol, nicotine, caffeine and drugs controlled under the MDA or international conventions.⁵ It confers on enforcement agencies powers of entry, search, seizure and destruction of substances controlled

¹ Amy Peacock and others, ‘New Psychoactive Substances: Challenges for Drug Surveillance, Control and Public Health Responses’ (2019) 394(10209) *Lancet* 1668.

² PSA, s 2.

³ Home Office, *Review of the Psychoactive Substances Act 2016* (2018) 8 (HOR).

⁴ PSA, ss 2-9, 26-7.

⁵ *ibid* sch 1.

under the Act,⁶ and also civil sanctions to deal with prohibited activities.⁷ In contrast to previous attempts to control recreational drugs (which individually list banned substances) the ‘blanket ban’ approach in the PSA was intended to combat the rapid emergence of NPS without the MDA’s time-consuming requirement of evidencing a drug’s harms before it can be added to the A/B/C harm-classification system.⁸ The PSA required a review of the Act to be presented to Parliament 30 months after commencement:⁹ this Home Office Report (HOR) is the most comprehensive evaluation of the Act to date.¹⁰

This thesis evaluates the PSA (and to some extent, other legal approaches to NPS) more comprehensively than the HOR, from practical, theoretical and developmental perspectives. The European Commission’s guidelines on legislative evaluation inform the structure and research questions of this thesis.¹¹ Chapter one considers the practical effectiveness of the PSA with reference to the Act’s goals. In contrast to the HOR’s findings that ‘most of the main aims of the PSA appear to have been achieved’,¹² it is shown that the Act has failed to achieve most of its goals. Chapter two analyses the Act’s efficiency from a theoretical standpoint, informed by the findings from the previous chapter; it is argued that the PSA conflicts with multiple principles of criminalisation and of the rule of law, and that it is an illegitimate exercise of state power. Chapter three considers the PSA’s continuing relevance in light of political and technological developments post-enactment, and its coherence with both international and domestic drug legislation and policy. It is argued that although the Act is coherent with international and domestic drug legislation, its justificatory rationale is threatened by technological advancements, and it may soon be superseded by changing priorities at the political/policy level.

⁶ *ibid* ss 36-50.

⁷ *ibid* ss 12-25.

⁸ Home Office, ‘New Psychoactive Substances Review: Report of the Expert Panel’ (2014) 18 <<https://www.gov.uk/government/publications/new-psychoactive-substances-review-report-of-the-expert-panel>>.

⁹ PSA, s 58.

¹⁰ HOR (n 3).

¹¹ European Commission, ‘Better Regulation: Guidelines and Toolbox’ ch VI <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en>.

¹² HOR (n 3) 7.

Chapter 1: Effectiveness

This chapter evaluates the PSA's effectiveness¹ by plotting the UK NPS landscape before and after the Act's introduction, with reference to the Act's goals of: ending NPS sales; ending the game of cat and mouse; reducing psychoactive substance use; and reducing psychoactive substance-related harms.² Each goal is considered in turn, using wider evaluation criteria than those found in the Home Office Report (HOR).³ Attempting causal attribution of any changes in this landscape exclusively to the PSA is impossible due to: the vast number of interconnected factors that affect drug use; post-PSA controlling of certain NPS under the MDA; discrepancies in official statistics publications; and limitations of space. Therefore, this assessment of 'effectiveness' aims not to determine objective cause and effect with certainty, but to paint a picture of NPS in the UK, suggest answers to the more subjective questions regarding the Act's goals (e.g., whether the PSA has been enforced 'well'), and inform further discussion in the following chapters. It is argued that the Act has been ineffective in furthering these objectives, despite the HOR's claims to the contrary.⁴

1(1) End Sales

The HOR identified ending the open sale of NPS in the UK as a primary goal of the PSA.⁵ However, among the guiding principles of the Government-commissioned Expert Report on the Psychoactive Substances Bill 2015 was 'limiting the involvement of organised crime in the illicit drug market'.⁶ Moreover, the offence of exporting a psychoactive substance attempts to control international NPS trade.⁷ Thus, the PSA's goal was to control both open *and* clandestine NPS sales. The HOR's narrow approach enabled the overall conclusion that 'most of the main aims have been achieved, with the open sale of NPS largely eliminated',⁸ sidestepping the question of whether the post-PSA situation of UK NPS sales is an improvement.

¹ European Commission (n 11, Introduction) 59.

² As identified in: Home Office, *Review of the Psychoactive Substances Act 2016* (2018) 8 (HOR).

³ *ibid.*

⁴ *ibid* 7.

⁵ *ibid.*

⁶ Home Office, 'New Psychoactive Substances Review: Report of the Expert Panel' (2014) 5 (Expert Panel) <<https://www.gov.uk/government/publications/new-psychoactive-substances-review-report-of-the-expert-panel>>.

⁷ PSA, s 8.

⁸ HOR (n 2) 7.

1(1)(a) Open Sales

'Headshops' (high-street retailers which openly sold NPS)⁹ and their clearnet ('websites openly available on the internet')¹⁰ equivalent were a major source of NPS. In 2013 there were estimated to be over 250 physical and 100-150 online UK-based NPS vendors.¹¹ The proliferation of these outlets contributed to media sensationalism and the resulting 'moral panic' surrounding NPS,¹² despite relatively few fatalities.¹³ They were also a driving force behind the PSA as trading standards and medicines laws¹⁴ were easily bypassed with warnings that the products were 'not for human consumption',¹⁵ 'research chemicals', 'bath salts' and 'plant food'.¹⁶ Earlier studies suggested the products sold were of low purity, mislabelled and even contained substances controlled under the MDA.¹⁷ However, it appears that as the market grew, so did product quality: despite significant variation across Europe, one later study showed UK NPS samples did correspond to what was advertised with >90% purity.¹⁸ High street retailers were legitimate (i.e. tax-paying) businesses,¹⁹ and the Home Office recognised the employment of responsible retail practices by self-regulating parts of the industry, including refusing underage sales and the availability of harm-reduction advice (particularly with online sales).²⁰ There was also 'little evidence of NPS use driving crime and disorder',²¹ and 'none of the 10 joint reports prepared since 2010 by the European Monitoring

⁹ RSPH, 'Removing Legal Highs from the High Street' (2015) <<https://www.rsph.org.uk/our-work/policy/drugs/legal-highs.html>>.

¹⁰ Sarah Barber, 'The Psychoactive Substances Bill 2015' (HC Briefing Paper CBP 7334, 16 October 2015) 8.

¹¹ Expert Panel (n 6) 9.

¹² Ornella Corazza, Hui Yun Chan and Andres Roman-Urrestarazu, 'NPS: Moving from Blanket Prohibition to a Functionalist Approach' in Ornella Corazza and Andres Roman-Urrestarazu (eds), *Novel Psychoactive Substances: Policy, Economics and Drug Regulation* (2017) 126; Liviu Alexandrescu, 'Mephedrone, Assassin of Youth: The Rhetoric of Fear in Contemporary Drug Scares' (2014) 10(1) *Crime Media Cult* 23.

¹³ Expert Panel (n 6) 12.

¹⁴ E.g., The Human Medicines Regulations 2012, SI 2012/1916, reg 257 requires accurate labelling of medicines for human consumption.

¹⁵ Rosalind Gittins and others, 'Exploration of Use of New Psychoactive Substances by Individuals in Treatment for Substance Misuse in the UK' (2018) 8(4) *Brain Sci* 58.

¹⁶ Mark Baron, Mathieu Elia and Leonie Elie, 'An Analysis of Legal Highs: Do They Contain What It Says on the Tin?' (2011) 3 *Drug Test Anal* 576.

¹⁷ *ibid* 580; Bram Miserez, Oscar Ayrton and John Ramsey, 'Analysis of Purity and Cutting Agents in Street Mephedrone Samples from South Wales' (2014) 32 *Forensic Toxicol* 305; Anca Frinculescu and others, 'Variation in Commercial Smoking Mixtures Containing Third-Generation Synthetic Cannabinoids' (2017) 9(2) *Drug Test Anal* 327.

¹⁸ Tibor Markus Brunt and others, 'Online Test Purchased New Psychoactive Substances in 5 Different European Countries: A Snapshot Study of Chemical Composition and Price' (2017) 44 *Int J Drug Policy* 105, 110.

¹⁹ Expert Panel (n 6) 37.

²⁰ *ibid* 14-5.

²¹ *ibid* 16.

Centre for Drugs and Drug Addiction and Europol ... on NPS ... was able to provide any concrete evidence of the eventual involvement of established organized criminal groups'.²²

However, it was argued that headshops 'normalised drug use, suggested NPS were safe ... and may have made already vulnerable people more vulnerable'.²³ Some studies have questioned the quality of products sold right up to the time of the PSA's enactment,²⁴ while brightly coloured packets of NPS were regarded as a marketing strategy to appeal to adolescents.²⁵ It was also recognised that businesses which participated in Government consultations and demonstrated responsible practices were not necessarily typical of the whole industry.²⁶

1(1)(b) Pre-PSA 'Invisible' Sales

The annual Crime Survey for England and Wales (CSEW) 'provides a better reflection of the extent of crime than police recorded figures as the survey asks about crimes that are not reported to or recorded by the police',²⁷ but 'as a household survey ... does not have good coverage of problematic or vulnerable drug users, including those who are homeless or in prison'.²⁸ However, as pre-PSA NPS use was predominantly associated with middle-class users,²⁹ the CSEW is a useful source in this context.³⁰

The 2014/15 and 2015/16 CSEWs indicated that dealers played a greater role in NPS supply than the internet, and the 2015/16 CSEW indicated that 'a friend, neighbour or colleague' was a more important source of NPS than headshops.³¹ Given the relatively recent 'normalisation' of social drug supply whereby a few individuals participate in a 'small scale commercial enterprise' to supply a

²² Krzysztof Krajewski, 'The Unbearable Lightness of Simplicity' (2016) 112 *Addiction* 33, 34.

²³ RSPH (n 9).

²⁴ Fiona Catherine Measham, 'Drug Safety Testing, Disposals and Dealing in an English Field: Exploring the Operational and Behavioural Outcomes of the UK's First Onsite "Drug Checking" Service' (2019) 67 *Int J Drug Policy* 102.

²⁵ Ornella Corazza and others, "'Spice," "Kryptonite," "Black Mamba": An Overview of Brand Names and Marketing Strategies of Novel Psychoactive Substances on the Web' (2014) 46(4) *J Psychoact Drugs* 287, 289.

²⁶ Expert Panel (n 6) 14.

²⁷ ONS, 'Crime in England and Wales QMI' (2020)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/methodologies/crimeinenglandandwalesqmi>>.

²⁸ HOR (n 2) 30.

²⁹ Shane Blackman and Rick Bradley, 'From Niche to Stigma, Headshops to Prison: Exploring the Rise and Fall of Synthetic Cannabinoid Use Among Young Adults' (2017) 40 *Int J Drug Policy* 70.

³⁰ The Home Office, *Drug Misuse: Findings from the Crime Survey for England and Wales* (CSEW) for each year are available at: <<https://www.gov.uk/government/collections/drug-misuse-declared>>.

³¹ *ibid* CSEW 2014/15 21; CSEW 2015/16 24.

circle of friends,³² and the ease of NPS acquisition from headshops, the original source of NPS in these invisible sales might have been visible retailers. Therefore, despite the evidence of a significant clandestine NPS market prior to the PSA, removing headshops may have contributed to the Act's goal of ending NPS sales.

1(1)(c) Enforcement

The HOR extensively details the enforcement activities carried out under the PSA;³³ only the main points will be summarised here. Since the Act's introduction, 'much of the visible sale of NPS in [physical] headshops appears to have ceased',³⁴ and 'as of [the PSA's implementation date] there were no remaining active [online] shops with a UK domain selling NPS'.³⁵ The PSA's civil enforcement mechanisms have rarely been used to close down headshops given the success of police and local authority efforts prior to the Act's implementation;³⁶ likely facilitated, though, by the impending threat of the PSA. This demonstrates the desire of most headshop owners to operate lawfully, although many outlets had 'fire sales' to shift remaining stock before the Act came into force,³⁷ suggesting an abandonment of the responsible retailing they had previously demonstrated.

Few stop and searches were conducted under the PSA to December 2017, which is expected given the lack of a simple possession offence; the generally low rates of NPS use compared to traditional drugs;³⁸ and because MDA search powers might be more familiar to police officers.³⁹ However, these powers have been used disproportionately among minority groups: 8% of individuals searched under the PSA during this period were black.⁴⁰ This is less than the proportion of black people searched under the MDA over the same period (21%),⁴¹ but is nonetheless alarming given that the last census found that black people accounted for just 3.3% of England and Wales' overall

³² Ross Coomber, Leah Moyle and Nigel South, 'The Normalisation of Drug Supply: The Social *Supply* of Drugs as the "Other Side" of the History of Normalisation' (2016) 23(3) *Drugs* (Abingdon Engl) 255, 256.

³³ HOR (n 2) 16-28.

³⁴ *ibid* 30.

³⁵ Elle Wadsworth, Colin Drummond and Paolo Deluca, 'The Adherence to UK Legislation by Online Shops Selling New Psychoactive Substances' (2018) 25(1) *Drugs* (Abingdon Engl) 97, 99.

³⁶ HOR (n 2) 16.

³⁷ *ibid* 19.

³⁸ 1(3)(a).

³⁹ *ibid* 18.

⁴⁰ HOR (n 2) 20.

⁴¹ *ibid*.

population;⁴² drug laws have been driving racial disparities for decades;⁴³ ethnic minorities are found with and use drugs 'at a similar or lower rate than white people';⁴⁴ a 2020 Sentencing Council investigation found racial disparities in drug offence sentencing;⁴⁵ and a recent report which notes that 'disproportionality has increased as the use of stop and search has declined, indicating that the remaining use of the powers is more heavily concentrated on black ... groups'.⁴⁶

The HOR contains customised data on PSA offences, prosecutions and sentences obtained from internal civil service sources.⁴⁷ Only one of the post-Act quarterly Criminal Justice Statistics for England and Wales specifically mentions the PSA.⁴⁸ Furthermore, PSA prosecutions are rare in Scotland and Northern Ireland.⁴⁹ These factors make analysis of enforcement under the Act difficult. However, the Crown Prosecution Service (CPS) does publish quarterly case outcomes by offence type: in Q1 of the 2016/17 financial year (when the PSA was enacted) the non-conviction rate for *all* prosecuted drug offences in England and Wales was 6.1%, and remained at a similar 5.9% in Q4 of 2016/17 and 6.2% in Q3 of 2017/18.⁵⁰ By contrast, the HOR notes that over the same period there were 261 PSA prosecutions in England and Wales, resulting in 171 sentences.⁵¹ This equates to an approximately 34.5% non-conviction rate for PSA-specific drug offences,⁵² almost 5.7 times higher than for all drug offences,⁵³ even though 'activity against the drugs threat continues to account for the largest proportion of UK law enforcement disruptive activity'.⁵⁴

⁴² ONS, 'Ethnicity and National Identity in England and Wales: 2011' (2012) 3
<<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandnationalidentityinenglandandwales/2012-12-11>>.

⁴³ Niamh Eastwood, Michael Shiner and Daniel Bear, *The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales* (2013) 41; Kojo Koram (ed), *The War on Drugs and the Global Colour Line* (2019).

⁴⁴ Eastwood (n 43) 15-6.

⁴⁵ Amber Isaac, 'Investigating the Association Between an Offender's Sex and Ethnicity and the Sentence Imposed at the Crown Court for Drug Offences' (Sentencing Council 2020)
<<https://www.sentencingcouncil.org.uk/news/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/>>. Sentencing is explored at 2(2)(b).

⁴⁶ Michael Shiner and others, *The Colour of Injustice: 'Race,' Drugs and Law enforcement in England and Wales* (2018) 13.

⁴⁷ HOR (n 2) 21, 27.

⁴⁸ Ministry of Justice, 'Criminal Justice Statistics Quarterly, England and Wales, 2016' (2017)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614414/criminal-justice-statistics-quarterly-december-2016.pdf>.

⁴⁹ HOR (n 2) 27.

⁵⁰ The CPS, 'Case Outcomes by Principal Offence' for each quarter are available at:
<<https://www.cps.gov.uk/publication/cps-case-outcomes-principal-offence>>.

⁵¹ HOR (n 2) 27.

⁵² Appendix 1.1.1.

⁵³ Appendix 1.1.2.

⁵⁴ NCA, 'National Strategic Assessment of Serious and Organised Crime' (2019) 30
<<https://www.nationalcrimeagency.gov.uk/who-we-are/publications>>.

1(1)(d) Post-PSA

Post-Act seizures of NPS are still being recorded, demonstrating sales continue ‘albeit in a less visible manner’.⁵⁵ Official data on NPS seizures were first collected in 2017/18, but were not available in time for the HOR: the latest figures show a 25% increase in NPS seizures between 2017/18 and 2018/19.⁵⁶ A post-PSA merging of markets has occurred, whereby organised criminals now supply both NPS and traditional drugs.⁵⁷ The HOR provided evidence that this has increased the price and reduced the availability of NPS.⁵⁸ However, qualitative evidence suggesting that NPS are now easier to source outside city centres⁵⁹ was omitted from the HOR. Such ‘county lines’ dealing (where Serious and Organised Crime (SOC) gangs exploit vulnerable people to expand from cities to smaller towns) has become increasingly problematic since first assessed by the National Crime Agency (NCA) in 2014.⁶⁰ Although primarily concerned with Class A drug supply, county lines dealing in NPS was identified almost immediately after the PSA⁶¹ and continues to play a limited role.⁶²

Even so, ‘shops and the internet remain important sources of NPS’.⁶³ Some clearnet sites have emerged since the PSA,⁶⁴ but darkweb (websites accessible only with special software, allowing users and website operators to remain anonymous and untraceable)⁶⁵ NPS vendors have proliferated markedly.⁶⁶ Notably, there have been no prosecutions for exporting a psychoactive

⁵⁵ HOR (n 2) 28.

⁵⁶ Home Office, *Seizures of Drugs, England and Wales, Financial Year Ending 2019* (2nd edn, 2019) 23.

⁵⁷ ‘Gang That Tried to “Flood” Inverness with Drugs is Jailed’ *BBC News* (7 October 2019) <<https://www.bbc.co.uk/news/uk-scotland-highlands-islands-49959942>>; ‘Gang Members who Supplied Spice in Wrexham Jailed’ *ITV News* (15 October 2018) <<https://www.itv.com/news/wales/2018-10-15/gang-members-who-supplied-spice-drug-in-wrexham-jailed>>.

⁵⁸ HOR (n 2) 29.

⁵⁹ Adam Lusher, ‘Deadly “Legal Highs” Can Now Be “Ordered Like a Takeaway” Because of Government Ban, Users Say’ *Independent* (2 December 2016) <<https://www.independent.co.uk/news/homelesshelpline/legal-highs-ban-war-on-drugs-spice-mamba-nps-homeless-helpline-centrepoint-charity-christmas-appeal-a7449536.html>>.

⁶⁰ NCA, ‘County Lines and Gang Violence, Exploitation and Drug Supply’ (2016) 3 <<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/15-county-lines-gang-violence-exploitation-and-drug-supply-2016/file>>.

⁶¹ NCA, ‘County Lines Violence, Exploitation and Drug Supply’ (2017) 10 <<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/234-county-lines-violence-exploitation-drug-supply-2017/file>>.

⁶² NCA, ‘County Lines Drug Supply, Vulnerability and Harm’ (2018) 3 <<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file>>.

⁶³ HOR (n 2) 38.

⁶⁴ *ibid* 34.

⁶⁵ UNODC, *World Drug Report 2020 Booklet 4: Cross-Cutting Issues* (2020) 67.

⁶⁶ 3(1)(b).

substance, despite a 2018 study which ‘found that the UK was the second largest seller of synthetic cannabinoids after China’.⁶⁷ There has been ‘rising concern that NPS might begin to be marketed in less economically developed countries’, driven by legislation including the PSA.⁶⁸ The lack of any export prosecutions further indicates the inaptitude of enforcement under the Act.

1(1)(e) Summary

Predicated on ostensible claims that problematised the flawed but fledgling headshop industry, the PSA ended open NPS sales. However, clandestine NPS sales were not pliant to the Act’s criminal justice interventions, and SOC organisations and darkweb marketplaces now dominate the scene; this is a failing of the Act, which aimed to end *all* NPS sales. Enforcement under the PSA has been disproportionately directed at minority groups, and the non-conviction rate for prosecuted PSA offences is far higher than for equivalent offences under the MDA. It is therefore submitted the Act has not been enforced ‘well’.

⁶⁷ HOR (n 2) 23-5, 34.

⁶⁸ Peacock (n 1, Introduction) 1671.

1(2) Cat and Mouse

Controlling drugs under the MDA is a time-consuming process: the Advisory Council on the Misuse of Drugs (ACMD) must provide evidence of a drug's harms before it can be added to the A/B/C classification system.⁶⁹ Newly identified NPS emerged rapidly in Europe, quadrupling from an average of 12 per year in 2005-2008 to 48 in 2011.⁷⁰ Temporary Class Drug Orders (TCDO) were introduced in 2011, enabling fast-track banning of NPS until further evidence of their harms could be collated.⁷¹ However, growth in NPS continued (doubling to 98 between 2011-2015)⁷² leading to the announcement of a 'landmark bill [which] will fundamentally change the way we tackle [NPS] and put an end to the game of cat and mouse in which new drugs appear on the market more quickly than Government can identify and ban them'.⁷³ This 'fundamental change' was employing a blanket ban, with a primary goal of the PSA being to provide an innovative method of curbing innovation, removing the (presumed) incentive to continue developing new NPS to exploit legislative loopholes.⁷⁴ The HOR's findings on achieving this goal are (to the extent of their accuracy) less controversial than the conclusions regarding ending NPS sales, as '[ending the game of cat and mouse] does not appear to have been achieved'.⁷⁵ However, the HOR failed to consider the effectiveness of the PSA in relation to the wider theme of innovation that has been the hallmark of NPS and the Act itself: this thematic relationship is the subject of this section.

1(2)(a) Pre-PSA Emergence

The emergence of new drugs is not a new phenomenon: failed commercial/research pharmaceuticals have entered street-level trade since the 1970s,⁷⁶ and waves of new, pharmacologically distinguishable chemicals each decade demonstrate this 'cyclic feature' of drug markets.⁷⁷ Attempts to control these drugs have been of limited success: PCP, fentanyl analogues,

⁶⁹ Expert Panel (n 6) 18.

⁷⁰ EMCDDA, *European Drug Report: Trends and Developments* (2019) 33.

⁷¹ Police Reform and Social Responsibility Act 2011, sch 17.

⁷² EMCDDA, *European Drug Report* (n 70) 33.

⁷³ Home Office, 'News Story: Blanket Ban to Clamp Down on "Legal Highs"' (29 May 2015) <<https://www.gov.uk/government/news/blanket-ban-to-clamp-down-on-legal-highs>>.

⁷⁴ HOR (n 2) 35.

⁷⁵ *ibid* 69.

⁷⁶ Fiona Measham and Russell Newcombe, 'What's So "New" About New Psychoactive Substances? Definitions, Prevalence, Motivations, User Groups and a Proposed New Taxonomy' in Torsten Kolind, Betsy Thom and Geoffrey Hunt (eds), *The SAGE Handbook of Drug and Alcohol Studies* (2017).

⁷⁷ Justice NA Tettey and others, 'Emergence, Diversity and Control of New Psychoactive Substances: A Global Perspective' in Hans H Maurer and Simon D Brandt (eds), *New Psychoactive Substances: Pharmacology, Clinical, Forensic and Analytical Toxicology* (2018).

benzodiazepines and amphetamines continue to be widely abused internationally despite decades of prohibition.⁷⁸ NPS are similar to these substances in that they too have been largely developed from existing pharmaceutical research,⁷⁹ but different in two important ways: the rapid momentum of their identification eclipsed that previously seen,⁸⁰ and their endurance was often ephemeral and geographically heterogeneous.⁸¹

1(2)(a)(i) Mephedrone and New Dissociatives

Mephedrone, methoxetamine and ketamine have never been controlled under the PSA, but are helpful in analysing the pre-Act position. Mephedrone (an amphetamine/cathinone stimulant) was among the first-identified new substances,⁸² emerging at a time when cocaine and ecstasy purity was at an all-time low.⁸³ It garnered widespread hysterical media attention⁸⁴ and was controlled under the MDA in 2010.⁸⁵ Some evidence suggests use subsequently fell,⁸⁶ but ‘several key studies [showed] continued use and popularity’,⁸⁷ stabilising at a lower rate of use only when traditional drug purities increased.⁸⁸ Some reports indicate that mephedrone use is rising again, despite its unchanged ‘B’ classification.⁸⁹

⁷⁸ UNODC, *World Drug Report 2019 Booklet 1: Executive Summary* (2019).

⁷⁹ E.g. Some SCRAAs were originally developed as medicines: Roger D Pertwee, ‘The Therapeutic Potential of Drugs That Target Cannabinoid Receptors or Modulate the Tissue Levels of Actions of Endocannabinoids’ (2005) 7(3) AAPS J e625.

⁸⁰ EMCDDA, *European Drug Report* (n 70).

⁸¹ Justice Tetley and Conor Crean, ‘New Psychoactive Substances: Catalysing a Shift in Forensic Science Practice?’ [2015] *Phil Trans R Soc B* 370.

⁸² Kelly Morris, ‘UK Places Generic Ban on Mephedrone Drug Family’ (2010) 375(9723) *Lancet* 1333.

⁸³ EMCDDA, *Recent Changes in Europe’s MDMA/Ecstasy Market* (2016) 8.

⁸⁴ Jeremy Sare, ‘How the Media Helped Ban Mephedrone’ (2011) 342 *BMJ* 472.

⁸⁵ MDA (Amendment) Order 2010, SI 2010/1207.

⁸⁶ Giles Stephenson and Anna Richardson, ‘New Psychoactive Substances in England: A Review of the Evidence’ (2014) 2

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368587/NPSevidenceReview.pdf>.

⁸⁷ Kate O’Brien and others, ‘New Psychoactive Substances and British Drug Policy: A View From the Cyber-Psychonauts’ (2015) 22(3) *Drugs (Abingdon Engl)* 217, 218.

⁸⁸ Stephenson and Richardson (n 86) 30; cf EMCDDA, *Recent Changes* (n 83) 8.

⁸⁹ Joanna Hockenull, Kevin G Murphy and Sue Paterson, ‘Mephedrone Use is Increasing in London’ (2016) 387(10029) *Lancet* 1719.

Methoxetamine (a new dissociative anaesthetic⁹⁰ with historically consistent low rates of use)⁹¹ was the first drug subject to a TCDO,⁹² with limited evidence suggesting use fell following this.⁹³ However, use of ketamine – a relatively recently abused⁹⁴ dissociative drug made class C in 2005⁹⁵ and elevated to class B in 2014⁹⁶ and from which methoxetamine is derived⁹⁷ – fell in the period that methoxetamine was legal,⁹⁸ but has seen an increase in recent years.⁹⁹

This brief account of the effect of legal approaches on two ‘pre-PSA NPS’ presents slightly mixed results, but does contradict the widely-held presumption¹⁰⁰ that the market and popularity of new drugs was driven purely by legal status: mephedrone remained popular following its ban and has actually seen a resurgence, and controlling (the comparatively less-popular drug) methoxetamine apparently encouraged the already-illegal, but relatively small ketamine market. This also preliminarily evidences that the creation of new drugs might have been (in part) a ‘trial and error’ strategy by manufacturers to determine which drugs would establish themselves among users (as was seemingly the case with mephedrone and dissociatives generally) and were worth pursuing. This could explain the largely ephemeral nature of most NPS including methoxetamine and Synthetic Cannabinoid Receptor Agonists (SCRAs).

1(2)(a)(ii) Synthetic Cannabinoid Receptor Agonists

SCRAs are drugs which have a strong effect on the human endocannabinoid system ‘with some functional similarity to natural cannabis’.¹⁰¹ First-generation SCRAs such as JWH-018 were controlled under the MDA in 2009,¹⁰² but second-generation SCRAs emerged with slightly different

⁹⁰ WHO, ‘Methoxetamine: Critical Review Report’ (2014) 10
<https://www.who.int/medicines/areas/quality_safety/4_22_review.pdf>.

⁹¹ Stephenson and Richardson (n 86) 14-5.

⁹² Home Office, ‘Press Release: First “Legal High” Banned Under New Power’ (29 March 2012)
<<https://www.gov.uk/government/news/first-legal-high-banned-under-new-power>>.

⁹³ Simon L Hill and others, ‘Methoxetamine Toxicity Reported to the National Poisons Information Service: Clinical Characteristics and Patterns of Enquiries (Including the Period of the Introduction of the UK’s First Temporary Class Drug Order)’ (2014) 31 *Emerg Med J* 45.

⁹⁴ SC Deb (Draft Misuse of Drugs Act 1971 (Amendment) Order 2005) 31 October 2005 col 3.

⁹⁵ MDA (Amendment) Order 2005, SI 2005/3178.

⁹⁶ MDA (Ketamine Etc.) (Amendment Order) 2014, SI 2014/1106.

⁹⁷ WHO, ‘Methoxetamine’ (n 90).

⁹⁸ ACMD, ‘Ketamine: A Review of Use and Harm’ (2013) 19

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264677/ACMD_ketamine_report_dec13.pdf>.

⁹⁹ CSEW 2017/18 (n 30) 7.

¹⁰⁰ Expert Panel (n 6) 14, 19.

¹⁰¹ Dima Abdulrahim and Owen Bowden-Jones, ‘Harms of Synthetic Cannabinoid Receptor Agonists (SCRAs) and Their Management’ (2016) 3 <<http://neptune-clinical-guidance.co.uk/wp-content/uploads/2016/07/Synthetic-Cannabinoid-Receptor-Agonists.pdf>>.

¹⁰² MDA (Amendment Order) 2009, SI 2009/3209.

chemical compositions immediately after.¹⁰³ Second-generation SCRA were the largest emergent class of NPS,¹⁰⁴ and were added to the MDA in 2013.¹⁰⁵ Legality certainly played a role in their constant redevelopment.¹⁰⁶ However, while most individual substances within each generation were short-lived,¹⁰⁷ JWH-018 was still available up to and after the PSA's enactment,¹⁰⁸ further suggesting that *demand* (and perhaps identification of which NPS would remain in demand) was a key factor in their production; and that their intertwining with illicit market activity might have allowed them to 'diffuse into the street pharmacopeia'.¹⁰⁹ SCRA emergence has generally declined since 2014,¹¹⁰ but the current situation with third-generation SCRA illustrates the difficulties faced by even the 'landmark' PSA.

1(2)(b) The Blanket Ban

The PSA controlled third-generation SCRA until they were added to the MDA in December 2016.¹¹¹ However, they continue to be produced despite the attempt of both frameworks to control them:¹¹² global seizures of SCRA by weight substantially increased between 2016-2017;¹¹³ and the UK's NCA reports that the market is expanding, especially in prisons.¹¹⁴ This indicates that the endurance of JWH-018 is not an isolated case: a growing market composed of fewer new SCRA means that specific SCRA are becoming increasingly established. Thus, not only has the PSA failed to stop the development of new SCRA, it has encouraged a marked change in the nature of SCRA's existence. Furthermore, while 'subsequent generations of SCRA have become increasingly potent',¹¹⁵ the

¹⁰³ Paul Dargan and others, 'The Impact of Changes in UK Classification of the Synthetic Cannabinoid Receptor Agonists in "Spice"' (2011) 22(4) *Int J Drug Policy* 274.

¹⁰⁴ EMCDDA, *European Drug Report* (n 70) 33.

¹⁰⁵ MDA (Amendment) Order 2013, SI 2013/239.

¹⁰⁶ Expert Panel (n 6) 14, 19; Peacock (n 1, Introduction) 1670; EMCDDA, *New Psychoactive Substances in Europe: Legislation and Prosecution – Current Challenges and Solutions* (2016) 9.

¹⁰⁷ EMCDDA, *European Drug Report* (n 70) 17.

¹⁰⁸ Andrew Scourfield and others, 'Synthetic Cannabinoid Availability on Darknet Drug Markets: Changes During 2016-2017' (2019) 3(1) *Toxicol Commun* 7; UNODC, 'New Psychoactive Substances: Overview of Trends, Challenges and Legal Approaches' (2016) 5 <https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/ECN72016_CRP2_V1601405.pdf>.

¹⁰⁹ Caroline Chatwin and others, 'New Drugs, New Directions? Research Priorities for New Psychoactive Substances and Human Enhancement Drugs' (2017) 40 *Int J Drug Policy* 1.

¹¹⁰ EMCDDA, *European Drug Report* (n 70) 33.

¹¹¹ MDA (Amendment) Order 2016, SI 2016/1109.

¹¹² EMCDDA, *European Drug Report* (n 70) 33.

¹¹³ UNODC, *World Drug Report 2019 Booklet 2: Global Overview of Drug Demand and Supply* (2019) 49.

¹¹⁴ NCA 2019 (n 54) 9, 32.

¹¹⁵ Giulia Costa and others, 'Neuronal and Peripheral Damages Induced by Synthetic Psychoactive Substances: An Update of Recent Findings from Human and Animal Studies' (2020) 15(5) *Neural Regen Res* 802, 810.

