DOI: 10.18261/9788215031415-2019-06

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Criminal Justice and Detention[1]

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ABSTRACT This chapter evaluates the implementation of the UN Convention on the Rights of the Child (Articles Art. 37 and 40) in the policy and practice of detention of children within the Norwegian criminal justice system. It covers three different forms of detention (pre-trial police custody, pre-trial court-ordered custody and detention as punishment) from a legal and empirical perspective. The chapter finds that Norway has, to a large extent, addressed many critiques from the CRC Committee, including on limitation of the use of detention, conditions for detained children, and the need for various law reforms. However, challenges remain in relation to time-unlimited preventive detention of children and conditions in police detention. Moreover, the authors highlight a cross-cutting challenge within Norway has – the near absence of specialization with regard to youth criminal justice, and conclude that there is a need for the further development of alternatives to traditional criminal justice detention.

KEYWORDS criminal justice | police custody | pre-trial custody | punishment | CRC | children's rights

1. We wish to thank the informants from the Norwegian Correctional Services, the National Police Directorate, key personnel at Bergen and Oslo Police Districts and the Norwegian Bar Association who all provided valuable information to the work with this chapter. We also want to thank Ingun Fornes, the editors of this book, and the reviewer, for productive comments on the content of the chapter.

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5.1 INTRODUCTION

The UN Convention on the Rights of the Child (hereinafter CRC), defines a 'child' as every human being below the age of 18 years.[2] Departing from this definition, it is clear that also children are subject to the criminal justice system in most jurisdictions.[3] Individuals under the age of 18 can be criminally responsible, although the minimum age for criminal responsibility can vary.[4] Hence, children can also be detained when they have committed a crime, or are suspected to have done so.

At the same time, children are different from adults, as they are not yet fully developed, biologically, psychologically and socially. The CRC thus acknowledges that children are more vulnerable and possess different needs than adults, particularly in the areas of care and upbringing.[5] The treaty emphasizes the *best interests of the child* as a primary consideration,[6] and requires specific concern also for those children that are subject to the criminal justice system, which is reflected in the standards regarding detention (Articles 37 and 40). These provisions are also directly applicable in Norway due to incorporation of the CRC in Norwegian law.[7] This was further strengthened in 2014 through a constitutional revision (section 104) that stipulates that the best interests of the child should be a primary interest in all decisions that involve children.[8]

As in all jurisdictions, however, there is a tension between child protection and the criminal justice perspectives. The CRC itself permits the detention of children yet taking the best interests of the child seriously can be at odds with traditional ideas and measures of criminal justice, not least detention. Notably, Norway has been criticized for not complying with the specific CRC requirements in this area.

2. UN Convention on the Rights of the Child, (CRC) 1989 art. 1. This rule allows for a lower age limit if under the law applicable to the child, majority is attained earlier. This is not the case for Norway. We will in the following consequently use the term "child" when we refer to persons under the age of 18.
3. In this chapter, we will not discuss the background and adequacy of this age limit for the definition of a "child". For such a discussion, see inter alia Holzscheiter (2010), chapters 4–5.
4. The minimum age of criminal responsibility, Justice for children briefing no. 4.
5. Cf. CRC/C/GC/10 *General Comment No. 10 (2007) on Children's rights in juvenile justice* and CRC/C/GC/20 General comment No. 20 (2016) on the implementation of the rights of the child during adolescence.
6. CRC Art. 3
7. Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven) (LOV-1999-05-21-30) See Søvig below in Chapter 9.
8. *Grunnloven (2014) Kongeriket Norges Grunnlov*. Lovdata. Available in translated version: https://www.stortinget.no/globalassets/pdf/english/constitutionenglish.pdf.

Against this background, this chapter evaluates the implementation of the CRC in the current rules and practices of detention of children within the Norwegian *criminal justice system,* with the aid of legal analysis, descriptive statistics, select interviews, and document content analysis.[9] The Norwegian criminal justice system involves three different forms of detention, namely *pre-trial police custody*, *pre-trial court-ordered custody* and *detention as punishment*, which are regulated by different rule-systems and relate to the CRC in different and complex ways. The aim of this chapter is, in this regard, to provide an overall evaluation of how the Norwegian criminal justice system complies with the requirements in CRC Art. 37 and 40, on the *limitation of the use of detention* and the *conditions for detained children*. Such a systemic approach leaves no room for going deeply into the details, but we provide a needed framework for future research.[10]

5.2 CHILD RIGHTS AND CRIMINAL JUSTICE: GENERAL PREMISES

A general premise for the discussion of this chapter is that children can be subject to the measures of the criminal justice system. The CRC obliges all states to establish a minimum age, below which children shall be presumed not to have the capacity to violate the criminal law.[11] In Norway, this minimum age of criminal capacity is 15 years, which is in accordance with the CRC.[12] Therefore, only children between 15 and 18 years can be subject to the criminal justice system, and be detained, if they commit crimes. Children below the age of 15 who commit crimes are acquitted but are generally subject to measures within the childcare services.[13]

9. The discussion of this chapter is thus limited to detention of children that have committed, or are suspected of having committed, crimes. Children are detained in Norway also as a consequence of general policing and immigration law (see chapters by Aasgard/Langford and Lidén in this volume). It is, however, important to deal with detention within these different contexts separately, as they differ with regard to legal aims and functions. A separate treatment of different forms of detention also provides a basis for discussing differences as regards the number, and treatment of detained children.
10. There are several previous contributions regarding children in detention, where in particular children in custody has been criticized, but no overall evaluation of *all* forms of detention within the criminal justice system that separates these from detention on other grounds has been conducted.
11. CRC Art. 40(3).
12. Straffeloven (2005) *Lov om straff (straffeloven)*. Available in translated version: http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19020522-010-eng.pdf and CRC/C/GC/10 paras. 32–33 and rule 4 of the *Beijing Rules*- Bejing Rules (1985) “Age of Criminal Responsibility” under *General Principles*.
13. The Police can, however, undertake certain crime preventive measures also against children below the age of 15, see politiloven, section 13, and the prosecutor can decide to investigate the crime, see straffeprosessloven, section 224 tredje ledd and påtaleinstruksen section 7-4 andre ledd.

If they commit serious crimes or engage in repeated criminality, these children can be placed in a childcare institution. It is here worth noting that the childcare services in Norway historically have played an important role in the field of criminal justice.[14] In the late 1950s to the early 1960s, 85 per cent of all prosecutions were put before the Child Welfare Committee rather than the prosecuting authorities. Without having the precise data, our clear impression is that the criminal justice system plays a more dominant role today. Furthermore, childcare institutions were to a larger degree than today viewed as an alternative means to prison. [15]

Our focus in this chapter is, however, on meausures within the criminal justice system, and hence on the children that have passed the minimum age of criminal capacity. In Norway (and elsewhere) many of these children – who have passed the minimum age of criminal capacity – commit crimes. In 2014, 4,325 children between the ages 15 and 17 were prosecuted for committing crimes in Norway[16], constituting 1.4% of all prosecutions that year. Children are prosecuted for all types of crimes, including very serious crimes. Yet the most common criminal offences committed by children between the ages 15 and 17 are traffic-related, drug and property crimes.

Children can thus be subject to the Norwegian criminal justice system, and detained within it. However, when this happens, the state is obliged to ensure their rights according to the CRC; and research in this regard has underlined the negative consequences of detention of children.[17] As children are in a process of development, they are more prone to long-lasting harm when placed in unsafe or punitive contexts, provides strong reasons for treating children differently from adults in the criminal justice system.

As mentioned, tensions arise between the CRC's perspective of the child, and the rationality and function of the criminal justice system.[18] These tensions relate to both conceptual and practical aspects of criminal justice. On a general conceptual level, the criminal justice system is traditionally not centered on what is best for the offender (in this case the child), but rather on crime and punishment objectives. These aims are typically understood as *retribution* (punishing those that deserve it, and according to what they deserve) and *crime prevention* (punishing

14. For in-depth analyses of the relation between the criminal justice system and the childcare service see Kjersti Ericsson (1996) and Gerd Hagen (2001).
15. Hagen (2001). pp 164.
16. SSB 2014.
17. See Fornes (2017) Chap. 3 for an overview.
18. On this tension, see *inter alia* Lappi-Seppälä (2011) pp.199–264 and Marieke Persson (2017) pp. 17–19. See also chapter by Aasagard and Langford on policing in this volume.

in order to deter people from committing crimes). In Norway, crime prevention is articulated as the primary aim of punishment. At the same time, retributive goals are clearly present. Only those that can be blamed are held responsible and punished, and only in proportion to their blameworthiness.[19] Consequently, murder is punished more harshly than theft. In this regard, a child's immaturity is relevant for decisions about responsibility and punishment, which is reflected in rules on criminal incapacity for children under the age of 15, and rules about infancy as a mitigating factor in sentencing.[20] Such rules are, however, based upon the idea that the child is less blameworthy than the adult, and not upon the type of concern for the child that the CRC is centred on.

