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# 'Discursive struggles' between criminal justice sanctions and health interventions for people who use drugs: a qualitative exploration of diversion policy and practice in Scotland

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## ABSTRACT

Amidst growing recognition that people who use drugs are often vulnerable and in need of health-focused support, international conventions and national priorities on personal drug use are changing with emphasis shifting from criminal justice to health narratives. In Scotland, there has been a move toward health-led drug policymaking, and yet little is known about how diversion operates in this context. An exploratory qualitative study was conducted utilizing semi-structured interviews with professionals holding lead, strategic-level roles in Scottish diversion policy and practice ( $n = 15$ ). Interview transcripts were thematically analyzed using a structured framework technique. Findings show that the term 'diversion' is used to refer to criminal justice-initiated drug treatment routes, both pre- and post-conviction. Unlike many international examples, Scottish diversions tend to embed health-focused support *within* criminal sanctions, rather than acting as *alternatives*. Participants expressed the view that the term diversion implied a shift from criminal justice sanctions to health-led support that did not occur in reality. We, therefore, argue that the term diversion may function to mute a 'discursive struggle' between criminal justice sanctions and health interventions for people who use drugs, obscuring a growing gap between aspirational governance principles and institutional and lived realities.

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## KEYWORDS

Diversion; public health; drugs; criminalization; devolved policy; decriminalization; drug treatment

## Introduction & Background

This paper draws from the findings of a qualitative research study to examine how diversion is operating in Scotland. It offers an important and timely contribution to academic literature, whilst creating policy-relevant knowledge by rendering the nuances of diversion visible in a dynamically changing context. Whilst contextually situated, the paper identifies several issues with how the concept of diversion operates in complex systems of governance, worthy of further exploration in other contexts. It aims to contribute an enhanced understanding of the theory and practice of diversion at a time of social and political change. The paper utilizes the central premise of Alex Stevens's (2007) theory to suggest that the term diversion can be a linchpin, which interacts with a *discursive struggle* at the epicenter of drug policymaking, obscuring gaps between policy discourses and institutional realities.

The 'problem' of drug use is a nexus for inherently complex policy and practice-based responses. A theoretical lens is helpful to deconstruct the relationship between macro-level influences and micro-level structural arrangements. In his 2007 work, Alex Stevens introduces the concept of *discursive struggles*, suggesting that the interaction of political influences, population-level trends, and evidence on the nature of drug use, is complex, leading to shifts between criminal

justice and health governance discourses across time. Stevens (2007) suggests that at the onset of international drug prohibition, the policymaking endeavors of many nations were geared toward drug use as a criminal matter, relating to multiple forms of crime. Stevens (2007) points out that the link between drug use and crime is based upon misuse of statistical evidence that was not intended to infer causality, but rather a correlation. He suggests that this interpretation of the evidence has been prioritized at some points, especially when it appears to fit a dominant narrative and a political impetus toward dealing with drug use as a crime issue. Within the theoretical framing of *discursive struggles*, however, population-level health concerns can cause governance responsibility to shift from criminal justice to health. The crime versus health nexus has also been adopted by public health stakeholders, to argue for increased investment in treatment services. A recent independent review conducted by Dame Carol Black in 2020, however, adopted a critical stance, arguing that a reduction in criminal justice-led interventions could be aligned with austerity and was thus, a cost-saving measure (Black, 2020). What Stevens (2007) points out, however, is that an oscillation between criminal justice and health at a strategic level can create unpredictable outcomes at a practice level, noting that institutional processes do not always shift at the same rate, or in the same direction,

as strategic priorities. Such *discursive struggles* are not limited purely to the strategic domain, but rather, can occur within services, often resulting in debates about the relative merits of different treatment philosophies, often centering around a debate between the need for care or control, treatment or punishment, recovery or abstinence (Ashton, 2008).

