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New Zealand's psychoactive substances legislation

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Introduction

As with many western countries, New Zealand's drug laws are out of date and are causing more harm than was originally intended. The laws carry the shadow of a prohibitionist past, have failed to keep up with innovations in drug production and supply and do not relate well to modern understandings of harm reduction and health protection.

The challenge of Benzylpiperazine (BZP) 'party pills' in the late 1990s and early 2000s made deficiencies in New Zealand's drug law abundantly clear. No framework for controlling BZP and other party pills could be found within existing laws and regulations. An endless cat and mouse game began between the Government and the 'legal high' industry, with new psychoactive substances (NPS) coming onto the market as quickly as existing substances could be banned.

This prompted the New Zealand Government to order a review by the New Zealand Law Commission of the Misuse of Drugs Act 1975 (MODA).[4] The recommendations[5] from this review led to New Zealand's ground-breaking and world-leading Psychoactive Substances Act 2013.[6]

New Zealand's small population and remote location make for a poor and risky market for international drug rings. Drugs like heroin and cocaine, which are present in other parts of the world, are relatively rare. The creation of NPS continues a long history of New Zealanders making the most of available resources to create substitutes for drugs that are unavailable.

It is fitting then, that New Zealand has become the first country to pass legislation that seeks to regulate NPS to ensure they are low risk, rather than to control them through prohibition and punitive measures.

The Psychoactive Substances Act 2013 has been generally well-received by politicians, the 'legal high' industry and the public. It is also receiving considerable attention from like-minded jurisdictions around the world.

As we shall see, if is far from a perfect or final solution, but it bodes extremely well for future drug policy development and reform, both here and overseas.

History of the Misuse of Drugs Act 1975

Background on drug control prior to 1975

Drug control policy and legislation in New Zealand only began to solidify in the 20th century. In the late 19th century, government interventions into New Zealand drug markets were tentative, largely regulatory, and in response to growing recognition of the addictive nature of many popular therapeutic drugs, such as opium.

The first prohibition approach came with the Opium Prohibition Act 1901[7] which, due to growing public health fears internationally, banned smoking opium and the importation of opium in a smoke-able form.

Heroin, cocaine and cannabis started being regulated in New Zealand in the 1920s, largely in response to the international drug conventions. In 1926, New Zealand acceded to the International Opium Convention 1925[8] which required controls over the manufacture, import, export, sale and distribution of a growing range of drugs, including cannabis. Based on this convention, New Zealand enacted the Dangerous Drugs Act 1927,[9] which introduced a licensing scheme and made it an offence to import, export or otherwise produce or deal in scheduled drugs except under licence or lawful authority. Over time, additional drugs were added to the Dangerous Drugs Act schedule in response to other international agreements and conventions. Many of the drugs regulated under the Dangerous Drugs Act remained readily available on prescription. Heroin, for example, was widely prescribed in oral dose form until the mid-1950s. In fact, by 1950 New Zealand had one of the highest per capita rates of heroin use in the world.[10]

In 1961 New Zealand became one of 40 signatories to the United Nations (UN) Single Convention on Narcotic Drugs,[11] which replaced all previous treaties and covered more than 100 drugs, including cocaine, cannabis and, later, hallucinogens such as LSD. The Convention required parties to limit the use of specified drugs to medical and scientific purposes. New Zealand implemented the Convention by enacting the Narcotics Act 1965,[12] which introduced a distinction between offenders who deal in narcotics and those who simply possess or use them. The maximum penalty for dealing in narcotic drugs was 14 years imprisonment. Someone convicted of a possession or use offence faced up to three months imprisonment and a fine of up to NZ$400 or both (US$335).[13]

In 1968, New Zealand established a Board of Health Committee chaired by Deputy Director General of Health Geoffrey Blake-Palmer to report on, and make recommendations about, a perceived increase in illicit drug use and drug dependency in the country. Indeed, recreational drug use had become more widespread during the 1960s with the growth of the counterculture.

The Blake-Palmer Committee found there had been an increase in the illicit use and trafficking of prohibited drugs. Between 1955 and 1963, no more than 40 people per year had been charged with drug offences but in 1972 alone, 700 people were charged with a drug offence.[14] The number of people hospitalised for drug dependence also doubled during the 1960s.[15] The Committee concluded that a new single law was needed to control all drugs and similar substances (other than alcohol and tobacco) which had significant potential for dependence. It suggested that controlled drugs should be divided into schedules according to their potential for harm and that maximum penalties should also reflect relative degrees of harm. Interestingly for this early stage, the Committee suggested that the police should use their discretion in deciding what action to take when people were using rather than dealing in drugs. It specified that alternatives to prosecution would be desirable, particularly with younger offenders and that 'there are kinder and more effective methods than using criminal law alone to deal with the misuse of drugs',[16] such as educational, therapeutic, social and supportive measures. The Committee also argued for improved treatment options but, because none of these suggestions required legislation, they did not feature in the new Misuse of Drugs Act (MODA) which was enacted in October 1975 and came into force in June 1977.

