

Drug laws in Thailand: the limits of reforms to relieve prison overcrowding

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Introduction

There has been a sharp increase in the number of people who have been charged, found guilty, and imprisoned for drug-related offences around the world over the past twenty years.³ In comparison to other countries, Thailand has a high proportion of people imprisoned for drug offences; as of 1 January 2024, 206,080 people were imprisoned for drug offences, accounting for 74.5% of all people in prison.⁴ Critical factors that have led to this high level of incarceration include the extremely punitive approach taken by national drug policies and law enforcement in the past—the so called ‘drug-war’ in Thailand.⁵ However it is increasingly considered an unsuccessful approach to realising both drug control and health promotion objectives. Subsequently, concepts related to decriminalising the use and possession of drugs for personal use, such as integrated socio-economic measures, demand and supply reduction, alternative development, public sensitisation, awareness-raising campaigns, and public health services were incorporated into the Thai criminal justice system in recent years, which seem to have contributed to a decline in the prison population over the past 5 years although the overall level remains high.⁶ Featured amongst these changes is the promulgation of a new Narcotics Code in 2021; this paper discusses the alternative measures to incarceration adopted in the Narcotics Code from the perspectives of practitioners and people involved in the criminal legal system.

Shifting the approach to drug policy from punishment to health care

Following the operational recommendations and international standards on drug policy issues such as proportionate punishment for drug offences and alternatives to incarceration established following the 2016 United Nations General Assembly Special Session (UNGASS) on the World Drug Problem, Thailand became one of the first nations in Southeast Asia to update its legal framework on drug control and rehabilitation with the passage of the Narcotics Code B.E. 2564 in 2021. With an emphasis on the healthcare of people who use drugs, the new Code allows for the pilot of harm reduction services,⁷ cultivation of some narcotic plants under regulatory controls, e.g. cannabis for personal consumption and for commercial, medical, or research purposes⁸, and modifies the threshold amounts for sentencing punishment.⁹ It also establishes a special committee responsible for rehabilitation,¹⁰ and removes the ‘presumption of guilt’ in the offence of drug possession for commercial distribution.¹¹ While alternative approaches, such as a community-based recovery model, have been adopted, the details of their implementation, including sentencing thresholds and nature of the medical treatment programmes, are to be specified by further regulations decided upon by the rehabilitation committee.¹² The key modifications made by the Narcotics Code are presented below in Table 1.

Table 1. Comparison between the old and new drug laws

Topics	New Narcotics Code 2021	Old Narcotics Act and other relevant laws	Remarks
1. Definition a. Differentiating between normal offences and serious offences b. Changes the definitions of distribution and production	Section 1 Serious offences mean offences related to producing, importing, exporting, distributing, or possessing except possession for personal consumption. Distribution means sale, exchange, share, or give with benefits in return, and possession for distribution. Involvement solely in portioning or packaging does not constitute an offence of drug production.	No differentiation No differentiation Portioning or packaging is presumed to constitute drug production.	According to the new provision, personal consumption is no longer a serious offence. This resulted in the removal of the minimum penalty for consumption (see below 4. Sentencing), which enables the court to avoid handing down any sentence of imprisonment, and to order that the individual enter the rehabilitation system instead. People involved in portioning or packaging will no longer be prosecuted for a serious offence.
2. Criminalisation of Use a. Decriminalises the use of some types of drugs and removes the presumption of guilt provisions	Section 107 Possession of some specific drugs for consumption is prohibited. Small-scale possession of the drug in an amount, defined as less than the amount specified by the Minister of Public Health shall be presumed as possession for personal consumption, not possession for distribution.	Section 15 (repealed) Any act of production, import, export, or possession of drugs with an amount specified by law, or in excess of that amount, shall be strictly presumed to be possession for distribution.	The new law adopts the indicative approach, not the determinative approach to sentencing. People in possession of drugs deemed to be of a small amount, or less, will no longer be presumed to be engaged in drug distribution, and will not fall under the serious offences provision.

