

Saul Sette, Defence Notes

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Peyote & San Pedro Cacti

Dried Peruvian Torch - Trichocereus peruvianus

Ref: **CACTI - DRY**

This pack contains genuine dried samples of Trichocereus peruvianus cacti (also known as Peruvian Torch), collected in Matucana-Huaro-chiri, Peru, at 2100m.

Botanical/horticultural herbarium specimen only. Not for human consumption.

Contents:
20g

Weight: **N/A** Size: **170mm x 150mm**

Stock: **In Stock**

PRICE £9.99

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About E

Dried mescaline containing cacti for sale at www.everyonedoesit.com

The UK [Misuse of Drugs Act 1971](#)¹ (MDA) lists a number of controlled substances divided into Classes A, B and C according to their alleged danger and abuse potential. For example, substances such as heroine, cocaine and LSD are listed as Class A drugs, amphetamines are listed as Class B drugs and cannabis is listed as a Class C drug. The severity of the penalties associated with possession or supply of a drug is linked to the drug's classification and range from a caution or fine for possession of a Class C drug to a maximum of life imprisonment for supply or trafficking of Class A drugs.

In recognition of the fact that drugs are not always sold and used in their pure form but often as admixtures of various kinds, the list of controlled substances in the MDA is followed in by the qualifier "*Any preparation or other product containing a substance or product for the time being specified in any of the paragraphs 1 to 4 above*" (Schedule II, Part I, paragraph 5). This means that not only are the substances listed controlled but also any "preparation" or "product" containing these substances. However, since many of these controlled substances occur naturally in various common plants and fungi, there is considerable controversy and confusion as to what exactly the terms "preparation" and "product" may mean in this context as no explanation or examples are given in the text of the MDA itself. These words are obviously open to interpretation.

¹ <http://www.ukcia.org/pollaw/lawlibrary/misuseofdrugsact1971.html>

In the past, the terms "preparation" and "product" have been interpreted by the courts rather arbitrarily, although often reluctantly and inconsistently, to include "magic mushrooms" (which contain the Class A substances psilocin and psilocybin) that had been in some way "prepared" for human consumption or made into a "product". This led to the paradoxical situation where dried "magic mushrooms" were considered a "preparation" of a Class A drug while fresh "magic mushrooms", which have the exact same psychoactive effects, were considered perfectly legal and were openly sold in hundreds of shops across the country – packaged, weighed, labelled and dosed explicitly for human consumption. Equally paradoxical is the fact that something which could at best (or at worst) be tentatively described as a "preparation" of something legal would be considered a preparation of something illegal. By applying deductive logic this would mean that if a dried "magic mushroom" is a preparation of a fresh "magic mushroom" and if a dried "magic mushroom" is a preparation of an illegal substance, then the fresh "magic mushroom" would be that illegal substance – this is clearly nonsensical since fresh "magic mushrooms" were considered legal.

As a consequence of the confusion generated by these terms and the reluctance by the courts to extend the interpretations of "preparation" and "product" to cover fresh magic mushrooms which had been packaged and chilled, the [law was finally amended in July 2005](#)² to explicitly to include "magic mushrooms" in any form.

It was hoped that this amendment would put to rest the uncertainty surrounding the terms "preparation" and "product" in Schedule II, Part I, paragraph 5 by effectively consigning them to legal history and finally clarifying what is and isn't legal. However the confusion is now continuing, greater than ever, this time regarding a range of plants which are commonly available in the UK and which, although clearly legal in their natural form, contain controlled substances. Cacti such as the Peyote cactus (*Lophophora williamsii*), the San Pedro cactus (*Trichocereus pachanoi*) and the Peruvian Torch cactus (*Trichocereus peruvianus*) which contain the Class A drug mescaline, are available in cactus nurseries as well as stores such as B&Q, Homebase and Ikea where they are sold as ornamental plants. The seeds of the Morning Glory, a very common household plant, contain LSA, also a Class A drug. These seeds can be purchased from most home and gardening stores. The Class A drug DMT (which is not orally active unless mixed with other substances) has been detected in Chinese remedies which can be obtained from virtually every Chinese remedy shop in the UK. A common type of grass which grows all over Europe, as well as most plants in the Acacia species contain DMT. Although the substances contained within these plants are scheduled there is no explicit reference in the MDA to any plant or fungus containing controlled substances other than the cannabis plant, coca leaf, opium poppy, poppy-straw and concentrate of poppy-straw and, after the recent amendment to include "magic mushrooms", "*a fungus (of any kind) which contains psilocin or an ester of psilocin*".

It is unclear exactly what criteria would be used to determine the circumstances in which any of these plants, which are not explicitly scheduled, would become a "preparation" or "product" of the controlled substances which they contain. Additionally, the simple and narrow interpretations of the terms "preparation" and "product" as applied by the courts to "magic mushrooms" prior to the change in the law could potentially affect a whole host of legitimate activities if applied in the same way to other plants. A detailed look at the MDA, UK case law, as well as international conventions regarding controlled substances and the stance taken by some other European countries calls into question whether the term "preparation" is suitable (or was in fact even originally intended) to cover plants and fungi in any form or whether, unless otherwise specified, it should simply cover admixtures containing the controlled substances, as natural language would imply.

The UK has also recently seen a huge increase in the popularity of so called "legal highs" or "herbal highs". Legal psychoactive plants such as Kratom, *Salvia Divinorum* and Blue Lotus have become popular alternatives to illegal drugs. As a consequence there has been a huge

² <http://www.opsi.gov.uk/SI/si2005/20051653.htm>

proliferation of "head shops" selling these products, both Internet based stores and traditional brick and mortar shops such as those often seen in places like Camden.

Some of the plants commonly sold in "head shops", however, contain controlled substances. Examples of these are the DMT containing plants *Psychotria viridis* and *Mimosa hostilis* used for the [Ayahuasca](#)³ brew, a concoction which has been used for thousands of years by Amazonian shamans and which is now gaining popularity in the West. Mescaline containing cacti such as Peyote, the San Pedro cactus and the Peruvian Torch cactus, which have been used in religious and ritual contexts since pre-Inca times in Southern and Central America, are also popular. These are sometimes sold as live plants or cuttings but more commonly dried or powdered and usually packaged. Although some websites and shops explicitly sell such items as "legal highs" with instructions for preparation, others, due to the lack of clarity in the law, are more cautious and sell them "not for human consumption", as "herbarium specimens", "potpourri" or "incense". It is believed that this passes the onus of deciding what to do with the purchase (and consequently any potential liability resulting from any specific mode of use) onto the customer.

