

Gender-sensitive drug policies for women

Introduction

The number of women and girls in prison, estimated to be more than 740,000, is increasing: between 2010 and 2020 there was a 17 per cent increase globally.¹

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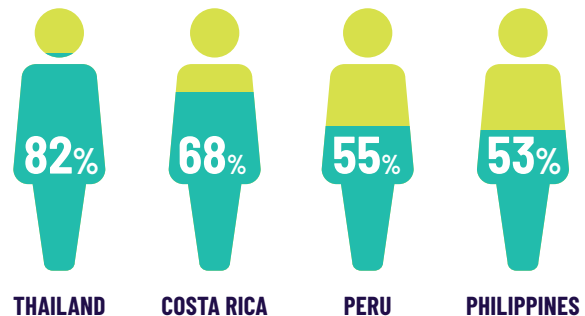
Women are imprisoned worldwide for drug-related offences more than for any other crime.

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Drug-related offences are known to have a particular and disproportionate impact on women. In 2018 the United Nations estimated that 35 per cent of women in prison worldwide are imprisoned for drug offences, compared to 19 per cent of men.² This proportion, however, increases dramatically in Latin American and Asian countries. In Brazil, for example, 62 per cent of women in prison in 2017 were there because of drug-related offences – compared to a quarter of men.³

This model for reform details how policy makers and criminal justice practitioners can respond effectively and positively to reduce the unnecessary imprisonment of women for drug-related offences in line with international standards. It draws on the report, **Sentencing of women convicted of drug-related offences**, which includes findings from a study of 18 jurisdictions undertaken by Linklaters LLP for Penal Reform International and co-published with

PROPORTION OF WOMEN IN PRISON FOR A DRUG OFFENCE:⁴



the International Drug Policy Consortium.⁵ Overall, the study found that women's complex reasons and pathways into criminal justice systems for drug-related offences are not adequately reflected in legislation, sentencing guidelines where they exist, or sentencing practices across the 18 jurisdictions.

Women, drugs and prisons: perilous pathways

Women are rarely major players in the illegal drug trade. The increase in women's imprisonment for drug-related offences has been attributed, in part, to the greater ease with which low-level crimes can be prosecuted, with women's primary role in drug trafficking usually being that of a drug courier. This makes them typically easy targets for drug enforcement authorities, even though it does little to disrupt drug-trafficking networks.

