

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF  
WESTERN AUSTRALIA

BETWEEN:

**ROBERT CHRISTOPHER JAMES PICKETT**

Appellant

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and

**THE STATE OF WESTERN AUSTRALIA**

Respondent

### APPELLANT'S SUBMISSIONS

#### Part I:

- 20 1. These submissions are in a form suitable for publication on the internet.

#### Part II:

2. The appellant and 5 other males were convicted in the Supreme Court of Western Australia of murder, contrary to s279 of the *Criminal Code* (WA) ('the Code'). At the time the offence was alleged to have been committed the 5 males were part of a larger group comprising 8 males, which included 3 juveniles (PM, TSM and JW).
3. The prosecution case was that one, and only one, of those males (other than JW) was guilty of murder as the principal offender under s7(a) of the Code. It was reasonably possible that the principal offender was PM who was 11 years of age at  
30 the time of the alleged offence. The prosecution alleged that the males who may not have been the principal offender, which included the appellant, were guilty of murder only by operation of ss7(b), (c) or 8 of the Code.

4. There was no evidence adduced at the appellant's trial relevant to the question of whether PM had the necessary capacity for the purposes of s29 of the Code.
5. Was it necessary for the State to prove at the appellant's trial that PM had capacity for the purposes of s29 of the *Criminal Code* (WA) in order to prove that the appellant was guilty of murder by operation of ss7(b), 7(c) or 8 of the Code?

**Part III:**

6. Notice is not required to be given in compliance with section 78B of the *Judiciary Act 1903* (Cth).

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**Part IV:**

7. The internet citation of the reasons for judgment of the Court of Appeal is *Birdsall v The State of Western Australia* [2019] WASCA 79

**Part V:**

8. On 27 January 2016, Patrick Steven Slater ('the deceased') died as a result of a stab wound that was inflicted in the course of an attack on the deceased by a group of eight males (Joint Core Appeal Book 'AB' 158.09; Court of Appeal 'CA' decision [1]-[2]).
- 20 9. Each of the eight males was charged with the deceased's murder (AB 158.18; CA [3]).
10. Their ages ranged from 11 years to 29 years (AB 158.15; CA [2]).
11. One of the males, PM, who was 11 years old, was tried separately in the Children's Court of Western Australia. The other seven males were tried in the Supreme Court of Western Australia (AB 158.21; CA [4]).
12. On 29 May 2017, the seven males were arraigned and pleaded not guilty to murder (AB 158.25; CA [5]).

13. On 31 May 2017, one of the seven males (JW), who was aged 14 at the time of the offending, pleaded guilty to manslaughter. The State accepted that plea (AB 158.29; CA [5]).
14. The remaining six males were Christopher Birdsall, Clinton Mead, Dylan Anthony, Robert Pickett, Stefan Mead and TSM (AB 158.34; CA [6]).
15. They were all adults except for TSM, who was 17 years at the time of the offending (AB 158.50; CA [7]).
16. On 11 July 2017, after a trial before Martino J and a jury, each of the remaining six males were convicted of murder (AB 158.53; CA [8]).
- 10 17. Each of the males, except for Christopher Birdsall, appealed to the Court of Appeal against their conviction (AB 159.40; CA [12]-[14]).
18. Later PM was tried before the President of the Children's Court of Western Australia. He was acquitted of murder but convicted of manslaughter (AB 159.36; CA [11]).
19. The facts relevant to this appeal may be summarised as follows.
20. In the early hours of 27 January 2016, there were three altercations involving two groups of people (AB 160.11; CA [18]).
21. The deceased was fatally stabbed during the third altercation (AB 159.58-160.13; CA [17]-[18]).
- 20 22. The first altercation occurred at about 2.45am and lasted for about 5 minutes (AB 160.24, CA [19]).
23. During the first altercation, a member of the deceased's group, Barney Brockman, produced a tomahawk, later striking Robert Pickett on the back of the head with it (AB 160.29-160.35; CA [19]).
24. The deceased produced a machete but did not strike or threaten anyone with it (160.31; CA [19]).
25. The second altercation began about fifteen minutes after the first (AB 160.44; CA [20]).

