CITATION:	*FIRTH, JUSTIN & RIGBY V AL [2021] NTLC028*
PARTIES:	FIRTH, JUSTIN & RIGBY V AL
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	YOUTH JUSTICE
FILE NOS:	21947434; 21934772; 21933010; 21925026, 22000336; 22002262; 21919351; 21923343; 22003166; 22010554; 22011425; 22019116; 22010551; 22011433; 22011772; 22014028; 22016059; 22019117; 22019122; 22019108; 22018899; 22019132; 22033280; 22041718; 22106071
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DELIVERED AT:	DARWIN
HEARING DATE:	8 SEPTEMBER 2021
DECISION OF:	JUDGE ELISABETH ARMITAGE

CATCHWORDS: *Mental Health and Related Services Act* (NT) – s 77 dismissal of charge – mental illness or disturbance – beneficial legislation - summary jurisdiction – youth justice

Mental Health and Related Services Act (NT) ss 4, 6, 6A, 15, 77

Mununggurr v Gordon & Anor [2011] NTSC 82

O'Neil v Lockyer [2012] NTSC 10

Hooper v Territory Insurance Office (2002) 11 NTLR 182

BAE Systems Australia Ltd v Rothwell (2013) 275 FLR 24

REPRESENTATION:

Counsel:

Complainant:	C McKay
Defendant:	S Ozolins

Solicitors:

Complainant:	Office of the Director of Public Prosecutions
Defendant:	Northern Territory Legal Aid Commission

Decision category classification:	A
Decision ID number:	NTYJC028
Number of paragraphs:	65

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21947434; 21934772; 21933010; 21925026, 22000336; 22002262; 21919351; 21923343; 22003166; 22010554; 22011425; 22019116; 22010551; 22011433; 22011772; 22014028; 22016059; 22019117; 22019122; 22019108; 22018899; 22019132; 22033280; 22041718; 22106071

BETWEEN

FIRTH, JUSTIN & RIGBY

Complainant

AND

AL

Defendant

REASONS FOR DECISION

(Delivered 5th November 2021)

JUDGE ELISABETH ARMITAGE

1. AL is 15 years old. AL is presently a child on a long term protection order under the care of the Chief Executive Officer, Territory Families, Housing and Communities ("the CEO"). Interstate child care and protection authorities have been involved with AL and her family from a young age. AL moved to the Northern Territory in 2017 to live with her father after her mother, who lives interstate, could no longer manage her challenging behaviours. AL came into the care of the CEO in February 2019 when her father also relinquished her care because of her challenging behaviours. Since being taken into the care of the CEO, AL has experienced a number of different "placements", including living at a bail residence commonly referred to as Saltbush and, between 25 May 2020 and 6 August 2021, in a Safe House run by the CEO. AL was remanded in detention in Don Dale Detention Centre on 6 August 2021 after lighting a fire in her bedroom at the Safe House. Charges arising from that incident are not the subject of these proceedings. However, many other incidents that occurred in the Safe House, at other care placements, and before AL was taken into care, are the subject of charges in these proceedings.

2. These proceedings concern 66 charges laid between 11 February 2019 and 17 February 2021. AL has a long list of mental health diagnoses and so her mental condition at the time of the alleged offences and any impact her mental condition may have had on her behaviour and her capacity to understand or control her behaviours was a pertinent issue. Due to the alleged offending continuing over an extended period of time and the delays in conducting assessments, on two separate occasions the Court ordered that AL be assessed and certificates be prepared by Top End Mental Health Services (TEMHS) pursuant to s 77 of the *Mental Health and Related Services Act* ("the Act").

The Law

3. Section 77 of the Act provides as follows:

> **Dismissal of charge**
>
> (1) This section applies to a person if:
>
> (a) the person is charged with an offence in proceedings before the court (other than proceedings for a committal or preliminary hearing); and
>
> (b) the court is exercising summary jurisdiction in the proceedings.
>
> (2) The court may request from the Chief Health Officer a certificate in the approved form stating:
>
> (a) whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance; and
>
> (b) if the person was suffering from a mental illness or mental disturbance – whether the mental illness or disturbance is likely to have materially contributed to the conduct.
>
> (3) The Chief Health Officer must not give the court the certificate unless the Chief Health Officer has received and considered advice on the person from an authorised psychiatric practitioner or designated mental health practitioner.
>
> (4) After receiving the certificate, the court must dismiss this charge if satisfied that at the time of carrying out the conduct constituting the alleged offence:
>
> (a) the person was suffering from a mental illness or mental disturbance; and
>
> (b) as a consequence of the mental illness or disturbance, the person:
>
> (i) did not know the nature and quality of the conduct; or
>
> (ii) did not know the conduct was wrong; or
>
> (iii) was not able to control his or her actions.

4. In s 6 of the Act "mental illness" is defined as follows:

> (1) A ***mental illness*** is a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person in one or more of the areas of thought, mood, volition, perception, orientation or memory and is characterised:
>
> (a) by the presence of at least one of the following symptoms:
>
> (i) delusions;
>
> (ii) hallucinations;
>
> (iii) serious disorders of the stream of thought;
>
> (iv) serious disorders of thought form;
>
> (v) serious disturbances of mood; or
>
> (b) by sustained or repeated irrational behaviour that may be taken to indicate the presence of at least one of the symptoms referred to in paragraph (a).
>
> (2) A determination that a person has a mental illness is only to be made in accordance with internationally accepted clinical standards.

