HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. B52 of 2022**

BETWEEN: **BDO**
Appellant

and

THE QUEEN
Respondent

ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA LTD
SUBMISSIONS SEEKING LEAVE TO BE HEARD AS AMICUS CURIAE

Part I: Publication

1. These submissions are suitable for publication on the internet.

Part II: Basis of intervention and the parties in support of whom intervention is sought to be made as amicus curiae

2. The Aboriginal Legal Service WA Ltd (ALSWA Ltd) seeks leave to make submissions about particular issues in this appeal.

3. Specifically, in interpreting the phrase '*capacity to know that he ought not to do the act or make the omission*' as appears in s 29 of the *Criminal Code 1913* (WA) (**Code**) it is correct to incorporate this Court's decision in ***RP v The Queen*** [2016] HCA 53; (2016) 259 CLR 641 '***RP v The Queen'*** . In doing so, an accused child's social, cultural, linguistic and/or developmental characteristics must be the focus in determining whether the presumption has been rebutted.

4. ALSWA Ltd is also able to make wider submissions about a child's background which encompasses a broader factual compass than if this decision is restricted to this appellant's dyslexia.

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5. In the way that it was achieved in ***RYE v The State of Western Australia*** [2021] WASCA 43 '***RYE'*** the amicus supports that jurisprudence laid down in ***RP v The Queen*** as appropriate and adapted to the Code.

Part III: Why leave to be heard as amicus curiae should be granted

A Application of principles to ALSWA Ltd's amicus curiae's application

6. The principles governing this Court's discretion to allow amici curiae to be heard are well established.[1] Applying those criteria here.

7. First, are the discrete issues identified at paragraphs 3 and 4 above.

8. Second, the discrete issue supplements the appellant's position that mere absence of evidence of a child's mental illness is insufficient in displacing the presumption.[2]

9. Third, this Court would be helped by the amicus regarding broader issues. These broader submissions go to the workability of the principles for trial courts from the perspective of the marginalised. This is because in ***RYE*** and ***RP v The Queen*** it was held that where the State must prove beyond reasonable doubt that a child has 'capacity', attention *must* be focused upon the intellectual and the moral development of the particular child at the material time.[3] It was also held that a child's education and environment in which they were raised are highly relevant in considering whether the child had capacity to know, at the material time, that the conduct in question was seriously wrong by the ordinary standards of reasonable adults.[4] In Queensland it is arguable this has an evidential focus (i.e. "*inferences capable of rebutting the presumption can be drawn from the accused's age when considered together with evidence of the accused's education or of the surrounding circumstances of the offence, or with observations of the accused's speech and demeanor*.").[5] Under the common law and in Western Australia "(*r)ebutting that presumption directs attention to the intellectual and moral development of the*

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[1] ***Roadshow Films Pty Ltd v iiNet Limited (No.1)*** [2011] HCA 54; (2011) 248 CLR 37, 38-39 [2]-[6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). ***Levy v Victoria*** [1997] HCA 31; (1997) 189 CLR 57, 60 (Brennan CJ).

[2] Appellant's submissions at paragraph 36.

[3] ***RYE v The State of Western Australia*** [2021] WASCA 43 [55] '***RYE'.***

[4] ***RP v The Queen*** [2016] HCA 53; (2016) 259 CLR 641 ***'RP v The Queen'*** [12], [9], [12]. ***RYE*** [55].

[5] ***R v F ex Parte Attorney-General*** [1998] QCA 97; [1999] 2 Qd R 157, 162 (Davies JA).

particular child".[6] Evidence about a child's education, and environment prove this.[7] This becomes the controlling analysis.

10. Fourth, the amicus' expertise enables it to significantly assist the Court. This expertise is set out as follows.

B ALSWA's Ltd expertise in Children's Court for vulnerable children

11. ALSWA Ltd is a community-based organisation, which was established in 1973. ALSWA Ltd aims to empower Aboriginal people and advance their interests and aspirations through a comprehensive range of legal and support services throughout Western Australia. ALSWA Ltd aims to:

a. Deliver a comprehensive range of culturally-matched and quality legal services to Aboriginal and Torres Strait Islander peoples throughout Western Australia.
b. Provide leadership which contributes to participation, empowerment and recognition of Aboriginal and Torres Strait Islander peoples as the Indigenous people of Australia.
c. Ensure that Government and Aboriginal and Torres Strait Islander peoples address the underlying issues that contribute to Aboriginal and Torres Strait Islander disadvantage on all social indicators, and implement the relevant recommendations arising from the Royal Commission Into Aboriginal Deaths in Custody.
d. Create a positive and culturally-matched work environment by implementing efficient and effective practices and administration throughout ALSWA.