26. During the second altercation, TSM armed himself with a pole, JW with rocks and PM with a bottle. The members of the two groups threw rocks and pieces of concrete at each other (AB 160.48; CA [20]).
27. The deceased and his group ran up the escalators or stairs to the first floor of The Esplanade Train Station Complex (AB 160.57; CA [20]).
28. Some of the eight males threw objects towards the deceased and Barney Brockman. None of the objects struck anyone (AB 160.60-161.08; CA [20])
29. The third altercation began shortly before 3.30am (AB 161.25; CA [22]).
30. The eight males went up the escalators or stairs to the first floor of the Esplanade Train Station Complex in pursuit of the deceased (AB 161.25; CA [22]).
31. CCTV footage at the complex captured the eight males carrying various weapons or objects as they went up the escalators or stairs, as follows:
  - a. Clinton Mead was the first member of the appellants' group who went up the escalators. He was carrying a metal star picket in his right hand and a rock or other large object in his left hand. He threw the rock in the deceased's direction (AB 161.35; CA [23]);
  - b. Christopher Birdsall was the first member of the appellant's group who went up the stairs. He had a bottle in his right hand which he threw in the deceased's direction (AB 161.40; CA [23]);
  - c. Stefan Mead was next up the stairs. He had an object in his left hand and reached into his right-hand pocket to retrieve an object, the nature of which was unclear (AB 161.45; CA [23]);
  - d. Robert Pickett was next up the stairs. He reached into his right-hand back pocket with his right hand and retrieved an object that appeared to be flat. He was holding pieces of blue and white cloth in his other hand (AB 161.50; CA [23]);
  - e. TSM was carrying what appeared to be a bottle in one hand and another object in his other hand (AB 161.53; CA [23]);
  - f. PM was carrying a bottle in his right hand and a long silver object, described as a socket bar, in his left hand (AB 161.56; CA [23]);

g. Dylan Anthony was carrying a long wooden pole in his right hand (AB 161.58; CA [23]);

h. JW had a rock or something similar in each hand (AB 162.08; CA [23]).

32. As the eight males made their way up the first floor of the complex, the deceased ran across a concrete concourse towards a grassed area. The males chased the deceased and caught up with him, where they assaulted him. There was CCTV footage of the chase but not the assault. The duration of the assault was about 50 seconds. (AB 162.10-162.19; CA [24])

10 33. During the assault, Christopher Birdsall kicked the deceased to the head and other parts of the body. Clinton Mead struck the deceased with the metal star picket. Dylan Anthony struck the deceased with the long wooden pole. Other assaults were inflicted on the deceased who suffered 23 external injuries, including the fatal stab wound, lacerations, abrasions and bruises (AB 162.21-162.28; CA [25]).

34. One of the eight males used a screwdriver to inflict the fatal stab wound to the deceased's chest. The length of the wound track was 25cm. The screwdriver pierced the deceased's aorta and both lungs. He bled to death and died very quickly (AB 162.31-162.38; CA [26]).

35. After the deceased was assaulted, the eight males fled towards the escalators and stairs (AB 162.40; CA [27]).

20 36. CCTV footage showed that as they were descending the stairs, Robert Pickett was carrying a piece of red cloth under his left arm and PM was carrying the socket bar and a screwdriver (AB 162.53; CA [29]).

37. Some members of the group headed towards a construction site at Elizabeth Quay, where police later found various items including a socket bar and a screwdriver (AB 162.58-163.08; CA [29]-[30]).

38. Martino J found that PM carried the screwdriver away from the scene and down the stairs (AB 222.50; CA [288]).

30 39. His Honour was unable to find who took the screwdriver to the first floor of the complex (CA [287]) or who had fatally stabbed the deceased (AB 223.07; CA [290]).

**Part VI:**

40. As already noted above, the appellant and 5 other males were tried in the Supreme Court of Western Australia on a charge of murder, contrary to s279 of the *Criminal Code* (WA) (the Code). At the time the offence was alleged to have been committed the 5 males were part of a larger group comprising 8 males, which included 3 juveniles (PM, TSM and JW).<sup>1</sup>

41. The prosecution case was that one, and only one, of those males (other than JW) was guilty of murder as the principal offender under s7(a) of the Code. However, it is not in dispute that it was reasonably possible that the principal offender was PM, who was 11 years of age at the time of the alleged offence. The prosecution alleged that the males who may not have been the principal offender, including the appellant, were guilty of murder only by operation of ss7(b), (c) or 8 of the Code.