Those involved in the commercial trade of "legal highs" are not clandestine underground operations but often large and legitimate tax-paying companies conducting their business openly as indicated in the following Guardian article published in January 2006, entitled "*Exotic, legal highs become big business as 'headshops' boom*":

<http://society.guardian.co.uk/drugsandalcohol/story/0,8150,1682325,00.html>

Here are just a few examples of UK companies selling dried mescaline containing cacti and DMT containing plants. A search on Google using keywords such as "dried peruvian torch" will reveal many more:

http://www.everyonedoesit.co.uk/online_headshop/Dried_San_Pedro_Trichocereus_Peruvianus.cfm?iProductID=2309 (this company is quoted in the above Guardian article as allegedly having an annual turnover of over £2m).

<http://www.potseeds.co.uk/peyote/index.htm#CT00002>

<http://www.deva-ethnobotanicals.com/proddetail.php?prod=004995&PHPSESSID=721247ea36c53f354efc5ca33ba0b222>

http://www.connoisseurscorner.co.uk/phpshop/Page_380.html

http://www.cannabis-seeds.co.uk/product_details.php/product_id/528

http://www.redeyefrog.co.uk/San_Pedro_Peruvian_Torch_Trichocereus_Peruvianus.html

<http://www.wellcoolstuff.com/thestore/prods/SPPTP.html>

http://www.everyonedoesit.co.uk/online_headshop/Chacruna_Psychotria_Viridis_leaves_Ayahuasca_Admixture_1_The_Li.cfm?iProductID=3694

http://www.redeyefrog.co.uk/Chacruna_Psychotria_viridis.html

http://www.allsalvia.co.uk/herbal_highs.htm

http://www.cannabis-seeds.co.uk/product_details.php/product_id/616

http://www.herbsworld.co.uk/product_info.php?cPath=22&products_id=30&osCsid=8802ccfc17e64281f7af7c1e870c202b

³ <http://en.wikipedia.org/wiki/Ayahuasca>

According to the following Independent article published in May 2006, entitled "*Magic mushroom users turn to exotic alternatives to get high without breaking law*", the popularity of alternatives to "magic mushrooms" such as the Peyote cactus and Ayahuasca has greatly increased since the ban on mushrooms:

http://news.independent.co.uk/uk/this_britain/article621825.ece (article)

<http://comment.independent.co.uk/commentators/article621773.ece> (commentary)

Although there are now hundreds of companies openly selling plants containing controlled substances in the UK, there is considerable uncertainty as to the exact legal standing for the thousands of people who, every week, buy and use such "legal highs". The authorities have obviously been aware of the phenomenon for several years, but no legal action has been taken until now and the status quo was that "legal highs" were in fact generally seen as being "legal", at least in absence of any evidence to the contrary.

Lacking any precedents, since the terms "preparation" and "product" have only been applied by the courts to "magic mushrooms" and not to any other plant or fungus, there is no clear indication as to how these terms would be interpreted with respect to other plant materials which are now commonly available.

One of the main points of contention is whether drying or powdering a plant containing a controlled substance would be considered to result in a "preparation" or "product" of the controlled substance contained within it. Some believe that this interpretation is possible since in cases concerning "magic mushrooms" (prior to the mushrooms themselves being scheduled) the courts ruled that powdering (*Regina v Stevens*, 1981 [unreported]) or even simply drying the mushrooms (*Regina v Cunliffe*⁴, 1986) resulted in a "preparation" of psilocin and psilocybin and that packaging and freezing the mushrooms resulted in a "product" (*Regina v Hodder*⁵, 1989).

In *Regina v Stevens*, the test case for dried "magic mushrooms", the defendant had been caught in possession of dried and powdered "magic mushrooms". In reference to the word "preparation" in the 1971 Act, the judge stated the following:

It was intended that its ordinary and natural meaning should be given to it. What was needed in order that these mushrooms should be prepared is that they ceased to be in their natural growing state and had in some way been altered by the hand of man to make them into a condition in which they could be used.

Although the "*altered by the hand of man*" criteria was later quoted in subsequent cases, it has been argued that the Court was here answering the wrong question, and, as a result, misinterpreted Schedule II, Part I, paragraph 5 of the MDA. Paragraph 5 refers to "any preparation" – the word "preparation" is clearly being used as a noun, relating to the substance in question, as opposed to as a verb, describing the activities of the individual(s) concerned. Whilst it may seem a minor point, it is far easier to prove that some preparatory activities had taken place ("did the individual's actions amount to acts of preparation?") than to prove that, as a result, the mushrooms had become "a preparation" – namely, "a specially made up substance, especially a medicine or food"⁶. If the word "preparation" is treated as a noun then something either is or isn't a "preparation" in its own right, regardless of the actions of the individual(s) in question. Preparatory acts don't mean that you end up with a "preparation".

⁴ <http://paragraph5.blogspot.com/2006/11/r-v-cunliffe.html>

⁵ <http://paragraph5.blogspot.com/2006/11/hodder-and-another-v-chief-constable-of.html>

⁶ <http://www.dictionary.com>

In [Regina v Cunliffe](#) a collection of dried "magic mushrooms" was found in a wooden casket in the appellant's home. He was convicted after the jury was given the following summing-up in the Court of Appeal:

It is only if you can say to yourselves, 'We feel sure that what this man did was to arrange for the mushrooms to be dried out in his house to be available for use for drug taking'; only if you are satisfied that he did that act of preparation rather than it being just a natural ordinary occurrence on its own, only then can you find this man guilty.

In line with Stevens, the word "preparation" was (mis?)construed as referring to the actions of Cunliffe, as opposed to referring to the finished product. The conviction was upheld.

In [Regina v Hodder](#) the appellant was brought to trial following the discovery of forty-four labelled bags, each containing one hundred magic mushrooms, in his freezer compartment. Whilst Hodder and his co-appellant knew that it was illegal to prepare the mushrooms for use as "psychedelics", they thought that this meant that it was wrong to boil or dry them. Their lawyers argued that the bagging and labelling of the mushrooms did not constitute an act of "preparation", as "preparation" must refer to the mushrooms and not mere packaging: furthermore, they argued that *preservation* of the mushrooms by freezing was not akin to "preparation". It was submitted that a distinction needed to be drawn between "preparatory acts" and the question of whether what was in their clients' possession was "a preparation", and that their clients' activities did not fall within Schedule II, Part I, paragraph 5 of the 1971 Act. The judge summarised the arguments of Hodder's lawyer, Mr. Bromilow, in the following manner:

For example, mere picking, submitted Mr. Bromilow, would not make the mushrooms a preparation, nor would putting them in packets and labelling them make them a preparation. They would still be mushrooms. The man in the street, said Mr. Bromilow, would not refer to the frozen mushrooms in the freezing compartment of the refrigerator as a preparation; he would simply call them frozen mushrooms.

