PROTECTING THE RIGHTS OF JUVENILE OFFENDERS IN VIETNAMESE AND VICTORIAN CRIMINAL PROCEDURE LAWS IN COMPLIANCE WITH UNITED NATIONS BENCHMARK MODEL OF JUVENILE JUSTICE

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A thesis submitted in total fulfilment of the requirements for the degree of Doctor of Philosophy

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February 2013
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<td>ACT</td>
<td>Australian Capital Territory</td>
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<tr>
<td>ACHR</td>
<td>American Convention on Human Rights 1969</td>
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<td>ALRC</td>
<td>Australian Law Reform Commission</td>
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<tr>
<td>CA 1958</td>
<td>Crimes Act 1958</td>
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<td>CCA 1958</td>
<td>County Court Act 1958</td>
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<td>CKC</td>
<td>Children’s Koori Court</td>
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<td>CMY</td>
<td>Centre for Multicultural Youth</td>
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<td>CPA 2009</td>
<td>Criminal Procedure Act 2009</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>Cth</td>
<td>Commonwealth of Australia</td>
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<td>CCTV</td>
<td>Closed Circuit Television</td>
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<td>CYFA 2005</td>
<td>Children, Youth and Families Act 2005</td>
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<tr>
<td>CRWG</td>
<td>Child Rights Working Group</td>
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<tr>
<td>CAHABPS</td>
<td>Central after Hours and Bail Placement Service</td>
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<tr>
<td>DHS</td>
<td>Department of Human Services</td>
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<tr>
<td>DPP</td>
<td>Director of Public Prosecutions</td>
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<tr>
<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>IPPs</td>
<td>Information Privacy Principles</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social, and Cultural Rights</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>NSW</td>
<td>New South Wales</td>
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<tr>
<td>SCA 1986</td>
<td>Supreme Court Act 1986</td>
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<tr>
<td>SCR 2005</td>
<td>Supreme Court (General Civil Procedure) Rules 2005</td>
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<tr>
<td>SARC</td>
<td>Scrutiny of Acts and Regulations Committee</td>
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<tr>
<td>UK</td>
<td>United Kingdom</td>
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<td>UN</td>
<td>United Nations</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>USA</td>
<td>United States of America</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
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<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<tr>
<td>Vic</td>
<td>Victoria</td>
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<td>VLA</td>
<td>Victoria Legal Aid</td>
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<td>Victorian Aboriginal Legal Service</td>
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<td>VSCA</td>
<td>Court of Appeal of the Supreme Court of Victoria</td>
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<td>VUFO</td>
<td>Vietnam Union of Friendship Organizations</td>
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<td>VIYAC</td>
<td>Victorian Indigenous Youth Advisory Council</td>
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<tr>
<td>YRIPP</td>
<td>Youth Referral and Independent Person Program</td>
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<tr>
<td>YACVic</td>
<td>Youth Affairs Council of Victoria</td>
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STATEMENT OF AUTHORSHIP

Except where reference is made in the text of the thesis, this thesis contains no material published elsewhere or extracted in whole or in part from a thesis submitted for the award of any other degree or diploma.

No other person’s work has been used without due acknowledgement in the main text of the thesis.

The thesis has not been submitted for the award of any degree or diploma in any other tertiary institution.

28/02/2013
(Date)          (Signature)
ABSTRACT

Children and young persons, including those in conflict with the criminal law, are usually given consideration and care by society. At the international level, a framework protecting the rights of children dominated by the Convention on the Rights of the Child has been enacted. The United Nations has recommended that member States set up a juvenile justice system which emphasizes the three goals of restoring harms caused by offending, helping wrongdoers to recognize their misconduct and facilitating their reintegration into the community.

As the first Asian country signing the Convention on the Rights of the Child, Viet Nam has made efforts to build up its juvenile justice system. However, Viet Nam does not have a distinct juvenile justice system. The legislative framework and practices for dealing with juvenile delinquency reveal a large number of limitations.

By contrast, the State of Victoria possesses a distinct separate juvenile justice system based upon United Nations standards for juvenile justice. Nonetheless, several shortcomings exist in that system including the lack of special procedures applicable to children and young people tried by the Supreme Court; the lack of protection of juveniles’ privacy in the investigation stage; limitations relating to youth detention; etc.

This thesis evaluates the extent to which the treatment of juveniles within the justice systems of Viet Nam and Victoria complies with the United Nations’ benchmark model of juvenile justice. The thesis addresses this question in a number of stages. First, it outlines the United Nations’ framework establishing procedural safeguards for children and young offenders. Using this as a benchmark the thesis then analyses advantages and shortcomings of the legislative frameworks and practical implementation governing juvenile offenders in Viet Nam and Victoria. Finally, a comparison of these two jurisdictions clarifies similarities and differences and provides the basis for recommendations about how better compliance can be achieved with United Nations standards.*

* This thesis has been prepared in conformity with the requirements set out in the La Trobe University guidelines (Schedule B). Footnotes and references are based upon the legal citation recommended in the *Australian Guide to Legal Citation* (Melbourne University Law Review Association Inc., 3rd ed, 2010).
ACKNOWLEDGEMENTS

This research would not have been completed without the encouragement and support of many persons. The author can only mention some particular persons here.

I would like to thank my principal supervisor, Prof. Dr Gordon R. Walker. It was good to be supervised by him. He always reviewed my thesis on time and carefully. Working with Prof. Gordon Walker, I have not only gained additional legal knowledge but also acquired ways to deal with matters arising in daily life. My co-supervisor, Associate Prof. Marilyn McMahon, is a person who has given me invaluable advice during the progress of doctoral research. Specializing in criminal law, criminal procedure and criminology, she has helped me to amend and supplement the content of my thesis. I appreciate her supervising me after her departure from La Trobe University. Without the advice and support of my supervisors, I would not have been able to accomplish the doctoral thesis.

I am thankful to my family. My parents have always provided a stable spiritual foundation during my life. They have given me confidence to get through difficulties. I am grateful to my parents in law. Based on their financial support and encouragement, my wife was able to participate in the LLM Program and live with me in Melbourne. I would like to take this opportunity to express my thankfulness to my wife. She has given my life happiness and purpose which have helped me to complete this study.

I would like to acknowledge the financial support of the Vietnamese Ministry of Education and Training and La Trobe University. Without this support, I could have not been able to research in an Australian academic institution. I am grateful to Ho Chi Minh City University of Law for giving me the opportunity to study abroad. I would like to thank the administrative staff of the School of Law of La Trobe University. Their assistance was indispensable in the progress of writing my thesis.
Part One
INTRODUCTION, PRELIMINARY MATTERS AND
THE UNITED NATIONS BENCHMARK MODEL OF JUVENILE JUSTICE
Chapter 1
INTRODUCTION

I. Background
In any civilized society, human rights, including the rights of an accused person, must be respected and secured. Many countries – drawing on distinctive features of their history, socio-economic foundations and legal traditions – have legislation which contains provisions to protect human rights, especially the rights of juvenile offenders. A juvenile is a vulnerable person whose psychology and physiology is still developing and whose awareness of life is limited. As a result, these people need special care and protection.

The legislative frameworks governing the rights of children and young persons, at the international and national levels, have already been established. The United Nations (UN) has adopted several treaties and universal instruments relating to the rights of juvenile offenders. Among these legal documents, the Convention on the Rights of the Child (CRC) was the first legally binding international instrument to incorporate a full range of human rights for children all over the world. The overall purpose of these UN legal instruments is to set out the basic human rights of children that must be recognized, to establish core principles of protection and to oblige national governments to protect and ensure the rights of children. Furthermore, the UN has established a system of human rights bodies including the Human Rights Council, the Human Rights Committee, the Committee on the Rights of the Child and so on to monitor the implementation of human rights treaties. In addition, there are other UN bodies and entities involved in human rights promotion and protection.

In most UN member States, there are offices of UN bodies operating with the purpose of evaluating the legal system and assisting these countries to improve the effectiveness of human rights protection.

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2 For a comprehensive list of international legal documents governing the rights of juvenile offenders: see pages 54-55 of the thesis.
5 These bodies and entities comprise the International Court of Justice, the Office for the Coordination of Humanitarian Affairs, the UNICEF and so on.
A. Viet Nam

Viet Nam is a member State of the UN. Since signing international treaties regarding the protection of juveniles, especially the CRC, the Vietnamese government has made efforts to harmonize national legislation to comply with international legal instruments. In Viet Nam, a regulatory framework for the purpose of preventing, protecting, dealing with, and educating juvenile offenders has been established including the Criminal Code 1999, the Criminal Procedure Code 2003, the Law on Protection, Care and Education of Children 2004 and so on. Recently, increasing research on the Vietnamese juvenile justice demonstrates that this issue has become more important in Viet Nam.

The Vietnamese Government has also expressed interest in matters relating to juvenile justice. In order to implement Resolution No. 09/1998/NQ-CP on Improving Activities of Preventing and Fighting with Crimes in the New Situation, in 1998 the Prime Minister approved a national program to prevent and fight crime, comprising four main projects. Among these projects, the fourth focused on preventing and fighting crimes committed by children and juveniles. The Ministry of Security, the Supreme People’s Court, the Supreme People’s Procuracy and the Committee on Protecting and Caring for Children subsequently undertook a research project, “Improving the Capacity of the Juvenile Justice System”, which analyzed the law relating to juveniles and included a comparison with relevant international standards embodied in the Conventions which Viet Nam had adopted. The Supreme People’s Courts has conducted a number of studies aiming to identify a model of Family and Juvenile Courts which Viet Nam should establish in the future.

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6 Chapter 4 of the thesis will present and analyze in detail the Vietnamese legislative framework governing the rights of juvenile offenders.
7 This Resolution was adopted on 31 July 1998 by the Vietnamese Government. In the first decade since Viet Nam commenced establishment of its market economy, the number of crimes increased caused serious consequences for society. In order to create significant changes in fighting crimes, the Government decided to implement new important policies and measures. These were included in this Resolution.
10 For example, UNICEF Vietnam and the Supreme People’s Court, Conference Material on Consultative Policies for the Establishment of Family and Juvenile Courts in Viet Nam (2011); Adjudication Academy of the Supreme People’s Court, Overview Report on the Reasoning and Practical Basis of the Necessity of Establishing Special Court for Juveniles in Viet Nam (2010). These studies are in accordance with Resolution No. 08-NQ/TW of the Politburo of 2 January 2002 on Some Major Tasks of Justice in the Next Period and Resolution No. 49-NQ/TW of the Politburo of 2 June 2005 on Justice Reform Strategies towards 2020.
B. Victoria

Australia is also a member State of the United Nations. Australia (and thereby Victoria) ratified the CRC in 1991. Since then, juvenile justice systems in Australia have been refined in all States and Territories. Generally, the juvenile justice systems in every State and Territory in Australia possess distinctive characteristics based on different approaches towards the treatment and processing of juvenile offenders. In recent years, academics have generally conceptualized the various approaches to juvenile justice practice in terms of either a ‘justice model’ or a ‘welfare model’. The first approach concentrates on punishment whereas the second places emphasis on the treatment and rehabilitation of juvenile offenders. The delivery of criminal justice to juveniles varies in the States and Territories of Australia. It could be argued that among the different systems in the Australian federal model, Victoria has an advanced children’s rights and juvenile justice system. The effectiveness of the Victorian juvenile justice is partly demonstrated by the fact that Victoria has the second lowest rate of offending of young people in Australia and juvenile delinquency decreased in 2011-2012.

II. Thesis Question

A number of international declarations and some national statutes have defined human rights as the basic rights and freedoms to which all human beings are entitled. As previously noted, there has been a great deal of research on strategies for improving human rights, especially the rights of juvenile offenders in criminal cases. Consequently, it is now possible to identify a ‘benchmark model’ for the protection of the rights of juvenile offenders in the various policies and procedures identified and advocated in many publications of UN bodies. A key issue is whether Viet Nam has been successful in establishing an effective juvenile justice system. Despite the fact that Viet Nam is proud of being the first country in Asia and the

12 Christine Alder and Joy Wundersitz, ‘New Directions in Juvenile Justice Reform in Australia’ in Christine Alder and Joy Wundersitz (eds), Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism? (Australian Institute of Criminology, 1994) 1, 3.
15 There were 29,867 juvenile offenders processed in 2011/2012, which was a decrease of 4.8% on the 31,375 processed in 2010/2011: see Victoria Police, Crime Statistics 2011/2012 (2012) 16.
second country in the world to ratify the CRC, the implementation of this international convention in Viet Nam has been problematic. There is controversy about whether the rights of children and young offenders in the criminal justice system have been sufficiently protected. This controversy is caused by two factors: the shortcomings of legislative framework and incorrect and inadequate application of the law. Hence, pressure to reform the juvenile justice system in Viet Nam has increased.

Many studies have shown that despite some shortcomings, the State of Victoria in Australia has created a juvenile justice system which embodies many of the features of the juvenile justice model advocated in UN conventions and treaties. This thesis will identify differences between the two legal systems and suggest that Vietnamese legislators could usefully adapt the Victorian model of juvenile justice system to effectively secure the rights of juvenile offenders. The main questions this thesis seeks to answer are how, and to what extent, could Viet Nam adopt features of the Victorian juvenile justice model, and transfer particular provisions of international child rights law into its national law? To answer these questions, this thesis will first identify the benchmark identified in relevant UN standards and then analyze and compare the two legal systems of Viet Nam and Victoria. A practical aim of the thesis is to contribute to the ongoing discussion in Viet Nam concerning the optimal way to deal with juvenile offenders. The strategy adopted in this thesis will assist Viet Nam to acquire the best parts of the Victorian juvenile justice model. Finally, the thesis will provide specific recommendations for juvenile justice reform in both jurisdictions based on the principles, rules and interpretations adopted by UN child rights bodies.

III. Research Objectives

This research has specific aims:

- First, it aims to identify the ‘benchmark model’ for the delivery of justice to juvenile offenders identified in multiple and diverse UN policies and recommended procedures.
• Second, it aims to outline the Vietnamese and Victorian legislative frameworks governing the protection of the rights of juvenile offenders in criminal cases.
• Third, the practical assurance of particular rights of juvenile offenders in Viet Nam and Victoria will be discussed.
• Fourth, the thesis will evaluate the major strengths and shortcomings of each juvenile justice system from legislative and implementation perspectives by comparing each criminal justice system to the benchmark standards embodied in relevant UN conventions, rules, principles and guidelines.
• Finally, the thesis will develop recommendations to improve the criminal justice systems of Viet Nam and Victoria based upon the ‘benchmark model’ provided by the UN.

IV. Contribution of Thesis
This thesis provides recommendations for Vietnamese legislators concerning reform of the juvenile justice system and could also be used as a basis for research activities, legal education and training. In addition, and more practically, this thesis proposes specific strategies to protect the rights of juvenile offenders in criminal cases in Viet Nam. Finally, through comparative research, the author creates an opportunity for Vietnamese and Victorian scholars to obtain an understanding of their respective legal systems.

V. Scope of Thesis
Protecting the rights of juvenile offenders requires a combination of strategies from criminal law, criminal procedure law and criminology. However, this thesis concentrates on researching and analyzing provisions governing criminal procedure in Viet Nam and Victoria, as well as the mechanisms to implement these provisions. In this regard, it is worth noting that the execution of a court’s judgments or decisions is not considered a stage of criminal processes. Hence, provisions governing this issue are not within the scope of this thesis. Other potentially relevant areas, such as criminal law and criminology, will only be mentioned in passing.

19 Particularly, the author uses the Manual for the Measurement of Juvenile Justice Indicators adopted by the UNODC in 2006 as a basis to assess and evaluate the juvenile justice systems in Viet Nam and Victoria.
VI. Structure of Thesis

This thesis comprises four main parts with several chapters in each part:

- Part Two: Protection of the Rights of Juvenile Offenders in Viet Nam
- Part Three: Protection of the Rights of Juvenile Offenders in Victoria
- Part Four: Conclusion

The four parts of the thesis are:


Chapter 2 reviews the literature relevant to the issue of juveniles in the criminal justice system. It highlights some basic concepts concerning juveniles, juvenile offenders and juvenile justice. In order to provide a comprehensive overview, the chapter also describes and compares two main paradigms of juvenile justice: retributive justice and restorative justice.

Chapter 3 describes the benchmark model for the delivery of justice to juveniles involved in the criminal justice system under the UN framework of human rights, children’s rights and juvenile offenders’ rights.

Part Two: Protection of the Rights of Juvenile Offenders in Viet Nam. This part comprises Chapters 4 and 5. Chapter 4 analyzes the Vietnamese legislative framework governing the rights of juvenile offenders in criminal proceedings. The historical
background of the Vietnamese legal framework is explored. Although the bulk of this thesis concentrates on exploring contemporary issues, an historical examination is essential to comprehend conditions in the past which have influenced current regimes and policies. A detailed analysis of the Vietnamese criminal procedures applied to criminal cases committed by juveniles is provided. Subsequently, an evaluation into the major advantages and shortcomings of relevant provisions designed to ensure the rights of juvenile offenders is conducted.

Chapter 5 addresses the practical protection of particular rights of juvenile offenders in Viet Nam. This chapter analyses the major strengths and weaknesses of the regimes and policies currently implemented in Viet Nam. It identifies the main difficulties in actually securing the procedural guarantees of juvenile offenders. In conjunction with the legal framework evaluation presented in Chapter 4, this analysis is foundational to the development of the reform proposals offered in the last part of the thesis.

**Part Three: Protection of the Rights of Juvenile Offenders in Victoria.** Part Three includes Chapters 6 and 7. These chapters are structured similarly to Chapters 4 and 5. Chapter 6 outlines the Victorian legal framework governing the rights of children and young offenders. Chapter 7 addresses the implementation of key rights of juveniles.

**Part Four: Conclusion.** This final part of the thesis comprises Chapters 8 and 9. In Chapter 8, based on analyses and evaluations previously presented, the similarities and differences of Viet Nam and Victoria concerning the protection of juvenile offenders’ rights from legislative and legal implementation viewpoints are identified. Chapter 9 proposes specific recommendations to improve the juvenile justice systems in Viet Nam and Victoria. Because of differences between the two jurisdictions, the thesis provides specific recommendations for each jurisdiction. Challenges which Viet Nam and Victoria will face during the process of legal reform as well as particular advantages that can be utilized are also identified.

**VII. Methodology**

To achieve the thesis objectives, the author uses a combination of legal research methods: legislative analysis, case studies and comparative law. The first method (legislative analysis) is essential to establish the benchmark model for a juvenile criminal justice system inherent
in UN policies, guidelines and recommended procedures. It enables the author to evaluate the regulatory frameworks and explore the strengths and shortcomings of the juvenile justice systems in Viet Nam and Victoria. However, this method is most suited to theoretical legal research. In order to examine the practical efficiency of any legislation, the case study method is critical. By presenting and analyzing some significant criminal cases involving juveniles, this thesis highlights problematic areas in the two legal systems. The last method used in this thesis is comparative law. Nowadays, a key law reform method used by many countries is to adapt legislation from other countries. As Zweigert and Kotz state, ‘comparative law can be used as a law research method, an aid for legislators and a tool of law reform’.20 Particularly, this thesis is based on the interpretive comparison approach which makes ‘it possible to address internal debates about policy issues, as well as how practitioners exercise professional judgment’.21 This approach is a suitable way of conducting comparative research on the Vietnamese and Victorian juvenile justice systems with the aim of addressing the nature of each system and identifying legal provisions in Victoria that Viet Nam could use in its legal reform process.


Chapter 2
PRELIMINARY MATTERS – KEY DEFINITIONS AND ISSUES
RELATING TO JUVENILE OFFENDERS

I. INTRODUCTION
The aim of this chapter is to present and discuss essential terms and issues closely relating to juvenile justice. It is divided into two major sections. Section one focuses on defining and analyzing three important concepts: ‘juvenile’, ‘juvenile offender’ and ‘juvenile criminal justice’. In addition, the characteristics of juveniles are also included in this section. These distinct characteristics provide rationales for the special protection of children and young offenders in the criminal process. Section two analyzes and compares two main paradigms of juvenile justice: the ‘retributive justice’ and the ‘restorative justice’. A detailed understanding of the main objectives and features of each model will assist Victoria and particularly Viet Nam to adopt optimal features of a criminal justice system.

II. BASIC CONCEPTS
A. Introduction
To establish a clear understanding of the key terms employed in UN policies and recommended procedures, as well as national legislation and practices, it is necessary to clarify basic terms: ‘juvenile’ and, more particularly, ‘juvenile offender’. Prima facie, it appears that this is a simple mission. However, different answers for these questions can be found in international child rights instruments, as well as in Vietnamese and Victorian legislation.

B. Juvenile Offender: Definitions and Features
1. Who are Juvenile Offenders?
a. Juveniles
To answer the question ‘Who is a juvenile offender?’, the first step is to clarify the term ‘juvenile’. Generally, a ‘juvenile’ is a ‘young person’ or a ‘youth’.\(^1\) According to Principle

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2.2 (a) of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (‘The Beijing Rules’), a ‘juvenile’ is defined as ‘[a] child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult’. It can be seen from the definition that a juvenile is a ‘child’ or ‘young person’ upon whom distinctive criminal policies and criminal procedures may be applied. In order to obtain a better understanding of the definition of a ‘juvenile’, the next step is to explore the concept of a ‘child’ and a ‘young person’.

Concerning the definition of a ‘child’, art 1 of the CRC provides that ‘[a] child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’. Generally, art 1 of the CRC stipulates that a child will be below the age of 18 years unless a State Party stipulates a lower age in their legislation. By contrast, in the UN framework, there is no definition of the term ‘young persons’. Bainham states that in England under the *Children Act 1989* and the CRC, a ‘child’ is normally defined as a person below the age of majority. He also explains that although both ‘children’ and ‘young persons’ are captured in the term ‘minor’, there is a distinction between these two terms for certain purposes. Basically, in the English criminal law, persons who are under 14 years are called ‘children’ whereas those over 14 but under 18 years are called ‘young persons’. Collectively, these persons are referred to as juvenile offenders and occasionally as ‘young offenders’.

Comparing the two above definitions, it can be seen that the definition of a ‘child’ is directly related to age, while the definition of a ‘juvenile’ depends on the manner in which a ‘child’ or ‘young person’ is treated for an offence. This is because the CRC governs issues relating to children in general, whereas the Beijing Rules only applies to children or young persons in conflict with the criminal law. The definition of a ‘juvenile’ is very important because it identifies the scope of offenders to whom the standards provided in the Beijing Rules are applicable. However, ‘in essence the Beijing Rules say no more than if a person is treated as

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4 Ibid 85.

5 Ibid 613.
a juvenile then he or she is a juvenile’.\(^6\) This is obviously a circular definition. It has not established a common understanding of the concept of a ‘juvenile’ for all Member States of the UN when adopting legislation relating to such persons. It allows national legal systems to freely define ‘juvenile’. Moreover, this circular definition leads to the consequence that in countries where juveniles accused of serious offences are treated like adults, the *Beijing Rules* cannot be applied.\(^7\)

Fortunately, the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*\(^8\) provides a more substantive definition of a ‘juvenile’. According to Rule 11(a), ‘a juvenile is every person under the age of 18’. Here, the term ‘juvenile’ is coincident with the term ‘child’ defined in the CRC. In addition, and notwithstanding that the Human Rights Committee has observed that under the *International Covenant on Civil and Political Rights* (ICCPR)\(^9\) the limits of juvenile age are determined by ‘each State Party in the light of relevant social, cultural and other conditions’, the Committee ‘is of the opinion that all individuals under the age of 18 should be treated as juveniles’ at least in matters relating to criminal justice.\(^10\) Van Bueren notes that art 40 of the CRC partially improved the situation by transforming ‘some of the Beijing principles into binding law for State Parties’ and requiring them to apply all duties provided in this article ‘to all children up to majority, regardless of whether the national criminal law treats them like adult’.\(^11\) Thus, it can be concluded that the limitation in the definition of a ‘juvenile’ in the *Beijing Rules* is partially overcome by improvements in later international human rights legislation. Consequently, juveniles (children, young people, or minors) can be defined as persons below the age of majority (commonly 18 years) who are often treated differently in national legal frameworks in comparison with adults.

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\(^7\) For example, in the United States children who are accused of murder may be tried as adults: see Van Bueren, above n 6, 171.


\(^11\) Van Bueren, above n 6, 172.
i. Vietnamese Legislation

In Viet Nam, there is a distinction between the concepts of a ‘child’ and ‘juvenile’. Article 1 of the Law on Protection, Care and Education of Children 2004\(^\text{12}\) provides that ‘children’ are persons under 16 years old. By contrast, ‘juveniles’, as prescribed in art 18 of the Civil Code 2005 and art 119(1) of the Labor Code 1994,\(^\text{13}\) are persons under 18 years. In the legislative framework of Vietnamese criminal justice, there is no legal document directly providing definitions of ‘children’ and ‘juveniles’. However, through some provisions\(^\text{14}\) in the Penal Code 1999,\(^\text{15}\) it can be said that the criminal law of Viet Nam also uses the definitions of ‘children’ and ‘juveniles’ stipulated in other areas of law. In other words, there is consistency in the provisions relating to the definition of ‘children’ and ‘juveniles’ in different fields of law in Viet Nam.

A basic reading of these provisions indicates that a ‘child’ is a person under 16 years and a ‘juvenile’ is a person under 18 years. The question is whether or not these provisions of the Vietnamese legislation conflict with the CRC and the Beijing Rules. As analyzed in the previous part of this section, the age of a ‘juvenile’ is not fixed for all State Parties. The stipulations in these two international legal documents merely provide suggestions and guidance. More importantly, they allow member nations to legislate on this issue. Hence, it cannot be said that Vietnamese legislation does not comply with international law. Moreover, in the Vietnamese criminal legal framework, which will be analyzed closely in later chapters, there are distinctive criminal policies and procedures applying to ‘juvenile offenders’ who are under eighteen years.

ii. Victorian Legislation

The legal framework in Victoria governing the rights of those in the criminal justice system provides no definition of the term ‘juvenile’. However, from an examination of child-related

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\(^{12}\) The Law No. 25/2004/QH11 on Protection, Care and Education of Children was adopted by the National Assembly on 15 June 2004 and entered into force on 1 May 2005.

\(^{13}\) The Civil Code 2005 was adopted by the National Assembly on 14 June 2005 and entered into force on 1 January 2006.

\(^{14}\) These legal bases are stipulated from art 111 to art 116 of the Penal Code 1999 and in other provisions. In these articles, the ages of the victims who are called ‘children’ and ‘juveniles’ are provided clearly. Children victim are persons under 16 years while juvenile victims are under 18 years. It can be said that these levels of age of the victims are also applied for children offender and juvenile offenders.

\(^{15}\) The Penal Code 1999 was adopted by the National Assembly on 21 December 1999. It was amended and supplemented on 19 June 2009.
legislation, it can be said that in Victoria a ‘juvenile’ is considered to be a ‘minor’, ‘child’, ‘young person’, or ‘youth’. Among these terms, ‘minor’ generally means a person under the age of eighteen years. Section 3(1) of the Age of Majority Act 1977 provides that:

Subject to this section for all the purposes of the laws of the State:
(a) a person who, on or after the day of commencement of this Act attains the age of eighteen years, attains full age and full capacity on attaining that age;
(b) a person, who on the day of commencement of this Act is of or over the age of eighteen years, but under the age of twenty-one years, attains full age and full capacity on that day;
(c) the expression minor means a person not of full age.

Nonetheless, there is no uniform definition in Victorian legislation of the term ‘child’. In fact, different areas of law have different provisions on the relevant maximum age of a ‘child’. For instance, under s 3 of the Child Employment Act 2003, a ‘child’ means a person under 15 years of age. However, in relation to criminal matters, the definition of a ‘child’ is different. According to s 3(1) of the Children, Youth and Families Act 2005, a ‘child’ is:

(a) in the case of a person who is alleged to have committed an offence, a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years but does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the Court; and
   (aa) in the case of a proceeding under the Family Violence Protection Act 2008, a person who is under the age of 18 years when an application is made under that Act; and
   (ab) in the case of a proceeding under the Stalking Intervention Orders Act 2008, a person who is under the age of 18 when an application is made under that Act; and
(b) in any other case, a person who is under the age of 17 years or, if a protection order, a child protection order within the meaning of Schedule 1 or an interim order within the meaning of that Schedule continues in force in respect of him or her, a person who is under the age of 18 years.

As can be seen from the above legislation, the term ‘juvenile’ has the same meaning as ‘minor’, which generally includes both ‘children’ and ‘young persons’. In the UN legal instruments, these terms are not distinguished clearly. By contrast, legislation of the State Parties, especially in relation to criminal law, provides greater clarity for the ages of ‘children’ and ‘young persons’. In general, and despite the fact that these persons are ‘minors’ (i.e. under 18 years), ‘young persons’ are usually older than ‘children’. National juvenile criminal justice policies and systems frequently stipulate different provisions for each group.

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16 These terms are used in s 3(1) of the Age of Majority Act 1977; s 3(1) and Schedule 2 of the Children, Youth and Families Act 2005.
17 The Age of Majority Act 1977 was assented to on 6 December 1977 and came into effect on 1 February 1978.
18 The Child Employment Act 2003 was assented on 11 November 2003 and came into effect on 12 June 2004.
19 The Children, Youth and Families Act 2005 was assented to on 7 December 2005 and came into effect on 23 April 2007.
b. Juvenile Offenders

A definition of ‘juvenile offender’ is provided in Principle 2.2(c) of the Beijing Rules. According to this principle, ‘[a] juvenile offender is a child or young person who is alleged to have committed or who has been found to have committed an offence’. It is clear that this definition of ‘juvenile offender’ comprises two elements: the first element is ‘juvenile’, (a term analysed in the previous section), and the second element is ‘offender’. In general, an offender is ‘one who commits an offence’. Combined with art 1 of the CRC, the concept of a juvenile offender may be expressed as follows:

A juvenile offender is a child or young person below the age of eighteen years (unless under the law applicable to that person, majority is attained earlier), who is alleged to have committed or who has been found to have committed an offence.

This definition specifies the maximum age of a juvenile offender; i.e. below 18 years old. However, there is another factor which is also important: the minimum age of the juvenile offender (usually called the minimum age of criminal responsibility). The reason why the CRC did not specify this age is probably because it is difficult and unreasonable to require all State Parties to prescribe the same minimum age of criminal responsibility. Instead, art 4 of the Beijing Rules suggests that:

In those legal systems recognizing the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.

The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no lower age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities (such as marital status, civil majority, etc.).

Efforts should therefore be made to agree on a reasonable lowest age limit that is applicable internationally.

It is obvious that persons, especially juveniles, in different countries have different levels of physical and mental development, including varying awareness of dangerousness of their actions. This is probably one of the reasons leading to wide differences between jurisdictions as to the minimum age of criminal responsibility. For instance, in the State of Victoria in

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20 Simpson and Weiner, above n 1, Volume X: Moul – Ovum, 725. In this dictionary, a juvenile offender is defined as ‘a person under a certain age (14 or 16) who commits an offence, and for whose case special statutes have been passed’. 

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Australia this age is ten years;\(^{21}\) in Viet Nam it is 14 years;\(^{22}\) in Sweden it is 15 years, etc.\(^{23}\) This thesis will focus on legal matters relating to juvenile offenders whose ages are at or above 10 years (in Victoria), 14 years (in Viet Nam) and under 18 years at the time of alleged commission of the offence (i.e. the focus is on criminally responsible juveniles).

We now turn to examine the scope of the term ‘offender’. Is the notion of an ‘offender’ limited to persons who have already been sentenced? Or does it include other participants in criminal procedure? In order to answer this question, it is necessary to determine the moment when a person is officially considered guilty. Generally, in all international declarations, regional charters and national legislation, there is consistency on this issue. According to art 11(1) of the UDHR: ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.’ Again, one of the guarantees required by the CRC for every child alleged to have infringed the criminal law is the right to be presumed innocent until proven guilty according to law.\(^{24}\) More than fifty years after the CRC was adopted, the European Community enacted the *Charter of Fundamental Rights of the European Union*,\(^{25}\) of which Article 48 also prescribes this important right along with the right to defence.

Viet Nam and Australia have adopted these international instruments. Article 72 of the Vietnamese *Constitution 1992*\(^{26}\) and art 9 of the Vietnamese *Criminal Procedure Code 2003*\(^{27}\) stipulate: ‘No person shall be considered guilty and be punished until a court judgment on his or her criminality takes legal effect.’ In Victoria, this principle is also

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\(^{21}\) *Children, Youth and Families Act 2005*, s 3(1). But the doctrine of *doli incapax* states that a child under 14 years is presumed not to have criminal responsibility. However, this presumption may be rebutted by the prosecution. See below page 24 of the thesis.

\(^{22}\) *Penal Code 1999*, art 12(2).


\(^{24}\) See art 40(2)(b)(i) of the CRC.

\(^{25}\) The Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter on behalf of their institutions on 7 December 2000.

\(^{26}\) The *Constitution 1992* was adopted by the National Assembly on 15 April 1992 (amended by Resolution No. 51/2001/QH10 of the National Assembly on 25 December 2001).

\(^{27}\) The *Criminal Procedure Code 2003* was adopted by the National Assembly on 26 November 2003 and entered into force on 1 July 2004.
endorsed in s (25)(1) of the *Charter of Human Rights and Responsibilities Act 2006*:\(^{28}\) ‘A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.’

In summary, a person is only considered to be guilty of a criminal offence when a court judgment on his or her criminality takes legal effect. After being sentenced, the guilty person must serve the particular penalties imposed by the court. Hence, if it is considered that offenders only comprise guilty persons, the scope of the term ‘juvenile offender’ will be simultaneously restricted. On this reading, the protection of fundamental rights of juvenile offenders only focuses on protecting the rights of juvenile persons at the stage of executing the court’s judgment. Such reading is arguably misguided because the objectives of the above-mentioned international instruments are not only for the protection of fundamental rights of guilty juvenile persons, but also of others in previous stages of criminal procedure (such as persons held in custody, persons who have been accused and defendants). Consequently, the focus must be extended to include alleged juvenile offenders.

*i. Vietnamese Legislation*

In Viet Nam, there is no legislation specifically providing a definition of a ‘juvenile offender’. In the *Criminal Procedure Code 2003*, Chapter 32 prescribes procedures applied to *minors*. However, a definition of ‘juvenile offender’ does not appear in this chapter. Instead, there are some other concepts in Chapter 4 of this Code (Participants in the Procedures) relating to this definition. Three key terms are used in relevant legislation in Viet Nam: ‘persons held in custody’, ‘accused’ and ‘defendant’. The first concept is ‘persons held in custody’, provided in art 48 of the *Criminal Procedure Code 2003*:

> Persons held in custody are persons arrested in urgent cases, offenders caught red-handed, persons arrested under pursuit decisions,\(^{29}\) or confessing or self-surrendering offenders against whom custody decisions have been issued.

There are five types of persons who can be called ‘persons held in custody’. These persons consist of those arrested in urgent situations (as detailed in art 81(1)); offenders caught red-handed and persons arrested under pursuit decisions (as provided in art 82); and confessing

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\(^{28}\) The *Charter of Human Rights and Responsibilities Act 2006* was assented to on 25 July 2006 and came into operation on 1 January 2007 (except Divisions 3 and 4 of Part 3). Divisions 3 and 4 of Part 3 came into operation on 1 January 2008.

\(^{29}\) A pursuit or wanted decision is issued by competent bodies, normally the investigating bodies, in order to give notice to everyone the information relating to particular criminals these bodies are seeking.
or self-surrendering offenders. When analyzing art 81(1), it appears that all persons arrested in the three cases\textsuperscript{30} enumerated in this article are those who are suspected of committing a crime. In the case of offenders caught red-handed and those who confess, these are persons against whom proceedings have not yet been initiated. However, persons arrested under pursuit decisions or self-surrendering offenders can be the accused persons or defendants.

The second concept is ‘the accused’ which is defined in art 49 of the \textit{Criminal Procedure Code 2003}. Unlike persons held in custody, the accused is a person against whom criminal proceedings have been officially initiated by competent authorities having sufficient grounds to determine that the person has committed criminal acts.\textsuperscript{31} The third concept is ‘defendant’. Under art 50 of the \textit{Criminal Procedure Code 2003}, a defendant is a person whom the courts have decided to bring to trial. Hence, the terms ‘accused’ and ‘defendant’ are effectively interchangeable. Nonetheless, because the accused has been brought for trial by the court’s decision, this person is now called the defendant.

From the above analysis, it is clear that in Viet Nam there are no procedural participants who are called ‘offenders’. However, as analyzed earlier, based on the contents of the \textit{Beijing Rules}, (especially the definition of ‘juvenile offender’), it could be argued that all juvenile persons held in custody, juvenile accused persons and juvenile defendants can be considered as juvenile offenders.

Another issue relating to the definition of a ‘juvenile offender’ is the time chosen to determine whether a person is a juvenile or not. From a criminal law perspective, many countries define this at the time when a person \textit{commits} a crime. Thus, in order to determine if an offender is a juvenile, there are two factors to be considered. The first factor is his or her date of birth and the second is the time when he or she commits a crime. If he or she is under eighteen years old, according to Vietnamese criminal law, he or she will be considered as a ‘juvenile offender’ and distinctive criminal policies will apply.

\textsuperscript{30} Article 81 of the \textit{Criminal Procedure Code 2003} provides three cases in which urgent arrests can be made: ‘(a) When there exist grounds to believe that such persons are preparing to commit very serious or exceptionally serious offences; (b) When victims or persons present at the scenes where the offences occurred saw with their own eyes and confirmed that such persons are the very ones who committed the offences and it is deemed necessary to immediately prevent such persons from escaping; (c) When traces of offences are found on the bodies or at the residences of the persons suspected of having committed the offences and it is deemed necessary to immediately prevent such persons from escaping or destroying evidences.’

\textsuperscript{31} \textit{Criminal Procedure Code 2003}, art 126.
Nonetheless, from a criminal procedure perspective, there is a difference in determining the age of a juvenile offender. Article 301 of the *Criminal Procedure Code 2003* stipulates:

> The criminal procedure applicable to arrestees, persons kept in custody, accused and defendants, who are minors, shall comply with the provisions of this Chapter, and concurrently with other provisions of this Code which are not contrary to those of this Chapter.

It can be seen from the above provision that specific criminal procedures are only applied to arrestees, persons kept in custody, accused and defendants, who are minors. This means that these persons must be between 14 years and 18 years of age at the time they are arrested, kept in custody, accused or brought to trial (rather than at the time they committed a crime). Hence, although at the time of committing a crime an offender is a juvenile, the specific procedures provided in Chapter 32 of the *Criminal Procedure Code 2003* will not apply in cases the person is eighteen years or older at the time of investigation or trial.

Thus, according to Vietnamese criminal procedure law, the time chosen to determine whether an offender is a juvenile or not is the time when the authorities conduct specific procedural activities to solve a criminal case, rather than the time when the individual allegedly committed a crime. It is often argued there should be consistency between the Vietnamese criminal law and criminal procedure law on this issue. However, from a theoretical perspective, although these two fields of law have a close interrelationship, each has distinctive functions, governed objects and governing methods. Criminal law is usually called substantial or substantive law, whereas criminal procedure law is considered as formalistic procedural law. Thus, despite the difference between criminal law and criminal procedure law on the time applied to determine whether or not an offender is a juvenile, it is arguable that these laws are in direct conflict and therefore do not diminish the protection of the legitimate rights of juvenile offenders.32

**ii. Victorian Legislation**

The Victorian legislative framework does not provide a definition of ‘juvenile offender’. Under the key legislation in Victoria – the *Criminal Procedure Act 2009* – ‘the accused’ is defined as ‘a person who is charged with an offence or is directed under s 415 to be tried for

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32 Do Thi Hoang Yen, *Hoan Thien Thu Tuc To Tung doi voi Nguoi Chua Thanh Nien Pham Toi [Improving Criminal Procedures Applicable to Juvenile Offenders]* (LLB Thesis, Ho Chi Minh City University of Law, 2006) 6.
perjury’.33 Furthermore, s 3(1) of the Sentencing Act 199134 defines a ‘young offender’ as an offender who at the time of being sentenced is under the age of 21 years. Moreover, in order to prevent conflicts of law, as well as to facilitate the interstate transfers of ‘young offender’, Schedule 2 of the Children, Youth and Families Act 2005 stipulates the ages of young offenders in different circumstances.35 It would appear that in Victoria an ‘offender’ is considered to be a person who has been sentenced by the court. However, and similar to Vietnam, Victoria also has protection for persons who are not ‘offenders’ but are simply being interviewed by the police.36

In Victoria, as mentioned earlier, the definition of a ‘child’ is provided in s 3(1) of the Children, Youth and Families Act 2005. From this legislation, we see that in the majority of cases the maximum age of a person who is considered to be a ‘child’ is 18 years at the time the person committed the crime. However, there is another important point which should not be forgotten. A ‘child’ does not include a person who, although under 18 years at the time of committing an offence, is 19 years or older when a criminal proceeding is commenced in the court.37 From the foregoing we can see distinctions exist in Victorian legislation between the definitions of a ‘child’ and a ‘young offender’. The former is mainly based on the age of a person at the time he or she committed an offence, while the latter depends on the time at which the person is sentenced.

It appears that the definition of a ‘juvenile’ or ‘minor offender’ in Vietnamese legislation is similar to the definition of a ‘child’ in the Children, Youth and Families Act 2005 of Victoria. Moreover, there is a similar approach in Vietnamese and Victorian criminal law on

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33 Criminal Procedure Act 2009, s 3.
34 The Sentencing Act 1991 was assented to on 25 June 1991 and came into effect on 22 April 1992.
35 Under Schedule 2 of the Children, Youth and Families Act 2005, a ‘young offender’ means: (a) in another State who (i) is under the age of 18 years; or (ii) is of or above the age of 18 years but under the age of 21 years and who has committed or is alleged to have committed an offence when the person was under the age of 18 years and who has been dealt with under a law which applies in that State and which relates to the welfare or punishment of such a person; or (b) in Victoria who (i) is subject to an order made under paragraph (f), (g), (h), (i) or (j) of section 360(1), whether the order was made by the Children’s Court or by some other court; or (ii) is under the age of 21 years and is serving a sentence of detention in a youth justice centre; or (iii) is under the age of 21 years and has been released on parole under this Act; or (c) who is in Victoria and is subject to an arrangement for the transfer of the person to Victoria or is being transferred through Victoria from one State to another under an agreement.
36 See the Crimes Act 1958, s 464A(3); s 464C(1),(2); s 464K(8).
37 Children, Youth and Families Act 2005, s 3(1). Previously, the Children’s Court of Victoria had jurisdiction over children under the age of 17 years (Children’s Court Act 1906, s (2)). Complying with the international obligations set out in the CRC, the Court’s jurisdiction is now expanded to children under the age of 18 years at the time of committing the alleged offence.
the issue of choosing the time to determine the age of a juvenile offender. Both jurisdictions use the time of committing the crime. Nevertheless, from a criminal procedure law perspective, there is one major difference. In Viet Nam, a person will not be considered as a child if at any stage of the processing of the criminal case, that person’s age is eighteen years or older. By comparison, in Victoria a person will not be considered as a child if at the trial stage, the person is 19 years or older.

In conclusion, although Australia and Viet Nam have ratified the CRC, there are some differences between Victorian and Vietnamese legislation, relating to the definition of ‘children’ and ‘young offender’. The reason is largely because of discrepancies between the two jurisdictions’ cultures, legal traditions and levels of socio-economic development. In spite of these differences, the two legal systems have the same objective of improving the protection of young vulnerable persons in the community.

2. What are Characteristics of Juvenile Offenders?

a. Juvenile Offenders’ Distinctive Characteristics

It was previously noted that the minimum age of criminal responsibility is ten years (Victoria) and 14 years (Viet Nam) and that juvenile offenders are generally defined to be below 18 years old. Juveniles are viewed as having numerous changes in their psychology and physiology which influences their thinking, behaviour and actions. Many studies have explored the key characteristics of juvenile offenders. These will now be considered.

Juvenile offenders have not completed their physical and mental development. Consequently, their ability to be aware of and control dangerous actions may be restricted. In addition, their cognitive development is relatively immature, superficial and impulsive. Because of their physiological development, juvenile offenders’ psychology in this period

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38 Paragraph 9 of the CRC’s Preamble states: ‘[T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’ (emphasis added).
may also be more unstable and irritable. They desire independence. Excessive consideration and supervision by their parents and teachers may make juveniles feel uncomfortable and fretful; consequently, they may try to escape from these controls.

Moreover, juveniles usually have a shorter and more limited experience of life than adults. Bourdillon observes that ‘children do not have the knowledge of the wider world necessary to know how to prepare themselves for it’. Because of limited living experiences and knowledge, juvenile offenders may have insufficient evaluation of events. In addition, juveniles may be influenced more easily by others, especially their peers. Another feature of juvenile offenders is that their awareness of the consequences of committing crime, compared with adults, may not be as developed. It may be easier for juveniles to be rehabilitated by families, schools and society in order to give up an offending lifestyle.

This was the conclusion of the Ingleby Committee cited by Fortin:

Although young offenders are ‘often an appalling nuisance’, they are of less immediate danger to society than adult law-breakers, they are less responsible for their actions, and are more amenable to training and education.

Many child psychologists and legal experts have identified family, education (or school) and community (or society) as the three main factors which have an important influence on the developmental and psychological characteristics of children. The family is the immediate social environment in which the child grows up. According to Bruhn and Parcel, ‘family is part of a larger socio-cultural system, and outside influences affect the health behaviour of family members. Parents can be powerful role models as well as teachers of children’s health behaviour.’ After the family, school is usually considered as the second primary socialising influence. Juveniles spend a significant proportion of their time in school. Teachers and peers can strongly influence juveniles. Moreover, the social environment in which juveniles

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42 Yen, above n 32, 7.
45 Ingleby Committee was appointed on 3 October 1956 to consider issues relating to juvenile justice systems in England and Wales (13 November 2012) <http://www.childrenwebmag.com/articles/key-child-care-texts/the-ingleby-reportchaired-by-viscount-ingleby>.
are living also has an enormous impact on their development. If children live in a
dysfunctional social environment, their risk of being involved in offending lifestyles will be
increased. A healthy society is a ‘good land’ for the comprehensive development of
juveniles. By contrast, living in a social environment with many social evils increases the
likelihood of juveniles committing crime. Alder and Wundersitz state that juveniles can be
considered as the products of the social environment within which they were born and grow
up. Their offences, therefore, are partly derived from negative elements in that
environment. Consequently, governments often place strong emphasis on the family and
social milieu of juvenile offenders, giving a high priority to the needs and well-being of the
family and its members; making public education accessible to all young persons, and
developing and strengthening community-based services and programs which respond to the
special needs, problems, interests and concerns of young persons.

b. The Two Different Groups of Juvenile Offenders

The features discussed above are common to all juvenile offenders. However, as mentioned
previously, the term ‘juvenile offenders’ includes both ‘child offenders’ and ‘young
offenders’ who have different age and majority levels. Each juvenile offender group has
certain characteristics and these characteristics influence their offending. Thus, researching
the distinctively psychological features of each juvenile group is necessary.

The younger juvenile offender group (child offenders) involves an age group in which
children’s physiology changes occur. As a result, these persons often feel uncomfortable and
hesitate to confide their thinking to friends and families. Their abilities to perceive and deal
with these changes are restrained and immature.

48 Ngoc, above n 44, 15.
49 Ibid. 16.
50 Christine Alder and Joy Wundersitz ‘New Directions in Juvenile Justice Reform in Australia’ in Christine
Alder and Joy Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced
Optimism?* (Australian Institute of Criminology, 1994) 1, 3.
51 Ibid.
52 *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112, UN GAOR, 45th
sess, 68th plen mtg, UN Doc A/RES/45/112 (14 December 1990), para 11 (‘The Riyadh Guidelines’).
55 Yen, above n 32, 8.
56 Nguyen Quang Huy, *Dau Tranh Phong Chong Toi Pham o Lua Tuoi Chua Thanh Nien tai Viet Nam*
(Preventing and Fighting against Juvenile Delinquency in Viet Nam) (LLB Thesis, Ho Chi Minh City
University of Law, 1999) 13.
The older juvenile offender group (young offenders) involves persons who are preparing to become adults. Their physiological changes begin to stabilise, therefore, their psychology is also becoming more stable.\(^57\) In comparison with the first group, the insight and decision-making abilities of these young offenders is more mature.

Recognizing these differences, the criminal law and criminal procedure law of many countries have distinctive provisions for juvenile offenders from the two different groups. For instance, art 12 in the Vietnamese *Penal Code 1999* provides: ‘(1) Persons aged full 16 years or older shall have to bear penal liability for all crimes they commit. (2) Persons aged full 14 years or older but under 16 years old shall have to bear penal liability for very serious crimes intentionally committed or particularly serious crimes.’ In this regard, s 344 of the *Children, Youth and Families Act 2005* (Vic) simply provides: ‘A child under the age of 10 years cannot commit an offence.’ However, as previously mentioned, the *doli incapax* doctrine of common law states that a child aged ten years or more but under 14 years is generally presumed not to have actual knowledge or capacity at the time of doing the act or making the omission to know his or her conduct is wrong. In order to rebut this presumption, the prosecution must demonstrate that the juvenile offender realized that his or her conduct was wrong at the time it was committed.\(^58\)

Under the Vietnamese *Criminal Procedure Code 2003*, art 303 concerning the application of arrest, custody and temporary detention, prescribes:

1. Persons aged between full 14 years and under 16 years old may be arrested, held in custody or temporary detention if there are sufficient grounds prescribed in Articles 80, 81, 82, 86, 88 and 120 of this Code, but only in cases where they commit very serious offences intentionally or commit especially serious offences.

2. Persons aged between full 16 years and under 18 years old may be arrested, held in custody or temporary detention, if there are sufficient grounds prescribed in Articles 80, 81, 82, 86, 88 and 120 of this Code, but only in cases where they commit serious offences intentionally or commit very serious or especially serious offences.

It would appear that the focus of many juvenile justice systems is on preventing, educating, and creating the conditions for juvenile offenders’ rehabilitation, rather than concentrating

\(^{57}\) Yen, above n 32, 8.

on punishment. In order to achieve these objectives, it is required to define precisely ‘juvenile criminal justice’, to indentify essential components of it, and subsequently to reinforce and improve these factors. The next section provides a brief analysis of these issues.

3. What is Juvenile Justice?

Generally, the term ‘justice’ has many meanings such as ‘the quality of being just’; ‘the administration of law, or the forms and processes attending it’; or ‘judicial proceedings’. Surprisingly, although the term has been used in international and national legislation, there are no official definitions. Based on the *Beijing Rules*, the term ‘juvenile justice’ can be defined as a component of organizing and executing justice specifically designed for juveniles who violate the law, in order to effect the legal education and protection of these persons as well as to ensure and maintain legal order in society.

From the *Beijing Rules*, it appears that the law violated by juveniles must be criminal law rather than other legal fields, such as administrative law, civil law and so on. However, in Viet Nam, there are two distinct legal systems dealing with juveniles in conflict with the law: the administrative system and the criminal system. These two systems constitute the ‘justice system’. Nonetheless, as mentioned previously, this thesis focuses on issues relating to juvenile offenders and the juvenile criminal justice system. Juvenile criminal justice is a subcategory of juvenile justice. According to this definition, juvenile criminal justice will comprise the following components:

- The legislative framework which establishes the bases for organizing and operating judicial activities for juveniles. Specifically: the criminal law; criminal procedure

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59 These requirements also appear in art 40 of the CRC: ‘States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.’

60 Simpson and Weiner, above n 1, 326.


63 See above Section IV of Chapter 1 of the thesis.
The system of relevant organizations including police, procuracies and courts. These are the main competent bodies, sometimes called procedure-conducting bodies, dealing with juvenile offenders. They are established by governments to detect, handle and prevent offences happening in society.

Legal enforcement officials including procedure-conducting persons, such as investigators, prosecutors, juries, magistrates and judges. These persons represent procedure-conducting bodies and implement the legislation to resolve criminal cases committed by juveniles. In addition, there are also other people who have responsibility for educating, preventing, assisting and handling juvenile offenders, such as social workers, lawyers, health personnel, prison officers, and other professionals concerned with juvenile justice.64

These components of the juvenile criminal justice system have a close interrelationship. Any legal frameworks made less effective without the co-operation of judicial bodies and law enforcement officials. Thus, the legal policies of the State routinely emphasize enhancing and strengthening all these factors. This is affirmed in art 1.4 of the Beijing Rules:

Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society.

Concerning the aims of a juvenile justice system, art 5 of the Beijing Rules provides that: ‘The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.’ This is reinforced by art 40(1), (4) of the CRC. According to Bueren, there are two goals contained in art 5 of the Beijing Rules: the first is the encouragement of the well-being of children, while the second emphasises that juvenile offenders should be dealt with in a manner proportionate to their circumstances and the

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offence. In order to achieve these aims, international law concerning rights and criminal offending by children has established a number of fundamental principles upon which a juvenile justice system should be based.

C. Observations
The concept of ‘juvenile offender’ was clarified by a combination of the CRC and the Beijing Rules. As the two member States of the CRC, Viet Nam and Australia (and thereby Victoria) share some similar provisions in their criminal and criminal procedure legislation relating to the definition of juvenile offenders (including defining the maximum age of a child). However, there are differences between these two legal systems including the definition of a child, provisions on the minimum age of criminal responsibility, the criminal responsibility of each juvenile offender group as well as some specific legal terminology. Nonetheless, common aims shared by the two juvenile criminal justice systems are the establishment of a comprehensive legal framework in order to enhance and strengthen the protection of juvenile offenders’ rights and the effective implementation of relevant legislation. To achieve these aims, Viet Nam and Victoria should follow the UN benchmark model for the administration of juvenile justice. Due to their distinct characteristics, a large amount of research has been conducted to explore an appropriate model, rather than the ‘traditional’ criminal proceedings, to deal with children and young offenders. Relevant UN bodies have also adopted basic principles for the use of measures without resorting to judicial proceedings. The following section of this thesis analyzes these issues in further detail.

III. DIFFERENT PARADIGMS OF JUVENILE JUSTICE
A. Introduction
In order to evaluate reforms to the juvenile justice systems in Viet Nam and Victoria, it is useful to compare and evaluate different models of juvenile justice that have been influential in recent years. Generally, there have been many different approaches to juvenile justice: for example, the treatment model, retributive justice, restorative justice, therapeutic justice,

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65 Van Bueren, above n 6, 172.
66 The principles for the administration of juvenile justice can be found in the Beijing Rules while the basic principles governing the protection of children’s rights are provided in the CRC.
cultural courts and community justice. However, among these models, the retributive and restorative justice approaches have emerged as the two dominant contemporary paradigms.

The examination of criminal justice models has a relationship with the assurance of juvenile offenders’ rights. Each criminal justice system has its priority objectives. Based upon these, appropriate procedures are prescribed to identify and prove the truth of criminal cases. The important task is to find a model which balances the need to secure juvenile offenders’ rights and the requirement to ensure public order and security. Regarding juvenile justice, the UN human rights and child rights bodies particularly encourage Member States to conduct research and adopt informal procedures to deal with children and young people. It can be argued that resolving juvenile cases without resorting to court proceedings may not safeguard procedural rights of offenders. Although this may be true to some extent, the benefits of informal procedures outweigh this concern. Moreover, it should be noted that informal responses are often limited in petty offences. For serious cases, the traditional criminal justice is still employed. The subsequent discussion of restorative justice demonstrates advanced features of informal ways to deal with juvenile delinquency.

B. Retributive Justice

Many studies have identified retributive justice as the traditional model of criminal justice, currently applied in most jurisdictions. This model has been established on the basis that:

All individuals are reasoning agents who are fully responsible for their actions and so should be held accountable before the law. Within this model, the task of the justice system is to assess the degree of culpability of the individual offender and apportion punishment in accordance with the seriousness of the offending behaviour.

There has been a great deal of research exploring the reasons why people seek to punish offenders. Relating to this issue, there are two main schools of thought. According to the retributionist stance, ‘perpetrators deserve to be punished in proportion to their “internal wickedness” and the imperative to punish is derived not from the future consequences of the punishment, but rather from a universal goal of giving people what they deserve’. This

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68 Alder and Wundersitz, above n 50, 3.
approach is called the ‘just deserts’ theory. By contrast, those representing the utilitarian approach (such as Jeremy Bentham) argue that ‘punishment, and indeed all action, ought to be assessed by the potential harm or benefit to society. Any decision to punish individuals, then, must weigh the potential harms to the individual (and, thus, to society) against the benefits to society, and punishment is moral only if society stands to benefit’. This approach is called ‘deterrence’ theory; the purpose of punishment is to adjust the future behaviours and actions not only of punished criminals (specific deterrence) but also of other citizens in society (general deterrence) and, therefore, reduce future crimes.

Although there have been many different approaches to punishment, it is clear that retributive justice mainly focuses on inflicting penalties on offenders and not on the rehabilitation and reintegration of these persons. In other words, the traditional justice model only pays attention to the damage caused by offences and tries to apply a proportionate punishment to the offender. Retributive justice emphasizes the active role of state in treating and preventing crimes by using coercive measures, while offenders play a passive-defensive role in the criminal process. Offences are viewed as activities against the interests of the state, rather than against victims and communities.

The retributive justice model has been criticized by a number of legal researchers, particularly juvenile justice professionals. For examples, Garland and Wilkins argue that:

Perhaps the most damaging effect of the retributive paradigm on the juvenile justice system has been its tendency to make non-punitive “alternative sanctions” appear weak and less adequate than incarceration, thereby closing off consideration of inexpensive and less harmful responses to youth crime.
To a similar effect, Braithwaite and Makkai claim that this approach may have negative effects on offenders, including stigmatization, humiliation, and isolation, and may decrease their opportunities for regaining self-respect and the respect of the community. These shortcomings suggest that retributive justice is incompatible with the objectives of juvenile criminal justice. Hence, legislators and legal researchers have explored other models of juvenile justice.

C. Restorative Justice

The restorative justice appeared on the international stage in the 1990s. It was a new approach to juvenile justice and quickly gained wide support. This approach attempts to change our view of crime. Although the idea of restorative justice has been established for some time, it is not easy to obtain a precise definition of this model. This is partly because:

Restorative justice encompasses a variety of practices at different stages of the criminal process, including diversion from court prosecution, actions taken in parallel with court decisions, and meetings between victims and offenders at any stage of the criminal process (for example, arrest, pre-sentencing, and prison release). Restorative justice may be used not only in adult and juvenile criminal matters, but also in a range of civil matters, including family welfare and child protection, and disputes in schools and workplace settings. For virtually all legal contexts involving criminal matters, restorative justice processes are applied only to offenders who have admitted to an offence.

Concerning this issue, Marshall states that restorative justice is ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future’. Other scholars have argued that the scope of this definition is too narrow because it mentions only face-to-face meetings between relevant parties, overemphasizes the process than the main aim of repairing damage and forgets that coercive measures may need to be used in order to repair the harm.

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76 Lemley, above n 72, 45.
77 Ibid.
Another definition – proposed by advocates, who call for a ‘Maximalist’ model – is that restorative justice includes every activity which is mainly designed for doing justice by way of repairing consequences caused by offences. 81 On the other hand, in the view of the UN, ‘restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities’. 82

Before analyzing the key features of restorative justice, it is essential to consider the objectives of this model. Many legal researchers concluded that:

Restorative justice focuses on harm caused by offenders by seeking to repair harm to victims and communities and reducing future harm by preventing crime. Restorative justice requires offenders to take responsibility for their actions and for the harm those actions have caused. It seeks redress for victims, reparation by offenders, and reintegration of both within the community as communities and government achieve restorative justice through a cooperative effort. 83

It is quite clear that restorative justice focuses on repairing damage and addresses the need to prevent future offending, rather than punishing the offender. It encourages collaboration between parties in the reparation process. This model of criminal justice emphasizes the roles and interests of all parties involved. Specially, it takes a more sympathetic view of offenders by creating opportunities for them to rehabilitate into the community. This is one reason for concluding that restorative justice’s goals are compatible with those of the juvenile justice system. Indeed, the UN and its bodies have adopted many legal instruments incorporating restorative justice principles and programs and encouraged Member States to research, apply, evaluate and modify these programs.

Under the restorative justice model and the ‘welfare model’ in Australia, treatment is more

important than punishment. According to Alder and Wundersitz, the ‘welfare model’ recognizes the immaturity of children and, therefore, does not consider children as individuals who have sufficient capacity for self-determination. Rather it views them as affected by their living environment and juvenile delinquency partially arises from the negative features of this environment. These scholars claim that the juvenile justice system’s task is to determine, treat and repair the deep social causes of offending, instead of focusing on the imposition of penalties to juvenile offenders. Many studies have shown that restorative justice has the dominant features appearing below.

First, the role and experience of victims in the criminal process is given greater emphasis by restorative justice. This approach acknowledges that crime is an act against another person and the community. In other words, restorative justice is established ‘on the notion that criminal activity harms people and relationships’, including not only victims but also offenders and their respective communities. Therefore, this paradigm of juvenile justice creates opportunities for these parties to effectively participate in the criminal process.

Second, restorative justice promotes more free discussion between all relevant parties. It utilizes dialogue and negotiation as an effective method to reach reasonable and fair outcomes between parties relating to a criminal offence. It tries to reduce the formality of the traditional criminal process by introducing informal procedures in meetings between key participants. The composition of a meeting often includes victims, offenders and the community. Under restorative justice, the criminal process is a reparative one, where all

84 It appears that restorative justice has more objectives than the ‘welfare model’. Treatment of juvenile offenders is only one aim of restorative justice. Additionally, restorative justice protects not only the offender but also the victim and community.
85 Alder and Wundersitz, above n 50, 3.
86 Ibid.
87 Ibid.
88 Daly and Hayes, above n 78, 2.
91 Daly and Hayes, above n 78, 2.
parties co-operate to find effective ways to repair and heal the harm caused by the crime. Braithwaite observes that ‘an apology, restoration of emotions, a sense of security and empowerment, forgiveness, and reconciliation are “emergent values” of restorative processes’.  

Third, restorative justice has been established in many forms, including family group conferencing, victim-offender mediation, community reparation boards, and circle sentencing. These forms of restorative justice are congruent with the definition of ‘restorative process’ provided by the UN Economic and Social Council:

Restorative process means any process in which the victim and the offender, and, where appropriate, any other 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. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

- **Family Group Conferencing.** This model is commonly applied in juvenile cases in New Zealand and Australia. It is frequently used to replace a prosecution, but in several jurisdictions it also is a sentencing option. Alder and Wundersitz claim that, in essence, a family group conference is a comparatively informal meeting and the structure is organized loosely. This model is congruent with the concept of diversion in which the main objective is to remove young offenders from the formal court process in order to reduce the formality and coerciveness of the hearing. Despite varying compositions, procedures and content, a family group conference frequently includes the offender, victim, their supporters, other relevant parties and a competent official. These participants use the conference to discuss the offending and pursue a reasonable resolution. According to Bazemore and Griffiths, family group

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95 New Zealand was the first country legislating for Family Group Conferences in 1989. All of the States and Territories in Australia, except the Northern Territory, have implemented or conducted trials of some form of Family Group Conferencing: see Nathan Harris, ‘Family Group Conferencing in Australia 15 Years on’ [2008] (27) *Child Abuse Prevention Issues* 7.
97 Ibid and Wundersitz, above n 50, 7.
98 Ibid.
conferencing is the strongest form for educating offenders on the consequences of their action.99 This is because one of its goals is ‘to make young people accountable for their offences by encouraging them to take responsibility for their actions, to make good the damage done, or to accept a penalty’.100

- **Victim-offender Mediation.** This model ‘typically is used as a diversion from formal prosecution or as a condition of probation after the court has accepted an admission of guilt’.101 Victim–offender mediation programs have been the most frequently studied restorative justice programs. The dominant feature is the great emphasis on the victim’s capacity to inform the offender of the consequences caused by the offence.102 This type of program provides opportunities for victims to participate in the criminal process. The victim can explain directly to the offender about the damage or injury he or she has suffered. However, it should be noted that the determination of responsibility and amount of restitution is not part of the mediation process.103 Instead, this model creates opportunity for victims and offenders to participate in a dialogue where the ultimate aims are ‘victim healing, offender accountability, and recovery of the victims’ losses’.104

- **Community Reparation Boards.** Under this form of restorative justice, several community members have a meeting with offenders to discuss criminal actions, their harmful effect on the community and appropriate resolution. The strength of this model is the involvement of the community in the criminal process.105 However, it has a transparent shortcoming as it diminishes the role of victims in the meeting.

- **Circle Sentencing.** This provides a holistic approach to restorative justice.106 It is

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100 Alder and Wundersitz, above n 50, 7.
101 Stevenson, above n 96, 2.
103 Stevenson, above n 96, 3.
104 Ibid.
105 Ibid.
often used in Native American and Canadian Aboriginal contexts. ‘Circles’ involve victims, offenders, community members, friends, and families developing a shared understanding of the offender and the offence. Circle sentencing has some similar features with family group conferencing. However, it appears that the composition of participants in the two models is different. In family group conferencing, agents of the criminal justice system often take the role of facilitators for the meeting, whereas these persons are not involved in the circle sentencing model.

D. Comparisons

This section presents a comparison between the retributive and restorative justice models and identifies key differences between them. This will assist in determining which paradigm is most suitable for juvenile justice. In recent years, there has been a great deal of research focusing on this issue and scholars appear to share the following conclusions:

- First, the ultimate goals of the retributive and restorative justice models are different. The former focuses on punishing the offender, whereas the latter focuses on repairing the harm cause by the offence. In other words, retributive justice focuses on establishing guilt by examining an offender’s actions in the past. Conversely, restorative justice pursues solutions and obligations of recovering damage. The main reason contributing to this difference is the centrality of ‘deterrence’ and ‘just deserts’ theories in retributive justice. This approach holds that punishment is effective because the threat of penalties prevents crime. Conversely, restorative justice argues that ‘punishment alone is not effective in changing behaviour and is disruptive to community harmony and good relationships’. Furthermore, restorative justice also emphasizes assisting offenders to reintegrate into community, which is not significant in retributive justice. Restorative justice requires a

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107 Lemley, above n 72, 52.
109 Daly, above n 79, 58.
community to provide effective and sufficient assistance to rehabilitate offenders, including ‘psychological and educational support, job training and placement’.111

- Second, victims of crime are relatively neglected in the retributive approach. On the other hand, restorative justice recognizes the central role of victims in the process of resolving criminal cases. This is probably related to different views of criminal responsibility in the two justice models. Retributive justice takes the view that an offence is an act violating criminal law, conflicting with the State’s interests. Consequently, criminal responsibility is an obligation of offender to the State, rather than to victims and other parties involved. As a result, the victim is not considered an important party in the criminal process and the participation of this actor is not necessary, in some circumstances, for determination of the criminal responsibility of an offender. By contrast, ‘restorative justice is guided by the principle that crime harms both individuals and relationships’.112 Victims play an active and central role in the process of indentifying guilt and criminal responsibility.113

- Third, in retributive justice, the community is represented abstractly by the State.114 In restorative justice, community members or organizations are identified concretely and have active roles in the criminal process. Flowing from the premise that crime is an act against the State, retributive justice emphasizes the active role of the State in the criminal justice process. Bodies, such as the police, prosecutors and judges represent the State and are vested with the power to solve criminal cases in order to protect the interests of the State and to ensure public safety. The role of other parties (for instance, victims, offenders and especially communities) is passive. Conversely, in restorative justice, the active and direct participation of these parties is crucial to determine obligations of offenders to repair harm caused by their offences.115

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111 Braithwaite, above n 92, 357.
112 Ibid 355.
113 Stevenson states that ‘restorative justice is victim centered. Repairing harm to the victim caused by the offence is a primary goal of the restorative process’: see Stevenson, above n 96, 1.
114 Zehr, above n 110.
115 Lemley, above n 72, 44.
Fourth, retributive justice emphasizes an adversarial relationship among parties. In contrast, restorative justice emphasizes dialogue and negotiation among parties. 116 Bazemore and Umbreit claim that ‘whereas retributive justice is focused on determining guilt and delivering appropriate punishment (“just deserts”) through an adversarial process, restorative justice is concerned with the broader relationship between the offender, the victim and the community’. 117 To resolve harmoniously the interests of all parties, restorative justice utilizes a process which encourages the participation of victims, offenders and communities, as well as focusing on information exchange, conversation and common assent between these parties. 118 In other words, restorative justice uses informal dispute settlement and community justice.

The above comparison shows that restorative justice appears to be suitable for dealing with cases involving children and young people. As noted before, the UN child rights framework has consistently emphasized the need to promote measures for dealing with juvenile offenders without resorting to judicial proceedings. These measures are specific forms of restorative justice and considered as an indispensable part of national juvenile justice systems. The Committee on the Rights of the Child even states that the application of informal interventions should not be limited to children who commit petty offences and first-time child offenders. 119 However, the interventions without resorting to judicial proceedings must fully respect procedural safeguards of juvenile offenders. 120

E. Observations
Awareness of offenders’ criminal responsibility has shifted from considering it as an obligation to the State, to the newer idea that it is an obligation to victims and communities. This shift combined with the recognition of juveniles’ human rights (especially criminal procedural rights) in international law has played a critical role in underpinning the notion of

116 Daly, above n 79, 58.
118 Lemley, above n 72, 46.
120 Article 40(3)(b) of the CRC.
restorative justice. Compared with the current model of retributive justice, this new approach is much more compatible with the objectives of juvenile justice. Restorative justice places an emphasis on repairing harms caused by an offence, including those experienced by offenders themselves. It utilizes informal procedures as a means to resolve criminal cases. This approach diverts juvenile offenders from the formal criminal process in order to reduce the negative impact of such process. In addition, restorative justice also creates opportunities for juvenile offenders to rehabilitate and reintegrate into community.

Based on UN legal instruments governing the administration of juvenile justice, different restorative justice paradigms have already been established in several jurisdictions, including the United States, Canada, England, Wales, New Zealand, Australia, and Thailand. In Viet Nam, although some elements and forms of restorative justice appear in current administrative and criminal legal frameworks, this approach is still relatively new. Hence, Vietnamese legislators and juvenile justice professionals might benefit from research on models of restorative justice in other jurisdictions in order to reform the current juvenile legal system of Viet Nam. In Victoria, the juvenile justice system embodies a number of features and forms of restorative justice. However, the effectiveness of these processes is still subject to analysis and evaluation.

IV. CONCLUSIONS

Key definitions closely relating to juvenile justice have been clarified by the UN child rights framework. The term ‘juvenile offender’ can only be defined by the combination of the CRC, the *Beijing Rules*, and the *UN Rules for the Protection of Juveniles Deprived of their Liberty*. Through these UN instruments, a ‘juvenile offender’ is ‘a child or a young person under the age of 18 who is alleged to have committed or who has been found to have committed an offence’. As Viet Nam and Australia (and thereby Victoria) are the two State Parties of the CRC, these jurisdictions have similar provisions governing the maximum age of a child. A major difference between Viet Nam and Victoria is provision concerning the minimum age of criminal responsibility. In the first jurisdiction, persons who are under 14 years do not have criminal liability. In the second jurisdiction, children under the age of 10 years are considered incapable to commit an offence.
Studies have shown that juveniles are persons who are immature and vulnerable. They are ‘less responsible for their actions, and are more amendable to training and education’. Hence, retributive justice appears inappropriate to deal with children and young offenders. By contrast, according to a large amount of research and practices, restorative justice has emerged as an ideal model for juvenile criminal justice. The UN has endorsed principles of restorative justice in criminal matters, as well as restorative programs including mediation, conciliation, conferencing and sentencing circles. These programs may complement or replace currently ineffective legal systems in several Member States.

Since ratifying the CRC, Australia in general – and the State of Victoria in particular – and Viet Nam have modified their domestic legal systems to comply with international standards to protect the rights of juvenile offenders. In the criminal and procedure laws of Viet Nam and Victoria, however, there are certain differences resulting from differences in legal tradition, cultures, and levels of economic and social development. Victoria has established a criminal process and programs encompassing features of restorative justice. By contrast, in spite of having several principles of the restorative justice, the current system of juvenile criminal justice in Viet Nam largely embodies features of retributive justice. In order to establish a basis for the comparison, evaluation and reform of the Vietnamese and Victorian juvenile justice systems, the next chapter of this thesis depicts the UN benchmark model for dealing with children and young offenders.

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Chapter 3
THE UNITED NATIONS BENCHMARK MODEL OF JUVENILE JUSTICE

I. Introduction
This chapter provides a comprehensive review of issues concerning the protection of juvenile offenders’ rights in criminal proceedings. Assessing the rights of juvenile offenders requires consideration of what constitutes ‘rights’. In this context, it is obvious that human rights, children’s rights and the rights of juvenile offenders have a close interrelationship and all need to be protected. Children share the basic human rights of adults. In certain circumstances, if children violate the criminal law, they are called juvenile offenders. In order to resolve criminal cases, criminal justice processes are used by the competent bodies representing the State. During criminal proceedings, the law invests juvenile offenders with a number of rights, which are essential to protect their legitimate interests.

In this chapter, the author identifies, clarifies and outlines a UN model of juvenile justice. The term ‘model’ refers to a consistent, harmonious, relatively integrated set of principles, policies and recommended procedures which can be extracted from diverse and multiple publications and pronouncements of various UN bodies such that they constitute a ‘model’ of juvenile justice. This model will be used as the benchmark for subsequent evaluation of the Vietnamese and Victorian juvenile justice systems, as well as recommendations for future reform of these two jurisdictions.

II. Aims and General Principles of Protecting Juvenile Offenders’ Rights
A. Introduction
This section presents objectives and leading principles of a comprehensive juvenile justice system as outlined in the UN framework. These objectives and principles identify a regulatory framework of juvenile justice which affects the practical operation of procedure-conducting bodies and other institutions and persons involved in the process of dealing with children and young offenders. By complying with these objectives and principles, Member States can establish a comprehensive policy for juvenile justice including prevention of juvenile delinquency; dealing with juvenile offenders; and disposition, rehabilitation and reintegration into the community.
B. Aims of Protecting Juvenile Offenders’ Rights

This section outlines the interests that are protected through the rights of juvenile offenders. In addition, it creates rationales for choosing a model which is compatible with these aims of juvenile criminal justice. Based on the UN legal instruments previously mentioned, the aims of protecting the rights of juvenile offenders are:

- First, through the protection of juvenile offenders’ rights, unjust prosecution and adjudication can be restricted and the effectiveness of the criminal process will be strengthened. Furthermore, protecting the rights of juvenile offenders may restrict the use of illegal measures such as corporal punishment and torture during the criminal process, especially in the investigation stage. It is possible that in some cases, at the end of the criminal justice process, juvenile offenders will be found not guilty. If in previous procedural stages, their fundamental rights and legitimate interests were sufficiently respected and ensured, the damages suffered by them may not be serious. Thus, responsible procedure-conducting bodies do not incur high costs to compensate these innocent persons. It could be said that protecting the rights of juvenile offenders is a legitimate barrier, which competent authorities must overcome before concluding the guilt of juvenile offenders. Nonetheless, the protection of offenders’ rights and the effectiveness of the criminal justice process are not necessarily in conflict. Indeed, these interests have a close relationship. The levels of protecting juvenile offenders’ rights reflect the effective, civilized and democratic features of any juvenile criminal justice systems. This is because the rights of juvenile offenders are special forms of human rights, which are only recognized and protected in a civilized and democratic society.

- Second, protecting the rights of juvenile offenders creates opportunities for these offenders to realize their mistakes, repair harms caused by their actions and reintegrate into the community. This second goal relates to many important issues such as the form of criminal justice process, types of punishment, the treatment and education of juvenile offenders; the method to repair harms caused by offences and so on.

Concerning models of juvenile justice, the UN and its bodies have consistently held that State parties should establish ‘a comprehensive child-centered juvenile justice
process’.1 This process is based on the principle of the best interests of the child and a restorative justice model (which will be discussed in the following sections). In other words, protecting the rights of juvenile offenders requires the establishment of a criminal justice system in which the interests and the active roles of juvenile offenders are completely assured.

In order to choose appropriate punishments for juvenile offenders, the court should take into account the child’s level of physical and mental development, his or her living and education conditions as well as the causes and conditions of offending. In addition, the legal framework should adopt a wide range of sentencing options in order to assist the court to choose the most suitable measure to apply in each case. To give the protection of juvenile offenders’ rights comprehensive meaning, the juvenile justice system should also focus on the rehabilitative process of juvenile offenders.

- Third, protecting the rights of juvenile offenders can decrease juveniles’ recidivism. This aim is closely related to the second goal because the more juvenile offenders are accepted by the community their likelyhood of reoffending may be lessened.2 Where offenders receive proper consideration from community members, they may not feel isolated and ashamed. This may help them to reintegrate into the society and prevent them from reoffending. A key factor is to assist juvenile offenders realize their faults and inspire their desire to self-educate to become useful citizens of society.

From the above analysis, it is clear that these aims have a close relationship with each other. In order to fulfil all of these goals, States should establish:

A child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes children’s sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society.3

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2 This may be one of reasons why the UN has suggested member States to promote restorative justice programs in dealing with children and young offenders. Some programs such as Community Reparation Boards and Circle Sentencing require community members to participate in the decision-making process. A number of studies have showed that restorative justice is effective in reducing offender recidivism: see Nancy Rodriguez, ‘Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism’ (2007) 53(3) Crime Delinquency 355, 359. See also Department of Human Services, Review of the Youth Justice Group Conferencing Program, Final Report (2010) 25.
C. General Principles of Protecting Juvenile Offenders’ Rights

It is clear that the rights of juvenile offenders play an important role in protecting their legitimate interests during the criminal process. Nonetheless, ensuring that all of these rights are respected is not a simple task. A key source of conflict is between the protection of the rights of juvenile offenders and the effective handling of a criminal case, the protection of the public interest, and security. In order to achieve these two goals simultaneously, fundamental principles protecting juvenile offenders’ rights should be established. These principles are standards enacted to maximize the protection of juvenile offenders which – simultaneously – do not diminish the effectiveness of the criminal justice process. There is no international legislation directly governing this issue. However, through the UN regulatory framework stipulating child-related issues, basic principles for protecting the fundamental rights of juvenile offenders can be discerned. These principles are designed to guide State parties in establishing and reforming their juvenile criminal justice systems as well as assisting UN bodies to set up criteria to evaluate the compliance with CRC of these national legal systems.

For example, para 8(a) of the Guidelines for Action on Children in the Criminal Justice System provides:

> In the use of the Guidelines for Action at both the international and national levels, consideration should be given to the following:

> (a) Respect for human dignity, compatible with the four general principles underlying the Convention, namely: non-discrimination, including gender-sensitivity; upholding the best interests of the child; the right to life, survival and development; and respect for the views of the child.

Furthermore, para 5 of General Comment No. 10 of the Committee on the Rights of the Child states:

> In the administration of juvenile justice, States parties have to apply systematically the general principles contained in articles 2, 3, 6 and 12 of CRC, as well as the fundamental principles of juvenile justice enshrined in articles 37 and 40.

The above provisions show there are four general principles for protecting the rights of children including those in conflict with the criminal law. These are considered the ‘leading principles of a comprehensive policy for juvenile justice’. The State parties of the CRC

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4 Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), para 5 (‘General Comment No. 10’).
have responsibilities to respect and ensure these principles. The following section briefly discusses these four principles.

1. The Nondiscrimination Principle

Article 2 of the CRC provides that:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

The principle of nondiscrimination ‘applies in conjunction with all substantive rights in the CRC, but does not provide an independent right to freedom from discrimination’.5 This principle is not only utilized to protect the criminal procedural rights of juvenile offenders but also to ensure other rights of juveniles. It requires that all children should enjoy their rights and no child should suffer discrimination based on any grounds.

Nonetheless, in the field of juvenile justice, this principle has particular requirements. The Committee on the Rights of the Child notes that State parties have to take all necessary measures to ensure that all children violating the law are treated equally.6 This general principle is applied to prevent any form of discrimination in the criminal process as well as in the rehabilitation of juvenile offenders. Concerning to this matter, the Committee on the Rights of the Child emphasizes that:

Many children in conflict with the law are also victims of discrimination, for example, when they try to get access to education or to the labor market. Therefore, it is necessary to adopt policies in order to prevent such discrimination, *inter alia*, as by providing former child offenders with appropriate support and assistance in their efforts to reintegrate in society.7

Another requirement of this principle is to prevent discrimination not only between juvenile offenders themselves, but also between juvenile offenders and adult offenders. On this issue, the Committee recommends that ‘State parties abolish the provisions on status offences,

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6 Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 6.
7 Ibid para 7.
such as vagrancy, truancy, runaways and other acts, in order to establish an equal treatment under the law for children and adults’.8

2. The Best Interests Principle

The principle of best interests is recognized at the international level by principles 2 and 7 of the Declaration on the Rights of the Child in 1959. Thirty years later, it was confirmed by art 3(1) of the CRC: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.’

This is the paramount principle protecting the rights of juvenile offenders and it functions as an ‘umbrella provision’.9 In a broader context, this principle could be comprehended as ‘a reconciliation of culture and human rights’.10 The Committee on the Rights of the Child indicates that the best interests of the child should be seen as the principal element which competent bodies need to consider before issuing any decisions involving the administration of juvenile justice. Protecting the child’s best interests means that the objectives of reintegration and restorative justice are given more priority than the traditional aims of criminal justice, including suppression or retribution.11 According to this UN human rights body, because of their disparate physical and psychological development, emotional and educational needs, juvenile offenders should be considered less culpable than adult offenders.12 These features, combining with other differences, are the rationales for the establishment of separate juvenile justice systems providing special treatment for juvenile offenders.13

The above explanation of the Committee on the Rights of the Child is compatible with art

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8 Ibid para 8. Indeed, this requirement has already provided in para 56 of the Riyadh Guidelines, stating: ‘In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.’


10 Alston, above n 9, 183.

11 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 10.

12 Ibid.

13 Ibid.
40(1) of the same Convention. Additionally, it appears that the content of this principle is partly encompassed in other international legal instruments, such as art 14(4) of the ICCPR, arts 5.1 and 17.1 of the Beijing Rules.

On the other hand, according to Alston, there are three roles which art 3(1) of the CRC might play in the future:

- The first is (in conjunction with other articles of the Convention) to support, justify or clarify a particular approach to issues arising under the Convention. In this context, it is an aid to construction as well as an element which needs to be taken fully into account in implementing other rights.
- The second role is as a mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention.
- Relating to the third role, Alston suggests that ‘in all matters not governed by positive rights in the Convention, art 3(1) will be the basis for evaluating the laws and practices of the State parties’.

Although the best interests of the child are required to be considered in any case in the criminal process, protecting the rights of juvenile offenders does not have the same meaning as shielding, upholding and excusing their actions and behaviours. Moreover, the need to protect the best interests of juvenile offenders should be balanced with the need to

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14 Article 40(1) of the CRC provides: ‘States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.’
15 Article 14(4) of the ICCPR stipulates: ‘In the case of juvenile persons, the procedure shall be such as will take account their age and the desirability of promoting their rehabilitation.’
16 Article 5.1 of the Beijing Rules states: ‘The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.’
17 Article 17.1 of the Beijing Rules emphasizes: ‘The disposition of the competent authority shall be guided by the following principles: (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society; (b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; (c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated 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; (d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.’
18 Alston, above n 9, 197-8.
19 Ibid 198.
effectively process criminal cases, the need to preserve public safety, order, health, morals, and the fundamental rights and freedoms of others. This is demonstrated in a number of articles of the CRC, such as arts 13, 14 and 15. However, as the Committee on the Rights of the Child acknowledges, ‘although preservation of public safety is a legitimate aim of the justice system, this aim is best served by full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC’.  

3. The Right to Life, Survival and Development
This principle is prescribed in art 6 of the CRC and art 6 of the ICCPR. Article 6 of the CRC stipulates: ‘(1) States Parties recognize that every child has the inherent right to life. (2) States Parties shall ensure to the maximum extent possible the survival and development of the child.’ Compared with other rights of juveniles enshrined in the CRC, the right to life is the only one prescribed as an ‘inherent’ right. Some commentators suggest that this is a ‘peremptory norm of the general international law’.

In the context of juvenile justice, this principle impacts on the various stages of the criminal process especially the adjudication stage (relating to decisions concerning penalties for juvenile offenders) and also on the execution stage and the reintegration of juveniles. This principle requires that the death penalty and life imprisonment without possibility of release cannot be applied to juvenile offenders. Relating delinquency to the development of the child, the Committee on the Rights of the Child claims that delinquency and the deprivation of liberty have negative consequences for a child’s development and seriously hamper his/her reintegration in society. This should result in a policy of responding to juvenile delinquency in ways that support the child’s development. In addition, these are the rationales behind the provision prohibiting unlawful and arbitrary deprivation of the child’s liberty and requiring that arrest, detention and imprisonment should be utilized as a measure of last resort and for the shortest appropriate period of time.

20 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 14.
21 Buck et al, above n 5, 128.
22 Ibid.
23 See art 37(a) of the CRC.
24 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 11.
25 Ibid.
26 See art 37(b) of the CRC.
4. The Right to be Heard

The ‘right to be heard’\(^{27}\) or the ‘right to express views and participate in decisions’\(^{28}\) is recognized by art 12 of the CRC:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

This is a crucial provision of the CRC. Buck observes that ‘[w]hen read together art 5 with art 13, it reflects a move away from merely identifying what decisions children are not competent to take, to consideration of how children can participate’.\(^{29}\) Additionally, Van Bueren asserts that art 12(1) of the CRC ‘has great practical potential in improving the protection of the rights of the child as it clearly places a duty on State parties to involve children when they wish in all matters affect them’.\(^{30}\) The Committee on the Rights of the Child comments that art 12(2) of the CRC requires State parties to create opportunities for juvenile offenders to express their views freely during all stages of criminal proceedings,\(^{31}\) provided those views should be given due weight in accordance with the age and maturity of the child. Furthermore, the Committee on the Rights of the Child notes that diversion is only conducted on the free and voluntary consent of the child, of which the appropriateness and desirability are determined by the child with legal and other advice and assistance.\(^{32}\) In order to ensure this principle, art 40(2)(b) of the CRC recognizes a number of rights for accused children such as the right to effective participation in the proceedings; prompt and direct information of the charges; legal or other assistance; presence and examination of witnesses.

This principle establishes a base for juvenile offenders to protect their legitimate interests. It supports the right of defence of juvenile offenders and the guarantee of a fair trial. According to the Committee on the Rights of the Child, a fair trial demands that juvenile

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\(^{27}\) This name is used by the Committee on the Rights of the Child in General Comment No. 10, UN Doc CRC/C/GC/10, para 12.

\(^{28}\) This name is used by Trevor Buck in International Child Law (Routledge, 2nd ed, 2011) 129.