42. Because PM was under the age of 14 years, but over the age of 10 years, s29 of the Code was relevant to the question of his criminal responsibility. Section 29 relevantly provides that “a person under the age of 14 years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.”

43. At the appellant’s trial the prosecution led no evidence relevant to PM’s capacity. Further, proof that PM had the relevant capacity could not be established merely by the drawing of an inference from the nature of the act or acts constituting the offence, ‘no matter how obviously wrong the act or acts constituting the offence may be.’<sup>2</sup> The jury was not directed that it needed to consider the issue despite the fact that submissions were made to the trial judge that those directions were required.

44. The respondent accepted in the CA that if the State was obliged to prove at the appellant’s trial that PM had capacity pursuant to s29 of the Code then the appeal

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<sup>1</sup> Only TSM was tried in the Supreme Court with the other adult males. JW pleaded guilty to a charge of manslaughter after the trial commenced. PM was tried in the Children’s Court of Western Australia and was convicted by a judge of that court of the offence of manslaughter.

<sup>2</sup> *RP v R* [2016] HCA 53, (2016) 259 CLR 641 at [9] (Kiefel, Bell, Keane and Gordon JJ), and similarly at [38] (Gageler J).

should be allowed and that there was no room for the application of the ‘proviso’ ( AB 173.36; CA [86]).

45. Section 279 is found in Chapter XXVIII of the Code, and it proscribes the circumstances in which an unlawful killing of another human being will constitute the offence of murder (relevantly in this case, an unlawful killing done by a person who intends to kill or cause life threatening injury to the person killed). Section 268 of the Code provides that it is unlawful to kill any person unless such killing is authorised or justified or excused by law. Section 270 sets out when a person is deemed to kill another person. Section 277 provides that a person who unlawfully kills another person is guilty of the crime of either manslaughter or murder, depending on the circumstances of the case.
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46. Other provisions of the Code provide for authorisations, justifications or excuses for acts or omissions that would otherwise constitute offences, including homicide offences, including those provisions in Chapter V that are concerned with when a person will not be ‘criminally responsible’ for an act or omission that would otherwise constitute an ‘offence’.
47. As such, the combined effect of ss 29, 277 and 279 is that a child aged 10 or over but under 14 who kills another person is not criminally responsible for doing so, and thus is at least excused and commits no offence, unless their section 29 capacity is proved beyond reasonable doubt, because the act causing the death is excused by law.
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48. The appellant argued in the CA that the trial judge made a wrong decision on a question of law by failing to direct the jury that he could not be found guilty of murder if the jury could not exclude beyond reasonable doubt that PM was the person who inflicted the injury that caused the death of the deceased.
49. The appellant submitted that proof that any of the five accused was guilty of an offence by virtue of s7(b) or (c), or s8, of the Code required proof, as against the particular accused, that the person who fatally stabbed the deceased *committed that offence*. If PM did the acts that constituted the offence, but the prosecution did not prove that he was criminally responsible for those acts because he had the capacity to know that he ought not to have done them (s29 of the Code), then it followed
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that on a proper construction of ss7(b), (c) and 8 of the Code<sup>3</sup> the appellant could not be found guilty of that offence (AB 166.40; CA [47]-[48]). This is because it is a necessary precondition to the operation of both ss7 and 8 that ‘an offence is committed’.<sup>4</sup> An offence would not have been committed by PM if he was not proved to have been criminally responsible.

10 50. As Beech JA identified (AB 246.48; CA [394]) the issue to be determined by the CA was whether the liability of a person for an offence under ss7(b), (c) or (d), or s8, of the Code, which only arises when ‘an offence is committed’, depends on the criminal responsibility of the person (or one of the persons) who actually did the act(s) or made the omission(s) that constitutes that offence (usually referred to as ‘the principal’). This issue raised a question of the proper construction of those provisions and, in particular, their relationship with the provisions relating to criminal responsibility set out in Chapter V of Part 1 of the Code.

