IN THE CHILDREN'S COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Revised
Not Restricted
Suitable for Publication

Court Reference: K10242343

WB[1] Applicant

v

Director of Public Prosecutions Respondent

In the matter of an application by a child under s356(6) of the *Children, Youth and Families Act 2005*

JUDGE:	HER HONOUR JUDGE CHAMBERS
HELD:	MELBOURNE
DATE OF HEARING:	12 JUNE 2019
DATE OF JUDGEMENT:	24 JUNE 2019
CASE MAY BE CITED AS:	*WB v DPP* [2019] VChC 1

REASONS FOR DECISION

Catchwords: Criminal law – child accused charged with aggravated carjacking which is defined as a Category A serious youth offence – application for the Category A serious youth offence to be heard and determined summarily pursuant to s356(6) of the *Children, Youth and Families Act 2005* – accused now 18 years of age – whether the Children's Court has adequate sentencing options to respond to the child's offending – whether "relatively high" burden of establishing substantial and compelling reason for the Category A serious youth offence to be heard and determined summarily has been met – WB's childhood and adolescence marked by extraordinary trauma, instability, abuse and neglect – low level of cognitive functioning, diagnosed disorders and mental health issues – sexual assault of WB in detention – application for summary jurisdiction granted.

APPEARANCES:	Counsel	Solicitors
For the Applicant:	Mr P Brown	Comito & Associates
For the Respondent:	Mr J Manning	Office of Public Prosecutions

[1] To ensure there is no possibility of identification of the applicant, who is a child, this ruling has been anonymised in respect of the name of the applicant.

Introduction

1. WB was born on [date removed] and is now 18 years old.

2. On 28 January 2019, WB was arrested and charged with the offence of aggravated carjacking contrary to s79A of the *Crimes Act 1958* in addition to other offences arising from an incident on 24 January 2019, when he was 17 years of age.

3. The offence of aggravated carjacking is a Category A serious youth offence as defined by s3 of the *Children, Youth and Families Act 2005* (CYFA). As it is alleged that WB was at least 16 years old at the time he committed the offence, s356(6) of the CYFA applies a presumption that the charge will not be heard and determined summarily.

4. WB has requested that the Category A serious youth offence be heard and determined summarily in the Children's Court.[2] The application is opposed by the prosecution.

5. The allegations giving rise to the charge of aggravated carjacking can be briefly stated.

6. Shortly after 6.30pm on Thursday 24 January 2019, Dr E arrived at the [location removed] Hospital and parked his 2012 Mercedes Benz sedan in the hospital's underground car park.

7. After getting out of his car, Dr E was approached by three youths, HC aged 18, WB then aged 17 and a female, SH aged 16. HC demanded that Dr E hand over his car keys. Assuming he was joking, Dr E continued to walk past the group. WB then went up to Dr E, raised his fists and again demanded the keys. While his attention was on WB, Dr E felt blows to his back. He then tried to walk away from the group however WB tried to grab the keys from his hand and a struggle ensued. Dr E lost his balance and fell forward onto the concrete ground. In this process, the keyring snapped, and WB took the car key. The three offenders then jumped into Dr E's car, with WB in the driver's seat. The group then stole Dr E's Mercedes Benz, with WB driving the car out of the carpark at speed. Arising from the incident, Dr E suffered a fractured left wrist and bruising to his back and left hip.

8. For the reasons that follow, I have granted the application for summary jurisdiction for this Court to hear and determine the Category A serious youth offence of aggravated carjacking.

[2] Section 356(6)(a) of the CYFA.

The Legislation

9. The relevant provisions of s356(6) of the CYFA provide:

> *"(6) If a child is charged before the Court with a Category A serious youth offence committed when the child was aged 16 years or over, other than murder, attempted murder, manslaughter, child homicide, an offence against s.197A of the* ***Crimes Act 1958*** *(arson causing death) or an offence against s.318 of the* ***Crimes Act 1958*** *(culpable driving causing death), the Court must not hear and determine the charge summarily unless –*
>
> *(a) the child or the prosecution requests that the charge be heard and determined summarily; and*
>
> *(b) the Court is satisfied that the sentencing options available to it under this Act are adequate to respond to the child's offending; and*
>
> *(c) any of the following applies-*
>
> *(i) it is in the interests of the victim or victims that the charge be heard and determined summarily;*
>
> *(ii) the accused is particularly vulnerable because of cognitive impairment or mental illness;*
>
> *(iii) there is a substantial and compelling reason why the charge should be heard and determined summarily."*