\(^{29}\) Buck et al, above n 5, 129.


\(^{31}\) Committee on the Rights of the Child, General Comment No. 12 (2009): The Right of the Child to be Heard, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009), para 58 (‘General Comment No. 12’).

\(^{32}\) Ibid para 59.
offenders are able to take part effectively in the adjudication.\textsuperscript{33} In order to achieve this aim, they must understand the charges, the potential effects and punishments.\textsuperscript{34} On this basis, they can direct their defence counsel to examine witnesses, evaluate evidence and imposed measures.\textsuperscript{35} In this regard, the Committee on the Rights of the Child states that children’s voices in the juvenile justice system are becoming a dominant factor leading to ‘improvements and reform, and for the fulfilment of their rights’.\textsuperscript{36}

\textit{D. Observations}

The above sections provide answers for two questions: ‘What can be gained by protecting the rights of juvenile offenders?’, and ‘What principles should be applied when protecting children and young offenders?’. The answers clarify that the assurance of juvenile offenders’ rights is the vital issue of a comprehensive policy for juvenile justice to which every member State of the UN should aspire. Additionally, in the administration of juvenile justice, State Parties must observe general principles and fundamental principles of juvenile justice enshrined in particular provisions of the CRC.\textsuperscript{37} The four leading principles ensure that all children in conflict with the criminal law are treated equally; their best interests is a primary consideration in the decision-making process; their views should be fully respected and implemented at all stages of criminal proceedings; and effective national policies and programs for the prevention of juvenile delinquency should be developed to reduce the negative impact on the child’s development. The fundamental principles of juvenile justice enshrined in arts 37 and 40 of the CRC will be presented and analyzed in subsequent sections of this chapter.

\textbf{III. Human Rights, Children’s Rights and Juvenile Offenders’ Rights in International Law}

\textit{A. Introduction}

Prior to an outline of the UN benchmark model for a comprehensive juvenile justice, it is necessary to clarify the relationships among three notions: human rights, children’s rights and juvenile offenders’ rights. This explains the origin and nature of juvenile offenders’

\textsuperscript{33} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 46.
\textsuperscript{34} Ibid.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid para 12.
\textsuperscript{37} Ibid para 5.
rights in criminal proceedings, as well as reasons for protecting these rights. The first two sections describe basic issues relating to human rights and children’s rights in international law such as definition and classification. The crucial third section outlines the UN benchmark framework governing the rights of children and young offenders.

B. Human Rights in International Law

1. Definition

The issue of human rights has become a prominent focus in contemporary international law. Although there are different opinions concerning the definition of and approach to human rights, most of people agree that human rights ‘involve the ability to demand and enjoy a minimally restrictive yet optimal quality of life with liberty, equal justice before law, and an opportunity to fulfil basic cultural, economic, and social needs’.

Many researchers have located human rights within a religious and philosophical basis. For example, Clapham observes that religious texts such as the Bible and the Koran describe not only the responsibilities, but also the rights of human beings. Sharing this opinion, Hass also suggests that many major religions such as Hinduism, Buddhism and Christianity emphasize various elements of human rights including legal equality, religious freedom, free speech, self-determination and nondiscrimination.

The philosophical origin of human rights explains the relationship between governments and individuals. According to most secular philosophies, because of their human characteristics and potentials, governments must respect human rights of individuals and create a framework for them to obtain a better life. Smith observes that some great philosophers developed the concept of ‘natural rights’ – privileges which should be enjoyed by all human beings. According to Hass, the so-called ‘natural rights’ established the initial foundation for the development of the notion of human rights.

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40 Hass, above n 38, 10-1.
41 Ibid 17.
43 Hass, above n 38, 17.
2. Classifications of Human Rights

There are various ways of classifying human rights. Hass describes three ways of categorizing human rights. The first is suggested by Karl Vasak. This categorization of human rights is based upon ‘the French trichotomy between liberty, equality, and fraternity’. According to this criterion, human rights are divided into three generations: (1) Civil and political rights, which concentrate on issues of liberty; (2) Economic, social, and cultural rights, which relate to equality; (3) A wide range of issues such as the rights to development, a healthy environment, group self-determination and peace.

The second classification relies on chronology. According to this approach, human rights may be classified into different types which developed at different historical times. For example, constitutional rights appeared from the thirteenth century to the eighteenth century; civil liberties in the eighteenth century; political rights, minority rights, and rights of persons in wartime in the nineteenth century; economic, social, and cultural rights, rights of self-determination, group rights and right to peace in the twentieth century.

The third approach to categorizing human rights is to describe analytical subtypes which respect to different areas of activity. For instance, Muskie and Vance state that human rights embrace freedom from violations of the human person, rights of fulfilment of economic needs, and civil and political rights, whereas Shue claims that liberty, security rights, subsistence rights etc. are different forms of human rights.

Among these ways of classifying human rights, the first is accepted by many scholars. Howard’s *Human Rights Law Directions* also mentions three generations of human rights: including civil and political rights; social rights; and other rights such as rights to a safe and sustainable environment, rights of peoples to self-development and to the protection of their cultural heritage. Sharing this opinion, Nowak and Davidson confirm that:

The terminology of first and second generation rights is also sometime applied to these two categories of rights to signify the fact that civil and political rights are, by and large, concerned with freedom.

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42 Ibid.
46 See table 1.1 in Hass, above n 38, 6.
47 Hass, above n 38, 7.
48 See table 1.2 in Hass, above n 38, 7.
from State interference while economic, social and cultural rights represent objectives or aspirations for a State to pursue in promoting the well-being of its people.\textsuperscript{50}

This approach is similar to the standard list of human rights recognized by the UDHR, which states:

Whoever they are, a person has the right that their life should be protected; they are not tortured or enslaved, nor be subject to arbitrary, lawless treatment by those in authority; they should be given fair trials; enjoy basis privacy and basic freedoms such as freedom of religion, speech, association and assembly, and the right to voluntary marriage, rights to vote and stand for election and rights not to suffer discrimination on racial, sexual and other grounds.\textsuperscript{51}

In fact, these rights are usually called civil and political rights as detailed in the ICCPR. Civil rights and political rights are two different set of human rights, but they are interrelated. Civil rights are those rights designed to protect an individual’s physical and mental integrity, prevent discrimination, and preserve their right to a fair trial whereas political rights are those creating possibilities for individuals to participate in civil society.\textsuperscript{52}

The UDHR also recognizes economic, social and cultural rights such as: the right to work; the right to establish trade unions and join the trade union of choice; the right to social security including social insurance; the right to an adequate standard of living for self and family; the right to education; the right to take part in cultural life and to enjoy the benefits of scientific progress and its applications, etc. These types of rights are detailed in the \textit{International Covenant on Economic, Social, and Cultural Rights (ICESCR)}.\textsuperscript{53}

It is impossible to draw a clear distinction between these generations of human rights, because ‘[a]ll human rights are universal, indivisible and interdependent and interrelated’.\textsuperscript{54} On the other hand, among the three generations of human rights, the first – civil and political rights – is likely to have the closest relationship with rights of juvenile offenders in criminal proceedings as further analyzed in a later section. This is demonstrated by the fact that art 14 of the ICCPR prescribes the majority of procedural safeguards of offenders. In the case of


\textsuperscript{51} Howard, above n 49, 8.

\textsuperscript{52} Conte and Burchill, above n 50, 3.


juvenile persons, the ICCPR has additional requirements. For examples, art 10(2) provides that accused juveniles must be separated from adults and brought as speedily as possible for trials. Moreover, art 14(4) requires special procedures for juvenile persons which take account their age and the desirability of promoting their rehabilitation.

3. International Human Rights Protection Mechanism

Human rights can be protected through three main systems at three levels: international, regional and national. Each has mechanisms (e.g. legal frameworks, executing and adjudicative bodies) for the effective protection of all types of human rights, including the rights of juvenile offenders. Among these systems, the international human rights defence system is probably the most important because of its crucial role and universal influence. Within this system, the UN is the principal international organization undertaking the task of reinforcing and strengthening mechanisms to protect human rights throughout the world.

Bertrand Ramcharan, the Deputy High Commissioner for Human Rights and Assistant Secretary-General stated:

The defence of human rights was one of the activities that defined the contemporary and future United Nations. No other body could replace it for universality, legitimacy, trust and its international code of human rights. The human rights mission of the United Nations was central to its raison d’être and was becoming more and more crucial to its other leading roles: the prevention of conflicts, peace-keeping, humanitarian assistance and development.55

In order to establish the legal basis for the operations of its bodies in the field of human rights, the UN has adopted dozens of international legal instruments, including:

- *Universal Declaration of Human Rights 1948*;56
- *United Nations Declaration on the Elimination of All Forms of Racial Discrimination 1963*;
- *International Covenant on Civil and Political Rights 1966*;
- *International Covenant on Economic, Social and Cultural Rights 1966*;
- *Convention on the on the Elimination of All Forms of Discrimination against Women 1979*;
- *Covenant against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984*.57

These international legal instruments are substantive documents recognizing the rights of human beings, especially vulnerable persons, such as children and women, as well as punishing any types of behaviours and actions which potentially violate or infringe substantive human rights. These conventions contain provisions which guide member States in establishing effective domestic models for ensuring and improving human rights. In order to promote these goals, international conventions often prescribe minimum standards, objectives and essential elements for human rights protection. On this point, Hass concludes there are four means which are usually utilized to intervene in States that fail to comply with international human rights standards, including ‘(1) diplomatic and verbal efforts, (2) legal action, (3) economic and humanitarian action, and (4) military means’.\(^5^8\) This author also emphasizes that proactive or punitive action can be used in all four circumstances.\(^5^9\)

Along with substantive legislation, the UN also enacts procedural laws that create international adjudicative bodies and provides the legal base for the practical operation of these bodies. These laws are often adopted in the forms of optional protocols or resolutions.\(^6^0\)

Regarding the UN human rights and humanitarian enforcement mechanisms, these are either UN treaty-based or UN Charter-based. Martin et al state:

> Charter-based organizations are supported by UN members dues; treaty-based organizations are funded only on a voluntary basis by the states parties to the treaty. Within the UN enforcement system, there are diverse organs, such as courts/tribunals, committees, special procedural mechanisms, working groups, rapporteurs, experts, and representatives.\(^6^1\)

On a detailed analysis of UN instruments, especially procedural matters, it appears that most UN human-rights related bodies, whether they are treaty-based or charter-based, perform many functions. These bodies are not only responsible for the interpretation, supervision and


\(^{58}\) Hass, above n 38, 188.

\(^{59}\) Ibid.

\(^{60}\) For examples, the *First Optional Protocol to the International Covenant on Civil and Political Rights 1966*; the *Resolution 1503 of Economic and Social Council 1970*; the *Optional Protocol to the Convention of All Forms of Discrimination against Women 1999*; the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 2002*.

implementation of international legal documents. They also play an important role in adjudicating human rights cases. These bodies currently, include: 62

• UN treaty-based tribunals: the International Criminal Court,63 the Human Rights Committee,64 the Committee against Torture,65 the Committee on Elimination of Racial Discrimination,66 and the Committee on the Elimination of Discrimination against Women.67

• UN charter-based tribunals and other mechanisms: the International Court of Justice,68 International Criminal Tribunal for the Former Yugoslavia, and International Tribunal for Rwanda,69 and the UN High Commissioner for Human Rights.70

B. Children’s Rights in International Law

1. Critical Questions

As can be seen from consideration of the UN framework, issues relating to children’s rights appear quite transparently. Nonetheless, there was considerable controversy about the term ‘children’s rights’. Key questions were: Do children have rights? Are children’s rights the same as children’s welfare? What are the rights of children? And do children have obligations? Before exploring these issues, it should be noted that the term ‘children’ is used in accordance with the definition prescribed in the CRC, which was analyzed in the first section of Chapter 2.

There have been many theories considering the bases of children’s rights. In Children – The Modern Law, Bainham briefly examined three influential British theories of children’s rights provided by MacCormick, Eekelaar and Freeman.71 According to MacCormick, there are

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62 Ibid 7-12.
63 Established by the Treaty of Rome.
64 Established by the ICCPR with its Optional Protocol.
65 Established by the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984.
67 Established by the Optional Protocol to the Convention of All Forms of Discrimination against Women 1999.
68 Established by the League of Nations in 1921.
70 Firstly appointed in 1994.
two theories explaining the nature of right: the ‘will theory’ and the ‘interest theory’. Will theory requires that ‘to have a legal or moral right is to be able to exercise individual choice over the enforcement or waiver of duties imposed on someone else’. According to will theory, in order to become a right-holder, a person must be able to exercise an autonomous choice as to when and whether to utilize their rights. Proponents of this approach are concerned that because children are not competent to exercise their choices, they may not be considered as right-holders. By contrast, interest theory focuses on the protection of an individual’s interests by imposing duties on others. According to this theory, ‘someone has a right if his or her interest is enough to require others to be under a duty to protect it’. Raz claims that this approach ‘is not dependent on whether the right holder is actually capable of asserting or waiving his or her claim’. Hence, if a society recognized the need to care, educate and protect children, it must be aware of its responsibility to acknowledge these rights of children. The fact that children may or may not have enough capacity to utilize or waive these rights is not relevant in determining the obligations of a society.

On the second issue, Bainham argues that children’s ‘rights’ is a multi-dimensional notion embracing two elements: protection and self-determination. Because of their immaturity and vulnerability, children need protection from adults. Nonetheless, as legal persons, children should have the right of self-determination. Concerning the term ‘welfare’, Bainham suggests this depicts a level of ‘self-determination or qualified autonomy’. In addition, according to Farson, self-determination is the vital inheritance right of children which overrules all others. Consequently, ‘children’s rights’ is a concept which encompasses the welfare or the best interests of children. However, a key difference between ‘rights’ and ‘welfare’ is that rights are universal while welfare is individualistic. Worsfold argues that children’s rights have an essential feature which is truly global, applicable for

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73 Bainham, above n 71.
74 Buck et al, above n 5, 25.
75 MacCormick, above n 72.
78 Bainham, above n 71, 100.
79 Ibid.
children all over the world. By contrast, according to Dworkin, ‘a person’s welfare is a matter of his success in fulfilling his preferences, goals and ambitions’. 

Concerning the third question, there are a number of ways to classify children’s rights. Eekelaar divides the interests of children into three groups: basic, developmental and autonomy interests. According to this author, basic interests comprise those which are vital for a healthy life ‘including physical, emotional and intellectual care’. Developmental interests mean that equal opportunities in maximizing suitable resources should be given to all children during their childhood. Autonomy interests of children involve their freedom to decide independently their lives.

Freeman categorizes children’s rights into four groups: rights to welfare, rights of protection, rights to be treated like adults, and rights against parents. First, children’s rights to welfare can be considered as human rights which are enumerated in the United Nations Declaration of the Rights of the Child 1959, comprising the entitlement to a name and nationality; the right to adequate nutrition, housing, recreation and medical assistance and the right to receive free education. Second, children’s rights of protection refer to ‘protection from negative behaviour and activities such as inadequate care, abuse or neglect by parents, exploitation by employers or environmental dangers’. Third, the right of children to be treated like adults means children are entitled the same rights and liberties as adults if there is no justification for differentiating between them. Fourth, children’s rights against parents are those relating to children’s need for independence from their parents’ control.

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84 Eekelaar, above n 83.
85 Ibid.
86 Ibid.
88 Andrew Bainham, above n 71, 107-8.
89 Ibid 108.
91 Ibid 109.
Among these categories of rights, perhaps the rights of protection and to be treated like adults support for procedural safeguards of children and young people. Bainham states that ‘protective rights are concerned that minimally acceptable standards of treatment are observed and, as such, are largely, although not exclusively, the province of criminal law’. The right of protection is entitled to not only child victims but also offenders. As their adult counterparts, children and young offenders enjoy human rights in criminal proceedings. Governments (represented by polices, prosecutors and judges) have responsibility to respect these legal rights. Additionally, because of their immaturity and vulnerability, child offenders are often received special and additional protection from international law.

In comparison with the first three questions, the last has received least attention from scholars. Nevertheless, it can be seen that all jurisdictions apparently recognize and stipulate certain obligations towards children in their respective laws. Children’s responsibilities vary from a duty to respect and support their parents, to civil and criminal responsibilities and are very culturally relative. Relating to the obligations of children, it is worth noting that:

> The younger the child the less actual and legal capacity that child will possess and the less justification there is for imposing duties or responsibilities on that child. As the child gets older and gradually acquires greater actual and legal independence so the case gets stronger for requiring increased actual and legal responsibility on the part of the child or, perhaps more accurately, young person.92

2. The International Legal Instruments Governing Children’s Rights

Consistent with the international legal framework governing human rights, there are a number of international legal instruments designed to protect the rights of children, including the following:

- *Declarations of the Rights of the Child 1924 and 1959;*
- *Universal Declaration of Human Rights 1948;*
- *International Covenant on Civil and Political Rights 1966;*
- *International Covenant on Economic, Social and Cultural Rights 1966;*

From an historical perspective, children’s rights were internationally recognized and protected ‘even before the modern development of international human rights law’.93 This is

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92 Bainham, above n 71, 114.
93 Buck et al, above n 5, 23.
illustrated by the fact that the first human rights declaration adopted by any inter-
governmental organizations was the Declaration of the Rights of the Child, which preceded
the UN’s Universal Declaration of Human Rights by 24 years. Second, children’s rights
are stipulated in specific legal instruments such as the two declarations in 1924 and 1959 and
the CRC. Furthermore, the rights of children are also prescribed in other international legal
instruments governing human rights in general. These legal documents express the modern
development from merely establishing principles for protecting children’s rights based on
considering them as ‘passive objects of concern’ to enumerating and recommending
effective mechanisms and policies to protect children’s rights based on a recognition of the
active and participating role of children. The rights of children recognized and stipulated in
these legal documents include essential rights relating to juvenile offenders.

C. Juvenile Offenders’ Rights in the United Nations Framework

1. Definition and Features

a. Definition

As previously noted, juvenile offenders’ rights are closely related to human rights. In fact,
they are specific forms of civil rights, which are stipulated in the ICCPR. According to
Conte and Burchill, ‘civil rights are those which are calculated to protect an individual’s
physical and mental integrity, to ensure that they are not the victims of discriminations, and
to preserve their right to a fair trial’. In this section, emphasis will be placed on rights of
juvenile offenders in the criminal process (rather than consideration of juveniles’ general
rights). Based on the foregoing, rights of juvenile offenders may be defined as civil rights in
criminal proceedings which are recognized and entitled by criminal procedure law.

The question now addressed is why international and national legal systems must
particularly recognize and protect the rights of juvenile offenders in the criminal process.
First, this is largely because the criminal procedural rights of juvenile offenders derive from
human rights. Second, juvenile offenders are often in an especially disadvantaged position
compared with other parties in criminal proceedings, especially investigators and
prosecutors. Juvenile offenders may not have enough knowledge and power to protect their

94 Buck et al., above n 5, 23.
95 For instance, the Universal Declaration of Human Rights 1948 and the two Covenants in 1966.
96 Buck et al., above n 5, 23.
97 Conte and Burchill, above n 50, 3.
legitimate interests. Consequently, ‘it is important that certain legal limits be placed on those powers in order to provide some measure of protection to the fundamental rights of suspects and accused persons’. In other words, by recognizing the rights of juvenile offenders, international and national laws create specific protections and require investigators, prosecutors and judges to operate within these protections to prove a juvenile offender’s guilt.

b. Features

The above consideration of juvenile offenders’ rights leads to the following conclusions:

- First, the rights of juvenile offenders derive from human rights and basic civil rights of citizens. Although these persons are called ‘offenders’, this does not mean that all their rights will be eliminated by law. Juvenile offenders still possess basic human rights. Hence, their dignity and humanity should be recognized and respected to some extent. This is mentioned in the concept of ‘human rights culture’ by Clapham. According to this author, ‘human rights culture’ means that ‘everyone is ensured to be treated with respect to their inherent dignity and human worth…’. Being suspected (or convicted) of a crime does not justify the suspension of all human rights. Davis explains:

  Most murderers or vicious racists are entitled to the protection of their human rights. Of course, these are not rights to enable them to murder or pursue racist activities. But even the worst of persons is entitled to a fair trial, other basic rights and to proper treatment in prison.

Moreover, because juvenile offenders are also citizens of their countries, it will be reasonable for these specific persons to be granted the basic rights of citizens. These rights are often prescribed in national constitutions and transformed into criminal procedural rights stipulated in criminal procedure law. It is quite clear that human rights, the basic rights of citizens and the criminal procedural rights of juvenile offenders are closely related.

- Second, many rights of juvenile and adult offenders are the same. In the very early stage of establishing international human rights, there was no distinction between the

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99 Clapham, above n 39, 2.
100 Howard, above n 49, 3.
rights of juvenile and those of adults. In fact, they were stipulated on the same legal basis. These international legal instruments not only recognize the substantive rights of offenders in criminal proceedings but also at sentencing. These rights include the:

- Right to a fair trial;
- Right to life; no cruel and inhuman punishment;
- Right of prisoners to reformation and rehabilitation;
- Presumption of innocence.102

Third, aside from those rights shared with adult offenders, juvenile offenders also have some distinctive rights. Recognizing the vulnerability and immaturity of juvenile offenders, more recent international human rights law has reserved special procedural rights for juveniles, embodied in provisions such as:

- Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence
- To be fully respected of privacy at all stages of the proceedings.103

2. Classification of Juvenile Offenders’ Rights

Most national criminal procedure laws divide criminal proceedings into different stages, such as institution, investigation, prosecution, and adjudication. Previously, some countries (including Viet Nam) considered the enforcement of a court’s judgment as a phase of the

101 Such as the UDHR, the ICCPR, the Standard Minimum Rules for the Treatment of Prisoners 1955; the Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment 1984; the Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment 2000.
102 For comprehensive list of rights, see Hass, above n 38, 101.
103 See arts 37, 40 of the CRC.
criminal procedural process. However, researchers have recently argued that one should separate the stage of criminal proceedings which ends with the coming to legal effect of a court’s decision from the enforcement or execution of the sanction, whilst acknowledging that both stages need special legal safeguards to protect the rights of juveniles. According to Prof. Dunkel, this approach partially explains why the Council of Europe has passed the European Rules for Juvenile Offenders Subject to Sanctions or Measures in 2008 (Rec (2008) 11) concerning mainly the enforcement or execution stage.104 Moreover, this approach is supported by the fact that a large number of countries currently have separate laws governing the enforcement or execution of a court’s decision in a criminal case, while previously this stage was often included in the Criminal Code and Criminal Procedure Code. At each procedural phase, offenders may have specific rights and obligations.

The rights of offenders are guaranteed not only by international human rights and criminal procedure legislation but also by several regional legal instruments.105 Specifically relevant to juvenile offenders’ rights and juvenile justice are documents such as:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules);
- Convention on the Rights of the Child;
- Basic Principles on the Role of Lawyers;106
- United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines);108
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty;

104 Prof. Frieder Dunkel was one of three experts drafting these rules. The author of this thesis and Prof. Frieder Dunkel share the view that enforcement of a court’s decision should be separated from a criminal proceeding.
• Guidelines for Action on Children in the Criminal Justice System;\(^{109}\)
• Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters;\(^{110}\)
• Model Law on Juvenile Justice;\(^{111}\)
• General Comment No. 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (art. 14);\(^{112}\)
• General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial;\(^{113}\)
• General Comment No. 8: The Right of the Child to Protection from Corporal punishment and other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia);\(^{114}\)
• General Comment No. 10: Children’s Rights in Juvenile Justice;\(^{115}\)
• General Comment No. 12: The Right of the Child to be Heard.\(^{116}\)

The above convention, rules, guidelines, principles and general comments constitute the UN framework for juvenile justice. Through this framework, a benchmark model can be identified. This model governs all issues of a comprehensive juvenile justice system. It governs the prevention of juvenile delinquency, different programs and procedures used to deal with juveniles, and measures of disposition, rehabilitation and reintegration into the community of children and young offenders. However, as previously clarified, this thesis

\(^{111}\) The model law is a document published by the Centre for International Crime Prevention in 1997 which aims to ‘facilitate the drafting of national legislative provisions adapted by countries wishing to establish a law on juvenile justice or to modernize their legislation in this area’: see Brigitte Doring, Introduction for Model Law on Juvenile Justice.
\(^{112}\) Human Rights Committee, General Comment No. 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (art. 14), 21st sess, (13/04/1984), HRI/GEN/1/Rev. 9(I), 184–8 (‘General Comment No. 13’).
\(^{113}\) Human Rights Committee, General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 19th sess, UN Doc CCPR/C/GC/32 (23 August 2007) (‘General Comment No. 32’).
\(^{114}\) Committee on the Rights of the Child, General Comment No. 8 (2006): The Right of the Child to Protection from Corporal punishment and other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, inter alia), 42nd sess, UN Doc CRC/C/GC/8 (2 March 2007) (‘General Comment No. 8’).
\(^{115}\) Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) (‘General Comment No. 10’).
\(^{116}\) Committee on the Rights of the Child, General Comment No. 12 (2009): The Right of the Child to be Heard, 51st sess, UN Doc CRC/C/GC/12 (20 July 2009) (‘General Comment No. 12’).
focuses on the issue of protecting the rights of juvenile offenders in criminal proceedings. The prevention of juvenile delinquency and execution of disposition measures are outside the scope of this thesis. The UN juvenile justice benchmark model is described in Figure 1.

Figure 1. The UN Benchmark Model of a Comprehensive Juvenile Justice System

- Distinct legal framework
  - Special chapters in general criminal and procedural law
  - Separate statutes (Model Law on Juvenile Justice)

- Specialized procedure-conducting bodies and persons
  - Juvenile courts, specialized units within investigation bodies and prosecutions
  - Specialized judges or magistrates, investigators and prosecutors

- Supporting services and facilities
  - Probation, counseling or supervision
  - Day treatment centres, residual care and treatment of child offenders

A comprehensive juvenile justice system

- Prevention of juvenile delinquency
  - The Riyadh Guidelines

- Dealing with juvenile offenders

- Disposition
  (art 37(a) of the CRC, arts 17-19, Parts 4-5 of the Beijing Rules)
  - Prohibition of the death penalty
  - No life imprisonment without parole
  - Institutional and non-institutional treatments

Minor offences

Interventions without resorting to criminal proceedings (Diversion)

- Article 40(3)(b) of the CRC
- Article 11 of the Beijing Rules
- Restorative justice programs: mediation, conciliation, conferencing and sentencing circles. (ECOSOC Res. 2002/12: Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters)

Serious offences

Criminal proceedings
(art 40 of the CRC, art 7 of the Beijing Rules, General Comments No. 10 of the Committee on the Rights of the Child)

General rights

1. Right to be presumed innocent
2. Right to remain silent
3. Right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment
4. Right not to be subject to arbitrary arrest or detention

Procedural rights

1. Right to be informed promptly and directly of the charges
2. Right to be tried without undue delay
3. Right to have the free assistance of an interpreter
4. Right of defence
5. Right to equality before courts and tribunals and to a fair trial
6. Right to the presence and examine of witnesses
7. Right to appeal

Rights particular to juvenile offenders

1. Right to the presence of a parent or guardian
2. Right to privacy
International and national legislation use different terms to express the rights of juvenile offenders, such as ‘guarantee’, ‘basic procedural safeguard’, or ‘right’. Despite being a non-binding legal instrument, the *Beijing Rules* mentions a non-exhaustive list of basic procedural safeguards for juvenile offenders in art 7.1, including:

- the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority.

In summary, the rights of juvenile offenders could be divided into specific groups comprising general rights, procedural rights and special rights. However, this is a relative classification because these rights have an interrelationship. Part of Figure 1 of the thesis describes three groups of juvenile offenders’ rights in the criminal process.

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<thead>
<tr>
<th>General Rights</th>
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<td>1. Right to be presumed innocent</td>
<td>1. Right to be informed promptly and directly of the charges</td>
<td>1. Right to the presence of a parent or guardian</td>
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<tr>
<td>2. Right to remain silent</td>
<td>2. Right to be tried without undue delay</td>
<td>2. Right to privacy</td>
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<td>3. Right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment</td>
<td>3. Right to have the free assistance of an interpreter</td>
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<td>4. Right not to be subject to arbitrary arrest or detention</td>
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<td>7. Right to appeal</td>
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117 Article 40(2)(b)(i) of the CRC.
118 Article 7.1 of the *Beijing Rules*.
119 Article 11(1) of the UDHR and art 14(2) of the ICCPR.
120 Based on different criteria, other scholars may have various ways to classify the rights of juvenile offenders. For example, Geraldine Van Bueren simply divides the rights of child offenders into two groups at two stages of criminal proceedings: prior to the determination of criminal charges and during the determination of criminal charges: see Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, 1995) Chapter 7.
Most of these procedural safeguards (with the exception of the right to the presence of a parent or guardian and the right to be fully respected of privacy) are standards which apply not only to juvenile but also adult offenders and are provided in binding legislation such as the ICCPR (art 14) and the CRC (art 40(2)(b)). Although the CRC does not reiterate all the rights stipulated in the ICCPR, the saving clause contained in art 41 was designed to guarantee for juvenile offenders the protection of additional rights which can be found in other regional and international instruments.\textsuperscript{121} Article 40(2)(b) of the CRC only establishes the minimum of safeguards. Although the ICCPR, the Beijing Rules and the CRC have different legal effects, they provide a critical foundation for the protection of procedural rights of juvenile offenders and have an interrelationship with each other. Thus, when analyzing basic procedural safeguards in the following sections, these international instruments should be considered in combination.

a. General Rights

These are the rights of juvenile offenders which exist through the whole criminal process. Procedure-conducting bodies and persons have an obligation to guarantee these rights. The general rights of juvenile offenders comprise the following:

- **Right to be Presumed Innocent.** This right is prescribed in almost all international legal instruments.\textsuperscript{122} The content of the right to be presumed innocent is uniformly comprehended. This procedural safeguard is ‘applicable to all stages up to conviction and to criminal proceedings only’.\textsuperscript{123} The presumption of innocence is ensured under art 11 of the UDHR: ‘Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.’

This right not only influences the investigation and prosecution stages, but also requires public authorities to refrain from prejudging the outcome of a trial.\textsuperscript{124}

\textsuperscript{121} Van Bueren, above n 120, 182.
\textsuperscript{122} These include art 11(1) of the UDHR; art 14(2) of the ICCPR; art 40(2)(b)(i) of the CRC; and rule 7.1 of the Beijing Rules. Additionally, the right to be presumed innocent has also been recognized by art 6(2) of the ECHR; art 8(2) of the ACHR and art 7(1) of the African Charter on Human Rights and Peoples’ Rights 1981.
\textsuperscript{124} Conte and Burchill, above n 50, 176.
other words, no person shall be considered guilty and be punished until a court judgment on his or her criminality takes legal effect. Consequently, public authorities have a responsibility to respect and assure all the fundamental rights of juvenile offenders, rather than treat them as guilty persons. This right requires criminal procedure-conducting persons to have an objective attitude and no preconception about the guilt of the accused and defendants. This assists criminal procedure-conducting persons not to ignore evidence of innocence and circumstances extenuating the criminal liabilities of the accused or defendants. The Human Rights Committee suggests that during court sessions, defendants should ordinarily not be handcuffed or kept in cages or otherwise appear to the court in a manner suggesting they may be dangerous criminals. More importantly, the presumption of innocence requires that the burden of proof for any criminal charge is on the prosecution, and an accused must have the benefit of the doubt.

- **Right to Remain Silent.** This right is stipulated in art 7.1 of the *Beijing Rules* and art 55(2)(b) of the *Statute of the International Criminal Court 1998*. It provides:

  Where there are grounds to believe that a person has committed a crime … that person shall also have the following rights of which he or she shall be informed prior to being questioned: [t]o remain silent, without such silence being a consideration in the determination of guilt or innocence …

This right is called ‘the right to silence’ in some jurisdictions. It is the right of a suspect, an accused or a defendant to say nothing when being questioned either in pre-trial or trial stages. The right to remain silent is related to the ‘privilege against self-incrimination’ and the right to be presumed innocent. The right to remain silent is designed to protect individuals against the power of the State. Persons who refuse to speak to police or testify at trial are not punished. Therefore, any confessional evidence collected by means of threat or promise or other oppression is

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125 Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 29.
126 Conte and Burchill, above n 50, 177.
127 This right is stipulated in art 14(3)(g) of the ICCPR; art 40(2)(b)(iv) of the CRC; art 67(1)(g) of the *Statute of the International Criminal Court 1998*; and art 8(2)(g) of the ACHR. Article 40(2)(b)(iv) of the CRC stipulates: ‘Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [n]ot to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.’
Van Bueren notes that ‘children may be more vulnerable to pressures to ‘confess’ and the right to remain silent helps to prevent such pressures’. However, he argues that this right of juvenile offenders is not protected extensively under the ICCPR and the CRC. Article 40(2)(b)(iv) of the CRC only provides that juvenile offenders are not ‘compelled to give testimony or to confess guilt’ and similar expression are used in art 14(3)(g) of the ICCPR. Consequently, ‘it appears that adverse inferences could be drawn from silence and refusal to answer questions whilst in custody’. Van Bueren concludes that if the Beijing Rules are not incorporated into States’ own legislation there will not be any binding legal duty on them to realize the right to remain silent. Concerning this issue, the Human Rights Committee explains that:

Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.

Common law usually requires the police to explain this right to suspected persons (before interrogating them), i.e., that they are not obliged to answer any questions but whatever they say can be used as evidence against them in trial. However, the right to silence has been modified by several common law jurisdictions including the UK, Northern Ireland and Singapore. These jurisdictions have enacted legislation allowing the court to ‘draw adverse inferences at trial from the defendant’s failure to provide certain information to police’. At the present time, there are some controversies surrounding the situations in which courts can make adverse inferences against an accused and a defendant who remains silent in pre-trial and trial stages. To address the possibility of drawing a contrary inference, the police (in the UK) have supplemented their caution: “You do not have to say anything. But

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130 Van Bueren, above n 120, 178.
131 Ibid.
132 Ibid.
133 Human Rights Committee, General Comment No. 13, HRI/GEN/1/Rev. 9(I), 184-88 [14].
134 Ligertwood, above n 129.
136 Criminal Evidence Order 1988, arts 3, 5-6.
137 Criminal Procedure Code, ss 122(6)-123(1), inserted by the Criminal Procedure (Amendment) Act 1976.
it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence.”

- **Right not to be Subject to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment.** This right is stipulated in art 5 of the UDHR; art 7 of the ICCPR; art 17.3 of the *Beijing Rules*; arts 19, 37(a) of the CRC; art 55(1)(b) of the *Statute of the International Criminal Court 1998*; and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984*. Article 37(a) of the CRC stipulates: ‘No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.’ Article 55(1)(b) of the *Statute of the International Criminal Court 1998* also prescribes:

> In respect of an investigation under this Statute, a person: [s]hall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment; …

It appears that the right not to be subject to torture and cruel, inhuman and degrading treatment or punishment is recognized in both international and regional human rights laws. The rationale behind this safeguard is the right of juveniles in general, and juvenile offenders in particular, to be respected for their human dignity and physical integrity and equal protection by the law, which is considered as ‘the fundamental guiding principle of international human rights law’. This guarantee operates not only at the investigation and prosecution stages, but also at the adjudication and disposition stages. The main legal basis ensuring this right of juvenile offenders is art 37(a) of the CRC, which is complemented and extended by art 19 of the same Convention. However, it should be noted that art 19 is designed to provide for the protection of children in general (rather than juvenile offenders) against corporal punishment and other cruel or degrading forms of punishment.

Through UN human rights legal instruments, it can be seen that definitions of terms such as ‘torture’, ‘corporal’ or ‘physical’ punishment, and ‘non-physical’ punishment

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139 Ligertwood, above n 129, 35.
140 It should be noted that controversy in some areas about the issue of physical punishment of children by parents is outside the scope of this thesis. Alternatively, this section focuses on physical punishment of juvenile offenders by the State.
141 Committee on the Rights of the Child, *General Comment No. 8*, UN Doc CRC/C/GC/8, para 11.
are explained quite clearly. The basic requirement of this right is that all torture or other cruel, inhuman or degrading treatment or punishment of juvenile offenders must be prohibited and eliminated by national laws of States parties. This is because these forms of punishment cause not only physical pain but also harmful effects on the normal development of juveniles.

On the other hand, the Committee on the Rights of the Child accepts there are exceptional cases in which the use of ‘reasonable’ and ‘moderate’ restraint of juvenile offenders can be justified. Nevertheless, in these circumstances, the Committee emphasizes that the application of restraint must always be consistent with ‘the principle of the minimum necessary use of force for the shortest necessary period of time’. It also notes that the safety of measures used and the proportion of each case must be ensured.

- **Right not to be Subject to Arbitrary Arrest or Detention.** This right is stipulated in art 9 of the UDHR; art 9 of the ICCPR; art 37(b)-(d) of the CRC; art 29 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990* and art 55(1)(d) of the *Statute of the International Criminal Court 1998*. Articles 37(b)-(d) of the CRC stipulates:

  - No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
  - Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
  - Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

The right to liberty is obviously extremely valuable to every person. However, criminal procedure law usually entitles authorities to temporarily restrict the liberty

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142 Committee on the Rights of the Child, *General Comment No. 8*, UN Doc CRC/C/GC/8, para 16.
143 Ibid para 15.
144 Ibid.
145 Ibid.
of offenders by establishing lawful arrest and detention measures. Furthermore, because of concerns for the safety and physical and mental wellbeing of juveniles, competent bodies can only impose arrest, detention and imprisonment on these offenders when they do not have other appropriate options. Whenever applying these measures, competent bodies must only impose them for a ‘reasonable’ duration only (in order to preclude excessive deprivation of liberty).

b. Procedural Rights
These safeguards are designed to establish an equitable and fair criminal justice process which promptly and correctly resolves criminal cases. Particularly, these procedural guarantees assist offenders to have adequate time and conditions to conduct their defence against the prosecution and request the superior court to review the first-instance judgment if they are not satisfied with such judgment. The majority of these rights are applied to juvenile and adult offenders, although international law often has additional requirements for children and young offenders. The rights in this group differ from general rights in terms of applying scope. Some procedural rights exist in certain stages of criminal proceedings rather than in the whole criminal process. The following procedural rights of offenders are frequently mentioned in international legal instruments:

- **Right to be Informed Promptly and Directly of the Charges.** This basic procedural safeguard is provided in art 14(3)(a) of the ICCPR, arts 7.1, 10.1 of the *Beijing Rules* and art 40(2)(b)(ii) of the CRC. The latter article stipulates:

  > Every child alleged as or accused of having infringed the penal law has at least the following guarantees: [t]o be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians.

  The right to be notified of charges has a close relationship with the right of defence because it assists juvenile offenders to conduct their right of defence more effectively. The Human Rights Committee and the Committee on the Rights of the Child have commented about this right in *General Comment No. 32* and *General Comment No. 10*. These Committees’ comments can be summarized as follows:
The Committee on the Rights of the Child considers that the terms ‘prompt’ and ‘direct’ mean ‘as soon as possible’.\textsuperscript{146} Thus, the charges against a juvenile offender must be given to him or her at the first stage of the criminal process when the prosecutor or the judge initially takes procedural steps against the child. The Human Rights Committee states ‘this guarantee applies to all cases of criminal charges, including those of persons not in detention, but not to criminal investigations preceding the laying of charges’.\textsuperscript{147} This guarantee requires that even when the case is handled by way of diversion (without using court procedures) the child must be informed of the charges\textsuperscript{148} or, in trials without the presence of the accused, he or she must be informed of the charges and notified of the proceedings.\textsuperscript{149}

Article 14(3)(a) of the ICCPR stipulates that a child offender must be informed ‘in detail in a language which he understands of the nature and cause of the charge against him’. According to the Committee on the Rights of the Child, this provision ‘may require a presentation of the information in a foreign language and a “translation” of the formal legal jargon often used in criminal/juvenile charges into a language the child can understand’.\textsuperscript{150} The Committee additionally emphasizes that supplying the child with the official document is not sufficient and an oral interpretation may be necessary.\textsuperscript{151} Concerning this issue, the Human Rights Committee takes a slightly different opinion when it states that art 14(3)(a) allows the authorities to announce the charge either orally (and confirm in writing later) or in writing, provided that the information identifies both the law and the alleged general facts on which the charge is based.\textsuperscript{152} In this regard, the explanations of the Committee on the Rights of the Child focus on ways to help a juvenile offender comprehend his or her charge, while those of the Human Rights Committee emphasize the contents of information contained in the charge.

\begin{itemize}
\item \textsuperscript{146} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 47.
\item \textsuperscript{147} Human Rights Committee, \textit{General Comment No. 32}, UN Doc CCPR/C/GC/32, para 31. See also Communication No. 1056/2002, \textit{Khachatryan v Armenia}, para 6.4.
\item \textsuperscript{148} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 47.
\item \textsuperscript{149} Human Rights Committee, \textit{General Comment No. 32}, UN Doc CCPR/C/GC/32, para 31.
\item \textsuperscript{150} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 47.
\item \textsuperscript{151} Ibid para 48.
\item \textsuperscript{152} Human Rights Committee, \textit{General Comment No. 32}, UN Doc CCPR/C/GC/32, para 31.
\end{itemize}
According to art 40(2)(b)(ii) of the CRC, authorities are entitled to relay the charges through a child offender’s parents or legal guardians when it is appropriate to do so. This means that State parties may be free to use their discretion and withhold information relating to charges if a child’s interest is adversely affected by his or her parents or legal guardians being informed.\textsuperscript{153} Van Bueren recommends that State parties should consider the wishes of the child before making such a decision.\textsuperscript{154} Nonetheless, even when the charges are informed to these persons, authorities still have the duty to ensure the child understands each charge against him or her. The Committee on the Right of the Child asserts that ‘it is most appropriate if both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences’.\textsuperscript{155}

This is an apparent gap between the operation of art 9(4) and art 40(2)(b)(ii) of the CRC. According to art 9(4) of the CRC, essential information on the whereabouts of a child who is separated from his or her family because of ‘any action initiated by a State party’ should be provided \textit{on request} to family members unless such information would be detrimental to the well being of the child. Therefore, if the child’s family members do not make the request, authorities are not obliged to inform them of charges relating to a child offender. Van Bueren concludes that ‘the right of children, under binding international law, to have their parents notified of their immediate apprehension by law enforcement authorities appears to have been sacrificed in the rush for the completion of the second reading of the CRC’.\textsuperscript{156}

\begin{itemize}
\item \textbf{Right to be Tried without Undue Delay.} This right is provided in arts 10(2)(b); 14(3)(c) of the ICCPR; art 40(2)(b)(iii) of the CRC; arts 7.1, 20 of the \textit{Beijing Rules} and art 67(1)(c) of the \textit{Statute of the International Criminal Court 1998}. The right to be tried without unreasonable delay manifests the common law principle that ‘justice delayed is justice denied’.\textsuperscript{157}
\end{itemize}

\textsuperscript{153} Van Bueren, above n 120, 177.
\textsuperscript{154} Ibid.
\textsuperscript{155} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 48.
\textsuperscript{156} Van Bueren, above n 120, 177.
Article 10(2)(b) of the ICCPR prescribes that ‘[a]ccused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication’. This is reinforced by art 20 of the Beijing Rules proposing that each case from the outset should be handled, ‘expeditiously without any unnecessary delay’. Van Bueren considers that the repetition in the phrasing of this principle ‘serves to emphasize that speed is consistent with the best interests of the child’. In its General Comment No. 21, the Human Rights Committee observes that necessary attention to the fact that art 10(2)(b) of the ICCPR is a mandatory provision was not given by some States parties and also emphasizes that cases involving juveniles must be considered as speedily as possible. Although the discription of this right only refers to the adjudication phase, it is relevant to all stages of the criminal process. The Human Rights Committee states:

This right is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.

In General Comment No. 32, the Human Rights Committee emphasizes that this principle involves the time from the formal charging of the accused to the time when the final judgment on appeal is rendered. It is generally acknowledged that the length of this stage should be ‘reasonable’. Regarding this issue, the Human Rights Committee explains that in determining whether or not the length of a trial stage is reasonable, three main elements should be taken into account: the case’s complexity, the accused person’s conduct, and the manner in which the matter was settled by the administrative and judicial authorities. The Committee also notes that in situations where the court does not grant bail, the accused must be tried as soon as possible. These interpretations are compatible with the principle embodied in art 37(b) of the CRC that children should only be detained for the shortest appropriate time.

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158 Van Bueren, above n 120, 175.
159 Human Rights Committee, General Comment No. 21: Replaces General Comment 9 Concerning Humane Treatment of Persons Deprived of Liberty (Art. 10), 44th sess, UN Doc HRI/GEN/1/Rev.1 at 33 (10 April 1992), para 13 (‘General Comment No. 21’).
160 Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, para 35.
162 Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, para 35.
163 Ibid. See also Communication No. 818/1998, Sextus v Trinidad and Tobago, [7.2].
• **Right to Have the Free Assistance of an Interpreter.** This procedural right is guaranteed by art 14(3)(f) of the ICCPR and art 40(2)(b)(vi) of the CRC. The provision in the CRC is that a child offender is entitled to have the free assistance of an interpreter if he or she cannot understand or speak the language used. Obviously, to ensure fairness and ‘equality of arms’\(^\text{164}\) in criminal proceedings, this right should be available at all stages of the criminal process. In this regard, art 40(2)(b)(vi) of the CRC is more comprehensive than art 14(3)(f) of the ICCPR. This is because the latter only entitles the free assistance of an interpreter to juvenile offenders in the court trial.\(^\text{165}\)

It is suggested that the interpreter should have knowledge and experience of working with children in order to assist the juvenile offender to fully comprehend any question raised and protect the right to a fair trial and ensure effective participation.\(^\text{166}\) Moreover, deriving from the spirit of this article and in compliance with art 23 of the CRC, the Committee on the Rights of the Child proposes that children with speech impairment or other disabilities involved in criminal proceedings should be provided with adequate and effective assistance by well-trained professionals, e.g. in sign language, by State parties.\(^\text{167}\)

• **Right of Defence.** This right is provided in international legal instruments such as, art 11(1) of the UDHR; arts 14(3)(b),(d) of the ICCPR; art 40(2)(b)(i) of the CRC; art 7.1 of the *Beijing Rules*; art 67(1)(b) of the *Statute of the International Criminal Court 1998*.\(^\text{168}\) Basically, the right of defence provides that offenders have a right to challenge the charges against them. It includes the right of offenders to defend

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\(^\text{164}\) See below page 78 of the thesis.
\(^\text{165}\) The terms used in art 14(3)(f) of the ICCPR indicate that this assistance is limited to the adjudication stage. By contrast, in para 40 of *General Comment No. 32*, the Human Rights Committee states that “[t]his right arises at all stages of the oral proceedings”.
\(^\text{166}\) Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 62. Although the free assistance of an interpreter is applicable to both aliens and nationals, the Committee on the Rights of the Child and the Human Rights Committee note that this assistance need not be provided to a child who has a foreign or ethnic origin, but besides his or her mother tongue, understands and speaks the official language: see Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 62 and Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 40.
\(^\text{167}\) Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 63. See also Committee on the Rights of the Child, *General Comment No. 9 (2006): The Rights of Children with Disabilities*, 43\(^\text{rd}\) sess, UN Doc CRC/C/GC/9 (27 February 2007) (“*General Comment No. 9*”).
\(^\text{168}\) The right of defence has also been recognised by arts 6(3)(b)-(c) of the ECHR.
themselves or choose attorneys to assist them, and the right to have adequate time and facilities to prepare their defence.\(^{169}\) Defence counsel may utilize all necessary measures prescribed by law to collect exculpatory evidence or evidence reducing the criminal responsibility of offenders as well as assisting offenders in other issues. Generally, defence counsel will be chosen by offenders themselves. In the case of juvenile offenders, national law sometimes allows their legal representatives to choose defence counsel for them. Moreover, the ICCPR and the CRC require that legal or other appropriate assistance must be provided for juvenile offenders in the preparation and presentation of their defence.\(^{170}\) The Committee on the Rights of the Child also interpreted this issue and indicated that the State parties have discretion in identifying the forms of legal assistance and legal aid should be free of charge.\(^{171}\)

Concerning the second content of the right of defence, art 67(1)(b) of the Statute of the International Criminal Court 1998 prescribes:

In determination of any charge, the accused shall be entitled to the following minimum guarantees, in full equality: … to have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused’s choosing in confidence; …

Not only this provision but also arts 14(3)(b),(d) of the ICCPR prescribe that the accused must be given adequate time and facilities for preparing their defence. The Human Rights Committee explains that to determine the first element (adequate time), the features of each case should be taken into account.\(^{172}\) In addition, defence counsel can request the court to suspend a trial if they think the time for preparation of their client’s defence is insufficient, especially in cases involving serious and/or complex offences.\(^{173}\)

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\(^{169}\) Conte and Burchill, above n 50, 182.

\(^{170}\) Article 14(3)(d) of the ICCPR provides: ‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: … [t]o be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; …’ Article 40(2)(b)(i) of the CRC stipulates: ‘Every child alleged as or accused of having infringed the penal law has at least the following guarantees: …. and to have legal or other appropriate assistance in the preparation and presentation of his or her defence …’

\(^{171}\) For detailed explanation, see Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 49.

\(^{172}\) Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, para 32.

\(^{173}\) Ibid.
In relation to the second element (adequate facilities), the Human Rights Committee suggests that offenders should have the right to access to documents and other testimony essential for the preparation of their defence.\footnote{174} Moreover, opportunities to freely communicate with defence counsel should be given to offenders.\footnote{175} Furthermore, the Human Rights Committee also emphasizes that the confidentiality of communication between offenders and defence counsel must be fully respected.\footnote{176} This means procedural-conducting bodies must not limit or influence, apply pressures or improperly interfere with the relationship between juvenile offenders and their defence counsel.\footnote{177}

- **Right to Equality before Courts and Tribunals and to a Fair Trial.** This right is provided in almost all international and regional legal instruments such as, art 10 of the UDHR; art 14(1) of the ICCPR; art 40(2)(b)(iii) of the CRC.\footnote{178} Article 14(1) of the ICCPR stipulates:

  All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

This provision ‘is aimed at ensuring the proper administration of justice, and to this end uphold a series of individual rights such as equality before the courts and tribunals, and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law’.\footnote{179} These rights are designed to ensure that judgments of courts or tribunals are fair and without bias. They also create conditions for other individuals in the community to observe and examine the adjudication of the courts and tribunals because it requires most criminal cases to be tried publicly. Except from particular circumstances, everyone can attend court sessions. This is
derived from the common law principle of open justice: ‘not only should justice be done, it should be seen to be done’.\(^{180}\)

The first right comprises equality of arms and equal treatment. Equality of arms requires the enjoyment of ‘the same procedural rights by all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantages or other unfairness to the defendant’\(^{181}\). While equality of arms relates to utilizing procedural rights between parties in the same proceeding, the ‘equal treatment’ application is broader and involves the principles of equality before the law and non-discrimination\(^{182}\).

The second right pertains to the entitlement to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Human Rights Committee emphasizes that the requirement of competence, independence and impartiality of a tribunal in the sense of art 14(1) is an absolute right that is not subject to any exception\(^{183}\). ‘Competence’ refers to the appointment of appropriately qualified and experienced persons to act as judicial officers\(^{184}\). ‘Independence’ particularly refers to ‘the procedures and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, … and the actual independence of the judiciary from political interference by the executive branch and legislature’\(^{185}\).

For the third requirement, the Human Rights Committee has observed that ‘impartiality’ has two aspects. First, judges must not be influenced by personal bias or prejudice, nor preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of

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\(^{180}\) Pound and Evans, above n 157, 169.

\(^{181}\) Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 13.

\(^{182}\) Conte and Burchill, above n 50, 164.

\(^{183}\) Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 19.

\(^{184}\) Conte and Burchill, above n 50, 165.

the other.\textsuperscript{186} Second, the tribunal must also appear to a reasonable observer to be impartial.\textsuperscript{187}

- **Right to the Presence and Examination of Witnesses.** This procedural guarantee is provided in art 14(3)(e) of the ICCPR, art 7.1 of the *Beijing Rules* and art 40(2)(b)(iv) of the CRC. The latter article prescribes:

> Every child alleged as or accused of having infringed the penal law has at least the following guarantees … to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality.

According to the Committee on the Rights of the Child and the Human Rights Committee, this procedural safeguard derives from the principle of equality of arms (between defence and prosecution). The ultimate aim of this principle is to ensure the accused has the same rights as are available to the prosecution of compelling the presence of witnesses and examining or cross-examining any witnesses.\textsuperscript{188} The Committee on the Rights of the Child explains there are distinctions between different legal systems, especially between the accusatorial and inquisitorial trials, involving the use of the term ‘to examine or to have examined’.\textsuperscript{189} In the inquisitorial system, defendants often transfer their right to examine witnesses to the lawyer or, in the case of children, to another appropriate body.\textsuperscript{190} Nonetheless, the Committee on the Rights of the Child emphasizes that the child should be informed of the possibility to examine witnesses and given opportunities to express his or her views on this matter in accordance with his or her age and maturity.\textsuperscript{191}

Generally, there are two aspects to this procedural guarantee. First, juvenile offenders have the right to examine witnesses against them (adverse witnesses). Second, under the same conditions, juvenile offenders are also entitled to present and examine witnesses on their behalf. As to the first aspect, the Human Rights Committee notes that a proper opportunity to question and challenge adverse witnesses is only given at

\textsuperscript{186} Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 21.
\textsuperscript{187} Ibid.
\textsuperscript{188} Ibid para 39.
\textsuperscript{189} Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 59.
\textsuperscript{190} Ibid.
\textsuperscript{191} Ibid.
some stages of the criminal process. The second aspect is not an unlimited right. This means juvenile offenders can only present witnesses who are relevant for their defence. In other words, art 14(3)(e) of the ICCPR does not entitle the defendant to submit evidence at any time or in any manner. The Human Rights Committee, on the other hand, states that within these limits, and subject to the limitations on the use of statements, confessions and other evidence obtained in violation of art 7 of the ICCPR – the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment – it is basically for State parties’ legislatures to identify the admissibility of evidence and how their courts assess it. These provisions of the CRC and the ICCPR establish the legal basis for both prosecutors and offenders in examining and evaluating the reliability and demonstrated effect of evidence as well as discrediting testimony.

- **Right to Appeal.** This right is provided in art 14(5) of the ICCPR and art 40(2)(b)(v) of the CRC. It provides:

> Every child alleged as or accused of having infringed the penal law has at least the following guarantees: If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.

The Human Rights Committee addresses three cases in which art 14(5) is infringed. First, where the first-instance court’s decision is final. Second, where according to national law, the judgment rendered by an appeal court or a final instance court (in case acquittal was announced by the lower court) cannot be re-examined by a higher court. Third, except where the involved State party has made a reservation to this provision, where a decision of the highest court is final (here the highest court or tribunal acts as the first and ultimate level of trial).

Moreover, the Committee also clarifies that art 14(5) of the ICCPR requires the State party to design procedures allowing the higher court to review the *nature* of the

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193 Ibid.
195 Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 47.
This means conviction and sentence must be substantively re-examined on two features: the adequacy of evidence and law. Thus, any reviews considering only one of the above features of the convicted judgment are violations of this provision. Nevertheless, the Committee explains that art 14(5) simply requires the court conducting the review to look at the factual aspect of the case rather than imposing on this court an obligation to carry out a full trial or a hearing.

The right of appeal is designed to allow an opportunity for convicted persons to request higher judicial bodies to reconsider the judgments or decisions of lower courts. By accessing this right, convicted persons can further protect their legitimate rights and interests. In addition, this provides an opportunity for higher courts or tribunals to correct mistakes in the decisions of lower courts or tribunals, further contributing to the protection of justice in society.

c. Rights Particular to Juvenile Offenders

In comparison with the first two groups, these procedural safeguards are specially preserved for juvenile offenders. These privileges are justified by the immaturity, vulnerability and awareness limitation of children and young people. The UN legal framework requires the following distinct guarantees for juvenile offenders:

- **Right to the Presence of a Parent or Guardian.** This right is provided in arts 7.1, 10.1 and 15.2 of the *Beijing Rules*. Article 15.2 of the *Beijing Rules* stipulates:

  The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

Because of juvenile offenders’ immaturity and vulnerability, the presence of their parents or guardians may help to protect their rights. Thus, the Committee on the Rights of the Child notes that the attendance of parents or legal guardians can

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provide general psychological and emotional support to juvenile offenders. This is usually because parents and guardians are those having the closest relationships with juveniles and the most sufficient understanding about them. These are persons upon whom juveniles can rely. Hence, it is suggested that the national laws of State parties should provide maximum opportunities for parents or legal guardians to participate in the criminal process. Concerning this issue, Van Bueren states:

Overemphasis should not necessarily be placed on legal or non-legal qualifications of the child’s representative; it is the quality of the representation which is important. This does not necessarily imply that the role of the juvenile’s representative ought to be the same as an adult’s defence counsel, but that the child has to feel confident that there is an informed and well-trained independent professional on whom the child can rely both for advice and representation.

However, in specified cases, if the participation of parents or guardians is adverse to a juvenile offender’s best interests, or there is a request by the juvenile offender, they may be excluded or allowed only limited participation in the proceedings. There is no further explanation concerning these circumstances. Thus, it is within the discretion of competent authorities to decide whether to allow parents and legal guardians to participate in the criminal process. Besides parents and guardians (in the criminal process involving juvenile offenders), there may be other individuals and organizations undertaking duties to supervise and educate juveniles. However, guidelines on this issue are not provided by UN human rights bodies.

- **Right to Privacy.** The term ‘privacy’ may be defined as ‘the state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; freedom from interference or intrusion’. It is a concept basically relating to ‘notions of personal autonomy and dignity’. In this context, the term ‘privacy’

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199 Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 53. It can be recognized that the above explanation of the Committee on the Rights of the Child is totally consistent with the Commentary of art 15 of the *Beijing Rules*: ‘The right of the parents or guardian to participate as stated in rule 15.2 should be viewed as general psychological and emotional assistance to the juvenile – a function extending throughout the procedure.’

200 Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 54.

201 Van Bueren, above n 120, 180.

202 Indeed, the commentary of art 15 of the *Beijing Rules* mentions one situation where the participation of parents or legal guardians can be excluded. It is the case when ‘the presence of parents or guardians at the hearings plays a negative role, for instance, if they display a hostile attitude towards the juvenile’.


204 Pound and Evans, above n 157, 111.
refers to personal information of juvenile offenders which must not be published by the media. This special guarantee of juvenile offenders is recognized by art 8 of the Beijing Rules, arts 16, 40(2)(b)(vii) of the CRC and art 17 of the ICCPR. The rationale behind this legal safeguard is to avoid detrimental effects upon juvenile offenders by ‘undue publicity’ or by a public ‘labeling process’. The primary requirement of the right to be fully respected of privacy is that any information (including, but not limited to, the name of the offender) which may lead to the identification of a juvenile offender, should not be published. This is because ‘undue publicity’ may create obstacles to juvenile offenders’ capacity to access education, work, housing or safety. Also, criminological research into ‘labeling’ suggests that frequent identification of juvenile offenders as ‘delinquent’ or ‘criminal’ has an adverse impact on them. This is partly because juveniles are especially susceptible to stigmatization. Thus, public authorities must be careful with publicity regarding offences allegedly committed by children. They should use appropriate measures to ensure that juvenile offenders are not indentified through press releases and impose sanctions on journalists who infringe the right to privacy of a juvenile offender. In addition, the Committee on the Rights of the Child states that the right to privacy obliges all professionals concerned in the enforcement of measures taken by the court or other competent authority to ensure that all information which may lead to the identification of the child remains confidential.

Article 21 of the Beijing Rules clarifies other requirements of the right to privacy concerning criminal records of juvenile offenders. Article 21.1 provides that ‘[r]ecords of juvenile offenders shall be kept strictly confidential and closed to third parties’. However, it allows ‘persons directly related with the disposition of the case at hand’ and other ‘duly authorized persons’ generally including researchers to access

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205 The right to privacy is also protected by art 3.2.-20 of the Model Law on Juvenile Justice.
206 Article 8.1 of the Beijing Rules.
207 Ibid art 8.2.
208 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 64.
209 Commentary of art 8 of the Beijing Rules.
210 Ibid.
211 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 64.
212 Ibid.
213 Ibid para 66.
to such records. Moreover, art 21.2 prohibits the use of juvenile offenders’ records in
adult proceedings in subsequent cases concerning the same offender. 214

Article 16 of the CRC, modeled on art 17 of the ICCPR, states that the child’s
privacy should not be arbitrarily or unlawfully interfered with by any party. Article
40(2)(b)(vii) of the CRC, reflecting art 16, simply provides that every child alleged
or accused of having infringed the penal law must have his or her privacy fully
respected at all stages of the proceedings. 215 In particular, the Committee on the
Rights of the Child encouraged all State parties to carry out court and other hearings
of a juvenile offender behind closed doors, 216 and a verdict or sentence should be
pronounced in public in such a way that does not reveal the identity of the child. 217
This interpretation of the Committee is slightly different from the concluding words
of art 14(1) of the ICCPR which stipulates that ‘any judgment rendered in a criminal
case or in a suit at law shall be made public except where the interests of juvenile
persons otherwise requires’. This provision prevents a judgment in a criminal case
involving a juvenile offender from being made public. However, the Committee’s
comment and the above provision of the ICCPR have a common aim – to prevent
individual information of the child being identified through court hearings.
According to Van Nijnatten, ‘decisions having intensive influence for the lives of
children and their families must be opened to public scrutiny’. 218 Moreover, the
common law principle of open justice requires that justice should not only be done

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214 In light of this principle, the Committee advises State parties to provide for ‘an automatic removal from the
criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain
limited, serious offences where removal is possible at the request of the child, if necessary under certain
conditions (e.g. not having committed an offence within two years after the last conviction)’: see Committee on
the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 67.

215 According to the Committee on the Rights of the Child, all stages of the proceedings commence ‘from the
initial contact with law enforcement (e.g. a request for information and identification) up until the final
decision by a competent authority, or release from supervision, custody or deprivation of liberty’: see
Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 64.

216 Common law country experts stated that closed court hearings is a ‘bedrock principle’ of fair trial rights for
children and a recognized exception to the open courts rules whereas civil law country experts thought this is a
violation of fundamental trial rights: see Ann Skelton, Iyabo Ogunniran and Violet Odala, A UN Model Law on
Juvenile Justice: A Comparative Assessment, University of Pretoria, Outline of Presentation (20 April 2011)

217 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 66.

218 Van Nijnatten, ‘Behind Closed Door: Juvenile Hearings in the Netherlands’, 3 Int Jo Law and Fam 177
but also be seen to be done. Consequently, State parties should follow suggestions of the Committee on the Rights of the Child.

E. Observations

Flowing from a desire to respect and ensure human rights, especially the rights of children and young persons in conflict with the criminal law, legal frameworks governing the rights of juvenile offenders have been established both at international and national levels. UN legal instruments have created standards and norms for juvenile justice by enumerating the rights of juvenile offenders, providing objectives and general principles for the protection of these rights. Generally, State parties of the CRC, including Viet Nam and the State of Victoria, have attempted to align their administration of juvenile justice in compliance with this Convention. This is demonstrated by the fact that most of juvenile offenders’ rights are recognized and stipulated in Vietnamese and Victorian criminal justice systems. However, according to an evaluation of the Committee on the Rights of the Child:

Many States parties still have a long way to go in achieving full compliance with the CRC, for example, in the areas of procedural rights, the development and implementation of measures for dealing with children in conflict with the law without resorting to judicial proceedings, and the use of deprivation of liberty only as a measure of last resort. This may be the result of a lack of a comprehensive policy for the field of juvenile justice.

It is, therefore, necessary to explore in more detail various models of juvenile justice, particularly the approaches and programs which have been supported by the UN. This may assist Viet Nam in finding a model appropriate with its legal system, socioeconomic foundation and based upon international criteria on the administration of juvenile justice. In the case of Victoria, this study creates an opportunity to review, compare and improve the contemporary juvenile justice system from both legislative and practical aspects. The following section provides a closer examination of dominant juvenile justice models.

IV. Conclusions

The protection of human rights, especially children’s rights in general and the rights of juvenile offenders in particular, is a critical issue identified by scholars and legal professionals in recent years. These rights have a close interrelationship. Indeed, the rights of juvenile offenders, including the right to be presumed innocent, the right to remain silent, the

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219 Pound and Evans, above n 157, 169.
220 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 1.
right of defence, the right to a fair trial and so on, are specific forms of children’s civil rights. Further, children’s rights are derived from human rights.

Recognizing the importance of children and young offenders’ rights protection, the UN and its respective bodies have developed a large number of principles, policies, rules and guidelines which constitute a benchmark model for a comprehensive juvenile justice. This model comprises policies and programs for the prevention of juvenile delinquency and appropriate measures in disposition, rehabilitation and reintegration into the society of juvenile offenders. In particular, the UN framework identifies widely accepted approaches and procedures to deal with children and young offenders. According to UN child rights bodies, State parties of the CRC, depending on their specific circumstances, can use diversion or judicial proceedings. At present, a number of jurisdictions use restorative justice programs to deal with minor offences and first-time child offenders while in serious cases, judicial proceedings are utilized. The Committee on the Rights of the Child recommended that the application of measures without resorting to judicial proceedings should not be limited in minor cases. However, regardless of the type of intervention, human rights of children and young people in the criminal process must be respected and ensured in accordance with general principles and fundamental principles of juvenile justice as provided for in the CRC. Based on the UN benchmark model, the next four chapters of the thesis evaluate the juvenile justice systems of Viet Nam and Victoria – two member States of the UN – in terms of their legal framework and enforcement.
Part Two

PROTECTION OF THE RIGHTS OF JUVENILE OFFENDERS IN VIET NAM
Chapter 4
THE LEGISLATIVE FRAMEWORK GOVERNING THE RIGHTS OF
JUVENILE OFFENDERS IN VIETNAM

I. Introduction
In order to provide an historical overview of the regulatory framework protecting juvenile offenders’ rights, this chapter begins by describing the establishment and development of the Vietnamese criminal procedure legislative framework from 1945 to the present. Subsequently, the author identifies sources of the criminal procedure law of Viet Nam and briefly describes the criminal process applicable to juvenile cases. Particular provisions of Vietnamese criminal procedure law designed to protect juvenile offenders are discussed and analyzed. The advantages and shortcomings of these provisions are then considered in order to create a basis for the recommendations in the last chapter of this thesis.

II. Protection of Juvenile Offenders’ Rights: A Historical Overview
A. Introduction
The establishment and development of the legal framework protecting the rights of juvenile offenders is closely related to the process of struggle and liberation in Viet Nam. Generally, this process is divided into two main stages. The first was from 1945 (when the north of Viet Nam was liberated) to pre-1975; the second is from 1975 (when Viet Nam achieved complete independence) to the present. In the first stage, Viet Nam did not have a criminal procedure code. Hence, fundamental rights as well as the criminal procedural rights of offenders only obtained some recognition in other sources of law, such as constitutional law, the laws on organization of the people’s courts and the people’s procuracies, etc. Consequently, it is difficult to identify specific provisions that protected the rights of juvenile offenders in this period. In 1988, the first criminal procedure code was enacted which officially stipulated criminal procedural rights pertaining to juvenile offenders. Subsequently, in 2003, Viet Nam adopted a new, second code of criminal procedure. The Criminal Procedure Code 2003 prescribed detailed criminal procedural rights for juvenile offenders, as well as provisions to ensure that these rights were observed.

B. The Period from 1945 to 1988
1. From 1945 to 1954
Since its establishment on 2 September 1945, the Government of Viet Nam has enacted provisions regulating criminal procedure law. While the criminal procedural rights of offenders were not stipulated separately, these rights were recognized under the general form of human rights.

The first Constitution of Viet Nam, adopted in 1946, stipulated several fundamental rights of Vietnamese citizens including:

- The right to be equal before the law (art 7)
- Freedom of residence, and freedom to travel domestically and abroad (art 10)
- The right not to be arrested and detained without judicial decision (art 11)

Moreover, Chapter 4 of the Constitution 1946 dealt with judicial bodies and also indirectly prescribed human rights, and general principles of criminal procedure activities. These comprised the following:

- The right of national minorities to use their languages before the court (art 66)
- The right of defence (art 67)
- The right to a public trial (art 67)
- The right of accused and convicted persons not to be tortured, beaten and maltreated (art 68)

In this period, when the UDHR had not yet been adopted, the provisions in the Constitution 1946 constituted valuable predecessors to subsequent legislation. The right to a defence and the right of a convicted person to have their honour and human dignity respected were also addressed in other specific legislation.

Concerning the right to a defence, on 18 June 1949, Decree 69/SL was enacted, entitling accused persons the right to obtain a non-lawyer to protect their interests before the court. Article 1 of the Decree stipulates:

Before courts trialing matters related to land and commercial matters, ordinary courts, special courts trialing less serious offences and serious offences, except for military courts, victims, defendants and

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accused persons can seek a citizen, who is not a lawyer to protect their interests. This citizen must be approved by the president of the court.2

In addition, art 2 of this Decree prescribes: ‘If an accused does not have any defence counsel, the president of the court, by himself/herself or by the request of the accused, may assign defence counsel for the accused.’3 Relating to the rights of convicted persons’ honour and human dignity to be respected, art 4 of the Direction 181/ND-64 of the Ministry of Public Security and the Ministry of Justice provides: ‘During a period of detention, convicted persons must be provided sufficient food according to the minimum standards of living depending on economic status of each region.’5 Despite being adopted in a period of considerable difficulty, these provisions afforded basic protections of the rights of accused persons. They established the basis for the later development and protection of human rights in the criminal process in Viet Nam.6

2. From 1954 to 1975
Although focused on the liberation of the South of Viet Nam during this period, the issue of human rights protection in the criminal justice system was still a concern of the Vietnamese Government. The second Constitution, adopted in 1959, improved the provisions of its predecessor concerning the protection of human rights. The Constitution 1959 not only continued to recognize a number of human rights in the criminal process which had been stipulated in the previous Constitution7 but also adopted further provisions to ensure compliance with these rights. General principles of procedure governing arresting, releasing, body searching, searching of residences, objects, correspondence of accused persons were also prescribed in other legislation, including the Law on the Organization of the People’s Procuracies 19608 and the Law 103/SL-L005 19579 governing the protection of the freedom

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3 The Supreme People’s Court, above n 2.
4 This Direction was adopted on 12 June 1951 to provide guidance for the implementation of the Decree 150/SL (7 November 1950) of the President of the Democratic Republic of Viet Nam governing the organization of prisons.
5 Article 5 of the Direction 181/ND-6 stipulates: ‘All convicted persons are to be provided with newspapers and magazines; entitled to study culture, politics; and guided on handicrafts and manufacture development.’
6 Minh, above n 1, 25.
7 For example, the right to be equal before the law (art 22); the right to liberty of movement and freedom to choose his residence (art 28); the right of defence (art 101); etc.
8 This Law was adopted on 15 July 1960.
9 This Law was adopted on 20 May 1957.
of body and the right not to be infringed on residences, objects and correspondence of citizens.\textsuperscript{10} Moreover, the Resolution of the Governmental Council of 1956 provides:

In order to ensure the people’s freedom of body, arbitrary arrests must be forbidden. For red-handed violation circumstances, commune authorities are entitled to arrest. However, commune authorities cannot detain arrestees over 24 hours and must transfer them to district authorities. All forms of measures infringing … people’s freedom of body … must be forbidden.

Specially, the right to defence continued to be recognized. Article 7 of the \textit{Law on the Organization of the People’s Courts 1960} prescribed:

The right of defence of defendants is assured. Defendants can defend themselves or seek lawyers to defend them. Defendants can also seek other citizens introduced by unions or approved by the courts to defend them. When necessary, courts may assign defence counsel for defendants.\textsuperscript{11}

In comparison with earlier provisions governing the right to defence, this new legislation had the advantage of establishing a mechanism to ensure compliance. For instance, the new legislation added a new person on whom defendants can rely to defend them. Moreover, the provision relating to the period during which the accused must be notified of the indictment assisted defendants by ensuring that they were provided with sufficient time to prepare their defence for courts.

More significantly, the second Constitution recognized new human rights relevant to the criminal justice system, including:

- The inviolability of citizens’ bodies (art 27);
- The right to complain and denounce any state agencies violating the law (art 29);
- The right to compensation for damage caused by staff of state agencies and departments (art 29).

These further rights reflected an attempt by the Vietnamese government to protect human rights in the criminal justice system, consistent with obligations under international legal instruments.\textsuperscript{12} In summary, through the development of a legal framework relating to human rights in the criminal justice system, Viet Nam established significant protections of the

\textsuperscript{10} Article 1 of the \textit{Law 103/SL-1005} stipulated: ‘The right of freedom of body and the right not to be infringed on residences, objects and correspondence of citizens are respected and protected. No one can violate these rights.’

\textsuperscript{11} In order to ensure compliance with this right, the \textit{Circular 2225/HCTP} of 24 October 1956 of the Ministry of Justice stipulated: ‘The indictment must be notified to defendants within 3 days before opening the court session. Hence, at the trial, the courts must examine whether or not defendants receive the indictment.’

\textsuperscript{12} Minh, above n 1, 28.
rights of offenders. These early developments formed a basis for legal reform in later periods.

3. From 1975 to 1988
The third Constitution of Viet Nam was adopted in 1980 and manifested new developments in the protection of human rights in the criminal justice system, consistent with the new international legal instrument – the ICCPR. Compliance with arts 7, 9-10(1) of the ICCPR, led to art 69 – the right not to be subjected to torture or to cruel, inhuman or degrading treatment – being added to the Constitution 1980. In addition, art 70 of the Constitution also recognised the right to the protection of life, property, honour and dignity.

In criminal procedure legislation, the protection of human rights became a fundamental operative principle guiding judicial bodies. The rights of equality before the law and the defence of accused persons and defendants were usually recognized in the laws governing the organization of the People’s Procuracies and the People’s Courts, both in the North and the South of Viet Nam during this period. Notably, the basic interests of people detained and deprived of their liberty were protected by strict supervision of the People’s Procuracies.

Thus, the Direction 06/KSGG-CT 1985 emphasizes:

All levels of the People’s Procuracies need to improve the duties on supervision of detention houses, prisons and draw attention to the assurance of the life and human dignity of detained persons and convicted persons.

Furthermore, Direction 13/KSGG-CT 1986 on the task to examine unlawful detentions in wards and communes prescribed:

The People’s Procuracies must conduct immediate examination on the wards and communes having signs of seriously illegal detentions in order to detect and conclude these violations are infringements of Article 119 of the Penal Code … and if these illegal detentions caused serious harms at the levels

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13 Human rights, which had been stipulated in the first two Constitutions, continued to be recognized in the Constitution 1980, such as the right not to be infringed on residences; the right of confidential correspondence, telephone, telegraph of citizens are guaranteed; the right to liberty of movement and freedom to choose his residence (art 71); the right to lodge complaints and denunciations and the right to compensation (art 73); and the right of defence (art 133).

14 Minh, above n 1, 29.

15 This Direction was adopted on 2 May 1985.


17 This Direction was adopted on 24 May 1986.
which can be considered as offences, criminal proceedings must be instituted in order to investigate and prosecute to serve the aims of general prevention and education.\(^\text{18}\)

In conclusion, it can be seen that the range of human rights protected in the criminal justice system was broadened in this period, consistent with new human rights appearing in international legal instruments. This development also reflected a heightened awareness in Viet Nam concerning the need to protect human rights in criminal proceedings.

C. The Period from 1988 to 2009

1. From 1988 to 2003

During this period numerous changes occurred in many areas of society. Viet Nam began to build an independent and self-reliant economy through promoting internal strength, actively integrating into the world’s economy and conducting industrialisation and modernisation of the country. The State adopted consistent policies on development of a socialist-oriented market economy.\(^\text{19}\)

Along with economic development, there were significant changes in legislative activities, especially in criminal law and criminal procedure law. In 1985, the Penal Code was enacted,\(^\text{20}\) establishing general principles in dealing with juvenile offenders. In 1988, the first *Criminal Procedure Code*\(^\text{21}\) was adopted. Compared with previous legislation, this Code had many special features. The *Criminal Procedure Code 1988* prescribed the order and procedure for instituting, investigating, prosecuting and adjudicating criminal cases and executing criminal judgments.\(^\text{22}\) Analyzing the *Criminal Procedure Code 1988* and other relevant legislation, the criminal procedure law of Viet Nam demonstrated the following features:

- First, the protection of human rights was expressed in general principles of criminal procedure law. In comparison with previous periods, these principles were stipulated more comprehensively.\(^\text{23}\) Moreover, the stipulation of these principles reflected an

\(^{18}\) Law Department of the Ministry of Public Security, above n 16, 462.

\(^{19}\) Article 15 of the *Constitution 1992* (amended on 25 December 2001).

\(^{20}\) This Code was adopted on 27 June 1985 and entered into force 1 January 1986.

\(^{21}\) This Code was adopted on 28 June 1988 and entered into force 1 January 1989. It was amended on 30 June 1990; 22 December 1992 and 9 June 2000.

\(^{22}\) Tiep states that this Code inherited and developed previous features of Vietnamese criminal procedure law, especially from 1945 to the present; protected the rights and legitimate interests of citizens and strictly dealt with all offences; see Tran Quang Tiep, *Protection of Human Rights in Vietnamese Criminal Law and Criminal Procedure Law [Bao Ve Quyen Con Ngguoi trong Luat Hinh Su va Luat To Tung Hinh Su Viet Nam]* (2004) 100.

\(^{23}\) See arts 3, 4, 6-7, 10, 12, 19-20, 24 of the *Criminal Procedure Code 1988*. 93
innovation in legal thinking, compatible with international human rights law. For example, art 10 of the *Criminal Procedure Code 1988*, governing the right to be presumed innocent, was modeled on art 11(1) of the UDHR.

- Second, general principles of criminal procedure law concerning the protection of offenders’ rights were specified in a number of particular provisions in the *Criminal Procedure Code 1988*.24

- Third, in this period, criminal procedure law developed separate provisions for juvenile offenders. This was mainly evident in Chapter 31 of the *Criminal Procedure Code 1988*. This chapter, comprising ten articles, prescribes special procedures to handle criminal cases involving juvenile offenders. Chapter 31, combined with other provisions25 in the *Criminal Procedure Code 1988*, generally established a legal framework for protecting the rights of juvenile offenders in this period. Furthermore, the adoption of the *Law on Protection, Care and Education of Children* in 1991 manifested further concern by the State to protect immature and vulnerable persons.

- Fourth, the criminal procedure law of Viet Nam in general, and the *Criminal Procedure Code 1988* in particular, had some shortcomings. Because this Code had been developed in the early period of the State innovation process, it contained some weaknesses. Viet Nam did not have a separate juvenile justice system. When the legislative framework for juvenile offenders was adopted, judicial bodies and persons specifically dealing with juvenile offenders were not established. Moreover, the general principles of criminal procedure law, stipulated in Chapter 1 of the *Criminal Procedure Code 1988*, did not recognize some important rights of juvenile offenders (for example, the right to defence of persons in custody; the right to damage compensation and restoration of honour and interests of unjustly handled persons).

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24 These provisions were embodied in Chapter 3 prescribing the rights and obligations of participants in the criminal process; Chapter 5 stipulating deterrent measures; Chapters 9-11 governing investigating activities; as well as specific provisions relating to adjudication of the courts and execution of the courts’ judgments.

25 Article 271 of Chapter 31 in the *Criminal Procedure Code 1988* stipulates: ‘The criminal procedure applicable to accused and defendants, who are minors, shall comply with the provisions of this Chapter, and concurrently with other provisions of this Code which are not contrary to those of this chapter.’ Thus, all articles in Chapter 31, combining with other relevant provisions in the *Criminal Procedure Code 1988*, established a special criminal procedure applicable to juveniles in conflict with the law.
2. From 2003 to 2009

In compliance with the Penal Code 1999, the Constitution 1992, and Resolution 08-NQ/TW of the Politburo on Central Missions of Judicial Activities in the Future, the National Assembly of Viet Nam adopted a new Criminal Procedure Code in 2003, thereby replacing the earlier Code. Together with this Code of 2003, relevant legislation was also enacted establishing appropriate principles for procedure-conducting bodies to carry out their tasks objectively, comprehensively and sufficiently, detecting accurately and quickly and handling justly and timely all criminal acts, not leaving criminals unpunished and the innocent punished unjustly. Compared with the first Code, the Criminal Procedure Code 2003 embodied a number of strengths:

- First, it continued to maintain basic established principles protecting the rights of offenders. It amended and supplemented several principles and recognized some new principles. For instance, the guaranteeing of a right to compensation of persons suffering injury or damage caused by criminal procedure-conducting bodies or persons.

- Second, the Code identified more clearly and specifically the rights and obligations of participants in the criminal process. For example, art 48(2)(d) supplemented the right of defence for persons in custody. This was a new provision, identifying the obligations of the State and compatible with the requirements of Resolution 08-NQ/TW of the Politburo.

- Third, the Code has strict and specific provisions governing ‘deterrent measures’.

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26 This Code was adopted on 21 December 1999 and entered into force on 1 July 2000.
27 The Resolution No. 08/NQ-TW of the Politburo created numerous changes and improvements in organizations and operations of judicial bodies in general and criminal procedure-conducting bodies in particular.
28 This Code was adopted on 26 November 2003 and entered into force on 1 July 2004.
29 This legislation will be mentioned and analysed in Section III(B)(2)(c)-(d) of this Chapter.
31 Ibid art 30.
32 Part II (B)(1)(d) of Resolution No. 08-NQ/TW of the Politburo requires: indentifying more clearly the rights and obligations of participants in the criminal process; creating opportunities for lawyers to participate in criminal activities such as investigating accused persons, searching files of criminal cases, arguing democratically in the court’s sessions, in order to assist them in enjoying more sufficiently their rights in the criminal process, contribute to strengthen the responsibilities of criminal procedure-conducting bodies.
33 This is derived from provisions of Resolution No. 08-NQ/TW of the Politburo. Part II (B)(1)(a) of this Resolution requires relevant bodies and persons to research and suggest solutions for restricting the application of the temporary detention of accused persons committing certain types of offences. In addition, Part II
specified that in circumstances which do not require arrest and detention, the People’s Procuracies should not approve arrest warrants, custody decisions and detention warrants.

- Fourth, the Code amends and supplements provisions governing investigating activities. The aims of these changes were to improve the effectiveness of investigating activities and simultaneously ensure fundamental rights of citizens are not to be violated arbitrarily.

In addition, in 2004, the new *Law on Protection, Care and Education of Children*[^34] was adopted replacing the earlier law of 1991. The new legislation addresses in more detail the rights of children in general and children in conflict with the law in particular, and the responsibilities of relevant persons, bodies and organizations in assisting children. In 2005, the *Youth Law* was enacted. This Law governs important issues relating to Vietnamese citizens aged 16 to 30 years such as their rights and obligations, duties of the State, families and society towards youth and youth organizations.[^35]

**D. Observations**

Researching and analyzing the establishment and development of the legal framework governing the rights of juvenile offenders, it can be observed that:

- First, developments in Viet Nam, based on international human rights legislation, have tried to balance two major aims: suppressing criminals, while protecting the fundamental rights of offenders, especially juvenile offenders. In the first period of construction after the war, the first aim was emphasized. By contrast, in later periods, when the socioeconomic condition of the country stabilized, the second aim became more prominent.

- Second, at the present, the regulatory framework governing the protection of the rights of juvenile offenders continues to be amended and supplemented.

[^34]: This Law was adopted on 15 June 2004 and entered into force on 1 January 2005.
[^35]: *Youth Law 2005*, art 1. This Law was passed on 29 November 2005 and entered into force on 1 July 2006.
Nevertheless, shortcomings still exist. These shortcomings will be analysed in detail in Section III(D) of this chapter.

III. The Contemporary Legislative Framework

A. Introduction

Having conducted comprehensive research on the juvenile justice system of Viet Nam, UNICEF and the Law Research Institute of Vietnamese Ministry of Justice stated:

Since signing the CRC, the Vietnamese government has worked to make national legislation in compliance with the Convention. The fundamental spirit has been reflected in the new or revised legal documents from the Constitution to the Legal Code, Laws, Ordinances, Decrees, and Guiding Circulars.36

From this comment, it can be seen that the legislative framework of the juvenile criminal justice system in Viet Nam is a combination of many different types of legislation. Each type of legislation governs particular objectives relevant to juvenile offenders. According to the Report of UNICEF and the Legal Research Institute of the Vietnamese Ministry of Justice on Situation Analysis of Juvenile Justice in Viet Nam and Evaluation of the Contemporary Juvenile Justice System, laws relating to juvenile offenders can be categorized into three groups:

- Crimes and penalties applicable to juvenile crimes;
- Procedures applicable to juveniles and;
- Execution of sentences applicable to juveniles.37

The first and third issues do not fall within the scope of this thesis. Therefore, the next sections of this chapter focus on provisions relating to criminal procedures applicable to juvenile offenders.

B. Sources of Criminal Procedure Law

1. Definition

Sources of criminal procedure law in Viet Nam are legal normative documents, adopted by competent bodies of the State in accordance with the orders and procedures prescribed by

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37 Ibid.
law, the contents of which are criminal procedural norms having enforceable effect on relevant bodies, organizations and individuals (such as procedure-conducting bodies, procedure-conducting persons and participants in the criminal process).\(^\text{38}\) Narrowly interpreted, the sources of criminal procedure law are legislation governing relationships between procedure-conducting bodies (such as investigating bodies, procuracies and courts); procedure-conducting persons and participants in criminal proceedings (for example, investigators, prosecutors and accused persons, judges and defendants); etc.

Moreover, it should be noted that Viet Nam has a code system. Thus, case law is not considered as a source of criminal procedure law.\(^\text{39}\) Instead, the sources of Vietnamese criminal procedure law are found in legal documents such as constitutions, codes, laws, resolutions, ordinances, decrees and circulars. In order to evaluate the effectiveness of provisions contained in these legal documents, analyzing significant criminal cases is necessary because this assists to explore their advantages and shortcomings.

2. Classification

Classification of the sources of criminal procedure law is based on the form, validity of legal documents and competence of bodies adopting these documents.\(^\text{40}\) The sources of Vietnamese criminal procedure law include the following:

a. The Constitution 1992

The Constitution 1992 is the backbone of the Vietnamese legal system.\(^\text{41}\) It is the source of other branches of law, including criminal procedure law. In the Constitution 1992, there are provisions recognizing and protecting the fundamental rights of citizens, including the rights of persons in custody, accused persons and defendants, including the:

- Right to be equal before the law (art 52);
- Right to physical inviolability and to have life, health, honour and dignity protected by law (art 71);
- Right not to be arrested without a warrant from the People’s Court, or a warrant from

\(^{38}\) Hanoi University of Law, *Giao Trinh Luat To Tung Hinh Su Viet Nam [Curriculum of Vietnamese Criminal Procedure Law]* (Justice, 2006) 30.