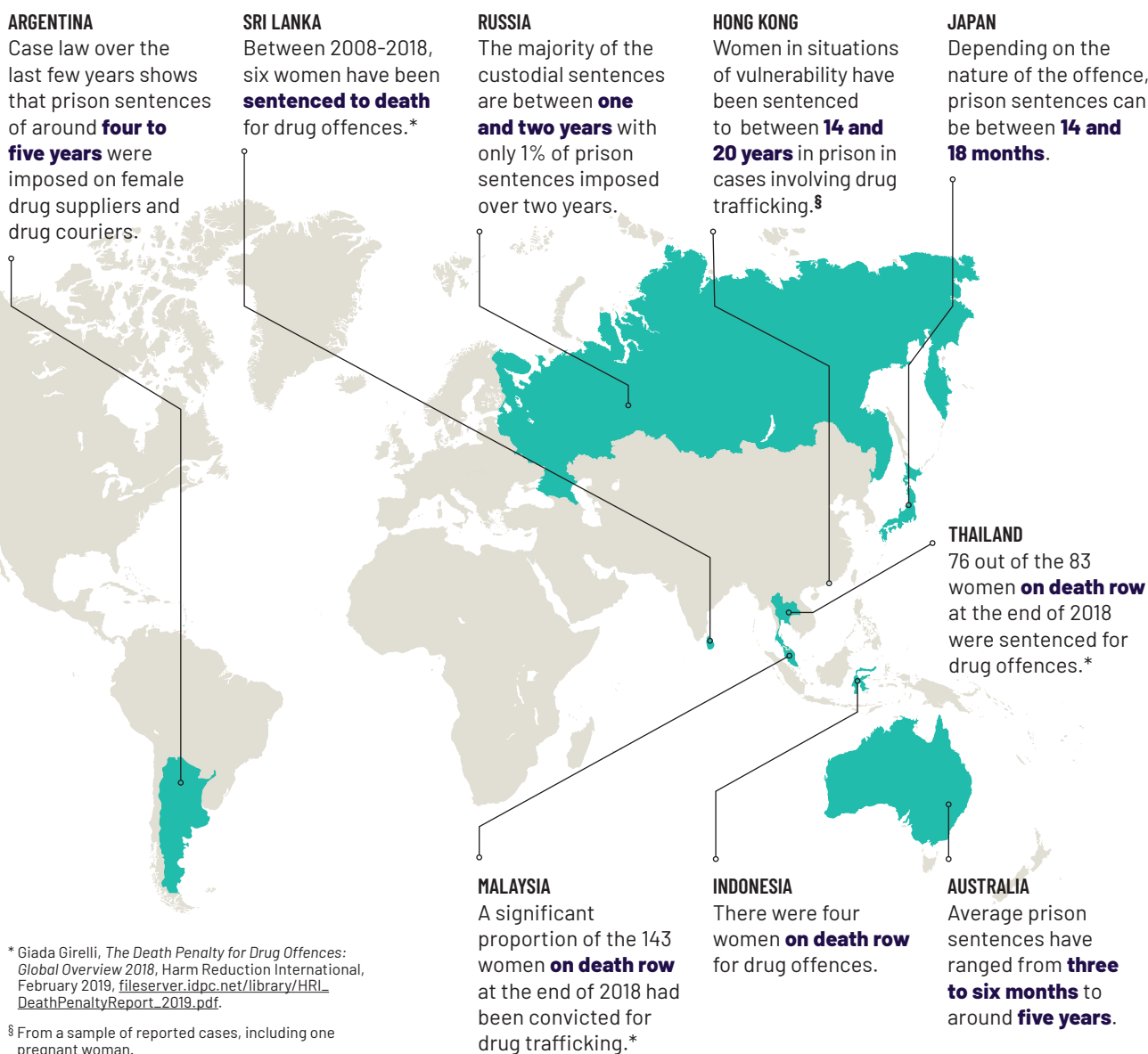
The main drivers of the increase in women's imprisonment for drug offences include mandatory pre-trial detention, disproportionate sentencing and mandatory minimum sentencing, as well as lack of access to alternatives to incarceration or punishment. The continued criminalisation of people who use drugs is a major contributor. In many countries, women continue to receive prison sentences and the length of the sentence can range from a few months to over a couple of years at one end of the spectrum, to long sentences or even the death penalty at the other end of the spectrum.

The backgrounds and reasons for women's involvement in the illegal drug markets are complex and thread with violence, coercion and situations of vulnerability. In most cases, for all their lives these women have

been excluded from the basic services, protection and support that is expected from the state.⁶ These intersecting vulnerabilities are compounded when women are detained and tried in a foreign country.

Fifty per cent of women in prison, as opposed to 30 per cent of men, are estimated to have experienced drug dependence in the year prior to imprisonment.⁷ However, historically punitive approaches to drug use have meant that harm reduction services are less available in prisons than in the community, and drug treatment services in prisons are mostly abstinence-based. Where they exist, harm reduction and drug treatment services in prisons are in most cases available only for men, and are designed, implemented, and evaluated without the participation of women.⁸

DISPARITY IN PRISON SENTENCES FOR WOMEN CONVICTED OF DRUG-RELATED OFFENCES:



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A large number of women worldwide are currently imprisoned or have been sentenced for drug offences, in many cases for transporting drugs (as mules), having a secondary role in the commission of crimes or performing low-level high-risk tasks, often at the request of their partners.

Report of the United Nations High Commissioner for Human Rights.⁹

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Drug use should not be confused with drug dependence. Women from all strata of society use drugs but they use them differently to men and with different consequences. Women may be more vulnerable than men to some of the harms associated with drug use, mostly because of the stigma, discriminations and exclusion they face, and also because of the lack of access to services tailored to their specific needs.¹⁰ Levels of past trauma and gender-based violence are high among women with drug dependence.¹¹ Women are more likely than men to identify trauma and/or stressors such as relationship problems, environmental stress and family problems as causes for their initiation or continuation of drug use.¹²

International standards: calling for alternatives to imprisonment for women

The **United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)** recognise that many women, including those charged with or convicted of drug offences, should not be in prison given the harmful impact of imprisonment.