In the end, the aim of retribution is difficult to reconcile with the child's best interests. The UN Committee on the Rights of the Child (the CRC committee) has underlined that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.[21] Nonetheless, the CRC does open for the use of detention as a last resort. In Norway, very serious crimes committed by a child above the minimum age of criminal capacity (15) are understood to require a harsh punishment, i.e., imprisonment, even though it may result in various negative consequences for the child. Against this background, it is important to recognize that different types of crimes, in varying degrees, may trigger tensions between criminal justice and CRC perspectives. These tensions include the victim's point of view and suffering caused, in particular by serious crimes, even when the offender is legally defined as a child.[22] In cases of serious criminal offences, there is also a larger room for the use of pre-trial detention than in cases of less serious crimes. The best interest-principle is, in this respect, thus interpreted as capable of being overridden by considerations of criminal justice.[23] In light of this, the *limitation of the use of detention* is central from the CRC perspective, which as we shall see, depends on the existence of alternative measures for dealing with child offenders.

Although detention of children may be acceptable, the manner of detention requires close consideration. The concept of 'detention' relates to a myriad of dif-

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19. See Gröning, Husabø and Jacobsen (2016), Chap. 2.
20. Straffeloven, sections 20 a, 78 i and 80 i.
21. CRC/CGC14 General comment No. 14 (2013) on the rights of the child to have his or her best interests taken as a primary consideration, para. 28.
22. See Nicole Hennum (2014), The aporias of reflexivity: Standpoint, Position and Non-normative Childhoods, s. 7 for a perspective on this problem.
23. See Freeman (2007) p. 5 and Fornes (2017), Chap. 5.

ferent practical solutions concerning arrests and imprisonment. The *securing of adequate conditions* for detained children is therefore an imperative from the CRC perspective. In this respect, arguments that *may* justify the need of detention have no bearing as such on the nature of detention. In this context, it is important to recall that the criminal justice system is anchored in the constitutional values of the legal order, i.e., the respect of an individuals' dignity, equality and human rights.[24] In order to provide security for an individual, the criminal justice system must not only protect the individuals from other individuals' criminal behavior, it must also ensure that public authorities themselves do not exercise power in a manner that violates individual rights, so that also a person suspected or sentenced for a crime is treated with humanity and respect. This is a general requirement that has particular relevance when the person is a child. From our point of view, the CRC must ultimately be understood as an *integrated part* of the criminal justice system, to which any measure within this system must in compliance. Against this background, we shall now take a closer look at the CRC requirements regarding children in detention.

5.3 CRC REQUIREMENTS REGARDING DETENTION

5.3.1 FOCUS ON SUBSTANTIAL REQUIREMENTS IN CRC ART. 37 AND 40

Articles 37 and 40 of the CRC concern rights for children that are being accused or recognized of having committed a crime. These provisions provide for specific rights and duties and involve many different requirements regarding detention. Our focus is on substantial requirements regarding the limitation of the use of detention and the conditions for detained children.

Article 37(a) provides the child with the fundamental and general rights, to be protected from torture or other cruel, inhuman or degrading treatment or punishment – rights which also are applicable to adults. Moreover, Article 37(a) provides the child with the right to be protected from capital punishment, life imprisonment without possibility of release and unlawful or arbitrary deprivation of liberty. This prohibition thus provides for limitations as regards imprisonment for lifetime, and provides absolute standards for the way detention is carried out.

Limitations regarding the use of detention are first and foremost stipulated in Art. 37(b). This rule states that 'detention shall be used only as a measure of last resort and for the shortest appropriate period of time'.[25] The requirement that

24. Gröning, Husabø and Jacobsen. (2016) pp. 42–55.
25. CRC Art. 37(b).

detention shall be 'a last resort' is a strict standard. Hence, detention must be the *final* option, in the event that less-intrusive alternatives are unsuitable.[26] It follows from the Beijing rules[27] that detention shall not be used unless the child is involved in serious criminality, and unless there is no other appropriate response.[28] Seen in conjunction with Article 40, this rule requires also that the state has *made sure that there are no alternatives to detention*. Although the use of detention is here related to a need for reacting on serious crimes, the concern for the child must in the end be understood as primary. The rules regarding detention are therefore not mandatory, but must permit individual assessment of the needs and effects of detention for the child.[29]

The requirement that detention shall be for the 'shortest appropriate time'[30] requires an individual assessment. Moreover, the period of detention must be kept to a minimum. In this respect, the CRC committee has been critical towards the possibility of sentencing children to 20 years of imprisonment.[31] Moreover, while there is no exact time-limit for *pre-trial detention*, the CRC committee has been critical towards Japan for doubling the time-limit from four to eight weeks.[32] The requirement also implies that children in police custody are brought as speedily as possible, i.e. within few days, before a judge or another judicial organ that can review the detention.

CRC art. 37(c) particularly provides standards concerning the conditions for and the treatment of detained children. It states the fundamental principle that every child must be treated with humanity and respect, and in a manner which takes into account the needs of persons of his or her age.[33] The reference to age implies that children should not be treated as a homogenous group, but that their

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26. CRC/C/GC/10 para. 28 a. See further Schabas and Sax, (2006) pp. 84–85.
27. Bejing Rules (1985). The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) was adopted by General Assembly resolution 40/33 of 29 November 1987. The Beijing rules state that juvenile justice shall be conceived as an integral part of the national development process of each member state, and that the rules shall be implemented in the context of economic, social and cultural condition in all member states (Beijing Rules 1985).
28. Art. 17 (1) of the *Beiing Rules*.
29. Schabas and Sax (2006), p. 82.
30. Art. 37(b).
31. UN doc CRC/C/15/Add. 170, 2002, Consideration of reports submitted by States parties under Article 44 of the Convention. February 1, 2002. Concluding observations by the UN Committee on the Rights of the Child. para 79 (f).
32. UN doc CRC/C/15/Add. 231, 2004, *Consideration of reports submitted by States parties under article 44 of the Convention. February 26, 2004.* para 53.
33. CRC art. 37(c).

personal development must be taken into account.[34] As a particular aspect of respectful treatment, Art. 37(c) furthermore requires that detained children are separated from adults, unless it is considered in the child's best interest not to do so. The aim of this requirement is to prevent a negative impact on the child in adult settings.[35] Children that are placed together with adults, face, *inter alia*, a risk of being subject to violence and sexual abuse, and may come in contact with criminal networks.[36] The separation requirement does not necessarily presuppose separate buildings for children and adults. It is sufficient that children are detained in a separate part of an institution also holding adults.[37] Finally, Art. 37(c) provides detained children with the right to maintain contact with their family through correspondence and visits, save in exceptional circumstances. Due to children's early stage of development, this principle ensures that children may have contact with their family and network to a greater extent than adults.

Article 40 covers more broadly the rights of all children that are subject to investigation, arrest, charges, any pre-trial process, trial and sentence. It also concerns the institutional conditions for, and the treatment of, detained children. Art. 40(1) pertains to the right of the child to be treated in a manner consistent with the promotion of the child's sense of dignity and worth that reinforces the child's respect for human rights and fundamental freedoms of others. The child's age and the desirability of promoting its reintegration and the assumption of a constructive role in society, should also be taken into account in this regard.

Of special importance for this chapter is Art. 40(3) stating that the 'States shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law'.[38] In other words, the States shall seek to promote a distinctive *juvenile criminal justice system*. Art. 40(4) requires in addition the availability of a variety of alternatives for dealing with children outside institutions. The presence of alternatives may also affect the extent to which children are detained in prisons.

These rights must be viewed dynamically in relation to the general principles of the CRC. In particular, the principles expressed in Art. 2 (non-discrimination), Art. 3 (best interests of the child), and art. 6 (the right to life, survival and development) relates to the subject of this chapter.

34. Schabas and Sax (2006) p. 89.
35. See further Schabas and Sax (2006), p. 92.
36. Gording Stang and Hydle (2015), p. 53.
37. See rule 13 (4) *Beijing Rules*. See further Schabas and Sax (2006), p. 92.
38. CRC Art. 40 (3).

