EXPLANATORY MEMORANDUM TO

THE MISUSE OF DRUGS ACT 1971 (AMENDMENT) ORDER 2023

2023 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Home Office and is laid before Parliament by Command of His Majesty.

2. Purpose of the instrument

2.1 This Order in Council (the 'Order') brings nitrous oxide under control as a Class C drug under Part 3 of Schedule 2 to the Misuse of Drugs Act 1971 ('the 1971 Act'), owing to its widespread misuse and health and social harm in the UK.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument (that is, the jurisdiction(s) which the instrument forms part of the law is) is England and Wales, Scotland and Northern Ireland.

4.2 The territorial application of this instrument (that is, where the instrument produces a practical effect) is England and Wales, Scotland and Northern Ireland.

5. European Convention on Human Rights

5.1 The Minister for Crime, Policing and Fire, the Rt. Hon. Chris Philp MP, has made the following statement regarding Human Rights:

"In my view the provisions of the Misuse of Drugs Act 1971 (Amendment) Order 2023 are compatible with the Convention rights."

6. Legislative Context

6.1 The 1971 Act controls drugs that are "dangerous or otherwise harmful." Schedule 2 to the 1971 Act specifies these drugs and groups them into three categories, Class A, Class B and Class C. This three-tier system of classification provides a framework within which criminal penalties are set with reference to the harm a drug has, or is capable of having when misused, and the type of illegal activity related to that drug. Part 1 of Schedule 2 to the 1971 Act lists Class A drugs, Part 2 lists Class B drugs, and Part 3 lists Class C drugs.

6.2 Nitrous oxide is currently captured under the Psychoactive Substances Act 2016 ('the 2016 Act'). This Order specifies that nitrous oxide will now instead be controlled as a drug which is "dangerous or otherwise harmful" under the 1971 Act. It will be a Class C drug.

6.3 The Government's decision to control nitrous oxide as a Class C drug under the 1971 Act follows consultation with the Advisory Council on Misuse of Drugs (the 'ACMD') in accordance with section 2(5) of the 1971 Act.

6.4 It is intended that a further related statutory instrument will come into force at the same time as this Order. This will amend the Misuse of Drugs Regulations 2001 (S.I. 2001/3998) ('the 2001 Regulations') to make such provision as is appropriate for legitimate access to nitrous oxide for example in healthcare.

7. Policy background

What is being done and why?

7.1 Nitrous oxide, as a psychoactive substance, is currently subject to the provisions of the 2016 Act. Whilst it is an offence to produce, supply, offer to supply, possess with intent to supply, import or export a psychoactive substance where a person knows, or is reckless as to whether, it will be consumed for its psychoactive effects, it is not an offence to possess a psychoactive substance (except in a custodial setting).

7.2 In September 2021, following increasing reports of the harms associated with its misuse, the Government commissioned the ACMD to undertake an updated harms assessment of nitrous oxide. The Government requested that the ACMD include in its assessment a recommendation on the appropriate legislative control of the substance.

7.3 The ACMD provided their updated harms assessment in March 2023, which can be found here:

Nitrous oxide: updated harms assessment (accessible) - GOV.UK (www.gov.uk)

7.4 In its report, the ACMD did not recommend the control of nitrous oxide under the 1971 Act, the ACMD noted the risk of health harms such as nerve damage, particularly where high volumes of nitrous oxide are used. The ACMD also noted anecdotal reports of links to anti-social behaviour and the widespread use and availability of the drug, particularly amongst children and young people.

7.5 The Government carefully considered the ACMD's report. Its response to the ACMD's report can be found here:

Government response: ACMD nitrous oxide review (accessible) - GOV.UK (www.gov.uk)

7.6 The Government notes the health and social harms of the misuse of nitrous oxide, including anti-social behaviour. It also notes that nitrous oxide is the third most misused substance among those aged 16-24 (according to the 2021/22 Crime Survey1 for England and Wales). As a consequence, the Government has taken the decision to control nitrous oxide under the 1971 Act.

7.7 The control of nitrous oxide as a Class C drug under the 1971 Act will take nitrous oxide outside of the ambit of the 2016 Act and instead place it within the framework of controls of the 1971 Act. This will make possession of nitrous oxide an offence, unless such possession is authorised under the 2001 Regulations or by licence. It will also mean that the penalties and enforcement provisions under the 1971 Act apply.

[1] Crime in England and Wales - Office for National Statistics (ons.gov.uk)

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union/ trigger the statement requirements under the European Union (Withdrawal) Act 2018 / implement any future relationship agreement with the European Union within the meaning provided by section 37 of the European Union (Future Relationship) Act 2020.

9. Consolidation

9.1 It is not currently intended that amendments to Schedule 2 to the 1971 Act will be consolidated.

10. Consultation outcome

10.1 The ACMD has been consulted and, following review of nitrous oxide's harms, recommended that nitrous oxide remain subject to the 2016 Act. However, the Government has decided to control nitrous oxide under the 1971 Act for the reasons outlined in paragraph 7.6.

11. Guidance

11.1 The decision to control nitrous oxide as a Class C drug under the 1971 Act will be communicated to key stakeholders and the wider public. The Home Office will issue a circular with legislative guidance primarily for the police and the courts. The Government will continue to update its messaging on the harms of this substance, including through its FRANK information and advisory service online, which is aimed at young people and adults to inform them of drug related risks and harms.

12. Impact

12.1 There is no, or no significant, impact on business, charities, or voluntary bodies from this Order.

12.2 The impact on the public sector relates to law enforcement and the criminal justice system, including the court system, the prison system, and the Legal Aid Agency. There will be increased costs to the public sector as a result of an increased volume of offenders charged by the police and progressing through the criminal justice system.

12.3 A full Impact Assessment is submitted with this memorandum and published alongside the Explanatory Memorandum on legislation.gov.uk.

13. Regulating small business

13.1 The Order applies to activities that are undertaken by small businesses.

13.2 The Government intends to minimise the burdens on legitimate users of nitrous oxide, whilst mitigating risks of harm, misuse and diversion, through provision to be made in the accompanying regulations amending the 2001 Regulations.

14. Monitoring & review

14.1 The Government will continue to monitor the control measures through the regulatory framework governing controlled drugs. It will also maintain oversight through the healthcare regulatory bodies in England and through engagement with the Devolved

Administrations. This will include national data collection and surveys on crime and drug misuse.

15. Contact

15.1 Marcus Starling at the Home Office, Telephone: 07833 294 373 or email: Marcus.Starling1@homeoffice.gov.uk can be contacted with any queries regarding the instrument.

15.2 Marcus Starling, Deputy Director for the Drug Misuse Unit at the Home Office can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Minister for Crime, Policing and Fire, the Rt. Hon. Chris Philp MP, can confirm that this Explanatory Memorandum meets the required standard.