Topics	New Narcotics Code 2021	Old Narcotics Act and other relevant laws	Remarks
3. Rehabilitation a. Establishes voluntary-based rehabilitation system and removes criminal record for rehabilitation attendees	Sections 108-123 The Rehabilitation committee has the authority to set up rehabilitative approaches including harm reduction services, pre-screening centres and referral system to rehabilitation centres. No criminal record for people who voluntarily attend the rehabilitation programmes. Social reintegration centres across Thailand to support post-attendees with referrals to needed services, including housing, welfare, and vocational training.	Lack of voluntary-based programs and incentives for people who use drugs brought about an unsuccessful system. Most people who use drugs were categorised as serious offenders according to the old law and unable to be sent to rehabilitation centres outside the prisons.	This is the first time in Thailand to principally use a public health-led approach where criminal records and criminal proceedings are not applied for people who use drugs. There is also an official voluntary-based rehabilitation system that provides through-care and after-care support. This is an example of the new alternative measures under the Narcotics Code.
4. Sentencing a. Differentiates sentencing for normal offences and serious offences b. Removes mandatory minimum penalty for non-serious offences and some serious offences	Section 145, 152, 165, 166 Serious offences related to heroin and methamphetamine have no minimum penalty except when it involves specific activities such as commercialisation or selling to a child. Circumstances such as seriousness and socio-economic factors shall be considered when sentencing. The judge shall prioritise healthcare and the use of rehabilitation over punishment.	Section 65-66 (repealed) Mandatory minimum penalty is 4-year imprisonment. No such provisions	The Narcotics Code shifts the burden of proof onto the prosecutor when claiming that a person is guilty of a serious offence. These provisions are innovative in directing the judge to comprehensively consider all relevant factors before sentencing and to divert defendants from the criminal justice system to the public health system where rehabilitation programmes are prioritised. This accordingly increases access to alternatives to imprisonment.

Box 1. New thresholds for drug possession

The Cabinet Office has issued an official update on the quantity thresholds established for drug possession in June 2024.¹³ For possession for personal use, the thresholds vary depending on the type and classification of drugs or prohibited substances:

Type I drugs

- Heroin (no more than 300 milligrams)
- Amphetamine and methamphetamine (no more than 1 tablet/unit of use, or 100 milligrams of net mass)

Type II drugs

- Cocaine (no more than 200 milligrams)
- Opium (no more than 5,000 milligrams)

As we shall see below, many have raised concerns about the insufficiency of these thresholds, noting that people who use drugs will ordinarily possess quantities over the limits established above. Although the provision on the absolute presumption of guilt has been removed and replaced by the provision on presumption of innocence in the current Narcotics Code, which establishes the burden of proof on the prosecutor, the Code still allows for the Minister of Justice to determine

the threshold quantities. This creates uncertainty in the enforcement of the criminal law and its penalties on individuals; however, theoretically speaking, the criminal law and its enforcement must be clear, predictable, and certain because it affects the fundamental rights and freedom of the people. As a result of this, and other concerns about the realisation of the objectives of the new Narcotics Code, criticisms have been made against the revised thresholds.¹⁴

The rehabilitation centres under the present laws are operated by a mixture of state agencies, including public hospitals, community-based centres (often co-located with a hospital), and more centralised and specialist agencies such as the Princess Mother National Institute on Drug Abuse Treatment. Under the Rehabilitation Act 2002, the Department of Probation had an oversight role over all such facilities and often had a liaison officer/inspector stationed at each, particularly custodial facilities, but the role has now shifted to the multi-agency National Addiction Treatment and Rehabilitation Committee led by the Ministry of Public Health. Pre-screening centres providing medical support for people with severe drug dependence issues and other conditions such as post-traumatic stress disorder (PTSD), are again a combination of specialist standalone facilities and centres co-located with existing hospitals and other public health facilities, under the supervision of the Ministry of Public Health.

Box 2. International human rights standards on drug policy and the deprivation of liberty

In 2021, the UN Working Group on Arbitrary Detention, which has been mandated by the United Nations to provide research and recommendations to Member States concerning arbitrary deprivation of liberty, released a landmark report on drug policies.¹⁵ Whilst the report contains a broad range of useful recommendations for an effective, human rights-based approach to drugs, two standards are particularly relevant to the subject of this report.

First of all, incarceration is not an appropriate response to drug use. Any form of detention or

imprisonment driven by drug use and possession for personal use constitutes an arbitrary detention of liberty, and is incompatible with international human rights law. This includes mandatory internment in rehabilitation centres.