5.3.2 PREVIOUS CRITIQUE AGAINST NORWAY

In concluding observations submitted to Norway in 2010, the CRC Committee expressed particular concern regarding Art. 37(b-c) and 40.[39] This concern was related both to the limitations of the use of detention and to the conditions for detained children. While the CRC Committee noted that the number of children under the age of 18 in prison in Norway was low, it nonetheless expressed concern regarding the increase in the number of imprisoned children. Hence, the CRC Committee recommended that Norway should ensure a limitation of detention so that children are detained only as a last resort, and for as short time as possible. Furthermore, the CRC Committee expressed particular concern regarding the physical conditions in Norwegian prisons, as they were considered unsuitable for children, given that children are not detained separately from adults and training of prison personnel for the treatment of juvenile offenders was not mandatory. The CRC Committee recommended that Norway comply with the requirement of keeping detained children separated from adults, ensure that persons working with children in the criminal justice system receive appropriate training, and ensure rehabilitation and education during time of imprisonment. Eight years later, in the concluding observations on the combined 5th and 6th periodic reports of Norway,[40] the CRC Committee urged Norway to bring its juvenile justice system fully in line with the CRC and other relevant standards. Furthermore, the CRC Committee recommended the discontinuance of preventive detention for children. Reiterating its concluding observations from 2010, in situations where detention is unavoidable, the CRC Committee urged Norway to ensure that children are not detained together with adults both in pre-trial detention and prison. It recommended further that solitary confinement be avoided to the greatest extent possible, and that the Norwegian state should make the necessary legislative amendments to extend the applications of alternative form of sanctions, i.e. juvenile sanctions.

Following this earlier critique by the CRC Committee, also the Norwegian Ombudsman for Children,[41] the Ombudsman,[42] and the Norwegian Bar Associa-

39. CRC/C/NOR/CO4 2010. Consideration of reports submitted by State parties under article 44 of the Convention. March 3, 2010 No. 4 Concluding Observations by the UN Committee on the Rights of the Child.
40. CRC/C/NOR/CO/5-6 2018. Advanced Unedited Version: Concluding observations on the combined 5th and 6th periodic reports of Norway. 14 May–1 June 2018 Adopted by the Committee as its seventy-eighth session.
41. Supplementary Report to the UN Committee on the Rights of the Child, 2009.
42. Sivilombudsmannen 2014 and 2016.

tion,[43] have raised the same or similar concerns. Against this background, we will now assess to what extent the current rules and practices of detention comply with the CRC standards.

5.4 NORWEGIAN RULES AND PRACTICES ON DETENTION: OVERVIEW

The rules regarding detention of children that have committed, or are suspected for having committed a crime, are found in the Criminal Procedure Act[44], the Penal Code[45], the Execution of Sentences Act[46], and Police Law.[47] *Pre-trial police custody* and *pre-trial court-ordered custody* are primarily regulated in the Criminal Procedure Act, yet certain rules are to be found in Police regulations. The Penal Code regulates the use of *imprisonment and preventive detention as punishment*.[48] Finally, the Execution of Sentences Act stipulates rules about the treatment of children in the execution of these sentences, and in court custody. Many of these rules are the result of law reforms in 2012 aiming to reduce the number of children in arrest and detention, in light of the the previous critique from the CRC committee.[49]

In the following sections (5–7) we will take a closer look at these rules and their implementation in practice, and assess whether they conform to CRC standards. This assessment combines a legal analysis of relevant criteria with an empirical investigation into the actual situation for detained children in Norway. In the latter regard, we base our assessment on statistical data from the Police Directorate, the Directorate for Detention Services, the Youth Unit at the Bjørgvin Prison, the NOVA report series and Statistics Norway (SSB). Our evaluation of the conditions for detained children is based upon interviews with key personnel within the Police and the Correction services as well as visits to selected units. Previous

43. Advokatforeningens årstale 2010.
44. Straffeprosessloven (1981) *Lov om rettergangsmåten i straffesaker* (Criminal Procedure Act). Available in translated version: http://app.uio.no/ub/ujur/oversatte-lover/data/lov-19810522-025-eng.pdf
45. Straffeloven (2005) (Penal Code).
46. Straffegjennomføringsloven (2002) *Lov om gjennomføring av straff mv.* (Execution of the Sentences Act).
47. FOR-1990-06-22-3963. Forskrift 26. juni 1990 om alminnelig tjenesteinstruks for politiet (Police Instructions).
48. Penal Code, Chapters 6 and 7.
49. Innst. 83 L (2011-2012). *Innstilling fra justiskomiteen om lov om endringer i straffeloven, straffeprosessloven, straffegjennomføringsloven, konfliktrådsloven m.fl. (barn og straff)*.

reports from the Ombudsman, the Children's Ombudsman and the Norwegian Bar Association have also been a basis for this evaluation. Our examination relates only to data obtained until 2017.

In the search for a complete statistical overview, we have faced certain challenges. The difficulty in obtaining a full statistical overview in this area is in itself problematic and has also frequently been criticized by the Ombudsperson for Children.[50] The most challenging numbers to obtain have been from the *Politioperativ system* (PO), over arrests. First, the system does not allow us to distinguish between children arrested on a criminal basis and children arrested on other grounds. Secondly, certain sources of errors may occur when children are registered as being detained in a police custody cell, but in reality have been detained in an office or of the like. A final source of error has been that there may exist duplication of information in the PO. Despite having met obstacles in obtaining a full statistical overview, our requests have been thoroughly followed up by the Police Directorate and from local police districts, yet the lack of a complete overview of central statistics is a critical concern.

5.5 POLICE CUSTODY

5.5.1 LEGAL CRITERIA

Pre-trial police custody and pre-trial court-ordered custody are closely related to each other. Police custody is decided by the police prosecutor, and is generally enforced in cells located within police buildings. In many occasions, the police only keep a person arrested for interrogation and in order to secure evidence, before releasing the person in question. Court-ordered custody follows from police custody in those cases where the police prosecutor wishes to keep a person in custody. A person is then transferred from the police building to prison. However, in practice, it may take some time before such a transferral takes place. In other cases, a person may be transferred to a prison before the court decision after a special request from the police. With this in mind, we take a closer look at police custody, while court-ordered custody will be dealt with in Section 5.2.

The general conditions for the use of police custody follow from the Criminal Procedure Act §§ 171–183. These rules provide for a common legal basis for the different measures involved in police custody, i.e., arrest, transfer to a police station, initial detention (e.g. for interrogation), and eventually custody. Any person suspected of one or more acts punishable with more than six months' imprison-

50. Supplementary Report to the UN Committee on the Rights of the Child, 2009.

ment can be detained for certain defined purposes. These are to hinder that a detainee evades prosecution or the execution of a sentence, interferes with the evidence or commits a criminal act punishable by six months' imprisonment.[51] A person can also request detention.

Detention can also take place when the person has confessed or is suspected to a considerable degree to have committed certain criminal acts punishable by at least 10 years of imprisonment. In addition, any person who is caught in the act and does not desist from the criminal activity may be detained without regard to the penalty imposable.[52] Hence, in these cases, police custody can be used for lesser criminal offences.

For detention to take place, however, it must not constitute a *disproportionate infringement* of liberty.[53] Detention of children under the age of 18 shall not take place unless it is considered *especially necessary*. This is a strict standard, which was introduced in the legislation in 2000, requiring that detention is limited to an *absolute minimum*.[54] Such delimitation is in conformity with the principle of detention as a last resort following from CRC Art. 37 (b).[55] Of importance for this limitation of detention is that the prosecutor may decide on different kinds of control measures, such as requiring a detainee to stay within a certain area or withholding their passport.[56] The police prosecutor, however, lacks the formal authority to place a child in a childcare institution. Such a placement requires a court order. Informally, police may on agreement with the childcare service, require that the child spend the night in a childcare institution instead of police custody.[57]

Police custody must be *limited in time*. If the prosecution authorities wish to keep a child in custody, the child must be brought before the court *as soon as possible and not later than the day after the arrest*.[58] The aim of this time-limit is to reduce the time the child spends in custody awaiting judicial decision, and to sig-

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51. Ibid, Section 171.
52. Ibid, sections 172, 173.
53. Ibid. Section 170 a and Grunnloven, article 94.
54. Ibid., para. 174, see NOU 2006:15 *Barn og straff – utviklingsstøtte og kontroll.*p. 68, and Prop. 135 L (2010–2011). *Endringer i straffeloven, straffeprosessloven, straffegjennomføringsloven, konfliktrådsloven m.fl. (barn og straff)*. p. 50.
55. Prop.135 L (2010–2011), p. 50. See also Rt. 2004 Decision by Norges Høyesterett of 03.11.2004. p. 1655 para. 13.
56. See Criminal Procedure Act, section 181. See further Bjerke, Keiserud and Sæther (2011), pp. 642–643.
57. See below in Section 6.2.
58. See Criminal Procedure Act, section. 183. For adults, the time-limit is three days.

nal that the prosecution and the courts must prioritize cases involving children.[59] The rules on this matter are clearly in conformity with the CRC.[60]

In contrast to the strict limitations of the use of police custody, the conditions for detained children are surprisingly poor and fragmentally regulated. There is a general police regulation about 'defensible supervision' of persons in custody, which is interpreted as requiring more when the detained person is under the age of 18.[61] In addition, there are local police directives regarding police custody in the different police districts that stipulate specific routines and procedures for children.[62] The precise content of these directives differ between districts, opening the door to different practices – which may compromise the principle of equal treatment. It is, however, a general requirement that the police immediately contact the child's guardian and the childcare services when a child is arrested.[63] The police directives also dictate that certain measures are to be taken when children are kept in police custody, in order to reduce the negative effects of detention. These may include, inter alia, more frequent supervision and contact between police personnel and the child, offering the child walks in close by yet confined area, and offering contact with psychologists or other health personnel. The extent of such measures is, however, open for discretion, and depends on available resources and the facilities of the arrest buildings.

