

The crisis of overcrowded prisons in Indonesia: Barriers to accessing alternatives to imprisonment

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Introduction

Indonesia maintains a punitive war on drugs policy model. Various campaigns are conducted to emphasise that drug offences are the most serious crimes.¹ This construction is clearly contrary to international human rights standards. The Human Rights Committee defines the meaning of 'most serious crime' through General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life (GC/36). Paragraph 35 of GC/36 does not place drug offences as one of the most serious crimes.² This further confirms that Indonesia's war on drugs policy has been built upon an erroneous and unfounded paradigm.

Law Number 35 of 2009 concerning Narcotics (Narcotics Law) which is in force until now contains offences that tend to open up extensive interpretations and overlap between one another.

The implication of this overlapping offence in the Narcotics Law is the imprisonment of people who use drugs, people who have drug dependency, and people who abuse drugs.³ The paradigm of the most serious crime built by the government in narcotics cases actually brings problems to the conditions of correctional institutions in Indonesia. The problem is at least evident from the results of an assessment of the characteristics of people incarcerated for drug cases conducted by the Jakarta Regional Office of the Ministry of Law and Human Rights, stating that at the end of 2018, the number of people in prison for drug cases reached 115,289 people or 95% of the total number of people imprisoned for special criminal cases in Indonesia. This figure is much higher than the number of people detained in corruption cases (5,110), illegal logging (890), terrorism (441), and money laundering (165).⁴



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Alternatives to Imprisonment for People Who Use Drugs in the Indonesian Legal Framework

Correctional overcrowding is a worldwide problem and challenge. In 2023, the Global Prison Trends reported that more than 11.5 million people were held in prisons around the world, including 2.2 million imprisoned for drug offences.⁵ Indonesia is one of the countries that contribute to the highest overcrowding rate. A study noted a consistent increase in the percentage of overcrowding from 2015 (25%) to 2020 (103%).⁶ Based on data published through the Correctional Database System as of August 2021, of the total number of special residents of all regional offices of the Ministry of Law and Human Rights of the Republic of Indonesia, there were 116,930 people incarcerated for drug supply and 28,483 in prison for drug use.⁷ The same source also noted that the condition of detention facilities and prisons in Indonesia has exceeded capacity by 97%.⁸

One of the steps taken to address these problems are alternatives to imprisonment. In general, alternatives to imprisonment were created to reframe the narrow understanding of the purpose of retributive punishment. Non-imprisonment sentences are a response designed to avoid the use of prisons at some stage in the criminal justice system.⁹ Importantly, the international drug conventions that lay down the global drug control framework do allow for the use of alternatives to incarceration for drug offences, and in recent decades we have seen an emerging consensus from United Nations agencies and human rights experts calling for a global shift towards the use of alternatives, including through the recent UN system common position on incarceration. But

unfortunately, this concept is not necessarily found in the legal framework of the Narcotics Law in Indonesia.

In the Narcotics Law, alternatives to imprisonment are manifested in the context of medical and social rehabilitation for people who use drugs. However, the Narcotics Law is unable to provide broad access to medical intervention. The provision of medical and social rehabilitation in Article 54 is hampered by the existence of drug possession offenses. Furthermore, the word “may” in Article 103 of the Narcotics Law authorises judges to determine or impose rehabilitation sentences for people who use drugs.

The Narcotics Law in principle provides the right for someone to possess narcotics for the benefit of health services and/or the development of science and technology.¹⁰ In practice, however, this is rarely possible for people who use drugs. Both possession and trafficking are classified into one offence, as regulated by Article 111 of the Narcotics Law, which stipulates criminal penalties for the use of plant-type narcotics, and Article 112, which regulates possession of non-plant-type narcotics. The existence of overlapping offences in the Narcotics Law puts people who use drugs in a vulnerable position to be arrested and sentenced to imprisonment.

