

# DRUGS ACT 2005

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## EXPLANATORY NOTES

### THE ACT

#### *Commentary on Sections*

#### **Part 1: Supply of Controlled Drugs**

##### ***Section 1: Aggravated supply of controlled drug***

4. This section, in *subsection (1)*, inserts a new section 4A into the Misuse of Drugs Act 1971 and stipulates the circumstances which a court must treat as aggravating factors in respect of the offence of supply of a controlled drug. New section 4A(2) requires a court to treat either or both of two conditions as aggravating factors and, where either condition is met, to state that the offence is so aggravated.
5. New section 4A(3), together with new section 4A(5), provides that the first condition is met when a person supplies a controlled drug on or in the vicinity of school premises when they are being used by children and young people and within one hour of any such time. New section 4A(4), together with new section 4A(6), provides that the second condition is met when a person causes or permits a child or young person to deliver a controlled drug to a third person or to deliver a drug related consideration to himself or a third person in connection with the offence of supply of a controlled drug.
6. New section 4A(7) defines a drug related consideration as a consideration of any kind, thus encompassing any form of payment or reward, be it in cash, goods or services.
7. New section 4A(8) defines 'school premises' and 'school' for the purposes of this provision
8. *Subsection (2)* provides that new section 4A does not apply to any offence committed before it comes into force.

##### ***Section 2: Proof of intention to supply a controlled drug***

9. It is an offence under section 5 of the Misuse of Drugs Act 1971 to possess a controlled drug with intent to supply it to another. This section in *subsection (2)*, amends section 5 of the 1971 Act to create a presumption of intent to supply where the defendant is found to be in possession of a particular amount of controlled drugs. Where the presumption applies a court or jury must assume that the defendant intended to supply the drugs. The presumption does not apply if evidence is adduced, by any person, that raises an issue that the

defendant may not in fact have intended to supply those drugs. Where such evidence is raised it will be for the prosecution to prove beyond reasonable doubt that the defendant intended to supply the drugs in his possession. The particular amount of drugs that will give rise to the presumption will be prescribed by the Secretary of State in regulations. The levels will reflect and be proportionate to the seriousness of the offence of supply of a controlled drug. *Subsection (2)* provides that the regulations only have effect in respect of proceedings for an offence committed

after those regulations come into force. Section 31 of the 1971 Act will apply to those regulations. Therefore the regulations may make different provision for different controlled drugs and may only be made following consultation with the Advisory Council on the Misuse of Drugs. *Subsection (3)* amends section 31 of the 1971 Act to provide that a draft of the regulations made must be approved by a resolution of each House of Parliament.

## **Part 2: Police Powers Relating to Drugs**

### ***Section 3: Drug offence searches***

10. Those in possession of drugs may seek to conceal them from the police in body cavities. This section amends section 55 of the Police and Criminal Evidence Act 1984, which provides for an intimate search of a person where it is suspected that the person may have a Class A drug concealed on him.
11. *Subsection (2)* provides that a drug offence intimate search may only be undertaken where the person to be searched has consented in writing and requires that the person be informed that the search has been authorised and the grounds on which it has been authorised.
12. *Subsection (3)* inserts a new section 55(10A) which requires that the authorisation for the search, grounds for that authorisation and consent of the person to be searched is recorded in the custody record.
13. *Subsection (5)* inserts a new section 55(13A) which provides that appropriate inferences may be drawn by a court or jury where a person refuses without good cause to consent to an intimate search.
14. *Subsection (6)* amends section 55(17) to make clear that the information that is required to be given to the suspect by section 55(3B) can be conveyed by a constable or suitably designated detention officer or staff custody officer.

### ***Section 4: Drug offence searches: Northern Ireland***

15. **Section 4** makes provision equivalent to section 3 for Northern Ireland. Section 4 amends Article 56 (intimate searches) of the **Police and Criminal Evidence (Northern Ireland) Order 1989 (S.I. 1989/1341)**.

### ***Section 5: X-rays and ultrasound scans: England and Wales***

16. This section inserts a new section 55A into the Police and Criminal Evidence Act 1984.
17. New section 55A(1) enables a police officer of at least the rank of inspector to authorise an x-ray or ultrasound scan (or both) of a person suspected of swallowing a Class A drug which he had in his possession with intent to supply or export unlawfully, where the person has been arrested for an offence and is in police detention.
18. New section 55A(2) provides that an x-ray may not be taken or an ultrasound scan undertaken without the suspect's consent which must be in writing. New section 55A(3) requires that the person be informed that the x-ray or ultrasound has been authorised and the grounds on which it has been authorised. New section 55A(4) provides that the x-ray or ultrasound scan may only be taken at a hospital, registered medical practitioner's surgery or other place used for medical purposes and only by a registered medical practitioner or nurse. New section 55A(5) and (6) requires that the authorisation for the x-ray or ultrasound, grounds for that authorisation and consent of the person to be searched is recorded in the custody record as soon as practicable after the x-ray has been taken or ultrasound carried out.
19. New section 55A(7) and (8) makes provision for information relating to x-rays and ultrasound scans to be included in annual reports made by chief constables or the

Commissioner of Police of the Metropolis. The reporting requirements are similar to those which apply to information relating to intimate searches.