5.5.2 CHILDREN IN POLICE CUSTODY

The imposition of strict standards concerning the use of police custody for children seem to have had the intended result. While around 1 000 children were held in police custody in 2010 (before current standards were implemented),[64] 298 children were held in 2015, 238 in 2016, and finally, 70 children were held in police custody as of the first four months of 2017. These numbers demonstrate a

59. Prop.135 L (2010–2011), pp. 169–170.
60. See Section 2.3 of the chapter.
61. See FOR-2006-06-30-749 Forskrift 1. juli 2006 om bruk av politiarrest, paras. 2–5. See also Auglend and Mæland (2016), pp. 815 ff.
62. These local directives also build upon different directives and document from the Norwegian Police Directorate and the Higher Prosecution Authorities. At present, there is no overall Central Police directive regarding police custody, but such directive is under development.
63. That the police shall inform the Child Care Services also follows from Straffeprosessloven § 183, and the duty of the Police to inform the Guardians of the child is regulated in FOR-2006-06-30-749 § 2-4, cf. FOR-1990-06-22-3963 § 9-2. For a critique of the lack of available and operative services past opening hours see Rotihaug, Vengen and Osland (2014).
64. Prop. 135 L (2010–2011).

prominent decrease over the course of seven years.[65] The numbers also show that only a small amount of the children that are prosecuted in Norway are held in police custody.[66]

According to the Police Directorate, children are only detained when there are no other practical measures available.[67] There are, as we have seen, different grounds for police custody, and some open for custody also for less serious crimes. In cases of less serious offences the police may informally agree with the childcare services that the child spends the night in a childcare institution, provided that the control of the child is secured. The cooperation between the police and the local childcare institution is here of certain importance, and differences between different police districts will result in different practices when it comes to children in detention. The police may also in cases of less serious criminality agree that the child spends the night at home with his/her guardians. Most children that were held in custody during 2016 had however, committed relatively serious crimes.

There has also been a positive change with regard to the time children spend in custody. In 2012, 113 children were held in custody for more than 24 hours. In 2013, after the introduction of stricter standards, 47 children were held for more than 24 hours.

However, the institutional conditions for detained children are still a problematic matter. Children subject to police custody are most commonly detained in a cell or a security cell in police buildings. In many police districts, the conditions of these cells do not comply with the specific needs of the child. A particular problem is also the variation between different police districts.[68] In Bergen, the cells are for instance located in outdated cellar buildings without daylight or clocks on the wall. Nevertheless, certain police districts, such as Tønsberg Central Arrest have cells made specifically for children.[69] These often include certain facilities, such as TVs and sinks, which are considered to be perceived as less stressful. These regional variations are problematic with regard to equal treatment of children in police custody in Norway. Generally, the lack of institutional facilities is highly problematic as it limits the possibilities for the police to secure the needs of the child.

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65. Politidirektoratet (3/2015), Politidirektoratet (3/2016) and Politidirektoratet (1/2017).
66. The following is based upon interviews with staff members of the Police Directorate, and the Police District of Bergen and Oslo.
67. See also Prop. 135 L (2010–2011), p. 17 that supports this.
68. See Juristkontakt (5/2016).
69. Sivilombudsmannen (2014a).

5.6 COURT-ORDERED CUSTODY

5.6.1 LEGAL CRITERIA

Should a person detained by the police remain in custody, it must be decided by a court. The conditions for court-ordered custody are primarily regulated in by the Criminal Procedure Act, section 184, and are essentially the same as for police custody. The threshold for the court to decide on (continued) custody is, however, by its wording here even stricter.[70] Children cannot be held in custody unless it is *strictly necessary*, which implies that there should be *no other alternatives*.[71] A court may in this regard decide on alternative measures, such as placement in an institution or a municipal residential unit.[72] Placement in childcare institutions may here be an alternative to detention for children.[73] The use of such alternative measures is however conditioned by the consent of the municipality or relevant institutions.[74]

Court practice shows that the courts generally take into account the rights of the child. In accordance with the CRC emphasis on differentiation, the best interest for the child weighs more heavily for young children.[75] The availability of alternatives to custody also seems to play a vital role for the courts' decisions. On some occasions, however, courts are of the view that alterantives *should have been* available.[76] The Norwegian Directorate for Children, Youth and Family Affairs has in this regard expressed clear reservations towards custody in childcare institutions, and emphasized that it can only secure criminal justice aims as long as they are in conformity with childcare regulations.[77] This shows that the clash between childcare and criminal justice perspectives may be an obstacle to an adequate limitation of detention of children. It also shows that there is a need for a clarification of the role of the municipality and relevant institutions as actors within the criminal justice system.

The rules on the time-limits for court-ordered custody are generally in accordance with the CRC.[78] When the defendant is under the age of 18, the court shall

70. According to the preparatory works, the conditions for police arrest and court detention should however be understood to stipulate a similar threshold. See Prop.135 L (2010–2011), pp. 58–59.
71. Ibid pp. 58–59.
72. See Straffeprosessloven § 188.
73. See Larsen (2016) pp. 119–120.
74. See Criminal Procedure Act, section 188.
75. See *inter alia* LF 2008-102133 Decision of Frostating lagmannsrett of 04.07.2008, p. 2.
76. See *inter alia* Rt.2005.358 Decision by the Supreme Court of Norway of 23.03.2005 and Rt.2012.274. Decision by Supreme Court of Norof 15.02.2012.
77. See letter from The Norwegian Directorate for Children, Youth and Family Affairs (2012).
78. There may still be individual cases that are problematic with regard to the CRC requirement, and this must be evaluated in each case. For a discussion on this matter see Fornes (2006) and Havre (2014).

set a fixed a time-limit that shall be as short as possible and that shall not exceed two weeks (for adults the maximum period is 12 weeks). On request from the prosecutor, it can be prolonged for two weeks at a time.[79] Also the judicial control of the continuous need for detention is, in this regard, comforting.

The institutional conditions for children in court-ordered custody are, in contrast to police custody, regulated by the Criminal Procedure Act. There is for instance an absolute prohibition against excluding the child from company with other prisoners, in accordance with the CRC Art. 37 (1).[80] The child must also, in accordance with CRC Art. 37(c), be able to receive visits and have correspondence with close family members, save in *specific circumstances*, such as in cases of honor violence.[81] In addition, the Execution of the Sentences Act contains several rules for the treatment of children in custody and in the administration of punishment.[82] Of particular importance is Section 10(a) that requires that the conditions for detention should be adjusted to the needs of the child. In accordance with recommendations from the CRC Committee about the need for rehabilitation and education, this rule also requires the establishment of specific Youth Units with an interdisciplinary team to assist the needs of the child during the entire time in prison.[83] Against this background two Youth Units with an interdisciplinary team as part of the staff have been established, namely Bjørgvin in Bergen and Eidsvoll in Oslo.[84]

A prevailing issue experienced by the police is that persons charged for committing a crime sometimes provide false identity in order to ensure a milder sentence. Most often this concerns their age. If the police are uncertain as to whether the stated age is false or not, the person charged for committing a crime must undergo a procedure for determining the person's (or child's) age. However, until the opposite is proven, the person is treated legally as a child, with all their attendant rights.

