



universität  
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# MASTER THESIS

Titel der Master Thesis / Title of the Master Thesis

„Children Deprived of their Liberty in Sri Lanka“

verfasst von / submitted by

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angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of  
Master of Arts (MA)

Wien, 2017 / Vienna 2017

Studienkennzahl lt. Studienblatt /  
Postgraduate programme code as it appears on  
the student record sheet:

A 992 884

Universitätslehrgang lt. Studienblatt /  
Postgraduate programme as it appears on  
the student record sheet:

Human Rights

Betreut von / Supervisor:

Univ. Prof. Dr. Manfred Nowak, LL.M.

## **ACKNOWLEDGMENT**

This Master thesis would not have been possible without the strong support of my supervisor Prof. Manfred Nowak who was not only an inspiration during the whole Master programme, but also motivated me to write about deprivation of liberty of children in Sri Lanka. A special word of gratitude is also owed to Mag. Helmut Sax who provided me with help and advice in the field of children's rights and always offered a sympathetic ear.

I would also like to express my thanks to all the people who helped me before and during my field trip to Sri Lanka, especially Prof. Ravindra Fernando, Varathagowry Vasudevan and Chathuri Jayasooriya. The realisation of this Master thesis was only possible due to your interest and strong collaboration. You made my trip to Sri Lanka a unique experience which I will always remember and look back on with joy.

Last but not least, I would also like to thank my family and friends who supported me emotionally and financially during this time and my great-aunt from Canada who assisted me with her English language skills.

Thank you! Danke! Stuti! Nandri!

## LIST OF ABBREVIATIONS

|           |  |
|-----------|--|
| CAT       | Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment   |
| CJPB      | Children Judicial Protection Bill  |
| CRC       | Committee on the Rights of the Child / Convention on the Rights of the Child   |
| CRC-OP-AC | Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict                  |
| CRC-OP-SC | Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography |
| CRPD      | Committee on the Rights of Persons with Disabilities / Convention on the Rights of Persons with Disabilities                     |
| CYPO      | Children and Young Persons Ordinance   |
| DoP       | Department of Prison   |
| DoSS      | Department of Social Services  |
| DPCCS     | Department of Probation and Child Care Services  |
| ECHR      | European Convention on Human Rights  |
| e.g.      | for example  |
| et al     | and others   |
| etc.      | et cetera  |
| et seq.   | and the following  |
| Fn.       | footnote   |
| GACC      | Guidelines for the Alternative Care of Children  |
| GoSL      | Government of Sri Lanka  |
| HDO       | Houses of Detention Ordinance  |
| HRCSL     | Human Rights Commission of Sri Lanka   |
| ICCPR     | International Covenant on Civil and Political Rights   |

|         |   |
|---------|---|
| Inst.   | Institutionalisation  |
| LHRD    | Lawyers for Human Rights and Development                        |
| LTTE    | Liberation Tigers of Tamil Eelam                                |
| MoE     | Ministry of Education   |
| MoH     | Ministry of Health  |
| MWCA    | Ministry of Women and Child Affairs                             |
| NCPA    | National Child Protection Authority                             |
| NDDCB   | National Dangerous Drugs Control Board                          |
| NGO     | Non-Governmental Organisation                                   |
| NIMH    | National Institute of Mental Health                             |
| No.     | Number  |
| OPCAT   | Optional Protocol to the Convention against Torture             |
| p.      | page  |
| PETU    | Preventive Education and Training Unit                          |
| pp.     | pages   |
| PODDO   | Poisons, Opium and Dangerous Drugs Ordinance                    |
| POO     | Probation of Offenders Ordinance                                |
| UNGA    | United Nations General Assembly                                 |
| UNICEF  | United Nations International Children's Emergency Fund          |
| UNOHCHR | United Nations Office of the High Commissioner for Human Rights |
| YOTSO   | Youthful Offenders (Training School) Ordinance                  |

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## 1. INTRODUCTION

International Human Rights Law, in particular the United Nations Convention on the Rights of the Child (CRC), established the principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time. This principle is not only applicable to children who come in conflict with the law, but all scenarios in which children can be deprived of their liberty, such as children in child care institutions, children in prison with their parents, etc. are covered by it.

The reason behind the establishment of this principle is that deprivation of liberty does have negative effects on children and on society as a whole. As the Non-Governmental Organisation (NGO) Panel for the Global Study on Children Deprived of their Liberty states,

Children deprived of their liberty are exposed to increased risks of abuse, violence, acute social discrimination and denial of their civil, political, economic, social and cultural rights; certain disadvantaged groups are more affected than others; and society is affected at large as deprivation of liberty tends to increase social exclusion, recidivism rates and public expenditure.<sup>1</sup>

This thesis intends to determine to what extent Sri Lanka is complying with the principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time. It will cover the following three areas, where children can be deprived of their liberty: children in conflict with the law, children and child protection services and children and health care services. These areas were chosen on the basis of interest and availability of information.

The term ‘children in conflict with the law’ relates to persons under eighteen who have been convicted of committing an offence or are suspected/accused of having committed an offence.<sup>2</sup> The deprivation of liberty of these children is probably the most common and most known form of deprivation of liberty of children. The consequence that children need to be detained after breaking the law is, in fact, deeply rooted in Sri

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<sup>1</sup> Non-Governmental Organisation (NGO) Panel for the Global Study on Children Deprived of their Liberty, ‘Goal of the Study’, [website], 2016, [bit.ly/NGOPanel\\_GlobalStudy](http://bit.ly/NGOPanel_GlobalStudy), (accessed on: 3 July 2017).

<sup>2</sup> The United Nations International Children’s Emergency Fund (UNICEF), ‘Child Protection Information Sheet: Children in Conflict with the Law’, 2006, p. 1, [bit.ly/UNICEF\\_InfoSheet](http://bit.ly/UNICEF_InfoSheet), (accessed on: 10 March 2017); Committee on the Rights of the Child (CRC), General Comment No. 10, ‘Children’s Rights in Juvenile Justice’, 2007, CRC/C/GC/10, p. 3.

Lanka's legal understanding whose juvenile criminal law dates back to 1939.<sup>3</sup> However, the deprivation of liberty of children in conflict with the law should be a measure of last resort and for the shortest appropriate period of time. States should give priority to alternative measures such as community based diversion and reintegration, alternative conflict resolution at community level, mediation, etc.<sup>4</sup>

Another category where children are at risk of being deprived of their liberty are children and child protection services. This includes, for example, orphaned, abandoned, destitute or poor children and children with disabilities. The institutionalisation of these children is a concept that mostly stems from Western societies, but was introduced to Sri Lanka during colonial times.<sup>5</sup> In the 20<sup>th</sup> century this alternative care concept even increased due to changes in the economic and socio-political situation of the country. Families could rely less on their extended family and traditional support structures, such as religious institutions that supported poor families through education, food, and accommodation, or land-owners who also offered food and accommodation to the families of their servants.<sup>6</sup>

Another factor which increased the number of children in need of care and protection was the 26-year-long civil war between the Government of Sri Lanka (GoSL) and the Liberation Tigers of Tamil Eelam (LTTE). Particularly affected were children in the North and East of the country, where some of the heaviest fighting took place.<sup>7</sup> This was aggravated even more by the tsunami disaster in 2004.<sup>8</sup>

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<sup>3</sup> An Ordinance to make Provision for the Establishment of Juvenile Courts, for the Supervision of Juvenile Offenders, for the Protection of Children and Young Persons, and for other connected purposes (Children and Young Persons Ordinance - CYPO), No. 48 of 1939.

<sup>4</sup> Penal Reform International, 'Protecting the Rights of Children in Conflict with the law', 2005, p. 43ff, [bit.ly/UNODC\\_ProtecChild](http://bit.ly/UNODC_ProtecChild), (accessed on: 10 April 2017).

<sup>5</sup> V. Vasudevan, 'Child Care Institutions as Quality Family, Surrogate (alternative) Care Services in Sri Lanka', *Institutionalised Children Explorations and Beyond*, Vol. 1, No. 1, 2014, p. 3. Available from IndianJournals.com (accessed on: 6 July 2017).

<sup>6</sup> D. Seneviratne and F. Mariam, 'Home Truths: Children's Rights in Institutional Care in Sri Lanka', in Denov, M., R. Maclure, K. Campbell (ed.), *Children's Rights and International Development. Lessons and Challenges from the Field*, New York, PALGRAVE MACMILLAN, 2011, pp. 19, 37.

<sup>7</sup> Ibid, p. 19; BBC, 'Sri Lanka Profile – Timeline, [website], 21 September 2016', [bit.ly/BBC\\_SriLankaProfile](http://bit.ly/BBC_SriLankaProfile), (accessed on: 21 March 2017).

<sup>8</sup> N. De Silva and A. G. Punchihewa (Save the Children), 'Push and Pull Factors of Institutionalization of Children: A Study based in the Eastern Province', 2011, p. 51, [bit.ly/PushPullFactors](http://bit.ly/PushPullFactors), (accessed on: 25 March 2017).



Several studies prove that institutional care is detrimental to the cognitive, behavioral, and social development of young children.<sup>9</sup> Especially, institutionalisation for a longer period of time presents a high risk of negatively effecting the child's development.<sup>10</sup> Therefore, these children should be deprived of their liberty only as a measure of last resort and for the shortest appropriate period of time.

The third category 'children and health care services' comprises children with mental health issues and drug dependent children. In particular, the civil war and the tsunami had detrimental impacts on the psychology of Sri Lanka's children. For example, the economic situation after the war forced many women to search for work abroad which negatively influenced the mental health of their children.<sup>11</sup> A study from 2015 revealed that 40% of the left-behind children have a mental disorder.<sup>12</sup> But even before, mental health had been a matter of concern with Sri Lanka's population especially suffering from depression, alcoholism, substance abuse and suicides.<sup>13</sup>

With regard to Sri Lanka's youth substance abuse has become an increasing concern since the early 1980s.<sup>14</sup> Consequently, the National Dangerous Drugs Control Board (NDDCB) was established three years later and charged with the task of ensuring the treatment and rehabilitation of drug abusers.<sup>15</sup> One way of doing this was the establishment of treatment and rehabilitation centres which risks, of course, the deprivation of liberty also of these children.

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<sup>9</sup> P. Giagazoglou et al, 'The effect of institutionalization on psychomotor development of preschool aged children', *Research in Developmental Disabilities*, Vol. 33, No. 3, May – June 2012. Available from Elsevier SD Freedom Collection, (accessed on: 12 April 2017); A. N. Almas et al, 'The Effects of Early Institutionalization and Foster Care Intervention on Children's Social Behaviors at the Age of Eight', *Social Development*, Vol. 20, No. 2, 25 July 2014. Available on Wiley Online Library (accessed on: 12 April 2017).

<sup>10</sup> S. H. Lin et al, 'The Relation Between Length of Institutionalization and Sensory Integration in Children Adopted from Eastern Europe', *The American Journal of Occupational Therapy*, Vol. 59, 2005, [bit.ly/AJOT\\_Article](http://bit.ly/AJOT_Article), (accessed on: 12 April 2017); A. Kumar et al, 'Duration of Institutionalization is Associated with Functional Neural Outcomes in Children with Histories of Early Deprivation', *Annals of Neurology*, Vol. 78, issue S19, 2015, [bit.ly/ANA\\_NationalMeeting](http://bit.ly/ANA_NationalMeeting), (accessed on: 19 April 2017), p. 164.

<sup>11</sup> M. Chandradasa and K. Kuruppuarachchi, 'Child and youth mental health in post-war Sri Lanka', *BJPsych International*, Vol. 14, No. 2, 2017, p. 36. Available from ResearchGate, (accessed on: 30 June 2017).

<sup>12</sup> K. Wickramage et al, 'Risk of mental health and nutritional problems for left-behind children of international labor migrants', *BMC Psychiatry*, 2015, <http://bit.ly/2uDLqWN>, (accessed on: 6 July 2017).

<sup>13</sup> Basic Needs, 'Sri Lanka', [website], no date available, <http://bit.ly/BNSL1>, (accessed on: 6 July 2017).

<sup>14</sup> United Nations Office on Drugs and Crimes, 'Sri Lanka', [website], 2005, <http://bit.ly/2u4To9H>, (accessed on: 6 July 2017).

<sup>15</sup> National Dangerous Drugs Control Board, 'Welcome to NDDCB Web Site', [website], 2015, <http://bit.ly/2uEbv88>, (accessed on: 6 July 2017).

## **2. METHODOLOGY**

### **2.1 Methodological Approach**

The methodological approach of this Master thesis is a mixture of legal, political, and sociological disciplines. Qualitative as well as quantitative methods were used by doing literature review, by conducting interviews and by analyzing statistics.

The literature included international conventions and rules, domestic laws of Sri Lanka, reports and articles from international organisations, NGOs and governmental bodies and information made available at NGOs' and governmental bodies' websites. The international conventions and rules helped with understanding the meaning of deprivation of liberty and with formulating the framework of this thesis. As the CRC is the core international document for this thesis, its guiding principles and the general measures a state should take to implement it were consulted in order to systematize the structure of this thesis.

The other documents helped with understanding the legal framework of deprivation of liberty of children in Sri Lanka, its administration, and the respective competences. Furthermore, most of these documents already revealed some bad practices.

The information gathered through the above-mentioned documents was complemented through fifteen semi-structured interviews which were conducted during a field trip to Sri Lanka from 14 May to 10 June 2017. The interview partners were people who are experts in the topic and mostly worked in the area of children's rights for a long period of time. They were either independent researchers or University professors, or working for a governmental body or a national and/or international NGO. First and foremost, these interviews contributed to the understanding of the respective law, the legal processes, and the existing problems and shortcomings. Furthermore, the interview partners assisted in gathering quantitative information about the different facilities depriving children of their liberty.

Although it is important to also capture the views of the children themselves, the decision was taken not to conduct interviews with children deprived of their liberty. The reason behind this was the limited time available for the research. Conducting interviews with children is a sensitive task and time consuming as the children would have to get used to the interviewer in order to feel comfortable enough for the interview.

However, during the field trip four institutions – three child care institutions and one treatment centre for drug dependent persons – were visited which gave a fuller picture of the situation of the children.

Last but not least, two conferences were attended which gave the opportunity to take part in the currently ongoing debate on the topic and to get a deeper understanding of it. The first conference was a presentation of a yet to be published report by a Sri Lanka based think-tank called ‘Verité Research’ which legally and institutionally assessed Sri Lanka’s juvenile justice system. The other conference was organized by the Ministry of Women and Child Affairs (MWCA) in order to launch the ‘National Partnership to End Violence Against Children in Sri Lanka’.

## **2.2 Research Question**

The research question of this paper is inspired by the UN Global Study on Children Deprived of their Liberty which was initiated by the UNGA Resolution 69/157 on 18 December 2014.<sup>16</sup> The reason for conducting this study is the realisation that children deprived of their liberty are often invisible rights-holders and that most countries do not have data on the number of children deprived of their liberty. This gives rise to concern as these children have increasingly become victims of human rights violations.<sup>17</sup>

Consequently, this thesis intends to determine to what extent Sri Lanka is complying with the principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time. Sri Lanka was chosen because of previous working experience and personal interest. Due to the page limit of the thesis, this research question will cover the following three areas: children in conflict with the law, children and child protection services, and children and health care services. The decision not to cover all children that can be deprived of their liberty should under no circumstances send the signal that dealing with the deprivation of liberty of some children is more important than of others. All children have the equal right to liberty

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<sup>16</sup> UNGA, Resolution 69/157, ‘Rights of the Child’, 3 February 2015, A/RES/69/157, p. 14.

<sup>17</sup> UN Office of the High Commissioner for Human Rights (OHCHR), ‘Children Deprived of Liberty – The United Nations Global Study’, [website], no date available, <http://bit.ly/UNGS2>, (accessed on: 8 July 2017).

and should be deprived of their liberty only as a measure of last resort and for the shortest appropriate period of time.

The following sub-questions need to be addressed in order to be able to answer the main research question: Are the respective laws promoting the principle that deprivation of liberty should be a measure of last resort and for the shortest appropriate period of time? Which alternatives to deprivation of liberty do exist in Sri Lanka and which measures has the GoSL taken so far in order to reduce the use of deprivation of liberty with regard to children? How many institutions exist and what is the situation of the children in these institutions? What kind of data with regard to these children is available and which conclusions can be drawn from these data?

### **3. TERMINOLOGY**

#### **3.1 The Right to Personal Liberty**

In order to clarify what deprivation of liberty means and which scenarios are ultimately covered by it, one must first of all look at the protected right: the right to personal liberty. This right is one of the first human rights to be guaranteed as it dates back to the Magna Charta Libertatum in 1215.<sup>18</sup>

The right to personal liberty is guaranteed in several regional and international human rights instruments such as Article 5 of the European Convention on Human Rights (ECHR)<sup>19</sup>, Article 9 of the International Covenant on Civil and Political Rights (ICCPR)<sup>20</sup>, Article 14 of the Convention on the Rights of Persons with Disabilities (CRPD)<sup>21</sup>, and Article 37 of the Convention on the Rights of the Child (CRC).<sup>22</sup>

According to Article 9 (1) ICCPR ‘Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.’<sup>23</sup> As the second

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<sup>18</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, Kehl, N.P. Engel Verlag, 2005, p. 212.

<sup>19</sup> European Convention on Human Rights (ECHR), (signed 4 November 1950, entered into force 3 September 1953), ETS 5, Article 5 (1).

<sup>20</sup> International Covenant on Civil and Political Rights (ICCPR), (adopted 15 December 1966, entered into force 23 March 1976), United Nations, Treaty Series, Vol. 999, Article 9 (1).

<sup>21</sup> Convention on the Rights of Persons with Disabilities (CRPD), (adopted 13 December 2006, entered into force 3 May 2008), A/RES/61/106, Article 14 (1) (a).

<sup>22</sup> Convention on the Rights of the Child (CRC), (adopted 20 November 1989, entered into force 2 September 1990), 1577 UNTS 3, Article 37 (b).

<sup>23</sup> ICCPR, Article 9 (1).

sentence of this Article indicates, the right to liberty is not an absolute right, but can be restricted by the state for legitimate reasons. It must be seen as a procedural guarantee, which protects people from arbitrary or unlawful deprivation of liberty.<sup>24</sup>

In order to fully understand what exactly a deprivation of liberty is one must, thus, look at the definition of the terms ‘arrest’ and ‘detention’. According to Nowak’s Commentary to the ICCPR, the term ‘arrest’ is a deprivation of liberty during the period a person is awaiting to be brought before the competent authority.<sup>25</sup> ‘Detention’, on the other hand, means any deprivation of liberty ‘regardless of whether this follows from an arrest (custody, pre-trial detention), a conviction (imprisonment), kidnapping or some other act’.<sup>26</sup>

This leads to a rather broad definition of ‘deprivation of liberty’ which refers to any deprivation of liberty – not only when a person is detained for committing a crime, but also in cases of ‘mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.’<sup>27</sup> It covers, for example, ‘police custody, “arraigo,”<sup>28</sup> remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children, and confinement to a restricted area of an airport, and also [...] being involuntarily transported.’<sup>29</sup> According to the Human Rights Committee also the ‘Placement of a child in institutional care amounts to a deprivation of liberty within the meaning of Article 9’.<sup>30</sup> Not covered are, however, normal educational measures of parents or the family, which may involve a certain control over the movement of the child and the daily school attendance.<sup>31</sup>

One *lex specialis* to Article 9 ICCPR is Article 37 (b) CRC as it refers to the right to personal liberty of children. It states that ‘No Child shall be deprived of his or her

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<sup>24</sup> Nowak, p. 212.

<sup>25</sup> Ibid, p. 221.

<sup>26</sup> Ibid.

<sup>27</sup> Human Rights Committee, General Comment No. 8, ‘Article 9 (Right to Liberty and Security of Persons)’, 1982, HRI/GEN/1/Rev.8, p. 169.

<sup>28</sup> Arraigo is a form of preventive detention in Mexico that allows for imprisonment without formal charges for up to 80 days (Human Rights Watch, ‘Mexico: Abolish “Arraigo” Detention from Constitution’, 25 April 2013, [website], <http://bit.ly/HRW-AbolishArraigo>, (accessed on: 16 June 2017).)

<sup>29</sup> Human Rights Committee, General Comment No. 35, ‘Article 9: Right to Liberty and Security of Persons’, 2014, CCPR/C/GC/35, pp. 1, 2.

<sup>30</sup> Ibid, p. 18.

<sup>31</sup> Ibid, Fn. 176.

liberty unlawfully or arbitrarily<sup>32</sup> and that ‘the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’.<sup>33</sup> In its travaux préparatoires the CRC clarified that this Article is based on Article 9 ICCPR. Accordingly, the term ‘deprivation of liberty’ under the CRC is also defined in a broad way covering more than the detention of children for committing a crime.<sup>34</sup>

This interpretation is underpinned by the CRC’s General Guidelines for Periodic Reports which state that Article 37 (b) follows the definition of the term ‘deprivation of liberty’ of the United Nations (UN) Rules for the Protection of Juveniles Deprived of their Liberty (‘The Havana Rules’).<sup>35</sup> Consequently, deprivation of liberty under Article 37 (b) ‘means any form of detention or imprisonment or the placement of a person in another public or private custodial setting from which this person is not permitted to leave at will by order of any judicial, administrative or other public authority.’<sup>36</sup> The same definition can be found in Article 4 (2) of the Optional Protocol to the Convention against Torture of 2002 (OPCAT).<sup>37</sup> Pursuant to the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, ‘imprisonment’ is a deprivation of liberty following a conviction of an offence and ‘detention’ is any deprivation of liberty, except as the result of a conviction.<sup>38</sup> Consequently, the term ‘deprivation of liberty’ under the CRC is defined in the same broad way as under the ICCPR and covers, thus, all kind of deprivation of liberties of children and not only detention for committing a crime.

However, one question which arises when one reads this definition is what exactly falls under the detention of persons in private custodial settings. According to Nowak’s and

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<sup>32</sup> CRC, Article 37 (b).

<sup>33</sup> Ibid.

<sup>34</sup> UN Doc. E/CN.4/1986/39, para. 90, at note 3.

<sup>35</sup> CRC, ‘General Guidelines regarding the form and contents of periodic reports to be submitted by States Parties under Article 44, Paragraph 1 (b), of the Convention’ (‘General Guidelines for Periodic Reports’), 1996, CRC/C/58, p. 40.

<sup>36</sup> UN General Assembly (UNGA), Resolution 45/113, ‘United Nations Rules for the Protection of Juveniles Deprived of their Liberty’ (‘The Havana Rules’), 14 December 1990, A/RES/45/113, p. 4.

<sup>37</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT), (adopted 18 December 2002, entered into force 22 June 2006), A/RES/57/199, Article 4 (2).

<sup>38</sup> UNGA, Resolution 43/173, ‘Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment’, 9 December 1988, A/RES/43/173, p. 1.

McArthur's Commentary to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), deprivation of liberty also includes private custodial settings where the public authority only gave its consent or acquiescence, such as private hospitals or nursing homes.<sup>39</sup> There are no reasonable grounds why this interpretation of the definition should not be applicable to the definition of deprivation of liberty in the Havana Rules and consequently to Article 37 (b) CRC.

### **3.2 The Right to Freedom of Bodily Movement**

The right to liberty of persons must be differentiated from the right to freedom of bodily movement. The right to liberty of persons equals 'the freedom of bodily movement in the narrowest sense'.<sup>40</sup> Less serious interventions with the freedom of bodily movement, such as restrictions of domicile or residency, banishment, captivity on an island or deportation from State territory, do not relate to the right to liberty but fall under the guarantee of 'freedom of movement'.<sup>41</sup> On the other hand, the right to liberty of person is, for example, interfered with in the case of 'forceful detention of a person at a certain, narrowly bounded location, such as a prison or some other detention facility, a psychiatric facility, a reeducation, concentration or work camp, or a detoxication facility for alcoholics or drug addicts, as well as an order of house arrest'.<sup>42</sup>

## **4. INTERNATIONAL LEGAL FRAMEWORK**

### **4.1 Relevant Conventions Ratified by Sri Lanka**

The main document laying down children's rights is the CRC which is applicable to persons below the age of eighteen years.<sup>43</sup> The CRC came into force on 2 September 1990, thirty days after the date of deposit of the twentieth instrument of ratification, as stipulated in Article 49 (1) CRC.<sup>44</sup> With 196 State Parties the CRC is the most ratified

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<sup>39</sup> M. Nowak and E. McArthur, *The United Nations Convention against Torture: A Commentary*, New York, Oxford University Press, 2008, p. 931.

<sup>40</sup> Nowak, p. 212.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> CRC, Article 1.

<sup>44</sup> Ibid, p. 1 and Article 49 (1).

human rights treaty in the world. It is, however, striking that the United States of America has not yet ratified the treaty.<sup>45</sup> Sri Lanka signed the CRC on 26 January 1990 and ratified it on 12 July 1991. It also ratified the Optional Protocol to the CRC on the involvement of children in armed conflict (CRC-OP-AC) on 8 September 2000, and the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (CRC-OP-SC) on 22 September 2006.<sup>46</sup> So far, Sri Lanka has submitted eight periodic reports to the Committee on the Rights of the Child (CRC), two of which relate to the Optional Protocols to the CRC.<sup>47</sup> Until now, Sri Lanka has not directly implemented the CRC in its national law. In 1992, as a result of the ratification of the CRC, Sri Lanka adopted the Children Charter of Sri Lanka. This Charter is, however, not legally binding but rather a policy document.<sup>48</sup>

Another Convention relevant to this thesis is the ICCPR which inter alia lays down the right to personal liberty. Sri Lanka acceded to this Covenant on 11 June 1980 and has so far submitted five periodic reports, the next one being due on 31 October 2017.<sup>49</sup>

The CRPD was signed by Sri Lanka on 20 March 2007 and ratified on 8 February 2016.<sup>50</sup> As the ratification only took place recently, Sri Lanka has so far not submitted its initial report to the Committee on the Rights of Persons with Disabilities (CRPD) which must be handed in at the latest two years after acceptance of the Convention.<sup>51</sup> The Optional Protocol to the CRPD which establishes an individual complaint mechanism has not yet been signed or ratified by Sri Lanka.<sup>52</sup>

Although Sri Lanka has already acceded to the CAT on 3 January 1994, it has so far not signed or ratified the OPCAT<sup>53</sup> which has the objective to ‘establish a system of regular

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<sup>45</sup> UNOHCHR, ‘Ratification Status for Sri Lanka’, [website], no date available, [bit.ly/RatificationStatus](http://bit.ly/RatificationStatus), (accessed on: 13 March 2017).

<sup>46</sup> Ibid.

<sup>47</sup> UNOHCHR, ‘Reporting Status for Sri Lanka’, [website], no date available, [bit.ly/ReportingStatus](http://bit.ly/ReportingStatus), (accessed on: 13 March 2017).

<sup>48</sup> White & Case LLP, ‘Access to Justice for Children: Sri Lanka’, 2014, p. 1, [bit.ly/AccessstoJusticeSL](http://bit.ly/AccessstoJusticeSL), (accessed on: 13 April 2017).

<sup>49</sup> UNOHCHR, ‘Ratification Status for Sri Lanka’; UNOHCHR, ‘Reporting Status for Sri Lanka’.

<sup>50</sup> UNOHCHR, ‘Ratification Status for Sri Lanka’.