HOR claims that ‘the role of the PSA in this [latest potency] increase is not clear’.¹¹⁶ However, this overlooks the ‘iron law of prohibition’: a ‘phenomenon [which] follows fundamental economic logic’ whereby criminalising drugs does increase their potency, as there is greater incentive to produce increasingly concentrated substances to, *inter alia*, reduce transport costs and the risks of being caught.¹¹⁷

The HOR used data from the UK’s Forensic Early Warning System (FEWS) as evidence that non-SCRA NPS continue to be developed and identified, but noted difficulty in ‘[drawing] firm conclusions [as] the number of newly identified NPS each year tends to be very small, and [the] results are only based on a selective sample of the whole market’.¹¹⁸ This sample is ‘selective’ because the HOR did not count MDA-controlled NPS which were included in FEWS.¹¹⁹ Thus, it could be hazarded that the HOR’s reliance on these figures downplays the true extent of novel substances *generally* appearing on Britain’s streets given how quickly NPS are added to the MDA,¹²⁰ but despite this dilution the failing of the PSA to end the game of cat and mouse is nonetheless evident. Reasons given in the HOR for this continued emergence include consumer demand for unknown substances and potential incentives to create NPS to avoid drug laws in foreign jurisdictions and/or the harsher penalties in the MDA,¹²¹ however, this might also be due to the ‘trial and error’ strategy previously mentioned.

The PSA’s blanket ban (and the generic ban on third-generation SCRA) has, however, been successful in curbing innovation in one area of drug production: legitimate medical and industrial research.¹²² The scope of the Act was narrowed by exempting: investigational medical products as defined by the Human Medicines Regulations 2012;¹²³ activities carried out by medical professionals in the course of their profession;¹²⁴ scientific research approved by a relevant ethics review body;¹²⁵ and by restricting the requisite *mens rea* of NPS production and supply offences to intention and/or recklessness as to the substance’s psychoactivity and/or likelihood of being

¹¹⁶ HOR (n 2) 6.

¹¹⁷ Leo Beletsky and Corey S Davis, ‘Today’s Fentanyl Crisis: Prohibition’s Iron Law, Revisited’ (2017) 46 Int J Drug Policy 156, 157.

¹¹⁸ HOR (n 2) 36.

¹¹⁹ *ibid.*

¹²⁰ The true number of NPS may be ‘4-fold higher than what identified by both the EMCDDA ... and the UNODC’: F Schifano and others, ‘New/Emerging Psychoactive Substances and Associated Psychopathological Consequences’ [2019] Psychol Med 1, 10.

¹²¹ HOR (n 2) 36.

¹²² Predicted by: Alex Stevens and Fiona Measham, ‘The “Drug Policy Ratchet”: Why Do Sanctions for New Psychoactive Drugs Typically Only Go Up?’ (2014) 109(8) Addiction 126.

¹²³ PSA, sch 1.

¹²⁴ *ibid* sch 2.

¹²⁵ *ibid.*

consumed for its psychoactive effect.¹²⁶ However, qualitative evidence suggests these exemptions (and the published guidance for researchers)¹²⁷ are not enough:

There are so many groups in the UK trying to carry out clinical trials on NPS ... however when it comes to the Act and the need for expensive licences, it's not easy. You can easily break the law due to [the PSA's] broad wording ... when you do the research. The easiest way in many institutions is not to touch it.¹²⁸

(Dr Amira Guirguis, Senior Lecturer in Pharmaceutical Chemistry in the Psychopharmacology, Drug Misuse and NPS Research Unit, University of Hertfordshire.)

Research is very difficult, as all psychoactive drugs are now [controlled].¹²⁹

(David Nutt, Professor of Neuropsychopharmacology, Imperial College London.)

Research into all psychiatric medication has been dealt a significant blow by the [PSA], which makes it possible to commit a serious drug production offence without having any idea, and impacts research into any new medicine ... the result of drug scheduling laws is that we senselessly discard hundreds of potential medications that could have valuable therapeutic properties.¹³⁰

(Dr Alex O'Bryan-Tear, Beckley Foundation.)

Furthermore, after adding third-generation SCRA to the MDA:

Representatives from the research community contacted the Home Office and the ACMD, informing them that a large number of research compounds ... were inadvertently captured

¹²⁶ *ibid* ss 4-9.

¹²⁷ Home Office, 'Psychoactive Substances Act 2016: Guidance for Researchers' (2016) <<https://www.gov.uk/government/publications/psychoactive-substances-act-2016-guidance-for-researchers/psychoactive-substances-act-2016-guidance-for-researchers>>.

¹²⁸ Julia Robertson, 'Have Legislative Changes Curbed Use of "Legal Highs"?' (*Pharmaceutical Journal*, 30 November 2018) <<https://www.pharmaceutical-journal.com/news-and-analysis/features/have-legislative-changes-curbed-use-of-legal-highs/20205826.article>>.

¹²⁹ *ibid*.

¹³⁰ Daniel Pryor, 'The Psychoactive Substances Act is a Failure' (*Adam Smith*, 9 August 2017) <<https://www.adamsmith.org/blog/the-psychoactive-substances-act-is-a-failure>>.

under the generic definition. As a result, ... institutions had to obtain ... licences to conduct certain aspects of their research.¹³¹

(Baroness Williams of Trafford, Minister of State, Home Office.)

A chemical included in [the SCRA ban] was tetrahydrocannabivarin [which] is the only known naturally occurring antidote to synthetic cannabinoids and so might have been a useful treatment for synthetic cannabinoid toxicity.¹³²

(Professor Nutt.)

1(2)(c) Post-PSA Innovations

Corresponding with the ‘iron law of prohibition’, almost immediately after the MDA’s enactment new forms of liquid, concentrated cannabis were being smuggled through London Heathrow airport.¹³³ The PSA-induced increased potency of SCRA has precipitated a similar innovation. UK prisons had been overwhelmed with predominantly SCRA-type NPS prior to the PSA,¹³⁴ and a December 2015 report concluded that ‘NPS are now the most serious threat to the safety and security of the prison system that our inspections identify’.¹³⁵ Yet, the latest annual prisons report for England and Wales states that ‘NPS had been underestimated’,¹³⁶ signifying the vast scale of the current problem. This has been amplified by the fact that SCRA are now much easier to smuggle into custodial settings, as A4 paper and photographs can be soaked in powerful new liquid concentrates of these drugs before being sold to inmates: there is now ‘categorical evidence to support anecdotal suggestions that [NPS] are entering UK prisons in this manner’.¹³⁷

Another post-PSA innovation is the mode of SCRA production itself: the NCA suggests that UK-based production is increasing, evidenced by rising importation of precursors¹³⁸ (chemicals required for

¹³¹ HL Deb 15 July 2019, vol 799, col 19GC-20GC. The MDA (Amendment) Order 2019, SI 2019/1323 removed the 40,000-90,000 substances inadvertently captured by the generic definition.

¹³² David J Nutt, “‘Groundhog Decade Not Brave New World’” (2020) 6 Drug Sci Pol Law 1, 4.

¹³³ *Taonis* [1974] 59 Cr App R 160.

¹³⁴ Karen Duke, ‘Producing the “Problem” of New Psychoactive Substances (NPS) in English Prisons’ (2020) 80 Int J Drug Policy 102479.

¹³⁵ HMIP, *Changing Patterns of Substance Misuse in Adult Prisons and Service Responses* (2015) 7.

¹³⁶ HMIP, *Chief Inspector of Prisons for England and Wales: Annual Report 2018-19* (2019) 8.

¹³⁷ Loretta T Ford and Jonathan D Berg, ‘Analytical Evidence to Show Letters Impregnated with Novel Psychoactive Substances are a Means of Getting Drugs to Inmates Within the UK Prison Service’ (2018) 55(6) Ann Clin Biochem 673.

¹³⁸ NCA 2019 (n 54) 32.

synthesis of psychoactive substances which are not necessarily psychoactive themselves).¹³⁹ Unlike the MDA (and associated subordinate legislation) which controls numerous precursors,¹⁴⁰ the PSA is concerned only with substances used for their psychoactive effect *directly*. Paradoxically, the otherwise ‘catch-all’ PSA is actually *too narrow* in this regard.¹⁴¹

The EMCDDA reports that availability of synthetic opioids is rising in Europe, driven by the USA opioid epidemic,¹⁴² SOC interest in global expansion and ‘broader changes in the illicit drug market’.¹⁴³ These opioids include the highly toxic¹⁴⁴ NPS U-47700, which was controlled by the PSA until being added to the MDA in 2017.¹⁴⁵ The PSA’s inability to curb the innovative re-development¹⁴⁶ and rapid emergence¹⁴⁷ of these drugs; the desire of SOC organisations to enter the now-illicit UK NPS market with increasingly potent substances by utilising the aforementioned ‘trial and error’ strategy; and the UK’s experience with the post-PSA establishment of specific SCRA suggests that opioid-type NPS may soon become an increasingly pressing public health issue.

1(2)(d) Summary

The experience of previous prohibitive drug laws has been repeated: the PSA has failed to end the game of cat and mouse, and has instead encouraged further innovation in NPS production and the establishment of certain SCRA in the street trade. These developments could continue to have negative effects in relation to synthetic opioids in the near future.

¹³⁹ INCB, *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances* (2015) pt III.

¹⁴⁰ The Controlled Drugs (Drug Precursors) (Intra-Community Trade) Regulations 2008, SI 2008/295.

¹⁴¹ Though a charge of conspiracy to produce psychoactive substances could be brought in some cases, the PSA’s lack of a precursor offence conflicts with its aim of ending the game of cat and mouse via a blanket legislative ban.

¹⁴² Which has been caused by opioid over-prescription: Beletsky and Davis (n 117).

¹⁴³ EMCDDA, *Fentanils and Synthetic Cannabinoids: Driving Greater Complexity into the Drug Situation* (2018) 9.

¹⁴⁴ WHO, ‘Expert Peer Review No.1 for U-47700’ (2016)

<https://www.who.int/medicines/access/controlled-substances/4.1_U-47700_PeerReview_1.pdf>.

¹⁴⁵ MDA (Amendment) Order 2017, SI 2017/634.

¹⁴⁶ Kirti Kumari Sharma and others, ‘The Search for the “Next” Euphoric Non-Fentanyl Novel Synthetic Opioids on the Illicit Drugs Market: Current Status and Horizon Scanning’ (2019) 37(1) *Forensic Toxicol* 1.

¹⁴⁷ Dima Abdulrahim and Owen Bowden-Jones, ‘The Misuse of Synthetic Opioids: Harms and Clinical Management of Fentanyl, Fentanyl Analogues and Other Novel Synthetic Opioids’ (2018) 2

<<http://neptune-clinical-guidance.co.uk/wp-content/uploads/2018/03/The-misuse-of-synthetic-opioids.pdf>>.

1(3) Reduce Use

A goal of the PSA was ‘to reduce the number of people using psychoactive substances, including ... young people, the homeless and those in prisons’.¹⁴⁸ The HOR concluded that the PSA has reduced NPS use in the general adult population, but that the findings are mixed regarding vulnerable users.¹⁴⁹ This section explores the effectiveness of the PSA in achieving this goal by augmenting the HOR’s evidence with the latest statistics and literature. The quantitative and qualitative effects of the PSA on NPS use will be analysed in relation to various groups, and space will be given to the more speculative question of *why* these effects might have occurred in order to present a further dimension of the PSA’s efficacy in this area. PSA-induced displacement to traditional drugs will also be considered.

1(3)(a) Generally

Official surveys provide the most reliable quantitative estimates of NPS use among the general population (though true prevalence estimates are impossible),¹⁵⁰ but as household surveys they cannot capture NPS use patterns among marginalised and vulnerable groups such as the homeless. The pre-Act 2014/15 Scottish Crime and Justice Survey (SCJS)¹⁵¹ asked a representative adult population sample whether they had taken ‘powders, pills, herbal mixtures or crystals sold as “legal highs”’: approximately 0.39% of all respondents reported use in the preceding 12 months.¹⁵² 0.5% of all respondents reported nitrous oxide use in the preceding 12 months.¹⁵³ The latest SCJS (which was not published in time for the HOR)¹⁵⁴ indicates a reduction in the general population’s preceding 12 months NPS use to approximately 0.17% of all respondents.¹⁵⁵ This large reduction is complicated by the small sample size of NPS users and the fact that a separate question was asked about SCRA use in the preceding 12 months, which 0.2% of all respondents answered

¹⁴⁸ HOR (n 2) 8.

¹⁴⁹ *ibid* 69.

¹⁵⁰ Katy MacLeod and others, *Understanding the Patterns of Use, Motives, and Harms of New Psychoactive Substances in Scotland* (2016) 7-8.

¹⁵¹ The ‘Main Findings’, ‘Drug Use’ and ‘Data Tables’ sections of the: Scottish Government, *Scottish Crime and Justice Survey* (SCJS) for each year are available at:

<<https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/crime-and-justice-survey/publications>>.

¹⁵² *ibid* SCJS 2014/15: Drug Use 40; Appendix 1.2.

¹⁵³ *ibid* 58.

¹⁵⁴ HOR (n 2) 33.

¹⁵⁵ SCJS 2017/18: Data Tables (n 151) 4.21a, 4.22a.

affirmatively.¹⁵⁶ Additionally, the ambiguity of the wording ‘legal highs’ has caused demonstrable uncertainty in respondents’ answers for years.¹⁵⁷ Nitrous oxide use remained unchanged.¹⁵⁸

The CSEW evidences similar reductions which were covered in the HOR: the pre-Act 2014/15 and 2015/16 surveys showed past-year NPS use among all respondents at 0.8% and 0.7% respectively, which fell to 0.4% in the post-Act 2016/17 and 2017/18 surveys.¹⁵⁹ Nitrous oxide use remained unchanged since the 2013/14 survey.¹⁶⁰ The latest, post-HOR, CSEW indicates stable rates of NPS/nitrous oxide use.¹⁶¹

The HOR convincingly notes that this reduction in post-PSA NPS use is unlikely to have resulted from an unwillingness to disclose use following the change in legal status (as ‘the fall in NPS prevalence was driven by those [reporting] using another illicit drug’), but rather due to ‘the fall in availability, increase in price [and] other factors’.¹⁶² Understanding in more depth the extent of the role PSA-induced changes in price and availability or ‘other factors’ played in reducing use is key to assessing the PSA’s effectiveness.

UK ‘problem’ users (i.e. injecting or long duration/regular use) account for approximately just 10% of all drug users.¹⁶³ Reasons for using NPS vary across user-types: ‘psychonauts’ (people who take drugs to subjectively explore their effects) are motivated by curiosity, pleasure and ‘researching purity, safe dosage and potential health risks’.¹⁶⁴ Others use for reasons of low confidence and weight management,¹⁶⁵ peer pressure/sociality; compulsion; self-management of physical and mental health issues; improving sex;¹⁶⁶ quality and potency compared to traditional drugs;¹⁶⁷ and because NPS are not detected in standard drug tests.¹⁶⁸ Although the PSA has increased the price of NPS and (by some measures) reduced availability, the Act cannot address these other motivations. Legality plays only a minor motivating role,¹⁶⁹ and cost appears to have been less important than other factors in pre-Act Scottish¹⁷⁰ and Northern Irish¹⁷¹ NPS use. Furthermore, primary reasons for NPS cessation coinciding with the PSA’s enactment included bad personal

¹⁵⁶ *ibid* 4.06a.

¹⁵⁷ SCJS 2014/15: Drug Use (n 151) 41.

¹⁵⁸ SCJS 2017/18: Data Tables (n 151) 4.20a.

¹⁵⁹ HOR (n 2) 39.

¹⁶⁰ *ibid* 41.

¹⁶¹ CSEW 2018/19 (n 30) 27, 30.

¹⁶² HOR (n 2) 40.

¹⁶³ BMA, *Drugs of Dependence: The Role of Medical Professionals* (2013) 26.

¹⁶⁴ O’Brien (n 87) 219.

¹⁶⁵ Gittins (n 15).

¹⁶⁶ MacLeod (n 150) 27-33.

¹⁶⁷ Kathryn Higgins and others, ‘Evidence for Public Health on Novel Psychoactive Substance Use: A Mixed-Methods Study’ (2019) 7(14) *Public Health Res* 56-7.

¹⁶⁸ Expert Panel (n 6) 29.

¹⁶⁹ O’Brien (n 87) 32.

¹⁷⁰ MacLeod (n 150) 28.

¹⁷¹ Higgins (n 167) 57.

experiences; witnessing negative effects on others; and damage to health and relationships.¹⁷² These reasons are similarly unattributable to the PSA as they reflect individual experiences irrespective of the law.

The HOR noted difficulties in causally establishing displacement from NPS to other substances post-Act due to the small number of NPS users and limitations of official statistics, concluding there was insufficient evidence for this in the general population.¹⁷³ However, there are correlations between reductions in NPS use and increases in other drug use in official statistics,¹⁷⁴ and there is quantitative and qualitative evidence suggesting displacement to traditional drugs due to the increased price of NPS, particularly among (but not limited to) vulnerable users.¹⁷⁵

1(3)(b) Children

Aggravating factors in the offence of supplying or offering to supply psychoactive substances under the PSA include dealing in the vicinity of a school and using under-18s as couriers,¹⁷⁶ but the HOR noted no statistically significant post-Act change in NPS use among children aged 11-15, and also evidenced that the Act has encouraged displacement to traditional drugs in other young age groups.¹⁷⁷ A recent study of predominantly English NPS users found increased use among under-18s.¹⁷⁸ These results are mirrored by a 2018 Scottish Government survey which indicated a small increase in 15 year-olds using and being offered NPS¹⁷⁹ compared to 2015,¹⁸⁰ and also showed statistically significant increases in the proportion of schoolchildren who thought drugs were easily obtainable¹⁸¹ and who agreed 'it is OK to take legal highs'.¹⁸²

¹⁷² MacLeod (n 150) 34-37.

¹⁷³ HOR (n 2) 47.

¹⁷⁴ *ibid* 47-8; 1(4)(b)(i)-(iv).

¹⁷⁵ Addaction, 'Novel Psychoactive Substances Insight Report: The View from Young People' (2017) 7 <<https://www.wearewithyou.org.uk/documents/10/npsinsightreport.pdf>>; 'Evidence for the Scottish Affairs Select Committee Inquiry into the Use and Misuse of Drugs in Scotland 2019' (2019) 6 <<https://www.parliament.uk/documents/commons-committees/scottish-affairs/Written-evidence/written-evidence-problem-drug-use-sac.pdf>>.

¹⁷⁶ PSA, s 6.

¹⁷⁷ HOR (n 2) 43.

¹⁷⁸ Elena Deligianni and others, 'Impact of the UK Psychoactive Substances Act on Awareness, Use, Experiences and Knowledge of Potential Associated Health Risks of Novel Psychoactive Substances' (2020) 86(3) *Br J Clin Pharmacol* 505.

¹⁷⁹ Scottish Government, *Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS): Drug Use Report (2018)* (2019) 12, 21.

¹⁸⁰ Scottish Government, *Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS): Drug Use Report (2015)* (2016) 8.

¹⁸¹ SALSUS 2018 (n 179) 24.

¹⁸² *ibid* 29.

1(3)(c) Homeless

Based primarily on a *DrugWise* survey of drug workers' experiences and an Exeter-based study of 38 homeless NPS users,¹⁸³ the HOR concluded that 'the evidence on NPS use among vulnerable users, including the homeless, is mixed'.¹⁸⁴ Quantitative evidence shows that adults presenting for NPS treatment with a housing problem have increased from 32% in 2015-16, to 36% in 2016-17, to approximately 45% in 2017-18 and 2018-19.¹⁸⁵ During the same period, NPS treatment numbers decreased overall from 2042 to 1363,¹⁸⁶ suggesting rising levels of NPS use among the homeless. Both the ACMD¹⁸⁷ and the latest EMCDDA UK report¹⁸⁸ also indicate high levels of NPS use among homeless populations in Manchester, Newcastle, Cardiff and the UK generally. Research conducted immediately after the PSA's enactment found a negligible change in young homeless NPS use,¹⁸⁹ and an October 2018 report from Wrexham Council described NPS use among rough sleepers as a 'significant issue'.¹⁹⁰ In Glasgow, use of SCRA¹⁹¹ and benzodiazepine-type NPS¹⁹² among homeless persons have been observed. Thus, contrary to the HOR, there is substantial evidence indicating the PSA's ineffectiveness in reducing NPS use among the homeless. The link between NPS use and homelessness has been established in other EU countries due to low access to harm reduction services,¹⁹³ and the ACMD has warned that '[drug treatment] funding cuts are the single biggest threat to ... recovery outcomes',¹⁹⁴ suggesting the PSA's criminal justice approach to NPS is not the most effective option for reducing homeless NPS use.

¹⁸³ HOR (n 2) 44-45.

¹⁸⁴ *ibid* 69.

¹⁸⁵ PHE, 'Adult Substance Misuse Statistics from the National Drug Treatment Monitoring System (NDTMS) 2018 to 2019: Data Tables' (2019) table 4.2 <<https://www.gov.uk/government/statistics/substance-misuse-treatment-for-adults-statistics-2018-to-2019>>.

¹⁸⁶ *ibid*.

¹⁸⁷ ACMD, 'Drug-Related Harms in Homeless Populations and How They Can Be Reduced' (2019) 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810284/Drug-related_harms_in_homeless_populations.pdf>.

¹⁸⁸ EMCDDA, 'United Kingdom: Country Drug Report 2019' (2019) 10 <<https://www.emcdda.europa.eu/publications/country-drug-reports/2019/united-kingdom>>.

¹⁸⁹ YHNE, 'NPS Report' 11 <<https://www.yhne.org.uk/wp-content/uploads/Final-NPS-Report.pdf>>.

¹⁹⁰ Arc4, 'Homelessness Strategy: 2018-2022' (2018) 29 <<http://old.wrexham.gov.uk/assets/pdfs/housing/homeless-strategy.pdf>>.

¹⁹¹ Holly Lennon, 'Spice: Warning Over Rise in Use of "Zombie" Drug in Glasgow' *Glasgow Times* (2 May 2017) <<https://www.glasgowtimes.co.uk/news/15258523.spice-warning-over-rise-in-use-of-zombie-drug-in-glasgow/>>.

¹⁹² 'Street Valium Blamed for "Unprecedented" Spike in Drugs Deaths' *BBC News* (28 January 2019) <<https://www.bbc.co.uk/news/uk-scotland-glasgow-west-47034644>>.

¹⁹³ Drik Korf and others, 'How and Where to Find NPS Users: A Comparison of Methods in a Cross-National Survey Among Three Groups of Current Users of New Psychoactive Substances in Europe' [2019] *Int J Ment Health Ad.*

¹⁹⁴ ACMD, 'News Story: ACMD Warns Minister of Falling Local Funding for Drug Treatment Services' (6 September 2017) <<https://www.gov.uk/government/news/acmd-warns-ministers-of-falling-local-funding-for-drug-treatment-services>>.

1(3)(d) Prisons

The HOR notes a rise in use and availability of NPS in UK prisons since the PSA, but downplays this by stating that ‘the PSA *may not* have had a significant impact on reducing NPS use in prisons’.¹⁹⁵ The latest HM Chief Inspectorate of Prisons for England and Wales Annual Report indicates a ‘deluge of [NPS]’ leading to a ‘growing number of prisoners under the influence of [NPS]’.¹⁹⁶ The equivalent Scottish report states that ‘use of [NPS] continues to have a detrimental impact ... and links to high-level violence’,¹⁹⁷ despite the PSA’s offence¹⁹⁸ of custodial possession.

Motivations for using NPS in prisons include ease of access; social acceptance due to high rates of use; avoidance of detection in drug tests; as a coping mechanism; boredom; addiction; and enjoyment.¹⁹⁹ The PSA-induced increased ease of smuggling NPS into prisons²⁰⁰ has arguably exacerbated the motivation of easy access, derivatively increasing use and social acceptance. Recent research indicates that rates of NPS use are lower before and after imprisonment, with SCRAAs regarded as a ‘prison drug’.²⁰¹ Mandatory drug testing figures support this, as 7.3% of English and Welsh tests returned positive for NPS in 2018/19, over 18 times above general English and Welsh levels of use.²⁰²

1(3)(e) Chemsex

‘Chemsex’ (using drugs to enhance sexual experience) NPS users were regarded as a high prevalence/risk group in the pre-Act Government Expert Review of NPS,²⁰³ but were not discussed in the HOR. The main chemsex substances are controlled under the MDA,²⁰⁴ but ecstasy/ketamine-type NPS and ethylphenidate have also been used.²⁰⁵ Although ethylphenidate was controlled under an extended TCDO before being added to the MDA in 2017 (thus never controlled under the

¹⁹⁵ HOR (n 2) 45-6 [my emphasis].

¹⁹⁶ HMIP, *Annual Report* (n 136) 8, 32.

¹⁹⁷ HMIPS, *HM Chief Inspector’s Annual Report 2018-19* (2019) 19.

¹⁹⁸ PSA, s 9.

¹⁹⁹ HMPPS, ‘Guidance: Psychoactive Substances in Prisons’ (15 May 2019)

<<https://www.gov.uk/guidance/psychoactive-substances-in-prisons>>.

²⁰⁰ 1(2)(c).

²⁰¹ Sharon Grace, Charlie Lloyd and Amanda Perry, ‘The Spice Trail: Transitions in Synthetic Cannabis Receptor Agonists (SCRAAs) Use in English Prisons and on Release’ (2020) 27(4) *Drugs* (Abingdon Engl) 271.

²⁰² HMPPS, ‘Annual Digest 2018/19’ (2020) 25 <<https://www.gov.uk/government/statistics/hmppps-annual-digest-2018-to-2019>>; text to n 159; Appendix 1.3.

²⁰³ Expert Panel (n 6) 64.

²⁰⁴ Hepatitis Scotland, ‘Chemsex in Scotland: Starting the Conversation’ (2016) 10-3

<http://www.hepatitisscotland.org.uk/files/3014/7003/8716/Chemsex_in_Scotland__20_June_2016.pdf>.

²⁰⁵ MacLeod (n 150) 31.

PSA),²⁰⁶ the HOR describes it as an NPS in relation to the PSA so it is included in this thesis.²⁰⁷ Chemsex users are predominantly homosexual men,²⁰⁸ commonly motivated by pleasure, being already intoxicated, their partner's use and to overcome internalised homophobia.²⁰⁹

Recent research shows chemsex is increasingly common²¹⁰ and widespread throughout the UK.²¹¹ As all psychoactive substances are now illegal, the implication is that legality is not a major concern for users and that some displacement to traditional drugs may have occurred post-PSA. However, due to the low rates of NPS use both generally and in chemsex, a large-scale shift to MDA-controlled drugs may have had only a minor, unobservable impact. The only UK longitudinal study of individual chemsex drugs found that tailored health-based interventions among the sample participants led to reductions in the prevalence of both chemsex and chemsex-specific drugs between March 2015 and March 2018.²¹² The drugs reported in the study were all controlled under the MDA and did not change in legal status, suggesting that health-based approaches are more effective than the law (including the PSA's symbolic function/goal of discouraging *psychoactive substance* use) for encouraging cessation.

Poppers (amyl/alkyl nitrites) are also commonly used in chemsex,²¹³ and recent case law indicates they are illegal under the PSA.²¹⁴ General prevalence estimates are unavailable in post-PSA official statistics, but their use in chemsex apparently remains high.²¹⁵

²⁰⁶ MDA (Amendment) Order 2017, SI 2017/634.

²⁰⁷ HOR (n 2) 56.

²⁰⁸ Marina Daskalopoulou and others, 'Recreational Drug Use, Polydrug Use, and Sexual Behaviour in HIV-Diagnosed Men Who Have Sex With Men in the UK: Results from the Cross-Sectional ASTRA Study' (2014) 1 Lancet HIV e22.

²⁰⁹ MacLeod (n 150) 31, 41.

²¹⁰ Janey Sewell and others, 'Changes in Recreational Drug Use, Drug Use Associated with Chemsex, and HIV-Related Behaviours, Among HIV-Negative Men Who Have Sex With Men in London and Brighton, 2013-2016' (2018) 94 Sex Transm Infect 494.

²¹¹ H Wiggins and others, 'Demand for and Availability of Specialist Chemsex Services in the UK: A Cross-Sectional Survey of Sexual Health Clinics' (2018) 55 Int J Drug Policy 155.

²¹² Sewell (n 210) 59.

²¹³ Daskalopoulou (n 208).

²¹⁴ *Rochester* [2018] EWCA Crim 1936; 2(2)(a)(ii).

²¹⁵ Matthew Peter Hibbert and others, 'Psychological and Sexual Characteristics Associated with Sexualised Drug Use and Chemsex Among Men Who Have Sex With Men (MSM) in the UK' (2019) 95(5) Sex Transm Infect 342.

1(3)(f) Sex Workers and Sexual Exploitation

Evidence of the link between NPS and child sexual exploitation (including sex in exchange for drugs) was presented to the Public Bill Committee on the Psychoactive Substances Bill,²¹⁶ and ‘involvement in the sex trade is often intertwined with drug use’,²¹⁷ but this group was not considered in the HOR. A 2015 study of Welsh sex workers showed 44.8% used ‘mephedrone or NPS’ at least ‘a few times a year’ and 13.8% reported ‘almost every day’ use.²¹⁸ Prostitution-funded SCRA use was also observed in Manchester immediately prior to the PSA’s enactment,²¹⁹ and NPS use among sex workers continues post-Act in Northern Ireland.²²⁰

The Welsh study indicated that the availability of Class A drugs was a major motivation for drug use²²¹ and that the biggest obstacle to cessation was constant contact with drug dealers.²²² As the PSA has shifted NPS supply to dealers, this might suggest that displacement to traditional drugs and little reduction in overall substance use has occurred post-Act. However, evidence to confirm this is extremely scarce: the EMCDDA notes ‘a great deal of the research and responses available in relation to women who use drugs is oriented towards opioid users [which necessitates] further research on ... NPS and polydrug use’.²²³

1(3)(g) Summary

While overall NPS use has decreased post-PSA, this has not occurred among the vulnerable/problem-using demographics the Act was intended to target. This is because

²¹⁶ Public Bill Committee, ‘Psychoactive Substances Bill: Written Evidence’ (2015) 2-3
<<https://publications.parliament.uk/pa/cm201516/cmpublic/psychoactive/memo/psychoconsolidated.pdf>>

²¹⁷ Sharon Arpa, ‘Women Who Use Drugs: Issues, Needs, Responses, Challenges and Implications for Policy and Practice’ (2017) 8
<http://www.emcdda.europa.eu/system/files/attachments/6235/EuropeanResponsesGuide2017_BackgroundPaper-Women-who-use-drugs.pdf>.

²¹⁸ Tracey Sagar, Debbie Jones and Katrien Symons, ‘Sex Work, Drug and Alcohol Use: Bringing the Voices of Sex Workers into the Policy and Service Development Framework in Wales’ (2015) 73
<<https://gov.wales/sites/default/files/publications/2019-02/sex-work-drug-and-alcohol-use-bringing-the-voices-of-sex-workers-into-the-policy-and-service-development-framework-in-wales.pdf>>.

²¹⁹ Rob Ralphs, Paul Gray and Anna Norton, ‘New Psychoactive Substance Use in Manchester: Prevalence, Nature, Challenges and Responses’ (2017) 34 <<https://e-space.mmu.ac.uk/618462/1/New%20psychoactive%20substance%20use%20in%20Manchester.pdf>>.

²²⁰ Higgins (n 167) 34, 88.

²²¹ Sagar (n 218) 101.

²²² *ibid* 87.

²²³ Arpa (n 217) 14.

motivations for using NPS are often not susceptible to changes in the legal status of NPS, so the Act was unlikely to be successful in reducing use among these demographics from the outset.

1(4) Reduce Harms

The HOR discussed potency, hospital admissions, numbers in treatment, deaths, and NPS-related violence and crime, concluding that the PSA's goal of reducing NPS-associated harms has 'been achieved in the main'.²²⁴ This thesis uses the more comprehensive drug harm criteria contained in the often-cited work of David Nutt *et al* as headings.²²⁵

1(4)(a) Mortality

Whereas the HOR contains customised data from statistics agencies,²²⁶ this analysis of NPS-related deaths is limited by the reliance on data from annual statistics publications, which are based on when deaths are registered (rather than when they occurred) and also include NPS controlled by the MDA for numerous years.²²⁷ However, the latest statistics have been published 3 years after the introduction of the PSA, so it is unlikely that the gap between the date of death and registration is significant enough to obfuscate analysis. Furthermore, the wider definition of NPS used in this thesis than in the HOR (for reasons given in the introduction) offsets the need to distinguish those NPS that have been moved from the PSA to the MDA.

In Scotland, deaths in which 'NPS were implicated in or potentially contributed to the death' have soared every year post-PSA, from 74 in 2015; to 286 in 2016; to 337 in 2017; to 575 in 2018.²²⁸ In England and Wales, NPS-related deaths halved in the year post-PSA, but have since returned to pre-PSA levels.²²⁹ While numerous years of data are required to reach firm conclusions, this casts doubt on the preliminary evidence suggesting the PSA might have reduced NPS-related deaths in England and Wales, and the advancement in the HOR that the PSA has reduced overall harms.²³⁰ Considering

²²⁴ HOR (n 2) 52-69.

²²⁵ David J Nutt, Leslie A King and Lawrence D Philips, 'Drug Harms in the UK: A Multicriteria Decision Analysis' (2010) 376(9752) *Lancet* 1558.

²²⁶ HOR (n 2) 64.

²²⁷ *ibid* 65.

²²⁸ Almost all these deaths involved etizolam/benzodiazepine-type NPS and included other substances: NRS, *Drug-Related Deaths in Scotland in 2018* (2019) 76-7 <<https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/deaths/drug-related-deaths-in-scotland>>.

