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The Experiences of Justice-Involved Neurodiverse Children in England and Wales: How Can We Close the Rights Gap?

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Abstract

Children with special educational needs and disabilities (SEND) and those defined as 'neurodiverse' are significantly over-represented in the English and Welsh youth (juvenile) justice system (YJS). Evidence points to a number of significant challenges in neurodiverse children's lives before entering the justice system that increase the likelihood of criminalisation. Then, once in the youth justice system, they encounter further challenges that are both harmful and arguably inconsistent with their human rights. This paper discusses research showing that neurodiverse children often have their rights compromised both prior to and throughout their involvement with the youth justice system. The concluding section of the paper will focus on best practices and recent developments in England and Wales that seek to close the rights gap for this group of children. It is hoped that, by considering both the advances and challenges in England and Wales, the paper will provide a useful case study for international jurisdictions seeking to close this gap for neurodiverse children in youth justice systems.

Keywords: neurodiversity; juvenile justice; youth justice; neurodivergence; human rights; children's rights; justice-experienced children; criminal justice

1. Introduction

A range of international and national protections exist for children, including the right to non-discrimination for people with disabilities [1,2], the right to an inclusive education [3], and the right to a fair trial [3,4], which includes being able to 'participate effectively in a criminal trial' [5]. However, there is emerging evidence of the over-representation of neurodiverse children in youth justice systems internationally. For example, a review of 25 studies of children in custody found an ADHD (attention deficit hyperactivity disorder) rate of 12% amongst boys and 19% amongst girls [6]; an Australian study found that 48% of children in their sample of justice-involved children subjected to child protection procedures had a neurodisability [7]; and in the USA a national survey found that 33% of children in custody had a disability, half of whom had a neurodisability [8].

The UK Department for Education recently found that 80% of children in the English and Welsh youth justice system (YJS) had special educational needs and/ or disabilities (SEND) [9]. Although we do not have data on the proportion of this group that is neurodiverse, it is estimated that it is likely to be significant, given that high levels of neurodiversity have been found amongst justice-experienced children (e.g., [10]). For example, it has been found that 90% of incarcerated children had a communication disorder [11]. An international meta-analysis found that the rate of people with ADHD in the prison population is five to ten times higher than in the general population [12].

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Neurodiverse, justice-experienced children and young people in England and Wales also have a range of co-morbid challenges including mental ill health, intellectual disabilities, substance use and complex support needs [13]. According to the Department for Education [14], children in England and Wales with special educational needs and disabilities (SEND) who have an education, health and care (EHC) plan are almost three times more likely to be permanently excluded than children without identified SEND. Exclusion from school heightens children's risk of entering the youth justice system, creating a school-to-prison pipeline effect [10]. Research shows the school-to-prison pipeline disproportionately affects neurodiverse children, with school exclusion often acting as a mechanism for their criminalisation [15].

Such concerns prompted UK charity, The National Autistic Society (NAS), to review autistic children's experiences in the YJS [16]. They found that concerns emerged between aged 13–15 amongst autistic children regarding involvement in offending. This was due to several factors, including being easily led or influenced by others, violence and/or aggression towards others, damaging property and being excluded from school. The NAS found that these challenging behaviours were the result of not receiving appropriate support or getting a timely diagnosis prior to their involvement in the justice system. They also found that education and health systems were not equipped to meet the needs of autistic young people. Equally, they found that the English and Welsh YJS was not equipped to meet the needs of autistic children and young people, with information on diagnosis not shared, no adaptations made, and a lack of awareness from professionals across the YJS. They concluded that the impact on young people and their families as a result of their involvement in the YJS was 'devastating'. Further, the UN Committee on the Rights of the Child [17] stated that children who have developmental delays or neurodevelopmental disorders or disabilities—including autism spectrum disorder, foetal alcohol spectrum disorder, or acquired brain injury—should not be placed in the child justice system, even if they meet the minimum age of criminal responsibility. They added that if children are not automatically excluded, they should be assessed on an individual basis.

Considering the significant over-representation of neurodiverse children in the youth justice system, the harmful effects of the system on their wellbeing, and concerns that children with a neuro-disability should not be in the youth justice system at all, we still know very little about the extent to which neurodiverse children's experiences before and during their involvement with the youth justice system may undermine their fundamental rights and protections. This paper seeks to explore this deficit by considering the extent to which neurodiverse children's basic rights are being compromised and discusses ways to reduce the rights gap for neurodiverse children in justice systems worldwide.

