

NOTICE OF FILING

Details of Filing

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File Title:	BIJ23 & ANOR v STATE OF WESTERN AUSTRALIA
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



Amended Statement of Claim

Amended on 22 May 2025 with the consent of the Respondent.

Omissions are struck through. Additions are underlined.

No: WAD109/2023

Federal Court of Australia

District Registry: Western Australia

Division: General

BIJ23 by his litigation representative BKJ23 and another named in the Schedule

First Applicant

STATE OF WESTERN AUSTRALIA

Respondent

A. PRELIMINARY

1. Defined Terms in this Statement of Claim have the same meaning as in the Further Amended Originating Application.

B. THE APPLICANTS

2. The first applicant (**BIJ23**) was born on 10 February 2007. He has and, at all material times, had:
 - (a) a neurological injury because of a motorcycle accident which occurred when he was 14;
 - (b) an intellectual disorder;
 - (c) severe claustrophobia;
 - (d) attentional deficits;
 - (e) language disorder and cognitive impairment including severe memory impairment;
 - (f) suicidal ideation; and

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- (g) non-suicidal self-injury,
(collectively **BIJ23's Disabilities**).
- 3. BIJ23 was detained at the juvenile detention centre located within Casuarina maximum security adult prison (**Unit 18**) for the following periods:
 - (a) 20 July 2022 to 23 August 2022;
 - (b) 28 September 2022 to 14 December 2022;
 - (c) around 15 February 2023 to 6 March 2023;
 - (d) around 17 July 2023 to 16 August 2023;
 - (e) around 17 October 2023 to 13 December 2023.
- 4. BIJ23 is Aboriginal and, in the periods in which he was detained in Unit 18, he was a child of 15 to 17 years of age.
- 5. The second applicant (**BIK23**) was born on 6 August 2005.
- 6. BIK23 has and, at all material times, had:
 - (a) attention deficit hyperactivity disorder (**ADHD**); and
 - (b) adolescent-onset conduct disorder (**AOCD**),
(collectively **BIK23's Disabilities**).
- 7. BIK23 was detained at Unit 18 for the following periods:
 - (a) 20 July 2022 to 10 August 2022;
 - (b) 15 August 2022 to 8 September 2022;
 - (c) 17 October 2022 to 13 January 2023; and
 - (d) 27 January 2023 to about 6 August 2023.
- 8. In the periods in which he was detained in Unit 18, BIK23 was a child of 16 or 17 years of age.

C. THE GROUP MEMBERS

- 9. BIJ23 and BIK23 each bring this proceeding seeking the relief set out in the Originating Application, on their own behalf and as representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the Group Members (as that term is defined in paragraph 2 of the Further Amended Originating Application).

10. At the date of this Statement of Claim, and as at the date of commencement of this proceeding seven or more Group Members have claims against the respondent (**State**).

D. THE RESPONDENT

11. The State is sued under the title 'State of Western Australia', pursuant to s 5(2) of the *Crown Suits Act 1947* (WA).
12. The State is vicariously liable for the acts done by each person holding any of the offices or positions set forth in paragraphs 21 to 24 below within the scope of their actual or apparent authority performed by them in the course of their duties and/or exercising their powers under the *Young Offenders Act 1995* (WA) (**YO Act**) and the *Young Offenders Regulations 1995* (WA) (**YO Regulations**): section 182(4) of the YO Act; section 123 of the DDA.

E. BANKSIA HILL DETENTION CENTRE AND UNIT 18

13. At all material times, the State has operated the Banksia Hill Detention Centre (**Banksia Hill**) as a detention centre declared pursuant to s 13 of the YO Act.
14. On 13 July 2022, the Minister declared, under section 13 of the YO Act, those buildings and enclosures situated within Casuarina Prison (**Casuarina Prison**) and known as Unit 18 to be a detention centre, commencing operation on 14 July 2022 (**Unit 18**).
15. On 20 July 2022, approximately 20 young persons, who had immediately prior to that point been detained in Banksia Hill, were transferred to Unit 18.
16. At all material times from 20 July 2022 to the date of filing of this Statement of Claim, the State has operated Unit 18 as a detention centre declared under s 13 of the YO Act.

F. RELEVANT PROVISIONS OF THE YO ACT AND YO REGULATIONS

17. The provisions of the YO Act and the YO Regulations that are primarily material to the matters pleaded in this Statement of Claim are pleaded in paragraphs 18 to 42 below.

Objectives and principles

18. Section 6 of the YO Act sets out the main objectives of the YO Act as follows:
 - (a) to provide for the administration of juvenile justice;
 - (b) to set out provisions, embodying the general principles of juvenile justice, for dealing with young persons who have, or are alleged to have, committed offences;
 - (c) to ensure that the legal rights of young persons involved with the criminal justice system are observed;

- (d) to enhance and reinforce the roles of responsible adults, families, and communities in:
 - (i) minimising the incidence of juvenile crime;
 - (ii) punishing and managing young persons who have committed offences; and
 - (iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens;
 - (e) to integrate young persons who have committed offences into the community; and
 - (f) to ensure that young persons are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity.
19. Section 7 of the YO Act sets out the general principles to be observed in performing functions under the YO Act as follows:
- (a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences;
 - (b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct;
 - (c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult;
 - (d) the community must be protected from illegal behaviour;
 - (e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so;
 - (f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so;
 - (g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so;
 - (h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary;

- (i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner;
- (j) punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways;
- (k) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time;
- (l) in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered;
- (m) a young person who commits an offence is to be dealt with in a way that:
 - (i) strengthens the family and family group of the young person;
 - (ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and
 - (iii) recognises the right of the young person to belong to a family.

Detainees, key persons and administration

- 20. Section 3 of the YO Act defines "detainee" to mean "a person who is detained in a detention centre" (**detainee**).
- 21. In respect of Unit 18, the key persons responsible for administering the YO Act and the YO Regulations are:
 - (a) the relevant Minister;
 - (b) the CEO of the Department of the Public Service principally assisting the Minister in the administration of the YO Act (**CEO**), who is, subject to the Minister's direction, required "to carry into operation the provisions of [the YO] Act so far as the duty is not expressly committed to any other person" (s 9);
 - (c) the Superintendent, who is the person in charge of Unit 18 (s 3);
 - (d) Officers and other persons appointed by the CEO to implement or administer the YO Act (s 11(1)); and
 - (e) custodial Officers appointed by the CEO for primarily non-administrative functions (s 11(1a)).

22. By s 11B of the YO Act, a “custodial officer” (as that term is defined in s 3 of the YO Act), among other things:
- (a) has a responsibility to maintain the security of Unit 18 (s 11B(a));
 - (b) must obey all lawful orders given to him or her by the Officer under whose control or supervision he or she is placed (s 11B(c)); and
 - (c) may issue to a detainee such orders as are necessary for the purposes of the YO Act, including the security, good order, or management of a Detention Centre. Further, they may use such force as is prescribed under s 11C of the YO Act as is necessary to ensure that lawful orders given to a detainee are complied with (s 11B(d)).
23. By s 11E of the YO Act, a “prison officer” (as that term is defined in s 3 of the YO Act):
- (a) may assist in the exercise or performance of any power or duty under the YO Act if requested to do so by the CEO or the Superintendent (s 11E(1));
 - (b) when assisting, has the powers, duties, and protection from liability of a custodial Officer, in addition to the powers and duties conferred or imposed on the prison officer under any other law (s 11E(2)); and
 - (c) when assisting, may use such force as may be used by a custodial Officer and with the approval of the CEO, may use such weapons as are necessary in the circumstances (s 11E(3)).
24. Under s 11F of the YO Act a “police officer”:
- (a) may assist in the exercise or performance of any power or duty under the YO Act if requested to do so by the CEO or the Superintendent (s 11F(1)); and
 - (b) when assisting, has the powers, duties, and protection from liability of a custodial Officer in addition to the powers and duties conferred or imposed on the police officer under any other law (s 11F(2)).
25. Section 13(1) of the YO Act empowers the Minister to declare a place to be a “detention centre”. The YO Act distinguishes detention centres from prisons established under the *Prisons Act 1981* (WA). Section 118A(1) provides that, if a person under 18 years old is sentenced to a term of imprisonment, they must, subject to limited exceptions, serve that sentence in a detention centre and not in a prison.
26. Section 181(1) of the YO Act empowers the CEO (subject to the approval of the Minister) to make “rules for the management, control, and security of detention centres generally or a specified detention centre and for the management, control, and security of

detainees and the management of officers of the Department". The YO Regulations prevail over the rules, to the extent of any inconsistency.

Orders, force, restraint and confinement

Power to give orders

27. By s 11B(d) of the YO Act, a custodial Officer may issue to a detainee such orders as are necessary for the purposes of the YO Act, including the security, good order, or management of a detention centre and may use such force as is prescribed under s 11C as is necessary to ensure that lawful orders given to a detainee are complied with.

Use of force

28. By s 11C of the YO Act:
- (a) a custodial Officer may use "no more than prescribed force" in the management, control and security of a detention centre; and
 - (b) force may only be used "in the prescribed circumstances".
29. The requirements of s 11C of the YO Act are given additional content by regulations 71 and 72 of the YO Regulations:
- (a) The "prescribed force" which may be used under s 11C(1) is defined as "the degree of physical force which is the minimum required to control a detainee's behaviour in the circumstances" (reg 71(1)).
 - (b) A person cannot use a physical restraint hold when applying prescribed force unless they have received instruction in the proper use of that hold, and the use of that type of hold has been authorised by the Superintendent (reg 71(2)).
 - (c) The "prescribed circumstances" in which force may be used under s 11C(1) are defined as meaning "an immediate period when a detainee is imminently presenting a risk of physical injury to himself or herself, other detainees or staff" (reg 72(1)). As soon as the imminent risk has passed and the detainee has been stabilised, prescribed circumstances for the use of force no longer exist (reg 72(2)).

Restraint

30. By s 11D(1) of the YO Act, the CEO or the Superintendent may authorise and direct the restraint of a young offender where, in their opinion, such restraint is necessary:
- (a) to prevent the young offender injuring himself or herself, or any other person;
 - (b) upon considering advice from a medical practitioner, on medical grounds; or

- (c) to prevent the escape of a young offender during his or her movement to or from a facility or detention centre, or during his or her temporary absence from a facility or detention centre.
31. Restraint involving the use of medication must not be used on medical grounds unless the approval of a medical practitioner is obtained first (s 11D(2)).
 32. The Superintendent is required to report to the CEO if restraint is used on a detainee for a continuing period of more than 24 hours (s 11D(3)).

Confinement

33. The term “confine” and its cognates have their ordinary meaning in the YO Act and the YO Regulations and are so used in this Statement of Claim, as follows:
 - (a) “confine” has its ordinary meaning of “to enclose within bounds” and “to shut up or keep in”;
 - (b) “confined” has its ordinary meaning of “enclosed within bounds” and “shut up or kept in”;
 - (c) “confinement” has its ordinary meaning of “the state of being confined”; and
 - (d) “confine” and its cognates refer to actions and the consequence of actions by the CEO, Superintendent or Officers requiring a detainee to remain in their sleeping quarters or a designated room during “unlock hours”, as defined in reg 73 of the YO Regulations.
34. The term “unlock hours” is defined in reg 73 of the YO Regulations as meaning the “period during which detainees who are not subject to confinement or restraint are able to leave their sleeping quarters”, being the hours in the ordinary routine of the detention centre when detainees, other than those subject to lawful confinement or restraint, are permitted to be outside their sleeping rooms.
35. Where a detention offence (as that term is defined by s 170 of the YO Act) is admitted or found to be proved, s 173 of the YO Act empowers a Superintendent or visiting justice, among other things, to order that the detainee be confined to the detainee’s sleeping quarters, or to a designated room for a period not exceeding:
 - (a) 24 hours if the order is made by the superintendent; or
 - (b) 48 hours if the order is made by a visiting justice.
36. Section 196(1) of the YO Act empowers the Governor to make regulations. Section 196(2)(e) provides that, without limiting s 196(1), regulations may be made conferring authority on a Superintendent “to order that a detainee be confined to the detainee’s

sleeping quarters, or to a designated room, for a period not exceeding 24 hours in order to maintain good government, good order or security in a detention centre”.

37. Part 9 of the YO Regulations is entitled “Confinement of detainees”. It provides for two types of confinement:
 - (a) A Superintendent or a visiting justice may order that a detainee be confined to their sleeping quarters or to a designated room if they have been found to have committed a detention offence (**detention offence confinement**) (regulation 74(1)).
 - (b) A Superintendent may order that a detainee be confined to their sleeping quarters or to a designated room in order to maintain good government, good order or security in a detention centre (**security confinement**) (regulation 74(2)).
38. Divisions 2 and 3 of Part 9 of the YO Regulations set out procedures and safeguards that apply to detention offence confinement and security confinement, respectively, including:
 - (a) the Superintendent must make and maintain a record of an order to confine a detainee (regulations 76(1), 79(1));
 - (b) where confinement is ordered to take place in a designated room, the Superintendent must assess the room to be of an appropriate size and sufficiently lit and ventilated that the detainee can be confined without injury to health;
 - (c) a detainee under detention offence confinement is entitled to fresh air, exercise and staff company for a period of at least 30 minutes every three hours during unlock hours (regulation 76(3)); and
 - (d) a detainee who is held in security confinement for twelve hours or longer is entitled to at least one hour of exercise each six hours during unlock hours (regulation 79(4)).

Search

39. Section 196(3) of the YO Act empowers the Governor to make regulations conferring authority on a Superintendent, among other things, for search of and seizure of things from detainees.
40. Regulation 82(1) of the YO Regulations authorises the Superintendent to search any detainee “in accordance with this Part” and take from them any illegal or unauthorised thing found on their person. The Superintendent is authorised to use such force as is

reasonably necessary to perform that search and seizure. The Superintendent may direct an officer to undertake the search on their behalf.

41. Regulation 85 of the YO Regulations sets out when a search under regulation 82(1) may occur as follows:

- (a) A detainee should be searched:
 - (i) on admission to the detention centre;
 - (ii) immediately before discharge from the detention centre;
 - (iii) on leaving or returning to a detention centre; and
 - (iv) when transferring from one detention centre to another.
- (b) A detainee may be searched at any time, and in such a manner, as is considered necessary at the time by the Superintendent.

42. Regulation 86 of the YO Regulations provides how a search under regulation 82(1) may occur as follows:

- (a) a detainee may be searched using either a “pat” or “strip” search depending on the circumstances surrounding the requirement of the search (regulation 86(1)).
- (b) a detainee should be “strip” searched if there are circumstances giving rise to a reasonable suspicion that the detainee may be in possession of an item that could:
 - (i) jeopardise the safety, good order or security of the detention centre; or
 - (ii) be used for self-harm,(regulation 86(2)).
- (c) at least two officers must be present during a search of a detainee (regulation 86(3)).
- (d) a detainee must not be “strip” searched in the sight or immediate presence of a person of the opposite gender. However, a superintendent may direct that such a search is to be carried out in the presence of a medical practitioner or a nurse (regulation 86(4)).
- (e) where practicable, a detainee should not be “strip” searched in the immediate presence of another detainee (regulation 86(5)).
- (f) any search of a detainee must be conducted with due regard to the decency and self-respect of the detainee (regulation 86(6)).

- (g) despite sub-regulation (4) above, a superintendent may direct that a search is to be carried out in the presence of a medical practitioner or nurse (regulation 86(7)).
- (h) whenever a detainee is “strip” searched, each officer taking a role in that search must forward a written report of the search to the superintendent (regulation 86(8)).

G. WRONGFUL IMPRISONMENT

43. In this Statement of Claim:

- (a) “general lockdown” refers to the practice in Casuarina Prison and/or Unit 18, of locking all detainees or prisoners in their sleeping quarters during unlock hours;
- (b) “rolling lockdown” refers to the practice in Casuarina Prison, and/or Unit 18, of locking detainees and/or prisoners in their sleeping quarters during unlock hours, except for those within particular wings or parts of the prison and/or detention centre, who are allowed out of their sleeping quarters for a short period only, before those wings or parts of the prison and/or detention centre are returned to lockdown and successively opening for short periods and returning to lockdown the other remaining wings or parts of Unit 18 and/or Casuarina Prison.

