

# 6

## Policing

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**ABSTRACT** Policing is critical for children’s security but police are also responsible for preventing and addressing crime *by* children and younger persons. This can raise risks from a human rights perspective, especially as children are more likely to come in contact with police due to their greater presence in public places. The UN Convention on the Rights of the Child (CRC) sets out various protections concerning arrest and detention, and this chapter examines their implementation in Norway in law but especially in practice. The number of children arrested has been steadily falling but significant concerns remain about specific police practices. Three stand out and are the focus of the chapter: racial profiling, use of solitary confinement, and detention for immigration. The chapter is cautiously optimistic on progress on some other areas but especially critical as to the lack of measurement and denialism in other areas.

**KEYWORDS** policing | criminal justice | children’s rights | racial profiling | detention | immigration

### 6.1 INTRODUCTION

Police play an important role in protecting children *from* harm and form an integral part of child protection services. In Norway, police are tasked with receiving and investigating reports of abuse, violence and sexual assault against children (see Chapter 4, Sections 2 & 5). At the same time, police also are responsible for preventing and addressing crime *by* children and younger persons, which raises risks from a human rights perspective. In this respect, the Convention on the Rights of the Child (CRC) is relatively clear. Article 37(b) provides that children shall not be deprived of their liberty ‘unlawfully or arbitrarily’ and that detention

shall only be a measure of ‘last resort’ and for the ‘shortest appropriate period of time’. Children who are arrested or detained shall be ‘treated with humanity’ (Article 37(c)) and have the right to prompt access to legal aid and the right to challenge the decision (Article 37(d)).

The previous chapter dealt with the extent by which children are covered by criminal law and the implications of being found guilty of offences, especially the penalty of imprisonment. This chapter examines the relationship between children and police, partly in law but especially in practice. As criminological research indicates, children are more likely to come into contact with police than adults. In the USA, it has been observed that ‘young people have more frequent contacts with the police than adults due to their disproportionate involvement in law breaking and their greater presence on the streets (amplifying accessibility to the police)’ (Brunson and Weitzer, 2009: 858). In Norway, the number of children arrested has been steadily falling but significant concerns remain about specific police practices. Three stand out: racial profiling, use of solitary confinement, and detention for immigration. Each of these will be considered in turn in this chapter.

## 6.2 RACIAL PROFILING

Racial profiling has been the subject of extensive research and political debate in the United States and various European states (Open Society Justice Initiative, 2009b). In Norway, the situation is otherwise. Thus far, there has only been one study of the phenomenon: a qualitative investigation with participant observation and interviews with police and youth from ethnic minorities (Sollund, 2007a; 2007b).<sup>1</sup> Otherwise, the topic has been only addressed in media coverage of specific alleged incidents. In December 2017, the national statistics agency (SSB) admitted that it could not estimate the number of arrests and prosecutions that were affected by racial profiling (Andersen, Holtmark and Mohn 2017: 23). This dire shortage of quantitative as well as qualitative research on racial/ethnic profiling of both adults or children has persisted despite the issue constituting a regular concern of the Committee on the Rights of the Child and the European Commission against Racism and Intolerance.

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1. Recently, interviews with a selection of young people with minority backgrounds in the five Nordic countries have also been published (Solhjell et. al., 2018). See discussion below in section 2.2.

### 6.2.1 CONCEPTS AND OBLIGATIONS

The term 'racial profiling' does not possess a coherent definition. Nonetheless, the UN Human Rights Council describe it as:

a reliance by law enforcement, security and border control personnel on race, colour, descent or national or ethnic origin as a basis for subjecting persons to detailed searches, identity checks and investigations, or for determining whether an individual is engaged in criminal activity.<sup>2</sup>

The concept of racial profiling has arguably acquired new momentum with the counterterrorism paradigm of the 21<sup>st</sup> century and the accompanying focus on prevention of radicalization and terrorism. Additionally, many criminologists argue that it has accompanied the shift from a post- to a pre-crime society, where the objective is to identify potential suspects and prevent future criminal acts (Janus 2004; Zedner 2007; Lomell 2012). In this paradigm, predictive profiling of certain groups or areas can become a natural part of police work. Research in the USA indicates that ethnic minorities are particularly vulnerable to profiling because of a range of structural and psychological factors. '*Street crime*' is often higher in economically distressed communities, which can result in increased police presence as well as easier crime solving, together with corruption and other forms of malfeasance (e.g. planting evidence). Studies also show that 'white' individuals can enjoy a 'halo effect' (Weitzer, 1999) and that discrimination may be embedded in police forces – with racially derogatory language remaining part of the everyday discourse of police officers (White, Cox, and Basehart 1991) and evidence of implicit racial bias amongst many police officers (Spencer et al., 2016).

