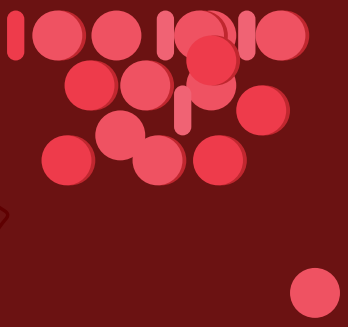
Drug Policy
Advocacy Group
Myanmar

GUIDING DRUG LAW REFORM IN MYANMAR

A LEGAL ANALYSIS OF THE DRAFT BILL AMENDING 1993 NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES LAW



October 2017

About this report

This document was drafted by a group of national and international organisations with in depth knowledge and extensive experience of drug-related issues in Myanmar, and was reviewed by several lawyers and international drug policy experts. It provides a thorough analysis of the draft bill amending Myanmar 1993 Narcotic Drugs and Psychotropic Substances Law, in the light of UN drug control treaties, international human rights norms, and the latest evidence and international best practices.

Acknowledgements

This publication is the result of a collaborative effort by all member organisations of Drug Policy Advocacy Group – Myanmar: HIV / AIDS Alliance, Médecins du Monde (MdM), Myanmar Anti-Narcotics Association (MANA), Myanmar Opium Farmers Forum (MOFF), National Drug Users Network Myanmar (NDNM), Population Services International (PSI), Save the Children and Transnational Institute (TNI).

Special thanks to Tripti Tandon (Lawyers Collective), Gloria Lai (IDPC) and Martin Jelsma (TNI) for their expert guidance, inputs and review of this publication.

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Introduction

A draft bill amending Myanmar 1993 Narcotic Drugs and Psychotropic Substances Law was published in newspapers in March 2017 for public consultation. It was subsequently discussed in the upper house of Parliament (*Amyothar Hluttaw*) on 16 August 2017.

The draft bill introduces important changes to Myanmar drug law. Most significantly, it intends to place public health at the heart of the country's drug control strategy, and lengthy prison penalties for drug use have been eliminated to facilitate access to health services for drug users. This is a positive improvement and must be applauded as a progressive measure. Nevertheless, the draft bill also contains a number of shortfalls that could be addressed with a few basic, although fundamental, adjustments.

This paper thoroughly analyses the draft bill, and looks in detail at its provisions in the light of UN drug control treaties, international human rights norms, and the latest evidence and international best practices. We hope that this document will be a useful tool for members of the Government, Members of the Parliament, and other policy makers who are taking part in the drug law and policy reform processes in Myanmar. In this way we believe it can help further improve the current legislation.

Each section or sub-section of the existing law and related draft bill that requires attention is presented in bold text (provisions from the draft bill are earmarked with a *). Each of these sections or sub-section is then followed by one or more comments that highlight particular aspects that could be improved or better taken into account. Finally, an alternative wording is proposed for each provision analysed, which incorporates the suggested comments.

Because of the topic under discussion, this document is by necessity technical. It contains an extensive number of suggestions, though not all of them have the same strategic importance. To help with this, the **Main recommendations** section proposes a summary of key concerns and recommendations policy makers should focus on as a matter of priority. It also includes a number of references to help with further investigation on the part of those wishing to go deeper into the debate.

Main recommendations

1. During their discussion on 16 August 2017, representatives from the upper house of Parliament (*Amyothar Hluttaw*) approved changes that eliminate prison penalties for drug use, reportedly to facilitate drug users' access to health services. A provision that exempted drug users caught with small amounts of drugs for personal use, which was initially included in the draft bill, was, however, removed after discussions. This unexpected decision is, unfortunately, likely to jeopardise the entire reform, as using drugs necessarily involves possessing them in the first place. Indeed, it directly undermines the draft bill's primary objective, which has been repeatedly asserted as placing the focus on public health rather than criminal justice. By eliminating prison penalties for drug use, policy makers have acknowledged that severe punishment is an obstacle for drug users to access health services. No significant gain can be expected for public health if drug users risk multiple years in jail for possessing small quantities for their own consumption.

   It is critically important that representatives from the lower house of Parliament (*Pyithu Hluttaw*), who will discuss the draft bill in the near future, re-introduce the initial exemption clause, which is crucial for the success of the reform.

2. The current draft bill foresees that drug treatment remains compulsory in principle ("the drug user shall go under treatment..."). Although no prison penalty is foreseen for non-compliance with this requirement, forcing an individual to undertake treatment clearly violates individual fundamental freedoms and contradicts the right to health contained in the Constitution of the World Health Organization (WHO), as well as principles of drug dependence treatment advised by WHO and the UN Office on Drugs and Crime (UNODC).[1] It also disregards scientific evidence and constitutes a waste of public resources, as the majority of drug users are actually not dependent users and therefore need no treatment.[2]

   The law should explicitly specify that treatment – and rehabilitation – should always remain voluntary, as this could easily lead to detention under the guise of treatment. Instead, efforts should focus on making access to voluntary treatment, information, counselling and harm reduction services more easily available to drug users who need them across the country.

3. The draft bill foresees no changes in relation to opium farmers, and continues to prescribe extremely harsh sanctions for people who cultivate illicit plants. This is problematic as it ignores the fact that hundreds of thousands of poor farmers, often living in highly insecure areas, still rely on small-scale poppy cultivation to survive. Even though subsistence farmers are rarely prosecuted, the existence of prison penalties puts them at serious risk of harassment and bribery by the police. Maintaining penalties also results in breaching international human rights (e.g. the right to be free from hunger, the right to live a life in dignity) and constitutes a significant barrier to development.

   Ending prison penalties for small-scale cultivation, in conditions defined by the Government of Myanmar, should be considered, and milder and more proportionate sanctions, such as non-custodial measures or the imposition of fines or warnings as alternatives to incarceration, should be contemplated.

