

# **Report to the Tyne and Wear Trading Standards Joint Committee**

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## **Psychoactive Substances Act 2016**

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### **Purpose of the report**

To update the Committee on the implementation and effects of the Psychoactive Substances Act 2016 that came into force on 26 May 2016.

### **The Safety Issue**

1. The UK has seen the emergence of new substances or products that are intended to mimic the effects of traditional controlled drugs such as cannabis, cocaine, amphetamine and MDMA (ecstasy). These are collectively known as new psychoactive substances ("NPS").
2. These new substances - together with other substances that have been used as intoxicants for many years (for example, nitrous oxide) - are often referred to as "legal highs".
3. The main source of supply of new or emerging psychoactive substances is currently and historically through 'headshops', small, specialised shops which market 'legal highs' and drugs paraphernalia. The Psychoactive Substances Act 2016 is focussed on closing down the sale of unregulated and frequently harmful substances for consumption. This industry will also be the focus of enforcement monitoring and action primarily by the Police Services. The substances of concern associated with headshops are rarely, if ever, sold by legitimate retailers.
4. However the Act will have implications for legitimate retailers too, which in many cases will sell psychoactive substances (as defined by the Act) entirely legitimately, such as solvents and butane.

### **The Act**

5. It creates a number of criminal offences covering the supply of a psychoactive substance. These will apply across the UK including:
  - Producing a psychoactive substance
  - Supplying, or offering to supply, a psychoactive substance
  - Possession of a psychoactive substance with intent to supply it
  - Importing or exporting a psychoactive substance
  - Possessing a psychoactive substance in a custodial institution

6. The Misuse of Drugs Act 1971 will continue to be the main piece of domestic drug legislation in the UK and already controls over 500 psychoactive substances (as well as other harmful drugs such as heroin and cocaine). Substances controlled under the 1971 Act will not be covered by the Psychoactive Substances Act 2016. Where legitimate high street retailers are concerned, no products should contain any substance containing a controlled drug and that position is entirely unaffected by the new act.

### **What is a Psychoactive Substance?**

7. The new Act captures psychoactive substances not covered by the existing drugs framework, such as nitrous oxide. Unlike previous drugs legislation, this Act does not list substances that are affected, but covers any that fit its definitions (much like the Intoxicating Substances Act 1985).
8. There is a general understanding of so-called 'legal highs' as replacements for controlled drugs, but the Act provides a specific definition based on their effect on people. A substance must be capable of having a psychoactive effect (as defined in the Act) in order to be covered by the new legislation. A psychoactive substance is defined as one which affects a person's mental functioning or emotional state by stimulating or depressing their nervous system.
9. In practice this would include the kind of effects that we associate with controlled drugs, such as the following:
- hallucinations
  - changes in alertness
  - perception of time and space
  - mood or empathy with others
  - drowsiness
10. This wide definition is intended to pre-empt new substances emerging onto the drugs market because it defines them by their effects, rather than by their chemical structure. This means that it may be difficult for retailers to know if a substance is affected by the PS Act or not. There are several factors which make this easier.

### **Exemptions**

11. A large range of substances are completely exempted from the Act because they are fully regulated by existing laws. This means that nothing need change in the way that they are sold. The exempted substances are:
- Food
  - Any Medicinal products (defined by Human Medicines Regulations 2012)
  - Alcohol
  - Controlled drugs
  - Nicotine and tobacco products
  - Caffeine

### **Practical Implications for Retailers**

12. All of the substances that were covered by the Intoxicating Substances (Supply) Act 1985 will now be covered by the Psychoactive Substances Act 2016. They will be the primary focus for retailers. This includes the following:

- Solvent-based glues
- Correction fluids/thinners
- Marker pens
- Any kinds of aerosols
- Anti-freeze
- Nail varnish/nail varnish remover
- Nitrous oxide canisters (such as those used in whipped cream dispensers)

13. The Psychoactive Substances Act 2016 repeals the ISSA. The selling restrictions and products caught by the Intoxicating Substances (Supply) Act 1985 are entirely duplicated by this new Act so these controls will continue in altered form under the new offences described below.

