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Sia Lagos

Registrar

Important Information

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Reply

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
Applicants

STATE OF WESTERN AUSTRALIA

Respondent

A. PRELIMINARY

1. Defined Terms in this Reply have the same meaning as in the Amended Originating Application, the Amended Statement of Claim (**ASOC**) and in the Defence.
2. Save as to the admissions contained in the Defence and as otherwise expressly pleaded below, the Applicants join issue with each allegation in the Defence.
3. In response to the Defence, the Applicants say as follows:

B. THE APPLICANTS

4. The Applicants do not plead to sub-paragraph 2(d) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

C. THE GROUP MEMBERS

5. Sub-paragraph 9(a) is admitted.
6. As to sub-paragraph 9(c)(i):
 - (a) it is denied that Trespass to the Person Claims are claims for damages based on the fault of a person within the meaning of sections 5A(1) and 5V(1) of CLAWA;

Filed on behalf of	Applicants
Law firm	Levitt Robinson
Tel	(02) 9286 3133 Fax (02) 9283 0005
Email	slevitt@levittrobinson.com
Address for service	C/- Levitt Robinson, Ground Floor, 162 Goulburn Street, Surry Hills NSW 2010

- (b) in the alternative, to (a) above, it is denied that false imprisonment claims are claims for damages based on the fault of a person within the meaning of sections 5A(1) and 5V(1) of CLAWA;
 - (c) further in the alternative to (a) above, the Trespass to the Person Claims or Negligence Claims that are founded on an unlawful intentional act done with an intention to cause personal injury to a person (**Intentional Personal Injury Claims**) are excluded from Parts 1A, 1C, 1CA, ID, 1E, and 2 (other than section 10A) of CLAWA by reason of section 3A of CLAWA.
7. As to sub-paragraph 9(d), by the operation of section 46PO of the AHRC, the relevant temporal limit for claims alleging a breach of the DDA and/ the ADA on behalf of Group Members is the date of termination of the Amended Complaint by the AHRC on 15 February 2024, not the date of the making of a complaint.

D. THE RESPONDENT

8. As to paragraph 12:
- (a) the Applicants do not plead to sub-paragraph (b) as no allegations against them are pleaded therein and they make no admissions with respect thereto;
 - (b) as to sub-paragraph (c)(i):
 - (i) it is admitted that the Respondent is and was at all material times a public body within the meaning of section 5U of CLAWA;
 - (ii) it is denied that each Minister, each CEO, each Superintendent, each Officer, prison officer and/or police officer is or was at all relevant times a “public body or officer” within the meaning of section 5U of CLAWA;
 - (c) sub-paragraphs (c)(ii) and (c)(iii) are denied;
 - (d) in the alternative to 8(c) above, to the extent that the Trespass to the Person Claims and the Negligence Claims are claims for damages arising out of the fault of “a public body or officer” in the performance or non-performance of a public function to which section 5X of CLAWA applies, which is denied, a policy decision authorising the use of force, the application of restraints, forced confinement or forced strip searches beyond the limits prescribed by the YO Act and the YO Regulations is so unreasonable that no reasonable public body or officer in that position could have made it.

E. BANKSIA HILL DETENTION CENTRE AND UNIT 18

9. [Not used]

F. RELEVANT PROVISIONS OF THE YO ACT AND YO REGULATIONS

10. The Applicants do not plead to sub-paragraph 17(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
11. Sub-paragraph 21(b) is admitted.
12. Sub-paragraph 22(b) is admitted.
13. Paragraph 27 is admitted.
14. Paragraph 29 is admitted.
15. Sub-paragraph 30(b) is admitted.
16. Sub-paragraph 32(b) is admitted.
17. Sub-paragraph 33(b)(iv) is admitted.
18. Sub-paragraph 39(a) is admitted.
19. Sub-paragraph 40(a) is admitted.
20. As to sub-paragraph 41(b):
 - (a) paragraphs 6 and 8 above are repeated;
 - (b) alternatively, if s 5X of CLAWA applies, which is denied, each occasion of a search must be supported by specific authorisation which is based substantially on financial, economic, political or social factors or constraint if the Policy defence in s 5X of CLAWA is to apply.

G. WRONGFUL IMPRISONMENT

21. As to paragraph 44:
 - (a) sub-paragraphs 44(a) and (b) are admitted;
 - (b) sub-paragraphs 44(c) and (d) are denied;
 - (c) nothing referred to in paragraph 44 authorised the further confinement of a detainee in a cell or sleeping quarters within a detention centre other than when such further confinement was in accordance with the YO Act and YO Regulations;
 - (d) the Respondent has the onus of proof of the lawfulness of the confinement of a detainee in a cell or sleeping quarters during unlock hours.

