



Law Society
of Scotland

Consultation Response

Proposed Drugs Death Prevention (Scotland) Bill

September 2022



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Criminal Law, Licencing Law and Health and Medical Law committees welcome the opportunity to consider and respond to the consultation on the proposed Drugs Death Prevention (Scotland) Bill¹. We had considered some of the issues around the use and misuse of drugs in Scotland previously, for instance, in written evidence to the UK Parliament's Scottish Affairs Committee in 2019². Our committees have the following comments to put forward for consideration.

Aim and approach

1. Which of the following best expresses your view of the proposed Bill?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially oppose
- Fully opposed
- Do not wish to express a view

Please explain the reasons for your response.

Partially oppose - There were 1,339 drug deaths in Scotland in 2020, significantly higher than for countries elsewhere in Europe³. The Registrar General's Annual Review of Demographic Trends showed that in 2021 drug deaths in Scotland were the second highest number ever recorded at 3 and a half times the UK rate. Furthermore, those living in the most deprived areas of Scotland were more than 15 times as likely to

¹ [220523--opc-consultation-final.pdf \(parliament.scot\)](#)

² [12-04-2019-crim-scottish-affairs-committee-use-and-misuse-of-drugs-in-scotland-call-for-written-evidence-003.pdf \(lawscot.org.uk\)](#)

³ [Drug deaths in Scotland reach new record level - BBC News](#)

die from drug misuse⁴. The response to drug misuse in Scotland must be multi-faceted, involving education, healthcare and justice. The ways in which this should be addressed involve issues of social policy beyond the scope of our committees. Our committees comprise practitioners involved in the prosecution and defence of drug offences, academics, medical practitioners and others across civic Scotland: our response focuses, in large part, on the justice response to the misuse of drugs.

In our response to the Scottish Affairs Committee in 2019, we discussed the use of safe drug consumption rooms, stating:

“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 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.”

We are partially opposed to the Bill, on the basis that amendment to the Misuse of Drugs 1971 Act is needed. The operation of overdose prevention centres (OPCs) may involve offences under the 1971 Act, both for users of these services and for the staff involved in providing these services. The misuse of drugs is a reserved area under Schedule 5 of the Scotland Act 1998, and unless the UK Parliament legislates to permit OPCs, or the competence of the Scottish Parliament is extended by an Order in Council under section 30 of the Scotland Act 1998⁵, we believe that criminal offences may occur in their provision.

Prosecutions must be in the public interest, and it falls within the discretion of the Lord Advocate as to which suspected offences should be brought forward. The consultation paper notes that the Lord Advocate has stated that police officers may choose to issue a recorded police warning for simple possession offences for all classes of drugs⁶. We note that the current Lord Advocate stated in her evidence to the Criminal Justice Committee in November 2021 that the question of prosecution in the public interest, could be re-examined in relation to consumption rooms “where a detailed set of proposals is brought forward and

⁴ [Scotland's Population 2021 \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk)

⁵ [Scotland Act 1998 \(legislation.gov.uk\)](https://legislation.gov.uk)

⁶ [Lord Advocate statement on Diversion from Prosecution | COPFS](#)

we are confident that they are based on sound evidence”⁷. However, the degree to which prosecutorial discretion may need to be applied to allow OPCs to operate effectively is concerning. It is a fundamental principle of the rule of law that questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.

It is also a principle of the rule of law that laws should apply equally to all, save to the extent that objective differences justify differentiation. However, OPCs might be implemented, there would be some areas in Scotland where these services may be available, and some in which they were not. This may well be objectively justifiable, focusing services in areas of most need, requires a wider consideration of the way in which the criminal justice system treats people with drug dependency issues. We must avoid a situation in which people with drug dependency issues in comparable situations, can use an OPC in one area and in another face criminal prosecution and potentially, a custodial sentence.