10. The issues to be determined in this application are as follows:

(a) Is the Court satisfied that the sentencing options available to it under the CYFA are adequate to respond to the child's offending? [s356(6)(b)]; and if so,

(b) Do any of the following apply:

(i) Is WB particularly vulnerable because of cognitive impairment? [s356(6)(c)(ii)] or;

(ii) Is there a substantial and compelling reason why the charge should be heard and determined summarily? [s356(6)(c)(iii)]

11. It is not contended that it is in the interests of the victim that the charge be heard and determined summarily and accordingly no reliance is placed on s356(6)(c)(i) of the CYFA.

Other charges

12. WB is charged with other offences arising from this incident of alleged offending, including theft of the motor vehicle, recklessly causing injury, unlawful assault, theft of petrol, conduct endangering persons and offences against the *Road Safety Act 1986,* including dangerous driving.

13. The hearing and determination of the additional indictable charges are subject to s356(3) of the CYFA. Under that provision the indictable charges must be heard and determined summarily unless, at any stage, the Court considers the charge/s unsuitable by reason of exceptional circumstances to be determined summarily in the Children's Court.

14. In this case, the prosecution has not made application for the additional indictable charges to be "uplifted" by reason of exceptional circumstances and has indicated it does not intend to do so. The prosecution has also indicated that some of the indictable charges; namely theft of motor vehicle, recklessly causing injury and unlawful assault are likely to resolve as alternates to the charge of aggravated carjacking. In that event, the prosecution submits that there is little prospect of any overlap of the charges being prosecuted in two jurisdictions should the charge of aggravated carjacking proceed in a higher jurisdiction. For that reason, the prosecution did not contend that it is in the interests of the victim to avoid the proceedings being "split" between two jurisdictions.

15. Ultimately, this issue has not required further consideration in circumstances where the application for summary jurisdiction has been granted, however it can be observed that it is less than desirable that related charges are heard and determined in separate jurisdictions.[3]

[3] In contrast, see for instance, s145 of the *Criminal Procedure Act 2009* and the power given to the Magistrates' Court (and to the Children's Court by virtue of s528(2)(b) of the CYFA) to transfer related summary offences following a committal. However, this provision has no application to indictable charges heard and determined summarily under the CYFA, leaving open the prospect of related charges being heard and determined in two jurisdictions in the absence of a finding of "exceptional circumstances" under s356(3) of the CYFA.

Adequacy of sentencing options under the CYFA

16. An assessment of whether the Children's Court has adequate sentencing options to respond to the offending that constitutes the Category A serious youth offence is a complex exercise. It requires the Court, on the material currently available to it, to assess whether the sentencing options under the CYFA are adequate – as a positive finding – to respond to the offending. The assessment requires the Court to have regard to many of the matters ordinarily considered when sentencing an offender including the objective seriousness of the offending, any aggravating features of the offending balanced against matters relevant to reduce or mitigate the sentence imposed, including the personal history and background of the accused child. However, many matters remain unknown at present; for instance, whether the matter will resolve to a plea (although the defence has indicated the charges are likely to resolve to a plea), the timing and weight that may attach to any plea as indicative of remorse, and accordingly the sentencing discount likely to apply. These are highly relevant sentencing considerations that cannot be properly assessed and balanced at this time.

17. However, based on the material presently before the Court, the following matters remain relevant to the assessment under s356(6)(b) of the CYFA.

18. First, aggravated carjacking is a serious offence that carries a maximum penalty, for persons sentenced under the *Sentencing Act 1991*, of 25 years' imprisonment. For adults, the offence carries a mandatory non-parole period of three years unless the court finds that a special reason exists.[4] These provisions are an expression by Parliament of the seriousness with which the offence of aggravated carjacking is viewed. The maximum penalty is intended to operate as a serious deterrent to those who use violence (or weapons) to take another person's car.

19. Second, the serious nature of the offending itself. The aggravated carjacking was committed in company where the victim was targeted in the carpark of the hospital, and where he was assaulted, receiving multiple blows to his back and has struggled with the offenders before falling to the concrete ground of the carpark. It was a nasty, violent confrontation aimed at grabbing Dr E's car keys from his hand, to steal his valuable car. Due to the incident, Dr E suffering a fractured wrist and bruising. Whilst WB was not the instigator of the offending,

[4] Section 10AD of the *Sentencing Act 1991.*

he was an active participant. It was WB who grabbed the keys leading to the struggle, and who entered the driver's seat and drove the car, at speed, out of the carpark. However, it is relevant that it is the adult offender who played the predominant role in the aggravated carjacking.

