A critical analysis of New Zealand's *Psychoactive Substances Act* 2013 and its implementation process

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Abstract

Introduction: In July 2013, the New Zealand Parliament passed the *Psychoactive Substances Act* (PSA), the world's first law to regulate the availability of new psychoactive substances (NPS, "legal highs", LH). Under the "interim PSA regime" 47 products were permitted to be sold subject to new retail and other regulations. In May 2014, the Government abruptly ended the interim regime following public protests. This thesis aims to critically evaluate the PSA and its implementation.

Methods: A mixed methods approach combined qualitative and quantitative methods of data collection and analysis. Legal analysis of the PSA and related legislation, and content analysis of parliamentary debates and public submissions were completed. Semi-structured interviews were then conducted with key informants (KI) including politicians, government officials, health professionals, and LH industry actors (n=30). Questions about health perceptions and social acceptability of approved products were added to an annual survey of police arrestees (n=834). Analyses of primary data included thematic analysis of interview transcripts and statistical analysis of data from the arrestee survey.

Results: The legal definition of "psychoactive substance" (s. 8, 9(1) PSA) overlaps with other regulatory regimes (e.g. medicines, dietary supplements) resulting in an unclear legal status for some products. Interviewed KIs identified a number of issues with the "interim regime", including the safety of interim products, speed and efficiency of withdrawing problem products, the lack of regulations on price and retail opening hours, slowness of developing regulations for the full PSA regime, and the effectiveness of communicating the new policy to stakeholders and the public. As the market commercialised, the LH industry adopted business and lobbying strategies previously attributed to the alcohol and tobacco sectors, including targeting vulnerable customers. Surveyed police arrestees considered approved synthetic cannabis (SC) products higher health risk and less socially acceptable than alcohol, tobacco and many illegal drugs, reflecting problems with interim product approvals. The ban on animal testing of prospective products is likely to prevent further implementation of the PSA, unless a new political consensus is achieved.

Conclusions: The issues experienced during PSA implementation highlight the significant challenges of establishing a legal market for psychoactive products. The time, resources and planning required to successfully implement the PSA may have been underestimated.

Preface

Personal statement

I studied law in Warsaw (Poland) and Lisbon (Portugal), and graduated with a Master's Degree in Law from the University of Warsaw in April 2013. I also worked as a journalist for a couple of years, including as an individual contractor with the Ministry of Justice in Poland. I completed formal education in media studies, obtaining a bachelor's degree from the National School of Film, Television and Theatre in Łódź (Poland) in September 2011. This varied educational and professional background gives me a unique approach to studying laws, with a particular interest in "law in action", where the focus is on how law works in the real world and how it is applied in society rather than purely how it stands in statutes.

I developed my interest in laws controlling access to illegal drugs during a three-month study visit at the Centre for Legal and Economic Research, University of Porto (Portugal) in 2012. Since then my interest in the field has evolved.

I am originally from Poland, a country in Central Europe particularly hard hit by the problem of new psychoactive substances (NPS), with mass poisoning reported in 2010 and 2015. A "blanket ban" on supply of NPS products implemented in Poland in 2010 has not proved to be a long-term solution to the NPS problem. This raised my interest in alternative legal approaches to the NPS problem. During the 10 months of my internship with the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) in 2013, my interest in the issue of controlling NPS developed further.

It was June 2013, at the 3rd International Multidisciplinary Forum on New Drugs (Lisbon, Portugal), that I first learnt about New Zealand's regulated market approach to new psychoactive substances from a presentation by Associate Professor Chris Wilkins. In March 2014 I applied for a PhD scholarship to study how the New Zealand's market for NPS established under the Psychoactive Substances Act (PSA) 2013 worked in practice.

By the time my PhD study began in June 2014 the interim regulated market established under the PSA had been ended. This unforeseen change in the regulatory environment necessitated substantial changes in the initial PhD research proposal. However, it also raised a new set of questions about what issues and challenges with the PSA had resulted in the abrupt ending of the interim regime. My PhD aimed to investigate and analyse these issues and challenges with the intention of enhancing any future implementation of the PSA and identifying learnings for proposed regulatory regimes for other psychoactive substances.

Acknowledgements

Associate Professor Chris Wilkins and Professor Karen Witten supervised this Thesis and I would like to acknowledge their advice and guidance. In particular, I would like to thank my primary supervisor Associate Professor Chris Wilkins for his comments on drafts of research articles included in this thesis and continuous support in my research, publishing and learning process. I would like to acknowledge the supportive research environment provided by the SHORE and Whāriki Research Centre and the administrative and editing help from SHORE staff Jan Sheeran and Lisa Morice.

This study would not be possible without participants who agreed to share their experiences about implementation of the Psychoactive Substances Act 2013. I am grateful to all study participants, who I cannot acknowledge here by name due to confidentiality reasons. Also, I would like to thank staff from the Ministry of Health for their help with the legislation and feedback provided. Anonymous reviewers of journal articles published during this PhD also provided valuable comments on the manuscripts.

I would like to thank my family for their support and encouragement.

About dissertation "by publications"

This thesis has been prepared by joining together six journal articles published or submitted for publication during the course of the PhD candidature. It is a "PhD by publication", where each results chapter constitutes a research article with a structure typical for peer-reviewed journals. It has been written in line with Massey University Guidelines on PhD Thesis by Publication (Massey University, no date).

The thesis works as an integrated whole, with Chapters 1, 2 and 3 outlining the research context and methodology and Chapter 10 synthesising and discussing findings from all published papers. The results chapters (Chapters 4–9) constitute published research papers.

