Children's rights in Australia*

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President of the Children's Court of Victoria

Thanks and acknowledgments

I am grateful to the Chancellor of Victoria University, Mr George Pappas for those kind words and for the invitation to deliver this Chancellor's Lecture.

Before I commence, may I also take this opportunity to acknowledge the traditional owners of the land on which we meet here today, the people of the Kulin nations, and pay my respects to their elders both past and present.

My acknowledgments also go to:

- Vice-Chancellor and President, Professor Peter Dawkins;
- Professor Andrew Clarke, Dean of the College of Law & Justice;
- Other academics and distinguished guests, students, ladies and gentlemen.

Introduction

I am honoured to be delivering the Chancellor's Lecture here at Victoria University. While the focus of my discussion today will be on the rights of children in Victoria's criminal justice system, it seems fitting here to highlight the universal right of all children and young people to an education. Of course, access to an education or, more tellingly, the absence of education in the lives of our young people is a concerning feature of those appearing in our criminal justice system.

I wish to acknowledge Victoria University for the vital role it plays in providing educational opportunities to tens of thousands of students every year from diverse socio-economic, cultural and educational backgrounds.[1] It is fitting in this

* This paper is derived from the 2015 Chancellor's lecture presented by the author at Victoria University, Melbourne, on 28 October 2015.

[1] Victoria University, *About Us* (2015) <https://www.vu.edu.au/about-us/vision-mission/university-of-opportunity>

International Week of the Child that we pay tribute to the organisations that foster and promote the fundamental rights of all children and young people to care, housing, education, health; moreover a sense of well-being and of belonging.

The topic of children's rights in Australia spans the theoretical and practical; encompasses civil and political, social, economic and cultural rights and freedoms; is underpinned by international human rights; and implemented by youth-specific domestic legislation across all states and territories. There is explicit recognition internationally and in domestic legislation that children should be afforded special protections having regard to their particular characteristics and vulnerabilities.

Recently, I heard the adolescent brain described as being 'still under construction', a reference to the prolific body of neurobiological, psychological and social research that now tells us that the brain continues to develop until the mid-20s and until then, the functions of reasoning, decision-making and impulse control are all essentially works in progress.[2] Any legal framework referable to children and young people, in order to be just, must bear this in mind.

Today I will, firstly, talk about internationally recognised children's rights. I then briefly discuss the implementation of child-specific legislation (in relation to the criminal justice system) across the states and territories of Australia, with a focus on the *Children, Youth and Families Act 2005* ('CYFA') in Victoria. Finally, I will focus on children's issues in the Victorian criminal justice system, with an overview of important initiatives and programs operating today in the Children's Court of Victoria, the Court I am privileged to lead.

Of course, the behaviour of younger generations has long been a topic of dinner-table conversation.

[2] See, eg, Elizabeth Sowell et al., 'Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Post adolescent Brain Maturation' (2001) 21 *Journal of Neuroscience* 8697, 8819; Elkhonon Goldberg, *The Executive Brain: Frontal Lobes and the Civilized Mind* (Oxford University Press, 2001); Sarah-Jayne Blakemore and Suparna Choudhury, 'Development of the Adolescent Brain: Implications for Executive Function and Social Cognition' (2006) 47(3) *Journal of Child Psychology and Psychiatry* 296.

Shakespeare, *The Winter's Tale*

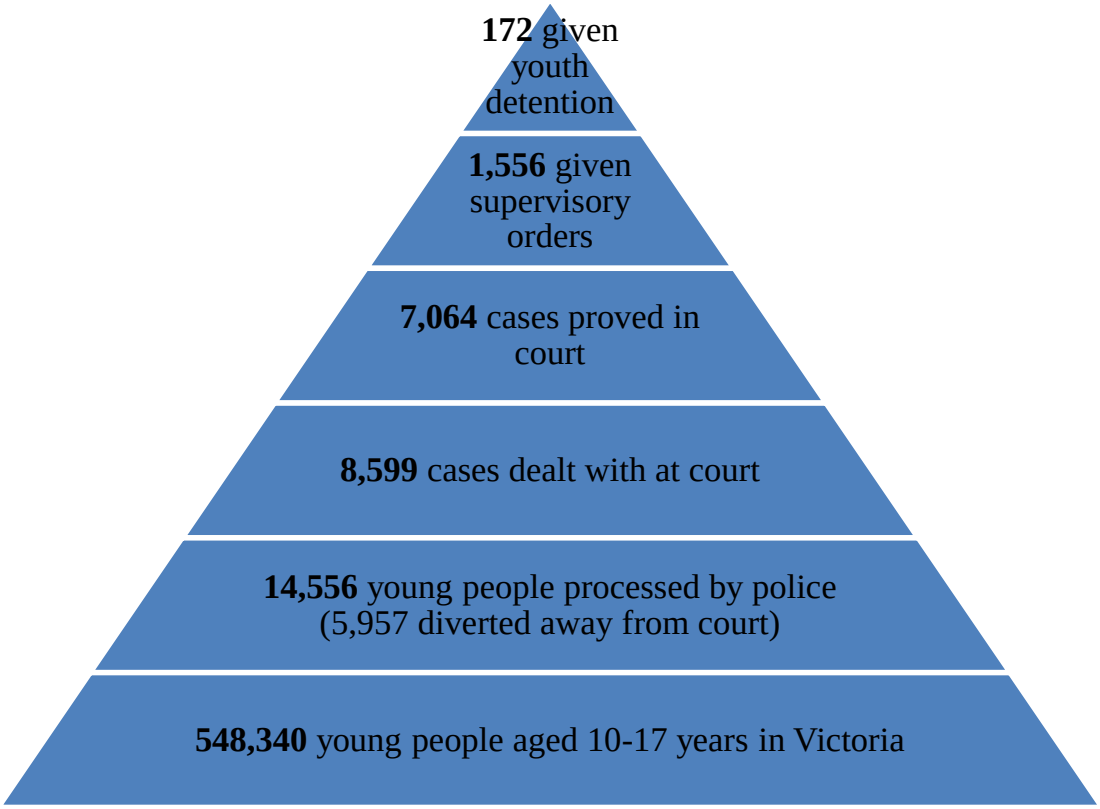
As William Shakespeare once wrote:

> I would, there were no age between ten and three-and-twenty; or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancientry, stealing, fighting ...
>
> — *The Winter's Tale*, Act Three, Scene Three

But Shakespeare was, first and foremost, a dramatist. It is important to emphasise that only a very small percentage of young Victorians actually come to the attention of law enforcement authorities, and fewer still require formal intervention in their lives.

