

# Practical Drug Decriminalization in British Columbia

August 2019

*While the possession of illicit drugs for personal use ("simple possession") is a criminal offence,<sup>1</sup> individual provinces still have significant powers to redress some of the harms of drug prohibition. In light of the federal government's failure to meaningfully reform drug policy, provinces like B.C. can and must take legal steps to effectively ("de facto") decriminalize simple possession by re-directing police resources away from its criminal enforcement.*

## OVERVIEW

By every metric, the War on Drugs has been disastrously unsuccessful. This war has been waged foremost against Black, Indigenous and poor people.<sup>2</sup> Prohibition and the policing of drug-related offences fail to reduce the use and availability of illicit drugs and instead exacerbate public health concerns by driving drug use further underground.<sup>3</sup> Prohibition – not drug use – creates violence, crime, infection, disease, overdose, and an underground market of increasing toxicity.

In B.C., where a public health emergency has been in effect since April 2016, emergency harm reduction responses have been critical to curbing fatalities caused by prohibition.<sup>4</sup> The efficacy and accessibility of those responses, however, is undermined by persistent policing and law enforcement against people who use drugs.<sup>5</sup>

B.C. cannot wait on the federal government to decriminalize simple possession. Effectively responding to the opioid crisis requires the Province to use its own power and immediately amend its policing legislation so that policing practices do not frustrate public health initiatives. The amendment recommended below re-focuses policing priorities and improves access to health services and resources.<sup>6</sup> These are more than just 'within the scope of' the Province's power: they are the Province's responsibility.

<sup>1</sup> *Controlled Drugs and Substances Act*, SC 1996, c 19 ["CDSA"] at section 4(1).

<sup>2</sup> Boyd, S., & MacPherson, D. (2019). The harms of drug prohibition: Ongoing resistance in Vancouver's Downtown Eastside. *BC Studies*, (200), 87-96,302,305,308.

<sup>3</sup> See: Evan Wood et al, "The war on drugs: a devastating public-policy disaster" (2009) 373 *The Lancet* 989.

<sup>4</sup> BC Centre for Disease Control, *Overdose deaths would be at least twice as high without emergency harm reduction and treatment response*, 5 June 2019, available at: <https://science.ubc.ca/news/overdose-deaths-would-be-least-twice-high-without-emergency-harm-reduction>

<sup>5</sup> Darcie Bennett and D.J. Larkin, *Project Inclusion: Confronting Anti-Homeless and Anti-Substance User Stigma in British Columbia*, (Vancouver: Pivot Legal Society, 2018) ["*Project Inclusion*"] at pp. 44-52.

<sup>6</sup> The recommendation is in line with one made by B.C.'s Provincial Health Officer, Bonnie Henry, in her recent special report: *Stopping the Harm: Decriminalization of people who use drugs in BC*. The report calls on the Province to "enact regulation under the provincial Police Act to include a provision that prevents any member of a police force in BC from expending resources on the enforcement of simple possession offences under Section 4(1) of the CDSA." See: Office of the Provincial Health Officer, "*Stopping the Harm: Decriminalization of people who use drugs in BC*" (Provincial Health Officer's Special Report 2019), at p. 37. Available

## RECOMMENDATION

That the B.C. legislature amend the *Police Act*<sup>7</sup> to include a provision that prevents any member of a police force in B.C.<sup>8</sup> from expending resources on the enforcement of simple possession offences (the “Amendment”). The Amendment would prevent members from using police resources, including member time, on investigations, searches, seizures, citations, arrests, and/or detentions that relate solely to actual or alleged violations of simple possession laws.<sup>9</sup>

The Amendment requires no legislative changes to existing federal provisions regarding controlled substances under the *CDSA*. In combination with de facto decriminalization, and as a necessary response to B.C.’s public health emergency, the Province should also scale up evidence-based supports (including opioid assisted therapy, overdose prevention sites, treatment, and other health services) to improve the health and safety of people who use drugs.

## LEGAL ANALYSIS

Under the *Constitution Act*,<sup>10</sup> the provinces have exclusive powers to legislate certain issues, including:

- the *administration of justice* in the province; and
- the *health* of people in the province.

The recommended amendment aims to ensure (1) more effective policing in B.C. and (2) improved health for people who use illicit drugs through increased access to health and harm reduction services. These aims fit squarely within the above-noted enacting powers of the Province.<sup>11</sup> This Amendment has the potential to save lives in the midst of an ongoing drug poisoning crisis.