Further provisions on the criteria for people suspected of a drug offence who can access rehabilitation are set out in several regulations under different institutions.¹¹ The article on possession of narcotics for personal use may apply under the condition of a positive urine test at the time of arrest and a possession limit below the weight determined by the legislation.¹²

Table 1. Narcotics’ Weight for Personal Possession

Methamphetamine	1 grams	LSD (d-lysergic acid diethylamide)	2 grams
MDMA (ecstasy)	2.4 gram (8 tablets)	PCP (phencyclidine)	3 grams
Heroin	1.8 grams	Fentanyl	1 grams
Cocaine	1.87 grams	Methadone	0.5 grams
Marijuana	5 grams	Morphine	1.8 grams
Coca Leaf	5 grams	Petidin	0.96 grams
Mescaline	5 grams	Codeine	72 grams
Psilocybin	5 grams	Buprenorphine	32 grams

Although there is no sufficient basis to prove that these thresholds are realistic for people who use drugs, in practice these quantities are often used to identify whether the defendant is a person who uses drugs or sells drugs. This is based on the elements of the articles on drug offences that qualify drug evidence with a certain weight.

The thresholds above indicate the level of culpability a person has. If a person commits a crime with a quantity of drugs above the threshold, they will receive a more severe sentence. However, Indonesia does not further categorise dealers or couriers into levels of seriousness. If a defendant meets the qualifications for drug severity as set out in SCCL 4/2010, then he/she can undergo an assessment process to access rehabilitation.

To open up opportunities for rehabilitation for people who use drugs in the legal process, they must go through an assessment mechanism by the BNN's Integrated Assessment Team (IAT). According to Article 8 of the Head of BNN Regulation 11/2014 on the Procedure for Handling Suspects and/or Defendants of Narcotics Addicts and Victims of Narcotics Abuse into Rehabilitation Institutions (BNN's Head Regulation Number 11/2014), suspects who wish to be placed into rehabilitation institutions must undergo an assessment by the IAT which results in a recommendation. To initiate the assessment process, investigators must submit a written request to the IAT. Therefore, this is not something offered to the suspect, but rather relies heavily on the discretion of the investigator. In addition, based on Article 22 paragraph (1) of BNN's Head Regulation 11/2014, the Public Prosecutor for the purpose of prosecution and the Judges for the purpose of examination at trial, "may" request assistance from the IAT to conduct an assessment of the accused. Based on these provisions, the assessment mechanism by IAT can basically be carried out at all levels of examination. However, this again relies on the discretion of the public prosecutor and judge examining the case.

The assessment conducted by the IAT is divided into two parts. First, the medical and psychosocial assessment and analysis, as well as recommendations for therapy and rehabilitation plans for the suspect or accused. Second, the analysis of a suspect's or defendant's involvement in illicit drug trafficking. Prior to an examination by IAT, investigators at the police level must first conduct a urine test with a positive result for drug use.¹³ During Covid-19, the assessment mechanism by the IAT was conducted online through video calls. Interviews are conducted in person by the medical and legal teams with the suspect or accused. The results of the examination are issued after six days from the request from the investigator.¹⁴

In some cases, a person who uses drugs may also be identified as a dealer or courier involved in illicit drug trafficking. This is often based on the amount of drug possession that exceeds the threshold for rehabilitation. In addition, the construction of offences in the Narcotics Law does not clearly outline the difference between "possession" and "abuser". In fact, in the case of people who use drugs who are charged with Article 127 of the Narcotics Law - even though they have met the criteria as referred to in SCCL Number 4/2010 - they do not necessarily receive a rehabilitation sentence. Based on research conducted by LBHM in 2014, from a total of 522 decisions collected from district courts in Jakarta, Bogor, Depok, Tangerang, and Bekasi, only 28 decisions met the criteria for accessing rehabilitation as stipulated in SCCL Number 4/2010. Of these 28 decisions, there were 25% of cases that were still sentenced to imprisonment.¹⁵ This proves that the process for assessing whether a person meets the criteria for rehabilitation for drug users has not run optimally.

Challenges and Barriers to Accessing 'Alternatives' for People Who Use Drugs in the Indonesian Legal System

Within a punitive policy environment, access to rehabilitation is not easy to obtain. Apart from having to go through a series of assessments by the IAT, whose implementation is based on the exercise of law enforcement discretion, there are several terms and conditions that can further hinder access to rehabilitation.

In the context of law enforcement in drug cases, the IAT has an important role in increasing the chances of obtaining rehabilitation decisions in court. Unfortunately, the results of this recommendation-based examination are not binding on the public prosecutor or judge examining the case. In other words, the public prosecutor or judge can override the results of the assessment conducted by the BNN IAT.