20. New section 55A(9) provides that appropriate inferences may be drawn by a court or jury where a person refuses without good cause to consent to an x-ray or ultrasound scan.
21. *Subsection (2)* amends Schedule 4 to the Police Reform Act 2002 to allow detention officers and staff custody officers to inform suspects of the matters referred to in section 55A(3).

### ***Section 6: X-rays and ultrasounds scans: Northern Ireland***

22. **Section 6** makes provision equivalent to section 5 for Northern Ireland. Section 6 inserts a new Article 56A into the [Police and Criminal Evidence \(Northern Ireland\) Order 1989 \(S.I. 1989/1341\)](#) dealing with the taking of x-rays and the carrying out of ultrasounds. The authorisation must be given by a police officer of at least the rank of superintendent.

### ***Section 7: Testing for presence of Class A drugs***

23. This section makes a number of amendments to the Police and Criminal Evidence Act 1984 (PACE) to allow for the introduction of drug testing of persons after arrest. The existing provisions for testing after charge remain. The new provision will apply to persons aged 18 and over. *Subsections (2) to (6)* amend section 63B of PACE to permit persons aged eighteen or over to be tested on arrest for a specified Class A drug. This power arises where the person has been arrested for a “trigger” offence or for any offence where a police officer of at least the rank of inspector has reason to believe the misuse of such a drug contributed to that offence and authorises the test. This power sits alongside the existing power in section 63B of PACE, as amended by section 5 of the Criminal Justice Act 2003, to test persons who have been charged with such an offence.
24. *Subsection (7)* inserts new sections 63B(4A) and 63B(4B) into PACE. These require a notification to be given by the Secretary of State that appropriate arrangements have been made in respect of an area before testing on arrest can operate. The notification may refer to an entire police area or to a single police station.
25. *Subsections (8) to (12)* further amend section 63B of PACE. New section 63B(5B) ensures that, where a sample is taken from a person on arrest, no other sample can be taken if he is charged with that offence or any other offence which meets the charge condition during that period of detention. However, in that event, the sample must be treated as having been taken in respect of the offence for which the person is charged. New section 63B(5C) allows for a person who has been arrested for an offence which meets the arrest condition to be tested within a period of 24 hours following his arrest for that offence even though the only reason for his detention at the point the sample is taken is due to his having been arrested for a further offence that does not satisfy the arrest condition. New section 63B(5D) also provides that a person has to have been brought before the custody officer before a test may take place. *Subsection (10)* substitutes a new section 63B(6A) which provides the Secretary of State with a power to amend by order the age of persons to whom such a request can be made on arrest and on charge. *Subsection (11)* amends section 63B(7) of PACE to permit disclosure of the drug test results for the purpose of making a decision as to whether to give a conditional caution under Part 3 of the Criminal Justice Act 2003. *Subsection (12)* omits section 63B(9) of PACE. *Subsection (13)* provides that the notification condition is to be treated as being satisfied for the purposes of the charge condition in those areas in which section 63B(2) of PACE is in force on the day this section comes into force. *Subsection (13)* also provides that the notification condition is to be treated as being satisfied for the purposes of the age condition in those areas in which a notification has been given under section 63B(9) of PACE on the day this section comes into force.

### ***Section 8: extended detention of suspected drug offenders***

26. Some drug dealers will swallow drugs, suitably wrapped, upon arrest.
27. This section will allow a court to remand a prisoner to the custody of a police officer where it is suspected that the prisoner has swallowed drugs to conceal evidence and avoid prosecution.
28. Currently the police may detain a person in police detention under the Police and Criminal Evidence Act 1984 for a maximum of 96 hours prior to charge. This is not necessarily a sufficient period of time for swallowed evidence to be recovered.
29. Section 152 of the Criminal Justice Act 1988, permits a magistrates' court to commit a person charged with an offence under section 5(2) of the Misuse of Drugs Act 1971 (possession of a controlled drug) or a drug trafficking offence into the custody of a Customs officer for a period of up to 192 hours to increase the likelihood of the evidence being recovered.
30. This section amends section 152 of the Criminal Justice Act 1998 to give magistrates similar powers to remand a person, upon charge, to the custody of a police officer, for a period of up to 192 hours.

