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Submission on call for evidence

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## **Inquiry on illegal drug use and its effects on society and the economy**

The alliance for rights-oriented drug policies (AROD) is grateful for this opportunity to raise awareness about human rights.

In the past ten years there has been movement from interpreting the UN Drug Control conventions in the light of a drug-free ideal—where the criminal law was seen as indispensable—to emphasise the ground reality and the intention to promote health and welfare. Internationally, therefore, to ensure that the control regime does not contribute to unnecessary harm, there is a push to ensure that the quality of the legislation meets human rights demands,<sup>1</sup> and the Home Affairs Committee should focus on this in its inquiry on UK drug policy.

After 50 years of a war on drugs it is uncontroversial that the Misuse of Drugs Act has failed to limit the problem of illegal drugs. Instead, the combined insight is that the prohibition has had unfortunate additional consequences, that the distinction between legal and illegal substances

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<sup>1</sup> See WHO, UNDP, UNAIDS and International Center on Human Rights and Drug Policy; [International Guidelines on Human Rights and Drug Policy](#) (2019), Council of Europe, Parliamentary Assembly: [Drug policy and human rights in Europe: A Baseline Study](#) (2019). A/HRC/47/40, *Arbitrary detention relating to drug policies: Study of the Working Group on Arbitrary Detention* (2021). See also the Norwegian Royal Commission [NOU 2019:26](#)



is irrational, and that a health policy approach is the most appropriate way to limit problems associated with drug abuse. Precisely for this reason, European countries are busy devising new policies, some decriminalizing drug use while others are regulating the market for cannabis.

The work of the Home Affairs Committee, therefore, should elaborate on the most appropriate model for drug policy, in accordance with human rights demands, and our report [\*Human Rising\*](#) provides a basis for the human rights paradigm. This [acclaimed](#) manuscript presents a comparative analysis on the development of drug policy in the Western world. Moral panic is shown to be the engine of drug prohibition; the problem with the Misuse of Drugs Act is expanded upon (pp. 105-23); and the solution is plain: Once the psychological and power political reasons behind drug prohibition are exposed, the drug law becomes connected to the arbitrary persecution of the past, and remedies must be made.

### **Human rights and drug policy**

As shown in *Human Rising*, sociologists, criminologists, psychologists, and jurists have noted scapegoating as the engine of drug prohibition. This phenomenon—our tendency to blame out-groupings for problems that we have a collective responsibility to solve—is the common denominator behind all human rights violations, and as half of Europe are regulating the cannabis market, the Home Affairs Committee should consider the implications.

There is no doubt that the costs of prohibition are enormous. The wickedness inflicted on society by alcohol prohibition was nothing compared to the prohibition of drugs and only public panic ensures the continuation of punishment. This has been [obvious](#) for decades.<sup>2</sup>

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<sup>2</sup> Public panic has been evident since the 1970. See for instance KAPLAN, *MARIJUANA: THE NEW PROHIBITION* (1971), the report of the National Commission on Marijuana and Drug Abuse (1972), the Consumers Union Report, *Licit and Illicit Drugs* (1972). Most recently, the Norwegian Royal Commission



Instead of providing leadership, however, politicians have obstructed human rights demands, and that is why more and more courts recognise autonomy for cannabis use. In Norway and elsewhere, [civil disobedience](#) movements ensure that more judgments are coming, and with the COE Baseline report, the 2021 report of the Working Group on Arbitrary Detention, and the guidelines of UNDP et al. there is a solid basis for anchoring human rights in drug policy.

