

New Psychoactive Substances Expert Review Group

**Review of the current Legal Framework
available to Govern the Sale and Supply of
New Psychoactive Substances**

ACKNOWLEDGEMENTS

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In particular the Review Group would like to acknowledge the willingness and participation of organisations based in Angus who provided valuable insights into the local response to the sale and supply of New Psychoactive Substances in their area. The Review Group was struck by the level of commitment across agencies to co-ordinate activity and develop trust with community representatives and respond to community concerns.

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1. EXECUTIVE SUMMARY

1.1 This report presents the conclusions and recommendations of the Expert Review Group established by the then Minister for Community Safety and Legal Affairs, Roseanna Cunningham MSP, on 27 June 2014 and announced at the British Irish Council meeting in Dublin. The Group were asked to review the current legal framework available to Scottish public authorities to govern the sale and supply of New Psychoactive Substances (NPS) in Scotland. The Group had a deliberate and specific legal focus, but also considered operational and practical aspects, in the context of the existing legal framework. The membership reflects this and a full list of members can be found at Annex A. This final report of the Group is presented to Paul Wheelhouse MSP, the current Minister for Community Safety and Legal Affairs on behalf of Scottish Ministers.

1.2 NPS is a description that is given to a group of substances that are designed to mimic the effects of controlled drugs although the contents and chemical composition of these substances can vary. There is not always a clear or accurate relationship between how substances are sold and marketed and the actual products being consumed. Some of these products, although able to be legally sold or supplied for varying purposes, are not safe. Sellers frequently attempt to evade prosecution by marking products as “not fit for human consumption”. The chemical compound can be altered quickly and easily, making it difficult to control these substances under the Misuse of Drugs Act 1971. Once the chemical composition is stable and harms established, it can be captured under this legislative vehicle. Therefore some NPS have been brought into the Misuse of Drugs Act 1971 regime, often following a period of temporary ban resulting in a change of status to a controlled drug. The evidence base on NPS in respect of prevalence and harm is relatively undeveloped compared to controlled drugs, and work is underway to better understand the motivations for and circumstances of NPS use in Scotland, by the Scottish Government and others. NPS use in Scotland is still relatively low compared with other illicit drug use. However, use amongst some sub sections of the population is higher, especially amongst young people. Where NPS are implicated in drug deaths, it is present in most cases with other drugs or alcohol. Notwithstanding this, there were 5 deaths in 2013 where NPS was the sole substance implicated out of a total of 60 deaths where NPS was implicated to some extent.

1.3 In bringing successful prosecutions for the sale and supply of NPS in Scotland, it is important that there is a consistent understanding amongst agencies about what NPS are, and what the effects of consumption might be. A set of national standards for definition, measurement and testing, and an agreed framework within which clinicians and enforcement agencies can operate will be helpful in supporting successful enforcement and treatment activity. There is growing evidence of multi-agency working and a range of agreements to share information but these can be enhanced. There is a legislative framework to support prosecutions in relation to NPS, but the Group was asked to examine the effectiveness of this regime, drawing on the work of two enforcement summits convened by the Scottish Government in 2013 and 2014. The Group also recognised the work of a Home Office sponsored Group to review NPS which published its report in October 2014.

1.4 The membership of the Group was drawn from a range of expertise in legal, policy and operational backgrounds. Using sub groups and drawing evidence from current practice, the Group considered 3 themes of criminal and civil law, planning and licensing, and consumer protection and trading standards. The Group examined a range of current statutory and common law powers which could potentially be used to tackle NPS. Each provision was subject to detailed consideration as to its usefulness and operational effectiveness.

1.5 The Group concluded that there are a number of legal mechanisms potentially available to tackle the sale and supply of NPS, and noted some success in the application of the law to date. In the case of some provisions, the group identified weaknesses that limited the effective application of the legal provision. The Group therefore makes a number of recommendations:

1. A definition of New Psychoactive Substances (NPS) should be developed that can be adopted across all areas in Scotland including: research, academia, NHS Health Boards, enforcement agencies, forensics and toxicology, local and national Government, education, treatment services and others to ensure consistency and a common understanding. Consideration should be given to whether the definition should be based on their chemical compound group (e.g. synthetic cannabinoid, cathinone) or according to their effect (e.g. stimulant, sedative).
2. A national centre of excellence in forensic analysis should be established to lead in the detection and identification of NPS in Scotland. This centre could lead work on the development of national standards for NPS testing across all agencies, where testing relates to a criminal or potentially criminal case. The Centre should share information with hospitals, trading standards and relevant services on emerging trends, building and maintaining the knowledge base on NPS.
3. Information should be shared appropriately and effectively between the recommended national centre of excellence and agencies dealing with NPS issues, including those responsible for gathering information with a view to prosecution. A formal protocol between the relevant agencies should be put in place setting out roles and responsibilities and the circumstances for how information should be shared and the timescales for doing so.
4. The Scottish Government and the Home office should work in partnership to create new legislation that will be effective in Scotland.
5. Licensing authorities should attach conditions and restrictions in relation to the sale of NPS when issuing public entertainment or similar licences. This could be extended to include drug paraphernalia.
6. A tool-kit and operational guidance should be developed in partnership with appropriate stakeholders to assist frontline trading standards staff in tackling NPS.

2. INTRODUCTION

2.1 Many drugs are *controlled drugs*, as defined under the Misuse of Drugs Act 1971. New Psychoactive Substances (NPS) is a description of a set of substances designed to mimic the effect of controlled drugs such as stimulants, downers, psychedelics and hallucinogens, but which do not, by definition, fall within the current legal framework that prohibits the possession or sale of drugs controlled under the 1971 Act. The contents and chemical composition of these substances can vary greatly and there is often no clear relationship between what and how substances are sold and the actual products being consumed. Some types of substance can be more potent and volatile than others and have different effects on those taking them, sometimes with fatal consequences. NPS are normally sold as powders, pills or capsules and can be snorted, swallowed or injected. Often they are consumed with other forms of drugs (controlled and non-controlled) including alcohol.

2.2 In an attempt to evade prosecution NPS are frequently labelled as ‘not for human consumption’ and are often sold in other guises such as ‘bath salts’ or ‘plant food’. At present, NPS can be bought online or from retail premises, some of which are referred to as “head shops”. There is a common misconception that because these substances are ‘legal’, they carry few risks to health. Some people consume these substances on the basis that they will not fall foul of any workplace drug testing and will not enter the criminal justice system.

Evidence Base

2.3 In reviewing the evidence base, the Group recognise that whilst NPS have risen to prominence in recent years, much is still unknown about the scale and associated harms of NPS in Scotland. In response to this, the Scottish Government’s Justice Analytical Services (JAS) has developed a programme of analytic work to address some of the key knowledge gaps. To date this has included an initial evidence review¹, an extensive mapping exercise of the existing sources of data available on NPS in Scotland², and a review of the key evidence gaps on prevalence and harms of NPS use³. An Evidence Group, drawn from the fields of academia, health, and the third sector amongst others, has also been established. This has led to proposals for further analytical work on NPS, for example exploring prevalence amongst key subgroups of the population, and the motivations for, and associated harms of, NPS use. This wider programme of work will be used to inform an effective and proportionate response to the problem of NPS in Scotland, both with regard to reducing the demand for and supply of NPS, and harm reduction measures/ treatment for those who use them.

2.4 One issue that emerged from the early considerations of the Evidence Group is the differing understandings and interpretation of what is meant by NPS. In order to build an effective national response to the problem, it is important that a common definition is established to describe NPS. Commonality of purpose and definition is

¹ Scottish Government Social Research (2014) [New Psychoactive Substances – Evidence Review](#)

² Gillies, Allan (2014) Mapping Current and Potential Sources of Routine Data Capture on NPS in Scotland, Scottish Government (forthcoming)

³ Gillies, Allan (2014) Closing Evidence Gaps on the Prevalence and Harms of New Psychoactive Substances in Scotland, Scottish Government (forthcoming)

essential to collaborative working across a range of fields, from academia to treatment services. This issue is reflected throughout the report.

Prevalence of NPS in Scotland

2.5 Existing evidence suggests that use of NPS amongst the general adult population in Scotland is relatively low compared with use of illicit drugs. In the most recent Scottish Crime and Justice Survey (SCJS) 0.5 per cent of all adults reported taking 'new drugs' in the year prior to the survey (conducted between April 2012 and March 2013)⁴. This included BZP (benzylpiperazine), GBL (gamma-butyrolactone), synthetic cannabinoids, khat and salvia divinorum. For the same period, 0.4 per cent of respondents reported taking mephedrone⁵. This compares to 6.2 per cent of adults who reported having used one or more illicit drugs over the same time period⁶.

2.6 However, reported rates of use amongst younger age groups and some sub-sections of the population are higher. The SCJS found NPS use to be more prevalent in the 16-24 age group than those aged 25-44⁷. 4 per cent of 15 year olds reported having used one or more NPS at least once in their lifetime in the most recent Scottish Schools Adolescent Lifestyle and Substance User Survey (SALSUS)⁸. Of these, 2 per cent reported having taken at least one NPS in the month prior to completing the survey (conducted between September 2013 and March 2014)⁹.

2.7 However, these data have limitations. The SCJS is a survey of private households, while SALSUS targets school pupils. Those with chaotic drug use and/or precarious living arrangements are likely to be under-represented in these figures. In addition, when drug use is more prevalent in a particular subsection of the population, national surveys like these may under-report use. Targeted online surveys suggest that this is likely to be the case for NPS use. The 2014 Global Drug Survey found that prevalence of NPS use in clubbers was substantially higher than the general population. Data from the UK showed that 12 per cent of respondents reported using "legal highs", research chemicals and/or synthetic cannabis in the 12 months prior to the survey (conducted during November / December 2013)¹⁰.

2.8 Stakeholders across Scotland have also raised concerns about the use of these substances, in particular amongst vulnerable young people, adults with mental health issues and injecting drug users. These groups are unlikely to be captured by national household or school surveys, or by targeted online surveys. Anecdotal reports suggest that NPS use is on the increase amongst these groups, and there are concerns that the consequences of NPS use in these vulnerable subgroups may be more severe.