Young people and crime in Victoria

A statistical snapshot of young people's involvement in the criminal justice system (2009-10)[3]

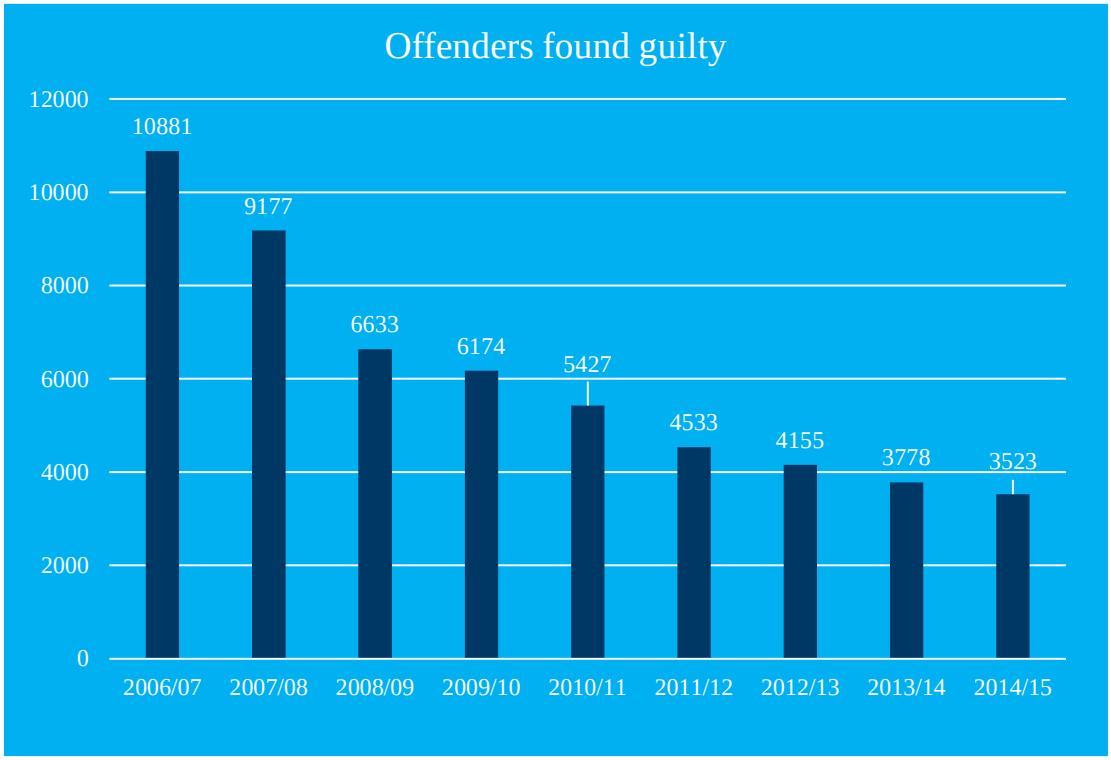


[3] Adapted from Figure 3 in the Sentencing Advisory Council report *Sentencing children and young people in Victoria* (2012) at 13.

In 2014/15, just over 3,500 young people were found guilty of a criminal offence in the Children's Court.[4] This represents a decline of about 8% on the previous year; consistent with a trend we have observed over the last five years.

Rates of offending by young people in Victoria

Offenders found guilty in the Children's Court (2006-15)[5]



That said however, we do know much about the characteristics of the young people involved in our criminal justice system. Males greatly outnumber females – most are aged between 15 and 17 years and too many of them, as well as contending with the physical, cognitive and social challenges normally associated with adolescence, also have complex issues compounded by socio-economic disadvantage, abuse, neglect, exposure to family violence, substance abuse, mental illness and homelessness as the backdrop to their maturation.

For this cohort of young offenders, addressing the factors leading to their offending is critical.

[4] Children's Court of Victoria, *Annual Report 2014/15* (2015) 3.
[5] Children's Court of Victoria, *Annual Reports*.

Internationally recognised rights of the child

Children's rights are recognised under general, and specific, human rights treaties on an international level.

The International Covenant on Civil and Political Rights ('ICCPR') contains protections for adults and children, with some specific safeguards for children such as article 14(4) which provides that criminal proceedings should take into account their age, and the 'desirability of promoting their rehabilitation'.[6] Other general human rights instruments may also make specific reference to children's rights, such as article 25(2) of the Universal Declaration of Human Rights which provides that 'childhood' is 'entitled to special care and assistance'.[7]

More specifically, the Convention on the Rights of the Child ('CRC') is the main international treaty that specifically codifies rights as they apply to children.[8] The CRC was adopted in the United Nations General Assembly in 1989, and Australia ratified the CRC in 1990.[9] The CRC reflects the need to extend particular care and safeguards to children, by reason of a child's physical and mental immaturity.[10] The CRC codifies existing rights specifically in relation to children (contained in other international human rights treaties more generally), but also includes some specific protections for children.

