

# Proposals for Decriminalization of Illicit Drug Use: Considering a Combination of *déjà-vu*, Diversion and Devil-with-many-details for Health-oriented Policy Reform

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## Keywords

decriminalization, illicit drug use, drugs, criminal justice, health policy

In February 2021, the Liberal government tabled Bill C-22, a bill proposing to purge mandatory minimum penalties (MMP) for multiple criminal offences in Canada, including several of the Controlled Drugs and Substances Act's drug supply offences.<sup>1</sup> Furthermore, the government announced for the bill to include provisions that will “require police and prosecutors to consider alternatives to laying charges in simple [drug] possession cases, such as diversion to treatment [ . . . towards] leeway to use conditional sentence orders in cases where an individual is not a public safety threat.”

Little of the proposed reforms is new or innovative. The MMPs proposed for deletion were introduced by a previous (Conservative) government, thus reverting to an earlier status quo. Moreover, “conditional sentencing” is a dated (1996) justice reform vehicle towards increasing use of “alternative punishments” to mainly keep non-violent offenders from incarceration, to improve sentencing and to reduce costs. The C-22 initiative, however, fits within a currently popular chorus promoting “decriminalization” of illicit drug use in Canada including leading stakeholder voices from health, legal, and other sectors.<sup>2</sup> Its volume has been amplifying, especially in the face of the unrelenting “opioid crisis” and related overdose-mortality, yet persistent lack of soundly effective solutions. Several countries have implemented decriminalization approaches for illicit drug use, which vary widely in design and operations.<sup>3,4</sup> But beyond these variations, and while many Canadians agree with the general concept of “decriminalization” of illicit drug use, decriminalization is a complex construct with potential for multiple—some hidden—pitfalls or unintended adverse consequences. Some of these have been considered previously within cannabis policy reform debates (but were mostly avoided in Canada by opting for legalization and regulation of cannabis). Key issues include:

First, while “decriminalization” can generally be seen as a laudable concept, given its premise of reducing the severity of punishment for personal drug use, it sends ambivalently normative messaging. “Decriminalization” approaches still involve categorical delineations of “right-and-wrong” combined with punitive consequences for illicit drug use, implying that health and safety is conditional on abstinence (i.e., non-use). While this may be more contentious for cannabis than for drug use involving higher risk for harm decriminalization implies continuous punishment for what is typically an ongoing, chronic disease-based behaviour. Thus, decriminalization approaches may reduce the severity, but not the fundamental illogicality of punishment.

Second, many “decriminalization” approaches come in form of “diversion” provisions, that is, arrangements where a criminal charge/sentence is suspended, or reduced, in favour of alternative interventions imposed on the drug

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user/offender. The criminal sentence remains inactive as long as the offender complies with the alternative measures designated (which can be multifold and/or extensive), as is the essential mechanic behind “conditional sentencing.” For illicit drug use offences, this commonly occurs through an offender’s diversion to addiction treatment. “Drug treatment courts” are popular practical examples for this approach.<sup>5</sup> While “treatment orders” appear therapeutically benevolent for a drug-using offender, they however are a mixed blessing. Many such offenders do not qualify for a drug use “disorder” (“addiction”) condition and therefore find themselves misplaced in treatment. Furthermore, addiction treatment in Canada greatly varies in approaches, availability, and quality. Even within high-standard programs, depending on drug and patient characteristics, drop-out or relapse usually far exceed retention and success rates.<sup>6,7</sup> These factors combined, even with best intentions (and typically involving judges without related expert knowledge), set up many offenders for failure and likely return-paths to court. Moreover, the perceived benevolence and punitive threshold-lowering of diversion can lead to “net-widening” effects, pulling increasing numbers of individuals into—yet primarily punitive—criminal justice processes.<sup>3</sup>

Third, many criminal justice-initiated alternatives to punishment involve institutionalized “discretion,” for example, by police or prosecutors, as to whether diversion approaches should be used.<sup>4,5</sup> These decisions rely on mostly subjective judgements of individual or behavioural characteristics of the offender, while in practice commonly translate into expressions of socio-racial biases, stigma, or outright discrimination. While many justice system authorities prefer to use punitive over alternative or “soft” approaches, almost any user of illicit drugs may indicate some (subjective) reason possibly viewed as a possible “public safety” threat. “Discretion” is a well-recognized, universally tricky challenge in justice system operations. Its enactment precariously positions police or prosecutors as “judges” ruling on the “deservingness” of drug use offenders for alternatives to punishment.

Fourth, with “decriminalization” aiming to reduce the reach and severity of legal punishments for illicit drug users, its application to personal drug possession offences-only misses the mark by design. Especially among users intensively involved with addictive (e.g., opioids/psychostimulants) drug use, law-breaking by circumstance is rarely limited to drug possession-specific offences. As long as the drugs of consumption are illegal and can only be sourced from illegal (e.g., “black market”) sources, most users inevitably are involved with “drug supply” offences—illegal drug purchasing, trading or “trafficking”—on a regular basis. Moreover, many ongoing, and especially socially marginalized (e.g., homeless) users, are continuously involved with other illegal activities including theft, fraud/forgery, burglaries, or sex work necessary towards supporting and funding their illicit drug use needs.<sup>8</sup> In fact, many illicit user find themselves more commonly entangled with the justice

system for these acquisition-type illegal behaviours than for actual *per se* drug possession offences. Therefore, meaningful “decriminalization” approaches ought to reasonably naturally consider and accommodate these consequential behaviours arising from illicit drug use in prohibition-based frameworks, as long as users are forced to obtain their drugs of use from illegal and unregulated sources. Otherwise, the detrimental effects of punishment, marginalization, and stigma will simply continue through these dynamics.

