Dalhousie Law Journal

Volume 43 | Issue 1 Article 4

2020

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Recommended Citation

Haley Hrymak, "The Opioid Crisis as Health Crisis, Not Criminal Crisis: Implications for the Criminal Justice System" (2020) 43:1 Dal LJ 281.

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The Opioid Crisis as Health Crisis, Not Criminal Crisis: Implications for the Criminal Justice System

The criminal justice system's response to the opioid crisis exacerbates risks faced by people using drugs and is harmful to public health. Interviews with 11 interviewees including defence counsel, probation officers, and public interest lawyers and advocates revealed three key challenges of working in the criminal justice system during the opioid crisis. First, there is a lack of understanding of addiction within the criminal justice system. Second, as a result of the opioid crisis, fentanyl trafficking sentencing decisions in British Columbia emphasize the need for lengthier prison sentences, which disproportionately affects people who use substances. Third, the conditions on bail and probation orders and the resulting breaches of conditions increase the risk of custodial sentences for people who use drugs. This article outlines four recommendations for how the criminal justice system can be improved. First, actors within the criminal justice system need to understand the opioid crisis as a public health crisis and not a criminal crisis. Second, community supports should be expanded, including diversion programs, housing, and employment opportunities. Third, when people receive custodial sentences, they must have access to harm reduction supplies including naloxone, clean needles, and proper evidence-based health treatments, such as Opioid Substitution Therapy. Last, this article recommends the development of training that is delivered and designed in conjunction with people who use substances for all people working in the criminal justice system.

La réponse du système de justice pénale à la crise des opioïdes exacerbe les risques auxquels sont confrontées les personnes qui utilisent des drogues et est néfaste à la santé publique. Des entrevues menées auprès de 11 personnes, notamment des avocats de la défense, des agents de probation et des défenseurs de l'intérêt public, ont révélé trois défis importants pour le système de justice pénale confronté à la crise des opioïdes. Premièrement, il y a un manque de compréhension de la toxicomanie au sein du système de justice pénale. Deuxièmement, en raison de la crise des opioïdes, les décisions relatives à la détermination de la peine pour le trafic de fentanyl en Colombie-Britannique mettent l'accent sur la nécessité d'imposer des peines d'emprisonnement plus longues, ce qui touche de façon disproportionnée les personnes qui consomment des drogues. Troisièmement, les conditions des ordonnances de mise en liberté sous caution et de probation et les manquements aux conditions qui en découlent augmentent le risque de peines d'emprisonnement pour les personnes qui consomment des drogues. Le présent article présente quatre recommandations sur la manière d'améliorer le système de justice pénale. Premièrement, les intervenants du système de justice pénale doivent comprendre que la crise des opiacés est une crise de santé publique et non une crise criminelle. Deuxièmement, les soutiens communautaires devraient être élargis, notamment les programmes de déjudiciarisation, l'aide au logement et l'accroissement des possibilités d'emploi. Troisièmement, lorsque des personnes reçoivent des peines d'emprisonnement, elles doivent avoir accès à des mesures de réduction des méfaits, y compris la fourniture de naloxone et de seringues propres ainsi qu'à des traitements de santé appropriés fondés sur des données probantes, comme la thérapie de substitution des opioïdes. Enfin, le présent article recommande l'élaboration d'une formation qui serait conçue de concert avec les personnes qui consomment des drogues et qui serait offerte à toutes les personnes qui travaillent dans le système de justice pénale.

* I acknowledge that this research took place on the unceded territory of the Squamish, Tsleil-Waututh, and Musqueam Nations. I would like to thank the experts I interviewed as well as the anonymous reviewers, Siobhan Quigg, Lynda Corkum, Professor Kim Brooks, Professor Debra Parkes, and Professor Benjamin Perrin. This article is an excerpt from my thesis from UBC and I am appreciative to the Peter A. Allard School of Law for its generous financial contribution to my LL.M.

Introduction

The opioid crisis in Canada has hit BC the hardest. In April 2016, the BC provincial health officer, Dr. Perry Kendall, declared a public health emergency.[1] The number of overdose deaths has risen from 153 in 2015 to 667 in 2016.[2] In 2017, 1,226 people in BC died from fentanyl-detected overdoses and 1,337 died in 2018. The crisis continues, with 702 people dying of suspected fentanyl-detected overdoses between January and October 2019.[3] These numbers do not account for the many people who survive overdoses and continue to be at risk.

While research has advanced dramatically to allow for a comprehensive understanding of addiction, the criminal justice system lags behind.[4] Research shows that the laws and policies surrounding drug use have a negative effect on the health of people living with addiction,[5] and it is "estimated that approximately 56-90% of people who inject drugs will be incarcerated at some stage during their life."[6] The criminal justice system's response to the lasting opioid crisis is problematic because it is uninformed by the public health response and potentially worsening the crisis through the continuation of harmful practices that surround the criminalization of addiction.

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1. See "Provincial health officer declares public health emergency," *BC Gov News* (14 April 2016), online: <news.gov.bc.ca/10694> [perma.cc/6QEG-69XJ]; see Canada, Health Canada, *Government of Canada Actions on Opioids: 2016 and 2017*, Catalogue No H14-236/2017E-PDF (Ottawa: Health Canada, November 2017), online: <www.canada.ca/content/dam/hc-sc/documents/services/publications/healthy-living/actions-opioids-2016-2017/Opioids-Response-Report-EN-FINAL.pdf> [perma.cc/D36L-EKUY].
2. BC Coroners Service, "Fentanyl-Detected Illicit Drug Toxicity Deaths" at 7, online: <www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/statistical/fentanyl-detected-overdose.pdf>.
3. See British Columbia, Ministry of Public Safety and Solicitor General (Office of the Chief Coroner), *Fentanyl-Detected Illicit Drug Toxicity Deaths January 1, 2012 to May 31, 2019* (British Columbia Coroners Service, 11 July 2019) at 1, online: <www.llbc.leg.bc.ca/public/pubdocs/bcdocs2016/598178/2019/Jan1_2012_May31_2019.pdf> [perma.cc/CKB4-F4NR].
4. See Adela Beckerman & Leonard Fontana "Issues of Race and Gender in Court-Ordered Substance Abuse Treatment" (2001) 33:4 J Offender Rehabilitation 45; see Kathy Bettinardi-Angres & Daniel Angres, "Understanding the Disease of Addiction" (2010) 1:2 J Nursing Regulation 31.
5. Expert letter from Dr. Evan Wood to New West Minister Court (13 September 2017) in Haley Hrymak, "5.1.4 Appendix D—Expert Letter," *The opioid crisis as health crisis, not criminal crisis: implications for the criminal justice system*, (LLM Thesis, University of British Columbia, 2018) [unpublished], online: <open.library.ubc.ca/cIRcle/collections/ubctheses/24/items/1.0371246> [perma.cc/8M38-SWF8] [Dr. Wood Letter], citing Andrew Ball et al, *Multi-Centre Study on Drug Injecting and Risk of HIV Infection a Report Prepared on Behalf of the WHO International Collaborative Group for the Programme on Substance Abuse* (Geneva: World Health Organization, 1995).
6. UNAIDS, *The Gap Report 2014: People Who Inject Drugs* (Geneva: UNAIDS, 2014) at 6, online: <www.unaids.org/sites/default/files/media_asset/05_Peoplewhoinjectdrugs.pdf> [perma.cc/2R7T-VY3N].

This two-part paper analyzes interviews from 11 interviewees, including defence lawyers, probation officers, social justice lawyers and advocates, working within the current justice system in the Greater Vancouver area. It begins with a discussion of the research methodology before opening into Part I. Part I provides a broad overview of some of the concerns from interviewees about how the criminal justice system engages drug use. The main themes in the responses from interviewees and the relevant literature relating to these themes are discussed and contextualized within the opioid crisis. Analysis of interviews with the interviewees identified three main themes. First, the laws and practices in the criminal justice system reflect a lack of understanding of addiction. Second, increasing the prison sentences for street-level traffickers is not an evidence-based response to this public health crisis. Lengthier prison sentences do not promote public safety and ignore the fact that most traffickers use substances themselves.[7] Third, there is a disconnect between the conditions of bail and probation orders and the reality of the lived experiences for people who use substances. Interviewees spoke of a high volume of administrative breaches that stem from the imposition of these conditions and the increased criminalization of people due to insecure housing, mental health issues, or substance use. The court imposes conditions that ultimately lead to a high incidence of administrative breaches, which causes people to frequently be incarcerated and increases their risk of overdose upon release.[8]

Part II provides recommendations for improving the criminal justice system's response to the opioid crisis to reduce harm towards people who use drugs. The primary recommendation is to treat addiction as a health matter and not a criminal matter. Interviewees recommended that the criminal justice system should learn from the existing evidence-based harm reduction responses in the Greater Vancouver area such as Insite and the NAOMI project for guidance on the efficacy of treating substance use as a health matter.[9] The interviewees recommended an expansion of community support and diversion programs, as well as support for people with criminal involvement to find employment and secure housing. When people are incarcerated, interviewees recommended that prisons be equipped with the necessary evidence-based harm-reduction tools, including opioid substitution therapy, clean needles, and Naloxone.

7. See Cheryl Webster & Anthony Doob, "Searching for Sasquatch: Deterrence of Crime Through Sentence Severity" in Joan Petersilia & Kevin R Reitz, eds, *The Oxford Handbook of Sentencing and Corrections* (New York: Oxford University Press, 2012) at 2.

8. The research supporting this is discussed *infra* text accompanying note 42.

9. See generally Julie Bruneau et al, "Management of Opioid Use Disorders: A National Clinical Practice Guideline" (2018) 190:9 CMAJ 247 at E247.

Interviewees explained that the first step towards shifting to a health-based approach is learning from people with lived experiences of drug use and criminal justice system involvement.

Methodology

This research focuses on BC: the epicentre of the opioid crisis.[10] It employs descriptive and qualitative (interview) methods. The descriptive research involved reviewing scholarship primarily from law and public health disciplines to provide a foundation of the existing research on the intersection between criminal law and public health. Interviews with interviewees in the Greater Vancouver area supplemented the descriptive study. Interviews were semi-structured to allow for fluidity in responses and to account for the diversity of expertise within the study population.