44. By reason of the matters in paragraphs 33 to 38 above, each of the following constitutes wrongful imprisonment of a detainee:

- (a) the confinement of a detainee in a room during unlock hours other than:
 - (i) detention offence confinement not exceeding 24 hours, lawfully ordered by the Superintendent as permitted by s 173 of the YO Act and reg 74(1) of the YO Regulations;
 - (ii) detention offence confinement not exceeding 48 hours, lawfully ordered by a visiting justice as permitted by s 173 of the YO Act and reg 74(1) of the YO Regulations;
 - (iii) security confinement not exceeding 24 hours, lawfully ordered by the Superintendent as permitted by regulation 74(2) of the YO Regulations;
- (b) detention offence confinement or security confinement for which the Superintendent has failed to make and maintain a record of the order to confine the detainee contrary to regulations 76(1) (detention offence confinement) and 79(1) (security confinement) of the YO Regulations;
- (c) detention offence confinement or security confinement in a designated room not assessed by the Superintendent to be of an appropriate size and sufficiently ventilated and lit that the detainee can be confined in that room without injury to

health contrary to regulations 76(2) (detention offence confinement) and 79(3) (security confinement) of the YO Regulations;

- (d) security confinement where the Superintendent has failed to inform the detainee of the reason for the confinement contrary to regulation 79(2) of the YO Regulations;
- (e) failure to give a detainee subject to detention offence confinement fresh air, exercise and staff company for a period of at least 30 minutes every three hours during unlock hours contrary to regulation 76(3) of the YO Regulations;
- (f) failure to give a detainee subject to security confinement fresh air, exercise and staff company for a period of at least one hour every six hours during unlock hours contrary to regulation 79(4) of the YO Regulations;
- (g) purported security confinement which is not reasonably necessary to maintain good government, good order or security in Unit 18 contrary to regulation 74(2) of the YO Regulations; and
- (h) the confinement of detainees in a room by a general lockdown or rolling lockdown other than for dealing with a disturbance or a hazard from which the detainees need to be protected because such confinement is not authorised by the YO Act, the YO Regulations or the common law.

H. BATTERY AND/OR ASSAULT

45. By reason of the matters in paragraphs 28 to 32 and 39 to 42 above, each of the following constitutes a battery of a detainee:

- (a) except in connection with the proper exercise of the power to search under regs 85 to 87 of the YO Regulations, the use of force on a detainee when the detainee is not imminently presenting a risk of physical injury to himself or herself, other detainees, or staff contrary to s 11C of the YO Act and reg 72(1) of the YO Regulations;
- (b) the use of force on a detainee after an imminent risk of physical injury to the detainee, other detainees, or staff has passed contrary to s 11C of the YO Act and reg 72(2) of the YO Regulations;
- (c) the use of force on a detainee exceeding the degree of physical force which is the minimum required to control the detainee's behaviour in the circumstances, contrary to s 11C of the YO Act and reg 71(1) of the YO Regulations;
- (d) the use of a physical restraint hold on a detainee by an Officer when:

- (i) the Officer has not received instruction in the proper use of that physical restraint hold; or
- (ii) the Superintendent has not authorised the use of that type of physical restraint hold;

contrary to s 11C of the YO Act and reg 71(2) of the YO Regulations;

- (e) the restraint of a detainee other than authorised or directed by the CEO or Superintendent in the following circumstances permitted under s 11D of the YO Act:

- (i) such restraint as is necessary in the lawfully formed opinion of the CEO or Superintendent to prevent the detainee from injuring himself, herself, or any other person;
- (ii) such restraint as is necessary in the lawfully formed opinion of the CEO or Superintendent on medical grounds advised and approved by a medical practitioner in advance of the use of the restraint;
- (iii) such restraint as is necessary in the lawfully formed opinion of the CEO or Superintendent to prevent the escape of a detainee:

- 1. during his or her movement to or from a detention centre; or
- 2. during his or her temporary absence from a detention centre;

- (f) the search of a detainee that involves physical contact with the person of the detainee in circumstances or in a manner not authorised by regs 85 to 87 of the YO Regulations; and

- (g) a strip search involving physical contact with the person of the detainee conducted as a matter of routine practice and/or in the absence of circumstances giving rise to a reasonable suspicion that the detainee may be in possession of an item that could:

- (i) jeopardise the safety, good order or security of Unit 18; or
- (ii) be used for self-harm.

- 46. By reason of the matters in paragraphs 28 to 32 and 39 to 42 above, each of the following constitutes an assault of a detainee:

- (a) conduct of the Superintendent or an Officer that caused a detainee to apprehend that the Superintendent or Officer might make or cause physical contact with the detainee in the circumstances set out in paragraph 45 above;

- (b) the strip search of a detainee not involving physical contact with the person of the detainee conducted as a matter of routine practice and in the absence of circumstances giving rise to a reasonable suspicion that the detainee may be in possession of an item that could:
 - (i) jeopardise the safety, good order or security of the detention centre; or
 - (ii) be used for self-harm; and
 the detainee apprehended that if he or she did not submit to the strip search physical force would be used against him or her; and
- (c) the strip search of a detainee not involving physical contact with the person of the detainee, conducted in a manner not authorised by reg 86 of the YO Regulations, and the detainee apprehended that if he or she did not submit to the strip search physical force would be used against him or her.

I. DUTY OF CARE

Foreseeable Risk of Harm

47. Each detainee, including BIJ23 and BIK23, was, while in detention in Unit 18:

- (a) a child, or a young adult who had commenced to be a detainee while a child;
- (b) under the control of the Minister, the CEO, the Superintendent and Officers;
- (c) without freedom or capacity to provide for their own needs for food, clothing, shelter, medical treatment, other health and welfare, and education or rehabilitation;
- (d) separated from their parents or guardians who were, accordingly, unable to provide for their needs for food, clothing, shelter, medical treatment, other health and welfare, and education;
- (e) dependant on the CEO, Superintendent and Officers to provide for their needs for food, clothing, shelter, medical treatment, other health and welfare, and education;

(together and severally **Detainee Characteristics**).

48. Many detainees in Unit 18, including BIJ23 and BIK23, were, while in detention in Unit 18 (and previously Banksia Hill), persons who:

- (a) had experienced trauma, abuse or neglect both before and since becoming a detainee;

- (b) had at least one domain of neurodevelopmental impairment including one or more of:
 - (i) cognitive impairment;
 - (ii) behavioural disorders; and
 - (iii) other mental health conditions;
 - (c) were vulnerable to injury to their mental health (including psychiatric injury);
 - (d) were vulnerable to self-harm and/or attempts at self-harm,
- (together and severally **Additional Detainee Characteristics**).

Control over risk of harm

49. At all material times during the Relevant Period:

- (a) the Minister, the CEO, the Superintendent and Officers knew, or ought reasonably to have known, that, or to the effect that, detainees were children who had, or were likely to have, the Detainee Characteristics and the Additional Detainee Characteristics;

Particulars

- a. *As to the Detainee Characteristics, the awareness of the Minister, the CEO, the Superintendent and Officers is to be inferred from the circumstances, as those are matters arising from the nature and operation of the Detention Centres.*
- b. *As to the matter in sub-paragraph 48(a) above, the Minister, the CEO, the Superintendent and Officers ought to have been aware of that matter because:*
 - i. *independent research demonstrates the high proportion of young persons in detention who have experienced trauma, abuse and neglect, such the 2009 NSW Young People in Custody Health Survey which showed that 81% of female detainees and 57% of male detainees had experienced trauma, abuse or neglect; and*
 - ii. *that matter had been the subject of report by and had informed recommendations of the Office of the Inspector of Custodial Services including in its 2017 Report "Behaviour management practices at Banksia Hill Detention Centre".*

- c. *As to the matters in sub-paragraph 48(b) above, the Minister, the CEO, the Superintendent and Officers ought to have been aware of those matters because:*
 - i. *independent research demonstrates the high proportion of detainees in youth detention suffering from disabilities including neurocognitive impairment, behavioural disorders and other mental health conditions including a 2016 study of detainees at Banksia Hill by the Telethon Kids Institute which indicated that nine of out ten young people in detention had at least one form of severe neurodisability.*
 - ii. *that research had been reported by and had informed recommendations of the Office of the Inspector of Custodial Services including in its 2017 Report "Behaviour management practices at Banksia Hill Detention Centre".*
 - d. *As to the matters in sub-paragraphs 48(c) and (d) above, the Minister, the CEO, the Superintendent and Officers ought to have been aware of those matters because a reasonable person in the circumstances would have inferred those matters from the Detainee Characteristics and the matters in sub-paragraphs 48(a) and 48(b) above.*
- (b) the Minister, the CEO, the Superintendent and some Officers had the right and ability to determine who was employed in Unit 18, what skills were required, what training and procedures would be followed and what persons would be allowed into Unit 18;
 - (c) the CEO, the Superintendent and Officers had the right and ability to determine how and when detainees were exposed to contact with other detainees.

Vulnerability

- 50. The Detainee Characteristics and, or alternatively, the Additional Detainee Characteristics, meant that the detainees were vulnerable individuals.

State duty of care

- 51. By reason of the matters in paragraphs 47 to 50 above, at all material times during the Relevant Period, the State owed all detainees a non-delegable duty to take reasonable steps to ensure the Minister, the CEO, the Superintendent, Officers and any third party who entered a Detention Centre took reasonable care to avoid acts or omissions ~~which a reasonable person in their respective positions could reasonably foresee would be likely to~~ might foreseeably cause harm to a detainee.

Minister, the CEO, the Superintendent and Officers' Duty of Care

52. The relationship of the Minister, the CEO, the Superintendent and Officers with detainees under their control, including BIJ23 and BIK23, was such that each of them was under a duty to take reasonable care to avoid acts or omissions which ~~a reasonable person in the position of the Minister, the CEO, the Superintendent and Officers respectively could reasonably foresee would be likely to harm~~ might foreseeably cause harm to the detainee.

~~53. By reason of the matters in paragraphs 47 to 50 above, harm to detainees of the following kinds were reasonably foreseeable with respect to each of the duties of care set out in paragraphs 51 and 52 above:~~

~~(a) physical harm;~~

~~(b) harm to their mental health (including psychiatric injury).~~

53. By reason of the matters in paragraphs 47 to 50 above, there was a foreseeable and not insignificant risk of harm to detainees with respect to each of the duties of care set out in paragraphs 51 and 52 above:

(a) Physical injury as a result of:

(i) uses of force by Officers; and

(ii) self-harm;

(b) psychiatric injury, including exacerbation of previous mental health conditions or disabilities as a result of one or more of:

(i) being subjected to extended periods of confinement;

(ii) uses of force or threats of use of force by Officers;

(iii) being subjected to restraints;

(iv) being subjected to strip searches;

(v) failure to make a comprehensive assessment of mental health and/or cognitive disabilities such that the CEO, Superintendent and Officers had limited knowledge of the disabilities, vulnerabilities, risks and support needs of individual detainees;

(vi) failure to provide or to provide access to comprehensive mental health services and/or treatment for detainees;

- (vii) failure to train officers in relation to the needs of children with mental health and/or cognitive disabilities and de-escalation techniques in response to behaviour arising from the detainee's disabilities;
- (viii) failure to modify behaviour and discipline policies to reduce avoidable incidents of non-compliance by detainees arising from the detainee's disabilities;
- (ix) restrictions being imposed on detainee access to education, recreation and goods, services and facilities.

J. RELEVANT AREAS UNDER THE DDA AND ADA

54. During the Relevant Period, the State was an educational authority and an education provider within the meaning of ss 4 and 22 of the DDA and ss 1.4 and 2.1 of the *Disability Standards for Education 2005* (Cth) (**DSE**).

Particulars

- a. *During the relevant period, Banksia Hill and Unit 18 were each institutions at which education or training was provided to detainees.*
 - b. *The DSE are standards formulated under the DDA to clarify and elaborate the legal obligations under the DDA in relation to education, and operate as subordinate legislation.*
55. Throughout the Relevant Period:
- (a) Banksia Hill and Unit 18 were each an educational institution; and
 - (b) each Superintendent and Officer was a member of staff of an educational institution,
- within the meaning of the DDA and the DSE.
56. During the Relevant Period, the State provided goods and services and made facilities available to detainees, within the meaning of s 24 of the DDA and s 28 of the ADA, including:
- (a) a facility of a place and space in which detainees could receive visits from friends, relatives and legal advisers;
 - (b) a service, being the kind provided by government, of an Officer or Officers being present to provide assurance that the facility within a detention centre in which detainees received visits from friends, relatives and legal advisers was safe for the detainees and visitors;

- (c) telephone facilities for communicating with friends, relatives and legal advisers;
 - (d) a service relating to telecommunications being the provision of telephones and opportunities for the detainees to use the telephones;
 - (e) a facility of a place and space for recreation and/or exercise;
 - (f) a service, being the kind provided by government, of an Officer or Officers being present to provide assurance that the facility within a detention centre in which detainees were able to enjoy recreation and exercise was safe for the detainees;
 - (g) facilities to enable recreation and/or exercise, including a recreation yard;
 - (h) a service relating to entertainment and recreation being the provision of televisions and radios and opportunities for the detainees to use the televisions and radios;
 - (i) a service relating to the kind provided by members of a profession, being medical services, including medical treatment;
 - (j) goods, being discretionary food items, such as those served in a canteen; and
 - (k) a service, being the kind provided by government, to protect detainees from risk of physical harm, including self-harm, battery and/or assault by other detainees.
57. During the Relevant Period, the State provided goods and services and made facilities available to prisoners in adult prisons in Western Australia, including Casuarina Prison, within the meaning of s 28 of the ADA, including:
- (a) a facility of a place and space in which prisoners could receive visits from friends, relatives and legal advisers;
 - (b) a service, being the kind provided by government, of an Officer or Officers being present to provide assurance that the facility within a prison in which prisoners received visits from friends, relatives and legal advisers was safe for the prisoners and visitors;
 - (c) telephone facilities for communicating with friends, relatives and legal advisers;
 - (d) a service relating to telecommunications being the provision of telephones and opportunities for the prisoners to use the telephones;
 - (e) a facility of a place and space for recreation and/or exercise;
 - (f) a service, being the kind provided by government, of an Officer or Officers being present to provide assurance that the facility within a prison in which prisoners were able to enjoy recreation and exercise was safe for the prisoners;
 - (g) facilities to enable recreation and/or exercise, including a recreation yard;

- (h) a service relating to entertainment and recreation being the provision of televisions and radios and opportunities for the detainees to use the televisions and radios;
- (i) a service relating to the kind provided by members of a profession, being medical services, including medical treatment;
- (j) goods, being discretionary food items, such as those served in a canteen; and
- (k) a service, being the kind provided by government, to protect detainees from risk of physical harm, including self-harm, battery and/or assault by other prisoners.

58. During the Relevant Period, in Unit 18, the State either:

- (a) did not provide or make available all the goods, services and facilities of the kinds set out in paragraphs 56 and 57 above to or for detainees; or
- (b) provided or made available goods, services and facilities of the kind set out in paragraphs 56 and 57 above to or for detainees to a lesser degree or on a more restricted basis than those kinds of goods, services and facilities were provided to or made available for prisoners in adult prisons, including Casuarina Prison.

Particulars

- a. *In Unit 18, the cells provided for detainees had been damaged such that in many cases detainees could not shower, use the toilet or obtain their own drinking water, without leaving their cell.*
- b. *In Unit 18, as a result of the level of staffing in Unit 18 and operational policies for staff:*
 - i. *detainees were often not permitted out of their cells at all during ordinary unlock hours, except for short and limited amounts of time in which they were expected to conduct any out of cell activities which the detainees desired or needed to conduct, including showering, using the toilet and obtaining their own drinking water.*
 - ii. *detainees were often not permitted to take visits from or to make phone calls to a friends, relatives and legal advisers, or alternatively, were forced to choose between using a limited amount of time in which they would be permitted to be outside of their cells for recreation, visits or telephone calls or education or other activities.*
- c. *detainees were often not permitted to use facilities for exercise or recreation, or alternatively, were forced to choose between using a limited amount of*

time in which they would be permitted to be outside of their cells for recreation, visits or telephone calls or education or other activities.

- d. *professional visitors, including legal and medical professionals, were regularly denied entry to Unit 18 or were otherwise refused access to detainees.*
- e. *detainees were often required to engage with medical services including acute psychological services in conditions which impaired their ability to receive the benefits of those services. In particular:*
 - i. *detainees were often not provided with a private separate room in which to meet with a psychologist or other mental health worker and were instead assessed by conversations taking place through the grille in the door of their cell.*
 - ii. *medical response times at Unit 18 were generally longer than at Banksia Hill because Unit 18 relies on the medical unit of Casuarina Prison which is further away from Unit 18 than the medical unit in Banksia Hill is from cells in Banksia Hill.*
- f. *at Unit 18 psychological assessments were regularly unable to be conducted at all or were only able to be conducted through the grille in a detainee's cell door, impairing their therapeutic value;*
- g. *in Unit 18 monitoring of detainees under observation, for example because of a risk of self-harm, is conducted by video-link.*
- h. *detainees in Unit 18 had limited opportunity to undertake any programs because programs scheduled to be undertaken at Unit 18 were frequently cancelled.*
- i. *Further particulars, including as to the periods in which particular goods, services and facilities were not provided or made available at all and those in which they were provided or made available on a more restrictive basis only, will be provided after discovery.*

K. BEHAVIOURAL REGIME

59. Throughout the Relevant Period, the State (through the CEO, the Superintendent and Officers) applied a behavioural regime (**Behavioural Regime**) to BIJ23 and BIK23 and to all other detainees in Detention Centres as follows:

- (a) All detainees must not:

- (i) fail to comply with lawful directions from Superintendents and Officers;
- (ii) be verbally or physically offensive;
- (iii) be verbally or physically aggressive;
- (iv) be violent;
- (v) make images involving violence or write words involving violence; or
- (vi) harm themselves,

(Proscribed Conduct).

