

# Submission to the Scottish Parliament Criminal Justice Committee Roundtable

October, 2021



[Release](#) is the national centre of expertise on drugs and drugs law in the UK. The organisation, founded in 1967, is an independent and registered charity. Release provides free non-judgmental, specialist advice and information to the public and professionals on issues related to drug use and to drug laws. The organisation campaigns directly on issues that impact its clients - it is their experiences that drive the policy work that Release does and why Release advocates for evidence-based drug policies that are founded on principles of public health rather than a criminal justice approach. Release believes in a just and fair society where drug policies should reduce the harms associated with drugs, and where those who use drugs are treated based on principles of human rights, dignity and equality.

Release will be responding to issues relating to:

- i. The role of the Crown Office and Prosecution Service in the prosecution of cases relating to the supply and use of illegal drugs in Scotland.
- ii. Tackling drug use in the prison system, looking at the support provided to prisoners during their time in prison and the arrangements that are made to provide the best support to prisoners who have a drug problem on their release.
- iii. The legal framework that currently criminalises the misuse of certain drugs and the related issue of whether one policy that may assist in tackling drug deaths is the provision of 'safe consumption rooms'.

## (i) The role of the Crown Office and Prosecution Service in the prosecution of cases relating to the supply and use of illegal drugs in Scotland

In 2020/21 there were 35,410 drug offences recorded by the police in Scotland. The vast majority of these crimes (86% - 30,344 offences) were for simple **possession** offences.<sup>1</sup> Despite evidence that tough sanctions are ineffective at reducing drug use,<sup>2</sup> and that self-reported illicit drug use has been increasing globally<sup>3</sup> - including in Scotland<sup>4</sup> - over the last decade, the Home Office continues to push the rhetoric that 'drug policy is working, drug use is falling'. Meanwhile, when the Home Office compared the legal framework of 14 countries it concluded that there was not "any obvious relationship between the toughness of a country's enforcement against drug possession, and levels of drug use in that country".<sup>5</sup> Regardless, the central government spend on drug law enforcement and related activities is estimated to be approximately **£1.6 billion** per annum<sup>6</sup>, with the estimated central government spend on early drug intervention in a comparable year at only £215 million<sup>7</sup> (with an estimated £600 million on treatment and negligible spending on drug education<sup>8</sup>).

The high spend on drug law enforcement continues **despite** evidence of its inefficacy in terms of drug control and health outcome-improvement,<sup>9</sup> evidence of racial inequity in drug law enforcement,<sup>10</sup> and despite evidence from the Government's own 2017 review of the 2010 UK Drug Strategy which concludes that enforcement activity designed to remove drugs from the market, for example, drug seizures, "has little impact on availability", and that enforcement activities impacting the operation of drug markets "is likely to be short lived... given the resilience of markets".<sup>11</sup> Furthermore, we consider that **drug-related death rates** being at their highest since records began across the UK<sup>12</sup> - with Scotland continuing to have Europe's *highest* per capita rate of drug deaths<sup>13</sup> - to be a shocking indictment of the current strategy.

The extension of police warnings and possible diversion for those caught in possession of class A controlled drugs in Scotland - announced by the Scottish Lord Advocate on the 22nd September, 2021<sup>14</sup> - is a welcome move away from the criminalisation of drug use, and one towards the practical, harm-reduction solutions needed to reverse the public health crisis. However, Release have recently published a response<sup>15</sup> to the Lord Advocate's position which outlines concern about the way in which this change has been discussed in the media, and reservations around the way Scottish diversion schemes will work in practice.

Media outlets' framing of this decision as unprecedented in the UK is incorrect given that recorded police warnings, a form of '**depenalisation**', already exist for class B and C controlled substances in Scotland. Police-led diversion schemes for low-level offences - including the possession of all illegal drugs - have already been in place in a number of police forces in England and Wales for over half a decade.<sup>16</sup> Furthermore, police in England and Wales can issue a community resolution (essentially a police warning) for possession of drugs. Whilst depenalisation and/or diversion is preferable to immediate prosecution - and is arguably as far as the Lord Advocate is able to go considering drugs legislation is reserved to Westminster - the efficacy of the policy will not be realised unless it is applied *equitably*, and key concerns remain around the ability of the approach to improve the lives of people with *problematic* drug use.

