A modest proposal to decriminalise the simple possession of drugs.

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Introduction

In recent years, decriminalisation of drug possession has been recommended by international public bodies, including the United Nations (UNCEBC, 2019) and the World Health Organisation (WHO, 2017). In the UK, it has been backed by the Royal Society of Public Health, the Faculty of Public Health (RSPH & FPH, 2016), and both the Scottish Affairs Committee (2019) and the Health and Social Care Committee (2019) of the House of Commons. None of these bodies have specified how decriminalisation should be done; a question which has many possible answers (Greer et al., forthcoming).

Here we present a modest proposal to decriminalise the simple possession of drugs (without intent to supply) by repealing the subsections of the Misuse of Drugs Act 1971 (the MDA) that criminalises this activity. This would leave substances controlled under the MDA in a similar position to those that are currently controlled under the Psychoactive Substances Act 2016 (the PSA); it would be illegal to import, produce or supply them, but simple possession would not be a criminal offence.

This proposal is modest in several ways. It does not require a new legal framework, but rather draws on that provided by the existing MDA. It stops far short of the type of legal regulation of the production and sale of drugs that many call for. It would therefore do little to resolve problems that arise in the illicit market for these substances, such as violence and exploitation of children and vulnerable adults. It reflects the existing moves away from criminalising people for possession of controlled drugs that are already being taken by police forces, who increasingly use out of court disposals for simple possession offences. Police would retain the power to search and confiscate these substances when there are reasonable grounds to suspect importation, production, supply or intent to supply.

The proposed change would, however, represent a significant step away from the failed punitive logic of UK drug policy. It would remove a law that has been used to create 2.9 million criminal records resulting from convictions and cautions in Great Britain in the last 50 years, so preventing the harms of criminalisation from being added to those experienced by many people who use drugs.

The harms of criminalisation

The harms imposed by the criminalisation of drug possession are multiple. Most obvious are the direct harms of arrest and punishment. Relatively small numbers of people are sent to prison for drug possession. In 2019, 819 immediate custodial sentences were given for such offences in England and Wales (MoJ, 2020). Much larger numbers get a criminal record by being convicted of the offence at Court or through being given a police caution, although these numbers have been dropping as police forces have made more use of out of court disposals, such as warnings, on the spot penalties, and more recently community resolutions, and as the use of stop and search has fallen significantly over the last decade. In 2010, there were 43,406 convictions and 36,007 cautions for drug possession, by 2019, these numbers has fallen respectively to 21,641 and 13,049, a still significant number of people criminalised every year (MoJ, 2020). A much larger number are harmed by the imposition of stop and search for suspected drug possession. In 2019, there were 558,973 stop and searches, of which 57% were carried out on suspicion of drug offences (Home Office, 2020). It is well documented that these harms fall especially hard on people from racialised communities (see the chapter in this volume by Akintoye, Amal and Stevens).

Beyond the direct and immediate harms of entanglement in the criminal justice system are the less tangible, but longer lasting, harms to individuals and communities. Criminalisation leaves stigmata in the form of criminal records and the necessity to declare such offences in job and visa applications. For communities that are over-policed and under-protected, which are often those where large numbers of Black people live, the disproportionate searching, arresting and criminalisation of young people is a barrier to the creation of trusting relationships with the police, and even with other agencies of the state.

The MDA, as with previous Acts of Parliament that prohibited controlled drugs, sought to deter use of these substances through the threat of criminalisation. However, in the last 50 years the UK has witnessed huge growth in consumption many of controlled drugs. At the same time, there has been a significant increase in drug related harms, not only the high rates of criminalisation but also record levels of drug related deaths. Criminalisation has not reduced use by deterrence; use has increased. The legislative framework for possession of drugs appears to have little impact on a person's decision to use them, and so we should focus on models that reduce harms. Reforming the MDA to repeal the offences of possession is a first step in that process.

The relevant sections of the Misuse of Drugs Act 1971

The most relevant part of the MDA is section 5, specifically section 5(1) and (2). They make it a criminal offence to possess any of the substances which are defined as controlled drugs by the Act, unless that person or substance is exempted by other sections of the Act, including by the Misuse of Drugs Regulations 2001. Section 5(3) makes it an offence 'for a person to have a controlled drug in his possession, whether lawfully or not, with intent to supply it to another'. Schedule 4 provides the maximum punishments available to the Courts for those found guilty of an offence under the Act, including an offence under section 5(2).