The analyses that have been done affect the right to use. Several courts have given good judgments in this area,<sup>3</sup> and it is obvious that principles such as autonomy, proportionality, equality, and the presumption of liberty invalidate punishment against cannabis users. Even so, the answer to a rights analysis depends on the questions asked, and the committee cannot complete its task unless it examines whether it is necessary to continue a criminal market when half of Europe is in the process of regulating cannabis:

*Is it the case that the UK needs the prohibition law to protect society, or are citizens better served by removing the Misuse of Drugs Act? Are there good reasons for punishment in the domain of drug policy, or would it be better to acknowledge the hunt for scapegoats and the arbitrary persecution of earlier times?*

This is for the Home Affairs Committee to review. An effective remedy lies at the heart of human rights, and the definition of arbitrary detention is simple: we are dealing with arbitrary detention when punishment is not compatible with human rights. To be within the realm of human rights, the law must promote a legitimate purpose, be the least intrusive

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investigated the evolution of drug policy and words like "unbalanced views", "misleading perceptions", "misapplication of punishment", and "reality-resistant iniquity" were used. According to the Royal Commission, it's a debate characterised by "stereotypical representations", "moral indignation and revenge urges", and one in which, a "scientific understanding of the drug problem has played a minor role". "Panic" was used several times in this report. [NOU 2019:26- From punishment to help](#), chapter 3. See also Michael Vitiello, *The War on Drugs: Moral Panic and Excessive Sentences*, 69 Clev. St. L. Rev. 441 (2021) available at <https://engagedscholarship.csuohio.edu/clevstlrev/vol69/iss2/8>

<sup>3</sup> See the judgements of constitutional courts in [Georgia](#), [Mexico](#), and [South Africa](#)



of all available instruments, and reflect a well-adjusted balancing of the individual's right to freedom as measured against society's need for protection.

It is the state's responsibility to show that this is the case, but no one has documented that punishment is a good idea. Politicians have imagined drugs as the enemy at the gate, an evil against which war must be declared, but whether the enemy must be fought by tyrannical methods is disputed. That is why there is a broad agreement on decriminalisation.

### **Decriminalisation not a solution**

For unprincipled people, this is the easiest way to distance themselves from the sins of the past. The idea is to limit the damage that comes with punishment by using fewer totalitarian means, but without looking at the root of the evil; the prohibition itself. This is how many politicians would rather have it, but it is a halfwit-solution. In decriminalised regimes, prohibitionists rightfully object to their countries opening the doors to organised crime, while drug users find it ridiculous that they must buy cannabis from gangsters instead of growing it themselves or ordering from legal manufacturers abroad.

It is difficult not to interpret such policies as a state-sponsored mafia racket. Decriminalisation only enables the continuing influence of a black market and if the goal is to reduce stigma (or the crime associated with the illicit drugs), the Home Affairs Committee must consider incorporating a regulated market.

The UK cannot have a fair and wholesome drug policy without it. Not only is separating drug users from drug dealers a gordian knot but proposing different limits to the quantities of drugs recommended for decriminalisation would do absolutely nothing to prevent arbitrariness in punishment. To the contrary, the dynamics of drug prohibition will



continue to ensure that drug users become dealers<sup>4</sup> (and then prisoners), and it is just absurd to insist on drawing a line to justify subjugation.

After all, people having 10, 20 or 100 grams in their pocket does not meaningfully decide if they should be pathologized or demonised, and the more the police intensify the persecution of producers and dealers, the more the quality of goods deteriorates, causing more violence to arise in the drug market. In the end, the society remains caught in a destructive cycle, and it is just because of the need for scapegoats that no one asks if there are good reasons for punishing sellers and manufacturers.

Since society continues to distort the law of supply and demand into a context of victim and aggressor, the proponents of the drug law can still praise themselves for their efforts in the war on drugs. They can leave a market [worth](#) around €500 billion to criminals, thus maintaining a source of budget, self-esteem, and powers, but no one has shown how this is compatible with human rights. This is what needs to be done. Drug prohibition exposes drug users and society to completely unnecessary risk, and the Home Affairs Committee must look more closely at the implications of international law.

