In the High Court of Justice **CO/7548/2007**
Queen's Bench Division
Administrative Court

In the matter of an Application for Judicial Review

The Queen on the Application of

CASEY WILLIAM HARDISON

Claimant

– v –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

STATEMENT OF CASE
Drugs Strategy Consultation

"It is a curious but significant fact that no government in the past hundred years has dared to commission a wide-ranging inquiry into drugs and drug policy."

Drugs – Facing Facts
RSA Commission on Illegal Drugs
Community and Public Policy
March 2007

Prepared By

Casey William HARDISON

August 28th 2007

STATEMENT OF CASE

Introduction:

1) The Claimant, Mr. Casey William Hardison, is serving a twenty-year sentence of imprisonment for the production of controlled drugs. He is concerned that the Government's Drugs Strategy Consultation paper ("the DSCP"), *'Drugs: Our Community, Your Say. A Consultation Paper, July 2007'* is procedurally unfair to consultees and thus himself. Hence, he seeks permission for judicial review.

2) The Defendant, the Secretary of State for the Home Department, states that the DSCP lay at the heart of the "largest single consultation exercise on the future of tackling drugs this country has seen". Because drugs can concomitantly give rise to enormous benefits and untold suffering, it is not in the public interest for the consultation to continue until the shortcomings of the DSCP are ameliorated.

3) As a consultee, the Claimant is personally concerned that if the DSCP's unfairness, identified herein, is not corrected in the mind of Government and so too the public then he has little chance of a successful appeal against conviction and/or sentence; the Drug Strategy Consultation offers him that hope.

4) Still, the Claimant can identify several areas where the DSCP has unfairly and inexplicably excluded the key findings of both a 2006 report of the Advisory Council on the Misuse of Drugs ("ACMD") examining the risks of harm to young people caused by drugs and a 2006 Parliamentary Science and Technology Committee report into the use of scientific evidence in making drug policy distinctions. Both reports elucidate how the distinctions underpinning the implementation of the Government's current Drug Strategy are based on historical and cultural factors which lack a consistent and objective basis.

5) The unfairness in the DSCP complained of by the Claimant has its genesis in the same historical and cultural factors; failure to consult upon them risks public welfare and individual autonomy and leaves the people in ignorance. This can not be acceptable or reasonable no matter what the temporary political cost or benefit. In fact, politics should have nothing to do with such a dangerous subject.

The Law on Consultation or the Duty the Defendant owes to consultees:

6) Because the Defendant has voluntarily embarked upon consultation re the Government's Drug Strategy it must be carried out properly. In R v North & East Devon Health Authority, *ex parte* Coughlan [2001] QB 213, Lord Woolf MR giving the judgment of the Court of Appeal said in paragraph 108:

> "108. It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken: *R v Brent London Borough Council, Ex p Gunning* (1985) 84 LGR 168."

7) To this end the Defendant has an obligation "to take reasonable steps to acquaint [herself] with the relevant information": Secretary of State for Education v Tameside MBC [1977] AC 1014, 1065.

8) This is especially so where any proposal up for consultation might have the potential to impact personal liberty. Indeed, as was stated in Wooder v Dr Feggetter *et al.* [2002] EWCA Civ 554 at paragraph 24:

> "one of the classes of case where the common law implies a duty to give reasons is where the subject-matter is an interest so highly regarded by the law (for example, personal liberty) that fairness requires that reasons, at least for particular decisions, be given as of right".

9) More, it is an accepted principle of administrative law that a public body undertaking consultation must do so fairly. This overriding need for fairness in any consultation process was confirmed by the Court of Appeal in R (Edwards and others) v Environment Agency and others [2006] EWCA Civ 877: see paragraphs 90-94 and 102-106. In paragraph 103 Auld LJ, with whom Rix and Maurice Kay LJJ agreed, said this:

> "103. [I]f … a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it."

10) Further, as stated in Coughlan at paragraph 115:

> "The risk an authority takes by not disclosing such [evidence] is not that the consultation process will be insufficient but that it may turn out to have taken into account incorrect or irrelevant matters which, had there been an opportunity to comment, could have been corrected".

11) Hence, public engagement, including effective consultation on policy development and service design, is key to a healthy democracy. Moreover, by exposing preliminary policy analysis and options to scrutiny and listening carefully to the views of stakeholders, the Government can build up a broad evidence-base which allows for effective and efficient policymaking. Good consultations which truly reach those concerned, lead to better policies and reduce the risks of policies failing to meet their objectives or resulting in unintended consequences.

12) Thus, consultation is an integral part of policy development whereby the Government seeks evidence, validates existing evidence and exposes preliminary policy analysis and options to scrutiny.

13) The Government's current policy on consultations is set out in the Cabinet Office *Code of Practice on Consultations 2004*, ("the Code"). This sets out the criteria for carrying out formal, written Government consultations. Departure from the Code requires clearance from the responsible Minister, here the Defendant, and any reasons for the deviation should be set out in the consultation document.