While the use of ethnicity may be legitimate and apposite when used as descriptive terms, it becomes morally problematic when used to detect criminal behaviour. Legally, if the police behave differently towards a child based on his or her race or ethnicity, in the absence of an objective and reasonable justification, international and domestic obligations concerning discrimination may be violated.<sup>3</sup> In this respect, it is noteworthy that the Koblenz Administrative Court in Germany ruled in 2012 that skin color cannot be the decisive factor leading to an identity check; and use of such a criterion is a clear violation of the constitutional ban on

2. <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/080/01/PDF/G1508001.pdf?OpenElement>

3. *Kennedy v. Trinidad & Tobago* Communication No 845/1999, UN Doc. CCPR/C/67/D/845/1999 (UN Human Rights Committee).

discrimination.<sup>4</sup> Furthermore, questions of indirect discrimination may arise as the effects of certain police behaviour may affect children of a certain race or ethnicity disproportionately.<sup>5</sup>

The right to non-discrimination is enshrined in Article 2 of the CRC. States' Parties shall respect and ensure the rights 'without discrimination of any kind', and the grounds of discrimination that would be most relevant for racial profiling in Norway would be a child's or his or her parents' or legal guardian's 'race', 'colour', 'language', 'religion', and 'national, ethnic or social origin'. In its general comments, the CRC Committee has not explicitly dealt with racial profiling. However, in General Comment No. 6, it stated that policing of foreign nationals relating to the public order

are only permissible where such measures are based on the law; entail individual rather than collective assessment; comply with the principle of proportionality; and represent the least intrusive option. In order not to violate the prohibition on non-discrimination, such measures can, therefore, never be applied on a group or collective basis (para 18).<sup>6</sup>

Furthermore, in General Comment No. 10, the Committee stated that 'particular attention must be paid to de facto discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children' such as children belonging to racial, ethnic, religious or linguistic minorities.<sup>7</sup>

### 6.2.2 INTERNATIONAL CRITIQUE OF NORWAY

International attention has been drawn to the deficit in research on racial profiling in Norway. As early as 2008, the European Commission against Racism and Intolerance (ECRI) wrote in its report on Norway that addressing racial profiling practices and advancing the confidence of the population of immigrant background was a 'key challenge' for the Norwegian police.<sup>8</sup> While not specifically concerned with children, the report stated that ECRI had 'continued to receive information indicating that racial profiling, notably in stop and search operations carried out

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4. 'Court bans police racial profiling', *DW*, 31 October 2012. Available at: <https://www.dw.com/en/court-bans-police-racial-profiling/a-16347425>
  5. *D.H. v. Czech Republic*, Application no. 57325/00, Judgment 7 February 2006 (ECtHR).
  6. CRC Committee, General comment No. 6 on Treatment of unaccompanied and separated children outside their country of origin, Thirty-ninth session, 17 May–3 June 2005.
  7. CRC Committee, *General Comment No. 10 on Children's rights in juvenile justice*, U.N. Doc CRC/C/GC/10 (2007).

by the police' was common in Norway.<sup>9</sup> It was highlighted as an issue that Norwegian authorities should address particularly. The Commission emphasized that Norway should prioritize the implementation of in-depth research on racial profiling, including observation of police activities in order to identify racial profiling practices (ECRI 2008: 10).

According to the 2012 ECRI report, Norwegian authorities had informed the Commission that racial profiling 'does not exist in the police's modus operandi' (p. 7). The Police Directorate reiterated the statement in 2016, asserting that the police do not conduct racial profiling and that there is zero tolerance for racism within the police force.<sup>10</sup> Moreover, former minister of Justice and Public Security, Anders Anundsen, told the Parliament in 2016 that the police receive few complaints on discrimination. In 2014, the police received 736 complaints, whereby 25 of these concerned ethnic or racial discrimination.<sup>11</sup>

The ECRI report did, however, note that other sources indicated that there had been complaints that public security officials had used 'racial profiling techniques to stop and search members of vulnerable groups' (ECRI 2012: 7). In the two reports following the fourth monitoring cycle in 2008, the Commission concluded that the recommendation of both monitoring and researching racial profiling practices by the police in Norway had not been implemented. However, ECRI did highlight the advantageous outreach activities conducted by the Oslo police towards minority groups and training of police officers in cooperation with NGOs.

### 6.2.3 EXISTING RESEARCH IN NORWAY

Turning to the existing research, the only authoritative study on the topic is by Sollund (2007a). She formally interviewed 18 persons with minority background and 20 police officers, participated in 38 police patrol shifts and informally interviewed 88 police officers while on patrol, and spent some days within a police station. Her results are mixed. She observed that police engaged in 'few unjustified stop and

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8. Fourth Report on Norway (2008), p. 8. <https://rm.coe.int/fourth-report-on-norway/16808b597a>. FAFO researchers Anne Britt Djuve og Jon Horgen Friberg report that only 57% of first-generation migrant youths from Africa and Asia report confidence in the police. The figure for second-generation migrants from these regions is 68% and 'ethnic Norwegian' youth 78%. See: FAFO, *Elevers tillit til politiet*, <https://www.faf.no/index.php/om-fafo/nyheter/item/tilliten-til-politiet-hos-elever-i-videregaende-skole>

9. *Ibid.*, para. 8.

