Reducing incarceration rates through decriminalisation, depenalisation, and mechanisms of diversion offers more effective and less costly ways to reduce drug-related crime, and promotes the health and social inclusion of low-level drug offenders.

Why is it important to reduce incarceration?
In an attempt to reduce illicit drug markets, many governments rely on the incarceration of drug offenders. The rationale for instituting incarceration as punishment for drug-related crimes is the belief that harsh penalties instituted by a strong criminal justice system will deter potential growers, users and dealers from becoming involved in the drug market. Incarceration therefore plays an important part in most national drug control systems, although the extent and nature of its use varies widely from one country to another.

In the past four decades, increasing numbers of people arrested for drug-related offences have been sent to prison. The steepest rise has been in the USA, where over half of federal prison inmates are kept in custody for a drug charge. \(^1\) Less significant rises have also taken place throughout Europe, Asia, Africa, Oceania and the Americas. \(^2\) The rising trend of incarceration is concerning, and its effectiveness for alleviating drug-related problems is highly questionable (see Box 1).

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**Box 1. Abstract from the UNODC Handbook of basic principles and promising practices on alternatives to imprisonment**

‘Individual liberty is one of the most fundamental of human rights, recognized in international human rights instruments and national constitutions throughout the world. In order to take that right away, even temporarily, governments have a duty to justify the use of imprisonment as necessary to achieve an important societial objective for which there are no less restrictive means with which the objective can be achieved.’
The UN drug control system is ambivalent in its attitude towards punitive measures for drug offences. In its 2007 Annual Report, the International Narcotics Control Board devoted a whole chapter to the need for proportionality in sentencing for drug-related offences. However, this recommendation was made within an international legal framework that still strongly encourages a punitive approach, particularly article 3 of the 1988 Convention, which compels governments to adopt all the necessary measures to establish criminal sanctions for drug-related offences. At the same time, the UN drug conventions offer countries considerable flexibility by allowing social and health measures to be used in addition to, or instead of, criminal penalties for drug-dependent offenders and do not make a specific requirement for drug use to be criminalised. In practice, most governments have introduced tough drug laws and penalties to comply with the letter and ‘spirit’ of the UN drug conventions. Over the years, concerns have grown that the widespread incarceration of people who use drugs is too costly, is ineffective and exacerbates health and social problems, while failing to prevent and deter drug use.

Problems associated with high rates of incarceration

Evidence shows that tough law-enforcement tactics that aim to achieve high incarceration rates for drug offenders have led to negative consequences, not only for drug offenders but also for the criminal justice system and wider society:

Financial costs

According to Harvard economist Jeffrey Miron, the USA spent US$15.2 billion to keep state and federal drug law offenders in prison in 2006. In the early 1990s, it was estimated that the yearly cost of a prison place was more than the cost of tuition, room and board at Harvard University. High expenditure on incarceration is not limited to the USA. North of the border, Canada spent almost US$3 billion on custodial services in 2005–2006. The enormous resources devoted to incarcerating drug offenders diverts resources away from vital socio-economic and health programmes such as housing, education and treatment for drug dependence that are crucial to alleviating drug-related problems and tackling the very social conditions that may lead some people to use drugs in the first place.

Excessive burden on the criminal justice system

The use of mandatory minimum sentences and pre-trial detention, and the associated increase in incarceration of non-violent offenders, can damage the reputation and efficient functioning of a country’s criminal justice system. Sentencing laws that result in low-level drug offenders serving longer sentences than bank robbers, kidnappers and other violent offenders (such as rapists or murderers) undermine the notion of proportionality and fairness of the legal system. Overloading the criminal justice system with low-level offenders may also weaken its ability to administer justice efficiently and to focus resources on higher-level criminals.

Limited impact on reducing drug use

Some governments argue that punitive law-enforcement measures will reduce drug consumption by directly lowering demand. This assertion is based on the flawed assumption that if people who use drugs are incarcerated, they are not contributing to the illicit drug market, and heavy sentences will deter drug use. However, in practice it is difficult to find a correlation between the incarceration of drug users and a reduction of the illicit drug market (see Box 2 for more details). WHO itself concluded that ‘countries with more stringent policies towards illegal drug use did not have lower levels of such drug use than countries with more liberal policies’.
Box 2. Comparison of incarceration rates and the prevalence of drug use in Amsterdam and San Francisco

A 2004 study comparing cannabis use in Amsterdam, the Netherlands, and San Francisco, USA, demonstrated that the perceived risk of punishment had no impact on levels of drug use. Despite significantly different law-enforcement regimes in the two cities – Amsterdam allowed drug use in coffee shops and San Francisco imposed imprisonment as a penalty for drug use – the research found remarkable similarities in patterns of drug use. Research suggests that punishment generally has a limited impact on all types of drug use, especially for people dependent on drugs.