\(^{39}\) Ibid 31.

\(^{40}\) Ibid.

\(^{41}\) Ibid.
or ratification by the People’s Procuracies (except in the case the person is caught in flagrant violation of the law) (art 71);

• Right not to be considered guilty and liable to punishment until a verdict has been reached by the Court and has come into effect (art 72);
• Right to compensation and to rehabilitation of honour for damage (art 72);
• Right to lodge with any competent State authority a complaint or denunciation (art 74);
• Right of defence (art 132).

In relation to children in general, the Constitution 1992 prescribes the responsibilities of the State, society and the family in protecting, caring and educating children (art 65). In addition, this Constitution also provides functions, tasks and general operative principles of criminal procedure-conducting bodies such as the courts and procuracies.

b. The Criminal Procedure Code 2003

The fundamental and most important source of criminal procedure law is the Criminal Procedure Code. This is because the Code comprehensively and systematically governs almost all issues of criminal procedure law. As noted previously, the Criminal Procedure Code 2003 is the second Code of Viet Nam, which has legal effect at the present. The aims of this Code are to:

• Prevent and preclude crimes;
• Detect accurately and quickly and handle justly and in time all criminal acts, not leaving criminals unpunished and the innocent punished unjustly;
• Protect the socialist regime, safeguard the interests of the State, the legitimate rights and interests of citizens, organizations and;
• Protect the socialist legal order, and at the same time educate all people in the sense of law observance, struggling to prevent and fight crimes.

The Criminal Procedure Code 2003 is structured in 8 parts, comprising 37 chapters and 346 articles. This Code prescribes:

• The order and procedure of instituting, investigating, prosecuting and adjudicating criminal cases and executing criminal judgments;

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42 Article 64 of the Constitution 1992 stipulates that ‘[p]arents are duty bound to bring up and educate their children into useful citizens of society’. Conversely, ‘children have an obligation to respect and care for their grand-parents and parents’.
44 Hanoi University of Law, above n 38, 31.
• The functions, tasks and powers of, as well as relationships among procedure-conducting bodies;
• The tasks, powers and responsibilities of procedure-conducting persons;
• The rights and obligations of various agencies, organizations and citizens;
• International cooperation in the criminal procedure.46

As regards juvenile offenders, Viet Nam does not have a separate juvenile justice system. Indeed, there are few differences in the criminal procedures for adult and juvenile offenders. The Criminal Procedure Code 2003 contains only one chapter (Chapter 32, with 10 articles) stipulating special and extra requirements for criminal procedures involving juvenile offenders. Consequently, almost all provisions designed for adult offenders are also utilized for juvenile offenders.

Compared with the previous Code, the Criminal Procedure Code 2003 made improvements in various areas including: the effectiveness of judicial bodies’ operation; ensuring the freedom and democratic rights of citizens which are recognized in the Constitution and the law; identifying the functions and tasks of criminal procedure-conducting bodies; strengthening the duties of criminal procedure-conducting persons and clarifying the rights and obligations of participants in the criminal process.47 Nevertheless, in practice, the Criminal Procedure Code 2003 has several shortcomings, including provisions relating to criminal procedures applied for juvenile offenders.48 This problem was recognized when the Politburo adopted Resolution No. 49/NQ-TW on Judicial Reform Strategy towards 2020.49

c. Laws

Together with the Constitution 1992 and the Criminal Procedure Code 2003, a number of laws contribute to the establishment of a comprehensive legislative framework governing criminal procedure law. These laws include:

• The Organization of the People’s Courts;50
• The Organization of the People’s Procuracies;51
• Lawyers.52

47 Legislative Department of the Prosecution Science Academy, Basic Amendments of the Criminal Procedure Code 2003 (Justice, 2003) 5.
48 These shortcomings will be analysed in Section III(D) of this Chapter.
49 This Resolution was adopted on 2 June 2005.
Almost all of this legislation governs issues such as the organization, functions, tasks and powers of competent bodies in the criminal process, comprising the Procuracies and Courts. Combined with the **Criminal Procedure Code 2003**, these laws create the legal basis for conducting criminal processes in Viet Nam.

### d. Resolutions

While the **Criminal Procedure Code 2003** is the most important source of criminal procedure law, the Standing Committee of the Congress and the Judges Council of the Supreme People’s Court have adopted a set of resolutions which supplement the Code. These Resolutions include:

- **Compensating for Unjust Persons caused by Authorized Persons in Criminal Proceedings**;54
- **Guiding the Implementation of Several Provisions in the Third Part “First Instance Trial” of the Criminal Procedure Code 2003**;56
- **Guiding the Implementation of Several Provisions in the Fourth Part “Appellate Trial” of the Criminal Procedure Code 2003**;57

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53 Concerning issues relating to Investigating Bodies, Military Procuracies and Military Courts, see the Ordinance No. 23/2004/PL-UBTVQH11 of 20 August 2004 on the Organization of Criminal Investigating Bodies; Ordinance No. 04/2002/PL-UBTVQH11 of 04 November 2002 on the Organization of Military Courts; and Ordinance No. 05/2002/PL-UBTVQH11 of 04 November 2002 on the Organization of Military Procuracies. It should be noted that beside criminal procedure-conducting bodies, criminal procedure law of Viet Nam also allows other bodies such as border guard, customs, ranger, coast guard forces and other agencies of the People’s Police or the People’s Army to conduct a number of criminal procedural activities. These special bodies are stipulated in legal documents: the Law No. 29/2001/QH10 of 29 June 2001 on the Customs; Ordinance of 7 April 1997 on the Border Guard; Ordinance No. 04/1998/PL-UBTVQH10 of 25 March 1998 on the Coast Guard Forces; and Decree No. 119/2006/ND-CP of 16 October 2006 on the Organization and Operation of Rangers.


57 Resolution No. 05/2004/NQ-HDTP of 8 December 2005.

58 Resolution No. 02/2007/NQ-HDTP of 2 October 2007. Among these Resolutions, the first was adopted by the Standing Committee of the National Assembly whereas the others were adopted by the Judges Council of the Supreme People’s Court. The first Resolution deals with issues relating to the right to compensation of persons suffering from damage caused by the criminal procedure-conducting bodies or persons. The second Resolution provides detailed explanation for certain provisions in the first part of the Code, focusing on
In addition to these legal documents, the sources of criminal procedure law also include other types of legislation such as Ordinances, Decrees and Circulars. All these documents manifest the position and policies of the Vietnamese Government on the treatment and protection of the rights of offenders in general, and juvenile offenders in particular.

C. Overview of Vietnamese Criminal Process Applicable to Juvenile Offenders

As mentioned previously, in Vietnam, the criminal procedures applicable to juvenile and adult offenders are similar. Basically, the process of solving a criminal case comprises several stages: institution, investigation, prosecution, first instance trial, appellate trial, execution and special stage. These stages have a close relationship and create a common sequential process. Each stage has specific aims, particular criminal procedure-conducting bodies and participants, distinctive procedural activities and must be conducted within prescribed time limits.

The following description reveals that Vietnam is applying a mixed model of inquisitorial and adversarial procedures with the dominance of inquisitorial system. Criminal processes in criminal procedure-conducting persons and circumstances where these persons must refuse to conduct procedures or be changed; and ensuring the right to defend of accused persons and defendants. The last three Resolutions explain in details certain provisions of the Criminal Procedure Code concerning the implementation of three stages: first instance trial, appellate trial and execution of the courts’ judgments or decisions.


60 See Vo Khanh Vinh and Nguyen Manh Khang (eds), Vietnamese Law on Criminal Execution: Theoretical and Practical Issues [Phap Luat Thi Hanh An Hinh Su Viet Nam: Nhung Van De Ly Luan va Thuc Tien] (Justice, 2006) 22. According to these authors, in Vietnamese legal science, there are many different schools of thinking relating to the execution of criminal judgments. Some scholars state this is a stage of the criminal process. Others argue that this is an administrative and criminal justice activity. Others consider criminal execution as the prolongation of criminal law. The second opinion seems to be more popular and is strengthened when the Law on Execution of Criminal Judgments 2010 is adopted separately from the Criminal Procedure Code 2003. See also Hanoi University of Law, above n 38, 10. Acknowledging that criminal procedural rights of juvenile offenders only exist in stages of the criminal process, the author of this thesis does not analyze issues derived from the execution of criminal judgments. However, it is worth noting that Vietnamese criminal law and criminal procedure law have specific provisions governing the implementation of each penalty and judicial measure imposed on juvenile offenders. In comparison with those applicable to adult offenders, there are some differences reflecting in specific areas such as regimes of detention, education, re-education; termination of serving of judicial measures; commutation of penalties or exemption from serving of penalties; remission of criminal records; measures assisting juvenile offenders to rehabilitate into the community.
Viet Nam do not meet the UN benchmark standards for juvenile justice. Pre-sentence diversion does not exist in Vietnamese criminal procedure law although international guidelines have consistently supported the use of measures without resorting to judicial proceedings in dealing with juvenile offenders.\(^\text{61}\) The existence of pre-sentence diversion is one of core indicators used to evaluate a member State’s juvenile justice system.\(^\text{62}\) A variety of alternatives to institutional care required by art 40(4) of the CRC is not available. Moreover, Viet Nam does not have specialised procedure-conducting bodies and persons to address cases involving juveniles.

1. Institution

‘Institution’ is the first stage of the criminal process. Competent bodies must determine if an event has a ‘criminal sign’\(^\text{63}\) in order to decide whether to initiate a criminal case. This stage ‘boots’ the criminal process. However, it should be noted that criminal procedure law does not require competent bodies to detect the offender immediately in this stage. Whenever these bodies identify an event that has criminal signs, they can issue a decision to institute a criminal case.\(^\text{64}\) In other words, through a decision to institute a criminal case, competent bodies indirectly give notice to society that an offence has been committed and this decision has the effect of starting procedural activities to detect the offender, to take them to trial and impose appropriate penalties to them. Moreover, despite being called the instituting stage, a decision not to institute a criminal case can be issued at the end of this stage if a competent body has sufficient grounds.\(^\text{65}\) The following diagram describes generally the process of instituting a criminal case under the criminal procedure law of Viet Nam.

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\(^{61}\) See the CRC, art 40(3)(b); the Beijing Rules (arts 11(1)-(3)) and the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (art 7).


\(^{63}\) According to the Vietnamese criminal law, there are four features of the criminal sign: the act is considerably dangerous to the society; the act violates criminal law; the criminal is faulty in conducting his or her act; and the act should be imposed penalties.

\(^{64}\) It should be noted that, under art 105 of the Criminal Procedure Code 2003: ‘[t]he cases involving the offences prescribed in clauses 1 of arts 104, 105, 106, 108, 109, 111, 113, 121, 122, 131 and 171 of the Penal Code 1999 shall only be instituted at the requests of victims or lawful representatives of victims who are juveniles or persons with physical or mental defects.’ The aims of this provision are to prevent victims from being harmed by the institution of the case, create an opportunity for victims in choosing an appropriate settlement. They may have mediation with the wrongdoers or request procedure-conducting bodies to institute the case. For example, victims of “Rape” and “Forcible Sexual Intercourse” offences (arts 111, 113 of the Penal Code 1999) may not want their cases to be instituted and tried in public.

\(^{65}\) Chapter 8 of the Criminal Procedure Code 2003 provides the issues relating to instituting stage such as grounds and basis; competences and procedures of instituting criminal cases; instituting criminal cases based on requests of the victims; and grounds for not instituting criminal cases.
Figure 2. Institution Process of a Criminal Case

All statutory references are to the Criminal Procedure Code 2003.

66 All statutory references are to the Criminal Procedure Code 2003.
2. Investigation

Investigation is a stage of the criminal process at which competent bodies collect, examine, and evaluate evidence relating to offences and offenders. This stage has three main aims:

- First, identifying the offence and offender.
- Second, identifying the levels of harm or damage caused by the offences. Generally, this creates a basis for a court to determine reasonable levels of compensation and the appropriate levels of sanction for offenders.
- Third, identifying the reasons for and conditions preceding the commission of the crime and requesting relevant bodies and organizations to undertake reparative and preventive measures. It is accepted that preventing crime is always better than treating crime. Hence, in this stage, investigating bodies have the task of clarifying the reasons for, and conditions preceding, the crime and coordinating with relevant bodies to develop effective solutions to eliminate these precipitating and conditions. This contributes to the prevention of future offences, thereby reducing future harm.

Procedures relating to the investigation stage are prescribed in Chapter 9 to Chapter 14 of the Criminal Procedure Code 2003. The process starts immediately after competent bodies issue a decision to institute a criminal case. The first step is to identify investigating competence. Then, the appropriate investigating body collects evidence. There are five groups of investigatory activities stipulated in Chapter 10 to Chapter 13 of the Criminal Procedure 2003. In comparison with the investigation of adult offenders, there are several special issues in relation to juvenile offenders.

During the investigating stage, a decision to suspend the investigation of a case can be issued based on grounds prescribed in art 160 of the Criminal Procedure Code 2003. This decision temporarily ceases the investigation. At the end of this stage, the investigating body can issue one of two decisions: investigation cessation or a proposal for prosecution. The decision to cease investigating has the effect of terminating this stage. However, in a manner similar to a decision to suspend an investigation, investigation cessation can be resumed.

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67 These competences are generally stipulated in arts 110-111 of the Criminal Procedure 2003 and specified in the Ordinance on Organization of Criminal Investigation 2004.
68 These differences will be analysed in Section III(D) of this Chapter.
69 According to art 165 of the Criminal Procedure Code 2003, an investigation can be resumed when there are grounds to cancel a decision to suspend investigation.
When an investigating body issues a proposal for prosecution and transfers the case file to
the procuracy, this terminates the investigation stage and starts the next step of the criminal
process – the prosecution stage. The investigation stage of a criminal case prescribed in
Vietnamese criminal procedure law is summarized in the chart in Figure 3.

Although investigating bodies play a significant role in the process of investigation, there are
other important bodies participating in this stage. First, some bodies are assigned particular
investigating activities (e.g. border guards, customs, rangers, the coast guard forces and other
agencies of the People’s Police or the People’s Army). In order to expeditiously carry out
the task of detecting and handling all criminal acts, the Criminal Procedure Code 2003
provides that the above-mentioned bodies can conduct a number of investigating activities.
However, because they are not professional investigating bodies, the criminal procedure law
restricts these bodies to investigating offences closely related to their own operative fields.
Second, it is the procuracy which participates in the investigating stage. The objectives of
the procuracy’s participation are prosecuting at the investigation stage and supervising the
investigation. As a correlative to each objective, the Criminal Procedure Code 2003
stipulates concrete tasks and powers of the procuracy.

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70 Ordinance No. 23/2004/PL-UBTVQH11 of the National Assembly’s Standing Committee of 20 August 2004
on the Organization of Criminal Investigation, art 4.
71 For example, customs can investigate two offences prescribed in arts 153-154 of the Penal Code 1999:
Smuggling offence and Illegal Cross-Border Transportation of Goods and/or Currencies offence; rangers can
investigate six offences prescribed in arts 175, 189-191, 240, 272 of the Penal Code 1999: Breaching
Regulations on Forest Exploitation and Protection; Destroying Forests; Breaching Regulations on the
Protection of Precious and Rare Wild Animals; Breaching the Special Protection Regime for Nature
Preservation Areas; Breaching Regulations on Fire Prevention and Fighting; and Breaching Regulations
Relating to the Protection and Use of Historical or Cultural Relics, Famous Landscapes and Scenic Places,
Causing Serious Consequences.
72 According to current point of views in Viet Nam, the prosecuting function of the procuracy begins from
instituting stage of the criminal process.
Figure 3. Investigation Process of a Criminal Case

- Identify the investigating authority
  - Investigating bodies of the People’s Police (art 110(1))
  - Investigating bodies of the People’s Army (art 110(2))
  - Investigating body of the Supreme People’s Procuracy (art 110(3))
  - Other competent bodies: border guard, customs, ranger, the coast guard forces, etc. (art 111)

- Conduct investigation
  - Internrogation of the accused (arts 126-132)
  - Taking statements of witnesses, victims, civil plaintiffs, civil defendants, persons with interests and obligations related to the cases (arts 133-137)
  - Confrontation and identification (arts 138, 139)
  - Search, forfeiture, seizure, distraint of property (Ch 12)
  - Scene examination, autopsy, examination of traces on human bodies, investigation experiments, expertise (Ch 13)

- Issue a decision
  - Suspension of investigation (art 160)
  - The accused suffers from mental diseases or other dangerous ailments
  - The accused is not yet identified or their whereabouts are unknown
  - The expertise has been solicited but the results are not yet available upon the expiry of the investigation time limit
  - One of the grounds prescribed in arts 105(2), 107 of the Criminal Procedure Code applies
  - Investigation cessation (art 164)
    - One of the grounds prescribed in arts 19, 25 and 69(2) of the Penal Code applies
    - The investigation time limits have expired and it cannot be proved that the accused has committed the offence
  - Termination of investigation (art 162)
    - The investigation time limits have expired and it cannot be proved that the accused has committed the offence
  - Proposal for prosecution (art 163)
    - Has sufficient evidences to determine the offence and the accused
  - Sent to the procuracy of the same level
3. Prosecution

It is during the prosecution stage that the procuracy carries out activities in order to prosecute the accused before court by indictment, or issues other decisions to resolve a criminal case. As previously mentioned, the prosecution stage starts when the procuracy receives the case file and an investigation conclusion report proposing prosecution from the investigating body. Similar to the investigating stage, the first step in the prosecuting stage is to identify the procuracy’s competence to prosecute.

Second, the procuracy examines and evaluates all evidence collected by the investigating body. It is noteworthy that the *Criminal Procedure Code 2003* invests the procuracy with the power to carry out investigating activities to evaluate the reliability of evidence, as well as to supplement evidence for the case by interrogating the accused;\(^\text{74}\) taking statements from witnesses;\(^\text{75}\) arranging meetings between victims, offenders and/or witnesses\(^\text{76}\) and conducting investigation experiments.\(^\text{77}\)

Finally, based on examination and evaluation, the procuracy may issue one of four decisions: return the case file for additional investigation; suspend the case; end the case or issue an indictment.\(^\text{78}\) When the procuracy issues an indictment to prosecute the accused before a court, the criminal process proceeds to a new stage: first-instance trial. The following chart provides a general outline of the prosecuting stage according to Vietnamese criminal procedure law.

\(^{74}\) *Criminal Procedure Code 2003*, art 131(3).
\(^{75}\) Ibid art 135(6).
\(^{76}\) Ibid art 138(5).
\(^{77}\) Ibid art 153(3).
\(^{78}\) Ibid art 166(1).
Figure 4. Prosecution Process of a Criminal Case

Identify the competent prosecuting authority:

- District-level People’s Procuracy
- Provincial-level People’s Procuracy
- Regional Military Procuracy
- Zone-level Military Procuracy

Activities of the procuracy:

- Receive the case file from the investigating body
- Examine and evaluate evidence collected by the investigating body

Issue a decision:

- Sent to the investigating body
- Return the case file for additional investigation (art 168)
- Suspension of the case (art 169(1))
- Cessation of the case (art 169(2))
- Indictment (art 167)

Sent to the court of the same level:

Evidence in the case is insufficient, which the procuracies cannot supplement by themselves
- There are grounds to initiate criminal proceedings against the accused for other offences or there are other accomplices
- There are serious violations of the criminal procedure
- The accused suffers from mental disorder or other dangerous ailments
- The accused has escaped and their whereabouts are unknown
- One of the grounds prescribed in arts 105(2), 107 of Criminal Procedure Code applies
- One of the grounds prescribed in arts 19, 25 and 69(2) of the Penal Code applies
- There is sufficient evidence to prosecute
4. First-Instance Trial

The first level of trial involves a competent court resolving a case by issuing a judgment or other necessary decision. In comparison with the first three stages of the criminal process, the first-instance trial stage comprises two major steps: preparation for trial (pre-trial) and the actual court session. The first step starts when the court receives a case file and indictment from the procuracy. Although the court which has competence to trial the case is mentioned in the indictment, it is necessary for the court to re-examine its jurisdiction. The first-instance trial jurisdiction is established in arts 170-172 of the *Criminal Procedure Code 2003*. Then, the competent court or, more exactly, the judge(s)\(^{79}\) examine and evaluate all evidence in the case file provided by the procuracy: see Figure 5.

At the end of the trial preparation stage, the judge assigned to preside over the court session issues one of four decisions: to return the case file for additional investigation; to suspend the case; to cease the case or to bring the case for trial. The last decision has the effect of bringing the case for trial. In other words, this decision changes the first-instance trial stage from the first step (trial preparation) to the second step – opening the court session for trial. Generally, the first-instance trial session embraces five main parts: procedures for opening a court session, procedures for inquiry, argument, deliberation, and pronunciation of a court judgment: see Figure 6.

\(^{79}\) Article 185 of the *Criminal Procedure Code 2003* provides: ‘A first-instance trial panel shall be composed of one professional judge and two lay judges. For serious and complicated cases, the trial panel may be composed of two professional judges and three lay judges. For cases where the defendants brought for trial are charged with offences punishable by death as the highest penalty, the trial panel shall be composed of two professional judges and three lay judges.’ (emphasis added).
Figure 5. First-Instance Pre-Trial Process of a Criminal Case

1. Identify the jurisdiction:
   - District-level People’s Court
   - Provincial-level People’s Court
   - Regional Military Court
   - Zone-level Military Court

2. Activities of the court in trial preparation stage:
   - Receive the case file from the procuracy
   - Examine and evaluate evidence collected by the investigating body and the procuracy
   - Issue a decision
     - Sent to the procuracy
     - Return the case file for additional investigation (art 179)
     - Suspension of the case (art 180)
     - Cessation of the case (art 180)
     - Decision to bring the case for trial
       - Open the first instance trial session

3. Sent to the procuracy:
   - Evidence in the case needs to be further examined, which cannot be supplemented at the court session;
   - There are grounds to believe that the defendant has committed another offence or there is another accomplice
   - There are serious violations of the criminal procedure
   - The accused suffers from mental disorder or other dangerous ailments
   - The accused escapes and his/her whereabouts are unknown
   - One of the grounds prescribed in art 105(2); points 3-7 of art 107 of the Criminal Procedure Code applies
   - The procuracy withdraws the entire prosecution decision
   - There is a sufficient basis for trial
Figure 6. First-Instance Trial Session of a Criminal Case

**Procedures for opening a court session**
- Presiding judge reads the decision to bring the case for trial; examines the identity cards of summoned persons who are present and explains to them their rights and obligations at the court session (art 201)
- Settlement of requests for change of professional judges, lay judges, procurators, court clerk, experts and/or interpreters (art 202)
- Explanation of the rights and obligations of interpreters and experts (art 203)
- Explanation of the rights, obligations of witnesses, and isolation of witnesses (art 204)
- Settlement of requests for examination of evidence and postponement of court sessions due to the absence of persons concerned (art 205)

**Procedures for inquiry**
- Reading of indictments (art 206)
- The presiding judge puts questions first, then procurators, defence counsels and persons defending the interests of involved parties (art 207)
- Announcement of statements at investigating body when necessary (art 208)
- Examination of exhibits (art 212)
- Presentation and announcement of documents of the cases and comments and reports of agencies or organizations (art 214)

**Argument at a court session**
- Prosecutor(s): - present the arraignments; - propose the charges against the defendants; - may withdraw the whole prosecution decisions and propose the trial panels to pronounce the defendants not guilty (art 217(1))
- Defendants and their defence counsels present their defence (art 217(2))
- Other participants and their defence counsels may present opinions to protect their rights and interests (art 217(3))
- Counter-argument (art 218)
- Final words of defendants (art 220)

**Deliberation**
- Members of the trial panels must settle all matters of the cases by majority vote on each matter. Judges shall vote last. Persons holding minority opinions shall have the right to present their opinions in writing for inclusion in the case file (art 222(1))
- All opinions and decisions of the trial panels made in the process of deliberating judgments must be recorded in the minutes (art 222(4))

**Pronunciation of judgment**
- The presiding judge or another member of the trial panel shall read the judgment and may, after reading, explain further the execution of the judgment and the right to appeal (art 226)
5. Appellate Trial

Appellate trial is a further stage of the criminal procedure. It is the second level of trial, in which a superior court re-hears the case or reviews the first-instance decision when the judgment or decision is appealed or protested against before it becomes legally valid. The appellate trial is not a mandatory stage in the criminal process. This procedure is only undertaken when participants in the criminal process appeal and/or competent procuracies protest against the first-instance judgment or decision. In the appellate trial stage, the immediate superior court examines the lawfulness and basis of the first-instance judgment or decision. This allows a superior court to correct mistakes by a lower court. This stage also creates an opportunity for participants to request a higher court to protect their legitimate interests by adjusting the first-instance judgment or decision.

The appellate trial stage comprises a number of steps. First, the appellate trial panel receives the case file and appeal and/or protest and examines and evaluates these documents. This can be described as the appellate trial preparation step. The criminal procedure law of Viet Nam allows participants in the criminal process and procuracies to supplement, change, or withdraw their appeals and protests. As a correlative to each circumstance, the Court of Appeal issues specific decisions.

The second step is opening the appellate trial session. Generally, the procedures of an appellate trial session are similar to those of a first-instance trial session. The differences between these two court sessions are outlined in art 247 of the Criminal Procedure Code 2003. At the end of an appellate trial session, the trial panel issues one of four decisions: the rejection of the appeal or protest keeping the first-instance judgment unchanged; the

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81 Under Vietnamese law, the right to ‘appeal’ is entitled to procedural participants including victims, civil plaintiffs, civil defendants, persons with interests and obligations related to the cases, and their lawful representatives, defendants, defence counsel. The right to ‘protest’ is empowered to the procuracies of the same level with the first-instance court and the immediate superior procuracies. Procedural participants can only appeal first-instance judgments or decisions which are not legally valid. Competent procuracies can protest any judgments or decisions regardless whether they have legal effect or not. When the procuracies protest first-instance judgments or decisions which are not legally valid, the appellate trial procedures will be conducted. In case the procuracies protest legally valid judgments or decisions, the ‘cassation’ procedure or re-opening procedure will be carried out.
82 Article 244 of the Criminal Procedure Code 2003 stipulates: ‘An appellate-trial panel shall be composed of three judges and possibly added two jurors in case of necessity.’
amendment of the first-instance judgment; the cancellation of the first-instance judgment and transfer of the case file for re-investigation or re-trial or a decision to cancel the first-instance judgment and terminate the case. It is noteworthy that all decisions of the appeal court enter into force immediately and cannot be appealed. In relation to amending the first-instance judgment, this can be done in two ways: either less or more serious for defendants. The appeal court can decide to cancel the first-instance judgment for re-investigation. This decision returns the criminal process to the investigating stage. Alternatively, the Court of Appeal can decide to cancel the first-instance judgment for re-trial. This decision returns the case to the first-instance trial stage. Concerning the last decision, the Court of Appeal can decide to cancel the first-instance judgment and immediately terminate the case or declare the defendant not guilty before terminating the case.

Figure 7 of the thesis describes appellate procedures of a criminal case in accordance with Vietnamese criminal procedure law.
Figure 7. Appellate Trial Process of a Criminal Case

1. Identify the jurisdiction
   - Provincial-level People’s Court
   - Appeal Court of the Supreme People’s Court
   - Zone-level Military Court
   - Central Military Court

2. Receive the case file from the court of first instance
   - Examine the case file; appeal of procedural participants and/or protest of the procuracy

3. Receive appeal and/or protest
   - Different procedures compared with first-instance trial (art 247)

4. Open the appellate court session
   - Before the inquiry, one trial panel member must briefly present the case contents, decision(s) of the first-instance judgment and contents of the appeal or protest
   - In the arguing process, procurator(s) must present the procuracy’s viewpoints on the settlement of the case

5. Issue a decision
   - Amend the first-instance judgment
     - Less serious than the first-instance judgment (art 249(1), (2))
     - More serious than the first-instance judgment (art 249(3))
   - Reject the appeal or protest and keep the first-instance judgment unchanged (art 248(2) (a))
   - First-instance judgment is correct
   - Re-investigation (art 250(1))
   - Re-trial (art 250(2))
   - Investigation at the first-instance level is insufficient and cannot be supplemented at the appellate level
   - The composition of the first-instance trial panel did not conform to law provisions or showed other serious violations of criminal procedure
   - There are grounds to believe that the persons who were declared not guilty by the first-instance courts had committed an offence
   - Declare the defendants not guilty and cease the case (art 251)
     - One of the grounds prescribed at Points 1 and 2, art 107 of the Criminal Procedure Code applies
     - One of the grounds prescribed at Points 3-7, art 107 of the Criminal Procedure Code applies
   - Cease the case (art 251)
     - Cancel the first-instance judgment and transfer the case file FOR
     - Central Military Court

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6. Special Stage

This is a stage in which a court reviews a legally valid judgment or decision which is protested against because of allegedly serious law violations detected in the handling of the case (‘cassation’ procedure)\(^\text{84}\) or due to newly discovered circumstances which may substantially change the contents of the original judgment or decision but which were unknown to the court that issued a judgment or decision (re-opening procedure).\(^\text{85}\) It should be noted that this is not a level of trial because according to art 20 of the Criminal Procedure Code 2003 and art 11 of the Law on Organization of the People’s Courts 2002, there are only two levels of trial: first-instance trial and appellate trial. Rather, the ‘cassation’ and re-opening procedures are considered to be ‘special stages’ in the criminal process. They are special because they review legally valid judgments or decisions of the courts.

Similar to the appellate trial stage, the ‘cassation’ and re-opening procedures are not compulsory in the criminal process. These procedures only take place when there is a protest by a competent person. The higher courts use these special procedures to adjust errors in judgments and decisions of lower courts. Issues relating to ‘cassation’ and re-opening procedures are addressed in Chapters 30 and 31 of the Criminal Procedure Code 2003. These chapters describe: the nature of the two procedures; the grounds of protest and competent persons who can protest; jurisdiction to review the case and the rights of ‘cassation’ and reopening procedure panels.

The ‘cassation’ and re-opening procedures share a number of features. Both procedures review legally valid judgments or decisions of the lower courts. In addition, the Criminal Procedure Code 2003 has the same provisions for procedures relating to some issues, such as jurisdiction to review cases; participants in the court sessions; composition of the court panels; preparation for, and procedures at, the court sessions and time limits for the two procedures.\(^\text{86}\) Also, the special procedures of the criminal process generally comprise a number of phases. First, an appropriate court receives a protest from a competent person and a court panel examines and evaluates the case. Second, a court session is opened to review the judgment or decision. The court panel can issue one of three decisions: a rejection of the...
protest and retain the judgment or decision; dismissal of the protested judgment or decision for re-investigation or re-trial; and dismissal of the protested judgment or decision and cease the case.\footnote{Criminal Procedure Code 2003, arts 285, 298.}

However, there are also some differences between the ‘cassation’ and re-opening procedures. First, the ‘cassation’ procedure reviews a legally valid judgment or decision which is protested against because of allegedly serious law violations detected in the handling of the case,\footnote{Ibid art 272.} while the re-opening procedure reviews a legally valid judgment or decision which is protested against due to newly discovered evidence or circumstances which may substantially change the contents of such judgment or decision but which were unknown to the original court when it issued the judgment or decision.\footnote{Ibid art 290.} Second, because of this difference, the grounds of protest for the two procedures are not the same.\footnote{Ibid arts 273, 291.} Moreover, the categories of persons having the right to protest for the ‘cassation’ procedure are different from those for the re-opening procedure.\footnote{Ibid arts 275, 293.} The time limits for lodging protest the two procedures are also different.\footnote{Ibid arts 278, 295.}

‘Cassation’ and re-opening procedures are described by Figures 8 and 9 of the thesis. Figure 10 is a diagram summarily describing all stages of a criminal case in Viet Nam.
Figure 8. ‘Cassation’ Procedure of a Criminal Case

Grounds to lodge protest (art 273)
- Serious violations of criminal procedures occurred in the investigation, prosecution or trial
- The inquiry at the court session is biased or insufficient
- The conclusion in the judgment or decision is not consistent with the objective circumstances of the case
- Serious mistakes were made in the application of the Penal Code

Jurisdiction to review a case (art 279)
- The Judges Committee of the provincial-level people’s court
- The Judges Committee of the military zone-level military court
- The Criminal Tribunal of the Supreme People’s Court
- The Central Military Court
- The Judges Council of the Supreme People’s Court

Open the court session of ‘cassation’ (art 282)
- One member of the ‘cassation’ panel shall read the presentation on the case. Members of the ‘cassation’ panel shall express their opinions
- The offender, defence counsel, persons with interests and obligations related to the protests (who are summoned) present their opinions
- The representative of the procuracy expresses his/her viewpoint on the settlement of the case

Issue a decision (art 285)
- Reject the protest and retain the legally valid judgment or decision
- The legally valid judgment or decision is correct
- Dismiss the legally valid judgment or decision and cease the case
- One of the grounds for not instituting a case prescribed in art 107 of the Criminal Procedure Code applies (art 286)
- Dismiss the legally valid judgment or decision for re-investigation or re-trial
- One of the grounds for lodging protest prescribed in art 273 of the Criminal Procedure Code applies (art 287)
Figure 9. Re-opening Procedure of a Criminal Case

- Grounds to lodge protest (art 291)
  - Statements of witnesses, expertise conclusions, oral interpretations of interpreters contain important contents discovered to be untruthful
  - Investigators, procurators, judges or jurors made incorrect conclusions, thus leading to the wrong trial of the cases
  - Exhibits, investigation records, records of other proceedings or other documents in the cases are forged or not truthful
  - Other circumstances which have rendered the settlement of the cases untruthful

- Jurisdiction to review a case (art 296)
  - Similar to jurisdiction to review a case according to ‘cassation’ procedures prescribed in art 279

- Open the court session of reopening procedures (art 297)
  - Similar to procedures of the court session of ‘cassation’ prescribed in art 282

- Issue a decision (art 298)
  - Reject the protest and retain the legally valid judgment or decision
  - The legally valid judgment or decision is correct
  - Dismiss the legally valid judgment or decision and cease the case
  - One of the grounds for not instituting a case prescribed in art 107 of the Criminal Procedure Code applies
  - Transfer the case file to competent procuracy for re-investigation (art 300(1))
  - Transfer the case file to competent court for re-trial (art 300(2))
  - One of the grounds to lodge protest prescribed in art 291 of the Criminal Procedure Code applies
  - Dismiss the legally valid judgment or decision FOR re-investigation or re-trial
Figure 10. Summary Flowchart of Criminal Proceedings in Viet Nam

Institution

- Decide not to institute a criminal case
- Decide to institute a criminal case

Investigation

- Cessation of investigation
- Proposal for prosecution
- Suspension of investigation

Prosecution

- Cessation of the case
- Suspension of the case
- Indictment
- Return case file for further investigation

First-instance Trial

- Pre-trial

Appellate Trial

- Reject the appeal or protest
- Amend the first-instance judgment
- Cancel the first-instance judgment

- Decision to bring the case for trial

- Court session

- Cease the case
- Declare defendant not guilty and cease the case
- Re-trial
- Re-investigation

Re-opening Procedure

- “Cassation” Procedure
- Re-investigation

- Rejection of protest and retain the legally valid judgment or decision
- Dismiss the legally valid judgment or decision and cease the case
- Dismiss the legally valid judgment or decision FOR re-investigation or re-trial
D. Protection of Juvenile Offenders’ Rights: Advantages and Shortcomings

This section analyses particular provisions of Vietnamese criminal procedure law governing the protection of key rights of juvenile offenders in the criminal process. Generally, because of the influence of international law (especially UN legal instruments), provisions of Vietnamese criminal procedure law are similar to those of international human rights law. In order to avoid repetition, in this section the author focuses on analyzing divergences in Vietnamese criminal procedure law from international law, as well as the advantages and limitations of the juvenile justice regulatory framework.

1. General Rights

a. Right to be Presumed Innocent

In Viet Nam, the right to be presumed innocent is considered as to be a distinctive principle of criminal procedure law. This principle is prescribed in art 72 of the *Constitution 1992* and art 9 of the *Criminal Procedure Code 2003*: ‘No person shall be considered guilty and be punished until a court judgment on his/her criminality takes legal effect.’

This principle in Vietnamese criminal procedure law is similar to those embodied in international legal documents. Moreover, many studies have shown that the right to be presumed innocent recognized in Vietnamese criminal procedure law also has the following features:

- First, in Viet Nam, only a court has competence to convict a person and impose appropriate penalties. The Vietnamese Government is organized on the principle of centralization of power. There is close cooperation between state bodies in conducting legislative, executive, and judicial missions. The courts are established to

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93 Hanoi University of Law, above n 38, 46. In Viet Nam, protecting rights of juvenile offenders is considered as fundamental principles of criminal procedure law. These principles are prescribed in Chapter 2 of the *Criminal Procedure Code 2003*. According to the authors of the *Curriculum of Vietnamese Criminal Procedure Law*, the principles of criminal procedure law are divided into two groups: distinctive principles and other principles. Distinctive principles are principles only recognised by criminal procedure law and reflect the contents and nature of this independent legal branch. The first group includes principles such as: no person shall be considered guilty until a court judgment on his/her criminality takes legal effect; guarantee of the right to defence of detainees, accused and defendants; responsibility to institute and handle criminal cases; detection and remedy of causes and conditions for crime commission; settlement of civil matters in criminal cases; guarantee of the right to damage compensation and restoration of honour and interests of unjustly handled persons. Other principles are general principles of the legal system influencing criminal procedure law. This group consists of principles such as: guarantee of the socialist legislation in the criminal procedure; respect for, and defence of, fundamental rights of citizens; guarantee of all citizens’ right to equality before law; etc.

94 These studies include Hanoi University of Law, above n 38; Pham Van Loi (ed), *Binh Luan Khoa Hoc Bo Luat To Tung Hinh Su Nam 2003* [Scientific Comments on the Criminal Procedure Code 2003] (Justice, 2005).
conduct judicial functions.\textsuperscript{95} No other state body can carry out these function. This provides a legal guarantee for every citizen – without trial by a court with necessary procedures prescribed by law, no one is liable for conviction and penalty. Thus, a person can only be considered to be guilty when there is a court judgment on his/her criminality which enters into force. It is worth noting that even in circumstances where a court has already issued a conviction but this judgment has not yet taken into effect,\textsuperscript{96} a convicted person is still not guilty and does not have to bear the imposed penalty.\textsuperscript{97}

- Second, any doubts in the process of investigation, prosecution and trial must be resolved in an advantageous way for the accused defendant. It is possible that in some circumstances, procedure-conducting bodies cannot substantiate their charges. In these cases, any assumptions about the accused defendant must be explained in an advantageous way for them. Consequently, adverse assumptions cannot form the basis of a prosecution of the accused defendant. It should be emphasized that giving the benefit of any doubts in an advantageous way to the accused defendant occurs only when, despite using all investigation and enquiries, procedure-conducting bodies do not have sufficient evidence to convict a person.

\textit{i. Advantages}

From an historical perspective, it can be recognized that even before ratifying the CRC, the right to be presumed innocent was stipulated in the \textit{Criminal Procedure Code 1988}.\textsuperscript{98} After ratifying the CRC, this right continued to be prescribed in the \textit{Constitution 1992} and the \textit{Criminal Procedure Code 2003}. Thus, successive Vietnamese Governments have consistently respected and protected this right of juvenile offenders in the criminal process.

\textsuperscript{95} Article 127 of the \textit{Constitution 1992} and art 1 of the \textit{Law on the Organization of People’s Courts 2002} prescribe: ‘The supreme court, regional courts, military courts and other courts established by the law are judicial bodies of the Socialist Republic of Viet Nam.’

\textsuperscript{96} For example, a convicted judgment of the first-instance court does not enter into force when the time limits for lodging appeals and protests are not expired.

\textsuperscript{97} Recognition of this principle does not reduce the value of procedural decisions issued pre-trial (for example, in relation to a decision to initiate criminal proceedings against an accused; a decision to indict an accused by a procuracy). These decisions identify the act of a person as a criminal act and constitute a process of collecting evidence in the investigating stage, whether or not this person is guilty will be decided by a court at trial. These investigating activities – of collecting evidence, detecting criminals – are essential for the subsequent adjudication of a court.

\textsuperscript{98} In the \textit{Criminal Procedure Code 1988}, the right to be presumed innocent was stipulated in art 10.
Second, in the *Criminal Procedure Code 2003*, legislators replaced the discretionary phrase ‘*can be considered guilty*’ with the confirmative phrase ‘*shall be considered guilty*’. This change had two aims: to make the *Criminal Procedure Code 2003* compatible with the *Constitution 1992* and to present a more definitive protection of human rights in Vietnamese criminal procedure law. Moreover, this change makes the provision in Viet Nam similar to those in international law.

Third, to establish guarantees for the effective implementation of this principle, Vietnamese criminal procedure law contains particular provisions. For instance, art 10 of the *Criminal Procedure Code 2003* stipulates:

Investigating bodies, procuracies and courts must apply every lawful measure to determine the facts of criminal cases in an objective, versatile and full manner, to make clear evidences of crime and evidences of innocence, circumstances aggravating and extenuating the criminal liabilities of the accused or defendants.

The responsibility to prove offences shall rest with the procedure-conducting bodies. The accused or defendants shall have the right but not be bound to prove their innocence.

This principle creates the essential conditions for ensuring the right to be presumed innocent for juvenile offenders, as it requires criminal procedure-conducting persons to adopt an unbiased approach during the process of collecting, examining and evaluating evidence to prove the guilt of the accused defendant. It prevents these persons from pre-judging the criminality of offenders. This principle prohibits the punishing of innocent people in the criminal justice system. Moreover, the second paragraph of art 10 imposes a responsibility to substantiate offences on procedure-conducting bodies. It also confirms that proving innocence is the right, rather than the duty of offenders. This means offenders are not obliged to provide evidence for their innocence. Of course, it might be better for their interests if they could display exculpatory proof. However, when procedure-conducting bodies cannot prove offenders’ guilt, offenders must be considered innocent.

In addition, during the criminal process, criminal procedure law obliges procedure-conducting bodies to issue favourable decisions for offenders. For example, in the investigating stage, an investigating body may issue a decision to cease an investigation when the investigation time limits have expired and the guilt of the accused has not yet been
established.99 In the prosecuting stage, a competent procuracy may issue a decision to cease the case100 or, in the trial stage, to withdraw the prosecution.101 Finally, if there are grounds to find a defendant not guilty, the trial panel is obliged to declare this person not guilty.102

Third, the right to be presumed innocent means that until a conviction is issued, accused persons are not guilty. Consequently, procedure-conducting bodies cannot treat them as guilty even when they are subject to temporary detention. This is the reason why the criminal procedure law of Viet Nam provides that the pre-trial regime of custody and temporary detention must differ from the regime applicable to persons serving imprisonment after conviction.103

Fourth, there were amendments to other provisions to make them compatible with the content and spirit enshrined in this principle. For example, there are changes in provisions relating to the clothing of defendants in criminal court sessions. Currently, defendants do not have to wear distinctive clothes (i.e. prison clothing). This is dissimilar to the previous situation when defendants had to wear prison clothes when they were present at criminal court sessions.104 The reason for this change is that at the time when the criminal court session takes place, defendants are not deemed to be guilty. Thus, there is no rationale for forcing them to wear distinctive clothes. Despite being a minor amendment, this matter reveals the detailed consideration given to protecting the fundamental rights of offenders in the criminal process in Viet Nam.

ii. Shortcomings

In comparison with general comments of the Committee on the Rights of the Child and the

99 Criminal Procedure Code 2003, art 164(3).
100 Ibid art 169(1).
101 Ibid arts 181, 217(1).
102 Ibid art 222(2).
103 Ibid art 89. In Viet Nam, the regime of custody and temporary detention is stipulated in the Decree No. 89/1998/ND-CP of the Government of 7 November 1998 adopting the Regulations of Custody and Temporary Detention. The regulations applicable to persons serving imprisonment penalties is prescribed in the Law No. 53/2010/QH12 of the National Assembly of 17 June 2010 on Criminal Execution.
104 Article 1 of Resolution No. 743/2004/NQ-UBTVQH11 of the National Assembly’s Standing Committee of 24 December 2004 on the Dresses of Defendants in Criminal Court Sessions stipulates: ‘In criminal court sessions, defendants who are granted bail and defendants who are temporarily detaining are entitled to wear ordinary clothes ensuring the solemnity; defendants who are soldiers on active service are entitled to wear ordinary uniform without military signals, military insignias, military badges. Defendants who are executing the imprisonment penalty must wear distinctive clothes prescribed by the Government in criminal court sessions.’
Human Rights Committee, provisions governing the right to be presumed innocent for juvenile offenders in the criminal procedure law of Viet Nam are slightly different. Both General Comment No. 10 of the Committee on the Rights of the Child and General Comment No. 32 of the Human Rights Committee confirm that the presumption of innocence imposes the burden of proving guilt on the prosecution. By contrast, in Vietnamese criminal procedure law, this perspective is established in art 10 of the Criminal Procedure Code 2003 which sets out the Principle of Determining the Truth of Criminal Cases, rather than in the contents of the right to be presumed innocent. In spite of being only a difference in legal formulation, this shows that Vietnamese criminal procedure law has not complied with the interpretations of UN human rights bodies. This is one of the reasons contributing to the overlap between the right to be presumed innocent and the principle of determining the truth of criminal cases.

In addition, as explained by the Human Rights Committee, the principle of presumption of innocence requires all public authorities to avoid anticipating the result of a trial and the media are prohibited from publishing wrongful information relating to cases. In this regard, Viet Nam applies the first requirement and generally omits the second. This is illustrated by the fact of a number of cases in which the outcomes of trials are different from information published in the media. Furthermore, Vietnamese scholars and legal experts have sometimes forgotten to note that the indication of guilt is not dependent on the length of pre-trial detention and the presumption of innocence is not affected by a denial of bail or findings of responsibility in civil proceedings (See para 30 of General Comment No. 32 of the Human Rights Committee).

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105 Committee on the Rights of the Child, General Comment No. 10 (2007): Children’s Rights in Juvenile Justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), para 42 (‘General Comment No. 10’); Human Rights Committee, General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 19th sess, UN Doc CCPR/C/GC/32 (23 August 2007), para 30 (‘General Comment No. 32’).
106 Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, para 30. See also Communication No. 770/1997, Gridin v Russian Federation, [3.5], [8.3].
107 This happened in two cases occurring in 2011. The first was case Le Van Luyen (a juvenile) who murdered four people in one family and robbed property. The second was case Tran Thuy Lieu who murdered her husband (Journalist Hoang Hung). Many published articles showed that there were accomplices in these cases. However, the appellate courts’ judgments confirmed that the defendants committed offences by themselves. Information relating to these cases are online available at <http://us.24h.com.vn/an-ninh-hinh-su/vu-xu-luyen-an-phuc-tham-chua-phai-la-het-c51a444899.html> (02/04/2012); <http://us.24h.com.vn/tin-tuc-trong-ngay/tuong-thuat-phien-phuc-tham-vu-nha-bao-bi-dot-c46a463774.html> (22/06/2012).
108 See also Concluding observations, Italy, CCPR/C/ITA/CO/5 (2006), para 14 and Argentina, CCPR/CO/70/ARG (2000), para 10; Communications No. 788/1997, Cagas, Butin and Astillero v Philippines,
b. Right to Remain Silent

i. Advantages

In Viet Nam, there is no legislation that directly protects the right to remain silent. However, certain provisions\textsuperscript{109} in the \textit{Criminal Procedure Code 2003} can be understood to indirectly support the right to remain silent. These provisions enumerate the rights and obligations of persons held in custody, the accused and defendants, including the right to present statements, opinions and argue at court sessions. It is implicit that if an offender does not want to utilize this right, he or she will remain silent. Because presenting statements is a right, offenders do not incur criminal responsibility if they decide not to exercise this right. Procedure-conducting persons, especially investigators and prosecutors, cannot force offenders to supply information relating to cases. Such a strategy, if adopted, would violate the right to remain silent and may contribute to mistakes in investigating outcomes.\textsuperscript{110} However, as a practical measure, it is often argued that offenders should put forward their statements, opinions and arguments to defend legitimate benefits and rights, because if offenders remain silent, prosecutors may more easily prove their guilt. Moreover, if ‘offenders make honest declarations and reports and show their repentance’\textsuperscript{111} this may be considered as a circumstance extenuating penal liability.

ii. Shortcomings

Despite being an essential right and recognized in the \textit{Beijing Rules} and the \textit{Statute of International Criminal Court}, currently, the right to remain silent is not directly stipulated in the criminal procedure law of Viet Nam. This has negative consequences in relation to the protection of other rights and legitimate interests of offenders and creates disadvantages for offenders in exercising their right of defence. Although the \textit{Criminal Procedure Code 2003} has provisions requiring procedure-conducting bodies to explain their rights and obligations to offenders, in most cases these bodies only inform offenders that they are entitled to present their statements and do not inform them that they can remain silent.

\textsuperscript{109} Such as arts 48(2)(c), 49(2)(c), 50(2)(g).
\textsuperscript{110} Hanoi Law University, above n 38, 120.
\textsuperscript{111} Penal Code 1999, art 46(1)(p).
c. Right not to be Subject to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment

i. Advantages

In Viet Nam, the right not to be subject to cruel and inhuman punishment is considered a fundamental principle of criminal procedure law. This right has been recognized since 1980 in legislation including the Constitution, Penal Code and Criminal Procedure Code. Currently, it is specified in art 71 of the Constitution 1992; and arts 6, 7 of the Criminal Procedure Code 2003. The provisions governing this right in Viet Nam are similar to those contained in international law (such as the Statute of International Criminal Court 1998, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Beijing Rules, the ICCPR and the CRC). Significantly, the Criminal Procedure Code 2003 clearly provides that physical punishment during procedural activities (e.g. interrogation of accused persons) is an offence and any procedure-conducting persons engaging in such conduct may be criminally liable under the Penal Code 1999. Article 131(1) of the Criminal Procedure Code 2003 extended the operation of the Criminal Procedure Code 1988 by specifying that prosecutors may be charged if they use corporal punishment on an accused.

b. Shortcomings

The above mentioned legislation of Viet Nam only promulgates general principles for securing the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment and focuses on punishing public officials who violate this right. There is a lack of measures to prevent offenders from being tortured or corporally punished in criminal proceedings, particularly in the investigation stage. Article 2(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 requires each State Party to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture’. Additionally, there is no provision in the Criminal Procedure Code 2003 directly prescribing that any statement collected as a result of torture shall not be


113 Article 6 prescribes: ‘All forms of coercion and corporal punishment are strictly forbidden.’ Article 7 stipulates: ‘Citizens have the right to have their life, health, honour, dignity and property protected by law. All acts of infringing upon the life, health, honour, dignity and/or property shall be handled according to law.’

invoked as evidence in criminal processes. The Committee on the Rights of the Child accepts that the use of reasonable restraint to control dangerous behaviour of children in conflict with the law may be necessary to protect people working with them. However, Viet Nam does not have detailed guidance on this matter.

d. Right not to be Subject to Arbitrary Arrest or Detention

a. Advantages

The assurance of this right of juvenile offenders under Vietnamese criminal justice system has developed in a number of ways. These are discussed below.

First, Viet Nam has established a legislative framework ensuring the right not to be subject to arbitrary arrest or detention. This right is considered to be a fundamental principle of Vietnamese criminal procedure law. It is stipulated in art 71 of the Constitution 1992, art 6 of the Criminal Procedure Code 2003. Significantly, the Penal Code 1999 prescribes the act of ‘abusing positions and powers to detain persons in contravention of law’ as an offence. 115

Second, the criminal procedure law has detailed provisions governing the application of deterrent measures. This is illustrated by the fact that the Criminal Procedure Code 2003 devotes the whole of Chapter 6 to these measures. 116 Acknowledging that arrest, custody and detention will affect the right to liberty of offenders, the Criminal Procedure Code 2003 only allows procedure-conducting bodies to use these measures in necessary circumstances based on the provisions and procedures prescribed by the criminal procedure law.

Third, there are distinct provisions limiting the use of arrest, custody and temporary detention of juvenile offenders. These provisions are contained in art 303 of the Criminal Procedure Code 2003, which governs arrest, custody and temporary detention. Article 303 stipulates:

1. Persons aged between 14 years and under 16 years may be arrested, held in custody or temporary detention if there are sufficient grounds prescribed in Articles 80, 81, 82, 86, 88 and 120 of this Code,

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116 According to Chapter VI of the Criminal Procedure Code 2003, there are six deterrent measures which can be used in the criminal process: arrest, custody, temporary detention, ban from travel outside one’s residence place, guarantee, depositing money or valuable property as bail.
but only in cases where they commit very serious offences intentionally or especially serious offences.\textsuperscript{117}

2. Persons aged between 16 years and under 18 years may be arrested, held in custody or temporary detention, if there are sufficient grounds prescribed in Articles 80, 81, 82, 86, 88 and 120 of this Code, but only in cases where they commit serious offences intentionally or very serious or especially serious offences.

Thus, it can be seen that juvenile offenders can only be arrested, held in custody and temporarily detained when they have committed certain types of serious offences prescribed in the Penal Code 1999\textsuperscript{118} (the offences for which adult offenders can be detained are not so limited). Moreover, art 303 provides that there are differences in how arrest, custody and temporary detention may be used with juvenile offenders according to their ages. Generally, whether or not juvenile offenders can be arrested, held in custody and temporarily detained depends on two elements: their age and the category of offence they committed.

In addition, art 303(3) introduces a new provision requiring that the bodies ordering the arrest, custody or temporary detention of juveniles must notify their families or legal representatives immediately after arresting, holding in custody and temporary detaining. This provision aims to assist families and legal representatives to promptly exercise prescribed rights to protect the arrested and detained juveniles, for example to meet their children at police stations, to seek lawyers and to attend interrogations. Article 304 also allows procedure-conducting bodies to assign juvenile offenders to their parents or guardians for supervision as an alternative to detention in custody. Parents and guardians then have a responsibility to supervise, educate and assure the juvenile offenders’ presence when procedure-conducting bodies summon them to appear.

Fourth, the criminal procedure law of Viet Nam has many provisions which are compatible with the UN framework governing youth detention. For instance, Decree No. 89/1998/ND-CP stipulates that juvenile offenders who are deprived of liberty shall be separated from

\textsuperscript{117} This provision is compatible with art 12 of the Penal Code 1999 stipulating: ‘Persons aged 16 or older shall have to bear penal liability for all crimes they commit. Persons aged 14 or older but under 16 shall have to bear penal liability for very serious crimes intentionally committed or particularly serious crimes.’

\textsuperscript{118} According to art 8 of the Penal Code 1999, based on the nature and extent of danger to the society of acts, crimes are classified into four types: less serious crime, serious crime, very serious crime and particularly serious crime.
adult offenders. Moreover, they are entitled to contact with their families and defence counsel, through correspondence and visits.

A complaints system for persons in detention (including juveniles) is established in Viet Nam. Procedures for lodging and addressing complaints are provided in Chapter 35 (arts 325-333) of the Criminal Procedure Code 2003 and Decree No. 89/1998/ND-CP (art 31). Juvenile offenders are entitled to complain about unlawful custody or detention by themselves or through their representatives. They may make requests or complaints to the director of the detention facility or the procuracy. Particularly, art 333 of the Criminal Procedure Code 2003 requires procuracies immediately to consider and settle complaints related to the application of arrest, custody and temporary detention measures. In cases where it takes time to conduct further verification, these complaints must be addressed within three days after the date of receipt thereof. These provisions of Viet Nam are basically in conformity with the UN Rules for the Protection of Juveniles Deprived of their Liberty (arts 75-77). According to the UNODC, the existence of a complaints system for juvenile in detention is one of policy indicator use to measure the juvenile justice of member States. That system exists in Viet Nam and is moderately protected by law.

**ii. Shortcomings**

In comparison with the CRC provisions governing the right not to be subject to arbitrary arrest or detention, those in Vietnamese criminal procedure law have some shortcomings. These are now discussed.

First, there is no provision in the Criminal Procedure Code 2003 or relevant legal documents requiring that arrest, custody and detention be used only as a measure of last resort and for the shortest appropriate of period of time. In fact, there is no distinction between the time limits for custody and temporary detention applicable to juvenile and adult offenders. However, it is clear that the consequences of arrest, custody and temporary detention in the investigating stage are prescribed in arts 87, 120 of the Criminal Procedure Code 2003.

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120 Ibid arts 22, 30.
121 UNODC, above n 62, 23.
122 The time limits of custody and temporary detention in the investigating stage are prescribed in arts 87, 120 of the Criminal Procedure Code 2003.
detention may not be the same for juvenile and adult offenders. Hence, it would seem to be unfair for juvenile offenders if they are subject to the same time periods as adult offenders.

Second, the provisions in arts 303(1)-(2) concerning arrest are unreasonable and unfeasible. As previously noted, the age of juvenile offenders and the type of offence they have committed are two elements which procedure-conducting bodies must determine before arrest, holding in custody and detaining temporarily. However, how do procedure-conducting bodies determine these issues before they arrest suspected persons? For example, suppose a call is received at a police station reporting there is a person preparing to commit an offence. In this situation, if the report is accurate, police must arrest immediately the suspected person to prevent him/her from committing a crime. They may not have sufficient time to determine the age of the suspected person and the category of offence he or she intends to commit. Thus, in urgent circumstances, it would be unreasonable to prevent procedure-conducting bodies from arresting suspected persons, even if they are juveniles.

Third, provisions in arts 303(1)-(2) of the Criminal Procedure Code 2003 theoretically deprive the opportunity to apply ‘Summary Procedures’\(^\text{123}\) for juveniles. Under art 319 of the same Code, summary procedures shall be applied only when the following conditions are fully met:

1. The persons committing criminal acts are caught red-handed;
2. The offences are simple with obvious evidences;
3. The committed offences are less serious ones;
4. The offenders have clear personal identifications and records.

According to arts 303(1)-(2), juveniles regardless their ages are not to be arrested when they only commit less serious offences, even in ‘red-handed’ cases. Whereas, two of the four conditions which must be met in order to apply summary procedures are: (1) the persons are arrested in red-handed cases and (2) they committed less serious offences. Comparing these provisions again shows that art 302(1)-(2) of the Criminal Procedure Code 2003 should be amended so that summary procedures can be used in juvenile cases.

\(^{123}\) Summary procedures are provided in Chapter 34 of the Criminal Procedure Code 2003. Summary procedures have shorter time limits of procedural stages and less procedural activities in comparison with ordinary procedures.
2. Procedural Rights

a. Right to be Informed Promptly and Directly of the Charges

As previously mentioned, this procedural safeguard is only applicable to criminal charges, not to criminal investigations. Hence, in the *Criminal Procedure Code 2003*, the provisions for this right include arts 49(2)(g) and 166(1). Article 49(2)(g) stipulates that the accused is entitled to receive a copy of the indictment and decision relating to his or her prosecution. This right is specified by art 166(1) which provides that:

> Within three days after issuing one of the above-said decisions, the procuracies must notify the accused and defence counsel thereof; and hand the indictment … to the accused. Defence counsel may read the indictments, take notes and copy documents in the case files related to the defence under the provisions of law and put forward requests.

These requirements are applicable in the same manner to adult and juvenile offenders. In the *Criminal Procedure Code 2003*, there are provisions imposing on the authorities the duty to ‘immediately notify the arrests to the arrestees’ families, the administrations of the communes, wards or townships where the arrestees reside or the agencies or organizations where they work’. In the case of juvenile offenders, art 303(3) also requires the bodies ordering arrest, custody or temporary detention to notify families or lawful representatives thereof immediately after the arrest, custody or temporary detention is conducted. However, as explained by the Human Rights Committee, notice of the reasons for an arrest is separately ensured by art 9(2) of the ICCPR and is different from the right to be informed of the charges which is guaranteed by art 14(3)(a). In this regard, the *Criminal Procedure Code 2003* of Viet Nam does not have any provisions requiring parents or guardians of juvenile offenders to be informed promptly and directly of charges against their children.

Moreover, art 166(1) has a further limitation because it only mentions the procuracies’ responsibility to *notify and transfer* the indictment to juvenile offenders and their defence counsel. Obviously, this provision does not assist a juvenile offender to understand the law and the general facts on which the charge is based as well as its possible consequences. As a result, this may cause disadvantages for juvenile offenders in preparing and presenting their right of defence.

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124 These decisions of the procuracies include: decision to prosecute the accused before court by an indictment; decision to return the file for additional investigation and decision to cease or suspend the case.

b. Right to be Tried without Undue Delay

i. Advantages

In Viet Nam, although the right to be tried without undue delay is not directly specified, the Criminal Procedure Code 2003 determines specifically and clearly the maximum duration for all stages of the criminal process. The duration of each procedural stage is established mainly with relation to the type of offences committed by the accused and the complexity of the case. This is partly in accordance with explanations in General Comment No. 32 of Human Rights Committee.

ii. Shortcomings

Provisions relevant to the right to a speedy trial and the time limits of procedural stages in Vietnamese criminal procedure law reveal some shortcomings. These are discussed below.

• First, there is no distinction between the time limits applicable to procedural stages in juvenile cases and those in adult cases. For instance, the time limit for the investigating stage, in an ordinary case, must not exceed two months for less serious offences (counting from the time of institution of a criminal case to the time of termination of investigation); the time limit for the first-instance trial preparation is thirty days for less serious offences (counting from the date of receipt of the case files). This is incompatible with art 40(2)(b)(iii) of the CRC, arts 14(3)(c), 14(4) of the ICCPR and clearly contrary to the suggestion provided in General Comment No. 10 of the Committee on the Rights of the Child.

• Second, despite being stipulated in the Criminal Procedure Code 2003, summary procedures do not appear to be used in cases involving juvenile offenders. The main

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126 The time limits of these stages are specified in arts 119, 166, 176, 242, 283 of the Criminal Procedure Code 2003.
127 Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, para 35: ‘... What is reasonable has to be assessed in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities …’ (emphasis added).
129 Ibid art 176(2).
130 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 52: ‘The Committee recommends that the States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults …’ (emphasis added).
reason is the lack of provisions governing the participation of defence counsel. In summary proceedings, the time limits of procedural stages are very short. However, many procedures must be completed before lawyers can officially defend juvenile offenders.\(^{131}\) Therefore, in practice, although all conditions set out in art 319 of the *Criminal Procedure Code 2003* are met, procedure-conducting bodies have not applied summary procedures.\(^{132}\) They state that within very short time limits, they are unable to complete necessary procedures to appoint defence counsel for juvenile offenders from the investigation stage.

- Third, violation of time limits is not considered to be a serious procedural infringement. According to the *Resolution No. 4* of the Judges Council of the Supreme People’s Court, serious procedural violations include cases in which procedure-conducting bodies and procedure-conducting persons do not conduct compulsory activities required by the *Criminal Procedure Code 2003* or incorrectly conduct procedural activities provided in this Code. These acts must seriously infringe the rights of participants in the criminal process or impair the objectives and comprehensive processing of the case.\(^{133}\) This provision is imprecise and does not clarify whether or not a violation of time limits is a serious procedural infringement. This may affect the protection of the legitimate interests of participants in the criminal process, especially juvenile offenders, as well as the responsibilities of procedure-conducting bodies who may violate time limits and solutions for cases.

c. Right to Have the Free Assistance of an Interpreter

In Viet Nam, the right to have the free assistance of an interpreter is not only a constitutional provision but also a fundamental principle of criminal procedure law. Article 133 of the *Constitution 1992* provides that ‘[t]he People’s Court shall ensure to the citizens of all ethnic nationalities in the Socialist Republic of Viet Nam the right to use their own tongue and


\(^{132}\) Yen, above n 131.

\(^{133}\) Part I(4.4) of *Resolution No. 04/2004/NQ-HDTP of the Judges Council of the Supreme People’s Court.*
writing before the Courts’. This provision is specified by art 24 of the *Criminal Procedure Code 2003* as follows:

Spoken and written language used in the criminal procedure is Vietnamese. Participants in the criminal procedure may use spoken and written languages of their own nationalities; in this case, interpreters shall be required.

Based on these provisions, all criminal procedural activities are conducted in the Vietnamese language. Criminal procedural participants, including accused and defendants who do not understand Vietnamese have the right to rely on their interpreters in reviewing the case files and participating in criminal procedural activities. They can use their own language to make suggestions and claims as well as presenting their statements in court sessions. The authorities undertake to ensure the assistance of an interpreter for these persons. This procedural guarantee is not only applicable to ethnic people residing in Viet Nam but also to aliens who commit offences in Viet Nam. Using spoken and written languages of their own nationality may assist an accused and defendant to exercise their right of defence; creates opportunities for social organizations and citizens to positively participate in criminal procedural activities; and strengthens educational meanings of these activities.¹³⁴

Concerning interpreters, art 61 of the *Criminal Procedure Code 2003* enshrines specific requirements such as the obligations of interpreters and the circumstances in which interpreters must refuse to participate in the procedure. In addition, art 61(4) provides that ‘the provisions of this article shall also apply to persons who know signs of the mute and the deaf’. However, in comparison with the interpretation of the Committee on the Rights of the Child, it can be seen that Vietnamese criminal procedure law does not have any requirements concerning distinctive qualifications of interpreters for juvenile offenders.

d. Right of Defence

The right of defence is an essential right of juvenile offenders and is a basic principle of Vietnamese criminal procedure law.¹³⁵ Article 11 of the *Criminal Procedure Code 2003* stipulates:

Detainees, accused and defendants shall have the right to defend themselves or to ask other persons to defend them. Investigating bodies, procuracies and courts have the duty to ensure that detainees, accused and defendants exercise their right to defence under the provisions of this Code.

¹³⁵ This right is prescribed in arts 11, 48(2)(d), 49(2)(e), 50(2)(e), 57(2), 305 of the *Criminal Procedure Code 2003*. 135
In comparison with international law governing this right, specifically art 40(2)(b)(i) of the CRC and art 67(1)(b) of the Statue of the International Criminal Court, art 11 of the Criminal Procedure Code 2003 of Viet Nam has similar contents. First, offenders are entitled to defend themselves or to seek appropriate persons to assist them. Second, procedure-conducting bodies have a responsibility to assist offenders in exercising their right of defence. In the case of juvenile offenders, this principle requires procedure-conducting bodies to appoint attorneys for them without charge.136

i. Advantages

The right of defence is one of the fundamental rights of offenders and was recognized early in the history of Vietnamese criminal justice.137 The Criminal Procedure Code 2003 extends the right of defence to a new category of participant in the criminal process – persons held in custody.138 Defence counsel can now participate in criminal proceedings from the institution stage to promptly provide legal assistance for persons taken into custody.139 The attendance of defence counsel in the first procedural stage may prevent persons in custody from giving ‘initial’ statements which have adverse impact on their defence. This amendment of the Criminal Procedure Code 2003 strengthens the comprehensive protection of human rights in the criminal process.140

Second, Vietnamese criminal procedure law includes a number of specific provisions to ensure the right of defence of offenders. The aim of these provisions is to facilitate

136 Article 57(2) of the Criminal Procedure Code 2003 prescribes: ‘In the following cases, if the accused, defendants or their lawful representatives do not seek the assistance of defence counsels, the investigating bodies, procuracies or courts must request bar associations to assign lawyers’ offices to appoint defence counsels for such persons or request the Viet Nam Fatherland Front Committees or the Front’s member organizations to appoint defence counsels for their organizations’ members: (a) The accused or defendants charged with offences punishable by death as the highest penalty as prescribed by the Penal Code; (b) The accused or defendants being minors or persons with physical or mental defects.’

137 The right of defence was stipulated in art 46 of Decree No. 13 of 24 January 1946 on the Organization of the Courts and Grades of Judges; Decree No. 69/SL of the President of Democratic Republic of Viet Nam of 18 June 1949 on Permitting Accused Persons to Obtain People who are not Lawyers to Defend for before Ordinary Courts and Courts Adjudicating Petty and Serious Offences, and Decree No. 144/SL of the President of Democratic Republic of Viet Nam of 22 December 1949 on the Extension of Defendants’ Right to Defend before Courts; Criminal Procedure Codes 1988 and 2003; all the Constitutions.


139 Before the Criminal Procedure Code 2003 entered into force, defence counsel could only participate in criminal proceedings to defend accused persons in the investigation stage.

140 Pham Thao, Báo Ve Quyen va Loi Ich cua Nguoi Bi Tam Giu, Bi Can, Bi Cao la Nguoi Chua Thanh Nien trong To Tung Hinh Su [Protecting the Rights and Interests of Juveniles Who are Persons Held in Custody, Accused Persons, Defendants in the Criminal Process] (LL M Thesis, Ho Chi Minh City University of Law, 2009) 41.
convenient conditions for offenders to effectively prepare their defences. This is illustrated by the fact that the Criminal Procedure Code 2003 provides concrete rights for persons held in custody, the accused, and defendants to support their right of defence. These rights include the right to be informed of the reasons for their custody; the right to be informed of the offences which they have been accused of; and the right to be informed of the decision to bring the case for trial. Other important rights include: the right to an explanation of their rights and obligations; the right to present their statements; the right to present documents, objects as well as claims, the right to present opinions, argue at court sessions (defendants), etc.141 It is clear that these rights are essential, useful tools in exercising the right of defence.

While directly recognizing the rights of offenders, the Criminal Procedure Code 2003 concomitantly imposes responsibilities on procedure-conducting persons. Procedure-conducting persons must respect and ensure the rights of offenders, and must not obstruct offenders seeking to assert these rights.

In addition, there is no doubt that defence counsel plays an essential role in assisting offenders to utilize their right of defence. Thus, provisions of criminal procedure law relating to defence counsel are also relevant. Currently, defence counsel has the following rights:

To participate in the procedure from the time the custody decisions are issued; to read the minutes of the proceedings in which they have participated, and procedural decisions related to the persons whom they defend; to request investigating bodies to inform them in advance of the time and places of interrogating the accused so as to be present when the accused are interrogated; to collect documents, objects and details related to their defence; to copy records in the case files, which are related to their defence.142

There are some restrictions on who may act as defence counsel. Until 2004, persons who were next of kin143 of persons who conducted or were conducting the procedure in a case were not allowed to act as defence counsel. This was an unreasonable stipulation. For example, consider the situation where a defence counsel participated in the criminal process from the instituting stage. In the first-instance-trial stage, a judge, who has a close relationship with the defence counsel, is assigned to the case. In this situation, it is clearly unjustifiable to force the defence counsel to give up his/her task because he/she has already participated in the criminal process before the judge was assigned to the case. Furthermore,

141 Criminal Procedure Code 2003, arts 48(2), 49(2), 50(2).
142 Ibid art 58(2).
143 See Part I(4(b)) of Resolution No. 03/2004/NQ-HDTP of the Judges Council of the Supreme People’s Court.
if this defence counsel is replaced, it may have negative effects on ensuring the right of
defence of the offender. Hence, Resolution No. 03/2004/NQ-HDTP provides that in these
circumstances, it is necessary to assign another judge not having a close relationship with the
defence counsel to conduct proceedings.\textsuperscript{144} This means the defence counsel can continue
carrying out his or her assignment. But the judge, who has a close relationship with the
defence counsel, must be replaced by another.

Third, there are distinctive provisions to protect the right of defence of juvenile offenders.
These provisions include arts 57(2) and 305 of the \textit{Criminal Procedure Code 2003}.\textsuperscript{145}

- Article 57(2) outlines particular circumstances in which procedure-conducting bodies
  must appoint defence counsel for offenders, including juvenile offenders.\textsuperscript{146} This
  provision of Vietnamese criminal procedure law fulfils the requirement established
  by art 40(2)(b)(i) of the CRC and art 15(1) of the \textit{Beijing Rules}.

- Article 305 establishes the right of juvenile offenders’ legal representatives to choose
defence counsel. Part II(2)(a) of \textit{Resolution No. 03/2004/NQ-HDTP} explains that both
  juvenile offenders and their representatives are entitled to choose defence
  counsel. Article 305 also confirms the duty of procedure-conducting bodies to
  appoint defence counsel for juvenile offenders.

However, because defence is a right of juvenile offenders, they can use or waive this
right.\textsuperscript{147} As previously noted, art 57(2) of the \textit{Criminal Procedure Code 2003} requires
procedure-conducting bodies to appoint defence counsel for juvenile offenders. However,
this article also invests juvenile offenders and their lawful representatives with the right to
refuse the appointed defence counsel. This issue may become difficult when there is a
conflict between juvenile offenders and their representatives in deciding whether or not to

\textsuperscript{144} See Part II(1) of \textit{Resolution No. 03/2004/NQ-HDTP of the Judge Council of the Supreme People’s Court}.
\textsuperscript{145} Detailed interpretations of these provisions can be found in \textit{Resolution No. 03/2004/NQ-HDTP of the Judge
Council of the Supreme People’s Court}.
\textsuperscript{146} The detail procedures of appointing defence counsels for juvenile offenders are prescribed in art 57(2) of the
\textit{Criminal Procedure Code 2003}: ‘If the accused, defendants or their lawful representatives do not seek the
assistance of defence counsels, the investigating bodies, procuracies or courts must request bar associations to
assign lawyers’ offices to appoint defence counsels for such persons or request the Viet Nam Fatherland Front
Committees or the Front’s member organizations to appoint defence counsels for their organizations’
members.’
\textsuperscript{147} \textit{Resolution No. 03/2004/NQ-HDTP} supplements provisions relating to the right to refuse defence counsel of
juvenile offenders.
refuse defence counsel. Resolution No. 03/2004/NQ-HDTP outlines detailed guidelines on this issue. Specifically, Part II(3)(d.2) of this Resolution states:

If only the defendant refuses the defence counsel, while his/her legal representative does not refuse the defence counsel, or alternatively, if only the legal representative refuses the defence counsel, while the defendant does not refuse the defence counsel, the trial shall be conducted in accordance with general procedures with the participation of the appointed defence counsel.

This simply means that whenever a defendant or his/her legal representative does not refuse the appointed defence counsel, the court session will be carried out with the participation of the appointed counsel. The ultimate aim of this provision is to assist juvenile offenders to exercise their right of defence by using defence counsel.

ii. Shortcomings

In comparison with the CRC, the Beijing Rules, the ICCPR and the interpretations of the Human Rights Committee and the Committee on the Rights of the Child, Vietnamese criminal procedure law governing the right of defence of juvenile offenders has several shortcomings.

First, legal or other assistance for juvenile offenders in the preparation and presentation of their defence is quite limited. According to arts 56, 57(2) of the Criminal Procedure Code 2003, procedure-conducting bodies may provide two types of defence counsel for juvenile offenders: lawyers and people’s advocates. However, people’s advocates only represent juvenile offenders who are members of the Vietnamese Fatherland Front Committees or the Front’s member organizations. Article 9(4) of the Interdisciplinary Circular No. 01/2011/TTLT provides that procedure-conducting bodies may request other organizations to provide legal aid for juvenile offenders. However, under art 10(3) of the Law on Legal Aid 2006, only helpless children (persons under 16 years of age) are provided legal assistance. In addition, criminal procedure law does not require those defending juvenile offenders to have sufficient knowledge and comprehension of the juvenile justice process and to be trained to work with juvenile offenders as recommended by the Committee on the Rights of the

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148 Previously, this is a gap of Vietnamese criminal procedure law.
These shortcomings limit the effectiveness of exercising the right of defence of juvenile offenders in practice.

Moreover, according to the *Criminal Procedure Code 2003*, juveniles in custody are not entitled to have defence counsel appointed by procedure-conducting bodies. This is a considerable gap. If the *Criminal Procedure Code 2003* generally allows defence counsel to participate in criminal proceedings at the time a person is taken into custody, there is no reason to provide that the appointment of defence counsel is only applicable to an accused juvenile or a juvenile defendant. When a juvenile is arrested and taken into custody, he or she starts contact with the criminal justice process with many difficulties and concerns. Without the attendance of defence counsel, legitimate rights of juveniles in custody may not be ensured.

Second, provisions governing the rights and obligations of defence counsel have some dubious features. Article 58(2)(a) of the *Criminal Procedure Code 2003* allows defence counsel to be present when testimony is taken from a person held in custody, when the accused is interrogated, but allows counsel to question this person only if the investigator consents. Clearly, defence counsel has a passive role in investigating activities. How can they effectively protect the interests of an accused when an investigator does not permit them to speak? It is unreasonable to require defence counsel to be silent when they witness investigators using unlawful measures which violate the legitimate interests of an accused.

Concerning the obligations of defence counsel, art 58(3)(a) of the *Criminal Procedure Code 2003* requires them to transfer documents and/or other materials related to cases to procedure-conducting bodies at any stage of the criminal process. This provision clearly places defence counsel in a disadvantaged position when arguing with prosecutors in court sessions. Defence counsel must communicate their evidence to investigating bodies, procuracies and courts even before trial is conducted. Consequently, there are reduced opportunities for defence counsel to rebut the accusations of prosecutors. This provision creates an unbalanced relationship between defence counsel and prosecutors which may damage the right of defence of juvenile offenders. The question is whether under criminal

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150 Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 49.
procedure law of Viet Nam prosecutors are obliged to share their evidence with defence counsel. There is no provision in the Criminal Procedure Code 2003 directly imposing that duty on prosecutors. Instead, according to art 58(2)(g), defence counsel are entitled to ‘read, take notes of and copy records in the case files, which are related to their defence, after the termination of investigation according to law provisions’. Article 166(1)(c) further provides that ‘[d]efence counsel may read the indictments, take notes and copy documents in the case files related to the defence under the provisions of law and put forward requests’. It may be argued that these provisions create an indirect way for defence counsel to approach evidence gathered by investigators and prosecutors contained in case files. However, this places defence counsel in a passive position when gathering evidence. Although reading, taking notes and copying records in case files are crucial rights, in reality many procedure-conducting persons do not recognize that sharing evidence with defence counsel is an obligation.

Furthermore, criminal procedure law does not establish mechanisms to ensure that objects and documents collected by defence counsel are considered, evaluated and accepted as evidence. This is a common shortcoming in both juvenile and adult cases. Provisions contained in art 64 of the Criminal Procedure Code 2003 directly indicate that only objects and documents gathered by procedure-conducting bodies in compliance with prescribed procedures may be considered as evidence. Defence counsel are only allowed to provide things and documents for procedure-conducting bodies but whether these bodies are obliged to evaluate and accept such documents as evidence of the case is not provided. This creates the unfairness for defence counsel in practice because their evidence is often disregarded or unaccepted by procedure-conducting bodies.151

Third, the confidentiality of communications between juvenile offenders and their defence counsel is not protected. In General Comment No. 10, the Committee on the Rights of the Child interprets art 14(3)(b) of ICCPR as follows:

The child and his/her assistant must have adequate time and facilities for the preparation of his/her defence. Communications between the child and his/her assistance, either in writing or orally, should take place under such conditions that the confidentiality of such communications is fully respected in accordance with the guarantee provided for in article 40(2)(b)(vii) of CRC, and the right of the child to

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In the criminal procedure law of Viet Nam, there is no provision embodying this requirement. Generally, persons held in custody or temporarily detained can meet their defence counsel only if the procedure-conducting bodies consent. The duration of a meeting cannot exceed one hour. These provisions are applied to both juvenile offenders and adult offenders without distinction. Consequently, it can be said that, on this issue, Vietnamese criminal procedure law does not fulfil the requirements of UN legal instruments governing the right of defence.

e. Rights to Equality before Courts and Tribunals and to a Fair Trial

i. Advantages

In the Vietnamese legislative framework, there are a number of provisions governing the rights to equality before courts and tribunals and to a fair trial. Essentially, these rights have been recognized as basic principles of criminal procedure law. They are prescribed in arts 52, 130 of the Constitution 1992; arts 5, 14, 16, 18-19 of the Criminal Procedure Code 2003.

Basically, the content of these provisions is similar to those prescribed in art 14 of the ICCPR and explained by General Comment No. 32 of the Human Rights Committee. Concerning the right to equality before courts and tribunals, art 19 of the Criminal Procedure Code 2003 stipulates that prosecutors and participants in the criminal process have equal rights in presenting evidence, documents and objects and making claims and arguing before courts. Furthermore, this article imposes responsibility on courts to create conditions to facilitate the exercising of these rights. In addition, art 5 of the Criminal Procedure Code 2003, governing the right to equality before the law of all citizens, also requires that similar procedures are applied in similar cases.

Concerning the right to a fair and public hearing by a competent, independent and impartial tribunal, art 18 of the Criminal Procedure Code 2003 stipulates:

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152 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 50 (emphasis added).

Courts shall conduct trials in public, everybody shall have the right to attend such trial, unless otherwise prescribed by this Code.

In special cases where State secrets should be kept or the national customs and practices should be preserved or the involved parties’ secrets must be kept at their legitimate requests, courts shall conduct trials behind closed door but must pronounce the judgments publicly.

In the case of juvenile offenders, art 307(1) further provides that courts may decide to conduct a trial which is closed to the public when necessary. Article 14(1) of the ICCPR and arts 18, 307(1) of the Criminal Procedure Code 2003 of Viet Nam contain similar points. Generally, all these stipulations require that trials shall be conducted publicly except where there are reasonable justifications (such as morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires) for not doing so. In these circumstances, the press and the public may be excluded from all or part of a trial.

Moreover, art 130 of the Constitution 1992 and art 16 of the Criminal Procedure Code 2003 stipulate that during a trial, professional and lay judges are independent and must abide by the law. This principle is usually explained by saying that courts are independent of investigating bodies and procuracies, other individuals, bodies and organizations; lower courts are independent of higher courts; professional judges are independent of lay judges. These provisions are similar to General Comment No. 32 of the Human Rights Committee concerning the ‘independent tribunal’.

Regarding the qualifications of procedure-conducting persons who deal with juvenile cases, art 302(1) of the Criminal Procedure Code 2003 prescribes:

Investigators, procurators and judges who carry out the criminal procedure towards juvenile offenders must possess necessary knowledge about the psychology and education of juveniles as well as activities of preventing and fighting crimes committed by juveniles.

It is obvious that as well as legal knowledge, this extra awareness may assist procedure-conducting persons, especially judges, to resolve cases more effectively. Having knowledge of juveniles’ psychology and activities in relation to preventing and combating juvenile offences may assist procedure-conducting persons to apply most appropriate strategies. This may create the opportunity for increased co-operation with juvenile offenders.\footnote{Hanoi Law University, above n 38, 499.} Moreover, art 307(1) requires that the composition of a trial panel in juvenile cases must include a lay
judge who is a teacher or a Ho Chi Minh Communist Youth Union cadre. The basis of this provision is that these persons have knowledge of juveniles’ psychology and experience educating them. Their participation in trials may facilitate the handling of the case and help to educate and prevent further crime.\(^{155}\) From the foregoing, it can be concluded that provisions in Vietnamese criminal procedure law concerning procedure-conducting persons are compatible with those reflected in the commentary of art 22 of the *Beijing Rules*.\(^{156}\)

### ii. Shortcomings

Despite being recognized in many articles of the *Criminal Procedure Code 2003*, the contents of the rights to equality before courts or tribunals and to a fair trial of juvenile offenders, compared with general comments of the Human Rights Committee, are still insufficient, unclear and imprecise.

First, concerning the right to equality before courts or tribunals, the criminal procedure law of Viet Nam does not mention the right of access to the courts (as explained in *General Comment No. 32* of the Human Rights Committee). Article 5 of the *Criminal Procedure Code 2003* provides generally for the right to equality before the law of all citizens. One aspect of this right is that all persons participate in the criminal process having the same status, rights and obligations. However, the right of access to the courts is not elaborated. In addition, art 5 does not clearly prohibit procedure-conducting bodies from using factors including *language, political or other opinions, and property* of offenders as reasons to create barriers for them in exercising the right of access to the courts.

Second, explanations and analyses provided in official documents on the right to equality before courts or tribunals are not sufficient. The authors\(^{157}\) of these materials state that the basic content of this right is equality of procedural rights in court sessions between prosecuting parties (prosecutors, victims) and defending parties (defendants, defence counsels). However, their explanations do not clarify that each party may have distinct

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\(^{156}\) Commentary of art 22 of the *Beijing Rules*: ‘The authorities competent for disposition may be persons with very different backgrounds ... For all these authorities, a minimum training in law, sociology, psychology, criminology and behavioural sciences would be required. This is considered as important as the organizational specialization and independence of the competent authority.’

\(^{157}\) Hanoi Law University, above n 38 and Loi, above n 94.
procedural rights provided that these ‘distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant’ as stated by the Human Rights Committee.158

Third, in spite of being recognized in art 16 of the Criminal Procedure Code 2003, the requirement that courts and tribunals be ‘impartial’ when engaged in adjudicating activities is not specified clearly. In fact, article 16 only emphasizes the requirement of independence in professional and lay judges. It could be argued that art 14 of the Criminal Procedure Code 2003 addresses this gap by mentioning the requirement of ‘impartial’.159 However, art 14 is a very simple stipulation that does not provide specific requirements in relation to the impartiality of professional and lay judges who issue ultimate decisions in cases.

Fourth, art 188(1) of the Criminal Procedure Code 2003 provides that: ‘Defendants being held in temporary detention, when appearing at court sessions, shall only be allowed to meet with their defence counsel. Their contacts with other persons must be permitted by the presiding judges of the court sessions.’ This provision is applicable to all defendants being held in temporary detention, whether they are juveniles or adults. In the case of adult defendants, in order to ensure the security and order of trials, this provision may be necessary. Where defendants are children and young persons then, because of their immaturity and the right to the presence of a parent or guardian, they should not be restricted to communicating only with defence counsel.

f. Right to the Presence and Examination of Witnesses
In the Vietnamese criminal procedure law, there is no provision transparently entitling juvenile offenders the right to present and examine witnesses. The criminal justice system of Viet Nam has features of the inquisitorial system. Thus, similar to the observation of the Committee on the Rights of the Child, offenders indirectly exercise this procedural safeguard by requesting the authorities to summon witnesses, participating in the ‘confrontation’ of witnesses and/or through their defence counsels or representatives.

158 Human Rights Committee, General Comment No. 32, UN Doc CCPR/C/GC/32, para 13.
159 Article 14 of the Criminal Procedure Code 2003 stipulates: ‘The heads and deputy heads of investigating bodies, investigators, chairmen and vice-chairmen of procuracies, procurators, presidents and vice-presidents of courts, judges, jurors and court clerks must not conduct the procedure or interpreters and experts must not participate in the procedure if there are plausible grounds to believe that they may not be impartial while performing their duties.’ (emphasis added).
Articles 49(2)(d) and 50(2)(d) of the Criminal Procedure Code 2003 provide fundamental rights of the accused and defendants, including the right to request the authorities to summon their witnesses. However, in Viet Nam because the responsibility to prove criminal cases belongs to criminal procedure-conducting bodies, it is also their duty to detect and summon witnesses. Furthermore, the titles of arts 49-50 above implicitly indicate that the right to suggest the authorities summon witnesses of offenders is limited to some stages of the criminal process including investigation, prosecution and first-instance trial stages.

