

# TRANSFORM

## DRUG POLICY FOUNDATION

### Drugs Bill 2005 Lords Second Reading Briefing

#### About Transform

Transform Drug Policy Foundation exists to minimise drug-related harm to individuals and communities by bringing about a just, humane and effective system to regulate and control drugs at national and international levels.

Transform's work includes:

- Carrying out research, policy analysis and innovative policy development
- Challenging government to demonstrate rational, evidence based reasoning to support its policies and expenditure
- Promoting alternative, evidence based policies to parliamentarians, government and government agencies
- Advising non-governmental organisations whose work is affected by drugs in developing drug policies appropriate to their own mission and objectives
- Providing an informed, rational and clear voice in the public and media debate on UK and international drug policy

For more information please visit [www.tdpf.org.uk](http://www.tdpf.org.uk) or contact the Transform office on 0117 941 5810.

#### Transform Policy

Transform provides policy responses to government consultations on issues that have implications for drug policy and law. Transform also submits evidence to Select Committees, independent inquiries and other policy fora. Transform can also provide briefings to individual policy makers on request.

**Contents:**

• Introduction	3
• Note on Regulatory Impact Assessments	5
• Clause 1: Aggravated supply of controlled drug	6
• Clause 2: Proof of intention to supply a controlled drug	8
• Clauses 3,4,5,6,8: Drug offence searches	10
• Clauses 7,9,10,11,12,13,14,15,16,17,18,19: Testing for presence of class A drugs, and requirements for initial and follow up assessments	11
• Clause 20: Intervention Orders (ASBOs)	15
• Clause 21: Inclusion of fresh ‘magic’ mushrooms (containing Psilocin) as Class A drugs	16
• Appendix – Lack of consultation	21

**Summary: principal concerns**

- The Bill is overly focused on criminal justice-based initiatives, which have a poor record of effectiveness.
- Arguments presented to support these enforcement measures, specifically around deterrent effects and reducing availability, are not evidence based.
- Some clauses risk breaching the Human Rights Act 1998, especially Article 6 which provides for the right to a fair trial, including the presumption of innocence.
- There has been an unacceptable lack of consultation with key stakeholders in the drugs field on significant sections of the Bill.
- The Bill contains many ill-thought-out, populist ‘tough on drugs’ measures that will make little or no difference to existing legislation and practice, or be actively counterproductive.

*Because this Bill contains 24 clauses covering a wide range of legislative reforms Transform addresses each of the proposed changes separately:*

## Introduction

### ***Evidence-based policy or election-time populism?***

As a Guardian editorial recently noted, all criminal justice initiatives in the run up to the election should come with a large health warning - and history suggests that this is especially true regarding drug legislation. Inevitably the highly politicised pre-election environment is less than ideal for devising effective evidence-based policy, and the new Drug Bill 2005 provides a good example of precisely the problems that can emerge in this context.

Like many such Bills it contains a number of very different provisions, some more contentious than others. However, it is Transform's view that the thrust of the Bill has been shaped by pre-election pressures rather than the real needs being expressed in the drugs field. This shortcoming is made clear by highly critical responses from Drugscope (representing over 900 drug agencies in the UK) and leading treatment agency Turning Point<sup>1</sup>, and Release<sup>2</sup> (see box). This is underlined by the minimal/non-existent consultation on the Bill with key stakeholders in the drugs field (see appendix for more discussion).

One of the only elements of the Bill to have a thorough consultation is the repeal of reforms to section 8 of the Misuse of Drugs Act (clause 23). These reforms were initially rushed through Parliament (without a widespread consultation) as part of the Criminal Justice and Police Act 2001, and sought to extend powers to prosecute individuals for permitting the consumption of controlled drugs on their premises. At the time they were portrayed as 'tough' measures to enable police to shut down crack houses. Unfortunately the change also jeopardised the work of thousands of agencies and individuals who worked with problematic drug users, and unsurprisingly there was massive resistance to the change. In a belated response, a consultation was convened, with 102 out of the 104 responses received being opposed to the change.

*"We need to focus on making current treatment programmes more effective, not dreaming up new offences to shovel people into the system. Instead, we see both the Conservatives and Labour parties in a pre-election pantomime trying to prove who's toughest on drugs. It flies in the face of the evidence. The key is that you punish the crime and treat the addiction – that distinction is starting to be lost through the war on drugs"*

**Lord Victor Adebawale (CEO of Turning Point), Mirror 22 November 2004**

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

**Comment on the Drugs Bill from Release, December 2004, in Drink and Drug News**

<sup>1</sup> See Drugscope / TurningPoint press release, and alternative Bill: [http://www.drugscope.org.uk/news\\_item.asp?a=3&intlID=1172](http://www.drugscope.org.uk/news_item.asp?a=3&intlID=1172)

<sup>2</sup> <http://www.drinkanddrugs.net/features/jan1005/gettingtoughondrugs.pdf>

It is symptomatic of the drug policy making process in recent years that the only clause in the new Bill to have had a widespread consultation is one that repeals a previous piece of ill-thought-out, populist 'tough on drugs' policy making. Many of the clauses of this Bill are equally ill thought out and lacking in consultation, and in Transform's view likely to meet a similar fate.

Sadly there is a long history of such politically distorted policy making in the drugs field. In 2000 Tony Blair sent the now infamous leaked memo to Philip Gould in which he identifies a *'need to highlight the tough measures'* (all of which relate to drugs) and that *'this should be done soon and I personally should be associated with it'*.