It is worth noting here that Parliament recognised (in section 5(2A)) the limits to criminalisation of simple possession in 2011. When creating Temporary Class Drug Orders (TCDOs), legislators specified that section 5(1) and (2) would not apply to substances controlled under these orders. While simple possession of such substances was not criminalised under the MDA, section 23A was also inserted into the Act in order to enable police officers to search for and seize substances that are subject to TCDOs.

For other substances, it is section 23 that gives a constable the power to search persons or vehicles and to seize substances if they have 'reasonable grounds to suspect that any person is in possession of a controlled drug in contravention of this Act or of any regulations'.

Comparison to the Psychoactive Substances Act 2016

The PSA is by no means a perfect piece of legislation. It includes, for example, a definition of psychoactivity that is scientifically absurd (Stevens et al., 2015). It does, nevertheless, provide an interesting comparison to the MDA. Crucially, it does not create an offence of possession of the substances that it controls, except if there is intention to supply, or the possessor is in a custodial institution.

Sections 36 of the PSA provides powers to stop and search if there are reasonable grounds to suspect a person of contravening sections 4 to 9 of the PSA, which ban importation, production, supply and possession in a custodial institution (note: not possession outside a custodial setting). Section 37 gives powers to enter and search when there are 'reasonable grounds to suspect that there is relevant evidence in a vehicle'.

Section 43 of the PSA gives the power to retain any item found subsequent to a search carried out under sections 36 or 37, where that item can be used to determine an offence has been committed. An officer may also seize a psychoactive substance under section 43(5) regardless of whether it is relevant evidence. Essentially, section 36 or 37 allows for a search where there has been a contravention under the Act, but if a person is in possession for their own personal use then an officer, under section 43(5), can seize the substance. Sections 49 and 50 give powers to retain and dispose of seized substances.

Our modest proposal

In order to reduce the harms and costs of criminalisation, we propose removing the offence of possession by repealing subsection 5(1) and 5(2) of the MDA. If these subsections were repealed, but section 5(3) were not, it would no longer be an offence to possess substances that are controlled under the MDA, unless there was also intent to supply. The relevant part of Schedule 4 would also be repealed to remove the stated punishment for the offence.

This would also have the effect of limiting the power to stop and search under section 23 of the MDA, as simple possession would no longer be 'in contravention of this Act'. We consider this to be a strong advantage of this proposal, as it would limit the harms imposed by disproportionate and ineffective stop and search practices. We see no powerful argument why search powers should be retained for simple possession if it is no longer a criminal offence. Parliament did not believe it necessary to create a power to search on suspicion of simple possession of substances controlled under the PSA.

Section 23 (2) could therefore be amended to reflect the powers in the PSA, whereby an officer can lawfully seize a psychoactive substance even if it is not evidence of an offence having been committed. Thus streamlining the system of policing for all substances, those controlled under the MDA and those, which by default and a poorly defined definition of psychoactivity, fall under the PSA.

This proposal is not limited to any particular substances, as has been the case with some previous alternatives to arrest and prosecution for possession, such as cannabis and khat warnings. It would

follow other jurisdictions - including the Czech Republic, Spain, Portugal and the US state of Oregon - in applying decriminalisation to the simple possession of all controlled drugs.

This proposal does not, however, import some foreign innovation into UK law. It takes the current legal treatment of possession of substances that are controlled under TCDOs and the PSA and applies it to all substances controlled under the MDA. Simple possession is not a crime in the PSA, not for TCDOs, and we see no good reason why it should be in the MDA. Repeatedly Home Secretaries, and Ministers responsible for drugs, have rejected calls to decriminalise controlled drugs on the basis that the policy experience of other countries cannot simply be transferred into the UK context due to the difference in societal and cultural attitudes. In response to the 2019 Health and Social Care Committee's recommendation to consult on decriminalising possession of drugs, the Government stated they had "no intention of decriminalising drugs... We are aware of decriminalisation approaches being taken overseas, but it is overly simplistic to say that decriminalisation works. Historical patterns of drug use, cultural attitudes, and the policy and operational responses to drug misuse in a country will all affect levels of use and harm" (Home Office, 2021). Yet, the UK has already decriminalised possession of some drugs through the PSA and the use of TCDOs. Repealing the relevant sections of the MDA, as outlined above, would achieve policy consistence and clarity in the law, including for law enforcement.[1]

