5. Vulnerability under COVID-19: Children's Human Rights under Lockdown

E. Kay M. Tisdall and Fiona Morrison

Abstract The COVID-19 pandemic has shown how vulnerable we are, individually, collectively and globally. The pandemic caught many Global North countries by surprise, unused to such widespread and pervasive disaster. Despite Scotland's commitment to children's human rights, state responses show the precarity of children's human rights under the pressures of responding to the pandemic, and the vulnerability of considering the full range of children's rights to protection, provision, and participation.

Keywords COVID-19 | children's rights | human rights | vulnerability | disaster

5.1 INTRODUCTION

A familiar narrative has arisen about the policy responses to the COVID-19 pandemic.[1] As nation-states struggled to respond to what became a global pandemic, to try and protect their population's survival and health, the ensuing policy responses highlighted and exacerbated existing inequalities and created new ones. Evidence has steadily accumulated of the negative impacts on those who experienced poverty or insecure work and/or those who were groups at risk of discrimination by sex, race, disabilities or other forms.[2] The COVID-19 policy responses have shone a light on and accelerated the increasing dominance of digital access across key aspects of people's lives – from access to services, to relationships, to

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[1]   Clare Bambra, Ryan Riordan, John Ford, and Fiona Matthews, "The COVID-19 Pandemic and Health Inequalities," *Journal of Epidemiology and Community Health*, no. 11 (2020): 964–968; Nirmala Rao and Philip A. Fisher, "The Impact of the COVID-19 Pandemic on Child and Adolescent Development Around the World," *Child Development*, vol. 92(5) (2021): 738–748.

[2]   Bambra et al., "The COVID-19 Pandemic," 964–968; see also Teodor Mladenov and Ciara Siobhan Brennan, "Social Vulnerability and the Impact of Policy Responses to COVID-19 on Disabled People," *Sociology of Health & Illness*, vol. 43(9) (2021): 2049–2065.

learning – and the growing divide between those who have such access and those whose access is lacking or insecure.[3] COVID-19 has underlined that we are all vulnerable to such disasters and that our systems and structures may ameliorate or increase inequalities, support, undermine or ignore human rights, making certain individuals and groups of people more vulnerable than others.

This chapter considers learning from the independent Children's Rights Impact Assessment (CRIA) undertaken in Scotland on the emergency measures impacting children in Scotland from April to June 2020. This was undertaken for the Commissioner for Children and Young People in Scotland,[4] due to the considerable concerns growing in the children's rights sector about breaches to children's rights. The CRIA was undertaken by a group of "experts" organised by the Observatory of Children's Human Rights Scotland.[5] Completed in a very tight timeframe to inform subsequent action by the Commissioner's Office and others, it involved reaching out to organisations and other expertise (including children and young people and their advocacy groups, such as the Children's Parliament[6] and the Scottish Youth Parliament[7]) at the start, middle and end of the drafting. This maximised the exchange of available and emerging evidence and identification of issues. The independent CRIA concentrated on a selection of relevant emergency legal and policy measures legislated for and introduced in Scotland by the Scottish and UK Parliaments, in response to the pandemic. Many of these measures were specifically related to the "lockdown" that was enforced, where children and adults were required to stay in their residences and mobility through public spaces, and access to them, was severely if not entirely restricted.[8]

3　Afnan N. Alkhaldi, "Digital Exclusion during the COVID-19 Pandemic: A Review of How Developed Countries Responded to Support Their Citizens," *International Journal of Electronic Government Research*, vol. 18(1) (2022): 1–19.

4　The Commissioner is a statutory, independent office appointed by the Scottish Parliament. The main function of the Commissioner is to promote and protect the rights of children and young people in Scotland. For more information about the Commissioner and the Commissioner's Office, see https://www.cypcs.org.uk/ (accessed October 13, 2024).

5　The Observatory is a collaborative of Scottish organisations working to drive implementation of children's human rights in Scotland, with local impact and global learning. For more information about the Observatory, see https://www.ed.ac.uk/education/observatory. (accessed October 13, 2024).

6　For more information about the Children's Parliament, see https://www.childrensparliament. org.uk/about-us/ (accessed October 13, 2024).

7　For more information about the Scottish Youth Parliament, see https://syp.org.uk/. (accessed October 13, 2024).

8　For more information on the independent CRIA's methodology and content, see https://www. cypcs.org.uk/coronavirus/independent-impact-assessment/. (accessed October 13, 2024).

CRIAs are a General Measure for implementing the UN Convention on the Rights of the Child (CRC), recommended by the UN Committee on the Rights of the Child.[9] They seek to ensure children's human rights are considered when decisions are made – such as when reviewing and developing policy or service provision. An authoritative definition of CRIAs is provided by the European Network of Ombudspersons for Children:

> A Children's Rights Impact Assessment examines the potential impacts on children and young people of laws, policies, budget decisions, programmes and services as they are being developed and, if necessary, suggests ways to avoid or mitigate any negative impacts.[10]

While the report was called a CRIA, it was in fact done largely after policies had been determined, so could be described more accurately as a Children's Rights Impact Evaluation.

