

NOTICE OF FILING

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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.

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Form 33
Rule 16.32

Defence to Amended Statement of Claim

Federal Court of Australia
District Registry: Western Australia
Division: General

BIJ23

First Applicant

BIK23

Second Applicant

STATE OF WESTERN AUSTRALIA

Respondent

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Unless otherwise defined below and without any admission, in this Defence:

- I. the Respondent adopts the defined terms in the Amended Statement of Claim dated 22 May 2025 (and filed on 23 May 2025) (**SOC**); and
- II. certain documents mentioned in this Defence will be the subject of a claim in part for public interest immunity and/or confidentiality.

In response to the SOC, the Respondent says as follows:

A. PRELIMINARY

- 1 It does not plead to paragraph 1 as it contains no allegations against it and makes no admission in respect of that paragraph.

B. THE APPLICANTS

- 2 As to paragraph 2, it:

- (a) admits that the first applicant (**BIJ23**) was born on 10 February 2007;
- (b) admits that BIJ23 suffered a neurological injury because of a motorcycle accident which occurred when he was 12;
- (c) admits that, from at least 2 July 2021:
 - (i) BIJ23 appeared to meet the criteria for a mild neurocognitive disorder; and
 - (ii) BIJ23 had severe impairment in:
 - (A) cognition;
 - (B) memory;
 - (C) language; and
 - (D) executive functioning;

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- (i) Neurodevelopmental Assessment Report.
- (d) says that the terms “an intellectual disorder”, “attentional deficits”, “language disorder and cognitive impairment including severe memory impairment” and

“non-suicidal self-injury” are embarrassing and/or ambiguous in that they do not properly identify the nature of the alleged “disorder”, “deficits” or “impairment”;

(e) otherwise does not know and therefore cannot admit paragraph 2.

3 As to paragraph 3, it:

(a) admits that during the Relevant Period, BIJ23 was detained in Unit 18 during the following periods:

(i) 20 July 2022 to 23 August 2022;

(ii) 28 September 2022 to 14 December 2022;

(iii) 24 February 2023 to 17 July 2023;

(iv) 18 August 2023 to 17 October 2023;

(v) 7 February 2024 to 23 February 2024; and

(vi) 12 March 2024 to 17 April 2024; and

(b) otherwise denies paragraph 3.

4 It admits paragraph 4.

5 It admits paragraph 5.

6 As to paragraph 6, it:

(a) admits that the second applicant (**BIK23**) has, and had at all material times, attention deficit hyperactive disorder (**ADHD**); and

(b) otherwise does not know and therefore does not admit paragraph 6.

7 As to paragraph 7, it:

(a) admits that BIK23 was detained in Unit 18 during the following periods:

(i) 20 July 2022 to 10 August 2022;

(ii) 16 August 2022 to 6 September 2022;

(iii) 8 November 2022 to 13 January 2023; and

(iv) 27 January 2023 to 7 August 2023.

(b) otherwise denies paragraph 7.

8 As to paragraph 8, it:

(a) admits that BIK23 was a child of 16 or 17 years of age in the period from 20 July 2022 to 5 August 2023; and

(b) otherwise denies the allegations in paragraph 8.

C. THE GROUP MEMBERS

9 As to paragraph 9, it:

(a) says that, between 13 July 2022 and 23 May 2025, “detainees” (within the meaning of section 3 of the *Young Offenders Act 1994 (WA) (YO Act)*) were detained in Unit 18, which was declared to be a detention centre under section 13 of the YO Act;

(b) says that as to the “**DDA sub-group**” (as that term is defined in paragraph 2(b)(i) of the Further Amended Originating Application filed on 12 June 2024 (**FAOA**)) and/or the “**ADA sub-group**” (defined in paragraph 2(b)(ii) of the FAOA) the determination of the DDA sub-group claims and/or ADA sub-group claims would necessitate an examination of the particular circumstances of each incidence of disability discrimination or age discrimination alleged (as the case may be), such that the questions of law or fact set out in paragraphs 1 to 14 of the “Questions common to claims of group members” section on pages 4 and 5 of the FAOA are not common to the claims of the DDA sub-group members and/or ADA sub-group members;

(c) says that as to the “**Tort sub-group**” (as that term is defined in paragraph 2(b)(iii) of the FAOA):

(i) all claims of:

(A) false imprisonment, assault and/or battery (including by unlawful strip searches, unlawful use of restraints, unlawful use of force and/or unlawful use of controlled weapons) (**Trespass to the Person Claims**); and

(B) all claims of loss or injury caused by a breach of a duty of care (including by failing to take reasonable steps to prevent psychiatric injury to that sub-group) (**Negligence Claims**),

are “claim[s] for damages for harm caused by the fault of a person” within the meaning of sections 5A(1) and 5V(1) of the *Civil Liability Act 2002 (WA)* (**CLAWA**);

(ii) the determination of the:

(A) Trespass to the Person Claims; and/or

(B) Negligence Claims,

would necessitate an examination of the idiosyncrasies of each incidence alleged to constitute false imprisonment, assault, battery or breach of a duty of care such that the questions of law or fact alleged to be common to the claims of Group Members in paragraphs 6, 7, 8, 10, 12, 13 and 14 of the ‘Questions common to claims of group members’ section on pages 4 and 5 of the FAOA are not common to the claims of members of the Tort sub-group;

(d) says that by operation of ss 46PO(2) and (3) of the *Australian Human Rights Commission Act 1986 (Cth)* (**AHRC Act**), the Applicants cannot advance claims on behalf of group members alleging a breach of the *Disability Discrimination Act 1995 (Cth)* (**DDA**) or the *Age Discrimination Act 2004 (Cth)* (**ADA**) which occurred after the date of the making of a complaint to the Australian Human Rights Commission (**AHRC**);

(e) says that, to the extent that BIJ23 or BIK23 purport to advance claims in this proceeding in relation to Banksia Hill (whether on their own behalf or on behalf of group members in this proceeding) that are also advanced by the applicants in proceeding WAD251/2022 *Walters & Anor v State of Western Australia* on behalf of BIJ23 or BIK23 or group members in this proceeding in their capacity as group members in proceeding WAD251/2022, in circumstances where BIJ23 or BIK23 or group members in this proceeding have not opted out of proceeding WAD251/2022, the claims are an abuse of process and liable to be permanently stayed or stuck out; and

- (f) otherwise does not plead to paragraph 9 as it contains no allegations against it and makes no admission in respect of that paragraph.

10 It does not know and therefore cannot admit paragraph 10.

D. THE RESPONDENT

11 It admits paragraph 11.

12 As to paragraph 12, it:

(a) admits that:

- (i) it is vicariously liable for wrongful acts and omissions of the Minister responsible for the administration of the YO Act, acting within the scope of their authority;

- (ii) it is vicariously liable for wrongful acts and omissions of;

- (A) each Chief Executive Officer of the Department (as that term is defined in s 3 of the YO Act) (**CEO**);

- (B) each Superintendent (as that term is defined in s 3 of the YO Act);

- (C) each person who is appointed under section 11(1a)(a) of the YO Act as a custodial officer (**Officers**);

- (D) each prison officer (as that term is defined in s 3 of the YO Act); and

- (E) each police officer (as that term is defined in s 3 of the YO Act),

acting within the course of their employment; and

- (b) says that whether any wrongful act or omission of a CEO, Superintendent, Officer, prison officer and/or police officer was within the course of their employment requires:

- (i) an examination of the circumstances of each alleged incident;

- (ii) an enquiry as to whether the tortious act in question has a sufficiently strong connection with the employment, and what is entailed in that employment, so as to be said to have been done in the course of that employment; and

- (iii) taking into account specific features of the role assigned to the employee, which include characteristics such as authority, power, trust, control and the ability to exploit the relationship, which the employment places the wrongdoer in, in respect of the alleged victim;
- (c) says further that:
- (i) the Respondent, each Minister, each CEO, each Superintendent each Officer, prison officer and/or police officer is and was at all relevant times a “public body or officer” within the meaning of s 5U of CLAWA;
 - (ii) each of the:
 - (A) Trespass to the Person Claims; and/or
 - (B) the Negligence Claims,are “claim[s] for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and/or
 - (iii) in respect of the Trespass to the Person Claims and the Negligence Claims, a “policy decision” cannot be used to support a finding that the Respondent was at fault unless the decision was so unreasonable that no reasonable public body or officer in its position could have made it, pursuant to s 5X of CLAWA; and
- (d) otherwise denies paragraph 12.

E. BANKSIA HILL DETENTION CENTRE AND UNIT 18

13 As to paragraph 13, it:

- (a) admits that the Respondent has operated the Banksia Hill Detention Centre (**Banksia Hill**) from 5 September 1997 to date and that Banksia Hill is a detention centre declared pursuant to s 13 of the YO Act; and
- (b) otherwise denies the allegations in paragraph 13.

14 As to paragraph 14, it:

- (a) admits that on 13 July 2022, the Minister declared, under section 13 of the YO Act,

those buildings and enclosures situated within Casuarina Prison and known as “Unit 18” to be a detention centre, commencing operation on 14 July 2022 (**Unit 18**); and

- (b) says further that the declaration referred to in paragraph 14(a) above was a “policy decision” within the meaning of sections 5U and 5X of CLAWA.

15 As to paragraph 15, it:

- (a) admits that on 20 July 2022, 17 detainees, who had immediately prior to that point been detained in Banksia Hill, were transferred to Unit 18; and
- (b) otherwise denies the allegations in paragraph 15.

16 It admits paragraph 16.

F. RELEVANT PROVISIONS OF THE YO ACT AND YO REGULATIONS

17 As to paragraph 17, it:

- (a) admits that the provisions of the YO Act and the *Young Offenders Regulations 1995 (YO Regulations)* pleaded in SOC [18] to [42] are material to the matters pleaded in the SOC;
- (b) says that the materiality and legal meaning of those provisions requires full consideration of the language of each of the YO Act and YO Regulations viewed as a whole and the context, general purpose and policy of the YO Act and YO Regulations; and
- (c) otherwise denies the allegations in paragraph 17.

Objectives and principles

18 It admits paragraph 18.

19 It admits paragraph 19.

Detainees, key persons and administration

20 It admits paragraph 20.

21 As to paragraph 21, it:

- (a) admits that:
- (i) the relevant Minister is responsible for administering the YO Act and the YO Regulations;
 - (ii) under s 9 of the YO Act, it is the duty of the CEO, under the direction of the Minister, “to carry into operation the provisions of [the YO] Act so far as the duty is not expressly committed to any other person”;
 - (iii) under s 3 of the YO Act, “superintendent” means the “person in charge of the detention centre”;
 - (iv) under s 11(1) of the YO Act, the CEO may appoint, under and subject to Part 3 of the *Public Sector Management Act 1994* (WA), such officers and other persons as are necessary to implement or administer the YO Act;
 - (v) under s 11(1a) of the YO Act, in addition to persons appointed under s 11(1) and for the purposes of the YO Act, the CEO may appoint:
 - (A) custodial officers for primarily non-administrative functions; and
 - (B) officers and employees of particular classes as are prescribed by the regulations,
 and may remove those persons in the prescribed circumstances; and
 - (vi) under s 3 of the YO Act, “custodial officer” means:
 - (A) a superintendent, or other officer with custodial functions, appointed under s 11(1) of the YO Act; or
 - (B) a person who is appointed under s 11(1a)(a) of the YO Act as a custodial officer;
- (b) says that the CEO may, by a signed instrument of delegation, delegate to an officer of the Department, either generally or as otherwise provided in the instrument, any power or duty under the YO Act, pursuant to s 10 of the YO Act; and
- (c) otherwise denies the allegations in paragraph 21.

22 As to paragraph 22, it:

- (a) admits that, under s 11B of the YO Act, a custodial officer:
 - (i) has a responsibility to maintain the security of the facility or detention centre where he or she is employed;
 - (ii) must obey all lawful orders given to him or her by the officer under whose control or supervision he or she is placed; and
 - (iii) 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 facility or detention centre, and 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; and
- (b) says that, under s 11B of the YO Act, a custodial officer is liable to answer for the escape of a detainee placed in his or her charge or for whom when on duty he or she has a responsibility;
- (c) otherwise denies the allegations in paragraph 22.

23 As to paragraph 23, it:

- (a) admits:
 - (i) paragraph 23(a);
 - (ii) that under s 11E(2) of the YO Act a prison officer when assisting under s 11E(1) of the YO Act:
 - (A) has the powers;
 - (B) is subject to the responsibilities; and
 - (C) is to receive the protection from liability,

which in like circumstances would be conferred or imposed on a custodial officer, in addition to the powers and duties conferred and imposed on that prison officer by or under any other law; and
 - (iii) that under s 11E(3) of the YO Act a prison officer when assisting under s 11E(1) of the YO Act may use such force as can be used by a custodial

officer and, with the approval of the CEO, may use such control weapons as are necessary in the circumstances; and

(b) otherwise denies the allegations in paragraph 23.

24 As to paragraph 24, it:

(a) admits:

(i) paragraph 24(a);

(ii) that under s 11F(2) of the YO Act a police officer when assisting under s 11F(1) of the YO Act:

(A) has the powers;

(B) is subject to the responsibilities; and

(C) is to receive the protection from liability,

which in like circumstances would be conferred or imposed on a custodial officer, in addition to the powers and duties conferred and imposed on that police officer by or under any other law; and

(b) otherwise denies the allegations in paragraph 24.

25 As to paragraph 25, it:

(a) admits that:

(i) s 13(1) of the YO Act empowers the Minister to declare a place to be a "detention centre";

(ii) s 118A(1) of the YO Act provides that if:

(A) as a result of a sentence imposed by a court a young person is to be imprisoned; and

(B) the young person is under 18 years old at the time when under that sentence he or she is to be imprisoned,

then, unless a direction has been made under s 118(4) of the YO Act, the young person is to serve that sentence in a detention centre and not in a

prison until a direction is made under s 178 of the YO Act; and

(b) otherwise denies the allegations in paragraph 25.

26 It admits paragraph 26.

Orders, force, restraint and confinement

Power to give orders

27 It admits paragraph 27 and, in this defence, refers to the power under section 11B(d) of the YO Act, which provides that an Officer may issue “such orders to a detainee as are necessary for the purposes of the YO Act, including the security, good order, or management of a detention centre and [to] use such force as is prescribed under s 11C as is necessary to ensure that lawful orders given to a detainee are complied with”, as the “**Compliance with Orders Power**”.

Use of force

28 As to paragraph 28, it:

- (a) admits that under s 11C of the YO Act, a custodial officer:
 - (i) is authorised to use no more than “prescribed force” in the management, control and security of a facility or detention centre (**Management, Control and Security Power**); and

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- (i) Reg 71(1) of the YO Regulations provides that “prescribed force” means “the degree of physical force which is the minimum required to control a detainee’s behaviour in the circumstances”.
- (ii) must not use force on a young offender unless that force is used in the “prescribed circumstances”;

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- (i) Reg 72(1) of the YO Regulations provides that “prescribed circumstances” means “an immediate period when a detainee is imminently presenting a risk of physical injury to himself or herself, other detainees or staff”.

- (b) refers to and repeats paragraph 22(a)(iii) above and says that the Compliance with Orders Power authorises the use of force;
- (c) refers to and repeats paragraph 40(a)(iii) below and says that the Use of Force in Searches Power (as defined in paragraph 40(a)(iii) below) authorises the use of force;
- (d) refers to and repeats paragraph 32(b) below and says that the Restraints Power (as defined in paragraph 30(b) below) authorises the use of force; and
- (e) otherwise denies the allegations in paragraph 28.

29 It admits paragraph 29 and says further that the provisions of the YO Act prevail over the YO Regulations to the extent of any inconsistency.

Restraint

30 It admits paragraph 30 and says further that:

- (a) “**restraint**” under the YO Act and YO Regulations has its ordinary meaning of “a measure or condition that keeps someone or something under control”; and
- (b) in this defence, it uses the term “**Restraints Power**” to refer to the power under s 11D(1) of the YO Act, which provides that the CEO or a Superintendent may authorise and direct the use of a restraint (being, in its ordinary meaning, “a measure or condition that keeps someone or something under control”) where, in their opinion, such restraint is necessary (among other things) to prevent the young offender injuring himself or herself, or any other person”.

31 It admits paragraph 31.

32 As to paragraph 32, it:

- (a) admits that s 11D(3) provides that if restraint is used in relation to a young offender for a continuing period of more than 24 hours, the use and the circumstances must be reported as soon as practicable to the CEO by the Superintendent who has overall responsibility for the young offender at the time;
- (b) says that s 11D(3) does not refer to a restraint being used “on” a detainee but, rather, “in relation to” a detainee; and

- (c) otherwise denies the allegations in paragraph 32.

Confinement

33 As to paragraph 33, it:

- (a) admits paragraphs 33(a) to 33(c);
- (b) says that:
 - (i) “confinement” in the YO Regulations means that a detainee is “confined to that detainee’s sleeping quarters or a designated room” during unlock hours (reg 73 and 74 of the YO Regulations);
 - (ii) the definition of “unlock hours” in reg 73 of the YO Regulations contemplates that detainees may not be able “to leave their sleeping quarters” because they are subject to “confinement or restraint”;
 - (iii) a detainee is not “subject to confinement” within the meaning of the YO Regulations if they are “confined to that detainee’s sleeping quarters or a designated room” not during unlock hours (emphasis added);
 - (iv) reg 74(2) of the YO Regulations provides that “superintendent may order that a detainee be confined to that detainee’s sleeping quarters or to a designated room in order to maintain good government, good order or security in a detention centre”; and
- (c) otherwise denies the allegations in paragraph 33.

34 As to paragraph 34, it:

- (i) admits that “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”; and

- (a) otherwise denies the allegations in paragraph 34.

35 It admits paragraph 35.

36 As to paragraph 36, it:

- (a) admits that:

- (i) s 196(1) of the YO Act empowers the Governor to “make regulations prescribing all matters that are required or permitted by [the YO] Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of [the YO] Act”; and
- (ii) admits that s 196(2)(e) of the YO Act 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"; and

(b) otherwise denies the allegations in paragraph 36.

37 As to paragraph 37, it:

(a) admits that:

- (i) reg 74(1) of the YO Regulations provides that a “superintendent or a visiting justice may order that a detainee be confined to that detainee’s sleeping quarters or to a designated room as a way of dealing with a detainee who has been found to have committed a detention offence”; and
- (ii) reg 72(2) of the YO Regulations provides that “superintendent may order that a detainee be confined to that detainee’s sleeping quarters or to a designated room in order to maintain good government, good order or security in a detention centre”;

(b) refers to and repeats paragraph 30 above; and

(c) otherwise denies the allegations in paragraph 37.

38 As to paragraph 38, it:

(a) admits the content of the YO Regulations in paragraphs 38(a) to (d); and

(b) otherwise denies the allegations in paragraph 38.

Search

39 As to paragraph 39, it:

(a) says that s 196(3) of the YO Act provides that, without limiting s 196, the Governor may make regulations for the management, control, and security of detention centres generally or a specified detention centre and for, among other things, the management, control, and security of detainees:

(i) conferring authority on a Superintendent to search a detainee and take from him or her any thing found on his or her person:

(A) which apparently was not issued to the detainee with the approval of the Superintendent; or

(B) which has been retained by the detainee without the approval of the Superintendent; or

(C) which, although issued or retained with the approval of the Superintendent, appears to the Superintendent to constitute a threat to or breach of the security or good order of the detention centre,

and to use such force as is reasonably necessary for the purpose of performing that search or seizure; and

(ii) conferring authority on a Superintendent to use a trained dog to assist in carrying out a prescribed search; and

(iii) limiting the liability for injury or damage caused by the use of a trained dog when under the control of an authorised person in carrying out a search, and when the search was carried out in prescribed circumstances; and

(b) otherwise denies the allegations in paragraph 39.

40 As to paragraph 40, it:

(a) says that:

(i) reg 82(1) of the YO Regulations provides that a Superintendent “is authorised to search any detainee in accordance with this Part and take from him or her any illegal or unauthorised thing found on his or her person”;

- (ii) reg 83 of the YO Regulations provides that a Superintendent “is authorised to use a trained dog to assist in carrying out a search in accordance with this Part”;
- (iii) reg 84 of the YO Regulations provides that a Superintendent “is authorised to use such force as is reasonably necessary to perform a search and to take from a detainee in, entering or leaving a detention centre any illegal or unauthorised thing found during a search” (**Use of Force in Searches Power**); and
- (iv) a Superintendent may direct an Officer to undertake a search on their behalf; and

(b) otherwise denies the allegations in paragraph 40.

41 As to paragraph 41, it:

(a) admits that:

- (i) reg 85(1) of the YO Regulations provides that a detainee “should” be searched:
 - (A) on admission to the detention centre;
 - (B) immediately before discharge from the detention centre;
 - (C) on leaving or returning to a detention centre; and
 - (D) when transferring from one detention centre to another; and
- (ii) reg 85(2) provides that a detainee “may” be searched “at any time, and in such a manner, as is considered necessary at the time by the superintendent” (**Search Power**);

(b) says further that the authorisation of searches of detainees:

- (i) on admission to a Banksia Hill;
- (ii) immediately before discharge from Banksia Hill;
- (iii) on leaving or returning to Banksia Hill;
- (iv) when transferring from Banksia Hill to another detention centre;

- (v) on placement into an observation or multi-purpose cell;
- (vi) on receipt of intelligence;
- (vii) on discovery of contraband during a pat search or refusal by the detainee to comply with a pat search; and/or
- (viii) on such other occasions and in such a manner as the Superintendent or their delegate considered necessary to ensure the good order, security and safety of Banksia Hill and the wellbeing of detainees and staff,

is a “policy decision” within the meaning of sections 5U and 5X of CLAWA (**Conduct of Searches Policy Decision**); and

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- (i) Commissioner’s Operating Policy and Procedure (COPP) 9.6 Searching;
 - (ii) COPP 2.1 Admissions; and
 - (iii) see also reg 85 of the YO Regulations. Regulation 85(2) provides that “A detainee may be searched at any time, and in such a manner, as is considered necessary at the time by the superintendent”.
- (c) otherwise denies the allegations in paragraph 41.

42 As to paragraph 42, it:

- (a) admits that reg 86 of the YO Regulations provides that:
 - (i) a detainee may be searched using either a “pat” or “strip” search depending on the circumstances surrounding the requirement of the search;
 - (ii) 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:
 - (A) jeopardise the safety, good order or security of the detention centre;
 - or

- (B) be used for self-harm;
 - (iii) at least 2 officers must be present during a search of a detainee;
 - (iv) a detainee must not be “strip” searched in the sight or immediate presence of a person of the opposite gender;
 - (v) where practicable, a detainee should not be “strip” searched in the immediate presence of another detainee;
 - (vi) any search of a detainee must be conducted with due regard to the decency and self-respect of the detainee;
 - (vii) despite sub-regulation 86(4), a Superintendent may direct that a search is to be carried out in the presence of a medical practitioner or a nurse; and
 - (viii) 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; and
- (b) otherwise denies the allegations in paragraph 42.

G. CLAIMS OF FALSE IMPRISONMENT

43 It does not plead to paragraph 43 as the paragraph contains no allegations against it and makes no admission in respect of that paragraph.

44 It denies paragraph 44 and says further that:

- (a) section 118A of the YO Act provides that a young person sentenced by a court to be imprisoned must serve the sentence in a detention centre and not in a prison, unless a direction is made in respect of the young person under ss 118(4) or 178(3) or the young person is transferred under section 178A(2) of the YO Act;
- (b) a detainee is lawfully held in a Detention Centre:
 - (i) if in accordance with a remand warrant issued within the meaning of the *Criminal Procedure Act 2004* (WA);
 - (ii) if in accordance with a warrant of commitment issued with the meaning of the *Sentencing Act 1995* (WA); or

- (iii) if in accordance with ss 19 and/or 21 of the YO Act; and
- (c) the powers conferred by regs 73 and 74 of the YO Regulations do not derogate from the:
 - (i) Compliance with Orders Power; and/or
 - (ii) Management, Control and Security Power,
 under the YO Act and refers to and repeats paragraph 33(b) above; and
- (d) none of the matters pleaded in paragraphs 44(b) to 44(g) of the SOC render the confinement of a detainee unlawful if that confinement was otherwise lawful.