Firstly, the decision to issue an individual a warning or to prosecute rests with the police officer's judgement at the point of issue, as guided by the Police Scotland's Standard Operating Procedure.<sup>17</sup> Police discretion has often allowed for racial disparities or overrepresentation of people from deprived communities to be sustained in the criminal justice system.<sup>18</sup>

Secondly, the Lord Advocate's statement provided no detail on how warnings will be used for *repeat* offenders. The decision to either issue another warning or prosecute is based on the similarity of their previous offence, the gravity of their offence and/or the frequency of interactions with law enforcement. While it is important to avoid bringing new people into the criminal justice system, the police warnings may have no positive impact for those already within the system due to past offences or regular drug use. The guidelines must allow for people to receive repeated warnings or to be repeatedly diverted (as is the case with the West Midlands' diversion scheme for example), otherwise Scotland will be simply criminalising those who are drug *dependent*, which is contrary to the motivations for expanding the scheme.

Whilst the depenalisation of drugs may be the beginning of positive change, Release advocate for full *de jure* (in law) decriminalisation as the best option for those who use drugs and the society that surrounds them. Specifically, Release support a **no punishment** model of decriminalisation for drug use and possession – which is the approach taken by Spain, the Netherlands, and Uruguay.<sup>19</sup> It is also the approach we *currently* have in the UK in relation to the psychoactive substances which fall under the Psychoactive Substances Act, 2016,<sup>20</sup> as opposed to those falling under the Misuse of Drugs Act, 1971.<sup>21</sup>

Research undertaken by Release looked at countries across the world that no longer criminalised use or possession of drugs; none experienced increases in drug consumption linked to policy.<sup>22</sup> Countries such as Australia (which had decriminalised cannabis possession in a number of states and had diversion schemes for all controlled substances in every state), Portugal, and the Czech Republic reported improved physical and mental health outcomes when compared to individuals who were criminalised. Decriminalisation has also been associated with reduced rates of recidivism, reduced burden on police resources and savings to public spending related to social costs.<sup>23</sup> By decriminalising the possession of controlled drugs for personal use, resources could be diverted from the criminal justice system into health and other services for people who use drugs, as well as wider community programmes, thus ensuring a greater return on investment for communities and criminal justice agencies.

Portugal, for example, decriminalised the use and personal possession of all drugs in 2001, whilst also investing in harm reduction and treatment programmes. The number of annual drug overdose deaths reduced from 318 in 2000 to 40 in 2015.<sup>24</sup> A 2015 study found an 18% reduction in the social costs of drug use in the first ten years of decriminalisation in Portugal.<sup>25</sup> The proportion of the prison population sentenced for drug offences in Portugal has fallen from over 40% to 15%, rates of drug use have remained consistently below the EU average, and Portugal has gone from accounting for over 50% of yearly HIV diagnoses linked to injecting drug use in the EU to 1.7%.<sup>26</sup>

Both the Health and Social Care Select Committee<sup>27</sup> and the Scottish Affairs Committee<sup>28</sup> in their inquiries on drugs in 2019 have recommended that the UK government consult on reforming the law to end criminal sanctions for possession offences.

## **(ii) Tackling drug use in the prison system, looking at the support provided to prisoners during their time in prison and the arrangements that are made to provide the best support to prisoners who have a drug problem on their release**

In Release's written submission<sup>29</sup> to phase two of Dame Carol Black's independent review of drugs,<sup>30</sup> we discuss a number of suggestions in terms of supporting people who use drugs in custody. Firstly, we suggest that the Government *reconsider* whether custody is the most effective resolution – particularly given evidence of **diversion** programme-success<sup>31</sup> and support.<sup>32</sup> Phase one of Dame Carol Black's review estimated that 42% of men, and 28% of women entering the prison system are dependent on drugs.<sup>33</sup> According to the biennial Scottish Prisoners Survey 2019,<sup>34</sup> which is undertaken in each of the 15 Scottish prisons, 41% of respondents stated that their drug use was a problem for them on the outside, 39% said that they had used illegal drugs whilst in prison, and more than one in ten (12%) stated that they only *started* using drugs whilst in prison.