However, at trial, the magistrates had been of the opinion that "because the mushrooms were counted out into packages each containing one hundred, then labelled and subsequently frozen, that, using the ordinary and natural meaning of the word 'preparation', the actions of the appellants amounted to preparation for future use".

Again, the actions rather than result were seen as the determining factor. The Court of Appeal upheld the appellants' conviction but, crucially, disagreed with the magistrates' logic. On this instance, it was ruled that freezing did not amount to "preparation", and the case was distinguished from both Stevens and Cunliffe, where the mushrooms had been dried out, for the following reason: "There was no evidence that freezing the mushrooms brought them into a suitable state to be consumed. Indeed, the evidence was that they could not be used until they had been defrosted. However, it will be remembered that Schedule II Part I paragraph 5 is not restricted to preparations, referring to both: 'any preparation or other product "'. The Court relied on this second limb of paragraph 5 to uphold the convictions:

In my judgment these mushrooms picked, packaged and frozen do come within the meaning of the word 'product' or within the phrase 'or other product' in those words' ordinary and natural meanings. The evidence indicates clearly that the appellants were producing packages of frozen mushrooms for use by themselves and others in much the same way that supermarkets produce packaged and frozen vegetables. The calling of such packets of frozen vegetables 'products' is an ordinary and natural use of language. Consequently on that ground I would refuse this appeal.

These three cases laid down the shaky foundations for the legal interpretations of Schedule II, Part I, paragraph 5 of the MDA with regards to "magic mushrooms". However, in reality the situation is now much more complicated, since the courts and authorities such as the Home Office have more recently made conflicting interpretations and given advice which is

unclear, if not fundamentally contradictory. Indeed it could be argued that interpreting dried or frozen "magic mushrooms" as a "preparation" or "product" was a mistake in the first place in light of new information, more recent case law and other developments which have taken place since. It could also be reasonably argued that the same definition of "preparation" or "product" should not be applied equally to all plants containing controlled substances and that the interpretations used for "magic mushrooms", which had always been uncomfortable to the courts, are no longer adequate in view of a whole host of other plants which are now commercially available and used in a variety of ways.

For a start, here are the Home Office views regarding dried mescaline containing cacti and DMT containing Ayahuasca plants specifically:

[Home Office Letter - Richard Mullins](#)⁷

[Home Office Letter - Chris Edwards](#)⁸

According to the first letter by the Home Office Drugs Directorate spokesman Richard Mullins:

It is not the growing and sale of such plants for horticultural purposes which is illegal, but the unauthorised production, supply and possession of controlled drugs such as mescaline, from them which is unlawful under the Misuse of Drugs Act 1971.

(...)

*A bona fide trader selling dried material and samples of cacti etc. for purely botanical / horticultural / herbarium specimen's purposes has **nothing to fear** [emphasis retained from original], notwithstanding the fact that the cacti etc. contain a controlled drug.*

(...)

In itself drying for purely botanical / horticultural / herbarium purposes – "mere preservation" – does not in law amount to preparation for the production of a controlled drug.

The second letter by Chris Edwards states:

There is a gray area over whether these plants become a preparation once they are dried. I am aware that pot-pourri cactus plants are quite popular and have previously had enquiries about whether it is lawful to sell such items. You are right in saying that most traders specify that such items are not for human consumption and I believe this is probably the reason for the status quo as the onus is then passed onto the customer as to what he or she then does with the purchase.

Regarding Ayahuasca plants, it goes on to state:

Ayahuasca and Yage are both drinks prepared from plants. Again, it is my understanding that it is only when it becomes a preparation that it becomes an illicit brew. The plants themselves contain Class A substances which then have to be extracted to make the liquid.

Both letters can be interpreted in a way that would suggest that it is not the mere act of drying that results in a "preparation" in itself, as commonly believed or as seemed to be the case with "magic mushrooms". Some form of separation of the controlled substance from the plant material would have to take place in order for it to be considered a "preparation", although it's unclear whether the actions or the end result would be the deciding factor. In

⁷ http://i136.photobucket.com/albums/q173/sergei77/home_office1.gif

⁸ http://i136.photobucket.com/albums/q173/sergei77/home_office2.gif

any event, no easily ascertainable criteria are given. Neither letter categorically states that drying in itself constitutes an act of "preparation" or "production". What both seem to imply is that "intention" for human consumption or "context" might be the deciding factor, rather than any particular rudimentary process which is applied to the plant material, such as drying.

However there is a glaring flaw in this approach. Consuming a controlled substance is not *in itself* a crime. "Magic mushrooms" were until recently legal in the UK in their "fresh state". They were packaged, weighed, dosed and legally sold explicitly for human consumption despite the fact that they contained the controlled substances psilocin and psilocybin. Customs and Excise even collected tax on the sale of these fungi. [An article published in the Independent in 2004](#)⁹ stated: "Magic mushroom traders are facing a £1m tax bill after a Customs and Excise ruling that the hallucinogenic fungus is to be treated as a drug and not a food".

[A Home Office letter in circulation in 2003](#)¹⁰, prior to the law on "magic mushrooms" being changed, said:

In relation to your specific queries our view is as follows: queries 1 and 2 - it is not illegal to grow and pick psilocybin mushrooms and eat them fresh. Queries 3 and 4 - it is not illegal to sell or give away a growing kit as the mushrooms themselves are not controlled. Query 5 - it is not illegal to sell or give away a freshly picked mushroom, provided that it has not been prepared in any way. In the light of the earlier court cases, this is query 6, it would be for the courts to determine whether chilling mushrooms in a fridge constituted altering them in any way.

A court consequently upheld these views in [Regina v Dennis Mardle & Colin Evans](#)¹¹ (2004) and additionally ruled that packaging and chilling the mushrooms did not constitute a "preparation" or "product". The judge stated "*The issue in this case, in substance is really this, whether the fresh mushrooms which are kept in a fridge or cool bag and are packed in punnets or otherwise, are a preparation or product*". He then went on to state, "*I take the view, the Home Office circular which deals with the cooling and chilling point, is a fudge, to put not too fine a point on it. They are being ultra cautious maybe, but I do not think the language is very happy, because everybody is entitled to know exactly what is and what is not a criminal offence*". The case was dismissed on the grounds of "abuse of process".

