**Review of the Psychoactive Substances Act 2013**

**Prepared by the Ministry of Health**

**6 December 2018**

**Introduction**

1. Section 106 of the Psychoactive Substances Act 2013 (the Act) requires that:
2. *The Ministry must, no later than 5 years after the commencement of this Act,-*
   1. *conduct a review of the policy and operation of this Act; and*
   2. *prepare for the Minister a report on the review.*
3. *As soon as practicable after receiving the report, the Minister must present a copy to the House of Representatives.*
4. Section three of the Act describes the purpose of the Act:

*The purpose of this Act is to regulate the availability of psychoactive substances in New Zealand to protect the health of, and minimise harm to, individuals who use psychoactive substances.*

1. This review has considered the effectiveness of the Act against its stated purpose. The Ministry of Health has held discussions with the following agencies to inform the review: the New Zealand Police (Police), the New Zealand Customs Service (Customs), the Ministry of Justice, the Institute of Environmental Science and Research (ESR), the New Zealand Drug Foundation, and Local Government New Zealand.
2. Appendix One describes the history of the Act and psychoactive substances in New Zealand from the early 2000s.
3. Figure One shows the process for classification of drugs under the Misuse of Drugs Act.

**Overview of the Psychoactive Substances Act**

1. ­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 are illegal if they are not approved products.

**Regulation of psychoactive substances before commencement of the Psychoactive Substances Act**

1. Before the psychoactive substances regime was established, some substances were regulated under the Misuse of Drugs Act 1975 and others were not regulated at all.
2. By 2013 there were between 200 and 300 unregulated psychoactive substances that existed in a grey area. They were not controlled drugs or medicines but there was increasing community concern about the safety of these products which were widely available.
3. The Misuse of Drugs Act regulates controlled drugs in New Zealand and establishes offences and penalties for possession, administering, selling and supplying, importing and exporting, producing and manufacturing of classified drugs.
4. The classification of a drug under the Misuse of Drugs Act is determined by the risk of harm the drug poses to individuals or to society by its misuse. Drugs posing a very high risk of harm are classified Class A, those posing a high risk of harm are classified Class B and those posing a moderate risk of harm are classified Class C. Generally, before commencement of the Psychoactive Substances Act, if any substance was not classified A, B or C under the Misuse of Drugs Act, and not regulated by the Medicines Act 1981, it was legal to sell, supply and use. After commencement of the Psychoactive Substances Act, all unapproved psychoactive substances became illegal.

**Evaluation of the Psychoactive Substances Act**

1. Prior to the 2013 commencement date, there was a visible market for products and use was comparatively openly discussed. After commencement, seizure data (refer to table in paragraph 14) has shown that a strong market for unapproved, and therefore illicit, psychoactive products has developed.
2. The market has effectively been driven underground, which in turn means there is very limited ability to monitor or manage risks to health of users, and other harm.
3. Anecdotal reports of harm are of considerable concern. The Coroner reports current investigations of 40 to 45 deaths provisionally related to psychoactive substances. Hospital emergency departments and ambulance services report increased presentations due to psychoactive substances (but reliable data is not available).
4. Data that is available shows that:

* *There are no approved products*: no licence applications for retailing, manufacturing, or wholesaling products have been received by t­­­­­he Psychoactive Substances Regulatory Authority. Licences have been issued for research and import (for research purposes).
* *Convictions have increased*: offences under the Act include importing and manufacturing psychoactive substances, and possession, sale and supply of unapproved products. The number of people convicted of a psychoactive substance offence rose from seven in 2013 to 172 in 2017. One person was imprisoned in 2013, seven people in 2014, 26 people in 2015, 27 people in 2016 and 43 people in 2017.

In 2017 49 Europeans were convicted of psychoactive offences, 99 Māori, 19 Pacific Peoples and five ‘other’. In line with other drug-related legislation, Māori appear to be over-represented in the number of convictions under the Psychoactive Substances Act.

*Amount of seized products has increased*: large volumes of psychoactive substances have been seized at the border by the NZ Customs Service and domestically by NZ Police. They report an increase in seizures since 2013. The majority of these seizures have been synthetic cannabinoids and ‘synthetic cannabis’.

