

1. The Psychoactive Substances Act 2016 was passed by Parliament in January 2016 to tackle the trade in psychoactive substances in the UK. The Act will come into effect on 6 April 2016.
2. Since around 2008/09, 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").
3. 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".
4. The main source of supply of new or emerging psychoactive substances is currently and historically through 'head shops', 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. The substances of concern associated with 'head shops' are rarely, if ever, sold by legitimate retailers.
5. 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. This guidance is provided to assist legitimate retailers in continuing to comply with the law under the Act.
6. The Act creates a number of criminal offences covering the supply of a psychoactive substance. These will apply across the UK including:
 - a). **Section 4** - Producing a psychoactive substance
 - b). **Section 5** - Supplying, or offering to supply, a psychoactive substance
 - c). **Section 7** - Possession of a psychoactive substance with intent to supply it
 - d). **Section 8** - Importing or exporting a psychoactive substance
 - e). **Section 9** - Possessing a psychoactive substance in a custodial institution
7. 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?

8. 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).
9. 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.

10. 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

11. 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

12. 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

What should Retailers focus on in practice?

13. 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 or anti-freeze
- Nail varnish/nail varnish remover
- Nitrous oxide canisters (such as those used in whipped cream dispensers)

14. The Psychoactive Substances Act 2016 will repeal 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.

15. 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.

Things to consider

16. 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. See the specific offences below.

17. All of the Act's criminal offences will apply to all retailers – both the individual employee and members of management as appropriate with offences for management and partners etc. at Section 56.

Offences in the Act

18. 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. A person intentionally supplies a substance to another person.

- This will require a deliberate action on behalf of the supplier.

b. The substance is a psychoactive substance.

- This is described in more detail above.
- If a case is prosecuted, the psychoactive nature of a substance will need to be forensically determined by the prosecution. Retailers are not expected to conduct this testing themselves across substances they stock.

c. The person knows or suspects, or ought to know or suspect, that the substance is a psychoactive substance.

- The prosecution will need to prove to a court that the individual supplying the product either knew or should have known that the product they were supplying was psychoactive.
- This will include, for example, considering what the product is, its packaging and whether it had any warning labels or descriptions.
- Considerations will include the type of business who supplied the substance. A court may determine that a worker in a shop that specialises in selling 'legal highs' should know more about the substances they are selling than a retail outlet worker selling thousands of varied products, such as in a supermarket.
- They will also include whether an individual has received any training from their employer on what the substance is and any restrictions on its sale, similarly to what has been done previously under ISSA 1985.
- This issue will be considered on a case by case basis taking into account individual circumstances. For further guidance on how to comply with this, see the next section.

d. 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.

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.

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.

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.

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.

Steps Retailers can take to comply with the law: Q and A

To what extent should retailers know what is and what is not a psychoactive substance in their range of products?

- All substances that are covered by the ISSA 1985 will continue to be in the scope of the PS Act. These are the substances that should be the focus of retailers.
- 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.
- 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.
- 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

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.
- 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.

How can cashiers on the ground risk assess these purchases to ensure that they are not accused of being reckless?

In practice this will be similar to the way they assess transactions under ISSA. The test as to whether a person is reckless is subjective, and ultimately comes down to the following:

- Is the cashier aware of the risk that the substance in question is likely to be consumed?
- Would it be reasonable for them to take that risk in supplying the substance?

Whilst the new legislation provides no legal bar on sale to under-18s for purposes other than consumption, retailers can consider continuing to voluntarily age-restrict products and give updated training to staff that they had previously covered by ISSA 1985, to prevent those at highest risk from gaining access to psychoactive substances.

Where adults purchase products containing psychoactive substances, retailers can assess the risk case by case. In doing so, they could have regard to the following (indicative but not exhaustive factors):

- What is the substance? Is it something that has been flagged high risk previously, such as a substance covered by ISSA, or something that the Home Office has identified to retailers as being of concern? If not, it is very unlikely to be high risk.
- What quantity of psychoactive product the customer is purchasing - a can of deodorant, or a number of canisters of nitrous oxide?
- What else they are buying - is this part of a weekly shop, or solely a purchase of high risk substances?
- The timing of the purchase - a purchase during unsocial hours might be more likely to be high risk.
- The apparent physical/mental state of the customer - Is s/he already drunk/intoxicated?
- Does s/he have physical symptoms of intoxication, like bad skin, weeping eyes, rash around the nose?
- Is the customer a person known to the store as having been intoxicated/ abused substances before?
- If the cashier has suspicions, they could simply ask the customer why they are buying the product. Does their explanation sound reasonable?

Case Study 2

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.

- The cashier asks why these are being purchased 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.

Case Study 3

In a gardening store, a male who looks apparently in his fifties buys a quantity of anti-freeze. It is during the day, in the middle of the week.

- He seems entirely sober; he also buys a number of other items related to car maintenance.
- Without any further risk factors, the cashier would be justified in assessing this purchase as low risk.

Does the new legislation replace the Cigarette Lighter Refill (Safety) Regulations 1999?

No, the offence in the Regulations is not replicated by the Psychoactive Substances Act 2016. It strictly prohibits sale of butane canisters to all under 18 year olds, regardless of any intent to consume. The Psychoactive Substances Act 2016 does not replicate these offences.

How can we apply this to self-service check-outs?

- By continuing to risk assess intoxicating products as they had been under ISSA.
- Retailers can limit quantities of substances available on self-service.
- There is no expectation that retailers should widen the range of substances to be risk assessed at self-service tills beyond those which are already covered at ISSA.

Please note: This information has no legal force and is not an authoritative interpretation of the law, which is a matter for the Courts.

It is intended to help retailers to understand in general terms, the main features of the legislation. The information is not a substitute for the legislation and you should refer to the text of the Psychoactive Substances Act 2016 for a full statement of legal requirements and obligations. Where appropriate, you should seek your own independent legal advice.

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