LAWS RELATING TO THE DISPOSAL OF FORENSIC PATIENTS IN SRI LANKA AND SUGGESTIONS FOR REFORM

LAP de Alwis,[#] VL Seneviratne,[##] TSS Mendis,[###]
C. Abhayanayaka[####]

ABSTRACT

The laws on the disposal of forensic patients in Sri Lanka are outdated and in need of reform. They are unhelpfully brief, highly bureaucratic, and do not adequately safeguard the rights of this vulnerable group of patients. Not only do they not contribute to the development of forensic mental health services in the country but also act as a hindrance. These laws, as they stand now, focus on detention rather than rehabilitation or reintegration. Following a review of the existing statutes, the authors propose a number of reforms, including the introduction of custodial and noncustodial forensic mental health orders, limiting terms, community disposal, a specialised forensic mental health tribunal and the exclusion of non-serious offending from forensic mental health laws. Special laws are also needed for the disposal of those with intellectual disability and cognitive impairment. These reforms would help to ensure that forensic patients are treated fairly and humanely and are able to reintegrate into society as soon as possible.

Keywords – forensic patients, criminal procedure code, disposal laws, Sri Lanka

[#] MBBS, MD (Psych), FRANZCP, Consultant Psychiatrist Gold Coast Mental Health Service.

[##] MBBS, MD (Psych), FRANZCP, Consultant Psychiatrist, Gold Coast Mental Health Service.

[###] MBBS, MD (Psych), Consultant Forensic Psychiatrist Victorian Institute of Forensic Psychiatry (Forensicare).

[####] MBBS, MD (Psych), Consultant Forensic Psychiatrist Kandy Teaching Hospital (Received 20 Apr 2024, Revised 29 Jun 2024, Accepted 07 Jul 2024)

1. INTRODUCTION

The word 'Forensic' derives from the Latin term *'forensis'* referring to the Forum[1], where citizens would gather for judicial matters. Thus, the term forensic, used as an adjective, refers to matters pertaining to, connected with, or used in courts of law.[2] A 'forensic patient' in a mental health setting is a patient who is having or has had interactions with a court of law concerning a criminal offence. Jurisdictions differ with regard to which patients get categorised as 'forensic patients' with most having no fixed definition.[3] In Sri Lanka, mental health professionals use this term to refer to a category of patients who used to be referred to as 'criminal lunatics' or 'insane criminals' in legislation.[4] This category includes individuals who are incapable of making their defence at the time of judicial inquiry, those who have been found not guilty by reason of insanity (NGRI) and prisoners who are mentally ill needing treatment in a hospital setting. Forensic patients are an important subgroup of mental health patients due to higher levels of government and public scrutiny with regard to their detention, management, and release.[5]

Individuals who have been found NGRI or unfit for trial are neither subjected to punishment nor allowed to go free. Instead, in most countries that follow English law principles, such individuals are detained under special laws often referred to as disposal laws or forensic laws. These disposal or forensic laws would determine how, when and where forensic

1 A public place or a marketplace in an old Roman city

2 'Forensic, Adj. & n.' (*OED Online*, OUP June 2023). <www.oed.com/dictionary/forensic_adj> accessed 21 April 2024.

3 F Kaiser, 'Who Is a Forensic Patient and Are They Treatable? Can It Be Agreed, and Does It Matter?' (2004) 29(2) Rawal Medical journal 68.

4 Mental Diseases Ordinance, No 27 of 1956 Sri Lanka, s 34.

5 Paul E Mullen, 'Forensic Mental Health' (2000) 176 (4) British Journal of Psychiatry 307.

patients would be detained, how they should be monitored and how they could be released.[6] The law relating to forensic patients in Sri Lanka is contained within Chapter 31 of the Code of Criminal Procedure Act 1979,[7] sections 9 and 10 of the Mental Diseases Ordinance No. 27 of 1956 and section 69 of the Prisons Ordinance No. 16 of 1877. Chapter 31 of the Code of Criminal Procedure Act (CPC) contains the bulk of the legislature. The Mental Diseases Ordinance and the Prison Ordinance only have a few provisions dealing with the transfer of mentally unwell prisoners between prisons and the mental hospital. The CPC details the detention, release, and monitoring of those who have been found incapable of making their defence at the time of trial as well as those who have been found NGRI.