### **Part 3: Assessment of Misuse of Drugs**

#### ***Section 9: Initial assessment following testing for the presence of Class A drugs***

31. This section in *subsections* (1) and (2), introduces a new discretionary power for the police to require persons who have tested positive for a specified Class A drug under section 63B of PACE, as amended by section 7 of this Act, to attend an initial assessment of their drug misuse. *Subsection* (3) sets out the purposes of that initial assessment. This power is subject to the age condition and notification condition (as set out in *subsections* (4) to (6)) being met. *Subsection* (4) provides that a person can only be subject to the requirement if he has reached the age of 18 (or a different age, if the Secretary of State so specifies by order made by statutory instrument). *Subsections* (5) and (6) provide that a person can only be subject to the requirement where the relevant chief officer of police has been informed that the necessary arrangements for carrying out the assessments have been made for those who have been tested at the police station in which the person was detained. Such a notification can apply to a police area or to a single police station.

#### ***Section 10: Follow-up assessment***

32. This section in *subsections* (1) and (2), provides that a police officer must, when imposing a requirement to attend an initial assessment under section 9, also require the person to attend a follow-up assessment and must inform the person that this second requirement will cease to have effect if he is informed at the initial assessment that he is no longer required to attend the follow-up assessment. *Subsections* (3) and (4) set out the purposes of the follow-up assessment. The age and notification conditions which apply to follow-up assessments are similar to those which apply to initial assessments. *Subsection* (5) provides that the person concerned must have reached the age of 18, (or such different age as is specified by the Secretary of State by order). *Subsections* (6) and (7) provide that a person can only be subject to the requirement where the relevant chief officer of police has been informed that the necessary arrangements for carrying out the assessments have been made for those who have been tested at the police station in which the person was detained.

#### ***Section 11: Requirements under sections 9 and 10: supplemental***

33. This section imposes a number of obligations on police officers where they require a person to attend an initial assessment under section 9, or both an initial assessment

under section 9 and a follow-up assessment under section 10. *Subsection (2)* requires a police officer to inform the person of the time and place of the initial assessment and *subsection (3)* requires a police officer to warn the person that he may be prosecuted if he fails, without good cause, to attend for the duration of the initial assessment. *Subsection (4)* requires a police officer to give a similar warning in the case of a person who is also required to attend a follow-up assessment. *Subsection (5)* requires a police officer to confirm the requirement to attend an initial assessment or both an initial assessment and a follow-up assessment (as the case may be) and the matters expressed verbally under *subsections (2) and (3)* and any warning given under *subsection (4)* in writing. *Subsection (6)* confirms that this information must be conveyed verbally and in writing before the person is released from police detention. *Subsection (7)* requires the provision of such information to be recorded in the person's custody record. *Subsection (8)* enables the police or a suitably qualified person to provide a further written notice to the person varying the time and/or place of the initial assessment and repeating the previous warning regarding threat of prosecution.

### ***Section 12: Attendance at initial assessment***

34. This section in *subsection (2)*, places a duty on the person conducting the initial assessment to inform the police if the person concerned fails to attend or remain for the duration of that assessment. *Subsections (3) and (4)* provide that a person is guilty of an offence and liable on summary conviction to a fine, imprisonment or both if they fail without good cause to attend and remain for the duration of the initial assessment. *Subsection (5)* provides that a person who fails to attend the initial assessment will no longer be required to attend a follow-up assessment.

### ***Section 13: Arrangements for follow-up assessment***

35. This section sets out the arrangements for a follow-up assessment. *Subsections (2) and (3)* provide that the requirement for a person to attend a follow-up assessment ceases to have effect if the person is informed by the initial assessor that he is no longer required to attend that assessment. The initial assessor will do so where he considers that a follow-up assessment is not appropriate. *Subsections (4) and (5)* require the initial assessor, where he considers a follow-up assessment to be appropriate, to inform the person of the time and place of that assessment and warn the person that a failure to attend for the duration of the assessment without good cause may render him liable to prosecution. *Subsection (6)* requires the initial assessor to confirm the requirement and the matters expressed verbally in *subsections (4) and (5)* in writing. *Subsection (7)* confirms that this information must be conveyed verbally and in writing before the end of initial assessment. *Subsection (8)* enables the initial assessor or another qualified person to provide a further written notice to the person varying the time and/or place of the follow up assessment and repeating the previous warning regarding threat of prosecution.