The protocols for the interview research received Behavioural Research Ethics Board (BREB) approval from the University of British Columbia.[11] In compliance with BREB requirements, all participants signed a consent form and were able to withdraw from the study at any time. The interviews were approximately 45 minutes in length and were recorded using an audio recorder and transcribed.

To recruit participants, I emailed experts, including probation officers, defence lawyers, social workers, and individuals who work within social justice organizations. I will refer to my research participants as "interviewees." In each email, I attached an invitation letter that included the background, purpose and content of the interview, as well as the consent form. The consent form stated that the responses of all participants would be anonymous and that participants could withdraw from the study at any time. I recruited additional participants through the "snowball" method whereby participants recommended other individuals for the study. A total of 11 participants were interviewed. The participants in this study were positioned to contribute to this research because their work intersected with criminal law and people who use substances. They spoke of the particular risks faced by their clients during the opioid crisis, as many of the interviewees work in the Downtown Eastside of Vancouver (DTES).

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10. See *R v Chin*, 2017 BCSC 501 at para 35, 138 WCB (2d) 287; See also News 1130 Staff, "National opioid overdose numbers show crisis is hitting the West hardest" *News 1130* (6 June 2017), online: <www.news1130.com/2017/06/06/national-numbers-opioid-epidemic-show-hitting-west-hardest/> [perma.cc/4KXN-52W8].

11. I applied for BREB on 1 December 2017 and received this approval on 16 January 2018 (certificate number H17- 02668).

One expert explained that their "clients are disproportionately impacted by the opioid crisis."[12]

I conducted a thematic analysis of the interviews. Thematic analysis is a method of analyzing qualitative data that requires deeply exploring the research question and responses to find themes within the data.[13] This research explored the barriers that exist within the criminal justice system for people who use drugs. Further, I asked interviewees for their insights on the consequences of these barriers and how they address them in their work. While there were responses that were specific to each question, some themes transcended several questions. The discussions varied between participants depending on their experience.

The themes that were identified within the responses of the interviewees were supported in the literature of the subject matter. In this work, I discuss the themes that emerged from the interviewees' experiences and the support provided in the literature, giving context to the issue by presenting specific quotes when helpful.[14] Themes were manually coded in the interviews and the data of each interview was reviewed for a minimum of four hours before identifying themes.

The scope of this research was to interview experts working with people who use substances to understand the key challenges for people using substances within the criminal justice system and how these challenges are exacerbated during the opioid crisis. There are several key limitations to this work. Undoubtedly the criminal justice system's response to the fentanyl crisis will affect the mass incarceration of Indigenous people.[15] However, a comprehensive analysis of the distinct challenges faced by Indigenous people in the criminal justice system is not within the scope of this work.[16] Further research and discussion with Indigenous people would be needed to be able to offer an appropriate and thoughtful analysis

12. The Downtown Eastside is one of Canada's poorest neighbourhoods and is known for its resilience. The pronouns used for all interviewees are her/she.

13. See Marie Crowe, Maree Inder & Richard Porter "Conducting Qualitative Research in Mental Health: Thematic and content analyses" (2015) 49:7 Austl & NZ J Psychiatry 616 at 619.

14. See generally *ibid;* see generally Jennifer Fereday & Eimaer Muir-Cochrane, "Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development" (2006) 5:1 Intl J Qualitative Methods 80 at 82, citing Michael Patton, *Qualitative research & evaluation methods*, 3rd ed (Thousand Oaks: Sage, 2002).

15. See Canada, Canadian Centre for Justice Statistics, *Adult and Youth Correctional Statistics in Canada, 2016/2017*, by Jamil Malakieh, Catalogue No 85-002-X (Statistics Canada, 19 June 2018), online: <www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.pdf> [perma.cc/8GBU-T63H] [CCJS].

16. I am situated in this work as a non-Indigenous person who is continually learning of the ongoing impact of colonialism on Indigenous people. I felt this information was important to share particularly after reading the article by Patricia Barkaskas & Sarah Buhler, "Beyond Reconciliation: Decolonizing Clinical Legal Education" (2017) 26:1 J L & Soc Pol'y 1.

of the continued harms of colonialization and the impact the opioid crisis is having on Indigenous people.[17] Future research should be conducted to hear from Indigenous people and look at the specific harms of the opioid crisis on the Indigenous population.

People who use drugs are at the forefront of this research. However, a limitation of this work is that I did not design the research to directly reach out to people who use drugs. Additional time would have been required for ethics approval if I specifically sought out participants who use drugs in my recruitment criteria, and I unfortunately had time constraints for this project that would have made that research design impossible. As a result, I focused my project on justice system responses and the participant recruitment criteria was anyone who works with people who use drugs who are facing criminal charges. While one participant self-identified as a drug user, I did not ask any participant about their experiences with drug use as that was beyond the scope of the research.

Within my recruitment, I invited peers of people who use drugs to participate but I was not successful. As a result of unsuccessfully recruiting peers of people who use drugs, I did not have the opportunity to ask about the challenges and recommendations for change from people who are the true experts in this area. I draw on secondary sources that bring in the perspectives of people who use drugs, as well as reports written by drug user networks to mitigate the impact of this limitation on the overall paper. This research attempted to hear the perspectives of judges and Crown counsel, but I was unsuccessful in recruitment. Further research should be undertaken to hear from people who use drugs, judges, lawyers and people who work in law enforcement.

I. *The main challenges identified by interviewees working in the criminal justice system*

Through conducting interviews with 11 interviewees, I learned the main challenges supporting and representing the rights of people who use substances identified by interviewees working in the criminal justice system. Part I of this work goes through the four main themes found within the interviewee's responses and the relevant literature. The first challenge is that the current legal system does not accurately understand substance use and addiction. Second, the interviewees described the increased custodial sentence range for street-level traffickers of opioids

17. See generally First Nations Health Authority, *Overdose Data and First Nations in BC: Preliminary Findings* (Vancouver: First Nations Health Authority, 2017), online: <www.fnha.ca/newsContent/Documents/FNHA_OverdoseDataAndFirstNationsInBC_PreliminaryFindings_FinalWeb.pdf> [perma.cc/5J7H-YK8H].

as a challenge of the current criminal model. Third, the conditions imposed on bail and probation orders, including abstain conditions, red zone conditions, and treatment conditions, were described as often setting people with substance use issues up to fail. Last, interviewees described the scarce availability for alternative measures, rehabilitative resources, and social supports, including diversion programs, safe housing, and treatment opportunities. Interviewees explained that during the opioid crisis these challenges exacerbate the risks to the health and well-being of people who use drugs.

1. *Lack of understanding of addiction in the criminal justice system*

Interviewees stated that the justice system and the actors within it often lack understanding of addiction, substance use, and life as a vulnerable person. People who become involved in the criminal justice system are more likely to "have suffered adverse emotional, social, neurological, and developmental effects from traumatic experiences in childhood and adolescence, and some of these impacts also appear to be linked to offending behaviour."[18] The Vancouver Area Network of Drug Users' (VANDU) website gives insight into the need for recognition of the complexities of drug use: "VANDU recognizes that the realities of poverty, racism, social isolation, past trauma, mental illness, and other social inequalities increase people's vulnerabilities to addiction and reduces their capacity for effectively reducing drug-related harm."[19]

Interviewees provided examples where justice system actors did not appreciate the impacts of the all-consuming nature of addiction, the health effects of being drug sick, and the frequent interactions with police for people who are homeless and use substances. Some people who use substances frequently use to stay well and avoid being drug sick; their aim is not necessarily to get high. Several people interviewed in Pivot's report "explained that the constant hustle to acquire the substances they need to stay well ha[d] a detrimental effect on every aspect of their lives, including housing, employment, education, mental and physical health,

18. Sam Wright, Mark Liddle & Pippa Goodfellow, *Developing Trauma-Informed Resettlement for Young Custody Leavers: a Practitioner's Guide* (London: Beyond Youth Custody, 2016) at 2, online: <www.beyondyouthcustody.net/wp-content/uploads/Developing-trauma-informed-resettlement-for-young-custody-leavers-a-practitioner%E2%80%99s-guide.pdf> [perma.cc/H55P-RLNK]; see also Susan Hunt et al, "Creating Evidence-Based Change Through a Trauma-Informed Lens: Translating Principles Into Practice" (2018) 9:1 Intl J Child, Youth & Family Studies 54 at 54; see also William Lee et al, "Childhood Sexual Abuse and Syringe Sharing Among People Who Inject Drugs" (2015) 19:8 AIDS Behav 1415 at 1455 [Lee].

19. "About VANDU," online: *VANDU* <vandureplace.wordpress.com/> [perma.cc/U8AY-LCRQ].

and interpersonal relationships."[20] Interviewees unanimously spoke of the great deal of work to be done within the current legal system to achieve a system that fully recognizes what it means to use substances and have an addiction.

Addiction is often stigmatized by society as a problem related to self-control and willpower.[21] This lack of understanding creates a system with ineffective and sometimes harmful solutions. One participant of the research explained that "the current legal system has put people in an impossible position which is…significantly increasing risk to life and health." Interviewees made it clear that this stigma is part of the reason the justice system further oppresses people in vulnerable positions and often acts against the goals of public safety. Leading scholars and doctors in the healthcare system echo the frustration of working against the stigmatization of people who use substances. These actors also emphasize the difficulty of translating the successes of addiction science into improvements for patients because of the stigma and the "default position to criminalize and punish persons struggling."[22]

Interviewees explained that the lack of understanding of addiction is particularly problematic in the opioid crisis because the actions of the justice system have consequences for public safety. Despite the opioid crisis, interviewees explained that the courts are not shifting towards an understanding of substance use. While there are areas of the justice system that work to understand the issues that people who use substances face, there is still a large knowledge and practice gap.[23]

What follows are the main challenges identified by the interviewees in working within the criminal justice system and how these challenges

20. Darcie Bennett & DJ Larkin, *Project Inclusion: Confronting Anti-Homeless & Anti-Substance User Stigma in British Columbia* (Pivot Legal Society, 2018) at 32, online: <www.pivotlegal.org/project_inclusion_full> [perma.cc/ D6GP-ZEV5] [Bennett & Larkin].

