

INQUIRY INTO LAW REFORM ISSUES REGARDING SYNTHETIC DRUGS

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Submission

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Inquiry into Law Reform Issues regarding
Synthetic Drugs

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Preface

The NSW Young Lawyers Criminal Law Committee (“the Committee”) is grateful for the opportunity to provide a submission to the Inquiry into Law Reform Issues regarding Synthetic Drugs being conducted by the Legislative Assembly Committee on Legal Affairs (“the Inquiry”).

We understand that the Inquiry is particularly concerned about whether current drug laws adequately cover synthetic cannabinoid products (“SCPs”), and we limit our submissions to that issue.

NSW Young Lawyers is a Division of the Law Society of NSW. It is made up of legal practitioners and law students who are under the age of 36 or in their first 5 years of practice. Our membership is made up of some 13,000 members.

The NSW Young Lawyers Criminal Law Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform. The Committee regularly submits to inquiries by law reform agencies and Parliaments.

Summary of recommendations

1. Further evidence is required in order to properly assess the adequacy of legislation regarding SCPs before any further steps can be taken in terms of regulation – areas of enquiry are set out in this submission.
2. The Inquiry should obtain expert evidence on the availability and potential harm of each SCP in order to assess the current legislation.
3. The Inquiry should have regard to interstate legislation and liaise with interstate and federal authorities with a view to adopting a consistent national approach.
4. The regulation of SCPs should be not only consistent but also easy to understand.
5. The legislation regarding SCPs should meet (but not exceed) the need to protect the community from potential harm – but there is insufficient evidence properly to assess that level of harm at the present time.
6. The legislation should respond to new SCPs in a way that is based on evidence and proportionate to the potential harm posed.

SCPs include various different chemicals

SCPs are comprised of various different chemicals known by a number of different brand names. The chemicals include:

- 5-(1,1-Dimethylheptyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (CP 47, 497)
- 5-(1,1-Dimethyloctyl)-2-[(1R,3S)-3-hydroxycyclohexyl]-phenol (Cannabicyclohexanol or CP 47, 497 C8 Homologue)
- 1-Pentyl-3-(1-naphthoyl)indole (JWH-018)
- 1-Butyl-3-(1-naphthoyl)indole (JWH-073)
- 4-methoxynaphthalen-1-yl-(1-pentylindol-3-yl)methanone (JWH-081)
- 1-Pentyl-3-(4-methyl-1-naphthoyl)indole (JWH-122)
- 1-[2-(4-Morpholinyl)ethyl]-3-(1-naphthoyl)indole (JWH-200)
- 2-(2-chlorophenyl)-1-(1-pentylindol-3-yl)ethanone (JWH-203)
- 4-ethylnaphthalen-1-yl-(1-pentylindol-3-yl)methanone (JWH-210)
- 2-(2-Methoxyphenyl)-1-(1-pentylindol-3-yl)ethanone (JWH-250)
- 1,1-Dimethylheptyl-11-hydroxy-tetrahydrocannabinol (HU-210)
- 1-(5-fluoropentyl)-3-(2-iodobenzoyl)indole (AM-694)
- 1-(5-fluoropentyl)-3-(1-naphthoyl)indole (AM-2201)
- 1-pentyl-3-(4-methoxybenzoyl)indole (RCS-4)

This list of chemicals is not complete because there are more than a hundred compounds with cannabinoid activity.¹

The brand names include:

- Kronic, Northern Lights, Spice and Kaos,²
- Mango and Voodoo,³
- K2, Mojo, Aroma, Dream, Chill, Chaos, Skunk, Space Diamond, Silent Black, Tai Fun, Sensation, SpicyXXX, Spike 99, Bonsai-18, Banana Cream Nuke, Wicked X, Natures Organic and Zen;⁴
- Spice Gold, Spice Silver, Spice Diamond and Yucatan Fire;⁵ and
- Sence, Chill X, Smoke, Genie and Algerian Blend.⁶

1 Paul Griffiths et al, "How Globalization and Market Innovation Challenge How We Think About and Respond to Drug Use: 'Spice' A Case Study" *Addiction*, Vol 105(6), Jun 2010, p 951-953 at 951.