Article 3 of the CRC provides that in all actions concerning children, the 'best interests of the child' shall be a primary consideration. Article 40 obliges state parties to recognise the right of every child alleged to have committed a crime to be treated with dignity and worth, and with responses that take into account the

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[6] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[7] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[8] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[9] Australian Human Rights Commission, *Australia's commitment to children's rights and reporting to the UN* (October 2007) <https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un>
[10] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) preamble.

age of the child, and the desirability of promoting the child's reintegration and constructive input into society.

There are three other United Nations ('UN') initiatives related to children's rights and which fill out the content of the CRC:[11]

- UN Guidelines for the Administration of Juvenile Delinquency ('The Riyadh Guidelines'), 1990.[12]
- UN Standard Minimum Rules for the Protection of Juvenile Justice ('The Beijing Rules'), 1990.[13]
- UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990.[14]

These human rights instruments create a framework of children's rights and minimum standards on an international level. Standards applicable in the criminal justice system include that a minimum age should be established below which children should not be imprisoned; the use of arrest, detention and imprisonment as a measure of last resort; the arrest, detention and imprisonment of children for the shortest appropriate period of time; and the right of children deprived of their liberty to be treated with humanity and dignity, in accordance with their age, amongst other protections.[15]

Recognition in Australian law

There is no CRC Act on a domestic level; it does not form part of Australian legislation.[16] Some cases in the court system have looked at whether, while not a direct source of law in Australia, the CRC and or international human rights conventions may be considered in the exercise of sentencing discretions.[17]

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[11] Australian Human Rights Commission, *Human Rights Brief No 2: Sentencing Juvenile Offenders* (1999) <https://www.humanrights.gov.au/publications/human-rights-brief-no-2>
[12] *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA Res A/RES/45/112, UN Doc A/45/49, 14 December 1990.
[13] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN Doc A/40/53, 29 November 1985.
[14] *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UN Doc A/45/49, 14 December 1990.
[15] Geraldine van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff, 1995) 206-231.
[16] Melinda Jones, 'Myths and facts concerning the Convention on the Rights of the Child in Australia' (1999) 5(2) *Australian Journal of Human Rights* 126.
[17] Magistrate Peter Power, *11. Criminal Division – Sentencing* (21 July 2016) Children's Court of Victoria <http://www.childrenscourt.vic.gov.au/legal/research-materials/sentencing>

States and territories across Australia have adopted their own legislative frameworks for children in the criminal justice system, and each state and territory has their own specialised children's court.[18]

Child-specific Acts apply in each of these jurisdictions:

- New South Wales – *Children (Criminal Proceedings) Act 1987*.
- Australian Capital Territory – *Children and Young People Act 2008*.
- Queensland – *Childrens Court Act 1992*; *Youth Justice Act 1992*.
- South Australia –*Young Offenders Act 1993*; *Youth Court Act 1993*.
- Tasmania – *Youth Justice Act 1997*.
- Western Australia – *Young Offenders Act 1994*; *Children's Court of Western Australia Act 1988*.
- Northern Territory – *Youth Justice Act 2005*.
- Victoria – *Children, Youth and Families Act 2005*.

Each Act, including the CYFA, places the best interests of the child as the paramount consideration for all decision-makers, including the courts.

Children, Youth and Families Act 2005 (Vic) ('CYFA')

The legislation underpinning the Children's Court of Victoria, as it operates today, is the product of 150 years of social, philosophical, political and legislative debate, research and development.[19]

The Children's Court was first established in Victoria in 1906 by the *Children's Court Act* which gave the Court exclusive jurisdiction to deal with children under the age of 17 years. Prior to this children were dealt with in the same courts and in the same way as adults.

Moving forward to 1982, the Victorian Government convened the Child Welfare Practice and Legislation Review Committee chaired by Professor Terry Carney of

[18] Australian Institute of Criminology, *Juvenile court system* (11 November 2013) <http://www.aic.gov.au/criminal_justice_system/courts/juvenile.html>
[19] Magistrate Peter Power, *1. Acts, Regulations, Rules* (10 April 2015) Children's Court of Victoria <http://www.childrenscourt.vic.gov.au/legal/research-materials/acts-regulations-rules>

Monash University. The Committee reported in 1984 ('Carney Report'), and made a number of recommendations affecting the structure of the Children's Court. One issue raised in the Carney Report was the failure of the legal system to distinguish between children in need of protection and young people who were committing criminal offences.[20]

At this time babies, children and young persons before the Court were charged with being in need of protection and if the charge was found proved, this would appear on a police criminal history sheet.

In 1989, Parliament passed the *Children and Young Persons Act 1989* ('CYPA') enacting many of the recommendations of the Carney Report. The objectives of the CYPA as described in the Second Reading Speech included strengthening the role of the Children's Court of Victoria as a specialist court responsible for dealing with matters affecting children and young people,[21] and, echoing article 40 of the CRC, providing an adequate and constructive response to children and young people charged with, and found guilty of, committing offences. The Act increased the minimum age of criminal responsibility from eight to 10 years of age and expanded the non-custodial sentencing options available to emphasize the rehabilitative nature of the Court.

In 2007, the CYFA replaced the *Children and Young Persons Act* in all matters involving children and young people.[22] This legislation aimed to provide an 'adequate and constructive response' to children and young persons charged with, and found guilty of, criminal offences in addition to 'an extended and more flexible range of dispositions' to enable children and young persons to remain at home where it was practical and appropriate to do so.[23]

In many respects, the CYFA contains provisions that are consistent with the standards outlined in the CRC and other human rights instruments.

[20] See, eg, Child Welfare Practice and Legislation Review Committee, *Final Report* (1984) 238.
[21] Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 1988, 1150 (Mr Spyker).
[22] *Children, Youth and Families Act 2005* s 2.
[23] Victoria, *Parliamentary Debates*, Legislative Assembly, 8 December 1988, 1150 (Mr Spyker).