The Scottish Government had been voluntarily undertaking a form of CRIAs on its own policies for some time. Their form also included children's well-being, leading to the acronym CRWIAs. Scotland thus should have been sharply observant of children's human rights in its policy responses. The United Kingdom, as the State Party, ratified the CRC in 1991 and has thus been obligated for over 30 years to operationalise the CRC in practice and policy. Scotland has long had separate legislation and legal jurisdiction in areas such as education, social services, health, family, and criminal law, and this has extended since Scottish devolution and the (re)establishment of the Scottish Parliament in 1999.[11] The Scottish Government has articulated a commitment to human rights generally, with the establishment of the First Minister's Advisory Group on Human Rights Leadership, and to children's human rights specifically.[12] For nearly two decades, the Scottish Government has used variations of the slogan "making children's rights real" as an organising

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9   UN Committee on the Rights of the Child, *General Comment no. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child (Arts. 4, 42 and 44, Para 6)*, CRC/GC/2003/5 (November 27, 2003).

10   European Network of Ombudspersons for Children (ENOC), *A Guide on How to Carry out CRIA*, (ENOC, 2020), 11, http://enoc.eu/wp-content/uploads/2020/12/ENOC-Common-Framework-of-Reference-FV.pdf.

11   E. Kay M. Tisdall and Malcolm Hill, "Policy Change under Devolution: The Prism of Children's Policy," *Social Policy and Society*, vol. 10(1) (December 2011): 29–40.

12   For example, see Scottish Government website on human rights, https://www.gov.scot/policies/human-rights/#:~:text=In%20Scotland%2C%20civil%20and%20political,treaties%20which%20apply%20to%20Scotland. (accessed October 13, 2024).

principle of its childhood policy.[13] During the COVID-19 pandemic, the Scottish Government was legislating for CRC incorporation into domestic law; this has now been achieved through the UNCRC (Incorporation) (Scotland) Act 2024.[14] In this policy environment, children's human rights should have been a central feature of policymaking under COVID-19.

The chapter continues by reviewing how vulnerability is conceptualised in legal philosophy, childhood studies and critical disaster studies. Drawing on analysis from the independent CRIA, we consider how vulnerability played out in policy responses to COVID-19 and the extent to which notions of vulnerability helped advance or impede children's human rights. The chapter concludes by discussing the potential for vulnerability in advancing children's human rights. We offer key areas for attention, if we are to ensure that notions of vulnerability do not inadvertently marginalise children and their human rights.

5.2 VULNERABILITY, CHILDHOOD STUDIES AND DISASTER STUDIES

As has been well rehearsed by other authors in this edited book, legal philosophers such as Fineman have developed "vulnerability" as an alternative to liberal theories of rights.[15] Following on from long-standing feminist critiques, liberal theory is criticised for conceiving individuals as autonomous, independent and self-sufficient.[16] Instead, all people are potentially vulnerable and dependent: vulnerability is universal and an inevitable condition of being human because all people are embodied.[17] Rather than perceiving vulnerability as inevitably negative, it can also inspire creativity and trust and develop or deepen relationships.[18] The state has positive obligations, when vulnerability is recognised, to ensure protection is provided to people as they need it and to promote resilience by providing resources.[19]

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13   For example, see Scottish Government, *Incorporating the UN Convention on the Rights of the Child into Scots Law: consultation* (2019), https://consult.gov.scot/children-and-families/uncrc/ (accessed November 11, 2022).

14   See https://www.parliament.scot/bills-and-laws/bills/united-nations-convention-on-the-rights-of-the-child-incorporation-scotland-bill/stage-1 (accessed October 13, 2024).

15   For example, Haugli and Martnes, chapter 1; Herring, chapter 3; and Martnes, chapter 6.

16   Daniel Bedford, "Introduction: Vulnerability Refigured," in *Embracing Vulnerability*, eds. Daniel Bedford and Jonathan Herring (Abingdon: Routledge, 2020), 1–28.

17   Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, vol. 20(1) (2008): 1–18.

18   Danielle Petherbridge, "What's Critical about Vulnerability? Rethinking Interdependence, Recognition, and Power," *Hypatia*, vol. 31(4) (2016): 589–604.

19   Fineman, "The Vulnerable Subject: Anchoring Equality," 1–18.

Indeed, questions are raised about why some people have so many resources while others do not.[20]

Herring has particularly developed these ideas with a childhood and children's rights lens.[21] Law, he argues, has emphasised children's lack of capacity, protecting children from harm, and has confined children to institutional or private spaces. Children are constructed as being inherently vulnerable, with insufficient attention to how structurally, situationally and relationally they are made particularly vulnerable. Instead, if universal vulnerability were the premise, we would recognise commonalities between children and adults.[22] The distinctions would be blurred or erased between them, as people are all interdependent, all people have impaired capacity and lack rationality, and people's values are all influenced by others. The results would treat adults more like children rather than children more like adults.[23] Significant legal changes would follow. Particular concessions for disadvantaged groups, for example, would become the norm. Attention would be given to why special accommodations and advantages are given to able-bodied people or some adults. The state would have a role in social provision, addressing people's vulnerability.

