



Law Council
OF AUSTRALIA

Minimum Age of Criminal Responsibility

Speech delivered by Arthur Moses SC, President, Law Council of Australia at the Human Rights Commission Forum, Canberra.

10 December 2019

I would like to acknowledge the traditional custodians of the land on which we meet, the Ngunnawal people and offer my respects to their Elders past, present and emerging.

I extend these respects to all Aboriginal and Torres Strait Islander peoples who join us today.

It is an honour to be invited to speak at the United Nations Human Rights Day about an issue that has been very important to me this year as President of the Law Council of Australia – raising the minimum age of criminal responsibility. Because on this day – we should not forget the rights of children.

There is no bigger issue confronting our nation

The urgency of this task was highlighted to me very early this year when I visited the Don Dale Youth Detention Centre at the opening of the Law Term in Darwin. That centre has come to symbolise the devastating impact that consistent policy failings continue to have on Australian children and Australia's First Nations People. Nearly two years after a Royal Commission recommended the centre be closed, it operates out of a former adult prison, which is not fit for use, until such time as a new centre is built. Incredulously, the new centre will be built near an adult prison as if somehow suggesting that imprisonment in an adult prison will be the rite of passage for children detained in the new centre. This is wrong. Imprisonment should not be a rite of passage for our Indigenous youth or indeed any Australian child.

It was a humbling experience to meet with the young detainees at the centre. During my inspection of the centre, I was struck by the words I saw on the poster in the cell of a child who was being detained there, which read in part "lessons not learned are lessons repeated." Those words continue to resonate with me long after the visit. These words serve as a powerful reminder for those entrusted with the responsibility to develop law and policy that we cannot continue to repeat the mistakes of the past.

The visit to the Don Dale Youth Detention Centre brought home to me very personally, the reality of the current laws relating to the minimal age of criminal responsibility. Very powerfully. That in Australia, to our lasting shame we lock young children up rather than diverting them from the criminal justice system.

As President of the Law Council it has compelled me to make this a core issue of our work this year.

Across the country there are around 600 children under the age of 14 in our prisons every year – and 10 of them are just 10 years old.¹ More than half have not even been sentenced yet.²

These are some of the most vulnerable children in society.

Many have been abused or neglected during their short lives.³ Many have cognitive impairments.⁴

They need help and the protection of society.

Instead they are being put into juvenile detention centres.

This is an indictment on our nation. To quote Nelson Mandela:

“It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”⁵

It’s a matter of tremendous concern to the legal profession that two weeks ago the Council of Attorneys-General failed to commit to raising the minimum age of criminal responsibility.⁶

Our politicians are dragging their feet when we should be moving at lightning speed to change an unjust law which harms our children and does not make society safer. This is to be compared to the speed with which the Attorneys-General have agreed to reforms to defamation laws or the Federal Government tripping over itself to put out another version of the fundamentally flawed draft Religious Freedom Bill.

¹ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (Australian Government, Report, 2019) ‘Table S74b: Young people in detention during the year by age, states and territories, 2017-18’.

² Ibid 16. ‘On an average day in 2017–18, more than half of all young people in detention were unsentenced (60% or 588 young people)’.

³ Commission for Children and Young People Victoria, *The same four walls: Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system* (2017) 37; Queensland Family and Child Commission, *The Age of Criminal Responsibility*, 3. See also Australian Institute of Family Studies, *The Intersection between the child protection and youth justice systems* (Australian Government, Webpage, July 2018): ‘children and young people with a history of abuse or neglect are at increased risk of engaging in offending behaviours than those without a history of maltreatment.’

⁴ NSW Health and NSW Juvenile Justice, *2015 Young People in Custody Health Survey: Key findings for all young people* (2016).

⁵ United Nations, ‘Nelson Mandela International Day 18 July’, <https://www.un.org/en/events/mandeladay/mandela_rules.shtml>.

⁶ Council of Attorneys-General, *Communique* (29 November 2019, Adelaide) <<https://www.ag.gov.au/About/CommitteesandCouncils/Council-of-Attorneys-General/Documents/Council-of-Attorneys-General-communique-November-2019.pdf>>.

The science is clear

I accept this is not an easy issue for politicians to tackle.

But there is always public controversy over increasing the minimum age, especially in places where youth crime is high.

The evidence is clear: jailing children has a detrimental impact. It does not make our country safe but exacerbates the problem.

In June this year, Law Council Directors from around Australia unanimously voted to change the Law Council's policy in relation to the minimum age of criminal responsibility, resolving that no child under the age of 14 should be held criminally responsible.

Bringing the law in line with medical evidence

Raising the age to 14 would remove the need for courts to consider the confusing and complex "*doli incapax*" common law doctrine.

This states that anyone aged between 10-14 cannot be held responsible for a crime if they do not understand their behaviour is seriously wrong, unless the prosecution can demonstrate otherwise. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.

