

Impact Summary: Synthetic Drugs Response

Section 1: General information

Purpose
The Ministry of Health is solely responsible for the analysis and advice set out in this Regulatory Impact Statement, except as otherwise explicitly indicated. This analysis and advice has been produced for the purpose of informing key policy decisions to be taken by Cabinet

Key Limitations or Constraints on Analysis
<p>The analysis was impacted by a number of issues:</p> <ul style="list-style-type: none">• This impact assessment was carried out under tight timeframes, so a detailed cost-benefit analysis of the options was not possible.• The range of options was limited to those taking a “health approach” to drug use.• The quality of data limited the impact analysis, as there is no data available on how many synthetic drugs there are in New Zealand, nor how many users or suppliers there are. Synthetic drugs are comparatively new to New Zealand, and have to date not featured in New Zealand’s health and wellbeing surveys, or reputable peer reviewed research. What data is available is presented in Section 2.1.• These options and the underpinning analysis have been consulted on and tested with the Ministry of Justice, New Zealand Police, the New Zealand Customs Service, the Department of the Prime Minister and Cabinet, and the Treasury. Wider consultation has not been possible because of tight timeframes. The expertise of the New Zealand Drug Foundation has been sought throughout this project.

Responsible Manager (signature and date):
<p>Emma Hindson Manager Prevention Ministry of Health</p>

Quality Assurance Reviewing Agency:

Treasury and the Ministry of Health (joint panel review)

Quality Assurance Assessment:

The panel considers that the Synthetic Drugs Response Regulatory Impact Assessment (RIA) does not meet the Quality Assurance criteria.

Reviewer Comments and Recommendations:

The Panel and Treasury's Vote team support funding for the health and education initiatives.

The Panel considers, however, that the RIA does not provide sufficient information for Ministers to make an informed decision about the regulatory proposals. Our concerns are summarised under the relevant quality assurance criteria of consulted, complete and convincing.

Complete

- There is insufficient discussion of how effective regulatory options are expected to be on drug supply (including how easily suppliers can switch to other synthetic drugs).
- The preferred option involves emphasising Police discretion not to prosecute where prosecution is not in the public interest or where a therapeutic approach would be more beneficial. This will go some way to achieving the Government's objective of not criminalising users.

However, the preferred option also includes a 'presumption of supply' level of 56 grams, above which a person is deemed to be a supplier unless they prove otherwise. The Attorney General and Supreme Court have previously found such limitations on the presumption of innocence to be unjustifiably inconsistent with the Bill of Rights Act. Fifty-six grams is about a month's worth for an average dependent user, or a few days' worth for some heavy users.

The RIA is not convincing that emphasising discretion will be sufficient to avoid criminalising users. An option that included setting a very high presumption of supply in order to target importers and manufacturers could have been considered.

- Other risks, while identified, are insufficiently addressed.

For example, Police, users, and suppliers will often not know whether the compound they are dealing with is the targeted synthetic drug or a lower risk drug. This risks excessive Police use of the greater search and seizure powers that come with classification. It will also be difficult for suppliers/users to know what penalties they may face (which poses serious rule of law issues).

Consulted

- Other than government agencies, consultation has been limited to the New Zealand Drug Foundation. Broader public consultation might have gained feedback from experts in health and social services, for example.

Convincing

- The Panel notes the Ministry's view that the two drugs 5F-ADB and AMB-FUBINACA are of particular concern. However, even if it is accepted that these two drugs should be dealt with now, the same urgency does not yet exist for other potential future drugs. The RIA should give greater consideration to this, particularly to any proposal that allows future drug classification with less public and Parliamentary scrutiny than currently.

Section 2: Problem definition and objectives

2.1 What is the policy problem or opportunity?

From July 2016 to May 2017, 13 deaths were linked to synthetic drug use. In the period from June 2017 to June 2018, 42 deaths have been provisionally linked to synthetic drug use. These Coronial cases are actively under investigation. Without ongoing activity focused on reducing harm from synthetic drugs, it is unlikely that there will be any change in this situation. Synthetic drugs will remain cheap and easy to get, and will continue to be attractive to suppliers and users. There is no reason for a shift to other less harmful drugs.

Two synthetic cannabinoids 5F-ADB, and AMB-FUBINACA have been implicated in a number of deaths, and have been found throughout New Zealand. They are currently unapproved products under the Psychoactive Substances Act. The Expert Advisory Committee on Drugs has recommended these two should be scheduled as Class A drugs under the Misuse of Drugs Act.

Synthetic drugs are cheap, potent, and easy to get. Users appear to be both a cohort of young people with little concern for risk, and those seeking an extreme psychoactive effect including people with pre-existing mental health conditions, people on low incomes, and homeless people. Some users of synthetic drugs in New Zealand are suffering serious health consequences as a result of taking synthetic drugs. The effects vary widely, because the concentrations of chemicals varies. Users are at risk of loss of consciousness, seizures, cardiac arrhythmias, and vomiting. There have been anecdotal reports of increased presentations at hospital emergency departments, and increased attendance at synthetic drug related incidents by ambulance officers.

The number of convicted charges for offences under the Psychoactive Substances Act is of concern.

Convicted charges 2017/18

- i) Synthetics: in 2017/18 there were 212 convicted charges under the Psychoactive Substances Act 2013:
 - 103 were for sale and/or supply of an unapproved psychoactive substance
 - 106 were for possession of an unapproved psychoactive substance
 - 3 convicted charges were for other offences.
- ii) For comparison, in 2013/14 there were 32 convicted charges.
- iii) All drugs: in 2017/18 there were 10,809 convicted charges under the Misuse of Drugs Act 1975.
- iv) For comparison, in 2013/14 there were 9,425 convicted charges under the Misuse of Drugs Act.

An immediate response to address synthetic drug-related harm (including synthetic cannabinoids) is required. There is opportunity for the immediate response to take into account future issues with new and emerging drugs. The intent is to balance controlling supply, and thus ensuring public health and safety, with protecting those who use these dangerous synthetic drugs from criminalisation, and helping to shift people towards the health and social support services they need.