The consultation paper notes several offences under the 1971 Act and how these might be considered in the context of overdose prevention centres (OPCs). In assessing the relevance of these to the OPCs, it would be helpful to have more detail around the services envisaged to be provided. For instance, the level of medical involvement towards an agreed drug treatment plan, or the types of drugs to be permitted. The consultation paper notes that the smoking of opium, cannabis or cannabis resin would not be included within the licensing regime proposed, though other drugs can also be smoked, such as methamphetamine. We note that this is potentially a criminal offence under part 1 of the Smoking, Health and Social Care (Scotland) Act 2005⁸ for service users and service providers as this prohibits smoking in certain wholly or substantially enclosed places which are being used wholly or mainly as a place of work or which are being used wholly or mainly in the provision of education or health or care services.

Regarding specific offences under the 1971 Act, more detail around the practical operation of OPCs would be helpful, we agree with the consultation paper that section 4 offences may not occur, as there is not the supply or production of controlled drugs (other than potentially the administration of drugs such as Naloxone in a medical context to avert overdose however we note the specific regulations⁹ and competency framework training in place which relate to its provision other than on prescription by a medical professional).

Users of OPCs will contravene section 5 of the 1971 Act in possessing controlled drugs. Service users would be possessing controlled drugs in travelling to an OPC and while consuming those drugs in an OPC. Service providers may be committing that offence, particularly if controlled drugs are left behind or mislaid. There are statutory defences to this offence, at section 4(4):

“(a) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of preventing another from committing or continuing to commit an offence in connection with that drug and that as soon as possible after taking possession of it he took all such steps as were reasonably

⁷ [Official Report \(parlamaid-alba.scot\)](#) at page 20

⁸ [Smoking, Health and Social Care \(Scotland\) Act 2005 \(legislation.gov.uk\)](#)

⁹ [The Human Medicines \(Amendment\) \(No. 3\) Regulations 2015 \(legislation.gov.uk\)](#)

open to him to destroy the drug or to deliver it into the custody of a person lawfully entitled to take custody of it; or

(b) that, knowing or suspecting it to be a controlled drug, he took possession of it for the purpose of delivering it into the custody of a person lawfully entitled to take custody of it and that as soon as possible after taking possession of it he took all such steps as were reasonably open to him to deliver it into the custody of such a person.”

It may be possible to operate a OPC in line with these statutory defences, though would require strict policies around the destruction of any controlled drug or the delivery of these substances to the police. If there was prosecutorial discretion around the possession of controlled drugs at OPCs, there may remain a practical question around transit to these OPCs. As a comparison, it is an offence under section 49 of the Criminal Law (Consolidation) (Scotland) Act 1995 to possess an article with blade or point in a public place without reasonable excuse. The scope of reasonable excuse regarding possession of a controlled drug may need to be considered, for instance, evidence of pre-booking an appointment or prior contact with an OPC.

The consultation paper notes that section 8 offences may not occur at OPC locations for persons being the “occupier or concerned in the management of any premises”. The OPC services would not involve knowing permission or suffering of the “supplying or attempting to supply a controlled drug to another in contravention of section 4(1) of this Act or offering to supply a controlled drug to another in contravention of section 4(1)... preparing opium for smoking... [or] smoking cannabis, cannabis resin or prepared opium”. The policy of the OPC may need to be strict in terms of, as noted above, the services offered to ensure that smoking of controlled drugs – and smoking of tobacco products – is not allowed. Practically, we also believe that OPC providers would need to ensure sufficient security measures to ensure that no attempt was made to deal controlled drugs on the premises.

Section 9A offences relate to the supply of articles for administering or preparing controlled drugs. There is an exemption for the provision of hypodermic syringes, though there may be other types of material involved. Under the Misuse of Drugs Regulations 2001 SI 3998, regulation 6A (3)¹⁰ permits the provision of foil, as a safer alternative to syringe, where this is either to engage a patient in a drug treatment plan, or which form part of a patient’s drug treatment plan. To avoid prosecution under section 9A¹¹, it will again be important for any OPC to have a clear and rigorous policy around drug paraphernalia.

As noted above, the Lord Advocate has discretion around the prosecution of any offences. Without amendment to the 1971 Act to permit these OPCs, there will be breaches of the law, whether prosecuted or not as a result of that discretion. We cannot support the proposed Bill, because of that reliance on discretion over the law as currently stands. We indicate our partial rather than full opposition on the basis that the 1971 Act could be amended to allow for OPCs.