²²⁹ ONS, 'Deaths Related to Drug Poisoning in England and Wales: 2018 Registrations' (2019) 10 <<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsrelatedtodrugpoisoninginenglandandwales/2018registrations/pdf>>.

²³⁰ HOR (n 2) 65, 69.

the reduced NPS use in the general population,²³¹ this increased (in Scotland) and unchanged (in England and Wales) mortality post-PSA indicates increased harm per user.

1(4)(b)(i) Damage: Acute Toxicity

Legal definitions of NPS focus on chemical structure, degrees of psychoactivity and their relationship with existing legal frameworks; treatment providers group drugs based on their perceived pharmacological effect. This creates difficulties in distinguishing NPS from traditional drugs, so hospital statistics must be treated carefully when analysing NPS-related toxicity, e.g., SCRAAs are grouped together with herbal cannabis despite the fact that the former produce significantly different effects and carry exceptionally higher medical risks than the latter.²³²

A note in the Scottish figures states it is 'highly likely' the PSA led to a reduction in general acute toxicity admissions in the 'other stimulant' (i.e. not cocaine) category.²³³ However, 'other stimulants' was the main category among under-15s' admissions, followed by 'cannabinoids' and 'multiple/other drugs'.²³⁴ Admissions relating to these (largely NPS) categories are broadly similar to pre-Act levels among under-15s.²³⁵ Also, there had been a general downward trend of admissions relating to 'other stimulants' since 2014-15 (2 years before the PSA was enacted),²³⁶ and the HOR also noted evidence that showed NPS-related concerns had been decreasing well before the PSA's introduction.²³⁷ Further studies have claimed the Act had little effect on stimulant NPS admissions in Scottish hospitals, though pre-PSA enforcement activities including TCDOs did.²³⁸ Therefore, the PSA appears not to have reduced NPS-related acute toxicity in Scottish children, and the suggestion it has reduced toxicity admissions relating to 'other stimulants' is questionable. There has been a sharp increase in Scottish toxicity admissions in the 'sedative/hypnotic' category (which includes etizolam and other benzodiazepine-type NPS) since the PSA's introduction following numerous

²³¹ 1(3)(a).

²³² Olaf H Drummer, Dimitri Gerostamoulos and Noel W Woodford, 'Cannabis as a Cause of Death: A Review' [2019] *Forensic Sci Int* 298.

²³³ ISD Scotland, 'Drug-Related Hospital Statistics: Scotland 2017/18' (2019) 9 (DRHS 2017/18) <<https://www.isdscotland.org/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2019-05-28/2019-05-28-DRHS-Report.pdf>>.

²³⁴ *ibid* 13.

²³⁵ ISD Scotland 'Drug-Related Hospital Statistics: Scotland 2015/16' (2016) 5 <<https://www.isdscotland.org/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2016-09-27/2016-09-27-DrugHospitalStatistics-Report.pdf>>.

²³⁶ DRHS 2017/18 (n 233) 8.

²³⁷ HOR (n 2) 59.

²³⁸ Janice Pettie and others, 'New Drug Controls and Reduced Hospital Presentations due to Novel Psychoactive Substances in Edinburgh' (2018) 84(10) *Br J Clin Pharmacol* 2303.

years of relative stability, and sedatives/hypnotics were also the largest percentage classified as overdoses.²³⁹

The HOR noted a post-Act fall in English and Welsh drug poisoning admissions, but stated that '[due to the limitations of hospital statistics] it is not possible to identify with any certainty the extent to which these reductions in admissions were driven by the introduction of the PSA'.²⁴⁰ However overall drug toxicity admissions numbers have returned to the record-high levels seen in 2015/16, driven largely by 'other opioids', 'cocaine' and 'other/unspecified narcotics', potentially suggesting displacement to traditional drugs and/or different NPS.²⁴¹ Poisoning admissions among under-16s are currently at 2015/16 levels.²⁴² Welsh drug-related admissions have increased 17.2% since 2014/15 and those for cannabinoids (apparently partly due to SCRA use among the homeless and imprisoned) are now at 'historically high levels'.²⁴³

The HOR suggested NPS-related ambulance call-outs have decreased post-PSA;²⁴⁴ however, West Midlands and South Western Ambulance Services statistics since show a marked increase in call-outs for SCRA-related toxicity.²⁴⁵

1(4)(b)(ii) Damage: Mental Functioning

Drug-related psychiatric hospital stays in Scotland are currently above pre-Act levels for all drugs except opioids, though there have been reductions since 2016/17.²⁴⁶ The equivalent English statistics indicate a post-PSA reduction, mainly driven by opioids and cannabinoids.²⁴⁷ However, those for 'multiple drug use and other psychoactive substances' are around 2015/16 levels.²⁴⁸ Causal links between admissions reductions and the PSA cannot be established, though the mixed results do question the PSA's efficacy in reducing NPS-related mental/psychological harms.

²³⁹ DRHS 2017/18 (n 233) 8.

²⁴⁰ HOR (n 2) 54.

²⁴¹ NHS, 'Drug Related Hospital Admissions: Data Tables' (2019) Tables 4.1, 4.2 <<https://digital.nhs.uk/data-and-information/publications/statistical/statistics-on-drug-misuse/2019/drug-admissions-data-tables>>.

²⁴² *ibid* Table 4.1.

²⁴³ Drew Turner and Josie Smith, 'Data Mining Wales: The Annual Profile for Substance Misuse 2018-19' (2019) 22-4 <<http://www.wales.nhs.uk/sitesplus/888/opendoc/351328>>.

²⁴⁴ HOR (n 2) 59.

²⁴⁵ Sarah Marsh, 'Huge Rise in Ambulance Callouts to Deal with Spice Users' *Guardian* (20 September 2018) <<https://www.theguardian.com/politics/2018/sep/20/huge-rise-in-ambulance-callouts-to-deal-with-spice-users>>.

²⁴⁶ DRHS 2017/18 (n 233) 17.

²⁴⁷ NHS (n 241) Table 2.2.

²⁴⁸ *ibid*.

1(4)(b)(iii) Damage: Numbers in Treatment

The HOR noted a '29% fall in [over-18s in England] presenting to treatment citing NPS' post-Act.²⁴⁹ The latest statistics show an 11% increase from the previous year, but numbers are still well below pre-Act levels.²⁵⁰ The number of under-18s presenting for NPS treatment in England was at a record low in 2018/19.²⁵¹ These results are encouraging, but a 2016 Royal Society for Public Health survey indicated that the increased stigma resulting from prohibitive drug laws could deter up to one in four young people from seeking treatment,²⁵² so the actual reduction in harms may not be so pronounced. As discussed, treatment numbers among people with housing issues have increased dramatically since the PSA.²⁵³ In prisons/secure settings, the overall number of people in treatment for NPS has 'continued to rise' from 6% in 2015/16 to 11% in 2018/19, but the number of under-18s in treatment for NPS fell from 8% to 1% over this period.²⁵⁴ Scottish,²⁵⁵ Welsh²⁵⁶ and Northern Irish²⁵⁷ NPS-specific treatment numbers are no longer available as NPS are now grouped together with substances long-controlled by the MDA, though the HOR noted a rise in Welsh treatment numbers based on internal NHS data.²⁵⁸

²⁴⁹ HOR (n 2) 60.

²⁵⁰ *ibid* cf PHE, 'Adult Substance Misuse Treatment Statistics 2018-19: Report' (2019) 1.2 <<https://www.gov.uk/government/publications/substance-misuse-treatment-for-adults-statistics-2018-to-2019/adult-substance-misuse-treatment-statistics-2018-to-2019-report>>.

²⁵¹ PHE, 'Young People's Substance Misuse Treatment Statistics 2018-19: Report' (2019) 10.2 <<https://www.gov.uk/government/publications/substance-misuse-treatment-for-young-people-statistics-2018-to-2019/young-peoples-substance-misuse-treatment-statistics-2018-to-2019-report>>.

²⁵² RSPH, 'Taking a New Line on Drugs' (2016) 33 <https://www.drugsandalcohol.ie/25677/1/RSPH-Taking_a_new_line_of_drugs.pdf>.

²⁵³ 1(3)(c).

²⁵⁴ PHE, 'Alcohol and Drug Treatment in Secure Settings 2018-19: Report' (2020) 11.3, 11.7 <<https://www.gov.uk/government/publications/substance-misuse-treatment-in-secure-settings-2018-to-2019/alcohol-and-drug-treatment-in-secure-settings-2018-to-2019-report#young-people-in-treatment-overview>>.

²⁵⁵ ISD Scotland, 'Scottish Drug Misuse Database 2017/18: Data Tables' (2019) Table 3.1 <<https://www.isdscotland.org/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2019-10-08/2019-10-08-SDMD-Tables.xlsx>>.

²⁵⁶ NWIS, 'Treatment Data: Substance Misuse in Wales 2018-19' (2019) 71 <<https://gov.wales/sites/default/files/publications/2019-10/treatment-data-substance-misuse-in-wales-2018-19.pdf>>.

²⁵⁷ Department of Health, 'Census of Drug and Alcohol Treatment Services in Northern Ireland: 30 April 2019' (2019) <<https://www.health-ni.gov.uk/sites/default/files/publications/health/drug-alcohol-census-2019.html>>.

²⁵⁸ HOR (n 2) 63.

1(4)(b)(iv) Damage: Injecting and Blood-Borne Viruses

People who inject drugs (PWID) are at heightened risk of harms including skin infections, cardiovascular disease, overdose and blood-borne viruses.²⁵⁹ Injecting NPS specifically carries further risks, including higher-frequency injecting²⁶⁰ (leading to more soft tissue infections)²⁶¹ and equipment sharing.²⁶²

A study analysed surveys from almost 13,000 Scottish PWID, finding a pre-PSA upward trend of NPS injecting in Scotland, from 0.2% in 2008-09 to 11% in 2015-16.²⁶³ This was driven largely by displacement from heroin to ethylphenidate injection, and was associated with an increase in Hepatitis C (HCV) prevalence.²⁶⁴ Scottish NPS injecting rates post-PSA are below 1%; chronic HCV prevalence has reduced,²⁶⁵ and NPS injection-related endocarditis infections in Edinburgh have also decreased.²⁶⁶ However, the PSA's role in these changes is unclear, as evidence suggests that ethylphenidate toxicity admissions at Edinburgh Royal Infirmary fell by 96.7% following the ethylphenidate TCDO,²⁶⁷ and because HCV testing was at record high levels in 2017/18.²⁶⁸

Scottish cocaine injecting rates rose sharply over the same period NPS injecting all but ceased (post-PSA) following years of relative stability despite small year-on-year increases.²⁶⁹ Additionally, there is evidence of post-PSA displacement from NPS to cocaine in Scotland²⁷⁰ – and other research has

²⁵⁹ Semel/UCLA, 'Potential Complications of IV Drug Use' <https://www.semel.ucla.edu/dual-diagnosis-program/News_and_Resources/Potential_Complications_Of_IV_Drug_Use>.

²⁶⁰ Anna Tarján and others, 'HCV Prevalence and Risk Behaviours Among Injectors of New Psychoactive Substances in a Risk Environment in Hungary: An Expanding Public Health Burden' (2017) 41 Int J Drug Policy 1.

²⁶¹ Sarah Larney and others, 'A Systematic Review of Injecting-Related Injury and Disease Among People Who Inject Drugs' (2017) 171 Drug Alcohol Depend 39.

²⁶² PHE, 'Shooting Up: Infections Among People Who Inject Drugs in the UK, 2017: An Update, November 2018' (2018) 34

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756502/Shooting_up_2018.pdf>.

²⁶³ Andrew McAuley and others, 'Emergence of Novel Psychoactive Substance Injecting Associated with Rapid Rise in the Population Prevalence of Hepatitis C Virus' (2019) 66 Int J Drug Policy 30 (NPS HCV).

²⁶⁴ *ibid.*

²⁶⁵ Andrew McAuley and others, 'Needle Exchange Surveillance Initiative: 2008-09 to 2017-18' (2019) 4, 11 <<https://www.hps.scot.nhs.uk/web-resources-container/needle-exchange-surveillance-initiative-nesi-2008-09-to-2017-18/>>.

²⁶⁶ SS Joshi and others, 'Staphylococcus Aureus Endocarditis Associated with Injecting New Psychoactive Substances' (2018) 48 J R Coll Physicians Edinb 304, 309.

²⁶⁷ Pettie (n 238).

²⁶⁸ McAuley, 'NESI' (n 265) 8.

²⁶⁹ *ibid* 4.

²⁷⁰ Crew, 'NPS at Crew: Annual Report 2016-2017' (2017) 19-20 <<https://www.crew.scot/wp-content/uploads/2019/08/NPS-at-Crew-Annual-Report-2016-2017.pdf>>.

speculated that the PSA might have encouraged displacement from NPS to cocaine in the UK²⁷¹ – suggesting the PSA might have contributed to the increase in cocaine injecting rates. In contrast to the reduction in HCV prevalence, there has been ‘a rapid rise in prevalence of HIV among [Glasgow’s] PWID population associated with homelessness, incarceration and a major shift to injection of cocaine’.²⁷²

Causally determining the PSA’s effect on reducing harm to PWID is complicated by ‘the increasing availability of higher purity cocaine in the UK’;²⁷³ and the fact that half of all NPS-using PWID were based in Edinburgh/Lothian,²⁷⁴ whereas the increase in cocaine injecting was observed in Glasgow. Moreover, displacement from NPS to traditional drugs might actually reduce harms, as treatment for traditional drugs is better understood than for NPS-related disorders.²⁷⁵ However, the benefits of reductions in NPS injecting and HCV prevalence might be offset by the potentially PSA-induced displacement from NPS to cocaine injecting and rise in HIV prevalence.

In England, Wales and Northern Ireland there appears to be a downward trend in NPS injecting in recent years, though this trend began years before the introduction of the PSA.²⁷⁶

Chemsex is strongly associated with risky behaviours, including injecting and BBV transmission.²⁷⁷ As mentioned,²⁷⁸ prohibitive drug legislation (including the PSA) appears to be ineffective at ameliorating these harms.

1(4)(c) Dependence

Early NPS/drug use is associated with future chronic dependence²⁷⁹ so the high rates of use and acute toxicity admissions among children may predict extensive future harms. Compulsion was a

²⁷¹ Al-Banaa and others, ‘Effect of the UK Psychoactive Substances Act 2016 on Episodes of Toxicity Related to New Psychoactive Substances as Reported to the National Poisons Information Service. A Time Series Analysis’ (2020) 77 Int J Drug Policy 102672.

²⁷² Andrew McAuley and others, ‘Re-Emergence of HIV Related to Injecting Drug Use Despite a Comprehensive Harm Reduction Environment: A Cross-Sectional Analysis’ (2019) 6(5) Lancet HIV e315.

²⁷³ Al-Banaa (n 271).

²⁷⁴ McAuley, ‘NPS HCV’ (n 263).

²⁷⁵ Dima Abdulrahim and Owen Bowden-Jones, ‘Guidance on the Clinical Management of Acute and Chronic Harms of Club Drugs and Novel Psychoactive Substances’ (2015) 7, 121 <<http://neptune-clinical-guidance.co.uk/wp-content/uploads/2015/03/NEPTUNE-Guidance-March-2015.pdf>>.

²⁷⁶ PHE, ‘Shooting Up’ (n 262) 34.

²⁷⁷ Adam Bourne and others, ‘“Chemsex” and Harm Reduction Need Among Gay Men in South London’ (2015) 26(12) Int J Drug Policy 1171, 1172-3.

²⁷⁸ 1(3)(e).

²⁷⁹ Higgins (n 167) 31.

key factor among pre-Act Scottish NPS users,²⁸⁰ and the rise in Scottish etizolam/benzodiazepine-type NPS-related mortality signals increasing dependence-related harms due to the high addiction potential of these substances.²⁸¹ NPS dependence-related harms among the homeless have likely been exacerbated by post-PSA increased use among this group, as there is a 'well documented' link between homelessness and drug dependence.²⁸² PSA-induced reductions in NPS prevalence among the general population may not have reduced NPS dependence-related harms as approximately 90% of UK drug users are not long duration/regular users.²⁸³ Furthermore, the PSA-induced displacement from NPS to highly addictive traditional drugs like cocaine²⁸⁴ may also predict increased dependence-related harms.

1(4)(d) Loss of Tangibles/Relationships

Whether NPS use is a symptom or cause (or both) of homelessness is unclear (though evidence of people losing tenancies due to NPS use exists),²⁸⁵ but the preceding discussion demonstrates the PSA has been ineffective in reducing harms among homeless people. Loss of educational achievements resulting from NPS use cannot be quantified, but as post-PSA use among children remains high and disengagement from education is common among young problem NPS users,²⁸⁶ this harm has certainly manifested to some extent. The PSA's lack of a simple possession offence precludes users losing clean criminal records, but those convicted of custodial possession may face increased difficulties securing work on release.

Scottish NPS users commonly reported negative effects on relationships and financial problems (including benefits sanctions) due to compulsive NPS use and associated chaotic lifestyles.²⁸⁷ However, in the absence of further studies the PSA's effect on these harms is unclear.

²⁸⁰ MacLeod (n 150) 38-9.

²⁸¹ Francesco Busardò and others, 'Is Etizolam a Safe Medication? Effects on Psychomotor Performance at Therapeutic Dosages of a Newly Abused Psychoactive Substance' (2019) 301 *Forensic Sci Int* 137.

²⁸² Rebecca Gomez, Sanna J Thompson and Amanda N Barczyk, 'Factors Associated with Substance Use Among Homeless Young Adults' (2010) 31(1) *Subst Abus* 24.

²⁸³ BMA (n 163).

²⁸⁴ Eric J Nestler, 'The Neurobiology of Cocaine Addiction' (2005) 3(1) *Sci Pract Perspect* 4.

²⁸⁵ MacLeod (n 150) viii.

²⁸⁶ 1(3)(b); Higgins (n 167) 32.

²⁸⁷ MacLeod (n 150) vii-viii.

1(4)(e) Crime

The PSA has led to headshops being replaced by an expansive black market whereby NPS are smuggled along ‘county lines’ by SOC organisations, resulting in intimidation, serious physical violence, use of firearms, ‘cuckooing’ (where drug dealers take over vulnerable victims’ homes to operate from), human trafficking and child sexual exploitation.²⁸⁸ Seizures of NPS by number, doses and weight are increasing,²⁸⁹ and large amounts of benzodiazepine-type NPS continue to be found despite enforcement efforts to shut down clandestine laboratories producing them on industrial scales.²⁹⁰ Furthermore, the Act’s failure to stem NPS use in prisons has led to continuing ‘debt, bullying and violence’.²⁹¹

1(4)(f) Economic and International Harms

Based on the government’s 2015 economic assessment,²⁹² a back-of-envelope estimate of the PSA’s overall economic cost since enactment (to the publication of the most recent relevant statistics) is £827.6 million. This is over 2.7 times higher than the £297.8m which the 2015 economic assessment indicated the cost would be to the publication of the most recent relevant statistics.²⁹³

The PSA has potentially contributed to harms internationally by incentivising NPS markets in less developed countries, as punitive UK controls make NPS production in less-regulated countries more attractive.²⁹⁴ Additionally, the PSA (as part of international efforts to control NPS) has likely increased the potency of NPS globally,²⁹⁵ due to the ‘iron law of prohibition’.²⁹⁶

²⁸⁸ NCA 2018 (n 62) 3-5.

²⁸⁹ Home Office, *Seizures 2019* (n 56) 23-4.

²⁹⁰ *McGaw (Scott) v HM Advocate* [2019] HCJAC 78; Jack Aitchison, ‘Man Charged in “Drugs Bust” After 250,000 “Blue Plague” Fake Valium Pills Found in Pollok’ *Glasgow Times* (23 December 2019) <<https://www.glasgowtimes.co.uk/news/18120499.man-charged-drugs-bust-250-000-blue-plague-fake-valium-pills-found-pollok/>>.

²⁹¹ HMIP, *Annual Report* (n 136) 8.

²⁹² Home Office, ‘Impact Assessment: Creation of a Blanket Ban on NPS in the UK’ (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/433151/NPSGBImpactAssessment.pdf>.

²⁹³ Appendix 1.4.

²⁹⁴ 1(1)(d).

²⁹⁵ HOR (n 2) 6.

²⁹⁶ 1(2)(b).

1(4)(g) Summary

NPS-related fatalities continue to rise in Scotland post-PSA, and are at pre-Act levels in England and Wales. Noting the limitations of hospital statistics, the PSA appears not to have reduced NPS- and other drug-related acute toxicity and psychiatric harms, especially among vulnerable demographics. Although overall numbers in treatment have decreased, treatment numbers among prisoners and the homeless continue to rise. The post-PSA reduction in NPS-using PWID (and associated HCV prevalence) may be offset by PSA-induced displacement to injecting traditional drugs and a rise in HIV prevalence; and there is evidence to suggest that dependence-related harms continue, albeit masked by data limitations. The criminalisation of supplying NPS has created an expansive black market, allowing SOC organisations to, *inter alia*, violently exploit people through county lines operations. The economic cost of the Act is apparently significantly higher than was expected, and the PSA may well have contributed to harms internationally. Therefore, it is submitted that the PSA has failed in its goal to reduce NPS-related harms.

Informed by the preceding discussion, this chapter analyses the PSA from a primarily theoretical standpoint. It broadly follows the European Commission's guidelines on legislative evaluation by considering the PSA's efficiency, i.e., whether the Act is cost-effective and proportionate.¹ To avoid criticisms that the guidelines assess legislative efficiency only in socio-economic – and not jurisprudential – terms,² this chapter deviates from the EC guidelines by defining 'cost' in the broad, non-economic sense, as 'that which is ... lost in order to obtain something'.³

Part one of this chapter analyses the Act's efficiency by looking 'horizontally' to the principles which underpin other criminal laws,⁴ namely harmfulness, wrongfulness and fair labelling.⁵ Dissonance with these normative principles of criminalisation is a 'cost' in this efficiency evaluation. Part two considers the 'diagonal' crossover between the preceding 'horizontal' analysis and the following 'vertical' analysis: specifically, it considers the PSA's adherence to the rule of law-based requirements of maximum legal certainty and proportionate sentencing.⁶ Part three employs Dubber's paradigmatic 'police' and 'law' modes of governance to critique the Act's 'vertical' efficiency, i.e., whether the mode of governance inherent in the PSA is a cost-effective, proportionate, and legitimate exercise of state power.⁷ After concluding the PSA seeks the benefits of both of Dubber's paradigmatic modes yet achieves those of neither, the insights gained throughout this chapter are blended with Farmer's 'jurisprudence of security'⁸ to identify a potential alternative – and intrinsically more efficient – way of controlling NPS.

¹ European Commission (n 11, Introduction) 61.

² Dirk H van der Meulen, 'The Use of Impact Assessments and the Quality of Legislation' (2013) 1(2) *Theory Pract Legis* 305, 313.

³ 'Cost' (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/cost>>.

⁴ The terms 'horizontal' and 'vertical' analysis are derived from: Markus D Dubber, 'Preventative Justice: The Quest for Principle' in Andrew Ashworth, Lucia Zedner and Patrick Tomlin (eds), *Prevention and the Limits of the Criminal Law* (2013).

⁵ Jeremy Horder, *Ashworth's Principles of Criminal Law* (8th edn, 2016) ch 4.

⁶ *ibid* 85; Malcolm Thorburn, 'Proportionate Sentencing and the Rule of Law' in Lucia Zedner and Julian V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012).

⁷ Dubber, 'Preventative Justice' (n 4); Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (2005).

⁸ Lindsay Farmer, 'The Jurisprudence of Security: The Police Power and the Criminal Law' in Markus Dirk Dubber and Mariana Valverde (eds), *The New Police Science: The Police Power in Domestic and International Governance* (2006).

2(1) Horizontal Efficiency

The approach of critiquing criminal laws ‘horizontally’ against the internal standards of a benchmark, ideal criminal law has been variously criticised,⁹ including for being a less ‘fruitful’ means of analysis than the ‘vertical’ analysis employed in the third part of this chapter.¹⁰ However, the PSA’s deviation from these normative criminalisation principles deserves consideration, as this can be regarded as a ‘cost’ in this efficiency evaluation, and is relevant to the latter parts of this chapter.

2(1)(a) Harm

Harm prevention is among the most fundamental normative tenets of criminalisation,¹¹ and is the first subject of this horizontal efficiency evaluation. The first two parts of this analysis are a ‘harm reduced’ versus ‘harm caused’ cost-effectiveness evaluation, discussing individual-level harms with reference to Feinberg’s harm principle; and collective-level harms with reference to Farmer’s conception of ‘securing civil order’. The final part evaluates the theoretical efficiency of the Act’s offences against, *inter alia*, Ashworth and Zedner’s principles of harm-preventing offences. The PSA’s overall coherence or dissonance with the theoretical bases discussed throughout this section will determine the first aspect of the Act’s horizontal efficiency.

2(1)(a)(i) Harm: Individuals

The harm principle has multiple discrete formulations,¹² but Feinberg’s classic definition is that:

[i]t is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor and there is probably no other means that is equally effective at no greater cost to other values.¹³

⁹ Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016) 302-3; Arlie Loughnan, *Self, Others and the State: Relations of Criminal Responsibility* (2020) 53.

¹⁰ Dubber, ‘Preventative Justice’ (n 4) 68.

¹¹ Horder, *Ashworth’s Principles* (n 5) 22, 54, 57-8.

¹² Victor Tadros, ‘Harm, Sovereignty and Prohibition’ (2011) 17 LEG 35.

¹³ Joel Feinberg, *Harm to Others* (1984) 26.

Feinberg's harm principle requires more than the pre/post-PSA analysis of NPS-related harms expounded in the previous chapter: 'probably be effective' implies a baseline understanding of (in)effective strategies; 'no other [equally effective] means' requires comprehensively analysing available evidence and seriously considering alternatives; and his reference to 'other values' necessitates balanced and proportionate criminalisation with regard to interests including welfare and the 'advancement of ... goals like health'.¹⁴ Whether the PSA satisfies these requirements and efficiently protects individuals from NPS-related harms can be evaluated with Bacchi's 'what's the problem represented to be?' approach.¹⁵

The NPS problem was represented as being high NPS use 'after years of stable and declining drug use', (i.e. NPS use was represented as a problem in itself); and an exploitative headshop industry which circumvented the law and sold unknown drugs, resulting in crime, disorder, and harms including fatalities.¹⁶ The assumptions underlying this representation were fostered by media sensationalism,¹⁷ and the established legal approach which associates drugs with crime and characterises users in a 'vulnerability/transgression nexus' of being simultaneously (and conflictingly) non-autonomous and criminally deviant.¹⁸

Left unproblematic in this representation, however, was prohibition itself: the game of cat and mouse was regarded by policymakers as a product of legislative form, not substance,¹⁹ notwithstanding the decades-long pedigree of newer and more potent recreational drugs appearing in response to prohibitive laws.²⁰ Similarly dismissed were the potential benefits of headshops,²¹ despite their employment of quasi-regulatory harm-reduction frameworks which, e.g., often refused underage sales; and there being no conclusive evidence of criminality driving the pre-PSA NPS market.²² Users' inherent vulnerability was accepted as fact with little scrutiny in Parliamentary debates and Government reports,²³ overlooking the fact that the vast majority of drug users are not problem users; and that curiosity, pleasure, 'psychonautic' research, improving sex, the quality and potency of NPS, and non-detection in standard drug tests were all 'positive'

¹⁴ *ibid* 57.

¹⁵ Carol Bacchi, 'Introducing the "What's the Problem Represented to Be?" Approach' in Angelique Blestas and Chris Beasley (eds), *Engaging with Carol Bacchi: Strategic Interventions and Exchanges* (2012).

¹⁶ Explanatory Notes to the PSA, paras 8-13.

¹⁷ 1(1)(a).

¹⁸ Kate Brown and Emma Wincup, 'Producing the Vulnerable Subject in English Drug Policy' (2020) 80 *Int J Drug Policy* 102525.

¹⁹ Explanatory Notes to the PSA, paras 8, 14, 19, 22; Home Office, 'News Story' (n 73, ch 1).

²⁰ 1(2)(a).

²¹ Despite the concerns of various legislators, the goal of removing headshops has been pursued since at least 2015: HL Deb 9 June 2015, vol 762, cols 735, 745, 760, 762, 769; Home Office, 'Guidance for Local Authorities on Taking Action Against Headshops Selling New Psychoactive Substances' (2015) <<https://www.gov.uk/government/publications/action-against-head-shops>>.

²² 1(1)(a).

²³ HL Deb 9 June 2015, vol 762, col 763; Brown and Wincup (n 18).

and autonomous motivations for use.²⁴ Expert advice on the framing of the Act and the substances it prohibits was (and is still) disregarded in favour of pursuing a widened prohibitive policy,²⁵ and Duke argues that ‘NPS have been conveniently scapegoated for more fundamental and systemic problems within the prison system [including budget cuts, overcrowding, and lack of purposeful activities]’.²⁶

This representation of the problem effected the PSA, which has achieved a reduction in NPS use. However, this reduction was arguably mainly driven by non-problem users, while overall NPS-related fatalities have increased and harms among vulnerable populations including the homeless and incarcerated have been exacerbated.²⁷ The custodial possession offence can further negatively affect prisoners’ prospects on release,²⁸ and the Act has perpetuated and extended the MDA’s disproportionate police enforcement tactics and sentencing practices against minority groups.²⁹ Additionally, vulnerable individuals are now threatened by SOC gangs through ‘cuckooing’ and the use of children in county lines NPS-trafficking operations.³⁰

In a nuance of (mis)interpreting the NPS problem, the PSA shifted the balance of the vulnerability/transgression nexus apparent in previous UK drug laws from transgression-leaning to vulnerability-leaning. The orthodox criminal justice approach to drug users provides only limited legislative scope for the provision of treatment.³¹ However, by rejecting the logic of criminal blameworthiness otherwise recognised by the PSA’s custodial possession offence, the focus on all NPS users’ perceived vulnerability resulted in the absence of a PSA simple possession offence. While consequentially positive – as possession offences often exacerbate harms for end users³² – this belies an inaccurate and enduringly negative deontological position. Users are not regarded within drug policy as autonomous agents,³³ but remain subject to the (recalibrated)

²⁴ 1(3)(a)

²⁵ Expert Panel (n 6, ch 1) 35; Release and Transform, ‘Joint Submission to the Home Affairs Committee’s Short Inquiry into the Psychoactive Substances Bill’ (2015) <<https://www.release.org.uk/publications/release-transforms-submission-home-affairs-select-committees-short-inquiry-psychoactive>>; Letter from Les Iversen to Theresa May (23 October 2015) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470421/ACMD_definitions_advice_final-23-October-2015.pdf>; Letter from Sarah Newton to Professor Les Iversen (20 December 2016)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/579735/Minister-Sarah-Newton_to_Professor_Les_Iversen_-_TCDO_Recommendation_20_12_16.pdf>.

²⁶ Duke (n 134, ch 1).

²⁷ 1(3)(a)-(d); 1(4)(a), (c)-(d).

²⁸ 1(4)(d); 2(1)(c).

²⁹ 1(1)(c).

³⁰ 1(1)(d); 1(4)(e).

³¹ E.g., the Drugs Act 2005, s 9 provides that individuals in police custody who test positive for Class A drugs can be required to attend an initial assessment for treatment.

³² Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (2008) 151; *Drugs and Rights* (1992).

³³ Because accepting the rationality of the vast majority of users would require rejecting blanket prohibition.

vulnerability/transgression nexus, in which a focus on vulnerability within an overall prohibitive framework justifies perpetuating the criminal justice approach. As an illustration, the latest UK Drugs Strategy references vulnerability over 20 times and polemically alludes to the need for tough enforcement with regards to NPS throughout.³⁴ Similarly, in a recent Parliamentary exchange, a question about the failure of current drug policy to protect vulnerable users was answered with a statement that enforcement must be ‘pursued vigorously’.³⁵ This is a circularity: the PSA’s inability to protect the vulnerable from harm is sanctioning continuing, ineffective prohibition aimed at preventing harm to vulnerable people. Similar ‘epistemic bootstrapping’³⁶ justified the PSA’s creation: the MDA’s proscription of traditional drugs precipitated the emergence of NPS, and the ensuing game of cat and mouse itself legitimised more extensive prohibitive enforcement via a blanket ban.³⁷ Circularities can be resolved only with conclusion-distinct evidence, but many of the PSA-induced negative changes in the NPS market were readily foreseeable, and instead the PSA has crystallised its own justificatory harms.

Bacchi’s ‘what’s the problem represented to be?’ heuristic has shown that the conditions of Feinberg’s harm principle are not satisfied with regards to the PSA. Evidence regarding headshops and the framing of the Act was not comprehensively analysed and/or dismissed; the welfare of at-risk groups has been sacrificed for the ‘benefit’ of reduced NPS use among the general, non-problem NPS using population, for whom the ‘advancement of goals ... like health’ was arguably unnecessary; and in light of the historical experience of prohibitive drug policies, pursuing a blanket ban demonstrates a baseline *misunderstanding* of (in)effective strategies.

2(1)(a)(ii) Harm: Collective

The ‘vulnerability zeitgeist’³⁸ of recent drug policy extends to various collective interests which were threatened by NPS. A broad underlying rationale of the PSA was ‘securing civil order’, defined by Farmer as ‘the co-ordination of complex modern societies composed of a range of entities or legal persons that are responsible, in a range of different ways, for their own conduct, for the wellbeing of others, and for the maintenance of social institutions’.³⁹ This is evident in the PSA’s explicit goals

³⁴ HM Government, *2017 Drug Strategy* (2017) <<https://www.gov.uk/government/publications/drug-strategy-2017>>.

