Response to the Drugs Bill 2005

RELEASE
Response to the Drugs Bill 2005
www.release.org.uk

About Release

Release seeks to meet the health, welfare and legal needs of drug users and those who live and work with them, through the provision of a range of services aimed at preventing or reducing the harm that drugs can cause. Release also acts as a source of independent expertise on a wide range of matters concerning drugs, the law and human rights.

Introduction

The overall effect of the Drugs Bill is, we believe, to reinforce the recent trend toward situating the understanding of drug use, and policy responses to it, within the primary framework of criminal justice. We believe that this is likely to lead to a fundamental change in the culture of drug treatment, including a problematic, and difficult, role for drug workers who are beholden both to their clients and to the criminal justice authorities.

Further, while it appears likely that elements of the Bill are intended to combat problematic drug use, there is no recognition of the fact that much drug use is non-problematic to both individuals and the wider community.

It is a matter of concern that some of the best and most creative elements of the government's drug strategy are becoming distorted by virtue of misguided attempts to placate populist criticisms to the effect that it is insufficiently "tough on drugs".

Any sober assessment of the problems linked to widespread drug use must recognise that the situation is not susceptible to a "military" solution. Of course, the "war on drugs" is, in most domains of human experience, a figure of speech: but the tone it sets for policy is real enough. The idea gains currency that the problems of drug use can be made to disappear by means of more muscular discourses, the use of punishments ever more severe, and continuous increases in the forms and extent of surveillance.

While the extension of treatment provision for problematic drug use is of course to be welcomed, there are issues both ethical and pragmatic which arise from making the primary route into treatment so heavily dependent on someone's involvement with the criminal justice system. While the impact of a pattern of perverse reward (by which preferential access to treatment is given to those who indulge in lawbreaking) can be overstated, its existence is nonetheless readily verified by observation and discussion with drug users.

Moreover, the long-term effectiveness of compulsory modes of treatment is doubtful. While few will disagree with the Bill's underlying objective of reducing the acquisitive crime associated with problematic drug use, there are much more productive ways of setting about it. The population that forms the core target-group for many of the proposed interventions is one whose drug-taking is intimately — and inextricably — interwoven with an entire complex of factors in desperate need of address, and from which the "chaotic" and "anti-social" character of the drug-taking is in fact derived.

Many of those working in the field of drug treatment are themselves acutely aware of this. Issues of education, housing, employment, socio-economic class and ethnicity, social engagement and validation, to name but a few: problems in each of these areas must be explored and addressed if one is to relieve the underlying trauma, rather than simply punishing or suppressing the symptomatic behaviours.

In order to meet this need, the available financial and human resources would, we believe, be better employed in extending the range and improving the quality and training of the existing service provision. The acquisitive crime and public nuisance linked to "chaotic" drug use can best be reduced through high-quality services organised around the imperatives of public health and evidence-based drug education.

We are particularly disappointed by the lack of consultation with key stakeholders in relation to this Bill which, we believe, has led to a number of ill-thought through, and potentially damaging, provisions being put forward.

Part 1 – Supply of Controlled Drugs

Clause 1. Aggravated supply of a controlled drug

Summary

This clause requires the court, when considering sentencing, to treat certain circumstances surrounding a conviction for supply as "aggravating factors" and to state in open court that the offence is so aggravated, such circumstances being as follows:

(a) The offence was knowingly committed in the vicinity of a school when it was in use by under 18 year-olds, or one hour before or after any such time; or

(b) In connection with the commission of the offence, the offender used a courier who was under 18 at the time of the offence.

Release comment

1. We question the need for this requirement to be imposed on the courts, which would in any event be expected to take into account aggravating factors such as these when considering sentencing. The provision will not add to the court's powers and we believe it will have no useful effect. We therefore do not support this provision.

Clause 2. Proof of intention to supply a controlled drug

Summary

This provision would amend the Misuse of Drugs Act 1971 ("MDA 1971") by reversing the burden of proof where a defendant is found in possession of a quantity of a controlled substance which is considered not to be a reasonable quantity to possess for personal use. The presumption will not apply "if evidence is adduced which is sufficient to raise an issue that the accused may not have had the drug in his possession with [intent to supply]" (cl. 2(2) of the Bill).

Release comment

2. We are fundamentally opposed to this provision, which we consider to be unnecessary and unworkable. The significance of the provision will very much depend upon the meaning of the phrase "*evidence…adduced which is sufficient to raise an issue that the accused may not have had the drug in his possession with [intent to supply]*". Is this to include evidence adduced by the prosecution, or only evidence adduced as part of the defence case? How much evidence will be required to raise an issue? Depending upon the answers to these questions, this provision may be relevant in only a very few cases. However, the practical implications of the provision also require consideration.

3. The question what is a reasonable quantity to possess for personal use depends upon the facts of individual cases, as well as expert evidence. The process of arriving at a formula for this, in relation to a huge range of substances and widely varying patterns of use, seems an impossibly unscientific task. How is it intended that this task will be carried out? Presumably the ACMD will have input into the decision-making process, but where will their fund of knowledge come from? Surveys in this field are notoriously difficult. We believe that in many cases, including for example precursor chemicals and cannabis cultivation, the new law may be completely unworkable.