A different use of vulnerability is prevalent in disaster management, social care practice and related literature. There are "vulnerable groups", specific groups of people who are at particular risk. For example, in the European Commission's index for risk management, vulnerable groups merit a complete section and start with the definition:

> … the population within a country that has specific characteristics that make it at a higher risk of needing humanitarian assistance than others or being excluded from financial and social services. In a crisis situation such groups would need extra assistance, which appeals for additional measures … as a part of the emergency phase of disaster management.[24]

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20   Jonathan Herring, "Vulnerability, Children and the Law," in *Law and Childhood Studies*, ed. Michael Freeman (Oxford: Oxford University Press, 2012), 243–263.

21   Herring, "Vulnerability, Children," 243–263; Jonathan Herring, *Vulnerability, Childhood and The Law* (Cham Switzerland: Springer, 2018); Daniel Bedford and Jonathan Herring, eds., *Embracing Vulnerability: The Challenges and Implications for Law* (London: Routledge, 2020).

22   Herring, *Vulnerability, Childhood*.

23   Herring, *Vulnerability, Childhood*.

24   European Commission, Joint Research Centre, M., Marin-Ferrer, K. Poljanšek, and L. Vernaccini, *Index for Risk Management – INFORM: Concept and Methodology, Version 2017* (European Union: 2017), 34.

In social care, "vulnerable groups" is very common, referring to groups that previously might have been referred to as "at risk" or "in need". It has protection overtones in the UK, because there is protection of "vulnerable groups" legislation, which is primarily about criminal records checks on those who might work with such vulnerable groups. These groups include children and young people under the age of 18 as well as adults who are provided with care, health, community care or welfare services. Rather than recognising that all people are vulnerable, this discourse identifies particular groups of people as specifically vulnerable.

This discourse has not gone without critique. Sherwood-Johnson,[25] for example, develops a fascinating comparison within Scottish policy for those considered "vulnerable" or "at risk". This showcases how child protection policy does not challenge power relationships. Children are seen as inherently at risk of harm and dependent on others. Parental control of children is typically accepted unless a parental failure is identified and the state then becomes a "benign intervenor". Adult power is not the problem within child protection policies. Sherwood-Johnson contrasts this with domestic abuse policy, which is not based on women being vulnerable. The problem lies with male partners as perpetrators, within a wider context of problematic gender inequalities. Unlike children, women are not seen as inherently at risk of harm or dependent on others. The state is not necessarily benign and can rightfully be challenged for allowing gender inequalities to persist. The question, then, if a similar approach were applied to child protection policy, is what would the policy look like? Would it address childhood inequalities, conceptualising responsibility of the problem as lying with the abusers and structural inequalities[26] rather than inherently vulnerable children? To what extent would a vulnerability lens attend to structural inequalities that produce the conditions where children are harmed? And would this be sufficient to protect and implement the rights of individual children and ensure accountability for those who harm children?

Another powerful critique is developed by researchers such as Brown,[27] who have undertaken research with people who are included within so-called vulnerable groups. Their research underlines that few people wish to claim this category, as it is not a position of strength – albeit it may gather philanthropic

25   Fiona Sherwood-Johnson, "Constructions of 'Vulnerability' in Comparative Perspective: Scottish Protection Policies and the Trouble with 'Adults at Risk,'" *Disability & Society*, vol. 28(7) (2013): 908–921.

26   Brid Featherstone, Anna Gupta, Kate Morris and Sue White, *Protecting Children: A Social Model* (Bristol: Policy Press, 2018).

27   Kate Brown, "Vulnerability: Handle with Care," *Ethics and Social Welfare*, vol. 5(3) (2011): 313–321.

or government sympathy. The discourse of vulnerability can be oppressive and paternalistic; it can stigmatise and exclude; it can be used to widen control over certain people.[28] Vulnerability can be used to constrain someone's rights to make decisions, separating them from their social networks, which in turn makes them more vulnerable.[29] Vulnerability then may not be emancipatory or address power relations, but instead entrench power imbalances.

Children are vulnerable to being constructed as vulnerable. A well-known concept within childhood studies is that childhood is socially constructed. As famously written by Prout and James, "A child's immaturity is a biological fact: but how this immaturity is understood and how it is made meaningful is a fact of culture".[30] This form of social construction does not deny that there is a reality of a child's immaturity, but points out that certain aspects of this are considered important, and these create particular understandings of children and childhood. In the Global North, such constructions "traditionally" perceive children as vulnerable, innocent, dependent and incompetent.[31] While such constructions may well persist, they have been joined by some valuing of children – but often as future capital and human investments.[32] Such constructions of childhood remain persistent.