1.1. Setting the Context

1.1.1. What Do We Mean by Neurodiversity?

'Neurodiversity' is a general umbrella term that first appeared in the literature some 30 years ago and focused on a celebration of all neurological differences amongst individuals [18]. Neurodiversity encompasses a range of conditions, including ADHD (attention deficit hyperactivity disorder), ASD (autistic spectrum disorder), FASD (foetal alcohol spectrum disorder), DLD (developmental language disorder), Dyspraxia, Dyslexia, and communication difficulties [19], and some of these conditions overlap or co-occur. However, despite this, a diagnosis usually only exists for one condition. Neurodiverse conditions have been under-diagnosed in England and Wales due to long waiting lists and the complexities associated with overlapping conditions [20]. However, certainly within the English and Welsh context, care must be taken not to rely solely on a diagnosis of a condition before a child's needs can be recognised, due to the lengthy waiting lists for assessment

and high thresholds for diagnosis [19]. It is also questionable as to whether one should rely on medical models for diagnosis that focus on a person's individual 'deficits' and ignore the wider systems around children (especially those in the YJS) that can disable and exclude [10]. However, for the purposes of this paper, it is important to note that the definitions of disability contained within rights-based instruments tend to have a higher threshold than the umbrella term of neurodiversity (as an identity descriptor) and typically encapsulate a neurodiverse condition that may restrict or impair a child's ability to actively participate in justice proceedings [21], as outlined in General Comment 24 (above).

1.1.2. The Youth Justice System (YJS) in England and Wales

The Youth Justice System in England and Wales oversees all children aged 10–17 who are accused of a criminal offence and includes a range of different agencies. In England and Wales, the age of criminal responsibility is 10. Despite strong evidence and calls from experts and the UN to raise it to 14 (e.g., [22]), government policy remains unchanged, mainly due to concerns about media backlash.

Typically, upon suspicion of a criminal act, the police arrest, question and either charge or release a child. The police are divided into 43 geographical areas across England and Wales. Both legislation (The Police and Criminal Evidence Act 1984) and its accompanying Codes of Practice outline how children should be policed in England and Wales. After a child has been arrested and charged, they are typically sent to the Youth Court to appear before 2–3 specially trained Lay Magistrates. The Youth Courts deal with criminal cases committed by children aged 10–17. They make decisions about whether a child is released on bail or remanded in custody, determine guilt and sentencing outcomes, and ultimately whether a child will be labelled as a criminal for the rest of their lives. Children in the justice system in England and Wales invariably commit minor offences, with the majority of offences falling into the minor assault category, driving offences, shop theft and criminal damage [23]. Most offences are heard in the Youth Court, but serious (indictable) offences are heard in the adult-based Crown Court in front of a judge and jury. When a child is sentenced, they can receive a community sentence and are supervised by a local Youth Justice team made up of social workers, probation staff, teachers, health workers, and police officers. If sentenced to custody, children are placed in one of three settings: Secure Children's Homes (ages 10–17), Secure Training Centres (ages 12–17), or Young Offender Institutions (boys aged 15–18). Since 2008, the number of children entering the youth justice system has decreased by over 80%. Those who still enter the system are typically among the most vulnerable; many come from ethnically diverse backgrounds, have experience in care, and/or are neurodiverse [23].

1.1.3. Protections in National Legislation and International Human Rights Instruments

A range of international instruments exist to protect a plethora of rights for children. The main children's rights instrument is the United Nations Convention on the Rights of the Child (UNCRC) [3], which was drafted in 1989 and remains the most ratified human rights treaty in the world, with 196 countries ratifying it, including the United Kingdom in 1991. It is worth noting that the USA remains one of the only countries that has not signed this treaty. The UNCRC is a legally binding treaty and covers a range of general protections for children, but for the purposes of this paper, Article 2 covers the right to non-discrimination; Article 3 states that the best interests of the child should be a top priority in all decisions and actions that affect children; Article 12 covers the right for the child to be heard and have their views taken into account in all matters that affect them; Articles 28 covers the right to an education; Article 37 states that children should not be subjected to inhumane treatment and detention, and that detention should only be used as

a last resort; and finally Article 40 protects children in the YJS by giving them the right to a fair trial and to be treated with dignity and respect. The UN Committee on the Rights of the Child has made it clear that all articles apply equally to children with disabilities [24].

Article 6 of the ECHR [4] also provides the right to a fair trial, which includes 'participat[ing} effectively in a criminal trial' [5]. However, scholars have commented that the meaning of 'effective participation' is unclear [25], meaning that it is difficult to both define and protect this right for children within the court system [25,26]. The Convention on the Rights of Persons with Disabilities [1] involves a right to equality and non-discrimination under Article 5 and the right to an inclusive education under Article 24. Sheehan et al. [27] note that 'Together these international standards recognise that all children are an inherently vulnerable group in the context of justice proceedings'.

