



**Local councils
play an active
role in keeping
our communities
healthy.**

Psychoactive Substances Regulations: A Consultation Document

Local Government New Zealand Submission to the Ministry of Health

21 March 2014

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INTRODUCTION

Thank you for this opportunity to provide input into the development of the psychoactive substances regulations. This submission has been prepared on behalf of New Zealand's 67 territorial authorities which have been given the statutory discretion to prepare and adopt locally approved products policies (LAPPs).

LGNZ is the national organisation of local authorities in New Zealand and all 78 councils are members. We represent the national interests of councils and lead best practice in the local government sector. LGNZ provides advocacy and policy services, business support, advice and training to our members to assist them to build successful communities throughout New Zealand. Our purpose is to deliver our sector's Vision: "Local democracy powering community and national success."

As an organisation we are committed to ensuring that councils have the policy levers and practical support to fulfil their statutory duties and meet community expectations in all aspects of their responsibilities. With regard to the regulation of psychoactive substances, further development of tools for councils is clearly required over and above than those flagged in the consultation paper and we look forward to working with the Ministry on how these might be reflected in the final regulations.

The need for better community information

One of the challenges councils are facing is citizens' lack of awareness of the new legislation, the policy rationale behind it and a lack of knowledge about the nature of local governments' new regulatory responsibilities. Councils are perceived by many in the community as having a greater ability to regulate the sale of psychoactive substances than in fact they have. We believe that the Ministry of Health needs to develop a public-facing communications strategy to inform New Zealanders on the reasons behind the legislation, and the relative roles of the different agencies involved in the regulation of psychoactive substances.

Such a strategy could include but should not be limited to the development of material that councils can use to communicate with their communities. It is important that this is led by central government/agencies in the same way that changes to alcohol laws have been. LGNZ is happy to work with the Ministry on development of a communication strategy.

The ability to regulate the location of retail outlets selling psychoactive substances is new for councils and we comment elsewhere on how the policy and legislative process might have been undertaken differently. It is important for agencies involved in regulatory implementation to be involved in the design of this legislation and accompanying regulations, for both efficiency and effectiveness reasons.

We look forward to working with officials in the Ministry of Health on the development of regulations, a strategic communications strategy and guidance to councils to ensure effective implementation.

KEY POINTS

Communications

LGNZ recommends that the Ministry of Health develop a public-facing communications strategy to inform New Zealanders about the rationale for and the nature of the new Psychoactive Substances legislation and the relative roles of the different agencies involved in its implementation. LGNZ is happy to work with the Ministry on this.

Collaboration

LGNZ recommends, in line with the recommendations of the Productivity Commission, that local government representatives should work alongside officials from the Ministry of Health, and other relevant agencies such as Police, on the analysis of submissions and the design of the final retail regulations. We recommend a cross-sector working group of appropriate parties is constituted for this purpose.

Interim licenses

LGNZ recommends that interim licenses should be subject to an adopted LAPP, noting that interim licenses holders who cannot continue to operate will be able to apply for a full license in a designated area once regulations are notified.

Evidence of compliance

LGNZ agrees that applicants for a retail licence must show that their application complies with the relevant LAPP. We believe strongly that the Regulatory Authority must not grant a license to any applicant who fails to so comply.

Fit and proper test

LGNZ recommends that the Authority consult with the relevant local authority to ascertain the nature of any relevant experience the council might have with the applicant.

Discretionary provisions

LGNZ recommends that:

- Regulations specify both minimum and maximum amounts of an approved substance that might be purchased in a single sale;
- An excise tax on approved products is introduced to reflect the cost of consumption on the NZ health system and the local community; and
- Councils are provided with the ability in the regulations to recommend opening and closing hours.

Place of sale

LGNZ recommends that shops licensed to sell approved products should specialise in the sale of these substances and should not be able to sell forms of merchandise not related to the consumption of psychoactive substances, particularly those that may appeal to a youth market.

SUBMISSION

LGNZ accepts that Parliament has determined to legalise the production and consumption of certain approved psychoactive substances. However, many councils have found that communication and the regulatory tools provided in the Psychoactive Substances Act are insufficient to meet the expectations of communities for the effective control of retail outlets. We address these gaps at appropriate places throughout the submission.

