



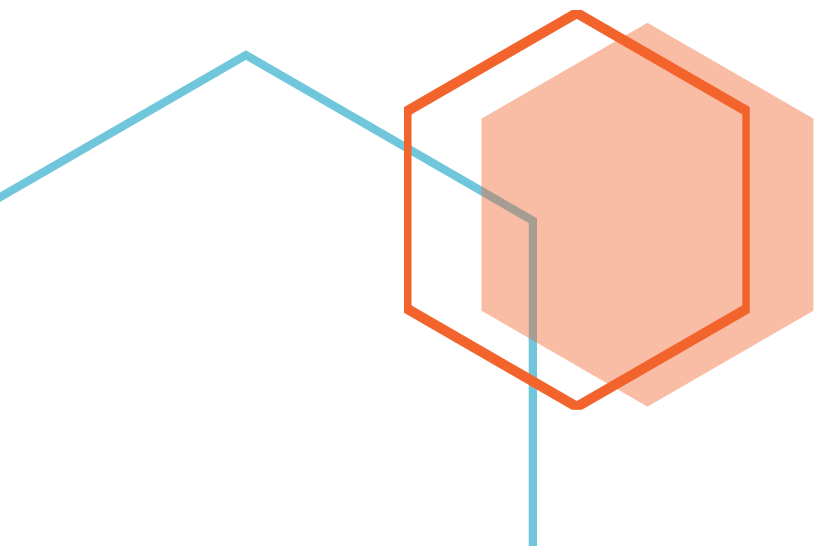
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Dismantling barriers: justice for children affected by neurodisabilities

Working Paper

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Abstract

This Working Paper focusses on the practical steps needed to ensure the rights of children affected by neurodisabilities when they are in conflict with the law. International law and standards, including the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities, create clear and explicit State obligations for action to ensure their rights. However, despite being over-represented in criminal justice systems across the world, their specific needs are rarely recognised, understood or accommodated.

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This Working Paper first examines some of the evidence regarding the prevalence of neurodisability amongst children in conflict with the law and then sets out the international law and standards regarding State obligations for the care and treatment of this group of children. Drawing on these international laws and standards, as well as good practice in a range of different countries, it provides guidance for governments, civil society and other stakeholders on how to ensure that the rights of children with impairments are respected, protected and fulfilled at every stage of the criminal justice process.



1. Introduction

Neurodisability¹ – also referred to as neurodevelopmental disorders or disabilities - encompasses a range of conditions, including attention deficit hyperactivity disorder (ADHD), learning/intellectual disability, autism spectrum disorders (ASD), foetal alcohol spectrum disorders (FASD), and acquired brain injuries. These conditions are caused by different factors that can compromise brain development and function. These include genetic factors, pregnancy or birth-related complications - including alcohol and drug exposure during pregnancy - acute injury and illness. Although neurodisability is frequently confused with mental illness, it is different primarily because it is a long term condition.

Children with neurodisabilities are a very diverse group. The nature of their impairments differs greatly and is affected by their family situation and economic, social and cultural background. However, there are some commonalities in the way impairments are manifested and in the sort of management that they need. When a child has a neurodisability, it can impact on their ability to learn, understand, communicate and undertake every-day tasks. It can also create problems with memory and concentration, emotional functioning, impulse control and social judgement.

The great majority of children with neurodisabilities do not come in to conflict with the law. However, a comprehensive review of the research evidence reveals a disproportionately high prevalence of neurodevelopmental disorders amongst children and young people in detention facilities, that is consistent across various international contexts.² There is a relationship between having a neurodisability and a heightened risk of coming in to conflict with the law.

This is not a simple cause and effect relationship. Children come in to conflict with the law for many reasons that may not be connected to impairments including peer pressure, a propensity to risk-taking, and being born and raised in adverse social and environmental circumstances. Equally, children may be more likely to experience neurodisability if they are living in adverse social and environmental conditions and

¹ See Annexe below for definitions of terminology used.

² Hughes N, Williams H, Chitsabesan, P, et al. Nobody made the connection: The prevalence of neurodisability in young people who offend. Office of the Children's Commissioner for England, 2012.



these circumstances can also affect or interact with symptoms of neurodisability and create additional risk factors to offending.³

All children who come in to conflict with the law have rights that are clearly established in international law and standards.⁴ These include the right to fair trial, to legal assistance and support, to participate in legal proceedings, to protection from violence and to have their best interests as a primary consideration in decision-making by courts. These rights must be implemented without discrimination for all children with disabilities. Non-discrimination is not synonymous with equal treatment for everyone and special measures or adaptations are needed to ensure that children affected by neurodisabilities have their rights equally respected, protected and fulfilled.

The intersection of a child's age and level of maturity with problems associated with neurodisabilities, creates challenges for justice systems. Many children, whether or not they have disabilities, find the experience of formal justice proceedings confusing at best and a source of fear, distress and secondary victimisation at worst. It is not unusual for children to find it difficult to communicate with the adults involved, to profoundly mistrust justice authorities, particularly law enforcement officials, and to lack basic information and understanding about processes and procedures which prevents their full participation. All of these issues are far worse for children when problems associated with their impairments prevent their effective engagement (for example, due to difficulties in understanding their rights or participating in interviews or court hearings). If any underlying neurodisability is not clearly identified at an early stage, then these associated problems can also prevent rehabilitation and reintegration interventions from working effectively. This in turn may lead to a higher risk of re-offending and harsher responses from justice systems, including when sentencing and using disciplinary sanctions in detention.⁵

The result is that children who are affected by neurodisabilities are confronted by insurmountable barriers to the realisation of their rights under international law and standards. Some of these barriers are systemic and relate to a lack of coordination between different services such as child welfare and protection, health, education and

³ Hughes, N. (2015) 'Neurodisability in the youth justice system: recognising and responding to the criminalisation of neurodevelopmental impairment', Howard League for Penal Reform, What is Justice? Series. https://howardleague.org/wp-content/uploads/2016/04/HLWP_17_2015.pdf

⁴ See Section Three of this Working Paper for a more detailed exploration of the international law and standards relevant for children in conflict with the law.

⁵ Eileen Baldry, Damon B. Briggs, Barry Goldson & Sophie Russell (2018) 'Cruel and unusual punishment': an inter-jurisdictional study of the criminalisation of young people with complex support needs, *Journal of Youth Studies*, 21:5, 636-652, p.641



justice leading to no one taking full responsibility for supporting them. Other barriers are procedural and arise from the complexity and rigidity of many justice processes. There are also cultural and attitudinal barriers created by a lack of awareness amongst justice professionals about how to identify and work with children with neurodisabilities. The impact of these barriers is that the child is denied their right to be treated on an equal basis with other children who do not share their neurodisabilities. More often than not this is because the justice and protection systems have failed to adequately identify and accommodate their differences.

This Working Paper focusses on the practical steps needed to ensure the rights of children affected by neurodisabilities when they are in conflict with the law.⁶ It first examines some of the evidence regarding the prevalence of neurodisability and then sets out the international law and standards regarding State obligations for the care and treatment of this group of children. Drawing on these international laws and standards, as well as good practice in a range of different countries, it provides guidance for governments, civil society and other stakeholders on how to identify, assess and respond to ensure that the rights of children with impairments are respected, protected and fulfilled when they are in conflict with the law.

2. The prevalence of neurodisability and children in conflict with the law

There is a growing body of evidence that disproportionate numbers of children in conflict with the law around the world have one or more neurodisabilities.⁷ For example, the prevalence of ADHD among young people in the general population is typically reported to be between three and seven per cent in countries such as the United States and the United Kingdom.⁸ However, a review of 25 studies of imprisoned youth, with a total sample size of 16,750 young people, found an ADHD rate of 11.7 per cent among males and 18.5 per cent among females.⁹ Similarly, while reported rates of learning or

⁶ This Working Paper does not look at the wider - and very important - issue of the extent to which these children's rights are being met outside contact with the law, for example, in terms of prevention of injury and early therapeutic interventions.