⁴ Robertson, Laura, with Bates, Ellie (2014) [The Scottish Crime and Justice Survey: Drug Use](#), Scottish Centre for Crime and Justice Research: University of Glasgow, Scottish Government Social Research

⁵ Now a controlled drug under the Misuse of Drugs Act 1971

⁶ Robertson, Laura, with Bates, Ellie, (2014), [The Scottish Crime and Justice Survey Drug Use](#), Scottish Centre for Crime and Justice Research: University of Glasgow, Scottish Government Social Research

⁷ Ibid

⁸ NHS National Services Scotland (2014) [Scottish Schools Adolescent Lifestyle and Substance Use Survey \(SALSUS\): Drug Use](#) Report

⁹ Ibid

¹⁰ Winstock, A (2014) [The Global Drug Survey 2014 Findings](#), accessed 3.2.2015

Harms

2.9 Challenges in responding to the emergence of new forms of NPS, identifying chemical compounds present in NPS products and gaps in reporting mean that comprehensive evidence on the harms of NPS use is limited. However, there are indications that NPS can cause a range of physical and psychological symptoms¹¹. These include cardiovascular problems, hyperthermia, kidney failure, fluid in the lungs, and seizures; as well as psychological disorders such as anxiety, agitation, memory loss, depression and psychosis. These health risks vary depending on the manner and quantity of NPS consumption and whether the product is smoked, swallowed, imbibed, snorted or injected. There are also unknown risks where NPS are consumed with other products such as alcohol, controlled drugs or even other medications.¹²

2.10 National Records of Scotland (NRS) produce an annual report on drug related deaths. These show that NPS have been implicated in a number of deaths from 2009 onwards (when the first Scottish deaths involving NPS were registered¹³). Deaths where NPS were found to be present in the body have increased over this period, from 4 in 2009, 47 in 2012, to 113 in 2013. Deaths where it was reported that one (or more) NPS were implicated in the death were lower, but again have increased, from 3 in 2009 to 60 in 2013¹⁴.

2.11 In 39 of the 60 deaths recorded in 2013 (where one or more NPS were implicated) the only NPS present were benzodiazepines (usually phenazepam). In 19 cases, other types of NPS were present, including AMT (alphamethyltryptamine), BZP (benzylpiperazine), PMA (paramethoxyamphetamine) or PMMA (paramethoxymethamphetamine). There were two deaths for which both benzodiazepine NPS and other types of NPS were present. However, in most cases, 'traditional' drugs (such as heroin and methadone) were also implicated in these deaths, and in only a small proportion of cases were NPS identified as being the only substances implicated - 5 out of 60 deaths in 2013¹⁵.

2.12 In addition to these figures, information on deaths related to NPS are captured as part of the National Drug Related Death Database (NDRDD), which has been managed by NHS Scotland – Information Services Division (ISD) since 2009¹⁶. These reports analyse a subset of the deaths reported by NRS, but provide more detail on the nature and social circumstances of individuals who died of a drug-related death. The most recent publication (on deaths reported in 2012) includes a detailed analysis of 36 deaths in which NPS were implicated. This showed that the majority of these deaths were from Greater Glasgow & Clyde (14 deaths), Lothian (9 deaths) and Lanarkshire (5 deaths) NHS Health Board areas. The remaining eight cases were spread between five other NHS Health Boards, both urban and rural. Six NHS Health Boards had no NPS-related deaths. The majority of deaths were

¹¹ Wood DM, Dargan PI (2012) Novel psychoactive substances: how to understand the acute toxicity associated with the use of these substances. *Therapeutic Drug Monitoring* Aug;34(4):363-7

¹² Scottish Government Social Research (2014) [New Psychoactive Substances – Evidence Review](#)

¹³ National Records of Scotland (2014) [Drug-related deaths in Scotland in 2013](#)

¹⁴ Ibid

¹⁵ Ibid

¹⁶ The most recent report was published in 2014: NHS National Services Scotland – ISD Scotland (2014) [The National Drug-Related Deaths Database \(Scotland\) Report: Analysis of Deaths occurring in 2012](#)

amongst males (29 deaths), and the overwhelming majority (33 deaths) were among individuals known to have used drugs prior to their death¹⁷.

2.13 At the heart of the Review Group's work was a recognition that in tackling NPS effectively, agreement on what constitutes NPS is important across all interested professions in order that substances can be correctly identified and information captured as the chemical composition can change on a regular basis. Associated with this, there is a significant challenge, therefore, for the forensic community in developing a consistent set of standards for measuring, identifying and defining NPS in respect of associated and direct harms. This issue of evidencing both substances and harm is at the root of some of the operational difficulties in making the existing legal framework effective.

Working definition of NPS

2.14 For the purposes of this report the Expert Review Group adopted the following definition of New Psychoactive Substances (NPS): Psychoactive drugs which are not prohibited by the United Nations Single Convention on Narcotic Drugs or by the Misuse of Drugs Act 1971, and which people are seeking for intoxicant use¹⁸.

Recommendation

- A definition of New Psychoactive Substances (NPS) should be developed that can be adopted across all areas in Scotland including: research, academia, NHS Health Boards, enforcement agencies, forensics and toxicology, local and national Government, education, treatment services and others to ensure consistency and a common understanding. Consideration should be given to whether the definition should be based on their chemical compound group (e.g. synthetic cannabinoid, cathinone) or according to their effect (e.g. stimulant, sedative).

Multiagency Approach to Information Sharing

2.15 In considering an effective response at an operational level, the Group noted the importance of information sharing between agencies and professional groups engaged in managing the implications of NPS for individuals and services. It was evident that information sharing can be for different purposes. In a clinical setting, having ready access to local drug trend information, known substances in circulation, and their effects, can be vital in making a quick and accurate diagnosis of NPS use. This is particularly complicated by the poly drug use that surrounds NPS and the increasing evidence of injection in some areas. From the point of view of enforcement, being able to quickly identify substances in the context of drug seizures, and in drug related deaths, is necessary to prevent further harms and to support services to deal with substances circulating at a national and local level.

2.16 A number of arrangements are in place at a local, national and international level to ensure the swift dissemination of information. The Group concluded that it

¹⁷ NHS National Services Scotland – ISD Scotland (2014) [The National Drug-Related Deaths Database \(Scotland\) Report: Analysis of Deaths occurring in 2012](#)

¹⁸ Scottish Government (2014) [New Psychoactive Substances – Evidence Review](#)

would be helpful for a review of such arrangements to take place in order to formalise these arrangements, and provide clarity to all those with an interest on both obligations and the likely benefits of sharing information.

Recommendation

- Information should be shared appropriately and effectively between the recommended national centre of excellence and agencies dealing with NPS issues, including those responsible for gathering information with a view to prosecution. A formal protocol between the relevant agencies should be put in place setting out roles and responsibilities and the circumstances for how information should be shared and the timescales for doing so.

Current Legislative Framework

2.17 NPS have been designed to fall outside the Misuse of Drugs Act 1971. In response to this the UK Government introduced Temporary Class Banning Orders which can place any potentially harmful substance under a temporary ban, whilst they await consideration by, and a recommendation from, the Advisory Council on the Misuse of Drugs (ACMD). However, this is often a short term solution as manufacturers react quickly to any new substances specified in legislation and alter the chemical structure of the substance to avoid prosecution. These changes can be slight but significant enough to move a substance outwith the definition of a controlled drug under the 1971 Act.

Enforcement Summit

2.18 In 2013 the Scottish Government held an NPS and New Drugs in Scotland Workshop to explore the challenges that NPS present to Scotland, focusing on the themes of enforcement, health and research. Following this event an NPS Enforcement Summit took place in April 2014. It was attended by representatives from local authority legal and Trading Standard groups, Police Scotland, Alcohol and Drug Partnerships and the UK and Scottish Governments.

2.19 Delegates recognised the scale of the issue of NPS. The summit concluded that enforcement activity had encountered difficulties and was hampered by these substances currently being outwith the framework of the 1971 Act. Relatively untested approaches that were emerging internationally could not easily be replicated without a sound evidence base and an underpinning legislative framework that supported enforcement. Deliberations at that event concluded that a definitive review of the current legal framework available to Scottish public authorities would be helpful. This resulted in the commission of this Report by Scottish Ministers.

Home Office

2.20 The UK Government commissioned its own Expert Group to examine the challenges of tackling NPS. That review considered issues of prevention, education and treatment alongside the law. The Scottish Government Enforcement Summit in April 2014 was attended by Home Office officials and the conclusions from those discussions influenced the UK wide work. The Home Office New Psychoactive

Substances Review – Report of the Expert Panel, was published on 30 October 2014¹⁹. The Group, in considering the matter of the law on behalf of Scottish Ministers, has taken into account the UK report and the UK Government’s response to it in its considerations. Specifically, the Group heard from the Home Office and an Expert Panel representative on 3 December 2014 as part of its evidence gathering. The Group has welcomed the opportunity to work collaboratively in considering a response to the sale and supply of NPS.

Devolved and Reserved Issues

2.21 Following the results of the Scottish Independence Referendum on 18 September 2014, the Smith Commission was established to take forward the devolution commitments made during the Referendum process, and examine further powers for the Scottish Parliament. The Smith Commission published its report on 27 November 2014. A number of recommendations were made but the Misuse of Drugs Act 1971 was not considered a candidate for further devolution.

2.22 The Group conclusions include legislative recommendations. It is recognised that there will be a need to carefully consider the correct approach to these matters, and that such considerations may require to take into account matters which are reserved under the Scotland Act 1998.

2.23 For this reason, where necessary, the Group recommends that the Scottish Government and UK Government work together to give effect to the recommendations and achieve a robust outcome.

¹⁹ Home Office (2014) [New Psychoactive Substances Review: Report of the Expert Panel](#)

3. TERMS OF REFERENCE

Remit

3.1 The Expert Review Group was established to review the current legal framework available to Scottish public authorities in tackling the sale and supply of NPS. The Group was also asked to look at international approaches with a view to considering whether these might work in a Scottish context. The Group was asked to take a practical and operational approach to its work, and in that regard, suggested what additional guidance or other forms of support could be made available to assist enforcement and other agencies in tackling the sale and supply of NPS.