4. Although the draft bill foresees no prison penalties for drug use itself, it proposes no change regarding the prescribed prison penalties for other drug-related offences. Generally speaking, all sanctions prescribed in the law continue to be extremely harsh and grossly disproportionate. This is the case, as mentioned above, for small-scale opium farmers, but also for low-level dealers ('user-dealers') or drug carriers who can be punished with 20 or more years of imprisonment, even though it is well known that they have only a very limited role and responsibility in the drug trade. Proportionate sentences should not only be determined by quantities of drugs possessed or cultivated, but also by other important factors such as the extent of the harm caused by the offence, the role of the offender in the illicit drug market, or the existence of mitigating factors (e.g. first-time offence, absence of alternative livelihood options, sole caregiver to children or other dependents, absence of violence in committing the offence etc.). In addition to this, the use of mandatory minimum sentences (e.g. "from a minimum of 5 years imprisonment…") is an obstacle to proportionate sentencing as it precludes a judge from taking into account all circumstances of the offence. Finally, the death penalty for drug offences is incompatible with both international human rights norms and international drug control treaties.[3]

It is suggested that the law explicitly includes and considers all circumstances of the offence and the offender, thereby establishing culpability and deciding a proportionate sentence. Mandatory minimum sentences and death penalty for drug offences should also be removed.

Detailed analysis of the draft bill proposing amendments to Myanmar 1993 Narcotic Drugs and Psychotropic Substances Law

Chapter I: **Title and definition**

- ***Section 2:*** *"The following expressions contained in this Law shall have the meanings given hereunder:*

  - *Sub-section a): "Narcotic drug means any of the following:*
    - *i) Poppy plant, coca plants, cannabis plant or any kind of plant which the Ministry of Health has, by notification, declared to be a narcotic drug, substances and drugs derived or extracted from any such plant;*
    - *ii) Drugs which the Ministry of Health has, by notification declared to be a narcotic drug, and substances containing any type of such drug;"*

  - *Sub-section b): "Psychotropic substance means drugs which the Ministry of Health has, by notification declared to be a psychotropic substance;*

  - *Sub-section c)*: "Production means production of narcotic drugs and psychotropic substances and includes processing, preparation and manufacturing of a mixture of the substances produced with chemical or any other type of substance."*

Comments:

- For reasons of simplification and consistency, sub-section a) defining "narcotic drugs" could be re-phrased in line with sub-section b) defining "psychotropic substances".

- The proposed definition of production in sub-section c), which reads "production means production of...." is tautological. Moreover, "production" should be more clearly distinguished from cultivation. It is suggested to re-phrase sub-section c) as a definition of "manufacture".

- "Harm reduction" is a concept referred to in several of the proposed amendments. However, the term has not been properly defined. It is therefore suggested to include its definition in an additional sub-section to section 2).

- Similarly, it is suggested that a definition of "alternative development" is included.

Proposals:

- ***Align in Section 2 the definitions of Narcotic Drugs and Psychotropic Substances, by re-phrasing sub-section a):*** "Narcotic drug means drugs that the Ministry of Health has, by notification, declared to be a narcotic drug."

- ***Include an alternative wording for Section 2, sub-section c):*** "Manufacture means any process by which a narcotic drug or psychotropic substance is refined, processed or transformed, and includes preparation of a mixture of any narcotic drug or psychotropic substance with chemicals or with any other type of substance."

- ***Add Section 2, sub-section i):*** "Harm reduction refers to evidence-based policies, programmes and practices that aim primarily to reduce and minimise the adverse health, social and economic consequences of drug use. Harm reduction services can include, but are not limited to, drop-in centres for drug users, needle and syringe exchange programmes, opioid substitution therapy, overdose management interventions and peer education."

- ***Add Section 2, sub-section j):*** "Alternative development refers to a process to prevent and reduce reliance for subsistence livelihoods on the illicit cultivation of plants containing narcotic drugs through specifically designed sustainable rural development measures."

Chapter II: **Aims of the law**

Section 3: "The aims of this Law are as follows:"

- ***Sub-section a): "To prevent the danger of narcotic drugs and psychotropic substances, which can cause degeneration of mankind, as a national responsibility;"***

Comment:

The first paragraph of Section 3 remains unchanged and continues to set the tone and the spirit of the law. With this in mind, the use of the clause "which can cause the degeneration of mankind" is a gross overstatement that has more to do with ideology than scientific evidence. It is undisputable that psychoactive drugs can cause important harms to both individuals and the society at large. However, this is precisely the reference to considerably exaggerated dangers, and the use of excessive language, that has, for decades, justified the imposition of highly repressive measures that are totally disproportionate to the harms actually caused by drugs. A more neutral reference to "the harms caused by drug use", would allow for more rational and balanced measures based on public health.

Proposal:

- ***Include an alternative wording for Section 3, sub-section a):*** "To prevent and reduce the harms of narcotic drugs and psychotropic substances, as a national responsibility;"

Section 3

- ***Sub-section c): "To carry out more effectively measures for imparting knowledge and education on the danger of narcotic drugs and psychotropic substances and for medical treatment and rehabilitation of drug users;"***

Comment:

This sub-section could be revised to better incorporate measures for the treatment of drug users.

Proposal:

- ***Include an alternative wording for Section 3, sub-section c):*** "To provide measures for education, treatment, management, care, support and harm reduction for drug users;"

Section 3

- ***Sub-section d): "To impose more effective penalties on offenders in respect of offences relating to narcotic drugs and psychotropic substances;"***

Comment:

This sub-section refers to *more effective* penalties but fails to incorporate *proportionate sentencing*, which has been accepted by the international community in the Outcome Document of the 2016 United Nations General Assembly Special Session on the World Drug Problem (UNGASS), April 2016 [Para 4, sub-paragraphs (j, k, l)]. The proportionality of sentences notably involves that those are not determined only on the basis of quantities of drugs possessed or cultivated, but also in light of other important factors such as the extent of the harm caused by the offence, the role of the offender in the illicit drug market, or the existence of mitigating factors (e.g. first-time offence, absence of alternative livelihood options, sole caregiver to children or other dependents, absence of violence in committing the offence etc.).