The argument linking high incarceration rates with the reduction of drug use also ignores the existence of active drug markets in many prisons worldwide. For example, a 2004 EMCDDA report estimated that the lifetime prevalence of drug use among prisoners varied from 22% to 86% in European prisons, and a 2006 study in Germany found that 75% of prisoners who injected drugs continued to inject while in prison.

Other governments have justified their incarceration policies by citing the positive effects of imprisonment on the rehabilitation of drug offenders. However, it is widely accepted that imprisonment in itself does not have a reformative effect. While appropriate drug treatment for detainees dependent on drugs can have an impact on drug use and re-offending rates after release, drug treatment in prisons should always be considered as a last option, as evidence shows that better results can be achieved through treatment in the community (see Box 3).

Box 3. Community-based treatment versus treatment in prisons in New York

The Drug Treatment Alternative-to-Prison was developed in Brooklyn, New York in 1990. The programme provides 15 to 24 months of treatment for drug dependence, in a residential therapeutic community. It is open to people dependent on drugs who have repeatedly sold drugs, have not been convicted of a violent crime and are willing to engage in treatment and communal living, do not have a history of violence or severe mental health problem, and are facing a mandatory prison sentence. A five-year evaluation of the programme found that only 26% of offenders diverted into treatment were reconvicted, compared to 47% of comparable offenders who had been sent to prison.

Health consequences

Incarceration also entails significant collateral costs for health, particularly with regard to blood-borne infections such as HIV and hepatitis C. There are consistently higher levels of drug use, especially by injection, in prison populations than in the general population. As needle and syringe programmes (NSPs) remain limited or non-existent in the prisons in most countries, prisoners are usually forced to reuse contaminated equipment. A 2009 review of evidence on HIV in prisons demonstrates that the high prevalence of HIV and drug dependence among prisoners, combined with the sharing of injecting drug equipment, make prisons a high-risk environment for the transmission of HIV and other blood-borne diseases. Ultimately, this contributes to HIV epidemics in the communities to which prisoners living with HIV return after their release from prison (for more information, see Section 2.4: Effective drug interventions in prisons).
Mass incarceration also impacts on a wide range of other health conditions, including undiagnosed mental health problems, chronic conditions such as diabetes and hypertension and problems with oral health and nutrition. Longer sentences have resulted in increasing numbers of older people in prisons, with the associated disease profile of Alzheimer’s disease, respiratory and heart conditions and so on. Overcrowding and lack of resources mean that prisoners’ health problems are often aggravated during imprisonment.

While services to prevent and treat HIV and other infectious diseases are increasingly available in the community, prisoners typically lack access to basic health care, adequate nutrition and diagnosis and treatment of HIV and other infectious diseases.

**Alternative strategies to incarceration**

Given the significant costs of incarceration and its limited deterrent effect, it is hard to justify a drug policy approach that prioritises widespread arrest and harsh penalties on grounds of effectiveness. Consideration of alternative strategies to incarceration that are effective for addressing drug dependence and related crimes, should be premised on two core principles, as discussed below.

- **Approaching drug use as a health problem, not a crime** – a change of focus is needed from considering drug use as a crime to approaching it as a health problem, and from punishing people dependent on drugs to promoting their access to evidence-based treatment for drug dependence. This approach means reducing incarceration and developing alternative mechanisms to deal with arrested users. Such an approach is supported by the UN drug conventions, in particular the UN Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), and more recently by the INCB, which emphasised that the principle of proportionality should be applied to offences of personal possession, purchase, cultivation and use ‘as complete alternatives to conviction and punishment’.

- **Imposing proportional penalties for drug offences** – a fundamental shift in approach is needed for the punishment of drug offences. Laws and regulations prescribing sentences and penalties for drug offences should be reformed to reflect the seriousness of the crime and the likely impact of punishment on the overall illicit drug market. In any case, the death penalty should not be used for drug offences (see Box 3 in Section 2.1: Drug law reform). Of particular importance is the need to distinguish between different types of drug offenders – ‘recreational’ or casual users, people dependent on drugs, ‘social’ or low-level dealers, and serious or organised traffickers (see Section 2.1: Drug law reform). Pre-trial detentions and mandatory minimum penalties should be avoided for low-level and non-violent drug offenders, in order to reduce prison overcrowding. Policy makers should seek to understand the extent and type of harms caused by different drug-related activities, in order determine the relevance and proportionality of punishment.

