Notes on policy and legal responses to novel psychoactive substances ('legal highs') and non-medical use of prescription drugs, submitted to the Home Affairs Select Committee Drugs Inquiry by Transform Drug Policy Foundation, September 21, 2012.

Danny Kushlick from Transform Drug Policy Foundation gave evidence to the Committee on 10th July 2012. He was asked about how the arguments being made for drug law reform related to 'legal highs' and non-medical use of prescription drugs by Lorraine Fullbrook MP, but given time constraints was unable to offer a full answer. The Chair therefore invited Transform to submit additional evidence relating to this question in writing.

Summary points:

The market for legal novel psychoactive substances (NPS), and non medical use of prescription drugs has emerged due to high and resilient demand for certain prohibited drugs. Both phenomena can therefore be seen as an unintended consequence of drug prohibition and the corresponding absence of any legal supply route to meet demand.

The legal NPS market is associated with significant risks that directly relate to the lack of market regulation. Prohibitions on NPS can, however, have unintended consequences; creating a void in the market for new NPS, creating an illegal market for established NPS, or displacing use back to illegal substances for which legal NPS may have been substitutes.

Until demand reduction efforts prove more effective, the reality of demand as it currently exists must be dealt with pragmatically. Recent experiences show that prohibitions do not eliminate the problem and may increase harms.

Policy responses should seek to reduce the health and social costs associated with the use of drugs, and the markets that supply them. Leaving an unregulated legal market, or blanket prohibition (in all likelihood resulting in an unregulated criminal market) as the only options is blinkered and irrational.

There are a range of regulatory models that can be considered, allowing controls over products, vendors and availability – these offer potentially significant reduction in the harms associated with NPS and it would be negligent to rule them out. They have been experimented with in some countries, and are being considered by the current European Commission impact assessment of NPS.

Such developments might appear at odds with the prevailing prohibitionist ethos – but they may in fact offer a unique opportunity for a controlled experiment; guiding drug policy by pragmatic health principles rather than 'tough on drugs' posturing or knee jerk populism.

Background and context

Transform aims to support development of the most effective models for the regulation and control of non-medical drugs. The aim is to reduce the health and social harms associated with use of drugs, as well as wider social harms associated with the drug markets.

To this end we advocate both:

- the establishment of appropriately regulated markets for adult use of currently illegal drugs (as detailed in our 2009 publication *'After the War on Drugs; Blueprint for Regulation'*[i]) and,
- Improved regulation of currently legal drugs , most obviously including alcohol and tobacco; including controls on price/taxation, packaging, age controls, branding and advertising etc (See *'After the War on Drugs; Blueprint for Regulation'* chapter 5).

The goal of both processes is to establish the optimal model of regulation to achieve the shared goals of minimised health and social harms (see points 2.1 and 2.2 in our earlier submission[ii]). Both involve increased levels of regulation, even if the starting point is different: the former in which regulation has effectively been abdicated to unregulated criminal profiteers, the latter which has seen historical under-regulation and corresponding over-commercialisation, gifting the market to non-criminal profiteers.

Transform's position on the non-medical misuse of prescription drugs and the recent emergence of a range of novel psychoactive substances is informed by the same rationale.

It is vital that both trends – and responses to them - are be seen in the context of

- historically rising demand for non-medical drugs under a legal/policy framework which strictly prohibits most of those in greatest demand.
- the fact that drugs with similar effects – whether stimulants, psychedelic or depressant effects are easily substituted by users.
- the reality that there are a range of factors that influence drug user choices between one drug and another – these include relative cost, availability, quality (purity/reliability), perceived risk and legal status.

Novel Psychoactive Substances

These are sometimes referred to in political and media discourse as *'legal highs'* – a term initially coined by those marketing them, and then latched onto by the media, but one that is increasingly unhelpful, not least because many of them are no longer legal (alcohol and tobacco are curiously never included under this moniker). 'Novel Psychoactive Substance' (NPS) is a more accurate and focused term. There are a range of substances that come under this broad NPS heading, including a number of psychedelics[iii], but the majority of the market (and correspondingly, concern amongst the drugs field and policy makers) has been and remains made up of synthetic stimulants, such as BZP, mephedrone, and naphyrone. These drugs meet the demand for stimulants that has historically been met by more familiar illegal drugs including cocaine, ecstasy/MDMA and amphetamines. An additional group of products are made using synthetic cannabinoids that mimic the effect of cannabis.

Focusing on the stimulant grouping; as an alternative to the more familiar illegal drugs, there are a number of reasons why the legally available NPS may be perceived as preferable:

- they are often relatively cheaper
- they are more consistent in quality/strength (for context cocaine and ecstasy has been deteriorating in purity and consistency over the last decade),
- they are effectively freely available from online suppliers or local 'headshops', thus avoiding the risks and pitfalls of engaging with the criminal market place
- Whilst there is little evidence to suggest illegality is a significant deterrent , legal NPS still have the relative advantage of not being associated with the risk of arrest, prosecution and a criminal record.