12. In 2020/2021 there were 102 young people in custody and of them 77 identified as Aboriginal.[8] This is approximately 75% of the juvenile detention system despite making up only 3% of the population.[9]

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[6] ***RP v The Queen*** [12]. ***RYE*** [55].
[7] ***RP v The Queen*** [9] ***RYE*** [55].
[8] WA Department of Justice, Annual Report 2021/2022, page 27 retrieved at Department of Justice, Western Australia - Annual Report 2021-2022 (www.wa.gov.au)
[9] Ibid page 28.

13. ALSWA Ltd has litigated the following relevant cases and has a presence in the Children's Court of Western Australia that demonstrates its expertise and in turn provides a unique perspective to the questions arising:

a. ***NR v The DPP*** [2022] WASC 456 where the sole ground of appeal was that the Magistrate's verdict that s 29 of the Code had been proven beyond reasonable doubt was unreasonable. The appeal against conviction was allowed. The appellant was convicted on the basis that he was part of a group that stole with violence from two male children. The appellant ran, with others in his group, from the scene. The appellant also ran from the police before being apprehended. Upon arrest, the appellant told the police that he could outrun them and that they should not touch him otherwise they would be arrested. The appellant was 12 years old at the time.

b. ***EYO v The State of Western Australia*** [2019] WASCA 129 where the Aboriginal Legal Service WA Ltd challenged the admission of the appellant's electronic audio visually recorded interview (Ground 2). The Court of Appeal allowed the appeal holding that the interview was incorrectly admitted because of a combination of circumstances. One circumstance included when a letter was sent by the ALS to the Police when coupled with the appellant's answers that he did not wish to participate in the interview. It was held to be unfair to admit the interview and the trial Judge erred by doing so.[10]

c. In ***DJ v The Director of Public Prosecutions*** [2022] WASC 303, the appellant appealed against a decision by a Magistrate that denied him the relief under *Young Offenders Act 1994* (WA) s 189(3) '*YO Act'*. Section 189(3) abridged the shelf life of a conviction by expediting the two year waiting period for certain offences under s 189(2) of the *YO Act.* The appellant had appeared before the Magistrate under s 189(3) of the *YO Act* initially, subsequently sentenced by the President of the Children's Court to immediate custody under operation of mandatory sentencing law and then applied again under s 189(3) of the *YO Act.* That final application was dismissed. The appellant had a significant cognitive disability, received National Disability Insurance Scheme Support and would have likely met the diagnostic criteria for FAS-D. Ground 1, argued an error of

[10] ***EYO v The State of Western Australia*** [2019] WASCA 129 [53], [76]-[79]. To be clear it was also the absence of a clear explanation of the second limb of the caution was also relevant to the exclusion [79].

law in the exercise of discretion. While the errors of law were upheld on different bases the appeal was ultimately dismissed.

d. Similarly, ***D v Edgar*** [2019] WASC 183 was an appeal against sentence. That case held that an appellant who was 11 or 12 and came from a severely disadvantaged background, witnessing extreme violence, was yet to meet the criteria of foetal alcohol spectrum disorder 'FAS-D', had taken steps to rehabilitation and had spent 108 days in custody was deserving of the relief under s 189(3) of the *YO Act.* Subsequently the appeal was allowed.

e. In 2022, ALSWA Ltd represented and assisted 2253 children in the Children's Court. The 2253 represented 18% of the client base of ALSWA Ltd.

f. ALSWA's Youth Engagement Program 'YEP' Diversion Officers can assist young people who are appearing in the Perth Children's Court by providing support and referrals to enable young people to comply with court orders and improve their wellbeing. The types of assistance include accommodation, education/training, substance abuse, health, family issues, Centrelink and ID, transport, and support for youth justice related appointments. In 2022, 67 young people were assisted by the metro YEP program and 23 young people in the Kimberley region were assisted by YEP. In 2022-2023, the Youth Engagement will expand to South Hedland and Kununurra.

