



SDF
Scottish Drugs
Forum

A national resource of expertise on drug issues

The Control of Drugs



ISSUES IN HARM REDUCTION SERIES

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Issues in harm reduction

All substance use is potentially harmful to individuals, communities and wider society. Harm reduction approaches seek to reduce the risk or the extent of harms associated with substance use.

The 'Issues in Harm Reduction' series examines the gaps in harm reduction provision in Scotland, looks at practice elsewhere and the evidence base that has been generated and then concludes on how a more comprehensive range of harm reduction interventions may be developed to improve Scotland's response to substance use.

The papers in the series are designed for the general reader and to promote informed discussion and to prompt stakeholders to action. Scottish Drugs Forum works on behalf of and with stakeholders in the drugs field to improve Scotland's response to substance use and seeks to build and foster the working relationships necessary to develop and deliver the range of high quality interventions required.

Introduction

This briefing aims to contribute to debate around the legislative approach to drug use, possession and supply. It describes the current system and alternatives that have been suggested and describes practicable and more effective controls in terms of reducing the harms that can occur as a result of drug use.

Discussion is sometimes impaired by the misuse and misunderstanding of some terms that are frequently used. In this paper, also in much (but not all) of the literature, the following terms are defined as thus:

Prohibition

Generally this term is used to describe a situation where the importation, manufacture, supply and possession (and often the consumption) of drugs is a criminal act punishable by imprisonment, a fine or other measure by the police or the courts.

It should be noted that in practice this does not prevent the supply of drugs. It also means that there is no regulation of supply in terms of quality and that supply is likely to be in the control of organised crime. The analogy of Federal US alcohol prohibition (1920-33) is often used.

Decriminalisation

This is not a clearly defined legal term. It is generally used to describe the removal of criminal penalties for possession of small amounts of specified drugs for personal use. To comply with international treaties, under a decriminalisation approach, possession remains an offence that can be subject to a civil or administrative sanction such as a mandatory treatment assessment. Production, importation and supply remain illegal and are punishable as under prohibition.

Legalisation

In its most narrow definition, legalisation would mean that substances were treated like any other product and that people would be free to manufacture, import, supply, possess and consume drugs. However, legalisation almost certainly would involve some form of regulation in practice.

Regulation

Almost all products e.g. food, consumer goods, etc. are regulated in terms of their manufacture and supply to ensure safety and quality. Some products are also taxed to discourage consumption. So when people talk about legalisation, they are also usually talking about regulation of supply – this would most likely be relatively strict state regulation like that applied to alcohol and tobacco.

The international basis for the control of drugs

The framework for international drug control rests chiefly with a series of United Nations conventions:

1961 Single Convention on Drugs

1971 Convention on Psychotropic Substances

1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances

Over 180 states including the UK are parties to the three UN drug conventions. Their approach is embedded in domestic legislation and policy across the world including the UK.

The criminalisation of personal possession was only made explicit in the 1988 Convention. Article 3(2) states: ‘...each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption.’ The commentary on the Convention says explicitly that this paragraph ‘amounts in fact also to a penalisation of personal consumption.’

However, the same article states that any measures adopted shall be ‘subject to its constitutional principles and the basic concepts of its legal systems.’ So states can, and have, adopted less punitive responses to drug possession and use without breaching their obligations under the Convention. This is the basis for decriminalisation in states that are parties to the 1988 Convention.

SDF Comment

The UN convention framework leaves the decriminalisation of possession as a legal possibility but makes it impossible to legalise drugs without removing the UK from the Convention framework. It therefore seems that decriminalisation is the most practicable alternative to the status quo as regards drug control. Scotland is bound by the Conventions as part of the UK and it seems it could not initiate legislation that breached these, even in the event of drug control being devolved as agreements on international treaties and conventions is a power reserved to the UK Government.



The development of drug control in the UK since 1971

The control of drugs is a reserved matter - the legislative framework lying entirely with the UK Government at Westminster. The possibility of devolving these powers was raised in public debate in 2014 at the time the Smith Commission¹ was deliberating extending devolution and there was some support for the idea. However, any change that would breach international conventions to which the UK is a signatory could not be made by a devolved administration, no matter what powers were devolved.

The 1971 Misuse of Drugs Act (MoDA) allows the classification of drugs. Drugs can be classified as Class A, B or C. On the advice of the Home Secretary-appointed Advisory Council on the Misuse of Drugs (ACMD), the Home Secretary can classify and therefore control any substance.