On the other hand, offenders have the right to directly participate in a criminal investigation activity which is called ‘confrontation’. According to this provision, confrontation shall be conducted by investigators or prosecutors where there are contradictions in the statements of two or more persons, including offenders and witnesses. Although the main aim of this criminal investigation activity is to determine the truth, it is also a way for offenders to exercise their right to examine witnesses, particularly those against them.

By contrast to the investigation and prosecutions stages, defendants cannot directly examine witnesses at hearings. However, under several provisions of the Criminal Procedure Code 2003, offenders can exercise the right to present and examine witnesses through their defence counsel or representatives. Article 58(2)(d) recognizes the right to make requests of a defence counsel. More clearly, art 211(2) provides that after the inquiries of the trial panel and prosecutor, defence counsel can further examine witnesses. Up to this point, there are no differences between juvenile and adult offenders in exercising the right to present and examine witnesses. However, in Vietnamese criminal procedure law there are distinct provisions applicable to juvenile offenders relating to this right. Article 306 invests the representatives of the defendants’ families and representatives of their schools and/or organizations attending court sessions the right to make requests. These requests may include summoning and examining of witnesses (although this rarely happens in reality).

160 Summoning, escorting witnesses and taking their statements are provided in arts 133-135 of the Criminal Procedure Code 2003.
161 Articles 49-50 stipulate the rights and obligations of ‘accused persons’ and ‘defendants’. These procedural participants appear in the investigation, prosecution and first-instance trial stages. In the appellate stage, art 246 of the Criminal Procedure Code 2003 provides that ‘the appellants or persons with interests and obligations related to the appeals or protests … shall also have the right to supplement documents and/or objects’ (emphasis added). This provision does not entitle offenders the right to present their witnesses in this phase of the criminal proceedings.
g. Right to Appeal

i. Advantages

Provisions governing the right to appeal of participants in the criminal process in general and juvenile defendants in particular, in Vietnamese criminal procedure law are quite similar to those stipulated in international law and the explanations of the Human Rights Committee and the Committee on the Rights of the Child. Some examples are provided below.

First, the *Criminal Procedure Code 2003* clarifies that the appellate trial is the second level of trial in the criminal justice process. In comparison with the *Criminal Procedure Code 1988*, a number of provisions relating to the appellate stage have been amended and supplemented. These changes attempt to distinguish the appellate procedure from ‘cassation’ and reopening procedures, which are special stages in criminal proceedings.\(^\text{163}\) These are also compatible with the principle of implementation of two level-trial regime prescribed in art 20 – a supplementation of the *Criminal Procedure Code 2003*. Moreover, the features and tasks of the appellate trial, which are prescribed in Vietnamese criminal procedure law and analyzed in officially referenced documents, are similar to those expressed in *General Comment No. 32* Human Rights Committee. In this context, the appellate trial procedure is designed to generally review the nature of the case by examining ‘the sufficiency of the evidence and of the law, the conviction and sentence’.\(^\text{164}\)

Second, the *Criminal Procedure Code 2003* clearly provides a right of appeal to participants in the criminal process, including juvenile defendants, their legal representatives, and their defence counsel.\(^\text{165}\) Defendants have a wide right of appeal. They can appeal all issues contained in a first-instance judgment, such as types of offences, types and levels of main penalties, additional penalties, judicial measures, levels of compensation, handling exhibits, legal costs, etc.\(^\text{166}\) Where the defendant is a juvenile or a person with physical or mental defects, their legal representatives and defence counsel are entitled to appeal to protect these

\(^{163}\) Tran Van Trung, ‘Tình chất của Xét Xsiphuc Tham va Quyen Khang Cao, Khang Nhi’ [Nature of Appellate Trial and the Rights to Appeal and Protest] in Loi, above n 94, 471.

\(^{164}\) Human Rights Committee, *General Comment No. 32*, UN Doc CCPR/C/GC/32, para 48.

\(^{165}\) Criminal Procedure Code 2003, art 231.

\(^{166}\) Trung, above n 163, 474.
persons’ interests. This independent right of representatives and defence counsel is not dependent on the consent of the defendant.\textsuperscript{167}

Third, Vietnamese criminal procedure law embodies essential conditions for juvenile offenders to exercise their right of appeal, as well as detailed provisions governing appellate procedures. Article 50 of the Criminal Procedure Code 2003 recognizes the right of defendants to receive judgments or decisions of courts. Article 229 prescribes that within ten days of the pronouncement of judgments, first-instance courts must hand copies of the judgment to the defendant and defence counsel. The aim of these provisions is to assist defendants to have sufficient information relating to their cases to effectively exercise their right of appeal. Moreover, the Criminal Procedure Code 2003 also prescribes the procedures and time limits for lodging appeals, late appeals, notification of appeals, and supplementation, change and withdrawal of appeals.\textsuperscript{168} Through these provisions and explanations, Vietnamese criminal procedure law establishes effective protection of the right to appeal of juvenile defendants. According to art 233(1) of the Criminal Procedure Code 2003, appellants can send their written appeals to the first-instance courts or to the courts of appeal. They may also present their appeals directly to the first-instance courts. If the defendants are under temporary detention, the superintendent boards of the detention centre must guarantee the right of defendants to appeal. Similar to other jurisdictions, defendants must lodge their appeals within specified time limits. Late appeals may be accepted if plausible reasons can be given.\textsuperscript{169} Article 238 entitles defendants and their representatives the right to supplement, change and withdraw their appeals during the time limits specified for lodging appeals or even after these time limits have expired.\textsuperscript{170}

Fourth, there are other provisions in the Criminal Procedure Code 2003 relating to the power of the court of appeal to protect the interests of defendants. There is one significant supplement in the Criminal Procedure Code 2003 in accordance with General Comment No. 32 of the Human Rights Committee. Paragraph 46 of this comment explains that art 14(5) of

\begin{itemize}
\item \textsuperscript{167} Hanoi Law University, above n 38, 409.
\item \textsuperscript{168} These issues are stipulated in arts 233-236, 238 of the Criminal procedure Code 2003 and explained in detail by Resolution No. 5/2004/NQ-HDTP of the Judges Council of the Supreme People’s Court.
\item \textsuperscript{169} These are force majeure or other objective obstacles which prevent defendants from lodging appeals in the time limits, such as natural calamities, floods, diseases, etc.: see Part I(5.1) of Resolution No. 05/2004/NQ-HDTP of the Judges Council of the Supreme People’s Court.
\item \textsuperscript{170} Part I(7) of Resolution No. 05/2004/NQ-HDTP of the Judges Council of the Supreme People’s Court.
\end{itemize}
the ICCPR is infringed not only if ‘[t]he decision by the court of first instance is final, but also where a conviction imposed by an appeal court or a court of final instance, following acquittal by a lower court, according to domestic law, cannot be reviewed by a higher court’.

In the *Criminal Procedure Code 2003*, art 250(2)(b) stipulates:

> The courts of appeal shall dismiss the first-instance judgments for re-trial at the first-instance level with a new composition of the trial panel when there are grounds to believe that the persons who were declared not guilty by the first-instance courts had committed offences.

Article 250(2)(b) was a new provision in the *Criminal Procedure Code 2003*. The aim of this provision is to resolve issues where the first-instance court found that the defendant was not guilty but later, the Court of Appeal discovers sufficient evidence to establish the guilt of the defendant. Previously, in this situation, the Court of Appeal was bound by the incorrect first-instance judgment and had to request competent persons to protest to a higher court according to ‘cassation’ procedure. This was unreasonable and caused increased costs and time.171 The amendment introduced in the *Criminal Procedure Code 2003* now allows the Court of Appeal to cancel a first-instance judgment and order a retrial. The question often asked is why the Court of Appeal cannot directly convict the defendant when it has sufficient evidence to do so. The answer is that if the Court of Appeal convicts the defendant, he/she cannot appeal this judgment.172 This is a serious violation of the right to appeal. Hence, the process established by art 250(2)(b) assures the right of appeal of defendants.

Moreover, there is another provision in the *Criminal Procedure Code 2003* which is also designed to protect the interests of defendants, even they do not use the right to appeal or are not appealed or protested against. Article 249(2) stipulates:

> If having grounds, the courts of appeal may also commute penalties, apply the Penal Code’s articles and clauses on lesser offences, shift to lighter penalties; retain the imprisonment terms and hand down suspended sentences also on defendants who do not appeal or are not appealed or protested against (emphasis added).

Generally, the Court of Appeal only considers the contents of appeals or protests. Nonetheless, art 249(2) also allows the Court of Appeal, when necessary, to adjust parts of

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171 Trung, above n 163, 505-6.
172 Defendants can only appeal first-instance judgment which has not entered into force yet. In this case, the judgment of the Court of Appeal has legal effect immediately after being announced.
first-instance judgments which are not appealed or protested. Nonetheless, it is worth noting that the Court of Appeal can only repair parts of first-instance judgment which relate to the criminal responsibility of defendants and in more advantageous ways for them. Again, this demonstrates a protection of the interests of defendants.

**ii. Shortcomings**

In comparison with UN legal documents governing the right of appeal, there is one clear shortcoming in Vietnamese criminal procedure law. According to para 50 of *General Comment No. 32* of the Human Rights Committee:

> The right to have one’s conviction reviewed is also violated if defendants are not informed of the intention of their counsel not to put any arguments to the court, thereby depriving them of the opportunity to seek alternative representation, in order that their concerns may be ventilated at the appeal level.

Article 245 of the *Criminal Procedure Code 2003* only provides that defence counsel shall be summoned to attend court sessions. In the case of a juvenile defendant, if defence counsel is not present, the court session must be postponed. However, in the *Criminal Procedure Code 2003*, there is no provision similar to the above interpretation of the Human Rights Committee requiring that the defendant be informed if their counsel does not intend to present any arguments to the court. It is obvious that where defence counsel is present at a court session but does not put any arguments, they cannot effectively protect juvenile defendants’ interests. As the Human Rights Committee commented, this defect in the *Criminal Procedure Code 2003* may deprive juvenile offenders an opportunity to seek alternative defence counsel.

Under the *Criminal Procedure Code 2003*, a juvenile sentenced to a term of imprisonment by an appellate court is not allowed to appeal to the Supreme People's Court even when in the proceeding which is the subject of the appeal, the first-instance court had not ordered that

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173 For example, A and B are accomplices in a criminal case. The first-instance trial of this case was conducted. After that, A appealed the judgment of the first-instance court but B did not appeal. Then in appellate trial, the Court of Appeal found that there were grounds to commute penalties for not only A but also B. In these circumstances, although B did not exercise the right to appeal and was not appealed or protested against, the Court of Appeal could commute the penalty imposed on B by the first-instance court.

174 Article 249(1) of the *Criminal Procedure Code 2003* provides that: ‘The Courts of Appeal shall have the right to amend the first-instance judgments as follows: (a) to exempt defendants from penal liability or penalty; (b) to apply the Penal Code’s article and clauses on lesser offences; (c) to commute penalties for defendants; (d) to reduce the levels of damage compensation and amend decisions on handling exhibits and (e) to shift to lighter penalties; to retain the imprisonment term and hand down suspended sentences.’

175 See Part II(3) of *Resolution No. 05/2004/NQ-HDTP of the Judges Council of the Supreme People’s Court*. 

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the person be imprisoned. Alternatively, juveniles or their lawful representatives may request authorized persons including President of the courts or Chairman of the procuracies at prescribed levels to re-examine the case and protest according to ‘cassation’ or re-opening procedures. It is clear that deciding whether to protest or not totally depends upon the discretion of these persons. Furthermore, in criminal proceedings, decisions of the Judges Council of the Supreme People’s Court have ultimate effect and cannot be protested whereas in civil proceedings these decisions can be reviewed when there is a request of the Standing Committee of the National Assembly, recommendation of the Justice Committee of the National Assembly, recommendation of the Chairman of the Supreme People’s Procuracy or suggestion of the President of the Supreme People’s Court.176

3. Rights Particular to Juvenile Offenders
a. Right to the Presence of a Parent or Guardian

i. Advantages

In Viet Nam, the right to the presence of a parent or guardian is mainly guaranteed by art 306 of the Criminal Procedure Code 2003. According to this article, not only representatives of the families of juvenile offenders, but also teachers or representatives of their schools, the Ho Chi Minh Communist Youth Union or other organizations in which juvenile offenders study, work and live have a right to participate in the criminal process.177 Furthermore, these persons and organizations are actually obliged to participate because they play a primary role in educating and caring for juveniles.178 Families, relatives, teachers, youth union members and people from related organizations may have close relationships with juvenile offenders and may know their personal characteristics, living circumstances and educational environment. Thus, the participation of these persons and organizations in proceedings can assist procedure-conducting bodies to deal with cases appropriately and contribute to the protection of the rights and legitimate interests of juvenile offenders.179

Moreover, art 306 stipulates situations in which the participation of representatives of the family of a juvenile offender is compulsory. These situations can take place at the

176 Law No. 65/2011/QH12 of the National Assembly of 29 March 2011 on the Amendment and Supplement of Some Provisions of the Civil Procedure Code, art 52. This Law took legal effect on 1 January 2012.
177 Criminal Procedure Code 2003, art 306(1).
178 UNICEF and the Law Research Institute of Vietnamese Ministry of Justice, above n 36, 64-5.
179 Viet, above n 155, 604.
investigating or adjudicating stages. For instance, a family member of a person in custody or an accused must be present when police interview and interrogate. At trial, the presence of representatives of families, schools, and organizations is also mandatory.

Article 306 also prescribes more specifically the rights of representatives of families, schools, and/or organizations when these persons participate in the proceedings. In the investigating stage, they are entitled to: communicate with the person kept in custody or the accused (if the investigators so agree); supply documents and materials; make requests or complaints and read the case file (at the end of investigating stage). At trial, they have the right to provide documents and exhibits; request or propose to change the procedure-conducting person; join in the arguing process; complain about procedural acts of procedure-conducting persons and court decisions; defend juvenile offenders and appeal.

From the above, it can be seen that provisions in Vietnamese criminal procedure law governing the right to have parents or guardians present in the criminal processing of juvenile offenders are established on the basis of international law, specifically principles 7.1, 10.1, 15(2) of the Beijing Rules. Furthermore, art 306 of the Criminal Procedure Code 2003 allows a wide range of individuals who have a close relationship with a juvenile offender to participate in almost all stages of the criminal process. These persons may ‘take part in considering and evaluating the defendant and may contribute to an appropriate resolution’. More importantly, this article recognizes a number of rights which are essential for representatives of families, schools, and organizations to protect the rights and interests of juvenile offenders.

**ii. Shortcomings**

Provisions governing the presence and participation into criminal processes of parents or

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180 *Criminal Procedure Code 2003*, art 306(2). This provision is applicable to persons in custody and accused persons who are between 14 and 16 years or juveniles with mental or physical defects or in other necessary circumstances. Article 306(2) allows investigators to conduct interrogation without the presence of family members or legal representatives where these persons are deliberately absent without plausible reasons.


182 Ibid, art 306(2).

183 Ibid, art 306(3).

184 Ibid, art 305.

185 Ibid, art 231.

guardians of juvenile offenders under the Criminal Procedure Code 2003 are unclear and insufficient. This is demonstrated in the various limitations discussed below.

First, there is a lack of clarity as regards the term ‘representative of families’ provided in art 306 of the Criminal Procedure Code 2003. This has led to different connotations of this term. Hoang observed that the term has been understood to refer to:

(a) *Parents or guardians*. This explanation is based on provisions in art 141 (Representatives at Law) of the Civil Code 2005;\(^{187}\)

(b) Only the *head of a family household* (as the representative of the juvenile offender’s family. This understanding relies upon art 107 (Representatives of Family Households) of the Civil Code 2005;

(c) *Representatives at law* and *representatives under authorization* (art 143 of the Civil Code 2005).

(d) *An adult in a family household* such as parents, grandparents, uncles, aunties, brothers, sisters and so on. These persons are not required to live in common households. They only need to have blood-relationships with juvenile offenders.\(^{188}\)

Among the above approaches, the last is often used. However, at present no official guidance on this issue is provided by relevant authorities. This causes significant difficulties for procedure-conducting bodies in the practice of dealing with cases involving juvenile offenders.

Second, the Criminal Procedure Code 2003 does not prescribe the rights of representatives of families, schools and organizations in the prosecuting stages. Although art 306(1) stipulates the obligation of representatives of families to participate in proceedings, it is not stipulated which activities carried out by prosecutors require the presence of representatives of families, as well as the rights of families when participating in these activities. (Article 306 is limited to the investigating and adjudicating stages of the criminal process).

\(^{187}\) This Code was passed on 14 June 2005 by the National Assembly of Viet Nam and entered into force on 1 January 2006.

Third, art 306 of the Criminal Procedure Code 2003 does not specify sanctions for representatives of the family of a juvenile offender who are intentionally absent without plausible excuse. If participation in the criminal process is an obligation of representatives of families, sanctions should be imposed when these persons do not perform their duty. The imposition of sanctions for non-attendance could possibly strengthen the responsibility of families in caring, educating and protecting juveniles. Furthermore, alternative solutions are not provided for circumstances where representatives of family are not available to participate in criminal proceedings.

Fourth, art 306(2) of the Criminal Procedure Code 2003 provides that:

Where the persons kept in custody or the accused are between full 14 years and under 16 years old or minors with mental or physical defects, or in other necessary cases, the taking of their statements and interrogation must be attended by their families’ representatives, except for the cases where their families’ representatives are deliberately absent without plausible reasons.

According to Yen, there are matters arising from the above provisions which are unsettled. Does art 306(2) require that all interrogations of juvenile offenders must have the presence of families’ representatives and their signatures on all minutes of interrogation? Or are they only required to sign one or some minutes of interrogation? In the latter case, does the law require that these minutes of interrogation must contain adequate information of offending and be consistent with other evidence in case files?\(^{189}\)

Fifth, the attendance of representatives of schools and organizations may not always be necessary. Despite being environments in which juvenile offenders study and work, it is perhaps unreasonable to require representatives of schools and organizations to participate in every court session. Viet suggests that, in practice, procedure-conducting bodies usually summon representatives of the families of juvenile offenders, while representatives of schools and organizations are only summoned when necessary.\(^{190}\) This suggests that provisions in art 306(3) relating to the presence of representatives of schools and organizations in court sessions are unreasonable and frequently not complied with.

Sixth, there are no provisions stipulating the circumstances in which procedure-conducting bodies can deny the participation of representatives of families, schools and organizations.

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189 Yen, above n 188.
190 Viet, above n 155, 605.
As provided in art 15(2) of the *Beijing Rules*, competent authorities can revoke the right to participate in the criminal process of juvenile offenders’ parents or guardians if it is necessary for the protection of the interest of the juvenile offender. Hence, it is clear that there is a gap in the criminal procedure law of Viet Nam governing this issue.

b. Right to Privacy

In the Vietnamese legal system, there are only general provisions protecting the health, honour, dignity, home, correspondence, telephone and telegraph communications of citizens. These provisions are recognized as fundamental principles of criminal procedure law in arts 4, 7-8 of the *Criminal Procedure Code 2003*. However, these provisions do not prohibit the publication of any information which may lead to the identification of a juvenile offender as required in art 8 of the *Beijing Rules* and *General Comment No. 10 of the Committee on the Rights of the Child*.

In order to overcome the above shortcoming, art 3(3) of the *Interdisciplinary Circular No. 01/2011/TTLT-VKSTC-TANDTC-BCA-BTP-BLĐTBXH* provides that procedure-conducting bodies and persons have responsibility to ensure the confidentiality of private information of juveniles; all procedural activities relevant to juveniles must be conducted in environment appropriate for securing the privacy and honour, human dignity of juveniles. Moreover, based upon art 307(1) of the *Criminal Procedure Code 2003*, art 11(2) of the *Interdisciplinary Circular No. 01/2011/TTLT* stipulates that in addition to special cases where State secrets should be kept or the national customs and practices should be preserved or the involved parties’ secrets must be kept at their legitimate requests (art 18 of the *Criminal Procedure Code 2003*), courts are enable to conduct trial of juvenile defendants behind closed doors to facilitate...
their reintegration process. This Interdisciplinary Circular also prohibits ‘roving trial’\textsuperscript{193} of juvenile defendants except where legal education and popularization and crime prevention otherwise require. These provisions partly demonstrate that Vietnamese legislators have given attention to the right to privacy of juvenile offenders. Nonetheless, comparing with the UN standards on this issue, the above provisions reveal certain limitations including:

First, provision that only procedure-conducting bodies and persons are obliged to ensure the confidentiality of private information of juveniles is inadequate. Dealing with juveniles in practice may involve other agencies, organizations and persons such as agencies which are assigned to conduct a number of investigations, the Labour – Invalids and Social Affairs bodies, the Youth Associations, defence counsel etc. These agencies and persons have conditions to know private information of juveniles and thereby they must also have a duty to respect and ensure this information. Other provisions contained in art 3(3) of the Interdisciplinary Circular No. 01/2011/TTLT are unclear and unfeasible. For instances, what information is considered private information and may lead to the identification of juveniles? What is environment appropriate for securing the privacy and honour, human dignity of juveniles? What are sanctions imposed on persons who violate the obligation to ensure the confidentiality of juveniles’ private information?

Second, relating to the principle of a public trial, art 307 of the Criminal Procedure Code\textsuperscript{2003} provides that – in necessary circumstances – trials may be conducted behind closed doors. However, in the Vietnamese legislative framework, there is no specific guidance on this issue. This is incompatible with art 16 of CRC, General Comment No. 10 and General Comment No. 12 of the Committee on the Rights of the Child. The last legal basis provides:

> The court and other hearings of a child in conflict with the law should be conducted behind closed doors. Exceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child (emphasis added).\textsuperscript{194}

As previously mentioned, in addition to special cases specified in art 18 of the Criminal Procedure Code\textsuperscript{2003}, art 11(2) of the Interdisciplinary Circular No. 01/2011/TTLT allows courts to conduct trial of juvenile defendants behind closed doors to facilitate their

\textsuperscript{193} These are trials publicly conducted at the places where offences were committed or defendants domicile rather than at the courtroom. This form of trials is often applicable to important cases of which the purposes are to propagandise and popularize the laws and to admonish persons having intention to commit similar offences.

\textsuperscript{194} Committee on the Rights of the Child, General Comment No. 12 (2009): the Right of the Child to be Heard, 51\textsuperscript{th} sess, UN Doc CRC/C/GC/12 (20 July 2009), para 61.
reintegration process. This is, however, an optional provision which may lead to the inconsistency in practical implementation between different courts. If conducting trial behind closed doors is identified as a means to facilitate juveniles’ reintegration process, it must be an obligation of all courts to apply this form of trial. Experts of common law countries state that closed courts is ‘a bedrock principle of fair trial rights for children and a recognized exception to the open courts rules’.\(^{195}\)

Moreover, art 11(2) of the Interdisciplinary Circular No. 01/2011/TTLT empowers courts to conduct ‘roving trial’ in order to educate and popularize the law and prevent crime. Conducting public trial of juvenile defendants at the courtroom should even be restricted. Therefore, using ‘roving trial’ in juvenile cases is unacceptable, inconsistent with the principle of the child’s best interests (art 3 of the CRC), the right to be treated in a manner appropriate with the child’s age and the ‘desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’ (art 40(1) of the CRC). Additionally, there is no research demonstrates that ‘roving trial’ is the best and only way for legal education and popularization and crime prevention.

Third, art 18 of the Criminal Procedure Code 2003 stipulates that any judgments, including those in juvenile cases, should be made public, without any exceptions. This provision of Vietnamese criminal procedure law is itself in conflict with international law, specifically second sentence of art 14(1) of the ICCPR, providing:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires … (emphasis added).

Although the right to privacy is a particular right of juveniles in conflict with the law, it is poorly protected in the Vietnamese regulatory framework. This legislative shortcoming directly impacts on the practical protection of juvenile offenders’ privacy. In this particular context, Viet Nam does not observe the basic principle established by the UN framework

that juveniles’ privacy must be fully respected and ensured at all stages of criminal proceedings.

E. Observations
From the foregoing, it can be seen that the Vietnamese legislative framework governing the rights of juvenile offenders embodies various forms of legislation including Constitution, Code, Law, Resolution, Ordinance, etc. Basically, the majority of criminal procedures applicable to adult offenders are also employed in juvenile cases. Nonetheless, the Criminal Procedure Code 2003 contains a number of distinctive provisions dealing with juvenile offenders. These provisions govern the arrest, custody, detention, defence, participation of families, schools and organizations, composition of the trial panel, etc. As a State party to the CRC, Viet Nam has recognized almost all human rights of juvenile offenders in the criminal justice system. However, the above analysis also demonstrates that the Vietnamese regulatory framework contains a large number of limitations.

IV. Conclusions
The criminal justice system of Viet Nam in general, and the juvenile justice system in particular, have a long history. The process commenced on the Independence Day of Viet Nam and continues to the present. At the beginning, although a Criminal Procedure Code was not adopted, the protection of the human rights of offenders in criminal proceedings received serious consideration from the State. This is evidenced by the fact that some human rights were recognized and supplemented in the first three Constitutions of 1946, 1959, and 1980, as well as in other legislation. Protecting the rights of offenders proceeded to a higher level when the first Criminal Procedure Code was enacted in 1988. One of the significant contributions of this code was a clear prescription of the stages of the criminal process (institution, investigation, prosecution, first-instance trial, appellate trial, execution, and special stage, consisting of ‘cassation’ procedure and reopening procedure). More importantly, separate provisions designed to protect juvenile offenders were introduced. Together with the Constitutions, the Criminal Procedure Code 1988, other courses of criminal procedure law were also adopted such as Laws, Resolutions, Ordinances, Decrees, and Circulars. All of these sources contribute to the creation of a diversified legislative framework.
Having been in operation for approximately fifteen years, the Criminal Procedure Code 1988 was replaced by the Criminal Procedure Code 2003. This second code had many advantages compared with the earlier code. It recognized and protected almost all the criminal procedure rights of juvenile offenders prescribed in UN legal documents. However, one major shortcoming is that Viet Nam has not established a separate and comprehensive legislative framework to protect juvenile offenders. Despite adopting some distinctions between procedures applicable to juvenile and adult offenders, these provisions are frequently unclear, insufficient, and unreasonable. Furthermore, Viet Nam does not have a court system particularly designed for children and young offenders. Restorative justice programs have not been researched and applied in this jurisdiction. Despite the view that education and rehabilitation are the main objectives of juvenile justice system, the penalties and procedures applicable to children and young offenders do not reflect this approach. In other words, Viet Nam does not have a ‘specialized juvenile justice system’ – a ‘core policy indicator’ used to assess and evaluate juvenile justice.\(^{196}\) Being a State party of the CRC, Viet Nam might re-examine all UN legal documents and interpretations of human rights bodies such as the Human Rights Committee, the Committee on the Rights of the Child. Based on this research, amendments and supplementations of the contemporary criminal regulatory framework of Viet Nam are necessary.

\(^{196}\) UNODC, above n 62, 5-6.
Chapter 5
PROTECTION OF THE RIGHTS OF JUVENILE OFFENDERS IN VIET NAM: THE PRACTICE

I. Introduction
The previous chapter outlined advantages and shortcomings of the Vietnamese legislative framework governing the rights of juvenile offenders. The outline gives rise to a number of questions. Have these rights actually been recognized, respected and ensured in reality? What are the major strengths and weaknesses in the protection of these rights? What are the reasons for these advantages and limitations? This chapter addresses these questions by analyzing and evaluating the exercise of juvenile offenders’ rights in criminal proceedings in Viet Nam from a practical perspective. It demonstrates that there is a noticeable discrepancy between the protection of children and young people in conflict with the criminal law in Viet Nam and the requirements and standards stipulated in the international child rights legal framework.1

II. Protection of Juvenile Offenders’ Rights: Major Strengths, Major Weaknesses and Reasons
A. Introduction
This section addresses major strengths and weaknesses in the operation of some procedural safeguards for children and young offenders in Viet Nam. As can be seen from Chapter 3, all procedural rights are important and necessary. However, this section focuses on examining the protection of some distinctive rights of juvenile offenders, including the right of defence, the right to the presence of a parent or guardian, the right to be fully respected of privacy, the right not to be subject to arbitrary arrest or detention and the right to equality before courts and tribunals and to a fair trial. This section also presents and analyzes a number of factors the create barriers to the protection of these rights, thereby establishing the basis for the recommendations presented in the last chapter of the thesis.

1 The information contained in this chapter is derived from various sources including reports of the Supreme People’s Procuracy and the Supreme People’s Court, materials of relevant conferences and legal journals.
B. Major Strengths, Major Weaknesses and Reasons

1. Right of Defence

a. Major Strengths

In recent years, the right of defence of offenders in general, and juvenile offenders in particular, has been exercised more effectively in Viet Nam. Procedure-conducting bodies respect and facilitate defence counsel in conducting their roles and tasks. This is demonstrated by the fact that procedures for granting the ‘Certificate of Defence Counsel’ are simplified and conducted within prescribed time limits.2

Additionally, investigatory bodies at different levels instruct investigators to discuss and confirm schedules of participation for defence counsel in a number of investigations including interrogations, examination of documents, solicitation of expertise etc. Phan observes that the Security Investigatory Body of Ho Chi Minh City has facilitated the operation of lawyers in the investigation stage through prescribing specific conduct, such as quickly accepting requests by defence counsel to: participate in interrogations, examine documents and exhibits provided by lawyers and families of accused persons, examine requests for granting ‘guarantee’,3 and organize medical examinations, treatments or appraisements for accused persons suffering from mental diseases or other dangerous ailments.4

Similarly, in the prosecution stage, the Supreme People’s Procuracy has facilitated defence counsel access to case files in recent years.5 In the trial stage, courts at different levels create

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3 Article 92(1) of the Criminal Procedure Code 2003 defines guarantee as ‘a deterrent measure to replace the temporary detention measure. Depending on the criminal acts’ nature and extent of danger to the society and the personal details of accused persons or defendants, investigating bodies, procuracies or courts may decide to let them be guaranteed’. Two relatives may stand guarantee for an accused person or a defendant. Organizations may stand guarantee for an accused person or a defendant being their member. Individuals and organizations use their prestige to guarantee for the attendance of accused persons or defendants when procedure-conducting bodies summon.

4 Hoai, above n 2, 3-4.

5 Lawyer Phan observes that in cases involving serious offences committed at different regions, case files are often transferred to the Supreme People’s Procuracy in Hanoi. The Supreme People’s Procuracy grants Certificates of Defence Counsel by post if it considers that applicants have the eligibility prescribed by law. In some circumstances, lawyers in Southern areas are entitled to apply for the Certificate of defence counsel at the Second Office of the Supreme People’s Procuracy in Ho Chi Minh City and access case files there. A number
opportunities for lawyers to examine and photocopy case files.\textsuperscript{6} A number of simple procedures such as delivering the decision to bring the case for trial and producing the judgment to defence counsel are observed.\textsuperscript{7} Judges and their clerks in some courts consider requests by lawyers in the pre-trial stage as well as accepting requests to summon witnesses and relevant parties and examine exhibits at trial.\textsuperscript{8}

On the other hand, the number of lawyers is increasing and their qualifications are partly improving.\textsuperscript{9} The participation of defence counsel has increasingly contributed to the protection of the rights and legitimate interests of accused persons and defendants and the assistance of procedure-conducting bodies in resolving criminal cases. There have been a number of cases where courts have imposed lesser penalties than those requested by procuracies; decided that defendants were innocent, or requested additional investigation. In some circumstances the reasoning of defence counsel, which was previously not accepted by first-instance courts, has been accepted by appellate courts.\textsuperscript{10}

A key factor contributing to these beneficial developments is the National Assembly’s enactment of the \textit{Criminal Procedure Code 2003}\textsuperscript{11} supplemented by a large number of legal documents that give guidance on the implementation of this Code. The Ministry of Justice adopted the \textit{Model Principles of Lawyers’ Profession Ethics} in 2002\textsuperscript{12}, Decrees and Circulars on the implementation of the \textit{Law on Lawyers 2006}. These legal documents mark a turning-point in confirming the role and participation of lawyers in criminal cases based on \textit{Resolutions 08 and 49} of the Politburo.\textsuperscript{13} Further, in 2011 the Viet Nam Bar Federation and

\footnotesize{of regional procuracies including those in Ho Chi Minh City, Dong Nai, Binh Duong, Kien Giang, Ca Mau etc. quickly grant the Certificate of Defence Counsel and allow lawyers to examine, photocopy case files and resolve their reasonable lawful requests and recommendations: see Hoai, above n 2, 3-4.}
\footnotesize{\textsuperscript{6} Hoai, above n 2, 4.}
\footnotesize{\textsuperscript{7} Ibid.}
\footnotesize{\textsuperscript{8} Ibid.}
\footnotesize{\textsuperscript{9} In 2010, Viet Nam had 5,714 lawyers and 2,771 trainee lawyers (over fourfold increase than in 2000): see Central Directing Board of Justice Reform, ‘Mot So Tinh Hinh ve To Chuc va Hoat Dong cua Luat Su trong Thoi Gian Qua’ [Organization and Operation of Lawyers in the Last Period] (2010) \textit{8 News-Bulletin of Justice Reform} 27.}
\footnotesize{\textsuperscript{10} Hoang Thi Son, ‘Thuc Trang Thuc Hien Quyen Bao Chua va Quyen Nho Nguoi Khac Bao Chua cua Bi Can, Bi Cao’ [The Practice of Exercising the Right to Defend of Accused Persons and Defendants] (2002) \textit{4 Journal of Jurisprudence} 3.}
\footnotesize{\textsuperscript{11} The \textit{Criminal Procedure Code 2003} has many amendments regarding when defence counsel are entitled to participate in criminal proceedings, their rights and obligations as well as procedures at trials.}
\footnotesize{\textsuperscript{12} These ‘Model Principles’ were enacted by Decision No. 356b/2002/QD-BTP of 5 August 2002 of the Minister of the Ministry of Justice.}
\footnotesize{\textsuperscript{13} Hoai, above n 2, 3-4.}
the Supreme People’s Procuracy signed a Regulation on Cooperation between these bodies. Under this Regulation, the Supreme People’s Procuracy agreed to direct its departments to facilitate and ensure the rights of lawyers in carrying out their professional activities in the investigation and prosecution stages. In turn, the Federation undertakes to guide and supervise provincial bar associations and lawyers in observing the prescribed obligations of defence counsel, including the obligation to attend timely and sufficiently when being requested by the procuracies. This is an important step in removing obstacles and limits on the participation of lawyers in criminal proceedings. In the near future, the Federation will sign similar Regulations with the Ministry of Public Security and the Supreme People’s Court.

The above analysis shows that the assurance of juvenile offenders’ right to defend in Vietnamese practice is compatible with the UN benchmark standards to some extent. Juvenile offenders receive free legal assistance in their preparation and presentation of defence as required by the CRC (art 40(2)(b)(i)), Beijing Rules (art 15.1) and General Comment No. 10 (para 49) of the Committee on the Rights of the Child. Procedures and mechanisms for equal access to lawyers are provided for all juvenile offenders without discrimination. The majority of lawyers have appropriate education and training and are aware of their ethical duties.

b. Major Weaknesses

The assurance of juvenile offenders’ right to defend in Viet Nam has many practical restrictions. Most investigatory bodies and procuracies do not have a list of lawyers operating in their regions. They remain restricted in selecting defence counsel for children

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17 Ibid art 9.
18 Do Thi Phuong, ‘Thuc Tien Dieu Tra, Truy To, Xet Xu doi voi Nuoi Chua Thanh Nien’ [The Practice of Investigation, Prosecution, Trials and Criminal Execution of Juveniles], 3 (23 November 2009)
and young offenders. In some cases, investigators and prosecutors convince juvenile offenders and their legal representatives to refuse the right to defence counsel. Nong states that even in serious cases involving juvenile offenders or offenders who do not complete the last year of junior high school, such persons sign a ‘paper to refuse lawyers’ on the basis that they are able to defend themselves or because the fee of hiring lawyers is too expensive (although their families previously hired those lawyers to defend them). Many lawyers believe that most cases where offenders refuse legal representation occur because offenders suffer pressure and receive false information from investigatory officials.

The three key problematic areas usually identified by lawyers include the procedures for granting the Certificate of Defence Counsel, communication with accused persons in contemporary detention camps, and access to case files. The majority of lawyers state that most barriers occur in the investigation stage. A number of investigatory officials take the view that lawyers’ participation will impede their investigations. Hence, they dislike lawyers’ attendance in interrogations and use many reasons to prevent lawyers attending (such as ensuring the secrecy of the assignment and/or investigation). Additionally, investigatory officials do not usually notify the times and places of interrogation to defence counsel. When defence counsel wish to meet accused persons or defendants who are being temporarily detained, they must complete a number of complicated administrative procedures including obtaining permission from police. Defence counsel sometimes face obstacles created by officials in temporary detention camps, such as not having a place to

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19 Ibid 3.
22 In juvenile cases these shortcomings may be less serious because lawyers are appointed by procedure-conducting bodies to ensure the right of defence of children and young offenders.
24 For further information, see Hoai, above n 2, 5-6.
meet their clients or arbitrarily limiting the duration of meetings.\textsuperscript{25} Although the \textit{Criminal Procedure Code 2003} empowers lawyers to attend other investigatory activities (including crime scene examination, investigation experiments and seizure of exhibits), in practice defence counsel are not allowed to attend these investigations.\textsuperscript{26} When defence counsel and other participants complain, procedure-conducting bodies seldom bother to reply as required (in writing within prescribed time limits).\textsuperscript{27}

The participation of lawyers in the prosecution stage is not clearly outlined. In reality, after the investigation stage is completed, lawyers often contact procuracies to access case files and communicate with accused persons in contemporary detention camps. The outcome of these requests depends upon the consent of prosecutors. In many cases, prosecutors suggest defence counsel access case files when they are transferred to the courts. Prosecutors claim that their offices are restrictive and there is no room for defence counsel to examine case files or, alternatively, because of the ‘prosecution demands’ or complicated case files, they cannot allow lawyers to access case files.\textsuperscript{28}

In some cases, the appointment of defence counsel only occurs when the case file is transferred to the court. This means that, in the earlier stages, the procuracy and investigatory body does not fulfil their obligations. In these circumstances, there is no unanimity as to whether or not the superior court needs to cancel the first-instance judgment and accede to the request for a retrial.\textsuperscript{29} Furthermore, in many cases at the trial preparation stage, court officials prevent defence counsel from accessing case files by using reasons such as the administrator of case files is busy or absent, or they are waiting for the consent of the court’s managers.\textsuperscript{30}

\textsuperscript{25} These shortcomings can happen in all stages of criminal proceedings: see Nguyen Ngoc Khanh, ‘Mot So Van De ve Bao Dam Quyen Bao Chua cua Bi Cao trong Giai Doan Xet Xu So Tham Vu An Hinh Su’ [Some Issues Relating to the Assurance of the Right to Defend of the Defendant in the First-Instance Trial Stage of Criminal Cases], 3-4 (23 November 2012) <http://svlaw.7forum.biz/t625-topi>
\textsuperscript{26} Hoai, above n 2, 6.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
\textsuperscript{29} The Supreme People’s Procuracy, \textit{Bao Cao Ket Qua Phoi Hop Rut Kinh Nghiem Mot Nam Thuc Hien Bo Luat To Tung Hinh Su Nam 2003} [Report on the Outcome of Cooperation in Drawing Experiences from One Year Implementing the Criminal Procedure Code 2003] (2005) 32.
\textsuperscript{30} Khanh, above n 25.
These limitations extend the distance between the Vietnamese juvenile justice system and the UN benchmark criteria concerning the actual guarantee of the right to defend. This procedural safeguard of juvenile offenders is not protected in all stages of criminal proceedings. Many procedure-conducting bodies, particularly investigatory bodies, in Vietnam do not follow the UN requirements on facilitating operation of defence counsel, for example principles 8, 16 and 21 of the Basic Principles on the Role of Lawyers:

All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; ...

It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

c. Reasons

The above deficiencies are derived from shortcomings in the legislative framework, particularly the Criminal Procedure Code 2003; the lack of education and training of procedure-conducting persons; the limited legal knowledge of offenders; and the inefficiency of defence counsels. Phuc states that investigatory officials, who have lower education and training levels than lawyers, are afraid that participation of lawyers in criminal proceedings will create ‘a large amount of troubles’. Others are not adequately aware of their procedural obligations to facilitate offenders in exercising the right of defence. There is a view that in a case where the investigation is carried out carefully and adequately but the investigatory body does not appoint a defence counsel for the accused juvenile, this may not be considered a serious procedural violation and the case file may not be returned for further investigation. Phuc argues that the importance of the right to defend is inconsistent with this view. He also claims that persons engaging in this conduct should incur a ‘sanction’ manifest in a rejection of the conduct: for instance, case files should be returned in the pre-trial stage, or judgments may be cancelled.

31 See above Chapter 4, Section III(D)(2)(d.ii) of the thesis.
33 Ibid.
34 Ibid.
35 Ibid.
On the other hand, in Viet Nam the majority of people do not usually hire lawyers in criminal cases. Some are not aware they are entitled to rely on defence counsel, whereas others do not know that procedure-conducting bodies must request bar associations to arrange defence counsel for children and young offenders. In some circumstances, juvenile defendants and their legal representatives not only do not rely on, but also refuse, lawyers at trials.

Part of the problem relates to the legal profession. The total number of lawyers is not sufficient to satisfy demand. Some lawyers conduct a defence cursorily, particularly in juvenile cases where they are appointed by procedure-conducting bodies. The three main reasons for this are the low fees, the irresponsibility of defence counsel and their lack of sufficient knowledge and understanding of the various legal aspects of juvenile justice process as well as experience to work with children in conflict with the criminal law. This shortcoming is clearly contrary to General Comment No. 10 (para 49) of the Committee on the Rights of the Child. In some cases, after finishing the procedures for granting the Certificate of Defence Counsel, they may only attend for some interrogations. Having regard to investigators and prosecutors, some defence counsel do not fulfil their tasks. In some places, defence counsel do not ask investigatory bodies to provide the investigation conclusion reports and do not request procuracies to inform them whether case files are transferred to the court. In the trial stage, defence counsel might only send a written defence document to the court (rather than attending at trial). In other circumstances, they attend at trial but merely request the court to impose a reduced penalty, rather than...
vigorously advocate to protect children and young defendants. Moreover, some lawyers violate professional ethics. They give more attention to fees than their responsibility to prove the innocence of, or to detect circumstances extenuating the criminal responsibility of, their clients.

2. Right to the Presence of a Parent or Guardian

a. Major Strengths

The participation of a parent or guardian of juvenile offenders in criminal proceedings in Viet Nam has improved. Procedure-conducting bodies at first-instance and appellate levels have ‘invited’ representatives in families, teachers or representatives of schools, the Ho Chi Minh Communist Youth Union or other organizations to participate in criminal proceedings as required by art 306(1) of the Criminal Procedure Code 2003. They have also assisted these persons exercising important rights including the right to: inquire about persons kept in custody or the accused (if the investigators so agree); provide documents or other materials; and make requests or complaints and read the case files upon the termination of the investigation in order to protect the legitimate interests of children and young persons. In most cases, families’ representatives attend the interrogations and trials of juveniles.

b. Major Weaknesses

The trial of children and young offenders in the presence of their family is a problematic issue in Viet Nam. Investigatory bodies only pay attention to the presence of defence counsel and often forget the attendance of family representatives although the Criminal Procedure Code 2003 mandates the participation of both persons.

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42 See A Group of Journalists, ‘Diem Mat Luat Su “Dinh Cham” – Bai 1: Vi Tien Bat Chap Dao Duc Nghe Nghiep’ [Identifying Lawyers Who Have Violated Professional Ethics] (2011) Online Legal Journal of Ho Chi Minh City (15 August 2011) <http://phapluattp.vn/20110814100412590p0e1063/vi-tien-bat-chap-dao-duc-nghe-nghiep.htm>. It should be noted that cases mentioned in this article are civil ones. For criminal cases, evidence is not available.
43 Chau, above n 38, 2.
44 The Supreme People’s Procuracy, above n 29, 11.
45 Statement of the former Chairmen of Binh Thuan Provincial People’s Procuracy. Specific statistics relating to the participation of parents and guardians in criminal proceedings are not collected.
46 Quach Huu Thai, ‘Nhung Vuong Mac trong Thuc Tien Xet Xu Nguoi Chua Thanh Nien Pham Toi’ [Difficulties in the Practice of Adjudicating Juvenile Offenders] (Paper presented at the Conference on the
In the investigation stage, representatives of families, schools and organizations are only invited to attend when investigations are nearly completed or where the case involves compensation for victims who suffered material damage caused by a juvenile offender. In many cases, procedure-conducting bodies do not request legal representatives to participate in criminal processes, or may even prevent their participation, based on reasons such as ensuring investigatory secrets. On the other hand, at trial, legal representatives may only desire to be present for adjudication and to hear a court’s announcement of judgment. In other words, participation is formalistic and passively dependent on courts’ decisions.

Investigatory bodies sometimes accept relatives of juvenile offenders rather than their parents (such as brothers, sisters, aunts and uncles) to participate in criminal processes as representatives of families. Is this a serious procedural violation? Are courts entitled to return case files for additional investigations in these circumstances? As discussed in Chapter 4, the Supreme People’s Court has not adopted any particular approach governing these issues. Hence, in practice the majority of courts accept that the representatives of families of juvenile defendants can include these persons and do not return case files for additional investigations.

In a number of circumstances, guardians have not been allowed to communicate with their children in custody in police stations. Some parents state that they have been allowed to supply food but have been unable to meet and talk with them. In many cases, parents have not been allowed to attend the interrogation of their children. Other guardians are asked to sign minutes of interrogation although in practice they have not participated in those interrogations. Because of their young age, easily vulnerable features and a psychology of fearing the police, children are more sensitive to coercion than adults. When investigatory officials use interrogation strategies similar to those applied to adults, combined with the absence of a representative of the family, children may be easily frightened and stressed. These are serious procedural violations likely to adversely impact on the interests of children.

Protection of Juveniles under Vietnamese Criminal Law and Criminal Procedure Law, Ho Chi Minh City University of Law, December 2009) 3.

47 Phuong, ‘Discussion on the Definition and Basis’, above n 41, 4.
49 The Supreme People’s Procuracy, above n 29, 11.
50 Thai, above n 46.
51 Phuong, ‘The Practice of Investigation’, above n 18, 4.
52 Trung, above n 39, 7.
and young offenders. Moreover, investigatory bodies frequently have one or two minutes of interrogation made with the witness of representatives of family.\(^{53}\) As previously analysed in Chapter 4, this is a gap in the Vietnamese legislative framework. In practice, courts temporarily accept that they only need one minute of the interrogation made with the representatives of family attending, so long as this minute embodies adequate information concerning the defendant’s commission of the offence and is consistent with other evidence contained in case files.\(^{54}\) This is contrary to international law and may violate the interests of children and young offenders.

Furthermore, in many trials of children and young offenders, representatives of their families, schools and organizations do not participate, particularly in cases involving homeless juvenile defendants without clear personal identification and records.\(^{55}\) The Supreme People’s Court instructs that ‘in cases where personal identification of defendants cannot be verified, trials do not need the attendance of the representative of their families, schools or social organizations’.\(^{56}\) This instruction only mentions cases where personal identification of defendants cannot be verified. However, problematic issues arise in circumstances where personal identification of defendants can be verified but their family domicile is very far away and there is consequent difficulty in issuing a summons. In reality, there have been many cases where investigatory bodies have not summoned any representatives of family because they reside far away.

When case files are transferred to courts, courts often send the summons by post. Nevertheless, family representatives often still do not attend trial and courts must adjourn proceedings many times. In these circumstances, courts often request the Youth Union to appoint an official to represent the defendants’ families. However, the participation of the Youth Union official is contrary to the Criminal Procedure Code 2003 which provides that the Youth Union may only participate where defendants do not have family representatives (rather than where defendants have family representatives but courts cannot summon these

\(^{53}\) Thai, above n 46.
\(^{54}\) Ibid.
\(^{55}\) Adjudication Science Institute of the Supreme People’s Court, Bao Cao Tong Quan ve Co So Ly Luan va Thuc Tien cua Su Can Thiet Thanh Lap Toa An Chuyen Trach doi voi Nguoi Chua Thanh Nien o Viet Nam [Overview Report on the Reasoning and Practical Basis of the Necessity of Establishing Special Court for Juveniles in Viet Nam] (2010) 42.
\(^{56}\) Part II(16) of the Official Dispatch No. 81/2002/TANDTC of the Supreme People’s Court of 10 June 2002.
persons). Similarly, when the domicile of a representative of the family of a defendant is very far away, it is difficult for courts to send other procedural documents. These issues are still not governed by law. Consequently, resolution of these issues depends on the personal attitudes of judges, which may lead to arbitrariness.

These weaknesses reveal that the practical assurance of the right to the presence of a parent or guardian of juvenile offenders in Viet Nam does not meet the relevant UN benchmark standards. Derived from shortcomings of the legislative framework, procedure-conducting bodies do not create maximum opportunities for the possible participation of parents or legal guardians in the actual proceedings as recommended by the Committee on the Rights of the Child in General Comment No. 10 (para 54). Additionally, in practice, there is no case where authorized bodies limit, restrict or exclude the presence of parents from proceedings although they should do so because of the best interests of juvenile offenders. This issue was consistently mentioned in the UN juvenile justice framework.57

c. Reasons

Because provisions concerning legal representatives contained in the Criminal Procedure Code 2003 are not specific and clear, when implementing them, procedure-conducting bodies do not consistently request legal representatives to participate in criminal proceedings to protect the interests of juvenile defendants.58 In the reality of actual proceedings, many judgments involving juvenile defendants are subsequently cancelled because courts at different levels do not share a uniform understanding on persons who may represent the families of juvenile defendants.59

Beside these legislative limitations, the lack of responsibility of procedure-conducting persons is another reason impacting on the right to the presence of a parent or guardian of juvenile offenders. Many investigators think that some provisions of the criminal law

57 See art 15.2 of the Beijing Rules and para 53 of General Comment No. 10 of the Committee on the Rights of the Child.
impede investigatory activities and they try to “dodge” the law and counteract the supervision of the procuracies.\textsuperscript{60}

A lack of legal knowledge and responsibility by the representatives of juveniles’ families also causes adverse impact on the protection of juveniles’ interests in criminal proceedings. Family representatives sometimes do not acknowledge that participating in criminal processes is their responsibility and obligation. Consequently, some family representatives do not attend interrogations and trials while the participation of others is reluctant and ineffective. Further, they are sometimes not fully aware of essential rights conferred by criminal procedure law. Public officials may exploit this weakness to revoke or violate the rights of representatives of families thereby infringe the legitimate interests of children and young offenders.

3. Right to Privacy

a. Major Strengths

In Viet Nam, legal researchers, lawyers and managers of some procedure-conducting bodies are beginning to give more attention to the protection of the right to privacy of children and young offenders. The appropriateness of ‘roving trials’\textsuperscript{61} in juvenile cases is being re-examined and there have been progressive opinions which propose to eliminate this form of trial.\textsuperscript{62} A number of journalists are aware of the rights of juveniles. This is illustrated by the fact that they do not include information leading to the identification of juvenile defendants in their articles. Interestingly, one journalist recently criticized his colleagues for using ‘pejorative’ names to refer to particular juvenile offenders.\textsuperscript{63}

\textsuperscript{60} Trung, above n 39, 7.
\textsuperscript{61} See above Chapter 4, n 193 of the thesis.
\textsuperscript{63} Lu Quang Vinh, ‘Vu An “My Soi” Nhin Tu Goc Do Xa Hoi Hoc Toi Pham: Dung Voi Quy Ket Trach Nhiem Cho Nganh Giao Duc’ [The Case “My Soi” under the Perspective of Criminal Sociology: Do not be Premature in Attributing the Responsibility to the Education Branch] (15 June 2011)
b. Major Weaknesses

In practice, the right to privacy of juvenile offenders in Viet Nam is not ensured. Information leading to the identification of children and young offenders is regularly published in media such as television, newspapers and the internet. Most information relates to sentenced juveniles and includes their names, ages and domiciles, the main facts of cases, offences and penalties. Even where a juvenile is just arrested, this information is published. Although these publications seek to alert society to the increase of, and reasons for, juvenile offending, much information regarding offenders is thereby made known to the public. This practice is incompatible with arts 16 and 40(2)(b)(vii) of the CRC (which requires that the privacy of children and young offenders be fully respected at all stages of the criminal process).

The media in Viet Nam sometimes hastily impute blame to offenders (including juveniles) before a competent court renders a valid judgment. This contributes to the public having biased views regarding the guilt of children and young offenders. Theoretically, this may subsequently affect judges in the decision-making process. Under the pressure of public opinion, a judge may not dare to pronounce a defendant innocent, even in circumstances where the evidence suggests this to be so. Even where the defendant is not guilty according to the court’s judgment, public suspicion may still exist because of arbitrary accusations from the media. Additionally, a number of journalists use ‘pejorative’ names to refer to some juvenile offenders. Others include photos of juvenile defendants in their papers. This may


For instance, Tran Tuan Huy, a sixteen-year-old was jailed 17 years for murdering his pregnant girlfriend <http://tinanninh.com/giet-nguoi/linh-17-nam-tu-vi-toi-giet-nguoi-tinh-dang-mang-thai>; Le Bao Trong, a sixteen-year-old was jailed 18 years for committing two offences: “Murder” and “Plundering Property” <http://laodong.com.vn/Tin-tuc/Giet-nguoi-cuop-tai-san-thoat-an-tu-hinh/46767>; Nguyen Thuy Hang (aged 17) and Nguyen Thi Thanh Thuy (aged 16) were given the “suspended sentence” for committing the offence: “Procuring Prostitutes” <http://tuoitre.vn/Chinh-tri-Xa-hoi/428289/Phat%20Sam-Duc-Xuong-9-nam-tu.html>; Dao Thi Thu Huong, a fourteen-year-old was jailed 12 years for committing three offences: “Rape”, “Rape against Children” and “Plundering Property” <http://www.hoahoctro.vn/metrotin/vu_an_my_so_i_va_dong_bon_tong_hinh_phat_len_den_160_nam_tu_my-soi_nhan_an_kich_khung-100-9875.html>.

In this case, the pupil Ngo Ngoc Linh, a seventeen-year-old was arrested because he is suspected of stealing 33 cell phones. The information of this case is available at <http://www.tinnoi.vn/Mot-hoc-sinh-lop-12-bi-bat-khan-cap-Nganh-Giao-duc-noi-gi-06511555.html>.

For instance, the juvenile defendant Dao Thi Thu Huong was named “Nu quai” (“Female Monster”) by Thanh Trung (a journalist of Hoa Hoc Tro Online Journal) <http://www.hoahoctro.vn/metrotin/phap-luat-nu-quai-my-soi-bat-khoc-tim-me-100-9860.html> or “Soi hoang” (“Wild Wolf”) by Trong Hieu <http://us.24h.com.vn/an-ninh-hinh-su/tu-thieu-nu-thanh-soi-hoang-tan-doc-c31a383537.html>.
help readers recognize defendants and thereby create more barriers for children and young people on their way to reintegrating into society in future.

Most trials of juveniles are conducted in public with the attendance of the public and journalists – even in cases where both the defendant and victim are juveniles. Even in cases where trials are conducted behind closed doors, judgements are pronounced in public at court sessions in a way that clearly reveal the identity of juvenile defendants. This is incompatible with the ICCPR (art 14(1)) and General Comment No. 10 of the Committee on the Rights of the Child (para 66). The number of roving trials has increased. Roving trials contribute to frightened and stressed children and young offenders. Roving trials often impose more serious punishment on juvenile defendants than those imposed by trials conducted in courtrooms. Furthermore, under this form of trial, defendants bear not only the criminal responsibility prescribed by the criminal law but also accusations and pressures from members of the public. Relatives of defendants also may experience considerable pressure from public opinion and social relationships may be affected. Defendants at ‘roving trials’ may face many difficulties reintegrating into society after completing their sentence. This practice is contrary to the recommendation of the Committee on the Rights of the child that all State parties should adopt the principle that trials involving juvenile

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68 The numbers of roving trials in three consecutive years (2007, 2008 and 2009) were 146, 163 and 199. See Adjudication Institute of the Supreme People’s Court, Overview Report on the Reasoning and Practical Basis of the Necessity of Establishing Special Court for Juveniles in Viet Nam (2010) 128.

69 Roving trials of juvenile defendants have been conducted by many courts such as the Provincial Court of Bac Ninh jailing Tran Van Quy (aged 17) 18 years and Dam Van Ngoc (aged 16) 14 years for committing two offences: “Murder” and “Plundering Property”; the Provincial Court of Kon Tum jailing the three seventeen-year-old defendants: Tran Thanh Tung (17 years), Mai Anh Dung and Bui Huu Nghia (16 years for each defendant) for committing the offence: “Murder”; the District Court of Long Khanh (Dong Nai province) jailing Duong Van Hoa (aged 15) two years for committing the two offences: “Stealing Property” and “Plundering Property”, Lang Quoc Viet (aged 17) one year and 6 months for committing the offence: “Deliberately Damaging Property”, the District Court of Tam Ky (Quang Nam province) jailing Pham Phu Quy (aged 16) one year for committing the offence: “Property Robbery by Snatching”; see Tung and Thuong, above n 62.


72 Ibid.
offenders be conducted behind closed doors with very limited exceptions which are clearly provided in the law.\footnote{Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 66.}

Making a decision to conduct trials behind closed doors or in public directly affects the honour, human dignity and future of juvenile offenders. However, in Viet Nam this issue is not given proper weight. In practice, trials can be carried out behind closed doors based on the request of defendants or other participants.\footnote{Canh, above n 67, 4.} This form of trial may be applicable to sexual offences where victims are children.\footnote{Trung, above n 39, 7.} The rationale is that only child victims should be protected (the protection of juvenile offenders is deemed unnecessary). According to Trung, this approach has a negative influence on the psychology of juvenile offenders because it makes them feel ashamed of their guilt and hinders their reintegration into the community.\footnote{Ibid.}

In comparison with other rights of juvenile offenders, the right to privacy appears to be seriously violated in actual proceedings in Viet Nam. This member State is unable to achieve the main objective pursued by the UN regulatory framework governing the right to privacy: avoiding harm caused by undue publicity or by the process of labeling, effect of stigmatization, and possible impact on juvenile offenders’ ability to reinte\textcolor{black}{gr}ate into the community, etc. The above weaknesses demonstrate that Vietnamese legislators and legal enforcement officers do not fully comprehend the necessity to protect juvenile offenders’ privacy and therefore do not observe obligation of a State party to the CRC.

c. Reasons

The causes of the above weaknesses flow mainly from gaps in the Vietnamese legislative framework. As analyzed in Chapter 4, the \textit{Criminal Procedure Code 2003} does not contain any provisions safeguarding the right to privacy of offenders in general, and juvenile offenders in particular. Consequently, there is no requirement that public officials must ensure offenders’ privacy when dealing with criminal cases and no sanction is imposed on persons who infringe this right of juvenile offenders. Moreover, although art 307 of the \textit{Criminal Procedure Code 2003} empowers courts when necessary to conduct trials of
juvenile defendants behind closed doors, no legislation specifies which circumstances are considered ‘necessary’. Hence, courts arbitrarily decide whether to conduct trials behind closed doors. In reality, professional judges often conduct trials in public in order to demonstrate their impartiality and objectiveness.\(^77\) On the other hand, lay judges may not have the ability to determine which cases should be conducted behind closed doors.\(^78\)

Also some journalists in Viet Nam are not sufficiently aware of the rights and obligations prescribed by the law. They do not know the requirements of international law, namely the CRC, on the protection of juvenile offenders’ privacy. Journalists may focus on seeking information about a case and transmitting that to readers without thinking of the adverse impact on the interests of children and young offenders.

4. Right not to be Subject to Arbitrary Arrest or Detention

a. Major Strengths

Under the *Criminal Procedure Code 2003*, arrest, custody and temporary detention are mainly executed by investigatory bodies under the approval and supervision of procuracies. In the adjudicative stage, courts must decide to continue to use, cancel, or replace temporary detention. In recent years, this procedural safeguard of juveniles has been given more attention. After arrest, holding in custody and temporarily detaining children and young persons, competent bodies must notify their families or lawful representatives.\(^79\) In some cases, procedure-conducting bodies refer juvenile offenders to their parents or guardians to supervise them and ensure their presence when summoned.\(^80\) The procuracies’ approval of arrest, custody and temporary detention has been conducted carefully. This may reduce the police’s abuse of arresting persons in urgent circumstances.\(^81\) The procuracies’ supervision of the implementation of these deterrent measures has improved. The procuracies now examine custody houses, temporary detention and detention camps many times annually in

\(^77\) Canh, above n 67, 4.
\(^78\) Ibid.
\(^79\) The Supreme People’s Procuracy, above n 29, 11.
\(^80\) Ibid.
\(^81\) Article 81(4) of the *Criminal Procedure Code 2003* provides that: ‘Within 12 hours after receiving the requests for approval of, and documents related to, the urgent arrests, the procuracies must issue decisions to approve or not to approve such arrests. If the procuracies decide not to approve the arrests, the issuers of arrest warrants must immediately release the arrestees.’
order to detect violations, make requests and recommendations to improve the operations.\textsuperscript{82} The effectiveness of the procuracies’ operation is partly demonstrated by the fact that most persons arrested and taken into custody now proceed to prosecution.\textsuperscript{83} In other words, a system of ensuring regular independent inspection of detention places exists in Viet Nam and is moderately protected by law and policy.\textsuperscript{84} Viet Nam basically follows requirements set out in the \textit{UN Rules for the Protection of Juveniles Deprived of their Liberty}.\textsuperscript{85}

\textbf{b. Major Weaknesses}

In some situations, investigatory bodies substitute deterrent measures for investigations in order to force persons in custody and accused persons to give information concerning their offences, although the application of deterrent measures does not satisfy conditions prescribed by the \textit{Criminal Procedure Code 2003}.\textsuperscript{86} This leads to a situation where courts must render judgments in which the duration of imprisonment is identical to that of the temporary detention. According to art 303 of the \textit{Criminal Procedure Code 2003}, juveniles may be arrested and temporarily detained where they commit serious offences intentionally or very serious or especially serious offences. Nonetheless, in 2011 Vice-President Long of the Criminal Court of Ho Chi Minh City People’s Court, found that a pupil stealing a motorbike had been temporarily detained.\textsuperscript{87} He observed that although this is a serious

\textsuperscript{82} In 2011, the procuracies conducted 5,200 examinations of custody houses and 315 examinations of temporary detention centres. The procuracies rendered 1,309 protests and petitions requesting the police to strictly observe regulations and policies applicable to persons in custody and detained persons, and to strengthen the administration of custody houses and temporary detention centres: see the Supreme People’s Procuracy, above n 29, 5. At present, the inspection of detention places of provincial people’s procuracies is governed by \textit{Regulation on Supervising the Custody, Temporary Detention; Administrating and Educating Persons Executing Imprisonment Penalty} adopted by Decision No. 959/2007/QD-VKSNDTC of the Chairman of the Supreme People’s Procuracy of 17 September 2007.

\textsuperscript{83} In 2006, the scale was 95.3\%: see the Supreme People’s Procuracy, \textit{Summary Report on the Operation of the People’s Procuracies in 2006} (15 January 2007) 2. In 2007, the scale was 96\%: see the Supreme People’s Procuracy, \textit{Summary Report on the Operation of the People’s Procuracies in 2007} (31 December 2007) 3.

\textsuperscript{84} This is a policy indicator used to evaluate member States’ juvenile justice systems: see UNODC, \textit{Manual for the Measurement of Juvenile Justice Indicators} (2006) 22.

\textsuperscript{85} Article 72 provides: ‘Qualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis ... and should enjoy full guarantees of independence in the exercise of this function.’ Article 74 stipulates: ‘After completing the inspection, the inspector should be required to submit a report on the findings. The report should include an evaluation of the compliance of the detention facilities with the present rules and relevant provisions of national law, and recommendations regarding any steps considered necessary to ensure compliance with them.’

\textsuperscript{86} Trung, above n 39, 8.

\textsuperscript{87} Long, above n 62. In a similar situation, Ngo Ngoc Linh (aged 17) was arrested in an urgent case (art 81(1)(c) of the \textit{Criminal Procedure Code 2003}) and temporarily detained in 3 months for being suspected to involve in stealing of 33 cell phones. Lawyer Vu Hoang Tuan argues that the urgent arrest should not be conducted because the urgency of the case did not exist and the property was already returned. The procedure-conducting bodies should not use the temporary detention measure because this pupil committed a less serious
procedural violation, it has become normal and continues to recur. Additionally, the procuracies’ approval of decisions to apply or replace deterrent measures in some circumstances is incorrect. Thus, there are many cases where the court must release persons who have been inappropriately detained. This limitation reflects that Viet Nam does not comply with a consistent rule established by the UN framework that ‘the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time’ (emphasis added).

Although art 302(2) of the Criminal Procedure Code 2003 requires procedure-conducting bodies to establish the age of juveniles, in many cases these bodies, especially the investigatory bodies and procuracies, do not fulfil this requirement. This has caused serious infringements of the interests of children and young people. For example, a person who is under the minimum age of criminal responsibility must not be taken into custody and temporarily detained. Nonetheless, an investigatory body may still take a young person into custody and detain them because it has made a mistake in clarifying the age of the person. The application of custody and temporary detention in such cases is unlawful. Consequently, when a court announces the person is not guilty, the responsible body must pay compensation. The wrongful use of custody and temporary detention not only has negative impact on the interests of juveniles but also wastes time and the State’s budget. Another situation is where an investigatory body and procuracy rely only on the statement of the arrested person to determine that he or she is an adult when other credible documents indicate this person is a juvenile. Because of a negligent failure to establish the age of the

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88 Long, above n 62.
90 Article 37(b) of the CRC. This rule was also stipulated in the Beijing Rules (art 13), Rules for the Protection of Juveniles Deprived of their Liberty (art 17).
91 The Ninh Hai District People’s Court sentenced Nguyen Ngoc Duy (a fifteen-year-old boy) to 8 months of imprisonment for committing the “Stealing Property” offence. After that, Ninh Thuan Provincial People’s Court determined that Nguyen could not incur criminal responsibility because the minimum age of criminal responsibility for this offence was 16 years. In this case Nguyen was temporarily detained for 3 months and 9 days: see the Supreme People’s Procuracy, No. 1/KSXXHS of 5 January 2001, Special Subject on the Supervision of Criminal Trials Relating to Cases Where Courts Pronounced that Defendants were not Guilty, 9.
92 For instance, in the case Le Quang Tuan committing “Plundering Property” offence, the offender testified that his date of birth was 10 May 1986 whereas in the Birth Certificate and the Secondary Degree his date of
juveniles, investigatory bodies and procuracies fail to apply special provisions governing the custody and temporary detention of juveniles as stipulated in art 303 of the Criminal Procedure Code 2003.

Additionally, when conducting an arrest, or placing a person in custody and temporary detention, investigatory bodies often do not fulfil the obligation to ensure important rights of juveniles. Not many arrestees and detainees are aware that they have the right to: be informed of the offences which they have been accused of; present documents, objects and claims; be informed of their rights and obligations and their right to remain silent. This serious procedural violation may lead to the infringement of other guarantees such as the right of defence, the right to the presence of a parent or guardian and the right to the equality before courts and to a fair trial. However, the Criminal Procedure Code 2003 does not provide legal consequences for this type of violation and therefore it may continue to occur in practice.

Overloaded custody and detention centers still exist in many regions. In a number of cases, juveniles are temporarily detained in the same place as adults. Moreover, there is often no separation between persons taken into custody and those who are temporarily detained. This practice is clearly incompatible with a basic principle adopted by the UN framework that “every child deprived of liberty shall be separated from adults unless it is considered in

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93 Phuong, ‘Discussion on the Definition and Basis’, above n 41, 5.
95 Ibid.

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the child’s best interest not to do so’. 96 The management of custody and detention in some areas is undisciplined, leading to the escape or commission of new offences of persons in custody or temporarily detained. 97

As regards the time limits for custody and temporary detention, some regions are slow in making decisions to extend the temporary detention time limits or to release temporarily detained persons where the time limits have expired. 98 In the pre-trial stage, although art 177 of the Criminal Procedure Code 2003 stipulates that the time limit for temporary detention shall not exceed those for the trial preparation specified in art 176 of the Code, many courts, after rendering temporary detention orders and where the time limits in these orders are overdue, still do not bring the case to trial. 99 This form of violation occurs in both first-instance and appellate courts. 100 In some other circumstances, although the time limits set out in the temporary detention orders of the procuracies or those approved by them have expired, first-instance courts continue to detain accused persons without issuing the new orders. 101 Again, Viet Nam does not observe a recommendation of the Committee on the Rights of the Child that ‘a child can be released from pretrial detention as soon as possible, and if necessary under certain conditions’. 102

c. Reasons

There are a number of reasons for the above-noted limitations. First, some prosecutors do

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96 The ICCPR (art 10(2)(b)), the CRC (art 37(c)), the Beijing Rules (art 13.4), Rules for the Protection of Juveniles Deprived of their Liberty (art 29) and General Comment No. 10 (para 85) of the Committee on the Rights of the Child.
98 H. Dung, above n 94. According to the Supreme People’s Procuracy, until 31 May 2004 there were 295 persons still temporarily detained when the temporary detention orders were expired but the procedure-conducting bodies did not render orders extending the time limits of temporary detention or decisions to release them.
99 The Supreme People’s Procuracy, No. 02/KSXXHS of 23 January 2003, Special Subject on Violations of the Penal Code and Criminal Procedure Code Happening in the Adjudication of Courts at All Levels, 17-8.
100 Ibid 17. For example, a district court rendered a temporary detention order in which the time limit was longer than that prescribed by the law: see the Supreme People’s Procuracy, No. 686/KSXXHS of 11 April 1999, Special Subject on Violations at Criminal Trials, 6.
101 The Supreme People’s Procuracy, above n 100, 6.
102 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 81.
not take seriously their responsibility in supervising judicial activities\(^\text{103}\) (including the application of arrest, custody and temporary detention). This may derive from the relatively low status and salaries for such persons. The professional ability of many judges, prosecutors and investigators is limited. Consequently, investigators’ proposals for applying for arrest, custody and temporary detention are sometimes incorrect.\(^\text{104}\) Procedural documents, including the minutes of arrest, custody and temporary detention, made by investigators often have mistakes.\(^\text{105}\) Some prosecutors are confused when applying the law and executing their tasks.\(^\text{106}\) Second, some managers of procuracies and courts do not closely supervise their officials’ operation or their administration and education. Third, many custody houses and temporary detention camps do not have sufficient facilities to satisfy the requirements prescribed by law.\(^\text{107}\)

5. Right to Equality before Courts and Tribunals and to a Fair Trial

a. Major Strengths

With the enactment of Resolution No. 08/NQ-TW and Resolution No. 49/NQ-TW, argumentation procedure in criminal trials is given more consideration than before. There has been an improvement in the ‘argumentation culture’. Prosecutors and lawyers use ‘proper language’, expressing respect for each other and focusing on the discovery of the objective truth of cases.\(^\text{108}\) Prosecutors not only protect their allegations but also raise arguable issues contained in the indictment and accept reasonable positions adopted by defence counsels.\(^\text{109}\) Courts judgments are partly based on the result of the argumentation between prosecutors and defence counsels.

In comparison with previous times, judges now deal with children and young offenders more appropriately.\(^\text{110}\) Essentially, they try to help juvenile offenders. In some circumstances, judges now provide some guidance to assist juvenile defendants to present their case in the

\(^{104}\) The Supreme People’s Procuracy, Report on the Outcome of Cooperation, above n 29, 14.
\(^{105}\) Ibid.
\(^{106}\) Ibid.
\(^{107}\) The Supreme People’s Procuracy, Summary Report on the Operation of the People’s Procuracies, above n 97, 11.
\(^{108}\) Hoai, above n 2, 4.
\(^{109}\) Ibid.
most advantageous way. This is reflected in some court sessions where some judges ask simple questions and explain details to children and young offenders.

b. Major Weaknesses

The major shortcomings in ensuring the right to equality before courts and tribunals and the fair trial of children and young offenders in Viet Nam are reflected in four main issues.

First, there is an inequality between the prosecution and the defence. The attendance of defence counsel and other legal representatives contributes to the assurance of the rights and legitimate interests of juvenile defendants as well as a fair trial. However, in many cases procedure-conducting bodies do not appoint defence counsel for juveniles who are unable to hire lawyers, or these bodies do not allow representatives of the families, teachers, representatives of schools or the Ho Chi Minh Communist Youth Union to participate in trials.

Additionally, there is bias between prosecutors and defence counsel when exercising their rights at trials. Trial panels often favour the requests and opinions of prosecutors. By contrast, the requests and opinions of defence counsel are frequently not considered appropriately. The role of defence counsel at trials has been ‘overshadowed’. In Viet Nam, provisions relating to persons participating in, and procedures of, the inquiry and argumentation at trials are fairly reasonable. Nonetheless, there is a lack of appropriate mechanisms to ensure these provisions are observed in reality. Under art 207(2) of the Criminal Procedure Code 2003, in the inquiry at trial, the professional judge is the first

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111 Ibid.
112 Many courts do not request the bar associations to appoint defence counsels for juvenile defendants including the courts of Ninh Thuan, Ha Noi City, Ha Nam, Bac Lieu, etc. In the case of a juvenile defendant, Hoang Khoi Cham committing “Illegally Transporting Narcotics” offence in Quang Ninh, the courts did not invite a representative of the family to participate in the first-instance and appellate trials: see the Supreme People’s Procuracy, above n 100, 8. These violations continue happening in subsequent years such as in the case of Pham Van Binh and accomplices committing the two offences: “Causing Public Disorder” and “Destroying Property”. Five of seven defendants were juveniles but at the first-instance trial conducted on 18 September 2002 by the District Court of Ham Thuan Nam, there were no defence counsel or representatives of families. The trial panel did not have a lay judge who is a teacher or a cadre of Ho Chi Minh Communist Youth Union. In the case of a juvenile defendant, Doan Van Thuong committing “Intentionally Inflicting Injury” offence, in the first-instance trial conducted on 27 November 2002, the District Court of Hoai An did not invite a lawyer or guardian to protect the interests of the defendant. In the case of juvenile defendant, Nguyen Khac Dat committing “Stealing Property” offence, the trial panel of the District Court of Quang Xuong did not have a lay judge who is a teacher or Ho Chi Minh Communist Youth Union cadre: see the Supreme People’s Procuracy, No. 02/KSXXHS of 23 January 2003, Special Subject on Violations at Criminal Trials, 25.
person who questions the defendant. Subsequently, lay judges and prosecutor(s) are entitled to question the defendant. Only after these persons complete their inquiry can defence counsel question the defendant. When judges and prosecutors conduct the inquiry, the presiding judge often does not restrict the time available to them. By contrast, when defence counsel ask questions, they are frequently limited in time by the presiding judge. Similar limits may occur when defence counsel present their written defence. In several cases, trial panels provided an opportunity for defence counsel to present their opinions but then declared ‘these opinions are unacceptable’ without giving any reasons. According to the results of a survey conducted in 2006, (after Resolution No. 08/NQ-TW was enacted), this shortcoming has occasionally occurred. Moreover, when defence counsel raise issues which need to be argued with prosecutors, in many cases prosecutors do not present their arguments and the presiding judge does not require prosecutors to respond to defence counsel. In particular, instead of presenting arguments going to the essence of the matter, some prosecutors favour technical arguments and criticise the ‘wording’ used by defence counsels or present positions on the personality of lawyers.

Second, judicial independence is not ensured. Although art 16 of the Criminal Procedure Code 2003 empowers professional and lay judges to conduct trials independently and requires them to abide by law, in reality their adjudication is influenced by many factors. Judges often focus on the accusation of defendants and depend on accusatory evidence collected by the investigatory bodies and procuracies. Judgments are frequently not truly based on the result of public argumentation at trials. In many cases, courts’ judgments seem to be determined prior to conducting trials. In theory, once a judge is assigned to be in charge of a case they are entitled to make their own evaluation of the criminal responsibility of the defendant and decide on appropriate penalty. Nonetheless, in reality judges usually

114 Khanh, above n 113, 4.
115 This survey was conducted by Nguyen Ngoc Khanh supporting for his PhD thesis - “The Roles of Defence Lawyers in Viet Nam”.
116 According to art 218 of the Criminal Procedure Code 2003, the presiding judge is empowered to request prosecutors to respond to opinions related to the cases, which are presented by defence counsels but have not yet been touched upon by prosecutors in their arguments. However, in reality, the presiding judge may or may not exercise this right.
117 Hoai, above n 2, 6.
‘report’

to the President of the court and ask for his/her opinion before rendering judgments. In complicated cases, lower courts often ask for the opinion of a superior court in order to avoid the cancellation of the first-instance judgments on appeal. This may prevent judges of the lower courts from being evaluated as not having adequate ability to conduct adjudication.

Additionally, corruption still exists, thereby impeding the fairness and judiciousness of judgments. As in China, the common sources of judicial corruption in Viet Nam are the parties, their lawyers, and hired consultants and experts with an interest in the case. On the other hand, lay judges are not independent. In practice lay judges do not have dominant roles in the decision-making process of trial panels. Despite having the same rights as professional judges, lay judges are likely to follow professional judges’ positions, particularly in criminal cases. They are not independent in evaluating evidence and making decisions. In other words, lay judges do not accomplish the role of community representatives in the adjudication. Their participation is only formalistic.

In addition to the above factors, the independence of the courts in Viet Nam is influenced by administrative bodies (including the People’s Committees) and Party organs (namely, the People’s Councils). Salazar-Volkman notes that the role of judge in Viet Nam ‘is to

118 In the reality of adjudication, the term ‘case report’ includes many acts such as deciding, instructing and discussing cases. This term indicates that prior to a public trial, the judge received instructions for dealing with the case. These instructions can be ones of the superior courts to the lower courts, of the Judges Committee or the court leaders (including the President and Vice-President) to the presiding judge.

119 In some circumstances where judges do not follow instruction of the President of the court and have mistakes in ‘reporting cases’, they are imposed a disciplinary measure. For instance, the President of the Provincial Court of Khanh Hoa rendered a decision to criticize a judge for violating the instruction of the leader and lacking of reporting the six cases in the last six months of 2010: see Thanh Tung, ‘Khong Bao An, Tham Phan Bi “Tram”’ [One Judge is “Killed” because of not Reporting a Case] Online Legal Journal of Ho Chi Minh City (12 July 2011) <http://phapluattp.vn/20110711114617691p0c1063/khong-bao-an-tham-phan-bi-tram.htm>.


122 Under art 119 of the Constitution 1992, the People’s Councils are ‘the State authorities in respective localities, the representative bodies of the people’s will, aspirations and rights as masters in their localities; they are elected by the local population, and are responsible to the latter and to the higher State authorities’.
interpret the laws in view of party decisions, party policy and government policies. The judge is not a neutral *primus interparis* between rights-holder and duty-bearers, but rather part of the State/party apparatus.\textsuperscript{123} These bodies may intervene in adjudication through various mechanisms including operative expenditure, ideology, policy and personnel matters. They are sometimes involved directly in deciding the outcome of particular cases, especially politically-sensitive cases. In this regard, Viet Nam does not observe the UN *Basic Principles on the Independence of the Judiciary*,\textsuperscript{124} particularly principle 2:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

The Chairman or a Vice-Chairman of the provincial-level People’s Council takes a significant role in the procedure of appointing, removing from office and dismissing professional judges of the people’s courts at provincial and district levels. In order to become a professional judge in Viet Nam, beside other criteria, a person must be a Communist Party member (although art 5 of the *Ordinance on Professional and Lay Judges of the People’s Courts 2002* does not include this requirement).\textsuperscript{125} Similar to professional judges, lay judges of local courts shall be elected by the People’s Councils of the same level at the recommendations of the Fatherland Front Committees of the same level, and shall be relieved from position or dismissed by the People’s Councils of the same level at the proposals of the chief judges of the same-level people’s courts after reaching agreement with the Viet Nam Fatherland Front Committees of the same level.\textsuperscript{126} These procedures illustrate that principle 10 of the UN *Basic Principles on the Independence of the Judiciary* is not complied with in Viet Nam:

> Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, … (emphasis added).


\textsuperscript{124} These principles were adopted by the Seventh United Nations Congress on the *Prevention of Crime and the Treatment of Offenders* held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

\textsuperscript{125} This implicit requirement aims to help the Vietnamese Communist Party to control the operation of judges. Being a member of the Communist Party, a judge must observe its directions and regulations.

\textsuperscript{126} *Ordinance No. 02/2002/PL-UBTVQH11 of the National Assembly’s Standing Committee of 4 October 2002 on Judges and Jurors of the People’s Courts*, art 38(1).
The third problematic issue relates to the organization of the courtroom and the special rights of juvenile defendants at trial. The organization of the courtroom used for conducting the trials of juvenile offenders is identical to that of their adult counterparts. During the trial, juvenile defendants must stand to answer all questions made by trial panels, prosecutors and other participants. They do not have a raised dock near their defence counsel and representatives of the families. Prior to trial, they are not entitled to visit the court and be introduced to its procedures. Shortened hearing times with hourly breaks (as well as extra breaks if required) are not available when trying juvenile defendants in Viet Nam. Moreover, because many cases must be tried each day, juvenile defendants are not separated from their adult counterparts while waiting for their trial to commence. In the trials of juvenile defendants, judges wear the same suit as when they conduct trials of adult defendants. According to a survey recently conducted by the Supreme People’s Court, these are factors making juvenile defendants stressful and frightened.127

The fourth matter concerns the operation of professional and lay judges. The majority of judges in Viet Nam are only trained in legal matters and do not have particular knowledge relating to the psychology and education of juveniles, as well as juvenile crime prevention128 (as required by art 302(1) of the Criminal Procedure Code 2003). Some presiding judges are unconcerned about violations of the rights of juveniles that occur in the investigation and prosecution stages.129 In practice, the President of the court is mainly concerned with administrative matters such as whether the case is complex and whether experienced judges are necessary.130 Consequently, some judges are less experienced in dealing with young people and have a less sympathetic attitude when questioning children and young offenders.131 The solemn environment of court rooms and very formal attitude of judges may negatively impact on the ability of juvenile defendants to give their statements.

The Criminal Procedure Code 2003 stipulates that the trial panel of a case involving a juvenile defendant ‘must include a lay judge being a teacher or a Ho Chi Minh Communist

127 Adjudication Science Institute of the Supreme People’s Court, above n 68, 43.
128 Canh, above n 67, 5.
129 The Supreme People’s Procuracy, above n 29, 15.
130 Canh, above n 67, 5.
Youth Union cadre’. A question arose as to whether lay judges who used to be teachers can participate in the trials of juvenile defendants. The Court of Ho Chi Minh city accepts these lay judges by accepting that they can understand the psychology of children and young people. However, this is only an instruction by a provincial court and cannot be applied to courts in other provinces.

In practice, the majority of lay judges work in various branches and departments of the People’s Committees. However, the number of lay judges who are teachers or Ho Chi Minh Communist Youth Union cadres is insufficient for the number of trials that occur. Thus, some trials of juvenile defendants breach the requirement on the composition of a trial panel set out in art 307(1) of the Criminal Procedure Code 2003. Courts have been faced with difficulties in ‘inviting’ lay judges to participate in trials. Indeed, courts only ‘invite’ certain lay judges who have advantageous conditions to frequently participate in trials. For these reasons, the trials of juvenile defendants in some cases have involved serious procedural infringements which, when considered by superior courts, have resulted in the canceling of judgments and requests to lower courts to conduct retrials from the first-instance stage.

Additionally, which lay judge is invited to participate in a trial panel, and the time available for them to prepare for a case, depends on the court clerk. Canh observes that in September of every year, a period when courts often have to hear a large number of cases, court clerks usually call lay judges to conduct trials urgently without providing sufficient time for them to examine case files. Where many trial panels are needed in one day, court clerks on their own initiative ‘interchange’ lay judges in order to fulfil the requirement of art 307(1) of the Criminal Procedure Code 2003 regarding the composition of the first-instance trial panel in juvenile cases. This explains the fact that some decisions to bring cases for trial do not specify the name of the lay judge. In reality, presiding judges only include these names when lay judges have been officially invited to participate. This shows that court officials do not

133 Thai, above n 46, 5.
134 Phuong, ‘The Practice of Investigation’, above n 18, 5. See also Thai, above n 46, 5.
135 This violation occurred in the courts of Dac Lac, Bac Lieu, Dong Thap, Phu Yen and Vinh Phuc. See the Supreme People’s Procuracy, Special Subject on Violations at Criminal Trials, above n 100, 9.
136 Canh, above n 67, 5.
137 Ibid.
138 The Supreme People’s Procuracy, Report on the Outcome of Cooperation, above n 29, 15.
comply with their obligations and do not observe the essential rights of children and young offenders.

In some cases, there is no lay judge who is a teacher or Ho Chi Minh Communist Youth Union cadre participating in the first-instance trial panel. Nonetheless, in order to hide this fact from the superior courts and procuracies, first-instance courts sometimes implicitly write in the judgment that a lay judge participated who was a teacher or Ho Chi Minh Communist Youth Union cadre. This practice occurs because the superior courts and procuracies rely solely on court judgments and decisions when considering whether the composition of the first-instance trial panel complies with obligations under the *Criminal Procedure Code 2003*.139

Furthermore, many lay judges do not adequately fulfil their functions and do not perform their required tasks. Some of them do not consider the issue of whether or not the defendant is a juvenile.140 They also may not sufficiently examine case files in the pre-trial stage. Thus, at trial lay judges tend to be relatively passive. Professional judges ask the majority of questions of defendants. Lay judges often ask just a few questions or remain totally silent during the trial. Their questions are sometimes unnecessary and meaningless.141 Lay judges are often dependent on professional judges’ decisions regarding the penalties applicable to convicted juveniles. Consequently, lay judges tend to have a limited role in protecting the legitimate interests of juvenile defendants or assisting them in recognizing and repairing their wrongful behaviours.

c. Reasons

The inequality between defence counsel and prosecutor at trial is caused by the model of criminal procedure used in Viet Nam. Under the inquisitorial criminal justice system, the functions of judges and prosecutors overlap. Article 10 of the *Criminal Procedure Code 2003* imposes the responsibility to prove offences on procedure-conducting bodies (including investigatory bodies, procuracies and courts). Hence, at trial the judge is not only

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139 Canh, above n 67, 6.
140 Ibid 4.
an ‘umpire’ but also – like the prosecutor – has a responsibility to prove the guilt of defendant. Criminal procedure law vests judges with the power to participate in the examining of defendants. In theory prosecutors have the task of establishing the guilt of the accused; in reality judges are the main actors asking questions of defendants at trial. Although judges are required to determine the facts of cases in an objective manner, both judges and prosecutors often focus on accusatory evidence. To a certain extent, judges cooperate with prosecutors and investigators to prove charges against a defendant. Thus, defendants and their counsel are placed in a disadvantageous position at trial. Nguyen, the Deputy Chairman of Bac Giang Bar Association, depicts the difficulties faced by lawyers when conducting the defence as follows:

Where a house has been already built (even plastered and painted) by the accusatory bodies, it is extremely hard for defence counsel to alter the structure. We must examine every procedural activity of the accusatory bodies to detect the negligence, intentional faults and mistakes thereby we may effectively defend our clients.