Secondly, the Working Group has expressed concerns about the use of mandatory or coerced drug treatment in judicial settings, as well as about the intervention of the courts, law enforcement, or the military, in decisions concerning drug treatment. The following excerpt is particularly relevant:¹⁶

“The Working Group considers that the threat of imprisonment should not be used as a coercive tool to incentivize people into drug treatment. While some defendants, when given a choice, have refused drug treatment and accepted a prison sentence as an outcome, the measure of coercion involved in such a choice is too great and is an unacceptable infringement on the right to choose one’s treatment freely, to refuse treatment or to discontinue it at any time. Courts should also not order compulsory or forced drug treatment. Drug treatment should always be

voluntary, based on informed consent, and left exclusively to health professionals. There should be no court supervision or monitoring of the process, which should rest exclusively with trained medical professionals.”

In August 2023, the Office of the High Commissioner for Human Rights published a report on drug policy that reiterated concerns for prison overcrowding and the lack of access to drug treatment and harm reduction services, and recommendations to prohibit compulsory drug treatment programmes.¹⁷

Case Studies

At the start, the researchers explained to the five participants the purpose of the study, and stressed the confidential, anonymous, and voluntary nature of their participation. All the participants’ consent to participate in the study was subsequently obtained. To maintain their anonymity, pseudonyms have been given to all of them in the summary of research outcomes presented below. The selection of participants in this study was based on the convenience sampling method.

This study draws upon the experiences of five people involved with drug offences, four men and one woman, and their interactions with the Thai criminal justice system, particularly in relation to the current state of drug laws, their implementation, and the use of non-custodial measures. At the time of the interview, the five persons were aged 30, 39, 46, 46 and 55. They were arrested at the ages of 27, 30, 40, 42, and 46, respectively. All five were arrested for the offence of possessing narcotics, in all cases methamphetamine, with intent to sell, and charged under the Narcotics Code. They received court sentences ranging from 2 years and 4 months to

33 years and 4 months. An outlier was Mr. B, who was additionally charged with attempted assault on an officer while attempting to flee, for which he was shot in the leg. With regards to previous criminal records, two out of the five participants were involved in the criminal justice system for the first time. Of the three participants that had prior criminal records, one had been convicted for joint possession with intent to sell, another person had three previous convictions for joint assault, possession while serving in the military, and selling methamphetamine, and the third person had three previous convictions for selling methamphetamine in differing quantities.

The circumstances for each case varied significantly, both in their journey through the criminal justice system and the duration of their sentences, but the underlying legislation used for their prosecution was identical, namely the Narcotics Act 1979 – the legal framework in force before the 2021 reforms – which regulates the charges, sanctions, and procedures for the trial and sentencing of drug charges. The legislation also provides authorities with an option, as an alternative to a custodial sentence, for defendants to undergo rehabilitation and treatment.

Access to non-custodial measures for people who use drugs under the new Narcotics Code

Mr. A was arrested alongside two friends who had drugs in their possession (50 grams of crystal methamphetamine), and charged as co-de-

fendants for possession with intent to sell. Upon arrest, he was not subject to urine testing by the police officers or the narcotic control officers due to the quantity of drugs being sufficient for prosecution under possession with intent to sell rather than simple possession.

For as long as the threshold quantity for possession with intent to sell was exceeded, further testing for prosecution as a person who uses drugs was deemed unnecessary.

Participants' experiences of treatment by the police authorities varied to a notable degree, with Miss D and Mr. E subjected to urine tests during their process by police, tests which were positive, while the remaining three were not subject to such testing. Mr. C stated outright that it was up to the discretion of the responsible officers to conduct testing, which reflects the existing legislation. In line with this, participant Mr. A stated that in his experience, it was often not conducted if there was sufficient evidence to prosecute for possession with intent to sell, due to the lack of necessity after the quantity of drugs was established to meet the classification for the automatic assumption of intent to sell.