⁷ See FNs 3 and 4.

⁸ National Institute for Health and Clinical Excellence. (2008). *Attention deficit hyperactivity disorder: Diagnosis and management of ADHD in children, young people and adults*. London: NICE.

⁹ Fazel S, Doll H, Långström N. Mental disorders among adolescents in juvenile detention and correctional facilities: a systematic review and metaregression analysis of 25 surveys. *Journal of the American Academy of Child & Adolescent Psychiatry* 2008; 47(9): 1010-9



intellectual disability among the general population are between two and four per cent¹⁰, amongst imprisoned young people they vary from 10 to 32 per cent.¹¹

Higher rates of FASD have also been identified among young people in detention. Four Canadian studies suggest rates of 11 to 23 per cent¹², while a recent study in Western Australia suggests a prevalence of 36 per cent in detention settings.¹³ This compares to estimates that two to five per cent of children in the US and some European countries are born with FASD.¹⁴ In each of these studies, particularly high rates of FASD were reported among Aboriginal youth in detention (19 to 47 per cent), indicating that FASD cannot be readily separated from complex issues of intergenerational disadvantage and poor access to health care.

Traumatic brain injuries (TBI) involve an insult to the brain caused typically by a blow to the head in an assault, a fall, sporting injury or car crash.¹⁵ TBI has been described as a 'silent epidemic' since it is often not recognised and in middle and low-income countries, three times as many people can suffer TBIs compared with high-income

¹⁰ McKay, J. and Neal, J. (2009). Diagnosis and disengagement: exploring the disjuncture between SEN policy and practice. *Journal of Research in Special Educational Needs*, 9(3), 164-172.

¹¹ Kroll L, Rothwell J, Bradley D, Shah P, Bailey S, Harrington R. Mental health needs of boys in secure care for serious or persistent offending: a prospective, longitudinal study. *The Lancet* 2002; 359(9322): 1975-9; Chitsabesan P, Kroll L, Bailey S, et al. Mental health needs of young offenders in custody and the community. *British Journal of Psychiatry* 2006; 188: 534-40; Herrington V. Assessing the prevalence of intellectual disability among young male prisoners. *Journal of Intellectual Disability Research* 2009; 53(5): 397-410; Allerton M, Champion U, Kenny D, Butler T. NSW young people in custody health survey: a summary of some key findings. *Juvenile Justice: from Lessons of the Past to a Road Map for the Future Conference*, Sydney; 2003; Haysom L, Indig D, Moore E, Gaskin C. Intellectual disability in young people in custody in New South Wales, Australia—prevalence and markers. *Journal of Intellectual Disability Research* 2014; 58(11): 1004-14.

¹² Fast, D.K., Conry, J. & Loock, C.A. (1999) Identifying fetal alcohol syndrome among youth in the criminal justice system. *Journal of Developmental & Behavioral Pediatrics*, 20(5): 370-372; Rojas, E.Y. & Gretton, H.M. (2007) Background, offence characteristics, and criminal outcomes of Aboriginal youth who sexually offend: A closer look at Aboriginal youth intervention needs. *Sexual Abuse: A Journal of Research and Treatment*. 19(3): 257-83; Smith, A., Cox, K., Poon, C., Stewart, D., and McCreary Centre Society (2013). *Time Out III: A profile of BC youth in custody*. Vancouver, BC: McCreary Centre Society; Murphy, A. and Chittenden, M. (2005) *Time out II: A profile of BC youth in custody*. Vancouver, BC: The McCreary Centre Society.

¹³ Bower C, Watkins RE, Mutch RC, Marriott R, Freeman J, Kippin NR, Safe B, Pestell C, Cheung CS, Shield H, Tarratt L. Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia. *BMJ open*. 2018 Feb 1;8(2):e019605.

¹⁴ May PA, Gossage JP, Kalberg WO, et al. Prevalence and epidemiologic characteristics of FASD from various research methods with an emphasis on recent in-school studies. *Developmental disabilities research reviews* 2009; 15(3): 176-92.

¹⁵ Williams W et al. Traumatic brain injury: a potential cause of violent crime? *Lancet Psychiatry* Vol.5 Issue 10, October 2018



countries.¹⁶ Adolescents and young adult males are the group most at risk and disadvantage is a major risk factor.

Experiences of traumatic brain injury (TBI) appear to be particularly common among young people in conflict with the law. A recent systematic review¹⁷ of evidence in the UK suggests that 32 to 50 per cent of young people in custody report experience of a TBI resulting in loss of consciousness at some point in their childhood, compared to five to 24 per cent within the general population. The disparity in prevalence is more pronounced as the severity of injury increases and the earlier the injury took place. Earlier childhood injury has been associated with: earlier age of detention; greater violence; greater drug misuse; repeat offending; and higher risk of suicidality and self-harm when in custody.¹⁸

3. The rights of children with neurodisabilities who are in conflict with the law

3.1 International legal framework

The Convention on the Rights of the Child (CRC)¹⁹ is the primary international instrument that sets out State obligations for the treatment of children in general, and specifically when they are in conflict with the law. The CRC is almost universally ratified – every UN member state has ratified it, except for the United States which is a signatory. When a State ratifies the CRC it is legally bound to implement its provisions and to report at periodic intervals on its progress. It is also important to note that the provisions in the CRC are non-derogable. This means that they apply even in times of emergency and

¹⁶ Roozenbeek B, Maas AIR, Menon DK. Changing patterns in the epidemiology of traumatic brain injury. *Nat Rev Neurol* 2013; **9**: 231–36. Cited in Note 15 above.

¹⁷ Hughes N, Williams W, et al. The prevalence of traumatic brain injury among young offenders in custody: a systematic review. *Journal of head trauma rehabilitation* 2015; **30**(2): 94-105.

¹⁸ Chitsabesan, Prathiba; Lennox, Charlotte; Williams, Huw; Tariq, Omar; Shaw, Jenny, W. H. (2015). Traumatic Brain Injury in Juvenile Offenders: Findings From the Comprehensive Health Assessment Tool Study and the Development of a Specialist Linkworker Service. *J Head Trauma Rehabil*, 30(2); Williams, W. H., McAuliffe, K. A., Cohen, M. H., Parsonage, M., Ramsbotham, J., & General The Lord David. (2015); and Traumatic brain injury and juvenile offending: complex causal links offer multiple targets to reduce crime.. *J Head Trauma Rehabil*, 30(2), 69-74.

¹⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3



conflict and cannot be set aside in any circumstances.²⁰ There are also other binding international treaties and non-binding but influential standards relevant for the treatment of children in conflict with the law. These reinforce and elaborate on the CRC's provisions.²¹

Together these international standards recognise that all children are an inherently vulnerable group in the context of justice proceedings. This vulnerability derives from their age, maturity and evolving capacities and because they 'differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law.'²² The nature of their vulnerability derives from their age but also from other characteristics such as their gender and whether or not they have the support they need.²³

²⁰ Only Articles 10 (family reunification), 13 (freedom of expression) and 15 (freedom of association and peaceful assembly) of the CRC are subject to limited exceptions.

²¹ The relevant international standards include the UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25 May 2000 (A/RES/54/263);

UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001 (A/RES/54/263); UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, 14 July 2011, (A/HRC/RES/17/18). It also includes non-treaty instruments such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 29 November 1985 (A/RES/40/33); UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), 14 December 1990 (A/RES/45/112); UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules), 14 December 1990 (A/RES/45/113); and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules), 16 March 2011 (A/RES/65/229). These standards have been elaborated further in UN Committee on the Rights of the Child, General Comment No. 10 (2007) Children's Rights in Juvenile Justice, 25 April 2007 (CRC/C/GC/10) (please note that at the time of writing this is being updated) and also the Secretary-General, Guidance Note on Justice for Children, 2008 and UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, 28 March 2013 (A/RES/67/187).