Particulars

- a. *The Proscribed Conduct was applied by rules and operating procedures for the management and control of detention centres and detainees made by the CEO from time to time pursuant to s 181 of the YO Act.*
 - b. *Examples of such rules and operating procedures include the “Custodial Operating Procedures and Policies” (COPPs) which have been promulgated from around 2019 onwards, and in particular COPPs 6.1, 6.2, 6.4, 6.10 and 7.6.*
 - c. *Instances of the application of the Behavioural Regime to BIJ23 and BIK23 are set out in paragraphs 97 and 98 below for BIJ23 and paragraphs 166 and 167 ~~and 168~~ below for BIK23.*
 - d. *Further particulars may be provided after discovery.*
- (b) If BIJ23 or BIK23 or another detainee engaged in the Proscribed Conduct, officers subjected the detainee to consequences including:
- (i) the use of physical force, including the use of chemical agents;
 - (ii) handcuffing;
 - (iii) confinement to their cell;
 - (iv) confinement to a cell in an observation unit;
 - (v) loss of cell placement;
 - (vi) loss of program placement;
 - (vii) confiscation of goods;
 - (viii) denial of use of goods, services and facilities of the kinds referred to in paragraph 56 above; and

- (ix) detention of the detainee in Unit 18, instead of Banksia Hill.

Particulars

- a. *The consequences for the Proscribed Conduct were partly specified in the rules and operating procedures for the management and control of detention centres and detainees made by the CEO from time to time pursuant to s 181 of the YO Act referred to in the particulars to paragraph 59(a) above.*
 - b. *The consequences were imposed through:*
 - i. *the delegation of authority to Superintendents and Officers; and*
 - ii. *exercises of discretion by officers in purported exercise of authority under s 11B(d) of the YO Act.*
 - c. *Instances of the application of the Behavioural Regime to BIJ23 and BIK23 are set out in paragraphs 97 and 98 below for BIJ23 and paragraphs 166 and 167 ~~and 168~~ below for BIK23.*
 - d. *Further particulars may be provided after discovery.*
60. Under the Behavioural Regime, when BIJ23, BIK23 or another detainee engaged in Proscribed Conduct, they were subjected to the consequences referred to in paragraph 59(b) above even in circumstances where the Proscribed Conduct in which they had engaged was a symptom or manifestation of a disability of the detainee.

Particulars

- a. *As regards BIJ23, the Applicants refer to the matters pleaded in paragraphs 97 and 98 below.*
 - b. *As regards BIK23, the Applicants refer to the matters pleaded in paragraphs 166 and 167 ~~and 168~~ below.*
 - c. *As regards other detainee group members, further particulars will be provided in evidence and after discovery.*
61. By reason of the matters in paragraphs 59 and 60 above, detainees with a disability were required not to engage in conduct which was a manifestation or symptom of their disability or they would be subjected to the kinds of consequences referred to in paragraph 59(b) above.
62. By reason of the matters pleaded in paragraphs 56 to 61 above, at all material times, the State, through the CEO, the Superintendent and the Officers imposed a condition or practice upon detainees in detention centres, being that:

- (a) at the discretion of the State, the CEO, the Superintendent and the Officers, detainees could be detained in Unit 18 instead of Banksia Hill as a punishment for apprehended non-compliance with the Behavioural Regime; and
- (b) detainees so detained in Unit 18 would only have access to or be provided with a lesser range of the goods, services and facilities set out in paragraph 56 and 57 above, or would only have access to or be provided with those goods, services and facilities on a more restrictive basis, as compared to prisoners in adult prisons, including Casuarina Prison.

L. CLAIMS OF BIJ23

L.1 False Imprisonment, assault and battery

False imprisonment

63. During the time BIJ23 was detained at Unit 18, the CEO and the Superintendent frequently used general lockdowns and rolling lockdowns in the management of Unit 18 for operational reasons, including staff shortages.

Particulars

- a. *BIJ23 was confined to his cell during unlock hours as part of a general lockdown or a rolling lockdown on the dates and for the aggregate number of hours particularised in the BIJ23 Statement of Particulars Part 3, paragraph 1.*
 - b. *Particulars of other occasions when BIJ23 was confined in a cell during unlock hours as part of a general lockdown or a rolling lockdown will be provided following discovery.*
64. When a general lockdown referred to in paragraph 63 above was in effect, BIJ23 was locked in his accommodation cell for the duration of the lockdown.
65. When a rolling lockdown referred to in paragraph 63 above was in effect, BIJ23 was locked in his accommodation cell during the period in which the unit or wing in which his cell was located was subject to the rolling lockdown.
66. When BIJ23 was locked in his cell during general lockdowns or rolling lockdowns, he was subjected to confinement within the meaning of the YO Act.

Particulars

- a. *The Applicants repeat the particulars subjoined to paragraph 63 above.*

67. The confinement of BIJ23 in his cell during the general lockdowns and rolling lockdowns referred to in paragraphs 63 to 66 above was not detention offence confinement or security confinement.
68. The confinement of BIJ23 in his cell during the general lockdowns and rolling lockdowns deprived BIJ23 of his liberty.
69. By reason of the matters in paragraphs 44 and 63 to 68 above, the CEO, the Superintendent and Officers falsely imprisoned BIJ23 when he was confined in a cell during general lockdowns and rolling lockdowns.
70. In addition to the matters in paragraphs 63 to 69 above, on numerous occasions while BIJ23 was detained at Unit 18, he was confined in his sleeping quarters or other designated rooms during unlock hours, including in the following circumstances:
 - (a) following incidents of use of force by Officers or threatened use of force by Officers; and
 - (b) following incidents of self-harm or threatened self-harm by BIJ23;
 - (c) on other occasions and in circumstances in respect of which further details will be provided.

Particulars

- a. *BIJ23 was confined in a cell on occasions including the occasions particularised in the BIJ23 Statement of Particulars Part 3.*
- b. *Of the occasions particularised in the BIJ23 Statement of Particulars Part 4,*
 - i. *Further particulars of occasions when BIJ23's confinement was for the purpose of limiting or preventing interaction between BIJ23 and other detainees may be provided following discovery.*
 - ii. *Occasions when BIJ23's confinement followed the use of force by officers or threatened use of force by officers are particularised in the BIJ23 Statement of Particulars Part 3, paragraph 2.*
 - iii. *Occasions when BIJ23's confinement followed incidents of self-harm or threatened self-harm by BIJ23 are particularised in the BIJ23 Statement of Particulars Part 3, paragraph 3.*
 - iv. *Occasions when BIJ23's confinement was when Officers assigned to supervise BIJ23 during unlock hours were unavailable are particularised in the BIJ23 Statement of Particulars Part 3, paragraph 4.*

- c. *Particulars of other occasions on which BIJ23 was confined in a cell, including in the kinds of circumstances already particularised, will be provided following discovery.*

- 71. The confinement of BIJ23 in his cell on each of the occasions referred to in paragraph 70 above was not a detention offence confinement and deprived BIJ23 of his liberty.
- 72. The confinement of BIJ23 in his cell during each of the occasions referred to in paragraph 70 above was not justified.

Particulars

- a. *If the confinement of BIJ23 in the circumstances referred to in paragraph 70 above purported to be security confinement, the confinement was unlawful for one or more of the following reasons:*
 - i. *it was not directed by the Superintendent;*
 - ii. *the Superintendent failed to make and maintain a record of the order to confine BIJ23;*
 - iii. *it was not reasonably necessary to maintain good government, good order or security at Unit 18;*
 - iv. *the Superintendent failed to inform BIJ23 of the reason for the confinement;*
 - v. *BIJ23 was not given fresh air, exercise and staff company for a period of at least 1 hour every 6 hours during unlock hours.*
- b. *If the confinement of BIJ23 in the circumstances referred to in paragraph 70 above did not purport to be security confinement, it was unlawful because it deprived BIJ23 of his liberty without authority under the YO Act and without lawful justification.*

- 73. By reason of the matters in paragraphs 70 to 72 above, the State falsely imprisoned BIJ23.

Strip searches

- 74. BIJ23 was subjected to a strip search on several occasions during his time in detention at Unit 18.

Particulars

- a. *BIJ23 was strip searched:*

- i. *at or shortly after the time of his admission on each occasion he was admitted to Unit 18; and*
 - ii. *on several other occasions, the exact time and date of which BIJ23 does not currently know.*
- b. *Further particulars of strip searches of BIJ23 will be provided following discovery.*

75. On each occasion referred to in paragraph 74 above:

- (a) BIJ23 apprehended that if he did not submit to a strip search, Officers would immediately use force on him and make unwanted physical contact with his body;
- (b) BIJ23 did not freely consent to being strip searched and submitted to being strip searched out of fear that physical force would be used on him;
- (c) the Superintendent did not have a reasonable suspicion that BIJ23 might have possession of an item that could jeopardise the safety, good order or security of Unit 18 or be used for self-harm.

76. By reason of the matters in paragraphs 74 and 75 above, Officers assaulted BIJ23 when they required him to submit to a strip search.

Use of force

77. While BIJ23 was detained at Unit 18, he was subjected to the use of force by Officers in which Officers made unwanted physical contact with BIJ23's body, including the following kinds of force:

- (a) one Officer taking hold of BIJ23's arms;
- (b) two Officers taking hold of BIJ23 by BIJ23's arms, each Officer holding an opposite arm;
- (c) an Officer taking hold of BIJ23's legs;
- (d) one or more Officers forcing BIJ23 to the ground;
- (e) one or more Officers holding BIJ23 face down on the ground or on a mattress on the ground;
- (f) one or more Officers holding BIJ23 by the legs in a "figure 4" position while he was face down on the ground, such that BIJ23's legs were interwoven in a pattern resembling the numeral 4: with one leg bent to the side and the other leg bent upwards folded over the first leg;

- (g) “folding up”, where one or more Officers would hold each of BIJ23’s arms and kick his legs out from under him; one Officer would then position themselves at BIJ23’s head, using their hands to hold his face down, while placing their knee either on or near his neck; the other Officers would then stretch BIJ23’s arms behind his back and fold his legs up at the knees, using their weight to hold his ankles down at his buttocks;
 - (h) holding BIJ23 in one of the ways described above while handcuffs were applied to or removed from BIJ23's wrists;
 - (i) one or more Officers pushing BIJ23 with a hard shield;
 - (j) one or more Officers pushing BIJ23 with a soft shield;
 - (k) one or more Officers using a chemical agent on BIJ23.
78. Force of the kind described in paragraph 77 above was used on BIJ23 on numerous occasions.

Particulars

- a. Force was used on BIJ23 in the circumstances particularised in Part 4 of the BIJ23 Statement of Particulars.*
 - b. Further particulars may be provided following discovery.*
79. BIJ23 did not consent to physical contact being made with his body when force was used on him on the occasions referred to in paragraph 78 above.
80. BIJ23 had a continuing apprehension that imminent physical contact would be made with his body by Officers on the occasions referred to in paragraph ~~77~~ 78 above.
81. The use of force on BIJ23 was unlawful on those occasions referred to in paragraph 78 above:
- (a) particularised in the BIJ23 Statement of Particulars Part 4, paragraph 1 as on those occasions the use of force occurred otherwise than in an immediate period when BIJ23 was imminently presenting a risk of injury to himself or other detainees or staff;
 - (b) particularised in the BIJ23 Statement of Particulars Part 4, paragraph 2 as on those occasions the use of force occurred after imminent risk of injury has passed and BIJ23 had already been stabilised; and

- (c) particularised in the BIJ23 Statement of Particulars Part 4, paragraph 3 as on those occasions the use of force involved more than the degree of physical force which was the minimum degree required to control BIJ23's behaviour.

81A Further, with respect to each said use of force in which a chemical agent was used on BIJ23 by a custodial officer, such use was unlawful in that:

- (a) The chemical agent used at Unit 18 in the Relevant Period is a substance known as oleoresin capsicum discharged by a spray weapon.
- (b) By reg 5 and schedule 2 of the *Weapons Regulations 1999* (WA), at all material times provided that a spray weapon made or modified to be used to discharge oleoresin capsicum is a "controlled weapon" within the meaning of the *Weapons Act 1999* (WA).
- (c) By s 7 of the *Weapons Act*, at all material times it was an offence to, without lawful excuse, carry or possess (and thus use) a controlled weapon.
- (d) At all material times custodial officers within the meaning of the YO Act had no lawful authority, and thus no lawful excuse, to carry or possess (and thus use) a controlled weapon.

82. By reason of the matters in paragraphs 45 and 46 and paragraphs 77 to 84 81A above, Officers assaulted and battered BIJ23 on the occasions referred to in paragraphs 78 and 81 above.

Handcuffing

83. While BIJ23 was detained at Unit 18, he was subjected to handcuffing or the application of other restraints on numerous occasions.

Particulars

- a. On at least two (2) occasions whilst detained in Unit 18, BIJ23 was handcuffed whilst attending education.*
- b. Further particulars of the handcuffing referred to in particular (a) above will be provided following discovery.*
- c. BIJ23 was handcuffed or otherwise subjected to restraints during incidents involving the use of force particularised in the BIJ23 Statement of Particulars Part 5.*
- d. Further particulars of the handcuffing or restraining of BIJ23 may be provided following discovery.*

84. The handcuffing or other restraint of BIJ23 referred to in paragraph 83 was unlawful.

Particulars

- a. *On the occasions referred to in particulars (a) to (d) to paragraph 83:*
 - i. *the CEO or the Superintendent did not authorise and direct the restraint of BIJ23;*
 - ii. *if the CEO or the Superintendent did authorise and direct the restraint of BIJ23, the CEO or the Superintendent did not form the opinion that the restraint of BIJ23 was necessary to prevent injury to himself or any other person;*
 - iii. *alternatively, if the CEO or the Superintendent did form the opinion that the handcuffing or other restraint of BIJ23 was necessary to prevent injury, the opinion of the CEO or the Superintendent was not reasonable;*

as further particularised in the BIJ23 Statement of Particulars Part 5.
- b. *Further particulars of the unlawful handcuffing of BIJ23 may be provided following discovery.*

85. BIJ23 did not consent to physical contact being made with his body when he was put in handcuffs or other restraint on the occasions referred to in paragraph 83 above and submitted to handcuffing and other restraint either as a result of:

- (a) fear that additional physical force would be used on him if he did not submit; or
- (b) Officers using force to physically hold and restrain him while handcuffs were put on him.

86. BIJ23 had a continuing apprehension that imminent physical contact would be made with his body by Officers on the occasions referred to in paragraph 83 above.

87. By reason of the matters in paragraphs 45(e) and 83 to 86 above, Officers assaulted and battered BIJ23.

L.2 Breach of duty of care

88. BIJ23's Disabilities are cognitive impairments and behavioural disorders that affect BIJ23's thought processes, emotions, behaviour and judgement in that he has difficulty with:

- (a) being aware of, and regulating, his emotions;
- (b) understanding and communicating his experiences;

- (c) problem-solving, especially when under stress;
 - (d) consequential reasoning;
 - (e) controlling his impulses;
 - (f) regulating his behaviour;
 - (g) refraining from impulsive and/or dysregulated behaviour;
 - (h) coping with stressors, including extended periods of confinement.
89. While in detention in Banksia Hill and Unit 18, and especially in responses to distress, agitation or emotional overwhelm, BIJ23 engaged in the following behaviours that were a symptom or a manifestation of BIJ23's Disabilities and were thus caused or contributed to by, and an aspect of, his conditions:
- (a) internalising anger and stress;
 - (b) exhibiting a lack of thought and/or concern for the consequences of his actions;
 - (c) refusing to follow instructions;
 - (d) damaging or destroying property;
 - (e) repeatedly threatening or engaging in self-harm or attempted suicide, as particularised in the BIJ23 Statement of Particulars Part 7;
 - (f) being verbally aggressive, abusive or otherwise annoying to Officers;
 - (g) being violent;
 - (h) going out of bounds;
 - (i) reacting with heightened emotional and physical responses to peremptory, complex or unpleasant commands;
 - (j) appearing to be irritable, thought-disordered and aggressive; and
 - (k) exhibiting paranoid and/or suspicious behaviour.
90. That BIJ23 has cognitive impairments, had or was likely to have cognitive impairments and behavioural disorders, as well as the nature of those impairments and disorders, were matters which the State, the Minister, the CEO and the Superintendent knew or ought to have known.

Particulars

- a. BIJ23 had been diagnosed with a cognitive impairment in July 2021.*

- b. *Officers were made aware by BIJ23 and by BIJ23's aunt that BIJ23 had cognitive impairments.*
 - c. *BIJ23 repeats the matters in paragraph (c) of the particulars sub-joined to paragraph 49(a) above. In the circumstances referred to in that paragraph, the State, the Minister, the CEO and the Superintendent ought to have assessed detainees, including BIJ23, to determine whether they had any disabilities and, if so, the nature and extent of those disabilities.*
91. Further, ~~and in the alternative,~~ the State, the Minister, the CEO, ~~and the Superintendent~~ and Officers ought to have foreseen that a person of normal fortitude might, in the circumstances of BIJ23's case, suffer a recognised psychiatric injury if reasonable care were not taken.