4. Any requirement for the reversal of the burden of proof in criminal proceedings, from the prosecution to the defence, must be considered in the context of the right to a fair trial enshrined in Article 6 of the Human Rights Act 1998 ("HRA 1998"). This requires that "*Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law*" (Art. 6(2)).

5. A practical concern has been raised concerning the position of defendants in respect of whom the presumption arises, but who deny possession altogether, perhaps on the basis of ignorance of the existence of the drugs. In these circumstances, will the defence's evidence that there was no possession at all raise an issue such that the presumption will not apply? If not, it may be difficult for the defence to support their case and avoid conviction for intent to supply, if they are not believed on the issue of possession.

6. The existence of a threshold may also have the unforeseen effect of adding credibility to the defence in cases where intent to supply is alleged in relation to quantities below the threshold.

7. This proposal is unnecessary and its practical implications are deeply problematic. It should have been the subject of consultation with stakeholder organisations, including experts in the drugs field and the criminal legal profession.

Part 2 – Police Powers Relating to Drugs

Clauses 3-6. Drug offence searches; X-rays and ultrasound scans

Summary

Clause 3 would amend Section 55 of the Police and Criminal Evidence Act 1984 ("PACE 1984"), which provides for an intimate search of a person who is suspected to have a Class A drug concealed on them. The amendments provide that:

(a) A drugs only intimate search may only be undertaken with consent.
(b) Authorisation for the search, together with the grounds, and the subject's consent, must be recorded in the custody record.
(c) The court may draw an adverse inference where a person refuses to consent without good cause.
(d) Information required to be given to the suspect about the search can be given by a constable or suitably designated detention officer or staff custody officer.

Clause 5 would insert a new Section 55A into PACE 1984, creating similar provisions in relation to X-ray and ultrasound scans, involving powers for the police to authorise such procedures in relation to a person suspected of swallowing a Class A drug, where the person has been arrested for an offence and is in police detention. Refusal to undergo the procedure, without good cause, may lead to an inference being drawn.

Clauses 4 and 6 allow for the same changes in the law to occur in Northern Ireland.

Release comment

8. We welcome the requirements in relation to consent and authorisation for these procedures. The introduction of an adverse inference should be considered in the context of the right to a fair trial, provided by the HRA 1998 (Art. 6). We recognise, however, the difficulties of policing drugs offences by "swallowers" and, in the overall context of the legislation, we have no strong objection to these provisions in principle. However, a number of practical concerns have been raised by criminal law practitioners, which are summarised below.

9. Health concerns have been raised in relation to X-rays and further information should be made available about the potential health implications. It is also not clear whether concern about the health implications will be considered good

cause to refuse to undergo an X-ray. Further, will the arrestee be given the opportunity of obtaining legal advice before being asked to consent to an X-ray or ultrasound scan?

10. Intimate searches could be considered "inhuman or degrading treatment" under Article 3 of the HRA 1998. Accordingly, in addition to the safeguards already provided under Section 55 of PACE 1984, we believe that there should be a statutory presumption in favour of using X-ray and ultrasound before resorting to an intimate search, being a more reasonable and proportionate alternative.

11. In relation to the inference under Clauses 3 and 5, this Bill appears to lack any safeguards equivalent to those provided by S.38(6) of the Criminal Justice and Public Order Act 1994 in relation to Ss. 34-37 of that Act. These safeguards ensure that (a) proceedings will not be transferred to the Crown Court for trial, (b) there will not be a case to answer, and (c) there will not be a conviction, solely on the basis of an inference drawn under those provisions. There is also a safeguard to ensure that the operation of the provisions will not prejudice any power of a court in any proceedings to exclude evidence at its discretion. If this proposal becomes law, it must be ensured that equivalent safeguards exist in relation to it.

12. Clauses 3 and 5 differ from other adverse inference clauses in that it is not clear what inferences might be properly drawn from a failure to give consent. The only obvious inference is that the person was in possession of a Class A drug. However, as the clause currently stands, any inference can be drawn in any proceedings against the person for "an offence". There is no provision to the effect that the court retains its discretion to exclude evidence. This is likely to necessitate a large body of case law. The government needs to clarify in what circumstances an inference is to be admissible. If this is only to be in relation to offences of possession, it must be considered whether the interference with Article 8 of the HRA 1998 is justified in terms of proportionality.

13. We refer also to the argument raised by the Law Society[1] in relation to this provision, that where consent is not given and no drugs have in fact been located, there should be no case to answer in relation to a drug related offence.

14. No consideration appears to have been given to the privilege against self-incrimination.

[1] Parliamentary Brief, 18 January 2005 (contact: Shona Ferrier – 020 7320 9546; shona.ferrier@lawsociety.org.uk).