²² UN Committee on the Rights of the Child, General Comment No. 10 (2007) Children's Rights in Juvenile Justice, 25 April 2007 (CRC/C/GC/10), para 10. It should be noted that this General Comment is in the process of being updated and revised.

²³ Beduschi, A. (2018) Vulnerability on trial: Protection of Migrant Children's Rights in the Jurisprudence of International Human Rights Courts 36 Boston University International Law Journal 55-85.

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971116



The CRC encourages the creation of a specialised system for children when they are conflict with the law which has the objectives of preserving public safety, holding a child accountable for their offending behaviour and above all promoting their reintegration back in to society.²⁴ The international standards also establish the following core obligations for States and other regarding the care and treatment of children in conflict with the law:

- Children must be treated equally and fairly, and without discrimination.
- In all decisions concerning children taken within the context of the justice system, the best interests of the child are a primary consideration.
- Children should be treated in a way that upholds their right to life, survival and development.
- Children should be able to express their views freely and be heard in all matters affecting them.
- Any response to a child in conflict with the law 'shall always be in proportion to the circumstances of both the offenders and the offence.'²⁵
- States must promote measures for dealing with children in conflict with the law without resorting to judicial proceedings, for example by the use of restorative justice or informal rehabilitation programmes.²⁶
- Children should only ever be detained as a measure of last resort and for the shortest appropriate period of time.²⁷
- Children should be treated in a manner²⁸:
 - That is consistent with the child's sense of dignity and worth;
 - That reinforces the child's respect for the rights and freedoms of others;
 - That takes into account the child's age;

²⁴ Article 40 of the CRC states: "States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law."

²⁵ Beijing Rules, Rules 5 and 17

²⁶ Article 40 (3) of the CRC

²⁷ Article 37 (b) of the CRC

²⁸ Articles 37 and 40 of the CRC



- That promotes the child's reintegration and his or her assuming a constructive role in society; and
- That excludes all forms of violence.

3.2 Equitable treatment and dismantling barriers

The rights and protections for children in conflict with the law are universally applicable principles that apply to all children including those who have disabilities. The Convention on the Rights of Persons with Disabilities (CRPD)²⁹ and the CRC are the foundational instruments setting out the legal framework of obligations towards children with disabilities who are in conflict with the law - they are mutually reinforcing.

One central component of this framework is that children with disabilities have a protected status and should receive treatment that is equal to other children in the justice system. The CRC was the first human rights treaty to include disability as grounds for protection from discrimination.³⁰ Being treated without discrimination does not mean being treated in the same way as everyone else. Special measures or adaptations will be needed to ensure that children affected by neurodisabilities have their rights equally respected, protected and fulfilled.³¹ Article 23 of the CRC places explicit obligations on States to introduce measures to promote inclusion and freedom from discrimination for children with disabilities. It emphasises their right to a 'full and decent life in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community'. It also imposes obligations on States to provide special care and assistance to enable the child to achieve the 'fullest possible social integration and individual development, including his or her spiritual or cultural development'.

The CRPD is the first international human rights instrument that includes an explicit right to access to justice. Article 13 creates an obligation on States to "ensure effective access to justice for persons with disabilities on an equal basis with others." It highlights two areas needed to fulfil this obligation: the provision of procedural and age-appropriate accommodations that facilitate participation and appropriate training for

²⁹ UN General Assembly, *Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106*

³⁰ Article 2 of the CRC states that no child should encounter discrimination on the grounds of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.'

³¹ Committee on the Rights of the Child, General Comment no. 5, General measures of implementation of the Convention on the Rights of the Child, 27 November 2003, CRC/GC/2003/5, para. 12.



those working in the field of administration of justice, including police and prison staff. The CRPD therefore reinforces the importance of making “reasonable accommodations” to ensure that children with disabilities can access justice on an equal basis with others, as long as these accommodations do not impose a disproportionate or undue burden.³² Such accommodations should be available at every stage of the child’s interaction with the justice system and be adequately funded.

The other core aspect of this legal framework is that children with disabilities are confronted by barriers preventing their equitable treatment within justice systems and the importance of identifying and removing these barriers. The CRPD specifically addresses the sort of barriers that children with impairments face when they are in conflict with the law. Article 1 of the CRPD defines “persons with disabilities” as including: “[t]hose who have long-term physical, mental, intellectual or sensory impairments, which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” Importantly, this definition represents a shift away from a purely medical model of disability to one that includes social realities.³³ Disability is defined not just in terms of a child’s specific physical and/or mental impairments and limitations but in terms of how society responds to and interacts with these limitations and impairments. This social model of disability focuses on the barriers created by the environment such as lack of physical access to buildings, transportation and information. The barriers also encompass the attitudes and prejudices of society, the policies and practices of governments, and the often exclusionary structures of health, welfare, education and other systems.

This approach is mirrored by the UN Committee on the Rights of the Child – the body established to monitor implementation of the CRC – which emphasises that children with any kind of impairment encounter a combination of social, cultural, attitudinal and physical obstacles to realisation of their rights.³⁴ Therefore action is needed to remove

³² Article 2 of the CRPD defines “Reasonable accommodation” as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

³³ Rannveig Trausdóttir, ‘Disability Studies, the Social Model and Legal Developments’ in Oddný Mjöll and Gerard Quinn (eds.), *The UN Convention on the Rights of Persons with Disabilities* (Leiden: Martinus Nijhoff Publishers, 2009).

³⁴ See UN Committee on the Rights of the Child (CRC), *General comment No. 9 (2006): The rights of children with disabilities*, 27 February 2007, CRC/C/GC/9, para. 5 states: ‘The Committee also notes that children with disabilities are still experiencing serious difficulties and facing barriers to the full enjoyment of the rights enshrined in the Convention. The Committee emphasizes that the barrier is not the disability itself but rather a combination of social, cultural, attitudinal and physical obstacles which children with disabilities encounter in their daily lives. The strategy for promoting their rights is therefore to take the necessary action to remove those barriers.’



those barriers to ensure that they are treated equitably and without discrimination and to ensure that their best interests are taken in to account as a primary consideration in all decisions affecting them.

In the context of criminal proceedings, children affected by neurodisabilities can face many barriers to realisation of their rights under the CRC and the CRPD. Some are systemic and relate to a lack of coordination between different services such as child welfare and protection, health, education and justice leading to no one taking full responsibility for supporting a child in conflict with the law. There are also procedural barriers arising from the complexity, formality and rigidity of many justice processes. Above all there are cultural and attitudinal barriers created by a lack of understanding amongst justice professionals about the capacity of children of neurodisabilities. The impact of these barriers is that the child is denied access to a fair trial on an equal basis with other children because the system has failed to adequately identify and accommodate their differences.

Specific barriers at different stages of the justice process include:

- A failure by the police on arrest to recognise that a child has a neurodisability. The disability is therefore invisible and the child's behaviour is interpreted as a refusal to cooperate or as indifference, all of which may mean they are treated unfairly and their evidence is not properly understood or interpreted.
- Lack of understanding that a child may have difficulty in communicating their personal details to the police or to courts, resulting in a failure to contact family members.
- Lack of recognition from justice professionals that a child is struggling to participate effectively and to communicate and understand formal legal proceedings.
- If the child has legal representation (and, of course, many do not) their lawyer may not be able to communicate effectively with them, with the very real possibility of the facts of the case not being presented accurately to the court, and an inappropriate sentence being imposed.
- If a child affected by neurodisabilities is in detention, prison staff may not recognise or address their impairments. As a result, the child may not be able to communicate with staff and he or she will be particularly vulnerable to bullying and exploitation by both prison wardens and other inmates, with no effective means of challenging the abuse.



- Efforts made to rehabilitate and reintegrate a child which do not address their specific disability are unlikely to succeed. This increases the risk that the child may re-offend and be unable to reintegrate in to their community on release from detention.