14. ALSWA Ltd has also made submissions in the following areas to address the challenges faced by Aboriginal clients who experience cultural, linguistic and social barriers in the criminal justice system. The following submissions concentrated on issues relevant to the culture, language and social barriers facing ASLWA Ltd clients. ALSWA Ltd has an advantage in understanding the situation of children who are being prosecuted where s 29 of the Code is in issue. Some examples of this expertise are set out below:

a. A 2010 submission regarding youth in detention, report and intervention to the United Nations Permanent Forum on Indigenous Issues, Ninth Session- New York 19-30 April 2009.[11]

[11] Youth in Detention report and intervention - Aboriginal Legal Service

b. A 2014 submission regarding the *Criminal Law (Mentally Impaired Accused) Act 2006* (WA).[12]

c. A 2017 submission into the review of the *Young Offenders Act 1994* (WA).[13]

d. A 2020 submission to the Council of Attorney-General's on raising the age as part of a member organisation of Social Reinvestment.[14]

e. Development and research assistance to the second edition of the *Aboriginal Benchbook for Western Australian Courts.*[15]

f. Submissions for the inquiry into the high level of involvement of indigenous juveniles and young adults in the Criminal Justice System, December 2009. These were submissions made to the Parliament of Australia, House of Representatives House Standing Committee on Aboriginal and Torres Strait Island Affairs.[16]

Part IV: Statement of the issues presented by the appeal that the amicus desires to make submissions to the Court

15. The amicus makes submissions about the following issues:

a. The requirement on the prosecution to prove that a child has the '*capacity to know that he ought not to do the act or make the omission*' requires proof that the child knows it is seriously wrong to do the act or make the omission according to the standards of ordinary reasonable adults. This necessarily focuses a trial Court's attention on the intellectual and moral development which in turn requires evidence about a child's social, cultural and educational background before any conclusion of criminal responsibility is met. After all, children do not mature at uniform rates. This recognised jurisprudence under the common law[17] aligns with (a) the terms of s 29 of the Code as a matter of statutory construction (b) history and (c) rationale.

b. Section 29 of the Code is an excuse which presumes a state of affairs (i.e. legal immunity). By remembering this immunity and incorporating the test of serious wrongness with its focus on a child's development as the threshold requirement

[12] ALSWA Submission to CLMIA Act DP - Aboriginal Legal Service
[13] KM_C554e-20170406140045 (als.org.au)
[14] SRWA+Submission+on+Raising+the+Age+of+Criminal+Responsibility.pdf (squarespace.com)
[15] Aboriginal Benchbook for Western Australian Courts 2nd Ed - Australasian Institute of Judicial Administration - Australasian Institute of Judicial Administration (aija.org.au)
[16] High juvenile involvement in the Criminal Justice System WA - Aboriginal Legal Service
[17] ***RP v The Queen*** [9].

to displace the presumption affirms the onus and standard of proof. In turn prosecuting authorities ought to properly consider a child's individual disposition before proceeding. The intersection between criminal responsibility and a child's disposition reveals the practical problems that trial courts deal with: is a conviction appropriate where a child's life may have been marred by violence such that violence is normalised? Is a child who simply follows elder peers someone who has capacity to know? Is a child's biological age consistent with their developmental age of a child who bears an inter-generational scar of foetal alcohol spectrum disorder?

A Proving that a child has '*capacity to know that he ought not to do the act or make the omission*' requires proof that the child knows it is seriously wrong to do the act or make the omission according to the standards of ordinary reasonable adults is sourced in text and flexible jurisprudence which properly embraces the whole of a child's disposition

16. An issue identified during the special leave application was whether ***RYE*** was able to incorporate a higher threshold test for whether a child knows it is seriously wrong not to do an act according to the standards of ordinary reasonable adults.[18] The word 'wrong' does not appear in s 29 of the Code.

17. This test finds its basis in the text itself and has an additional rationale from the amicus' point of view.

18. First, is the text itself in s 29 of the Code and its contextual setting. The orthodox approach to statutory code construction is that the meaning begins with the text and not a statement of how the law stood beforehand with a subsequent consideration about whether the Code changed the common law.[19] In many Code jurisdictions which share the identical phrase in the Western Australian Code attention has focussed on the meaning of 'capacity' and whether that requires proof of actual

[18] ***BDO v The Queen*** [2022] HCATrans 184, page 6, [210]-[215].
[19] ***Brennan v R*** (1936) 55 CLR 253, 263.

knowledge.[20] In the seminal case of ***R v F; Ex parte Attorney-General***[21] on the first stated question to the Reference Court, Davies JA observed that:

> "…is preferable in my view, if the phrase ''that the person ought not to do the act'' needs to be paraphrased, and I doubt if it does, to use the phrase ''that the act was wrong according to the ordinary principles of reasonable man'' [citation omitted].