The practice of the ‘case report’ derives from two main reasons. First, a number of judges do not have sufficient professional ability and experience to render their own decisions in some cases. Hence, they lack confidence, are timid and must request instructions from the courts’ leaders. Second, many court managers are used to receiving reports from judges. They want to use administrative orders to monitor judges’ works. Que, a former President of the Criminal Court in the Supreme People’s Court, asserts that where court managers still think of ‘professional subsidization’ and do not want to see unjust or wrongful judgments, the ‘case report’ phenomenon is hard to eliminate.

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143 Nguyen Van Tu cited in Minh and Tu, above n 142.


145 Truong Xuan Tam cited in Tung, above n 119.

146 In Viet Nam, the term ‘achievement disease’ is frequently used to refer to the above thinking. In this context, it means leaders only focus on the achievements of their court without paying attention to the legality of the ways utilised to obtain these achievements. Consequently, the courts’ leaders are likely to intervene in the adjudication of judges.

147 Que, above n 144.
The reasons for the limits on lay judges’ operation derive from the reality that most of these persons concurrently hold an office in State bodies. They are busy with their other activities and do not have sufficient time to attend to the adjudication of the courts. Further, they do not have the required legal knowledge and skills to conduct trials. They are unable to apply the law in order to protect the best interests of juvenile offenders. Article 5(2) of the Ordinance on Professional and Lay Judges of the People’s Courts 2002 stipulates that:

Vietnamese citizens, who are loyal to the Fatherland and the Constitution of the Socialist Republic of Viet Nam, have good moral qualities, are incorrupt and honest, have legal knowledge, have the spirit to resolutely protect the socialist legal system, resolutely protect the interests of the State, the legitimate rights and interests of citizens, have good health to ensure the fulfilment of their assigned tasks, can be elected or appointed to be lay judges.

It is difficult to identify and examine these requirements. Although one of the aims of lay judges’ involvement is to bring a degree of common sense to the judicial process, their lack of legal knowledge makes them lose confidence when undertaking their duty, particularly in complex cases involving economic offences. Other reasons may include the low payment of the lay judge service and the lack of enthusiasm and awareness of some lay judges.

C. Observations

The protection of juvenile offenders’ rights discussed in the previous section has shown different strengths and weaknesses. As regards the right of defence, procedures for granting the ‘Certificate of Defence Counsel’ are simple and conducted within prescribed time limits. Some procedure-conducting bodies facilitate defence counsel communicating with accused persons and examining and photocopying case files. The number of lawyers has increased and their qualifications have improved. By contrast, the majority of investigatory bodies and procuracies remain passive in appointing defence counsel for children and young offenders. Investigators and prosecutors occasionally even convince juvenile offenders and their legal representatives to refuse defence counsel. In many circumstances, it is only in the adjudicative stage that, courts appoint defence counsel for accused juveniles. Consequently, the ‘quality’ of the defence in juvenile cases is frequently perfunctory and ineffective.

As to the right to the presence of a parent or guardian, procedure-conducting bodies have invited juveniles’ representatives (families, schools or other organizations) to participate in criminal processes and facilitated their exercise of important rights recognized by law. Nonetheless, in many circumstances they are only invited when the investigations are nearly
completed. Parents and guardians are sometimes prevented from communicating with children in custody in police stations. Others are forced to sign minutes of interrogation although they were not present for those interrogations. Their participation is formalistic and passively dependent on courts’ decisions. In many trials, they do not attend, particularly in cases involving homeless juvenile defendants.

In connection with the right to be fully respected of privacy, the number of trials conducted behind closed doors is increasing. Many roving trials have been conducting by courts at different levels. However, roving trials of juvenile defendants are being reconsidered. An increasing number of journalists are aware of this procedural safeguard. However, in reality, information leading to the identification of children and young offenders is published by the media. They sometimes hastily impute the blame on offenders before a judgment is rendered. Journalists sometimes use ‘pejorative’ names to refer to juvenile offenders. The majority of juveniles’ trials are conducted in public with the attendance of people and the media’s staff.

In recent years, the right not to be subject to arbitrary arrest or detention has been given more attention. After arrest, taking into custody and temporary detaining children and young persons, public authorities notify their families or lawful representatives. In some situations, procedure-conducting bodies refer juveniles to their parents or guardians instead of using custodial measures. However, in many cases custody and temporary detention is unnecessary and unlawful. Some procedure-conducting bodies also do not ensure important rights of those arrested and detained, for instance, the right to be informed of the offences which they have been accused of, to present documents, objects and claims. In many temporary detention camps, there is no separation of juveniles and adults. Some regions are slow in extending temporary detention time limits or releasing persons temporarily detained where the relevant time limits has expired.

In the process of improving the right to equality before the court and a fair trial, defence counsel in Viet Nam have been supported in arguing with prosecutors and other participants at trials. Courts’ judgments are partly based upon outcomes of argument between prosecutors and defence counsel. Judges deal with children and young offenders with sympathetic attitudes. Nonetheless, in practice the safeguard of this procedural right has
many disadvantages including the inequality between the prosecution and defence, the violation of judicial independence and the identical organization of courtrooms in juvenile and adult cases. Additionally, juvenile defendants at trial are not given distinctive rights compatible with their age. Professional and lay judges do not have adequate knowledge regarding the psychology of children and young people and the prevention of juvenile crime.

III. Conclusions
The preceding description and analysis reveals that the protection of some important rights of children and young offenders is problematic. In comparison with earlier times, the professional skills and legal knowledge of procedure-conducting persons have improved. They are more aware of the importance of ensuring the rights of juveniles in criminal proceedings. Accordingly, a number of public officials facilitate children and young persons and the representatives of their families and schools, teachers etc. to exercise their rights under criminal procedure law. On the other hand, legal researchers and lawyers have outlined many shortcomings of the legislative framework. Some solutions and opinions compatible with requirements and standards set out in international human right law have been suggested. Importantly, these critics show that the model of criminal procedure currently applied in Viet Nam is the main source of limitations in the protection of the rights of offenders in general and juvenile offenders in particular.

The guarantee of some critical rights of juvenile offenders in Viet Nam is also problematic. Limitations exist in different forms: for instance, public officials do not notify and explain to children and young people their rights in criminal proceedings; they intentionally create barriers for juveniles and their defence counsel, representatives of families, schools, teachers etc. in exercising the rights recognized by the criminal procedure law; they exploit the lack of legal knowledge, making participation formalistic and meaningless. Notably, some procedure-conducting persons and leaders of procedure-conducting bodies have incorrect approaches in dealing with children and young offenders.148 These factors create a considerable distance between the actual protection of the rights of juveniles in conflict with the criminal law in Viet Nam and the minimum guarantees and standards set out in the UN

148 Vo Van Them (a senior prosecutor of the Supreme People’s Procuracy supervising appellate trials in Ho Chi Minh city) and Nguyen Thi Hong (a former Vice-President of Phuoc Long District Court) support for “roving trials” even in cases of juvenile defendants: see Tung and Thuong, above n 62.
benchmark framework of juvenile justice. Protection of juvenile offenders has only been given consideration in recent years although Viet Nam is the first Asian country signing the CRC. Many appropriate approaches on juvenile justice including diversion, restorative justice are not adopted in Viet Nam. Generally, there is a little difference between the practical assurance of the rights of juvenile and adult offenders, particularly the right to privacy and the right to equality before courts and a fair trial.

As previously mentioned, the main reason for the above weaknesses derives from limitations in the Vietnamese mixed criminal procedure model. This model focuses on controlling crime rather than ensuring the human rights of offenders in the criminal justice process. Under this model, public authorities are obliged to prove offences and thus they tend to gather evidence supporting the accusations against offenders. The defence ‘party’ is placed in a disadvantageous position compared with the prosecution ‘party’. Defence counsel are unable to have fair and equal argument with prosecutors. Consequently, unless the criminal procedure model currently implemented in Viet Nam is modified, the exercise of essential rights of children and young offenders will continue to face many obstacles.

There are other reasons. First, gaps in the legislative framework impede the actual safeguarding of the rights of juveniles. Second, public officials (including procedure-conducting persons) do not have specialized knowledge of children and young people, lack relevant legal knowledge and are not sufficiently responsible. The salaries of judges have not kept pace with modern life. Sometimes, leaders of procedure-conducting bodies do not closely supervise their officials’ operation and fail to give timely and appropriate instructions. Third, defence counsel and, representatives of families, schools, organizations and teachers are not sufficiently aware of their roles and responsibilities when assisting children and young offenders in criminal proceedings. Consequently, their participation is often perfunctory and ineffective. Fourth, Vietnamese legislators and law enforcement authorities at national and local levels appear not to have a comprehensive understanding on the UN standards for juvenile justice.
Part Three

PROTECTION OF THE RIGHTS
OF JUVENILE OFFENDERS IN VICTORIA
Chapter 6
THE LEGISLATIVE FRAMEWORK GOVERNING THE RIGHTS OF
JUVENILE OFFENDERS IN VICTORIA

I. Introduction
Chapter 6 is divided into three main sections in order to create a basis for a comparison of Vietnamese and Victorian legislative frameworks in Chapter 8. The first section of this chapter provides a historical overview of the development of the Victorian juvenile justice system since the 19th century. Section two describes the processing of criminal cases involving juvenile offenders in Victorian criminal procedure law. The third section analyses and evaluates specific provisions in the Victorian regulatory framework designed to protect the rights of children and young offenders.

II. Protection of Juvenile Offenders’ Rights: A Historical Overview

A. Introduction
To understand the characteristics of the contemporary legislative framework for juvenile offenders in Victoria, it is important to consider the historical background of this juvenile justice system. This raises various questions. What were the traditional approaches for dealing with juvenile offenders? Have those approaches changed? Were there any particular provisions adopted to protect the rights of juvenile offenders in the criminal justice process? What is the model of juvenile justice currently operating in Victoria? This section considers these questions in detail. Here, the development of the Victorian juvenile justice system is divided into three major periods including the nineteenth and twentieth centuries, and the first ten years of the 21st century.

B. Nineteenth Century Developments
In the early nineteenth century, ‘juvenile offenders’ did not exist as a separate legal category.1 There was no distinctive criminal justice system for juvenile offenders. Both juvenile and adult offenders were tried in the same courts with similar procedures. The same penalties applied to juvenile and adult offenders. The common objective of punishment was deterrence, though youth was considered to be a mitigating element in deciding

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A desire for special treatment of juvenile offenders appeared in England in the first half of the nineteenth century. In Australia, and particularly in Victoria, significant changes occurred somewhat later, during the middle and the last decades of the nineteenth century. These changes led to the establishment of a separate juvenile justice system. Most developments related to the penal regime applicable to juvenile offenders. This is illustrated by the fact that courts occasionally applied ‘flexible and composite measures’ to deal with juvenile offenders rather than harsh penalties. These measures included discharging young persons convicted for the first time of an offence; using conditional discharge by placing children under the care of a specified person or welfare institution; using pardons and ‘boarding-out’. Furthermore, efforts were made to separate juveniles from adult prisoners to prevent ‘contamination’. According to Seymour, these policies reflected the idea that when dealing with juvenile offenders, some concessions should be made.

In the middle of the nineteenth century, the State of New South Wales (NSW) introduced legislation that made significant changes to methods dealing with juvenile offenders. These Acts applied to people under 19 years and allowed the Supreme Court to place these young offenders under the care and custody of any person applying to take charge of them. The legislation also attempted to reduce delays at trials involving juvenile offenders by stipulating a summary trial (the aim was to avoid long periods of remand in custody, thereby preventing adverse consequences

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2 Cunneen and White, above n 1.
4 This term was used by John Seymour in Dealing with Young Offenders (Law Book, 1988) 61.
5 According to Seymour, boarding-out was an arrangement by which children were placed in foster homes and the government contributed to their upkeep. Despite being applied mainly to young, neglected children, boarding-out was also imposed on some juvenile offenders: see Seymour, above n 3, 61-2.
6 Seymour, above n 3, 9.
7 Ibid 10.
8 The legislation included an Act to Provide for the Care and Education of Infants Who May be Convicted of Felony or Misdemeanor 1849 (13 Vict. No. 21) and an Act for the More Speedy Trial and Punishment of Juvenile Offenders 1850 (14 Vict. No. 2). At this time Victoria was a part of NSW. Thus, NSW statutes had legal effect in Victoria. Seymour observed that these Acts remained part of Victorian law when the colony separated from NSW. However, the 1849 Act was substantially re-enacted while the 1850 Act was amended: see Seymour, above n 3, 26-8.
9 Seymour, above n 3, 25.
from contacts with adult prisoners).\textsuperscript{10} It provided special procedures, different and lesser penalties for juvenile offenders in comparison with their adult counterparts.\textsuperscript{11}

These legislative reforms constituted a minor procedural change rather than a step towards the establishment of a separate juvenile criminal justice system.\textsuperscript{12} However, they became the foundation of the establishment of Children’s Courts in Australia in later periods, embodying the notion that simple, speedy court procedures were appropriate for juvenile offenders.\textsuperscript{13}

In 1851, the new Colony of Victoria was separated from NSW. Subsequent Victorian statutes dealing with neglected children and juvenile offenders were numerous.\textsuperscript{14} These statutes mainly dealt with two categories of children: neglected and convicted children. They provided definitions, correctional measures, and special procedures applicable to these children and established reformatory and industrial schools. Reformatory schools were established for juvenile offenders while industrial schools were for poor children.\textsuperscript{15} The former could be seen as a significant development in the creation of a separate and distinctive justice system for juvenile offenders. These institutions\textsuperscript{16} evolved from charitable schools, including asylums and orphanages. Reformatory and industrial schools dealt with two different groups: dangerous youths and youths in danger. However, in reality, there was an overlap in the treatment of these groups. After several amendments,\textsuperscript{17} there was a blurring between the definitions of neglected and convicted children, as well as the institutions in which these children were held. A neglected child could be transferred to a reformatory school while a convicted child could be sent to an industrial school. This development

\textsuperscript{10} Seymour, above n 3, 27.
\textsuperscript{11} Cunneen and White, above n 1, 8.
\textsuperscript{12} Seymour, above n 3, 27.
\textsuperscript{13} Ibid.
\textsuperscript{14} These statutes included the \textit{Neglected and Criminal Children’s Act 1864}; \textit{Neglected and Criminal Children’s Amendment Act 1874}; \textit{Neglected and Criminal Children’s Amendment Act 1878}; \textit{An Act for the Further Amendment of the Law Relating to Neglected and Criminal Children 1881}; \textit{Juvenile Offenders Act 1887}; \textit{Neglected Children’s Act 1887}; \textit{Crime Act 1890 (Part II, Division 2)}; \textit{Neglected Children’s Act 1890}.
\textsuperscript{15} Mary Carpenter, \textit{Reformatory Schools for the Children of Perishing and Dangerous Classes and for Juvenile Offenders} (1851) cited in Cunneen and White, above n 1, 8.
\textsuperscript{16} In Victoria, industrial schools were located in Melbourne, Geelong, Ballarat, and Bendigo. Reformatory schools for boys included the hulks “Deborah”, “Sir Harry Smith”, “Success”, and “Jika Jika” (in the Pentridge Prison’s grounds). For Protestant girls, the government reformatory school initially was close to the Sunbury Industrial School (outside Melbourne) before being transferred to “Jika Jika”. A reformatory school for Catholic girls was established in Abbotsford (in Melbourne) before being moved to Oakleigh: see Seymour, above n 3, 53-4.
\textsuperscript{17} \textit{The Neglected and Criminal Children’s Act 1864} was amended in 1874 and 1878.
reflected changed attitudes towards juvenile offenders. It also marked the emergence of a new model of criminal justice – welfare and treatment focusing on identifying and remedying the needs of juvenile offenders – which replaced the traditional judicial and punishment model.

Consequently, in Victoria there were important innovations paving the way for the establishment of a separate justice system for juvenile offenders. The legislative framework dealing with convicted children was created together with one for neglected children. There were flexible and composite methods and different penalties applicable to some offences committed by juvenile offenders compared to those for adult offenders. Moreover, a system of institutions for juvenile offenders was established, including reformatory and industrial schools. Separate procedures applicable to juvenile offenders for some offences were adopted creating the foundation for the establishment of the Children’s Court in the next century.

However, there were several shortcomings within this period. There was a degree of ambivalence in the regimes for juvenile offenders. To some extent, juvenile offenders were treated as neglected, rather than offending children. Furthermore, in the 19th century, it was rare to discover purely procedural legislation dealing with juvenile offenders. Indeed, procedural provisions were mixed in those statutes governing penal regimes for juvenile offenders.

C. Twentieth Century Developments

1. The First Half of the Twentieth Century

During the last decades of the nineteenth century and the early years of the twentieth century, Children’s Courts were established in several countries including Australia, the USA, the United Kingdom, and Canada. The powers of these courts varied. South Australia was the first State in Australia to establish a Children’s Court in 1890 followed by all other States early in the twentieth century. In Victoria, the Children’s Court was established.

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19 Cunneen and White, above n 1, 13.
established by the *Children’s Court Act 1906*.\(^{20}\)

The main reason for the emergence of Children’s Courts in Australia was to ensure that juvenile offenders were tried separately from adult offenders and not affected by the contamination and stigma produced by police courts.\(^ {21}\) Seymour adds that, from a child-welfare perspective, Children’s Courts might also eliminate procedures by which juvenile offenders were treated as criminals; the ultimate objective was to use lesser punishments for juveniles than adults.\(^ {22}\) In other words, the establishment of Children’s Courts reflected a desire to create a more sympathetic atmosphere for dealing with juvenile offenders. Moreover, Children’s Court functioned as ‘the first great form of diversion’.\(^ {23}\)

In order to achieve these aims, the reformed criminal justice system included:

- Special judges who would display an awareness of children’s problems. In Victoria, s 4 of the *Children’s Court Act 1906* allowed ‘any person’ to be selected as a magistrate of a Children’s Court. However, in practice, special magistrates were appointed in the Melbourne Children’s Court and in the eleven other metropolitan courts.\(^ {24}\)

- Probation officers who could provide information relating to juveniles’ backgrounds, as well as suggest effective measures to remedy their problems.\(^ {25}\) The *Children’s Court Act 1906* stipulated basic issues such as appointment, duties, powers of probation officers and the supervision powers of probation officers on children released conditionally.\(^ {26}\)

- Particular procedures for juvenile offenders.

Special provisions creating procedural safeguards for juvenile offenders were also contained in the *Children’s Court Act 1906*, including: separate premises (ss 6, 11); exclusive

\(^{20}\) In the first half of the 19th century, four *Children’s Court Acts* were passed in 1906, 1915, 1917, and 1928. As well as these Acts, the criminal legislative framework of Victoria in this period also included the *Crimes Act 1915*.

\(^{21}\) Seymour, above n 3, 69. See also Cunneen and White, above n 1, 14.

\(^{22}\) Seymour, above n 3, 70.


\(^{24}\) Seymour, above n 3, 97.

\(^{25}\) Ibid 71-2.

\(^{26}\) *Children’s Court Act 1906*, ss 7-10.
jurisdiction (s 12); exclusion of the public from court (ss 15-16); disposal of child pending or during adjournment of hearing (ss 18(4)-(5)); parent’s attendance in court (s 19); summary trials of children at different ages (ss 26-27); and procedures at inquiries or hearings (s 28).

As previously mentioned, a key reason for the establishment of Children’s Courts was to try juvenile offenders separately from adults. Thus, ss 6, 11 of the Children’s Court Act 1906 provided that Children’s Court sittings could not be held at the same venues and times as other court procedures. These provisions aimed to prevent the ‘haphazard mixing of juvenile and adult cases’. Nonetheless, in Victoria only the Children’s Court in Melbourne had its own premises; other Children’s Courts operated in the same premises as adult courts. The organization of some of these courtrooms was inappropriate for proceedings relating to juveniles because they did not ensure the separation of juvenile and adult offenders (especially when their cases were tried immediately before or after each other).

In order to protect juvenile offenders from publicity and stigma, ss 15-16 of Children’s Court Act 1906 enabled the Children’s Court to exclude any person from the court-room or place of hearing and the precincts thereof if it considered these persons were not directly interested in the case. The Act also provided for monetary and imprisonment penalties to be imposed on persons who did not obey orders of the court. However, the Children’s Court Act 1906 did not have any provisions governing the question of publicity by the media of cases involving juvenile offenders.

As to the disposal of a child pending or during the adjournment of a hearing, s 18(4) of the Children’s Court Act 1906 provided various options, such as taking the child to a ‘depôts’; placing the child with some respectable persons, in a gaol or the lock-up of a police station (separated from other prisoners) or using bail. According to Seymour, the use of special remand facilities represents a distinctive feature of procedures applicable to juvenile offenders. The objective was to shield juvenile offenders from the police court atmosphere

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27 Seymour, above n 3, 296.
28 Ibid.
29 For further information, see Seymour, above n 3, 296.
30 A remand facility situated in Royal Park near Melbourne.
31 Seymour, above n 3, 308.
and the possibility of contamination from periods of remand in police lock-ups and prisons.\textsuperscript{32}

Another procedural safeguard protecting the interests of juvenile offenders was a provision governing the presence of a child’s parent in court. Section 19 of the \textit{Children’s Court Act 1906} prescribed that the parent of a juvenile offender had the right to be present at trial. If the parent did not attend, the Children’s Court, depending on each circumstance, might adjourn the hearing and summon the parent to attend before the Court. Moreover, presence in the Court of the child’s parent was an obligation rather than an invitation. Thus, if the parent was absent without reasonable excuse, he/she could be arrested by a warrant. Through these provisions, it can be seen that the participation of children’s parents was regarded as important in protecting the best interests of juvenile offenders. Parents could assist the Children’s Court in evaluating the child’s background and home circumstances, as well as deciding an appropriate penalty for a juvenile offender. Examining the impact of the parent’s attitude on the result of a case, Seymour concluded:

\begin{quote}
If a parent appears to be hostile, unconcerned or inadequate, this may affect the outcome of a case and, if the offence is sufficiently serious, lead to a probation or supervision order or to removal from home. On the other hand, if a parent appears to be upset by the child’s behaviour, but able and willing to cope with it, a magistrate who is in doubt will be likely to impose a less severe measure.\textsuperscript{33}
\end{quote}

Important provisions reflecting an early legislative attempt to reduce the formality of procedures in Children’s Courts appeared in the \textit{Children’s Court Act 1906}. Section 28 of this Act stipulated:

\begin{quote}
At the inquiry or hearing into any charge or information against a child the court shall be guided by the real justice of the case \textit{without regard to legal forms and solemnities} and shall direct itself by the best evidence it can procure or that is laid before it (emphasis added).
\end{quote}

In conclusion, the first half of the 20\textsuperscript{th} century witnessed significant steps in establishing a separate juvenile justice system in Victoria through the introduction of the Children’s Courts. Despite being modified versions of courts for adult offenders,\textsuperscript{34} the system of Children’s Courts in Victoria reflected a desire to establish a special institution for juvenile offenders. This also indirectly indicated that the welfare model of justice still occupied a dominant position in this period. In addition to Children’s Courts, separate procedures for

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{32} Ibid.
\item \textsuperscript{33} Ibid 307.
\item \textsuperscript{34} John Seymour, ‘Children’s Courts in Australia’ in Allan Borowski and James M. Murray (eds), \textit{Juvenile Delinquency in Australia} (Methuen, 1985) 186, 186.
\end{enumerate}
\end{footnotesize}
dealing with cases involving juvenile law-breakers were also stipulated. Significantly, several procedural rights of juvenile offenders such as the right to the presence of a parent, the right not to be arbitrarily arrested or detained were recognized and protected by the legislative framework.

2. The Second Half of the Twentieth Century

At the end of the first half of the 20th century there were doubts about the welfare model (or child-saving policies) and the Children’s Courts. These doubts became more apparent in the 1960s. There was concern about:

- the effectiveness of rehabilitation policies;
- the protection of young person’s legal rights;
- the potentially damaging impact of formal justice processes;
- coercive penalties for non-criminal matters;
- net-widening;
- indeterminate sentences and administrative discretion;
- and injustice resulting from needs-based sentencing (lack of proportionality and consistency). 35

Consequently, a new approach for dealing with young offenders was developed. It was called ‘diversion’. Wundersitz has defined diversion as ‘the direction of cases away from formal adjudication by a court to non-court procedures or programs’. 36 The aim of this method was to prevent juvenile offenders from being inducted into the formal criminal justice system and reduce the level of state interference in their lives. 37 Moreover, it was anticipated that diversionary procedures might bring other advantages including: simpler and speedier procedures; decreased costs; extra time and resources for courts to deal with more serious offenders; reduced recidivism as well as effective participation of juvenile offenders and their families in the criminal process resulting in more positive response. 38 Wundersitz thought the approach taken in Australia was different from the United States of America (USA). Diversion in the USA was designed to divert juvenile offenders to community-based treatment programs. 39

Despite having the advantages claimed above, diversion was criticized because of certain shortcomings. The first limitation was called ‘net-widening’. 40 The diversionary approach

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35 NSW Law Reform Commission, above n 18, 28.
38 Wundersitz, above n 36, 275.
39 Ibid 272.
40 This term was used in Seymour, above n 3, 261.
may widen the net of social control with the result of bringing into the justice system juveniles who might be exempted by the police because their offences were trivial in nature.\textsuperscript{41} Another concern was that procedures employed by this approach failed to protect legal rights of juvenile offenders.\textsuperscript{42} This might be because a juvenile tends to admit an offence without legal advice in the expectation of being treated by quick and simple procedures in order to avoid court trial and criminal record.\textsuperscript{43}

Although informal procedures represented by forms of the diversionary approach were criticized, Seymour acknowledged the important contribution of these procedures to the development of juvenile justice:

Informal procedures represent an extremely important aspect of the juvenile justice system. Given how little is known about changing and controlling human behaviour, it is undeniable that they provide a cheap, humane and efficient response to the great bulk of juvenile offending.\textsuperscript{44}

Moreover, the use of diversion in juvenile justice was also encouraged by the \textit{Beijing Rules} - an international legal instrument partly adopted to establish procedural safeguards for juvenile offenders.\textsuperscript{45} Article 11 of the \textit{Beijing Rules} provides that ‘consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority’. This was subsequently confirmed by art 40(3) of the \textit{CRC}.\textsuperscript{46}

Commencing in the late 1950s, Victoria and some other States established police cautions and panels as two forms of diversion. In Victoria, the police cautioning scheme was developed in 1959. The legal basis of this scheme was the Victorian police standing orders. This is the principal form of pre-court diversion in Victoria.\textsuperscript{47} The program gave police the discretion to decide whether or not to caution or charge and send a young offender to court. The rationale behind the police cautioning program is to assist juveniles to avoid being dealt

\textsuperscript{41} Wundersitz, above n 36, 278.
\textsuperscript{42} Seymour, above n 3, 270-1.
\textsuperscript{43} Wundersitz, above n 36, 279.
\textsuperscript{44} Seymour, above n 3, 283.
\textsuperscript{45} NSW Law Reform Commission, above n 18, 32.
\textsuperscript{46} See also Committee on the Rights of the Child, \textit{General Comment No. 10 (2007): Children’s Rights in Juvenile Justice}, 44\textsuperscript{th} sess, UN Doc CRC/C/GC/10 (25 April 2007), paras 24-27 (‘\textit{General Comment No. 10}’).
with by the formal criminal justice system, which is often criticized because it may cause adverse consequences to juveniles through criminalization.48

The police cautioning program included informal and formal cautions. According to Seymour the former was ‘administered on-the-spot’ while the latter was ‘a more carefully regulated, official procedure’.49 Police cautions could be used when certain elements were fulfilled. The child must admit the offence and consent to the caution. The seriousness of offences, the age and attitude of the child and the parents’ responses were other important factors in deciding whether a caution could be used.50 The formal caution could be carried out by a senior officer at the local police station with the participation of the child’s parents, guardians or other adult chosen by the child. Depending on circumstances, the child and his or her family could be given gentle advice, a stern warning or asked to sign an undertaking.51 After completing a cautioning process, the child was free to go without further action.

An evaluation by David Challinger suggested that the effectiveness of dealing with particular types of juvenile offenders by using the cautioning program or conventional court procedures was more or less similar.52 However, certain advantages of the police cautioning program cannot be denied. These include immediacy, simplicity, a low level of resource requirement and high level of success (in terms of recidivism rate – only about 15 per cent of cautioned young people came to police attention again).53 Seymour concluded that these programs ‘allow more time and care to be devoted to the process, sometimes children and parents participate, and (in case of panels) social worker expertise is brought to bear’.54

Another form of diversionary approach adopted in Victoria in this period was the Victim-Offender Mediation Program.55 This program was a post warning, pre-court alternative and

49 Seymour, above n 3, 233.
51 Ibid 239-40.
53 Carroll, above n 47.
54 Seymour, above n 3, 278.
55 This program operated in Geelong and Frankston before its termination because the funding was withdrawn from the Dispute Resolution Program: see Carroll, above n 47, 174. See also Evi Kadar, ‘Victim-Offender
was carried out on referral from the police. Participants in the mediation session included victims, offenders, their friends and family members, and mediators. Mediation was carried out by the Dispute Settlement Centre. The main part of the mediation session ‘focuses on a discussion of losses and any agreement reached between parties which may involve some forms of restitution’. If the mediation was not successful, the case was referred back to the police. Police then made a decision on whether or not they needed to conduct any additional measures concerning the juvenile offender. As with other forms of restorative justice, this program aimed to create opportunities for victims to inform the offender of the harm caused by the offence. For offenders, mediation could assist them to recognize their wrongful behaviour and repair the damage in a non-punitive context. Kadar argues that one of the advantages of this program is ‘the raised awareness and interest by criminal justice agencies and the community in looking at crime and its resolution in a new and positive way. It is an alternative approach which may be suitable for a limited number of young people and victims.’ Another significant outcome of the program was a high rate of reported satisfaction for both offenders and victims. Despite its short existence, the Victim-Offender Mediation Program contributed to the development of family conferencing program in Victoria in the last decade of the twentieth century.

During the 1990s, dissatisfaction with the welfare and justice models led to a new approach – restorative justice – for dealing with juvenile offenders in Australia. It is noteworthy that in 1990, Australia ratified the CRC. This event had an impact on the evolution of Australian juvenile justice system. In Victoria, the Law Reform Commission observed that restorative justice programs had been ‘both piecemeal and ad hoc, with individual programs developed in response to various perceived needs within the community’. Restorative justice in Victoria was first developed in 1995 with a Juvenile Justice Group Conferencing Pilot Mediation Program’ in Lynn Atkinson and Sally-Anne Gerull (eds), National Conference on Juvenile Justice (Australian Institute of Criminology, 1993) 425, 425.

56 Carroll, above n 47, 174.
57 Kadar, above n 55, 430.
58 Ibid 431.
59 Ibid 426.
60 Ibid 435.
Program operating from the Melbourne Children’s Court only.\textsuperscript{63} The program was supported by Anglicare (Victoria) and modeled on Family Group Conferencing in New Zealand.\textsuperscript{64} It was a voluntary pre-sentence diversionary procedure applicable to juvenile offenders up to and including 17 years old by the criminal division of the Children’s Court.\textsuperscript{65} Strang states that a distinctive characteristic of the Victorian juvenile justice group conferencing was that it was not designed for minor or petty issues; essentially it was an effort of the Children’s Court to divert juvenile offenders from the risk of entering the justice system.\textsuperscript{66} Griffiths considers the main aims of this program ‘were to avoid net-widening to young people who would not otherwise receive a supervisory order, ensure young people’s rights were respected by the process, and achieve diversion from youth justice supervision’.\textsuperscript{67} Two evaluations of the Victorian Juvenile Justice Group Conferencing Program were undertaken in 1997 and a further evaluation occurred in 1999. Recidivism rates of offenders who had attended group conferences were reported to be slightly slower or comparable than those in the control group (offenders eligible for conferencing but did not participate) and positive feedback was received from conference’s participators including juvenile offenders, victims, their families and related professionals.\textsuperscript{68}

In 1956 – the beginning of this period – there was separate legislation governing the Children’s Court.\textsuperscript{69} However, in the last decades of the twentieth century some legislation

\begin{itemize}
  \item \textsuperscript{63} Heather Strang, ‘Restorative Justice Programs in Australia: A Report to the Criminology Research Council’ (Research School of Social Sciences, Australian National University, 2001) 10.
  \item \textsuperscript{64} Ibid.
  \item \textsuperscript{65} Louise Bassett, \textit{Restorative Justice – Background and Discussion Paper} (Department of Justice, Neighbourhood Justice Centre, 2007).
  \item \textsuperscript{66} Strang, above n 63.
  \item \textsuperscript{67} Mark Griffiths, ‘Strategies to Promote the Social Movement of Restorative Justice in Corrections’ (Paper presented at the Restorative Practices International Inaugural Conference, Twin Waters Towers Resort Sunshine Coast, Queensland, 16-19 October 2007) 2.
\end{itemize}
was consolidated in the *Children and Young Persons Act 1989*, a statute specially designed to govern matters relating to children and young person in general and juvenile offenders in particular. The *Children and Young Persons Act 1989* was the fundamental legal basis of the Victorian juvenile justice system in the second half of the twentieth century. The Act represents the commitment of Victoria to use the least punitive and intrusive measures in dealing with juvenile offenders. Its aims were to improve the best interests, rehabilitation and individual progression of young people as well as their effective communications with family and society. Furthermore, the *Children and Young Persons Act 1989* established certain procedural safeguards for juvenile offenders such as procedural guidelines to be followed by court (s 18); closed court proceedings in particular cases (s 19); legal representation (ss 20-21); custody and bail (pt 4 div 2); procedure for indicable offences triable summarily (pt 4 div 4); the right to appeal (pt 4 div 8). Moreover, the *Crimes Act 1958* also recognized other rights of offenders including the right to have legal aid (s 360A); the right to silence (s 464J); the right to communicate with lawyers and others (s 464C).

In conclusion, the second half of the twentieth century was characterized by the development of informal procedures to deal with juvenile offenders. Police cautioning in Victoria was one of the most significant models in the diversionary approach. Additionally, there was a distinction between policies for dealing with juvenile offenders and those for neglected children. This led to the establishment of a separate legislative framework – the Victorian juvenile justice system. Compared with the first half of the twentieth century, more legislation including criminal and criminal procedure laws was passed in the second half of the same century. There were also amendments to the legal framework during this period. Importantly, the rights of juvenile offenders that had been recognized in previous periods continued to be maintained and strengthened.

*Children and Young Persons (Miscellaneous Amendments) Act 1996; Children and Young Persons (Reciprocal Arrangements) Act 2000.*

70 This was reflected in the purposes of the Act provided in s 1(b).

71 Law Reform Committee, Parliament of Victoria, above n 62.


73 See also *Legal Aid Commission Act 1978.*
D. Twenty-First Century Developments

In this period, Victoria has conducted many programs to divert children and young people from criminal proceedings. Right Step and ROPES have emerged as two prominent diversionary programs. The Right Step program is an innovative case management diversion model run by Youth Connect in co-operation with the Victoria Police and Moorabbin Justice Centre which aims to reduce recidivism of young people aged between 10 and 18. After being informed of the informant’s wish to refer the young offender to the program, the Magistrate adjourns the hearing for eight weeks. The case manager then communicates and works with the young person at Youth Connect to assist him or her in accessing appropriate locally based support services and addressing reasons causing criminal behaviour. A report is made by the case manager at the end of the program and sent to the Magistrate who may dismiss the young person’s matters if being satisfied with the report.

Slightly different from Right Step, the ROPES program focuses on young persons aged between 12 and 17 who have little or no criminal history. These persons must have agreed to participate in ROPES and must either have been cautioned under the Police Cautioning Program or referred to the program from one of the prescribed Children’s Courts. This means the ROPES program may take place before a young person is brought to the Children’s Court or in the pre-plea stage. This program aims to:

- demonstrate to young people that although they have offended and have been apprehended by police, they do not have to go down the path of continual anti-social behaviour or criminal activity. The program is designed to share trust, respect and co-operation between police and young persons. Its objective is to create a new level of understanding between police, the Children’s Court and the young people involved that is not based on a negative punitive experience but rather is based on positive behaviour change.

It requires the young persons and police informants to complete a full day program at the Cliffhanger Rock Climbing Centre (or similar alternative) on a low ROPES and high

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74 This is a pilot program which only operates out of one court in Moorabbin. Philanthropic funding ended in October 2012: see Youthlaw, Submission to the Department of Justice in Response to Practical Lessons, Fair Consequences: Improving Diversion for Young People in Victoria (2012) 31.
75 Youthlaw, above n 74.
76 Ibid.
77 Ibid.
78 The young person must have been cautioned no more than 2 times in the past or is being brought to the Children’s Court for the first time: see Children’s Court of Victoria, Research Materials, Sentencing, The “ROPES” Program <http://www.childrenscourt.vic.gov.au/CA256CA800011129/page/Research+Materials-Sentencing?OpenDocument&1=60-Research+Materials~&2=94-Sentencing~&3=#ropes>.
79 Children’s Court of Victoria, above n 78.
80 Ibid.
ROPES course. At the end of this course, a certificate of satisfactory completion will be given to a young person and sent to the Court. The presiding judicial officer then discharges the defendant without: requiring him or her to re-attend at court, taking a formal plea or conducting a summary hearing and making any finding relating to the young person’s guilt. The Victoria’s ROPES program is a unique diversionary process and a good way to make significant changes to procedures without adopting new legislation.

Alongside diversionary programs, restorative justice has been extended in the early years of the 21st century in Victoria. In 2003, the Family Group Conferencing Pilot 1995 was expanded to include two pilot programs alongside existing metro services (Jesuit Social Services – Metro; Salvation Army – Goulburn Valley; Anglicare – Gippsland). At present, there is a group conferencing program operating in the Criminal Division of the Children’s Court. Richards observes that in Victoria, restorative justice is currently supervised by the Department of Human Services and performed on the basis of a number of community-based institutions. Unlike other Australian jurisdictions, Victorian family conferencing ‘is a diversion program used by courts; police are unable to refer juveniles to restorative conferences’. In other words, the Victorian group conference is carried out before the court adopts a sentence, while in other States this process is a pre-court option or a ‘diversion from court prosecution’. Issues relating to the conference such as participants and objectives are stipulated in ss 415(6)-(7) of the Children, Youth and Families Act 2005. Richards observes that:

Under the program, juveniles can be diverted from receiving a community-based youth justice order, or from receiving a more severe disposition than they may have received had they not participated in a

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81 Children’s Court of Victoria, above n 78.
82 Ibid.
83 Ibid.
88 Ibid.

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conference. To avoid net-widening, the program does not target offences that may be dealt with by police diversion strategies, such as cautioning.90

Further evaluation of the Youth Justice Conferencing Program was conducted in 2006 and 2010.91 According to these evaluations, the program had achieved certain successes including the diversion of juvenile offenders from being inducted into the criminal justice system and a decrease in terms of frequency and seriousness of recidivism.92

Along with the development of restorative justice, the rights of juvenile offenders in criminal processes have also been given more attention. After more than 15 years since ratifying the CRC, almost all of the rights of juvenile offenders were officially stipulated in the Charter of Human Rights and Responsibilities Act 2006. These include the right to be presumed innocent (s 25(1)); the right to speedy trial (s 25(2)(c)); the right of defence (ss 25(2)(b)-(d)); the right to appeal (s 25(4)); the right of protected against cruel and inhuman punishment (s 10); the right not to be arbitrarily arrested or detained (ss 21-23(1),(3)); the right to equality before courts and tribunals and to a fair trial (s 24). Although its impact is unpredictable because every right is subject to significant exemptions and limitations,93 the Act is a key legal basis for the improvement of procedural and human rights safeguards of juvenile offenders. Other rights of young offenders are provided in the Crimes Act 1958 such as the right to remain silent (ss 464A(3), 464J) and the right to the presence of a parent or guardian (s 464E(1)).

It is noteworthy that in Victoria, restorative justice has also been applied to adult offenders. In 2006, Neighbourhood Justice Divisions of the Magistrates’ Court and the Children’s Court were established by the Courts Legislation (Neighbourhood Justice Centre) Act 2006. The primary aims of the legislation are to simplify access to the justice system and apply therapeutic and restorative approaches in the administration of justice.94

90 Richards, above n 87.
92 Ibid.
E. Observations

Each historical period has witnessed a new development in the process of establishing the Victorian juvenile criminal justice system. The desire to create a separate justice system for juvenile offenders germinated in the late of the nineteenth century. This was illustrated by the appearance of special correctional institutions including reformatory schools for juvenile law-breakers. Turning to the first half of the twentieth century, the Children’s Court systems were established marking the dominance of the welfare model and contributing a key component to the juvenile justice system. The second half of the twentieth century saw a new stage of informal procedures represented by the Victorian police cautioning programs in dealing with juvenile offenders. The ultimate aim of these methods was to divert young offenders from the formal court processes to prevent adverse impacts on young offenders’ lives. In the last decade of the twentieth century, restorative justice was implemented in Victoria. This model is considered to be most appropriate for dealing with juvenile offenders. In the early years of the 21st century, restorative justice programs continue their operation with further improvements in Victoria.

Along with the development of theories relating to juvenile justice over more than 200 years, the criminal procedural rights of juvenile offenders have been also recognized and protected in Victoria. There is no doubt that the ultimate aim of juvenile justice models is to discover the most effective methods in dealing with juvenile offenders. These paradigms embrace the comprehensive protection of juvenile offenders’ rights in criminal proceedings.

III. The Contemporary Legislative Framework

A. Introduction

At present, Victoria has a separate legal framework dealing with children and young offenders. This framework has been formulated on the basis of models and standards set out in international law, especially relevant UN legislation. There are a number of Acts, Regulations and Rules establishing the Victorian criminal regulatory framework. Moreover, case law governing certain areas of criminal procedure has also contributed to a unique Victorian legal system. This framework has created a stable legal basis for dealing effectively with offences committed by juveniles. However, in comparison with international

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95 Strang, above n 63, 4.
standards and requirements on ensuring the rights of juvenile offenders in criminal proceedings, the Victorian legislative framework has certain limitations.

In this part, Section B outlines the sources of criminal procedure law. Section C offers a brief description of criminal processes applicable to children and young offenders under Victorian law. Section D examines the benefits and shortcomings of the Victorian legislative framework governing the protection of juvenile offenders’ rights.

B. The Sources of Criminal Procedure Law
As in other States and Territories of Australia, the Victorian law governing criminal procedure includes common law and statutory law. Findlay et al observe that in New South Wales, South Australia and Victoria, the majority of criminal laws were established and developed by judges.96 However, in recent years, common law increasingly has been replaced by statutory law.97

1. Common Law
In Australia, all federal and many state offences are stipulated in statute. A few offences still exist under state law in which both the definition and punishment are wholly governed by common law.98 In other circumstances, a definition is provided by common law while the penalty is prescribed in statute.99 Fox observes that ‘the rules of criminal procedure are generally defined in statute law or regulations made under statute, but are also to be found in the common law as enunciated by state Supreme Courts and the High Court’.100

Therefore, in Victoria, the law governing criminal procedure includes decisions of the Victorian Supreme Court and the High Court of Australia. This case law provides important assistance in the interpretation of statutory provisions involving procedural safeguards and human rights of offenders in general, and juvenile offenders in particular, in the criminal justice process.

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97 Ibid.
98 Ibid, above n 93, 5.
99 Ibid.
100 Ibid.
2. Statutory Law

From 2005 onwards, a number of enactments governing criminal procedure have been passed which establish a more comprehensive legislative framework for juvenile justice system in Victoria. Corns and Tudor observe that the Victorian criminal procedure law ‘is currently undergoing significant change, probably the single biggest suite of legislative reforms in five decades’. They argue that the main aims of the reforms in Victoria are ‘to create greater unity and uniformity in the court system, simplification of the laws, and enhanced protection of human rights’. The contemporary legal framework includes a number of statutes. The key legislation is outlined below.

a. The Crimes Act 1958

A number of provisions enshrined in the Crimes Act 1958 govern procedures at stages in the criminal process. Section 346(1) of the Children, Youth and Families Act 2005 stipulates that the provisions of Pt III div 1 sub-div 30A of the Crimes Act 1958 apply to the custody and investigation of a child. In other words, the Crimes Act 1958 governs the custody and investigatory stage of criminal proceedings applicable to juveniles. The Act is an indispensable component of the Victorian legal system in general and juvenile criminal justice in particular. Part III div 1 sub-div 30A of the Crimes Act 1958 recognizes some rights of persons in custody such as the right to remain silent and the right to have an interpreter. It also regulates investigatory activities including questioning, fingerprinting, forensic procedures, search and seizure. Along with general provisions applicable to adult offenders, the Crimes Act 1958 establishes special and additional requirements relating to custody and investigation of juvenile offenders, i.e. the presence of a parent or guardian or an independent party when investigating juveniles in custody (s 464E); fingerprinting of children at different ages (ss 464K, 464L) and forensic procedures on child (s 464U).

101 Christopher Corns and Steven Tudor, Criminal Investigation and Procedure: The Law in Victoria (Thomson Reuters, 2009) 4.
102 Ibid 5.
104 This is a reiteration of the whole s 129(1) of the Children and Young Persons Act 1989.
b. The Children, Youth and Families Act 2005

The *Children, Youth and Families Act 2005* replaced most of the *Children and Young Persons Act 1989* on 23 April 2007. The Act amends, supplements and combines the *Children and Young Persons Act 1989* and part of the *Community Services Act 1970* in order to establish an integrated child protection and support system for children and family.\(^{105}\)

Two of the main objectives set out in the *Children, Youth and Families Act 2005* are ‘to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and to continue the Children’s Court of Victoria as a specialist court dealing with matters relating to children’.\(^{106}\) These purposes are mainly expressed through Chapter 5 (Children and the Criminal Law) and Chapter 7 (the Children’s Court of Victoria) of the Act. The *Children, Youth and Families Act 2005* is the primary legal basis of procedural activities applicable to juvenile offenders. Hence, relevant provisions of the Act are among the research objects of this thesis.

In comparison with the *Children and Young Persons Act 1989*, no substantive changes involving the operation of the Criminal Division of the Children’s Court as well as the powers and functions of the Koori Court are made in the *Children, Youth and Families Act 2005*.\(^{107}\) However, the Act vests the Criminal Division with additional powers to order a Group Conference and ‘to breach sentencing orders and to enforce fines imposed by the Children’s Court against a person who is no longer a child’.\(^{108}\)


The *Charter of Human Rights and Responsibilities Act 2006* (the Charter) came into force fully on 1 January 2008. Modeled on human rights laws in the Australian Capital Territory (ACT), New Zealand and the United Kingdom, the Victorian *Charter of Human Rights and Responsibilities Act 2006* is a landmark in Australia’s constitutional and political history.\(^{109}\)

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\(^{106}\) *Children, Youth and Families Act 2005*, ss 1(c)-(d).

\(^{107}\) Power, above n 105, 1.4-1.5.

\(^{108}\) Ibid 1.5.

Williams argues that the focus of the Act is to promote the work of Government and Parliament in order to prevent human rights problems occurring at the earliest phases.\textsuperscript{110} Corns and Tudor also consider that:

> The Act is a highly significant piece of legislation that puts human rights considerations at the forefront of policy development, legislative reform, statutory interpretation, and public authorities’ decision-making. It is only the second such statute in Australia (following the example of the Australian Capital Territory’s Human Rights Act 2004). The Charter has immediate relevance to criminal procedure and investigation since a large number of the human rights it recognizes are directly concerned with the operation of the criminal law.\textsuperscript{111}

The main purpose of the Charter is to protect and promote human rights, including the rights of juvenile offenders in the criminal justice process (s 1(2)). To achieve this objective, the Charter uses certain methods which are enumerated in s 1(2). Section 4 identifies organizations which are public authorities for the purposes of the Charter. Significantly, s 25 provides a comprehensive list of human rights to be protected by the Parliament. Arenson and Bagaric state that the Charter ‘does not purport to create new rights but it is designed to guide the courts in their interpretation of existing statutes.’\textsuperscript{112} Moreover, the Charter emphasizes that these rights are not absolute. They can be subject to reasonable limitations. To determine whether or not the limits are demonstrably justified, s 7(2) of the Charter stipulates grounds and relevant factors which should be taken into account.

d. The Criminal Procedure Act 2009

The \textit{Criminal Procedure Act 2009} and the majority of its provisions came into operation on 1 January 2011. The criminal justice system in Victoria was impacted significantly by this new statutory framework.\textsuperscript{113} The Act clarifies, simplifies and consolidates the laws relating to criminal procedure in the Magistrates’ Court, the County Court and the Supreme Court (s 1(a)). Many stages of the criminal process are reformed including prosecution, pre-trial, trial and appeal procedures for both summary and indictable offences. In relation to juvenile criminal justice, the \textit{Criminal Procedure Act 2009} provides for a six-month time limit for the filing of charges for summary offences in the Children’s Court (s 1(d)) and amends the \textit{Children, Youth and Family Act 2005} (s 1(k)). Fox evaluates the \textit{Criminal Procedure Act 2009} as follows:

\begin{itemize}
\item \textsuperscript{110} Williams, above n 109.
\item \textsuperscript{111} Corns and Tudor, above n 101, 6.
\item \textsuperscript{112} Kenneth J Arenson and Mirko Bagaric, \textit{Criminal Procedure: Victoria and Commonwealth} (LexisNexis, 2009) 4.
\item \textsuperscript{113} Corns and Tudor, above n 101, 6.
\end{itemize}
The new Act has amalgamated criminal procedure provisions found in a number of other Acts. It has sought to produce consistency of approach by providing a procedural continuum that functions on the basis that there is one criminal proceeding which commences on the filing of a charge sheet and continues through to appeal. At one end of that continuum the objective is to strengthen pre-hearing and pre-trial procedures to identify and, where possible, resolve issues in advance. At the other end there are major changes in criminal appeal process, including the introduction of interlocutory appeals, designed to reduce the number of post-conviction appeals and re-trials.114

C. The Overview of Criminal Process Applicable to Juvenile Offenders

A number of scholars have researched Victorian criminal procedure law. A majority of them describe and analyze all stages of criminal proceedings in Victoria and compare them with federal law. Others focus on particular stages such as investigation and trial. Although these researchers sometimes mention distinctive provisions applicable to juvenile offenders, intensive studies on this topic have not been conducted. One reason is that criminal proceedings applicable to juvenile offenders include stages similar to those for their adult counterparts such as commencement, investigation, prosecution and trials, especially in indictable cases. Moreover, procedures in the Children’s Court are similar to those applicable to the Magistrates’ Court.115

However, as previously mentioned, Victoria has established a separate legal framework governing the criminal justice process for juvenile offenders. This is illustrated by the passage of the Children and Young Persons Act 1989 now replaced by the Children, Youth and Families Act 2005. Under this Act, the Children’s Court has jurisdiction for juveniles accused of summary offences and certain indictable offences. Major differences between criminal procedures applicable to juveniles and those for adults are reflected in the provisions governing these categories of offences. The Children, Youth and Families Act 2005 enshrines procedural guidelines which must be followed by the Children’s Court when dealing with juveniles.116 When a juvenile is accused of an indictable offence which cannot be heard and determined summarily, the jurisdiction to deal with these cases is vested in the County Court or the Supreme Court. These courts operate under different principles and guidelines compared to those of the Children’s Court. However, it should be noted that when the County Court or the Supreme Court deals with juveniles, the Court must comply with the additional requirements set out in the Charter of Human Rights and Responsibilities Act

114 Fox, above n 93, preface, para 2.
115 Children, Youth and Families Act 2005, s 528(2).
116 Ibid Part 7.3.
2006 as to children’s human rights in the criminal process. In order to meet these requirements, the County Court and the Supreme Court can adopt procedural guidelines stipulated in the Children, Youth and Families Act 2005. Moreover, the distinctive feature of criminal proceedings involving juveniles is also reflected in provisions governing the appellate stage. The following sections depict all stages of the criminal process applicable to children and young offenders in Victoria.

1. Commencement of a Criminal Proceeding

Generally, a criminal proceeding in the Children’s Court is commenced in the same manner as in the Magistrates’ Court. According to s 5 of the Criminal Procedure Act 2009, there are two main ways to commence a criminal proceeding: (a) filing or signing a charge-sheet; or (b) filing a direct indictment. Depending on each circumstance, different authorities have competence to commence the criminal process. Charging a person in general, and a juvenile in particular, with an offence may arise at several stages in the investigatory process. In circumstances (a) and (b) above, it is likely that investigations were carried out before the filing or signing of a charge-sheet or the filing of a direct indictment. Distinctive provisions can be found in the process of commencing a criminal proceeding involving a juvenile. These relate to issues surrounding the time limit for filing a charge-sheet and custody and bail of juveniles.

- First, the time period for filing a charge-sheet in juvenile cases is of shorter duration than in adult cases. Section 7(1) of the Criminal Procedure Act 2009 provides that ‘[a] proceeding for a summary offence must be commenced within 12 months after the date on which the offence is alleged to have been committed’. Under s 344A of the Children, Youth and Families Act 2005, this time limit is only 6 months.

- Second, there are different requirements concerning exceptional cases for these time limits. In adult cases, a proceeding can be commenced after the expiry of the above

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119 In addition, a criminal proceeding can be initiated in situation (c) where a court directs a person to be tried for perjury.
120 For more details, see Figure 11 of the thesis.
121 Corns and Tudor, above n 101, 62.
122 However, in situation (c) the investigatory process may be conducted after the Children’s Court directs that a child be prosecuted for perjury.
period if the accused gives written consent and the DPP or a Crown Prosecutor consents. In juvenile cases, s 344A(1)(b) of the *Children, Youth and Families Act 2005* provides that ‘the child, *after receiving legal advice*, gives written consent, and a member of the police force of or above the rank of sergeant consents, to the proceeding being commenced after the expiry of that period’. Thus, the Court must examine whether the young person received legal advice before giving his or her written consent. If this requirement is not satisfied, the hearing must be adjourned to enable the child to obtain that legal advice.\(^{123}\) Moreover, if the child withdraws his or her consent to the commencement of the proceeding, the Court must strike out the charge.\(^{124}\)

- Third, there are special provisions relating to applications for the extension of time for commencement of proceedings, as well as for rehearing that application. Under ss 344B-C of the *Children, Youth and Families Act 2005*, the Court may extend the period for commencing the proceeding based on the application of an informant. Nonetheless, the child (if absent at the hearing of the informant’s application) is also entitled to apply to the Court for an order that the determination be set aside and that the application be reheard.\(^{125}\)

- Fourth, there are particular provisions governing custody and bail of juveniles. The commencement of a criminal proceeding often involves issues of custody and bail. Part 5.2 div 1 of the *Children, Youth and Families Act 2005* contains distinctive provisions applicable to custody and bail of juveniles. This prevails over s 12 of the *Criminal Procedure Act 2009* governing the summons or warrant to arrest of the Magistrates’ Court. Moreover, s 346 of the *Children, Youth and Families Act 2005* refers to the application of Pt III div 1 sub-div 30A of the *Crimes Act 1958* to the custody and investigation of a child and s 10 of the *Bail Act 1977* to release on bail.

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\(^{123}\) *Children, Youth and Families Act 2005*, s 344A(4)(a).

\(^{124}\) Ibid s 344A(6).

\(^{125}\) Ibid s 344D.
2. Investigation

The investigation stage can take place before or after the commencement of a criminal proceeding. Generally, relevant authorities file or sign a charge-sheet or file a direct indictment when they have enough evidence to warrant charging a suspect with a crime. However, this does not mean investigations will be terminated.126

Legislation governing the criminal investigation of juveniles consists of various statutes including the Crimes Act 1958, the Children, Youth and Families Act 2005 and the Victoria Police Manuals 105-1, 112-3. Criminal investigation includes search and seizure of evidence, questioning, fingerprints, forensic procedures and covert investigations. While Victoria Police undertakes to investigate persons including juveniles who violate the

126 Corns and Tudor observe that ‘further investigation may well be possible and desirable after the filing of charges, though the accused person is highly unlikely to be involved in such post-charging investigations’: see Corns and Tudor, above n 101, 62.
criminal law, there is a wide range of other agencies and persons participating in criminal investigation. Generally, investigation methods applicable to adults are also used for juveniles. However, in the latter cases, additional conditions and requirements are often set out. For example, a parent or guardian or an independent person must be present during the processes of searching, questioning and taking fingerprints of children.

In relation to forensic procedures, s 464U(2) of the *Crimes Act 1958* provides that the police cannot request a child aged 10 years or more but under 18 years to undergo a forensic procedure unless the Children’s Court has made an order directing the child to undergo a compulsory procedure in accordance with ss 464U(7) and 464V(5). The criteria for making an order are the same as those applicable to adults. Section 464U(8) also sets out factors which must be taken into account by the Children’s Court in considering whether the making of the order is justified. These factors include the seriousness of the circumstances surrounding the offence, the degree of participation of the child in the crime and the age of the child. Regarding forensic information from juveniles, s 464ZGA(1) of the Act stipulates that if the suspect who provided the sample was a child, then if the sample is not required to be destroyed and the person does not commit any further offences up to the age of 26 years, then the police must destroy any sample taken and any related material and information. However, this does not apply if the forensic procedure was conducted for the particular offences enumerated in s 464ZGA(2) of the Act such as murder, attempted murder, manslaughter etc.

In Victoria, beside public investigatory measures, law enforcement authorities may conduct a broad range of methods or techniques surreptitiously. These are called covert investigations. However, in juvenile cases, covert investigations appear to be infrequently used. This is because these special methods and techniques should be utilized only for complex cases and emergency situations. It is unlikely that juvenile suspects are often involved in these circumstances. In addition, as previously mentioned, in almost all

127 Section 464(2) of the *Crimes Act 1958* defines ‘investigating official’ as ‘a member of the police force or a person appointed by or under an Act (other than a member or person who is engaged in covert investigations under the orders of a superior) whose functions or duties include functions or duties in respect of the prevention or investigation of offences’.


129 *Crimes Act 1958,* s 464U(7).

130 For discussion on covert investigations: see Corns and Tudor, above n 101, 213-51.
investigations relating to juveniles, a parent or guardian or an independent person is required to be present and therefore it is unsuitable to carry out covert investigations. In theory, however, these investigative forms may still be applied to juveniles. The critical issue is adopting statutory rules governing covert investigations. Although Victoria has legislation in relation to this field including the *Crimes (Assumed Identities) Act 2004; Crimes (Controlled Operations) Act 2004* and *Surveillance Devices (Amendment) Act 2004*, it appears that there are no particular provisions governing the conduct of covert investigations in juvenile cases.

The following diagram describes investigations conducted in a criminal case in Victoria.

**Figure 12. Investigation Stage in a Criminal Proceeding**

- **Conducting investigations**
  - **Members of the police force**
  - Persons appointed by or under an Act whose functions or duties include functions or duties in respect of the prevention or investigation of offences
  - **Questioning (s 464A(2)(3) of CA 1958)**
  - Identification: name and address (s 456 AA); photography; fingerprinting (ss 464K – 464Q of CA 1958)
  - Forensic procedures (ss 464U, 464ZA(3), 464ZGA of CA 1958)
  - Search for and seizure of things (pt III div 1 sub-div 31 of CA 1958)
  - Identification by eyewitnesses (pt 3.9 of EA 2008)
  - Covert investigations: false identities, controlled operations, covert search warrants, surveillance devices (*Crimes (Assumed Identities) Act 2004; Crimes (Controlled Operations) Act 2004; Surveillance Devices (Amendment) Act 2004*)

- **Investigating officials (s 464(2) of CA 1958)**
- **Police prosecutor**
- **Other prosecutors**
3. Prosecution

Prosecution is a procedural stage ‘at which a criminal investigation becomes litigation in the criminal jurisdiction of a court’.\textsuperscript{131} It commences at the time the prosecution agency receives the brief of evidence from investigative officials gathered in the investigation stage. Under Victorian and Commonwealth laws, prosecutions are undertaken by police prosecutors, the Director of Public Prosecutions (DPP), the Commonwealth Director of Public Prosecutions, other public prosecutors and individuals (private prosecutions).\textsuperscript{132} After examining and evaluating the brief of evidence, a prosecutor decides whether to prosecute or not. In Victoria, the criteria governing the decision to prosecute are set out in s 2.1 of the Policy No. 2 of the Office of Public Prosecutions.\textsuperscript{133} These include two necessary and sufficient steps: Is there a reasonable prospect of conviction and is the prosecution in the public interest? If a prosecutor decides not to prosecute, the criminal proceeding shall be ended. By contrast, if a decision to prosecute is made, the prosecutor has a responsibility to conduct the case in a fair and impartial manner.\textsuperscript{134} In order to fulfil this requirement, the prosecutor must do such things as calling relevant witnesses; disclosing prior convictions of prosecution witnesses and disclosing exculpatory evidence.\textsuperscript{135}

The prosecution process may include summary hearings and trials of indictable offences. In most cases, this process ceases when the court renders a judgment determining whether the accused is guilty or not. However, it is worth noting that in committal proceedings, if the court orders the accused to be discharged and the prosecutor agrees, the prosecution ends. By contrast, if the DPP disagrees with the court, he or she can file a direct indictment against that person and commence a new criminal proceeding. In this case, the prosecution function continues to be carried out by the prosecutor.

\textsuperscript{131} Corns and Tudor, above n 101, 286.
\textsuperscript{132} See Figure 13 of the thesis. For further discussion concerning the machinery of prosecutions: see Fox, above n 93, 43-60.
\textsuperscript{133} In addition to the factors (set out in s 2.1.10) which should be considered in determining whether the public interest requires a prosecution, s 2.2.2 of the Policy No. 2 provides particular factors which should be examined in the prosecution of juveniles.
\textsuperscript{134} Corns and Tudor, above n 101, 293.
\textsuperscript{135} Ibid.
4. First-Instance Trial

a. Summary Hearing

Generally, summary hearings are used for all summary offences and certain indictable offences. The Criminal Division of the Children’s Court has jurisdiction to hear and determine all charges against children for summary offences. The Court also hears most indictable offences (except for those provided in s 516(1)(b) of the Children, Youth and Families Act 2005) if the child or his or her parent does not object and it considers that the charge is suitable to be determined summarily.\(^{136}\) If the child is an aboriginal and the offence is within the jurisdiction of the Criminal Division (other than a sexual offence as defined in s 6B(1) of the Sentencing Act 1991) and the child consents, the Koori Court (Criminal Division) has jurisdiction to deal with the proceeding.\(^{137}\)

The process of a summary hearing proceeds through two main steps: pre-summary hearing and summary hearing. In the first step, a mention hearing is usually conducted. At this hearing, the court is informed by the parties as to whether the defendant is pleading guilty or not guilty and the expected duration of the matter.\(^{138}\) The court then lists the case for a

\(^{136}\) Children, Youth and Families Act 2005, ss 356(3)-(4).

\(^{137}\) Ibid s 519(1).

\(^{138}\) Corns and Tudor, above n 101, 349.
‘contest mention hearing’ or may proceed immediately to hear and determine the charge.\(^{139}\) The contest mention hearing usually takes places if the accused pleads not guilty.\(^{140}\) Alternatively, at this stage a ‘summary case conference’ may be carried out. This conference includes a meeting between the prosecution and the accused to manage the progression of the case by indentifying a number of issues set out in s 54(1)(a)-(d) of the *Criminal Procedure Act 2009*.

Section 356(3) of the *Children, Youth and Families Act 2005* provides that if a child is charged before the Children’s Court with an indictable offence, the Court must hear and determine the charge summarily and conduct a committal proceeding into the charge. This can be contrasted with cases involving adults where a committal proceeding is not held if the charge of an indictable offence is heard and determined summarily.\(^{141}\) It is worth noting in this respect that the *Children, Youth and Families Act 2005* governs criminal procedures against a child and therefore the provisions enshrined in s 356(3) of the Act are given priority. However, concerning the detailed procedures of a committal proceeding, relevant provisions of the *Criminal Procedure Act 2009* are applied because the *Children, Youth and Families Act 2005* does not have any provisions governing this special proceeding.

In the second step, at any time before taking a formal plea from an accused, the Children’s Court may adjourn the proceeding to enable the accused to participate in a diversion program. As previously mentioned, the Children’s Court may refer a young person to the ROPES program.\(^{142}\) If the accused completes a diversion program, the court must discharge him or her without any finding of guilt. By contrast, the accused must appear before the court to continue the hearing.

A summary hearing usually begins with an opening address by the prosecutor. In response, the accused may also give an opening address.\(^{143}\) After that, evidence from witnesses may be adduced and tested through examination in chief, cross-examination and re-examination.

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\(^{139}\) See Figure 14 of this thesis.

\(^{140}\) Corns and Tudor, above n 101, 350.

\(^{141}\) *Criminal Procedure Act 2009*, s 96(b).

\(^{142}\) The eligibility criteria for a young person to be accepted on to the ROPES program can be found at Children’s Court of Victoria, above n 78. See also Sentencing Advisory Council, Sentencing Children and Young People in Victoria (2012) 33-4.

\(^{143}\) *Criminal Procedure Act 2009*, s 65.
When all evidence is examined, the prosecutor and the accused may give their closing addresses. Eventually, the court will consider the case and render its judgment. It should be noted that in summary hearings the giving of opening, closing or making of supplementary addresses of the prosecutor and the accused are only conducted by leave of the court.

In the sentencing process, if the Children’s Court was considering imposing a sentence of probation or a youth supervision order in respect of one or more offences, it may defer sentence to permit a child to participate in a group conference. The Court is required to consult with Youth Justice as to whether the child is suitable to participate in a group conference although it is not bound by latter’s opinion. The sentencing process resumes after a group conference is completed. The outcome plan of a group conference is often given weight and incorporated in the Court’s sentence. Moreover, the Children, Youth and Families Act 2005 provides for certain limitations concerning sentence of the Court in this circumstance. Group conference is a restorative justice program in criminal proceedings in Victoria. Provisions governing this program are generally compatible with Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters in terms of

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144 Criminal Procedure Act 2009, ss 73-74. Particularly, under s 75(1) of the Criminal Procedure Act 2009, the prosecutor may make a supplementary address to the court after the closing address of the accused.
145 Corns and Tudor observe that the court often delivers its verdict immediately at the end of the hearing. In other cases, the court may adjourn the matter briefly to consider the case. If the accused is found guilty, the sentencing hearing can be carried out immediately. However, it is not unusual for the court to adjourn several days to give the accused and his or her lawyer an opportunity to prepare for the sentencing hearing: see Corns and Tudor, above n 101, 351.
146 Criminal Procedure Code 2009, ss 65(1), 73-75(1). It should be noted that in summary trials a person who did not appear in the proceeding or the informant on this person’s behalf may apply to the court for an order to rehear the charge. However, this is not an appeal in criminal proceedings. Under s 92 of the Criminal Procedure Act 2009, the court may set aside any findings and orders made in the earlier proceeding and rehear the charge.
147 Children, Youth and Families Act 2005, s 415(1). Objectives and participants of a group conference are provided in ss 415(2), (4), (6)-(7) of this Act.
148 Formal legislative basis for determining the suitability in this case is not provided. However, some of the current criteria can be found at the Children’s Court research materials: see <http://www.childrenscourt.vic.gov.au/CA256CA800011129/page/Research+Materials-Sentencing?OpenDocument&1=60-Research+Materials~&2=94-Sentencing~&3=#group_conferencing>.
149 Children’s Court of Victoria, above n 148.
150 For example, if the child has participated in a group conference, the Court must impose a lesser sentence than it otherwise would have imposed had the child not so participated. By contrast, the Court is not entitled to impose a more severe sentence than it would have imposed had sentencing not been deferred (Children, Youth and Families Act 2005, ss 362(3)-(4)).
conditions for referral, objectives, participants, handling of cases following a group conference etc.

**Figure 14. Summary Hearing in a Criminal Proceeding**

![Diagram of Summary Hearing in a Criminal Proceeding](image)

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152 This diagram is adapted from *Chapter 3 – Summary Procedure* in Department of Justice, *Criminal Procedure Act 2009: Legislative Guide* (2010) 61.
b. Trial of Indictable Offences

The trial of indictable offences consists of three steps: a committal proceeding, a pre-trial and a trial. Section 96 of the *Criminal Procedure Act 2009* provides that ‘a committal proceeding must be held in all cases in which the accused is charged with an indictable offence, except cases where (a) a direct indictment is filed; or (b) the charge is heard and determined summarily’. However, as previously mentioned, if a child is charged with an indictable offence which can be heard and determined summarily, the Children’s Court also must conduct a committal proceeding. According to Fox, a committal proceeding is ‘an administrative check on the strength of the case being mounted by the prosecutorial authority and not an act of adjudication’. The primary aim is to decide if the accused should be ‘committed’ to stand trial.

A committal proceeding may include a number of hearings. It often commences with a ‘filing hearing’ where the court fixes a date for a committal mention hearing and a period of time for service of a hand-up brief. If the accused or his or her lawyer gives written consent, the informant can serve a plea brief (an abbreviated version of the hand-up brief) any time before the hand-up brief is due to be served. In this case, if the accused pleads guilty at a committal mention hearing, the court must commit the accused for trial. By contrast, a full hand-up brief must be served after that. In circumstances where the hand-up brief is served, s 118(1) of the *Criminal Procedure Act 2009* requires the accused and the DPP or, if the DPP is not conducting the committal proceeding, the informant, to jointly file with the registrar a ‘case direction notice’ at least seven days before the committal mention hearing. This requirement facilitates communication between the parties and agreement as to the manner in which the committal proceeding will be carried out.

The next step is a ‘committal mention hearing’. This is a preparation for the main stage – a ‘committal hearing’. There is a distinction between a ‘committal mention hearing’ and a

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153 Fox, above n 93, 223.
154 Corns and Tudor, above n 101, 297. For specific aims of a committal proceedings, see s 97 of the *Criminal Procedure Act 2009*.
155 *Criminal Procedure Act 2009*, ss 101(a)-(b), 107(1).
156 Ibid s 116(1)-(2).
157 Ibid s 142(1)(b).
158 Ibid s 142(2). The time when a full hand-up brief must be served is fixed by the court.
159 See *Criminal Procedure Act 2009*, s 107.
160 Corns and Tudor, above n 101, 301.
‘special mention hearing’. In the latter, among other things, the court may change the date
fixed by it for any hearing in a committal proceeding.\textsuperscript{161} This implies that a special mention
hearing can take place at any time before the committal hearing. Moreover, normally on the
date of the committal mention hearing, the court can direct the parties to participate in a
‘case conference’\textsuperscript{162} which is conducted to ‘encourage frank discussions and resolution of
matters at an early stage’.\textsuperscript{163}

At the end of a committal proceeding, the court must either discharge the accused or commit
the accused for trial.\textsuperscript{164} If the DPP disagrees with the discharge decision by the court, he or
she may file a direct indictment in one of the superior courts leading to the commencement
of a new criminal proceeding against the accused.\textsuperscript{165} By contrast, if the DPP disagrees with a
decision of the court to commit the accused for trial, he or she may discontinue prosecution
for an offence against the accused.\textsuperscript{166}

The following diagram describes procedures in a committal proceeding.

\textsuperscript{161} \textit{Criminal Procedure Act 2009}, s 153(a).
\textsuperscript{162} Ibid s 127.
\textsuperscript{163} Corns and Tudor, above n 101, 302. In the process of a committal proceeding, after a charge-sheet has been
filed and before the committal hearing, a ‘compulsory examination’ may be carried out. However, the court
only allows the application for this examination hearing to be made because of the interests of justice. The
court may make an order requiring a person to attend before it on a fixed date for the purpose of being
examined by or on behalf of the informant or producing a document or thing or both. (\textit{Criminal Procedure Act
2009}, part 4.3).
\textsuperscript{164} \textit{Criminal Procedure Act 2009}, ss 141(4)(a)-(b).
\textsuperscript{165} Ibid ss 156, 161.
\textsuperscript{166} Ibid ss 156, 177. For procedures after committal, see Parts 4.10-4.11 of the \textit{Criminal Procedure Act 2009}. 
Figure 15. Committal Proceeding

Optional process →

Filing hearing (pt 4.2)

Pre-hearing disclosure by prosecution (pt 4.4)

Compulsory examination hearing (pt 4.3)

Special mention hearing (pt 4.7)

Pleas brief

Hand-up brief

Case direction notice (pt 4.5)

Committal mention hearing and case conference (ss 125-127)

Plea not guilty

Plea guilty

Commit the accused for trial

Discharge the accused

Transfer related summary offences

Forward documents to DPP

Taking of evidence

Procedures after committal (pts 4.10, 4.11)

A committal hearing (pt 4.7)

Pre-trial stage (pt 5.5 of CPA 2009)
The trial process for indictable offences basically consists of two stages: pre-trial and trial. It commences with the filing of an indictment by the DPP or a Crown Prosecutor. An indictment is generally filed after the accused has been committed for trial. The process then moves to the preparation stage for trial. In this phase, a trial judge may conduct a directions hearing in which he or she may make or vary any direction or order, or require a party to do anything that is considered necessary for the fair and efficient conduct of a proceeding. One of the main purposes of this hearing is to provide an essential preparation for trial before a jury is empanelled and thereby possibly reducing the duration of a trial. After the directions hearing, the prosecution and the accused must disclose certain documents. It should be noted that after an indictment is filed, a sentence indication may be made by the court at any time. This indicates the sentence that is likely imposed on the accused.

Another matter is that the process of prosecution against the accused can be discontinued by the DPP by way of announcing or filing a written notice in court of the discontinuance. This can happen at any time (except during trial) whether or not an indictment against the accused has been filed. This decision by the DPP terminates a criminal proceeding.

A criminal court session formally commences with an ‘arraignment’ where the court examines the identification of the accused, asks whether the accused has read each charge on the indictment and pleads guilty or not guilty to the charge. If the accused has pleaded not guilty to any of the charges on an indictment, he or she must be arraigned in the presence of a jury panel. The procedures of trials for indictable offences have some differences in comparison to those applicable to summary offences.

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167 As previously mentioned, where a court discharges the accused, the DPP can file a direct indictment in a superior court.
168 *Criminal Procedure Act 2009*, s 181(1).
169 *Corns and Tudor*, above n 101, 337.
170 For provisions governing pre-trial disclosure obligation of prosecution and accused, see Part 5.5 div 2 of the *Criminal Procedure Act 2009*.
171 *Criminal Procedure Act 2009*, s 207.
172 Ibid s 177(1).
173 Ibid s 177(2).
174 Moreover, s 178 requires the DPP to immediately notify an accused in custody of the discontinuance of the prosecution and the accused will be released from custody if he or she is not being detained for any other reason.
175 *Criminal Procedure Act 2009*, s 215(1).
176 Ibid s 217(a).
• First, a jury is used in trials of indictable offences (there is a separation between the tasks of the trial judge and the jury). The jury is governed by the Criminal Procedure Act 2009 and the Jury Act 2000. In summary hearings the magistrate sits alone and decides the law and the facts.

• Second, summary hearings are normally commenced and prosecuted by police prosecutors. By contrast, proceedings in the County Court and the Supreme Court are commenced by public prosecutors representing the Crown (the DPP and Crown Prosecutors).

• Third, in jury trials, the prosecution must give an opening address and the accused must respond; this does not require the leave of the court. Similar rules are applied to closing addresses of the prosecution and the accused.

Trial process of indictable offences is described by the following chart.

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177 Criminal Procedure Act 2009, ss 224-225.
178 For further information concerning the differences between jury trials and summary hearings: see Corns and Tudor, above n 101, 348, 350-1.
Figure 16. Trial Process of Indictable Offences

The accused is committed for trial → A direct indictment is filed against the accused

Jurisdiction
- County Court (s 36A of CCA 1958)
- Supreme Court (div 2A of SCA 1986)

Pre-trial procedure (pt 5.5 of CPA 2009)
- Directions hearing (div 1)
- Pre-trial disclosure (div 2)
- Orders and decisions (divs 3, 4)
- Sentence indication (pt 5.6)

Trial (pt 5.7 of CPA 2009)
- Arraignment
  - Plea of guilty
  - Plea of not guilty
  - Commencing trial

Sentencing hearing

Opening address of prosecutor
- Response of representative and the accused
  - Adducing evidence
  - Closing case of prosecutor
  - Opening address of the accused
    - Adducing evidence
    - Closing address of prosecutor
    - Closing address of the accused

Judge’s directions to the jury
- Verdict of the jury
  - Entry of guilty
  - Entry of not guilty
- Discharge of jury from delivering
  - Judge’s decision
5. Appeals

a. Summary offences

There are two mechanisms which can be utilized by convicted children (or prosecutors) to appeal to superior courts. These mechanisms are described briefly in Figures 17 and 18 below.

A convicted juvenile can appeal to the County Court or the Trial Division of the Supreme Court (if the Children’s Court was constituted by the President) against conviction and sentence or sentence alone imposed by the Children’s Court. If the appellate court sentenced a person to a term of detention whereas previously in the first-instance trial, the Children’s Court had not ordered that person be detained, he or she can appeal to the Court of Appeal against the sentence. In this circumstance, that person must be given leave to appeal by the Court of Appeal.

The DPP can also appeal to the County Court or the Trial Division of the Supreme Court (if the Children’s Court was constituted by the President) against a sentence imposed by the Children’s Court on the basis of public interest. The DPP cannot appeal against acquittal or dismissal of the charges. In the latter case, however, the DPP can refer any point of law that has arisen in the proceeding to the Court of Appeal. Moreover, the DPP is not entitled to bring a further appeal against an appellate court’s sentence.

Under s 430P of the Children, Youth and Families Act 2005, a party to a proceeding (including convicted persons and the DPP), other than a committal proceeding, can appeal to the Supreme Court on a question of law from a final order of the Children’s Court in that proceeding. If a person decides to appeal in this circumstance, he or she abandons finally and

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179 Children, Youth and Families Act 2005, s 424. Procedures for exercising the right of appeal in this situation are governed by ss 425-426 of the same Act.
180 Children, Youth and Families Act 2005, s 430R. The appellate procedures applicable to this circumstance are provided in ss 430S, 430V of the Act.
181 Children, Youth and Families Act 2005, s 427(1).
182 Ibid s 430W.
183 Ibid s 427(2). Appellate procedures of the DPP are stipulated in ss 428-429 of the Act.
conclusively the right to appeal to the County Court or the Trial Division of the Supreme Court.\textsuperscript{184}

\textbf{Figure 17. Appellate Mechanism of Summary Offences}

\begin{figure}

\begin{center}
\begin{tikzpicture}
  \node (scpa) at (0,0) {Supreme Court (Court of Appeal)};
  \node (scp) at (0,-2) {Supreme Court (Trial Division)};
  \node (cc) at (-3,-4) {County Court};
  \node (cckc) at (-3,-5) {Children’s Court (Criminal Division or Koori Court)};
  \node (acp) at (-3,-6) {A convicted person (s 424 of CYFA 2005)};
  \node (dpp) at (-3,-7) {DPP (s 427 of CYFA 20095)};
  \node (atpp) at (-3,-8) {A party to a proceeding (other than a committal proceeding) (s 430P of CYFA 2005)};
  \node (asp) at (-3,-9) {A sentenced person};

  \draw[->] (scpa) -- (scp);
  \draw[->] (scp) -- (cc);
  \draw[->] (cc) -- (cckc);
  \draw[->] (cckc) -- (acp);
  \draw[->] (cckc) -- (dpp);
  \draw[->] (cckc) -- (atpp);
  \draw[->] (acp) -- (cc);
  \draw[->] (dpp) -- (cc);
  \draw[->] (atpp) -- (cc);

  \node (wct) at (12,0) {Writ of Certiorari (Order 56 of SCR 2005, s 104 of SA 1991)};

  \node (f1) at (-1.5,-1) {Against detention sentence (s 430R of CYFA)};
  \node (f2) at (1.5,-1) {Refers point of law (s 430R of CYFA 2009)};

  \node (f3) at (3,-3) {Constituted by President};

  \node (f4) at (0,-10){184 Children, Youth and Families Act 2005, s 430Q. In addition to the above circumstances, a person who has been sentenced by a court (whether at first instance or appeal levels) for an offence can make an application for relief or remedy in the nature of certiorari to remove the proceeding into the Supreme Court. Despite not strictly being an appeal, in essence this remedy has many of the features of appellate decision-making and judicial review. The Supreme Court (Civil Procedure) Rules 2005 allocates ‘the jurisdiction of the Court to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto’ in Order 56 (Judicial Review) and requires this jurisdiction ‘shall be exercised only by way of judgment or order (including interlocutory order)’. Moreover, section 104 of the Sentencing Act 1991 provides that when the Supreme Court determines that the sentence imposed was beyond the power of the sentencing court or its own power (if it was the sentencing court), the ‘Supreme Court may, instead of quashing the conviction, amend the conviction by substituting for the sentence imposed a sentence which the sentencing court had power to impose’.

\end{tikzpicture}
\end{center}
\end{figure}
b. Indictable Offences

Normally, trials of indictable offences are within the jurisdiction of the County Court and the Trial Division of the Supreme Court. Consequently, if there are any appeals against conviction or sentence imposed by these Courts, the Court of Appeal has power to conduct appellate trials. Whereas appeal procedures concerning summary offences are mainly governed by the Children, Youth and Families Act 2005, those applicable to indictable offences are provided in the Criminal Procedure Act 2009 and other statutes. According to this legislation, the right of appeal is open to convicted or sentenced persons, the DPP and trial judges. In comparison with the appellate mechanism of summary offences, there are some differences in the mechanisms applicable to indictable offences.

- First, a trial judge of the County Court or the Trial Division of the Supreme Court may reserve a question of law arising before or during the trial for determination by the Court of Appeal. 185 Although this is a request to the Court of Appeal to review and determine a difficult or novel point of law as it arises in a trial context, deciding such reserved questions has many of the features of appellate decision-making. 186

- Second, s 24AA of the Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 allows a person found not guilty by reason of mental impairment to appeal to the Court of Appeal against that verdict with the leave of the Court. If the Court of Appeal accepts the appeal, it must set aside the verdict and either enter a judgment and verdict of acquittal or order a new trial. 187 However, if the Court of Appeal considers that the proper verdict would have been guilty of an offence (whether the offence charged or an offence available as an alternative verdict), it must render a new verdict of guilty of that offence substituting for the previous verdict (s 24AA(7) of the Act).

- Third, a new category of appeal – interlocutory appeal – is introduced in the Criminal Procedure Act 2009. This only applies to a proceeding in the County Court or the Trial Division of the Supreme Court for the prosecution of an indictable offence. 188

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185 Children, Youth and Families Act 2005, s 302(2).
186 Corns and Tudor, above n 101, 401.
187 Children, Youth and Families Act 2005, s 24AA(8).
188 Ibid s 295(1).
A party to the proceeding is entitled to appeal against an interlocutory decision\(^{189}\) to the Court of Appeal if this Court grants leave. A juvenile brought before these courts may utilize the interlocutory appeal; those appeals are available to juveniles and adults in the same manner. Provisions governing interlocutory appeals ‘attempt to balance the potential disadvantages, such as fragmentation, frivolous applications and time wasting, against the potential benefits, such as avoiding the time lost in awaiting the outcome of the trial before being able to challenge a questionable judicial decision’.\(^{190}\) This is demonstrated by the procedures for an interlocutory appeal as provided in the \textit{Criminal Procedure Act 2009}.\(^{191}\) According to Fox, interlocutory appeals may assist to ‘avoid the risk of wrongful conviction or unjustified acquittal’.\(^{192}\) However, unless this special category of appeal is conducted expeditiously, it will prolong rather than reduce delay in the completion of criminal trials.\(^{193}\)

- Fourth, the decision of the Victorian Court of Appeal may be appealed to the High Court of Australia. The appellate jurisdiction of the High Court is recognized by s 73(ii) of the \textit{Commonwealth of Australia Constitution Act 2003} and s 35(1)(a) of the \textit{Judiciary Act 1903}. The accused or Crown can apply to the High Court for a special leave to appeal. Basing on criteria set out in s 35A of the \textit{Judiciary Act 1903}, the High Court decides whether to grant special leave. In exercising its appellate jurisdiction, the High Court has a number of solutions such as: (a) granting a new trial; (b) reversing or modifying the judgment appealed from; (c) awarding execution from the High Court or remitting the cause to the Court from which the appeal was brought for the execution of the High Court’s judgment.\(^{194}\)

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\(^{189}\) Section 3 of the \textit{Criminal Procedure Code 2009} defines interlocutory decision as ‘a decision made by a judge in a proceeding whether before or during the trial, including a decision to grant or refuse to grant a permanent stay of the proceeding’.

\(^{190}\) Corns and Tudor, above n 101, 409.


\(^{192}\) Fox, above n 93, 500.


\(^{194}\) \textit{Judiciary Act 1903}, ss 36-37. For further information concerning appeal to the High Court: see Fox, above n 93, 505-9.
Figure 18. Appellate Mechanism of Indictable Offences

This chart is created by reference to Figure 5 – Appeals in Indictable Cases in Fox, above n 93, 472.
Figure 19. Summary Flowchart of Criminal Proceedings in Victoria

(G: Guilty) (NG: Not guilty)

Optional process

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196 This diagram is adapted from Figure 1 – Overview of the Prosecution Progress in Fox, above n 93, 42.
D. Protection of Juvenile Offenders’ Rights: Advantages and Shortcomings

Following the description of criminal processes applicable to children and young offenders, this section focuses on analyzing the advantages and limitations of the Victorian criminal justice legislation in relation to the protection of criminal procedural rights of children and young offenders.  

1. General Rights

a. Right to be Presumed Innocent

This procedural safeguard is a ‘fundamental and well-established principle of common law’ and is also provided in s 25(1) of the Charter of Human Rights and Responsibilities Act 2006 (the Charter). There is no difference between juvenile and adult offenders as regards the right to be presumed innocent. In Victoria, the content of this principle is similar to that stated by the UN’s human rights bodies as well as the English common law. For instance, s 357(1) of the Children, Youth and Families Act 2005 emphasizes that ‘on the summary hearing of a charge for an offence, whether indictable or summary, the Children’s Court must be satisfied of a child’s guilt on proof beyond reasonable doubt by relevant and admissible evidence’. Similarly, s 141 of the Evidence Act 2008 stipulates that ‘in a criminal proceeding, the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt’.