Adoption and evaluation of the Misuse of Drugs Act 1975

The new Act implemented the Committee's recommendation of a harm-based classification system for drugs (A, B and C, and listed in schedules 1, 2 and 3 respectively). An amendment in 2000[17] clarified that Class A drugs are considered to pose a very high risk of harm. Class B drugs pose a high risk, and Class C drugs a moderate risk. A second amendment[18] established the Expert Advisory Committee on Dugs (EACD) to assess substances' harm potential and classify them accordingly.

Despite these changes, most of the drugs classified at the time have never been reviewed and only those assessed since 2000 have been classified according to the new harm schedule. As a result, a number of anomalies exist. For example LSD is classified as a Class A drug despite a 2009 EACD review[19] which concluded that this classification was 'anomalous and disproportionate to the risk of harm associated with its use'.

The MODA has been amended many times since its enactment. Important amendments were made in 1988 and 1996 to include the control of drug analogues – substances that have a chemical structure similar to controlled drugs but that were not already classified or scheduled. These amendments were made to address the emergence of NPS developed by making subtle changes to the chemical structures of prohibited drugs. However, the MODA still did not address the emergence of new synthetic drugs that had their own unique chemical structures.

In March 2008, the New Zealand Law Commission[20] – an independent, government-funded organisation that reviews laws that need updating, reforming or developing – started a review of the MODA (read more below). The Law Commission described the Act as having become complex and difficult to understand and navigate because of its numerous amendments. The Law Commission noted a number of other issues or failings that led them to question whether it remained a 'coherent or effective legislative framework'.[21] Questions about the Act's appropriateness included the suitability of the penalty regime and law enforcement powers it contained, which have been in place and largely unmodified for more than 30 years and which may not reflect other changes that have occurred in criminal law over that period. However, the Law Commission declared that the most fundamental issue with the MODA was that it is poorly aligned with New Zealand's National Drug Policy (NDP).[22] The NDP is New Zealand's overarching policy for preventing and responding to drug use and is based on the principle of harm minimisation. As the Law Commission explained:

> '*The Act is a criminal justice statute. The policy underpinning it is to eliminate the illegal importation, production and supply of drugs by prohibiting these activities, providing powers for enforcing that prohibition and imposing severe penalties. The use of drugs, even by those who are dependent on them, is treated as a matter solely for the criminal law rather than health policy'.*[23]

The NDP, on the other hand, seeks to reduce health, social and economic harms by appropriately balancing supply control, demand reduction and problem limitation strategies. The risk is that criminal law and its enforcement, because they are contained in the legislation, will dominate drug policy at the expense of other measures that would better minimise harm.

Drug possession and use are offences under the MODA and depending on the class of drug someone is caught with, they can be liable for a prison sentence of up to six months and a fine of up to NZ$1,000 (US$838). In addition to the effects of a criminal sanction, by making drug use an offence the MODA also significantly impedes measures that might be adopted to support harm reduction measures. Indeed, people who use drugs suffer stigma and other harms because drug use is illegal. Finally, because all drug use is a criminal activity, harm reduction education and social marketing strategies that could help reduce demand and drug harms are also limited.

The BZP challenge to MODA

It was starkly illustrated that the MODA was no longer working when party pills became widely available in New Zealand around the year 2000. Party pills were promoted as a legal alternative to prohibited drugs. Most contained BZP often combined with trifluoromethylphenylpiperazine (TFMPP). These two substances were not covered by the MODA because they were chemically unique enough to not be considered as controlled analogues. Therefore, the manufacture and sale of BZP-based party pills was entirely unregulated in New Zealand during the early 2000s.

According to the New Zealand Alcohol, and Drug Use Survey (undertaken between August 2007 and April 2008),[24] BZP was the fourth most widely used drug in New Zealand in 2007/2008 – after alcohol,

tobacco and cannabis. 5.6 per cent of respondents had used BZP in the previous 12 months, while 13.5 per cent had used BZP at some point in their lives. Its use was not surveyed in previous years. It has been suggested that the extent of BZP use in New Zealand at the time was probably unique in the world.[25] A report prepared for the Ministry of Health estimated that, in total, approximately 20 million doses of party pills containing BZP or TFMPP and related substances were sold in New Zealand between 2002 and 2006.[26]

Findings from research commissioned by the Government indicated that BZP was associated with a number of health risks and negative social consequences.[27] For example, a study[28] looked at 61 patients who presented a total of 80 times at the Christchurch Hospital Emergency Departments with party pill-related issues between 1 April and 1 September 2005. Patients with mild to moderate toxicity experienced symptoms such as insomnia, anxiety, nausea, vomiting, palpitations, dystonia (a neurological movement disorder), and urinary retention. Some adverse reactions persisted up to 24 hours after ingestion. 15 toxic seizures were recorded. Two patients suffered life-threatening toxicity with status epilepticus (persistent seizure) and severe respiratory and metabolic acidosis (increased acidity in the blood and other body tissue).