So, according to the above, possessing, selling *and consuming* a plant or fungus which contains a controlled substance is not illegal provided that the plant or fungus material is not considered a "preparation". Now if mere "intention" to consume made the plant or fungus a "preparation" then the above court ruling would not have been possible since it would make no sense to uphold that consuming a plant or fungus that contains a controlled substance is legal if the mere intention to consume it made it into an illegal "preparation". It's a "chicken and egg" situation.

The judge's view in [Regina v Dennis Mardle & Colin Evans](#) that packaging and chilling ("preserving") the mushrooms did not result in a "product" is also contradictory of the judge's view in [Regina v Hodder](#) that packaging and freezing (again, merely "preserving", albeit by a different method) the mushrooms resulted in a "product" (but not a "preparation"). This is a significant move away from the previous interpretations of "preparation" and "product" with regards to plants and fungi as well as an acknowledgement of the flaws in the old approach.

Note that although "magic mushrooms" are now explicitly scheduled, regardless of their state, this does not affect cacti or any other plant not explicitly mentioned in the MDA. From this we can infer that, at a minimum, selling fresh mescaline containing cacti for

⁹ <http://news.independent.co.uk/uk/legal/article51073.ece>

¹⁰ http://i136.photobucket.com/albums/q173/sergei77/magic_mushrooms_home_office.jpg

¹¹ http://www.erowid.org/plants/mushrooms/mushrooms_law15.shtml

human consumption, packaged, dosed, chilled, is perfectly legal, if the same rules are to be applied.

Since the dried cactus is not a "preparation" or "product" either (according to [Richard Mullins' Home Office letter](#)) one could further infer that possessing it, selling it (for human consumption) *and consuming it*, is not illegal. If it were, it would have to be a "preparation" or "product" to start with. And to say that "intention" to consume makes it a "preparation" or "product" would be inconsistent with what the courts have already upheld regarding fresh "magic mushrooms", as explained above.

So what exactly is a "preparation" or "product" as intended by the MDA? If it is not the mere act of drying and it is not "intention" for human consumption, is it something that's dependent on a process or procedure that's applied to the plant material (for example, some form of extraction or separation of the controlled substance) or is it all about "context"? Are acts, intentions or the end result the deciding factor? Is it a combination of things? And, most importantly, how is the general public to know *in advance* what the exact criteria is for any given plant or fungus which may contain controlled substances since this is not published or clearly defined anywhere? Considering the potential penalties for an incorrect interpretation of the law (a maximum of a life sentence for supply) this is clearly an unsatisfactory state of affairs.

The best we can do, apart from making interpretations from the views of the UK courts and authorities such as the Home Office, which are contradictory and give no conclusive answer, is to look at the definition of "preparation" in the [UN Convention on Psychotropic Substances](#)¹² to which the UK, and most other European countries are signatory and also to look at how other more or less "common law" countries have interpreted this term, bearing in mind that the MDA was designed to implement the UN Convention on Psychotropic Substances and the term "preparation", like much of the content of the MDA, appears to have been borrowed directly from the text of the Convention.

[The Convention defines the term "preparation"](#)¹³ as follows:

"Preparation" means:

- 1. any solution or mixture, in whatever physical state, containing one or more psychotropic substances, or*
- 2. one or more psychotropic substances in dosage form.*

Point 2 obviously doesn't apply to plants since a plant is not normally referred to as a "substance" in natural language. And to define a single species of dried plant as a "solution or mixture" would not make any sense either.

To see some examples of things which would be considered a "preparation" according to the Convention and to get a further understanding of what things might be defined as "preparations" by the Convention in practice, we can look at a section of the Convention entitled "List of Preparations Included in Schedule III". Here we see a list of mixtures of previously isolated substances added to something else (a "base"), for example *"Preparations of Diphenoxylate containing, per dosage unit, not more than 2.5 milligrams of diphenoxylate calculated as base and a quantity of atropine sulfate equivalent to at least 1 per cent of the dose of diphenoxylate"*. There is no reference to plants or plant materials in any form, or to any crude plant based concoction of any kind.

[The Commentary on the Convention on Psychotropic Substances](#)¹⁴ notes that while many plant derived chemicals are controlled by the treaty, the plants themselves are not:

¹² <http://www.drugtext.org/library/legal/treat/psychotropic.html>

¹³ http://www.unodc.org/unodc/en/bulletin/bulletin_1971-01-01_3_page002.html#s030

¹⁴ http://en.wikipedia.org/wiki/Convention_on_Psychotropic_Substances

The term "synthetic" appears to refer to a psychotropic substance manufactured by a process of full chemical synthesis. One may also assume that the authors of the Vienna Convention intended to apply the term "natural material" to parts of a plant which constitute a psychotropic substance, and the term "natural psychotropic substance" to a substance obtained directly from a plant by some process of manufacturing which was relatively simple, and in any event much simpler than a process of full chemical synthesis.

(...)

Cultivation of plants for the purpose of obtaining psychotropic substances or raw materials for the manufacture of such substances is not "manufacture" in the sense of Article 1, paragraph (i). Many provisions of the Vienna Convention governing psychotropic substances would be unsuitable for application to cultivation. The harvesting of psychotropic substances, i.e. separation of such substances from the plants from which they are obtained, is "manufacture".

(...)

*The cultivation of plants from which psychotropic substances are obtained is not controlled by the Vienna Convention. (...) Neither the crown (fruit, mescal button) of the Peyote cactus nor the roots of the plant *Mimosa hostilis* nor *Psilocybe* mushrooms themselves are included in Schedule 1, but only their respective principles, mescaline, DMT and psilocine, psilotsin.*

As if the above wasn't clear enough, the question of whether the Convention was intended to cover plants (fresh or dried) as well as crude plant based decoctions was finally put to rest in a [Fax issued by the United Nations International Narcotics Control board in 2001](#)¹⁵ regarding Ayahuasca plants which stated:

No plants (natural materials) containing DMT are at present controlled under the 1971 Convention on Psychotropic Substances. Consequently, preparations (e.g. decoctions) made of these plants, including ayahuasca are not under international control and, therefore, not subject to any of the articles of the 1971 Convention.

[An email dated December 2006 from the United Nations International Control Board](#)¹⁶ in response to an enquiry regarding dried mescaline cacti similarly stated the following:

As you may be aware, mescaline is a substance listed in Schedule I of the Convention on Psychotropic Substances of 1971, and therefore subject to the provisions set forth in that Convention. In contrast, no plants (natural materials) containing psychotropic substances are at present controlled under the 1971 Convention. Consequently, preparations (e.g., decoctions) made of these plants are not under international control and, therefore, not subject to any of the articles of the 1971 Convention.