The national legislative and policy framework in England and Wales provides a variety of protections. Notably, the Equality Act 2010 [2] safeguards individuals from discrimination on the basis of disability, explicitly encompassing 'hidden disabilities' such as those experienced by neurodiverse children and adults. Within the same legislation, there is a 'public sector equality duty' on public authorities (including the youth justice and education systems) to consider how their policies or decisions affect people who are protected under The Equality Act [2]. England and Wales have also produced a set of Sentencing Council guidelines to assist sentencers within court. The guidelines require courts to consider any speech and language difficulties when sentencing children, as these may affect their ability to communicate with the court and understand the sanctions. ZA v R [28] reaffirmed that reasons for sentencing must be explained to children in clear, understandable language. This context is important to understand the frameworks to protect neurodiverse children in the YJS and the extent to which the responses of the YJS fall short of these rights-based frameworks.

2. Methods

This paper draws upon the findings of two qualitative studies. The first examined the pathways leading children into custody, while the second explored the impact of family support services on children identified as 'at risk' of permanent school exclusion, as well as their families. Both studies employed one-to-one semi-structured interviews as the primary data collection method. Some neurodiverse children and families in each study faced specific harms that potentially infringed their rights. This paper examines these experiences and considers whether their rights were compromised.

In Study 1, 48 children were in custody at the time of their interviews. Analysis of these interviews in Table 1 revealed that 19 children self-reported having been diagnosed with, or believed themselves to have, a neurodiverse condition or special educational need. Among these nineteen participants:

Table 1. Demographics of Children (Study One).

Characteristic	Details
Gender	All boys (1 aged 15, 4 aged 16, 12 aged 17, 2 aged 18)
Ethnicity	Thirteen White British, two Mixed White and Black British, three Mixed Asian and White British, one Asian British
Offence Types	Burglary, robbery, violence, sexual offences, manslaughter
Interview Setting	Six interviewed in the community within three months of release, thirteen interviewed whilst in custody

For Study 2, interviews were conducted with five families, each involving at least one parent or carer and the child identified as 'at risk' of exclusion. All children had identified SEND and/or neurodiverse conditions. Each family was identified as White British, and all children were boys aged either 11 or 12.

Prior to commencing research, ethical approval was obtained from the relevant universities (Bedfordshire University for Study 1 and Keele University for Study 2). Children were identified and approached by their youth justice worker, both in custody and in the community, who explained the study verbally and sought informed consent. The researcher liaised with youth justice workers regarding each participant's learning and communication needs to ensure interview methods were appropriately adapted.

Immediately before each interview, ongoing consent was confirmed, and participants were reminded that participation was entirely voluntary, particularly given the power dynamics inherent in criminal justice-based qualitative research [29]. It was emphasised to both children and families that the interviews were not a requirement of sentencing and withdrawal was possible at any time without consequence. Interviews followed a schedule incorporating prompts and probes, encouraging a conversational flow largely directed by the interviewee, aligning with Burgess' [30] concept of a 'conversation with a purpose' rather than a rigid question-and-answer format. All interviews were audio recorded and deleted immediately after transcription; anonymisation occurred at transcription.

Thematic analysis methods [31] were used to identify, analyse, and discuss recurring patterns emerging from the data, with coding and organisation facilitated by NVivo software (version 15). Applying an inductive approach, several core themes were identified from both studies. In preparation for this paper, the author identified all relevant international and national conventions and analysed the data from both studies in relation to the human rights legislative frameworks outlined above. This methodology acknowledges that data arises from the dynamic interaction between interviewer and interviewee [32], recognising that factors such as interview context and relationships may influence outcomes. Pseudonyms were assigned to all participants[1].

3. Findings and Discussion

This paper investigates the extent to which neurodiverse children's experiences—both prior to and during their involvement in the youth justice system—may undermine their human rights. Furthermore, it evaluates potential strategies for addressing the existing rights gap. Accordingly, this section is structured based on some of the fundamental rights outlined above and in international instruments, with empirical evidence presented and analysed for each individual right.

3.1. The Right to Non-Discrimination (Article 2 UNCRC, Article 5 CRPD, the Equality Act 2010 [2])

Article 2 prohibits discrimination against children enjoying their rights on all grounds, including disability. It allows for appropriate measures to be made to ensure children with disabilities can enjoy all rights contained within the Convention. However, despite this important standard, children with SEND and neurodiverse children remain significantly over-represented in school exclusions and youth justice systems both in the UK and globally. As noted above, 80% percent of children in the English and Welsh YJS have SEND [9], making them the most over-represented group in this cohort. The over-representation of neurodiverse children in youth justice systems remains a global challenge, with researchers estimating that around 50% of children in youth justice systems are neurodiverse [33].

Neurodiverse children and those with SEND have long faced disproportionate exclusion from mainstream education [34]. For example, neurodiverse children in Finland

are more likely to be excluded from education without receiving appropriate support [35]; disabled children were 50% less likely to enrol in education in some African countries [36], and in the USA, children with ADHD or an emotionally based disability had the highest likelihood of school exclusion [37]. In Study 1, 19 out of 48 incarcerated boys were neurodiverse, and in Study 2, 60% of the children referred to the Family Support Project had been identified as 'at risk' of youth justice involvement and school exclusion.