Clause 7. Testing for presence of class A drugs

Summary

Clause 7 allows for testing for the presence of specified Class A substances, namely cocaine and heroin, where an individual is arrested:

(a) for a 'trigger offence' or
(b) 'where a 'police officer of at least the rank of inspector has reasonable grounds for suspecting that the misuse by that person of a specified Class A substance caused or contributed to the offence and has authorised the sample to be taken' (Clause 7(3))

Failure to give a sample upon request is to be a criminal offence, carrying a sentence of up to 3 months imprisonment and/or a level 4 fine. (PACE 1984, s. 63C(1))

Release comment

15. We strongly oppose this provision, which was proposed in the government's 2004 consultation on police powers[2] ("the policing consultation").

16. We believe that drug testing is an invasive procedure which should only be carried out either with the subject's consent or in order to prove or disprove the commission of an offence, for example when driving. In any other circumstances, we believe that testing is disproportionate, unfair and arguably contrary to the HRA 1998.

No consent

17. There is no reference to "consent" in this provision. There is a good reason for this – there can be no consent where a significant detriment, in this case the commission of a criminal offence, would result from refusal.

18. The position is the same for young people aged 14 to 17 years, for whom no appropriate consent is required under the current regime of testing upon charge. Should testing upon arrest be extended to this age group, the same absence of a requirement for appropriate consent will presumably exist. Parents and guardians will therefore not be able to refuse the giving of a sample on behalf of a young person, as doing so will mean the commission of an offence by that young person.

No offence

19. The mandatory testing under Clause 7 is not intended to prove or disprove the commission of an offence. Further, those who are subject to the mandatory

[2] Modernising Police Powers to Meet Community Needs (published August 2004; www.homeoffice.gov.uk/docs3/modernising_powers.html). See Release's response to the paper at www.release.org.uk/news.

testing may never be charged with the offence for which they were arrested, and may never have committed any offence.

20. We believe that individuals should not be required to undergo tests and mandatory health assessments in these circumstances, in which it may be difficult to justify the interference with Article 8 of the HRA 1998 based upon the perceived link between drug use and crime - especially if the person does not have any convictions. One possible remedy that has been proposed would be to introduce a requirement that before the testing is imposed, a causal link must be established between the person's drug use and criminal activity other than simple possession of an illicit drug. However, we are opposed to mandatory testing in any circumstances other than to prove or disprove an offence, as we believe that such measures constitute a disproportionate infringement of privacy.

Breach of human rights

21. We believe that there is a case to be argued that testing in the proposed circumstances is a breach of the right to respect for private life, as enshrined by Article 8 of the HRA 1998.

Reliability of results / false positives

22. No drugs test is 100% reliable and the risks of false positives are well documented (see the following paragraphs). For example, it is possible to test positive for opiates, or to produce a false positive for cocaine, as a result of taking prescription drugs or even over-the-counter cold remedies.

23. It was stated in a 2004 UK study[3] that the risk of false positives in drug tests "*does mean that their results need to be treated with a degree of caution*", and that "*[w]here an initial oral fluid or urine test shows up positive in a cup or vial by a change in colour, it is now widely recognised that such positive test results need to be followed up by a full, more costly laboratory test in order to be relied upon. There may be an alternative – and 'innocent' explanation for the presence of an illicit drug. This may emerge only after review of a pre-test interview, in which subjects are asked whether they have taken any over-the-counter or prescribed medications. There are documented cases of people giving wildly improbably explanations for the presence of drugs in their bodies, which have turned out on further examination to be true*."

24. There is no indication as to whether pre-test interviews will be conducted, the extent of analysis to be carried out on the sample given, the circumstances in which any further analysis might occur, and the procedure for challenging a positive test if it is believed to be false.

25. Given the volume of tests that is expected to be carried out, there are likely to be a significant number of false positives each year, leading to the erroneous

[3] Report of the Independent Inquiry into Drug Testing at Work, first published in 2004 by the Joseph Rowntree Foundation (www.jrf.org.uk).

imposition of mandatory assessments in an already over-stretched area of law enforcement and treatment provision.

Extension of trigger powers

26. The proposals for mandatory testing must be considered in the context of the proposals in the 2004 policing consultation[4] for the extension of trigger powers to all offences which are triable either way or on indictment. In that paper, the government proposed a review of the concept of seriousness in determining whether the power of arrest exists in relation to an offence. Currently, the power of arrest arises where the offence carries up to a five-year sentence upon conviction (subject to specified exceptions). The paper proposes that the five-year rule should be abolished and that, instead, the question whether an offence is arrestable should be determined by the arresting constable exercising his/her judgement as to the seriousness of the offence and the complexity of the investigation, according to specified criteria. The paper goes on to state as follows in relation to trigger powers (our emphasis):

"*…whilst proposing that the power of arrest should be applied to all offences meeting the [specified criteria]…, the range of other powers which are triggered by an offence being arrestable should at this stage remain subject to set criterion [sic]. Potentially, that could be applied to those offences which carry a term of five or more years imprisonment. This would be in line with section 24(1) of PACE. However, that would maintain – not simplify – powers around arrest. A more effective process may be to enable the exercise of trigger powers to all offences which are triable either way or on indictment.*"[5]

If these proposals became law, the impact of mandatory testing upon arrest would be significantly increased.

