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Commonwealth, states and territories must lift minimum age of criminal responsibility to 14 years, remove doli incapax

Every Australian jurisdiction should lift the minimum age of criminal responsibility to 14 years to improve justice outcomes for vulnerable children and remove the need for the fraught doli incapax presumption, according to the Law Council.

Law Council Directors from around Australia unanimously resolved in Darwin at the weekend to change the Law Council's policy, which previously called for the minimum age of criminal responsibility to be raised to "at least 12-years-old".

"The current minimum age of criminal responsibility in all states and territories, and under federal law, is 10 years of age. This is far too low," Law Council of Australia President, Arthur Moses SC, said today.

"Research-based evidence on brain development supports a higher age as children are not sufficiently able to reflect before acting or comprehend the consequences of a criminal action. Children belong in their communities with their families and guardians, not in detention. Imprisonment should be a last resort when it comes to children, not a first step.

"The incarceration of children as young as 10 is a national tragedy. There is something wrong when children can't join Facebook until 13 but in Australia can be prosecuted for a criminal offence at 10."

Mr Moses said the decision by Law Council Directors was timely, as the minimum age and its disproportionate impact on First Nations communities will be discussed this week at the United Nations' Human Rights Council in Geneva.

"Raising the minimum age of criminal responsibility to 14 would also remove the need for courts to consider the confusing and complex "doli incapax" presumption," Mr Moses said.

"Doli incapax means the law presumes a child under the age of 14 does not possess the necessary knowledge required to have criminal intent. This presumption can be disproved or rebutted by leading evidence to show that a child knew his or her actions were morally wrong. In practice, doli incapax has proven to be extremely difficult to apply in court.

"The presumption continues to wreak confusion as to whether the defence or prosecution bears the burden of proving that a child knew their conduct to be wrong. This leads to errors and results in children being held in custody for lengthy periods of time before the presumption can be led or tested in court, and the child acquitted. As recently as last week, the Northern Territory Court of Appeal allowed an appeal in the case of *KG v Firth* which demonstrated the uncertainty surrounding doli incapax and the risks of its erroneous application.

"Raising the minimum age of criminal responsibility to 14 years would improve justice outcomes for some of our most vulnerable children and honour Australia's commitments under international law, including to promote the best interests of the child. This would also replace doli incapax altogether, significantly reducing complexity and confusion in our courts.

"We call on Australian Attorneys-General to commit to raising the minimum age in every jurisdiction," said Mr Moses.

"Raising the age of minimum criminal responsibility is not being soft on crime: it means adopting a just, proportionate approach. The evidence clearly shows those detained as children are often imprisoned as adults. This is not the trajectory we want for vulnerable children or the best way to keep our communities safe. Children must be protected, not criminalised, and prison should never be a rite of passage.

"Many children in detention have not been sentenced. There must be greater emphasis on evidence-based alternatives to detention, including intensive rehabilitative and welfare-based responses, justice reinvestment projects, early intervention, prevention, and community-led diversion programs."

Anne-Louise Brown

P 0406 987 050

E Anne-Louise.Brown@lawcouncil.asn.au