Approach

3.2 The Group first met on 27 August 2014 and agreed its remit. In approaching the work, members agreed that they should work across the professional interests from which they were drawn and share insights from those working in the field and with operational experience of working within the boundaries of the existing law and associated practice.

3.3 A specific meeting was held in Angus to hear first-hand of the work going on there to tackle NPS which had been the subject of much media and community interest. In total, a further 3 meetings of the Group were held to develop thinking and reach conclusions. At its final meeting on January 27, the Group presented its initial conclusions to Paul Wheelhouse MSP, Minister for Community Safety and Legal Affairs.

Membership

3.4 The membership of the Group was drawn from a range of expertise from legal, policy and operational backgrounds. The Group was Co-Chaired by Paul Johnston, Director for Safer Communities, Scottish Government and Craig French, Deputy Director for Criminal Justice in the Legal Directorate of the Scottish Government. Other members were drawn from Police Scotland, the Crown Office and Procurator Fiscal Service, the Law Society for Scotland, the Faculty of Advocates, local authorities, the Scottish Government, COSLA and Trading Standards Scotland. A full list of the Expert Review Group can be found at Annex A. Secretariat for the Group was provided by the Drugs Policy Unit of the Scottish Government.

Subgroups

3.5 The Group identified a range of law that might be relevant to any enforcement regime for NPS. Three broad themes emerged from the law that merited specific and more focused examination: Criminal and Civil Law, Planning and Licensing and Consumer Protection and Trading Standards. Subgroups were formed to take forward work on each theme. They reviewed the current law, how it works in practice and how it might be strengthened or improved. A number of international case studies were considered when assessing and evaluating alternative

approaches and options for improvement under each theme. This report reflects these three themes as well as making more general recommendations that have wider relevance.

3.6 Where it was concluded that a particular provision was unlikely to be effective in tackling the sale and supply of NPS, it is not dealt with in detail in the body of this report, but is listed in Annex B.

4. CRIMINAL LAW

4.1 The Criminal and Civil Law Subgroup examined a comprehensive list of current statutory and common law powers which could potentially be used to tackle NPS. The Group analysed each provision in a methodical and systematic way, considering the extent to which the provision could be used to tackle NPS currently or in the future.

4.2 The remainder of this section therefore explores in more detail the legal provisions that were considered to have potential, or are actively being used by Scottish public authorities to tackle the supply and sale of NPS in Scotland.

Case Study Operation Redwall

Operation Redwall is a collaborative multi-agency approach to tackling NPS which is co-ordinated and driven by Police Scotland's Organised Crime and Counter Terrorism Unit (OCCTU). Operation Redwall aims to use all legal powers currently available to Scottish public authorities to target premises selling NPS.

A national day of action was coordinated on 22 August 2014. 58 premises were targeted in towns across Scotland including: Ayr, Glasgow, Peterhead, Musselburgh, Dundee, Arbroath, Aberdeen and Edinburgh. Police Scotland invested circa 300 officers. Their numbers were augmented by members of a number of partner agencies - namely Trading Standards, the National Crime Agency, Europol, the Scottish Fire and Rescue Service, British Transport Police, Health and Safety officers, the Scottish Police Authority, Her Majesty's Revenue and Customs, Crown Office Procurator Fiscal Service, Environmental Health, the NHS, the Medicines and Healthcare Products Regulatory Authority and The Angelus Foundation.

During the day of action more than 6,000 packets of NPS were seized. A significant quantity of products used in the manufacture of NPS was also seized with a potential street value in excess of £3.3 million.

Although a number of the premises that were targeted continue to trade, police investigations remain on-going following the day of national action. Operation Redwall is continuing to take action against NPS.

Culpable and Reckless Conduct

What is the law?

4.3 Culpable and reckless conduct is a common law offence in Scots law. It involves exposing a particular individual or individuals to danger, where that danger involves a significant risk to health or life.

4.4 Common law is developed through the courts and as a result, it is not a static form of law. It has previously been described as being a means of 'filling a need'

due to its ability to evolve²⁰. As a common law offence, the application of culpable and reckless conduct can apply to differing facts and circumstances.

4.5 This has been seen in the case law, which has, in the past, been used successfully against persons supplying potentially noxious substances. In *Khaliq v HMA*²¹, the charge was held to cover circumstances of an accused supplying “glue sniffing kits” to children. The accused knew the customers intended to inhale the fumes and that this would be injurious to health and a threat to their life. The abuse of the glue was a known, intended and expected purpose.

4.6 In *Ulhaq v HMA*²², the charge was held to be relevant to cover the sale of large quantities of lighter fuel and glue, in their original packaging, to adults, on the basis that the shopkeeper knew the customers intended to use the substance for no proper purpose.

4.7 It is clear a charge of culpable and reckless conduct could be relevant to the sale and supply of NPS in certain circumstances. This law has been used in the recent past to secure a conviction. This is referred to on page 36 of the report.

Operational Effectiveness and Efficiency

4.8 In order to prosecute someone for culpable and reckless conduct, evidence must be presented to show that the seller knew, or was reckless as to the fact, that the product was being purchased for human consumption. Often this involves building up a picture of what the product is truly being sold for. Many NPS suppliers take precautions to show that the sale or supply is not, on the face of it, for human consumption. They do this by labelling packaging to state that a product is not for human consumption. Therefore, evidence has to be built up to show that the accused knew, or was reckless as to the fact, that the customer intended to consume the product.

4.9 The harm or potential harm to health is another factor which requires to be proved if a prosecution is to be successful. This will require analysis of the substance to identify it. Thereafter, expert evidence to establish its harmful effects is required.

4.10 Obtaining such forensic and expert evidence can be difficult due to the changing nature and strength of the different chemical compounds constituting NPS. Obtaining expert evidence can also be frustrated by a lack of evidence of the risks associated with the use, and long term use, of NPS. The Group considered that whilst the building up of a body of evidence of harm may be possible, this could, in some circumstances, take time. The Group agreed a national centre for forensic testing would greatly assist in providing standards and building evidence for possible prosecution.

4.11 Finally, it should be noted that the person prosecuted under culpable and reckless conduct is likely to be the shop assistant who carries out the sale. This

²⁰ *Khaliq v HMA* 1984 JC 23, 26 per Lord Avonside

²¹ *Khaliq v HMA* 1984 JC 23

²² *Ulhaq v HMA* 1990 SCCR 593

offence, therefore, may not impact quite so directly those further up the chain of supply from continuing the business.

Improvements to the law

4.12 The offence of culpable and reckless conduct is capable of being established in certain instances where NPS has been supplied for human consumption. There are, however, some issues which arise when using the offence due to the changing nature of NPS.

4.13 However, steps will continue to be taken by the relevant bodies to improve identification of these substances and to build a body of expert evidence in relation to the harm that these substances can cause to health. At present, this involves forensic analysis and in many cases expert evidence, which all takes time to obtain.

4.14 There is scope to make better use of the common law through improved identification of the substances and the building up of expert evidence about the substances themselves and the harms associated with them.

Case Study United States of America

The Group spent time looking at comparative jurisdictions, which involved consideration of the analogue approach which has been adopted by the United States of America.

In the 1980s the US Congress passed legislation by way of the 1986 Controlled Substances Analogue Enforcement Act to control substances that fell outside the scope of existing legislation. Prior to this they had experienced problems with emerging 'designer drugs' similar to the problems faced by Scotland and the UK in relation to the scope of the Misuse of Drugs Act.

Under the Act an analogue is defined as a substance which is structurally, and pharmacologically, substantially similar to a controlled substance, or the effect is intended to be, or is represented as being, substantially similar. Analogue substances are to be treated as controlled if they can be shown to be intended for human consumption.

Criticisms of the Act have included the fact that investigations can be resource intensive and prosecutions more expensive and time consuming than under other drugs legislation. Notwithstanding this, references in the Home Office report to the analogue approach indicate that 430 people have been charged under the Act since 2011. Over 185 of these cases were resolved through plea negotiation following disclosure of evidence to the defence. Successful prosecutions were recorded for all those who took their case to trial. These results have been attributed to extensive investigation and a high quality of expert evidence.²³

²³ The Expert Panel, appointed by the Home Office heard evidence from the US Drugs Enforcement Agency and Department of Justice. This information is detailed on pages 24 and 25 of their report.

Despite the numerical results, the Group considered there to be significant difficulties with the analogue approach, which did not overcome the current issues faced. The legislation is complex and proof requires the prosecutor to show, and the fact finder to be satisfied, that the substance is an analogue. There is a perceived difficulty with this when it comes to establishing whether something is 'substantially similar.' Questions regarding how similar something actually has to be and at what stage it is required to be similar, make it unclear what substances are actually included.

Given that the chemical composition of NPS can vary even within one specific branding, it is possible that whilst one batch would meet the 'substantially similar' test, another may not. There is also considered to be a potential risk of encouraging the development of new and unique substances, with their own effects, if this approach were adopted.

The prosecution must also show that the substance is intended for human consumption. As evidence has shown, suppliers often label items in apparently innocuous ways, such as calling them plant food. Although the analogue act does not exclude the possibility of the Court drawing an inference relating to knowledge.

Misuse of Drugs Act 1971

What is the provision?

4.15 The Misuse of Drugs Act 1971 provides a framework of offences, including being in possession of a controlled drug, being in possession with intent to supply or being concerned in the supply of a controlled drug. The Misuse of Drugs Act lists which drugs are controlled. These provisions can be used where controlled drugs are found during analysis of the NPS seized from premises, in particular for the offence of being concerned in the supplying of a controlled drug, if the circumstances permit.

4.16 Temporary Class Drug Orders are being used to bring particular substances found in NPS, under control.

Operational Effectiveness and Efficiency

4.17 If, following forensic analysis, a product purporting to be a NPS is found to contain a controlled drug, the 1971 Act applies and the product ceases to be classed as an NPS but becomes a controlled drug.