However, Pound and Evans argue that the presumption is not absolute and is limited by statute in many circumstances; for example, provisions (usually called reverse onus provisions) which impose either an evidential or legal burden of proof on accused persons. To determine whether a reverse burden of proof constitutes a reasonable limitation on the presumption of innocence, usually all the circumstances of the case must be taken into account including:

197 The main research objects of this section are provisions of the Crimes Act 1958, the Children, Youth and Families Act 2005, the Charter of Human Rights and Responsibilities Act 2006 and the Criminal Procedure Act 2009. Other relevant legislation such as the Bail Act 1977, Magistrates’ Court Act 1989, County Court Act 1958, Supreme Court Act 1986, Public Prosecutions Act 1994 and Evidence Act 2008 as well as case law are examined when necessary.
199 Corns and Tudor cite the classic statement of this principle by Viscount Sankey LC in Woolmington v DPP [1935] AC 462 at 481-482, where Sankey LC described the duty of the prosecution to prove its case against the accused as the “golden thread” of English criminal law: see Corns and Tudor, above n 101, 315.
200 Pound and Evans, above n 198, 179.
• the seriousness of the offence and the punishment that may flow from a conviction;
• whether the provision places an evidential or legal burden on the accused;
• the nature and extent of the factual matters required to be proved by the accused, including whether they are matters within the accused’s knowledge or to which he or she has access; and
• the significance of those matters relative to matters required to be provided by the prosecution.  

In *R v Momcilovic*, the Victorian Court of Appeal had an opportunity to examine the compatibility of the *Drugs, Poisons and Controlled Substances Act 1981* with the right to be presumed innocent. Under s 5 of the *Drugs, Poisons and Controlled Substances Act 1981*, a person is deemed to be in possession of drugs if he or she owns a property where the drugs are found, unless he or she can satisfy the court to the contrary. Here, s 5 of the Act imposes the legal burden of disproving possession on the accused, rather than requiring the prosecution to prove the core elements of the offence. In the appellate trial, the Court held that the reverse onus imposed by s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* infringed the right to be presumed innocent in a purposive manner that could not be cured by s 32 or justified under s 7 of the Charter. Because the Court is not empowered to invalidate the *Drugs, Poisons and Controlled Substances Act 1981*, it intended to issue a Declaration of Inconsistent Interpretation requiring the Parliament to reconsider this Act.

Although *Momcilovic* involved an adult offender, it is unlikely that the Court would make a different decision in the case of a juvenile. The most important contribution of this case is that the right to be presumed innocent recognized by the Charter is one of the criteria which the Court will utilize when examining the reasonableness of any laws. Furthermore, in this case the Court considered the best approach when evaluating whether a statutory provision violates a right guaranteed by the Charter. The approach adopted includes three steps:

• Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984*.
• Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.
• If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.

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201 Pound and Evans, above n 198, 180.
205 Barrett, above n 203.
Where the limitation is not demonstrably justified pursuant to s 7(2), the Court may issue a Declaration of Inconsistent Interpretation. Importantly, the Court stated that such Declaration should be seen, as reflected in parliamentary debates about the Charter, as ‘epitomizing the intended relationship between the courts and the legislature in the dialogue model’; rather than a last resort.

b. Right to Remain Silent

In Victoria, the common law ‘right to remain silent’ is generally preserved and recognized by s 464A(3) of the Crimes Act 1958:

Before any questioning (other than a request for the person’s name and address) or investigation under subsection (2) commences, an investigating official must inform the person in custody that he or she does not have to say or do anything but that anything the person does say or do may be given in evidence.

The right to silence is also recognized at trial. This is illustrated by provisions that prohibit a jury from drawing any adverse inference from the silence of the defendant. Under ss 20(1)-(2) of the Evidence Act 2008, judges are entitled to comment to the jury on a failure of the defendant to give evidence, but such comment must not suggest that the failure was because the defendant was, or believed that he or she was, guilty of the offence involved. Particularly, a judge may also comment on such a failure by a person who, at the time of the failure, was a parent or child of the defendant. Similarly, the comment cannot suggest that the parent or child failed to give evidence because the defendant was guilty of the offence concerned or the parent or child believed that the defendant was guilty of the offence concerned. Moreover, s 89(1) of the Evidence Act 2008 provides that an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused to answer one or more questions of investigating officials.

Although the Charter does not directly recognize the right to silence, it provides that an accused person has the right ‘not to be compelled to testify against himself or herself or to confess guilt’. The privilege against self-incrimination partially recognizes the right to silence. According to Corns and Tudor, the ‘common law provides that the privilege continues to apply unless it is clearly abrogated by the words of a statute (Sorby v

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206 Barrett, above n 203.
207 Crimes Act 1958, ss 20(3)-(4).
208 See also Petty v The Queen (1991) 173 CLR 95, 99.
Commonwealth (1983) 152 CLR 281, 309), which sometimes occur (see e.g. Major Crime (Investigative Powers) Act 2004, s 39). According to these scholars, the right to remain silence includes not only the right of the accused not to say anything in his or her defence but also the right not to call witnesses on his or her behalf.

The right to silence does not mean an accused is allowed to stand absolutely mute or that they are not obliged to participate in the conducting of investigations and preparation of trial. Section 464J of the Crimes Act 1958 stipulates that ‘[n]othing in this subdivision affects the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations except where required to do so by or under an Act or a Commonwealth Act; …’. This implies that in particular circumstances set out by statutory provisions, the right to silence can be overridden.

In the pre-trial stage, the accused is required to disclose his or her response to the summary of the prosecution opening and the notice of pre-trial admissions. Furthermore, in the arraignment, the accused is asked about his or her plea. If the accused remains silent, a plea of not guilty is entered on behalf of him or her by the court. Nonetheless, this does not have any serious impact on the right to silence because ‘there is no requirement that such a response must have any substantive content’. It is worth noting that if the accused chooses to give evidence on his or her behalf, the privilege against self-incrimination does not apply and therefore he or she is obliged to answer the questions of prosecution in cross-examination.

c. Right not to be Subject to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment

Australia has ratified the Convention against Torture and Other Cruel, Inhuman or

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210 Corns and Tudor, above n 101, 316.
211 Ibid.
212 Ibid.
213 Criminal Procedure Act 2009, s 183.
214 Ibid s 221.
215 Corns and Tudor, above n 101, 316.
216 Crimes Act 1958, s 399(4). See also s 128(10) of the Evidence Act 2008, Attwood v The Queen (1960) 102 CLR 353.
Degrading Treatment or Punishment 1984 and the Optional Protocol 2002. It has adopted the definition of ‘torture’ provided in art 1 of the Convention into the Crimes (Torture) Act 1988, s 3. Other terms such as ‘cruel’, ‘inhuman’ and ‘degrading’ punishment are understood as interpreted by the Human Rights Committee.

In Victoria, this procedural safeguard is provided in ss 10(a)-(b) of the Charter. It is modeled on art 7 of the ICCPR. Corns and Tudor state that this right is:

very important in the context of criminal investigation, and provides fundamental limits upon how criminal investigators may treat suspects and indeed, witnesses and others … Investigators have an obligation to treat all persons with respect and not to behave in ways that degrade, humiliate or intimidate them.

Thus, public officials breaching this principle must be punished and in certain circumstances be prosecuted. Compensation and remedies should be given to victims of offences related to torture. However, the Charter ‘is unlikely to give rise to an independent remedy of compensation for violations of section 10’. This means that punishing offenders and compensating victims are governed by other statutes such as the Public Prosecutions Act 1994 and the Victims of Crime Assistance Act 1996. In this regard, the National Human Rights Consultation states that:

Unlike the ACT and UK Human Rights Acts, the Victorian charter does not provide any discrete remedies for human rights breaches. If a claim under the charter is raised in the context of another proceeding, it might provide an additional reason for granting the remedy sought in those proceedings, but a person is not entitled to a remedy solely by reason of a breach of the charter.

In relation to the conduct of public officials violating this procedural right, there is a limitation in Victoria. No specific offences of torture are provided in Victorian criminal law though acts of torture may be criminalized under the provisions of other offences, (e.g., assault). Because torture is normally related to the act of a person acting in his or her

217 Australia became a party to the Convention against Torture in 1989 and signed the Optional Protocol on 19 May 2009.
218 See C v Australia (Communication No. 900/1999) [4.6]. See also Pound and Evans, above n 198, 99.
219 Corns and Tudor, above n 101, 28.
220 Pound and Evans, above n 198, 98.
221 Ibid.
223 The Human Rights and Equal Opportunity Commission observes that Queensland provides for a specific offence of torture (Criminal Code 1899 (Qld), s 320) and the Australian Capital Territory also criminalizes torture. By contrast, there is no specific offence of torture under NSW, Northern Territory, South Australia, Tasmania, Western Australia or Victorian law: see Comments of the Human Rights and Equal Opportunity Commission on Australian’s Compliance with the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (2008) 6, n 11.
capacity as a public official or while acting in an official capacity, this person should incur penalties different from those imposed on an ordinary person committing a similar act.

With the exception of s 10 of the Charter, there is no statutory provision under Victorian law directly recognizing the right not to be subject to torture and cruel, inhuman and degrading punishment. It is even more difficult to explore distinctive provisions designed to protect this right of juvenile offenders. As can be seen in the previous statement of Corns and Tudor, torture is likely to occur in the investigation stage of criminal proceedings. Consequently, provisions governing the acts of investigating officials when conducting investigations, the rights of the accused when being questioned and when being taken into custody are legal protections for the prevention of torture. On the other hand, cruel, inhuman and degrading treatment or punishment is closely related to the execution stage of the criminal process. The Children, Youth and Families Act 2005 preserves a wide range of distinctive sentences for the Children’s Court in dealing with juvenile offenders. This enables the Children’s Court to be more flexible in deciding an appropriate sentence for a convicted child, the aims of which are to protect wellbeing and to create an advantageous environment for supervision, education and training.

Another important issue arising here is the lawfulness of evidence obtained by using any form of torture. Section 138(1) of the Evidence Act 2008 provides:

> Evidence that was obtained (a) improperly or in contravention of an Australian law; or (b) in consequence of an impropriety or of a contravention of an Australian law is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained.

Under this section, it is presumed that improperly or illegally obtained evidence is inadmissible except where the court believes that the desirability of admitting the evidence outweighs the desirability of excluding it.\(^\text{224}\) When deciding whether to admit or exclude evidence gathered improperly or illegally, the court must take into account a number of criteria set out in s 138(3) of the Evidence Act 2008, including ‘whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognized by the ICCPR’. Here the court is unlikely to accept evidence collected by the use of torture in pre-

\(^{224}\) Corns and Tudor, above n 101, 263.
trial stages because this method obviously breaches the right not to be subject to torture recognized by art 7 of the ICCPR.

d. Right not to be Subject to Arbitrary Arrest or Detention

Under s 21(2) of the Charter, a person ‘must not be subjected to arbitrary arrest or detention’. This principle appears in a number of provisions contained in the Crimes Act 1958, the Magistrates’ Court Act 1989, the Children, Youth and Families Act 2005 and the Criminal Procedure Act 2009 governing arrest and detention. Similar to other jurisdictions, Victoria provides two forms of arrest including arrest without a warrant and arrest with a warrant.

In Victoria and Australia generally, arrest without warrant is used in most cases.225 Arrest without warrant is primarily governed by the Crimes Act 1958. Moreover, other statutes such as the Bail Act 1977, the Road Safety Act 1986 and the Family Violence Protection Act 2008 also recognise powers to arrest without warrant. Section 458 of the Crimes Act 1958 allows any person to arrest without warrant anyone in three circumstances including:

- Finds a person is committing an offence;
- Under instruction to arrest by a prescribed police officer; or
- Believes on reasonable grounds that the person is escaping from legal custody.

On the other hand, s 459 of the Crimes Act 1958 provides for arrest without warrant by a member of Victoria police. Under this section, police can arrest any person without warrant at any time if they believe on reasonable grounds that the person has committed an indictable offence.226 A member of the police force is given power to arrest without warrant by a number of statutes in certain situations. For instance, under s 76 of the Road Safety Act 1986, a police officer may arrest without a warrant a person who is believed to have committed an offence against any regulation made by that Act and who refuses to give a name or address when being requested or gives a false name or address. A member of the police force may arrest a person without a warrant if they reasonably think that the person is likely to violate

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226 This can be in Victoria or outside Victoria but would be an indictable offence according to Victorian law: see Corns and Tudor, above n 101, 51-2.
bail conditions. Section 38 of the *Family Violence Protection Act 2008* empowers a police officer to arrest a person without a warrant where he or she believes that the person has committed an offence against a family violence safety notice prescribed in s 37 of that Act.

Arrest with warrant is mainly regulated by the *Magistrates’ Court Act 1989*. Generally, arrest with a warrant takes place through certain steps including application for warrant, issue of warrant, execution of warrant and post-execution of warrant. A warrant to arrest is governed by the *Magistrates’ Court Act 1989*, Part 4 div 3 sub-div 2. Under s 12 of the *Criminal Procedure Act 2009*, the informant is the only person who may apply for an arrest warrant. Depending on particular features of the case, a registrar or magistrate may issue a summons requiring the accused to present in court on a fixed date or issue a warrant to arrest the accused. The grounds based upon which the court issues a warrant to arrest are provided in the *Criminal Procedure Act 2009*, s 12(5) and the *Magistrates’ Court Act 1989*, s 28(5). Under these provisions, a warrant to arrest the accused in the first instance is issued only if a registrar or magistrate is satisfied by evidence on oath or by affidavit that:

- the accused probably will not answer a summons; or
- the accused has absconded, is likely to abscond or is avoiding service of a summons that has been issued; or
- any other Act requires or authorizes a warrant or for other good cause.

In the case of juvenile offenders, s 345(1) of the *Children, Youth and Families Act 2005* provides that a registrar must not issue a warrant to arrest in the first instance unless he or she is ‘satisfied by evidence on oath or by affidavit that the circumstances are exceptional’. Furthermore, s 345(2) of the Act emphasizes that s 345 applies even if it may be contrary to s 12 of the *Criminal Procedure Act 2009*. These provisions demonstrate that arrest should be used as a last resort in the case of juveniles. Indeed, a summons is preferable to arrest not only in dealing with juveniles but also adults.  

Section 57(7) of the *Magistrates’ Court Act 1989* empowers a judge of the County Court and the Supreme Court to issue a warrant to arrest. A judge of these courts may exercise this

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228 Under s 461(2) of the *Crimes Act 1958*, a police officer is not obliged to take into custody any person if he or she believes that the criminal proceeding can effectively be conducted against that person by summons.
right when the accused fails to respond to a summons to appear in court, or fails to answer bail, or if it is otherwise authorized by law.\textsuperscript{229} Under s 324 of the \textit{Criminal Procedure Act 2009}, the Court of Appeal may issue ‘any warrant necessary for enforcing the orders of the court’. It should be noted that ‘[a] warrant to arrest other than in the first instance must include a statement of the reason for issuing the warrant’.\textsuperscript{230}

In general, a warrant is executed by a person directed by the court. He or she can be a police officer or any other authorized person.\textsuperscript{231} However, under s 63(2) of the \textit{Magistrates’ Court Act 1989}, although a warrant to arrest may be directed to a specific member of the police force, it may be carried out by any other police officer. Within a reasonable time (not later than 24 hours after taking the child in custody), the police must either:

- release him or her unconditionally or on bail under s 10 of the \textit{Bail Act 1977}; or
- bring him or her before the Court or a bail justice (when the Court is not sitting at any convenient venue).\textsuperscript{232}

Where a child is brought before the Court, the Court must decide to grant bail or not. In the latter case, the Court can only remand the child for a period not more than 21 days.\textsuperscript{233} If the time in custody has expired when the child is brought before the Court, it may continue to remand the child in custody for a further period but not longer than 21 days.\textsuperscript{234} If the child is brought before a bail justice, he or she may grant bail or refuse bail and remand the child in custody. In the latter case, the child must be brought before the Court in the next working day or within 2 working days if the proper venue is in a prescribed region of the State.\textsuperscript{235}

Detention of juveniles is unavoidable in certain circumstances in criminal proceedings. One of the aims of the process is to ensure the attendance of the accused before court. However, if this is the main objective, it can be achieved by the use of bail, particularly in case of juveniles. The \textit{Children, Youth and Families Act 2005} contains a number of provisions encouraging the use of bail. Section 346(8) of the Act allows an independent person, who

\textsuperscript{229} Magistrates’ Court Act 1989, ss 330(4)-(5).
\textsuperscript{230} Ibid s 61(6).
\textsuperscript{231} Ibid s 63(1).
\textsuperscript{232} Children, Youth and Families Act 2005, s 346(2).
\textsuperscript{233} Ibid s 346(3).
\textsuperscript{234} Ibid s 346(5).
\textsuperscript{235} Ibid s 346(4).
attends at the inquiry of a police officer into a case under s 10 of the *Bail Act 1977*, to facilitate the granting of bail by arranging accommodation. Furthermore, under s 346(9) of the Act, a child must not be refused to grant bail solely because he or she does not have any (adequate) accommodation. Where a child does not have the capacity or understanding to enter into an undertaking defined in the *Bail Act 1977*, he or she may be released on bail if his or her parent or some other person enters into an undertaking to produce him or her before the Court to continue the hearing or trial.236

Where the Court refuses to grant bail and the child remains in custody, generally he or she must be placed in a remand centre.237 The child may also be remanded in a police gaol. Section 347(2) of the *Children, Youth and Families Act 2005* sets out a number of rights for the child when he or she is placed in gaol such as the right to be kept separate from detained adults, the right to be kept separate based on sex, the right to receive visits from certain persons, etc. These provisions are consistent with the Charter, ss 23(1), 22(2). According to Pound and Evans, the combination of s 23(1) and s 22(2) requires that ‘any accused child or any child detained without charge must be segregated in detention from both adults (whether charged or convicted) and, “except where reasonably necessary”, from other children who have been convicted of offences’.238 These provisions, on the other hand, do not prevent convicted children from being detained in the same place with convicted adults. However, the Committee stated that ‘the current Victorian practice of detaining young adults (between 18 and 21 years of age) in the same correctional facilities as children represented best practice’.239

From the foregoing, it can be concluded that the right not to be subject to arbitrary arrest or detention of juveniles is guaranteed under Victorian criminal procedure law. Fundamentally, the majority of provisions governing the arrest and detention of adults are also applied to juveniles. In addition, there are a number of distinctive provisions designed for arresting and detaining children. The primary aim of these statutory provisions is to ensure that juveniles

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236 *Crimes Act 1958*, s 346(10).
237 *Children, Youth and Families Act 2005*, s 347(1). Remand centres are established for ‘the detention of children awaiting trial or the hearing of a charge or awaiting sentence or in transit to or from a youth residential centre or youth justice centre’ (*Children, Youth and Families Act 2005*, s 478(a)).
238 Pound and Evans, above n 198, 162.
are arrested and remain in custody only when necessary, in accordance with detailed requirements established by law.

2. Procedural Rights
a. Right to be Informed Promptly and Directly of the Charges

The right to be informed promptly and directly of the charges is recognized by s 25(2)(a) of the Charter:

A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees: to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she speaks or understands …

This provision is modeled upon art 14(3)(a) of the ICCPR. The subsection ‘contains two essential requirements relating to the adequacy of the notification of a charge – that is, that an accused should be informed and informed promptly’. These requirements are guaranteed by a number of provisions contained in the Criminal Procedure Act 2009. Under s 12(4) of the Act, after a charge-sheet has been validly filed with a registrar, he or she must either issue a summons to answer the charge to the accused or a warrant to arrest. Moreover, s 14(1) allows a member of the police force or a public official acting in the performance of his or her duty (but after signing a charge-sheet), to issue a summons to answer the charge. In this way, the accused is indirectly informed of the charge at an early stage of a criminal proceeding.

Section 16 of the Criminal Procedure Act 2009 provides that in general every summons to answer a charge must be served personally on the accused at least 14 days before the return date – the first date on which the proceeding is listed before the court. If it is a charge for an indictable offence of which a registrar has fixed a date for a filing hearing, the time limit for serving the accused is at least 7 days before that date or any time before that date which is prescribed by the court’s rules. These provisions aim to fulfil the essential requirement set out in the Charter that the accused must be informed ‘promptly’ of the charge.

In order to help the accused understand the nature and reason for the charge, s 13 of the Criminal Procedure Act 2009 provides that a copy of the charge-sheet, a notice containing summary of relevant provisions of the Act, the advice that the accused should seek legal

240 Pound and Evans, above n 198, 180.
advice and the right, if eligible, to legal aid under the *Legal Aid Act 1978* and details of how to contact Victoria Legal Aid, must be accompanied with the summons to answer the charge or the warrant to arrest. Furthermore, Schedule 1 of the Act sets out specific issues which must be contained in the charge-sheet. Significantly, Part 8.3 of the *Criminal Procedure Act 2009* contains a number of provisions governing the service of documents in the criminal process. The aims of these provisions are: to ensure that important documents, particularly the charge-sheet, are delivered to the participants including the accused directly and precisely; to indentify clearly the responsibility of relevant parties in cases of loosing or late serving documents and to provide appropriate solutions to remedy any deficiencies.

Where a member of the police force or a public official files a charge-sheet with a registrar, they must serve a preliminary brief on the accused within 7 days after the day on which the charge-sheet is filed.\(^{241}\) Moreover, a copy of the preliminary brief must be available on the return date to provide to the accused or the legal practitioner representing the accused if these persons request.\(^{242}\) Section 37 of the *Criminal Procedure Act 2009* sets out in detail the contents of a preliminary brief including a copy of the charge-sheet, a notice in the form prescribed by the court’s rules, a statement made by the informant personally, any evidentiary certificate, etc. This section aims to guarantee that the accused can understand clearly the nature of the charge, the evidence on which the charge is based and to assist the accused in preparing his or her defence. Additionally, the accused is entitled to request the informant to serve a full brief. In this regard, there is a slight difference between the time at which juvenile offenders can make the request and that of their adult counterparts. Under s 528(2A) of the *Children, Youth and Families Act 2005*, juvenile offenders are allowed to make the request at any time after the criminal proceeding has commenced whereas, according to s 39(1A)(a) of the *Criminal Procedure Act 2009*, adult offenders are entitled to do this at any time after a summary case conference is held.\(^{243}\) After receiving the written notice from the accused, the informant must serve a full brief at least 14 days before the

\(^{241}\) *Criminal Procedure Act 2009*, s 24(a).

\(^{242}\) *Ibid* s 24(b).

\(^{243}\) Section 54(2) of the *Criminal Procedure Act 2009* provides that ‘[…]if a preliminary brief is served within 7 days after the day on which the charge-sheet is filed, a summary case conference must be conducted before (a) the charge is set down for a contest mention hearing or a summary hearing; or (b) a request for a full brief is made under section 39(1)’. In any other case, adult offenders can request for a full brief at any time after the criminal proceeding has commenced (s 39(1A)(b) of the *Criminal Procedure Act 2009*).
In comparison with the preliminary brief, the full brief includes in details more information on which the prosecution intends to rely at the hearing of the charge.245

b. Right to be Tried without Undue Delay

In Victoria, the right to be tried without undue delay is recognized by ss 25(2)(c) and 21(5)(b) of the Charter. The first provision applies to the time taken at all stages of a criminal proceeding including sentence, appeal and retrial whereas the second solely applies to the length of time prior to the commencement of a trial.246 Furthermore, s 21(5)(b) recognizes the right to be tried without unreasonable delay particularly of a person who is arrested or detained on a criminal charge, rather than any accused person in general. In the case of accused children, s 23(2) specially provides that they ‘must be brought to trial as quickly as possible’. In comparison with the requirement of trial ‘without unreasonable delay’ stipulated in s 25(2)(c) and s 21(5)(b), this provision imposes ‘a more onerous obligation’.247 These sections of the Charter are modeled on art 10(2)(b) of the ICCPR and art 40(2)(b)(iii) of the CRC. Despite minor difference in the use of terminology, there is no ‘material distinction’248 between these provisions.

As expressed in the wording of above provisions, this procedural safeguard only applies to the time when the charge against a person is made. Under Victorian criminal procedure law, however, the spirit of this principle is also reflected in provisions governing time limits for filing a charge-sheet, particularly in the case of juvenile offenders. Section 344A(1) of the Children, Youth and Families Act 2005 provides that in general ‘[a] proceeding against a child for a summary offence must be commenced within 6 months after the date on which the offence is alleged to have been committed’, while this time limit is double in the case of adults.249 When the criminal proceeding is commenced earlier, the child may be promptly brought before the court for a hearing.

244 Criminal Procedure Act 2009, s 39(2).
245 Contents of a full brief are provided in s 41 of the Criminal Procedure Act 2009.
246 Pound and Evans, above n 198, 183.
248 Pound and Evans, above n 198, 162.
249 Criminal Procedure Act 2009, s 7(1).
Other provisions in Victorian criminal procedure law facilitate the right of children and young offenders to be tried without unreasonable delay. These provisions relate to the time limit for bringing a child taken into custody before the Children’s Court or a bail justice. In normal cases, the maximum length of time is 24 hours after taking a child into custody. The aim of these provisions is to prevent the child from being detained for excessive periods of time. This may also help the court to quickly find an appropriate solution to deal with the child, which may include hearing and determining the charge. By contrast, in the case of adult offenders, the maximum duration of custody is not identified. Under the *Magistrates’ Court Act 1989*, s 64(2), the arrested person may be brought before a bail justice or magistrate within a ‘reasonable of time’ – the determination of which depends upon a number of factors set out in the *Crimes Act 1958*, s 464A(4).\(^{250}\)

In the criminal process, if the court believes that a continuance may lead to an unfair hearing or trial, it may stay proceedings. However, in *R v Upton*, the Supreme Court of the Australian Capital Territory held that undue delay is not a ground for the adjournment of proceedings.\(^{251}\) This is consistent with the judgments in *Dietrich v The Queen* and *Jago v District Court*\(^{252}\) where the High Court of Australia held that a stay of proceedings is not justified by a lack of legal representation or unreasonable delay of trial unless it can be illustrated that ‘the result will be that a fair trial is no longer possible’.\(^{253}\) Consequently, the infringement of one of the minimum procedural safeguards for offenders set out in s 25(2) of the Charter does not automatically cause a stay of proceedings.\(^{254}\)

Other provisions that facilitate a criminal proceeding being conducted promptly include those governing time limits to file and serve important documents (such as preliminary brief, full brief, hand-up brief, plea brief, the notice of appeal, etc.). Additionally, allowing certain indictable offences to be heard and determined summarily with simplified procedures contributes to the right to be tried promptly.

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\(^{250}\) The Human Rights Commission has held that if the delay has been caused by the accused or his or her legal representatives, this right is not violated: see *Stephens v Jamaica* (Communication No. 373/1989), [9.8].  
\(^{251}\) *R v Upton* [2005] ACTSC 52, [19].  
\(^{252}\) *Dietrich v The Queen* (1992) 177 CLR 292; *Jago v District Court* (NSW) (1989) 168 CLR 23.  
\(^{253}\) Pound and Evans, above n 198, 252.  
\(^{254}\) Ibid.
c. Right to Have the Free Assistance of an Interpreter

Under s 25(2)(i) of the Charter, an accused is entitled to have ‘the free assistance of an interpreter if he or she cannot understand or speak English’. This provision is modeled on art 14(3)(f) of the ICCPR. Consistent with these provisions and art 40(2)(vi) of the CRC, the Children, Youth and Families Act 2005, s 526 prescribes:

If the Court is satisfied that a child, a parent of a child or any other party to a proceeding has a difficulty in communicating in the English language that is sufficient to prevent him or her from understanding, or participating in, the proceeding, it must not hear and determine the proceeding without an interpreter interpreting it.

According to s 3 of the Charter of Human Rights and Responsibilities Act 2006, ‘interpreter’ means an interpreter accredited by a prescribed body, or a competent person (if an accredited interpreter is not readily available). The prescribed body is the National Accreditation Authority for Translators and Interpreters Limited. A competent interpreter can be an ‘adult family member who speaks both the accused’s language and English’.

Despite being modelled on the ICCPR and the CRC, provisions governing the right to have the free assistance of an interpreter for juvenile offenders in the Victorian legislative framework actually go further than the requirements set out in these international conventions. For instance, under s 25(2)(j) of the Charter, the accused can have the ‘free assistance of assistants and specialized communication tools and technology if he or she has communication or speech difficulties that require such assistance’. The aim of this provision is to guarantee that ‘persons with such difficulties can understand the case put against them and fully and effectively participate in all stages of the criminal proceedings’. There is no equivalent to this provision in the ICCPR and the CRC. In fact, this provision of Victoria is consistent with General Comments No. 9 and General Comments No. 10 of the Committee on the Right of the Child. Additionally, s 526 of the Children, Youth and Families Act 2005 ensures this right not only for a juvenile offender but also for his or her parent. Obviously, when a child’s parent understands the essential and procedural issues of the case, he or she can protect the child more effectively.

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256 Pound and Evans, above n 198, 187.
257 Ibid 188.
258 Committee on the Rights of the Child, General Comment No. 9 (2006): The Rights of Children with Disabilities, 45th sess, UN Doc CRC/C/GC/9 (27 February 2007), para 74(a) (‘General Comment No. 9’); General Comment No. 10, UN Doc CRC/C/GC/10, para 63.
d. Right of Defence

In Victoria, juvenile offenders’ right of defence is ensured by s 25(2)(b) of the Charter. Under this subsection, ‘[a] person charged with a criminal offence is entitled … to have adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her’. As previously mentioned, according to the UN Human Rights Committee, the adequacy of time and facilities required to satisfy this right depends on various elements of the case.\footnote{Human Rights Committee, \textit{General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 19\textsuperscript{th} sess, UN Doc CCPR/C/GC/32 (23 August 2007), para 32 (‘General Comment No. 32’).}

Under the Victorian legal framework, the right of defence is guaranteed from the investigation stage to the trial stage. In the investigation stage, investigating officials must inform the person in custody of this right.\footnote{\textit{Crimes Act 1958}, s 464C(1).} After that, they have to postpone questioning and investigation for a reasonable time as well as afford reasonable facilities as soon as practicable to enable the person in custody to communicate with a friend, relative or legal practitioner.\footnote{Ibid.} They also have to allow the legal practitioner or his or her clerk to communicate with the person in custody.\footnote{Ibid s 464C(2).} Particularly, s 464E(1)(b) of the \textit{Crimes Act 1958} provides that the child in custody is allowed to communicate with his or her parent or guardian or an independent person before the commencement of any questioning or investigation and their communication is not to be overheard.

Generally, the accused has the right to present his or her case personally or to make a defence by a legal representative. Nonetheless, juvenile offenders are entitled to be legally represented and \textit{must} be represented in proceedings relating to contested bail applications and hearing of charges concerning imprisonable offences.\footnote{Children, Youth and Families Act 2005, ss 524-525(2).} Similar to the investigation stage, where a juvenile offender is not legally represented, the Children’s Court may adjourn the hearing of the proceeding to give him or her an opportunity to obtain legal representation.\footnote{Ibid s 524(1).} Under s 524(3) of the \textit{Children, Youth and Families Act 2005}, a hearing previously adjourned may be resumed even though a child offender is not legally represented.
if the Court is satisfied that he or she has been given a reasonable opportunity to obtain legal representation but has failed to do so.

The accused can choose his or her defence counsel or, if eligible, can be provided legal assistance by Victoria Legal Aid under the *Legal Aid Act 1978*.\(^{265}\) The Charter further requires authorities to inform the accused of this right in case he or she does not have legal assistance.\(^{266}\) Fox observes there are various forms of legal aid including legal advice, duty lawyer services, legal assistance, and voluntary legal aid services.\(^{267}\) Under s 26(1) of the *Legal Aid Act 1978*, duty lawyer services and legal advice are provided without charge. Legal assistance, however, is provided without any costs payable by the accused if he or she meets the eligibility criteria set out in the *Legal Aid Act 1978*. In other cases, an applicant must pay a certain amount to Victoria Legal Aid. These provisions are consistent with s 25(2)(f) of the Charter. Under s 24(2) of *Legal Aid Act 1978*, priority for legal assistance is given to persons charged with indictable offences or indictable offences triable summarily regardless of whether they are juveniles or adults.

The requirement that an accused must have adequate facilities to prepare his or her defence is also manifest in provisions governing disclosure by the prosecution in the pre-trial stage. Under the *Criminal Procedure Act 2009*, the prosecution is obliged to serve certain documents on the accused in the pre-hearing stage of summary offences or indictable offences triable summarily and the pre-trial stage of indictable offences. These documents include a preliminary brief and a full brief (if requested);\(^{268}\) a plea brief or a hand-up brief;\(^{269}\) a summary of the prosecution opening and a notice of pre-trial admissions.\(^{270}\) These documents share some common features. They include the charge-sheet and any information, document and thing on which the prosecution intends to rely in the hearing or trial. Essentially, these documents contain evidence gathered by the prosecution against the accused. Based on these documents, the parties may resolve certain issues of law, procedure and fact as well as identify issues which need more consideration by the trial judge.


\(^{266}\) Ibid s 25(2)(e).

\(^{267}\) Fox, above n 93, 87-9.

\(^{268}\) *Criminal Procedure Act 2009*, ss 35(1), 39(2).

\(^{269}\) Ibid ss 107, 116.

\(^{270}\) Ibid s 182(1).
may help to reduce the length and costs of the hearing or trial. Information contained in these documents assists the accused in preparing his or her defence.

Pre-hearing or pre-trial disclosure is also imposed on the accused. For instance, s 183(1) of the **Criminal Procedure Act 2009** requires the accused to serve on the prosecution his or her response to the summary of the prosecution opening and the notice of pre-trial admissions. According to Fox, the **Criminal Procedure Act 2009** ‘requires a higher degree of defence disclosure than previously contemplated by the adversary system’. However, the Act still preserves particular provisions which favour the accused in conducting the disclosure obligation. Section 183(4) of the **Criminal Procedure Act 2009** allows the accused not to present in advance the identity of any defence witness other than expert witness nor indicate whether he or she will give evidence.

Additionally, the committal proceeding when dealing with indictable offences creates advantages for the accused in exercising his or her defence. Section 97 of the **Criminal Procedure Act 2009** sets out the purposes of a committal proceeding. Some of these include enabling the accused to hear or read the evidence against him or her and to cross-examine prosecution witnesses and to adequately prepare and present a case. At a committal proceeding, the accused is entitled to access the prosecution case whereas he or she is not obliged to present evidence. The committal proceeding has been sometimes criticized for creating an unfair advantage to the accused compared with the prosecution. Thus, Corns and Tudor argue that the primary aim of a committal proceeding is to enable the court to review the prosecution case, rather than to favour any parties. Furthermore, the defence must also undertake to disclose evidence in the pre-trial stage but not at the committal process.

### e. Right to Equality before Courts and Tribunals and to a Fair Trial

In Victoria, this procedural principle is recognized at common law and in statutory law. Under s 24(1) of the Charter, ‘a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing’. Two fundamental

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271 Fox, above n 93, 269.
273 Ibid.
rights are protected by this section: ‘the right to a fair hearing and the right to public pronouncement of judgments and decisions’. These rights are applicable to all stages of criminal proceedings in all courts and tribunals of Victoria.

Although s 24 of the Charter is modeled on art 14(1) of the ICCPR, it has a minor variation. The former recognizes the right to a fair ‘hearing’ whereas the latter protects only the right to a fair ‘trial’. This is derived from the fact that in Victoria, proceedings conducted at the Magistrates’ Court and the Children’s Court are described as a ‘hearing’ not a ‘trial’. The term ‘trial’ refers to proceedings taking place before a jury in the County Court or the Supreme Court. Trials are only applicable to indictable offences whereas hearings are applicable to all summary offences and certain indictable offences prescribed by law. The rights contained in s 24 of the Charter are given to a person charged with a ‘criminal offence’ including both indictable and summary offences.

There is a close relationship between s 24 and s 25 of the Charter. The Charter provides some minimum procedural safeguards for an accused in s 25. The rights in s 25 are subsidiary to and essential for the right to a fair hearing. The right to a fair hearing also relates to other rights in the Charter such as the right of equality before the law and to the equal protection of law (s 8(3)), the right not to be tried or punished more than once (s 26) and the prohibition on retrospective criminal law (s 27).

Basically, the requirement of the right to a fair and public hearing set out in s 24 of the Charter is similar to art 14(1) of the ICCPR. It includes express elements such as ‘fairness’, ‘public’ hearing and ‘competent, independent and impartial’ court or tribunal and implied elements: for instance the right of access to the courts; the right to advice and representation; the right to a hearing without undue delay and the right to the disclosure of relevant evidence. Essentially, some of implied elements are the minimum guarantees provided for

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274 Pound and Evans, above n 198, 165.
275 Nonetheless, as noted by the Human Rights Committee, ensuring all guarantees set out in s 25 does not mean that a fair hearing is totally achieved: see General Comment No. 13: Equality before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14), 21st sess, (13/04/1984), HRI/GEN/1/Rev. 9(I), 184-88, para 5. It should be noted that although General Comment No. 13 was replaced by General Comment No. 32, the latter does not explain about this issue in details. By contrast, it cannot be automatically concluded that the accused does not receive a fair hearing if one of these minimum guarantees is not met: see Pound and Evans, above n 198, 166.
276 Pound and Evans, above n 198, 171.
in s 25, the observation of which contributes to the achievement of a fair hearing. Because these procedural safeguards have been previously discussed, the subsequent discussion only focuses on express elements.

The fairness of a hearing refers to the principle of ‘equality of arms’ which was discussed in Ragg v Magistrates’ Court of Victoria.277 Under Victorian criminal procedure law, there are a number of statutory provisions designed to ensure fairness between the prosecution and the accused in all stages of the criminal justice process. Provisions in the Criminal Procedure Act 2009 govern the disclosure obligation of parties at the pre-hearing or pre-trial stages,278 and the presence and examination of witnesses at a hearing or trial. Corns and Tudor state that:

The prosecution must run the prosecution case in a fair and impartial manner. This includes, among other things, full disclosure of all evidence to be adduced by the prosecution at trial, and providing the accused with all relevant exculpatory material, even if the prosecution does not intend to use that material at the trial, as well as disclosing to the accused any prior convictions of prosecution witnesses to be called. The prosecutor can also object to the admissibility of evidence proposed to be called by the defence ....279

The accused in turn must serve their response on the prosecution case. However, relying on the privilege against self-incrimination, an accused is allowed not to give any evidence and may remain silent during the hearing or trial (although this does not prevent him or her from opposing any arguments of the prosecution).

Concerning the second express element, s 24 of the Charter requires that all proceedings must be conducted in public (except in the circumstances provided in s 24(2)).280 There is a shortcoming in s 24(2) of the Charter. It does not include s 523(2) of the Children, Youth and Families Act 2005 which entitles the Children’s Court to conduct the whole or any part of a proceeding against an accused child behind closed doors with the presence of only persons or classes of persons specified by the Court. On the other hand, under s 24(3) of the Charter, all judgments or decisions of a court or tribunal must be pronounced in public except where the best interests of a child otherwise requires or a specific law otherwise permits.

277 Ragg v Magistrates’ Court of Victoria and Another (2008) 18 VR 300, 310-11 [45]-[51].
278 Criminal Procedure Act 2009, Part 3.2 divs 2-3 and Part 5.5 div 2.
279 Corns and Tudor, above n 101, 322.
280 Section 24(2) refers to circumstances specified in s 19 of the Supreme Court Act 1986, s 80AA of the County Court Act 1958 and s 126 of the Magistrates’ Court Act 1989.
The requirement of a ‘competent, independent and impartial’ court or tribunal is also ensured in the Victorian juvenile justice system. The Children’s Court is a ‘specialist tribunal dealing with criminal and welfare matters relating to children and young persons’. The Children’s Court was established by the Children, Youth and Families Act 2005 and is at the same level in the judicial hierarchy as the Magistrates’ Court. The Criminal Division of the Children’s Court has jurisdiction over children who at the time of the alleged commission of the offence were under 18 years of age but of or above 10 years of age but does not include any person who is of or above 19 years of age at the commencement of proceedings. This Division is empowered to hear and determine all charges against children for summary offences and certain indictable offences. However, when a child is charged with an indictable offence before the Children’s Court, he or she can elect to be tried by jury in the Supreme Court or in the County Court.

The independence and impartiality of the Children’s Court are manifested through the assignment and roles of magistrates and judicial registrars in proceedings and in its procedural rules. These elements ‘are also protected as a matter of Australian constitutional law on the basis that any court, including any State court, capable of exercising the judicial power of the Commonwealth must be, and must appear to be, independent and impartial’. Generally, in Victoria any person who is appointed as a magistrate or an acting magistrate under ss 7, 9 of the Magistrates’ Court Act 1989 may be assigned to be a magistrate for the Children’s Court either exclusively or in addition to any other duties. The President of the Children’s Court must consider the experience of any magistrate or acting magistrate in matters relating to child welfare before assigning them to the Court. An assigned person continues to be a magistrate for the Children’s Court for so long as he or she holds the office of magistrate or acting magistrate under the Magistrates’ Court Act 1989 unless his or her assignment is revoked. Magistrates of the Children’s Court have the same protection and immunity as those of judges of the Supreme Court.

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281 Fox, above n 93, 102.
282 Children, Youth and Families Act 2005, s 516(1)(b).
283 Ibid s 356.
285 Children, Youth and Families Act 2005, s 507(1).
286 Ibid s 507(2).
287 Ibid s 507(4).
288 Ibid s 513.
The primary role of magistrates and judicial registrars of the Children’s Court is to guarantee that trials are conducted in compliance with the law and are fair to all parties. In order to complete this function, they are empowered to decide questions of law and admissibility of evidence as well as to control the parties. Similar to judges in superior courts, magistrates and judicial registrars of the Children’s Court are expected to be absolutely independent and neutral in the way they conduct hearings. If a judge favoured one or other of the parties, this could be grounds for a subsequent appeal on the ground that the judge was biased.289 The Victorian justice system manifests a fundamental principle of the adversary system – that the function of investigating and gathering evidence should be separated from the function of considering the evidence and deciding the case.290

The independence of the Children’s Court is also illustrated through its specialist procedures. Basically, it has similar powers to, and operates under the general procedures of, the Magistrates’ Court.291 However, the Children’s Court must follow the additional requirements set out in pt 7.3 of the Children, Youth and Families Act 2005. It must ensure a child and his or her parents understand the nature of the trial and facilitate participation by the child in the proceeding.292 Any wishes expressed by the child should be considered and the stigma to the child and his or her family should be minimized.293 These procedural guidelines are consistent with general principles established by the CRC. They affect the adjudication and decisions of magistrates and judicial registrars of the Children’s Court.294

An important question is whether these procedural rules are also applied by the Supreme Court and the County Court when dealing with juvenile offenders. Based on comparison with judgments of the European Court of Human Rights and minimum standards set out by relevant international human rights instruments, Burnnard concluded that ‘current procedures employed in the Victorian Supreme Court in trials of young people violate the

289 Corns and Tudor, above n 101, 321.
291 These procedures are governed by the Magistrates’ Court Act 1989 and Criminal Procedure Act 2009.
293 Ibid ss 522(1)(d),(f).
294 Fox states that being tried before the Children’s Court may have a number of advantages including expeditious proceedings and less severe sanctions focusing on rehabilitation rather than retribution: see Fox, above n 93, 104.
provisions of the *Charter of Human Rights and Responsibilities Act 2006*, particularly those governing the right to a fair trial and the right to be treated in an age-appropriate manner. She states that the most significant shortcoming is the absence of consistent, age-appropriate procedures for young accused.

Similar research on trials of juvenile offenders in the County Court does not appear to have been conducted. However, under s 36A(2) of the *County Court Act 1958*, ‘the general principles of practice and procedure observed for the time being in the Supreme Court of Victoria with respect to the trial or determination of indictable offences shall be adopted and applied in the County Court’. In other words, the Supreme Court and the County Court employ similar procedures in dealing with young offenders. This may lead to a conclusion that proceedings against juvenile offenders in the County Court have similar limitations to those in the Supreme Court.

**f. Right to the Presence and Examination of Witnesses**

This right of juvenile offenders is recognized by ss 25(2)(g)-(h) of the Charter. Under s 25(2)(g), the accused is entitled to examine witnesses against him or her. Section 25(2)(h) allows the accused to obtain the presence and to examine witnesses on his or her behalf. These rights are ensured by a number of provisions in the *Evidence Act 2008* and the *Criminal Procedure Act 2009*.

Before examining this right of juvenile offenders, it is necessary to reiterate the process of presenting and examining witnesses under Victorian criminal procedure law. In the adversary system, this process commences with examination in chief by the prosecution. Immediately after this first step, the accused or his or her lawyer may cross-examine the witness. The prosecutor then may re-examine the witness to clarify any

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296 Burnnard, above n 295, 181.
297 The *Evidence Act 2008* governs the adducing of evidence given by witnesses whereas the *Criminal Procedure Act 2009* provides procedures for presenting and examining witnesses.
298 Examination in chief is ‘the questioning of a witness by the party who called the witness to give evidence, not being questioning that is re-examination’ (Evidence Act 2008, Dictionary, part 1).
299 *Criminal Procedure Act 2009*, ss 65(1)(a), 224.
300 Cross-examination is ‘the questioning of a witness by a party other than the party who called the witness to give evidence’ (Evidence Act 2008, Dictionary, Part 1).
301 *Criminal Procedure Act 2009*, ss 132, 225.
uncertain or inconsistent issues arising in the cross-examination. These steps are repeated for each witness of the prosecution. The prosecution case is closed when all its witnesses are called and examined. 303 After that, the accused and his or her counsel may call witnesses 304 and the above procedures are repeated although the roles of the parties are reversed.

The right to the presence and examination of witnesses occurs in summary hearings, the trial of indictable offences, and also in committal proceedings. However, some limitations are imposed on the accused when exercising this right in the last category of proceeding. Under s 124(1) of the Criminal Procedure Act 2009, a witness may be cross-examined only if the court grants leave. 305

There is no distinctive provision in the Victorian legal framework ensuring the right of juvenile offenders to present and examine witnesses. This is illustrated by the fact that this procedural safeguard is mainly governed by the Evidence Act 2008 and the Criminal Procedure Act 2009, rather than the Children, Youth and Families Act 2005. Because juveniles are less likely to be mature and have legal knowledge, the exercising of this right in the criminal process is largely dependent on their legal representative. 306

Clearly, the selection of the legal practitioner plays a pivotal role in the success of the accused’s defence. Moreover, together with the accused, the legal practitioner participates in all stages of the process of presenting and examining witnesses. They must present to the jury the response of the accused to the prosecution’s opening address, 307 select and question witnesses on behalf of the accused and cross-examine witnesses of the prosecution.

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302 Re-examination is ‘the questioning of a witness by the party who called the witness to give evidence, being questioning (other than further examination in chief with the leave of the court) conducted after the cross-examination of the witness by another party’ (Evidence Act 2008, Dictionary, Part 1).
303 Criminal Procedure Act 2009, ss 73, 234.
304 Ibid ss 66(b), 226(b).
305 In determining whether cross-examination is justified, the court must consider various factors enumerated in ss 124(4)-(5) of the Criminal Procedure Act 2009. The accused is allowed to conduct cross-examination and re-examination of witnesses only at the committal hearing. At other type of hearings in a committal proceeding such as compulsory examination hearing and committal case conference, the accused is not entitled to exercise this right (Criminal Procedure Act 2009, s 106(4)).
306 Thus, provisions regulating the rights of the child’s representative are crucial in this aspect. In a summary hearing and the trial of indictable offences, a legal practitioner is entitled to select one of the options set out in ss 66, 226 of the Criminal Procedure Act 2009 including: (a) A submission that there is no case for the accused to answer; (b) Answer for the charge by choosing to give evidence or call other witnesses to give evidence or both; and (c) Not to give evidence or call any witnesses.
307 Criminal Procedure Act 2009, s 225 (1)(a).
g. Right to Appeal

Under s 25(4) of the Charter, ‘[a]ny person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court in accordance with law’. This subsection is modeled on art 14(5) of the ICCPR. In the case of convicted children, s 424 of the *Children, Youth and Families Act 2005* invests them with the right to appeal to the County Court or the Supreme Court (where the Children’s Court is constituted by the President) against a conviction and sentence imposed by the Children’s Court or against sentence alone. The *Children, Youth and Families Act 2005* specially preserves the whole of pt 5.4 to provide for appellate procedures. Convicted children are also entitled to appeal to the Victorian Court of Appeal or the High Court of Australia under the *Criminal Procedure Act 2009* and the *Judiciary Act 1903*. These statutes establish the legal basis for the guarantee of the right to appeal of children and young offenders in Victoria.

When analyzing this legal basis, three dominant issues emerge:

- First, appeal is not as of right in certain circumstances. This means the convicted person cannot automatically challenge the original judgment. This is applicable to situations where they intend to appeal to the Victorian Court of Appeal or the High Court of Australia. In these cases, a sentenced person must be given leave to appeal by the relevant courts. The question raised here is whether the right to apply for leave to appeal of juvenile offenders is sufficiently compatible with ‘the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court’ recognized by s 25(4) of the Charter, art 14(5) of the ICCPR and arts 40(2)(b),(v) of the CRC. In this regard, the Human Rights Committee in *Lumley v Jamaica* held that:

  A system not allowing for automatic right to appeal may still be in conformity with art 14(5) as long as the examination of an application for leave to appeal entails a full review, that is, both on the basis of the evidence and of the law, of the conviction and sentence and as long as the procedure allows for due consideration of the nature of the case.  


308 For instance, ‘a person sentenced to a term of detention by an appellate court may appeal to the Court of Appeal against the sentence if in the proceeding that is the subject of the appeal, the Children’s Court had not ordered that the person be detained and the Court of Appeal gives the person leave to appeal’ (*Children, Youth and Families Act 2005*, s 430R(2)). Similarly, appeals against judgments of the Supreme Court of a State to the High Court are only conducted if the High Court grants the would-be appellant a special leave to appeal (*Judiciary Act 1903*, s 35(2)). These courts may refuse to grant leave to appeal if the party applying for it cannot demonstrate that there is substantially arguable matter, which need to be reviewed at the superior courts.  

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Second, the judgment of a trial judge can be reviewed by a different division of the same court. The *Criminal Procedure Act 2009*, pt 6.3 empowers the Court of Appeal to review the conviction and sentence imposed by the trial judge of the Supreme Court of Victoria. It might be questionable whether this provision is consistent with the requirement set out in art 14(5) of the ICCPR that the judgment of originating court must be re-examined by a ‘higher court’. In this regard, art 14(5) of the ICCPR prevents a conviction or sentence from being confirmed or reviewed by the same judge.\(^{310}\) It does not, however, prohibit a different division from reviewing judgments of a trial judge in the same court. It is the power of the appellate court when re-examining judgments that is important. Although the Court of Appeal and the Trial Division are two components of the Victorian Supreme Court, the first can affirm (dismiss appeals)\(^{311}\) or set aside the conviction and sentence (order a new trial, impose a new sentence or remit the matter to the originating court)\(^{312}\) imposed by the trial judge of the latter.

The third issue relates to the category of persons who may become appellants. Generally, the right to appeal is allowed to a convicted person, the DPP, parties to a proceeding (other than committal proceedings) and the trial judge. Additionally, the child’s parent or the Secretary of the DHS may appeal on behalf and in the name of the child where he or she is under the age of 15 years.\(^{313}\) This means that a convicted child of 15 to under 18 years must decide by himself or herself whether to make an appeal.\(^{314}\) It is arguable whether these children have sufficient legal knowledge to properly exercise their right of appeal.

### 3. Rights Particular to Juvenile Offenders

#### a. Right to the Presence of a Parent or Guardian

This procedural right of juvenile offenders is not provided in the Charter but is recognized by a number of provisions contained in the *Victoria Police Manual 105-1*, the *Crimes Act 1958*, the *Children, Youth and Families Act 2005* and the *Criminal Procedure Act 2009*.

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\(^{310}\) See *Consuelo Salgar de Montejo v Colombia*, Communication No. 64/1979, UN Doc CCPR/C/OP/1 (1985), paras 9.1, 11.

\(^{311}\) *Criminal Procedure Act 2009*, ss 276(2), 281(2).

\(^{312}\) Ibid ss 277(1), 282(1).

\(^{313}\) *Children, Youth and Families Act 2005*, s 430ZB.

\(^{314}\) In this case, the DPP and the trial judge do not appeal.
Section 7.3 of the *Victoria Police Manual 105-1* requires the presence of a parent or guardian or an independent third party during a search of children except in urgent or serious circumstances. Sections 486, 488E-G of the *Children, Youth and Families Act 2005* provide for searches of children and visitors in detention. However, provisions governing searches of children upon arrest or in police custody are not adopted.  

Moreover, under s 464E(1)(a) of the *Crimes Act 1958*, an investigating official must not question or conduct any investigation unless a parent or guardian of the child or an independent person is present, with the further condition that the child is allowed to communicate with that person before the commencement of any questioning or investigation (*Crimes Act 1958*, s 464E(1)). The attendance of one of these persons is also compulsory in fingerprinting. Particularly, the fingerprints of a child aged 10 years or more but under 15 years may be taken only if the child and a parent or guardian consent.  

In order to make the presence of the child’s parent in the criminal process more effective, criminal procedure law vests in this person a number of rights such as the right to object to the jurisdiction of the Children’s Court on behalf of the child and the right to obtain legal representation for the child.

Besides a parent or guardian, the child is also provided the assistance of an independent person. Section 464E of the *Crimes Act 1958* states that (where a parent or guardian of the child is not available) an independent person must present at police questioning or investigation. An independent person plays similar role as a parent or guardian. They are allowed to communicate with persons in custody before the commencement of any questioning or investigation and assist, protect and support them during the questioning or investigating processes. The participation of independent persons in these stages of criminal proceedings provides an additional ‘source’ to ensure the interests of children and young people.

In addition to independent persons, children and young offenders are also given the support

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315 Corns and Tudor, above n 101, 101.
316 However, under sub-s 2, this does not apply when the investigating official believes that the communication ‘would result in the escape of an accomplice or the fabrication or destruction of evidence’ or ‘the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed’.
317 *Crimes Act 1958*, s 464K(8).
318 Ibid s 464L(2).
320 Ibid s 524(1).
321 *Crimes Act 1958*, s 464E(1)(b)
of legal practitioners. In the pre-trial stages, before any questioning or investigation commences, the person in custody is entitled to communicate with a legal practitioner.\textsuperscript{322} In the trial stage, s 524 of the \textit{Children, Youth and Families Act 2005} requires the Children’s Court to ensure that a child is legally represented in all stages of a criminal proceeding. Section 525 of the same Act stipulates proceedings where a child offender must be legally represented. These provisions are consistent with the requirements of the Charter that ‘[a] child charged with a criminal offence has the right to a procedure that takes account of his or her age …’\textsuperscript{323} and procedural guidelines of the Children’s Court that it must ensure the proceeding is comprehensible not only to the child but also to his or her parents.\textsuperscript{324}

Nonetheless, there are a number of limitations in current law governing the presence and participation into criminal proceedings of parents, guardians and independent persons. These legislative shortcomings were analyzed in the \textit{Final Report No. 21: Supporting Young People in Police Interviews} of the Victorian Law Reform Commission.\textsuperscript{325} This Report identified issues which need to be supplemented and clarified including:

- The role of a parent or guardian;
- When is a parent or guardian is not ‘available’ according to s 464E of the \textit{Crimes Act 1958}?
- Definition, qualifications and role of independent persons;
- Responsibilities of investigating officials in ensuring the presence of a parent, guardian or independent person;
- Consequences for non-compliance with s 464E of the \textit{Crimes Act 1958}.

\textbf{b. Right to Privacy}

Privacy and reputation of a person are ensured by s 13 of the Charter. This section is modeled on art 17 of the ICCPR. In the case of a child offender, the \textit{Children, Youth and Families Act 2005} establishes a number of provisions to protect this right. Generally, the Children’s Court operates under procedural guidelines which require it to respect the ‘cultural identity and needs of the child’ as well as ‘minimize the stigma to the child and his

\begin{itemize}
\item \textsuperscript{322} Ibid s 464C.
\item \textsuperscript{323} \textit{Charter of Human Rights and Responsibilities Act 2006}, s 25(3).
\item \textsuperscript{324} \textit{Children, Youth and Families Act 2005}, s 522(1).
\end{itemize}
or her family’. Following these principles, s 534 of the Act provides that, except with the permission of the President of the Children’s Court, a person must not publish or cause to be published:

- A report of a proceeding in the Court or of a proceeding in any other court arising out of a proceeding in the Court that contains any particulars likely to lead to the identification of the particular venue of the Children’s Court, a child or other party to the proceeding or a witness in the proceeding;
- A picture, being or including a picture of a child or other party to, or a witness;
- Any matter that contains any particulars likely to lead to the identification of a child.

The child offender’s privacy is also protected through provisions governing the publicity of trials in the Children’s Court. Under s 523(2) of the Children, Youth and Families Act 2005, on the application of a party or of any other person who has a direct interest in the proceeding or without any such application, the Children’s Court may order that ‘the whole or any part of a proceeding be heard in closed court; or only persons or classes of persons specified by it may be present during the whole or any part of a proceeding’. This provision is compatible with s 24(2) of the Charter governing a fair hearing. Moreover, s 24(3) of the Charter emphasizes that ‘all judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires’. This subsection is partially modeled on art 14(1) of the ICCPR.

In this regard, Victoria has made some efforts to harmonize its legislative framework with international requirements concerning a child offender’s right to be fully respected of privacy. However, some limitations still exist in the Victorian legal framework. As mentioned before, the Committee on the Rights of the Child suggests that ‘all State parties introduce the rule that court and other hearings of a child in conflict with the law be conducted behind closed doors. Exceptions to this rule should be very limited and clearly stated in the law’. In Victoria, proceedings in the Children’s Court are normally heard in open court and occasionally in closed court when prescribed persons request or the Children’s Court itself recognizes should to do so. Hence, in theory, if parties of the case do

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327 Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10 (25 April 2007), para 66.
not apply for a closed trial and the Children’s Court also believes that a closed trial is unnecessary, juvenile offenders are tried in an open court. This is clearly contrary to the approach of the Committee on the Rights of the Child and the procedural guidelines of the Children’s Court itself that the criminal proceedings should minimize the stigma to the child and his or her family as well as the ‘desirability of promoting the child’s rehabilitation’. It can be argued that the provisions of the Children, Youth and Families Act 2005 on the restriction of publication of proceedings prevent a child offender from being identified even though the trial is conducted publicly. Nonetheless, these provisions vest in the President of the Children’s Court discretionary power regarding the restriction of publication of proceedings. It is reasonable to claim that provisions on restriction of publication of proceedings cannot ensure the privacy of juvenile defendants is completely protected and trying them in open court may lead to an adverse impact on their best interests.

E. Observations

The above analysis illustrates that a separate legislative framework dealing with children and young offenders has been established in Victoria. Components of the contemporary legal framework include common law and statutory law with the latter having a more significant role. Generally, proceedings against juvenile offenders encompass stages similar to those applicable to adult offenders. However, a number of distinctive provisions for young offenders are also contained in the Victorian justice system.

Previously, a number of young offenders’ human rights were ensured by common law and several statutes such as the Crimes Act 1958 and the Magistrates’ Court Act 1989. With the enactment of the Charter of Human Rights and Responsibilities Act 2006, almost all juvenile offenders’ rights in the criminal process are recognized and protected. The Charter is modeled on the ICCPR with certain modifications to make it compatible with other legislation in Victoria. Along with human rights applicable to all persons, the Charter also recognizes special requirements of children and young offenders in the criminal justice including the right to a fair trial and the right to be treated in an age-appropriate manner. These requirements are consistent with procedural guideline followed by the Children’s Court.

Despite the above advantages, the contemporary legal framework of Victoria has certain limitations in protecting children and young offenders. Proceedings in the Children’s Court are normally conducted in open court. Some procedures employed by the Supreme Court violate the right to a fair trial and the right to be treated in an age-appropriate manner – rights of children and young offenders which are recognized by the CRC. Additionally, with the exception of the Charter, ‘no legislation exists in Victoria to safeguard the needs and rights of young people in a courtroom, with the result that there is very little awareness of this issue among judges, counsel and other court staff’.  

IV. Conclusions

The Victorian juvenile justice system has been established for more than 100 years. The process commenced with the appearance of the Children’s Court in 1906, followed by informal procedures including police cautioning programs to divert children and young offenders from the formal court processes in the second half of the 20th century. The 21st century has witnessed the adoption and application of restorative justice in the Victorian legal system aimed at repairing damage and healing relationships between parties through informal dialogue and meetings. Analysis of the Victorian legislative framework demonstrates that Victoria has pursued the welfare model, focusing on education and rehabilitation rather than punishment of juvenile offenders. This is consistent with innovative practices in criminal justice in developed jurisdictions as well as UN human rights bodies.

While the welfare approach may be manifested through criminal procedures and measures applicable to children and young offenders committing petty offences, in serious cases this approach is also used as the basis of balancing the fundamental rights of juvenile offenders and the protection of public interests and order. In Victoria, the rights of young offenders are recognized and ensured by common law and several statutes. Currently, with the arrival of the Charter of Human Rights and Responsibility Act 2006, these rights have been significantly enhanced. The Act ‘is also encouraging new ways of thinking about human rights, including exploring innovative approaches to giving people a say in decisions that

329 Burnnard, above n 295, 181.
330 Corns and Tudor, above n 101, 24.
affect them’. Modeled on the ICCPR, the Act incorporates international minimum standards on protection of human rights, including those in the criminal process, into the State legal framework, thereby requiring public authorities to act in ways compatible with it and to give proper consideration to relevant human rights when making decisions.

In order to provide for effective and adequate protection of juvenile offenders’ rights, a combination of the Charter and other relevant legislation such as the Children, Youth and Families Act 2005 and the Criminal Procedure Act 2009, would appear necessary. In fact, the criminal legal framework of Victoria has been reformed significantly during the first ten years of this century and continues to evolve. The legal reform process focuses on clarifying, simplifying and consolidating laws governing criminal procedures in the Victorian court system.

Despite these developments, certain limitations still exist in the Victorian juvenile justice system. While proceedings against children and young offenders in the Children’s Court are conducted under special procedural guidelines, those in the Supreme Court appear to infringe the right to a fair trial and the right to be treated in age-appropriate manner. With an increasing number of young offenders presenting before these courts, their treatment ‘is not an academic concern but an unfortunate reality, which must be addressed as soon as possible’. As to the Charter, it is argued that the ‘Attorney-General’s involvement has generally extended the time taken in court and the resources required to bring a charter action’. Significantly, the Act does not entitle a person to a remedy solely because of a violation of its provisions.

As can be seen from the foregoing, this chapter has focused on analyzing the protection of the rights of children and young offenders under the Victorian juvenile justice system from legislative perspective. The implementation of these procedural safeguards in practice will be discussed in the subsequent chapter of the thesis.

332 Burnnard, above n 295, 183.
333 National Human Rights Consultation, above n 222, 262.
334 Ibid.

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Chapter 7
PROTECTION OF THE RIGHTS OF JUVENILE OFFENDERS
IN VICTORIA: THE PRACTICE

I. Introduction
According to the Drug and Crime Prevention Committee of the Victorian Parliament, ‘children’s rights and juvenile justice approaches in Victoria are arguably more advanced than in other regions of Australia’.¹ This is partly demonstrated in the Victorian legislative framework which was previously discussed in Chapter 6. Nonetheless, the Drug and Crime Committee emphasized that child rights ‘need to be practically enacted in the everyday situations in which young people, including young offenders, find themselves’.² In other words, the concept of children’s rights ‘needs to be given practical implementation at every level of government and community service delivery’.³ To provide a comprehensive understanding of the Victorian juvenile justice, this chapter analyses the protection of children and young offenders’ rights in practice.

II. Protection of Juvenile Offenders’ Rights: Major Strengths, Major Weaknesses and Reasons
A. Introduction
Chapter 6 has the same structure as Chapter 4. Issues surrounding the implementation of some essential procedural safeguards designed for children and young offenders are discussed including the right of defence, the right to the presence of a parent or guardian, the right to privacy, the right not to be subject to arbitrary arrest or detention and the right to the equality before courts and tribunals and to a fair trial. The chapter aims to describe what happens with regard to these rights in practice and to analyze major strengths and limitations in preventing these rights from being breached. This chapter also explores factors creating obstacles to the protection of the rights of juvenile offenders.

² Ibid 75.
³ Ibid.
**B. Major Strengths, Major Weaknesses and Reasons**

1. **Right of Defence**

a. **Major Strengths**

In Victoria, various authorities, centres and organizations provide legal assistance for the defence of children and young offenders. Key providers are: Victoria Legal Aid (VLA), Victorian Aboriginal Legal Service (VALS), and Youthlaw.\(^4\) They can assist children and young people in many areas including representation at court hearings of criminal matters. In practice, most children and young offenders exercise their right of defence with support from VLA. This independent statutory authority:

prioritizes young people charged with criminal offences over other client groups by choosing not to apply a means-test, allowing a grant of legal assistance for almost all offences other than the most minor, and resourcing their staff practice to act for around half of the number of young people charged with offences.\(^5\)

VLA provides specialist services such as Child Support Legal Service (comprising an outreach program that visits VLA’s offices and other locations), Neighbourhood Justice Centre (providing a duty lawyer, legal advice and representation services for Magistrates’ Court, Children’s Court) and Youth Legal Service (including a 24-hour, 7 day a week telephone advice line coordinated through VLA as part of the Youth Referral and Independent Person Program for young people under 18 in police custody).\(^6\) The Youth Legal Service gives children and young people free advice over the phone, or by appointment if they are in custody, with priority given to those who have been arrested and locked up by the police or sent to court by the Department of Human Services (DHS).\(^7\) VLA consistently identifies one of its core services is to provide young people with duty lawyers at courts, advice in the community and youth justice facilities and legal representation when their cases are brought for trial.\(^8\) In 2010-2011, 25,417 people aged between 12 to 25 (29.7% of VLA’s total clients) received a grant of legal assistance, legal advice or duty lawyer services.\(^9\) Moreover, VLA operates a Youth Crime sub-program which ensures child offenders ‘are treated fairly and that outcomes have a therapeutic focus by providing expert advice and representation in a way that reflects the unique status and vulnerability of

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\(^4\) Other providers include Youth Affairs Council of Victoria Inc (YACVic), Frontyard Youth Services etc.
\(^6\) Ibid 16.
\(^8\) Victoria Legal Aid, above n 5, 38. See also Victoria Legal Aid, *Seventeenth Statutory Annual Report 2011-12* (2012), 38.
\(^9\) Victoria Legal Aid, above n 5, 53.
VLA spent $9.5 million in 2011-2012 on legal services relating to youth crime (5.8% of the total operating expenditure).

As a Victoria’s state-wide community legal centre for young people, Youthlaw works to address the legal issues facing young people through legal services, advocacy, law reform and preventive education programs, within a human rights and social justice framework. It provides legal services for young people at many locations such as Drop in Legal Clinic at Frontyard Youth Services, Salvation Army Youth Bus, Braybook Youth Enterprise Hub, RMIT University, and services by phone and email. In 2011-2012, 1,546 people received assistance from Youthlaw, including court representation and on-going legal casework for 275 young people. From 2010 to 2013 Youthlaw will focus on three key areas including police interactions with young people, diversion, and infringement reform.

To protect the rights of the Koori community including children and young people in conflict with criminal law, the Victorian Aboriginal Legal Service (VALS) was established. VALS provides not only basic legal advice and court representation but also legal research and education relating to Aboriginal and/or Torres Strait Islander peoples across the State of Victoria. VALS affirms that the adequacy of legal representation for these people ‘goes to the heart of questions of access, equity and the rule of law’. VALS has a 24 hour a day

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10 Victoria Legal Aid, above n 5, 34. The efficient operation of youth crime sub-program is illustrated in a prominent case where a lawyer of VLA, in co-operation with welfare agencies and the DHS, supported and defended Brandon (a fourteen-year-old boy in remand). They demonstrated that Brandon had an intellectual disability. They found his paternal grandmother. Brandon was placed on a good behaviour bond on the condition that he had regular contact with disability services. At present, he lives in country Victoria with his grandmother, has returned to school, stayed out of trouble and become a local sports champion in his new community. Additionally, in 2011-2012, VLA lawyers helped two young Indonesians (Dion and Ari) return home to their families after spending an average of around one year in custody because of being charged with aggravated people smuggling: see Victoria Legal Aid, Seventeenth Statutory Annual Report 2011-12 (2012), 34-5.


13 Ibid 5-7.

14 Ibid 8.


16 A number of justice advocacy relating to children are carried out by VALS including: Submission on how Australia protects and provides for its children to Child Rights Taskforce Australia (NGO Report to the UN for Australia’s review by the Committee on the Rights of the Child – 20th December 2010) and Submission to Victorian Government in response to Protecting Victoria’s Vulnerable Children Inquiry (April 2010) etc: see Victorian Aboriginal Legal Service Co-operative Limited, Annual Report 2010-2011, 25. See also Annual Report 2011-2012, 15.

17 Victorian Aboriginal Legal Service Co-operative Limited, above n 16, 3.

18 Ibid 4.
service provided by a team of Client Service Officers and criminal solicitor. They provide services to clients from pre-trial (custody, bail) to trial stages (representation at court). In 2010-2011, VALS’s criminal law team provided casework representation in 3,718 cases and duty law assistance in 94 cases. Observing 19 hearings over 11 sittings (22 weeks) in the Children’s Koori Court, researchers found that most defendants were legally represented by lawyers of VALS.

In addition to VLA, Youthlaw and VALS, Victoria has special programs (‘pro bono’ programs) operated by private law firms which facilitate in accessing justice. Under these programs, law firms provide free legal assistance to approved clients. This program has substantially improved access to justice for marginalised and disadvantaged Victorians.

The above description shows that the actual protection of children and young peoples’ rights to defend in Victoria is compatible with relevant UN standards. Special organizations and community legal centres have been established to provide legal and other appropriate assistance in the preparation and presentation of juveniles’ defence (CRC, art 40(2)(b)(ii)). The legal aid provided by these organizations and centres is free of charge (Beijing Rules, art 15.1). Generally, lawyers in the Children’s Koori Court made careful preparation for their cases and positive representation at hearings. Intimidation, hindrance, harassment and improper interference to the performance of lawyers’ professional functions do not exist in practice (Basic Principles on the Role of Lawyers, art 16). The confidentiality of

19 Victorian Aboriginal Legal Service Co-operative Limited, above n 16, 21.
20 Ibid 22.
22 Pro bono programs are carrying out based on an agreement (Penal Contract) between the State and a Service Provider (Panel Firm). They provide ‘legal services that are socially responsible and without expectation of fee, at a reduced fee or where payment is considered inappropiate. The primary objective of those services is the assistance of disadvantaged persons or organizations or the promotion of the public interest’: see Victoria Department of Justice, Policy Guidelines for the Delivery of Pro Bono Services for an Approved Cause under the Government Legal Services Contract (2005), para 1.2(d).
24 Law firms are required by the Victorian Government to provide pro bono services of at least 5 to 15 per cent of the value of the legal fees derived under panel arrangements; see submissions of Public Interest Law Clearing House; Human Rights Law Resource Centre (Educate, Engage, Empower) and Australian Lawyers for Human Rights to National Human Rights Consultation, Report (2009) 200.
communications and consultations between defence counsel and juveniles are ensured (*Basic Principles of the Role of Lawyers*, arts 8, 22).

**b. Major Weaknesses**

Theoretically, the right of defence is attached to the right to access to justice. In its concluding observations, the UN Human Rights Committee stated that Australia does not ensure adequate access to justice for marginalized and disadvantaged groups, including Indigenous people and aliens. Then, there is a lack of safeguards and resources in Australia to secure access to justice for all people. Many submissions to the National Human Rights Consultation Committee, including one from Seniors Rights Victoria, indirectly express concerns about the opportunities to access legal representation. The ‘Rights of Children and Young People’ Working Conference, which was held by the Victorian Federation of Community Legal Services in 2001, also identified that limited access to legal representation for young people at a police station and to information relevant to young people about police powers is one of problematic issues of juvenile justice. This practice is contrary to art 3 of *Basic Principles on the Role of Lawyers*, which requires governments to ‘ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons’.

**c. Reasons**

There are several reasons for the above-mentioned weaknesses. Many children and young people do not know they have a right to legal advice prior to the commencement of court hearings. The result of a survey (conducted by the National Children’s and Youth Law Centre with the assistance of Child Rights Taskforce members) revealed that only 40% of 628 respondents (who were children and young people under the age of 20 years from across Australia) knew of their legal rights and even less (27.6%) were informed of their rights.

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29 National Human Rights Consultation, above n 23, 198.
which may include the right of defence. This is inconsistent with art 5 of Basic Principles on the Role of Lawyers.  

Insufficient funding for legal aid and community legal centres has an adverse impact on access to justice in human rights matters. This is a common factor in most Australian states and territories, including Victoria. Several recent submissions to the National Human Rights Consultation Committee show that funding for legal aid has declined substantially in recent years. Particularly, legal aid funding for Indigenous people has been unchanged for more than a decade, representing a decrease of 40% in real terms. Some legal centres argued that inadequate funding of legal aid commissions has led to a practical consequence that in some jurisdictions, legal aid is only available to the very poor and mostly relating to criminal matters. Like legal aid, government funding for community legal centres in recent years has been reduced, which places significant pressure on these centres although demand for their services has been increased. In Victoria, despite its important role and effective operation, Youthlaw remains one of the lowest funded community legal centres. The Aboriginal and Torres Strait Islander Legal Services complain that ‘they are grossly underfunded and the current funding and indexation proposed by the Commonwealth over the next three years does not match market or population projections’.  

2. Right to the Presence of a Parent or Guardian

As previously discussed in Chapter 6, under the Victorian legislative framework, at all stages of criminal proceedings involving children and young people, public officials generally must secure the presence of a parent or guardian. Where these persons cannot participate in the criminal process, independent persons, other family members, relatives and

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32 Article 5 stipulates: ‘Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.’
34 Submission of Aboriginal and Torres Strait Islander Legal Services to National Human Rights Consultation, Report (2009) 199.
38 Victorian Aboriginal Legal Service Co-operative Limited, above n 16, 4-5.
close friends can replace them to provide support. This section provides an evaluation on the current practice in Victoria concerning the attendance of these persons.

a. Major Strengths

In consultations with both Victoria Police and young people, the Victorian Law Reform Commission found that in most circumstances when questioning a young person in custody, police successfully ensure the presence of a parent or guardian.\(^{39}\) Where a parent or guardian is not available, independent persons attend police interviews to provide support for children and young people.\(^{40}\) Independent persons can be trained volunteers of the Youth Referral and Independent Person Program (YRIPP) or other individuals arranged by police stations.\(^{41}\)

The YRIPP is a partnership program between government and non-government agencies which was established in 2003. This program aims to provide an independent person service supporting young people in custody who may subsequently become defendants in criminal proceedings and appropriate early interference in order to divert young people from progressing to higher levels of the judicial processes.\(^{42}\) The YRIPP has adopted its process of volunteer selection based on specific criteria as well as training and assessment program. As at June 2010, YRIPP had 350 active volunteers, with a further 102 undertaking training.\(^{43}\) In the 2009-2010 financial year, YRIPP volunteers supported young people in more than 2900 interviews across Victoria.\(^{44}\) The importance of this program is reflected in the roles of YRIPP volunteers before, during and after the interview. Before the interview, they help young persons to contact a lawyer, a friend or relative, explain the interviewing procedures and their essential rights. During the interview, they observe whether ‘the police are acting properly, fairly and with respect for the rights of the detained person and to take appropriate action (based on ... observations and the young person’s wishes) if it appears they are not’.\(^{45}\) After the interview, independent persons may attend fingerprinting of young people,


\(^{40}\) The Commission noted that ‘accurate statewide data on the frequency with which police use a young person’s parent or guardian rather than an independent person is not available’: see Victorian Law Reform Commission, above n 39, 38.

\(^{41}\) Victorian Law Reform Commission, above n 39, 38.


\(^{43}\) Victorian Law Reform Commission, above n 39, 39.

\(^{44}\) Ibid.

\(^{45}\) Centre for Multicultural Youth, above n 42, 53.
discussion on young persons’ satisfaction and concerns about the interview and police treatment when they were in custody, etc.\textsuperscript{46}

Instead of using YRIPP volunteers, two thirds of police stations in Victoria ensure the attendance of an independent person by relying on their own lists of individuals who have agreed to attend police interviews of juveniles.\textsuperscript{47} These persons include teachers, ministers of religion, bail justices or justices of the peace\textsuperscript{48} or other family members of young people, for example a grandparent, brother or sister.\textsuperscript{49} They perform the same roles and responsibilities as YRIPP volunteers at police interviews.

The presence of independent persons in interviewing specific categories of person is generally secured. For example, when interviewing young aboriginal people, police officers must contact the local Aboriginal Community Justice (if operational in the area) so that the latter’s members can notify relatives or friends and converse with the person in custody and assist with welfare matters.\textsuperscript{50} In relation to young people with an impaired mental state or capacity, the Victoria Police Manual requires police officers to ensure the presence of an ‘independent third person’, who may be a relative or close friend, or a trained volunteer from the Office of the Public Advocate.\textsuperscript{51}

Independent persons not only support young people in police questioning but also in the bail process. In conformity with ss 346(7)-(8) of the \textit{Children, Youth and Families Act} 2005, DHS performs a scheme for facilitating the bail granting for young people. During business hours, police can contact the regional youth unit\textsuperscript{52} while they can call the Central after Hours

\textsuperscript{46} Victorian Law Reform Commission, above n 39, 45.
\textsuperscript{47} Ibid 47.
\textsuperscript{48} Consultations 3 (Victoria Police Hume 1) in Victorian Law Reform Commission, above n 39, 47.
\textsuperscript{49} Consultations 32 (Victoria Police Mallee), 3 (Victoria Police Hume 1), 33 (Victoria Police Dandenong) in Victorian Law Reform Commission, above n 39, 47.
\textsuperscript{52} Victoria Department of Human Services, \textit{Central after Hours and Bail Placement Service} (26 March 2010) <http://www.vcf.vic.gov.au/youth-justice/ library/fact-sheets/cahabps>. During business hours, there is a court advice worker at the Children’s Court providing bail support. The daytime workers provide a similar assessment service to CAHABPS. An intensive bail support program is currently being piloted at the Melbourne Children’s Court. (Telephone conversation with Angela Kambouris, Manager, Central after Hours and Bail Placement Service, 14 September 2010 in Victorian Law Reform Commission, above n 39, 50).
and Bail Placement Service (CAHABPS) outside business hours to provide assistance for young people who are subject to bail processes.\footnote{53 In 2009, CAHABPS responded to 550 callouts (an average of 46 per month): see Victorian Law Reform Commission, above n 39, 113.}

From the foregoing it can be concluded that Victoria has developed relatively comprehensive mechanisms to secure the presence of a parent or guardian supporting young people in very early stages of criminal proceedings. Furthermore, the existence of independent persons provides an efficient alternative in cases where parents or guardians are not available or unlocated. They provide effective assistance for a large number of young people in police interviews and bail processes. In this regard, Victoria establishes and observes higher standards than those set out in the UN framework.

\textbf{b. Major Difficulties and Concerns}

Through consultations and submissions, the Victorian Law Reform Commission and other relevant organizations have expressed concerns regarding the participation of parents or guardians and independent persons. These concerns include the passive and ineffective assistance of parents and independent persons; difficulties in recruiting and retaining volunteers in YRIPP and non-YRIPP police stations; training of YRIPP volunteers; delays in independent persons arriving at police interviews; problems in ensuring the attendance of independent persons in regional areas and securing independent persons for specific categories of people including aboriginal young people, young people in out-of-home care and those from cultural and linguistically diverse backgrounds.

\textit{i. Limitations of Parents and Independent Persons}

Relating to the participation of parents in police interviews, Youthlaw observed that:

Many parents will either not know about or understand the system, or may give advice that’s to the detriment of a young person or contrary to their best interests. Some parents may want their child to simply agree with or go along with police. One Braybrook participant said that parents may actually take the police’s side. Some parents would assume their child was guilty already and ask the young person questions like “Why did you do it?”\footnote{Youthlaw, \textit{Young People Having Their Say about the Role of Independent Persons}, Submission from Youthlaw in response to \textit{Supporting Young People in Police Interview Background Paper} (2009) 4-5.}

The Victorian Law Reform Commission also noted:

In some instances, a parent or guardian, like the young person’s father in \textit{Toomalatai},\footnote{\textit{DPP v Toomalatai} (2006) 13 VR 319, 320 [7].} may be critical
of the young person or remain passive during the interview. In other instances, the parent or guardian may feel overwhelmed by the interview and, as a result, be unable to provide the young person with any meaningful support.56

In *Director of Public Prosecutions v Toomalatai*, Dean Toomalatai (aged 16 years and 2 months at the time of the incident) was charged with affray, manslaughter and intentionally or recklessly causing injury or serious injury.57 His father was asked to come to the police station but he only met his son in the interview room for a couple of minutes and then went away because he thought Toomalatai was not happy with him.58 The police subsequently arranged for Mr John Walker, a Justice of the Peace, to attend.59 Prior to the commencement of the interview, Mr Walker admonished the accused and advised him to speak to the police when being questioned.60 During the interview, Mr Walker ‘sat passively, even when Mr Toomalatai displayed obvious confusion at some points’.61 Mr Walker stated he had not been trained for his role.62 Justice Bell held that admissions made by the accused during the police interview should be excluded because Mr Walker did not perform properly the duty of an independent person.63 Mr Walker should not have judged and admonished Toomalatai before the interview and remained passive during the questioning process.64 *Toomalatai* demonstrates the limitations of the role of the independent person in supporting a young people and the need to clarify the role of these persons.

**ii. Difficulties in Recruiting, Retaining and Training Volunteers**

The difficulty in recruiting and retaining volunteers is a common issue for both YRIPP and non-YRIPP police stations. The recruitment process has become a challenge for YRIPP because of a natural attrition of volunteers.65 According to Victoria Police, more volunteers need to be recruited.66 YRIPP volunteer training is another concern. A few volunteers consider the YRIPP training is too long and includes irrelevant information.67

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56 Victorian Law Reform Commission, above n 39, 25.
58 Ibid 320 [7].
59 Ibid 320 [3].
60 Ibid 320 [4].
61 Ibid 322 [15].
62 Ibid 321 [12].
63 *DPP v Toomalatai* (2006) 13 VR 319, 335 [78].
64 Ibid 335 [78].
65 Consultation 13 (Jim Barritt – YRIPP) in Victorian Law Reform Commission, above n 39, 50.
66 Consultation 9 (Victoria Police Geelong) in Victorian Law Reform Commission, above n 39, 50.
67 Consultation 21 (Honorary Justices), submission 24 (Anonymous) to Victorian Law Reform Commission, above n 39, 51.
volunteers are even not received any comprehensive and on-going training for their role. Additionally, the performance of independent persons has been criticised by Victoria police. Police officers complain that some independent persons interrupt interviews unnecessarily (although their interruption is less often than those of a parent), and volunteers may overstep the role of independent person and advocate for young people.

iii. Problems in Ensuring the Attendance of Independent Persons in Regional Areas
Some police officers state that independent persons are slow in arriving at police stations. This extends the time a young person is held in custody. Consequently, police may contact a community volunteer from the station list who lives nearby and who can attend more quickly than a YRIPP volunteer. The delayed arrival at police stations of independent persons occurs more often in regional and rural areas because of volunteer deficiency and greater travelling time. Victoria police state that long distance travel in rural areas is not being considered when assigning YRIPP volunteers. To resolve this problem, police in regional areas may directly drive a volunteer to an interview or let a volunteer sit in on more than one interview when they present at the station. However, this is a temporary solution and appears inappropriate. The volunteer in this situation may hesitate to take action against police’s improper behaviour. Moreover, if there are many interviews conducted in one day, the independent person may be exhausted and thereby his or her functions are not properly performed.

iv. Problems in Securing Independent Persons for Specific Categories of People
Securing the presence of a parent or guardian of an Aboriginal young person in police

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68 Victorian Law Reform Commission, above n 39, 47.
69 Consultations 9 (Victoria Police Geelong), 28 (Victoria Police Flemington) in Victorian Law Reform Commission, above n 39, 52. However, the Commission understands that in the time since consultation, the vast majority of police who responded to YRIPP surveys were pleased with the timely response of volunteers. The Commission also understands that YRIPP has resolved issues with the call centre that were resulting in delays.
70 Consultation 3 (Victoria Police Dandenong) in Victorian Law Reform Commission, above n 39, 52.
71 Consultation 4 (Victoria Hume 2) in Victorian Law Reform Commission, above n 39, 52.
72 Consultations 9 (Victoria Police Geelong), 28 (Victoria Police Flemington), 32 (Victoria Police Mallee), 33 (Victoria Police Dandenong) in Victorian Law Reform Commission, above n 39, 51.
73 Consultation 28 (Victoria Police Flemington) in Victorian Law Reform Commission, above n 39, 51.
74 Consultation 28 (Victoria Police Flemington) in Victorian Law Reform Commission, above n 39, 51.
75 Consultations 3 (Victoria Police Hume 1), 4 (Victoria Police Hume 2), 24 (YRIPP, YACVic and CMY), 32 (Victoria Police Mallee) in Victorian Law Reform Commission, above n 39, 51.
76 Consultation 3 (Victoria Police Hume 1) in Victorian Law Reform Commission, above n 39, 51.
77 Ibid.
interviews presents many difficulties in practice. Sometimes it is hard for police officers to communicate with family members, guardians or relatives when an Aboriginal young person is held in custody and is to be questioned. Where these people are not available, an independent person of Aboriginal descent, including an elder in the community, a VALS client service officer, an Aboriginal Community Justice Panel member or an Aboriginal police liaison officer, may be invited to present at police interviews to support the young person. However, police data shows that VALS client service officers do not frequently attend police interviews. This may be attributed to a lack of resources or, alternatively, local client service officers not being contacted by the police.

Ensuring an independent person for young people in out-of-home care is also a problematic issue in Victoria. This is mainly because of difficulties in determining guardianship of young people in state care. The Victorian Police Manual requires police officers to contact the DHS, which has responsibility to supply and verify details of the lawful guardian. Nonetheless, whether DHS is obliged to inform parents when a young person in state care is in custody for police interviewing is not stipulated. Moreover, members of the Children’s Court of Victoria have noted that guardianship of young people in residential care sometimes cannot be determined at short notice and after hours. They also argued that the definition of guardianship in the context of s 464E of the Crimes Act 1958 is unclear.