Charter of Human Rights and Responsibilities Act 2006 (Vic)

The *Charter of Human Rights and Responsibilities Act 2006* (‘*the Charter*’) iterates the human rights it seeks to protect in Part 2, and while applicable to the conduct of public authorities such as the Victoria Police, the interpretative clause in section 32 is most relevant to the work of the courts.

In the *Charter*, the majority of the codified human rights are adapted from the ICCPR.[24] Section 25 of the *Charter* provides certain minimum guarantees for persons charged with criminal offences, equally applicable to adults and children. More specifically however, section 23 requires that an accused child who is detained must be segregated from all detained adults; must be brought to trial as quickly as possible; and that a child convicted of an offence must be treated in an appropriate way for his or her age.

The rights of Victorian children in the criminal justice system

Consistent with principles outlined in international human rights instruments and with Victorian *Charter* rights, the CYFA incorporates processes and considerations clearly differentiated from the adult criminal system. It does this by providing for specialist and therapeutic responses to children and young people with a clear emphasis on rehabilitation of the child; often resulting in the Court making orders that would be ‘entirely inappropriate in the case of older and presumably more mature individuals’.[25]

Specialist Children’s Court

Section 1 of the CYFA describes the Children’s Court as a ‘specialist court’ dealing with matters relating to children. The Children’s Court has four divisions:

- Family Division;
- Criminal Division;
- Children’s Koori Court (Criminal Division);
- Neighbourhood Justice Division.

[24] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.
[25] *R v Evans* (2003) VSCA 223, 15.

The Family Division determines applications relating to the care and protection of children and young people from birth to 17 years of age who are at risk (child protection matters).

In the Criminal Division, the Children's Court has exclusive jurisdiction to hear and determine criminal charges brought against children aged 10-17 years (at the time of alleged commission of the offence), including indictable offences but with the exception of six 'fatal' offences: murder, attempted murder, manslaughter, child homicide, arson causing death, and culpable driving causing death.[26] These matters are heard in the County Court or Supreme Court (as the case requires).

There are some cases where the Children's Court may consider the charge is unsuitable by reason of exceptional circumstances to be heard and determined summarily.[27] However, the power of the Children's Court to relinquish jurisdiction should be exercised with 'great reluctance'.[28]

In Victoria and all Australian states, children under the age of 10 cannot be held legally responsible for their actions. Section 344 of the CYFA provides that it is 'conclusively presumed that a child under the age of 10 years cannot commit an offence.'

It is notable that the minimum age of criminal responsibility in many other countries is higher:

- 12 years of age in Canada,[29] and the Netherlands;[30]
- 14 years of age in Germany,[31] and Japan;[32]
- 15 years of age in Sweden.[33]

[26] *Children, Youth and Families Act 2005* ss 516(1)(b), 356(3).
[27] *Children, Youth and Families Act 2005* s 356(3)(b).
[28] *A child v A Magistrate of the Children's Court* (Unreported, Supreme Court of Victoria, Cummins J, 24 February 1991) 9.
[29] *Criminal Code (Can)* s 13.
[30] Child Rights International Network, *Minimum Ages of Criminal Responsibility in Europe* (2016) <https://www.crin.org/en/home/ages/europe>
[31] Ibid.
[32] Child Rights International Network, Minimum Ages of Criminal Responsibility in Asia (2016) <https://www.crin.org/en/home/ages/asia>
[33] Child Rights International Network, *Minimum Ages of Criminal Responsibility in Europe* (2016) <https://www.crin.org/en/home/ages/europe>

Whether the age of criminal responsibility should be higher in Australia is a matter for public debate.

Prior to the commencement of the *Children and Young Persons (Age Jurisdiction) Act 2004* changes in 1 July 2005, children were dealt with in adult criminal courts when they turned 17. As such, the upper limit of the Children's Court's jurisdiction was not in conformity with relevant international norms. Article 1 of the CRC – to which Australia is a signatory – defines a child as a person under the age of 18 unless the relevant national law specifies an earlier age of majority. Due to this exception, the Victorian age of majority for criminal proceedings pre-1 July 2005, while not in breach of the UN Convention, was not in accordance with its intent. The Australian Law Reform Commission ('ALRC') and Human Rights and Equal Opportunity Commission in their joint report 'Seen and heard: priority for children in the legal process' recommended that '[t]he age at which a child reaches adulthood for the purposes of the criminal law should be 18 years in all Australian jurisdictions.'[34] The new definition of 'child' in the CYPA, and subsequently the CYFA, adopted the ALRC's recommendation and brought Victorian law into line with the UN Convention.

The law in Victoria also distinguishes between a 'child' under the CYFA and a 'young offender' under the *Sentencing Act 1991* which is any person under the age of 21 years at the time of sentencing.[35] Unique to Australia, Victoria operates a 'dual track' system that enables young offenders aged 18-20 appearing in adult courts to be assessed to determine their suitability to undergo a custodial sentence at a youth detention facility. The Sentencing Advisory Council ('SAC') has previously reported that between 2005 and 2009 about half of young offenders aged 18-20 and given a custodial sentence were sent to a youth detention facility.[36]

In Victoria, there are two facilities for young offenders in this age group:

- Malmsbury Youth Justice Centre – for males aged between 18-20 years;

[34] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [18.21]-[18.22].
[35] *Sentencing Act 1991* s 3(1).
[36] Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) xi.

- Parkville Youth Residential Centre – for females aged 18-20 years.

*Age of criminal responsibility – '**doli incapax**'*

As stated, the CYFA provides that children under 10 years of age cannot commit a criminal offence.[37] In Victoria, there is also a 'presumption' at common law that a child under 14 years is incapable of committing a crime. In these cases, the onus lies on the prosecution to prove beyond reasonable doubt that the child accused knew at the time that his or her offending was seriously wrong.[38] This is known as the '*doli incapax*' presumption.

