

A simple (ish) guide to the Psychoactive Substances Act (PSA)

Date: 2/11/2017
Version: 1.7

What is it?: The Psychoactive Substances Act (PSA) comes into force on 26th May 2016.¹ The Act makes it an offence to produce, supply or offer to supply any psychoactive substance if the substance is likely to be used for its psychoactive effects and regardless of its potential for harm. The only exemption to the PSA are those substances already controlled by the Misuse of Drugs Act, nicotine, alcohol, caffeine and medicinal products. The main intention of the PSA is to shut down shops and websites that currently trade in 'legal highs'. Put simply any substance is illegal to produce or supply if it is likely to be used to get high.

Introduction of the Act: The Bill was given royal assent on the 28th January 2016 and was due to start on 6th April 2016^{2,3} although this was delayed until 26th May 2016.

Existing laws: The PSA doesn't replace the Misuse of Drugs Act (1971) so laws around existing illegal (controlled) drugs will remain the same. Temporary Class Drug Orders (TCDOs) can still be applied and the Human Medicines Regulations (2012) will remain the same. However the Intoxicating Substances Supply Act (1985)* will be scrapped.

At present a substance causing concern must be reviewed by the ACMD (the Advisory Council on the Misuse of Drugs) to assess any potential harm. The ACMD then advise the government on a course of action. The government do not have to take this advice, but are bound to consult the ACMD first. The ACMD will still have a role and a 'new' or emerging psychoactive substance can still be brought under the Misuse of Drugs Act, but the PSA was introduced without consulting the ACMD and fundamentally changes UK drug legislation.

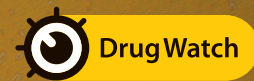
Possession: Possession of a psychoactive substance **is not an offence**, except in a 'custodial institution' (prison, young offender centre, removal centre etc.). The definition of custodial institution does not include Mental Health secure units.⁴ Possession with intent to supply, importing or exporting a psychoactive substance are all offences under the PSA.

Importation: The PSA does not include possession as an offence as the government did not want it to lead to the mass criminalisation of young people. It has however been pointed out by some commentators that the importing of a psychoactive substance would include buying a psychoactive substance from a non-UK based website, which may lead to individuals being prosecuted.

Supply and production: The main thrust of the PSA is intended to act against shops and websites supplying 'legal highs'. If the experience of similar legislation introduced in Ireland is repeated the visible outlets selling them will most likely disappear. The PSA is also quite specific in that the onus is on the sellers and producers of a substance to ensure it is not 'likely' to be consumed for its psychoactive effects.

*Made it an offence to sell volatile substances (e.g. glues, gases) to under 18s if it was believed they would be inhaled to cause intoxication.

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Penalties under the Psychoactive Substances Act 2016:

Offence	Summary (Magistrates Court)	Indictment (Crown Court)
Possession	Not an offence	Not an Offence
Possession in a custodial institution	Up to 12 months and/or a fine*	Up to 2 years and/or a fine
Possession with intent to supply	Up to 12 months and/or a fine*	Up to 7 years and/or a fine
Supply/offer to supply etc.	Up to 12 months and/or a fine*	Up to 7 years and/or a fine
Production	Up to 12 months and/or a fine*	Up to 7 years and/or a fine
Importation/exportation	Up to 12 months and/or a fine*	Up to 7 years and/or a fine
Failure to comply with a Prohibition or Premises notice	Up to 12 months and/or a fine*	Up to 2 years and/or a fine

*Summary convictions in Northern Ireland are up to 6 months and/or a fine.

Offences under the PSA would be considered 'aggravated' if they involved supply to under 18s, were near a school or a children's home (Local authority children's homes etc).

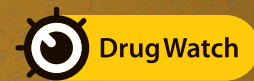
Powers of stop and search: Police will have powers of stopping and searching individuals and premises, however possession of psychoactive substances will not be an offence and which substances are actually psychoactive is far from legally clear at present.⁵ Currently the Association of Chief Police Officers (now the National Police Chiefs' Council) guidance states that a 'legal high' should be treated like a controlled drug until proven otherwise. Further guidance may be issued.

