

# Joint Submission to the CESCR Drug Policy Annotated Outline Consultation

## Submitting Organisations

Anti-Death Penalty Asia Network (ADPAN) is a regional network of organisations and individuals committed to working towards abolition of the death penalty in the Asia Pacific. <https://adpan.org/>

Justice for Sisters (JFS) is a human rights group working towards meaningful protection, promotion, and fulfilment of human rights of lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ+), and gender-diverse people in Malaysia. <https://justiceforsisters.wordpress.com/>

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The co-signatories of this submission welcome the opportunity to provide information on the impacts of punitive drug policies on the economic, social, and cultural rights of persons in Malaysia, as well as the general impact of international cooperation in the field of drug policies across Southeast Asia.

## 1.0 General obligations of State parties under the Covenant

The Malaysian Government hasn't fulfilled the right to the highest attainable standard of physical and mental health for PWUDs and those incarcerated for drug offences. PWUDs in Malaysia are subjected to mandatory rehabilitation efforts that are often plagued with issues of alleged torture and corruption. Without widely accessible options of voluntary-based treatment, PWUDs remain hindered from enjoying the highest standard of health. They are also not covered by both public- and private-led health insurances in Malaysia. In cases of death resulting from overdoses, or even a positive test of drugs found in the event of someone's death, could null the life insurance coverage of said person.

The legal benchmark for incarcerating someone for drug offences is low in Malaysia. Two-thirds of the prison population in Malaysia were convicted of nonviolent drug offences, and this has directly contributed to overcrowded prisons in the country. Persons incarcerated for drug offences are therefore deprived of their right to health in an environment of severe sanitation issues and lack of medical care in prisons.

About two-thirds of people on death row in Malaysia are convicted of drug trafficking, and they are usually kept in solitary confinement for 23 hours a day with an hour of 'yard time' per day<sup>1</sup> in disregard of international human rights standards.<sup>2</sup> More recent information obtained from death row prisoners indicate that the conditions of solitary confinement and yard time differs significantly depending on the prison they are incarcerated in, with some describing being able to exercise outdoors and converse with other death row inmates, while others are kept completely segregated from other prisoners during their time on death row. The distinction seems to be attributable to the age and period in which the prison was constructed. Testimony from people on death row in newer prisons revealed that their prison cells are structured in a way where the death row prisoners are able to hear and converse with one another. In contrast, older prisons are often designed with complete isolation through solitary confinement in mind. Many of these prisons were also notoriously used for holding political detainees under the Internal Security Act 1960 or the Emergency Ordinance 1969 prior to their abolition. Currently, some prisons have reallocated cells used for solitary confinement under the Prevention of Crime Act 1959 for the purpose of incarcerating death row inmates, resulting in harsher detention conditions.

Problems affecting the general prison population also affect those on death row, including limitations in amenities such as toothpaste, additional food, and access to phone calls without financial support by family members outside. It should be noted that there have been anecdotal reports from people on death row that some prisons occasionally allow for some personal items to be kept in their cells.

Nonetheless, those on death row are not granted any opportunities for work in prison, denying them all opportunities for side income to supplement their expenses in detention.<sup>3</sup> In addition, they do not have access to any education or rehabilitation programs.<sup>4</sup> This renders them extremely vulnerable if they are released after a successful appeal or a successful clemency application.

Meanwhile, incarcerated women in Malaysia are also deprived of their right to gender-specific healthcare, including but not limited to access to menstrual products and care. For instance, according to testimony of a death row inmate in one prison, every 8 pieces of "thin", 28CM-long wingless pads would cost a prisoner about RM5 (EUR1). For those with little to no access to money (for 4 months consecutively), however, the prison provides them with merely 5 pieces of the same type of sanitary pads, along with a quarter bar of body soap and a quarter bar of detergent soap, every 4 months. Women in this predicament cope by cutting up old shirts or towels into smaller pieces to be used and

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<sup>1</sup> Berrih C. & Ngeow, C. Y. (2020) Isolation and Desolation: Conditions of Detention of People Sentenced to Death

<https://www.ecpm.org/app/uploads/2022/08/OK-mission-enquete-Malaisie-GB-2019-280420-WEB.pdf>

<sup>2</sup> Nelson Mandela Rules, Rule 43.1(a)/(b).

<sup>3</sup> Prisons Regulations 2000, Regulation 181.

<sup>4</sup> Berrih & Ngeow, *supra* note 49, at 78.

reused during menstruation. As a result, ringworm infections are not uncommon among the women.

