

## Guide to the Psychoactive Substances Act 2016

The Psychoactive Substances Act 2016 (PSA) comes into force on 26<sup>th</sup> May, 2016. It is a blanket ban on everything that has a psychoactive effect. The government are trying to stop the market in so-called legal highs (new psychoactive substances – NPS).

It **DOES NOT** replace the Misuse of Drugs Act 1971 (MDA) which carries on applying to controlled drugs not covered by the PSA.

This Guide will outline the possible offences that you might commit under the Act. If you are interested in the background to the Act and policy issues, please see [here](#), or contact [Release's legal team](#).

-----

For all offences, the prosecution will have to prove that a substance is psychoactive, something that we believe will be very difficult in Court. For some substances there will already be lots of evidence about their effects that will be used, but others will need careful testing. For others, testing won't prove much and other evidence, including witness statements about your behaviour, will be used. [Guidance from the Home Office](#) shows that part of the testing will be looking at the way the PS acts/reacts compared to similar drugs controlled under the MDA. However, Release is of the view that it will be difficult for the Prosecution to prove the full definition of psychoactivity as they will have to show that the substance affected '*mental functioning or emotional state*'.

**Because this is a new law it is hard to say what will happen until some cases come to Court – we will be keeping an eye on this and updating our Guidance when needed.**

In the meantime, you might want to plead not guilty and make the prosecution prove the psychoactivity of a substance. This is your right but remember there are risks involved if you are subsequently found guilty of the offence, the main one being a longer sentence than if you had pleaded guilty early on.

If you do want to challenge a prosecution or discuss a potential prosecution please call **our helpline for specific legal advice – 0207 324 2989**.

### [“Psychoactive Substance” meaning and exemptions](#)

A “Psychoactive substance” (PS) is defined as:

*“... any substance which is capable of producing a psychoactive effect in a person who consumes it”.*

*“For the purposes of this Act a substance produces 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; and references to a substance's psychoactive effects are to be read accordingly.”*

This means that a substance speeds up or slows down a person's central nervous system, affecting the way their brain works or their emotions.

[Some substances are exempted](#) from the legislation, including:

- Alcohol;
- Nicotine/tobacco;
- Caffeine;
- Medicinal products (as per the [Human Medicines Regulations 2012](#)); and

- Food and drink (this has to be something that is usually eaten/drunk and doesn't contain a banned substance. If the food/drink has a psychoactive substance that is naturally in it, it is not banned when used as food/drink. For example, nitrous oxide when used to whip cream is not controlled, but when sold for inhalation it is.)

*\*\*The Home Office has given [guidance](#) for people who sell products that have lawful uses but could also be used as a PS\*\**

[Some activities will also be allowed](#) with a PS, without an offence being committed. These are healthcare-related and approved research.

----

The following sections look at what the police can do if they suspect you have committed an offence, and what those offences are.

## [Stop and search](#)

You can only be stopped and searched (by police, National Crime Agency officers and customs officials) for psychoactive substances if the authorities reasonably suspect that you have committed, or are likely to commit, one of the offences below.

**Possession for personal use is not an offence** – you can't be stopped and searched just for this. But, you might be stopped and searched for a controlled drug (e.g. If 'a small bag of white powder' is seen) as the officer won't know what it is at first. If this happens, you should tell them straight away that it is not a controlled drug and that you want it tested.

## [Entering, searching and taking items from you](#)

The officers, mentioned above, have the power to enter and search any property under the PSA if they reasonably believe there are items in the building that are relevant evidence for an offence under the Act, and they have a search warrant. They also have the power to search any vehicle that they suspect has evidence of one of the offences.

The authorities **can take from you, and keep, anything they find in a search which they reasonably believe is a PS or is evidence of one of the offences.**

## [Keeping and destroying items](#)

**Anything that is seized can be kept for as long as is necessary.** This will apply where a substance needs to be tested to prove it is a PS, and also if something will be used as evidence in Court.

**If officers take an item from you in legal search under the PSA,** they have the power to dispose of it as long as:

- They reasonably believe it is PS, but,
- Isn't evidence of an offence under the PSA, and,
- They don't think it was being used for an exempted (allowed) activity.

**REMEMBER THAT YOU CAN'T BE SEARCHED JUST FOR POSSESSION OF A PS.**

If you are **convicted for one of the offences outlined below** the **Court will order that any PS linked to the offence won't be returned to you, and might order the same for any other items used to commit the offence (e.g. Equipment).** You, or anyone else who say they own the items, can appeal this decision and the Order won't be in place effect until the time for an appeal has passed or any appeal has been decided.

