



7. Vulnerability Denied: The Rights of Children in Conflict with the Law

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Abstract The Convention on the Rights of the Child (CRC) recognises the rights of all children, including children in conflict with the law, who are entitled to age-appropriate treatment and respect for their dignity and right to reintegration into society. Despite these standards, many states ignore the special vulnerability of these children, who often suffer poor individual, family and community circumstances which are compounded by punitive responses that focus on their behaviour rather than their needs. This chapter presents the view that rights-based responses to children in conflict with the law that focus on rather than deny the vulnerability of these children find greater support in the research.

Keywords youth justice | vulnerability | children's rights | punishment | reintegration

7.1 INTRODUCTION

Children in conflict with the law frequently present with a complexity of needs that has a profound impact on their lives. Their vulnerability – shaped by negative educational experiences, poor mental health and inadequate family support – brings them into contact with a justice system which deepens their vulnerability even further.

The UN Convention on the Rights of the Child (CRC) recognises the rights of all children, defined in Article 1 as everyone below the age of 18 years, and makes specific provision for children in conflict with the law. Under the CRC, these children are entitled to age-appropriate treatment that takes into account the desirability of promoting their reintegration into society (Article 40). Despite the almost universal ratification of the CRC, however, youth justice approaches in many jurisdictions ignore these rights, subjecting children in conflict with the law to processes and approaches that have little regard for the burden of vulnerability that they carry. Many states choose prosecution to protection – either for all

children in conflict with the law or for those who commit more serious crimes – imposing punitive sanctions that respond more to their behaviour than to their needs. For many, this results in the imposition of the ultimate sanction, imposing detention sometimes for very long periods up to and including a sentence of life.

Set against this backdrop, this chapter seeks to question why, unlike children in other circumstances, many states deny the vulnerability of children in conflict with the law, choosing to hold them fully accountable before the law, imposing punishment rather than protection and care. Having established the clear vulnerability of children in conflict with the law as underpinned by a large body of research, the chapter goes on to argue that, rather than responding with punishment, states should take account of this vulnerability by relying on approaches that respond to children's needs. An important way to do this, it is submitted, is through reliance on the CRC. Although not a perfect approach, the CRC highlights the importance of treating children in conflict with the law in an age-appropriate manner, paying particular attention to their complex needs and the explicit priority of reintegrating them into society. Framed thus, the Convention advocates an approach that not only recognises the rights of the child but equally highlights the need to safeguard their rights in the process. While the rights of children in conflict with the law can legitimately, it appears, be subjugated to the rights of others – victims and society as a whole – this chapter argues that a rights-based approach to children in the justice system, including in detention, requires an appreciation of children's vulnerability if these children are to enjoy protection of their rights.

7.2 THE VULNERABILITY OF CHILDREN IN CONFLICT WITH THE LAW

Extensive research confirms that children in conflict with the law have experienced adversity and disadvantage at a personal, family and community level, often with a convergence of complex circumstances and factors in their backgrounds.¹ At an individual level, children who end up in trouble have been found to suffer poor mental health, substance use (often connected), and both disabilities and

1 See Jerome Reil and Ian Lambie, "Profiles of Children and Young Persons Who Commit Serious Offences," in *Responses to Serious Offending by Children Principles, Practice and Global Perspectives*, eds. Nessa Lynch, Yannick van den Brink and Louise Forde (Routledge, 2022), 41–54.

psychiatric disorders. Studies highlight that children with mental health problems are over-represented in youth justice systems,² and a significant proportion of young people involved in juvenile justice meet the criteria for at least one psychiatric disorder, with studies reporting prevalence rates ranging from 30% to 70%.³ Studies indicate that neurodevelopmental disorders – including intellectual disability, language disorders, autism spectrum disorders and foetal alcohol spectrum disorders – are “vastly elevated” among the youth-offending population relative to the general public.⁴ The prevalence of traumatic brain injuries is also substantially greater among children in the justice system than their non-offending peers.⁵ The relationship between early childhood trauma and high rates of offending behaviour in young people is also clear, with one US study finding that of the young people in conflict with the law, 90% had experienced a traumatic event in childhood.⁶ A more recent Irish study reached an identical finding with respect to children involved in a police diversion programme.⁷ This interplay of multiple adverse circumstances in a child’s life is a common theme in the literature,⁸ with studies finding that the accumulation of psychosocial burdens results in post-traumatic distress and highly complex needs,⁹ connecting to the child’s involvement in