Conventions surrounding drug prohibition are not static, but rather change over time and context (Malloch, 2013). Substances such as heroin, cocaine, and cannabis, which are illegal in the UK and other countries, were once considered benign and acceptable (Csete et al., 2016; Sánchez-Avilés & Ditrych, 2018; Stevens, 2010; Volkow et al., 2017). Legislation to control the consumption of these substances is related to political forces between nations, rather than evidence about the substances themselves (Stevens, 2007). Globally, there is increasing support for public health approaches (Bewley-Taylor & Jelsma, 2016; Jelsma, 2017). In one example, at a United Nations Special Assembly on Drugs in 2016, all United Nations member states agreed to review drug policies, to examine how current arrangements influence public health, heralding shifts in political discourses at a macro, international level (Fordham & Haase, 2018; Klein & Stothard, 2018). At various points since the 1960s, diversion has been emphasized as a possible alternative to punitive sanctions (European Monitoring Centre for Drugs & Drug Addiction, 2015; Hughes et al., 2019a).

In this paper, we use Steven's 'discursive struggle' concept to explore diversion arrangements in Scotland. Before presenting the findings, however, it is necessary to outline the differences between the UK system of prosecution and policing, and the arrangements in Scotland, highlighting how and where in Scotland's system of diversion occurs. Scotland is a devolved nation within the United Kingdom. The Scottish Government has responsibility for setting its own drug strategies, as well as health and justice policy. Overarching drug laws that prohibit the use, possession, and supply of substances such as heroin, cocaine, and cannabis are reserved to the UK Government in Westminster (Keating et al., 2003). The relationship between police and prosecutors in Scotland differs from the rest of the UK, which has a bearing on diversion arrangements, a matter which is often under-acknowledged or misunderstood within the wider literature.

Police officers in Scotland have a statutory duty to report all offenses to Scotland's Crown Office and Procurator Fiscal Service (COPFS) who determine who will be prosecuted and who will not, based on an assessment of all of the facts and circumstances of each individual case (Scottish Sentencing Council, 2018). Whilst Scottish Police Officers can make a referral to drug treatment, all decisions on prosecution are made by Scotland's COPFS, and all cases must be reported for prosecutorial decision making (Crown Office & Procurator Fiscal Service, 2001; Scottish Sentencing Council, 2018). All decisions on prosecution are made based on what is considered to be in the public interest. The prosecution code sets out the factors that Scottish Prosecutors should take into account when determining what action, if any, is in the public interest. This includes the nature and gravity of the offense, and the personal circumstances of the individual (Crown Office & Procurator Fiscal Service, 2001). Because

there is no 'blanket policy' to drugs offenses in Scotland, as would be the case in any other offending situation, the prosecutorial action which is appropriate to meet the public interest (including the public interest in addressing the causes of the offending behavior or to influence the likelihood of re-offending) depends on the particular circumstances. In some cases, therefore, a decision can be made to refer individuals to a treatment alternative, usually conducted via local authority and third sector partnerships, where a suitable service is known to exist (Crown Office & Procurator Fiscal Service, 2001; Malloch & Mclvor, 2013), and such actions would be considered 'diversion'. This arrangement differs from the rest of the UK, and in particular from England and Wales where Police Officers can divert people away from prosecution using discretionary police diversion schemes.

Although diversion in Scotland occurs at the point of prosecution, rather than arrest, legislation enables Prosecutors to offer a number of specific alternatives to prosecution, including fiscal fines, compensation orders, and work orders. These alternatives exist in addition to the power to prosecute the case in court, decide to take no action, issue a warning, or offer a diversion to a structured social work intervention that can act as an alternative to formal sanctions, if completed successfully (Crown Office & Procurator Fiscal Service, 2001). In the period 2017–2018, a total of 7666 possession-only offenses were reported to Scotland's COPFS, resulting in 57 people being offered a diversion from prosecution.<sup>1</sup> By 2018–2019, 8220 possession-only cases were reported, and 357 diversions were offered (UK Parliament, 2019c).<sup>2</sup> According to J. Hamilton (personal communication, February 18, 2020), internal statistics from Scotland's Crown Office show that during this period, a total of 790 diversions were offered in cases where drug possession was reported alongside other offense types. If an offer of diversion from prosecution is made, a person is able to refuse, and if they do so, there is no black mark against their name and future diversions from prosecution can be offered.<sup>3</sup>

In Scotland, if a case proceeds to court and an individual is convicted of an offense, several post-conviction and post-sentencing 'diversion' routes to treatment then exist (Eley et al., 2002; Malloch & Mclvor, 2013). Scotland's (2018) alcohol and drug strategy describes alternative community sentences such as Drug Treatment and Testing Orders (DTTO), Community Payback Orders (CPO), and Structured Deferred Sentences, as 'diversion' on the basis that, whilst they are criminal sanctions in and of themselves, they carry an embedded drug treatment route (Malloch & Mclvor, 2013). In Scotland, community-based alternatives to custodial sentences such as DTTOs and CPOs constitute diversion because they offer alternatives to custody, often with an embedded treatment/support requirement. Similarly, Structured Deferred Sentences can be used to 'test' the likelihood of compliance to further community sentences, by offering a diversion to structured social work support and assessment, thereby shifting some of the focus towards what people are being diverted to, rather than from.