H. CLAIMS OF BATTERY AND/OR ASSAULT

45 As to paragraph 45, it:

- (a) as to paragraph 45(a), it:
 - (i) admits that the YO Act and YO Regulations authorise contact with a detainee:
 - (A) pursuant to the Management, Control and Security Power in s 11C of the YO Act and regs 71 and 72 of the YO Regulations; and
 - (B) pursuant to the Search Power and Use of Force in Searches Power and regs 84 to 87 of the YO Regulations;
 - (ii) says that the following persons may use “prescribed force” (being physical force to the degree which is the minimum required to control a detainee’s behaviour in the circumstances) if necessary to ensure that lawful orders given to a detainee are complied with:
 - (A) a custodial officer (pursuant to s 11B(d) of the YO Act);
 - (B) a prison officer (pursuant to ss 11E(2) and 11E(3) of the YO Act);
and
 - (C) a police officer (pursuant to s 11F(2) of the YO Act);
 - (iii) says further that the persons identified in paragraph 45(a)(ii) above may use

“prescribed force” in exercising a power under the YO Act and/or YO Regulations;

- (iv) refers to and repeats paragraph 30 above and says that under the YO Act and YO Regulations:
 - (A) the terms “restraint” (being “a measure or condition that keeps someone or something under control”) and “prescribed force” are not mutually exclusive; and
 - (B) use of “prescribed force” may include the use of “restraint” (including as set out in s 11D of the YO Act);
- (b) denies the allegations in paragraph 45(b) and refers to and repeats paragraphs 28(a) to 28(d) and 45(a)(ii) to 45(a)(iv) above;
- (c) as to paragraph 45(c), it admits that reg 71(1) of the YO Regulations does not authorise 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;
- (d) as to paragraph 45(d), it admits that reg 71(2) of the YO Regulations does not authorise 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;
- (e) denies the allegations in paragraph 45(e) and refers to and repeats paragraphs 28(a) to 28(d) and 45(a)(ii) to 45(a)(iv) above;
- (f) denies the allegations in paragraphs 45(f) and 45(g), refers to and repeats paragraph 41(a) above and says that:
 - (i) reg 85(2) of the YO Regulations provides that “a detainee may be searched at any time, and in such a manner, as is considered necessary at the time by the superintendent”; and
 - (ii) the use of the word “may” in reg 86(1) of the YO Regulations is permissive

and in contrast to the use of the word “must” in regs 86(3), 86(4), 86(6) and 86(8) of the YO Regulations;

- (g) says further that in the period in which BIJ23 and BIK23 were detained in Unit 18 (being the period from 20 July 2022 to 17 April 2024):
 - (i) at least the following physical restraint holds (defined in paragraph 77(d) below) were authorised by the Superintendent;
 - (A) a figure four restraint (until 14 December 2022);
 - (B) an escort hold or wrist weave hold;
 - (C) prone position with the detainee’s arms in the small of the lower back;
 - (D) an under hook and pike hold; and
 - (E) an **over hook and pike hold** is a variation of the under hook and pike hold and may be used for a detainee of a small size reducing the risk of discomfort to the shoulders. by inserting one arm over the detainee’s shoulder; and
 - (ii) each custodial officer and prison officer received instruction in the proper use of at least those physical restraint holds as part of their standard training;
- (h) says further that the use of force on a detainee may be justified in self-defence at common law;
- (i) further, or alternatively, says that:
 - (i) the authorisation of the use of handcuffs on a detainee:
 - (A) where the movement of a detainee is required during periods of lockup where, to preserve the good government, order and security of Banksia Hill or Unit 18 (as applicable), handcuffs are, in the view of the shift manager, required;
 - (B) where, following an incident, the detainee is compliant but responding, staff determine in the interests of maintaining the safety of the detainee and others, that handcuffs are required for the removal of the detainee from the area;

- (C) where handcuffs are required to be applied in the controlled escort of a detainee; or
- (D) where a detainee has been placed on a management regime, approved by the Superintendent, which requires the application of handcuffs when out of cell,

is a “policy decision” within the meaning of sections 5U and 5X of CLAWA (**Use of Handcuffs Policy Decision**); and

PARTICULARS

- (i) During the period in which BIJ23 and BIK23 were detained in Unit 18 (being the period from 20 July 2022 to 17 April 2024), policies for the use of handcuffs on detainees were set out in COPP 5.2, COPP 8.2, COPP 10.2 and COPP 12.3.
- (ii) the authorisation of the use of a “two-point restraint” or “three-point restraint” or “leg shackling” on a detainee:
 - (A) where incident management, assessment, de-escalation and preparation has been undertaken;
 - (B) where a detainee presents as an imminent or ongoing risk to themselves, others or safety-critical equipment;
 - (C) where a detainee attempts to damage or obscure cell cameras or observation hatch, damages other safety-critical equipment, such as by compromising electricity and water to the point a detainee is likely to harm themselves, is observed hurting themselves or heard making threats that indicate a willingness to self-harm and alternatives to restraints are not available, have been exhausted or have failed;
 - (D) where a detainee is presenting as an imminent risk in cell damage incidents and de-escalation techniques relative to the detainee’s age and cognitive abilities have been exhausted and been ineffective;
 - (E) where two-point restraints or three-point restraints are required to be applied during high security escorts or escorts to a non-secure location; or

- (F) where a three-point restraint is applied where an escorting officer is required to be one-to-one with a prisoner during a hospital visit,
- is a “policy decision” within the meaning of ss 5U and 5X of CLAWA (**Use of Mechanical Restraints Policy Decision**);

PARTICULARS

- (i) During the period in which BIJ23 and BIK23 were detained in Unit 18, (being the period from 20 July 2022 to 17 April 2024), policies for the use of two and three point restraints were set out in COPP 10.2; Instruments of Restraint – Youth Custodial Training Manual; Superintendent’s Notice 1 of 2022.
- (iii) the claims in paragraphs 45 to 46 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA;
- (iv) pursuant to s 5X of CLAWA, the Conduct of Searches Policy Decision, Use of Handcuffs Policy Decision and/or Use of Mechanical Restraints Policy Decision cannot be used to support a finding that the Respondent was at fault unless the Conduct of Searches Policy Decision, Use of Handcuffs Policy Decision and/or Use of Mechanical Restraints Policy Decision was so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it; and
- (j) otherwise denies the allegations in paragraph 45.
- 46 As to paragraph 46, it:
- (a) refers to and repeats paragraphs 45(a) to 45(i) above;
- (b) says that any apprehension as alleged in paragraphs 46(a) and 46(b) must have been objectively reasonable and requires an examination of the particular circumstances of each alleged assault; and
- (c) otherwise denies the allegations in paragraph 46.

I. DUTY OF CARE

47 It admits paragraph 47.

48 As to paragraph 48, it:

- (a) refers to and repeats paragraphs 2 and 6 above;
- (b) admits that some detainees were persons who had experienced trauma, abuse or neglect both before and after being a detainee and says that the nature of any such trauma, abuse or neglect varied from detainee to detainee, as did the behaviour of those detainees (if any) due to such trauma, abuse or neglect;
- (c) admits that some detainees had neurodevelopmental impairment including one or more of cognitive impairment, behavioural disorders and/or other mental health conditions and says that the nature of such impairment varied from detainee to detainee;
- (d) says that some detainees, including BIJ23 and BIK23, were at all material times not “person(s) of normal fortitude” within the meaning of s 5S of CLAWA; and
- (e) otherwise does not know and therefore cannot admit paragraph 48.

Control over risk of harm

49 As to paragraph 49, it:

- (a) refers to and repeats paragraph 47 above;
- (b) says that, pursuant to s 5W of CLAWA, in determining whether the Respondent, the Minister, the CEO, the Superintendent, any Officer, prison officer and/or police officer has a duty of care or has breached a duty of care, the Court must have regard to the following matters:
 - (i) the functions required to be exercised by the public body or officer are limited by the financial and other resources that are reasonably available to the public body or officer for the purpose of exercising those functions;
 - (ii) the general allocation of those resources by the public body or officer is not open to challenge;

- (iii) the functions required to be exercised by the public body or officer are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate); and
 - (iv) the public body or officer may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate;
- (c) admits that the Minister, the CEO, the Superintendent, Officers, prison officers and/or police officers knew, or ought reasonably to have known that detainees were children who had, or were likely to have, the Detainee Characteristics;
- (d) refers to and repeats paragraph 48 above;
- (e) as to paragraph 49(b), it:
- (i) admits that at all material times, the Minister and/or CEO had the right and ability to determine who was employed in Unit 18 and Banksia Hill, what skills were required, what training and procedures would be followed, and what persons would be allowed into a Detention Centre, subject to the provisions of the YO Act and *Public Sector Management Act 1994 (WA)*, including subsidiary legislation made thereunder; and
 - (ii) says that the ability to determine who was employed in Unit 18 and Banksia Hill, what skills those persons were required to have and what training and procedures would be followed was (and is) limited by the financial and other resources that were (and are) reasonably available to Unit 18 and Banksia Hill for the purpose of exercising those functions;

PARTICULARS

- (i) Unit 18 and Banksia Hill have faced challenges in dealing with damage to property caused by detainees, recruiting necessary staff and staff absences (including due to workers compensation claims). Further particulars will be provided following discovery and/or the filing of evidence.
- (f) as to paragraph 49(c), it:

- (i) admits that each Minister, CEO, Superintendent and Officer, prison officer and/or police officer has the rights and powers conferred upon them at the relevant time by the YO Act and YO Regulations;
- (ii) says further that the “ability to determine how and when detainees were exposed to contact with other detainees” depended, in part, on:
 - (A) the circumstances prevailing in Unit 18 at the relevant time; and/or
 - (B) the limited financial and other resources that were reasonably available to Unit 18 for the purpose of exercising its functions; and

PARTICULARS

- (i) It refers to and repeats the particulars to paragraph 49(e) above.
- (g) otherwise denies the allegations in paragraph 49.

Vulnerability

50 As to paragraph 50, it:

- (a) says that in that form the allegation is embarrassing and/or ambiguous in that it does not identify the risk(s) of harm in respect of which the detainees are alleged to be vulnerable; and
- (b) under cover of the above objection, denies the allegations in paragraph 50.

The Respondent’s duty of care

51 As to paragraph 51, it:

- (a) refers to and repeats paragraphs 48 and 49 above;
- (b) admits that a detaining authority has a duty to exercise reasonable care for the physical safety of a detainee;
- (c) says that:
 - (i) such a duty of a detaining authority does not require the authority to ensure the physical health and safety of a detainee but, rather, is an obligation of reasonable care to avoid harm to the physical condition of a detainee; and

- (ii) the scope and content of any duty owed to each detainee and what types of risks of harm are encompassed by the duty is informed by:
 - (A) the matters set out in s 5W of CLAWA;
 - (B) the obligation of each Minister, CEO, Superintendent, Officer, prison officer and/or police officer to ensure the effective detention of detainees in accordance with the law; and
 - (C) the duty of care owed to employee of Unit 18, including each Superintendent, Officer, prison officer and/or police officer;

PARTICULARS

- (i) It refers to and repeats the particulars to paragraph 49(e) above.
- (d) says that:
- (i) section 5S of CLAWA provides that the Minister, the CEO, the Superintendents, Officers, prison officers and/or police officers did not owe a duty of care to the Applicants to take care not to cause the Applicants' mental harm unless the Minister, CEO, Superintendents, Officers, prison officers and/or police officers (as the case may be) ought to have foreseen that a person of normal fortitude might, in the circumstances of the case, suffer a recognised psychiatric illness if reasonable care were not taken;
 - (ii) section 5S of CLAWA requires a particular and separate inquiry into the existence and content of a duty of care with respect to mental harm;
 - (iii) section 5S of CLAWA imposes a qualification on the test of reasonable foreseeability by specifying three elements that a respondent ought to have foreseen, namely:
 - (A) that “a person of normal fortitude” might;
 - (B) “in the circumstances of the case” suffer; and
 - (C) “a recognised psychiatric illness”, if reasonable care were not taken;

- (iv) section 5S of CLAWA requires the Applicants to identify with some precision the nature of the risk which might give rise to mental harm by identifying the risk of particular events which might give rise to mental harm;
 - (v) there is no articulation in paragraph 51 of the SOC of the nature of the conduct that the Respondent should have foreseen which might lead a person of normal fortitude to suffer a psychiatric illness; and
 - (vi) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk;
- (e) says further that:
- (i) section 5B of CLAWA requires the Applicants to identify and articulate the "risk of harm" against which it is alleged the Respondent would be negligent for failing to take precautions;
 - (ii) paragraphs 47 to 51 of the SOC do not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22]; and
 - (iii) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk; and
- (f) otherwise denies the allegations in paragraph 51.

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

52 As to paragraph 52, it:

- (a) refers to and repeats paragraphs 51(a) to 51(c) above; and
- (b) otherwise denies the allegations in paragraph 52.

53 As to paragraph 53, it:

- (a) admits paragraph 53(a);
- (b) refers to and repeats paragraphs 48, 51(a) to 51(c) above; and

(c) otherwise denies the allegations in paragraph 53.

J. RELEVANT AREAS UNDER THE DDA AND ADA

54 As to paragraph 54, it:

(a) says that, during the Relevant Period:

(i) the Respondent administered education and training at:

(A) Banksia Hill; and

(B) Unit 18;

(ii) Auwest Specialist Education and Training Services (**ASETS**) was a registered training organisation (**RTO**), registered by the Training Accreditation Council (**TAC**), to deliver vocational education and training (**VET**) programs to detainees of Unit 18;

(iii) the Certificate in General Education for Adults (**CGEA**) was a VET program, which contained curriculum accredited in Victoria, by the Adult, Community and Further Education Board. The Respondent did not develop the curriculum;

(iv) ASETS accepted enrolments in the CGEA; and

(v) ASETS was administered by the Department; and

(b) otherwise admits the allegations in paragraph 54.

55 As to paragraph 55, it:

(a) refers to and repeats paragraph 54 above;

(b) admits that Banksia Hill and Unit 18 were each an educational institution;

(c) does not know and therefore cannot admit that the Superintendent or Officers were members of staff of an educational institution; and

(d) otherwise admits the allegations in paragraph 55.

56 As to paragraph 56, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
 - (ii) does not specify which of the matters in paragraph 56(a) to (k) are said to be:
 - (A) goods; and/or
 - (B) services; and/or
 - (C) facilities;
- (b) says that:
 - (i) it admits that during the Relevant Period it provided the matters set out in paragraphs 55(a), (c), (d), (e), (g), (h), (g2), (g3) of the SOC to detainees at Banksia Hill and/or Unit 18;
 - (ii) it does not know and therefore cannot admit that it provided the matters set out in paragraphs 55(b), (f), (i) and (k) of the SOC to detainees during the Relevant Period, unless and until particulars are provided of the specific matters that BIK23 and BIJ23 allege were provided to them;
 - (iii) says further that as an inherent part of detention, the Respondent provided or made available to detainees at Banksia Hill and/or Unit 18:
 - (A) a place to receive visits from friends, relatives and legal advisors;
 - (B) telephones to communicate with friends, relatives and legal advisors;
 - (C) a space for recreation and exercise;
 - (D) goods and services for recreation and exercise; and
 - (E) food and canteen services;
- (c) otherwise denies the allegations in paragraph 56.

57 As to paragraph 57, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise; and
 - (ii) does not specify which of the matters in paragraphs 57(a) to (k) are said to be:
 - (A) goods; and/or
 - (B) services; and/ or
 - (C) facilities; and
- (b) under cover of that objection:
 - (i) refers to and repeats paragraph 56; and
 - (ii) otherwise denies the allegations in paragraph 57.

58 As to paragraph 58, it:

- (a) objects to paragraph 58 and says that the paragraph is embarrassing and/or ambiguous in that it pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise; and
- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 56 and 57 above; and
 - (ii) otherwise denies the allegations in paragraph 58.

K. BEHAVIOURAL REGIME

59 As to paragraph 59, it:

- (a) objects to paragraphs 59(a)(ii) to (vi) and says that the requirements listed are not facially neutral when such conduct is alleged to be a manifestation of BIJ23's or BIK23's disabilities, and therefore does not give rise to a "requirement" or "condition" within the meaning of section 6(2) of the DDA;

- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 21 to 42 and 54 to 57 above;
 - (ii) admits that BIJ23, BIK23 and other detainees were required to comply with all lawful demands, directions and orders given or made by the CEO, Superintendent and Officers within the scope of their powers afforded by the YO Act and YO Regulations; and
 - (iii) says that to the extent that the matters listed in paragraphs 59(a)(ii) to (iv) formed the subject of a valid demand, direction or order given or made by the CEO, Superintendent and Officers within the scope of their powers afforded by the YO Act and YO Regulations, it admits that all detainees were required to comply;
- (c) says that insofar as there was a “Behavioural Regime” (which it denies), the requirements in paragraphs 59(a)(i) to (vi) were in order to:
 - (i) protect BIJ23 and/or BIK23 from harm to themselves and others;
 - (ii) maintain the safety and security of other detainees;
 - (iii) maintain the safety and security of Officers and other staff;
 - (iv) maintain the security, good order and management of each detention facility; and/or
 - (v) to exercise and perform powers and duties conferred by the YO Act and YO Regulations,(together, the **Safety and Security Objectives**);
- (d) says that insofar as detainees engaged in Proscribed Conduct, it acted in accordance with the requirements set out in paragraphs 27 to 42 above; and
- (e) otherwise denies the allegations in paragraph 59.

60 As to paragraph 60, it:

- (a) refers to and repeats paragraph 59 above, including the objection; and
- (b) otherwise denies the allegations in paragraph 60.

61 As to paragraph 61, it:

- (a) refers to and repeats paragraph 59 above, including the objection; and
- (b) otherwise denies the allegations in paragraph 61.

62 As to paragraph 62, it:

- (a) refers to and repeats paragraphs 56 to 61 above;
- (b) says that detainees were placed in Unit 18 in situations where they were not able to be safely and securely accommodated at Banksia Hill; and

PARTICULARS

- (i) The method and criteria by which detainees at Banksia Hill are identified, referred, assessed and placed in Unit 18 was set out in COPP 14.1 which became COPP 2.3 on 18 December 2023. COPP 2.3 provides that where, due to the detainee's behaviour, they are assessed as being unable to be accommodated safely and securely at Banksia Hill, the Superintendent/Officer in charge shall seek the Commissioner's approval to immediately transfer the detainee to Unit 18, prior to the completion of the referral process. Detainees are identified for referral to Unit 18 through a combination of a review of the Total Offender Management Solution system (**TOMS**), incident reviews and any other relevant documents; and
 - (ii) Unit 18 Multidisciplinary Meeting Initial Referral Reviews.
- (c) otherwise denies the allegations in paragraph 62.

L. CLAIMS OF BIJ23

L.1 False Imprisonment, assault and battery

False imprisonment

63 As to paragraph 63, it:

- (a) admits that during the time that BIJ23 was detained at Unit 18, Unit 18 was placed in "general lockdown" and/or "rolling lockdown" (as those terms are

defined in SOC [43]) on the basis of the Safety and Security Objectives;

PARTICULARS

- (i) During the time that BIJ23 was detained at Unit 18, detainees at Unit 18 were restricted to their cells or restricted to their living units during at least the following periods:
 - (A) between approximately 6.45pm in the evening each day until and 7:15am the following day (**Overnight Lockdown**);
 - (B) between approximately 12:00pm to 12:40pm and 4:00pm to 4:40pm for periods of approximately 30 to 40 minutes each day for staff breaks; and
 - (C) typically on Wednesdays or Fridays for approximately 3 hours for staff training subject to operational factors; and
 - (ii) it refers to paragraph 70 of the BIJ23 Schedule of Particulars.
- (b) says that some “general lockdowns” and/or “rolling lockdowns” referred to in paragraph 63(a) above were implemented when the number of staff who attended for work at Unit 18 that day was insufficient to have all detainees (who were not otherwise subject to confinement or restraint) out of their cells during unlock hours while at the same time maintain the security, good government, good order and/or management of Unit 18 and the safety and security of detainees, Officers, prison officers, police officers and other staff;

PARTICULARS

- (i) Further particulars of general lockdowns and/or rolling lockdowns during the time that BIJ23 was detained at Unit 18 will be provided following discovery and/or evidence.
- (c) says that the claims set out in paragraphs 63 to 87 and/or 124 to 128:
- (i) are “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and/or 5V(1) of CLAWA;
 - (ii) are subject to the following provisions of CLAWA:

- (A) ss 5U, 5V, 5W and/or 5X of Part 1C of CLAWA; and/or
- (B) Part 2 of CLAWA;
- (iii) include “claim[s] for personal injury damages for mental harm” within the meaning of s 5R(1) of CLAWA”; and/or
- (iv) are subject to ss 5Q, 5R, 5S and/or 5T of Part 1B of CLAWA; and
- (d) says further that the authorisation of general lockdowns and/or rolling lockdowns in the management of Unit 18 is a “policy decision” within the meaning of s 5U of CLAWA (**Lockdowns Policy Decisions**); and

PARTICULARS

- (i) During the period in which BIJ23 and BIK23 were detained in Unit 18 (being the period from 20 July 2022 to 17 April 2024), policies for the use of lockdowns and/or rolling lockdowns were set out in COPP 6.7. COPP 6.7 authorised the use of lockdowns in the following circumstances:
 - (A) in response to an emergency;
 - (B) to maintain the safety, security and good order of the detention centre;
 - (C) to facilitate planned/unplanned movements;
 - (D) insufficient staffing to maintain the safety, security and good order of the detention centre; and/or
 - (E) other circumstances as authorised by the Superintendent.

COPP 6.9 provides that the Overnight Lockdown commences at 6:45pm.
- (e) otherwise denies the allegations in paragraph 63.

64 It refers to and repeats paragraph 63 above and otherwise admits paragraph 64.

65 It refers to and repeats paragraph 63 above and otherwise admits paragraph 65.

66 As to paragraph 66, it:

- (a) refers to and repeats paragraphs 33(b), 37(a) and 63 above; and
- (b) otherwise denies the allegations in paragraph 66.

67 As to paragraph 67, it:

- (a) admits that the confinement of BIJ23 in his cell during a lockdown or rolling lockdown was not “detention offence” confinement; and
- (b) otherwise denies the allegations in paragraph 67.

68 As to paragraph 68, it:

- (a) says that BIJ23 was deprived of his liberty by reason of being a detainee at Unit 18;
- (b) refers to paragraph 44(a) and 44(b) above and paragraph 69(b) below; and
- (c) otherwise denies the allegations in paragraph 68.

69 As to paragraph 69, it:

- (a) refers to and repeats paragraphs 66 to 68 above;
- (b) refers to and repeats paragraph 44(b) above and says that BIJ23 was lawfully detained during the relevant periods;

PARTICULARS

- (i) Detention warrant issued 20 January 2022 authorising detention from 14 December 2021 for a total term of 4 months;
- (ii) detention warrant issued 20 January 2022 authorising detention from 14 December 2021 for a total term of 5 months;
- (iii) detention warrant issued 24 August 2022 authorising detention from 17 June 2022 for a total term of 1 year;
- (iv) detention warrant issued 14 February 2023 authorising detention from 4 February 2023 for a total term of 12 months;

- (v) detention warrant issued 11 October 2023 authorising detention from 11 October 2023 for a total term of 3 months; and
 - (vi) further particulars will be provided following discovery and/or evidence.
- (c) refers to and repeats paragraph 12(c) above;
- (d) refers to and repeats paragraph 63(b) and says further or in the alternative that:
 - (i) the claims in paragraphs 63 to 69 and/or 124 to 128 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Lockdowns Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Lockdowns Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (e) says further or in the alternative that:
 - (i) pursuant to reg 74(2) of the YO Regulations, the Superintendent may order that detainees be confined to their respective sleeping quarters or to a designated room in order to maintain good government, good order or security in Unit 18;
 - (ii) in implementing each general lockdown or rolling lockdown, the Superintendent and/or Officers ordered that the detainees be confined to their respective sleeping quarters or to a designated room in order to maintain good government, good order or security in Unit 18; and/or
 - (iii) such orders were made in order to maintain good government, good order or security in Unit 18;

PARTICULARS

- (i) It refers to paragraph 71 of the BIJ23 Schedule of Particulars.

- (f) says further or in the alternative that:
- (i) pursuant to s 11B(d) of the YO Act, an 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 facility or detention centre, and 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;
 - (ii) in implementing each general lockdown or rolling lockdown, Officers issued orders to detainees of Unit 18 to return to their cells; and/or
 - (iii) such orders were necessary for the purposes of the YO Act, including the security, good order and/or management of Unit 18; and

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 69(e) above.
- (g) says that when BIJ23 was confined to his sleeping quarters or another designated room during unlock hours, it was on the basis of the Safety and Security Objectives pursuant to the:
- (i) Management, Control and Security Power (see paragraph 69(e) above); and/or
 - (ii) Compliance with Orders Power (see paragraph 69(f) above); and
- (h) otherwise denies the allegations in paragraph 69.

70 As to paragraph 70, it:

- (a) says that:
- (i) during his detention in Banksia Hill and/or Unit 18, BIJ23 engaged in violence and threats of violence, including:
 - (A) on 27 June 2022, when BIJ23 was upset after seeing his lawyer and was aggressive and threatening towards staff;
 - (B) on 1 July 2022, when BIJ23 threatened to spit in the face of the nurse who was present to review him after the use of force;

- (C) on 24 August 2022, when BIJ23 threatened officers that he would fight them if they continued to enter his cell and clear his camera from obstruction;
 - (D) on 9 December 2022, when BIJ23 threatened and abused staff while being counselled to remove a ligature from around his neck;
 - (E) on 10 December 2022, when BIJ23 made highly sexualised and threatening comments towards female staff, and threw rocks at officers during a code red out of bounds incident; and
 - (F) those instances in the particulars sub-joined to paragraphs 96(c), 97(i), 97(k) and 97(m) below;
- (ii) during BIJ23's time in Unit 18, overnight lockdown usually started at 6.45pm and went until 7.45am the next day (being, the Overnight Lockdown);
 - (iii) refers to paragraph 69 above and says that when BIJ23 was confined to his sleeping quarters or another designated room during unlock hours, it was on the basis of the Safety and Security Objectives pursuant to the:
 - (A) Management, Control and Security Power; and/or
 - (B) Compliance with Orders Power;

PARTICULARS

- (i) It refers to paragraph 70(a) above and to paragraphs 3, 4, 42, 62 and 63 of the Respondent's schedule of particulars for BIJ23 (**BIJ23 Schedule of Particulars**).
- (b) says further or in the alternative that the confinement of a detainee to their sleeping quarters or to a designated room:
 - (i) following incidents of violence or threatened violence by a detainee;
 - (ii) following incidents of self-harm;
 - (iii) when insufficient Officers and/or other staff are available to supervise detainee(s) during unlock hours; and

- (iv) to interrupt a cycle of behaviour and provide the opportunity for detainees reflect on their behaviour and assist with the ongoing good government, good order or security of the detention centre;

is a “policy decision” within the meaning of ss 5U and 5X of CLAWA (**Specific Confinement Policy Decisions**); and

PARTICULARS

- (i) During the period in which BIJ23 and BIK23 were detained in Unit 18 (being the period from 20 July 2022 to 13 December 2023) policies for the use of confinement of a specific detainee were set out in COPP 5.2, COPP 6.1, COPP 6.4, COPP 6.10, Superintendent Notices’ 6 of 2024, 3 of 2024, 5 of 2022, and the ARMS Manual – Youth Version.

- (c) otherwise denies the allegations in paragraph 70.

71 As to paragraph 71, it:

- (a) admits that the confinement of BIJ23 to his sleeping quarters or another designated room during unlock hours on each of the occasions referred to in paragraph 70 above was not detention offence confinement;
- (b) refers to paragraph 72 below; and
- (c) otherwise denies the allegations in paragraph 71.

72 As to paragraph 72, it:

- (a) says that BIJ23 was deprived of his liberty by reason of being a detainee at Unit 18 and refers to and repeats paragraphs 44(a) and 44(b) above;
- (b) further or in the alternative, it refers to and repeats paragraph 70 above and says that when BIJ23 was confined to his sleeping quarters or another designated room during unlock hours, it was on the basis of the Safety and Security Objectives pursuant to the:
 - (i) Management, Control and Security Power; and/or
 - (ii) Compliance with Orders Power;

PARTICULARS

- (i) It refers to the particulars to paragraph 70(a)(iii) above.
- (c) refers to and repeats paragraph 63(b) above and says further or in the alternative that:
 - (i) the claims in paragraphs 70 to 73 and/or 124 to 128 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Specific Confinement Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Specific Confinement Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (d) otherwise denies the allegations in paragraph 72.

73 As to paragraph 73, it:

- (a) refers to and repeats paragraphs 70 to 72 above; and
- (b) denies the allegations in paragraph 73.

Strip searches

74 As to paragraph 74, it:

- (a) admits that BIJ23 was subjected to a half-and-half strip search (being a search in which half a person’s clothing is removed at a time, with those clothes put back on before removal of the other half) on 24 August 2022 and refers to and repeats paragraphs 41(a) and 42(a) above;

PARTICULARS

- (i) On 23 August 2023, BIJ23 was transferred back to Banksia Hill to attend a sentencing hearing via video link on 24 August 2022; he was subjected to a half-and-half strip search.
- (b) otherwise denies paragraph 74.

75 As to paragraph 75, it:

- (a) does not know and therefore cannot admit paragraph 75(a);
- (b) refers to and repeats paragraphs 41(a), 42(a) and 45(f) above and says that:
 - (i) reg 85(2) of the YO Regulations states that a “detainee may be searched at any time, and in such a manner, as is considered necessary at the time by the superintendent”;
 - (ii) reg 81(4) of the YO Regulations states that “if the superintendent is empowered to search a detainee, officer or other employee, or a person to whom Division 4 applies, the superintendent is empowered to direct an officer to undertake that search on his or her behalf”; and
 - (iii) reg 86(2) of the YO Regulations does not limit the conduct of strip searches to when there are circumstances giving rise to a reasonable suspicion that the detainee may be in possession of an item that could (a) jeopardise the safety, good order or security of the detention centre; or (b) be used for self-harm;
- (c) refers to and repeats paragraph 74(a) above and to the particulars thereto which identify the circumstances in which BIJ23 was searched; and
- (d) otherwise denies paragraph 75.