Support for or rebuttal of *doli incapax* requires the Court to review past behaviour, assess current levels of adjustment and functioning, as well as conduct a detailed examination of the child's statements about the alleged offending. In Victoria, the Court or practitioners can refer the child to the Children's Court Clinic for a clinical assessment. The Clinic provides the Court with clinical expertise on the intellectual functioning and development of the child to assist in determining whether or not the presumption has been rebutted.

The presumption of incapacity can be traced back for hundreds of years. It is supported by the CRC, which requires signatory states to establish 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'[39] It is also in line with The Beijing Rules, which state:

> 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 anti-social behaviour.[40]

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[37] *Children, Youth and Families Act 2005* s 344.
[38] See *R v ALH* (2003) 6 VR 276.10. See also Arie Freiberg, *Sentencing: State and Federal Law in Victoria* (3rd ed, 2014) 921; Magistrate Peter Power, *10. Criminal - Procedure* (7 October 2016) Children's Court of Victoria < http://www.childrenscourt.vic.gov.au/legal/research-materials/criminal-procedure>
[39] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(3)(a).
[40] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN Doc A/40/53, 29 November 1985, r 4.1 commentary.

There has, nonetheless, been a great deal of debate about the continued relevance of the principle of *doli incapax*.[41]

In an article titled 'Doli Incapax: Why Children Deserve its Protection', the author Thomas Crofts, Senior Lecturer at Murdoch University, addresses the criticisms around the presumption of *doli incapax*, chiefly that it is no longer relevant where children today have such ready access to education, the internet and other electronic media, making them, in effect, more 'street smart'.[42] But Croft argues against the notion that children today more readily understand the wrongfulness of criminal acts than in earlier times and indeed there are many indicators that 'conditions in modern society may be making it more difficult for children to learn what is right and wrong'.[43]

The debate about the relevance of *doli incapax* often arises in the context of high profile cases of young offenders committing very serious offences, for instance the James Bulger case in the United Kingdom ('UK'). However, the presumption exists because children are dealt with in a criminal court with the possibility of punitive sanctions. As Croft observes, in such an environment and due to the nature of childhood, 'the presumption allows children what they deserve: protection if they are unable to understand the wrongfulness of their actions and conviction if they are so able.'[44]

In 1997, the ALRC recommended that all states and territories retain the *doli incapax* presumption in its current form and place it on a legislative footing.[45] *Doli incapax* remains in place at common law in Victoria.

Although it is interesting to note that following on from the James Bulger case, the *Crime and Disorder Act 1998* (UK) was passed abolishing the rebuttable presumption for those aged 10 to 13, leaving England and Wales with one of the

[41] Kelly Richards, What makes juvenile offenders different from adult offenders? (February 2011) Australian Institute of Criminology <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html>
[42] Thomas Crofts, 'Doli Incapax: Why Children Deserve its Protection' [2003] *Murdoch University Electronic Journal of Law* 26.
[43] Ibid [41].
[44] Ibid [44].
[45] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84 (1997) [18.20].

lowest age levels of criminal responsibility in the world. It could be observed that this outcome gives credence to the truism that 'hard cases make bad laws'.

Sentencing Principles in the Children's Court

Sentencing in the Children's Court is manifestly different from sentencing in adult jurisdictions.

The *Sentencing Act 1991* guides Victorian courts in the sentencing of adults; the purposes for which a sentence may be imposed are punishment, deterrence, rehabilitation, denunciation, and protection of the community.[46]

In contrast, the focus of the CYFA in sentencing young offenders is predominantly – although not completely – 'welfare'-oriented, that is to say, rehabilitative.[47] Unlike adult courts, where rehabilitation is but one of five purposes for which a sentence may be imposed, in the Children's Court rehabilitation is the overarching or core principle, although in appropriate cases, the emphasis on rehabilitating the offender is qualified by the need to protect the community, to specifically deter the young offender and to hold them accountable for their actions.

Section 360 of the CYFA provides the Children's Court with a range of dispositions that the Court can impose upon a finding of guilt and establishes a clear sentencing hierarchy which extends from dismissal without conviction at the lowest end, undertakings to be of good behaviour, good behaviour bonds, fines, probation, youth supervision or attendance orders, through to detention in a youth residential or justice centre at the other end. A sentence of imprisonment is not a sentencing option available under the under the CYFA.

The Victorian approach, with its focus on the rehabilitation of children, the emphasis on graduated and proportional responses and the use of detention as the

[46] *Sentencing Act 1991* s 5(1).
[47] Magistrate Peter Power, *11. Criminal Division – Sentencing* (21 July 2016) Children's Court of Victoria <http://www.childrenscourt.vic.gov.au/legal/research-materials/sentencing>

sentence of last resort, is consistent with the principles enunciated in the CRC and other associated human rights covenants.

A particular distinction when sentencing young people as opposed to adults are the matters to be considered in determining which sentence to impose on a child under section 362 of the CYFA. The matters listed at section 362(1) include:

- the need to strengthen and preserve the relationship between the child and the child's family; and
- the desirability of allowing the child to live at home and allowing the child's education, training or employment to continue without interruption or disturbance; and
- the need to minimise the stigma to the child resulting from a court determination; and
- if appropriate, ensuring the child is aware that he or she must bear a responsibility for the offending; and
- if appropriate, the protection of the community.

Unsurprisingly, non-supervisory orders, including undertakings, good behaviour bonds and fines represent the most commonly imposed orders (approximately 66% in 2012/13). Supervisory orders including probation, youth supervision orders and youth attendance orders comprises 30% with detention orders (youth justice centre orders and youth training centre orders (but not remand) making up the remaining 4% in 2012/13.[48]

Deterrence

It is perhaps the role of deterrence as a factor in adult sentencing that most differentiates it from the sentencing of children.