The table below contains information about publications comprising the results chapters of this thesis, and other research outputs published during this PhD. As the author of this PhD thesis, I hold primary authorship of all research papers, with my thesis supervisors and SHORE & Whāriki Research Centre support staff who contributed significantly to the research listed as co-authors. Appendix A contains a detailed statement of contribution to each research paper and other outputs published during this PhD. I have received permission from all copyright holders to reprint journal articles and other outputs in this thesis.

PhD content	Article title and journal, or full reference (if published)	Publication status
Chapter 4	Rychert, M., & Wilkins, C. (2016). What products are considered psychoactive under New Zealand's legal market for new psychoactive substances (NPS, 'legal highs')? Implications for law enforcement and penalties. *Drug Testing and Analysis*, 8(8), 768-778. Doi: 10.1002/dta.1943	published
Chapter 5	Rychert, M., Wilkins, C. & Witten, K. (2017). Issues with monitoring the safety of psychoactive products under a legal regulated market for new psychoactive substances (NPS) ('legal highs') in New Zealand. *Drug and Alcohol Review*. Published online 23 Feb 2017. Doi: 10.1111/dar.12507	published
Chapter 6	Rychert, M., Wilkins, C. & Witten, K. (2017). "Lost in translation": issues with the establishment of a legal market for 'low risk' psychoactive products ('legal highs') in New Zealand. *Drugs: Education, Prevention & Policy.* Published online 2 Feb 2017. Doi: 10.1080/09687637.2017.1282422	published
Chapter 7	Rychert, M. & Wilkins, C. (2016). Legal high industry business and lobbying strategies under a legal market for new psychoactive substances (NPS, 'legal highs') in New Zealand. *International Journal of Drug Policy*, 37, 90-97. Doi: http://dx.doi.org/10.1016/j.drugpo.2016.08.011	published

Chapter 8	Rychert, M., Wilkins, C., Parker, K. & Witten, K. Are government-approved "legal highs" perceived to be safer and more socially acceptable than alcohol, tobacco and illegal drugs? Findings from a survey of police arrestees in New Zealand. *Drug and Alcohol Review*. Forthcoming.	accepted
Chapter 9	Rychert, M. & Wilkins, C. (2015). The challenge of a ban on animal testing for the development of a regulated legal market for new psychoactive substances (NPS) ('legal highs') in New Zealand: Issues and options for resolution. *International Journal of Drug Policy*, 26(12), 1273-1278. Doi: http://dx.doi.org/10.1016/j.drugpo.2015.08.006	published
Appendix G	Rychert, M. & Wilkins, C. (2015) Did we have the wrong debate about Elixinol™ and medicinal cannabis? [Letter]. *New Zealand Medical Journal*, 128(1521), 69-70.	published
Appendix H	Rychert, M. & Wilkins, C. (2016). Thirty-one psychoactive plants exempted from New Zealand's Psychoactive Substances Act 2013 [Letter]. *Addiction*, 112(1), 181-182. Doi: 10.1111/add.13526	published
Appendix I (some sections incorporated in Chapter 2, s 2.1, 2.3)	Rychert, M., & Wilkins, C. (2017), *New Zealand's pre-market approval regime for 'low risk' new psychoactive substances (NPS, 'legal highs') - a regulatory alternative to prohibition*, in: A. Malczewski (Ed.) Monitoring drugs and drug addiction on local level. Warsaw, Poland: Information Centre for Drugs and Drug Addiction. (Published in English and Polish)	published
Appendix K	Rychert, M., & Wilkins, C. (2015). Is the recent ban on animal testing of legal high products a fatal blow to the development of a legal market for 'low-risk' psychoactive products in New Zealand? [Letter] *Addiction*, 110(4), 713-714. Doi: 10.1111/add.12853	published
Appendix L	Wilkins, C., and Rychert, M. (2017) Recent developments with the New Zealand regulated market approach to 'low-risk' psychoactive products. Addiction, 112: 34–36. doi: 10.1111/add.13495.	published
Appendix M	Wilkins, C., Rychert, M., Byrska, B., Van Hout, M., Corazza, O., & A.Roman-Urrestarazu (2017). "Exploring novel policy responses to NPS and 'legal highs' in New Zealand, Poland, Republic of Ireland & the United Kingdom". *Novel Psychoactive Substances. Policy, Economics and Drug Regulation*. Ed. Ornella Corazza & Andres Roman-Urresterazu. Springer Nature, 2017	published

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List of acronyms

ECJ	European Court of Justice
EMCDDA	European Monitoring Centre for Drugs and Drug Addiction
EU	European Union
EWA	Early Warning Advisory (UNODC)
EWS	Early Warning System (EU)
IDMS	Illicit Drug Monitoring System (IDMS – NZ)
KI	Key informant
LAPP	Local Approved Product Policy (NZ)
LH	'Legal highs'
LHI	'Legal high' industry
MODA	Misuse of Drugs Act (1971 – UK; 1975 – NZ)
MOH	Ministry of Health
NGO	Non-governmental organisation
NPS	New psychoactive substances
NZ	New Zealand
NZ-ADUM	New Zealand Arrestee Drug Use Monitoring study
NZLC	New Zealand Law Commission
P	Participant
PSA	Psychoactive Substances Act (2013 – NZ, 2016 – UK)
PSAA	Psychoactive Substances Amendment Act (2014 - NZ)
PSB	Psychoactive Substances Bill (i.e. "draft" law, before vote in Parliament - NZ)
PSEAC	Psychoactive Substances Expert Advisory Committee (NZ)
PSRA	Psychoactive Substances Regulatory Authority (NZ)
RSR	Restricted Substances Regime (NZ)
SC	Synthetic cannabinoids
TCDN	Temporary Class Drug Notice (NZ)
TCDO	Temporary Class Drug Order (UK)

UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UK	United Kingdom
WHO	World Health Organization