76 As to paragraph 76, it:

- (a) refers to and repeats paragraphs 74(a) and 75(c) above;
- (b) says that the searches conducted of BIJ23 were pursuant to the:
 - (i) Search Power;
 - (ii) Use of Forces in Searches Power;
 - (iii) Restraints Power; and/or
 - (iv) Compliance with Orders Power;
- (c) refers to and repeats paragraph 63(b) above and says further or in the alternative that:

- (i) the claims in paragraphs 74 to 76 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Conduct of Searches Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Conduct of Searches Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (d) otherwise denies the allegations in paragraph 76.

Use of force

77 As to paragraph 77, it:

- (a) refers to and repeats paragraph 70(a)(i) above;
- (b) admits that while BIJ23 was detained at Unit 18, he was sometimes subjected to the use of force of the kind set out in paragraphs 77(a) to 77(k) of the SOC;
- (c) says that the use of force on a detainee is authorised by the YO Act and the YO Regulations and in the circumstances referred to in paragraphs 28(a) to 28(d) and 45 above; and
- (d) refers to and repeats paragraph 45(g) above and says further that at all material times during the period that BIJ23 was detained in Unit 18 all Officers were trained in the use of physical restraint holds, including:
 - (i) an **escort hold** by which:
 - (A) a single Officer takes hold of, or makes contact with, one of the detainee’s arms or shoulders; and
 - (B) two Officers takes hold of a detainee’s arms, with each Officer holding one arm;
 - (ii) a **“wrist weave”**:

- (A) by which an Officer holds the detainee's arm with one hand, places the Officer's other arm at the inner side of the detainee's elbow and using the first hand, bends the detainee's arm at the elbow around the Officer's wrist;
 - (B) performed by two Officers, in which each Officer holds an opposite arm of the detainee;
- (iii) an "**under hook and pike hold**", by which an Officer inserts one arm under the detainee's armpit, and secures by cupping and then holds the detainee's shoulder with the hand of that Officer's first arm and applies downward pressure with a locked arm on the back of the detainee's neck with the Officer's other hand;
 - (iv) an Officer taking hold of a detainee's legs;
 - (v) one or more Officers forcing a detainee to the ground;
 - (vi) one or more Officers holding a detainee face down on the ground or on a mattress on the ground;
 - (vii) a "**figure four restraint**", by which one or more Officers positioned behind the detainee's legs hold a detainee by the legs in a "figure 4" position while the detainee is face down on the ground, such that the detainee's legs are interwoven in a pattern resembling the numeral 4 with one leg bent to the side and the other leg bent upward folded over the first leg, which was also referred to as "folding up";
 - (viii) restraining a detainee while handcuffs are applied to or removed from the detainee's wrists;
 - (ix) restraining a detainee while leg shackles are applied to or removed;
 - (x) use of a "**soft shield**", which is a large, padded shield and is designed to use on less threatening detainees, lowering the level of impact on the detainee; and
 - (xi) use of a "**hard shield**", which is a polycarbonate riot shield that offers more protection to the staff and has more of an impact on the detainee; it is the

decision of the section leader as to which shield should be used, and the appropriate level of force; and

(e) otherwise denies paragraph 77.

78 As to paragraph 78, it:

(a) admits that force of the kind described in one or more of paragraphs 77(a) to 77(k) of the SOC was used on BIJ23 during his detention in Unit 18; and

PARTICULARS

(i) Paragraphs 4, 11, 15, 17, 19, 29, 30, 31, 34, 37, 42, 56, 61, 63 and 66 of the BIJ23 Schedule of Particulars.

(b) otherwise denies paragraph 78.

79 As to paragraph 79, it:

(a) says that the circumstances in which force was used on BIJ23 are particularised in paragraph 78(a) above; and

(b) otherwise denies paragraph 79.

80 It does not know and therefore cannot admit paragraph 80.

81 As to paragraph 81, it:

(a) says that the says that the Compliance with Orders Power authorises the use of such force as is prescribed under s 11C(1) of the YO Act as is necessary to ensure that lawful orders given to a detainee are complied with and is not limited to the “prescribed circumstances” referred to in s 11C(2) of the YO Act and reg 72(1) of the YO Regulations and refers to and repeats paragraph 45 above;

(b) says further that the use of force on BIJ23 was pursuant to the:

(i) Compliance with Orders Power;

(ii) Management, Control and Security Power;

(iii) Restraints Power; and/or

(iv) Use of Force in Searches Power;

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 78(a) above.
- (c) further, or alternatively, says that on the occasions particularised below the use of force on BIJ23 was in self-defence at common law; and

PARTICULARS

- (i) Paragraphs 4, 6, 15, 16(4), 16(6), 29, 31(11), 33(4), 37, 45(5), 56(1), 56B(5), 63(1), 66, 68(9), 68(11), 68(16), and 69(7) of the BIJ23 Schedule of Particulars.
- (d) otherwise denies the allegations in paragraph 81.

81A. As to paragraph 81A, it:

- (a) admits that oleoresin capsicum spray was used on or near BIJ23 at Unit 18 on 30 July 2022, 21 June 2023, 5 February 2024 and 24 March 2024;
- (b) admits that oleoresin capsicum spray was at the time of the dates specified in subparagraph (a) above, a controlled weapon for the purposes of the *Weapons Act 1999* (WA) (**Weapons Act**);
- (c) admits paragraph 81A(c);
- (d) denies paragraph 81A(d) and says that from October 2012:
 - (i) reg 10A(2) of the *Weapons Regulations 1999* (WA) (**Weapons Regulations**) provides that a person does not commit an offence under section 7(1) of the *Weapons Act* only because the person, in the performance of the person's functions as a custodial officer, carries or possesses a capsicum spray weapon; and
 - (ii) reg 10A (3) of the *Weapons Regulations* provides that a person does not commit an offence under section 7(2) of the *Weapons Act* only because the person, in the performance of the person's functions as a custodial officer, carries or possesses a capsicum spray weapon in a manner that could reasonably be expected to cause someone: (1) to be injured or disabled; or (2) to fear that someone will be injured or disabled;

- (e) says further that:
- (i) section 5A(1)(a) of the Weapons Act provides that “lawful excuse” in relation to carrying or possessing a weapon includes carrying or possessing the weapon for the purposes of a lawful employment, duty or activity;
 - (ii) section 10(3) of the Weapons Act provides that a person does not commit an offence under section 6, 6A, 6B, 7, 8A or 8 of the Weapons Act in such circumstances, if any, as the regulations may prescribe;
 - (iii) regulation 10(a) of the Weapons Regulations provides that “a person does not commit an offence under section 6, 6A, 7 or 8 of the Act only because of something done by the person in the performance of the person's functions as ... a prison officer as defined in the *Prisons Act 1981*”;
 - (vii) section 11E of the YO Act provides that a prison officer who is assisting upon the request of the chief executive officer or a superintendent may use such force as can be used by a custodial officer and, with the approval of the chief executive officer, may use such control weapons as are necessary in the circumstances; and
 - (viii) the members of the Special Operations Group (**SOG**) who attended Unit 18 at the time of the dates specified in paragraph 81A(a) above were authorised by the CEO to use the weapons set out in paragraph 81A(a) above.

PARTICULARS

- (i) The standard procedure by which the SOG is deployed to a youth detention centre, including Unit 18, involves a request from a Superintendent to the Commissioner for Young People or Duty Deputy Commissioner for Young People. By authorising such a deployment, the Commissioner or Duty Deputy Commissioner authorises the use by the SOG in that deployment of such control weapons (including oleoresin capsicum spray) in respect of which each member of the SOG is authorised, and trained, for use in their position as prison officers.
- (f) otherwise denies paragraph 81A.

82 It denies paragraph 82.

Handcuffing

83 As to paragraph 83, it:

- (a) admits that handcuffs were used on BIJ23 on the occasions particularised below;
and

PARTICULARS

- (i) Paragraphs 4, 19, 29, 30 31, 37, 42, 56, 63 and 66 of the BIJ23 Schedule of Particulars;
- (ii) in addition, it refers to BIJ23's Individual Management Personal Support Plan (**PSP**), dated 26 September 2022; the PSP explicitly authorises the use of handcuffs for BIJ23 when moving between secure locations; for movements within "MS2", the PSP provides that the application of handcuffs is at the discretion of the unit manager or senior officer, based on BIJ23's behaviour;
- (iii) BIJ23's PSP dated 23 February 2023 and PSP dated 8 March 2023, further authorise the use of handcuffs from secure location to secure location within the "Assessment Phase and MS1";
- (iv) BIJ23's PSP dated 25 August 2022 and PSP dated 13 January 2023, provide that mechanical restraints are to be used for movements between secure locations;
- (v) BIJ23's PSP dated 24 September 2021, PSP dated 19 October 2023 and PSP dated 20 October 2021 provide that if BIJ23 is required to attend support services/programs external to ISU due to the inability to provide any/appropriate/acceptable access in ISU, use of mechanical restraints to mitigate flight risk/absconding to be requested to ensure safe movement between locations; approval is to be sought from the delegated authority prior;
- (vi) BIJ23's PSP dated 22 June 2022 provides that mechanical restraints are to be applied between secure locations, and then further provides that cuffs are to be used between two locations;
and

(vii) BIJ23's PSP dated 29 August 2022 provides that for movements in "MS1/2" BIJ23 is to be placed in restraints outside of Unit from secure location to secure location.

(b) otherwise denies paragraph 83.

84 As to paragraph 84, it:

(a) refers to and repeats paragraphs 70(a)(i) and 81(a) above; and

(b) says that the use of handcuffs on BIJ23 was pursuant to the:

(i) Restraints Power;

(ii) Compliance with Orders Power; and/or

(iii) Management, Control and Security Power; and

PARTICULARS

(i) It refers to and repeats the particulars subjoined to paragraph 83 above.

(c) refers to and repeats paragraph 63(b) above and says further or in the alternative that:

(i) the claims in paragraphs 83 to 87 and/or 124 to 128 constitute a "claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA; and

(ii) pursuant to s 5X of CLAWA, the Use of Handcuffs Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless Use of Handcuffs Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and

(d) otherwise denies the allegations in paragraph 84.

85 As to paragraph 85, it:

- (a) says that the circumstances in which BIJ23 was handcuffed are particularised in paragraph 83 above; and
- (b) otherwise does not know and therefore cannot admit paragraph 85.

86 It does not know and therefore cannot admit the allegations in paragraph 86.

87 As to paragraph 87, it:

- (a) refers to and repeats paragraph 84 above; and
- (b) otherwise denies paragraph 87.

K.2. Breach of duty of care

87A. As to paragraphs 47 to 53, 88 to 93 and/or 128 and 129, it:

- (a) says that the claims set out therein are:
 - (i) “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and/or 5V(1) of CLAWA; and/or
 - (ii) subject to the following provisions of CLAWA:
 - (A) s 5B of Division 2 of Part 1A of CLAWA;
 - (B) ss 5C and/or 5D of Division 3 of Part 1A of CLAWA;
 - (C) s 5K of Division 5 of Part 1A of CLAWA;
 - (D) ss 5U, 5V, 5W and/or 5X of Part 1C of CLAWA; and/or
 - (E) Part 2 of CLAWA; and/or
- (b) says that the claims set out in paragraphs 47 to 53, 88 to 93 and/or 128 and 129:
 - (i) include “claim[s] for personal injury damages for mental harm” within the meaning of s 5R(1) of CLAWA”; and/or
 - (ii) are subject to ss 5Q, 5R, 5S and/or 5T of Part 1B of CLAWA.

88 As to paragraph 88, it:

- (a) refers to and repeats paragraph 2 above;

(b) says that BIJ23:

- (i) was identified by a psychologist at Banksia Hill to have difficulties regulating his emotions and impulsivity;

PARTICULARS

- (i) ARMS – Prisoner Risk Assessment Group (ARAG) Minutes - 29 July 2022.
- (ii) was referred to the Unit 18 multidisciplinary team for consideration due to his: suicidal and non-suicidal self-injury behaviour; difficulties with coping in detention; psychosocial stressors; emotional reactivity and impulsivity; and stressors related to extended cell time and Court matters;

PARTICULARS

- (i) BIJ23 – MDT Meeting Minutes – 27 September 2022.
- (iii) was identified by a psychologist to be limited in terms of his capacity to engage in counselling and other support programs due to his low overall non-verbal cognitive abilities as well as poor verbal abilities;

PARTICULARS

- (i) BIJ23 – Neurodevelopmental Assessment Court Report – 02 July 2021 (p. 12).
- (iv) was identified by a psychologist to have limited capacity to solve problems, make informed decisions, and understand the possible consequences of his actions;

PARTICULARS

- (i) BIJ23 – Neurodevelopmental Assessment Court Report – 02 July 2021 (p. 11).
- (v) was identified by a psychologist as being impaired in the domain of impulse control;

PARTICULARS

- (i) BIJ23 – Neurodevelopmental Assessment Court Report – 02 July 2021 (p. 9).
- (vi) was identified by a psychologist as being significantly impaired in executive functioning which will impact on his ability to plan, reason, and think through the consequences of his actions;

PARTICULARS

- (i) BIJ23 – Neurodevelopmental Assessment Court Report – 02 July 2021 (p. 11).
- (vii) had an Individual Engagement Plan developed by staff and reviewed by his allocated psychologist that identified triggers, warning signs, coping strategies and supports to be employed when interacting with BIJ23;

PARTICULARS

- (i) BIJ23 – Individual Engagement Plans.
- (viii) was identified by a psychologist at Banksia Hill as being vulnerable to swift changes in mood and escalation in risk to self in the context of poor coping skills and impulsivity; and

PARTICULARS

- (i) BIJ23 – Contact Notes – 17 October 2023 (p. 84).
- (ix) was identified by a psychologist at Banksia Hill to have a high level of impulsivity and difficulty coping with extended lockdowns; and

PARTICULARS

- (i) BIJ23 – Contact Notes – 17 October 2023 (p. 114).
- (c) otherwise does not know and therefore cannot admit paragraph 88.

89 As to paragraph 89, it:

- (a) refers to and repeats paragraph 2 above;

- (b) says that the use of the term “his conditions” is embarrassing and/or ambiguous in that it does not identify the “conditions” alleged;
- (c) admits that while in detention in Banksia Hill and/or Unit 18, BIJ23 engaged in the following behaviours:
 - (i) exhibiting a lack of thought and/or concern for the consequences of his actions (as alleged in paragraph 89(b));
 - (ii) refusing to follow instructions (as alleged in paragraph 89(c));
 - (iii) damaging or destroying property (as alleged in paragraph 89(d));
 - (iv) repeatedly threatening or engaging in self-harm or attempted suicide (as alleged in paragraph 89(e));
 - (v) being verbally aggressive, abusive or otherwise annoying to Officers (as alleged in paragraph 89(f)); and
 - (vi) being violent (as alleged in paragraph 89(g)); and
- (d) otherwise does not know and therefore cannot admit paragraph 89.

90 As to paragraph 90, it:

- (a) repeats paragraph 89 above;
- (b) says that, from 2 July 2021, it was aware that:
 - (i) BIJ23 appeared to meet the criteria for a mild neurocognitive disorder; and
 - (ii) BIJ23 had severe impairment in:
 - (A) cognition;
 - (B) language;
 - (C) memory; and
 - (D) executive functioning; and

PARTICULARS

- (i) Neurodevelopmental Assessment Report.

(c) otherwise denies the allegations in paragraph 90.

91 As to paragraph 91, it:

(a) refers to and repeats paragraph 51(d) above;

(b) refers to and repeats paragraphs 89 and 90 above;

(c) says that at all relevant times, BIJ23 was not a “person of normal fortitude” within the meaning of s 5S of CLAWA;

(d) refers to and repeats paragraph 51(d) above and says that the allegation is embarrassing and/or ambiguous in that:

(i) under s 5S of CLAWA, because it is necessary to assess whether a person of normal fortitude would suffer a recognised psychiatric illness “in the circumstances of the case”, it is necessary to specify the critical event(s) with a degree of precision;

(ii) paragraph 91 of the SOC does not identify whether:

(A) it is alleged that each incident cross-referenced in the particulars to that paragraph was foreseeable and might, in the circumstances of the case, cause a person of normal fortitude to suffer a recognised psychiatric illness; or

(B) it alleges that some combination of incidents in each sub-paragraph might do so; or

(C) whether it alleges that the combination of all incidents in all sub-paragraphs might do so;

(iii) there is no articulation in paragraph 91 of the SOC of the nature of the conduct that the Respondent should have foreseen which might lead a person of normal fortitude to suffer a psychiatric illness; and

(iv) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent’s response, or lack of response, to that risk; and

(e) under cover of that objection, otherwise denies the allegations in paragraph 91.

92 It denies paragraph 92 and says further or in the alternative that:

- (a) refers to and repeats paragraph 70 and 72 above;
- (b) says that:
 - (i) paragraph 92 does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22]; and
 - (ii) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk;
- (d) says further or in the alternative that pursuant to section 5W of CLAWA:
 - (i) the functions that were required to be exercised by Unit 18 were limited by the financial and other resources that were reasonably available Unit 18 (including the number of available staff) for the purpose of exercising those functions;
 - (ii) the general allocation of those resources is not open to challenge;
 - (iii) the functions required to be exercised by Unit 18 are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which this proceeding relates); and
 - (iv) the Respondent's allocations of staff to Unit 18 were a "policy decision" within the meaning of s 5X of CLAWA;
- (c) says further or in the alternative that:
 - (i) the claims in paragraphs 47 to 53, 88 to 93 and/or 128 and 129 constitute a "claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the:
 - (A) Lockdown Policy Decision(s); and/or
 - (B) Specific Confinement Policy Decision(s),

cannot be used to support a finding that the Respondent was at fault unless the policy decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and

(d) otherwise denies paragraph 92.

92A. As to paragraph 92A, it:

(a) refers to and repeats paragraphs 44(a), 44(b), 49, 69(e) and 69(f) above;

(b) refers to and repeats paragraph 70 and 72 above;

(c) refers to and repeats paragraph 92 above; and

(d) otherwise denies paragraph 92A.

92B. It denies paragraph 92B and says further that if (which is denied) there was any breach of the alleged duty of care by the Respondent, the Minister, the CEO, a Superintendent and/or any Officer, BIJ23 was contributorily negligent (within the meaning of section 5K of CLAWA and/or section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA)) in failing to take precautions against the risk of that harm by:

(a) failing to comply with directions issued to him by Officers; and/or

(b) failing to refrain from threatening to harm Officers and/or other detainees.

PARTICULARS

(i) With respect to failing to comply with the directions issued by Officers, it refers to paragraphs 6, 7, 16, 21, 29, 33, 37, 56, 56B, 59, 63 and 66 of the BIJ23 Schedule of Particulars;

(ii) with respect to failing to refrain from threatening to harm Officers and/or other detainees, it refers to paragraphs 1, 4, 6, 7, 15, 16, 29, 32, 33, 38, 37, 56, 56B, 59, 63, 65, 66 68 and 69 of the BIJ23 Schedule of Particulars; and

(iii) further particulars may be provided following discovery and the filing of evidence.

92C. As to paragraph 92C it:

- (a) refers to paragraph 75 and 76 above; and
- (b) says further that paragraph 92C does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22];
- (c) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk; and
- (d) otherwise denies paragraph 92C.

92D. As to paragraph 92D, it:

- (a) refers to and repeats paragraphs 40(a), 41(a), 42(a) and 49 above;
- (b) refers to and repeats paragraphs 75, 76 and 81 above;
- (c) refers to and repeats paragraph 92C above; and
- (d) otherwise denies paragraph 92D.

92E. As to paragraph 92E, it:

- (a) refers to and repeats paragraph 1(a)92C above;
- (b) says further that:
 - (i) the claim in paragraph 92E constitutes a "claim for damages for harm caused by the fault of a public body or by officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Conduct of Searches Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Conduct of Searches Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and

(c) otherwise denies paragraph 92E.

92F. As to paragraph 92F, it:

- (a) refers to and repeats paragraph 81 above;
- (b) says that paragraph 92F does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22];
- (c) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk; and
- (d) otherwise denies paragraph 92F.

92G. As to paragraph 92G, it:

- (a) refers to and repeats paragraphs 22(a)(iii), 28, 40(a)(iii) and 49 above;
- (b) refers to and repeats paragraph 81 above;
- (c) refers to and repeats paragraph 92F above; and
- (d) otherwise denies paragraph 92G.

92H. It denies paragraph 92H and says further that if (which is denied) there was any breach of the alleged duty of care by the Respondent, the Minister, the CEO, a Superintendent and/or any Officer, BIJ23 was contributorily negligent (within the meaning of section 5K of CLAWA and/or section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA)) in failing to take precautions against the risk of that harm by:

- (a) failing to comply with directions issued to him by Officers; and/or
- (b) failing to refrain from threatening to harm Officers and/or other detainees;

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 92B above.

92I. As to paragraph 92I, it:

- (a) refers to and repeats paragraph 84 above;
- (b) says further that:
 - (i) paragraph 92I does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22]; and
 - (ii) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk;
- (c) says further or in the alternative that pursuant to section 5W of CLAWA:
 - (i) the functions that were required to be exercised by Unit 18 were limited by the financial and other resources that were reasonably available to Unit 18 (including the number of available staff) for the purpose of exercising those functions;
 - (ii) the general allocation of those resources is not open to challenge; and
 - (iii) the functions required to be exercised by Unit 18 are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which this proceeding relates);
- (d) says further or in the alternative that:
 - (i) the claims in paragraphs 92I to 92K constitute a "claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Use of Handcuffs Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the policy decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and

(e) otherwise denies paragraph 92I.

92J. As to paragraph 92J, it:

(a) refers to and repeats paragraphs 84 and 49 above;

(b) refers to and repeats paragraph 92I above; and

(c) otherwise denies paragraph 92J.

92K. It denies paragraph 92K and says further that if (which is denied) there was any breach of the alleged duty of care by the Respondent, the Minister, the CEO, a Superintendent and/or any Officer, BIJ23 was contributorily negligent (within the meaning of section 5K of CLAWA and/or section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA)) in failing to take precautions against the risk of that harm by:

(a) failing to comply with directions issued to him by Officers; and/or

(b) failing to refrain from threatening to harm Officers and/or other detainees.

PARTICULARS

(i) It refers to and repeats the particulars subjoined to paragraph 92B above.

92L. As to paragraph 92L, it:

(a) refers to and repeats paragraphs 2 and 49 above;

(b) refers to paragraphs 92(b), 92C(b)(b), 92F(b) and 92I(b) above;

(c) says that the allegation is embarrassing and/or ambiguous in that it does not identify the content or requirements of a "comprehensive assessment" (in subparagraph (a)) or the content or requirements of the training referred to in subparagraph (c);

(d) says that BIJ23's disability was recorded in the TOMS from on or about 27 July 2022;

(e) says that it trained Officers in:

(i) interacting with detainees with disabilities;

PARTICULARS

- (i) The Respondent relies on the Disability Services Handbook distributed as part of the training for Officers at the Corrective Services Academy.
- (ii) interacting with detainees who have suffered trauma; and
- (iii) mental health first aid; and

PARTICULARS

- (i) The Respondent relies on the training conducted at the Corrective Services Academy as outlined in:
 - (A) Intellectual and Cognitive Disability Training for Prison Officers; and
 - (B) the Disability Services Handbook.
- (f) otherwise denies paragraph 92L.

92M. It denies paragraph 92M.

93 As to paragraph 93, it:

- (a) says that s 5T of CLAWA states that a Court cannot make an award of personal injury damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness;
- (b) says further that any award of personal injury damages in favour of BIJ23 is subject to the application of Part 2 of CLAWA;
- (c) refers to and repeats paragraphs 92B, 92H and 92K above; and
- (d) otherwise denies the allegations in paragraph 93.

K.3. Disability Discrimination Act Claims

94 As to paragraph 94, it:

- (a) admits that pursuant to s 123 of the DDA, the Respondent is vicariously liable for the conduct engaged in by the CEO, Superintendent and Officers within the scope

of their actual or apparent authority unless the Respondent can establish that it took reasonable precautions and exercised due diligence to avoid the conduct; and

(b) otherwise denies the allegations in paragraph 94.

95 As to paragraph 95, it:

(a) refers to and repeats paragraph 2 above;

(b) says further that as to the disabilities it admits in paragraph 2 above, those disabilities fall within the definition of "disability" under the DDA; and

(c) otherwise does not know and therefore cannot admit the allegations in paragraph 95.

96 As to paragraph 96, it:

(a) as to sub-paragraph (a):

(i) refers to and repeats paragraph 97 below; and

(ii) otherwise admits the allegations in sub-paragraph (a);

(b) as to sub-paragraph (b):

(i) refers to and repeats paragraph 97 below; and

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (b);

(c) as to sub-paragraph (c):

(i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 presented as irritable and aggressive; and

PARTICULARS

(i) These occasions include:

(A) on 1 July 2022, BIJ23, along with other detainees, was causing damage to his cell, he was then extracted by a

SOG team. As part of the extraction, BIJ23 was non-compliant and aggressive;

(B) on 1 August 2022, BIJ23 was acting aggressively and spat at Officers;

(C) on 4 October 2022, BIJ23 was observed by a psychologist as being friendly and easily engaged but irritable with staff and still reported a dislike for Unit 18, asking if he could return to Banksia Hill; and

(D) on 12 October 2022, BIJ23 met with a psychologist where he presented as irritable and appeared teary at times, he identified stressors related to out of cell time, phone calls and his desire to return to Banksia Hill.

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (c); and

(d) as to sub-paragraph (d):

(i) refers to and repeats paragraph 97 below; and

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (d).

97 As to paragraph 97, it:

(a) as to sub-paragraph (a):

(i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 indicated that he was stressed and was observed by a psychologist to be internalising his stress and anger; and

PARTICULARS

(i) These occasions include:

(A) on 28 July 2022, BIJ23 met with a psychologist who observed that he remained at high risk-to-self in the

context of his high internalised anger/stress, impulsivity, cognitive vulnerability and systemic stressors;

(B) on 20 September 2022, BIJ23 met with a psychologist where he identified stressors due to his transfer to Unit 18 and informed the psychologist that he felt isolated from his supports; and

(C) on 12 October 2022, BIJ23 met with a psychologist where he identified stressors related to out of cell time, phone calls and his desire to return to Banksia Hill.

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (a); and

(b) as to sub-paragraph (b):

(i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 informed others that he was experiencing stress due to extended periods of confinement; and

PARTICULARS

(i) It refers to and repeats the particulars subjoined to sub-paragraph 97(a)(i) above.