If the judge sentences the defendant to rehabilitation, this does not necessarily erase their criminal record. If the defendant is still examined in the trial process and is convicted of a drug crime, then they still have a criminal record. This provision is stipulated in Article 103 paragraph (1) letter a of the Narcotics Law, which explains that a defendant who is convicted but ordered to undergo rehabilitation will still be counted as someone serving a sentence. On the other hand, if the de-

fendant is not proven guilty of committing a narcotics crime, then the judge determines that the defendant must undergo rehabilitation so that the period of serving rehabilitation is not considered a sentence. However, the construction of Article 103 and Article 127 of the Narcotics Law in practice often does not function optimally with the biased provisions of Article 112 and Article 111 of the Narcotics Law.

In addition, the financing of a person who uses drugs sentenced to rehabilitation is another issue. Article 103 paragraph (1) letter b of the Narcotics Law imposes the costs of implementing rehabilitation on the state. In addition, Article 21 of BNN's Head Regulation 11/2014 states that the cost of conducting assessments by the IAT is charged to the BNN budget. However, the provision on waiving the costs of assessment and rehabilitation for defendants who receive rehabilitation sentences often causes problems. In its application, a person sentenced to rehabilitation is still asked for treatment costs from the hospital or rehabilitation institution appointed by the judge. This is presumably due to the high cost of treatment if rehabilitation patients based on court judgements are continuously admitted. It is important for the state to understand that mandatory drug rehabilitation in the criminal justice system only moves the problem of overcapacity from prisons to rehabilitation centres.

Box 1. Is mandatory in-patient rehabilitation a genuine alternative to incarceration?

In everyday practice, people who are caught in the criminal justice system and their attorneys often do their utmost to seek a sentence to rehabilitation rather than incarceration. While this work is extremely commendable, it is also important to consider whether mandatory rehabilitation in an in-patient treatment centre that the patient cannot voluntarily leave is a genuine alternative to incarceration. As civil society and United Nations agencies have noted in the past,¹⁶ mandatory rehabilitation facilities or compulsory drug detention centres are often associated with a lack of evidence-based drug treatment, unsanitary condi-

tions, and ill-treatment against people who use drugs. Furthermore, academic research¹⁷ has shown that there is no evidence for improved outcomes connected to compulsory treatment, and in fact there can be harms associated with it. Instead of forcing people into treatment, states should invest in voluntary health services that are attractive and tailored to individual needs. Because of this, a host of UN agencies and UN human rights bodies have called for the immediate closure of compulsory drug detention centres, and have made clear that detention and deprivation of liberty are never an appropriate response to drug use.¹⁸

Case Study

Since 2021, LBHM has been assisting a man who used drugs named PI (41 years old) who was arrested and faced legal proceedings for using methamphetamine with a net weight of 0.4971 grams. PI was caught at his house when he was about to use methamphetamine. PI had previously undergone rehabilitation in 2019 at one of the rehabilitation centres for a year.

PI works as a manual laborer who usually receives calls for house or building construction. PI uses methamphetamine as an energy stimulant so that he has sufficient energy when working. In the course of his career, PI was active in handling cases that were closely related to the fulfilment of the right to health. From 2006 to 2018, PI actively worked as an addiction counsellor at an NGO in Jakarta. In 2015, PI was also assigned by BNN for 9 months to provide support as an addiction counsellor at a rehabilitation institution appointed by BNN. While working for BNN, PI was part of the successful implementation of the “100,000 Drug Addicts Rehabilitation Movement” program in 2015.

While he was detained at the police station, LBHM tried to get the police to bring in an IAT from BNN to examine PI’s addiction condition. Some bureaucratic obstacles had to be pursued by the legal team until PI finally underwent a virtual assessment by BNN. The results of the assessment found that PI is a stimulant abuser with a moderate level of dependence and a pattern of regular use. On the other hand, the legal facts state that PI was not involved in illicit drug trafficking. These two facts led to a conclusion that PI needed to undergo rehabilitation to receive treatment in order to recover medically for six months at the Drug Dependence Hospital, Jakarta.

LBHM brought the results of this assessment to the trial. LBHM also presented an expert who explained that Indonesia’s punitive drug policies keep people who use drugs like PI away from access to healthcare. Unfortunately, the judges were still attached to the drug war paradigm of thinking. After undergoing legal proceedings for approximately 7 months, PI was sentenced to 2 years and 6 months imprisonment, after previously being prosecuted for 6 years and 3 months imprisonment.