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14) The major headings of the *Code of Practice on Consultations 2004* appear in the Drugs Strategy consultation paper Annex C on page 35. It will be shown that the following statements from the 2004 Code are particularly relevant to this claim:

> "Criterion 2: "Be clear about what your proposals are, who may be affected, what questions are being asked […] 2.2 Explicitly state any assumptions made about those who are likely to be affected by the proposed policy. Encourage respondents to challenge these assumptions. 2.3 As far as possible, consultation should be completely open, with no options ruled out. However, if there are things that cannot be changed … due to prior Ministerial commitments, then make this clear. […]."

> "Criterion 6: Ensure your consultation follows best regulation practice […] 6.3 Consider alternatives to regulation […] 6.4 Consider unintended consequences of the proposal and ask respondents to highlight these in their response. 6.5 [E]nsure that you ask about the practical enforcement and implementation issues […] 6.6 [S]eek to ensure that the Principles of Good Regulation are followed whenever policy is being developed. These are: proportionality; accountability; consistency; transparency; and targeting."

15) All consultees have a legitimate expectation that the *Code of Practice on Consultations 2004* will be followed in the DSCP, at least in spirit, if not in letter.

16) Finally, the Drugs Strategy consultation paper is entitled *'Drugs: Our Community, Your Say'*. There is no indication in the letter to stakeholders or the DSCP introduction that the consultation is limited to illegal drugs. Thus, there is a legitimate expectation that all drugs which can cause harm to individuals and the community when misused will be consulted upon and that no drugs will be excluded, particularly alcohol and tobacco which Government recently acknowledged "account for more health problems and deaths than illegal drugs".

17) It will be seen that the 14 major failings in the DSCP, set out in this claim as **Issues**, boil down to the Defendant's failure to: 1) follow the Code; 2) follow the guidelines laid down in Coughlan at 108; 3) give effect to the duty to give reasons as set out in Wooder at 24; 4) get acquainted with relevant information as set out in Tameside at 1065; 5) consult on relevant evidence and its consequences as stated in Coughlan at 115; and 6) give effect to the principle of fairness confirmed in Edwards at 103.

18) The **Issues** set forth in this claim in paragraphs 19-32 fall under three headings:

a) A general failure by the Defendant to provide sufficient information and reasons in the DSCP for intelligent consideration and intelligent response to its proposals and response form questions;

b) A failure to undertake consultation at a time when DSCP proposals are still in a formative stage;

c) A failure to honour the legitimate expectations created within the consultation paper itself.

STATEMENT OF CASE

The DSCP generally fails to provide sufficient information and reasons for intelligent consideration and intelligent response:

19) **Issue 1:** The DSCP uses the term "drugs" inconsistently, incorrectly and ambiguously. Consequently, there is insufficient information for consultees to establish exactly which drugs are included or excluded in the consultation and which drugs are being referred to each time the term "drugs" is used in the DSCP proposals and response form questions. Does the Court agree?

a) The official UN Office on Drugs and Crime ("UNODC") definition of "drugs" is taught to our young people as part of the National Curriculum via the Personal, Social and Health Education framework. It has been adopted by the statutory Advisory Council on the Misuse of Drugs, the World Health Organisation and is consistent with both the definition given for "controlled drug" in s2(1)(a) of the Misuse of Drugs Act 1971 and the definition given for "drug" in Black's Law Dictionary 8th Ed. It reads:

> "A substance people take to change the way they feel, think or behave".

b) Here, with emphasis, are several illustrative examples of this issue:

i) Correct use – "We know that there will always be some people who abuse **legal and illegal drugs**" (p.14);
ii) Incorrect use – "These groups include: children whose parents misuse drugs **or** alcohol" (p.9); (this implies alcohol is <u>not</u> a drug)
iii) Inconsistent use – "**Alcohol, cannabis and solvents**, rather than Class A drugs such as heroin and cocaine, **are the substances** most commonly used by young people" (p.8); (this identifies *Cannabis* as a substance)
iv) Ambiguous use – Question 28: "What role should the community play in tackling **drug dealers** and **drug supply**?" (p.26) (Are publicans included?)

c) Unless Government is proposing the prohibition of commerce in the drugs alcohol and tobacco by stealth, Question 28, above, from the DSCP cannot be given intelligent consideration or an intelligent response; nor can these:

i) Q27a – "How can police forces best build confidence that **drug supply** is being effectively tackled locally?"
ii) Q36 – "How can we further reduce the **supply of drugs** and improve detection and the prevention of importation?"

d) The clearest indication of which drugs are included in the consultation is stated on page 8:

i) It is more effective to address **all** substances that are misused by young people, including illegal drugs, alcohol and volatile substances, rather than focus on one type". (p.8)

e) Yet, this statement distinguishes some illegal drugs as drugs, the drug alcohol by name and volatile substances, when used as a drug, as <u>not</u> drugs and omits tobacco, the drug which directly contributes to the most human deaths.

