

NITROUS OXIDE – CRIMINALISING POSSESSION AS A “CONTROLLED DRUG”

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On 26 March 2023, the Government announced its intention to make the simple possession of nitrous oxide (“laughing gas”) a criminal offence for the first time and that there will also be tighter controls on retailers “to prevent the supply of nitrous oxide for misuse”. [\[Link\]](#). In its ‘*Anti-Social Behaviour Action Plan*’, the Government states (para.22) that “When Parliamentary time allows, we intend to legislate to make nitrous oxide a Class C drug with potential prison sentences and unlimited fines for unlawful supply and possession” [\[Link\]](#). See also the Government’s response to the ACMD [\[Link\]](#).

The Government’s position is contrary to the conclusions of the *Advisory Council on the Misuse of Drugs* that carried out a detailed “Harms Assessment” of the substance [\[Link\]](#). It concluded that nitrous oxide “should not be subjected to control under the Misuse of Drugs Act 1971” for the following reasons:

- Level of health and social harms: current evidence suggests that the health and social harms are not commensurate with control under the Misuse of Drugs Act 1971.
- Proportionality of sanctions: the offences under the Misuse of Drugs Act 1971 would be disproportionate for the level of harm associated with nitrous oxide and could have significant unintended consequences.
- Impact on legitimate uses: control under the Misuse of Drugs Act 1971 could produce significant burdens for legitimate medical, industrial, commercial, and academic uses. The current scale and number of legitimate uses that stand to be affected is unknown but is estimated to be large.

The ACMD made seven recommendations that included retaining nitrous oxide as a substance subject to enforcement under the Psychoactive Substances Act 2016, but supported by interventions (such as various consumer protection measures) designed to reduce health and social harms associated with the substance.

The ACMD assessment makes clear that the inhalation of nitrous oxide for its non-medicinal psychoactive effects carries potential risks to personal health. Between 2001–2020, there were 56 deaths associated with the substance (but some deaths “occurred in medical settings”; para.4.1); 2,041 deaths associated with benzodiazepines (Class C); 47 deaths association with solvents; and 426 deaths associated with fuels (ACMD: para.4.6). People who repeatedly use nitrous oxide “are at a dose-dependent risk of developing serious neurological consequences” (para.4.14). However, there are “no readily available data on

the number of patients undergoing treatment for neurological harms associated with nitrous oxide in the UK” (para.4.18).

The PSA 2016 imposes a ‘blanket’ prohibition on acts of producing, supplying, offering to supply, importing or exporting, and (in a custodial setting only) the possession of a non-exempted “psychoactive substance” that is “likely to be consumed by individuals for its psychoactive effect”. Exempted substances include “medicinal products”, “controlled drugs”, “alcohol”, “tobacco”, “caffeine”, and substances that are “ordinarily consumed as food” and which do not contain a prohibited (non-authorised) psychoactive ingredient. Nitrous oxide is a permitted food additive (E942) and thus, when used as such, is exempted from the PSA 2016.

In terms of enforcing the PSA, nitrous oxide presented problems from the start. The Court of Appeal (England and Wales) decided that nitrous oxide was not a “medicinal product” when consumed for a purpose that was unconnected with health (*R v Chapman* [2017] EWCA Crim 1743). It also decided that the substance is capable of producing a “psychoactive effect” in a person regardless of whether the biological effect was achieved directly or indirectly (*R v Rochester* [2018] EWCA Crim 1936).

If nitrous oxide were to be classified as a “controlled drug” for the purposes of the Misuse of Drugs Act 1971, a number of consequences would follow.

1. The substance would no longer be a “psychoactive substance” for the purposes of the PSA 2016. This is because “controlled drugs” (MDA) and “psychoactive substances” (PSA) are mutually exclusive.
2. The simple possession of nitrous oxide would become a criminal offence under the MDA – subject to any exemptions, exceptions, or defences enacted under the MDA or its associated Regulations.
3. Unless excepted (etc.) under the MDA, the simple possession of nitrous oxide for recreational use in private, would also be a criminal offence.
4. The maximum penalties for trafficking in drugs that are controlled under the MDA, are substantially higher (even in respect of Class C drugs) than those available under the PSA 2016.
5. Detailed provision would need to be made in order to permit (presumably in the least bureaucratic manner) many different medical, commercial and industrial applications of nitrous oxide. One approach might be the enactment of provisions in the MDA that are specific to nitrous oxide so that the possession, supply etc., of that substance “without reasonable excuse” or “without good reason” is made unlawful (and criminal). However, such an open-textured approach would differ markedly

from the existing structure of the MDA under which prohibitions are imposed – subject to exemptions that are particularised in Regulations. The Government’s response to the ACMD suggests that some licensing measures *may* be introduced in the supply of nitrous oxide: “We accept the ACMD’s recommendation to consult on legitimate uses to help inform how we continue to enable legitimate use within the legislation, for example through appropriate licensing measures potentially applied to supply if appropriate”. It is conceivable that licensing would apply in respect of wholesale supplies rather than retail supplies. If nitrous oxide were to be made a Class C controlled drug, would a Home Office licence be required to import or to export the substance (even for personal use, other than inhalation)?

The Government’s thinking may be that if the PSA 2016 cannot prevent the recreational use of nitrous oxide, then criminalising the supply and possession of it under the MDA 1971, may do so. It means of course that the Government would be rejecting the view of the ACMD that offences under the MDA would be disproportionate to the level of harm associated with nitrous oxide, and that there is a risk of creating significant unintended consequences.

It would be unusual for a gas to be classified as a “controlled drug” under the MDA 1971. In cases where nitrous oxide is contained in a balloon, the person holding it is in possession of the balloon and the gas. But possession of the gas will ‘evaporate’ once the gas is released – which may pose some challenging issues of enforcement if the gas were to be classified as a “controlled drug”.

The PSA 2016 repealed the Intoxicating Substances (Supply) Act 1985. The latter was intended to address ‘glue-sniffing’ (solvent abuse) by making it an offence for an *adult* to supply (or offer to supply) a substance (other than a controlled drug) to a person under 18 years of age, knowing (or having reasonable cause to believe) that the recipient was under age and that the substance (or its fumes) would be likely to be inhaled by the latter for the purpose of intoxication. The 1985 Act did not criminalise the simple possession of an “intoxicating substance”, which is arguably unsurprising given the multiple applications of solvents and glues.

Messaging through legislation is important. But the credibility of the message is also important.

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