10. Utrop (2016).

11. <https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=65790>

search incidents involving ethnic minorities, and if so, only soft approaches' (p. 80). She acknowledged that it was likely that the police were aware of her presence although felt that 'what is revealed of police conduct during field-work is what usually takes place amongst them' (ibid). Yet, most ethnic minority informants found reported 'the experience of being unjustly targeted', which they attributed to racism; and Sollund concludes that ethnicity does seem to play some role in who is targeted. This results in a form of 'typological guilt', an 'assumption that these persons may have committed or intended to commit crime, based on their appearance' (p. 90). Sollund also expresses concerns that the discourse on ethnicity in private police spaces may also have an effect on police practices.

In a more recent study of all Nordic countries, 121 young people with minority background between the age of 15 and 25 were interviewed on their experiences with the police (Solhjell et. al., 2018). These recollections repeat the same patterns as reported by Sollund, although more report incidents of police violence in Norway. The authors of this study conclude that ethnicity is one of five factors that appears to trigger greater police attention. The others were clothing, congregating or walking in groups, living in specific neighbourhoods, and gender (i.e., male).

Sarah Abraham, senior advisor at the Norwegian Police University College, has recently confirmed the apparent scarcity in research on racial profiling in Norway. In August 2016, she told *Politiforum* (Mortvedt and Trædal, 2016), that racial profiling has not been systematically examined in the Norwegian police and remarked that there is a lack of research into the routines of the police, thereby preventing a quantitative analysis to ascertain whether the police stops persons on basis of their skin colour. The lack of research is remarkable considering the considerable literature in countries such as USA and United Kingdom (see overview in Brunson and Weitzer, 2009) but also Sweden and Denmark (Hydén, 2006; Uhnöo, 2015). Abraham called for an increased focus on racial profiling in the curriculum of police students; and she referred to the report *Politiet mot 2020* (Politidirektoratet, 2008), concerning the staffing and competency requirements of the police, which discovered that the police suffered from a lack of expertise in their work with minorities.

The use of racial profiling by the police in Norway is also commonly discussed in relation to immigration control. Police conduct such control practices with the intent to determine whether persons have a valid residence permit in Norway, pursuant to the Immigration Act § 21. Immigration control is further regulated in the Police Directorate's circular letter RS2010/009.<sup>12</sup> The police may stop a person

12. *Politiets utøvelse av utlendingskontroll på territoriet, herunder i grenseområdene*, Politidirektoratet, 2001, RS 2001/021 Available at <https://www.nidsenter.no/fag/juss/rundskriv/>

and request proof of identity when there is reason to assume that the person in question is a foreign national and the time, place and situation give grounds for such check. Akhenaton de Leon, leader of the Norwegian NGO OMOD (*Organisasjon mot offentlig diskriminering*) has argued that despite the legitimate objective underpinning this rule, the police should be aware of the consequences such checks may give rise to, arguing that such practices generate a loss of trust of the police, particularly amongst people that are stopped repeatedly (Mortvedt and Trædal, 2016).

#### 6.2.4 REFLECTIONS AND EVALUATION

The deficiency in statistics and in-depth analysis on racial profiling on children by the police prevents any definitive remarks about the existence of such practices in Norway. Moreover, accusations can be difficult to validate, and the sources should be reviewed carefully. Nonetheless, while it is imperative to recognize that investigations into racial profiling are inherently complex, four points can be made.

The first is that the UN Working Group of Experts on People of African Descent has stated that consistent denial by authorities without evidence can worsen the problem. In their words, in the case of one state, 'The repeated denial that racial profiling does not exist in Germany by police authorities and the lack of an independent complaint mechanism at federal and state level fosters impunity' (Feb. 2017).

The second is that several non-academic sources provide details of racial profiling by the Norwegian police. When the Committee on the Elimination of Racial Discrimination in 2015 reviewed Norway in 2015, several NGOs raised concerns about the police authorities' deficient competence in relation to diversity and discrimination in Norway, accentuating that male minority youth experience discrimination from the police when stopped and questioned, furthermore, arguing that 'there are indications of racial profiling taking place on a regular basis, especially in regards to minority youth' (The Norwegian Centre Against Racism, 2015: 48–49). Media accounts of racial profiling of children have seemingly increased in recent times or gained more attention. A recent high-profile incident in February 2018, in which two youths in a McDonalds restaurant were subject to a full body search and photographing by police led to a protest outside parliament and complaints to the special police unit on the basis that this was too common an occurrence.<sup>13</sup>

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13. Arnsten Linstadog and Christian Boger, 'Organisasjoner mener politiet spesielt går etter Oslo-ungdom med mørk hud. Lørdag demonstrerer de', *Vårt Oslo*, 2018.