LBHM appealed the decision to the Jakarta High Court. In the appeal, LBHM objected to the District Court’s stance on the imprisonment sentence and its inability to provide answers to PI’s medical and social intervention needs. At the appeal level, LBHM succeeded in changing the verdict to 6 months rehabilitation at Jakarta Drug Dependency Hospital, in accordance with the recommendations of the IAT.

This victory was not easily achieved. When transferred from the detention facility to Jakarta Drug Dependency Hospital, PI was charged a registration fee of Rp 3,820,000 (approx. 250 USD). PI was forced to undergo rehabilitation by being made to pay those fees. PI should have completed his rehabilitation on June 22, 2022. However, the hospital did not allow PI to go home, for two reasons. First, PI must pay off the rehabilitation fee. Secondly, PI’s criminal case had not been completed, as the prosecutor’s appeal to the Supreme Court had not concluded. LBHM considered that the hospital’s actions constituted maladministration and harmed PI. Therefore, LBHM filed a complaint with a supervisory and independent institution, the Ombudsman of the Republic of Indonesia, for which LBHM was still waiting on the results at the time of this paper’s publication.

The case study above shows the barriers and challenges to accessing rehabilitation. They can basically be resolved by taking decisive steps in the form of decriminalisation and shifting to a rights-based approach to health for peo-

ple who use drugs. The various formal and informal requirements for drug users to access alternatives show that the government is still half-hearted in fulfilling the right to health of its citizens.

Early Release for People Who Use Drugs During Covid-19

The Covid-19 pandemic did not diminish the glorification of the war on drugs in Indonesia. During the pandemic, the government did not make available opportunities for people who use drugs sentenced to imprisonment to receive parole or assimilation. The Indonesian government issued Regulation of the Minister of Law and Human Rights Number 32 of 2020 which has been amended by Number 24 of 2021 and Number 43 of 2021 concerning Terms and Procedures for Granting Assimilation, Conditional Release, Leave Before Release, and Conditional Leave for Prisoners and Children in the Context of Preventing and Combating the Spread of Covid-19 (MOLHR 32/2020) to adjust the capacity of correctional institutions in Indonesia.

During the Covid-19 pandemic, the Directorate General of Corrections, Ministry of Law and Human Rights released 115,798 prisoners through the government's assimilation program.¹⁹ Assimilation is a process of re-integrating adult and child prisoners into community life.²⁰ Meanwhile, parole is a coaching program for prisoners to re-en-

ter community life after meeting predetermined requirements.²¹ In general, the requirements that must be met are showing good behaviour and actively participating in coaching programs while in correctional institutions.

However, the regulations exclude people convicted for drug offences sentenced to more than five years' imprisonment from being eligible for assimilation programmes. In fact, in terms of crime typology, people who use drugs can be included in the release criteria. There are two things that can be used as a basis, first a person who uses drugs does not endanger others and second, they may have a history of illness that makes them more vulnerable to transmission of any type of disease in prison.

The exclusion of the right to assimilation and parole not only has a detrimental impact on people who use drugs sentenced to imprisonment but also perpetuates the problem of correctional overcrowding in Indonesia. This proves that the war on drugs denies emergency and humanitarian efforts that should be available for people who use drugs.

Recommendations

Based on the data and analysis presented above, the following recommendations are presented:

1. The government should stop pursuing punitive drug war policies and prioritise health-based interventions for people who use drugs.
2. The government needs to take strategic and tactical steps to reduce overcrowding in correctional institutions by decriminalising people who use drugs, reforming the law to draw a clear distinction between possession for personal use and for trafficking, and also providing them with the right to enter assimilation programmes and access early release measures.
3. The government must fulfill and ensure access to transparent and affordable alternatives to imprisonment for people who use drugs.
4. The government needs to establish binding regulations that apply to all law enforcement institutions as part of an integrated criminal justice system in Indonesia so they are able to fulfill the right to access alternatives to imprisonment for people who use drugs, including in relation to threshold quantities for possession of narcotics and other criteria for distinguishing between possession for personal use and supply.