Proposal:

- ***Include an alternative wording for Section 3, sub-section d):*** "To impose more proportionate and effective penalties in respect of offences relating to narcotic drugs and psychotropic substances, taking into account all circumstances that relate to the offence and the offender, such as aggravating and mitigating factors, and alternatives to incarceration;"

Section 3

- ***Sub-section e)*: "To cooperate with the United Nation's member States, international and regional organisations in respect of the prevention of the use, trade, transport or manufacturing of narcotic drugs and psychotropic substances by laying down the local framework in accord with Narcotic Drugs Control Conventions."***

Comment:

The proposed amended section only refers to "in accord with Narcotic Drugs Control Conventions". However, the 2016 UNGASS outcome document (as well as other General Assembly resolutions) emphasised the need that all drug control efforts must also be implemented "in full conformity" with international human rights law. It states clearly that the three UN drug control conventions "and other relevant international instruments" together constitute the cornerstone of the international drug control system.

Proposal:

Include an alternative wording for Section 3, sub-section e): "To cooperate with the United Nation's Member States, international and regional organisations in respect of the prevention of the use, trade, transport or manufacturing of narcotic drugs and psychotropic substances by laying down the local framework in accord with the international drug control conventions and in full conformity with international human rights law."

Section 3

Sub-section f)*: "To encourage the prevention from the harm of narcotic drugs by using the current national and international cooperation mechanisms;"

Comment:

An explicit reference to the World Health Organization, UNAIDS, UN Development Programme, UN Office on Drugs and Crime, International Narcotics Control Board and other UN specialised Agencies in this sub-section may be useful.

Proposal:

Include an alternative wording for Section 3, sub-section f): "To prevent and reduce the harms of narcotic drugs and psychotropic substances by using current national and international mechanisms including recommendations by the World Health Organization UNAIDS, UN Development Programme, UN Office on Drugs and Crime, International Narcotics Control Board and other specialised United Nations agencies;"

Section 3

Sub-section g)*: ***"Solving narcotic drug-related socio-economic problems resulting from the illicit opium poppy cultivation, manufacturing or trading by planting crops substitution programmes, developing narcotic drug control policies, implementing sustainable development plans / programmes, and setting short and long-term goals."***

Comments:

The introduction of an explicit reference, into this new sub-section, to "solving narcotic drug-related socio-economic problems" in opium growing areas and to "implementing sustainable development plans / programmes" is a very positive step. The wording and the concepts used, however, are confusing. The proposed paragraph indeed refers to socio-economic problems resulting from illicit opium poppy cultivation, but one of the key lessons learned from alternative development / sustainable development strategies is that illicit crop cultivation is often not the *cause* but rather the *result* of pre-existing socio-economic problems.

This sub-section also introduces a reference to "crops substitution programmes" as one of the main tools that can help solve socio-economic problems in poppy growing areas. However, such programmes are known, at least as stand-alone interventions, to be largely ineffective in addressing those problems, as they fail to take into account other important root causes of illicit crops cultivation, such as conflict, access to land, lack of infrastructure, access to essential services and markets etc.

Proposal:

Include an alternative wording for Section 3, sub-section g): "Addressing socio-economic problems and other root causes of cultivation of plants used for the illicit manufacturing or trading of narcotic drugs by developing evidence-based drug-control policies, implementing sustainable development programmes, and setting short and long-term goals."

Chapter III: **Formation of the Central Committee and the functions and duties of the Central Committee**

Section 6: ***"The functions and duties of the Central Body are as follows:"***

Sub-section e)*: ***"Develop programmes relating to the provision of treatment to drug users, dissemination of knowledge, and provision of harm reduction services to reduce the harms related to narcotic drug use;"***

Comment:

The explicit reference to "the provision of harm reduction services to reduce the harms related to narcotic drug use" among the functions and duties of the Central Committee is a very positive and useful inclusion, as there was previously no reference to harm reduction in the law. The word "narcotic" could be deleted, as harm reduction also refers to reducing the harms caused by psychotropic substances.

Proposal:

Include an alternative wording for Section 6, sub-section e): "Develop programmes relating to the provision of treatment to drug users, dissemination of knowledge, and provision of harm reduction services to reduce the harms related to drug use;"

Section 6

Sub-section p)*: ***"Extraditing a criminal offender either wanted by Myanmar or other Country in accord with Extradition Law for transporting or distributing narcotic drugs and psychotropic substances;"***

Comments:

If extradition for the most serious drug offences can be an important tool for States to combat large-scale international drug trafficking, additional details on the scale of offences that could lead to extradition would be useful, as well as an exclusion clause for extradition to countries that enforce the death penalty for drug-related offences, or where there is a risk of torture, inhumane treatment or lack of due process.

Extradition could, for instance, be foreseen for offences prescribed under sections 19 to 21 of the most serious nature.

Proposal:

- ***Include an alternative wording for Section 6, sub-section p):*** *"*Extraditing a criminal offender, either wanted by Myanmar or any other Country, in accord with Extradition Law, for the most serious offences prescribed under the sections 19 to 21 of this Law, except if the Law of the country of extradition foresees the death penalty for the concerned offence(s) or when there is a risk of torture, inhumane treatment or lack of due process;"

Chapter IV: **Formation of Working Committees, Sectors and Regional Committees**

- ***Section 7):*** ***"The Central Committee shall form the following Working Committees and Sectors and shall determine the functions and duties thereof respectively:"***
  - ***Sub-section c):*** ***"Body for Substitute Crops Cultivation;"***
  - ***Sub-section d):*** ***"Body for Livestock Breeding;"***
  - ***Sub-section k):*** ***"Other Working Bodies as may be required;"***

Comments:

- It is suggested sub-sections c) "Body for substitute crops cultivation" and d) "Body for livestock breeding" be deleted, as the draft bill proposed a new sub-section b) "Alternative Development implementation and management body" that is already inclusive of those two sectors.
- The draft bill suggests deleting Section 7, sub-section k): "Other Working Bodies as may be required". Having an open-ended category such as in sub-section k) is useful as it provides flexibility and allows the Central Committee to set up a working body to deal with an emerging area or issue, which is not expressly provided for in the law. Therefore, it is suggested that sub-section k) of section 7 be retained.
- It is further suggested that a sub-section l) be added to Section 7, to read "Body for harm reduction services".