As we approach the next election the pattern appears to be repeating itself. In the short press release from the Home Office announcing the new Drugs Bill<sup>3</sup> there are no less than four mentions of 'tough' in the first 150 words: *'a tough package of anti-drugs measures'*, *'tougher action against dealers'*, *'tougher penalties'* and *'tougher powers to deal with dealers'*. The Prime Ministers speech announcing the Bill contained a similar number of 'toughs'<sup>4</sup>, and we can expect more of the same in the coming months.

The criminal justice focus of this Bill flies in the face of almost all recent academic analysis and debate. Detailed reports from the Police Foundation (1999), Royal College of Psychiatrists and the Royal College of Physicians (2001), The Home Affairs Select Committee (2002), The Foreign Policy Centre (2002), The Scottish Consortium on Crime and Criminal Justice (2002), and Transform (2004) have all argued that the heavy enforcement focus of UK drug policy is ineffective and often counterproductive<sup>5</sup>. A recent (unpublished) report from the Prime Minister's own Strategy Unit came to similar conclusions.

Transform is concerned that drugs initiatives are predominantly emerging from the Prime Minister's Office rather than the relevant Government Departments – namely the Home Office and Department of Health. The Drugs Bill is a prime example of the problems that can result. The thinking behind the clause calling for mandatory testing on arrest came about as a result of Lord Birt's co-option of a 'blue skies' exercise that took place in the Number 10 Strategy Unit during 2003, as reported in the Independent<sup>6</sup>. Lord Birt has neither the knowledge nor the expertise to develop the initiatives that have been put forward. And the failings of this Bill exhibit starkly the need to return the brief for developing effective drugs initiatives to the departments and individuals who have the necessary expertise to deal with this complex area of social policy.

Transform are also concerned that the Human Rights implications of some clauses of the Bill have been ignored. Many of these concerns have recently been supported by a report produced by the Joint Parliamentary Committee on Human Rights<sup>7</sup>. Along with this report's criticisms of specific clauses it notes the *"inadequacy of the Explanatory Notes in relation to the Bill's implications for human rights."* These; *"merely recite the fact that a statement of compatibility has been given."* It continues; *"They do not identify the Convention rights engaged nor provide any reasoning in support of the bald*

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<sup>3</sup> [http://www.homeoffice.gov.uk/n\\_story.asp?item\\_id=1191](http://www.homeoffice.gov.uk/n_story.asp?item_id=1191)

<sup>4</sup> <http://www.number-10.gov.uk/output/Page6670.asp>

<sup>5</sup> for details and links to these reports please see [www.tdpf.org.uk/Policy\\_LinksToKeyReports.htm](http://www.tdpf.org.uk/Policy_LinksToKeyReports.htm)

<sup>6</sup> [http://www.tdpf.org.uk/MediaNews\\_LatestNews\\_19\\_01\\_04.htm](http://www.tdpf.org.uk/MediaNews_LatestNews_19_01_04.htm)

<sup>7</sup> <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/47/4702.htm>

*statement of compatibility. This does not inspire confidence that human rights compatibility has been a matter of central concern in the formulation of the policy and the drafting of the legislation."*

Transform note that this report *was not available* in time for the Commons' debates or Standing Committee scrutiny of the Bill. Further criticism of the Human Rights implications has come from briefings produced by Justice, The Law Society and Liberty<sup>8</sup>.

## **Recommendations**

Transform would like to see this Bill scrapped, and calls on policy makers in both houses to ensure that it is not passed into law. The few reasonable or useful clauses (notably the repeal of the Section 8 MDA amendment) should be incorporated into other legislation at a later stage (the earlier the better).

In the short term Transform supports the recommendations made in the Drugscope - Turning Point alternative Drugs Bill document: *'The Drugs Bill: What is needed to support the drug sector?'*<sup>9</sup>

Transform also calls upon the Government to release its grip on the policy making process and return it to its rightful place with the departments and individuals with the experience and knowledge that it requires.

In the longer term Transform believes UK drug policy requires a major realignment in light of decades of experience with the failings of the 'war on drugs'. The prohibitionist paradigm has been widely discredited and a significant rethink of how policy makers address drug use and misuse in the UK is long overdue. Transform has produced a detailed report critiquing current policy and outlining ways forward based on evidence of effectiveness. The report, titled *'After the War on Drugs, Options for Control'* is available for download (in pdf. format) from [www.tdpf.org.uk](http://www.tdpf.org.uk).

## **Note on Regulatory Impact Assessment (RIA)**

The Home Office has provided a Regulatory Impact Assessment (RIA) that *"provides a cost-benefit analysis of the Bill, as well as an analysis of the impact of the Bill in respect of equity and fairness, enforcement, sanctions, monitoring, review and consultation."* (Para 63 explanatory notes). This document attempts to explain and justify the proposed legislation and provides an invaluable window into Home Office thinking in developing this legislation, much of which has been used in this briefing as the basis of the critique.