2 Legislative Assembly Legal Affairs Committee, *Media Release*, 27 February 2012

3 NSW Health, *Media Release*, 28 June 2011.

4 Joseph M Pierre MD, "Cannabis, Synthetic Cannabinoids, and Psychosis Risk: What the Evidence Says", *Current Psychiatry*, Vol 10 No. 9, 2011, 49-58 at 51.

5 United States Drug Enforcement Administration, Office of Forensic Sciences. "Spice—plant material(s) laced with synthetic cannabinoids or cannabinoid mimicking compounds" *Microgram Bulletin*, March 2009.

<http://www.justice.gov/dea/programs/forensicsci/microgram/mg0309/mg0309.html> accessed 11 March 2012.

6 European Monitoring Centre for Drugs and Drug Addiction, "Drug Profile: Synthetic Cannabinoids and 'Spice'" <http://www.emcdda.europa.eu/publications/drug-profiles> accessed 11 March 2012.

SCPs are inconsistently regulated

New South Wales

Some SCPs are currently illegal in NSW, but others are not. Prohibited drugs are regulated in NSW by the *Drug Misuse and Trafficking Act 1985* (NSW) (“the Act”) and the *Poisons And Therapeutic Goods Act 1966* (NSW). The possession of “low-THC” cannabis (meaning plants whose leaves and flowering heads have a concentration of less than 1% THC) is in part regulated by the *Hemp Industry Act 2008* (NSW)

The following table shows some prohibited and non-prohibited SCPs:

Prohibited	Not prohibited
CP 47, 497;	JWH-203;
CP 47, 497 C8 Homologue;	JWH-081;
JWH-018;	JWH-210;
JWH-073;	HU-210;
JWH-122;	AM-694;
JWH-200;	AM-2201
JWH-250.	RCS-4

In our view, the Inquiry should obtain expert evidence on the availability and potential harm of each SCP in order to assess the current legislation. The type of precursors required to manufacture each, the normal use of those precursors, and the equipment involved may also be a relevant consideration.

The Committee can see serious practical issues in making some, but not all SCPs controlled substances. Consumers of non-illicit SCPs may have great difficulty in distinguishing between products that are chemically, but not visually (or otherwise), distinct. This would lead to inadvertent contravention of the Act by innocent persons.

Interstate

Not all SCPs are prohibited interstate.

The following legislation regulates prohibited drugs interstate:

- Victoria: *Drugs, Poisons and Controlled Substances (Drugs of Dependence – Synthetic Cannabinoids) Regulations 2011*
- Queensland: *Drugs Misuse Regulation 1987*
- South Australia: *Controlled Substances (Controlled Drugs, Precursors and Plants) Regulations 2000*
- Western Australia: *Misuse of Drugs Act 1981*
- Tasmania: *Misuse of Drugs Act 2001.*

The existing prohibitions are not consistent. The table below illustrates whether each SCPs is prohibited:

State	CP 47, 497	CP 47, 497 C8	JWH-018	JWH-073	JWH-122	JWH-200	JWH-250	JWH-081	JWH-203	JWH-210	HU-210	AM-694	AM-2201	RCS-4
NSW	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	N	N	N
VIC	Y	Y	Y	Y	Y	Y	Y	N	N	N	N	Y	N	N
QLD	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
SA	Y	N	Y	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y
WA	Y	Y	Y	Y	Y	Y	Y	N	N	N	Y	Y	Y	Y
TAS	Y	N	Y	Y	N	N	Y	N	N	N	N	N	N	N

In the Committee's submission, the Inquiry should have regard to interstate legislation and liaise with interstate and federal authorities with a view to adopting a consistent national approach.