H. BATTERY AND/OR ASSAULT

22. As to sub-paragraphs 45(i)(i) and 45(i)(ii):
- (a) paragraphs 6 and 8 above are repeated;
 - (b) alternatively, if section 5X of CLAWA applies, which is denied, each occasion of the use of handcuffing or other mechanical restraints must be supported by specific authorisation which is based substantially on financial, economic, political or social factors or constraint if the Policy defence in sections 5U or 5X of CLAWA is to apply.
23. As to sub-paragraphs 45(i)(iii) and 45(i)(iv), paragraphs 6 and 8 above are repeated.
24. The Applicants do not plead to sub-paragraph 46(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

I. DUTY OF CARE

25. As to sub-paragraph 48:
- (a) it is admitted that the nature of trauma, abuse and neglect experienced by detainees varied from detainee to detainee, as did the behaviour of those detainees due to such trauma, abuse and neglect;
 - (b) it is admitted that the nature of neurodevelopmental impairment varied from detainee to detainee;
 - (c) section 55(1) of the CLAWA does not require a person to be of normal fortitude in order to be owed a duty of care;
 - (d) the paragraph is otherwise denied.
26. Sub-paragraph 49(b) is denied and paragraphs 6 and 8 above are repeated.
27. Sub-paragraph 50(a) is denied and the Applicants say that the risks of harm in respect of which BIJ23, BIK23 and each detainee were vulnerable were the risks of physical or psychological injury as pleaded in paragraph 53 of the ASOC.
28. The Applicants do not plead to sub-paragraph 51(c) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
29. As to sub-paragraph 51(d)(i) and (iii) are admitted.
30. As to sub-paragraph 51(e):
- (a) sub-paragraph (i) is admitted;
 - (b) sub-paragraphs (ii) and (iii) are denied and the Applicants further say that:

- (i) the risks against which the State was required 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 might foreseeably cause harm to a detainee were the not insignificant risks of physical or psychiatric injury to detainees as pleaded in paragraph 53 of the ASOC;
- (ii) the set of circumstances giving rise to the potential for the realisation of the risks of harm are identified in paragraphs 47 to 50 and 53 of the ASOC.
- (iii) the general causal mechanism of the injuries sustained is pleaded:
 - (1) for BIJ23, at paragraphs 88 to 93 of the ASOC;
 - (2) for BIK23, at paragraphs 157 to 162 of the ASOC; and
 - (3) for the Tort sub-group members, at paragraph 203 of the ASOC.

J. RELEVANT AREAS UNDER THE DDA AND THE ADA

31. Save to admit that at Unit 18 there were:

- (a) a place to receive visits;
- (b) telephones;
- (c) a space for recreation and exercise,

and that, from time to time, various goods and services were available to detainees, paragraph 56(b)(iii) is otherwise denied

K. CLAIMS OF BIJ23

K.1 False Imprisonment, assault and battery

False imprisonment

32. As to sub-paragraph 63(c):

- (a) paragraphs 6 and 8 above are repeated;
- (b) alternatively, if s 5X of CLAWA applies, which is denied, each occasion of a lockdown must be supported by specific authorisation which is based substantially on financial, economic, political or social factors or constraint if the Policy defence in s 5X of CLAWA is to apply.

33. As to sub-paragraph 69(b):

- (a) that at all material times BIJ23 was lawfully detained in Unit 18 is admitted;

- (b) nothing referred to in paragraph 69 authorised the further confinement of BIJ23 in a cell or his sleeping quarters within Unit 18 other than when such further confinement was in accordance with the YO Act and YO Regulations;
 - (c) the Respondent has the onus of proof of the lawfulness of the confinement of BIJ23 in a cell or his sleeping quarters during unlock hours.
34. As to sub-paragraphs 69(d), (e) and (f):
- (a) sub-paragraphs (e)(i) and (f)(i) are admitted;
 - (b) sub-paragraphs (d), (e)(ii) and (f)(ii) are denied and paragraphs 6, 8 and 32(b) above are repeated.
35. Save to admit that the documents (which the Applicants do not presently have copies of) as described in the particulars appear to contain information that, if proved, would likely substantiate the matters pleaded, sub-paragraph 70(a) is otherwise presently not admitted.
36. As to sub-paragraph 70(b):
- (a) paragraphs 6 and 8 above are repeated;
 - (b) further, or alternatively, it is denied that the confinement of BIJ23, other than for detention offence confinement or security confinement, is a 'policy decision' within the meaning of ss 5U and 5X of CLAWA.
37. As to paragraph 72(c), paragraphs 6 and 8 above are repeated.

Strip Searches

38. As to paragraph 75, sub-paragraphs (b)(i) and (ii) are admitted.
39. As to sub-paragraph 76(c), paragraphs 6 and 8 above are repeated.