There is significant international evidence that certain groups of children (including neurodiverse children) are over-represented within youth justice systems. Kilkelly et al. [24] (p. 49) note that this is 'a situation at odds with the general principle of the CRC that children are entitled to enjoy their rights—including prevention from contact with the justice system—without discrimination'.

3.2. The Right to an Inclusive Education (Articles 28 UNCRC and Article 24 CRPD)[2]

Article 28 states that all children have a right to an education that is 'available and accessible'. Article 24 of the CRPD specifically recognises the right of children and adults with a disability to have an education that is inclusive, providing for reasonable accommodations and support to allow them to reach their full potential. In England and Wales, neurodiverse children face several challenges. They may experience extended periods of disengagement or absence from school and often struggle to understand classroom behavioural expectations, such as verbal instructions and rules [11]. When these difficulties are misunderstood by teachers as 'bad' or 'disruptive' behaviour, rather than signs that a child is having trouble coping in the school environment, neurodiverse students can end up being unfairly excluded from school [11,38]. Recent discussions have highlighted the negative effects of schools enforcing and punishing minor rule breaches, with evidence suggesting that strict disciplinary policies may disproportionately harm children with SEND and other neurodiverse students [38]. Eddie (Study 1) was in custody when interviewed and discussed being labelled as a 'problem child' and 'class clown'. He had undiagnosed ADHD at the time, and gave an example of the types of behaviours that caused him to be repeatedly excluded, until he disengaged from education altogether:

> *Int: How did you find being in the school environment? Did you feel like it was...? What kinds of things were you getting in trouble for?*
>
> *Eddie: Fighting, I had a stink bomb and chucked it into this corridor and all the pupils ran out of the classroom. It was funny, but...*

Similarly, Paul discussed his 'mega-strict' school that used punitive sanctions as the only means to manage, often minor, challenging behaviours. Paul explained why he stopped altogether at age 13:

> *Paul: Everyone was taking the piss out of me, because they were excluding me, and then it were like the six weeks holidays, and then they were putting me back in isolation until the holidays again.*

Neurodiverse children are disproportionately subjected to 'hidden exclusions' in England and Wales. This practice, also known as 'off-rolling' is widely reported by parents of neurodiverse children as a means of removing them from the school register by placing children in alternative provision or 'encouraging' parents to home educate, has significantly increased in recent years [39,40]. It has been found that this practice of 'invisibilising' neurodiverse children from support services is not only harmful but can be extremely disruptive and can exacerbate already challenging behaviours [38]. Tom discussed being placed in an alternative education provision after displaying challenging behaviours in school. When he stopped attending the alternative provision at age 13, he stated that 'no-one' contacted him to try and find a suitable education placement:

Int: Where did they send you when you got kicked out? Did they try and send you anywhere else?

Tom: They sent me to a PRU (Pupil Referral Unit—alternative provision) but it was pointless because it was a month or a few weeks before the six week holidays and I attended, went for the few weeks, after that no one got back to me about school/PRU/education nothing.

Int: No one offered you a place anywhere or tried to put you anywhere? So, what did you do?

Tom: Started selling drugs.

The COVID pandemic further intensified existing challenges, as multiple studies indicate that neurodiverse children have faced ongoing difficulties in returning to school [41]. This issue has had a particularly pronounced effect on neurodiverse students, with 30% of autistic children in the UK classified as persistent absentees [42].

Extensive evidence shows that the UK is not fully meeting its responsibility to provide neurodiverse children with accessible, available and inclusive education. It is often not until the child has been permanently excluded from school and involved in the justice system that they finally have their needs identified and met. Parents in Study 2 reported feeling guilty that a criminal conviction was needed for their child's educational needs to be addressed, despite expressing relief at their needs finally being met.

There is an apparent paradox here in that the right to an inclusive education is only achieved for neurodiverse children once they have been excluded, disabled and labelled by the education systems. The narrow focus of the English and Welsh education systems on behaviour and attendance management appears to be undermining the right to an inclusive education for neurodiverse children.

3.3. The Right to Not Be Subject to Inhumane Treatment and Detention, and That Detention Should Only Be Used as a Last Resort (Article 37 UNCRC)

The Havana Rules[3] state that forceful restraint against children in custody should be prohibited, save for limited circumstances, and should not involve inhuman or degrading treatment. If restraint is used, it should be for the shortest period of time possible. The UN outlines that 'inhumane and degrading treatment' includes physical harm and solitary confinement or any other punishment that could compromise the child's physical or mental health [24] (p. 22).