<sup>51</sup> UNOHCHR, ‘Committee on the Rights of Persons with Disabilities’, [website], no date available, [bit.ly/CRPD2](http://bit.ly/CRPD2), (accessed on: 26 April 2017).

<sup>52</sup> UNOHCHR, ‘Ratification Status for Sri Lanka’.

<sup>53</sup> Ibid.



visits undertaken by independent international and national bodies to places where people are deprived of their liberty'.<sup>54</sup>

#### **4.2 The 'Last Resort' and 'Shortest Period of Time' Principle**

At the core of this thesis stands the principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time (in the following 'last resort' and 'shortest period of time' principle). The main document stipulating this principle is the CRC. The relevant provision is Article 37 (b) CRC which states that

The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.<sup>55</sup>

Recalling the definition of the terms 'arrest', 'detention' and 'imprisonment' in Chapter 3.1, this principle is not only applicable to children in conflict with the law who might be arrested or imprisoned, but also to children who are deprived of their liberty for other reasons such as mental illness, vagrancy, etc.

Although this means that Article 37 (b) CRC does cover all three categories of children of this thesis, some other documents which lay down the 'last resort' and 'shortest period of time' principle or related principles will be mentioned as this shows its wide acceptance and importance.

For children in conflict with the law the 'last resort' and 'shortest period of time' principle was already laid down in the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')<sup>56</sup> and the 1990 'Havana Rules'.<sup>57</sup> The 'Beijing Rules' do not only mention it with regard to pre-trial detention<sup>58</sup>, but also state in general that 'Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible

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<sup>54</sup> OPCAT, Article 1.

<sup>55</sup> CRC, Article 37 (b).

<sup>56</sup> UNGA, Resolution 40/33, 'United Nations Standard Minimum Rules for the Administration of Juvenile Justice' ('The Beijing Rules'), 29 November 1985, A/RES/40/33, Rules 13.1, 17.1 (b).

<sup>57</sup> UNGA, 'The Havana Rules', Rule 2.

<sup>58</sup> UNGA, 'The Beijing Rules', Rule 13.1.

minimum’.<sup>59</sup>

Also, the 1997 UN Guidelines for Action on Children in the Criminal Justice System<sup>60</sup>, and the 2008 UN Approach to Justice for Children<sup>61</sup> reiterate the ‘Last Resort’ and ‘Shortest Period of Time’ principle.

The 1990 UN Standard Minimum Rules for Non-custodial Measures (‘The Tokyo Rules’) which are applicable to all persons who are subject to alternatives to imprisonment – irrespective of their age – determine this principle explicitly for pre-trial detention stating that ‘Pre-trial detention shall be used as a means of last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.’<sup>62</sup> Furthermore, they stipulate that alternatives to pre-trial detention should be used as soon as possible and that the pre-trial detention should not last longer than necessary.<sup>63</sup> Also, the CRC in its General Comment No. 10 (2007) raises its concern with regard to the length of pre-trial detention in some countries and emphasizes that a range of alternative measures to pre-trial detention must be available in order to reduce its occurrence.<sup>64</sup>

With regard to children and childcare services, the UN Guidelines for the Prevention of Juvenile Delinquency (‘Riyadh Guidelines’) lay down that institutionalisation should be a measure of last resort and for the shortest appropriate period of time. In contrast to the other UN documents, these guidelines also mention criteria when institutionalisation should come into effect: (a) when harm has been inflicted on the child by the parents or guardians, (b) when the parents or guardians have abused the child sexually, physically or emotionally or (c) the child has been abandoned or exploited by them, (d) when the parents threaten the child with physical or moral danger due to their behavior, or (e) when the child or young person inflicts serious physical or psychological danger to himself and ‘neither the parents, the guardians, the juvenile himself or herself nor non-

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<sup>59</sup> Ibid, Rule 17.1 (b).

<sup>60</sup> UNGA, Resolution 1997/30, ‘UN Guidelines for Action on Children in the Criminal Justice System’, 21 July 1997, A/RES/1997/30, Rule 18.

<sup>61</sup> UN Security Council, Guidance Note, ‘UN Approach to Justice for Children’, 2008, Principle 8.

<sup>62</sup> UNGA, Resolution 45/110, ‘United Nations Standard Minimum Rules for Non-Custodial Measures’ (‘The Tokyo Rules’), 14 December 1990, A/RES/45/110, Rule 6.1.

<sup>63</sup> Ibid, Rule 6.2.

<sup>64</sup> CRC, CRC/C/GC/10, para. 80.

residential community services can meet the danger by means other than institutionalisation.<sup>65</sup>

Furthermore, the Guidelines for the Alternative Care of Children (GACC) state that the ‘Removal of a child from the care of the family should be seen as a measure of last resort and should, whenever possible, be temporary and for the shortest possible duration’<sup>66</sup> and that ‘Measures aimed at protecting children in care should be in conformity with the law and should not involve unreasonable constraints on their liberty and conduct in comparison with children of similar age in their community.’<sup>67</sup>

For children with disabilities Article 14 CRPD clarifies that persons with disabilities – including children – hold the right to liberty. In this context, State Parties have to assure that these persons ‘are not deprived unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty’.<sup>68</sup>

In its General Comment No. 9 (2007) on the rights of children with disabilities the CRC expressed its concern regarding the high degree of institutionalisation of children with disabilities.<sup>69</sup> It called on State Parties to ‘use the placement in institutions only as a measure of last resort, when it is absolutely necessary and in the best interest of the child.’<sup>70</sup> Furthermore, it expressed its misgivings regarding the institutionalisation of children with disabilities for the mere goal of limiting the child’s liberty of freedom of movement. It recommended the establishment of small residential care facilities and stressed the importance of rigorous screening and monitoring procedures.<sup>71</sup>

Although there is no international document explicitly stating that deprivation of liberty of persons with mental health conditions should be a measure of last resort and for the shortest appropriate period of time, the Human Rights Council expressed its concerns

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<sup>65</sup> UNGA, Resolution 45/112, ‘United Nations Guidelines for the Prevention of Juvenile Delinquency’ (‘The Riyadh Guidelines’), 14 December 1990, A/RES/45/112, Principle 46.

<sup>66</sup> UNGA, ‘Guidelines for the Alternative Care of Children’, Principle 14.

<sup>67</sup> Ibid, Principle 92.

<sup>68</sup> CRPD, Article 14 (1).

<sup>69</sup> CRC, General Comment No. 9, ‘The Rights of Children with Disabilities’, 2007, CRC/C/GV/9, p. 13.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

with regard to the institutionalisation of these persons in its resolution ‘Mental Health and Human Rights’.<sup>72</sup>

### **4.3 The Guiding Principles of the CRC**

According to the CRC’s General Guidelines on Periodic Reports from 1996, the CRC is based on four guiding principles. The first one is the principle of non-discrimination as laid down in Article 2 CRC which determines,

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>73</sup>

State Parties to the CRC are therefore not only obliged not to violate the rights in question (‘respect’), but also, they have to take appropriate measures so that individuals can enjoy and exercise the CRC stipulated rights (‘ensure’).<sup>74</sup>

The best interest of the child is another leading principle of the CRC which has to be taken into consideration ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies’.<sup>75</sup> This formulation suggests that the principle has a wide scope, covering not only the substantive provisions of the CRC, but also activities that are not expressly stipulated as an obligation in the CRC. Furthermore, although the principle is primarily applicable to acts of public officials, the term ‘private social welfare institutions’ extends it to acts of private bodies.<sup>76</sup>

The third guiding principle of the CRC, the right to life, survival and development, is laid down in Article 6 CRC. In this Article, the right to life is described as ‘inherent’,

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<sup>72</sup> Human Rights Council, Resolution 32/18, ‘Mental health and human rights’, 2016, A/HRC/RES/32/18, p. 2.

<sup>73</sup> CRC, Article 2.

<sup>74</sup> S. Detrick, *A Commentary on the United Nations Convention on the Rights of the Child*, The Hague, Kluwer Law International, 1999, p. 68.

<sup>75</sup> CRC, Article 3 (1).

<sup>76</sup> Detrick, p. 90.

meaning that the society has an obligation to protect each individual's right to life. The right to life is a non-derogable right, even in time of public emergency.<sup>77</sup>

Together with the right to survival, the right to development is only subject to progressive realization in the sense that State Parties need to ensure them only to the maximum extent possible. Accordingly, a State Party's capacities and its constitutional processes are taken into consideration when assessing whether it has fulfilled its obligation under Article 6 CRC.<sup>78</sup>

The fourth and last guiding principle is the respect for the views of the child principle which is laid down in Article 12 CRC. Accordingly, a 'child who is capable of forming his or her own views' has the 'right to express those views freely in all matters affecting the child'.<sup>79</sup> These views shall, subsequently, be taken into consideration in conformity with the child's age and maturity.<sup>80</sup> As a consequence, a child must in particular be heard in judicial or administrative proceedings which are of concern to the child – either in a direct way or through a 'representative of an appropriate body'.<sup>81</sup>

#### **4.4 General Measures of Implementation of the CRC**

According to Article 4 CRC 'States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.'<sup>82</sup> Which exact obligations derive from this Article, the CRC clarified in its General Comment No. 5 (2005).<sup>83</sup> The ones that are most relevant for this thesis are explained below.

##### **4.4.1 Legislative Measures and Justiciability of Rights**

After a state ratifies the CRC, it is obliged to ensure that all domestic legislation and administrative guidance, including relevant 'sectoral' laws, fully comply with the Convention. In this process, not only does each Article need to be considered but the

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<sup>77</sup> Ibid, p. 126.

<sup>78</sup> Ibid, p. 130.

<sup>79</sup> CRC, Article 12 (1).

<sup>80</sup> Ibid.

<sup>81</sup> Ibid, Article 12 (2).

<sup>82</sup> CRC, Article 4.

<sup>83</sup> CRC, General Comment No. 5, 'General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6)', 2005, CRC/GC/2003/527.

Convention needs to find recognition in a holistic way. Furthermore, particular attention should be paid to the justiciability of the rights recognized in the CRC. Therefore, the State needs to implement the right to have an effective remedy into its national law and establish child-sensitive procedures.<sup>84</sup>

It is essential that this ‘coordination process’ is a continuing one in the sense that not only existing but also proposed legislation needs to be reviewed. Furthermore, not only governmental departments should be involved in this process, but also independent institutions, such as NGOs, national human rights institutions, academics, affected children etc. The traditional way to do this is by incorporating the Convention. However, also in this case the state concerned has to bring all relevant domestic law in compliance with the Convention.<sup>85</sup>

#### **4.4.2 National Plan of Action**

The CRC recommends States to develop a ‘unifying, comprehensive, and human rights based’<sup>86</sup> national strategy or plan of action, which needs to be authorized by the highest level of government. This strategy should not only be a list of good intentions, but must stipulate a sustainable process, including the necessary financial and human resources. In addition, the strategy must take care of its implementation by determining its own monitoring and continuous review.<sup>87</sup>

#### **4.4.3 Coordinating Implementation**

In order to implement the above mentioned national strategy and the relevant laws effectively, central government departments, government departments in the different provinces, and civil society need to coordinate their efforts. This should ensure a cross-governmental recognition of the Convention’s principles and standards and the States’ obligations.<sup>88</sup>

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<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid, p. 5.

<sup>87</sup> Ibid, p. 5.

<sup>88</sup> Ibid, p. 6.

#### **4.4.4 Data Collection and Analysis**

According to the CRC one essential part of the implementation of the Convention is the ‘Collection of sufficient and reliable data on children, disaggregated to enable identification of discrimination and/or disparities in the realization of rights’.<sup>89</sup> This is important insofar, as these data can, on the one hand, be evaluated and used to assess progress in implementation and, on the other hand, be used to identify possible problems.<sup>90</sup>

#### **4.4.5 Monitoring Implementation**

In order to ensure that the implementation process is based on the principle of the best interest of the child and includes all the provisions of the Convention, an effective monitoring process is vital. This process should be two-fold on two levels: First of all, it should not only predict the impact of the measures taken, but also evaluate the actual impact of the implementation of taken measures. Secondly, there should be self-monitoring by the Government, but also an independent monitoring process should be in place. For example, an independent human rights institution could conduct this task.<sup>91</sup>

#### **4.4.6 Training and Capacity-Building**

Another important obligation State Parties to the CRC have is to provide systematic and ongoing training to all actors involved in the implementation process and to those working with and for children, such as government officials, members of the judiciary, teachers, social workers, those working in institutions and places of detention, the police, etc. People who undergo this training should learn that the child itself holds rights, which rights the CRC contains and how the CRC works in general.<sup>92</sup>

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<sup>89</sup> Ibid, p. 7.

<sup>90</sup> Ibid.

<sup>91</sup> Ibid, pp. 6, 9.

<sup>92</sup> Ibid, p. 7.

## 5. CHILDREN IN CONFLICT WITH THE LAW

### 5.1 Sri Lanka's Criminal Law in Relation to Juveniles

The juvenile justice system in Sri Lanka is primarily regulated in six different laws: the Penal Code of 1883, the Children and Young Persons Ordinance No. 48 of 1939 (CYPO), the Youthful Offenders (Training School) Ordinance No. 42 of 1944 (YOTSO), the Houses of Detention Ordinance No. 5 of 1907 (HDO), the Vagrants Ordinance No. 40 of 1841, and the Probation of Offenders Ordinance No. 42 of 1944 (POO).

The Penal Code sets the age of criminal responsibility in Sri Lanka at eight years.<sup>93</sup> However, in Section 76 of the Penal Code it is stipulated that children between eight and twelve years of age cannot be held criminally responsible if they have 'not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion'.<sup>94</sup>

The CYPO is applicable to children between eight and sixteen years of age. It provides for the establishment of juvenile courts and regulates, on the one hand, the procedural law for children who come in conflict with the law and, on the other hand, the care and protection of children. Under the CYPO, a person under the age of fourteen years is defined as a 'child' and a person who has attained the age of fourteen years and is not older than fifteen years is defined as a 'young person'.<sup>95</sup> Whether these age limits refer to the time the person committed the offence, to the time when charges were pressed against the person, or to the time of the trial is not specified by the CYPO. In the following, the term children might be used for both, children and young persons. Otherwise, it will be specified that children under the age of fourteen years are meant.

The YOTSO provides for the establishment of training schools for persons from sixteen to twenty-two years of age ('youthful person') and regulates their detention, training and rehabilitation.<sup>96</sup>

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<sup>93</sup> An Ordinance to provide a General Penal Code for Ceylon (Penal Code), No. 11 of 1883, Section 5 (a).

<sup>94</sup> Ibid, Section 76.

<sup>95</sup> CYPO, Section 88.

<sup>96</sup> An Ordinance to make Provision for the Establishment of Training Schools, for the Detention, Training and Reformation of Youthful Offenders, and for the purposes connected therewith (Youthful Offenders (Training Schools) Ordinance - YOTSO), No. 28 of 1939, Section 16.



The HDO provides for the establishment of houses of detention for vagrants. According to Section 2 of the HDO a vagrant is ‘(a) any person found asking for alms’<sup>97</sup> or ‘(b) any person not being physically able to earn, or being unwilling to work for, his own livelihood and having no visible means of subsistence’<sup>98</sup>.

In the Vagrants Ordinance, the procedure for the detention of vagrant boys and of girls who are victims of prostitution and related offences is regulated.<sup>99</sup> The POO regulates under which circumstances a court may issue a probation order.<sup>100</sup>

## 5.2 Procedural Law

As mentioned above, the CYPO provides for the establishment of juvenile courts dealing with cases involving children or young persons. A juvenile court is defined as a ‘court of summary jurisdiction sitting for the purpose of hearing any charge against a child or young person’.<sup>101</sup> As of June 2016, Sri Lanka has only set up two discrete juvenile courts, one in Battaramula (Western Province) and one in Jaffna (Northern Province).<sup>102</sup> All the other proceedings are, thus, held before magistrate’s courts or municipal courts sitting as juvenile courts.<sup>103</sup> Each magistrate’s court or municipal court appoints at least one person who acts as the children’s magistrate when the court is sitting as a juvenile court.<sup>104</sup> When a young person is accused of committing an ‘indictable offence’<sup>105</sup> the offender can choose whether he wants to be tried by the juvenile court or a higher court.<sup>106</sup>

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<sup>97</sup> An Ordinance to Provide for the Establishment of Houses of Detention for Vagrants (Houses of Detention Ordinance - HDO), No. 5 of 1907, Section 2.

<sup>98</sup> Ibid.

<sup>99</sup> An Ordinance to amend and consolidate the Law relating to Vagrants (Vagrants Ordinance), No 40 of 1841.

<sup>100</sup> An Ordinance to amend the Law relating to the Release of Offenders on Probation and to the Supervision of such Offenders, and to provide for the Establishment and Administration of a Probation Service (Probation of Offenders Ordinance - POO), No. 42 of 1944, Sections 3, 4.

<sup>101</sup> CYPO, Section 2.

<sup>102</sup> I. Range, S. Marasinghe and D. Mudalige, ‘Special Juvenile Court in Battaramulla’, *Daily News*, 14 August 2010, [bit.ly/DailyNews\\_JuvenileCourt](http://bit.ly/DailyNews_JuvenileCourt), (accessed on: 20 March 2017); Northern Provincial Council, ‘Sri Lanka’s Second Children’s Magistrate Court declared open in Jaffna – 17 November 2011’, [website], 2011, [bit.ly/NPC\\_ChildrenMagistrateCourt](http://bit.ly/NPC_ChildrenMagistrateCourt), (accessed on: 20 March 2017).

<sup>103</sup> CYPO, Sections 4 (1) and (2).

<sup>104</sup> Ibid, Sections 3 (1) and (2).

<sup>105</sup> According to the CYPO an ‘indictable offence’ is an offence which is triable by the High Court according to the First Schedule to the Code of Criminal Procedure Act (CYPO, Section 88)

<sup>106</sup> CYPO, Section 9 (4) (b) (i).

When a child or young person who is brought to a police station has allegedly committed an offence, the officer in charge of the police station must inform the probation officer of the Provincial Department of Probation and Child Care Services (DPCCS) of the nature of the offence and the day and hour of the court hearing.<sup>107</sup>

When the child or young person cannot be immediately brought before the competent court, the officer in charge of the police station can release him or her on bail which has to be paid by the parent or guardian. However, in three cases the officer in charge can also decide to detain the child or young person in a remand home or in the residence of ‘any person nominated by the Minister’: (1) the child or young person is accused of committing a scheduled offence<sup>108</sup>, (2) the child or young person would otherwise come into contact with any prostitute or reputed criminal, (3) or the ends of justice would be at risk.<sup>109</sup>

The procedure before juvenile courts is regulated by Sections 9 et seq. of the CYPO. First of all, the court is obliged to explain the substance of the alleged offence to the child or young person in easy-to-understand language. When deciding how a child or young person who has been found guilty should be dealt with, the juvenile court shall take into consideration the available information and circumstances of the juvenile offender, including a report of the responsible probation officer which describes the home surrounding, the school record, the health, and the character of the child or young person.<sup>110</sup> In order to facilitate the information gathered by the probation officer, the court has the possibility to send the child or young person to a remand home or to the custody of a fit person for twenty-one days. This period can even be extended by the court for an unspecified number of times.<sup>111</sup>

When the child or young person is found guilty, there are several institutional sentences available to the court: Where the crime is punishable with imprisonment in the case of

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<sup>107</sup> Ibid, Section 17; Verité Research, ‘Legal and Institutional Assessment of Sri Lanka’s Juvenile Justice System. Draft Report’, 2017 (unpublished), p. 29.

<sup>108</sup> According to the CYPO scheduled offences are offences specified in the Second Schedule of the Judicature Act: murder, culpable homicide not amounting to murder, attempt to murder, attempt to commit culpable homicide or robbery, rape, causing of injury with offensive weapons, abetment to causing of injury with offensive weapons.

<sup>109</sup> Ibid, Section 14.

<sup>110</sup> Ibid, Sections 9 (5) (f), 17 (2).

<sup>111</sup> Ibid, Section 10 (2).

an adult, the court can sentence the child or young person to be held in custody in a remand home for a maximum period of one month.<sup>112</sup> If he or she is twelve years or older the court can order him or her to be sent to a so-called approved or certified school for a period of three years.<sup>113</sup>

In the case of a young person who has an unruly or depraved character the court can sentence this person to be imprisoned instead of sending him or her to a remand home or certified school.<sup>114</sup> For children or young persons who commit scheduled offences other than murder, the court can also order detention ‘in such place and on such conditions as the Minister may direct’.<sup>115</sup>

Boys from sixteen to twenty-two years of age (‘youthful persons’) can be sent to a training school for youthful offenders for a period of three years in three cases: (1) they have been found guilty of an offence triable only by the High Court or a Magistrate’s Court, (2) they have previous convictions, (3) or they have violated a probation order. Precondition of this sentence is that the criminal habits or tendencies or associations of this youthful person suggest the detention in the training school.<sup>116</sup>

In case the court is not sure whether the youthful person can be detained in a training school, a report by the Commissioner General of Prisons on the suitability can be requested. While this report is being prepared, the youthful offender can be detained in the Welikada Prison (Colombo), the Bogambara Prison (Kandy) or the Jaffna Prison, for a maximum period of twenty-one days.<sup>117</sup>

Furthermore, persons between the age of sixteen and twenty-two years can be sent to a training school for a period of three years when they escape from the approved or certified school, fail to come back in case of temporary leave of absence or run away from the fit person. If they are under sixteen years, the court can exceed the detention in the approved or certified school for a maximum period of six months.<sup>118</sup>

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<sup>112</sup> Ibid, Section 25 (1).

<sup>113</sup> Ibid, Sections 26 (1), 42 (1).

<sup>114</sup> Ibid, Section 23 (2).

<sup>115</sup> Ibid, Section 24 (2).

<sup>116</sup> YOTSO, Section 4.

<sup>117</sup> Ibid, Sections 4 (2) (a) and (3), First Schedule.

<sup>118</sup> CYPO, Section 55 (1).

Besides those custodial sentences, the court has various alternative measures at its disposal. First of all, the court can remit a fine which is to be paid by the parent or guardian of the young offender.<sup>119</sup> According to Section 27 (1) of the CYPO the court can order the child or young person to be handed over to his or her parent or guardian or nearest relative who will be responsible for his or her good behaviour, order the child or young person to be placed with a fit person – not necessarily a relative – who is willing to take care of him or her, make an order of conditional discharge under Section 306 of the Criminal Procedure Code, or make a probation order. Section 30 of the CYPO gives the court the possibility to admonish and subsequently discharge the child or young person. For male offenders Section 29 of the CYPO provides for the controversial measure of a corporal punishment of six strokes with a light cane. Last but not least, the court can release the child or young person on a community based corrections order for offences that have a prescribed penalty of less than two years.<sup>120</sup>

The court also has the possibility to detain a child under the HDO. According to Section 4 of the HDO a vagrant child who ‘has been convicted of any offence by a Magistrate’s Court’<sup>121</sup> or a child who is obviously a vagrant but ‘refuses or fails to accompany a police officer, or to appear before a Magistrate’s Court’<sup>122</sup> can be ordered by the court to be detained in a detention home. Only children between the age of five and fifteen can be placed in such a home.<sup>123</sup>

According to Section 10 of the Vagrant Ordinance, boys between the age of twelve and twenty-one who address or follow people in a certain area against their will, who offer or commit illicit sexual intercourse or indecencies in public places, who wholly or partly earn their living by prostitution, who procure persons for illicit or unnatural intercourse in a systematic way, or who are wandering about the streets and address persons or are in the company of disorderly or immoral persons can be ordered to

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<sup>119</sup> CYPO, Section 28 (1).

<sup>120</sup> An Act to Make Provision for the Imposition of Community Based Correction Orders by Courts in Lieu of Sentences of Imprisonment for the Appointment of a Commissioner of Community Based Corrections and for Matters Connected Therewith or Incidental Thereto (Community Based Corrections Act), No. 46 of 1999, Section 5 (1) (b).

<sup>121</sup> HDO, Section 4 (1).

<sup>122</sup> Ibid, Section 10.

<sup>123</sup> C. Jayasooriya, ‘Rehabilitation, Care and Protection of Children in Contact with the Law: Is Institutionalization The Best Option?’, Term Paper, University of Colombo 2009, pp. 15, 16, [bit.ly/Jayasooriya\\_Research](http://bit.ly/Jayasooriya_Research), (accessed on: 30 May 2017).

execute a bond in which they promise to behave – with or without sureties.<sup>124</sup> If a boy violates this bond, the Magistrate can send him to prison where he has to work for a maximum period of six months. In case the boy is between twelve and sixteen years and the magistrate is not convinced of the bond option he can also be sent to an approved school for a period of at least three years. If the boy is more than sixteen years old he can be sent to a training school for youthful offenders also for at least three years. Already for possibly necessary inquiries a vagrant boy can be held in detention.<sup>125</sup>

### **5.3 Analysis of the Legal Framework and its Practical Implementation**

#### **5.3.1 Age Limits**

One of the most serious issues with regard to Sri Lanka's juvenile justice system are the set age limits. First of all, the age of criminal responsibility which is set at eight years is very low. Although Article 40 (3) CRC obliges states to establish a 'minimum age below which children shall be presumed not to have the capacity to infringe the penal law', it does not stipulate a specific minimum age. However, in its General Comment No. 10 (2007) the CRC specifies that a minimum age of criminal responsibility below the age of twelve years is not acceptable.<sup>126</sup> Already in 1995, the Human Rights Committee criticized the low age of criminal responsibility in Sri Lanka and the wide discretion of the judge when it comes to determining whether a child above eight years of age and under twelve years of age has enough maturity to be criminally responsible.<sup>127</sup>

In its National Action Plan for the Protection and Promotion for Human Rights 2011-2016 Sri Lanka recognized that the age of criminal responsibility is too low.<sup>128</sup> Furthermore, the GoSL promised in its fifth and sixth combined periodic report submitted to the CRC that they will continue to advocate for ultimately raising the

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<sup>124</sup> Vagrants Ordinance, Sections 3 (1) (e), 7, 9, 10.

<sup>125</sup> Vagrants Ordinance, Section 10.

<sup>126</sup> CRC, General Comment No. 10, p. 11.

<sup>127</sup> Human Rights Committee, 'Consideration of Reports submitted by States Parties under Article 40 of the International Covenant on Civil and Political Rights', 27 July 1995, CCPR/C/79/Add.56, p. 4.

<sup>128</sup> GoSL, 'National Action Plan for the Protection and Promotion of Human Rights 2011-2016', 2011, p. 102, [bit.ly/NHRA\\_2011-2016](http://bit.ly/NHRA_2011-2016), (accessed on: 5 May 2017).

minimum age of criminal responsibility to fourteen years.<sup>129</sup> Although amendments to the law have been tabled before the Cabinet of Ministers to raise the minimum age of criminal responsibility initially to twelve years, these amendments have not yet been approved by the Parliament.<sup>130</sup> According to Dr. Hemamal Jayawardena, a child protection specialist who is currently working for the UN International Children's Emergency Fund (UNICEF) in Sri Lanka, the amendment of the age of criminal responsibility is progressing slowly as some people fear that children who are between eight and twelve years on paper, but in reality as mature as a fourteen- or fifteen-year-old will not be rehabilitated in an institution anymore and can also not be rehabilitated by their parents at home.<sup>131</sup>

Another problem in this regard is that children between sixteen and eighteen years of age are not covered by the CYPO and consequently excluded from the juvenile justice system, even though the Age of Majority Ordinance 1865 determines the legal age of majority in Sri Lanka with eighteen years.<sup>132</sup> This is a problem insofar as all children under the age of eighteen should benefit from a special juvenile justice system which takes into account their particularities as described under Article 40 CRC.