2. JUSTIFICATION AND RESEARCH PROBLEM

The authors found little legal scholarship on the laws related to the disposal of forensic patients in Sri Lanka. Despite the extensive body of literature on this subject internationally and the efforts made by legislators in the Western World to address Human Rights implications of disposal laws, there is a notable absence of discourse regarding the legal

6 Anne G Crocker, James D Livingston and Marichelle C Leclair, 'Forensic Mental Health Systems Internationally' in Ronald Roesch and Alana N Cook (eds), *Handbook of Forensic Mental Health Services* (1st edn, Taylor & Francis 2017); HJ Salize, H Dreßing and C Kief, 'Placement and Treatment of Mentally Ill Offenders–Legislation and Practice in EU Member States.' (Central Institute of Mental Health 2005) <https://ec.europa.eu/health/ph_projects/2002/promotion/fp_promotion_2002_frep_15_en.pdf> accessed 21 April 2024; Harald Dressing, Hans Joachim Salize and Harvey Gordon, 'Legal Frameworks and Key Concepts Regulating Diversion and Treatment of Mentally Disordered Offenders in European Union Member States.' (2007) 22 European Psychiatry 427; JR Ogloff, R Roesch and D Eaves, 'International Perspective on Forensic Mental Health Systems.' (2000) 23 International Journal of Law and Psychiatry 429; S Every-Palmer and others, 'Review of Psychiatric Services to Mentally Disordered Offenders around the Pacific Rim.' (2014) 6 Asia-Pacific Psychiatry 1.

7 Sections 374 to 386 of the CPC.

implications of these laws in Sri Lanka. This review aims to fill that gap by examining the existing disposal laws in detail to advance the understanding of these laws. The findings will hopefully provide recommendations for legal reform to safeguard the rights of a very vulnerable group of individuals.

3. METHODOLOGY

The authors adopted a doctrinal research design involving the comprehensive and systematic analysis of existing legal material including statutes, case law, regulations, and secondary legal sources. We aimed to identify, interpret, and critically analyse the current legal framework that exists in Sri Lanka for the disposal of forensic patients. We used our collective knowledge and experience in working with forensic patients in different legal jurisdictions including in Sri Lanka to critique the practical applicability of these laws.

3. RESULTS AND DISCUSSION

3.1 Different meanings of the term ‘of unsound mind’ within Sri Lankan law

In Sri Lankan law, the term ‘of unsound mind’ is used to refer to a state of abnormal reasoning resulting from mental illness. However, the law fails to define what constitutes a state of ‘unsoundness’ except in a few instances. The Mental Diseases Ordinance states that a person ‘of unsound mind’ needs to be ‘so far deranged in mind as to render it necessary that he, either for his own sake or that of the public, should be

placed under control'.[8] This is identical to how the term was defined in the Lunacy Ordinance of 1873, the predecessor of the current Mental Diseases Act.[9] The definition clarifies criteria District Courts need to consider when deciding to commit a person to a mental hospital. Though defined a century and a half ago, it captures the essence of risk-based criteria used in many modern jurisdictions for involuntary detention and treatment.[10]

The Penal Code and the CPC define 'of unsound mind' differently to the Mental Diseases Ordinance. Neither of the two Acts defines the term directly. Nevertheless, the intended meaning of this term can be arrived at by looking at the functional incapacities contributing to the state of unsoundness, that make up the legal tests contained within the relevant provisions in the Acts. For example, the Penal Code describes 'of unsound mind' in Section 77 as being incapable of knowing the nature of one's actions or as being incapable of knowing that their actions are wrong or contrary to the law. Thus, to be of unsound mind for exoneration from criminal responsibility, the perpetrator needs to lack the aforementioned cognitive capacities. This definition is based on an expansion of the M' Naghten Rules of English law.[11] Section 380 of the CPC clarifies the term similarly when referring to those acquitted of their crimes due to mental illness. However, Sections 374 and 375 of the CPC use the same phrase 'of unsound mind' to mean something entirely different. In these sections, 'of unsound mind' describes the functional incapacity of not being able to

8 Section 33 (a) of the Mental Diseases Ordinance

9 LAP De Alwis, 'Development of Civil Commitment Statutes (Laws of Involuntary Detention and Treatment) in Sri Lanka: A Historical Review' (2017) 5 Medico-Legal Journal of Sri Lanka 22.

10 D Pinals and D Mossman, *Evaluation for Civil Commitment* (Oxford University Press 2012).

11 LA De Alwis, 'Historical Origins of the Insanity Defense in Sri Lanka and India' (2019) 10 Sri Lanka Journal of Psychiatry 4.

make one's defence at a judicial inquiry or trial which means being unfit to plead and stand trial. Thus, the unsoundness referred to in Sections 374 and 375 denote a different set of cognitive incapacities dealing with comprehension and communication to that referred to in Section 380 of the same act or Section 77 of the Penal Code. As it stands, the differences in the definitions are not made explicit and have led to confusion in the past.[12] The Prison Ordinance does not provide for a separate definition but adopts the one contained in the Mental Diseases Ordinance.[13]

3.2 The different types of forensic patients in Sri Lanka

Sri Lankan law recognises 3 types of forensic patients. (a) Those who are unfit to plead and stand trial, (b) those who have been found not guilty due to reason of insanity (NGRI) and (c) prisoners with mental illness.