21. See Charles Dackis & Charles O'Brien, "Neurobiology of Addiction: Treatment and Public Policy Ramifications" (2005) 8:11 Nature Neuroscience 1431 at 1431; see also Bennett & Larkin, *supra* note 20 at 81.

22. Tony Kirby, "Evan Wood: Bringing change to Addiction Medicine" (28 November 2015) 386:10009 The Lancet 2131 at 2131, quoting Dr. Evan Wood (Dr. Evan Wood is Professor of Medicine at UBC, the Canada Research Chair in Inner City Medicine, a physician, the Director for the BC Centre on Substance Use, the Medical Director for Addiction Services, and the Physician Program Director for Addiction, Providence); see also Lee, *supra* note 18 at 1455.

23. Experts spoke of two general positive parts of the criminal justice system within the Greater Vancouver area: Drug Treatment Courts (DTCs) and the Downtown Community District Court (DCD). These two court systems are not discussed in this work because while interviewees explained they are positive models, DTCs deal with a limited number of people and the DCD deals only with summary offences. They are positive models that are difficult to assess briefly and tangentially; therefore they are absent from this paper.

stand to exacerbate the risks faced by people who use drugs during the opioid crisis.

2. *Custodial sentences and the opioid crisis*

This section will discuss the courts' approach to sentencing, the disruptive effects of lengthier sentences including their propensity to increase the risk of overdose and recidivism, the impact on Indigenous people, and the harms of prison. Interviewees disapproved of the courts' sentencing approach for trafficking in fentanyl because it causes significant harm and leads to recidivism. Interviewees were asked their view on the sentencing approach being taken by the courts for trafficking in fentanyl. The sentencing range for fentanyl trafficking was defined by the BC Court of Appeal in *R v Smith*.[24] *Smith* set the starting range for street-level trafficking of fentanyl to a prison sentence of 18–36 months and possibly higher.[25] Caselaw across Canada shows that the courts are increasing the custodial sentences and finding there is an enhanced need for deterrence when the substance being trafficked is fentanyl.[26] Research results show harsher sentences do not achieve even a marginal effect on the deterrence of crime.[27] When asked about this trend in the caselaw, the conclusion from the interviewees was that the courts have it "ass backwards" and the imposition of longer prison sentences is both a harmful and ineffective response to the opioid crisis.

Interviewees explained that an individual's substance use is often a contributing factor to their interaction with the law, and custodial sentences disrupt peoples' lives in significant ways. Prison sentences remove people from their community and whatever stability and supports they have established. Custodial sentences terminate employment and housing arrangements that are often difficult to find. Research in Toronto revealed that time in jail increased people's risk of homelessness by forty per cent.[28] Custodial sentences also disrupt delicate connections with family, friends or community resource workers, such as doctors, health clinicians,

24. 2017 BCCA 112, 138 WCB (2d) 605.

25. See *ibid.*

26. See *ibid*; see *R v Butler*, 2017 BCPC 315, 142 WCB (2d) 575; see *R v Creuzot*, 2017 BCSC 1075 at para 39 [2017 CarswellBC1753; see *R v Aujla*, 2016 ABPC 272, 2016 CarswellAlta 2313; see *R v Moore*, 2017 ONCJ 801, 2017 CarswellOnt 18532; *R v Castro*, 2016 NWTSC 8, 2015 CarswellNWT 112; see also Haley Hrymak, "A Bad Deal: British Columbia's Emphasis on Deterrence and Increasing Prison Sentences for Street-Level Fentanyl Traffickers" (2018) 41:3 Man LJ.

27. See Michael Weinrath & John Gartrell, "Specific Deterrence and Sentence Length" (2001) 17:2 J Contemporary Crim Justice 105; see Webster & Doob, *supra* note 8.

28. Kevin Tilley, *Justice Denied: The Causes of B.C.'s Criminal Justice System Crisis* ed by David Eby (Vancouver, BC Civil Liberties Association, 2012) at 6 [Tilley], citing John Howard Society of Toronto, *Homeless and Jailed: Jailed and Homeless* (August 2010) [John Howard].

support workers, and probation officers. These connections and supports for people living on the margins of society are important considerations to recidivism.

According to interviewees, prison sentences are harmful to the health of people who use substances, and particularly, incarceration increases the risk of overdose death. As explained by Dr. Evan Wood in his letter to the New Westminster Court dated 13 September 2017:

> Incarceration has been associated with reduced tolerance to drugs resulting in a dramatically increased risk of fatal overdose upon release. It has been consistently demonstrated across a range of international jurisdictions that individuals who use drugs face a three to eightfold increased risk of overdose death within the first two weeks of release from a correctional facility compared to subsequent time periods.[29]

Incarceration also affects the health of people who use drugs because it impacts their ability to access opioid agonist treatment (methadone, buprenorphine/naloxone) and has been "associated with delays initiating and interruptions…during incarceration and following release."[30]

There was agreement among the interviewees that prisons are not rehabilitative and in many instances are an impediment to rehabilitation for people who use drugs. Further, research shows that individuals who are incarcerated for drug offences have higher recidivism rates than other offenders,[31] and recent release from custody is associated with "an increased likelihood of being involved with alternative, higher-risk income generating activities such as sex work, acquisitive crime and drug

29. Dr. Wood Letter, *supra* note 5 at 110.
30. *Ibid.*
31. See Marie-Eve Sylvestre et al, *Red Zones and other Spatial Conditions of Release Imposed on Marginalized People in Vancouver* (Ottawa: Social Science and Humanities Research Council of Canada, 2017) at 26 [Sylvestre], citing Geoffrey Cowper, *A Criminal Justice System for the 21st Century final report to the Minister of Justice and Attorney General, Honourable Shirley Bond* (Victoria: BC Justice Reform Initiative, 2002) at 18; British Columbia, Police Services Division, Ministry of Public Safety and Solicitor General. *BC Policing Jurisdiction Crime Trends 2015*, (December 2017), online: <www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/police/publications/statistics/police-resources.pdf > [perma.cc/7TNB-YGLR]; and Vancouver Police Department, *Project Lockstep: A United Effort to Save Lives in the Downtown Eastside* (4 February 2009), online: <vancouver.ca/police/assets/pdf/reports-policies/vpd-project- lockstep.pdf.> [perma.cc/XMN2-RFTB]; see John Howard, *supra* note 28.

dealing."[32] Ten of the eleven interviewees responded with "no" when asked if Canadian prisons are rehabilitative, while one person said that if "prison" included Healing Villages then they may be rehabilitative.[33] Notably, most of the interviewees laughed when asked if prisons are rehabilitative. One participant of the research stated: "You talk to anyone who has been through this [prison] cycle and you know it doesn't work. It is not rehabilitative…problematic substance use is a health issue and prison doesn't answer any of that." Interviewees discussed the lack of rehabilitative opportunities in custody and the poor prison conditions.[34]

The negative impacts of incarceration are most drastic amongst Canada's Indigenous population.[35] An expert commented on this mass incarceration and Canada's continued legacy of colonization: "Jail is so traumatic for people. It is the new residential school." BC has one of the most disproportionately high levels of Indigenous incarceration anywhere in Canada.[36] Other current issues that exist in Canadian prisons include: limited treatment for individuals with addictions and mental health problems; overpopulation and overcrowding; use of solitary confinement;[37]

32. Dr. Wood Letter, *supra* note 5 at 112, citing Kerr et al, "Characteristics of injection drug users who participate in drug dealing: Implications for drug policy" (2008) 40:2 J of Psychoactive Drugs 147; DeBeck et al, "Incarceration and drug use patterns among a cohort of injection drug users" (2009) 104:1 Addiction 69; Milloy et al, "Incarceration of People Living with HIV/AIDS: Implications for Treatment-as-Prevention" (2008) 27:6 Drug & Alcohol Rev 693; Richardson et al, "Factors associated with employment among a Cohort of Injection Drug Users" (2010) 29:3 Drug & Alcohol Rev 293; Zivanovic et al, "Eviction and Loss of Income Assistance Among Street-Involved Youth in Canada" (2016) 37:2 J Pub Health Pol'y 24; Deering et al, "The Street Cost of Drugs and Drug Use Patterns: Relationships with Sex Work Income in an Urban Canadian Setting" (2011) 118:2-3 Drug & Alcohol Dependence 430.

33. Healing Villages are places where people may serve their sentence but they do not conform to a traditional prison structure.

34. See also Canada, Office of the Correctional Investigator, *Annual report of the Correctional Investigator 2014-2015,* by Howard Sapers (26 June 2015), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20142015-eng.aspx> [perma.cc/JAQ9-2WPN] [Sapers].

35. See CCJS, *supra* note 15.

36. See Benjamin Perrin & Richard Audas*, Report Card on the Criminal Justice System #2* (Ottawa: Macdonald-Laurier Institute for Public Policy, 2018) at 35.