## [Returning items to you](#)

In some cases a PS and/or other items will be given back to you at the end of a case. The Court might order this if they aren't sure that something:

- Is a psychoactive substance, or,

- Has been used to commit an offence,  
OR, even if it is a PS:

- It wasn't likely to be consumed by anyone for its psychoactive effects, or,
- The item was being used for an exempted activity.

You can also apply for a PS or items to be returned to you.

## Offences under the PSA

### Production

You commit this offence if:

- **You intentionally produce a PS** and you know or suspect it is a PS, and,
- **You intend to consume it** for its psychoactive effects or you **know or are reckless as to whether it is likely to be consumed by another person** for its psychoactive effects.

Below are explanations of the important words/phrases:

- **“Production”** means making in some way.  
*Case law on what counts as production for cases under the MDA will be useful.*
- **“Intentionally”** means on purpose and not by accident.  
*For example, if you had a lab set up making a PS, you couldn't say that this isn't what you meant to do, unless the lab was for another legal reason and the PS was made as a side effect. This would also apply if you were making a PS for research, with a licence, and then accidentally made something else.*
- **“Know or suspect”** depends on the person's level of knowledge.  
*For example, a headshop owner would usually be assumed to have a higher level of knowledge than an 18-year-old who had never used psychoactive substances before. **Previous contact with the police for 'legal highs' might be used against you.***
- **“Intend to consume it for its psychoactive effects”** is about what you were going to do.  
*Evidence about your past production/use might be used to prove this. If you aren't intending to take it yourself, but are just experimenting with chemistry, you will need to put forward evidence to support this.*
- **“Know or be reckless”**. Knowledge is as described above and recklessness is not thinking or caring about a possible risk.  
*So, acting recklessly means **doing something when you haven't given any thought to the risk or, realising that there is a risk and doing it anyway.***
- **“Likely to be consumed by another person for its psychoactive effects”** is about what was going to happen to the product after you made it.  
*If there is evidence that it has been packaged, for example, this might show that there was a chance someone else was going to take it (or at least that you would supply it to someone else – see below). If the product made in the lab was clearly labelled, “not for human consumption” it might be enough to show that you were not reckless about another person consuming it, but this would probably have to be in combination with the product having another clearly (believable) legal use.*

### Supplying or Offering to Supply

You commit this offence if:

- **You intentionally supply a PS** to someone when you **know or suspect** it is a PS, or, **ought to know or suspect** it is a PS, and,
- **You are reckless as to whether the PS is likely to be consumed by the person to whom it is supplied (or anyone else)**, for its **psychoactive effects**.

Below are explanations of the important words/phrases:

- **“Intentionally”** means on purpose and not by accident.

*If you lend someone a bag or coat with a PS in it that you have forgotten was there it could be argued that this was an accident.*

- **“Supply”** means giving to someone.  
*Just passing a bag of “spice” to another person could be supply. There doesn’t have to be any money (or other goods) involved. But this would make a difference to any sentence.*
- **“Know or suspect”**. See the explanation, above.
- **“Ought to know or suspect”** is more of an independent/outside test, about someone’s knowledge.  
*Even if a person says they know nothing about a PS, if there was other evidence like computer downloads showing that they have read about (or even bought) a PS before, it will be assumed that they should know it is a PS.*
- **“Reckless”**. See the explanation above.
- **“Likely to be consumed ... for its psychoactive effects”**. See the explanation, above.

You also commit an offence if:

- You **offer to supply a PS** to someone, and,
- You **know or are reckless** as to whether they (or someone else) would be **likely to consume the substance for its psychoactive effects**, if they took you up on the offer.

Below are explanations of the important words/phrases:

- **“Offer to supply”** means that there does not need to be an actual supply taking place - the PS only needs to be offered.  
*This could be words or other actions, like asking someone if they want to sniff some glue, or offering a PS for sale on the internet or in a shop. If case law on “offering” under the MDA is used, the PS won’t have to be there at the time of the offer (you could be going away to get it and bring it back) and you could be guilty even if what you’ve actually got is legal but you are pretending it is a PS. Headshop owners are at risk as the shop setting where products are for sale is enough to be an offer.*
- **“Know or are reckless”**. See the explanation, above.  
*It could be argued that labels on products saying “not for human consumption” show that you weren’t reckless, but again your knowledge and background might be used against you.*
- **“Likely to consume ... for its psychoactive effects”**. See the explanation, above.  
*This might be hard to prove. For example, if you offered glue to sniff but you knew that the person you were offering it to would never use it in that way – they might, for example, use it for arts and crafts -- you could argue that no offence has been committed.*

If you are over 18, and the supply/offer to supply involves any of the following, you will receive a worse sentence:

- Happens near a school;
- Involves someone under 18 as a courier; or,
- Takes place in a custodial institution (e.g. prison),

This is known as a [statutory aggravating factor](#).