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| **Synthetic Cannabis & Synthetic Cannabinoids combined** | | | | |  |
| **Customs and Police: 2014 - 2017[[1]](#footnote-1)** | |  |  |  |  |
|  |  | 2014 | 2015 | 2016 | 2017 |
|  | Seizure Weight (kg) | 158 | 43 | 218 | 65 |
|  | Seizure Frequency | 105 | 206 | 350 | 501 |
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* There has also been a significant increase in damiana leaf identified at the border. Damiana is a common plant material used as a base for synthetic cannabis. While it is subject to the normal plant material regulation at the border it is not regulated under the Psychoactive Substances Act or the Misuse of Drugs Act. The border activity suggests the illicit market for products remains strong.
* *Territorial authorities have policies in place*: the Psychoactive Substances Act allows for territorial authorities to put in place a policy relating to the sale of approved products within its district. A Local Approved Products Policy may include policies on the location of premises where approved products may be sold in relation to broad areas within the district, by proximity to other premises, and/or by proximity to other premises or facilities (for example, kindergartens, schools, other community facilities). Local Government New Zealand reports that most territorial authorities have Local Approved Products Policies in place.

**The Psychoactive Substances Act does not function as intended**

1. The following factors have impacted on the implementation of the Act:

* *Animal testing*: in mid-2014 a petition aimed at stopping psychoactive substances being tested on animals gained over 40,000 signatures. Subsequently the 2014 amendment to the Act included provisions that prohibited testing on animals being taken into account in assessing a product for approval.

The amendment of the Act in May 2014 provided, in effect, that the Psychoactive Substances Expert Advisory Committee can only consider the evidence from animal testing to ban a product, not to approve it. Therefore the regime created by the Act to approve and license psychoactive products cannot approve or license any product until an appropriate alternative to animal testing is available. Alternatives being developed internationally include in vitro methods, using human cells and tissues, and advanced computer modelling techniques.

The Psychoactive Substances Act cannot work as intended unless the principle that animals must not be used in trials for the purposes of assessing whether a psychoactive product should be approved is removed.

* *The environment has changed*: the National Drug Intelligence Bureau believes that some unapproved products and synthetic cannabinoids currently available are even more risky and more prevalent than were available during the drafting and implementation of the legislation.
* *Border control*: this is challenging because of the large numbers of different substances encountered. NZ Police and NZ Customs Service both note an increasing need to be able to be more reactive both to volumes and to new substances constantly emerging.

**Areas of focus for further work**

*Offences and penalties*

1. The Psychoactive Substances Act makes unapproved products illegal. The offences and penalties in the Psychoactive Substances Act are aimed at people operating outside of the regulation of substances that pose a low risk of harm. The offences and penalties may be out of step with the actual risk of harm posed, because more risky substances were expected to be scheduled under the Misuse of Drugs Act.
2. The Psychoactive Substances (Increasing Penalty for Supply and Distribution) Amendment Bill is currently before the Justice Committee. It aims to increase the penalty for selling or supplying psychoactive substances that are not approved products. The Bill would align the penalties with those for an offence in the Misuse of Drugs Act for sale or supply of Class C controlled drugs even if they are a low risk of harm.
3. Increased penalties do not necessarily produce a corresponding deterrent effect. The international and domestic evidence does not support the contention that increased penalties results in reduced incidences of offending.
4. Customs is generally in favour of increasing penalties in line with the risk of harm as is provided for in the Misuse of Drugs Act. Police support the Psychoactive Substances Act continuing to manage low harm substances, and that the penalties and enforcement powers for low harm substances should not exceed what is currently stipulated in the Psychoactive Substances Act.

*The Misuse of Drugs Act classification system*

1. The classification system cannot keep up with the volume of new psychoactive substances being imported and used by New Zealanders beginning in the early 2000s, nor can it keep up with the ease and speed with which drug composition can be altered.
2. The process of classifying a drug has taken up to two years from the time the Expert Advisory Committee on Drugs makes a recommendation. Classification under the Misuse of Drugs Act is achieved via an Order in Council. The Health Committee considers the Order for up to 28 days, and following its report back, the House approves the Order in Council and a commencement order is made. There are some options for streamlining the process, for example reconsidering the way in which Cabinet considers the Order in Council and the commencement order. More detail of this process is provided in a flow chart attached.
3. Alternatively, a Bill to amend the Misuse of Drugs Act could be used to classify substances, amending the drug classification schedules of that Act. In normal circumstances, this is unlikely to be any more efficient.