5. Section 4 of the Act defines **mentally disturbed** as:

> "(the) behaviour of a person that is so irrational as to justify the person being temporarily detained under this Act."

6. The kind of behaviours encompassed by the concept of mental disturbance are found in s 15 of the Act which sets out the criteria for involuntary admission on the grounds of mental disturbance as follows:

> The ***criteria*** for the involuntary admission of a person on the grounds of ***mental disturbance*** are that:
>
> (a) the person does not fulfil the criteria for involuntary admission on the grounds of mental illness or complex cognitive impairment; and
>
> (b) the person's behaviour is, or within the immediately preceding 48 hours has been, so irrational as to lead to the conclusion that:
>
> (i) the person is experiencing or exhibiting a severe impairment of or deviation from his or her customary or everyday ability to reason and function in a socially acceptable and culturally appropriate manner; and
>
> (ii) the person is behaving in an abnormally aggressive manner or is engaging in seriously irresponsible conduct that justify determination that the person requires psychiatric assessment, treatment and care that is available at an approved treatment facility; and

(c) unless the person receives treatment and care at an approved treatment facility, he or she:

(i) is likely to cause serious harm to himself or herself or to someone else; or

(ii) will represent a substantial danger to the general community; or

(iii) is likely to suffer serious mental or physical deterioration; and

(d) the person is not capable of giving informed consent to the treatment and care or has unreasonably refused to consent to the treatment and care; and

(e) there is no less-restrictive way of ensuring the person receives the treatment and care.

7. Under the Act mental illnesses and mental disturbances are differentiated from complex cognitive impairments which are explained in s 6A of the Act as follows:

(1) A person has a ***complex cognitive impairment*** if the person has a cognitive impairment with a behavioural disturbance.

(2) A person has a ***cognitive impairment*** if the person has an intellectual impairment, neurological impairment or acquired brain injury (or any combination of these) that:

(a) is, or is likely to be, permanent; and

(b) results in substantially reduced capacity in at least one of the following:

(i) self-care or management;

(ii) decision-making or problem-solving;

(iii) communication or social functioning.

(3) A person has a ***behavioural disturbance*** if the person's mental condition has deteriorated to the extent the person is behaving in an aggressive manner or is engaging in seriously irresponsible conduct.

8. Under the Act children may be involuntarily admitted into an approved treatment facility and potentially involuntarily detained (under Division 3 of the Act) on the grounds of mental illness (s 14 of the Act), and on the grounds of mental disturbance (s 15 of the Act), but not on the grounds of complex cognitive impairment (s 15A (a) of the Act).

9. Accordingly s 77 may apply to children suffering from a:

(1) Mental illness, or

(2) Mental disturbance which would justify the person being temporarily detained.

10. However, unlike adults, s 77 of the Act is not available to children who have a sole diagnosis of complex cognitive impairment. It seems that a child could potentially be excluded from consideration for a s 77 dismissal in circumstances where a dismissal might be available to a similarly diagnosed adult.

11. The procedure to be followed in respect of any exercise of the power to dismiss a charge pursuant to s 77 of the Act was considered by Kelly J in *Mununggurr v Gordon & Anor* [2011] NTSC 82. As her Honour explained:

> "[15] That power can only be exercised after the Court has received a certificate from the Chief Medical Officer stating:
>
> (a) whether at the time of carrying out the conduct constituting the alleged offence, the person was suffering from a mental illness or mental disturbance; and
>
> (b) if the person was suffering from a mental illness or mental disturbance – whether the mental illness or disturbance is likely to have materially contributed to the conduct.
>
> [16] That certificate cannot be determinative of the question for decision by the Court under s 77(4) for two reasons. First, the certificate is directed to a different question from that to be decided by the Court under s 77(4). Both the Chief Health Officer and the Court must determine whether at the time of carrying out the conduct constituting the alleged offence the person was suffering from a mental illness or mental disturbance. Thereafter the enquiries differ. The Chief Health Officer must state whether the mental illness or disturbance is likely to have materially contributed to the conduct. That is a different matter from that which the Court must determine under s 77(4), namely whether, as a consequence of the mental illness or disturbance, the person:
>
> (i) did not know the nature and quality of the conduct; or
>
> (ii) did not know the conduct was wrong; or
>
> (iii) was not able to control his or her actions.
>
> …
>
> [19] The second reason why the certificate cannot be determinative of the decision to be made by the Court under s 77(4) is that that subsection plainly requires **the Court** to be satisfied of the relevant matters. In order to do that, the Court must undertake its own assessment of those matters, which it can only do by considering relevant evidence."

12. In *O'Neil v Lockyer* [2012] NTSC 10 Barr J considered the weight to be given by a court to a statement in a s 77 Certificate that the person was suffering from a mental illness or mental disturbance. He said:

> "… Such statements are necessarily based on opinion: the opinion of the Chief Health Officer, informed by the advice (factual details and opinion) of an "authorised psychiatric practitioner or designated mental health practitioner" under s 77(3). The opinion of the Chief Health Officer may be an expert opinion actually reached by the Chief Health Officer himself or herself, or may be a simple transmission of the opinion of another person, that is, of the psychiatric practitioner or mental health practitioner who

provided advice under s 77(3). The opinion of the Chief Health Officer well may be a combination of both.

The Court should not rely exclusively on a s 77(2) certificate for the purpose of satisfying itself under s 77(4)(a). The certificate may not be admissible in evidence, and even if admissible the weight to be accorded it may be only slight.