We know that this doctrine is leading to huge inconsistencies in different jurisdictions and it is incredibly difficult to use in a courtroom. On 18 June 2019, the Northern Territory Court of Appeal in *KG v Firth* [2019] NTCA 5 allowed an appeal in a case where the judge at first instance failed to properly apply the *doli incapax* doctrine in favour of a child.

For example, it is often difficult to determine whether a child knew that the relevant act was wrong unless he or she states this during police interview or in court. Therefore, to rebut the presumption, the prosecution has sometimes been permitted to lead highly prejudicial evidence that would ordinarily be inadmissible. In these circumstances, the Australian Law Reform Commission has noted the doctrine may not protect children but be to their disadvantage.⁷

⁷ Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, (Report No 84, September 1997) [18.19].

This doctrine is leading to children being held in custody for lengthy periods of time before the presumption can be led or tested in court, and the child acquitted.⁸

Removing the “*doli incapax*” doctrine would be consistent with research-based evidence and medical consensus on brain development.

This supports a higher age as children are not sufficiently able to reflect before acting or comprehend the consequences of a criminal action.

Their brains, like their bodies, are experiencing significant growth and development such that they may not have the required capacity to be criminally responsible.⁹

The part of the brain that governs a child’s reasoning, impulsivity and consequential thinking is most affected.¹⁰

We are tearing children away from their families, support networks and communities at a key moment in their lives.

Maturity takes time and we recognise that in almost every other facet of life.

For instance, you cannot apply for a Medicare card until you are 15.¹¹

You cannot fly alone on the Qantas plane that brought me to Canberra until you are 13.¹²

And in Queensland it is a criminal offence for a parent or guardian to leave a child under the age of 12 on their own.¹³

⁸ Kate Fitz-Gibbon and Wendy O’Brien, ‘A Child’s Capacity to Commit Crime: Examining the Operation of *Doli Incapax* in Victoria (Australia)’ 8(1) *International Journal for Crime, Justice and Social Democracy* 18, 26.

⁹ Chris Cunneen, ‘Arguments for Raising the Minimum Age of Criminal Responsibility’ (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) 11; Thomas Crofts, ‘A Brighter Tomorrow: Raise the Age of Criminal Responsibility’ (2015) 27(1) *Current Issues in Criminal Justice* 123; Enys Delmage, ‘The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective’ (2013) 13(2) *Youth Justice* 102.

¹⁰ Ibid, quoting Nicholas Lennings and Chris Lennings, ‘Assessing Serious Harm Under the Doctrine of *Doli Incapax*: A Case Study’ (2014) 21(5) *Psychiatry, Psychology and Law* 791, 794.

¹¹ Department of Human Services, *How to get your own Medicare card at 15 years old* (Web Page, July 2019) <<https://www.humanservices.gov.au/individuals/services/medicare/medicare-card/how-get-your-own-card-15-years-old>>.

¹² Qantas, *Unaccompanied minors* (Web Page) < <https://www.qantas.com/au/en/travel-info/children/unaccompanied.html>>.

¹³ *Criminal Code Act 1899* (Qld) s 364A.

How can it be that a child can't join Facebook until 13 but in Australia they can be locked up like caged animals in a Queensland watchhouse.¹⁴ Is this who we are as a nation? Is this how we treat our children?

Our international obligations

Our laws are also out of step with international human rights standards.

We have signed up to the United Nations Convention on the Rights of the Child.

This has resulted in the Committee on the Rights of the Child twice calling on Australia to raise its age of responsibility first to 12 and more recently to 14.¹⁵

So far we have ignored these calls.

We are also out of step with the rest of the world. Elsewhere, the average age for detaining children is 12,¹⁶ and in Europe it rises to 14.¹⁷

Scandinavian countries such as Finland and Norway have embraced a different model for their children.

That model is strongly focused on prevention and dealing with wrongful behaviour outside of the courts and prisons. It means children under the age of 15 can be detained by police for a short time but cannot be remanded in custody.¹⁸

¹⁴ Lydia Lynch, *Children 'held like animals' in Brisbane watchhouse denied pencils, pens*, Brisbane Times (Online, May 15 2019) <<https://www.brisbanetimes.com.au/national/queensland/children-held-like-animals-in-brisbane-watchhouse-denied-pencils-pens-20190514-p51nc0.html>>: 'Ms Siegel-Brown told the ABC's *Four Corners* that the children were being "held like caged animals in concrete pens".'

¹⁵ See Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005); Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention – Concluding Observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012). See also United Nations Committee on the Rights of the Child, *General Comment No 24 on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fGC%2f24&Lang=en>.