Despite this, multiple studies have shown that all children's experiences in custody are harmful and constitute 'institutionalised abuse' [43]. The 'pains' of custody [43] experienced by all children are felt much more acutely by neurodiverse children and adults. The environment has been found to be overwhelming for both neurodiverse adults and children with the bright lights, loud and echoey wings, sharing confined cells with strangers, and often unannounced changes to the regime [44]. There is also evidence that neurodiverse prisoners are subjected to higher levels of physical restraint and bullying [20,45–48], often impacting their mental health, with high levels of anxiety reported amongst both adult and child prisoners. Such challenges often lead to triggering behaviours as communications of distress, and evidence has suggested that the prison environment is particularly harmful for both children and adults with ADHD [48] and ASD [20]. Such triggering behaviours would then lead to higher levels of punishment, physical restraint, and isolation for up to 23 h per day. Gormley [45] (p. 6) has conceptualised such challenges as the 'hidden harms' experienced by disabled people in custody. Joel, who had been diagnosed with ADHD, described how he had spent most of his time in custody on 'Basic' for fighting with other young people:

Int: What were you on, basic?

Joel: Basic for my full sentence.

Int: Why were you on basic?

Joel: Fighting all the time.

He went on to explain why he had to fight in custody:

Joel: Because if you don't, then that's how you just get made into a victim, if you show that you're not willing to stand up for yourself, then everyone's gonna think you're an idiot aren't they?

The English and Welsh Youth Justice system permits the use of 'pain inducing restraint' in 'emergencies', where there is a risk to the child, other children, staff, or visitors of a threat to life or serious physical harm [49]. This includes the sanctioning of a range of weaponry to be used against children, including PAVA (pepper) spray, attack dogs, and pyrotechnics. Children in custody reported the effects of violence used against them, which conflicts with the UNCRC [3] and has drawn criticism from UK children's charities. For example, Dylan (Study 1) was asked about a visible injury to his hand (caused by his hand being forced into an abrasive carpet and removing a chunk of flesh) when he was interviewed whilst in custody:

Int: What have you done to your hand by the way, that looks really sore?

Dylan: Oh that.

Int: Yes, you look like you've taken some flesh out there as well.

Dylan: I got re-, it's carpet burn.

Int: Restrained?

Dylan: Yes, I got restrained by some officers.

Int: Okay. That looks bad.

Dylan: They just restrained me for no reason really.

Int: What happened?

Dylan: Because I was on the phone, or I'd just come out the pad, jumped on the phone, I was on the phone for like 30 s and my mate next to me, he took my numbers, like my diary with all my numbers in and he ran off so I chased him, I got the numbers off him and I went back on the phone and the officer's like, "Oh, you have to go back in your cell for fucking about." And I was like "Oh, but I haven't even had my phone call yet," because I hadn't had a phone call for a few days because in the morning no one answers, because they get you up proper early, like seven, eight and no one answers on the weekend and that. And obviously the officer's "Oh well, Dylan, you have to go back in your cell because you were fucking about," and I'm saying "Miss, I wasn't fucking about, he just took my numbers so I ran after him," and she's like, "Well are you refusing?" so I said, "Yes, I am refusing." And she just like called for back up. . .'

Within Young Offenders Institutions (YOIs), which hold the majority of children in custody in England and Wales, the adult-based behaviour management regime, the 'Incentives and Earned Privileges Scheme', rewards good behaviour by increased time out of cells and family visits, amongst other privileges. For those who struggle to comply with the rules, they are placed on a 'basic' regime, which includes being placed in solitary confinement for up to 23 h per day, thus compromising Article 37 of the UNCRC [3]. Children with ADHD are placed disproportionately on 'Basic', leading to isolation in cell for up to 23 h per day, with significant impacts on their mental health, an increase in frustration, producing negative behaviours—placing children in a vicious cycle [10]. A

number of children from Study 1 who were neurodiverse discussed the damage to their mental health of being placed in solitary confinement. A number described self-harming and having suicidal thoughts for the first time as a result of this punishment, and one young person opted to repeatedly flood his cell as a way to escape the physical and mental harms caused by solitary confinement.

Although all children in English and Welsh YOIs are routinely screened for neurodisabilities, research has highlighted the limited effectiveness of this process. Specifically, flagged needs are often not addressed, nor do the results consistently inform staff practices with these children [11]. Moreover, it has been suggested that screening at the point of custody or during criminal justice interventions occurs too late and should instead be implemented earlier, ideally during a child's primary education [50]. Consequently, routine inspections of custodial settings have revealed that over two-thirds of children with mental or emotional health needs experience no improvement upon release.

In terms of the principle of last resort contained in Article 37, it is widely acknowledged amongst academics and policy makers [51] that this is not being adhered to in England and Wales. Around 40% of the custodial population are needlessly on remand (held in custody before their trial), demonstrated by the fact that recent figures show that 63% of remanded children did not go on to receive a custodial sentence on conviction (or were acquitted) [23]. For those who have received a custodial sentence, the majority spend on average 3 months in custody for minor assaults, which could easily be replaced with a longer period of community supervision [51]. We know that the use of unnecessary custody for both sentenced and remanded children will disproportionately impact neurodiverse children and young people, given the data outlined at the top of this paper.