Proposals:

- ***Delete Section 7, sub-section c):*** "Body for substitute crops cultivation."
- ***Delete Section 7, sub-section d):*** " Body for livestock breeding."
- ***Retain Section 7, sub-section k): "***Other Working Bodies as may be required."
- ***Add Section 7, sub-section l): "***Body for harm reduction services."

Chapter V: **Providing medical treatment and rehabilitation to drug users**

Section 9

- ***Sub-section a)*: "The drug user shall go under treatment at the Department or medical facilities approved by the Ministry of Health and Sports for this purpose."***

Comment:

The compulsory registration of drug users, and subsequent prison penalties previously foreseen under section 15 for those who failed to register (three to five years), were repealed in the new version of the Law. This is a major improvement, as long-term prison sentences for using drugs and failing to register were highly disproportionate sanctions. This new sub-section a), however, maintains in principle an obligation for all drug users to undertake medical treatment ("the drug user shall go under treatment…"). Although no prison penalty is now foreseen for non-compliance with this requirement, forcing an individual to undertake treatment, especially in a closed setting that involves detention, clearly violates individual fundamental freedoms and contradicts the right to health contained in the Constitution of the World Health Organization (WHO), as well as principles of drug dependence treatment advised by the WHO and UNODC.[4] It also disregards scientific evidence and constitutes a waste of public resources, as the majority of drug users are not dependent users and therefore need no treatment.[5] Establishing compulsory treatment measures can easily lead to the use of forced treatment in residential stay, which amounts to detention. In fact, several South-East Asian countries, such as Vietnam, Thailand, Cambodia, Malaysia and Lao People's Democratic Republic have for many years used treatment centres to detain drug users under the guise of treatment.[6] Those centres have very high relapse rates (in Vietnam, for example, from 80 to 97%),[7] and 12 UN agencies called in 2012 to close all

compulsory detention centres on the grounds that they violate human rights and threaten detainees' health.[8] The Government of Myanmar should therefore not repeat the mistakes of other countries in the region, and rather than making treatment compulsory in principle, it should instead focus on making access to *voluntary* treatment, information, counselling and harm reduction services *more easily available* to drug users who need them.

Proposal:

- ***Include an alternative wording for Section 9, sub-section a):*** "A drug user may voluntarily undergo drug treatment, counselling or harm reduction services at the Department or medical facilities approved by the Ministry of Health and Sports for this purpose, or at other facilities providing specialised health and harm reduction services for drug users operated by organisations with a valid Memorandum of Understanding (MoU) with the Ministry of Health and Sports."

Section 9

- ***Sub-section d)*: "A member of the police force may send a person who is suspected to use narcotic drugs to any health facilities of the Ministry of Health and Sports or to the nearest medical facilities approved by the Government in order to perform preliminary medical investigation or treatment."***

Comments:

- This sub-section entrusts the police (law enforcement) with tasks they are not trained or qualified to perform, such as assessing whether a person is a drug user or not. In addition, the wording "person who is suspected of using narcotic drugs" is excessively broad, resulting in police officers being given wide and unguided powers under the following sub-section e).
- The use of the term "send a person" is also problematic, as it can be interpreted restrictively and can result in the arrest and the use of coercion by the police.
- Finally this sub-section foresees that people suspected of using narcotic drugs can be sent only to "health facilities of the Ministry of Health and Sports or to the nearest medical facilities approved by the Government", which in most areas are simply not available. Providing for an additional option to refer users to "heath facilities that offer harm reduction services for drug users" would be a useful inclusion, as such services are much more widely available in areas with a high prevalence of drug use and are better adapted than treatment for the great majority of drug users.

Proposal:

- ***Include an alternative wording for Section 9, sub-section d):*** "A member of the police force may refer a person who is found using drugs to the nearest health facilities operated or approved by the Ministry of Health and Sports that offer drug treatment and / or other specialised health and harm reduction services for drug users operated by organisations with a valid Memorandum of Understanding (MoU) with the Ministry of Health and Sports."

Section 9

- ***Sub-section e)*:*** ***"The respective police officer can screen any person that fails to follow sub-section d) and apply to the relevant Court to pass an order that enables such person to enter into a bound."***

Comments:

- The proposed sub-section once more entrusts police officers with medical tasks they are not qualified or trained to perform ("screen a person"). In addition, it is vague and confusing, and it is unclear what "fails to follow sub-section (d)" actually means.

- This paragraph also confirms that under the amended Law, drug treatment is mandatory in nature and can be imposed by a Court to potentially any drug user. As previously mentioned, forced treatment violates the right to health and disregards the fact that most users are not dependent and therefore do not need treatment.

Proposal:

- ***Delete Section 9, sub-section e):*** "The respective police officer can screen any person that fails to follow sub-section d) and apply to the relevant Court to pass an order that enables such person to enter into a bound."

Section 9

- ***Sub-section f)*:*** ***"The Court may pass an order that enables such person to enter into a bond according to the stipulations of medical investigations or treatment."***

Comment:

The only circumstance under which a Court may order a drug user to undergo treatment should be limited to the specific case of a user who committed a criminal offence as a result of drug dependence (e.g. a theft committed to buy drugs), as established through an evidence-based assessment of drug dependence performed by a medical professional. Even in such a case, drug treatment should not involve any forced detention.