→ **Rule 61** requires courts to consider mitigating factors when sentencing women in contact with the law, noting specifically lack of criminal history, relative non-severity and nature of the offence, caretaking responsibilities and typical backgrounds.

→ **Rule 62** requires the ‘provision of gender-sensitive, trauma-informed, women-only substance abuse treatment programmes in the community’ for diversion and alternative sentencing purposes for offences entailing drug use.

→ **Rule 64** specifically encourages non-custodial sentences for pregnant women and women with dependent children to be preferred.

The **United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules)** commits governments to reduce the unnecessary use of imprisonment through non-custodial measures and provide that pre-trial detention should be a measure of last resort.

Women's stories:

Mary

Mary Jane Veloso, a Filipina mother of two on death row in Indonesia for smuggling heroin, was formerly a migrant domestic worker in Dubai. Mary said she left this job after being sexually attacked (an attempted rape), and was subsequently a victim of human trafficking, and coerced into smuggling drugs.¹³

Merry

Merry Utami, an Indonesian woman who is on death row in Indonesia is a grandmother and former migrant worker in Taiwan. She left her abusive partner and subsequently met and fell in love with a Canadian man, who reportedly groomed her for three months before inviting her on a trip to Nepal with him, where he gave her a new suitcase (lined with heroin) to take home with her, on a separate flight to his own.¹⁴

Nayeli

Nayeli is an indigenous woman incarcerated in Cochabamba, Bolivia. She has suffered from sexual violence and has lived her entire life in poverty. Nayeli’s father was convicted for transporting drugs. When she was young, her family lived in prison for 7 years. When her father was released, the family faced economic hardship. Nayeli was offered \$1,000 to swallow capsules filled with cocaine and to travel to Chile which she agreed to do to provide for her family. She was arrested after her second trip and spent 6 months in prison. Upon her release, Nayeli was in debt and decided to again transport drugs to support her son. She was carrying 3 kilograms of cocaine paste taped to her legs and received an 8-year sentence. The father of Nayeli’s youngest son does not pay child support, so she supports him on her own by announcing visitors to the jail over the loudspeaker.¹⁵

Article 3 of the UN Convention on the Rights of the Child requires children’s best interests to be assessed and taken into account as a primary consideration in all actions or decisions concerning them, which includes decisions around mother’s imprisonment.

Several other instruments agreed to by member states of the UN recommend and call for proportionate sentencing, gender-specific measures for women in contact with the law for drug offences, and alternatives to imprisonment.¹⁶

Model for reform

01

Decriminalise drug use and drug possession for personal use

→ Remove all criminal and administrative penalties, from fines to detention, for offences such as drug use, cultivation and possession of drugs for personal use, and possession of drug use paraphernalia, such as needles and syringes.

The key objective of decriminalisation is to end the punishment and stigmatisation of people who use drugs – an issue particularly relevant to women who use drugs as they are facing significant stigma and discrimination for contravening their traditional roles as mothers and caretakers. Decriminalisation policies pave the way for providing an enabling and supportive environment for the provision of gender-responsive harm reduction,¹⁷ voluntary drug dependence treatment, and other health and social services that women who use drugs may need. Decriminalisation is widely supported by all 31 UN agencies and other multilateral bodies.¹⁸ Drug use and possession for personal use is decriminalised in over 30 countries, or 50 jurisdictions worldwide.¹⁹

02

Use pre-trial detention only as a measure of very last resort

→ Eliminate the mandatory or disproportionate use of pre-trial detention for drug offences, and repeal laws and policies that exclude people convicted for drug offences from alternatives to imprisonment.

→ Address the gendered impact of poverty by improving access to quality, free legal representation and support for women who face pre-trial detention to increase access to existing diversionary measures and alternatives to punishment and imprisonment.