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- 2 Kelly N. Graves, James M. Frabutt and Terri L. Shelton, “Factors Associated with Mental Health and Juvenile Justice Involvement among Children with Severe Emotional Disturbance,” *Youth Violence and Juvenile Justice*, vol. 5(2) (2007): 147–167; Kim Reising, Maria M. Tfofi, David P. Farrington and Alex R. Piquero, “Depression and Anxiety Outcomes of Offending Trajectories: A Systematic Review of Prospective Longitudinal Studies,” *Journal of Criminal Justice*, vol. 62 (2019): 3–15, 3; Sara Goodkind, Jeffrey J. Shook, Kevin H. Kim, Ryan T. Pohligh and David J. Herring, “From Child Welfare to Juvenile Justice: Race, Gender, and System Experiences,” *Youth Violence and Juvenile Justice*, vol. 11(3) (2013): 249–272.
 - 3 Larking S. McReynolds, Craig S. Schwalbe and Gail A. Wasserman, “The Contribution of Psychiatric Disorder to Juvenile Recidivism,” *Criminal Justice and Behavior*, vol. 37(2) (2010): 204–216.
 - 4 Reil and Lambie, “Profiles of Children,” 41–54, 44–45.
 - 5 *Ibid.*, 45.
 - 6 Carly B. Dierkhising, Susan J. Ko, Briana Woods-Jaeger, Ernestine C. Briggs, Robert Lee and Robert S. Pynoos, “Trauma Histories among Justice-Involved Youth: Findings From the National Child Traumatic Stress Network,” *European Journal of Psychotraumatology*, vol. 4(1) (2013): 1–12.
 - 7 Aoife Dermody, Sharon Lambert, Anne Rackow, Juliana Garcia, and Caroline Gardner, *An Exploration of Early Life Trauma and its Implications for Garda Youth Diversion Projects* (Dublin: Youthrise / Quality Matters, 2020).
 - 8 Sinead Freeman, “The Experience of Young People Remanded in Custody: A Case for Bail Support and Supervision Schemes,” *Irish Probation Journal*, vol. 5 (2008): 91–101.
 - 9 Reil and Lambie, “Profiles of Children,” 41–54, 43.

offending behaviour.¹⁰ Substance use has also been highlighted as a particular problem driving criminal involvement,¹¹ although it can also overlap with other adverse circumstances such as experience of state care and homelessness, both of which can increase the likelihood of criminal justice system contact.¹²

Family support is vital for children undergoing this level of personal adversity and trauma, and yet parental loss and bereavement are also common to children who come into conflict with the law. Parental conflict is found to increase the risk of involvement in offending behaviour¹³, and family turbulence and deprivation can be significant factors in the backgrounds of children who get into trouble.¹⁴ Children exposed to domestic violence, especially as young children, risk compromised attachment and healthy development, which can give rise to a host of other problems later in childhood, including poor self-regulation, behavioural problems and learning difficulties.¹⁵ Exposure to domestic violence has been found to be the best predictor of adolescent male aggression and violence, and female victimisation in intimate relationships finds violence as an accepted part of relationships.¹⁶ One major longitudinal study found a complex interaction between early experiences of crime victimisation and later experiences of crises within the family, suggesting that later involvement in violent offending is predicted by sustained adversity over time.¹⁷ More generally, poor parental monitoring and low levels of

10 Barbara Lay, Wolfgang Ihle, Günter Esser and Martin H. Schmidt, "Juvenile-Episodic, Continued or Adult-onset Delinquency? Risk Conditions Analysed in a Cohort of Children Followed Up to the Age of 25 Years," *European Journal of Criminology*, vol. 2(1) (2005): 39–66, 61; André M. van der Laan, Martine Blom, and Edward R. Kleemans, "Exploring Long-Term and Short-Term Risk Factors for Serious Delinquency," *European Journal of Criminology*, vol. 6(5) (2009): 419–438, 431–432.

11 Colin Webster, Robert MacDonald, and Mark Simpson, "Predicting Criminality? Risk Factors, Neighbourhood Influence and Desistance," *Youth Justice*, vol. 6(1) (2006): 7–22, 16.

12 Jade Boyd, Danya Fast and Will Small, "Pathways to Criminalization for Street-Involved Youth Who Use Illicit Substances," *Critical Public Health*, vol. 26 (5) (2015): 530–541, 530.

13 Lay, Ihle, Esser and Schmidt, "Juvenile-Episodic," 39–66, 61; David P. Farrington, "Cross-National Comparative Research on Criminal Careers, Crime and Punishment," *European Journal of Criminology*, vol. 12(4) (2015): 386–399, 392; David J. Smith and Susan McVie, "Theory and Method in the Edinburgh Study of Youth Transitions and Crime," *British Journal of Criminology*, vol. 43(1) (2003): 169–195, 188; Alexander T. Vazsonyia, Gabriela Ksinan Jiskrova, Albert J. Ksinan and Marek Blatný, "An Empirical Test of Self-Control Theory in Roma Adolescents," *Journal of Criminal Justice*, vol. 44 (2016): 66–76, 70.

14 Lesly McAra and Susan McVie, "Youth Crime and Justice: Key Messages from the Edinburgh Study of Youth Transitions and Crime," *Criminology and Criminal Justice*, vol. 10(2) (2010): 179–209, 187.

