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Abstract

This chapter aims to illuminate aspects of the risk environment within which drugs are consumed and policed in Scotland. Firstly, we focus on the macro-level policy context and legislation that governs the way policing of drugs is carried out in Scotland, including the 1971 Misuse of Drugs Act and the Police and Fire Reform (Scotland) Act 2012. Then we discuss the leeway afforded by meso and micro-level policy and policing practices in Scotland and other jurisdictions to illustrate how different approaches create contexts that limit or enable harm reduction policing. We move on to consider policing practices used in Scotland, including stop and search, diversion and other criminal justice measures, highlighting the consequences of these for people who use drugs. We conclude that whilst the language of the policy context signals a progressive approach, there is a gap between policy and practice. We call for further consideration to be given to ameliorating the harms resulting from the legislative and policy context that governs the drug problem in the UK and Scotland, with the aim being to safeguard public health and respect the human rights of people who use drugs and strive for social justice for them, their families and their communities.

Introduction

At the time of writing, Scotland is in the midst of a drug crisis, holding the position of various tragic 'first' places. The number of drug-related deaths in Scotland increased by 6% between 2018 and 2019 and then a further 5% in 2020, where it reached the largest number since records began in 1996 and more than double the number recorded a decade ago. In 2019, Scotland's drug-death rate was higher than those reported for all the EU countries, and was approximately 3½ times that of the United Kingdom (UK) as a whole (National Records of Scotland 2020). In 2015, in Greater Glasgow and Clyde, an HIV outbreak identified amongst people who inject drugs was the largest such incident in the UK for 30 years (McAuley et al. 2019). In terms of policing the drug problem, the proportion of searches conducted on the basis of drugs is very high, at 81% in 2020 (Police Scotland 2021a), and has been at a similar rate (77-82%) for the last few years. The vast majority of recorded drug crimes (86%) are for possession (Scottish Government 2020a). Scotland continues to have one of the highest rates of imprisonment in Europe (SCCJR 2019), partly attributed to a greater number of those convicted for drug-related offenses (Tombs and Piacentini 2012). The use of very short sentences, serially served and largely driven by convictions where drug and alcohol are implicated, is so common in Scotland that they have been given their own name: "doing life by instalments" (Armstrong and Weaver 2013, p.302).

Policing of drugs in Scotland is currently taking place within a context where policies and practices to address the drug problem and to minimise negative health, social and legal impacts associated with drug use, seem to thus far be ineffective, or even unintentionally harmful. However, it is exactly because of this context that a focus on harm reduction policing¹ is even more urgent. The policy context in Scotland should – in theory – be conducive to fostering a progressive approach. Firstly, the drugs portfolio in the Scottish Government

moved from justice to the population health directorate more than a decade ago and the 2018 Drugs Strategy (Scottish Government 2018) recognises that problem drug use is a public health issue and plans to focus on a human-rights based approach. Secondly, the purpose of policing (enshrined in legislation since 2012) includes improving wellbeing and safety and Police Scotland's new Drug Strategy (launched in 2020) aims to reduce harm and develop a public health approach. However, there is a gap between policy and practice and we also need to be cognisant of the salience of drug legislation, which sits at a UK level.

In this chapter we aim to elucidate premises and developments that make up the current context within which drugs are policed in Scotland, starting with the relevant macro and micro policy environment. Our discussion is guided by the concept of the 'risk environment', a framework which promotes an "understanding of how environmental conditions, and different risk environments, shape the introduction (or not) of harm reduction policies and responses as well as their implementation and impact" (Rhodes 2002, p.87). We move on to describe current policing practices towards Scotland's drug problem and discuss their tangible effects for people who use drugs. We finish by laying out our suggestions for the future. By following this trajectory, we aim to highlight what we see as the characteristics of the stalemate in policing of the drug problem and sketch out an alternative future where harm reduction is firmly recognised as a basic human right for people who use drugs, their communities and ultimately for Scotland as a whole.

Regulating the drug problem: Macro-level policy

For the vast majority of jurisdictions and within the context of prohibitionist approaches, the world's drug problem has been effectively constructed as a criminal justice rather than a health issue. However, the construction of social problems delineates the repertoire of responses societies choose to adopt towards them. Essentially, as Bacchi suggests, policy responses to social problems is not the "government's best effort to *solve* 'problems'; rather, policies *produce* 'problems' with particular meanings that affect what gets done or not done, and how people live their lives" (Bacchi 2012, p.22). As such, the way the drug problem has been historically constructed – and continues to be constructed – is not inconsequential; its construction enables or even dictates the approach taken to 'tackle' it, with its intended or unintended consequences.

Despite over 20 years of devolution, the drug problem in Scotland is still largely governed by the 1971 Misuse of Drugs Act (MDA); the overarching piece of legislation that regulates the production, supply and possession of controlled drugs in the UK, and underpins successive UK Governments' criminal justice approach to drugs. However, drug policy and legislation not only impacts on people's lives where contact with the Criminal Justice System (CJS) is concerned. Policy and legislation shape the practice responses we put in place and restricts our imagination in terms of alternative ways of acting; they define the context within which harm reduction interventions are introduced and delivered. In this way policy and legislation constitute one of the factors shaping the environment within which people consume substances, intentionally or unintentionally adding or taking away from the risk associated with drug use (Rhodes 2002). Simultaneously, it dictates the ways such environments are

policed. In this respect, the 1971 MDA creates enabling conditions for the introduction and delivery of public health interventions or in some cases, impedes their establishment.

