

Consultation Response

Scottish Affairs Committee

Call for Written Evidence

Inquiry: Use and Misuse of Drugs in Scotland

12 April 2019



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

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Our Criminal Law Committee welcomes the opportunity to consider and respond to the UK Government Scottish Home Affairs Committee Call for written evidence into the Inquiry: Use and Misuse of Drugs in Scotland. The committee has the following comments to put forward for consideration.

The Criminal Law Committee includes members from the prosecution and defence interests in Scotland as well as those representing academia. Prosecution solicitors are involved in making decisions as to potential prosecutions and defence solicitors are involved in defending clients accused of drugs offences.

General

We understand that the term “drug misuse” adopts the World Health Organisation definition of drug misuse as “the use of a substance not consistent with legal or medical guidelines.”¹

¹ https://www.who.int/substance_abuse/terminology/who_lexicon/en/

Misuse of Drugs is a reserved matter to the UK Parliament under schedule 5 of the Scotland Act 1998.

Three acts regulate drugs in the UK and apply equally to Scotland. These comprise:

- the Misuse of Drugs Act 1971 (1971 Act) on which this response concentrates
- the Medicines Act 1968 that governs the manufacture and supply of medicine
- the Psychoactive Substances Act 2016 (2016 Act) which creates a number of offences relating to psychoactive substances which are defined in section 2(2) of the 2016 Act. Psychoactive substances have increased in popularity over the last decade resulting in the commencement of the 2016 Act.

The 1971 Act applies to UK and is intended to prevent the non-medical use of certain drugs. It controls not just medicinal drugs but also drugs with no current medical use. Drugs subject to this Act are known as 'controlled' drugs and are categorized under Class A, B and C which classification may change from time to time. The 1971 Act defines a series of offences including unlawful supply, intent to supply, import or export and unlawful production. It contains powers exercisable by the police to stop, detain and search people on "reasonable suspicion" that they are in possession of a controlled drug².

Recognising the problem with drug misuse, in 2008, the Scottish Government launched a new national drugs strategy called "The Road to Recovery"³ which outlined a new approach to tackling Scotland's drug misuse. These approaches were aimed at:

- Preventing drug use as being more effective rather than treating established problems. There are strong links between tackling problem drug use and the Scottish Government's wider policies in relation to mental health, early years and growing the economy.
- Reducing the supply of drugs to prevent the harm to individuals and society and to protect communities.

We outline below the prosecution policies in Scotland which include powers being made available under the Proceeds of Crime Act 2002⁴ so that assets gained through drug dealing can be returned to local communities.⁵

There is a need to recognise too to recognise the role of Drug Treatment and Testing Orders (DTTO) that are imposed by courts where someone's offending is clearly linked to problem drug misuse. It differs from other community-based sentences such as Community Payback Orders as the focus of a DTTO is to

² Section 23(4) of the 1971 Act

³ <https://www2.gov.scot/Resource/Doc/224480/0060586.pdf>

⁴ Operated under the Crown Office and Procurator Fiscal Service <http://www.copfs.gov.uk/our-priorities/proceeds-of-crime>

⁵ The CashBack for Communities programme is a unique Scottish Government Programme which takes funds recovered through the Proceeds of Crime Act 2002 and invests them into community programmes, facilities and activities largely, but not exclusively, for young people.

address problem drug use to reduce the risk of further offending and harm. It is available to lower tariff offenders.

Also, there is a need to address the problem with supply of drugs to prison with an aim at improving treatment within prisons to those who are sentenced and have drugs related problems. In 2017, there was an indication from the Scottish Prison Report that three prisoners a day were caught on drugs⁶.

We refer to large drugs seizure below and their significance in that the importance of a seizure can be understood from the judges where the effect of removal of large quantities of drugs from the public is "not only significant but massive."

The Scottish Government⁷ has assembled an expert taskforce⁸ to tackle the rising number of drug deaths in Scotland. There were 934⁹ drug-related deaths registered in 2017 which increased by 66 deaths from the previous year. This has made the death rate more than double the UK average.¹⁰ The rise in drug-related deaths among women has outpaced the increase among men. These have caused a number of concerns.

The taskforce is to consider key drivers into drug deaths and advise on what further changes either in practice or in law that would help to save lives and reduce the harm to Scotland from drug deaths.

In Scotland, heroin was the most lethal single drug which contributed to 55% of the total number of deaths while heroin the substitute methadone was implicated in 42% of the deaths. Benzodiazepine sedatives were implicated in 49% of the deaths. A number of those who died had more than one drug in their system.

The amount of heroin seized by Police Scotland in 2018 was more than double that recovered in the previous year. Cocaine seizures fell 18kg while cannabis increased. Police Scotland also seized more than 25,000 ecstasy-type tablets, almost three times the previous year's total. The amount of diazepam and psychoactive drugs - known as benzodiazepines seized was down from more than two million tablets to 320,000. There has been fluctuation considerably each year as to which drug has been involved in the most seizures.¹¹ While most drug seizures consist of relatively small quantities (usually possession-related

⁶ Scottish Prison Service Annual Report showed 1,133 inmates were disciplined for taking drugs in 2015/16 - up 13 per cent from 1,003 in the previous 12 months.