---

at: <https://www2.gov.bc.ca/assets/gov/health/about-bc-s-health-care-system/office-of-the-provincial-health-officer/reports-publications/special-reports/stopping-the-harm-report.pdf>

<sup>7</sup> *Police Act*, RSBC 1996, c 367.

<sup>8</sup> As defined under s. 1.1 of the *Police Act*. The amendment would apply to all members of police forces under the authority of the *Police Act*, including those belonging to municipal police departments and the RCMP operating in B.C.

<sup>9</sup> Sensible B.C. proposed similar legislation in 2012 regarding the offence of simple possession specifically in relation to cannabis, prior to its legalization. Elections B.C. accepted the legislation as constitutionally sound and suitable for a ballot initiative. There were an insufficient number of signatures to have a referendum, however.

See: <https://elections.bc.ca/docs/init/Sensible-Policing-Act.pdf>

<sup>10</sup> *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11.

<sup>11</sup> The Amendment does not conflict with or invalidate federal legislation, including the *CDSA*. It does not, for instance, create a program that necessarily entails *CDSA* violations—either for people who use drugs or for police and Crown Counsel, who have no positive obligation to enforce and prosecute all Criminal Code offences. Dual compliance with both the *CDSA* and the Amendment is possible, and insofar as the Amendment seeks to mitigate ineffective policing and improve health and safety for people who use drugs, the Amendment actually furthers the goals of the *CDSA* to protect public health and maintain public safety.

## Regarding the administration of justice in the province

The provincial legislatures have exclusive power to make laws about the administration of justice in each province.<sup>12</sup> This includes responsibility over policing and law enforcement in the province, with respect to both provincial legislation and the criminal law.<sup>13</sup> Decisions about the priorities of police forces in B.C. are also a provincial responsibility.<sup>14</sup>

The Amendment aims to ensure appropriate, effective policing and law enforcement during a public health emergency. This means limiting law enforcement when its impacts are harmful and counter-productive to human life, health, and safety. The enforcement of simple possession is a costly strain on the criminal justice system: failing to reduce the availability and use of illicit drugs, functioning at cross-purposes with public health initiatives by driving drug use further underground, and above all, churning people who use drugs through the criminal justice system and compounding stigma. By redirecting police resources away from the low-level offense of simple possession, the Amendment would minimize ineffective policing and its attendant harms.

## Regarding the health of people in the province

Provincial legislatures also have legislative powers over general matters of health within the province.<sup>15</sup> Drug possession may amount to a criminal offence, but the governments of Canada and B.C. have both recognized drug use as a public health issue, while courts have consistently recognized addiction as an illness.<sup>16</sup> Courts have also affirmed numerous provincial enactments and programmes concerning the health of people who use or are addicted to illicit drugs as valid exercises of the provincial health power.<sup>17</sup>

The Amendment aims to ensure better health outcomes for people who use drugs by reducing the adverse health impacts of low-level drug law enforcement and promoting access to life-saving health services without fear of law enforcement. Prohibition has been roundly criticized as a public health disaster. People living in fear of criminalization are forced to compromise their own health and safety habits to avoid police detection, including by avoiding life-saving drug-related health services and supports.<sup>18</sup> Removing the threat of arrest would encourage people to access services without fear of criminalization. In turn, the redistribution of resources would allow the Province to scale up and improve the efficacy of evidence-based health supports, including culturally safe, peer-run services.

---

<sup>12</sup> *Constitution Act* at s. 92(14).

<sup>13</sup> *O'Hara v British Columbia*, [1987] 2 SCR 591 at para 14.

<sup>14</sup> *Police Act* at s. 2.1.

<sup>15</sup> "Health" is not specifically enumerated under the *Constitution Act*, but courts have consistently regarded it as primarily a matter under provincial control. Section 92 (16) is regarded as the provinces' "residual power" over matters of health in the province, including "cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services." See: *R v Morgentaler*, [1993] SCR 463. See also: *Schneider v The Queen* [1982] SCR 112; *Bell Canada v Quebec*, [1988] 1 SCR 749 at para 18; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624.

<sup>16</sup> *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 ["PHS"] at para 27.

<sup>17</sup> For instance, in *PHS*, the Court confirmed that a supervised consumption site (in effect, a decriminalized 'zone') was a valid provincial health service. Moreover, overdose prevention sites in B.C. operate pursuant to provincial health legislation; the federal government has not challenged the Province's ability to do so.

<sup>18</sup> *PHS* at para 10. See also: *Project Inclusion* at p. 47.