Release welcomes the *extension* of the 'presumption against short sentences' (PASS) to now include sentences of up to 12 months (previously up to 3 months) in Scotland as of June, 2019 as voted by MSPs, in recognition that short sentences often disrupt factors that can help prevent offending, including family relationships, housing, employment and access to healthcare and support.<sup>35</sup> This change - as described by then Justice Secretary Humza Yousaf MSP - is designed to "encourage courts to consider *alternatives* to custody, which can be more effective in rehabilitating individuals as they pay their debt to society".<sup>36</sup> Evidence to support the PASS extension has been outlined by Howard League Scotland, including evidence of the disproportionate harm of custodial sentences (of any length) for women,<sup>37</sup> who are frequently subject to ineffective, short custodial sentences of 12 months or less (the case for 90% of women sent to prison in Scotland in 2017/18).<sup>38</sup>

An area of concern, however, is that the presumption is not a *ban*, and that courts are still able to impose prison sentences of 12 months or less. The think-tank *Reform* propose that 'a full ban on short sentences would mean a significant increase in the use of community sentences' and add that 'Probation services would need to be resourced to manage this increase'.<sup>39</sup> *Reform* also add that 'clearly, one unintended consequence could be that sentencers pass harsher sentences to circumvent a ban' and warn that 'this would need to be monitored and action taken if evidence shows this to be the case'.<sup>40</sup> Sentencers should also be more informed about community alternatives to custody with better training and the increased use of pre-sentence reporting.

Custodial institutions must take responsibility for releasing people into safety and it is vital that we ensure people released from prison are offered Naloxone. Release advocate for the urgent provision of Naloxone in *all* custody settings. It should be made freely available to those who are leaving police custody at the station, at Magistrates and Crown Courts, and where needed at custodial institutions such as prisons and YOIs. At present, according to the Scottish Prisoners Survey 2019, approximately one fifth of those reporting in the survey (19%) had used naloxone at some point and of these 9% had been

supplied naloxone in the last 12 months. Of those who were supplied naloxone in the last year, half (49%) were supplied it in prison and three quarters (77%) in the community.<sup>41</sup>

For those released on completion of their sentence it is suggested that precautions are taken for those known to use substances. In addition to providing Naloxone to reverse overdose, we highlight the dangers of releasing this population on a **Friday** in terms of accessing stable housing, drug treatment, and job centres; increasing the chances of a relapse, reoffending and death.<sup>42</sup> Despite the Prisoners (Control of Release) (Scotland) Act 2015,<sup>43</sup> whereby prisoners due for release on a Friday can have their release brought forward by one or two days to allow them to access housing or medical services, according to figures obtained by The Herald on Sunday, as of October, 2019, just 15 people had had their release brought forward since the enactment of the law in February 2016, while 17 had been refused early release, and 11,054 had been released on a Friday.<sup>44</sup>

The continued scheduling issues raises numerous difficulties. There is a clear danger that in releasing people who use drugs and are reliant on a prescription on a Friday, they will be faced without a prescription, enter withdrawal, and be unable to enrol with a service until the following week. Faced with days of withdrawal immediately on leaving custody, there is a substantial risk of relapse setting back treatment, recriminalisation, or overdose. Release would advocate that those in receipt of a prescription while in custody be supplied with a quantity of medication to last several days on release; providing them the opportunity to manage their symptoms until they are able to enrol with a treatment service and minimising the risk of illicit substance use, overdose, or immediate offending behaviour.

While a carceral approach remains, actions should be taken to implement the recommendations made by the Advisory Council on the Misuse of Drugs (ACMD) in regards to custody to community transitions for those with problematic substance use.<sup>45</sup> Among the risk factors cited by the ACMD were a high incidence of homelessness, increased risk of death due to a fatal overdose in the weeks immediately after leaving custody, and that using time in custody as an opportunity to reduce problematic substance use was often squandered through a failure to provide support on release.<sup>46</sup> According to the Scottish Prisoners Survey 2019,<sup>47</sup> 38% of prisoners reported being assessed for drug use upon admission to prison. A quarter had been given the chance to receive treatment for drug use during their current sentence (25%) and one fifth reported receiving help (21%). As part of its role in preparing prisoners for release, the Scottish Prison Service created a *specific* role for some of its staff as Throughcare Support Officers. However, in her 2019-20 annual report the Chief Inspector of Prisons for Scotland noted that their role had been suspended to "help address staff resourcing issues elsewhere in Scotland's prisons" (p 26). She went on to praise the role they had performed and called for **restoration** of that role at the earliest opportunity.<sup>48</sup>

**(iii) The legal framework that currently criminalises the misuse of certain drugs and the related issue of whether one policy that may assist in tackling drug deaths is the provision of 'safe consumption rooms'**