The proposal that the implementation of the regulations should take place in two phases is supported. LGNZ had previously expressed concern at the prospect of the retail regulations being gazetted before councils had the opportunity of adopting their LAPPs. Should this have happened there would have been no way policies could have influenced the location of outlets until licenses came up for their three year review. We are therefore very pleased that regulations governing retail licenses have an expected implementation date of early 2015. This should provide ample time for those councils that wish to adopt LAPPs to do so before regulations come into force.

Some compliance issues

As noted above LGNZ is pleased that the Government is considering a two-phase implementation of the regulations to allow councils time to develop and adopt appropriate policies. There are a number of specific issues which we wish to mention.

Changing premises

The consultation document raises the issue of how retail premises operating in areas that are outside the provisions of an adopted LAPP should be dealt with. It is assumed that these are premises operating under an interim license prior to the notification of retail regulations in 2015. The options appear to be:

1. To continue to operate outside the legal zone in a council's LAPP until the interim period concludes and permanent licenses within the designated area are secured, at which point the licensed premise shifts in order to comply with the policy;
2. To retain the license to operate but the premise is obliged to shift to a position within the designated zone while still an interim license, presumably within a defined period; and
3. The premise closes down until the end of the interim period and a permanent license applied for within the appropriate zone when that option becomes available.

It appears that most councils expect that option three will apply where a premise with an interim license finds itself outside the designated LAPP zone once a policy is adopted but before regulations are notified. This expectation is also shared by many citizens as well. LGNZ fully supports option three.

Providing evidence of compliance with a LAPP

LGNZ agrees that applicants for a retail policy **must** show that their policy complies with the relevant local approved products policy. We believe strongly that the Regulatory Authority **must not** grant a license to any applicant which fails to so comply.

The immediate question for councils concerns the nature of the paper-work required for confirming whether or not an application is consistent with a council's LAPP, and how this might be handled in an efficient manner, for both the council itself and the applicant. The model that might be most appropriate for this purpose is that used in the Gambling Act, in which an applicant seeks from their

council written confirmation that their application is consistent with the council's LAPP. LGNZ recommends that the Authority should provide a standard template for providing this level of proof.

Place of sale

With regard to place of sale, LGNZ wishes to reinforce a point made above that shops licensed to sell approved products should specialise in the sale of these substances and should not be able to sell forms of merchandise not related to the consumption of psychoactive substances themselves, particularly products that may appeal to youth. We believe that this would provide an important deterrent to casual users who are only prepared to access licensed premises because they also sell merchandise not related to the approved products.

Local government policies for approved products

This section of the consultation document describes the minimum range of matters a council can take into account in the development of an LAPP as provided for in the Psychoactive Substances legislation. It also notes that phase two of the implementation process has been timed to allow councils to put policies in place before retail regulations are notified.

There are a number of matters in the statute that are still to be determined in detail, resulting in councils having to make a number of assumptions, for example:

- What does the phrase "facilities of a particular kind" mean? Would it include, for example, sites where people congregate while waiting for public transport?
- What does "broad areas" mean? For example, would a broad area include a series of specific but non-contiguous streets?

An additional matter is the status of an LAPP which has the unintended effect of effectively banning sales by preventing the location of a retail outlet within a particular jurisdiction. This could occur, for example, in a smaller community where there are multiple places of a particular kind. We recommend that the Ministry ask the Crown Law Office for a view on the legal status of any policy that inadvertently results in such a situation.

We submit that the regulations are specific so that councils would know the full extent of their authority, that is the matters they can take into account, before beginning to consult on and adopt a regulatory plan, such as an LAPP. The problem is that some councils may over-prescribe and expose their policy to legal challenge on *ultra vires* grounds, while others may under-prescribe and fail to fully meet community expectations. Both may face a policy amendment process once the final regulations are announced - a costly process for both councils and communities.

If local variation is acceptable then the Ministry, in the first instance, needs to articulate the reasons for this from a policy perspective. LGNZ is very happy to work with Ministry officials on developing appropriate strategies.