20. In WB's case, the offending was aggravated by the fact that he was subject to a twelve-month youth supervision order imposed by the Children's Court at the time of the offending[5] and further, that he has a significant and relevant criminal history dating back to May 2013. Relevantly, WB's prior criminal history includes the offences of aggravated carjacking with an offensive weapon, attempted carjacking, dangerous driving and recklessly causing injury, for which he has previously been sentenced to detention. WB's first sentence of detention was imposed on 17 May 2017 for multiple offences including aggravated burglary, armed robbery, burglary, dangerous driving and for which he was sentenced to nine months' detention in a youth justice centre.[6] On 18 August 2017, WB was sentenced to detention for 15 months for offences that included aggravated carjacking and two charges of attempted carjacking. Deterring WB from this type of serious offending and the protection of the public will be highly relevant sentencing considerations in this case.

21. However, in WB's case, there are also powerful factors that will operate in reduction of any sentence imposed. WB was born on 17 June 2001 and is now 18 years old. He was 17 years old at the time of this incident. It is accepted by the prosecution that WB's early childhood and adolescence has been marked by significant adversity and disadvantage. He has been diagnosed with an intellectual disability within the meaning of the *Disability Act 2006*, with the Statement of Intellectual Disability[7] finding that he has "significant sub-average general intellectual functioning" and "significant deficits in adaptive behaviour" for which he is eligible for disability services through DHHS. In custody, WB has been subject to a serious sexual assault. These are all circumstances to which I will return later in my decision, but each is relevant to sentence.

[5] The Children's Court at Melbourne sentenced WB to a twelve-month youth supervision order, with a special condition that he comply with the Disability Plan of Services, on 22 August 2018 having found his breach of the YSO imposed on 13 February 2018 proved.
[6] On the same date, WB was sentenced to an aggregate term of 6 months' detention to be served concurrently with the nine months' detention for further offending.
[7] Statement of Intellectual Disability dated 11 August 2017.

22. In considering whether the sentencing options available to the Children's Court under the CYFA are adequate to respond to the offending, it is relevant to compare the sentencing options under the CYFA with those available in a higher jurisdiction under the *Sentencing Act 1991* where different sentencing considerations and options apply. Under the CYFA, the sentencing considerations are markedly different to those that apply to adults.[8] For instance, general deterrence has no role to play in sentencing children under the CYFA.[9] There is no capacity to impose a sentence of imprisonment and the Children's Court cannot impose a sentence of detention in a youth justice centre beyond three years for one offence or an aggregate of four years for more than one offence.[10] In contrast, the County Court has the power to impose a term of adult imprisonment, or a period of detention in a youth justice centre for up to four years in respect of one or more offences.[11]

23. On behalf of WB, I was referred to cases involving the sentencing of adults to illustrate the adequacy of the sentencing options available under the CYFA to respond to WB's offending. For instance, in *DPP v Teryaki*,[12] a 23-year-old accused was sentenced to three years' imprisonment with a non-parole period of two years, despite a long criminal history, for offences of aggravated carjacking, attempted carjacking and theft of motor vehicle. On appeal, the sentence was reduced to two years and three months' imprisonment with a non-parole period of 1 year and 9 months. It is relevant to note that the accused in that case had a significant intellectual disability (with an IQ of 56) and had made a number of serious suicide attempts in custody. In *DPP v Amanamoi*[13] a youthful offender, aged nineteen, was sentenced to three years and ten months' imprisonment for an aggravated carjacking. In that case, however, the offender had a no prior criminal history.

24. In my view, cases such as these illustrate the difficulty of assessing the adequacy of sentencing options by reference to other cases where the sentencing considerations vary considerably. Nonetheless, they are of utility in a general sense in demonstrating the weight that attaches to factors such as youth, disadvantage and intellectual impairment even when sentencing an offender for the serious offence of aggravated carjacking.

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[8] See s362 of the CYFA cf. s5 of the *Sentencing Act 1991.*
[9] See *CNK v the Queen* [2001] VSCA 228.
[10] Section 413(2) and (3) of the CYFA.
[11] Section 32C(2C) of the *Sentencing Act 1991* limits the availability of youth detention for a "young offender" unless exceptional circumstances apply; see also s586 of the CYFA. Section 32(3) of the *Sentencing Act 1991* provides the maximum periods for youth detention.
[12] [2018] VCC 1876.
[13] [2018] VCC 1507.

