

Home Office circular

Psychoactive Substances Act 2016

- **Broad subject:** Crime and disorder
- **Issue date:** 20 May 2016
- **From:** Crime, Policing and Fire Group (CPFG) – Drugs and Alcohol Unit
- **Sub category:** Drug offences
- **Implementation date:** 26 May 2016
- **This circular is addressed to:** Lord Chief Justice, Justices of the Supreme Court, President of the Queen's Bench Division, Master of the Rolls, Senior Presiding Judge, Lords Justices of Appeal, Chairman of the Judicial College, High Court Judges, Presiding Judges, Resident Judges, Crown Court Judges, District Judges (Magistrates' Courts), Chairmen of the Justices, Director of Public Prosecutions, HM Chief Inspector of Constabulary, Chief Officers of Police in England and Wales, Director General of the National Crime Agency, Police and Crime Commissioners in England and Wales, Mayor's Office for Policing and Crime, College of Policing, HM Revenue and Customs, Chief Crown Prosecutors, Attorney General's Office.
- **Copies of this circular go to:** Council of Circuit Judges, Magistrates' Association, Association of District Judges, Justices' Clerks' Society, Registrar of Criminal Appeals, National Police Chiefs' Council, Association of Police & Crime Commissioners, Police Superintendents' Association, Police Federation, The Law Society, the Sentencing Council, the Bar Council, the Criminal Bar Association, Institute of Chartered Accountants of England and Wales, Citizens Advice Bureaux, Association of Chief Police Officers, Chief Probation Officers, Local Government Association

Introduction

1. From around 2008/09, the UK has seen the emergence of new uncontrolled substances that are intended to mimic the effects of controlled drugs such as cannabis, cocaine, amphetamine, MDMA (ecstasy) and heroin. These are collectively known as "new psychoactive substances" ("NPS"). The chemical composition of these substances is deliberately designed to evade the controls in the Misuse of Drugs Act 1971 ("the 1971 Act"). These substances are often inappropriately referred to as "legal highs": inappropriate given that the chemicals in them are often neither legal nor safe for human consumption. These substances have proliferated at an alarming rate and are being openly sold in head shops (retail businesses specialising in the sale of NPS and drug-related paraphernalia) on high streets across the UK and from internet sites with UK domains.
2. In view of the speed at which substances are being produced to circumvent existing laws, the Government commissioned the New Psychoactive

Substances Review Expert Panel in 2013 to review the existing legislative approach. The Panel looked at a number of international approaches and recommended a blanket ban on distribution of NPS.

3. In its October 2014 response to the Panel's report, the Government announced its intention to develop proposals for a blanket ban similar to that introduced in Ireland in 2010. In May 2015, the Government was elected with a manifesto commitment to "create a blanket ban on all new psychoactive substances, protecting young people from exposure to so-called legal highs".

4. The resultant Psychoactive Substances Act 2016 received Royal Assent on 28 January 2016. The Act creates a blanket ban on the production, distribution, sale and supply of psychoactive substances in the United Kingdom for human consumption. It also gives police and other enforcement agencies a range of powers including powers to seize and destroy psychoactive substances as defined by the Act, search persons, premises and vehicles and enter premises by warrant. It includes a number of civil sanctions to enable a graded response.

5. The 2016 Act does not replace the Misuse of Drugs Act (MDA) 1971, which provides the legislative framework for the regulation of dangerous or otherwise harmful drugs in the UK, so laws around existing illegal (controlled) drugs will remain the same. It is expected that some psychoactive substances will continue to be classified under it in circumstances where there is evidence of harms, assessed by the ACMD, which are considered sufficient to justify control with the application of the higher penalties, stricter offences and the offence of simple possession in that Act.

6. All provisions will come into force on 26 May 2016 and extend across the UK.

7. A glossary of abbreviations used in this circular is contained in Annex A

8. Points of contact can be found in Annex B.

9. Offence codes are attached at Annex C

10. Further sources of guidance are attached at Annex D

11. The Forensic Strategy to support the operation of the Act is attached at Annex E.

Psychoactive Substances (Sections 2-3)
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12. Sections 2-3 define a psychoactive substance for the purposes of the Act. A psychoactive substance is a substance which is capable of producing a psychoactive effect in a person who consumes it and is not an exempted substance. A person consumes a substance if the person causes or allows the

substance, or fumes given off by the substance, to enter the person's body in any way.