The certificate is not binding on the Court and the Court must consider all the evidence…

An examination by the Court of the evidence will reveal the basis on which the Chief Health Officer made the statements in the certificate. If they represent an expert opinion actually reached by the Chief Health Officer himself or herself; and if, on the evidence, the facts on which the expert opinion is based are established, then the statements of opinion would probably be admissible and entitled to such weight as the Court thinks fit. If the statements in the certificate are merely a transmission of the opinion of another person, the certificate will be inadmissible for the purposes of the Court's consideration of the s 77(4) matters, and would in any event have little evidentiary value.

In this context, obiter remarks made by me in *Taylor v Bamber and Westphal* [2011] NTSC 36 at [11] (and [16]), where I said that the s 77(2) certificate and the statements of opinion it contains have significant evidentiary value, should be treated with caution and read subject to the matters explained in the preceding paragraphs."

13. In *O'Neil v Lockyer* Barr J also considered s 77(2) and how the Court is to determine "whether the mental illness or disturbance is likely to have materially contributed to the conduct". Barr J said:

> "A useful test as to whether a mental illness or mental disturbance materially contributed to conduct constituting an alleged offence is whether the mental illness or mental disturbance was a factor that **operated actively** to bring about the conduct."

14. As to who bears the onus in s 77(4) *O'Neil v Lockyer* Barr J said:

> "… The defendant has the onus of establishing the defence of mental illness or mental disturbance under s 77(4), consistent with the common law in relation to the defence of insanity in a criminal trial… The standard of proof is on the balance of probabilities."

The Evidence

15. On 8 September 2021 the Court was asked to determine whether or not any of the 66 charges laid against AL should be dismissed pursuant to s 77 of the Act. In respect of this inquiry the Court was asked to consider the following evidence:

    (a) A s 77 Certificate dated October 2020 referrable to 5 files and 16 charges concerning alleged offending between 11 February 2019 and 4 January 2020. In that Certificate the Chief Health Officer was of the

opinion that AL was suffering from a mental illness or disturbance at the time of carrying out the conduct but was not of the opinion that the mental illness or disturbance was likely to have materially contributed to the conduct. The basis for this opinion was a Forensic Psychiatric Court Report prepared by Dr Yolisha Singh dated 1 June 2020.

(b) A s 77 Certificate dated 31 May 2021 referrable to the remaining 20 files and 50 charges concerning offending alleged to have occurred between 7 May 2019 and 17 February 2021. In that Certificate the Chief Health Officer was of the opinion that AL was suffering from a mental illness or disturbance at the time of carrying out the conduct and was also of the opinion that the mental illness or disturbance was likely to have materially contributed to the conduct. The basis for this opinion was a Forensic Psychiatric Court Report prepared by Dr Brendan Daugherty dated 31 May 2021.

(c) A Supplementary Report of Dr Singh dated 5 September 2021.

(d) Oral testimony of Dr Singh and Dr Daugherty.

(e) Statutory declarations of care workers and complainants MF dated 15 January 2020 and MPD dated 16 January 2020, each of which concerned the facts surrounding alleged offending on 15 January 2020.

Was AL suffering from a mental illness at the time of each alleged offence?

16. Each of the s 77 Certificates expressed opinions that AL was suffering from a "Mental Illness/Mental Disturbance at the time of carrying out the conduct". Neither certificate specified whether she was suffering from both a mental illness and a mental disturbance, or whether her mental health conditions were captured by one or both definitions.

17. In any event, there was no dispute between the expert psychiatrists that at the time of their examinations AL suffered from various mental health conditions which Dr Singh referred to as "disorders" and Dr Dougherty referred to as "illnesses". Although there was broad agreement concerning the complexity of her symptoms, there were some minor differences between them concerning the most appropriate combination of diagnoses. Together their reports attest to the following diagnoses when AL was examined by them in 2020 and 2021 respectively:

(1) A serious disturbance of mood: Drs Singh and Daugherty

(2) PTSD: Drs Singh and Daugherty

(3) Major Depressive Disorder: Dr Singh

(4) Attention Deficit Hyperactivity Disorder (ADHD): Drs Singh and Daugherty

(5) Specific Language Disorder: Drs Singh and Daugherty

(6) Oppositional Defiance Disorder (ODD): Dr Singh

(7) Conduct Disorder (CD): Drs Singh and Daugherty

(8) Reactive Attachment Disorder (RAD): Dr Daugherty

(9) Possible Autism Spectrum Disorder (ASD)(Level 2): Drs Daugherty and Singh

18. Dr Singh and Dr Daugherty each reviewed the clinical history of AL and in combination their reports noting the following history of mental illness diagnoses:

    (1) AL was first diagnosed with attachment and anxiety disorder and ADHD when she was 10 years old.

    (2) In 2017 AL was diagnosed with reactive attachment disorder of childhood, anxiety disorder, ADHD, complex PTSD and specific language disorders.

    (3) During inpatient admissions on 4-5 April and 3-7 May 2019 AL was diagnosed with reactive attachment disorder, ADHD and complex PTSD.

    (4) A review by child and adolescent psychiatrist Dr Das on 5 March 2020 confirmed the May 2019 diagnoses.

    (5) During an inpatient admission between 29 January and 8 February 2021 AL was diagnosed with RAD (which may be better described as complex developmental trauma), ADHD, major depressive disorder, generalized anxiety disorder, conduct disorder, autism spectrum disorder (level 2), mild intellectual disability, expressive and receptive language disorder.