³⁵ HC Deb 6 February 2020, vol 671, col 480.

³⁶ Jonathan Vogel, ‘Epistemic Bootstrapping’ (2008) 105(9) *J Philos* 518.

³⁷ 1(2)(a)-(b).

³⁸ Brown and Wincup (n 18).

³⁹ Farmer, *Making the Modern Criminal Law* (n 9) 299.

of changing harmful public attitudes towards NPS (which were widely perceived as legal, and thus safe, highs) via its expressive function;⁴⁰ addressing the anti-social behaviour in public spaces associated with unregulated headshops;⁴¹ and (as an antidote to the MDA's impotence) reaffirming the credibility of prohibitive drug policy via a blanket ban.

The MDA does also have a preventative rationale⁴² and has been described as 'a proxy for the control of public order'.⁴³ However, the PSA differs from the MDA in the novel preventative ways it tries to promote collective interests, reflecting the 'preventative turn' in the criminal law whereby retributivist desert-based liability has become increasingly superseded by novel legislative techniques enabling punishment in the absence of harm.⁴⁴

A brief sketch of the Act's preventative nature is required. The PSA created various criminal offences: custodial possession of psychoactive substances; breach of PSA-derived civil preventative orders (CPO); and the market-related offences of producing, supplying, possessing with intent to supply, and importing/exporting psychoactive substances.⁴⁵ The custodial possession and CPO-related offences are evidently preventative, i.e., they do not require the causation of harm. However, the market offences are also preventative as neither actual nor even a risk of harm is required for conviction. While the MDA deems that specific drugs themselves are objectively and inherently harmful via the A/B/C harm-classification system, the PSA requires only that the substance 'affects the person's mental functioning or emotional state' by 'stimulating or depressing the person's central nervous system'.⁴⁶ The blanket ban's lack of harm distinctions and the inceptive direct use of CPOs within drug legislation are the novel preventative aspects of the PSA.

Ramsay argues that citizens have a right to feel secure from the threat of crime and anti-social behaviour as subjective insecurity undermines citizens' 'vulnerable autonomy' to participate in

⁴⁰ Explanatory Notes to the PSA, paras 7, 9, 22; HL Deb 20 January 2016, vol 604, col 1442; Expert Panel (n 6, ch 1) 5; Home Office, 'News Story' (n 73, ch 1).

⁴¹ Explanatory Notes to the PSA, para 12.

⁴² MDA, s 1(2).

⁴³ Police Foundation, *Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (2000) 7.

⁴⁴ Though it has been argued that 'claims that prevention constitutes a new departure or paradigm shift are, at best, only partially true since today's preventive endeavours have clear precursors in the eighteenth- and nineteenth-century origins of the criminal justice system': Andrew Ashworth and Lucia Zedner, *Preventative Justice* (2014) 49.

⁴⁵ PSA, ss 4-9, 26-7.

⁴⁶ *ibid* s 2.

individual and civic life.⁴⁷ This echoes the rationale (and militates in favour) of the PSA's preventative offences. However, Tadros argues that 'we should not make the insecure less secure [to] benefit those who are more secure',⁴⁸ and Cornford notes a right to subjective security should not entail reduced objective security.⁴⁹ Like the individual-level costs of the PSA, e.g., disproportionate police enforcement against minority groups and increased harms among homeless people, the Act is also inefficient at this collective level. The perceived threats to citizens' 'vulnerable autonomy' are out of sight and mind, with the (ostensibly beneficial) effect of removing unregulated and disorder-driving headshops from high streets. However, the security of the civil order is diminished in real terms with the rise of anonymous, unaccountable and violent SOC gangs.⁵⁰ This increase in NPS-related crime is paradoxically (and parasitically) essential to the security and credibility of the prohibitive legal order: reminiscent of the vulnerability-based prohibition circularity, NPS-related crime mobilises tougher prohibitive enforcement. Yet, the blanket ban's purpose of restoring credibility to UK drug policy is among the starkest failings of the Act, with the game of cat and mouse patently continuing.⁵¹

With regards to changing public attitudes, the evidence of PSA-induced displacement suggests the Act has (inefficiently) altered attitudes towards NPS at the cost of inversely affecting attitudes towards traditional drug use. Moreover, I have previously argued that the semiotics of the PSA's blanket ban of all NPS are intrinsically negative and inappropriate;⁵² and it has been convincingly argued that where harm distinctions are inaccurate or absent:

[t]he most dangerous message of all [is that] all drugs are equally dangerous. When young people know from their own experience that part of the message is either exaggerated or untrue, there is a serious risk they will discount all the rest.⁵³

Thus, the PSA has been inefficient in preventing harm to the collective interests it sought to protect via securing specific aspects of the civil order: 'disorder-driving' headshops have been removed, but replaced with SOC gangs; all NPS are legislatively controlled, but the emergence of NPS continues

⁴⁷ Peter Ramsay, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (2012) ch 5; Andrew Cornford, 'Book Review' (2014) 77(3) MLR 516.

⁴⁸ Victor Tadros, 'Crimes and Security' (2008) 71(6) MLR 940, 962.

⁴⁹ Cornford (n 47) 519.

⁵⁰ 1(4)(e).

⁵¹ 1(2)(b).

⁵² Nicholas Burgess, 'The Lost Symbol: A Semiotic Analysis of the Psychoactive Substances Act 2016' [2017] ASLR 109.

⁵³ Police Foundation (n 43) 4.

and the derivative threat to the credibility of prohibitive drug laws remains; and while a reduction in overall NPS use might reflect changed attitudes towards NPS, the means employed to do so are not necessarily appropriate, especially given the displacement from NPS to traditional drugs.

2(1)(a)(iii)(A) Harm: Principled Preventative Criminalisation: Market Offences

Ashworth and Zedner have developed harm-prevention offence categories and preventative offence-specific principles of criminalisation. The PSA conforms to a number of these descriptive categories to varying degrees. The PSA's market offences⁵⁴ are crimes of 'abstract endangerment' as they require no 'proof of actual or likely danger'; and they are 'prophylactic crimes', i.e., where harms 'arise only after further human interventions', as the end user of a psychoactive substances must themselves ingest the substance – or dealers must engage in some further harmful conduct such as exploitation or violence – before harm can occur.⁵⁵ They also share similarities with 'pre-inchoate' crimes, i.e., '[whereas] the properly inchoate offences of attempt, conspiracy and encouragement ... require proof of an objectively dangerous act ... pre-inchoate offences only require proof of a subjectively dangerous actor'⁵⁶ without any 'need for proof of an intent to cause harm'.⁵⁷ However, although the subjective dangerousness of offenders and substances is considered at the sentencing stage, and the offences require no intent to cause harm, the market offences are not strictly *pre-preparatory* in nature. Nonetheless, this overlap between descriptive categories enables application of a wider set of Ashworth and Zedner's principles.

Ashworth and Zedner's preventative offence principles which are relevant to the PSA⁵⁸ can broadly be grouped into those relating to the offender's responsibility, and those relating to the gravity/triviality of the criminalised conduct.

The PSA conforms to the first 'responsibility' principle, which states that people 'may be held criminally liable for acts [they have] done, on the basis of [potential future acts], only if [they have] declared an intent to do those further acts'.⁵⁹ The offence of possession with intent to supply explicitly requires intent; and the intent to distribute psychoactive substances in the offences of production and importation are so evidently implied as to also satisfy this principle.

⁵⁴ Text to n 45.

⁵⁵ Ashworth and Zedner (n 44) 102, 111.

⁵⁶ Ramsay (n 47) 176-7.

⁵⁷ Ashworth and Zedner (n 44) 3.

⁵⁸ The principle relating to crimes of 'concrete endangerment' is irrelevant to PSA offences.

⁵⁹ Ashworth and Zedner (n 44) 112.

The second 'responsibility' principle, which relates to the offences of supplying and exporting psychoactive substances, states that:

A person may fairly be held liable for the future acts of others only if [they have] sufficient normative involvement in those acts (e.g. [through encouragement, assistance or facilitation]), or where the acts of [others] were foreseeable, with respect to which the person has an obligation to prevent a harm that might be caused by the other.

Ashworth and Zedner suggest parent/child relationships exemplify such obligations to prevent harm.⁶⁰ These obligations might legitimately be extended to strangers, e.g., to prevent sales of alcohol to heavily drunk persons,⁶¹ but common to these obligations is an objective assessment of the other person's lack of autonomy. A blanket ban on sales or exports of psychoactive substances to lucid adults illegitimately disregards their autonomy and fails this test. While preventative criminalisation may be theoretically appropriate where addicted users are concerned, pragmatic considerations of proof militate against criminalisation, as the level of intrusive surveillance into individuals' medical state required to separate addicts from non-addicts would be impractical and ethically unacceptable.

More difficult is what constitutes 'normative involvement', as supplying/exporting NPS necessarily constitutes 'facilitation'.⁶² Simester and von Hirsch tentatively suggest that criminalising the supply of potentially harmful products depends on the value and legitimacy of the supplied thing's standard uses, as normative involvement implies 'a communicative element ... such that the assistance is not merely happenstance but something [the supplier] endorses and for which [the supplier] too is responsible'.⁶³ Suppliers of potentially harmful drugs evidently endorse the use of drugs for their psychoactive effects. However, 'the existence of standard legitimate uses should count, in the normal way, against criminalisation'.⁶⁴ It is submitted that the use of drugs for their psychoactive effects is a standard legitimate and valuable use which exists before the law. Fine wine, craft beer and malt whisky use is often seen as valuable and legitimate, e.g., during graduation

⁶⁰ *ibid.*

⁶¹ Or selling NPS to heavily intoxicated persons; however, some authors regard this as a controversial expansion of the harm principle: Jeremy Horder, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' in GR Sullivan and I Dennis (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (2012).

⁶² AP Simester and Andrew von Hirsch, 'Remote Harms and Non-Constitutive Crimes' (2009) 28(1) *Crim Justice Ethics* 89, 100.

⁶³ *ibid* 100-1.

⁶⁴ *ibid* 101.

celebrations; the use of poppers is similarly regarded by many;⁶⁵ and even the use of SCRA, perhaps the most harmful NPS, is probably regarded as valuable and legitimate to the vast (non-problem) majority⁶⁶ of users. However, alcohol use would be prohibited by the PSA if not for the arbitrary⁶⁷ exemption; recent judicial decisions indicate poppers are illegal under the Act;⁶⁸ and SCRA emergence was among the Act's main justifications.⁶⁹ I am not suggesting that NPS should be uncontrolled,⁷⁰ but the principle of requiring the state to establish proof beyond reasonable doubt before determining criminality ought to preclude the Act's blanket criminalisation of supplying any psychoactive substance,⁷¹ as drugs can be supplied for legitimate (and harmless) standard uses. Especially so, given the force of criminal sanctions, which (to state briefly) are 'a morally loaded sledgehammer'⁷² and 'the most powerful weapon in the state arsenal'.⁷³

The first principle relating to the gravity/triviality of the criminalised conduct states that 'the more remote the conduct criminalized is from the harm-to-be-prevented, and the less grave that harm, the weaker is the case for criminalization'.⁷⁴ The potential harms of some NPS are grave, but in stipulating no harm-to-be-prevented via a blanket ban of all substances which affect mental functioning or emotional state, 'the potential for abuse, for over-extension into the innocent lives of citizens increases dramatically',⁷⁵ making the offences arguably too broad to satisfy this principle. Similarly, Ashworth and Zedner posit that preventative offences should 'require the court to adjudicate on the particular wrong targeted, and not on some broader conduct'; and criminalisation of abstract endangerment must focus only 'on those instances where there is a significant risk of serious harm' with 'regulatory or administrative measures [applied] to deal with lesser risks of harm'.⁷⁶ As the market offences arbitrarily require courts to adjudicate on the substance's ability to affect mental functioning or emotional states instead of harm, are imprecise by design, and preclude the use of regulatory or administrative measures to deal with low-risk NPS, these

⁶⁵ 'Poppers Should Not Be Banned Until the Evidence is Reviewed' (*Stonewall*, 20 January 2016) <<https://www.stonewall.org.uk/cy/node/21898>>; HC Deb 20 January 2016, vol 604, col 1456.

⁶⁶ BMA (n 163, ch 1).

⁶⁷ Beatrice Brunhöber, 'Drug Offences' in Markus D Dubber and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014).

⁶⁸ *Rochester* [2018] EWCA Crim 1819; 2(2)(a)(ii).

⁶⁹ 1(2)(a)(ii).

⁷⁰ See discussion at 2(3)(d)-(e).

⁷¹ For discussions of this principle in the context of framing drug laws, see: Husak, *Overcriminalization* (n 32) 52; Brunhöber (n 67).

⁷² AP Simester and Andrew von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011) 10.

⁷³ Douglas Husak, 'Reservations about *Overcriminalization*' (2011) 14(1) *New Crim LR* 97, 102.

⁷⁴ Ashworth and Zedner (n 44) 112.

⁷⁵ AP Simester, 'Prophylactic Crimes' in Sullivan and Dennis (n 61).

⁷⁶ Ashworth and Zedner (n 44) 114, 116.

principles are also unsatisfied and indicate the PSA's use of preventative criminalisation is inefficient.

2(1)(a)(iii)(B) Harm: Principled Preventative Criminalisation: CPOs

The PSA provides for the creation of civil preventative orders (CPO). Kelly has recently elucidated why 'hybrid' CPOs (which the PSA CPOs are examples of) are objectionable in principle.⁷⁷ Firstly, they are coercive, i.e., they create restrictions backed by the threat of imprisonment, 'but their imposition is often left as a matter of judicial decision-making as opposed to risk assessment with appropriate safeguards'.⁷⁸ Secondly, they are punitive: they relate to already-illegal behaviours, i.e., other PSA offences; they operate similarly to accepted punishments, e.g., suspended sentences; and they have a punitive purpose of characterising/stigmatising the subject as requiring restraint from committing PSA offences.⁷⁹ However, 'their imposition is not preceded by the heightened criminal fair trial safeguards'.⁸⁰

Under these frameworks, courts can impose prohibition and/or premises orders – preventing persons carrying out non-criminal activities or requiring persons to take reasonable steps to prevent such activities in designated places – where the court is satisfied on the balance of probabilities that either the person is likely to commit, assist or encourage a PSA market offence, or has not complied with a preceding prohibition/premises notice.⁸¹ Orders must be 'necessary and proportionate' and can be imposed either after conviction for a PSA offence or following application by a listed authority, e.g., a chief officer of police.⁸² Orders have an indefinite duration (except where the person is under 18) and breach without a reasonable excuse is punishable by up to two years' imprisonment.⁸³

Although PSA CPOs have not been widely used, 'issues of principle remain important'.⁸⁴ Parallels can be drawn with the 'talisman' of CPOs, the anti-social behaviour order (ASBO).⁸⁵ Both are civil orders, breach of which is a criminal offence, and can be criticised for taking no account of the person's intention to engage in the overall harm-to-be-prevented by the order; for disallowing a

⁷⁷ Rory James Kelly, 'Behaviour Orders: Preventative and/or Punitive Measures?' (PhD thesis, University of Oxford 2019) 228.

⁷⁸ *ibid* 221, 229.

⁷⁹ *ibid* 222, 224.

⁸⁰ *ibid* 229.

⁸¹ PSA, ss 12-14, 17-18, 20, 22. Prohibition/premises notices can be issued by senior police officers and local authorities, but their breach is not an offence.

⁸² PSA, ss 13-14, 18-21.

⁸³ *ibid* ss 18-19, 26.

⁸⁴ Ashworth and Zedner (n 44) 83.

⁸⁵ *ibid* 78.

locus poenitentiae, i.e., an opportunity for the person to change their mind; and for creating personalised criminal laws.⁸⁶ However, whereas (at least in England) ASBO applications were decided on the criminal standard of proof,⁸⁷ PSA CPOs require only the civil standard, which is concerning as ‘the criminal standard of proof is one of the major safeguards against epistemic error [and] miscarriage of justice’.⁸⁸ Additionally, the reverse-burden ‘reasonable excuse’ defence per the Act’s wording is objectionable for being unclear, as judicial precedent provides no definite answer as to whether the burden is evidential or persuasive.⁸⁹ Furthermore, the PSA CPOs conflict with some of Ashworth and Zedner’s suggested CPO principles, including that CPOs ‘should only be instituted ... after conviction’ to ensure legitimacy via a concrete basis (i.e., past offending rather than ‘likelihood’) for preventing future acts; and that if CPOs are not created following a criminal conviction and on a lower standard of proof, they should be wholly regulatory measures with lower, non-custodial penalties for breach.⁹⁰

2(1)(a)(iv) Harm: Conclusion

The PSA was created to prevent harm to various individual- and collective-level interests. With reference to Feinberg’s harm principle and Farmer’s conception of securing civil order, a ‘harm reduced’ versus ‘harm caused’ efficiency evaluation was undertaken: despite some benefits, e.g., reducing NPS use in the general population and removing headshops, the Act has not been cost-effective, as, *inter alia*, NPS-related harms to vulnerable populations have been exacerbated and the NPS market is now dominated by SOC organisations. Though some of the PSA’s market offences do conform to Ashworth and Zedner’s harm-preventing offence principle of requiring intent, the Act’s blanket ban sacrifices other principles of preventative criminalisation; and conflicts with the general principle of requiring proof beyond reasonable doubt before determining criminality. Moreover, the Act’s CPOs are objectionable due to their high maximum sentences; potentially persuasive reverse burden clauses; and watered-down fair criminal trial safeguards. Thus, the PSA’s horizontal efficiency – i.e., its coherence with normative principles of the criminal law – is deficient across multiple theoretical bases insofar as advancing the criminal law’s aim of preventing harm.

⁸⁶ *ibid* 84-5.

⁸⁷ *R (McCann) v Manchester Crown Court* [2003] 1 Cr App R 27.

⁸⁸ Ian Dennis, ‘Security, Risk and Preventative Orders’ in Sullivan and Dennis (n 61).

⁸⁹ Eamon Keane and Fraser Davidson (eds), *Raith on Evidence: Principles, Policy and Practice* (3rd edn, 2018) paras 5-25 to 5-48.

⁹⁰ Ashworth and Zedner (n 44) 93-4.

2(1)(b) Wrongfulness

The view that conduct should be criminalised only if it is morally wrongful as a matter of normative principle is ubiquitous, though not universal.⁹¹ Whether the use, possession or sale of drugs generally is wrongful has sparked extensive discussion, though Husak convincingly argues that ‘arguments for the alleged immorality of drug use almost never are produced; this judgement is typically put forward as a kind of brute moral fact or incontrovertible moral intuition’.⁹² Limitations of space preclude such general analyses here, but wrongfulness in the specific context of NPS and the PSA will be briefly sketched and commented on.

Certain instances of NPS sales ought to be criminalised for being morally wrongful, independent of purely harm-based considerations. The sale of NPS to children or the use of children as NPS couriers⁹³ is morally wrongful as children lack the ‘developmental maturity fully to understand, and evaluatively to distinguish, between choices they can or must make in life’;⁹⁴ and the sale of impure and/or mislabelled NPS is wrongful as this denies the buyer the requisite fair opportunity and capacity to make an informed choice about ingesting a particular product, whether or not harm results. These two moral wrongs, i.e., the sale of NPS to children and the (intentional) mislabelling of NPS as ‘plant fertiliser’ and ‘bath salts’ (to circumvent trading standards and medicines laws), were widespread pre-PSA.⁹⁵ Furthermore, as the UK NPS trade approached the event horizon of the PSA’s enactment, many retailers abandoned their responsible practices, e.g., with ‘fire sales’ of heavily-discounted stock.⁹⁶ However, these examples of specific moral wrongs do not imply that selling NPS is wrongful *per se*. Thus, while the PSA does legitimately criminalise some morally wrongful conduct, it does so inefficiently, by also proscribing non-wrongful conduct, e.g., the sale of NPS to autonomous adults.⁹⁷ Moreover, as argued later in this chapter,⁹⁸ the Act’s efficiency in relation to proscribing wrongful conduct is further impaired by the existence of (more cost-effective) potential approaches that could regulate these specific wrongs without criminalising non-wrongful conduct.

Arguably, selling NPS post-PSA is wrongful as this involves tacit endorsement of the violent and exploitative SOC-led NPS market.⁹⁹ This view has provided a moral basis for maintaining a criminal

⁹¹ Andrew Cornford, ‘Rethinking the Wrongness Constraint on Criminalisation’ (2017) 36 *Law Philos* 615.

⁹² Husak, *Overcriminalization* (n 32) 151.

⁹³ PSA, s 6 provides that using children as couriers is an aggravation.

⁹⁴ Horder, *Ashworth’s Principles* (n 5) 71.

⁹⁵ 1(1)(a).

⁹⁶ 1(1)(c).

⁹⁷ For comprehensive general discussions which reach similar conclusions, see: Paul Smith, ‘Drugs, Morality and the Law’ (2002) 19(3) *J Appl Philos* 233; Rob Lovering, *A Moral Defense of Recreational Drug Use* (2015).

⁹⁸ 2(3)(c)-(e).

⁹⁹ A similar argument is found in: Peter Alldridge, *Relocating Criminal Law* (2000) ch 7.

justice approach to NPS.¹⁰⁰ However, this is another example of the circular justificatory leitmotif discussed previously in relation to preventing harm: participating in the NPS market would not be wrongful on this rationale but for the PSA's prior criminalisation of NPS, as there was no evidence of SOC organisations driving the pre-PSA NPS market.¹⁰¹

Though limited by space, this short discussion demonstrates the PSA's dissonance with another normative principle of criminalisation, and is therefore the second element of the Act's horizontal inefficiency.

¹⁰⁰ HC Deb 18 July 2017, vol 627, cols 732-4.

¹⁰¹ 1(1)(a).

2(1)(c) Fair Labelling

Fair labelling, i.e. ‘that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law-breaking’¹⁰² is an ‘entirely unobjectionable’¹⁰³ principle in criminal law, but one with which the PSA conflicts.

The PSA’s broad definitions enable the conviction, and thereby condemnation, of those who sell drugs where the MDA’s narrow definitions do not. However, condemnation is beneficial only insofar as it is accurately represented and dispensed; otherwise, the risk of significant costs is entailed.¹⁰⁴ The PSA’s definitions create numerous such risks, as the blanket ban accords everyone convicted under the Act for supplying¹⁰⁵ NPS the same label, i.e. that of ‘supplying a psychoactive substance’, regardless of the harmfulness or volume (or any other measure of the ‘magnitude of the law-breaking’) of the specific NPS supplied. For example, the severity of previous convictions for drug-related offences is a determining factor in security vetting for public¹⁰⁶ and private¹⁰⁷ sector jobs, and is judged with reference to the label dispensed on conviction. However, those convicted for a low-level PSA offence may be refused employment where someone convicted of a Class C (i.e. low-level) MDA offence might be successful, as severity judgements for PSA convictions cannot be made due to the absence of a harm/offence-seriousness categorisation framework. Although the severity of sentences imposed for previous convictions is also used in pre-employment screening,¹⁰⁸ this alone cannot ameliorate the PSA’s absence of accurate condemnatory labels ‘[as sentences may be] substantially aggravated or mitigated as a result of factors which are unrelated to and tell us nothing about the offence itself or the offender’s culpability’.¹⁰⁹ Inversely, however, accurate condemnatory labels are necessary for proportionate sentencing, and the PSA’s lack of such labels has precipitated arbitrary sentencing.¹¹⁰

¹⁰² Andrew Ashworth, *Principles of Criminal Law* (5th edn, 2006) 88.

¹⁰³ James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71(2) MLR 217, 246.

¹⁰⁴ *ibid* 226.

¹⁰⁵ Or any other offence created by the Act.

¹⁰⁶ ‘Appendix: Security Vetting and Procedures of Not Directly Employed Workers in Prisons’ <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/215521/dh_128595.pdf>.

¹⁰⁷ See e.g., Nacro, ‘Employing Someone with a Criminal Record’ <<https://www.nacro.org.uk/resettlement-advice-service/support-for-employers/employing-someone-with-a-criminal-record/#suitable>>.

¹⁰⁸ The Rehabilitation of Offenders Act 1974, s 5 dictates when convictions become ‘spent’, based on the sentence severity. ‘Spent’ convictions are not included on certain pre-employment background checks: ‘Convictions and Higher Level Disclosures’ (22 October 2019) <<https://www.mygov.scot/convictions-higher-disclosures/>>.

¹⁰⁹ Chalmers and Leverick (n 103) 223.

¹¹⁰ Discussed at 2(2)(b).

Moreover, Tadros argues that fair labelling is essential for the promotion of social justice, which as he advocates, is:

that the set of rules that the state enforces are guided by respect for autonomous agents, and the protection and promotion of their interests [and] to ensure that each citizen of the state has confidence both that this is the case and that all are abiding by that public set of rules.¹¹¹

Tadros states that the condemnatory function of the criminal law (exercised via fair labelling) '[reaffirms] a public commitment to ensure trust and confidence that a public scheme of justice is adhered to', but this 'can be developed only if ... interests are adequately reflected in the scheme of laws'.¹¹² On Tadros' understanding, inherent in the principle of fair labelling are requirements of constructive and rational debate in the creation of legislation, public consensus as to the law's moral basis, and public confidence of the law's place within wider policy.¹¹³

The rationales employed in the PSA's creation were often deficient: it was based on the Irish equivalent,¹¹⁴ but 'no formal evaluation of the impact of the [Irish] legislation [was] undertaken'.¹¹⁵ The ACMD recommended numerous changes to the Bill, including defining a 'psychoactive substance' in scientific, rather than lay terms, but this advice was disregarded as it was '[not] the Government's intentions'.¹¹⁶ The concerns of the pressure groups *Release* and *Transform* regarding the Psychoactive Substances Bill's legal certainty were also ignored,¹¹⁷ and, moreover, the predictive potential of past experiences with prohibitive legislation was largely overlooked.¹¹⁸ In Tadros' words, such 'impoverished level of consultation and debate [undermines] the confidence that citizens can have ... eroding the sense that the criminal law imposes proper limits on our

¹¹¹ Victor Tadros, 'Fair Labelling and Social Solidarity' in Zedner and Roberts (n 6).

¹¹² *ibid.*

¹¹³ *ibid.*

¹¹⁴ Criminal Justice (Psychoactive Substances) Act 2010 (Ireland).

¹¹⁵ Expert Panel (n 6, ch 1) 35.

¹¹⁶ ACMD, 'ACMD's Final Advice on Definitions for Psychoactive Substances Bill' (2015)

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470421/ACMD_definitions_advice_final-23-October-2015.pdf>.

¹¹⁷ Release and Transform (n 25) 4.

¹¹⁸ E.g., the 'iron law of prohibition' and historical emergence of new drugs: 1(2)(a)-(b).

conduct as part of a shared project of advancing our interests and ensuring respect for our independence'.¹¹⁹

Following the UK-wide June 2020 anti-racism protests,¹²⁰ the UK Government announced the creation of the Commission on Race and Ethnic Disparities, with the aim of examining the 'priority area' of criminal justice.¹²¹ The PSA, and wider prohibitive drug policy, has contributed to racial disparities in the criminal justice system.¹²² In conjunction with the recently reignited public discourse on racism, this might stimulate public demand for new approaches to drugs; and suggests that the PSA is regressing rather than advancing Tadros' social justice-seeking view of fair labelling, as the interests of certain demographics are not 'adequately reflected in the scheme of laws'. Furthermore, a recent Scottish Affairs Committee Report concluded that 'the UK Government must immediately review the exemption of substance dependence from equality legislation and assess the impact it has on people who use drugs', signalling that current drug policies are not only regarded as objectionable for being criminal justice- rather than health-based, but also on social justice grounds.¹²³

The PSA's dissonance with the requirements of fair labelling concludes this evaluation of the Act's horizontal efficiency. In its blanket criminalisation of NPS, the PSA has sacrificed multiple principles of criminalisation, including harm prevention (in the context of three theoretical bases); the proscription of moral wrongdoing; and fair labelling, and is therefore an inefficient statute when analysed horizontally, i.e., against the standards which normatively underpin other criminal laws.

¹¹⁹ Tadros, 'Fair Labelling' (n 111).

¹²⁰ 'George Floyd Death: Thousands Turn Out for UK Anti-Racism Protests' *BBC News* (2 June 2020) <<https://www.bbc.co.uk/news/uk-52949014>>.

¹²¹ 'News Story: Commission on Race and Ethnic Disparities' (16 July 2020) <<https://www.gov.uk/government/news/commission-on-race-and-ethnic-disparities-16-july-2020>>.

¹²² 1(1)(c).

¹²³ Scottish Affairs Committee, *Problem Drug Use in Scotland: First Report* (2019, HC 44) para 154.

2(2) Diagonal Efficiency

Formalist requirements of the rule of law such as maximum legal certainty have been posited as fundamental principles of the criminal law, akin to harmfulness, wrongfulness and fair labelling.¹²⁴ The following ‘diagonal’ analysis of the PSA’s adherence to formalist requirements of the rule of law considers the area of overlap between the horizontal and vertical critiques of the Act’s efficiency: harmony with the formalist requirements would both indicate a dimension of horizontal efficiency – as the PSA’s effects would not be at the cost of these normative principles of criminalisation – and also suggest that PSA is an efficient example of functionalist rule of law-based ‘vertical’ governance.

2(2)(a) Maximum Legal Certainty

The rule of law-based¹²⁵ principle of maximum legal certainty requires that ‘the law must be adequately accessible: the citizen ... must be able (if need be with appropriate advice) to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail’.¹²⁶ However, the scope of laws on drugs not controlled by the MDA has been uncertain for decades, and the PSA has exacerbated this problem via its blanket ban.

2(2)(a)(i) Pre-PSA Legal Uncertainty

A 1984 Scottish case applied the general offence of reckless endangerment/injury to the supply of potentially toxic substances to children,¹²⁷ followed soon after by an equivalent English statutory offence.¹²⁸ However, a later Scottish case dispelled any implied requirements of supplying the substances to children,¹²⁹ potentially extending the offence to supplying NPS, an uncertainty not shared by the English legislation.¹³⁰ Also uncertain was whether trading standards and medicines

¹²⁴ Horder, *Ashworth’s Principles* (n 5) 59.

¹²⁵ *Ibid* 83.

¹²⁶ *Sunday Times v United Kingdom* (1979) 2 EHRR 245 [49].

¹²⁷ *Khaliq v HM Advocate* 1984 JC 23.

¹²⁸ Intoxicating Substances (Supply) Act 1985.

¹²⁹ *Ulhaq v HM Advocate* 1991 SLT 614.

¹³⁰ Timothy H Jones and Ian Taggart, *Criminal Law* (7th edn, 2018) para 9-45.

regulations could be used to target NPS; these were largely unsuccessful, so the PSA was created to replace the English statute with a new, UK-wide framework.¹³¹

Concerns about the legislation were numerous.¹³² The ACMD stated that the final definition of a ‘psychoactive substance’ was ‘unnecessarily broad’,¹³³ and the Academy of Medical Sciences expressed unease over the Act’s potential to affect medical research.¹³⁴ Additionally, the definition does not distinguish direct or indirect psychoactive effects, so poppers were thought (and intended)¹³⁵ to be captured until outcry precipitated the ACMD’s ‘consensus view’ statement that the Act did not capture substances with ‘peripheral’, indirect effects on the central nervous system.¹³⁶ Moreover, the Act could be construed to prohibit nutmeg (of which five grams can cause ‘euphoria, giddiness ... detachment, confabulation and hallucinations’)¹³⁷ despite the exemption for foodstuffs.¹³⁸

2(2)(a)(ii) Post-PSA Legislative Construction

Maximum legal certainty is not *absolute* certainty, but ‘the use of vague terms should be reinforced by other definitional elements, guidelines or illustrative examples’.¹³⁹ There are some (less vague) definitional elements in the PSA. The legislature responded to the concerns of the Academy of Medical Sciences by including exemptions to prohibited activities for medical professionals and researchers in the Act.¹⁴⁰ Although terms such as ‘approved scientific research’, ‘ethics review body’ and ‘charities’ are defined with reference to existing legislation, these exemptions have not been effective as the PSA’s broad wording has nonetheless (inefficiently) obstructed medical and industrial research.¹⁴¹ Guidelines for interpreting the PSA do exist, such as the ACMD’s advice on

¹³¹ 1(1)(a); PSA, sch 5; Though following *Quinn v Cunningham* 1956 JC 22, the potential Scottish offence of selling whisky to alcoholics remains.

¹³² Release and Transform (n 25).

¹³³ ACMD, ‘ACMD Advice on Definitions of Scope for the “Psychoactive Substances Bill”’ (2015) 4 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/454039/Definitions_report_final_14_august.pdf>.

¹³⁴ Letter from The Academy of Medical Sciences to Theresa May (29 June 2015) <<https://acmedsci.ac.uk/file-download/37505-559242b4ecf2e.pdf>>.

¹³⁵ Psychoactive Substances Bill Deb 27 October 2015, cols 37-8.

¹³⁶ ACMD, ‘ACMD Review of Alkyl Nitrites (“Poppers”)’ (2016) 3 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/508179/Poppersadvice.pdf>.

¹³⁷ James A Bourgeois, Usha Parthasarathi and Ana Hategan, ‘Taking the Spice Route: Psychoactive Properties of Culinary Spices’ (2014) 13(4) *Curr Psychiatry* 21, 22-3.

¹³⁸ Burgess (n 52) 112.

¹³⁹ Horder, *Ashworth’s Principles* (n 5) 84.

¹⁴⁰ PSA, sch 2.