In response, the Government announced its intention to prohibit BZP in 2007, with the ban coming into effect in April 2008. The EACD recommended provisions within the MODA[29] to control substances which had a low risk of harm but needed some degree of control. The Committee proposed a number of restrictions be applied to such psychoactive substances, which included:

- The interdiction to sell or supply the substances to anyone under 18
- Restrictions on the types of premises from which they can be sold and on how they can be packaged, labelled and displayed
- The interdiction to advertise restricted substances, except within the premises from which they are sold or on the internet.

The regulatory proposal under which BZP was restricted was given effect in the Misuse of Drugs Amendment Act 2005.[30] The EACD was given the statutory responsibility to evaluate and assess substances and make recommendations to the Minister of Health as to whether any additional substance should be restricted.

Industry manufacturers responded almost immediately with a new wave of party pills which substituted 1,3 dimethylamylamine (DMAA) and other synthetic compounds for BZP. These produced similar effects to BZP, but again, fell outside existing regulations. These were followed by yet another wave of products containing synthetic cannabinoids; substances which, when smoked or vaporised, produce effects that mimic the high associated with cannabis. These new psychoactive substances posed a major challenge to existing regulations. While some fell within controlled drug analogue provisions, and could thus be banned under the MODA, others were chemically unique and could not be prohibited under the MODA. Many required expert chemical analysis, with fine distinctions between chemical structures sometimes having to be made. Inevitably there were delays while evidence was collected or research commissioned. During this time potentially harmful products could remain uncontrolled and readily available.

In March 2009, Environmental Science and Research found CP 47, 497 – the active ingredient added to a number of herbal products – to be structurally similar enough to tetrahydrocannabinol (THC) to be classified as an analogue and thus to be controlled as a Class C drug. Immediately following the removal of CP 47,497, new products emerged containing other uncontrolled cannabinoids. Testing of these substances revealed the synthetic substances JWH-018 and JWH-073. However they were not sufficiently similar to THC for them to be classed as analogues and they could therefore not be controlled.

As had happened overseas, this became an endlessly repeating ‘cat and mouse’ cycle. Once a substance had been examined and prohibited, another unregulated substance would rapidly take its place.

The Misuse of Drugs Amendment Act 2005's regulatory approach did not have any significantly helpful effect. In fact, BZP was the only drug to be covered by that regime. The schedule of restricted substances has remained empty since, and, based on a recommendation from the EACD,[31] BZP was reclassified as a Class C controlled drug in April 2008. Further, the EACD subsequently determined that the analogue system was inaccurate and unsuitable as a basis for prohibiting a substance because it is not always easy to determine whether an analogue is more or less harmful than the substance it resembles.

Another possibility considered in New Zealand was controlling new substances by applying other legislation, such as the Hazardous Substances and New Organisms Act 1966 (HSNO).[32] The Law Commission thought most psychoactive substances met the required minimum degree of toxicity to make them hazardous substances as they have adverse biological effects on health, at least if used to excess.[33] However, the HSNO was never used because its assessment criteria were designed for environmental protection and were too broad and not sufficiently adequate for assessing the 'more intangible benefits and risks associated with the deliberate ingestion of psychoactive substances'.[34]

A fully workable solution could not be found under existing legislation, triggering the Government's directive to the Law Commission to review the MODA.

The Law Commission MODA review

The Law Commission review found two fundamental problems with existing regulatory regimes. First, there simply was no mechanism for effectively regulating NPS before they reached the market. Secondly, the onus was completely on the Government to identify NPS and then to determine whether they were harmful before placing restrictions on them.[35]

The Law Commission recommended a new regulatory regime requiring psychoactive substances to be assessed and approved before they can be manufactured, imported or distributed within New Zealand. This would effectively reverse the onus of proof from the Government to the manufacturer.[36] The Law Commission noted that submitters were strongly in favour of a change that placed responsibility on manufacturers and distributors of NPS to demonstrate their safety and obtain approval before releasing them:

> '*The New Zealand Drug Foundation, for example, said that this type of regime would ensure that the risks associated with the recreational use of all psychoactive substances are assessed and appropriate controls are put in place before such substances become available for sale'*.[37]

The Law Commission suggested that food, medicines, controlled drugs, alcohol, tobacco and non-psychoactive herbal smoking products should be excluded from the substances regulated under the new regime. The definition of 'herbal smoking product' in section 2 of the Smoke-free Environments Act 1990 should be reviewed and, if necessary, amended to ensure that herbal smoking products containing psychoactive chemicals, additives or substances (such as synthetic cannabinoid substances like JWH compounds) are regulated under the new regime.

In total, the Law Commission made 144 recommendations, to which the Government responded[38] in September 2011 with caveats around the need to do more policy work around most of these recommendations, but with an 'in-principle' agreement to develop a new regulatory regime for 'low risk' psychoactive substances. The primary objective of the proposed legislation was to develop a regime capable of dealing with the rapidly evolving NPS market, balancing the risk of harm to individuals and society with the demand for these substances.[39] A regulatory body would be established to approve the products presented by manufacturers before they could go onto the market.