## Possession with Intent to Supply

You commit this offence if:

- You have a PS **in your possession**, and,
- You **know or suspect** that it is a PS, and,  
You **intend to supply** that substance (directly or indirectly) to someone **for its consumption as a psychoactive substance**.

Below are explanations of the important words/phrases:

- **“In your possession”** means that you have control of it.  
*It could be on you personally (in a bag, pocket etc.), in a car, in your room or other building that you have access to.*
- **“Know or suspect”**. See the explanation, above.

- **“Intend”** means it wouldn’t an accident.
- **“Supply”**. See the explanation, above.
- **“Consumption as a psychoactive substance”** has a similar meaning to “likely to be consumed for its psychoactive effects”, but here there is no doubt and **the person supplying must mean to supply the substance for it to be used as a PS.**

*For example, if you offered glue to sniff even if you knew that the person you were offering it to would never use it in that way, an offence would still have been committed because you intended to supply it for its psychoactive effects rather than for another use.*

Sometimes the only evidence of intent to supply will be a large amount of the PS. There are no “cut offs” between what is an amount for personal use compared to possession with intent to supply. This will depend on the person (people use or need different amounts), the situation and reason they have the PS (e.g. a three-day festival), and the PS itself (some will be weaker than others). **There is a risk of being charged with intent to supply and having to give evidence that it was just personal possession.**

### Importation and Exportation

You commit this offence if:

- You **intentionally import** a substance which is a PS, and,
- You **know or suspect**, or **ought to know or suspect**, that the substance is a PS, and,
- You **intend to consume** the PS for its psychoactive effects, or you **know/are reckless** as to whether it is likely to be consumed by another person for its psychoactive effects.

**Exactly the same applies to export of a PS.**

Below are explanations of the important words/phrases:

- **“Intentionally”**. See the explanation, above.
- **“Import” and “export”** for this offence mean **the PS is brought into or out of the UK by air, land or sea.**  
*It applies the same if you are buying for yourself or to supply on to others. So, **if the PS is being bought and sold in the UK this wouldn't be an offence.** But if you bought the same product from China an offence would be committed. **To keep the risk as low as possible you should try to make sure that you are only buying from UK sellers**, although this can be difficult over the Internet because of the way some sites are hosted. You might have a defence if you did not realise the site was Chinese, there was nothing clearly showing this and have evidence that you genuinely believed it to be in the UK.*

Customs sometimes send a letter to someone who has ordered a drug controlled by the MDA, letting them know that it has been found and will be destroyed unless they want to challenge this. This might also happen with a PS in future – **if you do get a letter like this you should not contact the authority just let the substance be destroyed (unless you are sure it is not a PS and can show evidence of this).**

### Possession of Psychoactive Substance in a Custodial Institution

You commit this offence if:

- You are **in possession of a PS in a custodial institution**, and,
- You **know or suspect** it is a PS, and,
- You **intend to consume the PS for its psychoactive effects.**

Below are explanations of the important words/phrases:

- **“In possession”**. See the explanation, above.
- **“Custodial institution”** includes a prison, Young Offender Institution (or other secure centre), and immigration detention centres.  
***We think this is very unfair, as there is no separate offence of possession in prison for drugs controlled under the MDA.** The prison would normally deal with that through adjudication. **If you***

*are caught with a PS in a prison you should check if the prison rules let them do anything and ask the governor to deal with it themselves without involving the police, or do nothing.*

- **“Know or suspect”**. See the explanation, above.
- **“Intend to consume the PS for its psychoactive effects”**. See the explanation, above.

## Sentencing under the PSA

The maximum sentences for each offence are below. **Maximum sentences aren't normally used for drug offences under the MDA and we assume that will be the same for the PSA** but until cases have gone through Court we won't know what will happen.