### **5.3.2 Juvenile Courts**

Another striking issue is the fact that so far only two separate juvenile courts have been established, one in Battaramulla (Western Province) and one in Jaffna (Northern Province).<sup>133</sup> This leads to the problem that the majority of cases involving children or young persons are tried by magistrate courts or municipal courts which usually deal with adult cases. According to a yet to be published report by Verité Research, experts in the juvenile justice sector reported that children in conflict with the law often faced the same treatment as adult offenders.<sup>134</sup> A consequence of this might be that too little

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<sup>129</sup> GoSL, CRC/C/LKA/5-6, p. 54.

<sup>130</sup> Ibid.

<sup>131</sup> Interview No. 10, 25 May 2017.

<sup>132</sup> An Ordinance to make the Age of Eighteen Years the Legal Age of Majority in Sri Lanka (Age of Majority Ordinance), No. 7 of 1865, Section 2.

<sup>133</sup> I. Range, S. Marasinghe and D. Mudalige, 'Special Juvenile Court in Battaramulla'; Northern Provincial Council, 'Sri Lanka's Second Children's Magistrate Court declared open in Jaffna – 17 November 2011'.

<sup>134</sup> Verité Research, p. 26.

attention is paid to the principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time.

As the CYPO only covers children from eight to sixteen years, children between the ages of sixteen and eighteen are not even tried by magistrate courts sitting as juvenile courts. Furthermore, children or young persons charged with scheduled offences and children or young persons who commit a crime jointly with a person who has attained the age of sixteen years are exempt from the jurisdiction of the juvenile magistrate.<sup>135</sup>

As already mentioned in the previous chapter, this is a clear violation of Article 40 CRC.

### **5.3.3 Release on Bail and Pre-Trial Detention**

Section 14 of the CYPO gives police officers the possibility to release a child or young person on bail until the trial is taking place. This, however, is rarely done in practice.

According to experts interviewed by Verité Research, the reason for this could be that police officers do not want to take responsibility for releasing a child on bail.<sup>136</sup>

According to Dr. Hemamal Jayawardena, police officers are not aware of this option. They mostly use the general Criminal Procedure Act and are, thus, not familiar with the special features of the CYPO. Although they receive training in this regard, Dr. Jayawardena had the experience that the impact of these trainings is not long-lasting.<sup>137</sup>

Another problem in that respect is that the CYPO stipulates wide grounds under which police officers can commit a child or young person to a remand home or in the residence of one of the persons the Minister appointed to be permitted to detain a child.<sup>138</sup> In general, the CYPO lacks a provision laying down that pre-trial detention should be a measure of last resort and for the shortest appropriate period of time as laid down in the Beijing Rules.<sup>139</sup>

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<sup>135</sup> Ibid, Sections 5 (1) (a) and (b).

<sup>136</sup> Verité Research, p. 22.

<sup>137</sup> Interview No. 10, 25 May 2017.

<sup>138</sup> CYPO, Section 14.

<sup>139</sup> UNGA, 'The Beijing Rules', Rule 13.1.

### 5.3.4 Court Proceedings

Also with regard to the criminal proceedings, there are several problems arising from the law itself and from its practical implementation. First of all, the CYPO does not grant the child or young person the right to legal representation. Section 16 (3) of the CYPO requires the court to make the parent or guardian of the child or young person attend the trial. These persons, however, are in no way capable of legally representing the child in the same way as a professional. In practice, this leads to children pleading guilty.<sup>140</sup> This is a clear violation of Article 40 (2) (iii) and (iv) CRC which stipulate, on the one hand, that children should be provided with legal or other appropriate assistance and, on the other hand, that children should not be forced to plead guilty.

A positive aspect of the CYPO are its Sections 10 and 17 which require the court to take into consideration the circumstances of the child – especially through the social inquiry report delivered by the probation officer – when deciding on how to deal with the child. In practice, however, these reports did not contain sufficient information and commonly, standardized phrases and conclusions were used.<sup>141</sup> Although the report which revealed these shortcomings is rather old, it is still valid according to Prof. Sharya Scharenguivel, law professor at the Faculty of Law in Colombo.<sup>142</sup> Another problem is that magistrates often did not put enough emphasis on the social inquiry report or did not consider it at all.<sup>143</sup> This might lead to children being deprived of their liberty although other options would have been available.

Although the court might ask the child questions with regard to the social inquiry report, there are no provisions stating that a child who is capable of forming his or her own views should be asked for its opinion with regard to the decision how he or she should be dealt with as stipulated in Article 12 (2) CRC.<sup>144</sup> Furthermore, it should be included that the best interest of the child as laid down in Article 3 CRC should be taken into consideration when deciding on a child's case.

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<sup>140</sup> Lawyers for Human Rights and Development (LHRD), 'Study on Young Persons Detained at the School for Youthful Offenders at Ambepussa', 2010, p. 17; Verité Research, p. 28; LHRD, 'A Study on Certified Schools and Remand Homes', 2012, p. 38.

<sup>141</sup> V. Samaraweera, 'Report on the Abused Child and the Legal Process of Sri Lanka', 1997, p. 60.

<sup>142</sup> Interview No. 1, 17 May 2017.

<sup>143</sup> Verité Research, p. 28.

<sup>144</sup> CYPO, Section 10 (1).



Another problem in this context is that police officers have in some cases reportedly failed to comply with Section 17 of the CYPO which requires them to inform the probation officer in case a child or young person is to be brought before a court. According to experts in the field, this often lead to a higher risk of vulnerability of the child or young person and to children being without representation during the judicial proceedings which, as already explained, is a violation of Article 40 (2) (iii) CRC.<sup>145</sup>

Also cause for concern is the possibility of the court to send a child or young person to a remand home for an unspecified period of time for the sole purpose of facilitating the information gathering for the social inquiry. As UNICEF Regional Office for South Asia already stated in a report in 2006 this means that the child might be deprived of its liberty for the sole purpose of making it easier for the probation officer to fulfil his or her task.<sup>146</sup>

### **5.3.5 Sanctions**

Regarding the sanctions available to courts it must, first of all, be noted that none of the juvenile criminal laws have a provision stating that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time.<sup>147</sup> The sentences themselves and their practical implementation moreover suggest that deprivation of liberty is neither a measure of last resort, nor for the shortest appropriate period of time.

It is, for example, worrying that a child above twelve years must be sent to an approved or certified school for a fixed period of three years as this might lead to the nonsensical result of a child being detained for a longer period than an adult for the same offence.<sup>148</sup>

Furthermore, it is not comprehensible why all children should be sent to an approved or certified school for a fixed period of three years, regardless of the offence they have committed. The same is true for youthful offenders who are also always sent to training schools for a period of three years.<sup>149</sup> This clearly violates Rule 5.1 of the Beijing Rules

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<sup>145</sup> LHRD, 2010, p. 13; Verité Research, p. 22.

<sup>146</sup> UNICEF Regional Office for South Asia, 'Juvenile Justice in South Asia: Improving Protection for Children in Conflict with the Law', p. 111, [http://bit.ly/UNICEF\\_JJ](http://bit.ly/UNICEF_JJ), (accessed on: 15 February 2017).

<sup>147</sup> CYPO; YOTSO; HDO; Vagrants Ordinance.

<sup>148</sup> Verité Research, p. 14.

<sup>149</sup> YOTSO, Section 4.

which stipulate that ‘any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence’.<sup>150</sup> Although the detention in remand homes is for a maximum period of one month, children are often detained for a much longer period.<sup>151</sup>

Another worrying provision of the CYPO is its Section 23 (2) which states that a young person who has an unruly or depraved character can be sent to prison instead of a remand home or certified school.<sup>152</sup> This leads to the absurd result of a young person being punished solely for his or her character.

Furthermore, it is incomprehensible why youthful offenders should be detained in prisons while the General Commissioner of Prisons is preparing his report on the suitability of a detention in a training school.<sup>153</sup> This means that a child is being detained in prison for the sole reason of facilitating the General Commissioner’s work. At least this detention is limited to a maximum period of twenty-one days.<sup>154</sup>

A study conducted by Lawyers for Human Rights and Development (LHRD) on the training school for youthful offenders at Ambepussa furthermore discovered that children who committed petty theft are sent to the training school, although adults who commit the same crime as first time offenders are generally not punished with custodial sentences.<sup>155</sup>

Another worrying issue is that the HDO and the Vagrants Ordinance allow for the detention of children for the sole reason of being a vagrant or of engaging in behavior that serves their survival.<sup>156</sup> Under the Vagrants Ordinance vagrant boys can even be held in detention for inquiries.<sup>157</sup>

### **5.3.6 Alternative Measures at the Hands of the Court**

As already described above courts have several alternative measures to deprivation of liberty at their hands. This is in accordance with Article 40 (3) (b) CRC. However, these

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<sup>150</sup> UNGA, Beijing Rules, Rule 5.1.

<sup>151</sup> LHRD, 2012, pp. 5, 6, 33, 34.

<sup>152</sup> Ibid, Section 23 (2).

<sup>153</sup> YOTSO, Sections 4 (2) (a), 4 (3).

<sup>154</sup> Ibid, Section 4 (3).

<sup>155</sup> LHRD, 2010, p. 4.

<sup>156</sup> HDO; Vagrants Ordinance.

<sup>157</sup> Vagrants Ordinance, Section 10.

alternatives are either not used at all or not used enough. For example, several of the interviewed experts argued that the possibility to place a child or young person into the custody of a fit person is not really used in practice. One of the reasons for this is that there is no register or list on such persons available to the court.<sup>158</sup>

With regard to the alternative measure of probation there are different opinions on whether this is practiced. According to Nirmalee Perera, probation officer at the National DPCCS, probation orders are used by courts.<sup>159</sup> Prof. Sharya Scharenguivel, on the other hand, said that probation does not work.<sup>160</sup> According to a study conducted for Save the Children from 2006, more emphasis should be put on children when it comes to probation orders and probation orders should in general be better used in order to avoid detention.<sup>161</sup>

Clear is, however, that community based corrections have not been used at all in respect of children in conflict with the law.<sup>162</sup> The problem might be that the CYPO itself has no provision with regard to community based correction. A community based correction order for a child in conflict with the law needs, thus, to be based on the Community Based Corrections Act.

### **5.3.7 Actors Involved in the Juvenile Justice System**

As previously explained, there are problems with regard to the cooperation between the police force and the probation officers of the Provincial DPCCS. The police force sometimes fails to inform the probation officer in case a child is to be brought before a court. As this can have fatal consequences for the child concerned, it is important to find ways to enhance the cooperation between those two kind of officers.

Although there are various coordination meetings in fora such as the Divisional, the District and the Village Child Development Committees, the effectiveness of these

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<sup>158</sup> Interview No. 1, 17 May 2017; Interview No. 2, 17 May 2017; Verité Research, pp. 26, 40.

<sup>159</sup> Interview No. 15, 31 May 2017.

<sup>160</sup> Interview No. 1, 17 May 2017.

<sup>161</sup> J. Parry-Williams (Save the Children), 'Suggestions for a Strategy to Develop Alternative Care and Diversion Systems through Government Structures in Sri Lanka', 2006, pp. 7, 18. Available from ResearchGate, (accessed on: 23 May 2017).

<sup>162</sup> Verité Research, p. 28; M. A. Niriella, 'The emergence of restorative justice in Sri Lanka: a review essay', *International Journal of Comparative and Applied Criminal Justice*, Vol. 37, No. 3, 2012, p. 242. Available from ResearchGate, (accessed on: 16 June 2017); CRC, Consideration of Reports submitted by States Parties under Article 44 of the CRC, 20 January 2010, CRC/C/LKA/3-4, p. 90.

meetings has been questioned as police officers and probation officers often do not find the time to attend the Divisional and the District Child Development Committees.<sup>163</sup> Furthermore, the lack of financial and technical capacity among the officers hampers an effective multi-coordination process. Also, the Village Child Development Committees are suffering from a lack of resources and technical facilitation and are not considered an effective forum.<sup>164</sup>

Another problem in this regard is that police officers, probation officers and magistrates are trained separately and by many different organisations. The advantage of a joint training would be a common level of knowledge and enhanced collaboration among the different actors.<sup>165</sup>

But not only the lack of joint training is a problem but, in general, all the actors involved in the juvenile justice system are suffering from a lack of training on juvenile justice and child protection and demonstrate poor knowledge on the respective laws and policies which negatively affects the children concerned.<sup>166</sup> With regard to police officers the problem is that the training conducted has no long-lasting impact. A study from 2015 showed, for example, that short-term training of Sri Lankan police officers does not lead to a change in their attitudes with regard to child protection.<sup>167</sup>

Also, with regard to magistrates and high court judges, there seems to be a lack of training. As already mentioned above, they often failed to take into consideration the social inquiry report of the probation officers when deciding on how to deal with a child. Furthermore, it seems that they are not ordering community based correction with regard to juvenile offenders, although this would be a good alternative to detention.<sup>168</sup>

Before 1987, probation officers underwent a 6-month long initial training by the National DPCCS. Following the provincial devolution since the 13<sup>th</sup> amendment to the

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<sup>163</sup> Save the Children, 'Investing in Children in Sri Lanka – Child Centric Resources Analysis', 2016, p. 56, [bit.ly/ChildCentricResourceAnalysis](http://bit.ly/ChildCentricResourceAnalysis), (accessed on: 13 June 2017).

<sup>164</sup> Ibid, pp. 56, 57.

<sup>165</sup> Interview No. 4, 18 May 2017; Interview No. 15, 31 May 2017.

<sup>166</sup> Verité Research, p. 62.

<sup>167</sup> B. Pathirana and P. de Zoysa, 'The effectiveness of a short-term training program on child protection among Sri Lankan police officers', *International Journal of Police Science & Management*, Vol. 17, No. 3, 2015. Available from Sage Journals, (accessed on: 23 June 2017).

<sup>168</sup> Verité Research, p. 28.

constitution and due to resource limitations, this is not possible anymore.<sup>169</sup> Probation Officers furthermore suffer from low salaries and a marginalization within the juvenile justice system. This leads to a lack of new and trained probation officers and has the negative consequence of non-institutional approaches being less used in the juvenile justice system.<sup>170</sup>

### **5.3.8 Children Escaping from Institutions**

Last but not least, the Sections of the CYPO dealing with children escaping from institutions must be mentioned. According to Section 49 (2) of the CYPO a child or young person who escapes from a remand home may be captured and brought back to the home without a warrant and has to pay a fine of 200 rupees and/or has to stay longer in the home for a maximum period of six months. According to Section 55 of the CYPO a child or young person who escapes from an approved or certified school or fails to come back may also be captured without warrant and be subject to an increase of the detention period for a maximum period of six months. Young persons might as an alternative also be sent to a training school for three years. These provisions are obviously of punitive character and prove that the children are not allowed to leave the institutions at will. Furthermore, they are against the principle that deprivation of liberty should be a measure of last resort and for the least appropriate period of time as they give the court the possibility to extend the duration of the detention.

## **5.4 Existing Institutions and Situation therein**

In Sri Lanka, there exist six different kinds of institutions for children in conflict with the law: correctional centres for youthful offenders, training schools for youthful offenders, detention homes, remand homes, certified schools and approved schools. All of these are state-run institutions, except the one approved school in Maggona.<sup>171</sup> Although children in conflict with the law can also be sent to approved schools, the

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<sup>169</sup> Save the Children, p. 265; Government Information Center, 'Co-ordination between the National Department and the Provincial departments of Probation and Child Care Services', [website], 2009, [bit.ly/GIC\\_Coordination](http://bit.ly/GIC_Coordination), (accessed on: 27 March 2017).

<sup>170</sup> Verité Research, p. 32.

<sup>171</sup> Save the Children, p. 242.

approved school in Maggona was only built to house orphaned, deserted, destitute and abused children and will, thus, only be considered under Chapter 6.<sup>172</sup> Whereas detention homes, remand homes and certified schools are resourced and managed by the Provincial DPCCS, correctional centres and training schools for youthful offenders fall within the Department of Prison's (DoP) remit.<sup>173</sup> In total, there are nineteen institutions, spread over all nine provinces except the Eastern Province, the North Western Province and the Sabaragamuwa Province.<sup>174</sup> The following table gives an overview of the institutions and their purpose.

**Table 01: Overview of Institutions for Children in Conflict with the Law 2012**

| Type of Institution                         | No. of Institutions | Purpose of Institution  |
|---|---------------------|---|
| Correctional Centres for Youthful Offenders | 2                   | drug rehabilitation of boys between the ages of sixteen and twenty-two  |
| Training School for Youthful Offenders      | 1                   | train and discipline convicted and non-convicted boys between the ages of sixteen and twenty-two  |
| Detention Homes                             | 1                   | rehabilitate destitute children over eight years of age; also houses children who committed burglary, theft, sale and use of alcohol; children in need of care and protection; disobedient children; others |
| Remand Homes                                | 10                  | house children while their cases are being heard; detain convicted children   |
| Certified Schools                           | 5                   | provide vocational training to children in conflict with the law (and children in need of care and protection)  |
| <b>Total</b>                                | <b>19</b>           |   |

Sources: DPCCS, 2013, p. 18; DoP, 'Prison Statistics of Sri Lanka', 2016, p. 3; CYPO; YOTSO.

In all of the above-mentioned institutions the children are deprived of their liberty as defined in Chapter 3.1. They cannot leave the institution at will and their life is strictly regulated and disciplined with little contact to the outside world.<sup>175</sup> A study conducted by LHRD on certain selected certified schools and remand homes, the approved school in Maggona and a children's home for girls in Gangodawila found that many of the children in these institutions originally come from areas far away from the institution.

<sup>172</sup> DPCCS, 'Current Status of Child Care Institutions and Institutionalized Children in Sri Lanka', 2013, p. 18, [bitly/Current\\_Childcare\\_Analysis\\_book](http://bitly/Current_Childcare_Analysis_book), (accessed on: 13 March 2017).

<sup>173</sup> Save the Children, p. 260.

<sup>174</sup> Department of Prison (DoP), 'Prison Statistics of Sri Lanka', 2016, p. 3, [bit.ly/PrisonStatistics2016](http://bit.ly/PrisonStatistics2016), (accessed on: 17 June 2017); DPCCS, 'Annual Statistical Report 2011, 2012', 2012.

<sup>175</sup> Jayasooriya, p. 29.

Consequently, their families are not able to visit them for years.<sup>176</sup> As there is only one training school for youthful offenders in Watareka (Southern Province), it can reasonably be concluded that the same problem exists for children who are put in this institution.<sup>177</sup> This constitutes a violation of Article 9 (3) CRC, which states that children who are separated from their parents have the right to stay in regular contact with their parents, unless it is detrimental to their best interest.

The above-mentioned study furthermore revealed that children have no contact with the outside world and have to stay in the schools or remand homes with the exception of ‘poya days’<sup>178</sup> where they can visit the closest temple.<sup>179</sup> This was also confirmed by some of the interview partners.<sup>180</sup>

Another report from Save the Children discovered that children in institutions are confronted with a lack of individual choice and of privacy. The interviewed children did, for example, complain about a lack of the opportunity to make day to day choices and decisions that are normal for children their age.<sup>181</sup> This is contrary to the right to development of children as one of the guiding principles of the CRC.<sup>182</sup> In addition, children in state institutions are obliged to wear government clothes.<sup>183</sup> This does not only lead to the stigmatization of these children as offenders, but is also contrary to Rule 36 of the Havana Rules.

Another problem that needs to be mentioned is the lack of qualified staff in the institutions. According to the DPCCS’ report from 2013, 46% of the staff in child care institutions was not trained in the area of child care and counselling.<sup>184</sup> Furthermore, Verité Research’s assessment of Sri Lanka’s juvenile justice system revealed that low salary scales are decreasing the motivation among the staff in the institutions and

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<sup>176</sup> LHRD, 2012, p. 29.

<sup>177</sup> DoP, p. xiii.

<sup>178</sup> Name for any holiday in Sri Lanka that is held to mark a full moon (Sussex Information Centre, ‘What is a Poya Day in Sri Lanka’, *Secret Sri Lanka*, [web blog], no date available, <http://bit.ly/PoyaDaysSriLanka>, (accessed on: 24 July 2017).

<sup>179</sup> LHRD, 2012, p. 29.

<sup>180</sup> Interview No. 1, 17 May 2017; Interview No. 2, 17 May 2017; Interview No. 3, 25 May 2017; Interview No. 5, 19 May 2017; Interview No. 8, 24 May 2017.

<sup>181</sup> R. Jayathilake and H. Amarasuriya, ‘Home Truths: Children’s Rights in Institutional Care in Sri Lanka’, 2005, p. 68.

<sup>182</sup> CRC, Article 6.

<sup>183</sup> Jayathilake and Amarasuriya, p. 54.

<sup>184</sup> DPCCS, 2013, p. 40.

keeping adequately trained professionals from wanting to work in the institutions. Ultimately, this leads to a lack of human resources which clearly increases the risk of the children being deprived of their liberty.<sup>185</sup> However, according to Rules 81 and 85 of the Havana Rules, the institutions should be equipped with sufficient staff who should receive appropriate training.

## **5.5 Data on Institutions and Children**

The latest nationwide data available with regard to those institutions which are under the purview of the DPCCS is the annual statistical report covering the years 2011 and 2012. The challenge in this regard is that the data collection on the institutions and the children is gathered by the Provincial DPCCS and there is no national systematized and comprehensive database yet. According to the GoSL, the National Commissioner of Probation and Childcare Services is in the process of establishing such a database at both the national and provincial levels.<sup>186</sup> According to Nirmalee Perera, probation officer of the National DPCCS, they have just started establishing this database.<sup>187</sup>

The latest data with regard to the institutions which are under the purview of the DoP are the prison statistics of May 2016.<sup>188</sup>

### **5.5.1 Total Number of Children**

According to the prison statistics of May 2016, Sri Lanka has only one training school for youthful offenders which used to be in Ambepussa, but was moved to Watareka (Southern Province) in March 2014. As of 2015, there were twenty-one convicted male offenders in that training school, eighteen of which were under seventeen years.<sup>189</sup>

For drug addicted youthful offenders, there are two correctional centres: one in Pallansena (Western Province) which consists of a closed prison and an open camp and one in Taldena (Uva Province) which is only an open camp. The statistic does not provide any detail on how many youthful offenders are in those centres.<sup>190</sup>

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<sup>185</sup> Verité Research, p. 32.

<sup>186</sup> GoSL, CRC/C/LKA/5-6, p. 9.

<sup>187</sup> Interview No. 15, 31 May 2017.

<sup>188</sup> DoP, 'Prison Statistics of Sri Lanka'.

<sup>189</sup> Ibid, pp. xiii, 48.

<sup>190</sup> Ibid, p. 3.



The following table shows the total number of institutions which are under the purview of the DPCCS and the total number of children in these institutions in the year 2012.

**Table 02: Total Number of DPCCS Institutions and of Children in these Institutions 2012\***

| Name of Institution | Number of Institutions | Number of Children |
|---------------------|------------------------|--------------------|
| Detention Homes     | 1                      | 71                 |
| Remand Homes        | 10                     | 1,474              |
| Certified Schools   | 5                      | 183                |
| <b>Total</b>        | <b>17</b>              | <b>1,728</b>       |

\*this number also includes children and child care services (Chapter 6)

Source: DPCCS, 2012, pp. 1, 2, 11.

### 5.5.2 Reasons for Admission and Size of Institutions

With regard to the training schools and the correctional centres for youthful offenders, the latest prison statistics do not provide any detail on the reason for their admission to those institutions.<sup>191</sup> The latest statistics of the DPCCS from the year 2012, on the other hand, provide more detailed information on this which is depicted in Tables 03, 04, 05. What needs to be taken into consideration is that children and child protection services are also included in these statistics.

First and foremost, these data show that all institutions are detaining a considerably high number of children. Especially striking is the remand home in Makola with almost 500 children. With regard to the reason for the admission it is noticeable that 26% of children in remand homes and 43% of children in certified schools are there due to theft. Furthermore, 24 children (34%) in the Halpatota Detention Home, 46 children (3%) in remand homes and 26 children (14%) in certified schools are there simply because of being disobedient to their parents. Especially in the detention home and in the certified schools this is a strikingly high number. Shocking is also that 89 children are in remand homes because of straying or being destitute. Generally, these data suggest that many children in institutions have been sent there on questionable grounds. This is contrary to Rule 17.1 (c) of the Beijing Rules which limits deprivation of liberty

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<sup>191</sup> DoP, 'Prison Statistics of Sri Lanka'.

to ‘a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response’.<sup>192</sup>

**Table 03: Admission to the Halpatota Detention Home by Reason 2012**

| Offence                        | Number of Children |
|--------------------------------|--------------------|
| Thefts/Burglaries              | 6                  |
| Disobedience to parents        | 24                 |
| Sale or use of Alcohol         | 7                  |
| In need of care and protection | 20                 |
| Other                          | 14                 |
| <b>Total</b>                   | <b>71</b>          |

Source: DPCCS, 2012, p. 10.

**Table 04: Admissions to Remand Homes by Reason 2012**

| Offence                           | Makola     | Anuradhapura | Kithulampitiya | Rammuthugala | Werawalawatta | Jaffna    | Meeghakotuwa | Dehiowita | Yasodara  | Safe House | Total        |
|-----------------------------------|------------|--------------|----------------|--------------|---------------|-----------|--------------|-----------|-----------|------------|--------------|
| Murder/Trying to Murder           | 8          | 2            | 2              | 0            | 0             | 1         | 0            | 0         | 0         | 16         | 29           |
| Arson                             | 0          | 0            | 0              | 0            | 0             | 0         | 0            | 0         | 0         | 14         | 14           |
| Victim of Abuse/Sexual Harassment | 14         | 0            | 6              | 0            | 35            | 3         | 0            | 3         | 3         | 12         | 76           |
| Sexual Abuse                      | 9          | 8            | 3              | 4            | 1             | 4         | 61           | 0         | 45        | 24         | 159          |
| Theft                             | 97         | 61           | 53             | 1            | 70            | 28        | 0            | 23        | 0         | 54         | 387          |
| Quarrelling                       | 18         | 17           | 11             | 0            | 18            | 8         | 0            | 5         | 0         | 10         | 87           |
| Disobedience                      | 11         | 0            | 5              | 0            | 0             | 0         | 0            | 1         | 3         | 26         | 46           |
| Straying                          | 21         | 2            | 4              | 2            | 11            | 0         | 2            | 0         | 1         | 0          | 43           |
| Being Stranded                    | 5          | 10           | 0              | 0            | 2             | 0         | 2            | 0         | 0         | 5          | 24           |
| Use of Liquor/Drugs               | 7          | 28           | 0              | 1            | 3             | 4         | 0            | 3         | 0         | 19         | 65           |
| Child Labour                      | 1          | 1            | 2              | 0            | 0             | 7         | 0            | 4         | 2         | 21         | 38           |
| Further Investigation             | 290        | 0            | 0              | 0            | 0             | 0         | 0            | 5         | 2         | 3          | 300          |
| On Suspicion                      | 9          | 2            | 10             | 1            | 1             | 0         | 0            | 7         | 0         | 2          | 32           |
| Others                            | 2          | 0            | 60             | 83           | 10            | 5         | 14           | 0         | 0         | 0          | 174          |
| <b>Total</b>                      | <b>492</b> | <b>131</b>   | <b>156</b>     | <b>92</b>    | <b>151</b>    | <b>60</b> | <b>79</b>    | <b>51</b> | <b>56</b> | <b>206</b> | <b>1,474</b> |

Source: DPCCS, 2012, p. 6.