Proposal:

- ***Include an alternative wording for Section 9, sub-section f):*** "The Court may pass an order that legally binds a drug user to undertake drug treatment, in cases where the latter has committed a criminal offence as a result of drug dependence, as established through an evidence-based assessment of drug dependence performed by a medical professional."

Section 9

- ***Sub-section g)*:*** ***"If a drug user fails to enter into a bond according to the order of the Court subject to sub-section f) or violates any terms and conditions of a bond, he / she can be sent to the relevant rehabilitation centre established for the purpose of this Law for a minimum of 3 to a maximum of 5 months to receive medical treatment and rehabilitation."***

Comment:

This additional sub-section establishes that a three to five-month rehabilitation period, presumably in a closed setting, can be imposed on drug users who fail to undertake treatment following a Court's decision. Just as with forced treatment, forced rehabilitation violates individual fundamental rights, including the right to health, and is contrary to the very notion of rehabilitation, which is beneficial in nature, not punitive. Rehabilitation services should no doubt be more widely available and systematically proposed to marginalised drug users with a drug dependence problem. However these should remain voluntary at all times and allow patients to discontinue the programme if they wish. Any compulsory rehabilitation should be ordered by a Court and be limited to cases where a drug user has repeatedly committed criminal offences as a result of drug dependence. Additionally, it should never involve detention.

Proposal:

- ***Include an alternative wording for Section 9, sub-section g):*** "A drug user may voluntarily undergo rehabilitation services at the relevant rehabilitation centre foreseen by this Law."

Section 9

- ***Sub-section h)*: "The Ministry of Health and Sports shall be responsible for providing medical treatment to the drug user who has been sent to the relevant rehabilitation centre pursuant to sub-section g); and"***

- ***Sub-section i)*: "After the drug user has been provided with medical treatment pursuant to sub-section h), he/she shall be sent to the Social Welfare Department to join physical and mental rehabilitation courses."***

Comment:

- Those 2 sub-sections are no longer relevant if rehabilitation remains a service that is voluntary in nature.

Proposals:

- ***Delete Section 9), sub-sections h):*** "The Ministry of Health and Sports shall be responsible for providing medical treatment to the drug user who has been sent to the relevant rehabilitation centre pursuant to sub-section g); and"

- ***Delete Section 9), sub-section i):*** "After the drug user has been provided with medical treatment pursuant to sub-section h), he/she shall be sent to the Social Welfare Department to join physical and mental rehabilitation courses."

Chapter VI: **Rehabilitation**

Proposal

For chapter heading: in light of the proposed renaming of Chapter V as, "Providing Medical Treatment and Rehabilitation to drug users", the heading of existing chapter VI, which reads: "Rehabilitation", needs to be deleted and section 11 integrated under Chapter V.

Chapter VIII: **Offences and penalties**

Section 15: ***"A drug user who has been convicted of having violated the disciplines of the relevant rehabilitation centre during the period of time he / she is being placed in such rehabilitation centre for the purposes under section 9, g):***

Sub-section a)*: "Shall perform community services for a minimum of 180 hours to a maximum of 240 hours if the drug user has reached 16 of age;"

Comments:

Community service described in this section is a *sanction* that is compulsory in nature. Two observations can be made in relation to this:

- The "violation of the disciplines of a rehabilitation centre" can hardly qualify as an *offence* under criminal Law, which would be punishable by such a legal sanction;
- Any sanction that is compulsory in nature shall be ordered by a decision of Justice issued by a Court, after due fair trial.

Community service should not be considered as an "acceptable" sanction for drug users who would not be able to cease using illicit drugs. Instead, the use of community service should be reserved for cases where it can have an educational value, for instance for users who have committed minor criminal offences (e.g. thefts, deterioration of properties etc.).

Proposals:

- ***Include an alternative wording for Section 15:*** "A Court may issue an order, where it is believed it can have an educational value, for minor criminal offences, such as thefts, that are committed as a result of drug dependence:

- ***Include an alternative wording for Section 15, sub-section a):*** **"**To perform community services for a minimum of 180 hours to a maximum of 240 hours if the drug user has reached 16 of age;"

Section 16: ***"Whoever is guilty of any of the following acts shall, on conviction, be punished with imprisonment for a term which may extend from a minimum of 5 years to a maximum of 10 years and may also be liable to a fine:"***

- ***Sub-section a):*** ***"Cultivation of poppy plant, coca plant, cannabis plant or any plant which the Ministry of Health has by notification declared to be a narcotic drug;"***

Comments:

- This sub-section remains unchanged and continues to foresee extremely harsh sanctions for people who cultivate illicit plants. It ignores the fact that hundreds of thousands of poor farmers, often living in highly insecure areas, still rely on small-scale poppy cultivation to survive. Even though this provision is rarely enforced, its very existence puts subsistence farmers at serious risk of arrest, harassment, and bribery by the police. While international drug conventions require the cultivation of crops for illicit purposes (excepted for personal use) to be deemed a criminal offence, maintaining disproportionally harsh sanctions on farmers also results in breaching international human rights (e.g. the right to be free from hunger, the right to live a life in dignity) and constitutes a significant barrier to development. If full decriminalisation of small-scale cultivation is not deemed feasible, milder and more proportionate sanctions should be considered as alternatives to incarceration. Those could, for instance, include non-custodial measures or the imposition of fines or warnings. If alternative livelihood options are not available, it is the responsibility of the government to first provide adequate sustainable development assistance before a farmer can be sanctioned for his / her dependence on the illicit drugs economy for basic subsistence.

- The use of mandatory minimum sentences (e.g. "from a minimum of 5 years imprisonment") is generally an obstacle to both proportionate sentencing and the consideration of alternatives to imprisonment, as it does not allow the judge to take into account all circumstances of the offence. It is therefore suggested to remove the mandatory minimum sentence and retain only the maximum sentence (e.g. "up to a maximum of … years").