19. This appears to be the first connection between the word 'wrong' and s 29 of the Code. After reviewing the Queensland position, the majority in ***RYE*** concluded that 'ought' in s 29 connotes a duty or rightness and 'ought not' is the negative form.[22] For example irresponsibility (as the antonym to duty) or wrongness (as the antonym to rightness). Put simply, a child has to have the 'capacity to know' that they should not do the wrong thing. The majority's interpretation of those words thus took the words of the Code first and *subsequently* then looked to the common law.[23]

20. Following on from that, in s 26 of the Code for example, there is a presumption of soundness of mind which is rebutted by proof of one of three capacities under s 27 of the Code.[24] Proving that a person has the relevant capacity under s 27 to know that he or she ought not do the act has led this Court to hold: that where a person through the disordered condition of the mind could not reason about the matter with a moderate degree of sense and composure then the person does not know that what

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[20] The following details those jurisdictions whose provisions are materially similar to the Western Australian position. In Western Australia see: ***HS v Lawford*** [2018] WASC 257 [113] (Jenkins J), ***RYE*** [44] (Buss P and Mazza JA). The majority position in ***RYE*** on this issue was the first in a set of three statutory construction conclusions see [50],[51] and [55]. In the Queensland see ***R v B*** [1997] QCA 486, 3-4 and ***R v F; Ex parte Attorney-General*** [1997] QCA 486; (1999) 2 Qd R 157, 160. In the Northern Territory ***Rigby v ND*** [2022] NTSC 51 '***Rigby v ND'*** [25] (Barr J). In Tasmania, the focus has been its closest to ***RYE*** as a 'hybrid' analysis: ***M v J*** [1989] TASSC 55; (1989) Tas R 212 '***M v J'*** [17]-[18]. While ***M v J*** considered s 18(2) of the *Criminal Code 1924* (Tas) which contained the additional word 'sufficient' it does not seem that that word featured in Neasey's J analysis which focused on the interplay between the terms of the statute first and then its common law history. The ACT *Criminal Code 2002* (ACT) s 26(1) requires proof that a child knows that his or conduct is wrong. Section 7.2 of the *Criminal Code 1995* (Cth) are drafted similar to the ACT provisions. In summary, Queensland, Tasmania, the Northern Territory, Western Australia are influenced on the Griffith Code whereas the Commonwealth Criminal Code does not draw on the Griffith Code. New South Wales, Victoria and South Australia rely on the common law as a major source of criminal law.

[21] ***R v F; Ex parte Attorney-General*** [1997] QCA 486; (1999) 2 Qd R 157.

[22] ***RYE*** [46]-[50].

[23] I.e ***RYE*** at [50] and then [51]. ***Brennan v R*** (1936) 55 CLR 253, 263.

[24] Appellant's submissions, paragraph 40. See also in Canada where the state of insanity and the state of childhood have much in common because they both indicate that the individual in question does no accord with the basic assumptions of the criminal law model: that the accused is a rational autonomous being who is capable of appreciating the nature and quality of an act and of knowing right from wrong: ***R v Chaulk*** [1990] 3 SCR 1303, 1320 a point recently referred to in ***LRW v The Director of Public Prosecutions*** [2022] WASC 437, [46].

they were doing was wrong.[25] What is meant by wrong in that context has regard to the everyday standards of reasonable people.[26] This test has historical roots under the common law where the concept of doli incapax has also borrowed the M'Naghten Rules.[27]

21. The text of s 29 of the Code states that a child has capacity 'to know'. The text does not state 'capacity' and nothing else. The phrase 'to know' must mean 'to know' that it is incorrect/wrong to do the act or omission.[28] What exactly the level of knowledge is, is not a topic that the Code itself defines. This is a topic that the Courts grapple with. Inevitably, this leads to the conclusion that the 'seriously wrong' test recognised in the common law (and in particular by this Court)[29] has a legitimate basis. After all, the common law was part of the original design of s 29 of the Code.

22. Ultimately, what the majority did in ***RYE*** was to engage the text in s 29 despite the view in the Northern Territory that it did not.[30] This is because the phrase as it appears in s 29 of the Code encapsulates a composite set of ideas: capacity and knowledge. It is arguable that this phrase is what the majority in ***RYE*** identified as a 'third' constructional issue.[31] The amicus supports the correctness of the majority position in ***RYE*** when it concluded that this test was required. Consequently that provided a working standard for trial courts by its dominant focus on intellectual and moral development.[32] This would not result in philosophical sophistry[33] instead the majority approach in ***RYE*** engaged the trifecta of text, context and purpose.