- The Regulatory Impact assessment for the Drugs Bill 2005 is available online here: [www.homeoffice.gov.uk/docs4/RIA\\_drugs.pdf](http://www.homeoffice.gov.uk/docs4/RIA_drugs.pdf)
- Details on Regulatory Impact Assessments are available from [www.cabinetoffice.gov.uk/regulation/ria-guidance/content/better-policy/index.asp](http://www.cabinetoffice.gov.uk/regulation/ria-guidance/content/better-policy/index.asp)
- Guidelines for good practice in producing RIAs are provided by the National Audit Office here: [www.nao.org.uk/publications/nao\\_reports/01-02/0102329checklist.pdf](http://www.nao.org.uk/publications/nao_reports/01-02/0102329checklist.pdf)

<sup>8</sup> Contact Transform or the relevant organisations for details

<sup>9</sup> <http://www.drugscope.org.uk/wip/7/PDFs/drugs%20bill.pdf>

**Clause 1: Aggravated supply of controlled drug**

*This clause inserts a new Section 4A into the Misuse of Drugs Act 1971 and stipulates the circumstances which a court must treat as aggravating factors in respect of the offence of supply of a controlled drug. These aggravating factors include supply of drugs near a school, use of couriers under 18, and the use of third parties to transport cash. This applies only to supply offences, not intent to supply.*

**Transform response:**

1. The Home Office's own calculations suggest that the net effect of this change will be to add an average of 1 month to an estimated 63 convictions each year for aggravated supply<sup>10</sup>. By any stretch this is an insignificant change to enforcement practice that will have no meaningful impact or deterrent effect (*the cost, if Home Office estimates are accurate, will be in the region of £170,000 per annum in additional prison costs*).
2. It is *already the case* that sentencing judges can take aggravating circumstances into account during sentencing and guidelines already exist to assist this process, rendering this piece of legislation almost completely redundant in any practical sense. This fact has not escaped the Home Office RIA analysis, which notes: *"Courts currently have discretion to take into account any aggravating factors present when the offence is committed."* No explanation is given why, in such circumstances, the proposed legislation is necessary.
3. It is not unlikely that judges may (correctly) view such moves as politically motivated interference and undermining of their discretion and judgment. It is also quite possible that the Court of Appeal would view any such inflated sentences with similar scorn and downgrade them accordingly to re-establish the status quo.
4. Transform is concerned about the lack of consultation on this clause. The proposal is not mentioned in the 'Police Powers' consultancy (August 2004)<sup>11</sup>, and there is no mention in the RIA that any individual or organisation in the drugs field, or the Sentencing Guidelines Council / Sentencing Advisory Panel were consulted.
5. The benefits of this clause would appear to be political; pandering to popular fears, stoked by tabloid media coverage, that drug dealers routinely prey on young people by hanging around school gates to solicit new customers. The RIA notes the *'concern expressed'* about this problem and the *'anecdotal evidence'* to support it. In reality the *'concern'* and *'anecdotes'* emerge almost entirely from newspapers, notably, of late, the 'News of the World' (*to whom Tony Blair gave an exclusive interview announcing random drug testing in schools (22.02.04)*).

<sup>10</sup> Home Office Drugs Bill 2005 Regulatory Impact Assessment, page 19.

<sup>11</sup> [www.homeoffice.gov.uk/docs3/modernising\\_powers.html](http://www.homeoffice.gov.uk/docs3/modernising_powers.html)

6. Isolated cases aside, research has shown very clearly that the spectre of drug dealers at the school gates is largely anecdotal (i.e. tabloid myth), and that in the vast majority of cases young people of school age acquire drugs through siblings or peer networks. This view is clearly described in the 1998 report *'Drug Misuse and the Environment,'* from the government-appointed Advisory Council on the Misuse of Drugs:

*"Access to illicit drugs [amongst young people] is most likely at the initial stage to be provided by friends. This is well-researched and well-evidenced. In the light of the decisive role of friendship networks in disseminating drugs, it is difficult to conceive of any effective form of conventionally conceived drug enforcement policy to control access at this level - quite simply, how might one be expected to police friendship?"*

*"The emphasis on friendship as 'peer pressure' reflects a major difficulty in so much of the social discourse around drug-related issues - namely the absence of any notion of volition or desire. Health education discourses in particular have often been cleansed of any reference to the possibility that people might use drugs because they find them pleasurable. Reflecting the same tendency to view the drug user as a passive victim of circumstance, there is a constant resort to the use of the term 'pusher' which does not accurately describe the dynamics of consensual drug markets, or to the alleged involvement of foreign and alien influences in drug-dealing networks".*

7. This clause will have little or no impact in practice and Transform recommend that it be struck from the Bill in its entirety.

**Clause 2: Proof of intention to supply a controlled drug**

*It is an offence under the Misuse of Drugs Act 1971 to possess a controlled drug with intent to supply it to another. This clause amends section 5 to create a presumption of intent to supply where the defendant is found to be in possession of a particular amount of controlled drugs, reversing the burden of proof so that the onus is on the defendants to establish they are **not** dealers.*

**Transform response:**

8. As with the proposed drug testing on arrest (p. 11) there are legal problems raised by this proposed reversal of the evidential burden. The Human Rights act 1998 (article 6) states clearly that: *“Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”*. If enacted this clause would reverse the burden of proof, meaning that individuals are presumed guilty until they prove themselves innocent (see appendix 2).
9. The Home Office RIA claims that *‘drug dealers use the defence of personal possession or bulk buying when arrested/charged with drug supply offences’*. Whilst this doubtless true in some situations, it is also the case, unacknowledged by the Home Office RIA, that these defences are sometimes used truthfully. Therefore, the result of implementing this legislation will be an increase in wrongful convictions of individuals guilty of nothing more than possession for personal use, yet convicted for intent to supply and facing a likely prison term for a crime they have not committed.
10. This would be a miscarriage of justice; a significant ‘cost’ (not mentioned in the RIA) and, Transform believes, sufficient reason alone to reject this clause in its entirety. Such wrongful convictions will have precisely the undermining effect on public confidence in the CJS that the Home Office claims this measure is seeking to reduce.
11. The fact is that the Crown Prosecution Service makes informed judgements on whether to prosecute an individual for intent to supply based on a variety of evidence. This will include not only the quantity of the given drug, but also the presence of cash, weighing equipment (scales), bags for drug sales, witness and forensic evidence and so on. Judges, magistrates and juries can similarly use this evidence to make informed judgements.
12. This clause proposes to remove this element of informed judgement from the equation and make the prosecution and sentencing process completely arbitrary, based only on a set of numbers devised by the Home Office. In the RIA (*on the subject of magic mushrooms*) the Home Office states that *‘sentencing is a matter for the courts’* - a sentiment that clearly has not informed this clause.
13. Much of this debate is entirely theoretical. Legal experts have advised Transform that the ability of prosecutors to activate a presumption of guilt (for intent to supply) is