25. In his useful submissions before me, Mr Manning appearing for the prosecution, conceded that the Children's Court has adequate sentencing range to respond to WB's offending in respect of the charge of aggravated carjacking. Notwithstanding his concerning criminal history, and his most recent sentence of 15 months' detention for similar offending, I have concluded that the sentencing options available under the CYFA are adequate to respond to WB's offending in this case. In reaching this conclusion, I have clearly attached great weight to his age at the time of the offending, his cognitive impairment combined with the significant disadvantage, trauma and dysfunction he has experienced throughout his life. I have also proceeded on the basis he will receive a sentencing discount for the plea provisionally indicated through his counsel.

Particular vulnerability because of cognitive impairment or mental illness

26. The next issue to consider is whether, having satisfied s356(6)(b), the applicant can establish any one of the three matters listed in sub-paragraphs (i)-(iii) of s356(6)(c) of the CYFA. In this case, it is submitted that WB is particularly vulnerable because of cognitive impairment under sub-paragraph (ii).

27. To date, no higher Court has authoritatively considered the "particularly vulnerable" limb of s356(6)(c) of the CYFA. On behalf of WB, it is submitted that the word "particularly" should be read as "particular" to WB, rather than a "higher degree" of vulnerability. However, reading the provision in context, I do not consider the construction contended for on behalf of WB to be open. I note that the Second Reading speech to the amending legislation used the word "especially" in place of the word "particularly", but otherwise failed to shed light on the intended operation of this limb. Nonetheless the use of the word "especially" indicates that the ordinary, dictionary definition of "particularly" is to be preferred; that is, "especially or more than usual".[14] The use of the word "particularly" and not "particular" emphasises that a *quality* of vulnerability is required. Moreover, the provision requires an applicant to establish a causal connection between the child's cognitive impairment or mental illness and the vulnerability; that is, that the child is particularly vulnerable *"because of"* the cognitive impairment or mental illness.

[14] Cambridge University dictionary definition of "particularly".

28. WB was assessed by Dr Lisa Forrester, of the Children's Court Clinic for the purposes of this application on 9 May 2019. Dr Forrester is a clinical and forensic psychologist with over 17 years' experience working in forensic and clinical settings for both youth and adults. Her report dated 18 May 2019 was tendered in evidence in the application and Dr Forrester gave evidence before me on 12 June 2019.

29. Dr Forrester's report outlined WB's family and developmental history, to which I return later in my reasons, previous assessments of WB and her assessment of his current psychological wellbeing.

30. It is necessary for me to refer to some of those earlier assessments. In February 2013, when WB was 11 years old, he was assessed by psychologist, Mr Bob Ives. On testing, WB was found to have a full-scale IQ of 72, which is on the 3rd percentile. Mr Ives reported that WB had previously been diagnosed with Attention Deficit Hyperactivity Disorder – for which he had been prescribed Ritalin,[15] Reactive Attachment Disorder and Generalised Anxiety Disorder. Mr Ives expressed the opinion that "it would be expected that these disorders would be compounding and interacting, and have a significant adverse impact on WB's developmental needs as they inhibit academic success, social relatedness, place him at high physical risk due to his impulsive behaviour in the community and impede the formation of secure attachment with caregivers, with his high levels of anxiety impacting across all areas of his functioning".

31. In July 2018, when he was 17 years old, WB was further assessed by consultant psychologist, Ms Gina Cidoni who again administered the Weschler Adult Intelligence test. In her report dated 25 July 2018, Ms Cidoni confirmed that, consistent with the 2013 finding, WB had a "borderline intellectual function with a full-scale IQ of 72". Further, Ms Cidoni expressed the opinion that WB presented with "anxiety and moderately unstable mood at one end and hypomania at the other… [with] emerging antisocial traits consistent with previous diagnoses of ADHD, anxiety and reactive attachment disorder. Symptoms of PTSD were in evidence and emerging depression".

32. Dr Forrester did not undertake a further assessment of WB's cognitive functioning, given the last assessment was conducted inside of two years by Ms Cidoni. In Dr Forrester's view

[15] Which WB has subsequently ceased taking.

the two assessments of Dr Ives and Ms Cidoni confirm a consistent and stable "picture" of WB's impaired cognitive functioning that is likely to be lifelong. I am satisfied WB has a cognitive impairment with low intellectual functioning consistent with a full-scale IQ of 72.