The way the MDA has contributed to the creation of a risk environment for people who use drug in the UK, including Scotland, is exemplified in the fate of Safe Consumption Rooms which, at the time of writing, are non-existent in the 4 nations. This is despite the continually increasing numbers of drug-related deaths (National Records of Scotland 2020), the aftermath of an HIV outbreak in Glasgow (McAuley et al. 2019), a wealth of evidence on the effectiveness of Safe Consumption Rooms as a drug death prevention intervention (EMCDDA 2018) and recommendations by the ACMD (2016) for their establishment. This was also despite calls from the Glasgow City Health and Social Care Partnership, who in 2016 wrote to the Lord Advocate of Scotland requesting him 'to issue a letter of comfort'. This document would contain a guarantee that the facility's operation would not be legally challenged or the subject of prosecution, despite the technically illegal activity that would be conducted inside (Scottish Affairs Committee 2019). In November 2017, The Lord Advocate declined this call. When giving evidence to the Scottish Affairs Committee two years later, he justified this decision:

"the basic point is a recognition that, for such a facility to operate effectively, you need an appropriate legislative framework that establishes an appropriate system for licensing and oversight, addresses the scope of exemptions from the criminal law, and deals with issues of civil liability. There must also be a recognition that legislation resolves the policy issues in a democratically accountable way. I simply cannot create that kind of regime through a letter of comfort." (Wolfe 2019)²

Efforts to introduce Safe Consumption Rooms in Scotland in 2017-2018 met the same fate. The Freedom of Information Request (FOI/19/01755) communication between the then Scottish Government Minister for Public Health and Sport, Aileen Campbell (MSP), and the UK Government Minister for Crime, Safeguarding and Vulnerability, clearly shows the stalemate and also makes clear that drug control remains the responsibility of the UK Government and that there are no plans to devolve this 'important responsibility'. As Victoria Atkins (MP) states:

"There is no legal framework for the provision of Drug Consumption Rooms in the UK and we have no plans to introduce them. A range of offences is likely to be committed in the operation of drug consumption rooms. It is for local police forces to enforce the law in such circumstances and, as with other offences of this type, we would expect them to do so." (FOI/19/01755).

Unlike drug laws which are UK wide, devolved administrations, including Scotland, publish their own drug strategies. Reviewing Scottish Government progress since the 'Road to Recovery' strategy of 2008, Audit Scotland (2019) paints a bleak picture, but does identify the implementation of certain drug harm reduction strategies (such as supply of Naloxone, provision of sterile injecting equipment and Opioid Substitution Therapy) as 'paving the way to longer-term improvement' (Audit Scotland 2019, p.6). However, they note that despite additional investment in drug and alcohol services, the 'cost effectiveness and value for

money of the investment made over the last ten years had not been set out' (Audit Scotland 2019, p.6). The Scottish Government (2018) Drug Strategy 'Rights, Respect and Recovery', recognises problem drug use as a public health issue and aims to focus on a holistic, human rights-based approach to reducing avoidable deaths related to problem drug use. It highlights, for example, prevention and early intervention, delivering in partnership and a public health approach to justice. The intended outcome related to the latter involves diverting vulnerable people from the justice system wherever possible and fully supporting those within justice settings. In order to achieve this, commitments made by the Scottish Government include ensuring 'that people who come into contact with justice agencies are provided with the right support from appropriate services' and setting up a group to advise on the contribution and limitations of the MDA to health outcomes in Scotland. Whilst the intended outcome is to *divert vulnerable people from the justice system*, in contrast the strategy also commits to 'support the work of Police Scotland, to ensure that those groups involved in *drug dealing or distribution* are being effectively targeted for *prosecution*' (emphasis added). Here the focus is on the police role in aiming to control the supply of drugs, as set out in the Serious and Organised Crime Strategy (2015).

It is in this context that the Drug Deaths Taskforce (DDTF) was established in 2019, to take an evidence-based approach to identifying key areas of action required by partners to address the challenge of reducing drug-related deaths in Scotland. Although it is acknowledged that the response must be multi-faceted, some of the six identified areas of action of particular relevance to our discussion include the targeted distribution of Naloxone, optimising public health surveillance and supporting those in the justice system. For example, Police Scotland have recently initiated a DDTF funded 'test of change' where police in three 'test bed' areas are being trained and have the opportunity to carry Naloxone. Secondly, the DDTF recently funded a project to pull together the evidence base to prepare for the implementation of drug checking services in Scotland. Thirdly, various DDTF funded projects support people in contact with the justice system; for example, Wayfinders in East Dunbartonshire places peer navigators to within the justice system to support people who have problems with drug use. Furthermore, the DDTF Criminal Justice and Law group reported on visits they undertook to explore how operational practice could be altered to support better health outcomes for people who use drugs.

Leeway afforded by meso- and micro-level policy and policing practices

International and national drug laws and strategies certainly shape the contexts within which drugs are consumed and people who use drugs are policed. However, policies and practices at a lower level, such as at the organisational level of police forces – in various parts of the world – have hugely impacted this intersection of public health and policing. For example, directly linking their findings to this conceptualisation of a risk environment, Miller and colleagues (2008) spoke about how street level policing practices in Mexico influence injecting drug users' willingness to carry injecting equipment, despite syringe possession not being a crime. Similarly, in an Australian context Maher and Dixon (1999) discussed how what can be considered a success of 'policing practices', such as successful crackdown of drug markets, can essentially have negative consequences for public health.