To counter such barriers, the Committee recommends that children with disabilities who are in conflict with the law should be:

- Interviewed using appropriate languages or forms of communication;
- Be looked after by police, social workers, lawyers and advocates, prosecutors and judges who have had appropriate training;
- Be dealt with as far as possible without resorting to formal legal procedures. When it is necessary in the interest of public order, efforts must be made to ensure that they have access to information about the justice system and their rights within it; and
- Only be deprived of their liberty if a treatment programme is available to address the offending behaviour. In such cases, the institution must have appropriate facilities and trained staff. In making such decisions, the competent authorities should make sure that the human rights and legal safeguards of the children are fully respected.³⁵

Another crucial aspect of removing barriers is ensuring that information and data is available in the first place to identify when children with neurodisabilities are in conflict with the law and to understand their experiences. Article 31 of the CRPD requires States to ensure that 'appropriate information, including statistical and research data' is collected to enable the development of relevant evidence-based policy and to 'identify and address the barriers faced by persons with disabilities in exercising their rights.' The Committee on the Rights of the Child urges States parties to 'systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and effective responses to juvenile delinquency in full accordance with the principles and provisions

³⁵ UN Committee on the Rights of the Child (CRC), *General comment No. 9 (2006): The rights of children with disabilities*, 27 February 2007, CRC/C/GC/9, paras 73 and 74



of CRC.³⁶ Without such information, the nature and extent of the justice barriers facing these children remains hidden from view.

Different kinds of information and data should be collected that includes details of impairment type and the kind of adjustments and supports that are needed at different stages of the justice process. This will serve to expose the extent of any inequality or disadvantage they encounter. It will also be useful in making decisions about targeting resources effectively and efficiently. Given that many countries do not collect information and data about children in conflict with the law, let alone about children with specific disabilities, this is a complex task but an essential one.³⁷

4. Dismantling barriers

The following section of this Working Paper examines some of the practical and concrete steps that can be taken to meet State obligations at different stages of the criminal justice process – from early interventions to prevent offending through to reintegration back in to the community following a conviction. It looks specifically at steps that can be taken to ensure that children affected by neurodisabilities are treated equitably and without discrimination. The guidance offered is addressed to an international audience. It will therefore need to be contextualized carefully to ensure it addresses the specific challenges posed within different settings. It takes in to account that practitioners are often working within imperfect justice systems and frequently grapple with low pay, inadequate legislation, lengthy delays in proceedings, low levels of political will for reform and a lack of needed referral pathways for child-friendly services and psychological support.

³⁶ UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para 98

³⁷ See Lawson, A. *Access to justice for children with mental disabilities, The Collection and Dissemination of Data: Guidance Report*, Mental Disability Advocacy Centre (2015)



4.1 Early intervention

The importance of preventing children from coming into conflict with the law in the first place cannot be over-emphasised.³⁸ Primary crime prevention initiatives that broadly address the root causes of social problems such as poverty and inequality, and emphasise inclusion and access to basic services, can be very important. Children who have been identified as being at risk of coming into conflict with the law should also be specifically targeted in crime prevention policies, in a way that does not stigmatise or discriminate against them. Such policies should always be evidence-based and undertaken in partnership with the child and their family (where appropriate). Interventions such as early screening for neurodisabilities, mentoring, family therapy and liaison programmes linking families with appropriate support have been found to be effective in many countries in helping families under pressure to cope and respond effectively to children's challenging behaviour and to reduce the risk of offending.³⁹

³⁸ For guidance on prevention see the UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), General Assembly resolution 45/112 of 14 December 1990; see also UN Committee on the Rights of the Child, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, paras 15–21

³⁹ Public Health England has produced guidance on *Collaborative approaches to preventing offending and re-offending by children (CAPRICORN)* which sets out a framework to help local authorities prevent young people offending and re-offending, by looking at primary (or 'upstream') causes of offending, as well as secondary (or 'downstream') causes. Available at: <https://www.gov.uk/government/publications/preventing-offending-and-re-offending-by-children/collaborative-approaches-to-preventing-offending-and-re-offending-by-children-capricorn-summary>

Youth on Track scheme in Australia

The Youth on Track scheme was first established in 2013 in New South Wales. Children aged 10-17 years old are referred to the scheme when they are identified as being at high risk of offending and have had an initial police contact. Providing they give their consent to participate, a case manager will work with them to lower their risk of offending.

As part of their initial assessment they are screened for cognitive disabilities using a validated tool – the Child and Adolescent Intellectual Disability Screening Questionnaire (cognitive disabilities are defined by the New South Wales Law Reform Commission, as: ‘an ongoing impairment in comprehension, reason, adaptive functioning, judgement, learning or memory that is the result of any damage to, dysfunction, developmental delay, or deterioration of the brain or mind.’ New South Wales Law Reform Commission Report 135, June 2012). The aim of this tool isn’t to diagnose, but to determine whether or not a child should be referred to a clinician for further assessment. If cognitive disabilities are identified, then these are taken in to account by the caseworker as they develop their care plan with the child. All Youth on Track caseworkers and family therapists have completed specialised training, that includes working with young people with a cognitive disability in the criminal justice system. Outcomes for children who undergo this scheme are promising: for example, in 2018, 59 per cent of participants reduced their risk of reoffending score after three months and 72 per cent reduced their score after six months. The majority of participants who completed the scheme had improvements in family functioning, behaviour, and engagement with school or employment.

For more information see New South Wales Department of Justice, ‘Youth on Track Social Outcomes Evaluation, Final Report’ April 2017

4.2 Appropriate minimum age of criminal responsibility

The minimum age of criminal responsibility is the age at which children are deemed to be of sufficient maturity to be held criminally accountable. States should set as high a minimum age of criminal responsibility as possible reflecting the evolving emotional, mental and intellectual maturity of children. In General Comment No. 10, the



Committee on the Rights of the Child concludes that ‘a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable.’⁴⁰ At the same time it stresses that States should not lower their age of criminal responsibility to 12 where it has already been set higher and strongly encourages States to introduce a higher minimum age of criminal responsibility, for instance 14 or 16 years of age.

As pointed out by the CRC Committee, “[a]lleging that the child is criminally responsible implies that he/she should be competent and able to effectively participate in the decisions regarding the most appropriate response to allegations of his/her infringement of the penal law.”⁴¹ Therefore, the age at which children can be held accountable should take into account their capacity to participate effectively in criminal proceedings. The capacity to participate is highly likely to be affected when a child has impairments and this should also be taken into consideration both in terms of setting an appropriate age and providing needed support.

When countries have a low minimum age of criminal responsibility, it follows that children are criminalised at an earlier age. Early contact with the justice system is a key predictor of future offending.⁴² Given that children with neurodisabilities are disproportionately represented in criminal justice systems, a low minimum age of criminal responsibility can therefore make it more likely that they will become entrenched within the justice system. On the other hand, having a minimum age of criminal responsibility that is in line with international standards means that younger children’s behaviour is responded to outside of the criminal justice system. Where they are provide with effective community-based responses to their actions at a young age, this can create ladders of escape and avoid the excessive criminalisation of their behaviour.

4.3 Arrest and initial interactions with police

In almost all contexts, the first point of contact with the justice system is the police. The international standards are clear that the arrest of a child should be a measure of last resort and should last for the shortest appropriate period of time.⁴³ This can be

⁴⁰ UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para 32. It should be noted that this General Comment is currently being revised and it is likely that the recommended minimum age will be raised to at least 14.

⁴¹ UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para 45.

⁴² Cunneen, C. (2017) *Arguments for Raising the Minimum Age of Criminal Responsibility*, Research Report, Comparative Youth Penalty Project, University of New South Wales, Sydney.

⁴³ Article 37(b) of the CRC.



particularly important for children with disabilities. During the stage of arrest and police detention, a child affected by neurodisabilities is likely to be especially scared, disorientated and anxious about what will happen to them. They may appear sullen or defiant and this can be mis-interpreted by police as being uncooperative.