23. Against that background, the amicus supports the appellant's reading that a return to the common law paradigm of serious wrongness accords with history and

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[25] ***Porter v R*** (1933) 55 CLR 182, 189-90 (Dixon J as his Honour then was). See also ***Stapleton v The Queen*** (1952) 86 CLR 358, 367.
[26] ***Porter v R*** (1933) 55 CLR 182, 189-90 (Dixon J as his Honour then was).
[27] ***M (A Child) v The Queen*** (1977) 16 SASR 589, 591 (Bray CJ). See also ***RP v The Queen*** [38].
[28] ***RYE*** [50].
[29] ***RP v The Queen*** [9].
[30] ***Rigby v ND*** [34].
[31] The first constructional question and conclusion is in ***RYE*** at [44], and the second is at [50]. The third is at [51].
[32] ***RYE*** [55].
[33] ***RYE*** [92] (Murphy JA). Contrast Barr J in ***Rigby v ND*** who held at paragraph [20] it was a high bar.

ensures that the presumptive state of affairs is not whittled down to insignificance.[34] Against that backdrop too it is a matter of legitimate statutory construction to return to the common law because it was Sir Samuel Griffiths himself who referred to s 29 as coming from the common law.[35]

24. While the Queensland Courts affirmed primacy to 'capacity to know' while arguably jettisoning the serious knowledge requirement the Western Australian Court of Appeal in ***RYE*** obeyed canon code construction principles. Respectfully, the Queensland Courts[36] interpreted the Code by reference to the pre-existing law in order to divine a difference. Whereas had the Queensland Courts done what Western Australia did, the result would have been to interpret 'capacity' in its composite phrase of 'capacity to know'. In doing so, it would embrace the correct meaning of both the composite phrase as well as the meaning of the word 'capacity'. Once that had been concluded the common law could have been referred to in aid. Another example emanates from the Northern Territory. In 1982 the Northern Territory applied the common law[37] and in 1983 the *Criminal Code Act 1983* (NT) s 23 commenced. Subsequently, the Northern Territory Supreme Court in comprehensively detailed reasons noted the distinct difference to the common law.[38] This captures the seductive vice of irregular Code construction: namely to take the law as it stood before to work out how it stands now.[39]

25. The majority in ***RYE*** held whether or not a child knows it is seriously wrong not to do the act according to the standards of ordinary reasonable adults gives meaning s 29 as a whole. The majority rationale in ***RYE*** is anchored in the text and it is correct to incorporate the common law in aid where necessary. The phrase "*he ought not to do the act or make the omission'* was held as reference to the child's capacity, at the material time, to know that doing the act or making the omission

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[34] Appellant's submissions at paragraph 27. In particular the amicus supports that *both* the plurality position and Gageler J's position in ***RP v The Queen*** as valid in the interpretation of s 29 of the Code.
[35] Letter from Sir Samuel Griffiths to the Queensland Attorney-General, 29 October 1897, VIII, page 15, left hand column.
[36] Most notably what began in the seminal decision in ***R v F ex parte Attorney General*** [1999] 2 Qd R 157. For example in all of the stated questions for the Court in ***R v F*** the Court looked back to the common law first. By contrast the majority in ***RYE*** began its analysis with the text and textual context of s 29 of the Code before turning to the common law [27]-[30] and then expressing four constructional construction conclusions [44], [50]-[51] and [55].
[37] ***O'Toole v Arnold*** (1982) 16 NTR 8, 10.
[38] ***Rigby v ND*** [19]-[20].
[39] ***Brennan v R*** (1936) 55 CLR 253, 263.

was morally wrong.[40] The basis for 'wrongness' is explained above. Additionally, the seriously wrong threshold as opposed to mere mischief reflected the plurality position in ***RP v The Queen*** on the one hand[41] and linking the 'wrongness' to the standards of ordinary reasonable adults reflected Gageler's J judgment in ***RP v The Queen***[42] on the other hand. Both aspects were necessary to reflect the actual text of the Code.[43] Even the word 'capacity' belies an array of complex factors – a point noted in other areas of the law.[44] The plurality approach in ***RP v The Queen*** with its focus on a child's intellectual and moral development with its consequential evidentiary focus on a child's home, education and culture lends itself to answering the very difficult questions that these phrases create. In ***RYE*** the majority connected wrongness according to the ordinary standards of reasonable adults by evidence about a child's education and environment.[45] This leads to the next issue.