Evidence-based regulation

The *Drug Misuse and Trafficking Amendment (Prohibited Drugs) Regulation 2011* commenced on 8 July 2011 and amended Schedule 1 of the Act to include seven SCPs as prohibited drugs. The Committee expects the Regulation was motivated by concerns similar to those that initiated the present Inquiry. The Regulation commenced on 8 July 2011 and amended Schedule 1 of the Act to include even SCPs as prohibited drugs

In the time available, the Committee is unable to locate any reported NSW prosecutions for use, possession, supply or manufacture of SCPs.

Evidence of the harm posed by SCPs is limited. By way of example, we refer to the table shown in the **Appendix** to this submission, which sets out a summary of recent anecdotal reports. The Committee is comprised of lawyers, not pharmacologists. We are unable to assess the accuracy and reliability of the anecdotal reports cited. We do not know whether these findings can be extrapolated to assess the potential harm of SCPs generally. We do observe that most of these results relate only to one of the many SCP variants.

Nevertheless, what is clear is that comprehensive studies of the risk posed by SCPs are limited. There is no officially published safety data regarding synthetic cannabinoids, almost nothing is known about their effects in humans, and little is known about their toxicology. While they may have a greater potential to cause harm and result in accidental overdosing than cannabis, further studies are needed to assess these risks reliably.⁷

The means to detect and analyse SCPs are also limited. There are apparently no known field tests that will detect the majority of synthetic cannabinoids. Blood tests for the detection of synthetic cannabinoids are only available in some laboratories. Urine tests are not yet fully developed.⁸

⁷ European Monitoring Centre for Drugs and Drug Addiction, "Thematic Paper—Understanding the 'Spice' Phenomenon" 2009 <http://www.emcdda.europa.eu/html.cfm/index90917EN.html> accessed 11 March 2012 at 12, above, n 1, at 952, above, n 6.

⁸ *Ibid.*

In our view, the following further evidence is required in order to properly assess the adequacy of legislation regarding SCPs:

1. How prevalent are SCPs in NSW?
 - a. How often are SCPs seized by the NSW Police Force/Australian Federal Police/Australian Customs Service in NSW?
 - b. How often are charges are laid by the NSW Police Force/Australian Federal Police regarding possession/use/supply/manufacture of SCPsin NSW?
 - c. How often are calls received by the NSW Poisons Information Centre/Ambulance Service regarding use/overuse of SCPs?
 - d. How often are patients admitted into hospital regarding use/overuse of SCPs?
 - e. How many websites advertise the sale of SCPs?
 - f. How many shops advertise the sale of SCPs?
2. How harmful are SCPs?
 - a. Have any studies been done to determine the toxicity of SCPs and assess the potential harm?
 - b. Is there a sufficiently reliable study (with a sufficiently large sample size of human subjects, a vigorous methodology and peer reviewed outcomes) to assess the potential harm?
3. How can SCPs be detected?
 - a. What tests can the NSW Police Force/Australian Federal Police/independent experts perform to analyse the contents and potency of seized SCPs?
 - b. What tests can the NSW Police Force/ Australian Federal Police/independent experts perform to analyse blood/urine/skin samples from persons suspected of handling/using SCPs?
4. What are the likely consequences of regulating or further regulating SCPs?
 - a. What is the relationship between the manufacture/use/regulation of SCPs and the manufacture/use/regulation of cannabis?
 - b. What is the relationship between the manufacture/use/regulation of SCPs and the manufacture/use/regulation of other prohibited drugs?
 - c. What is the relationship between the manufacture/use/regulation of SCPs and the manufacture/use/regulation of new SCPs that are not yet regulated?

Clarity

The Committee submits that the regulation of SCPs should be not only consistent but also easy to understand.

The Act creates offences for possessing, using, supplying and manufacturing prohibited drugs (including ss 10, 12, 24 and 25).

The penalties for the offences are serious. For example, manufacture of a prohibited drug not involving commercial quantities carries a maximum penalty of \$220,000 or 15 years

imprisonment or both (s 32). The production of SCPs presumably requires sophisticated manufacturing equipment, and legitimate suppliers will only ever be producing retail amounts. Manufacture involving commercial quantities is subject to a standard non-parole period of at least 10 years. Further, the circumstances of SCP regulation bring another consideration because some products are not illicit.