33. As to his mental health, Dr Forrester administered the DASS-21 comprising three self-report scales designed to measure negative emotional states of depression, anxiety and stress. In her opinion, WB currently experiences moderate levels of depression, and mild levels of stress and anxiety. The Trauma Symptom Checklist for Children inventory assessment undertaken by Dr Forrester revealed no elevations that would indicate clinically significant impairment across anxiety, depression, anger, posttraumatic stress, dissociation and sexual concerns. It was only WB's response to the anger scale that was elevated relative to other scales but did not indicate clinically significant impairment. In her evidence, Dr Forrester agreed that the previously diagnosed disorders – ADHD, Reactive Attachment Disorder and Generalised Anxiety Disorder – result in a complex presentation that are likely to overlap with one another and are also likely to be lifelong. Dr Forrester accepted that whilst the diagnosis of a Reactive Attachment Disorder pertains to children only, the characteristics that attach to that disorder are largely unresolved in WB's case.

34. However, what is less clear is whether these impairments, both cognitive and associated with WB's diagnosed disorders, combined with his moderate levels of depression and mild levels of stress and anxiety, contribute to make WB "particularly vulnerable". In certain respects, assessment on this issue is complicated by some limitations to Dr Forrester's report, including WB's unwillingness to discuss his experience of the sexual assault and the vague responses often given by WB, particularly to questions regarding his mental health.

35. In her report, Dr Forrester unequivocally assesses WB as a "highly vulnerable young man" but attributes this vulnerability to a constellation of factors, of which his borderline intellectual functioning is just one factor amongst a complex background "characterised by chronic abuse and neglect, parental substance abuse and poor mental health, disrupted attachments, trauma and instability".

36. In other regards, Dr Forrester's report indicated elements of resilience on the part of WB, notwithstanding his impaired cognitive capacity, including a presentation consistent with being *"pretty happy"*, with affect that was reactive and within normal range, reports of WB

being well settled in detention and easily managed by staff, with a developing capacity to develop more open and trusting relationships with staff and a positive attitude towards programs, including educational activities with Parkville College, where he is currently undertaking his VCAL.

37. For reasons which I will expand upon shortly, whilst I am satisfied that WB is a highly vulnerable young person, I am not satisfied that his borderline cognitive capacity or mental health issues, either alone or combined, are the reason why he is especially or particularly vulnerable. Rather, WB's vulnerability is caused by a range of factors that each impact one upon the other and which I find to be relevant to the third limb of s356(6)(c). However, I am not satisfied the link between his vulnerability and his cognitive impairment or mental illness has been demonstrated such that the criteria under s356(6)(c)(ii) applies.

A substantial and compelling reason

38. In determining whether there is a "substantial and compelling reason" why the charge should be heard and determined summarily, it is notable that Parliament has expressly directed that the Court must have regard to its intention that a charge for a Category A serious youth offence should not *normally* be heard and determined summarily: s356(7) of the CYFA.

39. In its written submissions, the prosecution submitted that the requirement to establish a "substantial and compelling reason" imposed a "heavy burden" on the applicant, submitting that the test is similar in nature to the "special reasons" exception contained in the statutory minimum sentence provisions of the *Sentencing Act 1991*, as noted in the Second Reading Speech.[16] The Victorian Court of Appeal considered the meaning of the phrase "substantial and compelling circumstances" in *DPP v Hudgson*[17] and made the following observations relied upon by the prosecution in aid of its characterisation of the test in sub-paragraph (iii):

> *"It was plainly the intention of Parliament that the burden imposed on an offender who sought to escape the operation of s10 should be a heavy one and not capable of being lightly discharged.*

[16] Written Submissions dated 23 April 2019 and the reference to the Victorian Parliamentary Debates, Legislative Council, 8 June 2017.
[17] [2016] VSCA 254.

More specifically, we accept the Director's submission that the word "compelling" connotes powerful circumstances of a kind wholly outside what might be described as 'run of the mill' factors, typically present in offending of this kind."

40. In *Hudgson,* the Court was considering the meaning of the phrase "substantial and compelling circumstances" in the context of the *Sentencing Act 1991* provisions that require the fixing of a mandatory minimum non-parole period of four years for adults sentenced for the offence of intentionally causing serious injury in circumstances of gross violence.