(a) Unfit to plead and stand trial: Defendants who are unable to understand the charges against them or to participate in their own defence. They may be suffering from a mental illness, a developmental disability, or a severe cognitive impairment.

(b) Not guilty due to reason of insanity (NGRI): These individuals are found not criminally responsible for their actions due to a mental illness at the time of the offence. They may be committed to a psychiatric hospital for treatment, or they may be released into the community under supervision.

(c) Prisoners with mental illness: Individuals with mental illness incarcerated in a prison or jail. They may have been convicted of

[12] *Police Sergeant Simeon v Weerappan* (1936) 1 CLJN 46 (High Court).

[13] In section 69 (5) of the Prison Ordinance.

a crime, or they may be awaiting trial.

All three types of forensic patients are subject to different legal and treatment standards. The goal of treatment is to restore the individual's mental health to the point where they can be safely discharged from custody to reintegrate into society.

3.2.1 Forensic laws relating to those who are unfit to plead and stand trial

Section 374 and 375 of the CPC specify that any person unable to make a defence for themselves (unfit to plead and stand trial) as a result of mental illness, in a Magistrates Court or a higher court, will have their trial or inquest postponed until recovery from the mental illness. The legal test for this determination is not defined. The term 'of unsound mind' is used here to refer to the mental illness causing the incapacity of the defendant. The law requires medical expertise be involved as evidence in this determination. The incapacities that would make a defendant unfit to plead and stand trial are defined in case law in Sri Lanka and follows the English law tradition. In the 1927 case of *King v Pindorissa,*[14] Lyall Grant J referred to the legal test used in the English case of *R v Prichard*[15] when defining the relevant capacities that needed to be present in the defendant to be able to make their defence. Lyall Grant J instructed the jury to consider if the defendant 'sufficiently understood the proceedings, what was alleged against him, what he was entitled to do and say, and his power to bring forward witnesses in his own defence'.[16]

If the alleged offence is one in which bail may be granted and sufficient

[14] *K v Pindorissa* (1927) 29 NLR 385 (High Court).

[15] *R v Prichard* (1836) 7 Car P (England and Wales High Court (King's Bench Division))

[16] *K v. Pindorissa* (n 15).

surety is provided, the defendant may be released on bail. In such instances, it is incumbent upon the judicial officer to ensure that the release of the defendant on bail does not pose a risk to the defendant or to any other individuals.[17] Section 377(2) of the CPC gives authority to the court to appoint an official to review the defendant while on bail and report back to the court. If the defendant recovers from their mental illness, this official should certify the recovery, allowing the inquiry or trial to begin. The law does not provide any guidance on whom this official should be and what expertise they need to possess to do their job. Where bail can not be granted, the defendant will be detained. The Minister of Justice will be informed by the courts of such detentions. The Minister has the authority to issue an order for the continued detention of such a defendant in a custodial facility or to move them to a mental hospital.[18]

Once a person detained under section 376 (2) of the CPC, due to being unfit for trial, becomes capable of making their defence, the judicial inquiry can resume. The Commissioner of Prisons or two Visitors are needed to certify this. The certification involves deciding on the person's ability to make his or her defence. It is of note that no medical evidence is required by law for this certification.[19] Following certification, such prisoners will be taken in front of the same court that ordered their detention. Judicial officials of the court can then resume the trial or commence the trial *de novo* if they are satisfied with the recovery of the defendant.

17 Section 376(1) of the CPC.

18 Section 376 (2) of the CPC.

19 Sections 377, 378, & 383 of the CPC.

3.2.2 Forensic laws relating to those who have been found not guilty by reason of insanity (NGRI)

The CPC stipulates that Individuals found NGRI under section 77 of the Penal Code will be detained in a place of 'safe custody' until the orders of the Minister of Justice are known.[20] The same rule applies to those found guilty of the offence but had their conviction overturned by the Court of Appeal after being found to have been of unsound mind at the time of the offence.[21] The Minister may order such persons to be detained at a 'mental hospital, prison, or other suitable place of custody'.[22] The legal test for being acquitted on grounds of unsoundness of mind is well-defined in section 77 of the Penal code, as well as in section 380 of the CPC. The law requires the judgement of acquittal to specifically mention if the accused committed the crime or not.