General deterrence is regarded as an important sentencing consideration at common law because it is said to be conducive to community protection. It is said, to achieve this end, a sentence may operate as a deterrent to the broader community from engaging in similar criminal conduct.

[48] Children's Court of Victoria, *Annual Report 2012/13* (2013) 17.

The Court of Appeal in *CNK v The Queen* [2011] VSCA 228 confirmed that general deterrence had no application when sentencing young people.[49]

The Court of Appeal stated that 'the unambiguous command' in section 362(1) is that no greater sentence should be imposed on a child than the nature and circumstances of the child's offending require.[50] When considering the language used in section 362(1)(g), the Court of Appeal specifically stated that:

> The deliberate use of language in para (g) which deals only with specific deterrence, and says nothing about the need to deter others from committing 'violent or other wrongful acts', is a clear indication of legislative intention.[51]

Accordingly, when sentencing a child under the CYFA the sentence need not be calibrated to operate as a general deterrent, even to other youthful offenders.

Incarceration rates for young people

The notion that young people should be placed in detention only as a last resort is one of the key doctrines upon which Australia's youth justice systems are based.[52] In Victoria, section 361 of CYFA makes clear that the Court must not impose a sentence of detention in a youth justice centre unless satisfied that it is not appropriate to impose any other sentence under section 360(1) of the Act. Again this is consistent with article 37(b) of the CRC which provides 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.[53]

Victoria's detention rates have been essentially stable over the past decade. They are also consistently lower than those of other states and territories. In 2013/14, on

[49] *CNK v The Queen* [2011] VSCA 228, [38]-[39].
[50] Ibid [13].
[51] Ibid [10].
[52] Australian Institute of Health and Welfare, *Youth justice in Australia 2013-14* (29 April 2015) <http://www.aihw.gov.au/publication-detail/?id=60129550638>
[53] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b).

an average day 1,210 young people (aged 10 years and more) were under youth justice supervision in Victoria. 88% (or 1,065) of young people under supervision in Victoria were supervised in the community. The remainder (12%) were in detention. Young people in Victoria constituted 20% of all young people in Australia under supervision on an average day.[54]

The number of children being detained in a Youth Residential Centre or Youth Justice Centre in Victoria has declined by 60% over the past five years. However in a concerning development, the number of *alleged* young offenders remand in custody has increased alarmingly: by 57% between 2013 and 2014.[55] On my first visit to Parkville Youth Justice Centre earlier this year, 67 young people were remanded whilst only 26 were undergoing sentence. This alarming trajectory can be traced to the introduction of amendments to the *Bail Act 1977* in December 2013.[56] Introducing new bail offences which place alleged offenders in a position of having to 'show cause' as to why they should be bailed has had a disproportionate impact on young people, now being remanded in custody at rates never seen before in Victoria.

This alarming trend was also remarked upon recently by Judge Michael Bourke, Chairperson of the Youth Parole Board. In the Board's 2014/15 Annual Report, Judge Bourke states that 'young people, often very young, should not be held in remand unless it is necessary'.[57] He also notes that where sentences are imposed after long remands, there is contracted time or capacity for proper youth parole planning, impacting on the prospect of supporting the young person's reintegration into their community.

Urgent action is required to ensure young people, who may not ultimately be sentenced to a period in detention are not remanded due to the commission of bail offences, such as breaching curfew conditions, placing them in the position of

[54] Australian Institute of Health and Welfare, *Victoria: youth justice supervision in 2013-14* (29 April 2015) <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550826>
[55] See, eg, Jesuit Social Services, *An escalating problem: Responding to the increased remand of children in Victoria* (October 2015) < http://jss.org.au/wp-content/uploads/2016/01/An_escalating_problem_-_Responding_to_the_increased_remand_of_children_in_Victoria.pdf>
[56] *Bail Amendment Act 2013*.
[57] Youth Parole Board, *Annual Report 2014/15* (2015), xiii.

having to 'show cause' as to why they should be bailed, where no other risk to the community has been demonstrated.[58]

Characteristics of offenders in youth detention in Victoria

The Youth Parole Board has provided a snapshot of the characteristics of the 134 males and 4 females detained on sentence and on remand:

- 41% had previous child protection involvement;
- 18% had current child protection involvement;
- 60% were victims of abuse, trauma or neglect;
- 56% had been suspended or expelled from school;
- 27% presented with mental health issues;
- 26% had a history of self-harm or suicidal ideation;
- 89% had a history of alcohol and/or drug abuse;
- 13% were parents.[59]

A whole of government response is needed to address the inherent vulnerabilities of these young people to prevent progression to the adult criminal justice system. There is clearly an ongoing need and community interest in providing assistance to young people completing their sentences to support their transition back into their community, from safe housing options, access to mental health, drug and alcohol treatment and educational supports.

Children's Court initiatives

I turn now to some of the particular responses which have been developed in recent years to address specific characteristics in the juvenile justice landscape. The three in particular that I would like to look at are:

- the Children's Koori Court;
- Youth diversion; and
- the Education Justice Initiative operating in the Children's Court.

[58] Postscript: the *Bail Amendment Act 2016* further amended the *Bail Act 1977* (eg, to provide that the section 30A(1) offence of contravening certain conduct conditions does not apply to children).
[59] Youth Parole Board and Youth Residential Board, *Annual Report 2013/14* (2014) 13.