<sup>192</sup> UNGA, ‘The Beijing Rules’, Rule 17.1 (c).

**Table 05: Admission to Certified Schools by Reason 2012\***

| Offence                        | Makola    | Kappetipola | Hikkaduwa | Rammutugala | Kondavil  | Total      |
|--------------------------------|-----------|-------------|-----------|-------------|-----------|------------|
| Theft/Burglaries               | 33        | 13          | 11        | 10          | 11        | 78         |
| Disobedience to parents        | 11        | -           | 4         | 3           | 8         | 26         |
| Sale and use of alcohol        | 6         | 2           | -         | -           | 7         | 15         |
| In need of care and protection | 6         | 4           | 23        | 12          | 2         | 47         |
| Suicide attempts               | -         | -           | -         | -           | -         | -          |
| Others                         | 9         | 2           | 2         | 4           | -         | 17         |
| <b>Total</b>                   | <b>65</b> | <b>21</b>   | <b>40</b> | <b>29</b>   | <b>28</b> | <b>183</b> |

Source: DPCCS, 2012, p. 7.

## 5.6 Measures Aiming at Reducing Deprivation of Liberty

### 5.6.1 Legislative Measures

The Ministry of Justice already acknowledged that the CYPO has apparent shortcomings and first of all decided to reform the law. However, as there would have been too many changes the Ministry finally agreed on drafting a new law which would replace the CYPO: The Children (Judicial Protection) Bill (CJPB).<sup>193</sup>

If enacted, this Bill would change a lot of things for the better. The most important feature is that it is applicable to all children up to eighteen years of age.<sup>194</sup> Furthermore, it explicitly stipulates at the outset that the best interest of the child should be a prevailing principle in all the matters concerning children and that the child should be given a voice.<sup>195</sup>

During the judicial proceedings, the child would not only have the possibility to get support by a judicial guardian who has the task to help the child with the legal proceedings and to report essential or urgent matters to the court, but the child would also be asked by the court at the beginning of the proceedings whether it needs the support of an Attorney-at-law. Furthermore, the CJPB imposes the duty on the court to

<sup>193</sup> Interview No. 9, 24 May 2017.

<sup>194</sup> Children (Judicial Protection) Bill (CJPB), March 2014, Section 68.

<sup>195</sup> Ibid, Sections 2 (a), (c).

provide legal assistance to the child.<sup>196</sup> All of these provisions would lower the chances that the child pleads guilty no matter what had happened.

Another important feature of the CJPB is the more in-depth assessment of the child, its situation and the best solution for this child. For example, the Bill provides for the conduct of a case conference. This conference should assist the court in deciding on where to place a convicted child, how to rehabilitate and reintegrate the child and how to trigger free and voluntary reconciliation between the child and the victim. In addition, the probation officer is not only obliged to submit one social report, but shall provide an interim and a final report.<sup>197</sup> Also the quality of these reports would be raised by the CJPB as they should not only inform the court about the status of the child, but also about the child's wishes.<sup>198</sup>

The Bill would furthermore contribute to de-institutionalisation to a certain degree as it would repeal Section 14 of the CYPO which determines broad grounds for pre-trial detention of children.<sup>199</sup> Moreover, it states that children in conflict with the law can be held in pre-trial detention for a maximum period of four months with a review every fourteen days.<sup>200</sup> It also stipulates that a child can be detained in an approved or certified school for a maximum period of three years. It seems, thus, that also shorter periods of detention would be possible.<sup>201</sup> Furthermore, it would not be possible anymore to arrest a child without a warrant who escaped from a remand home, approved or certified school etc.<sup>202</sup>

Another positive feature would be the inclusion of community correction orders as a form of sentencing for children above fourteen years of age.<sup>203</sup> Furthermore, the CJPB states that "The words "conviction" and "sentence" shall not be used in relation to any

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<sup>196</sup> Ibid, Sections 28 (a), 40 (1), 42 (1).

<sup>197</sup> Ibid, Section 30.

<sup>198</sup> Ibid, Sections 14, 23.

<sup>199</sup> CJPB.

<sup>200</sup> Ibid, Section 24 (3).

<sup>201</sup> Ibid, Section 56.

<sup>202</sup> CJPB.

<sup>203</sup> Ibid, Section 35 (1) (f).

child in conflict with the law'<sup>204</sup> instead of simply stating that they 'shall be ceased to be used'<sup>205</sup>.

However, as of July 2016 the CJPB remains a draft. At the moment, it is at the Attorney General's Office which will decide whether the Bill has to be approved by all the nine Provincial Councils as probation and child care services are a devolved subject since the 13<sup>th</sup> amendment to the Constitution. This would considerably delay the enactment of the law.<sup>206</sup> The issue of the delay of its enactment has already been raised in the 'National Action Plan on the Promotion and Protection of Human Rights 2011-2016'.<sup>207</sup> Furthermore, the Government has reiterated that the CJPB would be passed in its fifth and sixth combined periodic report to the CRC.<sup>208</sup> As the Attorney General's Office has not yet decided whether the approval of the nine Provinces is required, it is difficult to predict when the Bill will finally be enacted.

Another problem with regard to the CJPB is the selective consultation during the drafting process. For example, the Human Rights Commission of Sri Lanka (HRCSL) and Prof. Sharya Scharenguivel, who teaches at the Law Faculty in Colombo and is inter alia focusing on children's rights, have not been involved in formulating the CJPB.<sup>209</sup> Especially with regard to the Human Rights Commission this gives reason for concern as Section 10 (c) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 explicitly stipulates that the HRCSL has the function 'to advise and assists the government in formulating legislation and administrative directives and procedures, in furtherance of, the promotion and protection of fundamental rights'<sup>210</sup>. According to Ambika Satkunanathan, member of the HRCSL since 2015, the CJPB has neither been made public, nor has the HRCSL been provided with the draft.<sup>211</sup>

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<sup>204</sup> Ibid, Section 39.

<sup>205</sup> CYPO, Section 33.

<sup>206</sup> Interview No. 1, 17 May 2017; Interview No. 9, 24 May 2017; Government Information Center, 'Co-ordination between the National Department and the Provincial departments of Probation and Child Care Services'.

<sup>207</sup> GoSL, May 2011, p. 101.

<sup>208</sup> GoSL, Fifth Periodic Report submitted under Article 40 of the ICCPR, 31 January 2013, CCPR/C/LKA/5, p. 55

<sup>209</sup> Interview No. 1, 17 May 2017; Interview No. 5, 19 May 2017.

<sup>210</sup> An Act to Provide for the Establishment of the Human Rights Commission of Sri Lanka; to Set Out the Powers and Functions of such Commission; and to Provide for Matters Connected Therewith or Incidental Thereto (Human Rights Commission of Sri Lanka Act), No. 21 of 1996, Section 10 (c).

<sup>211</sup> Interview No. 5, 19 May 2017.

NGOs and independent experts, on the other hand, have been consulted to a certain extent in the drafting process and were, thus, able to give their opinion.<sup>212</sup> This was also confirmed by Kamalini De Silva, Secretary to the Ministry of Justice at the time of the drafting of the CJPB.<sup>213</sup>

### 5.6.2 National Policies and Action Plans

At the moment, there are several national policies and action plans with regard to children in the process of being developed in Sri Lanka. For example, the National Child Protection Authority (NCPA) formulated two policies with regard to child protection which also covers children in conflict with the law. In fact, the formulation of this policy was one of the main reasons for the establishment of the NCPA.<sup>214</sup> The first policy the NCPA drafted was the ‘National Child Protection Policy 2013’. Although this policy was never approved by the Cabinet, it had some important features that are worth mentioning. For example, it stipulated that ‘children should be detained only as a last resort and kept in institutions for the shortest possible length of time.’<sup>215</sup> The policy also recommended to use mediation boards in juvenile justice issues. This should lead to a reduction of placing children in public or private institutions, police custody or juvenile detention centres.<sup>216</sup>

The second policy of the NCPA is the ‘Draft National Policy on Child Protection 2017’ which is the successor of the 2013 policy. It is not clear when this policy will be approved as public consultation was undertaken until 15 May 2017.<sup>217</sup> In contrast to the policy from 2013, the National Policy on Child Protection 2017 provides for a more or less concrete plan on its implementation.<sup>218</sup>

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<sup>212</sup> Interview No. 6, 23 May 2017; Interview No. 7, 23 May 2017.

<sup>213</sup> Interview No. 9, 24 May 2017.

<sup>214</sup> An Act to provide for the Establishment of the National Child Protection Authority for the purpose of formulating a National Policy on the Prevention of Child Abuse and the Protection and Treatment of Children who are Victims of such Abuse; for the Co-ordination and Monitoring of Action against all forms of Child Abuse and for matters connected therewith or incidental thereto (National Child Protection Authority Act) No. 50 of 1998.

<sup>215</sup> NCPA and Ministry of Child Development and Women’s Affairs, ‘National Child Protection Policy’, 2013, p. 32, [bit.ly/NCPP\\_2013](http://bit.ly/NCPP_2013), (accessed on: 4 May 2017).

<sup>216</sup> Ibid.

<sup>217</sup> NCPA, ‘Time Period for Public Input on draft of the National Child Protection Policy has been Extended’, [website], 2017, [bit.ly/NCPA\\_DraftPolicy](http://bit.ly/NCPA_DraftPolicy), (accessed on: 9 May 2017).

<sup>218</sup> NCPA, ‘National Policy on Child Protection 2017’, 2017, pp. 12, 13.

According to Sajeeva Samaranayake, the current Deputy Chairperson of the NCPA, the problem with these policies is that the NCPA cannot develop them alone, but all the relevant sectors and stakeholders have to be involved and to give their agreement to this policy.<sup>219</sup> The actual impact of this policy needs to be seen once it has been approved. Another Action Plan that plays a role in this regard is the ‘National Action Plan for the Protection and Promotion of Human Rights 2011-2016’. However, some of its most important features with regard to the de-institutionalisation of child offenders have still not been implemented. For example, the Action Plan recommended to include community based options in the CYPO and to increase the minimum criminal age.<sup>220</sup>

### **5.6.3 Mediation Boards**

One possibility to prevent children from being sent to an institution is mediation through mediation boards. The establishment of mediations boards is provided for by the Mediation Boards Act No. 72 of 1988. These boards are set up as an alternative to litigation in order to settle minor disputes in a speedy manner. According to Government sources there currently exist 329 mediation boards and approximately 8,266 mediators in Sri Lanka.<sup>221</sup>

A dispute can be referred to a mediation board by either of the parties or, if the case is already brought before the civil court, by the court.<sup>222</sup> In practice, however, most of the cases are referred to mediation boards by the police, although this is not covered by formal policies or regulations.<sup>223</sup>

In 2011, the Parliament of Sri Lanka passed an important amendment to the Mediation Boards Act making it possible to mediate cases where minors have stolen an item worth

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<sup>219</sup> Interview No. 4, 18 May 2017.

<sup>220</sup> GoSL, May 2011, p. 102.

<sup>221</sup> Ministry of Justice, ‘Mediation Boards Commission’, [website], no date available, [bit.ly/MoJ\\_MediationBoardsCommission](http://bit.ly/MoJ_MediationBoardsCommission), (accessed on: 20 March 2017).

<sup>222</sup> An Act to Provide for the Establishment of Mediation Boards in Arms to be Specified by the Minister; to Define the Powers and Duties of Such Boards, and to Make Provisions for Matters Connected Thereto (Mediation Boards Act), No. 72 of 1988, Sections 6 (1), 8.

<sup>223</sup> C. Siriwardhana, ‘Evaluation of the Community Mediation Boards Program in Sri Lanka’, 2011, pp. 17, 18, [bit.ly/EvaluationMediation](http://bit.ly/EvaluationMediation), (accessed on: 6 July 2017).

less than 5,000 Rupees.<sup>224</sup> This was done in order to prevent children who committed such minor offences from entering the juvenile justice system.

According to Dr. Hemamal Jayawardena, one of the problems is that the police, as the entity which refers the most cases to mediation boards, are also reluctant to send children in conflict with the law to mediation boards. The reason behind this is that in case the mediation fails because the parties cannot agree on a solution and the incident needs to be dealt with by the court, the police have in the meanwhile lost important investigation time. Consequently, the police often bring cases directly to the magistrate.<sup>225</sup> But often also magistrates are reluctant to refer cases to mediation boards as they have prejudices against them such as dealing with cases in a slow manner.<sup>226</sup> Furthermore, part of the purpose of mediation is already lost as the child entered the juvenile justice system.<sup>227</sup>

#### **5.6.4 Women and Children's Desks**

Another promising practice is the establishment of Women and Children's Desks at police stations. However, it seems that these Women and Children's Desks are not responsible for children in conflict with the law but only for children in need of protection.<sup>228</sup>

#### **5.6.5 Rehabilitation and Re-Integration of Juvenile Offenders**

Rehabilitation and re-integration are decisive factors when it comes to the prevention of recidivism among juvenile offenders and can, thus, prevent future deprivation of liberty. In Sri Lanka, rehabilitation is mainly the task of the institutions mentioned in Chapter 5.4.<sup>229</sup> These institutions are, however, ill-equipped and not organized in a way that enables children to rehabilitate and reintegrate into society.

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<sup>224</sup> M. Gunawardana, 'A Just Alternative – Providing access to justice through two decades of Community Mediation Boards in Sri Lanka', 2011, p. 37, [bit.ly/MediationBoardsSL](http://bit.ly/MediationBoardsSL), (accessed on: 15 July 2017).

<sup>225</sup> Interview No. 10, 25 May 2017.

<sup>226</sup> Siriwardhana, p. 19.

<sup>227</sup> Interview No. 10, 25 May 2017.

<sup>228</sup> Parry-Williams, p. 10.

<sup>229</sup> Jayasooriya, p. 20.



One of the most serious problems is the insufficient possibility for children to gain social skills which are essential for the re-integration after the period of detention. As the life in the institutions is strictly regulated and disciplined with little contact to the outside world, the children are not sufficiently prepared to be able to re-integrate into society.<sup>230</sup> According to a study on institutional care in Sri Lanka conducted for Save the Children in 2005,

Their interpersonal skills were also limited due to lack of experience. The feeling of being unloved and unwanted left them extremely vulnerable to manipulation. Their knowledge and skills to deal with people and to build and develop relationships were limited. Many of the children expressed fear about society outside the children's institutions and were worried about their inability to deal with it once they left the institution.<sup>231</sup>

Also, the lack of regular counseling constitutes a problem. As LHRD stated 'most of the children in these institutions are persons from disrupted families who have been deprived of parental love and care, for the improvement of their thinking and change of their attitudes, regular counseling is required. But the institutions have no counselors regularly visiting them.'<sup>232</sup> This is not only detrimental for the success of the rehabilitation, but also contrary to the right of children to development as stipulated in Article 6 CRC.

Especially, certified schools aim to rehabilitate the children through vocational training, so that they have a smooth reintegration into society when they finish the three years at the school. According to the above-mentioned study by Save the Children, children were not happy with the vocational training offered in the institutions as it was outdated and stereotyped.<sup>233</sup> Moreover, a study by LHRD revealed that there was a lack of instructors for certain courses.<sup>234</sup>

With regard to the training school for youthful offenders the rehabilitation of the children was hampered by the fact that persons with previous experience in prison life

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<sup>230</sup> Ibid, p. 29.

<sup>231</sup> Jayathilake and Amarasuriya, p. 71.

<sup>232</sup> LHRD, 2012, p. 24.

<sup>233</sup> Jayathilake and Amarasuriya, p. 59.

<sup>234</sup> LHRD, 2012, p. 22.

were also sent to the school. Furthermore, the lack of probation reports which contain information about the home surroundings, school records, character of the child, history of delinquency and tendency to escape make it difficult for the staff to rehabilitate the child.<sup>235</sup>

### **5.6.6 Monitoring of Institutions**

There are several entities which are entitled to monitor the institutions for children in conflict with the law: Visitors according to the CYPO, Visitors according to the YOTSO, the NCPA and the HRCSL. However, it seems that there is no organized system of monitoring. Furthermore, it is not clear what the frame of reference of the conducted monitoring is.

According to Sections 48 (2) and 51 (2) (b) of the CYPO the relevant Minister can nominate one or more persons to be so-called ‘visitors’ of a remand home or of a certified school and to make inspections. The terms of reference of these visits can be regulated through rules made by the relevant Ministers.<sup>236</sup> Whether such visitors have been nominated and whether rules for their visits have been laid down is, however, unknown. Furthermore, it is not clear whether these institutions are also monitored by the Provincial DPCCS which are resourcing and managing them in the end.<sup>237</sup>

Also with regard to training schools the relevant Minister may make regulations with regard to the inspections by visitors.<sup>238</sup> These regulations also remain unknown.

According to Section 34 (1) (a) of the National Child Protection Authority Act, an officer authorized by the NCPA may ‘enter and inspect any premises of any institutions by which child care services are provided.’<sup>239</sup> However, according to the Manager of Law Enforcement of the NCPA, the authority is currently not conducting monitoring.<sup>240</sup>

Last but not least, the HRCSL has a monitoring mandate with regard to all the institutions for juvenile offenders.<sup>241</sup> However, according to the HRCSL’ last annual

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<sup>235</sup> LHRD, 2010, p. 27.

<sup>236</sup> CYPO, Sections 52 (1) (a), (3).

<sup>237</sup> Save the Children, p. 260.

<sup>238</sup> YOTSO, Section 14 (2) (m).

<sup>239</sup> National Child Protection Authority Act, Section 34 (1) (a).

<sup>240</sup> Interview No. 3, 18 May 2017.

<sup>241</sup> HRCSL Act, Section 11 (d).

report from the year 2013, only the probation home of Meegahakotuwa and the Male Child Probation Home of Muruththettuwa have been visited.<sup>242</sup>

## **5.7 Conclusion and Recommendations**

As the description of the situation in the institutions has shown, children in conflict with the law are actually deprived of their liberty in the institutions. Not only are the children not allowed to leave the institution at will, but the life of the children in the institution is strictly regulated and disciplined with little contact to the outside world. The data on the institutions and the children furthermore showed that the institutions are detaining a high number of children and are not spread around the island which decreases the possibility to uphold family contact.

On the basis of the above depicted legal framework and its practical implementation it can, furthermore, be concluded that deprivation of liberty of children in conflict with the law is not a measure of last resort. First of all, the low age of criminal responsibility makes it possible to detain children under twelve years of age. In addition, there are broad grounds which allow for the pre-trial detention of children and although children could be released on bail this is rarely done in practice. Another problem is that children are pleading guilty because they are not legally represented during the court proceedings. Also, the social inquiry report which is the main basis for the court's decision whether to detain a child or not has many shortcomings which increase the risk of a child being detained.

The data on the reasons for the admission to institutions furthermore showed that children are detained on questionable grounds such as being disobedient to the parents. Equally worrying is the fact that children can be detained for the sole reason of facilitating the preparation of reports by probation officers or the General Commissioner of Prison.

Also, the insufficient use of alternative measures at the hands of the court and of mediation boards increases the risk of children to be deprived of their liberty. This can inter alia be attributed to the fact that police officers, probation officers and magistrates are not adequately trained in the area of juvenile justice. Furthermore, there is a high

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<sup>242</sup> HRCSL, 'Annual Report 2013', 2013, pp. 29, 30, [bit.ly/HRCSL\\_AR](http://bit.ly/HRCSL_AR), (accessed on: 16 May 2017).

risk that children become repeat offenders as the institutions are not well-equipped in order to rehabilitate the children and to enable them to re-integrate into society. Last but not least, the possibility to prolong the period of detention in case of an escaping child proves that the ‘last resort’ principle is not fulfilled by Sri Lanka.

There is also sufficient evidence showing that deprivation of liberty of children in conflict with the law is not for the shortest appropriate period of time. For example, there is no stipulated maximum period for pre-trial detention. This is also true for the detention in remand homes during the preparation of the social inquiry report. Furthermore, children can be sent to approved or certified school for a fixed period of three years without taking into consideration the crime committed. This might lead to the absurd result of a child being detained for a longer period than an adult for the same offence. Although the detention in remand homes of already convicted children is limited to one month, the children are in practice detained much longer.

In summary, it can be concluded that Sri Lanka is not complying with the principle that deprivation of liberty of children in conflict with the law should be a measure of last resort and for the shortest appropriate period of time.

The following table was created by the author of this thesis on the basis of the findings. It gives an overview of the measures that should be taken in order to address the above-mentioned problems and to work towards the fulfilment of the ‘last resort’ and ‘shortest appropriate period of time’ principle. The table also names the key responsible agencies and depicts the presumed feasibility of these measures. Half of the measures are estimated as having a high feasibility. The majority of the remaining measures would be feasible if the appropriate financial resources would be allocated.

**Table 06: Recommendations with regard to Children in Conflict with the Law**

| Recommendation |                | Impact  | Feasibility | Key Responsible Agency       |
|----------------|----------------|---|-------------|------------------------------|
| Legal          | Amend the CJPB | Include the principle that deprivation of liberty of children in conflict with the law should be a measure of last resort and for the shortest appropriate period of time | High        | Ministry of Justice;<br>MWCA |

|   |   |   |  |   |
|---|---|---|--|---|
| <b>Legal</b>                                      | Enact the CJPB with the amendment   | This would solve many problems such as covering all children up to the age of 18, taking into consideration the best interest and the view of the child, legal representation of the children, more in-depth assessment of the children, less pre-trial detention, possibility of shorter period of detention, community correction order for children etc. | Depends on whether all nine Provincial Councils have to approve CJPB | Parliament;<br>Provincial Councils  |
|   | Amend the Penal Code in order to increase the age of criminal responsibility to at least twelve years             | This would prevent children under twelve/fourteen years of age from being detained.   | High   | Ministry of Justice;<br>MWCA  |
|   | Amend the Mediation Boards Act so to include cases where minors have stolen an item worth less than 10,000 Rupees | This would lead to fewer children being deprived of their liberty.  | High   |   |
| <b>Actors Involved in Juvenile Justice System</b> | Establish more juvenile courts  | This would increase the magistrates' knowledge on the juvenile justice system and would decrease the risk of children in conflict with the law being treated like adults.   | Depends on financial allocation                                      | Ministry of Justice   |
|   | Give joint training for police officers, probation officers and magistrates                                       | This would increase collaboration among the actors and would lead to a more holistic understanding of the laws and processes.   | High   | Ministry of Law and Order;<br>National and Provincial DPCCS;<br>Ministry of Justice |
|   | Give more long-term training especially with regard to alternative measures to detention                          | This would increase the use of alternative measures (mediation boards, probation orders etc.).  | Depends on financial resource allocation                             |   |
|   | Increase salary of probation officers   | This would increase their recognition and motivation and would lead to more people wanting to work in the probation sector.   | Depends on financial allocation                                      | National and Provincial DPCCS   |
|   | Expand the mandate of Women and Children's Desks to children in conflict with the law                             | This would improve police services provided for children in conflict with the law.  | High   | Ministry of Law and Order;<br>MWCA  |
|   | Equip courts with a list of possible fit persons  | This would increase the use of the fit person order and lead to fewer children being institutionalised.   | High   | Ministry of Justice   |
|   | Establish an ombudsman especially for children in the legal process   | This would increase the monitoring of children in the juvenile justice system.  | Depends on financial allocation                                      | Ministry of Justice   |

|   |   |   |  |                                    |
|---|---|---|--|------------------------------------|
| <b>Institutions</b>                       | Recruit more staff  | This would allow for a less regulated and disciplined organisation of the institution.  | Depends on financial allocation          | Provincial DPCCS; DoP              |
|   | Increase the salary of the staff  | This would lead to more people wanting to work in the institutions.   | Depends on financial allocation          |                                    |
|   | Increase the training of the staff  | This would enable the staff to conduct counselling, rehabilitate the children and to prepare them for reintegrating into society which would ultimately prevent recidivism among juvenile offenders.  | Depends on financial resource allocation |                                    |
|   | Give children more individual choice and privacy  | This would increase the chances of a smooth social reintegration of the children which would ultimately prevent recidivism among juvenile offenders.  | High                                     |                                    |
|   | Establish more but smaller institutions spread across the island  | This would increase the possibility to uphold family contact and would increase the possibility of the children to gain social skills which would facilitate social inclusion and would ultimately prevent recidivism among juvenile offenders. | Depends on financial allocation          |                                    |
|   | Update vocational training offer  | This would increase the chances of social inclusion after being released and would ultimately prevent recidivism among juvenile offenders.  | High                                     |                                    |
|   | Establish a systematic monitoring system of the institutions (e.g. a multi-disciplinary committee) and a comprehensive frame of reference                                       | This would make it possible to monitor the organisation of the institution and to see whether there are children that can be released earlier.  | Depends on financial allocation          | Provincial DPCCS; HRCSL; NCPA; DoP |
| <b>National Policies and Action Plans</b> | Improve national policies/action plans in accordance with international law and standards (CRC, Beijing Rules, etc.), involve all actors and get approval of highest GoSL level | This would make the overall de-institutionalisation process more effective.   | High                                     | NCPA                               |
| <b>Data</b>                               | Establish a nationwide systematized and comprehensive database on children in conflict with the law   | This would make it possible to monitor the impact of the other measures.  | High                                     | National and Provincial DPCCS; DoP |

## 6. CHILDREN AND CHILD PROTECTION SERVICES

### 6.1 Sri Lanka's Law Relating to Children and Child Protection Services

There are three main laws dealing with the institutionalisation of children who are in need of child protection services: the CYPO of 1939, the Model Orphanage Statute of 2013 and the Vagrants Ordinance of 1841.

Whereas the CYPO regulates what happens to 'children and young persons in need of care and protection' that are brought before a court, the Model Orphanage Statute regulates the accommodation of orphaned, deserted or destitute children in voluntary children's homes or state receiving homes and the Vagrants Ordinance regulates what happens to girls who have been victims of certain sexual offences.<sup>243</sup> Although the Model Orphanage Statute is only a model law and can be differently implemented in the nine provinces according to their regional context, the general features of the Model Statute, like the definition of the category of children and the institutionalisation process, seem to be conserved.<sup>244</sup>

The CYPO is applicable to persons under the age of sixteen years.<sup>245</sup> According to Section 34 of the CYPO, 'children and young persons in need of care and protection' are defined as follows: First of all, a child or young person in need of care and protection is 'a child or young person who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control.'<sup>246</sup> Moral danger is presumed when the child is destitute, wandering without any settled place of abode and without visible means of subsistence, begging or receiving alms, or loitering for the purpose of begging or receiving alms.<sup>247</sup>

Furthermore, a child who is a victim of one of the following crimes or lives in the same household as a victim of such an offence, or lives in the same household as a person

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<sup>243</sup> CYPO, Sections 34 et seq; A Statute to Provide for the Registration, Supervision and Administration of Voluntary Children's Homes maintained for the Provision of Accommodation Facilities and Protection to Orphans, Deserted or Destitute Children; The Protection of the Rights of Children Accommodated in Registered Children's Homes and for Matters connected therewith and incidental thereto (Model Orphanage Statute), 29 April 2013; Vagrants Ordinance, Sections 10, 11.

<sup>244</sup> Interview No. 15, 31 May 2017.

<sup>245</sup> CYPO, Section 88.

<sup>246</sup> CYPO, Section 34 (1) (a).