¹⁰ [The Misuse of Drugs Regulations 2001 \(legislation.gov.uk\)](#)

¹¹ [The Misuse of Drugs Regulations 2001 \(legislation.gov.uk\)](#)

2. Do you think legislation is required, or are there are other ways in which the Bill's aims could be achieved more effectively? Please explain the reasons for your response.

As above, we believe that legislation is required to amend the 1971 Act.

3. Which of the following best expresses your view of the proposal to establish overdose prevention centres?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Do not wish to express a view

Please explain the reasons for your response.

Partially opposed - OPCs may have a role in addressing these issues, and a recent study published in the Lancet states, "overdose prevention centres... offer a new setting to deliver widely accepted and evaluated treatments, with no evidence they increase crime or drug use. The safest response to prevent harm is to support, and not oppose their introduction."¹²

While we do not support the proposed Bill, there is a case to be made in the same terms for amendment of the 1971 Act. The degree to which this will address the drug problem across Scotland will need to be evaluated, and a concern around the response of the criminal justice system outside these areas will need to be addressed.

¹² [https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667\(22\)00038-X/fulltext](https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(22)00038-X/fulltext)

4. Which of the following best expresses your view of the proposal for a licensing regime to enable the establishment of overdose prevention centres?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Do not wish to express a view

Please provide reasons for your response, including on the proposed conditions for licensing (see pages 12 to 14 above) and on the proposal that health and social care partnerships are responsible for licensing and scrutinising OPCs?

We are fully opposed to a licensing regime on the basis that amendment to the 1971 Act is required. We do not think that it is lawful to license premises to facilitate potential criminal offences.

5. Which of the following best expresses your view of the proposal for a new body, the Scottish Drug Deaths Council?

- Fully supportive
- Partially supportive
- Neutral (neither support nor oppose)
- Partially opposed
- Fully opposed
- Do not wish to express a view

Please provide reasons for your response, including views on the proposed functions of the SDDC (see pages 14 to 16 above) and on how it should operate in practice.

Neutral - We believe that the scale of drug dependency and fatality through drug misuse in Scotland deserves specific attention. If a Scottish Drugs Death Council is implemented, this would require significant resources. There would also need to be consideration, for instance, in how this role coordinates with that of the Crown Office and Procurator Fiscal Office around Fatal Accident Inquiries. We also note that an express remit of its powers would be required.

Financial implications

6. Any new law can have a financial impact which would affect individuals, businesses, the public sector, or others. What financial impact do you think this proposal could have if it became law?

- a significant increase in costs
- some increase in costs
- no overall change in costs
- some reduction in costs
- a significant reduction in costs

Please explain the reasons for your answer, including who you would expect to feel the financial impact of the proposal, and if there are any ways you think the proposal could be delivered more cost-effectively.

We do not have comments at this stage.

Equalities

7. Any new law can have an impact on different individuals in society, for example as a result of their age, disability, gender re-assignment, marriage and civil partnership status, pregnancy and maternity, race, religion or belief, sex or sexual orientation. What impact could this proposal have on particular people if it became law? Please explain the reasons for your answer and if there are any ways you think the proposal could avoid negative impacts on particular people.

There may be equality factors around these proposals, for instance, the far larger numbers of male fatalities from drug misuse. As above, there may also be geographic and socio-economic factors, with the concentration of drug misuse in urban areas, the availability of OPCs, and the very different outcomes for people in comparable circumstances depending on location¹³.

¹³ [Scotland's Population 2021 \(nrscotland.gov.uk\)](https://www.nrscotland.gov.uk)

Sustainability

- 8. Any new law can impact on work to protect and enhance the environment, achieve a sustainable economy, and create a strong, healthy, and just society for future generations. Do you think the proposal could impact in any of these areas? Please explain the reasons for your answer, including what you think the impact of the proposal could be, and if there are any ways you think the proposal could avoid negative impacts?**

We do not have comments at this stage.



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