Particulars

- a. *The circumstances of the case include:*
 - i. *the matters set out in paragraphs 88 to 90 above;*
 - ii. *the physical injuries suffered by BIJ23 as a result of the assaults and batteries referred to in paragraphs 77 to 87 above;*
 - iii. *the physical injuries suffered by BIJ23 as a result of him engaging in self-harm;*
 - iv. *the confinement of BIJ23 in the circumstances described in paragraphs 63 to 73 above;*
 - v. *the strip searching of BIJ23 in the circumstances described in paragraphs 74 to 76 above;*
 - vi. *the use of force BIJ23 in the circumstances described in paragraph 77 and 78 above;*
 - vii. *the handcuffing and other restraint of BIJ23 in the circumstances described in paragraph 83 above;*
 - viii. *the deprivations pleaded in paragraphs 104, 105, 115, 115B 446 and 117 below and in the BIJ23 Statement of Particulars Parts 8 and 9.*
- ~~92. In breach of the duty of care they each owed to BIJ23, the State, the Minister, the CEO, the Superintendent and Officers failed to take reasonable care to avoid acts or omissions which it was reasonably foreseeable would be likely to cause harm to BIJ23 of the kind set out in paragraphs 0 and 91 above.~~

Particulars

- ~~a. Failing to provide adequate assessment of BIJ23's' disability and complex support needs arising from his cognitive impairment;~~
- ~~b. Failing to provide adequate mental health services, including in the circumstances described in the BIJ23 Statement of Particulars Part 6 paragraph 1;~~
- ~~c. Failing to modify adequately the Behavioural Regime at Banksia Hill and Unit 18 to reduce the occasions of distress and anxiety which prompted incidents of non-compliance by BIJ23, and in response to such incidents subjecting BIJ23 to transfer to Unit 18, confinement, uses of force and restraints when he reacted with heightened emotional and physical responses to directions, commands and stressful situations;~~
- ~~d. Officers failed to avoid incidents of non-compliance by BIJ23 by failing to modify adequately the behaviour and discipline policies at Unit 18 in the circumstances described in the BIJ23 Statement of Particulars Part 6, paragraph 2;~~
- ~~e. Officers gave BIJ23 peremptory, complex, or unpleasant commands or instructions in the circumstances described in the BIJ23 Statement of Particulars Part 6, paragraph 3.~~
- ~~f. Officers subjected BIJ23 to uses of force and/or restraints and/or confinement when he reacted with heightened emotional and physical responses to directions, commands and stressful situations in the circumstances described in the BIJ23 Statement of Particulars Parts 4 and 5;~~
- ~~g. More specific actions which the State, the Minister, the CEO and the Superintendent could have taken in order to reduce such incidents are set out in paragraph 0 below;~~
- ~~h. Failing to adequately protect BIJ23 against risks of self-harm by failing to adequately monitor BIJ23, including in the circumstances referred to in the BIJ23 Statement of Particulars Part 6, paragraph 4;~~
- ~~i. Failure to provide BIJ23 with an adequately safe environment, including for a child detainee, in the circumstances described in the Statement of Particulars Part 6, paragraph 5;~~

- ~~j. Subjecting BIJ23 to the deprivations pleaded in paragraphs 104, 105, 115, 116 and 117 below and in the BIJ23 Statement of Particulars Parts 8 and 9;~~
- ~~k. Subjecting BIJ23 to extended periods of confinement as pleaded in paragraphs 63 and 70 above;~~
- ~~l. Subjecting BIJ23 to repeated strip searches as pleaded in paragraph 74 above;~~
- ~~m. Subjecting BIJ23 to uses of force as pleaded in paragraphs 77 to 78 above;~~
- ~~n. Subjecting BIJ23 to restraints as pleaded in paragraphs 83 above.~~

92. Further to paragraphs 53 and 88 to 91 above, there was a reasonably foreseeable and not insignificant risk that BIJ23 would suffer physical injury and/or a recognised psychiatric illness by being subjected to:

- (a) confinement to his cell during unlock hours;
- (b) prolonged periods of confinement, namely instances of confinement for over 10 hours and/or on successive days.

92A. In the circumstances:

- (a) a reasonable person in the position of the State, the CEO and the Superintendent would have required Officers not to subject detainees in Unit 18 (including BIJ23) to:

- (i) confinement to their cell during unlock hours; and/or
- (ii) prolonged periods of confinement, namely instances of confinement over 10 hours and/or on successive days,

except as authorised by law, namely detention offence confinement or security confinement in accordance with regulation 24 of the YO Regulations;

- (b) a reasonable person in the position of the State and Officers would not have subjected BIJ23 to:

- (i) confinement to his cell during unlock hours; and/or
- (ii) prolonged periods of confinement, namely instances of confinement over 10 hours and/or on successive days,

except as authorised by law, namely detention offence confinement or security confinement in accordance with regulation 24 of the YO Regulations.

92B. In the premises:

- (a) the State, the CEO and the Superintendent acted in breach of their respective duties of care to BIJ23 by not doing that which is set out in paragraph 92A(a) above;
- (b) the State and Officers acted in breach of their respective duties of care to BIJ23 by subjecting him to:
 - (i) confinement to his cell during unlock hours; and/or
 - (ii) prolonged periods of confinement, namely instances of confinement over 10 hours and/or on successive days.

as pleaded in paragraphs 63 to 72 above and the particulars thereto.

92C. Further to paragraphs 53 and 88 to 91 above, there was a reasonably foreseeable and not insignificant risk that BIJ23 would suffer physical injury and/or a recognised psychiatric illness by being subjected to unlawful strip searches.

92D. In the circumstances:

- (a) a reasonable person in the position of the State, the CEO and the Superintendent would have required Officers not to subject detainees in Unit 18 (including BIJ23) to unlawful strip searches and ensured they did not do so;
- (b) a reasonable person in the position of the State and the Officers would not have subjected BIJ23 to unlawful strip searches.

92E. In the premises:

- (a) the State, the CEO and the Superintendent acted in breach of their respective duties of care to BIJ23 by failing to do that which is set out in paragraph 92D(a) above;
- (b) the State and the Officers breached their respective duties of care to BIJ23 by subjecting him to unlawful strip searches as pleaded in paragraphs 74, 75 and 76 above.

92F. Further to paragraphs 53 and 88 to 91 above, there was a reasonably foreseeable and not insignificant risk that BIJ23 would suffer physical injury and/or a recognised psychiatric illness as a consequence of being subjected to physical force, including chemical agents, that was unreasonable in all the circumstances, including having regard to the Detainee Characteristics, the Additional Detainee Characteristics and BIJ23's Disabilities.

92G. In the circumstances, a reasonable person in the position of the State and the Officers would not have subjected BIJ23 to unreasonable use of physical force, including chemical agents.

92H. In breach of their respective duties of care the State and the Officers:

(a) subjected BIJ23 to unreasonable, including unlawful, physical force as pleaded in paragraphs 77 to 81 above;

(b) subjected BIJ23 to chemical agents as pleaded in paragraph 81A above.

92I. Further to paragraphs 53 and 88 to 91 above, there was a reasonably foreseeable and not insignificant risk that BIJ23 would suffer physical injury and/or a recognised psychiatric illness as a consequence of being subjected to handcuffing and the use of other restraints which was unreasonable in all the circumstances, including having regard to the Detainee Characteristics, the Additional Detainee Characteristics and BIJ23's Disabilities.

92J. In the circumstances, a reasonable person in the position of the State and the Officers would not have subjected BIJ23 to unreasonable use of handcuffing and other restraints.

92K. In breach of their duty of care, the State and the Officers subjected BIJ23 to the unreasonable use of handcuffing and other restraints as pleaded in paragraphs 83 and 84 above and the particulars thereto.

92L. Further, by reason of the matters set out in paragraphs 92, 92C, 92F and/or 92I above, a reasonable person in the position of the State, the CEO and the Superintendent would have:

(a) ensured that a comprehensive assessment of BIJ23 was undertaken on admission to custody to identify the BIJ23 Disabilities and the matters pleaded in paragraph 88 above;

- (b) ensured that all Officers were informed of the result of the said assessment, including such of BIJ23's Disabilities as were disclosed by the said assessment;
- (c) ensured that Officers were trained in relation to the needs of children in detention with mental health and/or cognitive disabilities, including each of BIJ23's Disabilities.

92M. In the premises, the State, the CEO and the Superintendent acted in breach of their respective duties of care to BIJ23 by failing to do that which is set out at paragraph 92L above.

93. As a result of the breaches of duty of care described in paragraphs 92 to 92M above, BIJ23 has suffered injury and damage.

Particulars

- ~~a. *Psychiatric injury, including anxiety, mental distress and suicidal ideation;*~~
- ~~b. *Numerous episodes of self-harm and attempted suicide, including those particularised in the BIJ23 Statement of Particulars, Part 7;*~~
- a. *Physical injury ~~including~~ (and consequent pain and suffering) in the nature of ~~from~~ cuts, abrasions and scarring to his body from numerous episodes of self-harm and attempted suicide including those particularised in the BIJ23 Statement of Particulars, Part 7; ~~the episodes of self-harm and attempted suicide~~*
- b. *Physical injury ~~including~~ (and consequent pain and suffering) from being subjected to uses of force and restraints by Officers, including in the circumstances particularised in the BIJ 23 Statement of Particulars, Parts 4 and 5.*
- c. *Injury to his mental health, including anxiety, mental distress, suicidal ideation and self-harm ideation.*
- d. *Further particulars may be provided following discovery and/or information obtained from health service providers.*

L.3 Disability Discrimination Act Claims

94. The conduct of the CEO, Superintendent and Officers pleaded herein were within the scope of the actual or apparent authority and thus was conduct engaged in also ~~be~~ by the State: section 123 of the DDA.

95. BIJ23's Disabilities each constitute a disability within the meaning of the DDA.

96. BIJ23's Disabilities are disorders that affect BIJ23's thought processes, emotions, behaviour and judgement such that:
- (a) BIJ23 often has difficulty regulating his emotions and behaviour;
 - (b) when confronted with peremptory, complex or unpleasant commands, he is likely to react with heightened emotional and physical responses;
 - (c) he can appear to be irritable, thought disordered and aggressive; and
 - (d) he can be paranoid and suspicious.
97. While in detention in Banksia Hill and Unit 18, BIJ23 engaged in the following kinds of behaviour, that were a symptom, or a manifestation, of his disabilities and thus caused or contributed to by, and being an aspect of, BIJ23's Disabilities:
- (a) internalising anger and stress;
 - (b) difficulty coping with stressors, including extended periods of confinement;
 - (c) difficulty problem-solving when under stress;
 - (d) exhibiting a lack of thought and/or concern for the consequences of his actions;
 - (e) difficulty controlling his impulses;
 - (f) difficulty refraining from the above behaviour;
 - (g) difficulty regulating his emotions;
 - (h) refusing to follow instructions;
 - (i) damaging or destroying property;
 - (j) self-harming and/or attempting to commit suicide, or threatening to do so, as particularised in the BIJ23 Statement of Particulars Part 7;
 - (k) being verbally aggressive;
 - (l) being violent;
 - (m) going out of bounds; and
 - (n) annoying Officers.
98. Officers responded to the behaviour of BIJ23 in paragraph 97 above whilst he was detained in Unit 18 by:
- (a) detaining BIJ23 in Unit 18 instead of Banksia Hill, for the periods set out in paragraph 3 above, including in the circumstances particularised in the BIJ23 Statement of Particulars Part 2;

- (b) confining BIJ23 in his cell, as described in paragraph 70 above and particularised in the BIJ23 Statement of Particulars Part 3;
- (c) the use of force against and use of restraints on BIJ23 as described above in paragraphs 78 and 83 above and particularised in the BIJ23 Statement of Particulars Parts 4 and 5;
- (d) denying or restricting BIJ23's access to or refusing to provide BIJ23 with:
 - (i) programs and privileges; and
 - (ii) other goods, services and facilities amongst those set out in paragraph 56 above,
 as particularised in paragraphs 115 and 116 ~~115B~~ below and in the BIJ23 Statement of Particulars Parts 8 and 9; and
- (e) restricting BIJ23's access to educational activities, as particularised in paragraphs 104 and 105 below and in the BIJ23 Statement of Particulars Part 7, paragraphs 6 and 7.

Particulars

- a. *The behaviour of BIJ23 to which Officers responded in punishing him by transferring him to Unit 18 is particularised in the BIJ23 Statement of Particulars Part 2.*
 - b. *Further particulars will be provided following discovery.*
99. BIJ23 would have been able to, or alternatively would have been better able to, manage the symptoms and manifestations of BIJ23's Disabilities whilst in Unit 18 if the CEO, the Superintendent and Officers made the following reasonable adjustments for BIJ23:
- ~~(a) Providing BIJ23 with appropriate mental health treatment, counselling and support.~~
 - ~~(a)(b) Providing BIJ23 with appropriate behavioural therapy, cognitive behavioural therapy, to assist him to learn to, and to, better regulate his emotions and behaviour.~~
 - ~~(b)(c) Training Officers about BIJ23's Disabilities and in r~~Requiring eOfficers to use techniques and approaches to communication with BIJ23 to reduce confrontation and escalation, namely including:
 - (i) using non-confrontational language and behaviour in response to apprehended incidents of non-compliance so far as reasonably possible;

- (ii) allowing BIJ23 greater time and flexibility in enforcing compliance with directions;
- (iii) not threatening to use force or confinement, or to withdraw privileges.
- ~~(d) Providing BIJ23 with, and assisting him to implement, an individual behaviour plan~~
- ~~(c)(f)~~ Assisting BIJ23 to cope with the boredom and frustration of detention and/or isolation, and reducing the risk of him self-harming, by providing him, or not depriving him, of access to:
 - (i) a television, radio, games, reading material or other forms of distraction and/or entertainment;
 - ~~(ii) education or rehabilitation programs;~~
 - ~~(ii)(iii)~~ the ability to eat or socialise with other detainees;
 - ~~(iii)(iv)~~ in-person contact with visitors or any other person aside from custodial staff;
 - ~~(iv)(v)~~ telephone contact with family members;
 - ~~(v)(vi)~~ hygiene products and services, such as a towel, shampoo, bodywash, toothbrush and facilities and opportunities for ablutions,

(separately and collectively the **BIJ23 Reasonable Adjustments**).

100. The CEO, the Superintendent and Officers did not make the BIJ23 Reasonable Adjustments referred to in paragraph 99 above.

100A. BIJ23's Disabilities were one of the reasons the Officers (and thereby the State) did not make the BIJ23 Reasonable Adjustments in that Officers refused to accept that:

- (a) BIJ23's Disabilities genuinely impaired his ability to avoid or minimise incidents of non-compliance;
- (b) BIJ23 was not capable of preventing or minimising incidents of dysregulated or disturbed behaviour without adjustments like the BIJ23 Reasonable Adjustments first being made.

100B. At a minimum, the matters set out in paragraph 100A above should be inferred by reason of the following:

- (a) as pleaded in paragraph 49(a) above, amongst others the Officers knew, or ought reasonably to have known that detainees were children who had, or were likely to have, the Detainee Characteristics and the Additional Detainee Characteristics;

- (b) the Office of the Inspector of Custodial Services identified in its 2017 Report “Behaviour Management Practices at Banksia Hill Detention Centre” (2017 OICS Report) that staff lack confidence in non-punitive approaches to behaviour problems of detainees;
- (c) the 2017 OICS Report recommended that a trauma informed model be pursued for young people in detention (such as BIJ23);
- (d) Officers persisted in the use of punitive responses to behaviour problems of detainees following the 2017 OICS Report, including in the Relevant Period;
- (e) Officers did not make any of the BIJ23 Reasonable Adjustments, even during minor incidents and where making the BIJ23 Reasonable Adjustments would have imposed little to no additional burden on the operation of Unit 18;

Particulars

- a. Particulars of the circumstances in which the Officers refused to make the BIJ23 Reasonable Adjustments and engaged in punitive responses to manifestations of BIJ23’s Disabilities are set out in Part 8 of the BIJ23 Statement of Particulars.
- b. Particulars of the circumstances in which the Officers refused to make the BIJ23 Reasonable Adjustments and deprived BIJ23 of goods, services and facilities in response to manifestations of BIJ23’s Disabilities are set out in Part 9 of the BIJ23 Statement of Particulars.
- c. Further particulars may be provided following discovery.

101. Had the BIJ23 Reasonable Adjustments been made, BIJ23:

- (a) would not have been subjected to the matters described in paragraph 98 above, either at all, or alternatively to the extent that occurred;
- (b) would have been able to access and would have attended education activities; and
- (c) would have been able to access and would have accessed the goods, services and facilities set out in paragraph 56 above.