The third is that academic research reveals two tendencies, which suggest a number of legal conclusions. One is that there may be a very small group of police officers that actively engage in ethnic profiling of youth and adults, and occasionally with violence. This accords with the interviews in NCHR (2016) and Solhjell et. al. (2018) and is possibly reflected in the statement by one police officer to Sollund (2007a: 84) as to the variation of political views amongst police officers. The other is that ethnicity may have been institutionalised or socialised in police's patrolling and interviewing practices. This conclusion is certainly drawn by all three above-mentioned studies although to slightly different degrees. To the extent that ethnicity is an indicator used by police (consciously or unconsciously), it raises questions as to whether there is discrimination. Such use of ethnicity, including skin colour, can be only justified if there are reasonable and objective criteria. Certainly, if ethnicity is the *dominant* reason for police intervention, the defence to discrimination would not be met. As the Committee on Child Rights has stated that in the policing of foreign nationals, there must be an 'individual rather than collective assessment'.<sup>14</sup> Moreover, even if ethnicity is only *a* reason for police intervention, current police practices may fall foul of the proportionality test.<sup>15</sup> We can ask: Are police practices structured in such a way that youths with minority backgrounds must needlessly suffer discrimination in effect? If there are alternatives as to how and what manner youths are targeted, have these been investigated and implemented? Moreover, if police resources are disproportionately targeted in areas in which there are many youth with minority background, there are questions of indirect discrimination. For example, research indicates that most marijuana use among young people in Oslo occurs on the west side but police resources are predominantly used in the east side, in which there are disproportionately more children with a minority background (Acharki, 2018). Given that marijuana use is a very common reason for stop and search by police, the geographic allocation of resources may suggest indirect discrimination in practice.

Finally, the burden is arguably with the authorities to prove, with research, that racial profiling does not exist. After a decade of critique from international mechanisms and domestic organisations, the ball is in the court of the authorities to demonstrate that racial profiling is not present and/or that there are effective mechanisms in place to prevent its occurrence. Organizations in Norway have recommended, without success, a number of practices that could be introduced including 'receipts' for every police stop; and Open Society Justice Initiative (2009a; 2009b) have recommended a range of best practices based on research

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14. See section 2.1 above.

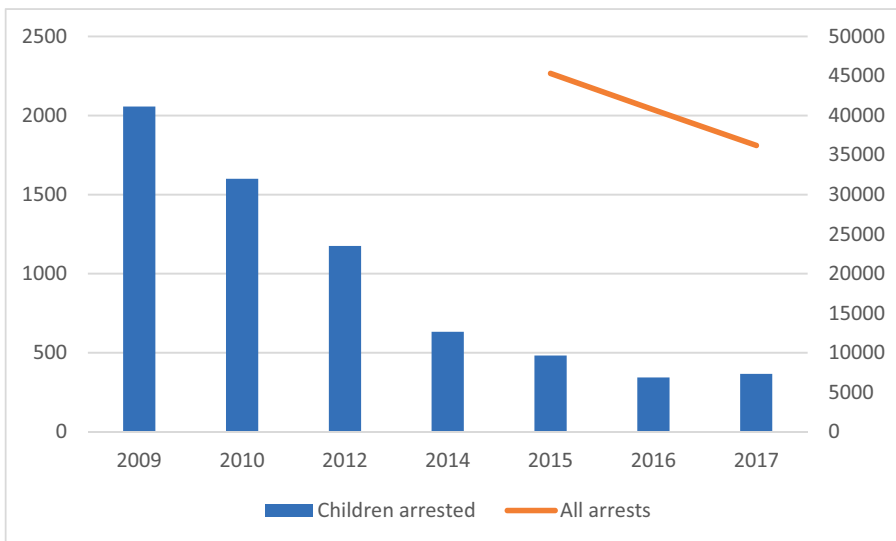
15. See section 2.1 above.



and police experiences in Europe. This lack of responsiveness and evidence suggests that Norway sits with the burden of proof in demonstrating that police do not engage in racial profiling and that it has taken sufficient action to prevent such abuses of power.

### 6.3 ARRESTS AND SOLITARY CONFINEMENT

A decade ago, the number of children arrested and detained attracted significant attention. In 2010, as Figure 1 demonstrates, 2076 children were detained by the police according to official police records. Domestic organisations, the law associations and international supervisory bodies were highly critical.<sup>16</sup> Since then, levels of police detention have declined considerably. The three-fold reduction in overall arrests is also matched in the reduction of detention of children under the age of 15, who are not subject to criminal law and who cannot be lawfully detained. In 2010, there were 49 in this category but only 10 in 2015.



