

October 4, 2019

Joint Committee on Mental Health, Substance Use and Recovery
Sen. Julian Cyr & Rep. Marjorie Decker

**SUPPORT S.1134 & H.1712
SAFE CONSUMPTION SITES**

Chairwoman Decker, Chairman Cyr, and members of the Joint Committee on Mental Health, Substance Use and Recovery:

The ACLU of Massachusetts supports S.1134 and H.1712, which approach substance use disorders with a public health lens and a harm reduction focus. Massachusetts is in the midst of a long, brutal opioid epidemic. In 2018, 1,617 people in our state died from confirmed opioid-related overdoses. This epidemic, like all health epidemics, requires a comprehensive strategy that focuses on prevention and providing treatment on-demand. One part of such a strategy is to reach people struggling with substance use disorder who are not currently engaged in treatment, via facilities like safe consumption sites.

Safe consumption facilities, sometimes called overdose prevention sites, have been operating across Australia, Canada, and Europe for decades and have successfully prevented overdose deaths, reduced the transmission of disease, and connected people to treatment. The evidence shows they work.¹ Recognizing the success of safe consumption facilities in other countries, the 2018 Harm Reduction Commission recommended that “[a] pilot program of one or more supervised consumption sites should be part of the Commonwealth’s efforts to combat the opioid crisis.”²

Much has been made about a potential conflict between authorizing a safe consumption facility and the federal Controlled Substances Act, which makes the possession and consumption of some drugs illegal under federal law. The day after the Committee’s hearing on these bills, in a case of first impression, a federal court in Pennsylvania addressed this question directly. The court held that a proposed safe consumption site in Philadelphia does not violate the CSA because the purpose of the safe consumption site is not to facilitate illegal drug use, but rather to *reduce* drug use by providing medical support and connecting people with substance use disorders to recovery services.³ While the Pennsylvania decision does not control courts in the District of Massachusetts, it is significant that the only court to consider whether safe consumptions violate the federal law found that safe consumption sites are not illegal.

¹ See, e.g., Potier C, Laprévotte V, Dubois-Arber F, et al. *Supervised injection services: What has been demonstrated? A systematic literature review*. Drug and Alcohol Dependence. 2014;145:48-68 (review of 75 articles regarding supervised overdose prevention sites found that these sites were associated with better health outcomes for intravenous drug users and fewer overdose deaths).

² Massachusetts 2018 Harm Reduction Commission Report (Mar. 1, 2019).

³ *US v. Safeshouse*, No. 19-0519, 2019 WL 4858266 (E.D. Pa. Oct. 2, 2019).

Massachusetts has proud history of doing what's best for its residents, even when there is tension between state and federal law. Despite the fact that cannabis consumption is illegal under federal law, the Commonwealth has allowed cannabis consumption for medicinal purposes since 2012. Voters approved consumption and possession for recreational purposes in 2016. Massachusetts has continued with legalization despite the conflict of the state laws with federal drug laws.

It is well-established that the state and federal governments can adopt different laws addressing the same activities and separately enforce each within the boundaries of the state under the “dual sovereignty” doctrine:

Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. ... That either or both may if they see fit punish such an offender cannot be doubted.⁴

While the Pennsylvania case held that a nonprofit entity's operation of an overdose prevention site did not violate the CSA, the court did not deal with whether individual drug users could be prosecuted for possession under the federal law. Under the principle of dual sovereignty, state-sanctioned safe consumption sites will not shield individuals acting in compliance with the state law from arrest, indictment, and conviction under the federal CSA. Providing safe consumption sites will not change the legal risks that individuals are taking by consuming illegal drugs in violation of state and federal laws. Rather, like medical and recreational cannabis laws, the Commonwealth can establish state law but offers no legal protection from possible punishment by the federal government under the federal CSA. While Massachusetts cannot eliminate an individual drug user's risk of federal prosecution, a safe consumption site can dramatically reduce that person's risk of death from an overdose.

The legislation before you is about how Massachusetts as a state wants to use its own resources to tackle the opioid crisis. Only a court can decide whether safe consumption sites are legal in Massachusetts, but the Commonwealth's policy decision to explore the feasibility of overdose prevention sites, prioritizing evidence-based, live-saving measures over the enforcement of drug laws by state law enforcement, is within the purview of the state legislature.

As Supreme Court Justice Louis Brandeis famously wrote, a “[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁵ The laboratory of democracy, at its best, means that community-based answers that solve difficult social problems bubble up to the federal level and are eventually ensconced in law. And, in our federalist system of government, public health is a core state power, which is granted great deference by the federal government.⁶ Because overdose prevention sites are a matter of public

⁴ *Moore v. Illinois*, 55 U.S. 13, 20 (1852).

⁵ *New State Ice Co. v. Liebman*, 285 U.S. 252 (1932).

⁶ *See Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1905).

health concern, it is especially fitting that the state would participate in the laboratory of democracy in this area.

Over the last several years, the legislature and the Baker administration have stepped up to combat the opioid crisis, making Massachusetts a leader in harm reduction and evidence-based strategies. The Commonwealth has expanded access to life-saving Naloxone, ensured that medication assisted treatment is available in prisons, funded needle exchange programs, launched the State without StigMA campaign, and more. This legislation represents another evidence-based public health response to chronic drug use in an effort to save lives and support recovery. Too many people die in the Commonwealth every year due to drug overdoses. These are preventable deaths. We urge the Committee to continue to prioritize the health and well-being of Massachusetts's residents over fear of conflict with the federal government.