19. Dr Dougherty considered that AL's mental illnesses were chronic, they had materialised at an early age, and symptoms of her mental illnesses were present throughout the period of her alleged offending.

20. I am satisfied on the combined evidence of the expert psychiatrists that AL was suffering from an array of mental illnesses at the time of carrying out the conduct constituting each alleged offence.

Concerning the charges referred to in the s77 Certificate dated 31 May 2021 (excluding 4 charges on file 22002262)

Did the mental illnesses materially contribute to the conduct?

As a consequence of her mental illnesses:

(i) did AL not know the nature and quality of her conduct; or

(ii) did AL not know the conduct was wrong; or

(iii) was AL not able to control her actions?

21. It is logical to address these issues together.

22. In his report dated 31 May 2021 Dr Dougherty considered offending over 20 files containing 50 charges. One file (22002262) contained four charges alleged to have occurred on 15 January 2021 (the boiling water incident). Dr Singh also considered this incident in her reports. Putting this incident to one side, I will now consider the remaining 19 files and 46 charges addressed by Dr Dougherty in his report.

23. Concerning those remaining 19 files and 46 charges, in her evidence Dr Singh confirmed that she could not offer an opinion on those charges and said:

> "I am unable to provide information about matters that I have not had regard to, or an opinion about matters that I have not had regard to, or seen documentation, or, indeed, discussed with the young person."

24. Accordingly, the only evidence referable to those 46 charges is from Dr Dougherty, a fully qualified psychiatrist with a dual sub-specialty in Child and Adolescent Psychiatry and Forensic Psychiatry. That he is an expert in the field of Child and Adolescent Psychiatry was not in issue.

25. As discussed earlier in this decision, Dr Dougherty reviewed AL's medical records and noted her complex history and many diagnoses. Dr Dougherty interviewed AB on 26 March 2021 for approximately 30 minutes in person and again on 13 April 2021 for approximately 25 minutes via telehealth. While acknowledging the limitations of videoconferencing for psychiatric assessment Dr Dougherty did not have any reason to believe that it materially affected his opinions.

26. In respect of each charge Dr Dougherty considered the alleged facts, any available collateral information (primarily from CCIS (health) notes) and during his examination obtained AL's recollection and explanation for the alleged offences, all of which he documented in his report. Dr Dougherty noted that for some offences AL was able to recall reasonable detail but for others she had limited memory.

27. As to whether the mental illnesses materially contributed to the alleged offending conduct Dr Dougherty said:

> "I am of the opinion that the following symptoms arising from the mental disorders… materially contributed to the conduct. It is difficult to comment on each individual charge, as AL's accounts are limited, and the collateral information is variable. However, they fit a general pattern seen in the alleged offences, which symptoms are described below.
>
> AL suffers from *cognitive distortions*, arising from her diagnosis of PTSD, which contributed to acts of violence towards others. For instance, she perceived people to be threatening and having malicious intent, when in fact they had neutral or positive motivation…so reacted aggressively towards them.
>
> AL's alleged offences were largely *impulsive* in nature. Impulsivity is a symptom of PTSD, RAD, and ADHD, and represents the failure of impulse-control mechanisms in the brain. For example, in alleged incident 8, she opportunistically and impulsively assaulted multiple care workers whilst she was emotionally dysregulated. This was characteristic of most of her alleged offences. Though AL sometimes reported a planned element to the alleged offences, most occurred impulsively and her post-hoc statements are most likely superficial explanations hiding the unsophisticated reality of her actions.
>
> *Emotional dysregulation*, a symptom of PTSD, RAD, and ADHD, was a feature of the alleged offences. Like impulsivity, emotional dysregulation is a failure of higher brain (executive) functions that developed through childhood and adolescence. Whilst a degree of emotional dysregulation is

> common in young people, in AL it was exaggerated due to her mental disorders and significantly contributed to her alleged aggression. Her emotional dysregulation impaired her ability to consider the effect and consequences of her actions, leading her to act more impulsively and reactively. This is broadly evident in her alleged offences.
>
> Finally, there is a strong likelihood that *disassociation and traumatic flashbacks*, associated with PTSD, contributed to the alleged offending. For example, in instances where AL was reported as "acting possessed" and/or hearing voices that told her to harm others, in the absence of other possible and/or convincing explanation, these are likely the representation of dissociative events associated with her trauma. Alternatively, they may represent an early psychotic disorder, which would also classify as a mental illness, and they would also have materially contributed to the alleged offending."

28. In his oral evidence Dr Dougherty explained that most of AL's offending was impulsive in nature, her impulsivity arose from or was connected to her mental illnesses and her impulsivity materially contributed to her offending conduct.

29. Dr Dougherty was of the opinion that, even in spite of her mental illnesses, AL did understand the nature and quality of her conduct. In other words, she knew what she was doing.

30. However, Dr Dougherty was of the opinion that AL did not know that what she was doing was wrong, in the way that persons not suffering from mental illnesses understood "wrongness". In examination in chief he explained:

> "… I don't think that she actually was able to appraise whether it was wrong or not at the time… Her level of hyper-arousal, her impulsivity and her bias toward seeing neutral stimuli as threatening and the possibility of disassociation means that, to me, it's more likely than not that she actually just reacted in the moment…. Part of that reaction means that you can have a simple sequential process… She repeatedly seems to act in a very egocentric manner… I have been hurt therefore I want to hurt others, is a very limited… way to appraise things morally… She doesn't really, in that moment, understand that her actions are wrong, but simply (her actions are) what seemed right to her in the moment."