However, changes to policing practices with the stated aim of promoting public health approaches to the drug problem have also been noted. Indeed, historically, the police have played a pivotal role in the introduction of, for example, Safe Consumption Rooms; in the Netherlands, the majority of the facilities seem to have originated from initiatives by residents and police, with the support of local authorities, with the shared aim being the reduction of public nuisance (Hedrich 2004). When Needle Syringe Programmes (NSPs) were first introduced in England and Wales, the Metropolitan Police Service (MPS), London, issued a Police Order in June 1988 stating that it was service policy that people who inject drugs should not be arrested for carrying injecting equipment in a public place – as would be the case under the provisions of the section 139 of the Criminal Justice Act 1988 (Monaghan and Bewley-Taylor 2013). In an attempt to strike a balance between law enforcement and public health, the Commissioner of New South Wales Police discouraged police officers from making unwarranted patrols in the vicinity of needle and syringe exchange programmes, acknowledging the heavy police presence acts as a barrier to accessing services (Monaghan and Bewley-Taylor 2013). More recently, in Canada, the Vancouver Police Department developed and implemented an organisation-wide policy which endorsed harm reduction strategies for people who inject drugs, to promote safe, open and ready access to harm reduction interventions in the area (Lansberg et al. 2016). In this same jurisdiction, the local Police Department supported the establishment of a pilot Safe Consumption Room and subsequently introduced a strategy of actively promoting its use by people who injected in public through police referrals to the service (DeBeck et al. 2008).

It becomes evident then, that meso- and micro-level policy, and the way this shapes policing practice, can have direct implications for the effectiveness of public health interventions. Depending on the way organisational policies shape local environments, members of the police working at street level can actively promote harm reduction principles or indeed diminish people's access to health services and safer use of drugs. As such, policing practices can lead to change or contribute to -structural- violence (Sarang et al. 2010).

Can there be such leeway in Scotland?

Policing in Scotland has undergone significant change over the last decade, with the formation of Police Scotland in 2013 bringing together the eight legacy police forces and intensifying the politicisation of policing. The legislative basis for the new single police service also enshrined a new purpose of policing: 'to improve the safety and wellbeing of persons, localities and communities' (Police and Fire Reform (Scotland) Act 2012, section 32). The Act states that this must be achieved by working in a manner which is: 'accessible to and engaged with communities', 'promotes measures which prevent crime, harm and disorder'; and involves 'working in collaboration with others'. Although there may be potential perceived tensions within aspects of the purpose of policing, e.g. between securing both the safety of communities and the wellbeing of people (including people who use drugs), this legislation clearly provides a mandate for police to work in partnership to improve wellbeing and prevent harm, which goes far beyond a narrow crime fighting purpose with enforcement-based solutions focused on bringing offenders to justice. The Act provides a strong basis for police in Scotland to focus efforts on harm reduction, particularly when it comes to dealing with people who use drugs, by engaging communities and working collaboratively to adopt a public health approach to policing.

In 2020 Police Scotland launched their first Drugs Strategy (Ritchie 2020), which aims to adopt a whole systems approach with partners to reduce the harm caused by the supply and consumption of drugs through an integrated prevention and enforcement approach. This involves working to reduce drugs deaths and prevent harm by developing new approaches with partners to support the activity of the DDTF under the Scottish Government Drugs Strategy. The strategy also aims to adopt a public health approach to the policing of drugs and prioritises prevention, alongside enforcement. The activity of the Drug Strategy Board is supported by a Substance Harm Prevention Sub-Group, with the enforcement activity driven in parallel by Serious and Organised Crime structures. Whilst this is not unproblematic and there are obvious tensions between enforcement and prevention, given, for example, the potential unintended consequences where enforcement may exacerbate harm for drug users, it is worth noting that at least the strategy purports to focus on targeting enforcement towards suppliers posing the greatest threat. Indeed, Stevens (2013) highlights the potential effectiveness of targeting drug dealers who are causing the highest levels of harm with 'pulling-levers' approaches, e.g. diversion into treatment, as an example of applying harm reduction principles to policing.

During the deliberations of the Scottish Affairs Committee on problem drug use in Scotland, suggestions were made to sketch out a way for Safe Consumption Rooms to be introduced and safely operate in the country. Such suggestions included the establishment of an agreement between Safe Consumption Rooms – where this was to be introduced – and the local police not to pursue drug-related offences within the facility (Scottish Affairs Committee 2019); echoing ways of working highlighted in other countries and discussed above. This was indeed viewed positively by some, with Assistant Chief Constable Steve Johnson of Police Scotland noting that “if the proposed facility was ‘legitimate’, Police Scotland would work with the NHS and other stakeholders to support it” (Scottish Affairs Committee 2019, p.272).

However, it was also noted that such arrangements, operating in parallel but also in contravention to the current legislative context, may not be tenable; a concern that was also put forth by police force representatives. Such concerns were aptly explained by Assistant Chief Constable Johnson:

“From an officer perspective, if you are an officer and you are walking the streets of Glasgow where that facility is and you stop someone who is on their way [there] in possession of those drugs, there is a hefty dose of the “woulda, coulda, shoulda” squad. If the person does not then go to the safe facility [...] but takes themselves down by the side of the Clyde and injects and falls in the river and dies, the “woulda, coulda, shoulda” would be “what are the police doing? You had a power; you did not exercise it”. That person should have been in a custody facility, put in front of the sheriff, from the sheriff to the court [...] That is a harsh reality faced” (Scottish Affairs Committee 2019, p.274).