13. A substance causes a psychoactive effect in a person if, by stimulating or depressing the person's central nervous system, it affects the person's mental functioning or emotional state.¹

14. The 2016 Act lists a number of exempted substances which fall outside the definition of a psychoactive substance. Exempted substances are included in Schedule 1 either because they are already subject to existing legislation or because their psychoactive effects are negligible. These include:

- a) Controlled drugs (within the meaning of the Misuse of Drugs Act 1971);
- b) Medicinal products;
- c) Alcohol;
- d) Nicotine and tobacco products;
- e) Caffeine; and
- f) Food

15. The 2016 Act also lists a number of exempted activities which fall outside the definition of a psychoactive substance. These include;

- a) Healthcare-related activities; and
- b) Approved research

16. The 2016 Act contains a power, by regulations (subject to the affirmative resolution procedure) to vary or add to the list of psychoactive substance. Before making regulations the Home Secretary is required to consult the Advisory Council on the Misuse of Drugs, the Government's scientific advisors under the Misuse of Drugs Act 1971.

Main Offences (Sections 4-11)

17. The 2016 Act makes it an offence to: produce; supply; offer to supply; possess with intent to supply; import or export a psychoactive substance. The maximum penalty, on conviction on indictment (that is, in the Crown Court), is seven years' imprisonment, an unlimited fine, or both. There is an offence of simple possession in a custodial institution, but not in the community at large.

¹ Following advice from the Advisory Council on the Misuse of Drugs, the Government accepted that alkyl nitrites (poppers) do not meet this definition. The ACMD advice is available here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508179/Poppersadvice.pdf

The Government response is available here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/509607/Minister_Bradley_to_Professor_Les_Iversen_22.03.16.pdf

18. No offence is committed under the Act if the substance or the conduct is covered by an exemption or exempted activity specified in Schedules 1 and 2 mentioned above.

19. All of the offences at sections 4-9 are triable either way.

Section 4: Producing a Psychoactive Substance

20. Section 4 creates the offence of producing a psychoactive substance.

21. The offence has three mental elements, which are mirrored in the other main offences:

- a) The production must be intentional, so if a psychoactive substance was inadvertently created (for example, as an unintended by-product of research) the offence would not be made out. The defendant must also have intended to produce a psychoactive substance rather than any other substance.
- b) Second, the defendant must have known or suspected that the substance was a psychoactive substance.
- c) Third, the defendant must either intend to consume the psychoactive substance for its psychoactive effects, or know, or be reckless as to whether, the psychoactive substance is likely to be consumed by another person for its psychoactive effects.

Section 5: Supply and Offering to Supply a Psychoactive Substance and Section 6: Aggravation of an Offence under Section 5

22. Section 5 provides for two separate offences, namely supply of a psychoactive substance and offering to supply a psychoactive substance. The three mental requirements of the offence broadly mirror those at section 4.

23. Section 6 provides for a statutory aggravating factor when sentencing an offender for an offence of supplying, or offering to supply, a psychoactive substance where the supply, or offer to supply, took place at or in the vicinity of a school, involved the use of a courier under the age of 18 or took place in a custodial institution. This section only applies where the offender was aged 18 or over. Where one of three conditions is satisfied, the court is required to treat the condition as an aggravating factor when determining the sentence.

Section 7: Possession of a Psychoactive Substance with intent to supply

24. Section 7 provides for an offence of possession with intent to supply psychoactive substances. The conduct element of the offence is satisfied if the defendant is in possession of a psychoactive substance with a view to supplying it to another person for consumption. There are two mental elements of the offence. First, the defendant must know or suspect that the substance is a psychoactive substance. The second mental element is that the defendant must intend to supply the psychoactive substance to another person for its psychoactive effects.