<sup>247</sup> Ibid, Section 34 (2).

who has been convicted of such a crime in respect of a child or young person is considered a child in need of care and protection: exposure or abandonment of a child under twelve years by a parent or person having care of it; kidnapping or abducting a child under ten years with intent to steal movable property from the person of such child; murder; culpable homicide not amounting to murder; assault or criminal force; sexual harassment; kidnapping or abducting a woman to compel her marriage; procurement; rape; incest; sexual intercourse against the order of nature with a man, woman, or animal; acts of gross indecency; cruelty to children or young persons; causing or encouraging seduction or prostitution of a girl under sixteen; allowing persons under sixteen to be in brothels; causing or procuring persons under sixteen to beg; any other offence involving bodily injury to a child.<sup>248</sup>

Also, a child or young person being female who lives in the same household as a girl or women who has been married within a prohibited degree of relationship (directly descended from the other; brother or sister; niece or nephew; etc.) is considered of being in need of care or protection.<sup>249</sup>

Last but not least, a child or young person under the age of five who has been prevented from receiving education by a vagrant is a child or young person in need of care or protection according to the CYPO.<sup>250</sup>

The Model Orphanage Statute is applicable to orphaned, destitute or deserted children under eighteen years of age. A child is orphaned when both parents are dead or one is dead and the other one is incapable of providing care. When it is an 'illegitimate' child it is orphaned when the mother is dead.<sup>251</sup> According to Section 40 of the Model Orphanage Statute, deserted means that a child has been left by both parents or by one parent and the other one is not able to act as a parent or both parents are not able to act as parents. In the case of an 'illegitimate' child it means that the child has been left by his or her mother or the mother is not able to act as a parent.<sup>252</sup>

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<sup>248</sup> Ibid, Section 34 (1) (b), First Schedule.

<sup>249</sup> Ibid, Section 34 (1) (b) (iv).

<sup>250</sup> Ibid, Section 34 (1) (c).

<sup>251</sup> Ibid.

<sup>252</sup> Model Orphanage Statute, Section 40.



Another important law with regard to children and child protection services is the Vagrants Ordinance. This Ordinance does not only regulate what happens to boys between the age of twelve and twenty-one years who are, for example, vagrants or prostitutes (see Chapters 5.1 and 5.2), but also regulates that girls under the age of sixteen years who have been victims of seduction, prostitution or unlawful sexual intercourse can be brought to a place of safety.<sup>253</sup>

Another special law which was introduced following the tsunami which occurred in December 2004 is the Tsunami (Special Provisions) Act No. 16 of 2005. This Act regulates the registration, foster care and adoption of children (under eighteen years) and young persons (between eighteen and twenty-one years) who became orphans after the tsunami and children and young persons left with a single parent who is not able to take care of the child.<sup>254</sup> According to one interview partner, no child was placed in a children's home as a direct consequence of the Tsunami.<sup>255</sup>

The adoption of children who were not orphaned due to the tsunami is regulated in the Adoption of Children Ordinance. What is noteworthy about this Ordinance is that it only applies to children under the age of fourteen years.<sup>256</sup>

## **6.2 Placement Procedure**

The institutionalisation process of children and young persons in need of care and protection is regulated by the CYPO. According to Article 17 of the CYPO the officer in charge of the police station to which the child or young person is taken should immediately notify the probation officer. Subsequently, the probation officer investigates the case and gives the court relevant information about e.g. the home surroundings, the school record, the health status, and the character of the child or young person.

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<sup>253</sup> Vagrants Ordinance, Sections 10, 11.

<sup>254</sup> An Act to enable Special Legal Provisions to be made in respect of Persons and Property affected by the Tsunami that occurred on December 26, 2004, and for matters connected therewith or incidental thereto (Tsunami Act), No. 16 of 2005.

<sup>255</sup> Interview No. 7, 23 May 2017.

<sup>256</sup> An Ordinance to Provide for the Adoption of Children, for the Registration as Custodians of Persons having the Care, Custody or Control, of Children of whom they are not the Natural Parents, and for Matters Connected with the Matters Aforesaid (Adoption of Children Ordinance), No. 24 of 1949, Section 17.

Already before being produced before the magistrate court, a child or young person can be brought to a place of safety by a police officer where he or she has to stay until he or she can be brought before the court.<sup>257</sup> Also, when the court is not in the position to make a decision with regard to the child, the court can, inter alia, order the child to stay in the place of safety for an initial period of twenty-eight days which can be extended for a non-specified period of time.<sup>258</sup>

If the magistrate's court sitting as a juvenile court comes to the conclusion that the child or young person is in need of care or protection it can (1) send him or her to an approved or certified school if the child has attained the age of twelve years, (2) hand him or her over into the care of any fit person who is willing to take the child or young person, (3) make the parents sign a recognizance stating that they would exercise proper care and guardianship, or (4) order the child or young person to be placed for a certain period – no longer than three years – under the supervision of a probation officer, or some other appointed person. The last option can also be ordered by the court as an addition to the care of the fit person or the recognizance signed by the parents.<sup>259</sup>

How to handle cases of girls under the age of sixteen years who have been victims of seduction, prostitution or unlawful sexual intercourse is regulated by the Vagrants Ordinance. Accordingly, any police officer or 'grama niladharies'<sup>260</sup> can bring such a girl to a place of safety if one of the above-mentioned crimes has been committed or is suspected to have been committed against that girl. There, the girl can be detained for a period not exceeding seven days before being brought to the court. If the magistrate thinks that one of the above-mentioned offences has been committed in respect of the girl, he can – if he deems it necessary – issue an order with regard to the care and accommodation of that girl until a charge has been made against the offender. In case the offender is convicted, the magistrate can extend the order for a period not exceeding

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<sup>257</sup> CYPO, Section 37 (1).

<sup>258</sup> Ibid, Section 37 (2)

<sup>259</sup> Ibid, Section 35.

<sup>260</sup> Sri Lankan public official who carries out administrative duties in a grama niladhari division, which is under the Home Affairs Division of the Ministry of Public Administration and Home Affairs (Ministry of Public Administration and Management, 'Grama Niladhari Administrative Division', [website], 30 January 2015, <http://bit.ly/GramaNiladhariDivision>, (accessed on: 24 July 2017).

twenty-one days.<sup>261</sup> Thereafter, the magistrate can issue one of the above-mentioned orders of the CYPO.

According to the Model Orphanage Statute, orphaned, deserted or destitute children up to the age of five can be sent to a state receiving home which is administered by the Provincial DPCCS. Usually, a person who finds such a child may inform a police officer, an officer of the Provincial DPCCS or a grama niladharies. The informed officer should, subsequently, bring the child to the nearest hospital for a medical examination. Afterwards, the child can be sent to a receiving home if the probation commissioner gives his approval.<sup>262</sup>

Orphaned, abandoned and destitute children above the age of five can be sent to voluntary children's homes with the prior approval of the provincial commissioner.<sup>263</sup> When the child is 'facing a situation which endangers or threatens to cause any harm or a threat to the child's life, health or safety'<sup>264</sup> the manager of the children's home can accept the child without awaiting the approval by the commissioner. After two weeks, however, he must obtain the provincial commissioner's approval. A child admitted to a voluntary children's home can only be kept for more than three years if the probation commissioner gives his consent thereto.<sup>265</sup>

According to the 'National Guidelines on the Management of Child Abuse and Neglect', there should be a clinical and an institutional case conference when a child victim is brought to a hospital. The clinical case conference should be held within 24 hours of the child's admission to the hospital and has the aim of medically examining the child and to fix date, time and chair for the institutional case conference.<sup>266</sup>

The institutional case conference should be held once all the relevant medical specialists have examined the child and has the aim of deciding or making recommendations on, inter alia, the placement of the child, its medical management and its psychosocial rehabilitation and reintegration. These decisions and recommendations should then be

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<sup>261</sup> Vagrant Ordinance, Sections 13 and 25 (a).

<sup>262</sup> Model Orphanage Statute, Section 35.

<sup>263</sup> Model Orphanage Statute, Section 15 (1) (a).

<sup>264</sup> Ibid, Section 15 (2).

<sup>265</sup> Ibid, Sections 15 (2), 17 (2).

<sup>266</sup> Ministry of Justice, et al., 'National Guidelines for The Management of Child Abuse and Neglect. A Multi-Sectoral Approach', 2014, pp. 30, 31, [bit.ly/Guideline\\_ChildAbuse](http://bit.ly/Guideline_ChildAbuse), (accessed on: 10 May 2017).

included in the social inquiry report which the probation officer gives to the court. The institutional case conference has a multi-disciplinary composition. Participants are, for example, a pediatrician, a psychiatrist, the probation officer, a police officer of the Women and Children's Desk, the parents or guardians of the child, the child itself etc.<sup>267</sup>

### **6.3 Analysis of the Legal Framework and its Practical Implementation**

#### **6.3.1 Definition of Children in Need of Care and Protection**

There is a need of a clearer definition of what constitutes a child in need of care and protection. Whereas the HDO and the Vagrants Ordinance consider certain children who are vagrants or involved in behavior that serves their survival, such as begging, selling sex, vagrancy, etc., as child offenders, the CYPO stipulates that children who have no parent or guardian or a parent or guardian unfit to exercise care or not exercising proper care and who are begging or receiving alms, or loitering for the purpose of begging or receiving alms as children in need of care and protection.<sup>268</sup> Furthermore, the CYPO considers children who have been caused or procured to beg as children in need of care and protection.<sup>269</sup> All children who are vagrants or involved in behavior that serves their survival should be considered as children in need of care and protection.

Another problem in this regard is that only girls under the age of sixteen years who have been victims of certain sexual offences are considered as being in need of care and protection. Boys who are involved in prostitution are even considered as child offenders and can be sent to prison, approved schools or centres for youthful offenders.<sup>270</sup> As this is contrary to the principle of non-discrimination as laid down in Article 2 CRC this should be amended so that also these boys are considered as children in need of care and protection.

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<sup>267</sup> Ibid, p. 35

<sup>268</sup> HDO, Sections 4, 10; Vagrant Ordinance, Section 10; CYPO, Section 34.

<sup>269</sup> CYPO, Section 34 (1) (b), First Schedule.

<sup>270</sup> CYPO, First Schedule; Vagrant Ordinance, Section 10.

### 6.3.2 Placement Procedure

According to the CYPO, juvenile courts do not only have jurisdiction over cases of juvenile offenders, but also have the power to decide on how to deal with a child in need of care or protection. As has been mentioned before, only two juvenile courts have been established so far.<sup>271</sup> But also children in need of care and protection should not be dealt with by magistrate courts or municipal courts which usually deal with adult cases. Another problem with regard to the placement procedure is that the clinical and the institutional case conferences are not regularly conducted and are not being taken into serious consideration by the magistrates when it comes to the child's placement.<sup>272</sup> This was also affirmed by some of the interviewed experts.<sup>273</sup> One of the reasons for this might be that these conferences are not yet required by law, but only stipulated in guidelines.

Also, the social inquiry report which should contain the decisions and recommendations of the institutional case conference brings problems with it which were already mentioned in Chapter 5.3.4. The main ones are the standardized phrases and conclusions made by the probation officers and that magistrates often do not put enough emphasis on the report or do not consider it at all.<sup>274</sup> This is contrary to Principle 6 of the GACC which states that all alternative care decisions should be made on a case-by-case basis.

It is, furthermore, worrying that Section 37 of the CYPO allows for the detention of a child in a place of safety until the child can be brought before the court without stipulating a maximum period of detention. The Vagrants Ordinance, on the other hand, stipulates that girls who have been victims of certain sexual offences can be so detained for a maximum period of seven days.<sup>275</sup>

Last but not least, in accordance with Article 12 CRC and Principles 6 and 66 of the GACC it should be stipulated in the CYPO that a child who is capable of forming his or her own views should be asked for its opinion with regard to its alternative care

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<sup>271</sup> GoSL, CRC/C/LKA/5-6, p. 55.

<sup>272</sup> Verité Research, pp. 24, 28.

<sup>273</sup> Interview No. 4, 18 May 2017; Interview No. 15, 31 May 2017;

<sup>274</sup> Samaraweera, p. 60.

<sup>275</sup> Vagrants Ordinance, Section 13 (2).

placement. Furthermore, it should be included that the best interest of the child as stipulated in Article 3 CRC and Principle 6 of the GACC should be taken into consideration when deciding whether a child should be sent to an institution or whether one of the alternative measures is feasible.

### **6.3.3 Institutional Placement**

First of all, none of the laws dealing with children and child protection services stipulate that deprivation of liberty should be a measure of last resort and for the shortest appropriate period of time.<sup>276</sup>

Another critical feature of the CYPO is that it provides for the accommodation of children in need of care and protection together with children in conflict with the law in approved or certified schools. The legislator's thought behind this was that also children in conflict with the law require care and protection. Ultimately, however, this leads to children in need of care and protection being subject to corrections and sanctions.<sup>277</sup>

This is confirmed by the fact that a child or young person in need of care and protection who escapes from an approved or certified school or fails to come back may also be captured without warrant and be subject to an increase of the detention period for a maximum period of six months. If the child is already sixteen years, he or she might also be sent to a training school for three years.<sup>278</sup> These provisions are obviously of punitive character and against the principle that deprivation of liberty should be a measure of last resort and for the least appropriate period of time.

The accommodation of children in need of care and protection together with child offenders is, thus, clearly in conflict with the GACC which stipulate that 'Measures should be taken so that, where necessary and appropriate, a child solely in need of protection and alternative care may be accommodated separately from children who are subject to the criminal justice system.'<sup>279</sup>

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<sup>276</sup> CYPO; Model Orphanage Statute; Vagrants Ordinance.

<sup>277</sup> Interview No. 1, 17 May 2017.

<sup>278</sup> CYPO, Section 55.

<sup>279</sup> UNGA, 'Guidelines for the Alternative Care of Children', Principle 124.

### **6.3.4 Alternative Measures to Institutionalisation and their Impact**

There are two alternative measures to the institutionalisation of children and child protection services in Sri Lanka: the fit person order and adoption. According to Section 35 (1) (b) of the CYPO the Court has the possibility to give the child into the care of a fit person. This person may or may not be a relative of the child concerned. However, as already highlighted under Chapter 5.3.6, the fit person order is not really used in practice as the court does not have a register or list of fit persons. Furthermore, the DPCCS' data on state receiving homes from 2012 shows that only very few children have been placed in the custody of a fit person after being discharged (see Chapter 6.5.3).<sup>280</sup>

Adoption, on the other hand, is more often used. In 2012, there were seven foreign adoptions and 16,607 local adoptions in Sri Lanka. This number is rather high. Also, the DPCCS' data with regard to state receiving homes suggest that adoption is one of the alternatives that is actually used as almost one third of the children discharged from these institutions were adopted (see Chapter 6.5.3).<sup>281</sup> Striking is, however, the huge gap between local and foreign adoption. Although Article 21 (b) CRC states that foster care and local adoption shall take precedence, foreign adoption seems to be expandable. Furthermore, some of the interviewed experts complained about the very long adoption process.<sup>282</sup> Another problem is that according to the Adoption Ordinance only children up to the age of fourteen can be adopted.<sup>283</sup>

### **6.3.5 Actors involved in the Placement Procedure**

Please refer to Chapter 5.3.7 as the actors involved in the institutionalisation process of children and child protection services are the same as those involved in the juvenile justice system.

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<sup>280</sup> DPCCS, 2012, p. 9.

<sup>281</sup> Ibid.

<sup>282</sup> Interview No. 2, 17 May 2017; Interview No. 14, 30 May 2017; Interview No. 15, 31 May 2017.

<sup>283</sup> Adoption of Children Ordinance, Section 17.

#### 6.4 Existing Institutions and Situation therein

In Sri Lanka, there are eight different types of institutions for child protection: certified schools, approved schools, voluntary children's homes, state receiving homes, safe houses, detention homes, national training and counselling centres and children's homes for children with disabilities. All of these institutions fall under the purview of the Provincial DPCCS, except the national training and counselling centre which falls under the National DPCCS' remit and the children's homes for children with disabilities which are under the purview of the Department of Social Services (DoSS).<sup>284</sup> The following table gives an overview of these institutions.

**Table 07: Overview of Institutions for Children and Child Care Services 2012**

| Type of Institution                             | No. of Institutions |         | Purpose of Institution  |
|---|---------------------|---------|---|
|   | Gov.                | Private |   |
| Certified Schools                               | 5                   |         | Provide vocational training to children in need of care and protection (and children in conflict with the law)  |
| Approved Schools                                | 1                   |         | Provide vocational training to children in need of care and protection (and children in conflict with the law)  |
| Voluntary Children's Homes                      |                     | 336     | Private institutions that accommodate destitute, orphaned and neglected children, etc.  |
| State Receiving Homes                           | 8                   |         | House orphaned, abandoned and destitute children up to five years of age  |
| Places of Safety                                | 6                   | 6       | House children in need of care and protection before court proceedings and girl victims before/during court proceedings   |
| Detention Homes                                 | 1                   |         | Rehabilitate destitute children over eight years who loiter around as beggars; also houses children who committed burglary, theft, etc.; children in need of care and protection; disobedient children; others                                    |
| National Training and Counselling Centres       | 2                   |         | Accommodates children who have been sexually abused or raped, engaging in theft, straying children, disobedient children, and children engaged in child labour, married under-aged children, children stranded and suspected of committing crimes |
| Children's Homes for Children with Disabilities | 1                   | N.A.    | Provides shelter and care for mentally and physically disabled children   |
| <b>Total Number</b>                             | <b>366</b>          |         |   |

Sources: DPCCS, 2012, p. 1; DPCCS, 2013, pp. 18, 19.

<sup>284</sup> Save the Children, p. 260.



All of the children in these institutions are deprived of their liberty as defined in Chapter 3.1 as they cannot leave the institution at will. Almost all interview partners expressly affirmed when asked whether they would consider these children deprived of their liberty.<sup>285</sup> According to Varathagowry Vasudevan, Senior Lecturer in Social Work at the Sri Lanka School of Social Work ‘they are all deprived of their liberty. They can go home in the holidays, but only for a certain period of time. Then they have to return. They are still deprived of their liberty as they are under control.’<sup>286</sup>

Also, Prof. Sharya Scharenguivel, who teaches at the Law Faculty in Colombo and is inter alia focusing on children’s rights stressed that ‘The institutions are very discipline orientated. We are looking at corrections and sanctions. Also, for children in need of care and protection it’s like that.’<sup>287</sup> She goes on to say that ‘The skills training has taken over. But childhood should not only be about skills training.’<sup>288</sup>

The DPCCS in its report on the ‘Current Status of Child Care Institutions and Institutionalized Children in Sri Lanka’ from 2013 also criticized the strict administration of rules and regulations which lead to children being unhappy in the institutions and pleaded for a review of these rules and regulations. Furthermore, it found fault with the low decision-making power of the children in the institutions as this might lead to the management of the institution deciding contrary to the best interest of the child.<sup>289</sup> This constitutes a violation of Article 3 as well as Article 12 CRC.

Another problem in this regard is that there is a lack of trained staff in these institutions. According to a study conducted by the DPCCS in 2013, 46% of the staff was not even trained in the area of child care or child counselling.<sup>290</sup> As Principle 116 of the GACC stipulates there needs to be sufficient training. Furthermore, Verité Research’s assessment of Sri Lanka’s juvenile justice system revealed that low salary scales are decreasing the motivation among the staff in child care institutions and keeping

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<sup>285</sup> Interview No. 1, 17 May 2017; Interview No. 2, 17 May 2017; Interview No. 3, 18 May 2017; Interview No. 5, 19 May 2017; Interview No. 7, 23 May 2017; Interview No. 8, 24 May 2017; Interview No. 10, 25 May 2017; Interview No. 15, 31 May 2017.

<sup>286</sup> Interview No. 2, 17 May 2017.

<sup>287</sup> Interview No. 1, 17 May 2017.

<sup>288</sup> Ibid.

<sup>289</sup> DPCCS, 2013, pp. 9, 16, 51.

<sup>290</sup> Ibid, p. 40.

adequately trained professionals from working in the institutions. This is contrary to Principle 114 of the GACC and ultimately leads to a lack of human resources.<sup>291</sup>

With regard to children with disabilities there is only one state-run institution in Sri Lanka especially providing care for these children. This institution focuses on children with autism and autism-related disabilities and is run by the DoSS of the North Central Provincial Council. No data could be found on how many private institutions for children with disabilities exist. According to a report by Save the Children from 2016, there is a ‘dearth of facilities for children with disabilities, especially residential facilities for the rehabilitation of children with mental disabilities where they can receive treatment as well as care and protection’.<sup>292</sup>

Although it should be considered as positive that there are not so many institutions for children with disabilities as they should have the chance to grow up with their families at home, in practice, this has led to children with disabilities being accommodated in the general institutions run by the Provincial DPCCS, like the certified school in the Southern Province.<sup>293</sup>

According to Sajeeva Samaranayake, the current Deputy Chairperson of the NCPA, this is a problem insofar as these children need special attention and specially trained staff which is not available in the general institutions. Furthermore, Samaranayake is of the opinion that this situation decreases the staff’s opportunity to develop their skills.<sup>294</sup> As has been mentioned above, the staff in the general institutions is not even trained enough for children who have no disability.<sup>295</sup> This is contrary to Article 23 (1) and (2) CRC as it does not guarantee the right of children with disabilities to special care and as the child’s active participation in the community might be hampered. Furthermore, accommodating these children together with the other children clearly increases the risk of them to be deprived of their liberty.

The National and Provincial DoSS, however, have no resources allocated for the establishment of specialised residential facilities with comprehensive treatment and

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<sup>291</sup> Verité Research, p. 32.

<sup>292</sup> Save the Children, p. 272.

<sup>293</sup> Ibid.

<sup>294</sup> Interview No. 4, 18 May 2017.

<sup>295</sup> DPCCS, 2013, p. 40.

rehabilitation for children with disabilities, with the exception of the North Central Provincial Council and its institution for children with autism and autism-related disabilities.<sup>296</sup> According to Dr. Hemamal Jayawardena, a child protection specialist who is currently working for UNICEF Sri Lanka, ‘disabled children are falling through the cracks’.<sup>297</sup>

## **6.5 Data on Institutions and Children**

As already mentioned in Chapter 5.5, there is no national systematized and comprehensive database with regard to children and child care institutions yet.<sup>298</sup> Therefore, the latest available data is the Annual Statistical Report from the DPCCS covering the years 2011 and 2012. Moreover, the DPCCS report on the ‘Current Status of Child Care Institutions and Institutionalized Children in Sri Lanka’ contains some relevant statistical information.

### **6.5.1 Total Number**

The following table gives an overview of the total number of institutions and of children in need of childcare services in these institutions. The number of children accommodated in certified schools and in detention homes does not constitute the total number of children in these institutions as children in conflict with the law were excluded. What is striking about these data is that the vast majority of children are accommodated in voluntary children’s homes. What needs to be taken into consideration is that this number might not cover unregistered voluntary children’s homes.

The large number of children in comparison to the number of institutions – especially when taking into consideration that children in conflict with the law were excluded from this statistic – suggests that most of the institutions are rather large. As suggested in Principle 23 of the GACC, Sri Lanka should develop alternatives to these big institutions such as individualised and small group care.

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<sup>296</sup> Save the Children, p. 272.

<sup>297</sup> Interview No. 10, 25 May 2017.

<sup>298</sup> GoSL, CRC/C/LKA/5-6, p. 9.

**Table 08: Total Number of Institutions and of Children in these Institutions 2012**

| Type of Institution                       | No. of Institutions | No. of Children |
|---|---------------------|-----------------|
| Certified Schools*                        | 5                   | 73              |
| Approved Schools                          | 1                   | 3               |
| Voluntary Children's Homes                | 336                 | 11,062          |
| State Receiving Homes                     | 6                   | 298             |
| Places of Safety                          | 8                   | N/A             |
| Detention Homes*                          | 1                   | 44              |
| National Training and Counselling Centres | 2                   | 52              |
| <b>Total Number</b>                       | <b>357</b>          | <b>11,532</b>   |

\*Children in Conflict with the Law were excluded from the number of children  
Source: DPCCS, 2012, p. 1.

### **6.5.2 Data with Regard to Duration of Stay**

The following table gives an overview of how long children stayed in the institutions. What must be noted is that children in conflict with the law are included in this table. The majority of the children stayed in the institution between two and five years. This could be explained by the fact that an approved or certified school order is usually for a period of three years.<sup>299</sup> The second biggest group are those children who stayed in the institution between zero and two years. 22% of the children were in the institutions between five and ten years. Only 8% of the children stayed ten to fourteen years and only 4% spent more than fifteen years in the institution.

Although these numbers seem low in the beginning, they are rather high considering that 82% of the total number of children had either both or one parent.<sup>300</sup>

Another noteworthy issue is that out of the children who stayed ten to fourteen years or more than fifteen years in the institutions the majority were girls. The reason for this is their increased vulnerability due to early marriages or physical and sexual abuse.<sup>301</sup>

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<sup>299</sup> CYPO, Section 42.

<sup>300</sup> DPCCS, 2013, p. 61.

<sup>301</sup> Ibid, p. 7.

**Table 09: Duration of Stay of Children in Institutions 2013\***

| 0-2 years |       | 2-5 years |       | 5-10 years |       | 10-14 years |     | More than 15 years |     | Total  |
|-----------|-------|-----------|-------|------------|-------|-------------|-----|--------------------|-----|--------|
| M         | F     | M         | F     | M          | F     | M           | F   | N                  | F   |        |
| 1,525     | 2,597 | 2,314     | 3,007 | 1,193      | 1,879 | 398         | 746 | 211                | 291 | 14,179 |

\*This also covers children in conflict with the law in Certified Schools, Remand and Detention Homes  
Source: DPCCS, 2013, p. 61.

### 6.5.3 Data with Regard to State Receiving Homes

Table 10 shows the reasons for the admission of children up to the age of five years to state receiving homes aggregated by sex in 2012. What is striking is that most of the children were sent to these homes because they were destitute (74%). Only 2% were sent to this type of institution because they were orphaned. Here, too, it is notable that the number of girls admitted to state receiving homes is much higher.

Table 11 shows what happened to the children who were discharged from the state receiving homes in 2012. As can be seen from the table a major number of the children were sent to a voluntary home afterwards (39%). 24% of children could be reunited with their parents or guardians. Considering that only 2% of the children were orphans, this number is rather low. Furthermore, it is striking that only in 6% of the cases a fit person order was used. It can, thus, be concluded that this alternative to institutionalisation is not regularly used. However, 28% of the children were adopted which is no surprise, though, considering that they were under five years of age.

**Table 10: Admission to State Receiving Homes by Reason 2012**

| Receiving Home | Orphan   |          | Abandoned |           | Destitute |            | Total      |            |
|----------------|----------|----------|-----------|-----------|-----------|------------|------------|------------|
|                | M        | F        | M         | F         | M         | F          | M          | F          |
| Prajapathi     | 1        | 1        | 2         | 2         | 23        | 34         | 26         | 37         |
| Ruhunu         | -        | -        | 11        | 9         | 23        | 18         | 34         | 27         |
| Sujatha        | 1        | 2        | 6         | 6         | 10        | 9          | 17         | 17         |
| Tikiri Sevana  | -        | -        | 9         | 14        | 19        | 20         | 28         | 34         |
| Amila Sevana   | -        | -        | -         | -         | 16        | 10         | 16         | 10         |
| Paradise       | -        | -        | 3         | 10        | 8         | 31         | 11         | 41         |
| <b>Total</b>   | <b>2</b> | <b>3</b> | <b>31</b> | <b>41</b> | <b>99</b> | <b>122</b> | <b>132</b> | <b>166</b> |

Source: DPCCS, 2012, p. 9.