37. Canada's new solitary confinement legislation, Bill C-83, became fully enforced on 30 November 2019. The change is a response to the BC Supreme Court ruling that segregation is unconstitutional. The Bill has been critiqued as merely renaming solitary confinement spaces to "Structured Intervention Units," and Senator Kim Pate has called the new legislation unconstitutional. See Teresa Wright, "Canada's new solitary confinement bill makes it easier to put inmates in isolation, senator says," *Global News* (5 May 2019), online: <globalnews.ca/news/5241955/canada-solitary-confinement-bill-inmates-isolation/> [perma.cc/75JV-4C6B]; see Anita Grace, "Why a federal bill about to take effect won't be the end of solitary confinement in Canada," *The Star* (15 November 2019), online: <www.thestar.com/news/canada/2019/11/15/why-a-federal-bill-about-to-take-effect-wont-be-the-end-of-solitary-confinement-in-canada.html> [perma.cc/E45F-A9ZM].

lack of skills training and vocational programs for inmates; and a decline in the quality of managing individuals and their cases.[38]

3. *Conditions and breaches*

Problematic conditions on bail and probation orders and the resulting breaches that stem from them were continually emphasized by interviewees as one of the biggest challenges in the criminal justice system. Bail orders are conditions or "terms of release" placed upon an individual when they are released from custody into the community pending their trial.[39] The *Charter* enshrines the right to reasonable bail, the right to the presumption of innocence, the right not to be arbitrarily detained, and the right to liberty and security of the accused.[40] The law is clear that conditions of bail should only be imposed to ensure that the person attends court and does not reoffend. As stipulated by the recent Supreme Court of Canada decision in *Antic,* "release is favoured at the earliest reasonable opportunity and on the least onerous grounds."[41] Research participants explained that numerous conditions are frequently imposed on bail orders. A recent study conducted in Vancouver revealed that ninety-seven per cent of bail orders had conditions attached.[42] On average 4.39 optional conditions are imposed per each bail order in BC.[43]

Probation orders are court orders imposed upon sentenced individuals. The law clearly states that probation orders are intended to be rehabilitative and must not contain components that are punitive in nature. There are codified mandatory conditions that appear on all probation orders, and any additional conditions are decided by the court after hearing recommendations by defence and Crown counsel. A 2017 study found that on average 3.9 optional conditions are imposed in addition to the three mandatory conditions of probation orders.[44] Interviewees spoke about how the "rehabilitative" intention of probation orders for people becomes punitive when an individual does not follow their conditions.

One of the strongest themes flowing from the interviews was advocates' frustration with both the number of conditions of bail and probation orders and the way those conditions set up an accused person

38. See Sapers, *supra* note 34.
39. Someone can be denied bail on three grounds: Primary Ground (to ensure the arrestee comes to court for their court dates), Secondary Ground (for the protection of the public), and Tertiary Ground (to maintain confidence in the administration of Justice).
40. *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c11, ss 7, 9, 11.
41. *R v Antic*, 2017 SCC 27 at para 29, citing *R v Anoussis*, 2008 QCCQ 8100 at para 23 [*Antic*].
42. See Sylvestre, *supra* note 31 at 4.
43. See *ibid* at 36.
44. See *ibid.*

to fail.[45] One participant of the research described bail conditions as the "best example" of how the criminal justice system does not understand addiction. Many individuals cannot meet the conditions to secure their release on bail. People who are low income, homeless, or suffering from mental health or substance abuse issues are more likely to be denied bail. The instability of their lives is often seen to be part of the risk they present on bail.

In addition to identifying that the broad theme of the overuse of conditions, interviewees also discussed specific conditions that are problematic for people who use substances including: abstinence conditions; treatment conditions; and red zone conditions. The interviews further revealed that the volume and nature of the conditions lead to breaches. Despite a decrease in the crime rate in Canada over the past decades, the number of people denied bail continues to rise.[46] The next section outlines the individual conditions that interviewees emphasized were most problematic for people who use drugs within bail and probation orders.[47]

a. *Abstain conditions*

An abstain condition is a court order for a person to abstain from the consumption and possession of alcohol and/or illicit drugs. Interviewees reflected that the imposition of abstain conditions revealed a lack of understanding from the courts as to what the disease of addiction involves. An expert explained that the imposition of abstain clauses on orders shows "…no real understanding of addiction as a continuum and addiction as a chronic and recurring thing in people's lives." Another described the difficulty of working with clients on abstinence conditions, stating that "as front-line staff we recognize that substance abuse is a situation that clients find themselves in often, and it's not one we can just put conditions around and fix, and we recognize the hardships that people have in trying to get recovery." While interviewees indicated that abstinence conditions have decreased in number over recent years, they are still imposed regularly by courts in BC.

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45. See generally Nicole Myers, "Eroding the Presumption of Innocence: Pre-Trial Detention and the use of Conditional Release on Bail" (2017) 57:3 Brit J Crim 664 at 675, 681.

46. See Jillian Rogin, *The Application of* Gladue *to Bail: Problems, Challenges and Potential* (LLM Thesis, York University, 2014) at 41 [*Rogin*], citing Canada, Statistics Canada, *Police Reported Crime Statistics in Canada, 2012* by Samuel Perreault (Ottawa: StatCan, 25 July 2013), online: <www.statcan.gc.ca/pub/85-002-x/2013001/article/11854-eng.htm#wb-tphp> [perma.cc/Z4CP-TYJQ].

47. Conditional Sentence Orders (CSOs) are not addressed in this work given that they are jail sentences served within the community and subject to mandatory conditions. Experts did not raise any issues pertaining to CSOs.

Interviewees believed that placing abstinence conditions on people results in harm. For example, a person may shift towards using substances in a private and covert manner to avoid a breach of an abstinence condition. This may mean they do not attend supervised-injection sites or overdose prevention sites; therefore, they no longer have safe spaces to use drugs. Without a safe space to use drugs, people are at an increased risk of both overdosing and of other forms of health risks as explained in the 2011 Supreme Court Case of the *PHS Community Services Society*:

> Although many users are educated about safe practices, the need for an immediate fix or the fear of police discovering and confiscating drugs can override even ingrained safety habits. Addicts…inject hurriedly in alleyways and dissolve heroin in dirty puddle water before injecting it into their veins…users who overdose are often alone and far from medical help…These dangers are exacerbated by the fact that injection drug users are a historically marginalized population that has been difficult to bring within the reach of health care providers.[48]

Interviewees spoke of abstinence clauses precluding people on probation from being truthful with their probation officer because if they are using, they may be charged with breaching the conditions of their probation order and potentially be incarcerated. This may inhibit the probation officer from assisting the individual and providing the resources they need. Fear of detection and criminal charges may prevent people from being honest with other social supports as well. An expert discussed the courts' imposition of abstinence conditions and their misunderstanding: "[S]ometimes it sounds very good to a judge to put that abstinence in the order…[but] we just add to the criminal record, without recognizing that that abstinence condition is actually setting them up for failure."

Interviewees stated that abstain clauses often correspond to the condition that the person must not possess any drug paraphernalia, which may include needles, pipes, rolling papers, and syringes. The prohibition of drug paraphernalia can result in a prohibition of harm reduction equipment. One research participant explained that: "[It] is completely counterproductive. We know that the health care system is spending millions of dollars on clean needles and exchange programs and we know that the science indicates that it is helpful and stops the exchange of disease and prevents the negative health impacts such as abscesses and infections." If a person who uses drugs is prohibited from carrying clean equipment, for example a clean needle, the health of that person and the community is affected. It may lead a person to share needles with others or to look

48. *PHS Community Services Society v Canada (AG)*, 2011 SCC 44 at para 10.

for discarded needles, rather than risk being caught by the police with a needle. The sharing of needles transmits HIV and hepatitis C, and other dangerous infections including endocarditis.[49] As one advocate explained, this condition criminalizes "…behaviour that is otherwise completely lawful and perhaps the safest thing for them at the moment."

b. *Treatment conditions*

Interviewees discussed various issues surrounding treatment conditions as part of court orders for people with problematic substance use within the criminal justice system. The first challenge interviewees described was the over-imposition of rehabilitative conditions. Second, interviewees described the difficulty in finding evidence-based treatment for people who are court ordered to attend or are seeking treatment themselves. Interviewees explained that there are limited opportunities for effective recovery housing in the Greater Vancouver area. The lack of effective treatment coupled with the insistence of rehabilitative conditions on bail leads to further harm for people who use drugs.

In *Antic,* the Supreme Court of Canada reiterated the need for the *Criminal Code* bail provisions to apply uniformly across the country, given the impact of pre-trial custody on the life of an accused and their potential trial.[50] The Supreme Court reiterated that unconditional release is the default position to someone being released from custody. If conditions are to be imposed, it should be considered only to the "extent that [these conditions] are necessary to address concerns related to the statutory criteria for detention and to ensure that the accused can be released" not in order to "change an accused's person's behaviour or to punish an accused person."[51]

The courts' overemphasis on rehabilitative bail conditions was examined by criminal law scholar Jillian Rogin. Rogin's work analyzes the application of *Gladue* at bail.[52] Rogin finds that "although legal actors are aware that rehabilitation should not be pursued at bail, in practice, the

49. See *ibid.*

50. See *Antic*, *supra* note 41 at para 65-66.

51. *Ibid* at para 67.

52. The Supreme Court of Canada offered a partial response to the mass incarceration of Indigenous people through the decision of *R v Gladue*, [1999] 1 SCR 688, 171 DLR (4th) 385. *Gladue* provided further guidance to the scope of section 718.2 (e) of the *Criminal Code*, which states that when sentencing an offender, a court must consider "all available sanctions, other than imprisonment" and pay "particular attention to the circumstances of Aboriginal offenders." The Supreme Court of Canada's decision in *Gladue* called for judges to pay attention to the unique circumstances of Indigenous offenders in order to reduce the use of prison as a sanction and expand the use of restorative justice principles in sentencing.

boundary between crime prevention and rehabilitation is often blurred."[53] Rogin provides insightful critiques of bail conditions that are imposed upon Indigenous people who apply for judicial interim release, including where there is an attempt to bring a *Gladue* analysis to bail decisions. Rogin identifies that Indigenous offenders often have a bail plan that includes treatment as part of a necessary condition of their release plan.[54] Rogin explains that the overuse of treatment conditions at bail is inappropriate and results in accused persons being seen as "presumptively guilty[,]" which in turn "perpetuates systemic discrimination" for Indigenous people.[55] Further, she notes that courts tend to attribute problems that exist for Indigenous people in Canada including poverty and addiction, to Indigenous 'culture or heritage' without acknowledging the role of colonialism and colonial laws.[56]

Interviewees explained that conditions for individuals who use drugs tend to require the person be released to a recovery centre and to attend treatment. Interviewees explained there is a lack of available counselling, residential treatment, and options for people seeking help for their substance use. There is a significant lack of counselling available for people who use drugs in the Greater Vancouver Area, such as "…trauma informed counselling for women impacted by violence and counselling specific for Indigenous folks that has a level of understanding appropriate for residential school survivors and the very particular impacts of colonization on Indigenous people." Many of the interviewees discussed examples of working with clients who were ready to seek treatment and wanted to attend counselling but were unable to access a program that fit their needs. One advocate explained that "when someone asks for help, we can almost never give it to them…so we just keep on re-arresting them."[57]

Interviewees repeatedly emphasized the lack of proper residential treatment facilities and explained that most centres in the Greater Vancouver area are not truly rehabilitative. For instance, one interviewee stated:

> We know there are a lot of "recovery houses" and I use that term lightly. People go there so that they can get released [from custody] because … certainly people don't want to stay in custody. However, the fact is that they are getting released with really strict conditions and that they are

53. Sylvestre, *supra* note 31 at 82.
54. See Rogin, *supra* note 46 at 37.
55. *Ibid* at 46.
56. See *ibid* at 61.
57. Experts spoke of extensive waitlists for the reputable treatment facilities in the Greater Vancouver area.