3.2 3 Forensic laws relating to mentally ill prisoners

Any prisoner who develops a mental illness while in custody can be transferred to a mental hospital or a place of observation under section 69 of the Prison Ordinance. The transfer may be for assessment or treatment. The law only allows the mental hospital and the various houses of observation to accept such prisoners. The Mental Diseases Ordinance has similar provisions enabling the Minister of Justice to issue a directive to remove a prisoner to the mental hospital when a prisoner is suffering from a mental illness.[23] Mentally-ill prisoners in the mental hospital can be

[20] Section 381 of the CPC.

[21] Section 338 of the CPC.

[22] Section 381 of the CPC.

[23] Refer s 9 of the Mental Diseases Ordinance.

transferred back to prison upon recovery of their mental illness or when a medical officer can certify that the prisoner no longer needs to be kept in the mental hospital.[24]

3.3 Ensuring the well-being of those who are detained

The existing law has little detail about the assessment, monitoring, and rehabilitation of those individuals detained under the forensic provisions in the CPC. Section 382 indicates that it is the responsibility of the Commissioner of Prisons to visit such detainees in prison every 6 months to ensure their well-being and to monitor for recovery. The same responsibility falls on the Visitors of the mental hospital for individuals transferred to the mental hospital. Apart from the six-monthly visits by the Commissioner of Prisons or the Visitors, no other legislative provisions are ensuring minimum standards of care, follow up or review of forensic patients.

3.4 Release from detention

None of the laws dealing with forensic patients in Sri Lanka refer to recovery from mental illness. This is likely a reflection of the time when these statues were passed, when serious mental illness did not have a cure and people were usually committed to various institutions for life. Instead of focussing on recovery or cure, the statutes refer to more functional outcomes, such as becoming able to make a defence or becoming safe enough to be discharged into the community.

Section 384 of the CPC allows for release of those found NGRI or unfit to

[24] ibid.

stand trial, if they are no longer considered to be in danger of doing injury to themselves or to any other person. This group includes detainees who are still unable to stand trial, but have recovered from their mental illness to the point where either the Prison Commissioner or visitors can recommend that they are no longer a danger to themselves or others. Detainees suitable for release need to be identified by the Prison Commissioner or the visitors and recommendations made to the Minister. The Minister of Justice may release them from detention or order further detention. If a detainee has not already been transferred to the mental hospital, the Minister may order transfer to a mental health facility. To transfer to a mental health facility, the Minister is required to appoint a committee consisting of a Magistrate and two medical officers to make a formal inquiry into the state of the mind of the detainee.

Under section 376 or 381 of the CPC, a friend or relative of a detainee can make an application to the Minister of Justice, requesting release. The Minister is authorised to release such detainees under section 385 of the CPC if he or she is satisfied that the care they will receive while in the care and custody of relatives or friends is adequate. This release is upon condition that the released detainees are produced for review to a person identified by the Minister. This process appears to be outside the recommendations of the Prison Commissioner or visitors and based only on the judgement of the Minister. Prima facie, this appears to lack transparency and is therefore vulnerable to corruption and undue influence.

3.5 Evolution of the disposal laws in Sri Lanka

The earliest laws about forensic patients in Sri Lanka were contained within the Lunacy Ordinances of 1839, 1840 and 1873. In 1883, Sri Lanka

adopted the Indian Code of Criminal Procedure with changes to suit local needs.[25] Following the enactment of the Ceylon Code of Criminal Procedure Ordinance No. 3 of 1883, provisions related to forensic patients were removed from the Lunacy Ordinance of 1873. Chapter 33 of the 1883 code, dealing with criminal lunatics, contained a comprehensive set of laws dealing with those who were unfit to stand trial, those who were NGRI and mentally-ill prisoners.[26] Compared to similar laws in Great Britain at the time, the provisions contained in Chapter 33 of the 1883 code were much more progressive and liberal. Except for minor changes, the content of Chapter 31, of the current CPC is the same as Chapter 33 of the 1883 code. Thus, it is submitted that the forensic mental health provisions in Sri Lankan law were enacted in their current form more than a century ago.

4. SUGGESTIONS FOR REFORM

In Sri Lanka, mental health laws for forensic patients retain the same form as what was contained in the first Criminal Procedure Code, passed in 1883. At the time, these laws would have been considered innovative and enlightened. However, after more than a century of stagnation, they are now very much outdated. They appear to focus more on detention with little to no focus on correction, rehabilitation, and reintegration. Moreover, there are hardly any safeguards built into the law to ensure the protection of the human rights of defendants. They have become a barrier to the

[25] T Nadaraja, *The Legal System of Ceylon In Its Historical Setting (Asian Studies)* (Brill Academic Pub 1997).