The role and purpose of the Koori Children's Court

Victoria and all Australian states and territories continue to grapple with the persistent problem of significant overrepresentation of indigenous young people in the juvenile justice system, and specifically in the juvenile detention population. In 2013/14, 58% of young people aged 10-17 in detention in Australia were Aboriginal and Torres Strait Islanders, this despite them comprising only about 6% of young people aged 10-17 in Australia.[60]

Here in Victoria, indigenous young people constitute only 2% of the State's population aged 10-17, but in 2013/14 they made up around 16% of those aged 10-17 under supervision on an average day.[61] An Indigenous young person in Victoria aged 10-17 is at least 12 times more likely than a non-Indigenous young person to be under supervision on an average day. This is slightly lower than the national level (15 times as likely). Although the rate of young people under supervision fell in recent years, the decrease was proportionally greater for non-Indigenous young people than for Indigenous young people.

An important strategy for addressing over-representation of Indigenous young people in the juvenile justice system has been to foster Indigenous participation in sentencing procedures – a focus of many of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (1991).

The first formal Children's Koori Court in Victoria was established by the *Children and Young Persons (Koori Court) Act 2004* which created the Koori Court (Criminal Division) of the Children's Court. The Children's Koori Court commenced at Melbourne in October 2005 and I am proud to say recently marked its 10th anniversary. The objective of the Children's Koori Court is to ensure greater participation of the Aboriginal community in the processes of the Children's Court by incorporating an important role in the sentencing discussion

[60] Australian Institute of Health and Welfare, *Youth justice in Australia 2013-14* (29 April 2015) <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550805>
[61] Australian Institute of Health and Welfare, *Victoria: youth justice supervision in 2013-14* (29 April 2015) <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129550826>

by Aboriginal elders or respected persons. At its heart the Koori Court aims to interrupt the cycle of intergenerational offending and incarceration.

Young people who elect to appear before a Koori Court are making a commitment to show respect to the Court, including the judicial officer, and the Elders and Respected Persons, and to take responsibility for their behaviour. For anyone who might view the Koori Children's Court as an 'easy' option for Koori offender, you should know that, in reality, for offenders, for families and Elders, involvement in the Koori Court process is a very intense, challenging and reflective experience.

The former President of the Children's Court, Judge Paul Grant, described Koori Court proceedings as:

> … often dynamic and confronting. The voice of the [accused], family and community are always present and central. There is no escape from acceptance of responsibility and particular problems that should be addressed are discussed openly and honestly.

Some of the key findings of an evaluation of the Children's Koori Court completed in 2009 were that:

- Failure to appear rate and court order breach was very low.
- Further offending was often less serious than the principal offence heard at initial Children's Koori Court hearing.
- The Children's Koori Court is a culturally-responsive institution within Victoria's juvenile justice system.
- It has fostered positive participation by Koori youth, their families and their community in the Court.
- It has fostered increase accountability of the Koori community for Koori youth.
- It has fostered increased Koori community awareness of Indigenous and community codes of conduct and standards of behaviour.[62]

[62] Allan Borowski, 'Evaluating the Children's Koori Court of Victoria: Some Key Findings' (Presentation delivered at the Australian Institute of Criminology Occasional Seminar, AIC, 15 March 2010).

Put simply, the Koori Children's Court is a better way of doing things for our Koori people who found the old ways alienating and disheartening.

During 2014/15, the Melbourne Children's Koori Court expanded to Heidelberg and Dandenong. The Children's Koori Court also sits at Shepparton, Swan Hill, Mildura, Warrnambool (including Portland and Hamilton), Morwell and Bairnsdale. The Court will continue to explore options for the further expansion of the Koori Court jurisdiction to establish Koori Court sites during 2015/16.

Youth Diversion Pilot Program

In some cases, it is appropriate to divert young people away from the criminal justice system (and avoid a criminal record) and to intervene early with supports to prevent further offending. By offering young people the opportunity to address the underlying causes contributing to their criminal behaviour, balanced against the need to hold them accountable for offending behavior, we can provide the best chance for rehabilitation.

Pre-court diversionary programs have been a feature of the approach to juvenile justice in Victoria for some time.[63] These approaches include police cautioning, and the 'Ropes' Program which was developed by the Children's Court and Victoria Police in 2002 as a pre-plea diversionary program for young people appearing in the Children's Court for the first time. The objective of the Ropes program which operates across Victoria is to give young people an understanding of their own ability to achieve what they thought was not possible, to create the capacity for positive behaviour change, to engender understanding in young people that police can support them with issues that underlie their behaviour and to deter them from further offending.[64]

The Children's Court has long advocated for a coordinated State-wide diversion program for young people appearing in the Children's Court as recognised by the SAC in its 2012 report 'Sentencing Children and Young People in Victoria'.

[63] See, eg, Sentencing Advisory Council, *Sentencing children and young people in Victoria* (2012) Chapter 4.
[64] Ibid 33–34.

In June this year the Children's Court commenced a 12 month pilot, partnering with Jesuit Social Services, the Youth Support and Advocacy Service ('YSAS') and Centacare to offer a youth diversion pilot program – the first time that a formalised youth diversion program has been available in a Children's Court in Victoria.

The Youth Diversion Pilot Program operates at seven sites and targets young people who acknowledge their offending and who have little or no criminal history. The aims of the program are to:

- provide support and intervention to young people who may be starting out on a path of offending;
- facilitate diversion away from the criminal justice system;
- assist young people to address any problems likely to lead to further offending behaviour.

The Court can refer eligible young people to a community-based organisation for assessment about suitability and the components of the plan. Diversion plans can be broad-ranging, and fit the circumstances of the young person and the offending (for example: a letter of apology to the victim, drug and/or alcohol counselling, employment services) and encompass family, community, and schooling links to ensure that participants are properly supported to develop pro-social behavior and effectively participate in the community. Upon successful completion, the criminal matters are discharged, which importantly results in no finding of guilt (criminal record) against the young person.

As of this week, 130 young people have been referred into the diversion program with 62 diversion plans successfully completed. Although it is too early to observe any trend, the main factors present across this group were disengagement from education or employment, substance use and a history of child protection involvement. Diversion plans were tailored to meet the needs of each participant and the initial reports from providers are that participants have engaged fully and are well-placed to complete the program.