> not really residing in a recovery house, [because it is] being run by a less than professional non-profit.

Interviewees spoke of the recovery houses as problematic environments. These facilities are often privately run, and the person's welfare cheque often goes directly to the houses after they have been admitted. Interviewees described the difficult position of people who use substances when they are brought into custody because they often are without homes and rehabilitative options for release. The interviewees remain sceptical about the rehabilitative potential of recovery homes, with one of them calling them, "…crack houses designed as recovery, that are just money grabs where there is no actual work being done for recovery."

Interviewees explained that often courts do not understand the circumstances people are in after leaving treatment and hold the false impression people move into stable housing after completing a treatment program. The residential treatment facilities generally have a program that is for a fixed period of time: often 30 days. Transitioning out of the recovery centres can be a challenge as that transition is rarely facilitated by the centre. When people complete the programming at a recovery centre, they may be left without a residence and without programs that may have been available in the facility. It is a systemic problem that people who undergo treatment have nowhere to go following the completion of the program. One expert explained that for her clients the challenges of recovery facilities are often not worth their supposed benefits. She explained many of her clients feel: "What the fuck is the point?…you finish or you get kicked out, where do you end up?…People coming through their programs just return to a place impossible to maintain sobriety."

c. *Red zones*

Red zones on bail conditions or probation orders prohibit people from entering a certain geographic area. Interviewees discussed several challenges that result in the imposition of red zone conditions for people who use drugs. The challenges of these conditions are their overuse; that the area that is red zoned is far too broad; and there is harm caused to people who use drugs and are prohibited from certain areas. Red zone conditions are intended to protect public safety and be specific to the alleged offence or conviction. However, interviewees explained that in many communities the red zone is used so frequently that people involved in the justice system can often draw the typical "red zone" area on a map; it is not tailored to the specific incident. During his time as a geography graduate student at Simon Fraser University, William Damon found that despite the need for "no go" areas to be specifically oriented to a location,

"37% of all restrictions were centered in the Downtown Eastside of Vancouver (DTES) with an additional 11% in the downtown area."[58]

Often when offences are committed by substance users in the DTES, the person is ordered to not attend within the area near the offence, which includes the entire red-zoned area described below.[59] The DTES coincides with the location of all the services for people who use substances including, as an advocate explained, "methadone; needle exchange; overdose prevention sites; supervised consumption sites; defence counsel; shelters; soup kitchens… everything." Therefore, the conditions are potentially increasing the rate of crime and increasing the "risk of negative police encounters and detention."[60] An interdisciplinary team of academics examined cases from 1982 to 2015 and found that red zones account for twenty per cent of the conditions imposed within criminal proceedings and disproportionately impact people who use drugs, showing that over half of the bail orders for drug offences included a red zone condition.[61] Interviews with people impacted by these red zones showed that these conditions led to an inability to access resources, displacement, and emotional harm.[62]

d. *Impact of conditions: administrative breaches*

Interviewees explained that given the frequent imposition of abstain conditions, treatment conditions, and red zone conditions, charges of breaches of court orders are all too frequent. One advocate discussed how the treatment conditions and reporting conditions turn into a punitive measure "…for no reason whatsoever other than just to keep an eye on this person." There is a "significant disjuncture" between the conditions that are imposed and the lives of individuals subject to these conditions.[63]

An advocate described that if the release conditions are too numerous or are not crafted to recognize the circumstances of the person's substance use, then they are "…doomed to fail" and the release conditions are a way of "…basically creating crime." Charges involving Administration of Justice Offences (AJOs) are more likely to result in guilty verdicts and more likely to result in custodial sentences than any other type of offence.[64]

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58. Sylvestre, *supra* note 31 at 45, citing William Damon, *Spatial Tactics in Vancouver's Judicial System* (MA Thesis, Department of Geography, Simon Fraser University, 2014).
59. See *ibid* at 10.
60. *Ibid* at 4.
61. *Ibid.* Damon's research found that the DTES related to 93% of area restrictions related to drug offences.
62. *Ibid* at 70-71.
63. *Ibid* at 4.
64. See *ibid* at 30: "In 2008/2009 35% of all criminal offences were punished with custody compared to 56% of BOP (breach of probation) and 45% of FTC (failure to comply) offences" (*ibid*).

One expert gave an example of a client she worked with who had a history of using fentanyl and was homeless and living under a bridge. He was an Indigenous man on a probation order and he had a criminal charge for failing to report to his probation officer when required to do so. The expert explained that the Crown's position on the file was for 60 days of jail because his last conviction was for 45 days of jail. The expert commented: "How stupid is that? It is a guy living under a bridge! Do we really want him sitting in prison? It seems so counterproductive. He is committing no crime other than being poor."

Research shows that there has been a significant increase (10.8%) in completed criminal cases related to breaches of bail conditions and probation orders between 2005–2006 and 2013–2014.[65] In 2014, seventy-nine per cent of police-reported offences related to charges against the administration of justice.[66] In 2014, breaches of probation and failures to comply with court orders represented seventy-nine per cent of all police-reported AJOs. In total, the AJOs represented approximately one in ten of the Criminal Code offences that were reported by the police Canada-wide.[67] In 2013–2014 thirty-nine per cent of all completed cases in adult courts across Canada included at least one AJO, fifty per cent of which were for failing to comply with conditions and thirty-three per cent involved a breach of probation charge.[68] One advocate described the consequences of these breaches in the following way: "most of our clients are being thrown in jail for failing to report…it is ridiculous. It is small things… non-violent…things."[69]

e. *Recent changes*

On 1 April 2019, the director of the federal public prosecution service released a *Guideline to the Deskbook*, which governs the actions of federal prosecutors, recognizing the harms of certain bail conditions for people with a substance use disorder. Specifically, the Guidebook ordered federal prosecutors to generally avoid the following three conditions on people with substance use disorders: "not to be in possession of controlled substances[,]" "not to be in possession of drug use paraphernalia[,]" and

65. See *ibid* at 30.
66. See *ibid* at 3, 29.
67. See *ibid* at 29; Canada, Department of Justice, *The Canadian Criminal Justice System: overall Trends and Key Pressure Point,* (23 November, 2017), online: <www.justice.gc.ca/eng/rp-pr/jr/press/> [perma.cc/N4JK-X4FA]. Administration of justice offences include failure to comply with a court order, breach of probation, failure to appear, unlawfully at large, escapes or helps escapes from unlawful custody and other administration of justice offences.
68. See Sylvestre, *supra* note 31 at 30.
69. They are presumptively innocent during this time as guaranteed by the *Charter* s 11(d). Prison in this paper refers to federal and provincial prisons, as well as pre-trial detention centres.

broad area restrictions.[70] The stated purpose of the directive is to minimize or eliminate these conditions for people with substance use disorders, recognizing that imprisonment for minor breaches relating to someone's addiction puts them at an increased risk of overdose upon release from custody.[71]

The directive cites the Pivot Legal Society's report *Project Inclusion: Confronting Anti-Homeless and Anti-Substance User Stigma in British Columbia,* which draws from the firsthand experiences of 76 people who were interviewed about "their experiences of homelessness, with accessing harm reduction and health care services, with the criminal justice system, and with accessing services such as income assistance, shelters, and hospitals."[72] This directive shows a positive response to the opioid crisis and will have a direct impact on some of the main challenges identified in this work. There has been no comparable directive made by the provincial Crown department.

II. *Recommendations*

Interviewees were asked what recommendations they would suggest to improve the criminal justice system for people who use substances. The four recommendations provided have been suggested in pre-existing literature,[73] and they are reinforced here as necessary steps during the opioid crisis to improve the health of people who use substances. First, these recommendations include shifting the view of the opioid crisis to more accurately reflect that it is a public health crisis that needs harm reduction responses. Second, community supports are needed to assist people with alternatives to a criminal system. Housing and stable employment were recommended as they are key to the health and well-being of people and directly impact drug users' intersection with the criminal justice system. Third, prisons need to mitigate the increased risks they cause to people who use substances by providing harm reduction materials including opioid substitution therapy, clean needles, and naloxone. Fourth, people working in the criminal justice system should be educated and provided with training on the realities of addiction and the intersection with substance use and the law. This training should be provided by people with firsthand

70. Public Prosecution Service of Canada, *3.19 Bail Conditions to Address Opioid Overdoses*, in the Public Prosecution Service of Canada Deskbook (1 April 2019), online: <www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch19.html> [permca.cc/XWG2-S38K], citing Bennett & Larkin, *supra* note 20.

71. *Ibid.*

72. Bennett & Larkin, *supra* note 20 at 4.

73. See e.g. *ibid*.

experiences and designed to recognize and appreciate the expertise of the providers.

1. *The opioid crisis should be viewed as a health crisis, not a criminal crisis*

The primary recommendation from interviewees was the need to treat addiction as a health matter and not a criminal matter. The criminal justice system should treat people with addictions "like those with heart disease or cancer, recognizing a treatable illness not a stereotype." Interviewees described the need for the criminal justice system to acknowledge and accept that they cannot "fix" health problems. One expert told the story of a client who was taken into custody for being intoxicated in public, and she spent the night on the cement floor of the drunk tank in a wet sweater. The expert observed, "we are still grappling with the right intervention when someone is simply using substances and they happen to not have four walls to do it behind."