15 Reil and Lambie, "Profiles of Children," 41–54, 44.

16 Ibid.

17 McAra and McVie, "Youth Crime and Justice," 187.

parental support are linked to involvement in offending,¹⁸ with parental absence, however caused, associated with increased childhood delinquency.¹⁹

A family's low socioeconomic status is known to be a further risk factor for victimisation and offending, although the literature suggests this is interrelated with other factors like race and family structure.²⁰ Children's experience of sexual abuse²¹ or repeated bullying can be linked to involvement in offending too.²² Experiences of marginalisation are especially problematic as cycles of exclusion become self-perpetuating, and a history of system contact can disrupt efforts to access legitimate employment or training opportunities.²³ More worryingly, perhaps, early intervention programmes, rather than keeping the child away from the justice system, can have the opposite effect of drawing young people into repeated cycles of contact.²⁴

Brain science research further reveals the link between developmental factors and children's involvement in offending behaviour, with studies finding that the development of the brain can impact behaviour during adolescence in a manner which exposes children's chances of coming into contact with the justice system.²⁵ In particular, research has found that poor impulse self-regulation and high sensation-seeking can contribute to children's involvement in risky behaviour,

18 Ibid.; Smith and McVie, "Theory and Method in the Edinburgh Study of Youth Transitions and Crime," 173; M. van der Laan, Blom, and Kleemans, "Exploring Long-Term and Short-Term Risk Factors for Serious Delinquency," 431; Venla Salmi and Janne Kivivuori, "The Association between Social Capital and Juvenile Crime: The Role of Individual and Structural Factors," *European Journal of Criminology*, vol. 3(2) (2006): 123–148, 140.

19 Salmi and Kivivuori, "The Association between Social Capital and Juvenile Crime," 134–135.

20 Robin M. Hartinger-Saunders, Barbara Rittner, William Wiczorek, Thomas Nochajski, Christine M Rine and John Welte, "Victimization, Psychological Distress and Subsequent Offending Among Youth," *Children and Youth Services Review*, vol. 33(11) (2011): 2375–2385.

21 Ella Cockbain and Helen Brayley, "Child Sexual Exploitation and Youth Offending: A Research Note," *European Journal of Criminology*, vol. 9(6) (2012): 689–700.

22 George E. Higgins, David N. Khey, Brenda Cherie Dawson-Edwards and Catherine D. Marcum, "Examining the Link Between Being a Victim of Bullying and Delinquency Trajectories among an African American Sample," *International Criminal Justice Review*, vol. 22(2) (2012): 110–122; Silvia Staubli, and Martin Killias, "Long-Term Outcomes of Passive Bullying during Childhood: Suicide Attempts, Victimization and Offending," *European Journal of Criminology*, vol. 8(5) (2011): 377–385.

23 Mary-Louise Corr, "Young People's Offending Careers and Criminal Justice Contact: A Case for Social Justice," *Youth Justice*, vol. 14(3) (2014): 255–268.

24 Lesly McAra and Susan McVie, "Youth Justice? The Impact of System Contact on Patterns of Desistance from Offending," *European Journal of Criminology*, vol. 4(3) (2007): 315–345, 337.

25 Charlotte Walsh, "Youth Justice and Neuroscience: A Dual-Use Dilemma," *British Journal of Criminology*, vol. 51(1) (2011): 21–39.

including offending behaviour.²⁶ This pattern – demonstrating teenagers’ heightened propensity towards risk taking – has been found to be similar across a variety of countries.²⁷

Finally, it is important to note that one of the most prevalent factors in the treatment of children in conflict with the law is the role played by race, gender and minority status. In terms of gender, many studies note that being male is associated with higher levels of involvement in criminal behaviour.²⁸ Being male was found in one study to be a moderate predictor of involvement in prolonged, intensive forms of offending²⁹ which might be attributable to a combination of boys experiencing simultaneously more risk and less protection than girls.³⁰ The influence of race on the justice system is well established, and black and minority children – across jurisdictions – come into contact with the justice system disproportionately more than their white counterparts.³¹ Evidence of the structural inequality faced by black and brown boys in particular can be found in the recent evidence that, while

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- 26 Laurence Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” *Psychology, Public Policy, and Law*, vol. 23(4) (2017): 410–420; Laurence Steinberg, Grace Icenogle, Elizabeth P. Shulman, Kaitlyn Breiner, Jason Chein, Dario Bacchini, Lei Chang, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Patrick S. Malone, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan and Hanan M. S. Takash, “Around the World, Adolescence Is a Time of Heightened Sensation Seeking and Immature Self-Regulation,” *Developmental Science*, vol. 21(2) (2018): 13.
 - 27 Natasha Duell, Laurence Steinberg, Grace Icenogle, Jason Chein, Nandita Chaudhary, Laura Di Giunta, Kenneth A. Dodge, Kostas A. Fanti, Jennifer E. Lansford, Paul Oburu, Concetta Pastorelli, Ann T. Skinner, Emma Sorbring, Sombat Tapanya, Liliana Maria Uribe Tirado, Liane Peña Alampay, Suha M. Al-Hassan, Hanan M. S. Takash, Dario Bacchini and Lei Chang, “Age Patterns in Risk Taking Across the World,” *Youth Adolescence*, vol. 47 (2018): 1052–1072.
 - 28 Josine Junger-Tas, Denis Ribeaud and Maarten J. L. F. Cruyff, “Juvenile Delinquency and Gender,” *European Journal of Criminology*, vol. 1(3) (2004): 333–375, 355; Michael Rocque, Chad Posick, Ineke H. Marshall, and Alex R. Piquero, “A Comparative, Cross-Cultural Criminal Career Analysis,” *European Journal of Criminology*, vol. 12(4) (2015): 400–419, 413.
 - 29 Daniel Seddig and Jost Reinecke, “Exploration and Explanation of Adolescent Self-Reported Delinquency Trajectories in the *Crimoc* Study,” in *The Routledge International Handbook of Life-Course Criminology*, eds. Arjan Blokland and Victor van de Geest (London & New York: Routledge, 2017), 159–178, 175.
 - 30 Abigail A. Fagan, M. Lee Van Horn, J. David Hawkins and Michael W. Arthur, “Gender Similarities and Differences in the Association between Risk and Protective Factors and Self-Reported Serious Delinquency,” *Prevention Science*, vol. 8 (2007): 115–124.
 - 31 Nancy E. Dowd, “Black Boys Matter: Developmental Equality,” *Hofstra Law Review*, vol. 45(47) (2016).