- As mentioned earlier, the proportionality of sentences requires them to be determined not only on the basis of quantities of drugs cultivated or possessed, but also in light of other important factors such as the extent of the harm caused by the offence, the role of the offender in the illicit drug market, or the existence of mitigating factors (e.g. first-

time offence, absence of alternative livelihood options, sole caregiver to children or other dependents, existence of alternative sources of income in community, absence of violence in committing the offence etc.).

- The use of prison penalties should not apply to small-scale subsistence farming but instead be reserved for penalising large-scale commercial production controlled by criminal organisations.

Proposals:

- ***Include an alternative wording for Section 16:*** "Whoever is guilty of any of the following acts shall, on conviction, be punished by imprisonment for a term which may extend to a maximum of 5 years, or alternatively, in light of the circumstances of the case, and in particular to the existence of mitigating factors, by administrative non-custodial sanctions, such as education, financial and technical support for alternative cultivation, fines or warnings:"

- ***Include an alternative wording for Section 16, sub-section a):*** "Cultivation of poppy plant, coca plant, cannabis plant or any plant which the Ministry of Health and Sports has by notification declared to be a narcotic drug;"

Section 16

- ***Sub-section c)*:*** ***"Exemption: this section shall not apply to any situation in which a drug user holds a certain amount of narcotic drugs or psychotropic substances not exceeding the amount stipulated by the Ministry of Health and Sports for the purpose of using it for himself / herself or as treatment for any patients under the prescriptions."***

Comments:

- This exemption, as spelled out in the above sub-section, was included in the draft bill that was presented to the upper house of Parliament (*Amyothar Hluttaw*) on the 16 August 2017. It was, without a doubt, the main improvement brought to Myanmar 1993 Narcotic Drugs and Psychotropic Substances Law. In fact, the provision proposed to end the criminalisation of drug use and also its natural extension – possession for personal use. In so doing, it laid the foundations of drug control strategies based on public health rather than repression. However, Members of the *Amyothar Hluttaw* decided to retain the exemption only for drug use, and excluded the possession of small amounts of drugs for personal use as laid out in the concerned provision. This unfortunate decision is likely to jeopardise the entire reform. Indeed, it directly undermines the bill's primary objective of placing the focus on public health rather than criminal justice. By eliminating prison penalties for drug use, policy makers have acknowledged that severe punishment is an important obstacle for drug users to access health services. In light of this, the exemption should also apply to the possession of small amounts of drugs for personal use (it is common sense that using drugs will mean possessing them in the first place). No significant gain can be expected on the public health

front if drug users still risk imprisonment for multiple years for possessing small quantities of drugs for their own consumption. In addition, prison overcrowding will continue to be a serious issue, as it can be expected that thousands of people will still be incarcerated every year for minor drug offences. It is therefore critically important that representatives from the lower house of Parliament (*Pyithu Hluttaw*), who will soon discuss the bill, re-introduce the initial exemption clause, which was crucial for the success of the reform.

- It is noteworthy that possession for personal use shall also include the notion of cultivation for personal use. Indeed, the international conventions make no distinction between possession and cultivation for personal use, but only between the purpose of personal use or the intention of supply (for possession as well as cultivation).

- This sub-section refers to the definition of threshold quantities by the Ministry of Health and Sports to differentiate possession of drugs for personal use from possession for trafficking or supply. It is important that such thresholds are not set at unrealistically low levels, to prevent confusion between trafficking and possession for personal use. In addition, the quantity of drugs possessed should not be the *only* deciding factor in determining possession for supply. It is therefore recommended that thresholds remain *indicative* and that other factors relating to the circumstances of the individual and the offence be considered. Those could include a history of drug dependence and patterns of drug use of the offender, or conversely the possession of several mobile phones and large amounts of money, the presence of drugs divided into different packets, or firearms etc.

- Although non-retroactivity is a general principle of International Law, there can be exceptions when changes of a given criminal law can result in more favourable sentences or benefit the accused or those convicted. If this exception is adopted (decriminalisation of drug use and possession or cultivation for personal use), the Government may successively consider issuing a series of amnesty laws to release people currently imprisoned for drug use or possession for personal use, in virtue of justice and equality of all citizens in front of Law.

- Finally, the addition of a second exemption related to the illicit cultivation for subsistence purposes, within limits and circumstances defined by the Government of Myanmar, would prove very useful. This exemption should include for the cultivation of certain plants for traditional medicinal, ceremonial or cultural practices.[9]

Proposals:

- ***Include an alternative wording for Section 16, sub-section c):*** "Exemption: this section shall not apply to any situation in which a person cultivates plants or is in possession of narcotic drugs or psychotropic substances for his / her personal use or as part of a treatment under a medical prescription, as established in light of threshold quantities stipulated by the Ministry of Health and Sports as well as other circumstances related to the offence or the individual."

- ***Include an additional exemption as Section 16, sub-section d): "***Exemption: this section shall not apply to the small-scale illicit cultivation for subsistence purposes, in absence of sustainable alternative livelihood options, or to the cultivation for traditional medicinal, ceremonial or cultural practices in accordance with applicable indigenous, religious and cultural rights, within limits and conditions defined by the Government of Myanmar."

Section 19: ***"Whoever is guilty of any of the following acts shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 10 years to a maximum of an unlimited period:***

Sub-section a): ***"Possessing, transporting, transmitting, and transferring a narcotic drug or psychotropic substance for the purpose of sale;***

Comments:

- The existing Section 19, sub-section a) allows a person to be sentenced to a minimum of 10 years to a maximum of an unlimited period of imprisonment for possessing, transporting, transmitting and transferring a narcotic drug or a psychotropic substance for the purpose of sale. The quantity limits deemed to be for the purpose of sale are set out in Section 26 of the existing law. Sections 19 and 20, when read with Section 26, result in imposing a minimum sentence of 10 years or 15 years under section 19 and 20 respectively for the possession of fairly small amounts of drugs. It is well known that most people caught with drugs are mere carriers who only have a very limited role and responsibility in the illicit drug market. In light of this, the sentence prescribed in Section 19 and Section 20 is too harsh and disproportionate for the offence. Other important factors such as the extent of the harm caused by the offence, the role of the offender in the illicit drug market, or the existence of mitigating factors (e.g. first-time offence, absence of alternative livelihood options, sole caregiver to children or other dependents, absence of violence in committing the offence etc.) should therefore also be taken into account.