severely limited by the wording and technical detail of the Bill. The Bill calls for the following to be inserted into the Misuse of Drugs Act:

*“If it is proved that the accused had an amount of a controlled drug in his possession which is not less than the prescribed amount, the court or jury must assume that he had the drug in his possession with the intent to supply it”*

However it also calls for the following text to be included immediately after:

*“Subsection (4A) above does not apply if evidence is adduced which is sufficient to raise an issue that the accused may not have had the drug in his possession with that intent.”*

14. What this caveat means is that if evidence is *adduced*<sup>12</sup> then the presumption of guilt (of intent to supply) will not be triggered. Defence lawyers will inevitably use this caveat (presumably included to try and make the Bill compliant with the Human Rights Act) to avoid the presumption of guilt by producing some such evidence - simply, for example, in the form of testimony from the defendant. The effect will be that this ‘tough’ measure will in practice rarely, if ever, be deployed.
15. One of the benefits of this particular clause noted by the Home Office RIA is that increasing prosecutions of dealers will reduce the availability and use of drugs. There is no evidence offered to support this contention, whilst a great deal exists to contradict it. Research by the Home Office itself shows quite clearly that increased arrests of dealers do not have any measurable effect on availability or use (which continue to increase), a proposition supported in some detail by a recent unpublished report from the Number 10 Strategy Unit. The reality is that for every dealer arrested there is a queue of willing replacements all too eager to profit from the lucrative illegal markets created by prohibiting goods that are in huge demand. The true picture is one of systemic failure that, in contrast to the Home Office claims, serves to undermine confidence in the Criminal Justice System and undermine police morale.
16. The Joint Committee on Human Rights Report on the Bill notes that:

*“We are unable to reach a definitive view on compatibility [with the Human Rights Act] because the prescribed amount which triggers the applicability of the statutory assumption is not on the face of the Bill but will be contained in regulations to be made by the Secretary of State. Bearing in mind the seriousness of the offence of possession with intent to supply, it will be important that there is a sense of proportion in the amounts which are prescribed by regulation as triggering the statutory assumption”.*<sup>13</sup>

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<sup>12</sup> ‘to mention (a fact) as a supporting reason, piece of evidence’ – Chambers dictionary

<sup>13</sup> <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/47/4702.htm>

**Clauses 3,4,5,6,8: Drug offence searches**

*These clauses amend section 55 of the Police and Criminal Evidence Act 1984, which provides for an intimate search of a person where it is suspected that the person may have a Class A drug concealed on him. The changes will allow a court to draw an adverse inference from the unreasonable refusal of an arrestee to consent to an intimate body search carried out under Section 55 of the Police and Criminal Evidence Act 1984 (PACE), or, where appropriate, an x-ray or ultrasound scan (both in UK and Northern Ireland). Clause 8 will extend the length of time suspects can be held without charge from 96 to 192 hours where they are suspected to have swallowed drugs.*

**Transform response.**

17. In the context of the current legislation these measures appear reasonable, although concerns have been expressed about potential harm from x-rays (particularly for young people), and some human rights advocates have objected on principle to an adverse inference from refusal of an intimate body search. According to the RIA these changes have resulted from consultation with police, and Transform acknowledge the practical difficulties faced in dealing with drug swallowers. Transform would be concerned about extending the period which potential swallower could be held without charge if there was no physical evidence (e.g. X-ray or ultrasound) to suggest that drugs had been swallowed.
18. In a recurring theme throughout the RIA reference is made to a 'deterrent effect' that is not supported by any evidence Transform is aware of. The additional claim that increasing prosecutions of dealers will reduce drug availability (and therefore use) is contradicted by a considerable body of evidence, including research from the Home Office and the Number 10 Strategy Unit.
19. The Joint Parliamentary Committee on Human Rights' report on the Bill draws attention to:  
  
*"the need for safeguards to be put in place to ensure that excessive weight is not placed on a refusal to consent to an intimate search or an X-ray or ultrasound scan, and in particular for the police to be required to ensure that individuals are aware of the consequences of refusing such consent, and that adequate guidance will be given by judges to juries"*<sup>14</sup>

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<sup>14</sup> <http://www.publications.parliament.uk/pa/jt200405/jtselect/jtrights/47/4702.htm>

**Clauses 7,9,10,11,12,13,14,15,16,17,18,19: Testing for presence of class A drugs, and requirements for initial and follow-up assessments**

*These clauses make a number of amendments to the Police and Criminal Evidence Act 1984 (PACE) to allow for the introduction of drug testing of persons after arrest. The existing provisions for testing after charge remain. This new provision will apply to persons aged 18 and over (clause 7). The various clauses make various provisions to mandate initial and follow up assessments in the event of a positive test.*

**Transform response:**

20. These clauses propose to create a situation whereby an individual, arrested for a 'trigger offence' but neither found guilty nor charged with any offence, will be mandated to take a drug test, and, if positive, attend a treatment assessment, both under the threat of a fine or imprisonment (up to 51 weeks) for refusal. It is proposed that this will happen on a large scale with the Home Office estimating 113,000 additional tests undertaken under the new legislation of which an estimated 35,000 will be positive (*RIA annex A p.35*).