14. The Act is aimed at closing down the sale of those psychoactive substances which are consumed for their psychoactive effect (as part of the market unhelpfully known as 'legal highs'). This means that most psychoactive substances caught by the provisions of the Act will not be sold by retailers in the first place.

### **Other things to consider**

15. The Act only captures substances which are supplied for human consumption for their psychoactive effect unless they are exempted by either Schedule 1 or 2 of the Act. The supply of a psychoactive substance for any other purpose is not caught. So where substances are sold by a retailer for cleaning, gardening, industrial use etc., their sale will not be an offence.

### **Offences**

16. Of the Act's offences, the supply and offer to supply offences (Section 5) are most relevant to retailers. They are similar to the offences in ISSA. The offence of supply is outlined below:

- A person intentionally supplies a substance to another person.
- The substance is a psychoactive substance.
- The person knows or suspects, or ought to know or suspect, that the substance is a psychoactive substance.
- The person knows, or is reckless as to whether, the psychoactive substance is likely to be consumed by the person to whom it is supplied, or by some other person, for its psychoactive effects.

17. A retailer should take reasonable steps to satisfy themselves that they are aware of the use of such a product. These steps are likely to be very similar to the steps that retailers currently take to comply with ISSA 1985 and could include:

- Warning signs in store/on products themselves.
- Training for staff to be able to assess risk.
- Given that young customers present a particular risk group- updating of training and age- restriction policies previously used under ISSA to make a fully informed assessment.
- Limiting quantities of substances to be sold in one purchase.

18. In any cases of prosecution, the onus will be on the prosecution to prove that the retailer knew the purpose of the purchase or that they were reckless and did not take reasonable steps to satisfy themselves of the purpose.
19. A retailer should consider the type of substance, the circumstances of the purchase (e.g. quantity and time of day), what else an individual is purchasing and any background information such as if the purchaser is a repeat purchaser and known for psychoactive consumption. For example, the purchasing of industrial cleaner on a week day alongside other household goods differs from young males purchasing nitrous oxide canisters late on a weekend.
20. There is no expectation for a retailer to go above and beyond what is reasonable and it is important to remember that the offences only apply where there is a risk of consumption.
21. An established retailer, which sells a wide variety of products entirely legitimately, is not expected to know whether each and every one of them contains a psychoactive substance.
22. Retailers are not expected to undertake testing of substances to confirm whether they are psychoactive. In particular, there are large numbers of household goods, gardening goods etc. which may or may not contain psychoactive ingredients. It is not reasonable to test each and every one of these indiscriminately.
23. The Home Office will continue to use its Forensic Early Warning System to monitor emerging substances of concern. Where it comes to light that substances are emerging as a concern, and likely to be widely sold, the Home Office will provide information to retailers through industry representatives to allow them to make risk assessments on products containing these substances.

### **Case Study 1**

24. A retail outlet which sells a range of substances stocks a species of plant and seeds. It has sold the plant for a long time without making any risk assessment. The substance is supplied to the retail outlet with no warnings from the supplier and the substance has not previously been covered by ISSA. Evidence later comes to the attention of the Home Office that this plant has psychoactive properties.
25. The retail outlet, assuming it has discharged due diligence under existing practice will not have committed an offence by supplying the plant, because it did not know, nor should it have known that the substance it sold was psychoactive. However, once it receives this information (along with the rest of the supply chain), it would be expected to make a risk assessment on the product.

### **Case Study 2**

26. In a retail outlet, a young customer who looks over 25 attempts to buy several containers of whipped cream canisters, containing nitrous oxide at 11pm. They are not purchasing anything else.

27. The cashier asks why these are being purchase and the customer is hesitant in replying and when they do they seem intoxicated, slurring their words. The cashier should consider not selling the goods.

**Recommendation**

28. The Committee is asked to note the information.