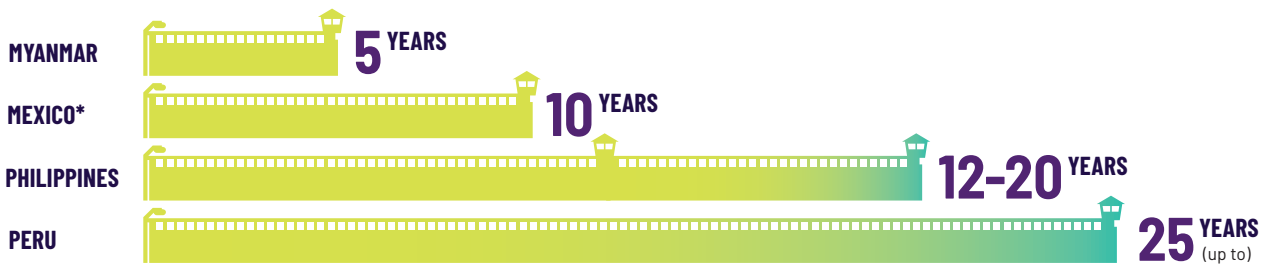
In several countries, drug laws establish mandatory pre-trial detention for drug offences – such as in Mexico, Guatemala, or the Philippines. In other jurisdictions, pre-trial detention for drug activities is not mandatory, but it is prioritised by harsh drug laws and policies, such as in Argentina, Chile, Costa Rica, Ecuador and Uruguay.²⁰ In India, drug legislation requires judges to refuse bail for people charged with drug offences unless a clear case of ‘not guilty’ is made at the outset of proceedings; in almost all cases, this leads to pre-trial detention.²¹ Informal drivers of pretrial detention, such as lack of knowledge of the criminal justice system, lack of resources and social networks, and prejudices against those who break social rules, also impact disproportionately women charged with illegal drug activities. In many cases, women in pre-trial detention are not aware of their right to access bail, or to access legal aid and representation, especially before they confess to committing a drug offence.²²

03

Remove mandatory minimum sentences for drug offences

→ Remove laws and policies that impose mandatory minimum sentences. Adopt approaches where particular circumstances and backgrounds, including those that are gender-specific such as coercion, experience of trauma or abuse, or drug dependence, can be taken into account.

Many drug laws establish high mandatory minimum sentences for low-level drug offences, including for drug possession and use, without considering any mitigating circumstances, including those unique or specific to women. In many cases, mandatory minimum sentencing laws only let judges consider the quantity and type of the drugs at stake when deciding on a sentence. They are a simplified, inherently unfair response to a complex reality, and a major driver of mass imprisonment. They particularly impact women, who tend to be involved in the low-level but highly visible drug activities that are punished harshly due to mandatory minimums, as well as communities marginalised on the basis of race and ethnicity.²³ Evidence shows that mandatory sentences are not effective at deterring crime.²⁴

MINIMUM SENTENCES FOR DRUG OFFENCES (YEARS IN PRISON):²⁵

* Federal, for transportation or trafficking.

04

Abolish the death penalty for drug offences

- Address the disproportionate impact of the death penalty on women convicted of drug-related offences by immediately commuting such sentences.
- Revise laws and policies to abolish the death penalty, including for drug offences.
- Life imprisonment should not replace the death penalty for drug offences, either through commutation or following abolition.
- In all cases that involve a potential death sentence, legal aid must be provided at all stages, including to allow women to appeal their sentence in line with international standards.

At least 35 countries retain the death penalty for drug offences in law.²⁶ In international law, the death penalty is prohibited for all but the 'most serious crimes' which does not include drug-related crimes.²⁷ Latest data from 2019 found that over 100 women were on death row for a drug offence.²⁸ Many of the women who have been sentenced to death for drug offences are 'drug couriers' from foreign countries, with low socio-economic status and from ethnic minority backgrounds. In Malaysia, 95 per cent of the women under a death sentence were for drug trafficking offences and 86 per cent of these women were foreign nationals (see point 9).²⁹ These women operate at the lowest level of the illegal drug trade yet receive the harshest punishment. Duress, coercion, manipulation, pressure to provide for family members and situations of vulnerability have been identified as the main drivers for women sentenced to death for drug offences.³⁰

05

Establish and implement gender-specific mitigating factors in legislation governing the prosecution and sentencing of women for drug-related offences

- Reform drug laws and policies to allow for the systematic consideration of mitigating circumstances in sentencing for drug offences, taking into account the role of the person in the illegal drug trade, as well as the reasons for their involvement – bearing in mind that prison should only be used as a measure of last resort.
- Establish gender-sensitive mitigating circumstances that address the main pathways of women's involvement into illegal drug economies, such as a history of trauma or partner violence, coercion, caretaking responsibilities, drug dependence and others.