## 2.0 Drug policy and Rights

There is a lack of ethical care towards persons who have used or are involved in controlled substances in Malaysia. The National Anti-Drug Agency (AADK), along with its partners and other voluntary-based treatment centres, provide rehabilitation to PWUDs. However, there is no systemic monitoring and evaluation of said rehabilitation methods — further harming already-at-risk marginalised communities such as women and LGBTQ+ persons held at treatment and rehabilitation centres throughout the country<sup>5</sup>. This could potentially violate the UNODC-WHO standards of treatment.

Furthermore, Malaysia's Department of Islamic Development (JAKIM) and the Islamic Department of each state have a distinctive role in the treatment and rehabilitation centres — giving out grants (*zakat*) not only for drug use disorders, but for “rehabilitating” LGBTQ+ persons into conceived notions of normalcy. For instance, the Selangor Islamic Council (MAIS) has fund allocations for the purpose of rehabilitation of LGBTQ+ persons away from their non-heteronormative lifestyles<sup>6</sup>.

### 2.1 Arbitrary Raids in relation to Drug Offences and its impact on human rights

In Malaysia, LGBTQ and gender-diverse people are disproportionately vulnerable to arbitrary arrests and raids on the grounds of drug use or possession, owing to the criminalization and demonization based on sexual orientation, gender identity, and gender expression (SOGIE). Many LGBTQ people use substances to cope with the increasing minority stress that they face due to institutional and societal discrimination, while also using substances for social and other reasons.

Drug laws in Malaysia are commonly used as grounds for raids of LGBTQ events<sup>7</sup> and establishments<sup>8</sup>, often resulting in violent, humiliating, and degrading treatment of

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<sup>5</sup> Here are the (scientific) problems with saying LGBTs in Malaysia have mental health issues  
<https://www.malaymail.com/news/what-you-think/2023/05/27/here-are-the-scientific-problems-with-saying-lgbts-in-malaysia-have-mental-health-issues-tham-jia-vern/71149>

<sup>6</sup> Fatwa Jenis Penerima Asnaf al-Riqab Negeri Selangor Dan Apa-Apa Yang Berkaitan Dengannya  
<https://mais.gov.my/al-riqab/>

<sup>7</sup> Jawi has detained 20 men for dressing in drag, say KL cops  
<https://www.thestar.com.my/news/nation/2022/10/30/jawi-has-detained-20-men-for-dressing-in-drag-say-kl-cop>

<sup>8</sup> After Blue Boy, FT Ministry says public complaints welcome for more gay club raids  
<https://www.malaymail.com/news/malaysia/2018/09/06/after-blue-boy-ft-ministry-says-public-complaints-welcome-for-more-gay-club/1670012>

detainees<sup>9</sup>, loss of livelihood opportunities for event organisers, forced migration,<sup>10</sup> fear of loss of employment due to detention, and even termination of employment.<sup>11</sup> These raids further shrink spaces and isolate LGBT people from safe social and communal spaces.

The combination of criminalization of LGBT people and substances as well as regulation of clubs and other similar businesses, increases risks to venues and businesses to host LGBT events. Justice for Sisters has documented the disruption of at least four LGBT-inclusive events in 2022 and 2023, where the police warned the venue of prospective raids should they continue to hold the events, although no legitimate grounds for raids are provided. Consequently, venues and businesses stop hosting LGBT events due to fear of being subjected to investigation or raids under various grounds, including substance use.

Establishments, such as saunas, frequented by gay, bisexual, and queer men as well as other men who have sex with men are subjected to periodic raids. These raids are often sensationalised in the media, causing further harm in online spaces.<sup>12</sup> This deters establishments from providing safer sex information and kits so that they are not identified as gay venues.

## 2.2 International cooperation and assistance in countries with punitive drug policies, including the death penalty

In a region robust with international cooperation against transnational organised crime and illicit trafficking<sup>13</sup>, current realities, to varying extents, violate the UN safeguards guaranteeing protection of the rights of those facing the death penalty<sup>14</sup>. The moratorium on capital punishment, which is supported by 125 countries in 2022<sup>15</sup>, has also yet to be applied uniformly across the region. Most visibly, the death penalty for drug offences glaringly violates the 1961 UN Single Convention on Narcotic Drugs, which made clear that

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<sup>9</sup> <https://arrow.org.my/wp-content/uploads/2021/01/LGBTIQ-Rights-in-Malaysia-.pdf>

<sup>10</sup> LGBTQ community voices concern over 'discrimination, threats'

<https://www.nst.com.my/news/nation/2023/08/945456/lgbtq-community-voices-concern-over-discrimination-threats>

<sup>11</sup> <https://www.queerlapis.com/11-men-case-intro/>

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<https://hivlawcommission.org/wp-content/uploads/2017/06/rbap-hhd-2014-policy-and-legal-envt-related-to-hiv-services-in-malaysia-1.pdf>

