

3.4

Alternatives to incarceration

Key recommendations

- Drug use should be considered as a health issue. Harm reduction and evidence-based treatment should be available and prioritised for people who use drugs, as well as people involved in low-level drug offences who are found to be dependent on drugs
- Incarceration should only be used as a last resort, and only for high-level, violent drug offenders
- Diversion mechanisms at arrest, prosecution and sentencing should be developed to help ensure that cases of low-level drug offenders do not overload and incapacitate criminal justice systems
- Legislative and practical barriers to the implementation of alternatives to incarceration for drug offenders should be removed¹¹⁵
- Social and community support networks should be established, including educational and employment programmes, housing, health services, etc. in order to address the socio-economic factors that led people to engage in the illicit drug trade in the first place
- Alternatives to incarceration should be tailored to address the specific needs and vulnerabilities of women
- Countries implementing or considering measures to increase diversion need to carefully review the evidence and options before choosing the best process/model for their circumstances.

Introduction

As a result of the punitive approaches that have prevailed in international and national drug control regimes, rates of incarceration have steadily increased since the 1970s. The steepest rise has been

in the USA.¹¹⁶ In Latin America, the rate of people incarcerated for drug offences has grown at a faster rate than the overall prison population.¹¹⁷ Rises have also taken place throughout Europe, Asia, Africa, and Oceania.¹¹⁸ Currently, although there are large differences between individual countries and between regions,¹¹⁹ persons convicted for drug offences (drug possession and drug trafficking) make up 21 per cent of the sentenced prison population worldwide.¹²⁰

The high rates of imprisonment for drug-related offences have contributed to prison overcrowding, exacerbating serious concerns about prison conditions. According to the Working Group on Arbitrary Detention, overcrowding 'can call into question compliance with article 10 of the International Covenant on Civil and Political Rights, which guarantees that everyone in detention shall be treated with humanity and respect for their dignity'.¹²¹

Both mass incarceration for drug offences and prison overcrowding disproportionately affect the most vulnerable groups in society, in particular ethnic minorities. In Europe, for example, most prisoners are from poor communities, and the proportion of immigrants and ethnic minorities is increasing.¹²² Similarly, in the USA '5 times as many Whites are using drugs as African Americans, yet African Americans are sent to prison for drug offenses at 10 times the rate of Whites'.¹²³ In producing countries, incarcerated coca growers and small producers usually belong to the most marginalised sectors of society.

Drug offences have played an important role in the significant increase in the female prison population. Over 90% of prison inmates are male; however, over time 'the total number of female prisoners (who constitute 5-8 per cent of the prison population) grew by 26 per cent between 2004 and 2012 — an increase far higher than that recorded for men (11 per cent)'.¹²⁴ A significant percentage of this increase is associated with drug offences¹²⁵ — generally of a minor, non-violent nature.¹²⁶ For example, 'in Argentina, Brazil, and Costa Rica, well over 60 percent of each country's female prison population is incarcerated for drug-related crimes'.¹²⁷ In Europe, drug of-



Prison for women in Bogota, Colombia

fences account for about 28% of incarcerated women, with the highest percentages in Tajikistan (70%) and Latvia (68%), and the lowest in Poland (3.1%).¹²⁸ Thailand has the world's sixth largest prison population, and the world's highest rate of imprisonment of women – in 2015, it was reported that 70% of the men and 80% of the women imprisoned were held for drug offences, mostly for possession and consumption offences. In addition, the number of arrests for drug use alone increased from 51,566 in 2003 to 209,366 by 2013, accounting for 92% of all drug-related arrests in 2013 for Thailand.¹²⁹

The imprisonment of mothers and caregivers can have crushing effects on their children, families, and communities.¹³⁰ Infants and young children with an incarcerated parent become victims of the punitive approach to drugs.¹³¹ In many countries around the world, some children live with their mothers in prison, generating complex situations for prison institutions.¹³²

A paradigm shift is urgently needed, in order to address this situation. Here again, it is important to recall that most prison inmates are incarcerated for drug offences of a minor, non-violent nature. For example, in the Federal District and in the state of Mexico, about 75% of the prisoners are detained for possession of small amounts of drugs; and in Colombia, over 98% of the prisoners incarcerated for drug offences 'would not have had – or it was unlikely that it could be proved that they had – an important role in drug trafficking networks.'¹³³

In this context, comprehensive and contextualised alternatives to arrest, sentencing and incarceration should be designed and implemented. Alternatives to incarceration provide more effective and less costly ways to reduce drug-related crime, while also promoting the health and social inclusion of low-level drug offenders by addressing some of the root causes of their involvement in the illicit market.