Very few legal systems explicitly envisage specific mitigating factors for women. Where they exist, they tend to focus on the traditional roles of women as mothers and caregivers; this is the case in Germany (for pregnant women), and Russia (for pregnant women, or women with small children).

A gender-sensitive approach to mitigating factors should take into account the unique causes and pathways of women into illegal drug activities, and the consequences of their imprisonment. These should include: a prior history of gender-based violence, involvement in illegal drug activities under coercion or influence of a male partner or relative, a history of drug dependence and/or mental illness, and involvement in illegal drug activities in order to fulfil their caretaking responsibilities. Through legal reform or judicial decision, Brazil, Cambodia and Mexico have recently introduced gender-specific provisions that aim to reduce the number of women in prison, but these reforms are yet to result in tangible

change. In January 2021, England and Wales revised its sentencing guidelines to better address the gender and ethnic disparities in sentencing for drug offences.

In some jurisdictions there is some consideration given to the role that a woman plays in the drug supply chain. When lesser sentences are imposed for people who have less direct involvement or are involved in lower-level or non-violent drug-related offences, that is likely to affect women more than men and can result in more lenient sentences for women convicted of drug crimes. For example, German criminal law takes the person's role in the drug supply chain into account (perpetrator

or participant) for sentencing. In Spain, a drug courier will receive a less severe sentence than for offences committed higher in the drug trafficking chain.

Basing sentences on the quantity of drugs involved or type of drug does not allow for gender-specific mitigating factors to be fully considered. The Colombian Criminal Code includes no minimum threshold in terms of quantity of drugs that constitutes "trafficking". In Costa Rica, possession of a large quantity of drugs will give rise to a presumption of trafficking. In Hong Kong, courts consider in sentencing how harmful the drugs are and how addictive they are, while in New Zealand, one consideration in sentencing is their perceived risk of harm.

06

Increase the use of alternatives to imprisonment for women convicted of drug-related offences

→ Urgently amend existing laws and policies to ensure that women charged with or convicted of non-violent drug offences are eligible for diversionary measures and alternatives to punishment or imprisonment.

→ Reform relevant laws to remove barriers preventing women that have committed drug offences from accessing alternatives to punishment or imprisonment.

→ Ensure that the underlying factors that bring women into contact with the illegal drug economy are considered in the implementation of non-custodial measures. Complement non-custodial measures with gender-sensitive support programmes that address these factors. Prioritise and fund programmes that are led by affected communities.

In some countries like the Philippines, drug laws explicitly exclude the possibility of alternatives to custodial measures for people convicted for a drug offence, with no regards to the gravity of the action itself. In Indonesia, people sentenced to more than 5 years in prison for a drug offence, which is the case for all those involved in drug supply activities, can only access alternatives to imprisonment if they provide valuable information to law enforcement – something that those involved in lower-level activities are usually unable to do. In other jurisdictions, while the possibility of alternatives to prison exists in law, only an extremely low number of women convicted for drug offences benefit from them (for instance, 4 per cent in Russia reported in 2020).

It is positive to note that in a number of jurisdictions such as Germany and New Zealand, non-custodial sentences are the more common form of sentence for low-level drug-related offences by women. In 2016, Mexico passed a law which removed impediments for people sentenced for federal drug offences to access alternatives to imprisonment such as parole, preparatory or conditional release or a substitution (such as home detention).

Gender-sensitive approaches to diversionary measures and alternatives to imprisonment should consider the whole range of specific factors that draw women into contact with the illegal drug economy. Rather than replacing one form of punishment with another, like house arrest, alternatives to imprisonment should take a less interventionist approach to address the woman's individual needs through counselling, mentoring, and referrals to training or education, voluntary drug treatment and harm reduction, legal assistance, mental health support or other social services.³¹

States should address the historical underinvestment in gender-specific support services for women involved in illegal drug activities and prioritise and fund programmes that are led by affected communities, in line with Sustainable Development Goal 5.