3.4. The Right to Be Treated with Dignity and Respect in the Juvenile Justice System, the Right to a Fair Trial, the Right for the Child to Be Heard and Have Their Views Taken into Account in All Matters That Affect Them (Article 12 UNCRC) and Equal Access to Justice for People with a Disability (Article 40 UNCRC, Article 6 ECHR, Article 13 CRPD)

Considerable attention has been given to defining the concept of a fair trial within the context of youth justice. Much of this focus centres on evaluating whether a child is able to participate effectively at every stage of the criminal justice process, beginning with initial contact with the police and continuing through to active involvement during sentencing procedures. The concept of 'effective participation' at all stages of the youth justice system links closely with the right for a child to be heard and have their views taken into account in all matters that affect them (Article 12 UNCRC). To effectively participate, it follows that a child's voice and views must be heard and taken into account. Sadly, multiple research studies examining all stages of the youth justice process demonstrate that all children, and particularly those with SEND and neurodiversity, are denied opportunities to have their voices heard and effectively participate in criminal justice proceedings [10,25]. To meet the rights outlined above, a child needs to comprehend each step of the criminal justice process and actively participate at every stage. Their opinions should also be clearly expressed and given proper consideration. Kilkelly et al. [24] (p. 6) suggest that 'adjustments to the proceedings are required to create an atmosphere of understanding, including adjustments to language, child-friendly layout of courts and interviewing spaces, removal of intimidating attire, and making sure that support from both appropriate adults and all practitioners involved in the proceedings is available to the child.'

However, during a review of the Youth Justice System, Charlie Taylor concluded that:

> 'Too often children are the passive recipients of justice and do not understand the process to which they have been subjected. In addition, the way children are currently dealt with in the criminal courts does not provide sufficient opportunity to understand the causes of their offending' [52]. (p. 29)

Similar to prison settings, the custody suite in a police station presents significant challenges for neurodiverse adults and children. Environmental features that may be triggering or overwhelming have been shown to contribute to behaviours that are frequently misinterpreted by law enforcement as non-compliance. This misunderstanding can lead to an increased likelihood of being charged with an offence and a decreased chance of diversion from the criminal justice system [44] (p. 12). Additionally, neurodiverse adults are less often provided with an appropriate adult to advocate for their rights and support them during police custodial procedures [47].

There have been moves within England and Wales to divert as many children away from the Youth Justice System as possible, which involves the police considering whether to refer a child to the Youth Justice Service for a diversion programme or charge them with an offence. Recent research by the Centre for Justice Innovation [53] found that neurodiverse children and children with SEND were not benefiting from diversion programmes to the same extent as children without SEND or neurodiversity. Reasons for this included that the police rarely considered a child's SEND or communication needs when making decisions about how to communicate with children or whether they should be offered diversion. They also found an unnecessary use of force and restraint against neurodiverse children, which could be particularly harmful to children with SEND and neurodiversity, often triggering to an escalation in challenging behaviours. The Centre for Justice Innovation also found that legal advisors (solicitors) in the police station often did not have the requisite knowledge or expertise in youth justice generally and specifically about diversion and children's complex needs to appropriately advise them within the police station [53]. For example, in Study 1, Rob stated that:

> *'I had a duty solicitor who I think half-arsed his job, didn't really say much, just told me to go, "No comment." I don't think I heard a word out of him to be honest, he just sat there, he sat there and wasn't doing any speaking, it was just me.'*

The Carlile Inquiry [54], a UK government-commissioned review of Youth Courts in England and Wales noted that children's mental ill health and neurodevelopmental disabilities further hindered their understanding and that there was no way to identify their needs. Turner and Hughes [55] (p. 176) note that assumptions are made about a child's abilities based on their age that may not be met by children with communication or cognitive difficulties. Studies indicate that neurodiverse adults are often denied bail in court because they may not understand the requirements, lack adequate support to follow them [56], or face conditions that are so strict they become impossible to meet, effectively setting them up for failure. More generally, people with intellectual disabilities have been found to have difficulty understanding legal terminology and court proceedings [57]. People with communication difficulties can often struggle to sequence events when giving evidence in court [58], and poor or limited responses to questioning can often be misunderstood as a person being evasive or untrustworthy [59]. Further, at court, neurodiverse adults were more likely to be remanded in custody before trial [44]; over a fifth did not understand what was going on in court or why they were there [47]; and neurodiversity was not considered in sentencing decisions [44].