Empirical evidence suggests that alternatives yield better cost-effectiveness than incarceration. For example, drug dependence treatment programmes operating outside of prisons yield up to US\$8.87 for every dollar invested, while drug treatment in prison yields a return on investment of US\$1.91-US\$2.69 for every dollar invested.¹³⁴ Similarly, studies conducted in England and Wales suggest that alternatives including both residential treatment and supervised release are more cost-effective than incarceration and are more effective at reducing recidivism.¹³⁵ Finally, alternatives to incarceration can reduce the stigma and discrimination experienced by people sentenced to prison, and are instrumental in helping states to meet their international human rights obligations.

Legislative/policy issues involved

The UN drug conventions include explicit provisions allowing alternatives to conviction or punishment for offences relating to personal use, including pos-

Box 1 The Law Enforcement Assisted Diversion (LEAD) programme in Seattle¹³⁶

LEAD is a police diversion programme, launched in October 2011 in Seattle, USA. It targets people arrested for minor drug offences and sex work who meet the eligibility criteria: i.e. individuals identified as suffering from 'substance use disorders'.

The programme offers significant discretion to police officers, based on the assumption that they know the community best – LEAD therefore places a strong emphasis on community policing and strengthening community ties with the law enforcement authority. Thus, when the police officer stops a person, he/she has the power to decide whether or not to divert them into the programme. As the referral authority, police officers therefore have the ability to divert people to adequate services without conducting an actual arrest.

If the person is diverted into the programme, he/she is connected to a case manager who will decide the type of monitoring arrangement the person will be subjected to, which usually includes a set of services tailored to the individual's needs. The programme generally involves community-based treatment and support ser-

· vices, guided by harm reduction principles. If the individual complies with the programme and its assessments, he/she is not charged and consequently does not get a criminal record. It is also important to note that the programme has no formal or punitive sanctions for 'non-compliance', and a person can re-enter the programme if they fail on the first instance and are caught by the police for a similar offence. Indeed, the reason why the programme was initiated in the first place was for the police to find better ways to deal with the same individuals going in and out of the criminal justice system.¹³⁷

· The programme was originally designed as a pilot project, funded by private foundations. LEAD is now funded by the city of Seattle. The first evaluations of LEAD's effectiveness were published in early 2015. Available data reported reductions in law enforcement costs, as well as increased effectiveness of the programme to reduce recidivism when compared to the traditional criminal justice system. The evaluation concluded that, 'People in LEAD were 60% less likely than people in the control group to be arrested within the first 6 months of the evaluation.'¹³⁸



LEAD caseworker Tim Candela, right, attends a LEAD meeting at the SPD West Precinct in Seattle in August 2014

Credit: Mike Kane, The Huffington Post

session, purchase, cultivation and production, and for 'appropriate cases of a minor nature' not relating to personal use¹³⁹ – for which states are encouraged to implement alternatives to conviction or punishment, such as education, rehabilitation or social reintegration, and where the offender is found to be dependent on drugs, 'treatment and aftercare'.¹⁴⁰

Alternatives to incarceration for drug offences can be defined as any measure intended to: a) limit the use of imprisonment as a punishment; b) reduce the pressure on countries' criminal justice systems, particularly on prisons; and c) decrease the time of actual deprivation of liberty for individuals who have committed drug-related offences. The ultimate objective of alternatives to incarceration is to ensure that prison is used as a last resort.

Alternatives to incarceration should be available for all non-violent drug offenders, such as low-level couriers and dealers, as well as drug dependent individuals who have committed economic/acquisitive offences – that is, for those who currently constitute the majority of the prison population today. Alternatives to incarceration for these individuals would ensure that more effective responses and resources are tailored towards large-scale, violent drug traffickers and high-level criminals.

People who use drugs should not be subject to incarceration, and a process of **decriminalisation** should be adopted for drug use, possession of drugs for personal use, the possession of drug use paraphernalia and the cultivation and purchase of substances for personal use (see Chapter 3.1). Small-scale farmers involved in illicit crop cultivation should also be decriminalised (see Chapter 4.2). This ensures that people who use drugs and subsistence farmers do not end up in prison, and that the health and social dimensions of these activities are addressed within an enabling political environment.

Other alternatives can be grouped into three main categories: a) **diversion at arrest and pre-prosecution stages**; b) **diversion at prosecution**; and c) **alternatives at sentencing and post-sentencing**.