20 51. The majority concluded that if the person who actually did the act(s) that caused the death of the deceased was not criminally responsible, because of the operation of s29 of the Code, then that conclusion did not preclude the appellant from being found to be liable for the deceased’s death under ss7(b), 7(c) or 8 of the Code, or from being convicted of murder. Specifically, the majority were satisfied that even if PM (who was 11 years of age at the time) was the person who inflicted the fatal wound to the deceased, the State was not obliged to prove that PM was criminally responsible because he had capacity under s29 of the Code in its case against the appellant (AB 199.31; CA [193] and [194]). It was on this basis that the majority concluded that the trial judge did not make a wrong decision on a question of law, that the ground of appeal had therefore not been made out (AB 199.58; CA [195] and [196]), and dismissed the appellant’s appeal against conviction.

52. As will be further explained below, the critical conclusions that were reached by the majority about the proper construction of ss7, 8 and 29 of the Code were that:

- a. Sections 7 and 8 are ‘not concerned with the criminal responsibility of any person who is a party to an offence [or] ... of any of the persons who have

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<sup>3</sup> The prosecution case was that if the appellant did not inflict the fatal wounds on the deceased then he was guilty of murder by operation of ss7(b), (c) or (d), or s8 of the Code.

<sup>4</sup> The words ‘when an offence is committed’, and ‘an offence is committed’, are found in the chapeau to s7 and in the body of s8(1), respectively.

formed a common intention to prosecute an unlawful purpose in conjunction with one another', and criminal responsibility is dealt with in Chapter V of the Code (AB 192.56-193.19; CA [164]-[165]).

- b. By operation of s36 of the Code, the provisions of Chapter V operate to excuse a person who would otherwise be criminally responsible for an act or omission. In particular, s29 of the Code confers on a child between the ages of 10 and 14 years a 'personal exemption or immunity from criminal responsibility for an act or omission' (AB 193.20-197.50; CA [166]-[184]).

- 10 53. On the other hand, Beech JA found that if a person who did the act<sup>5</sup> that constituted an offence was not criminally responsible because of the application of any of the provisions in Chapter V of Part 1 of the Code (which included s29) then that person will not have committed an offence. In those circumstances the preconditions for the operation for ss7 and 8, namely that 'an offence is committed', could not be established and, as a result, no person could be found to have committed the offence by operation of any of s7(b), (c), or (d), or s8 (AB 254.55; CA [422]).
54. The appellant adopts the conclusion reached by Beech JA, and His Honour's reasons for reaching that conclusion, and submits that the majority's conclusions are erroneous.
- 20 55. The proper approach to the construction of the Code is well-established. Those principles were identified by the majority (AB 178.19-179.42; CA [103]-[108]) and by Beech JA (AB 255.40-255.51; CA [424]-[425]). No issue is taken by the appellant that those principles were accurately identified. The issues raised by the ground of appeal concerns the correct application of those principles to the relevant provisions of the Code.
56. In the CA it was uncontroversial that in order for a person to be convicted of an offence under ss7(b), (c) and (d), and under s8, of the Code the prosecution must prove that a person (or persons) actually engaged in the conduct constituting the elements of the relevant offence (AB 179.43-181.16 and 252.30; CA [109]-[113] and [416]). This necessarily follows from the text of those provisions, which

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<sup>5</sup> At footnote 138 of the reasons of Beech JA it was noted that the discussion about the proper construction of the relevant provisions of the Code were expressed in terms of an 'act', but that the same analysis applied in respect of offences constituted by the making of an omission.

provides that it is a necessary pre-condition to the operation of both ss7 and 8 that 'an offence is committed'.

57. The question that is raised in this appeal is concerned with the proper construction of the words 'an offence is committed' specifically in relation to whether 'an offence is committed' for the purposes of ss7(b), (c) and (d), and s8 in circumstances in which the prosecution fails to prove that the person who may have 'committed' the offence was 'criminally responsible' for the act or omission constituting the offence of murder because he had the capacity referred to in s29 of the Code.

