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**AT THE HEART
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Te Tūāpapa Tarukino o Aotearoa

New Zealand Drug Foundation submission on the Psychoactive Substances (Increasing Penalty for Supply and Distribution) Amendment Bill

Submitted to the Justice Committee on 4 May 2018

Tēnā koe

This Bill proposes an increase in the penalty for selling or supplying psychoactive substances that are not approved products.

This Bill will not achieve its purported aim to reduce the supply of dangerous synthetic cannabis products. Instead, it will result in more health harms, fill up our prisons, and cost more to implement. It should be discarded.

Our submission is structured in three parts:

- **PART ONE – the Bill won't reduce drug harm and should be discarded**
- **PART TWO – the Psychoactive Substances Act 2013 is due for review this year. Why waste time tinkering?**
- **PART THREE – to make a real impact in reducing drug harm we need to make wider changes. We have the solutions**

Thank you for considering our submission. We also request the opportunity to make an oral submission.



Ross Bell

Executive Director

The Drug Foundation is a charitable trust. We have been at the forefront of major alcohol and other drug debates for 28 years, promoting healthy approaches to alcohol and other drugs for all New Zealanders.

PART ONE – THIS BILL WILL NOT REDUCE THE HARM CAUSED BY DRUGS AND SHOULD BE DISCARDED

The proposed amendment contradicts the original purpose and intent of the Psychoactive Substances Act 2013 (the Act)

The purpose of the Act was to regulate the availability of psychoactive substances to protect the health of, and minimise harm to, individuals who use those substances

1. In the ten years before the Act was passed, new substances were being produced so quickly there wasn't time to make each illegal before the next was developed. Hundreds of untested products were legally on sale, and no one knew their health effects.
2. The Act introduced a pre-market approval process. If a substance could be proven to pose no more than a low risk of harm, it could be approved for sale under strict regulations. If it was shown to pose more than a low risk of harm, it would be an unapproved product and could not be sold legally.
3. The Act was created on the understanding that a regulated market is much safer than unregulated black market, where profit is the only motive. In a black market, products are not tested, there are no manufacturing standards, and no one is accountable if a product causes harm or even death.
4. The Act established an “interim period” in which some products and suppliers could apply for temporary licences while the final regulations were written. Products for which no serious adverse reactions had been recorded were given interim licenses and allowed to remain on sale.

The Act worked extremely well to reduce harm initially but legislators backed off for political reasons

5. When the Act was passed in 2013, the number of retail outlets for “legal highs” was reduced from as many as 4000 to fewer than 170. The number of products available for legal sale fell from around 200 to fewer than 50. All of these products were on the lower harm end of the spectrum. The Act also set purchasing age restrictions.
6. The upshot was that dangerous substances were harder to access after the Act was passed, especially for young people. Related hospital admissions fell¹. Anecdotally, so did reports to the National Poisons Centre.

¹ <https://www.radionz.co.nz/news/national/273700/synthetic-drug-ban-success-study>

7. Unfortunately, the reduction in the number of retail outlets magnified attention on the remaining outlets, which were largely unwelcome in their communities. They became a focus for the media, as did personal stories of the harmful impacts of substance use. The media largely ignored the fact that these problems had developed in the unregulated market, or were caused by products already removed from sale.
8. Meanwhile, the regulations and manufacturing standards that were intended to support the Act took far too long to be developed. The interim regime was left carrying more weight, and for longer, than had been anticipated. Imports could not be checked for purity as required, and obtaining and delivering certificates of analysis proved a challenge. It became difficult to say exactly what was in some products – the very opposite of what had been intended.
9. In 2014, amid intense media focus, the government rushed through an amendment ending the interim licensing period and removing all psychoactive substances from sale. The amendment also banned the use of animal testing results to show that a product met the “no more than a low risk of harm” standard. This effectively rendered the approvals process unworkable and no products have been approved for sale under the Act to date.

The Psychoactive Substances Act was never meant to deal with harmful substances. These would be better covered by the Misuse of Drugs Act 1975.

10. New psychoactive substances that are currently causing deaths in New Zealand, such as AMB-Fubinaca, should be scheduled under MoDA. This approach would be consistent with our current legal framework.
11. The purpose of the Psychoactive Substances Act was to regulate substances with a low risk of harm, thus steering consumers away from high risk products. It was not set up to deal with what has now developed in New Zealand - a black market (rather than a retail market) dealing with a continual stream of highly dangerous new products. The most appropriate way to deal with dangerous products on the black market is to schedule them as controlled substances under the Misuse of Drugs Act.
12. Having said that, we would like to point out that setting high penalties for drug use and supply in general *is not a long term effective solution to reducing the harm caused by drugs*. While the Misuse of Drugs Act is the sensible place to put harmful drugs at present, we would prefer to see a complete overhaul of the way drugs are treated under New Zealand law. Our thoughts on this are outlined in part three of this submission.