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (b);

(c) does not know and therefore cannot admit the allegations in sub-paragraph (c);

(d) as to sub-paragraph (d):

(i) objects to sub-paragraph (d) and says that the paragraph is embarrassing and/or ambiguous; and

(ii) under cover of that objection does not know and therefore cannot admit the allegations in sub-paragraph (d);

(e) as to sub-paragraph (e):

- (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 had difficulty regulating his impulses; and

PARTICULARS

- (i) These occasions include:
 - (A) on 28 July 2022, BIJ23 reported to a psychologist that he had difficulty regulating his emotions and impulsivity; and
 - (B) on 26 October 2022, BIJ23 met with a psychologist who observed that he remained vulnerable to swift changes in mood and escalation in risk-to-self in context of poor coping skills and impulsivity.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (e);
- (f) as to sub-paragraph (f):
 - (i) objects to sub-paragraph (f) and says that the paragraph is embarrassing and/or ambiguous; and
 - (ii) under cover of that objection, does not know and therefore cannot admit the allegations in sub-paragraph (f); and
- (g) as to sub-paragraph (g):
 - (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 had difficulty regulating his emotions; and

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to sub-paragraph 97(e)(i) above.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (g); and
- (h) as to sub-paragraph (h):

- (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 refused to following instructions; and

PARTICULARS

- (i) These occasions include:
 - (A) on 14 November 2022, BIJ23 refused to comply with instructions to take his medication;
 - (B) on 8 December 2022, BIJ23 was attempting to use the phone in the A wing of Unit 18 without authorisation, he was instructed to put the phone down and return to his cell by Officers, and he refused to comply with these instructions; and
 - (C) on 21 June 2023, during a recreation break in the C wing of Unit 18, BIJ23 refused an instruction to return to his cell and instead began to damage the ceiling of the C wing.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (h);
- (i) as to sub-paragraph (i):
 - (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 damaged property, including his cell; and

PARTICULARS

- (i) These occasions include:
 - (A) on 1 July 2022:
 - (1) BIJ23, along with other detainees housed in the Jasper Unit, were causing damage to their cells;
 - (2) Officers sought to negotiate with BIJ23 and issued use of force warnings;
 - (3) notwithstanding the warnings issued, BIJ23 continued to cause damage to his cell; and

(4) as a consequence, on the instruction of the Assisting Superintendent, BIJ23 was then extracted from his cell by the SOG team;

(B) on 5 February 2024:

(1) BIJ23, along with another detainee, was observed by an Officer damaging the storeroom next to the D wing as well as throwing wooden and metal objects towards Officers;

(2) Officers gave a use of force warning and requested BIJ23 and the other detainee to stop;

(3) BIJ23 got hold of a large piece of glass in his hands and said he was going to kill himself and if Officers came near him, he was going to slice them all;

(4) BIJ23 then barricaded himself in an interview room, while Officers gave multiple use of force warnings and BIJ23 again refused instructions; and

(5) Officers deployed a chemical agent in the room and BIJ23 was restrained and taken to the shower to decontaminate and thereafter placed in his cell with fresh clothes.

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (i);

(j) as to sub-paragraph (j):

(i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 engaged in self-harm, attempted suicide or threatened to do so; and

PARTICULARS

(i) These occasions include:

(A) on 27 July 2022:

- (1) BIJ23 attempted to commit suicide by tying a piece of his t-shirt material around his neck and attaching it to a broken viewing window in his cell;
- (2) Officers attended to assist BIJ23 to remove the piece of t-shirt tied around his neck;
- (3) BIJ23 was agitated and stated words to the effect of "I'll just tie something else around my neck"; and
- (4) BIJ23 was then attended to by a psychologist and underwent a medical assessment and it was noted that he had minor abrasions around his neck;

(B) on 10 October 2022:

- (1) At around 6.38am, BIJ23 began self-harming in his cell via scratching his arm with items of a broken television;
- (2) Officers immediately responded and entered his cell to search and remove all broken items;
- (3) BIJ23 was receptive to counselling and his cell door was secured; and
- (4) as there was no nurse on-site at Unit 18 during the time of the incident, the nurse at Casuarina prison was contacted and band aids were provided to the First Applicant.

(k) as to sub-paragraph (k):

- (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 was verbally aggressive; and

PARTICULARS

- (i) These occasions include:

- (A) on 1 November 2022, while being escorted back to his cell, BIJ23 was abusive to Officers saying words to the effect of “Which one of you cunts wants to be king hit”, “Fuck this shit, I’m killing myself”, and “Who fucking went in my cell and moved my shit around”; and
 - (B) the 5 February 2024 incident described in the particulars subjoined to paragraph 97(h)(i) above.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (k);
- (l) as to sub-paragraph (l):
 - (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 was violent; and

PARTICULARS

- (i) These occasions include:
 - (A) the 21 June 2023 incident described in the particulars subjoined to paragraph 97(h)(i) above; and
 - (B) on 5 February 2024 incident described in the particulars subjoined to paragraph 97(h)(i) above.
 - (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (l);
- (m) as to sub-paragraph (m):
 - (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIJ23 was out of bounds; and

PARTICULARS

- (i) These occasions include:
 - (A) on 22 July 2021:

- (1) a code red out of bounds was called as BIJ23 and other detainees were on the fence at the rear of the oval at Banksia Hill, also known as the inner perimeter fence;
 - (2) Officers attempted to counsel BIJ23 and the other detainees, however they were unreceptive and threatened to assault staff, and were spitting towards staff;
 - (3) BIJ23 and the other detainees also removed a large section of the microphonic wire and began to make a lasso with it, with the intent of trying to snag one of the perimeter cameras and ripping it off the hinge;
 - (4) BIJ23 and the other detainees eventually came down from the fence and were escorted to a cell in the ISU in mechanical restraints;
 - (5) BIJ23 was medically assessed by a nurse who noted no injuries; and
 - (6) BIJ23's caregiver was notified;
- (B) on 26 September 2021:
- (1) a code red out of bounds was called as BIJ23 absconded to the fence between ISU and the Admissions Centre;
 - (2) BIJ23 remained on the fence perimeter for some time, and made threats to spit on staff, incited other detainees to smash their cells and "do runners", he also made sexualised comments toward female staff;
 - (3) BIJ23 threatened to kill himself several times during the incident and created a makeshift ligature and attached one end to the fence and the other around his neck;

- (4) BIJ23 was counselled and eventually came down from the fence, was placed in mechanical restraints and escorted to his cell;
 - (5) BIJ23 was medically assessed by a nurse who treated him for a minor injury; and
 - (6) BIJ23 received a loss of privilege for both television and canteen access for five days following this incident;
- (C) on 20 January 2022:
- (1) a code red out of bounds was called as BIJ23 and another detainee absconded and climbed the inner perimeter fence; and
 - (2) BIJ23 was counselled and eventually came down from the fence, was placed in mechanical restraints and escorted to his cell;
- (D) on 9 March 2022:
- (1) a code red was called in the Urquhart Unit;
 - (2) BIJ23 and three other detainees were in the Urquhart yard. The detainees were ordered to return to their cells. While making his way up the stairs to the wing, BIJ23 was angry and complained about having to go to his cell;
 - (3) BIJ23 jumped onto a banister, climbed over a grill area and hung onto the ledge of the outside balcony between A wing and B wing;
 - (4) BIJ23 was counselled by Officers for approximately 30 minutes;
 - (5) in the meantime, other Officers formed a cordon below BIJ23 in case he fell or jumped. Officers also

brought a ladder and a mattress to assist BIJ23 in coming down from the balcony;

- (6) after 20 minutes or so, BIJ23 climbed back over the railings and onto the landing, where he could then use the ladder to come down; and
- (7) BIJ23 was placed in mechanical restraints and moved to his cell, where the mechanical restraints were removed;

(E) on 20 June 2022:

- (1) a code red out of bounds was called in the Karakin Unit;
- (2) BIJ23 and another detainee were on the roof of the Karakin Unit; they damaged the flue and the TV aerial on the roof and also removed several roof sheets;
- (3) BIJ23 and the other detainee also threw metal objects off the roof, and BIJ23 threw a metal object at a window which resulted in broken glass;
- (4) BIJ23 was counselled to climb down from the roof via the fence; was placed in mechanical restraints and escorted to his cell; during the escort BIJ23 disclosed he had self-harmed during the incident; and
- (5) BIJ23 was medically assessed by a nurse; and his caregiver was notified of the incident;

(F) on 28 June 2022:

- (1) a code red out of bounds was called;
- (2) BIJ23 kicked the glass panel of doors in the psychology building and cracked one of the windows;

- (3) BIJ23 and another detainee then ran from the psychology building, across the oval and climbed onto the fence;
 - (4) BIJ23 entered the sterile zone between the fences between the Urquhart Unit;
 - (5) BIJ23 had a large brick or piece of rock and was issued with a use of force warning should he attempt to assault Officers;
 - (6) BIJ23 threatened to throw the rock at Officers;
 - (7) an officer engaged with BIJ23 who then dropped the rock and climbed back over the fence; and
 - (8) BIJ23 was placed in mechanical restraints and escorted to his cell, where the mechanical restraints were removed;
- (G) on 2 July 2022:
- (1) a code amber was called in B wing;
 - (2) BIJ23 pulled a window panel off the wall and raised it over his head and threatened to throw it at Officers;
 - (3) BIJ23 then dropped the window panel and attempted to jump out of the window;
 - (4) An officer grabbed BIJ23's shirt and another Officer blocked the window from the outside;
 - (5) BIJ23 was restrained on the floor and attempted to spit on Officers;
 - (6) BIJ23 was placed in mechanical restraints;
 - (7) BIJ23 kicked out at several Officers who were escorting him back to his cell and tried to spit on them;

- (8) after BIJ23 was secured in his cell, the mechanical restraints were removed and officers performed a hot exit;
 - (9) after being secured in his cell, BIJ23 continued to make verbal threats towards an officer, including that he wanted to fight the Officer; and
 - (10) BIJ23 was medically assessed by a nurse;
- (H) on 30 July 2022:
- (1) a code red out of bounds was called in the living area of Unit 18 as BIJ23 and other detainees sat above the fridge;
 - (2) Officers counselled the detainees and eventually they came down from atop the fridge; BIJ23 was placed in mechanical restraints and escorted to a new cell after he became non-compliant when he saw his old cell;
 - (3) BIJ23's mechanical restraints were removed once he was in cell; after which he picked up a book and hit an Officer on the wrist with it;
 - (4) Officers attempted to exit the cell, while BIJ23 threw the same book at them; the cell was then secured; and
 - (5) BIJ23 was medically assessed by a nurse;
- (I) on 6 December 2022:
- (1) BIJ23 and two other detainees went out of bounds by running into the kitchen and taking food from the fridge without permission;
 - (2) Officers attempted to counsel the detainees but they did not follow instructions;

- (3) BIJ23 and the other detainees then ran into the laundry and locked themselves in; an Officer unlocked the door and ordered the detainees to return to their cells; which they eventually did;
 - (4) BIJ23 then became noncompliant during the escort to his cell refusing to go inside his cell;
 - (5) BIJ23 was then secured in his cell; and
 - (6) BIJ23 received a loss of privilege for evening recreation that day;
- (J) on 10 December 2022:
- (1) a code red out of bounds was called as BIJ23 stood on another detainee's shoulders to access the roof of the gazebo;
 - (2) BIJ23 and another detainee were on the roof of the shelter/gazebo and BIJ23 started ripping parts of the roof off, stating to staff that the ripped pieces were meat cleavers;
 - (3) BIJ23 abused staff with words to the effect that they would assault the staff present;
 - (4) BIJ23 also made highly sexualised comments to the female Officer present and stated a willingness to harm staff with weapons and without weapons;
 - (5) BIJ23 and the other detainee threw things at Officers while on the roof;
 - (6) BIJ23 and the other detainee were eventually counselled to come down off the roof; and
 - (7) BIJ23 was placed in mechanical restraints and escorted to his cell where a pat search was conducted and he was medically assessed by a nurse who noted no injuries; and

(8) the incident described in the particulars subjoined to paragraph 97(i)(i) above occurred;

(K) on 12 January 2023:

(1) a code red out of bounds was called due to multiple detainees, including BIJ23, absconding to the roof top of the Urquhart Unit;

(2) BIJ23 was counselled to come down from the fence line before he could reach the roof; recovery officers assisted him to get down the fence during which BIJ23 fell causing the two Officers assisting him to also fall;

(3) BIJ23 was then placed in mechanical restraints and escorted to his cell; where the mechanical restraints were removed; and

(4) BIJ23 then threw a remote at an Officer before the door was secured;

(L) on 26 February 2023:

(1) BIJ23 was in the yard for recreation time and phone calls and was instructed to start moving towards the unit door to return to his cell;

(2) BIJ23 evaded Officers and moved to the rear of the basketball court, where an Officer attempted to counsel him;

(3) BIJ23 was unreceptive to counselling and a code amber was called;

(4) BIJ23 again evaded staff and made his way to the raised path along the fence line to an area that was out of bounds;

(5) BIJ23 was further counselled and made his way towards Officers; and

- (6) BIJ23 was escorted by an Officer, holding BIJ23's left arm, to another Officer, who placed BIJ23 in mechanical restraints and escorted him to his cell;
- (M) on 14 March 2023;
- (1) BIJ23 was in the yard and moved towards the turnstile. He was instructed to move back from the turnstile and then started moving along the top of the retaining wall;
 - (2) BIJ23 was counselled to move back from the retaining wall, but instead climbed over the fence and onto the footpath, where BIJ23 then climbed another fence;
 - (3) BIJ23 was given a use of force warning and a mattress was placed on the ground below the retaining wall for BIJ23's safety;
 - (4) BIJ23 was counselled by Officers;
 - (5) BIJ23 picked up and threw small rocks at Officers;
 - (6) Officers proceeded along the path to the end of the retaining wall and assisted BIJ23 down onto the footpath;
 - (7) BIJ23 was placed in mechanical restraints;
 - (8) BIJ23 was abusive towards Officers and threatened to kill Officers. BIJ23 attempted to bite an Officer;
 - (9) BIJ23 was escorted to A wing and then back to his cell and continued to be abusive towards Officers;
 - (10) after being returned to his cell, the mechanical restraints were removed; and
 - (11) BIJ23 was medically assessed by a nurse;

(N) on 15 April 2023:

- (1) a code red out of bounds was called as BIJ23 was unlocked from his cell by multiple other detainees who had gained access to an Officer's keys;
 - (2) BIJ23 and the other detainees gained access to the roof space and caused extensive infrastructure damage; and
 - (3) staff were required to be evacuated by escorts as it was unsafe for them to remain in the area.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (m);
- (n) as to sub-paragraph (n):
- (i) objects to sub-paragraph (n) and says that the paragraph is embarrassing and/or ambiguous; and
 - (ii) under cover of that objection does know and therefore cannot admit the allegations in sub-paragraph (f); and
- (o) otherwise does not know and therefore cannot admit the allegations in paragraph 97.

98 As to paragraph 98, it:

- (a) as to sub-paragraph (a):
- (i) it says that on six occasions, BIJ23 was transferred from Banksia Hill to Unit 18;

PARTICULARS

(i) The dates of the transfers are set out below:

- (A) 20 July 2022 – transferred to Unit 18 and transferred back to Banksia Hill on 23 August 2023;

- (B) 28 September 2022 – transferred to Unit 18 and transferred back to Banksia Hill on 14 December 2022;
- (C) 24 February 2023 – transferred to Unit 18 then transferred back to Banksia Hill on 17 July 2023;
- (D) 18 August 2023 – transferred to Unit 18 then transferred back to Banksia Hill on 17 October 2023;
- (E) 7 February 2024 – transferred to Unit 18 then transferred back to Banksia Hill on 23 February 2024; and
- (F) 12 March 2024 – transferred to Unit 18 then transferred back to Banksia Hill on 14 April 2024.

(ii) says that those transfers were made on the basis of:

- (A) his incident history; and
- (B) the fact that Unit 18 was better able to deal with his displayed behaviours;

PARTICULARS

(i) The reasons for those transfers are set out below:

(A) on 20 July 2022, BIJ23 was transferred from Bankia Hill to Unit 18 on the basis that:

- (1) his incident history, specifically his recent escalation in out of bounds incidents and cell damages, presented a significant risk to Banksia Hill in its current state of operations; and
- (2) the infrastructure of Unit 18 was better able to deal with his displayed behaviours;

(B) on 28 September 2022, BIJ23 was transferred from Banksia Hill to Unit 18 on the basis that:

- (1) his incident history presented a significant risk to Banksia Hill in its current state of operations;

- (2) the infrastructure of Unit 18 was better able to deal with his displayed behaviours;
 - (3) he also informed Officers that he wanted to move to Unit 18 to be with ██████████ but after a discussion, he stated he did not want to move there; and
 - (4) the recorded “Movement Reason” was BIJ23’s behaviour posed a significant risk to the safety and good order of Banksia Hill;
- (C) on 24 February 2023, BIJ23 was transferred from Banksia Hill to Unit 18 on the basis that:
- (1) his incident history, specifically two recent out of bounds incidents involving a roof ascension, cell damages, sexually inappropriate behaviours toward staff and another detainee, and physical threats to staff presented a significant risk to Banksia Hill in its current state of operations;
 - (2) through a Detainee Telephone System contact, he informed a Unit 18 detainee that he will “try [his] hardest now” to go to Unit 18; and
 - (3) the infrastructure of Unit 18 was better able to deal with his displayed behaviours;
- (D) on 18 August 2023, BIJ23 was transferred from Banksia Hill to Unit 18 on the basis that:
- (1) his incident history, including recent multiple staff assaults, as well as his expected behavioural issues present a significant risk to Banksia Hill in its current state of operations; and
 - (2) the infrastructure of Unit 18 was better able to deal with his displayed behaviours, specifically noting the increased risk of ongoing construction at Banksia Hill and insecure state of many internal areas;

(E) on 7 February 2024, BIJ23 was transferred from Banksia Hill to Unit 18 on the basis that:

(1) his incident history, specifically attempts to take staff keys, significant infrastructure damage, and assaulting detainees present a significant risk to Banksia Hill maintaining normal operations; and

(2) the infrastructure of Unit 18 was better able to deal with his displayed further decline in behaviours;

(F) on 12 March 2024, BIJ23 was transferred from Banksia Hill to Unit 18 on the basis that;

(1) his incident history, specifically recent out of bounds incidents, self-harm threats, and staff assaults present a significant risk to Banksia Hill maintaining normal operations; and

(2) the infrastructure of Unit 18 was better able to deal with his displayed “persistent high-risk behaviour”.

(iii) says further that on each occasion BIJ23 was transferred to Unit 18, it was done pursuant to the Safety and Security Objectives;

(iv) says further that any decision to transfer BIJ23 to Unit 18 was done following an assessment by a multidisciplinary team made up of individuals with expertise in rehabilitation, operations, security, case planning, health and welfare, psychology and mental health, to determine whether it was appropriate for BIJ23 to be transferred; and

(v) otherwise denies the allegations contained in sub-paragraph (a);

(b) as to sub-paragraph (b):

(i) refers to and repeats paragraph 63 and 70 above;

(ii) says that in each of the circumstances where BIJ23 was confined to his cell on the basis of lockdowns, it did so pursuant to the Safety and Security Objectives;

PARTICULARS

- (i) The occasions where BIJ23 was confined to his cell include:
 - (A) on the dates set out in paragraph 70 of the BIJ23 Schedule of Particulars on the basis of a rolling lockdown;
 - (B) in the circumstances following a use of force incident as set out in paragraphs 4, 16, 29, 31, 37, 61, 63, 66 and 67 of the BIJ23 Schedule of Particulars; and
 - (C) in the circumstances following a self-harm incident as set out in paragraphs 3, 24, 25, 30, 31 35, 39, 47, 48, 49, 51, 53 and 56 of the BIJ23 Schedule of Particulars.

- (iii) says further that in each of the circumstances where BIJ23 was confined to his cell following the use of force by an Officer or a threat of use of force by an Officer, it did so pursuant to the Safety and Security Objectives;

PARTICULARS

- (i) The occasions where BIJ23 was confined to his cell following the use of force or threat of use of force by an Officer, include:
 - (A) on 9 August 2022:
 - (1) BIJ23 attended a visit, and was accompanied in transit by two other young persons;
 - (2) the detainees were counselled prior to departure about expectations and that any failure to follow instructions would be deemed as non-compliance;
 - (3) while being escorted back to Unit 18, the detainees became non-compliant;
 - (4) the detainees did not respond to counselling from attending Officers;

- (5) at one point the detainees tampered with, and were able to open, the back door of the van in which they were being transported;
 - (6) the detainees refused to exit the vehicle when instructed by Officers to do so;
 - (7) the detainees were given a use of force warning prior to force being used;
 - (8) handcuffs were applied to the detainees to assist with their escort back to cell;
 - (9) during his escort back to cell, BIJ23 attempted to abscond from custody;
 - (10) BIJ23 attempted to spit at Officers; and
 - (11) BIJ23 was assessed by the nurse and nil injury was recorded; and
- (B) the 5 February 2024 incident described in the particulars subjoined to paragraph 97(h)(i) above;
- (iv) says further that on the occasions where BIJ23 committed acts of self-harm he was ordinarily in his cell and thus not taken to his cell following the incident; and
- (v) otherwise denies the allegations contained in sub-paragraph (b).
- (c) as to sub-paragraph (c):
- (i) refers to and repeats paragraphs 77 to 87 above;
 - (ii) says that during his periods of detention at Banksia Hill or Unit 18 there were occasions where BIJ23 was subject to the use of force or restraints;
 - (iii) says further that in each of the circumstances where:
 - (A) use of force was used against BIJ23; or
 - (B) restraint was used against BIJ23,

it was done so pursuant to the Safety and Security Objectives; and

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- (i) The occasions where use of force or restraint was used pursuant to the Safety and Security Objectives, include:
 - (A) on 2 August 2022:
 - (1) BIJ23 was scratching his cell camera and was counselled by an Officer to desist;
 - (2) BIJ23 became highly abusive, aggressive and threatened Officers;
 - (3) BIJ23 was directed to take a position on his bed; he refused;
 - (4) an Officer issued a use of force warning and opened the cell door and entered;
 - (5) use of force was carried out, BIJ23 was placed in a three-point restraint; and
 - (6) while the restraint was occurring BIJ23 resisted and made numerous threats to harm Officers involved; and
 - (B) the 9 August 2022 incident described in the particulars subjoined to paragraph 98(c)(iii) above.
- (iv) otherwise denies the allegations in sub-paragraph (c);
- (d) as to sub-paragraph (d):
 - (i) refers to and repeats paragraphs 56 above and 115 and 115B below;
 - (ii) says that access to programs or privileges may be restricted on the basis of the Safety and Security Objectives;
 - (iii) otherwise denies the allegations in sub-paragraph (d);

- (e) as to sub-paragraph (e):
 - (i) refers to and repeats paragraph 104 below;
 - (ii) says that during the Relevant Period, access to education would only be limited where:
 - (A) a critical incident occurred that required the response of all staff and a lockdown of detainees until the incident was resolved;
 - (B) a detainee made statements of intention to engage in self-injury or attempt suicide;
 - (C) a detainee was making statements of intention to assault another detainee or staff;
 - (D) a detainee was dysregulated and needed to be regulated before they could participate in education;
 - (E) various incidents rendered the physical environment unsafe for both detainees and staff;
 - (F) a detainee was unwell;
 - (G) a detainee declined to participate;
 - (H) a detainee had in-person Court appearance; or
 - (I) a detainee could be temporarily taken out of education to attend a medical appointment, psychological counselling or program appointment;
 - (iii) otherwise denies the allegations sub-paragraph (e); and
- (f) otherwise does not know and therefore cannot admit the allegations in paragraph 98.

99 As to paragraph 99, it:

(a) as to sub-paragraph (a):

- (i) subject to the matters referred to in sub-paragraph (iv) below, admits that cognitive behavioural therapy was not provided to BIJ23 during the periods he was in detention;
- (ii) says that cognitive behavioural therapy:
 - (A) is one of several therapeutic interventions available that may be exercised in particular circumstances;
 - (B) is subject to the assessment of that individual; and
 - (C) is subject to clinical discretion, resource availability, and the detainee's engagement capacity; and
- (iii) does not know and cannot admit whether specific therapies may have been considered for a particular detainee but were not applied in relation to that detainee on the basis that they were not considered suitable in the circumstances that presented themselves at the relevant time;
- (iv) says that approaches consistent with, or elements of, cognitive behavioural therapy may be applied in different settings, including offence specific counselling, ARMS assessments, or staff-led interventions such as verbal reframing of negative thought patterns during de-escalation attempts, and reflection exercises facilitated following incidents of non-compliance or emotional dysregulation; and
- (v) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (a);

(b) as to sub-paragraph (b):

- (i) says the paragraph is vague and embarrassing and liable to be struck out as it:
 - (A) fails to identify, with sufficient particularity, the techniques that would be required to be used by Officers;

- (B) fails to adequately explain when each adjustment should be made, and whether deploying one of the supposed adjustments is sufficient, or whether a combination of adjustments should be attempted, and if so what combination; and
 - (C) requires the exercise of a discretion, and as such the adjustment cannot be considered necessary;
- (ii) under cover of those objections says that it:
- (A) trained Officers in:
 - (1) interacting with detainees with disabilities;

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- (i) The Respondent relies on the Disability Services Handbook distributed as part of the training for Officers at the Corrective Services Academy.
- (2) interacting with detainees who have suffered trauma; and
- (3) mental health first aid; and

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- (i) The Respondent relies on the training conducted at the Corrective Services Academy as outlined in:
 - (A) Intellectual and Cognitive Disability Training for Prison Officers; and
 - (B) the Disability Services Handbook.
- (B) put in place an Individual Engagement Plan for BIJ23 which was given to the multidisciplinary team for Banksia Hill and Unit 18, the Assistant Superintendent of Operations (who was responsible for informing Senior Officers and Officers of the Individual Engagement Plan for BIJ23, as necessary), Intensive Support Workers and Aboriginal Youth Support Officers, and included the following techniques to use when confronting BIJ23's challenging behaviour:

- (1) talking in a calm and soft manner;
 - (2) avoiding instructions given by different people;
 - (3) one staff member following through with the instructions;
 - (4) giving BIJ23 time to process the instructions;
 - (5) avoid repeating instructions; and
 - (6) purposefully ignoring non-compliant behaviour if there is no risk of harm to others or BIJ23 himself;
- (C) set out instructions in TOMS as to how to how to communicate with BIJ23, including:
- (1) speaking slowly and clearly;
 - (2) using plain English;
 - (3) breaking down complex tasks into smaller instructions and repeating;
 - (4) providing visual schedules and reminders; and
 - (5) providing regular reminders to “stop, think, and then do”.
- (iii) says further and in the alternative that insofar as the techniques and approaches to communication are reasonable adjustments (which is denied), the Respondent provided reasonable adjustments as outlined in sub-paragraph 99(b)(ii)(B) and 99(b)(ii)(C) above;
- (iv) says further and in the alternative that insofar as the techniques and approaches to communication are reasonable adjustments (which is denied), Officers who observe non-compliant behaviour:
- (A) must exercise discretion to determine the most appropriate response;
 - (B) must act quickly to ensure the security and safety of detainees and staff;

- (C) face variable factors depending on the circumstances of the behaviour, including immediate issues concerning safety to the individual detainee as well as other detainees and staff; and
 - (D) may not have sufficient time to engage in any of the techniques or approaches due to the immediacy of any specific act or threat;
- (v) by reason of the matters set out above, the alleged reasonable adjustment would:
 - (A) undermine the Safety and Security Objectives; and
 - (B) prevent Officers from exercising their discretion in identifying the most appropriate response to non-compliant behaviour,

and would therefore impose an unjustifiable hardship on the Respondent within the meaning of the DDA; and
- (vi) otherwise denies the allegations in sub-paragraph (b);
- (c) as to sub-paragraph (c):
 - (i) says that the paragraph is vague and embarrassing and liable to be struck out as it fails to adequately explain when each adjustment should be made, and whether deploying one of the supposed adjustments is sufficient, or whether a combination of adjustments should be attempted, and if so what combination;
 - (ii) under cover of that objection, says that during the period of his detention at Banksia Hill and Unit 18, BIJ23 was, subject to the limits set out in sub-paragraph 99(c)(iii) below, provided with access to the matters listed in paragraphs 99(c)(i) to (v) of the SOC;
 - (iii) says further that at times, BIJ23's access to the matters listed in paragraph 99(c)(i) to (v) of the SOC was limited or refused where:
 - (A) BIJ23's conduct was non-compliant with directions; or
 - (B) BIJ23 was a security risk to himself, other detainees or staff;

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- (i) The Respondent relies on the matters set out in paragraphs 70(a), 97 and 98 above.
- (iv) says further that the alleged reasonable adjustment would:
 - (A) undermine the Safety and Security Objectives; and
 - (B) prevent Officers from exercising their discretion in identifying the most appropriate response to the behaviour set out in sub-paragraph 99(c)(iii) above;
- (v) says that insofar as access to the matters listed in sub-paragraphs 99(c)(i) to (v) of the SOC are reasonable adjustments (which is denied), Officers who observe such behaviour:
 - (A) must exercise discretion to determine the most appropriate response;
 - (B) must act quickly to ensure the security and safety of detainees and staff;
 - (C) face variable factors depending on the circumstances of the behaviour, including immediate issues concerning safety to the individual detainee as well as other detainees and staff; and
 - (D) may not have sufficient time to engage in any of the techniques or approaches due to the immediacy of any specific act or threat;
- (vi) says further that by reason of the matters set out in sub-paragraphs 99(c)(iv) and 99(c)(v) above, the proposed reasonable adjustment would impose an unjustifiable hardship on the Respondent within the meaning of the DDA; and
- (vii) otherwise denies the allegations in sub-paragraph (c); and
- (d) otherwise denies the allegations in paragraph 99.