Section 8: Importing or Exporting a Psychoactive Substance

25. Section 8 provides for two offences of importing or exporting a psychoactive substance. The conduct element of the offences is satisfied if the defendant imports or exports a substance and the substance is a psychoactive substance. There are three mental elements of the offences. First, the importation or exportation of the substance must be intentional. Second, the defendant must know or suspect, or ought to know or suspect, that the substance is a psychoactive substance. Third, the defendant must either intend to consume the substance him or herself for its psychoactive effects, or must know, or be reckless as to whether, the substance is likely to be consumed by other individuals for its psychoactive effects. These offences therefore cover importation and exportation of psychoactive substances whether for personal use or for the purpose of supplying others.

Section 9: Possession of a Psychoactive Substance in a Custodial Institution

26. Section 9 provides for an offence of possession of a psychoactive substance in a custodial institution. It applies to anybody on such a premises, including prisoners, visitors, and staff. There are two mental elements: first, the defendant must know or suspect that the substance is psychoactive; second, the defendant must intend to consume that substance for its psychoactive effects.

Penalties for the main offences.

Maximum penalties for sections 4-8 across the UK (triable either way):

Offences	Maximum penalty on summary conviction in England and Wales	Maximum penalty on summary conviction in Scotland	Maximum penalty on summary conviction in Northern Ireland	Maximum penalty on conviction on indictment
Section 4 (production), 5 (supply and offering to supply), 7 (possession with intent), 8 (importation/exportation)	Six months' imprisonment (rising to 12 months once section 154 (1) of the Criminal Justice Act 2003 is commenced), an unlimited fine, or both.	12 months' imprisonment, a fine not exceeding the statutory maximum (currently £10,000), or both.	Six months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both	Seven years' imprisonment, an unlimited fine, or both.

Maximum penalties for section 9 across the UK (triable either way):

Offence	Maximum penalty on summary conviction in England and Wales	Maximum penalty on summary conviction in Scotland	Maximum penalty on summary conviction in Northern Ireland	Maximum penalty on conviction on indictment
Section 9 (possession of a psychoactive substance in a custodial institution)	Six months' imprisonment (rising to 12 months once section 154 (1) of the Criminal Justice Act 2003 is commenced), an unlimited fine, or both.	12 months' imprisonment, a fine not exceeding the statutory maximum (currently £10,000), or both.	Six months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both	Two years' imprisonment, an unlimited fine, or both.

Powers for dealing with prohibited activities (Sections 12 – 35)
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27. Sections 12 to 35 provide for four civil sanctions in the Act: prohibition notices, premises notices, prohibition orders and premises orders. These civil powers afford law enforcement agencies, such as the police and local authorities, an alternative route to criminal proceedings as a way of tackling the NPS supply chain. The use of these powers will enable law enforcement officers to take action swiftly to nip a problem in the bud or to adopt a more proportionate approach to low-level offending. It will be a matter for the relevant law enforcement agency to determine which approach to adopt in any given circumstances. Where there is evidence of a criminal offence under the Act, there is no requirement to apply the civil sanctions in the first instance as a criminal prosecution may be the appropriate action to take. Equally, if a prohibition notice or premises notice has been served and is then breached, the relevant law enforcement agency might proceed to a criminal prosecution or pursue a prohibition order or premises order, as the case may be.
28. Prohibition notices and premises notices may be issued by a senior police, National Crime Agency (NCA) or Border Force officer or by a local authority. A prohibition notice would require the subject of a notice to stop carrying out “prohibited activity”, that is producing, supplying, offering to supply, importing or exporting a psychoactive substance or assisting or encouraging such an activity. A premises order would require a person, for example the landlord of head shop (retail premises selling NPS), to take all reasonable steps to prevent prohibited activities taken place on the relevant premises. There is no direct penalty for breach of a prohibition or premises notice; they effectively act as a warning to the recipient of further consequences should they continue to undertake prohibited activities, or fail to prevent such activities taking place on premises for which they have some responsibility.
29. Prohibition orders or premises orders are made by the courts. These orders may contain such prohibitions, restrictions and requirements that the court considers appropriate. In particular, a prohibition order may require the subject of the order, for example a head shop proprietor, to hand over stocks of psychoactive substances. Both a prohibition order and a premises order may also include “an access prohibition” effectively closing specified premises for up to six months. Breach of a prohibition order or premises order is a criminal offence punishable by a prison sentence of up to two years, an unlimited fine, or both.