21. It is unprecedented and plainly in conflict with the Human Rights Act (specifically Act 6) to have mandatory assessments (with criminal penalties including fines and or imprisonment) on the basis of a positive drugs test alone. The human rights organisation Liberty has previously objected to tests prior to *conviction* (see box), let alone prior to *charge* (see box). A positive test itself is not a criminal offence, and the Bill does not propose to make it so, either by establishing an offence of 'internal possession' or through 'previous possession' by implication. However, the effect will be **de-facto criminalisation of Class A drug use** in such cases.

*"We welcome the aim of breaking the link between drug use and crime. But they should not be testing people before conviction - to tackle the link between drugs and crime, they should first prove someone is guilty of a crime. Under the present scheme, someone mistakenly arrested and innocent of any offence could refuse to take a drug test - and find themselves criminalised simply for that. Voluntary drug referral schemes work well in police stations; mandatory tests should be kept until after conviction".*

**Mary Cunneen, associate director of Liberty 27th July 2001**

22. Regards clauses 7, 9-10 and 20 the Joint Parliamentary Committee on Human Rights notes that:

*"On the information currently available to us, however, we have some concerns that these clauses have the potential to interfere with the Article 8 right to refuse treatment even before a person has even been charged with a criminal offence, let alone had the circumstances*

*of their case considered by a court. Our concern is that people who have been compulsorily drug tested on arrest, are then effectively coerced, by threat of criminal sanction, into agreeing to treatment, before being charged with any criminal offence and without any prior judicial authorisation." (This report was not available in time for the Commons' debates or Commons' Standing Committee scrutiny of the Bill)*

23. Transform believes the proposed change would set a dangerous precedent. Can mandatory testing and assessments (with criminal charges, fines or imprisonment for refusal) be imposed when someone has not been charged with any offence? If so, it is a small step to similar mandatory testing for individuals who have not even been arrested, only stopped and searched, but whom police suspect may be under the influence of a Class A drug.
24. A comparison could be made with roadside breath testing for alcohol in the blood, which can be undertaken on the basis of a police judgment of reasonable suspicion that a driver may have been drinking. Refusal to give a breath test became an offence in 1983, and police can undertake random roadside tests under certain circumstances. But drink-driving is a major risk to the public and a serious crime in its own right; being under the influence of a Class A drug is neither.
25. There are significant practical issues around drug testing, which despite advances remains fraught with methodological and legal problems. There is the long history of false positives in drug tests where people have tested positive for Class A drugs triggered by prescription drugs and even foods such as poppy seed bagels. Tests have also give false negatives, and there are further issues over the legal status and accuracy of results for different types of test, issues around chain of custody for A and B samples, as well as the civil rights issues concerning blood tests or observed urine samples.
26. It is difficult to see how implementation of this clause will have any meaningful deterrent effect, either on drug use or on drug-related offending. As with the other 10 mentions of the deterrent effect of the proposed legislation in the RIA, the extent of such an effect is un-quantified (except to mention that it is *'hard to quantify'* on page 25). No measurement of the deterrent effect is proposed, nor any research to establish how it might be measured. The Home Office has never undertaken nor presented any evidence to demonstrate the deterrent effect that is at the heart of this Bill, and indeed UK drug enforcement policy. Such an effect seems to be marginal at best, and almost completely irrelevant for the chaotic drug users (who are the nominal focus of this policy drive) many of whom already have a long history of offending and multiple convictions (*see chapter 6 of 'After the War on Drugs, Options for Control' - available at [www.tdpf.org.uk](http://www.tdpf.org.uk) for further discussion*).
27. The Home Office (RIA) makes the aim of these measures quite clear: *"The aim of the Drug Interventions Programme is to **reduce crime** by getting drug misusing offenders into treatment."* [Their emphasis]. It is notable that the benefits of *'treatment'* - a health intervention - are measured purely in terms of crime reduction. Transform is concerned that the primary aim of this enforced *'treatment'* should be crime reduction rather than the health and well being of the drug user. No health indicators *at all* are mentioned in the RIA cost benefit analysis.

28. What is being described as *'treatment'* is essentially enforced abstinence, a significantly different usage from that of the medical community. This *'treatment'* is coerced rather than sought, based on abstinence from the outset (regardless of clinical best practice), is determined by courts rather than in consultation between doctor and patient and is enforced with intrusive testing and the threat of custody for failure.

29. The Home Office (in the RIA) states that:

*"Refusal and breaches will be kept to a maximum of no more than 5% by ensuring that the police and the drug workers at all stages of the process are fully able to explain not only the requirements but more importantly the benefits of complying with the requirements, which are not onerous, and putting in place processes, which will make it easier for the drug misuser to comply with the requirements."*

How can the Home Office can guarantee that no more than 5% of those arrested will either refuse a test or breach the conditions that follow a positive test? Experience with drug treatment and testing orders, court ordered treatment and treatment as a bail condition suggests that a substantial minority, often as high as 25% of arrestees, will choose to go to prison, where they can invariably maintain their drug habit, rather than enter coerced abstinence-based treatment. These will inevitably be the most problematic and chaotic users and the most prolific offenders. A recent NAO report on Drug Treatment and Testing Orders found that 80% of those on the Order had re-offended within 2 years<sup>15</sup>. A more recent report<sup>16</sup> (March 2005) by the Public Accounts Select Committee found that only 28% of Drug Treatment and Testing Orders in 2003 were completed.