4.18 Investigation and prosecution of offences under the Misuse of Drugs Act 1971 is relatively straightforward. If a substance is controlled this is established through forensic analysis. Thereafter, evidence of how a person was involved in the supplying of the controlled drug would be gathered. This would include details of those at the point of sale and those in the supply chain. The powers of the 1971 Act may be invoked in respect of products which contain a controlled substance only. The Group acknowledged that the Home Office continue to ban substances under

these arrangements, but the effectiveness is limited due to the ease with which identified chemical compounds can be changed.

Improvements to the provision

4.19 Many NPS have been controlled under the Misuse of Drugs Act, through Temporary Class Drug Orders; mephedrone is a good example. The easily changed nature of the compounds makes this less efficient in being able to catch compounds changed in order to take them outwith the definitions of the compounds which have been controlled. The Home Office review of NPS made recommendations in relation to extending the period of a Temporary Class Drug Order to enable products to be banned pending a thorough risk assessment.

Misuse of Drugs Act 1971 – Section 9A(1)

What is the provision?

4.20 This offence is to criminalise the supply, or offer of supply, of articles to be used or adapted for use in administering of controlled drugs, where the person believes that the supply is for that purpose.

Operational effectiveness and Efficiency

4.21 The Group considered this offence separately, given that many of the headshops display articles such as pipes or bongs which can be used to assist in the administration of NPS. Only persons supplying articles which are believed to be used for the administration of controlled drugs can be charged under Section 9A. This section does not apply to circumstances where the person is selling articles which could be used to administer products which do not contain controlled drugs, for example, NPS.

Improvements to the provision

4.22 The usefulness of this provision may be improved as more substances are controlled under the Misuse of Drugs Act 1971, although it is not effective at tackling new and emerging substances.

Case Study Republic of Ireland

The Group considered the Criminal Justice (Psychoactive Substances) Act 2010 (the 2010 Act) which was introduced in the Republic of Ireland in 2010, against a backdrop of public concern over a rise in headshops and NPS users.

The 2010 Act criminalises the sale, supply, importation, exportation and advertising of NPS, where a person knows or is reckless as to whether the NPS was for human consumption. The 2010 Act also provides a wide variety of measures to tackle the various harms which arise due to the sale and supply of NPS, from providing clear police powers of search and seizure, to prohibition and closure orders for premises and a bespoke offence.

Provision is made for exemptions, to ensure that the scope of the 2010 Act does not interfere with legitimate markets and there is power to add new exemptions by secondary legislation, where appropriate, to safeguard emerging markets.

Following a successful prosecution on indictment, offences under the 2010 Act can attract a fine, or a maximum custodial sentence of 5 years, or both. Following a summary conviction, the available penalty is a maximum custodial sentence of 12 months, or a fine, or both²⁴. The fine can be up to a maximum of 5,000 euros. In addition, there are forfeiture powers which can be exercised at the discretion of the Court.

Under the 2010 Act the prosecutor must prove that the substance was sold, imported or exported and that it is psychoactive. There is also an onus on the prosecutor to satisfy the court, with regard to certain prescribed factors, that it is reasonable to assume that the person knew, or was reckless as to, whether the substance was being acquired or supplied for human consumption. This can be established, notwithstanding oral or written instructions that may be given to users, thus providing a tool against inferences that may be drawn from packaging stating the product is not for human consumption. It is open to the defence to show that the substance is not psychoactive or is not intended for human consumption.

The Group recognise that proof of the essential facts of the case under the Irish model would still require forensic analysis and expert evidence. One key benefit of the 2010 Act is the approach it has taken to defining NPS, focussing on its effect on a consumer's central nervous system, as opposed to its chemical composition. It is considered that this will not only increase the possibility of controlling a wide range of NPS but may simplify the requirements for expert evidence.

In relation to police powers, there are statutory stop, search and seizure powers for places, vehicles and suspects. These would, in a similar manner to the Misuse of Drugs Act 1971, equip police with the necessary powers to investigate potential offences.

The Irish Police Force (Garda Siochana) also have powers under the 2010 Act to issue 'prohibition notices' requiring a person to cease the activities specified in the notice, where there are reasonable grounds for believing, for example, that NPS are being supplied at premises. Additionally, they can apply to the Courts, under civil procedure, for 'prohibition orders' where there is non-compliance with a prohibition notice. Failure to comply with a prohibition order can constitute a criminal offence.

In addition to, or as an alternative to, the range of penalties outlined above, Courts can make a 'closure order'. This prohibits persons from operating a business which may reasonably be connected with the sale of NPS.

When considering the Irish model, the Group compared the 2010 Act with relevant consumer protection legislation which exists in this country. There are a number of

²⁴ With the exception of the offence of obstructing or interfering with a member of the Garda Siochana or a Customs and Excise Officer in the course of their duties under the 2010 Act (see s. 15 of the 2010 Act, this offence attracts a 12 month maximum custodial penalty and/ or a fine of 5,000 euros).

aspects which are similar in nature to legislation currently enforced by Trading Standards Services, such as the powers of entry, inspection, search and seizure. The prohibition orders referred to above are similar to suspension notices under regulation 11 of the General Product Safety Regulations. The Act also includes corporate and vicarious liability for offences, a feature common in UK consumer protection offences. This would overcome many of the issues that are highlighted in relation to the use of the common law offence of culpable and reckless conduct.

4.23 The Group agreed that there are a number of benefits to the Irish model, which could strengthen the tools that are currently available and being used by agencies to tackle NPS supply in Scotland. The Irish Act provides a number of ways to tackle the issues that arise out of the sale of NPS, from headshops, police powers as well as prosecution.

4.24 The effectiveness of this model can be demonstrated numerically, as Ireland has seen a reduction in the number of headshops, from 102 in 2010, to less than 10.

4.25 The Home Office noted in their report the need for specific legislation and drew on aspects of the Irish model in their recommendations. The Irish approach brings liability to the individuals supplying NPS and profiting from the harm and potential harm that these substances can cause.

Intoxicating Substances (Supply) Act 1985

What is the provision?

4.26 This makes it an offence to supply, or offer for supply, a substance, not being a controlled drug, to a person under 18 if the person knows, or has reasonable cause to believe, that the substance, or its fumes, are likely to be inhaled by the person under the age of 18 for the purposes of causing intoxication. However, this offence **does not extend to Scotland**.

4.27 The availability of the common law offence of culpable and reckless conduct as outlined in *Khaliq v HMA*²⁵ would tend to explain why this offence was not extended to Scotland.

Operational Effectiveness and Efficiency

4.28 NPS are taken in many forms. This offence covers only the inhalation of a substance or its fumes, and therefore strict adoption would not be effective as NPS can be consumed in many ways. However, aspects of the offence were considered useful. It was noted that no harm had to be proved other than intoxication. It was considered that proof of this would be easier than the current requirement of proof of harm under the common law offence of culpable and reckless conduct.

²⁵ *Khaliq v HMA* 1984 JC 23

Improvements to the provision

4.29 This provision is directed at the particular harm of under 18 year olds inhaling intoxicating substances and it does not apply in Scotland. The Group did not consider that the provision would cover all forms of use of NPS, and did not recommend the adoption of this offence with further extensions to cover NPS. However the Group did consider that there was some merit in considering whether intoxication would be apt terminology in relation to any new offence.

5. CIVIL LAW

5.1 Many of the provisions looked at under civil law form part of a grouping related to prevention of nuisance or harm. These are described below and a collective commentary is offered:

Antisocial Behaviour (Scotland) Act 2004

What is the provision?

5.2 Section 4 of the 2004 Act allows a local authority to apply for an Anti-Social Behaviour Order (ASBO) against an individual. To obtain the ASBO against that person it must be shown that the person is at least 12 years of age, they have engaged in anti-social behaviour against a person within the area of the local authority, or, if the application is on behalf of a registered social landlord, a person living in or likely to be in the vicinity of the property.

5.3 The court can impose conditions which are aimed at preventing the relevant person doing anything which is necessary for protecting that person from further anti-social behaviour. The ASBO is a preventative order designed to provide relief from the behaviour. Breach of an ASBO is a criminal offence.

Closure of Premises

What is the provision?

5.4 Part 4 of the 2004 Act provides another potential tool for bodies considering how to combat the harms of NPS. This provision allows a senior police officer, after serving a closure notice, to apply to the Court to seal off residential and non-residential premises, and prohibit access to them for up to 3 months. This is in order to give the surrounding community relief from persistent disorder or nuisance. Failure to comply with a closure order is a criminal offence.

Public Space Protection Orders (PSPOs)

What is the provision?

5.5 This order was created in the Anti-Social Behaviour Crime and Policing Act 2014. It does not extend to Scotland. A Local Authority in England and Wales can make a Public Space Protection Order if it is satisfied on reasonable grounds that either activities are being carried on, or are likely to be carried on, in a public place which have, or will have, a detrimental effect on the quality of life of those in the locality and the effect is, or is likely to be, of a persistent or continuing nature, or is likely to be such as to make the activities unreasonable and justifies restrictions to be imposed by the notice.

5.6 The order prohibits specified things being done in an identified area, or requires someone carrying out specified things in that area to do something.

5.7 The order must be reasonable to prevent the detrimental effect or reduce it.

Operational Effectiveness and Efficiency

5.8 In certain circumstances ASBOs can have application in terms of the nuisance effect linked to premises selling NPS. An example of this would be if there was regular anti-social behaviour in the vicinity of the premises.

5.9 The provisions of the Act are limited in that it can only be used to target particular patrons and not the actual cause of the harm itself, i.e. the shop itself. In addition, in order to obtain an ASBO, the local authority or registered social landlord would be required to persuade the Court that the conduct of the relevant individual amounted to 'antisocial behaviour'.

5.10 The Group was unaware of any instances in which such orders have been sought by local authorities in Scotland to tackle antisocial behaviour outside headshops.

5.11 Examples given by the Home Office of Public Space Protection Orders (in "Putting Victims First") show where the order could be used. This includes to prevent groups from using a public square as a skateboard park and to discourage drunken anti-social behavior in the same place by making it an offence not to hand over containers of alcohol when asked to do so. The Group consider that to the extent of combatting anti-social behavior, there may be some merit in this type of order and recognise that the City of Lincoln Council voted to use a PSPO to ban NPS use in the city centre.²⁶ However, the Group was concerned that the same limitations may arise with PSPOs as arise in relation to the use of ASBOs and the ability of such orders to target sale and supply.