Direct discrimination

102. By reason of the matters pleaded at paragraphs ~~95~~ 94 to 101 above, the State, through the conduct of the CEO, the Superintendent and Officers, discriminated against BIJ23

within the meaning of section 5 of the DDA on the ground of BIJ23's Disabilities in that, ~~the State:~~

- (a) ~~did not make the BIJ23 Reasonable Adjustments; and~~
- (b) ~~the failure to make the BIJ23 Reasonable Adjustments had the effect that by failing to make the BIJ23 Reasonable Adjustments, the State treated BIJ23 was, because of BIJ23's Disabilities, treated less favourably than a 15 to 17-year-old child without his disabilities would have been treated in circumstances that were not materially different.~~

Particulars

- a. *BIJ23 refers to and repeats paragraph 99 above.*
- b. *A 15 to 17 year old child detained in Banksia Hill or Unit 18 without BIJ23's Disabilities would in the usual course not engage in the behaviour described in paragraphs 96 and 97 above and, accordingly, would not have been subjected to conduct from Officers of the kind described in paragraph 98 above or, alternatively, would have been subjected to such conduct much less frequently and to a less severe degree.*
- c. *The less favourable treatment includes:*
 - i. *transfer from Banksia Hill to Unit 18;*
 - ii. *directions from Officers to submit to strip searches, to submit to being placed in handcuffs or other restraints and to return to his cell;*
 - iii. *confinement in his cell or other place within Unit 18;*
 - iv. *threats of force and use of force by Officers;*
 - v. *the matters in paragraphs 104, 105, 115 and 115B ~~116~~ below.*
- d. *Further particulars will be provided following discovery.*

Indirect discrimination

103. In the alternative to paragraph 102 above, by reason of the matters pleaded in paragraphs 59 to 62 ~~64~~ and 95 ~~94~~ to 101 above, the State, through the conduct of the CEO, the Superintendent and Officers, discriminated against BIJ23 within the meaning of section 6(2) of the DDA on the ground of BIJ23's Disabilities in that:

- (a) the State required BIJ23, to comply with the Behavioural Regime;

- (b) because of BIJ23's Disabilities, BIJ23 was only able to comply with the Behavioural Regime if the BIJ23 Reasonable Adjustments were made;
- (c) the State did not make the BIJ23 Reasonable Adjustments;
- (d) the failure to make the BIJ23 Reasonable Adjustments had the effect of disadvantaging BIJ23.

Particulars

BIJ23 refers to and repeats the matters in paragraphs 59, 60, and 98 above.

Discrimination in education

104. When BIJ23 was punished by being detained in Unit 18, as referred to in paragraph 98(a) above:

- (a) detainees in Unit 18 were often either:
 - (i) not permitted to attend school and given no access to education or rehabilitation programs; or
 - (ii) required to choose between:
 - 1. using a limited amount of time in which they would be permitted to be outside of their cell for recreation, visits or telephone calls; or
 - 2. education or other activities,
 due to the level of staffing in Unit 18; and
- (b) at other times, detainees in Unit 18 were either:
 - (i) given individual instruction by a teacher inside their cell;
 - (ii) given worksheets and provided with limited instruction by a teacher who remained outside of their cell while the detainees remained inside; or
 - (iii) given worksheets only and provided with no instruction by any teacher; and
- (c) when detainees were provided with instruction or educational materials including worksheets or reading material, that instruction and those materials were provided without reference to their individual level of competence and were often below their level of competence.

Particulars

- a. *During the period from 20 July 2022 through 31 July 22, BIJ23 received no education.*

- b. *During the month of August 2022, BIJ23 received only 1 hour 40 minutes of education.*
- c. *During the month of December 2022, BIJ23 received only 1 hour 45 minutes of education.*
- d. *Further particulars of BIJ23 being denied access to education during his time in Unit 18 will be provided following discovery.*

105. When, during his detention in Unit 18, BIJ23 was confined in his cell or otherwise punished by being restricted in his access to educational activities, as referred to in paragraphs 98(b) and 98(e) above:

- (a) he was not permitted to attend school or any classroom; and
- (b) he was either:
 - (i) given no access to education or rehabilitation programs;
 - (ii) given individual instruction by a teacher inside his cell;
 - (iii) given worksheets and provided with limited instruction by a teacher who remained outside of his cell while he remained inside; or
 - (iv) given worksheets only and provided with no instruction by any teacher; and
 - (v) when BIJ23 was provided with instruction or educational materials including worksheets or reading material, that instruction and those materials were provided without reference to his level of competence and were often at a level below his competence.

Particulars

- a. *BIJ23 refers to and repeats the particulars sub-joined to paragraph 104 above.*
- b. *While BIJ23 was detained in Unit 18, Officers would usually selectively allow some detainees to attend education or access goods, services and facilities outside of their cells, but would not allow BIJ23 to attend education or access goods, services and facilities outside of his cell if he had been perceived to have misbehaved.*
- c. *Further particulars of BIJ23 being denied access to education during his time in Unit 18 will be provided following discovery.*

106. By reason of the matters in paragraphs 54, 55 and 102, 104 and 105 or, alternatively, paragraphs 54, 55 and 103 to 105 above, the State, by its servants and agents, the

Superintendent and Officers, unlawfully discriminated against BIJ23 on the ground of his disabilities:

- (a) in contravention of s 22(2)(a) of the DDA, by denying or limiting BIJ23's access to, or effective enjoyment of, the benefit of education on those occasions when BIJ23 was:
 - (i) not permitted to access or provided with a classroom or a teacher;
 - (ii) provided with worksheets and only limited or no instruction from a teacher; or
 - (iii) required to choose between using a limited amount of time in which he would be permitted to be outside of his cell for (1) recreation, visits or telephone calls or education or (2) other activities, due to the level of staffing in Unit 18; or
 - (iv) not provided with any educational worksheets.
- (b) in contravention of s 22(2)(c) of the DDA, by subjecting BIJ23 to the following other detriments:
 - (i) disruptions and lack of routine in his education and rehabilitation;
 - (ii) a curriculum, when being taught, that was below his level of competence;
 - (iii) being given educational materials, including reading material, that was below his level of competence.

Disability Standards for Education

107. By reason of BIJ23's Disabilities, BIJ23 would have been assisted in his participation in education at Unit 18 on the same basis as a student without a disability if the following reasonable adjustments within the meaning of ss 3.3 and 3.4 of the DSE had been made for him by the State:

- (a) ~~appropriately~~ assessing BIJ23's literacy and numeracy competency on admission to Banksia Hill and/or Unit 18;
- ~~(b) developing a curriculum, learning plan and other educational material tailored to BIJ23's competency level, designed to encourage BIJ23's participation and accommodate his style of learning and encourage his educational progress and achievement;~~
- ~~(b)(c)~~ adopting techniques and approaches to communicating with BIJ23 to reduce confrontation and escalation, namely:

- (i) allowing greater time and flexibility in enforcing compliance with directions;
- (ii) using non-confrontational language and behaviour in response to apprehended incidents of non-compliance so far as reasonably possible;
and
- (iii) not engaging in punitive responses to incidents in which BIJ23 had become dysregulated.
- (c) providing BIJ23 with remedial literacy and numeracy education delivered by a specialist literacy and numeracy teacher;
- ~~(d) adopting disciplinary practices within educational settings which accommodated the behavioural manifestations of BIJ23's Disabilities, rather than adopting punitive responses thereto;~~
- ~~(e) adjusting the materials, or the mode of education provided to BIJ23 (in the limited circumstances in which any education was even provided) to accommodate his disability;~~
- ~~(f) providing BIJ23 with sufficient access to teachers and substitute teachers; and~~
- ~~(d)(g) taking steps to arrange~~ arranging for and/or facilitate facilitating the provision of specialised support services to BIJ23 to accommodate his disability namely psychologists, counsellors and/or support workers trained in assisting persons with brain injury, cognitive impairments and attention deficits to self-regulate their emotions and behaviour.

108. In contravention of s 5.2 of the DSE:

- (a) the State did not consult with BIJ23 about whether BIJ23's Disabilities affected his ability to participate in education; and
- (b) the State either:
 - (i) made no decision with respect to making reasonable adjustments for BIJ23; or, alternatively,
 - (ii) decided not to make the adjustments in paragraph 107 above or any other reasonable adjustments; and
- (c) by reason of the matters in sub-paragraphs (a) and (b) above, failed to take reasonable steps to ensure that BIJ23 was able to participate in education at Unit 18 on the same basis as a student without a disability, and without experiencing discrimination.

109. By reason of BIJ23 being provided with a curriculum and educational materials which were unsuitable by reference to his academic capacity and/or existing level of academic attainment as set out in paragraph 105(b) above, BIJ23 was not allowed to participate in education on the same basis as a student without a disability, in contravention of s 6.2 of the DSE.
110. BIJ23 required the following specialised support services to accommodate his disability and enable him to participate in educational activities provided at Unit 18:
- (a) mental health treatment, counselling and support;
 - (b) behavioural therapy to assist him to learn to, and to, better regulate his emotions and behaviour;
 - (c) an appropriately qualified support worker to assist BIJ23 in his interactions with Officers and detainees.
111. To the extent that the specialised support services referred to in paragraph 110 above were of a kind provided by the State at Unit 18, the State failed to take reasonable steps to ensure that BIJ23 had access to the service in contravention of s 7.2(2) of the DSE.
112. To the extent that the specialised support services referred to in paragraph 110 above were of a kind not provided by the State at Unit 18, the State failed to take reasonable steps to facilitate the provision by another person or agency of the support services referred to in paragraph 110 above to BIJ23 in contravention of s 7.2(3) of the DSE.
113. In contravention of s 7.2(6) of the DSE, BIJ23 was not consulted about his need for specialist support services of the kind referred to in paragraph 110 above.
114. By reason of the matters in paragraphs 54 and 107 to 113 above the State contravened s 32 of the DDA.

Goods, services and facilities

115. ~~From time to time~~ ~~By reason of the matters in paragraphs 56 and 102 above, or alternatively paragraphs 56 and 103 above, when~~ BIJ23 was punished for alleged misbehaviour by:
- (a) loss of program placement, loss of recreation time, and/or loss of television privileges, as referred to in paragraph 98(d) above;
 - (b) being refused access to or not being provided with other goods, services and facilities, ~~amongst those set out in paragraph 56 above, as referred to in paragraph 98(d) above;~~

the State, by the Superintendent and Officers, refused to provide BIJ23 with goods, services or facilities on the grounds of his disabilities in contravention of s 24(a) of the DDA.

Particulars

- ~~a. While BIJ23 was detained in Unit 18, Officers would regularly selectively allow some detainees to attend education or access goods, services and facilities outside of their cells, but would not allow BIJ23 to attend education or access goods, services and facilities outside of his cell if he had been perceived to have misbehaved.~~
- ~~b. On numerous occasions a psychologist working in Unit 18 was unable to see BIJ23 because the Officers would not permit the psychologist to do so because of perceived misbehaviour by BIJ23.~~
- ac. *BIJ23 was punished for alleged misbehaviour by loss of program placement and/or loss of privileges as particularised in See the BIJ23 Statement of Particulars Parts 8 and 9.*
- ~~d. The punishment of BIJ23 for misbehaviour by loss of program placement, loss of recreation time and loss of privileges and refusing him access to or not providing him with other goods, services and facilities had the effect of denying BIJ23 access to recreational and/or therapeutic activities, facilities and goods.~~
- be. *Further particulars will be provided following discovery.*

115A By reason of paragraphs 56 and 102 above, alternatively 56 and 103 above, the conduct pleaded in paragraph 115 above was in contravention of section 24(b) of the DDA in that the State by its servants or agents, the Superintendent and Officers, refused to provide BIJ23 with goods, services or facilities on the ground of his disabilities.

~~116. By reason of the matters in paragraphs 56, 101-0 above above, or alternatively by reason of the matters in paragraphs 56, 0 and 103 above, when BIJ23 was required to be handcuffed or otherwise restrained for movements to and from his cell and within Unit 18 and while accessing services and facilities provided to or made available for him in Unit 18, the State by its servants and agents, the Superintendent and Officers, in contravention of s 24(b) of the DDA unlawfully discriminated against BIJ23 on the ground of his disabilities in the terms or conditions on which the State provided BIJ23 with goods or services or made facilities available to BIJ23 as follows:~~

115B When located within Unit 18 BIJ23 was required to submit to handcuffs or other restraints in order to:

- (a) ~~BIJ23 was required to submit to handcuffs or other restraints in order to attend visits from his aunt BKJ23 or from legal advisers;~~
- (b) ~~BIJ23 was required to submit to handcuffs or other restraints in order to attend medical services at Unit 18;~~
- (c) ~~BIJ23 was required to submit to handcuffs or other restraints in order to access telephone facilities for communicating with his family or legal advisers; and~~
- (d) ~~BIJ23 was required to submit to handcuffs or other restraints in order to make use of the caged area provided as an area for recreation and exercise in Unit 18.~~

Particulars

Particulars of the periods when BIJ23 was required to be in handcuffs or other restraints for movements to, from and within Unit 18 will be provided following discovery.

116 By reason of paragraphs 56 and 102 above, alternatively 56 and 103 above, the provision to BIJ23 of the goods, services or facilities on the terms and conditions and/or in the manner set out in paragraph 115B above on the ground of his disabilities was conduct by the State by its servants or agents, the Superintendent and Officers, in contravention of section 24(b) of the DDA.

L.4 Age Discrimination Act Claims

117. By reason of the matters in paragraphs 56 to 58 above, when BIJ23 has been detained in Unit 18, BIJ23 has been able to access fewer of the goods, services and facilities set out in paragraphs 56 and 57 above, or has only been able to access those goods, services and facilities on a more restrictive basis, as compared to the ability of prisoners in adult prisons.

Particulars

BIJ23 repeats and refers to the particulars sub-joined to paragraph 58 above.

Direct Discrimination

118. By reason of the matters pleaded in paragraphs 58 and 117 above, the State, through the conduct of the CEO, the Superintendent and the Officers, discriminated against BIJ23 within the meaning of s 14 of the ADA on the ground of BIJ23's age in that:

- (a) BIJ23 was treated less favourably than an adult prisoner would have been treated in circumstances which were not materially different; and
- (b) BIJ23 was so treated by reason of his age.

Particulars

- a. *An adult prisoner whose conduct in prison was comparable with BIJ23's conduct in detention would not have been relocated to Unit 18 or any equivalent adult facility and consequently would not have been deprived of access to goods, services and facilities not provided (or provided only to a lesser extent or on a more restrictive basis) in Unit 18.*
- b. *The State:*
 - i. *placed and kept detainees in Unit 18 because they were not adults and could not be placed in an adult prison unless and until they reached the age of 16 years old and were the subject of a successful application by the CEO under s 178 of the YO Act; and*
 - ii. *did not take steps to ensure that goods, services and facilities were provided to or made available for detainees in Unit 18 comparable to those provided to or made available for detainees in Banksia Hill or to those provided to or made available for prisoners in adult prisons.*

Indirect Discrimination

119. In the alternative to paragraph 118 above, by reason of the matters pleaded in paragraphs 58, ~~63~~ 62 and 117 above, the State, through the conduct of the CEO, the Superintendent and the Officers, discriminated against BIJ23 within the meaning of s 15 of the ADA on the ground of BIJ23's age in that the State:

- (a) imposed the practice or condition referred to in paragraph 62 above;
- (b) the imposition of that condition or practice had the effect of disadvantaging persons of BIJ23's age (that is, under 18 years of age) who were detained in Unit 18.

Particulars

BIJ23 refers to and repeats the particulars subjoined to paragraphs 58 and 118 above.

L.5 Remedies

120. In respect of the matters in section L.1, BIJ23 seeks the declarations referred to in Part A of the Originating Application.
121. In respect of the matters in section L.2, BIJ23 seeks the declarations in Part A of the Originating Application.
122. In respect of the matters in section L.3, BIJ23 seeks the declarations in Part A of the Originating Application.
123. In respect of the matters in section L.4, BIJ23 seeks the declarations in Part A of the Originating Application.
124. By reason of the matters in paragraphs 63 to 73, BIJ23 suffered deprivation of liberty, anxiety, distress, discomfort, humiliation, helplessness, indignity, frustration and outrage.
125. By reason of the matters in paragraphs 74 to 87, BIJ23 suffered deprivation of liberty, anxiety, distress, discomfort, humiliation, helplessness, indignity, frustration and outrage.
126. Further, BIJ23 claims aggravated damages for false imprisonment, assault and battery.

Particulars

- a. *At the time of the matters described in paragraphs 63 to 87 above BIJ23 was an Aboriginal child aged 15 to 17.*
- b. *BIJ23's pain, discomfort, anxiety, distress, humiliation, helplessness, indignity, frustration and outrage caused by the matters in paragraphs 63 to 87 above were exacerbated by BIJ23's Disabilities as set out in subparagraphs (a) to (g) to paragraph 2 above.*
- c. *Officers on numerous occasions taunted BIJ23 while he was confined in his cell when BIJ23 asked to be allowed to shower or use the toilet, requested drinking water or to make telephone calls or have time out of his cell, including for recreation. Officers responded to such requests by demanding that BIJ23 remain quiet and threatening to place him in a rip-proof gown. Officers repeatedly sought to humiliate BIJ23 by describing such gowns as "dresses" and describing persons wearing them as "princesses", for example by asking BIJ23 "would you like your dress princess?" This conduct increased BIJ23's humiliation indignity and frustration when he was confined in his cell.*

- d. *The conduct of the Superintendent and Officers described in paragraphs 63 to 87 above disregarded the limits on the power of the Superintendent and Officers.*
- e. *Further particulars may be provided following discovery.*

127. Further, in relation to the matters in paragraphs 63 to 87 above, BIJ23 was treated with contumelious disregard of his personal circumstances, including his disabilities as set out in subparagraphs (a) to (g) to paragraph 2 above, and BIJ23 claims exemplary damages.