100 As to paragraph 100, it:

- (a) refers to and repeats paragraph 99 above; and

- (b) otherwise denies the allegations in paragraph 100.

100A. As to paragraph 100A, it:

- (a) refers to and repeats paragraphs 99 to 100 above; and
- (b) otherwise denies the allegations in paragraph 100A.

100B. As to paragraph 100B, it:

- (a) refers to and repeats paragraphs 49 and 99 to 100A above; and
- (b) otherwise denies the allegations in paragraph 100B.

101 As to paragraph 101, it:

- (a) refers to and repeats paragraphs 97 to 100A above; and
- (b) otherwise denies the allegations in paragraph 101.

Direct discrimination

102 As to paragraph 102, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise; and/or
 - (ii) alleges that the conduct alleged is unlawful by reason of some unspecified combination of paragraphs 94 to 101, without identifying which provisions (or combination of provisions) in those paragraphs are said to have the effect pleaded; and/or; and
 - (iii) fails to identify a comparator as required under s 5 of the DDA; and
- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 94 to 101 above;

- (ii) says that the appropriate comparator to determine whether BIJ23 was treated differently in circumstances that were not material different is a child:
 - (A) aged between 13 and 15;
 - (B) detained at Banksia Hill or Unit 18;
 - (C) without BIJ23's disabilities; and
 - (D) who consistently engaged in non-compliant or dangerous behaviour as set out in paragraphs 96 to 98; and
- (iii) otherwise denies the allegations in paragraph 102.

Indirect discrimination

103 As to paragraph 103, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise; and/or
 - (ii) alleges that the conduct alleged is unlawful by reason of some unspecified combination of paragraphs 59 to 62 and 94 to 101 of the SOC, without identifying which provisions (or combination of provisions) in those paragraphs are said to have the effect pleaded; and
- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 22 to 26, 59 to 62, 95 to 101 above;
 - (ii) says that to the extent a "requirement" or "condition" has been identified it was reasonable having regard to the Superintendents' and Officers' obligation to maintain the Safety and Security Objectives; and
 - (iii) otherwise denies the allegations in paragraph 103.

Discrimination in education

104 As to paragraph 104, it:

- (a) refers to and repeats paragraphs 98 above;
- (b) says that paragraph 104 is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what are alleged to be the “rehabilitation programs” that BIJ23 was not given access to;
- (c) says further that in each of the circumstances where BIJ23 was confined to his cell on the basis of lockdowns, it was done pursuant to the Safety and Security Objectives;
- (d) says that during the periods that BIJ23 was held in Unit 18:
 - (i) an educational staff member was usually present at Unit 18;
 - (ii) for safety and security reasons, modifications were put in place in the provision of educational services, including:
 - (A) education classes were held in a common room;
 - (B) alternatively, staff members would deliver educational services to BIJ23 and other detainees one on one; and
 - (C) educational staff supplied work packs that would be delivered to detainees in Unit 18; and
 - (iii) says further that detainees in Unit 18, including BIJ23, could request library books to read while in the Unit;
- (e) says further that during the time that BIJ23 was held at Unit 18, he attended classes;

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- (i) During BIJ23’s periods of detention at Unit 18 between 20 July 2022 and 17 April 2024, BIJ23’s attendance at class was as follows:
 - (A) 11 August 2022 for 1 hour and 40 minutes;

- (B) 18 October 2022 for 1 hour;
- (C) 19 October 2022 for 55 minutes;
- (D) 20 October 2022 for 55 minutes;
- (E) 21 October 2022 for 2 hours;
- (F) 24 October 2022 for 2 hours;
- (G) 25 October 2022 for 1 hour;
- (H) 26 October 2022 for 50 minutes;
- (I) 27 October 2022 for 1 hour and 10 minutes;
- (J) 28 October 2022 for 1 hour;
- (K) 31 October 2022 for 1 hour;
- (L) 2 November 2022 for 1 hour;
- (M) 3 November 2022 for 1 hour and 40 minutes;
- (N) 4 November 2022 for 1 hour;
- (O) 7 November 2022 for 1 hour;
- (P) 8 November 2022 for 1 hour and 30 minutes;
- (Q) 9 November 2022 for 1 hour;
- (R) 10 November 2022 1 hour;
- (S) 11 November 2022 for 1 hour;
- (T) 16 November 2022 for 2 hours and 30 minutes;
- (U) 17 November 2022 for 2 hours;
- (V) 18 November 2022 for 2 hours and 30 minutes;
- (W) 21 November 2022 for 1 hour and 55 minutes;
- (X) 22 November 2022 for 3 hours and 30 minutes;

- (Y) 23 November 2022 for 2 hours and 45 minutes;
- (Z) 24 November 2022 for 4 hours and 30 minutes;
- (AA) 25 November 2022 for 3 hours;
- (BB) 28 November 2022 for 1 hour and 20 minutes;
- (CC) 29 November 2022 for 4 hours and 25 minutes;
- (DD) 30 November 2022 for 1 hour;
- (EE) 1 December 2022 for 1 hour and 40 minutes;
- (FF) 5 December 2022 for 2 hours and 20 minutes;
- (GG) 28 February 2023 for 45 minutes;
- (HH) 1 March 2023 for 1 hour;
- (II) 7 March 2023 for 30 minutes;
- (JJ) 8 March 2023 for 1 hour;
- (KK) 16 March 2023 for 2 hours;
- (LL) 20 March 2023 for 1 hour;
- (MM) 21 March 2023 for 1 hour and 40 minutes;
- (NN) 22 March 2023 for 2 hours and 30 minutes;
- (OO) 27 March 2023 for 1 hour and 15 minutes;
- (PP) 28 March 2023 for 30 minutes;
- (QQ) 29 March 2023 for 1 hour;
- (RR) 31 March 2023 for 1 hour;
- (SS) 3 April 2023 for 1 hour;
- (TT) 4 April 2023 for 1 hour;
- (UU) 26 April 2023 for 1 hour;

(VV) 27 April 2023 for 1 hour;
(WW) 1 May 2023 for 45 minutes;
(XX) 4 May 2023 for 30 minutes;
(YY) 5 May 2023 for 1 hour;
(ZZ) 8 May 2023 for 1 hour;
(AAA) 11 May 2023 for 1 hour;
(BBB) 16 May 2023 for 1 hour;
(CCC) 23 May 2023 for 1 hour;
(DDD) 30 May 2023 for 1 hour and 5 minutes;
(EEE) 31 May 2023 for 45 minutes;
(FFF) 1 June 2023 for 30 minutes;
(GGG) 2 June 2023 for 30 minutes;
(HHH) 6 June 2023 for 1 hour and 20 minutes;
(III) 7 June 2023 for 45 minutes;
(JJJ) 8 June 2023 for 20 minutes;
(KKK) 13 June 2023 for 10 minutes;
(LLL) 14 June 2023 for 30 minutes;
(MMM) 15 June 2023 for 10 minutes;
(NNN) 19 June 2023 for 30 minutes;
(OOO) 20 June 2023 for 1 hour;
(PPP) 26 June 2023 for 15 minutes;
(QQQ) 27 June 2023 for 30 minutes;
(RRR) 28 June 2023 for 30 minutes;

(SSS) 29 June 2023 for 20 minutes;
(TTT) 30 June 2023 for 1 hour;
(UUU) 3 July 2023 for 10 minutes;
(VVV) 4 July 2023 for 20 minutes;
(WWW) 5 July 2023 for 10 minutes;
(XXX) 11 July 2023 for 20 minutes;
(YYY) 12 July 2023 for 30 minutes;
(ZZZ) 17 July 2023 for 30 minutes;
(AAAA) 21 August 2023 for 10 minutes;
(BBBB) 24 August 2023 for 20 minutes;
(CCCC) 28 August 2023 for 30 minutes;
(DDDD) 29 August 2023 for 15 minutes;
(EEEE) 30 August 2023 for 20 minutes;
(FFFF) 31 August 2023 for 30 minutes;
(GGGG) 5 September 2023 for 10 minutes;
(HHHH) 8 September 2023 for 30 minutes;
(IIII) 19 September 2023 for 20 minutes;
(JJJJ) 9 October 2023 for 15 minutes;
(KKKK) 12 October 2023 for 5 hours;
(LLLL) 13 October 2023 for 5 hours;
(MMMM) 16 October 2023 for 5 hours;
(NNNN) 17 October 2023 for 5 minutes;
(OOOO) 13 February 2024 for 40 minutes;

- (PPPP) 14 February 2024 for 50 minutes
- (QQQQ) 15 February 2024 for 25 minutes;
- (RRRR) 21 February 2024 for 1 hour and 25 minutes;
- (SSSS) 22 February 2024 for 1 hour and 5 minutes;
- (TTTT) 13 March 2024 for 15 minutes; and
- (UUUU) 25 March 2024 for 35 minutes.

(f) says further that, during the period that BIJ23 was in Unit 18, there were occasions that he did not attend education classes due to operational reasons; and

(g) otherwise denies the allegations in paragraph 104.

105 As to paragraph 105, it:

(a) refers to and repeats paragraphs 63, 69, 70 and 104 above; and

(b) otherwise denies the allegations in paragraph 105.

106 As to paragraph 106, it:

(a) says that the paragraph:

(i) conflates ss 22(2)(a) and 22(2)(c) of the DDA and is therefore impermissible and embarrassing and ought to be struck out; and

(ii) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;

(b) under the cover of those objections:

(i) refers to and repeats paragraphs 54, 55, 102, 104 and 105 above (including the objections); and

(ii) otherwise denies the allegations in paragraph 106;

(c) further or in the alternative, if the Respondent has discriminated against BIJ23 on the grounds of a disability as alleged (which it denies), such discrimination is not unlawful by reason of s 21B of the DDA because of the following matters:

(i) in order to ensure the safety and security of Banksia Hill, a separate unit was required to be established because of the destruction done by certain detainees at Banksia Hill;

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(i) On 28 November 2021, there was a riot that broke out at Banksia Hill which caused property damage;

(ii) on 26 December 2021, multiple detainees engaged in riotous behaviour at Banksia Hill which caused damage to the rooftops and the Urquhart Unit;

(iii) on 21 January 2022, multiple detainees engaged in riotous behaviour at Banksia Hill which caused extensive damage to the infrastructure of Turner B wing;

(iv) on 22 February 2022, there was a major disturbance at Banksia Hill which caused damage to roof tops and fencing; and

(v) the Respondent refers further to the particulars subjoined to paragraph 49(e)(ii) above.

(ii) on the occasions BIJ23 was transferred to Unit 18 it was done for the purpose of the Safety and Security Objectives; and

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(i) It refers to and repeats the particulars subjoined to paragraph 98(b) above.

(iii) the placement of modifications on the provision of education in Unit 18 was done for the purpose of the Safety and Security Objectives; and

- (d) by reason of the matters set out in sub-paragraphs 106(c)(i) to 106(c)(iii) above:
- (i) not moving BIJ23 to Unit 18 following his behaviour would have imposed unjustifiable hardship on the Respondent within the meaning of the DDA; and
 - (ii) not placing modifications on the provision of education in Unit 18 would have imposed unjustifiable hardship on the Respondent within the meaning of the DDA.

Disability Standards for Education

107 As to paragraph 107, it:

- (a) says that to the extent that:
- (i) BIJ23 was a student with a disability;
 - (ii) Banksia Hill and/or Unit 18 was an educational institution; and
 - (iii) the Respondent was an educational provider in relation that educational institution,
- then:
- (iv) clause 5.2(2) of the *Disability Standards for Education 2005* (the **Standards**) obliged the Respondent to:
 - (A) consult BIJ23, or an associate of BIJ23, about whether a disability he had, affected his ability to participate in the courses or programs for which he was enrolled and use the facilities or services provided by the Respondent;
 - (B) in light of the consultation, decide whether an adjustment was necessary to ensure that BIJ23 was able to participate in the courses or programs provided by the educational institution, and use the facilities and services provided by it, on the same basis as a student without a disability; and
 - (C) if:

(1) an adjustment was necessary to achieve the aim mentioned in paragraph 107(a)(iv)(B) above; and

(2) a reasonable adjustment could be identified in relation to that aim,

make a reasonable adjustment for BIJ23 in accordance with Part 3; and

(v) clause 6.2(2) of the Standards obliged the Respondent to:

(A) consult BIJ23, or an associate of BIJ23, about whether a disability he had, affected his ability to participate in learning experiences of the course or program provided by the Respondent;

(B) in light of the consultation, decide whether an adjustment was necessary to ensure that BIJ23 was able to participate in those learning experiences on the same basis as a student without a disability; and

(C) if:

(1) an adjustment was necessary to achieve the aim mentioned in paragraph 107(a)(v)(B) above; and

(2) a reasonable adjustment could be identified in relation to that aim,

make a reasonable adjustment for BIJ23 in accordance with Part 3;

(b) says that clause 3.4(1) of the Standards provided that, for the Standards, an adjustment was reasonable in relation to a student with a disability if it balanced the interests of all parties affected;

(c) says that clause 3.4(2) of the Standards provided that, in assessing whether a particular adjustment for a student was reasonable, regard should be had to all the relevant circumstances and interests, including the circumstances and interests set out in that clause;

- (d) as to sub-paragraph (a):
 - (i) says that the sub-paragraph is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what are said to be the assessments that would assist BIJ23 in participating in his education;
 - (ii) says that the education team at Banksia Hill assessed BIJ23's literacy and numeracy in 2019, 2020, 2022, 2023 and 2024;

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- (i) PAT Maths Assessment 2018;
 - (ii) BHDC Assessment Process 2020;
 - (iii) BHDC Assessment Process 2022;
 - (iv) BHDC Assessment Process 2023; and
 - (v) BHDC Assessment Process 2024.
 - (iii) refers to and repeats paragraphs 104 and 106 above; and
 - (iv) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (a);
- (e) as to sub-paragraph (b):
 - (i) refers to and repeats paragraph 99(b) above; and
 - (ii) otherwise denies the allegations in sub-paragraph (b);
- (f) as to sub-paragraph (c):
 - (i) says that BIJ23 was taught remedial literacy and numeracy skills; and
 - (ii) otherwise denies the allegations in sub-paragraph (c);
- (g) as to sub-paragraph (d):
 - (i) says that the Respondent provided BIJ23 with access to psychologists, counsellors and support workers at Banksia Hill and Unit 18; and

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- (i) The Respondent provided BIJ23 with access to psychologists, throughout his time at Banksia Hill and Unit 18, including on the following dates: 23 June 2022; 4 July 2022; 6 July 2022; 8 July 2022; 14 July 2022; 15 July 2022; 19 July 2022; 27 July 2022; 28 July 2022; 3 August 2022; 4 August 2022; 5 August 2022; 25 August 2022; 29 August 2022; 31 August 2022; 5 September 2022; 20 September 2022; 4 October 2022; 6 October 2022; 10 October 2022; 12 October 2022; 26 October 2022; 2 November 2022; 4 November 2022; 18 November 2022; and 23 November 2022.
- (ii) The Respondent provided BIJ23 access to counsellors/support workers throughout his time at Banksia Hill and Unit 18; says that some of the staff at Banksia Hill and Unit 18 were trained in assisting people with brain injury, cognitive impairments or attentional deficits; and

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- (i) It refers to and repeats paragraph 99(b) above.
- (iii) otherwise does not know and therefore cannot admit the allegations in subparagraph (g);
- (h) says that it will refer to the full terms and effect of the Standards; and
- (i) otherwise denies the allegations in paragraph 107.

108 As to paragraph 108, it:

- (a) refers to and repeats paragraph 107 above; and
- (b) says that BIJ23 was enrolled in three learning plans and successfully completed two, being:
 - (i) VU22358: Developing Learning Goals (15 October 2021); and
 - (ii) VU22384: Develop and document a learning plan and portfolio (13 December 2023); and

(c) otherwise denies the allegations in paragraph 108.

109 As to paragraph 109, it:

(a) refers to and repeats paragraphs 107 to 108 above; and

(b) otherwise denies the allegations in paragraph 109.

110 As to paragraph 110, it:

(a) says that:

(i) paragraph 110(a) is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what is said to be the mental health treatment, counselling and support that BIJ23 required;

(ii) paragraph 110(b) is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what is said to be the behavioural therapy that would assist BIJ23 “to learn to, and to, better regulate his emotions and behaviour”; and

(iii) paragraph 110(c) is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what is said to be an “appropriately qualified” support worker;

(b) under cover of that objection:

(i) refers to and repeats paragraphs 99 to 100 and 107 above;

(ii) does not know and therefore cannot admit the allegations in paragraph 110; and

(iii) cannot plead further to the allegations contained in paragraph 110 in the absence of particulars.

111 As to paragraph 111, it:

(a) refers to and repeats paragraph 100, 108 and 110 above; and

(b) otherwise denies the allegations in paragraph 111.

112 As to paragraph 112, it:

- (a) refers to and repeats paragraphs 100, 108, 110 and 111 above; and
- (b) otherwise denies the allegations in paragraph 112.

113 As to paragraph 113, it:

- (a) refers to and repeats paragraphs 107 to 112 above; and
- (b) otherwise denies the allegations in paragraph 113.

114 As to paragraph 114, it:

- (a) refers to and repeats paragraphs 54 and 107 to 113 above; and
- (b) otherwise denies the allegations contained in paragraph 114.

Goods, services and facilities

115 As to paragraph 115, it:

- (a) refers to and repeats paragraph 98 above;
- (b) says that that during his detention at Banksia Hill and/or Unit 18 there were occasions where BIJ23's access to the programs or services listed in paragraph 115 of the SOC were limited by reason of BIJ23's:
 - (i) non-compliance with lawful directions;
 - (ii) threatening behaviour to others;
 - (iii) threatening behaviour to himself;
 - (iv) abuse of other detainees or staff; and
 - (v) assault of other detainees or staff;

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- (i) It refers to and repeats the matters set out in paragraphs 96 and 97 above.
- (c) says further that the decisions to limit access to the programs and services listed in paragraph 108 of the SOC were made pursuant to the Safety and Security Objectives; and

- (d) otherwise denies the allegations in paragraph 115.

115A. As to paragraph 115A, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it fails to identify a good, service or facility within the meaning of ss 4 and 24 of the DDA, and ought to be struck out;
- (b) under cover of that objection:
 - (i) refers to and repeats paragraph 56, 102, 103 and 115 above; and
 - (ii) otherwise denies the allegations in paragraph 115A; and
- (c) further or in the alternative, if the Respondent has discriminated against BIJ23 on the grounds of a disability as alleged (which it specifically denies), such discrimination is not unlawful by reason of s 21B of the DDA because of the following matters:
 - (i) on the occasions that BIJ23 was transferred to Unit 18, it was done for the purposes of Safety and Security Objectives;
 - (ii) on the occasions where access to the programs or services listed in paragraph 115 of the SOC was limited, it was done for the purposes of Safety and Security Objectives;
 - (iii) by reason of the matters set out in sub-paragraphs (i) to (ii) above:
 - (A) not moving BIJ23 to Unit 18 following his behaviour would impose unjustifiable hardship on the Respondent within the meaning of the DDA; and/or
 - (B) allowing BIJ23 unrestricted access to the programs and services listed in paragraph 115 of the SOC whilst in Unit 18 would impose unjustifiable hardship on the Respondent; and
- (d) otherwise denies the allegations in paragraph 115A.

115B. As to paragraph 115B, it:

- (a) refers to and repeats paragraph 102 above;

- (b) admits that on occasion during his detention at Unit 18, pursuant to BIJ23's PSPs, he was handcuffed or otherwise restrained for movements within the unit;

PARTICULARS

- (i) It refers to and repeats the matters set out in paragraph 83 above.
- (c) says further that in instances where BIJ23 was handcuffed or otherwise restrained for movements within Unit 18, it (and the PSP) was made pursuant to the Safety and Security Objectives; and
- (d) otherwise does not know and therefore cannot admit the allegations contained in paragraph 115B.

116 As to paragraph 116, it:

- (a) says it is embarrassing and/or ambiguous in that it fails to identify a good, service or facility within the meaning of ss 4 and 24 of the DDA, and therefore ought to be struck out;
- (b) under cover of that objection:
 - (i) refers to and repeats paragraph 56, 83, 84, 102, 103 and 115A above; and
 - (ii) otherwise denies the allegations in paragraph 116;
- (c) further or in the alternative, if the Respondent has discriminated against the BIJ23 on the grounds of a disability as alleged (which it specifically denies), such discrimination is not unlawful by reason of s 21B of the DDA because of the following matters:
 - (i) while in Unit 18 and Banksia Hill, BIJ23 displayed behaviours that were dangerous to himself, other detainees and staff;

PARTICULARS

- (i) It refers to and repeats paragraphs 97 and 98 above.
- (ii) the use of handcuffs or restraints on BIJ23 for movements within Unit 18 was done for the purposes of the Safety and Security Objectives; and

- (iii) by reason of the matters set out in sub-paragraphs (c)(i) and (c)(ii) above, if the Respondent had been precluded from handcuffing or otherwise restraining BIJ23 for the purpose of movements within Unit 18 this would have imposed an unjustifiable hardship on the Respondent within the meaning of the DDA.

L.4 Age Discrimination Act Claims

117 As to paragraph 117, it:

- (a) says that s 6 of the ADA provides that, for the purposes of the ADA, a reference to discrimination against a person on the ground of the person's age is taken not to include a reference to discrimination against a person on the ground of a disability of the person within the meaning of the DDA;
- (b) refers to and repeats paragraphs 56 to 58 (including the objections) above; and
- (c) otherwise denies the allegations contained in paragraph 117.

Direct Discrimination

118 As to paragraph 118, it:

- (a) says that s 14 of the ADA relevantly provides that for the purposes of the ADA a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the age of the aggrieved person if:
 - (i) the discriminator treats or proposes to treat the aggrieved person less favourably than, in circumstances that are the same or are not materially different, the discriminator treats or would treat a person of a different age; and
 - (ii) the discriminator does so because of the age of the aggrieved person;
- (b) says that the appropriate comparator to determine whether BIJ23 was treated differently in circumstances that were not materially different is a person:
 - (i) of a different age from BIJ23;
 - (ii) detained at Banksia Hill or Unit 18; and

- (iii) further or alternatively to sub-paragraph 118(b)(ii) above, who consistently engaged in non-compliant or dangerous behaviour as set out in paragraphs 96 to 98 above;
- (c) further, objects to paragraph 118 and says that the paragraph is embarrassing and/or ambiguous in that it:
- (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
 - (ii) does not plead, particularise or cross-refer to any material facts as to what is said to be the circumstances that “are not materially different”; and
 - (iii) does not allege a specific breach of a prohibition against discriminatory conduct under the ADA;
- (d) under the cover of those objections, it:
- (i) refers to and repeats paragraph 58, 62 and 117 above; and
 - (ii) denies the allegations in paragraph 118, including without limitation that “prisoners in adult prisons” or “an adult prisoner” are an appropriate comparator under s 14 of the ADA.

Indirect Discrimination

119 As to paragraph 119, it:

- (a) says that s 15 of the ADA relevantly provides that for the purposes of the ADA a person (the discriminator) discriminates against another person (the aggrieved person) on the ground of the age of the aggrieved person if:
- (i) the discriminator imposes, or proposes to impose, a condition, requirement or practice;
 - (ii) the condition, requirement or practice is not reasonable in the circumstances; and
 - (iii) the condition, requirement or practice has, or is likely to have, the effect of disadvantaging persons of the same age as the aggrieved person;

- (b) objects to paragraph 189 and says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
 - (ii) alleges that the conduct alleged is unlawful by reason of some unspecified combination of paragraphs 58, 62 and 117 of the SOC, without identifying which provision (or combination of provisions) in those paragraphs are said to have the effect pleaded;
 - (iii) fails to plead a material fact required by s 15 of the ADA, namely that the alleged condition, requirement or practice is not reasonable in the circumstances; and
 - (iv) does not allege a specific breach of a prohibition against discriminatory conduct under the ADA; and
- (c) under cover of that objection:
 - (i) refers to and repeats paragraphs 58, 62 and 117 to 118 above;
 - (ii) says that to the extent a “practice” or “condition” has been identified it was reasonable having regard to the CEO’s, Superintendents’ and Officers’ obligation to maintain the Safety and Security Objectives; and
 - (iii) otherwise denies the allegations in paragraph 119, including without limitation that the assessment of the effect of any alleged “practice” or “condition” is to be made by reference to persons “under 18 years of age” or that the alleged “access” to “goods, services and facilities” is to be compared with “prisoners in adult prisons, including Casuarina Prison” or “prisoners in adult prisons”.