Use of Force

40. As to sub-paragraph 81A(d), the applicants say regulation 10A of the *Weapons Regulations 1999* (WA) (**Weapons Regulations**) commenced on 12 December 2024.

Handcuffing

41. As to paragraph 84(c), paragraphs 6 and 8 above are repeated.

K.2 Breach of duty of care

42. Save to repeat sub-paragraph 6(a) and paragraph 8 above, the Applicants do not plead to paragraph 87A as no allegations against them are pleaded therein and they make no admissions with respect thereto.

43. Save to say that each incident cross-referenced in the particulars to paragraph 91 of the ASOC are critical events that the State, the Minister, the CEO and the Superintendent and Officers ought to have foreseen that a detainee of normal fortitude might, detained as they were in a Detention Centre and in the circumstances of BIJ23's case, suffer a recognised psychiatric illness if reasonable care was not taken, the Applicants otherwise join issue as to sub-paragraph 91(d).
44. The Applicants do not plead to sub-paragraph 92(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
45. As to the first sub-paragraph 92(d) and sub-paragraph 92(c), paragraphs 6 and 8 above are repeated.
46. The Applicants join issue to paragraph 92B and further say as follows:
 - (a) section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) is not applicable to the Trespass to the Person Claims or the Intentional Personal Injury Claims;
 - (b) further, and in the alternative, at all material times, by reason of his age and having the Detainee Characteristics, Additional Detainee Characteristics and BIJ23's Disabilities:
 - (i) BIJ23 did not know nor could not have been expected to know that he was able to and could take precautions against the risk of harm within the meaning of s 5K of CLAWA;
 - (ii) BIJ23 was not, in the circumstances, guilty of contributory negligence within the meaning section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) at any time.
47. The Applicants do not plead to paragraph 92C as no allegations against them are pleaded therein and they make no admissions with respect thereto.
48. As to paragraph 92E:
 - (a) Sub-paragraphs 6(a) and 6(c) above are repeated;
 - (b) it is denied that the strip searches conducted of BIJ23 were a 'policy decision' within the meaning of ss 5U and 5X of CLAWA.
49. The Applicants do not plead to paragraph 92F as no allegations against them are pleaded therein and they make no admissions with respect thereto.
50. As to paragraph 92H, paragraph 46 is repeated.

51. As to paragraph 92I:
- (a) the Applicants do not plead to sub-paragraph (b) as no allegations against them are pleaded therein and they make no admissions with respect thereto;
 - (b) the Applicants deny sub-paragraph (c);
 - (c) in respect to sub-paragraph (d), paragraphs 6 and 8 above are repeated;

52. As to paragraph 92K, paragraph 46 is repeated.

53. Sub-paragraph 93(a) is admitted.

K.3 Disability Discrimination Act Claims

54. Sub-paragraphs 99(a)(ii)(A) and (B) are admitted.

55. The Applicants do not plead to sub-paragraph 99(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

56. The Applicants do not plead to sub-paragraph 102(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

57. The Applicants do not plead to sub-paragraph 103(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

58. The Applicants do not plead to sub-paragraph 104(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

59. The Applicants do not plead to sub-paragraph 106(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

60. The Applicants do not plead to sub-paragraph 107(d)(i) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

61. The Applicants do not plead to sub-paragraph 110(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

62. The Applicants do not plead to sub-paragraph 115A(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

63. The Applicants do not plead to sub-paragraph 116(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

64. The Applicants do not plead to sub-paragraphs 118(c) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

65. The Applicants do not plead to sub-paragraph 119(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

K.4 Remedies

66. As to paragraphs 124:
- (a) it is admitted that certain of the identified claims are claims of the nature pleaded in sub-paragraph 124(a)(ii);
 - (b) sub-paragraph 124 (c)(i) is admitted;
 - (c) the paragraph is otherwise denied.
67. As to paragraph 128, sub-paragraphs 66(a) and (c) above are repeated.

L. CLAIMS OF BIK23

L.1 False Imprisonment, assault and battery

68. As to paragraph 132(d):
- (a) paragraphs 6 and 8 above are repeated;
 - (b) alternatively, if s 5X of CLAWA applies, which is denied, each occasion of a lockdown must be supported by specific authorisation which is based substantially on financial, economic, political or social factors or constraint if the Policy defence in s 5X of CLAWA is to apply.
69. As to paragraph 138(b):
- (a) that at all material times BIK23 was lawfully detained in Unit 18 is admitted;
 - (b) nothing referred to in paragraph 138 authorised the further confinement of BIK23 in a cell or his sleeping quarters within Unit 18 other than when such further confinement was in accordance with the YO Act and YO Regulations;
 - (c) the Respondent has the onus of proof of the lawfulness of the confinement of BIK23 in a cell or his sleeping quarters during unlock hours.
70. As to sub-paragraphs 138(d), (e) and (g):
- (a) sub-paragraphs (d)(i) and (e)(i) are admitted;
 - (b) sub-paragraphs (d)(ii), (e)(iii) and (g) are denied and paragraphs 6 and 8 above are repeated.
71. Save to admit that the documents (which the Applicants do not presently have copies of) as described in the particulars appear to contain information that, if proved, would likely substantiate the matters pleaded, sub-paragraphs 139(a)(i) and (ii) are otherwise presently not admitted.