10 58. A necessary starting point for the determination of this issue is s2 of the Code, which provides that:

An act or omission which renders the person doing the act or making the omission liable to punishment is called *an offence*. (emphasis added)

59. As Beech JA observed (AB 256.30. [CA [428]]), s2 is a definition of a distinctive kind because, unlike the various definitions that are set out in s1, which are expressed to 'mean' something, it provides for what is 'called' an offence. This distinction indicates that the definition in s2 is not to be inserted into the other provisions in the Code wherever the word 'offence' appears. Rather, the purpose of the definition in s2 is make it clear that offences are constituted by the acts or omissions described in the various offence creating provisions in the Code. What is significant is that the relevant act of omission must also render the person who did the act or made the omission 'liable to punishment', before it can be 'called an offence'.

20 60. By s1 of the Code, the term 'criminally responsible' is defined to mean 'liable to punishment as for an offence', and the term 'criminal responsibility' is defined in as 'liability to punishment as for an offence'. It can be seen from this that both the definition of 'offence' in s2, and the definitions of 'criminally responsible' and 'criminal responsibility', use the phrase 'liable to punishment'.

30 61. Many of the provisions in Chapter V of Part 1 of the Code are directly concerned with the issue of 'criminal responsibility', in particular ss 22, 23(2), 23A, 23B, 24, 25, 27, 29, 30, 31, 32 and 34. There are also some other provisions in the Code that provide that a person is not criminally responsible for acts or omission in the

context of specific offences: ss 228, 229, 230, 246, 248, 259, 305, and 441.<sup>6</sup> What each of these provisions have in common is that they are all concerned with whether a person is criminally responsible for *acts* and *omissions*, albeit in different prescribed circumstances.

62. The effect of these provisions is that when they apply,<sup>7</sup> and a person is not 'criminally responsible' for doing an act or making an omission, the person is also not 'liable to punishment as for an offence'. That this is so follows from the effect of the definition of 'criminally responsible' in s1 of the Code.

10 63. If a person is *not* 'liable for punishment as for an offence', because they are not criminally responsible for an act or omission, it also follows that the same act or omission will not constitute an 'offence' for the purposes of s2. In those circumstances a necessary part of what is, by force of s2, called an offence (namely an act or omission that renders a person liable for punishment) will not have been established. It also means that an offence will not have been 'committed'.<sup>8</sup>

20 64. This means that in circumstances in which a person who did an act or made an omission that would otherwise have constituted an offence, but was not criminally responsible for that act or omission, the pre-condition for the operation of s7, '[w]hen an offence is committed', would not be engaged. Accordingly, *that* person would not be 'deemed to have taken part in committing the offence and be guilty of the offence', by operation of s7(a). Further, no other person could be affected by the deeming operation of ss7(b), (c) or (d) and, in particular, would not be deemed to have committed the offence.

65. For the same reasons, no person could be deemed to have committed an offence by the application of s8 in those circumstances, it also being necessary in that context to establish that 'an offence is committed' before the deeming effect of s8 can operate.

66. The above is essentially a re-formulation of Beech JA's preferred construction, which appears at AB 254.53 and 258.23; CA [422] and [434]. As Beech JA

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<sup>6</sup> See also s281.

<sup>7</sup> More accurately, when there is an evidentiary foundation for them to be engaged, and the prosecution fails to prove that they do not apply beyond reasonable doubt (with the exception of s27, pursuant to which an accused bears the onus of proof).

<sup>8</sup> The word 'committed' is not defined in the Code.

reasoned, that construction is supported by textual and contextual considerations, and by what was said by the plurality in *Pickering v The Queen* [2017] HCA 17; (2017) 260 CLR 151 (AB 255.21-274.2; CA [423]-[493]), which reasons the appellant respectfully adopts.