20) **Issue 2:** The DSCP does not make clear if all drugs which can be misused are included in the consultation or if tobacco and alcohol are excluded. Legal drugs such as alcohol and volatile substances appear included but tobacco is not mentioned as being included or excluded. This ambiguity and/or lack of reasoning for the possible exclusion of alcohol and tobacco results in there being insufficient information for consultees to establish if the DSCP proposals and questions apply to all drugs the misuse of which is sufficient to cause a social problem.

a) The only apparent reference in the DSCP to drugs included in the consultation indicates the importance of all drugs being tackled together. Alcohol and volatile substances are specifically included in this reference, suggesting it is included in the DSCP, but tobacco is omitted, suggesting tobacco is excluded:

> "It is more effective to address **all** substances that are misused …" (p.8)

b) If the most lethal drugs, alcohol and tobacco, are excluded from the DSCP strategy and consultation then the use of the term "drugs" in the DSCP means neither all drugs nor simply controlled drugs but rather indicates a new arbitrary and hybrid definition of drugs to mean "all drugs except alcohol and tobacco" creating further ambiguity vis-à-vis the term "drugs".

21) **Issue 3:** The DSCP fails to justify the distinction it makes between drugs referenced in the consultation, distinguishing some drugs as "drugs" and some drugs as "substances". Insufficient reasons for this distinction results in consultees being unable to determine if there is a justification for such a distinction and how such a distinction is or might be relevant to the DSCP proposals and questions. Besides, this distinction is irrational in itself as in fact all drugs referenced in the DSCP by any term are drugs.

a) These emphasised DSCP statements are examples of this distinction:

i) "The current strategy aims to make information on **drugs and other substances**, such as alcohol, available to all young people and their families" (p.8);
ii) "Education in schools and other settings helps young people to acquire the knowledge, skills and understandings they need to keep themselves safe from harm when they encounter **illegal drugs** and **legal substances** such as alcohol, tobacco, medicines and volatile substances" (p.9);
iii) Q11: "Should **drugs and/or substance abuse** campaigns be targeted at the under-11 age group?" (p.14)

b) Here the inconsistent use of this distinction identifies *Cannabis* as a substance:

> "**Alcohol, cannabis and solvents**, rather than Class A drugs such as heroin and cocaine, **are the substances** most commonly used … " (p.8);

c) The claimant believes that no objective justification exists for the distinction made in the DSCP between drugs distinguished as "drugs" and drugs distinguished as "substances"; and that, ultimately, this distinction is a veiled attempt by Government to obscure their failure to treat like cases alike by implying that somehow drugs distinguished as "drugs" in the DSCP are inherently different from drugs distinguished as "substances" in the DSCP.

22) **Issue 4:** Because of the ambiguity identified in **Issues 1, 2** and **3** above consultees cannot give intelligent consideration and an intelligent response to the DSCP proposals because they cannot tell if each of the proposals applies equally to all drugs referenced in the DSCP or if they will be applied unequally between those drugs distinguished as "drugs" and those distinguished as "substances".

a) The proposed aims 1, 3, and 4, set out on page 7 of the DSCP, are likely to be applied equally to all drugs, whether specifically included in the DSCP or not and whether identified as "drugs" or "substances", because they each target the legitimate aim of reducing harms caused to individuals and the community from the misuse of dangerous or otherwise harmful drugs. The DSCP states: "We aim to make further progress on:

> [1] reducing the harms drugs cause to the development and well-being of young people and families;
> [3] reducing the harms drugs cause to the health and well-being of individuals and families;
> [4] reducing the impact of drugs on local communities – reducing drug related crime and associated antisocial behaviour".

b) But, the second proposed aim ("the 2PA"), "bringing the full force of law enforcement to bear on drug dealers at all levels" (p.7) is qualitatively different from the other proposed aims in that it is in fact an implementation or regulatory method for achieving the legitimate aim of harm reduction.

c) And, because alcohol appears specifically included in the DSCP, it seems very unlikely, even absurd to the Claimant that the 2PA will be applied equally to all drugs referenced within the DSCP. The 2PA thus appears ambiguous and may obscure a difference of treatment which results in consultees being unable to respond intelligently even though personal liberty will be affected for some "drug dealers" but perhaps not for all.

23) **Issue 5:** If Government does intend a difference of treatment, via the unequal application of the 2PA, between traders of drugs distinguished as "drugs" and those distinguished as "substances" then no reasoning at all is given for the criminalization of some but not all "dealers" of equally harmful drugs.

a) The Claimant asserts the Defendant has deliberately failed to set out in the DSCP the recent and relevant evidence from the 2006 reports of the ACMD and the Parliamentary Science and Technology Committee which would have informed consultees that any intended unequal application of the 2PA based on the distinction between drugs termed "drugs" and drugs termed "substances" is Wednesbury unreasonable.

b) As Coughlan held at 115: "The risk an authority takes by not disclosing such [evidence] is not that the consultation process will be insufficient but that it may turn out to have taken into account incorrect or irrelevant matters which, had there been an opportunity to comment, could have been corrected".

c) The failure by the Defendant to set out for consultation in the DSCP relevant evidence indicating any intended unequal application of the 2PA would lack a rational public health and safety justification will be dealt with in **Issue 13**.