5.12 The Group did not consider that Closure Orders were likely to be effective to tackle the sale or supply of NPS. The provisions of Part 4 are not designed to tackle premises selling NPS. The Group recognised that these orders may provide relief to communities surrounding headshops and other premises supplying NPS, if antisocial behaviour was caused. However, a Sheriff would require to be convinced that any premises in question was associated with significant or persistent disorder or nuisance to members of the public. This clearly does not tackle the root problem, namely the supply of NPS and the potential resulting harm.

Improvements to the Provisions

5.13 This range of measures, although effective in tackling local nuisance, would not tackle the sale and supply of NPS directly. The Group make no recommendations in this area but will be interested to see the effect of the approach adopted in Lincoln, following the introduction of the PSPO on 1 April 2015.

²⁶<http://democratic.lincoln.gov.uk/documents/s15203/Proposals%20for%20the%20Implementation%20of%20a%20Public%20Space%20Protection%20Order.pdf>

6. INTERNET SALES

6.1 The issue of NPS supply via the internet has been steadily increasing. This is of significant concern because the internet allows greater access to a wider range of substances which are untested and where little is known about the longer term health implications. Such sales are not likely to be cash sales, so would require a debit or credit card.

6.2 It is difficult to establish how much of the demand for NPS in Scotland is met directly by online stores, and how much is sourced in head shops, or from street-level dealers. The 2014 Global Drugs Survey (which included almost 80,000 respondents from 17 countries) found that 20.5 per cent of all Scottish respondents had experience of purchasing drugs from the internet²⁷. This figure however may include 'dark web' purchases of controlled drugs, and the survey itself was largely targeted at clubbers.

Clearnet and Darknet

6.3 NPS are available on the 'clearnet' but similar to headshops, online retailers are cautious to give advice to users so as to avoid breaching consumer protection laws. NPS which have been controlled are available for sale through the 'darknet'. The darknet can also be used to purchase more traditional controlled drugs and is primarily used to ensure privacy, anonymity and untraceability for those engaging in criminal activity.

6.4 Internet sales pose a significant challenge to police and HM Revenue and Customs as small volumes of NPS are difficult to detect and there are increasing challenges around identification of the substances due to the constantly evolving chemical structure and the continuously changing nature of the NPS market.

6.5 In the Republic of Ireland the police and other services monitor the internet for any Irish domain websites selling NPS. If any are found they are removed. In March 2014 the Police said there was no evidence of Irish websites selling NPS.

Summary – Criminal Law

6.6 The Group consider that the common law offence in Scotland of culpable and reckless conduct can be applied, in certain circumstances, to the sale or supply of NPS for human consumption, when the seller knows, or is reckless as to whether, this is for human consumption. Due to the way that sellers adapt their practices, including adding labels that the product is not for human consumption, investigators and prosecutors require to build a body of evidence to enable proof of this fact. However, any case using culpable and reckless conduct is likely to only target the shop seller and not the shop owner. There is also an identified need for forensic and expert evidence to establish what the NPS is and the basis on which it could be harmful to health. Relevant bodies will continue to work together to achieve this.

²⁷ Winstock, A (2014) [The Global Drug Survey 2014 Findings](#), accessed 3.2.2015

6.7 The Misuse of Drugs Act 1971 provides a more straightforward regime but it relies on substances being controlled under that Act. It was considered that the other criminal offences examined did not assist in tackling the problem of the sale or supply of NPS over and above the existing common law offence of culpable and reckless conduct.

6.8 In light of this, the Group considered there was real merit in considering a new offence to deal with the sale or supply of NPS. Particular consideration was given to the type of approach adopted in Ireland, and it was agreed this would be preferable to the other approaches adopted internationally.

6.9 The Irish definition would require proof of the psychoactive nature of the substance. The Group noted that in the Home Office NPS Report of the Expert Panel there is consideration to using the term “intoxication”. The Group would welcome further examination of this to ensure this is what is required in policy terms. It would be helpful to ensure that the terminology adopted can be supported in evidence whether forensic or expert evidence.

6.10 The Group recognise that headshops are only one part of the NPS landscape with the internet playing a large part in the trade. Internet sales could be considered as part of any new offence, taking into account potential difficulties raised in terms of extra territorial jurisdiction. Consideration should also be given to establishing proof of identity when someone is dealing over the internet to ensure that the offence is effective in that area.

Summary – Civil Law

6.11 The Group did not consider that the civil powers examined were designed to tackle the specific issue of headshops, in that they did not address the source of the problem. The Irish model of providing specific powers which can be exercised by the police, and then the courts, was a preferred way of tackling the source and making clear to those involved in the NPS trade that it was unacceptable and would not be tolerated.

Recommendations

- A national centre of excellence in forensic analysis should be established to lead in the detection and identification of NPS in Scotland. This centre could lead work on the development of national standards for NPS testing across all agencies, where testing relates to a criminal or potentially criminal case. The Centre should share information with hospitals, trading standards and relevant services on emerging trends, building and maintaining the knowledge base on NPS.
- The Scottish Government and the Home office should work in partnership to create new legislation that will be effective in Scotland.

7. LICENSING

7.1 The Planning and Licensing Subgroup reviewed the current legislative landscape in addressing the sale and supply of NPS. There is currently no statutory scheme in place which specifically licenses the sale or supply of NPS in Scotland. The Group examined the existing powers available before exploring options to create a new licensing regime to tackle NPS.

Civic Government (Scotland) Act 1982 (the 1982 Act)

What is the provision?

7.2 The Civic Government (Scotland) Act 1982 regulates a range of licensing functions of local authorities in Scotland. The Act is split into ten parts and covers a range of activities from general licensing provisions, control of sex shops, offences and powers of constables, public processions, lost and abandoned property, property in the possession of persons taken into police custody, property in unlawful possession of persons taken into police custody and certain other property not previously covered, buildings and miscellaneous and general matters.

7.3 Conditions can be applied to licences but these must be clear and specific to ensure they are enforceable. Scottish Ministers have powers to amend the 1982 Act.

Public Entertainment Licences

7.4 Section 41 of the Civic Government (Scotland) Act 1982 provides for the grant of public entertainment licences by local authorities.

7.5 Where a licensing authority has determined that public entertainment should be licensed, restrictions can be applied to any licence granted via Schedule 1 to the Civic Government (Scotland) Act 1982 Act. This could include restricting the sale of NPS and general drug paraphernalia. Such a licensing condition, if properly framed and enforced, could assist authorities in preventing NPS substances finding their way into public entertainment events.

7.6 Section 41(3) of the Civic Government (Scotland) Act 1982 Act provides that licensing authorities can attach certain conditions to a public entertainment licence. They are (a) restricting the use of a premises to a specific form of entertainment, (b) limiting the number of people to be admitted to the premises, and (c) setting the days and times when the premises may open in relation to the purposes of the licence.

7.7 There are no specific offences with regards to public entertainment licences but general offences under the Civic Government (Scotland) Act 1982 Act apply. Those who breach a condition of a public entertainment licence could be liable to a fine up to £20,000 or imprisonment for a maximum of six months and it would impact on the prospects of a public entertainment licence being issued in the future to the same premises or by the same persons.

7.8 The requirement for a public entertainment licence would not apply where NPS are being sold from a headshop but it could offer a means of restricting the sale

and supply of NPS where large public entertainment events are due to be held. This could provide a means of preventing NPS being publically available and provide a means to confiscate NPS being sold and allow for the removal of any individual from the event found to be selling NPS.

Street Traders Licence

7.9 Section 39 of the Civic Government (Scotland) Act 1982 Act provides for street traders licences. Such a licence is required by an individual in order to carry out street trading in a public place, similar to public entertainment licences.

7.10 As per other licences in the Civic Government (Scotland) Act 1982 Act, the licensing authority can set additional conditions to any licence granted. As such, an authority could attach conditions to a licence such as restricting the geographical area in which the licence holder could operate. Whilst such a condition would not eliminate the risk associated with the selling of NPS, it would represent a means of restricting where they could be sold.

Operational Effectiveness and Efficiency

7.11 Similar to public entertainment licences, the requirement for a street traders licence would not apply where NPS are being sold from a headshop. However, in circumstances where individuals were selling such substances via other means, i.e. selling via a stall etc. in a public place, a street trader licence may be required and anyone selling NPS via these means without a licence would be committing an offence. This would provide the police with a means of confiscating any such substances being sold without a relevant street trader licence.

7.12 There are no specific offences with regards to street traders in the Civic Government (Scotland) Act 1982 Act but again, the general offences of the Act apply, making it an offence to carry out a licensed activity without a licence.

New Zealand

7.13 Whilst the legislation outlined above offers some opportunities to regulate the sale of NPS, none have been specifically designed to tackle NPS and as such they do not provide a comprehensive means to address NPS issues. The Group also considered the approach adopted by New Zealand and whether it could be effective in Scotland.

Case Study New Zealand

New Zealand has attempted to address the problems posed by NPS via a system of licensing and regulation. The New Psychoactive Substances Act 2013 created the Psychoactive Substances Regulatory Authority, the Psychoactive Substances Expert Advisory Committee, and the Psychoactive Substances Appeals Committee. The Authority sits within the Health Ministry and is responsible for granting licences to importers, researchers, manufacturers, wholesalers and retailers.

A licence to sell an unapproved product only permits sale to other licence holders

and not to the public. To be approved a product must have undergone trials and the Authority must be satisfied that the product poses no more than a low risk of harm. Traditional Misuse of Drugs legislation requires the authorities to establish that a substance poses a risk of harm before it can be listed as a controlled drug, whereas under the 2013 Act, the onus is on the applicant to satisfy the Authority and the Advisory Committee that the product poses no more than a low risk of harm.

The Act includes a definition of psychoactive substances which excludes foods, alcohol, caffeine, controlled drugs and medicines among other exceptions. The Act applies where the primary purpose of the product is to induce a psychoactive effect and imposes very strict controls on advertising, labelling and where the products may be sold.

There are several offences for operating without a licence and for breaching licence conditions. It is an offence to possess an unapproved product (or an approved product if under 18) but these may be dealt with by way of infringement proceedings rather than traditional prosecution.