67. The following textual and contextual considerations were identified by Beech JA as supporting his preferred construction of ss7 and 8:

- a. The use of the phrase ‘as for an offence’, in the definition of ‘criminal responsibility’ in s1 of the Code, indicates that any issue of criminal responsibility needs to be determined in order to inform whether an offence has been committed. It connects the common phrase ‘liable for punishment’ in the definitions of ‘offence’ and ‘criminal responsibility’, such that ‘an offence is committed where a person does an act (accompanied by prescribed circumstances, result or state of mind, as stipulated in the offence-creating provision) for which they are criminally responsible’ (AB 257.35-258.55; CA [431]-[435]).
- b. In accordance with what was said by the plurality in *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1, an ‘offence’ for the purposes of ss7 and 8 from the *Criminal Code* (Qld) involves ‘a conduct element, in combination with all or some of circumstances, intent or result elements, which, together, attract liability to punishment’ (AB 259.18; CA [436]). The various provisions of Part V of the Code are concerned with criminal responsibility for one or more of those elements, and not for an offence, suggesting that whether an offence has been committed depends on whether the person committing the offence was criminally responsible (AB 259.1-259.38; CA [436]-[437]).
- c. The inclusion of the final paragraph of s7 of the Code, which applies in circumstances in which a person commits an offence by the use of an ‘innocent agent’ (AB 259.40-261.18; CA [438]-[444]), including where he or she lacks criminal responsibility.<sup>9</sup>

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<sup>9</sup> For example, by reason of immature age. See also AB 272.21-AB273.1; CA [487]-[490].

68. It is also important to take s7(a) into account as part of the contextual considerations. In accordance with that provision, '[e]very person who actually does the act or makes the omission which constitutes the offence' is also 'deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it'. However, even though s7(a) proceeds on the basis that the person actually did the act or made the omission, and was not a person who might be liable as an accessory, the deeming effect of s7 does not apply unless 'an offence is committed'.

10 69. There is no footing in the text of s7(a) for the issue of criminal responsibility to be considered. Section 7(a) is only concerned with identifying *who* may be affected by its operation. It follows that the question of whether a person 'who actually does the act or makes the omission which constitutes the offence' is criminally responsible must fall to be determined in the context of the introductory words of s7, '[w]hen an offence is committed'. This strongly supports the construction favoured by Beech JA, namely, that a person may be liable under ss7(b), (c) and (d), and s8, of the Code only if the person who did the act constituting the offence was criminally responsible for the doing of that act.

20 70. The construction of ss7 and 8 of the Code contended for by the appellant finds support in the following observations that were made by Gageler, Gordon and Edelman JJ in *Pickering v The Queen* [2017] HCA 17; (2017) 260 CLR 151 at [40]:

Section 31(1) [of the *Criminal Code* (Qld)] relevantly provides that a person is "not criminally responsible" for an act if the person does that act in one of the specified circumstances. That is, in relation to that act, they are not "liable to punishment as for an offence". "[O]ffence" is relevantly defined as an act which renders the person doing the act liable to punishment. It necessarily follows that an act done in one of the circumstances specified in s 31(1) is not an offence; the act does not constitute an offence.

30 71. Section 31(5) of the *Criminal Code* (Qld) is a provision found in Part 5 of that statute, concerned with prescribing a circumstance in which a person will not be criminally responsible for an act or omission. The references in the joint judgment to phrases such as 'criminally responsible', 'liable to punishment as for an offence', and 'offence', were references to definitional provisions relevantly identical to those in the Code.