⁷ 30 May 2019

⁸ <https://www.bbc.co.uk/news/uk-scotland-47759041> 30 March 2019

⁹ <https://www.nrscotland.gov.uk/files//statistics/drug-related-deaths/17/drug-related-deaths-17-pub.pdf>

¹⁰ Described as 2 and ½ times – Annex G <https://www.nrscotland.gov.uk/statistics-and-data/statistics/statistics-by-theme/vital-events/deaths/drug-related-deaths-in-scotland/2017>

¹¹ <https://www.bbc.co.uk/news/uk-scotland-47625367>

offences), annual quantities of drugs seized can be greatly influenced by a small number of large seizures (usually from supply-related crimes).¹²

In relation to large drug seizures, Scotland was the location of the largest UK largest seizure of drugs. Two Turkish sailors, Mumin Sahin and Emin Ozmen, were caught with the biggest haul of cocaine and were jailed for a total of 42 years. Three tonnes of the Class A drug, with a street value of £500 million, was recovered from the ocean-going tug MV Hamal, when located at sea about 100 miles off Aberdeen. The drugs had been hidden in a specially-adapted secret ballast tank in the Tanzanian-registered vessel, which sailed from Istanbul to Tenerife and then to the North Sea. It was intercepted by the Royal Navy and the Border Force acting together. The importance of intelligence sharing in an international context to allow this successful seizure to take place can readily be seen.

There have been calls to consider various ways forward which include decriminalisation of drug users, the introduction of safe drug consumption rooms, the prescription of heroin and funding proper treatment.¹³

We would not seek to comment on social policy and therefore most of these headlines lie outwith the scope of the Committee's expertise. What we have included below are some topics where we consider that our knowledge of the Scottish criminal justice system may provide some background to consider in connection with the questions that have been posed.

Prosecution in Scotland

Crown Office and Procurator Fiscal Service (COPFS) are the sole prosecuting authority in Scotland. They are responsible for deciding if any prosecution should be undertaken for possession, the supply of drugs or other contraventions arising under the 1971 Act. Decisions as to prosecution will be taken on the basis of sufficiency of evidence under Scots Law as to an offence having been committed and the identification of the accused. Prosecution must be merited in the public interest. Public interest factors lie entirely within the COPFS's discretion and are set out fully under the COPFS Prosecutorial Code.¹⁴ That takes into account, for instance, the nature and gravity of the offence. COPFS will also determine in which forum any prosecution for offences under the 1971 Act will take place which include:

- summary prosecution which will take place in the Sheriff or Justice of the Peace Court (JP Court)
- solemn prosecution that will take place in the Sheriff and Jury Court or High Court of Justiciary

These will normally involve prosecutions for more serious offences such as contraventions of section 5(3) or Section 4(3)(b) of the 1971 Act i.e. supply charges.

¹² The National Statistics publication

¹³ <https://www.theguardian.com/uk-news/2017/aug/15/drug-related-deaths-in-scotland>

¹⁴ http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

Minor offences for possession of less serious drugs (category B or C) under section 5(2) of the 1971 Act may well result in a diversion being made from court prosecution. The routes for diversion are set out in paragraph 9 of the COPFS Prosecutorial Code. Decisions that may be made include:

- no proceedings (which could relate to seizure where there is an evidential insufficiency of evidence such as an illegal search having taken place)
- the issue of a warning letter issued from the Procurator Fiscal. Such a warning will make it clear that a report of a crime has been submitted to the Procurator Fiscal and that any repetition of the alleged behaviour will be likely to result in a prosecution
- the issue of a Fiscal Fine under Section 302 of the Criminal Procedure (Scotland) Act 1995 which allows the Procurator Fiscal to make a conditional offer of a fixed penalty in relation to any offence in respect of which an alleged offender could competently be tried before the JP Court (Possession of drugs charges are competent in the JP Court). A range of penalties of £25, £50, £75 or £100 is available along with fixed instalment payments of between £5 and £20 per fortnight may be offered.
- diversion from prosecution. The use of diversion by a Procurator Fiscal will depend on the availability locally of a suitable diversion scheme. Diversion may be appropriate for less serious offences where it may prevent or deter further offences
- Offences committed by child, where there may be a referral to the Scottish Children's Reporter. The Lord Advocate has issued confidential guidelines to the police in relation to reporting offences alleged to have been committed by children¹⁵. The prosecutor retains a discretion to refer to the Reporter cases involving children where such action is considered to meet the public interest.

Drug Driving (Specified Limits) (Scotland) Regulations 2019 (the Regulations)

Scotland is introducing new drug driving limits and roadside testing from 21 October 2019.¹⁶ The regulations replicate those controlled drugs specified in The Drug Driving (Specified Limits) (England and Wales) Regulations 2014 and The Drug Driving (Specified Limits) (England and Wales) (Amendment) Regulations 2015 (which added in amphetamine), making a list of 17 specified controlled drugs. The English and Welsh provisions are already in force.