Many of the interviewees spoke of the need to implement harm reduction practices in the criminal justice system, particularly in light of the opioid crisis. Harm reduction is the aimed goal of reducing negative health and social consequences associated with drug use without depending on abstinence from the drug itself.[74] Interviewees explained that the key harm reduction initiatives within the Greater Vancouver area can inform the direction of the criminal justice system. Interviewees spoke of the positive benefits of the evidence-based harm reduction initiatives such as Insite and the Injectable Opioid Agonist Therapy (iOAT),[75] including the North American Opiate Medication Initiative (NAOMI). The community's response to the opioid crisis can be seen through an increase in harm reduction strategies and initiatives. This article briefly describes the health benefits of supervised injection sites and heroin-assisted treatments as these two initiatives were repeatedly emphasized in the interviewees' responses.

a. *Insite and injectable opioid agonist therapy*

Interviewees spoke of the positive impact that Insite has on the community within the DTES by reducing harm to people who use drugs. North America's first supervised injection facility, Insite, does not provide

74. See generally Alana Klein, "Criminal Law and the Counter-Hegemonic Potential of Harm Reduction" (2015) 38:2 Dal LJ 2; see generally Mark Haden, "The Evolution of the Four Pillars: Acknowledging the Harms of Drug Prohibition" (2006) 17:2 Intl J Drug Pol'y 124; see Patricia G Erickson et al, eds, *Harm Reduction: A New Direction for Drug Policies and Programs* (Toronto: University of Toronto Press, 1997) at 4.

75. Now referred to in BC as iOAT (Injectable Opioid Agonist Therapy).

drugs. It provides clean injection equipment and health care staff who supervise drug consumption.[76] Since its inception in 2003, 3.6 million clients have injected illicit drugs at Insite, and there have been 6,440 overdose interventions and zero deaths. Between January 1 and December 31 of 2017, there were 2,151 overdose interventions at Insite. Interviewees explained that courts should be mindful of the evidence of Insite. It is important for the justice system to not create barriers for people to access harm reduction sites, for example, through Red Zone conditions as described in Part I. The lifesaving results that safe injection sites provide are imperative during the overdose crisis.[77]

Interviewees discussed the positive impact that iOAT has had on the people with whom they have worked. iOAT involves the prescription of pharmaceutical quality heroin (diacetylmorphine) within a supervised and specifically designed clinic. iOAT was found to be a therapeutic option for "chronic, long-term, opioid injectors who remain outside of the current addiction treatment system." NAOMI was Canada's version of Heroin Assisted Therapy (HAT).[78] It was a randomized controlled trial where injectable heroin was provided to people with one of the purposes being the evaluation of HAT in Canada.[79] The recipients of the prescription were people who have been long-term opioid injectors.

The study was effective at reaching people who had struggled to get treatment for years, and an improvement to both their physical and psychological health was evident from the study. There were no reported negative impacts on the neighborhood that surrounded the NAOMI project. When participants were provided with safe heroin there was a marked reduction in their need to purchase illicit heroin. This resulted in a reduced crime rate for the participants who had previously turned to crime to pay for their illicit heroin.[80]

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76. See Vancouver Coastal Health, "Insite—Supervised Consumption Site," online: <www.vch.ca/locations-services/result?res_id=964> [perma.cc/L4BN-R2SF].

77. There are 15 overdose prevention sites within Vancouver alone that provide similar services.

78. HAT involves a patient attending to a clinic 2–3 times daily for supervised injection of heroin. The NAOMI project first began in February of 2005 and first ended in March of 2007. The model resembled other HAT studies done in Europe, and NAOMI was intended to be a trial run for research purposes. The trials in 2005 were conducted simultaneously in Vancouver, and Montreal. In Vancouver there were 192 participants and in Montreal there were 59.

79. See Eugenia Oviedo-Joekes et al, "The North American Opiate Medication Initiative (NAOMI): Profile of Participants in North America's First Trial of Heroin-Assisted Treatment" (2008) 85:6 J Urban Health 812 [Oviedo-Joekes].

80. One of the project's most notable successes was providing an alternative to a hard to reach population who had tried treatment, including methadone, for a period of time without any reduction in offending.

In a report created by Naomi Patients Association (NPA), participants of the project detailed some of the benefits of the NAOMI research. One common theme within their responses was that the provision of heroin (or in some instances hydromorphone) removed the constant struggle to illegally obtain the drugs and get enough money to do that. One participant stated:

> "I didn't have to worry about having to get up every morning and run all over hell's half acre just like a chicken with my head cut off wondering where I was going to get the money to get better."[81] Another stated: "I wasn't sick, you know, I wasn't running around trying to get $10 all the time."[82]

One expert in this research described a client she represented for almost 20 years who had an eight-page criminal record. The client stopped having criminal involvement once they were involved with the NAOMI project. The expert stated that "by giving him his heroin I haven't been employed by him…last time I saw him he was working and doing well and the only thing that changed was they gave him his drugs."

Another expert spoke of the success they observed through their clients' involvement within the NAOMI project:

> We know from the NAOMI project that monitored use is great and it means I'll get housed and I'll move on with my life and do other things, and we don't need to talk about whether or not that person is going to stop using injectable heroin or hydromorphone because it's kind of irrelevant and now they are engaged in a system that works. So maybe they will say…that they identify as someone who has a disability, maybe they will choose to identify as someone who takes medication every day, just like a whole bunch of other people.

One advocate summarized her response for how to best improve access to health for people who use substances: "Give the people who are using heroin, cocaine, fentanyl…whatever…give them their drugs. And through INSITE, say 'here we are ready to help you…and give [them] a bowl of soup too and give [them] a sandwich and…every once in a while say 'hey, we are here for you.'"

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81. The NAOMI Patients Association & Susan Boyd, *Naomi Research Survivors: Experiences and Recommendations* (20 February, 2012) at 24, online: <drugpolicy.ca/wp-content/uploads/2012/03/NPAreportMarch5-12.pdf > [perma.cc/3XRD-XA7K] [NPA].
82. *Ibid.*

b. *Decriminalization*

Advocates spoke of the need for decriminalization of substances to "…abolish prohibition." They explained that this movement for decriminalization should be seen in light of the efficacy of programs like NAOMI; "…the genie is out of the bottle about how effective this is." The general consensus from the research participants was that decriminalization, and movement towards it, should be paramount at this time:

> Really, I think [the opioid crisis] is caused by prohibition. If these people that were addicted could get pharmaceutical grade drugs that were prescribed to them then they wouldn't be risking fentanyl overdoses. They would be in control. Prohibition causes more harm than the substances do themselves.

Within the discussion surrounding decriminalization it is necessary to review the recommendations made by the NPA in their 2011 report.[83] The NPA report written by the patients within the NAOMI trial draws attention to the disproportionate impact prohibition has on people who are already vulnerable: "Prohibition fuels an illegal market and, unlike in more privileged neighborhoods, drug use and selling is more visible on the street in the DTES instead of hidden behind closed doors."[84] The argued need for decriminalization has been particularly poignant during the opioid crisis. One advocate said: "Even our politicians are talking about how we need to decriminalize drugs…we are there. We just need to actually do it. People are dying. There is no…excuse at this point."

People in support of decriminalization argue that it would be a step in the right direction towards ending the opioid crisis, while saving thousands of lives and millions of dollars.[85] As stated by one advocate: "…to be perfectly honest if we don't start seeing a movement on a legislative front, I wonder if we will start seeing…judicial activism on that front because incarcerating people simply doesn't work." These considerations demonstrate the distance between the justice system's current response, and the response advocates say is needed.

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83. See *ibid* at 16 citing Senate, *Proceedings, Special Committee on the Traffic in Narcotic Drugs in Canada* (1955) at 244.

84. *Ibid* at 4.

85. See e.g. Devesh Vashishtha, Maria Luisa Mittal & Daniel Werb, "The North American Opioid Epidemic: Current Challenges and a Call for Treatment as Prevention" (2017) 14:7 Harm Reduction J at 3; see e.g. Steffanie A Strathdee, Leo Beletsky & Thomas Kerr, "HIV, drugs and the legal environment" (2015) 26:1 Intl J Drug Pol'y at S27; see e.g. Rebecca Jesseman & Doris Payer, "Decriminalization: Options and Evidence" Canada Centre on Substance Use and Addiction (June 2018) at 1.

Insite, the NAOMI Project, SALOME, and Crosstown Clinic were all commended by advocates in this research. [86] With a harm reduction approach, there is more room to offer kindness and humanity to a population that is systematically stigmatized.

2. *Expand community supports*

The recommendation from all interviewees was for an expansion of community supports for people to prevent their involvement within the criminal justice system in the first place. They specifically recommended: additional government support to organizations that work with people who use substances or need mental health support; enhancing support to diversion programs; and establishing further employment and housing opportunities for people with prior drug use or criminal involvement.[87] These arguments for investments into community supports have been emphasized for years, including in a report by the Canadian Centre for Policy Alternatives and the John Howard Society of Manitoba, which was made in anticipation of the *Safe Streets and Community Act*:[88]

> The Province of Manitoba could better spend the estimated $90 million per year that the *SSCA* is expected to cost…to address the root causes of crime and drug dependency. By investing in new social housing and childcare spaces rather than prison cells, and investing in employment, education, and drug dependency supports rather than correctional staff, they make the case that we really could build safer streets and communities for everyone.[89]

a. *Diversion programs*

Interviewees spoke of the need for further diversion programs in the community to prevent people from being incarcerated. Diversion programs and proper community supports recognize "…the root causes of people's addiction, rather than punishing people for having the addiction." Diversion

86. The Providence Crosstown Clinic provides medical heroin and hydromorphone within a supervised clinic to chronic substance use patients. The Study to Assess Longer-term Opioid Medication Effectiveness (SALOME) is a clinical trial conducted at the Providence Crosstown Clinic comparing medically prescribed heroin with a pain medication (hydromorphone). Findings suggest that hydromorphone could be offered as an alternative treatment for patients with long-term opioid dependence; see Oviedo-Joekes, *supra,* note 79.