30. It seems disingenuous for the Home Office to describe the testing requirements as *'not onerous'* when they are backed up by the threat of imprisonment, a threat that is further more described as making it *'easier for the drug misuser to comply'*.

31. Wider concerns about the use of treatment administered by the criminal justice system are explored in more detail in chapter 2 of the Transform report *'After the War on Drugs-Options for Control'* which can be downloaded (in pdf format) at [www.tdpf.org.uk](http://www.tdpf.org.uk).

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<sup>15</sup> [www.tdpf.org.uk/Medianews\\_PressReleases\\_26\\_03\\_04.htm](http://www.tdpf.org.uk/Medianews_PressReleases_26_03_04.htm)

<sup>16</sup> <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmpublic/403/40302.htm>

**Clause 20: Intervention Order**

*This clause amends the Crime and Disorder Act 1998 (the "CDA") in relation to Anti-social Behaviour Orders (ASBOs) and provides for a new order which can be made alongside an ASBO when drug misuse has been a cause of the behaviour that led to the ASBO being made.*

***Transform response:***

32. Transform would have no objection in principle to the concept of ASBOs if they could be shown to be effective and comply with human rights legislation. Unfortunately their effectiveness remains unproven and there are real concerns that they are issued on a civil standard of evidence but can trigger a criminal conviction for a breach of the ASBO conditions. However, given that ASBOs are already in place, a requirement to attend drug services does not seem unreasonable, and it is welcomed that this will remain a civil order. It is difficult to make further comment without seeing the details for the administration of such an order and Transform are keen to see clear guidelines for what constitutes a breach of this ASBO condition and what consequences can be expected for such a breach. We would be concerned if, for example, criminal penalties were incurred for non-compliance. There are wider concerns too about the efficacy of coerced treatment (see '*After the War on Drugs – Options for Control*' at [www.tdpf.org.uk](http://www.tdpf.org.uk) for further discussion).
33. Transform would like to see equal treatment of alcohol misusers on ASBOs where their drinking is shown to be a cause of anti-social behaviour.

**Clause 21: Inclusion of mushrooms containing Psilocin etc. as Class A drugs**

*This clause inserts into Part 1 of Schedule 2 to the Misuse of Drugs Act 1971 a fungus of any kind that contains the drug Psilocin or an ester of that drug. These mushrooms are commonly known as ‘magic mushrooms’, or psilocybe mushrooms as they are described here.*

*Note: In 2004 Transform produced a detailed briefing on policy options for psilocybe mushrooms that was sent to the Home Office before the new Bill was announced. This briefing gives details of alternative policy options, including reclassification of psilocybe mushrooms, and the licensing of vendors. The briefing can be read here:*

*[www.tdpf.org.uk/Policy\\_General\\_Mushrooms.htm](http://www.tdpf.org.uk/Policy_General_Mushrooms.htm) .*

*It is currently being updated in light of recent developments.*

**Transform response:**

34. This clause will theoretically make fresh psilocybe mushrooms (currently unclassified and therefore legal to sell, possess and consume) a Class A drug, allowing police to arrest and prosecute vendors and/or close down shops and stalls openly selling them. The Home Office RIA considers three options: leaving the law as it is, licensing fresh mushroom sales, or making fresh mushrooms a Class A drug and attempting to shut down the emerging market. Transform believe that the worst possible choice has been made. It is highly problematic for legal and practical reasons (outlined below), it will create criminals and criminal activity where none currently exists and it is likely to increase harm to recreational users. Transform shares the Home Office view that the status quo is unsatisfactory but disputes the cost/benefit analysis in the RIA which significantly plays down the practical difficulties and actual costs of the enforcement option whilst failing to consider the significant benefits of options that involve licensing vendors.

35. There will always have to be some legal caveat to protect the millions of landowners on whose land psilocybe mushrooms grow naturally. This includes thousands of farmers as well as major landowners including the Queen, the MoD and the Church of England. The problematic question will inevitably emerge: at what point does a fresh mushroom growing in a field, park or garden become a class A drug - the possession of which ‘*can get you up to seven years in jail and an unlimited fine*’ and the supply of which ‘*can get you life and an unlimited fine*’<sup>17</sup>. The Home Office have informed Transform that there will be statutory instruments enacted to address this issue *after* the Drugs Bill 2005 has been passed. These statutory instruments, defining how the new law will work in practice, will not be available for parliamentary scrutiny or any external consultation before the Bill is passed. Transform believes this is not an acceptable way to develop drug policy and legislation.

36. Without access to the statutory instruments (which, by all accounts, have yet to be drafted) Transform are unable to comment on how they will operate in practice. However, it seems inevitable that loopholes will remain. While demand for

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<sup>17</sup> From [www.talktofrank.com](http://www.talktofrank.com)

mushrooms exist, and such legal confusion continues, vendors will doubtless seek out ways to supply psilocybe mushrooms, especially whilst profit margins of ‘several hundred percent’ remain<sup>18</sup>. This is likely to result in a lengthy, expensive and undignified legal tango between enforcement agencies and vendors, growers and users. Transform does not accept the Home Office RIA assertion that this move will be cost neutral for the criminal justice system.