L.5. Remedies

120 It denies that BIJ23 is entitled to the relief claimed in paragraph 120.

121 It denies that BIJ23 is entitled to the relief claimed in paragraph 121.

122 It denies that BIJ23 is entitled to the relief claimed in paragraph 122.

123 It denies that BIJ23 is entitled to the relief claimed in paragraph 123.

124 As to paragraph 124, it:

(a) says that BIJ23's claims for damages in respect of the matters alleged in paragraphs 63 to 87 and 124 to 128 of the SOC are:

(i) "claim[s] for damages for harm caused by the fault of a person" within the meaning of ss 5A(1) and 5V(1) of CLAWA; and

(ii) claims for "personal injury damages" within the meaning of s 5T of CLAWA; and

(b) says further that any award of personal injury damages in favour of BIJ23 is subject to the application of Part 2 of CLAWA;

(c) says further that:

(i) section 5T of CLAWA provides that the Court cannot make an award of personal injury damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness; and

(ii) the harm(s) alleged in paragraph 124 do not consist of a recognised psychiatric illness; and

(d) otherwise does not know and therefore cannot admit paragraph 124.

125 As to paragraph 125, it:

(a) refers to and repeats paragraph 124 above; and

(b) otherwise does not know and therefore cannot admit paragraph 125.

126 As to paragraph 126, it:

(a) refers to and repeats paragraph 124 above; and

(b) otherwise denies the allegations in paragraph 126.

127 As to paragraph 127, it:

- (a) refers to and repeats paragraph 124 above; and
- (b) otherwise denies the allegations in paragraph 127.

128 As to paragraph 128, it:

- (a) says that BIJ23 claims for damages in respect of the matters alleged in paragraphs 48 to 53, 88 to 93, 128 and/or 129 of the SOC are:
 - (i) “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and 5V(1) of CLAWA; and
 - (ii) claims for “personal injury damages” within the meaning of s 5T of CLAWA, and refers to and repeats paragraphs 124(b) and 124(c) above; and
- (b) otherwise denies the allegations in paragraph 128.

129 As to paragraph 129, it:

- (a) refers to and repeats paragraphs 106, 114, 115A, 116, 117, 118 and 119 above; and
- (b) otherwise denies the allegations in paragraph 129.

130 As to paragraph 130, it:

- (a) refers to and repeats paragraph 129 above; and
- (b) otherwise denies the allegations in paragraph 130.

131 As to paragraph 131, it:

- (a) refers to and repeats paragraphs 129 and 130 above; and
- (b) otherwise denies the allegations in paragraph 131.

M. CLAIMS OF BIK23

M.1 False imprisonment, assault and battery

False imprisonment

132 As to paragraph 132, it:

- (a) admits that during the time that BIK23 was detained at Unit 18, Unit 18 was placed in “general lockdown” and/or “rolling lockdown” (as those terms are used in SOC [43]) on the basis of the Safety and Security Objectives;

PARTICULARS

- (i) It refers to paragraph 45 of the BIK23 Schedule of Particulars.
- (b) says that it cannot otherwise plead to paragraph 132 in the absence of particulars;
- (c) says that some “general lockdowns” and/or “rolling lockdowns” referred to in paragraph 132(a) above were implemented when the number of staff who attended for work at Unit 18 that day was insufficient to have all detainees (who were not otherwise subject to confinement or restraint) out of their cells during unlock hours while at the same time maintain the security, good government, good order and/or management of Unit 18 and the safety and security of detainees, Officers, prison officers, police officers and other staff;

PARTICULARS

- (i) Further particulars of general lockdowns and/or rolling lockdowns during the time that BIK23 was detained at Unit 18 will be provided following discovery and/or evidence.
- (d) says that the claims set out in paragraphs 132 to 156 and/or 194 to 197 of the SOC:
 - (i) are “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and/or 5V(1) of CLAWA;
 - (ii) are subject to the following provisions of CLAWA:
 - (A) ss 5U, 5V, 5W and/or 5X of Part 1C of CLAWA; and/or

(B) Part 2 of CLAWA;

(iii) include “claim[s] for personal injury damages for mental harm” within the meaning of s 5R(1) of CLAWA”; and/or

(iv) are subject to ss 5Q, 5R, 5S and/or 5T of Part 1B of CLAWA; and

(e) refers to and repeats paragraph 63(d) above; and

(f) otherwise denies the allegations in paragraph 132.

133 It refers to and repeats paragraph 132 above and otherwise admits paragraph 133.

134 It refers to and repeats paragraph 132 above and otherwise admits paragraph 134.

135 As to paragraph 135, it:

(a) refers to and repeats paragraph 33(b), 37(a) and 132 above; and

(b) otherwise denies paragraph 135.

136 As to paragraph 136, it:

(a) admits that the confinement of BIK23 in his cell during a lockdown or rolling lockdown was not “detention offence” confinement; and

(b) otherwise denies the allegations in paragraph 136.

137 As to paragraph 137, it:

(a) says that BIK23 was deprived of his liberty by reason of being a detainee at Unit 18 and refers to and repeats paragraph 44(a) and 44(b) above and paragraph 138(b) below; and

(b) otherwise denies the allegations in paragraph 137.

138 As to paragraph 138, it:

(a) refers to and repeats paragraphs 135 to 137 above;

(b) refers to paragraph 44(b) and says that BIK23 was lawfully detained during the relevant periods;

PARTICULARS

- (i) Remand warrant issued on 30 July 2020, authorising imprisonment until a new court date of 31 July 2022 at 9.15am;
 - (ii) arrest warrant issued on 21 August 2020, executed on 22 August 2020 authorising BIK23 to be brought before a Court and to be dealt with according to law;
 - (iii) arrest warrant issued on 19 October 2020, executed on 26 October 2020 authorising BIK23 to be brought before a Court and to be dealt with according to law;
 - (iv) detention warrant issued on 30 November 2021 authorising imprisonment for a total of 1 year, to take effect from 11 October 2021;
 - (v) detention warrant issued on 31 November 2021 authorising imprisonment for a total of 1 year, to take effect from 11 October 2021;
 - (vi) detention warrant issued on 10 June 2022 authorising imprisonment for a total term of 6 months, to take effect from 10 June 2022;
 - (vii) arrest warrant issued on 16 November 2022, executed on 19 November 2022 authorising imprisonment until release according to law;
 - (viii) remand warrant issued on 25 November 2022, authorising imprisonment until a new court date of 13 December 2022 at 9.30am; and
 - (ix) detention warrant issued 24 February 2023 authorising imprisonment for a total of 1 year from that date.
- (c) refers to and repeats paragraph 12(c) above;
- (d) says further or in the alternative that:
- (i) pursuant to reg 74(2) of the YO Regulations, the Superintendent may order

that detainees be confined to their respective sleeping quarters or to a designated room in order to maintain good government, good order or security in Unit 18;

- (ii) in implementing each general lockdown or rolling lockdown, the Superintendent and/or Officers ordered that the detainees be confined to their respective sleeping quarters or to a designated room in order to maintain good government, good order or security in Unit 18; and/or
- (iii) such orders were made in order to maintain good government, good order or security in Unit 18;

PARTICULARS

- (i) It refers to paragraph 69 of the BIK23 Schedule of Particulars.

(e) says further or in the alternative that:

- (i) pursuant to s 11B(d) of the YO Act, an 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 facility or detention centre, and may use such force as is prescribed under section 11C of the YO Act as is necessary to ensure that lawful orders given to a detainee are complied with;
- (ii) in implementing each general lockdown or rolling lockdown, Officers issued orders to detainees of Unit 18 to return to their cells; and/or
- (iii) such orders were necessary for the purposes of the YO Act, including the security, good order and/or management of Unit 18; and

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 138(d) above.

(f) says that when BIK23 was confined to his sleeping quarters or another designated room during unlock hours, it was on the basis of the Safety and Security Objectives pursuant to the:

- (i) Management, Control and Security Power (see paragraph 138(d) above); and/or

- (ii) Compliance with Orders Power (see paragraph 138(e) above);
- (g) says further or in the alternative that:
 - (i) the claims in paragraphs 132 to 142 and/or 194 to 197 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Lockdowns Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Lockdowns Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it; and
- (h) otherwise denies the allegations in paragraph 138.

139 As to paragraph 139, it:

- (a) says that:
 - (i) during his detention in Banksia Hill and/or Unit 18, BIK23 engaged in violence and threats of violence, including:
 - (A) punching, kicking and otherwise assaulting Officers and/or other staff;
 - (B) threatening Officers and/or other staff with violence; and
 - (C) engaging in acts of violence within Banksia Hill and/or Unit 18;

PARTICULARS

- (i) It refers to paragraphs 1, 2, 3, 7, 8(5), 9, 10, 11, 12(5), 14, 16, 17, 18, 19, 24, 26, 27, 29, 34, 41 and 44 of the Respondent’s schedule of particulars for BIK23 (**BIK23 Schedule of Particulars**).
- (ii) during BIK23’s time in Unit 18, overnight lockdown usually started at 6.45pm and went until 7.45am the next day (being, the Overnight Lockdown);

(iii) refers to paragraph 138 above and says that when BIK23 was confined to his sleeping quarters or another designated room during unlock hours, it was on the basis of the Safety and Security Objectives pursuant to the:

(A) Management, Control and Security Power; and/or

(B) Compliance with Orders Power;

PARTICULARS

(i) It refers to the paragraphs 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 15, 17, 18, 19, 24, 26, 27, 29, 34 and 41 of the BIK23 Schedule of Particulars.

(b) refers to and repeats paragraph 70(b) above; and

(c) otherwise denies the allegations in paragraph 139.

140 As to paragraph 140, it:

(a) admits that the confinement of BIK23 to his sleeping quarters or another designated room during unlock hours on each of the occasions referred to in paragraph 139 above was not detention offence confinement;

(b) refers to paragraph 141 below; and

(c) otherwise denies the allegations in paragraph 140.

141 As to paragraph 141, it:

(a) says that BIK23 was deprived of his liberty by reason of being a detainee at Unit 18 and refers to and repeats paragraphs 44(a) and 44(b) above;

(b) further or in the alternative, it refers to and repeats paragraph 139 above and says that when BIK23 was confined to his sleeping quarters or another designated room during unlock hours, it was on the basis of the Safety and Security Objectives pursuant to the:

(i) Management, Control and Security Power; and/or

(ii) Compliance with Orders Power;

PARTICULARS

- (i) It refers to the particulars to paragraph 139(a)(iii) above.
- (c) refers to and repeats paragraph 63(b) and says further or in the alternative that:
 - (i) the claims in paragraphs 139 to 142 and/or 194 to 197 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Specific Confinement Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Specific Confinement Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (d) otherwise denies the allegations in paragraph 141.

142 As to paragraph 142, it:

- (a) refers to and repeats paragraphs 139 to 141 above; and
- (b) denies the allegations in paragraph 142.

Strip searches

143 As to paragraph 143, it:

- (a) admits that BIK23 was subject to a half-and-half strip search on 15 February 2023 and refers to and repeats paragraphs 41(a) and 42(a) above;

PARTICULARS

- (i) BIK23 was subject to a half-and-half search on 15 February 2023 after he was found with an improvised weapon among other dangerous items in his cell after a routine cell search. Flat screws, 8 metal weld pins broken off an air vent, multiple screws, a metal makeshift weapon/tool approximately 50 cm in length, bent with sharp sides and screws missing were found in BIK23's

cell earlier in the day. The outcome of this routine cell search prompted a half-and-half strip search.

(b) admits that BIK23 was also subjected to a half-and-half strip search on the following dates and refers to and repeats paragraphs 41(a) and 42(a) above:

(i) 20 May 2023;

(ii) 1 July 2023;

(iii) 4 July 2023;

PARTICULARS

(i) On 20 May 2023, BIK23 was subject to a half-and-half strip search after BIK23 claimed that he had lit a fire in his cell with a lighter; after the fire had been extinguished, a cell search was completed, and the lighter could not be found in the cell; a senior officer directed that a half-and-half searched be completed as it was possible that BIK23 had secreted the lighter in or on his person; the lighter was not found;

(ii) on 1 July 2023, a half-and-half strip search was authorised by the Deputy Superintendent after BIK23 was damaging his cell using makeshift weapons; BIK23 used pieces from the shower head and the metal drain and caused extensive damage to the shower, toilet and sink in his cell; and

(iii) on 4 July 2023, a half-and-half strip search was authorised by the Deputy Superintendent after BIK23 caused extensive damage to his cell and gained access to various weapons. Officers had seen BIK23 with a large chunk of steel, a metal plate and brick and throwing them around his cell attempting to cause damage.

(c) otherwise denies paragraph 143.

144 As to paragraph 144, it:

(a) does not know and therefore cannot admit paragraph 144(a);

- (b) refers to and repeats paragraphs 41(a), 42(a) and 45(f) above and says that:
 - (i) reg 85(2) of the YO Regulations states that a “detainee may be searched at any time, and in such a manner, as is considered necessary at the time by the superintendent”;
 - (ii) reg 81(4) of the YO Regulations states that “if the superintendent is empowered to search a detainee, officer or other employee, or a person to whom Division 4 applies, the superintendent is empowered to direct an officer to undertake that search on his or her behalf”; and
 - (iii) reg 86(2) of the YO Regulations does not limit the conduct of strip searches to when there are circumstances giving rise to a reasonable suspicion that the detainee may be in possession of an item that could (a) jeopardise the safety, good order or security of the detention centre; or (b) be used for self-harm;
- (c) refers to paragraphs 143(a) and 143(b) above and to the particulars thereto which identify the circumstances in which BIK23 was subject to half-and-half searches; and
- (d) otherwise denies paragraph 144.

145 As to paragraph 145, it:

- (a) refers to and repeats paragraph 143(a), 143(b) and 144(c) above;
- (b) says that the searches conducted of BIK23 were pursuant to the;
 - (i) Search Power;
 - (ii) Use of Force in Searches Power; and/or
 - (iii) Compliance with Orders Power;
- (c) refers to and repeats paragraph 63(b) and says further or in the alternative that:
 - (i) the claims in paragraphs 143 to 145 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and

- (ii) pursuant to s 5X of CLAWA, the Conduct of Searches Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Conduct of Searches Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (d) otherwise denies the allegations in paragraph 145.

Use of force

146 As to paragraph 146, it:

- (a) refers to paragraph 139(a)(i) above;
- (b) admits that while BIK23 was detained at Unit 18, he was sometimes subjected to the use of force by Officers of the kind set out in paragraphs 146(a) to 146(m);
- (c) says that the use of force on a detainee is authorised by the YO Act and the YO Regulations and in the circumstances referred to in paragraphs 28(a) to 28(d) and 45 above;
- (d) refers to and repeats paragraph 77(d) above in relation to the period that BIK23 was detained in Unit 18; and
- (e) otherwise denies paragraph 146.

147 As to paragraph 147, it:

- (a) admits that force of the kind described in one or more of paragraphs 146(a) to 146(m) of the SOC was used on BIK23 during his detention in Unit 18; and

PARTICULARS

- (i) Part 4 paragraphs 1, 2 and 3 of the BIK23 Schedule of Particulars.
- (b) otherwise denies paragraph 147.

148 As to paragraph 148, it:

- (a) says that the circumstances in which force was used on BIK23 are particularised in paragraph 147(a) above; and

(b) otherwise denies paragraph 148.

149 It does not know and therefore cannot admit paragraph 149.

150 As to paragraph 150, it:

(a) says that the Compliance with Orders Power authorises the use of such force as is prescribed under s 11C(1) of the YO Act as is necessary to ensure that lawful orders given to a detainee are complied with and is not limited to the “prescribed circumstances” referred to in s 11C(2) of the YO Act and reg 72(1) of the YO Regulations and refers to and repeats paragraph 45 above;

(b) says further that the use of force on BIK23 was pursuant to the:

(i) Compliance with Orders Power;

(ii) Management, Control and Security Power;

(iii) Restraints Power; and/or

(iv) Use of Force in Searches Power; and

PARTICULARS

(i) It refers to and repeats the particulars to paragraph 147(a) above.

(c) further, or alternatively, says that on the occasions particularised below the use of force on BIK23 was in self-defence at common law; and

PARTICULARS

(i) It refers to paragraphs 1(1)(k), 2(6), 3(14), 7(1), 10(18), 12(5), 17(8), 17(16), 24(2), 34(2), and 41(7) of the BIK23 Schedule of Particulars.

(d) otherwise denies the allegations in paragraph 150.

151A. As to paragraph 151A, it:

(a) admits that oleoresin capsicum spray was used on or near BIK23 at Unit 18 on 30 July 2022, 4 December 2022, 5 March 2023, 13 April 2023, 16 April 2023 and 6 August 2023;

- (b) admits that oleoresin capsicum spray was on the dates specified in sub-paragraph (a) above a controlled weapon for the purposes of the Weapons Act;
- (c) admits paragraph 151A(c);
- (e) denies paragraph 151A(d) and says that from October 2012:
 - (i) reg 10A(2) of the Weapons Regulations provides that a person does not commit an offence under section 7(1) of the Weapons Act only because the person, in the performance of the person's functions as a custodial officer, carries or possesses a capsicum spray weapon;
 - (ii) reg 10A (3) of the Weapons Regulations provides that a person does not commit an offence under section 7(2) of the Weapons Act only because the person, in the performance of the person's functions as a custodial officer, carries or possesses a capsicum spray weapon in a manner that could reasonably be expected to cause someone: (1) to be injured or disabled; or (2) to fear that someone will be injured or disabled;
- (d) says further that:
 - (i) section 5A(1)(a) of the Weapons Act provides that "lawful excuse" in relation to carrying or possessing a weapon includes carrying or possessing the weapon for the purposes of a lawful employment, duty or activity;
 - (ii) section 10(3) of the Weapons Act provides that a person does not commit an offence under section 6, 6A, 6B, 7, 8A or 8 of the Weapons Act in such circumstances, if any, as the regulations may prescribe;
 - (iii) regulation 10(a) of the Weapons Regulations provides that "a person does not commit an offence under section 6, 6A, 7 or 8 of the Act only because of something done by the person in the performance of the person's functions as ... a prison officer as defined in the Prisons Act 1981";
 - (iv) section 11E of the YO Act provides that a prison officer who is assisting upon the request of the chief executive officer or a superintendent may use such force as can be used by a custodial officer and, with the approval of the chief executive officer, may use such control weapons as are necessary in the circumstances; and

- (v) the members of the SOG who attended Unit 18 on 30 July 2022, 4 December 2022, 5 March 2023 and 6 August 2023 were authorised by the CEO to use oleoresin capsicum discharged by a spray weapon; and

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 81A(e)(viii) above.
- (e) otherwise denies paragraph 151A.

151 It denies paragraph 151.

Handcuffing / leg-shackling

152 As to paragraph 152, it:

- (a) admits that handcuffs were used on BIK23 on the occasions particularised below;

PARTICULARS

- (i) It refers to paragraphs 3, 10, 17, 18, 19, 24, 27, 29, 31, 34, 41 of the BIK23 Schedule of Particulars.
 - (ii) BIK23's PSP dated 28 June 2022 further authorises the use of handcuffs from secure location to secure location;
 - (iii) BIK23's PSP dated 15 May 2022 further authorises the use of handcuffs for all movements outside the unit within "Assessment Phase and Milestone 1" and for handcuffs to be used at the discretion of the Supervising Officer and Unit Manager if BIK23 for attendance at programs or visits outside the unit within "Milestone 2";
 - (iv) BIK23's PSP dated 26 October 2022 and 28 October 2022 authorises the use of handcuffs when leaving the ISU within "Milestone 1"; and
 - (v) BIK23's PSP dated 5 January 2023 authorises the use of handcuffs when moving BIK23 from secure location to secure location.
- (b) says that the reference to "leg shackling" is embarrassing in that paragraphs 153

and 154 of the SOC do not allege any leg shackling to have been unlawful;

- (c) admits that leg shackling was used on BIK23 on the occasions particularised below; and

PARTICULARS

- (i) Paragraph 18 of the BIK23 Schedule of Particulars.

- (d) otherwise denies paragraph 152.

153 As to paragraph 153, it:

- (a) refers to and repeats paragraphs 139(a)(i), 152(a) and 152(c) above; and

- (b) says that the use of handcuffs on BIK23 was pursuant to the:

- (i) Restraints Power;
- (ii) Compliance with Orders Power; and/or
- (iii) Management, Control and Security Power; and

- (c) refers to and repeats paragraph 32(b) and says further or in the alternative that:

- (i) the claims in paragraphs 152 to 156 and/or 194 to 197 constitute a “claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function” within the meaning of s 5X of CLAWA; and

- (ii) pursuant to s 5X of CLAWA, the Use of Handcuffs Policy Decision(s) and/or Use of Mechanical Restraints Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless Use of Handcuffs Policy Decision(s) and/or Use of Mechanical Restraints Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and

- (d) otherwise denies the allegations in paragraph 153.

154 As to paragraph 154, it:

- (a) says the circumstances in which BIK23 was handcuffed are particularised in paragraphs 152(a) and 152(c) above; and
- (b) otherwise does not know and therefore cannot admit paragraph 154.

155 It does not know and therefore cannot admit the allegations in paragraph 155.

156 As to paragraph 156, it:

- (a) refers to and repeats paragraph 153 above; and
- (b) otherwise denies paragraph 156.

M.2 Breach of duty of care

156A. As to paragraphs 47 to 53, 157 to 162 and 198 and/or 199, it:

- (a) says that the claims set out therein are:
 - (i) “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and/or 5V(1) of CLAWA; and/or
 - (ii) subject to the following provisions of CLAWA:
 - (A) s 5B of Division 2 of Part 1A of CLAWA;
 - (B) ss 5C and/or 5D of Division 3 of Part 1A of CLAWA;
 - (C) s 5K of Division 5 of Part 1A of CLAWA;
 - (D) ss 5U, 5V, 5W and/or 5X of Part 1C of CLAWA; and/or
 - (E) Part 2 of CLAWA; and/or
- (b) says that the claims set out in paragraphs 47 to 53, 157 to 162 and 198 and/or 199 of the SOC:
 - (i) include “claim[s] for personal injury damages for mental harm” within the meaning of s 5R(1) of CLAWA”; and/or
 - (ii) are subject to ss 5Q, 5R, 5S and/or 5T of Part 1B of CLAWA.

157 As to paragraph 157, it:

- (a) refers to and repeats paragraph 6 above; and
- (b) otherwise does not know and therefore cannot admit paragraph 157.

158 As to paragraph 158, it:

- (a) refers to and repeats paragraph 6 above;
- (b) admits that while in detention in Unit 18, BIK23 engaged in the following behaviours:
 - (i) setting fires (as alleged in paragraph 158(a) of the SOC);
 - (ii) damaging or destroying property (as alleged in paragraph 158(b));
 - (iii) exhibiting a lack of thought and/or concern for the consequences of his actions (as alleged in paragraph 158(c));
 - (iv) self-harming (as alleged in paragraph 158(g)); and
 - (v) refusing to follow instructions (as alleged in paragraph 158(h)); and
- (c) otherwise does not know and therefore cannot admit paragraph 158.

159 As to paragraph 159, it:

- (a) refers to and repeats paragraphs 6 and 158 above; and
- (b) otherwise denies the allegations in paragraph 159.

160 As to paragraph 160, it:

- (a) refers to and repeats paragraph 51(d) above;
- (b) refers to and repeats paragraphs 158 and 159 above;
- (c) says that at all relevant times, BIK23 was not a “person of normal fortitude” within the meaning of s 5S of CLAWA;

- (d) refers to and repeats paragraph 51(d) above and says that the allegation is embarrassing and/or ambiguous in that:
 - (i) under s 5S of CLAWA, because it is necessary to assess whether a person of normal fortitude would suffer a recognised psychiatric illness “in the circumstances of the case”, it is necessary to specify the critical event(s) with a degree of precision;
 - (ii) paragraph 160 of the SOC does not identify whether:
 - (A) it is alleged that each incident cross-referenced in the particulars to that paragraph was foreseeable and might, in the circumstances of the case, cause a person of normal fortitude to suffer a recognised psychiatric illness; or
 - (B) it alleges that some combination of incidents in each sub-paragraph might do so; or
 - (C) whether it alleges that the combination of all incidents in all sub-paragraphs might do so;
 - (iii) there is no articulation in paragraph 160 of the SOC of the nature of the conduct that the Respondent should have foreseen which might lead a person of normal fortitude to suffer a psychiatric illness; and
 - (iv) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent’s response, or lack of response, to that risk; and
- (e) under cover of that objection, otherwise denies the allegations in paragraph 160.

161 As to paragraph 161, it

- (a) refers to and repeats paragraph 139 and 141 above;
- (b) says that:
 - (i) paragraph 161 does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22]; and

- (ii) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk;
- (c) says further or in the alternative that pursuant to section 5W of CLAWA:
- (i) the functions that were required to be exercised by Unit 18 were limited by the financial and other resources that were reasonably available to Banksia Hill (including the number of available staff) for the purpose of exercising those functions;
 - (ii) the general allocation of those resources is not open to challenge;
 - (iii) the functions required to be exercised by Unit 18 are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which this proceeding relates); and
 - (iv) the Respondent's allocations of staff to Unit 18 were a "policy decision" within the meaning of s 5X of CLAWA;
- (d) says further or in the alternative that:
- (i) the claims in paragraphs 47 to 53, 157 to 162 and/or 198 and/or 199 constitute a "claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the:
 - (A) Lockdown Policy Decision(s); and/or
 - (B) Specific Confinement Policy Decision(s);

cannot be used to support a finding that the Respondent was at fault unless the policy decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (e) otherwise denies paragraph 161.

161A. As to paragraph 161A, it:

- (a) refers to and repeats paragraphs 44(a), 44(b), 49, 138(d) and 138(e) above;
- (b) refers to and repeats paragraph 139 and 141 above;
- (c) refers to and repeats paragraph 161 above; and
- (d) otherwise denies paragraph 161A.

161B. It denies paragraph 161B and says further that if (which is denied) there was any breach of the alleged duty of care by the Respondent, the Minister, the CEO, a Superintendent and/or any Officer, BIK23 was contributorily negligent (within the meaning of section 5k of CLAWA and/or section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)*) in failing to take precautions against the risk of that harm by:

- (a) failing to comply with directions issued to him by Officers; and/or
- (b) failing to refrain from threatening to harm Officers and/or other detainees.

PARTICULARS

- (i) With respect to failing to comply with the direction issued by Officers it refers to paragraphs 1, 2, 7, 8, 9, 11, 16, 18, 19, 23, 24, 27, 29, 30, 31, 34 and 44 of the BIK23 Schedule of Particulars;
- (ii) with respect to failing to refrain from threatening to harm Officers and/or other detainees, it refers to paragraphs 1, 2, 7, 11, 12, 18, 19, 24, 27, 28, 30, 34 and 44 of the BIK23 Schedule of Particulars; and
- (iii) further particulars may be provided following discovery and the filing of evidence.