Powers of entry, search and seizure (Sections 36 – 48)
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30. Section 36 enables police and NCA officers and customs officials to stop and search a person where they have reasonable grounds to suspect the person has committed, or are likely to commit, one of the main offences under the Act

(that is, the offences of production, supply etc of a psychoactive substance or an offence of breaching a prohibition order or premises order).

31. Sections 37 and 38 provide powers to search vehicles, vessels and aircraft if an officer has reasonable grounds to suspect they contain evidence of an offence under the Act.
32. An enforcement officer (police and NCA officers, customs officials and local authority officer) also have the power to enter and search premises for evidence of an offence under the Act in accordance with a search warrant issued by a justice of the peace (or equivalent).
33. The provisions in section 43 enable a relevant enforcement officer to seize and detain any substance found in the course of a search under the Act which the officer reasonably believes to be a psychoactive substance or evidence of an offence under any of sections 4 to 9 and 26 of the Act.
34. It is an offence contrary to section 48 for a person, without reasonable excuse, to intentionally obstruct a relevant enforcement officer in the exercise of his or her powers under sections 36-45, or to fail to comply with a reasonable requirement made or direction reasonably given by a relevant enforcement officer. It is also an offence to prevent another person from complying with such a requirement or direction. The maximum penalties for these offences are as follows:

Maximum penalty on summary conviction in England and Wales	Maximum penalty on summary conviction in Scotland	Maximum penalty on summary conviction in Northern Ireland
Six months' imprisonment (rising to 51 weeks once section 281(5) of the Criminal Justice 2003 comes into force), unlimited fine, or both.	12 months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both.	Six months' imprisonment, a fine not exceeding the statutory maximum (currently £5,000), or both.

Retention and disposal of items (Sections 49 – 54)

35. Sections 49-53 allow for the retention of items seized for as long as is necessary and, in particular, either for use as evidence in a trial or to enable forensic examination (for example, to determine whether a seized substance is a psychoactive substance), or as part of an investigation for an offence under the Act.
36. Seized psychoactive substances may be destroyed/disposed of by officers or, in certain circumstances, returned to the person entitled to them.
37. Where a person has been convicted for an offence under any of sections 4 to 9 and 26 of the Act (or an associated secondary offence), the sentencing

court must make a forfeiture order in respect of any psychoactive substances relating to the offence and may make one in respect of other items that were used in the commission of the offence. The convicted person and any other person who claims ownership of the items are entitled to make representations to the court (subsection (6)), and a forfeiture order does not take effect until the time for lodging an appeal has lapsed or until the outcome of any appeal (subsection (7)). Subsections (8) to (10) enable the court to make supplementary provision to give effect to a forfeiture order.

Border Force powers of seizure

38. Section 55 ensures that Border Force officers can exercise the powers under the Customs and Excise Management Act 1979 (“CEMA”) when they intercept psychoactive substances entering or leaving the UK, particularly by post. Border Force customs officials routinely rely on CEMA powers to enforce restrictions on the importation (or exportation) of particular items. A number of the CEMA powers would automatically apply in any event, for example the power in section 159 of CEMA to examine any imported goods, but this section provides that other CEMA provisions are engaged.

Amendments to Secondary Legislation

39. The Visiting Forces and International Headquarters (Application of Law) Order 1999 (“the 1999 Order”). The 1999 Order provides for visiting forces and headquarters to be exempt from the enactments listed in Schedule 5 as if they were a part of the home forces under the rule of law whereby, in the absence of an express provision or necessary implication, statutes do not bind the Crown. The Misuse of Drugs Act 1971 is included within Schedule 5. The 2016 Act has been inserted into Schedule 5 making the provisions of the 2016 Act subject to the exemptions provided by the 1999 Order.
40. The 2016 Act has been inserted into Safeguarding Vulnerable Groups Act 2006 (Prescribed Criteria and Miscellaneous Provisions) Regulations 2009. These Regulations prescribe the criteria which determine whether a person should be included automatically in the children’s barred list or the adults’ barred list maintained by the Disclosure and Barring Service under section 2 of the Safeguarding Vulnerable Groups Act 2006. The offence of supplying or offering to supply a psychoactive substance to a child (section 5) has been added to the children’s and the adults list.