Key decision-makers regarding who is diverted are, at the initial stage, Prosecutors (Crown Office & Procurator Fiscal Service, 2001; Malloch & Mclvor, 2013; Scottish Sentencing

Council, 2018). In cases where a conviction is likely, cases are referred to court. Procurator Fiscals decide which court a case should be heard in, depending on the seriousness of the charges. Scotland has six Sheriffdoms which are each overseen by a Sheriff Principal who is the decision-maker in summary procedures, where low-level drug-related offending, and possession offenses are usually dealt with. Although decision-makers on prosecution, conviction and sentencing are Scotland's Prosecutors and Sheriffs, diversion interventions are provided by local authority and third sector partnerships, as well as National Health Service and third sector partnerships. Many such interventions rely on partnerships between multiple agencies, with the third sector providing many of the front-line services. In common with many other parts of the world, diversion in Scotland is an area of policy and practice that exists at a 'tipping point', or 'gateway', between criminal justice and health.

Some decades ago the term 'diversion' was used internationally to define a practice of non-action of law enforcement officials, in cases where criminal justice involvement was considered not to be in the public and/or individual's best interest (Cohen, 1979; Hughes, Seear, et al., 2019). As evidence on the complexity of drug use has increased, however, there has been growing recognition in many contexts that criminalization itself can increase stigma (Lancaster et al., 2015). Criminalization has been shown to create barriers to employment, education, and stable housing, elements considered fundamentally important to recovery (Best & Colman, 2019). By contrast, alternatives to criminal sanctions, such as the 'diversion' strategies outlined above have been shown to alleviate some of the harms caused by criminal sanctions, paving the way to positive change for some individuals (De Wree et al., 2008; Glasgow Community Justice Authority, 2017; Kruithof et al., 2016; Razmadze et al., 2015). In many contexts diversion is also fast-evolving, and the term is now used to refer to a wide range of interventions that can be provided on contact with criminal justice authorities (Bull, 2005; Hughes & Ritter, 2008; Kopak & Frost, 2017).

Internationally, the term 'diversion' tends to refer most commonly to interventions that, if completed successfully, act as *alternatives* to criminal justice sanctions (Hayhurst et al., 2017; McKenna et al., 2018; Schlesinger, 2018; Worden & McLean, 2018). The arrangements in place to support diversion, and the types of services provided, differ widely across contexts, suggesting a need for contextually-situated research such as the study reported here. To date, there has been very little research examining how these shifting trends in governance principles are influencing the interventions that exist for people who use drugs who come into contact with Scotland's criminal justice system. The research study reported here is part of a wider project that aims to address this gap.

## Materials and Methods

The study set out to explore how diversion was operating in Scotland, from the perspectives of professionals involved in implementing and delivering diversion arrangements at a lead, and/or strategic level. Given that the issue of drug use is recognized as inherently complex, we understood that it

would require an in-depth research method believing that the topic would lend itself well to an exploratory qualitative approach (Eisenhardt et al., 2016; Ferraro et al., 2015; McConnell, 2018). The study was co-funded by the Economic and Social Research Council (ESRC) and the Scottish Government. The funding arrangements made it possible to establish a Scottish Government Research Advisory Group for the study (hereafter referred to as the RAG) comprising of policy analysts from the areas of criminal justice and health, as well as the academic research team. The role of the RAG included sharing expertise on the topic of diversion, helping to broker research access, and supporting the identification of potential key participants. Research participants were identified via professional networks, in consultation with the RAG group and the research team.