<sup>13</sup> UNODC (2022). A new Regional Programme for Southeast Asia and the Pacific takes form for 2022–2026. Retrieved June 19, 2023, from

<https://www.unodc.org/unodc/frontpage/2022/March/a-new-regional-programme-for-southeast-asia-and-the-pacific-takes-form-for-20222026.html>

<sup>14</sup> Economic and Social Council, 'Safeguards guaranteeing protection of the rights of those facing the death penalty. Resolution adopted by the Economic and Social Council on 25 May 1984', Retrieved June 22, 2023, from

[https://www.unodc.org/pdf/criminal\\_justice/Safeguards\\_Guaranteeing\\_Protection\\_of\\_the\\_Rights\\_of\\_those\\_Facing\\_the\\_Death\\_Penalty.pdf](https://www.unodc.org/pdf/criminal_justice/Safeguards_Guaranteeing_Protection_of_the_Rights_of_those_Facing_the_Death_Penalty.pdf)

<sup>15</sup> UN General Assembly, 'Moratorium on the use of the death penalty. Resolution adopted by the General Assembly on 15 December 2022', UN Doc. A/RES/77/222 (6 January 2023). December 2022, <https://undocs.org/A/RES/77/222>

the ultimate objective of the drug control system was the improvement of the “health and welfare of [hu]mankind”<sup>16</sup>.

The UNODC has a history of acknowledging this problem in its strategies. In a 2012 position paper, the agency stated that if a government continues to execute individuals convicted of drug-related offences, it “may have no choice but to employ a temporary freeze or withdrawal of support” as it may be construed as “legitimising government actions”<sup>17</sup>. It has stated its opposition to the death penalty for drug offences as the punishment “for those convicted solely of drug-related or economic offences raises grave human rights concerns”<sup>18</sup>. Furthermore, the plight of trafficking victims, particularly drug mules duped into carrying drugs, are re-victimized with their criminalization — which may run afoul of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.

Executions in Singapore made up about 4% of the world’s executions on drug-related crimes in 2022, all for those convicted with the mandatory death penalty for drug-related crimes. This included the execution of a Malaysian person with an intellectual disability convicted of trafficking 43g of heroin<sup>19</sup>. At least two executions have taken place so far in 2023, both cannabis-related, including one in April this year for merely conspiring to traffic in cannabis alongside fair trial concerns.<sup>20</sup> The overwhelming majority of prisoners facing death row in Singapore are from ethnic minorities, highlighting the racially disparate impact of the criminal justice system and issues of structural discrimination.<sup>21</sup> Despite these instances, the UNODC has developed and piloted regional training initiatives in drug control in collaboration with the Singapore Government, involving local law enforcement. These initiatives are concerning in that it legitimises Singapore’s stance on the death penalty.<sup>22</sup>

Although Indonesia has not carried out executions since 2016, they have continued to sentence people to death for drug offences at a significant rate. In 2022, there were at least 123 new charges and death sentences related to drug offences<sup>23</sup>, and at least a total of 428

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<sup>16</sup> Global Commission on Drug Policy, *War on Drugs: Report of the Global Commission on Drug Policy* (2011) 5.

<sup>17</sup> UNODC, *UNODC and the Promotion and Protection of Human Rights: Position Paper* (2012) 10.

<sup>18</sup> UNODC, *Drug control, crime prevention and criminal justice: A human rights perspective*. Note by the Executive Director, UN Doc E/CN.7/2010/CRP.6–E/CN.15/2010/CRP.1 (3 March 2010) para 25; UNODC, *The death penalty and organized crime* (Web Page, 2018).

<sup>19</sup> BBC News, *Singapore executes man on drugs charge, rejecting mental disability plea*, 27 April 2022, Available at <https://www.bbc.com/news/world-asia-61239221>

<sup>20</sup> Anti Death-Penalty Asia Network, “Plea to Singapore: Stop the execution of Tangaraju”, 21 April 2023. Available at <https://www.malaysiakini.com/letters/662908>

<sup>21</sup> ICERD Committee on the Elimination of Racial Discrimination, “Concluding Observations on the Initial Report of Singapore”, Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/241/44/PDF/G2224144.pdf?OpenElement>

<sup>22</sup> UNODC, “Singapore and UNODC conduct pilot regional training programme to strengthen control of new psychoactive substances”, Available at <https://www.unodc.org/unodc/en/frontpage/2017/October/singapore-and-unodc-conduct-pilot-regional-training-programme-to-strengthen-control-of-new-psychoactive-substances.html>