41. In considering the phrase "substantial and compelling reason" for the purposes of the CYFA however, the starting point is to construe the words in a way that is consistent with the ordinary meaning to be given to those words, whilst having regard to the statutory context in which they appear when viewed as a whole.[18] By its language, the provision does not create an obligation to establish an "irresistible, exceptional or rare" reason or reasons, but rather a reason or reasons that are "substantial and compelling", and no more.

42. A recent decision of the County Court in *PT v DPP*[19] analysed this phrase and the extent of the burden upon an applicant, albeit under s168 and subject to s168A of the *Criminal Procedure Act 2009,* in an application to transfer a Category A serious youth offence to the Children's Court. In *PT,* Judge Gamble concluded that whilst the phrase "substantial and compelling" imposes a test that is more stringent than the test of "compelling reason" it is nonetheless a somewhat less stringent test than that of "substantial and compelling circumstances" in the original form of s10A(2)(e) of the *Sentencing Act 1991* as interpreted by the majority in *Hudgson.* In the event, Judge Gamble described the test to be applied as "a 'relatively high' one, as opposed to a 'high' or 'very high' one, and that the relevant provisions impose on an applicant something less than a 'heavy' onus or burden".[20]

43. I respectfully adopt the characterisation given by Judge Gamble in *PT* of the test to be applied in considering the words "substantial and compelling reason" in s356(6)(c) of the CYFA. I consider this approach to be consistent with the statutory context in which the words appear in the CYFA. The test is also aligned with the child-specific rights enshrined in the *Charter of Human Rights and Responsibilities Act 2006* (the Charter) including, "as

[18] *Project Blue Sky Inc. v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].
[19] [2019] VCC 836.
[20] Ibid at [61].

far as it is possible to do so" interpreting the phrase "substantial and compelling reason" as it is used in s356(6) of the CYFA in a way that is compatible with the child, WB's, human rights, including:

- The right to such protection as is in his best interests and is needed by him by reason of being a child: s17(2) of the Charter;
- The right to be treated in a way that is appropriate for his age: s23(3) of the Charter; and
- The right to a criminal procedure that takes account of his age and the desirability of promoting the child's rehabilitation: s25(3) of the Charter.

44. In adopting this approach, I have had regard to the fact that *Hudgson* involved an interpretation of the phrase "substantial and compelling circumstances" in the context of a scheme of mandatory minimum sentencing for adult offenders under the *Sentencing Act 1991*. In contrast, the phrase "substantial and compelling reason" is to be construed in the context of a decision regarding the exercise of jurisdiction by a specialist Children's Court under child-specific legislation, the CYFA. For those reasons, I do not consider the test requires either rare or unforeseen circumstances or imposes more than a "relatively high" burden whilst having regard to Parliament's intent that such matters should *normally* not be heard and determined summarily.

45. In the case of WB, as indicated, I am satisfied that the "relatively high" burden of establishing "substantial and compelling reason" has been met. These are my reasons.

46. WB's childhood and adolescence has been marked by extraordinary trauma, instability, abuse and neglect. It is necessary to outline some of WB's personal history for the purposes of this decision. Much of this information is contained in the reports filed in this application, including a Take Two Assessment Report dated 4 April 2011 when WB was nine years old. In summary it records:

- WB was born on 17 June 2001. His father had died of a drug overdose before he was born and his mother reported heroin and methadone use during his pregnancy.
- At six months of age, it was reported that his mother was using multiple substances and was both verbally and physically abusing WB. His mother's partner was also abusive to WB and his mother, allegedly threatening to put WB's head down the

toilet and to give him away. During this time, his mother's relationship with her partner was characterised by extreme violence in the presence of WB. A report to child protection was substantiated at that time.

- At the age of two, a further report was made to child protection and WB was removed from the care of his mother. Over the following 16 months, his mother continued to experience numerous traumas, periods of homelessness and unsuccessful attempts at detoxification.

- WB's placement broke down in May 2005 and he and his sister were placed in foster care.

- WB was reunified with his mother in 2007, however his mother struggled to manage his behaviour. In November 2009 WB was removed and placed in residential care. In that placement he is reported to have absconded up to twenty times a day. Two further home-based placements broke down in 2011 due to WB's behaviours and he was moved to a Berry St residential unit with one-on-one staffing.