Each participant was selected based on their known expert knowledge, reputation, and experience within their given fields. The issue of 'expert knowledge' can be challenged on the basis that the term fails to capture complex power dimensions involved in the construction of the term 'expert' (Lancaster et al., 2015; Peršak, 2016). Here the term is used to illustrate the breadth of knowledge held by selected participants who each adopted a 'key informant' role. To capture a diversity of perspectives, participants were recruited from multiple professional sectors involved in the delivery of diversion policy and practice. The study comprised a total of 15 semi-structured interviews with individuals holding key positions in policy ( $n=5$ ), criminal justice professionals ( $n=2$ ), health ( $n=2$ ), third sector ( $n=3$ ), and mutual aid groups ( $n=3$ ).

Ethical approval for the study was obtained from the General University Ethics Panel, University of Stirling, Scotland. Interviews took place over a four-month period. The requirement to take the study through ethical committees of external agencies impacted access arrangements, given the short time frame for this study, with the result that we were unable to interview participants from Police Scotland and Criminal Justice Social Work. Although this is recognized as a limitation of the study, we were particularly interested in exploring diversion practices after the point of arrest, conviction, and sentencing. Participants were recruited who could provide a systems-level overview of diversion in Scotland, given their involvement in multiple sectors and lead strategic level roles.

Data were analyzed using Spencer and Ritchie (2002) Structured Framework Analysis technique. This sequential step process involved the researchers reading and re-reading interview transcripts until familiarisation was achieved. Data were then analyzed using line-by-line manual coding using the software package NVivo (version 12) and themes created via an inductive process (Eisenhardt et al., 2016). The research team returned to the data in subsequent iterative rounds, clustering themes into larger, 'parent' codes once patterns and links emerged. The codes were then synthesized into a thematic framework that was imposed onto a cell-matrix using the software package Microsoft Excel (2016). Once conclusions had been drawn, the lead researcher returned to the participants to check for the accuracy of the analysis and interpretation of key findings. The direct feedback given from

participants was then used to inform the final research findings. This did not result in significant change, as all participants agreed with the analysis of their own individual interviews. Instead, the final feedback helped with accuracy over key terms used and the legal arrangements pertaining to diversion.

The uniqueness of the roles held by participants meant that it was not possible to identify them by professional role in order to protect anonymity. As such, participants are identified by their professional sector rather than role. Contributors from mutual aid groups had both personal and professional experience of drug use and criminal justice involvement, either their own or a family members.

## Results

### *Diversion: a symbolic linchpin that mutes a discursive struggle?*

Initially, participants were asked to describe their knowledge of diversion. Immediately, a fluidity in how the term 'diversion' was used and understood became evident. Most participants pointed out that responses to this question were contingent upon how the term 'diversion' was understood. Participants pointed out that diversion was underpinned by multiple definitions which made it difficult to draw distinctions about the services which were, and were not, considered to be 'diversion', as the following quotes illustrate;

Part of the problem is that diversion is often seen in that really formal way, as diversion from prosecution.

(Participant 11, Mutual Aid Group)

There is diversion from prosecution and diversion from the courts. Lots of people do not understand those distinctions, which are quite difficult to understand if you have not worked in the [Scottish] system.

(Participant 7, Third Sector)

Fluidity in the definition of 'diversion' had several effects. For example, policymakers suggested that such fluidity made diversion difficult to identify, fund, and measure. This meant that it was unclear which diversions were 'working well' and for whom;

I suppose that the answer to your question depends on how broadly you are drawing [the term] diversion".

(Participant 4, Policy)

Despite acknowledging that it was difficult to identify and measure, those from a policy background were very clear regarding their position on diversion, asserting that it was a term used to describe any and all interventions that provide a route to 'drug treatment' from *within* the criminal justice system. For this group, the question of whether diversion moved people out of formal criminal sanctions (or not) was unimportant. This position concurs with the Scottish Government's (2018) Alcohol and Drug Strategy, *Rights, Respect, Recovery*, which states that diversion to treatment should be a priority for all criminal justice involvement, whether at the point of arrest, conviction or sentencing, in

recognition that those with drug-related issues are often vulnerable and in need of support. The study highlighted that the term diversion shifted the 'discursive frame' toward a belief that a diversion was a move away from criminal justice to health, despite the fact that the interventions and sentences being discussed occurred could more accurately be described as a coming together of the two. As such, the existence of a *discursive struggle* about diverting people from criminal justice to health was actually muted by the use of the term 'diversion' itself, made possible by the fluidity in how the term was applied.