justice systems have contracted and numbers in detention have fallen, the impact of this has not been enjoyed equally by black and ethnic minority children.³²

In summary, then, a very substantial body of research over many decades has confirmed an undeniably strong link between vulnerability in childhood – defined by experiences of trauma, adversity and disadvantage of multiple, complex forms – and a child’s later involvement in offending or anti-social behaviour. What is less clear, however, is how states account for this vulnerability in how they respond to offending behaviour. This question is addressed in the section that follows.

7.3 THE RIGHTS OF CHILDREN IN CONFLICT WITH THE LAW

So where does the international human rights framework stand on the treatment of children in conflict with the law, amidst this picture of adversity, trauma and vulnerability? What approaches does the CRC prescribe, mandate or recommend in light of these circumstances, and to what extent do the international standards take account of children’s vulnerability when they come into contact with the law? In general, the CRC has two key approaches that could be said to take account of children’s vulnerability – the first is an emphasis on diversion, through increasing the age of criminal responsibility and advocating the use of informal adjudication and community sanctions, and the second is the requirement of specialisation and adaptation in a way that mitigates the harshness of the justice system for children while at the same time helping the arc of justice to bend towards their needs and circumstances.³³ This following section sets out these two elements in more detail.

7.3.1 Diversion

The CRC recognises the importance of protecting children’s rights when they come into conflict with the law and draws out the principle of diversion in a number of ways. In this regard, the Committee on the Rights of the Child has recognised that “[e]xposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults”.³⁴ Highlighting its desire therefore to “promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased

32 Chris Cunneen, “Youth Justice and Racialization: Comparative Reflections,” *Theoretical Criminology*, vol. 24(3) (2020): 521–539.

33 Ursula Kilkelly, “Youth Justice and Children’s Rights: Measuring Compliance with International Standards,” *Youth Justice*, vol. 8(3) (2008): 187–192.

34 UN Committee on the Rights of the Child, *General Comment No 24 (2019) on Child Rights in the Child Justice System*, CRC/C/GC/24, (September 18, 2019), para. 2.

knowledge about children's development",³⁵ the Committee draws attention to measures that divert children from the justice system, including raising the age of criminal responsibility, diverting children from formal justice processes, and ensuring detention is used as a measure of last resort.³⁶

In particular, the Convention recommends that children are diverted from the criminal justice system altogether and, as a first step, requires the establishment of a minimum age below which children cannot be held criminally responsible (Article 40(3)(a)). This, the Committee says, should be set at a minimum age of 14 years, although it commends states that apply higher ages of 15 and 16, which better reflect recent evidence about child development.³⁷ Significantly, the Committee has formed the view that "[c]hildren with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility".³⁸

The Committee recommends that interdisciplinary approaches are in place to protect the rights of children below the age of criminal responsibility, including approaches that emphasise family support, address the need for psychosocial support, and build resilience.³⁹ Separately, the Committee recommends that states engage in a process of decriminalisation, so that pathways into the justice system are closed to children engaging in only minor offending.⁴⁰

For children above the age of criminal responsibility, the Convention requires states to apply measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (Article 40(3)(b)). According to the Committee, diversion should be the preferred way to respond to children who come into conflict with the law, and opportunities for diversion should appear early and frequently throughout the process.⁴¹ Article 40(4) requires states to make available "[a] variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care" to ensure that children are dealt with "in a manner appropriate to their well-being and proportionate both to their circumstances and the offence." Consistent with

35 CRC/C/GC/24, para. 2.

36 CRC/C/GC/24, para. 6.

37 CRC/C/GC/24, para. 22.

38 CRC/C/GC/24, para. 28.

39 CRC/C/GC/24, para. 11.

40 CRC/C/GC/24, para. 12.

41 CRC/C/GC/24, para. 16.

the principle of imposing detention only as a last resort, the CRC strongly advocates for community-based, progressive approaches that respond to the needs of the child. In doing so, the Convention implicitly accepts that detention is harmful to children, requiring in detention that they are separated from adults for their own protection, enjoy the right to maintain contact with family through correspondence and visits, and have the right to prompt access to legal and other appropriate assistance (Article 37(c) and (d)) in ensuring the legality of their detention. The Committee on the Rights of the Child highlights the need for a specialist form of detention for children; this is explained further in the section below.