This will introduce for Scotland a zero-tolerance approach to eight drugs which are the most associated with illegal use which include cannabis, heroin and cocaine, with limits set at a level where any claims of accidental exposure can be ruled out. Additionally, a list of other drugs associated with medical use will have limits based on impairment and risk to road safety.

¹⁵ The age of a child is proposed currently to be increased to 12 under the Age of Criminal Responsibility (Scotland) Bill which is currently before the Scottish Parliament.

¹⁶ https://www.parliament.scot/S5_JusticeCommittee/General%20Documents/DD-LSS.pdf

This supports the concept that drug driving is completely unacceptable. There is a need to “use all of the tools at our disposal to prevent the avoidable deaths and damage caused by those who drive under the influence of drugs.”¹⁷

We responded when The Drug Driving (Specified Limits) (Scotland) Regulations 2019¹⁸ were laid before the Scottish Parliament which we fully supported. There is a need to ensure that the public are fully aware of the significance of the changes being made with the introduction of the new offence and also of the identity of the 17 controlled drugs which are included in the Regulations.¹⁹

There is the opportunity too for Scotland to learn from the English and Welsh experience in that problems arose causing cases to be dropped where there were issues with testing samples from across the UK that had been affected by alleged tampering of results by one of the Testing Services. We are not aware of the arrangements that have been put in place to analyse the drugs once the Regulations come into force. Presumably the experience of England and Wales can provide practical information (and guidance) for our purposes. There are suggestions that there are not many forensic laboratories in Scotland but again we assume that there will be able the capacity to deal with the increased volume of work following October 2019 when commencement takes place.

Once the Regulations come into force; their effect can be monitored with regard to cases reported for prosecution by Police Scotland as well as successful convictions.

Introduction of safe drug consumption rooms

There have been discussions around support for the introduction of a medically-supervised safe consumption facility in Glasgow to curb street injecting. Glasgow's Health and Social Care Partnership had proposed introducing the facility which would be the first of its type in the UK that would help treat hundreds of drug users who inject in public in the city centre.

It was proposed as a pilot project that would allow users to bring street drugs purchased away from the premises and take them in a supervised setting in a safe way. The plan was also to offer heroin assisted treatment (HAT) providing prescribed medical heroin to a small number of drug users who had exhausted other options.

For this to work, there would need to be a “tolerance zone” where there would not be any prosecution for the possession of drugs. That would either require a change in the 1971 Act or the use as highlighted above of prosecutorial discretion from COPFS not to prosecute in certain circumstances. The Lord

¹⁷ Cabinet Secretary for Justice Secretary Humza Yousaf

¹⁸ 30 January 2019

¹⁹ <https://www.gov.uk/drug-driving-law>

Advocate has not supported that proposal other than to state that HAT can already be provided under the current law.

Were there further evidence to support safe drug consumption rooms and any pilot to take place, there would be a need to amend the 1971 Act to provide Scotland with powers to facilitate that solution.

Management of Offenders (Scotland) Bill (the Bill)

This Bill is currently going through the Scottish Parliament when we refer to our written evidence dated 20 April 2018.²⁰ The Bill covers three main policy areas which includes the electronic monitoring of offenders by expanding its use and provision. This could be utilised in connection with checking that an offender is complying with conditions of a drug programme. This could assist when looking at ways to tackle the issues of drug related offending in connection with the consideration of bail or a sentence.

We understand that the technology exists in relation to the expansion of electronic monitoring. Future possibilities depend much on the advances that are and have been made. This could follow the range of possibilities that are outlined with the use of a SCRAM Ankle or SCRAM remote breath programme which have been adapted to support voluntary and court-ordered testing and post-trial in connection with conditions on sentence and drug monitoring.²¹

This, if utilised, would need be based upon rigorous and robust evidence-based advance testing of the technology prior to the Scottish Government's approval. It would need to ensure that it complies fully with modern scientific standards and is fit for operation across Scotland.

Likewise, there would need to be full scrutiny and independent evaluation of the monitoring system if it is put in place. In respect drug testing, there must be a check mechanism that guard against the risk of "false positives". The reliability of the monitoring technology must also be subject to regular review and must take cognisance of any improved technology.

²⁰ <https://www.lawscot.org.uk/media/360080/call-for-evidence-management-of-offenders-scotland-bill.pdf>

²¹ <http://lamonitoring.net/drug-testing/>

Paragraph 73 of the Policy Memorandum of the Bill set out the purpose of section 10(3) of the Bill which states that “different arrangements may be made for different purposes.” The basis of this provision is to allow for the establishment of demonstration projects which we assume envisages the use of pilot projects. Perhaps testing this out by way of a pilot project may be a method for the future.

For further information, please contact:

Gillian Mawdsley
Policy Executive
Law Society of Scotland
DD: 0131476 8206
gillianmawdsley@lawscot.org.uk