So what's certain (and one of the few certain things in this whole mess), is that the Convention does not cover DMT containing plants or mescaline containing cacti, fresh or dry, or any simple decoctions derived from such plants. Therefore the UK or any other signatory country is not under any obligation under the terms of the treaty to control these plants in any way, shape or form. This does not mean that the UK is not allowed to legislate beyond the requirements of the Convention, however there is nothing in the MDA to indicate or suggest that this is the case regarding DMT containing plants, mescaline containing cacti or other plants or fungi which are not explicitly scheduled.

¹⁵ http://i136.photobucket.com/albums/q173/sergei77/incb_ayahuasca_fax.gif

¹⁶ http://i136.photobucket.com/albums/q173/sergei77/incb_cacti.jpg

It is also clear that it is possible to interpret the term "preparation" as *not* being applicable to plants and plant materials. [The French courts upheld the following definition of preparation](#)¹⁷ in January 2005 regarding the DMT containing Ayahuasca brew:

- *Ayahuasca is not DMT and thus cannot be considered scheduled.*
- *The sole toxicity of a "product" doesn't allow legal authority (Justice) to consider it scheduled.*
- *The operation of decoction, infusion, or maceration doesn't permit to obtain a "substance" ["a pure substance"] and is not a "preparation" [in the technical, pharmacological, and legal sense].*
- *A preparation is a technical operation consisting in having [pure] substances previously at disposal before mixing them with other substances.*

The above is consistent with the UN view. The Ayahuasca plants as well as Peyote (but not San Pedro and Peruvian Torch), were consequently explicitly scheduled in France a few months after the above ruling, reflecting the inadequacy of the term "preparation" as applied to plant materials.

[An Italian court reached a similar conclusion](#)¹⁸ in January 2006 and the Ayahuasca brew was not deemed a "preparation", despite the fact that it contains DMT, since the plants themselves are not controlled and the levels of DMT contained in the brew are comparable to those contained in the plants used to make the brew, therefore no significant process of isolation or "separation" of the controlled substance had taken place. Plants such as [Peyote and "magic mushrooms" have been explicitly scheduled in Italy since 1968](#)¹⁹ again indicating that a distinction needs to be made between the plants and the controlled substances contained within them (or "preparations" thereof).

Even if British courts were to take the position that the UN Convention on Psychotropic Substances doesn't matter because the UK is taking a view that goes beyond the requirements of the Convention, it is clear that legal interpretations of the term "preparation" which exclude natural psychotropic materials (as in the Convention itself) are perfectly possible. Therefore simply using the term "preparation" without qualifying it with a definition is insufficient – conflicting interpretations can and have been made by different authorities.

So why did the UK deem dried "magic mushrooms" a "preparation" or "product"? Perhaps, this was a faulty interpretation by the courts. It used to be said that it was a legal anomaly or "loophole" that fresh "magic mushrooms" were considered legal. In reality it was probably a legal anomaly that dried "magic mushrooms" were considered illegal since they were not explicitly referred to in the MDA and are not covered by the UN Convention on Psychotropic Substances. The fact that the law had to be amended to include "magic mushrooms" in any form, specifically to avoid confusion, is an indication that it was flawed to start with. Applying the terms "preparation" and "product" to plants or fungi was a mistake, since if that was the original aim, it did not fulfill it. The inadequacy of the law in this respect is highlighted by the comments of the judge in [Regina v Dennis Mardle & Colin Evans](#): *"it is not enough (...) simply to say that these two drugs are unlawful, but not specifically legislating in respect of these products where they occur naturally"*. The Home Office themselves publicly acknowledged the problems inherent in the interpretation of these terms in their [Drugs Act 2005 – Magic Mushrooms FAQ](#)²⁰ by stating: *"[Question] What was the problem with the law as it stood? [Answer] The Misuse of Drugs Act controlled the chemicals inside the mushroom (psilocin and psilocybin) rather than the mushrooms themselves although it was also an offence to possess or supply mushrooms if*

¹⁷ http://www.santodaime.it/Library/LAW/Francia/courdapeldeparis05_france.pdf

¹⁸ <http://forums.ayahuasca.com/phpbb/viewtopic.php?t=10992>

¹⁹ <http://www.ecn.org/hemp/Leggi-decreti/DM150268.htm>

²⁰ <http://www.drugs.gov.uk/drugs-laws/drug-act-2005/faq/>

they had been prepared or if they were in the form of a product. It is a matter of legal interpretation what constitutes a preparation or a product and this had led to uncertainty".

Also note that if the legislators had wished to prevent the use of other psychoactive plants containing controlled substances, or to avoid further uncertainty, they could have included these plants in the [Misuse of Drugs \(Amendment\) \(No. 2\) Regulations 2005](#)²¹ together with the "magic mushrooms", however they chose not to do so despite the [Transform Drug Policy Foundation pointing out in a letter to the Home Office](#)²² prior to the Amendment coming into effect that the confusion would continue and warning that "*Clamping down on magic mushrooms would, on principle, necessitate clamping down on other plants that contain Class A substances. These include Peyote and San Pedro cacti (containing mescaline and widely available in garden centres), and fresh/dried poppies and poppy seeds from which opium can easily be extracted (available in garden centres, craft shops and even IKEA)*".

The fact that certain plants such as "opium poppy", "poppy-straw" and "concentrate of poppy-straw", "cannabis" and "coca leaf" are referred to explicitly in the MDA is further indication that the terms "preparation" and "product" were not intended to be applied to plants and plant materials otherwise there would be no need to refer to these plants explicitly since they would simply be considered "preparations" or "products" of the separately scheduled controlled substances which they contain.

This is reinforced by [Regina v Goodchild](#)²³ (1978) where the defendant was found in possession of stalks of the cannabis plant. At the time the stalk of the cannabis plant was not explicitly scheduled although the fruiting tops of the plant were (the law was later amended). The defendant was charged with possession of a cannabinol derivative – THC, a Class A drug on the basis that the stalks of which he was in possession contained THC. In this case the judge, Lord Diplock, stated:

Most though not all of the listed drugs in the three classes A, B and C are described by their precise chemical name and are synthetic substances which do not occur in the natural state. In the case of these drugs there is no room for doubt or ambiguity, a substance either is the described synthetic drug (or a preparation or other product contained in the described synthetic drug) or it is not.

But there are some listed drugs which, although they can be synthesised, also occur in the natural state in plants, fungi or animals, and these include some of the most used narcotic drugs. It would not in my view be a natural use of language to say for instance, that a person was in possession of morphine when what he really had was opium poppy straw, from which whatever morphine content there might be in it, had not yet been separated, nor do I think it would be an apt use of language to describe the poppy straw as a "preparation or other product" containing morphine since this expression is inappropriate to something that is found in nature as distinct from something that is man-made.