Diversion at arrest and pre-prosecution stages

There are a number of mechanisms at the arrest or pre-prosecution stages that can be used to avoid incarceration. These may involve referrals to an administrative monitoring system, to evidence-based drug dependence treatment where required, or other non-punitive measures such as educational programmes.¹⁴¹ In this case, such mechanisms usually rely on police officers as the key personnel making decisions on whether to divert a person into criminal

prosecution or to an alternative mechanism. Several countries have established such diversion systems which may vary greatly, but which usually apply to both people caught for low-level dealing and people arrested for offences motivated by drug dependence.

Diversion at arrest and pre-prosecution stages have two main advantages when they are compared to other forms of diversion. Firstly, they reduce pre-trial detention, which has led to a serious human rights crisis in several countries around the world.¹³² Secondly, they prevent people from having to undergo a lengthy and difficult criminal procedure, thereby reducing criminal justice overload and incarceration rates, as well as associated costs. The sooner the person is diverted away from the justice system, the better.

Diversion at prosecution

In this diversion system, prosecutors are the key decision makers that determine whether the person arrested should appear before a court or be referred to an alternative such as drug dependence treatment, or other health and social services. The Scottish diversion system, for instance, allows prosecutors to divert people into social support interventions (see Box 2).

Sentencing and post-sentencing alternatives

These alternatives include both diversion through the criminal proceedings and mechanisms to reduce

Box 2 The Scottish diversion system

In Scotland, Procurators Fiscals (equivalent of prosecutors) are responsible for identifying which of those accused of having committed a minor crime and who do not represent a significant risk to the public, should be diverted into social support interventions. Such interventions involve individual and/or group sessions as well as referrals to harm reduction and voluntary drug dependence treatment services, aiming to address a range of issues such as offending behaviours, alcohol and drug use, social skills, education, employment and training. An evaluation of the scheme highlighted the advantages of addressing the needs of drug offenders in a community-based setting, which were shown to be more cost-effective and more likely to result in lower rates of reoffending.¹⁴³

Box 3 Costa Rica's Restorative Justice Project

In parallel with its 2013 legislative reform (presented in Box 2 of Chapter 3.3), Costa Rica has adopted a Restorative Justice Project. The project includes several measures aiming to reduce the prison population. It created a drug treatment court adapted to the Costa Rican legal system – where drug use is decriminalised. Targeted populations include low-level and first-time offenders, who have committed an offence related to their drug dependence. An interdisciplinary and specialised group of restorative justice (composed of physicians, psychologists and social workers, among others) tailors their response to the needs of the beneficiary, focusing on residential or outpatient treatment.

Furthermore, Costa Rica has developed alternatives to incarceration with a gender perspective. The 2013 legislative reform enables women accused of introducing drugs in prison and who are living in conditions of poverty, are heads of household living in conditions of vulnerability, or have custody of minor children, older adults or persons with some form of disability, to be granted the benefit of home arrest, supervised release, residence in a halfway house, or electronic monitoring.¹⁴⁴

Most interestingly, Costa Rica is currently developing an institutional network of health and social services to assist former female offenders to reintegrate into society. The network offers psychological support, help to find employment, social services, childcare, etc. in an effort to address the underlying causes of involvement in the drug trade, as well as to reduce recidivism.¹⁴⁵

the length of incarceration. In these cases, judges decide whether to initiate the referral process – and when.

Diversion mechanisms can be initiated at the moment when a person has entered the criminal justice system, for example through a suspension of criminal proceedings under judicial supervision. The diverted person must comply with certain conditions such as treatment for drug dependence and/or a series of social interventions, including

education and community work. Drug courts and community courts are common examples of such diversion mechanisms.¹⁴⁶

The drug court model has been widely implemented in the USA and in several Latin American countries – however, severe criticisms have emerged around this model, which should therefore be approached with caution.¹⁴⁷ One of the main criticisms of the drug court model is that it continues to address drug dependence through the lens of the criminal justice, instead of a health and social issue. Drug courts were also heavily criticised for:

- The fact that, in some regions of the world, drug courts focus on simple drug use, instead of people dependent on drugs who have committed other offences
- Pushing people who are not necessarily dependent on drugs to accept treatment instead of going to prison – leading to an ineffective use of available resources
- The absence of health professionals for the determination of whether the person is dependent or not
- The fact that the person has to admit culpability to access the treatment programme
- The practice of imposing sanctions for people failing to complete their treatment programme – these sanctions are sometimes more severe than if the person had gone through the traditional criminal justice system.¹⁴⁸

A person may also be diverted away from incarceration after he/she has been convicted, through mechanisms that substitute or reduce the prison sentence. These include probation programmes, conditional sentencing, clemency, etc.¹⁴⁹ Although such diversion schemes have a more limited impact on reducing criminal justice overload – since drug offenders will have already gone through the criminal justice system – it does impact both on prison overcrowding, as well as on people's ability to reintegrate in society. These diversion mechanisms can also help reduce the harms caused by the incarceration of people in charge of children, elderly and people with disabilities.