¹⁶ UNICEF, *Youth Policy Working Paper* (2016) <http://www.youthpolicy.org/library/wp-content/uploads/library/2016_YPL_Working_Paper_4_Age_Matters_Eng.pdf>; Riley Morgan, 'How young is too young? The age of criminal responsibility around the world', *SBS News* (online), 22 November 2017 <<https://www.sbs.com.au/news/how-young-is-too-young-the-age-of-criminal-responsibility-around-the-world>>.

¹⁷ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) quoting Barry Goldson 'Unsafe, unjust and harmful to wider society: grounds for raising the minimum age of criminal responsibility in England and Wales' *Youth Justice*, 13(2) (2013) 111-130.

¹⁸ Anette Storgard, 'Juvenile Justice in Scandinavia' (2006) 5:2 *Journal of Scandinavian Studies in Criminology and Crime Prevention* 188 <<https://www.tandfonline.com/doi/abs/10.1080/14043850410028703>>.

Germany has chosen to employ a social welfare response to address children under the age of 14.¹⁹

Children who commit unlawful acts there are the responsibility of parents, schools as well as state children and youth services.

Children under the age of 16 in Portugal who commit a crime cannot be sent to jail.²⁰ It does not have a juvenile criminal law and anyone deemed to have committed an adult offence is educated on the country's values, and assessed for what social and educational help they need to be rehabilitated.²¹

I am not suggesting today that we need to follow Portugal or Norway's path.

But why are we here in Australia so resistant to change? Change that I would say most Australians would agree with.

There is a feeling perpetuated by some that young people are terrorising our communities.

Of course, there are some very young people that commit very serious offences, but their numbers are tiny.²²

The majority of children that get caught up in the criminal justice system are charged for offences of theft, burglary and property related crime.²³

¹⁹ Senator Will Brownsberger, *Young Adults in the German Criminal Justice System* (Web Page, 2018) <<https://willbrownsberger.com/young-adults-in-the-german-criminal-justice-system/>>; European Commission, *Study on children's involvement in judicial proceedings Contextual overview for the criminal justice phase – Germany* (June 2018) 18

<<http://www.childreninjudicialproceedings.eu/docs/ContextualOverview/Germany.pdf>>; Vincent Schiraldi, 'In Germany, It's Hard to Find a Young Adult in Prison', *The Crime Report* (10 April 2018) <<https://thecrimereport.org/2018/04/10/in-germany-its-hard-to-find-a-young-adult-in-prison/>>.

²⁰ International Juvenile Justice Observatory, *Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends* (2013) <http://www.oijj.org/sites/default/files/baaf_portugal1.pdf>.

²¹ Ibid.

²² Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology, Trends and issues in crime and criminal justice, 2011) <<https://aic.gov.au/publications/tandi/tandi409>>.

²³ Australian Bureau of Statistics, *Criminal Courts Australian 2016-2017* (2018) 'Table 5 Defendants finalised by sex and age by principal offence and court level' <<http://www.abs.gov.au/AUSSTATS/abs@.nsw/DetailsPage/4513.02016-17?OpenDocument>>.

Murder and sexual offences are rarely carried out by juveniles.²⁴

I want to be very clear: we believe children under 14 should be held accountable for their actions, but they should not be held criminally responsible and sent to jail.

For instance accountability may involve a child being taken before the Family Court, who can impose supervision or care orders. If a child commits an act that constitutes an offence and they have no family support then they could be placed under the supervision of a specialist team and placed in accommodation where they can be cared for and rehabilitated. Crucially this process could be all handled through care proceedings rather than criminal proceedings.

Long term costs of jailing children

When we look overseas in countries where the age of responsibility is 14 or higher, research shows 'there are no negative consequences in terms of crime rates'.²⁵

What is of huge consequence is the tremendous waste of money we spend incarcerating children.

On average, it costs roughly \$531,000 per year to keep a young person in juvenile detention.²⁶ In 2017-2018 youth detention involved a staggering total government spend in Australia of more than \$509 million.²⁷

Surely this money could be better spent on addressing the causes that lead children to commit crimes. We should be investing in prevention, early intervention and programs that prevent future offending instead of doing the same old thing.

Research clearly shows the younger a child is when first having contact with youth justice, the more likely they will become entrenched in the justice system.

The statistics should put us all to shame.

²⁴ Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (Australian Institute of Criminology, Trends and issues in crime and criminal justice, 2011) <<https://aic.gov.au/publications/tandi/tandi409>>.

²⁵ Chris Cunneen, 'Arguments for Raising the Minimum Age of Criminal Responsibility' (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) quoting Dunkel (1996) 38.

²⁶ Nationally in 2017-18, the average cost per day per young person subject to detention-based supervision was \$1455: Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, ch 17, 17.25.

²⁷ Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, ch 17, Table 17 A.8.

Adult prisoners have a reoffending rate of about 50 per cent,²⁸ which is bad enough, but in Victoria it's 84 per cent for 13 to 14 year-olds and 86 per cent for 10 to 12 year-olds.²⁹

But let me be clear at this point: there is one community that is bearing the brunt of this brutal policy.