24) **Issue 6:** Consultees cannot determine any reasoning to support the second proposed aim ("the 2PA"), "bringing the full force on law enforcement to bear on drug dealers at all levels" (p.7), or the assumptions which underpin it, because the DSCP acknowledges a lack of evidence for this aim's effectiveness, presents no reasoning for supporting the 2PA over alternative regulatory options and, in fact, presents no alternative regulatory options to the 2PA at all.

a) The DSCP indicates that the 2PA is intended to reduce drug harm:

> "In the final analysis, reducing supply means causing shortages of drugs. In those circumstances we would expect the prices of drugs to rise and the purity to reduce. Sustaining those changes should, in conjunction with other elements of the drug strategy, contribute to a reduction of harms caused to individuals and the community by drug misuse and lead to reduced demand". (p.23) [*N.B.* reduced purity increases adulteration]

b) Yet, the DSCP points out the lack of evidence for the 2PA's effectiveness in achieving its intention:

> "The fact that we have not yet reached a position in the UK where there has been an appreciable and sustained shortage of drugs means that we do not have direct experience of such effects" (p.23), "the effort that has been put into reducing the supply of drugs has not so far resulted in increased street prices" and "It has been difficult to discern a connection, which must exist to some extent, between the tactical successes (e.g. drugs seizures and arrests) and the shape of the market" (p.24).

c) Indeed, the Chairman of the statutory Advisory Council on the Misuse of Drugs told the 2005-2006 Parliamentary Science and Technology Committee, **HC 1031**, in oral evidence on February 15th 2006 that:

> "Q166: What we have to do though is realize that over the last 30 years the use of drugs has dramatically increased in this country, and that the criminal justice system has not prevented that in any way". (Ev 7)

d) The failure to consult on alternative regulatory options (which may be more effective) is contrary to the *Code of Practice on Consultations 2004 Criterion 6* even though the DSCP declares in Annex C that it "follows" the Code:

> "This consultation follows the Cabinet Office Code of Practice on Consultation, the criteria for which are set out below". (p.35)

e) If the Government does intend a difference of treatment between "dealers" of tobacco, "drugs" and "substances" then alternative regulatory options are clearly available, but because the DSCP does <u>not</u> provide an assessment of alternative regulatory options and does <u>not</u> encourage consultees to suggest alternatives to, or unintended consequences of, the 2PA and its implementation methods, this proposed aim remains obfuscated, unexplained and appears closed for consultation contrary to the *Code of Practice on Consultations 2004 Criterions 2.3* and *6*.

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Consultation on the proposed second aim has not been undertaken at a time when the proposal is still in a formative stage:

25) **Issue 7:** The second proposed aim ("the 2PA") "bringing the full force on law enforcement to bear on drug dealers at all levels" (p.7), appears not to be in a "formative stage".

a) The SSHD's forward indicates the 2PA has been decided in principle:

> "We remain resolute in our determination to put drug dealers out of business" and "[W]e are ambitious to harness the full force of our law enforcement might, […], all bearing down on the dealers who profit from the harm and misery they supply" (p.5).

b) The 2PA is the fundamental regulatory principle underlying Government drug policy vis-à-vis drugs the Defendant currently classifies as illegal. Even though it affects personal liberty and the exercise of property rights, this principle has never been publicly consulted upon before.

c) If there are things which cannot be changed about Government's drugs policy discretion re this principle due to prior executive commitments such as the three UN drug Conventions, and/or commitments to the current implementation of the 1971 Misuse of Drugs Act and/or to majoritarian opinion or attitudes then, this is not made clear and explicit in the DSCP nor does the DSCP set out the public interest justification for such fettering.

d) The Claimant asserts that those affected by the 2PA have a right to be heard which is denied if this proposed aim is not genuinely open for consultation.

26) **Issue 8:** The DSCP failure to present for consultation alternative regulatory options to the only proposed regulatory method, the 2PA, indicates that no other options are being considered and thus this proposal is decided in principle.

a) The DSCP declares in Annex C that it "follows" the *Code of Practice on Consultations 2004*:

> "This consultation follows the Cabinet Office Code of Practice on Consultation, the criteria for which are set out below". (p.35)

b) Nevertheless, contrary to the *Code of Practice on Consultations 2004 Criterion 6,* the DSCP does not consider opportunities for simplification of regulations, particularly the "fully integrated approach … to the development of policies designed to prevent the hazardous use of tobacco, alcohol and other drugs" called for by the statutory ACMD in Recommendation 11 of their 2006 report *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'*.

c) Likewise, the DSCP does not encourage consultees to suggest alternatives to, or unintended consequences of, the 2PA or its implementation methods.

d) The grounds above in **Issue 7** and **Issue 8** lead the Claimant to conclude that this strategic aim is decided. Does the Court agree?

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There has been a breach of the Claimant's legitimate expectations:

27) **Issue 9:** The DSCP, by failing to give adequate reasoning and/or justifications for **Issues 1-8** set out above, fails to honour the legitimate expectations the DSCP creates in being the focal point of "the largest single consultation exercise on the future of tackling drugs the country has seen". (p.7)

> "This consultation document, backed by a wider programme of consultation events over the summer and autumn of 2007, will involve the public, communities, families, experts and current and ex drug users. It will be **the largest single consultation exercise on the future of tackling drugs the country has seen**". (p.7, emphasis added)

28) **Issue 10:** Contrary to the legitimate expectation created by the Defendant's statement in the DSCP forward: "We want to have an open debate, **engaging everyone who has a contribution to make**" (p.5, emphasis added), consultees cannot determine why tobacco appears wholly excluded from the consultation's definition of drugs and similarly why alcohol is at best ambiguously included, thereby possibly excluding those drugs and the contribution their users and traders may wish to make to the consultation and future Drugs Strategy.