*If we recognise that there are not only pathological reasons for why people choose drugs, and that the humanisation of drug addicts makes it problematic to prosecute, how about subjecting them to the dangers of a criminal market? Is the prohibition of drugs necessary in a modern society?*

The answer is obvious for those who want to see. Yet the blind spot remains and the committee has a duty to emphasise, clarify, and deliver on human rights obligations. Politicians cannot continue as before

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<sup>4</sup> Because of the complications with a criminal market, the prohibition will continue to provide incentives for drug users to sell to friends and to store more than the projected quantity of decriminalised goods. The prohibition also makes drug users prone to venture deeper into the criminal world because the better the connection, the better the price and the quality of product.



without facing the principles of human rights, and AROD has five questions that must be answered if they wish to retain punishment in drug policy.<sup>5</sup>

Unless this is done, civil society cannot not be assured that punishment is just. A human rights analysis is the only way to ensure a firm foundation for UK drug policy, and whether the right to use cannabis includes a regulated market remains to be seen. The issue has not been the subject of analysis, but [Amnesty](#) and [Human Rights Watch](#) argues that human rights concerns involve the drug market, and further testing is not complicated.

### **Human rights analysis 101**

To be "necessary in a modern society", there must be a certain relationship between goals and means. The prohibition must not only be the least intrusive of all available measures but suitable to achieve the goal of a drug-free society. In this regard, it is becoming increasingly obvious that the penal code has failed to limit the problem of illegal drugs. This is why decriminalisation is seen as a minimum, but the Council of Europe<sup>6</sup> and the UN Working Group for arbitrary detention<sup>7</sup> recommend further investigations. Even INCB, the UN's supreme authority in drug related issues, advocates that human rights must be emphasised, and as the Norwegian Royal Commission on drug reform noted:

*Interference with the exercise of the right to privacy, etc. can only happen 'when this is in accordance with the law and is necessary in a democratic society for the sake of national security, public*

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<sup>5</sup> See MIKALSEN, [HUMAN RISING](#) (2018) chapter 12.2.3, or [Five questions that must be answered | Alliance for Rights-Oriented Drug Policies \(arodpolicies.org\)](#)

<sup>6</sup> "Further to their existing legal obligations, States should assess the intended and unintended effects of envisaged drug policy measures, taking into account their potential impact on the enjoyment of human rights." Council of Europe, Parliamentary Assembly: [Drug policy and human rights in Europe: A Baseline Study](#) (2019) p. 5.

<sup>7</sup> "The Working Group has expressed concern about disproportionate sentences for drug-related offenses . . . and has called for reform to ensure that sentences for drug-related offences are proportionate." A/HRC/47/40, Arbitrary detention relating to drug policies: [Study of the Working Group on Arbitrary Detention](#) (2021) p. 6.



*security or the country's economic welfare, to prevent disorder or crime, to protect health or morality, or to protect the rights and freedoms of others', cf. Article 8 (2). In order to be compatible with ECHR Article 8, infringement of the right to respect for privacy, etc. the intrusion must promote a legitimate purpose and be necessary in a democratic society. . . . [Although] the states have a wide margin of discretion in assessing whether infringement of the right to privacy and family life is compatible with Article 8 of the ECHR, the requirement of necessity [implies] . . . that it must be demonstrated that the intervention corresponds to a 'pressing social need'. It must also be shown that the intervention is proportional to the purpose of the intervention, taking into account relevant interests that must be weighed in the assessment. It is primarily the responsibility of the state to do these assessments, but the ECtHR may review whether the arguments alleged to justify the intervention are relevant and proportionate and whether the rights were adequately respected in the decision-making process leading up to the adoption of the intervention.<sup>8</sup>*

This is uncontroversial. The state can intervene in individual freedoms if the intervention reflects a rational intrusion as measured against society's need for protection but must show that this is the case. Beyond this point, the state has a margin of discretion that is relatively wide. In social and economic issues, it is allowed wide leeway to devise its policies, but when it comes to criminal policy, the matters are different. When it comes to coercion and deprivation of liberty, the room for discretion is smaller, and the law must be narrowly tailored to serve a significant governmental interest.