They can be at particular risk of taking statements literally and making false confessions impulsively, hastily and without fully understanding the consequences. Any experience of trauma may make them highly vulnerable to coercive and oppressive methods of questioning. They may struggle to understand complex terminology or concepts, be unusually stressed and overwhelmed and have difficulty with being enclosed in small rooms. All of these responses can impact negatively and unfairly on the way in which the police respond to them.

Early identification of a child's neurodisability is critical. In some cases the impairment will be immediately apparent or the child's history will already be known to the police. Where the authorities already know that a child is affected by neurodisability, alternatives to arrest, such as summonses and notices to appear at police stations, should be used where possible.

However, children with neurodisabilities often do not exhibit clear signs of cognitive impairment, or difficulty regulating emotion and they may not be capable themselves of understanding or describing their condition to others.

Police need to be trained to recognise and respond appropriately to neurodisability. It is not realistic or practical to expect that they will have the skills to be able to make a diagnosis, but they should be able to recognise the key signs of neurodisability. It can be very useful to have culturally-sensitive and validated brief screening tools to identify for the presence of neurodisability.⁴⁴ Police should also be trained to understand how a child's impairments affect their behaviour and engagement and to determine if the situation requires: a criminal justice response alone; a social care or healthcare response alone; or a combination of responses. The police should be able to refer those at higher risk who require more detailed assessment to medical or protection services. It is acknowledged that formal assessment is time-consuming and expensive and in many jurisdictions may not be practical owing to a lack of clinicians.

⁴⁴ In England and Wales, for example, an assessment and screening tool called Do It Profiler is available for use in prisons and youth offending settings. For more information see <https://www.doitprofiler.com/sectors/justice-2/>



If it appears to the police that a child has neurodisabilities, then there are a number of procedural safeguards that need to be in place to protect them during and after arrest. They need:

- To be told why they have been arrested in a language they understand and of their rights, in a manner which is consistent with their age and level of understanding.⁴⁵ Some police authorities use child-friendly information sheets for this purpose.
- To be continuously well informed, at every stage of the procedure, on his/her rights and obligations and on the future steps.
- To have parents immediately notified of their arrest⁴⁶ and present during their detention and questioning.⁴⁷ Their involvement should be viewed as providing general psychological and emotional assistance to the children.⁴⁸
- If parents cannot be reached, a legal guardian or another support person (such as a social worker) should be present to support the child from the moment of arrest and during any subsequent investigation.
- To have a lawyer who will inform them of their legal rights in a manner they understand.⁴⁹
- To be talked to in a 'child friendly' environment.
- To be held for no longer than 24 hours before being brought before a court or released.⁵⁰
- To be held separately from adults and for girls to be held separately from boys.
- A child's privacy and dignity must be protected when any non-intimate search is conducted. Intimate searches should only be carried out in limited circumstances

⁴⁵ Article 9 (2) of the ICCPR, which applies equally to children as it does to adults, provides that anyone who is arrested shall be informed, at the time of arrest, of the reasons for his or her arrest.

⁴⁶ Rule 10.1 of the Beijing Rules.

⁴⁷ Rule 15.2 of the Beijing Rules.

⁴⁸ Commentary Rule 15 of the Beijing Rules and Article 53 of the CRC.

⁴⁹ Article 37(d) CRC and Rule 15.1 of the Beijing Rules.

⁵⁰ UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 83.



and with safeguards in place that take in to account the child's ability to understand the reason for the search and any prior history of abuse.⁵¹

- To have access to medical care as required.
- Police questioning is an area of particular concern and police should be trained to keep questions short and simple; address one issue at a time; check comprehension; have frequent breaks and make sure a support person is always present.
- Use of force and instruments of restraint is prohibited except in 'exceptional circumstances' such as when the child poses an imminent threat of injury to himself or herself or others."⁵²

4.4 Diversion

States should seek to promote measures for dealing with all children in conflict with the law without resorting to formal judicial proceedings, providing that human rights and legal safeguards are fully respected.⁵³ This kind of diversion away from formal proceedings can take place at any stage of the criminal justice process and is commonly used at police level, by prosecuting authorities and by judges. Children should be 'diverted' away from the formal justice system towards an informal system that focusses on responding to the offending behaviour in a way that encourages the child to take full responsibility for their offending and that addresses the root causes of the offending behaviour. Under close supervision, children are obliged to actively participate in measures such as counselling, vocational training to increase employment prospects, access to education and engagement in specific programmes to address aspects of violence relevant to the offence. Their progress is followed up and if they do not comply then a case can be referred back to the court.

Diversion away from the criminal justice system is particularly desirable and can be a very effective response to offending by children affected by neurodisabilities. It enables them to avoid stressful court appearances and the possibility of detention where they

⁵¹ UNODC, *Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary*, (UN: New York, 2013).

⁵² UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para. 89.

⁵³ Article 40 (3) (b) of the CRC. Diversionary measures are also referred to in Rule 11 of the Beijing Rules; UN Economic and Social Council, *Guidelines for Action on Children in the Criminal Justice System resolution 1997/30*, 21 July 1997, paras. 15 and 42; and Rule 2.5 of the Tokyo Rules.



may experience violence, distress and rupturing of crucial family and social relationships. It also means that they do not have a criminal record at the end of the process which removes an obstacle to their future employment. When diversionary measures provide therapeutic interventions, treatment and care, this is likely to be much more effective at getting to the root causes of a child's offending and helping them to manage their condition than the formal justice process.

When a child with neurodisabilities is undergoing diversion measures, they should be assessed to identify the kind of adjustments or support they need in order to participate in diversion measures on an equal basis with children who do not have neurodisabilities. As far as possible, these assessments should take in to account the child's own views. In many countries, diversion is complex and is likely to be unfamiliar to many people. Children affected by a neurodisability may therefore need additional support in giving informed consent to participate. For example, a key requirement of any diversionary measure is that a child admits that they were responsible for the alleged behaviour and extra time may be needed to ensure they have sufficient understanding of the consequences of their choice.

All diversionary measures that are used must take in to account impairments caused by neurodisabilities such as difficulty in processing information and speech and language problems. Interventions need to be tailored to support coping strategies, planning and communication. In many countries, diversionary measures include restorative justice processes whereby the victim, offender and other relevant individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Capacity to participate effectively in these processes is important since they often require a child to take responsibility for their behaviour, to understand that their behaviour has caused loss or harm and to make apologies. The effectiveness of such restorative justice processes may be affected by problems associated with a child's neurodisabilities such as lack of empathy or understanding. To work effectively, children may require additional support from a person with specific training to help them understand the proceedings and be understood and to provide emotional support.

4.5 Pre-trial measures

Children should only be sentenced to deprivation of their liberty as a measure of last resort.⁵⁴ Deprivation of liberty prior to trial must be avoided unless the child is considered

⁵⁴ Article 37, CRC and Rule 19 of the Beijing Rules.



a danger to the public and should not be used because there is a lack of suitable alternatives if they are deprived of parental care. The transitory nature of pre-trial detention and the uncertainty as to its length makes it difficult for the child to undertake any treatment or engage in vocational and educational activities in any structured or meaningful way. It also disrupts education, disconnects a child from support provided by their family and community and in many cases there is a lack of adequate facilities, food and sanitation. Children with impairments can be at heightened risk of victimisation and violence from other children as well as staff.

When a child remains in the community pending or during trial, he or she may be subject to certain conditions such as curfew or reporting to police stations at a specific time. Courts should ensure that children with impairments are able to understand, remember and comply with these conditions so they are not being 'set up to fail' and unintentionally do not meet the courts' requirements because they have not fully understood or remembered them. Where possible, courts should provide a child with support to remind them of their bail conditions and facilitate compliance.