Disaster responses frequently perpetuate such constructions of childhood. Reviews of climate change research,[33] for example, find that children very commonly are positioned as passive victims and not recognised for their potential to help address climate risks. The international non-governmental organisation Plan International writes that based on their experience:

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28   Brown, "Vulnerability: Handle with Care," 313–321; Danielle Petherbridge, "What's Critical about Vulnerability? Rethinking Interdependence, Recognition, and Power," *Hypatia*, vol. 31(4) (Summer 2016): 589–604.

29   Barbara Fawcett, "Vulnerability: Questioning the Certainties in Social Work and Health," *International Social Work*, vol. 52(4) (June 2009): 473–484.

30   Alan Prout, and Allison James, "A New Paradigm for the Sociology of Childhood? Provenance, Promise and Problems," *Constructing and Reconstructing Childhood*, eds. Allison James and Alan Prout (London: The Falmer Press, 1990), 7–33, 7.

31   Jo Moran-Ellis and E. Kay M. Tisdall, "The Relevance of 'Competence' for Enhancing or Limiting Children's Participation: Unpicking Conceptual Confusion," *Global Studies of Childhood* 9(3) (2019): 212–223.

32   See Peter Moss, "Beyond the Investment Narrative," *Contemporary Issues in Early Childhood*, vol. 14(4) (2013): 370–372.

33   Kristoffer Berse, "Climate Change from the Lens of Malolos Children: Perception, Impact and Adaptation," *Disaster Prevention and Management*, vol. 26(2) (2017): 217–229; Ana Sanson, Karina V. Padilla Malca, and Judith Van Hoorn, "Impact of the Climate Crisis on Children's Social Development," in *The Wiley-Blackwell Handbook of Childhood Social Development*, 3rd Edition, eds. Peter K. Smith and Craig H. Hart (London: John Wiley and Sons, 2022), 206–223.

During a disaster, the physical survival needs of children (safe water, food, shelter, clothing, primary health care) are usually given a very high priority. But observation indicates that other needs and rights, which are also essential for children, like being protected from abuse and harm, education, rest, leisure, privacy and the right to participate freely in matters which affect them are too often overlooked.[34]

Children and childhood are restricted to three areas, according to Plan's analysis, within disaster literature. One, they are subsumed under studies of women. Two, the children's situation is "medicalised", limiting children to trauma and social work responses. These focus on professionals returning children to their "normal lives" as soon as possible. Three, children easily become the media's representation of disasters, as icons of needy and passive victims who need rescuing.[35] None of these three areas perceive children as social actors, capable of contributing to their families and communities, in times of disaster.

A rich seam within disaster studies problematises the notion of a disaster. This is summarised neatly by García-Acousta:

Anthropological studies of disasters using a historical perspective have shown that we should not confuse natural hazards with disasters; that disasters are the result of external rather than internal processes; that growing social and economic vulnerability is the main culprit in disaster events; and that disasters are processes resulting from pre-existing critical conditions in which accumulated vulnerability and social risk construction, understood as ways in which society constructs vulnerable contexts in its interaction with ecosystems, play a crucial role through their association with a certain hazard.[36]

Disasters, then, are not natural or inevitable; disasters are socially situated (what might be a disaster in one context may not be in another).[37] Albris goes as far as to say that structural inequalities, which create the vulnerabilities and risk, are

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34   Amer Jabry ed., *After the Cameras Have Gone: Children in Disasters* (2005), 1.
35   For a similar analysis, see Jonathan Todres, "Mainstreaming Children's Rights in Post-disaster Settings," *Emory International Law Review*, vol. 25(3) (2011): 1233–1261.
36   Virginia García-Acosta, "Disasters, Anthropology of," in *The International Encyclopaedia of Anthropology*, ed. Hilary Callan (London: John Wiley and Sons, 2018), 1–8, 3.
37   Doug Henry, "Anthropological Contributions to the Study of Disasters," in *Disciplines, Disasters and Emergency Management*, eds. David McEntire and W. Blanchard (Maryland: Federal Emergency Management Agency, 2005).

more important to a disaster than the hazard itself.[38] This literature emphasises the historicity and process of disasters, rather than seeing them as a dramatic event, as they arise from this patterned vulnerability and have implications far after the publicised event.[39] Thus, in this literature, vulnerability and risk are tied to the construction of disaster and are caused by social, political and cultural inequalities and power relations. Authors in the anthropology of disaster have very firmly applied this to the COVID-19 pandemic; as one of the seminal authors in the field writes, "The COVID-19 pandemic is a disaster, and disasters do not just happen".[40] Disaster studies, then, would point out that COVID-19 and its policy responses were not inevitable, and before, during and after were entwined with structural and patterned inequalities and vulnerability.

There are thus tensions within academic literature discussions of vulnerability. The legal philosophers, such as Fineman and Herring, are developing vulnerability as a universal concept, with ensuing implications for policy and practice. This conceptual reclaiming of vulnerability intersects with a pervasive use of vulnerability to refer, instead, to particular and usually disempowered groups of people who require special policy and practice attention. This use does not necessarily address power relations or structural reasons, so that vulnerability is not often a category people are wanting to claim. Children are the quintessential examples of a "vulnerable" group, with ensuing positioning, policies and practices. The anthropology of disasters focuses on structural vulnerabilities, that can make people individually and/or collectively vulnerable, which are socially constructed, created and exacerbated. We trace these contestations around vulnerability through discussions of the COVID-19 policy responses for children, particularly in the first stages of the pandemic.