Diversion mechanisms can contribute to reducing the incarceration rate of low-level and non-dangerous drug offenders. Different mechanisms for diverting these individuals from imprisonment can be combined to reduce the pressure on countries’ criminal justice systems, and achieve better health and social outcomes.
Depenalising and decriminalising drug possession for personal use
People caught in possession of drugs for personal use should be recognised as a special category, and should not be sent to prison solely for the possession or use of controlled drugs. Three main strategies have been adopted so far to remove incarceration as a response to the use or possession for personal use of controlled drugs:

- depenalisation (see Box 4 for an example from Australia)
- *de facto* decriminalisation (see Box 5 for an example from the Netherlands)
- decriminalisation (for detailed examples, see Section 2.1: Drug law reform).

These strategies have been effective in reducing the burden on the criminal justice and prison systems and improving access to social and healthcare services, while not leading to an increase in drug use.\(^{16}\)

**Box 4. Depenalisation in Australia**
Several Australian states have adopted a balanced policy between law enforcement and treatment services for drug offenders. In those states, cannabis cultivation and possession are met with civil penalties such as fines or infringement notices rather than incarceration. Police officers have implemented this mild enforcement system with substantial success, while avoiding some of the negative outcomes of an overly prohibitionist model, such as loss of productivity and threats to civil liberties. Their approach has had a positive effect on incarceration levels, since only 11% of the prison population was incarcerated for drug offences in 2010.\(^{17}\)

**Box 5. The Netherlands *de facto* decriminalisation model**
In the Netherlands, the Dutch authorities applied *de facto* decriminalisation to cannabis in the 1970s. Under this system, although cannabis possession and use remain illegal under the law, the Dutch Ministry of Justice chooses not to enforce the law. Possession of less than 5 grams of cannabis is no longer a target for law-enforcement interventions. Since the 1980s, the buying and selling of small quantities of cannabis has been permitted in licensed ‘coffee shops’ under strict regulations.

Diversion is an effective mechanism for implementing depenalisation and decriminalisation. Several countries around the world have established systems of diversion, which vary in many ways, but can be categorised by the stage at which diversion occurs (these will be explained below):

- diversion at arrest
- diversion at prosecution
- diversion at sentencing

Another distinction between diversion systems can be made – in some countries, diversion applies to people caught in possession of controlled drugs, while in others diversion can apply to people arrested for offences motivated by drug dependence (e.g. theft, fraud or sex work).

**Diversion at arrest**
Diversion mechanisms at arrest are designed to avoid burdening the criminal justice system with low-level offenders, and to provide appropriate services to people dependent on drugs. Diversion at arrest relies on police managers and officers as the key personnel making decisions on whether to divert a person into treatment or criminal prosecution. Portugal provides a good example of diversion away from the criminal justice system (see Box 6).
In July 2001, Portugal adopted a nationwide law that decriminalised the possession of all controlled drugs for personal use. Under this legal regime, drug trafficking is still prosecuted as a criminal offence, but drug possession for personal use is an administrative offence. The law also introduced a system of referral to Commissions for the Dissuasion of Drug Addiction (Comissões para a Dissuasão da Toxicodependência). When a person in possession of drugs is arrested, the police refer them directly to these regional panels, consisting of three people, among them a social worker, a legal adviser and a medical professional, and supported by a team of technical experts.

The commissions use targeted responses to dissuade new drug users and encourage people dependent on drugs to enter treatment. To that end, they can impose sanctions such as community service, fines, suspension of professional licences and bans on attending designated places, and recommend treatment or education programmes for people dependent on drugs.

After adoption of this new system, the proportion of drug offenders sentenced to imprisonment dropped to 28% in 2005 from a peak of 44% in 1999. This decline has contributed to a reduction in prison overcrowding, which fell from a rate of 119 to 101.5 prisoners per 100 prison places between 2001 and 2005. These data suggest that the Portuguese reform has indeed taken some of the pressure off the criminal justice system.

**Box 6. The Portuguese Dissuasion Commissions**

**Box 7. The Scottish diversion system**

The Scottish national Diversion from Prosecution scheme rolled out in 2000–2001 applies to offenders of all ages. The approach is designed to prevent a person who has committed a relatively minor crime and does not represent a significant risk of harm to the public from being sent to the criminal justice system. In Scotland, Procurators Fiscal (equivalent to prosecutors) are responsible for identifying which of the accused reported to them by the police are suitable for diversion into social work interventions.

