

Circular 006/2023: Control of nitrous oxide under the Misuse of Drugs Act 1971

A change to the Misuse of Drugs Act 1971 to control nitrous oxide under Class C of that Act and to schedule the substance under Schedule 5 to the Misuse of Drugs Regulations 2001 and make provision for lawful access to the substance for legitimate purposes, including medical use.

Introduction

This circular draws attention to the contents of the below Statutory Instruments, which will come into force on at 00.01 on 8 November 2023:

- The Misuse of Drugs Act 1971 (Amendment) Order 2023 (S.I. 2023/1091)
- The Misuse of Drugs (England and Wales and Scotland) (Amendment) Regulations 2023 (S.I. 2023/1099).

The Misuse of Drugs Act 1971 (Amendment) Order 2023 classifies nitrous oxide as a Class C drug under paragraph 1(a) of Part 3 of Schedule 2 to the Misuse of Drugs Act 1971 (“the 1971 Act”). The Misuse of Drugs (England and Wales and Scotland) (Amendment) Regulations 2023 amend the Misuse of Drugs Regulations 2001 (“the 2001 Regulations”) to place nitrous oxide, and preparations or products containing nitrous oxide (hereafter referred to as “nitrous oxide”), in Schedule 5 to the 2001 Regulations and make provision for continued lawful access to the substance for legitimate purposes, including medical use.

The SIs are available at www.legislation.gov.uk, as follows:

- S.I. 2023/1091 [The Misuse of Drugs Act 1971 \(Amendment\) Order 2023 \(legislation.gov.uk\)](http://www.legislation.gov.uk)
- S.I. 2023/1099 [The Misuse of Drugs \(England and Wales and Scotland\) \(Amendment\) Regulations 2023 \(legislation.gov.uk\)](http://www.legislation.gov.uk)

These SIs are also published by the Stationery Office. Telephone orders and general enquiries: 0330 202 5070.

Background

The 1971 Act controls drugs that are ‘dangerous or otherwise harmful’ when misused, primarily under a three-tier system of classification (Classes A, B and C) which 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 undertaken in regard to that drug.

The control of nitrous oxide under Class C of the 1971 Act follows the Government’s decision to ban the substance following consultation with the Advisory Council on the

Misuse of Drugs (ACMD) as a result of the negative effect on individual people and communities, the particularly concerning rates of use by school age children and young adults, and anecdotal reports of an increase in social harms such as drug driving and littering of discarded canisters. This is alongside widespread availability of nitrous oxide for illegitimate use and the risk of neurological harm that it presents to those consuming it in significant volumes, noted in the ACMD's Updated Harms Assessment.

While the ACMD's review concluded that the overall harms were insufficient to merit control, the Government felt that the considerations outlined above justified the control of the drug under Class C of the 1971 Act.

On the 27 March 2023, the Government published its Anti-Social Behaviour Action Plan (available here: - Anti-Social Behaviour Action Plan - GOV.UK (www.gov.uk)), which set out the Government's approach to ensuring that people can live without the fear of anti-social behaviour. As part of that plan, the government committed to ban nitrous oxide.

The 2001 Regulations (S.I. 2001/3998) regulate the legitimate access to controlled drugs under the 1971 Act by placing them in one of five schedules to the 2001 Regulations according to their recognised uses as medicines or research compounds. The Schedule into which a drug is placed primarily dictates the extent to which it is lawful to import, export, produce, supply, administer and possess the drug and also imposes requirements about prescription writing, record-keeping, labelling, destruction, disposal and safe custody.

The Government consulted the ACMD on 1) the appropriate scheduling of nitrous oxide under the 2001 Regulations; and 2) how to enable non-medical, lawful uses, including industrial uses. The Government accepted the ACMD's recommendation that nitrous oxide be placed in Schedule 5 to the 2001 Regulations, with modifications, on the basis that it would offer the most suitable controls while enabling medical-related and non-medical-related uses with the fewest burdens.

Nitrous oxide – Class C

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.

The ACMD provided their updated harms assessment in March 2023. In its report, while 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 among children and young people.

The Government carefully considered the ACMD's report which is available here: [Nitrous oxide: updated harms assessment \(accessible\) - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/115555/nitrous_oxide_updated_harms_assessment_accessible.pdf). The Government decided to control nitrous oxide under the 1971 Act as a Class C drug as a result of the reported recent rise in health and social harms, and the widespread use and availability of the drug particularly among children and young people.