Developing new legislation can be a time-consuming process. In this case, potentially harmful substances continued to be sold right up until the new legislation came into force. The Temporary Class Drug Notices (TCDNs) introduced by the Misuse of Drugs Amendment Act 2011[40]

provided an emergency mechanism to address this problem. Under the amendment, the Minister of Health was able to issue a TCDN on 'any substance, preparation, mixture, or article' that could 'pose a risk of harm to individuals or society'. This could apply either to particular products, or to substances that may be in any given products. TCDNs lasted for 12 months, during which time the risk of harm would be assessed by an expert committee to determine a substance's appropriate permanent classification, if any, under the Misuse of Drugs Act 1975. If more time was needed, the Minister could renew the notice for another year but this could be done only once. From the date a notice came into force, the import, export, manufacture, supply and sale of the drug concerned became illegal and the substance started being treated as if it were a Class C controlled drug, although personal possession and use would not be a criminal offence. The analogue provisions of the Misuse of Drugs Act did not apply to the drugs listed under a TCDN.

The Ministry of Health conceded that, while potentially helpful in the short-term, TCDNs were only a stop-gap measure that merely allowed the government to delay the development of final legislation. In many cases, 12 months would be insufficient time to accurately evaluate new substances, and this mechanism failed to resolve the issue of the Government being continually required to react to the emergence of NPS.

The Government's assessment that the TCDN regime would only be partially successful and 'not an effective long-term strategy'[41] proved accurate. On 31 January 2013 the *New Zealand Herald* reported that, while TCDNs had removed 32 substances and around 50 products from retailers' shelves over 18 months, NPS were rapidly replacing those removed.[42] The article quotes Associate Health Minister Peter Dunne as promising that a new permanent legislation reversing the onus of proof on the industry would be in place by the middle of 2013.

A new Act, a new approach

On 11 July 2013, the Parliament passed the Psychoactive Substances Act[43] with a majority of 119 votes to one. It became law on 18 July 2013.

As promised the legislation enacted a new legal framework for the testing, manufacture, sale, and regulation of psychoactive products with the responsibility on manufacturers to prove a product 'low risk' before it could be sold.

At the time of publication, a Psychoactive Substances Regulatory Authority is being established within the Ministry of Health. This Authority will be advised by a panel of experts and will be responsible for ensuring products meet adequate safety requirements before they can be distributed in New Zealand. It will also license importers, researchers, manufacturers, wholesalers and retailers.

Each new product will go through a clinical testing process to determine potential harms and the results of these tests will be publically available to inform health professionals (and anyone concerned) about what is in these products and what their effects might be.

There are specific restrictions in the legislation which require licences to be obtained by any company wishing to import, export, manufacture or sell psychoactive substances. The law will apply some of the best harm reduction tools from tobacco and alcohol control to these products; one key measure is the provision allowing the Authority to recall products that turn out to cause harm not detected in clinical trials. The Authority will be able to do this without any need for legislation – it will simply revoke the license.

Box 1. The Psychoactive Substances Act 2013 at a glance

- The Act sets up a legal framework for the testing, manufacture, sale and regulation of psychoactive products
- Health and harm minimisation are included in the Act's purpose
- Products will no longer be sold in dairies, grocery stores etc. People and businesses will need a license to sell these products
- The will be restrictions on advertising, marketing and the purchase age (18+)
- As with alcohol, councils will have the option of developing local policies around where stores can be located
- Products will undergo rigorous clinical testing to determine whether they are 'low risk'
- There will be clear rules around the use of animal testing — animal testing can only be used if there is no alternative
- If a product is proven 'low risk', then, as long as a person meets certain criteria (e.g. person of good repute, New Zealand citizen), a three-year licence to sell that product can be granted
- Products which appear to cause more harm than clinical testing showed can be pulled from the market
- A register of all approved and unapproved products will be publically available
- A code of practice will be in place within six months.

Benefits of the new act

Several aspects to the legislation have been identified that make it a great leap forward in terms of drug control legislation.

First, the law is pragmatic, evidence-based, and has the protection of health and harm reduction clearly highlighted as its main purpose. It acknowledges that there is a demand for psychoactive substances and concerns itself with seeing that this demand is met in a low-risk way. Unlike the MODA – which sought to reduce drug harms almost solely using a criminal justice approach – it seeks to protect the health of the end user without undue emphasis on illegality and punishment. While there are a number of offences contained in this bill,[44] they are weighted towards illegal manufacture or supply. People who use unapproved substances or who commit minor offences are not likely to be criminalised. Those caught in possession of unapproved products or for underage purchases will be given infringement notices, rather than convictions.

The Act takes the onus of proof away from the Government and places it squarely with manufacturers who must prove that their product is low risk before it can be sold.

Built into the legislation is a requirement for it to be reviewed by the Parliament within five years. This means that if certain aspects of the law are not working, they can be fixed and the focus can remain on protecting health and minimising harm. This sharply contrasts with the MODA's failings, which were never addressed through a revision of the Act itself. Instead, a myriad of subsequent amendments were applied which added levels of confusion and ultimately rendered the Act unworkable.

