

A simple (ish) guide to the Psychoactive Substances Act

Date: 1/2/2016
Version: 1.3

What is it?: The Psychoactive Substances Act will come into force on the 6th April 2016.¹ The Act will make 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 from the Act are those substances already controlled by the Misuse of Drugs Act, nicotine, alcohol, caffeine and medicinal products. The main intention of the Act is to shut down shops and websites that currently trade in 'legal highs'. Put simply any substance will be illegal to produce or supply if it is likely to be used to get high.

At what stage is the Act?: The Bill was given royal assent on the 28th January 2016 and will become law on 6th April 2016.²

Existing laws: The Act 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 this Act was introduced without consulting the ACMD and will fundamentally change drug legislation.

Possession: Possession of a psychoactive substance **will not be an offence**, except in a 'custodial institution' (prison, young offender centre, removal centre etc.). Possession with intent to supply, importing or exporting a psychoactive substance will all become offences.

Importation: The Act 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 Act 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 Act 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 Psychoactive Substances Act 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.³ Currently the Association of Chief Police Officers (ACPO) guidance states that a ‘legal high’ should be treated like a controlled drug until proven otherwise. There will presumably be further ACPO guidance issued before April 2016.

Premises and Prohibition notices: Within the Act 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 Act.

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.³ 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 2015.⁴

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.⁵

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Poppers: Amendments to make 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 as was similar advice by the Home Affairs Select Committee.⁶ However, the government have said they will review the evidence to support the claims that *'poppers' have a beneficial health and relationship effect'*.⁷ At present 'Poppers' (alkyl nitrites such as isopropyl nitrite) will not be exempt substances when the Act becomes law.

Nitrous oxide: Nitrous oxide (when used as a propellant for whipped cream) would be exempt as a food preparation, but would be considered a psychoactive substance if it was sold with the likelihood of being used to get high. This is pretty much the situation at the moment, however the onus will be on the supplier to ensure the product was not intended for this purpose.

Food and drink: Nutmeg (which is psychoactive) is used as an example in the government's commentary document⁸ 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 Transform⁹ points out the difficulties this issue may cause in practice. It also summaries most of the other main arguments/debates used against the Act, 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.

Costs: In the current financial climate the cost of anything is a major issue and the onus of implementing various aspects of this Act appears to fall on the police, Trading Standards and local authorities. In the debate at the Committee stage the issue of payment, for example the costs of testing, expert witnesses etc. was raised without any clear answers and certainly no commitment of funds coming from any new sources.

References:

1. <http://www.legislation.gov.uk/ukpga/2016/2/contents/enacted>
2. <http://services.parliament.uk/bills/2015-16/psychoactivesubstances.html>
3. 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.
4. <https://www.gov.uk/government/publications/home-secretary-letter-to-acmd-chair-psychoactive-substances-bill>
5. <http://www.legislation.gov.uk/ukpga/2016/2/section/3/enacted>
6. http://www.publications.parliament.uk/pa/cm201516/cmselect/cmhaff/361/36107.htm#_idTextAnchor028
7. <http://www.theyworkforyou.com/wrans/?id=2016-01-25.23945.h&s=drug+possession#g23945.r0>
8. <http://www.publications.parliament.uk/pa/bills/cbill/2015-2016/0063/en/16063en06.htm>
9. <http://www.release.org.uk/publications/joint-submission-public-bill-committee-psychoactive-substances-bill>

DrugWatch is currently an informal association of charities, organisations and individuals who share an interest in establishing a robust early warning system in the UK for all types of drugs.