It needs to be recognised that the ambiguity characterising the spaces created by micro- level policies threatens the viability of the approaches taken within them. Perhaps an illustrative example of this comes from the case of Peter Krykant, a drug activist operating a mobile Safe

Consumption Room in Glasgow, in the face of legislation that prohibits its existence. Disillusioned by the inaction of both the UK and Scottish Government amidst the context of rising drug-related death and the recent HIV outbreak in Glasgow, Krykant decided to deliver the service himself. Despite the facility providing a much-needed service and receiving positive international media attention, his efforts have not always been received favourably. After months of operating the van, on 23 October 2020 he was charged for obstructing police officers carrying out their duties in respect of the Misuse of Drugs Act 1971 on Parnie Street, Glasgow. Essentially, he was charged for obstructing police who sought to search his van. He was not arrested, but police officers submitted a report to the prosecutor fiscal. Krykant did not eventually face court action and Scotland's Lord Advocate, James Wolffe, applied discretion and the charges were dropped. However, the case is indicative of how a lack of a clearly defined legislative context can hinder public health approaches that operate in grey zones of tolerance which are as easily taken away as they are afforded by policing practices (The Guardian 2020).

The public health approach to policing is currently developing in Scotland and is being guided by Police Scotland's Drug Strategy Board. However, innovations of relevance to drugs which are being implemented thus far are, perhaps understandably, operating within the legislative parameters, rather than at their boundaries. Although calls for police in Scotland to carry Naloxone go back much further (McAuley and Aston 2018), through recent work with the DDTF Police Scotland commenced a pilot project in 2021, where police in three 'test-bed' areas are being trained and can then volunteer to carry Naloxone (Police Scotland 2021b). The pilot is currently being independently evaluated by a team at Edinburgh Napier and Glasgow Caledonian Universities. In the run up to this 'test of change' Police Scotland worked with various partners, through a Naloxone Delivery Steering group, to iron out various issues and prepare for training and implementation. Indications suggest that the response from officers has generally been positive, despite fervent opposition from the Scottish Police Federation whose concerns appear to centre on the expansion of the police role into health. Police Scotland officers had already come across people experiencing overdose and administered Naloxone whilst awaiting ambulance response on 12 occasions by May (Rae 2021) and 37 times by August (Livadeas 2021).

We will now turn our attention to the ways people who use drugs are currently policed in Scotland and highlight consequences of such policing practices for people who use drugs, their families and communities.

Policing practices, police disposals and their aftermath in Scotland

Stop and search practices

Stop and search is a police power where public safety needs must be balanced with individual human rights. Although people who use drugs are also subject to more 'informal' policing encounters (related to 'communicative surveillance' and 'intelligence gathering' (Lister et al. 2008)), stop and search is one of the main formal ways, along with formal warnings and arrests, in which people who use drugs are policed and come into contact with the CJS. In the UK and beyond the most common grounds for stopping and searching people is on suspicion

of possession of drugs (Shiner et al. 2018). The most recent statistics in Scotland (Police Scotland 2021a) show a figure of 81% in 2020. Searches on drugs grounds raise particular questions regarding human rights (e.g. rights to privacy, health and non-discrimination (INPUD 2015)). At the same time, the effectiveness of this police power in protecting the public has long been called into question and its purported crime reduction impact has not been backed up by evidence (Tirattelli et al. 2019). In contrast, we do know that repeated use of enforcement-based policing, including stop and search, has a negative impact on police-community relations (Hail et al. 2018). Tirattelli et al. (2019) conclude that stop and search is used as a tool of social control, and concerns have also repeatedly been raised about ethnic disproportionality and associated negative outcomes (Shiner et al. 2018).

Furthermore, when it comes to drugs we also need to consider the impact of stop and search on effectiveness in a broader sense, on access to harm reduction services and the right to a high standard of health. As discussed above, perceived levels of police enforcement impact on the willingness of people who use drugs to access harm reduction services and carry materials such as clean syringes and take home Naloxone, which users may fear will be perceived as drug paraphernalia and thereby grounds for being taken to a police station for a more intrusive search (McAuley and Aston 2018). This is in keeping with Sarang et al.'s (2010) findings that policing strategies are critical to creating environments which may increase risk and undermine harm reduction for people who inject drugs.

For quite some time the legislative basis for stopping, searching and detaining someone without arrest in Scotland lay in the Criminal Justice Scotland Act 1980, the Criminal Justice Procedure Act 1995 and the MDA 1971. Prior to 2014, stop and search in Scotland had not been subject to the same scrutiny or academic attention as England and Wales (Aston et al. 2019). Murray (2014) shed light on the rate of stop and search in 2010 being far higher than that of England and Wales, and the overwhelming reliance (70%) on 'consensual' or non-statutory search. A period of intense media and political attention, research (e.g. O'Neill et al. 2015) and scrutiny (HMICS 2015), including the establishment of an Independent Advisory Group on Stop and Search (Scott 2015), led to fundamental legislative and policy changes to this police practice. These were introduced in the Criminal Justice Scotland Act 2016, including the abolishment of the controversial practice of 'non-statutory' search (which were mostly for alcohol and drugs). Available data on stop and search may reflect these changes: there were 640,699 recorded instances of stop and search, a figure which decreased dramatically to a low of 29,768 in 2017-18. The volume has been sitting at around 30-40,000 since, and in 2019-20 the recorded figure was 41,167 (HMICS 2020).