Premises and Prohibition notices: Within the PSA there are quite detailed powers given to the police and local authorities for dealing with the licensees (owners etc.) of shops and UK-based websites, and penalties for failure to comply with notices issued under this section of the PSA.

Definition of psychoactive: Quite what constitutes a psychoactive substance is one of the most contentious issues in the Act, which defines it as: *"any substance which (a) is capable of producing a psychoactive effect in a person who consumes it, and (b) is not an exempted substance"*. The government are confident that a psychoactive substance can be defined, tested simply and cost effectively and subsequently proven in court.⁵ The ACMD among others have argued consistently that the definition used is too broad and is unworkable in practice. The Home Secretary responded to the concerns of the ACMD in November 2015.⁶

Exemptions: Nicotine, alcohol and caffeine will be exempt from being classed as psychoactive substances. Medicinal products as defined by the Human Medicines Regulations (2012) and drugs already controlled by the Misuse of Drugs Act (1971), will also be exempt. Further exemptions can be made by the Secretary of State after consultation with the ACMD.⁷

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Poppers: Calls for an exemption for poppers because of their prevalence in LGBT communities and a fear that banning them would lead to the use of more dangerous substances were rejected.⁸ The government planned a review of the evidence.⁹ However, after the ACMD pointed out that poppers would not fall within the Act's definition of a psychoactive substance,¹⁰ the review was scrapped.¹¹ The PSA **does not apply** to 'Poppers' (alkyl nitrites such as isopropyl nitrite).

Nitrous oxide: Nitrous oxide is exempt when for example it is used as a propellant for whipped cream, but covered by the PSA if sold with the likelihood of it being used to get high. However, in August 2017, a case of Intent to Supply was dismissed on the grounds that nitrous oxide was exempt as it could be used as a medicine regardless of the likelihood of it being used for intoxication. The judge ruled that the PSA does not make it clear that a substance is exempt only when it is used for medicinal purposes,¹² however this argument was rejected by the Court of Appeal in October 2017.¹³

Food and drink: Nutmeg (which is psychoactive) is used as an example in the government's commentary document¹⁴ of a psychoactive substance that would be classed as a food and be exempt unless it was specifically sold for psychoactive purposes. The evidence submission by Release and Transform¹⁵ points out the difficulties this issue may cause in practice. It also summarises most of the other main arguments/debates used against the PSA, such as whether it will be workable or enforceable in practice and whether it will make things worse as (arguably) may have happened in Ireland and Poland where similar legislation was introduced.

References:

1. <http://www.legislation.gov.uk/uksi/2016/553/regulation/2/made>
2. <http://services.parliament.uk/bills/2015-16/psychoactivesubstances.html>
3. <http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2016-03-21/32044/>
4. Personal correspondents with Home Office, Drugs legislation - Drugs & Alcohol Unit. April 2016
5. A substance will be regarded as psychoactive if it tests positive to one of a series of 5 – 10 in vitro receptor assays (list of tests not yet in the public domain). A database of around 100 compounds that have already been tested will be updated as new compounds are discovered, identified and tested. A new compound will be tested and if positive added to the list and the law applied retrospectively.
6. <https://www.gov.uk/government/publications/home-secretary-letter-to-acmd-chair-psychoactive-substances-bill>
7. <http://www.legislation.gov.uk/ukpga/2016/2/section/3/enacted>
8. http://www.publications.parliament.uk/pa/cm201516/cmselect/cmhaff/361/36107.htm#_idTextAnchor028
9. <http://www.theyworkforyou.com/wrans/?id=2016-01-25.23945.h&s=drug+possession#g23945.r0>
10. <https://www.gov.uk/government/publications/acmd-review-of-alkyl-nitrites-poppers>
11. <https://www.gov.uk/government/publications/psychoactive-substances-bill-overarching-documents>
12. <http://www.independent.co.uk/news/uk/home-news/laughing-has-nitrous-oxide-psychoactive-substances-act-judge-taunton-crown-court-a7920991.html>
13. <http://www.dailymail.co.uk/news/article-5039109/Hippy-crack-nitrous-oxide-illegal-drug.html>
14. <http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0063/en/16063en06.htm>
15. <http://www.release.org.uk/publications/joint-submission-public-bill-committee-psychoactive-substances-bill>