The Act protects public health by allowing products to be pulled from the market if they are later shown to be harmful. This can be done without a protracted legal process or undue delays. The focus is more on protecting health and reducing harm than protecting the rights of manufacturers or retailers.

Decisions about what products are approved will be made by officials advised by experts, not politicians. There is no discretion for the Authority to decline approval for a psychoactive product if it considers the product to pose no more than a low risk of harm. Further, the committee of experts which advises the Authority is required to act independently. Therefore, decisions made under the Act should be made on the basis of evidence rather than political or ideological considerations.

The Act establishes guidelines which require all NPS products to be demonstrably 'low risk'. This creates an incentive for manufacturers of psychoactive substances to develop products that are low risk rather than continually seeking to evade the law by producing substances with chemical variants, many of which are unknown in terms of their harm potential.

The regulations around marketing and advertising acknowledge that, even though a substance may have been approved, its use comes with a certain amount of risk, and therefore it should not be as readily available as other consumer products. Dairies [small convenience stores], supermarkets, liquor stores and petrol stations are specifically excluded from selling psychoactive substances. Products will need to come with health warnings, lists of ingredients and the contact information of the National Poisons Centre. Advertising or marketing of the products will not be allowed except at the point of sale and the purchase age will be 18, as is the case for alcohol and tobacco. Recent alcohol legislation in New Zealand[45] gave communities power over where, when and for how long alcohol outlets can be open in their areas via council by-laws and local alcohol plans. The Psychoactive Substances Act extends a similar process to the sale of NPS.

Lastly, and most importantly, the health and harm reduction approach of the Psychoactive Substances Act is a promising precedent for future drug law and drug policy reform.

Box 2. Statement by James Dunne on the Psychoactive Substances Act

'The default position for an unapproved substance is that it is banned. I think that is a necessary part of a risk-to-health-based regulated market.

The risk remains that the legislation could represent a more perfect prohibition rather than a step towards evidence-based drug policy.

I think that would be inconsistent with what the Act sets out to achieve, but it is still a possibility'.

James Dunne, Senior Associate, Chen Palmer, New Zealand Public and Employment Law Specialists

Remaining challenges

However, although the Psychoactive Substances Act is a vast improvement over previous approaches, it is by no means a perfect solution.

A major problem, for example, is that it only applies to new substances and does not address substances already scheduled under the MODA. This means that an important opportunity to re-examine – and reclassify – a number of substances has been missed. While substances like heroin or cocaine would not be likely to change in terms of how they are regulated, there are other substances classified under MODA that could benefit from another look.

Spice was one of the first synthetic cannabinoids to become popular in New Zealand and, anecdotally, was relatively low risk. However, it was chemically close enough to THC to be declared an analogue under the MODA, and was therefore banned. Because the MODA's analogue provisions still

stand, it does not get the opportunity to be evaluated or legalised under the new regime.

This leads on to a second anomaly. Products, such as Spice, which contain chemicals that have more predictable effects due to their similarity to existing drugs, are automatically banned as analogues. However, products containing new compounds we know little about – and which could turn out to be more harmful (even when approved, as the Act acknowledges) – can now go through a testing process and potentially gain approval.

A third related problem is the fact that the Psychoactive Substances Act introduces yet another way in which New Zealand deals with drugs. One set of laws exists for alcohol, another for tobacco, the MODA for existing drugs and the Psychoactive Substances Act for new substances. The Psychoactive Substances Act may be the most sensible approach to drug control New Zealand has taken yet, but in no way does it resolve the inconsistencies and complexity of the country's drug legislation.

But the devil will be in the details, many of which are yet to be filled in by regulations (due by the end of 2013). Even the precise meaning of 'low risk' is yet to be determined. Nor has it been decided exactly what information must be submitted in support of an application for approval.

The real test of the legislation will be whether it is actually possible for any product to be approved for sale. If the threshold for risk is set too low – so that nothing is ever approved – then what the Act will actually achieve would be a blanket pre-emptive ban on every psychoactive substance, and this was never its intent.

Issues to consider for the Act's implementation

While the law passed on 11 July and came into force on 1 August, there is an interim period during which products can still be sold before they have gone through a clinical testing process. Some products can still be sold for a limited period of time, as long as an application to gain approval has been lodged with the Authority. Some people and businesses have already been granted interim licenses to sell, manufacture, import/export and/or research some NPS products. This situation will continue until the Ministry of Health has developed the regulatory framework and properly set up the Authority.

The regulations are expected to be in place by the end of 2013. This could become an issue because while there is an overarching law in place, the regulatory details are still missing. This has led to community concern about the ability of the law to reduce the harm caused by NPS.

In addition, communities are unsure about what powers they have to control where and how these products are sold in their area. This is unlikely to be cleared up until the regulations are in place. There was also some public confusion about the act, with many communities expecting NPS products to be off the shelves overnight and never to return.

In the meantime, these concerns may be eroding political confidence that the Psychoactive Substances Act will help reduce harm. This is particularly pertinent because the Minister who was in charge of the legislation stepped down from the Associate Minister of Health role and was replaced by someone who is currently inexperienced in the field of drug policy. As the regulations come into place, and the law comes into full effect, community and political concerns are likely to be assuaged.