5.6.2 CHILDREN IN COURT-ORDERED CUSTODY

In the years prior to the incorporation of the CRC, just over a hundred children were registered in court-ordered custody. The number was, however, significantly

79. See Criminal Procedure Act, section 184, the time-limit for adults is 4 weeks.
80. See Ibid., secton 186 a.
81. See Ibid. section 186. See further Prop. L. (2010–2011), p. 171.
82. See Execution of the Sentences Act, see also further below in 7.1.
83. CRC/C/NOR/CO4, 2010, para 58.
84. See further Gording Stang and Hydle (2015), pp. 54–60.

reduced to 76 in 2003 and 47 in 2004.[85] Figure 5.1 below demonstrates how the number of children in court-ordered custody has evolved from 2005 to 2016. There is a prominent reduction of children in court-ordered custody from 2012, which can be explained from the amendments in the Criminal Procedural Act that followed from the critique of the CRC Committee.[86] The numbers from the latter years also indicate that court-ordered custody is only used when strictly necessary.

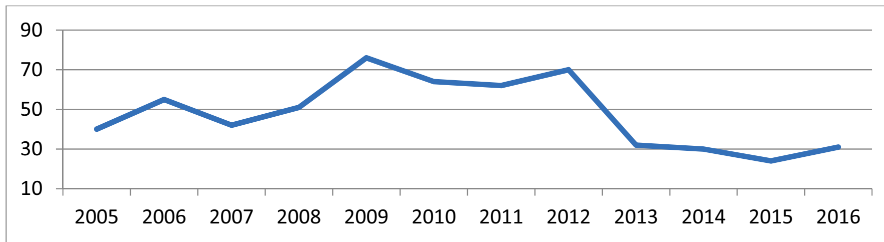

FIGURE 5.1 Number of children under 18 having completed court custody from 2005–2016.

Source: Kriminalomsorgens årsstatistikk 2005–2015.

However, the development of the time children spend in custody is then more complex. Figure 5.2, demonstrates time spent in court-ordered custody from 2008 to 2015 (measured in average days). From 2011 to 2014, 16-year-olds spent more time in custody than the other age groups. Moreover, for 2015, 15-year-olds exceed the time of both 16- and 17-year-olds. These numbers indicate that the child's age is not sufficiently considered when it comes to time spent in custody. We find this unlikely to be in accordance with the CRC's emphasis on the fact that the best interest of the child shall be more heavily weighted the younger the child is. At the same time, it is hard to draw any solid conclusions as the total number of detained children is low and the indicators are not controlled for other factors. Further statistics and research is needed.

For the period 2011 to 2016, the children who were held in court-ordered custody had committed different kinds of crimes such as rape, robbery, theft, drug-related crimes, and assault and battery. These types of crimes have a sentencing framework ranging from up to one year until 15 years of imprisonment.[87] A question is, in this regard, whether there should be alternatives to custody at least for the crimes in the lower end of the spectrum.

85. Mæhle (2014) p. 7.
86. Prop. 135 L (2010–2011).
87. Penal Code, sections 231, 271, 273, 291, 321 and 327.

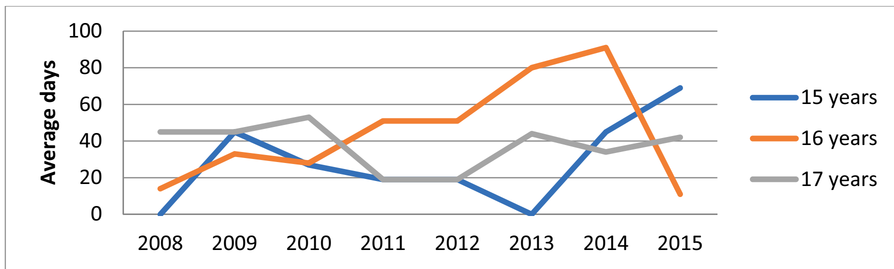

FIGURE 5.2 Average days spent in court custody distributed by age.
Source: Kriminalomsorgen årsstatistikk 2011, 2012, 2013, 2014 and 2015.

A specific aspect to note in this context is that there has been a decrease of children with foreign citizenship in court-ordered custody. In 2010, 52 per cent of all detained children were of foreign descent, compared with 32 per cent in 2016.[88]

Furthermore, after the establishment of the Youth Units, there have also been major improvements concerning the conditions for children in custody. Before the establishment of these units, children were placed in cells in ordinary prisons together with adults, and the separation requirement was a main challenge for the Correction Services. Now, children who should be kept in court-ordered custody (or who have been sentenced to imprisonment) should be placed in a Youth Unit unless another placement is in the child's best interest.[89] Therefore children are now incarcerated directly in Youth Units, or transferred to a Youth Unit. Nevertheless, there are still certain challenges concerning children in court-ordered custody.[90] There have been a couple of instances where the police have found a place for court-ordered custody for a child in a regular prison unit, without informing the Youth Unit. When such instances are revealed, the procedure that follows is that the child is transferred to a Youth Unit as soon as possible, provided that there is capacity. In periods the Eidsvoll Youth Unit has in this regard been reduced to half capacity due to lack of approval of sufficient fire security. This may be an explanation as to why 10 out of 31 children in 2016 were in court-ordered custody in a regular prison. As of June 15, 2017, all detained children have been placed in Youth Units.

A specific practical challenge is the use of security cells at the Bjørgvin Youth Unit. The prison personnel expressed a need for such cells at the Youth Units, but

88. Prop. 135 L (2010–2011) p. 19.
89. FOR-2002-02-22-183 *Forskrift 1. mars 2002 nr. 183 om forskrift for straffegjennomføring*. sections 3–4.
90. The following is based on an interview with central staff members of the Bjørgvin Youth Unit.

these security cells have been constructed and built with a special concern for children. The Ombudsman has also assessed the design of these cells and considers them as 'adequate'.[91] However, after an incident in the security cell at the Youth Unit at Bjørgvin, the security cell was found to be in need of renovation. Therefore, there is currently a lack of security cells available for children at this unit; hence, children are temporarily being transferred to Bergen prison for that purpose. In practice, such transfers take place before the security cell is considered necessary, so that the security cell can be used when needed. While in the Bergen prison, children are isolated from other inmates – often alone.[92] If the child is kept in solitary confinement, the Bergen prison's staff members, (e.g. the guidance counselor, psychologists and other health personnel) care for the child; and the interdisciplinary team from the Youth Unit works only as a secondary resource. In addition, isolation of a child consequently results in the child spending most of the time in a cell in effective solitary confinement, which is a major concern in relation to CRC Art. 37 (1).

Furthermore, while there are only two Youth Units in Norway, another major challenge is that children are often detained far away from their families and social networks. The geographic and/or demographic conditions of Norway are in this regard an obstacle to the full compliance of the CRC. The fact that there are only two Youth Units, located in Bergen and Oslo, suggests that children from other parts of Norway will be placed far from their networks' immediate geographical proximity. This may complicate or challenge the principle of Article 37 (3) providing children with the right to maintain contact with their family through visits.

5.7 IMPRISONMENT

5.7.1 LEGAL CRITERIA

Long-lasting and highly restrictive imprisonment is the most intrusive form of detention for children within the criminal justice system. It has also a clearer retributive justification than other forms of detention, as it is imposed as punishment.

Imprisonment of children is limited according to the Penal Code. An unconditional prison sentence can only be imposed on persons under the age of 18 when *especially necessary*, which is the same threshold as for police custody, and cannot

91. Hydle, I. M. and Stang, E. G. (2016), p. 126.
92. For further discussion on the problem of isolation of children in prison, see Eknes (2014) pp. 415–435.

exceed 15 years.[93] The Supreme Court appears more lenient now than in previous cases, possibly due to parliamentary signals,[94] and the courts as a whole generally seems to have followed suit. If other types of reactions are viewed as sufficient and adequate, these must be chosen by the judicial authorities.[95] Whether other reactions shall be used is evaluated in light of the character of the offence and the circumstances of the case more generally. For the most serious crimes, imprisonment is generally imposed.[96] Such delimitation of imprisonment is understood as in accordance with the CRC.[97]

Of certain importance for the limitation of imprisonment of children is the youth penalty that can be used as a punishment also for more serious, but not the most serious, crimes.[98] This penal sanction was introduced in 2014, and its objective is to help children back on 'the right track' after committing crimes.[99] Moreover, the youth penalty builds on ideals of restorative justice, where children are offered meetings with relevant stakeholders, such as school representatives and the Child Protective Services, as well as the police and the Correctional Services.[100] For practical reasons, however, the use of youth penalty requires that the offender has a residence in Norway.[101] This requirement may result in a child that has no residence in Norway is being imprisoned while children with residence avoid this option. In case this happens, which is difficult to validate, it will clearly be in tension with the principle of non-discrimination in CRC Art. 2.[102]

Regarding institutional conditions in prison, the Execution of the Sentences Act stipulates several requirements aimed at securing the needs of the child, where the new Youth Units represent a major leap forward.[103] There are, however, judg-

93. See Straffeloven § 33 and § 79.
94. See the decision cf Rt. 2012–274. Decision by Norges Høyesterett of 15.02.2012, p. 1313.
95. Ot.prp. nr. 90 (2003–2004) *Om lov og straff (straffeloven)* p. 435.
96. According to the Norwegian department of justice the concern for the best of the child must be outweighed when the child has committed very serious criminality, prop. 135 L 2010–2011 p. 100.
97. Ot.prp. nr. 90 (2003–2004) p. 435.
98. See Prop. 135 L (2010–2011) on the youth penalty.
99. Ibid on the youth penalty; Regjeringen (2014).
100. Regjeringen (2014).
101. See Prop 135 L (2010–2011), p. 164 on this condition. See also LA-2011-187926 Judgement by Agder lagmannsrett of 23.01.2012 for a judgment where the lack of residence in Norway prevented the court from using the youth penalty.
102. See Hansen (2015), pp. 41–43. See also Spangen Iversen (2013), pp. 377–395 and Holmboe (2014), pp. 397–414.
103. See Særregler for mindreårige innsatte fra Kriminalomsorgsdirektoratet 2016. See also above in 6.1.

ments where the court seems to argue that it is for the best for the child to receive a prison sentence, because of the favourable conditions in the Youth Units.[104] This is problematic. Improved prison conditions for children cannot legitimize sentencing a child to imprisonment, instead of alternative sanctions.