By contrast, both participants who held lead roles within Scotland's criminal justice system held a different position, stating that post-conviction diversions should not be considered diversion because a person was not being diverted away from criminal sanctions. For these professionals diversion was something that should act as an *alternative to prosecution*, not an addition to it. For these participants, the term 'diversion' did little to mute the *discursive struggle*. Their position, however, concurs with many international examples where post-conviction drug treatment pathways are rarely referred to as 'diversion', but rather as sentencing alternatives (Bolger et al., 2019; Bull, 2005; Jafari et al., 2015; Schlesinger, 2018; Worden & McLean, 2018). Both interviewees in our study who held this position insisted that post-conviction treatment routes should be seen as 'alternatives to traditional sentencing', and not diversion.

The study's findings revealed that those who believed that post-conviction routes to drug treatment were authentic 'diversion' justified this view by focusing on what people were being diverted *to*, rather than *from*. This was underpinned by a belief that diversion was ultimately a shift *from* punishment *to* treatment, creating what Hajer (2002) refers to as a *discursive affinity*, where policymakers and practitioners could discuss progressive shifts toward health-led approaches that did not necessarily translate to individual experiences, or indeed, change at an institutional level. This form of *discursive affinity* is common in the UK where embedding treatment into criminal justice interventions has been used for some time as a policy vehicle for achieving 'rehabilitation' (Raynor & Robinson, 2005). Although there was disagreement over the use of the term 'diversion' to describe post-conviction interventions, most participants held the view that Scotland's post-conviction interventions provided access to highly valuable, flexible packages of multi-professional support to manage drug-related issues. There was a commonly held belief across all professionals interviewed that these interventions were underpinned by therapeutic intent, despite their post-conviction location.

Whilst the term 'diversion' appeared to reduce discursive conflict between treatment and punishment at a strategic level, many participants felt that it obscured the fact that, from their perspectives, reform was urgently needed to ensure that health and psycho-social support could be accessed earlier before a person became criminalized for their drug use;

I think that one of the barriers is that some of the best interventions are too far into the justice system. You've got to ask why people can't get that [support] at an earlier stage.

(Participant 6, Third Sector)

Some participants suggested that Scotland's criminal justice system acted as a safety net for those with the highest levels of complex needs and enduring patterns of drug use, suggesting that this was not necessarily about passing responsibility from criminal justice to health, but a general lack of early intervention services. Participants from third sector diversion projects, mutual aid groups, and advocacy organizations, as well as criminal justice professionals, stated that people tended to come into the criminal justice system at points where their drug use had become entrenched and problematic. This meant that by the time court disposal was imposed, the person's identity became simultaneously 'offender', 'drug user' and 'patient', something that was further complicated by the fact that health interventions were offered under judicial progress review, representing a coming together of health and criminal justice, rather than a transfer. This often took the form of multi-agency teams, where criminal justice professionals were often the key decision-makers who could define eligibility, compliance and/or progress in drug treatment interventions.

Participant perspectives suggested that, although the term 'diversion' symbolically inferred a change in path, from one sector to another and giving the appearance of reform, the locus of control remained firmly with Scotland's criminal justice system. Most participants highly praised the therapeutic nature of post-conviction interventions but, for many, the fact that those who did not do well in treatment could face lengthier sentences was an issue that had to be addressed. The study findings suggest that the term diversion may, therefore, serve as a 'linchpin', through the binding together of disparate elements of the system and thereby reducing the appearance of conflict between health-led approaches and criminal justice sanctions at a policy level.

### ***Criminalization: a major issue in how diversion operates in Scotland?***

Many participants suggested that the term 'diversion' caused focus to shift away from the criminalization of people who use drugs. Almost all participants interviewed for the study expressed concern about the negative impact of criminalization under the current system in Scotland.

The biggest barrier to getting into recovery and maintaining recovery is criminalization.

(Participant 9, Third Sector)

Interestingly, participants did not make a distinction between possession offenses and drug-related offenses, such as violence and/or acquisitive crime. Responses given tended to focus more on each person and his/her needs, rather than crimes committed. All participants expressed a view, albeit in different ways, that if the issues that sit beneath drug-related offending were tackled, drug treatments were more likely to be successful and the risk of drug-related re-offending would naturally reduce. For many participants, criminalization could exacerbate stigma, presenting a barrier to engaging in treatment and long-term change.