**FIGURE 6.1** Arrest and Detention of Children 2009–2016.

16. See, e.g., *Advokatforeningens årstale 2010*; *Letter from Children's Ombudsmen to Police*, 28 February 2011; Rolv topdahl, 'Det er bare spørsmål om tid før et barn tar livet sitt i politiarresten', *NRK*, 18 February 2013; UN Children Rights Committee, *Concluding Observations on Norway*, 29 January 2010, para. 58.

The government claimed that this was a conscious response to concerns and criticisms although the same period has also seen a reduction in the overall number of arrests (see Figure 6.1). However, the decline in the arrests of children may be the result of other factors, such as the police reform which some claim has taken time away from frontline policing. Moreover, there was a slight increase in the number of children arrested in 2017, although it is noted by the police that in East Norway there has been many cases of grave and violent criminality (Politiet, 2017: Annex 1, s. 8). It is also important to note that the number of penalties imposed on children has increased. In 2017, prosecuting authorities imposed 15221 criminal penalties on children (Politiet, 2017: 12) This represents an increase of 15 percent since 2016 and the highest since 2012, and is regarded by police as a positive development since it demonstrates their concern with ‘minor criminality’ (Politiet, 2017: *ibid*).

The positive downward trend in police detention rates is not been necessarily matched by a commitment to remove one of the most problematic aspects of Norwegian and Scandinavian policing: the use of solitary confinement. In many or most cases of arrests of children, solitary confinement is used. In most instances, the confinement lasts a period of 1–24 hours while in a small number of cases it can be for many weeks. However, as we shall see below, Norway has received considerable critique for the use of solitary confinement. This is particularly because there is significant evidence that prolonged solitary confinement has deeply harmful psychological and physical effects (Smith, 2006).

Already in 1989, the UN Human Rights Committee (1989, para. 68–69) expressed a wish to receive more information on, *inter alia*, time-limits governing resort by prison authorities to solitary confinement or the use of security cells; clarification as regards detention in mental health institutions; time-limits for preventative detention, and the placing under special observation. In 2006, it expressed ‘concern’ about ‘solitary confinement and the possibility of unlimited prolongation of such pre-trial confinement, which might be combined with far-reaching restrictions on the possibility to receive visits and other contact with the outside world... [and] the continued use of pre-trial detention for excessive periods of time’ (Human Rights Committee, 2006, para. 13–14, see also 16). Five years later, the same concerns were reiterated (Human Rights Committee, 2011, para. 10, 12, 13).

Equally, the Committee against Torture (2002c, para. 84–86) has expressed continued concern about pre-trial solitary confinement (see overview and analysis in Langford et. al 2017). In 2008, it noted satisfaction regarding an amendment to the Criminal Procedure Act to reduce the ‘overall use of solitary confinement and to strengthen... judicial supervision,’ and guidelines on family notification, law-

yers and healthcare access. However, the committee expressed concern about the 'lack of adequate statistics validating the effectiveness of these measures.'

In practice, the use of solitary confinement has remained the most common form of detention. In 2013, almost all of the approximately 1000 children detained were subjected to solitary confinement. This was partly ameliorated by law reforms which reduced the amount of time to 24 hours, but the practice continues, and most cells are not child-friendly in any respect. Norway, like Sweden and Denmark, has consistently opposed demands for reforms on solitary confinement, whether for adults or children. However, the government's loss in an appeal, in which a court ruled solitary confinement of an adult unlawful in 2017,<sup>17</sup> and official acknowledgements that police cells are not suitable for children – and raise psychological risks and the potential for suicide – is at least one sign of progress. It is also notable that in the Police in their 2017 report notes that a number of general measures are used to try and dampen the effect of solitary confinement (Politiet, 2017: Annex 1, p. 8). This includes use of arrest as a last resort, placing of a child with an adult in an office rather than a cell, an open door to a cell with an adult person nearby, regular inspection and offers of food and a walk, offer on conversation and contact with guardians. It is also reported that in some police districts there is an offer of cells with a TV and a bathroom. These ameliorative measures seem positive but there is no indication as how much they are used or when alternatives to solitary confinement will become standard practice.

Overall, the reduction of the number of arrests is positive as it also means in practice a lower usage of solitary confinement. While police have sought to ameliorate the effects of solitary confinement, it continues for many children in practice. It is also noteworthy that the number of criminal penalties imposed on children has increased significantly in the past year.

## 6.4 IMMIGRATION DETENTION

The discourse on immigration detention has acquired considerable momentum in Norway over the last years, alongside an increasingly restrictive immigration law and an intensified political focus on the importance of forced returns.<sup>18</sup> A particularly vexed issue is the arrest and detention of children and whether such practices are in conformity with Norway's obligations under the CRC. Increased

17. 13-103468TVI-OTIR/01, District Court, 2 June 2014.