There are also several rules aimed at reducing the time in prison. The Correction Services must always consider placing inmates under 18 years in a lower security prison or in a halfway house, and allow them serve the sentence at home with electronic control.[105] It must also consider transferring the child for the completion of their sentence outside prison under certain supervision and control measures when half the term of the sentence has been served.[106]

In accordance with the CRC Art. 37 (1), there are many exceptions for inmates under the age of 18 in relation to exclusion from company with other inmates, and on the use of coercive measures.[107] Generally such measures must be strictly necessary and less intrusive means must have been tried and proved useless, or obviously be insufficient. The right to visits from close family is also specifically regulated.

Finally, it should be mentioned that the Correction Services have the opportunity to transfer an inmate under the age of 18 for execution of a prison sentence in a childcare institution.[108] This opportunity seems to have certain relevance for the courts when deciding on an unconditional prison sentence for a child.[109] In some cases, courts are even clear that an ordinary execution of a prison sentence will be clearly undesirable and almost instruct the Correction Services to decide upon transfer to an institution.[110] The realization of a transfer from prison to a childcare institution depends, however, on the availability of suitable institutions, indicating that clear alternatives to prison sentence are absent.

5.7.2 CHILDREN SERVING A PRISON SENTENCE

Few children serve a prison sentence in Norway. In 2016, there were six new imprisonments of children, while in 2015 and 2014 there was only one.[111] The

104. See LH-2016-72863 Judgement by Hålogaland lagmannsrett of 23.05.2016, pp. 6–7.
105. See Straffegjennomføringsloven § 11, § 16.
106. Ibid § 16.
107. See Straffeprosessloven §§37–39.
108. See Straffegjennomføringsloven § 12.
109. See inter alia LB-2003-3089 Judgement by Borgarting lagmannsrett of 06.10.2016 p. 6, LA-2009-77169 Judgement by Agder lagmannsrett of 04.09.2009, p. 4 and TOSLO-2012-6212, p. 6.
110. See LB-2011-204503 p. 4 for a clear example.
111. Kriminalomsorgens årsstatistikk 2014, 2015 and 2016.

numbers of children serving a prison sentence at each time differ from these numbers, but are similarly low. On 15 December 2016, there were for instance four children serving a prison sentence in Norway.[112] The years 2014–2016 represent a clear decline from previous years, and indicate the success of legal amendments done to reduce the number of children in prison. As demonstrated below, the number of children in prison has been reduced greatly in the last eight years. These numbers are consistent with the CRC emphasis that the younger the child, the more heavily weighted their best interest.

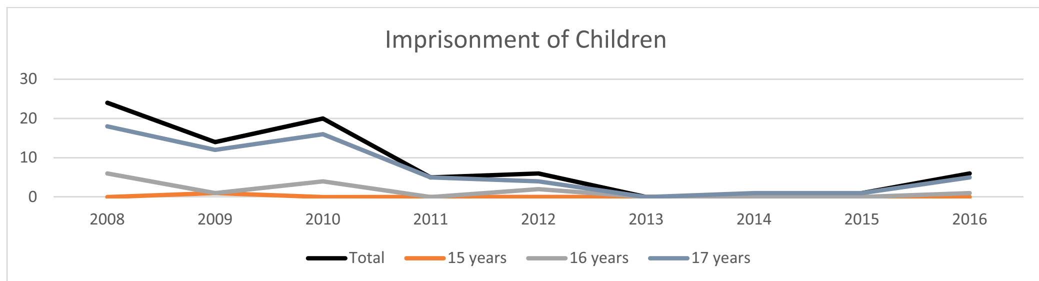

FIGURE 5.3 Imprisonment of children 2008–2016 by age and in total.

However, it must be noted that the number of children that are sentenced to imprisonment by the courts is significantly higher than the number of children that are in prison at each time – although also these numbers show a clear reduction. In 2014, 43 children were sentenced to prison, compared with 212 in 2002.[113] The reason for this might be that several children that are sentenced to prison have spent a long time in custody, and the sentence is by this time.[114] As a result, these children are released after the main trial. In addition, some children turn 18 before they start to serve their sentence, and are therefore placed in a regular prison unit. From a CRC perspective, it is important that also children *sentenced* to imprisonment are taken into account. It should here be noted that Norway has not included the number of children sentenced to prison in its most recent State report to the CRC Committee, but only those that are in prison.[115]

112. Kriminalomsorgens årsstatistikk 2015 p. 39. These numbers have also been supplemented by the Norwegian Correctional Service from our inquiry.
113. SSB 2014. See further Fornes (2017), Chap. 4.
114. Straffeloven § 83.
115. Rapport om Norges gjennomføring av FNs barnekonvensjon (2016), p. 75. It should also be noted that the numbers of children in prison reported seem to include also children in court custody, and also seem inconsistent with the officially reported numbers from the Norwegian Correctional Service.

As regard the length of the prison sentence, the six children imprisoned in 2016 were convicted on rape and robbery charges. They were convicted to sentences lasting from 92 days to two and a half years. All had Norwegian citizenship.

When it comes to the conditions for imprisoned children, these have as explained above been improved after the establishment of the Youth Units.[116] Children sentenced to a prison sentence shall as a main rule be placed here, and this was also the case with all but one of the six children imprisoned in 2016.[117] As of 15 June 2017 all children serving a prison sentence were placed in a Youth Unit.

The problematic issues regarding the conditions for children in court custody that has been explained above are the same in relation to children serving a prison sentence.[118] Also children serving a prison sentence may be temporarily transferred to a regular prison unit. The fact that the child may be detained in a Youth Unit far away from family and social networks is also even more troublesome when the child must serve a longer sentence.

5.8 PREVENTIVE DETENTION

5.8.1 LEGAL CRITERIA

A specific form of imprisonment in Norway is *preventive detention*.[119] This reaction is a hybrid construction, as punishment based upon considerations of the future risk that the perpetrator commits new crimes. As such, it deviates from backward-looking proportionality considerations that normally steers the choice of punishment. Preventive detention can be prolonged as long as the perpetrator is still considered dangerous, if needed for lifetime.

Preventive detention can only be imposed in specific circumstances: when a prison sentence for a specific term is insufficient to protect the life, freedom and health of the members of society. Furthermore, the perpetrator must have committed a serious crime and there must be a certain risk that he or she will commit new serious crimes. If the perpetrator is a person under the age of 18, preventive detention requires, in addition, *completely extraordinary circumstances*. According to the preparatory works, it should *almost never* be used against children.[120] It is at the same time acknowledged that there may be extraordinary cases where preven-

116. The following is based on interviews with a central staff member at the Bjørgvin Youth Unit.
117. See above in Section 6.2.
118. See above in Section 6.2.
119. Straffeloven §§ 40–47. See further Gröning, Husabø, & Jacobsen (2016), pp. 617–623.
120. Prop.135 L (2010–2011), p. 105.

tive detention is the correct reaction. [121] The more precise meaning of *completely extraordinary circumstances* is, in this regard, quite unclear. The preparatory works do not concretize this requirement in relation to CRC requirements, although it is generally clarified that the CRC should be taken into account.[122]

When passing a sentence of preventive detention for persons under the age of 18, the court shall fix a term that should not usually exceed 10 years and must not exceed 15 years. If the prosecution services do not make a request for prolongation, the person shall be released at the end of this term. If such a request is made, the detention can be continuously prolonged as long as the person is deemed to be dangerous.