[26] 'An Ordinance for Regulating the Procedure of the Courts of Criminal Judicature No. 3 of 1883 (Ceylon) Chapter XXXIII - Lunatics', *A Revised Edition of the Ordinances of the Government of Ceylon: Volume II -1883-1889* (Government of Ceylon 1895).

development of forensic mental health services in the country.[27]

The authors believe there is a strong and urgent need for reform in this area of law. At present, clearly defined forensic mental health orders and established protocols for permanently unfit defendants are absent. Additionally, there is no limit on detention time, which can result in even minor offenders being incarcerated for long periods. The release process for forensic patients is abrupt and without provisions for graduated release through community leave. In summary, the current legislature has none of the features of modern laws dealing with forensic patients.[28] The following proposals are made to improve the CPC and related laws in Sri Lanka to better manage the disposal of forensic patients.

4.1 Custodial and noncustodial forensic mental health orders

The CPC authorises the detention of forensic patients following a finding of NGRI or unfitness for trial.[29] However, it contains no provisions specifically establishing forensic mental health orders or supervision orders for these detainees. Furthermore, the law fails to differentiate between the disposal requirements of individuals based on the severity of the crime or their risk to society. Thus, a defendant charged with murder, once found NGRI or unfit to stand trial, would be disposed of in the same manner as a defendant charged with a much lesser offence. In many modern jurisdictions, forensic mental health orders can be matched to the risk posed by the defendant, such as custodial orders for more serious crimes and non-custodial supervision orders for less serious offences and

27 Angelo de Alwis, 'Fitness to Plead in Sri Lanka' (2014) 5 Sri Lanka Journal of Psychiatry 3.

28 For overview of contemporary forensic laws used across the world, ibid [3].

29 Section 376 and 381 of the CPC.

low-risk individuals.[30]

We suggest amendments to the current CPC and the Mental Diseases Ordinance to include clearly articulated forensic mental health orders. This can be achieved by expanding the existing provisions in Chapter 31 of the CPC or through amendments to the Mental Diseases Ordinance. It is recommended that a system of law that allows for multiple forms of disposals be designed, with the focus being rehabilitation and reintegration. These laws should not only authorise detention, but also condition community release, and community monitoring. In addition to conditional release with supervision and monitoring, options for unconditional release with the dismissal of charges should be made possible. Furthermore, these new forensic mental health orders should have the capacity to support the gradual reintegration of a forensic patient back into society through community leave. Courts or a suitable legal body should have the authority to specify monitoring requirements for those being released under these supervision orders, based on recommendations made by mental health experts.

[30] Greg James, 'Review Of The New South Wales Forensic Mental Health Legislation' (NSW Department of Health 2007) <www.health.nsw.gov.au/mentalhealth/resources/Publications/forensic-review.pdf> accessed 21 April 2024; Victorian Law Reform Commission (VLRC), 'Review of the Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997' (Victorian Law Reform Commission (VLRC) 2014) <www.lawreform.vic.gov.au/publication/review-of-the-crimes-mental-impairment-and-unfitness-to-be-tried-act-1997-report-2/> accessed 21 April 2024; Caxton Legal Centre Inc, 'Forensic Orders and Treatment Support Orders' (Queensland Law Handbook, May 2020) <queenslandlawhandbook.org.au/the-queensland-law-handbook/health-and-wellbeing/mental-health-laws/forensic-orders-and-treatment-support-orders/> accessed 21 April 2024.

4.2 Supervising those under Forensic Mental Health Orders

At present, there is little guidance on who is responsible for the monitoring and supervision of detainees or those released under sections 376, 384 and 385 of the CPC. Moreover, the law does not provide any mechanism for responding to breaches of supervision. It is proposed that any amendments to the law need to include guidance on how supervision responsibilities are divided between the various organisations in the health and legal sectors. Further, there is a need to have clear directions on what powers are held by the different organisations when it comes to enforcing monitoring requirements such as mandated medical appointments, urine drug screens and rehabilitation. The new laws should also include a clear mechanism to respond to a breach of supervision, such as the ability to recall persons from the community.