*Enforcement*

1. Classifying substances under the Misuse of Drugs Act provides greater opportunities for enforcement activities than are available under the Psychoactive Substances Act. For example, for Class A drugs, Police and NZ Customs Service are able to undertake search and surveillance activity that is not possible for drugs that are not classified under the Misuse of Drugs Act. Warrantless search of places, vehicles and people, and limited use of a surveillance device without a warrant is allowed under certain circumstances under the Search and Surveillance Act 2012 for Class A controlled drugs.
2. The Psychoactive Substances Act contains no provision that facilitates domestic controlled deliveries. A controlled delivery occurs when a delivery of illicit drugs is detected, but is continued under the surveillance of enforcement officers, allowing drugs to be tracked through the supply chain and overcome measures that smugglers use to frustrate normal enforcement methods. Enforcement officers are more likely to be able to identify the organisers of criminal activity through a controlled delivery.
3. The Psychoactive Substances Act has no provision that facilitates protections that would enable the deployment of undercover officers against importers, manufacturers and suppliers. Both controlled delivery and such protections are available for classified drugs in the Misuse of Drugs Act. This helps to disrupt the supply chain for these drugs, which may affect the price and availability and contribute to reduced harm.
4. There may also be opportunities for reconsidering priorities for enforcement activity, including the targeting of particular substances, and prioritising prevention measures for psychoactive substances that are carried out by Police and Customs.

*The wider context*

1. Government intends to hold a referendum about cannabis law reform at or before the next election. The referendum is in the early planning stages. The result of the referendum potentially influences changes to offences and penalties for cannabis related offences. If that was the case, it would be reasonable to expect that offences and penalties for other drugs and psychoactive substances should also be considered.
2. Government has also recently announced the establishment of a specialist advisory group, the Safe and Effective Justice Programme Advisory Group – Te Uepū Hāpai i te Ora, to work alongside Justice Sector agencies on a scope for effective criminal justice reform. Offences and penalties are likely to be addressed in this forum.
3. The Ministry of Health, Customs, and Police are all generally supportive of penalties that are in line with the risk of harm posed by psychoactive substances. There are also opportunities to better align offences and penalties in the Misuse of Drugs Act and other related legislation (such as the Medicines Act, Land Transport Act 1998 and others) to Government priorities. Consideration of offences and penalties, and the way in which New Zealand addresses drug use can make significant contributions to priorities such as equity, child poverty, a reduced prison population, a more humane justice system, and the intention to consider drug use more as a health issue.
4. The Ministry of Health, Police and Customs agree that the offences and penalties provisions in the Psychoactive Substances Act could be considered as part of a wider legislative reform work programme that aligns with broader Government priorities.

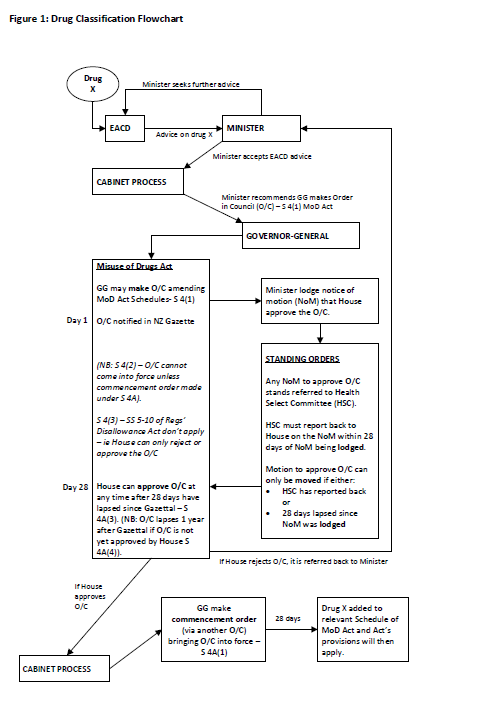
*Technical issues*

Working groups of officials have identified numerous small but important issues with the wording of the Act, and some omissions. It is recommended that changes to this Act should only be undertaken in context of a work programme including reference to other relevant legislation and Government priorities.

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| **In summary**  The Psychoactive Substances Act has not achieved its purpose of protecting health and minimising harm because:   * it has not enabled the availability of low risk psychoactive substances through a regulated market. This is primarily because animal testing provisions limit the ability to prove that products are low risk, and can therefore be approved * the continued supply and use of unregulated products has arguably made monitoring and management of associated risks more difficult * offences and penalties may be disproportionate to the harm posed by the increasing availability of high-risk products.   Amending the Psychoactive Substances Act would better enable it to meet its intended purpose. However, any changes to its provisions and associated Regulations should be considered as part of a wider drug legislation reform work programme that aligns with broader Government priorities. |