Increasing penalties will not reduce drug harm in NZ. It may make it worse by pushing up drug potency

13. With over 20 deaths linked to psychoactive drugs over the past year, we can understand the temptation to hand out tougher penalties to the people selling these dangerous substances. The logic behind this Bill is that a bigger legal penalty will deter suppliers from selling dangerous products. This should then lead to fewer people being harmed by using drugs.
14. Unfortunately, addressing the supply side of drugs in this way is doomed to failure. Theoretically, some suppliers may stop supplying certain products after penalties increase. But other suppliers with less to lose will inevitably fill the gaps². Supply will always step up to meet demand.
15. It might seem counter-intuitive, but coming down harder on drugs pushes up their price, making them more attractive to professional criminals. This in turn can make the products themselves more dangerous. The higher the risk for suppliers, the more incentive to make products stronger, less bulky and thus harder to detect. For example, as the drug war intensified between 1990 and 2007 in the USA the potency/purity of heroine increased by 60%, cannabis increased by 161% and cocaine increased by 11%³.
16. Obviously, higher potency products are more dangerous for consumers. We have already seen this in New Zealand. When new psychoactive drugs were banned in 2014, the market was driven underground. Since then, more and more potent synthetic drugs have come onto the market, some of which have tragically taken peoples' lives.
17. A related point is that research generally shows that factors such as swiftness and certainty of punishment have more effect on deterrence than the length of sentence⁴. Those who are already facing two year sentences are unlikely to be affected much in their choices by a potentially longer penalty. Many of them will already be selling a range of drugs, including those already subject to higher penalties under MoDA. This amendment is likely to have little effect on their choices.
18. We recommend not increasing penalties for supply in New Zealand. It is unlikely to reduce the availability of drugs. It may push up potency levels and put more money in the hands of professional criminals.

² Global Commission on Drug Policy (2011). *War on drugs: report of the Global Commission on Drug Policy*. Retrieved from http://www.globalcommissionondrugs.org/wp-content/uploads/2017/10/GCDP_WaronDrugs_EN.pdf

³ Transform Drug Policy Foundation (2016). *The Alternative World Drug Report* (2nd edn.) Available from <https://www.tdpf.org.uk/resources/publications/alternative-world-drug-report-2nd-edition>

⁴ US National Institute of Justice (2016). *Five things about deterrence*. Retrieved from <https://nij.gov/five-things/pages/deterrence.aspx#addenda>

This is not a good time to be adding to the prison population

19. This Bill will keep people in prison longer, putting further pressure on a prison system already bursting at the seams.
20. It costs \$302 every day to keep someone in prison⁵. It costs significantly less, and is more effective, to provide harm reduction and treatment programmes in the community. We outline our vision for reducing the demand for psychoactive substances and illicit drugs in part three.

The line between suppliers and those who use synthetic substances is sometimes blurred

21. It is tempting but simplistic to think of suppliers of dangerous substances as 100% bad, and motivated entirely by money. Some will be, but not all. Suppliers are often users themselves, selling drugs to fund their own dependent use. These users need health solutions, not harsher penalties. Raising penalties may see more vulnerable people facing longer prison sentences, rather than getting the help they desperately need.
22. Simplistic supply reduction strategies, such as increasing criminal penalties, will not reduce harm. We urge the Select Committee to resist the urge to 'crack down'. This will not work and only serves to distract from solutions that will actually reduce drug-related harm.

⁵ Department of Corrections (2017). *Annual Report: 1 July 2016 – 30 June 2017*. Retrieved from http://www.corrections.govt.nz/data/assets/pdf_file/0006/898629/Annual_Report_2016-17.pdf

PART TWO – THE PSYCHOACTIVE SUBSTANCES ACT 2013 IS DUE FOR REVIEW THIS YEAR. WHY WASTE TIME TINKERING?

The whole Act will be reviewed this year

23. The Psychoactive Substances Act has a built-in legislative review period. Section 106 requires the Ministry of Health to conduct a review of the policy and operation of the Act and prepare a report for the Minister by 18 July 2018. The Minister must then present a copy of the report to the House of Representatives.
24. The review presents an ideal opportunity to examine whether the Act is working as intended, and whether any part of it needs to change.
25. It is disingenuous to tinker with a small part of this Act without considering the Act in its entirety. It is also a waste of precious government resources when a full review is due within a few short months.

If we want to reduce deaths, we need the Act to work as originally intended.

26. As discussed at length in paragraphs 5-12 of this submission, the Act had great potential to limit the harm caused by new psychoactive substances.
27. Arguably, if the Act had been allowed to function as it was originally intended, we would not now be dealing with a flourishing black market in dangerous new psychoactive substances. Instead, people would be legally purchasing products that clinical trials have shown to have no more than a low risk of harm.
28. The tragic result has been the deaths of a number of New Zealanders. Deaths that may not have happened had the sale of psychoactive substances not been pushed underground by the 2014 amendments to the Act.
29. We look forward to a thorough review of the Act. We humbly request that the Committee uses its influence to ensure that the public is given adequate opportunity to submit on this process.

PART THREE – WIDER LAW REFORM IS ESSENTIAL TO MAKE A REAL REDUCTION IN THE HARM CAUSED BY DRUGS IN THIS COUNTRY

30. To limit the harm caused by psychoactive substances in New Zealand we recommend:

- Get the Act working as it was originally intended, allowing lower-harm substances to be strictly regulated. Allow drugs currently falling under MoDA to be assessed for inclusion in the Act.
- Remove criminal penalties for personal possession of illicit drugs in line with the Law Commission’s recommendations and our model drug law, Whakawātea te Huarahi⁶. This will encourage those who are struggling with their drug use to seek help.
- Put more resources into prevention, education, harm reduction and treatment to attack the problem at the source.
- Direct the Ministry of Health urgently to implement a multi-agency early warning system to monitor emerging drug trends. An early warning system could have given us valuable information before and during the synthetic cannabinoid crisis that led to so many deaths in 2017. This may have saved lives.

⁶ <https://www.drugfoundation.org.nz/policy-and-advocacy/drug-law-reform/>

FINAL RECOMMENDATIONS

1. Discard this Bill. It is unlikely to achieve its purpose of reducing harm. It will put pressure on the prison population and may further increase the potency of drugs on the market.
2. Focus instead on ensuring the upcoming review of the Psychoactive Substances 2013 Act is comprehensive, wide-ranging and includes public input.
3. Situate any changes to the Act in its wider context. To have a real impact on the harms caused by drugs in New Zealand we need wider law reform and more comprehensive investment in health programmes.