A young person on diversion will be involved in individual and/or group sessions, which cover a range of areas such as offending behaviour, alcohol and drug use, social skills, education, employment and training and problem solving. This diversion mechanism has shown particularly positive outcomes with respect to re-offending. The Youth Justice Diversion from Prosecution scheme in Dumfries and Galloway, for instance, has shown very encouraging results – between May and August 2010, 80 young people were diverted to a 6-week social work programme, and only five re-offended.

**Diversion at sentencing**

*Diversion at sentencing relies on judges as the key decision makers. There are two types of diversion at sentencing: diversion through the proceedings of a regular court, or through a specialised drug court. Some countries, such as the UK, process drug offenders through both (see Box 8).*
Box 8. Diversion at sentencing in the UK

The UK has established both general and specialised courts for processing drug-related offences. Since the mid-1990s, a major campaign was developed to divert offenders dependent on drugs away from prison and into treatment.

Every court in the country has resources and procedures to assess whether the offence committed is related to drug dependence, and whether the offender would benefit from treatment (the UK rarely imprisons people for drug possession, so most of these offenders are charged with related offences such as drug dealing, theft, fraud and sex work). If the court determines that a non-custodial penalty is appropriate, and a treatment place is available, then it may sentence the individual to a period of treatment instead of imprisonment. The advice to the court on appropriate treatment options is provided by probation officers.

In 2004, the UK experimented with specialised drug courts by establishing six pilot ‘dedicated drug courts’ (DDCs) to specifically deal with offenders dependent on drugs. These courts have the same basic powers as regular courts, that is, to assess drug treatment needs and alternatives to imprisonment. However, they have specialist staff and judges specifically focused on the drug problem of the offender, and they have a higher level of scrutiny of the offender’s progress in treatment. For example, specialised courts require regular reporting on how the treatment is progressing, and the offender discusses treatment progress regularly with the judge. This regular reporting helps to develop a closer relationship between the offender and the sentencing judge, which can in itself improve the prospect of successful treatment outcomes. An evaluation of the DDC initiative found that the specialised courts were useful for helping to reduce drug use and offending. However the evaluation also concluded that the effectiveness of the DDCs also depended on access to appropriate treatment.

Recommendations

1) A change of approach is needed to start treating drug use as a health problem instead of a criminal offence. Treatment is a more effective policy response to people who are dependent on drugs but are not involved in serious or violent crime. Incarceration should be reserved as an option for responding to serious offenders.

2) Laws and regulations prescribing penalties for drug offences need to be reviewed, with the objective of drawing a clear distinction between the severity of the crime, different actors and their impact upon the illicit drug market:

   • the use of incarceration as punishment should be reserved for high-level and/or violent drug offenders

   • governments should consider introducing depenalisation or decriminalisation as alternative responses to people who use drugs and non-dangerous, low-level street dealers.

3) Diversion mechanisms at arrest and at sentence need to be developed to help ensure that cases of low-level drug offenders do not overload and incapacitate criminal justice systems, and that people dependent on drugs can access appropriate services, including evidence-based treatment of drug dependence.
4) Any criminal procedure that increases the pressure on prison capacities, such as mandatory minimum sentences and pre-trial detention procedures, should be reserved for the most serious criminal offenders.

**Key resources**


**Endnotes**

1 US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics (December 2011), *Prisoners in 2010* (Washington: US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics), [http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf](http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf)


See articles 36b and 38 of the 1961 Convention (http://www.unodc.org/unodc/en/treaties/single-convention.html) and article 14(4) of the 1988 Convention (http://www.unodc.org/unodc/en/treaties/illicit-trafficking.html), which requires parties to ‘adopt appropriate measures aimed at eliminating or reducing illicit demand for narcotic drugs and psychotropic substances, with the view to reducing human suffering and eliminating financial incentives for illicit traffic’.

http://www2.ohchr.org/english/law/tokyorules.htm


See, for example: Hughes, C.E. & Stevens, A. (2010), ‘What can we learn from the Portuguese decriminalization of illicit drugs?’, British Journal of Criminology, 50: 999–1022, http://bjc.oxfordjournals.org/content/50/6/999.abstract


The Development Centre for Scotland, Social Work in Youth and Criminal Justice, Diversion, http://www.cjsw.ac.uk/content/diversion