5.3 VULNERABILITY AND POLICY RESPONSES

Policy responses to COVID-19 had and continue to have dramatic impacts on children's human rights. The independent CRIA examined the impact of the

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38   Kristoffer Albris, "Disaster Anthropology: Vulnerability, Process and Meaning," in *Defining Disaster*, eds. Marie Aronsson-Storrier and Rasmus Dahlberg (Elgar online, 2022), 30–44.

39   Andy Horowitz and Jacob A.C. Remes, *Critical Disaster Studies* (Philadelphia: University of Pennsylvania Press, 2021).

40   Anthony Oliver-Smith, "The Social Construction of Disaster: Economic Anthropological Perspectives on the COVID-19 Pandemic," *Economic Anthropology*, vol. 9 (2022): 167–171, 167. For another example, see Louis Cord and Margaret Arnold, *Natural Disasters and Vulnerable Groups: Insights for an Inclusive and Sustainable Recovery From COVID-19* (World Bank, 2020), https://blogs.worldbank.org/climatechange/natural-disasters-and-vulnerable-groups-insights-inclusive-and-sustainable-recovery-from-COVID-19-coronavirus.

immediate policy response to the pandemic on the rights of children in Scotland. It highlighted key areas that raised significant concerns. The analysis spanned a range of children's rights issues – education, play, children who are in conflict with the law, domestic abuse, and poverty – exploring the impacts that measures had on children's human rights. Through the analysis, the independent CRIA found that adult-oriented systems and institutions, and assumptions about normative child-hoods, made it difficult to ensure that children's rights or indeed the vulnerabilities of children were adequately addressed during policy responses. Rather, responses meant that there were groups of children who were inadvertently discriminated against.[41]

The COVID-19 policies closed public spaces and institutional places for children and confined children physically to their family households, making children increasingly dependent on their parents or other caregivers in their households. With this shift from public to private spaces for children, implementation of children's human rights depended even more on their households' living circumstances and parents/carers, with less direct reach from the state in terms of supporting services. While family households might generally be the best way to protect children, the Scottish Government recognised that for some children the increased reliance on them made children more – rather than less – vulnerable.[42]

While Fineman argues that a vulnerability framework will increase positive state support, instead in the COVID-19 policy responses we saw that such state obligations became tenuous – and the rights of the most vulnerable became increasingly at risk of being breached. For example, the move to online learning in schools placed too much hope that children had access to internet, devices, space and support at home for this – and disadvantaged those children who did not.[43] Early on, the Scottish Government recognised the need to ensure devices and data were available to more vulnerable households and financed schemes to do so. What the CRIA unveiled were further issues that limited children's access, such as families needing to share limited numbers of devices amongst themselves or younger children needing support to engage with school learning online, but one or both of their parents being expected to be working from home at the same time themselves.[44]

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41   E. Kay M. Tisdall and Fiona Morrison, "Children's Human Rights Under COVID-19: Learning From Children's Rights Impact Assessments," *The International Journal of Human Rights*, vol. 27 (2023).

42   Scottish Government, *Vulnerable Children Report 15 May 2020* (May 27, 2020).

43   Morag Treanor, *Poverty, Food and Digital Access* (Edinburgh: Commissioner for Children and Young People Scotland, 2020), https://cypcs.org.uk/wpcypcs/wp-content/uploads/2020/07/CRIA-appendix-poverty-food-insecurity-digital-exclusion.pdf.

44   Treanor, *Poverty, Food and Digital Access*.

Institutions and spaces of state intervention, support and services were closed, including schools and early-years provision.[45] There were restrictions, delays, and the suspension of specific legal rights for children in areas such as criminal justice, family law and child protection.[46] The state retreated, and children became "hidden" within their family households.

The independent CRIA found that the state's actions produced and had disproportionate and negative consequences for children and even more so for particular groups of children, demonstrating a form of discrimination. While vulnerability may be universal, it was more acute for children as a group, and even more acute for particular groups of children.[47] For example, restrictions in young offenders' institutions left young people confined to their cells, with very limited or no contact with family members, and education and other activities stopped.[48] The vulnerabilities of young people to suicide and mental health problems in these institutions were not specifically considered, even though there was considerable evidence of these pre-pandemic.[49] Despite international human rights frameworks requiring children to be treated differently from adults,[50] no special consideration was given to the young people in young offenders' institutions being given early release.[51] Indeed, most young people in such institutions were (and are) on remand and thus had not been found guilty of a crime.[52] While all these points were raised with decision-makers at the time, the rights of young people involved in the criminal justice system, as young people, were not addressed in the emergency policy responses. Here, the association with (potential) criminality was stronger than the "vulnerable" status of the young people as children. Being recognised

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45   Except for children deemed "vulnerable" and/or had parents who worked as key workers.