7.3.2 Specialisation

While many children who come into contact with the law experience multiple forms of adversity and vulnerability, such as those described here, their circumstances may also make engagement with the justice system additionally challenging. This is recognised by the CRC and other instruments, which advocate for a specialist and adapted criminal justice system for children.⁴² In particular, Article 40(3) of the Convention requires that states promote the establishment of laws, procedures, authorities and institutions specifically applicable to children accused of infringing the penal law, in a measure that highlights the imperative of specialist and separate treatment of children in conflict with the law. In addition, the Convention addresses the right of the child in the justice system to be treated

in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society. (Article 40(1))

Building on these standards, the Committee on the Rights of the Child recalls that children are different from adults “in their physical and psychological development” and that such differences “constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualised approach”.⁴³ In addition, they are entitled under Article 40(2) to have matters against them determined by a fair hearing without delay before a competent,

42 For details of these international standards, see further Kilkelly, “Youth Justice and Children's Rights,” 187–192.

43 CRC/C/GC/24, para. 2.

independent and impartial tribunal in the presence of “legal or other appropriate assistance” and, unless it is contrary to their interests, in the presence of their parents. The provision goes on to recognise the child’s due process rights, including the right to be presumed innocent, to examine and cross-examine witnesses, to the assistance of an interpreter and to an appeal in accordance with law. Importantly, the child has the right to have their privacy respected “at all stages of the proceedings”.

Focusing on the risks to children of engaging with a justice system ill-equipped to meet their needs, the Council of Europe adopted the Guidelines on Child-friendly Justice in 2010 in recognition of the need to make justice systems more “accessible and understandable to children”.⁴⁴ This important instrument draws on Article 12 of the CRC (the child’s right to be heard in decision-making) and the case-law of the European Court of Human Rights on the application of Article 6 (the fair trial right) to children in criminal justice proceedings to draw attention to the child’s participation rights in the justice system.⁴⁵ The Guidelines highlight the importance of providing children with access to information, legal assistance and the important supportive role played by parents in such proceedings. They pay particular attention to child-specific training for professionals, the use of child-appropriate language and supports, and the need to adapt the environment to the child’s needs and circumstances. Overall, they advocate for a fundamentally altered system of justice, in order to ensure children’s needs, circumstances and rights are protected when they come into conflict with the law.

As noted above, the Convention prohibits detention other than as a last resort and the Committee is clear that specialist measures must be adopted to ensure the harms of detention are minimised and the protections enhanced. The Committee on the Rights of the Child advocates for a specialist system of child detention, envisaging “separate facilities for children”, “staffed by appropriately trained personnel” that “operate according to child-friendly policies and practices”.⁴⁶ It sets out clear direction regarding the kind of conditions children should enjoy when deprived of their liberty and details the requirements on states to deliver on those rights including:

44 Ton Liefwaard, “Child-Friendly Justice and Procedural Safeguards for Children in Criminal Proceedings: New Momentum For Children in Conflict with the Law?,” *Bergen Journal of Criminal Law and Criminal Justice*, vol. 8(1) (2020): 1–17, 2.

45 Liefwaard, “Child-Friendly Justice,” 1–17, 7.

46 CRC/C/GC/24, para. 15.

- A physical environment conducive to reintegration, with opportunity for peer interaction, social and leisure activity and privacy.
- A right to education suited to the child's needs and abilities and designed to prepare the child for return to society, with vocational training likely to prepare them for future employment.
- A right to health assessment on admission and adequate healthcare in detention.
- Frequent communication with the wider community, with friends and family, and the opportunity to visit home, with no restrictions on communication with the child's lawyer.
- The use of restraint limited to when the child poses an imminent threat to himself or others and never involving deliberate infliction of pain or use as a punishment.
- Discipline consistent with the inherent dignity of the child with a prohibition on corporal punishment, solitary confinement or other punishment that compromises the child's physical or mental health.
- A right to make requests or complaints, to know their rights and have independent and qualified inspections of the detention setting, including consultation with the children detained.

7.4 STATES' RESPONSE TO VULNERABILITY AND RIGHTS

Having set out the literature on the vulnerability of children in conflict with the law and the corresponding provision in international standards for the rights of the child, this next section considers the response of States Parties to the Convention on these issues. While the picture is mixed and arguably not susceptible to generalisation, there is nonetheless clear support for the view that rather than take account of the evidence, many states choose punitive responses that downplay or ignore the exceptional vulnerability of children in conflict with the law, especially those accused or convicted of serious offences.

Many states have progressive approaches in place that divert children in conflict with the law from the criminal justice system, ensuring their needs and circumstances are met with special protection and care.⁴⁷ However, more common than systems that do not prosecute children at all are those approaches that use the justice system to address the factors associated with children's offending – mental

47 Louise Forde, "Welfare, Justice, and Diverse Models of Youth Justice: A Children's Rights Analysis," *The International Journal of Children's Rights*, vol. 29(4) (2021): 920–945.

health, lack of family support and poor education – while holding children accountable for the harm caused by their offending.⁴⁸