**Table 11: Placement of Children Discharged from State Receiving Homes 2012**

| Receiving Home | Back to Parents/Guardian |           | Legal Adoption |           | Fit Person Order |           | Voluntary Home |           | Other    |          | Total      |            |
|----------------|--------------------------|-----------|----------------|-----------|------------------|-----------|----------------|-----------|----------|----------|------------|------------|
|                | M                        | F         | M              | F         | M                | F         | M              | F         | M        | F        | M          | F          |
| Pajapathi      | 3                        | 6         | 3              | 6         | -                | -         | 18             | 25        | 2        | -        | 26         | 37         |
| Ruhunu         | 13                       | 9         | 6              | 4         | 1                | 1         | 16             | 3         | 1        | 1        | 37         | 18         |
| Sujatha        | 3                        | 12        | 6              | 2         | -                | -         | 8              | 7         | -        | -        | 17         | 21         |
| Jaffna         | 1                        | 1         | 8              | 4         | -                | -         | -              | 1         | -        | -        | 9          | 6          |
| Abaya          | 4                        | 17        | 6              | 7         | -                | -         | 1              | 9         | 1        | 1        | 12         | 34         |
| Tikiri Sevana  | 6                        | 5         | 10             | 9         | 1                | 4         | 20             | 18        | -        | -        | 37         | 36         |
| Amila Sevana   | 4                        | 1         | 5              | 9         | 4                | 1         | 3              | 5         | -        | 1        | 16         | 17         |
| Paradise       | 3                        | 3         | 6              | 11        | -                | 9         | 3              | 7         | 1        | 2        | 13         | 32         |
| <b>Total</b>   | <b>37</b>                | <b>54</b> | <b>50</b>      | <b>52</b> | <b>6</b>         | <b>15</b> | <b>69</b>      | <b>75</b> | <b>5</b> | <b>5</b> | <b>167</b> | <b>201</b> |

Source: DPCCS, 2012, p. 9.

#### 6.5.4 Data on Children with Special Needs

The following tables show firstly, what kind of disabilities children in child care institutions had and secondly, to what extent the institutions were able to meet their needs. Striking is that 24% of boys and 14% of girls were not able to meet any of their needs. This gives rise to concern as there are not enough special institutions for these children and the staff in the general institutions is not trained enough to help these children.<sup>302</sup>

**Table 12: Kind of Disability of the Children with Special Needs in Institutions 2013\***

| Category                    | No. of Boys | No. of Girls |
|-----------------------------|-------------|--------------|
| Physical                    | 56          | 103          |
| Learning (Mental)           | 144         | 171          |
| Visual Impairment           | 49          | 29           |
| Mental Health               | 128         | 109          |
| Hearing/language impairment | 128         | 86           |
| Other                       | 31          | 29           |
| <b>Total</b>                | <b>536</b>  | <b>527</b>   |

\*This covers also children in conflict with the law in Certified Schools, Remand and Detention Homes  
Source: DPCCS, 2013, p. 60.

<sup>302</sup> Save the Children, p. 260.

**Table 13: Degree of Disability of Children in Institutions 2013\***

| <b>Degree of Disability</b>    | <b>No. of Boys</b> | <b>No. of Girls</b> |
|--------------------------------|--------------------|---------------------|
| Able to Meet All Needs         | 230                | 313                 |
| Able to Meet Part of the Needs | 116                | 80                  |
| Cannot Meet Any Need           | 109                | 63                  |
| Other                          | 2                  | 0                   |
| <b>Total</b>                   | <b>457</b>         | <b>456</b>          |

\*This covers also children in conflict with the law in Certified Schools, Remand and Detention Homes  
Source: DPCCS, 2013, p. 38.

## **6.6 Measures Aiming at Reducing Deprivation of Liberty**

### **6.6.1 Legislative Measures**

As already mentioned in Chapter 5.6.1 the CJPB has been drafted in order to replace the CYPO. In the following, only those features which are relevant to children in need of care and protection and have not yet been mentioned in Chapter 5.6.1 will be considered. Also, the shortcomings of the CJPB can be found in Chapter 5.6.1.

First and foremost, the CJPB contains a broader definition of ‘child in need of care and protection’ and makes no differentiation between boys and girls.<sup>303</sup> Furthermore, the Bill makes special reference to children with disabilities, stating that the probation officer or the police officer must inform the social service officer of the DoSS before starting with the investigation. Subsequently, the social service officer has the task of assessing the condition of the child and of searching for appropriate residential care facilities.<sup>304</sup>

Another positive feature is that the officer in charge of the police station does not only have the duty to inform the probation officer, but also the parent or guardian of the child and has to produce the child before a government medical officer. The medical officer has to submit a medico legal report to the court within one month. Furthermore, the CJPB explicitly stipulates that the police officer and the probation officer shall collaborate.<sup>305</sup>

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<sup>303</sup> CJPB, Section 12.

<sup>304</sup> Ibid, Section 11.

<sup>305</sup> Ibid, Section 13.

A further positive aspect of the CJPB is that it foresees the preparation of an interim and a final social report by the probation officer. The interim social report includes, for example, a care plan for the child, the best place of safety for the child, the person who should ideally be appointed as guardian of the child and whether an institutional case conference should be conducted.<sup>306</sup> The final social report contains, inter alia, the child's wishes, the proceedings and the recommendations of the case conference if it was held and the recommendations of the probation officer himself if they differ from the recommendations of the case conference.<sup>307</sup> The exact proceeding of the institutional case conference is explained in Section 15 of the CJPB.

Last but not least, it seems that the detention periods would be shorter under the CJPB. For example, it is stipulated that a child can be kept in a place of safety for a maximum period of two days before being produced before the court.<sup>308</sup> Furthermore, a child can be detained in an approved or certified school for a maximum period of three years.<sup>309</sup>

### **6.6.2 National Policies and Action Plans**

As already mentioned in Chapter 5.6.2 there are several national policies and action plans with regard to children in the process of being developed. Although the 'National Child Protection Policy 2013' of the NCPA was never approved, it had some important features with regard to the de-institutionalisation of children and child protection services that are worth mentioning. For example, it called on the state of Sri Lanka to 'adopt an overall de-institutionalisation strategy which would gradually allow for the progressive elimination of large residential care facilities and the replacement by family-based care, individualized and small group care.'<sup>310</sup> Furthermore, a comprehensive plan should have been established to make sure that children primarily grow up with their family and their removal from this environment is only a measure of

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<sup>306</sup> Ibid, Section 15.

<sup>307</sup> Ibid, Section 17.

<sup>308</sup> Ibid, Section 20.

<sup>309</sup> Ibid, Section 56.

<sup>310</sup> NCPA and Ministry of Child Development and Women's Affairs, p. 16.



last resort.<sup>311</sup> Moreover, the policy recommended the establishment of a ‘Foster Care Act’ and a ‘Foster Care Commission’.<sup>312</sup>

The ‘Draft National Policy on Child Protection 2017’ incorporated some of the important features of its predecessors. However, as mentioned above, it is still in draft form.<sup>313</sup>

Another action plan that plays a role in this regard is the ‘National Action Plan for the Protection and Promotion of Human Rights 2011-2016’. Some important actions of this plan with regard to children and child care services were already put into practice. For example, the planned amendments to the Orphanage Ordinance were realized by the Model Orphanage Statute<sup>314</sup> (although not all Provinces have implemented it yet in their provincial legislation).<sup>315</sup> Consequently, the validity of a registration of a voluntary children’s home is limited to three years. Furthermore, an inspector can be appointed by the provincial commissioner of probation and child care services.<sup>316</sup> However, some promised actions from this plan have not been implemented, such as the establishment of a proper foster care system.<sup>317</sup>

With regard to children with disabilities there exists the ‘National Policy on Disability’ which has been approved by the Cabinet in 2003.<sup>318</sup> In order to give effect to this policy, a ‘National Action Plan for Disability’ has been developed. This Action Plan was adopted by the Parliament of Sri Lanka in 2014, thus only ten years afterwards.<sup>319</sup> According to UN agencies in Sri Lanka and civil society representatives working with persons with disabilities, these two documents have been prepared with ‘by-and-large consultative and participatory processes’.<sup>320</sup>

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<sup>311</sup> Ibid.

<sup>312</sup> Ibid, pp. 26, 33-35.

<sup>313</sup> NCPA, 2017.

<sup>314</sup> R. Wijesinha, ‘The Care of Children’, *The Island*, 22 July 2012, [bit.ly/TheIsland\\_TheCareOfChildren](http://bit.ly/TheIsland_TheCareOfChildren), (accessed on: 10 May 2017).

<sup>315</sup> Interview No. 15, 31 May 2017.

<sup>316</sup> Model Orphanage Statute, Sections 8 (3), 12.

<sup>317</sup> GoSL, May 2011, p. 114.

<sup>318</sup> Ministry of Social Welfare, ‘National Policy on Disability for Sri Lanka’, 2003, pp. 5, 6, [bit.ly/NP\\_Disability](http://bit.ly/NP_Disability), (accessed on: 16 March 2017).

<sup>319</sup> Ministry of Social Services and Ministry of Health, ‘Sri Lanka: National Action Plan for Disability’, 2013, [bit.ly/NAP\\_Disability](http://bit.ly/NAP_Disability), (accessed on: 16 March 2017).

<sup>320</sup> UN Special Rapporteur on the Rights of Persons with Disabilities, ‘Questionnaire on the rights of person with disabilities to participate in decision-making - Submission by the UN Agencies in Sri Lanka,

Striking is that the National Policy does make no reference to the right to liberty of persons with disabilities or the principle that deprivation of liberty of children with disabilities and the removal of such children from the care of the family should be a measure of last resort and for the shortest period of time. It stipulates, however, that children with disabilities must be prioritized when allocating them to residential care and that community group homes and other sustainable approaches will be tested for children with severe disabilities whose parents have died.<sup>321</sup> Furthermore, it states that ‘Children and adults who have severe disability and their families will have technical assistance, counselling and support in the home through community-based programmes’.<sup>322</sup>

The National Action Plan for Disability does contain more or less concrete actions to be taken which are directly linked to de-institutionalisation. First of all, it stresses the importance of keeping up the family ties while in residential care and of involving the parents and the family in the care process.<sup>323</sup>

Secondly, it states that persons who are currently accommodated in an institution and could be reunited with their family must be identified.<sup>324</sup> In order to reunite these persons, the Action Plan provides for the development of ‘progressive community-based plans [...] including measures to provide support needed and to deal with the problems that may arise’.<sup>325</sup> Although this phrase is very vague and does neither specify the community-based plans which should be developed, nor the support which should be provided and which problems may arise and how to deal with these problems, it must be acknowledged that there exists problem awareness to a certain degree.

Which of the above-mentioned goals stipulated by the Policy and the Action Plan on Disability have been reached so far is, however, not clear.

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in consultation with civil society representatives working with persons with disabilities’, 2015, [bit.ly/OHCHR\\_Questionnaire](http://bit.ly/OHCHR_Questionnaire), (accessed on: 15 April 2017).

<sup>321</sup> Ministry of Social Welfare, pp. 42, 58.

<sup>322</sup> Ibid, p. 58.

<sup>323</sup> Ministry of Social Services and Ministry of Health, p. 25.

<sup>324</sup> Ibid.

<sup>325</sup> Ibid.

### **6.6.3 Guidelines and Standards for Childcare Institutions in Sri Lanka**

In August 2013, the ‘Guidelines and Standards for Childcare Institutions in Sri Lanka’ were published. These guidelines cover a wide range of issues related to childcare institutions, such as the establishment of childcare institutions, the quality of caregivers and staff members, the quality of the care of the children, the standards for the physical environment and the security, and the quality of the monitoring and the evaluation.<sup>326</sup> However, according to Yashali Abeysundara, Manager Law Enforcement NCPA, these guidelines are not yet binding.<sup>327</sup>

### **6.6.4 Monitoring Mechanisms**

Several entities are entitled to monitor the child care institutions: Visitors according to the CYPO, the Provincial DPCCS, the NCPA and the Human Rights Commission. However, it seems that there is no organized system of monitoring. Furthermore, the above-mentioned Guidelines and Standards for Childcare Institutions are not used as a frame of reference for the monitoring.<sup>328</sup>

According to Section 51 (2) of the CYPO the relevant Minister can nominate one or more persons to be so-called ‘visitors’ of a certified school and to make inspection. As already explained in Chapter 5.6.6 it is not clear whether such visitors have been nominated and whether rules for their visits have been laid down is.

The Provincial DPCCS is tasked with the monitoring of private child care institutions. According to Section 12 of the Model Orphanage Statute, the Probation Commissioner himself or an inspector appointed by him can conduct surprise visits to Voluntary Children’s Homes.<sup>329</sup> Whether they are also conducting visits to state-run institutions which are also under their purview is, however, unclear.

According to Article 34 (1) (a) of the National Child Protection Authority Act, an officer authorized by the NCPA may ‘enter and inspect any premises of any institutions

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<sup>326</sup> NCPA, ‘Guidelines and Standards for Childcare Institutions in Sri Lanka’, 2013, Table of Contents, [bit.ly/2tVRODO](http://bit.ly/2tVRODO), (accessed on: 8 May 2017).

<sup>327</sup> Interview No. 3, 18 May 2017.

<sup>328</sup> SOS Children’s Villages Sri Lanka, ‘Alternative care system in Sri Lanka’, [website], no date available, [bit.ly/SOSCV\\_AlternativeCareSriLanka](http://bit.ly/SOSCV_AlternativeCareSriLanka), (accessed on: 5 July 2017); DPCCS, 2013, p. 16.

<sup>329</sup> Model Orphanage Statute, Section 12.

by which child care services are provided.<sup>330</sup> However, according to the Manager of Law Enforcement of the NCPA, the authority is currently not conducting monitoring with regard to child care institutions.<sup>331</sup>

Last but not least, the HRCSL has the possibility to conduct visits to places of detention and thereby ‘monitor the welfare of persons detained either by a judicial order or otherwise’.<sup>332</sup> However, from the HRCSL’s last annual report from the year 2013 the conclusion can be drawn that only very few visits are conducted throughout a year.<sup>333</sup>

According to Nirmalee Perera, probation officer of the National DPCCS, the DPCCS and the NCPA have conducted a pilot project in Colombo with a multi-disciplinary Committee visiting and monitoring children’s homes. This Committee is comprised of, for example, probation officers, child rights promotion officers, NCPA officers, police officers etc.<sup>334</sup>

#### **6.6.5 Sponsorship Schemes**

A study by DPCCS from 2013 revealed that almost two thirds of the children were in an institution mainly because of poverty.<sup>335</sup> Poverty is, thus, one of the main reasons why children end up in child care institutions. However, according to Principle 15 of the GACC, poverty ‘should never be the only justification for the removal of a child from parental care’. In order to address this underlying problem, families must, thus, be financially supported.

According to a report by Save the Children Sri Lanka from 2005, there are a range of sponsorship schemes to support families, like the Keppakaru Mapiya Scheme, the Sevana Sarana Fund, and Sisu Nena Kirana. Furthermore, there exist special schemes to support families with twins and triplets, and a range of social welfare programmes are offered to vulnerable families such as nutrition support programmes, alleviation programmes, and medical support programmes. These sponsorship schemes are, however, only to a certain degree effective as there is a delay in the allocation due to

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<sup>330</sup> National Child Protection Authority Act, Section 34 (1) (a).

<sup>331</sup> Interview No. 3, 18 May 2017.

<sup>332</sup> HRCSL Act, No. 21 of 1996, Section 11 (d).

<sup>333</sup> HRCSL, ‘Annual Report 2013’, pp. 29, 30.

<sup>334</sup> Interview No. 15, 31 May 2017.

<sup>335</sup> DPCCS, 2013, p. 48.

bureaucratic and legal procedures and a lack of resources.<sup>336</sup>

The biggest existing sponsorship programme in Sri Lanka is the Samurdhi Programme which was set up in 1995. The aim of this programme is to support poor families with food subsidies and to promote income-generation opportunities.<sup>337</sup> Although the overall poverty rates in Sri Lanka have decreased since the introduction of the Samurdhi Programme, it has been subject to various criticisms. For example, the Department of Census and Statistics revealed in 2007 that the ‘food stamp programme, which constitutes 80% of the total programme budget, misses about 40% of the households in the poorest quintile while almost 44% of the budget goes to households in the top three quintiles.’<sup>338</sup> The same criticism was expressed by the World Bank.<sup>339</sup>

Only recently, the UN World Food Programme also criticized the Samurdhi Programme by stating that ‘the maximum amount received by a family is far below the minimum requirement to meet a family’s basic needs, let alone its nutrition requirements.’<sup>340</sup>

In conclusion, although there are sponsorship programmes available to poor and vulnerable families, their effectiveness is questionable.

#### **6.6.6 Field Officers**

There are several officers working in the field in order to promote and protect children’s rights. Under the National DPCCS there are child rights promotion officers and assistants and the NCPA has divisional NCPA officers, district NCPA coordinators and district psychosocial officers. Also, the Children’s Secretariat has early childhood care and development (EECD) officers at various levels. Furthermore, there are the probation officers of the Provincial DPCCS, the social officers of the Social Department and police officers.<sup>341</sup>

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<sup>336</sup> A. Bilson and P. Cox (Save the Children in Sri Lanka), ‘Home Truths: Children’s Rights in Institutional Care in Sri Lanka’, 2005, pp. 14, 18, <http://bit.ly/HomeTruths1>, (accessed on: 19 June 2017).

<sup>337</sup> Parry-Williams, p. 10.

<sup>338</sup> Sunday Times, ‘Poverty Alleviation Programmes ineffective – CEPA’, *Sunday Times*, Vol. 42, No. 22, 2007, [bit.ly/SundayTimes\\_CEPA](http://bit.ly/SundayTimes_CEPA), (accessed on: 19 June 2017).

<sup>339</sup> E. Glinskaya, ‘An Empirical Evaluation of the Samurdhi Program’, no date available, p. 2, [bit.ly/Samurdhi\\_WorldBank](http://bit.ly/Samurdhi_WorldBank), (accessed on: 19 June 2017).

<sup>340</sup> UN World Food Programme, ‘National Strategic Review of Food Security and Nutrition. Towards Zero Hunger’, 2017, p. 40.

<sup>341</sup> Save the Children, pp. 262-263.

As there are so many different officers working under different Ministries and Departments, the question arises whether this is an effective system to promote and protect children and to ultimately prevent their institutionalisation. There is, in fact, the problem that several field officers have overlapping tasks. This is especially true for child rights promotion officers and NCPA officers who are both, for example, providing psychosocial support to children and conducting awareness raising programmes in schools, communities, etc.<sup>342</sup>

In order to avoid the duplication of their work, coordination is essential. For the moment, there is no real coordination mechanism which makes a comprehensive social service delivery dependent on the personal network of the respective officer. Consequently, only some well-connected and dedicated officers use the maximum resources to support families.<sup>343</sup>

Also, the training of the field officers suffers from shortcomings. Due to resource limitations and provincial devolution it is not possible anymore to provide initial long-term training and regular and systematic training thereafter. Another problem is that trainings are provided by different entities such as government agencies, training institutes, Universities, development partners, INGOs and NGOs.<sup>344</sup>

As Save the Children concluded in a report from 2016 Sri Lanka lacks a ‘systematic or comprehensive professional development programme for government cadres in the child protection sector.’<sup>345</sup> However, the field officers interviewed by Save the Children seemed to be ‘dedicated and sincere in their efforts, committed to their duty and making best efforts at providing efficient and quality services amidst great challenges, including severe resource restrictions and demotivation’.<sup>346</sup>

According to Chathuri Jayasooriya, an independent researcher who has been working in the field of child protection for many years, there are too many field officers working on different topics such as children, women, elderly people, and so on. According to Jayasooriya, it would be better to establish a new type of field officer called ‘family

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<sup>342</sup> Ibid, p. 275.

<sup>343</sup> Ibid, p. 281; Interview No. 15, 31 May 2017.

<sup>344</sup> Save the Children, p. 265.

<sup>345</sup> Ibid, p. 266.

<sup>346</sup> Ibid.

care worker', who is responsible for several, whole families.<sup>347</sup> This would, in fact, make it possible to decrease the number of field officers which would, in turn, allow for more in-service training. Furthermore, the officers would be able to form a stronger bond with the family which would improve the quality of the service.

#### **6.6.7 Women and Children's Desks**

A promising practice is the establishment of Women and Children's Desks at police stations. In 1979, the first Women and Children's Desk was established in Colombo. Since 1994, each police station is advised to establish a Women and Children's Desk.<sup>348</sup> However, as of 2016 only 43 police stations in Sri Lanka have such desks. Another problem is that these officers have multiple tasks which makes it hard for them to concentrate on their work at the Women and Children's Desk.<sup>349</sup>

According to Dr. Hemamal Jayawardena 'there is nothing special about it [Women and Children's Desk].'<sup>350</sup> This can be attributed to the fact that these police officers do not receive special training.<sup>351</sup> Furthermore, there is a lack of staff working at these desks.<sup>352</sup>

#### **6.6.8 Reunification with Families**

As shown in Chapter 6.5.2, 82% of the children in child care institutions in 2013 still had either both or one parent. Therefore, many children could theoretically be reunited with their family. Nevertheless, 22% of children in institutions stayed in the institutions between five and ten years. 12% of children in institutions even spent more than ten years in the institution.<sup>353</sup>

Also, the data available with regard to state receiving homes (see Chapter 6.5.3) suggest that reunification is not practiced enough. Although only 2% of children in state receiving homes were orphans, only 24% of children were handed over to their parent

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<sup>347</sup> Interview No. 14, 30 May 2017.

<sup>348</sup> Parry-Williams, p. 10.

<sup>349</sup> Save the Children, pp. 259, 276.

<sup>350</sup> Interview No. 10, 25 May 2017.

<sup>351</sup> Ibid.

<sup>352</sup> Verité Research, p. 20.

<sup>353</sup> DPCCS, 2013, p. 61.

or guardian in 2012.<sup>354</sup> This is aggravated by the fact that these children are under five years of age and could, thus, be reintegrated with their family more easily.

In order to reunite a child with its family, a system of so-called ‘Placement Committee Meetings’ was established. The functions and responsibilities of these placement committees are laid down in the Circular on Minimum Quality Standards of the DPCCS which are, however, not binding. The placement committee should meet every six months and consists of the following people: (1) provincial commissioner of probation and child care services and the probation officer in charge of the home, (2) manager/representative of the board of management, (3) mother/father; (4) house mother/house master.<sup>355</sup> This would be in accordance with Article 25 CRC and with Principle 14 of the GACC which state that the placement of a child in need of care or protection needs to be subject to regular review.

However, according to a report prepared by UNICEF in partnership with the Ministry of Child Development and Women’s Empowerment (now Ministry of Women and Child Affairs), 30% of voluntary children’s homes stated that they do not hold placement committees. Furthermore, out of the 335 homes that are holding such meetings, 45 declared that they do not keep written minutes of the meetings.<sup>356</sup> Although this report is already ten years old, the interviews with the experts suggest that not much has changed in this regard.<sup>357</sup>

Another problem that the interview partners stressed in this regard is that families are sometimes not able to take the children back. For example, Nirmalee Perera, probation officer, stated that ‘Sometimes the parents are available but they do not want to take the child back to their family due to poverty and many other reasons.’<sup>358</sup> According to Principle 15 of the GACC poverty should never be the only justification for not reintegrating a child with its family. Furthermore, Principle 33 lays down that states should ‘develop and implement consistent and mutually reinforcing family-oriented

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<sup>354</sup> DPCCS, 2012, p. 9.

<sup>355</sup> DPCCS, Circular on Minimum Quality Standards, ‘Fixation of General Standards for Promoting the Quality of Services in Voluntary Children’s Homes’, 1991, Section 6.9.

<sup>356</sup> UNICEF and Ministry of Child Development and Women’s Empowerment, ‘Out of Sight, Out of Mind. Report on Voluntary Residential Institutions for Children in Sri Lanka: Statistical Analysis’, 2007, p. 31, [bit.ly/OutofSight\\_Report](http://bit.ly/OutofSight_Report), (accessed on: 20 May 2017).

<sup>357</sup> Interview No. 3, 18 May 2017; Interview No. 8, 24 May 2017; Interview No. 14, 30 May 2017.

<sup>358</sup> Interview No. 15, 31 May 2017.



policies designed to promote and strengthen parents' ability to care for their children'<sup>359</sup>.

#### **6.6.9 Child Guidance Centre for Children with Disabilities**

In 2003, the DPCCS established a 'Child Guidance Center for Children with Disabilities' in the district of Colombo with the aim of helping parents of children with disabilities. The vision of the project was to provide the child with the 'necessary assistance and guidance'<sup>360</sup> and to 'raise parent's mental level and prepare them to face this situation of stunted growth of children.'<sup>361</sup> The objectives of the project are the early detection of the children with disabilities, to strengthen the network of various relevant service providers, to provide education to these children at an early age-level in order to facilitate the social interaction, and to support parents and family members with psychological assistance. So far, this project is only ongoing in the district of Colombo, but the authorities are attempting to expand it to the Gampaha District, the Rathnapura District, and the Hambanthota District.<sup>362</sup>

### **6.7 Conclusion and Recommendations**

As shown above, children in need of child protection services are actually deprived of their liberty in the institutions as they are not allowed to leave the institutions except for poya-days and during holidays. Furthermore, the lives of the children are strictly regulated and disciplined, and corrections and sanctions are used as these children are kept together with child offenders.

On the basis of the above depicted legal framework and its practical implementation it can, furthermore, be concluded that deprivation of liberty of children in need of child protection services is neither a measure of last resort, nor is it used for the shortest appropriate period of time. For example, children can be detained in a place of safety before being brought to the court for an unspecified period of time. Furthermore,

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<sup>359</sup> UNGA, 'Guidelines for the Alternative Care of Children', Principle 33.

<sup>360</sup> Department of Social Services, 'Early Investigation & Rehabilitation of Disabled Children', no date available, [bit.ly/DoS\\_CGC](http://bit.ly/DoS_CGC), (accessed on: 24 March 2017).

<sup>361</sup> Ibid.

<sup>362</sup> Ibid.

children can be detained in approved or certified schools for a set period of three years without taking into consideration the specific situation of the child. The court's possibility to prolong this period of detention in case of an escaping child also proves that the 'last resort' and 'shortest period of time' principle is not fulfilled.

Another problem is that the clinical and the institutional case conferences which have a high potential of preventing the institutionalisation of the children are not regularly conducted and do not receive enough attention by the magistrate. Also, the social inquiry report which contains the recommendations of the institutional case conference and is the basis for the placement decision of the court has many shortcomings.

Furthermore, it is problematic that the fit person order as one possible alternative to institutionalisation is not used enough. Also, adoption processes are not effective enough as they take too long which again forces children to stay in the institutions for a longer period of time. Moreover, children over fourteen years of age cannot be adopted. Last but not least the existing measures against institutionalisation are not contributing to de-institutionalisation. As poverty is one of the main reasons for children being sent to institutions, sponsorship programmes play a vital role. These are, however, not effective which might be related to the shortcomings of the officers working in the field who have the responsibility of tracking children in need of protection.

