Legal Highs, Legal Nightmares

Legal Highs or as those in the professional world seem to like to call them nowadays; Novel Psychoactive Substances (NPS) are a loosely defined (there is no official definition for NPS) group of synthetic chemical compounds that elicit a similar effect to those of controlled substances found under the Misuse of Drugs Act 1971. Despite the 'Legal' High tag they are illegal to sell, advertise or supply for the purpose of human consumption. It is for this reason that packaging for substances with dubious sounding intended uses such as 'bath salts', 'room deodorisers', ‘potpourri’ or ‘plant foods’ carry no penalties for possession.

In the same way that controlled substances such as cannabis, cocaine, amphetamines or ecstasy can produce a varied and differing response in the user, so can NPS. They can be categorised as a stimulant, dissociative, hallucinogen, depressant etc. just as the substances they mimic, and this is also true when looking at their routes of administration – NPS; depending upon their type can be smoked, ingested, snorted or injected just as their controlled cousins can.

NPS are largely produced in eastern countries such as China or India and then shipped over to Europe where they are distributed and sold via the internet, high street head shops, market stalls or by any retailer that wishes to exploit the current legal failings and apparent confusion of European Governments.

So who’s responsibility is it to regulate, enforce, disrupt or cease the trade in Novel Psychoactive Substances in the UK? It would appear that nobody really wants to put their hand up to that one.

The EU stumble along and occasionally ban a substance or two, just as they have this week with the likes of MDPV, methoxetamine, AH-7921, and 25i-NBOMe, while the UK Government introduced the Temporary Class Drug Order, or TCDO for short, as their best effort to date 2012. This order potentially gives them the powers to make a legal high a controlled substance for up to 12 months while they make a decision to ban or not to ban. At the time of writing no substances have been added to the TCDO list in 2014.

In December of 2013 the Home Office published guidance for local councils on legislative powers already available to ‘tackle’ head shops. The guidance offers little in the way of solutions for local authorities and in fact carries a line stating more or less that due to existing legal loopholes a successful prosecution will be difficult. This comes as no comfort to the professionals within local authority Public Health departments, Trading Standards officers and Police who come under increasing local pressure to act, and act now! Seemingly with little support from central Government.

So what are the existing powers? The majority of the powers are established consumer protection laws more readily deployed by Trading Standards departments enabling them to prosecute or cease those trading in mislabelled goods or selling items to the consumer under a false pretence.
Consumer Protection from Unfair Trading Regulations 2008 (CPRs)

What is it?

This legislation protects the consumer from such spurious activities as special offers that don't exist to shops advertising never ending closing down sales and in short is designed to offer (as the title says) the consumer protection from unfair or misleading trading practices. The regulations also ban misleading omissions and aggressive sales tactics, such as doorstep selling.

Will it work?

The main point of the law hinges around the seller omitting something that is ‘likely to lead the ‘average’ consumer to make a different transactional decision than they would otherwise make’ thereby being deemed ‘misleading’ under the CPRs Act. The problem comes when trying to prove that the ‘average’ consumer entering a head shop is unaware of what he or she is purchasing and is as a result making a different transactional decision regardless of whether or not the item purchased is labelled ‘potpourri’, ‘room deodoriser’ and carrying the ‘not for human consumption’ disclaimer. The likelihood is that both parties involved in the transaction know this NOT the case and renders the CPRs Act difficult to implement. Chester county council encountered major problems when attempting to seize and destroy products from a local head shop using the CPRs. Trading Standards officers in the authority said the labels “not for human consumption” and “not suitable for under-18s” were not enough to warn customers of any risks posed. Items bought during test purchases by officials were not tested and as a result the case was thrown out by the District Judge who said she “struggled to see how the charge could fit in with CPRs 2008, the Medicines Act or the Chemicals (Hazard Information and Packaging or Supply) Regulations 2009” and described the case as “a nightmare for any prosecuting authority”.

Intoxicating Substances (supply) Act 1985

What is it?

Simply put, this Act makes it an offence for any retailer to supply or offer to supply a substance (which is not a controlled drug) to a person who they know is under the age of 18 or have reason to suspect is under 18; or they know or have reasonable cause to believe that the substance is, or the fumes are, likely to be inhaled by the person, for the purpose of causing intoxication.

Will it work?