Too frequently, however, despite their extraordinary vulnerability, children in conflict with the law encounter not protection but a justice system that is rarely adapted to their circumstances. Their rights are downplayed or ignored during police questioning, and when prosecuted, they encounter judicial proceedings or sentencing practices that take little account of their age or their circumstances. Decisions to investigate, prosecute or sentence children frequently fail to take account of their vulnerability or needs, as is the case in other areas of child law or policy, and instead priority is given to community safety, vindication of victims' rights and the public interest in the administration of justice.⁴⁹ Low ages of criminal responsibility persist in many states, with the age of 10 still applicable in jurisdictions including England and Wales.⁵⁰ Other states have even lower ages of criminal responsibility, or even no minimum age, as is applicable across many US states, meaning that children can be tried at any age.⁵¹ Separately, some states "limit the applicability of the child justice system to children under the age of 16 years (or lower), or [...] allow by way of exception that certain children are treated as adult offenders", especially in the case of a serious offence.⁵² Ireland is a case in point, with a law that permits children to be prosecuted with some violent crimes at 10 years old; the regular age of prosecution is 12.⁵³ The age of criminal responsibility, however framed, is the gateway to the justice system, and setting the age at too low a level not only is contrary to international standards,⁵⁴ but results in children being inappropriately held to account in a justice process likely to be incomprehensible to them.⁵⁵ This general concern about the child's capacity to understand the criminal process, augmented by development science outlined

48 Forde, "Welfare, Justice and Diverse Models of Youth Justice."

49 Ursula Kilkelly and Ton Liefwaard, "International Children's Rights Principles and Responses to Serious Offending by Children: Recent Developments, Topical Issues and Global Challenges," in *Responses to Serious Offending by Children: Principles, Practice and Global Perspectives*, eds. Nessa Lynch, Yannick Van den Brink and Louise Forde (Routledge, 2022), 11–26.

50 Aaron Brown and Anthony Charles, "The Minimum Age of Criminal Responsibility: The Need for a Holistic Approach," *Youth Justice*, vol. 21(2) (2021): 153–171.

51 Barry C. Feld, "Unmitigated Punishment: Adolescent Criminal Responsibility and LWOP Sentences" *JL & Fam Stud*, vol. 10 (1): 11.

52 CRC/C/GC/24, para. 30; and further Kilkelly and Liefwaard, "International Children's Rights Principles and Responses," 11–26.

53 The Irish Children Act 2001.

54 Ursula Kilkelly and Ton Liefwaard, "International Children's Rights Principles and Responses," 11–26, 14.

55 Claire McDiarmid, "An Age of Complexity: Children and Criminal Responsibility in Law," *Youth Justice*, vol. 13(2) (2013): 145–160.

above, has led the Committee on the Rights of the Child to recommend raising the age of criminal responsibility to 14 years, at minimum.⁵⁶

The particular vulnerability of children in conflict with the law means that they have difficulty comprehending police questioning, a process fraught with legal risk. Kilkelly and Forde illustrate the difficulties that children can have navigating such situations, even where measures are taken to adapt the approach in line with their age.⁵⁷ Some jurisdictions use “appropriate adults” or intermediaries to support the child,⁵⁸ taking into account that language impairment can “impede, or even destroy, an individual’s ability to receive due process and effectively participate in the criminal justice system”.⁵⁹ It is pertinent in this regard that the CRC does not address the area of police questioning at all and, even in the general terms of youth justice, does not mandate legal representation for children preferring “legal or other appropriate assistance” instead.⁶⁰ Whether demonstrating a distinct lack of awareness of the vulnerabilities under which children labour in such processes or an unexpected optimism in the capacity of states to adapt their justice systems to the needs of children, both perspectives appear problematic. The reality is that even where such procedures are adapted as the Convention requires, they can be too complex and formal for children to comprehend, doubly so where children have suffered disadvantage, trauma and the other circumstances highlighted above.⁶¹

It is evident from the research that children with complex, unmet needs commonly come into contact with the justice system, and that this impacts disproportionately on children (boys) of minority and ethnic backgrounds. While the majority of children grow out of such behaviour, their vulnerability often means that they are more likely to be drawn deeper into the justice system. Research points to the additional vulnerability of children who are involved in serious or

56 CRC/C/GC/24 (2019), para. 22.

57 Louise Forde and Ursula Kilkelly, *Children’s Rights and Police Questioning: Qualitative Study of Children’s Experiences of being interviewed by the Garda Síochána* (Policing Authority, 2020).

58 Roxanna Dehaghani, “Interpreting and Reframing the Appropriate Adult Safeguard,” *Oxford Journal of Legal Studies*, vol. 42(1) (2022): 187–206.

59 Michelle LaVigne and Sally Miles, “Under the Hood: Brendan Dassey, Language Impairments and Judicial Ignorance,” *Albany Law Review*, vol. 82(3) (2019): 873–947, 890.

60 Ton Liefwaard, “Child-Friendly Justice: Protection and Participation of Children in the Justice System,” *Temple Law Review*, vol. 88(4) (2016): 905–927.

61 Ursula Kilkelly, “Youth Courts and Children’s Rights: The Irish Experience,” *Youth Justice*, vol. 8(1) (2008): 39–56; Stephanie Rap, “A Children’s Rights Perspective on the Participation of Juvenile Defendants in the Youth Court,” *The International Journal of Children’s Rights*, vol. 24(1) (2014): 93–112.

violent behaviour in this respect.⁶² For these children, experience of formal justice both during police questioning and during the trial process results in poor outcomes, including the imposition of punitive measures.⁶³ Despite the international standards advocating for more child-friendly approaches, the high levels of formality and legal process present a particular challenge for children labouring under extreme vulnerability. As Kilkelly and Liefwaard note, a gap has now emerged in the application of the Convention to children “at the deeper end of the justice system” with the result that children charged or convicted of a serious crime, despite their acute vulnerability, “are more likely to be denied the specialised interventions to which they are entitled under international children’s rights law”.⁶⁴ Despite their circumstances, such children are less likely to be selected for a diversion programme and more likely to be deemed worthy of a sentence of detention.⁶⁵ They are also highly likely, even in the most progressive jurisdictions, to be tried in the adult court system, where they face an environment and a process that has adapted little to their age and needs.⁶⁶ The more the child needs protection and care, it seems, the more likely they are to receive punishment.