COMMUNICATIONS

We noted in the introduction the problem created by a lack of awareness by citizens about the new legislation and the way in which responsibility is distributed between central and local government. Many perceive councils as having a greater ability to regulate the sale of psychoactive substances than is the case. As a result we are recommending that the Ministry of Health should develop a public-facing communications strategy to inform New Zealanders about the nature of the new Psychoactive Substances legislation and the relative roles of the different agencies involved in its implementation. LGNZ is happy to work with the Ministry and related agencies on this, which could include:

- Public relations, such as factual and feature based articles, including background, the policy, results to date, vision and next steps, as well as interviews with the Minister, a selection of our mayors, Police and other associated parties;
- Forums for community education, feedback and response, including online options;
- Website information, such Q & As; and
- Printed collateral and advertising.

The communication needs to include a strong evidence base outlining why the changes have occurred and what further changes will occur, and why, along with clear communication of the policy response to date and planned for the future.

Councils will want to see that the policy response is being led and communicated by central government, and accordingly the Ministry needs to be clear about the policy position and the role of LAPPs.

CONCLUSION

The need to prepare local approved product policies is a new requirement that was approved by Parliament with little or no prior knowledge by councils, one of the agencies charged with implementation. Because of community interest in the availability, location and type of stores selling these products many councils have had to quickly learn about the new regulatory regime and develop policies. This has been made more difficult because the regulations are yet to be adopted - these are expected in early 2015. While the additional time for councils to develop and adopt policies is appreciated, without knowledge of the full regulatory framework councils are developing local policies without guidance. It may be that once regulations are adopted some councils may need to amend their policies so as to be consistent with the regulations, leading to cost and inefficiency.

LGNZ believes it is important that local government representatives have the opportunity to work with officials from the Ministry of Health on the design of the final retail regulations and guidelines for councils. This would be in line with the recommendations of the Productivity Commission, which called for Government agencies to work closely with local government on the design of new regulations. Consequently we are pleased that the Ministry wishes to work with local government officials on the development of regulations on psychoactive substances. We are happy to facilitate this and to pull together representatives from the sector to form a working group.

MAKING A SUBMISSION

Consultation questions

- 1 Is the list of proposed information requirements for licence applications comprehensive enough?

If not, what else should be required, and why?

Additional information might include:

- Previous convictions and issues the council may have with the applicant and/or associates: this would enable the Authority to more fully assess the suitability and character of the potential licensee.
- Any known associates.
- Detailed information on the physical/approved address of the retail outlet and surrounding retail precinct/premises.

- 2 Should retail licence applications be accompanied by evidence of compliance with a local approved products policy if one is in effect in the applicant's area?

Yes. We would go further and insist that any application must have evidence that the application complies with a council policy - such evidence must be verified by an official from the relevant council. The Regulatory Authority should NOT grant a license to any applicant that does not so comply.

LGNZ suggests that the process under the Gambling Act to show that Class 4 gaming machine operators comply with a council's policy might be a good model to replicate.

- 3 Should retail licence applications be accompanied by evidence of compliance with a generic local approved products policy if no policy is in effect in the applicant's area?

LGNZ supports a generic policy however we note that not all of our members agree and we do see some drafting problems. If a council chooses to exercise its discretion and not have a policy then clarification is needed if a generic policy can have statutory authority under the Act.

For example, should a council choose not to adopt a policy then it is likely it will choose not to provide information to the Authority on whether or not a prospective retail license conforms to the generic policy.

Perhaps a better option would be for the Authority to establish a list of "particular places" and create a minimum distance within which retail outlets may not operate.

- 4 Are the factors the Authority should take into account when determining whether a licence applicant is a fit and proper person or whether a body corporate is of good repute in section 16(2) enough? The section 16(2) factors are:

- whether the applicant has been convicted of a relevant offence;
- whether there has been a serious or repeated failure by the applicant to comply with any requirement of the Act;
- whether there are other grounds for considering that the applicant is likely to fail to comply with any requirement of the Act; and
- any other matter that the Authority considers relevant.

If you think these factors are not enough, please give examples of additional factors the Authority should consider.

Any history of failure or non-compliance with other similar regulatory regimes should be a consideration. The Authority may wish to consult with local councils to ascertain whether they have any previous history with an applicant in relation to council business that might be relevant.