18. Puntervold Bø (2013) p. 135. See also <https://www.aftenposten.no/norge/i/eK6O/Politiet-har-fatt-instruks-om-a-tvangsreturnere-9000-migranter-i-ar>

attention was given to the issue in the spring of 2017, when the Borgarting Court of Appeal found that the State had violated *inter alia* the CRC, after having detained an Afghan family, including four children aged 7–14 years old, for 20 days at Trandum Detention Centre. The Court relied considerably on the ECtHR’s decisions of July 2016, which found that France had violated Articles 3, 5 and 8 of the ECHR when detaining families with children that were to be forcibly returned.<sup>19</sup> The rulings have additionally prompted legislative amendments in relation to the detention of children pursuant to the Immigration Act, however, primarily consisting of clarifications of the existing legal framework.<sup>20</sup>

#### 6.4.1 APPROPRIATENESS OF DETENTION

Research on the wider impact of immigration detention indicates that children are negatively affected by detention, both physically and mentally. The UNHCR has unequivocally called for an end to its usage, with experts stating that detention is never in the best interest of the child, moreover, emphasizing that even short periods of detention can have an *‘adverse and long-lasting effect on a child’s development’*.<sup>21</sup> A recent study into the international academic literature on immigration detention found consistent confirmation of how children that have been detained often experience impairments such as anxiety, depression, sleep deprivation and post-traumatic stress (Bosworth 2016: 4).

Recognition over the potentially grave consequences that immigration detention of children can give rise to has also been brought to the fore in Norway. Criticism has been directed against Trandum Detention Centre by the Committee on the Prevention of Torture,<sup>22</sup> moreover, the Parliamentary Ombudsman published a report in 2015 which acknowledged that while a considerable effort had been done to adjust the physical surroundings appropriate to the well-being of the detainees, Trandum Detention Centre *‘does not appear to be a suitable place for children’*,<sup>23</sup> highlighting instances of riots, self-harm, suicide attempts and the use of coercive measures. The Norwegian Psychological Association reached the same conclusion after its visit the same year.<sup>24</sup>

19. LB-2016-8370; A.B. and others v. France (11593/12), R.M. and others v. France (33201/11), A.M. and others v. France (24587/12), R.K. and others v. France (68264/14) og R.C. and V.C. v. France (76491/14).

20. LOV-2018-04-20-9, see Section 106 c.

21. UN experts’ statement on International Migrants’ Day 2016; see also UNHCR statement 2017

22. Committee on the Prevention of Torture (CoE) report on Norway 2011, p. 20.

23. The Parliamentary Ombudsman report (2015), p. 3.

24. Norwegian Psychological Association report (2015), p. 10.

Furthermore, investigations into children's perceptions of being detained at Trandum Detention Centre show that children consider themselves to be imprisoned, with a clear recognition of being deprived of their liberty.<sup>25</sup> These perceptions are reinforced by the element of control that permeates the mental and physical reality of being detained, exemplified by body searches; surrounding barbed wire fences; surveillance monitoring; doors that are locked and the inability to move around freely. In addition, children who are detained typically experience feelings of being unsafe due to loss of daily routines and may be subjected to further uncertainty on basis of parents' distress.<sup>26</sup>

Statistics demonstrate that there has been a decline in detention of children in the period of 2013–2016. Various government sources on the use of arrest and detention of families with children pursuant to the Immigration Act, highlight that families are almost exclusively arrested where deportation can be carried out quickly.<sup>27</sup> However, the statistics show that a significant number of children have been detained for more than 24 hours, despite repeated warnings about the harmful effects detention of children brings about.

**TABLE 6.1** Children at Trandum Detention Centre 2013–2016<sup>28</sup>

<b>Duration</b>	<b>2013</b>	<b>2014</b>	<b>2015</b>	<b>2016</b>	<b>Total</b>
< 24 hours	180	230	48	86	544
1–3 days	27	90	34	44	195
4–7 days	12	3	2	5	22
7–21 days	9	6	4	5	24
21–60 days	4			3	7
More than 60 days		1	1		2
<b>Total</b>	<b>232</b>	<b>330</b>	<b>89</b>	<b>143</b>	<b>794</b>

Examination of ten judgments from Oslo District Court in 2016, where immigrant families with children were detained, reveals that the Court recognized that Trandum Detention Centre is not suitable for children.<sup>29</sup> Nonetheless, the decisions demonstrate that the Court rarely considered alternatives to detention specifically

25. NOAS report (2017), p. 57.

26. Norwegian Psychological Association report (2015), p. 10.

27. See e.g. Innst. 78 L (2011–2012) s. 14; Prop 126 L (2016–2017) p. 48.

28. Prop 126 L (2016–2017) Table 7.1 p. 48.

and, moreover, often bypassed any specific consideration of whether it is absolutely necessary to detain the child in question. Instead, the Court accentuates how it is in the best interest of the child not to be separated from its parents, which thus renders detention of the child proportionate.