It should be noted that the Council's advice may be wholly or partly ignored by the UK Home Secretary and that classification is not necessarily based strictly on evidence of harms. This has led to seemingly anomalous classifications – for example that MDMA (ecstasy) is classified as a Class A drug like heroin and cocaine while the evidence is that it is not as harmful to users. The move of cannabis classification from Class B to C, and the subsequent reversal of this decision, does not reflect a significant change in the evidence of harms associated with cannabis but rather public attitudes and other pressures on government. There is also an apparent anomaly that it is not illegal to possess for personal consumption anabolic steroids, although they are a Class C drug.

From around 2008, the capacity of the system established by MoDA was challenged by the rapid proliferation of new substances becoming available. The ability of producers to make small chemical changes to substances and thus stay within the law changed the drug market at this time, as drugs chemically similar to illegal substances were sold openly on the internet and even in shops in the UK.

The UK Government has made two legislative innovations to meet these challenges.

1 Since 2012, the UK Home Secretary has been able to control substances under a temporary class drugs orders (TCDO) for one year before a decision is made on classification under the MoDA. This measure 'buys time' for the ACMD to gather and consider evidence and the Home Secretary to make a decision.

2 Since 2016, the Psychoactive Substances Act (PSA) has outlawed the importation and the supply of **all** psychoactive substances i.e. drugs; The law does not apply to named exceptions – notably alcohol, nicotine and some foodstuffs e.g. nutmeg. However it does not outlaw possession. Drugs controlled under MoDA are unaffected by PSA and remain classified and controlled in terms set out in MoDA. Indeed, substances still move to classification under MoDA – sometimes via a TCDO.

It is worth noting that in recent years MoDA has been used in adopting more aggressive approach to control. This shift involves previously uncontrolled substances, including in 2005 fresh 'magic mushrooms', coming under the 1971 MoDA for the first time and the introduction of the PSA itself.

Further anomalies in the UK system

These recent legislative changes have created further serious and potentially dangerous anomalies in UK drug law. The PSA makes it an offence to supply any psychoactive substance not already controlled under MoDA but possession of these drugs is legal, as it is for substances under a TCDO. Thus it is legal to possess new psychoactive substances which not only mimic the effects of banned substances – e.g. cannabis, amphetamines, ecstasy, LSD or benzodiazepines - but may be as dangerous or more dangerous than the illegal drugs that they mimic.

These anomalies raise questions about the system of controlling substances and suggest the need for there to be a review of the UK legal framework for the control of substances.

SDF Comment

Although it does influence most classification under MoDA, UK drug classification and control is not based entirely on evidence of harms or even potential harms. This makes the law unsatisfactory, even in its own terms. This situation is made worse by the introduction of TDCOs which at least acknowledge that there is a lack of evidence on the harms associated with the substance to which they apply. The PSA, in banning all psychoactive substances, breaks any link between there being a necessary existence of harms to justify state control.

The basis of current UK drugs control, in the terms in which it has always been justified – that it seeks to protect people who would otherwise experience drug-related harms – is flawed and its credibility is damaged.



Harms to individuals associated with criminalisation

There are a range of harms caused directly or indirectly by the criminalisation of drug possession. It is useful to consider the impacts on people who are often referred to as 'recreational users' and on people with drug problems.

For 'recreational users' the harms, excluding the need to pay a fine or other court disposal, may chiefly relate to the harms of receiving a criminal conviction e.g. the potential consequent impact on future access to employment or perhaps education or foreign travel. This is often described in terms of the harms from the consequences of drug possession being greater than the harm from the drug use itself. In many cases, it would be hard to argue that this is not the case.

But there are other harms. Because possession is illegal, people are less likely to tell health professionals of their use of substances and its impact on them, which may help when giving a medical history and with diagnosis. This means that harms are often missed by professionals and underestimated or misunderstood by the individual. Also users are reluctant to tell the police or others about concerns they may have over the safety of drugs they have been supplied; also they may not report a crime which is related to their drug use – e.g. being a victim of violence or being 'ripped off'.

For people with a drug problem, the harms associated with criminalising drug possession are well documented across many countries and these include the following:



Reducing the likelihood of people coming forward for help and making it harder for services to reach out to and engage with people, particularly vulnerable groups, for example, parents, young people or people involved in prostitution.



The use of substances in riskier situations and in ways that contribute to a range of harms (including increased risk of overdose or the spread of blood-borne viruses and bacterial infections) in order to avoid detection.