Seven years ago, the Home Office acknowledged<sup>49</sup> evidence from the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)<sup>50</sup> that supported safe consumption rooms, or Drug Consumption Rooms (DCRs). The EMCDDA's 2013 report reviewed evidence from a range of studies from across Europe, Canada and Australia, and considered there to be sufficient evidence to conclude that DCRs are generally successful in meeting their primary aims of providing an environment for safer drug use, improving the health status of the target group, and reducing public disorder, *without* incurring serious risk. This report found that DCRs provide a lower-risk, more hygienic environment for drug consumption than public spaces, and do not increase levels of use or risky patterns of consumption. People who use DCRs claim that they engage in risky injecting behaviour less when using a DCR, and DCRs were found to be successful in reaching their target population, principally street drug users and older long-term drug users who have never been in treatment.<sup>51</sup> This engagement is of *particular* importance in terms of tackling drug deaths as opiate-related death rates are higher among people *not* in contact with drug treatment services.<sup>52</sup> The EMCDDA report also found a corresponding *increase* in access to drug treatment services and a reduction in stigma around dependency.<sup>53</sup>

The above evidence was presented within a 2014 Home Office report,<sup>54</sup> and the proposal for drug consumption rooms was included in the ACMD's 2016 recommendations for reducing opioid-related deaths in the UK.<sup>55</sup> The emergence of DCRs across Europe - and the opportunity to disseminate health advice and encourage entry into treatment that they present - were highlighted in the 2017 National (UK) guidelines on clinical management of drug misuse and dependence.<sup>56</sup> Peer-reviewed evidence has also highlighted the demand for DCRs in the UK, including a high willingness to use DCRs among people who inject drugs in Scotland.<sup>57</sup> Calls to introduce a DCR in Glasgow<sup>58</sup> have been supported by the Scottish government,<sup>59</sup> the Advisory Council on the Misuse of Drugs,<sup>60</sup> and Police and Crime Commissioners.<sup>61</sup> Despite this support, there is yet to be an authorised DCR in Scotland.

It is Release's view that the recent position taken by the Minister for Crime and Policing, Kit Malthouse, in his exchange with the Scottish Affairs Committee, provides an opening for a **strategy** to introduce Drug Consumption Rooms (also referred to as Safer Injecting Facilities, Overdose Prevention Sites, or Enhanced Harm Reduction Centres) in Scotland. In his letter to the Committee,<sup>62</sup> dated 11<sup>th</sup> December 2020, the Minister states:

*"A range of crimes would be committed in the course of running such a facility, by service users and staff, such as **possession of a controlled drug, being involved in the supply of a controlled drug, knowingly permitting the supply of a controlled drug on a premises or encouraging or assisting these** and other offences. In addition to these issues of criminal liability there are difficulties around civil liability, were things to go wrong, with those operating DCRs potentially being sued for damages in negligence or other civil causes of action."*

Members of Release's legal team present an assessment<sup>63</sup> of the range of offences cited by the Minister below:

- **'Being involved in the supply' (s4 (3) Misuse of Drugs Act 1971)** is more likely to be engaged in relation to service users of a DCR rather than staff. Whilst *'knowingly permitting the supply of a controlled drug on a premises'* (s8(b) MDA) is an issue, it is one that exists for any service engaging with people who are drug dependent or where there are high levels of drug use, for example, a nightclub. To reduce the risk of criminal liability, especially the risk of permitting supply on premises, clear enforceable guidance on steps that will be taken if people supply drugs overcomes this risk. Similar policies will already be operational in homeless centres, shelters, drug treatment centres, and are not unique to DCRs.
- **'Encouraging or assisting'** refers to **s44 to s46 of the Serious Crime Act 2007**, and these sections do not apply in Scotland. Whilst there will be inchoate offences (aiding and abetting) in Scottish law, these will be devolved to Scotland, and therefore we believe exemptions can be applied to the Scottish law.
- **Civil liability** - As we understand it, this is also not a reserved matter and so is not relevant to considerations made by the UK government and can be managed by the devolved administration.
- **Possession offences** - These offences (s5(2) MDA) *would* be committed in and around a DCR. However, the Home Office recognises the importance of diversion schemes for low-level possession offences and is providing support and funding to these across England and Wales through ADDER. In September 2021, the new Lord Advocate announced an extension to the Recorded Police Warning Scheme to include possession of Class A drugs, stating *"Police officers may therefore choose to issue a Recorded Police Warning for simple possession offences for all classes of drugs"*.<sup>64</sup> Diversion from prosecution is already possible in Scotland - Release are simply proposing that a scheme be operated by Police Scotland at an earlier stage, whereby anyone caught in possession of a controlled drug that could be taken in a DCR is diverted to that facility.

In conclusion, if it is confirmed that the above offences are those engaged then the Scottish Parliament can agree that the MDA 1971 is a reserved matter, but also that the offences cited are ones managed in many lawful settings already, except possession offences which can be dealt with via diversion, which are supported by the Home Office.

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