31. In cross-examination Dr Dougherty said:

> "On balance, AL did not have an understanding of what was right or wrong more than the idea that what is right is something I think is right… She wants other people to feel her pain, therefore it is okay to make them feel her pain."

32. In addition, it was Dr Dougherty's opinion that AL had difficulty controlling her actions due to the level of her impulsivity. In evidence in chief he said:

> "It is clear that she probably doesn't have complete ability to control her actions and she doesn't have a complete inability to control her actions… If you took away the contribution from her PTSD, the attachment disorder

and the ADHD, I am of the opinion that I think she would have a much better ability to control her actions".

33. Further, in cross-examination Dr Dougherty said:

> "I think on balance, she has some ability to control her actions, but there are things that interfere with that, and it probably differs, to some degree, with the incident itself. But her impulsivity and emotional dysregulation, and at times disassociation, certainly interfered with it.... I try and think of what would happen if she did not have those mental disorders. And I think if she didn't have those mental disorders, she would be much more able to control her actions.... If she wasn't this dysregulated, if she wasn't this impulsive, if she wasn't this affected by her history of trauma leading to those diagnoses, I think she would... have been able to control her actions much better.
>
> ...
>
> When she is triggered and she is impulsive and she is dysregulated, that's when she really loses any ability to consider what's wrong, and to control her actions.
>
> ...
>
> ... I wouldn't say she has no capacity to control her actions, and I think part of the work that they were trying to do at Safe House was to help her gain control of that. But I think it's significantly reduced."

34. As pointed out by Counsel for AL there was no other evidence led concerning the 46 charges solely considered by Dr Dougherty. I was satisfied he had examined AL and formed his own opinions as to her illnesses which were largely consistent with the opinions of other psychiatric assessments. Further, he had considered all the relevant and available material concerning AL's background, her circumstances at the time of each offence, and the circumstances of the offending.

35. In respect of those 46 charges I accepted Dr Dougherty's evidence and opinions. I was satisfied that AL's mental illnesses materially contributed to her conduct. Although AL understood the nature and quality of her acts, I accepted Dr Dougherty's opinion that her capacity to reason as to the rightness or wrongness of her conduct was significantly impaired because of her mental illnesses. In addition, I was satisfied by his evidence that her capacity to control her actions was significantly impaired because of her mental illnesses.

36. While AL may have retained some residual capacity to reason and control her behaviours, I do not consider that s 77 requires the Court to be satisfied of a total and absolute inability to reason right from wrong or a total and absolute incapacity to control one's actions. I consider that he Act is beneficial legislation and therefore these provisions should be construed beneficially, liberally, generously, and in such a manner as to give the fullest relief which a fair meaning of the legislation will allow: see *Hooper v Territory Insurance Office* (2002) 11 NTLR 182 per Martin CJ at [22]. In *BAE Systems Australia Ltd v Rothwell* (2013) 275 FLR 244 at [70], Mildren J said:

"The general approach in this jurisdiction towards remedial or beneficial legislation is that the word used by the statute must be given a construction so as to give the most complete remedy which is consistent with the actual language employed and to which its words are fairly open. This approach is not confined to cases of ambiguity: see *Woodroffe v Northern Territory (2000)* 10 NTLR 52 at [28]"

37. As to AL's knowledge of "wrongness" and her ability to control her actions, I was satisfied on the balance of probabilities that in the moment of her actions her mental illnesses impacted her so severely that she did not know that her conduct was wrong and she was not able to control her actions.

38. Accordingly, pursuant to s 77 (4) of the Act, the 46 charges in the following 19 files are dismissed:

    21919351; 21923343; 22003166; 22010554; 22011425; 22019116; 22010551; 22011433; 22011772; 22014028; 22016059; 22019117; 22019122; 22019108; 22018899; 22019132; 22033280; 22041718; 22106071

Concerning 4 charges in file 22002262 (the hot water incident) referred to in the s77 Certificate dated 31 May 2021

Did the mental illnesses materially contribute to the conduct?

As a consequence of her mental illnesses:

(i) did AL not know the nature and quality of her conduct; or

(ii) did AL not know the conduct was wrong; or

(iii) was AL not able to control her actions?

39. This file is dealt with separately from the other files covered by the s 77 Certificate dated 31 May 2021 because this was an incident that Dr Singh also considered. Concerning this incident Dr Dougherty maintained his opinions outlined above but Dr Singh formed a different opinion.

40. The incident giving rise to the 4 charges on this file occurred on 15 January 2020. AL was 13 years old, in the care of the CEO and the single resident living in the Safe House. AL was charged with:

    (i) unlawfully assaulting MF, a worker who suffered harm (contrary to s 188A (1) & (2) of the *Criminal Code*)

    (ii) making a threat to kill (contrary to s 166 of the *Criminal Code*)

    (iii) unlawfully causing serious harm to MPD (contrary to s 181 of the *Criminal Code*)

    (iv) unlawfully assaulting MF, a worker who suffered harm (contrary to s 188A (1) & (2) of the *Criminal Code*)

41. The complainants were both employed care workers at the Safe House. However, it was MF's first day working with AL. The incident occurred at about 6 pm which was AL's usual dinner time. There was a door from the Safe House kitchen into a courtyard. Earlier in the day the door had been unlocked and AL had gone into the courtyard. However, because

AL was a flight risk, MPD arranged for another person to lock the courtyard door. When AL discovered the door was locked the incident occurred.