Under the current legislation, the main criteria for deciding whether an individual will be charged with simple possession or possession with intent to sell is a combination of the quantity of drugs seized as well as a reasonable suspicion by the responsible authorities, with the benefit to be given to the defendant. Section 107 of the Narcotics Code (2021) grants the authorised Committee under the Code to designate the threshold for which a reasonable presumption can be made to construct a preliminary intention to sell, that applies automatically. In

practice, the interviewees stated that there was often little exercise of that discretion and that possession of drugs of a certain quantity was often sufficient for charges to be laid for possession with intent to sell. Participants agreed that the quantity thresholds were unreasonable in the past, given the low cost of methamphetamine, the cost savings that can be made with bulk purchases, and the purchasing habits of people who use drugs. Mr. E, in particular, stated that the newly amended legislation to include as sentencing factors the behaviour of the defendant, in combination with the quantity in possession, was a better approach, though the application might not be that different from previous practice. Nevertheless, he agreed that significantly large quantities would, in his opinion, be sufficient for prosecution as possession with intent to sell alone.

All participants reported significant discretion being granted to and exercised by the police when classifying suspects according to the user/seller dichotomy, which also greatly determined the level of access and options they have in relation to non-custodial measures such as probation, and rehabilitation. The classification of drug seller as opposed to drug user by the police removed many of these options, as well as imposing significantly harsher sentences if it falls under the category of a serious offence (i.e. producing, importing, exporting, distributing, or possessing except possession for personal consumption).

Challenges facing people who use drugs in the criminal justice system

Multiple participants stated that the options for exercising their rights to non-custodial measures, particularly early release, were of limited accessibility to them. They were informed of the opportunity to write an application for consideration for early release but were given no assistance or guidance in doing so, and people held in prisons had to write those applications by themselves. Mr. A reported an average processing time of 5-6 months and little transparency, with approval being granted suddenly with little warning. Participants also stated that

such options were, in practice, not particularly open to prisoners with short sentences, as officers were of the opinion that due to the slow processing times, it was not worth the effort.

Miss D was the only participant to have previously undergone rehabilitation and classification as a person who uses drugs, hence was afforded options for non-custodial measures such as probation and rehabilitation. Other participants were denied this due to previous convictions for possession with intent to sell. Her experience with the rehabilitation programme involved two different contexts; firstly, a programme in a private hospital, and

secondly, a stricter programme managed by the Royal Thai Air Force Wing 41 in Chiang Mai. In terms of the programme, both had additional sanctions in place, such as lengthening of rehabilitation period for infractions, though Wing 41 also featured additional sanctions for demerits and breaches of rules, such as corrective discipline, additional training and duties, as well as more rigid conditions and militaristic discipline overall. Miss D stated that if participation in re-

habilitation was voluntary, there would be no record, but as hers was an alternative sanction by the authorities, the process was recorded. Positive results included improved physical and mental health, particularly weight gain, as well as an overall period to recuperate. However, the participants raised concerns that these facilities might also provide easy opportunities to buy drugs.

Prison release measures related to COVID-19

All participants in the study were beneficiaries of some form of sentence reduction during the COVID-19 pandemic, with at least four also benefiting from new legislative changes. Mr. A was of the opinion that rehabilitation was a better use of resources than imprisonment for people who use drugs, and that the closure of rehabilitation facilities during COVID-19 was an unwise move. This was seconded by Mr. C, who stated that it was a more effective and tailored solution as it tackled the underlying causes of drug dependence for people who use drugs, while allowing them to maintain support and care for their families.

The most common measure experienced in response to COVID-19 was the acceleration and expansion of promotions in prisoner classification, as well as the introduction of early release with electronic monitoring along with monetary bail of between 12 - 20,000 baht and other conditions.

In terms of measures to combat the spread of COVID-19 within prisons, participants reported that people in prison were permanently locked down inside their cells with no outside time granted during the early stages of the pandemic. Arrangements were made to separate people in prison infected with COVID-19 from people who were not infected, as much as possible. Provision of medications for COVID-19 depended on the severity of symptoms, with those having lung issues receiving better care, according to Mr. A and Mr. B. Mr. A also reported that prison staff stayed outside of the

cell blocks for fear of infection. Mr. C reported a different experience due to the entirety of the cell block getting infected, and as such outside time resumed. Mr. A and Mr. C also reported that their case processing was postponed and delayed due to COVID-19 infections. Mr. E reported no new releases, and that all people in prison were isolated for 12 days prior to release, and swabbed to test for COVID-19 infections in accordance with the set timetable.