Another pressing issue is the lack of reunifications of the children with their families. As the data with regard to the institutions and the children has shown, most of the children still had both or one parent and could have been reunited with their parents. Still, they stayed in the institutions for a relatively long period of time. One problem is that families are not able to take the children back because of poverty, problems in the family etc. which again demonstrates the shortcomings of the sponsorship programmes. Another factor is that placement committees which are responsible for re-unification are not meeting regularly.

The following table was created by the author of this thesis. It gives an overview of the measures that should be taken in order to address the above-mentioned problems and to work towards the fulfilment of the principle that deprivation of liberty of children and child protection services should be a measure of last resort and for the shortest appropriate period of time. The table also names the key responsible agencies and

depicts the presumed feasibility of these measures. Ten out of twenty-five measures are estimated as having a high feasibility. The majority of the remaining measures would be feasible if the appropriate financial resources would be allocated.

**Table 14: Recommendations with Regard to Children and Child Protection Services**

| Recommendation               |  | Impact  | Feasibility  | Key Responsible Agency             |
|------------------------------|--|---|--|------------------------------------|
| Legal                        | Amend the CJPB   | Include the principle that deprivation of liberty of children in need of care and protection should be a measure of last resort and for the shortest appropriate period of time.  | High   | Ministry of Justice;<br>MWCA       |
|                              | Enact the CJPB with the amendments   | This would solve many problems such as taking into consideration the best interest and the view of the child, also covering children with disabilities, more in-depth assessment of the children, shorter detention periods, etc. | Depends on whether all nine Provincial Councils have to approve CJPB | Parliament;<br>Provincial Councils |
|                              | Amend the Model Orphanage Statute  | Include the principle that deprivation of liberty of orphaned, deserted or destitute children should be a measure of last resort and for the shortest period of time.   | High   | Ministry of Justice;<br>MWCA       |
| Actors Involved in Placement | See Chapter 5.7  | See Chapter 5.7   | See Chapter 5.7  | See Chapter 5.7                    |
| Institutions                 | See Chapter 5.7  | See Chapter 5.7   | See Chapter 5.7  | See Chapter 5.7                    |
|                              | Ensure day care and respite care for children with disabilities  | This would enable parents to better cope with their responsibilities towards children with disabilities.  | Depends on financial allocation                                      | DoSS;<br>Provincial DoSS           |
| Measures Against Inst.       | Improve national policies/action plans in accordance with international law and standards (CRC, GACC, etc.), involve all actors and get approval of highest GoSL level | This would make the overall de-institutionalisation process more effective.   | High   | NCPA                               |
|                              | Establish more Women and Children's Desks  | This would ensure a child-friendly procedure at police stations all over the country.   | Depends on financial allocation                                      | Ministry of Law and Order          |

|                               |  |   |                                 |   |
|-------------------------------|--|---|---------------------------------|---|
| <b>Measures Against Inst.</b> | Improve sponsorship programmes   | This would tackle poverty as one of the main causes for institutionalisation of children.   | Depends on financial allocation | National DPCC; DoSS; etc.   |
|                               | Make the system of field officers more effective, e.g. merge the different field officers in one 'family care worker'                    | This would make it possible to provide more training and would improve the system of tracking vulnerable families.                                    | High                            | National and Provincial DPCCS; NCPA; Children's Secretariat; etc. |
|                               | Ensure the regular meeting of placement committees in all institutions.  | This would increase the opportunity for children to be reunified with their families.   | Depends on financial allocation | Provincial DPCCS  |
|                               | Develop and implement consistent family-oriented policies designed to promote and strengthen parents' ability to care for their children | This would increase the opportunity for children to be reunified with their families and would prevent separation from the family in the first place. | Depends on financial allocation | MWCA; NCPA; Provincial DPCCS; etc.                                |
|                               | Extend the coverage of child guidance centres  | This would help families with children with disabilities and would prevent their institutionalisation to a certain extent.                            | Depends on financial allocation | DoSS  |
| <b>Data</b>                   | Establish nationwide systematized and comprehensive database on children in need of care and protection                                  | This would make it possible to monitor the impact of the other measures.  | High                            | National and Provincial DPCCS; DoSS                               |

## 7. CHILDREN AND HEALTH CARE SERVICES

### 7.1 Sri Lanka's Law Relating to Children and Health Care Services

As this chapter will cover children with mental health issues and drug dependent children, there are four laws that need to be considered: the Mental Disease Ordinance No. 1 of 1873, the Code of Criminal Procedure Act No. 15 of 1979, the Drug Dependent Persons (Treatment and Rehabilitation) Act No. 54 of 2007, and the Poisons, Opium and Dangerous Drugs Ordinance (PODDO) No. 17 of 1929.

The Mental Disease Ordinance regulates the admission of mentally ill children to mental hospitals.<sup>363</sup> It dates back to the Lunacy Ordinance of 1873 when the country was still a British colony and has not been revised since 1956.<sup>364</sup> The Mental Disease Ordinance defines a person with an unsound mind as a person ‘who is 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’.<sup>365</sup>

The Code of Criminal Procedure Act regulates what happens to offenders who have been of unsound mind when they committed the offence.<sup>366</sup>

The treatment and rehabilitation of drug dependent children under eighteen years of age is regulated by the Drug Dependent Persons Act.<sup>367</sup> What exactly constitutes a drug dependent person is, however, not defined by this Act as it only stipulates that it ‘means a person to whom this Act applies’.<sup>368</sup>

The PODDO regulates which acts in relation to drugs are considered as crimes. Accordingly, the wholesale trade, the possession, the manufacture and the trafficking of dangerous drugs constitutes a crime.<sup>369</sup> In case the offender is a drug dependent person, he or she can be admitted to a treatment centre according to the Drug Dependent Persons Act.<sup>370</sup>

## 7.2 Placement Procedure

As has been mentioned above, the placement procedure of mentally ill children is regulated by the Mental Disease Ordinance. According to Sections 23 (2) and (3) of this Ordinance, children under sixteen years of age can be voluntarily admitted to a mental

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<sup>363</sup> An Ordinance to Make Further and Better Provision Relating to the Care and Custody of Persons of Unsound Mind and Their Estate (Mental Disease Ordinance), No. 1 of 1873, Section 23 (2).

<sup>364</sup> R. Weerasundera, ‘Mental health legislation in Sri Lanka: the time for change is now’, *Sri Lanka Journal of Psychiatry*, Vol. 2 (2), 2011, p. 43. Available from <http://sljpsyc.sljol.info>, (accessed on: 15 March 2017).

<sup>365</sup> Mental Disease Ordinance, Section 33 (a).

<sup>366</sup> An Act to Regulate the Procedure of the Criminal Courts (Code of Criminal Procedure Act), No. 15 of 1979, Chapter XXXI.

<sup>367</sup> An Act to Make Provision for the Treatment and Rehabilitation of Drug Dependent Persons and to Provide for Matters Connected Therewith or Incidental Thereto (Drug Dependent Persons Act), No. 54 of 2007.

<sup>368</sup> *Ibid*, Section 23.

<sup>369</sup> An Ordinance to Amend and Consolidate the Law Relating to Poisons, Opium and Dangerous Drugs (Poisons, Opium and Dangerous Drugs Ordinance – PODDO), No. 17 of 1929, Chapter V.

<sup>370</sup> Drug Dependent Persons Act, Section 10 (4).

hospital after written application by their parent or guardian and a recommendation by a medical officer. Children over fifteen years and under nineteen years can make the written application to the hospital themselves, without any involvement of their parent or guardian and without a recommendation by a medical officer.<sup>371</sup>

A child under sixteen years so admitted to the hospital may leave the hospital after his or her parent or guardian has informed the head of the hospital seventy-two hours before. A child above fifteen years may inform the hospital itself seventy-two hours before leaving.<sup>372</sup> Furthermore, a child above fifteen years can only be kept in hospital for another twenty-eight days if it becomes 'at any time incapable of expressing himself as willing or unwilling to continue to receive treatment'.<sup>373</sup>

The compulsory admission to a mental hospital is regulated in Section 2 et seq. of the Mental Disease Ordinance. In that respect, the Ordinance makes no distinction between children and adults. Accordingly, any police officer or grama niladharies or a private person who think that a person is of unsound mind may ask the district court to examine the person concerned. In case of an application by a private person a certificate from a medical practitioner needs to be enclosed.<sup>374</sup>

Subsequently, the district court summons the respective person as soon as possible and examines the person. If the court requires further observation, it can order the remand of the person for as long as it specifies and for an unspecified number of times in the custody of the Fiscal. Also, if the court considers that the person is of sound mind, but two medical practitioners certify the contrary, the court can so remand the person. After the period of remand, the court hears evidence and decides upon the state of mind of the person.<sup>375</sup>

When the court comes to the conclusion that the person is of unsound mind, the person can either be given into the custody of a fit relative or friend or into the custody of a mental hospital in case no relative or friend has undertaken the custody.<sup>376</sup> A person so sent to a mental hospital can be discharged in two cases: (1) either a guardian, a relative

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<sup>371</sup> Mental Disease Ordinance, Section 23 (1).

<sup>372</sup> Ibid, Section 24.

<sup>373</sup> Ibid, Section 27 (1).

<sup>374</sup> Ibid, Section 2.

<sup>375</sup> Ibid, Section 3.

<sup>376</sup> Ibid, Section 5.

or a friend apply for the transfer of that person into their custody, or (2) the head of the hospital decides to discharge the person after a medical officer certifies the recovery of the person.<sup>377</sup>

In case a child of unsound mind has committed an offence, it will be acquitted on the ground that it was ‘incapable of knowing the nature of the act alleged as constituting the offence or that it was wrong or contrary to law’.<sup>378</sup> Subsequently, the court can order the child to be sent to a place of safe custody until the Minister decides whether to place the child in a mental hospital, a prison or another place of safe custody.<sup>379</sup> A child so detained shall be visited by the Commissioner of Prison or the visitor of the mental hospital at least every half a year to examine the mental state. If these officers come to the conclusion that there is no risk that the child inflicts harm on him or herself or on another person, the child can (1) either be discharged, or (2) be (further on) detained in a mental hospital.<sup>380</sup>

The institutionalisation process of drug dependent children is regulated in the Drug Dependent Persons Act. According to Section 9 (1) of this Act, the parents or guardian of a drug dependent child under eighteen years of age have the right to apply for admission to a treatment centre on behalf of their child.<sup>381</sup> Although the child does not apply him or herself, this is called a ‘voluntary admission’. The child can, subsequently, only be released when the assessment panel and the medical officer in charge of the treatment centre believe that he or she has successfully completed the treatment.<sup>382</sup> The assessment panel is a committee which is comprised of a maximum of ten persons who are experts in the field of law or in the field of physiology or social problems related to drug dependence.<sup>383</sup>

With regard to the compulsory admission to treatment centres the Drug Dependent Persons Act makes no distinction between adults and children. Accordingly, the court may send a minor, who is according to the government medical officer a drug

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<sup>377</sup> Ibid, Section 8.

<sup>378</sup> Code of Criminal Procedure Act, Section 380.

<sup>379</sup> Ibid, Section 381.

<sup>380</sup> Ibid, Sections 382, 384.

<sup>381</sup> Drug Dependent Persons Act, Section 9 (1).

<sup>382</sup> Ibid, Section 9 (2).

<sup>383</sup> Ibid, Section 7.

dependent person, for compulsory treatment and rehabilitation to a treatment centre.<sup>384</sup>

Also, if the child has committed an offence under the PODDO the court can send the convicted child to a treatment centre for a specified time. The time in the treatment centre counts towards the sentence imposed on the child. If the director of the treatment centre deems it necessary, the duration of the treatment of the convicted child can be extended by the court.<sup>385</sup>

A child who has been compulsorily admitted to a treatment centre can be released by the court upon the recommendation of the director of the treatment centre and after consultation with the assessment panel.<sup>386</sup>

### **7.3 Analysis of the Legal Framework**

With regard to both mentally ill children under sixteen years and drug dependent children under eighteen years, it is worrying that in neither of the respective laws it is stipulated that the child's opinion and its best interest should be taken into consideration when he or she is voluntarily admitted to a mental hospital or a treatment centre.<sup>387</sup> Also Prof. Ravindra Fernando, the current Chairperson of the NDDCB, confirmed that drug dependent children cannot decide whether they want to go to a treatment centre or not as 'it's a punishment'.<sup>388</sup>

In accordance with Article 12 CRC a 'child who is capable of forming his or her own views'<sup>389</sup> should be asked for its opinion with regard to the admission. Moreover, it should be included that the best interest of the child as stipulated in Article 3 CRC should be taken into consideration when deciding whether a child should be admitted to a mental hospital or a treatment centre.

Furthermore, both laws lack a provision stating that mentally ill children need to be sent to child or adolescent psychiatric units and that drug dependent children need to be sent to child or youth treatment centres.<sup>390</sup> This should be included in order to avoid children

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<sup>384</sup> Ibid, Section 10 (1), (2), (3).

<sup>385</sup> Ibid, Section 10 (4).

<sup>386</sup> Ibid, Section 11.

<sup>387</sup> Mental Disease Ordinance, Section 23 (2), (3); Drug Dependent Persons Act, Section 9 (1).

<sup>388</sup> Interview No. 13, 30 May 2017.

<sup>389</sup> CRC, Article 12.

<sup>390</sup> Mental Disease Ordinance; Drug Dependent Persons Act.



being sent to adult psychiatric units or treatment centres.

Also, the fact that the child cannot leave the mental hospital or the treatment centre at will, as either the parents or guardian or the assessment panel and a medical officer have the decision-making power gives rise to concern.<sup>391</sup> As the admission to the treatment centre was voluntarily, the child concerned should be allowed to leave at will or should at least be asked about his or her view.

With regard to the compulsory admission of persons to mental hospitals or treatment centres, it is worrying that neither the Mental Disease Ordinance, nor the Drug Dependent Person's Act have a separate procedure for children. As children are more vulnerable than adults they need protective measures such as taking into consideration the best interest of the child, attendance of the parent or guardian in the court proceedings, explanation of the procedure in easy language etc.

With regard to mentally ill children there is the additional issue that the court can order the remand of the child in the custody of the Fiscal for as long as he determines and for an unspecified number of times.<sup>392</sup> As this clearly risks the deprivation of liberty of the child for an inappropriate long time, a maximum period of remand should be laid down. Also, the fact that a person can be sent to a mental hospital for the sole reason of being mentally ill suggests that the 'last resort' and 'shortest appropriate period of time' principle is not fulfilled. Additional conditions such as risk of inflicting harm to him or herself or to others should be included.

For drug dependent children it should furthermore be stipulated that the degree of dependence of the child should be taken into consideration when deciding upon the period of detention at the treatment centre.

Another problem is the periodic review of the placement in a mental hospital or treatment centre. The Mental Disease Ordinance does not provide for any periodic review which is contrary to Article 25 CRC. Although the Drug Dependent Persons Act does state that persons compulsorily admitted to a Treatment Centre shall 'from time to time be subject to assessment by an Assessment Panel'<sup>393</sup>, this also does not seem to be a periodic review of the placement.

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<sup>391</sup> Mental Disease Ordinance, Section 24; Drug Dependent Persons Act, Section 9 (2).

<sup>392</sup> Mental Diseases Ordinance, Section 3.

<sup>393</sup> Drug Dependent Persons Act, Section 10 (6).

However, a positive aspect of the Mental Disease Ordinance is that there is the alternative measure of sending the person into the custody of a fit relative or friend.<sup>394</sup> For drug dependent persons there is no alternative measure to the treatment centre.<sup>395</sup> A good alternative would be the treatment at home with regular visits of specialists. Regarding children who have committed a crime but were of unsound mind at that time, it is striking that there is the possibility that these children have to stay in the mental hospital although an officer has come to the conclusion that there is no risk that the child inflicts harm on him or herself or on another person.<sup>396</sup> As there is no reasonable ground for keeping the child in the mental hospital this constitutes a clear violation of the ‘last resort’ and ‘shortest period of time’ principle.

## **7.4 Existing Institutions and Situation Therein**

### **7.4.1 Mental Health Institutions**

In Sri Lanka, there are three state-run hospitals which provide treatment to children with mental health issues: the National Institute of Mental Health (NIMH) in Colombo, the Lady Ridgeway Hospital for Children which is also situated in Colombo and the Sirimavo Bandaranayake Specialized Children's Hospital in Peradeniya.<sup>397</sup> According to Dr. Mahesan Ganesan, Consultant Psychiatrist at the NIMH, there are also a few private hospitals for children with mental health problems.<sup>398</sup> However, no further information on these hospitals could be found.

The Sirimavo Bandaranayake Specialized Children's Hospital has a child psychiatry clinic which is conducted every Friday, but has no psychiatric in-patient care unit and will, thus, not be subject to further consideration.<sup>399</sup>

The Lady Ridgeway Hospital for Children, on the other hand, has two in-patient child psychiatry units, which were established in 2002 and 2014.<sup>400</sup>

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<sup>394</sup> Mental Disease Ordinance, Section 5.

<sup>395</sup> Drug Dependent Persons Act.

<sup>396</sup> Code of Criminal Procedure Act, Sections 382, 384.

<sup>397</sup> Interview No. 11, 29 May 2017.

<sup>398</sup> Dr. Mahesan Ganesan, e-mail message to author, 30 June 2017.

<sup>399</sup> Office of the Provincial Director of Health Service, ‘Annual Health Bulletin 2013’, 2013, p. 153, [bit.ly/AHB\\_2013](http://bit.ly/AHB_2013), (accessed on: 27 June 2017); MoH, ‘Annual Health Bulletin 2014’, 2014, p. 144.

<sup>400</sup> Chandradasa and Kurupparachchi, p. 36.

Also, the NIMH has an adolescent mental health unit which provides in-patient treatment for children between the ages of twelve and eighteen who are mentally ill.<sup>401</sup> It is the only mental hospital in Sri Lanka.<sup>402</sup> A positive feature of the NIMH is that family members are allowed to stay at the hospital with the children.<sup>403</sup> In practice, however, this might not be possible due to work obligations or long travel distances.

In total, there are twelve psychiatric beds for children and nine for adolescents on the whole island.<sup>404</sup> As all of these are in the Western Province, there is the tendency to treat children whose families cannot travel so far in female psychiatric or acute pediatric units. The concentration of in-patient facilities around Colombo furthermore leads to a lack of follow-up treatment.<sup>405</sup>

According to Dr. Mahesan Ganesan, none of the children in the hospitals are allowed to leave until their discharge. He confirmed that they are deprived of their liberty.<sup>406</sup> Although children usually stay for a short period such as one or two months, this is a problem insofar as it might prevent children from going to school during their treatment which is contrary to the right to education as stipulated in Article 28 CRC.<sup>407</sup> Furthermore, he explained that children who have committed a major crime are sent to the forensic unit and are, thus, accommodated together with adults.<sup>408</sup>

Another problem is that there is a general lack of personnel in the mental health sector such as mental health care workers and psychiatric social workers.<sup>409</sup> According to Dr. Ganesan, there are at the moment three or four child psychiatrists for the whole country.<sup>410</sup> In fact, the first two board-certified specialists in child and adolescent psychiatry only started working in Sri Lanka in 2016 after training in Australia.<sup>411</sup>

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<sup>401</sup> NIMH, 'Mental Health in the News', [website], 2015, [bit.ly/TheNation\\_NIMH](http://bit.ly/TheNation_NIMH), (accessed on: 27 June 2017).

<sup>402</sup> S. Bandara, 'Breaking the silence on depression: challenging task', *The Island*, 6 April 2017, [bit.ly/TheIsland\\_Article](http://bit.ly/TheIsland_Article), (accessed on: 27 June 2017).

<sup>403</sup> C. Hutter, M. Haputantri and G. Anver, 'Inside Sri Lanka's National Mental Health Institute: A Photostory', *Roar*, 25 October 2016, [bit.ly/roar\\_NIMH](http://bit.ly/roar_NIMH), (accessed on: 28 June 2017).

<sup>404</sup> Chandradasa and Kurupparachchi, p. 36.

<sup>405</sup> *Ibid*, p. 37.

<sup>406</sup> Interview No. 11, 29 May 2017.

<sup>407</sup> *Ibid*; Hutter, M. Haputantri and G. Anver, 'Inside Sri Lanka's National Mental Health Institute: A Photostory'.

<sup>408</sup> Interview No. 11, 29 May 2017.

<sup>409</sup> Save the Children, pp. 216, 224.

<sup>410</sup> Interview No. 11, 29 May 2017.

<sup>411</sup> Chandradasa and Kurupparachchi, p. 36.

One of the reasons for the lack of human resources are delays in the recruitment process. With regard to psychiatric social workers there is the additional issue of high educational requirements and the comparable low salary.<sup>412</sup>

Another problem in this context revealed by the above-mentioned study is that the training of public health care personnel did not include child mental health issues.<sup>413</sup>

All of the above-mentioned problems and shortcomings are a clear violation of Article 24 CRC which stipulates ‘the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health’.<sup>414</sup>

#### **7.4.2 Treatment Centres for Drug Dependent Children**

There is only one state institution for drug dependent children, namely the ‘Youth Prevention, Treatment and Rehabilitation Centre’ in Kandy (Central Province) which is run by the NDDCB.<sup>415</sup> According to the Drug Dependent Persons Act, also private treatment centres for drug dependent persons can be established under the condition of a license issued by the NDDCB.<sup>416</sup> However, according to the Chairperson of the NDDCB there are no private centres for children.<sup>417</sup>

According to Isuru Samarakoon who is a counsellor at the state-run treatment centre for children, children up to the age of twenty-one are sent to this institution.<sup>418</sup> Samarakoon furthermore said that the children are usually sent to the treatment centre for a period of twelve weeks. Only sometimes the court decides that this period is not enough for the child and orders the child to stay for a longer period. During this time, they are deprived of their liberty as they are not allowed to leave the institution.<sup>419</sup> This is a problem insofar as they are not going to school while receiving treatment which is contrary to

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<sup>412</sup> Save the Children, p. 224.

<sup>413</sup> Ibid, p. 218.

<sup>414</sup> CRC, Article 24 (1).

<sup>415</sup> NDDCB and Ministry of Law and Order & Southern Development, ‘Handbook of Drug Abuse Information 2016’, 2016, p. 105, [bit.ly/HandbookDrugAbuse16](http://bit.ly/HandbookDrugAbuse16), (accessed on: 15 June 2017).

<sup>416</sup> Drug Dependent Persons Act, Section 3.

<sup>417</sup> Prof. Ravindra Fernando, e-mail message to author, 10 July 2017.

<sup>418</sup> Interview No. 12, 30 May 2017.

<sup>419</sup> Ibid.

Article 28 CRC.<sup>420</sup> Another issue is that children are sometimes being sent to adult treatment centres as these might be closer to their home.<sup>421</sup>

## **7.5 Data on Institutions and Children**

### **7.5.1 Data with Regard to Children with Mental Health Issues**

Unfortunately, no data with regard to children with mental health issues could be found. According to Dr. Ganesan from the NIMH, the hospitals themselves have statistics that have, in his opinion, never been published. However, as has been mentioned above, there are twelve psychiatric beds for children and nine for adolescents in the whole country.<sup>422</sup> According to Dr. Ganesan, the limited number of beds has the consequence that children stay in the hospitals only for a short period such as one or two months.<sup>423</sup> Although this means that children are deprived of their liberty for a shorter period of time, this might lead to children not receiving adequate healthcare which is contrary to Article 24 CRC.

### **7.5.2 Data with Regard to Drug Dependent Children**

The latest data on drug dependent children by the NDDCB are from the year 2015. Table 15 gives an overview of how many children up to the age of nineteen were sent to treatment centres in 2015. As the table shows, there were only 74 children in the treatment centre in Kandy which makes up only 5% of the total number of admissions to treatment centres. Most of these children were between fifteen and nineteen years. Table 16 shows the drug related arrest by age and drug for the year 2013. Striking is that there was no arrest with regard to opium, hashish, cocaine, or psychotropic substances. The forty-three arrested children were all above fourteen years and mostly caught with cannabis.

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<sup>420</sup> Interview No. 13, 30 May 2017.

<sup>421</sup> Ibid.

<sup>422</sup> Chandradasa and Kurupparachchi, p. 36.

<sup>423</sup> Interview No. 11, 29 May 2017.

**Table 15: Treatment Admission by Age in 2015**

| Age Group                      | Number    | Percentage<br>(of total number of admissions) |
|--------------------------------|-----------|---|
| 0-14 years                     | 6         | 0.4   |
| 15-19 years                    | 68        | 4.6   |
| <b>Total Number/Percentage</b> | <b>74</b> | <b>5</b>                                      |

Source: NDDCB and Ministry of Law and Order & Southern Development, p. 50.

**Table 16: Drug Related Arrest by Age and Drug in 2013**

| Drug                       | Age Group      | Number    | Percentage<br>(of total number) |
|----------------------------|----------------|-----------|---------------------------------|
| Cannabis                   | Below 15 years | 0         | 0                               |
|                            | 15 - 18 years  | 41        | 0.1                             |
| Heroin                     | Below 15 years | 0         | 0                               |
|                            | 15 - 18 years  | 2         | 0                               |
| Opium                      | Below 15 years | 0         | 0                               |
|                            | 15 - 18 years  | 0         | 0                               |
| Hashish                    | Below 15 years | 0         | 0                               |
|                            | 15 - 18 years  | 0         | 0                               |
| Cocaine                    | Below 15 years | 0         | 0                               |
|                            | 15 - 18 years  | 0         | 0                               |
| Psychotropic<br>Substances | Below 15 years | 0         | 0                               |
|                            | 15 - 18 years  | 0         | 0                               |
| <b>Total Number</b>        |                | <b>43</b> | <b>0.1</b>                      |

Source: NDDCB and Ministry of Law and Order & Southern Development, pp. 17, 18.

## 7.6 Measures Aiming at Reducing Deprivation of Liberty of Mentally Ill Children

### 7.6.1 Legislative Measures

Although Sri Lanka is an outstanding country in its region with Bangladesh, Bhutan and the Maldives having no specific mental health legislation, there is an urgent need to reform the current Mental Health Ordinance. It has, for example, been criticized for having an out-of-date review procedure as patients who have been involuntarily admitted to an institution can only challenge this decision in front of a civil court. For people who might suffer from a ‘lack of awareness, social stigma and financial

constraints<sup>424</sup> this can constitute a burden.<sup>425</sup> Furthermore, the Ordinance should have separate child-friendly court procedures when it comes to the compulsory admission of a child to a mental health hospital or an in-patient child psychiatry unit.

Already in 2007, the Ministry of Health (MoH) of Sri Lanka drafted a new law with regard to mental health: The Draft Mental Health Act.<sup>426</sup> Although it has not been enacted until today, it has several positive features that need to be mentioned.<sup>427</sup>

Unlike the Mental Disease Ordinance, the Mental Health Act has a uniform voluntary admission procedure for all children up to the age of eighteen and states that ‘children under the age of thirteen (13) years shall be admitted to paediatric wards. Adolescents between thirteen (13) and eighteen (18) shall be admitted to adolescent wards.’<sup>428</sup> However, just like the Mental Disease Ordinance the draft law also lacks a provision stating that the view of the child and its best interest should be taken into consideration when voluntarily admitting the child to a hospital.<sup>429</sup>

With regard to the discharge of a child voluntarily admitted to a hospital this is different insofar as the child itself can request that it wants to be discharged, without needing the consent of its parents. However, in the end, the decision to discharge the child is entirely at the medical officer’s discretion.