Extending the contradiction further, despite the harms of detention, it remains permitted under the CRC, up to and including a sentence of life, as long as there is a possibility of release. As the Global Study on Children Deprived of Liberty makes clear, children continue to suffer breaches of their rights in detention around the world.⁶⁷ In such circumstances, it appears, their vulnerability is downplayed in favour of the public interest in punishment and retribution. Among the concerns highlighted by the Committee on the Rights of the Child are the poor material conditions of child detention, the overuse of detention on remand/pre-trial detention, and the absence of adequate health and education services that meet children’s needs.⁶⁸ The risks to children’s protection is highlighted, including by children themselves, in the Global Study on Children Deprived of Liberty, through the use of solitary confinement and exposure to violence.⁶⁹ The recommendations of the global study focus predominantly on methods to avoid, reduce and where possible

62 Reil and Lambie, “Profiles of Children,” 41–54.

63 Kilkelly and Liefwaard, “International Children’s Rights Principles and Responses,” 11–26.

64 Kilkelly and Liefwaard, “International Children’s Rights Principles and Responses,” 11–26, 23.

65 Kilkelly and Liefwaard, “International Children’s Rights Principles and Responses,” 11–26.

66 Rachel Martin, “Waiving Goodbye to Juvenile Offenders: A Multi-State Analysis of Juvenile Transfer Laws,” *ULC John Marshall Law Review*, vol. 54(2) (2021): 481–526.

67 Manfred Nowak, *UN Global Study on Children Deprived of Liberty* (United Nations General Assembly, 2019).

68 Ursula Kilkelly and Pat Bergin, *Advancing the Rights of Children in Detention* (Bristol University Press, 2022), 20–34.

69 Nowak, *UN Global Study on Children Deprived of Liberty*, 76–113.

eliminate the detention of children, by drawing attention to the root causes and pathways that lead to the deprivation of liberty.⁷⁰ States are recommended to “rigorously apply” the requirements of Article 37(b) of the CRC to ensure detention is a measure of last resort, requiring that children shall only be detained in “truly exceptional cases”. Where detention is unavoidable, the study recommends that states apply “child-friendly and gender-sensitive” conditions and protect children from abuse, neglect and exploitation, providing children with access to “essential services aimed at their rehabilitation and reintegration into society, including education, vocational training, family contacts, sports and recreation, adequate nutrition, housing and health care”.⁷¹

Admittedly, some progressive approaches have been adopted to take better account of children’s circumstances when they appear before the courts charged with a breach of the criminal law. For instance, in a series of judgments, the United States Supreme Court developed a line of developmental jurisprudence that was informed by the scientific evidence that children are not fully culpable for criminal acts on account of their immaturity.⁷² In truth, remarkable as these judgments are, they merely bring US sentencing into line with the CRC in prohibiting the imposition on a child of life without parole, no more.⁷³ Moreover, the requirement that a young person must be found to be “permanently incorrigible” before such a sentence could be imposed was diluted in the recent case of *Jones v Mississippi* (2021), and, in a separate development, courts have pointed to “trauma” in finding that young people cannot be rehabilitated.⁷⁴

Equally, some good practice is evident with respect to detention also, notably in Ireland, where a child-centred, rights-based approach has been embedded in the national children facility for children.⁷⁵ Given the complexity of implementing such an approach, it is perhaps not surprising that most jurisdictions committed to a progressive approach favour the elimination or reduction of detention rather than its reform.⁷⁶

70 Nowak, *UN Global Study on Children Deprived of Liberty*, 668.

71 Nowak, *UN Global Study on Children Deprived of Liberty*, 669.

72 Laurence Steinberg, “Adolescent Brain Science and Juvenile Justice Policymaking,” *Psychology, Public Policy, and Law*, vol. 23(4) (2017): 410–420.

73 Ursula Kilkelly, “Advancing the Rights of Young People in Juvenile Justice: The Impact of Juvenile Law Centre,” *Temple Law Review*, vol. 88(4) (2016): 629–652.

74 Marsha Levick and Susan Vivien Mangold, “Responses to Children Who Commit Serious Offending in the United States,” in *Responses to Serious Offending by Children*, eds. Nessa Lynch, Yannick van den Brink and Louise Forde (Routledge, 2022), 202.