4.3 Need for laws dealing with permanent unfitness

Certain mental illnesses, along with intellectual and cognitive disabilities, can render a defendant permanently unfit to stand trial. Sri Lankan law does not provide any guidance on how to proceed in such situations and offers no disposal options other than to detain such individuals pending a decision from the Minister. This can result in defendants being detained indefinitely, even for minor offences that would have only resulted in a short or a suspended sentence if convicted. This deprives such defendants of natural justice and violates International human rights treaties Sri Lanka has agreed to uphold.[31]

[31] Office of the High Commissioner Human Rights (OHCHR), 'UN Treaty Body Database: Sri Lanka' (*United Nations Human Rights Office of the High Commissioner*, 2023)

We propose laws that allow for a special hearing in the event a defendant is deemed to be permanently unfit to ensure that the objective elements of an offence are established beyond a reasonable doubt. Such special hearings are not uncommon in modern jurisdictions and are called a 'trials of the facts', a 'trial of objective elements' or as 'special hearings'.[32] In such a proceeding a not guilty plea is submitted on behalf of the defendant and the evidence against them is put under the scrutiny of the adversarial system of law. If the special hearing determines that the offence can not be proven beyond a reasonable doubt, the defendant is acquitted and released from the forensic system. If the evidence proves that the defendant did carry out the act or made the omission charged, they can be considered for detention and treatment.

While Sri Lankan law does not have legal provisions allowing for a special hearing, Section 262 of the CPC allows for a similar hearing to take place when a defendant is unfit to stand trial due to non-mental illness reasons. Section 262 stipulates the judicial process to follow where a defendant 'though not insane cannot be made to understand the proceedings of a judicial inquiry.' It allows for an inquiry or trial to continue even if an individual does not understand the judicial inquiry against them. In the event of a committal to a higher court or if convicted, the matter will be

<tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=164&Lang=EN> accessed 21 April 2024.

[32] Crimes Act 1900 (ACT) ss 315C–319A; Mental Health (Forensic Provisions) Act 1990 (NSW) s 19; Criminal Code Act 1983 (NT) pt IIA div 4; Criminal Law Consolidation Act 1935 (SA) ss 269M–269N; Criminal Justice (Mental Impairment) Act 1999 (Tas) s 15; Crimes (Mental Impairment and Unfitness to Be Tried) Act 1997 (Vic) pt 3; Ellen Limerick and others, 'Declared Unfit to Plead: Research Report' (TC Beirne School of Law, University of Queensland 2018) <law.uq.edu.au/files/45123/Declared_Unfit_to_Plead_Report_final_9%20May%202018.pdf> accessed 21 April 2023 Criminal Procedure (Insanity and Unfitness to Plead) Act 1991 (UK) ch 25 s 4 A (2); *Rv Antoine* [2001] 1 AC340, 350–1 (Lord Bingham CJ), 375–6 (Lord Hutton) (House of Lords); D Bean and others, 'Unfitness to Plead. Volume 1: Report.' (Law Commission (England and Wales) 2016) <www.lawcom.gov.uk/app/uploads/2016/01/lc364_ unfitness_vol-1.pdf> accessed 21 April 2024.

referred to the Court of Appeal. On the other hand, if the evidence is found to be insufficient for conviction, the matter is dismissed. The authors recommend having similar legal provisions that allow for the judicial inquiry to continue when the accused has been found permanently unfit. Such reforms would prevent persons who are permanently unfit to stand trial from being detained for indefinite periods.

4.4 Use of limiting terms when detaining persons under the forensic provisions in the CPC.

A limiting term is a fixed period specified by the court that reflects the length of detention or supervision the individual would have received if not found unfit for trial or NGRI and had received a full criminal trial.[33] A limiting term ensures that those who fall under forensic laws are not detained indefinitely. In Sri Lanka, where there are no provisions to fix a limiting term, it is not uncommon for the detention of a mentally-unwell offender to far exceed the maximum sentence for the offence if they had been found guilty.

[33] P Gooding and others, 'Unfitness to Stand Trial and the Indefinite Detention of Persons with Cognitive Disabilities in Australia: Human Rights Challenges and Proposals for Change.' (2016) 40 Melbourne University law review 816; NSW Law Reform Commission, 'Consultation Paper 6: People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences' (New South Wales Law Reform Commission 2010) <www.lawreform.justice.nsw.gov.au/Documents/Publications/Consultation-Papers /CP06.pdf> accessed 21 April 2024; Australian Law Reform Commission, 'Incarceration Rates Of Aboriginal And Torres Strait Islander Peoples (Discussion Paper 84)' <www.alrc.gov.au/wp-content/uploads/2019/08/discussion_ paper_84_ compressed_cover2.pdf> accessed 21 April 2024.

4.5 Differentiating between those who are temporarily unfit and those who have been found NGRI.

The CPC makes little distinction between those who are unfit to plead or stand trial and those who are NGRI. The statutory provisions detailing the detention, supervision, and release do not differentiate between these two groups of detainees. It is submitted that these two categories of prisoners have very different legal requirements. Those who are unfit will need to recover from their mental illness to restart the judicial inquiry without delay. On the other hand, those who have been found NGRI need to be released from custody in a manner that does not increase the risk posed to the community.