There are limited options within a Youth Court, should the judge have concerns about a child's ability to participate in proceedings. The main option available for adults in the Crown Court is to determine whether a defendant is unfit to plead. The test to establish this, taken from R v Pritchard, is that a defendant must show that he lacks one of the following abilities: understanding the charges, whether to plead guilty or not guilty, exercising their right to challenge the jurors, instructing their solicitor, follow court proceedings, give evidence in their defence. If one of these criteria is satisfied, then the defendant can be ruled unfit to plead. However, this power is not currently used for children in the Youth

Court, despite overwhelming evidence to show that most children (especially neurodiverse children) would meet at least one of the criteria in the Pritchard Test [60] (p. 10). For this reason, the Law Commission has recommended that the Pritchard Test is equally applicable in the Youth Court [61], but to date, this has not been enacted. Howard and Wishart argue that this places the UK in direct contravention of Articles 40 and Articles 6 of the UNCRC and ECHR respectively [60] (p. 54). Elsewhere, Clasby et al. [62] used procedural fairness as its central focus and found that a range of environmental adjustments could be made to a courtroom in Aotearoa (New Zealand) for neurodiverse young adults, which improved equal access to justice.

Also, within community orders, cognitive behavioural techniques used often assume children can connect thoughts, feelings, and actions; however, many neurodiverse children struggle with this approach, making it inappropriate for them [59]. Given these factors, alongside persistent challenges in comprehending children's communication difficulties and behaviours within the Youth Justice System (YJS), it follows that there are higher rates of neurodiverse children breaching community orders and subsequently being returned to Youth Court for resentencing [19]. Similarly with adults, research has found that upon being supervised in the community, neurodiverse adults were less likely to understand the requirements of their order [46], and less likely to receive support for their offending [44].

Overall, it is of little doubt that presently, on their pathways into the YJS and experiences within the YJS, neurodiverse children and children with SEND are being let down at every stage. This is evidenced by the failures of the education and youth justice systems to fully adhere to the extensive range of international and domestic rights and protections offered for children with disabilities. Nevertheless, a number of initiatives in England and Wales are actively working to address the rights gap faced by justice-involved neurodiverse children and children with special educational needs and disabilities (SEND), despite the considerable challenges outlined above.

4. International Policy Recommendations

The challenges faced by existing systems in effectively meeting the requirements of neurodiverse children and those with Special Educational Needs and Disabilities (SEND) have increasingly drawn the attention of charities, government representatives, policymakers, and practitioners throughout England and Wales. A range of innovative approaches and policy recommendations, many of which could be developed by international jurisdictions, are currently under development to address the rights gap impacting this population.

4.1. Closing the Rights Gap in Schools

Study 2 focused on an evaluation of a programme that sought to support children aged 7–11 (and their families) identified as 'at risk' of eventual school exclusion and justice involvement [63]. The findings indicated that most children were neurodiverse, and that family support—incorporating numerous elements of trauma-informed practice—served as a crucial resource for both children and their families. This support was associated with significant reductions in school exclusions, improvements in school attendance, and a decreased likelihood of future youth justice involvement. The principal features of the family support programme included provision of tailored and adaptable assistance without time constraints, enabling practitioners to establish strong relationships with both children and their families. The role of the worker as an advocate within education meetings and ensuring appropriate assessments were completed on time was invaluable to parents [63]. The paper concludes by suggesting that targeted, trauma-informed family support for neurodiverse children and their families could act as a blueprint for reducing school exclusions and eventual justice involvement.

4.2. Closing the Rights Gap in the Police Station

Holloway-George et al. [64] considered the experiences of autistic people in police custody. The study led to the production of a range of resources (Resources—The University of Nottingham) and co-produced training for officers to improve the experiences of autistic adults in this setting. A number of recommendations have been made by a range of studies to improve the experiences of neurodiverse children in police custody. These include compulsory neurodiversity training for police officers and legal advisors who attend the police station [65]; mandatory screening for educational needs and/ or neurodiversity in the police station [65]. Further recommendations include the provision of intermediaries[4] during police interviews for all child suspects where mandatory screening has identified SEND or neurodivergence [65].

There have been a range of recommendations related to improving the physical conditions for children detained in police stations. For example, the National Autistic Society Report (2022) [16], drew on the Equality Act 2010 [2] and recommended a range of 'reasonable adjustments' that could be made for autistic children in the police station. They included provision of a separate waiting area, using clear language during questioning, more time to process information, the provision of an intermediary, and easy-to-read forms [16].

4.3. Closing the Rights Gap in Court

A range of tools, approaches and adaptations have been developed to close the rights gap for neurodiverse children in the courts. When considering reform to the English and Welsh courts, some have advocated for adopting the Scottish Children's Hearings system, which considers both welfare and criminal issues within the same court. This often means that when a child is appearing for a criminal offence, the court is much better informed of a child's welfare needs than their English and Welsh counterparts. A recent report [65] presented to the UK Parliament that sought to examine what arrangements could be proposed for the reform of the Youth Justice System for children with SEND and neurodivergence did not go as far as recommending a shift to the Scottish system, but recommended re-introducing legislative power that compels local partners to provide information on a children's welfare needs to the court in advance of an appearance.