4.6 Trial

All children have the right to participate in trial proceedings. The Committee on the Rights of the Child states that 'the right to be heard is fundamental for a fair trial.'⁵⁵ Justice proceedings 'should be conducted in an atmosphere of understanding to allow the child to participate and to express herself/himself freely.'⁵⁶ Furthermore, '[a] child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age,' and '[p]roceedings must be both accessible and child-appropriate.'⁵⁷

The CRC Committee has recommended that all justice processes in which children are expected to participate must be transparent, informative, voluntary, respectful, relevant, child-sensitive, supported by training, safe, sensitive to risk and accountable.⁵⁸ To put this in to practice, justice proceedings must be specifically adapted and a child must receive adequate information about the process, the choices they have and the possible consequences of these choices. Equally important is the right of the child to

⁵⁵ UN Committee on the Rights of the Child, *General Comment No. 10 (2007) Children's Rights in Juvenile Justice*, 25 April 2007 (CRC/C/GC/10), para 44.

⁵⁶ UN Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to Be Heard*, 1 July 2009 (CRC/C/GC/12), para 60.

⁵⁷ As above, para 34.

⁵⁸ As above, para.134.



remain silent and not to participate. Substantial room for discretion is left for States to determine how this right should be put into practice, however, the optimum means of ensuring compliance is to establish specialized courts which are staffed by appropriately trained professionals.

Trial proceedings are intimidating and complex even for adults. A child affected by neurodisabilities is likely to experience a trial as particularly frightening and hard to comprehend. There are a number of procedural safeguards and adaptations that need to be in place to protect children affected by neurodisabilities during trial proceedings:

- The child has the right to due and speedy process.⁵⁹ If there is a lengthy period between arrest and trial, then children can find it difficult to connect the offence to the sentence. If children are in pre-trial detention for long periods of time, then this can be very harmful to their rehabilitation and reintegration. Justice professionals should be proactive in avoiding undue delay and there should be a limit on how long a case can be interrupted for, to await a missing witness or evidence.
- Whilst children may be assessed by the court regarding their ability to give evidence in compliance with rules of evidence, they also need to be assessed regarding their communication or other needs and reasonable accommodations made to ensure their right to be heard and to participate.
- The child has the right to be informed and given advice throughout the justice proceedings, for example, about charges, the different procedural steps that will be taken, the judgment or outcome of a hearing and about the consequences of remaining silent or of confessing to an offence.⁶⁰
- The child has the right to have access to a specialised and trained lawyer to support and assist them: 'Legal aid provided to children should be prioritised, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.'⁶¹ Legal professionals are a core safeguard against injustice and can support children to navigate complex and intimidating judicial processes.

⁵⁹ Article 40 (2) of CRC

⁶⁰ Article 40 (2) of the CRC

⁶¹ Rule 15 of the Beijing Rules and Principle 11 of the UNODC, *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems*, (UN: New York, 2013).



- Parents or other support adults should be informed about when charges are brought and be able to accompany their children during court hearings.
- Justice professionals should explain their different roles and the layout of the court prior to any hearings.
- Proceedings should be conducted in a child-sensitive manner, for example, children should be able to understand the language used, court sessions should be adapted to an individual child's pace with regular breaks and the physical environment should be child-friendly.
- All justice professionals should be trained to communicate using clear and straightforward language.

The CRC recognizes the right of children to have their privacy respected at 'all stages of the proceedings.'⁶² The public identification of any child in conflict with the law can be extremely harmful. It can be particularly damaging for children who are additionally vulnerable because of impairments. Disclosure of their identity can put them at risk of stigmatization from their communities and jeopardise their future opportunities for rehabilitation and reintegration. It is also more likely to occur given that their personal and sensitive data is shared amongst different agencies more frequently than other children. Their personal data should only be shared in accordance with their best interests.

⁶² Article 40(2)(b)(vii) of the CRC.

The right to a fair trial

In 2005, the European Court of Human Rights (ECtHR) found a violation by the United Kingdom of Article 6 of the European Convention on Human Rights (concerning the right to fair trial). The case involved an eleven year old boy with a 'low intellectual age' who had been charged and tried with attempted robbery. The Court concluded he had had very little comprehension of the proceedings, or of the nature of the penalty he faced, and had not been capable of participating in his trial sufficiently to satisfy Article 6.

The Court held that where a child such as the applicant was tried in criminal proceedings 'it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours, and adapt its procedure accordingly.' It also recognized that the accused needs to have a broad understanding of the nature of the trial process and of what is at stake for him or her, including the significance of any penalty which may be imposed, in order for the individual to participate effectively in the proceedings.

In another case against the UK concerning two boys who were eleven years old at their trial for murder (*T v UK*), the ECtHR ruled that 'it is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.'

Source: *S.C. v. United Kingdom*, 2004-IV Eur. Ct. H.R. 281, 295 and *T. v. United Kingdom* (no.24724/94), 1999 Eur. Ct. H.R. at 29.

4.7 Sentencing

Any sentence given by a court to a child must be proportionate to the gravity of the offence, the circumstances of the child and the needs of society.⁶³ This implies that judges should take account of the relevance of an identified neurodisability to a child's offending behaviour, including the potential impact on the child of difficulties with reading, processing and memory, maturity of judgement, impulsivity and an understanding of the perspectives of others. Judges also need to be trained and

⁶³ Article 40 (4) of the CRC and Rule 17 of the Beijing Rules.



supported to understand the ways in which neurodisability might affect a child's capacity to engage in justice processes, and the appropriateness of particular sentences and interventions.

Social inquiry reports are often used to assist the court in determining the most appropriate sentence after conviction. They can also be used at other stages of the justice process such as when making a decision regarding pre-trial detention or diversion and when planning and preparing for rehabilitation and reintegration measures after conviction. Social inquiry reports should be conducted by properly trained professionals in a safe environment; practice varies but often they are researched and written by probation officers or social workers. The child's right to privacy must be protected throughout the assessment process to protect him or her from further stigmatization and discrimination stemming from their disability.

Social inquiry reports should contain relevant information related to the family background of the child, the child's current circumstances, including where he or she is living and with whom, the child's educational background and health status, and previous offences, as well as the circumstances surrounding the commission of the offence and the likely impact of any sentence on the child. For children affected by neurodisabilities, social inquiry reports should address the following issues:

- Culpability: how does their disability impact upon their responsibility for their offending behaviour?
- Risk: does their disability make further offending more likely? Does it increase any risk to self or others? What can be done to minimise any risk identified?
- Feasibility: does the nature of the disability make it unlikely that the child would be able to comply with the requirements of a community-based sentence? What would be the implications of a custodial sentence?
- Supervision: what therapeutic interventions could be available as part of a community-based sentence? Can this be supervised effectively?

When a neurodisability is suspected or identified by a judge or lawyer, where possible, they should request additional expert opinions to gather more information including from psychologists, psychiatrists, neurologists, etc.



Any sentence must promote the rehabilitation and reintegration of the child so that they can be held accountable and take up a constructive role in society. A wide range of flexible community-based sanctions should be available to courts that can be tailored as appropriate for children affected by neurodisabilities. These can help to reduce the risk of re-offending by providing greater opportunities for a child's rehabilitation and reintegration than a sentence of detention. A community-based sentence also has the advantage of not damaging the positive and constructive aspects of a child's life such as their relationships with family and friends and access to education and vocational training.

Community-based sanctions may need to be adapted for children with impairments. Many rehabilitation programmes require high levels of verbal and cognitive competence, for example, group programmes or therapy. These may be inappropriate for children with communication difficulties who are unlikely to complete the programmes and therefore 'fail' to comply with the conditions of their sentence. Furthermore children with impairments may struggle to attend interventions on a regular and timely basis. To support them, supervisors can put in place strategies such as reminding parents or carers to encourage their child to attend and participate and having frequent supervision.

For children affected by neurodisability, being deprived of their liberty can be psychologically and physically harmful. The Beijing Rules state that:

- Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;⁶⁴
- Deprivation of personal liberty shall not be imposed unless the child is convicted of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.⁶⁵

International human rights standards also universally condemn life imprisonment without parole for children⁶⁶ and the UN Human Rights Council has called on States repeatedly to prohibit all forms of life imprisonment of children in law and practice.⁶⁷

⁶⁴ Rule 17.1(b) Beijing Rules.