As noted, no one has looked at this issue in its entirety. The European Court of Human Rights (ECtHR) and the UN apparatus has yet to look

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<sup>8</sup> [NOU 2019](#): 26, Chapter 7.4.3., p. 181



at the drug laws and the human rights commitments, but there can be no doubt about the requirement for human rights analysis. This cannot be postponed, and the following ECHR articles anchor the fundamental problem of the law.

## **Allegation of human rights violations**

- *The application of the Misuse of Drugs Act is incompatible with Article 3 of the ECHR, which states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment".*

"Inhuman" and "degrading" are associated with arbitrariness.<sup>9</sup> To the extent that principles of equality, proportionality, autonomy, and presumption of liberty are not observed, that we are dealing with unreasonable discrimination in the field of intoxicants, and that we have allowed double standards to define a policy,<sup>10</sup> there will be a violation of Article 3 of the ECHR. That is the case unless the [questions](#) posed by the rights-oriented debate are answered.

- *The application of the Misuse of Drugs Act is incompatible with Article 5 of the ECHR which states that "everyone has the right to personal liberty and security. No one shall be deprived of his liberty except . . . in accordance with a procedure prescribed by law."*

"Prescribed by law" means that the Misuse of Drugs Act must be within a framework as defined by the principles of human rights. The law must reflect an informed balancing of the individual's right to freedom as measured against society's need for protection. However, in this context, drug policy is characterised by public panic. This means that there is a mismatch between the Misuse of Drugs Act and human rights.

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<sup>9</sup> For the connection between the Penal Code sections 231, 232 and arbitrary imprisonment, see MIKALSEN, [TO END A WAR](#) (2015) pp. 95–99. See also MIKALSEN, [TO RIGHT A WRONG](#) (2016) chapter 8.5.5.

<sup>10</sup> For the double standards that perpetuate the problem of arbitrary persecution, see MIKALSEN, [HUMAN RISING](#) (2018) pp. 46–71. See also MIKALSEN, [TO RIGHT A WRONG](#) (2016), Chapter 8, especially 8.5.3, 8.5.4, 8.5.5.



The professional responsibility for the law is not being maintained, and the law is more intrusive than fair. As a society, without good reason, the UK exposes an outgroup to evils that it does not wish for the ingroup, and this is a violation of Article 5 of the ECHR – unless the [questions](#) raised by the rights-oriented debate are answered.

- *The application of the Misuse of Drugs Act is incompatible with Article 8 of the ECHR, which states that "Everyone has the right to respect for his private and family life, his home and his correspondence." It continues that "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."*

"Necessary in a democratic society" is the key. Traditionally, the state has had a wide margin of discretion, but it is widely documented that there are no good reasons for punishing drug use. Therefore, more and more courts are invalidating the drug law with regard to Article 8 of the ECHR. No court have looked at this issue in its full scope, but deprivation of liberty is an intrusive tool and if less invasive means are better suited to deal with the problem of drug abuse, it is difficult to see the necessity of a cure that hurts worse than the disease. In fact, professionals warn against the side-effects of the drug prohibition as one of the greatest challenges of our time and in this regard, no one has identified any necessity.<sup>11</sup> For this reason, it can be argued that positive human rights obligations include a regulated market,<sup>12</sup> and the Home

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<sup>11</sup> For the dynamics that the prohibition of drugs has inflicted on society, see MIKALSEN, [HUMAN RISING](#) (2018) part 2. See also MIKALSEN, [TO END A WAR](#) (2015) chapter 3

<sup>12</sup> PIET HEIN VAN KEMPEN, MASHA FEDOROVA, *INTERNATIONAL LAW AND CANNABIS: REGULATION OF CANNABIS CULTIVATION AND TRADE FOR RECREATIONAL USE: POSITIVE HUMAN RIGHTS OBLIGATIONS VERSUS UN NARCOTIC DRUGS CONVENTIONS* (2019); see also Jenkins, Bernstein, MacPherson, Tyndall, *Legal regulation as a human right and public health approach to currently prohibited substances*, International Journal of Drug Policy, Volume 91, May 2021