Drugs in New Zealand are regulated by the Misuse of Drugs Act 1975, the Psychoactive Substances Act 2013, and the Medicines Act 1981.

The Misuse of Drugs Act is now over 35 years old. Its main components were developed in the 1970s, when the illegal drugs of choice were cannabis, cocaine, opiates and psychedelics like LSD. New Zealand's drug landscape is now vastly different from that which existed in 1975. We now know much more about the harms of drug use, and what can be done to reduce them. The Misuse of Drugs Act largely treats drug use solely as a matter of criminal policy rather than health policy.

Over the years, amendments have been made to the Misuse of Drugs Act that make it difficult to understand and navigate. In 2007 the Law Commission was invited to review the Act, and published its report in 2011. Some of the recommendations were implemented, in part contributing to the development of the Psychoactive Substances Act 2013. Many of the recommendations, including an overhaul of the system for the classification of drugs, have not been implemented.

The Psychoactive Substances Act commenced in July 2013 and was amended in May 2014. The Act makes products containing psychoactive substances, which are proven to have no more than a low risk of harm, available through a regulated market. The Psychoactive Substances Regulatory Authority is established by the Act to assess the level of risk, and approve products with a low risk of harm. Psychoactive substances (including synthetic drugs) are illegal if they are not approved products. There are currently no approved products, largely due to the animal testing provisions of the Psychoactive Substances Act. The animal testing provisions effectively ban the use of animal testing to prove a product has a low risk of harm, and there are currently no other appropriate testing methods available. The Psychoactive Substances Act is due for review in 2018, but results of the review have not yet been published.

The Medicines Act 1981 regulates medicines, related products and medical devices in New Zealand. The Act ensures that the medicines and products used in New Zealand are safe and effective. There is some overlap with the Misuse of Drugs Act.

Current available penalties and enforcement powers are outlined in the table attached as Appendix A. There are more available enforcement powers applying to drugs classified under the Misuse of Drugs Act than are available under the Psychoactive Substances Act. This reflects the intention that the Psychoactive Substances Act regulates low risk products enabling them to be sold under specified conditions. To date, no synthetic cannabinoids have been classified under the Misuse of Drugs Act. There is opportunity to improve the ability of Police and NZ Customs to carry out enforcement activities to disrupt the supply of the synthetic drugs in New Zealand, by classifying these two dangerous synthetic cannabinoids as recommended.

Classifying a substance as a Class A, B or C drug has a process which is widely regarded as time consuming and complex. An amount of the substance is also set out in a schedule to the Misuse of Drugs Act to identify the amount that, if held by a person, that person is presumed to have the drug for the purpose of supply to other people. Each classified substance has an amount for presumption of supply. If it is not specified, a default applies, which is 56g. Specifying the presumption for supply enables enforcement activity, and more efficient prosecution.

The Attorney-General has previously concluded that presumption for supply, in general, is inconsistent with section 25(c) of the New Zealand Bill of Rights Act 1990; the right of everyone who is charged with an offence to be presumed innocent until proved guilty according to law. The last deemed supply provision to be added to the Misuse of Drugs Act received a negative section 7 report and was declared inconsistent with BORA.

Government wants to take a health-based approach to drug use, ensuring that manufacturers, importers and suppliers of synthetic drugs are targeted by enforcement activities, rather than drug users.

In the longer term, Government has signalled its intention to align the response to drug use and drug-related legislation, such as the Misuse of Drugs Act and the Psychoactive Substances Act and others, in ways that contribute to Government priorities such as Hāpaitia te Oranga Tangata: Safe and Effective Justice, addressing child wellbeing, achieving equity, and responding to the mental health and addiction inquiry. Government has also said it will hold a referendum about personal use of cannabis at or before the election in 2020. The referendum is being developed and led by the Ministry of Justice. No scope of any review of drug-related legislation, or timeline has yet been decided.

Legislation alone cannot reduce synthetic drug related harm, and therefore a community based response is also proposed.

2.2 Who is affected and how?

These proposals aim to change the behaviour of:

- Importers and suppliers: increased enforcement ability will disrupt the supply of synthetic drugs. This will in turn make synthetic drugs more expensive, which will help to reduce the availability and demand.
- Users: by reducing demand for synthetic drugs by enabling enforcement activity making supplying the synthetic drugs more risky, and therefore the drugs more expensive. Health-based interventions and services will be more readily available to users.

2.3 Are there any constraints on the scope for decision making?

Constraints

The Government has signalled that it wishes to protect users of synthetic drugs from criminalisation.

Dependencies

- The proposals in this paper are accompanied by other harm reduction activity which will be included in future papers. For example, a drug early warning system is being planned to provide a systematic means of gathering and disseminating information about new and emerging substances in ways that help form a response by both health and enforcement agencies. The practice of drug checking so users know what substance they are using will be considered both in terms of legality and possible expansion of services. Messaging and its dissemination are being developed by the NZ Drug Foundation, working closely with the Ministry of Health and with other non-government organisations.
- The Inquiry into Mental Health and Addiction may identify further recommendations to change the wider mental health and addiction sector.
- A review of the Misuse of Drugs Act is planned, although scope and timeframes are yet to be identified.
- The Ministry of Health recently prepared a statutory report: *Review of the Psychoactive Substances Act 2013*. The report finds the Act is not working as intended largely

because the animal testing provisions ban consideration of the results of animal testing to prove a substance is low risk. This has led to no products being approved for sale.

Other

The Psychoactive Substances (Increasing Penalty for Supply and Distribution) Amendment Bill is part way through the Committee of the whole House stage in the legislative process. The Bill is a member's Bill, and aims to increase the penalty for selling or supplying psychoactive substances that are not approved products to be in line with Class C drugs. An SOP increases the penalties to be in line with Class B drugs. The Bill has not been supported by Government. The provisions of this Bill are inconsistent with the intention of the Psychoactive Substances Act purpose of regulating low-risk substances.