In particular, participants highlighted the ways that criminalization could reduce access to stable housing, employment, and education. One participant pointed out that post-conviction 'diversions' could be too intense for some people, resulting in a risk of lengthier sentences for those who could not comply with drug treatments within criminal justice pathways. This could result in up-tariffing to lengthier sentences, which could be custodial;

For some people having that structured diversion is a real bonus and it works for them. And, for others, that structure is too much and they can't deal with it.

(Participant 8, Third Sector)

Participants expressed the view that a custodial sentence could increase strain and pressure on families which sometimes had the effect of disrupting informal support networks, reducing the likelihood of sustaining positive change:

... people lose their connection to their family, to their tenancy, continuity of medical treatment, they might lose their job. These are all factors which are known to underpin somebody's desistance.

(Participant 6, Third Sector)

Those who did receive custodial sentences were reported to face challenges in maintaining the continuity of medical care and housing. This indicates that, although 'diversion' might give a symbolic nod toward moving from a criminal justice-led pathway, toward health-focused support, this shift may be more imagined than real.

When asked how Scottish diversion arrangements could be improved, many participants held the view that decriminalization of all drugs in Scotland should be carefully considered.

What I would love to see is an in-depth review, a Commission if you like, to look at what the evidence is around decriminalization.

(Participant 8, Health)

This study was conducted in 2018, before the Scottish Government's new alcohol and drug strategy *Rights, Respect, Recovery* (2018) had been published, leading one participant to note:

Scotland is at a key moment in terms of policy, there is a treatment strategy coming out, so we've got to move quickly. This is, as I was alluding to earlier on, that decriminalization, legalization, is where I certainly don't feel clear as to what we need and want.

(Participant 15, Health)

Although very few participants held a clear view on what form decriminalization could take in Scotland, for many the issue was embroiled in a push-pull effect between public health principles and the current criminal justice-led system. For some participants, this juxtaposed the issue of treatment versus punishment, as the following quote illustrates:

We have the impression that there is growing support within the justice system for decriminalization and regulation of drugs, and for pursuing a health model of treatment rather than punishment.

(Participant 7, Third Sector)

Some participants felt that legislative and/or constitutional power was at the core of this issue expressing that, although

decriminalization could benefit Scotland, the responsibility for legal reform lay with the UK Government;<sup>4</sup>

Decriminalisation is a hot topic at the moment. Possession and use of certain drugs remain illegal under the Misuse of Drugs Act. And in Scotland, we don't have the ability to change that. It is a reserved matter.

(Participant 15, Health)

Some participants in our study, however, held the view that increased diversion away from criminal sanctions was possible:

Within Scotland, there is leeway as to whether or not people are prosecuted and the sentencing guidelines and so on. There is some wiggle room for Scotland.

(Participant 6, Third Sector)

The study findings indicate that the term 'diversion' symbolically alludes to a shift from criminal justice to health responses, a shift that was not always realized in practice. Participants noted that this also linked to Scotland's constitutional position as both a devolved nation and a member of the United Kingdom. The 'wiggle room' referred to in the quote above appears to be the gap between law and professional discretion, a matter which must be explored via further research, especially in light of the fact that diversion from arrest is possible in England and Wales (Spyt et al., 2019; Weir et al., 2019). And yet, as this paper has highlighted, a number of diversion from prosecution routes exist in Scotland. This suggests that further research that adopts a distinctly Scottish lens could open doors to reimagining the Scottish system in such a way that new strategies may begin to emerge. In general, however, there was support amongst participants for further research to examine what a model of decriminalization could look like for Scotland.

We need to open up a space to start to look at the case for decriminalization in more depth.