26. Second, take for example, a child who:

a. Has grown up in foster environments primarily with siblings due to being the victim of violent abuse in their biological parents home and/or
b. Who expresses gratuitous concurrence in everyday conversation and/or
c. Does not speak English as their first language and/or
d. Has diagnosed foetal alcohol spectrum disorder and/or a host of neurocognitive issues that affects language amongst other issues.[46]

may not have capacity to know it is seriously wrong. To which, that line of cases[47] which hold that the phrase *"…to know that he ought not to do the act or make the omission'* needs no amplification were incorrectly decided. This is a phrase that requires more content than hitherto proposed for the simple reason that a capacity

[40] ***RYE*** at [50]-[51].
[41] In particular ***RP v The Queen*** [9] (Kiefel, Bell, Keane and Gordon JJ).
[42] ***RP v The Queen*** [38] (Gageler J).
[43] I.e 'ought not do', 'to know'. As argued above, it also reflected the WA Code s 27.
[44] Heydon D, Heydon on Contract (2019) [1.60] cited in ***LRW v The Director of Public Prosecutions*** [2022] WASC 437 [54] (Solomon J).
[45] ***RYE*** at [55].
[46] As to the interaction between foetal alcohol spectrum disorder and its relationship to sentencing and confessional evidence see: Heather Douglas *'Foetal alcohol spectrum disorders: a consideration of sentencing and unreliable confessions'* (2015) 23 JLM 27.
[47] ***R v F ex parte Attorney General*** [1999] 2 Qd R 157, 160 [10]-[15]. See also in Queensland ***R v TT*** [2009] QCA 1999 [19] (Keane JA).

to know must be informed by evidence of who a child is, where they came from and their home environment.

27. Alternatively, a child in this example may have capacity to know where:

a. They have attended excellent educational institutions and/or

b. Provided with a stable family environment and/or

c. Do not suffer cognitive issues.

28. Approximately 45 years ago it was remarked that it might be thought perverse that a child in the second situation be prosecuted but a child in the first situation is not.[48]

29. However, the amicus' experience suggests otherwise. A Freddo Frog being stolen by a 12 year old and that child's entry into the criminal justice system necessarily requires a focus on the child's intellectual and moral development to prove that they know it is seriously wrong according to the standards of ordinary adults.[49] To do so accords with the text 'capacity' and the majority position in ***RYE*** wrestled with that issue in the correct way. In the examples given above however, a minimum threshold of 'capacity' alone means that for children (a) who readily obey authority figures due to gratuitous concurrence and (b) whose language expression due to neurocognitive issues means that criminal responsibility under s 29 of the Code will be more readily established. For example by reference to the circumstances of the offence or admissions.

30. However, the requirement of knowing that it is seriously wrong and that they ought not do the act or omission forces a trial court to examine beyond reasonable doubt whether the child may not know it is seriously wrong to do an act or omission. The requirement of seriously knowing it was wrong to do this act (and it not being mischievous) embraces the whole of the life of the person being prosecuted. It may,

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[48] ***M (A Child) v The Queen*** (1977) 16 SASR 589, 594 (Bray CJ) i.e. the waif who had no such advantages.

[49] For example in 2009 in the amicus' submissions to the Commonwealth House of Representatives, the gross over representation of young juvenile persons in the criminal justice system was made. A specific example of a child below the age of capacity charged with stealing a Freddo Frog highlighted disparities and intergenerational poverty experienced by Aboriginal people in contemporary society. This painted a troubling picture that reverses the 1977 observation made by Bray CJ the problem of questionable criminal responsibility has now gone the other way: High juvenile involvement in the Criminal Justice System WA - Aboriginal Legal Service

to the appellant's point, be that the difference is semantic.[50] However in the event that it is not, under both views the common law requirement of serious knowledge gives the whole of s 29 of the Code a practical flavour: the Court will necessarily then turn its attention to the intellectual and moral development of a child.

31. Proving that a child knows it is 'seriously wrong' with its subsequent focus on the intellectual and moral development of a child provides a flexibility sourced in history and provides a sensitive approach to the application of criminal law.

32. Centuries ago, criminal responsibility of children was guarded by the common law and an arguable stricter standard.[51] In 1845 the law of England presumed children under the age 7 could not be prosecuted.[52] Since then, the respective Australian Parliaments decided to raise the age of criminal responsibility.[53] Most recently, this Court, in the context of the common law jurisdictions, recognised that children do not mature at uniform rates.[54] This non-controversial observation can apply equally to the Code jurisdictions.

33. In the Code system the Courts chart the meaning of the words but otherwise the words provide 'certainty'.[55] This however does not mean that the words should be static. Discussions that revolved around the requirement of 'knowledge' as proof in displacing doli incapax hold greater force in the Code systems of criminal law. That is because, the absence of 'mens rea' in the Code[56] is both supplemented and safeguarded for by creation of criminal responsibility and excuses.[57] Accordingly, the requirement of knowing it is seriously wrong affirms the historical framework for criminal responsibility.