Another issue which relates to the lack of regulation is that of jurisdiction. The Police, Ministry of Health, the Authority, other health-related agencies, Local Councils, and some other government agencies all have a role to play in administering the Psychoactive Substances Act. It is currently unclear where responsibility lies for certain parts of the law such as controlled purchasing operations (which are used to ensure that age of purchase regulations, and other regulations, are complied with). Again this should clear up when regulations come into force and the appropriate agencies have had time to formulate inter-agency policies around implementation.

Finally, some issues are unlikely to be resolved. One such issue is that of the identification of NPS

products. Police are already having difficulty identifying substances and, given that this regime is separate from the MODA, there are now three categories of drugs (aside from alcohol and tobacco) which a substance could fall into. Each substance comes with a significantly different response – legal (no response), illegal (criminal justice response), and unapproved (administrative sanction). However, it is really hard to tell just by looking at any given substance which category it falls into. The only way to know for sure is to send it away for lab testing, which is both expensive and time consuming. It will be interesting to see how the police implement this part of the legislation.

The biggest test for the new legislation is whether any substances will be approved and, if so, whether people will use them or go back to the black market. Only time will tell.

One of the positive elements of the legislation is that there is a built-in review which has to take place before 2019. Any issues which arise in the next five years will be addressed by the Health Select Committee of the New Zealand Parliament and changes, if any are needed, will be suggested to the Government of the time.

Political support for the Psychoactive Substances Act

At the time the Psychoactive Substances Bill passed on July 11 2013, the Parliament was made up of 120 members from eight political parties. The Government was composed of the National, United Future, Māori and ACT parties. Labour, the Greens, New Zealand First and the Mana Party (and one independent MP) were in opposition.

The Parliament was remarkably non-partisan when it passed the Psychoactive Substances Bill into law 119 votes to one. The almost unanimous support for regulating the NPS is hopefully a sign that thinking in New Zealand is moving away from prohibition and punishment toward a modern and enlightened approach.

Opposition parties generally spoke well of the Bill.[46] The one vote opposed came from ACT Party leader John Banks who described the law as 'well-intentioned' and 'aimed at ensuring psychoactive substances sold in New Zealand are as safe as possible'. However, he said he could not support the legislation because it failed to rule out testing recreational drugs on animals.[47] It should be noted that New Zealand First MPs voted in favour of the Bill even though the party's official position is that all psychoactive substances should be banned.

Box 3. Quotes from key high-level individuals on the Psychoactive Substances Act

'Parliament put reducing drug related harm at the centre of the new law. That's a significant step forward in the legal framework for drug regulation, and our communities can only benefit'.

Labour MP Ross Robertson[48]

'These products have had a shocking effect on young people and their families, and up until now, frontline officers have had to deal with the consequences. Now Police can be proactive, and with the help of the public we can ensure that this new law is successfully enforced'.

Hon Anne Tolley, Associate Minister of Health[49]

'We have received feedback from parents, community providers and emergency departments regarding adverse reactions to these psychoactive substances including psychotic episodes, on-going mental health issues and insomnia. Restricting the availability of these substances will reduce the number of associated hospital emergency department admissions'.

Dr. Jill McKenzie Regional Public Health (Wellington) Medical Officer of Health[50]

'The Psychoactive Substances Act implements what I regard as the most important part of the Law Commission's recommendations. I am very pleased that the government has taken up this aspect of the Commission's recommendations and recognised its vision for effective drug control in the future'.

Warren Young, Law Commissioner

The industry response

The 'legal high' industry played a significant role in the development of the Psychoactive Substances Act. While there have been a number of people who have started producing these products solely to make money and with little concern for health consequences, others have lobbied the government and suggested policy alternatives in pursuit of a mutually suitable regulatory environment.

In fact, some industry representatives have argued that the Act should have been much tighter in terms of regulations around point of sale, and should have included mandatory training for retail staff.[51] They assert that the inclusion of these provisions would reduce risks to consumers and the industry, ensure purchasers are of age, and fully informed about what they are buying. The Social Tonics Advocacy and Research Trust (the STAR Trust), an advocacy body for the legal high industry, is developing its own retailer training standard which it hopes will become a prerequisite to licenses being issued.

Outspoken STAR Trust spokesperson Matt Bowden stated that most manufacturers were now socially responsible and were developing low risk products. Bowden explained that the industry wanted a change in the legal status so that safety technology can be properly funded and continually improved. According to Bowden, MODA should never have applied because their drugs have a definite purpose and place in society and were not being misused. Bowden also declared that the prohibition of NPS meant standards and quality control were left to gangsters and the lack of adequate regulation resulted in the proliferation of products containing unknown and potentially dangerous compounds. This tarnished legal drug-taking behaviour and made a legitimate market harder to achieve. He concluded:

> *'Most of us have seen black market drugs and people getting in trouble who are too stigmatised or embroiled in the underworld to be able to ask for help. Prohibition empowers organised crime but it destroys quality control. There is no safety zone, it is a no man's land'.*

The industry therefore seems to agree that the Psychoactive Substances Act is an opportunity to reverse many of the harms that have been done and to improve general perceptions around the use of legal highs.[52]

The public response

Despite both political and industry support, the Psychoactive Substances Act was not universally welcomed. While many agree that regulation and an approval process is preferable to a completely unregulated market, some New Zealanders tend to prefer a prohibitionist approach and rejected the fact that the act established a legitimate market for products they believe should not be available.

In an 18 July 2013 media release,[53] Manurewa Local Board Member Simeon Brown said, 'Essentially psychoactive substances will be able to be sold if they pass the tests in the Act. This is a huge concern to me… we need to protect our young people, and our communities from these drugs. We should be doing all we can to stop the sale of these products. We should not be promoting a culture of drugs where some are deemed "ok" for consumption just because they are legal and approved under this new legislation'.

In a 2 August media release,[54] Team Manurewa spokesperson Toa Greening said, 'The betrayal of all New Zealanders on legalising these poisons is now complete, our parliamentarians should hang their heads in shame on supporting this evil piece of legalisation'. Greening called on the Government to adopt a piece of legislation similar to Ireland's Criminal Justice (Psychoactive Substances) Act 2010,[55] which prohibits the import, export, sale or advertising of any psychoactive products not already encompassed by other legislation (e.g. alcohol and tobacco). He said that a member of the Health Select Committee had explained to him that the Psychoactive Substances Act was never meant to prohibit psychoactive substances, and therefore Ireland's legislation was never considered.

No doubt there are many concerned New Zealanders who may have expected the Act to entirely prohibit NPS, and who are disappointed it actually legitimises them. Only time will tell how representative the views of Messrs Brown and Greening actually are. It is likely that a softening of hard-line attitudes in the political sphere is reflective of a similar softening on the part of the general population. In fact, cries of alarm and public protests about the legitimising of drug taking have been largely absent.[56]

Animal testing

It is telling that reactions from the public have been far less about drug availability and far more about the Psychoactive Substance Act not ruling out animal testing. The testing of psychoactive substances on animals therefore became a controversial aspect of the legislation.

While they voted for the bill, the Green Party actively campaigned to remove the option to test NPS on animals. ACT Party leader John Banks, and many others, including Messrs Brown and Greening, have spoken out against animal testing in the media.[57] The controversy increased when, on 8 May 2013, the Chair of the Health Select Committee ruled all submissions on animal safety to be outside the scope of the Bill. Submissions were returned unconsidered.

During the second reading of the bill the Green Party attempted to introduce an amendment to the legislation that would have ruled out animal testing. This was voted down by Parliament but an amendment introduced by Associate Health Minister Todd McClay to limit animal testing to where it was absolutely necessary was successful.

Among the general population, a Horizon poll conducted from 15 to 21 March 2013 asked 2,114 adult New Zealanders about animal testing under the Psychoactive Substances Bill and found that less than 15 per cent of New Zealanders agreed with animal testing on psychoactive substances, even if it produces the best result.[58] Just under half (48.5 per cent) wanted no animal testing at all, and 23.4 per cent said they supported guidelines around animal testing, presumably to ensure it is done as humanely as possible.

Those opposed argued that testing on animals was cruel and immoral and that it would also hurt New Zealand's international reputation for good animal welfare. On the other hand, experts warned that determining whether a psychoactive substance is safe to be sold in New Zealand will inevitably involve some animal testing.[59]

The media and political focus on animal testing may have made the legislation slightly more robust in protecting animal welfare than it otherwise might have done. Under the Psychoactive Substances Act, animal testing may be used as a last resort: an alternative testing technique must be used if one exists. If alternatives to animal testing are not used, the Psychoactive Substances Regulatory Authority will disregard the results of any tests. In circumstances where alternatives do not exist, animal testing can only go ahead if it meets the following criteria:

- The trial must be based on the relevant International Conference on Harmonisation Guidelines[60] (these are non-binding rules on the scientific and technical aspects of pharmaceutical product registration)

- If the trial is undertaken in New Zealand, it must comply with the restrictions placed on the use of animals in research under the Animal Welfare Act 1999[61]

- If a trial is undertaken overseas, it must comply with restrictions on the use of animals in research, testing or teaching that are equivalent to, or exceed those in, the Animal Welfare Act 1999.

International interest and response

The Psychoactive Substances Act may position New Zealand as a world leader in terms of health-based responses to NPS, as interest has been growing around the world, and especially in the area of International drug policy. For example, the United Nations Commission on Narcotic Drugs (CND) has passed two major resolutions focusing on NPS, showing that the issue is definitely now on its radar.

Resolution 55/1 (Promoting international cooperation in responding to the challenges posed by new psychoactive substances – March 2012)[62] expressed concerns over the increased marketing of legal alternatives to internationally controlled drugs that may have similar effects to illicit substances. It acknowledged that identifying and controlling NPS posed challenges to health and law enforcement and encouraged member states to monitor emerging trends and share information and collaborate in considering responses. It encouraged member states to adopt approaches that would reduce supply and demand for psychoactive substances, especially in light of risks to young people.

Resolution 56/4 (Enhancing international cooperation in the identification and reporting of new psychoactive substances – March 2013)[63] reiterated and intensified the concerns of Resolution 55/1 and called on the United Nations Office on Drugs and Crime (UNODC) to 'consider within its programmes the provision of technical assistance in the identification and reporting of new psychoactive substances'.

In an op-ed in in *Neue Zuercher Zeitung*, UNODC Executive Director Yury Fedotov stressed the need for innovative approaches to be applied when dealing with NPS. Fedotov wrote that 'New Zealand, for example, has enacted creative legislation that places the onus of proving the substance is safe on the seller'.[64]

Ever-widening cracks are appearing in prohibition policies around the world, with more and more jurisdictions questioning whether the war on drugs can ever be won. Countries such as Portugal, the Netherlands, the Czech Republic, Uruguay and Australia are shifting away from punitive policies and are trying new approaches to drug law such as decriminalisation and even the legal regulation of certain drugs. How quickly prohibition's iron grasp will completely fall away is difficult to know, but the rapid rise in NPS is helping to highlight the holes in prohibitionist drug policy. Traditional strategies of drug control are struggling to contain the harms caused by these substances when new products are appearing faster than they can be banned. However, there are signs that New Zealand's Psychoactive Substances Act could serve as a model for those looking for a new regulatory approach. This has been highlighted clearly in the world's media, with a number of major international publications highlighting that New Zealand is trying something new, unconventional and potentially quite effective.

For instance, *The Economist* ran a piece on 10 August 2013 calling New Zealand an 'unlikely leader in legal highs'.[65] The piece describes how the Psychoactive Substances Act is designed to regulate the industry, protect consumers, shut out the criminals and save money while raising tax. It acknowledges that New Zealand still has work to do on putting this policy into practice and addressing some of the tricky questions the Act raises, but acknowledges that at least New Zealand is taking action. Most other countries continue to leave the matter to drug dealers.

Similarly, on 14 June 2013, *New Scientist* ran a short feature on the Psychoactive Substances Bill calling it the legislation 'the first in the world to regulate new recreational drugs based on scientific evidence of their risk of harm'.[66] The feature quotes a number of world drug control experts on how the legislation may serve as a model in a post-prohibitionist world.

Finally, on 11 July 2013, CNN described New Zealand's Psychoactive Substances Bill as a 'radical

new tack'.[67] The article stated that New Zealand was the first nation to take a 'dramatically different approach to… an alarming drug problem'. The CNN article agrees with an editorial published on 28 May 2013 in the *New Zealand Herald*,[68] that New Zealand has long been known, including to itself, as a 'social laboratory'.

Conclusion: The Act as a model for further drug policy reform

New Zealand has been a world leader in terms of promoting the human rights and well-being of its people. The country was one of the first to recognise indigenous rights, the first to give women the right to vote, and has a comprehensive no fault accident insurance scheme. The country's smoke-free laws and social welfare model have stood as examples for the rest of the world, and it is believed that the Psychoactive Substances Act will do the same.

Indeed, the Act is an important beginning and an optimistic outcome, not because it solves all the issues around drugs but because it enshrines in national laws a shift in thinking. It is the first piece of drug legislation that is truly evidence-based, with harm reduction at its heart, by explicitly stating that its purpose is to 'protect the health of, and minimise the harm to, individuals who use psychoactive substances'.

Based on the adoption of this Act, it is hard to imagine future drug legislation and policy in New Zealand returning to a prohibitionist direction. There is still work to be done and a fair bit of policy to untangle, but the expectation is that legislative reform the adoption of new modern drug policies will continue to ensure that the drugs people do take are safe, and that help can be accessed easily for those who need it.

Finally, if the New Zealand approach is successful, other countries will follow lead, or even improve on what has been have done so far.

Endnotes

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A helpful set of Frequently Asked Questions produced by the New Zealand Ministry of Health is available at:
http://www.health.govt.nz/our-work/regulation-health-and-disability-system/psychoactive-substances/psychoactive-substances-frequently-asked-questions
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Labour MP Ross Robertson, while criticising the Government for leaving the legislation to the last minute and rushing it through, said that the Act meant communities could now celebrate the fact that untested and unregulated drugs will no longer be available at corner dairies. See: http://www.labour.org.nz/news/local-mp-welcomes-new-law-restricting-the-selling-of-legal-highs
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The challenge of Benzylpiperazine (BZP) 'party pills' in the late 1990s and early 2000s made deficiencies in New Zealand's drug laws abundantly clear. No framework for controlling party pills could be found within existing laws and regulations. An endless cat and mouse game began between the New Zealand Government and the 'legal high' industry, with new psychoactive substances (NPS) coming onto the market as quickly as existing substances could be banned. As a response, the Government passed the 2013 Psychoactive Substances Act that seeks to regulate NPS in order to ensure that they are low risk, rather than trying to control them through prohibition and punitive measures. This briefing paper analyses the strengths and weaknesses of the new act.

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