With the requirement of a statutory basis for searches, and the associated dramatic reduction in volume of stop search, the rate of 'positive searches'³ where an item was found increased with a more targeted approach (Scott 2019a). At the point when consensual searches were used, the rate of finding an item during searches conducted on drugs grounds was only 12% (in 2013-14, HMICS 2015). The 'positive rate' for drugs searches has been higher at around 36-39% in recent years (36% in 2020, Police Scotland 2021a), which suggests that as the volume of searches has reduced, and is based on legislative grounds, the chances of finding drugs has increased. Nonetheless, it is worth highlighting that this means that the vast majority of times the power of search is used on people drugs are not found. Of the 11,162

searches where drugs were found between April and December 2020 the vast majority (61%) were class B drugs, with 20% being class A and 19% class C (Police Scotland 2021a).

Despite improvements to stop search records, the database and increased transparency with making data publicly available, unfortunately it is not possible for police to match nominal data in order to make data on multiple searches of individuals public. We know that of the 33,452 searches recorded in Scotland between April and December 2020, 4,413 individuals were searched two or more times (Police Scotland 2021a, p.3), but we do not have more information about how many times people have been repeatedly searched, which may have shed some light on the ways people who use drugs are policed. At the same time, and despite the recent changes in stop and search practices, the proportion of searches on drugs grounds is now higher. The figures are not comparable as the legislative context has changed dramatically and the recording practices and accuracy of the data pre-2017 were highly questionable. However, based on 2013-14 figures the recorded reason for searches was drugs in 44% of searches and another 31% (mainly consensual) were for alcohol (HMICS 2015). Since the legislative changes the proportion of searches on drugs grounds has been around 77-82%: 81% of searches were on drugs grounds in 2020 (Police Scotland 2021a), 77.5% in 2019-20 (Police Scotland 2020a), 78% in 2018-19 (Police Scotland 2019) and 82.6% in 2017-18 (Police Scotland 2018). Shiner et al. (2018) found that the proportion of searches in England and Wales on drugs grounds had increased from a half in 2010-11 to two thirds in 2016-17.

Considering the attention given to stop and search in Scotland in recent years and the high proportion of searches on the basis of drugs grounds, surprisingly little attention has been paid in the various scrutiny documents to the policing of drugs or people who use drugs. The 12-month review of the Code of Practice (McVie 2019) did acknowledge that strip searches were overwhelmingly conducted for drugs (69%), one in 20 searches involved a strip search, with 66% of them conducted inside a police station rather than in public view. Women were more likely to be subject to a strip search than men, but with lower detection rates for women (42%, compared to 50% for men). The report concluded that the introduction of a Code of Practice for stop and search was successful in achieving a higher standard of evidence based on reasonable suspicion, more 'positive' rates (finding an illicit item) and improved proportionality in terms of searches by sex, age group and ethnic identity. However, concerns were also raised regarding greater use of strip searches for women and lower positive outcomes for searches involving young people.

Statistics from SPA Forensic Services on the volume of drug analysis cases (12,600 in 2019), a 33% three-year demand increase in referrals from Police Scotland, and the fact that 82% of the cases in 2019 were for possession (SPA 2020) does not suggest that there has been a reduction in policing of drugs commensurate with the reduction in volume of stop and search. Preliminary analysis of drug-related stop and search during COVID-19 suggests there was a localised increase in certain parts of Glasgow during Spring 2020. The analysis of data by the Independent Advisory Group on temporary police powers related to COVID-19 suggests that most people receiving a Fixed Penalty Notices for breaching COVID-19 restrictions had a prior criminal history (McVie 2021). However, there has been virtually no discussion regarding policing of drug users in this context where two public health emergencies, a pandemic and a drug-related death epidemic collide. Recently concerns have also been raised in the media (McGivern 2021) regarding reports of searches of people who use drugs in Glasgow near harm

reduction facilities. Yet the strategic aim is to adopt a public health approach to policing of drugs at both a local level in Glasgow (Police Scotland 2020b), and a national level in Police Scotland's Drug Strategy (Ritchie 2020).

Police recorded warnings

Police in Scotland can deal with people accused of a crime in a variety of other direct ways. Of particular interest to the ways drugs are policed in Scotland is the measure of Recorded Police Warnings (RPWs), which was introduced in Scotland in 2016 to deal with a wider range of low-level offences, including possession of drugs. This is focused on possession of cannabis, although there have been calls to extend it to other substances too (Scottish Affairs Committee 2019). RPWs can take the form of a warning issued on the spot or a notice issued retrospectively. RPWs replaced the former practice of Formal Adult Warnings, however they can also be issued to people over the age of 16. RPWs do not constitute a finding of guilt but can be taken into account if the person comes to further notice of the police within a period of two years from the initial warning. The scheme aims to “have a positive impact on individuals by not criminalising them, minimising police bureaucracy and maximising operational officers' time” (Police Scotland 2020c, p.4). We need to clarify here that RPWs do not constitute a measure of full decriminalisation, as the measure can be – and is – delivered in the current legislative context.

In the year following its introduction, this alternative to prosecution measure became the most used police disposal with 19,678 issued in 2016-2017 (Scottish Government 2020b). Although there was a small decrease in their use the following year (17,332 in 2017-18), in 2018-2019 RPWs were the most used police disposal, making up 61% of police disposals- or 22,070 RPWs (Scottish Government 2020b). Unfortunately, official publications have not always contained a breakdown of the different offences for which RPWs have been issued in Scotland but we do know that 77% of RPWs were issued in 2017-18 for offences that fall into the 'Other' category (Scottish Government 2019a). The latest available figures however, are quite informative in regard to the dominance of drug-related offences amongst RPWs; in 2018-2019 drug offenses were the most common reason for their disposal (29%) (Scottish Government 2020b).