Forensic Strategy

41. As a consequence of the new approach of the 2016 Act, which defines substances by their psychoactive properties, there is a requirement for a new forensic capability to assist prosecutors in discharging the evidential burden.

42. The Forensic Strategy at Annex E sets out guidance for Forensic Service Providers (FSPs), law enforcement agencies and expert witnesses to support the operation of the PS Act. It provides guidance on the scientific principles for the new testing regime and the process and evidential considerations to support criminal and civil sanctions under the PS Act. The strategy has been developed by the Home Office with input from the Advisory Council on the Misuse of Drugs (ACMD).

Review/Monitoring

43. The Act sets out a duty on the Secretary of State to review the operation of the Act and lay a report of the review before Parliament within 30 months of the coming into force of sections 4 to 8. This will therefore be laid in Parliament by 25 November 2018

44. In support of this, police forces are being written to separately to provide voluntary data on seizures of psychoactive substances for the first year following commencement of the Act to support this review.

45. The codes for offences under the Act are at Annex C.

Glossary**Annex A**

NPS	New Psychoactive Substances
MDA	Misuse of Drugs Act 1971
The 2016 Act	The Psychoactive Substances Act 2016
NCA	National Crime Agency

Points of contact**Annex B**

Contact	Telephone	E-mail
Team Inbox for all		psact@homeoffice.gsi.gov.uk
Karen Lancaster Drug Legislation Team	020 7035 5338	Karen.rofe@homeoffice.gsi.gov.uk
Jamie McLellan Drug Legislation Team	020 7035 1885	James.mclellan@homeoffice.gsi.gov.uk
Sindi Selmani Drug Legislation Team	020 7035 3090	Sindi.selmani@homeoffice.gsi.gov.uk

Offence Codes**Annex C**

CJS Code	Sect	Offence Description	Class	HO	PNLD ref
PS16001	4(1)	Produce a psychoactive substance	E	93/41	H12520
PS16002	5(1)	Supply a psychoactive substance	E	93/42	H12521
PS16003	5(2)	Offer to supply a psychoactive substance	E	93/43	H12522
PS16004	7	Possess a psychoactive substance with intent to supply	E	93/44	H12523
PS16005	8(1)	Import a psychoactive substance	E	93/45	H12524
PS16006	8(2)	Export a psychoactive substance	E	93/46	H12525
PS16007	9(1)	Possess a psychoactive substance in a custodial institution	E	93/47	H12526
PS16008	26(1)	Fail to comply with a prohibition / premises order re psychoactive substances	E	93/48	H12527
PS16009	27(2)	Remain on/enter premises in contravention of access prohibition re psychoactive substances	S	193/56	H12528
PS16010	27(3)	Obstruct a person entering premises/securing premises against entry re psychoactive substances	S	193/57	H12529
PS16011	48(1)	Obstruct Enforcement Officer in performance of functions under Psychoactive Substances Act 2016	S	193/58	H12530
PS16012	48(2)	Fail to comply/prevent compliance with requirement/direction under Psychoactive Substances Act 2016	S	193/59	H12531
PL02037	7E(6)	Fail to give name and address to Community Support Officer	S	138/03	H12549

Sources of further guidance

Annex D

- The Psychoactive Substances Act 2016 and Explanatory Notes:
<http://www.legislation.gov.uk/ukpga/2016/2/contents/enacted>
- Psychoactive Substances Act 2016 policy documents:
<https://www.gov.uk/government/collections/psychoactive-substances-bill-2015>
- NPCC Guidance on the 2016 Act is available to police forces
- CPS Legal Guidance will be made available at: www.cps.gov.uk
- Guidance for Trading Standards/Councils issued by the Local Government Association
- Home Office Guidance for Researchers available at:
www.gov.uk/government/publications/psychoactive-substances-act-2016-guidance-for-researchers
- Home Office Guidance for Responsible Retailers available at:
www.gov.uk/government/publications/psychoactive-substances-act-2016-guidance-for-retailers