In our view, preventive detention for children raises problematic issues. CRC Art. 37 a. prohibits life imprisonment without possibility of release. Since the detained person must be released when the condition of risk is no longer present, preventive detention is not formally a violation of this rule. However, preventive detention is a highly intrusive form of punishment and stands in clear tension with the principle of the best for the child. Given the requirement that imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time it is troublesome that this reaction is time-unlimited. Already to use regular imprisonment against children is problematic, in particular longer sentences. For preventive detention there is a significant additional burden of the insecurity for the child about the length of the reaction.[123] Furthermore, preventive detention not only stigmatizes the child as being criminal, but also of being *dangerous*, which may be in tension with Art. 40 and the 'desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.[124] It is also important to consider that the evaluation of the risk for new crimes is in itself unsecure, and is generally considered to be more difficult the younger the child is.[125]

5.8.2 CHILDREN IN PREVENTIVE DETENTION

There is to date only one person under the age of 18 that has been sentenced to preventive detention, a decision made by the Supreme Court.[126] This child had

121. Ibid, p. 167.
122. Ibid section 2.3.
123. See also Prop.135 L (2010–2011) p. 105.
124. CRC Art. 40
125. See Rt.2006.641, para 12.
126. See HR-2016-290-A. Judgement by Norges Høyesterett of 09.02.2017, p. 10. See also for comparison, Judgment by Agder Lagmansrett of 15.09.2017 (LA-2017-112563) where a boy that was 15 years old at the time of committing the offence (a murder) was sentenced to regular imprisonment.

committed a murder, and had a history of many serious acts of violence including attempted murder. At the time of the murder, she was 15 years and 1 month, and just above the age of criminal capacity in Norway. The preventive detention will be carried out in a Youth Unit, where institutional conditions are arguably satisfactory. After the girl has turned 18, however, she will be transferred to a regular prison unit for preventive detention.

Clearly this was a case in which criminal justice considerations were significant. The girl had committed a severely serious crime, and it was difficult to consider any other punishment than imprisonment. Still, it is highly controversial to make use of *time-unlimited* preventive detention, not least because of the young age of the child. Even though preventive detention may be accepted in extreme cases, it is in our view problematic that it has now been imposed on a child at such a young age as 15. The lower court even indicated that a preventive detention would be *best* for the child.[127] The Supreme Court, however, rejected this kind of reasoning.[128] This case begs the question of whether there are no other available means in the Norwegian criminal justice system to use against such a young perpetrator, in order to prevent re-offending. The creation of a preventive detention regime is highly problematic in Norwegian criminal law, and it becomes even more troublesome when used against children.

5.9 CONCLUSION: ASSESSMENT AND POSSIBLE IMPROVEMENTS

To a significant extent, Norway has followed up on the previous critique from the CRC Committee, especially concerning the use of police custody, court-ordered custody and in prison. The introduction of law reforms to ensure implementation of the CRC in this area can be regarded as very positive.

Generally, the legal criteria for the limitation of detention of children is now in accordance with the CRC requirements of detention as last resort and for shortest appropriate time. Norway has, however, challenges in regard to a fully satisfying implementation of the CRC. To begin with, one may discuss whether there should be even more concrete and absolute requirements. The criteria for the use of detention are often value-laden and open for discretion, and the preparatory works are not always clear about the more specific requirements following from the CRC.[129]

127. See LB-2015-119615 Judgement by Borgarting lagmannsrett of 06.10.2016, p. 14 and TAHER-2015-13241 Judgement by Asker og Bærum tingrett of 26.06.2015, p. 20.

128. See HR-2017-290-A, p. 10.

129. The proposal for a new criminal procedure act only has very few matches on the words relating to the CRC, see NOU 2016 *Ny straffeprosesslov* p. 24.

A further step forward could be to limit the possibility of pre-trial custody to certain serious crimes. This has also been suggested in the preparatory works as a potential future change.[130] Another option could be to articulate clearer criteria for the proportionality and necessity evaluation in order to emphasize that detention of children is highly intrusive and requires stronger reasons than detention of adults. It should here be mentioned that the proposal for a new Criminal Procedure Act seeks to limit the general use of custody, by articulating the principle of the least possible infringement and by requiring more serious criminality before custody can be used.[131]

It seems clear that the Police, Prosecutors, Courts and Correction Services seek to limit and carry out detention of children in accordance with the CRC. The Supreme Court has in this regard been an important factor in the development towards fewer children in court-ordered custody and prison. To a certain extent, however, court practice – in line with the most recent recommendations from the CRC Committee – indicates that there is a need for a further development of rules concerning *alternatives* to detention. In this regard, one may argue for a further development of suitable institutions in the municipalities that could be used instead of holding children in custody in cells in police buildings and prisons. An important matter for further research is how the criminal justice system and child care institutions can interact in order to secure the best for the child.

However, the willingness to regulate and use alternatives to detention seems to have some limitations – also in Norway as an advanced welfare state. When it comes to very serious crimes the criminal justice rationality seems to outweigh the CRC perspective. When such criminality is at stake, the courts regularly decide on custody and imprisonment. Thus, when it comes to serious criminality, the tension between the criminal justice and the CRC perspective is obviously present, although the CRC acknowledge that certain serious crimes committed by children could be met with long prison sentences. This is not least seen in the possibility of time unlimited preventive detention of children, which in our view should be abolished.

Therefore, the conditions for detained children become an important matter. The fact that the number of detained children in Norway is low can and should never compensate for a deficient treatment of these children. In this regard, Norway has still a way to go when it comes to the conditions for children in police custody. These conditions are far from satisfying, and there is also a problematic variation between police districts. This indicates a need for the articulation of clear

130. Prop.135 L (2010–2011), p. 59.

131. See further NOU 2016:24 p. 315 ff.

and absolute legal requirements regarding the conditions for children in police custody. Above all, however, to provide satisfying conditions for children requires resources. If there is a serious political will in implementing the CRC, there must also be resources invested in adequate buildings.

The development and establishment of prison Youth Units should, in this regard, be underlined as a major improvement of the conditions for detained children. There should, however, be paid attention to the risk of a 'net-widening' effect, where the existence of satisfactory prison institutions justify that children are imprisoned. In addition, it is important to invest in the long-term rehabilitation and reintegration of those that commit crimes as children. There should be an adequate rehabilitation process within the prison system for those children that serve longer sentences, also with regard to their transfer from Youth Units to regular prisons when they turn 18. It should here be remembered that the strict limitations of the use of imprisonment alters the prison population. Those children that are in prison today typically have diverse and complex problems, and are often at a low level of maturity compared to children of the same age.

More generally, Norway is far from having a separate and specialized criminal justice system for children, as is desirable in light of CRC Art. 40. Norway has no specific courts, or specialized judges. It has neither a specific criminal process for dealing with children. In addition, the available measures that may serve as alternatives to the use of prison are as described still limited. It is time that Norway invests in a higher level of specialization and education in the criminal justice system in order to meet the specific needs for the child. The question that must also be raised is whether Norway should seek to realize a separate criminal justice system for children, which in case will require significant resources. Compared to many countries, also similarly small countries, Norway lies behind in this regard.[132] This can to a certain extent be explained by the specific topography of Norway, with many small local communites separated by mountains, and by the specific Norwegian pragmatic legal culture that has not favored specialisation.[133]

In the end, we must think beyond the criminal justice system. Taking children's rights seriously is difficult to reconcile with the inherent brutality of this system. Ideally, children committing crime should be taken care of long before a crime is committed, thus reducing the chances of its commission. It is well documented that many children that end up in criminality have a troublesome childhood, often

132. See Pruin (2010), pp. 1513–1556 and Dünkel et. al. (2010), pp. 1623–1690.

133. See Jørn Øyrehagen Sunde, Managing the unmanageable – An essay concerning legal culture as an analytical tool, in Søren Koch, Knut Einar Skodvin & Jørn Øyrehagen Sunde (eds.), *Comparing Legal Cultures*, 2017, Bergen: Fagbokforlaget, s. 15–16.

with early signs of problems.[134] In order to reduce the number of detained children, there must be sufficent focus on understanding these problems. An important way forward is engagement in kindergartens, schools and other institutions that can ensure mature child development without the need to consider crime and punishment.

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134. See inter alia Moffit et al. (2002).

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ANNEX: INDICATORS FOR BETTER MEASUREMENT OF IMPLEMENTATION

We were asked by the editors to consider whether existing indicators assist in measuring implementation. Several indicators show that Norway as an advanced welfare state lives up to several of its children's rigths commitments: first place in the KidsRights Index[135] and eleventh in the Realization of Children's Rights Index (RCRI)[136] However, our evaluation of the implementation of the CRC in the area of criminal justice and detention of children reveals the need for further improvement in Norway in realizing children's rights. This includes development of more specific indicators. While CRC indicators often have a broader focus, we here argue that it is important to develop more targeted indicators for the area of detention of children within the criminal justice system.