As for non-custodial measures, participants stated that first-time offenders for any crime were prioritised for release on electronic monitoring conditions, with a requirement for 1/3 of their sentence to have been already served; their applications were processed over 2 - 3 months. Mr. A reported a lack of pre-release preparation, with little more than merely a certificate for time served and pre-release isolation, but little support from staff. Mr. C received help from the CARE centre to liaise with the House of Blessing Foundation for assistance, including transportation, while Miss D and Mr. E were able to undertake pre-release programmes, combined with additional liaison with families and a clearly communicated release date. Information on non-custodial measures was reportedly poorly communicated, with Mr. A reporting needing to pay to attain it, while Miss D only found out via her family, and Mr. E only by conversing with prison staff.

Miss D, who was released on electronic monitoring conditions, reported additional surveillance from police bordering on harassment, while Mr. E was required to report regularly to the local probation officer.

Recommendations

Despite the reforms adopted by the new Narcotics Code and relevant regulations, there are still some challenges to the implementation of non-custodial measures such as the limited power of each authority in the criminal justice system to implement them, the mindset of the officers, and the unclear threshold quantities and criteria of possession for personal use. Our ongoing research suggests the following measures and actions should be taken to provide for a more effective regime of drug policy and legal implementation in Thailand, and to align them with international human rights law and standards;

1. While welcoming the reforms implemented with the new Narcotics Code (2021), legislators and policymakers should explore further reforms in order to ensure that drug use and drug dependences are treated only as a public health issue, and that no person is punished or incarcerated for drug use, including through the decriminalisation of possession for personal use.
2. Non-custodial measures should be mainstreamed throughout the Thai criminal justice system. Reduction in the use of custodial sentences for people charged with or convicted for drug offences could be prioritised under both current and future legislation, particularly through the granting of greater discretion in sentencing by removing mandatory minimum sentences, as well as through better education and training for legislators and judges.
3. Law enforcement authorities should not target operations at people who use drugs or engaged in low-level dealing, which is driven partly by the need to fulfil enforcement quotas and meet organisational key performance indicators (KPIs).
4. Prosecutors should be granted statutory power to allow discretionary exercise of authority to use measures other than incarceration as appropriate for the individual circumstances of cases including the discretion to discharge arrests and postpone prosecutions to pursue the use of alternative measures in the pre-trial stage of the criminal justice system.
5. The quantity thresholds to assess whether a drug is possessed for personal use or to sell

should be reviewed in consultation with people who use drugs, in order to constitute realistic and reliable indicators of personal use, and the process for deciding whether an individual will be charged with simple possession or possession with intent to sell clarified in favour of the defendant (where the main criteria is a combination of the quantity of drugs seized as well as a reasonable suspicion by the responsible authorities, with the benefit to be given to the defendant, as outlined above).

6. Treatment methods available under the existing rehabilitation-led approach need more resourcing and specialist expertise in order to address the specific needs and requirements of different types of people dependent on drugs remanded to such programmes. Treatment should be in line with the WHO-UNODC International Standards for the Treatment of Drug Use Disorder, that is, genuinely voluntary and provided by medical personnel rather than law enforcement or the military. Military-run rehabilitation centres should be closed down.
7. Capacity building and awareness raising programmes for officers should be organised in order to better knowledge and understanding about the recently promulgated Narcotics Code and the opportunities for implementing alternative measures to incarceration.
8. Thai authorities should expand the pilot tests of provision of evidence-based harm reduction services, both in the community as well as in detention settings.
9. Support programmes for people released from detention should be put in place, and where appropriate reinforced, including by ensuring continuity of care for people undergoing drug treatment.
10. In-depth research on the effectiveness of alternative measures to incarceration for people who use drugs should be further conducted, especially to find out the most appropriate set of measures that fit with the Thai context and to identify the need for improving legal frameworks to support the effective implementation of such measures.

Endnotes

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About this briefing paper

This paper looks at the crisis of overcrowded prisons in Thailand, and one of the major driving factors: the country's drug policy. It presents an analysis of the alternative measures to incarceration adopted in the Narcotics Code (2021), and outlines case studies to show some of the barriers and challenges in the Thai criminal justice system, particularly in relation to the current state of drug laws, their implementation, and the use of non-custodial measures. It concludes with recommendations for improving Thailand's drug policy and legal implementation to align with international human rights law and standards.

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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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Funded, in part, by:

