[2015] WACC 2

JURISDICTION	**:**	CHILDREN'S COURT OF WESTERN AUSTRALIA IN CRIMINAL
LOCATION	**:**	PERTH
CITATION	**:**	THE STATE OF WESTERN AUSTRALIA -v- BB (A CHILD) [2015] WACC 2
CORAM	**:**	JUDGE REYNOLDS
HEARD	**:**	2 DECEMBER 2014, 16 DECEMBER 2014 & 28 JANUARY 2015
DELIVERED	**:**	9 MARCH 2015
PUBLISHED	**:**	17 MARCH 2015
FILE NO/S	**:**	CC KA 437 of 2014 CC LE 41 of 2014 CC LE 42 of 2014 CC LE 1 of 2015 CC LE 2 of 2015
BETWEEN	**:**	THE STATE OF WESTERN AUSTRALIA Prosecution AND BB (A CHILD) Accused

Catchwords:

Criminal law - Child - Fitness to stand trial - Whether child accused released or custody order made - Child from remote aboriginal community

Legislation:

Criminal Law (Mentally Impaired Accused) Act 1996 s 9, s 12, s 19
Young Offenders Act 1994 s 67
Children and Community Services Act 2004 s 9, s 12, s 28
Criminal Code s 378, s 426

Result:

Charges dismissed and accused child released

Category:

Representation:

Counsel:

Prosecution	:	Mr S Stocks
Accused	:	Ms Z Gilders

Solicitors:

Prosecution	:	Director of Public Prosecutions (WA)
Accused	:	Aboriginal Legal Service

Case(s) referred to in judgment(s):

AH v The State of Western Australia [2014] WASCA 228

1 **JUDGE REYNOLDS**:

Introduction

2 On 9 March 2015 I gave some brief reasons on these matters and made final orders. I said that I would publish full written reasons later. These are those reasons.

3 The issues in these matters concern BB's fitness to stand trial, and if not fit, whether or not he should be released or be made the subject of a custody order.

4 BB was born on 14 August 1997 and is 17 years and about seven months of age.

5 BB is before the Court charged with 5 offences, namely:

1. Charge No. CC LE 41/2014 which alleges that between 3 and 4 September 2014, at Kalgoorlie he entered the place of Kennedy Drilling, Kalgoorlie without consent, and committed an offence of stealing;

2. Charge No. CC LE 42/2014 which alleges that between 3 and 4 September 2014 at Kalgoorlie he stole a can of energy drink the property of Kennedy Drilling;

3. Charge No. CC KA 437/2014 which alleges that on 28 October 2014 at Leonora he was in the place of Shell Petroleum Australia Pty Ltd trading as Coles Express, without consent, and with intent to commit an offence therein,

4. Charge No. CC LE 1/2015 which alleges that on 1 January 2015 at Leonora, he wilfully and unlawfully destroyed a window of a Ford Falcon motor vehicle; and

5. Charge No. CC LE 2/2015 which alleges that on 2 January 2015 at Leonora he wilfully and unlawfully destroyed a window and wooden cupboard, together valued at $2,200.

6 BB has not entered any pleas to any of the charges.

7 BB first appeared on the first three charges set out above before a Magistrate of the Court sitting at Kalgoolie on 28 October 2014. On 25 November 2014 the same Magistrate sitting at Kalgoorlie directed that

BB appear before me for the three charges on 2 December 2014. The Magistrate remanded BB in custody.

8 BB had been before the Court on 30 December 2013 and 18 March 2014 on other charges. I will set out the details of them later. In relation to those earlier charges, a report was obtained from Dr Wojnarowska dated 31 March 2014 on BB's fitness to stand trial. Dr Wojnarowska expressed the following opinion in that report:

> In my opinion [B] is not fit to stand trial and unfortunately his prospects of entering a plea in the future are limited. Intellectual disability is permanent and stable over the person's life span and is not amenable to therapeutic interventions; therefore [B]'s fitness to stand trial is not likely change in the near future.

9 The earlier charges were dismissed on the strength of that report and BB was released in relation to them.

10 On 25 November 2014, the Magistrate presiding over the Court at Kalgoorlie was aware of that prior report and opinion of Dr Wojnarowska. He raised the issue of BB's fitness to stand trial on the first three of the five new charges. He also expressed concern that the relevant agencies had not secured suitable accommodation for BB. Given the issues of BB's fitness to stand trial on the first three of the new charges, and the need for suitable accommodation and supports to be identified for BB as a matter of urgency, the Magistrate referred BB to me to deal with the three charges.

11 BB appeared before me for the first time on 2 December 2014. He was represented by counsel. When he appeared on that date, the position of the defence was that further to and consistent with the opinion of Dr Wojnarowska, he was not fit to stand trial on the three new charges. The matters were further adjourned to 16 December 2014 with a request by me for the agencies of Youth Justice of the Department of Corrective Services (YJ) and the Department of the Child Protection and Family Services (DCPFS) to work collaboratively to identify a suitable accommodation arrangement for BB.

12 On 16 December 2014, counsel for BB informed the Court that contrary to the position previously advanced by the defence on BB's fitness to stand trial, and after getting further advice and taking further instructions from BB, the position of the defence had changed and that it was now being submitted that BB was fit to stand trial on the new charges. I informed counsel that the issue required a further expert report

and I requested a further report from Dr Wojnarowska. I was pleased to be informed by the representative of DCPFS, that as a result of its representations, the Disabilities Services Commission (Disability Services), had decided that BB satisfied its requirements for eligibility and so it would provide him with supports. I was also pleased to be told that a suitable accommodation arrangement had been secured. BB was released on bail to live with an uncle and aunty in Leonora. The charges were further adjourned to 28 January 2015 for the return of the report of Dr Wojnarowska.

13 On 5 January 2015 BB appeared before a Magistrate of the Court sitting at Kalgoorlie charged with the further two offences of criminal damage. The Magistrate referred those two additional charges to me to join up with the first three charges so that all five charges came back before me on 28 January 2015.

Relevant provisions of the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act)

14 The CLMIA Act sets out various provisions in relation to mental unfitness to stand trial and procedures required to be considered by the Court in cases where an accused is not mentally fit.

15 Sections 9, 12 and 19 of the CLMIA Act relevantly provided as follows:

> **9. Mental unfitness to stand trial, definition**
>
> An accused is not mentally fit to stand trial for an offence if the accused, because of mental impairment, is —
>
> (a) unable to understand the nature of the charge;
>
> (b) unable to understand the requirement to plead to the charge or the effect of a plea;
>
> (c) unable to understand the purpose of a trial;
>
> (d) unable to understand or exercise the right to challenge jurors;
>
> (e) unable to follow the course of the trial;
>
> (f) unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
>
> (g) unable to properly defend the charge.

12. Deciding the question of mental fitness

(1) The question of whether an accused is not mentally fit to stand trial is to be decided by the presiding judicial officer on the balance of probabilities after inquiring into the question and informing himself or herself in any way the judicial officer thinks fit.

(2) For the purpose of the inquiry the judicial officer may —

(a) order the accused to be examined by a psychiatrist or other appropriate expert;

(b) order a report by a psychiatrist or other appropriate expert about the accused to be submitted to the court;

19. Procedure

(1) If the judge who decides that the accused is not mentally fit to stand trial —

(a) is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit, the judge must make an order under subsection (4); or

. . .

(4) An order under this subsection is an order quashing the indictment or, if there is no indictment, dismissing the charge and quashing the committal, without deciding the guilt or otherwise of the accused and either —

(a) releasing the accused; or

(b) subject to subsection (5), making a custody order in respect of the accused.

(5) A custody order must not be made in respect of an accused unless the statutory penalty for the alleged offence is or includes imprisonment and the judge is satisfied that a custody order is appropriate having regard to —

(a) the strength of the evidence against the accused;

(b) the nature of the alleged offence and the alleged circumstances of its commission;

(c) the accused's character, antecedents, age, health and mental condition; and

(d) the public interest.

Material facts alleged on the five charges

16 In relation to charge No. CC LE 41/2014 and charge No. CC LE 42/2014, for offences of burglary on a place and an associated stealing, it is alleged that BB climbed over a fence and into a secure yard of the premises in search of spray paint. He entered an unlocked building, located a fridge and removed a can of energy drink from it. He drank the energy drink and then left the yard by climbing back over the fence. He was identified from a DNA swab taken from the energy drink can left at the scene.

17 In relation to charge No. CC KA 437/2014, for an offence of burglary on a place, it is alleged that at about 12:35 am on 28 October 2014, that BB approached the Coles Express Service Station in Leonora. He unsuccessfully tried to enter the premises by a door and window, all of which were locked. He then used a metal grate to pry a metal screen from a window. He then broke the window and climbed inside. He then browsed about the shop and tried to open a security door to the cashier area. An alarm was activated and BB was startled and exited the store and ran from the scene. He was identified from CCTV footage of the incident.

18 In relation to charge No. CC LE 1/2015, for an offence of criminal damage it is alleged that at about 11:00 pm BB was involved in an altercation with another male. During the altercation he picked up an iron bar and used it to smash a window of a Ford Falcon motor vehicle which he believed belonged to the other male.

19 In relation to charge No. CC LE 2/2015, for an offence of criminal damage, it is alleged that at about 2:00 am BB kicked a window near the entrance to the Courthouse in Leonora. The force of the kick broke the window and also damaged a wooden cupboard inside the building. BB received severe lacerations to his right leg and left arm and then walked away from the scene.

20 BB told Police that he was drunk when he committed the criminal damage offences.

Further report of Dr Wojnarowska dated 23 January 2015 on fitness to stand trial

21 Dr Wojnarowska has provided a further report dated 23 January 2015 on BB's fitness to stand trial on the first three charges as set out above. She did not refer to the additional two charges of damage in her report. In the end, nothing turns on that.

22 At page 7 of the report, Dr Wojnarowska expressed her ultimate opinion in the following terms:

> In my opinion, [B] is currently not fit to stand trial and his prospects of entering a plea in the future are limited. Intellectual disability is permanent and stable over the person's life span and is not amenable to therapeutic interventions; therefore, in my opinion, [B] will continue to be unfit to stand trial and this is not likely to change in the near future.

23 Dr Wojnarowska set out the following information under the hearing of "Developmental/Family History" in her report. BB was born and raised in the Warburton Community in Regional Western Australia. His biological parents were assessed as unfit to raise their children due to alcohol abuse, domestic violence issues and frequent incarcerations. BB has two older sisters. He has a younger sister who lives with family members in Kalgoorlie. His older brother was killed in a motor vehicle accident a couple of years ago and before then struggled with alcohol use and frequent imprisonments. His biological mother has been unwell for a number of years due to medical complications associated with alcohol dependence and subsequent renal failure. She is supposed to undergo regular dialysis but is reportedly homeless, living on the streets of a regional country town and struggling to keep her medical appointments. His father died four years go.

24 The pregnancy with BB was reported to be complicated by his mother's alcohol use throughout her pregnancy. She also reportedly suffered from diabetes and was subjected to domestic violence. There is no specific information in relation to complications during the pregnancy or during childbirth and BB's developmental milestones are not known. From birth, BB was cared for by his maternal grandmother. That ended just over 18 months ago as her health deteriorated as a result of renal failure and she was not able to provide BB with any form of care. Thereafter BB moved to live with an aunt and uncle, but the level of care provided was questionable as his aunt suffered health issues and his uncle was incarcerated.

25 BB's attendance at school has been consistently poor over the years. He has not attended school for the past two to three years while living in the community. The available information suggested that he was illiterate. According to BB he could read and write "a little bit". When Dr Wojnarowska tested BB for the previous report, there was no evidence that he could read even simple sentences. When Dr Wojnarowska attempted to test BB for the purpose of this second report, he refused to co-operate and said that he could neither read nor write. English is not BB's first language.

26 Under the heading "Formulation", in her report dated 23 January 2015, Dr Wojnarowska stated as follows:

> [B] presents with intellectual disability of most likely multifactorial origin, which includes genetic factors, and possibly the presence of FAS. He displays both intellectual and functioning deficits in conceptual, social and practical domains. His reasoning, problem solving, planning and abstract thinking are severely impaired. He also demonstrates deficits in adaptive functioning which result in his failure to meet developmental standards for personal independence and social responsibility.
>
> Although [B] did not present with 'typical' FAS features as outlined in MSE section, it is important to note that not all individuals with FAS will have those facial features. The early introduction to solvent use has certainly contributed to his current cognitive dysfunction.
>
> [B]'s offending appears to be related to all of the above mentioned factors but it is of note that there is no history of aggression and his overall demeanour has been consistently noted as friendly.

27 Under the heading "Psychiatric Diagnosis", Dr Wojnarowska set out BB's Global Assessment of Functioning at 40/100.

BB's prior offending history and information on recent Court Orders

28 Between 11 March 2011 and 7 May 2013 inclusive, BB committed a variety of offences including burglaries, trespass, stealing, stealing a motor vehicle, carrying an article with intent to cause fear, driving a motor vehicle without a licence, breach of bail and damage. He was dealt with by the Court on 12 separate occasions during this period of time. On those occasions he was dealt with by either a referral to a Juvenile Justice Team or no further punishment pursuant to s 67 of the *Young Offender's Act 1994* (YO Act)

29 On 26 June 2013 BB was placed on a Youth Community Based Order (YCBO) for a term of six months with supervision and attendance

conditions, by the Court sitting at Warburton. The YCBO was imposed for offences of stealing, attempted aggravated burglary on a place and a trespass, all committed on 13 May 2013 at Warburton. During the term of the YCBO he was offered an engaged in only one program. It was an Art and Wellbeing Workshop held on 14 and 15 August 2013.

30 After the YCBO was imposed on 26 June 2013 and until it was cancelled by the Court on 28 August 2013 because of re-offending, BB was assisted by an aunty to report over the phone from Warburton to a YJ Officer (YJO) in Kalgoorlie on about four occasions. On several other occasions he failed to report over the phone as directed. On about three other occasions he engaged personally with a YJO for supervision when the YJO attended Warburton and made home visits.

31 It was noted by YJOs that BB was difficult to engage in phone discussion and also difficult to engage in supervision during home visits.

32 In about the middle of July 2013, BB travelled from Warburton to Leonora without requesting or giving any notice to a YJO. Later, on 22 July 2013, he was arrested on a warrant in Kalgoorlie and then released on bail. He then went to live at the Ninga Mia Community near Kalgoorlie. He later returned to Warburton. Sometime later again he returned to Kalgoorlie.

33 The report of YJ dated 9 March 2015 provides, amongst other things, as follows:

> **22 August 2013:** Phone contact was established with CPFS Kalgoorlie Duty Officer, . . . following contact with [B] in Kalgoorlie whilst under the influence of solvents and in the company with intoxicated adults. Ms . . . requested the information be provided to her in an email. An email was sent to Ms . . ., Mr . . . and . . . , Ms . . . detailing the following:
>
> - [B] located in public area of Kalgoorlie CBD openly sniffing paint in the company of intoxicated adult relatives.
> - [B] presented as unkempt [*sic*]; reported to be being hungry and unable to identify when he had last consumed food.
> - Attempts were made to return [B] to his caregivers Ms . . . and Mr. . . . It was established that Mr . . . had been arrested the previous night for discharging a firearm towards Ms . . . at the Ninga Mia Community and that [B] had witnessed this event and Mr . . . was in Police custody.
>
> As GYJS held primary case management of [B], at the time of this incident he was assisted by GYJS to locate a family member at the Ninga Mia Community to provide him care for the night. CPFS provided [B] a

> voucher for Foodbank. GYJS assisted [B] and his family to collect Foodbank Voucher and to attend Foodbank to collect food parcels. GYJS contacted WAPS who agreed to conduct regular patrols of the Nina Mia Community that evening in light of recent Domestic Violence incidence [*sic*], solvent misuse and concerns for [B]'s safety. GYJS attended in the early hours of that morning, following Mr . . . bail conditions. CPFS were notified of this.
>
> . . .
>
> **27 August 2013:** YJO, Ms . . . made phone contact with CPFS Field Officer, Mr . . . who informs that it is his assessment that Ms . . . and Mr . . . continue to be suitable caregivers for [B].

34 On 27 August 2013 a YJO made contact with the Goldfields Individual and Family Support Association, which is a non-government organisation that provides support to individuals and families with a disability. Unfortunately it was unable to accept a referral for BB as it did not have the funding to service the Warburton Community.

35 On 28 August 2013, the Court sitting at Warburton, cancelled the YCBO and placed BB on a new Order, an Intensive Youth Supervision Order (IYSO) for a term of six months with supervision and attendance conditions. It was also a condition of the IYSO that BB complete 50 hours of community work.

36 BB breached the YCBO by re-offending. He committed an offence of burglary on a place and a stealing on 16 July 2013 at Warburton, and an offence of breaching a bail undertaking by failing to appear before the Court, at Warburton, on 17 July 2013. The IYSO was imposed for these two new offences and the offences for which the YCBO was imposed.

37 The pre-sentence report provides that during the term of the IYSO, YJ made numerous attempts to refer BB for participation in programs. There is no mention in the report of any detail of the attempts and the programs. It is also stated in the report that there are very limited services available to young people residing in central desert communities.

38 As a result of difficulties in engaging with BB when he was on the YCBO, a YJO or YJOs made an assessment that BB may have been suffering from an intellectual disability. That assessment was clearly accurate. As a result, a referral was made to Psychological Services of YJ, however the referral was declined because of an inability for Psychological Services to fund a service at the Warburton Community.

39 During 10-14 September 2013, BB participated in the Desert Dust Up program facilitated by the Department of Education in Warburton. That program is an annual recreational and wellbeing program. During his engagement in the program, BB participated in activities including football, basketball, dance and art.

40 On 30 October 2013 an appointment was arranged by a YJO for BB to attend on a psychologist who had been employed to support the Health Service in the Ngaanyatjarra lands. This included the Warburton Community. The appointment was scheduled for 29 November 2013. Regrettably the appointment was cancelled by the service provider because the psychologist left the position and was not replaced.

41 On 2 December 2013, YJ with the support of an aboriginal mentor, co-facilitated a one day group workshop on "Awareness of Actions". BB actively participated in the workshop.

42 The supervision of BB under the IYSO, very much mirrored what happened when he was on the YCBO. He was assisted on some occasions to report by phone from Warburton to a YJO in Kalgoorlie. On some occasions he failed to report by phone as directed. He was issued with a first warning letter as a result of failing to report by phone on 17 September 2013. There were occasions when a YJO or YJOs made home visits on BB in Warburton. Again, it was noted that it was difficult to engage BB over the phone and during home visits. During one telephone link up for supervision, a YJO was able to have a discussion with BB's aunty about her strategies to support BB not to use solvents and to also support him to participate in community activities.

43 During one home visit YJ had a discussion with BB's family about his significant difficulty in remembering the days of the week, his reporting conditions and how to negotiate the use of a telephone. On 3 December 2013, a YJO or YJOs made a case management decision not to initiate breach action against BB for his failure to report for supervision by phone. With respect, in my view that was a very proper and sensible decision. It was recognition that BB did not have the capacity to remember or undertake the task of making a phone call, and that even when he did so with the support of his family, he was unable to engage in any meaningful supervision to produce any meaningful outcome. Although the effectiveness of face to face supervision was marginal, this was made the focus of his engagement with YJ. Supervision by way of home visits was conducted on 10, 11 and 17 December 2013.

44 BB appeared before the Court, at Warburton, on 30 December 2013 and was remanded in custody. He remained in custody until 4 April 2014. He appeared on 30 December 2013 for two charges. They were charge No. WB 175/2013 which alleged an offence of burglary on a place with intent committed on 15 December 2013 at Warburton, and charge No. WB 1183/2013 which alleged an offence of attempted burglary on a dwelling committed on 29 December 2013 at Warburton.

45 On 18 March 2014 BB appeared before the Court for three charges, the two just mentioned and charge No CC KA 99/2014 which alleged an offence of burglary on a dwelling with intent committed on 24-26 December 2013. None of those alleged offences appear on BB's record of convictions. It seems that the first report of Dr Wojnarowska dated 31 March 2014 concerned BB's fitness to stand trial on the first two of those three charges. On 4 April 2014 all three charges were dismissed after a finding, based on Dr Wojnarowska's report dated 31 March 2014, that BB was not fit to stand trial on each and every one of the three charges.

46 The IYSO, being for a term of six months, was due to expire on 27 February 2014. It remained in force beyond that date because BB had not satisfied the condition of completing 50 hours community work. Prior to being remanded in custody on 30 December 2013, BB had completed 37 hours. After he was released from custody on 4 April 2014, he completed five hours, four hours and four hours community work on 7, 8 and 9 April 2014 respectively. The IYSO therefore expired on 9 April 2014 when he completed the balance of 13 hours.

47 I will comment later on BB having been remanded in custody for so long from 30 December 2013 and also being made to do the balance of 13 hours community work after he was released from custody.

48 The report of YJ dated 9 March 2015 also set out as follows:

> On 9 April 2014 following the successful completion of all its conditions, [B] IYSO was discharged and his obligations to engage with Statutory GYJS ceased. Prior to this YJO, Ms . . . engaged with CPFS in a Signs Of Safety Meeting on the 20 March 2014. During this meeting it was established that [B] would be residing with his aunt and uncle, Mr . . . and Ms . . . in Kalgoorlie and this would be supported by CPFS.
>
> During this meeting, CPFS Case Manager, Ms . . . and meeting facilitator, Ms . . ., agreed that CPFS would hold primary case management of [B], following the completion of his Court Order and agreed to undertake the following tasks:

- Referral to the CPFS Strong Families Program;
- Referral to Disability Services;
- Referral to the Responsible Parenting Program;
- Explore options to ensure that [B]'s practical needs were being met (clothing; food; nutrition; furniture; toiletries) whilst residing with Ms . . . and Ms . . .
- Mentoring to be provided to [B] by CPFS Aboriginal Family Support Officer, Mr . . .

This information was further provided to GYJS by CPFS in the form of a Signs of Safety Assessment and Planning Form and placed on [B]'s YJS file.

BB's history with DCPFS

49 BB has an extensive history with DCPFS from the year 2000 relating to ongoing concerns being reported for his safety and wellbeing. Concerns have been consistently raised with DCPFS despite him being supposedly cared for by a number of different family members over a long period of time.

50 BB was taken into provisional protection and care on 11 April 2000 as a result of his mother being ill. He was returned to the care of his mother about a week later. He was taken into provisional protection and care again on 8 February 2011 because there was no suitable carer at the time. The following month he was returned to his family in Jameson, which is another community in the same region in which he was born. The Order was withdrawn on 29 March 2011.

51 In a report dated 24 November 2014 prepared on behalf of DCPFS for the assistance of the Court, the author set out as follows:

> **COUNSELLING/PERSONAL SUPPORT SERVICES:**
>
> It is not known if [B] has attended any counselling or accessed any support services. However, following concerns that [B] was trying to commit suicide, contact was made with Community Mental Health in Leonora to assess his mental health status. However it is unknown if [B] engaged with this service.
>
> Also, in a Psychological Report written on the 24 February 2014 by Dr Michael Davis, it was recommended (in Paragraph 19) that [B] is unlikely to benefit from substance abuse counselling due to his significant difficulties with the English language and noted memory deficits.
>
> [B] would strongly benefit from being linked into Disability Services, whom may be the more appropriate agency to assist [B] into his young

adult life, including assistance with housing, employment opportunities and day to day living.

DEPARTMENT FOR CHILD PROTECTION AND FAMILY SUPPORT RECOMMENDATIONS:

[B] is a 17 and 2 month old Aboriginal young man from the Ngaanyatjarra Lands. [B]'s long history of transience, criminal activity and anti social behaviour has impacted greatly on his family's willingness to assume long term carer responsibility for him. This is evident not only by [B]'s numerous relative carers who have cared for him over his lifetime, but also more recently that when [B] was arrested for further criminal actively [*sic*], no family members in Leonora area would bail [B] and accept parent/carer responsibility for him.

Whilst it is of concern that none of [B]'s family have been, or are unwilling to assume the role of being [B]'s responsible adult, [B] is not dissimilar to other young Aboriginal children who are of an age where they begin the transition into independent living. [B] has demonstrated his willingness to begin planning for his own life, like the time when he self selected to reside in Leonora following his brothers funeral early this year.

52 In the report of DCPFS dated 17 February 2015, filed at my request in this matter, the author set out amongst other things as follows:

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On 2 April 2014, Parent Support began working with [B], and his carer, Mr . . . and Ms . . . in Kalgoorlie in order to be able to address issues of solvent sniffing, lack of school attendance and significant criminal activity. [B] was incarcerated at the time, and upon [B']'s release from detention, Parent Support supported [B]'s placement by providing financial assistance for the practicalities of the placement, ie food, clothes, bedding, petrol vouchers and support cultural activities. Unfortunately, within two weeks of [B] placement with Mr and Ms . . ., [B] absconded and began residing with his extended family member, Ms . . . and the Ninga Mia Community, as there was a large group of male and female teenagers residing at this home for whom he could socialize with.

[B] then went on to reside in Leonora for a family funeral, and then despite his mother's wishes for him to return to the care of Ms . . ., [B] refused to return to her care, choosing to reside at a nearby bush camp. [B] went on to then reside with Ms . . . in Leonora. Ms . . . initially advised the Department that she was willing to assume the role of Responsible Adult of [B], however later retracted as she wanted [B] to remain in Kalgoorlie.

Following this, the Department held a number of interagency/family meetings to find another suitable carer for [B], with the outcome being that Mr . . . and Ms . . . agreed to be responsible for [B] on his release from custody.

> In relation to engagement with Disability Services, the Department for Child Protection and Family Support submitted a referral for [B] to Disability Services Commission, and on 1 December 2014, Justice Coordinator at Disability Services Commission confirmed that [B] was assessed as being eligible. It was requested of Ms . . . from Justice to notify His Honor [*sic*] of [B]'s eligibility. Since this, Mr . . . has been visiting [B] and his family and has created a 12 month support plan including reconnecting [B] with extended family, re-engage [B] in activities in the community and housing support.

53 The relevance of the date of 31 March 2014 is that it is the date of Dr Wojnarowska's first report which was given to DCPFS at the direction of the Court in April 2014.

Commentary and analysis of the law and the facts

54 I wish to comment on the submission made on 16 December 2014 by counsel acting for BB on instructions from the Aboriginal Legal Service that BB was fit to stand trial. In the circumstances, that was a difficult submission for counsel to make.

55 There is an urgent need for reform of the CLMIA Act to give Courts more options upon making a finding that an accused is unfit to stand trial. At present pursuant to s 19(4)(a) and (b) there are only two options. Both options are at one extreme or the other, namely, to release unconditionally or to make an indefinite custody order. The legislation in its current form puts undue pressure on legal advisers to go down the path of arguing that an accused is fit to stand trial in order to avoid exposing the accused to the possibility of an indefinite custody order. It is highly desirable for that undue pressure to be removed.

56 At present it seems that advice or decisions made by lawyers acting on behalf of young accused persons on the issue fitness to stand trial, may be based more on policy considerations, due to the of limited options available to a Court, rather than on the particular facts of the offences and of the individual accused. There is serious downside to that approach.

57 Before I set out the downside, I wish to repeat some of the background relevant to BB on the issue of his fitness to stand trial, against which the submission was initially made that he was fit to stand trial. On 4 April 2014, and so only about eight months earlier, charges for offences of burglary on a place, attempted burglary on a dwelling, and burglary on a dwelling were dismissed by the Court and BB was released based on Dr Wojnarowska's report dated 31 March 2014 that he was not fit to stand trial. As previously set out, Dr Wojnarowska also stated in that report that

BB's intellectual disability was permanent and stable over his life span and not amenable to therapeutic interventions. Further, the new offences included offences of the same nature as those dismissed on 4 April 2014.

58 Accordingly, without any further expert opinion which surprised significantly on the upside, it was highly likely that BB would again be found to be unfit to stand trial, this time on the new charges. While relevant, it would never be enough for a lawyer to simply say that he or she or some other lawyer had spoken with the particular accused about the charges and the trial process and believed that the accused was fit to stand trial.

59 The obvious downside to accused persons pleading guilty or being found guilty when they are in fact unfit to stand trial is that they can become immersed in the criminal justice system at the expense of the focus being on the provision of appropriate mental health services within the community. That immersion can become particularly problematic if accused persons who are in fact unfit to stand trial plead guilty to offences which can then or later be taken into account for the purpose of mandatory penalties. Further, research shows that early intervention is a key in relation to the improvement of mental health.

60 I appreciate that there are significant challenges and resource issues involved in the delivery of services to adults and children in geographically remote communities such as those in the Western Desert Region of Western Australia. Even so, it is essential for public agencies to ensure that the standards necessary to satisfy the legal requirements, tests and principles in laws relating to child protection are not compromised for children in remote communities.

61 The provisions of the *Children and Community Services Act 2004* (the CCS Act) apply equally to all children across the whole State. The CCS Act is recognition by the legislature that all children are dependent on adults and fall within a special category of persons in our community who need and should be given care and protection.

62 Section 9 of the CCS Act sets out the principles to be observed in the administration of the CCS Act. Sections 9(i) and 12 have particular application to aboriginal children. Section 9(i) provides that:

9. Principles to be observed

. . .

(i) the principle that decisions about a child should be consistent with cultural, ethnic and religious values and traditions relevant to the child;

. . .

63 Section 12 of CCS Act sets out the placement principle for aboriginal children. The principle seeks to promote the child's ongoing affiliation with the child's culture, and where possible, the child's family. Section 28 CCS Act sets out the tests to be applied to determine whether a child is in need of protection.

64 The circumstances of this case raise a number of legal questions. First, is the kind and level of services necessary but not given or caused to be given by public agencies to children in need of protection, a relevant consideration when deciding whether a custody order should be made. Secondly, does the answer to that question depend on whether the child is the subject of a protection order under the CCS Act, or on whether the omission of such services is a causative factor in the offending?

65 In particular, does an omission to provide such services form part of the child accused's antecedents pursuant to s 19(5)(c) of the CLMIA Act, and also, is it relevant when considering public interest pursuant to s 19(5)(d) of the CLMIA Act?

66 If such an omission is relevant, then the question of weight would arise. Applying usual principles, the weight would depend on the circumstances of the omission itself when weighed against all of the other factors in an overall consideration of everything in the particular case, including the strength of the evidence and the nature and circumstances of the alleged offence.

67 In my view it is not necessary to answer any of those questions on omission to deliver services to properly decide this particular case. If it was, then I would have given the parties and the relevant public agencies the opportunity to be heard and make submissions on them. Therefore, I have not taken into account and made any findings on those legal questions and the factual matters relating to them to reach my decisions to this case. That said, however, I wish to make some observations on some of the material before me relating to BB's care and protection. Hopefully

they will assist should omission to provide services ever become relevant in a future case.

68 I refer to the passages set out earlier herein from the DCPFS report dated 24 November 2014. At the time of that report, BB had already reached 17 years of age. Given that BB was taken into provisional protection and care in 2000 and 2011, albeit for short periods of time, his personal history over 17 years including possible FAS, parental neglect, lack of supervision, extended family being unwilling to care for him, substance abuse including sniffing solvents, little education, exposure to personal violence, intellectual and functioning deficits, and cognitive dysfunction, it is difficult to understand how it could be that DCPFS did not know if BB had attended any counselling or accessed any support.

69 It is also difficult to understand why, after DCPFS had been informed that BB had attempted to commit suicide and it had arranged for him to attend Community Mental Health in Leonora, that given the seriousness of the matter, it did not know if he had actually engaged with that service.

70 The reference to a recommendation in a psychological report that BB was unlikely to benefit from substance abuse counselling due to his significant difficulties with the English language and memory deficits, seems to have been used as a justification for not providing any substance abuse counselling or treatment. Surely in a situation such as this, where BB had such a serious substance abuse issue, it would be reasonable to expect something.

71 The report also stated that BB would strongly benefit from being linked into Disability services. Again, DCPFS was aware of BB's circumstances over many years. One of the actions that it had agreed to at the Signs of Safety meeting on 20 March 2014 was a referral to Disability Services. It had been given a copy of Dr Wojnarowska report dated 31 March 2014. That report made it clear that BB suffered mental impairment. Despite all of that, BB was not assessed by Disability Services until 1 December 2014.

72 It seems that regrettably the referral to Disability Services was not actioned and followed through until after BB had appeared before the Court on the three new charges for the offences allegedly committed in September and October 2014. Therefore, in the time leading up to and when those offences were allegedly committed, BB was not receiving any

services organised by Disability Services when he was suffering from mental impairment.

73 The first paragraph under the heading of "recommendations" is of concern because it clearly casts BB, the child, as being responsible for his own predicament of his family's unwillingness to assume long term care and responsibility for him. BB's mental impairment is highly likely to have existed for a long time. Mental impairment and possible FAS, factors beyond BB's control, may well have contributed to his family's unwillingness.

74 Further, the statement in the report that BB has had numerous relative carers who have cared for him in his lifetime, is open to question. An example of an incident inconsistent with that statement is the one in Kalgoorlie when BB was found under the influence of solvents and in the company of intoxicated adults. It was also in Kalgoorlie at that time that BB's uncle was arrested for discharging a firearm at his aunty. Despite DCPFS being informed of all of that, it seems that it maintained its assessment that BB's uncle and aunty were suitable carers. That is difficult to understand.

75 To state that BB is not dissimilar to other young aboriginal children who are of an age where they begin the transition into independent living is also of concern. First, if there are other young persons like BB, then that does not justify doing nothing or giving very little support to him. Rather, it paints a picture of a much bigger problem.

76 Secondly, to suggest that BB, a young person with mental impairment, possible FAS, and many other personal challenges, is capable without support of transitioning to independent living is a nonsense. Further to that, the statement that he "self selected" to reside in Leonora, is also a nonsense and so not capable of supporting anything.

77 The language used in the report of "self selected" suggests that BB had available to him for selection, two or more suitable carers in a safe, supportive and nurturing environment(s), and that he had the capacity to make the selection with the full knowledge and understanding of what was in his best interests. Clearly that was not the situation in BB's case. Indeed, there is simply no place for that kind of language in the context of child protection.

78 There are also systemic challenges in relation to the management of Court orders under the YO Act in cases such as BB's. The idea that for someone like BB, supervision by telephone would be meaningful and have the real potential to produce behavioural change is misplaced.

79 In addition to that, giving warning letters to young persons with mental impairment and/or no ability to read is simply process for the sake of process. It is not something that a Court would rely on.

80 The YO Act makes provision to allow for persons in aboriginal communities to engage in the supervision of young persons on Court orders. See s 17B of the YO Act. Given the information in the YJ reports on the supervision of BB on the YCBO and the IYSO, it seems that there is scope to increase the practical application of s 17B of the YO Act in the Western Desert Lands so that aboriginal people in a community can supervise aboriginal children and young persons on Court orders in the same community.

81 When it comes to sentence a young offender who has previously been placed on an order(s) short of immediate custody with attendance or program requirements to be performed in the community, then the Court will not proceed to sentence on the basis that the young offender has already had a real chance simply by reason of the order itself. Rather it will look to see what support(s), if any, were actually offered to the young offender pursuant to the order. See ***AH v The State of Western Australia*** [2014] WASCA 228.

82 It is of concern that BB remained in custody from 30 December 2013 to 4 April 2014 during which time his fitness to stand trial was being investigated. It is a long time for a young person and particularly for a young aboriginal person being away from country and family and suffering from mental impairment. It is situations like that which require lawyers, community, family and public agencies to work together to come up with some alternative.

83 I have previously mentioned that BB was required to complete the balance of 13 hours community work after he was released from custody. In my view, given that the IYSO would have expired on 27 February 2014 but for the community work not being fulfilled (see s 76 of the YO Act), and given that BB was in custody for about two months before that date and also for about five weeks after, and so unable to do the work, someone should have made an application to the Court pursuant to s 80 of

the YO Act for the IYSO to be amended or the community work condition to be discharged.

84 I wish to comment on YJ, by itself or in collaboration with other public agencies, working with young persons after a Court order expires. In this case, BB clearly continued to need intensive case management after the IYSO ended on 9 April 2014. The length or term of a Court order is a reflection of the criminality of the offending rather than the welfare needs of the young offender. Therefore, usually when a Court order comes to an end, the need for welfare and rehabilitation support for the young person continues. The point is that the objectives of prevention and diversion, and also rehabilitation, will usually still remain to be achieved after the expiry of a Court order. When that is so, it is highly desirable for public agencies to continue working collaboratively with the community, family and the young person to achieve those objectives.

85 In summary, it seems that there is a need for some systemic changes in the way that public agencies approach and deliver services to aboriginal children and young persons in remote aboriginal communities. There is also room for improvement in capacity building aboriginal people in aboriginal communities and families, to assist in the supervision of aboriginal children and young persons on Court orders living in the same community.

86 I now wish to apply the law in sections 9, 12 and 19 of the CLMIA Act to the factual circumstances in this particular case.

87 First, I am satisfied on balance that BB is not mentally fit to stand trial on each of the five charges before the Court. The recent opinion of Dr Wojnarowska, after properly applying the criteria set out in the CLMIA Act, is that BB is not fit to stand trial on the first three of the five charges set out at the start of these reasons. In my view her conclusion can be properly extended to also apply to the last two of the five charges.

88 Given the content of Dr Wojnarowska's opinions in both of her reports dated 31 March 2014 and 23 January 2015, that BB's intellectual disability is permanent and stable over his life span and is not amendable to therapeutic interventions, and bearing in mind that her more recent report is about 10 months after the first, I am satisfied that BB will not become mentally fit to stand trial within the next six months as provided in s 19(1)(a) of the CLMIA Act.

89 Both the State and the defence agree that BB is not fit to stand trial and that he will not become fit to stand trial within six months.

90 The next question is whether each of the charges should be dismissed and BB released or made the subject of a custody order pursuant to s 19(4)(a) or (b), respectively. When deciding whether to make a custody order it is necessary to have regard to the criteria provided in s 19(5) of the CLMIA Act.

91 Pursuant to s 19(5) of the CLMIA Act, a custody order cannot be made in respect of an accused unless the statutory penalty for the alleged offence is, or includes imprisonment. Imprisonment is a sentencing option for all of the five charges currently before the Court when constituted by a Judge. The charge for the alleged offence of stealing pursuant to s 378 of the *Criminal Code* (the Code), when heard by a Judge is taken to be on indictment. Therefore, the summary penalty provision in s 426(4) of the Code, which provides for a fine only, does not apply.

92 The State does not press for a custody order. It is submitted on behalf of the State that whether or not a custody order is made is a matter of discretion for the Court. The position on behalf of BB is that he should be released without any custody order being made.

93 The evidence against BB in relation to each of the five charges is strong. The point of real significance in determining whether or not a custody order should be made in relation to each charge, is that neither a sentence of immediate detention or a sentence of a conditional release order (ie a detention order coupled with an intensive young supervision order) would be a proper sentencing outcome if BB pleaded guilty or was found guilty.

94 While any burglary is serious by nature, the factual circumstances for each of the two allegedly committed by BB, put both of them at the bottom end. No person was in either of the premises at the time, there is no personal violence involved, and little or no property was stolen.

95 On my assessment, on each charge a custody order would be a grossly disproportionate outcome relative to a proper sentencing outcome if BB pleaded guilty or was found guilty.

96 In combination with all of that, in my view BB's age, antecedents and mental condition weigh against a custody order being made. Further, and again in combination with all of that, in my view it is not in the public interest for a young aboriginal person from a remote community who has allegedly committed offences in the circumstances as mentioned and commented upon, and who is of the age and has the antecedents and

mental condition as mentioned, to be removed from his country and family and placed in a detention centre in Perth indefinitely.

97 At present and after excellent collaborative work by officers of DCPFS and YJ, stable and supportive accommodation has been arranged for BB with an uncle and aunty in Leonora. Further to that and as mentioned, BB is now eligible and will receive services in the community from Disability Services.

Conclusion

98 For all these reasons I make the following finding and orders in relation to each of the five charges numbered CC LE 41/2014, CC LE 42/2014, CC KA 436/2014, CC LE 1/2015 and CC LE 2/2015:

1. BB is unfit to stand trial and will continue to be for the next 6 months; and

2. Charge dismissed; and

3. BB is released.