Re-arrest for an offence which does not meet the arrest condition

27. Clause 7 of the Bill contains an amendment to Section 63B of PACE 1984 (to become S.63B(5C)) which will allow for testing to take place where the following circumstances exist, without any requirement for authorisation by an inspector based on reasonable grounds that the misuse of a Class A drug has contributed to the commission of either offence:

(a) Someone has been arrested for a trigger offence; and
(b) Before a sample is taken under the mandatory testing requirement, s/he would usually be required to be released from detention; but
(c) S/he in fact continues to be in police detention due to an arrest for a non-trigger offence; and
(d) The sample is taken within 24 hours from the start of his/her detention by virtue of the trigger offence.

[4] Modernising Police Powers to Meet Community Needs (2004) (www.homeoffice.gov.uk/docs3/modernising_powers.html). See Release's response at www.release.org.uk/news.
[5] Ibid., para. 2.13.

28. This power could be open to abuse in circumstances where it has already been determined that there is insufficient evidence to charge a person for a trigger offence and yet, under this Clause, it would still be possible for that person to be tested for drugs without the need for an inspector's authorisation. It might be possible to safeguard against any such abuse by introducing a statutory requirement that an officer must not use the power under S. 63B(5C) unless s/he believes, on reasonable grounds, that the accused committed the trigger offence.

Clause 8. Extended detention of suspected drug offenders

Summary

This provision would extend Section 152 of the Criminal Justice Act 1988 (remand of suspected drug offenders) to permit magistrates' courts to commit a person charged with an offence under Section 5(2) of the MDA 1971 (possession of a controlled drug), or a drug trafficking offence, into the custody of a police officer (in addition to current powers to commit into custody of a customs officer) for up to 192 hours (8 days).

Release comment

29. The police (other than customs) are currently permitted to hold suspects prior to charge for up to 96 hours (4 days). This amendment will therefore double the time that suspected drug offenders may be held in custody by the police.

30. We recognise the practical difficulties involved in policing drugs offences by "swallowers". However, we would only support extended detention where there are reasonable grounds to believe that drugs may have been swallowed.

Part 3 – Assessment of Misuse of Drugs

Summary

Part 3 of the Drugs Bill makes a number of amendments to PACE 1984. It is proposed that anyone who tests positive for the presence of specified Class A substances under Section 63B of PACE 1984 (as amended by Clause 7 of this Bill) must attend an initial assessment and, if necessary, a follow-up assessment. Failure to attend the assessment, or to remain for its duration, will result in a fine and/or a custodial sentence.

Clause 9. Initial assessment following testing for presence of Class A drugs

Summary

A person who has tested positive for a specified Class A substance may be required to attend an initial assessment and remain for its duration. The aim of the assessment will be to:

- *Establish whether a person is 'dependent upon or has a propensity to misuse any specified Class A Drug' (Clause 9 (3)(a));*
- *Establish whether a person, found to be dependent on or have a propensity to misuse any specified Class A Drug, would benefit from a follow up assessment, assistance or treatment (Clause 9 (3)(b)); and*
- *Provide advice and explanations of the type of assistance and treatments available (Clause 9 (3)(c))*

The assessments are to be carried out by a 'suitably qualified assessor' known as the 'initial assessor' (Clause 9(3) & s.10(3)).

Clause 10. Follow-up assessment

Summary

The police officer must, at the same time as he imposes the requirement to attend the initial assessment, require the person to attend a follow-up assessment if the initial assessor decides it is appropriate, for the purposes of drawing up a care plan (Clause 10 (3)).

Release comment

31. The introduction of mandatory assessments, with criminal penalties for non-attendance, raises a number of fundamental issues including the following:

    - The effectiveness of coercive treatment in reducing crime
    - The effectiveness of coercive treatment in achieving recovery from problematic drug use
    - The ethics of coercive treatment
    - The re-direction of resources away from voluntary treatment
    - The criminalisation of law-abiding citizens

32. We welcome the use of the criminal justice system to give genuine and appropriate encouragement to people to enter into drug treatment, by providing assessment services within police stations and prisons. However, we are fundamentally opposed to coercive assessment and treatment within the criminal justice system.

Effectiveness of coercive assessment/treatment in reducing crime

33. There is no conclusive evidence to indicate that mandatory assessment is effective in reducing crime. Mandatory treatment was formally introduced to the UK statute book in 1998, in the form of Drug Testing and Treatment Orders (DTTOs). A 2003 study by the Home Office found that 80% of offenders who had been subject to a DTTO had been reconvicted within two years of the start of the Order.[6]

Effectiveness of coercive assessment/treatment in achieving recovery from problematic drug use

34. The introduction of mandatory assessment requires a consideration of the effectiveness of mandatory treatment. We welcome the government's recognition of the importance of drug treatment. However, we dispute the effectiveness of compulsory modes of assessment and treatment. We refer to Appendix 1 to this briefing, where these issues are looked at in more detail.