Particulars

- a. *The conduct of the Officers described in paragraphs 63 to 87 above showed a cruel and reckless disregard of the comfort and dignity of BIJ23;*
- b. *The conduct of the Officers described in paragraphs 63 to 87 above disregarded the limits on the powers of the Superintendent and Officers;*
- c. *BIJ23 refers to and repeats particulars (a) to (d) to paragraph ~~427~~ 126 above;*
and
- d. *Further particulars may be provided following discovery.*

128. By reason of the matters in paragraph 93, BIJ23 claims damages for personal injury.

129. By reason of the matters in paragraphs 106, 114, 115A, 116, 117, 118 and 119 above, BIJ23 suffered loss and damage.

Particulars

- a. *Hurt, humiliation and injury to feelings;*
- b. *Educational disadvantage*
- c. *Exacerbation of his symptoms of his disabilities;*
- d. *Further particulars may be provided following discovery and/or information obtained from health service providers.*

130. By reason of the matters in paragraph 129 above, BIJ23 claims damages by way of compensation pursuant to s 46PO(4)(d) of the *Australian Human Rights Commission Act 1975* (Cth) (**AHRC Act**).

131. Further, BIJ23 claims aggravated damages pursuant to s 46PO(4) of the AHRC Act.

Particulars

- a. *At the time of the matters described in paragraphs 95 to 119 above BIJ23 was an Aboriginal child aged 15 to 17.*
- b. *BIJ23's hurt, humiliation and injury to feeling caused by the matters in paragraphs 95 to 119 were exacerbated by:*
 - i. *BIJ23's Disabilities as described in subparagraphs (a) to (g) to paragraph 2 above;*
 - ii. *the arbitrariness of loss of program placements and/or loss of privileges;*
 - iii. *the boredom and frustration of being confined in a cell while being subjected to loss of access to facilities or services;*
 - iv. *the conduct of Officers referred to in particular (c) subjoined to paragraph 126 above.*
- c. *Further particulars may be provided following discovery.*

M. CLAIMS OF BIK23

M.1 False Imprisonment, assault and battery

False imprisonment

132. During the time BIK23 was detained at Unit 18, the CEO and the Superintendent frequently used general lockdowns and rolling lockdowns in the management of Unit 18 for operational reasons, including staff shortages.

Particulars

Particulars of occasions when BIK23 was confined in a cell due to general or rolling lockdowns will be provided following discovery.

133. When a general lockdown referred to in paragraph 132 above was in effect, BIK23 was locked in his accommodation cell for the duration of the lockdown.
134. When a rolling lockdown referred to in paragraph 132 above was in effect, BIK23 was locked in his accommodation cell during the period in which the unit or wing in which his cell was located was subject to the rolling lockdown.
135. When BIK23 was locked in his cell during all lockdown types, he was subjected to confinement within the meaning of the YO Act.

Particulars

The Applicants repeat the particulars subjoined to paragraph 132 above.

136. The confinement of BIK23 in his cell during all lockdown types referred to in paragraphs 132 to 135 above was not detention offence confinement or security confinement.
137. The confinement of BIK23 in his cell during the general lockdowns and rolling lockdowns deprived BIK23 of his liberty.
138. By reason of the matters in paragraphs 44 and 132 to 137 above, the CEO, the Superintendent and Officers falsely imprisoned BIK23 when he was confined in a cell during lockdowns and rolling lockdowns.
139. In addition to the matters in paragraphs 132 to 138 above, on occasions while BIK23 was detained at Unit 18, he was confined in his sleeping quarters or other designated rooms during unlock hours, including in the following circumstances:
 - (a) when Officers wanted to limit or prevent interaction between BIK23 and other detainees;
 - (b) following incidents of use of force by Officers or threatened use of force by Officers;
 - (c) when Officers assigned to supervise BIK23 during unlock hours were unavailable; and
 - (d) following incidents of self-harm or threatened self-harm by BIK23;
 - (e) on other occasions and in circumstances in respect of which further details will be provided.

Particulars

- a. *Other occasions when on which BIK23 was confined in a cell, including in the kinds of circumstances referred to above, are particularised in the BIK 23 Statement of Particulars Part 3.*
 - b. *Further particulars of other occasions on which BIK23 was confined in a cell, including in the kinds of circumstances already referred to above, may be provided following discovery.*
140. The confinement of BIK23 in his cell on each of the occasions referred to in paragraph 139 above was not detention offence confinement and deprived BIK23 of his liberty.
141. The confinement of BIK23 on the occasions referred to in paragraph 139 above was not justified.

Particulars

- a. *If the confinement of BIK23 in the circumstances referred to in paragraph 139 above purported to be security confinement, the confinement was unlawful for one or more of the following reasons:*
 - i. *it was not directed by the Superintendent;*
 - ii. *the Superintendent failed to make and maintain a record of the order to confine BIK23;*
 - iii. *it was not reasonably necessary to maintain good government, good order or security at Unit 18;*
 - iv. *the Superintendent failed to inform BIK23 of the reason for the confinement; and*
 - v. *BIK23 was not given fresh air, exercise and staff company for a period of at least 1 hour every 6 hours during unlock hours.*
- b. *If the confinement of BIK23 in the circumstances referred to in paragraph 139 above did not purport to be security confinement, it was unlawful because it deprived BIK23 of his liberty without authority under the YO Act and without lawful justification.*

142. By reason of the matters in paragraphs 139 to 141 142—above, the State falsely imprisoned BIK23.

Strip search

143. BIK23 was subjected to a strip search on several occasions during his time in detention at Unit 18.

Particulars

- a. *BIK23 was strip searched by:*
 - i. *Officers before he was allowed to shower (on various occasions); and*
 - ii. *a custodial Officer on 15 February 2023. This strip search was unnecessary as another Officer had already found the object being sought.*
- b. *further particulars of strip searches of BIK23 will be provided following discovery.*

144. On each occasion referred to in paragraph 143 above:

- (a) BIK23 apprehended on reasonable grounds that if he did not submit to a strip search, Officers would immediately use force on him and make unwanted physical contact with his body;
- (b) BIK23 did not freely consent to being strip searched and submitted to strip search out of fear that physical force would be used on him; and
- (c) the Superintendent did not have a reasonable suspicion that BIK23 might have possession of an item that could jeopardise the safety, good order or security of Unit 18 or be used for self-harm.

145. By reason of the matters in paragraphs 46(b), 46(c), 143 and 144 above, Officers assaulted BIK23 when they required him to submit to a strip search.

Use of force

146. While BIK23 was detained at Unit 18, he was subjected to the use of force by Officers in which Officers made unwanted physical contact with BIK23's body, including the following kinds of force:

- (a) one Officer taking hold of BIJ23's arms;
- (b) two Officers taking hold of BIJ23 by BIJ23's arms, each Officer holding an opposite arm;
- (c) an Officer taking hold of BIJ23's legs;
- (d) one or more Officers forcing BIJ23 to the ground;
- (e) one or more Officers holding BIJ23 face down on the ground or on a mattress on the ground;
- (f) one or more Officers holding BIJ23 by the legs in a "figure 4" position while he was face down on the ground, such that BIJ23's legs were interwoven in a pattern resembling the numeral 4: with one leg bent to the side and the other leg bent upwards folded over the first leg;
- (g) "folding up", where one or more Officers would hold each of BIJ23's arms and kick his legs out from under him; one Officer would then position themselves at BIJ23's head, using their hands to hold his face down, while placing their knee either on or near his neck; the other Officers would then stretch BIJ23's arms behind his back and fold his legs up at the knees, using their weight to hold his ankles down at his buttocks;

- (h) holding BIJ23 in one of the ways described above while handcuffs were applied to or removed from BIJ23's wrists;
 - (i) holding BIK23 in one of the ways described above while placing him in restraints such as handcuffs, leg shackles,
 - (j) one or more Officers pushing BIJ23 with a hard shield;
 - (k) one or more Officers pushing BIJ23 with a soft shield.
 - (l) one or more Officers using a chemical agent on BIK23;
 - (m) one or more Officers grabbing BIK23's face;
 - (n) one or more Officers hitting BIK23's head against the ground.
147. Force of the kind described in paragraph 146 above was used on BIK23 on numerous occasions.

Particulars

- a. *On 30 July 2022, 1 September 2022 and 3 December 2022, BIK23 was sprayed with a chemical agent by Officers.*
 - b. *On 1 September 2022 and 5 March 2023, BIK23 was folded up.*
 - c. *In about late December 2022, Officers grabbed BIK23's face so he could not breathe.*
 - d. *On 5 March 2023, an Officer hit BIK23's head against a concrete floor.*
 - e. *Further occasions on which BIK23 was subjected to uses of force are particularised in the BIK23 Statement of Particulars Part 4.*
 - f. *Further particulars may be provided following discovery.*
148. BIK23 did not consent to physical contact being made with his body when force was used on him on the occasions referred to in paragraph 147 above.
149. BIK23 had a continuing apprehension that imminent physical contact would be made with his body by Officers on the occasions referred to in paragraph 147 above.
150. The use of force on BIK23 was unlawful on those occasions referred to in paragraph 147 above:
- (a) particularised in the BIK 23 Statement of Particulars Part 4, Paragraph 1 as on those occasions the use of force occurred otherwise than in an immediate period when BIK23 was imminently presenting a risk of injury to himself or other detainees or staff;

- (b) particularised in the BIK23 Statement of Particulars Part 4, Paragraph 2 as on those occasions the use of force occurred after imminent risk of injury has passed and BIK23 had already been stabilised; and
- (c) particularised in the BIK23 Statement of Particulars Part 4, Paragraph 3 as on those occasions the use of force involved more than the degree of physical force which was the minimum degree required to control BIK23's behaviour.

151A Further, with respect to each said use of force in which a chemical agent was used on BIK23 by a custodial officer, such use was unlawful in that:

- (a) The chemical agent used at Unit 18 in the Relevant Period is a substance known as oleoresin capsicum discharged by a spray weapon.
- (b) By reg 5 and schedule 2 of the *Weapons Regulations 1999* (WA), at all material times provided that a spray weapon made or modified to be used to discharge oleoresin capsicum is a "controlled weapon" within the meaning of the *Weapons Act 1999* (WA).
- (c) By s 7 of the *Weapons Act*, at all material times it was an offence to, without lawful excuse, carry or possess (and thus use) a controlled weapon.
- (d) At all material times custodial officers within the meaning of the YO Act had no lawful authority, and thus no lawful excuse, to carry or possess (and thus use) a controlled weapon.

151. By reason of the matters in paragraphs 45, 46 and 146 to ~~450~~ 151A above, Officers assaulted and battered BIK23 on the occasions referred to in paragraphs 147 and 151 above.

Handcuffing / leg shackling

152. While BIK23 was detained at Unit 18, he was subjected to handcuffing, leg shackling or other restraints on numerous occasions.

Particulars

- a. *On 28 December 2022 and 5 March 2023, Officers handcuffed BIK23.*
- b. *When BIK23 was allowed out of his cell for family visits or medical appointments, he was usually handcuffed or had his legs shackled.*
- c. *Further occasions on which BIK23 was subjected to handcuffing or other restraints are particularised in the Statement of Particulars Part 5.*

- d. *Further particulars of the handcuffing, leg shackling or other restraints of BIK23 may be provided following discovery.*

153. The handcuffing of BIK23 referred to in paragraph 152 above was unlawful.

Particulars

- a. *On the occasions referred to in particulars (a) to (c) subjoined to paragraph 152 above:*
 - i. *the CEO or the Superintendent did not authorise and direct the restraint of BIK23;*
 - ii. *if the CEO or the Superintendent did authorise and direct the restraint of BIK23, the CEO or the Superintendent did not form the opinion that the restraint of BIK23 was necessary to prevent injury to himself or any other person; alternatively*
 - iii. *if the CEO or the Superintendent did form the opinion that the handcuffing or other restraint of BIK23 was necessary to prevent injury, the opinion of the CEO or the Superintendent was not reasonable*

as further particularised in the BIK23 Statement of Particulars Part 5.
- b. *Further particulars of the unlawful handcuffing of BIK23 may be provided following discovery.*

154. BIK23 did not consent to physical contact being made with his body when he was put in handcuffs on the occasions referred to in paragraph 152 above and submitted to handcuffing either as a result of:

- (a) fear that additional physical force would be used on him if he did not submit; or
- (b) Officers using force to physically hold and restrain him while handcuffs were put on him.

155. BIK23 had a continuing apprehension that imminent physical contact would be made with his body by Officers on the occasions referred to in paragraph 152 above.

156. By reason of the matters in paragraphs 45(e) and 152 to 155 above, Officers assaulted and battered BIK23.

M.2 Breach of Duty of Care

157. BIK23's Disabilities are disorders that affect BIK23's thought processes, emotions, behaviour and judgement in that he has difficulty with:

- (a) prominent inattention;
- (b) anxiety and panic attacks;
- (c) insomnia;
- (d) oppositional defiance traits;
- (e) executive functioning problems;
- (f) drug abuse; and
- (g) social skills difficulties.

158. While in Unit 18, BIK23 engaged in the following kinds of behaviour that were a symptom of or manifestation of BIK23's Disabilities and were thus caused or contributed to by, and being an aspect of, his disabilities:

- (a) setting fires;
- (b) destroying others' property;
- (c) lack of thought and / or concern for the consequences of his actions;
- (d) difficulty controlling his impulses;
- (e) difficulty refraining from the above behaviour;
- (f) difficulty regulating his emotions;
- (g) self-harming, as particularised in the BIK23 Statement of Particulars Part 7; and
- (h) refusing to follow instructions.

159. That BIK23 had, or was likely to have, ADHD and AOCD as well as the nature of ADHD and AOCD, were matters which the State, the Minister, the CEO and the Superintendent knew or ought to have known.

Particulars

- a. BIK23 had been diagnosed with ADHD and AOCD in 2016.*
- b. Officers were made aware by BIK23 and by BIK23's parents that BIK23 had ADHD and AOCD.*
- c. BIK23 repeats the matters in paragraph (c) of the particulars sub-joined to paragraph 49 above. In the circumstances referred to in that paragraph, the State, the Minister, the CEO and the Superintendent ought to have assessed detainees, including BIK23, to determine whether they had any disabilities and, if so, the nature and extent of those disabilities.*

160. Further, ~~and in the alternative~~, the State, the Minister, the CEO and the Superintendent ought to have foreseen that a person of normal fortitude might, in the circumstances of BIJ23's case, suffer a recognised psychiatric injury if reasonable care were not taken.

Particulars

- a. *The circumstances of the case include:*
- i. *the matters set out in paragraphs 157 to 159 above;*
 - ii. *the physical injuries suffered by BIK23 as a result of the assaults and batteries referred to in paragraphs 146 to 151 above;*
 - iii. *the physical injuries suffered by BIK23 as a result of him engaging in self-harm;*
 - iv. *the confinement of BIK23 in the circumstances described in paragraphs 132 to 142 above;*
 - v. *the strip searching of BIK23 in the circumstances described in paragraphs 143 to 145 above;*
 - vi. *the use of force BIK23 in the circumstances described in paragraph 146 above;*
 - vii. *the handcuffing or other restraint of BIK23 in the circumstances described in paragraph 152 above;*
 - viii. *the deprivations pleaded in paragraphs 174, 175, 185 and 185B ~~186~~ below and in the BIK23 Statement of Particulars Parts 8 and 9.*

161. ~~In breach of the duty of care they each owed to BIK23, the State, the Minister, the CEO, the Superintendent and Officers failed to take reasonable care to avoid acts or omissions which it was reasonably foreseeable would be likely to cause harm to BIK23 of the kind set out in paragraphs 53 and 160 above.~~

Particulars

- ~~a. Failing to provide adequate assessment of BIK23's disability and complex support needs arising from his cognitive impairment;~~
- ~~b. Failing to provide adequate mental health services, including in the circumstances described in the BIK23 Statement of Particulars Part 9 Paragraphs 3 and 4;~~
- ~~c. Failing to modify adequately the Behavioural Regime at Banksia Hill and Unit 18 to reduce the occasions of distress and anxiety which prompted incidents~~

~~of non-compliance by BIK23, and in response to such incidents subjecting BIK23 to confinement, uses of force and restraints when he reacted with heightened emotional and physical responses to directions, commands and stressful situations;~~

- ~~d. Officers failed to avoid incidents of non-compliance by BIK23 by failing to modify adequately the behaviour and discipline policies at Unit 18 in the circumstances described in the BIK23 Statement of Particulars Part 6, paragraph 2;~~
- ~~e. Officers gave BIK23 peremptory, complex, or unpleasant in the circumstances described in the BIK23 Statement of Particulars Part 6, paragraph 3.~~
- ~~f. Officers subjected BIK23 to uses of force and/or restraints and/or confinement when he reacted with heightened emotional and physical responses to directions, commands and stressful situations in the circumstances described in the BIK23 Statement of Particulars Parts 4 and 5;~~
- ~~g. Failure to provide BIK23 with an adequately safe environment, including for a child detainee, in the circumstances described in the BIK23 Statement of Particulars Part 6, Paragraph 5;~~
- ~~h. More specific actions which the State, the Minister, the CEO and the Superintendent could have taken in order to reduce such incidents are set out in paragraph 169 below;~~
- ~~i. Failing to adequately protect BIK23 against risks of self-harm by failing to adequately monitor BIK23, including in the circumstances referred to in the BIK23 Statement of Particulars Part 6, paragraph 5;~~
- ~~j. Subjecting BIK23 to the deprivations pleaded in paragraphs 174, 175, 185, and 186 below and in the BIK 23 Statement of Particulars Parts 8 and 9;~~
- ~~k. Subjecting BIK23 to extended periods of confinement as pleaded in paragraphs 132 and 139 above;~~
- ~~l. Subjecting BIK23 to repeated strip searches as pleaded in paragraph 143 above;~~

~~m. Subjecting BIK23 to uses of force as pleaded in paragraphs 146 to 150 above;~~

~~n. Subjecting BIK23 to restraints as pleaded in paragraphs 152 above.~~

161. Further to paragraphs 53 and 157 to 160 above, there was a reasonably foreseeable and not insignificant risk that BIK23 would suffer physical injury and/or a recognised psychiatric illness by being subjected to:

(a) confinement to his cell during unlock hours;

(b) prolonged periods of confinement, namely instances of confinement for over 10 hours and/or on successive days.