34. To pay literal attention to the word 'capacity' alone divorced from how it appears would capture too wide an audience of children with different makeups under the

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[50] Appellant's submissions at paragraph 38.
[51] See authorities listed in paragraphs 25 and 26 of the Appellant' submissions.
[52] ***R v Smith*** (1845) 1 Cox CC 260 referred to in ***O'Toole v Arnold*** (1982) 8 NTR 16.
[53] *Crimes Act 1914* (Cth) s 4M, *Criminal Code Act 1995* (Cth) s 7.1, *Criminal Code 1899* (Qld) s29(1), *Children, Youth and Families Act 2005* (Vic) s 344, *Children (Criminal Proceedings) Act 1987* (NSW) s 5, *Criminal Code Act* (NT) s 38(1), *Criminal Code 2002* (ACT) s 25, and *Criminal Code Act 1924* (Tas) s 18.
[54] ***RP v The Queen*** [12].
[55] Contra ***Vallance v R*** (1961) 108 CLR 56, 57-58.
[56] ***Widgee Shire Council v Bonney*** (107) 4 CLR 997, 981 (Griffiths CJ).
[57] In Western Australia it is found under Chapter 5 of the Code ss 22-36.

umbrella of criminal responsibility.[58] To that extent those Code jurisdictions which embraced 'capacity' as the singular operative focus of the test while ignoring how that word appears and its common law heritage should not be accepted.[59] Viewed in this way, the majority approach in ***RYE*** itself represented an orthodox example to Code statutory construction because at each stage the majority started with the text before turning to the common law.[60]

35. Whatever might be thought about the appropriateness of criminal responsibility and age as a political question, this Court has been able to ensure that a person's subjective characteristics can be taken into account while balancing equal application of law to all people in other contexts of the Western Australian criminal law.[61] To so hold in a case like this nuances the blunt edge of criminal responsibility and reinforces the presumptive state of affairs that exists in s 29 of the Code. It was that nuance that the majority in ***RYE*** was able to encapsulate in the interpretation of the s 29 of the Code. Alternatively, as the appellant points out, it will be this nuance that can be preserved if the plurality position in ***RP v The Queen*** applies in the interpretation of the Code.[62]

36. By ensuring that a Court be satisfied only on proof beyond reasonable doubt that a child knows it is seriously wrong to do the act or omission according to the standards of ordinary reasonable adults is to ensure attention is on the moral and intellectual development of a child. This interpretation respects:

a. Adherence to the actual text of the Code.
b. Individualised notions of justice according to a child's disposition. This is especially important considering the experience of the amicus' clients who are already often disfigured by disadvantage at the entry point of the criminal justice system.

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[58] Appellant's submissions at paragraph 36, footnote 98.
[59] In NT ***Rigby v ND*** [2022] NTSC 51 at [20] held that 'seriously wrong' is a high bar and at [25] disavowed the 'wrong' and 'seriously wrong' description to their equivalent on criminal responsibility preferring instead a focus on capacity. The NT approach is also mirrored in Qld in ***R v TT*** [2009] QCA 199 at [19] which affirmed that the approach was about 'capacity'.
[60] ***RYE*** at [27]-[30], then [38] with the conclusion on that issue at [44], then [45] with the conclusions expressed at [50] and [51].
[61] The most prominent example being in the law of provocation: *Criminal Code 1913* (WA) ss 245-246 and who the ordinary person is as to which see ***Stingel v The Queen*** (1990) 171 CLR 312.
[62] Appellant's Submissions paragraphs 37-43.

c. In turn providing the minimum level of criminal responsibility equally to all persons under the law.

37. The majority position in ***RYE*** or alternatively the wholesale application of the plurality position in ***RP v The Queen*** is appropriate and adapted to the criminal responsibility of children under the Code given the increased societal knowledge of the diversity of its members. This reading of s 29 of the Code also has the added benefit of conforming the law with the truth of the tragic disadvantage of the lives of the amicus' clients.