An initial response from the Ministry of Health was to introduce retail restrictions and interim licensing arrangements for low risk products. As a result, outlets selling NPS reduced from over 3,000 to 156 specialist stores. Out of the 200 available NPS at the time, 47 were granted temporary licences. In April 2014, The Psychoactive Substances Amendment Act introduced legislation ending the interim product approvals. The Authority revoked licences following reports of adverse effects and anti-social behaviour around outlets and by May 2014 no NPS were lawfully on sale.

This approach may lead to low risk products sold in a controlled environment and subject to restrictions. This may reduce the availability of NPS. It is estimated that the cost of the clinical testing process will be high. This may result in a reduction of the amount of applications as there is a significant risk that the product may be rejected. The approvals process is lengthy and Regulations need to be passed in order to allow for licences for sale to the public. These are expected in 2015.

However, it may lead to an increase in NPS usage as low risk products may be perceived to be relatively safe. There have been incidences of local communities campaigning against the licensing regime, arguing it is too lax in not banning all products, and implicitly acknowledging some substances as being safe. However, as the Act is not fully operational it is difficult to assess attitudes to the licence regime.

New Bespoke Licensing Legislation

7.14 Consideration was given to new bespoke licensing legislation to specifically address NPS in Scotland. This would have the advantage of directly addressing the misuse of these substances and addressing the potential harm to users that can result from their use.

7.15 However, there is a real risk that licensing the sale of NPS would be seen as a way of endorsing the products or indicating that, in some cases, they are safe to use. As such, the Group does not recommend that a licensing regime be created to restrict or otherwise govern the sale or supply of these products. However, the Group recommends that consideration be given to encouraging licensing authorities to attach conditions in relation to the sale of NPS when issuing relevant licences concerning public entertainment events.

Recommendation

- Licensing authorities should attach conditions and restrictions in relation to the sale of NPS when issuing public entertainment or similar licences. This could be extended to include drug paraphernalia.

8. PLANNING

8.1 Planning regulates development which is essentially the carrying out of building or engineering operations, but it also includes making a material change of use of buildings. The overarching purpose of planning is to regulate where development occurs to ensure they are situated in the right place. Planning controls therefore regulate where certain types of development should be allowed to take place and are not a mechanism for the prohibition of certain activities.

8.2 In the context of this report the concern relates to how buildings are being used rather than to their construction. Planning in this situation only regulates material changes of use of a building. If there is no material change in use of a building there is no requirement to obtain planning permission.

What is the provision?

8.3 Currently the Town and Country Planning (Scotland) Act 1997 (section 26(3)) provides that in two situations changes in use are treated as material change of use for the purpose of determining whether the change is 'development'. These relate to (a) the division of a single dwelling house into two or more separate dwelling houses and (b) the deposit of waste materials on land already used for that purpose if the size of the area is increased.

8.4 Section 26(2)(f) of the Town and Country Planning (Scotland) Act 1997 enables the Scottish Ministers to make an order (a Use Classes Order) specifying different classes of use. The use of a building for another use within the same class is not treated as development and so does not require planning permission. This means, for example, that planning permission is not required for the change of use of a building from a post office to a travel agency or from a laundrette to a funeral parlour. In addition, Article 3(5) of the Use Classes Order provides that nothing in any class shall include any use:

- (a) as a theatre;
- (b) as an amusement arcade or centre or funfair;
- (c) for the sale of fuel for motor vehicles;
- (d) for the sale, or display for sale, of motor vehicles;
- (e) for a taxi business or for the hire of motor vehicles;
- (f) as a scrapyards or a yard for the breaking of motor vehicles;
- (g) for the storage or distribution of minerals;
- (h) as a public house;
- (i) for any work registrable under the Alkali etc. Works Regulation Act 1906; or
- (j) for the sale of hot food for consumption off the premises.
- (k) as a waste disposal installation for the incineration, chemical treatment (as defined in Annex IIA to Directive 75/442/EEC3 under heading D9), or landfill of waste to which Directive 91/689/EEC applies.

8.5 If it were to be possible to describe a headshop or other premises selling NPS to a sufficient degree of accuracy so that it would not inadvertently catch the sale of other chemical or other products, it would be possible to amend Class 1 or add to the list in Article 3(5) to tighten planning control in relation to such uses. The result

would be that the change of use of a building to such a use would (provided it constituted a material change of use), require planning permission.

8.6 If planning permission is required for a change of use but it has not been obtained then this would constitute a breach of planning control and the planning authority would have enforcement powers under the 1997 Act. These powers include the power to seek an interdict from the court (section 146) to restrain or prevent an actual or apprehended breach of planning control. The planning authority could also serve an enforcement notice and a stop notice, or a temporary stop notice. It is an offence to contravene a stop notice or temporary stop notice.

8.7 Changes of this nature would be unlikely to affect existing outlets as the change of use (even if material) is likely to have already occurred. Similarly they would not affect any change of use unless it were material. This is a question for the particular circumstance unless the primary legislation were to be changed. The risk of any such change, however, is that it may very well affect a great number of “legitimate” uses. As such, the Group concluded the current legislation is not an effective means to tackle the sale and supply of NPS.

8.8 Even if sufficiently well-defined to avoid inadvertently catching other changes of use, a change to planning law would simply mean that a person wanting to open, say, a headshop, would have to make an application for planning permission to the local authority and obtain planning permission before doing so. Planning permission would usually be granted against a policy framework which sets out whether the development in question would be appropriate or not. A policy which sought to prohibit the grant of permission without exception would be difficult to defend in the context of a permitting regime.

8.9 The Group concluded that the planning regime is unlikely to provide a particularly effective means of tackling the sale or supply of NPS.

9. CONSUMER PROTECTION AND TRADING STANDARDS

9.1 The Group considered consumer protection and trading standards legislation available in Scotland that may be applicable to the sale and supply of NPS. The Group found that although there is no specific UK consumer protection legislation for tackling the sale or supply of NPS, there is a broad span of legislation that provides a range of criminal and civil sanctions.

General Product Safety Regulations 2005

9.2 Certain products present obvious and quantifiable risks to consumers and many products, including those such as toys, car tyres, poisons, fireworks, cosmetics and tobacco all have specific safety regulations which control and minimise the risks to consumers. Where no specific safety regulations exist for consumer products, the General Product Safety Regulations 2005 are intended to apply as a safety net to ensure that they are 'safe'. The General Product Safety Regulations are made in furtherance of obligations placed on the UK by European Union law and apply to the supply of new and second hand products.

Regulation 5 - The General Safety Requirement on Producers

9.3 The General Product Safety Regulations are underpinned by the 'general safety requirement' in Regulation 5, which, in essence, prohibits a producer from placing a product on the market, supplying a product, or offering or agreeing to do either of these things, unless that product is safe. It is a criminal offence under Regulation 20 to breach the general safety requirement.

9.4 Under Regulation 2, a safe product is one which –

“under normal or reasonably foreseeable conditions of usedoes not present any risk, or only the minimum risks compatible with the product's use, considered to be acceptable..... with a high level of protection for the safety and health of persons”.

9.5 The safety of a product is assessed having regard to;

- the product's characteristics;
- its packaging;
- its instructions for use;
- the effect on other products with which it might be used;
- labelling and other information provided for the consumer; and
- the categories of consumers at risk, particularly children and the elderly²⁸.

9.6 Under Regulation 2, the producer is defined as the manufacturer of a product when he is established in a Member State, or any other person presenting himself as the manufacturer by affixing to the product his name, trade mark or other distinctive mark; or the person who reconditions the product; or the person who imports it into the EU. The Group considers that this definition is likely to exclude persons whose

²⁸ Regulation 2 of the General Product Safety Regulations 2005

involvement is limited to the sale or supply of NPS unless those persons also pack and brand the product.

Operational Effectiveness and Efficiency

9.7 In order to establish a breach of the general safety requirement under Regulation 5 of the General Product Safety Regulations, it must be shown that the person against whom the case is brought is the producer (i.e. the manufacturer, EU importer or own brander) and that the particular NPS is not a safe product.

9.8 The product must be assessed against the general safety requirement and the above criteria. Proving risk will include overcoming false “not for human consumption” disclaimers and might also include identification of the NPS through the use of forensic science services. Once identified, toxicology experts may be required to speak to the harms caused by the identified compound, thus raising similar matters to those considered in relation to the use of culpable and reckless conduct discussed above.

Improvements to the provision

Forensic Services

9.9 In the course of routine product safety investigations, trading standards services typically submit samples of products to accredited forensic laboratories. The products are then examined against known safety standards and thereafter reports on any failures or risks which might render the product(s) unsafe are returned to the trading standards services. NPS present a significant challenge in that there are a myriad of new compounds and there are a lack of chemical standards against which they can be accurately identified. The scarcity of standards also means the cost of forensically examining a range of NPS can be prohibitive. This in turn makes ascertaining risks and progressing General Product Safety Regulations cases more difficult. Improvements in the forensic capabilities to identify NPS would greatly assist local authorities in determining the types of NPS products being sold. The national centre for forensic testing, detection and examination would greatly assist local authorities in applying the General Product Safety Regulations to tackle unsafe NPS.

Experts in Toxicology

9.10 Where forensic results have enabled the chemical identification of NPS, the experience of local authorities has been that there is a lack of toxicology experts willing to attest to harms. This is primarily attributed to an absence of empirical evidence or clinical trials investigating the long and short term effects of these substances.

9.11 Evidence also suggests that, where expert reports can be obtained, procurement is costly and can be beyond the budgets allocated for such purposes by local authorities.

Case Study South Ayrshire Council Trading Standards

Prior to its classification under the Misuse of Drugs Act 1971, mephedrone (or 4-methyl methcathinone) was the most notorious example of a harmful NPS being sold via the internet and in high street headshops. In 2010, South Ayrshire was becoming notorious for the ready availability of mephedrone²⁹. In response to this, the Trading Standards Service conducted covert test purchasing, with authorisation under the Regulation of Investigatory Powers (Scotland) Act 2000, and obtained evidence sufficient to overcome the potential barrier created by the product's 'not for human consumption' label. Forensic examination of samples was instructed and although it was slow and costly, it successfully identified the product as mephedrone. Toxicology experts were sourced from Guys & St Thomas' Hospital in London to provide expert opinion as to the harms and the combination of these factors led to convictions for the common law offence of culpable and reckless conduct and an offence under part II of the Consumer Protection Act 1987 for breaches of the labelling requirements of the Cosmetic Product (Safety) Regulations 2008.