72. Although the issue to be determined in *Pickering* did not concern ss7 or 8 of the *Criminal Code* (Qld), as Beech JA concluded (AB 264.1; CA [455]) what was said at [40] of the joint judgment about the meaning of ‘offence’, in the context of the meaning of ‘criminal responsibility’, is of general application. It confirms that those meanings are connected by the question of whether a person is liable to punishment. If a person is not criminally responsible for an act or omission, and is therefore nor liable to punishment, it follows that the act or omission is not an ‘offence’, and an offence will not have been committed.
- 10 73. Insofar as it may be contended that what was said by Kiefel CJ and Nettle J in *Pickering* at [21] does not support the construction contended for, the appellant refers to and relies on what was said by Beech JA at AB 265.1; CA [458]).
74. Twelve reasons were given by the majority for reaching the conclusion that a person who is alleged to be guilty of an offence pursuant to ss7(b) or (c), or s8, of the Code can be guilty of that offence even though the prosecution did not prove that the alleged principal offender had capacity at the material time under s29 of the Code (AB 190.35 to 199.8; CA [155] to [190]).
- 20 75. Subject to what is set out below, there is nothing controversial about the first 5 of those reasons set out at AB 191.1-192.54; CA [156]-[163]. In any event none of those reasons, based on established principles, are independently capable of affecting the proper construction of ss7 or 8.
76. In relation to the first reason (AB 191.3; CA [156]), and the majority’s reliance on the plurality in *R v Barlow* [1997] HCA 19; (1997) 188 CLR 1, it is accepted that the word ‘offence’ as used in the Code is ‘used to denote the element of conduct (an act or omission) which, if accompanied by prescribed circumstances, or if causing a prescribed result or if engaged in with a prescribed state of mind, renders a person engaging in the conduct liable to punishment’. However, the plurality in *Barlow* repeatedly refers to the requirement that the act that s8 of the Code attributes to the secondary party or parties is one which renders the principal

offender *liable to punishment*.<sup>10</sup> Where such an act does not render the person liable to punishment, it is not an offence, and no derivative liability can then attach.

77. In the second reason the majority said at AB 191.30; CA [158] that “[a]n offence is committed, for the purposes of s 7(b), s 7(c) or s 7(d), when the relevant acts or omissions by ‘the aider’ or ‘the counsellor or procurer’ and ‘the principal’ ... occur, and not when ‘the principal’ is convicted”. If, by that reason, the majority construed the introductory words in s7, ‘[w]hen an offence is committed’, to include the acts or omissions of an aider or a counsellor or procurer, then it is submitted that the majority also erred in that regard.<sup>11</sup>

10 78. While the acts or omissions of an aider or a counsellor or procurer are clearly critical in determining whether s7 operates, ss7(b), (c) and (d) are all expressed in ways that *assume* the commission of an offence by a person who has actually carried out the acts or made the omissions falling within the terms of one of the offence-creating provisions of the Code (or any other relevant statute). This is consistent with a construction of s7 that the introductory words in the chapeau, ‘[w]hen an offence is committed’, are referring to the acts or omissions that are set out in one of those offence-creating provisions.

20 79. The sixth and seventh reasons are expressed as conclusions, and may be considered to be steps in a reasoning process rather than discrete reasons. However, as noted above, these reasons do appear to constitute an important part of the majority’s reasoning.

80. To the extent that the majority’s sixth and seventh reasons note that s7 and s8 are not *directly* concerned with the criminal responsibility of a person who is a party to an offence, or who formed a common intention to prosecute an unlawful purpose, they are also uncontroversial. However, for the reasons that have already been set out above, including the reasons of Beech JA, the question of whether a person who actually does the act or omission that constitutes an offence *committed an offence*, constituting the necessary precondition for the operation of both ss7 and 8,

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<sup>10</sup> See the various references to the plurality judgment in the reasons of Beech JA at AB 265.38-267.10; CA [460]-[462]).

<sup>11</sup> Cf AB 196.19; CA [179].

can depend upon whether that person was criminally responsible for that act or omission.<sup>12</sup>

81. The critical step in the majority's reasons, however, is expressed in the eighth reason (AB 193.20; CA [166]). The essence of that reason is set out in the last sentence of CA [166]: 'the provisions of ch V operate to excuse a *person* who would otherwise be criminally responsible for an act or omission.' That this is the critical step in the majority's reasoning is demonstrated by a careful analysis of reasons 9 to 11.

10 82. Each of reasons 9 to 11, properly analysed, essentially repeat the conclusion that the provisions of Chapter V of the Code, in particular s29, confer a personal exemption or immunity from criminal responsibility for an act or omission, which will have no effect on the criminal responsibility of a person alleged to be liable pursuant to ss7(b), (c), (d), or s8, of the Code.<sup>13</sup>

83. The majority's reasoning in this regard depended heavily on s36 of the Code,<sup>14</sup> which provides that the provisions of Chapter V 'apply to all persons charged with any offence against the statute law of Western Australia'. In that regard the appellant refers to and adopts the reasons of Beech JA. The appellant also refers to and adopts what was said by Beech JA at AB 261.20-262.1; CA [445]-[447].