161C. As to paragraph 161C, it:

- (a) refers to and repeats paragraph 145(b) above; and
- (b) says further that paragraph 161C does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged

harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22];

- (c) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk; and
- (d) otherwise denies paragraph 161C.

161D. As to paragraph 161D, it:

- (a) refers to and repeats paragraphs 40(a), 41(a), 42(a) and 49 above;
- (b) refers to and repeats paragraphs 144, 145 and 150 above;
- (c) refers to and repeats paragraph 161C above; and
- (d) otherwise denies paragraph 161D.

161E. As to paragraph 161E, it:

- (a) refers to and repeats paragraph 161D above;
- (b) says further that:
 - (i) the claim in paragraph 161E constitutes a "claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA; and
 - (ii) pursuant to s 5X of CLAWA, the Conduct of Searches Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the Conduct of Searches Policy Decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (c) otherwise denies paragraph 161E.

161F. As to paragraph 161F, it:

- (a) refers to and repeats paragraphs 144 and 145;

- (b) says that paragraph 161F does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22];
- (c) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk; and
- (d) otherwise denies paragraph 161F.

161G. As to paragraph 161G, it:

- (a) refers to and repeats paragraphs 22(a)(iii), 28, 40(a)(iii) and 49 above;
- (b) refers to and repeats paragraph 150 above;
- (c) refers to and repeats paragraph 161(a) above; and
- (d) otherwise denies paragraph 161G.

161H. It denies paragraph 161H and says further that if (which is denied) there was any breach of the alleged duty of care by the Respondent, the Minister, the CERO, a Superintendent and/or any Officer, BIK23 was contributorily negligent (within the meaning of section 5K of CLAWA and/or section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)*) in failing to take precautions against the risk of that harm by:

- (a) failing to comply with directions issued to him by Officers; and/or
- (b) failing to refrain from threatening to harm Officers and/or other detainees.

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 161B above.

161I. As to paragraph 161I, it:

- (a) refers to and repeats paragraphs 153 above;
- (b) says further that:

- (i) paragraph 161I does not identify the person, thing or set of circumstances which is alleged to have given rise to the potential for the alleged harm nor the general causal mechanism of any injury sustained: *De Martin & Gasparini Pty Ltd v Bartlett* [2025] NSWCA 56 [22]; and
 - (ii) in the absence of a specified risk of harm, one cannot assess the probability of that risk occurring or evaluate the reasonableness of the Respondent's response, or lack of response, to that risk;
- (c) says further or in the alternative that pursuant to section 5W of CLAWA:
- (i) the functions that were required to be exercised by Unit 18 were limited by the financial and other resources that were reasonably available to Unit 18 (including the number of available staff) for the purpose of exercising those functions;
 - (ii) the general allocation of those resources is not open to challenge; and
 - (iii) the functions required to be exercised by Unit 18 are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which this proceeding relates);
- (d) says further or in the alternative that:
- (i) the claims in paragraphs 161I to 161K constitute a "claim for damages for harm caused by the fault of a public body or officer arising out of fault in the performance or non-performance of a public function" within the meaning of s 5X of CLAWA;
 - (ii) pursuant to s 5X of CLAWA, the Use of Handcuffs Policy Decision(s) and/or Use of Mechanical Restraints Policy Decision(s) cannot be used to support a finding that the Respondent was at fault unless the policy decision(s) was/were so unreasonable that no reasonable public body or officer in the position of the Respondent, the Minister, the CEO and/or the Superintendent could have made it/them; and
- (e) otherwise denies paragraph 161I.

161J. As to paragraph 161J, it:

- (a) refers to and repeats paragraphs 153 and 49 above;

(b) refers to and repeats paragraph 161(a) above; and

(c) otherwise denies paragraph 161J.

161K. It denies paragraph 161K and says further that if (which is denied) there was any breach of the alleged duty of care by the Respondent, the Minister, the CEO, a Superintendent and/or any Officer, BIK23 was contributorily negligent (within the meaning of section 5K of CLAWA and/or section 4(1) of the *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947 (WA)*) in failing to take precautions against the risk of that harm by:

(a) failing to comply with directions issued to him by Officers; and/or

(b) failing to refrain from threatening to harm Officers and/or other detainees;

PARTICULARS

(i) It refers to and repeats the particulars subjoined to paragraph 161B above.

161L. As to paragraph 161L, it:

(a) refers to paragraphs 6 and 49 above;

(b) refers to paragraphs 161(b), 161C(b), 161F(b) and 161I(b) above;

(c) says that the allegation is embarrassing and/or ambiguous in that it does not identify the content or requirements of a "comprehensive assessment" (in subparagraph (a)) or the content or requirements of the training referred to in subparagraph (c);

(d) says that it trained Officers in:

(i) interacting with detainees with disabilities;

PARTICULARS

(i) The Respondent relies on the Disability Services Handbook distributed as part of the training for Officers at the Corrective Services Academy.

(ii) interacting with detainees who have suffered trauma; and

(iii) mental health first aid; and

PARTICULARS

(i) The Respondent relies on the training conducted at the Corrective Services Academy as outlined in:

(A) Intellectual and Cognitive Disability Training for Prison Officers; and

(B) the Disability Services Handbook.

(e) otherwise denies paragraph 161L.

161M. It denies paragraph 161M.

162 As to paragraph 162, it:

(a) says that section 5T of CLAWA states that a court cannot make an award of personal injury damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness;

(b) says further that any award of personal injury damages in favour of BIK23 is subject to the application of Part 2 of CLAWA;

(c) refers to and repeats paragraphs 161B, 161H and 161K above; and

(d) otherwise denies the allegations in paragraph 162.

M.3 Disability Discrimination Act Claims

163 As to paragraph 163, it:

(a) admits that pursuant to s 123 of the DDA, the Respondent is vicariously liable for the conduct engaged in by the CEO, Superintendent and Officers within the scope of their actual or apparent authority unless the Respondent can establish that it took reasonable precautions and exercised due diligence to avoid the conduct; and

(b) otherwise denies the allegations in paragraph 95.

164 As to paragraph 164, it:

- (a) refers to and repeats paragraph 6 above; and
- (b) otherwise admits the allegations in paragraph 164.

165 As to paragraph 165, it:

- (a) does not know and therefore cannot admit the allegations in sub-paragraph (a);
- (b) as to sub-paragraph (b):
 - (i) says that during his detention at Unit 18 and/or Banksia Hill, BIK23 was medicated for anxiety; and
 - (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (b);
- (c) as to sub-paragraph (c):
 - (i) says that during his detention at Unit 18 and/or Banksia Hill, BIK23 was medicated for insomnia;
 - (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (c);
- (d) as to sub-paragraph (d):
 - (i) refers to and repeats paragraph 166 below; and
 - (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (d);
- (e) as to sub-paragraph (e):
 - (i) refers to and repeats paragraph 166 below; and
 - (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (e);
- (f) as to sub-paragraph (f):
 - (i) says that on 30 August 2022:

- (A) BIK23 was found to have stockpiled both his own medication and claimed to have “bought” medication from another young person in detention;
 - (B) when informed he would not be moving cells, BIK23 said words to the effect of “I have lots of tablets and I am going to take them to overdose” to an Officer;
 - (C) BIK23 informed the Officer he had ingested nine tablets;
 - (D) an Officer notified the nurse who reviewed BIK23 and recommended that the doctor on-call be notified;
 - (E) the doctor advised that no ambulance was necessary and that the nurse should monitor BIK23 every 30 minutes for any changes; and
 - (F) BIK23 was then regularly monitored; and
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (f);
- (g) as to sub-paragraph (g):
 - (i) says the allegation is vague and embarrassing and liable to be struck out; and
 - (ii) under cover of that objection, it does not know and therefore cannot admit the allegation in sub-paragraph (g); and
 - (h) otherwise does not know and therefore cannot admit the allegations in paragraph 165.

166 As to paragraph 166, it:

- (a) as to sub-paragraph (a):
 - (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIK23 started fires or attempted to start a fire; and

PARTICULARS

- (i) These occasions include:
 - (A) on 3 December 2022:
 - (1) Officers observed BIK23 attempt to start a fire in his cell using live wires and batteries;
 - (2) once Officers arrived at BIK23's cell, he attempted to cover his viewing window and he was given instruction to uncover it, which was ignored;
 - (3) BIK23 continued to play with the wires and batteries and as a consequence the power was turned off in A wing, being the wing where BIK23 was being housed;
 - (4) BIK23 then informed Officers that he had swallowed two batteries;
 - (5) an Officer then observed BIK23 tie a ligature around his neck;
 - (6) he also informed Officers that "I just want to die";
 - (7) Officers entered BIK23's cell and removed him and took him to a nurse who assessed him;
 - (8) BIK23 was taken to the Fiona Stanley Hospital in response to his complaints that he had swallowed batteries and was kept in overnight; and
 - (9) there was no indication that BIK23 in fact swallowed the batteries;
 - (B) on 28 December 2022:
 - (1) BIK23 started a fire in his cell using electrical wires, paper and his doona;

- (2) upon becoming aware of the fire, Officers immediately attended BIK23's cell;
 - (3) when they arrived at BIK23's cell, they instructed BIK23 to move away from the door and move to the back of the cell. This instruction was given so that officers could safely use the fire extinguisher to extinguish the fire, which they did;
 - (4) once the fire was extinguished, BIK23 was instructed to place his hands through the hatch for handcuffs to be placed on him; and
 - (5) once BIK23 had handcuffs on, he was extracted from the cell.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (a);
- (b) as to sub-paragraph (b):
- (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIK23 destroyed property that was not his own; and

PARTICULARS

- (i) These occasions include:
 - (A) on 11 July 2022:
 - (1) BIK23 was out of bounds and managed to climb onto the roof of the ISU; and
 - (2) along with other detainees BIK23 damaged the roof; and
 - (B) on 14 August 2022:
 - (1) BIK23 was involved in a code red out of bounds where, where he climbed up the air conditioning vent and smashed windows of the B wing windowsill; and

- (2) as a result, BIK23 was escorted to the ISU.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (b);
- (c) as to sub-paragraph (c):
 - (i) objects to sub-paragraph (c) and says that the paragraph is embarrassing and/or ambiguous; and
 - (ii) under cover of that objection does not know and therefore cannot admit the allegations in sub-paragraph (c);
- (d) does not know and therefore cannot admit the allegations in sub-paragraph (d);
- (e) as to sub-paragraph (e):
 - (i) objects to sub-paragraph (e) and says that the paragraph is embarrassing and/or ambiguous; and
 - (ii) under cover of that objection does not know and therefore cannot admit the allegations in sub-paragraph (e);
- (f) as to sub-paragraph (f):
 - (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIK23 reported that he had difficulty regulating his emotions; and

PARTICULARS

- (i) These occasions include:
 - (A) on 7 March 2023, BIK23 informed a mental health nurse that he was having difficulty regulating his behaviour.
- (ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (f);

(g) as to sub-paragraph (g):

- (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIK23 engaged in self-harm, attempted suicide or threatened to engage in self-harm or suicide' and

PARTICULARS

(i) These occasions include:

(A) the 3 December 2022 incident contained in the particulars subjoined to sub-paragraph (a)(i) above; and

(B) on 15 February 2023:

- (1) BIK23 reported to a nurse that he had smashed his head against the viewing window in his cell; and
- (2) the nurse attended to the superficial wound.

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (g);

(h) as to sub-paragraph (h):

- (i) admits that during his detention at Unit 18 and/or Banksia Hill there were occasions where BIK23 refused to follow instructions; and

PARTICULARS

(i) These occasions include:

(A) on 16 August 2022:

- (1) BIK23 was informed he would be transferred to Unit 18 on 16 August 2022 as he had been involved in a roof top protest and cell damage in recent days and that these actions were in contravention of the expected standards of behaviour;
- (2) BIK23 was placed in handcuffs to be escorted to the transport van;

- (3) BIK23 resisted transport to Unit 18 and dropped his weight in protest and use of force was necessary to avoid the BIK23 falling to the floor;
- (4) BIK23 disobeyed instructions to enter the vehicle, abused and threatened staff and stated words to the effect of "I'm not fucking going to casa";
- (5) BIK23 had the handcuffs moved from his rear to the front in preparation for his placement in the rear of the transport vehicle pod;
- (6) Officers then assisted BIK23 to his feet, as he continued to drop his weight, and escorted him to the rear of the transport vehicle;
- (7) BIK23 continued to resist and threaten Officers despite counselling, and kicked a fire extinguisher off the wall as well as the side of the transport vehicle;
- (8) while being secured in the transfer vehicle, BIK23 spat through the hatch numerous times making contact with at least three Officers;
- (9) during the escort in the transfer vehicle, BIK23 caused damage to the seat belts within the vehicle pod and kicked the walls of the pod;
- (10) throughout the incident, BIK23 threatened to bash and kill all staff involved when he gets the chance;
- (11) on arrival at Unit 18, BIK23 was counselled extensively and had tied seatbelts around his wrists, which he was counselled into removing and was then given a use of force warning before being restrained in handcuffs; and
- (12) once in his allocated cell, a nurse was on site and performed a post use of force review on BIK23, who noted bilateral red marks on his wrists, and a small

cut to a finger, in relation to which BIK23 denied any pain.

(B) following the 3 December 2022 incident contained in the particulars subjoined to sub-paragraph (a)(i) above, on 4 December 2024, BIK23:

- (1) was returned to Unit 18 and was told he would be placed in an multi-purpose (MPU) cell due to his self-harm attempts and the damage caused to his previous cell;
- (2) upon returning to Unit 18, BIK23 refused instructions to exit the vehicle;
- (3) Officers counselled BIK23 to leave the vehicle but he refused and tied the seatbelt around his arm so he could not leave the car;
- (4) BIK23 proceeded to abuse Officers and threatened to assault them if they came into the vehicle;
- (5) an Officer issued a use of force warning;
- (6) upon escorting BIK23 out of the vehicle, BIK23 attempted to assault several Officers by swinging his arms at, kicking and attempting to bite Officers;
- (7) BIK23 then attempted to grab a fire extinguisher;
- (8) in response to the above, an Officer used a chemical agent on BIK23; and
- (9) following the use of the chemical agent, BIK23 was taken to the shower and seen by a nurse.

(ii) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (h); and

(i) otherwise does not know and therefore cannot admit the allegations in paragraph 166.

167 As to paragraph 167, it:

(a) as to sub-paragraph (a):

(i) it says that on five occasions, BIK23 was transferred from Banksia Hill to Unit 18;

PARTICULARS

(i) The dates of the transfers are set out below:

- (A) 20 July 2022 – transferred to Unit 18 and transferred back to Banksia Hill on 10 August 2022;
- (B) 16 August 2022 – transferred to Unit 18 and transferred back to Banksia Hill on 6 September 2022;
- (C) 8 November 2022 – transferred to Unit 18 and transferred back to Banksia Hill on 13 January 2023;
- (D) 27 January 2023 – transferred to Unit 18 and remained there until 7 August 2023; and
- (E) 2 May 2023 – sent to Banksia Hill for a dental appointment for the day, and then back to Unit 18.

(ii) says that those transfers were made on the basis of:

- (A) his incident history; and
- (B) the fact that Unit 18 was better able to deal with his displayed behaviours;

PARTICULARS

- (i) On or about 20 July 2022, BIK23 was transferred to Unit 18 on the grounds that he posed a significant risk to the safety and good order of Banksia Hill in its current state of operations;
- (ii) on or about 16 August 2022, BIK23 was transferred to Unit 18 on the grounds that he had been in a roof top protest and caused

cell damage in recent days and that these actions were in contravention of the expected standards of behaviour;

- (iii) on or about 8 November 2022, BIK23 was transferred to Unit 18 in consideration of his [REDACTED] and significant history of self-harm;
 - (iv) on or about 27 January 2023, BIK23 was transferred to Unit 18 due to his involvement in two critical incidents on 24 and 25 January 2023; and
 - (v) on or about 2 May 2023, BIK23 was transferred to Banksia Hill for the purpose of a dental appointment and was returned to Unit 18 on the same day on the basis that he posed a significant threat to the security and good order of Banksia Hill.
- (iii) says further that on each occasion BIK23 was transferred to Unit 18, it was done pursuant to the Safety and Security Objectives;
 - (iv) says further that any decision to transfer BIK23 to Unit 18 was done following an assessment by a multidisciplinary team made up of individuals with expertise in rehabilitation, operations, security, case planning, health and welfare, psychology and mental health, to determine whether it was appropriate for BIK23 to be transferred; and
 - (v) otherwise denies the allegations in sub-paragraph (a);
- (b) as to sub-paragraph (b):
 - (i) refers to and repeats paragraphs 132, 138 and 139 above;
 - (ii) says that on occasion during his detention at Banksia Hill and/or Unit 18, BIK23 was confined to his cell;

PARTICULARS

- (i) These occasions include:
 - (A) on the dates referred to in the particulars paragraph 132 above as a consequence of a lockdown or a rolling lockdown;

- (B) on 4 December 2022, BIK23 was confined to his cell as a result of secreting a piece of metal seatbelt in his mouth and refusing to come out of the pod in the back of the transport van;
 - (C) on 20 April 2023, BIK23 was confined to his cell as a result of purposeful cell damage and constructing makeshift weapons from cell debris in his cell at Unit 18;
 - (D) on 26 May 2023, BIK23 was confined to his cell as a result of purposeful cell damage, and injury to self (not by way of self-harm) in his cell at Unit 18; and
 - (E) on 14 July 2023, BIK23 was confined to his cell as a result of engaging in a fight with another detainee which caused a code amber in B wing of Unit 18.
- (iii) says further that in each of the circumstances where BIK23 was confined to his cell, it was done pursuant to the Safety and Security Objectives; and
 - (iv) otherwise denies the allegations in sub-paragraph (b);
- (c) as to sub-paragraph (c):
 - (i) refers to and repeats paragraph 146 above;
 - (ii) says that on occasions during his detention at Banksia Hill and/or Unit 18, BIK23 was subject to the use of force;

PARTICULARS

- (i) These occasions include:
 - (A) the 16 August 2022 incident described in the particulars subjoined to paragraph 166(h)(i) above; and
 - (B) the 4 December 2022 incident described in the particulars subjoined to paragraph 166(h)(i) above.

- (iii) says further that in each of the circumstances where BIK23 was subject to the use of force, it was done pursuant to the Safety and Security Objectives; and
 - (iv) otherwise denies the allegations in sub-paragraph (c);
- (d) as to sub-paragraph (d):
- (i) refers to and repeats paragraph 56 above;
 - (ii) says that on occasion during his detention at Banksia Hill and/or Unit 18, BIK23 was denied, or his access was restricted to, programs or privileges or other alleged “goods, services or facilities”;

PARTICULARS

- (i) These occasions include:
 - (A) on 21 August 2022:
 - (1) BIK23 used a large metal object to attempt to smash his cell camera;
 - (2) an Officer counselled and cautioned BIK23, telling him to stop;
 - (3) BIK23 told the Officer to “fuck off”; and
 - (4) BIK23 received a loss of privilege for canteen due to the large restitution already owing by him;
 - (B) on 25 August 2022:
 - (1) BIK23 was involved in a physical altercation with another detainee; and
 - (2) as a result of this incident, BIK23 received a loss of privilege, for 30 minutes of recreation time in the unit instead of a restitution charge; and
 - (C) between 22 and 25 August 2022, BIK23 received a loss of privilege of social phone calls due to his poor behaviour in

intentionally damaging his in-cell camera on 21 August 2022.

- (iii) says further that in each of the circumstances where BIK23 was denied, or his access was restricted to, programs or privileges other alleged “goods, services or facilities”, it did so pursuant to the Safety and Security Objectives; and
- (iv) otherwise denies the allegations in sub-paragraph (d);
- (e) as to sub-paragraph (e):
 - (i) refers to and repeats paragraphs 173 and 174 below;
 - (ii) says that during the Relevant Period, access to education would only be limited where:
 - (A) a critical incident occurred that required the response of all staff and a lockdown of detainees until the incident was resolved;
 - (B) a detainee made statements of intention to engage in self-injury or attempt suicide;
 - (C) a detainee was making statements of intention to assault another detainee or staff;
 - (D) a detainee was dysregulated and needed to be regulated before they could participate in education;
 - (E) various incidents rendered the physical environment unsafe for both detainees and staff;
 - (F) a detainee was unwell;
 - (G) a detainee declined to participate;
 - (H) a detainee had in-person Court appearance; or
 - (I) a detainee could be temporarily taken out of education to attend a medical appointment, psychological counselling or program appointment; and

- (iii) otherwise denies the allegations in sub-paragraph (e);
- (f) as to sub-paragraph (f):
 - (i) refers to and repeats paragraph 152 to 156 above;
 - (ii) says that on occasion during his detention at Banksia Hill and/or Unit 18, BIK23 was handcuffed for movements to and from his cell;

PARTICULARS

- (i) It refers to and repeats paragraph 152 above.
- (iii) says further that in each of the circumstances where BIK23 was handcuffed, leg shackled or otherwise restrained to move him to and from his cell, it was done pursuant to the Safety and Security Objectives; and
- (iv) otherwise denies the allegations in sub-paragraph (f); and
- (g) otherwise denies paragraph 167.

168 As to paragraph 168, it:

- (a) as to sub-paragraph (a):
 - (i) says that BIK23 had regular access to medical services;
 - (ii) says further that, when it was decided by a medical professional that he be medicated, he was provided with appropriate medication;
 - (iii) says further that on the occasions where medication was not administered, it was because:
 - (A) medication was withdrawn due to BIK23 hoarding medication;

PARTICULARS

- (i) On 30 August 2022:
 - (A) BIK23 was found to have stockpiled his own medication and claimed to have bought medication from another detainee; when BIK23 was informed, he would not be

moving cells he informed Officers he was going to take all his pills;

(B) in response to this incident, the on-call doctor noted that all medication was to be ceased until psychiatrist review; and

(C) on 7 September 2022, BIK23 was discharged with a letter to his GP.

(B) BIK23 refused to take the medication; or

PARTICULARS

(i) On 13 January 2023, BIK23 refused to take his medication.

(C) in response to BIK23 not following instructions; and

PARTICULARS

(i) On 9 March 2023:

(A) there was a delay in administering medication due to incidents with other detainees;

(B) BIK23 proceeded to trash his cell and gain a weapon from pieces of his cell;

(C) BIK23 then proceeded to smash on his cell door yelling he wanted his medication; and

(D) no medication given to BIK23 that evening as he would not comply with instruction.

(iv) otherwise denies the allegations in sub-paragraph (a); and

(b) as to sub-paragraph (b):

(i) subject to the matters referred to in sub-paragraph (iv) below, admits that cognitive behavioural therapy was not provided to BIK23 during the periods he was in detention;

- (ii) says that cognitive behavioural therapy:
 - (A) is one of several therapeutic interventions available that may be exercised in particular circumstances
 - (B) is subject to the assessment of that individual; and
 - (C) is subject to clinical discretion, resource availability, and the detainee's engagement capacity;
 - (iii) does not know and cannot admit whether specific therapies may have been considered for a particular detainee but were not applied in relation to that detainee on the basis that they were not considered suitable in the circumstances that presented themselves at the relevant time;
 - (iv) says that approaches consistent with, or elements of, cognitive behavioural therapy may be applied in different settings, including offence-specific counselling, ARMS assessments, or staff-led interventions such as verbal reframing of negative thought patterns during de-escalation attempts, and reflection exercises facilitated following incidents of non-compliance or emotional dysregulation; and
 - (v) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (b);
- (c) as to sub-paragraph (c):
- (i) says the paragraph is vague and embarrassing and liable to be struck out as it:
 - (A) fails to identify, with sufficient particularity, the techniques that would be required to be used by Officers;
 - (B) fails to adequately explain when each adjustment should be made, and whether deploying one of the supposed adjustments is sufficient, or whether a combination of adjustments should be attempted, and if so what combination; and
 - (C) requires the exercise of a discretion, and as such the adjustment cannot be considered necessary;

- (ii) under cover of those objections says that it trained Officers in:
 - (A) interacting with detainees with disabilities;

PARTICULARS

- (i) The Respondent relies on the Disability Services Handbook distributed as part of the training for Officers at the Corrective Services Academy.
- (B) interacting with detainees who have suffered trauma; and
- (C) mental health first aid; and

PARTICULARS

- (i) The Respondent relies on the training conducted at the Corrective Services Academy as outlined in:
 - (A) Intellectual and Cognitive Disability Training for Prison Officers; and
 - (B) the Disability Services Handbook.
- (iii) says further and in the alternative that insofar as the techniques and approaches to communication are reasonable adjustments (which is denied), Officers who observe non-compliant behaviour:
 - (A) must exercise discretion to determine the most appropriate response;
 - (B) must act quickly to ensure the security and safety of detainees and staff;
 - (C) face variable factors depending on the circumstances of the behaviour, including immediate issues concerning safety to the individual detainee as well as other detainees and staff; and
 - (D) may not have sufficient time to engage in any of the techniques or approaches due to the immediacy of any specific act or threat;
- (iv) by reason of the matters set out above, the alleged reasonable adjustment would:

- (A) undermine the Safety and Security Objectives; and
 - (B) prevent Officers from exercising their discretion in identifying the most appropriate response to non-compliant behaviour,
- and would therefore impose an unjustifiable hardship on the Respondent within the meaning of the DDA; and
- (v) otherwise denies the allegations in sub-paragraph (c);
- (d) as to sub-paragraph (e):
- (i) says that it trained Officers in the following:
 - (A) interacting with detainees with disabilities;

PARTICULARS

- (i) The Respondent relies on the Disability Services Handbook distributed as part of the training for Officers at the Corrective Services Academy.
- (B) interacting with detainees who have suffered trauma; and
- (C) mental health first aid; and

PARTICULARS

- (i) The Respondent relies on the training conducted at the Corrective Services Academy as outlined in:
 - (A) Intellectual and Cognitive Disability Training for Prison Officers; and
 - (B) the Disability Services Handbook.
- (ii) says further that the alleged reasonable adjustment would:
 - (A) undermine the Safety and Security Objectives;
 - (B) require the provision of a support worker at all times as BIK23 could interact with an Officer at any time; and

- (C) require significant undertaking by the Respondent to hire individual support workers for BIK23 and other detainees with similar needs as BIK23; and
 - (iii) says that the provision of an individual support worker to support BIK23 with interactions with Officers would:
 - (A) cause delays in the ability of Officers to act quickly to ensure the security and safety of detainees and staff;
 - (B) undermine the authority of Officers; and
 - (C) require additional staffing requirements not just for BIK23 but for other detainees with similar needs as BIK23;
 - (iv) says further that by reason of the matters set out in sub-paragraphs 168(d)(ii) and 168(d)(iii) above, the proposed reasonable adjustment would impose an unjustifiable hardship on the Respondent within the meaning of the DDA; and
 - (v) otherwise denies the allegations in sub-paragraph (e); and
- (e) as to sub-paragraph (f):
- (i) says the paragraph is vague and embarrassing and liable to be struck out as it fails to adequately explain when each adjustment should be made, and whether deploying one of the supposed adjustments is sufficient, or whether a combination of adjustments should be attempted, and if so what combination; and
 - (ii) under cover of that objection, says that during the period of his detention at Banksia Hill and Unit 18, BIK23 was, subject to the limits set out in sub-paragraph (iii)below, provided with access to the matters listed in paragraphs 168(f)(i) to (vi) of the SOC;
 - (iii) says further that at times, BIK23's access to the matters listed in paragraphs 168(f)(i) to (vi) of the SOC was limited or refused where:
 - (A) BIK23's conduct was non-compliant with directions; or
 - (B) BIK23 was a security risk to himself, other detainees or staff; and

PARTICULARS

- (i) The Respondent relies on the matters set out in paragraphs 139(a), 166 and 167 above.
- (iv) says further that the alleged reasonable adjustment would:
 - (A) undermine the Safety and Security Objectives; and
 - (B) prevent Officers from exercising their discretion in identifying the most appropriate response to the behaviour set out in sub-paragraph (iii) above; and
- (v) says that insofar as access to the matters listed in sub-paragraphs 168(f)(i) to (vi) of the SOC are reasonable adjustments (which is denied), Officers who observe such behaviour:
 - (A) must exercise discretion to determine the most appropriate response;
 - (B) must act quickly to ensure the security and safety of detainees and staff;
 - (C) face variable factors depending on the circumstances of the behaviour, including immediate issues concerning safety to the individual detainee as well as other detainees and staff; and
 - (D) may not have sufficient time to engage in any of the techniques or approaches due to the immediacy of any specific act or threat;
- (vi) says further that by reason of the matters set out in sub-paragraphs (iv) and (v) above, the proposed reasonable adjustment would impose an unjustifiable hardship on the Respondent within the meaning of the DDA; and
- (vii) otherwise denies the allegations in sub-paragraph (f); and
- (f) otherwise denies paragraph 168.