The program will be independently evaluated in 2015/16.

The role of education - Education Justice Initiative

The former Chair of the UK Youth Justice Board, Rod Morgan, stated in 2007:

> It may be too much to say that if we reformed our schools, we would have no need of prisons. But if we better engaged with our children and young people in education we would almost certainly have less need of prisons. Effective crime prevention has arguably more to do with education than sentencing policy.

There is no doubt that young people who do not complete school tend to be significantly more disadvantaged later in life. Specifically, raising the 'educational attainment and inclusion of young people who offend has been identified as one of the most effective means of reducing the risk factors associated with criminal behaviour'.[65]

The *Education and Training Reform Act 2006* (Vic) directs that all children aged between the ages of 6 and 17 in Victoria must be enrolled at a registered school or registered for home schooling unless they have a reasonable excuse. Despite this, young people involved with the youth justice system often experience disengagement from school. As shown, over half of the young people detained on remand or sentenced to detention in a youth justice centre in Victoria have been suspended or expelled from school.[66] Unsurprisingly, a large proportion of the young people appearing before the criminal division are either partially or entirely disengaged from education.

School attachment is one of the environmental factors that have been used to explain the onset, persistence and desistance of offending among children.[67] A research report by Jesuit Social Services notes that **'**[s]chools play an important role in individual development and as instruments of social change and value

[65] See, eg, Kitty te Riele and Karen Rosauer, *Education at the Heart of the Children's Court: Evaluation of the Education Justice Initiative, Final Report* (Melbourne: The Victoria Institute for Education, Diversity and Lifelong Learning, 2015) 2.
[66] Youth Parole Board and Youth Residential Board, *Annual Report 2013/14* (2014) 13.
[67] Jesuit Social Services, *Thinking Outside: Alternatives to remand for children* (2013) 15 <http://jss.org.au/wp-content/uploads/2015/10/Thinking_Outside_Research_Report_-Final_amend_15052013.pdf>

transmission'.[68] A number of Australian and international studies have shown that there is a strong correlation between school performance rates of school retention, truancy and involvement in crime.[69]

In 2014, the Education Justice Initiative ('EJI') was established as a 12 month pilot project at the Melbourne Children's Court. Funded by the Department of Education and Training ('DET'), the EJI is directed towards those young people who appear in the court's Criminal Division who are either totally or partly disengaged from education. The aim of the program is to assist young people to re-engage with schooling. This is done with the assistance of DET staff who are at the Court each day. The aim of the EJI is to connect young people appearing before the Melbourne Children's Court (Criminal Division) or the Melbourne, Dandenong and Heidelberg Children's Koori Court to an appropriate, supported education pathway through liaison and advocacy with schools and training providers. Contact with young people can be initiated through direct outreach by staff at the Melbourne Children's Court, referral from Youth Justice, Victoria Legal Aid, the Koori Court Officer or a Children's Court magistrates.

The EJI is managed by Parkville College, which offers the full range of class options expected within any Victorian government school from Year 2 to Victorian Certificate of Education ('VCE') in all Department of Health and Human Services secure services. The College runs education programs at four locations including Parkville and Malmsbury Youth Justice Centre where detained young people attend classes six hours a day, six days a week, 52 weeks a year. Parkville College has also established a transitional learning centre, so young people on parole can keep studying until they find a suitable school on release from detention. This initiative supports students' integration into the community and mainstream educational institutions.

It seems self-evident to me that these initiatives will be critical in circumventing further involvement in criminal behaviour for the children in the program. Certainly, early indications are extremely positive. An initial evaluation of the

[68] Ibid 19.
[69] Ibid 18.

pilot conducted by the Victoria Institute earlier this year found that during the first six months of the pilot, the EJI staff had contact with approximately 450 young people, engaging intensively with 45 to help them reconnect with education. This cohort was identified as being between ages 14 to 17, 82% male, 57% from a culturally and linguistically diverse background and 8% explicitly identify as Aboriginal or Torres Strait Islander. In terms of their educational history, 45% were not currently enrolled in educational setting, 40% had five or more previous school enrolments and many had been disengaged from education for periods ranging from two months to two years. One 15 year old boy had been out of school for more than two years. It's worth noting that 100% of this cohort of young people expressed a willingness to engage with education be that flexible learning, TAFE or completing Year 10, Victorian Certificate of Applied Learning ('VCAL') or VCE. The Victoria University report concluded that without the support provided by the EJI, it was unlikely these young people would have been successful in negotiating re-entry into education.[70]

Anecdotally, the presence of the DET, through the EJI staff, in the Children's Court building highlights and promotes the positive role that education can and should play for all young people. The symbolism of the education office sitting between the Legal Aid and Victoria Police Prosecutors' office, and across the hall from Youth Justice, has not been lost on many young people and their families.

It is my firm belief that programs such as these are the way forward and the Court will continue to actively seek out opportunities to develop and provide programs and services that can make a direct and meaningful intervention in the lives of young people. I hope to see not only that the EJI continues at Melbourne Children's Court, but that it is expanded to all venues around Victoria.

Concluding remarks

So I have come full circle in this lecture; beginning and ending with a plea for improved education outcomes for our most vulnerable youths. When we speak of

[70] Kitty te Riele and Karen Rosauer, *Education at the Heart of the Children's Court: Evaluation of the Education Justice Initiative, Final Report* (Melbourne: The Victoria Institute for Education, Diversity and Lifelong Learning, 2015).

children's rights therefore, surely access to an education is one of the most significant. For an education surely is a gift for life.

When we talk of rights, we also speak of obligations. We, as a community, have an obligation to ensure that all young people have access to the rights so many of us take for granted.