Amongst the stimulant groups of NPS there has been an observable trend of new products emerging, establishing a market, and then being prohibited – often following a burst of high profile media around their risks. BZP was the first notable example in the UK, growing in popularity around 2004-6 before being prohibited for sale (but not importation and use) under the Medicines Act in 2007 and then prohibited outright under the Misuse of Drugs Act in 2009.

Mephedrone emerged rapidly during 2009-2010, arguably, to some extent filling the void in the 'legal high' market created by the BZP ban. Mephedrone was then prohibited under the Misuse of Drugs Act in late 2010. Following this ban a large number[iv] of other synthetic stimulants have subsequently emerged onto the market.

The market is effectively unregulated, creating a series of risks:

- **There no quality controls**. Whilst the quality (in terms of purity) of BZP and mephedrone before their respective bans, appears to have been quite high and reliable, more recently quality of legal NPS seems to have become more variable Recent research[v] based on analysis of text purchases (published in July 2012) suggested that many of the substance being sold online as 'legal highs' contained substances other than those advertised , often including prohibited substances . Studies have suggested that some users now accept the unpredictability of what they are consuming – referring to what is sometimes called *'bubble'*, an unspecified/unidentified white powder that will have some level of psychoactive effect[vi].
- Because these products cannot be sold for human consumption they are sold for other purposes – such as '*research chemicals'*, *'bath salts'* or *'plant food'*. This means **appropriate levels of information are not being available on packaging** concerning content, dosage, and risk/harm reduction information.
- **There are no age controls for purchase**. Whilst most 'head shop' sales have some (often inadequate) voluntary age controls in place, online sales have little or none – meaning these products are effectively available to anyone able to purchase online. For younger or novice users the unregulated legality - when viewed alongside strict prohibitions on other drugs - may give the inaccurate impression that the legal status and availability implies relative safety[vii]. There is some evidence that as well providing a substitute for illegal drugs some NPS have been gateways to initiation of some younger first time drugs users.

The rapidly changing nature of the NPS market creates additional challenges for the police – who are unable to identify substance; forensic services – who have to test for them; emergency services – who have difficulty identifying what substances an individual in an emergency situation may have taken, and drug service providers – who have little information on how to deal with problematic use of such drugs, assuming they can be identified.

Discussion points

- The 'legal' NPS market has largely emerged in response to demand for the effect the drugs provide in the context of historic prohibitions on such products. When legal products arrive that compare favourably to their illegal counterparts in terms of effect, risk[viii], quality and price – it is unsurprising that they become popular, and to some extent displace some illegal drugs. This phenomenon, and the specific challenges created by the rapid emergence of multiple NPS with unknown risk profiles occurs largely because of the lack of legal availability of more familiar and well understood drugs such as cannabis, ecstasy/MDMA, cocaine and amphetamines.

- The emergence of NPS can therefore be seen as driven primarily by the prohibitionist legal environment. There would have been, for example, no demand or market opportunity for products like *'Spice'* (one of the popular brand names for - now prohibited - synthetic cannabis products) if cannabis were legally available. Whilst demand remains for a particular drug (or drug effect), the profit opportunity this creates means that the market will always find a way to meet it - whether legal or illegal.

- Just as the emergence of NPS are an unintended consequence of historic prohibitions, so prohibiting a particular NPS can then have significant unintended consequences. Especially when demand for a given substance has been established, a ban is likely to have one or more of the following impacts:

    1) Create a void in the legal NPS market into which one or more new substance will move (the net health impacts of which are impossible to predict)
    2) Divert users back to the illegal substances the NPS are likely to have been a substitute for (exposing users to the risk of the illegal market and criminalisation over and above the risks of the drug use)
    3) Lead to the emergence of criminal market for the formerly legal NPS – in which it is likely that the quality (in terms of purity and reliability) of the product decreases and the cost increases.

Illustrative of this is that all of these impacts have been observed to some extent in the wake of the 2010 mephedrone ban.

What can be done?

New powers now exist to establish a 12 month ban on importation and sale of drugs following advice from the ACMD – to allow for an appraisal of risks, and decide on what course to take (notably, possession of these 'banned' drugs is not criminalised).

Whilst the ACMD are well qualified to provide a risk assessment (at least with what limited evidence is available) the problem they face is translating this analysis into effective policy recommendations given the lack of options available to them. Currently the options, once any temporary import and sale ban expires, are limited to either an outright ban under the MDA, or unregulated legal free for all. As this briefing makes clear, both scenarios are highly problematic.

There is an urgent need to explore options that occupy the middle ground between blanket prohibition and unregulated free market. These could allow regulatory tools be deployed that offer a degree of control over products, vendors, and availability.

Some limited potential exists for using trading standards legislation or medicines legislation[ix], but neither are adequate in the long term – what is needed is dedicated legislation and a regulatory model, custom made for the purpose of controlling non medical use of potentially risky psychoactive drugs. International law (the UN drug conventions) has been a barrier to exploration of such models for currently illegal drugs – but no such barrier exists for NPS. As such they provide an opportunity to explore regulatory alternatives to the obvious failings and counterproductive nature of blanket prohibitions.