¹⁴¹ 1(2)(b).

poppers, but these are not law. In *Rochester*¹⁴² the appellant sought to rely on the ACMD's 'consensus view' that indirect effects on the CNS are not 'psychoactive' in his appeal against conviction for selling nitrous oxide. Previously, the Court of Appeal had used an ACMD letter¹⁴³ and a Home Affairs Select Committee Report¹⁴⁴ when considering the harms and applicability of nitrous oxide to the PSA, but the *Rochester* court dismissed the appeal, stating the ACMD's view and its ministerial acceptance 'was not an admissible aid to construction', and made clear that an 'indirect effect was sufficient' given the lack of a direct/indirect distinction in the PSA.¹⁴⁵ As Fortson highlights, this again casts doubt on the legality of poppers, which can now only satisfactorily be resolved with a specific exemption.¹⁴⁶

The executive has provided illustrative examples to clarify the PSA's vague definition of a 'psychoactive substance', but these have arguably further confused the already-complex legislative and judicial definitional patchwork. The Act's explanatory notes state that nutmeg is an exempted substance because its 'psychoactive effect is negligible'.¹⁴⁷ However, the Home Office's guidance for retailers states that the 'psychoactive effects' with which the PSA is concerned include 'hallucinations; changes in alertness; perception of time and space; mood or empathy with others; and drowsiness'.¹⁴⁸ As mentioned above, all these effects can be associated with nutmeg intoxication, and following the literal legislative construction in *Rochester*, courts may be unpersuaded by the explanatory notes' stipulation that nutmeg's psychoactivity is 'negligible'.¹⁴⁹

The illegality of selling nutmeg for its psychoactive effect has not been judicially tested, so this criticism might appear merely theoretical. However, prior to *Rochester* the courts struggled with the Act's application to nitrous oxide: two 2017 prosecutions collapsed when the defence successfully argued that nitrous oxide was an exempted medicinal product.¹⁵⁰ This was widely reported in the media,¹⁵¹ and, until the court in *Chapman* ruled otherwise a few months later in October 2017,¹⁵² this appeared to be the legal position. During this period, in September 2017, Daniel Halpin was found selling nitrous oxide in 'a mistaken though honestly held belief that nitrous

¹⁴² *Rochester* (n 68).

¹⁴³ *Grigas* [2017] EWCA Crim 1819 [27].

¹⁴⁴ *Chapman and others* [2018] 1 WLR 726 [6].

¹⁴⁵ *Rochester* (n 68).

¹⁴⁶ Rudi Fortson, 'Drug Offences: *Rochester* (Kirk) Court of Appeal (Criminal Division): Lord Burnett CJ, Goss and Goose JJ; 17 August 2018; [2018] EWCA Crim 1936' [2018] Crim LR 1002.

¹⁴⁷ Explanatory Notes to the PSA, para 40.

¹⁴⁸ Home Office, 'Psychoactive Substances Act 2016: Guidance for Retailers' (20 May 2016) 3 <<https://www.gov.uk/government/publications/psychoactive-substances-act-guidance-for-retailers/psychoactive-substances-act-2016-guidance-for-retailers>>.

¹⁴⁹ Even though explanatory notes are a legitimate aid to construction: *Montila* [2004] UKHL 50 [35].

¹⁵⁰ Rudi Fortson, 'The Psychoactive Substances Act 2016, the "Medicinal Product" Exemption and Proving Psychoactivity' [2018] Crim LR 229, 230.

¹⁵¹ Mark Easton, "'Legal High" Review After Laughing Gas Cases Collapse' *BBC News* (31 August 2017) <<https://www.bbc.co.uk/news/uk-41098996>>.

¹⁵² *Chapman* (n 144).

oxide was not regarded as a psychoactive substance ... based on news coverage [of the collapsed trials]'.¹⁵³ He was convicted following a late guilty plea in August 2018. Ignorance of the law is no defence,¹⁵⁴ and neither the non-binding Crown Court decisions nor the associated media reports are grounds for strict legislative construction in favour of the accused. However, *Halpin* demonstrates the practical ramifications and costs of the PSA's definitional legal uncertainty.

Holder notes that modern decisions treat the principle that 'a penal statute falls to be construed with a degree of strictness in favour of the accused'¹⁵⁵ merely 'permissively'.¹⁵⁶ This was evident in *Rochester* where the court decided that no such 'canon of construction [could] assist the defendant'.¹⁵⁷ Similarly, courts may decide the PSA's lack of legal certainty is offset by the principle that 'those who skate on thin ice can hardly expect to find a sign [denoting] the precise spot where they may fall in'.¹⁵⁸ As discussed above, though, the costs of the PSA's uncertainty extend to beyond those who sell nitrous oxide-filled balloons for ephemeral highs. The wide public-interest discretion of UK prosecutors¹⁵⁹ might be the only protection for those who have been unwillingly and unjustifiably placed on thin ice, e.g., medical/industrial researchers and those who sell poppers, and for whom legislative, judicial and executive attempts to limit the scope of the PSA have failed. Such discretionary protection, however, 'unchecked and unbalanced by other branches of government', is arguably itself 'incompatible with the rule of law'.¹⁶⁰

¹⁵³ *Halpin* [2019] EWCA Crim 892 [5].

¹⁵⁴ Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74(1) MLR 1.

¹⁵⁵ *Hughes* [2013] 1 WLR 2461 [26].

¹⁵⁶ Holder, *Ashworth's Principles* (n 5) 88.

¹⁵⁷ *Rochester* (n 68) [23].

¹⁵⁸ *Kneller v DPP* [1973] AC 435, 463.

¹⁵⁹ CPS, 'The Code for Crown Prosecutors' (26 October 2018) 4.9

<<https://www.cps.gov.uk/publication/code-crown-prosecutors>>; COPFS, 'Prosecution Code' (2018) 6

<https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf>.

¹⁶⁰ Husak, *Overcriminalization* (n 32) 27.

2(2)(b) Proportionate Sentencing

Thorburn argues that 'state officials are the only ones with jurisdiction to administer criminal justice [and] that the terms of their jurisdiction impose further limits on how they may act when administering criminal punishment'.¹⁶¹ These limits are the 'basic requirements of the rule of law [which] means ... refraining from arbitrariness in the exercise of public power'.¹⁶² Such framing of 'the role of criminal sentencing within a larger constitutional order'¹⁶³ necessitates non-arbitrary, proportionate sentencing. Thorburn defines 'proportionality' with reference to Ashworth and von Hirsch's principles of: parity (offenders who commit equally serious crimes should be punished equally severely); rank-ordering (sentences should be more/less severe for more/less serious crimes respectively); and spacing (sentences should be proportionately severe in proportion to the degree of seriousness of the offence).¹⁶⁴

Overlap between the above criticisms of the Act's legal certainty and of the following analysis of PSA offence sentencing is inevitable. The blanket ban gives judges no guidance on linking punishment-severity with offence-seriousness, unlike the MDA's 'legally certain' A/B/C harm-classification system. As Ashworth and von Hirsch note, maximum sentences can '[give] proportionality of sentencing only a peripheral role'.¹⁶⁵ This difficulty is compounded by the sentencing guidance for NPS which, like the 'defining elements, guidelines or illustrative examples' regarding the Act's definition of psychoactivity, is obscure/contradictory, unauthoritative¹⁶⁶ and inconsistently applied.

2(2)(b)(i) Limitations

The limitations of the following analysis include Walker's 'rickety ladder':¹⁶⁷ if optimally proportionate sentencing under the PSA is where links can be drawn between the ('ladder-like') spectrums of crime-seriousness and punishment-severity 'without disturbing the ordinal order of

¹⁶¹ Thorburn (n 6).

¹⁶² *ibid.*

¹⁶³ *ibid.*

¹⁶⁴ Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (2005) 139-40.

¹⁶⁵ *ibid.* 131.

¹⁶⁶ 'This guidance does not carry the same authority as a sentencing guideline, and sentencers are not obliged to follow it': Sentencing Council, 'Sentencing of Drug Offences Involving Newer and Less Common Drugs' (2018) <<https://www.sentencingcouncil.org.uk/news/item/sentencing-of-drug-offences-involving-newer-and-less-common-drugs/>>.

¹⁶⁷ Nigel Walker, *Why Punish?* (1991) 102.

either scale' (i.e. 'the "rungs" of the central "ladder" linking crime-seriousness and punishment-severity must never cross'),¹⁶⁸ then the various sub-gradations within each scale will render a comparative benchmark of optimal proportionality elusive. For example, crime-seriousness in the PSA is not a linear, 'ladder-like' spectrum, but depends on multiple elements including: the highly variable relative harmfulness of the innumerable substances proscribed by the Act; the size and sophistication of the illicit operation; and the circumstances in which those substances were sold and to whom. Similarly, punishment-severity in PSA cases depends not just on crime-seriousness, but also the offender's criminal record, the timing of guilty pleas and the sentencing totality principle, i.e., 'it is usually impossible to arrive at a just and proportionate sentence for multiple offending simply by adding together notional single sentences'.¹⁶⁹ This makes identification of PSA-specific sentences difficult where judges have not fully explained their working in cases with multiple charges. Furthermore, as Bottoms highlights, comparing the relative punishment-severity of fines, community payback orders, court-ordered rehabilitation, and both suspended and immediate custodial sentences presents 'a significant number of difficulties'.¹⁷⁰ Finally, the small number of reported cases and limitations of space preclude a systematic analysis of sentencing in *all* PSA cases, so implausibility deriving from anecdotalism is a risk.¹⁷¹ However, these limitations can largely be mitigated by grouping cases by substance, circumstances and operational sophistication in considering crime-seriousness; and taking a primarily binary view of custodial/non-custodial sentences in considering punishment-severity. Additionally, PSA-specific sentences are estimated where judicial working-out is unclear, and to reduce anecdotalism numerous cases (with both disproportionate and 'settled' sentences) gleaned from various sources are considered against available statistics denoting overall average sentences.

¹⁶⁸ Anthony Bottoms, 'Five Puzzles in von Hirsch's Theory of Punishment' in Andrew Ashworth and Martin Wasik (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998).

¹⁶⁹ Sentencing Council, 'Offences Taken into Consideration and Totality: Definitive Guideline' (2012) 5 <<https://www.sentencingcouncil.org.uk/wp-content/uploads/Offences-Taken-into-Consideration-and-Totality-definitive-guideline-Web.pdf>>.

¹⁷⁰ Bottoms (n 168).

¹⁷¹ Clive Seale and David Silverman, 'Ensuring Rigour in Qualitative Research' (1997) 7(4) *Eur J Public Health* 379, 380.

2(2)(b)(ii) Nitrous Oxide

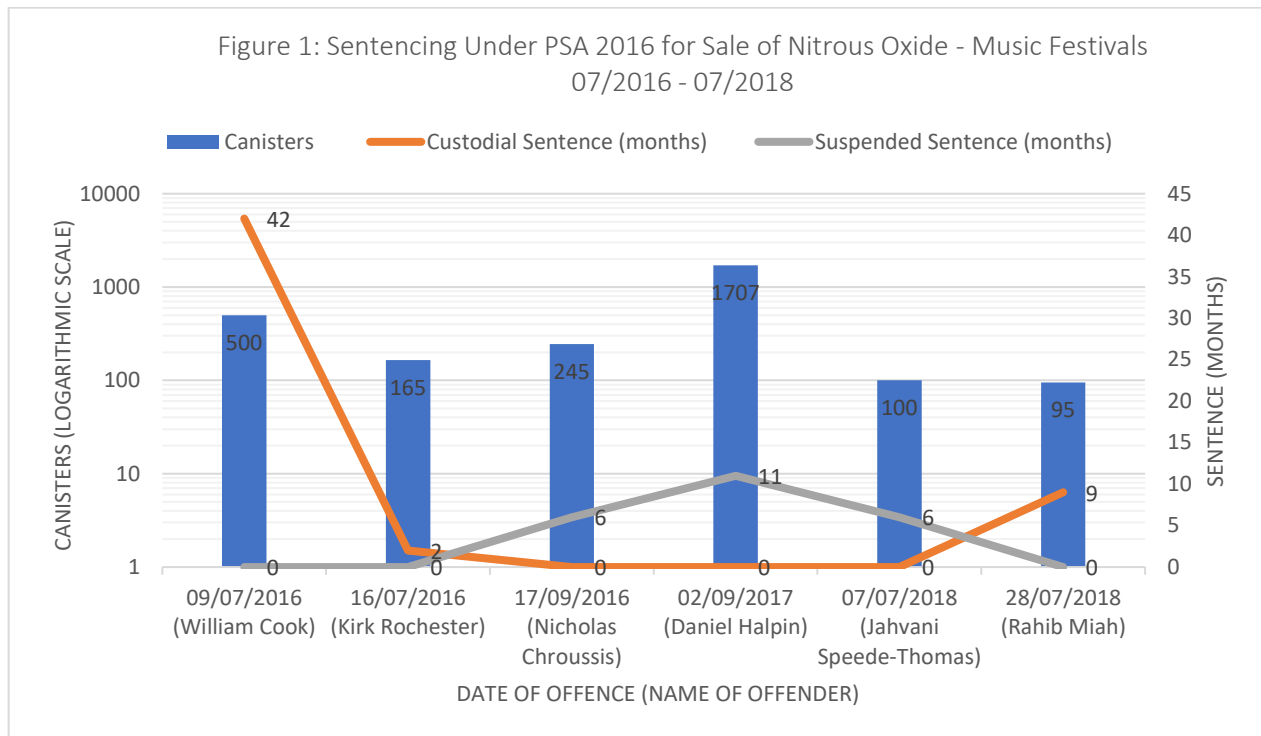


Figure 1 (above) demonstrates the disproportionality of sentencing for the sale of nitrous oxide at music festivals. William Cook was sentenced to 42 months’ custody – similar to the 2017 England and Wales average of 45 months for supplying a Class A drug¹⁷² – for selling ‘hundreds’ of nitrous oxide canisters at the 2016 Electric Daisy Carnival.¹⁷³ Given the relative harmless¹⁷⁴ of nitrous oxide compared to, e.g. heroin,¹⁷⁵ this sentence conflicts with all three principles of parity, rank-ordering and spacing. By contrast, Kirk Rochester was given just 2 months for intent to supply 165 similar canisters of nitrous oxide just a week later at the 2016 Love Box Festival,¹⁷⁶ and Nicholas Chroussis avoided custody with a 6-month suspended sentence and 150 hours of unpaid work for 245 canisters at the September 2016 Boundary Festival:¹⁷⁷ limitations recognised, there appears to

¹⁷² HOR (n 2, ch 1) 27.

¹⁷³ Home Office and Sarah Newton, ‘Press Release: Psychoactive Substances Ban 6 Months On: Almost 500 Arrests and First Convictions’ (29 December 2016) <<https://www.gov.uk/government/news/psychoactive-substances-ban-6-months-on-almost-500-arrests-and-first-convictions>>. The exact number of canisters is unknown: 500 has been graphically represented as an approximation.

¹⁷⁴ ACMD, ‘ACMD Advice on Nitrous Oxide Abuse’ (2015) 4

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409403/acmd-advice-on-nitrous-oxide.doc>.

¹⁷⁵ A Class A substance: MDA, sch 2.

¹⁷⁶ Rochester (n 68).

¹⁷⁷ Chapman (n 144).

be no parity among these three cases which involved similar numbers of identical canisters in similar settings over just three months.

Despite the clarification of nitrous oxide's legal status following Rochester's unsuccessful appeal,¹⁷⁸ sentencing for supplying nitrous oxide at festivals remained unpredictable. The trial judge in *Halpin*¹⁷⁹ referenced *Bush*¹⁸⁰ which stated that:

the circumstances of this offending ... constitute a significant aggravating factor. Summer music festivals in the UK are an increasingly important part of the popular culture ... Very often it is the first time [teenagers] have been away from direct parental control. They are particularly vulnerable to those trying to sell them drugs. Anyone who is involved in such an enterprise, even on a relatively low-level basis ... must expect an immediate custodial sentence.¹⁸¹

Halpin was caught with 1707 canisters (more than Cook, Rochester and Chroussis combined) at the 2017 Lockdown Festival, but had his *suspended sentence* reduced from 12 to 11 months on appeal.¹⁸² Despite the remarks in *Bush*, the courts appeared reluctant to impose immediate custodial sentences in festival nitrous oxide cases post-Chroussis: Jahvani Speede-Thomas received a (significant but non-custodial) 6-month suspended sentence, 10 days rehabilitation, 180 hours of unpaid work and a £425 fine for having 100 canisters at the 2018 Farr Festival.¹⁸³ However, when sentencing Rahib Miah to 15 months (reduced to 9 on appeal)¹⁸⁴ immediate custody after being caught with 95 canisters – the lowest quantity of all – at the 2018 Kendal Calling Festival, the judge stated that 'there has to be a sentence that tells people that in this county and at this festival (which is fast coming upon us) that drug-dealing will not be tolerated'.¹⁸⁵ Such wide and seemingly arbitrary deviation in punishment-severity in these cases is inconsistent with the rule of law-based principle of proportionate sentencing as there was comparatively little deviation in crime-seriousness. All these cases involved the same substance and occurred at music festivals. Furthermore, the size and

¹⁷⁸ *Rochester* (n 68).

¹⁷⁹ *Halpin* (n 153).

¹⁸⁰ *Bush* [2013] EWCA Crim 1164.

¹⁸¹ *ibid* [12].

¹⁸² *Halpin* (n 153) [2].

¹⁸³ Hertfordshire Constabulary, 'Man Sentenced for Selling Laughing Gas' (14 May 2019) <<https://www.herts.police.uk/news-and-appeals/man-sentenced-for-selling-laughing-gas-0215g>>.

¹⁸⁴ *Miah* [2019] EWCA Crim 1476.

¹⁸⁵ 'Student Jailed for Kendal Calling Laughing Gas Sales' *BBC News* (25 April 2019) <<https://www.bbc.co.uk/news/uk-england-cumbria-48054725>>.

sophistication of the operations were similar, with relatively modest (compared to the non-festival cases discussed below) numbers of canisters being sold by just one or two people.

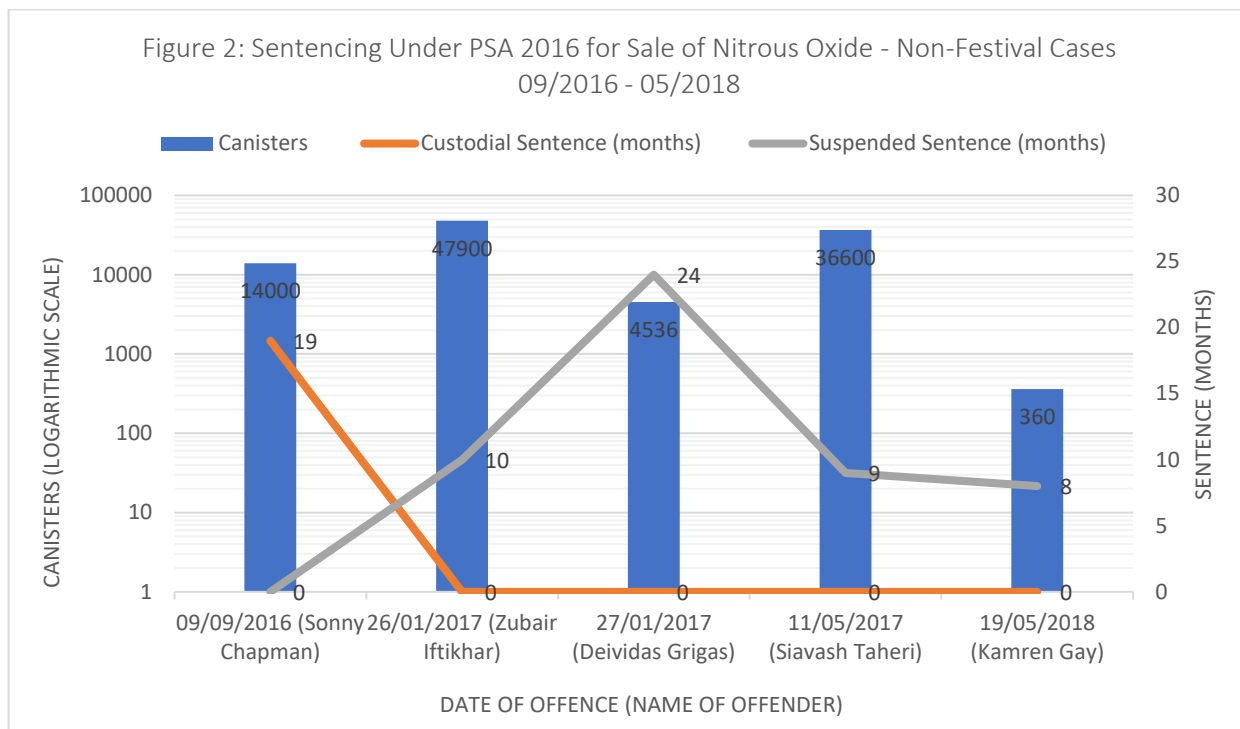


Figure 2 (above) shows sentencing in nitrous oxide sentences outside music festival settings is even less proportionate. Deividas Grigas received a 24-month suspended sentence on appeal for supply and possession with intent to supply a total of 4536 canisters.¹⁸⁶ This totals more canisters than in all the previously discussed cases combined, yet Grigas avoided immediate custody, unlike Cook, Rochester and Miah.

Sonny Chapman was given 28 months immediate custody for intent to supply over *14 thousand* nitrous oxide canisters, handling stolen goods and custody of one counterfeit currency note.¹⁸⁷ A breakdown of sentencing or the seriousness (i.e., summary or indictment) of each charge is unavailable, but on summary conviction the maximum sentences for the latter two offences are three¹⁸⁸ and six¹⁸⁹ months respectively. This suggests Chapman's sentence for supplying nitrous oxide may have been at least 19 months,¹⁹⁰ though the aforementioned sentencing totality principle may render this estimate inaccurate. However, Zubair Iftikhar *avoided prison* with a 10-month suspended sentence and 220 hours of unpaid work for intent to supply nearly *48 thousand*

¹⁸⁶ This sentence also took into account the offender's Class A drug dealing: *Grigas* (n 143) [4].

¹⁸⁷ *Chapman* (n 144).

¹⁸⁸ Magistrate's Courts Act 1980, s 33(1)(a).

¹⁸⁹ Forgery and Counterfeiting Act 1981, s 22(1)(a)(ii).

¹⁹⁰ Appendix 2.1.

canisters. This is nearly 3½ times more canisters than Chapman and over 10 times more than Grigas,¹⁹¹ but attracted the most lenient sentence of all three cases. Similarly, Siavash Taheri received a 9-month suspended sentence for over 36 thousand canisters.¹⁹² Both Iftikhar and Taheri were selling nitrous oxide to students, for many of whom going to university may be the first time away from direct parental control, but neither the comments in *Bush* nor the comparatively vast quantity of canisters appear to have been influential. Conversely, Kamren Gay's 8-month suspended sentence and 200 hours of unpaid work is only marginally more lenient than Iftikhar and Taheri's, yet Gay was given this for just 360 canisters.¹⁹³

Ashworth and von Hirsch argue that exemplary punishments – like those of Cook and Miah – make proportionality 'lose its status as an independent ethical requirement and remain subject to whatever dilutions appear to be needed in the name of crime control'.¹⁹⁴ These harsh sentences also highlight a methodological flaw in the HOR, which states that 'the average sentence lengths for possession and supply offences under the PSA are considerably shorter than the average sentence lengths for [equivalent] MDA offences',¹⁹⁵ implying that the blanket ban's lack of offence-seriousness categorisation has been accounted for with lower *average* punishment-severity compared to MDA offences, therefore PSA sentences are proportional. PSA offences *are* supposed to be less serious than MDA offences due to the blanket ban providing no graded structure of harms.¹⁹⁶ However, averages 'best resist the fluctuation between different samples [and are] not an appropriate measure of central tendency for skewed distribution',¹⁹⁷ and it is precisely the 'skewed distribution' found in Cook and Miah's cases that conflicts with the rule of law's requirement for proportionate sentencing. Additionally, these exemplary punishments are an ineffective deterrent given the unchanged rates of post-PSA nitrous oxide use.

¹⁹¹ "'Manchester Gas Man" Spared Jail Over Nitrous Oxide Sales' *BBC News* (13 November 2017) <<https://www.bbc.co.uk/news/uk-england-manchester-41972988>>.

¹⁹² Rob Kennedy, 'Barrel Of Laughing Gas: Dealer Caught Supplying Nitrous Oxide to Student Had 36,000 Canisters of It' *Chronicle Live* (6 June 2018) <<https://www.chroniclelive.co.uk/news/north-east-news/laughing-gas-northumbria-university-court-14748442>>.

¹⁹³ 'Leeds NOS Dealer Caught with 360 Nitrous Oxide Canisters in McDonald's Car Park' *Yorkshire Evening Post* (9 August 2018) <<https://www.yorkshireeveningpost.co.uk/news/crime/leeds-nos-dealer-caught-360-nitrous-oxide-canisters-mcdonalds-car-park-823276>>.

¹⁹⁴ Von Hirsch and Ashworth (n 164) 132-3.

¹⁹⁵ HOR (n 2, ch 1) 26.

¹⁹⁶ Home Affairs Committee, *Psychoactive Substances: Government's Response to the Committee's First Report of Session 2015-16* (HC 2015-16, 755) 7-8; CPS, 'Legal Guidance: Drug Offences' (12 March 2019) <<https://www.cps.gov.uk/legal-guidance/drug-offences>>.

¹⁹⁷ S Manikandan, 'Measures of Central Tendency: The Mean' (2011) 2(2) JPP 140, 140-1.

2(2)(b)(iii) Synthetic Cannabinoid Receptor Agonists

As mentioned, sentencing guidance for PSA offences is obscure, not authoritative¹⁹⁸ and has been inconsistently applied. Harris notes that *Waka*¹⁹⁹ provided ‘a mixed message, suggesting that: (1) the [2012] Drugs Guideline is [irrelevant]; (2) courts should not *ordinarily* have regard to that guideline; and (3) as the substance in question was a cannabinoid, a comparison with the Drugs Guideline was permissible and would serve as a strong indicator as to the appropriate sentence’.²⁰⁰ After *Waka*, the Sentencing Council published guidance for cases involving NPS,²⁰¹ which rather equivocally states that ‘sentencers should expect to be provided with expert evidence to assist in determining the potency of the particular drug and in equating the quantity in the case with the quantities set out in the guidelines in terms of the harm caused’.²⁰² However, Fortson highlights that ‘the relationship between potency, effects, toxicity and drug purity, is complex so that even with expert assistance, making fair and just comparisons with drug types and quantities that are specified in the Guideline [is challenging]’.²⁰³

In practice this has resulted in similar sentences for SCRA offences both before and after third-generation SCRAAs were added to the MDA, due to reliance on the guidelines²⁰⁴ for cannabis/Class B drugs: ‘sophisticated’ operations/conspiracies to produce SCRAAs contrary to the PSA resulted in 6-year sentences for those convicted of leading roles and 17-36 months for those with a lesser involvement.²⁰⁵ At the lower end, the appellant in *Waka* received a 7-month sentence on appeal for intent to supply £500 of SCRAAs.²⁰⁶ Similarly, sentences for large-scale SCRA offences under the MDA have included 5 years 5 months for leading roles and 32 months for lesser ones,²⁰⁷ and sentences for *Waka*-level dealing have ranged from 4-10 months.²⁰⁸

¹⁹⁸ Sentencing Council, ‘Sentencing of Drug Offences’ (n 166).

¹⁹⁹ *Waka* [2018] EWCA Crim 125

²⁰⁰ Lyndon Harris, ‘Sentencing: R v Waka (Mohammed Hussain) (Case Comment)’ [2018] Crim LR 675, 677.

²⁰¹ Sentencing Council, ‘Sentencing of Drug Offences’ (n 166).

²⁰² *ibid* 2.

²⁰³ Rudi Fortson, ‘Revising the Sentencing Guideline in Drug Cases’ [2020] Crim LR 513, 522.

²⁰⁴ Sentencing Council, ‘Drug Offences: Definitive Guideline’ (2012) 13, 21

<<https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-definitive-guideline-Web.pdf>>.

²⁰⁵ *Finn* [2018] EWCA Crim 2125; ‘Four Jailed Over £300k Spice Haul in Oldham and Stockport’ *BBC News* (23 January 2018) <<https://www.bbc.co.uk/news/uk-england-manchester-42778867>>; Jez Hemming, ‘Wrexham Spice Gang Jailed for 10 Years’ *Daily Post* (15 October 2018) <<https://www.dailypost.co.uk/news/north-wales-news/wrexham-spice-gang-jailed-10-15282053>>.

²⁰⁶ *Waka* (n 199).

²⁰⁷ Stephanie Finnegan, ‘Dealers “Flooding Streets of Leeds with Spice” Found with Huge Hoard of Weapons, Drugs and Cash’ *Leeds Live* (26 September 2019) <<https://www.leeds-live.co.uk/news/leeds-news/spice-dealers-jailed-after-weapons-16986390>>.

²⁰⁸ Tristan Cork, ‘Spice Dealer Found with Stun Gun and Shotgun Jailed’ *Bristol Post* (27 November 2019) <<https://www.bristolpost.co.uk/news/bristol-news/spice-dealer-found-stun-gun-3580563>>.

These sentences, although consistent, are disproportionate. As PSA offences are supposed to be less serious than MDA offences, the consistency in sentencing under both frameworks conflicts with the principle of rank-ordering. Comparing SCRA sentencing under the PSA and MDA in prison-related offence contexts also highlights further disproportionality, although reliable analysis is limited by the few reported cases. Custodial possession is the most likely PSA offence to result in immediate custody, with an average sentence length of 4 months.²⁰⁹ However, the court in *Ware*²¹⁰ upheld the appellant's 14-month sentence (but altered it to run concurrently instead of consecutively) for custodial possession of under 3 grams of SCRA, demonstrating there can be very wide deviation from the average. Conversely, after third-generation SCRA were added to the MDA, Stacey Sullivan was given 16 months (just two more than Ware) for the more serious crime of possession with intent to supply (a much larger amount of) approximately 56 grams of SCRA, then-Class B drugs, into a prison.²¹¹

This concludes the analysis of the PSA's 'diagonal' efficiency, i.e., the area of overlap between the preceding discussion of the Act's 'horizontal' efficiency (its adherence with normative principles of criminalisation) and the following discussion of the Act's 'vertical' efficiency (its legitimacy as an exercise of state power). The PSA is an inefficient statute in these 'diagonal' terms, as it sacrifices the rule of law-based principles of maximum certainty and proportionate sentencing in its pursuit of a vague, 'catch-all' definition of psychoactivity, which has triggered the knock-on effect whereby offenders have been punished arbitrarily.

²⁰⁹ HOR (n 2, ch 1) 26-7.

²¹⁰ *Ware* [2017] EWCA Crim 1266.

²¹¹ Nick Dorman, 'Prisoner's Girlfriend Caught Trying to Sneak Spice Drug into Jail in her Bra' *Mirror* (7 October 2017) <<https://www.mirror.co.uk/news/uk-news/prisoners-girlfriend-caught-trying-sneak-11305681>>.

2(3) Vertical Efficiency

This section analyses the Act's efficiency 'vertically', i.e., whether the mode of governance inherent in the PSA is a cost-effective, proportionate, and legitimate exercise of state power.²¹² After an outline of Dubber's conceptions of 'law' vis-à-vis 'police' as paradigmatic modes of governance, the remainder of this chapter identifies which mode of governance the PSA conforms to; critiques the efficiency of this mode; discerns the normative bases for potential alternative – and more intrinsically efficient – ways of governing NPS;²¹³ and briefly sketches these alternative options.

2(3)(a) 'Police' Versus 'Law'

Zedner and Loader note that 'Dubber's analysis [provides] a lens through which one could potentially deepen understanding of the myriad ways in which the claims to efficient management of disorderly people [read: NPS vendors] and things [read: NPS] ... do battle with those of liberal legalism—struggles in which the power to maximize welfare or order are pressed into service, if necessary, against the ideals of justice'.²¹⁴ Dubber distinguishes the 'police' and 'law' modes of governance as being characterised by heteronomy and autonomy, respectively; and he identifies a post-Enlightenment shift from police to law as being a shift 'from prudence to justice, from discretion to duty, from arbitrariness to principledness, from guideline to norm, [and] from competence to legitimacy'.²¹⁵ He also claims that police's 'defining characteristic [is] its very undefinability',²¹⁶ and that:

the apparent paradox between the pursuit of security ... and the infringement of individual rights ... resolves itself once the preventive state is seen as a police state, i.e., a state that pursues not the security of individual persons but of itself, or more precisely that seeks to maintain [the peace of the sovereign personified householder] or its abstract depersonified alternative (the public peace). The notion of individual rights is foreign to the police state; the victim in penal police is not the individual, the harm not to the individual's rights, nor the wrong the disrespect of one person's ... rights by another; nor is the offender in penal

²¹² Dubber, 'Preventative Justice' (n 4); *The Police Power* (n 7).

²¹³ With reference to: Farmer, 'The Jurisprudence of Security' (n 8).

²¹⁴ Ian Loader and Lucia Zedner, 'Review: Police Beyond Law?' (2007) 10(1) *New Crim LR* 142, 145. [My editing]

²¹⁵ Dubber, 'Preventative Justice' (n 4).

²¹⁶ Dubber, *The Police Power* (n 7) 120.

police the individual ... The offence in penal police involves a disturber of the peace and a holder of that peace.²¹⁷

2(3)(b) PSA: 'Police' or 'Law'?