Regarded simply from the point of view of language, the matter is in my view put beyond doubt as respect the specific narcotic ingredients found in opium poppies by the inclusion in the list as separate items "opium" and "poppy straw", as well as morphine, the bane, codeine and several other specified alkaloids which are or maybe constituents of opium and of poppy straw. A similar indication of the meaning of references in the Schedule to specific drugs by their scientific names is to be found in the inclusion as separate items of "cocaine" itself and "coca leaf" which contains cocaine and from which cocaine can be extracted. I should conclude, therefore, that prima facie, a reference in Schedule 2 to a specific drug by its scientific name, does not include a reference to any naturally occurring substance of which the specific drug is a constituent but from which it has not yet been separated.

²¹ <http://www.opsi.gov.uk/SI/si2005/20051653.htm>

²² http://www.tdpf.org.uk/Policy_General_Mushrooms.htm

²³ <http://paragraph5.blogspot.com/2006/11/director-of-public-prosecutions-v.html>

(...)

So prima facie, one would not suppose that possession of natural occurring leaf and stalk of the plant cannabis satifer of which cannabinol derivative THC was an unseparated constituent could be charged under the Act of a cannabinol derivative.

(...)

I would construe the Act in such a way as to avoid this irrational and unjust result, a man should not be jailed upon an ambiguity, I would allow the appeal and quash the conviction of the appellant for the offence of unlawful possession of a cannabinol derivative.

The above also implies that where the controlled substance occurs naturally, "separation" of the substance from the plant would be the deciding factor, again consistent with the UN view and the view taken by some other European countries.

Highlighting the inadequacy of the law with respect to plants which contain controlled substances, Lord Diplock went on to state:

There are other drugs listed under their scientific names which also occur in nature, but the natural source from which they can be obtained is not itself specified as a controlled drug in the Schedule. The following are examples.

Lysergamide and lysergide occur in nature in the stalks, leaves and stem of the flowering plant known as Morning Glory; mescaline is found in the flowering heads of the Peyote Cactus; psilocin and psilocybin are to be found in a toadstool sometimes called the Mexican magic mushroom; and bufotenine occurs in the common toadstool and in three other varieties of toadstool; in the stalks and leaves of a semi-tropical plant, and even as a secretion of the common toad and natterjack toad.

(...)

The question directly involved in this appeal will not arise again in future, as the definition of "cannabis" has now been amended by section 52 of the Criminal Justice Act 1977, so as to include the whole of the plant except the mature stalk and fibre produced from it and the seeds. However, similar questions may arise in relation to those other listed drugs described by their scientific names, but which also occur naturally in plants or fungi or animals. As I have already indicated as a necessary step in the reasoning which has led me to the conclusion in the instant appeal that no offence was committed by the appellant, the offence of unlawful possession of any controlled drug described in Schedule 2 by its scientific name is not established by proof of possession of naturally occurring material of which the described drug is one of the constituents unseparated from the others.

This is so whether or not the naturally occurring material is also included as another item in the list of controlled drugs.

Viscount Dilhorne, further added:

My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Diplock. I agree with it and only desire to add a few observations.

When Parliament intended that plants and parts of plants should come within the scope of the Misuse of Drugs Act 1971, it made its intention manifest, e.g., by the definition of cannabis in section 37 (1) as meaning the flowering or fruiting tops of any plant of the genus Cannabis from which the resin had not been extracted, and in Schedule 2, Part I,

by the inclusion in Class A drugs of coca leaf and of poppy straw, defined as meaning all parts, except the seeds, of the opium poppy, after mowing.

No parts of any plants of the genus Cannabis other than its flowering or fruiting tops are mentioned in the Act, and in my view no parts other than flowering or fruiting tops whether or not in their natural state they contain cannabinol derivatives, as defined in Part IV of Schedule 2, come within the scope of the Act.

In the previously mentioned [Regina v Dennis Mardle & Colin Evans](#) case regarding "magic mushrooms" which had been packaged and chilled, the judge stated:

It seems to me and I so decide that this is a case where rightly or wrongly, Parliament has left a gap very much like the case of Regina v Goodchild and it seems to me that that gap ought really to be filled by Parliament and not by decisions of these courts.

(...)

If one is looking at this legislation, it is not enough again with respect, adopting the reasoning of Lord Diplock in Regina v Goodchild for the legislation simply to say that these two drugs [psilocin and psilocybin] are unlawful, but not specifically legislating in respect of these products where they occur naturally. Very much like Regina v Goodchild, it seems to me that if, that is what the legislation intended, that is what they should have provided.

For these reasons, a person being caught in possession of dried pieces of the cannabis plant would not be charged with possession of a "preparation" of THC, the controlled substance contained within the plant, but with possession of cannabis. By the same token a person who is in possession of dried pieces of a mescaline containing cactus or dried leaves of a DMT containing plant, should not be charged with possession of a "preparation" of mescaline or DMT.

Another variable in the equation, assuming the terms "preparation" and "product" were originally intended to apply to all plants and fungi containing controlled substances (which is doubtful), is whether they should apply to all plants and fungi *equally* and *in the same way*. One could reasonably argue that this would be inappropriate since it would be like saying that "the way you prepare a sandwich is the same as the way you prepare a soup". There are a multitude of plants containing controlled substances which are now commercially available and which were not commercially available when the MDA was drafted over 35 years ago. The traditional methods of preparation for these plants vary wildly - some are ingested, some are smoked, some are made into brews, some are used as snuffs and so on.

For example, "magic mushrooms" are commonly ingested in their fresh or dry state and a typical dose would be around 1 or 2 grams of dry material. Dried magic mushrooms are as ready for human consumption as they are going to get, short of actually extracting the controlled substances which they contain. Assuming that dried magic mushrooms were deemed a "preparation" for consumption, to then use that logic and say that dried leaves of the DMT containing plant *Psychotria viridis* are equally a "preparation" for consumption would make no sense, just like it would make no sense to say that 1 or 2 grams of the leaves would constitute a "dose" just because that is the dose for "magic mushrooms". Apart from the fact that one would have to ingest approximately 50 grams of the leaves to reach a threshold dose of DMT, simply eating the dry leaves would have no effect, since DMT is not orally active unless combined with a Monoamine Oxidase Inhibitor (MAOI). The traditional method of preparation of the Ayahuasca brew involves mixing the DMT containing plant with a MAOI containing plant and making a brew which is boiled for several hours, sometimes a whole day in order to reduce it to a manageable amount of liquid. Even different plants containing the same controlled substance are prepared in different ways.