Section 3: Options identification

3.1 What options have been considered?

The immediate issue is to reduce synthetic drug-related harm.

The intent is to balance controlling supply, and thus ensuring public health and safety, with protecting those who use these dangerous synthetic drugs from criminalisation, and helping to shift users towards the health and social support services they need.

It will be helpful if the proposed interventions also take into account the need to be prepared for future issues with new and emerging drugs.

It is proposed to address the current harm being caused by synthetic drugs:

- A. by enabling a local community-led surge response with a public health and prevention focus, linked with appropriate addiction treatment, **and**
- B. implementing regulatory options.

A. Options to allow for appropriate funding for a local community-led 'surge' response with a public health and prevention focus, linked with suitable addiction treatment, that sets up an enduring framework for emerging substances in the longer-term

Status quo: continue with existing levels of funding. Some of these proposed services may not be able to be provided if the status quo remains. Users of synthetic drugs are currently unable to access effective health-based information or treatment. Harm cannot be minimised because health-based interventions are limited. Synthetic drugs are relatively new, and the current response mechanisms to drug related harm are insufficient for the comparatively rapid surge experienced from synthetic drugs. A co-ordinated response to drug related harm of this kind has not yet been put in place. DHBs will certainly benefit from the availability of a best practice or model community response. Due to competing priorities, and a range of outbreaks of harm that District Health Boards must deal with (including environmental events and communicable disease outbreaks), plus the fact that drug-related harm has not generally been experienced in this surge or outbreak-type manner previously, means that many DHBs will not have the resources to respond appropriately.

Option 1: \$1.15 million per annum be appropriated within the Public Health Service appropriation for a discretionary fund to:

- continue New Zealand Drug Foundation's work with drug-taking communities, and those in direct contact with them, to gain insights into drug demand and use in New Zealand, (\$50,000 per annum).
- provide primary prevention and local messaging, led by public health units or other community services/NGOs, and informed by messages developed by the New Zealand Drug Foundation (\$300,000 per annum).
- provide brief interventions, provided locally and/or within emergency departments for people presenting with synthetic drug-related harm, provided by DHBs or NGOs (\$200,000 per annum).
- support local, more mobile addiction treatment services, provided by DHBs and/or NGOs (\$500,000 per annum).
- provide social or employment support, to enable people who have experienced harm to make a lasting change in their lives, following clinical intervention (\$100,000 per annum).

Time-limited funding of four years has been specified as per-annum amounts in order to ensure an on-going response to a surge in drug-related harm is provided for as and when a community needs additional resources to meet a particular need. The availability of such funding will enable harm-reduction, helping to ensure a surge is managed well, and harm is therefore reduced.

Option 2: More money could be provided for more services, however, the services and funds listed in option 1 can be implemented immediately. Services can only increase activity so much in the short term, and more funding could not be practically applied in the short term.

B. Regulatory options

Analysis of these options is included in Section 4.1.

(i) Status quo

The status quo does not address the increase in harm from synthetic drugs. Drugs that are not classified (as Class A, B or C) under the Misuse of Drugs Act, are unapproved products under the Psychoactive Substances Act, and therefore illegal. Synthetic drugs are comparatively new, and the relatively rapid surge in harm that has arisen in particular communities cannot be readily addressed in the current regime. The existing legislation does not enable sufficient enforcement powers to disrupt supply of unclassified synthetic drugs in the community via effective enforcement.

(ii) Classifying two synthetic cannabinoids as Class A drugs with existing process

The Expert Advisory Committee on Drugs (EACD) has recommended that two particularly dangerous synthetic cannabinoids should be classified as Class A drugs under the Misuse of Drugs Act. EACD also recommended that an amount presumed to be for supply be set at and over:

- 28 grams of plant material containing 5F-ADB or AMB-FUBINACA
- 250 milligrams of 5F-ADB or AMB-FUBINACA (except when contained on plant material).

If an amount is not specified, the default under the law is 56g. This is in line with international treaty obligations, and recognises the very high risk of harm these two drugs represent.

The synthetic cannabinoids 5F-ADB and AMB-FUBINACA are currently unapproved products under the Psychoactive Substances Act. Classifying them as Class A drugs under the Misuse of Drugs Act enables enforcement powers which do not currently apply to these two drugs, and that would help disrupt the supply of these drugs, and therefore help reduce synthetic drug-related harm.

The classification process would include the scheduling in law an amount of the drug at which the person holding it is presumed to be in possession with the intent of supplying it to other people. This is standard for all classified drugs.

Amending the Misuse of Drugs Act

The Misuse of Drugs Act could be amended to enable improved enforcement powers in ways that do not criminalise users. Targeting import and supply chains by ensuring there are powers for search and surveillance but at the same time ensuring that users of drugs are not criminalised would recognise that drug use is a health issue, and should not be treated as a criminal issue. There are a number of ways this can be achieved. Further work is needed to thoroughly consider and report on the impacts and consequences.