75 Ursula Kilkelly and Pat Bergin, *Advancing the Rights of Children in Detention* (Bristol University Press, 2022).

76 Kilkelly and Bergin, *Advancing the Rights of Children in Detention*.

In this regard, reforms in sentencing are key. In Scotland, a progressive approach has emerged with the adoption of a new sentencing guideline for the sentencing of young people covering any person under 25 years. According to the Sentencing Young People Sentencing Guideline, consideration must be given to a range of factors in this process, including the young person's best interests, their maturity (taking account of factors such as development as well as age) and rehabilitation, including the young person's amenability to change.⁷⁷ Separately, in identifying the most appropriate sentence, the Guideline provides that a whole range of factors particular to the young person should be taken into account. Particularly novel is the requirement that the court, in selecting the most appropriate sentence, should ensure that it has "sufficient information to assess the maturity of the young person". According to the Guideline, this may include information about "addiction; physical and mental health; speech, language, and communication needs; trauma; adverse childhood experiences; the living environment, including whether the young person is or has been in care".⁷⁸ The Guideline also requires that the sentence imposed should take account of "the particular and individual circumstances of the young person" and have regard to the fact that "some sentences could have more of an adverse effect on a young person than on an older person because of the young person's age, maturity, and/or personal circumstances".⁷⁹

Overall, however, despite some emerging good practice in youth justice, including the move by states to increasingly divert children from the justice system and from detention, the extent of the vulnerability of children in conflict with the law appears to have had relatively little impact on the implementation of the CRC in this important area.

7.5 CONCLUSION

Established research now confirms, categorically, that children in conflict with the law present with extraordinary vulnerability. Frequently from impoverished backgrounds, with experience of disadvantage, and personal and family trauma, children in conflict with the law have experience of adversity with circumstances that converge to bring them into contact with the justice system. In addition, and as the requirement to set an age of criminal responsibility makes clear, international standards require the removal of young children from the justice system, in

77 Scottish Sentencing Council, *Sentencing Young People Sentencing Guideline*, effective from 26 January 2022.

78 Scottish Sentencing Council, *Sentencing Young People Sentencing Guideline*, 2022, para. 15.

79 Scottish Sentencing Council, *Sentencing Young People Sentencing Guideline*, 2022, para. 17.

acknowledgement of their heightened vulnerability. Research makes clear that fulfilling children's basic needs for education, health and family support can prevent them from getting into trouble. Despite the research pointing towards the need for greater protection for these children, states continue to bring them into the justice system, in a manner that is structurally unequal and disproportionate in impact, in order to satisfy the public interest for accountability. It is this politicisation (and racialisation) of youth justice that ultimately explains why states choose punishment over protection for these most vulnerable children.⁸⁰

The good news is that we know more about a child's vulnerability than ever before – with global studies, interdisciplinary research and the new frontier of developmental brain science providing evidence that is as clear as it is powerful. This evidence reflects existing international standards, including the CRC, which emphasises the imperative of diversion – from offending, from the justice system, and from detention – so that children can be provided with appropriate support, fulfilling lives and full enjoyment of their rights. It also highlights the need for specialist approaches when children come into contact with the justice system, although this, of itself, raises a question as to whether even an adapted system of justice can ensure that the rights of children are protected.

Importantly, the continuing emergence of research evidence – including recent brain science – has given rise to a refresh of international standards. The Committee on the Rights of the Child's revised General Comment on Children's Rights in the Child Justice System and newly developed standards such as the European Guidelines on Child-Friendly Justice are excellent examples of this. The capacity of the international community to ensure that the international standards remain up to date with the latest research is a source for some optimism, even if the implementation of those standards remains elusive at times. In this regard, it is important that these standards advocate for an approach that views the child in the justice system as a child, strongly supporting an approach that takes account of the child's vulnerability and mandating treatment that is child-centred and rights-based, regardless of the child's offending (or perhaps because of it). The assertion of the CRC as a treaty of rights for all children is vital in this context.⁸¹

It is important too that the children's rights standards outline the measures that, if implemented, will take account of the child's vulnerability. Connecting research to international law, the international standards must include an imperative to train

80 Laura Piacentini and Reece Walters, "The Politicization of Youth Crime in Scotland and the Rise of the 'Burberry Court,'" *Youth Justice*, vol. 6(10) (2006): 43–59.

81 Ursula Kilkelly, "All Children, All Rights in All Circumstances," in Nessa Lynch, ed. *Children's Rights in Aotearoa New Zealand – Reflections on the 30th Anniversary of the Convention on the Rights of the Child*. (Wellington: Law Foundation of New Zealand, 2019), 82–84.

police, lawyers, judges and other youth justice professionals in order to ensure that interactions with, communication with and treatment of children are informed by their vulnerability and circumstances, taking account of their stage of development and their adverse life experiences. The importance of systematic training on anti-discrimination and unconscious bias is vital here. Here, the Scottish approach presents a progressive model for other states to follow. It also needs to be accompanied by a commitment to training, which takes account of the impact of these circumstances and experiences on a child's mindset, attitudes and behaviours.

Ultimately, however, it is difficult not to conclude that children labouring under this level of vulnerability have no business being in the justice system at all, least of all one which traumatises them further. What the CRC makes clear is that children in conflict with the law are rights holders, not simply due to their participation in the justice system but because they are children, with equal rights regardless of age, other characteristics or background. Contrasting with other areas where protection or vulnerability can eclipse agency, we need to find ways to ensure that the reverse is not always the reality for these children whose vulnerability is so frequently ignored or underplayed. This is a right of every child, without discrimination, on an equal basis with all children.

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