42. In his statutory declaration dated 15 January 2020 MF described the incident as follows:

> "… Upon entering the lounge room I had a short conversation with AL and MPD during which I heard her say, "I want to go to the kitchen to get a drink". The kitchen is secured so I escorted AL to the kitchen and swiped my key fob and escorted her in. I saw AL get some juice from the fridge and pour the juice into a blue plastic cup. I saw AL open a door in the kitchen which leads to a fenced grass courtyard area and into the courtyard. I spoke with AL for about 10 minutes regarding a myriad of things. During the conversation she appeared normal with no heightened emotion. I escorted AL back into the lounge room to speak with her for another five minutes at which time I heard her say to me, "I want dinner".
>
> I then escorted her back into the kitchen after swiping again with my key fob and saw AL walk straight to the door to the courtyard and try and open the door. However it now appeared locked. AL turned to me and demanded that I unlock the door however I informed her that a key was required and I did not have the key. AL immediately became hostile towards me saying, "Open the door now or I'm going to kill you". As I tried to speak to her I saw AL walk straight for a kitchen drawer, open it and remove two plastic butter knives which were blue in colour. As this was occurring, I believe that MPD was in the lounge room area as this is where I had last seen him.
>
> I saw AL hold both of the knives by their handles with the plastic blades pointed upwards. I heard AL say, "I'm going to stab you, kill you and stab you in the eye". I saw AL start to slash at me with both of the plastic blades whilst also trying to stab me with the blades on multiple occasions. She was aiming for my face and upper body area. I managed to block all the attacks using my forearms and back towards the kitchen door. I saw AL immediately walk up to a white plastic electric kettle located near the bench and switch it on, it was plugged in. I could hear the kettle start to boil at which time I attempted to negotiate with AL to drop the knives and switch off the kettle as she was still holding the knives. Any time I attempted to approach AL she would slash out at me with the knives and tell me not to come near her.
>
> By this time I saw MPD swipe into the kitchen and enter just as the jug finished boiling. I told MPD that AL had just boiled the jug. I heard MPD say to AL, "Why did you boil the jug?". At this point AL had already dropped the knives on the kitchen bench and was starting to pour the boiling water into one of the blue cups. I heard AL respond, "Making hot chocolate". I said something to the effect of, "I do not think that she is making chocolate, she is going to throw it at us". I saw AL start to walk towards the both of us whilst holding the blue cup of boiling water in one of her hands. I turned and started to walk to the entrance door to leave the kitchen, my back was to AL and as I walked past MPD who was on my right I heard MPB cry out in pain. By this time I had already opened the door and as I turned to look at

MPB I saw that his face and shirt was wet with water. I saw him drop a loaf of bread during this process and follow me out of the kitchen. I closed the door which has a glass panel in the middle and saw AL run at the door and was attempting to open the door. I held the door shut as you do not require swipe access to exit the kitchen. I could see that AL had since dropped the blue cup onto the floor.

… I saw AL remove the entire contents of the fridge and empty the contents on the floor. She also started to throw the contents at the walls. As she did this she kept boiling the jug. I saw AL smashed a glass jar onto the floor at which time I quickly entered the kitchen numerous times and removed a few large pieces of the broken glass due to the risk the glass posed. As I entered the kitchen, AL would constantly spit at me, scratch me on my arms and face and throw numerous items at me.

I saw AL grab some cooking oil and say, "I know what to do, pour the oil on the hot plate burn the place". I saw AL switch the hotplate on which time I again entered the kitchen and removed the bottle of oil from her… As I removed the bottle of oil from her AL scratched me to the face. As I exited I saw that AL found another bottle of oil which was pretty much empty. I saw her pour the remaining contents of the oil onto the hotplate of the stove.

I continued negotiating with AL for an extended period of time and saw AL remove a pack of rice cakes from a shelf at which point she said, "This is what I have been looking for, we can go now". At this time MPD had returned to the kitchen and after continued negotiations we escorted AL back to the lounge room area where she watched U-tube on the TV and ate the rice cakes."

43. In his statutory declaration dated 16 January 2020 MPD recalled the incident as follows:

"… I headed towards the kitchen to check on AL. As I got close I saw MF holding the door to the kitchen open with his foot. MF looked a bit agitated and as I got closer I said, "Is everything okay?". MF said, "This kid is going to kick off". I walked through the kitchen door and saw AL between the kitchen sink and fridge, standing there where the kettle was. I heard that the kettle was on and making a grilling noise.

I asked AL, "What's going on?". She said, "You guys locked the door". I replied, "We didn't lock the door, we didn't have the key". MF repeated to AL what I had said. We were just trying to explain we didn't lock the door.

I then asked why the kettle was on. AL replied she was making a cup of hot chocolate. I said, "We don't have hot chocolate". Most of the time AL had her back to me. She then began looking in the cupboards for hot chocolate. I then heard the kettle click off and AL grabbed a blue cup and began pouring boiling water into the cup.