<u>Offence</u>	<u>Magistrates</u>	<u>Crown</u>	<u>N. Ireland</u>
<u>Production (inc personal use)</u>	<u>12mths/fine</u>	<u>7yrs/fine</u>	<u>6mths/2yrs</u>
<u>Supply and offer to supply</u>	<u>12mths/fine</u>	<u>7yrs/fine</u>	<u>6mths/2yrs</u>
<u>Possession with intent to supply</u>	<u>12mths/fine</u>	<u>7yrs/fine</u>	<u>6mths/2yrs</u>
<u>Importation or Exportation (inc personal use)</u>	<u>12mths/fine</u>	<u>7yrs/fine</u>	<u>6mths/2yrs</u>
<u>Possession in a custodial setting</u>	<u>12mths/fine</u>	<u>2yrs/fine</u>	<u>6mths/2yrs</u>

## Producers and Suppliers

There are some options to deal with banned activities without going down the criminal law route. If there is evidence of a criminal offence the other procedures don't have to be used, but they probably will be as a first step for people producing or supplying from a head shop.

### Prohibition Notices

These can be given by a senior police officer, National Crime Agency (NCA) or Border Force officer or by a local Council. They can be given when the **officer reasonably believes that you are doing, or likely to do, a “prohibited activity”**; for example, producing, supplying, offering to supply, importing or exporting a PS (or assisting or encouraging this) and that it is necessary and fair to give the Notice to stop you doing this activity.

**The Notice will set out the grounds for giving it**, tell you to stop doing the prohibited activity, and explain the possible effect of not doing as you're told. The notice will say how long it lasts, which can be up to 3 years. **You will be expected to stop the activity straight away, or as soon as practically possible.**

### Premises Notices

These apply the same as Prohibition Notices, but as well as believing the prohibited activity is happening (or likely to) the person being given the notice must own, rent, or control the property in some way. These notices tell someone - for example, the landlord of a head shop -- to take all reasonable steps to stop prohibited activities happening there.

**The Notice will set out the grounds for giving it, and explain the possible effect of not doing as you're told.**

**\*\*Both notices are just warnings - if you don't do something that a Notice tells you to you can't be punished. But, stronger action will probably be taken if you don't stop\*\***

## Prohibition Orders

These are made by the Court. They can be made if:

- **You haven't done as you were told in Prohibition Notice** (or the Court think you wouldn't do as told if you were given a Notice) or,
- **You have been convicted of one of the offences explained, above** (as well as any other sentence), and,
- **The Court thinks it is necessary and fair to make the Order to stop you doing this activity.**

An Order can include whatever prohibitions, restrictions and requirements the Court thinks are suitable, including, for example, making a headshop owner hand over stocks of psychoactive substances.

It can also include **"an access prohibition"** which closes a shop for up to six months. This might cause a problem if your home and workplace are the same property.

**The Order can last for up to three years. Breach of a prohibition order is a criminal offence punishable by a prison sentence of up to two years, an unlimited fine, or both.**

## Premises Orders

These can be made by the Court if:

- **You haven't done as you were told in Premises Notice**, or,
- **The Court think you wouldn't do as told if you were given a Notice**, and,
- **You own, rent, or control the property** in some way, and,
- **The Court thinks it is necessary and fair to make the Order to stop you doing this activity.**

It can also include **"an access prohibition"** which closes a shop for up to six months. This might cause a problem if your home and workplace are the same property.

**The Order can last for up to three years. Breach of a premises order is a criminal offence punishable by a prison sentence of up to two years, an unlimited fine, or both.**

**\*\*If you have a stock of PS that you want to get rid of, either before or after 26<sup>th</sup> May, 2016, the Home Office advise that you contact your local police station to ask how you should do this. If they tell you to bring it to the police station, get this in writing to protect yourself if you are stopped and searched on the way. No promise has been made that you won't be prosecuted for any offences if you contact the police, but they should look at cases fairly\*\***

----

**If you are arrested for any of the offences in this guide, ask to speak to a solicitor. This is your right.** If you don't have one, you can ask for the Duty Solicitor. The Duty Solicitor at the police station is independent, is NOT employed by the police and is FREE. **If you have asked for a Duty Solicitor and one isn't available, you have a right to say nothing in a police interview until one is available. It is NOT sensible to talk about the case with the police until you have spoken privately with a solicitor.**

If you have been released on bail while the police investigate, or have been charged with one of the offences and given a Court date, and want some **more advice please contact the legal team at Release:**

- **By phone – 0207 324 2989**
- **By email – [ask@release.org.uk](mailto:ask@release.org.uk)**
- **Online - [www.release.org.uk/helpline](http://www.release.org.uk/helpline)**