



Law Council
OF AUSTRALIA

Office of the President

12 June 2020

Chair
Age of Criminal Responsibility Working Group
c/- Strategic Reform Division
Department of Justice
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By email: LegPolicy@justice.wa.gov.au

Dear Chair

Supplementary Submission – *Pickett v Western Australia* [2020] HCA 20

The Law Council of Australia (**Law Council**) was grateful for the opportunity to make a written submission earlier this year to the Council of Attorneys-General (**CAG**) Age of Criminal Responsibility Working Group Review (**the Review**).¹ We provide the below information as a supplementary submission, following the High Court's recent decision on 29 May 2020 in the case of *Pickett v Western Australia* [2020] HCA 20 (**Pickett**), which has a particular bearing on the final question of the Review as to whether there is a need for:

... any new criminal offences in Australian jurisdictions for persons who exploit or incite children who fall under the minimum age of criminal responsibility (or may be considered doli incapax) to participate in activities or behaviours which may otherwise attract a criminal offence?

In *Pickett*, the High Court considered the criminal liability of four adults in a situation where the criminal act may actually have been committed by a child who was considered *doli incapax* under section 29 of the *Criminal Code Act 1913* (WA).

The joint judgment of Chief Justice Kiefel and Justices Bell, Keane and Gordon stated that:

In the present case, the circumstance that the person who actually killed the deceased may not have been criminally responsible for his act by reason of s 29 of the Code is immaterial to the guilt of each of the appellants under s 7(b), s 7(c) or s 8 of the Code. The liability of each of the appellants to punishment for the murder of the deceased did not depend on proof beyond reasonable doubt that the child who may have fatally wounded the deceased had to capacity to know that he ought not strike that blow.²

Their Honours emphasised, '[i]t is the doing of the act or the making of the omission by the actor that is attributed to another person or other persons, not the criminal responsibility of the actor'.³

¹ Law Council of Australia, Submission to the Council of Attorneys-General Age of Criminal Responsibility Working Group Review, 2 March 2020 <<https://www.lawcouncil.asn.au/resources/submissions/council-of-attorneys-general-age-of-criminal-responsibility-working-group-review>>.

² *Pickett v Western Australia* [2020] HCA 20 ('*Pickett*') (Kiefel CJ and Bell, Keane and Gordon JJ) 1, [3].

³ *Ibid* 24, [66].

While the decision concerned a Code state, Justice Nettle, in a separate but no less persuasive judgment, confirmed that this situation of criminal liability would also apply in common law jurisdictions:

But that extension of liability – somewhat imprecisely described as "innocent agency" – in no way denied the principal liability of aiders and abettors to, and parties to a joint criminal enterprise with, persons who were not criminally responsible.⁴

It is important that the CAG is informed of this unanimous decision of the High Court, which makes it clear that adults can be properly convicted for their involvement in criminal acts, even where the child who carried out the criminal act was under the minimum age of criminal responsibility or considered *doli incapax*. In the opinion of the Law Council, this legal development effectively closes off an argument against increasing the minimum age of criminal responsibility.

The Law Council also takes this opportunity to stress the importance of raising the minimum age of criminal responsibility ahead of the CAG meeting scheduled for 27 July 2020. It appreciates the many urgent issues arising for governments from COVID-19. However, Australia's low minimum age of criminal responsibility has been an urgent issue for decades. It is inherently linked to the alarming incarceration rates of First Nations peoples across this country – a concern that has rightfully risen to the forefront of the national consciousness over recent weeks.

Recent figures continue to show appalling statistics, including that First Nations children are 22 times more likely to be in detention than their non-Indigenous counterparts and first enter detention at earlier ages.⁵ Attorneys-General and governments in all jurisdictions must take the earliest available opportunity to avoid entrenching criminal pathways in the young, and commit to raising the minimum age from 10 to at least 14 years old.

It is the Law Council's firm belief that the measures necessary to implement alternative approaches to juvenile detention in order to better protect both children and communities will not occur until this commitment is made. This national course of action should be set in train on 27 July 2020.

Please contact Ms Alex Kershaw, Policy Lawyer, on (02) 6246 3708 or at alex.kershaw@lawcouncil.asn.au, in the first instance, should you require further information or clarification.

Yours sincerely



Pauline Wright
President

⁴ Ibid (Nettle J) 38, [95].

⁵ Australian Institute of Health and Welfare, *Youth Justice in Australia 2018-19* (Report, 15 May 2020) <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2018-19/contents/summary>>.