Once the cup was full AL picked it up and walked around the counter in the middle of the kitchen. I was concerned that AL had the cup of water so I picked up a loaf of bread. I said to AL, "AL, what are you doing?". I began

> walking backwards towards MF. AL replied, "Get out of the way I want to burn this cunt". I said, "You don't want to do this". I held the loaf of bread up to protect myself at which time she raised the cup up in a scooping motion and threw the boiling water at me and MF. MF was behind me, about 3 foot behind. The water hit me on the right side of my face, neck, chest and stomach.
>
> MF and I quickly exited the kitchen and close the door. I pulled my shirt off my skin as the heat was intense.
>
> …
>
> I spoke to AL briefly before the police arrived, she told me she was sad."

44. To put this incident in some context, in his report Dr Daugherty noted that 11 days before this incident AL tied socks around her neck, jumped out of a window and ran onto the highway. She was taken to the hospital where she reported hearing a male voice which was sometimes negative but sometimes nice. In the Emergency Department AL became "assaultive" and was taken by police to the watch house. Eight days after the boiling water incident AL swallowed a battery and assaulted a paramedic who was transporting her to the hospital. On 28 January 2020 she reported to a psychiatrist hearing a male voice telling her "do not tell them my business".

45. Dr Singh spoke to AL on 24 April 2020. In her report of 1 June 2020 she recorded AL's recall of the incident and her observations of AL as follows:

> "AL was reticent to discuss her current charges, she became angry as evidenced by her raised voice and use of expletives when attempts were made to explore these. Given the difficulty engaging her with the assessment process, I asked specifically about her behaviour at her previous placement. AL told me that she had wanted to kill a carer because she was not allowed to access the courtyard; explaining that she had boiled the kettle with the intention of throwing the water onto her carer to kill him. She said that the other carer got in the way and that as she was so angry she threw the water at him instead. AL expressed that using violence in this way, that is to get her needs met, was in her view appropriate. She did not express any remorse or regret in regard to these alleged actions."

46. Dr Daugherty spoke to AL on 26 March and 13 April 2021. In his report dated 31 May 2021 he recorded AL's recall of this incident as follows:

> "She said she "wanted to burn him alive." "Because I wanted to." She said she didn't remember about the door.
>
> I asked if the worker that was burnt still works there and she said, "Yes I am fine with him". Though, she said she wished she'd burned him more. She could not say why.
>
> (Asked separately, she said she likes to hurt people, so other people feel pain; I asked if she likes other things to feel pain, like Roxy the therapy dog, and she said no – because she's an animal. She then said that it's just humans that she wants to feel pain.)"

47. However, in his evidence in chief Dr Daugherty explained that in forming his opinion he gave greater weight to the objective information than any account or explanation provided after the event by AL. Dr Daugherty considered that many, if not all, of AL's recollections of the incident were a "superficial rationalisation" of her behaviour driven by her preoccupation with not wanting to be seen as someone with a mental illness.

48. Concerning these charges both doctors agreed that AL knew the nature and quality of her conduct. AL knew that throwing hot water on someone would cause them harm. The doctors disagreed on the questions of AL's knowledge of wrongness and capacity for control.

49. Dr Singh considered Dr Daugherty's report dated 31 May 2021. Having considered Dr Daugherty's opinions and reasoning, in her second report dated 5 September 2021 and in oral evidence Dr Singh remained staunchly of the view that AB knew that throwing hot water was wrong and that AL had capacity to control her actions. Dr Singh was cross examined on some differences between the precis version of the incident which was referred to in her reports and the witnesses accounts extracted above. I concur with the doctor's view, that the differences between the three accounts were not particularly significant and they did not undermine the basis of her opinion.

50. Dr Singh explained that while AL believed aggressive responses were useful, such a belief did not equate to a lack of capacity to understand that the behaviours were wrong. Dr Singh considered that AL understood the rules governing acceptable behaviour, as evidenced by her ability to participate in a 45 minute interview with Dr Singh in a respectful manner. When AL said that she wanted other people to feel her pain, AL understood that other people had feelings outside her own. Further, Dr Singh considered that there was no evidence that AL was suffering any dissociative symptoms at the time of the boiling water incident. AL did not report hearing voices or experiencing traumatic flashbacks at the time of the incident. In addition, Dr Singh considered that the facts of the incident and AL's account of the incident suggested purposeful aggression carried out in a sequential manner indicating a degree of control.

51. Dr Daugherty disagreed. As to AL's conduct on this occasion he said:

> "…she was probably triggered by something that we don't really understand… Her level of hyper-arousal, her impulsivity and her bias toward seeing neutral stimuli as threatening, and the possibility of disassociation, means that, to me, it's more likely than not that she actually just reacted in the moment. I think part of that reaction means that you can have… a simple sequential process and I don't think it necessarily takes away from the idea that the symptoms could have contributed to that conduct…. "

52. Although Dr Singh assessed AL at a point in time earlier than Dr Daugherty, Dr Singh was only provided with five files covering the period 11 February 2019 to 4 January 2020, and AL refused to discuss any of the other incidents with Dr Singh. Accordingly, Dr Singh based her opinion on much more limited information than was available to Dr Daugherty who considered 20 files over the period 3 May 2019 to 17 February 2021. AL was willing to recall and discuss many more incident with Dr Daugherty than she was with Dr Singh. Dr Daugherty was arguably better placed to form an opinion than Dr Singh.