General Product Safety Regulations Obligations on Distributors (Regulation 8)

What is the provision?

9.12 The scope of the general safety requirement is extended to 'distributors' under Regulation 8. The Group considers that those who are not producers, yet sell and supply NPS, either in headshops or via the internet, could constitute 'distributors' for the purposes of the General Product Safety Regulations. Regulation 8 requires distributors to act with care so as not to supply unsafe products and it applies where they know, or should have presumed, on the basis of information in their possession, and as a professional, that the product was not safe. Distributors are also required to participate in monitoring the safety of the product, including passing on risks, keeping and producing documentation for tracing the product's origin, and co-operating with enforcers.

Operational Effectiveness and Efficiency

9.13 The General Product Safety Regulations have been successful where the local authority has placed the suppliers of NPS on formal notice, by providing them with information that their products are being consumed and are therefore potentially unsafe. Under such circumstances the supplier cannot wilfully claim to be ignorant of any risks. The local authority is then better able to take follow-up action by requiring the supplier to provide evidence of –

- traceable supply chains and batch codes,
- accurate ingredients listed on packets,
- better instructions for use,
- warnings of potential risks – especially when consumed with other products/drugs, and

²⁹ Herald Scotland, available at: <http://www.heraldscotland.com/news/home-news/revealed-the-scottish-legal-high-factory-at-the-centre-of-a-global-trade-1.1014923> (accessed February 2015)

- test sample certificates and other product information.

9.14 Such requests can then possibly be backed up by General Product Safety Regulations sanctions such as suspension notices under Regulation 11, requirements to mark the product under Regulation 12, requirements to warn of potential risks under Regulation 13, and possibly forfeiture orders under Regulation 19.

Case Study Aberdeen City Council Trading Standards

Aberdeen City Trading Standards investigated all known sellers of NPS within the City regarding their obligations as distributors under Regulation 8 of the General Product Safety Regulations 2005. Each of the businesses selling NPS in the City were advised during officer visits - with a follow up in writing - that it was suspected they were selling unsafe products. They were warned that if analysis of test purchases from them proved this, then they would be reported to the Procurator Fiscal under the General Product Safety Regulations.

During the investigations each seller was given advice as to their legal responsibilities as NPS distributors in the supply chain. They were specifically informed that they must keep records as to who supplied them with NPS in order to ensure its origins can be traced should a safety issue arise. All were subsequently written to and required, using the powers contained in the General Product Safety Regulations, to produce records showing the sources of specific NPS products found to be on sale in their shops on a particular day.

Where traders fail to produce documents necessary for tracing the origin of the products, in this case NPS, they could face action under General Product Safety Regulations as these failures could constitute criminal offences under regulation 20(2).

Belfast City Council & Kent County Council Trading Standards

First Belfast City Council in 2013 and then Kent County Council in 2014 successfully used the General Product Safety Regulations to be granted forfeiture of large quantities of NPS from sellers in their respective areas. The actions were based on the obligations of the sellers under Regulation 8 as Distributors in the supply chain to ensure they comply with the general safety requirement, i.e. that the products contained no risk, or only the minimum risks compatible with a high level of protection for consumers. In order to meet this obligation the sellers were required to be able to trace and disclose their suppliers of NPS products; be aware and declare the exact contents of the products; and when made aware that it was reasonably foreseeable that the products were being consumed (despite the 'not for human consumption' labels) - be able to warn as to the harms of consumption; provide safe dosage information; and remove any reasonably foreseeable risks to the consumers.

Improvements to the provision

9.15 To date, any examples using consumer protection legislation to tackle NPS show that success lies mostly within the provisions of Regulations 8 of the General Product Safety Regulations. However, in the absence of bespoke legislation there remains uncertainty, risk and a lack of uniformity of approach across different local authorities. Accordingly the application of General Product Safety Regulations to NPS might be improved through the issue of enforcement Guidance. This could lead to a more co-ordinated and consistent approach to enforcement (where it is being considered) with the legislation as it stands at present.

The Consumer Protection from Unfair Trading Regulations 2008

What is the provision?

9.16 Unfair commercial practices directed at consumers by businesses in the EU single market are controlled by the Unfair Commercial Practices Directive (UCPD) 2005/29/EC³⁰. This legislation was given effect in the UK by way of the Consumer Protection from Unfair Trading Regulations 2008.

9.17 The legislation makes it an offence to engage in commercial practices which are ‘misleading actions’ and/or ‘misleading omissions’. In relation to NPS, misleading actions can arise from false descriptions on packaging and misleading omissions arguably include failing to provide material information such as the NPS’ true ingredients or its intended use and effects.

9.18 However, the legislation creates a two stage test that must be satisfied before an offence can be established and it is the second stage of the test that causes difficulty in relation to NPS. A misleading action or omission must have caused, or be likely to cause, the average consumer (of NPS) to take a transactional decision they wouldn’t have taken otherwise. The average consumer is defined as being, “reasonably well informed, reasonably observant and circumspect”. Further, where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.

Operation Effectiveness and Efficiency

9.19 The main limitation with using the Consumer Protection from Unfair Trading Regulations is that the average consumers of NPS represent a unique market that is both conscious and accepting of the false descriptions, fully aware that they are not buying plant foods, bath salts or research chemicals. As such, their decisions to purchase and consume NPS are not influenced by false descriptions or omissions. Further, the Directive makes clear that the Consumer Protection from Unfair Trading Regulations are about protecting consumers’ economic interests³¹. The harm with NPS is arguably not that consumers are being financially deceived, rather than their health is being put at risk. Accordingly, the Consumer Protection from Unfair Trading

³⁰ Unfair Business to Consumer Commercial Practices in the Internal Market Directive 2005/29/EC

³¹ This Directive therefore approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers’ economic interests and thereby indirectly harm the economic interests of legitimate competitors.

Regulations appear to provide limited scope for trading standards to control the supply of NPS.

Case Study Cheshire & Chester West³²

In Cheshire & Chester West a case was reported involving the sale of a product 'Gogaine' through a headshop in Chester. Action was taken after a 17 year old boy suffered convulsions and was hospitalised after allegedly consuming the product with alcohol. The case was prosecuted under the Consumer Protection from Unfair Trading Regulations and the Chemicals (Hazard Information and Packaging for Supply) Regulations 2009. Ultimately, the court decided that there was no case to answer after the failure of the prosecution to have every packet chemically analysed. The Judge also commented on the lack of applicability of Regulation 6 of the Consumer Protection from Unfair Trading Regulations to the issue through the failure to affect the transactional decision of the average consumer.

Part 8 of the Enterprise Act 2002

What is the provision?

9.20 Part 8 of the Enterprise Act 2002 creates procedures for enforcing certain consumer legislation. Trading standards services and other consumer protection organisations are 'enforcers' under the Act.

9.21 Enforcers are given a range of powers where certain conditions are met. The conditions include that the collective interests of consumers in the UK would be harmed by the conduct of a trader which constitutes specific domestic or Community law infringements. Part 8 includes the power to seek an enforcement order, which is similar to an interdict, and would operate to prevent a trader from repeating the infringing conduct. Breach of an enforcement order is a contempt of court offence.

9.22 As well as the Consumer Protection from Unfair Trading Regulations and other consumer protection legislation, domestic infringements can occur by acts or omissions specified by the Secretary of State. The Secretary of State has by Order³³ specified that breaches of contract for the supply of goods to a consumer, and/or an act done or omission made in breach of a duty of care owed to a consumer in delict, are domestic infringements.

Operational Effectiveness and Efficiency

9.23 Civil enforcement procedures under Part 8 of the Enterprise Act 2002 have been considered by some local authorities as a means to tackle NPS.

9.24 Challenges exist in showing the relevant domestic or (EU) Community infringements which harm the collective interests of consumers. Breach of the

³² Local Government Lawyer, available at: http://www.localgovernmentlawyer.co.uk/index.php?option=com_content&view=article&id=14201%3Acouncil-leaders-call-for-action-on-legal-highs-after-failed-prosecution&catid=190%3Aregulatory-articles&Itemid=122 (accessed February 2015)

³³ The Enterprise Act 2002 (Part 8 Domestic Infringements) Order 2003 (SI 2003/1593)

Consumer Protection from Unfair Trading Regulations would constitute a community infringement, however, the issues with their applicability to NPS remain (see above).

9.25 There is arguably a case for Part 8 infringement action due to breaches of contract, specifically the term implied by section 14 of the Sale of Goods Act 1979 (as amended) that NPS (as goods) are not of satisfactory quality due to their lack of safety or fitness for purpose.

9.26 There is also an argument that the unsafe nature of NPS products attracts liability in delict for breaches of the duty of care owed to consumers not to cause harm or injure them through the supply of defective products. However, there has, perhaps understandably, been a lack of complaints from the actual consumers of NPS making it challenging to show that 'the collective interests of consumers' are being harmed, a principle which necessarily underpins any Part 8 action.

Improvements to the provision

9.27 The provisions of Part 8 were introduced as part of the Injunctions Directive 98/27/EC and remain untested as a means of tackling NPS. Until such times as a trading standards service or other enforcer uses Part 8 as a test case on NPS its effectiveness will remain unknown.

Specific Labelling Requirements

9.28 In an effort to avoid regulatory scrutiny, producers of NPS often falsely warn that they are not for human consumption. They may also incorrectly describe them as products such as bath salts, plant food or research chemicals. However, by their choice of false descriptions, suppliers may unwittingly draw another form of scrutiny by applying one that requires specific labelling.

What are the Provisions?

9.29 Under product legislation regulating cosmetic products (bath salts) and fertilisers (plant food) there is a legal requirement to list the ingredients in order of composition. There is also a legal requirement to warn on packaging of the hazards consumers may face where a chemical substance might prove harmful.