Securing the presence of an independent person for young people from cultural and linguistically diverse backgrounds is another concern. The attendance of parents or guardians who do not understand or speak English well at police interviews of a young

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78 Consultations 12 (Victoria Police Bairnsdale), 32 (Victoria Police Mallee) in Victorian Law Reform Commission, above n 39, 52.
79 Consultation 9 (Victoria Police Geelong) in Victorian Law Reform Commission, above n 39, 52.
80 Consultation 5 (Brad Boon – VALS) in Victorian Law Reform Commission, above n 39, 52.
81 Consultations 9 (Victoria Police Geelong), 32 (Victoria Police Mallee) in Victorian Law Reform Commission, above n 39, 52.
82 Consultation 16 (Victoria Police Gippsland) in Victorian Law Reform Commission, above n 39, 52.
83 Consultations 1 (YRIPP Metro South East), 3 (Victoria Police Hume 1), 32 (Victoria Police Mallee) in Victorian Law Reform Commission, above n 39, 52.
84 Consultation 5, above n 80.
86 Consultation 8 (Judge Grant and Magistrate Power – Children’s Court of Victoria) in Victorian Law Reform Commission, above n 39, 53.
87 Ibid.
person is not uncommon in Victoria. Although police are required to arrange an interpreter in these cases, they do not always fulfil their responsibility and in such circumstances often turned to an independent person to support young people. According to the Centre for Multicultural Youth (CMY) and the YACVic, an ‘independent person should never be used in place of an interpreter for a parent as this only serves to further marginalise refugee and migrant parents from the justice process’. 

**v. Difficulties of Independent Persons in the Bail Process**

Another major concern relates to the uncertainty surrounding the role of independent persons supporting young people in the bail process. Section 346(7),(8) of the *Children, Youth and Families Act 2005* stipulates that during some bail procedures, a parent or guardian of the young person in custody or an independent person must be present. The Victorian Law Reform Commission has expressed concern that some independent persons who support a young person in custody during police interviewing are requested to undertake the role of the independent person during the bail process. Yet, it is clear that independent persons play very different roles during these two procedures. Some independent persons have not undergone training to assist young people in the bail process and do not have access to information about emergency accommodation facilities which may be an important factor when deciding whether to grant bail. Moreover, some people are unfairly requested to ‘act as a surety for a young person or give an undertaking on their behalf’.

When bail is granted to a young person, there may also be considerable confusion relating to the persons who can sign the bail condition form when a parent or guardian is absent. In practice, some YRIPP independent persons are uncertain about what their responsibilities are.

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88 Consultations 19 (YRIPP Metro West), 8 (Judge Grant and Magistrate Power – Children’s Court of Victoria), 26 (YRIPP Inner City and Bayside), 28 (Victoria Police Flemington) in Victorian Law Reform Commission, above n 39, 53.


90 Consultation 19 (YRIPP Metro West) in Victorian Law Reform Commission, above n 39, 53.

91 Submission 20 (CMY and YACVic) in Victorian Law Reform Commission, above n 39, 53.

92 Victorian Law Reform Commission, above n 39, 115.

93 Ibid.

94 Ibid.

95 Ibid.
in these situations. Interviews with independent persons reveal they had signed bail forms in the past when requested to do so and then arranged to transport young people to their home, or had signed bail forms with a clear notice on the forms ‘they were signing only as a witness and not in the capacity of the young person’s parent’. Others felt this was entirely unreasonable because they would be unable to secure the presence of young people before court when required.

Another difficulty has arisen in relation to restrictions on CAHABPS’ service provision. Because of restricted hours of the CAHABPS’s service, facilitating bail for young people will face difficulties when there is no appropriately available person. In fact if a young person is arrested and interviewed outside the service hours of CAHABPS, people such as independent persons may replace CAHABPS workers in the bail process. However, as previously noted, these people are not qualified to facilitate bail or arrange bail accommodation. Additionally, at present bail justices are not obliged to call CAHABPS and may not always wait for the worker to arrive even when called.

Although the establishment of independent persons is a dominant feature of the Victorian juvenile justice system, their actual operation in police interviews and bail process reveal a number of shortcomings. As noted before, this is a required standard in protecting rights of young people. With a high number of juveniles in conflict with the law and difficulties in recruiting volunteers, ensuring the attendance of independent persons is not easily accomplished. Victoria needs a process to revise, adjust and improve this area of juvenile justice.

96 Consultations 7 (YRIPP Shepparton), 10 (YRIPP Metro East), 11 (Victoria Police Metro East) in Victorian Law Reform Commission, above n 39, 115.
97 Consultation 7 (YRIPP Shepparton) in Victorian Law Reform Commission, above n 39, 115.
98 Consultations 7 (YRIPP Shepparton), 10 (YRIPP Metro East) in Victorian Law Reform Commission, above n 39, 115.
99 Consultation 7, above n 97.
100 Victorian Law Reform Commission, above n 39, 115.
101 Telephone conversation with Angela Kambouris, Manager, Central after Hours and Bail Placement Service, 14 September 2010 in Victorian Law Reform Commission, above n 39, 112.
102 Section 346(7) of the Children, Youth and Families Act 2005 only requires police officers to secure the presence of a parent or guardian of the child in custody or an independent person when they inquire into a case under s 10 of the Bail Act 1977.
103 Consultation 20 (CAHABPS and Youth Justice Unit) in Victorian Law Reform Commission, above n 39, 112.
c. Reasons
The main reason for the inadequate support of young people in custody during police interviews and the bail process is the lack of legislative clarity on the role of independent persons. The statutes mentioned here are the *Crime Act 1958* and the *Children, Youth and Families Act 2005*. The Victorian Law Reform Commission observes that:

Although s 464E of the *Crime Act 1958* was an important development, it does not provide a comprehensive statement of young people’s rights and police officers’ obligations during police questioning. The *Crimes Act 1958* also does not indicate who may be an independent person and what that person’s role is, nor does it explain the consequences of failing to comply with the requirements of s 464E.104

Judge Grant and Magistrate Power of the Children’s Court of Victoria also believe that the definition of guardianship in the context of the *Crimes Act 1958*, s 464E needs to be clarified.105 Moreover, like the *Crimes Act 1958*, the *Children, Youth and Families Act 2005* does not have any provisions describing the role of the parent, guardian or independent person in the bail hearing. This shortcoming affects both the process of granting bail under s 346(7)-(8) of the *Children, Youth and Families Act 2005*, and is relevant to the ‘other person’ in signing bail forms at the police station under s 346(10) of the same Act.106

Along with limitations in the legislative framework, lack of remuneration is considered a cause of difficulty in recruiting and retaining both YRIPP and non-YRIPP volunteers although some existing volunteers take the view that undertaking the role of independent persons is based on voluntary basis and not for money.107 In relation to rural areas, limited resources and funding were identified as significant barriers for recruiting and retaining volunteers.108

3. Right to Privacy
a. Major Strengths
Victoria has adopted legislation, namely the *Information Privacy Act 2000* and the *Children, Youth and Families Act 2005*, which protects the right to privacy of children and young people in general and those violating criminal law in particular. This is complemented at the

104 Victorian Law Reform Commission, above n 39, 18.
105 Consultation 8 in Victorian Law Reform Commission, above n 39, 53.
106 Victorian Law Reform Commission, above n 39, 110.
107 Ibid 50.
108 Consultations 3 (Victoria Police Hume 1), 4 (Victoria Police Hume 2), 24 (YRIPP, YACVic and CMY), 32 (Victoria Police Mallee) in Victorian Law Reform Commission, above n 39, 50.
national level by the *Privacy Act 1988* (Cth). As mentioned in Chapter 3, the right to privacy of juvenile offenders requires a protection of their criminal records. In conformity with the UN standards, the *Victoria Police Records Information Release Policy 2005* makes a distinction between guilty children and adults in relation to the lapse of time after which details of previous offences will not be released.\(^{109}\) Moreover, many legal centres for young people have conducted research identifying problematic issues surrounding the protection of children and young offenders’ privacy in criminal proceedings and have provided some appropriate recommendations.\(^{110}\)

In Victoria, privacy of juvenile offenders in the trial stage is well protected. Information which may lead to the identification of young offenders is not published. In reports and judgments, juveniles’ initials are used in lieu of their name. In this regard, Victoria observes international minimum standards for respecting and ensuring juvenile offenders’ privacy set out in the CRC (art 40(2)(b)(vii)); the ICCPR (art 14(1)) and the *Beijing Rules* (art 8).

**b. Major Weaknesses**

In Australia generally there is a lack of uniform protections for children’s privacy in the criminal processes resulting in unfair enjoyment of the safeguard established by art 40(2)(b)(vii) of the CRC.\(^{111}\) Together with rights at work, rights to participate and rights to freedom of movement, young people’s right to privacy is one of the rights regularly threatened or breached.\(^{112}\) In Victoria, the actual protection of children and young people’s right to privacy is problematic in several areas including:

- Criminal records for findings of guilt without conviction;
- Surveillance: use of closed circuit television cameras (CCTV) footage by security guards and police;

\(^{109}\) In general, where the sentenced person was an adult, his or her criminal record will be released for a period of ten years whereas this is five years where the sentenced person was a child. Victoria Police, *Information Release Policy* <http://www.police.vic.gov.au/retrievemedia.asp?Media_ID=38447>.

\(^{110}\) For example, a number of submissions suggested that provisions restricting ‘disclosure of the identity of children and young people should be extended to cover criminal investigations as well as court proceedings, because the policy reasons for this protection apply at all stages of the criminal process’: see Youthlaw, Submission PR 390, 6 December 2007; Youth Affairs Council of Victoria Inc, Submission PR 388, 6 December 2007; National Children’s and Youth Law Centre, Submission PR 166, 1 February 2007; Youthlaw, Submission PR 152, 30 January 2007; NSW Commission for Children and Young People, Submission PR 120, 15 January 2007 to Australia Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No. 108 (May 2008) vol 3, 2322 [69.90].

\(^{111}\) National Children’s and Youth Law Centre and the Child Rights Taskforce, above n 31, 18.

• Confidential information given to counsellors and health practitioners.\textsuperscript{113}

The first two issues are directly related to children and young offenders. Under the \textit{Victoria Police Records Information Release Policy 2005}, criminal history information is released on the basis of findings of guilt. There is no distinction between convictions and non-convictions when releasing criminal records. This means that in Victoria even where an offender is sentenced by a Magistrate but no conviction is recorded, this is still considered a permanent criminal record.\textsuperscript{114} Furthermore,

the information released on standard criminal record checks in Victoria includes minor offences (often where no conviction or other penalty was imposed by the Court) and provide little context to the nature or circumstances of offending, nor reflect the principle of privacy, special protection and reintegration of young people in the criminal justice system.\textsuperscript{115}

Criminal history information release and misunderstanding about the meaning of ‘convictions’ and ‘criminal records’ may have detrimental effects on children and young people’s lives and their livelihoods especially when they committed minor offences. Youthlaw states that:

Young people have lost their jobs, been refused employment and discriminated and stigmatized on the basis of trivial criminal matters. In Victoria an employer can lawfully refuse to hire or sack a worker for a criminal record that has nothing to do with the particular job e.g. a supermarket can lawfully refuse to hire a young shelf stacker because of a drunk and disorderly offence committed three years ago.\textsuperscript{116}

In Victoria, juvenile offenders’ right to privacy is often breached in pre-trial stages. This is a violation of art 8 of the \textit{Beijing Rules} which requires that young people’s right to privacy must be respected at all stages of criminal proceedings. Many young offenders have been indentified before their cases have proceeded to court.\textsuperscript{117} Young people do not believe that the way police disclose information pertaining to them may protect their privacy rights.\textsuperscript{118}

Regarding surveillance in public places, young people express concern that police and security guards have improper use and control of CCTV footage.\textsuperscript{119} The ‘Red Card’

\hspace{1cm}\textsuperscript{113} Youthlaw’s Presentation, \textit{Privacy: An Elusive Right for Young People} (2010) 1.
\textsuperscript{114} Youthlaw’s Presentation, above n 113, 3.
\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid.
\textsuperscript{117} Youthlaw’s Submission to the Australian Law Reform Commission, \textit{Privacy and Young People} (2007) 3.
\textsuperscript{118} Youthlaw’s Presentation, above n 113, 4.
\textsuperscript{119} Ibid.
policy120 of Westfield shopping centre is an example demonstrating an interference with a person’s privacy and an improper collection of personal information. According to Youthlaw:

The whole strategy could easily lead to an array of intrusions of young people’s privacy. Westfield’s actions raised concerns in Western Australia last July. It was reported that security guards were carrying photos of young people who had been excluded under this policy.121

Additionally, Youthlaw commonly hears young people complain that police can access CCTC footage when they need it but refuse to give it to others.122 In some cases, they want to access footage in order to make a complaint against police but they are denied.123 Where young people think that their right to privacy has been infringed, they are entitled to complain to the Privacy Commissioner. Nonetheless, under the current mechanism it is not easy for them to exercise this right or to seek redress.124

Along with the two above-mentioned issues, identification in court records is also another problematic issue concerning the protection of young offenders’ right to privacy. The Australian Law Reform Commission (ALRC) states that:

Information held by courts including case files, judgments, and case management systems often identify children and young people who are associated with proceedings, whether as a party to a civil or administrative proceeding, a defendant or victim in a criminal matter, a child involved in a family law dispute, a witness, or merely mentioned as part of the proceedings.125

The ALRC adds that although courts’ judicial records are exempted from the Privacy Act 1988 (Cth), the advent of online access to court records create possibilities for a large number of people with various purposes to readily view these documents.126 This raises significant privacy concerns regardless the extent of personal information that may be contained in court records.127

120 The national Westfield Shopping Centre Red Card policy was introduced in 2009 to curb antisocial behaviour by young people in shopping complexes. The cards rolled out across the country list prohibited activities, including running, swearing, yelling, blocking entrances and ‘mucking around’. The back of the card includes the consequences for bad behaviour, which may involve young people being banned from Westfield shopping centres for 24 hours to 6 months: see Youthlaw’s Presentation, above n 113, 4.
121 Youthlaw’s Presentation, above n 113, 4.
122 Ibid 5.
123 Ibid.
124 Ibid 7. See also Youth Affairs Council of Victoria Inc, above n 112, 7-8.
125 Australia Law Reform Commission, For Your Information, above n 110, 2320 [69.83].
126 Ibid 2320 [69.84].
127 Ibid.
c. Reasons

Gaps in the Victorian regulatory framework are the main reasons for actual limitations in protecting the right to privacy of children and young offenders. Victoria, unlike most other jurisdictions in Australia, does not have legislation ‘prescribing what information the Police must release through a criminal history check’.

Consequently, Victoria Police must rely on their internal guidelines when deciding this issue. According to Youthlaw:

> It is inadequate that the release of information with such significant potential to affect the social rights of individuals and frustrate their ability to participate in the community should be determined solely by police policy. In many cases the release of information about findings of guilt without conviction contradicts the carefully considered decisions of Magistrates and the principles behind the Children, Youth and Families Act 2005 and the Sentencing Act 1991.

The Information Privacy Act 2000 requires organizations in the Victorian public sector (including Victoria Police) to comply with ten Information Privacy Principles (IPPs) in collecting and handling personal information. However, ss 13 (a),(d) of the Act allows Victoria Police not to comply with some IPPs if it believes on reasonable grounds that non-compliance is necessary for its law enforcement or community policing functions. As previously analysed in Chapter 6, the Children, Youth and Families Act 2005 safeguards young offenders from being identified through its provisions governing the restriction on publication of proceedings. These provisions, nonetheless, are not applicable to the investigation stage carried out by police. Additionally, Victoria does not provide for ‘a spent convictions scheme under which certain convictions are ‘spent’ after a lapse of time, and no longer appear on a criminal history’. This is incompatible with recommendations of the Committee on the Rights of the Child that national legislation should provide for:

> an automatic removal from the criminal records of the name of the child who committed an offence upon reaching the age of 18, or for certain limited, serious offences where removal is possible at the request of the child, if necessary under certain conditions (e.g. not having committed an offence within two years after the last conviction).

In addition, beside shortcomings in the legislative framework, there are a range of factors undermining the right to privacy of children and young offenders. These include a lack of understanding about the right to privacy of young people and difficulties in accessing complaints mechanisms. The YACVic finds not only young people but also parents,
services, organizations, educational institutions, businesses or governments have poor comprehension of young people’s rights. Young people do not utilise the current complaint mechanisms because they do not know the existence of these mechanisms, do not realise their rights have been infringed and that they are entitled to make complaints.

Other reasons are identified by Youthlaw include:

• Young people do not have adequate information about their rights, options and legal assistance available;
• Young people are reluctant to speak out against magistrate, police, social workers, foster carers etc. because of the obvious power imbalance and they do not believe the system will support them;
• If young people lodge complaints they feel they must carry them and take responsibility for them;
• Complaint processes can be complicated, long, frustrating and unappealing;
• Although there is no need for a lawyer during complaint resolution some report feeling disadvantaged if they do not use a lawyer;
• The remedies available are limited and often not binding.

4. Right not to be Subject to Arbitrary Arrest or Detention

a. Major Strengths

In its Fourth Report under the CRC, the Australian Government stated that conditions of detention of children in Australia are in conformity with international standards. Following the concluding observations of the Committee on the Right of the Child, the Australian Government is obliged to carry out consultation with states and territories’ governments before making a decision to withdraw its reservation to art 37(c) of the CRC.138 According to an online survey with children and young people under the age of 20 years from across Australia conducted by the National Children’s and Youth Law Centre:

• A very small number had been locked up in a police cell (0.8%) and even less in a juvenile centre (0.4%). None of the children had been locked up in an adult prison.
• When asked if they feel they had been treated fairly by police, most of the children and young people indicated yes (76.3%).

132 Youth Affairs Council of Victoria Inc, above n 112.
133 Youth Affairs Council of Victoria Inc, above n 112, 7.
135 Youthlaw’s Presentation, above n 113, 7.
137 Committee on the Rights of the Child, above n 27, paras 7-8.
138 Australia, above n 136, para 12. Article 37c of the CRC requires that ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances’. The Committee on the Rights of the Child recommended the Australian government fully withdraw its reservation to art 37(c) of the CRC.
139 National Children’s and Youth Law Centre and the Child Rights Taskforce, above n 31, 65-6.
In comparison with all other states and territories, Victoria has the lowest rate of youth detention.\footnote{A paper presented by Judge Paul Grant on 30 November 2010 at the Court Network 2010 State Conference, 6 cited in Youthlaw, Implementation of the Convention on the Rights of the Child, A Working Paper of Victoria’s Contribution to the National NGO Report (2011) 125. See also Kelly Richards, ‘Trends in Juvenile Detention in Australia’ [2011] (416) Trends and Issues in Crime and Criminal Justice 2.} In 2008, there were 78 juveniles per 100,000 relevant population in detention (representing 14.3\%).\footnote{Kelly Richards and Mathew Lyneham, ‘Juveniles in Detention in Australia: 1981-2008’ (Monitoring Report No. 12, Australian Institute of Criminology, 2010) 14-6.} This indicator\footnote{The number of children in detention per 100,000 child population is an indicator to evaluate member State’s juvenile justice system: see UNODC, Manual for the Measurement of Juvenile Justice Indicators (2006) 11.} reflects that Victoria has strictly observed international standards clearly stating that detention of juveniles should only be used as a measure of last resort (art 37(b) of the CRC, art 19(1) of the *Beijing Rules*, art 2 of the UN Rules for the Protection of Juveniles Deprived of their Liberty).\footnote{Paul Mazerolle and Jennifer Saunderson, ‘Understanding Remand in the Juvenile Justice System in Queensland’ (Report, Griffith University, March 2008) 23 cited in National Children’s and Youth Law Centre and Child Rights Taskforce, above n 31, 48.}

To reduce the use of pre-trial detention, Victoria utilizes release on bail as an alternative measure. In this State, a number of bail support programs have been established including the CAHABPS,\footnote{This is the ‘Australia’s only Indigenous specific and culturally appropriate service’: see Gabrielle Denning-Cotter, *Bail Support in Australia*, Indigenous Justice Clearinghouse Research Briefs No. 2/2008, Attorney General’s Department and Australian Institute of Criminology cited in Matthew Ericson and Tony Vinson, *Young People on Remand in Victoria: Balancing Individual and Community Interests*, Jesuit Social Services (2010) 45.} the Koori Youth Bail Intensive Supervision Support Program,\footnote{Sue King, David Bamford, and Rick Sarre, *Factors that Influence Remand in Custody*, Final Report to the Criminology Research Council, Canberra, Criminology Research Council (2005) 119-20 cited in Ericson and Vinson, above n 144.} the Court Integrated Services Program and the Bail Advocacy and Support Program. King et al observe that Victoria has an effective usage of bail support services mainly because close connection and cooperation between judicial decision-makers and high profile of welfare services have been conducted.\footnote{Drug & Crime Prevention Committee, Victorian Parliament, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People* (2009) 237 cited in Youthlaw, Implementation the Convention on the Rights of the Child, above n 140, 126.}

Furthermore, Victoria has established various rehabilitative services in the juvenile detention system, such as drug and alcohol counselling, anger management counselling, technical and further education courses, sport and leisure activities, Young Men’s Christian Association programs, unit outings and work and day release.\footnote{Drug & Crime Prevention Committee, Victorian Parliament, *Inquiry into Strategies to Prevent High Volume Offending and Recidivism by Young People* (2009) 237 cited in Youthlaw, Implementation the Convention on the Rights of the Child, above n 140, 126.} A key worker is responsible for each
young person with whom they develop a client service plan. Particularly, the Youth Justice Community Support Service was introduced to provide necessary assistances for young people in the processes of rehabilitating and reintegrating into the society.

b. Major Weaknesses
There are many problematic issues surrounding the arrest, custody and detention of young people in current practices in Australia in general and Victoria in particular. These include improper acts of police, unnecessary custody and unreasonable time in police custody, human rights violations in youth detention centres, and over-representation of young people with special needs in the juvenile justice system (e.g children in immigration detention, indigenous young people and children with mental illness and/or intellectual disabilities).

i. Improper Acts of Police
In Victoria, most violations relating to the arrest, custody and detention of young people occur in the investigation stage. Independent persons received reports reflecting various categories of human rights infringements such as ‘physical assault at time of arrest (some allegations have described a weapon being used), verbal abuse (including abuse of a racist nature), intimidation techniques and threats (such as threats of strip searching)’. Independent persons have occasionally seen physical marks, bleeding, and/or bruising on young people’s bodies which are consistent with their allegations.

ii. Unnecessary Custody and Unreasonable Time in Police Custody
Another concern in current practice of Victoria is the unnecessary use of detention in many cases. King et al observed that 40 percent of Victorian remandees are either found not guilty

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147 Ibid.
149 Australia, above n 136, paras 280, 282; Committee on the Rights of the Child, above n 27, paras 62, 72-73(b).
150 Youthlaw, Implementation the Convention on the Rights of the Child, above n 140, 74.
151 Ibid. The Report shows that ‘of 1862 interviews with young people attended by a YRIPP independent person from 01 July 2008 to 30 June 2009, 195 interviews (10.47% of all interviews) recorded at least one allegation by the young person against Victoria Police. These 195 interviews resulted in 219 allegations over that 12 month period. The majority (63.01% or 138) of allegations throughout that period consisted of procedural breaches such as photographing without a young person’s consent or the fingerprinting of young people 14 years or under without parental consent/the presence of a parent. A minority of allegations (36.99% or 81) consisted of examples of serious misconduct. These included allegations of racial taunts and verbal abuse, intimidation and physical abuse’.
or sentenced to a period equal to, or less than, the time already served on remand (that is, approximately 60 percent of remandees spend additional time in custody after conviction).\(^{152}\) Additionally, an average of 40 percent of remandees in Victoria was discharged at court from 2000 to 2003.\(^{153}\) In comparison with other states and countries such as New South Wales, UK and Scotland, the rate of remandees in Victoria who are acquitted or not sentenced to imprisonment is slightly lower. Nonetheless, it should be remembered that accused persons and defendants are given the right to be presumed innocent - ‘a cornerstone of the international human rights regime’.\(^{154}\) Any unnecessary use of custody may affect the legitimate interests of remandees, particularly children and young people.

Furthermore, young people may actually spend an unreasonable amount of time in police custody. YRIPP personnel have observed circumstances where young people have been held in police custody for long periods of time because police officers could not find available Bail Justices to carry out an after-hours bail hearing.\(^{155}\)

### iii. Human Rights Violations in Youth Detention Centres

Human rights violations have been detected in youth detention in Victoria. After conducting an investigation in February 2010 of the Parkville Youth Justice Precinct (the Precinct),\(^{156}\) the Ombudsman found several gross failures of the DHS to maintain standards of health and safety. These breach the UN rules relating to the detention of young people,\(^{157}\) Australia’s own rules for such detention,\(^{158}\) other relevant legislation\(^{159}\) as well as human rights

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153 Ibid.
154 Ericson and Vinson, above n 144, 10.
155 Youthlaw, *Implementation of the Convention on the Rights of the Child*, above n 140, 124. In its submission, YRIPP mentioned a case studying in which a young person was held in custody in a Melbourne metropolitan police station. The interview concluded at 4:21am and a bail hearing was necessary as police were applying to refuse bail. Attempts were made to locate a Bail Justice without success. At 5:45am the Regional Inspector was contacted and the decision was made by Victoria Police to keep the young person in police custody until the court opened the following day.
156 The Precinct includes the Melbourne Youth Justice Centre (Justice Centre) and the Melbourne Youth Residential Centre (Residential Centre) located side by side at Parkville: see G E Brouwer, ‘Report of Investigation into Conditions at the Melbourne Youth Justice Precinct’ (Ombudsman Victoria, 2010) 6.
158 The *Australian Juvenile Justice Administration Standards for Juvenile Custodial Facilities 1999*.
159 Government health regulations, in particular the *Food Act 1984*. 293
principles in the *Charter of Human rights and Responsibilities Act 2006* and the CRC.\(^{160}\) Specifically, the investigation identified many health and safety concerns including:

- hanging points\(^{161}\) throughout the Precinct; close proximity of the Eastern Hill unit to a boundary fence, resulting in contraband more easily being thrown over the boundary wall; mouldy and dirty conditions; a high prevalence of communicable infections such as scabies, Staphylococcus Aureus and school sores; unhygienic conditions in food preparation areas etc.\(^{162}\)

The overcrowding in the Precinct led to many adverse consequences such as mixing of detainees of widely different ages, no separation between remanded detainees and sentenced offenders.\(^{163}\) This practice clearly breaches ss 22(2) and 23(1) of the *Charter of Human Rights and Responsibility Act 2006* and s 482(1)(c) of the *Children, Youth and Families Act 2005*.\(^{164}\) The investigation also identified many shortcomings relating to the conduct of the Precinct’s officers, such as inciting physical fights between detainees, assailing detainees, using unreasonable force on detainees during constraints, bringing contraband in the Precinct, falsifying records, stealing goods and consumables and sleeping during night shift.\(^{165}\)

**iv. Over-representation of Young People with Special Needs in Detention**

- **Children in Immigration Detention**

Although the Committee on the Rights of the Child was encouraged by positive changes in the legislative framework and practice of Australia regarding immigration detention of children, it is still concerned that unlawful child immigrants in Australia are automatically located in administrative detention (of whatever form) until their case is examined.\(^{166}\) Particularly, the Committee was seriously concerned that:

(a) Administrative detention is not always used as a measure of last resort and does not last for the shortest appropriate period of time;

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\(^{160}\) Brouwer, above n 156, 6-8.

\(^{161}\) A ‘hanging point’ refers to any fixed structure which can be used by a detainee to facilitate a suicide or attempted suicide by hanging.

\(^{162}\) Brouwer, above n 156, 7.

\(^{163}\) Ibid 8.

\(^{164}\) Section 22(2) of the *Charter of Human Rights and Responsibility Act 2006* requires ‘[a]n accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary’. Section 23(1) of the Act stipulates that ‘[a]n accused child who is detained or a child detained without charge must be segregated from all detained adults’. Section 482(1)(c) of the *Children, Youth and Families Act 2005* also requires the Secretary to ‘separate persons who are on remand from those who are serving a period of detention by accommodating them separately in some part set aside for the purpose’.

\(^{165}\) Brouwer, above n 156, 10.

\(^{166}\) Committee on the Rights of the Child, above n 27, para 62.
(b) Conditions of immigration detention have been very poor, with harmful consequences on children’s mental and physical health and overall development;
(c) There is no regular system of independent monitoring of detention conditions.\footnote{Committee on the Rights of the Child, above n 27, para 62.}

- **Young Indigenous Offenders**

The over-representation of indigenous young people in the juvenile justice system is another problematic issue. At 30 June 2008, Aboriginal juveniles in Australia were 24 times more likely to be in detention than non-Aboriginal juveniles.\footnote{Richards and Lyneham, above n 141, 21.} Despite having the lowest rate of young people under juvenile justice supervision in comparison to other states and territories, Victoria has 15 percent of Aboriginal persons aged 15 years and over living in households with children had been arrested in the last five years, with over half of those being arrested more than once.\footnote{State of Victoria, ‘The State of Victoria’s Children’ (Report, Department of Education and Early Childhood Development, 2009) 7 <http://www.education.vic.gov.au/about/directions/children/annualreports.htm>.} Nearly 6 percent had been incarcerated at some point in their lifetime.\footnote{Ibid.}

- **Mental Disordered Young People**

Like indigenous children, children with cognitive impairments (including mental illness and intellectual disabilities) remain over-represented in the juvenile justice system of Australia and Victoria. It was reported that in Australia, 40 percent of young people in juvenile detention have symptoms compatible with clinical psychological disorders.\footnote{Beyond Bars: Alternatives to Custody, ‘Mental Illness and the Criminal Justice System’ (Fact Sheet No. 9, Beyond Bars: Alternatives to Custody, 2007) 1; Dianna Kenny et al, ‘NSW Young People on Community Orders Health Survey 2003-2006’ (Key Findings Report, University of Sydney, 2006) 6 cited in National Children’s and Youth Law Centre and the Child rights Taskforce, above n 31, 49.} In Victoria, according to a snapshot survey of 168 males and eight females young people in custody conducted by the DHS in October 2011, 79 percent presented with mental health and intellectual functioning issues.\footnote{Youth Parole Board and Youth Residential Board of Victoria, *Annual Report 2011-2012* (2012) 12.}

**c. Reasons**

As discussed in Chapter 6, the Victorian legislative framework generally requires that detained children be separated from detained adults and children who are on remand must be segregated from persons serving a detention period. By contrast, Australia still has a reservation to art 37(c) of the CRC. This may hinder the implementation of Victorian
legislation governing youth detention. Hence, the Committee on the Rights of the Child takes the view that Australia’s reservation is unnecessary because there is no contradiction between the logic behind it and the provisions of art 37(c) of the CRC.\textsuperscript{173}

The wrongful actions of police officers when dealing with young people may derive – at least in part – from inadequate training. On the other hand, young people usually do not complain to senior police or to official complaint bodies because they want to get out of the police station quickly, fear reprisals or do not believe their complaint will affect police behaviour.\textsuperscript{174} According to YRIPP, this is partly derived from the lack of independent investigation into police complaints.\textsuperscript{175}

Concerning unaccepted conditions in the Precinct, the Ombudsman observes that ‘the design and location of the Precinct is inappropriate for a custodial facility which houses vulnerable children’.\textsuperscript{176} Improper conduct against detained young people by officers working at the Precinct may derive from lack of specialised education and training on child-related work.\textsuperscript{177} Another reason for the above-mentioned shortcomings is the irresponsibility of the DHS. Even when issues have come to light, the department has failed to investigate the matter and take decisive action to address improper conduct of the Precinct’s staff.\textsuperscript{178} Moreover, lack of external scrutiny of the Precinct and allocation of responsibility to carry out discipline investigations to the DHS’s Human Resources Manager ‘does not reflect the complexities associated with performing high quality investigations’.\textsuperscript{179}

As previously stated, the over-representation of young people with special needs in the juvenile justice system is a concern in Victoria. In the process of dealing with this matter, a

\textsuperscript{173} Committee on the Rights of the Child, above n 27, para 7.
\textsuperscript{175} Ibid.
\textsuperscript{176} Brouwer, above n 156, 7.
\textsuperscript{177} The investigation found that ‘39 per cent of former and current staff of the Precinct do not have a Working with Children Checks on their personnel file’ although this is a mandatory condition required by the \textit{Working with Children Act 2005}: see Brouwer, above n 156, 9. Section 3 of the \textit{Working with Children Act 2005} defines ‘Working with Children Checks is a process for assessing or re-assessing whether a person is suitable to work in child-related work’.
\textsuperscript{178} Brouwer, above n 156, 10-1. The Ombudsman notes that ‘while investigations are conducted they are often impeded by a lack of policy which directs how investigations are to be undertaken. In addition, the investigation outcome is at times limited by management’s confusion regarding the role of the department when Victoria Police is investigating’.
\textsuperscript{179} Brouwer, above n 156, 10.
number of reasons have been discovered. Factors contributing to the over-representation of indigenous young people in the juvenile justice system were identified by VALS and the Victorian Indigenous Youth Advisory Council (VIYAC). According to VALS, these factors include:

the underlying issues of racism and discrimination, poor education, health, housing and economic status, unemployment, alcohol and other substance abuse, cultural dispossession, family trauma (including having had a relative removed) and identity issues, to a name a few.180

Another reason is lack of programs and services which aim to improve or promote positive lifestyle choices for young indigenous people.181 Additionally, VIYAC argued that a history of family disruption, intervention and institutionalization is partly attributable to the removal of the ‘Stolen Generation’, which have led to the over-representation of Koori youth in the juvenile welfare and criminal justice systems.182 Another cause is the limited opportunity to access effective diversionary programs, including police cautioning and Youth Justice Group Conferencing.183 This is consistent with the 2011 Child Rights NGO report stating:

Lack of effective distinction between less serious offenders and repeat offenders, the fact Aboriginal juveniles are often dealt with by more punitive measures such as arrest and charge rather than other diversionary measures and inadequately resourced legal services are attributed as some of the causes of the overrepresentation of Aboriginal youth in the juvenile justice system.184

Reasons for the over-representation of young offenders with disabilities in the Victorian criminal justice system may flow from gaps in support services and funding, particularly lack of support in the education system185 and employment. In its submission to the Productivity Commission’s Inquiry into a Life-time Disability Care and Support Scheme, Youth Disability and Advocacy Service stated that:

Often securing access to funding is lengthy, subjecting young people and children with disabilities to physical, emotional and financial stress. Similarly there is often a shortfall in the cost of supports which is currently absorbed by families.186

180 Submission from VALS to the Drugs and Crime Prevention Committee, Victorian Parliament, above n 1, 251.
181 Sixty eight per cent of Koori youth stated that in a survey conducted by VIYAC in 2007: see submission from VALS to the Drugs and Crime Prevention Committee, Victorian Parliament, above n 1, 252.
184 National Children’s and Youth Law Centre and the Child Rights Taskforce, above n 31, 49.
186 Youth Disability Advocacy Service, Submission to Productivity Commission, Inquiry into Disability Care and Support (2010) 1 quoted in Youthlaw, above n 140, 85.
Another factor is borderline disabilities. In practice, there are many young people who are ineligible for a range of services provided for intellectually disabled people\textsuperscript{187} because they are ‘borderline’ disabled. These persons fall between the gaps of current systems and thereby are unable to receive support at decisive stages in their development, has resulted in the increase of the likelihood to be involved in a cycle of crime and homelessness.\textsuperscript{188}

In a recent research, Professor Patrick McGorry found that one quarter of all Australian young people are probably to be suffering from a mental health problem, usually including misuse or dependency of substance, depression or anxiety disorder, or combinations of these.\textsuperscript{189} The research also noted that:

Associated with mental disorders among youth are high rates of enduring disability, including school failure, impaired or unstable employment, and poor family and social functioning, leading to spirals of dysfunctional and disadvantage that are difficult to reverse.\textsuperscript{190}

These factors contribute to the increase of offending of young people with mental issues. Moreover, many mental health professionals argued that comprehensive services and treatment for mental health problems sometimes place adolescents and young people in a worse situation than they were before.\textsuperscript{191} Professor McGorry also stated that:

Whilst the mental health sector has become much better at identifying underlying mental health problems in young people, this does not necessarily solve the problem of being able to get them into counseling or other forms of treatment. For example, he has to refuse treatment to over 1000 young people each year.\textsuperscript{192}

5. Right to Equality before Courts and Tribunals and to a Fair Trial
a. Major Strengths

This procedural right of children and young offenders has been generally protected in practice in Victoria, reflecting in various issues closely relating to the actual operation of the Children’s Court. The court is reasonably structured with two divisions that address criminal and child protection matters separately. The building of the Children’s Court in Melbourne ensures complete physical separation of children’s and adults’ proceedings.

\textsuperscript{187} See the \textit{Disability Act 2006}, ss 49-50.
\textsuperscript{188} Submission from Jesuit Social Services to the Drugs and Crime Prevention Committee, Victorian Parliament, above n 1, 264.
\textsuperscript{190} Ibid.
\textsuperscript{191} Drugs and Crime Prevention Committee, Victorian Parliament, above n 1, 269.
\textsuperscript{192} Patrick McGorry quoted in Drugs and Crime Prevention Committee, Victorian Parliament, above n 1, 269.
In comparison with other jurisdictions such as NSW, Western Australia and the Northern Territory, the Children’s Court of Victoria place greater emphasis on the protection of young offenders’ needs rather than public security and responding to their offences.193 This is evidenced by the fact that very few young people were cautioned by police and fewer still required formal court intervention. In 2008-2009, there were 6,217 young people who were charged and had criminal charges proven against them in the Children’s Court representing less than 2% of total population aged between 10 and 17.194 Seventy five percent of these received orders including discharged, unaccountable and accountable undertakings, good behaviour bonds or fines.195 Moreover, the detention rate of young people remanded in custody or serving a sentence in Victoria was lower than in Western Australia and the Northern Territory.196

The success of hearings conducted by the Children’s Court in Victoria is partly dependent on the contribution of police prosecutors, youth justice workers and the Court’s Clinic. Only the courts in Melbourne and Brisbane have the service of specialist police prosecutors with good knowledge of their work responsibilities.197 Youth justice workers support hearings of the Victoria’s court with professional and useful pre-sentence reports.198 Victoria’s Clinic provides specialist assessments for both criminal and child protection cases which are used as a basis to inform decision-making of the Children’s Court.199

As regards Aboriginal children and young people, Victoria, South Australia and Queensland have introduced Aboriginal sentencing courts which provide an opportunity for respected members of the child’s community to participate in the sentencing decision.200 Based upon

194 Victoria Police and Children’s Court statistics, quoted in Youlthlaw and Frontyard Youth Services, Submission No. 35 to House Standing Committee on Family, Community, Housing and Youth, Inquiry into the Impact of Violence on Young Australians, 27 October 2009, 2.
195 Victoria Police and Children’s Court statistics, quoted in Youlthlaw and Frontyard Youth Services, above n 194.
196 In 2011, the detention rate in Victoria was 0.15 young people aged 10-17 years per 1,000 respectively compared with 0.77 in Western Australia and 1.2 in the Northern Territory: see Australian Institute of Health and Welfare (2012b), Juvenile Detention Population in Australia 2011, 8.
198 Ibid 17.
199 Ibid 25.
200 National Children’s and Youth Law Centre and the Child Rights Taskforce, above n 31, 49.
an analysis of 19 hearings spread across 11 sittings (22 weeks) of the Children’s Koori Court of Victoria (CKC), Borowski concluded that the CKC was likely implemented in accordance with its design.\textsuperscript{201} The principles of a fair and just trial and the right to be treated in age-appropriate manner are relatively well protected in the actual hearings. This is mirrored in the seating arrangements in court hearings, the order of proceedings, interactions among different actors in court and the social environment of the Court.

Under the current legislative framework of Victoria, in prescribed circumstances, children and young offenders may be brought before the County Court\textsuperscript{202} or the Supreme Court for trial. Despite many limitations in procedures currently employed in the Supreme Court of Victoria, judges occasionally made efforts to better facilitate the right to equality before the courts and to a fair trial of juvenile offenders. This is demonstrated by experiences of Justice Bell when trying a young defendant in a recent case, \textit{Director of Public Prosecution v TY}.\textsuperscript{203} Justice Bell helped TY so that he was allowed to have breakfast prior attending court each morning.\textsuperscript{204} At trial, the presiding judge did not attempt to explain matters more thoroughly for TY, included TY’s family in his addresses and communicated in a way that showed understanding of their circumstance and concerns.\textsuperscript{205} In addition, identification of TY was ensured during the proceeding as well as in reports and judgments, and his initials were used rather than his name at all times.\textsuperscript{206}

\textbf{b. Major Weaknesses}

The above-mentioned survey of the National Children’s and Youth Law Centre reveals that only a small percentage of respondents had their matter go to Court (5.6%). For those who

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\textsuperscript{201} Borowski, ‘In Courtroom 7’, above n 26, 1128. See also Borowski, ‘Evaluating the Children’s Koori Court of Victoria’, above n 21, 37. In the process of conducting this research, each hearing was observed by two observers. Observations notes were recorded on Court Observation Schedule. Based on these notes, observers prepared a more detailed report on each hearing. The report was normally completed within a few days of the hearing and thematically analysed. Each observer shared his findings with the other observer for discussion and confirmation – a form of peer debriefing designed to foster the credibility of their analyses.

\textsuperscript{202} Studies on actual trials conducted by the County Court are not found.

\textsuperscript{203} \textit{DPP v TY} (No. 2) - (2006) 14 VR 430; \textit{DPP v TY} (No. 3) - (2007) 18 VR 241; \textit{DPP v TY} (No. 2) - (2009) 24 VR 705.


\textsuperscript{205} Ibid 180-1.

\textsuperscript{206} Ibid 181.
proceeded to Court, only 9.5% had legal support in Court.207 As to Victoria, scholars express concerns about the protection of the right to equality before courts and to a fair trial of young offenders in the Children’s Court (including the CKC) and the Supreme Court. There are many factors hindering the practical operation of the Children’s Court. As observed by study participants in Victoria, although some judicial officers made best efforts to explain them, many children, young people and families usually found it difficult to understand court processes, decisions and their implications, and thereby affecting their right to be heard.208 Lawyers representing juvenile defendants were criticized because of poor case preparation, poor court craft, being overly adversarial and lack of focus on the child’s best interests.209

At CKC hearings, the cultural dimensions sometimes received little attention.210 Some magistrates and Elders assume that defendants either know what ‘culture’ is or what some of the major aspects of Aboriginal culture entail, although whether they actually perceive the meaning of ‘culture’ is unknown.211 In some hearings, magistrates, Elders and defendants have improper communication and relatively little interaction. Moreover, defence lawyers in CKC hearings usually ‘shielded’ their clients from engagement with magistrates and Elders.212 Family members, representatives of Aboriginal community service agencies or other support persons did not always attend CKC hearings.213 These participants’ contribution to the protection of juvenile defendants in some hearings was limited and inactive.

Concerning the Supreme Court of Victoria, as previously mentioned in Chapter 6, Burnnard argued that procedures currently followed by this Court violate children and young people’s right to a fair trial and to be treated in an age-appropriate manner.214 In his research, Burnnard addressed many limitations existed in the Court’s trials, including:

Social workers are not used to introduce the courtroom to the accused prior to the hearing, or during the case to explain the proceedings to the young person. Proceedings are conducted in a formal, intimidating environment, in language often incomprehensible by a young person whose education has

207 National Children’s and Youth Law Centre and the Child Rights Taskforce, above n 31, 65.
209 Ibid 17.
210 Borowski, ‘In Courtroom 7’, above n 26, 1121.
211 Ibid 1122.
212 Ibid 1124.
213 Ibid 1123, 1125.
214 Burnnard, above n 204, abstract.
in many cases been disrupted. Any procedural adjustments are introduced not as a matter of policy based on what would be necessary to ensure an effective fair trial, but on an ad-hoc basis and at the sole discretion of the presiding judge. Furthermore, the judge is often hampered by a system which not only gives little consideration to the unique position of young people, but frequently operates to their detriment.\(^{215}\)

These conclusions were partly based on Burnnard’s observation of actual procedures employed by the Supreme Court in a recent case, *Director of Public Prosecutions v TY* and experiences shared by Justice Bell.\(^{216}\) In this case, on 21 October 2003, when aged 14 years and eight months, TY struck his victim to the head with a golf umbrella and the victim died several days later because of brain injury.\(^{217}\) TY was convicted of manslaughter by the Victorian Supreme Court.\(^{218}\) In the appellate trial in late 2006, TY was sentenced to 12 years’ imprisonment.\(^{219}\) Justice Bell observed that TY was very tired and hungry during the trial; spent time during breaks and before and after his hearing every day in a Supreme Court cell; was tried in an unsuitably designed courtroom and was forced to wait for 20 minutes before speaking.\(^{220}\) These limitations demonstrate that the well-being of the juvenile defendant was not taken into account, resulted in uneffective participation in the proceeding. Moreover, TY was detained in an inappropriate place while waiting for the hearing. The courtroom organization may have increased TY’s stress and fear. The hearing was not conducted promptly, violating the right to be tried without undue delay.

Additionally, scholars have expressed profound concern about the inadequate facilities and improper design of Children’s Courts across all States and Territories (except Tasmania), particularly in rural and remote locations. In these regions, children’s matters are often heard alongside adult ones because there is no separation between Children’s Courts and adult courts.\(^{221}\) Although the issue of court facilities was mentioned 15 years ago in the ALRC report,\(^{222}\) it has not been improved. All buildings of Children’s Courts have recently reported as overcrowded, chaotic and often unsafe.\(^{223}\) In Melbourne, despite being separated in a purpose-built building, the criminal and child protection jurisdiction courtrooms are very

\(^{215}\) Ibid 181.
\(^{216}\) Burnnard, above n 204, 175.
\(^{217}\) *DPP v TY* (No. 2) - (2006) 14 VR 430, 430 [1].
\(^{218}\) Ibid 431 [2].
\(^{219}\) *DPP v TY* (No. 3) - (2007) 18 VR 241, 248 [72].
\(^{221}\) Borowski, ‘Whither Australia’s Children’s Courts?’, above n 193, 21.
\(^{222}\) Australian Law Reform Commission, *Seen and Heard*, above n 134, [18.186].
closely located causing negative consequences for both young offenders and children who are the subject of care proceedings. 224

c. Reasons

There are many reasons for the above-mentioned limitations in securing children and young offenders’ right to equality before court and to a fair trial in Victoria. One of these is shortcomings of the legal framework. Although the Victorian Supreme Court has jurisdiction to hear trials for some offences committed by children and young people, it does not have procedural safeguards as does the Children’s Court. Burnnard argues that most of young people tried in the Supreme Court experienced the same ‘procedures as their adult counterparts. There are no policies or guidelines in place which aim to protect the rights of young people in the courtroom’. 225

Many factors compromising the quality of professional practice of the Children’s Court are identified. These include high and often excessive workloads, lack of specialist judicial officers in rural and remote areas, youth justice workers and good lawyers. The Children’s Court of Victoria was described as “hugely busy” in both metropolitan and regional areas. 226

Good lawyers tend to avoid Children’s Court work because it is neither a pathway for promotion nor a means of getting high income. 227 Factors causing limitations in CKC hearings may comprise the inadequate training of magistrates and Elders. Other participants including family member or other support persons, Koori Court Worker and Koori Justice Worker, did not actively engage in the hearings. Representatives of indigenous community services and defendants’ community do not receive adequate encouragement to attend CKC hearings.

C. Observations

The practical protection of particular rights of children and young offenders in Victoria has many strengths and weaknesses. In regard to the right of defence, as noted before, all juvenile defendants in observed CKC hearings had legal representation. Generally, lawyers

224 Young offenders are usually ‘exposed to angry outbursts by families involved in care proceedings who are under emotional stress. Children who are the subject of care proceedings may get the impression that they have done something wrong as a result of the association with young offenders’: see Australian Legal Reform Commission, Seen and Heard, above n 134, [18.187].
225 Burnnard, above n 204, 174.
227 Ibid 17.
prepared their cases carefully and accomplished their tasks in criminal proceedings. Victorian Legal Aid and many community legal centers provide various legal services to support children and young offenders. However, access to legal representation for young people at police stations is limited. Aboriginal young people and foreigners have experienced many difficulties in access to justice.

In the majority of their interviews, police ensure the attendance of a parent or guardian of children and young people. When these persons cannot attend, independent persons may replace them to support juveniles. Volunteers of the YRIPP support young people in a large number of police questionings across Victoria. In bail processes, the youth justice units and the CAHABPS give assistance to young offenders. Nevertheless, in some cases, parents or guardians are not present at police interviews and court hearings. Some independent persons do not arrive at police stations promptly, particularly in regional areas. There are many obstacles in securing the attendance of independent persons for indigenous young people, young people in out-of-home care and those from cultural and linguistically diverse backgrounds.

The right to privacy of juveniles in conflict with the criminal law is generally protected in the trial stage. Initials of defendants rather than their names were used during proceeding, in reports and judgments. By contrast, in the investigation stage, identification of children and young people is not always ensured. Police release criminal history information without distinguishing convicted and non-convicted cases. Online court records, which contain young offenders’ personal information, may be viewed by a large number of people for various aims. For many reasons, children and young people rarely use current complaint mechanisms when their privacy is infringed.

In order to reduce the number of children and young people remanded in custody and detention, Victoria has adopted positive strategies and programs facilitating the use of bail. For special categories of persons including Aboriginal young people, young offenders with intellectual disabilities and those with mental health issues, Victoria has particular programs and projects to assist them when they are detained as well as in their process of reintegration into the community. Along with these advantages, many limitations concerning arrest, custody and detention of juveniles still exist. Police sometimes use physical assault, verbal
abuse, intimidation techniques and threats with children and young people at time of arrest and questioning. In some cases, young people were held in custody by police for an unreasonable time. Furthermore, many human rights violations seriously affecting the health and safety of children and young people being detained in the Precinct were detected by the Ombudsman.

The right to equality before courts and to a fair trial of juvenile offenders is basically secured in the current practice of Victoria. Despite a small slippage, the CKC is implemented in accordance with its design. The CKC and the mainstream Children’s Court observe distinctive procedures stipulated in the Children, Youth and Families Act 2005. Hearings in the Children’s Court are conducted in a manner appropriate with characteristics of children and young offenders. By contrast, the Victorian Supreme Court employs the same procedures for juvenile offenders and their adult counterparts. This is clearly inconsistent with principles and requirements set out in the CRC, guidelines and comments of UN bodies concerning the administration of juvenile justice system.

III. Conclusions

The analysis and discussion of this chapter and Chapter 6 show that Victoria not only adopts a distinctive legal framework for the juvenile justice system but also has policies, services and programs to ensure the regulatory framework is given effect. These services and programs support juveniles in various stages of the criminal justice process. For example, the YRIPP provides independent persons in police interviews; the CAHABPS supports juveniles in bail processes; the VLA provides legal advice and court representation etc. For special categories of children and young people including young Aboriginal people, intellectually disabled young offenders and those with mental health issues, Victoria has particular strategies and programs such as the Koori Youth Bail Intensive Supervision Support Program, Victorian Aboriginal Justice Agreement, ‘What Works?’ project, Adolescent Forensic Health Service etc. Victoria also establishes a system of specialized agencies and organizations providing legal assistance for children and young offenders in criminal proceedings including YACVic, VALS, Youthlaw etc. All these factors combining with positive operations of judicial authorities have contributed to successes in fulfilling requirements set out in the international legal framework governing human rights of juvenile offenders in the criminal justice process.
Nonetheless, the practical protection of some distinctive rights of children and young offenders in Victoria has limitations. Marginalized and disadvantaged groups, including indigenous young people and aliens have inadequate access to justice, particularly legal representation. The participation of independent persons supporting for children and young people in police interviews is problematic. Some were slow in arriving at police stations, interrupted interviews unnecessarily and overstepped their role. In addition, there are many difficulties in securing the attendance of independent persons in rural areas, for specific categories of people including aboriginal young people, young people in out-of-home care and those from cultural and linguistically diverse backgrounds. In some cases, the identification of young offenders in the investigation stage is not ensured. When releasing criminal records, there is no distinction between conviction and non-convictions. Regarding arrest, custody and detention of children and young people, many human rights violations are detected, particularly in the investigation stage. Conditions of detaining young offenders in the Precinct are unacceptable, leading to serious violations of national and international legislation governing youth detention. With current procedures, the Victorian Supreme Court cannot ensure the right to equality before courts and to a fair trial of juvenile offenders. At CKC hearings, court actors sometimes do not have proper communication with juvenile defendants. Other participants including defence lawyers, family members or other support persons occasionally do not attend court hearings and/or have limited supports for children and young offenders.

A number of reasons for these limitations have been identified. First, shortcomings of the legislative framework impede juvenile offenders in exercising some particular rights. There is lack of clarity in the Crime Act 1958 and the Children, Youth and Families Act 2005 as regards to the role of independent persons in police interviews and bail processes. Legislation does not prescribe what information police must release in criminal records. Restrictions on publication of proceedings are not imposed at the investigation stage. Procedural safeguards stipulated in the Children, Youth and Families Act 2005 are not applicable to the Supreme Court. Second, current human rights complaint mechanisms are often not utilised. Police complaints are not investigated by independent authorities. Third, insufficient funds hinder the operation of community legal centres. They cannot satisfy all demands of children and young people seeking legal assistance. Fourth, some criminal
procedure-conducting persons do not receive specialised education and training resulting in unfulfilling their tasks and functions when dealing with children and young people. Other participants such as parents, guardians, independent persons, etc. occasionally do not actively participate in the criminal processes. Fifth, juvenile offenders themselves are not fully aware of their rights and complaint mechanisms. This may flow from the fact that they are not informed by legal enforcement officials and adequately educated on legal matters.
Part Four

CONCLUSION
Chapter 8
COMPARISON OF THE PROTECTION OF JUVENILE OFFENDERS’ RIGHTS
IN VIET NAM AND VICTORIA

I. Introduction
Based on the analysis and discussion in the four previous chapters, this chapter compares the protection of children and young offenders’ rights in Viet Nam and Victoria from legislative and practical aspects. The Victorian juvenile justice system can be considered as a practical model following certain UN standards. The comparison enables indentification of the shortcomings of the Vietnamese juvenile justice system. This chapter explores and explains similarities and differences between the two juvenile justice systems in relation to the history and development of criminal procedures applicable to juvenile offenders and the protection of their rights in criminal processes. The latter issue occupies the majority of this chapter. However, assuming that it is unnecessary to compare all the rights of juvenile offenders, this chapter focuses on key similarities and differences between the principal rights. Based upon this analysis, common recommendations as well as separate solutions for each jurisdiction are provided in the conclusion.

II. Main Similarities and Differences
A. Introduction
This section addresses common and different features of the history of Vietnamese and Victorian juvenile justice systems; criminal procedures applying to juvenile offenders and the protection of their rights in legislation and practice. The comparison shows that along with a few similarities, there are many differences in these areas. A separate juvenile justice system was established in Victoria with the appearance of the Children’s Court in 1906. By contrast, separation of the justice system for children and young offenders from the general criminal justice system has only been discussed recently in Viet Nam. With different models of criminal procedure (inquisitorial system versus adversarial system), Viet Nam and Victoria have different provisions governing procedures in juvenile cases and those concerning the role and functions of procedure-conducting bodies. Based on the UN provisions on children’s rights, the legal framework of Victoria has more advantages and
fewer limitations than Viet Nam. From a practical perspective, the rights of juvenile offenders in Victoria are also protected more effectively.

**B. History of Vietnamese and Victorian Juvenile Justice Systems**

1. **Similarities**

As previously identified in this thesis, there are some minor similarities between Viet Nam and Victoria in respect of the establishment and development of juvenile justice systems and sources of criminal procedure law. Viet Nam and Australia are both parties to the CRC. The juvenile justice systems in these two States comprise legislation, procedure-conducting bodies including investigatory bodies, procuracies and courts operating through procedure-conducting persons such as investigatory officials, prosecutors and judges. Specialized institutions and organizations support the above bodies in dealing with children and young offenders. Finally, statutory law is the primary source of criminal procedure law in both jurisdictions.

2. **Differences**

The primary difference between Viet Nam and Victoria is that the former does not have a separate juvenile justice system whereas a distinctive juvenile justice system has been established in Victoria. More precisely, in Viet Nam the justice system for children and young offenders is subordinate to that of adult offenders. On the other hand, Victoria has a long-standing separate justice system for children and young people that originated in the late nineteenth century – at a time when Viet Nam was still a colony.

In Victoria in 1906, a Children’s Court was established. This marked an important milestone in the history of juvenile justice. By contrast, Vietnamese legal experts have begun to think about this issue only recently. In the second half of the twentieth century, certain procedural rights were recognized in specific legislation governing children and young offenders in Victoria. At this time, the North of Viet Nam conducted a process of consolidating the country, including the establishment of a criminal justice system. The first two Constitutions in 1946 and 1959 only provided for the fundamental rights of citizens, rather than establishing special procedural rights of juvenile offenders. In 1988, for the first time, a Criminal Procedure Code was enacted containing some special procedures for juvenile offenders in Viet Nam.
The second half of the twentieth century witnessed the introduction of informal procedures and restorative justice programs in Victoria. Conversely, in Viet Nam even at the present time, terms such as ‘diversion’ and ‘restorative justice’ do not exist in the criminal legislative framework.¹ Some forms of diversion are used for juveniles who violate administrative law, however, for children and young persons in conflict with the criminal law, diversion is rarely applied.²

In the first ten years of this century, the Victorian criminal legislative framework was further reformed. With the enactment of the Charter of Human Rights and Responsibilities Act 2006, the rights of children and young offenders in criminal proceedings were reinforced and promoted. Provisions of the Charter concerning certain procedural safeguards have been invoked to challenge the validity of statutory provisions of several other Acts.³ In Viet Nam, the second Criminal Procedure Code was passed in 2003, confirming and amending some procedures for juvenile offenders. Nonetheless, these amendments and supplementation did not alter matters significantly. In the near future, it is likely that the justice system (including that for children and young people) may experience a significant change in compliance with Resolution No. 49-NQ/TW of the Vietnamese Politburo on Judicial Reform Strategies.⁴

C. Criminal Procedures Applicable to Juvenile Offenders

In Viet Nam and Victoria, criminal procedures relating to juvenile offenders are modified

¹ Yen observes that Vietnamese law does not have adequate definitions or models and official programs of restorative justice, although principles and elements of restorative justice have been recognized and applied in very limited circumstances when dealing with juveniles infringing some laws: see Do Hoang Yen, ‘Tu Phap Phuc Hoi trong Viec Xu Ly Nguoi Chua Thanh Nien Vi Pham Phap Luat’ [Restorative Justice in Dealing with Juveniles Violating the Law’ (2008) 136 Journal of Legislative Research 23, 25.

² Van states that Vietnamese law has several provisions on general principles of diverting juvenile offenders to informal measures such as referring them to families, institutions and organizations for supervision and education. She also identifies a lack of specific provisions on conditions, competences, procedures and informal measures as well as legal consequences and regimes to examine and oversee the application of diversion. See Do Thuy Van, ‘Hoan Thien Phap Luat ve Xu Ly Chuyen Huong doi voi Nguoi Chua Thanh Nien Vi Pham Phap Luat’ [Improving Diversion of Juveniles in Conflict with the Law’ (2008) 20 Journal of Legislative Research 16, 20.

³ For example, R v Momeclovic (2010) 25 VR 436.

⁴ According to Resolution No. 49-NQ/TW, the criminal policy and procedure laws have a large number of shortcomings which have been slowly amended and supplemented. Moreover, organization, function, task and operational mechanism of judicial bodies have many limitations. The Resolution, therefore, identifies a number of judicial reform strategies which must be implemented and accomplished in 2020. These include improving the criminal policy and procedure laws; clearly indentifying functions and tasks, and improving machinery of, judicial bodies with the main focus is to improve the organization and operation of the people’s courts; establishing institutions supporting for judicial authorities; strengthening the international cooperation in judicial matters.
from those of their adult counterparts. Criminal proceedings usually include various stages such as institution, investigation, prosecution, first-instance trial and appellate trial.\(^5\) Basically, all stages of criminal proceedings under Vietnamese and Victorian juvenile justice systems share similar features in terms of definition, tasks and objectives. Moreover, each procedural stage possesses common characteristics.

On the other hand, the criminal procedures for children and young offenders in Viet Nam and Victoria have some differences. The main factor underlying the differences is the different ‘forms’ of criminal procedure employed in the two jurisdictions. Studies have shown that Viet Nam uses a mixture of inquisitorial and adversarial procedures, with the former being the main ‘style’ of criminal procedure.\(^6\) By contrast, criminal procedure in Victoria exhibits the features of an adversarial system. In other words, Viet Nam follows a model of criminal procedure which focuses on controlling crimes while Victoria has established a model that tends to respect individual rights and restrict the powers of public authorities and officials.\(^7\) In Viet Nam, most procedures for juvenile offenders are similar to those applicable to adult offenders. In Victoria, proceedings in the Children’s Court follow distinctive procedures which are basically compatible with the general principles set out in the CRC. However, procedures for juvenile offenders in the first jurisdiction are simpler than those in the second jurisdiction (particularly where young offenders are brought to the County Court or the Supreme Court of Victoria).\(^8\)

**1. Institution**

**a. Similarities**

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\(^5\) Both jurisdictions exclude execution of the court’s judgment from the criminal process.


\(^7\) Nguyen Ha Thanh, ‘Hai Mo Hinh To Tung Hinh Su Da Trung tren The Gioi’ [Two Prominent Models of Criminal Procedure in the World] (2008) 18 Journal of Legislative Research, 55-60. In this study, Thanh states that there have been two models of criminal procedure. The first is called crime control procedure while the second is equitable criminal procedure. According to this author, ‘model of criminal procedure’ is expression of the State’s treatment on persons who are suspected to commit offences. It decides whether the criminal process focuses on creating advantages for public bodies or protecting rights of citizens and other important issues. Based on features of these two models of criminal procedure presented and analysed in this paper, it can be concluded that Viet Nam follows the first model whereas Victoria employs the second model.

\(^8\) Victoria provides for committal proceeding which does not exist in Viet Nam.
Both jurisdictions empower a wide range of public authorities such as police, procuracies, courts and other bodies to institute the criminal process. The basis for instituting criminal cases is information concerning offences reported by citizens, agencies and organizations, or information directly discovered by competent bodies. Criminal proceedings are normally commenced by a decision by a relevant authorized person. There are relatively few differences between adult and juvenile cases in relation to procedures governing the instituting of criminal proceedings.

b. Differences
In Viet Nam, the power to institute criminal cases is vested in prescribed public bodies while under Victorian law, anyone can initiate a criminal prosecution. Additionally, Victoria has special provisions regarding time limits for filing a charge-sheet, applying for an extension of this time limit and procedures for rehearing applications in cases involving children and young people. In Viet Nam, these issues are applied to juveniles and adults without any differences. Also, the institution stage under Vietnamese criminal procedure law is normally conducted before the investigation stage. By contrast, under Victorian law, charge-sheets usually are only filed or signed after initial investigations have been carried out.

2. Investigation
a. Similarities
In Viet Nam and Victoria, criminal investigations are mainly conducted by members of the police. Additionally, a wide range of other agencies and persons are entitled to carry out a number of investigating activities. In Viet Nam, these include border guards, customs, rangers, coast guard forces and other agencies of the People’s Police or the People’s Army. In Victoria, they include persons appointed by or under an Act (but excluding members or persons who are engaged in covert investigations under the orders of a superior) whose functions or duties include the prevention or investigation of offences. There are a number of additional requirements imposed in relation to conducting investigations of children and

9 Although in certain circumstances private prosecutions can be limited by stipulating particular categories of people who are entitled to exercise this power, requiring the consent of a public official or allowing the DPP to take over and cease private prosecutions which have been previously initiated: see Richard Fox, Victorian Criminal Procedure: State and Federal Law (Monash Law Book, 13th ed, 2010) 62.
11 Crimes Act 1958, s 464(2). See also Christopher Corns and Steven Tudor, Criminal Investigation and Procedure: The Law in Victoria (Thomson Reuters, 2009), 16-22.
young offenders, e.g. the compulsory presence of a parent or guardian\(^\text{12}\) and the distinctive regime of detention in the investigation stage.\(^\text{13}\)

b. Differences
As was identified in Chapter 6, a number of investigatory activities in Victoria involving children and young offenders (such as fingerprinting and forensics investigations) are conducted under special provisions and procedures which differ from those for adult offenders. There are no equivalent provisions in Vietnamese criminal procedure law.\(^\text{14}\)

3. Prosecution
a. Similarities
Both jurisdictions establish systems of prosecution involving two functions: examining the work of investigating officials and prosecuting the accused in court in a fair and impartial manner. A prosecutor must assess whether or not an investigator has collected sufficient evidence to prove the charge. At the trial stage, the prosecutor presents evidence and argues with defence counsel to prove that the accused is guilty. Although Victorian criminal procedures follow the adversarial system, provisions governing the disclosure obligations of the prosecution in the pre-hearing or pre-trial stage are similar to features of the inquisitorial system followed in Viet Nam. From a criminal procedural perspective, there is no significant difference between the prosecution of juvenile and adult offenders. (Differences are manifested in the criminal law mainly in relation to criminal responsibilities and penalties).

b. Differences
In Viet Nam, there are two forms of prosecution: public prosecution and ‘private-public

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\(^{12}\) Criminal Procedure Code 2003, art 306(1)-(2) and Crimes Act 1958, ss 464E(1)(a), 464K(8).

\(^{13}\) Criminal Procedure Code 2003, art 303; Decree No. 89/1998/ND-CP of the Government of 7 November 1998 adopting the Regulations of Custody and Temporary Detention, art 15(1); Children, Youth and Families Act 2005, s 347(1)-(2).

\(^{14}\) Similarly, Victoria has enacted a number of statutes governing covert investigations, whereas equivalent legislation does not exist in Viet Nam. In Viet Nam, covert investigations are called ‘initial investigations’. These investigations have been governed by ‘internal’ regulations of the police, rather than criminal procedure legislation. A number of legal researchers and lawyers suggest that Viet Nam should legalize covert investigations in order to protect fundamental rights of citizens and ensure the transparency of criminal investigations: see Thanh Tu and Duc Minh, ‘Luat Hoa Cac Hoat Dong Dieu Tra Ban Dau’ [Legalization of Initial Investigations?] (2 April 2011) Legal Journal of Ho Chi Minh City <http://phapluattp.vn/20110402122651847p0c1063/luat-hoa-cac-hoat-dong-dieu-tra-ban-dau.htm>.
prosecution’. As previously mentioned, the ‘pure’ private prosecution does not exist under Vietnamese criminal procedure law. On the contrary, private prosecutions are recognized by Victorian and Australian federal law. Fox states that in theory all prosecutions for summary offences are conducted by individuals ‘acting as an informant in a personal capacity on his or her own name’. These differences may originate from different views of criminal responsibility in the two jurisdictions. In Viet Nam, criminal responsibility is responsibility of an offender towards the State and society and thereby the State has power to handle criminal cases. Procuracies are vested the State power to prosecute a person for committing an offence. In Victoria, criminal responsibility may be considered as liability of an offender towards the victim and community. Consequently, individuals are entitled to accuse a person of an offence before courts to protect their legitimate interest.

Different models of criminal procedure lead to dissimilar functions of the prosecution in Viet Nam and Victoria. The procuracies in Viet Nam have two functions: exercising the right of public prosecution and supervising judicial activities to ensure the strict and uniform observation of the law. Hence, procuracies can participate in all stages of criminal proceedings including the investigation stage. Prosecutors supervise the institution of criminal cases, investigating activities and the compilation of case files by investigating bodies; set investigation requirements etc. In Victoria, the prosecution mainly exercises the functions of charging and prosecuting people. Thus, in comparison with their counterparts in Viet Nam, Victorian prosecutors have fewer tasks and powers.

4. First-Instance Trial
a. Similarities
In both criminal justice systems, the courts’ jurisdiction in criminal cases is based upon the classification of offences allegedly committed by the accused. Generally, lower courts are empowered to conduct hearings or trials of petty offences whereas superior courts have jurisdiction over more serious offences. Compared with the first-instance trial stage in adult

15 Under Vietnamese criminal procedure law, the term ‘private-public prosecution’ refers to prescribed cases which can be instituted only if victims request (private prosecution). Based on requests of victims, public authorities decide whether or not to institute cases (public prosecution). Criminal Procedure Code 2003, art 105.
16 Crimes Act 1914 (Cth), s 13.
17 Fox, above n 9, 62.
18 Constitution 1992, art 137.
19 Criminal Procedure Code 2003, art 37(1).
cases, a number of different provisions governing this stage are employed in juvenile cases. For example, the trials of juvenile offenders can be carried out behind closed doors in certain circumstances. The parents or guardians and defence counsel must attend court. Professional and lay judges should have knowledge relating to the prevention of juvenile crime and have experience working with children and young people.

b. Differences

Compared with earlier stages in criminal proceedings, the trial stage (including first-instance and appellate trials) under Vietnamese and Victorian criminal procedure laws exhibit many differences. In Viet Nam, procedures applying to all four categories of offences are similar but in Victoria there are many differences between criminal proceedings relating to summary offences and indictable offences. Victoria has committal proceedings in indictable cases but these do not exist in Viet Nam. Prosecutions under Victorian law involve mandatory disclosure obligations in the pre-hearing and pre-trial stages. Viet Nam, on the other hand, does not directly require the prosecution to disclose evidence and other documents to an accused and defence counsel. However, defence counsel is entitled to access case files. In Viet Nam, professional judges and lay judge(s) must participate in the first-instance trial panel.20 In appellate trials, lay judges only appear when necessary.21 By contrast, Victoria does not empower lay people to participate in trial panels but, in indictable cases, defendants can be tried before jurors.

Under Vietnamese criminal procedure, a preparatory meeting between a prosecutor and a judge may be carried out in the pre-trial stage in certain circumstances.22 This meeting creates an opportunity for judge and prosecutor to address importance issues of a case before proceeding to a court session. For example, if a judge finds that the act of an accused person is not an offence, he or she can recommend the prosecutor to withdraw prosecution. If the prosecutor agrees, the judge then issues a decision to cease the case otherwise he or she will issue a decision to bring the case for trial. The existence of a preparatory meeting manifests a feature of an inquisitorial model followed by Viet Nam. Functions of court and procuracy in

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21 Ibid art 244.
22 Interdisciplinary Circular No. 01/TTLN of the Supreme People’s Court and the Supreme People’s Procuracy of 8 December 1988 on Guidance for Implementation of Some Provisions of the Criminal Procedure Code, Part II.
criminal proceedings are not clarified. This may lead to the result that judges and prosecutors often agree on the outcome of cases. Victoria, by contrast, does not provide for this type of meeting. If the Children’s Court declines to commit an accused for trial, the DPP can file a direct indictment against the accused and commencing a new proceeding in a superior court. This reflects features of an adversarial model and a clear division of functions between court and prosecution.

Criminal trials in Viet Nam embody inquisitorial procedures while those in Victoria reflect the characteristics of adversarial procedures. In Viet Nam, professional and lay judges play an active and primary role in trials. They determine which witnesses and experts will appear, question them and the parties, and deal with much of the preparatory work of the court. In other words, these judges exercise considerable control over the scope and direction of the case. Additionally, as in other civil law jurisdictions, lawyers in Viet Nam proffer lines of inquiry and make legal arguments rather than collecting evidence and presenting it (as their counterparts in common law systems do). At present, Vietnamese lawyers do not take a dominant role in trials. They ‘protect’ clients by exploiting the relationships between themselves and judicial officials rather than using their professional knowledge. This means that in many cases lawyers function as middlemen connecting the family of offenders with judicial officials in order to ‘arrange’ advantageous decisions or judgments for offenders.

In Victoria, judges take the roles of ‘umpires’ ensuring fair and impartial trials. Under an adversarial system, ‘the two opposing parties investigate, collect and present evidence and arguments before a passive “factfinder”’. Lawyers in criminal proceedings in Victoria play a critical role because the outcome of criminal cases is largely dependent on the argument at trial between lawyers representing the prosecution and the defendant. A defendant’s right to the presence and examination of witnesses is clearly recognized by Victorian law. By contrast, under Vietnamese criminal procedure law, there is no provision directly allowing defendants to present and examine witnesses. Defendants and defence counsel are only entitled to request procedure-conducting bodies to summon witnesses. More importantly, Victoria provides diversion programs which are deemed particularly suitable for dealing with children and young offenders. During summary proceedings, a court may inform an

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accused that a sentence of imprisonment commences immediately or a sentence of a specified type which would be likely imposed on him or her. By contrast, diversion programs and sentence indication are not provided for in Viet Nam.

5. Appellate Trial

a. Similarities

Viet Nam and Victoria have appellate procedures to provide opportunities for juvenile offenders to request superior courts to rehear or retry their cases. In both jurisdictions, offenders and the prosecution are entitled to exercise the right of appeal. Appeals must be within prescribed time limits. Late appeals may be accepted in certain circumstances. At the appellate stage, courts of appeal are empowered to dismiss an appeal, set aside the sentence of the first-instance court and order a new trial; or impose any appropriate sentence.

b. Differences

Differences are also manifest in the appellate procedures of Viet Nam and Victoria. Under the *Criminal Procedure Code 2003*, a sentenced person has the right to appeal without the leave of a court in all circumstances. In Victoria, by contrast, a person convicted or sentenced by the County Court or the Trial Division of the Supreme Court may appeal to the Court of Appeal only if this Court gives him or her leave to appeal. In Viet Nam, if a sentenced person is a juvenile, art 231 of the *Criminal Procedure Code 2003* gives defence counsel the right to appeal in order to protect the interests of the convicted juvenile. This is called the ‘independent right of appeal’. As previously identified in Chapter 6, Victoria does not recognize this category of appeal. Also, the time limit for lodging an appeal under the *Criminal Procedure Code 2003* (15 days after the date of pronouncement of a judgment) is shorter than that under the *Criminal Procedure Act 2009* (28 days).

In addition, the *Criminal Procedure Act 2009* introduces the right to lodge an interlocutory appeal in Victoria; such a right does not exist in Viet Nam. Viet Nam only gives individuals the right to complain about procedural decisions and acts of bodies and persons with procedure-conducting competence.24 Procedures for exercising this right, however, differ from the right to appeal. On the other hand, appellate procedures in Victoria include

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circumstances where a lower court refers a point of law to a superior court. In Viet Nam, this is not considered to be an appeal and therefore is not provided for in criminal procedure law.

The power of appellate courts in the two jurisdictions when reviewing a first-instance judgment is slightly different. Under Vietnamese criminal procedure law, the Court of Appeal cannot impose on a sentenced person a more serious penalty than that applied by the first-instance court where the prosecution and other relevant parties request the Court of Appeal to apply a less serious penalty for that person. These provisions aim to ensure legitimate interests of an appellant. In Victoria, the above restriction is not imposed on the Court of Appeal when it reviews an appeal concerning sentence of an offender. Furthermore, in Viet Nam, if the Court of Appeal cancels the first-instance judgment and requests a re-trial, a new composition of the trial panel must be established. This aims to prevent bias in reviewing the case. In Victoria, the Court of Appeal may decide ‘whether the hearing is to be conducted by the same judge or a different judge’. This means in theory a judge may carry out two hearings of the same criminal case.

D. Protection of Juvenile Offenders’ Rights

1. The Legislative Framework

a. Similar and Different Advantages

Viet Nam and Australia are parties to the ICCPR and the CRC. Hence, almost all the rights of children and young offenders in criminal proceedings embodied in these two documents have been recognized in, and ensured by, the legislative frameworks adopted in the two jurisdictions. The history of the two juvenile justice systems shows that even before ratifying the CRC, some criminal procedural rights of children had been recognized in legislation. After adopting the ICCPR and the CRC, Viet Nam and Australia harmonized national laws with these international Conventions. Consequently, additional rights of children and young offenders have now been established and the protection of these procedural rights is more effectively guaranteed.

26 Although in this case the Court of Appeal is required to warn the appellant that he or she may receive a more severe sentence than that imposed by the trial court: see Criminal Procedure Act 2009, s 281(3).
27 Criminal Procedure Code 2003, art 250(2).
28 Ibid s 282(3)(b).
Despite some modifications, most provisions concerning the rights of children and young offenders in Vietnamese and Victorian legislative frameworks are based on equivalent provisions in the ICCPR and the CRC as well as the guidelines, rules and general comments issued by the UN Human Rights Committee and the Committee on the Rights of the Child. Accordingly, a number of the procedural safeguards applying to children and young offenders in Viet Nam and Victoria share a similar content. These include the right to be presumed innocent; the right of defence; the right to the presence of a parent or guardian; the right to have the free assistance of an interpreter; the right not to be subject to cruel and inhuman punishment; the right not to be subject to arbitrary arrest or detention; and the right to equality before courts and tribunals and to a fair trial.

Nonetheless, some differences can be identified when comparing Vietnamese and Victorian legislative frameworks. The Victorian legislative framework has a number of significant advantages.

- With the enactment of the Charter of Human Rights and Responsibility Act 2006, almost all the rights of offenders in general (and juvenile offenders in particular) have been explicitly recognized and ensured. The contents of these procedural guarantees are similar to provisions in relevant international conventions, guidelines and general comments of UN human rights bodies.\(^{29}\)

- Victoria has established a distinctive justice system, based on a distinct legislative framework governing children and young offenders. This legal framework ensures that the rights of juvenile offenders in criminal proceedings are respected and protected in reality.

- Victoria has pursued a welfare model of the type endorsed by the UN in dealing with children and young people who violate the criminal law. Informal procedures including police cautioning programs and family group conferences have been used to resolve cases involving petty offences committed by juveniles. In particular, the establishment of the Children’s Court in Victoria, operating under special procedures

\(^{29}\) For examples, the right to be presumed innocent, the right to remain silent, the right to the presence of a parent or guardian and the right not to be subject to arbitrary arrest or detention.
and guidelines, has contributed to the treatment of juveniles in an age-appropriate manner.

By contrast, the benefits of the Vietnamese legislative framework are somewhat different.

- A number of the criminal procedural rights of juvenile offenders are directly or indirectly stipulated in the *Criminal Procedure Code 2003*. The majority of these rights are provided in the form of basic principles of criminal procedure law. For instance: the right to be presumed innocent; the right of defence; the right to equality before courts and tribunals and to a fair trial.30

- The content of some particular rights, such as the right to be presumed innocent, the right of defence and the right to appeal, is quite similar to those enshrined in UN conventions and the general comments of the Committee on the Rights of the Child and the Human Rights Committee. Viet Nam is one of the State Parties ratifying or joining the UN Conventions governing juvenile justice (for example CRC, the *Beijing Rules*, ICCPR). Hence, the Government of Viet Nam has adopted and reformed its national legislative framework in accordance with the minimum standards, objectives, and recommendations specified in these international legal documents.

### b. Similar and Different Shortcomings

Because they have been modeled on international human rights legal instruments, the Vietnamese and Victorian legislative frameworks follow international standards and requirements concerning the protection of the rights of juvenile offenders in criminal proceedings. This is a key characteristic of the two juvenile justice systems. Nonetheless, several common limitations can be detected. For instance, as regards the right to the presence of a parent or guardian, neither jurisdiction specifies circumstances in which public authorities can deny the participation of these persons in order to protect the best interests of juvenile offenders. Further, concerning the right to equality before courts and tribunals and to a fair trial, both Vietnamese and Victorian criminal procedure laws provide that trials

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30 Some of these rights had been recognized in earlier Vietnamese Constitutions as fundamental rights of citizens, including the right of defence, the right not to be subject to cruel and inhuman punishment and the right not to be arbitrarily arrested or detained.
(including those involving children and young offenders) must be conducted in public unless otherwise prescribed by law. The exceptional circumstances where trials or hearings of juvenile offenders may be conducted behind closed doors are not clearly specified in the laws of two jurisdictions.

Along with the above common limitations, the legislative framework of each jurisdiction has specific shortcomings. Several limits still exist in the Victorian legal framework, manifest in two ways.

- First, some gaps exist. Victorian law does not specifically criminalize torture by investigating officials, although acts of torture may be criminalized under provisions of other offences such as assault. Legal representatives are not allowed to independently exercise the right of appeal in order to protect the legitimate interests of sentenced children and young people.

- Second, current procedures employed by the Supreme Court violate juveniles’ right to a fair trial and the right to be treated in an age-appropriate manner.

The legislative framework of Viet Nam, on the other hand, has many limitations.

- The major shortcoming is the lack of a separate criminal juvenile justice system, providing a distinct legislative framework for the protection of the rights of juvenile offenders. In Viet Nam, only a few provisions establish additional requirements for the protection of juvenile offenders. These provisions govern several rights of juvenile offenders, such as the right of defence, the right to the presence of parents or guardians, and the right to appeal. Almost all other rights are applied without specific consideration of juvenile offenders. It is clear that without a justice system particularly designed for juveniles, Viet Nam does not fulfil the obligations imposed by CRC, thereby diminishing the effectiveness of the protection of the human rights of juvenile offenders.

31 See above Chapter 6, Section D(1)(c) of the thesis.
32 For example, in DPP v TY, the defendant was tired and hungry for the duration of the proceedings; spent time in a Supreme Court cell (a small room with a concrete floor containing only a padded bench on which to sit, a toilet and a sink) during breaks and before and after his hearing each day and spectators could observe the proceedings from the gallery above the courtroom etc. For more details, see Amanda Burnnard, ‘The Right to a Fair Trial: Young Offenders and the Victorian Charter of Human Rights and Responsibilities’ (2008) 20(2) Current Issues in Criminal Justice 173, 180-3.
• Second, many provisions in Vietnamese criminal procedure law applicable to juvenile offenders are unclear, insufficient, unreasonable, and sometimes contrary to relevant UN legal documents and interpretations of the Committee on the Rights of the Child and the Human Rights Committee. For example, the right to remain silent is not directly recognized; the confidentiality of communications between juvenile offenders and their defence counsel is not protected; provisions governing the rights and obligations of defence counsel are unreasonable; there is no provision that arrest, custody and detention can be used only as a measure of last resort and for the shortest appropriate period of time; the right of a juvenile defendant to examine witnesses is not provided and judgments of a court, including those of children and young offenders, must be announced publicly without any exceptions.

• Third, the Criminal Procedure Code 2003 has some limitations. There is overlap between provisions governing the protection of juvenile offenders’ rights. For instance, arts 57(2) and 305(2) are similar. Furthermore, the Criminal Procedure Code 2003 often requires the combined operation of two or more articles to give effect to one fundamental right of juvenile offenders. For example, the right to be presumed innocent is recognized by arts 9 and 10; the right to equal treatment by the courts and tribunals and to a fair trial is prescribed in five articles (5, 14, 16, 18, and 19) of the Criminal Procedure Code 2003. This creates difficulties in obtaining a comprehensive understanding of Vietnamese criminal procedure law. It suggests that Vietnamese legislators might not have been mindful of UN legal documents and UN human rights bodies’ explanations before drafting and adopting the Criminal Procedure Code 2003.

2. The Practice
   a. Similar and Different Strengths
   The practical protection of some rights of juvenile offenders in Viet Nam and Victoria has several common advantages. In most cases, juvenile defendants are legally represented by lawyers. Procedure-conducting bodies generally ‘invite’ a parent or guardian of children and

young people to participate in proceedings. They also observe prescribed procedures in relation to arrest, custody and detention of juveniles. The number of trials conducted behind closed doors is increasing. Some judges and magistrates have appropriate knowledge and attitudes when dealing with juvenile defendants.

However, in comparison with Viet Nam, Victoria has many more strengths in securing juvenile offenders’ rights in practice. Victoria has developed many strategies which are conformable with the UN benchmark standards for juvenile justice. These strategies have not been applied in Viet Nam. For example, Victoria has established a number of community legal centers supporting children and young people. These centers do not exist in Viet Nam where lawyers representing juvenile defendants are usually from private law offices. With the considerable increase in juvenile crime, these lawyers may not be able to satisfy increasing demand for legal representation.

Additionally, Victoria provides for independent persons to participate in the criminal processes. In practice, these persons make an important contribution to the protection of children and young people, particularly in the investigation stage. Viet Nam does not provide for independent persons although in some cases, where a parent or guardian is not available, investigatory bodies invite representatives of schools, the Ho Chi Minh Communist Youth Union or other organizations to be present at their interrogations. Moreover, many policies and programs to facilitate the use of bail as an alternative to youth detention have been implemented in Victoria. In the trial stage, Victorian courts fulfil the obligation to protect the identification of juvenile defendants. By contrast, as previously noted in Chapter 4, the Vietnamese criminal procedure law does not provide for this protection.

**b. Similar and Different Weaknesses**

Both jurisdictions share some similar limitations in ensuring children and young offenders’ rights in practice. Some bodies do not inform juveniles of their rights. Securing legal representation at police stations is not observed sometimes. The participation in proceedings of parents, guardians and other support persons is passive and limited. Moreover, children and young people are occasionally held in custody for an unreasonable time. Vietnamese courts and the Victorian Supreme Court do not apply appropriate procedures when dealing
with juvenile defendants.

On the other hand, each jurisdiction has particular weaknesses although Viet Nam has more limitations than Victoria. The exercising of juvenile offenders’ right of defence in Viet Nam is impeded by many factors. Criminal procedure-conducting bodies do not appoint defence counsel for young people in the investigation stage. In several cases, they have been reported to have discouraged juveniles to access defence lawyers. The ‘quality’ of defence in juvenile cases is variable. By contrast, this procedural safeguard is exercised more effectively in Victoria.\footnote{Although it is harder for indigenous young people and aliens to access to legal representation.}

In Viet Nam, parents or guardians are sometimes prevented from communicating with their children and wards at police stations. In some circumstances, they are only invited when investigations are nearly completed. There is no research on this issue in Victoria. However, concern has been expressed about the operation of independent persons supporting young people at police interviews in Victoria. Independent persons in regional areas sometimes do not arrive at police station promptly, interrupt police questioning unnecessary and overstep their role and that of defence counsel. The role of independent persons in bail processes is not clear.

The privacy of juvenile offenders in Viet Nam is clearly not respected. This derives from legislative shortcomings. In many cases, information about juvenile offenders and their offences is published in the media, even in pre-trial stages. Many trials of juvenile defendants are conducted in public. ‘Roving’ trials are particularly notable for making children and young offenders more stressed, embarrassed and guilty about their behaviour. In Victoria, only in exceptional cases can children and young offenders be identified in the investigation stage.

In Viet Nam, there are cases where children and young people are unnecessarily and unlawfully arrested, held in custody and detained. In many temporary detention camps, juvenile offenders are detained in the same places as adult offenders. In Victoria, police occasionally use unlawful measures with children and young people such as physical assault,
verbal abuse, intimidation techniques and threats. The lack of adequate facilities for juvenile detention sometimes results in violation of a large number of human rights.35

The right to equality before courts and to a fair trial of juvenile offenders in Viet Nam is not ensured. Courts are not independent in their operation. There is inequity between defence counsel and prosecutors when arguing at trial. Decision makers do not receive adequately specialized education and training on children and young persons. The same procedures are applied by Vietnamese courts when dealing with juvenile and adult defendants.