29) **Issue 11:** Contrary to the legitimate expectation created by the Defendant's statement in the DSCP forward: "We have moved on from a **polarised** debate and single approaches to a balanced strategy focused on outcomes, based on evidence and **delivered through partnership**" (p.5, emphasis added), the DSCP denies partnership to those persons who commerce in drugs targeted by the 2PA in contrast to those who commerce in drugs apparently <u>not</u> targeted by the 2PA, e.g. alcohol and tobacco traders currently in partnership with Government.

30) **Issue 12:** Contrary to the legitimate expectation created by the Defendant's statement in the DSCP forward: "We have moved on from a polarised debate and single approaches to a balanced strategy focused on outcomes, **based on evidence** and delivered through partnership" (p.5, emphasis added), the DSCP admits that the 2PA lacks "evidence". *Cf. Supra* **Issue 6**

31) **Issue 13:** Contrary to the legitimate expectation created by the Defendant's statement in the DSCP forward: "We have moved on from a polarised debate and single approaches to a balanced strategy focused on outcomes, **based on evidence** and delivered through partnership" (p.5, emphasis added), the DSCP omits relevant evidence which indicates that any intended unequal application of the 2PA would "lack a consistent and objective basis". *Cf. Supra* **Issue 5**

    a) The DSCP omits relevant "evidence" from the 2005-2006 House of Commons Science and Technology Committee report, **HC 1031**, *Drug classification: making a Hash of it?* examining Government's use of scientific evidence in policy making under the Misuse of Drugs Act 1971 <u>and</u> the 2006 report of the statutory Advisory Council on the Misuse of Drugs, *Pathways to Problems: hazardous use of tobacco, alcohol and other drugs by young people in the UK and its implications for policy'*. Each report elucidates, in their respective ways, how no objective justification exists for the risk management distinctions Government makes in implementing the legal framework which underpins the current Drug Strategy and the proposed second aim.

b) The ACMD report *Pathways to Problems* stated unequivocally:

> "**We believe that policy-makers and the public need to be better informed** of the essential similarity in the way in which psychoactive drugs work […] At present, the legal framework for the regulation and control of drugs clearly distinguishes between drugs such as tobacco and alcohol and various other drugs which can be bought and sold legally (subject to various regulations), drugs which are covered by the Misuse of Drugs Act (1971) and drugs which are classed as medicines, some of which are also covered by the Act. […] **these distinctions are based on historical and cultural factors and lack a consistent and objective basis**". (Para 1.13, emphasis added)

c) The ACMD admitted in *Pathways to Problems* that, in exercising their legal duty under the 1971 Act, they had discriminated upon the ground of legal status:

> "Although its terms of reference do not prevent it from doing so, the ACMD has not considered alcohol and tobacco other than tangentially. The scientific evidence is now clear that nicotine and alcohol have pharmacological actions similar to other psychoactive drugs. Both cause serious health and social problems and there is growing evidence of very strong links between the use of tobacco, alcohol and other drugs. **For the ACMD to neglect two of the most harmful psychoactive drugs simply because they have a different legal status no longer seems appropriate**". (p.14, emphasis added)

d) In relation to this, the ACMD recommended in *Pathways to Problems*:

> **Recommendation 1:** As their actions are similar and their harmfulness to individuals and society is no less than that of other psychoactive drugs, tobacco and alcohol should be explicitly included within the terms of reference of the Advisory Council on the Misuse of Drugs. (Para 1.14)
>
> **Recommendation 11:** A fully integrated approach should be taken to the development of policies designed to prevent the hazardous use of tobacco, alcohol and other drugs. (Para 4.48)

e) Six weeks earlier, **HC 1031**, *Drug classification: making a Hash of it?* concluded, *inter alia*:

> "106. One of the most striking findings highlighted in the paper drafted by Professor Nutt and his colleagues was the fact that, on the basis of their assessment of harm, **tobacco and alcohol would be ranked as more harmful than LSD and ecstasy** (both Class A drugs). […]107. The classification system purports to rank drugs on the basis of harm associated with their misuse but **we have found glaring anomalies in the classification system as it stands and a wide consensus that the current system is not fit for purpose**. […] 108. The problems we have identified highlight the fact that ***the promised review of the classification system is much needed*** and we urge the Government to proceed with the consultation without further delay. (Emphasis added)

f) Even though **HC 1031**, *Drug classification: making a Hash of it?*, recommended "that a consistent policy be developed as part of the forthcoming review of the classification system" (Paragraph 59), in Government's reply to **HC 1031**, **Cm 6941**, the Defendant's predecessor reneged on the promised[1] review of the drug classification system under the Misuse of Drugs Act 1971:

> "The Government believes that the classification system discharges its function fully and effectively and has stood the test of time. The current 3-tier classification system allows for **clear and meaningful distinctions to be made between drugs**. Its familiarity and brand recognition amongst stakeholders **and** the public is not to be dismissed. There is a wide understanding that Class A drugs are the most dangerous **substances**, and therefore carry the heaviest criminal penalties; whilst Class C drugs, although still harmful, are not of the same order" […] "Government has decided not to pursue a review of the classification system at this time".[2] (Emphasis added)

g) Yet, both the Committee and the ACMD had made it unequivocally clear that the classification system did <u>not</u> make "clear and meaningful distinctions … between drugs"; in fact, they made it clear that alcohol and tobacco are more harmful than some Class A drugs and should therefore be included. Hence, the "wide understanding that Class A drugs <u>are</u> the most dangerous substances" is <u>the</u> crucial misunderstanding that the Committee and the ACMD intended be corrected via the promised review of the classification system; the promised review on which the Defendant's predecessor reneged.

h) Unfortunately, the Claimant asserts, this matter still remains unresolved and obfuscated in the current Drug Strategy consultation, particularly re the 2PA which is about the implementation of the police power linked to the drug classification system under the Misuse of Drugs Act 1971.

i) Had the Defendant taken into account in the DSCP this relevant evidence then most if not all of the **Issues** set out in this claim would be mute. Accordingly, Government's refusal to accept both the ACMD's and the Science and Technology Committee's intention to correct inaccurate information is plain when the DSCP suggests three Class A drugs are "generally held" to be the most harmful, thereby implying that these drugs are the most harmful whilst avoiding falsely claiming that they in fact are:

> "Estimates suggest that the market per year for heroin is in the region of 20 tonnes and those for cocaine and crack about 18 tonnes and 16 tonnes. While these three drugs are **generally held** to cause the most harm in the UK …" (p.23, emphasis added)

j) The Claimant thus asserts, with a high degree of certainty, that the distinction impugned in **Issue 3** between "drugs" and "substances" is a deliberate attempt by Government to obscure their failure to treat like cases alike by implying that somehow drugs identified as "drugs" in the DSCP are inherently different from drugs identified as "substances" in the DSCP.

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[1] *Hansard*, HC Deb, 19 Jan 2006, Col 983 *et seq.*

[2] **Cm 6941** (2006) paragraphs 3 & 12

k) Indeed, in **Cm 6941**, Government's reply to **HC 1031**, the Defendant's predecessor explained, unconvincingly, Government's reasoning for treating alcohol and tobacco, thus these drugs' traders and users, differently from analogous drugs controlled under the Misuse of Drugs Act 1971:

> "The distinction between legal and illegal substances is not unequivocally based on pharmacology, economic or risk benefit analysis. It is also based in large part on historical and cultural precedents. A classification system that applies to legal as well as illegal substances would be **unacceptable** to the **vast majority** of people who use, for example alcohol, responsibly and would conflict with deeply embedded historical tradition and tolerance of consumption of a number of substances that alter mental functioning (ranging from caffeine to alcohol and tobacco). Legal substances are therefore regulated through other means. **However, the Government acknowledges that alcohol and tobacco account for more health problems and deaths than illicit drugs…**". (p.24) (emphasis added)

l) Crucially, this refusal to treat like cases alike is <u>not</u> justified by Government on the basis of objective factors related to the legitimate aim of drug harm reduction, (targeted by all proposed aims except the 2PA), but on subjective factors unrelated to <u>any</u> public health and safety justification, "historical and cultural precedents", *viz* good old-fashioned majoritarian public opinion.

m) Moreover, these subjective factors are themselves selective, concerned only with the historical and cultural precedents of the majority who consume the 'Western' drugs alcohol and tobacco and <u>not</u> with the historical and cultural precedents of minorities who prefer different drugs. Such cultural and historical factors are equally applicable to describing racism, sexism and homophobia; they describe but fail to justify majoritarian discrimination.

n) Consistent with majoritarianism, Government declared in **Cm 6941** that equal treatment vis-à-vis the 2PA, i.e., blanket prohibition of the exercise of property rights in drugs, would be "unacceptable" to those who use, for example alcohol, responsibly. Yet, there is clear evidence that the majority of those who use controlled drugs do so responsibly and also find prohibition unacceptable. On this, the 2001-2002 Parliamentary Home Affairs Select Committee report, HC-318, *'The Government's Drug Policy: is it working?'* stated:

> "Around four million people use illegal drugs each year. Most of these people do not appear to experience harm from their drug use, nor do they cause harm to others as a result of their habit" (Para 20).

o) Essentially, the Defendant fails to make the proper distinctions to be drawn under the 1971 Act between reasonably safe and unreasonably harmful drug consumption and trade, a distinction implied by the Act's title and by reference to drug use which is capable of having "harmful effects sufficient to constitute a social problem", s1(2), as opposed to drug use that does not have such effects. Additionally, the Defendant also fails to recognize that current regulations under the Act may be amended if new evidence shows that this would enhance the achievement of the Act's legitimate aims of harm reduction as, significantly, the Act is <u>not</u> fettered to the UN drug Conventions.

p) Finally, because the neutral Misuse of Drugs Act 1971 gives no indication that such an extreme difference of treatment under the Act is intended conjunct the fact that the UK is now a multicultural society based on equality, tolerance and respect for diversity, any majoritarian discrimination such as identified herein cannot be reasonable, fair, acceptable or lawful.

q) Hence, consultees should have been given a proper opportunity to make their views known on such an inherently vital matter that underpins the risk management distinctions Government makes in implementing the legal framework which in turn underpins the current Drug Strategy, the DSCP and its proposed second aim.