Ethics of coercive assessment/treatment

35. Drug workers providing mandatory assessments or treatment are placed in a difficult position professionally, both in terms of information sharing and the ability to provide an effective, health-driven service. There is an inherent conflict between drug treatment and the punitive aspects of the criminal justice system. We believe that drug workers' increased involvement in this type of work could lead to a real change in the culture of drug treatment, resulting in reduced effectiveness, low morale for drug workers – who may be placed in a position of probably unwelcome power in relation to their clients - and a possible aversion to drug treatment for those forced into it through the criminal justice system.

Re-direction of resources away from voluntary treatment

36. Any investment in drug treatment must be welcomed. However, an extensive (and ever expanding) system of mandatory assessment is likely to redirect resources away from the services available to those voluntarily seeking treatment outside the criminal justice system. This is demonstrated by the statement in the Final Regulatory Impact Assessment ("RIA") that the treatment costs arising from mandatory testing and assessment will total £22 million with £8.6 million being met by the Department of Health's treatment budget.[7] We would like to see more proposals to fund and support voluntary treatment, based on a health-driven agenda. This is particularly so given the greater success rates in voluntary treatment, whether accessed through the criminal justice system or through a conventional healthcare route.

37. It is envisaged that the power to require individuals to attend a further assessment, with a view to drawing up a care plan, will be implemented at a

[6] Home Office Findings 184, "The impact of Drug Treatment and Testing Orders on Offending: two year reconviction results" (Research, Development and Statistics Directorate, Hough et al, 2003).
[7] Home Office Drugs Bill Final Regulatory Impact Assessment, page 7.

later date. The RIA states that the further assessments will be "cost neutral", on the basis that money will be saved through reductions in crime.[8] It is unclear how this has been calculated and further details regarding implementation need to be made available.

38. The drug treatment profession is already stretched beyond capacity. It is impossible to see how suitably qualified assessors can be put in place without having a direct impact on the current shortage of qualified staff in the field. Again this raises issues in relation to resources and required expertise. We look forward to seeing proposals for the recruitment and training of drug treatment professionals for these purposes.

Criminalisation of law-abiding citizens

39. The introduction of the offences of failing to attend an assessment (see further below) criminalises the drug user, who may be an otherwise law-abiding citizen, and who may never even be charged as a result of the initial arrest. We refer in this regard to our comments at paragraphs 31 to 38 above, and Appendix 1.

Clause 11. Requirements under clauses 9 and 10: supplemental

Summary

This clause requires the police to give oral and written notice to the person of the time and place of the initial assessment and the possibility of prosecution in the event of non-attendance, before the person is released from police detention. Further written notice may be provided of any change in the appointment.

Release comment

40. Given the criminal implications of non-attendance, it is appropriate that these requirements should be laid down in statute. However, we note the additional paperwork that this will require for the police, and the extension of detention time that is likely to result from persons having to wait until the police have time to prepare written notice of an assessment.

41. All of this, in relation to individuals who may never be charged as a result of the initial arrest.

[8] Home Office Drugs Bill Final Regulatory Impact Assessment, page 6.

Clauses 12, 13 & 14. Attendance at initial and follow-up assessments; and arrangements for follow-up assessment

Summary

Clause 12 outlines the penalties for non-attendance and failure to remain for the duration of assessments. This clause also places a duty upon the person conducting the initial assessment to inform the police if the person concerned fails to attend or remain for the duration of that assessment.

Clause 13 sets out the arrangements for a follow-up assessment. The requirement to attend a follow-up assessment ceases to have effect if the person is informed by the initial assessor that he is no longer required to attend that assessment (because the assessor considers it is not appropriate). Where a follow-up assessment is considered appropriate, the assessor is under a duty to inform the person orally and in writing, before the end of the initial assessment, of the time and place of the assessment and to warn him that failure to attend without good cause could lead to prosecution. Further written notice may be sent of any change to the time or place of the appointment.

Clause 14 places a duty on the person conducting the follow-up assessment to inform the police if the person concerned fails to attend or remain for the duration of that assessment, in which case they will be guilty of an offence and liable to imprisonment for a term not exceeding 51 weeks and/ or a fine not exceeding level 4.

Release comment

42. A person who fails to attend the initial assessment or remain for its duration is to be guilty of an offence and liable on summary conviction to imprisonment and/ or a fine not exceeding £2,500. The maximum term for imprisonment in these circumstances is intended to be 3 months (cl.12(7) of this Bill). However, if this becomes law, the maximum term will become 51 weeks when S. 281 of the Criminal Justice Act 2003 ("CJA 2003") takes effect.[9]

43. The introduction of these offences further criminalises the drug user, who may be an otherwise law-abiding citizen, and who may never even be charged as a result of the initial arrest.

44. The RIA estimates that refusals to provide a sample and failure to attend assessments will arise in no more than 5% of cases. We do not accept the analysis which leads to this figure. It seems to have been calculated as a medium point between the figures of 1% (refusals of mandatory drug testing on charge) and 10% (breach of restrictions on bail), arising from studies carried out in 2004[10] on the current regime of drug testing on charge. However, this regime is not directly comparable to the proposals under Clause 7, which may lead to a mandatory assessment. We would expect the rate of

[9] The Criminal Justice Department at the Home Office confirms that s.281 CJA 2003 is not likely to come into force before September 2006.