- The use of mandatory minimum sentences (e.g. "from a minimum of 3 years imprisonment") is generally an obstacle to both proportionate sentencing and the consideration of alternatives to imprisonment, as it does not allow the judge to take into account all circumstances of the offence. It is therefore suggested that the mandatory minimum sentence is removed, and that only the maximum sentence (e.g. "up to a maximum of … years") is retained.

- As highlighted in previous comments, it is important that threshold quantities are not set at unrealistically low levels, to prevent confusion between trafficking and possession for personal use. In addition, the quantity of drugs possessed should not be the *only* determining factor in distinguishing between possession for personal use and possession for supply. It is therefore recommended that thresholds remain *indicative*, and that other factors relating to the circumstances of the arrest and the individual be considered. Those can include a history of drug dependence and patterns of drug use of the offender, possession of various mobile phones and large amounts of money, presence of drugs divided into different packets, presence of firearms, impact of the imprisonment on family or dependents, etc.

- The specific case of "user–dealers" should also be considered, and diversion measures towards drug treatment contemplated, as an alternative to imprisonment. In fact, some users may be selling drugs not as a commercial activity but to be able to sustain their own drug dependence. In such a case, referral to drug dependence treatment, intended as voluntary and not involving any detention, may be more effective than imprisonment.

- Finally, the expression "imprisonment for a maximum of an unlimited period" used in Section 19 and Section 20 is vague and arbitrary. It may be replaced by a definite period, such as a term of 'X' years or life, which should always be proportionate to the gravity of the offence.

Proposals:

- ***Include an alternative wording for Section 19:*** "Whoever is guilty of any of the following acts shall, on conviction and taking into account all circumstances of the offence, be punished with imprisonment for a term that may extend to a maximum of 10 years:

- ***Add Section 19, sub-section e):*** "Comment: specific diversion measures towards drug dependence treatment may be considered where it is believed they can be more effective than imprisonment, especially in cases where drug dealing occurred mainly as a way to support the person's own drug dependence.

- ***Section 20:*** ***"Whoever is guilty of any of the following acts shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 15 years to a maximum of unlimited period or with death:***

  - ***Sub-section a):*** ***Production, distribution and sale of a narcotic drug and psychotropic substance;***

  - ***Sub-section b):*** ***Importing and exporting a narcotic drug or psychotropic substance; communicating to effect such import or export."***

Comments:

- This section and sub-sections remain unchanged and continue to foresee the death penalty for certain categories of drug offences. As with Section 19, the quantity limits prescribed in Section 26 are on the low side and capital punishment could be imposed for very small amounts. Besides, the offence of 'communicating' to the effect that an import or export has been made is also punishable with death. This is grossly disproportionate.

- The death penalty for drug offences is incompatible with international human rights norms: Article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) restricts the imposition of the death penalty only to the "most serious crime" – a description that is understood to mean an offence that involves intentional killing or the taking of life. In this regard, drug offences (of any nature or scale) do not constitute the most serious crime under international law. The death penalty for drug-related offences is also inconsistent with the objectives of international drug control treaties.[10] Finally, there is no evidence that the death penalty for drug offences actually has any deterrent effect.[11]

- Generally, to avoid agents with low responsibilities in the drug trade (e.g. couriers) being convicted, with disproportionately harsh sanctions, the most serious sanctions should not be applied on the exclusive basis of quantities of drugs seized, but should take into account other factors such as the role and responsibilities of the accused within the criminal organisation.

- Even though the death penalty for drug-related offences is currently not enforced, Section 20 (read with Section 22, which lays down circumstances under which the maximum penalty shall be imposed for a given offence) may have the effect of making the death penalty mandatory in cases where the said circumstances exist. In view of the above, it is strongly urged that the death penalty be deleted from Section 20 of the existing law.

- As mentioned above, the use of mandatory minimum sentences (e.g. "from a minimum of 10 years imprisonment") is generally an obstacle to both proportionate sentencing and the consideration of alternatives to imprisonment, as it does not allow the judge to take into account all circumstances of the offence. It is therefore suggested to remove the mandatory minimum sentence and retain only the maximum sentence (e.g. "up to a maximum of … years").

Proposal:

- ***Include an alternative wording for Section 20:*** "Whoever is guilty of any of the following acts shall, on conviction and in light of all circumstances of the offence, be punished with imprisonment for a term which may extend to a maximum of 20 years:
  - Key participation, in a decision-making role, in the systematic and organised production, distribution and sale of a narcotic drug and psychotropic substance;
  - Key participation, in a decision-making role, in the systematic and organised import and export of a narcotic drug or psychotropic substance; communicating to effect such import or export."

Chapter IX: **Miscellaneous**

- ***Section 26:*** *"Whoever possesses or transports, transmits or transfers any of the following narcotic drug or psychotropic substance of the weight, volume or quantity or in excess of the weight, volume or quantity shown against each shall be deemed to possess for the purpose of sale and to transport, transmit or transfer for the purpose of sale:*

  - ***Sub-section a):*** *in the case of heroin – three grammes*
  - ***Sub-section b):*** *in the case of morphine – three grammes*
  - ***Sub-section c)*:*** *total of narcotic drugs in sub-sections a) and b) – three grammes*
  - *Sub-section d): in the case of crude opium or processed opium or total of the two – one hundred grammes*
  - ***Sub-section e)*:*** *in the case of cannabis or essence of cannabis or total of the two – one hundred grammes*
  - ***Sub-section f):*** *in the case of coca leaves – one hundred grammes*
  - ***Sub-section g):*** *in the case of cocaine – three grammes*

    g-1 in the case of amphetamine type stimulants – three grammes*

    g-2 in the case of methamphetamine hydrochloride (Ice) – three grammes*

    g-3 in the case of ephedrine or pseudoephedrine – three grammes*

  - ***Sub-section h):*** *the weight, volume or quantity which the Ministry of Health has, by notification from time to time prescribed for any narcotic drug or psychotropic substance.*

Comments:

The quantity of drugs possessed should never be the *only* deciding factor in determining the purpose of sale. While the use of threshold quantities can be a useful tool, they should always remain *indicative*, with other factors relating to the circumstances of the arrest and the individual also being considered. These can, for instance, include an offender's history of drug dependence and patterns of drug use, possession of various mobile phones or large amounts of money, presence of drugs divided into different packets, presence or firearms, eventual role of the accused within the criminal organisation, etc.