87. Other themes that were raised for community supports included extensive trauma-informed counselling.

88. *Safe Streets and Community Act*, SC 2012, c 1 [*SSCA*].

89. See Darcie Bennett & Scott Bernstein, *Throwing Away the Keys: The human and social cost of mandatory minimum sentences* (Vancouver: Pivot Legal Society, 2013), online: <www.pivotlegal.org/throwing_away_the_keys_the_human_and> [perma.cc/K3F8-2KA2] at 25-26, [Bennett & Bernstein], citing John Howard Society of Manitoba and Canadian Centre for Policy Alternatives, *Bill C-10: The Truth About Consequences* (Canadian Centre for Policy Alternatives, 2012).

programs are needed in a large part because of the harm caused to people who use drugs and are imprisoned. Interviewees explained that prisons do not provide appropriate supports and rehabilitative opportunities for people who use drugs: "If the thought on the front end is that we are sending people into prison to be rehabilitated, that is an unrealistic expectation and even if there are some improvements, thinking that prisons are therapeutic environments is just totally misguided."

Further, people face a significant increase of overdose death after their release from a correctional facility.[90] Between 1 January 2016 and 31 July 2017, 333 people in BC died from illicit drug overdoses while under community corrections supervision or within 30 days of release from a correctional facility.[91] Efforts to divert matters to prevent custodial sentences is especially important to public health during the opioid crisis.

b. *Employment opportunities*

Interviewees described stronger financial investments into employment opportunities as essential components for addressing the rights of people who use drugs. Unemployment and economic hardship correlate with the effect of drug use on people, as well as people's ability to cope with their addiction. Research has shown that increasing employment opportunities or reducing the economic hardship of people can result in a reduction of drug use, particularly following treatment.[92] In turn, unemployment and resulting economic hardship can predict higher drug addiction severity for people involved in the criminal justice system.[93]

One expert explained that to reduce recidivism and involvement with the criminal justice system, people need to have income-generating opportunities:

> There…has to be employment opportunities for folks…[and] income assistance/disability assistance and that has to be at a rate where folks don't feel that they have to go out and commit crimes to support themselves. There are lots of folks that need supports to make that

90. See Elizabeth Merrall et al, "Meta-analysis of drug-related deaths soon after release from prison" (2010) 105:9 Addiction 1545.

91. See British Columbia, Death Review Panel, *BC Coroners Service Death Review Panel: A Review of Illicit Drug Overdoses*, by Michael Egilson (5 April 2018) at 18-19, online: <www2.gov.bc.ca/assets/gov/birth-adoption-death-marriage-and-divorce/deaths/coroners-service/death-review-panel/bccs_illicit_drug_overdose_drp_report.pdf> [perma.cc/YZQ5-2ZAS].

92. See Craig Haney, "Mental health issues in long-term solitary and "supermax" Confinement" (2003) 49 Crim & Delinquency 124, cited in Bennett & Bernstein, *supra* note 89 at 23; see also Elizabeth Wahler, "Social Disadvantage and Economic Hardship as Predictors of Follow-Up Addiction Severity after Substance Abuse Treatment: Does Referral to Treatment by the Criminal Justice System Matter?" (2015) 33:1 Alcoholism Treatment Q 6 [Wahler].

93. See Wahler, *supra* note 93.

> transition from years of substance abuse where they are not functional in their day to day lives and then to transition into employment.

One example provided by an advocate was the potential of hiring women from the community who have had issues with substances as paid peer supports to other women in the community. Overall, interviewees discussed the need to acknowledge people's "lived experiences as adding value to organizations and [acknowledging] their contributions to society and the workplace."

c. *Housing*

Interviewees discussed the difficulties people face finding affordable housing in the Greater Vancouver area. That lack of affordable housing contributes to the marginalization of people with addictions.[94] Bernie Pauly, Geoff Cross and Derek Weiss released a report in 2016, reporting that the shelter occupancy rate in Vancouver was ninety-seven per cent.[95] In 2012, the British Columbia Civil Liberties Association estimated that BC could decrease seventy-nine per cent of the inmates who have severe addiction and mental health problems if they were "properly housed and offered basic services."[96] Interviewees explained that the lack of evidence-based treatment houses in the Greater Vancouver area affects people who use drugs' ability to get bail and ultimately impacts the length of time they spend in custody. While actors within the courts cannot build houses, interviewees explained that there needs to be recognition of how the housing crisis impacts people within the criminal justice system so to not further penalize people without appropriate housing supports.

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94. See BC Non-profit Housing Association & M Thomson Consulting, *2017 Homeless Count in Metro Vancouver*, prepared for the Metro Vancouver Homelessness Partnering Strategy Community Entity (Indigenous people accounted for 34% of the homeless population), cited in Sylvestre, *supra* note 31 at 24; see Richard Zussman "BC government set to increase welfare rates and disability assistance" *CBC News* (20 July 2017), online: <www.cbc.ca/news/canada/british-columbia/b-c-government-set-to-increase-welfare-rates-and-disability-assistance-1.4214828> [perma.cc/QQ2L-PX2W] (the welfare rate is $710 per month after a recent increase of $100 per month following a welfare freeze for a decade); see Oviedo-Joekes, *supra* note 79 citing S Galea & D Vlahov, "Social determinants and the health of drug users: socioeconomic status, homelessness, and incarceration" (2002) 117.Supp 1Pub Health Rep S135.

95. See Bernie Pauly, Geoff Cross & Derek Weiss, *No Vacancy: Affordability & Homeless in Vancouver* (Vancouver: 2016), online: <www.ugm.ca/affordability> [perma.cc/4DLR-ECXJ] cited in Sylvestre *supra* note 31 at 25.

96. Tilley, *supra* note 28 at 18-19, citing Michelle Patterson et al, *Housing and Supports for Adults with Severe Addictions and/or Mental Illness in BC*, (Simon Fraser University Centre for Applied Research in Mental Health and Addiction, 2007) at 79, online: <www.health.gov.bc.ca/library/publications/year/2007/Housing_Support_for_MHA_Adults.pdf> [perma.cc/L2E2-V6V3]: Research shows that the economics of housing people within custody in Canada is exorbitant. In 2008 it was estimated that the total cost of housing remanded adult inmates in prison was over $26 million (*ibid*).

3. *Increase harm reduction supplies in prisons*

Interviewees explained that if people do come to be incarcerated, prisons should offer harm reduction supplies, given the prevalence of drug use in prisons.[97] Canada has been reluctant to implement harm reduction services for people within prisons. This may be because harm reduction requires an acknowledgement of the prevalence of substances within prisons. However, the prevalence of drugs in custody is well known. One article in a medical journal summarized the prevalence well: "it can be stated without exaggeration that substance use problems are endemic among prisoners, and co-occurring disorders appear to be the rule rather than the exception."[98] Recently a man spoke to the CBC about his experience within a BC prison and said, "drugs act as a currency and there's a market for everything from cigarettes to steroids."[99]

Interviewees explained that the lack of harm reduction equipment within custody severely impacts the health of the prison population.[100] HIV and Hepatitis C are ten to 30 times higher in Canadian prisons than anywhere else in the general Canadian population, and the rates among women and Indigenous inmates the numbers are worse.[101] Interviewees emphasized the need for three primary harm reduction measures to be available for people in custody who use drugs: opioid maintenance therapy, clean needles, and naloxone. While these recommendations are geared towards the organization of provincial and federal custodial institutions, it is necessary for the actors within the criminal justice system, namely lawyers and judges, to be mindful of the severe gaps within custodial institutions. Prisons are not rehabilitative, and as described by advocates, prisons frequently lack the most basic harm reduction supplies to keep the prison population and the community safe.

97. A pilot study implementing prison needle exchanges is beginning in Canada. Experts also spoke of the need for further treatment options and mental health services.

98. See Canadian Mental Health Association, *Police and Mental Illness: Increased Interactions* (March 2005) at 8 as cited in Sylvestres *supra* note 31 at 26.

99. Rafferty Baker, "Think Prison Forces an End to Drug Addiction? Think Again" *CBC News* (25 April 2018), online: <www.cbc.ca/radio/ondrugs/think-prison-forces-an-end-to-drug-addiction-think-again-1.4632945> [perma.cc/GR2S-2RTP].

100. See Canada, Office of the Correctional Investigator, *Annual Report: 2015–2016* by Howard Sapers (Ottawa: 2017), online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20152016-eng.aspx> [perma.cc/W66E-XEVC].

101. See *ibid*.

a. *Opioid substitution therapy*

Opioid substitution therapy (OST) is the use of prescribed medication for withdrawal management.[102] Opioid use disorder is considered one of the most challenging forms of addiction; it is a chronic and relapsing condition with a serious risk of fatal overdose.[103] However, it is equally important that appropriate treatment and follow-up can lead to "sustained long-term remission."[104] Results from OST show that it "reduces mortality, HIV-related injecting risk behavior, illicit heroin use, and criminal activity."[105] The guidelines for effective intervention for the treatment of opioid use disorder suggest that detoxification from substances must be accompanied by an immediate transition to long-term addiction treatment, like OST, because without it there is an increased risk of relapse and death.[106] These treatments can be available for people within prison, and there should not be barriers to seeking treatment while incarcerated.[107]

Prisoners' Legal Services (PLS) recently filed a complaint to the Canadian Human Rights Commission on behalf of 75 inmates contesting the wait times for people in custody to receive OST.[108] In a CBC article, an advocate with the PLS explained that she has spoken to "numerous prisoners who have waited months—and some more than a year for OST…while in custody."[109] PLS argues the wait times for OST amount to inhumane treatment and discrimination on the basis of disability. Further details of the complaint show that inmates experience "involuntary tapering or sudden termination of their medications as punishment." The complaint filed by PLS raises the concerns of OST within federal prisons and has the potential to improve the conditions within federal institutions for people with opioid use disorder.