The impact of having a criminal record or being imprisoned and the impact on family, employment, housing, education and foreign travel, etc. that this can involve.



Further stigmatisation of people who, as people with a drug problem, are already stigmatised and who are often part of already marginalised populations.

No matter the legal status of drugs, people will get involved in problematic substance use. Alcohol and heroin serve as examples of how prohibition and regulation do not prevent problem use. However, changing the way in which drugs are controlled may help people with problem use by reducing the range and extent of harms they endure and make it easier for them to get the help they need to address their drug problem and related harms.

It should also be noted that criminalisation is also hugely expensive and there are significant opportunity costs that impact on wider society.

The evidence being generated by the development of a range of types of decriminalisation in over thirty countries and some US states shows the potential for decriminalisation to reduce drug-related harms.

SDF Comment

Any policy change should be measured with regard to its impact on drug-related harms. The key issue is whether decriminalisation leads to an overall decrease or increase in harm. These harms may be measured in terms of harms to individuals, families, communities and wider society including the opportunity cost of focussing policing and the criminal justice system on possession of substances for personal use.

On balance, it seems hard to argue that decriminalisation and the implementation of a system that better supported people with substance use problems would not be a better use of resources and have less consequent harm. SDF therefore advocates discussion and action that leads to the decriminalisation of possession of drugs for personal use and the development of a system that supports people with substance use problems to engage in activity and with services that promote better health and improvements in quality of life.



What is happening in Scotland and the rest of the UK?

Despite the long-standing legislation framework provided by The Misuse of Drugs Act (MoDA) and the legislative drift towards more control, there have been significant changes in enforcement that balance this tendency.

In Scotland, as in many countries, there have been changes in the way that the law, particularly around possession, is enforced due to changes in police, Procurator Fiscal and court practice over many years. These have tended to reduce the severity of punishment for possession offences. In Scotland, in the early 1980s, it was possible to receive a prison sentence for the possession of small amounts of class A drugs such as heroin or cocaine. This would be unthinkable now.

The Scottish criminal justice system has developed arrest referral, drug testing and treatment orders (DTTO) and Drugs Courts and thus created links between criminal justice and treatment. These are important means of diverting people from the criminal justice system and away from prison and serve as examples of better practice in our approach to drug-related crime, including the possession of drugs.

Examples of how policing and enforcement practice has evolved under existing UK legislation has involved local developments of practice, which have been aimed at harm reduction:

-  Since 2013 the Welsh Government has helped fund and develop WEDINOS which tests user-submitted samples of drugs and publishes the results on their website
-  In 2015 Durham Constabulary announced that they would no longer seek to prosecute people for the cultivation of cannabis for personal use
-  Since 2015 under Avon and Somerset's Drug Education Programme people caught in possession of drugs are offered an alternative to receiving a criminal record and court summons. They can attend a three-and-a-half hour drug education workshop run by a local drug service. On completion they receive a letter confirming that their drug possession offence has been dropped. Anyone can be offered the diversion, regardless of their past criminal record, including drug-related convictions
-  In late 2015 Police Scotland announced they would change their approach to possession of cannabis for personal use from January 2016. This involves the use of Recorded Police Warnings (RPWs). Official figures show officers handed out a total of 5,827 RPWs in 2016/17, equivalent to roughly a fifth of all drug possession charges².
-  A change in police attitudes to drug possession is obvious in England where some local constabularies support drug-checking facilities at music festivals and other venues. Some local constabularies have voiced support for proposals for the provision of drug consumption rooms.

SDF Comment

There may seem to be a contradiction between the tendency of legislation which is to include a greater number of substances within the scope of the law and trends in enforcement which is taking a more liberal approach to enforcing the law.

In parts of the UK possession of drugs is in the process of being partly decriminalised under existing legislation. This suggests that the legal framework, while creating potentially dangerous anomalies, may not be the obstacle to decriminalisation as is often asserted but that police and enforcement practice is also a key factor.

There are dangers in this evolution of local innovations as these decisions may not be made through democratic means or necessarily based on evidence of harms but rather in pragmatic approaches to enforcement. We should avoid a situation developing where changes in enforcement result in confusion over what the law actually is or that the enforcement decisions are, or are perceived to be, as has been claimed based in class or racial prejudice and on stigmatising stereotypes of users of certain drugs.

What is happening in other countries?

