



Policy Brief to the Standing Senate Committee on Legal and Constitutional Affairs: *Bill C-5*

Submitted to the Standing Senate Committee on Legal and Constitutional Affairs in Sept. 2022.

Diverting people who use substances away from the criminal justice system will not solve the drug toxicity crisis. But it is a step toward reducing the stigma faced by people who use drugs, and removing the health, social and economic harms of a criminal record.

Amendments to the *Controlled Drugs and Substances Act* (CDSA) through the passing of *Bill C-5* will enshrine opportunities for diversion in legislation.

However, ensuring that options for diversion successfully reduce the harms associated with substance use, relies on two factors beyond the legislation itself:

1. Police making appropriate use of diversion options, and
2. People being able to get timely access to a continuum of effective services and supports in their communities.

About 34 years ago, an act of Parliament established the Canadian Centre on Substance Use and Addiction (CCSA). We have an established reputation in Canada as an independent, neutral, nonpartisan and trusted third-party expert on substance use and addiction. Our work is always firmly rooted in science and sound methodology and driven by compassion. CCSA recognizes the power of the traditional knowledge held by Indigenous Peoples. These qualities have made CCSA a trusted adviser in Canada for all levels of government.

This submission identifies potential revisions to the bill to better align with the best evidence on alternatives to the criminalization of substance use. It also highlights actions that must accompany legislative change to achieve the intended impact.

Framing Substance Use as a Health and Social Issue

Substance use is a health and social issue that is most effectively addressed outside of the criminal justice system, and instead considers human rights and the social determinants of health.

The proposed principles outlined in *Bill C-5* section 10.1 are therefore welcomed as they clarify the spirit of the bill and establish how its success will be measured. Minor revisions would strengthen the principles. For example, section 10.1(c) could include a reference to the negative impact criminal sanctions have on health, relationships, employment and housing, in addition to the stigma of drug use. Among the root causes of adverse impacts of substance use are inequalities in the social determinants of health, including the impacts of poverty and racism on individuals. This could be explicitly recognized in section 10.1(d) or in a new clause.



The distinction between decriminalization and diversion is important. Decriminalization removes criminal sanctions. Various mechanisms can achieve this approach, including the repeal of section 4 of the CDSA or through a section 56 exemption, such as the one that will be in place in the City of Vancouver. *Bill C-5*'s diversion approach remains housed in the criminal justice system, with health and social measures as preferred alternatives. Diversion requires police to make judgments about an individual's health and social needs. For example, police would need to determine whether an individual's substance use merits referral to service or can be let go without further action. Not everyone who uses drugs needs treatment. Providing unneeded treatment is not only costly and burdensome to a stressed healthcare system, but it also risks doing more harm due to stigma and the potential impacts on employment and relationships.

Reducing Inequality

One of the stated objectives of *Bill C-5* is to reduce the inequality that is seen in the overrepresentation of Indigenous people, Black Canadians and marginalized populations in Canada's justice system. There is an established need to reduce inequality in the application of Canada's drug laws. For example, studies have shown that Black people in Toronto are significantly more likely to encounter police and to be charged with drug possession despite lower rates of use (e.g., Ontario Human Rights Commission, 2020).

Bill C-5 would amend the CDSA to clearly promote alternatives to arrest. But the final decision to take no further action, issue a warning, make a referral or lay charges lies with the police officer. Charging patterns are inconsistent among different police services. The Canadian Association of Chiefs of Police Special Advisory Committee on the Decriminalization of Drugs (2020) investigated this issue. They found that some urban police services report laying possession charges very rarely and primarily using alternatives (e.g., Vancouver), particularly in the context of the overdose crisis. Other police services continue with the status quo.

Police also have considerable variation in the alternatives available to them. Although some police services have directly embedded diversion options, timely access to evidence-based community services to support diversion options is a significant challenge, particularly for those outside of urban centres. In fact, part of the new Minister of Mental Health and Addictions' mandate letter is to address this challenge and advance access to a full range of evidence-based harm reduction and treatment options, but it will take time.

The disparities in police response highlight the need for clear guidance and monitoring to ensure that diversion reduces rather than perpetuates inequalities. As written, section 10.2(2) indicates that an officer's failure to consider these options would not invalidate the subsequent charges. This section of *Bill C-5* provides an opportunity for continued criminalization without recourse for those for whom alternative measures would have been preferable.

Additionally, CCSA supports the amendments of automatic sequestration of records of past convictions for simple possession, as outlined in section 10.6 of the bill if the changes maintain that this information would not be admissible in court. CCSA supports monitoring the impacts of diversion through record keeping if it does not detrimentally impact individuals with a record. This data collection is important to monitor the impacts of net widening (see below). These amendments reflect the evidence in acknowledging and responding to the harms associated with criminal records and the intent of the bill to reduce the inequality in the application of Canada's drug laws.



Net Widening

Implementing a diversion scheme can result in net widening, which is an increase in the number of individuals entering the criminal justice system following the implementation of a diversion scheme. For example, police may have given informal warnings before the diversion scheme. With diversion, they may decide to refer people to treatment instead. In this case, more people may be sent to treatment or to the court rather than being diverted people from the justice system altogether. Net widening can also include increased use of fines and informal interactions with police, which can be traumatizing for racialized populations. Net widening usually occurs when the diversion option is easily administered, when there are incentives for police to issue more alternative measures (e.g., performance targets) and when there are criminal justice sanctions for noncompliance (e.g., being fined or jailed for not completing treatment) (Hughes & Ritter, 2008; Shiner, 2015). To help avoid a net-widening effect, clear decision-making supports and training are needed for the appropriate use of alternative measures. This includes providing a clear understanding of the principles proposed in section 10.1 and data collection.

Building Capacity for Successful Implementation

Legislative and regulatory changes alone do not determine the success of substance use policy. The following actions are important to communities' capacity to support the implementation of a diversion model:

- Provide sustainable investment in an integrated continuum of timely and evidence-based community health and social services that address the gaps in access and availability of culturally appropriate supports and services in rural and remote communities.
- Provide training, protocols and policies that clearly communicate the objectives of the bill to promote its consistent, appropriate and equitable application.
- Provide training to criminal justice authorities, including police and the courts, to increase understanding of substance use and reduce stigma (e.g., Canadian Centre on Substance Use and Addiction, 2020).
- Improve data collection and reporting to allow for the monitoring of the bill's impact on equity-seeking groups to ensure the bill does not adversely impact these communities.

These plans to build capacity are important, and need to be clear and coincide with the enactment of *Bill C-5*.

Evidence-Based Approach

No one intervention on its own, including diversion, can address the complexity of substance use. A comprehensive, multisectoral approach is needed. This includes providing concurrent investments in a continuum of treatment, social and health services, and utilizing the lived and living experience of people who use drugs. CCSA has researched and presented our findings in the [Decriminalization: Options and Evidence](#) policy brief. We continue to monitor the evidence on various approaches to address the harms of substance use, and we stand ready to share our expertise.

Conclusion

By creating alternatives to criminalization, *Bill C-5* provides a step toward recognizing substance use as a health and social issue rather than a criminal justice issue. Based on a diversion rather than



decriminalization model, the bill faces challenges associated with reliance on police discretion and community resource capacity to achieve this objective, as well as the objective of reducing inequity.

Evidence on police diversion models shows that the following are essential to best achieving the objectives of the proposed legislation:

- Effective communication of the bill's principles,
- Training in their application,
- Investments and improvements in the range and accessibility of community services and supports, and
- Performance data that measure both application and impact.

References

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