72. As to sub-paragraph 141(c):

- (a) paragraphs 6 and 8 above are repeated;
- (b) further, or alternatively, it is denied that the confinement of BIK23, other than for detention offence confinement or security confinement, is a 'policy decision' within the meaning of ss 5U and 5X of CLAWA.

73. As to paragraph 144, sub-paragraphs (b)(i) and (ii) are admitted.

Strip Searches

74. As to sub-paragraph 145(c) paragraphs 6 and 8 above are repeated.

Use of Force

75. As to paragraph 151A:

- (a) sub-paragraphs (a) and (b) are admitted;
- (b) as to sub-paragraph (d) the Applicants say regulation 10A of the Weapons Regulations commenced on 12 December 2024.

Handcuffing/leg-shackling

76. As to sub-paragraph 153(c) paragraphs 6 and 8 above are repeated.

L.2 Breach of duty of care

77. Save to repeat sub-paragraph 6(a) and paragraph 8 above, the Applicants do not plead to paragraph 156A as no allegations against them are pleaded therein and they make no admissions with respect thereto.

78. Save to say that each incident cross-referenced in the particulars to paragraph 160 of the ASOC are critical events that the State, the Minister, the CEO and the Superintendent and Officers ought to have foreseen that a detainee of normal fortitude might, detained as they were in a Detention Centre and in the circumstances of BIK23's case, suffer a recognised psychiatric illness if reasonable care was not taken, the Applicants otherwise join issue as to sub-paragraph 160(d).

79. The Applicants do not plead to sub-paragraph 161(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

80. The Applicants join issue to paragraph 161 and further say as follows:

- (a) section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)* is not applicable to the Trespass to the Person Claims or the Intentional Personal Injury Claims;

(b) further, and in the alternative, at all material times, by reason of his age and having the Detainee Characteristics, Additional Detainee Characteristics and BIK23's Disabilities:

- (i) BIK23 did not know nor could not have been expected to know that he was able to and could take precautions against the risk of harm within the meaning of s 5K of CLAWA;
- (ii) BIK23 was not, in the circumstances, guilty of contributory negligence within the meaning section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) at any time.

- 81. The Applicants do not plead to sub-paragraph 161(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
- 82. As to sub-paragraphs 161(c) and (d), paragraphs 6 and 8 above are repeated.
- 83. As to paragraph 161B, paragraph 80 above is repeated.
- 84. The Applicants do not plead to sub-paragraph 161C(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
- 85. As to sub-paragraph 161E(b), paragraphs 6 and 8 above are repeated.
- 86. The Applicants do not plead to sub-paragraph 161F(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
- 87. As to paragraph 161H, paragraph 80 above is repeated.
- 88. The Applicants do not plead to sub-paragraph 161(lb) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
- 89. As to sub-paragraphs 161l(c) and (d), paragraphs 6 and 8 above are repeated.
- 90. As to paragraph 161K, paragraph 80 above is repeated.
- 91. Sub-paragraph 162(a) is admitted.

L.3 Disability Discrimination Act Claims

- 92. Sub-paragraphs 168(b)(ii)(A) and (B) are admitted.
- 93. The Applicants do not plead to sub-paragraph 168(c) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
- 94. The Applicants do not plead to sub-paragraph 171(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

95. The Applicants do not plead to sub-paragraph 172(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
96. The Applicants do not plead to sub-paragraph 173(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
97. The Applicants do not plead to sub-paragraph 175(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
98. The Applicants do not plead to sub-paragraph 176(d)(i) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
99. The Applicants do not plead to sub-paragraph 180(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
100. The Applicants do not plead to sub-paragraph 185A(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
101. The Applicants do not plead to sub-paragraph 186(a) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
102. The Applicants do not plead to sub-paragraph 188(c) as no allegations against them are pleaded therein and they make no admissions with respect thereto.
103. The Applicants do not plead to sub-paragraph 189(b) as no allegations against them are pleaded therein and they make no admissions with respect thereto.

L.4 Remedies

104. As to paragraph 194:
 - (a) it is admitted that certain of the identified claims are claims of the nature pleaded in sub-paragraph 194(a)(ii);
 - (b) sub-paragraph 194(c)(i) is admitted;
 - (c) the paragraph is otherwise denied.
105. As to paragraph 198, sub-paragraphs 104(a) and (c) above are repeated.

Date: 18/2/26.

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 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: 18.2.26.

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