Operational Effectiveness and Efficiency

9.30 Such labelling requirements are easily circumvented by the use of more generic descriptions for NPS (such as research chemicals) and hazard warning symbols are now being applied as a matter of course.

Conclusions

9.31 Following much consideration of the ways in which the relevant legislation can, and has been, interpreted to apply to NPS, the Group considered that the most effective existing powers in this area appear to be contained within the General Product Safety Regulations 2005. This conclusion is borne out by the experiences

and success of local authorities that have used them to take action against NPS sellers to date.

9.32 Despite this, the Group did identify situations in which barriers exist thus making application of the General Product Safety Regulations more difficult. It is considered that the creation of a national centre of excellence, that would be available to police and trading standards, may be of assistance in overcoming these barriers.

9.33 The Group also acknowledged that support and guidance for those trading standards services considering enforcement action would assist in removing any inconsistencies across local authorities. The Group agreed a working group should be established (with appropriate partners) to deliver a toolkit for trading standards services that will include guidance they could use in practice.

9.34 As a result, the Group makes the following recommendation:

Recommendations

- A tool-kit and operational guidance should be developed, in partnership with appropriate stakeholders, to assist frontline trading standards staff in tackling NPS.

Overall Summary and Conclusions

9.35 The Group welcomed the opportunity to consider the effectiveness of the current legal framework governing the sale and supply of NPS in Scotland. In reviewing the effectiveness of the framework, the Group took into the account the operational experience of its members and those working in the field. The Group is grateful to the number of experts who offered views and influenced our thinking.

9.36 In bringing successful prosecutions for the sale and supply of NPS in Scotland, it is important that there is a consistent understanding and confidence amongst agencies about what NPS are, and what the effects of consumption might be. The Group acknowledged the parallel work being led by the Scottish Government to better understand NPS in Scotland and to examine how improved data on prevalence and harm could contribute to meeting the evidential requirements to secure prosecutions.

9.37 In developing a comprehensive list of current statutory and common law powers which could potentially be used to tackle NPS, there was a strong consensus that there were a number of potential legal remedies available to tackle the sale and supply of NPS. The Group noted some success in the application of the law to date and the complexity of bringing cases against a backdrop of dealing with a substance that is complex and changing in its composition. As discussed throughout this report, in the case of some provisions, the Group also identified weaknesses that restricted the effective application of the legal provisions currently available. These weaknesses formed the basis for the recommendations of the Group.

9.38 Our recommendations are set out throughout the report, and the Group hopes that it has made a constructive contribution to the broad range of work that is already underway in Scotland to improve the response to the challenges posed by NPS.

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ANNEX B

PROVISIONS EXAMINED BUT LACKING MERIT IN TACKLING NPS

Enforcement Theme	Legislative reference / Source of powers	What does the law allow	How effective is it in practice
Consumer Protection and Trading Standards Legislation	Food Safety Act 1990 and food regulations made thereunder	Certain provisions might apply to NPS for example, Section 7 rendering food injurious to health and Section 15, relating to falsely describing food.	It is questionable whether the various means of NPS consumption, i.e. smoking and injecting as well as swallowing would be sufficiently robust to fall foul of FSA requirements.
	Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013	This requires specific information to be provided and for cancellation rights to be given to consumers who conclude contracts at a distance, i.e. internet sales of NPS	The provision is applicable to the supply of NPS via the internet. The Regulations provide valuable consumer protection generally but have limited impact in tackling the actual mischief of unsafe products that constitute the market for NPS
	The E-Commerce European Directive	This requires information to be provided by 'information society services' (websites which sell NPS) including a geographic address and specific information relating to commercial transactions.	The Group considered it useful only insofar as it requires a website based within the EU which sells NPS to disclose its geographic location. Actionable via the civil enforcement route provided by Part 8 of the Enterprise Act 2002.
	Cosmetic Products Enforcement Regulations 2013	This applies strict requirements for the safety of consumers in the cosmetic products market. It applies to NPS when they are incorrectly labelled as bath salts as the Regulations require a list of ingredients on the product or packaging.	Evidence suggests that increasingly the description "bath salts" is not being applied to NPS thereby avoiding liability under the Regulations.

Part IV of the Agriculture Act 1970	This legislation applies to labelling of fertiliser/feeding stuffs and contains obligations relating to items that are sold or prepared for sale. Requires prescriptively certain information including a list of the active ingredients and the manner by which they should be marked. Would apply to NPS as a fertiliser if described as 'plant food'.	As per the description "bath salts" - evidence suggest that suppliers are less likely to describe the product as "plant food" as it will then be subject to the requirements of the Regulations.
Sale of Goods Act 1979	The Sale of Goods Act 1979 implies terms into every contract for the sale of goods that they must be as described, of satisfactory quality and fit for purpose. NPS products will breach the implied terms in that they have false descriptions and are unsafe (safety being an aspect of satisfactory quality).	It is of limited use in that it provides civil remedies for individual consumers to take action against the other party to the contract (headshop or internet seller). Consumers that are willing to ignore false descriptions and take risks with their safety are unlikely to complain or exert their rights in contract. Possibly actionable via the civil enforcement route provided by Part 8 of the Enterprise Act 2002 as local authorities are general enforcers. However, the lack of consumer complaints may make it impossible to prove that the collective interests of consumers is being harmed.

<p>Criminal Law</p>	<p>Offences Against the Person Act 1861</p>	<p>Prohibits the malicious administration of poisonous or other destructive or noxious substances. NOTE: THIS ACT DOES NOT APPLY TO SCOTLAND.</p>	<p>This Act does not apply in Scotland.. The charge of culpable and reckless conduct/ causing real injury, would cover such offences if committed in Scotland. The legislation refers to administration. Adopting such terms is not broad enough to cover the wider range of complexities of NPS and it is not so much the administration of NPS but rather the sale and supply. There have been cases in Scotland where supply has been looked at as administration but there is ambiguity around the term and should be avoided.</p> <p>It is noted that there need not be any intent to cause danger to life or infliction of grievous bodily harm. The administration itself is sufficient to complete the crime should either of these things happen. If administration is carried out with intent to injure, aggrieve or annoy that is simply a misdemeanour.</p> <p>The Group did not find these charges particularly helpful in considering how to tackle NPS in the criminal law. The eventual injury to a person would be an aggravation in Scotland.</p>
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<p>Drugs Act 2005</p>	<p>This legislative framework deals with the aggravated supply of controlled drugs. NOTE: THIS ACT DOES NOT APPLY TO SCOTLAND.</p>	<p>This section has not been brought into force. It concerns possession which in relation to NPS is not the focus. If brought into force and adapted to cover NPS it could result in a change of behaviours by those who possessed the NPS to ensure that they are not in possession of the prescribed amount. For instance they may only put out samples in the shop rather than the full stock. Its effectiveness would be diminished by changes in behaviour of those who supplied NPS and therefore the group made no recommendation in relation to this legislation</p>
<p>Medicines Act 1968</p>	<p>The Medicines Act 1968 makes it an offence to sell, supply or import particular types of medicine.</p>	<p>The Medicines Act Regime was not found to be effective in terms of criminal prosecution. Although it contained offences, this was a licensing regime, however it was repealed by the Human Medicines Regulations 2012/1916 and as such we did not consider this to be helpful in the context of how to deal with NPS.</p> <p>The Group also concluded that there would be difficulties in defining NPS as ‘medicines’ for the purposes of application of the Act.</p>

<p>Regulation of the Investigatory Powers (Scotland) Act 2000 (RIPSA)</p>	<p>RIPSA is the statutory basis for the use of covert surveillance techniques by the police and other investigating agencies, satisfying the requirements of Article 8 of the European Convention on Human Rights (the right to respect for private and family life, home and correspondence).</p>	<p>The group heard evidence that covert techniques have been used successfully in detecting and obtaining evidence against the suppliers in a headshop. To this extent, whilst RIPSA as a standalone provisions does not provide a means of tackling the sale and supply of NPS, the group consider it to be a useful investigative tool, for gathering evidence.</p> <p>The group made no recommendations in relation to the RIPSA regime as it is considered to be fit for purpose in its current form.</p>
<p>Strict Liability / Vicarious Liability</p>	<p>There is no strict liability for supplying NPS. The common law offence of culpable and reckless conduct requires proof that the accused knew or was reckless to the fact that harmful product was being supplied for human consumption.</p> <p>Vicarious Liability, like strict liability, is a creature of statute which would enable a person, such as an employer, to be held responsible for the Acts of another.</p>	<p>At the moment there is no Strict Liability. It is not a provision itself, it is more a concept.</p> <p>Strict liability allows a person to be convicted of an act done by him or her without the mens rea- or the intention to commit the act.</p> <p>Under the common law there is no vicarious responsibility.. This means in terms of selling NPS, the owner of the shop cannot be held responsible for the acts of the shop assistant in supplying an NPS. Prosecutors would have to show that the shop owner had the intention to supply the NPS for human consumption and knew or was reckless to the harm to health or life</p>

<p>Other powers (employment, housing, health and safety, taxation, etc.)</p>	<p>Local Government etc. (Scotland) Act 1973 – Section 201</p>	<p>Introduction of Local Authority Byelaws.</p>	<p>The use of such byelaws has been successful in relation to prohibition of drinking in public in that it reduces nuisance and disorder. These byelaws tackled anti-social behaviour caused by drinking in public.</p> <p>It is not clear what any NPS orientated byelaw could be designed to prevent in terms of NPS suppliers. This was not considered to be a particularly effective way to tackle the root problem of NPS.</p>
	<p>Pedlars Act 1871</p>	<p>Prohibits an individual from acting as a ‘pedlar’ unless he is in possession of a pedlar’s certificate.</p>	<p>A pedlar’s licence would not apply to a headshop but where individuals were selling NPS via other means i.e. selling such substances as they travel, a pedlar’s licence would be required. Anyone selling NPS in this way without a licence, would be committing an offence under section 4 of the Act.</p> <p>The penalty is such that it would not act as a deterrent but it does give police the power to refuse a licence and if someone was found to be selling NPS without a licence it allows for the NPS to be confiscated.</p>

ANNEX C

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