IV. Conclusions
The preceding analysis identifies that the juvenile justice systems and the protection of the rights of children and young offenders in Viet Nam and Victoria share some key similarities and differences. Statutory law is the primary source of law in both jurisdictions. Criminal proceedings for juvenile offenders are basically similar to those for their adult counterparts with prescribed stages including institution, investigation, prosecution and trial. Additionally, the legislative frameworks in both jurisdictions provide a number of special procedures for children and young offenders. For example: the attendance of a parent or guardian is compulsory; a special regime for detention must be observed; hearings or trials can be conducted behind closed doors and public officials should have experience working with young people and knowledge of matters concerning juvenile offences. These shared features demonstrate that Viet Nam and Victoria have at least partly complied with the provisions of UN children rights bodies regarding the establishment of separate juvenile justice systems. In practice, as previously stated, Viet Nam and Victoria also share some similar strengths and weaknesses concerning the guarantee of particular rights of children and young people.

Both jurisdictions also share some common features in regard to the assurance of juvenile offenders’ rights in criminal processes. Almost all recommended minimum guarantees for children and young offenders in criminal proceedings have been recognized and protected in the legislative frameworks adopted in Viet Nam and Victoria. The content of these procedural safeguards is mainly modeled on equivalent provisions of the ICCPR and the

35 In Viet Nam, investigations on juvenile custodial and detaining facilities are conducted by procuracies. However, outcomes of these investigations are not available.
CRC. Basically, juvenile offenders enjoy all the criminal procedural rights vested in adult offenders. Additionally, public authorities must comply with extra requirements and take into account special matters when dealing with juvenile cases.

However, many differences exist between the Vietnamese and Victorian juvenile justice systems. In comparison with Viet Nam, Victoria has a long-standing history of establishing and improving a criminal justice system for children and young offenders. The process in Victoria commenced at the beginning of the twentieth century, whereas in Viet Nam it started in the 1980s. In Victoria, case law and statutory law are legal sources while in Viet Nam only statutory law is recognized as a source of law. Applying different models of criminal procedure, Viet Nam and Victoria have many different provisions governing proceedings applicable to juvenile offenders. The major difference exists in procedures at the first-instance trial stage. Judges in Viet Nam do not play the role of ‘umpires’ like their colleagues in Victoria. Together with prosecutors, Vietnamese judges have an accusatory function in criminal cases. The procedures of a trial reflect inquisitorial features and defence counsel do not have adequate facilities to argue fairly with the prosecution.

Victoria has a separate juvenile justice system that have been established for more than one hundred years. In Victoria some forms of diversion and restorative justice programs have been used. Victoria has a Children’s Court operating under distinctive procedures respecting and protecting the best interests of children and young offenders. Viet Nam, by contrast, does not essentially possess a ‘true’ justice system for children and young offenders. Viet Nam does not have a Children’s Court and a separate legislative framework for juvenile offenders, and does not utilize diversion and restorative justice in dealing with these vulnerable persons. Vietnamese legal experts have only recently conducted research on these areas. In Viet Nam, the criminal law provides some special judicial measures for sentenced juveniles\(^{36}\) and there are only a few differences in criminal procedures applicable to juvenile and adult offenders.

As two Member States of the CRC, the recognition and protection of rights of children and young persons in conflict with criminal law are different in Viet Nam and Victoria. The

\(^{36}\) Under art 70(1) of the Penal Code 1999, these judicial measures include: (a) education at communes, wards or district towns and (b) sending juvenile offenders to reformatory schools.
Victorian legislative framework governing the rights of juvenile offenders contains more benefits and fewer shortcomings than that of Viet Nam. This regulatory framework is fundamentally compatible with the ICCPR, CRC as well as guidelines and general comments of UN human rights bodies. Conversely, the Vietnamese legal framework only recognizes procedural rights for offenders in general, rather than juvenile offenders in particular. It may be concluded that in Viet Nam, the absence of specific protections for juveniles is unreasonable and even contrary to provisions of relevant international policy.

Differences in legal frameworks lead to differences in the actual protection of some rights of children and young people. In Viet Nam, there are many limitations. Children and young people often do not have defence counsel supporting them in the investigation stage. The performance of defence lawyers is often perfunctory and inefficient. In many cases, parents or guardians are not present at police interrogations and trials. Their support in proceedings is passive and restricted. The privacy of children and young offenders in all stages of the criminal process is unprotected. Arrest, custody and the detention of juveniles are often unlawful and unnecessary. Juveniles are not separated from adults in some custodial houses and temporary detention camps. There is no distinction in procedures applicable in trials of juvenile and adult defendants.

By contrast, in Victoria, procedural protections for juvenile offenders are generally implemented. However, weaknesses still exist in practice including difficulties in access to legal representation for indigenous young people; limitations in the operation of independent persons; the breach of children and young people’s privacy in the investigation stage; improper behaviour of police at the time of arresting and taking into custody juveniles; and inappropriate procedures followed by the Supreme Court in juvenile cases.

In summary, the juvenile justice systems in Victoria and particularly Viet Nam still have certain limitations. In order to meet the UN benchmark standards for protecting the rights of juvenile in conflict with the criminal law, each jurisdiction should identify areas which need to be improved and find appropriate reform strategies. Based on the UN benchmark model which was previously outlined, the next chapter of this thesis will provide particular recommendations for Viet Nam and Victoria to improve their juvenile justice systems.
Chapter 9
RECOMMENDATIONS AND CONCLUSIONS

I. Introduction
This chapter reviews major issues in the juvenile justice systems of Viet Nam and Victoria identified in previous chapters of the thesis and recommends ways to overcome shortcomings. These recommendations include reforming relevant legislation and improving legal implementation to give better effect to proposals of UN human rights and child rights bodies. \(^1\) The ultimate aim of the chapter is to assist the two jurisdictions to improve their juvenile justice systems by better reflecting international standards for protecting children and young offenders.

II. Improving the Juvenile Justice Systems in Viet Nam and Victoria
A. Reasons for Reform
1. Viet Nam
The incidence of juvenile delinquency in Viet Nam is high. \(^2\) The recidivism rate has increased. \(^3\) The Vietnamese government has made efforts in reforming criminal law and criminal procedure laws, however, as previously discussed in Chapters 4 and 5 of the thesis, the juvenile justice system of Viet Nam has many shortcomings in terms of regulatory framework and legal implementation. A number of juvenile offenders’ rights have been violated. There is a considerable distance between the Vietnamese juvenile justice legislative framework and that of Victoria and the UN regarding children and young offenders’ protection. This negatively impacts on the future development of these young people.

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\(^1\) Preventing juvenile delinquency is always better than the cure. However, the prevention of juvenile offence, the education, training and rehabilitation of sentenced juveniles do not fall within the scope of the thesis. Hence, this chapter does not provide recommendations in these areas.

\(^2\) In five years (2001-2005), the number of juvenile defendants sharply increased from 3,441 to 6,512 (nearly 190 percent): see Adjudication Science Institute of the Supreme People’s Court, *Bao Cao Tong Quan va Co So Ly Luan va Thuc Tien cua Su Can Thiet Thanh Lap Toa An Chuyen Trach doi voi Nguoi Chua Thanh Nien o Viet Nam* [Overview Report on the Reasoning and Practical Basis of the Necessity of Establishing Special Court for Juveniles in Viet Nam] (2010) 30.

\(^3\) Statistics show that from 2007 to 2009, the recidivism rates of juvenile offenders increased from 0.77% to 1.02%: see Adjudication Science Institute of the Supreme People’s Court, above n 2, 128.
As a member state of the CRC and the ICCPR, Viet Nam is obliged to conduct a review of its regulatory framework and legal enforcement. This can help Viet Nam establish a distinctive juvenile justice system conforming to the standards and requirements of international child rights law. A new juvenile justice system should aim to ensure the best interests of children and young offenders and reduce juvenile delinquency and recidivism rates. In this way, Viet Nam may become a part of ‘a world fit for children’.

2. Victoria

In comparison with Viet Nam, the juvenile justice system of Victoria has more advanced features. This does not mean that Victoria’s juvenile justice system is perfect. As presented in Chapters 6 and 7, there are a number of matters in the Victorian legislative framework and in practice which need to be improved. Special procedures have not been employed by the Supreme Court when trying children and young offenders although the number of juvenile cases before this Court has increased. Despite recognizing most procedural rights of juveniles, the Charter of Human Rights and Responsibilities Act 2006 does not have significant legal effect. An individual is not entitled to a remedy solely due to an infringement of the Charter’s provisions. In practice, many limitations concerning the legal representation of indigenous young people and aliens; operation of independent persons in rural regions and independent persons supporting for aboriginal people, young people in out-of-home care and those from cultural and linguistically diverse backgrounds and conditions of detention in the Parville Youth Justice Precinct must be addressed.4

For the above reasons, legal reform is essential for Victoria although the areas which need to be improved are different from those in Viet Nam. The Victorian Government can assist in the establishment of a distinctive Australian legal environment in which the rights of children and young people in conflict with the criminal law are adequately and efficiently guaranteed.

B. Recommendations for Legislative Reform

1. Viet Nam

a. Establishing a Comprehensive Juvenile Justice System

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4 See the conclusions of Chapter 7.
In order to strengthen the protection of children and young offenders, Viet Nam must establish a distinctive juvenile justice system. This is totally in accordance with the provisions of the CRC,\(^5\) and other international rules and guidelines governing the rights of children and young people in conflict with the criminal law as well as recommendations of the UN child rights bodies. The efficiency and indispensability of a separate juvenile justice system has been demonstrated in many developed countries. Such juvenile justice system should comprise a distinctive legal framework, specialized procedure-conducting bodies and persons as well as organizations, agencies and services supporting children and young offenders.

\textit{i. Enacting a Separate Legal Framework for the Juvenile Justice System}

In the justice reform process, Viet Nam should establish a distinctive regulatory framework for juvenile offenders. This will facilitate procedure-conducting bodies in dealing with cases involving juveniles and protect their fundamental rights. Similar to other jurisdictions, e.g. Australia, Germany and Thailand, Viet Nam should introduce two essential laws including the \textit{Law on Children Welfare} and the \textit{Family and Juvenile Courts Law}. The first would replace the \textit{Law on Protection, Care and Education of Children 2004}. It should have specific provisions for services which support children and families in the process of rehabilitating and reintegrating into the community. The second law would prescribe issues related to juvenile courts such as operating principles, organization, jurisdiction, procedures, system of supervisory and disciplinary measures applicable to juvenile offenders and selection criteria of professional and lay judges. Provisions in Chapter 32 of the \textit{Criminal Procedure Code 2003} relevant to juvenile offenders should be transferred to the \textit{Family and Juvenile Courts Law}. The necessity for a separate legal code for juvenile justice in Viet Nam has been repeatedly confirmed by the Committee on the Rights of the Child and NGOs.\(^6\)

\textit{ii. Setting up the Juvenile Courts System}

In recent years, legal experts and judicial bodies have conducted a number of studies regarding the establishment of Juvenile Courts in Viet Nam. Despite different opinions on

\(^5\) Article 40(3) of the CRC requires States parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the criminal law.

many issues surrounding these special courts such as jurisdiction, organization, procedures, selection criteria of professional and lay judges, most researchers have unanimously suggested that Viet Nam should build up a system of juvenile courts. This approach is in accordance with recommendations of the Committee on the Rights of the Child:

The States parties establish juvenile courts either as separate units or as part of existing regional/district courts. Where that is not immediately feasible for practical reasons, the States parties should ensure the appointment of specialized judges or magistrates for dealing with cases of juvenile justice.

According to the United Nations Children’s Fund (UNICEF) and the Law Research Institute of the Vietnamese Ministry of Justice, juvenile courts should be piloted in big cities with high rates of juvenile crime including Ha Noi, Ho Chi Minh, Da Nang and Hai Phong. After analysis and evaluation, a system of juvenile courts can subsequently be replicated across Viet Nam.

A question put here is whether the establishment of juvenile courts is compatible with the inquisitorial system followed by Viet Nam. The Children’s Court is often considered as an adversarial court in which the parties play a primary role in identifying the disputed issues, investigating and advancing the case and the judicial officer largely functions as a passive

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10 Ibid.
However, this does not mean Children’s Courts cannot be set up in the inquisitorial systems. Many Youth Courts or Family and Youth Courts or Juvenile Courts exist in Europe’s inquisitorial jurisdictions such as Austria, France, Germany, Greece, Italy, Portugal, Turkey etc. Moreover, most State and Territories of Australia have recently supported for a shift away from the ‘critical incident-based and confrontational approach of common law adversarialism’ towards a ‘collaborative problem-solving therapeutic jurisprudence approach’ in child protection and criminal cases. Judicial officers in a non-adversarial court play more active roles in case investigation and analysis. Because of such reasons, the establishment of juvenile courts is not unconformable with the Vietnamese inquisitorial system.

Another important issue arising here is the position and organization of juvenile courts. Under Resolution No. 49-NQ/TW of the Political Bureau on Judicial Reform Strategies towards 2020, the current People’s Courts system will be reorganized. There will be four court levels including Regional First Instance Courts (District Courts), Courts of Appeal (Provincial Courts), High Courts and the Supreme People’s Court. The establishment of juvenile courts must be based upon the new People’s Courts system. Viet Nam should set up juvenile courts within Regional and Provincial Courts. In the High Courts and the Supreme People’s Court, specialized panels which may include 3 to 5 judges responsible for juvenile cases may be established. In this regard, there is a minor difference between Victoria and Viet Nam. The Children’s Court of Victoria is an independent court at the same level as the Magistrates’ Court in the judicial hierarchy. Victoria has not established a separate Children’s Court at the same level as the County Court. Instead, specialized judges in the County Court and the Supreme Court conduct trials of children and young offenders where their offences fall within the jurisdiction of these Courts. This model is unsuitable for Viet Nam. The number of serious offences committed by juveniles in Viet Nam is higher than in

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13 Borowski, above n 11, 27.
14 Adjudication Science Institute of the Supreme People’s Court, above n 2, 121.
Victoria. Accordingly, Viet Nam needs separate juvenile courts at provincial level to deal with these serious cases.

Similar to the Children’s Court of Victoria, each juvenile court in Viet Nam can have two divisions: the Family Division and the Criminal Division. The Family Division has jurisdiction over issues relating to marriage and family which influence children and young people. The Criminal Division has jurisdiction to conduct trials of juveniles in conflict with the criminal law. Depending on level of juvenile courts, the Family and Juvenile Courts Law provides scope of offences which belong to the jurisdiction of the Criminal Division.

iii. Restructuring other Procedure-Conducting Bodies

Changes in the People’s Courts system will require restructuring of other procedure-conducting bodies including procuracies and investigatory bodies. Specifically, Viet Nam will establish four levels of People’s Procuracies comprising the Regional Procuracies, Provincial Procuracies, High Procuracies and Supreme Procuracy. At each level of People’s Procuracies, separate offices dealing with juvenile cases should be set up. Pham, a judge of the Court of Appeal in Ho Chi Minh City, asserts that:

According to the judicial reform strategy, special courts for juveniles will be established. To create the unification and synchronism, investigatory bodies and procuracies should also be developed in appropriate with the psychology of juveniles. This can ‘smooth’ stages of criminal proceedings. Although current conditions are not suitable, sooner or later these special bodies must be set up.

Concerning investigatory bodies, special divisions which are responsible for carrying out investigations of accused juveniles should be established. Alternatively, if current human resources and material facilities are not available, police should organize courses for

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16 At present, Viet Nam has three levels of People’s Procuracies: District Procuracies, Provincial Procuracies and the Supreme Procuracies.


19 Commander Tra Van Lao cited in Tung and Thuong, above n 18.
improving professional skills in conducting investigations of cases involving juveniles.\textsuperscript{20} In these courses, investigators will be introduced to ‘lawful friendly’ procedures and methods of investigating and dealing with juveniles. Investigations must fulfill requirements on protecting the rights of children, preventing them from being harmed and facilitating the collection of evidence from their statements. Regarding these issues, the Committee on the Rights of the Child also states:

A comprehensive juvenile justice system further requires the establishment of specialized units within the police, the judiciary, the court system, the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.\textsuperscript{21}

\textit{iv. Establishing and Improving Agencies, Organizations and Services Supporting Juvenile Offenders}

Along with specialized juvenile justice authorities, Viet Nam should develop a system of welfare institutions and services aimed at preventing juvenile crime and assisting juvenile offenders in criminal proceedings, their rehabilitation and social reintegration. In this regard, Viet Nam can follow the multi-agency approach of the Victorian and German juvenile justice systems.\textsuperscript{22} It should establish the community welfare youth agencies\textsuperscript{23} and youth court services.\textsuperscript{24} These agencies and services will have following functions:

- Provide welfare services to juveniles and families requiring protection, care and accommodation (pure welfare tasks);
- Assist prosecutors and judges by providing juveniles’ personal and family background information; psychological and psychiatric assessments of juveniles and families and recommending appropriate measures;
- Prevent juveniles from being detained unnecessarily in pre-trial stages;
- Partly participating in the supervision and execution of educational measures (mediation, social training, etc.).

The personnel of youth court services and welfare institutions may include social workers, teachers and psychologists. They must receive special education and training on issues

\textsuperscript{20} The Vietnamese Police General Department, in cooperation with UNICEF in Viet Nam, should enhance and strengthen plans to organize these special courses.
\textsuperscript{21} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 92.
\textsuperscript{22} See Frieder Dunkel, \textit{Germany} in Frieder Dunkel et al, above n 12, vol 2, 564-7.
\textsuperscript{23} \textit{Children, Youth and Families Act 2005}, Part 3.3.
\textsuperscript{24} The Victorian Children’s Court Services include Youth Service Officers, Liaison Office and Clinic (Part 7.7 of the \textit{Children, Youth and Families Act 2005}).
relating to juvenile crime and justice. When supplying services, they should be paid by juvenile courts or the government. On the other hand, the Vietnamese Government should have policies to mobilize volunteers, voluntary organizations, local institutions and other community resources to support juvenile offenders at all stages of criminal justice processes, particularly rehabilitation. The use of volunteers has some major advantages. They establish a link between the community and the juvenile justice system. Through their work, voluntary community members can improve their skills in dealing with juveniles, take an active role in responding to crime occurring in their community and facilitate the social reintegration of offenders and victims.

b. Adopting Special Procedures for Juvenile Offenders

i. Less Serious Offences: Introducing Restorative Justice Program

Legislators and law enforcement officials in Viet Nam should acknowledge that the establishment of a restorative justice approach is vital for juvenile offenders. They must change their traditional view that crime is an act against the State and follow the approach of restorative justice that views crime as an act against another person and the community. Consequently, victims, offenders and communities should play an active and direct role in the solution process. Rodriguez states that ‘restorative justice programs are an important component within juvenile courts’. The Family and Juvenile Court Law should stipulate principles, conditions and forms of restorative justice programs. Concerning these issues, Vietnamese programs should be informed by the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. A restorative program which is suitable with the socioeconomic conditions and legal system of Viet Nam must be developed.

Community and Family Group Conferencing is one model which should be considered. This

25 United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes (2006), 49-50. Despite being mentioned in the context of restorative justice, these advantages may also be seen when using volunteers in welfare institutions and youth court services.
28 UNICEF and Law Research Institute of the Vietnamese Ministry of Justice recommend that Viet Nam should introduce ‘pilot alternative diversion programmes that avoid resort to the formal juvenile justice system’: see UNICEF and Law Research Institute of the Vietnamese Ministry of Justice, above n 9, 97.
program, in comparison with other restorative justice programs, offers several advantages. It includes not only facilitator, victim and offender but also their families, friends and sometimes other members of the community (e.g. school teachers, neighbours). Participants in the conferencing process ‘identify desirable outcomes for the parties, address the consequences of the crime, explore appropriate ways to prevent the offending behaviour from reoccurring and develop a reparative plan’. Community and Family Group Conferencing can be considered as an alternative measure to divert juvenile offenders from the traditional criminal justice. This approach may reduce burdens on the criminal justice system and minimize the stigmatization of judicial proceedings. This is compatible with art 40(3) of the CRC which encourages State parties, whenever appropriate and desirable, to adopt and promote ‘measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected’.

Community and Family Group Conferencing can be applied to less serious cases and can be used at any stage of criminal proceedings. In pre-trial stages, prosecutors can decide to refer an accused juvenile to the conference; in the trial stage this power is vested in judges. Where a juvenile offender completes all responsibilities established by the conference, prosecutors can terminate proceedings; otherwise they refer the case to a juvenile court. In this case, the court must conduct the first-instance trial. A referral to the Community and Family Group Conferencing can also be made at the trial stage where:

a. The accused acknowledges to the judge his/her responsibility for the offence;

b. The judge believes that the conference is an appropriate way to deal with the case; and

c. Both the prosecutor and the accused consent to the judge’s adjourning the proceeding for this purpose.

If the accused completes the agreed outcomes of the conference, the judge must discharge the accused without any finding of guilt. Conversely, if the accused does not fulfil his/her responsibilities and is subsequently found guilty of the charge, the judge must assess the extent to which the accused complied with the conference’s agreed resolutions when sentencing.

29 UNODC, above n 25, 21.
ii. More Serious Offences: Designing Distinctive Provisions Ensuring the Rights of Juvenile Offenders

In circumstances where juveniles are accused of serious offences and criminal proceedings are initiated by competent authorities, a large number of procedural safeguards, particularly the principle of a fair and just trial, must be observed. To achieve this purpose, Viet Nam must amend and supplement relevant provisions of the Criminal Procedure Code 2003 as well as introduce essential provisions in the Family and Juvenile Courts Law. The following suggestions for Viet Nam derive from analyses in Chapters 3 and 4, and are based on relevant provisions of the CRC and general comments of the Committee on the Rights of the Child.

• Right to be Presumed Innocent

Several legal scholars in Viet Nam suggest that legislators should rename the title of art 9 of the Criminal Procedure Code 2003 from ‘No Person Shall be Considered Guilty until a Court Judgment on His or Her Criminality Takes Legal Effect’ to ‘Presumption of Innocence’. Furthermore, provisions contained in this article should be amended and supplemented as following:

Every person alleged as or accused of having infringed the criminal law has the benefit of doubt and is only guilty as charged if these charges have been proven beyond reasonable doubt. The responsibility to prove offences shall rest with the investigatory bodies and the procuracies. The accused or defendants shall have the right but not be bound to prove their innocence.

The new title of art 9 conforms to international human rights conventions and rules including the ICCPR (art 14(2)), the CRC (40(2)(b)(i)) and art 7.1 of the Beijing Rules. The amendment directly requires that whenever there is a doubt on the guilt of offenders, or there is not adequate evidence to prove offences, procedure-conducting bodies must release offenders. They should not intentionally prolong the duration of criminal processes where it is not possible to collect further accusatorial evidence.

Moreover, the duty to prove cases should be imposed only on the investigatory

bodies and prosecution. Courts should be excluded from this obligation. Trial panels are responsible for monitoring court sessions. Judges should take the role of umpires evaluating arguments made by prosecutors, victims, defence counsel and defendants. This amendment aims to ensure fairness between opposite parties at trials.

- **Right to Remain Silent**
  When the *Criminal Procedure Code 2003* is amended, legislators should extend the right to remain silent for offenders (including persons held in custody, accused persons and defendants) to all stages of criminal proceedings.31 This supplementation should confirm that the right to remain silent is one of fundamental rights of offenders in criminal proceedings. Procedure-conducting persons, particularly police, must have an obligation to inform and explain this procedural safeguard to offenders when arresting, and before interrogating, them. The recognition of the right to remain silent in the *Criminal Procedure Code 2003* may prevent procedure-conducting persons from exhibiting prejudice against offenders who do not give statements and using unlawful measures such as torture or corporal punishment. From another perspective, this right informs arrestees, accused persons and defendants that their cooperation with procedure-conducting bodies is not an obligation.

- **Right not to be Subject to Torture or to Cruel, Inhuman or Degrading Treatment or Punishment**
  Vietnamese legislators should give attention to the prevention of torture. Punishing public officials who have carried out acts of torture is one way but not the best means to resolve the issue. A more effective way may be raising awareness of law enforcement personnel and other persons involved in custody, detention and interrogation of the prohibition against torture. This requires more education and training on national and international regulatory frameworks concerning the right not to be subject to torture or cruel and inhuman punishment. They must acknowledge that torture and corporal punishment are forms of violence that infringe the dignity of

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individuals. A child friendly investigating ‘atmosphere’ which has been piloted in several provinces should be improved and expanded.

On the other hand, akin to art 15 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984, the Criminal Procedure Code 2003 should add provisions so that statements, evidence and documents gathered by acts of torture cannot be used as evidence in criminal proceedings. As to the use of reasonable restraint in limited circumstances, detailed guidance and training should be compulsory following the ‘principle of the minimum necessary use of force for the shortest necessary period of time’,32 ensuring that ‘any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control’.33

- **Right not to be Subject to Arbitrary Arrest or Detention**

The Family and Juvenile Court Law should have provisions that: ‘The arrest, detention or imprisonment of a juvenile shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.’34 Moreover, time limits of custody and temporary detention applicable to juvenile offenders should be shorter than those applicable to their adult counterparts. The use of non-custodial measures such as guarantees and depositing money or valuable property as bail should be encouraged.35 In this regard, Viet Nam should incorporate particular Rules of the UN into its national law including Rules for the Protection of Juveniles Deprived of their Liberty,36 Standard Minimum Rules for Non-custodial Measures37 and Standard Minimum Rules for the Treatment of Prisoners.38

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32 Committee on the Rights of the Child, General Comment No. 8 (2006): The Right of the Child to Protection from Corporal punishment and other Cruel or Degrading Forms of Punishment (arts. 19; 28, para. 2; and 37, *inter alia*), 42nd sess, UN Doc CRC/C/GC/8 (2 March 2007), para 15 (‘General Comment No. 8’).
33 Committee on the Rights of the Child, General Comment No. 8, UN Doc CRC/C/GC/8, para 15.
34 VUFO-NGO Resource Centre, above n 6 (emphasis added).
35 UNICEF and Law Research Institute of the Vietnamese Ministry of Justice, above n 9, 94. See also Duong, above n 30.
Article 303 of the *Criminal Procedure Code 2003* must be amended in order to create advantages for procedure-conducting bodies when arresting and custodying juveniles in practice and to remove the conflict between arts 303 and 319 of the same Code. In this regard, art 303 should be amended as follows:

1. **Juveniles may be arrested red-handed, arrested in urgent cases if there are sufficient grounds prescribed in arts 81 and 82 of the Criminal Procedure Code 2003.**
2. **Juveniles may be arrested, held in custody or temporary detention if there are sufficient grounds prescribed in arts 80, 86 and 88 of the Criminal Procedure Code 2003, but only in cases where they commit very serious offences intentionally or especially serious offences.**
3. **Investigatory bodies, procuracies and courts may decide to refer juvenile offenders to their parents or guardians for supervising, educating and ensuring the presence of juvenile offenders when procedure-conducting bodies summon. People who violate these tasks shall be sanctioned.**

- **Right to be Informed Promptly and Directly of the Charges**
  
  The *Criminal Procedure Code 2003* should require procedure-conducting bodies to notify juveniles’ parents or guardians of important decisions (including the decision to initiate criminal proceedings against the accused; the investigation conclusion report proposing the prosecution; the indictment) within prescribed time limits. Procedure-conducting bodies should also be obliged to explain the nature of these decisions for juveniles and their parents or guardians. Moreover, Vietnamese legislators should supplement provisions governing *service of documents* in criminal proceedings. In this regard, Part 8.3 of the *Criminal Procedure Act 2009* of Victoria should be considered.

- **Right to be Tried without Undue Delay**
  
  The *Family and Juvenile Courts Law* should provide time limits of each procedural stage in juvenile cases shorter than those in adult cases. Moreover, the *Criminal Procedure Code 2003* should prescribe violations of time limits in criminal proceedings are serious procedural infringements. Sanctions will be imposed on authorized persons who intentionally violate this procedural guarantee.

Provisions of the *Criminal Procedure Code 2003* governing summary procedures should be reviewed. Nguyen states that responsible authorities should adopt
guidances on the participation of lawyers in juvenile cases including the simplification of procedures of granting Certificates of Defence Counsel; the time limits within which investigatory bodies must send the official dispatch requesting a Bar Association to appoint its lawyer. At present, investigatory bodies and Bar Associations cooperate to ensure the prompt participation of lawyers in cases involving juvenile offenders. Moreover, the time limits of temporary detention provided in art 322(3) of the *Criminal Procedure Code 2003* should be clearly divided into two stages: investigation and prosecution. The use of temporary detention measure in each stage are decided by authorized investigating bodies and procuracies.

- **Right to Have the Free Assistance of an Interpreter**

  The *Family and Juvenile Courts Law* should have provisions that interpreters for juvenile offenders must undergo special training. Appropriate assistance for juveniles with speech impairment or other disabilities should be adequately provided. In this regard, Vietnam should give attention to the *General Comment No. 9 (The Rights of Children with Disabilities)* of the Committee on the Rights of the Child. To secure this procedural safeguard in practice, Viet Nam must adopt policies (such as increasing payment) to encourage different types of interpreters to participate in criminal proceedings. A registry of interpreters who can comprehend various languages and who possess basic legal knowledge should be established. Clear and accessible procedures for contacting and hiring interpreters should be adopted.

- **Right of Defence**

  To improve the right of defence in practice, Viet Nam should widen the scope of persons who can become defence counsel. Defence counsel should include not only lawyers, lawful representatives and people’s advocates but also other persons who

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are hired by offenders and approved by procedure-conducting bodies,\textsuperscript{41} for example persons working in State legal aid centres and legal counseling organizations.\textsuperscript{42} Supplementing juvenile offenders are legal aid beneficiaries under art 10 of the \textit{Law on Legal Aid 2006}. Defence counsel representing juvenile offenders should be trained and have experience in working with children and young people. A Child Protection Unit should be established within the Viet Nam Bar Federation.\textsuperscript{43} Payments for defence counsel in juvenile cases must be increased. The \textit{Family and Juvenile Court Law} should require authorized bodies to appoint defence counsel for juveniles at the time they are arrested or taken into custody.\textsuperscript{44} Moreover, Viet Nam should adopt a legal basis for the participation of independent persons supporting juveniles in police interviews based on the Victorian legal framework.

The \textit{Criminal Procedure Code 2003} should also have provisions creating greater equality between defence counsel, investigators and prosecutors in collecting evidence.\textsuperscript{45} Defence counsel must not be obliged to deliver documents and/or objects related to the case to investigating bodies, procuracies or courts. Legislators should supplement specific provisions on methods of detecting and gathering documents and objects which can be used as evidence by defence counsel.\textsuperscript{46} Only a court has the power to evaluate evidence presented by defence counsel and prosecutors. Additionally, the \textit{Criminal Procedure Code 2003} should entitle defence counsel to have discussions with persons in custody or accused persons when they are interviewed or interrogated \textit{without requiring the consent of investigators}. The confidentiality of such conversations must be ensured in compliance with the

\textsuperscript{41} The Board of Drafting the Amended Criminal Procedure Code, ‘Chu Trong Hon Hoat Dong Bao Chua’ [Giving More Attention to the Defence] cited in Nhan, above n 30 and Duong, above n 30.
\textsuperscript{42} Including those of socio-political, socio-political-professional and socio-professional organizations (art 13(2)(b) of the \textit{Law on Legal Aid 2006}).
\textsuperscript{43} UNICEF supported the creation of this unit in Cambodia in 2000. The project has achieved significant results: see Inter-Agency Coordination Panel on Juvenile Justice, \textit{Protecting the Rights of Children in Conflict with the Law (2005)} 35-7.
\textsuperscript{44} From the moment of arrest, defence counsel may inform the child of his or her rights, ensure that police questioning take places in conditions that respect procedures and the child’s rights and preventing pre-trial detention: see Inter-Agency Coordination Panel on Juvenile Justice, above n 43, 41.
\textsuperscript{46} Duong, above n 30.
principle that ‘consultations may be within sight, but not within the hearing, of law enforcement officials’.

- **Right to Equality before Courts and Tribunals and to a Fair Trial**

  In order to ensure this procedural safeguard, Viet Nam should follow the *Basic Principles on the Independence of the Judiciary*. Particularly, in relation to the criteria for the selection of professional judges, there must be no discrimination against persons on the grounds of religious, political or other opinion. The salaries of judicial officers including professional judges must be raised. Professional and lay judges must strengthen their professional knowledge and skills as well as respect professional ethics. To prevent lower courts from being dependent on superior courts, a common regulation on directing the adjudication of courts at all levels should be adopted. Specifically,

  In cases where the orientation of adjudication of a particular case is necessary, the superior court or managers of court at the same level should only present principles, referential suggestions to the trial panel. The ultimate decision belongs to the trial panel based on questioning and argumentation at trial. If a judge renders a judgment which is contrary to guidance of the superior court or managers of court at the same levels and such judgment is cancelled or amended, the judge must incur responsibility.

  Appropriate courtroom organization and ‘friendly’ procedures at trials of juvenile defendants should be introduced in the *Family and Juvenile Courts Law*. Regarding the organization of courtroom, Viet Nam can adapt the model of the Children’s Koori Court of Victoria. Namely,

  Hearings are convened around an oval bar table at which the defendant sits directly opposite the magistrate. An Elder sits on either side of the magistrate. The lawyer sits to the right of the defendant and the prosecutor to the right of the lawyer. The Koori Youth Justice Worker sits to the right of the prosecutor. Any family members or other support persons who attend

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47 *Basic Principles on the Role of Lawyer*, art 8. These principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.


sit to the left of the defendant. The CKC Worker sits to the left of the family members (and to the right of one of the Elders).  

Additionally, waiting time at the courtroom should be minimized and hearing time should be shortened with hourly breaks and extra breaks are available if required. Defendants should be permitted to spend time with their parents and social workers during breaks. They should not be handcuffed during the hearings. At any time, the presiding judge may order that the young person withdraw during all or part of the hearings and shall summarise the contents of such hearings after he or she returns. Prior to the hearing, defendants should have opportunities to visit the court with social workers and be introduced to the court’s procedures with the assistance of easily understood books. Judges at hearings of juvenile defendants do not wear suits as they do at trials of adult defendants. All members of the courtroom workgroup should not stand up when questioning young defendants.

• **Right to the Presence and Examine of Witnesses**

The **Criminal Procedure Code 2003** should supplement the right to the presence and examination of witnesses and introduce specific procedures for carrying out this right. This is a way to ensure the equality and fairness between parties at trials, particularly for defendants and defence counsel, and increase the adversarial feature in current Vietnamese criminal procedures. In this regard, Viet Nam should consider relevant provisions stipulated in the **Criminal Procedure Act 2009** and the **Evidence Act 2008** of Victoria. Furthermore, Viet Nam may enact an **Evidence Act** including Chapter 5 (arts 63-78) of the **Criminal Procedure Code 2003** and new provisions governing the adducing and admissibility of evidence.

• **Right to Appeal**

The **Criminal Procedure Code 2003** should supplement the provision that in circumstances where defendants are not informed of the intention of their counsel not to

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52 Adjudication Science Institute of the Supreme People’s Court, above n 2, 121.


54 Adjudication Science Institute of the Supreme People’s Court, above n 2, 121.

55 These include ss 65-66, 73, 132, 224-226, 234.

56 Part 2.1 – Witnesses.
put any arguments to the Court of Appeal, the trial must be adjourned. Accordingly, defendants should have opportunity to seek alternative defence counsel as stated by the Human Rights Committee.\(^{57}\)

More importantly, similar to s 430R(2) of the Children, Youth and Family Act 2005 of Victoria, the Family and Juvenile Courts Law of Viet Nam should entitle a juvenile sentenced to a term of imprisonment by an appellate court the right to appeal to the Supreme People’s Court against the sentence if:

- in the proceeding that is the subject of the appeal, the Children’s Court had not ordered that the person be imprisoned; and
- the Supreme People’s Court gives the person leave to appeal.

In addition, the Criminal Procedure Code 2003 should adopt provisions governing special procedures to review decisions of the Judges Council of the Supreme People’s Court. These procedures are similar to those provided in art 52 of the Law No. 65/2011/QH12 on the Amendment and Supplement of Some Provisions of the Civil Procedure Code.

- **Right to the Presence of a Parent or Guardian**

  The People’s Supreme Court should adopt guidelines clarifying the term ‘representative of families’ of juvenile offenders. Here, the explanation of the Criminal Court of the People’s Supreme Court at the Judicial Annual Conference 2008 should be considered. According to this Court:

  A lawful representative of defendants in criminal proceedings must be a natural representative, rather than a delegated representative. If defendants’ parents are alive, they shall be lawful representatives of defendants. If defendants’ parents were passed away, courts can accept other relatives of defendants (including grandparents, aunts, uncles, brothers, sisters) as their lawful representatives. If defendants do not have relatives, representatives of school, Youth Union or other organizations may become lawful representatives of defendants.\(^{58}\)

In addition, the Criminal Procedure Code 2003 should supplement the rights of the representatives of families, schools, Youth Union and other organizations at the stage

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\(^{57}\) Human Rights Committee, *General Comment No. 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, 19th sess*, UN Doc CCPR/C/GC/32 (23 August 2007), para 50.

of prosecution. Appropriate sanctions should be imposed on these persons when they are deliberately absent at criminal proceedings without plausible excuse. Conversely, provisions that require representatives of schools and organizations to attend all trials of juvenile defendants should be removed. Finally, the circumstances in which procedure-conducting bodies can refuse the participation of representatives of families because of the best interests of juvenile offenders should be clearly outlined.

- **Right to Privacy**
  The *Family and Juvenile Court Law* must have provisions ensuring the right to privacy of juvenile offenders during all stages of criminal processes, particularly at trial. In this regard, Viet Nam may adopt some provisions of the *Children, Youth and Families Act 2005* of Victoria.\(^59\) Additionally, the Family and Juvenile Court Law should provide that all bodies, agencies, organizations and persons (including journalists) involved in proceedings of juveniles have responsibility to ensure the confidentiality of private information of juveniles and specific sanctions shall be imposed on those who violate this obligation. Roving trials involving juveniles must be eliminated.\(^60\) Generally, trials of juvenile defendants should be conducted behind closed doors. Exceptions to this provision must be clarified in law. Court judgments should be publicly announced but should not disclose personal information of juvenile defendants.

c. **Increasing Features of the Adversarial System**
In the near future, Viet Nam will amend the *Criminal Procedure Code 2003*. A fundamental issue which must be determined is whether Viet Nam should or should not transfer its current model of criminal procedure to the adversarial system. This has considerable implications for the protection of the rights of offenders in general, and juvenile offenders in particular. Regarding this issue, many legal scholars have suggested that Viet Nam should continue to improve its mixed model of criminal procedure by adopting increased features of

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\(^59\) The restriction on publication of proceedings in the Children’s Court is provided in Part 7.5 of the *Children, Youth and Families Act 2005*.

\(^60\) VUFO-NGO Resource Centre, above n 6, 23. See also UNICEF and Law Research Institute of the Vietnamese Ministry of Justice, above n 9.
the adversarial system. Recommendations include:

i. Clearly separating the functions of participants in criminal processes. Namely, courts (professional and lay judges) should have a judicial function; procuracies (prosecutors), investigatory bodies (investigators), victims and their legal representatives should have accusatorial function; and defendants and their counsel should have the defending function. This can be achieved by:

• Amending art 10 of the *Criminal Procedure Code 2003* so that courts are not obliged to prove offences;\(^\text{62}\)

• Removing inappropriate powers of courts such as deciding whether to institute a criminal case (art 104(1) of the *Criminal Procedure Code 2003*); adjudicating defendants according to paragraphs more serious than those in the same articles which have been applied by the procuracies to prosecute them (art 196(2) of the *Criminal Procedure Code 2003*).\(^\text{63}\)

ii. Increasing the adversarial features of the first-instance trials. Argument may strengthen the publicity and transparency of the adjudication.\(^\text{64}\) This can be achieved by:

• Supplementing the principle of argument in the *Criminal Procedure Code 2003*;\(^\text{65}\)

• Amending provisions governing questioning procedures at trials so that prosecutors, victims, defendants and defence counsel take a main role in raising issues and establishing a case. Professional and lay judges should only make requests to direct the questioning process rather than ask questions concerning the facts of a case.

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\(^{63}\) For instance, when the procuracy applies para 1 of art 133 – Plundering Property – to prosecute a defendant, the court is not entitled to adjudicate the defendant based upon paras 2, 3 or 4 of art 133. This is because art 133(2),(3),(4) provide more serious penalties than art 133(1).

\(^{64}\) Phuc, above n 61.

\(^{65}\) Chi, above n 62.
- Removing provisions allowing judges to return case files for additional investigation (arts 179 and 199 of the Criminal Procedure Code 2003).66

iii. Extending adversarial features in the investigation stage. This means extending and ensuring the right of defence of persons in custody and accused persons in the investigation stage. The following recommendations should be considered:

- Having clear understanding of the term ‘documents relating to the defence’ (art 56(4) of the Criminal Procedure Code 2003);
- Clearly establishing the circumstances where procedure-conducting bodies can refuse to grant a Certificate of Defence Counsel;67
- Strengthening provisions that defence counsel’s presence is compulsory when investigators first interrogate accused persons and when accused persons confess guilt;
- Specifically providing methods for defence counsel to collect documents and other evidence.

d. Enhancing and Strengthening International Coordination in Juvenile Justice

The Vietnamese government should enhance and strengthen its cooperation with international organizations such as UNICEF and the United Nations Office on Drugs and Crime (UNODC) to improve the juvenile justice system. The People’s Supreme Procuracy, the People’s Supreme Court and the Ministry of Public Security, in coordination with the above organizations, should organize conferences on crucial matters which need to be addressed to assist Viet Nam to establish a comprehensive juvenile justice system. These international organizations can introduce juvenile justice models and practices which may be considered for adoption by Viet Nam. At present, more specialized professional training courses and programmes for investigators, prosecutors and judges dealing with juvenile cases should be also carried out. Officials attending these courses could then retransmit information to their colleagues. Materials from this training should also be made available to procedure-conducting bodies at all levels.

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66 Judges should exercise this right only if they find serious procedural violations which obstruct their adjudication.
67 As previously mentioned, lawyers can only participate in criminal proceedings when they are granted the Certificate of Defence Counsel. Article 27(3) of the Law on Lawyers 2006 generally stipulates that in cases provided by law, procedure-conducting bodies can refuse to grant this certificate. It does not specify these circumstances.
In addition, relevant non-profit organizations (NGOs) including the Child Rights Working Group (CRWG) in Viet Nam should play a more active role not only in the prevention of juvenile delinquency but also in the administration of juvenile justice. The CRWG can cooperate with the Vietnamese Bar Federation, the Central Youth Union and the Committee for Population, Family and Children to organise courses to teach skills to lawyers and officials involved in defending and supporting juvenile offenders in criminal processes. Collaboration among NGOs should be strengthened. On the other hand, the Vietnamese Communist Party and the Government must facilitate the contribution of these organizations and recognize that ‘NGOs play a key role in monitoring government compliance with human rights standards, advocating for improvements and denouncing rights violations’. They should create a political and legal environment facilitating the operations of NGOs particularly relating to juvenile justice. Regarding this issue, the Committee on the Rights of the Child suggests that:

States parties seek the active involvement of these organizations in the development and implementation of their comprehensive juvenile justice policy and provide them with the necessary resources for this involvement.

Viet Nam should also provide more detailed information relating to its implementation of the CRC, particularly arts 37 and 40 governing procedural safeguards of children in conflict with the criminal law. This will assist the Committee on the Rights of the Child to have a precise and comprehensive understanding on the current status of the Vietnamese juvenile justice system. Building on this knowledge, the Committee can develop appropriate strategies. NGOs in Viet Nam can advise the State on responding to each recommendation of the UN Committee on the Rights of the Child, especially in regard to the administration of juvenile justice.

2. Victoria

a. Improving Diversion for Young People

A comprehensive juvenile justice system should ensure not only the protection of juvenile offenders’ procedural rights but also the availability of diversionary programs at all stages of proceedings. This is because diversion has many benefits including the prevention of

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69 Committee on the Rights of the Child, *General Comment No. 10*, UN Doc CRC/C/GC/10, para 95.
70 VUFO-NGO Resource Centre, above n 6.
negative labelling and stigmatization of criminal processes, particularly of having a criminal record.71 Government and non-government agencies in Victoria have provided various diversion programs for young people, such as Police Cautioning (pre-court diversion), ROPES and Right Step (pre-plea diversion), and Youth Justice Group Conferencing (post-plea and pre-sentence diversion). However, the practical operation of these programs reveals many problems. These included:

- A lack of legislative basis resulted in inconsistent applications between areas and individual officers (especially in the use of police cautioning);
- Inadequate operative fund;
- Geographically limited access (less likely available for young people living in rural, regional and remote areas);72

In order to address the above shortcomings, many recommendations have been provided.73 First, a state-wide legislated diversion framework for juvenile offenders should be introduced.74 This may require legislating Police Cautions and other diversionary programs (including ROPES and Right Step) into the Children, Youth and Families Act 2005 or adopting a separate legislation. Legislating police warnings and cautions will:

institutionalise a youth policing approach where diversion is always considered an appropriate option for dealing with the majority of offenders, before summons or arrest; encourage principled and consistent decision-making; and provide a standard for police decision-making, which assists transparency and accountability.75

Second, the Youth Justice Conferencing Program should be maintained, and consideration should be given to expanding its applicability at pre-court and pre-plea stages. In this regard, provisions governing diversionary scheme of adult offenders76 should be taken into account. However, before taking a formal plea from an accused, the court can decide to use diversion without the prosecution’s consent.77 This will resolve a current problematic issue that proceedings are often adjourned to allow the prosecution to seek the informant’s views on

71 Article 11 of the Beijing Rules.
74 Ibid 5. At present, Victoria is the only State in Australia which does not legislate for police cautioning: see Youthlaw, above n 72, 12.
75 Youthlaw, above n 72, 12-7. See also Submission of Law Institute Victoria (2012) 19.
76 Criminal Procedure Code 2009, s 59.
77 The prosecution, young person and his or her legal representative can make submissions to the Magistrate.
the appropriateness of diversion and remove the ‘unfettered power of veto’ of the informant. In the pre-court stage, police should be empowered to refer young people to conferencing processes. Third, the Victorian Aboriginal Legal Service’s Police Cautioning and Youth Diversion Program should be refunded and expanded state-wide. This will create equal opportunities to access diversion programs for all children and young people in Victoria. Fourth, Diversion Co-ordinators of Children’s Courts should be employed. They are responsible for assessing and recommending conditions for a diversion plan.

b. Adopting Special Procedures for Trials of Juvenile Offenders in the Supreme Court
To ensure the right to a fair trial of children and young offenders, the Supreme Court should modify its procedures. Legislative amendments to the Supreme Court Act 1986 can be made. In this regard, procedural guidelines adopted by the Children’s Court should be taken into account. Victoria could adopt selected provisions of the United Kingdom’s Consolidated Criminal Practice Direction which extends the procedures employed in youth courts to the Magistrate’s Court and Crown Court. These provisions include ‘having defendants visit the courtroom before trial, sit with family members, be able to communicate with legal representatives and the elimination of wigs, gowns and uniforms worn by police and security staff’. Additionally, the new provisions should govern the physical elements of the courtroom in order to create an appropriate trial environment.

Section 44(1) of the Charter required it to be reviewed after the first four years of operation.

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80 Smart Justice for Young People, above n 72, 6.
84 Burnnard, above n 82, 184.
The Victorian Parliament’s Scrutiny of Acts and Regulations Committee (SARC) has undertaken this review. In its report, SARC provides a large number of recommendations to improve the regime for protecting and upholding the human rights and responsibilities of Victorians. The majority of SARC preferred retaining provisions for the scrutiny of new laws (Division 1 of Part 3 of the Charter) with certain modifications.85 Particularly, SARC suggested that ‘consideration be given to whether the rights contained in the ICCPR omitted by the Human Rights Consultation Committee should be re-examined for inclusion in the Charter’.86

One of the rights recognized by the ICCPR which should be included in the Charter is the right to compensation for wrongful conviction.87 A number of submissions to the SARC supported this proposal.88 Wrongfully convicted people may suffer ‘psychiatric and emotional effects from the conviction and subsequent imprisonment’.89 In the case of children and young person, the adverse consequences may be much more serious. Hence, they deserve compensation from the government. Many jurisdictions have stipulated this right for wrongfully convicted person in their legislation including the ACT,90 the UK,91 Thailand92 and Viet Nam.93 By contrast, under common law or statutory law, Victorians who have been wrongfully convicted and imprisoned have no right to compensation94 although the government often makes compensation for wrongful conviction on an ex gratia basis.95 Walsh states that ex gratia payments in most Australian jurisdictions ‘lack

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86 Scrutiny of Acts and Regulations Committee, above n 85, Recommendation 1.
87 The ICCPR, art 14(6).
88 Submission 291 (Australian Federation of University Women (Victoria)), 7 and Submission 285 (Castan Centre for Human Rights Law), 5 in Scrutiny of Acts and Regulations Committee, above n 85, 26.
90 Human Rights Act 1994 (ACT), s 23.
91 Criminal Justice Act 1988 (UK), s 133.
92 In Thailand, the right to restitution of wrongfully accused persons is recognized by s 246 of the Constitution 1997 and protected by the Crime Victim Compensation and Restitution for the Accused Act 2001.
94 Scrutiny of Acts and Regulations Committee, above n 85, 27.
95 Ibid 27.
transparency and are somewhat arbitrary in terms of when compensation will be offered and how it will be quantified’.\textsuperscript{96}

For all the above reasons, Victoria should include the right to be compensated for wrongful conviction in the \textit{Charter of Human Rights and Responsibilities Act 2006}. Additionally, similar to New Zealand, specific guidelines governing issues such as where compensation will be paid, compensation amounts etc. should be introduced.\textsuperscript{97} Victoria should also establish an independent body responsible for investigating suspected miscarriages of justice akin to Canada and the United Kingdom.\textsuperscript{98} At the federal level, like Ireland, the Australian Government should consider withdrawing its reservation to art 14(6) of the ICCPR. This will impose an obligation on governments of all States and Territories to introduce legal frameworks and mechanisms to ensure the right to compensation of wrongfully convicted people, particularly children and young person.

d. \textbf{Proposals for Improving Particular Rights of Juvenile Offenders}

\textbf{Right to the Presence of a Parent or guardian}

As to the right of a juvenile to have a parent or guardian present, several issues remain unresolved. These include:

- The functions of a parent or guardian during a police interview
- Whether the parent or guardian has the same role as the independent person
- Whether a parent or guardian can nominate another person to attend the police interview on their behalf, as the Victoria Police Manual suggests
- Whether that nominated person has the same role as the parent, guardian or independent person.\textsuperscript{99}

Concerning the first two issues, Youthlaw and the Federation of Community Legal Centres take the position that the roles of parents and independent persons should be distinct but complementary.\textsuperscript{100} The presence of a parent or guardian can prevent a child from being physically abused or threatened but does not necessarily ensure the

\begin{itemize}
\item \textsuperscript{97} Ibid.
\item \textsuperscript{98} Canada has the Department of Justice’s Criminal Conviction Review Group whereas the Criminal Cases Review Commission was established in the United Kingdom: see Lincoln and Morrison, above n 89, 6.
\item \textsuperscript{100} Youthlaw, \textit{Young People Having Their Say about the Role of Independent Persons}, Submission of Youthlaw in response to \textit{Supporting Young People in Police Interview Background Paper} (2009) 4.
\end{itemize}
effective information of his or her rights.\textsuperscript{101} Under s 464E of the \textit{Crimes Act 1958}, an independent person may substitute for a parent or guardian. Therefore, he or she is expected to play a role similar to that person. Nonetheless, because independent persons are trained in skills and legal knowledge, they can inform and explain basic legal rights which may be used by young people at police interviews.

As previously noted, s 464E of the \textit{Crimes Act 1958} does not specify circumstances in which a parent or guardian is considered to be ‘not available’. In practice, police arrange for the participation of an independent person in two situations: (1) when the parent or guardian ‘does not want to attend and does not nominate another person to attend for them’ and (2) when ‘it is undesirable for a parent/guardian to be present’.\textsuperscript{102} Circumstances in which the attendance of a parent or guardian might be ‘undesirable’ are also not specified. The Legal Reform Commission observed that the Victoria Police Manual gives police a ‘discretionary power’ to arrange an independent person even where a parent or guardian can attend police station.\textsuperscript{103} Thus, Victorian legislators should provide guidance about the circumstances in which police should not search for a parent or guardian and should initiate contact with an independent person. The \textit{Crimes Act 1958} should prescribe a time limit within which a police officer must find a parent or guardian and his or her responsibilities in securing the presence and proper performance of an independent person. The attendance of a parent or guardian may be considered ‘undesirable’ if it is contrary to the best interests of juveniles, for instance, they have a hostile attitude towards the young person\textsuperscript{104} (e.g. the father in \textit{Toomalatai}).

\textbf{Right to Privacy}

Article 8 of the \textit{Beijing Rules} provides that the right to privacy of juvenile offenders must be respected at \textit{all stages} of criminal proceedings. As previously discussed, s 534 of the \textit{Children, Youth and Families Act 2005} has provisions prohibiting the publication of information which may lead to the identification of children and young people.

\textsuperscript{103} Victorian Law Reform Commission, above n 99, 26.
\textsuperscript{104} Commentary of art 15.2 of the \textit{Beijing Rules}.
offenders. This protection against publicity should be extended to alleged juvenile offenders in the investigation and prosecution stages. Concerning this matter, the definition of ‘proceedings’ in the Children, Youth and Families Act 2006 should be expanded to cover alleged young offenders who are being investigated by police.\textsuperscript{105}

Additionally, complaints mechanisms should be strengthened to create easy and equitable access for young people who believe that their privacy has been violated. Youthlaw recommends a number of initiatives and new approaches including:

- Setting up a specific contact or advice point for young people to access if they believe their rights to privacy may have been breached.
- Better resourcing and funding of youth specific legal services to assist young people to utilize existing complaints mechanisms including Privacy Victoria, the Health Services Commissioner and the federal Office of the Privacy Commission.
- Training to youth workers regarding privacy and assisting young people to protect their privacy or provide outreach workers from the Privacy Victoria to deliver information to youth services or schools.\textsuperscript{106}

Moreover, legislation governing criminal history checks and spent convictions should be introduced. A clear legislative framework regulating criminal record management and the release of criminal histories should be adopted.\textsuperscript{107} This legislation should connect various privacy actual protections with the handling of criminal history records information; allow for the examination and correction on part of the record\textsuperscript{108} and include a policy by which certain criminal matters become spent.\textsuperscript{109}

- **Right to Appeal**

In order to assist convicted children to properly utilize their right of appeal, the Children, Youth and Families Act 2005 should provide that parents, the Secretary of the DHS or defence counsel, are entitled to make an appeal on behalf of a child whose age is under 18 years. It is hard to accept that children who are 15 - 18 years old are mature and have adequate legal knowledge to decide themselves whether to make an appeal or not. Children in this age group are still pupils studying in senior high schools. The CRC and rules, guidelines and comments of UN child rights bodies have not differentiated the protection of various groups of children. The

\begin{footnotes}
\item[105] Youthlaw’s Submission to the Australian Legal Reform Commission, *Privacy and Young People* (2007) 3.
\item[107] Ibid 3.
\item[108] Ibid.
\item[109] Youthlaw’s Submission to the Australian Legal Reform Commission, above n 105.
\end{footnotes}
ultimate aim is to protect all children under 18 years old. The empowerment of the right to appeal on defence counsel, on the other hand, has the effect of adding an additional ‘actor’ to detect incorrect judgments of the Children’s Court; give superior courts opportunities to review these judgments and thereby ensure the best interests of convicted children. Under the Basic Principle on the Role of Lawyers, they have a duty to ‘assist clients in every appropriate way, and taking legal action to protect their interests’.

Similar to Viet Nam, Victoria should provide that the appeal of defence counsel is independent of the child’s decision. However, the appeal in this situation is limited in one objective: to request the superior court to adjust the first-instance judgment or decision in advantageous ways for the child; for example, reducing the imposed penalties, the amount of compensation.

C. Recommendations for Legal Implementation

1. Viet Nam

a. Specializing Judicial Officials and Other Persons Involved in the Administration of Juvenile Justice

To effectively implement provisions of a juvenile justice regulatory framework, Viet Nam must have specialized law enforcement officials including investigators, prosecutors, judges and prison officers. This can be achieved by supplementing recruitment criteria and organizing professional education and training courses. Non-governmental organizations in Viet Nam observe that:

For their work with children judicial professionals need training and information on the practical implications of international standards on juvenile justice, a better understanding of child psychology and better child-sensitive skills and approaches to working with children, both children in conflict with the law and child victims.

The need of specialization within the judicial bodies of juvenile justice is consistently confirmed in UN rules and guidelines. All authorities dealing with juvenile offenders should receive training in law, sociology, psychology, criminology and behavioural sciences relating to children and young people. The Committee on the Rights of the Child states that

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111 VUFO-NGO Resource Centre, above n 6, 23.
‘this training should be organized in a systematic and ongoing manner’.\textsuperscript{113} It may include ‘professional education, in-service training, refresher courses and other appropriate modes of instruction’.\textsuperscript{114} Procedure-conducting persons in Viet Nam should have an understanding not only of national criminal procedure law and substantive law but also ‘human rights, principles and provisions of the CRC and other UN standards and norms in juvenile justice’.\textsuperscript{115} Particularly, they must be trained in the principles and practice of restorative justice because ‘notions of forgiveness and healing’\textsuperscript{116} may be relatively new to them. This helps members of judiciary to understand the benefits of the restorative justice process and therefore confidently refer cases to a restorative justice program.

Together with the establishment of Family and Juvenile Courts and the restructuring of other procedure-conducting bodies, appointing and electing criteria of judicial officials who deal with juvenile offenders should be amended. Viet Nam can amend relevant legislation including the \textit{Ordinance on Organization of Criminal Investigations 2004}, the \textit{Ordinance on Prosecutors 2002} and the \textit{Ordinance on Professional and Lay Judges of the People’s Courts 2002}. Alternatively, it may provide these additional criteria in the \textit{Family and Juvenile Courts Law} like Victoria and Germany.\textsuperscript{117}

Besides the above law enforcement officers, other persons having contact with juveniles in the criminal justice system such as lawyers, members of the Ho Chi Minh Communist Youth Union, administrators, other professionals working in institutions where children are deprived of their liberty, health personnel and social workers also need to undergo special training programs. As a result, lawyers may defend their juvenile clients with a more responsible attitude. Professionals working in custodial houses and temporary detention camps must have appropriate behaviours in dealing with detained juveniles. Social workers

\begin{itemize}
  \item \textsuperscript{113} Committee on the Rights of the Child, \textit{General Comment No. 10}, UN Doc CRC/C/GC/10, para 97.
  \item \textsuperscript{114} Article 22 of the \textit{Beijing Rules}. See also UNICEF and Law Research Institute of the Vietnamese Ministry of Justice, above n 9, 100.
  \item \textsuperscript{116} UNODC, above n 25, 55.
  \item \textsuperscript{117} Article 507(2) of the \textit{Children, Youth and Families Act 2005} (Vic) provides: ‘In assigning a magistrate or acting magistrate to be a magistrate for the Court, the President must have regard to the experience of the magistrate or acting magistrate in matters relating to child welfare’. Sections 35(2) and 37 of the \textit{Youth Courts Law 1974} of Germany require lay youth assessors, judges sitting in the youth courts and public prosecutors handling matters involving youths to ‘have appropriate education and training as well as experience in the education and upbringing of youths’.
\end{itemize}
may seek different measures to support juveniles in their rehabilitation and reintegration into the community. These persons, combining with judicial officials, can create comprehensive protection of juvenile offenders during all stages of criminal proceedings.

b. Propagating Legal Knowledge and Raising Awareness of the Need to Protect Juvenile Offenders

Responsible authorities in Viet Nam should organize campaigns to popularize national legal provisions governing the rights of juveniles to the public. This will help society to be aware of legal measures to protect juveniles in conflict with the criminal law. On the other hand, Viet Nam should conduct and promote other strategies to raise awareness of the need and the obligation to protect juvenile offenders in accordance with the CRC. In this regard, the Committee on the Rights of the Child recommends that:

The States parties should seek the active and positive involvement of members of parliament, NGOs and the media, and support their efforts in the improvement of the understanding of a rights-based approach to children who have been or are in conflict with the penal law. It is crucial for children, in particular those who have experience with the juvenile justice system, to be involved in these awareness-raising efforts.\(^{118}\)

Additionally, legal education should be included in the curriculum of senior high schools. Juveniles will have opportunity to know their crucial rights entitled by law. They can use these basic procedural safeguards to protect themselves when they are involved in criminal matters. In other words, legal education may help to ensure one core principle of the CRC – the right to be heard.

2. Victoria

a. Ensuring Legal Representation for Children and Young Offenders

To improve access to legal representation for Australian people in general and young persons in particular, funding to legal aid and community legal centres must be increased. This requires efforts from not only the Victorian Government but also the Federal Government. After conducting an inquiry into legal aid and access to justice in 2003-2004, the Senate Legal and Constitutional References Committee suggested:

The reform of legal aid funding arrangements; the collection of data on the demand for legal services and unmet legal need; increased funding for family law matters; the introduction of specialty legal advice services for Indigenous Australians, people living in rural and remote areas, refugees and

\(^{118}\) Committee on the Rights of the Child, General Comment No. 10, UN Doc CRC/C/GC/10, para 96.
Regarding legal representation of children and young people, participants in the Rights of Children and Young People Working Conference particularly recommend that:

Legal aid for representation of children should be nominated by each jurisdiction as a priority. The Commonwealth and the States and Territories should make separate appropriations of funds for the representation of children in all jurisdictions. State and Territory legal aid commissions should administer these funds.120

Along with the increase of funding for legal aid and community centres, a number of organizations involved recommended that restrictions on federal legal aid funding should be removed to make it available for state and territory matters.121 Additionally, the Australian Lawyers for Human Rights group has advised the Federal Government to introduce ‘tax and other financial incentives to encourage lawyers to train or practice in rural and remote areas’.122 The Victorian Government should enhance and strengthen pro bono services to improve access to justice for marginalized and disadvantaged people. A similar policy should be adopted by the Federal Government.123

Another proposal for securing access to legal representation of children and young people is raising their awareness of this procedural right. Legal education should be included in the curriculum of senior high schools. Parents, youth unions and relevant authorities should inform children and young persons of the right to legal advice.

b. Clarifying and Strengthening the Role of Independent Persons

The main factor hindering the practical operation of independent persons supporting children and young offenders in police interviews, as addressed in Chapter 7, is lack of clarity in the law (namely the *Crimes Act 1958* (s 464E)). This section should be repealed and replaced

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123 Submissions of the Public Interest Law Clearing House; Human Rights Law Resource Centre (Educate, Engage, Empower) and Australian Lawyers for Human Rights to National Human Rights Consultation, above n 118, 200.
with new provisions that deal with matters such as: a requirement for a support person to be present; a process for securing the presence of this person; consequences for failing to provide a support person; and clarification of the role of parent, carer or support person.\textsuperscript{124} 
As regards the roles of independent persons, consideration should be given to the argument of Justice Bell in \textit{Toomalatai},\textsuperscript{125} where he held that the role of the independent person includes:

- Checking upon and protesting against any possible unfair or oppressive behaviour;
- Assisting a child, particularly one who is timid, inarticulate, immature, or inexperienced in matters of law enforcement;
- Advising the child of his or her rights. This may include a reminder of the right to silence or advice against further participation in the interview in the absence of legal advice.\textsuperscript{126}

Along with recommendations for legislative amendment, the Victorian Law Reform Commission suggests the establishment of ‘a statewide scheme responsible for providing a pool of trained support persons that police must call to be present at interviews with young people in custody when a parent or carer cannot attend’.\textsuperscript{127} The Commission also points to authorities responsible for ensuring the participation of support persons in practice.\textsuperscript{128} Specifically, the Child Safety Commissioner, in cooperation with the Chief Commissioner of Police, should develop procedures for the presence of support persons in police questioning or investigation. The Child Safety Commissioner is also liable for monitoring the operations of the scheme and annually reporting to the Attorney-General. In consultation with the Chief Commissioner of Police and the Office of Police Integrity, the Child Safety Commissioner should adopt:

- A protocol for reporting allegations made by young people to support persons or made by support persons of police misconduct during questioning or investigation of a young person, and a Code of Conduct for support persons and a protocol for reporting alleged misconduct by support persons.\textsuperscript{129}

\textbf{c. Resolving Matters Relating to Youth Detention}

In order to facilitate the provisions enshrined in the UN framework that ‘every child

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\textsuperscript{124} For details, see Victorian Law Reform Commission, above n 99, 10-1.
\textsuperscript{125} \textit{DPP v Toomalatai} (2006) VSC 256.
\textsuperscript{126} \textit{DPP v Toomalatai} (2006) 13 VR 319, 331-32 [61]-[62].
\textsuperscript{127} Victorian Law Reform Commission, above n 99, 7.
\textsuperscript{128} Ibid 12.
\textsuperscript{129} Ibid.
\end{flushright}
deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’. Australia should ‘continue and strengthen its efforts towards a full withdrawal of its reservation’ to art 37(c) of the CRC. Regarding human rights violations by police, ‘there have been calls for better training of police so as to understand young people’s behaviour and deal with it in a non-discriminatory and balanced manner’. Moreover, a mechanism of independent investigations into police complaints should be established and strictly carried out. Recommendations of Ombudsman Brouwer to improve conditions at the Precinct should be taken into account.

d. Suplementing Children’s Courts Resources, Improving Professional Quality of All Courtroom Workgroup Members and Making Investment in Court Facilities

To deal with increasing workloads, additional judicial officers for the Children’s Court should be provided. Moreover, the Committee on the Rights of the Child confirms that the quality of professionals involved is crucial for the efficiency of any juvenile justice systems. Therefore, Victoria should carry out more training for all persons dealing with children and young offenders including judges, magistrates, Elders (at trials of indigenous young defendants), counsel, prosecutors, youth justice workers etc. Training courses should raise the awareness of judicial officers about international and national child rights laws, particularly the CRC and the Charter of Human Rights and Responsibilities Act 2006. Burnnard suggests that policy guidelines which are similar to those applying to lawyers acting in the Children’s Court should be adopted to inform Supreme Court judges and practitioners about their duties under the Charter.

Detailed recommendations in relation to the trials of juvenile offenders in the CKC include:

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130 Article 37(c) of the CRC. This requirement was also stipulated in art 9 of the UDHR, art 9 of the ICCPR and art 29 of the UN Rules for the Protection of Juveniles Deprived of Their Liberty.
131 Committee on the Rights of the Child, Concluding Observations: Australia, 40th sess, CRC/C/15/Add.268 (20 October 2005), para 8.
134 Burnnard, above n 82, 184.
135 Burnnard, above n 82, 184.
136 See Louis Akenson, Guidelines for Lawyers Acting for Children in the Children’s Court (Victoria Foundation, 2004).
137 Burnnard, above n 82, 184.
• Strenuous efforts need to be made to try to ensure that defendants do not appear in court without at least one family member or support person.
• Representatives of indigenous community service agencies should be present at all hearings.
• Greater effort needs to be made by the magistrates to directly engage defendants in the proceedings through posing questions directly to them, at least in the first instance, rather than to their lawyers.
• Both magistrates and Elders require further training in communicating with young people of various ages.
• Indigenous culture needs to feature more prominently in the interactions between court actors and defendants. Elders should not assume that defendants either know what is meant by “culture” or what some of the major aspects of Aboriginal culture entail.
• Where practicable, members of the defendant’s mob138 should be encouraged to attend the CKC hearing.139

In order to create a hearing environment appropriate with distinctive characteristics of children and young offenders, substantial investment in Children’s Court facilities (particularly in regional and remote locations) should be made. Courts’ buildings should have adequate interview rooms for lawyers to discuss with clients; audio-visual systems to allow parents domiciled far away to participate in proceedings and holding facilities for remandees brought before court and those sentenced to detention.

D. Predictable Challenges and Prospects

1. Viet Nam

a. Challenges

Viet Nam is still a lower middle income country.140 The gap between rich and poor remains wide.141 Child poverty is popular, severe and multi-dimensional.142 Completion rates at primary and lower secondary education levels have decreased.143 By contrast, Viet Nam has an increasing incidence of divorce, separation, co-habitation and pre-marital sex.144 This may have a negative impact on young people’s physical and mental health, especially juveniles.145

138 Generally, this term refers to ‘a promiscuous assemblage of people; a multitude or aggregation of persons regarded as not individually important’. However, in Australia and New Zealand, it is used without disparaging implication and has the same meaning as a ‘crowd’: see Simpson, J. A. and E. S. C. Weiner, The Oxford English Dictionary (Oxford University Press, 2nd ed, 1989), Volume IX: Look-Mouke, 927. In the above context, the term ‘mob’ may refer to the defendant’s community.
139 Borowski, ‘In Courtroom 7’, above n 51, 1125.
140 By the end of 2010, the per capita income of Viet Nam was 1,130 USD: see the World Bank, Vietnam Overview <http://www.worldbank.org/en/country/vietnam/overview>.
141 In 2008, the per capita monthly average income of the poorest quintile of the population was 8.9 times less than that of the richest quintile: see UNICEF Viet Nam, An Analysis of the Situation of Children in Viet Nam (2010) 43.
142 UNICEF Viet Nam, above n 141, 43-4.
143 Ibid 181.
145 Ibid 36.
Following the global financial crisis, the economy of Viet Nam encountered many challenges. The macroeconomic position is not solid; the economy’s competitive capacity is low and the inflation rate is high. These factors make the situation of juvenile crime in Viet Nam in the upcoming period more complicated. The amount and seriousness of juvenile delinquency may increase. There will be more juveniles in contact with the criminal justice processes. This will require a large number of judicial officers to deal with cases involving juvenile delinquency. However, it will be difficult to recruit advanced law students to work for judicial bodies. Low salary is one of the reasons causing the lack of judicial officers.

Additionally, most judicial officials in Viet Nam do not have adequate knowledge, experience and skill to deal with juvenile cases and ‘indicators and database systems for child issues, especially child protection issues, remain underdeveloped’. 146 Although statistics relating to juvenile delinquency have been collected by authorised bodies (including the Ministry of Public Security, the People’s Supreme Procuracy and the People’s Supreme Court), they have not been made publicly available. Legal researchers therefore have faced many obstacles to obtain this information.

Establishing a distinctive juvenile justice system involves considerable expense. As mentioned before, from now to 2020 Viet Nam should restructure the judicial bodies system, including the establishment of new facilities, supplementation of judicial officers, increase judicial professionals’ salaries and pay for legislative activities. With the current rate of economic development, this is a major challenge for Viet Nam.

b. Prospects
The justice reform strategy until 2020 was identified and is proceeding step by step under the close supervision of the Central Justice Reform Panel. A juvenile justice system can also be established as part of the justice reform progress. In addition, a number of legal researchers and enforcement officials in Viet Nam have progressive views about dealing with children and young offenders which are consistent with the guidance and orientation of UN child rights bodies. The NGOs and human rights bodies of the UN can enhance and strengthen the establishment of a distinctive juvenile justice system in Viet Nam.

146 Government of Viet Nam, above n 144, 36.
2. Victoria

a. Challenges

A key obstacle that Victoria may encounter in the process of juvenile justice reform is cost. For instance, an increase in funds for legal aid and community legal centres, the investment in Children’s Court facilities or the alteration of physical layout of the courtroom in the Supreme Court to make it appropriate for trials of children and young people ‘will be time-consuming and resource intensive’. This is a real challenge because at present Victoria Legal Aid service is facing a funding crisis, which could endanger the justice and welfare of thousands of Victorians. The National Human Rights Consultation Committee has stated that the cost to the community of not taking any action is likely to be greater if the people whose human rights are violated cannot seek justice or redress.

Securing legal representation and the attendance of support persons for children and young people in rural and remote regions is another challenge. To resolve this matter, Victoria should develop policies to encourage lawyers, practitioners and independent persons to live and work in these areas.

Another challenge relates to the overrepresentation of indigenous young people in the juvenile justice system and the treatment and protection of children within the immigration detention system. These matters continue to present considerable obstacles for Victoria and Australia. In consultation with indigenous communities, the Victorian Government should continue developing and implementing policies and programs aimed at supporting Aboriginal and Torres Strait Islander families in various areas such as social and health services, education and juvenile justice detention. Moreover, the Victorian Aboriginal Legal Service ‘Police Cautioning and Youth Diversion Program’ should be supported and

147 Burnnard, above n 82, 184.
148 Victoria Legal Aid has reported a 3.1 million AUD deficit for the 2011-12 financial year and is headed for a larger deficit this year. VLA claims this is due to a huge increase in demand for services and applications for grants: see Law Institute Victoria, Legal Aid Crisis Rally (2012) <https://www.liv.asn.au/PDF/ENews/Friday-Facts/2012LegalAidRally>.
150 National Human Rights Consultation, above n 119, 203.
151 Recommendations for the Australian government can be found in Committee on the Rights of the Child, Concluding Observations: Australia, 40th sess, CRC/C/15/Add.268 (20 October 2005), para 77; National Children’s and Youth Law Centre and Child Rights Taskforce, Listen to Children, Child Rights NGO Report (2011) 49.
Regarding children in the immigration system, Victoria should continue transferring them to other available community detention facilities. Moreover, recommendations by the Committee on the Rights of the Child on this matter should be followed by the Victorian Government as well as the Federal Government.

b. Prospects
The domestic economies of Australia in general and Victoria in particular have not been badly affected by the global financial crisis. In 2011, Melbourne was judged the world’s most liveable city by the Economist Intelligence Unit. In 2012, the Organization for Economic Co-operation and Development determined that Australia is the world’s happiest nation. A strong economy, stable politics and developed society will help Victoria to afford the expense of juvenile justice reform in the future. Victoria can introduce and carry out a number of programmes and policies to improve family stability, and education for children and young people. This will contribute to the effective prevention of juvenile delinquency, the appropriate handling of juvenile offenders and their successful reintegration into the community.

Victoria has an advanced juvenile justice system. Australia, including the State of Victoria, has basically fulfilled its obligations under the UN human rights conventions, particularly the CRC. In the process of legal reform, Victoria only needs to adjust and improve several areas of the regulatory framework. Additionally, legal reform in Victoria has been significant in recent years with transparent and appropriate procedures encouraging the involvement of a large number of authorities, agencies and organizations. Legal databases of Victoria are designed in conveniently accessible ways.

III. Conclusions
Juveniles are persons whose physical and mental capacities are not fully developed. Their legal knowledge and living experiences are limited. Recognizing their vulnerability and

153 See Committee on the Rights of the Child, Concluding Observations: Australia, 40th sess, CRC/C/15/Add.268 (20 October 2005), para 64.
immaturity, the criminal law and criminal procedure law of most jurisdictions frequently have special provisions to deal with them.

The international regulatory framework protecting the human rights of juveniles in general, and those in conflict with the criminal law in particular, has been established and improved, with the dominant position of the CRC. Moreover, UN human rights and child rights bodies have established rules, principles, guidelines and comments to help State parties clearly and adequately understand requirements and standards in developing comprehensive and efficient juvenile justice systems. Notably, the UN has recommended that State parties establish juvenile justice systems which focus on the restoration rather than the punishment of juvenile offenders.

As two State parties of the CRC, Viet Nam and Australia have made considerable efforts to adopt provisions of this Convention into their domestic legal frameworks. In these jurisdictions, most human rights of children and young people in criminal proceedings have been recognized in various sources of law. Viet Nam has established these rights in statutory laws such as the Constitution, Criminal Code, Criminal Procedure Code, Resolutions, Decrees and Circulars. Victoria has used written and unwritten laws including Charter, Crimes Act, Criminal Procedure Act, Children, Youth and Families Act to protect the rights of children and young offenders.

The most significant feature distinguishing the two jurisdictions is that until now Viet Nam has not had a distinctive juvenile criminal justice system like Victoria. Special provisions governing criminal proceedings involving juvenile offenders are included in legislation dealing with their adult counterparts. Chapter 4 of this thesis has demonstrated there are only a few differences between the procedures applicable to juvenile offenders and those employed in adult cases. In Viet Nam, notions of ‘restorative justice’ and ‘diversion’ have only been introduced in recent years. A system of juvenile courts has not been set up. Specialized judicial officers dealing with cases involving juveniles are insufficient. Agencies, organizations and services supporting juvenile offenders are also inadequate and play an ‘eclipsed’ role in criminal processes. There are significant distances between the Vietnamese juvenile justice legal framework and that of Victoria (and the requirements of the UN). Many rights are not stipulated, only indirectly recognized or essentially
inadequately provided. Consequently, the vital right of juvenile offenders – the right to be treated in an age-appropriate manner – is not ensured in Viet Nam.

The rights of juveniles violating the criminal law of Viet Nam have shown some improvements. Most procedure-conducting bodies appoint defence counsel for accused persons and defendants. Models of child-friendly investigation have been piloted in some regions. A number of judges have appropriate awareness, attitudes and behaviours when trying juvenile defendants. Others have progressive opinions in dealing with juvenile offenders such as removing ‘mobile trials’ and reducing public trials. Some journalists are also showing increased awareness of the right to privacy of juveniles.

However, due to shortcomings in the legislative framework and for other reasons, specific procedural rights of juvenile offenders in Viet Nam are not practically guaranteed. Many investigatory bodies do not appoint defence counsel for juveniles in the investigation stage or incite and even encourage juveniles to refuse a lawyer. Some defence counsel conduct their task perfunctorily and irresponsibly. Procedure-conducting bodies in some areas do not facilitate the participation of parents, guardians and representatives of juveniles’ families. The separation of juveniles from adults in some custodial houses and temporary detention camps is not ensured. Information leading to the identification of juveniles is often published in the media. Judicial officers providing, and journalists popularizing, such information do not incur appropriate sanctions. There are many ‘mobile trials’ involving children and young defendants. The physical features of courtrooms used for trying juvenile and adult defendants are identical. Juveniles are not given any necessary familiarisation, such as visiting courts prior to trial, being given an explanation about procedures, having more breaks during court sessions, etc.

In comparison with Viet Nam, Victoria has many advantages in terms of the juvenile justice regulatory framework and practical enforcement. A distinctive juvenile justice system has been established in Victoria, including the Children’s Court with specialized magistrates and judges dealing with cases involving children and young people. Restorative justice and diversion are carried out under forms of Police Cautioning Programmes and Family Group Conferences. Most human rights of children and young persons in criminal proceedings are
recognized and are closely similar to those stipulated in the CRC, rules, guidelines and comments of the UN human rights and child rights bodies.

There are some limitations existing in the Victorian juvenile justice regulatory framework. The County Court and Supreme Court do not employ special procedures at the trials of children and young people. Provisions governing the participation of independent persons supporting children and young people during police interviews lack clarity. Juveniles’ privacy in the investigation stage is not ensured in many circumstances. The *Charter of Human Rights and Responsibilities Act 2006* does not have significant influence on the protection of children and young people.

However, the rights of children and young people are basically safeguarded in practice in Victoria. Various legal aid and community legal centers give assistance to children and young people during criminal proceedings. A system of independent persons supporting young persons in police investigations has been introduced. Victoria has the lowest rate of youth detention in Australia. The Children’s Court, including the CKC, has basically followed principles and guidelines provided in the *Children, Youth and Families Act 2005*. The privacy of juvenile defendants at trial is protected.

Some particular weaknesses regarding the practical operation of the rights of children and young people have been identified. Access to justice, especially legal representation, for certain groups of youth is not ensured. The availability of support persons in rural and remote areas is problematic. Police in many cases act inappropriately when dealing with children and young persons. The physical elements of courtrooms in the Supreme Court are not suitable for the trial of juvenile defendants. Some judges of the Supreme Court are not sufficiently aware of the need to protect juveniles. The CKC actors sometimes have improper behaviours when communicating with juvenile defendants at trials. The overrepresentation of indigenous young people in the justice system is another enduring concern in Victoria.

It can be concluded that the juvenile justice systems of Viet Nam and Victoria possess different benefits and limitations. Accordingly, each jurisdiction needs to find appropriate solutions to improve its juvenile justice. Some particular provisions and policies successfully
carried out in Victoria warrant consideration in Viet Nam. Based upon analyses of the strengths and weaknesses of the legal frameworks and practical enforcement of Viet Nam and Victoria, informed by the CRC, ICCPR, rules, guidelines, principles and comments of the UN child rights bodies and recommendations of relevant national institutions, this thesis has developed specific proposals aiming to enhance and strengthen the protection of the rights of children and young people in criminal proceedings in these two jurisdictions.

Viet Nam can develop a comprehensive juvenile justice system compatible with current conditions of the country’s economy, society and legal tradition. Reform must be conducted in the areas of legislative framework and practical implementation. First, Viet Nam needs to enact two important laws including the *Law on Children’s Welfare* and the *Families and Juvenile Courts Law*. The second step is to set up a juvenile courts system and restructure other judicial bodies comprising the investigatory bodies and procuracies and extended organizations, agencies and services supporting for juveniles in criminal processes. Most importantly, Viet Nam should introduce special procedures which protect all rights of juvenile offenders balanced with the public interests and public security.

For less serious offences, Viet Nam should adopt restorative procedures rather than relying on traditional criminal justice, thereby removing the stigmatization effects of the latter. In cases of serious offences, the protection of juvenile offenders’ rights must be improved. Rights which should be directly stipulated include the rights to: remain silent, privacy, presence and examination of witnesses, and be tried without undue delay. Some other rights which need to be amended and supplemented comprise the rights: to be presumed innocent, not to be subject to arbitrary arrest and detention, not to be subject to torture and cruel or corporal punishments, to the presence of parents or guardians, of defence, to equality before courts and a fair trial, and to appeal. These general rights could be included in an amended *Criminal Procedure Code* while the distinctive rights of juvenile offenders should be prescribed in the *Families and Juvenile Courts Law*.

Additionally, Viet Nam should improve its mixed model of criminal procedures to create fairness and equality between accusatory and defending parties. This requires that Viet Nam clearly divide procedural functions among investigatory bodies, procuracies and courts.
Specific provisions to facilitate the practical operations of defending parties, particularly in representation at trial can then be adopted.

Along with their own efforts, the Vietnamese Government should utilize assistance from international child rights organizations and NGOs such as UNICEF and CRWG in establishing and improving juvenile justice. These institutions can provide professional knowledge, personnel and finance to assist legal reform in Viet Nam. The Vietnamese Government must recognize the important roles of these organizations and create an advantageous legal environment to promote their operations.

A comprehensive juvenile justice system must also include specialized enforcement officers who have adequate legal knowledge, skill and experience in working with children and young people. One method to achieve this aim is to strengthen education and training in national and international regulatory frameworks governing child protection. In a complementary manner, the Vietnamese Government should adopt favourable policies, including increased salaries to attract advanced law students to work for juvenile judicial bodies.

Better protection of juveniles also relies on endorsement by the community. Relevant people's organizations and unions should carry out campaigns to propagate laws and policies aiming at heightening awareness of the need to protect children and young people in conflict with the criminal law. The inclusion of a basic legal subject in the curriculum of senior high schools is another way which may help juvenile offenders to protect themselves in criminal proceedings.

Juvenile justice reform in Viet Nam confronts many challenges and prospects. The most considerable obstacle involves cost. The legal reform process will demand a large amount of money from the State budget while Viet Nam is still a relative poor nation. The State budget is limited and must cover many other fields of social life. Another challenge is personnel. Law enforcement officers in Viet Nam do not have adequate legal knowledge and experiences in dealing with juvenile offenders. Attracting more skilled personnel is difficult due to the relatively low income of judicial professionals (much lower than those of private economy). However, Viet Nam has some advantages in the reform process. The Politburo
has identified the justice reform strategies and legal studies researchers and enforcement officers have approached innovatory ideas of the UN and other jurisdictions in developing a reformed juvenile justice system.

In Victoria, institutions involved with children and young persons have conducted a number of studies and developed specific recommendations to improve the juvenile justice system. One important proposal is to introduce special procedures for trying children and young offenders in the Supreme Court, adopting principles and guidelines followed by the Children’s Court. The physical elements of some courtrooms in the Supreme Court should be altered to create trial environment appropriate with the vulnerability and immaturity of juvenile defendants. Other suggestions relate to the establishment of mechanism ensuring privacy of children and young persons in the investigation stage. Provisions governing the roles and operations of independent persons supporting for juveniles during police questioning should be clarified. The practical effects of the *Charter of Human Rights and Responsibilities Act 2006* should be strengthened.

In legal implementation, the Victorian Government should increase funds for legal aid and community legal centres to maintain and promote their assistance for children and young people in criminal proceedings. Regarding the facilities of youth detention centers, Victoria should follow and carry out recommendations provided by the Ombudsman.156

In the process of juvenile justice reform, Victoria has some major challenges and advantages. The renovation of courtrooms in the Supreme Courts, increase of funds for legal aid and community legal centers are costly. The overrepresentation of Aboriginal young people in the juvenile justice is a very complicated matter. However, Victoria has a more advantages than Viet Nam.

This thesis has demonstrated that the protection and treatment of juveniles in conflict with the criminal law in Viet Nam and Victoria has different features. In Viet Nam, the government has had a consistent approach in that the handling of juvenile offenders mainly aims to educate and help them redress their wrong behaviour, develop healthily and become

useful citizens. This approach is reflected in the criminal law and procedures. However, in comparison with the UN benchmark standards, the juvenile justice system in Viet Nam reveals a large number of shortcomings. Viet Nam has not established a distinctive juvenile justice system. Procedures applicable to juvenile and adult offenders are similar. Appropriate models and approaches in dealing with juveniles supported by the UN, for example restorative justice and diversion, have only been recently researched in Viet Nam. By contrast, Victoria has advanced approaches in protecting and dealing with children and young people. Victoria possesses a distinctive juvenile justice system based upon the UN benchmark model. In certain areas relating to the protection of the rights of juvenile offenders, Victoria even sets out higher standards than the UN. Nonetheless, many difficulties and concerns still exist in actual protection of juvenile offenders’ rights including a lack of appropriate procedures in the Supreme Court when trying children and young defendants, the crisis in legal aid funding and over-representation of indigenous young people in the juvenile justice system. As two member States of the UN, Viet Nam and Australia (including Victoria) are obliged to reform their juvenile justice systems in conformity to the UN benchmark standards. With general and specific recommendations, this thesis aims to make contribution to the juvenile justice reform processes in Viet Nam and Victoria. In this regard, Viet Nam may adopt particular provisions, policies and programs of Victoria in order to enhance and strengthen the protection of the rights of children and young offenders.
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**b. Australia**


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