Endnotes

1. Maria Fatima Bona, *The Destruction of Drugs is More Powerful than Corruption and Terrorism*, <https://www.beritasatu.com/nasional/541097/daya-rusak-narkoba-lebih-dahsyat-daripada-korupsi-dan-terorisme>
2. General Comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights (ICCPR), on the right of life. Indonesia has ratified the ICCPR through Law Number 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights.
3. The Narcotics Law provides different definitions between these three categories of people. A person who has drug dependency is a person who uses or abuses drugs and is in a state of dependence on drugs, both physically and psychologically. Drug dependence is a condition characterised by the desire to use drugs continuously with increasing doses to produce the same effect and, when the use is reduced and/or stopped suddenly, there will be typical physical and psychological symptoms. A person who uses drugs is a person who uses drugs without the right or against the law. Therefore, a person can be categorised into more than one group.
4. Regional Office of the Ministry of Law and Human Rights DKI Jakarta; Report on the Activities of Human Rights Assessment in the Region of Characteristics of Prisoners of Narcotics Cases. <https://jakarta.kemenumham.go.id/phocadownload/ppid/Laporan%20Pengkajian%20HAM.pdf>.
5. <https://cdn.penalreform.org/wp-content/uploads/2023/06/GPT-2023.pdf>.
6. Sulhin, Iqraq. (2020). Covid-19, Excessive Imprisonment, and Potential Humanitarian Catastrophes. *Jurnal Hukum dan Pembangunan* 50. No.2. page. 406.
7. Directorate General of Corrections, Correctional Database System, look at <http://smslap.ditjenpas.go.id/public/krl/current/monthly/year/2021/month/8>.
8. Directorate General of Corrections, Correctional Database System, look at, <http://smslap.ditjenpas.go.id/public/grl/current/monthly/year/2021/month/8>.
9. Faye S. Taxman dan Alex Breno, 2017, *Alternatives to Incarceration*, Oxford Research Encyclopedias Criminology and Criminal Justice, page 1.
10. The meaning of “health services” and “development of science and technology” are the use of Narcotics primarily for the purposes of treatment and rehabilitation, including for the purposes of education, training, research and development and skills carried out by government agencies whose duties and functions are to supervise, investigate, investigation, and eradication of illicit drug trafficking (Article 7 of Narcotics Law).
11. Among them are the Supreme Court, the Attorney General’s Office, the Indonesian National Police, the National Narcotics Agency (BNN), and the Ministry of Law and Human Rights.
12. The second dictum of Supreme Court Circular Letter No. 4/2010 on the Placement of Drug Abusers, Victims of Abuse and Addicts in Medical Rehabilitation and Social Rehabilitation Institutions (SCCL No. 4/2010).
13. Article 12 paragraph (1) of BNN’s Head Regulation 11 of 2014.
14. Article 4 paragraph (6) of BNN’s Head Regulation 11 of 2014.
15. Albert Wirya, et al, *At the End of the Judge’s Hammer: Documentation of Rehabilitation Sentences in Jabodetabek in 2014*, LBH Masyarakat, Jakarta, 2016, page. 10.
16. See: <https://idpc.net/publications/2019/02/10-years-of-drug-policy-in-asia-how-far-have-we-come-a-civil-society-shadow-report>, <https://www.unodc.org/roseap/en/2022/01/compulsory-treatment-rehabilitation-east-southeast-asia.html>
17. <https://pubmed.ncbi.nlm.nih.gov/26790691/>
18. <https://www.unodc.org/roseap/en/2022/01/compulsory-treatment-rehabilitation-east-southeast-asia.html>, <https://www.ohchr.org/en/calls-for-input/study-arbitrary-detention-relating-drug-policies>
19. Look at <https://nasional.sindonews.com/read/644469/13/kemenumham-115798-narapidana-dirumahkan-selama-pandemi-1640952761>
20. Article 1 point 3 MOLHR 32/2020.
21. Article 1 point 4 MOLHR 32/2020.

About this briefing paper

This paper looks at the crisis of overcrowded prisons in Indonesia, and one of the major driving factors: the country's drug policy. It presents an analysis of the available alternatives to incarceration for people who use drugs, and outlines a case study to show some of the barriers and challenges to accessing drug rehabilitation programmes as an alternative, as well as some inherent problems with those programmes. It presents some recommendations for addressing the problem with over-incarceration in Indonesia.

About IDPC

The International Drug Policy Consortium is a global network of NGOs that come together to promote drug policies that advance social justice and human rights. IDPC's mission is to amplify and strengthen a diverse global movement to repair the harms caused by punitive drug policies, and to promote just responses.

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