(Participant 14, Health)

## Discussion

The use of controlled substances such as heroin, cocaine, and cannabis has been subject to international control and prohibition for almost 60 years (Sánchez-Avilés & Dityrych, 2018). Although there is increasing evidence which calls into question the effectiveness of measures at the point of arrest, particularly in relation to people who use Class A drugs, there are several reasons why someone with drug-related issues could come into contact with criminal justice and law enforcement agencies (Connor et al., 2020; McSweeney et al., 2018). These include possession of illegal substances (primary drug-related offenses) and drug-related crime (secondary drug-related offenses). Interestingly, the participants interviewed within this study did not differentiate between possession and drug-related offending, perhaps reflecting the overarching policy context in Scotland where there is recognition that people who use drugs are often vulnerable and that socio-economic factors and criminal sanctions can exacerbate the challenges associated with recovery (Scottish

Government, 2018, 2019a, 2019b). There is arguably a pressing need for interventions that respond to the needs that lie beneath drug-related offending tailoring intervention to need (Best et al., 2008).

The study findings confirm that, in Scotland, the term 'diversion' is used to refer to criminal justice-initiated drug treatment routes, both pre- and post-conviction, including diversions from prosecution, and alternatives to custodial sentences. The findings suggest that, unlike many international examples, Scottish diversions tend to embed health-focused support within criminal sanctions, rather than acting as an alternative to them. The dominant theme to emerge from the study was a concern about the implications of the way the term 'diversion' is used in Scottish policy and practice. Many participants expressed the view that the term implies a shift from criminal sanctions to health-led support that does not actually occur in reality. Indeed, the term 'divert' means to change direction, to alter one's course, creating a symbolic binary shift that is not indicative of the complexity of arrangements in this context. Furthermore, we have shown that the term 'diversion' orientates discussion toward a binary either-or, health, or criminal justice pathways, which limits the discursive frame, reducing the likelihood of active debates on human rights, social recovery, and the place of mutual aid.

As we have highlighted, Steven's (2007) theory uses the term 'discursive struggle' to outline the fact that drug policy often creates the impression of binary shifts from punishment to treatment or criminal justice to health. The results of our study indicate that this concept is particularly relevant to the Scottish context, where there is often confusion about what is diversion, and what is not, made particularly potent by the fact that the term continues to be used after the point of conviction and sentencing. Instead of being a binary shift from criminal justice to health, we suggest that diversion could best be understood as a coming together of the two.

Diversion, when taken to mean interventions that shift people away from criminal sanctions toward health-focused support, is a practice that has the potential to create systemic change in nations where legislative frameworks allow police the autonomy to work in partnership with other agencies to create meaningful routes out of criminal justice pathways (Eastwood et al., 2016). Drawing from the findings of this study, we have shown that institutional arrangements in Scotland do not offer opportunities for police diversion *per se*, and although many opportunities are given for a route to health-focused support, this often happens much later in Scotland's criminal justice system than it does in other contexts. This suggests a need for further research into the nature, location and scope of diversion in Scotland, to arrive at contextually appropriate recommendations.

We have argued that the symbolic nature of the term 'diversion' in Scotland creates an imagined shift from criminal justice to health which, according to the participants interviewed for this study, does not reflect the realities in practice. As such, the term 'diversion' mutes a discursive struggle between criminal justice and health at a strategic level, which creates a veil over the complex constitutional and

institutional arrangements that exist in this context. Our findings suggest that this can make it less clear who is diverted from criminal sanctions, and who is not, creating a system that is difficult to navigate and evaluate. While many paths to drug treatment do exist within Scotland's criminal justice system, the confusion arises when we attempt to delineate those who access drug treatment alongside receiving a conviction. Perhaps most notably, we suggest that the term 'diversion', used in this way, can orientate discussion away from the potentially damaging consequences of criminalization. This is particularly true for low-level possession offenses, rather than other forms of 'related' offending, such as the violence associated with high-level drug supply and/or county lines.

Internationally more than 30 countries have opted for varying models of decriminalization to tackle drug use from a health-focused lens, many simultaneously investing heavily in public health interventions that tackle stigma, alongside increasing treatment access (Eastwood et al., 2016; Hughes, Seear, et al., 2019; Hughes et al., 2019a; Stevens, 2010; Stevens & Hughes, 2016; Volkow et al., 2017). In some countries, diversion acts as a form of de facto decriminalization, where police officers are encouraged not to arrest individuals for possession offenses, and sometimes low-level drug-related secondary offenses, and to divert people to support as an alternative to processing (Hughes, Seear, et al., 2019; Schlesinger, 2018; Worden & McLean, 2018). This form of Police diversion is possible in other parts of the UK, such as England and Wales, and several schemes have developed to move people out of criminalization processes on first contact, toward a range of interventions (Hughes et al., 2019b; Spyt et al., 2019; Weir et al., 2019). Scotland does have some interventions where Police can signpost people toward support (see Malloch & McIvor, 2013), but these do not affect criminalization procedures, because all cases are referred for prosecutorial decision making. This suggests that further contextually situated research is required to examine the role that Scotland's Crown Office and Prosecution service has to play in diversion.