<sup>23</sup> Institute for Criminal Justice Reform (2023). ‘Death Penalty Policy Situation Report in Indonesia 2022: Nobody is Protected’. Available at <https://icjr.or.id/wp-content/uploads/2023/04/Laporan-Hukuman-Mati-Tak-Ada-yang-Terlindungi.pdf>

people on death row as of August 2022. The ability for law enforcement agencies to secure drug-related convictions is aided by special investigative techniques such as undercover buying and controlled delivery — techniques which Indonesian law enforcement officials are equipped with due to UNODC-led training programmes<sup>24,25</sup>. It is notable that these techniques are not applicable to other offences, and there is no public information available of how these techniques are carried out during investigations — making them susceptible to arbitrary use. Moreover, the country's new Criminal Code (to be entered into force in 2026), while providing for commutation to death sentences in certain circumstances, is plagued with unclear technical regulations and remains determined by a presidential decree — an act closely related to the political will of the state. In spite of these instances, UNODC's regional programmes remain operational in the country.

Meanwhile in Malaysia, despite progress in abolition<sup>26</sup> (albeit for mandatory death penalty), Malaysia sentenced 79 individuals to death over drug-related offences in 2022<sup>27</sup>. Stigma against drug offenders also persists<sup>28</sup> — as inflammatory rhetoric has historically been employed to justify harsh penalties as drug prevention measures<sup>29</sup> in the country. However, the UNODC, amidst its current regional programme, has unfortunately been found in support of government activities related to drug control<sup>30</sup>.

In the Philippines — while without the death penalty — 69% of the Persons Deprived of Liberty (PDL) population in the Bureau of Jail Management and Penology (BJMP) are in detention for drug cases as of 30 September 2022, and 90% of them have pending court cases. Over-congestion of jails is also prominent; a report by the Commission on Audit showed that as of Dec. 31, 2022, 67% of BJMP's facilities are “heavily congested,” with congestion rates ranging from 101% to 2739%. A 2017 national audit of jails attributed this situation to the campaign against illegal drugs, coupled with slow action in courts. Nonetheless, despite the ongoing UN Joint Program on Human Rights (UNJPH) — of which the UNODC is a part of — the dire situation in jails continues to persist in the country.

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<sup>24</sup> Institute for Criminal Justice Reform (2019). 'Menyelidik Keadilan yang Rentan: Hukuman Mati dan Penerapan Fair Trial di Indonesia'. Available at

<https://icjr.or.id/wp-content/uploads/2019/01/Menyelik-Keadilan-Yang-Rentan.pdf>

<sup>25</sup> UNODC (2006). 'Criminal justice assessment toolkit'. Available at

[https://www.unodc.org/lpomex/uploads/documents/Publicaciones/Prevencion-del-delito-y-justicia-penal/Criminal\\_justice\\_assessment.pdf](https://www.unodc.org/lpomex/uploads/documents/Publicaciones/Prevencion-del-delito-y-justicia-penal/Criminal_justice_assessment.pdf)

<sup>26</sup> Human Rights Watch, Malaysia repeals mandatory death penalty, April 11 2023, Available at

<https://www.hrw.org/news/2023/04/11/malaysia-repeals-mandatory-death-penalty>

<sup>27</sup> Information provided to ADPAN by the Malaysian Prison Department.

<sup>28</sup> Goh, J. and Tham, J. V. (2022). “Kaki Dadah”: The Need to Reform Public Perception Towards People Who Use Drugs in Malaysia’. The Centre. Available at

<https://www.centre.my/post/kaki-dadah-the-need-to-reform-public-perception-towards-people-who-use-drugs-in-malaysia>

<sup>29</sup> Erlanger, S. (1989). Intensive War on Drugs by Malaysia and Singapore Shows Mixed Results. New York Times. Retrieved July 15, 2021, from

<https://www.nytimes.com/1989/12/15/world/intensive-war-on-drugs-by-malaysia-and-singapore-shows-mixed-results.html>

<sup>30</sup> In reference to the Malaysian National Anti-Drug Agency's reports in 2021,

<https://www.adk.gov.my/en/drug-abuse-information-network-for-asia-and-the-pacific-dainap-focal-points-meeting/> and 2022

<https://www.adk.gov.my/kunjungan-hormat-daripada-united-nations-office-on-drugs-and-crime-unodc/>.

## 3.0 Recommendations

Donor states are encouraged to urge the UNODC to follow through on its pronouncements; (i) make transparent the UN-government cooperation involved in its programmes related to transnational organised crime and illicit trafficking in Southeast Asia, (ii) consistently stand against the use of the death penalty for drug offences in the region, and (iii) firmly support the shift away from the 'War on Drugs' towards a health and evidence-based approach to addressing drug use.

The OHCHR's duty to conduct human rights due diligence of UN agency programmes should also be strengthened to better hold accountable programming efforts in the countries aforementioned, especially in relation to drug enforcement-related programs that negatively impact one's economic, social, and cultural rights.