Non-custodial measures should not result in drawing more women into the criminal justice system. Baseline research and continuous monitoring and evaluation of such measures are crucial to detect and avoid possible net-widening effects. Prosecutors, judges and probation services should consider the reasons for women's non-compliance with non-custodial sentences, including by consulting with women's groups and women in contact with the law in order to gain understanding of the challenges faced rather than automatically responding with punitive measures. They should also create realistic performance measures that consider the multitude of barriers faced by survivors of abuse.³²

COVID-19, drug offences and women

The COVID-19 global pandemic has highlighted the urgent need to reform policies related to drug offences. The UN joined many other voices in calling for the release of “those charged for minor and non-violent drug and other offences” in the context of COVID-19. At least 28 of 109 countries and territories that adopted decongestion measures in response to the risk of COVID-19 in prisons between March and June 2020 explicitly excluded

people detained for drug offences, regardless of their individual circumstances or health risks. Most governments have overlooked the different and unique impact that COVID-19 prevention and response measures may have on women in prison. Most data is not disaggregated by sex. In some countries, release criteria indirectly exclude women. In Colombia, for example, disqualifying people in prison for drug offences from release affects 45 per cent of women in prison, who are there for drug-related offences, compared to 12 per cent of men.³³

07

Adopt a health-based gender-sensitive approach to drug use and dependence

- Women must not be criminalised or otherwise punished for using drugs, including when they are pregnant, breastfeeding, or have dependent children.
- Provide drug treatment, harm reduction and other drug services, in the context of diversion measures and alternatives to punishment and imprisonment that are evidence-based, gender-sensitive, and trauma-informed.
- Abolish compulsory drug treatment, within and outside criminal justice systems. Engagement with services must be strictly voluntary, non-judgemental and non-conditional; rejection or discontinuation of treatment should not entail punishment or imprisonment.
- Ensure access to voluntary, evidence-based and gender-sensitive drug treatment and harm reduction services for women deprived of liberty.

For drug treatment to be gender-sensitive and trauma-informed, it needs to be voluntary, and not conditional. Drug treatment that is offered as the only

possible alternative to imprisonment is not genuinely voluntary; the same goes for treatment that would result in prosecution or imprisonment if the client fails to complete it or starts using drugs again.³⁴ Non-custodial measures that envisage compulsory or coerced drug treatment vary widely across jurisdictions, from drug courts to suspension of sentence if drug treatment is undertaken. Some of these measures, in particular drug courts, have become increasingly criticised and should therefore be avoided.³⁵ Similarly, the form of treatment will vary from country to country. States such as Sweden, Puerto Rico, Mexico or Russia provide, or in some instances mandate, people to undertake abstinence-based programmes, with no option for clients to choose the treatment that best suits their needs. In many cases, the proposed treatment lacks a gender-sensitive approach.³⁶

Access to gender-sensitive harm reduction measures for women remains severely limited, despite the fact that women who use drugs are more vulnerable to HIV, hepatitis, tuberculosis and overdoses than men who use drugs.³⁷ The availability of health services for women who use drugs in prison is particularly restricted – in the limited number of countries where harm reduction and treatment services do exist in prison, they are generally only available for men.³⁸

08

Ensure drug laws and policies address the special needs of pregnant women and mothers

- Amend drug laws and policies to ensure that pregnant women, breastfeeding women, and women with children who are charged with or convicted of a drug offence have preferential access to non-custodial measures. Imprisonment of women in these situations should only take place in exceptional cases.
- Remove the systematic use of criminal sanctions and other disciplinary measures such as removal of child custody, forced sterilisation or coerced drug treatment against women who use drugs.
- Ensure access to evidence-based, gender-sensitive and voluntary drug treatment and harm reduction services tailored to the needs of pregnant women who use drugs and women with children.