- (iii) Classification of the two synthetic cannabinoids 5F-ADB and AMB-FUBINACA, but specify an amount for presumption of supply that **only applies to the substance in powder or liquid form**, not the substance when applied to a plant material. This is because it is believed that importers and suppliers are more likely to hold these forms. This would protect some users from criminalisation. A quantity of the synthetic drug powder, liquid, or plant material with the drug applied would be specified in law as the quantity at which it is presumed to be for supply rather than for personal use. The default amount for presumption of 56 gm would apply for plant material.
- (iv) The Act could be amended to classify the two synthetic drugs as Class A and **reinforce and specify Police powers of discretion** to prosecute or use other interventions for possession and use of these two drugs. Police already have the ability to use discretion in making decisions to prosecute, and would be expected to help a severely impaired user, for example by calling an ambulance, rather than pursue a criminal justice outcome. The Act could specify that Police should not prosecute for possession and use (of any drug) where there is no public interest in proceeding with a prosecution or where a therapeutic approach would be more beneficial.
- (v) The Act could be amended to classify the two synthetic drugs as Class A but **require the consent of the Attorney General to prosecute** for possession and use of the two classified synthetic drugs.
- (vi) The Act could be amended **specifying offences and penalties for import, manufacture and supply, but not for possession and use of these two synthetic drugs**. This would signal a shift in New Zealand's regulation of illicit drugs. This would be a wider change to the law, not just using the current classification process.
- (vii) The Act could be amended to classify the two synthetic drugs as Class A and **create a new mechanism (eg, a new Drug Classification Schedule)** which has penalties and enforcement powers for only import, manufacture, and supply, but not for possession and use. This mechanism would allow for future

new or emerging drugs or for existing classified drugs to be classified in this way.

- (viii) The Act could be amended to **enable temporary drug class orders** to be issued. A temporary drug class order would provide for the immediate classification of substances as Class C1 controlled drugs under the Act. Temporary classification is achieved through the provision of Ministerial powers and not legislative amendment, and is therefore quicker. Once a classification notice is published advice must be sought as to whether substances should be scheduled under the Misuse of Drugs Act, through the usual classification process.

Amending the Psychoactive Substances Act

- (ix) The Psychoactive Substances Act could be amended to give Police and Customs the search and surveillance powers available to Police and Customs under the Misuse of Drugs Act for classified drugs.

The enforcement powers are summarised in Appendix A.

- (x) The Psychoactive Substances Act could also be amended to increase penalties for supply to equal those for Class B drugs for the purposes of dealing, and import the Misuse of Drugs Act supply provisions, with associated search and surveillance powers.

3.2 Which of these options is the proposed approach?

Preferred Financial Option

To support local responses to synthetic drugs, the Ministry of Health recommends Option 1: that \$1.15 million per annum for four years be appropriated within the Public Health Service appropriation for a discretionary fund for the projects listed in the previous section.

This approach will ensure health-based harm reduction is greatly enhanced for synthetic drug users.

Preferred Regulatory Options

A combination of options is preferred that amends the Misuse of Drugs Act by:

- classifying AMB-FUBINACA and 5F-ADB as Class A drugs
- specifying that Police should not prosecute for possession and use (for all drugs) where a therapeutic approach would be more beneficial or there is no public interest in proceeding with a prosecution
- enabling temporary drug class orders to be issued for emerging and potentially harmful substances.

This approach would achieve the aims of ensuring drug use is met with a health-based response, that enforcement activities are targeted at import, manufacture and supply of synthetic drugs and reduce synthetic drug related harm.

Section 4: Impact Analysis (Proposed approach)

4.1 Summary table of costs and benefits

It is not possible within very tight timeframes to conduct a comparison of costs and benefits.

B: Regulatory options analysis

(i) Status Quo

The Psychoactive Substances Act is intended to provide a regulated market for low-risk psychoactive substances. As it is designed to deal with low-risk substances, it carries lower penalties and lower enforcement powers than the Misuse of Drugs Act. These are not influencing the availability of synthetic drugs in New Zealand. The status quo will not sufficiently reduce synthetic drug-related harm.

Risks

In an operational situation, it may be difficult for enforcement officers to identify the substance they are dealing with. If it is powder for example, many drugs will look the same. These operational difficulties provide issues for enforcement in all jurisdictions. The concealment of unknown substances, for example hidden in baggage or packages of other goods for the purposes of smuggling into New Zealand at the border and the difficulty of identifying them must be acknowledged. It is also difficult for Police officers coming across unidentified substances on the street or in the course of other investigations. They cannot immediately know what the anonymous looking powder, liquid, or leaf material actually is. Testing of substances would be required before laying charges that apply to the particular substances if they were classified as Class A. This is currently the case with other Class A drugs. Almost all of the proposed options rely on laboratory testing to prove the substance involved in potential offending.

The number of different substances imported and used continues to grow. The status quo provides limited ability to deal with the proliferation of new synthetic drugs either at the border or in the domestic market. Nor does it help mitigate the harm they can cause. The status quo does not help the emphasis that drug use is a health issue.

This option does not provide for the future, or for reducing the current synthetic drug-related harm.

(ii) Classifying two synthetic cannabinoids as Class A drugs under existing process

The Expert Advisory Committee on Drugs (EACD) has recommended that 5F-ADB and AMB-FUBINACA should be Class A drugs because of the risk of harm they pose. EACD also recommended that an amount presumed to be for supply be set at and over:

- 28 grams of plant material containing 5F-ADB or AMB-FUBINACA
- 250 milligrams of 5F-ADB or AMB-FUBINACA (except when contained on plant material).

However, it is considered that rather than 28g for plant material with the synthetic drugs applied, the default amount from the Misuse of Drugs Act, 56g, should be assigned. 28g is the current specified amount of natural cannabis for presumption of supply. We do not consider that synthetic drugs are directly comparable. 28g is a reasonably low amount,

and specifying that would not protect users from criminalisation. 56g is the default amount in the Act, but to specify and even higher amount needs thorough consultation and further clinical advice which has not been possible at this time. We consider that combined with Police discretion (Option B iv) users should be much better protected from criminalisation.

It is likely this proposal will infringe section 25(c) of BORA, the right of everyone who is charged with an offence to be presumed innocent until proved guilty according to law. However, section 4 of the Bill of Rights Act 1990 requires that where a provision is demonstrably justified, it must be applied despite the inconsistency.

Classifying these two as Class A drugs enables enforcement powers for both Police and Customs which are not available otherwise. A comparison of available powers is outlined in Appendix A.

Risks

Classifying 5F-ADB and AMB-FUBINACA as Class A drugs and defining an amount for presumption of supply means there are offences and penalties not just for import, manufacture, and supply, but also for possession and use, which is counter to the requirement that users should not be criminalised. A lower than Class A classification would mean lesser penalties for possession and use, but would go against the advice of the Expert Advisory Committee on Drugs, so is not recommended.

It is possible that this classification would provide a perverse incentive for suppliers and users to turn to other substances with lesser penalties. However, it is considered unlikely that users know what substances have been applied to the leaf material they purchase. It may deter some suppliers, or mean they shift to other, unclassified substances. It is unknown under what timeframe such a shift might occur, or what substances they could move to. Such suppliers would still be committing an offence under the Psychoactive Substances Act.

Specifying an amount for supply at 56g for plant material may still risk some heavy or addicted users are criminalised. We believe that this higher amount, combined with requirements for Police discretion will help mitigate this and help to protect users.

Classification of these two synthetic drugs as Class A may risk Police using the greater search and seizure powers that come with reclassification. That is, Police don't know what substance they're dealing with until they get it tested. This means Police might conduct a lot of search and seizure of persons and property that turn out not to be involved with the targeted substances. This is a situation Police deal with daily. The use of discretion is discussed later in this document, and there are existing checks and balances in place to help prevent this. This risk cannot be immediately quantified and further analysis would be required.

Amending the Misuse of Drugs Act

(iii) Classification of the two synthetic cannabinoids 5F-ADB and AMB-FUBINACA, but specify an amount for presumption of supply that only applies to the substance in powder or liquid form, not the substance when applied to a plant material.

This option is based on the assumption that suppliers are more likely than users to hold the liquid and powder forms of the synthetic drugs. All substances classified as Class A, B or C under the Misuse of Drugs Act have an amount specified for presumption for supply.

Risks

This option does not sufficiently allow for the fact that suppliers tend to also be drug users, and users are often suppliers to some extent.

Distinguishing between users and suppliers of illicit substances is not a black and white exercise. The complex interplay of a number of factors informs this distinction, including a person's conduct/behaviour, the context of their behaviour, their intent, and the amount of the drug involved. Making this distinction can be particularly complex when a person is both a user and supplier. For example, important contributing information may include whether there is evidence that the person offered to sell the drug to another person; the nature of the relationship with the 'buyer' – i.e. is the 'buyer' a stranger?; whether there is evidence of multiple buyers, multiple suppliers, importation and/or a clandestine lab; whether the person obtained profit; and whether the amount of the drug involved meets the threshold for presumption of supply.

An amount of powder or liquid of the drug would be specified in law to indicate a presumption that more than that amount is considered to be for supply. However, understanding the level which could be for personal use would be challenging. People are known to import raw ingredients to make their own synthetic drugs so they may only be supplying themselves.

Evidence to support the distinction between users and suppliers is gathered through various Police activities, ranging from a more preventative-based approach, such as building relationships and talking to members of the community, and searches (where legally available), through to more complex investigative and intelligence gathering activities (where legally available) such as deployment of undercover officers, controlled deliveries, and surveillance devices. Police may gather evidence to support proceeding with prosecution of a supply-type offence, but it is ultimately up to the court to decide whether that evidence meets the threshold for conviction.

A supplier might also have large amounts of plant material with the synthetic drug applied to it in their possession as part of the supply chain. An addicted heavy user of the synthetic drugs might also have a large amount of plant material in their possession. This option excludes plant material, so some suppliers would not be included in this option.

Police note they rarely come across liquid or powder forms of synthetic cannabinoids. Customs note increasing numbers of small packages containing substances they cannot immediately identify.

This option does not sufficiently target supply, and continues the criminalisation of drug users. It ignores the likelihood that suppliers have large amounts of plant material ready to be sold. Neither Police nor Customs are in favour of this option. For this reason, this is not a preferred option.

The complexities of distinguishing between suppliers and users and protecting users from criminalisation are therefore not as easy as classifying only liquid or powder forms of these two drugs. Users would not be sufficiently protected from criminalisation under this option, and there is no emphasis on drug use as a health issue.

Amending the Misuse of Drugs Act

(iv) Reinforce and specify Police powers of discretion

This proposed amendment is consistent with the current policy and legislative approaches to high harm substances. It also offers a straightforward operational framework for frontline Police.

Discretion is an important part of the enforcement response to drugs in the community. Specified amounts for presumption for supply are in place for all classified drugs, either specified or default under the Misuse of Drugs Act. In this option, a legal requirement for the use of discretion should emphasise for front line Officers that criminalisation of users is not necessarily the best response, and provide some protection for users. This proposed new provision in the Misuse of Drugs Act would apply for all people, for all drugs, regardless of any related available penalty. Discretion could have precedence over other provisions of the Act.

The response from enforcement agencies and the decision to prosecute lies with the discretion of Police even though there is a presumed for supply amount specified for the classified drug, in this and in most of the options.

Police are **currently** able to offer from a suite of supported resolution options as an alternative to prosecution for possession of Class A drugs. These alternative resolution options are available for offences with a maximum penalty of six months imprisonment or less. The graduated response model is designed to provide both a proportionate level of support and accountability to the offender for their actions. Alternative resolution options include:

- Release without charge
- Verbal warning
- Written offence warning
- Formal conditional warning - current eligibility excludes methamphetamine possession
- Navigator referral
- Te Pae Oranga panel - current eligibility excludes methamphetamine possession.

Previous convictions and the receipt of previous pre-charge warnings do not immediately preclude an offender from being offered a further alternative resolution on another occasion. Public interest considerations regarding recurring conduct must also be taken into account and balanced with the offender's current mindset and willingness to address the underlying causes of their offending.

While victims must be consulted when an offender is to be offered an alternative resolution and their views should be given careful consideration (but not deemed determinative), possession of Class A drugs for personal use is usually considered a victimless crime.

Police can increase communications and frontline training to ensure compliance with the alternative resolution policy, as needed. Police can also monitor the number and nature of arrests for possession of certain substances, to ensure the primary purposes of alternative resolutions, rehabilitation and reparation, in cases of low level offending, are adhered to.

Risks

Police would have lawful basis to apply discretion not to pursue an arrest or prosecution, but there is no requirement to refer users for treatment or counselling.

There are also risks for suppliers and users in understanding what penalties they may face when they cannot be sure without laboratory testing what substance they have to sell or

use. With a fairly well known intent of the policy to reduce synthetic drug related harm and the fairly well known risk of synthetic drugs, should mean that suppliers are somewhat aware of the risk of prosecution and the range of penalties they may face. The extent of this risk, that it is unfair to suppliers who do not know exactly what they are supplying, has not been analysed. Also potential mitigation, including by use of discretion by enforcement officers, has not been analysed.

Possession and use would still be an offence with penalties. It also requires individual substances to be scheduled and does not allow for a quick response as new substances enter the market (however combining with temporary classification measures mitigates this).

(v) require the consent of the Attorney General to prosecute This would be an unusual step, and inconsistent with the treatment of other classified drugs. It would add to the Attorney General and Police workload.

Risks

This option does not recognise that drug users could benefit from treatment or other health based intervention. It is unlikely to help reduce harm experienced by users from a health and wellbeing perspective. [REDACTED]

(vi) Specify offences and penalties for import, manufacture and supply, but not for possession and use of these two synthetic drugs

It would be unique to have a very serious penalty for supply of a drug, but not a serious penalty for use, when Parliament has classified the two synthetic drugs as very dangerous. It does not provide for other emerging or new risky drugs in the future.

Risks

This option might mean users and suppliers switch to other drugs, or it could lead to a proliferation of suppliers dealing in smaller quantities of the two synthetic cannabinoids more frequently. There is no evidence to support or quantify these assumptions.

This option would also include a specified amount that presumes supply rather than personal use. The amounts for leaf material, powder and liquid forms of the drug presumed to be for supply would have to be very carefully considered to ensure a distinction between personal and supply is reasonable. This would require consultation and clinical advice which timeframes have not allowed.

Agencies considered that this option could not be implemented in advance of broader drug law reform because:

- it potentially creates a perverse incentive for people to use synthetic drugs, rather than a drug that carries an offence for possession (eg all other drugs scheduled under the Misuse of Drugs Act and all unapproved substances under the Psychoactive Substances Act)
- there may also be a perception of a low health risk. As a result of this, user demand may shift from lower harm substances such as cannabis to synthetic drugs. While this risk could be partially mitigated by public messaging about the health risks, it is likely that legal risk would be a compelling factor for users.

- it requires the development of a bespoke search warrant regime, which creates operational complexities for frontline Police and possible Bill of Rights inconsistencies.

(vii) create a new mechanism (eg, a new Drug Classification Schedule)

A new mechanism would enable drugs to be classified with penalties and enforcement powers for only import, manufacture, and supply, but not for possession and use. This sends a clear signal that the enforcement effort will target import, manufacture and supply, and that drug use is not considered a criminal issue for drugs classified in this manner.

Risks

This option would require a change to the law, it would not use the existing classification process. A new mechanism would be introduced. It would allow for appropriate enforcement powers to be enabled for any drugs classified in this new manner. It would also provide some clarity in an operational situation, if it is more readily understood that possession and use of particular drugs is not an offence.

This option would also ensure each drug is subject to the appropriate scrutiny of the classification process. The process is widely considered to be cumbersome and can take up to one year, sometimes longer. A flow chart of the process is attached as Appendix B. This option would consider further changes to the process of classifying substances.

The Expert Advisory Committee on Drugs would still be expected to provide advice about classification and about amounts for presumption of supply ensuring as much as possible that suppliers are targeted rather than those who are interested only in personal use. As in option vi, the amount for presumption for supply would have to be very carefully considered and consulted upon for each drug classified in this manner. This is because the distinction between supply and personal use would need to be well informed, and reasonable.

Agencies considered that this option could not be implemented in advance of broader drug law reform because:

- it potentially creates a perverse incentive for people to use synthetic drugs, rather than a drug that carries an offence for possession (eg all other drugs scheduled under the Misuse of Drugs Act and all unapproved substances under the Psychoactive Substances Act)
- there may also be a perception of a low health risk. As a result of this, user demand may shift from lower harm substances such as cannabis to synthetic drugs. While this risk could be partially mitigated by public messaging about the health risks, it is likely that legal risk would be a compelling factor for users.
- it requires the development of a bespoke search warrant regime, which creates operational complexities for frontline Police and possible Bill of Rights inconsistencies.

There is some legal uncertainty about Police's ability to undertake enforcement action in a manner consistent with other drugs, due to the absence of an offence for possession. This may lead to the requirement for Police to reach a higher threshold (ie clear evidence of dealing) prior to executing powers of search, whereas it is common presently with other

drugs to identify dealing offences as a result of a search initiated on the basis of suspected possession.

(viii) Temporary classification measures provide for the immediate control of substances under the Act, with the same penalties as for class C controlled drugs, except that personal possession or use is not to be an offence.

Temporary classification measures are achieved through the provision of Ministerial powers and not legislative amendment, and are therefore quicker. Once a classification notice is published advice must be sought as to whether substances should be scheduled under the Misuse of Drugs Act, through the usual classification process. Because a Ministerial power is proposed, it should be limited to a temporary class of C, not higher. The default presumption for supply from the Misuse of Drugs Act would be included for each temporary classification. For a temporary classification, being implemented quickly, there would not be time for the necessary clinical advice to recommend a specific presumption for supply amount.

Temporary classification measures were used to control emerging psychoactive substance before the introduction of the Psychoactive Substances Act. In the absence of the Act working as intended it is considered that reintroducing these measures could provide an interim solution to ensure the disruption of supply.