37. Criminalising fresh mushroom sales would certainly lead to the creation of an illegal market that does not currently exist, at the expense of legitimate taxed trade worth an estimated £175 000 a year in tax revenue<sup>19</sup>. As the Home Office RIA notes: “*An unintended consequence might be that the sale of these MMs is driven underground, perhaps encouraging the interest of organised crime groups*”. Transform would argue that there is no ‘perhaps’ involved here: it is a certainty that the criminal market would be the prime beneficiaries of this move. The developments of the past two years have established a demand that will not be reversed by government fiat. As a Class A drug it is likely that the price of psilocybe mushrooms would rise significantly in response to increased risk for vendors - creating a lucrative opportunity unlikely to be ignored by criminal profiteers. The amount of mushrooms in circulation will not decrease - it will simply move into the hands of criminals or domestic growers (see below), negating Home Office claims for health benefits from reduced prevalence.
38. Home psilocybe mushroom growing kits are now widely available, cheap, easy to use and growing in popularity. The new legislation will not prevent the sale of such kits – which do not themselves contain the prohibited active drugs. The likelihood is that a scenario similar to that with legal cannabis grow kits and seeds will emerge. This would mean that psilocybe mushroom supply would partially shift to unregulated small-scale domestic production, mirroring recent developments in cannabis production.
39. Clamping down on magic mushrooms would logically necessitate clamping down on other legal plants that contain Class A substances. These include Peyote and San Pedro cacti that contain the Class A drug *Mescaline*. These cacti are available in garden centres and are also appearing at the same stalls and ‘head shops’ that currently sell fresh psilocybe mushrooms (alongside cannabis smoking paraphernalia). Similarly fresh/dried poppies and poppy seeds from which opium can easily be extracted are widely available in garden centres, craft shops and even IKEA.
40. There are a number of plants containing psychoactive substances that are freely on sale in the UK but not covered by the Misuse of Drugs Act or any other legislation. These include the fly agaric mushroom that contains the powerful hallucinogen *muscarin*, a substance that is far more toxic and dangerous than psilocin/psilocybin and has been associated with fatalities. Fresh and processed fly agaric based products, including concentrated extracts for smoking, are already for sale at some outlets currently selling psilocybe mushrooms. There is a real danger of creating a

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<sup>18</sup> ‘Psychedelic mushrooms - Magic limbo’, The Economist, p.45 18th September 2004

<sup>19</sup> Drugs Bill RIA section 4.1.3

perverse situation whereby harshly enforcing the law on psilocybe mushrooms would lead to increasing use of the significantly more dangerous (but legal) fly agaric mushrooms.

41. Similarly, the *Salvia-Divinatorum* plant, the leaves of which are smoked, contains another powerful hallucinogen *Salvonorin*. Relatively little is known about the potential harms of *Salvonorin* use, but it is widely available in 'head shops', and online, in a variety of preparations. The spice *nutmeg* also is also psychoactive when consumed in larger quantities. Other drug-plants in this unclassified legal category include the stimulant Khat (a schedule 1 drug in the USA), and a number of more esoteric plants such as *Datura*, *Ayuasca* and *Ibogaine*, more commonly used for traditional ceremonial or religious reasons. Such inconsistencies and anomalies undermine the argument for clamping down on psilocybe mushrooms and are likely to result in further legal challenges.
42. The arguments in the RIA against a licensing system for vendors are extremely thin. It states *"This [licensing vendors] would be seen as encouraging the use of MMs [magic mushrooms], with the resultant risks to young people, particularly those with mental health problems. Further, this would set an undesirable precedent for other Class A drugs"*. The function of criminal law is to prevent crime, not to send out public health messages to young people; this is much more effectively achieved through public education. Licensed vendors would allow controls impossible in the current situation, or with illegal markets. For example, age limits on sales and restrictions on advertising and shop front promotions, and licensed vendors could be obliged to provide health and safety information with all sales, reducing the risks for users. These benefits are not explored in the RIA.
43. There is anecdotal evidence, supported by recent statistics on trends in drug use, that increasing use of psilocybe mushrooms has led to a fall in use of some other potentially more harmful drugs, notably ecstasy. Benefits from such a fall in overall harm to users would potentially be lost if this clause is enacted. The Home office RIA acknowledges this point but rejects it on the grounds that *'both are harmful'* – an assertion that ignores evidence of comparative harms.
44. There appears to be broad agreement between various medical and drug agencies that the health dangers of fresh psilocybe mushrooms are low relative to most other commonly used recreational drugs, legal or otherwise. As with any drug health risks do exist - but are limited by psilocybin / psilocin's low toxicity (there are no recorded fatalities), non-addictive nature (they *'are not addictive in any way'* according to the Government's 'TalktoFrank' website), and the rapid development of tolerance, negating most effects within a few days' continuous use. Recorded problems can include precipitation of existing mental health problems, unpleasant experiences (paranoia, frightening visions), and occasionally persisting anxiety and/or psychological disturbances after the effects of the drug have worn off. These occur most frequently in people with pre-existing mental or psychological problems, or following heavy use/ high doses. Most drug information sources, however, agree with the Government web site 'TalktoFrank' that *'the biggest danger with taking any magic mushrooms is making sure you're taking the right thing - there are hundreds of*

*varieties of out there and some of them are highly poisonous*'. There was a useful review of risks associated with psilocybe mushroom undertaken by the Dutch Co-ordination Centre for the Assessment and Monitoring of new drugs (CAM 2000)<sup>20</sup> that concludes that the risk to public health and social disorder was low. The widely described low risk potential calls into question the categorisation of prepared psilocybe mushrooms and psilocybin / psilocin as Class A drugs. This classification currently places mushrooms alongside the conspicuously more toxic and addictive drugs such as heroin and cocaine, and in the class *above* amphetamines (Class B). The possibilities for reclassification are discussed in the Transform briefing '*The Magic Roundabout – how to deal with psilocybe mushrooms*' available on [www.tdpf.org.uk](http://www.tdpf.org.uk).