Innovative tools and measures developed within England and Wales include the creation of guidance for judges on how to communicate with children (Writing to Children—A Judges Toolkit V1.7), provision of an intermediary for child defendants, and introducing a 'Ground Rules' hearing (more guidance here—YJLC-Guide-CPD.pdf) which considers any reasonable adjustments to the court environment and process to meet children's individual needs.

The National Autistic Society [16] made a range of recommendations for adaptations to the Youth Court that would begin to close the rights gap for neurodiverse children. They included extra breaks during the court hearing, an opportunity to see the courtroom before a hearing, more time to process information, easy-to-read forms, provision of an advocate or intermediary, and finally, a psychological assessment.

4.4. Closing the Rights Gap Following Sentence

There is overwhelming evidence to suggest that prisons are particularly harmful for neurodiverse children (e.g., [10]). There have been some recent initiatives in England and Wales to better meet the needs of neurodiverse children and adults in custody. For example, Neurodiversity Support Managers have been appointed across the prison estate to provide training and guidance to prison staff, improve processes to identify and support prisoners' neurodiverse needs, and ensure reasonable adjustments are made throughout the prison.

There has been little evaluation to date of this initiative; however, one suspects that although welcome, tampering with a failing system is unlikely to produce long-term reform.

As stated above, there is a range of tools that seek to screen for neurodisability in custody (The CHAT) and speech and language needs when in receipt of a community sentence. Although an important step forward in closing the rights gap for neurodiverse children, initial research suggests that screening alone is not enough, as it often does not lead to any meaningful or identifiable adaptation in how neurodiverse children are supported following sentence [10,55].

The National Autistic Society [16] also recommended some adaptations for autistic children in custody. They included provision of a named keyworker with an understanding of autism, adapted group programmes and education, choice about cell sharing, help with contacting people, more time to process information, easy-to-read forms, and information in advance about what to expect.

It is promising to see various methods and resources developed to address the rights gap for neurodiverse children in the Youth Justice System of England and Wales. Nevertheless, these efforts are often fragmented and largely driven by individual practitioners. For lasting, nationwide improvement that can withstand issues like staff turnover, a unified response from the UK government is essential.

5. Conclusions

The data presented in this article illustrate how justice-involved neurodiverse children encounter numerous challenges that are arguably inconsistent with their human rights in England and Wales. This paper has argued that the UK government is falling short of most of its obligations set out in international and national frameworks intended to protect these neurodiverse children. While there have been promising initiatives aimed at addressing some of the disparities in rights and an important recognition by the UK government of the need for improved support for neurodiverse children within the justice system, these efforts are largely practitioner-driven, resulting in inconsistency and fragmentation. National leadership is required across government to comprehensively close the rights gap for neurodiverse children in England and Wales. A powerful step forward would be to integrate the UNCRC [3] into national legislation, embedding children's rights within law. This has recently been enacted in Scotland, which paved the way for some powerful reforms, including increasing the age of criminal responsibility from 8 to 12, and the ending of child imprisonment in Young Offenders Institutions. It is vital that England and Wales follow the example set by their Scottish neighbours and place children's rights front and centre of any future policy development, especially given that such a high percentage of children in the YJS have SEND or are considered neurodiverse.

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Abbreviations

The following abbreviations are used in this manuscript:

ADHD	Attention Deficit Hyperactivity Disorder
ASD	Autistic Spectrum Disorder
CRPD	Convention on the Rights of Persons with Disabilities
DLD	Developmental Language Disorder
ECHR	European Convention on Human Rights
FASD	Foetal Alcohol Spectrum Disorder
NAS	National Autistic Society
SEND	Special educational needs and disabilities
UNCRC	United Nations Convention on the Rights of the Child
YJS	Youth justice system

Notes

[1] These findings reflect the perspectives of a cohort of children engaged with youth justice services. While they illustrate experiences of those with negative outcomes, they may not represent the full spectrum of neurodiverse children and those with SEND in the youth justice system, including individuals who may have experienced positive outcomes.

[2] Although Articles 23, 24 and 29 of the UNCRC contain additional protections for disabled children, as many neurodiverse children may not have been diagnosed or recognised as disabled, the more generic right to education and inclusivity in Articles 28 of the UNCRC and Article 24 of the CRPD has been selected for discussion in this paper.

[3] Minimum standards accepted by the UN for children deprived of their liberty.

[4] An intermediary is a communication specialist, usually a speech and language therapisr, who offers support to children as defendants, witnesses or victims in a court setting.

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