As described earlier, unlike legalisation and regulation, decriminalisation is permitted within the UN drug conventions and over 20 countries and jurisdictions have decriminalised the possession of drugs for personal use. In Europe, countries including Portugal (2001), Czech Republic (2010), Croatia (2012) and Norway (2017) have decriminalised drug possession and cannabis possession is widely decriminalised or policed in a manner to mean it is decriminalised. In other countries including France, Ireland, Finland, Slovakia there is a well-developed political debate on the decriminalisation of possession of all drugs.

There is considerable variety in how decriminalisation is implemented in different jurisdictions, in terms of quantity thresholds (for possession/dealing), the nature of civil sanctions and how sanctions are enforced and by whom (police, judges, social workers, health professionals).

Decriminalisation has shown some encouraging results in terms of linking people to treatment, avoiding imprisonment and reducing overall demand. There is also the reduction in other negative aspects of criminalisation.

What about cannabis? What about medical use? What about children?

A special case is often made for cannabis decriminalisation. The evidence for this case is, in substance, no different than a case for all drugs and that the decriminalisation of cannabis alone, as with the 'legalisation' of alcohol, reinforces stigma and prejudice on the users of other substances and may give an erroneous impression that cannabis is the 'safest illegal drug' and should therefore be decriminalised. A stronger more consistent case can be made that decriminalisation should apply to all psychoactive substances.

The potential for the medical use of cannabis and other substances is a separate matter from the control of substances although the debates have become unhelpfully conflated. This has resulted in some confusion.

As regards children, it is the duty of society to protect children from harm. Harm from the use of substances in childhood is, in some cases, greater than use in adults. The decriminalisation of possession for personal use does not apply to children and protection and support for the child is a priority in jurisdictions where decriminalisation has occurred.



Discussion and support for decriminalisation

Recent developments include a joint statement from the UN and World Health Organization in June 2017³ supporting the review and repeal of laws that criminalise drug use and possession of drugs for personal use.

At UK level, there is a long-standing public discourse about the legislative control of drugs and various organisations have campaigned and contributed on the issue including Transform⁴ and the United Kingdom Drug Policy Commission⁵ as well as LEAP⁶ – a campaign by former police officers

In terms of the media various newspapers have backed decriminalisation including The Times⁷. In Scotland, The Daily Record⁸ and the Scottish edition of The Sun⁹ have published pieces supportive of decriminalisation.

SDF Comment

It would seem that discourse within the media, civil society and the body politic is further developed than discussion in Parliament and most political party policy commitments. There is a clear need for discussion of decriminalisation and its possible contribution to improving Scotland's responses to drug use.

In November 2016 the Board of Scottish Drugs Forum agreed that the charity should support proposals for the decriminalisation of the possession of drugs and that it should support public discussion and debate on the impact of existing controls have and the impact any proposed changes to legislative controls and enforcement could make to drug-related harms and Scotland's overall response to problem drug use.

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The UK legal framework for the control of substances

	Examples	Possession for personal use	Production or supply
Misuse of Drugs Act Class A Drugs	Crack cocaine, cocaine, ecstasy (MDMA), heroin, LSD, magic mushrooms, methadone, methamphetamine	Up to 7 years in prison, an unlimited fine or both	Up to life in prison, an unlimited fine or both
Misuse of Drugs Act Class B Drugs	Amphetamines, cannabis, codeine, ketamine, synthetic cannabinoids, synthetic cathinones (e.g mephedrone)	Up to 5 years in prison, an unlimited fine or both	Up to 14 years in prison, an unlimited fine or both
Misuse of Drugs Act Class C Drugs	Benzodiazepines (valium), GHB, GBL, khat	Up to 2 years in prison, an unlimited fine or both	Up to 14 years in prison, an unlimited fine or both
Misuse of Drugs Act Class C (anabolic steroids exception)	Anabolic steroids	Possession is not a crime	Up to 14 years in prison, an unlimited fine or both
Drugs Covered by Temporary Class Drugs Order (TCDO)	Information on current TCDOs can be found on the UK home office website	None, but police can take possession of a drug suspected of being controlled under a TCDO	Up to 14 years in prison, an unlimited fine or both
Drugs covered by the Psychoactive Substances Act	Any substance for human consumption that is capable of producing a psychoactive effect and not exempt	None except in a custodial setting. Police can take possession of a substance which they suspect is covered under the PSA	Up to 7 years in prison, an unlimited fine or both

Note: A full list of MoDA controlled drugs is updated at:
<https://www.gov.uk/government/publications/controlled-drugs-list--2>



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