Affairs Committee should weigh the state's reasons for demonising and imprisoning those who possess illegal drugs. *Are there good reasons for this? Is it vital for the right to self-determination whether people have 10, 20 or 100 grams, or does the state enact an arbitrary division to be able to continue a policy that depends on scapegoats to survive?*

- *The application of the Misuse of Drugs Act is incompatible with Article 9 of the ECHR which states that "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance." It goes on to say that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others."*

This means that a human rights analysis is needed to assess the interference with freedom of thought, conscience, and religion. Principles of equality, proportionality, autonomy, and presumption of liberty put the bar high for criminalisation, and the state cannot be granted any margin of discretion as long as important questions remain unanswered. Public panic, after all, has been [detected](#) and the attached documentation shows how the right to freedom of thought, conscience, and religion entails a right to take illegal drugs.<sup>13</sup> There is no doubt that drug use does offer something positive. There is also no doubt that several substances play an important role for seekers of the divine and if those responsible for the drug policy cannot respond, the prohibition is invalidated by Article 9 of the ECHR.

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<sup>13</sup> On sections 231 and 232 of the Penal Code and the problem with freedom of thought, conscience, and religion, see MIKALSEN, [TO END A WAR](#) (2015) p. 99-111.



- *The application of the Misuse of Drugs Act is incompatible with Protocol 12 and Article 14 of the ECHR, which states that "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

"Other status" is crucial. The summary is not exhaustive, and any discrimination must withstand a human rights analysis if there is deprivation of liberty. Therefore, to the extent that there is an irrational distinction between legal and illegal substances and in the approach to different users, there will be a violation of Protocol 12 and Article 14 of the ECHR.<sup>14</sup> We will be dealing with arbitrary persecution—which will be the case if the five [questions](#) remain unanswered.

Space considerations make the treatment short but all the articles are connected and reflect on each other. To the extent that drug prohibition violates the principle of equality, proportionality, or autonomy, there will be arbitrary persecution; it will be a discriminatory, disproportionate, and unduly infringing practice for which an effective remedy will be urgently needed.

As the world is waking up to the problem of scapegoating, moral panic, arbitrary persecution and human rights violations, therefore, the Home Affairs Committee should recognise the abject failure of drug prohibition and secure human rights. Politicians must respond to the human rights argument, and it remains to be seen whether anyone can reasonably show that the application of punishment has any utility. For that to happen, the state must show good reasons to discriminate in the field of drug policy. Cannabis and psilocybin users, for example,<sup>15</sup> must

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<sup>14</sup> On the principle of equality and drug policy, see MIKALSEN, [TO END A WAR](#) (2015) chapter 3.1.1. See also MIKALSEN, [TO RIGHT A WRONG](#) (2016) chapter 8.4.4.

<sup>15</sup> In principle, this also applies to other forms of drug use.



be shown to pose a greater threat than alcohol users. Otherwise, only "culture" can be used as a reason and it is not a proper legal justification.

It should be mentioned that this is what prohibitionists have done. When pressed on the unscientific basis of the classification system, they tend to insist on a separation between licit and illicit drugs because, allegedly, there is a culture for alcohol but not for any other substances. Even so, "culture" is no good reason to discriminate in the area of drug policy and the committee is in possession of evidence which establishes that the ABC system violates basic human rights protections.

In addition to *Human Rising*, AROD also includes [Constitutional Challenges to the Drug Law](#), a case study which details how the US justice system have denied drug users a fair trial more than a hundred times. Douglas Husak, professor of law at Rutgers University, has noted that the U.S. Attorney General needs to see it and the committee now has the essentials to review the human rights dimension of drug policy both abroad and at home and to ensure protection for the persecuted.

Yours Sincerely

A handwritten signature in blue ink that reads 'Roar Mikalsen'. The signature is written in a cursive, flowing style with a long, sweeping tail at the end.

Roar Mikalsen

President of AROD