46   E. Kay M. Tisdall, Mary Ann Powell, Katie Reid and Grace Kong, *Independent Children's Rights Impact Assessment on the COVID-19 Response in Scotland* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

47   For a similar finding in the United States, see Lori Peek and Simone Domingue, "Recognizing Vulnerability and Capacity: Federal Initiatives Focused on Children and Youth Across the Disaster Lifecycle," in *Government Responses to Crisis*, eds. Stefanie Haeffele and Virgil Henry Storr (Cham: Palgrave Macmillan, 2020), 61–87.

48   Clair Lightowler and Debbie Nolan, *Children in Conflict with the Law and Children in Secure Care* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

49   Fiona Dyer, Clair Lightowler and Nina Vaswani, "Exacerbating, Illuminating and Hiding Rights Issues: COVID-19 and Children in Conflict with the Law," *The International Journal of Human Rights*, vol. 27(9–10) (2023).

50   United Nations, *Rules for the Protection of Juveniles Deprived of Their Liberty (1990) 'the Havana Rule',* Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 45/113 (December 14, 1990).

51   Lightowler and Nolan, *Children in Conflict with the Law*.

52   Dyer, Lightowler and Vaswani, "Exacerbating, Illuminating," 1426–1441.

as particularly vulnerable was not a protection for these children's rights to be addressed.

In some contrast to the limited policy attention to young people caught up in the criminal justice/penal system, domestic abuse was an active concern for policy makers (substantially influenced by the very active civil society organisations in this field). For example, the Coronavirus (Scotland) Act 2020 had placed a duty on ministers to take account of the nature and incidents of domestic abuse during the pandemic. It was not clear whether this duty extended to children, and, in practice, minimal data were gathered on children affected by domestic abuse. There was and is a lack of data on the incidence or nature of domestic abuse affecting children – and a lack of evidence on how their rights to protection were breached or upheld in this context. This highlights the risk of the vulnerabilities of children – their position and status – being subsumed into a general vulnerability category, so that their particular rights risk being overlooked or further marginalised.

The paralysis of legal systems had severe impacts on children's human rights. The restriction of criminal trials resulted in major and ongoing delays to the conclusion of criminal cases.[53] These delays and the uncertainty in proceedings were reported as a significant source of fear and anxiety for child witnesses.[54] The independent CRIA found concern about lapses in communication and notifications from the criminal justice system, as well as breaches in bail conditions with little reparation.[55] Methods for virtual participation in the children's hearings system[56] developed at pace. In subsequent research, Porter and colleagues note the convenience for many children and their families of not having to travel to hearings, but also the pressures of unreliable internet connections, the lack of privacy for children to communicate (e.g., in their family home, with other family members present) and children feeling a particular lack of information and advocacy support.[57] Thus, delays and attempts to address these by virtual justice often caused difficulties for children's protection and access to justice and made them potentially more at risk in their homes.

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53   E. Kay M. Tisdall, Mary Ann Powell, Katie Reid, and Grace Kong, *Independent Children's Rights Impact Assessment on the COVID-19 Response in Scotland*.

54   Fiona Morrison and Claire Houghton, "Children's Human Rights in the Contexts of Domestic Abuse and COVID-19," *The International Journal of Human Rights*, vol. 27(9–10) (2023): 1353–1368.

55   Morrison and Houghton, "Children's Human Rights," 1353–1368.

56   In Scotland, the children's hearing system is for children who offend and/or are in need of protection, and for whom compulsory supervision orders are being considered.

57   Robert B. Porter, Fern Gillon, Fiona Mitchell, Nina Vaswani and Emma Young, "Children's Rights in Children's Hearings: The Impact of COVID-19," *The International Journal of Children's Rights*, 29(2) (2021): 426–446.

Most civil proceedings that dealt with disputes about residence and child contact were suspended. Ongoing cases were temporarily suspended or adjourned, and only "urgent and necessary" cases were heard remotely.[58] Lengthy delays to new or ongoing disputes about child contact jeopardised a range of children's rights. The head of the Scottish judiciary, the Lord President, issued guidance to parents on complying with child contact orders during the suspension of civil proceedings.[59] The guidance made no reference to domestic abuse (one of the most common reasons for contact disputes[60]), children's best interests (Article 3 of the CRC) or children's participation rights (Article 12 of the CRC). It directed that, if it were not possible to comply with a court order due to COVID-19 restrictions, parents could temporarily vary contact orders.[61] It encouraged indirect contact and the use of video technology to facilitate contact.[62] This prioritised maintaining child contact rather than considering what was in a child's best interests. Changing the boundaries of court-ordered contact could be dangerous. Indirect and virtual contact opened opportunities for surveillance, psychological abuse and harassment.[63] It was unsuitable for some groups of children – for example, younger children or children with additional needs.[64] The particular vulnerabilities of children, or even "standard" considerations within Scottish law on the paramountcy of children's best interests, were not adhered to; policy responses very quickly reverted to a parental lens and favoured parental decisions.