161A. In the circumstances:

(a) a reasonable person in the position of the State, the CEO and the Superintendent would have required Officers not to subject detainees in Unit 18 (including BIK23) to:

(i) confinement to their cell during unlock hours; and/or

(ii) prolonged periods of confinement, namely instances of confinement over 10 hours and/or on successive days,

except as authorised by law, namely detention offence confinement or security confinement in accordance with regulation 24 of the YO Regulations;

(b) a reasonable person in the position of the State and Officers would not have subjected BIK23 to:

(i) confinement to his cell during unlock hours; and/or

(ii) prolonged periods of confinement, namely instances of confinement over 10 hours and/or on successive days,

except as authorised by law, namely detention offence confinement or security confinement in accordance with regulation 24 of the YO Regulations.

161B. In the premises:

(a) the State, the CEO and the Superintendent acted in breach of their respective duties of care to BIK23 by not doing that which is set out in paragraph 161A(a) above;

(b) the State and Officers acted in breach of their respective duties of care to BIK23 by subjecting him to:

(i) confinement to his cell during unlock hours; and/or

(ii) prolonged periods of confinement, namely instances of confinement over 10 hours and/or on successive days,

as pleaded in paragraphs 132 to 141 above and the particulars thereto.

161C. Further to paragraphs 53 and 157 to 160 above, there was a reasonably foreseeable and not insignificant risk that BIK23 would suffer physical injury and/or a recognised psychiatric illness by being subjected to unlawful strip searches.

161D. In the circumstances:

(a) a reasonable person in the position of the State, the CEO and the Superintendent would have required Officers not to subject detainees in Unit 18 (including BIK23) to unlawful strip searches and ensured they did not do so;

(b) a reasonable person in the position of the State and the Officers would not have subjected BIK23 to unlawful strip searches.

161E. In the premises:

(a) the State, the CEO and the Superintendent acted in breach of their respective duties of care to BIK23 by failing to do that which is set out in paragraph 161D(a) above;

(b) the State and the Officers breached their respective duties of care to BIK23 by subjecting him to unlawful strip searches as pleaded in paragraphs 143 to 145 above.

161F. Further to paragraphs 53 and 157 to 160 above, there was a reasonably foreseeable and not insignificant risk that BIK23 would suffer physical injury and/or a recognised psychiatric illness as a consequence of being subjected to physical force, including chemical agents, that was unreasonable in all the circumstances, including having

regard to the Detainee Characteristics, the Additional Detainee Characteristics and BIK23's Disabilities.

161G. In the circumstances, a reasonable person in the position of the State and the Officers would not have subjected BIK23 to unreasonable use of physical force, including chemical agents.

161H. In breach of their respective duties of care the State and the Officers:

(a) subjected BIK23 to unreasonable, including unlawful, physical force as pleaded in paragraphs 146 to 150 above;

(b) subjected BIK23 to chemical agents as pleaded in paragraph 151A above.

161I. Further to paragraphs 53 and 157 to 160 above, there was a reasonably foreseeable and not insignificant risk that BIK23 would suffer physical injury and/or a recognised psychiatric illness as a consequence of being subjected to handcuffing, leg shackling and the use of other restraints which was unreasonable in all the circumstances, including having regard to the Detainee Characteristics, the Additional Detainee Characteristics and BIK23's Disabilities.

161J. In the circumstances, a reasonable person in the position of the State and the Officers would not have subjected BIK23 to unreasonable use of handcuffing and other restraints.

161K. In breach of their duty of care, the State and the Officers subjected BIK23 to the unreasonable use of handcuffing and other restraints as pleaded in paragraphs 152 and 153 above and the particulars thereto.

161L. Further, by reason of the matters set out in paragraphs 161, 161E, 161F and/or 161I above, a reasonable person in the position of the State, the CEO and the Superintendent would have:

(a) ensured that a comprehensive assessment of BIK23 was undertaken on admission to custody to identify the BIK23 Disabilities and the matters pleaded in paragraph 157 above;

(b) ensured that all Officers were informed of the result of the said assessment, including such of BIK23's Disabilities as were disclosed by the said assessment;

- (c) ensured that Officers were trained in relation to the needs of children in detention with mental health and/or cognitive disabilities, including each of BIK23's Disabilities.

161M. In the premises, the State, the CEO and the Superintendent acted in breach of their respective duties of care to BIK23 by failing to do that which is set out at paragraph 161L above.

162. As a result of the breaches of duty of care described in paragraphs 161 to 161M above, BIK23 has suffered injury and damage.

Particulars

- ~~a. Psychiatric injury, including anxiety, mental distress and suicidal ideation;~~
- ~~b. Numerous episodes of self-harm and attempted suicide, including those particularised in the BIK23 Statement of Particulars, Part 7;~~
- a. Physical injury including (and consequent pain and suffering) in the nature of ~~from~~ cuts, abrasions and scarring to his body from numerous episodes of self-harm and attempted suicide, including those particularised in the BIK23 Statement of Particulars, Part 7; ~~the episodes of self-harm and attempted suicide;~~
- b. Physical injury including (and consequent pain and suffering) from being subjected to uses of force by Officers, including in the circumstances particularised in the BIK23 Statement of Particulars, Part 4.
- c. Injury to his mental health, including anxiety, mental distress, suicidal ideation and self-harm ideation.
- d. Further particulars may be provided following discovery and/or information obtained from health service providers.

M.3 Disability Discrimination Act Claims

163. The conduct of the CEO, Superintendent and Officers pleaded herein were within the scope of the actual or apparent authority and thus was conduct engaged in also ~~be~~ by the State: section 123 of the DDA.

164. BIK23's Disabilities each constitute a disability within the meaning of the DDA.

165. BIK23's Disabilities are disorders that affect BIK23's thought processes, emotions, behaviour and judgement in that he has difficulty with:

- (a) prominent inattention;

- (b) anxiety and panic attacks;
- (c) insomnia;
- (d) oppositional defiance traits;
- (e) executive functioning problems;
- (f) drug abuse; and
- (g) social skills difficulties.

166. While in Banksia Hill and Unit 18, BIK23 engaged in the following kinds of behaviour that were a symptom of or manifestation of BIK23's Disabilities and thus caused or contributed to by, and being an aspect of, BIK23's Disabilities:

- (a) setting fires;
- (b) destroying others' property;
- (c) lack of thought and / or concern for the consequences of his actions;
- (d) difficulty controlling his impulses;
- (e) difficulty refraining from the above behaviour;
- (f) difficulty regulating his emotions;
- (g) self-harming, as particularised in the BIK23 Statement of Particulars Part 7; and
- (h) refusing to follow instructions.

167. Officers responded to the behaviour of BIK23 described in paragraph 166 above by:

- (a) detaining BIK23 in Unit 18 instead of Banksia Hill, for the periods set out in paragraph 7 above, in circumstances including those particularised in the BIK23 Statement of Particulars Part 2;
- (b) confining BIK23 in his cell;
- (c) the use of force against BIK23;
- (d) denying or restricting BIK23's access to or refusing to provide BIK23 with:
 - (i) programs and privileges; and
 - (ii) other goods, services and facilities amongst those set out in paragraph 56 above,
- (e) removing BIK23 from or restricting his access to educational activities, as referred to in paragraphs 173 and 174 below.

- (f) requiring BIK23 to be handcuffed, leg shackled or otherwise restrained for movements to and from his cell for an extended period, as referred to in paragraph 152 above

Particulars

- a. *The behaviour of BIK23 to which Officers responded in punishing him by transferring him to Unit 18 is particularised in the BIK23 Statement of Particulars Part 2.*
- b. *Further particulars will be provided following discovery.*

168. BIK23 would have been able to, or alternatively would have been better able to, manage the symptoms and manifestations of BIK23's Disabilities whilst in Unit 18 if the CEO, the Superintendent and Officers made the following reasonable adjustments for BIK23:

~~(a) Providing BIK23 with appropriate mental health treatment, counselling and support.~~

(a) Providing BIK23 with medication, namely:

(i) ADHD medication; and

(ii) Mirtazapine, Seroquel and Clonidine for his anxiety, panic attacks and other mental health issues.

(b) Providing BIK23 with ~~appropriate~~ cognitive behavioural therapy to assist him to learn to and to better regulate his emotions and behaviour.

~~(c) Training Officers about BIK23's Disabilities and in~~ Requiring Officers to use techniques and approaches to communication with BIK23 to reduce confrontation and escalation, namely:

(i) using non-confrontational language and behaviour in response to apprehended incidents of non-compliance so far as reasonably possible;

(ii) allowing BIK23 greater time and flexibility in enforcing compliance with directions;

(iii) not threatening to use force or confinement, or to withdraw privileges.

~~(d) Providing BIK23 with an individual behaviour plan to reduce confrontation and escalation.~~

(e) Providing BIK23 with an ~~appropriate~~ individual support worker to assist him in his interactions with Officers and detainees by providing:

(i) clear, consistent instructions;

- (ii) clear expectations;
 - (iii) positive feedback;
 - (iv) guidance with initial actions to increase understanding of what is expected.
- (f) Assisting BIK23 to cope with the boredom and frustration of detention and/or isolation, and reducing the risk of him self-harming, by providing him, or not depriving him, of access to:
- (i) a television, radio, games, reading material or other forms of distraction and/or entertainment;
 - ~~(ii) education or rehabilitation programs;~~
 - (iii) the ability to eat or socialise with other detainees;
 - (iv) in-person contact with visitors or any other person aside from custodial staff;
 - (v) telephone contact with family members;
 - (vi) hygiene products and services, such as a towel, shampoo, bodywash, toothbrush and facilities and opportunities for ablutions,

(separately and collectively, the **BIK23 Reasonable Adjustments**).

169. The CEO, the Superintendent and Officers did not make the BIK23 Reasonable Adjustments referred to in paragraph 168 above.

169A. BIK23's Disabilities were one of the reasons the Officers (and thereby the State) did not make the BIK23 Reasonable Adjustments in that Officers refused to accept that:

- (a) BIK23's Disabilities genuinely impaired his ability to avoid or minimise incidents of non-compliance;
- (b) BIK23 was not capable of preventing or minimising incidents of dysregulated or disturbed behaviour without adjustments like the BIK23 Reasonable Adjustments first being made.

169B. At a minimum, the matters set out in paragraph 169A above should be inferred by reason of the following:

- (a) as pleaded in paragraph 49(a) above, amongst others the Officers knew, or ought reasonably to have known that detainees were children who had, or were likely to have, the Detainee Characteristics and the Additional Detainee Characteristics;
- (b) the Office of the Inspector of Custodial Services identified in its 2017 Report "Behaviour Management Practices at Banksia Hill Detention Centre" (2017 OICS

Report) that staff lack confidence in non-punitive approaches to behaviour problems of detainees;

- (c) the 2017 OICS Report recommended that a trauma informed model be pursued for young people in detention (such as BIK23);
- (d) Officers persisted in the use of punitive responses to behaviour problems of detainees following the 2017 OICS Report, including in the Relevant Period;
- (e) Officers did not make any of the BIK23 Reasonable Adjustments, even during minor incidents and where making the BIK23 Reasonable Adjustments would have imposed little to no additional burden on the operation of Unit 18;

Particulars

- a. Particulars of the circumstances in which the Officers refused to make the BIK23 Reasonable Adjustments and engaged in punitive responses to manifestations of BIK23's Disabilities are set out in Part 8 of the BIK23 Statement of Particulars.
- b. Particulars of the circumstances in which the Officers refused to make the BIK23 Reasonable Adjustments and deprived BIK23 of goods, services and facilities in response to manifestations of BIK23's Disabilities are set out in Part 9 of the BIK23 Statement of Particulars.
- c. Further particulars may be provided following discovery.

170. Had the BIK23 Reasonable Adjustments been made, BIK23:

- (a) would not have been subjected to the matters described in paragraph 167 above, either at all, or alternatively to the extent that occurred;
- (b) would have been able to access and would have attended education activities; and
- (c) would have been able to access and would have accessed the goods, services and facilities set out in paragraph 56 above.

Direct Discrimination

171. By reason of the matters pleaded at paragraphs 163 to 170 above, the State, through the conduct of the CEO, the Superintendent and Officers, discriminated against BIK23 within the meaning of section 5 of the DDA on the ground of BIK23's Disabilities in that ~~the State:~~

- ~~(a) did not make the BIK23 Reasonable Adjustments; and~~

- ~~(b) — the failure by failing to make the BIK23 Reasonable Adjustments had the effect that BIK23 was, because of BIK23's Disabilities, treated the State treated BIK23 less favourably than a 16- to 17-year-old child without his disabilities would have been treated in circumstances that were not materially different.~~

Particulars

- a. *BIK23 refers to and repeats paragraphs 168 to 170 above.*
- b. *A 16 to 17 year old child detained in Banksia Hill or Unit 18 without BIK23's Disabilities would in the usual course not engage in the behaviour described in paragraphs 165 and 166 above and, accordingly, would not have been subjected to conduct from Officers of the kind described in paragraph 167 above or, alternatively, would have been subjected to such conduct much less frequently and to a less severe degree.*
- c. *The less favourable treatment includes:*
 - i. *transfer from Banksia Hill to Unit 18;*
 - ii. *directions from Officers to submit to strip searches, to submit to being placed in handcuffs or other restraints and to return to his cell;*
 - iii. *confinement in his cell or other place within Unit 18; and*
 - iv. *threats of force and use of force by Officers;*
 - v. *the matters in paragraphs 174, 175, 185 and 185B ~~186~~ below.*
- d. *Further particulars will be provided following discovery.*

Indirect discrimination

172. In the alternative to paragraph 171 above, by reason of the matters pleaded in paragraphs 59 to 62 and 163 to 170 above, the State, through the conduct of the CEO, the Superintendent and Officers, discriminated against BIK23 within the meaning of section 6(2) of the DDA on the ground of BIK23's Disabilities in that:

- (a) the State required BIK23, to comply with the Behavioural Regime;
- (b) because of BIK23's Disabilities, BIK23 was only able to comply with the Behavioural Regime if the BIK23 Reasonable Adjustments were made;
- (c) the State did not make the BIK23 Reasonable Adjustments;
- (d) the failure to make the BIK Reasonable Adjustments had the effect of disadvantaging BIK23.

Particulars

BIK23 refers to and repeats the matters in paragraphs 60, 61 and 167 above.

Discrimination in education

173. When BIK23 was punished by being detained in Unit 18, as referred to in paragraph 167(a) above:

- (a) detainees in Unit 18 were often either:
 - (i) not permitted to attend school and given no access to education or rehabilitation programs; or
 - (ii) required to choose between:
 - 1. using a limited amount of time in which they would be permitted to be outside of their cell for recreation, visits or telephone calls;
 - 2. or education or other activities,
 due to the level of staffing in Unit 18; and
- (b) at other times, detainees in Unit 18 were either:
 - (i) given individual instruction by a teacher inside their cell;
 - (ii) given worksheets and provided with limited instruction by a teacher who remained outside of their cell while the detainees remained inside; or
 - (iii) given worksheets only and provided with no instruction by any teacher; and
- (c) when detainees were provided with instruction or educational materials including worksheets or reading material, that instruction and those materials were often at a level below their competence.

Particulars

Particulars will be provided following discovery.

174. When BIK23 was confined in his cell or otherwise punished by being removed from or restricted in his access to educational activities, as referred to in paragraphs , as referred to in paragraphs 167(b) and 167(e) above:

- (a) he was either:
 - (i) given individual instruction by a teacher inside his cell;
 - (ii) given worksheets and provided with limited instruction by a teacher who remained outside of their cell while he remained inside; or

- (iii) given worksheets only and provided with no instruction by any teacher; and
- (b) when BIK23 was provided with instruction or educational materials including worksheets or reading material, that instruction and those materials were often at a level below his competence.