Within this area, it is important to differentiate between different institutional contexts and types of detention, i.e., police custody, court custody and imprisonment as punishment, because they raise somewhat different needs and ask for different evaluation criteria. It is within each of these types also important to formulate indicators that concern different structural, procedural and outcome measures, such as the existence of appropriate laws (structural), the level of training and expertise (procedural) and how the children in this context have actually benefited from the realization of their rights (outcome). We here base our argument in line with the tripartite model of indicators developed by for instance the European

135. KidsRights Index (2018).

136. Realization of Children's Rights Index (2018). Norway has a score of 9.15. Liechtenstein ranked as number one has a score of 9.42.

Union Agency for Fundamental Rights (FRA)[137] and the work laid down in the Manual for the Measurement of juvenile justice indicators by The United Nations Office on Drugs and Crime.[138] We therefore suggest the following structure, with indicators that should be developed (not an exhaustive list). Our suggested indicator area is *detention of children within the criminal justice system*. The number that we propose may be considered high (22) although much of this data should be relatively easy for the criminal justice sector to collect.

Looking at the first context or type of deprivation of liberty treated in this chapter, namely *police custody*, we argue that there is a need for indicators both at a structural, procedural and an outcome level. See summary in Table 1. The structural indicators must provide useful information of the extent of child involvement in crime, and the extent to which arrest powers are used in an appropriate manner by law enforcement authority with respect to children's rights. Against this background, we therefore suggest that there should be enforced structural indicators on firstly, the existence of time-limits for children to be held in police arrest in existing legislation. Although there has been a positive trend with regard to the time children spend in police arrest after the introduction of stricter standards,[139] it is nonetheless important to enable the measurement of the time children spend in police arrest on average in order to ensure that children spend the least amount of time as possible in this type of detention.

Secondly, we suggest that there is a need for the existence of legal obligation of supervision and monitoring of children in police arrest. As our evaluation has demonstrated, the supervision of children in police arrest may sometimes be done in a haphazard way, and is often based on discretion which in turn results in different practices between police districts. See also discussion on the next chapter on racial profling. As the local police directives may vary from district to district, we hence argue that clear indicators capturing the existence (or lack thereof) of such supervision is needed. Such an indicator may enable a comparison across the different Norwegian police districts.

Thirdly, we propose that there should be developed indicators regarding the architectural conditions of the holding cells at the police stations. There is a striking difference between the conditions of the holding cells between the Norwegian police districts, which shows that a lack of adequate facilities for children. By developing indicators for architectural conditions, one may call attention to and evaluate the minimum standards for such conditions between the different police

137. European Union Agency for Fundamental Rights (2010).
138. The United Nations Office on Drugs and Crime (2006).
139. See subchapter 5.2. Children in police custody.

districts. Moreover, at the procedural level for police arrest, we argue that there is a need for indicators that capture the degrees of efforts made at state and regional level to implement training initiatives on how to handle children that are or are suspected of being in conflict with the law. Such efforts could be the existence and training of specialist counselling and support services for children in police arrest.

Finally, at the outcome level, we suggest that there is a need to formulate indicators that measure child-sensitive procedures for identifying age. Furthermore, we also argue that there is a dire need for developing clear, unambiguous and easily accessible data on the number of children in police custody and where they are placed (i.e. in an office or a security cell). Finally, we push for the development of indicators showing the number of alternative care placements available for each child held in police arrest.

TABLE 5.1 Indicators for children in police arrest

Level of measurement	What it measures
Structural indicators	◗ Time-limits in legislation ◗ Existence of legal obligation of supervision of the child ◗ Architectural conditions
Procedural indicators	◗ Training of police personnel ◗ Specialist counselling and support services
Outcome indicators	◗ Child-sensitive procedures for identifying age ◗ Data on the children in police arrest ◗ Data on alternative care placements available

Looking at the second type, *court-ordered custody*, we also here suggest that at the structural level of measurement there should be developed indicators for the existence of time-limits for children held in custody and during a prison sentence. While the rules on time-limits for court-ordered custody and imprisonment that exist in Norway to date generally are in accordance with the CRC, we nevertheless suggest that this should be made more easily measurable in order to ensure that no children exceed the time-limit set by the CRC. Furthermore, as with police arrest, we also here suggest indicators of existence of legal obligation of supervision of the child in court-ordered custody. As the timeframe of court-ordered custody in Norway to a large extent reflects good practice of the CRC, it is nevertheless our opinion that continuous supervision may avoid unnecessary trauma for the children placed in court-ordered custody. At the procedural level of measurement, we also here suggest that there should be formulated indicators on training initiatives of personnel and programs for specialist counselling and support services. While

we have witnessed that today there exist robust regulations in the two Youth Units in Norway, we nonetheless see that children in court-ordered custody sometimes are transferred to regular prisons with the interdisciplinary team only as a secondary resource. Hence, we suggest that there should be developed an indicator indicating that all prison personnel should be trained to deal with children – even in regular prisons. For the outcome indicators, we propose the development of indicators on alternative care placements available (such as being placed in a childcare institution). Finally, we also suggest that there should be developed indicators on the number of *all* children in court-ordered custody, and it should be made clear whether the child is put in a Youth Unit or a regular prison. We also suggest that there should be developed data on the number of children in security cells.

TABLE 5.2 Indicators for children in court-ordered custody

Level of measurement	What it measures
Structural indicators	◗ Time-limits in legislation ◗ Existence of legal obligation of supervision of the child
Procedural indicators	◗ Training of prison personnel ◗ Specialist counselling and support services
Outcome indicators	◗ Data on alternative care placements available ◗ Data on children in court-ordered custody and prison: a) Youth Unit/regular prison, and b) number of children in security cells

Finally, it is in our view that the third type of deprivation of liberaty, namely *imprisonment*, should have many of the same indicators as court-ordered custody. See summary in Table 5.3. As with court-ordered custody, we also propose that the same indicators at the structural and procedural level of measurement should exist for children serving a prison sentence. However, in addition to the same indicators listed above, one has to take into account that imprisonment as a type of punishment can last for several years. Therefore, the children's development over time must weigh more heavily when it comes to children serving a prison sentence than for children in court-ordered custody. Hence, it is imperative to attend to the children's psychological, physical and social development, and ensure that *all* requirements of article 40 of the CRC – the promotion of the child's integration – are met. We thus emphasize the importance of the following outcome indicators: First, and in order to reflect whether the child's rights have been realized in a given context and have benefitted from the interventions and programs of actions, we suggest that there should be formulated indicators for education programs and vis-

its that are in line with the CRC art. 37 (3). It is of our opinion that there must exist stable and effective rehabilitation programs for all imprisoned children. This is particularly important for children in preventive detention.

Secondly, there should exist indicators on school and education programs available for all imprisoned children in order to secure that imprisoned children receive educational stimuli. While the imprisonment of a child is the strictest form for punishment, imprisoned children should *not* be deprived of an education or programs of action that may lead to, or be part of the process of reintegration back into society.

Thirdly, we suggest that there should be indicators that take into account the possibility of network and community development. Here, we emphasize the importance to the child of staying in contact with close and relevant network and/or family (save in special cases concerning e.g. honor violence). Such contact should include visits and correspondence with relevant network. The child should also be able to be part of a community with other children meaning that the child should serve prison sentences together with other youths and *not* with adults (unless this is deemed as the child's best interest).

Fourthly, we suggest that there is a need to develop specific indicators in relation to preventive detention. These indicators should measure the risk assessment of placing a child in preventive detention. Furthermore, they should assess the legal conditions for preventive detention and the justification of the reaction. Last but not least, we argue – as above – that there should be clear indicators on the number of children serving a prison sentence. Furthermore, this indicator should also provide information on whether the child serves its sentence in a Youth Unit or a regular prison, and include the number of children and time spent in security cells in order to provide a comprehensive overall picture of the reality for children in conflict with the law in Norway.

TABLE 5.3 Indicators for children in prison

Level of measurement	What it measures
Structural indicators	◗ Time-limits in legislation ◗ Existence of legal obligation of supervision of the child
Procedural indicators	◗ Training of prison personnel ◗ Specialist counselling and support services
Outcome indicators	◗ Rehabilitation and education programs and visits with network ◗ Risk assessment of preventive detention ◗ Data on alternative care placements available ◗ Data on children in court-ordered custody and prison: a) Youth Unit/regular prison, and b) number of children in security cells