[10] Home Office Drugs Bill Final Regulatory Impact Assessment, page 37 – October 2004 Drug Testing Monthly Monitoring Report.

breach to be closer to that experienced in relation to restrictions on bail, leading to a much higher criminal justice cost than that suggested by the RIA.

45. The RIA states that defence solicitors will be "*engaged to ensure that they are aware of the benefits of these provisions and are able to inform their clients*".[11] Are lawyers to be expected, therefore, to give treatment advice? In any event, this suggestion assumes that the individual concerned will have representation. If a decision has been made not to charge them, it cannot be expected that legal aid will be available to that person even if they remain subject to mandatory assessments, until they breach.

46. The requirement for assessors to inform the police of non-attendance again highlights the conflicts faced by drug workers within a coercive treatment system. Questions must be asked as to the ethics and potential effectiveness of such treatment and the limitations on the relationship that can therefore exist between the client and the assessor, who is placed in a position of considerable power in relation to their client.

Clause 15. Disclosure of information about assessments

Summary

This clause provides that information obtained as a result of the initial assessment or follow-up assessment may not be disclosed without the written consent of the person concerned except in the case of information sharing with those involved in the conduct of the initial and follow-up assessments.

Release comment

47. It is not entirely clear what sharing of information is envisaged under this clause. There is to be no requirement for consent to the sharing of information between those who are involved in the conduct of the assessment. This presumably includes the "suitable assessors", but does it also include the police given their responsibility for arranging the assessments? This needs to be clarified.

48. We believe that genuine consent should be obtained from the individual before any personal information is shared for any purpose. Otherwise, such information sharing may be in breach of data protection and human rights legislation.

[11] Home Office Drugs Bill Final Regulatory Impact Assessment, page 6.

Clause 16. Samples submitted for further analysis

A person will no longer be required to attend an initial or follow-up assessment if, before he attends that assessment, a further analysis of the sample taken reveals that it was negative.

49. It is not stated in what circumstances a further analysis will be carried out, nor whether it will be possible for individuals to request this. This requires clarification. Please see also paragraphs 22 to 25 above.

Clause 17. Relationship with Bail Act 1976 etc.

Summary

A requirement to attend an initial or follow-up assessment ceases to have effect if, before s/he has complied with the requirement in question, the person is charged with the offence in respect of which the drug test was taken and is granted bail by a court on the condition that s/he undergo a relevant assessment and/or participate in follow-up under the Bail Act 1976.

A relevant assessment for the purposes of the Bail Act 1976 is to be treated as having been carried out where a person attends for the duration of an initial assessment and the initial assessor is satisfied that the assessment fulfilled the purposes of the relevant assessment. A person will be considered to have undergone such a relevant assessment in those circumstances.

An initial assessor may disclose information regarding the initial assessment to enable a court to determine whether those circumstances arise.

Release comment

50. Within the context of these provisions, we have no objection to Clause 17 save to note again the conflicted position of the drug workers who must disclose potentially incriminating information to the court directly relating to their treatment work with clients.

Clause 18. Orders under this Part and guidance

Summary

An order made by the Secretary of State amending the age at which persons may be required to attend an initial assessment and a follow-up assessment may make provision where appropriate in respect of under 18 year-olds.

Release comment

51. Release is particularly concerned about the possible extension of this legislation to young people and we would oppose such a move. If the proposals are implemented, in order to avoid the risk of alienating young people from drug treatment services in the longer term, it will be particularly

important to ensure that assessments are carried out by highly qualified, specialist professionals within a multi-agency framework. Account will need to be taken of other agencies and individuals who may already be working with the young person concerned.

52. It is also crucial that consideration be given to the potential criminalisation of otherwise law-abiding young people and appropriate measures for the implementation and enforcement of the suggested provisions. The young person's right to privacy and confidentiality should be of paramount consideration in this process. Detailed provisions will need to be made public on this before any extension is effected, and a public consultation should be carried out with relevant bodies before legislation is drafted.

Part 4 – Miscellaneous and General

Clause 20. Anti-social behaviour orders: intervention orders

Summary

This Clause provides the power for the court to impose intervention orders, for mandatory drug treatment and testing, alongside anti-social behaviour orders, where specified relevant conditions are met.

Release comment

53. The relevant conditions listed here do not include the subject's consent to, or interest in, treatment. The proposal is therefore for coerced treatment, to which we are opposed. We refer to our comments at paragraphs 31 to 39 above and Appendix 1.

Clause 21. Inclusion of mushrooms containing Psilocin etc. as class A drugs

Summary

This provides for any fungus containing Psilocin or an ester of Psilocin to be classified as Class A drugs.

Release comment

54. The unregulated supply of magic mushrooms creates a potential public health risk which needs to be addressed. We do not believe that it can be effectively addressed by criminalising fresh mushrooms. We believe it would be more productive to introduce strict regulation to the current market, with the primary purpose of protecting public health.