While effective in deterring the sale of volatile substances to young people, it carries what is known as a ‘mens rea’ or ‘guilty mind’ aspect that means you would have to prove that the vendor without doubt knew the substance was going to be used for something other than its stated purpose of, for example, ‘room deodorisation’ despite clear labelled instruction such as not for human consumption/do not ingest.

There are two other regulations that are indicated as useful in the disruption of NPS sale; The Cosmetic Products (safety) Regulations and the Distance Selling Regulations.
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(DSR) – both of these hinge upon packaging infringements such as in the case of the Cosmetic Products (Safety) Regulation where a product not listing ingredients will be in breach and therefore able to be seized. In the case of the DSR, any online supplier is unable to clearly provide an address to the consumer in good time can have operations disrupted. The issue with this is that most suppliers will be savvy enough to give the appearance of an address or at the very least a PO Box.

General Product Safety Regulations (GPSRs) 2005

What is it?

The seemingly most effective and permanent solution, and the one that most local authorities seem to be pinning all of their hopes upon is the GPSRs or as it is now often referred ‘The Belfast Model’.

A victory was proclaimed after Belfast City Council was granted powers to confiscate and destroy substances they believe to be ‘legal highs’. A ‘forfeiture order’ was granted using powers granted under the GPSRs against owners the city’s head shops. Belfast council have now removed substances from Belfast ‘head shops’ and the retailers no longer stock or sell the legal highs.

Since this action was taken there has been a scramble, often led by ill prepared, uninformed and under pressure local authorities to implement the GPSRs in relation to retailers stocking Novel Psychoactive Substances.

Will it work?

Well it has for now in Belfast, but it is important to remember that no legal challenge against the authority was mounted by the head shops.

The purpose of the General Product Safety Directive is to ensure that ‘all products intended for or likely to be used by consumers under normal or reasonably foreseeable conditions are safe’, and the Swiss cheese style holes begin to appear with the inclusion of the ‘not for human consumption’ labelling. This inclusion makes a prosecution under GPSRs difficult, and it is this difficulty that the Home Office makes reference to in its guidance to local authorities, as the burden of proof remains with them to prove that the product is in fact dangerous. The technology available to test the substances is scarce and expensive to outsource, this coupled with shrinking staff and shrinking budgets faces councils with barriers against successful action.

Anti-social Behaviour Crime and Policing Act 2014 (ASB)

What is it?

Section 76 of the new 2014 ASB and Policing Act allows the closure of premises under the proviso ‘that the use of particular premises has resulted, or (if the notice is not issued) is likely soon to result, in nuisance to members of the public, or that there has been, or (if the notice is not issued) is likely soon to be, disorder near those premises associated with the use of those premises, and that the notice is necessary to prevent the nuisance or disorder from continuing, recurring or occurring’
The Act allows closure of premises for a maximum period of 48 hours if the notice issued by a police officer (of at least the rank of superintendent), or a notice is issued by a local authority and the notice is signed by the chief executive officer of the authority or a person specifically designated by them.

Following this maximum 48hr period any further period of closure must be heard by a magistrate and may not exceed 3 months.

**Will it work?**

The Act appears to be responsible for a spate of recent closures in Somerset, Kent and Yorkshire and in some cases has led to the Head Shop owners throwing in the towel and closing voluntarily rather than running the risk of repeated financial outlay on new premises (the Act applies to the property, not the proprietor) that may (and probably will) face further closure and disruption. So it seems that this is the easiest option to disrupt and inconvenience retailers into submission, but has again faced no significant legal challenge proving its effectiveness and ultimately relies upon the recipient of any such magistrate sanctioned closure notice simply giving up the ghost in favour of an easy life.

The square peg to round hole method of using legislation to address issues for which they were not designed is a potential recipe for disaster, as without the precedent of a rigorous legal challenge it is unclear as to how the laws would stand up in relation to NPS in court. My guess, based upon the current situation and the seemingly organised and adaptable approach of distributors is that there is a very interesting battle ahead.

The recently released Advisory Council on the Misuse of Drugs paper - which accounts for the bulk of the high street head shops products (for now) suggests an approach based on the action of all ‘third generation synthetic cannabinoids’ and their ability to activate the CB1 receptor in brain. This seems to be a more permanent solution to the issue, but is one that has yet to be implemented.

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