r) This failure to give consultees an opportunity to comment upon evidence which impugns the central tenet of Government's Drug Strategy is an abuse of power which defeats Edwards holding at 103:

> "[I]f … a decision-maker, in the course of decision-making, becomes aware of some internal material or a factor of potential significance to the decision to be made, fairness may demand that the party or parties concerned should be given an opportunity to deal with it."

s) And as stated in Coughlan at 115:

> "The risk an authority takes by not disclosing such [evidence] is not that the consultation process will be insufficient but that it may turn out to have taken into account incorrect or irrelevant matters which, had there been an opportunity to comment, could have been corrected".

t) In fact, this failure to allow consultees to contribute to "open debate" (p.5) on the "evidence" which shows an unjustifiable discrimination at the heart of the Governments Drug Strategy, the people's Drug Strategy, contravenes the spirit of the consultation process itself as the DSCP promised explicitly:

> "We have moved on from a **polarised debate** and **single approaches** to a balanced strategy focused on outcomes, **based on evidence** and **delivered through partnership**". (p.5, emphasis added)

u) This failure – by the Defendant to disclose to consultees evidence which makes it clear that the critical risk management distinctions drawn by Government in the implementation of their Drug Strategy and in the issuance of the DSCP are not targeted to the actual risks drugs presented to individuals and society as the public interest, rationality and our children demand but are instead drawn on "historical and cultural factors [which] lack a consistent and objective basis" – is as dangerous and irresponsible as uninformed drug use.

v) The Claimant asserts that all of this has led to neglect for the public interest by the Defendant and that the ACMD, admittedly, shares some responsibility.

w) The Claimant asserts Government does not want an "open debate" (p.5) on the "evidence" thus his legitimate expectations have been thwarted by a consultation which does nothing more than move deckchairs on the Titanic.

32) **Issue 14:** Consultees have a legitimate expectation that the Cabinet Office *Code of Practice on Consultations 2004* will be followed in the DSCP, at least in spirit, if not in letter. And where it is not followed, Consultees have a legitimate expectation that any reasons for the deviation would be set forth in the consultation document itself.

a) In terms of the *Code of Practice on Consultations 2004 Criterion 2.2* the DSCP does not declare any assumptions made about those who are likely to be affected by the 2PA, let alone who will likely be affected. Any intended difference of treatment between those who exercise property rights in equally harmful drugs, whether distinguished as "drugs" or "substances", would contradict the DSCP's call for a Consistent approach:

> "It is more effective to address **all** substances that are misused by young people, including illegal drugs, alcohol and volatile substances, rather than focus on one type" (p.8)

b) In terms of the *Code of Practice on Consultations 2004 Criterion 2.3*, if there exist things which cannot be changed about Government's drugs policy, i.e., if the Defendant's discretion is fettered due to prior executive commitments such as the three UN drug Conventions, and/or commitments to the current implementation of the 1971 Misuse of Drugs Act and/or to majoritarian opinion or attitudes, then this is not made clear and explicit in the DSCP nor does the DSCP set out the public interest justification for such fettering.

c) In terms of the *Code of Practice on Consultations 2004 Criterion* 6.6 the Principles of Good Regulation, the 2PA appears likely to apply a blanket prohibition on the exercise of property rights in some drugs rather than Targeting harmful use and trade as currently is the case for restrictions applied to alcohol and tobacco. There is thus a lack of Consistency between restrictions applied to the exercise of property rights in equally harmful drugs; restrictions on the exercise of property rights of equally harmful drugs lack Proportionality, with alcohol and tobacco regulations being disproportionately weak whilst regulations applied to controlled drugs are disproportionately severe; there is little, if any, Transparency concerning these issues; Accountability is divided between different Government Departments with escalating incoherence.

d) Other than the 2PA, the consultation appears to Target harmfulness since proposed Aims 1, 3, and 4 all appear to target harmful effects of consumption and trade of all drugs, including alcohol and tobacco.

> "We aim to make further progress on: [1] reducing the harms drugs cause to the development and well-being of young people and families; [2] bringing the full force of law enforcement to bear on drug dealers at all levels; [3] reducing the harms drugs cause to the health and well-being of individuals and families; and [4] reducing the impact of drugs on local communities – reducing drug related crime and associated antisocial behaviour". (p.7)

e) In the final analysis, the Claimant asserts that were the Defendant to actually apply Government's Principles of Good Regulation to the Drug Strategy and the DSCP the **Issues** raised in this claim would be mute.

Claimant Concludes:

33) The consultation has taken into account an incorrect and irrelevant distinction which does not exist between "drugs" and "substances", hence, according to the ACMD, the Science and Technology Committee and the Claimant, the distinction is irrational and unjustifiable. All other **Issues** arise from this.