#### 6.4.2 LIMITATIONS ON THE ARREST AND DETENTION OF IMMIGRANT CHILDREN

An imperative distinction between detention pursuant to the Immigration Act and the Criminal Procedure Act is that the objective of the former is to secure the implementation of an administrative decision, typically to ensure that the foreign national does not evade the implementation of a decision entailing that he or she must leave the country.<sup>30</sup> While detention pursuant to the Immigration Act is not punishment as such, there is arguably an apparent punitive element associated with immigration detention, as it deprives the persons involved of their liberty. This is evident both in terms of how detention is involuntary and particularly in relation to how detainees are confined to facilities that to a considerable extent have similarities with prisons and often are perceived as such, especially by children.<sup>31</sup>

The Criminal Procedure Act prohibits detention of children below the minimum age of 15 years. The Immigration Act, however, does not contain such a limitation. Section 106 of the Act provides that a foreign national may be arrested and detained, provided that certain defined conditions are met, regardless of age.<sup>32</sup> It is established in several preparatory works that immigrant children below the age of 15 may be arrested and detained.<sup>33</sup> It was further established in the above-cited judgment from Borgarting Court of Appeals in May 2017 that the Immigration Act gives sufficient legal basis for detaining immigrant children accompanied by their parents who are under the age of 15.<sup>34</sup>

However, the absence of a *clear* basis in the Immigration Act for detaining children accompanied by their parents is arguably a distinctive and considerable

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29. The ten judgments are: 16-126413ENE-OTIR/01; 16-099607ENE-OTIR/01; 16-136285ENE-OTIR/03; 16-136302ENE-OTIR/03; 16-042565ENE-OTIR/04; 16-042590ENE-OTIR/04; 16-081212ENE-OTIR/05; 16-081212ENE-OTIR/05; 16-118305ENE-OTIR/06; and 16-090811ENE-OTIR/07.

30. Immigration Act § 99 (2).

31. Norwegian Psychological Association report (2015), p. 2.

32. Immigration Act § 106 a-h.

33. See e.g. Ot.prp.no. 75 (2006–2007); Prop. 138 L (2010–2011).

34. LB-2016-8370 p. 21

weakness and has repeatedly been emphasized by scholars and various NGOs.<sup>35</sup> Attention has further been drawn to the fact that the Immigration Act, until legislative amendments in April 2018, did not provide specific limitations on when children may be arrested and detained, as it only referred to the Criminal Procedure Act and that Sections 174 to 191 of the Act shall apply 'insofar as appropriate'.<sup>36</sup> Critics emphasized that the legal framework could be viewed as unpredictable and that the mere reference to the provisions in the Criminal Procedure Act was arbitrary and could cause unequal and differential treatment.<sup>37</sup> The amended section, however, emphasizes that children shall not be arrested unless it is especially necessary and that detention shall not take place unless it is considered absolutely necessary, thus reflecting the wording of Sections 174 and 184 of the Criminal Procedure Act.

The preparatory works of the Immigration Act specified that the necessity requirement shall be understood as an absolute requirement – to permit detention only when there are no other alternative measures available. Furthermore, in the recent decision, the Borgarting Court of Appeal has stated that the condition that arrest and detention must be absolutely necessary is not only contingent on a common linguistic understanding of the term, but also requires consideration of alternatives to detention.<sup>38</sup>

Section 106 (1) (a-h) of the Immigration Act stipulates various grounds for when a foreign national may be arrested and detained. The potential grounds do not distinguish between children and adults, as the wording of Section 106 applies to 'a foreign national', the exception being Section 106 (1)(g) and (h). The newly added Section 106(c) additionally stipulates certain conditions that must be met in order to detain pursuant to Section 106 (1)(a)-(h), furthermore, that children should normally not be arrested for more than 24 hours and that the child must be presented before a court if the arrest shall be extended. Moreover, a child may be detained for 72 hours at a time, which shall not be exceeded, unless particularly strong reasons warrant it. The child may be detained for nine days at a maximum.