Section 3(1) of the Act defines a prohibited drug to mean any substance, other than a prohibited plant, specified in Schedule 1. Schedule 1 lists a number of substances, including the seven SCPs previously mentioned. Schedule 1 continues with the following paragraph:

“Any substance that is an analogue of a drug prescribed in this Schedule, being a substance that has psychotropic properties, is not separately specified in this Schedule and is, in relation to the drug, any of the following:

- (a) a structural isomer having the same constituent groups as the drug,
- (b) a structural modification obtained in one or more of the following ways:
 - (i) the replacement of up to 2 carbocyclic or heterocyclic ring structures with different carbocyclic or heterocyclic ring structures,
 - (ii) the addition of hydrogen atoms to 1 or more unsaturated bonds,
 - (iii) the addition of 1 or more of the following groups having up to 6 carbon atoms in any alkyl residue, namely, alkoxy, cyclic diether, acyl, acyloxy, monoalkylamino and dialkylamino groups,
 - (iv) the addition of 1 or more of the following groups having up to 6 carbon atoms in the group and being attached to oxygen, namely, alkyl, alkenyl and alkynyl groups (for example, ester groups and ether groups),
 - (v) the addition of 1 or more of the following groups having up to 6 carbon atoms in the group and being attached to nitrogen, sulphur or carbon, namely, alkyl, alkenyl and alkynyl groups,
 - (vi) the addition of 1 or more of the following groups, namely, halogen, hydroxy, nitro and amino groups,
 - (vii) the replacement of 1 or more of the groups specified in subparagraphs (iii)–(vi) with 1 or more other groups so specified,
 - (viii) the conversion of a carboxyl or an ester group into an amide group.”

Without the benefit of expert evidence, the Committee is unable to determine whether that paragraph has the consequence that other SCPs are also prohibited. The language of this paragraph also highlights another shortcoming of the present regime: the Committee understands that there is currently often a six-month wait for the services of a forensic chemist in proceedings under the Act. If the offence relies on scientific definitions, it must be ensured that the technical services exist to evaluate suspected illicit substances. The current waiting periods for analysis are not fair to either the prosecution or defendants, although the Committee recognises that this is also not the fault of the labs involved.

The purposes of criminal law are not met unless citizens can know what is illegal and what is not (see eg *He Kaw Teh* (1985) 157 CLR 523, 567 (Brennan J)). In light of the significant maximum penalties of these offences, it is important that the legislation is easy to understand so that persons do not unknowingly commit offences. Given the (albeit limited) evidence of potential harm, it is also important that the legislation is clear so that it can serve to deter potential offenders. In light of the difficulties of testing for SCPs, it is lastly important that law enforcement agencies can easily understand what substances are prohibited.

Proportionality

The Committee submits that the legislation regarding SCPs should meet (but not exceed) the need to protect the community from potential harm. The Act recognises that greater penalties should be available for offences involving greater quantities of prohibited drugs and that smaller quantities should attract smaller maximum penalties. Schedule 1 of the Act classifies certain amounts of prohibited drugs as trafficable quantity, small quantity, indictable quantity commercial quantity and large commercial quantity. The Committee is unaware how those amounts have been determined for the seven SCPs currently in Schedule 1. We recommend that expert evidence be obtained on how those amounts relate to standard doses in order to assess whether the amounts are proportionate.

Sections 32 and 33 of the Act provide lower maximum penalties for cannabis but not for the seven SCPs. The Committee suggests that expert evidence on the relative harm posed by cannabis and cannabinoid products is required in order to determine whether the maximum penalties appropriately reflect the seriousness of the offences. On the face of the current evidence, it is not objectively clear why there should be a distinction.

How to address new developments

The Committee views with caution the comments made in the Inquiry's media release dated 27 February 2012 seeking "ideas on how we can strengthen current laws" in response to manufacturers reproducing "modified versions that circumvent existing laws."