Other factors might include any potential conflicts of interest, in a trading sense, and any known associates.

If the licence applicant is a body corporate there should be a screening of the board members to ensure all involved are of good character with no previous convictions.

LGNZ supports Christchurch City Council's suggestion that evidence of the number of people committing crimes while using products supplied by a particular retail outlet might be taken into account when a retail outlet's license is up for review.

- 5 Should the regulations require applicants to provide details of their involvement in other regulatory regimes, such as alcohol licensing processes?

Yes.

- 6 What records should the regulations require licence holders to keep?

Licence holders should maintain a register of substances that they sell and also maintain a stocktaking system to ensure they know what substances they have in stock at any time. This should be audited by the Ministry – this could be conducted when a licence is renewed, or at any other time. Sufficient information must be provided so that products and substances can be traced to the point of sale.

Some members have recommended that a record of all purchasers is kept. LGNZ believes that this could apply to customers who purchase bulk amounts (the Authority to determine the amount) to reduce the likelihood of illegal sales.

- 7 How long should licence holders be required to keep records for?

We support seven years as a reasonable balance between accessibility and efficiency.

- 8 Do you think there are factors or issues that the Authority should consider when setting discretionary conditions? If so, please provide details.

The Authority should set minimum and maximum limits for the amount of an approved substance that might be purchased in a single sale;

The Authority should also consider:

- An excise tax on approved products to reflect the cost of consumption on the NZ health system and the local community;
- A limit on the range of non-related products, such as clothing, which is be able to be sold in retail premises licensed to sell approved products;
- A limit on the hours a retail premise selling approved products may operate;
- A probationary period for new retail operators with full licenses provided after a satisfactory performance;
- Forbidding any food, alcohol or gambling from sale at a licensed premise;
- Ensuring sales staff are 20+ years of age;
- Requiring the provision of fact sheets setting out the health risks associated with consumption of the products;
- Ensuring premises have information on health and addiction services that people with problems related to consumption can seek help; and
- Given the flexibility in many home occupation rules in district plans, the regulations should make it clear that psychoactive substances are not to be sold from any building the primary purpose of which is a residential dwelling.

In addition it should be made clear in the license conditions that it applies to a particular premise, not just the person who is the license holder. Licenses should also be reviewed whenever a council LAPP is reviewed to ensure that retail outlets are operating in accordance with any amendments made to a policy.

- 9 Should the regulations prescribe other matters the Authority must take into account when deciding on an application? If yes, what should these matters be?

Licenses should be inspected same as a food premises – at least once a year.

The Authority should audit their records and review performance each time licences are renewed.

Account should be taken of other licensing and non-compliance issues both within the application district and in other areas of the applicant is operating in various council jurisdictions.

- 10 Do you agree a product approval application should include information on proposed manufacturing methods and how they will comply with the Psychoactive Substances Code of Manufacturing Practice?

Yes.

- 11 Do you think any further particulars, information, documents or other material should be prescribed in the regulations? If yes, what should these be?

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- 12 Do you agree with the proposal that the regulations require applications to contain information and data on the toxicity, pharmacology and related clinical effects of the psychoactive substance they are seeking approval for?

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- 13 Do you agree with the proposal that the regulations require product approval applications to contain information and data on:

- the psychoactive potential and related behavioural effects of the substance;
- the addictive potential;
- the proposed directions for use; and
- previous use, including use in clinical trials and in the wider population?

-

- 14 Are the proposed requirements and restrictions on labelling sufficient? If not, please make specific suggestions for further requirements and restrictions.

We suggest that labels also contain the emergency phone number 111.

- 15 Are the proposed requirements relating to health warnings sufficient? If not, please make specific suggestions for further requirements (for example, advice on what to do in the case of an overdose).

LGNZ agrees that advice on what to do in case of an overdose is important. Information should also specific that the products are not to be used by people under the age of 18 and that they contain psychoactive substances.

Consideration should be given to including a warning that, for people with a genetic predisposition, consumption may trigger permanent psychosis.

- 16 Are the proposed packaging requirements and restrictions sufficient? If not, please make specific suggestions for further requirements.

LGNZ supports plain packaging except for the required information regarding health risks etc.