Diversion from prosecution in Scotland

The policing practices discussed above can be viewed in the context of diversion from prosecution schemes. Across the UK, diversion schemes are mainly police-led initiatives that involve diverting people caught committing minor offences from the CJS. Diversion schemes for drug-related offences are usually applied in cases of possession for personal use or – in fewer cases – to supply or cultivation offences that are deemed to be minor. For example, Durham Constabulary's Checkpoint is a deferred prosecution scheme whereas Thames Valley Police's Drug Diversion Scheme provides direct access to drug services without admission of guilt and can be used for possession (but not supply) of any category of drug (see Spyt and Kew, this volume). Scotland has implemented diversion from prosecution schemes since the 1980s, with the stated aim of providing support targeting the underlying causes of offending, such as substance use (Scottish Government 2021). Diversion schemes were rolled out

nationally in 2000 and have targeted primarily people who use drugs, as well as young people and women.

At UK level, such police-led schemes usually involve police offering referral to treatment and support services as an alternative to arrest, prosecution or formal caution. However, in Scotland diversion works rather differently, potentially reflecting the different relationship between the police and prosecutors in Scotland in comparison to the rest of the UK (Price et al. 2021). As Price and colleagues (2021, p.119) note: “Police officers in Scotland have a statutory duty to report all offenses to Scotland’s Crown Office and Procurator Fiscal Service (COPFS) who determine who will be prosecuted and who will not, based on an assessment of all of the facts and circumstances of each individual case”. This is reflected in the most recent Guidelines on Diversion from Prosecution in Scotland, where the Scottish Diversion process is clearly defined as a process by which the “Crown Office and Procurator Fiscal Service (COPFS) are able to refer a case to social work – and their partners” (Community Justice Scotland 2020, p.3). Essentially the approach involves instances where prosecution may be waived or a decision on prosecution deferred pending successful completion of the social work scheme (Scottish Government 2020c).

Within the most recent Guidelines on Diversion from Prosecution in Scotland diversion is described as a three-stage process, with the police only involved in the first, initial phase (Community Justice Scotland 2020). According to the guidelines, the role of police is vital as they constitute the starting point for diversion processes to be potentially adopted; however, this role is limited to appraising and recording antecedent information about the incident and person involved, in the relevant section of the form to be submitted to COPFS. Vital as this may be as a starting point, it is exactly that – a point of initiation of a process rather than a distinct police-led initiative. In addition, diversion in Scotland is also understood as a scheme which can be offered post-conviction in court, in which case it is essentially diversion from custodial sentences rather than diversion from police custody.

Acknowledging the specific features that Scottish Diversion Schemes take, we highlight recent and historical figures of all diversion cases in the country. We note here that diversion schemes in Scotland have historically have been offered to small numbers of people, especially when compared to other fiscal disposals (Scottish Government 2021). Latest figures highlight an 8% increase in the number of diversion from prosecution cases commenced in 2019-2020 in comparison to 2018-2019 (Scottish Government 2021).

<INSERT TABLE 7.1>

It needs to be noted here that the breakdown of types of offences for cases where diversion is offered is not available in Criminal Justice Social Work Publications. However, as Price and colleagues note through a personal communication, in 2018-2019 internal statistics from the Crown Office showed that within that period “790 diversions were offered in cases where drug possession was reported alongside other offense types” (Price et al. 2021, p.119). A further note needs to be made on the predominance of cases involving young people (aged 16-20) within diversion offers; according to the latest available figures for 2019-2010 50% of cases where diversion was offered involved young people, clearly showing the previously stated focus of the scheme on this population group.

Police-led Initiatives to divert people from the criminal justice system

Positive Outcomes Project (POP) is a unique project developed by a joint DDTF proposal between Police Scotland, Glasgow Health and Social Care partnership (GHSCP) and currently involves a partnership with charity Aid and Abet, who provide input from people with lived experience. The project predominantly supports men who are engaged in what is termed 'chaotic' substance use and have been involved in persistent offending. Within the context of the project, police officers, addiction workers and a recovery coordinator with lived experience, coordinate with the aim of helping people stabilise their problematic use and reduce reoffending. Peer mentors with lived experience are based in police custody suites in Glasgow with the aim being to support people with addictions and offending by providing support and access to services, with a focus on Glasgow Housing First services. However, as this initiative occurs during the booking process in a police custody suite it should be noted that it occurs after arrest, rather than fully diverting people who use drugs from the CJS (as per the Thames Valley Police, see Spyt et al. 2019).

A recent Social Return on Investment Study evaluating POP highlighted the cost effectiveness and social value of the approach; focusing on a one-year period the study suggested a social return of £4.50 for every £1 invested, while the corresponding figure rose to £7.50 when focusing on a 2-year period (Scott 2019b). Participating service users spoke of reductions in substance use, making better informed decisions about using substances and thinking about their actions before reoffending (Scott 2019b). Although based on a small sample, such qualitative findings are promising and clearly highlight the role of police officers in effectively supporting vulnerable people who face problems with substance use. A similar project has been introduced in Edinburgh (VOW Project); again a Police Scotland led initiative in partnership with Aid and Abet, with the aim of reducing offending and harm to people in Edinburgh. VOW works to empower young people (aged 16 and over resident in Edinburgh), involved with the CJS and deemed to be at significant risk of experiencing drug-related harm. A recent evaluation of VOW has also highlighting promising results in relation to desistance (O'Rourke and Buchan 2019).