169 As to paragraph 169, it:

- (a) refers to and repeats paragraph 168 (including the objections) above;

- (b) otherwise denies the allegations in paragraph 169.

169A. As to paragraph 169A:

- (a) refers to and repeats paragraphs 168 and 169 (including the objections) above;
and
- (b) otherwise denies the allegations in paragraph 169A.

169B. As to paragraph 169B:

- (a) refers to and repeats paragraphs 49, 168 and 169 (including the objections) above;
and
- (b) otherwise denies the allegations in paragraph 169B.

170 As to paragraph 170, it:

- (a) refers to and repeats paragraph 163 to 169B above; and
- (b) otherwise denies the allegation in paragraph 170.

Direct Discrimination

171 As to paragraph 171, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
and/or
 - (ii) alleges that the conduct alleged is unlawful by reason of some unspecified combination of paragraphs 163 to 170, without identifying which provisions (or combination of provisions) in those paragraphs are said to have the effect pleaded; and/or;
 - (iii) fails to identify a comparator as required under s 5 of the DDA; and
- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 163 to 170 above;

- (ii) says that the appropriate comparator to determine whether BIK23 was treated differently in circumstances that were not material different, is a child:
 - (A) aged between 16 and 17;
 - (B) detained at Banksia Hill or Unit 18;
 - (C) without BIK23's disabilities; and
 - (D) who consistently engaged in non-compliant or dangerous behaviour as set out in paragraphs 166 to 168;
- (iii) otherwise denies the allegations in paragraph 170.

Indirect discrimination

172 As to paragraph 172, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise; and/or
 - (ii) alleges that the conduct alleged is unlawful by reason of some unspecified combination of paragraphs 59 to 62 and 163 to 170, without identifying which provisions (or combination of provisions) in those paragraphs are said to have the effect pleaded; and
- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 22 to 26, 59 to 62 and 163 to 170 above;
 - (ii) says that to the extent a "requirement" or "condition" has been identified it was reasonable having regard to the Superintendents and Officers obligation to maintain the Safety and Security Objectives; and
 - (iii) otherwise denies the allegations in paragraph 172.

Discrimination in education

173 As to paragraph 173, it:

- (a) says that paragraph 173 is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what are alleged to be the “rehabilitation programs” that BIK23 was not given access to;
- (b) under the cover of that objection, it:
 - (i) refers to and repeats paragraph 167(a) above;
 - (ii) says further that in each of the circumstances where BIK23 was confined to his cell on the basis of lockdowns, it was done pursuant to the Safety and Security Objectives;
 - (iii) says that during the periods that BIK23 was held in Unit 18:
 - (A) an educational staff member was usually present at Unit 18;
 - (B) for safety and security reasons, modifications were put in place in the provision of educational services, including:
 - (C) education classes were held in a common room;
 - (D) alternatively, staff members would deliver educational services to BIK23 and other detainees one on one; and
 - (E) educational staff supplied work packs that would be delivered to detainees in Unit 18; and
 - (iv) says further that detainees in Unit 18, including BIK23, could request library books to read while in the Unit;
 - (v) says further that during the time that BIK23 was held at Unit 18, he attended classes;

PARTICULARS

- (i) During BIK23’s periods of detention at Unit 18 between 20 July 2022 and 7 August 2023,, BIK23's attendance at class was as follows:

- (A) 25 July 2022 for 15 minutes;
- (B) 28 July 2022 for 15 minutes;
- (C) 11 August 2022 for 1 hour and 30 minutes;
- (D) 24 August 2022 for 1 hour;
- (E) 25 August 2022 for 2 hours;
- (F) 26 August 2022 for 4 hours;
- (G) 29 August 2022 for 1 hour and 45 minutes;
- (H) 30 August 2022 for 1 hour;
- (I) 31 August 2022 for 45 minutes;
- (J) 5 September 2022 for 1 hour and 30 minutes;
- (K) 6 September 2022 for 45 minutes;
- (L) 9 November 2022 for 1 hour;
- (M) 10 November 2022 for 1 hour;
- (N) 14 November 2022 for 1 hour;
- (O) 15 November 2022 for 1 hour;
- (P) 16 November 2022 for 1 hour and 30 minutes;
- (Q) 17 November 2022 for 2 hours and 15 minutes;
- (R) 18 November 2022 for 1 hour and 30 minutes;
- (S) 21 November 2022 for 1 hour;
- (T) 22 November 2022 for 3 hours and 30 minutes;
- (U) 23 November 2022 for 3 hours and 10 minutes;
- (V) 24 November 2022 for 3 hours and 35 minutes;
- (W) 25 November 2022 for 2 hours;

- (X) 29 November 2022 for 4 hours and 25 minutes;
- (Y) 30 November 2022 for 1 hour and 30 minutes;
- (Z) 1 December 2022 for 2 hours and 10 minutes;
- (AA) 5 December 2022 for 1 hour and 14 minutes;
- (BB) 15 December 2022 for 1 hour and 30 minutes;
- (CC) 20 December 2022 for 2 hours and 30 minutes;
- (DD) 21 December 2022 for 1 hour and 20 minutes;
- (EE) 22 December 2022 for 1 hour and 20 minutes; and
- (FF) 23 December 2022 for 1 hour and 15 minutes.
- (GG) 3 January 2023 for 1 hour and 30 minutes;
- (HH) 5 January 2023 for 2 hours and 35 minutes;
- (II) 6 January 2023 for 2 hours
- (JJ) 12 January 2023 for 1 hour and 30 minutes;
- (KK) 13 January 2023 for 1 hour;
- (LL) 9 February 2023 for 45 minutes;
- (MM) 10 February 2023 for 1 hour;
- (NN) 17 February 2023 for 1 hour;
- (OO) 20 February 2023 for 1 hour and 30 minutes;
- (PP) 21 February 2023 for 30 minutes;
- (QQ) 22 February 2023 for 40 minutes;
- (RR) 23 February 2023 for 1 hour;
- (SS) 27 February 2023 for 20 minutes;
- (TT) 28 February 2023 for 30 minutes;

(UU) 3 March 2023 for 20 minutes;
(VV) 13 March 2023 for 45 minutes;
(WW) 20 March 2023 for 1 hour;
(XX) 21 March 2023 for 45 minutes;
(YY) 22 March 2023 for 45 minutes;
(ZZ) 5 April 2023 for 1 hour;
(AAA) 9 May 2023 for 30 minutes;
(BBB) 24 May 2023 for 1 hour;
(CCC) 30 May 2023 for 10 minutes;
(DDD) 31 May 2023 for 1 hour;
(EEE) 7 June 2023 for 10 minutes;
(FFF) 8 June 2023 for 40 minutes;
(GGG) 9 June 2023 for 1 hour;
(HHH) 12 June 2023 for 15 minutes;
(III) 13 June 2023 for 20 minutes;
(JJJ) 15 June 2023 for 10 minutes;
(KKK) 27 June 2023 for 15 minutes;
(LLL) 29 June 2023 for 30 minutes;
(MMM) 3 July 2023 for 10 minutes;
(NNN) 5 July 2023 for 5 minutes;
(OOO) 10 July 2023 for 5 minutes;
(PPP) 19 July 2023 for 35 minutes;
(QQQ) 24 July 2023 for 15 minutes; and

(RRR) 26 July 2023 for 50 minutes.

(c) says further that, during the period that BIK23 was in Unit 18, there were occasions that he did not attend education classes by reason of:

- (i) COVID isolation;
- (ii) attending court;
- (iii) teacher training; and
- (iv) attending external programs; and

(d) otherwise denies the allegations in paragraph 173.

174 As to paragraph 174, it:

- (a) refers to and repeats paragraphs 132, 138, 173 above; and
- (b) otherwise denies the allegations in paragraph 174.

175 As to paragraph 175, it:

- (a) says that the paragraph:
 - (i) conflates ss 22(2)(a) and 22(2)(c) of the DDA and is therefore impermissible and embarrassing and ought to be struck out;
 - (ii) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
- (b) under the cover of those objections, it:
 - (i) refers to and repeats paragraphs 54, 55, 172, 173 and 174 (including the objections) above; and
 - (ii) otherwise denies the allegations in paragraph 175;
- (c) further or in the alternative, if the Respondent has discriminated against BIK23 on the grounds of a disability as alleged (which it specifically denies), such discrimination is not unlawful by reason of s 21B of the DDA because of the following matters:

- (i) in order to ensure the safety and security of the Banksia Hill, a separate unit was required to be established because of the destruction done by certain detainees at Banksia Hill;

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraphs 49(e)(ii) and 106(c)(i) above.
- (ii) on the occasions BIK23 was transferred to Unit 18 it was done for the purpose of the Safety and Security Objectives; and

PARTICULARS

- (i) It refers to and repeats the particulars subjoined to paragraph 167(a) above.
- (iii) the placement of modifications on the provision of education in Unit 18 was done for the purpose of the Safety and Security Objectives; and
- (d) by reason of the matters set out in sub-paragraphs 175(c)(i) to 175(c)iii):
 - (i) not moving BIK23 to Unit 18 following his behaviour would have imposed unjustifiable hardship on the Respondent within the meaning of the DDA; and
 - (ii) not placing modifications on the provision of education in Unit 18 would have imposed unjustifiable hardship on the Respondent within the meaning of the DDA.

Disability Standards for Education

176 As to paragraph 176, it:

- (a) says that to the extent that:
 - (i) BIK23 was a student with a disability; and
 - (ii) Banksia Hill and/or Unit 18 was an educational institution; and
 - (iii) the Respondent was an educational provider in relation that educational institution,

then:

- (iv) clause 5.2(2) of the Standards obliged the Respondent to:
 - (A) consult BIK23, or an associate of BIK23 about whether a disability he had, affected his ability to participate in the courses or programs for which he was enrolled and use the facilities or services provided by the Respondent; and
 - (B) in light of the consultation, decide whether an adjustment was necessary to ensure that BIK23 was able to participate in the courses or programs provided by the educational institution, and use the facilities and services provided by it, on the same basis as a student without a disability; and
 - (C) if:
 - (1) an adjustment was necessary to achieve the aim mentioned in paragraph 176(a)(iv)(B) above; and
 - (2) a reasonable adjustment could be identified in relation to that aim,
make a reasonable adjustment for BIK23 in accordance with Part 3;
- (v) clause 6.2(2) of the Standards obliged the Respondent to:
 - (A) consult BIK23, or an associate of BIK23, about whether a disability he had, affected his ability to participate in learning experiences of the course or program provided by the Respondent; and
 - (B) in light of the consultation, decide whether an adjustment was necessary to ensure that BIK23 was able to participate in those learning experiences on the same basis as a student without a disability; and
 - (C) if:
 - (1) an adjustment was necessary to achieve the aim mentioned in paragraph 176(a)(v)(B) above; and

- (2) a reasonable adjustment could be identified in relation to that aim,

make a reasonable adjustment for BIK23 in accordance with Part 3;
- (b) says that clause 3.4(1) of the Standards provided that, for the Standards, an adjustment was reasonable in relation to a student with a disability if it balanced the interests of all parties affected;
- (c) says that clause 3.4(2) of the Standards provided that, in assessing whether a particular adjustment for a student was reasonable, regard should be had to all the relevant circumstances and interests, including the circumstances and interests set out in that clause;
- (d) as to sub-paragraph (a):
 - (i) says that the sub-paragraph is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what are said to be the assessments that would assist BIK23 in participating in his education;
 - (ii) says that the education team at Banksia Hill assessed BIK23's literacy and numeracy in 2020, 2021, and 2022;

PARTICULARS

- (i) BHDC Assessment Process 2022;
 - (ii) Student Admissions Interview;
 - (iii) Education and Engagement Report 2021; and
 - (iv) Education and Engagement Report 2022.
- (iii) refers to and repeats paragraph 173 and 175 above;
- (iv) says that educational services were delivered in Unit 18 as set out in paragraph 107(a) above;
- (v) otherwise does not know and therefore cannot admit the allegations in sub-paragraph (a);

- (e) as to sub-paragraph (b):
 - (i) refers to and repeats paragraph 168(b) above; and
 - (ii) otherwise denies the allegations in sub-paragraph (b);
- (f) as to sub-paragraph (c):
 - (i) refers to and repeats paragraph 168(e) above; and
 - (ii) otherwise denies the allegations in sub-paragraph (c);
- (g) as to sub-paragraph (d):
 - (i) says that BIK23 was taught functional literacy and numeracy at Banksia Hill at his required level;
 - (ii) otherwise denies the allegations in sub-paragraph (d);
- (h) as to sub-paragraph (e):
 - (i) refers to and repeats paragraphs 168(a) above;
 - (ii) says that BIK23 was provided with medication for ADHD and for other mental health issues;

PARTICULARS

- (i) It refers to the matters set out in paragraph 168(a).
- (iii) says the Respondent provided BIK23 with access to psychologists, counsellors and support workers at Banksia Hill and Unit 18;

PARTICULARS

- (i) The Respondent provided BIK23 with access to psychologists, throughout his time at Banksia Hill and Unit 18, including on the following dates: 10 July 2022; 12 August 2022; 16 August 2022; 25 August 2022; 21 January 2023; 17 February 2023; 10 March 2023; 31 May 2023; 6 June 2023; 9 June 2023; and 13 June 2023; and
- (ii) the Respondent provided BIK23 access to counsellor/support workers throughout his time at Banksia Hill and Unit 18.

- (iv) says that on 26 April 2023, BIK23 was unable to see a psychologist due to insufficient staffing;
- (v) says some of the staff at Banksia Hill and/or Unit 18 were trained in assisting people with ADHD and AOCD; and

PARTICULARS

- (i) It refers to and repeats the matters set out in paragraph 168(b) above.
- (vi) otherwise does not know and therefore cannot admit the allegations in subparagraph (e); and
- (i) otherwise denies the allegations in paragraph 176.

177 As to paragraph 177, it:

- (a) refers to and repeats paragraph 176 above;
- (b) says that BIK23 completed two learning plans, being:
 - (i) VU22358: Developing Learning Goals (13 December 2021); and
 - (ii) VU22384: Develop and document a learning plan and portfolio (13 December 2023);
- (c) otherwise denies the allegations in paragraph 177.

178 As to paragraph 178: it:

- (a) refers to and repeats paragraphs 174, 176 and 177 above; and
- (b) otherwise denies the allegations in paragraph 178.

179 [Not used]

180 As to paragraph 180, it:

- (a) says that:

- (i) paragraph 180(a) is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what is said to be the mental health treatment, counselling and support that BIK23 required;
 - (ii) paragraph 180(b) is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what is said to be the behavioural therapy that would assist the BIK23 “to learn to, and to, better regulate his emotions and behaviour”; and
 - (iii) paragraph 180(c) is embarrassing and/or ambiguous in that it does not plead, particularise or cross-refer to any material facts as to what is said to be “appropriately qualified” support worker;
- (b) under cover of that objection:
- (i) refers to and repeats paragraphs 168 above;
 - (ii) does not know and therefore cannot admit the allegations in paragraph 180; and
 - (iii) cannot plead further to the allegations contained in paragraph 180 in the absence of particulars.

181 As to paragraph 181, it:

- (a) refers to and repeats paragraphs 177 and 180 above; and
- (b) otherwise denies the allegations in paragraph 181.

182 As to paragraph 182, it:

- (a) refers to and repeats paragraphs 180 and 181 above; and
- (b) otherwise denies the allegations in paragraph 112.

183 As to paragraph 183, it:

- (a) refers to and repeats paragraphs 178 to 182 above;
- (b) otherwise denies the allegations in paragraph 183.

184 As to paragraph 184, it:

- (a) refers to and repeats paragraphs 54 and 176 to 183 above; and
- (b) otherwise denies the allegations contained in paragraph 114.

Goods, services and facilities

185 As to paragraph 185, it:

- (a) refers to and repeats paragraph 167 above;
- (b) says that that during his detention at Banksia Hill and Unit 18 there were occasions where BIK23's access to the programs or services listed in paragraph 167 of the SOC were limited by reason of BIK23's:
 - (i) non-compliance with lawful directions;
 - (ii) threatening behaviour to others;
 - (iii) threatening behaviour to himself;
 - (iv) abuse of other detainees or staff; and
 - (v) assault of other detainees or staff;

PARTICULARS

- (i) It refers to and repeats the matters set out in paragraph 167(d) above.
- (c) says further that the decisions to limit access to the programs or services listed in paragraph 167 of the SOC were made pursuant to the Safety and Security Objective; and
- (d) otherwise denies the allegations in paragraph 185.

185A. As to paragraph 185A, it:

- (a) says that the paragraph is embarrassing and/or ambiguous in that it fails to identify a good, service or facility within the meaning of ss 4 and 24 of the DDA, and ought to be struck out;
- (b) under cover of that objection:

- (i) refers to and repeats paragraphs 56, 171, 172 and 185 above; and
 - (ii) otherwise denies the allegations in paragraph 185;
- (c) further or in the alternative, if the Respondent has discriminated against BIK23 on the grounds of a disability as alleged (which it specifically denies), such discrimination is not unlawful by reason of section 21B of the DDA because of the following matters:
- (i) on the occasions that BIK23 was transferred to Unit 18, it was done for the purposes of Safety and Security Objectives;
 - (ii) on the occasions where access to the programs or services listed in paragraph 185 of the SOC was limited, it was done for the purposes of Safety and Security Objectives; and
 - (iii) by reason of the matters set out in sub-paragraphs (i) to (ii):
 - (A) not moving BIK23 to Unit 18 following his behaviour would impose unjustifiable hardship on the Respondent within the meaning of the DDA; and/or
 - (B) allowing BIK23 unrestricted access to the programs and services listed in paragraph 115 of the SOC whilst in Unit 18 would impose unjustifiable hardship on the Respondent;
 - (iv) otherwise denies the allegations in paragraph 184.

185B. As to paragraph 185B, it:

- (a) refers to and repeats paragraph 167 above;
- (b) says that on occasion during his detention at Unit 18, BIK23 was handcuffed or otherwise restrained for movements within the detention centre;

PARTICULARS

- (i) It refers to and repeats the matters set out in paragraph 152 above.

- (c) says further that in instances where BIK23 was handcuffed or otherwise restrained for movements within Unit 18 it was done for the purposes of the Safety and Security Objectives; and
- (d) otherwise does not know and therefore cannot admit the allegations contained in paragraph 185B.

186 As to paragraph 186, it:

- (a) says it is embarrassing and/or ambiguous in that it fails to identify a good, service or facility within the meaning of ss 4 and 24 of the DDA, and therefore ought to be struck out;
- (b) under cover of that objection:
 - (i) refers to and repeats paragraphs 56, 171 and 185B above; and
 - (ii) otherwise denies the allegations in paragraph 186;
- (c) further or in the alternative, if the Respondent has discriminated against BIK23 on the grounds of a disability as alleged (which it specifically denies), such discrimination is not unlawful by reason of s 21B of the DDA because of the following matters:
 - (i) while in Unit 18 and Banksia Hill, BIK23 displayed behaviours that were dangerous to himself, other detainees and staff;

PARTICULARS

- (i) It refers to and repeats paragraphs 166 and 167 above.
- (ii) the use of handcuffs or restraints on BIK3 for movements within Unit 18 was done for the purposes of the Safety and Security Objectives; and
- (iii) by reason of the matters set out in sub-paragraphs 186(c)(i) and 186(c)(ii) above, if the Respondent had been precluded from handcuffing or otherwise restraining BIK23 for the purpose of movements within Unit 18 this would have imposed an unjustifiable hardship on the Respondent within the meaning of the DDA.

M.4 Age Discrimination Act Claims

187 As to paragraph 187, it:

- (a) refers to and repeats paragraph 117(a) above;
- (b) refers to and repeats paragraphs 56 to 58 (including the objections) above; and
- (c) otherwise denies the allegations contained in paragraph 187.

Direct Discrimination

188 As to paragraph 188, it:

- (a) refers to and repeats paragraph 118(a) above;
- (b) says that the appropriate comparator to determine whether BIK23 was treated differently in circumstances that were not materially different is a person:
 - (i) of a different age from BIK23;
 - (ii) detailed at Banksia Hill or Unit 18; and
 - (iii) further to alternatively to sub-paragraph (ii) above, who consistently engaged in non-compliant or dangerous behaviour as set out in paragraphs 166 to 168 above;
- (c) further, objects to paragraph 188 and says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
 - (ii) does not plead, particularise or cross-refer to any material facts as to what is said to be the circumstances that “are not materially different”; and
 - (iii) does not allege a specific breach of a prohibition against discriminatory conduct under the ADA; and
- (d) under the cover of those objections, it:
 - (i) refers to and repeats paragraph 58, 62 and 187 above; and

- (ii) denies the allegations in paragraph 188, including without limitation that “prisoners in adult prisons” or “an adult prisoner” are an appropriate comparator under s 14 of the ADA.

Indirect Discrimination

189 As to paragraph 189, it:

- (a) refers to and repeats paragraph 119(a) above;
- (b) objects to paragraph 189 and says that the paragraph is embarrassing and/or ambiguous in that it:
 - (i) pleads rolled-up conclusions and does not plead, particularise or cross-refer to any material facts from which those conclusions are alleged to arise;
 - (ii) alleges that the conduct alleged is unlawful by reason of some unspecified combination of paragraphs 58, 62 and 187, without identifying which provision (or combination of provisions) in those paragraphs are said to have the effect pleaded;
 - (iii) fails to plead a material fact required by s 15 of the ADA, namely that the alleged condition, requirement or practice is not reasonable in the circumstances; and
 - (iv) does not allege a specific breach of a prohibition against discriminatory conduct under the ADA; and
- (c) under the cover of those objections, it:
 - (i) refers to and repeats paragraph 58, 62 and 187 above;
 - (ii) says that to the extent a “practice” or “condition” has been identified it was reasonable having regard to the CEO’s, Superintendents’ and Officers’ obligation to maintain the Safety and Security Objectives; and
 - (iii) otherwise denies the allegations in paragraph 188, including without limitation that the assessment of the effect of any alleged “practice” or “condition” is to be made by reference to persons “under 18 years of age” or that the alleged “access” to “goods, services and facilities” is to be compared

with “prisoners in adult prisons, including Casuarina Prison” or “prisoners in adult prisons”.

M.5 Remedies

190 It denies that BIK23 is entitled to the relief claimed in paragraph 190.

191 It denies that BIK23 is entitled to the relief claimed in paragraph 191.

192 It denies that BIK23 is entitled to the relief claimed in paragraph 192.

193 It denies that BIK23 is entitled to the relief claimed in paragraph 193.

194 As to paragraph 194, it:

(a) says that BIK23’s claims for damages in respect of the matters alleged in paragraphs 132 to 156 and 194 to 197 of the SOC are:

(i) “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and 5V(1) of CLAWA; and/or

(ii) claims for “personal injury damages” within the meaning of section 5T of CLAWA;

(b) says further that any award of personal injury damages in favour of BIK23 is subject to the application of Part 2 of CLAWA;

(c) says further that:

(i) s 5T of CLAWA provides that the Court cannot make an award of personal injury damages for pecuniary loss for consequential mental harm unless the harm consists of a recognised psychiatric illness; and

(ii) the harm(s) alleged in paragraph 194 do not consist of a recognised psychiatric illness; and

(d) otherwise does not know and therefore cannot admit paragraph 194.

195 As to paragraph 195, it:

(a) refers to and repeats paragraph 194 above; and

(b) otherwise does not know and therefore cannot admit paragraph 195.

196 As to paragraph 196, it:

- (a) refers to and repeats paragraph 194 above; and
- (b) otherwise denies the allegations in paragraph 196.

197 As to paragraph 197, it:

- (a) refers to and repeats paragraph 194 above; and
- (b) otherwise denies the allegations in paragraph 197.

198 As to paragraph 198, it:

- (a) says that BIK23 claims for damages in respect of the matters alleged in paragraphs 48 to 53, 157 to 162, 198 and/or 199 of the SOC are:
 - (i) “claim[s] for damages for harm caused by the fault of a person” within the meaning of ss 5A(1) and 5V(1) of CLAWA; and/or
 - (ii) claims for “personal injury damages” within the meaning of s 5T of CLAWA, and refers to and repeats paragraphs 194(b) and 194(c) above; and
- (b) otherwise denies the allegations in paragraph 198.

199 As to paragraph 199, it:

- (a) refers to and repeats paragraphs 175, 184, 185A, 186, 188 and 189 above; and
- (b) otherwise denies the allegations in paragraph 199.

200 As to paragraph 200, it:

- (a) refers to and repeats paragraph 199 above; and
- (b) otherwise denies the allegations in paragraph 200.

201 As to paragraph 201, it:

- (a) refers to and repeats paragraph 199 and 200 above; and
- (b) otherwise denies the allegations in paragraph 201.

N. CLAIMS OF GROUP MEMBERS

202 It denies the allegations in paragraph 202.

203 It denies the allegations in paragraph 203.

204 It denies the allegations in paragraph 204.

205 It denies the allegations in paragraph 205.

206 It denies the allegations in paragraph 206.

207 It denies the allegations in paragraph 207.

208 It does not plead to paragraph 208 as it contains no allegations against it and makes no admission in respect of that paragraph.

Date: 21 November 2025



Signed by Nigel Jones

Lawyer for the Respondent

This pleading was prepared by Jonathan Kirkwood SC, Tim Jeffrie, Andrew McRobert and Laura Hilly of counsel.

Certificate of lawyer

I Nigel Jones certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 21 November 2025



Signed by Nigel Jones

Lawyer for the Respondent