- 17 Do you agree with the proposal to restrict a packet to one dose? Please give reasons for your answer.

We do not agree with a single sale. LGNZ has proposed that a prescribed minimum amount should be set so that 'opportunistic' sales are discouraged – single doses may make the product more affordable/accessible.

- 18 Do you agree with the proposal that a dose, in whatever form the product takes, is split wherever possible?

See above.

- 19 Do you think there should be restrictions on the form products can take? If so, what forms do you think should and shouldn't be allowed?

One of the problems a number of councils are already experiencing involves people congregating near a retail outlet smoking approved substances. If the substances were in the form of tablets the risk of anti social behaviour is less likely to occur.

- 20 Do you think there should be restrictions or requirements on the storage of psychoactive substances? If so, what should the restrictions or requirements be?

Retail outlets should have a low stock management system, perhaps keeping no more than two week's worth of stock at any one time.

- 21 Do you think restrictions or requirements should be set for the storage of approved products? If so, what should they be?

- 22 Do you think restrictions or requirements should be set regarding the display of approved products? If so, what should they be?

Yes – out of the reach of children and customers. Products should not be visually displayed and rules should be modelled on those used for the sale of tobacco.

- 23 Do you think restrictions or requirements should be set regarding the disposal of approved products? If so, what should they be?

Yes – expiry dates should be observed and stock out of date disposed of. Adopted rules should be consistent with the provisions of the Hazardous Substances and New Organisms Act.

- 24 Do you think there should be signage requirements in the regulations? If so, please give specific suggestions.

Yes. R18 signs plus health warnings should be displayed within retail outlets. No external signage should be permitted.

- 25 Do you think the regulations should specify further places where approved products may not be sold? If so, please provide specific suggestions.

Within designated areas any premises where gaming licenses are in place should be premises where psychoactive substances cannot be sold. Clarity is required about the exact definition of “fixed permanent structures” (s.52f.)

- 26 Do you think the regulations should prescribe restrictions or requirements for advertisements of approved products? If so, please provide specific suggestions.

No advertising of approved products should be permitted. The aim of the Act is to minimise harm, advertising would work against the purpose of the Act. We suggest similar rules to those imposed on the tobacco industry.

- 27 Do you think the regulations should prescribe restrictions or requirements on internet sales of approved products? If so, please provide specific suggestions.

Products should only be available on R18 websites and only ‘registered’ users should be able to access websites selling these products. Sites should be registered with the Ministry of Health and all sales should be regulatory monitored by the Authority.

- 28 Do you think the regulations should prescribe restrictions or requirements on the advertising of approved products? If so, please provide specific suggestions.

See the answer to Q. 26.

- 29 Do you agree with the proposed fees for the different licences? If not, please provide specific suggestions.

In the case of an operator with more than one premise each premise should be licensed and be subject to a fee.

- 30 Do you support a fixed fee or an hourly charge for processing applications for product approvals?

No opinion

- 31 Should fees be set for other specific functions? If yes, please state what they should be set for.

Yes, councils would like to have the ability to either set a fee or have a fee set by the Authority for the time taken to process an application for a retail license. The tasks to be undertaken by councils involves:

- Verifying that applicant's meet the local policy's conditions; and
- Research and providing any information on the council's previous history with an applicant.

- 32 Do you agree with the proposed list of items and process for setting levies? If not, please provide specific suggestions.

In addition to the specific costs incurred when process applications for licenses, councils incur costs of developing, adopting and monitoring a LAPP. This involves:

- The cost of research;
- The cost of policy development;
- The cost of the special consultative procedure; and
- The governance cost of adopting a policy.

Any levy set by the Authority could include an amount to be paid to the relevant local authority to offset the costs of developing, adopting and monitoring an LAPP.

Please return only *one* copy of your submission no later than **5pm on Friday 21 March** to:

The Manager
Psychoactive Substances Regulatory Authority
Ministry of Health
PO Box 5013
WELLINGTON
Email: psychoactives@moh.govt.nz

Alternatively, electronically complete the submission form available at the back of this document, add your comments and email to:

psychoactives@moh.govt.nz

Please put 'Regulations Consultation' in the subject line.