[Yopo seeds](#)²⁴ (*Anadenanthera colubrina*) also contain DMT. They are normally powdered and consumed as a snuff which enters the bloodstream through the nostrils.

In the case of mescaline containing cacti, the act of drying should be considered an act of "preservation", as indicated in [Richard Mullin's Home Office letter](#) and not "preparation" since it brings the cacti no closer to the "prepared" (meaning "ready") state in which they are usually consumed. Unlike Peyote which are often consumed raw, [traditional preparation](#)²⁵ of San Pedro and Peruvian Torch cacti ([which allegedly contain up to 10 times less mescaline than Peyote](#)²⁶) involves boiling the plant material for several hours, filtering out the flesh, and consuming the resulting liquid once it has been reduced to a manageable volume. If anything the dried cacti are one step further away from their final state of readiness for consumption with respect to fresh cacti, since they have to be first rehydrated. In [Regina v Hodder](#) it was held that *"There was no evidence that freezing the mushrooms brought them into a suitable state to be consumed. They could not be consumed until defrosted. The act of freezing the mushrooms was not an act of preparation"*. Similarly, consuming the dried cactus "as is" in sufficient quantity (45 grams or more, [according to literature](#)²⁷), would be physically very difficult - [the dried cactus becomes extremely hard](#)²⁸ and it is doubtful whether it would be digested sufficiently to produce a psychoactive effect unless it was previously rehydrated.

Drying the cacti is not a step in the preparation of the decoction which would be made out of them if they were to be consumed. The analogy of preparing a vegetable soup could be used. Drying the vegetables required for the soup is not necessary in order to prepare the soup. Although the vegetables could be dried in order to preserve them, the soup could be prepared without drying the vegetables and, conversely, the vegetables could be dried without getting any closer to a prepared soup, therefore the act of drying the vegetables is not intrinsic to preparing the soup but simply an act of preservation of the vegetables independent of preparing the soup and of no consequence to how prepared the soup is.

What might possibly be considered a "preparation" regarding cacti, just as with the Ayahuasca plants, is the liquid resulting from a brew, although this would still go further than the UN's position and the position taken by other European countries. This appears to be the view expressed in [Chris Edwards' Home Office Letter](#) where he states that *"Ayahuasca and Yage are both drinks prepared from plants. Again, it is my understanding that it is only when it becomes a preparation that it becomes an illicit brew. The plants themselves contain Class A substances which then have to be extracted to make the liquid"*. This statement could also be interpreted as a confirmation that the logic of "dried = preparation" cannot be applied equally to all plants, thus accounting for differing methods of preparation. Significantly, he also uses the word "extracted" which implies, at a minimum, that a rudimentary separation of the controlled substance from the plant material would be necessary.

It has been suggested, when the fresh "magic mushrooms" were legal, that merely chopping them up would make them into a "preparation". Obviously this could not be applied to cacti since the most common method of propagation involves "cuttings". The cactus is cut into pieces and the roots are allowed to re-grow from the cuttings, after which they are then replanted. It is also common for botanical enthusiasts to hold and exchange dried herbarium specimens of plants. If the cactus material was considered a "preparation" or "product" simply by virtue of it being dried or divided into pieces, these enthusiasts would suddenly find themselves potentially in possession, or worse, supplying a "preparation" of a Class A drug. The *"altered by the hand of man"* criteria for determining what is a "preparation" (as applied to "magic mushrooms"), vague as it is, could not be

²⁴ <http://en.wikipedia.org/wiki/Yopo>

²⁵ http://www.erowid.org/plants/cacti/cacti_preparation1.shtml

²⁶ http://www.erowid.org/plants/cacti/cacti_sanpedro_potency_faq.shtml#5

²⁷ <http://users.lycaeum.org/~iamklaus/dosage.htm>

²⁸ http://www.everything2.com/index.pl?node_id=1231273

reasonably applied to cacti, otherwise a whole host of legitimate activities would become illegal.

Furthermore, Class A drugs such as DMT, as well as being [naturally present in the human brain](#)²⁹, are [present in hundreds of commonly found plants](#)^{30 31} including a common type of grass known as [Reed Canary Grass](#)³² (*Phalaris arundinacea*) which is listed as a serious or principle weed in many European countries. Most plants in the Acacia species, from which the popular Acacia honey is made, contain DMT. [Acacia farnesiana](#)³³ is used in the perfume industry due to its strong fragrance. [Acacia seed flour](#)³⁴, also known as [Wattleseed](#)³⁵ has recently gained popularity due to its high nutritional content, hardness, availability, and low toxicity. Due to its low glycemic index, it is also often incorporated into diabetic foods.

DMT (along with 5-MeO-DMT) has been detected in the [traditional Chinese herbal remedy Evodia fruit or Wu Zhu Yu](#)³⁶ (*Evodiae Fructus*), a remedy composed of the dried fruits of the Rutaceae *Evodia rutaecarpa* plant. This plant is commercially available in the UK in Chinese herbal remedy shops and sold in dried and powdered format specifically intended for human consumption. [Dr & Herbs](#)³⁷, which has over 50 shops in the UK sells this remedy in dried, granulated form. Here are some examples of sites selling this medicinal plant in the UK:

http://www.shulan.uk.com/servlet/ListProducts3?cat=Formulae_Formulae

http://www.shg.me.uk/shop/catalog/product_info.php?cPath=24&products_id=1226&osCsid=760c390ee49c831806c6bf64047f3c5d

<http://www.incensemagic.co.uk/chris/Supp/herbs/chinese/PowderTZ.htm>

LSA, also a Class A drug, is present in the seeds of the Morning Glory plant as well as other common household plants. These seeds can be purchased in most "home and gardening" stores in the UK. They could be consumed simply by ingesting and chewing.

It seems fairly obvious from the above that the same narrow criteria for "preparation" used for "magic mushrooms" cannot be applied equally to all plants otherwise all sorts of people, from gardeners to medical practitioners could end up falling foul of the law. And for those with an interest in psychoactive plants it would be impossible to tell to what extent they are able to legally pursue their interests. A re-interpretation or clarification of the law would be necessary.