Clearly no substance should be allowed into any commercial market without at least a basic level of risk evaluation so a default prohibition on commercial sale of any new NPS is justified. However, such bans on emerging products will only be effective if there is a regulated outlet of other products that can meet pre-existing demand. Without some form of legally regulated supply the problems outlined above will inevitably continue, and in all likelihood get worse. Some form of regulated availability does not, of course, preclude increased investment in evidence based prevention and risk education that targets vulnerable populations – indeed, such interventions should form part of any drug policy.

In the longer term any regulated models for legal availability of NPS (as happened in New Zealand for BZP) are likely to create a problematic inconsistency between legal and illegal drugs – not least in terms of perception of risk. There is a need to explore models of regulation for all currently illegal drugs as well to create a level playing field – the rationale for which is explored in more detail in Transform's previous submission.

Prescription drugs

The non medical use of prescription drugs is also primarily demand driven and is unlikely to be substantially reduced unless alternative supply routes that meet demand are established, or demand can be reduced in the longer term. The ready availability of certain drugs, such as benzodiazepines, opiates, and amphetamines is a by-product of their extensive medical use. A strong argument can be made that many are either overprescribed, or that prescribing controls are inadequate. Increasing restrictions may appear an obvious solution, but there may again be unintended consequences in terms of displacing users to higher risk illegal drugs. Recent experiences in the US of an increase in heroin use following clampdowns on availability of some prescription opiates are illustrative of this risk[x]. The pragmatic solution would involve regulated supply of drugs that meets demand for non medical use in the short term, combined with longer term efforts to reduce demand.

As with NPS the choice is: unregulated legal markets, regulated legal markets or illegal markets controlled by criminal entrepreneurs; there must be no pretence that drugs can be eliminated altogether.

Recommendation:

Detailed examination of options for regulation of NPS may be beyond the scope of this inquiry. However, the committee should recommend that such options be explored by the appropriate body. Reference can be made to the Impact Assessment of options for NPS currently being undertaken by the European Commission, as well as work undertaken by UKDPC/Demos, and the experiences of New Zealand in regulating sales of BZP.

Further reading:

- ***Novel psychoactive substances report*. ACMD (2011)**
  http://www.homeoffice.gov.uk/publications/agencies-public-bodies/acmd1/acmdnps2011?view=Binary

- **Winstock, A., Wilkins C *''Legal highs' The challenge of new psychoactive substances'* Transnational Institute 2011**
  http://www.tni.org/sites/www.tni.org/files/download/dlr16.pdf

- ***'Taking drugs seriously: a Demos and UKDPC report on legal highs'* UKDPC/Demos 2011**
  http://85.13.242.12/publication/demos-ukdpc-legal-highs/

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[i] Available online here: http://www.tdpf.org.uk/Transform_Drugs_Blueprint.pdf

[ii] Available online here http://www.tdpf.org.uk/Transform-HASC-submission-2012.pdf

[iii] Whilst some pharmaceutical preparations have psychedelic properties, most of the *'legal'* psychedelics market is dried plant products, notably including dried fly agaric mushrooms and dried peyote cactus. Neither are actually *'novel'* having been consumed for 1000s of years.

[iv] Estimates suggesting as many as 40 last year. http://www.guardian.co.uk/society/2011/oct/25/legal-highs-automatically-banned

[v] Ayers, T., Bond, J. '*A chemical analysis examining the pharmacology of novel psychoactive substances freely available over the internet and their impact on public (ill)health. Legal highs or illegal highs?*' BMJ Open 2012, Vol 2, Issue 4. http://bmjopen.bmj.com/content/2/4/e000977.full

[vi] Measham, F., Moore, K., Østergaard, J. *Mephedrone,' ''Bubble'' and unidentified white powders: the contested identities of synthetic ''legal highs'''* Drugs and Alcohol Today VOL. 11 NO. 3 2011, pp. 137-146, http://bit.ly/PPy5vv

[vii] Sheridan, J., Butler, R.*'"They're legal so they're safe, right?" What did the legal status of BZP-party pills mean to young people in New Zealand?'* International Journal of Drug Policy, Volume 21, Issue 1, January 2010, Pages 77–81

[viii] In the absence of any formal evaluation, health risks are largely unknown, leaving knowledge on short and medium term risks to be established in an ad hoc, inadequate and dangerous fashion by experimental users and early adopters.

[ix] See *'Taking drugs seriously: a Demos and UKDPC report on legal highs'* UKDPC 2011 http://85.13.242.12/publication/demos-ukdpc-legal-highs/

[x] Cicero, T. Et al. 'Effect of Abuse-Deterrent Formulation of OxyContin' New England Journal of Medicine 2012; 367:187-189July 12, 2012 http://www.nejm.org/doi/full/10.1056/NEJMc1204141