53. However, even given those limitations applicable to Dr Singh's opinion, on this incident I preferred and accepted the evidence of Dr Singh on the question of AL's ability to control her actions. Whatever AL said after the event, and whatever motivated her to give those explanations, she articulated the reasons for her conduct during the incident itself. In this instance AL very specifically told the workers what she was planning on doing before she did it. AL had been trying to hurt MF with the plastic knives. When the water boiled she put the knives down, poured the water into a cup, and walked towards the workers. She said, "Get out of my way, I want to **burn** this cunt" and threw the boiling water at the workers.

54. I am satisfied by the evidence of the workers in combination with the expert opinion of Dr Singh that AL knew what she was doing and was in control of her actions. She was angry at the workers because she believed they had locked the courtyard door. When she was unsuccessful in hurting MF with the plastic cutlery she chose another weapon, boiling water. She was in control of her actions when she poured the water into a cup. She didn't spill it or pour it onto the bench or onto the floor. She was in control of her actions when she carried the cup closer to the workers. She didn't spill the water or take it somewhere else. She deliberately and purposively threw it in the direction of the worker who she was intending to burn.

55. However, there was nothing in the worker's evidence that indicates that AL knew that what she was doing was wrong. After the incident AL said she felt sad, not sorry. In her second report Dr Singh briefly explained the theories of moral development. Dr Singh noted that Dr Daugherty considered that AL was operating at an egocentric level of development (generally seen in children under the age of 9 years) whereas it was her opinion that AL was operating at a conventional level of moral development. The conventional level involves an awareness of shared social norms and values and a desire to live up to the roles and expectations of others. However, even Dr Singh conceded that the impact of her mental disorders deprived her of some of her ability to reason right from wrong. In her second report Dr Singh said:

> "At the time of the alleged offences AL was reported as experiencing symptoms of PTSD, depression, ADHD, ODD and conduct disorder. Given her level of distress and her age she is likely to have a much greater degree of hyper-arousal and impulsivity and less ability to appraise her actions in a consequential manner than an average child. Any deficit she was experiencing at the time of the alleged offending would not have totally deprived her of her ability to understand that her actions were wrong. The description of the alleged offences is consistent with someone suffering from the aforementioned mental disorders."

56. In his evidence when asked whether he agreed with Dr Singh's opinion that AL understood that her conduct during the boiling water incident was wrong Dr Dougherty said:

> "I disagree with that statement… Overall my opinion would be that she had limited understanding that her conduct was wrong at the time of the offence.

> I base (my opinion) on the severity of her symptoms caused by her mental illness. (Her) reasoning… in retrospect, how she thought about that particular incident… was very immature.
>
> … I don't think that she actually was able to appraise whether it was wrong or not at the time.... She repeatedly seems to act in a very egocentric manner. Dr Singh has gone into that a little bit in her report but I think it opines to a very limited understanding of what is right and wrong and it is really what is right for me… You know, they have hurt me therefore I will hurt them… I have been hurt therefore I want to hurt others, is a very limited… way to appraise things morally. And so, I think that she doesn't really, in that moment, understand that her actions are wrong, but simply what seemed right to her in the moment."

57. While I accept that AL could comply with rules when she chose to do so, there was nothing in the detailed material before me that persuaded me that AL was aware of shared social norms and values or had a desire to live up to the roles and expectations of others, in other words, that she was operating at a conventional level of moral development as opined by Dr Singh. Indeed her extreme behaviours which were harmful to herself and others pointed to her having no awareness or desire to conform to normal roles and expectations. Her very placement in a Safe House where she was contained away from regular society shows how very far she was from normal development expected of someone of her age.

58. On the question as to whether AL knew that her conduct was wrong I preferred and accepted the evidence of Dr Daugherty, noting in particular that he canvassed a far greater number of matters than did Dr Singh and referenced other material such as the medical records in considerable detail, which provided a fuller picture and context on which to base his opinion.

59. On the evidence before me, while I found that AL knew the nature and quality of her acts and was able to control her actions, I was also satisfied on the balance of probabilities that she did not know her conduct was wrong.

60. Accordingly, pursuant to s 77 (4) of the Act, the 4 charges in file 22002262 are dismissed.

Concerning the remaining 5 files and 16 charges referred to in the s77 Certificate dated October 2020

Did the mental illnesses materially contribute to the conduct?

As a consequence of her mental illnesses:

(i) did AL not know the nature and quality of her conduct; or

(ii) did AL not know the conduct was wrong; or

(iii) was AL not able to control her actions?

61. The opinions expressed in this certificate arose from Dr Singh's first report dated 1 June 2020.

62. As discussed earlier, in her first report Dr Singh considered that AL was suffering from a mental illness or disturbance but she was not of the opinion that the mental illness or disturbance materially contributed to the conduct.

63. In her oral evidence Dr Singh confirmed that AL refused to discuss any of the offending on these files and Dr Singh's main inquiry and basis for her opinion derived from the boiling water incident. In her evidence she explained that she formed opinions from the boiling water incident and inferred those opinions to the other 5 files covered by her report. In her evidence she said that her opinion in respect of those remaining files was less robust than her opinion on the boiling water incident.

64. On the question of knowledge of wrongness, I have already explained why I preferred and accepted Dr Daugherty's opinion and evidence over that of Dr Singh. There is nothing before me which indicates I should take a difference approach on the remaining 5 files.

65. Accordingly, for the same reasons expressed earlier, pursuant to s 77 (4) of the Act, the 16 charges in the following files are dismissed:

    22000336; 21947434; 21934772; 21933010; 21925026

Dated this 5TH day of November 2021

ELISABETH ARMITAGE
LOCAL COURT JUDGE