B The requirement of serious knowledge as evidenced by a child's moral and intellectual development strengthens the presumption, the onus and standard of proof by requiring prosecuting authorities to properly consider a child's individual disposition before proceeding to a prosecution

38. Within the second limb of s 29 of the Code is a presumptive state of affairs that provides an immunity of suit.[63] The immunity of suit emphasises just how difficult it should be to prosecute a child who sits in the twilight zone of criminal responsibility.[64] The armoury of this suit acts as a prima facie bulwark against criminal responsibility. This is especially true where increased awareness of neurocognitive sciences of young people is continually developing.[65] The criminal law's ability to respond to increased social understanding[66] should be a feature of this presumptive state of affairs by requiring that it can only be displaced by evidence that a child knows it is seriously wrong not to do the act or omission.

39. Under the prevailing view in jurisdictions such as the NT and Qld the lower standard of a child's capacity will be sufficient proof alone.[67] The alignment between the common law and the Code might be seen as a jolt. However, the

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[63] ***Birdsall v The State of Western Australia*** [2019] WASCA 79; (2019) 54 WAR 418 [170].

[64] Glanville Williams, *The Criminal Responsibility of Children',* [1954] Crim LR 493, 494.

[65] For example foetal alcohol spectrum disorder. See for example: Jacqueline Baker "*The duty we owe: Foetal alcohol spectrum disorder, Indigenous Imprisonment and Churnside v Western Australia [2016] WASCA 146", University of Western Australia Law Review* (2017) 42(2) 119-135. See also generally the convergence of these alarming and growing criminogenic trends in 2014: ***AH v The State of Western Australia*** [2014] WASCA 228; (2014) 247 A Crim R 34, [1]-[2].

[66] This Court has noted that ability to meet the changing needs of society on the one hand with the need for certainty under stare decisis on the other: ***Viro v The Queen*** (1978) 141 CLR 88, 120; ***R v O'Connor*** (1980) 146 CLR 64, 101; ***R v L*** (1991) 174 CLR 379, 390; ***Dietrich v R*** (1992) 177 CLR 292, 320 and 329.

[67] See in particular ***Rigby v ND*** at [20] "*…(i)t clearly raises the bar…"*

safeguard deployed under the common law ought to be uniform given the shared ancestry between the Code and the common law. The incorporation is not a radical reading but respects the nature of s 29 of the Code: which is to criminalise only those whose situation in life makes them knowledgeable enough and developmentally able to know that their acts or omissions are wrong. By ensuring this higher standard prosecutions are brought properly after considering the whole of a child's disposition as outlined in **Issue A.** It has been observed that it is apparently rare in the juvenile criminal justice system in Western Australia for expert medical or psychiatric evidence to be adduced.[68]

40. Criminal prosecutions of children require considered deliberation. The continued growing crises of disproportionate young Aboriginal persons in the criminal justice[69] system is safeguarded against by invoking the question of criminal responsibility in a careful proper way. The position in ***RP v The Queen,*** adaptable as much as it can be in the Code tradition, affirms the onus and standard of proof. By adopting the requirement of knowing it was seriously wrong the Code tradition will end where it began: the flexibility of the common law which is adaptable to meet the needs of the most disadvantaged of society.

[68] ***LRW v The Director of Public Prosecutions*** [2022] WASC 437 [55].
[69] See most recently ***NR v DPP*** [2022] WASC 456 [57] (McGrath J) and the notice of the alarming statistical over representation of young Aboriginal and Torres Strait Islander Children in the juvenile justice system. WA Department of Justice, Annual Report 2021/2022, page 27 retrieved at Department of Justice, Western Australia - Annual Report 2021-2022 (www.wa.gov.au).

Part V: Anticipated duration of the amicus' argument

41. The amicus is content to simply rely on these written submissions.

Dated
22 December 2022

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IN THE HIGH COURT OF AUSTRALIA
PERTH REGISTRY **No. B52 of 2022**

BETWEEN: **BDO**
Appellant

and

THE QUEEN
Respondent

ANNEXURE TO THE SUBMISSIONS OF THE AMICUS

Pursuant to Practice Direction No. 1 of 2019, the Amicus sets out below a list of statutes referred to in these submissions.

No.	Description	Version	Provisions
1.	*Criminal Code 1913* (WA), Chapter V	Current.	ss 22-36.
2.	*Criminal Code 1924* (Tas)		s 18.
3.	*Criminal Code 2002* (ACT)		ss 25 and 26(1).
4.	*Criminal Code 1995* (Cth)		ss 7.1-7.2.
5.	*Crimes Act 1914* (Cth)		s 4M.
6.	*Criminal Code 1899* (Qld)		s 29(1).
7.	*Children, Youth and Families Act 2005* (Vic)		s 344.
8.	*Children (Criminal Proceedings) Act 1987* (NSW)		s 5.
9.	*Criminal Code Act* (NT)		s 38(1).