Similar comments have been made in the United Kingdom regarding a SCP known there as 'Spice':

"However, the potential range of substances presents some challenges to ensure that any legislative changes are not easily subverted by manufacturers changing the compounds they add to the plant based mix. This concern is supported by recent experience in Germany that suggests that should one of the cannabinoids be controlled, manufacturers move to adding a chemically different, yet functionally similar, synthetic cannabinoid in the 'Spice' mix. Due to the number of variations, it is highly likely that specific legislation would always run some way behind the availability of a legal mix on the street. The ACMD therefore proposes generic legislation to control the synthetic cannabinoids that are, or could in the future, be used in preparations, without impacting on any legitimate use of these or related substances."⁹

Manufacturers are (and should be) entitled to produce products that are not illegal. The legislation should respond to new SCPs in a way that is based on evidence and proportionate to the potential harm posed.

The disadvantages of "generic legislation" creating a blanket prohibition on all SCPs is that a large number of different substances are prohibited without first ascertaining that they are available and obtaining evidence on any harm posed. Such legislation may also have negative consequences:

"The ban [on a range of synthetic cannabinoids in the UK] is the predictable result of a widespread contemporary trend to regulate things that only might be dangerous...Without further research, consultation with manufacturers and other evidence, there is a serious risk of banning relatively less dangerous chemicals, which will be replaced by more dangerous ones"¹⁰

⁹ Professor David Nutt, Advisory Council on the Misuse of Drugs Consideration of the Major Cannabinoid Agonists, 2009, at 3, <http://drugs.homeoffice.gov.uk/drugs-laws/acmd/> accessed 11 March 2012.

¹⁰ Richard Hammersley, "Dangers of Banning Spice and the Synthetic Cannabinoids" *Addiction*, 105(2), Feb 2010, p.373.

Conclusion

The Committee submits that the regulation of existing SCPs and new SCPs should respond to changes in manufacture without sacrificing clarity, proportionality and the need for sound evidence of prevalence and potential harm.

It is clear that the current evidence is inadequate, and the Committee hopes its suggested lines of inquiry above will be of assistance.

The Committee thanks you for the opportunity to comment. The Committee would welcome any opportunity to assist the Inquiry in respect of any evidentiary hearing.

Yours faithfully,



**Thomas Spohr | Executive Councillor, NSW Young Lawyers | Chair, Criminal Law Committee
NSW Young Lawyers | The Law Society of New South Wales**

Appendix

Case reports of psychosis associated with synthetic cannabinoids

Study	N (age)	Herbal product or suspected cannabinoid	Previous psychotic disorder	Symptoms
Müller et al, 2010 ^a	1 (25)	JWH-018 "Spice"	Yes	Anxiety, exacerbation of paranoid delusions, delusions of control, auditory hallucinations
Vearrier et al, 2010 ^b	1 (17)	JWH-018	No	Tachycardia, hypokalemia, agitation, visual hallucinations
Every-Palmer, 2010 ^c	5	JWH-018 CP-47,497	Yes	Agitation, disorganization, paranoid and grandiose delusions
Rodgman et al, 2011 ^d	3	JWH-018 ("Mojo")	—	"Mojo psychosis"
Benford et al, 2011 ^e	1 (20)	JWH-018 ("Spice")	—	Tachycardia, anxiety, paranoia, auditory and visual hallucinations
Van Der Veer et al, 2011 ^f	3 (20 to 30)	"Spice" "Spike 99"	No	Anxiety, disorganization, paranoia, Capgras delusion
Every-Palmer, 2011 ^g	9 (20s to 40s)	JWH-018 ("Aroma")	Yes	Anxiety, agitation, paranoia
Hurst et al, 2011 ^h	10 (21 to 25)	"Spice"	No	Anxiety, agitation, confusion, disorganization, paranoia, ideas of reference, hallucinations

Joseph M Pierre MD, "Cannabis, Synthetic Cannabinoids, and Psychosis Risk: What the Evidence Says", *Current Psychiatry*, Vol 10 No. 9, 2011, 49-58 at 52.