Implementation issues involved

A set of guiding principles should underpin the design and implementation of alternatives to incarceration:



Angela, 24 years old, sent to six years in prison in Bogota, Colombia, for bringing drugs into a prison

Adopting a human rights approach

Alternatives to incarceration have to meet international human rights standards. Compliance with the rights to health, life and the prohibition of torture is a central purpose of promoting alternatives.¹⁵⁰ Therefore, any alternative involving ill treatment, including compulsory detention centres, should not be implemented.

Using incarceration and punishment as a last resort

The objective of alternatives to incarceration is to reduce the overall use of prison. However, care should also be taken to ensure that alternatives to incarceration do not lead to an increase in the overall volume of sanctions and punishments (e.g. the so-called ‘net-widening effect’ described in Chapter 3.1).¹⁵¹

Approaching drug use as a health issue

The harms associated with drug control should not outweigh the harms of the substances themselves. A change in focus is therefore needed where drug use is dealt with as a health and social issue, instead of a criminal one – and is therefore decriminalised (see Chapter 3.1). As explained above, the UN drug conventions¹⁵² and several international human rights instruments¹⁵³ support this approach.

Avoiding coercive treatment

Not all people who use drugs require treatment. As explained in Chapter 2.5, only about one in 10 people who use drugs experience problems with their drug use and as a result may require treatment. When an offender is dependent on drugs, he/she should be offered appropriate and evidence-based treatment as an alternative to incarceration. When the offender uses drugs but is not dependent, alternatives such as referrals to harm reduction services should be available.

Adopting a gender perspective

This entails dealing with both the vulnerabilities of women and their children and the effects that incarceration may have on their lives. It also means that more research should be conducted on the scale of women’s involvement in the drug trade, the number of women incarcerated for drug offences, which offences they are incarcerated for, data on their situation (age, education, employment history, whether they have children, etc.), and who has benefited from alternatives to incarceration. Diversion mechanisms should also be based on a gender perspective to ensure that alternatives are effective at addressing the specific needs of women and children.¹⁵⁴

Promoting proportionate penalties for drug offences

Drug offences should reflect the seriousness of the crime and the likely impact of punishment on the overall illicit drug market. Alternatives to incarceration are but one component of a proportionate regime (see Chapter 3.3 for more details).

Developing a wide range of health and social services

The successful implementation of alternatives to incarceration depends on the accessibility and quality of health and social services such as healthcare services, including harm reduction and treatment, as well as social interventions. Networks of services, agencies and NGOs working together to address health and/or social and/or economic issues that the offender is facing are essential to develop the institutional support necessary to prevent recidivism and promote social reintegration.

Key resources

- European Monitoring Centre for Drugs and Drug Addiction (2015), *Alternatives to punishment for drug using offenders*, <https://dl.dropboxusercontent.com/u/64663568/library/EMCDDA-alternatives-to-punishment-for-drug-using-offenders-2015.pdf>

- Giacomello, C. (2013) *Women, drug offenses and penitentiary systems in Latin America* (London: International Drug Policy Consortium), https://www.unodc.org/documents/congress//background-information/NGO/IDPC/IDPC-Briefing-Paper_Women-in-Latin-America_ENGLISH.pdf
- Inter-American Drug Abuse Control Commission (2014), *Technical report on alternatives to incarceration for drug-related offenses*, <http://www.cicad.oas.org/apps/Document.aspx?id=3203>
- Transnational Institute & Washington Office on Latin America (December 2010), *Systems overload: Drug laws and prisons in Latin America*, http://www.wola.org/publications/systems_overload_drug_laws_and_prisons_in_latin_america_0
- United Nations Office on Drugs and Crime (2007), *UNODC handbook of basic principles and promising practices on alternatives to imprisonment*, http://www.unodc.org/pdf/criminal_justice/07-80478_ebook.pdf
- Washington Office on Latin America, International Drug Policy Consortium, DeJusticia, Inter-American Commission on Women (2016), *Women, drug policy and incarceration: A policymaker's guide for adopting, reviewing and implementing reforms related to women incarcerated for drug offenses*, http://www.wola.org/commentary/women_drug_policies_and_incarceration_in_the_american