### ***Section 14: Attendance at follow-up assessment***

36. This section in *subsection (2)*, places a duty on the person conducting the follow-up assessment to inform the police if the person concerned fails to attend or remain for the duration of that assessment. *Subsections (3) and (4)* provide that a person is guilty of an offence and liable on summary conviction to a fine, imprisonment or both if they fail without good cause to attend and remain for the duration of the follow-up assessment.

### ***Section 15: Disclosure of information about assessments***

37. This section provides that information obtained as a result of the initial assessment or follow-up assessment may not be disclosed without the written consent of the person concerned except as provided for in *subsections (1) and (2)*. *Subsection (1)* provides that information obtained as a result of an initial assessment may be disclosed to those involved in the conduct of the initial assessment and those who are or may be involved in the conduct of any follow-up assessment. *Subsection (2)* provides that information



obtained as a result of a follow-up assessment may be disclosed to those who are involved in the conduct of that assessment.

***Section 16: Samples submitted for further analysis***

38. This section in *subsection* (1) provides that a person will no longer be required to attend an initial or follow-up assessment if, before he attends that assessment, a further analysis of the sample taken reveals that it was negative. *Subsections* (4) and (5) provide that where a person has failed to attend or to attend for the duration of an assessment and the requirement subsequently ceases to have effect by virtue of *subsection* (1), no proceedings will be brought in respect of that failure and any ongoing proceedings in respect of that failure will be discontinued.

***Section 17: Relationship with the Bail Act 1976 etc.***

39. This section in *subsection* (1) provides that a requirement to attend either an initial assessment or a follow-up assessment ceases to have effect if, before he has complied with the requirement in question, the person is charged with an offence which satisfied the arrest or charge condition in relation to the drug test (the related offence) and is granted bail in respect of that offence by a court on the condition that he undergo a relevant assessment and/or participate in follow-up under the Bail Act 1976. *Subsection* (2) provides that a relevant assessment for the purposes of the Bail Act 1976 is to be treated as having been carried out where a person attends for the duration of an initial assessment and the initial assessor is satisfied that the assessment fulfilled the purposes of the relevant assessment. *Subsection* (3) further provides that a person will be considered to have undergone such a relevant assessment in those circumstances. *Subsection* (4) provides that an initial assessor may disclose information regarding the initial assessment to enable a court to determine whether those circumstances arise.

***Section 18: Orders under this Part and guidance***

40. This section provides that an order made by the Secretary of State amending the age at which persons may be required to attend an initial assessment and a follow-up assessment may make provision where appropriate in respect of persons under the age of eighteen, may make different provision for different police areas and must be approved in draft by both Houses of Parliament. *Subsection* (3) provides that a police officer and a suitably qualified person must have regard to any guidance issued by the Secretary of State under this Part of the Act.

***Section 19: Interpretation***

41. This section defines a number of terms that are used in Part 3 of the Act.

**Part 4: Miscellaneous and General**

***Section 20: Anti-social behaviour orders: intervention orders***

42. This section amends the Crime and Disorder Act 1998 (the “CDA”) in relation to Anti-social Behaviour Orders (ASBOs) and provides for a new order which can be made alongside an ASBO when drug misuse has been a cause of the behaviour that led to the ASBO being made.
43. *New section 1G, subsections* (1) and (2) set out when an application for an intervention order can be made. It provides that an intervention order can be applied for by a “relevant authority” (as defined in section 1(1A) of the CDA) when it makes an application for an ASBO under section 1 of the CDA or an order in the county court under section 1B of the CDA. The application for the intervention order should be preceded by an assessment and report of the defendant’s behaviour where this relates to the misuse of controlled drugs together with consultation with persons prescribed by the Secretary of State to ensure that the appropriate activities to address such behaviour

are available locally. There is also a power for the Secretary of State to prescribe that an intervention order can be made when other factors are influencing the person's behaviour. *Subsection (3)* provides that the court may make an order if it has made an ASBO and is satisfied that the relevant conditions relating to the intervention order are met. *Subsection (4)* sets out the "relevant conditions". They are that an order is desirable in the interest of preventing a repetition of the behaviour that led to the order being made, that the appropriate activities to address the behaviour have been identified locally, that the defendant is not already subject to an intervention order or to any other treatment relating to the behaviour which led to the intervention order being made and that the Secretary of State has notified the courts that such orders are available in their area. *Subsection (5)* states that the order should not exceed 6 months and requires the defendant to comply with the requirements of the order, and any directions that may be given under the order. *Subsection (6)* sets out that the order or directions given under the order can require the defendant to participate in specified activities and require attendance at specific times. *Subsection (7)* provides that the requirements of the order should avoid, as far as reasonably practicable, interfering with the defendant's religious belief and any work or educational commitments. *Subsection (8)* provides that the person responsible for providing or supervising the activities must inform the relevant authority if the defendant fails to comply with the order. *Subsection (9)* provides that the Secretary of State shall prescribe those persons who are responsible for the provision or supervision of the appropriate activities. *Subsection (10)* sets out definitions. *Subsection (12)* provides that an intervention order can be applied for if an ASBO has already been made on an earlier occasion, and the same conditions have been met.