55. The uncertainty surrounding the legal status of fresh, as opposed to prepared, mushrooms also needs to be resolved. We do not believe that this is achieved

by the proposed amendment, which does not adequately deal with the fact that magic mushrooms are naturally occurring.

Proof of lack of knowledge etc. to be a defence (s. 28, MDA 1971)

56. The RIA refers in passing to the defence of "ignorance" provided by Section 28 of the MDA 1971. This is not, however, a complete answer to the problem of legal uncertainty. Section 28 provides a defence where it is proved that the accused neither believed nor suspected nor had reason to suspect that the substance in question was a controlled drug. This may lead to injustice in many cases. In any event, in many cases it will be unreasonable to expect landowners to eradicate naturally occurring mushrooms even where they are known to exist.

57. In short, there will continue to be uncertainty which is not addressed by this Bill, due to the fact that these mushrooms are naturally occurring, and not uncommon, in the UK. We understand that the Home Office intends to produce secondary legislation concerning the implementation of the law. It is difficult to comment further without sight of such measures.

58. We note that the government is consulting with ACPO Drugs, the CPS and the ACMD and look forward to seeing the results of those discussions. It is not clear whether those bodies were consulted before this Bill was presented to Parliament. We would welcome sight of the reasoning behind the decision to classify mushrooms as Class A, including any advice provided by the ACMD.

59. We are concerned about the impact that the change in the law may have given the current wide availability and popularity of mushrooms, particularly among young people, and would be interested to see any analysis of this potential fallout, including other substances that young people might turn to as an alternative.

Schedule 1 - Amendments

Anti-Social Behaviour Act 2003 ("ASBA 2003")

Summary

This amendment will allow the police the power to enter any premises for the purpose of serving a Closure Notice, using reasonable force if necessary.

Release comment

60. ASBA 2003 created unprecedented powers for magistrates' courts to close down premises associated with Class A drug use, production or supply and serious nuisance or disorder, which are summarised in Appendix 2 to this briefing. We opposed this legislation on the basis that it is disproportionate

and prejudicial to the principle of access to justice.[12] The legislation was not made subject to a public consultation.

61. Under the current law, where a closure order is made, no one may enter the relevant premises, regardless of any legal interest in the premises or whether it is their home. The orders are made through civil proceedings, upon application by the police, based upon a balance of probabilities in which hearsay evidence is admissible. Breach of a closure order is, however, a criminal offence.

62. If this proposal becomes law, a further unprecedented move will be introduced by allowing the police to force entry into premises in order to effect service of these civil – not criminal - proceedings.

63. We are deeply concerned by the blurring of civil and criminal proceedings which characterises these and other measures brought in by the government in order to tackle anti-social behaviour. We believe that the public's access to justice is compromised by the rule that requires the court hearing of the closure proceedings to take place no more than 48 hours after the closure notice has been served.

64. It is stated in the RIA that the purpose of this amendment is to reduce the number of successful challenges against closure orders on the basis of ineffective service of the closure notice. No consideration has been given, however, to the question whether there would be fewer such challenges if the time between service and the hearing were extended beyond 48 hours. (Although, given the severe restrictions on access to the premises after service of the notice, delaying the hearing would not necessarily be desirable.) No consideration is given to the impact of the proposal, and of the closure powers in general, upon vulnerable individuals living in targeted premises.

65. The police should be able to prove effective service by posting notices on the door of premises or delivering it through the door. We consider the proposed amendment to be disproportionate and we strongly oppose it.

Schedule 2 - Repeals

Criminal Justice and Police Act 2001

66. The repeal of the amendment to Section 8(d) of the MDA 1971 is welcomed. However, the whole of Section 8 continues to be a source of considerable anxiety for those managing premises which are used by drug users, and it needs to be looked at again in consultation with those services with a view to achieving appropriate certainty.

[12] Please see our response to the consultation on draft guidance for the implementation of ASBA 2003, at www.release.org.uk/archive.

Lack of consultation

67. Given the serious nature of the proposals in this Bill, we are disappointed that much of it was not made subject to consultation with key stakeholders before the Bill's presentation to Parliament. We believe that pushing legislation through in this manner, without appropriate consultation in advance, does not lead to good, effective law-making.

68. We believe that this apparently hasty approach is reflected in the RIA, which contains some overly simplistic arguments and even inaccuracies. We refer, for example, to the error on page 18, para. 3.3.1(ii), concerning the maximum sentences for possession with intent to supply. Also, the suggestion (page 17, para. 3.2.3) that increased arrests of drug dealers could lead to a reduction in supply and therefore reduced crime. No account is taken here of the ease with which any gaps in supply are likely to be filled by other dealers, where demand continues to exist; the lack of evidence to support the effectiveness of tougher law enforcement as a deterrent; and the potential for increased prices in the market if there were indeed a significant reduction in supply.

69. We are particularly concerned that a public consultation should be carried out with relevant expert organisations before any attempt is made to extend the testing provisions in this Bill to young people.

70. We note that the amendment to Section 8(d) of the Misuse of Drugs Act 1971, introduced without public consultation in 2001, is now to be repealed under this Bill without ever having been brought into practice. This has arisen because consultation on that provision was only carried out after it had become law. While we welcome its repeal, we question the process by which it was ever introduced into statute and contend that the same mistake is being made in relation to many of the provisions of this Bill.