Counter-arguments

The main argument that is made against decriminalisation of drug possession is that it would increase harms by increasing use. It is often suggested that it would encourage drug use by 'sending the wrong message', and by reducing the deterrence of drug use by the threat of punishment for possession. These mechanisms do not seem actually to operate in practice. Several international analyses and reviews have found little evidence to support the idea that decriminalisation causes drug use to rise. It seems that young people tend not to pay much attention to the messages they are being sent by legislators when deciding what substances to consume. Given the rarity of police detection, relative to the numerous incidents of use, it is unsurprising that laws that criminalise possession have little deterrent effect.

[1] This argument for consistency between the MDA and the PSA was also included in 2016 in a report to the Home Secretary by the Advisory Council on the Misuse of Drugs on *Interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016*; a report that the government has so far refused to publish.

The absence of any punishment from the proposed model may lead to claims of going "soft on drugs", or that it will be politically unpalatable to consider taking no action against drug taking. As stated, the legal model and the threat of sanction has little impact on use, moreover countries such as Spain, Germany and Uruguay have, for decades, had systems where there is no punishment for possession of small quantities (Eastwood et al., 2016). There is a risk that inclusion of a sanction, such as civil fines issued by police, could lead to more people coming into formal contact with law enforcement (otherwise known as 'net-widening') or that failure to attend mandated treatment could result in a person being prosecuted for breaching an order (an example of 'mesh-thinning' (Cohen, 1985)).

Another argument made against decriminalisation is that it will make the job of police agencies harder when it comes to preventing, detecting and punishing the supply of controlled drugs. Current methods of controlling this supply are of doubtful efficacy, and may even be counter-productive by precipitating violence and other health harms. Some police officers, for example in Portugal, have reported that decriminalisation helps them to build better relationships with people who have drug problems, and so to improve the flow of intelligence, as well as the protection of this highly victimised group (Magson, 201400).

Additionally, it is sometimes argued tha removing the power to search for possession of drugs would limit the ability of police officers to find other prohibited items, such as weapons. The law is very clear in this area. The MDA, s23 requires that an officer must have reasonable grounds that a person is in possession of a controlled drug. It does not provide a general power to search for any prohibited item. To use it as a pretext to do so is unlawful. Such an approach risks damages legitimacy and trust in the police, and - as highlighted above - decriminalisation could in fact improve the public's view of law enforcement, especially amongst communities that are overpoliced (see the chapter in this volume by Akintoye, Ali and Stevens).

A counter-argument from a different perspective would come from those who want more radical reform. They will rightly point out that we need to go beyond decriminalisation of possession to the legal regulation of drug supply if we want to take the market for these substances out of the hands of organised crime. However, if legal regulation will happen substance by substance, we would still argue that we should decriminalise the simple possession of *all* substances.

Conclusion

We should note that our proposal relates only to decriminalisation. We have not made suggestions for increasing capacity for diverting people to education or treatment, as exists in Portugal and Oregon. This is largely because we believe that most people who use controlled drugs have no more need for education or treatment than the usual consumers of other drugs, such as alcohol or tobacco. If drug use is to be prevented, let us do it through measures that have evidence of positive effect, which criminalisation does not. If people need treatment, let that be provided to them in attractive, accessible and voluntary forms.

No doubt this proposal will be politically controversial. It will spark debates about how harmful drugs are, and the damage they can do to mental health, children and the developing brain. These arguments seem rather irrelevant to the question of whether to decriminalise possession, given the lack of evidence that it changes levels of drug use. Many substances that are controlled under the PSA are potentially more harmful than several of those listed under the MDA (including in class A), but their possession is not criminalised. We see much stronger evidence that decriminalisation can reduce the harms of stop and search, arrest and criminalisation (Stevens et al., 2019), and so propose the repeal of subsections 5(1) and 5(2) of the MDA in order to reduce these harms.

Acknowledgement

This chapter builds on a paper presented to the Criminal Law Reform Now conference in September 2021.

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