45. The RIA reports that the Home Office has consulted with the Small Business Association on the impact of this clause. It also notes that there is ongoing, but incomplete consultation with ACPO, ACMD, and the CPS. Not only is this level of consultation inadequate, ignoring wide swathes of the drugs field (notably Drugscope the voluntary sector and drug treatment service providers), but the clause has been included before consultation with the CPS, ACPO and ACMD are completed. Transform understands that as few as 6 of the 38 members of ACMD have so far responded. Transform's submission to the Home Office is not noted.
  
46. Amongst its justifications for making fresh mushrooms a Class A drug, the RIA claims that their continued sale will allow profits to be made from '*an undesirable business*'. In the context of the huge alcohol and tobacco industries operating in the UK, the extensions of the gambling trade, and the UK's status as the world second biggest arms exporter, Transform finds these arguments puzzling. For the vendors and their customers this is clearly not '*an undesirable business*'.
  
47. The curious legal status of psilocybe mushrooms offers a unique opportunity for the Government to experiment with legal licensing models within a small enclave of UK drug culture that does not feature any of the public health problems, crime, or antisocial behaviour associated with many other drugs. The Dutch have successfully licensed psilocybe vendors and Transform is disappointed that the Home Office has not reviewed the Dutch model in its RIA. For more information see the appendix '*Can we learn from the Dutch?*' in the Transform briefing on this issue here: [www.tdpf.org.uk/Policy\\_General\\_Mushrooms](http://www.tdpf.org.uk/Policy_General_Mushrooms).
  
48. Fresh psilocybe mushrooms offer an easily quantified and low concentration dosage of the active drug in its natural form, in some respects comparable with coca leaf chewing (low dose cocaine), or poppy tea (low dose opium) - neither of which cause significant health or social harms in regions where they are consumed. In this context licensing sales of psilocybe mushrooms is a form of harm reduction, minimising risks for users, keeping individuals away from stronger preparations, and potentially diverting individuals from more dangerous drugs, such as ecstasy or fly agaric mushrooms. Glastonbury Festival 2004, where psilocybe mushrooms were freely available for the first time, was notable for the lower numbers of ecstasy users,

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<sup>20</sup> This study is available as a pdf. download at <http://www.tdpf.org.uk/dutchmushroomstudy.pdf>

dealers and drug related medical emergencies.

49. Unlike the reclassification of cannabis which created a media storm there is (so far) little media interest in psilocybe mushrooms, which have yet to make much of an impact on popular culture and have not been associated with any high profile fatalities. The proposed police clampdown could backfire by providing acres of free publicity for the drug - compare the explosion of ecstasy use that followed the clampdown in the late 1980's. Transform feel that an opportunity to put in place a common sense licensing system has been missed and this proposed solution is ill-thought-out and will make incur social and police costs and health harms.

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## Appendix: Lack of consultation

The RIA provides details of consultation it has undertaken for each of the clauses in the Bill it analyses. It notes that the Home Office produced a consultation document on police powers titled 'Policing: Modernising Police Powers to meet Community Needs' ([http://www.homeoffice.gov.uk/n\\_story.asp?item\\_id=1055](http://www.homeoffice.gov.uk/n_story.asp?item_id=1055)) in August 2004.

However, the consultation picture that emerges is seriously inadequate:

- Only three elements of the Bill were covered in a Home Office consultancy document, two of which (inference from refusal to a search and increased powers to detain drug swallows) were relatively uncontroversial, and the other (testing on arrest) presented in brief, missing key details<sup>21</sup>.
- A single informal meeting took place at Number 10 between 20 police (from ACPO) and the Prime Minister, Home Secretary and Home Office minister, at which some, but not all, of the more contentious clauses were discussed<sup>22</sup>.
- Large sections of the Bill appear to have received no consultation whatsoever. On the ASBOs clause (20) the RIA notes that: '*No external consultation has been carried out.*' (p.13). Other clauses do not give any information on any consultation.
- No details are given as to what the response to this consultation was and no responses are published on the Home Office website. It is also unclear to whom this consultation was sent soliciting replies.
- Transform believe that these shortcomings breach the cabinet office code of practice on consultation available here: <http://www.cabinetoffice.gov.uk/regulation/docs/consultation/pdf/code.pdf>

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<sup>21</sup> The document briefly mentions the idea of testing on arrest and mandatory assessments: "*We will consider building on this by requiring those who test positive on arrest to see a drugs worker and to undergo an assessment of their drug misuse.*"

Few details are given in this brief summary and the fact that refusal of a test and failure to attend initial and follow up assessments will be a criminal offence (fine or custody) is only mentioned in the consultation's RIA document not the consultation document itself.

<sup>22</sup> A press release from ACPO reports that a meeting took place at Number 10 Downing Street in which '*The Prime Minister, the Home Secretary and Home Office Drugs Minister, Caroline Flint, invited twenty police officers involved in street level drug enforcement to an informal consultation meeting*'. According to an ACPO press release (November 25, 2004), at this meeting much, but not all, of what has appeared in the Bill was discussed.