PROHIBITION IS A KEY DRIVER OF THE NEW PSYCHOACTIVE SUBSTANCES (NPS) PHENOMENON

Any review of the New Zealand regulatory model for new psychoactive substances (NPS) has to begin with a recognition of the impact of the overarching system of prohibition, and especially what the United Nations Office on Drugs and Crime (UNODC) has referred to as ‘substance displacement’. In 2008 the UNODC identified five major negative consequences of prohibition; one of them recognizes that: ‘If the use of one drug was controlled, by reducing either supply or demand, suppliers and users moved on to another drug with similar psychoactive effects, but less stringent controls’ [1]—precisely the dynamic at work with regard to the NPS phenomenon. However, beyond noting that NPS ‘are commonly marketed as “legal” substitutes for existing illegal drugs’, Wilkins [2] does not explore the crucial role of the prohibition of such existing illegal drugs in fuelling the NPS market in the first place—a phenomenon that has direct implications on his analysis that follows.

Wilkins usefully identifies a number of challenges that the legislature has had to confront in developing its new regulatory market model for certain ‘low-risk’ NPS, also noting the problematic nature of prohibition-based responses, and how these problems have been the driver of the New Zealand innovations. Key among these problems is: ‘the speed at which manufacturers can replace a newly prohibited NPS compounds with an uncontrolled ones’.

Such displacement is perhaps most clearly illustrated by the synthetic cannabinoid group of NPS (such as ‘Spice’ and ‘K2’) that mimic cannabis (although a similar, if more complex, dynamic is observable with established and NPS stimulants). It is reasonable to speculate that no substantial market for synthetic cannabinoids would have emerged had cannabis been available via a legally regulated market-place, not least because evidence suggests that users prefer cannabis [3], and synthetic cannabinoids products appear to be more risky in terms of adverse health effects [4]. The experience in the Netherlands, where cannabis is at least de-facto legal and there is negligible demand for synthetic cannabinoids, supports this contention.

New Zealand now faces a probable scenario of having synthetic cannabinoids legally available under its new legislation, while less risky herbal cannabis products remain illegal. This fundamentally irrational scenario appears to have prompted Peter Dunne, the former New Zealand Minister of Health and architect of the Psychoactive Substances Act (PSA), to reconsider his previously hard-line prohibitionist position, recently speculating that the PSA ‘could well become the model by which narcotic drugs, currently controlled under the Misuse of Drugs Act, are regulated for the future’ [5].

The challenges that Wilkins lays out for NPS in New Zealand are usefully viewed within this wider analysis. The specific risks identified—high consumption episodes, polydrug use, risks to vulnerable populations, high-risk modes of administration and long-term use—are key risk variables relating to the use of any drug, but the lack of knowledge around these risks for NPS is a risk factor in itself. The fact that New Zealand is opting to regulate NPS, about which so little is known, rather than cannabis, 3,4-methylenedioxo-N-methylamphetamine (MDMA), cocaine or amphetamines, about which we know a great deal (many have medical uses and thus been through the rigours of clinical testing), is a perverse manifestation of the legal environment rather than a rational policy choice.

While the knowledge of NPS risks is certainly imperfect, the pragmatic reality remains that any such risks are reduced under an appropriate regulatory model in which at least some toxicology and risk evaluations have taken place, product contents are known to the buyer/consumer and controls on age access and marketing and branding are in place. The specific risks Wilkins identifies are all reduced in a regulated market scenario, whereby licensed products display information to users regarding the risks associated with use, and appropriate warnings (regarding dose, polydrug use, vulnerabilities, modes of administration, etc.) can be featured prominently on the packaging, or relevant advice given by licensed vendors at point of sale. Such labelling would presumably also address the risk liability concern that Wilkins raises.

The New Zealand regulated model—for all its potential flaws—remains preferable to either an unregulated online ‘free-for-all’ or a blanket prohibition and the default to a criminal controlled market. There is no fourth option which involves demand for drugs, or drug markets that meet that demand, disappearing altogether.

The model aims to reduce the risks associated with the NPS market—rather than make further futile or counter-
productive efforts to eradicate them entirely. It is a fundamentally pragmatic approach [6] but one that, given its novelty, is bound to have some teething problems. The New Zealand authorities have demonstrated a willingness to challenge the status quo in face of the evidence that previous approaches were not effective, and are also keeping the current policy and emerging evidence on drug risks under close review.

We perceive this bold move in part as a reactive initiative, in so far as it seeks to mitigate a major negative outcome of the primary intervention of global prohibition. The replacement of this one-size-fits-all blanket ban with a more just and effective system to regulate and control established drugs [7] that Dunne hints at would remove the key driver of the NPS market in the longer term.

Declaration of interests
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THE NEW ZEALAND PSYCHOACTIVE SUBSTANCES ACT (PSA): A POLICY BREAKTHROUGH OR JUST A SYMBOLIC ACT?

The Psychoactive Substances Act (PSA), about to be implemented in New Zealand, represents a new approach to drug control, as under its regulatory framework any new psychoactive substance (NPS) may be introduced to the market if scientifically (clinically?) demonstrated to pose ‘no more than a low risk’. Manufacturers will thus be allowed to produce and sell legally any NPS once they meet a set of requirements concerning health standards, product development and testing, etc.

Wilkins raises several thoughtful objections to the new legislation [1]. In particular, he points out that no clear definition of what constitutes a ‘low risk’ was provided under the PSA, and that the proposed testing requirements are more applicable for the medical, not recreational-use, drugs. Also, he anticipates practical enforcement difficulties, as many substances will remain illegal.

There are, however, several additional points to consider.

Most of the NPS manufacturers produce currently illicit goods. Presumably, at some point they have weighted the considerable risks of lawbreaking against the expected financial gains. Judging by the hidden ingredients in many NPS products, lack of consumer information, covert marketing strategies, etc. these producers appear to be solely profit-driven and not greatly concerned about their customers’ safety or public health issues [2]. How likely is it that these NPS producers will opt for a legal market? The implicit assumption here seems to be that, given a chance, they would. However, according to economic theory, they would do so only if the expected gains outweigh the costs. In this case, the costs under the proposed PSA appear substantial and not easily recovered. For instance, testing costs projections fall between 1 and 2 million $NZ per product—and these are probably underestimated, as the actual testing of an ‘inhalation product’ amounted to 6 million $NZ [1]. Further, the application fee alone is set to 180 000 $NZ [1]. These expenses are above and beyond other additional production costs associated with ‘playing by the rules’.

Thus, any legal NPS production will most probably be considerably more costly than it is under its current illicit production mode. Can current NPS producers raise such