Thus, the authors propose that these two categories of detainees be treated differently under separate statutory provisions. Legal provisions for individuals who have been found temporarily unfit should allow for relatively frequent reviews within a prison, hospital, or community setting until they achieve the capacities required to resume their judicial inquiry. Conversely, those who have been found NGRI, need a type of forensic mental health order to ensure they receive treatment as well as mandate monitoring for the reemergence of symptoms. Unlike defendants who are temporarily unfit for trial, those who are permanently unfit will need to be under the same legal statute as those found NGRI due to similar disposal requirements.

4.6 Provisions for community monitoring including leave from detention

At present, there are no statutory provisions within Sri Lanka's law allowing leave from detention for forensic patients. However, ordinary prisoners have had similar options such as conditional release,

community work and home leave since 1974.[34] Home leave allows prisoners who are serving long sentences and in open camps to leave the prison for up to seven days at a time to spend time with family and the community. This allows for the assessment of a prisoner's ability to cope with the stressors of living back in the community after being locked away in prison. Thus, any prisoner detained for mental health reasons in Sri Lanka will have fewer opportunities for rehabilitation and reintegration than an ordinary prisoner. The authors would like to emphasise the need to have legal statutes authorising conditional release as well as leave for detained forensic patients. These laws will need to have provisions that allow mandatory monitoring while on leave and the ability to bring someone back to a place of detention if there is evidence of deterioration of mental illness.

4.7 Specialised forensic mental health tribunal

At present, a Visitor's Board is convened by the Minister every six months to make recommendations on those who are detained under sections 376 and 381 of the CPC. The tribunal consists of three members: a psychiatrist, a representative from the Ministry of Justice and the Department of Prisons. This body makes recommendations to the Minister, who under the CPC has the authority to release or transfer detainees. From the experience of the authors, this is a slow and bureaucratic process where outcomes are not known for several months after the hearing. Furthermore, there is little transparency on how decisions are made.

We propose to modify the present law to enable the establishment of a

[34] http://www.academia.edu/download/32993825/prison_system.pdf.

new tribunal comprised of professionals from the judicial, medical, and social welfare sectors, with a greater level of authority than the present tribunal. The proposed tribunal should have the authority to decide on release from detention without reference to any higher official. Furthermore, we propose a committee comprised of mental health professionals be established through the legislative process, which will take into account the circumstances of each detainee and make recommendations regarding leave and release through a report to the tribunal.

4.8 Exclusion of non-serious offences from complicated forensic laws

When it comes to forensic patients, the CPC does not distinguish between serious and non-serious offending. The current situation is at odds with the Risk-Need-Responsivity Model (RNR model) of offender rehabilitation.[35] The RNR model dictates that interventions offered to an offender are risk matched to the severity of the risk posed. Thus, offenders who pose a higher risk receive more intensive and more structured interventions. The CPC, as it stands, does not allow practitioners of law or medicine to match evidence-based interventions to appropriate offenders because every offender is disposed of the same way irrespective of the seriousness of the offending. As a result, those accused of murder or other serious crimes are being detained in the same units as those accused of less serious crimes such as theft. The authors believe that minor offences such as non-indictable offences would not require the current procedural rigour of existing laws. It is proposed that the

[35] James Bonta and DA Andrews, *The Psychology of Criminal Conduct* (Routledge 2016); Leam A Craig, Theresa A Gannon and Louise Dixon, What Works in Offender Rehabilitation (1st edn, Wiley 2013).

introduction of laws to exclude non-serious offenders from the complicated legal process detailed in Chapter 31 of the CPC will remedy the inefficiency of the current system, resulting in fewer delays, lower costs and better justice for defendants.

4.9 Amending laws relating to mentally ill persons in custody

Currently, there are no legally sanctioned pathways for a mentally ill prisoner to be transported to the closest mental health facility for assessment or treatment. Section 69 of the Prison Ordinance only specifies Houses of Observation and mental hospitals as suitable destinations. The authority for transport needs to come from the Commissioner of Prisons, making the process of transfer liable for bureaucratic delay. It is submitted that laws should be amended to make the process of transfer possible to the closest public mental health service. Medical opinion should play a far more central role in the decision to transfer a prisoner to a mental health facility. The authority to transfer should be made at a lower level by a local administrator and not by the Prison Commissioner. There is a need to amend the Mental Diseases Ordinance so that it allows such mentally-ill prisoners to be subjected to Sri Lanka's civil commitment process, the process of involuntary detention and treatment, upon arrival at the mental health service. Having an option for prisoners to accept treatment voluntarily if their capacity to consent is preserved is also recommended.