34) Thus, the Claimant asserts that Government's Drug Strategy consultation and paper is fundamentally flawed and so procedurally unfair as to be unlawful, moreover, it is built upon a non-transparent inequality before the law of consumers and traders of equally harmful drugs under the Misuse of Drugs Act 1971 and that this appears to result from bias and undeclared fettered discretion on the part of Government founded upon "historical and cultural" factors lacking a consistent and objective basis, i.e., classic majoritarianism.

    a) The consultation ignores new evidence indicating that unjustifiable unequal treatment before law underpins Government drugs strategy.

    b) Alcohol and tobacco, drugs used and traded by the electoral majority and the majority of Government Officials, are excluded from the Misuse of Drugs Act 1971 whilst equally or less harmful drugs used by minorities are included and subject to a disproportionate blanked prohibition of property rights – import/export, s3, supply and production, s4, possession, s5, cultivation, s6, etc. – irrespective of their drug classification or the risk they pose to individuals and society when misused.

    c) This denies the majority equal protection in the exercise of property rights whilst minorities are denied equal freedom; a fair balance has not been struck between public welfare and individual autonomy.

    d) Because the consultation does not mention this fundamental strategic decision, which the Claimant asserts results in the deliberately disparate use of the terms 'drugs' and 'substances' as a means to obscure it, both groups are denied the right to be informed of the reasons for the unequal treatment and so denied their right to be heard in this desperately needed consultation.

    e) And because no public consultation has ever taken place concerning this strategic decision to implement the law unequally; it is "clearly and radically" wrong not to consult properly and adequately upon this strategic decision now that it has been elucidated by reports of both the Advisory Council on the Misuse of Drugs and the House of Commons Science and Technology Committee and especially now that Government has graciously entered upon a public consultation of its Drugs Strategy voluntarily: *Cf. R (Greenpeace) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) at para 63.

35) Beside it being "clearly and radically wrong" for the DSCP to not inform consultees of Government's "single approach", Government has ignored extensive evidence over 70 plus years which shows that a blanket prohibition of drugs is not a safe, cost-effective, suitable or proportionate method of reducing drug harm. Thus, whilst Government appears to have a closed mind, we suffer.

Loss suffered or feared suffered:

36) Claimant believes that the DSCP's procedural unfairness results in the following detriments:

a) It leaves consultees in a position where they can neither intelligently consider nor intelligently respond to the DSCP proposals and questions with a sense of shared purpose in formulating the aims of a future Drug Strategy.

b) It wastes the valuable time of the public in responding to an inadequate consultation and may even cause their disillusionment in the consultation process itself, a.k.a. "consultation fatigue". If the people lose faith in public consultation on what is a quintessential issue to overall public welfare, they may lose faith in participatory Government itself.

c) If the proposed second aim is not genuinely open for consultation, it denies those affected by the 2PA their right to be heard.

d) It damages an opportunity to seek the optimum operating state for the Government's Drugs Strategy both in balancing individual liberty with public welfare and in targeting the efforts and resources of a limited Government budget where it is most needed, the reduction of all drug harms. As is all too apparent, our children's lives depend on us getting it right.

e) It denies consultees the opportunity to tell Government that it is the policy of drug prohibition itself, i.e., the 2PA, which is:

i. fuelling the increase in street violence and gun crime;
ii. empowering organised criminals;
iii. flooding the already over-crowded prisons with inmates and heroin;
iv. driving recidivism through the roof;
v. corrupting public officials at all levels;
vi. eroding international security;
vii. distorting economic markets and moral values;
viii. and that international political bodies have encroached upon the States' traditional police powers to define the criminal law and protect the health, safety and welfare of their citizens, *ad nauseum*.

f) It denies the Claimant an opportunity to tackle head-on the Government's lack of joined-up policy making in this theatre where responsible and autonomous individuals make free and fully informed conscious choices to exercise property rights in drugs for ludibund, medicinal, spiritual and/or religious purposes.

g) It denies the Claimant an opportunity to establish that the Government's application of the Misuse of Drugs Act 1971 to him and others similarly situated is an abuse of majoritarian power not unlike racism, sexism and homophobia. Remember, Babylon's walls could fall in one hour.

STATEMENT OF CASE

Remedy Sought:

37) The Claimant seeks an interim injunction against the defendant prohibiting the continuation of the Drug Strategy Consultation process until the merits of this Claim are decided in a substantive hearing or until further order; this would include the public pronouncement of the withdrawal of the consultation process pending the outcome of this claim.

38) Alternatively, in the interim, the claimant will accept a written and published undertaking by the defendant to voluntarily: a) withdraw the consultation document; b) halt the consultation; c) redraft and reissue the consultation document consistent with the *Code of Practice on Consultation 2004 Criterion 6* and the law on consultation within 90 days.

39) Otherwise, via a substantive hearing, the Claimant seeks:

    a) a declaration that the consultation paper and process is unlawful;

    b) a prohibitory injunction against the defendant continuing the Drug Strategy Consultation process with the consultation paper *'Drugs: Our Community, Your Say, July 2007'* and any similar documentation;

    c) a mandatory order directing the SSHD to a) immediately withdraw the DSCP paper *'Drugs: Our Community, Your Say, July 2007'* and b) to redraft and reissue it consistent with the Code of Practice on Consultation 2004 Criterion 6 and the law on consultation within 90 days or whatever length of time the Court feels is appropriate.

    d) Costs and Damages to be determined by the Court as appropriate.

– I firmly believe that the facts stated in this draft Statement of Case are true.

Casey William HARDISON
Claimant

August 28th 2007