Arrests and criminal proceedings

In Scotland, drug-related crime is recorded under the category "other crime". Specifically, according to the classification of crimes and offences, the category 'other crimes' includes "Production, manufacture or cultivation of drugs; possession and supply of controlled drugs; related money laundering offences and finally bringing drugs into prison" (Scottish Government 2020a).

Throughout the past decade, drug crimes have remained the biggest contributor to overall figures of recorded 'other' crime, despite a 12% decrease from 2009-10 to 2018-19 (Scottish Government 2019b). However, recent figures suggest a reversal of this downward trend with an 8% increase from 32,399 in 2017-18 to 34,831 in 2018-19, when drug crimes made up 56% of 'other crimes' (Scottish Government 2019b). It should also be noted that this upward trend was observed throughout Scotland with the majority of local authorities (25/32) reporting increasing figures (Scottish Government 2019b). A reason initially put forward for this

increase relates to an amendment to the Misuse of Drugs Act 1971, which extended the list of Class C controlled substances with the addition of etizolam (a type of benzodiazepine). However, this noted increase had also been discussed as potentially caused by operational decisions given that a majority of crimes related to drug possession – by far the biggest category of recorded drug crime – were identified during police patrols and warrant-based searches (Scottish Government 2019b). The very latest figures of drug crimes confirm its dominance amongst ‘other crime’ recorded in Scotland as it made up 55% of this category in 2019-20 (Scottish Government 2020a), with the vast majority of these – 86% – referring to drug possession charges (Scottish Government 2020a). However, we also need to note here that for this last year of reporting the introduction of new drug driving laws in Scotland – where police now have powers to test drivers suspected of drug use – may have impacted these figures.

On a global level, the predominance of possession charges amongst global data on drug offenses has been noted previously. Latest data available at EU level, also suggest that the vast majority of drug offenses involve possession charges (79% of offenses in 2017 – the latest year of analysis), and the majority of those (75%) involve cannabis (EMCDDA 2019). The latest available data at UK level, as reported by the UK Reitox Focal Point to the EMCDDA, resonate with the rather imbalanced picture; in 2015/2016 approximately 107,000 court convictions and police cautions for drug offences were reported in England, Wales, Scotland and Northern Ireland of which 63% (67,490) related to possession of drugs (UK Focal Point on Drugs 2019).

This picture is also reflected in Scotland where the majority of seizures of controlled substances in Scotland in recent years is estimated to involve seizures for drug possession crimes, where quantities are small enough to be considered for personal use rather than crimes of supply. As shown in the Table 7.2 below, numbers of seizures from crimes relating to drug possession have consistently outnumbered those relating to crimes of possession with intent to supply (Scottish Government 2019b).

<INSERT TABLE 7.2>

Latest available data from a review undertaken each year on a subsample of 400 cases involving drug possession charges, clearly highlight the predominance of cannabis. In 2018-2019, cannabis was the most commonly seized drug by a considerable margin (51.0%), which in absolute numbers translated into 15,200 crimes of cannabis possession (Scottish Government 2020a).

Such figures raise questions about best use of police and forensics resources and time. Should police enforcement efforts be focused on types of crime (i.e. possession) where the quantity of drugs seized is small enough to be considered for personal use? Evidence from Portugal where de jure decriminalisation of drug possession has been implemented since 2001, highlight that a significant number of possession cases were diverted from the CJS while charges for trafficking increased by 11% when comparing the four years prior to decriminalisation with the four years subsequent to it (Hughes and Stevens 2007). As the authors note, this latter figure “may reflect the increased focus on trafficking by the police, or an increase in the occurrence of trafficking in and through Portugal, or a combination of the two factors” (Hughes and Stevens 2007, p.4). Although an in-depth analysis of the policy

change in Portugal is beyond the scope of this chapter, such figures necessitate reflection in the context of the statistics quoted above for Scotland.

Cases proceeded to court, convictions and people sentenced to custody

Policing practices are a gateway to contact with and entry to the CJS. Although not the main focus of this chapter, we conclude this section by providing data on the number of people whose cases do proceed to court.

Latest figures on criminal proceedings in Scotland highlight that 5,655 individuals were proceeded against in court for drug-related offenses, with a charge proven in the vast majority (4,997) of cases (Scottish Government 2020b). According to a Freedom of Information request to the Scottish Government (FOI reference: FOI/18/02863), the number of people sentenced to custody for drug-related crimes from 2007-2008 until 2016-2017 (where these were the main crime) is subject to fluctuations, although an increasing trend can be observed for the final year the FOI focused on. In contrast to recorded crime data, the number of people who are sentenced to custody because of supply and possession with intent to supply offences, have outnumbered those who have received a custodial sentence for possession of drugs.