Interestingly, however, while many participants in our study suggested that the time was right to consider the benefits that decriminalization could have for Scotland, there was little recognition of the role that diversion could play in this by those interviewed, perhaps indicative of the fluidity and confusion surrounding the use of the term itself. Despite strong support amongst participants for reform, many described a sense of systemic stagnation or a lack of constitutional power within the devolved context. Many participants suggested that this related to drug law in Scotland being reserved to the UK Government. A thorough analysis of the findings does not discount this possibility, but it does indicate that there may be wider barriers to confront and that future research should adopt a critical criminological lens to analyze the interaction of agency and structure to determine where and how the system is operating, and what the underlying influences are. It is worth noting, of course, that although the participants interviewed for this study held lead, strategic level roles, and a high level of knowledge across the many sectors involved in delivering 'diversions' in

Scotland, they were relatively low in number. Further research is needed to explore the points raised in this paper which fully engages with all parts of the system related to diversions in Scotland.

If we consider the findings of our study in relation to wider events in the UK context, we can identify evidence that the current system may be on the brink of reform. In the 18 months since the empirical work was undertaken (Summer 2018), several inquiries have examined the nature of drug use and drug policy in Scotland and the wider UK context. These include a Scottish Affairs committee, conducted by the UK Parliament (UK Parliament, 2019b), and a drugs policy inquiry conducted by the UK Parliament Health and Social Care Committee (UK Parliament, 2019a). Furthermore, a Scottish Ministerial Task Force has been established by the Scottish Government to ascertain whether legislative change could help to reduce escalating rates of drug-related deaths and health-related harms (Scottish Government, 2019a). This suggests that further research in this area of policy in Scotland is timely and much needed.

## Conclusion

Our study offers policy-relevant knowledge on the subject of diversion in Scotland, one of the UK's devolved nations. Participant views indicate that the legitimacy of applying criminal sanctions to people who have problems with their drug use and are engaging in health-focused drug treatments is being called into question in Scotland, as in many other parts of the world. We have illustrated that the term 'diversion' may, in fact, be functional, muting the discursive struggle between criminal sanctions and health interventions for people who use drugs. We have shown that the symbolic nature of this term obscures a growing gap between shifting governance principles and institutional realities.

The study raises some critical questions regarding an area of policy that is a highly complex puzzle and identifies several areas requiring further examination. There is a need for more research to better understand Scotland's diversion arrangements, analyzing how well they are considered to be working, and for whom. Drawing from the study findings, we argue that it is essential to engage with those involved in policy development, as well as those holding operational roles in diversion services and those with lived experience of diversion, to render gaps between policy and practice visible.

## Disclosure statement

No potential conflict of interest was reported by the author(s).

## Notes

1. Of the 7666 possession-only cases reported to COPFS in 2017–2018, 3331 fiscal fines, 554 work offers, 459 formal warnings were offered, and 45 cases were referred to Scotland's Children's Reporter for child welfare/needs concerns. A total of 2293 cases were proceeded in court, resulting in non-action for 926 people.
2. Of the 8220 possession-only cases reported to COPFS in 2018–2019, 3563 fiscal fines, 270 work offers, 529 warnings were offered, and 45

cases were referred to Scotland's Children's Reporter for welfare/needs concerns. A total of 2029 cases were proceeded in court, resulting in non-action for 1397 people.

3. It should be noted that only diversions from prosecution to structured social work interventions are considered 'prosecutorial diversion' in Scotland, whereas in other contexts, some of Scotland's prosecutorial alternatives would be considered diversion. This should be acknowledged in the reading of the statistics presented here.
4. Similar observations have been identified in the Welsh context too, which also operates a devolved parliament (Brewster & Jones, 2019).

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