Fifth, “decriminalization” approaches offer little sustained advancement towards shifting fundamental reforms of “drug use” control from a criminal to a genuinely health-based and health-focused matter. Under most “decriminalization” frameworks, the predominant logic remains that of drug use as “crime” and “deviance,” principally governed by justice-based norms, authorities and consequences. Those measures and experts to supposedly serve the health or therapeutic interests of drug users/offenders come in only secondarily or “at the mercy” of justice-based provisions.<sup>3,5</sup> Crucially, “decriminalization” reinforces the hegemony of crime control over public health for illicit drugs; this largely means stalemate rather than progress for fundamental and sustained policy reform.

Thus, while “decriminalization” proposals for illicit drug use are popular and largely well-intended, their overall merits require cautious analysis and scrutiny. “Decriminalization” is highly unlikely to resolve the massive drug-related health and social harms Canada presently faces and experiences. Moreover, decriminalization frameworks are not simply transferable from one setting to another. In many current decriminalization discussions, reference to the “Portugal model” as a guiding blueprint for decriminalization is made. While Portugal’s decriminalization reforms for illicit drug use implemented in the early 2000s have been associated with some (limited) reductions in problematic drug use and related criminal justice burden while increased treatment uptake, it is rightly observed that decriminalization options fundamentally depend on social-cultural and structural system contexts involved.<sup>7,9</sup>

Rather, fundamentally more genuine and sounder reform concepts are needed—and especially given the extreme volatility and harm arising from currently prevalent illicit/synthetic opioid (fentanyl) use and supply—to genuinely move “drug use” from a crime to a public health issue in Canada. This, as has been conceptually accepted for cannabis, will inevitably require consideration of legalization and regulation frameworks. We appreciate that within the present realities of politics and public opinion, only “decriminalization” may be a realistic, immediate reform step forward; however, such steps should ensure that those involved in the risky or problematic use of illicit drugs should, without primary interference from or detours through the criminal justice system, reliably be referred to relevant health-based interventions (e.g., treatment, “safe supply,” other health programs). This, however, should not constitute an end in itself but rather an interim move to allow

for the development of best options for truly health-oriented legalization and regulation approaches for what is currently defined as illicit drug use. Without pre-empting such options, but acknowledging that the principal substances (e.g., opioids, psycho-stimulants) in question pose substantially greater risks for harms than cannabis, these would likely entail strictly regulated and controlled dispensing of pharmaceutical-grade products to adult consumers combined with comprehensive and complementary risk-reduction and treatment interventions.

### Authors' Note

BF led the conception, data collection/analysis and draft writing of the manuscript. NB and SB substantially contributed to the conception, collection and interpretation of data, and multiple draft revisions of the work for critically for important intellectual content. All authors gave final approval of the manuscript version submitted. Data are not available as this manuscript did not include any primary data. All data reported in this manuscript is secondary data.

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### References

1. CBC News. Liberals introduce new bill to relax penalties for drug offences. February 18 2021. [accessed 2021 May 17]. <https://www.cbc.ca/news/politics/justice-reform-drug-treatment-criminal-code-1.5917710>
2. Office of the Provincial Health Officer. Stopping the harm: decriminalization of people who use drugs in BC. Vancouver (BC): Office of the Provincial Health Officer; 2020.
3. Rolles S, Eastwood N. Drug decriminalisation policies in practice: a global summary. London, UK: International Drug Policy Consortium; 2012.
4. Unlu A, Tammi T, Hakkarainen P. Drug decriminalization policy literature review: models, implementation and outcomes. Helsinki: Finnish Institute for Health & Welfare; 2020.
5. Fischer B. Doing good with a vengeance: a critical assessment of the practices, effects and implications of drug treatment courts in North America. *Criminal Justice*. 2003;3(3):227-248.
6. Brorson HH, Arnevik EA, Rand-Hendriksen K, Duckert F. Drop-out from addiction treatment: a systematic review of risk factors. *Clin Psychol Rev*. 2013;33(8):1010-1024.
7. Babor T, Caulkins J, Fischer B, et al. Drug policy and the public good (2nd ed.). Kochi, Kerala: Oxford University Press; 2018.
8. Bennett T, Holloway K, Farrington D. The statistical association between drug misuse and crime: a meta-analysis. *Aggress Violent Behav*. 2008;13(2):107-118.
9. Stevens A, Hughes CE, Hulme S, Cassidy R. Depenalization, diversion and decriminalization: a realist review and programme theory of alternatives to criminalization for simple drug possession. *Eur J Criminol*. 2019:1-26.