During the pandemic, there were strong policies for and media discourses on ensuring children, who were known to be vulnerable, would be protected despite lockdown and service restrictions.[65] Children categorised as vulnerable were permitted to attend school and early-years provision. In this context, attendance was largely a safeguarding measure, prioritising children's protection and safety, rather than a means to realise children's rights to education, social relationships, or other rights, such as play.[66] However, far fewer children attended school and

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58   Morrison and Houghton, "Children's Human Rights," 1353–1368.

59   Lord President, *Coronavirus Crisis: Guidance on Compliance with Court Orders Relating to Parental Responsibilities and Rights* (Edinburgh: Scottish Courts, 2020).

60   E. Kay M. Tisdall, Fiona Morrison and Judy Warburton, "Challenging Undue Influence? Rethinking Children's Participation in Contested Child Contact," *Journal of Social Welfare and Family Law*, 43(1) (2021): 8–22.

61   Lord President, *Coronavirus Crisis.*

62   Lord President, *Coronavirus Crisis.*

63   Morrison and Houghton, "Children's Human Rights," 1353–1368.

64   Morrison and Houghton, "Children's Human Rights," 1353–1368.

65   Tisdall and Morrison, "Children's Human Rights under COVID-19," 1475–1491.

66   Therese Casey, *Rest and Play* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

early-years provision than had been anticipated in this first lockdown, with indicative evidence of families not recognising themselves as vulnerable, not accessing information on the support available, not wanting to be labelled as "vulnerable" and/or experiencing practical barriers like problems with transportation to and from hub schools.[67] Provision for "vulnerable children" was not accessed as the state had anticipated.

The experiences of a particular group of children – those with caring responsibilities – shone a light on how policy responses could make children more rather than less vulnerable, underlying the societal and structural reasons that make children vulnerable. Lockdown policies were oriented towards adults, not children, having access to limited public spaces. Grocery shopping in person, for example, was initially restricted to one adult, resulting in children with caring responsibilities having to defend their presence in shops.[68] Online grocery shopping tended to have a minimum spend, which was not always financially possible for the children with caring responsibilities.[69] Adult-centric policies were introduced that structurally disadvantaged children with caring responsibilities, making them more rather than less vulnerable.

Some positive findings from children and their families were about not being under state surveillance. For example, certain families reported feeling more self-reliant without such active social work interventions, demonstrating to themselves and others that they could function well themselves.[70] Some children reported enjoying spending more time with their families, free from the pressures of bullying at school and/or following their own learning interests.[71] These positive findings show how supposedly "vulnerable" children (or "vulnerable" families) sometimes were less vulnerable than they were perceived pre-pandemic, that the state systems and institutions had made them more vulnerable rather than less so. But these positive findings were not as common as the negative ones, where children were made only more vulnerable by losing access to public spaces and state support.

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67 For evidence see Tisdall, Powell, Reid and Kong, *Independent Children's Rights Impact Assessment*.

68 See 38. Carers Trust, "#Supermarkets for Change Campaign ", (2020), https://carers.org/news-and-media/news/post/40-supermarkets4change (accessed November 13, 2022).

69 See Joint Letter to Supermarkets from the Commissioner and Parenting Organisations (2020), https://www.cypcs.org.uk/resources/joint-letter-supermarkets/ (accessed October 13, 2024).

70 Scottish Government, *Vulnerable Children Report 15 May 2020* (Edinburgh: Scottish Government, 2020).

71 Paige, Omima, Brodie, Katie Reid, Christina McMellon and Mary Ann Powell, "My Corona: Listening to Children in Corona Times," *The International Journal of Human Rights*, vol. 27(9–10) (2023).

5.4 CONCLUSION

This chapter has drawn on learning from the independent Children's Rights Impact Assessment undertaken in Scotland on the emergency measures impacting children in Scotland. It has considered the potential that the concept of vulnerability has to advance the implementation of children's human rights. Through our analysis we find that, in the current policy and legal context, vulnerability did not offer the protection to children's human rights that we might have anticipated. We suggest that three key areas need to be addressed to ensure that under vulnerability children's human rights are not marginalised.

First, a proactive state is needed, that is attuned to children and addresses the inequalities which lead to children being vulnerable. Fineman[72] argues that inequalities are far from inevitable: rather, society and its institutions produce and reproduce them. Thus, in its actions, the state has the potential to address and reverse inequalities. However, as discussed above, under COVID-19 policies the state largely retreated from children's lives and confined children to their families. Fineman argues families alone cannot mitigate or ameliorate individuals' vulnerability. As a structure, families are themselves vulnerable, and, as the independent CRIA confirmed, families are not necessarily "safe havens" for children. The independent CRIA showed that in retreating, rather than addressing inequalities, the state produced and exacerbated certain inequalities experienced by children.[73]

An analysis of disabled people's rights under COVID-19 is even more robust in critiquing the individualisation of vulnerability. Mladenov and Brennan[74] rehearse Fineman's universality of vulnerability, but find it insufficient. They suggest it remains unduly individualistic, focusing on everyone being potentially vulnerable rather than on its social construction. They prefer the "social vulnerabilities" approach of disaster studies, which they describe as "a condition of pre-existing social structures where certain social factors … exacerbate the effects of natural disasters on marginalised groups".[75] Their analysis of COVID-19 policy responses is that disabled people's social suffering increased because they were framed as "being at risk" and thus individually vulnerable. This gave an excuse for ignoring their human rights, whether it was being able to leave their homes, very negative

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72   Martha Albertson Fineman, "The Vulnerable Subject and the Responsive State," *Emory Law Journal*, vol. 60(11) (2010): 251–275.