71. We believe that a full public consultation would have led to a more informed analysis of these questions and an improved Bill.

Appendix 1

Effectiveness of coerced (as opposed to voluntary) treatment

1. Where treatment is driven by a criminal justice agenda, rather than an identified health-related need, it will always be fraught with difficulty. This is particularly so in the case of drug treatment, which involves a very wide and complex range of needs and goals, and in which moral judgements can sometimes have an important influence.

2. The lack of selectivity in mandatory assessment and treatment is of great concern. Coercive treatment may work for some individuals, who require constant and intensive supervision. However, this type of approach with some offenders, such as those whose crimes relate solely to the possession and ingestion of prohibited substances, may be at best ineffectual and at worst counter-productive.

3. Even where there is a genuine need for treatment, problems arise. A study conducted in 2003 by Douglas Marlowe J.D.Ph.D.[13] argued that treating sick people like criminals might breed counter-therapeutic feelings of resentment, hostility or hopelessness, as well as socialising clients into a milieu of criminal or anti-social behaviour. Marlowe went on to question the relative financial cost benefits of criminal justice supervision. Crucially, he concluded that some clients will perform better if left alone to develop a therapeutic relationship without such supervision.

4. This leads us to another problem associated with assessment and treatment through the criminal justice system, namely the effect of that dynamic on the relationship between the assessor/treatment provider and their client. This relationship is often key to the success or failure of drug treatment, particularly in relation to cocaine addiction where no substitute prescription is available. The importance of this relationship, long established as a key element of successful drug treatment, was recognised by the NTA in its briefing on treatment for cocaine/crack dependence[14], where it is stated that:

   "*…the quality of the client-counsellor and key worker relationship is highly influential in cocaine addiction treatment. US research has shown that counsellors who quickly establish a relationship within which the client feels they are being listened to, understood and being given helpful, positive responses have clients who stay longer and attend more often, improving outcomes. In some studies these experiences (captured by the terms "rapport" or "empathy") were a more important influence on engagement*

[13] "Integrating substance abuse treatment and criminal justice supervision", Science & Practical Perspective, University of Pennsylvania, August 2003.
[14] "Treating cocaine/crack dependence", NHS National Treatment Agency for Substance Misuse, August 2002.

with treatment and abstinence outcomes, than the client's motivation at treatment entry…"

5. It is easy to see how the position of the assessor or treatment provider within the criminal justice system might make it difficult or even impossible to establish the kind of relationship suggested here, severely limiting their ability to help their clients achieve positive outcomes.

6. It is widely accepted by drug treatment professionals that people will only stop using when they are ready to do so. Can a treatment order do anything to move someone into that position? Recent research from Scotland[15] (where DTTOs have had more success than in England and Wales) indicates that this can work, but only where "breaches" are not penalised and instead the reasons for non-compliance are examined.

7. This highlights the complexity of drug treatment and the need, long recognised by drug treatment professionals, for flexibility in treatment. Such flexibility will always be difficult to achieve when treatment is inextricably linked with an individual's relationship with, or progress through, the criminal justice system.

[15] "DTTOs: the Scottish way cuts the failure rate" (Drug and Alcohol Findings, 2003, 9, p. 14)

Appendix 2

Summary of the Closure Powers under the Anti-Social Behaviour Act 2003

1. A police superintendent authorises the issuing of a closure notice in relation to specified premises, based upon reasonable grounds for believing that:

   (a) In the last 3 months, those premises have been used in connection with the unlawful use, production or supply of a Class A controlled drug; and

   (b) The use of the premises is associated with the occurrence of disorder or serious nuisance to members of the public;

   Provided that

   (c) The local authority for the relevant area has been consulted; and

   (d) Reasonable steps have been taken to establish the identity of any person who lives on the premises or who has control of or responsibility for or an interest in the premises.

2. The closure notice must be served by a constable, and must contain information about the effect of the notice, giving a date, time and place for the hearing of the closure proceedings, and other information.

3. After the closure notice has been served, it will be an offence for anyone other than a person who habitually resides in the premises, or the owner of the premises, to remain on or enter the premises without reasonable excuse. This offence carries up to a six-month sentence or a level 5 fine, upon summary conviction.

4. There must be a hearing at the magistrates' court within 48 hours of service of the closure notice, to determine whether to make a closure order.

5. The court may make a closure order if, upon a balance of probabilities, it is satisfied that:

   (a) The premises have been used in connection with the unlawful use, production or supply of a Class A controlled drug;

   (b) The use of the premises is associated with the occurrence of disorder or serious nuisance to members of the public; and

   (c) The making of the order is necessary to prevent the occurrence of such disorder or serious nuisance for the period specified in the order.

6. If a closure order is made (it can be made for up to 6 months), the premises will be sealed and it will be an offence for any person, regardless of any legal

interest in the premises, to remain on or enter the premises without reasonable excuse, punishable with up to a six-month sentence or a level 5 fine, upon summary conviction.