There are also a number of religious groups present in the UK, including the [Santo Daime](#)³⁸ and the [União do Vegetal \(UDV\)](#)³⁹ churches which combine traditional Christian beliefs with native South American shamanic practices and use plant based concoctions containing controlled substances (*Ayahuasca*) as a religious sacrament. These groups have been recognised as legitimate religions and specifically granted the right to use such concoctions under the [Religious Freedom Restoration Act](#)⁴⁰ (to which the UK is a signatory) in [Spain](#)⁴¹ in

²⁹ http://www.ncbi.nlm.nih.gov/entrez/query.fcgi?cmd=Retrieve&db=PubMed&list_uids=20877&dopt=Citation

³⁰ <http://hjem.get2net.dk/gaffri/page6.html>

³¹ <http://deoxy.org/trypfaq.htm>

³² http://en.wikipedia.org/wiki/Reed_canary_grass

³³ <http://leda.lycaenum.org/?ID=15976>

³⁴ http://en.wikipedia.org/wiki/Acacia_seed

³⁵ <http://www.cherikoff.net/cherikoff/index.php?id=131>

³⁶ <http://mishmashblue.tripod.com/np60.pdf>

³⁷ <http://www.drherbs.co.uk/home.php>

³⁸ http://en.wikipedia.org/wiki/Santo_daime

³⁹ http://en.wikipedia.org/wiki/Uniao_do_Vegetal

⁴⁰ http://en.wikipedia.org/wiki/Religious_Freedom_Restoration_Act

⁴¹ http://www.santodaime.it/Library/LAW/Spagna/spanishjudgement00_TESTO.htm

2000, the [Netherlands](#)⁴² in 2001, and in 2005 even in the [United States](#)⁴³. Therefore legitimate use of these plants for their psychoactive properties is definitely possible in the UK.

Having looked at various aspects of the argument, the only thing that is clear, is that that there is no agreement either from part of the courts or from part of the authorities in the UK as to what exactly constitutes a "preparation" or "product" as intended, but crucially not defined, by the MDA. This confusion stems from the fact that these terms were not intended to cover the multitude of plants which are now commercially available and which contain controlled substances or which have been discovered to contain controlled substances since the MDA was drafted. Legislators, back in 1971, could not have foreseen the current situation, therefore the historical interpretations of the current laws which were already inadequate when applied to "magic mushrooms" are now even more inadequate when applied to other plants and fungi.

The bottom line is that it is virtually *impossible* for an individual to ascertain *in advance* and *with certainty* whether applying a certain process to a plant which contains a controlled substance or consuming it is legal or illegal. The courts and authorities cannot provide a clear and consistent definition of what constitutes a "preparation" or "product" because no definition of these terms is given in the text of the MDA. This adds another crucial facet to the debate - Article 7 of the [Human Rights Act](#)⁴⁴ which officially came into effect in the UK in 2000 to implement the European Convention on Human Rights originally drafted in 1950. This Article states that the law must be *clear* and *ascertainable* so that an individual is able to know *in advance* whether what they are doing is against the law or not. In the case of *Regina v Handyside* (1974, 17 Yearbook 228), the European Commission held that Article 7 includes the requirement that "*the offence*", or one might add "an offence", "*should be clearly described by law*". This Article was also quoted by the judge in [Regina v Dennis Mardle & Colin Evans](#).

So although the courts can make logical interpretations, it would be an infringement of an individual's human rights to convict them based on an unclear and ambiguous law, which seems to be the case here. And since there are no precedents and no clear message being sent by the authorities, Article 7 of the Human Rights Act is especially relevant.

Since in [Regina v Hodder](#) it was ruled that packaging and preserving "magic mushrooms" made them a "product" and in [Regina v Dennis Mardle & Colin Evans](#) it was ruled that packaging and preserving "magic mushrooms" *did not* make them a "product" (bearing in mind that the methods of preservation – freezing and chilling respectively were of no relevance in terms of differentiation), Schedule II, Part I, paragraph 5 of the MDA is inconsistent with a number of fundamental principles of criminal law, such as the non-retroactivity principle: "*the essence of the non-retroactivity principle is that a person should never be convicted or punished except in accordance with a previously declared offence governing the conduct in question*" (Ashworth A, 2003, p. 70).

The related principle of maximum certainty also states: "*[Maximum] certainty in defining offences embodies what are termed the 'fair warning' and 'void for vagueness' principles in United States law. All these principles may be seen as constituents of the principle of legality, and there is a close relationship between the principle of maximum certainty and the non-retroactivity principle. A vague law may in practice operate retroactively, since no-one is quite sure whether conduct is within or outside the rule*" (Ashworth A, 2003, p. 75).

Finally, there is the issue of "knowledge of the nature of the substance in possession" which requires that the accused should know not only of the existence of the substance but also that he or she should know that the substance over which he or she has control is in fact a

⁴² http://www.santodaime.it/Library/LAW/Olanda/amsterdamcourt01_english.htm

⁴³ <http://a257.g.akamaitech.net/7/257/2422/21Feb20061230/www.supremecourtus.gov/opinions/05pdf/04-1084.pdf>

⁴⁴ <http://www.clsdirect.org.uk/documents/leaflet07e.pdf>

controlled drug. Earlier cases involved the conviction of persons who had no knowledge of the fact that the substance in question was a controlled drug, thus making the possession offences, offences of strict liability. The unacceptability of this state of affairs resulted in the subsequent provisions of the Misuse of Drugs Act 1971, the aim of which were to provide a defence of mistake of fact in such circumstances.

Section 28 of the 1971 Act, which applies to certain named offences provided for by the Act, states in subsection 2 that "... *in any proceedings for an offence to which this section applies it shall be a defence for the accused to prove that he neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he is to be convicted of the offence charged*".

Presumably a person being charged with possession or supply of a controlled substance by virtue of being in possession of an alleged "preparation" or "product" – plant material containing the substance, could reasonably claim that he or she was not aware that whatever he or she was in possession of constituted a "preparation" or "product", even if a court did deem it a "preparation" or "product" on that instance. The court would have to define the criteria for what constitutes a "preparation" or "product" on that specific instance for that specific plant. The accused *could not* have possibly known this *in advance* since the criteria has not been *previously* clearly defined anywhere, no clear message is being sent by the authorities and there are no precedents in case law to refer to. This is different from "ignorance of the law", which would not be a valid defence.

It is also worth noting that the actual alkaloid content of some of the plants which allegedly contain controlled substances is the subject of debate. For example, there are only [two published studies on the mescaline content of the Peruvian Torch cactus](#)⁴⁵ one of which places the content at 0.817% per dried weight and the other 0% (!), so even the assertion that this cactus contains mescaline is, at this stage, speculative (although it is certainly possible, if not likely). The fact that the cactus has been reported to be psychoactive does not in itself mean for definite that it contains mescaline, since there are a number of cacti such as [Lophophora diffusa which are reportedly psychoactive but do not contain mescaline](#)⁴⁶.

⁴⁵ http://www.erowid.org/plants/cacti/cacti_article1.shtml

⁴⁶ http://www.erowid.org/plants/peyote/peyote_info2.shtml