73   Fiona Mitchell, *Child Protection, Children's Hearings and Care* (Edinburgh: Commissioner for Children and Young People Scotland, 2020); Claire Houghton, Fiona Morrison and Leah McCabe, *Domestic Abuse* (Edinburgh: Commissioner for Children and Young People Scotland, 2020).

74   Mladenov and Brennan, "Social Vulnerability," 2049–2065.

75   Mladenov and Brennan, "Social Vulnerability," 2049–2065.

experiences in some residential institutions, or their access to health and social care. They juxtapose this to the approach to homelessness in the UK, where great and largely successful efforts were made to find housing for all homeless people. Their analysis underlines the messages of disaster studies: that underlying patterns of vulnerability are integral to disasters, are exacerbated by disasters, and disasters are processes rather than events. They provide a haunting analysis about how individualising risk, through vulnerability discourses, can undermine people's human rights to their considerable detriment. Social vulnerabilities need to be addressed socially and by the state.

Second, radical reconfiguration of law and policy is necessary, to be inclusive of children, conceptualising children as social actors, not only dependents of adults. The independent CRIA underlined the persistence of adult-oriented systems and institutions even in a policy climate that is supportive of children's human rights. The absence of children and their interests in policymaking made it difficult to address children's vulnerabilities and ensure that their human rights were given priority during policy responses. Children were systematically disadvantaged, not necessarily because of adults' bad intentions but because of the pervasiveness of adult systems and resulting unbalanced power relations for children. Children were not always recognised as rights-holders and so their rights were not always supported and promoted. Much work is needed to ensure policy-making processes become inclusive of children. For vulnerability to help advance children's rights, there is a need for systems and institutions to shift conceptualisations of children – from dependents subsumed in families to social actors. Without this sort of shift, there is danger that policy continues to be made without children in mind and is thus exclusionary of children's interests and risks marginalising their human rights.

Third, vulnerability does not adequately protect children's human rights; human rights instruments like the CRC and other forms of rights' accountability are needed. Some children and their families resisted their classification as vulnerable, in not accessing options for state support in educational care provision. The CRIA's findings that children and their families can reject the categorisation of vulnerability, even if it would provide them with services, echo those of Brown and Petherbridge.[76] We suggest that for vulnerability to advance children's human rights, work is necessary to destigmatise vulnerability – to transform its connotations from those of disempowerment to those of empowerment. Without doing so, ideas of universal vulnerability risk being rejected rather than embraced by children who would be identified as particularly vulnerable. Further, state recognition

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76   Brown, "Vulnerability: Handle with Care," 313–321; Petherbridge, "What's Critical about Vulnerability?," 589–604.

that children are vulnerable as a group, and that some children are particularly vulnerable, did not ensure children's rights were protected in policy responses to the pandemic. The independent CRIA found the construction of childhood vulnerability in COVID-19 policies to be inadequate in ensuring the state met its obligations to children; the safeguards we may have hoped vulnerability would bring did not always materialise. A vulnerability lens offers the potential to upend the structural inequalities that produce children's disadvantage and systematic discrimination against children. However, progress to advance children's interests risks being limited without robust systems to ensure accountability for the protection and participation of children. Therefore, we suggest that without a human rights' framework and instruments like the CRC, ready access to justice and child rights' monitoring to underpin understandings of vulnerability, there is a danger that through vulnerability, children's rights become obscured.

Vulnerability is deeply entwined in the justification for and history of human rights. Grear,[77] for example, provides a searing analysis of how human rights were galvanised by the horrors of the two world wars, with the need to protect victims and the dispossessed. The initial Declarations of the Rights of the Child, in 1924 and 1959, were founded on claims to children requiring specific protection, with the wording of the 1959 Declaration then echoed in the preamble to the CRC: "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth". While perhaps arguments *for* human rights based on vulnerability help such rights to gain recognition and acceptance, a *status* of being particularly or inherently vulnerable risks undermining the realisation of rights. Our analysis suggests that claims based on inherent human dignity – or, in childhood studies' discourse, recognising children as social actors – and a structural analysis of vulnerability and inequalities are currently more likely to ensure that children's human rights are respected, fulfilled and supported in times of crisis.

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77   Anna Grear, "Embracing Vulnerability: Notes Towards Human Rights for More-Than-Human World," in *Embracing Vulnerability*, eds. Daniel Bedford and Jonathan Herring (Abingdon: Routledge, 2020), 153–174.

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