⁶⁵ Rule 17.1(c) Beijing Rules.

⁶⁶ Article 37(a) of the CRC.

⁶⁷ UN Human Rights Council, *Human rights in the administration of justice, including juvenile justice*, 29 September 2015, A/HRC/30/L.16, para. 24.

Sentencing Guidelines in England and Wales

When sentencing children in England and Wales, a court must have regard to the principal aim of the youth justice system which is to prevent offending by children and young people) and must also have regard to the welfare of the child or young person. The Sentencing Guidelines state that when considering the welfare of the child, courts should be 'alert' to any neurodisabilities: "1.11 The statutory obligation to have regard to the welfare of a child or young person includes the obligation to secure proper provision for education and training, to remove the child or young person from undesirable surroundings where appropriate and the need to choose the best option for the child or young person taking account of the circumstances of the offence.

1.12 In having regard to the welfare of the child or young person, a court should ensure that it is alert to:

- any mental health problems or learning difficulties/disabilities;
- any experiences of brain injury or traumatic life experience (including exposure to drug and alcohol abuse) and the developmental impact this may have had;
- any speech and language difficulties and the effect this may have on the ability of the child or young person (or any accompanying adult) to communicate with the court, to understand the sanction imposed or to fulfil the obligations resulting from that sanction;
- the vulnerability of children and young people to self-harm, particularly within a custodial environment; and
- the effect on children and young people of experiences of loss and neglect and/or abuse."

Source: Sentencing Council. Sentencing children and young people overarching principles and offence specific guidelines for sexual offences and robbery. Definitive guideline. 2017. <https://www.sentencingcouncil.org.uk/mcsg-updates/item/definitive-guidelines-on-sentencing-children-and-young-people-and-reduction-in-sentence-for-a-guilty-plea-published/>.



4.8 Rehabilitation and reintegration when deprived of liberty

For any child, detention can be an overwhelming experience that exacerbates existing problems and anxieties and children who have neurodisabilities and are deprived of their liberty are extremely vulnerable. When children are placed at long distances from their families, friends and carers, in institutions that are unfamiliar and intimidating, it is easy to see how the problems that may have led the child to offend can be intensified. It can be very difficult for them to access the services they require. Children with impairments can be at particular risk of violence and exploitation from their peers if they are socially isolated and marginalised and their behaviour is misinterpreted as confrontational. Furthermore, in many jurisdictions the main focus and intent of detention regimes is on the punishment of children rather than their rehabilitation. This is frequently the shared understanding, whether explicit or implicit, amongst staff working in facilities, the general public, justice systems, the media and governments. This can create a climate where harsh disciplinary sanctions become an integral part of this ongoing punishment.

Once in detention, children have exactly the same rights as their peers in the community including the right to education, to participation, to non-discrimination and to life, survival and development. Where children are deprived of their liberty, the main objective should be to provide care, protection, education and vocational skills, with a view to assisting the children to assume socially constructive and productive roles in society.⁶⁸ The following safeguards are highlighted as of critical importance.

- **Staff training and awareness of neurodisabilities**

Working with children in detention demands a specific set of capacities and skills not least because staff must be able to both maintain safety and order and support children to mature and develop and ultimately reintegrate back into their communities. The Havana Rules state that staff should include only those qualified to work with children. The makeup of the staff should be multi-disciplinary and include a sufficient number of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists.⁶⁹ Staff should be well remunerated, trained and given help with dealing with the challenges they face in their daily work.

⁶⁸ Beijing Rules, Rule 13

⁶⁹ Havana Rules, Rule 82



They also need to be educated about the impact of neuro-developmental disorders, how to identify them, pathways for referral (if any) and management strategies for supporting these children. Management strategies can be as straightforward as being aware of the need to communicate clearly and to provide information in small chunks in order to facilitate understanding. They can also include the use of assistive technologies such as task lists, picture schedules for a child's day or picture-based instructions and timers or manual or automatic reminders.

- **Ongoing health assessment**

All children deprived of their liberty have the right to the highest attainable standard of mental health. Children's mental health should be assessed when they arrive in a facility, and on an on-going basis as it is likely that detention may exacerbate existing conditions or induce new ones. By the time a child arrives at a detention facility, it is possible that they will have been assessed for neurodisabilities by the police or court. They may also have had previous contact with health services outside. If so it is important that this information is obtained by the detention authorities and informs the initial assessment of a child's mental health.

Assessment should be a dynamic process, with re-assessments taking place at regular intervals during the sentence as well as following any changes in circumstances. Details of any adjustments or supports which would enable the child to interact or communicate effectively with others or to participate in leisure or education activities should therefore be updated regularly. The Havana Rules state that any medical officer who has reason to believe that the physical or mental health of a juvenile has been or will be negatively affected by continued detention or any specific condition of detention, should report this fact immediately to the director of the detention facility and to the independent authority responsible for safeguarding the well-being of the juvenile.⁷⁰

- **Sentence planning**

A written, individualized and comprehensive treatment plan for their time in pre-trial detention or sentence should be developed that focusses on the child's rehabilitation

⁷⁰ Havana Rules, Rules 49, 51, 53



and ultimate reintegration into the community as its overall goal. The plan should set out a child's needs, the risk of re-offending, risks to the child and set out the interventions that are required and will be followed through after leaving the detention facility. For example, this might include planning daily activities to help a child cope with uncertainty and lack of routine.

- **Protection from violence**

It is very important that detention facilities are safe and secure places where children can be successfully engaged in education and rehabilitative activities. Article 19 of the CRC requires States to *'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence...'* Article 15 of the CRPD reinforces the right of persons with disability to freedom from torture or cruel, inhuman or degrading treatment or punishment. Violence against children with neurodisabilities can take different forms including abuse, neglect and physical and sexual violence. It often occurs behind closed doors and victims have limited access to report it.

Children affected by neurodisabilities may be at particular risk of being subject to punishments as a consequence of confrontational behaviour because they have failed to follow orders they have not understood. The Havana Rules provide that *'[a]ny disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person.'*⁷¹ This implies that disciplinary measures should not just be for punishment or for the maintenance of order and safety but should also have an educative purpose.⁷² The UN Model Strategies to eliminate violence against children within the criminal justice system also call for states *'to adopt clear and transparent disciplinary policies and procedures that encourage the use of positive and educational forms of discipline.'*⁷³

⁷¹ Havana Rules, Rule 66

⁷² Liefwaard, T, *Deprivation of liberty of children in the Netherlands*, (2008), Section Four

⁷³ UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice A/C.3/69/L.5, September 2014, Para 39



Disciplinary procedures for children in detention must be fairly, transparently and proportionately applied with adequate accountability in place for when it goes wrong. Staff

should be given training in behaviour management techniques that focus on de-escalating potentially violent situations. Where staff have a degree of discretion when responding to children's behaviour, then this use of discretion must be carefully monitored to avoid a separate and informal system of punishments which bypasses official procedures to be in place.

They should be trained on how to respond to children who have been identified as having neurodisabilities and encouraged to work towards their rehabilitation in every interaction. They should be aware that with such high levels of trauma in their backgrounds, common practices such as using handcuffs, searches, or locking children in their cells can bring back traumatic feelings and trigger post-traumatic stress symptoms.

Certain disciplinary procedures such as corporal punishment or the use of solitary confinement is strictly prohibited. The UN Special Rapporteur on Torture has concluded that the use of solitary confinement can amount to torture or cruel, inhuman or degrading treatment or punishment when used as a punishment, during pre-trial detention, indefinitely or for a prolonged period, for persons with mental disabilities or juveniles.⁷⁴ The use of isolation and segregation can also exacerbate mental ill-health and cause significant psychological harm.