This chapter's preceding analysis demonstrates that the PSA exemplifies Dubber's police paradigm: the Act's conflict with formalist rule of law principles is a *prima facie* indication of this,²¹⁸ and the PSA's goal of ending the game of cat and mouse – of pursuing the security and maintenance of the established prohibitive legal order – to the detriment of objective individual-level security²¹⁹ is thematically synonymous with 'the offence in penal police [being a disturbance to the personified householder's peace]' rather than harm to individual interests. This self-preserving householder-style governance similarly manifests following critical analysis of the Act's stated rationale of protecting the vulnerable – a term which captures both NPS users, who are all grouped together in an autonomy-rejecting 'vulnerability/transgression nexus', and also other citizens, whose 'vulnerable autonomy' is threatened by NPS-related antisocial behaviour – which I have argued serves to paradoxically and circularly perpetuate prohibitive drug policy.²²⁰ The patriarchal state-householder-knows-best position is further reinforced by the blanket ban, which decrees not only what is forbidden on the arbitrary basis of 'affecting mental functioning or emotional state', but also (arbitrarily) what little is permitted, i.e., alcohol, tobacco, caffeine, etc. Moreover, the PSA's forward-looking preventative police governmentality seeks the security of the state-householder under the guise of fairness and proportionality²²¹ by '[avoiding] what are perceived as burdensome due process protections' via the novel utilisation of CPOs,²²² which require only civil standards of proof and contain potentially persuasive reverse burden clauses.²²³ Additionally, authorities other than the professional institution of the police alone can be involved in their creation, which Farmer argues 'links [CPOs] up with a broader police power'.²²⁴ Disproportionality in PSA trials, both pre- and post-conviction is also created by the toothless requirement to have regard to obscure and discretionary sentencing and executive guidelines (which are themselves based on the established

²¹⁷ Dubber, 'Preventative Justice' (n 4).

²¹⁸ Or, at least, that the PSA does not exemplify the law governmentality.

²¹⁹ 2(1)(a)(i)-(ii).

²²⁰ *ibid.*

²²¹ Explanatory Notes to the PSA, para 88.

²²² Farmer, 'The Jurisprudence of Security' (n 8).

²²³ 2(1)(a)(iii)(B).

²²⁴ Farmer, 'The Jurisprudence of Security' (n 8).

prohibitive legal order),²²⁵ ‘non-compliance with which is of no consequence [in the police state]’.²²⁶ Finally, the HOR’s unsound conclusions of the PSA’s effectiveness are a further dimension of the Act’s police governance, as ‘from a police perspective, the state’s exercise of its penal power is subject at best to self -defined, -interpreted, and -enforced, vague, and flexible norms of prudence, efficiency, and good governance’.²²⁷

2(3)(c) PSA Police: Critique

The police governmentality exercised through the PSA did enable efficiency insofar as it effectively proscribes NPS without the time and resource costs entailed by the MDA’s requirement for demonstrable harm. However, as NPS proscription was an end pursued by the PSA in itself, and police governance is fundamentally unconstrained, Dubber’s account apparently entails that the PSA’s police governmentality cannot be subject to a legitimacy critique. In other words, the police power ‘[answers] to dictates of efficiency in ways that render any wider insistence upon its legitimacy a category mistake’.²²⁸ This, Dubber argues, is in contrast to law, of which the end of promoting individual autonomy is delivered, legitimised and accountable via principles including maximum legal certainty, proportionality, etc.²²⁹

However, Loader and Zedner argue that Dubber’s descriptive claims about the police power ‘could suggest an effective way of structuring and restraining the police power on its own terms’.²³⁰ If the police state ‘seeks to maintain [the peace of the sovereign personified householder] or its abstract depersonified alternative (the public peace)’,²³¹ it follows that in the present context the PSA must not only effectively proscribe NPS, but this proscription must also be effective in maintaining the established prohibitive legal order. The blanket ban has not stopped the emergence of new NPS, indicating the threat NPS posed to the prohibitive legal order remains;²³² and the evidence of evolving attitudes towards prohibitive drug laws including the PSA²³³ suggests threats to orthodox drug policy/the state-householder’s peace are becoming increasingly virulent.

²²⁵ 2(2)(a)(ii); 2(2)(b)(iii).

²²⁶ Markus Dirk Dubber, *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (2018) 107.

²²⁷ *ibid* 133.

²²⁸ Loader and Zedner (n 214) 143.

²²⁹ Dubber, *The Dual Penal State* (n 226) 107.

²³⁰ Loader and Zedner (n 214) 145.

²³¹ Dubber, ‘Preventative Justice’ (n 4).

²³² 2(1)(a)(ii).

²³³ Both domestically and internationally: see 3(1)(a); 3(2)(b)-(c).

Overall, the police governmentality apparent in the PSA's provisions is inefficient due to a legislative conflation of the end of stopping the game of cat and mouse via the blanket ban, the end of securing the maintenance of prohibition, and the (legitimate) end of retaining some state control in the supply of potentially harmful substances. This conflation has resulted in the fulfilment of only one among many effectiveness criteria that were intended to be realised by utilising the police mode of governance in response to NPS, at the cost of others. Loader and Zedner further argue that Dubber's conception of the state-householder in the police state imposes a duty on the householder to maximise the household's welfare, and that this imposes restraints on 'that which is not utility-maximising'.²³⁴ There is a danger here that the vertical analysis of the PSA as a police mode of governance collapses into the harm-based critique of the Act expounded earlier in this chapter. However, a more helpful, novel and holistic critique of the PSA's vertical efficiency might be achieved by setting aside Dubber's separation of police and law as distinct modes of governance, and considering legal solutions to NPS-related problems within Farmer's wider conception of security-based jurisprudence that takes the inseparability of police and law as its starting point.

2(3)(d) Normative Bases for Alternative Approaches

Farmer argues that Dubber's 'vision of police as an alternative form of order seriously underplays the significance of prevention and deterrence as the logics which were understood to underpin the exercise of the modern criminal law, and the understandings of civil order that it sought to secure'.²³⁵ Farmer's conception of a jurisprudence of security is summarised thus:

Insofar as security is – unlike police – not defined by its very indefinability and therefore may serve a function other than the evasion of principled constraint and critical analysis in the name of the pursuit of the undefined welfare of an undefined public, the project of giving meaning to the notoriously vague end of security bears the promise of constructive debate. It may emerge as the common ground where law theories of crime as an infliction of harm on persons and police theories of crime as an offense against the authority of the sovereign-householder can meet.²³⁶

²³⁴ Loader and Zedner (n 214) 145.

²³⁵ Farmer, *Making the Modern Criminal Law* (n 9) 47.

²³⁶ Markus Dirk Dubber and Mariana Valverde, 'Introduction' in Dubber and Valverde (n 8).

I have not argued that utilising elements of the police mode of governance in response to NPS is objectionable in principle.²³⁷ Rather, the modes of governance manifested in the PSA – both substantively police and superficially law – seek the benefits of both modes while, on balance, efficiently achieving those of neither. A legislative reappraisal of drug users’ autonomy is essential for efficient management of the NPS problem, as the status quo, *inter alia*, disregards the non-problem majority of drug users, creates barriers for those using NPS for research purposes, and perpetuates an inappropriate system. Such reappraisal, it is submitted, could ‘[stabilise expectations] in relation to the conduct of social life and state power’²³⁸ among those groups primarily targeted by drug laws, without resorting to counter-productive, arbitrary and politically expedient²³⁹ legislation. Equally, however, the demonstrable harm and wrongfulness associated with aspects of NPS and their markets – both pre- and post-PSA – and the position of incompetent management that the emergence of NPS placed existing policy in, necessitates some police/state-householder governance, while crucially recognising the police’s inherent requirement of prudence, as ‘it is easy to point to a harm that one’s pet legislation is designed to eradicate; it is a lot harder to show that it eradicates it’.²⁴⁰

Having identified the benefits and inefficiencies created by both the PSA and the pre-PSA governmentally-unregulated model, the ‘project of giving meaning to the notoriously vague end of security’ becomes realisable. NPS-related problems are multifaceted, permeating across legal, political and social spheres, and threaten security at different levels within each sphere.²⁴¹ Therefore, a nuanced approach located between the polar opposites of an autonomy-disregarding blanket ban and a disorderly, unregulated NPS free-for-all is arguably the most probable means of efficiently securing both autonomy and (civil) order. This chapter’s largely theoretical efficiency analysis is ill-suited to charting the cartography of such a middle ground: this challenge is outside the scope of a thesis evaluating the PSA specifically, and has been attempted elsewhere.²⁴² However, the European Commission’s legislative efficiency evaluation guidelines require asking whether there are ‘opportunities to simplify the legislation or reduce unnecessary regulatory costs without undermining the intended objectives of the intervention’.²⁴³ To conclude on the PSA’s

²³⁷ Including the use of preventative punishment when certain criteria are met: 2(1)(a)(iii)(A).

²³⁸ Farmer, ‘The Jurisprudence of Security’ (n 8).

²³⁹ Burgess (n 52) 119.

²⁴⁰ John Gardner, ‘Book Review: Douglas Husak, *Over-Criminalisation: The Limits of the Criminal Law*’ (August 2008) NDPR <<https://ndpr.nd.edu/news/overcriminalization-the-limits-of-the-criminal-law/>>.

²⁴¹ To recap: within the legal sphere, questions arise of the Act’s coherence with various normative principles of criminalisation. Within the political, NPS threaten legislators’ credibility and create a tension as to the mode of governance that ought to be employed. Threats NPS pose in the social sphere are distinguishable at individual and collective levels.

²⁴² E.g., Stephen Rolles, *After the War on Drugs: Blueprint for Regulation* (2012); Psychoactive Substances Act 2013 (New Zealand); Cannabis Act 2018 (Canada).

²⁴³ European Commission (n 11, Introduction) 61.

vertical efficiency, contextualised within a wider jurisprudence of security, the existence of some potential opportunities to reduce the PSA's costs, while retaining the Act's benefits, are worth outlining.

2(3)(e) Efficient Alternative Approaches: A Sketch

Recognising that constructing a regulatory system for NPS 'will necessitate a fundamental rethinking of the contents of the drug policy toolbox', Sneddon suggests 'criminal law enforcement [should play] a very small role within strategies for regulating the NPS trade. Instead ... the emphasis needs to be on understanding regulation as a decentred activity, involving both state and non-state actors in polycentric networks of governance'.²⁴⁴ Options for decentred NPS regulation do exist. The value of NPS users' capacity to provide information to, and engage with, efforts of policymakers in responding to problematic NPS via online discussion forums has been recognised,²⁴⁵ and headshop owners' employment of harm-reduction strategies pre-PSA demonstrates that the appetite for decentralised (but prudent) governance also exists among potential NPS vendors.

Leitzel argues that the 'center's role should be to insist upon [a robustness principle]', i.e., that vice policies 'should be robust with respect to departures from full rationality ... [working] well if everyone is fully informed and completely rational, and [working] well even if [many people] are occasionally (or frequently) irrational in their vice-related choices'.²⁴⁶ To enable the provision of support and protection to irrational people without imposing substantial costs on rational people, *qua* the 'robustness principle',²⁴⁷ Leitzel suggests taxation, licensing and advertising restrictions as potential solutions.

Determining an appropriate level of taxation which advances 'robustness' is difficult,²⁴⁸ but has arguably been achieved in Scotland. The Scottish Government recently introduced minimum unit pricing (MUP) on alcohol purchases,²⁴⁹ which the Supreme Court concluded was an efficient means of responding to harmful drinking without imposing unacceptable burdens on the non-problem drinking population.²⁵⁰ The legislation thus exemplifies both 'robustness' and Farmer's

²⁴⁴ Toby Sneddon, 'Drug Policy and Global Regulatory Capitalism: The Case of New Psychoactive Substances (NPS)' (2014) 25 *Int J Drug Policy* 1019, 1022.

²⁴⁵ Damien Rhumorbarbe and others, 'Monitoring New Psychoactive Substances: Exploring the Contribution of an Online Discussion Forum' (2019) 73 *Int J Drug Policy* 273, 274-5.

²⁴⁶ Jim Leitzel, *Regulating Vice: Misguided Prohibitions and Realistic Controls* (2008) 17, 265.

²⁴⁷ *ibid* 74.

²⁴⁸ *ibid* 155.

²⁴⁹ Alcohol (Minimum Pricing) (Scotland) Act 2012. Strictly speaking, MUP is not a 'tax', but this term is used here for simplicity.

²⁵⁰ *Scotch Whisky Association v Lord Advocate* [2017] UKSC 76.

jurisprudence of security framework. It employs a preventative logic similar to Dubber's conception of the state-householder, but which (non-arbitrarily) seeks to maximise the *defined* welfare of a *defined* public²⁵¹ (i.e., to prevent the most harmful health effects of heavy alcohol consumption among those most likely to over-consume alcohol; and also to secure victims of alcohol-related crime against its most likely perpetrators) while respecting individuals' autonomous choices. Research indicates that MUP has been targeted successfully, with 'reductions of purchased alcohol only [occurring] in the households that bought the most alcohol'.²⁵²

Taxation of NPS alone would not advance the Act's goal of removing otherwise-unregulated and (ostensibly) disorder-driving high street headshops, which arguably threatened citizens' 'vulnerable autonomy' and sold mislabelled and impure products. Licensing opportunities exist in various forms, but even the most centralised could be normatively compatible with Farmer's, Sneddon's and Leitzel's proposals.²⁵³ For example, Nordic countries' state-run alcohol monopolies exemplify the police governmentality by securing public welfare through restricted availability, high prices and stringent restrictions on vendors,²⁵⁴ yet promote autonomous, responsible consumption. Studies indicate this approach more successfully promotes welfare than privatised markets, including those found in other European countries,²⁵⁵ while customer satisfaction remains high.²⁵⁶

The criminal law's role, then, would be the mechanism for '[insisting] upon robustness'.²⁵⁷ In the context of regulatory offences in the corporate sphere, the use of police-esque powers²⁵⁸ such as reverse burdens of proof (which are illegitimately found in the PSA's CPOs) *might* be justified on the basis of low offence-seriousness,²⁵⁹ the accused's voluntary engagement in a regulated activity,²⁶⁰ and as such 'defences themselves encourage efforts to secure regulatory compliance'.²⁶¹ Moreover, despite it being a more controversial²⁶² principle than, e.g., harm prevention, this

²⁵¹ Text to n 236.

²⁵² Amy O'Donnell, 'Immediate Impact of Minimum Unit Pricing on Alcohol Purchases in Scotland: Controlled Interrupted Time Series Analysis for 2015-18' (2019) 366 I15274.

²⁵³ For a wider discussion of the practicalities of licensing, see Leitzel (n 246) 161-5.

²⁵⁴ That only the state may sell alcohol exemplifies Dubber's description of the '[maintenance] of [the sovereign personified householder's] peace': 2(3)(a).

²⁵⁵ Tim Stockwell and others, 'Estimating the Public Health Impact of Disbanding a Government Alcohol Monopoly: Application of New Methods to the Case of Sweden' (2018) 18(1400) BMC Pub Health; WHO, 'Status Report on Alcohol Consumption, Harm and Policy Responses in 30 European Countries' (2019) 5 <<https://www.euro.who.int/en/health-topics/disease-prevention/alcohol-use/publications/2019/status-report-on-alcohol-consumption,-harm-and-policy-responses-in-30-european-countries-2019>>.

²⁵⁶ Jenny Cisneros Örnberg and Hildigunnur Ólafsdóttir, 'How to Sell Alcohol? Nordic Alcohol Monopolies in a Changing Epoch' (2008) 25(2) NAD 129, 144-5.

²⁵⁷ Leitzel (n 246) 265.

²⁵⁸ Text to n 224.

²⁵⁹ David Hamer, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) CLJ 142, 149.

²⁶⁰ Keane and Davidson (n 89) paras 5-25 to 5-29.

²⁶¹ Horder, *Ashworth's Principles* (n 5) 182.

²⁶² Horder, 'Harmless Wrongdoing' (n 61).

approach to NPS would also conform to a minimalist conception of criminalisation, and achieve another dimension of horizontal efficiency.²⁶³

This discussion of alternative approaches to regulating NPS is not exhaustive. The practical challenges faced by alternative approaches are numerous, and include dismantling the post-PSA SOC-led NPS market. Additionally, a regulatory scheme for NPS, but not traditional drugs, would be arbitrary, '[necessitating] a fundamental rethinking of the contents of the drug policy toolbox'.²⁶⁴ However, the existence of alternative approaches to the state's governance of NPS (which do not entail the PSA's theoretical and practical inefficiencies as identified throughout this chapter) are themselves a final facet of the Act's inefficient management of NPS from a vertical analysis perspective.

²⁶³ Horder, *Ashworth's Principles* (n 5) 73-7.

²⁶⁴ Sneddon (n 244) 1022.

Chapter 3: Relevance and Coherence

This chapter follows the final two stages of the European Commission's guidelines for legislative evaluation by considering the PSA's relevance and coherence.¹

3(1) Relevance

Any legislative evaluation must consider its ongoing relevance, i.e., whether post-enactment developments have rendered a statute unfit for purpose or its original purposes obsolete. The following discussion argues that changes in UK political priorities regarding drug laws and technological advancements in the NPS market threaten the PSA's continuing relevance.

3(1)(a) Political

The aforementioned 2019 Scottish Affairs Committee Report recommended 'that the UK Government decriminalises the possession of small amounts of drugs for personal use'.² As the PSA does not criminalise simple NPS possession, this might indicate that the PSA's approach is still politically relevant. However, the Committee hinted that decriminalisation – itself a 'radical departure' from current drug policy – might lead to a legalised market, which the Committee heard 'would deliver more benefits than criminalisation'.³ This nuance carries strong implications for the continuing, rather than current, political relevance of the PSA's criminalisation of the NPS market. Moreover, the first report of a Home Office-commissioned independent review of drugs concluded that the current approach to NPS has failed in prisons and among vulnerable populations, and that increasing resources for enforcement organisations might not enable a sustained reduction in drug supply.⁴ Whether this independent review will recommend implementation of non-prohibitive approaches to NPS and/or precipitate a change in political stances is unclear,⁵ but current signs indicate reforms will be recommended.

¹ European Commission (n 11, Introduction) 62-3.

² Scottish Affairs Committee (n 123, ch 2) para 127.

³ *ibid* para 139.

⁴ Dame Carol Black, 'Review of Drugs: Executive Summary' (2020) 5 <<https://www.gov.uk/government/publications/review-of-drugs-phase-one-report>>.

⁵ The Report is due to be published in early 2021. Recommendations of other independent reviews, such as the Police Foundation (n 43, ch 2), have not been implemented.

Numerous UK political parties have pledged to reform or review drug laws. Labour and Plaid Cymru advocate Commission-led reviews of drug criminalisation;⁶ the Scottish National Party proposes decriminalisation of drug possession and devolution of drug laws;⁷ the Liberal Democrats favour a legally regulated cannabis market and the removal of criminal penalties for drug possession;⁸ and the Green Party supports repealing the PSA/MDA and fully legalising all drugs.⁹ In spite of these stances (which stand in sharp juxtaposition to the wide political support for the PSA's introduction in 2015)¹⁰ the Conservatives won a majority in the 2019 general election with a commitment to maintain the current criminal justice approach to drug enforcement.¹¹ This signals that the Act remains relevant to the majority of currently sitting MPs, although the extent to which drug policy played a decisive role in the Brexit-dominated 2019 general election is less clear. Additionally, there is tension between the current Government's commitment to effective enforcement of prohibitive drug laws and its pro-Brexit policy, due to the UK's withdrawal from EU drug-related frameworks which are 'essential to [tackling] serious and organised crime',¹² including the EMCDDA; the early warning and risk-assessment procedures for NPS; Europol; and the European Arrest Warrant.¹³ On a continuum of policy relevance, the 'get Brexit done' title of the Conservative manifesto (underpinned by the 'red lines' which forbid UK/EU cooperation in these drug-related frameworks)¹⁴ demonstrates that effective drug enforcement is evidently less relevant to the governing Conservative Party than other priorities, potentially to the erosion of the pledged commitment to effective drug enforcement via, *inter alia*, the PSA.

⁶ Labour Party, 'It's Time for Real Change: The Labour Party Manifesto 2019' (2019) 34-5, 44, 46; Plaid Cymru, 'General Election Manifesto 2019' (2019) 35.

⁷ SNP, 'Stronger For Scotland: 2019 Manifesto' (2019) 5, 14-5, 19; 'SNP Formally Backs Decriminalisation of Drugs' *BBC News* (13 October 2019) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-50036173>>.

⁸ Liberal Democrats, 'Stop Brexit, Build a Brighter Future: Manifesto 2019' (2019) 61, 71, 75, 83.

⁹ Green Party, 'If Not Now, When? Manifesto 2019' (2019) 66-7.

¹⁰ Martin Horton-Eddison and Joe Whittaker, 'UK General Election 2017: Where Do the Parties Stand on Drug Policy?' (2017).

¹¹ Conservative and Unionist Party, 'Get Brexit Done, Unleash Britain's Potential: The Conservative and Unionist Party Manifesto 2019' (2019) 18-9.

¹² NCA, 'Statement on Contingency Planning in Relation to UK Withdrawal from the European Union' <<https://www.nationalcrimeagency.gov.uk/news/nca-statement-on-contingency-planning-in-relation-to-uk-withdrawal-from-the-european-union>>.

¹³ The Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019, SI 2019/742, regs 18-9, 37, 55.

¹⁴ Andres Roman-Urrestarazu and others, 'Brexit Threatens the UK's Ability to Tackle Illicit Drugs and Organised Crime: What Needs to Happen Now?' (2019) 123 *Health Policy* 521, 522.

3(1)(b) Technological

Pertinent to whether the PSA's 'original objectives (still) correspond to needs'¹⁵ is the evolving nature of the online NPS market. The PSA's goal of ending NPS sales has displaced NPS market actors from headshop owners to SOC organisations, but also (in part) the market locus from high street and clearnet outlets to darknet cryptomarkets. These are online marketplaces, accessed via specialised software enabling anonymity for sellers and buyers, where goods¹⁶ are typically paid for in largely-untraceable cryptocurrencies.¹⁷

A study of the PSA's immediate impact on darknet NPS activity found that the number of darknet NPS vendors, specific NPS and NPS listings all substantially increased between October 2015 and October 2016.¹⁸ The UK is now 'leading the world in the rise of purchasing drugs on the darknet',¹⁹ with UK darknet drug sales rising substantially between January 2015 to May 2017.²⁰ Research conducted in 2016 found that UK drug cryptomarket vendors made the highest revenues of any European country,²¹ and this ranking has since remained constant.²² Furthermore, the 2020 Global Drug Survey (an international survey of a non-representative, self-selected sample of 100,000 to 500,000 internet users who use drugs) found substantial (approximately two-fold or more) increases in the number of English, Welsh and Scottish people buying drugs over the darknet since 2014, as part of a global upward trend.²³

Cryptomarkets have a modest share of the overall drug market (with NPS accounting for a small percentage of all drugs sold),²⁴ but there is evidence that use of cryptomarkets is likely to continue²⁵ and/or increase despite the barriers created by the requirements of specialised knowledge and software to access them.²⁶ Therefore, the PSA's original objective of removing visible NPS retailers

¹⁵ European Commission (n 11, Introduction) 62.

¹⁶ Most commonly illegal drugs.

¹⁷ UNODC, *World Drug Report 2020 Booklet 4: Cross-Cutting Issues* (2020) 67 (WDR 2020).

¹⁸ Elle Wadsworth and others, 'A Market on Both "Sides" of the Law: The Use of the Hidden Web for the Sale of New Psychoactive Substances' (2017) 32(3) *Hum Psychopharmacol Clin Exp* e2596.

¹⁹ Deligianni (n 178, ch 1) 514.

²⁰ WDR 2020 (n 17) 73.

²¹ Kristy Kruihof and others, *Internet-Facilitated Drugs Trade: An Analysis of the Size, Scope and the Role of the Netherlands* (2016).

²² WDR 2020 (n 17) 74. However, darknet vendors 'do not necessarily indicate their true locations'.

²³ *ibid* 79.

²⁴ *ibid* 60, 72. This might reflect that NPS use has historically been low compared to traditional drugs, and also reflect definitional inconsistencies in what constitutes 'NPS': Peacock (n 1, Introduction).

²⁵ WDR 2020 (n 17) 69-70.

²⁶ Michala Kowalski, Claire Hooker and Monica J Barratt, 'Should We Smoke It For You As Well? An Ethnographic Analysis of a Drug Cryptomarket Environment' (2019) 73 *Int J Drug Policy* 245.

is not relevant to current needs which involve darknet NPS retailers,²⁷ particularly as both pre- and post-PSA studies have noted the capacity of cryptomarkets to diffuse NPS to offline trade.²⁸ The PSA's roundabout encouragement of cryptomarket use may also have diluted the Act's (already-limited) successes effected by removing headshops, indicating another facet of the PSA's irrelevance.

The rationales underpinning the PSA's other original objectives (i.e., of ending the game of cat and mouse, reducing use, and reducing harms) are uncontroversial²⁹ and do remain relevant. However, the post-PSA cryptomarket advances impact the relevance of the PSA's *implementation* of those other goals' wider rationales.

International efforts to curb darknet sales have created a new game of cat and mouse. From 2010-2014 there were three dominant, enduring drug cryptomarkets.³⁰ Following their shutdown via enforcement operations and hackers, 'a proliferation of markets came into existence', including the major AlphaBay and Hansa platforms which were successively shut down by international enforcement operations in 2017.³¹ The latest EMCDDA/Europol report evidences 10 currently operational marketplaces.³² Additionally, it notes the 'darknet markets ecosystem is dynamic and resilient', and that continued fragmentation of large marketplaces into smaller ones will create further barriers to enforcement.³³ International darknet enforcement efforts are grounded in myriad (inter)national statutes of which the PSA is one small part, and are motivated by the wide range of illegal goods offered by cryptomarkets, of which NPS are one small part. Nonetheless, the PSA's direct impact on increasing darknet NPS activity and the major role of UK-based cryptomarket NPS vendors and customers – coupled with the UK's obligations to cooperate with these international enforcement efforts³⁴ – cements the Act's place in the creation of this new game.

Furthermore, cryptomarkets have impacted the relevance of the PSA's criminalisation-based implementation of the 'reducing use' and 'reducing harms' goals. The wide range of substances

²⁷ Maintaining headshop-free high streets post-PSA cannot be a relevant objective where the market locus is merely displaced, rather than eliminated.

²⁸ Judith Aldridge and David Décary-Hétub, 'Hidden Wholesale: The Drug Diffusing Capacity of Online Drug Cryptomarkets' (2016) 35 Int J Drug Policy 7; Peacock (n 1, Introduction) 1679-80.

²⁹ Re: the rationale of ending the game of cat and mouse, recall 2(3)(d)-(e) advocated a 'middle ground' between an NPS free-for-all and a blanket ban, which would seek to end (so far as practicable) the emergence of *unregulated* NPS. It is submitted that reducing use is uncontroversial in the same way as encouraging people to drink less alcohol, cease smoking and reduce unhealthy food consumption is uncontroversial; and reducing harms (NPS-related or otherwise) is a fundamental tenet of the criminal law.

³⁰ EMCDDA and Europol, *EU Drug Markets Report 2019* (2019) 68.

³¹ *ibid* 69.

³² *ibid*.

³³ *ibid* 67, 70.

³⁴ Commission Decision (EU) 2017/388 of 6 March 2017, OJ L59/39.

offered by cryptomarkets have extended users' drug repertoires, and 'the proportion of people purchasing drugs on the darknet who did not use drugs prior to their first drug purchase on the darknet doubled [between 2015-2020]'.³⁵ Additionally, the anonymous nature of cryptomarkets and cryptocurrency transactions entails easy money laundering and its associated harms.³⁶ Given the majority of cryptomarket goods are drugs (including NPS), decriminalising³⁷ sales of NPS and other drugs might yield positive returns in ameliorating these harms, and would therefore be a more relevant manner of responding to current needs.

³⁵ WDR 2020 (n 17) 78. While overall UK NPS use has reduced post-PSA, these figures do impact the Act's *continuing* relevance.

³⁶ Rolf van Wegberg, Jan-Jaap Oerlemans and Oskar van Deventer, 'Bitcoin Money Laundering: Mixed Results? An Explorative Study on Money Laundering of Cybercrime Proceeds Using Bitcoin' (2018) 25(2) J Financ Crime 419; Valeriia Dyntu and Oleh Dykyi, 'Cryptocurrency in the System of Money Laundering' (2018) 4(5) Balt J Econ Stud 75; NCA, 'Money Laundering and Illicit Finance' <<https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance>>.

³⁷ 2(3)(e).

3(2) Coherence

As no laws exist in a vacuum, legislative evaluation must also consider the statute's coherence, i.e., whether it works in synergy or tension with other measures.³⁸ The PSA's coherence will be analysed in four contexts: international legislation and obligations; international drug policy; domestic legislation; and domestic drug policy.

3(2)(a) International Legislation

Of the >950 identified NPS, only 48 are controlled across the three main UN conventions on recreational drugs.³⁹ Nonetheless, the PSA's coherence with the spirit of these conventions can still be assessed. The Single Convention on Narcotic Drugs 1961 and its amending 1972 Protocol;⁴⁰ the Convention on Psychotropic Substances 1971;⁴¹ and the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988⁴² all require party states to implement a criminal justice approach to drugs, i.e., a normative focus, to which the PSA adheres. Moreover, Article 3(4) of the 1988 Convention provides that states must make serious offences liable to punishment by imprisonment, and allows for minor offences to be dispensed with via alternatives to conviction or punishment. Insofar as this, the PSA's provision for incremental penalties ranging from a fine to 7 years' imprisonment is coherent with these international frameworks.⁴³ However, one area of dissonance is that all three Conventions require states to ensure the availability of controlled drugs for medical and scientific purposes, which the PSA has failed to do.⁴⁴

There have been various European-level attempts to create harmonising NPS/drug legislation. 1993 saw the creation of the EMCDDA⁴⁵ and a Schengen-based measure aimed at improving international cooperation in combating drug trafficking.⁴⁶ A 1997 Joint Action created:

³⁸ European Commission (n 11, Introduction) 62-3.

³⁹ UNODC, 'Early Warning Advisory on NPS' (2019) <<https://www.unodc.org/LSS/Page/NPS>>.

⁴⁰ 30 March 1961, 520 UNTS 151; 25 March 1972, 976 UNTS 3.

⁴¹ 21 February 1971, 1019 UNTS 175.

⁴² 20 December 1988, 1582 UNTS 95.

⁴³ PSA, s 10.

⁴⁴ 1(2)(b).

⁴⁵ Council Regulation (EEC) 302/93 of 8 February 1993, OJ L36/1.

⁴⁶ Decision (EC) (SCH/Com-ex (93)14) of 14 December 1993, OJ L239/427.

a mechanism for rapid exchange of information on new synthetic drugs [i.e., drugs not listed in the 1971 Convention and which pose a comparable serious threat to public health] in order to permit the application of the measures of control on psychotropic substances ... equally to new synthetic drugs.⁴⁷

Minimum/maximum custodial penalties for these control measures were prescribed in 2004;⁴⁸ a replacement to the 1997 Joint Action was created in 2005 to strengthen the information-exchange framework (and also updated the terminology used to 'NPS');⁴⁹ and the EMCDDA was recast in 2006.⁵⁰ However, the 2005 system was soon rendered ineffective by the 'rapid rise of NPS in the EU',⁵¹ eventually resulting in an updated 2017 Regulation aimed at further reinforcing the early-warning and risk-assessment procedures by reducing the requisite deadlines for early-warning/risk-assessment,⁵² and an accompanying Directive enabling easier control of specific NPS across jurisdictions by specifying minimum common rules on NPS offences and penalties.⁵³

The UK's coherence with these measures has been mixed. The UK participated in the 1997-2006 measures,⁵⁴ but only implemented the drugs cooperation parts of the Schengen acquis in 2005.⁵⁵ The UK later backtracked, deciding not to participate in European NPS law harmonisation attempts,⁵⁶ and was therefore not bound by the 2017 Directive on rules regarding NPS offences and penalties or the 1993 Schengen drug trafficking cooperation measures post-2014.⁵⁷ This was deliberately done to ensure non-coherence between any future UK NPS laws (e.g., the PSA) and EU NPS measures, which the UK Government claimed would 'fetter the UK's discretion to control different [NPS]'.⁵⁸

The 2017 Directive imposed *minimum* requirements, with the caveat that 'Member States may maintain or introduce ... with regard to [NPS], any national control measures that they consider appropriate'.⁵⁹ Additionally, the few NPS listed in the 2017 Directive were captured by existing UK

⁴⁷ Joint Action 97/396/JHA of 16 June 1997, OJ L167/1.

⁴⁸ Council Framework Decision 2004/757/JHA of 25 October 2004, OJ L335/8.

⁴⁹ Council Decision 2005/387/JHA of 10 May 2005, OJ L127/32.

⁵⁰ Regulation (EC) 1920/2006 of 12 December 2006, OJ L376/1.

⁵¹ Ute Stiegel, 'Legislating NPS in the European Union' in Corazza and Roman-Urrestarazu (n 12, ch 1).

⁵² Regulation (EU) 2017/2101 of 15 November 2017, OJ L305/1.

⁵³ Directive (EU) 2017/2103 of 15 November 2017, OJ L305/12.

⁵⁴ Adopted unanimously by Member States under: Treaty on the European Union, Title VI.

⁵⁵ Council Decision 2004/926/EC of 22 December 2004, OJ L395/70 art 1; Council Decision 2000/365/EC of 29 May 2000, OJ L131/43 art 1(c)(i).

⁵⁶ Protocol (No 19) OJ C326/290 art 4; Protocol (No 21) OJ C202/295.