With regard to compulsory admissions, the Mental Health Act provides for an improved procedure. Accordingly, patients can only be kept for an initial period of forty-eight hours. This period can be extended to another thirty days and thereafter for another three or six months, provided that a consultant psychiatrist and a medical officer deem this necessary in order to ‘(1) save the person’s life; (2) prevent a serious deterioration of his or her condition; (3) alleviate serious suffering by the patient; or (4) prevent the

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<sup>424</sup> Weerasundera, p. 43.

<sup>425</sup> Ibid.

<sup>426</sup> MoH, An Act to protect the rights of persons with mental illness, provide for the care, treatment, continuing care, and rehabilitation of persons with mental illness; establish the mental health advisory council and grievance committee; establish district review committees; repeal the mental disease ordinance (Chapter 559); and address matters connected therewith or incidental thereto (Draft Mental Health Act), June 2007.

<sup>427</sup> Interview No. 1, 17 May 2017.

<sup>428</sup> MoH, Draft Mental Health Act, Section 31 (3).

<sup>429</sup> Ibid, Section 31 (2).

patient from behaving violently or being a danger to himself or to others as a result of his or her mental illness'.<sup>430</sup>

Another positive feature is the improvement of the appeal procedure as the patient or his or her nearest relative or guardian can appeal the involuntary admission to a mental hospital.<sup>431</sup> Also, the review procedure has been enhanced by establishing district review committees and grievance committees and by providing for a three-stage review by these two and by the hospital director.<sup>432</sup> Furthermore, police officers cannot take a person who is dangerous for himself or the society into police custody, but have to bring the person to the nearest medical facility within three hours.<sup>433</sup>

However, the Mental Health Act also lacks a separate, child-friendly procedure when it comes to the compulsory admission of children to treatment centres.

### **7.6.2 Mental Health Policy**

The Sri Lankan Mental Health Policy 2005-2015 has the objective 'to be an essential instrument to ensure clarity of vision and purpose in the improvement of the mental health and psychological well being of the citizens of Sri Lanka'<sup>434</sup> and to 'treat mental disorders in an efficient and holistic manner'<sup>435</sup>.

Although the policy has no separate chapter on children with mental health issues, it does show some attempts to improve the situation of these children. For example, it states that 'Brief essential hospitalization for children will be in a local pediatric or other specialist mental health children's ward. Children will not be hospitalized in adult wards.'<sup>436</sup> These children's wards have not been established until today, but would be welcomed as this would facilitate maintaining contact with the family. Also, Dr. Ganesan is of the opinion that there should be small acute units in general hospitals

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<sup>430</sup> Ibid, Section 33 (3).

<sup>431</sup> Ibid, Section 34.

<sup>432</sup> Ibid, Sections 34, 35.

<sup>433</sup> Ibid, Section 38.

<sup>434</sup> Mental Health Directorate, 'The Mental Health Policy of Sri Lanka 2005-2015', 2005, p. 31, [bit.ly/MHP\\_2005-2015](http://bit.ly/MHP_2005-2015), (accessed on: 5 May 2017)

<sup>435</sup> Ibid.

<sup>436</sup> Ibid, p. 34.



all over the country where children with mental health issues can be hospitalized. So far, these units have only been established for adults.<sup>437</sup>

The policy furthermore provides for the establishment of ‘specialist child mental health services’<sup>438</sup> and provides for the inclusion of ‘separate requirements to treatment of children’<sup>439</sup> in the new health legislation. However, the Draft Mental Health Act has no separate requirements for the treatment of children.<sup>440</sup>

Another positive feature of the policy is that it states that services should be provided at community level in form of so-called ‘community support centres’.<sup>441</sup> According to a report by Save the Children from 2016, the development of community mental health care services and of community support centres are still in their early stages. There is, however, clear commitment and willingness on the site of the government.<sup>442</sup>

### **7.6.3 Monitoring**

According to Section 14 of the Mental Disease Ordinance the Minister can appoint so-called ‘visitors’ who have the power to enter a mental hospital at any time, at least once a month, and to examine anything which appears necessary to them. The director of the hospital or another person is obliged to grant access to such visitors.<sup>443</sup> Although it is unknown what exactly the frame of reference of these visits is and whether these visits are actually conducted, the provision that the mental hospitals shall be monitored once a month is positive. Ideally, however, a multi-disciplinary monitoring committee should be established in order to monitor the institutions on different levels and from various angles.

Also, the HRCSL is mandated to conduct visits to places of detention.<sup>444</sup> However, according to its last annual report from the year 2013, none of the above mentioned mental health institutions have been examined by the HRCSL.<sup>445</sup>

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<sup>437</sup> Interview No. 11, 29 May 2017.

<sup>438</sup> Mental Health Directorate, p. 35.

<sup>439</sup> Ibid, p. 39.

<sup>440</sup> Draft Mental Health Act.

<sup>441</sup> Ibid, pp. 30, 33, 34.

<sup>442</sup> Save the Children, p. 227.

<sup>443</sup> Mental Disease Ordinance, Section 14.

<sup>444</sup> HRCSL Act, No. 21 of 1996, Section 11 (d).

<sup>445</sup> HRCSL, ‘Annual Report 2013’.

## 7.7 Measures Aiming at Reducing Deprivation of Liberty of Drug Dependent Children

### 7.7.1 National Policy for the Prevention and Control of Drug Abuse

The 'National Policy for the Prevention and Control of Drug Abuse in Sri Lanka' was approved in June 2005 and includes several measures that should be taken in order to prevent drug abuse among children in Sri Lanka. However, as is so often the case, the implementation in practice constitutes a problem.

The policy stipulates, for example, that all educational institutions should provide special programmes which should prevent children from taking drugs through enhanced decision-making skills, spirituality etc.<sup>446</sup> In fact, the Ministry of Education's (MoE) Annual Report from 2014 reveals that the Ministry conducted a 'workshop on designing of the subject on drugs prevention'<sup>447</sup>. Whether this subject was implemented in the school curriculum is not clear from the Ministry's last annual report from 2015.<sup>448</sup> Furthermore, neither of the two reports mentions that drug prevention programmes for children are conducted by schools.<sup>449</sup>

Another preventive measure that the National Policy foresees are appropriate counselling facilities at schools above primary level.<sup>450</sup> However, according to a study from 2017 conducted by Buddhiprabha Pathirana, Senior Lecturer in Psychology at the University of Peradeniya, the counselling services at Sri Lankan schools are not effective. Although there exists school counselling, there is a lack of counsellors as there are currently 3,678 students per counsellor. Furthermore, students often do not know about the existence of counselling services at their school.<sup>451</sup>

Also, problems related to the counselling itself such as breach of confidentiality, stigmatization or misperception keep the children from making use of the counselling

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<sup>446</sup> GoSL, 'Sri Lanka National Policy for the Prevention and Control of Drug Abuse', 2005, Section 2.3.1 (f), [bit.ly/HandbookDrugAbuse16](http://bit.ly/HandbookDrugAbuse16), (accessed on: 15 June 2017).

<sup>447</sup> MoE, 'Annual Performance Report – 2014', 2014, p. 42, [bit.ly/APR\\_2014](http://bit.ly/APR_2014), (accessed on: 20 June 2017).

<sup>448</sup> MoE, 'Annual Performance Report – 2015', 2015, p. 42, [bit.ly/APR\\_2015](http://bit.ly/APR_2015), (accessed on: 20 June 2017).

<sup>449</sup> Ibid; MoE, 2014, p. 41-42.

<sup>450</sup> GoSL, June 2005, Section 2.3.1 (e).

<sup>451</sup> B. Pathirana, 'Exploring the Sri Lankan Student Perceptions Pertaining To School Counseling Services in Their School', *The International Journal of Indian Psychology*, Vol. 4, No. 85, 2017, pp. 42, 48, [bit.ly/SchoolCounsellingSL\\_Study](http://bit.ly/SchoolCounsellingSL_Study), (accessed on: 25 July 2017).

services at their school. Another factor is that seeking help from strangers is not part of the Sri Lankan culture as problems related to the family are usually solved in the private sphere.<sup>452</sup> As a solution, the study recommends the following measures: ‘group activities, lectures on common psychological concerns, parent and teacher consultation, peer support, and classroom guidance along with individual counseling’.<sup>453</sup>

### **7.7.2 Preventive Measures by the NDDCB**

The NDDCB is not only responsible for the state-run treatment and rehabilitation centres for drug dependent persons, but also provides other services with regard to the prevention of drug abuse. It has, for example, a ‘Preventive Education and Training Unit’ (PETU) which has several tasks and programmes aimed at the prevention of drug abuse among the population in Sri Lanka. With regard to children, the PETU provides, for example, drug education and awareness programmes for students and teachers in normal and in dhamma schools.<sup>454</sup> In 2015, the PETU conducted 563 school programmes in twelve districts and thereby reached 99,956 students.<sup>455</sup>

The PETU also has the task of giving drug related training to, on the one hand, officers and personnel in relevant department and ministries and, on the other hand, NGOs, volunteers, media personnel etc. In 2014, the unit has conducted 79 trainings for over 7,000 officers such as development officers, grama niladharies, teachers, etc.<sup>456</sup>

The programmes of the PETU seem, thus, to have a wide scope. In how far the impact and success of these programmes and trainings is evaluated is, however, not clear.

Another programme through which the NDDCB tries to prevent drug abuse is its outreach service. In this programme, so-called outreach officers who work for the grama niladhari division try to get to the roots of the drug problem by working at the district level.<sup>457</sup> The aim of these outreach services is to extend the prevention, treatment and rehabilitation services of the NDDCB, to build a collaboration between

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<sup>452</sup> Ibid, pp. 47, 49.

<sup>453</sup> Ibid, p. 49.

<sup>454</sup> PETU, ‘Status Report Month of September’, 2013, pp. 2, 4, [bit.ly/PETU\\_SRSept13](http://bit.ly/PETU_SRSept13), (accessed on: 26 July 2017).

<sup>455</sup> PETU, ‘Annual Report 2015’, 2015, p. 1, [bit.ly/PETU\\_AR2015](http://bit.ly/PETU_AR2015), (accessed on: 26 July 2017).

<sup>456</sup> PETU, ‘Annual Report 2014’, 2014, pp. 32-36, [bit.ly/PETU\\_AR2014](http://bit.ly/PETU_AR2014), (accessed on: 26 July 2017).

<sup>457</sup> NDDCB, ‘Outreach Services’, [website], 2015, [http://bit.ly/NDDCB\\_OS](http://bit.ly/NDDCB_OS), (accessed on: 29 June 2017).

stakeholders (schools, grama niladharies, samurdhi officers, divisional secretaries, social services, etc.) which allows for communication and for the joint development of drug prevention programmes, and to continuously check the success of these programmes.<sup>458</sup>

According to the NDDCB's 'Handbook of Drug Abuse Information in Sri Lanka' from 2016, the outreach service has been improved by upgrading the facilities of the outreach officers and by increasing the number of outreach officers in severely affected areas.<sup>459</sup>

According to Prof. Ravindra Fernando, the current Chair of the NDDCB, these outreach services are not an alternative measure to the treatment centre. Sometimes the officers do, however, conduct follow-up visits to the child's home after his or her discharge from the treatment centre.<sup>460</sup>

### **7.7.3 Monitoring**

The monitoring of treatment centres for drug dependent persons is regulated in a similar way as the monitoring of mental health institutions. According to Section 8 of the Drug Dependent Persons Act, the Minister can appoint official visitors for a term of two years upon the recommendation of the NDDCB. These visitors have the power to enter a treatment centre at any time and to examine anything which appears necessary to them. They are obliged to visit the treatment centres 'from time to time'<sup>461</sup> and to report back to the NDDCB.<sup>462</sup> Also, here the frame of reference of these visits is unknown. In contrast to the visitors of mental health institutions, these visitors are not obliged to conduct visits once a month. Again, a multi-disciplinary monitoring committee should be established in order to monitor the institutions on different levels.

Also with regard to this treatment centres the HRCSL is mandated to conduct visits.<sup>463</sup> However, according to its last annual report from the year 2013 none of the above-mentioned treatment centres have been examined by the HRCSL.<sup>464</sup>

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<sup>458</sup> Ibid.

<sup>459</sup> NDDCB and Ministry of Law and Order & Southern Development, p. 106.

<sup>460</sup> Interview No. 13, 30 May 2017.

<sup>461</sup> Drug Dependent Persons Act, Section 8.

<sup>462</sup> Ibid.

<sup>463</sup> HRCSL Act, No. 21 of 1996, Section 11 (d).

<sup>464</sup> HRCSL, 'Annual Report 2013'.

## **7.8 Conclusion and Recommendations**

As has been shown above, mentally ill children and drug dependent children are actually deprived of their liberty in hospitals or treatment centres as they are not allowed to leave the institutions during their treatment. Although they are low in numbers – especially in comparison to children in conflict with the law and children and child care services – this constitutes a problem as they are not attending school during this time. Furthermore, the low number of hospitals with in-patient units (two) and of drug rehabilitation and treatment centres (one) makes it hard for families to visit their children. One of the consequences of this is that children are admitted to adult psychiatric units or to adult treatment centres which are closer to their home. This is a problem insofar as it decreases the quality of their treatment.

From the above described placement procedure and the existing measures against deprivation of liberty it can, furthermore, be concluded that the ‘last resort’ and ‘shortest appropriate period of time’ principle is not fulfilled with regard to children and health care services.

The main problem with regard to the placement procedure of both mentally ill children and drug dependent children is that the respective laws do not call upon the responsible authority to take into consideration the child’s best interest and its point of view when voluntarily admitting the child to the institution. Furthermore, the children cannot stop the treatment at will or express their viewpoint in this regard, as either the parents or guardian or the assessment panel and a medical officer have the decision-making power. With regard to the compulsory admission of these children to hospitals or treatment centres, both laws lack a separate, child-friendly procedure which takes into consideration the vulnerable nature of children.

Also, the power of the court to remand a mentally ill child in custody of the Fiscal for as long as he specifies and for an unspecified number of times constitutes a problem as it clearly risks the deprivation of liberty of the child for an inappropriate long time. Furthermore, the fact that a person can be sent to a mental hospital for the sole reason of being mentally ill without any further conditions suggests that the ‘last resort’ and ‘shortest appropriate period of time’ principle regarding mentally ill children is not fulfilled.

With regard to children who have committed a crime but were of unsound mind at that time, it should be stipulated that they must be discharged from the hospital or place of safety when there is no risk that the child inflicts harm on him or herself or another person. Otherwise, the ‘last resort’ and ‘shortest appropriate period of time’ principle is clearly violated.

Another problem is that the court has no possibility to order the mentally ill or drug dependent child to receive treatment at home. Although the court has the possibility to give mentally ill children into the custody of a fit relative or friend, this does not ensure the treatment of that child. With regard to drug dependent children even this alternative measure does not exist.

Nevertheless, especially with regard to drug dependent children Sri Lanka seems to be very committed to take measures which obviate the deprivation of liberty. In particular, the preventive measures of the NDDCB have the potential to decrease the number of drug dependent children and thereby also the number of children sent to treatment centres. With regard to the measures against the deprivation of liberty of mentally ill children, on the other hand, there seems to be room for improvement.

The following table was created by the author of this thesis. It gives an overview of the measures that should be taken in order to address the above-mentioned problems and to work towards the fulfilment of the principle that deprivation of liberty of children and health care services should be a measure of last resort and for the shortest appropriate period of time. The table also names the key responsible agencies and depicts the presumed feasibility of these measures. Eight out of fourteen measures are estimated as having a high feasibility. The remaining measures would be feasible if the appropriate financial resources would be allocated.

**Table 17: Recommendations with Regard to Children and Health Care Services**

| Recommendation |                             | Impact   | Feasibility | Key Responsible Agency      |
|----------------|-----------------------------|--|-------------|-----------------------------|
| Legal          | Amend the Mental Health Act | Include that the child’s view and its best interest should be taken into consideration when voluntarily or compulsorily admitting a child; | High        | Ministry of Justice;<br>MoH |

|                     |  |   |  |                             |
|---------------------|--|---|--|-----------------------------|
| <b>Legal</b>        |  | include a separate, child-friendly procedure when it comes to the compulsory admission of a child.  |  |                             |
|                     | Enact the Mental Health Act with amendments  | This would improve the compulsory admission procedure, the appeal and review procedure, etc.  | High                                     | Parliament                  |
|                     | Amend the Drug Dependent Persons Act   | <p>Include that the child's view and its best interest should be taken into consideration when voluntarily or compulsorily admitting a child;</p> <p>include that a child's view shall be taken into consideration when it wants to stop the voluntary treatment;</p> <p>include a separate, child-friendly procedure when it comes to the compulsory admission of a child;</p> <p>include that a child can receive treatment at home by an outreach officer instead of the treatment centre.</p> | High                                     | Ministry of Justice;<br>MoH |
| <b>Institutions</b> | Establish small acute units in general hospitals all over the country where children with mental health issues can be hospitalized   | This would increase the possibility to uphold the contact with the family and friends.  | Depends on financial resource allocation | MoH                         |
|                     | Include child mental health in the training of health care personnel   | This would improve the quality of the treatment.  | High                                     |                             |
|                     | Evaluate the root-causes of the lack of board-certified specialists in child and adolescent psychiatry and take appropriate measures | This would increase the number of child and adolescent psychiatrists and would, ultimately, increase the quality of the treatment.  | Depends on financial resource allocation |                             |
|                     | Make the recruitment process of health care personnel more efficient   | This would counteract the lack of personnel in the mental health care sector.   | High                                     |                             |

|                     |   |  |   |                        |
|---------------------|---|--|---|------------------------|
| <b>Institutions</b> | Increase salary of psychiatric social workers   | This would lead to more people wanting to work as psychiatric social workers.  | Depends on financial resource allocation        |                        |
|                     | Ensure that teachers regularly visit the hospitals/treatment centres  | This would ensure that children in hospitals/treatment centres still receive education.  | High  | MoH;<br>NDDCB;<br>MoE  |
|                     | Build more and smaller treatment centres for drug dependent children  | This would increase the possibility to uphold the contact with the family and friends.   | Depends on financial resource allocation        | NDDCB                  |
|                     | Establish an independent, multi-disciplinary monitoring committee for mental health institutions and for treatment centres which has a comprehensive frame of reference and conducts regular visits | This would make it possible to monitor the organisation of the institution on different levels and from various perspectives and to see whether there are children that can be released earlier. | Depends on financial resource allocation        | MoH;<br>NDDCB;<br>etc. |
| <b>Prevention</b>   | Improve national policies/action plans in accordance with international law and standards (CRC etc.), involve all actors and get approval of highest GoSL level                                     | This would make the overall de-institutionalisation process more effective.  | High  | MoH;<br>NDDCB;<br>etc. |
|                     | Improve school counselling by recruiting more counsellors and by improving the quality of the counselling   | This would not only contribute to the prevention of drug abuse, but is also important for children with mental health issues.  | Depends on financial resource allocation / High | MoE                    |
|                     | Include 'drug abuse and prevention' as a subject in schools   | This would raise awareness and would contribute to prevention.   | High  | MoE;<br>NDDCB          |
| <b>Data</b>         | Establish nationwide systematized and comprehensive database on mentally ill and drug dependent children  | This would make it possible to monitor the impact of the other measures.   | High  | MoH;<br>NDDCB          |

## 8. CONCLUSION

In conclusion, Sri Lanka is neither with regard to children in conflict with the law, nor with regard to children and child protection services and children and health care



services complying with the principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time.

First of all, the children in all of the existing institutions in these three categories are deprived of their liberty as they cannot leave the institution at will. Secondly, the existing legal orders in these matters, as well as their practical implementation – especially when it comes to children in conflict with the law and children and child protection services – have proven that the ‘last resort’ and ‘shortest period of time’ principle is not fulfilled. Although there exist measures aimed at reducing and preventing the deprivation of liberty of these children, these should be improved.

In order to address the problems in this context and to work towards the fulfilment of the principle, certain measures, which should be taken by Sri Lanka, have been recommended.

Of particular importance are the enactment of the CJPB and the Mental Health Act and the improvement of existing national policies and action plans in accordance with international law and standards. Furthermore, there should be a joint and long-term training for the actors involved in the juvenile justice system and the placement procedure of children and child protection services in order to increase collaboration and to develop a more holistic understanding of the laws and processes.

With regard to the situation in the institutions themselves, action needs to be taken against the lack of human resources and the lack of sufficient training which constitutes a problem in all three areas. Furthermore, the children should be given more individual choice and privacy and should have the opportunity to continue education during their stay in hospitals or treatment centres. Also, the large institutions should be replaced by smaller institutions spread across the country. For children with mental health issues, small acute units in general hospitals should be established all over the island. This is important in order to improve the quality of the service and to uphold the contact with families and friends.

Furthermore, the monitoring of the institutions needs to be systematized and regularly conducted. One idea is to establish multi-disciplinary committees as this would make it possible to monitor the institution on different levels and from various perspectives.

This monitoring committee needs to be equipped with a comprehensive frame of reference which ensures common standards in the institutions.

With regard to children in conflict with the law it would be particularly important to strengthen the alternative measures at the hands of the court and the mediation boards and to improve the rehabilitation and re-integration of juvenile offenders.

As one of the main underlying problems with regard to children and child protection services is poverty, families need to be strengthened through sponsorship programmes and by making the system of field officers more effective. For children with disabilities day care and respite care opportunities need to be ensured so that they are not sent to the general child care institutions where they cannot receive the special attention that they would need. In general, alternative measures such as foreign adoption and the fit person order need to be used more frequently.

Although Sri Lanka seems to be very committed to take measures which obviate the deprivation of liberty of children and health care services – especially with regard to drug dependent children – there is still room for improvement. For example, school counselling needs to be improved and a subject on ‘drug abuse and prevention’ should be included in the school curriculum.

What needs to be emphasised is that the fulfilment of the ‘last resort’ and ‘shortest period of time’ principle is a gradual process and cannot be achieved overnight. This is especially true for Sri Lanka as a war-torn country which is in the middle of a transitional justice process.

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## **APPENDICES**

### **Appendix 1: Tables**

**Table 01:** Overview of Institutions for Children in Conflict with the Law 2012

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## Appendix 2: Interviews

| No. of Interview | Name                       | Organisation   | Position/Expertise                                    | Date        |
|------------------|----------------------------|--|---|-------------|
| 1                | Prof. Sharya SCHARENGUIVEL | Faculty of Law, University of Colombo  | Professor in Law specialising in inter alia children' | 17 May 2017 |
| 2                | Varathagowry VASUDEVAN     | National Institute of Social Development; School of Social Work; Ministry of Social Services | Senior Lecturer in Social Work                        | 17 May 2017 |
| 3                | Yashali ABEYSUNDARA        | NCPA   | Manager Law Enforcement                               | 18 May 2017 |
| 4                | Sajeeva SAMARANAYAKE       | NCPA   | Deputy Chairperson                                    | 18 May 2017 |
| 5                | Ambika SATKUNANATHAN       | Human Rights Commission  | Member  | 19 May 2017 |
| 6                | Thilani HEWAGE             | Sarvodaya  | Senior Manager – Operations                           | 23 May 2017 |
| 7                | Sanjeeva DE MEL            | Hope for Children/SERVE  | Country Representative/Executive Director             | 23 May 2017 |
|                  | Sriyani DE SILVA           | SERVE  | Manager – Development and Promotions                  |             |
| 8                | Prof. Hiranthi WIJEMANNE   | –  | Former Member CRC                                     | 24 May 2017 |
| 9                | Kamalini DE SILVA          | –  | Former Secretary to the Ministry of Justice           | 24 May 2017 |
| 10               | Dr. Hemamal JAYAWARDENA    | –  | Child Protection Specialist                           | 25 May 2017 |
| 11               | Dr. Mahesan GANESAN        | National Institute of Mental Health  | Consultant Psychiatrist                               | 29 May 2017 |
| 12               | Isuru SAMARAKOON           | National Dangerous Drugs Control Board   | Counselor, Treatment Centre for Youth in Kandy        | 30 May 2017 |
| 13               | Prof. Ravindra FERNANDO    | National Dangerous Drugs Control Board   | Chairperson   | 30 May 2017 |
| 14               | Chathuri JAYASOORIYA       | –  | Independent Researcher and Advisor                    | 30 May 2017 |
| 15               | Nirmalee PERERA            | National DPCCS   | Probation Officer                                     | 31 May 2017 |

## **ABSTRACT**

This Master thesis examines to what extent Sri Lanka is complying with the international principle that deprivation of liberty of children should be a measure of last resort and for the shortest appropriate period of time. It is inspired by the UN Global Study on Children Deprived of their Liberty which was initiated by the UNGA Resolution 69/157 on 18 December 2014. It covers the following three areas where children are at risk of being deprived of their liberty: children in conflict with the law, children and child protection services and children and health care services.

The research question is important insofar as deprivation of liberty of children does have negative effects on children and on society as a whole. Nevertheless, children deprived of their liberty are often invisible rights-holders and most countries do not have data in this area.

In order to answer that question, the relevant international and national laws and the pertinent literature have been examined. Furthermore, a four-week long field trip to Sri Lanka gave the opportunity to take part in the currently ongoing debate and to conduct fifteen semi-structured interviews with experts in the field.

All of this led to the conclusion that children in Sri Lanka are deprived of their liberty in all of the three above-mentioned areas and that this deprivation of liberty is neither a measure of last resort, nor for the shortest appropriate period of time. Consequently, the attempt was made to give recommendations to Sri Lanka on the basis of the identified problems which – if implemented – would help to gradually work towards the fulfilment of the ‘last resort’ and ‘shortest appropriate period of time’ principle.

## **ABSTRACT GERMAN (ZUSAMMENFASSUNG)**

Diese Master Arbeit untersucht, inwiefern Sri Lanka dem internationalen Grundsatz entspricht, dass Freiheitsentzug von Kindern nur als letztes Mittel und für die kürzeste angemessene Zeit angewendet werden darf. Inspiriert wurde diese Arbeit von der globalen Studie der Vereinten Nationen über Kinder, denen die Freiheit entzogen wurde, welche durch die Resolution 69/157 vom 18. Dezember 2014 ins Leben gerufen wurde. Es werden die folgenden drei Bereiche, in denen Kinder dem Risiko ausgesetzt sind, der Freiheit entzogen zu werden, behandelt: Kinder die mit dem Gesetz in Konflikt geraten sind, Kinder die Kinderschutzdienste benötigen und Kinder im Gesundheitswesen.

Die Forschungsfrage ist insofern von Bedeutung, als Freiheitsentzug negative Auswirkungen sowohl auf die Kinder als auch auf die ganze Gesellschaft haben kann. Nichtsdestotrotz, sind gerade diese Kinder als Rechteinhaber oft unsichtbar und die meisten Länder haben keine Daten über sie.

Um die gestellte Frage zu beantworten, wurde das einschlägige internationale und nationale Recht, sowie entsprechende Literatur analysiert. Außerdem eröffnete eine vierwöchige Forschungsexkursion nach Sri Lanka die Möglichkeit am aktuellen Diskurs teilzunehmen und fünfzehn Experten in diesem Bereich zu interviewen.

Das Ergebnis der Recherche war, dass in Sri Lanka Kinder in allen drei oben genannten Bereichen ihrer Freiheit entzogen sind und dieser Entzug weder als letztes Mittel noch für die kürzeste angemessene Zeit eingesetzt wird. Auf Grundlage der identifizierten Probleme wurde schließlich der Versuch unternommen, Sri Lanka Empfehlungen zu geben, die bei der schrittweisen Erfüllung des Grundsatzes helfen sollen.