44. *Section 1H, subsection (1)* provides that the court, before making the order, must make the defendant aware of the requirements of the order and the consequences of non-compliance, and allows the court on application by the defendant or the relevant authority to vary the order. The definition of a 'relevant authority' is the same as that given in section 1(1A) of the Crime and Disorder Act 1998, that is, the council for the local government area or any chief officer of police any part of whose police area lies within that area. *Subsection (2)* sets out that the Secretary of State has power to prescribe cases when *subsection (1)* does not apply, or when the explanation can be made in the absence of the defendant and in written form. *Subsection (3)* provides that if found guilty of a breach, the defendant is liable on summary conviction to a fine not exceeding level 4 on the standard scale.

*Subsection (4)* provides that the order will cease if the ASBO it was made with also ceases. *Subsection (5)* provides that the defendant or the relevant authority can ask the court to vary or discharge the order by way of application. *Subsection (6)* states that an application under *subsection (5)* made in the magistrates' court shall be an application by complaint. *Subsection (7)* allows the court to vary the order if it is varying the accompanying ASBO.

45. *Subsection (2)* of this section amends section 114(2) of the Crime and Disorder Act 1998 to provide that an order made by the Secretary of State under new section 1G of that Act, as inserted by *subsection (1)* of this section, is subject to the negative resolution procedure.

### ***Section 21: Inclusion of mushrooms containing Psilocin etc. as Class A drugs***

46. This section inserts into Part 1 of Schedule 2 to the Misuse of Drugs Act 1971 a fungus of any kind that contains the drug psilocin or an ester of that drug. This has the effect of making such a fungus, often referred to as 'magic mushrooms', a Class A drug for the purposes of the 1971 Act. Currently, such a fungus is only a Class A drug where it is in a form which constitutes a preparation or other product containing psilocin or an ester of psilocin for the purposes of paragraph 5 of Part 1 of Schedule 2 to the 1971 Act.

***Section 22: Financial provision***

47. This section authorises additional expenditure incurred by the Secretary of State as a result of the provisions of the Act and increases in expenditure under existing Acts.

***Section 23: Amendments and repeals***

48. This section gives effect to the Schedules which set out legislation to be amended and repealed.

***Section 24: Short title, commencement and extent***

49. *Subsection (1)* sets out the short title of the Act. *Subsections (2) to (5)* provide for commencement. *Subsections (6) and (7)* set out the extent of the Act.

***Schedule 1: Amendments***

50. *Paragraph 2* amends section 37 of the Police and Criminal Evidence Act 1984 (“PACE”) to enable persons who would otherwise be released on bail without charge to be detained to allow a sample to be taken before release so long as that extended detention does not take the total period of continuous detention for that offence beyond twenty-four hours.
51. *Paragraph 3* amends section 38(1)(a)(iiia) and section 38(6A) of PACE.
52. *Paragraph 4* amends section 63B(7) of PACE to enable the results of drug tests obtained under that section to be disclosed for the purposes of an initial assessment or a follow-up assessment and for the purposes of proceedings in respect of a failure to attend for the duration of either.
53. *Paragraph 5* omits subsection 57(5) of the Criminal Justice and Court Services Act 2000 which has been superseded by amendments made in section 7.
54. *Paragraph 6* repeals section 38 of the Criminal Justice and Police Act 2001 (which has not been brought into force). Section 38 of the 2001 Act prospectively amended section 8 of the Misuse of Drugs Act 1971 by creating an offence of permitting the use of a controlled drug on premises. This section is being repealed because adequate powers to close premises where drugs are used unlawfully are now provided for in Part 1 of the Anti-social Behaviour Act 2003.
55. *Paragraph 7* amends section 1 of the Anti-social Behaviour Act 2003. It provides that where a constable serves a closure notice under that section and fixes a copy of the notice to at least one prominent place on the premises he may enter any premises in question for the purposes of doing so (using reasonable force if necessary).
56. *Paragraph 8* omits subsection 5(3)(a) of the Criminal Justice Act 2003 which has been superseded by amendments made in section 7.