4.10 Intellectual disability and cognitive impairment

The current law does not differentiate between those with mental illness and intellectual disability or cognitive impairment such as dementia or

head injury. Defendants with intellectual or cognitive impairment have the same disposal options, including being held in the same places of detention as those with mental illness upon a finding of NGRI or unfitness for trial despite having very different treatment and rehabilitation needs. In the experience of the authors, individuals with intellectual or cognitive disability are often harmed when placed in general prison units or in non-specialised psychiatry inpatient units due to their vulnerability. While there is a need for investment in new infrastructure for defendants with intellectual or cognitive impairment, one of the first steps would be to recognise this group in law to be different to those who have come into contact with the law due to mental illness. Not only will the new law need to define this group, but also specify alternative disposal options that would cater to the unique care and rehabilitation requirements of this group.

4.11 Moving forensic mental health laws under the Mental Diseases Ordinance

Some jurisdictions have removed forensic mental health orders from criminal law and have placed them under the respective mental health laws of the country. The authors suggest that this should be considered, given that the country's mental health law is currently under review. In addition, we propose moving those who have been found NGRI and unfit for trial to mental health facilities. At present a significant proportion of such individuals are being held in correctional facilities. As the CPC contains the statutes for the disposal of this group of inmates, they fall under the jurisdiction of the criminal justice system. Moving the relevant legal provisions into mental health legislation would facilitate health services playing a more central role in the rehabilitation process. Prisons provide very little prospect or opportunity for those who are NGRI or unfit

for trial to demonstrate recovery and rehabilitation. This is due to a scarcity of mental health professionals in prison as well as overcrowding. The authors believe that the criminal justice system is not the appropriate pathway for this group of inmates, as their needs are better provided for by health services. Sri Lanka's health services are better equipped to provide the periodic medical review that is necessary for the gradual reintegration of such persons into the community.

4.12 Services to develop in line with changes in legislation

Although the forensic legislative framework serves as the foundation for forensic services, any modifications to the law will not have any impact unless there is an enhancement in the services and resources available for this group of mentally ill patients. If resources do not expand in parallel to legislative amendments, the laws themselves will likely become ineffective. In the experience of the authors, even the current statutes have not been fully implemented in the Country. For example, the Visitors' Board's recommendations take a long time to get implemented, leading to many individuals being detained in prisons or in the mental hospital for long periods.

5. THE NEED FOR REFORM

Sri Lanka ratified the Convention on the Rights of Persons with Disabilities (UNCRPD) in 2016. Thus, there is an expectation that the Country would take steps to harmonise its laws with the principles of the Convention. Signatories to the Convention around the world are implementing reforms

to bring their mental health laws in line with provisions of the convention.[36] Sri Lanka has made no progress in this regard when coming to its disposal laws. The proposed reforms will enable Sri Lanka to meet its obligations under the UNCRPD.

We believe that not only will the proposed reforms help Sri Lanka make its disposal laws fit for purpose for the 21st century, it would also allow the implementation of legal instruments such as noncustodial forensic orders that have a strong evidence base for reducing recidivism and improving patient outcomes.[37] In addition, the reforms will enable regular review of forensic patients, ensuring there is potential for enhancing offender outcomes over time with evidence-based multidisciplinary input as the field of forensic psychiatry matures in Sri Lanka. We note that in many countries, legal reforms have been the driver for developmental of psychiatric services.[38]

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[38] Stefano Ferracuti and others, 'Evolution of Forensic Psychiatry in Italy over the Past 40 years (1978-2018).' (2019) 62 International Journal of Law and Psychiatry 45; B McKenna and LE Sweetman, '*Models of Care in Forensic Mental Health Services: A Review of the International and National Literature*' (Ministry of Health, Government of New Zealand 2020).

6. CONCLUSION

The laws relating to forensic patients have not been amended and improved upon for more than 150 years. They are outdated, unhelpfully brief, highly restrictive and in breach of international human rights treaties Sri Lanka has agreed to uphold. There is an urgent need to amend and update the law for the development of forensic mental health services and to ensure equal rights for forensic patients. In this article, we have made suggestions on how the current law can be updated to bring it in line with similar laws in other modern jurisdictions. We believe that the proposed amendments will improve the disposal laws in Sri Lanka making it easier for health and legal professionals to understand their scope and responsibilities within this framework. Moreover, we hope that these amendments will end the arbitrary and indefinite detention of a highly vulnerable, highly stigmatised group of defendants. Without this first step, developing forensic mental health services in the country would be challenging. Amending statutes that are more than a century old will not be easy. To achieve this, there is a need for close collaboration between various stakeholders in the legal and medical professions. The perspectives and opinions of not only legal and medical experts, but also defendants and their families, are crucial for successfully updating these outmoded laws to reflect the realities of the 21st century.