Particulars

- a. *BIK23 repeats and refers to the particulars subjoined to paragraph 173 above.*
 - b. *Further particulars of BIK23 being denied access to educational and other programs while in Unit 18 will be provided following discovery.*
175. By reason of the matters in paragraphs 54, 55, 171, 173 and 174 above, or alternatively, paragraphs 54, 55, 172, 173 and 174, the State, by its servants and agents, the Superintendent and Officers, unlawfully discriminated against BIK23 on the ground of his disabilities:
- (a) in contravention of s 22(2)(a) of the DDA, by denying or limiting BIK23's access to, or effective enjoyment of, the benefit of:
 - (i) education on those occasions when BIK23 was not permitted to attend school while he was confined in his cell in Unit 18 for misbehaviour;
 - (ii) education in a classroom on those occasions when he was confined in his cell at Unit 18 for misbehaviour and given individual instruction by a teacher;
 - (b) in contravention of s 22(2)(c) of the DDA, by subjecting BIK23 to the following other detriments:
 - (i) disruptions and lack of routine in his education and rehabilitation;
 - (ii) a curriculum, when being taught, that was below his level of competence;
 - (iii) being given education materials, including reading material, that was below his level of competence.

Disability Standards for Education

176. By reason of his disabilities, BIK23 would have been assisted in his participation in education at Unit 18 on the same basis as a student without a disability if the following reasonable adjustments within the meaning of ss 3.3 and 3.4 of the DSE had been made for him by the State:
- (a) ~~appropriately~~ assessing BIK23's literacy and numeracy competency on admission into Banksia Hill and/or Unit 18;

- ~~(b) developing a curriculum, learning plan and other educational material tailored to BIK23's competency level and designed to encourage his participation and accommodate his style of learning;~~
- ~~(b)(e)~~ adopting techniques and approaches to communicating with BIK23 to reduce confrontation and escalation, namely, providing:
 - (i) allowing greater time and flexibility in enforcing compliance with directions;
 - (ii) using non-confrontational language and behaviour in response to apprehended incidents of non-compliance so far as reasonably possible;
and
 - (iii) not engaging in punitive responses to incidents in which BIK23 had become dysregulated;
- (c) adopting methods of instruction for BIK23 to improve his capacity to engage with and understand what he is being taught, namely, providing:
 - (i) clear, consistent instructions;
 - (ii) clear expectations;
 - (iii) positive feedback;
 - (iv) guidance with initial actions to increase understanding of what is expected.
- (d) providing BIK23 with functional literacy and numeracy education delivered by a specialist literacy and numeracy teacher in a 1 to 1 setting;
- ~~(d) adopting disciplinary practices within educational settings which accommodated the behavioural manifestations of his disability rather than adopting punitive responses thereto;~~
- ~~(e) adjusting the mode of education provided to BIK23 to accommodate his disability;~~
- ~~(e)(f)~~ taking steps to arrange for and/or facilitate arranging for and/or facilitating the provision of specialised support services to BIK23 to accommodate his disability, including appropriate namely
 - (i) ADHD medication;
 - (ii) Mirtazapine, Seroquel and Clonidine for his anxiety, panic attacks and other mental health issues; and

(iii) psychologists, counsellors and/or support workers trained in assisting persons with ADHD and AOCD to overcome anxiety and self-regulate their emotions and behaviour.

~~(g) providing sufficient access to teachers and substitute teachers; and~~

~~(h) taking steps to adjust the materials or the mode of education provided to BIK23 (in the extremely limited circumstances in which any education was provided) to accommodate his disabilities.~~

177. In contravention of s 5.2 of the DSE:

- (a) the State did not consult with BIK23 about whether his disabilities affected his ability to participate in education; and
- (b) the State either:
 - (i) made no decision with respect to making reasonable adjustments for BIK23; or, alternatively,
 - (ii) decided not to make the adjustments in paragraph 176 above or any other reasonable adjustments; and
- (c) by reason of the matters in sub-paragraphs 177(a) and (b) above, failed to take reasonable steps to ensure that BIK23 was able to participate in education at Unit 18 on the same basis as a student without a disability, and without experiencing discrimination.

178. By reason of BIK23 being provided with a curriculum and educational materials which were unsuitable by reference to his academic capacity and/or existing level of academic attainment as set out in paragraph 174(b) above, BIK23 was not allowed to participate in education on the same basis as a student without a disability, in contravention of s 6.2 of the DSE.

~~179. BIK23 required the following specialised support services to accommodate his disability and enable him to participate in educational activities provided at Unit 18:~~

~~(a) mental health treatment, counselling and support;~~

~~(b) behavioural therapy to assist him to learn to, and to, better regulate his emotions and behaviour;~~

~~(c) an appropriately qualified support worker to assist BIK23 in his interactions with Officers and detainees.~~

180. BIK23 required the following specialised support services to accommodate his disability and enable him to participate in educational activities provided at Unit 18:
- (a) mental health treatment, counselling and support;
 - (b) behavioural therapy to assist him to learn to, and to, better regulate his emotions and behaviour;
 - (c) an appropriately qualified support worker to assist BIK23 in his interactions with Officers and detainees.
181. To the extent that the specialised support services referred to in paragraph 180 above were of a kind provided by the State at Unit 18, the State failed to take reasonable steps to ensure that BIK23 had access to the service in contravention of s 7.2(2) of the DSE.
182. To the extent that the specialised support services referred to in paragraph 180 above were of a kind not provided by the State at Unit 18, the State failed to take reasonable steps to facilitate the provision by another person or agency of the support services referred to in paragraph 180 above to BIK23 in contravention of s 7.2(3) of the DSE.
183. In contravention of s 7.2(6) of the DSE, BIK23 was not consulted about his need for specialist support services of the kind referred to in paragraph 180 above.
184. By reason of the matters in paragraphs 54 and 176 to 183 above, the State contravened s 32 of the DDA.

Goods, services and facilities

185. ~~By reason of the matters in paragraphs 56 and 171 above, or alternatively paragraphs 56 and 172 above, when~~ From time to time BIK23 was punished for alleged misbehaviour by:
- (a) loss of program placement, loss of recreation time, and/or loss of television privileges, as referred to in paragraph 167(d) above;
 - (b) being refused access to or not being provided with other goods, services and facilities. ~~amongst those set out in paragraph 56 above, as referred to in paragraph 167(d) above,~~
- ~~the State, by the Superintendent and Officers, refused to provide BIK23 with goods, services or facilities on the grounds of his disabilities in contravention of s 24(a) of the DDA.~~

Particulars

- ~~a. While BIK23 was detained in Unit 18, Officers would regularly selectively allow some detainees to attend education or access goods, services and facilities outside of their cells, but would not allow BIK23 to attend education or access goods, services and facilities outside of his cell if he had been perceived to have misbehaved.~~
- ~~b. On numerous occasions a psychologist working in Unit 18 was unable to see BIK23 because the Officers would not permit the psychologist to do so because of perceived misbehaviour by BIK23.~~
- ~~a.c. BIK23 was punished for alleged misbehaviour by loss of program placement and/or loss of privileges as particularised in See the BIK23 Statement of Particulars Parts 8 and 9.~~
- ~~d. The punishment of BIK23 for misbehaviour by loss of program placement, loss of recreation time and loss of privileges and refusing him access to or not providing him with other goods, services and facilities had the effect of denying BIK23 access to recreational and/or therapeutic activities, facilities and goods.~~
- ~~b.e. Further particulars will be provided following discovery.~~

185A By reason of paragraphs 56 and 171 above, alternatively 56 and 172 above, the conduct pleaded in paragraph 185 above was in contravention of section 24(b) of the DDA in that the State by its servants or agents, the Superintendent and Officers, refused to provide BIK23 with goods, services or facilities on the ground of his disabilities.

~~186. By reason of the matters in paragraphs 56, 171 and 185 above or alternatively, 56, 172 and 185, above, when BIK23 was required to be handcuffed and/or ankle cuffed or other restraints for movement to and from his cell within Unit 18, and while accessing services and facilities provided to or made available for him in Unit 18, the State by its servants and agents, the Superintendent and Officers, in contravention of s 24(b) of the DDA unlawfully discriminated against BIK23 on the ground of his disabilities in the terms or conditions on which the State provided BIK23 with goods or services or made facilities available to BIK23 as follows:~~

185B When located within Unit 18 BIK23 was required to submit to handcuffs or other restraints in order to:

- (a) ~~BIK23 was required to submit to handcuffs and/or ankle cuffs or other restraints in order to~~ attend visits from members of his family, including his parents, or from legal advisers;
- (b) ~~BIK23 was required to submit to handcuffs and/or ankle cuffs or other restraints in order to~~ attend medical services at Unit 18;
- (c) ~~BIK23 was required to submit to handcuffs and/or ankle cuffs or other restraints in order to~~ access telephone facilities for communicating with his family or legal advisers;
- (d) ~~BIK23 was required to submit to handcuffs and/or ankle cuffs or other restraints in order to~~ make use of the caged area provided as an area for recreation and exercise in Unit 18.

Particulars

Particulars of the periods when BIK23 was required to be in handcuffs and/or ankle cuffs or other restraints for all movements to and from his cell within Unit 18 will be provided following discovery.

186 By reason of paragraphs 56 and 171 above, alternatively 56 and 171 above, the provision to BIK23 of the goods, services or facilities on the terms and conditions and/or in the manner set out in paragraph 185B above on the ground of his disabilities was conduct by the State by its servants or agents, the Superintendent and Officers, in contravention of section 24(b) of the DDA.

M.4 Age Discrimination Claims

187. By reason of the matters in paragraphs 56 to 58 above, when BIK23 has been detained in Unit 18, BIK23 has only been able to access fewer of the goods, services and facilities set out in paragraphs 56 and 57 above, or has only been able to access those goods, services and facilities on a more restrictive basis, as compared to the ability of prisoners in adult prisons.

Particulars

BIK23 repeats and refers to the particulars sub-joined to paragraph 58 above.

Direct Discrimination

188. By reason of the matters pleaded in paragraphs 58 and 187 above, the State, through the conduct of the CEO, the Superintendent and the Officers, discriminated against BIK23 within the meaning of s 14 of the ADA on the ground of BIK23's age in that:

- (a) BIK23 was treated less favourably than an adult prisoner would have been treated in circumstances which were not materially different; and
- (b) BIK23 was so treated by reason of his age.

Particulars

- a. *An adult prisoner whose conduct in prison was comparable with BIK23's conduct in detention would not have been relocated to Unit 18 or any equivalent adult facility and consequently would not have been deprived of access to goods, services and facilities not provided (or provided only to a lesser extent or on a more restrictive basis) in Unit 18.*
- b. *The State:*
 - i. *placed and kept detainees in Unit 18 because they were not adults and could not be placed in an adult prison unless and until they reached the age of 16 years old and were the subject of a successful application by the CEO under s 178 of the YO Act; and*
 - ii. *did not take steps to ensure that goods, services and facilities were provided to or made available for detainees in Unit 18 comparable to those provided to or made available for detainees in Banksia Hill or to those provided to or made available for prisoners in adult prisons.*

Indirect Discrimination

189. In the alternative to paragraph 188 above, by reason of the matters pleaded in paragraphs 58, 62 and 187 above, the State, through the conduct of the CEO, the Superintendent and the Officers, discriminated against BIK23 within the meaning of s 15 of the ADA on the ground of BIK23's age in that the State:

- (a) imposed the practice or condition referred to in paragraph 62 above;
- (b) the imposition of that condition or practice had the effect of disadvantaging BIK23.

Particulars

BIK23 refers to and repeats the particulars subjoined to paragraphs 58 and 188 above.

M.5 Remedies

190. In respect of the matters in section M.1, BIK23 seeks the declarations referred to in Part A of the Originating Application.

191. In respect of the matters in section M.2, BIK23 seeks the declarations in Part A of the Originating Application.
192. In respect of the matters in section M.3, BIK23 seeks the declarations in Part A of the Originating Application.
193. In respect of the matters in section M.4, BIK23 seeks the declarations in Part A of the Originating Application.
194. By reason of the matters in paragraphs 132 to 142 above, BIK23 suffered deprivation of residual liberty, anxiety, distress, discomfort, humiliation, helplessness, indignity, frustration and outrage.
195. By reason of the matters in paragraphs 143 to 156 above, BIK23 suffered pain, discomfort, anxiety, distress, humiliation, helplessness, indignity, frustration and outrage.
196. Further, BIK23 claims aggravated damages for false imprisonment, assault and battery.

Particulars

- a. *At the time of the matters described in paragraphs 132 to 156 above BIK23 was a child of 16 years and 17 years of age.*
 - b. *BIK23's pain, discomfort, anxiety, distress, humiliation, helplessness, indignity, frustration and outrage caused by the matters in paragraphs 132 to 156 above were exacerbated by:*
 - i. *BIK23's Disabilities;*
 - ii. *his status as a child in detention with no parent or other relative or friend to comfort him.*
 - c. *The conduct of the Superintendent and Officers described in paragraphs 132 to 156 above disregarded the limits on the power of the Superintendent and Officers.*
 - d. *Further particulars may be provided following discovery.*
197. Further, in relation to the matters in paragraphs 132 to 156 above, BIK23 was treated with contemptuous disregard of his personal circumstances, including his disabilities, and BIK23 claims exemplary damages.

Particulars

- a. *The conduct of the Officers described in paragraphs 132 to 156 above showed a cruel and reckless disregard of the comfort and dignity of BIK23;*

- b. *The conduct of the Officers described in paragraphs 132 to 156 above disregarded the limits on the power of the Superintendent and Officers;*
- c. *BIK23 refers to and repeats particulars (a) to (c) to paragraph 196 above; and*
- d. *Further particulars may be provided following discovery.*

198. By reason of the matters in paragraph 162 above, BIK23 claims damages for personal injury.

199. By reason of the matters in paragraphs 175, 184, 185A, 186, 188 and 189 above, BIK23 suffered loss and damage.

Particulars

- a. *Hurt, humiliation and injury to feelings;*
- b. *Educational disadvantage*
- c. *Exacerbation of his symptoms of his disabilities;*
- d. *Further particulars may be provided following discovery and/or information obtained from health service providers.*

200. By reason of the matters in paragraph 199 above, BIK23 claims damages by way of compensation pursuant to s 46PO(4)(d) of the AHRC Act.

201. Further, BIK23 claims aggravated damages pursuant to s 46PO(4) of the AHRC Act.

Particulars

- a. *At the time of the matters described in paragraphs 163 to 189 above, BIK23 was a child between the ages of 16 years and 17 years.*
- b. *BIK23's hurt, humiliation and injury to feeling caused by the matters in paragraphs 163 to 189 above were exacerbated by:*
 - i. *BIK23's Disabilities;*
 - ii. *the arbitrariness of loss of program placements and/or loss of privileges;*
 - iii. *the boredom and frustration of being confined in a cell while being subjected to loss of program placement and/or loss of privileges.*
- c. *Further particulars may be provided following discovery.*

NK. CLAIMS OF GROUP MEMBERS

202. Group Members within the Tort sub-group, while in detention in Unit 18, suffered:
- (a) false imprisonment; and/or
 - (b) assault and/or battery (including by unlawful strip searches, unlawful use of restraints and/or unlawful use of force);
- by an act or omission of the Minister, the CEO, the Superintendent and/or Officers for which the State is vicariously liable.
203. Group Members within the Tort sub-group, while in detention in Unit 18, suffered breach of a duty of care by the State, the Minister, the CEO, the Superintendent and/or Officers failing to take reasonable steps to prevent physical and/or psychiatric or psychological injury to the Applicants and the Group Members by an act or omission of the State, the Minister, the CEO, the Superintendent and/or Officers.
204. The State is vicariously liable for the breaches of duty described in paragraph 203 by the Minister, the CEO, the Superintendent and/or Officers.
205. Group Members within the DDA sub-group have, while in detention, suffered unlawful disability discrimination under ss 5, 6, 22, 24 and 32 of the DDA by an act or omission of the Minister, the CEO, the Superintendent and/or Officers which the State is taken to have engaged in, and for which the State is vicariously liable.
206. Group Members within the ADA sub-group have, while in detention, suffered unlawful age discrimination under ss 14, 15, of the ADA by an act or omission of the Minister, the CEO, the Superintendent and/or Officers which the State is taken to have engaged in, and for which the State is vicariously liable.
207. The acts or omissions described in paragraphs 202 to 206 above include acts and omissions of the kind the subject of the claims herein by the applicants.
208. Leave will be sought for the claims of Group Members set out in paragraphs 202 to 206 above which arise from:
- (a) the false imprisonment, assault, and/or battery of Group Members;
 - (b) the breaches of duty of care owed to Group Members;
 - (c) the unlawful disability discrimination suffered by Group Members; and
 - (d) the unlawful age discrimination suffered by Group Members.

to be pleaded and particularised after the determination of the common questions in a trial of the claims of the applicants and other sample or representative group members in accordance with directions to be given by the Court.

Date: 22 May 2025

A handwritten signature in black ink, appearing to be 'S. Levitt', written in a cursive style.

Signed by Stewart Alan Levitt

Lawyer for the applicants

This pleading was prepared by Paul Batley, ~~and Ben Slade~~ and Blaise Prentice-Davidson of Counsel and settled by Steven Penglis of Senior Counsel.

Certificate of lawyer

I, Stewart Alan Levitt, certify to the Court that, in relation to the Amended Statement of Claim filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 22 May 2025

A handwritten signature in black ink, appearing to be 'S. Levitt', written in a cursive style.

Signed by Stewart Levitt

Lawyer for the Applicants

SCHEDULE OF PARTIES

First Applicant: BIJ23 by his litigation representative BKJ23

Second Applicant: BIK23 by his litigation representative BKK23

Respondent: State of Western Australia