47. By February 2013, at the time of Mr Ives assessment, WB was assessed as having a borderline intellectual disability which Mr Ives stated, "severely limits [WB's] capacity for logical reasoning, his ability to formulate moral concepts and judgments, such as recognition of cause and effect, perception of consequences of actions, and understanding of ends and means". Mr Ives observed that WB came from "a very dysfunctional background" and that "almost from infancy has been placed in a variety of unsuccessful placements" with his mother "sabotaging many of his placements, while at the same time having a succession of often violent, drug using partners". Mr Ives expressed the opinion that WB is "obviously a very emotionally disturbed child, [who] in May 2007 was diagnosed with attention-deficit/hyperactivity disorder", making him "impulsive, emotionally and physically reactive".

48. Mr Ives reports that WB was subject to further attempts at a home placement in 2011, both of which failed and that he returned to a single person unit until July 2012.

49. During that period his schooling was erratic, with a two-hour day schooling program unable to be established due to WB's absconding behaviour. Indeed, WB has completed little formal schooling beyond early primary years.

50. Between July 2012 and February 2013, Mr Ives reports that WB was again moved to another residential unit where his "dysfunctional behaviour escalated and worsened" leading to his first offending.

51. In Ms Cidoni's July 2018 assessment, she noted WB's borderline intellectual functioning, expressed the opinion that this factor alone "results in compromised problem solving and judgement and presents a specific vulnerability where he struggles with the activities of daily living and he lives a problematic life where he functions under high strain with limited supports". Having been exposed to "severe trauma and instability in childhood, with multiple residential placements", Ms Cidoni stated that her assessment revealed "high situational stress with poor coping mechanisms, poor judgment and impulse control".

52. It is this complex intersection of factors that, having been assessed by Dr Forrester, led her to conclude as follows:

> *"[WB] presents as a very vulnerable young man, with a background characterised by chronic abuse and neglect, parental substance abuse and poor mental health, disrupted attachments, trauma and instability. He has been diagnosed with a range of mental health issues, has a long history of experiencing rejection and abandonment resulting in attachment difficulties, as well as a mild intellectual disability."*

53. It is against this background that I note that WB has spent much of the past three years in detention. However, a further factor is relevant to my considerations.

54. In May 2018, whilst detained at the Parkville Youth Detention Centre, it is reported that WB was the victim of two rapes committed by another detainee. Both rapes are alleged to have been committed on the one day, being 12 May 2018. The allegations are the subject of separate criminal proceedings where WB is the alleged victim. The horrific circumstances alleged by the prosecution in that case are [deleted for the purposes of publication].

55. Following the alleged rapes, WB was moved to another unit for his protection.

56. Although WB, when assessed by Dr Forrester, refused to discuss the rape allegations, Dr Forrester confirmed he became "quite distressed" when the issue was raised. Although she found no evidence of a post-traumatic stress disorder, Dr Forrester was unequivocal in her evidence that the incident was a highly traumatic event for WB. She noted that WB remains fearful that the perpetrator will return and that the "teasing" he has been subjected to following the rapes, "exacerbates his anxiety and impacts on his general wellbeing". Moreover, since that event, it is reported that WB, with his pre-existing vulnerabilities, has begun to self-harm, is less comfortable around new people, and dislikes being approached from behind. In Dr Forrester's discussions with the unit manager at Parkville, it was reported that WB now "has a tendency to shut down" and withdraw from social situations and is wary of any new residents. She reported that he has become fearful of certain parts of the Parkville precinct and prefers to stay within the confines of his unit.

57. Dr Forrester confirms that "there is no doubt" the serious sexual assaults "would have had an impact on [WB], particularly with regards to his sense of safety and security. Additionally, the event is likely to have reinforced WB's view of the world as being unfair and the perception of himself as being unreasonably targeted by others. It has also likely reinforced WB's already hypervigilant approach to the world". Sensibly, Dr Forrester recommends ongoing counselling with specialist services to respond to the assault.

58. In my view, the combination of factors including WB's background of trauma, abuse and neglect combined with his low level of cognitive functioning, diagnosed disorders and mental health issues, including moderate depression and mild anxiety – which I accept are each "compounding and interacting" – coupled with cogent evidence of WB being the victim of two instances of rape whilst in custody and the trauma associated with those events, constitute "substantial and compelling" reason for the Category A serious youth offence to be heard and determined summarily in a specialist Children's Court.

59. Accordingly, WB's application for summary jurisdiction is granted.

Judge A Chambers
President