Examination of the 2016 court decisions shows that the requirement of absolute necessity for detaining a child is only explicitly mentioned in half of the decisions, even though detention of the child or children in question is granted. This is arguably problematic, as it prevents recognition of which elements the Court has considered when determining that detention is unavoidable, including less intrusive alternatives such as those stipulated in Section 106 (2), which provides that the

35. See e.g. Husabø and Suominen (2012) p. 40.

36. Immigration Act § 106 (3).

37. See e.g. NOAS report (2017) p. 10; LB-2016-8370, pp. 10; 12

38. LB-2016-8370 p. 40.

arrested person can be placed under an obligation of notification to the police; or to stay in a specific place, typically at an asylum reception centre.<sup>39</sup> Only one of the 2016 district court rulings considers such alternatives specifically.<sup>40</sup> In addition, measures according to the Child Welfare Act Chapter 4 may be considered, on basis of statements from the Child Protection Service, which is notified when a child is detained at Trandum.<sup>41</sup> The latter alternative would, however, typically entail that the child would be placed in an emergency home, and thus separated from its parents, which is not considered to be in the best interest of the child in the court decisions that considers this alternative specifically.

A recurrent aspect of the 2016 court decisions is that the risk of evasion is accentuated as the primary explanation to why detention is both necessary *and* the reason as to why alternatives to detention are not applicable. This could be seen as problematic, given that the threshold for establishing risk of evasion is low. While the objective conditions for detention thus easily can be fulfilled, it is arguably pertinent to question whether the risk of evasion is given excessive weight, to the extent that it automatically exceeds other considerations such as the best interest of the child.

Furthermore, as only half of the 2016 decisions considered explicitly refer to the condition that detention of children can only occur if absolutely necessary, it is essential to question whether the safeguards against unlawful detention of children are applied too leniently. Irrespective of the absence of any direct reference to the provision, there is nonetheless limited consideration of why the child is to be detained in all of the assessed rulings. The Court typically finds that there is risk of evasion on basis of the parents' actions, which as a result renders it absolutely necessary to detain the child, regardless of whether the requirement of absolute necessity is considered specifically. Rather than providing a comprehensive consideration of the legal requirement, the Court rather assesses whether it is the best interest of the child to be detained together with its parents. The threshold for establishing absolute necessity is thus bypassed which cannot be seen as anything but a considerable deficiency, regardless of whether it is done deliberately or not.

The Borgarting Court of Appeal recognized this limitation in its May 2017 judgment. The Court maintained that it is not sufficient to establish that the conditions for detaining the respective parents are fulfilled, with an ensuing deliberation over whether it is in the best interest of the child to be detained with its parents. Such interpretation renders the special conditions that exist for detaining

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39. Immigration Act § 106 (2), cf. § 105.

40. 16-042590ENE-OTIR/04

41. Criminal Procedure Act § 183 (3).



children void of any legal force and the condition that detention of children must be absolutely necessary thus loses its material content.<sup>42</sup>

The Ministry of Justice has stated that it is very rare that it will be considered sufficient to detain only one of the parents, as it will not provide sufficient protection against risk of evasion.<sup>43</sup> The 2016 decisions attest to this understanding, as none of the rulings finds it sufficient to detain only one parent where both are present, and because of practical considerations such as deporting the family at the same time, renders detention of only one parent insufficient. As noted in the Borgarting judgment from May 2017, children below the age of 15 will rarely be willing or able to go other places than where their parents are. In the judgment, the Court states that the condition concerning the risk of evasion in the Immigration Act coheres poorly with the need to avoid the detention of children, and raises the question of whether children that are not at risk of evading a decision can *ever* be arrested and detained.<sup>44</sup> Moreover, it could be argued that if the risk of evasion occurs as a result of the arrest, detention may occur on basis of practical matters, such as facilitating deportation, rather than because it is absolutely necessary to detain.

All of the examined court decisions from 2016 illustrate how immigrant children are detained due to a consideration of their parents' likely actions and with varying consideration of the special conditions that regulates detention of children, as this is substituted by a best interest of the child assessment that limits a comprehensive deliberation over potential alternatives to detention. Accordingly, there are arguably sufficient grounds to question whether the application of the Immigration Act is in compliance with Article 37 (b) of the CRC and the requirement that detention shall only occur as a measure of last resort.

In December 2017, the Government announced that it would no longer be sending families and their children to Trandum. On 30 December 2017, a new interim family centre was opened in Hurdal, and a new permanent centre is, at the time of writing, due to open at Eidsvoll. Families will have two rooms in addition to collective space but cannot leave the building without police escort. While the new solution carries less characteristics of detention, the actual implementation will deserve close consideration. Moreover, question marks remain over the legislation and the policy and practice could shift again.

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42. LB-2016-8370 p. 33–34.

43. Prop 126 L (2016-2017), p. 87.

44. LB-2016-8370 p. 32.

## 6.5 CONCLUSIONS

Policing is critical for children's security but also raises risks from the perspective of the Convention on the Rights of the Child (CRC). This risk is heightened by the regular contact between children and police due to the greater presence of children in public places. This chapter has argued that there have been some significant improvements by Norway after sustained criticism on the use of police detention for children and Trandum detention centre for families under deportation orders. However, the state has refused to take steps to determine to what extent policing decisions are being guided by racial profiling and ensure that solitary confinement is the rare exception during detention of children.

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