Most women in prison are mothers. This reality also extends to women detained for drug offences. In Colombia, over 90 per cent of women incarcerated for a drug offence between 2010 and 2014 were mothers.³⁹ In Cambodia, where most women are in prison for drug offences, children can accompany their mothers in prison until the age of three; in February 2019, Cambodia's prisons hosted 170 mothers with children, and 51 pregnant women.⁴⁰

The automatic consideration of any drug offence as a serious crime that poses a general danger to society means that pregnant women and women with young children charged with a drug offence have been imprisoned regardless of the gravity of their involvement in the offence, and their personal circumstances. For example, in Peru, all people convicted for drug offences – including mothers – are excluded from alternatives to imprisonment.⁴¹ A recent study in Latin America showed that in countries including Peru, Mexico and Ecuador, alternatives to imprisonment like house arrest are only available prior to conviction, but not afterwards.⁴²

09

Address the disproportionate impact of drug laws on foreign national women

- Ensure that foreign national women detained for drug offences have access to alternatives to imprisonment, and to legal counsel, interpretation if needed, and consular assistance.
- Offer foreign national women convicted of drug offences the option to be repatriated to their home country.
- Reform laws that envisage the automatic deportation of foreign nationals that have been convicted for a drug offence, particularly for those with families in the host country.

Globally, many women convicted for drug offences are foreign nationals. In the UK and Portugal, 80 per cent of foreign women in prison had been convicted for a drug offence – twice as much as foreign men.⁴³

Foreign women face a number of specific challenges, including insecure migration status; language barriers; a lack of knowledge or understanding of the laws, criminal justice system and language of the country in which they are being held; limited financial means

to secure legal counsel or post bail; and no stable housing or job, which may disqualify them from alternatives to imprisonment.⁴⁴ Even when they are eligible for bail, foreign nationals are more likely to be detained pre-trial, especially if they come from ethnic or racial minorities.⁴⁵

According to data released in 2019, in Chile, Colombia, and Peru, 73.3, 50.9, and 42.9 per cent (respectively) of foreign women in prison are in pre-trial detention.⁴⁶

When a foreign person is detained, the Vienna Convention on Consular Relations and the UN Bangkok Rules⁴⁷ require local authorities to inform the consular services of the relevant home country, so that they can provide assistance, legal counsel and interpretation. However, such assistance is often not provided in time.⁴⁸ Without quality legal counsel it is unlikely that women who have become involved with the illegal drug markets due to human trafficking will be able to prove this circumstance. Support services also need to be tailored to foreign women, to address language barriers, the exclusion from many job-training and rehabilitation programmes within prisons, and lack of family visits.

Foreign women should have the same access to community alternatives and should be supported where it is difficult for them to meet the criteria, for example where they do not have a residence.

Other conditions can be imposed, such as surrendering identity documents, reporting to police or probation or supervision in the community.

The Bangkok Rules provide that repatriation should be voluntary and should only take place once the person deprived of liberty is given clear and full information

about their right to request a transfer to their home country, and its legal consequences.⁴⁹ Deportation is especially disruptive for women who have children, families, and support networks in the host country.

10

Develop gender-responsive training and dialogues on women and drug policies

→ **Provide gender-responsive training for professionals involved in the criminal justice process, such as policy makers, judges, prosecutors, law enforcement officers, defence lawyers and probation officers.**

Gender-sensitive training should promote understanding of women's drug use and drug dependency, the key drivers of women's involvement in drug-related offences, international standards, gender-specific mitigating circumstances, the impact on ethnic minorities and other groups, and approaches to encourage the use of gender-responsive alternatives to imprisonment. Impacted women and civil society organisations should be involved in the development and delivery, and their voices and experiences integrated into decision making.

Increased understanding and dialogue among criminal justice actors on the issue of sentencing and its impact on women arrested for drug offences is vital to improve outcomes for women. For example, Mexican Federal law establishes the *autoría mediate* – the defence of acting through another person – which could be used for those acting as drug couriers.⁵⁰ However, public defenders generally lack expertise and the possibility of relying on this defence is often overlooked.

Legal empowerment and resources should be provided for impacted women so they can know and claim their rights and offer peer support. A woman in Kenya who uses drugs spoke about the beneficial impact of this approach, stating "The harm reduction program in Kenya has expanded from the initial 60 in 2014 to over 7,000 in 2021. Several other partners have come in to support women who use drugs, we have been trained, we have been counselled, and we feel like community leaders. At this point we are able to provide leadership to our peers, something that we could never do without therapy".⁵¹

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