**Appendix One A history of the Psychoactive Substances Act and the environment.**

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| **Timing** | **Legislative changes** | **The environment** |
| **Early 2000s** | New Zealand experienced a rise in the availability and use of unregulated psychoactive substances (in products known as party pills, herbal highs, energy pills, synthetic cannabis).[[2]](#footnote-2) | In the early 2000s new kinds of recreational drugs arrived in NZ. Party pills, designer drugs, and legal highs containing no illegal ingredients were sold in dairies and bottle stores. There were increasing reports of side effects including aggression, psychosis, and seizures.  The process for controlling psychoactive substances was onerous and unsuited to the rapid growth of novel synthetic substances. |
| **2011** | The Law Commission released its report reviewing the Misuse of Drugs Act 1975, including recommendations for a new regime for psychoactive substances.  A 2011 amendment to the Misuse of Drugs Act allowed for temporary class drug notices (TCDN) providing a mechanism for prohibiting import, manufacture, sale and supply of substances listed by a notice in the Gazette.  Newly identified substances could be placed under a TCDN providing emergency restrictions as an interim measure while substances were assessed by an expert committee and a decision made about appropriate scheduling as a controlled drug or a restricted substance. | From 2011 analysis of large seizures of powders at the NZ border showed the presence of synthetic cannabinoids.    22 compounds were the subject of TCDNs from August 2011 to July 2013.  TCDNs provided an emergency solution where there were suspected safety issues but were not an evidence-based approach to drug control. They reduced, but did not eradicate the issues of being able to act quickly to regulate substances. |
| **2013** | The Associate Minister of Health introduced a Bill to regulate the sale, importation and manufacture of psychoactive substances. | The Act put the onus of proof that products were a low risk of harm onto the manufacturer/importer/distributor rather than requiring regulators to prove they were not safe. So instead of being legal until proven to be unsafe, the Act meant a product must be proven safe before it could be legally sold. |
| **18 July 2013** | The Psychoactive Substances Act 2013 came into force to regulate the availability of psychoactive substances in New Zealand to protect the health of, and minimise harm to, individuals who use psychoactive substances. The Act establishes the Psychoactive Substances Regulatory Authority. | Products, including those with synthetic cannabinoids, became banned because they had not been proven to be low risk, pushing them into the black market. |
| **July 2013 – May 2014** | Interim regime under the Act was in place. Some products were granted interim approvals and some manufacturers, importers, wholesalers and retailers were granted interim licenses. | A number of products were given interim licensing which meant they could be legally sold. Community concern about safety of these products continued, with a lot of media attention.  During the interim period there was widespread concern about animal testing, with street marches, petitions and comment on social media. |
| **8 May 2014:** | The Psychoactive Substances Amendment Act 2014 was passed:   * removed all interim approvals and licences from the New Zealand market (resulting in a recall of all products) * prohibited the consideration of animal testing by the Expert Advisory Committee when assessing if products are of low risk and therefore able to be approved * introduced a moratorium on processing any product approval applications or licensing applications until regulations came into force. | Regulations were expected to be in place by the end of 2014, allowing the full regulatory regime to come into effect. |
| **3 November 2014** | Regulations came into force, providing for product approval applications and licensing applications for importing, research and manufacturing. | Researchers noted a decrease in the incidence of medical emergencies related to synthetic cannabinoid use. |
| **21 April 2016:** | Regulations came into force allowing for applications by retailers and wholesalers for licenses to sell approved products. |  |
| **2016/2017** |  | Four deaths have been linked to specific synthetic cannabinoids. They are expected to be the subject of recommendations for classification as controlled drugs made by the Expert Advisory Committee on Drugs.  In the first 6 months of 2017, approximately 6 kg of of synthetic cannabinoid powder was seized at the border over 25 different incidents. This would make approximately 120 kg of synthetic cannabis, equating to approximately 40,000 3g bags.  Over 300 kg of damiana was imported to multiple entities in NZ in the first 6 months of 2017. It is used in the manufacture of synthetic cannabis.  Damiana is not a prohibited substance in NZ. |
| **2018** | The Psychoactive Substances (Increasing Penalty for Supply and Distribution) Amendment Bill introduced | Member’s Bill drawn from ballot, passed first reading and referred to Justice Committee. The Bill is currently at Committee of the whole House stage, partially completed.  The Bill aims to increase the penalty for selling or supplying psychoactive substances that are not approved products. The Bill would align the penalties with those for an offence in the Misuse of Drugs Act for Class C controlled drugs. |



1. This data combines seizures of the raw material (synthetic cannabinoids) with seizures of the finished product. 2014 is not a full year of seizures. [↑](#footnote-ref-1)
2. [↑](#footnote-ref-2)