⁵⁷ Directive (EU) 2017/2103 (n 89); Council Decision 2014/857/EU of 1 December 2014 OJ L345/1. However, the 2006 EMCDDA and the 2017 early-warning/risk-assessment Regulations (ns 50, 52) did apply.

⁵⁸ HL Deb 13 January 2014, vol 751, col WS1.

⁵⁹ Directive (EU) 2017/2103 (n 53) art 1b.

legislation prior to the Directive's implementation,⁶⁰ (and a separate draft regulation was not implemented),⁶¹ so concerns about 'fetter[ing] the UK's discretion' came to no fruition. Although the PSA's blanket ban is therefore not in tension with the 2017 Directive's minimum requirements, the Act is not formally or substantively in synergy with it either. For example, the PSA's 'mental functioning/emotional state' -based definition of a 'psychoactive substance' contrasts with the 2017 Directive's harm-based procedure for controlling NPS.⁶² Thus, the UK's blanket control of less harmful NPS, e.g., nitrous oxide, has no equivalent in EU law, and the PSA is therefore perceivable as the latest manifestation of the historical incoherence between UK and European NPS legislation.

3(2)(b) International Drug Policy

A cornerstone of the three UN Conventions' hard-line criminal justice enforcement policy is a requirement for total consensus among states.⁶³ The PSA's criminal justice approach is normatively coherent with those Conventions, but there have been developments among signatory states reminiscent of the shift⁶⁴ in UK political attitudes towards UK drug laws. Tracking the extent of these dilutions to the original uncompromising policy enables comparisons and conclusions to be made regarding the PSA's coherence with current international drug policy.

Encapsulating the hard-line orthodox approach, the 1961 Convention is the 'only [UN] treaty characterising the activity it seeks to regulate, control or prohibit as being "evil".⁶⁵ Though not violating the explicit and connoted requirements of combating this 'evil', over the following decades various European states implemented more relaxed measures towards illicit drug enforcement by employing administrative instead of criminal penalties for possession offences.⁶⁶ At the 1998 UN General Assembly Special Session of the World Drug Problem (UNGASS), member states formally 'reaffirmed [their] unwavering determination and commitment' to the Conventions. However, the German ambassador's statement that 26 states 'wished to add an Interpretative

⁶⁰ E.g., Mephedrone is an MDA-controlled drug; methoxetamine was subject to TCDO; and MDMB-CHMICA was controlled by the PSA before the EU legislation entered into force: 1(2)(a)-(b).

⁶¹ Procedure 2013/0305/COD, COM (2013) 619.

⁶² Directive 2017/2103 (n 53) art 1a.

⁶³ Known as the 'Vienna Consensus'. For two comprehensive discussions which informed this section, see: Neil Boister, 'Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs' (2016) 29 *Leiden J Int Law* 389; David R Bewley-Taylor, *International Drug Control: Consensus Fractured* (2012).

⁶⁴ 3(1)(a).

⁶⁵ Rick Lines, "'Deliver Us From Evil"? The Single Convention on Narcotic Drugs, 50 Years On' [2010] *Intl J Hum Rights Drug Policy* 3, 7.

⁶⁶ Boister (n 63) 394.

Statement to the already agreed Political declaration, [and the following] series of hostile country responses, removed what had become an increasingly precarious façade of harmony'.⁶⁷

In the post-1998 UNGASS decade, a series of 'soft defections' at various levels resulted in 'attrition' from the Conventions' 'authoritative norm'.⁶⁸ At the UN policy level, despite attempts of 'prohibition-oriented states to block [the] shift away from a zero-tolerance approach to drug use towards one centred on public health',⁶⁹ in 2003 the International Narcotics Control Board (INCB) expressed a softened 'ultimate aim' of the Conventions, as being '[reducing] harm' rather than the treaty wording of 'combating evil'.⁷⁰ In 2004, the INCB stated that 'practice of exempting small quantities of drugs from criminal prosecution is consistent with the [Conventions]',⁷¹ validating the use⁷² of administrative penalties in numerous states.

Harder defection at state level is observable in the legalisation of recreational cannabis markets in Uruguay, Canada and some USA states, further weakening the internal coherence⁷³ of international drug policy. Such radicalism has no consensus support among international policymakers⁷⁴ given the reaffirmation of the Conventions by member states at the 2016 UNGASS, thus rendering the hard-line orthodox policy the default *formal* international position. However, the post-1998 UNGASS developments, buttressed by the PSA-era endorsements of decriminalising drug users by two UN Secretary Generals,⁷⁵ and a 2017 Joint UN Statement calling for '[the repeal of] punitive laws that have been proven to have negative health outcomes [including] possession of drugs for personal use',⁷⁶ demonstrate that insofar as criminalisation of drug possession, the hard-line orthodox is anachronistic.

Despite some legislative coherence,⁷⁷ there is little NPS policy coherence between European states or at the EU level, let alone at the UN level.⁷⁸ A recent comparative study of six EU countries' NPS

⁶⁷ Bewley-Taylor (n 63) 2.

⁶⁸ *ibid* 20-1.

⁶⁹ *ibid* 102-3.

⁷⁰ INCB, *Report: 2003* (E.04.XI.1, 2004) para 218.

⁷¹ INCB, *Report: 2004* (E.05.XI.3, 2005) para 538.

⁷² Including Spain, Portugal, Mexico, Argentina, Slovenia, Croatia, Czechia, and Bulgaria: Boister (n 63) 394; EMCDDA, 'Countries' <https://www.emcdda.europa.eu/countries_en>.

⁷³ I.e., the 'Vienna Consensus'.

⁷⁴ Though consensus for radical change exists among international drug policy experts: Joanne Csete and others, 'Public Health and International Drug Policy' (2016) 387(10026) *Lancet* 1427.

⁷⁵ Transform, 'The UN Chief Executives Board Unanimously Endorses Decriminalisation of People Who Use Drugs' (2019) <<https://transformdrugs.org/wp-content/uploads/2019/03/UN-CEB-Briefing-2019.pdf>>.

⁷⁶ UN, 'Joint United Nations Statement on Ending Discrimination in Health Care Settings' (2017) <<https://www.who.int/en/news-room/detail/27-06-2017-joint-united-nations-statement-on-ending-discrimination-in-health-care-settings>>.

⁷⁷ Directive (EU) 2017/2103 (n 53).

⁷⁸ The UN 'urges Member States to use and follow the scheduling processes of the [Conventions]' with regards to NPS: UN CND Res 57/9 (2014) para 8.

policies found limited NPS policy harmonisation between member states, which have formulated approaches independently.⁷⁹ The UK's NPS policy was noted as 'harm reduction' (a policy shared by the other states except Sweden which pursues a 'drug free society' goal), largely due to the study's consideration of the UK's 2017 Drug Strategy in addition to PSA:⁸⁰ isolating regulatory measures, the study noted a contrast between the PSA's blanket ban approach and the approach of other jurisdictions.⁸¹

Among the few significant areas of coherence in European NPS policy is the EU Drugs Strategy 2013-2020, which prioritises identification and early-warning/risk-assessment procedures for NPS.⁸² However, options for controlling NPS are strongly contested at EU level, evidenced by the European Council's rejection of a European Parliament-approved draft regulation which aimed to create a three-tier approach, whereby low-risk NPS would remain uncontrolled; medium-risk NPS temporarily banned; and high-risk NPS permanently banned.⁸³ Despite its non-adoption, Colson notes that 'the draft was in itself another sign of the spectacular landslide moving the ground below the century-old drug prohibition regime',⁸⁴ given the draft's sanctioning of recreational (albeit 'low-risk') drug market.

3(2)(c) Domestic Legislation and Drug Policy

The UK's three legislative measures relating to NPS are the PSA; Temporary Class Drug Orders (TCDO);⁸⁵ and the MDA. They all share a coherent normative focus of a prohibitive, criminal justice approach to NPS. As mentioned, the PSA was intended to complement, not replace, TCDOs and the MDA as part of an overall classificatory framework for recreational drugs. For this framework to be coherent, the individual components must adhere to 'the two basic assumptions of any classification system [i.e., that the] categories must be mutually exclusive and collectively

⁷⁹ Jessica Neicun and others, 'Mapping Novel Psychoactive Substances Policy in the EU: The Case of Portugal, the Netherlands, Czech Republic, Poland, the United Kingdom and Sweden' (2019) 14(6) PLoS One e0218011.

⁸⁰ However, the Drug Strategy's ostensible claims to 'harm reduction' must be read in conjunction with its overarching focus on enforcement: 2(1)(a)(i).

⁸¹ Neicun (n 79) 16. Indeed, the UK's PSA stands out among other EU countries' innovative responses to NPS for having no 'harm' criteria: EMCDDA and Eurojust, *New Psychoactive Substances in Europe: Legislation and Prosecution—Current Challenges and Solutions* (2016) 10.

⁸² Council Recommendation EU Drugs Strategy 2013-20, OJ C402/01.

⁸³ Procedure 2013/0305/COD (n 61).

⁸⁴ Renaud N Colson, 'Harmonizing NPS Legislation Across the European Union: An Utopia' in Corazza and Roman-Urrestarazu (n 12, ch 1).

⁸⁵ Police Reform and Social Responsibility Act 2011, sch 17.

exhaustive'.⁸⁶ The TCDO's and MDA's substance-by-substance approaches were ill-equipped to provide a collectively exhaustive list of NPS due to the rate of NPS emergence, but the PSA plugged this gap with its blanket ban. Additionally, mutual exclusivity is ensured as substances can only be controlled under one of the three statutory measures at one time. Insofar as creating a prohibitive classificatory framework, the three measures are therefore coherent. However, one area of tension relates to custodial possession offences: the ACMD advised 'that TCDOs should not be modified to include a custodial possession offence' due to the PSA's custodial possession offence's inefficacy in reducing prison NPS use,⁸⁷ but, conversely, among policymakers the 'PSA has reduced the appeal of using [TCDOs as their use] involves removing the possession offence in custodial settings'.⁸⁸

A brief analysis of domestic drug policy, however, reveals greater dissonance. The aforementioned changes⁸⁹ in numerous political parties' drug policies have progressed to tension between the UK and Scottish Governments. Precipitated by Scotland's record drug death rate, the Scottish Government created the Drug Deaths Taskforce, with a remit to review the current criminal justice approach to recreational drugs⁹⁰ (which is reserved to the UK Parliament).⁹¹ Additionally, the Home Office vetoed plans for safe drug consumption facilities (whereby users can inject drugs under medical supervision) in Glasgow, despite Scottish cross-party support;⁹² and two drug policy summits held in 2020 (one arranged by the Scottish Government; the other by the UK Government) exposed 'fundamental differences' in the Scottish and UK approaches, with the former favouring 'a public health approach focused on harm prevention', while the latter 'stressed the importance of firm law enforcement'.⁹³

⁸⁶ Terance D Miethe and Wendy C Regoeczi, *Rethinking Homicide: Exploring the Structure and Process Underlying Deadly Situations* (2004) 48.

⁸⁷ ACMD, 'Future Use and Purpose of Temporary Class Drug Orders (TCDOs)' (2019) 2 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841038/Future_use_and_purpose_of_Temporary_Class_Drug_Orders__TCDOs__003_.odt>.

⁸⁸ HOR (n 2, ch 1) 4.

⁸⁹ 3(1)(a).

⁹⁰ 'Scottish Drug Deaths Taskforce: One Year Report' (2020) 15 <<https://drugdeathstaskforce.scot/media/1122/ddtf-report-full-report-final-amended-9-august-2020.pdf>>.

⁹¹ Scotland Act 1998, sch 5, para B1.

⁹² 'Cross-party Group Urges Home Office Rethink on "Fix Rooms"' *BBC News* (21 July 2019) <<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-49063485>>.

⁹³ Bryan Christie, 'Summit on Drug Deaths Ends with No Agreement' (2020) 368 *BMJ* m822.

3(3) Relevance and Coherence: Conclusion

This chapter has exposed cracks in the PSA's continuing relevance, and highlighted nuances in its coherence with wider law and policy. The present UK Government has a democratic mandate to continue the criminal justice approach to recreational drugs. However, the key issue of Brexit – the details of which go contrary to the effective enforcement of drug laws – and the cross-minority-party support for reviewing prohibitive drug legislation questions the PSA's relevance going forward. Additionally, the changes in the NPS market, which is becoming increasingly technology-facilitated and globalised, strike to the heart of the efficacy of the PSA's original goals.

International drug policy is undergoing a crossover. The softer stances adopted by individual states collectively demonstrate both the arrestment of the orthodox policy's momentum and also gradual steps towards a replacement framework. If/when these changes will approach the climax which predicates a paradigm policy shift is unclear due to the 'daunting political and procedural obstacles confronting [states] wishing to initiate [change]'.⁹⁴ Until then, the PSA retains a strong claim to coherence with international traditional drug policy, not just formally, but also with the current substantive 'crossover' given the Act's assonance with the international vogue of not criminalising drug use and possession. Yet, although the novelty of the NPS phenomenon is a likely explanation for the lack of an internally coherent international NPS policy, and thus drawing conclusions regarding the PSA's coherence with international NPS policy is difficult, the PSA's blanket ban does stand in sharp contrast to the approach of most other countries and the European Parliament's appetite for allowing a 'low-risk' NPS market.

Similar themes can be observed domestically. The UK's legal framework for recreational drugs is normatively coherent, and allows for the mutually exclusive and collectively exhaustive classification of drugs. However, the growing divide between the UK and Scottish Governments on how to approach the regulation of drugs signals that the current stalemate may be unsustainable.

⁹⁴ Bewley-Taylor (n 63) 281.

Conclusion

This thesis evaluated the PSA from practical, theoretical and developmental perspectives. Chapter one considered the Act's effectiveness with reference to its stated goals of: ending NPS sales; ending the game of cat and mouse; reducing psychoactive substance use; and reducing NPS-related harms. Using wider evaluative criteria than found in the HOR, it was argued – in contrast to the HOR's findings – that the Act has failed to achieve most of these aims.

Chapter two analysed the PSA's efficiency from a theoretical standpoint. It argued that the Act is an inefficient statute, as it conflicts with numerous normative principles of criminalisation, namely: preventing harm (across three theoretical bases); criminalising only that which is wrongful; and fair labelling. It also was shown that the PSA conflicts with the rule of law-based principles of maximum certainty and proportionate sentencing. Lastly, it was argued that the PSA is an inefficient exercise of state power, and some alternative – and intrinsically more efficient – approaches to NPS regulation were sketched.

Chapter three critiqued the PSA's continuing relevance, noting that shifts in political priorities and technological advancements threaten to render its justificatory rationales obsolete. Similarly, while the Act's claim to coherence with current international and domestic legislation is largely valid, the policies which underpin the PSA's criminal justice approach to recreational drugs are being dismantled both internationally and within the UK. The ramifications of the various iterations of drug criminalisation – including the PSA – must inform this dismantling and future reform.

Appendix

1.1.1

$$\begin{aligned}\% \text{ non-conviction rate PSA prosecutions} &= (n \text{ prosecutions} - n \text{ sentences}) / n \text{ prosecutions} \times 100 \\ &= (261 - 171) / 261 \times 100 \\ &= 34.48\%\end{aligned}$$

1.1.2

$$\begin{aligned}\text{Ratio} &= \% \text{ non-conviction rate PSA prosecutions} / \text{average \% non-conviction rate all drug offences} \\ &= 34.48 / ((6.1 + 5.9 + 6.2) / 3) \\ &= 5.68 : 1\end{aligned}$$

1.2

1.6% reported use at some point in their lives, of which 24.3% reported use in the preceding 12 months.

$1.6 \times 0.243 = 0.3888\%$ of all respondents reported use in the preceding 12 months.

1.3

$$\begin{aligned}\text{NPS-only positive tests} &= \text{Total positive tests} - \text{total non-NPS positive tests} \\ &= 17.7\% - 10.4\% \\ &= 7.3\%\end{aligned}$$

$$\begin{aligned}\text{Ratio} &= \text{NPS-only positive tests} / \text{general population NPS prevalence} \\ &= 7.3 / 0.4 \\ &= 18.25 : 1\end{aligned}$$

1.4:

The 2015 Government economic assessment of the PSA indicated that headshops would annually lose £32.6 million in profits and the Act would cost the criminal justice system £60m in the first year and £50m annually thereafter. It also claimed £20.9m would be saved based on 12 fewer fatalities (approximately £1.74m per death)⁹⁵ and £0.2m from 'reduced hospital admissions' annually.

Based on this the economic harm of the PSA has been: £130.4m in lost profits (to May 2020);⁹⁶ £210m in criminal justice system expenditure (to May 2020);⁹⁷ £591.6m in Scottish fatalities (to the July 2019 statistics);⁹⁸ a saving of £104.4m in English/Welsh fatalities (to the August 2019 statistics);⁹⁹ and an unknown loss due to the numbers of hospital admissions. This equates to a back-of-envelope overall economic cost estimate of £827.6m since enactment.¹⁰⁰ The 2015

⁹⁵ Appendix 1.4.1.

⁹⁶ Appendix 1.4.2.

⁹⁷ Appendix 1.4.3.

⁹⁸ Appendix 1.4.4; Text to n 228, ch 1.

⁹⁹ Appendix 1.4.5; Text to n 229, ch 1.

¹⁰⁰ Appendix 1.4.6.

economic assessment projected that this figure should be £297.8m.¹⁰¹ This means the PSA has cost almost 2.78x more than projected.¹⁰²

1.4.1:

£20.9m per year / 12 deaths per year = £1.74m per death per year.

1.4.2:

£32.6m per year x 4 years since enactment = £130.4m since enactment.

1.4.3:

£60m in the first year + (£50m per each subsequent year x 3 subsequent years) = £210m in criminal justice system expenditure since enactment.

1.4.4:

In Scotland in 2016, there were 286 deaths where NPS were 'implicated in, or potentially contributed, to the death'. In 2017 and 2018, this number rose to 337 and 575, respectively. The net change in deaths in 2017 was (337 – 286 = 51) and in 2018 was (575 – 286 = 289). This gives a total net change of (51 + 289 = 340). When multiplied by the per-year death cost of £1.74m, this equates to an overall cost of (340 x £1.74m = £591.6m).

1.4.5:

In England and Wales in 2016, there were 123 deaths involving NPS. In 2017, this number fell to 61. In 2018, this number rose to 125. The net change in deaths in 2017 was (61 – 123 = -62) and in 2018 was (125 – 123 = 2). This gives a total net change of (-62 + 2 = -60). When multiplied by the per-year death cost of £1.74m, this equates to an overall cost of (-60 x £1.74m = -£104.4m), i.e. a saving of £104.4m.

1.4.6:

£130.4m in lost profits + £210m in criminal justice system expenditure + £591.6m in Scottish deaths + (-£104.4m) in English and Welsh deaths = £827.6m

1.4.7:

£130.4m in lost profits + £210m in criminal justice system expenditure - (£20.9m due to 12 fewer deaths per year x 2 years [to the latest statistics]) - (£0.2m due to reduced hospital admissions per year x 4 years) = £297.8m.

1.4.8:

Current estimate of £827.6m / 2015 projection of £297.8m = 2.78

2.1

28 months total sentence - 3 months maximum sentence for handling stolen goods - 6 months maximum sentence for counterfeit currency = 19 months estimated sentence for intent to supply nitrous oxide.

¹⁰¹ Appendix 1.4.7.

¹⁰² Appendix 1.4.8.

Bibliography

Books and Reports

Alldrige P, *Relocating Criminal Law* (2000)

Ashworth A, *Principles of Criminal Law* (5th edn, 2006)

-- and Zedner L, *Preventative Justice* (2014)

Bewley-Taylor DR, *International Drug Control: Consensus Fractured* (2012)

British Medical Association, *Drugs of Dependence: The Role of Medical Professionals* (2013)

Dubber MD, *The Police Power: Patriarchy and the Foundations of American Government* (2005)

-- *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (2018)

Eastwood N, Shiner M and Bear D, *The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales* (2013)

European Monitoring Centre for Drugs and Drug Addiction, *New Psychoactive Substances in Europe: Legislation and Prosecution – Current Challenges and Solutions* (2016)

-- *Recent Changes in Europe's MDMA/Ecstasy Market* (2016)

-- *Fentanils and Synthetic Cannabinoids: Driving Greater Complexity into the Drug Situation* (2018)

-- *European Drug Report: Trends and Developments* (2019)

-- and Eurojust, *New Psychoactive Substances in Europe: Legislation and Prosecution—Current Challenges and Solutions* (2016)

-- and Europol, *EU Drug Markets Report 2019* (2019)

Farmer L, *Making the Modern Criminal Law: Criminalization and Civil Order* (2016)

Feinberg J, *Harm to Others* (1984)

HM Government, *2017 Drug Strategy* (2017)

<<https://www.gov.uk/government/publications/drug-strategy-2017>>

HM Inspectorate of Prisons, *Changing Patterns of Substance Misuse in Adult Prisons and Service Responses* (2015)

-- *Chief Inspector of Prisons for England and Wales: Annual Report 2018-19* (2019)

HM Inspectorate of Prisons for Scotland, *HM Chief Inspector's Annual Report 2018-19* (2019)

Home Affairs Committee, *Psychoactive Substances: Government's Response to the Committee's First Report of Session 2015-16* (HC 2015-16, 755)

Home Office, *Drug Misuse: Findings from the Crime Survey for England and Wales*
 <<https://www.gov.uk/government/collections/drug-misuse-declared>>

-- *Review of the Psychoactive Substances Act 2016* (2018)

-- *Seizures of Drugs, England and Wales, Financial Year Ending 2019* (2nd edn, 2019)

International Narcotics Control Board, *Report: 2003* (E.04.XI.1, 2004)

-- *Report: 2004* (E.05.XI.3, 2005)

-- *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances* (2015)

Horder J, *Ashworth's Principles of Criminal Law* (8th edn, 2016)

Husak D, *Drugs and Rights* (1992)

-- *Overcriminalization: The Limits of the Criminal Law* (2008)

Jones TH and Taggart I, *Criminal Law* (7th edn, 2018)

Keane E and Davidson F (eds), *Raitt on Evidence: Principles, Policy and Practice* (3rd edn, 2018)

Koram K (ed), *The War on Drugs and the Global Colour Line* (2019)

Kruithof K and others, *Internet-Facilitated Drugs Trade: An Analysis of the Size, Scope and the Role of the Netherlands* (2016)

Leitzel J, *Regulating Vice: Misguided Prohibitions and Realistic Controls* (2008)

Loughnan A, *Self, Others and the State: Relations of Criminal Responsibility* (2020)

Lovering R, *A Moral Defense of Recreational Drug Use* (2015)

MacLeod K and others, *Understanding the Patterns of Use, Motives, and Harms of New Psychoactive Substances in Scotland* (2016)

Miethe TD and Regoeczi WC, *Rethinking Homicide: Exploring the Structure and Process Underlying Deadly Situations* (2004)

National Records of Scotland, *Drug-Related Deaths in Scotland in 2018* (2019)
 <<https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/deaths/drug-related-deaths-in-scotland>>

Police Foundation, *Drugs and the Law: Report of the Independent Inquiry into the Misuse of Drugs Act 1971* (2000)

Ramsay P, *The Insecurity State: Vulnerable Autonomy and the Right to Security in the Criminal Law* (2012)

Rolles S, *After the War on Drugs: Blueprint for Regulation* (2012)

Scottish Affairs Committee, *Problem Drug Use in Scotland: First Report* (2019, HC 44)

Scottish Government, *Scottish Crime and Justice Survey*

<<https://www2.gov.scot/Topics/Statistics/Browse/Crime-Justice/crime-and-justice-survey/publications>>

-- *Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS): Drug Use Report (2015)* (2016)

-- *Scottish Schools Adolescent Lifestyle and Substance Use Survey (SALSUS): Drug Use Report (2018)* (2019)

Shiner M and others, *The Colour of Injustice: 'Race,' Drugs and Law enforcement in England and Wales* (2018)

Simester AP and von Hirsch A, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (2011)

United Nations Office on Drugs and Crime, *World Drug Report 2019 Booklet 1: Executive Summary* (2019)

-- *World Drug Report 2019 Booklet 2: Global Overview of Drug Demand and Supply* (2019)

-- *World Drug Report 2020 Booklet 4: Cross-Cutting Issues* (2020)

von Hirsch A and Ashworth A, *Proportionate Sentencing: Exploring the Principles* (2005)

Walker N, *Why Punish?* (1991)

Chapters in Edited Works

Bacchi C, 'Introducing the "What's the Problem Represented to Be?" Approach' in Blestas A and Beasley C (eds), *Engaging with Carol Bacchi: Strategic Interventions and Exchanges* (2012)

Bottoms A, 'Five Puzzles in von Hirsch's Theory of Punishment' in Ashworth A and Wasik W (eds), *Fundamentals of Sentencing Theory: Essays in Honour of Andrew von Hirsch* (1998).

Brunhöber B, 'Drug Offenses' in Dubber MD and Hörnle T (eds), *The Oxford Handbook of Criminal Law* (2014)

Colson RN, 'Harmonizing NPS Legislation Across the European Union: An Utopia' in Corazza O and Roman-Urrestarazu A (eds), *Novel Psychoactive Substances: Policy, Economics and Drug Regulation* (2017)

Corazza O, Chan HY and Roman-Urrestarazu A, 'NPS: Moving from Blanket Prohibition to a Functionalist Approach' in Corazza O and Roman-Urrestarazu A (eds), *Novel Psychoactive Substances: Policy, Economics and Drug Regulation* (2017)

Dennis I, 'Security, Risk and Preventative Orders' in Sullivan GR and Dennis I (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (2012)

Dubber MD, 'Preventative Justice: The Quest for Principle' in Ashworth A, Zedner L and Tomlin P (eds), *Prevention and the Limits of the Criminal Law* (2013)

– – and Valverde M, 'Introduction' in Dubber MD and Valverde M (eds), *The New Police Science: The Police Power in Domestic and International Governance* (2006)

Farmer L, 'The Jurisprudence of Security: The Police Power and the Criminal Law' in Dubber MD and Valverde M (eds), *The New Police Science: The Police Power in Domestic and International Governance* (2006)

Horder J, 'Harmless Wrongdoing and the Anticipatory Perspective on Criminalisation' in Sullivan GR and Dennis I (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (2012)

Measham F and Newcombe R, 'What's So "New" About New Psychoactive Substances? Definitions, Prevalence, Motivations, User Groups and a Proposed New Taxonomy' in Kolind T, Thom B and Hunt G (eds), *The SAGE Handbook of Drug and Alcohol Studies* (2017)

Simester AP, 'Prophylactic Crimes' in Sullivan GR and Dennis I (eds), *Seeking Security: Pre-Emptying the Commission of Criminal Harms* (2012)

Stiegel U, 'Legislating NPS in the European Union' in Corazza O and Roman-Urrestarazu A (eds), *Novel Psychoactive Substances: Policy, Economics and Drug Regulation* (2017)

Tadros V, 'Fair Labelling and Social Solidarity' in Zedner L and Roberts JV (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012)

Tettey NA and others, 'Emergence, Diversity and Control of New Psychoactive Substances: A Global Perspective' in Maurer HH and Brandt SD (eds), *New Psychoactive Substances: Pharmacology, Clinical, Forensic and Analytical Toxicology* (2018)

Thorburn M, 'Proportionate Sentencing and the Rule of Law' in Zedner L and Roberts JV (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (2012)

Journal Articles

Al-Banaa I and others, 'Effect of the UK Psychoactive Substances Act 2016 on Episodes of Toxicity Related to New Psychoactive Substances as Reported to the National Poisons Information Service. A Time Series Analysis' (2020) 77 *Int J Drug Policy* 102672

Aldridge J and Décary-Hétub D, 'Hidden Wholesale: The drug Diffusing Capacity of Online Drug Cryptomarkets' (2016) 35 *Int J Drug Policy* 7

Alexandrescu L, 'Mephedrone, Assassin of Youth: The Rhetoric of Fear in Contemporary Drug Scares' (2014) 10(1) *Crime Media Cult* 23

— — 'Streets of the "Spice Zombies": Dependence and Poverty Stigma in Times of Austerity' (2020) 16(1) *Crime Media Cult* 97

Ashworth A, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74(1) *MLR* 1

Baron M, Elia M and Elie L, 'An Analysis of Legal Highs: Do They Contain What It Says on the Tin?' (2011) 3 *Drug Test Anal* 576

Beletsky L and Davis CS, 'Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited' (2017) 46 *Int J Drug Policy* 156

Blackman S and Bradley R, 'From Niche to Stigma, Headshops to Prison: Exploring the Rise and Fall of Synthetic Cannabinoid Use Among Young Adults' (2017) 40 *Int J Drug Policy* 70

Boister N, 'Waltzing on the Vienna Consensus on Drug Control? Tensions in the International System for the Control of Drugs' (2016) 29 *Leiden J Int Law* 389

Bourgeois JA, Parthasarathi U and Hategan A, 'Taking the Spice Route: Psychoactive Properties of Culinary Spices' (2014) 13(4) *Curr Psychiatry* 21

Bourne A and others, '"Chemsex" and Harm Reduction Need Among Gay Men in South London' (2015) 26(12) *Int J Drug Policy* 1171

Brown K and Wincup E, 'Producing the Vulnerable Subject in English Drug Policy' (2020) 80 *Int J Drug Policy* 102525

Brunt TM and others, 'Online Test Purchased New Psychoactive Substances in 5 Different European Countries: A Snapshot Study of Chemical Composition and Price' (2017) 44 Int J Drug Policy 105

Burgess N, 'The Lost Symbol: A Semiotic Analysis of the Psychoactive Substances Act 2016' [2017] ASLR 109

Busardò F and others, 'Is Etizolam a Safe Medication? Effects on Psychomotor Performance at Therapeutic Dosages of a Newly Abused Psychoactive Substance' (2019) 301 Forensic Sci Int 137

Chalmers J and Leverick F, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217

Chatwin C and others, 'New Drugs, New Directions? Research Priorities for New Psychoactive Substances and Human Enhancement Drugs' (2017) 40 Int J Drug Policy 1

Christie B, 'Summit on Drug Deaths Ends with No Agreement' (2020) 368 BMJ m822

Coomber R, Moyle L and South N, 'The Normalisation of Drug Supply: The Social *Supply* of Drugs as the "Other Side" of the History of Normalisation' (2016) 23(3) Drugs (Abingdon Engl) 255

Corazza O and others, "'Spice," "Kryptonite," "Black Mamba": An Overview of Brand Names and Marketing Strategies of Novel Psychoactive Substances on the Web' (2014) 46(4) J Psychoact Drugs 287

Cornford A, 'Book Review' (2014) 77(3) MLR 516

— — 'Rethinking the Wrongness Constraint on Criminalisation' (2017) 36 Law Philos 615

Costa G and others, 'Neuronal and Peripheral Damages Induced by Synthetic Psychoactive Substances: An Update of Recent Findings from Human and Animal Studies' (2020) 15(5) Neural Regen Res 802

Csete J and others, 'Public Health and International Drug Policy' (2016) 387(10026) Lancet 1427

Dargan P and others, 'The Impact of Changes in UK Classification of the Synthetic Cannabinoid Receptor Agonists in "Spice"' (2011) 22(4) Int J Drug Policy 274

Daskalopoulou M and others, 'Recreational Drug Use, Polydrug Use, and Sexual Behaviour in HIV-Diagnosed Men Who Have Sex With Men in the UK: Results from the Cross-Sectional ASTRA Study' (2014) 1 Lancet HIV e22

Deligianni E and others, 'Impact of the UK Psychoactive Substances Act on Awareness, Use, Experiences and Knowledge of Potential Associated Health Risks of Novel Psychoactive Substances' (2020) 86(3) Br J Clin Pharmacol 505

Drummer OH, Gerostamoulos D and Woodford NW, 'Cannabis as a Cause of Death: A Review' [2019] Forensic Sci Int 298

Duke K, 'Producing the "Problem" of New Psychoactive Substances (NPS) in English Prisons' (2020) 80 Int J Drug Policy 102479

Dyntu V and Dykyi O, 'Cryptocurrency in the System of Money Laundering' (2018) 4(5) Balt J Econ Stud 75

Ford LT and Berg JD, 'Analytical Evidence to Show Letters Impregnated with Novel Psychoactive Substances are a Means of Getting Drugs to Inmates Within the UK Prison Service' (2018) 55(6) Ann Clin Biochem 673

Fortson R, 'The Psychoactive Substances Act 2016, the "Medicinal Product" Exemption and Proving Psychoactivity' [2018] Crim LR 229

-- 'Drug Offences: *Rochester (Kirk)* Court of Appeal (Criminal Division): Lord Burnett CJ, Goss and Goose JJ; 17 August 2018; [2018] EWCA Crim 1936' [2018] Crim LR 1002

-- 'Revising the Sentencing Guideline in Drug Cases' [2020] Crim LR 513

Frinculescu A and others, 'Variation in Commercial Smoking Mixtures Containing Third-Generation Synthetic Cannabinoids' (2017) 9(2) Drug Test Anal 327

Gardner J, 'Book Review: Douglas Husak, *Over-Criminalisation: The Limits of the Criminal Law*' (August 2008) NDPR <<https://ndpr.nd.edu/news/overcriminalization-the-limits-of-the-criminal-law/>>.