If in possession of nitrous oxide, it will be for the defendant to show that they fall within the scope of the exception, and so to demonstrate that they possess the drug for legitimate purposes.

In order to demonstrate that the supplier/importer/vendor has not been reckless as to supplying for non-legitimate use, it is expected that they will have taken reasonable steps to verify that the use is legitimate.

Nitrous Oxide – Illegitimate and Legitimate Use

Nitrous oxide is used for pain relief in medical settings, including dentistry. It also has a wide variety of legitimate uses in industry, manufacturing and technical processes, such as food packaging, but also in catering, as a whipped cream propellant. Hobbyists also use it in activities such as motor racing and model rocketry. The Government recognises that those users are not misusing nitrous oxide for its psychoactive effect.

Accordingly, nitrous oxide has been placed in Schedule 5 of the 2001 Regulations, but is excluded from the general permissions for importation, exportation, possession, and administration to another. Instead, new regulation 4C creates a bespoke exemption for nitrous oxide from the prohibition on importation and exportation, production, supply and possession of nitrous oxide where a person does not intend to wrongfully inhale the substance and/or, in the cases of importation, exportation, production and supply, does not know or is not reckless as to whether it is likely that another person will wrongfully inhale it.

“Wrongful inhalation” means inhalation other than for medical or dental purposes, and which is not accidental inhalation of nitrous oxide which has been released into the atmosphere (such as in industrial processes). Medical, dental and veterinary administration of nitrous oxide (which may involve inhalation) will therefore continue to be lawful, as will other activities such as use in industry or model rocketry. There is a requirement on importers, exporters, producers and suppliers to take appropriate steps to not be reckless, to ensure that subsequent users will not inhale the substance recreationally.

The Government ran a public consultation to inform this approach from 2 March to 27 May 2023, titled *Nitrous oxide: legitimate uses and appropriate controls*. The consultation and the Government response can be found here: [Nitrous oxide: legitimate uses and appropriate controls - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/nitrous-oxide-legitimate-uses-and-appropriate-controls).

This approach will not require a controlled drug licence to be held for the legitimate use of nitrous oxide. It will not impose safe storage requirements. Producers and

wholesale suppliers will be required to keep invoices (or like records) of each quantity of nitrous oxide they obtain and supply, and retail suppliers to keep records of each quantity of nitrous oxide they obtain (by regulation 24 of the 2001 Regulations).

Additionally, producers, dealers, medical practitioners and other specified persons may be required, where requested, to provide information in relation to nitrous oxide to the Secretary of State (by regulation 26 of the 2001 Regulations). All legitimate users will be encouraged to take measures to ensure that they are not reckless as to whether the substances will be used for wrongful inhalation. Additional guidance can be found on GOV.UK under Nitrous Oxide Factsheet and Guidance.

Annex A. Offence recording codes

The codes for recording offences by the police and the courts for statistical purposes within the Home Office Recorded Crime and Ministry of Justice Court Appearance Database (CAD) – which includes cautions – are as follows:

Nitrous oxide be placed under existing codes relating to “Other Class C” drugs as follows:

- 092/28 - Production of or being concerned in production of a controlled drug – Class C - other
- 092/48 - Supplying or offering to supply or being concerned in supplying or offering to supply a controlled drug – Class C - other
- 092/68 - Possession of a controlled drug – Class C - other
- 092/88 - Possession of a controlled drug with intent to supply – Class C - other
- 093/28 - Permitting premises to be used for unlawful purposes – Class C - other

Offences under s. 19(2)(a) and 19(2)(b) of the Criminal Justice (International Co-operation) Act 1990 will fall under the appropriate sub-classification code for either Class A, B or C drugs. For nitrous oxide, codes 77/55, and 77/58, which relate to Class C drugs, refer.

Importation and Exportation offences under s. 50(2) to (5) and s. 68(2) to (4)) and s. 170 (1), (2), (3) & (4) of the Customs and Excise Management Act 1979 will fall under the appropriate sub-classification code for either Class A, B or C drugs. Codes, 92/05, and 92/08 relate to Class C drugs.

Forces are required to record seizures of controlled drugs for the National Statistics Drug Seizures publication. Home Office analysts will advise of the relevant drug codes to record nitrous oxide seizures when the 2023/24 data template and guidance are distributed in the autumn of 2024.