20 84. There are four further reasons for concluding that while the provisions of Chapter V do confer personal exemptions or immunities from criminal responsibility, it does not follow that those provisions do not affect the liability of other persons under ss7 and 8 of the Code. *Firstly*, at AB 194.49, 196.42, and 197.26; CA [173], [180], and [182] the majority itself acknowledged as part of its reasoning that a child 'will not be liable to punishment' for an act or omission if the prosecution fails to prove that he or she had the necessary capacity for the purposes of s29 of the Code. But if a child is not liable to punishment then no offence will have been committed, having regard to the definition of 'offence' in s2 of the Code. If no offence has been committed then s7 will not be enlivened. *Secondly*, the effect of s36 is not to limit the operation of the provisions in Chapter V to persons who have

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<sup>12</sup> See also what was said by the majority to the same effect at AB 196.11; CA [178].

<sup>13</sup> See AB 194.15, 194.40, 195.17, 195.48, and 196.11-197.50; CA [170], [173], [175], [176], and [178]-[184].

<sup>14</sup> AB 193.20; CA [166].

been charged with an offence. Instead its evident purpose is to declare that the various provisions in Chapter V also apply to persons charged with any offence proscribed by the statute law of Western Australia. *Thirdly*, as was observed by the plurality in *Pickering* at [49] (albeit in a different context), ‘whether an offence is charged does not alter whether the act constitutes an offence in the sense that the accused is ‘liable to punishment’ for the act.’ *Fourthly*, the appellant *was* charged with an offence against the statute law of Western Australia. Although there was no question at trial about his own criminal responsibility the provisions of Chapter V did ‘apply’ to him, albeit in the context of the pre-conditions for the operation of ss7 and 8, namely, whether ‘an offence is committed’.

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85. It follows from the above that the majority’s conclusion that even if PM was the person who inflicted the fatal wound to the deceased, with the requisite intention for murder, the appellant’s liability under ss7(b), 7(c) or 8 was not precluded was wrong. The prosecution *was* obliged to prove at the appellant’s trial that PM had the capacity, in accordance with s29 of the Code, to know that he ought not to do the act or make the omission that caused the deceased’s death in the prosecution case against the appellant. The trial judge’s failure to direct the jury that the appellant could not be found guilty of murder if the jury could not exclude beyond reasonable doubt that PM was the person who caused the deceased’s death was an error of law (AB199.4-200.10; CA [194]-[195]).

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#### **Part VII:**

The orders sought by the appellant are:

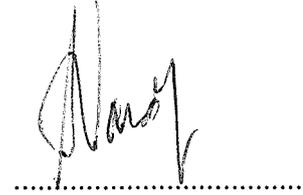
1. Appeal allowed.
2. Set aside the orders of the Court of Appeal of the Supreme Court of Western Australia made on 21 May 2019 and in lieu thereof substitute the following orders:
  - (a) appeal allowed;
  - (b) the appellant's conviction be quashed; and
  - (c) there be a new trial

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**Part VIII:**

It is estimated that 2 hours are required for the presentation of the appellant's oral argument.

Dated:

A handwritten signature in black ink, appearing to read "Sam Vandongen", is written over a horizontal dotted line.

Name: Sam Vandongen SC

Telephone: (08) 9220 0444

Facsimile: (08) 9325 9894

Email: [svandongen@francisburt.com.au](mailto:svandongen@francisburt.com.au)

**ANNEXURE – STATUTORY PROVISIONS**

<b>No.</b>	<b>Legislation</b>	<b>Sections</b>	<b>In Force</b>	<b>Version</b>
1.	<i>Criminal Code (WA)</i>	ss 1, 2, 7, 8, 22-36 (Chapter V), 228, 229, 230, 246, 248, 259, 268, 270, 277, 279, 281, 305, 441	Yes	30 November 2015 to 2 June 2016 (As at 27 January 2016)
2.	<i>Criminal Code (Qld)</i>	ss 7, 8, 31	Yes	1 December 2015 to 4 May 2016 (As at 27 January 2016)