Gittins R and others, 'Exploration of Use of New Psychoactive Substances by Individuals in Treatment for Substance Misuse in the UK' (2018) 8(4) Brain Sci 58

Gomez R, Thompson SJ and Barczyk AN, 'Factors Associated with Substance Use Among Homeless Young Adults' (2010) 31(1) Subst Abus 24

Grace S, Lloyd C and Perry A, 'The Spice Trail: Transitions in Synthetic Cannabis Receptor Agonists (SCRAs) Use in English Prisons and on Release' (2020) 27(4) Drugs (Abingdon Engl) 271

Hamer D, 'The Presumption of Innocence and Reverse Burdens: A Balancing Act' (2007) 66(1) CLJ 142

Harris L, 'Sentencing: *R v Waka (Mohammed Hussain)* (Case Comment)' [2018] Crim LR 675

Hibbert MP and others, 'Psychological and Sexual Characteristics Associated with Sexualised Drug Use and Chemsex Among Men Who Have Sex With Men (MSM) in the UK' (2019) 95(5) Sex Transm Infect 342

Higgins K and others, 'Evidence for Public Health on Novel Psychoactive Substance Use: A Mixed-Methods Study' (2019) 7(14) Public Health Res 56

Hill SL and others, 'Methoxetamine Toxicity Reported to the National Poisons Information Service: Clinical Characteristics and Patterns of Enquiries (Including the Period of the Introduction of the UK's First Temporary Class Drug Order)' (2014) 31 *Emerg Med J* 45

Hockenull J, Murphy KG and Paterson S, 'Mephedrone Use is Increasing in London' (2016) 387(10029) *Lancet* 1719

Husak D, 'Reservations about *Overcriminalization*' (2011) 14(1) *New Crim LR* 97

Joshi SS and others, '*Staphylococcus Aureus* Endocarditis Associated with Injecting New Psychoactive Substances' (2018) 48 *J R Coll Physicians Edinb* 304

Korf D and others, 'How and Where to Find NPS Users: A Comparison of Methods in a Cross-National Survey Among Three Groups of Current Users of New Psychoactive Substances in Europe' [2019] *Int J Ment Health Ad*

Kowalski M, Hooker C and Barratt MJ, 'Should We Smoke It For You As Well? An Ethnographic Analysis of a Drug Cryptomarket Environment' (2019) 73 *Int J Drug Policy* 245

Krajewski K, 'The Unbearable Lightness of Simplicity' (2016) 112 *Addiction* 33

Larney S and others, 'A Systematic Review of Injecting-Related Injury and Disease Among People Who Inject Drugs' (2017) 171 *Drug Alcohol Depend* 39

Lines R, "'Deliver us from evil"? The Single Convention on Narcotic Drugs, 50 Years On' [2010] *Intl J Hum Rights Drug Policy* 3

Loader I and Zedner L, 'Review: Police Beyond Law?' (2007) 10(1) *New Crim LR* 142

Manikandan S, 'Measures of Central Tendency: The Mean' (2011) 2(2) *JPP* 140

McAuley A and others, 'Emergence of Novel Psychoactive Substance Injecting Associated with Rapid Rise in the Population Prevalence of Hepatitis C Virus' (2019) 66 *Int J Drug Policy* 30

— — 'Re-Emergence of HIV Related to Injecting Drug Use Despite a Comprehensive Harm Reduction Environment: A Cross-Sectional Analysis' (2019) 6(5) *LancetHIV* e315

Measham FC, 'Drug Safety Testing, Disposals and Dealing in an English Field: Exploring the Operational and Behavioural Outcomes of the UK's First Onsite "Drug Checking" Service' (2019) 67 *Int J Drug Policy* 102

Miserez B, Ayrton O and Ramsey J, 'Analysis of Purity and Cutting Agents in Street Mephedrone Samples from South Wales' (2014) 32 *Forensic Toxicol* 305

Morris K, 'UK Places Generic Ban on Mephedrone Drug Family' (2010) 375(9723) *Lancet* 1333

Neicun J and others, 'Mapping Novel Psychoactive Substances Policy in the EU: The Case of Portugal, the Netherlands, Czech Republic, Poland, the United Kingdom and Sweden' (2019) 14(6) PLoS One e0218011

Nestler EJ, 'The Neurobiology of Cocaine Addiction' (2005) 3(1) Sci Pract Perspect 4

Nutt DJ, "'Groundhog Decade Not Brave New World'" (2020) 6 Drug Sci Pol Law 1

Nutt DJ, King LA and Philips LD, 'Drug Harms in the UK: A Multicriteria Decision Analysis' (2010) 376(9752) Lancet 1558

O'Brien K and others, 'New Psychoactive Substances and British Drug Policy: A View From the Cyber-Psychonauts' (2015) 22(3) Drugs (Abingdon Engl) 217

O'Donnell A, 'Immediate Impact of Minimum Unit Pricing on Alcohol Purchases in Scotland: Controlled Interrupted Time Series Analysis for 2015-18' (2019) 366 I15274

Örnberg JC and Ólafsdóttir H, 'How to Sell Alcohol? Nordic Alcohol Monopolies in a Changing Epoch' (2008) 25(2) NAD 129

Peacock A and others, 'New Psychoactive Substances: Challenges for Drug Surveillance, Control and Public Health Responses' (2019) 394(10209) Lancet 1668

Pertwee RD, 'The Therapeutic Potential of Drugs That Target Cannabinoid Receptors or Modulate the Tissue Levels of Actions of Endocannabinoids' (2005) 7(3) AAPS J e625

Pettie J and others, 'New Drug Controls and Reduced Hospital Presentations due to Novel Psychoactive Substances in Edinburgh' (2018) 84(10) Br J Clin Pharmacol 2303

Rhumorbarbe D and others, 'Monitoring New Psychoactive Substances: Exploring the Contribution of an Online Discussion Forum' (2019) 73 Int J Drug Policy 273

Roman-Urrestarazu A and others, 'Brexit Threatens the UK's Ability to Tackle Illicit Drugs and Organised Crime: What Needs to Happen Now?' (2019) 123 Health Policy 521

Sare J, 'How the Media Helped Ban Mephedrone' (2011) 342 BMJ 472

Schifano F and others, 'New/Emerging Psychoactive Substances and Associated Psychopathological Consequences' [2019] Psychol Med 1

Scourfield A and others, 'Synthetic Cannabinoid Availability on Darknet Drug Markets: Changes During 2016-2017' (2019) 3(1) Toxicol Commun 7

Seale C and Silverman D, 'Ensuring Rigour in Qualitative Research' (1997) 7(4) Eur J Public Health 379

Sewell J and others, 'Changes in Recreational Drug Use, Drug Use Associated with Chemsex, and HIV-Related Behaviours, Among HIV-Negative Men Who Have Sex With Men in London and Brighton, 2013-2016' (2018) 94 *Sex Transm Infect* 494

Sharma KK and others, 'The Search for the "Next" Euphoric Non-Fentanil Novel Synthetic Opioids on the Illicit Drugs Market: Current Status and Horizon Scanning' (2019) 37(1) *Forensic Toxicol* 1

Simester AP and von Hirsch A, 'Remote Harms and Non-Constitutive Crimes' (2009) 28(1) *Crim Justice Ethics* 89

Smith P, 'Drugs, Morality and the Law' (2002) 19(3) *J Appl Philos* 233

Sneddon T, 'Drug Policy and Global Regulatory Capitalism: The Case of New Psychoactive Substances (NPS)' (2014) 25 *Int J Drug Policy* 1019

Stevens A and Measham F, 'The "Drug Policy Ratchet": Why Do Sanctions for New Psychoactive Drugs Typically Only Go Up?' (2014) 109(8) *Addiction* 126

Stockwell T and others, 'Estimating the Public Health Impact of Disbanding a Government Alcohol Monopoly: Application of New Methods to the Case of Sweden' (2018) 18(1400) *BMC Pub Health*

Tadros V, 'Crimes and Security' (2008) 71(6) *MLR* 940

-- 'Harm, Sovereignty and Prohibition' (2011) 17 *LEG* 35

Tarján A and others, 'HCV Prevalence and Risk Behaviours Among Injectors of New Psychoactive Substances in a Risk Environment in Hungary: An Expanding Public Health Burden' (2017) 41 *Int J Drug Policy* 1

Tettey J and Crean C, 'New Psychoactive Substances: Catalysing a Shift in Forensic Science Practice?' [2015] *Phil Trans R Soc B* 370

van der Meulen DH, 'The Use of Impact Assessments and the Quality of Legislation' (2013) 1(2) *Theory Pract Legis* 305

van Wegberg R, Oerlemans J and van Deventer O, 'Bitcoin Money Laundering: Mixed Results? An Explorative Study on Money Laundering of Cybercrime Proceeds Using Bitcoin' (2018) 25(2) *J Financ Crime* 419

Vogel J, 'Epistemic Bootstrapping' (2008) 105(9) *J Philos* 518

Wadsworth E and others, 'A Market on Both "Sides" of the Law: The Use of the Hidden Web for the Sale of New Psychoactive Substances' (2017) 32(3) *Hum Psychopharmacol Clin Exp* e2596

Wadsworth E, Drummond C and Deluca P, 'The Adherence to UK Legislation by Online Shops Selling New Psychoactive Substances' (2018) 25(1) *Drugs (Abingdon Engl)* 97

Wiggins H and others, 'Demand for and Availability of Specialist Chemsex Services in the UK: A Cross-Sectional Survey of Sexual Health Clinics' (2018) 55 Int J Drug Policy 155

Government Resources and Official Statistics

-- 'Appendix: Security Vetting and Procedures of Not Directly Employed Workers in Prisons'
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/215521/dh_128595.pdf>

-- 'Convictions and Higher Level Disclosures' (22 October 2019)
<<https://www.mygov.scot/convictions-higher-disclosures/>>

-- 'Evidence for the Scottish Affairs Select Committee Inquiry into the Use and Misuse of Drugs in Scotland 2019' (2019) <<https://www.parliament.uk/documents/commons-committees/scottish-affairs/Written-evidence/written-evidence-problem-drug-use-sac.pdf>>

-- Letter from Les Iversen to Theresa May (23 October 2015)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470421/ACMD_definitions_advice_final-23-October-2015.pdf>

-- Letter from Sarah Newton to Professor Les Iversen (20 December 2016)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/579735/Minister-Sarah-Newton_to_Professor_Les_Iversen_-_TCDO_Recommendation_20_12_16.pdf>

-- Letter from The Academy of Medical Sciences to Theresa May (29 June 2015)
<<https://acmedsci.ac.uk/file-download/37505-559242b4ecf2e.pdf>>

-- 'Scottish Drug Deaths Taskforce: One Year Report' (2020)
<<https://drugdeathstaskforce.scot/media/1122/ddtf-report-full-report-final-amended-9-august-2020.pdf>>

Advisory Council on the Misuse of Drugs, 'Ketamine: A Review of Use and Harm' (2013)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/264677/ACMD_ketamine_report_dec13.pdf>

-- 'ACMD Advice on Definitions of Scope for the "Psychoactive Substances Bill"' (2015)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/454039/Definitions_report_final_14_august.pdf>.

- 'ACMD Advice on Nitrous Oxide Abuse' (2015)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/409403/acmd-advice-on-nitrous-oxide.doc>
- 'ACMD's Final Advice on Definitions for Psychoactive Substances Bill' (2015)
<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/470421/ACMD_definitions_advice_final-23-October-2015.pdf>
- 'ACMD Review of Alkyl Nitrites ("Poppers")' (2016)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/508179/Poppersadvice.pdf>
- 'News Story: ACMD Warns Minister of Falling Local Funding for Drug Treatment Services' (6 September 2017) <<https://www.gov.uk/government/news/acmd-warns-ministers-of-falling-local-funding-for-drug-treatment-services>>
- 'Drug-Related Harms in Homeless Populations and How They Can Be Reduced' (2019)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/810284/Drug-related_harms_in_homeless_populations.pdf>
- 'Future Use and Purpose of Temporary Class Drug Orders (TCDOs)' (2019)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/841038/Future_use_and_purpose_of_Temporary_Class_Drug_Orders__TCDOs__003_.odt>
- Arc4, 'Homelessness Strategy: 2018-2022' (2018)
<<http://old.wrexham.gov.uk/assets/pdfs/housing/homeless-strategy.pdf>>
- Barber S, 'The Psychoactive Substances Bill 2015' (HC Briefing Paper CBP 7334, 16 October 2015)
- Black C, 'Review of Drugs: Executive Summary' (2020)
<<https://www.gov.uk/government/publications/review-of-drugs-phase-one-report>>
- Crown Office and Procurator Fiscal Service, 'Prosecution Code' (2018)
<https://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf>.
- Crown Prosecution Service, 'Case Outcomes by Principal Offence'
<<https://www.cps.gov.uk/publication/cps-case-outcomes-principal-offence>>
- 'The Code for Crown Prosecutors' (26 October 2018)
<<https://www.cps.gov.uk/publication/code-crown-prosecutors>>
- 'Legal Guidance: Drug Offences' (12 March 2019) <<https://www.cps.gov.uk/legal-guidance/drug-offences>>

Department of Health, 'Census of Drug and Alcohol Treatment Services in Northern Ireland: 30 April 2019' (2019) <<https://www.health-ni.gov.uk/sites/default/files/publications/health/drug-alcohol-census-2019.html>>

HM Government 'News Story: Commission on Race and Ethnic Disparities' (16 July 2020) <<https://www.gov.uk/government/news/commission-on-race-and-ethnic-disparities-16-july-2020>>

HM Prison and Probationary Service, 'Guidance: Psychoactive Substances in Prisons' (15 May 2019) <<https://www.gov.uk/guidance/psychoactive-substances-in-prisons>>

HM Inspectorate of Prisons for Scotland, 'Annual Digest 2018/19' (2020) <<https://www.gov.uk/government/statistics/hmpps-annual-digest-2018-to-2019>>

Home Office, 'Press Release: First "Legal High" Banned Under New Power' (29 March 2012) <<https://www.gov.uk/government/news/first-legal-high-banned-under-new-power>>

-- 'New Psychoactive Substances Review: Report of the Expert Panel' (2014) <<https://www.gov.uk/government/publications/new-psychoactive-substances-review-report-of-the-expert-panel>>

-- 'Guidance for Local Authorities on Taking Action Against Head Shops Selling New Psychoactive Substances' (2015) <<https://www.gov.uk/government/publications/action-against-head-shops>>

-- 'Impact Assessment: Creation of a Blanket Ban on NPS in the UK' (2015) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/433151/NPSGBImpactAssessment.pdf>

-- 'News Story: Blanket Ban to Clamp Down on "Legal Highs"' (29 May 2015) <<https://www.gov.uk/government/news/blanket-ban-to-clamp-down-on-legal-highs>>

-- 'Psychoactive Substances Act 2016: Guidance for Researchers' (2016) <<https://www.gov.uk/government/publications/psychoactive-substances-act-2016-guidance-for-researchers/psychoactive-substances-act-2016-guidance-for-researchers>>

-- 'Psychoactive Substances Act 2016: Guidance for Retailers' (20 May 2016) <<https://www.gov.uk/government/publications/psychoactive-substances-act-guidance-for-retailers/psychoactive-substances-act-2016-guidance-for-retailers>>.

-- and Newton S, 'Press Release: Psychoactive Substances Ban 6 Months On: Almost 500 Arrests and First Convictions' (29 December 2016) <<https://www.gov.uk/government/news/psychoactive-substances-ban-6-months-on-almost-500-arrests-and-first-convictions>>

Information Services Division Scotland 'Drug-Related Hospital Statistics: Scotland 2015/16' (2016)
<<https://www.isdscotland.org/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2016-09-27/2016-09-27-DrugHospitalStatistics-Report.pdf>>.

-- 'Drug-Related Hospital Statistics: Scotland 2017/18' (2019)

<<https://www.isdscotland.org/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2019-05-28/2019-05-28-DRHS-Report.pdf>>

-- 'Scottish Drug Misuse Database 2017/18: Data Tables' (2019)

<<https://www.isdscotland.org/Health-Topics/Drugs-and-Alcohol-Misuse/Publications/2019-10-08/2019-10-08-SDMD-Tables.xlsx>>

Isaac A, 'Investigating the Association Between an Offender's Sex and Ethnicity and the Sentence Imposed at the Crown Court for Drug Offences' (2020)

<<https://www.sentencingcouncil.org.uk/news/item/investigating-the-association-between-an-offenders-sex-and-ethnicity-and-the-sentence-imposed-at-the-crown-court-for-drug-offences/>>

McAuley A and others, 'Needle Exchange Surveillance Initiative: 2008-09 to 2017-18' (2019)

<<https://www.hps.scot.nhs.uk/web-resources-container/needle-exchange-surveillance-initiative-nesi-2008-09-to-2017-18/>>

Ministry of Justice, 'Criminal Justice Statistics Quarterly, England and Wales, 2016' (2017)

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/614414/criminal-justice-statistics-quarterly-december-2016.pdf>

National Crime Agency, 'County Lines and Gang Violence, Exploitation and Drug Supply' (2016)

<<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/15-county-lines-gang-violence-exploitation-and-drug-supply-2016/file>>

-- 'County Lines Violence, Exploitation and Drug Supply' (2017)

<<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/234-county-lines-violence-exploitation-drug-supply-2017/file>>

-- 'County Lines Drug Supply, Vulnerability and Harm' (2018)

<<https://www.nationalcrimeagency.gov.uk/who-we-are/publications/257-county-lines-drug-supply-vulnerability-and-harm-2018/file>>

-- 'Money Laundering and Illicit Finance' <<https://www.nationalcrimeagency.gov.uk/what-we-do/crime-threats/money-laundering-and-illicit-finance>>.

-- 'National Strategic Assessment of Serious and Organised Crime' (2019)

<<https://www.nationalcrimeagency.gov.uk/who-we-are/publications>>

-- 'Statement on Contingency Planning in Relation to UK Withdrawal from the European Union'
<<https://www.nationalcrimeagency.gov.uk/news/nca-statement-on-contingency-planning-in-relation-to-uk-withdrawal-from-the-european-union>>

National Health Service, 'Drug Related Hospital Admissions: Data Tables' (2019)
<<https://digital.nhs.uk/data-and-information/publications/statistical/statistics-on-drug-misuse/2019/drug-admissions-data-tables>>

National Health Service Wales Informatics Service, 'Treatment Data: Substance Misuse in Wales 2018-19' (2019) <<https://gov.wales/sites/default/files/publications/2019-10/treatment-data-substance-misuse-in-wales-2018-19.pdf>>

Office for National Statistics, 'Ethnicity and National Identity in England and Wales: 2011' (2012)
<<https://www.ons.gov.uk/peoplepopulationandcommunity/culturalidentity/ethnicity/articles/ethnicityandnationalidentityinenglandandwales/2012-12-11>>

-- 'Deaths Related to Drug Poisoning in England and Wales: 2018 Registrations' (2019)
<<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/deaths/bulletins/deathsrelatedtodrugpoisoninginenglandandwales/2018registrations/pdf>>

-- 'Crime in England and Wales QMI' (2020)
<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/methodologies/crimeinenglandandwalesqmi>>

Public Bill Committee, 'Psychoactive Substances Bill: Written Evidence' (2015)
<<https://publications.parliament.uk/pa/cm201516/cmpublic/psychoactive/memo/psychoconsolidated.pdf>>

Public Health England, 'Shooting Up: Infections Among People Who Inject Drugs in the UK, 2017: An Update, November 2018' (2018)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/756502/Shooting_up_2018.pdf>.

-- 'Adult Substance Misuse Statistics from the National Drug Treatment Monitoring System (NDTMS) 2018 to 2019: Data Tables' (2019)
<<https://www.gov.uk/government/statistics/substance-misuse-treatment-for-adults-statistics-2018-to-2019>>

-- 'Adult Substance Misuse Treatment Statistics 2018-19: Report' (2019)
<<https://www.gov.uk/government/publications/substance-misuse-treatment-for-adults-statistics-2018-to-2019/adult-substance-misuse-treatment-statistics-2018-to-2019-report>>

-- 'Young People's Substance Misuse Treatment Statistics 2018-19: Report' (2019)
<<https://www.gov.uk/government/publications/substance-misuse-treatment-for-young-people-statistics-2018-to-2019/young-peoples-substance-misuse-treatment-statistics-2018-to-2019-report>>

-- 'Alcohol and Drug Treatment in Secure Settings 2018-19: Report' (2020)
<<https://www.gov.uk/government/publications/substance-misuse-treatment-in-secure-settings-2018-to-2019/alcohol-and-drug-treatment-in-secure-settings-2018-to-2019-report#young-people-in-treatment-overview>>

Sagar T, Jones D and Symons K, 'Sex Work, Drug and Alcohol Use: Bringing the Voices of Sex Workers into the Policy and Service Development Framework in Wales' (2015)
<<https://gov.wales/sites/default/files/publications/2019-02/sex-work-drug-and-alcohol-use-bringing-the-voices-of-sex-workers-into-the-policy-and-service-development-framework-in-wales.pdf>>

Sentencing Council, 'Drug Offences: Definitive Guideline' (2012)
<<https://www.sentencingcouncil.org.uk/wp-content/uploads/Drug-offences-definitive-guideline-Web.pdf>>

-- 'Offences Taken into Consideration and Totality: Definitive Guideline' (2012)
<<https://www.sentencingcouncil.org.uk/wp-content/uploads/Offences-Taken-into-Consideration-and-Totality-definitive-guideline-Web.pdf>>

-- 'Sentencing of Drug Offences Involving Newer and Less Common Drugs' (2018)
<<https://www.sentencingcouncil.org.uk/news/item/sentencing-of-drug-offences-involving-newer-and-less-common-drugs/>>

Stephenson G and Richardson A, 'New Psychoactive Substances in England: A Review of the Evidence' (2014)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/368587/NPSevidenceReview.pdf>

Turner D and Smith J, 'Data Mining Wales: The Annual Profile for Substance Misuse 2018-19' (2019) <<http://www.wales.nhs.uk/sitesplus/888/opendoc/351328>>

United Nations and European Union Resources

Arpa S, 'Women Who Use Drugs: Issues, Needs, Responses, Challenges and Implications for Policy and Practice' (2017)

<http://www.emcdda.europa.eu/system/files/attachments/6235/EuropeanResponsesGuide2017_BackgroundPaper-Women-who-use-drugs.pdf>

European Monitoring Centre for Drugs and Drug Addiction, 'Countries'

<https://www.emcdda.europa.eu/countries_en>

-- 'United Kingdom: Country Drug Report 2019' (2019)

<<https://www.emcdda.europa.eu/publications/country-drug-reports/2019/united-kingdom>>.

European Commission, 'Better Regulation: Guidelines and Toolbox'

<https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how/better-regulation-guidelines-and-toolbox_en>.

United Nations, 'Joint United Nations Statement on Ending Discrimination in Health Care Settings' (2017) <<https://www.who.int/en/news-room/detail/27-06-2017-joint-united-nations-statement-on-ending-discrimination-in-health-care-settings>>

United Nations Office on Drugs and Crime, 'New Psychoactive Substances: Overview of Trends, Challenges and Legal Approaches' (2016)

<https://www.unodc.org/documents/commissions/CND/CND_Sessions/CND_59/ECN72016_CRP2_V1601405.pdf>

-- 'Early Warning Advisory on NPS' (2019) <<https://www.unodc.org/LSS/Page/NPS>>

World Health Organisation, 'Methoxetamine: Critical Review Report' (2014)

<https://www.who.int/medicines/areas/quality_safety/4_22_review.pdf>

-- 'Expert Peer Review No.1 for U-47700' (2016)

<https://www.who.int/medicines/access/controlled-substances/4.1_U-47700_PeerReview_1.pdf>

-- 'Status Report on Alcohol Consumption, Harm and Policy Responses in 30 European Countries' (2019) <<https://www.euro.who.int/en/health-topics/disease-prevention/alcohol-use/publications/2019/status-report-on-alcohol-consumption,-harm-and-policy-responses-in-30-european-countries-2019>>.

Publications by Charities, NGOs etc.

Abdulrahim D and Bowden-Jones O, 'Guidance on the Clinical Management of Acute and Chronic Harms of Club Drugs and Novel Psychoactive Substances' (2015) <<http://neptune-clinical-guidance.co.uk/wp-content/uploads/2015/03/NEPTUNE-Guidance-March-2015.pdf>>.

- 'Harms of Synthetic Cannabinoid Receptor Agonists (SCRAs) and Their Management' (2016) <<http://neptune-clinical-guidance.co.uk/wp-content/uploads/2016/07/Synthetic-Cannabinoid-Receptor-Agonists.pdf>>
- 'The Misuse of Synthetic Opioids: Harms and Clinical Management of Fentanyl, Fentanyl Analogues and Other Novel Synthetic Opioids' (2018) <<http://neptune-clinical-guidance.co.uk/wp-content/uploads/2018/03/The-misuse-of-synthetic-opioids.pdf>>.
- Addaction, 'Novel Psychoactive Substances Insight Report: The View from Young People' (2017) <<https://www.wearewithyou.org.uk/documents/10/npsinsightreport.pdf>>
- Crew, 'NPS at Crew: Annual Report 2016-2017' (2017) <<https://www.crew.scot/wp-content/uploads/2019/08/NPS-at-Crew-Annual-Report-2016-2017.pdf>>
- Hepatitis Scotland, 'Chemsex in Scotland: Starting the Conversation' (2016) <http://www.hepatitisscotland.org.uk/files/3014/7003/8716/Chemsex_in_Scotland__20_June_2016.pdf>
- Horton-Eddison M and Whittaker J, 'UK General Election 2017: Where do the parties stand on drug policy?' (2017)
- Nacro, 'Employing Someone with a Criminal Record' <<https://www.nacro.org.uk/resettlement-advice-service/support-for-employers/employing-someone-with-a-criminal-record/#suitable>>
- Ralphs R, Gray P and Norton A, 'New Psychoactive Substance Use in Manchester: Prevalence, Nature, Challenges and Responses' (2017) <<https://e-space.mmu.ac.uk/618462/1/New%20psychoactive%20substance%20use%20in%20Manchester.pdf>>
- Release and Transform, 'Joint Submission to the Home Affairs Committee's Short Inquiry into the Psychoactive Substances Bill' (2015) <<https://www.release.org.uk/publications/release-transforms-submission-home-affairs-select-committees-short-inquiry-psychoactive>>
- Royal Society for Public Health, 'Removing Legal Highs from the High Street' (2015) <<https://www.rsph.org.uk/our-work/policy/drugs/legal-highs.html>>
- 'Taking a New Line on Drugs' (2016) <https://www.drugsandalcohol.ie/25677/1/RSPH-Taking_a_new_line_of_drugs.pdf>
- Semel/UCLA, 'Potential Complications of IV Drug Use' <https://www.semel.ucla.edu/dual-diagnosis-program/News_and_Resources/Potential_Complications_Of_IV_Drug_Use>

Sumnall H, Atkinson A and Broughton N, 'Report for the All Party Parliamentary Group on NPS and VSA' (2019) <<https://www.re-solv.org/wp-content/uploads/2019/06/APPG-Report-on-NPS-VSA.pdf>>

Transform, 'The UN Chief Executives Board Unanimously Endorses Decriminalisation of People Who Use Drugs' (2019) <<https://transformdrugs.org/wp-content/uploads/2019/03/UN-CEB-Briefing-2019.pdf>>.

Youth Homeless North East, 'NPS Report' <<https://www.yhne.org.uk/wp-content/uploads/Final-NPS-Report.pdf>>

Political Party Manifestos

Conservative and Unionist Party, 'Get Brexit Done, Unleash Britain's Potential: The Conservative and Unionist Party Manifesto 2019' (2019)

Green Party, 'If Not Now, When? Manifesto 2019' (2019)

Labour Party, 'It's Time for Real Change: The Labour Party Manifesto 2019' (2019)

Liberal Democrats, 'Stop Brexit, Build a Brighter Future: Manifesto 2019' (2019)

Plaid Cymru, 'General Election Manifesto 2019' (2019)

SNP, 'Stronger For Scotland: 2019 Manifesto' (2019)

Media Articles and Press Releases

-- 'Poppers Should Not Be Banned Until the Evidence is Reviewed' (*Stonewall*, 20 January 2016) <<https://www.stonewall.org/cy/node/21898>>

-- "'Manchester Gas Man" Spared Jail Over Nitrous Oxide Sales' *BBC News* (13 November 2017) <<https://www.bbc.co.uk/news/uk-england-manchester-41972988>>.

-- 'Four Jailed Over £300k Spice Haul in Oldham and Stockport' *BBC News* (23 January 2018) <<https://www.bbc.co.uk/news/uk-england-manchester-42778867>>

-- 'Leeds NOS Dealer Caught with 360 Nitrous Oxide Canisters in McDonald's Car Park' *Yorkshire Evening Post* (9 August 2018) <<https://www.yorkshireeveningpost.co.uk/news/crime/leeds-nos-dealer-caught-360-nitrous-oxide-canisters-mcdonalds-car-park-823276>>

-- 'Gang Members who Supplied Spice in Wrexham Jailed' *ITV News* (15 October 2018)

<<https://www.itv.com/news/wales/2018-10-15/gang-members-who-supplied-spice-drug-in-wrexham-jailed>>

-- 'Street Valium Blamed for "Unprecedented" Spike in Drugs Deaths' *BBC News* (28 January 2019)

<<https://www.bbc.co.uk/news/uk-scotland-glasgow-west-47034644>>

-- 'Student Jailed for Kendal Calling Laughing Gas Sales' *BBC News* (25 April 2019)

<<https://www.bbc.co.uk/news/uk-england-cumbria-48054725>>

-- 'Cross-party Group Urges Home Office Rethink on "Fix Rooms"' *BBC News* (21 July 2019)

<<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-49063485>>

-- 'Gang That Tried to "Flood" Inverness with Drugs is Jailed' *BBC News* (7 October 2019)

<<https://www.bbc.co.uk/news/uk-scotland-highlands-islands-49959942>>

-- 'SNP Formally Backs Decriminalisation of Drugs' *BBC News* (13 October 2019)

<<https://www.bbc.co.uk/news/uk-scotland-scotland-politics-50036173>>

-- 'George Floyd Death: Thousands Turn Out for UK Anti-Racism Protests' *BBC News* (2 June 2020)

<<https://www.bbc.co.uk/news/uk-52949014>>

Aitchison J, 'Man Charged in "Drugs Bust" After 250,000 "Blue Plague" Fake Valium Pills Found in Pollok' *Glasgow Times* (23 December 2019)

<<https://www.glasgowtimes.co.uk/news/18120499.man-charged-drugs-bust-250-000-blue-plague-fake-valium-pills-found-pollok/>>

Cork T, 'Spice Dealer Found with Stun Gun and Shotgun Jailed' *Bristol Post* (27 November 2019)

<<https://www.bristolpost.co.uk/news/bristol-news/spice-dealer-found-stun-gun-3580563>>

Dorman N, 'Prisoner's Girlfriend Caught Trying to Sneak Spice Drug into Jail in her Bra' *Mirror* (7 October 2017)

<<https://www.mirror.co.uk/news/uk-news/prisoners-girlfriend-caught-trying-sneak-11305681>>

Easton M, "'Legal High" Review After Laughing Gas Cases Collapse' *BBC News* (31 August 2017)

<<https://www.bbc.co.uk/news/uk-41098996>>

Finnegan S, 'Dealers "Flooding Streets of Leeds with Spice" Found with Huge Hoard of Weapons, Drugs and Cash' *Leeds Live* (26 September 2019)

<<https://www.leeds-live.co.uk/news/leeds-news/spice-dealers-jailed-after-weapons-16986390>>

Hemming J, 'Wrexham Spice Gang Jailed for 10 Years' *Daily Post* (15 October 2018)

<<https://www.dailypost.co.uk/news/north-wales-news/wrexham-spice-gang-jailed-10-15282053>>

Hertfordshire Constabulary, 'Man Sentenced for Selling Laughing Gas' (14 May 2019) <<https://www.herts.police.uk/news-and-appeals/man-sentenced-for-selling-laughing-gas-0215g>>

Kennedy R, 'Barrel Of Laughing Gas: Dealer Caught Supplying Nitrous Oxide to Student Had 36,000 Canisters of It' *Chronicle Live* (6 June 2018) <<https://www.chroniclelive.co.uk/news/north-east-news/laughing-gas-northumbria-university-court-14748442>>

Lennon H, 'Spice: Warning Over Rise in Use of "Zombie" Drug in Glasgow' *Glasgow Times* (2 May 2017) <<https://www.glasgowtimes.co.uk/news/15258523.spice-warning-over-rise-in-use-of-zombie-drug-in-glasgow/>>

Lusher A, 'Deadly "Legal Highs" Can Now Be "Ordered Like a Takeaway" Because of Government Ban, Users Say' *Independent* (2 December 2016) <<https://www.independent.co.uk/news/homelesshelpline/legal-highs-ban-war-on-drugs-spice-mamba-nps-homeless-helpline-centrepoint-charity-christmas-appeal-a7449536.html>>

Marsh S, 'Huge Rise in Ambulance Callouts to Deal with Spice Users' *Guardian* (20 September 2018) <<https://www.theguardian.com/politics/2018/sep/20/huge-rise-in-ambulance-callouts-to-deal-with-spice-users>>

Pryor D, 'The Psychoactive Substances Act is a Failure' (*Adam Smith*, 9 August 2017) <<https://www.adamsmith.org/blog/the-psychoactive-substances-act-is-a-failure>>

Robertson J, 'Have Legislative Changes Curbed Use of "Legal Highs"?' (*Pharmaceutical Journal*, 30 November 2018) <<https://www.pharmaceutical-journal.com/news-and-analysis/features/have-legislative-changes-curbed-use-of-legal-highs/20205826.article>>

PhD Theses

Kelly RJ, 'Behaviour Orders: Preventative and/or Punitive Measures?' (PhD thesis, University of Oxford 2019)

Websites

'Cost' (*Cambridge Dictionary*) <<https://dictionary.cambridge.org/dictionary/english/cost>>