Aboriginal or Torres Strait Islander youngsters aged between 10 and 17 are 23 times more likely to be in detention than non-Indigenous young people.³⁰

Almost all young people detained in the Northern Territory are Aboriginal or Torres Strait Islander children,³¹ and there was a point in 2018 when all were Indigenous.³²

If we are to tackle this national shame, we need to listen to and support those who know the most about how the laws and policies impact their own communities. For this reason, the Law Council is deeply troubled by the reported decision to defund the National Family Violence Prevention and Legal Services Forum by the government.³³

At a time when there are increasing calls for a stronger Aboriginal and Torres Strait Islander Voice, this decision risks silencing a service that has dedicated itself to ensuring the voices of Aboriginal and Torres Strait Islander women and children who have experienced family violence are heard and their experiences are made visible at the national level.

²⁸ Australian Productivity Commission, Steering Committee for the Review of Government Service Provision, *Report on Government Services 2019* (2019) Part C, Table CA.4.

²⁹ Victorian Sentencing Advisory Council, *Reoffending by Children and young People in Victoria* (2016) 26 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Reoffending_by_Children_and_Young_People_in_Victoria.pdf>.

³⁰ Australian Institute of Health and Welfare, *Youth Justice in Australia 2017–18* (2019) 9. This also states that Aboriginal and Torres Strait Islander young people were 17 times more likely than non-Indigenous young people to be under supervision (which encompasses both community-based supervision and detention).

³¹ *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Interim Report, March 2017) 9.

³² See, eg, Lorena Allam, 'All children in detention in the Northern Territory are Indigenous', *Guardian* (online, 26 January 2018) <<https://www.theguardian.com/australia-news/2018/jun/25/all-children-in-detention-in-the-northern-territory-are-indigenous>>.

³³ Julia Holman, *Morrison Government defunds Indigenous domestic violence body* (online, 6 December 2019) <<https://www.abc.net.au/radio/programs/am/morrison-government-defunds-indigenous-domestic-violence-body/11772656>>.

I am deeply troubled that it sends a message that the government does not want the public to hear the concerns of vulnerable Australians about how government policies are placing them at risk. In order to govern on behalf of all Australians, it is imperative that the government take into account the views of all Australians, including and importantly our most vulnerable before making decisions which impact on their lives. That is the least we can do as a mature and responsible democracy – we should not be shutting down views being publicly expressed because it criticises government policies.

Not a moment to delay

In conclusion, we must not forget the 600 children under the age of 14 who are currently locked up in detention across Australia every year.³⁴ I still reflect on the faces of the children I met at Don Dale and what their future will hold for them. In fact, if I am being honest, it haunts me.

The final report of the Royal Commission into the Protection and Detention of Young People in the Northern Territory found that the government must get children aged between 10 and 13 out of detention and into programs designed to address their underlying issues.³⁵

That report was released more than two years ago and nothing has been done.

Why? I believe in speaking plainly. It is pure cowardice. It is because the politicians in the Northern Territory are worried about the perception of being seen to be “weak on crime”. However, the politicians in the Northern Territory are not the only ones worried about the perception of being seen to be weak on crime if they alter the policy on the minimum age of criminal responsibility. This problem exists across the nation because regrettably, some of our politicians fail to understand that their role is to lead, not to be covered by those who shout the most on law and order issues. Children should not be used as a political football in law and order auctions by our politicians.

We need to convince our politicians to urgently address the acute welfare needs that many of our children are facing on a daily basis.

³⁴ Per annum, rounding to the nearest whole figure and based on the latest available data: Australian Institute of Health and Welfare, *Youth Justice in Australia 2017-18* (Australian Government, Report, 2019) ‘Table S74b: Young people in detention during the year by age, states and territories, 2017-18’.

³⁵ *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017), 418; *Report Overview*.

We need to reframe the argument away from a political debate on law and order and keep offering up evidence-based solutions that deal with the root cause of these social issues which demonstrates that what we are proposing will make the community safer.

But what we can and must do now is raise the minimum age we imprison children to 14.

Each day that goes by sees another child being charged or detained who should not have been dragged into the criminal justice system. I would urge our politicians to take heed of another quote from Nelson Mandela whilst they are privileged to hold public office for either a short time or long time:

*“We must use time wisely and forever realise that the time is always ripe to do right”*³⁶

Thank you.

³⁶ The Commonwealth, *Pacific governments to give youth a say in climate and development decisions* (online, 4 September 2015) <<https://thecommonwealth.org/media/press-release/pacific-governments-give-youth-say-climate-and-development-decisions>>.

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Marcus Priest

Director, Public Affairs and Communications

T. 02 6246 3715

E. Marcus.Priest@lawcouncil.asn.au