In addition, some of the threshold quantities established in this section, which aim to distinguish between possession for personal use or for the purpose of sale, appear to be rather low. Those could be reviewed in light of local and international practices.

Proposal:

Include an alternative wording for Section 26: "Whoever possesses or transports, transmits or transfers any of the following narcotic drug or psychotropic substances shall be, taking into account the weight, volume or quantity or in excess of the weight, volume or quantity shown against each, but also other factors and circumstances, deemed to possess for the purpose of sale and to transport, transmit or transfer for the purpose of sale:"

Section 28: ***"The provisions of this Law shall not apply to the following cases:***

- ***Sub-section a):*** ***production of narcotic drug or psychotropic substance and carrying out works of research thereof, with the consent of the relevant Ministry;"***
- ***Sub-section b):*** ***use, possession, transportation, transmission, transfer, sale, import, export and external dealing in respect of narcotic drug or psychotropic substance in the manner prescribed for the purpose of production, work of research of medical treatment, with the consent of the relevant Ministry;***
- ***Sub-section c):*** ***use, possession, transportation of a narcotic drug or psychotropic substance permitted by the Ministry of Health under the direction of any registered medical practitioner, in accordance with the stipulations."***

Comment:

This Section and its sub-sections remain unchanged. The exemptions foreseen are essential, as they allow a range of actions related to narcotic drugs and psychotropic substances for medical and scientific purposes. International drug control conventions explicitly promote this, because "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes" (preamble of the 1961 Convention – a similar wording exists for psychotropic substances). However, in this Section, the *cultivation* of controlled plants for medical and scientific purposes, in conditions that would be defined by the Government of Myanmar, is currently not included. Adding the word *cultivation* would be consistent with international conventions and legally facilitate experiments or pilot projects of licit cultivation for medical purposes.

Proposals:

- ***Include an alternative wording for Section 28:*** "The provisions of this Law shall not apply to the following cases:

- ***Include an alternative wording for Section 28, sub-section a):*** production and cultivation of narcotic drug or psychotropic substance and carrying out works of research thereof, with the consent of the relevant Ministry***;***

- ***Include an alternative wording for Section 28, sub-section b):*** use, possession, cultivation, transportation, transmission, transfer, sale, import, export and external dealing in respect of narcotic drug or psychotropic substance in the manner prescribed for the purpose of production, work of research of medical treatment, with the consent of the relevant Ministry;

- ***Include an alternative wording for Section 28, sub-section c):*** use, possession, cultivation, transportation of a narcotic drug or psychotropic substance permitted by the Ministry of Health under the direction of any registered medical practitioner, in accordance with the stipulations.

(Endnotes)

1 See: https://www.unodc.org/documents/drug-treatment/UNODC-WHO-Principles-of-Drug-Dependence-Treatment-March08.pdf

2 According to UNODC, only 10 to 15% of drug users in average are considered to have a problematic pattern of drug use or to be dependent.

3 FIDH and World Coalition against the death penalty. *The death penalty for drug crimes in Asia report – 2015*.
https://www.fidh.org/IMG/pdf/asia_death_penalty_drug_crimes_fidh_wcadp_report_oct_2015_pdf.pdf

4 See: Endnote 1

5 see: Endnote 2

6 International Harm Reduction Programme (2011), *Treated with cruelty: abuses in the name of drug rehabilitation* (New York: Open Society Foundations)

7 Human Rights Watch (2001), *The rehab archipelago: Forced labour and other abuses in drug detention centres in Southern Vietnam*

8 For more information see UN joint statement on compulsory drug detention and rehabilitation centers: http://www.unaids.org/sites/default/files/sub_landing/files/JC2310_Joint%20Statement6March12FINAL_en.pdf

9 The UN High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, stated at the 2016 UNGASS that it should "be clearly indicated that indigenous peoples should be allowed to use drugs in their traditional or religious practices where there is historical basis for this".

10 FIDH and World Coalition against the death penalty. *The death penalty for drug crimes in Asia report – 2015*.
https://www.fidh.org/IMG/pdf/asia_death_penalty_drug_crimes_fidh_wcadp_report_oct_2015_pdf.pdf

11 See comparative studies on: http://www.abc.net.au/news/factcheck/2015-02-26/fact-check3a-does-the-death-penalty-deter3f/6116030

Financial contribution

This publication has been made possible with financial support from the Open Society Foundations. The content of this publication is the sole responsibility of DPAG and should in no way be taken to reflect the views of the Open Society Foundations.

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Drug Policy Advocacy Group-Myanmar

Drug Policy Advocacy Group Myanmar

The Drug Policy Advocacy Group is a discussion platform composed of a wide range of stakeholders with an interest in drug-related policies and practices. Members include representatives from the drug users' and opium farmers' communities, civil society organisations, international and national NGO's. The group's main objective is to advocate for the adoption of drugs policies and practices based on public health, human rights and development.

Member organisations include: HIV / AIDS Alliance, Médecins du Monde (MdM), Myanmar Anti-Narcotics Association (MANA), Myanmar Opium Farmers Forum (MOFF), National Drug Users Network Myanmar (NDNM), Population Services International (PSI), Save the Children and Transnational Institute (TNI).