Interviewees explained that people within provincial institutions and pre-trial detention facilities are most at risk of harm. People are constantly transitioning in and out of provincial institutions and particularly pre-trial

102. See Bobby Smyth, John Fagan & Kathy Kernan, "Outcome of Heroin-Dependent Adolescents Presenting for Opiate Substitution Treatment" (2012) 42:1 J Substance Abuse Treatment 35 [Smyth].
103. See Bruneau, *supra* note 9 at E247.
104. *Ibid.*
105. Smyth, *supra* note 102 at 1.
106. See Bruneau, *supra* note 9 at E250, E253-E254.
107. For example, Buprenorphine became an available treatment option in 2005, and in 2007 Buprenorphine was combined with naloxone to create Suboxone. Suboxone is tablet that is taken by dissolving it under the tongue. Whereas, methadone is a liquid that is typically mixed with juice and the person drinks it.
108. Filed on 4 June 2018.
109. Rafferty Baker, "Human rights complaint filed over federal inmates' access to opioid treatment," *CBC News* (4 June 2018), online: <www.cbc.ca/news/canada/british-columbia/human-rights-complaint-opioid-treatment-1.4688486> [perma.cc/2QBT-SQC4].

detention facilities, and "…the reality is that people are quite likely to be in a risk state." Providing OST to people within custody is vital to the health of people who use drugs. This recommendation is in line with the medical research and is consistent with international recommendations and guidelines.[110]

The delays and difficulties for people in custody in receiving OST are often repeated when they are released into the community. People are released without the resources to get medication. One advocate provided an example of someone released on a Friday evening without a prescription and at a high risk of using and overdosing before being able to access their medication on Monday. An advocate working in a social justice organization explained that part of her job involves picking up people who have been released from custody "…right from the gate as often as humanly possible to ensure we can try and get them linked up with the OST so that there is no falling off that is unintentional. So, if someone is wanting to stay clean over a period of time – then the system isn't the reason why they are relapsing." The advocate works with a population that is at high risk, and she explained that few organizations have the capacity to help people transition between the prison and community in a way that reduces harm.

b. *Clean needles and naloxone*

Interviewees explained that clean needles or prison needle exchange programs (PNEPs) are a fundamental need for people who use drugs in prisons. PNEPs have been found to be safe and effective for people within custody who use drugs. In May of 2018, after a court case with the Canadian HIV & AIDS Legal Network, Correctional Service Canada (CSC) decided to implement two needle exchange programs at federal institutions.[111] This decision shows a positive step towards concession by the Federal Government on the importance of PNEPs.[112]

Further, interviewees explained that naloxone should be available to people in custody. It is positive that some people are provided with naloxone upon release from custody, particularly if they are not using drugs

110. See Sonali Jhanjee, "Providing Drug Abuse Treatment in Prison: A Call for Action" (2012) 5:1 Asian J Psychiatry 114, citing K Dolan et al, *Prisons and Drugs: A Global review of Incarceration, Drug use and Drug Services* (Beckley Foundation Drug Policy Programme, 2007).

111. See Rafferty Baker, "Needle Exchanges Coming to 2 Canadian Prisons," *CBC News* (14 May 2018), online: <www.cbc.ca/news/canada/british-columbia/needle-exchanges-coming-to-2-canadian-prisons-1.4662778> [perma.cc/X9BE-W3G8].

112. The lawsuit is being filed jointly by the Canadian HIV-AIDS Legal Network, Prisoners with HIV/AIDS Support Action Network (PASAN), an AIDS information group endorsed by Canada's Public Health Agency (CATIE) and the Canadian Aboriginal AIDS Network (CAAN), a coalition that provides support and advocacy for aboriginal people living with AIDS.

in custody.[113] The evidence is clear and reiterated in the national clinical practice guideline that relapse and risk of overdose are significantly higher after periods of abstinence.[114] One study found that people with opioid dependence released from custody were "12 times more likely to face that risk [of fatal overdose] in the two weeks following release."[115]

4. *Listening and learning from people with lived experiences*

Interviewees recommended that the criminal justice system, namely lawyers and judges should listen to and learn from the lived experiences of people who use drugs, particularly those who are in the Indigenous population. These groups can help to design the criminal justice system's response to the opioid crisis while informing the justice system's actors why the current model is ineffective and harmful. The author recommends comprehensive and mandatory training on substance use from medical professionals, people who use drugs, and people who have experiences with incarceration. Comprehensive training should be required for Crown counsel and judges as a starting point.

Interviewees explained that problems stem from the fact that people who work within the system are not informed directly by people who use drugs and front-line workers about the realities of drug use. Interviewees explained that the approach needs to be more integrative, with people listening to different partners and what they have to say because "a lot of decisions are being made by people who are out of touch." Another expert said that part of the problem is having Crown counsel and judges who do not have any experience with drugs. She added:

> I remember I was a young counsel when hearing a couple of Crowns… saying, 'who even tries crack? How can you wake up one day and think…oh I'm going to try crack?' and I just thought…if you can't wrap your head around someone being in so much emotional pain that they would do anything to end that moment, then you shouldn't be sending people to jail for it.

113. In 2017, CSC integrated a Take-Home Naloxone Initiative into the discharge planning of offenders on Opioid Substitution Therapy (OST). This initiative provides offenders with take-home kits on release and upon arrival at their community residence. See Canada, Office of the Correctional Investigator, *2. Prevention of Deaths in Custody in Office of the Correctional Investigator Annual Report 2017–2018* by Ivan Zinger, online: <www.oci-bec.gc.ca/cnt/rpt/annrpt/annrpt20172018-eng.aspx#s3> [perma.cc/46KK-WVDD].

114. Bruneau, *supra* note 9 at E249.

115. Tamsyn Burgman, "BC Prisoners get addictions therapy after settlement in Charter challenge," *The Globe and Mail* (15 April, 2016), online: <www.theglobeandmail.com/news/british-columbia/bc-prisoners-get-addiction-therapy-after-settlement-in-charter-challenge/article29648890/> [perma.cc/8KFD-GWR8].

The justice system could develop better responses to criminal involvement with people who use drugs if these responses were more aligned with the realities of drug use, particularly during the opioid crisis. One advocate expanded on these themes by saying:

> [The] absolute first thing is to hear from people who use drugs when they are not a defendant. They inform how the system works from the lens of a defendant. The judge will say something about your individual case, but giving peers a position of power to have feedback to how the system is working for them would be really powerful to having any kind of system of change because they are the interviewees, they are the ones who have been through the system for years and they know what works and what doesn't. For the most part, they understand what people's concerns are and they understand what would work better.

There is an unfortunate tendency to exclude the voices of groups that are central to the conversation from research, policy reform and planned change.[116]

Interviewees recommended that training be provided by people with lived experiences to people within the justice system, including Crown counsel and judges. To have meaningful conversations and training by people who use drugs, it is necessary to recognize their value and input as interviewees. Specifically, that involves ensuring that people with lived experiences inform the conversations; help plan the agenda; are paid for their expertise; are provided transport to the training event; are allowed breaks; are provided snacks; and are afforded other considerations that show that they are valued in the same way other education providers are valued.

The need to better listen and learn is particularly acute with respect to the perspectives of Indigenous people. In addition to being a demographic most affected by the opioid crisis, they bear an additional burden of experiencing systemic racism by the justice system and its actors.[117] Rogin recommends that the "racial profiling, the rounding up of the 'usual suspects' and the heightened scrutiny faced by Aboriginal people by police should all be considered" by the courts when assessing the current and past charges of the accused.[118]

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116. See NPA, *supra* note 81; see also Canadian HIV/Aids Legal Network, *'Nothing About Us Without Us' Greater Meaningful Involvement of People who Use Illegal Drugs: A Public, Health, Ethical, and Human Rights Imperative* 2nd ed (2005), online: <www.aidslaw.ca/site/wp-content/uploads/2013/04/Greater+Involvement+-+Bklt+-+Drug+Policy+-+ENG.pdf> [perma.cc/ZN63-SH9K].

117. See Rogin, *supra* note 46 at 93, citing Manitoba, Public Inquiry into the Administration of Justice and Aboriginal People, *The Justice System and Aboriginal People: Report of the Aboriginal Justice Inquiry of Manitoba*, vol 1 (Winnipeg: The Inquiry, 1991) at 102.

118. *Ibid.*

Conclusion

This paper described the key challenges that exist in the criminal justice system and recommendations for change. The interviewees interviewed provided insights into the challenges of working in the current justice system that confirm the challenges identified in pre-existing literature.[119] In Part I, interviewees explained that there are several key challenges to representing people who use substances within the criminal justice system. These risks are exacerbated during the opioid crisis given the increased risk of overdose death when people with substance use disorders are incarcerated. Interviewees spoke broadly of the challenges that result from the lack of understanding of addiction and the circumstances people who use substances are often in. Lengthy prison sentences for people with addiction are being imposed despite prisons being inappropriate institutions to address issues of addiction. Further, this disconnect between the realities of addiction and the criminal justice system's understanding is evident in the conditions imposed on bail and probation orders.

Part II of this work described the key recommendations made by interviewees surrounding the criminal justice system's response to the opioid crisis. Interviewees explained that the criminal justice system needs to treat this as a health crisis, not a criminal crisis. Further, the criminal justice system can learn from evidence-based harm reduction initiatives in the community such as Insite and the NAOMI project. Interviewees recommended the need for further community supports and diversion opportunities to prevent people from being involved within the criminal justice system. These supports include housing and employment opportunities for people with criminal justice background or involvement or who are vulnerable to criminal behaviour. For people who come to be incarcerated, prisons need to have harm reduction services available for them to use drugs safely. To begin to shift the focus of the criminal justice system, interviewees recommended that training be provided from people with lived experiences. Given the ongoing opioid crisis in BC, now is a particularly important time to examine the justice system's impact on the health of people who use drugs. The BC coroner's office has directed that efforts to reduce the risk of death and injury from drug use be evidence-based, innovative, and compassionate.

119. See e.g. Bennett & Larkin, *supra* note 20.