A temporary drug class order will provide for immediate control of substances under the Act. The same penalties will apply to temporarily classified substances as those that exist for import, manufacture and supply of Class C controlled drugs. However, a different approach will apply to personal possession or use. There are two ways this could be achieved:

- a. use and possession of a temporarily classified substance is not an offence. This would require a novel approach and a reasonable justification to confiscate unlawful and harmful substances when it is not an offence to possess them.
- b. use and possession of a temporarily classified substance is an offence. However, consistent with the proposed approach to possession or use for all controlled drugs described above, legislation similarly outlines that it is not in the public interest to prosecute for use and possession of a temporarily classified drug.

Any response to synthetic products needs to incorporate a means to quickly and appropriately classify emerging products so they come within new proposed controls. New, and potentially harmful, products are rapidly produced and current classification processes (which occur via legislative amendment) are unable to keep pace. Unless classified, these products will not be subject to whichever new search or enforcement measures are proposed. Without the ability to classify these new substances, any solution will therefore be unsustainable.

Risks

Temporary classification measures were used to control emerging psychoactive substances before the introduction of the Psychoactive Substances Act. Temporary classification may add a layer of administration to a system already considered cumbersome.

(ix) The Psychoactive Substances Act could also be amended to give Police and Customs the same enforcement powers available to Police and Customs under the Misuse of Drugs Act for classified drugs.

Risks

Including increased enforcement powers in the Psychoactive Substances Act does not align with the purpose of the Psychoactive Substances Act 2013 (regulation of low-risk substances).

The powers which are in the Misuse of Drugs Act are there for enforcement of substances recognised as high risk. It would not necessarily be fair for low risk substances to be subject to the same levels of enforcement. Further work would need to be done to understand how this option would impact on suppliers and users. However, there would be no health based response enabled for users by this option.

(x) The Psychoactive Substances Act could also be amended to increase penalties for supply to equal those for Class B drugs for the purposes of dealing, and import the Misuse of Drugs Act supply provisions, with associated search and surveillance powers.

Risks

This exposes suppliers of lower harm psychoactive substances to penalties for Class B drugs.

Attaching substantial search powers to this Act does not align with the original purpose of the Psychoactive Substances Act 2013 (regulation of low-harm substances).

Affected parties <i>(identify)</i>	Comment: nature of cost or benefit (eg ongoing, one-off), evidence and assumption (eg compliance rates), risks	Impact <i>\$m present value, for monetised impacts; high, medium or low for non-monetised impacts</i>
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Additional costs of proposed approach, compared to taking no action		
Regulated parties	More expensive drugs	Low
Regulators	More resources used on search and surveillance	Absorbed in baseline funds
Wider government	Per annum for local responses to synthetic drugs.	\$1.15m
Other parties	Per annum for possible increase in prosecutions for Crown Law.	Up to \$300,000
Total Monetised Cost		\$1.45m
Non-monetised costs		Low

Expected benefits of proposed approach, compared to taking no action		
Regulated parties	Increased access to services, and better health outcomes for users.	High

Regulators	Greater enforcement powers to disrupt the supply of synthetic drugs	Medium
Wider government		
Other parties		
Total Monetised Benefit		
Non-monetised benefits		High/Medium

4.2 What other impacts is this approach likely to have?

The difficulties of operational enforcement activities are shared by all jurisdictions. The number of new and emerging drugs will continue to be a problem. Identification and detection is increasingly difficult. This is mitigated by other harm reduction activities underway but not detailed in this paper. A multi-agency group will continue to work together on harm reduction.

Operational difficulties are mitigated in part by the clarity of classification of substances, and by a clear shared understanding of an expectation of a health response which is set up by legislative change to avoid criminalising users.

A health response is also becoming an important driver of drug law reform internationally. It is the stated goal of Government, and will influence future regulation and potential law reform in New Zealand.

The health response will inevitably give rise to the need for further resources, and this is expected to be addressed by the Government Inquiry into Mental Health and Addiction which will report shortly.

Small changes to existing legislation is not ideal, when it is well recognised that New Zealand's regulation of drugs needs to be carefully considered, especially when that regulation could contribute to wider Government priorities.

Section 5: Stakeholder views

5.1 What do stakeholders think about the problem and the proposed solution?

The following agencies have been consulted: the Ministry of Justice, New Zealand Police, the New Zealand Customs Service, Department of the Prime Minister and Cabinet, and the Treasury. Expert advice has been sought from the NZ Drug Foundation.

Police are concerned that:

- if it is not an offence to possess synthetic drugs, Police have less leverage to gain supply chain information or to intervene in the interests of harm prevention .
 - Officials will work closely together to ensure the practicality of on-the-ground enforcement activity once Cabinet has decided on an option for reducing harm.
- having enforcement powers without a commensurate penalty for use or possession sends a very mixed message to users, the public, and enforcement agencies.
 - The emphasis of the message will be that there should be a health response to drug use, and the supply chain is the focus of enforcement activity. Officials will work together to ensure this is reflected in legislative change and in other interventions where possible. It is important to note a suite of interventions, including those in this paper, is progressing.
- some investigations could result in use of powerful and intrusive investigative powers for offending relating to low harm substances if the drug in question was found to be low risk (low-level offending).
 - A range of options has been considered, and the preferred options are those which best mitigate this risk. It will be expected that judgement and compassion will be important factors (as they are now) in enforcement involving drug users. Sometimes there may be activity by Police or Customs that does not equate to the level of offending. Officials will work together, and with Parliamentary Counsel to ensure the legislation prevents this as much as possible.

The Ministry of Health has commissioned the NZ Drug Foundation to carry out insights work to ensure the use of synthetic drugs in New Zealand is well understood. They are working with non-government agencies nationwide, who have direct contact with users and the people around them. This work will be used to inform ongoing interventions. There is no other reliable data available (because it is not collected). The Drug Foundation will provide information about messages that will work to help reduce harm among users and advise about how the messages should be provided. It is expected that a programme of work involving agencies that are trusted and respected by drug users will be recommended, and can in part be built into a community health-based response.

The New Zealand Drug Foundation agrees with the EACD recommendation that the two synthetic cannabinoids 5F-ADB and AMB-FUBINACA should, under the logic of our current system, be reclassified as Class A substances, based on their harm profiles. However, it is opposed to any action that will have negative flow on effects. A reclassification could well result in users of synthetic substances facing more stigma, finding it harder to access treatment, and facing a conviction or even jail time for supplying substances to fund their own use.

Submitters to the Justice Committee considering the Psychoactive Substances (Increasing Penalty for Supply and Distribution) Amendment Bill told the committee that:

- there is a lack of evidence that longer prison sentences contribute to reduced harm
- that prohibition of drugs causes harm

- that being tough on crime does not work
- all drug use should be treated as a health issue rather than a criminal issue.

The submissions in support of the Bill generally argue that drug dealers should be punished, that penalties should be aligned with cannabis offences, and that this increase in penalties should be included along with a range of other interventions.

The Bill is currently in Committee of the Whole House, and the (not yet complete) debate has constantly referred to the need to not criminalise users, but penalise importers and suppliers.

New Zealand was recently visited by members of the Global Commission on Drug Policy recently, saying New Zealand urgently needs a new approach to drug policy, in which drugs are decriminalised and state-regulated. They suggested innovations such as regulated locations where people can safely take drugs. They also noted that marginalised people are affected, and there are other social issues at play.

Section 6: Implementation and operation

6.1 How will the new arrangements be given effect?

Financial proposal:

The Ministry will disburse funding through its usual contract procedures.

Regulatory options:

The options considered require a range of change.

If the preferred set of options was adopted:

- Amendments would be required to the Misuse of Drugs Act
- An Order in Council (or other new mechanism) would be required to classify the two synthetic cannabinoids 5F-ADB and AMB-FUBINACA.

The Ministry of Health will continue to work closely with Police, Customs and the Ministry of Justice.

The Ministry will work with PCO to draft and the Leader of the House to determine the timeframe.

Section 7: Monitoring, evaluation and review

7.1 How will the impact of the new arrangements be monitored?

If these changes are implemented, we could expect to see:

- A co-ordinated evidence based model for a community response to a surge in drug related harm being implemented when necessary
- more people being offered, and using available drug and addiction services,
- fewer people being admitted to health care with drug-related issues
- synthetic drug users receiving health care rather than being criminalised
- more prosecutions for import, manufacture and supply of synthetic drugs
- in the long term, a different attitude to high risk synthetic substances by the drug using community.

Synthetic drug related-harm is a relatively new problem, the information is not yet formally recorded for example by Emergency Departments or ambulance services. It is not included in national surveys, and it is too early to say if it will be in future.

As indicated earlier in this impact assessment, we cannot get exact numbers of users or suppliers of synthetic drugs, so the impacts listed above would be indications of harm reduction, as the data is built up.

7.2 When and how will the new arrangements be reviewed?

- *How will the arrangements be reviewed? How often will this happen and by whom will it be done? If there are no plans for review, state so and explain why.*
- *What sort of results (that may become apparent from the monitoring or feedback) might prompt an earlier review of this legislation?*
- *What opportunities will stakeholders have to raise concerns?*

We would expect these arrangements to be reviewed in the expected review of the Misuse of Drugs Act and other drug related legislation.

Misuse of Drugs Act - Penalties and Enforcement Powers

Appendix A

		Misuse of Drugs Act			
	Psychoactive Substances Act	Schedule 1 Class A Drugs	Schedule 2 Class B Drugs	Schedule 3 Class C Drugs	Schedule 4 Precursor Substances
Importation, manufacture, or supply	(without licence) Individual up to 2 years Body corp up to \$500,000 fine	Life imprisonment	Up to 14 years imprisonment	Up to 8 years imprisonment	Up to 7 years imprisonment, or \$1,000 fine, or both for supplying, producing, or manufacturing a precursor substance knowing it is to be used to commit an offence
Conspiracy to commit an offence		Up to 14 Years imprisonment	Up to 10 years imprisonment	Up to 7 years imprisonment	
Possession	Fine not exceeding \$500	Up to 6 months imprisonment or \$1,000 fine or both	Up to 3 months imprisonment or \$500 fine or both	Up to 3 months imprisonment or \$500 fine or both	
Use		Up to 6 months or fine not exceeding \$1000	3 months Fine not exceeding \$500	3 months Fine not exceeding \$500	
Police powers	Warrantless enter and search place or vehicle but not private premises	Warrantless search and surveillance can be carried out in	Warrantless search and surveillance can be carried out in specified circumstances	Warrantless search and surveillance can be carried out in	

	<p>Part 4 (except subpart 3) of Search and Surveillance Act 2012</p> <p>Part 4 is general provisions about searches, subpart 3 is search warrants.</p> <p>Power to enter and search retail premises</p>	<p>specified circumstances</p> <p>This is specified in Sections 20 to 22, 48 of the Search and Surveillance Act 2012</p> <p>Domestic controlled deliveries (Part 2, s 12 MODA)</p> <p>Protections for Undercover Officers (s 34A MODA)</p>	<p>This is specified in Sections 20 to 22, 48 of the Search and Surveillance Act 2012</p> <p>Domestic controlled deliveries (Part 2, s 12 MODA)</p> <p>Protections for Undercover Officers (s 34A MODA)</p>	<p>specified circumstances</p> <p>This is specified in Sections 20 to 22, 48 of the Search and Surveillance Act 2012</p> <p>Domestic controlled deliveries (Part 2, s 12 MODA)</p> <p>Protections for Undercover Officers (s 34A MODA)</p>	
Examples of Class A1, B1, and C1		Methamphetamine, Heroin, LSD, PCP (angel dust), Cocaine	Cannabis resin and oil, Opium, Morphine, MDMA, Amphetamine, Methcathinone	Cannabis plant, Cannabis seed, Catha edulis plant, Coca leaf, BZP	

Figure 1: Drug Classification Flowchart