Children should have the opportunity to submit complaints regarding any issue but including the use of disciplinary measures to the director of the detention centre, the central administration, judicial authority or other independent authority overseeing the facility or to an outside body such as the public prosecutor or defender or an Ombudsperson. The complaints procedure must be accessible, safe, effective and appropriate for a child in view of their impairments. Measures must be in place to protect children from reprisals arising from making a complaint. Independent monitoring bodies must closely scrutinise the use of disciplinary measures - both informal and formal - as part of the inspection process.

⁷⁴ UN General Assembly, *Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment*, 5 August 2011, A/66/268, para 81.



Staff should be obliged to report any concerns, suspicions or disclosures of ill-treatment of children to the appropriate authorities whether in the context of disciplinary measures or otherwise. Any allegation of violence, abuse, neglect or exploitation or violation of a staff code of conduct should be investigated and responded to in a timely and appropriate manner. Violence against children should be treated as serious misconduct and grounds for dismissal.

- **Reintegration**

Reintegration services in many countries do not function effectively; there is insufficient coordination and children 'fall through the cracks' at this important stage of transition. The Havana Rules stipulate that all children should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release. Children affected by neurodisabilities who are being released from detention and those who are finishing community-based sentences will need help with practical issues such as housing, employment, training, continuity in health care and education. They will also need help to develop skills, abilities and strategies which can help them through their personal, social and psychological vulnerabilities.

Link-worker pilot in detention facilities in England

A brain injury link worker scheme was set up in 2013 in a young offender institute (for boys aged 15-18 years old). Children were referred to the link worker scheme following an initial assessment on arrival at the facility or by professionals working with them in the facility. The child was then assessed by the link worker team looking closely at their ability to engage with daily living activities, health needs, self-management e.g. medication, potential safety and risk issues. This would highlight for example the need for physical assistance or adaptation, and also the need to be placed in a safe environment such as the healthcare wing due to vulnerability. A range of supportive interventions were provided according to the child's needs. These included:

- Education for the child about their brain injury and its effects, cognitive strategies involving functional intervention aids (e.g. a diary to aid memory, attention and thought records). Behavioural management plans and guidelines were developed with the child's involvement, which sometimes involved drawing up contracts with the child themselves.
- Support was provided in the form of psychological approaches to emotional regulation (e.g. mindfulness exercises, relaxation, increased awareness and the identification of triggers for anger).
- Support was also provided for education (e.g. a review of learning strategies with the child through problem solving difficulties encountered in a classroom setting). All the plans were reviewed in accordance with goal attainment and, where appropriate, this became part of their custodial sentence plan.
- One-to-one support was provided to help the young person engage in, prepare for and attend professional meetings and court appearances.
- Where needed the linkwork provided information and support referrals for further assessment or treatment e.g. neurology and physiotherapy.
- When the child was near to release from detention, the link worker team provided the child with support with problem-solving such as reducing re-offending, setting goals and how to achieve them on release. They also shared information with community support such as health care and probation services to ensure continual support on release. They worked closely to ensure that education, employment and housing were in place as required.
- On release, they worked on strategies and a plan to address and support any underlying TBI related needs, to help the child organise and attend relevant appointments in the community, re-engage with education and training, as well as signposting to community services for additional support.

The link worker team also worked with staff in the facility to deliver training and advice on specific issues relating to the impact of the TBI. This included how to develop behavioural intervention plans, general advice about how to engage and support children and ensuring the child's education was adapted to account for the difficulties associated with their brain injury (e.g. regular breaks, re-wording of questions).

A preliminary evaluation of this pilot found that the outcomes were promising and concluded that "early coordinated care is essential in meeting the complex needs of this group of young people, highlighting the important role of a multi-agency public health strategy with cross-departmental government support and assigned resources."

Source: Barrow Cadbury Trust (2016) Young people with Traumatic Brain Injury in custody: An evaluation of a Linkworker Service for Barrow Cadbury Trust and The Disabilities Trust.



5. Conclusions

Children who are affected by neurodisability are overrepresented in criminal justice systems across the world. But their specific needs are rarely recognised, understood or accommodated and they are confronted by many barriers to realisation of their rights under the CRC and the CRPD. The impact of these barriers is that the child is denied access to justice on an equal basis with other children because the system has failed to adequately identify and accommodate their differences. Dismantling these barriers requires recognition, understanding, resources and awareness. The right to non-discrimination is not synonymous with equal treatment for everyone. Special measures or reasonable accommodations are needed to ensure that children affected by impairments have their rights respected, protected and fulfilled in criminal proceedings, on an equal basis to children without such impairments.

To achieve this, law, policy and practice must be in place to guarantee that:

- Children in conflict with the law are screened for the presence of neurodisability.
- Justice professionals are supported to identify prominent disorders and to understand how they might affect a child's behaviour and engagement with the justice system.
- The adaptations that children need are identified at different stages of justice proceedings, for example, one to one mentoring to prepare for court hearings and targeted support with behaviour management in detention.
- Justice professionals are trained so they can communicate appropriately - for example, by speaking slowly and carefully, using simple, everyday language, avoiding technical terms or abstract concepts, giving sufficient time for processing a question and by using visual aids.
- Judicial officers responsible for sentencing take account of the relevance of neurodisability to offending behaviour, including the potential impact on the child of difficulties with reading, processing and memory, maturity of judgement, impulsivity and an understanding of the perspectives of others.
- The use of diversion and rehabilitation measures that include therapeutic treatments are prioritised.



- All children with neurodisabilities are provided with legal assistance and support when they are in conflict with the law.
- Justice responses are multi-disciplinary and multi-sectoral and include law enforcement officials, prosecutors, judges, social workers, probation services, civil society organisations, child protection and health and education workers working in close collaboration.

Above all, there is a need for greater visibility. A critical and much needed first step for governments and others is to gather information and data to identify and understand the experiences of these children – without this, the nature and extent of the justice barriers in place will continue to remain hidden from view.

Annexes

Terminology

Child: any person below the age of eighteen years.

Source: *UN Convention on the Rights of the Child, Article 1*

Child-friendly justice: “refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level.... It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.”

Source: *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010), II c*

Child in conflict with the law: “a child alleged to have, or accused of, or recognized as having infringed the criminal law after attaining the age of criminal responsibility and before the age of 18.”

Source: *Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary, UNODC (2013)*



Deprivation of liberty: “any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.”

Source: *UN Rules for the Protection of Juveniles Deprived of their Liberty (the Havana Rules)*, adopted by the General Assembly on 14 December 1990, Rule 11 (b)

Diversion: “the conditional channelling of children in conflict with the law away from judicial proceedings through the development and implementation of procedures, structures and programmes that enable many - possibly most - to be dealt with by non-judicial bodies, thereby avoiding the negative effects of formal judicial proceedings and a criminal record.”

Source: *Toolkit on Diversion and Alternatives to Detention, UNICEF (2010)*

Justice professional: For the purposes of this Working Paper, this term refers to judges, prosecutors, court staff, lawyers, paralegals, law enforcement officials, social welfare authorities working within justice systems, monitoring bodies, NGOs and detention facility employees.

Neurodisability: “Childhood neurodisability occurs when there is a compromise of the central or peripheral nervous systems due to genetic, pre-birth or birth trauma, and/or injury or illness in childhood. This definition includes a wide range of specific neurodevelopmental disorders or conditions, with common symptoms including: muscle weakness, communication difficulties, cognitive delays, specific learning difficulties, emotional and behavioural problems and a lack of inhibition regarding inappropriate behaviour.”

Source: *British Psychological Society “Position Paper Children and Young People with Neurodisabilities in the Criminal Justice System” (March 2015), p.7*

Reasonable accommodation: “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

Source: *UN Convention on the Rights of Persons with Disabilities, Article 2*

Restorative justice/ process: “any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles.”

Source: *UN Basic Principles on the use of restorative justice programmes in criminal matters (2000)*

Secondary victimisation: “victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.”



Source: *Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary*, UNODC (2009)

Further Reading

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