However, the number of people who are imprisoned for mere possession charges is by no means negligible, especially if we consider the impact of such an experience on people's lives. A detailed discussion of the effects of imprisonment is beyond the scope of the present discussion. However, we cannot but mention here that self-inflicted deaths are over six times more likely in prison than in the general population (Prison Reform Trust 2019), while for people who use drugs, experience of incarceration has been shown to be a risk factor increasing vulnerability to Hep C (Larney et al. 2013) and HIV infection (EMCDDA 2012). People with lived experience of prison experience a myriad of problems upon release including, but not limited to, loss of accommodation, diminished education and employment opportunities and stigmatisation. Far-reaching consequences on family life and relationships that can include loss of custody of children are also well documented in the literature (EMCDDA 2017). Parental imprisonment has also been discussed in the context of Adverse Childhood Experiences (ACEs), with children of incarcerated parents exposed to nearly five times as many other ACEs as their counterparts without incarcerated parents (Turney 2018). Experience of imprisonment in no way translates automatically into stopping drug use. This is aptly demonstrated in the most recent Scottish Prisoner Survey where 39% said that they had used illegal drugs in prison at some point, a figure which has remained the same since 2015 (SPC 2020). Finally, for people who use drugs, release from prison has been consistently highlighted as an overdose risk factor (EMCDDA 2017).

An alternative future of policing of drug in Scotland: Demanding the impossible?

In writing this chapter we were guided by the concept of risk environment (Rhodes 2002) to analyse how drug policy, organisational level policies and policing practices shape the context within which people who use drugs live and operate. Whilst the *language* of the policy context signals a progressive approach, there is a gap between policy and practice. We highlighted

that despite devolution, Scotland is constrained in its response to its drug problem by UK level legislation – the 1971 Drugs Act – which has been criticised over “the lack of effectiveness ... in drawing the right balance between the dangers associated with each type of drug, in deterring drug use and in providing a fair, balanced and proportionate response to drug use by different (particularly ethnic) groups in society” (Reuter and Stevens 2007, p.50). As we have shown, the proportion of searches conducted on the basis of drugs is very high in Scotland, yet Stevens (2013) calls for a reduction in expensive and potentially counter-productive approaches like large scale stop and search. The majority drugs found were class B drugs and the vast majority of drug analysis cases referred to SPA Forensic Services in 2019 were for possession. This suggests that a different approach will need to be taken if, as per the Police Drugs Strategy, enforcement is to be targeted towards suppliers posing the greatest threat. We discussed how Scottish government initiatives (for example, the National Naloxone Programme) and Police Scotland organisational-level policies are being implemented with the aim of reducing harm resulting from involvement with drugs. In this respect and in relation to Scotland, we agree with Bacon (2021) that on a global scale, and despite the continuous focus on supply and demand reduction, drug law enforcement policies and practices are characterised by a greater focus on harm reduction. Although these are positive moves forward, clearly in order to bring significant changes to the policing of people who use drugs there is a need for fundamental shifts in the ‘field’, including legislation.

That said, real change in police practice and culture will also require effective leadership and a strong commitment to organisational justice (Aston et al. 2019). Furthermore, as Bacon (2016) argues, clear definitions, guidelines and training is needed to focus policing practice on how to target harms. We highlighted the usefulness of these suggestions in examples from countries where decisive action and strong messages from leadership have allowed police to begin to push the boundaries and practice ‘outside the lines’ of current restrictive policies, with the aim of protecting the health and wellbeing of people who consume drugs. Although we note the existence of police-led initiatives (for example POP and VOW) we would like to see diversion from the criminal justice system at the earliest possible point. We also note reticence in taking more resolute steps that would enable the introduction of life saving interventions such as Safe Consumption Rooms in Scotland. We thus call for clearer, stronger messages from police leaders and partners in Scotland to pave the way for harm reduction to be firmly recognised as a basic human right and open up possibilities for policing practice that upholds and protects this right. Some of this is now evident in the Drug Law Reform Report (DDTF 2021), which makes recommendations for change.

As things stand, we are in a stalemate, with some possibility for action which may well be negated by the wider context within which it occurs – a context created by the criminalisation of the possession of illicit drugs. We thus call for further consideration to be given to ameliorating the harms resulting from the policies that govern the drug problem in the UK and Scotland. Furthermore, in this field, advocacy groups, activists, recovery communities and others with lived or living experience of drug use may have a central role, as will public engagement and political will. What we ultimately propose, is to go back to the drawing board to change the limits of what can be done. There is very little doubt that the punitive approach that has been implemented towards the drug problem – globally, as well as in the UK and Scotland – has failed to address the problem; if anything it has created more harm. In acknowledgment of this, across the globe jurisdictions are decriminalising drug use (Eastwood

et al. 2016). The evidence-base on positive outcomes of alternative to criminalisation approaches in relation to the harm caused by criminal convictions, to rates of recidivism and drug-related health harm is growing (Stevens et al. 2019). What is thus needed for Scotland is the political courage to acknowledge the stalemate produced by heavily prohibitionist policies and the will to re-design the chessboard that is the policy landscape. In doing so, Scotland would move towards ensuring effective support of people who use drugs, the respect of their human rights and the promotion of social justice for them, their families and their communities. If the rules are not working, it is time to change them. As ancient Roman statesman Cicero famously said: “The Welfare of the people is the ultimate law” – it is high time Scotland listens.

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¹ We identify harm reduction policing as a set of policies and practices that engage “communities in a manner that builds trust, addresses the needs of individuals using drugs, and reduces adverse effects of drugs and drug enforcement” (Krupanski 2018, p.4)

² We should note here that in May 2021, the Scottish Lord Advocate announced his resignation, prompting some to hope for a reconsideration of the issue (Powell 2021).

³ A positive stop and search is when an item is recovered where possession implies criminality on the part of the person being searched or where an item has been recovered which is potentially harmful.