

## NOTICE OF FILING

### Details of Filing

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File Title: MADISON MAY BURNS v STATE OF QUEENSLAND  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Registrar

### Important Information

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

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



**Defence**

No. VID944 of 2023

Federal Court of Australia  
District Registry: Victoria  
Division: General

**Madison May Burns**

Applicant

**State of Queensland**

Respondent

**Definitions**

1. In this Defence the Respondent refers to “VID944 of 2023” as the “Proceeding”.
2. As to the definitions within the Statement of Claim (SOC), the Respondent:
  - a. acknowledges the Applicant’s defined terms of “Child Removal Intervention”, “Family Healing”, “parent” and “race” for the purpose of the Applicant’s SOC (**Applicant’s Definitions**);
  - b. does not adopt the Applicant’s Definitions in this Defence or in the Proceeding;
  - c. adopts the Applicant’s defined terms for the “Children’s Claim Period”, *Child Protection Act 1999* (Qld), “**the Act**”, and that “**Indigenous**” or “**First Nations**” means Aboriginal and/or Torres Strait Islander as appropriate in context, in this Defence and the Proceeding;
  - d. says in relation to “Child Removal Intervention” that there is no such term used or defined within the Act or within the Respondent’s Departmental process and procedure;
  - e. says in relation to the “Children’s Claim Period” that the defined dates, 30 March 1999 to the date of issue of the Proceedings, are inconsistent with the dates

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Filed on behalf of (name & role of party)	State of Queensland (Department of Child Safety, Seniors and Disability Services) Respondent		
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referenced under “Representative action” in the Originating Application filed 13 November 2023, namely 5 March 1992 to the date of issue of this Proceeding;

- f. says in relation to “Family Healing” that there is no such term used or defined within the Act or within the Respondent’s Departmental process and procedure and repeats and relies on paragraph 23 below;
- g. says in relation to “race”, that race is identified and referred to separately to colour, descent, national origin or ethnic origin within the *Racial Discrimination Act 1975 (RDA)*;
- h. denies that “parent” has the meaning given to it by s 11 of the Act as “parent” is defined within the Act within s 11 and schedule 3 of the Act, and the Respondent adopts the definition of “parent” as provided under s 11 and schedule 3 of the Act and the prior definitions within the Act as they applied at the relevant time.

### **Representative proceeding**

3. As to paragraph 1 of the SOC the Respondent:

- a. says that while the Applicant seeks to bring the Proceeding as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976 (FCA Act)*, the Respondent is unable to determine if the threshold requirements of s 33C of the FCA Act have been met, due to the insufficient and ambiguous pleading and particularisation of the Applicant’s and Group Members’ claims against the Respondent, within the SOC;
- b. is otherwise not required to plead to paragraph 1 as it contains no allegations against it.

4. As to paragraph 2 of the SOC the Respondent:

- a. says that while the Applicant seeks to bring this Proceeding pursuant to ss 46PO and 46PB of the *Australian Human Rights Commission Act 1986 (AHRC Act)*, the Respondent is unable to determine if the alleged discrimination by the Respondent against Aboriginal and Torres Strait Islander children “was the same, similar, or related to” the alleged discrimination suffered by the Applicant during the Children’s Claim Period, due to the insufficient and ambiguous pleading and particularisation of the Amended Australian Human Rights Commission Representative Complaint (**AHRC**) dated 31 May 2023;

- b. says that the Children's Claim Period is inconsistently defined in the Amended AHRC Complaint and the SOC;
- c. is otherwise not required to plead to paragraph 2 as it contains no allegations against it.

### **Legislation**

- 5. As to paragraph 3 of the SOC the Respondent:
  - a. denies that the Act has provided power for the Respondent to remove children from the custody of their parents since 30 March 1999, as there is no such legislative power within the Act that uses the terminology to "remove" children from the custody of their parents, and the Act did not commence in its entirety until 23 March 2000;
  - b. says that from 23 March 2000, an authorised officer or police officer of the Respondent may take a child in immediate risk into the custody of the Chief Executive pursuant to s 18 of the Act, subject to meeting the requirements of the Act;
  - c. say that any other power to take a child into custody or guardianship is a power exercised by a Magistrate or the Children's Court, and not the Respondent's Department of Child Safety, Seniors and Disability Services and its predecessors, in accordance with the provisions and requirements of the Act.
- 6. As to paragraph 4 of the SOC, the Respondent admits that the RDA has been in force for the entirety of the Children's Claim Period as defined within the SOC and the Originating Application, repeating and relying on paragraph 2.e above, and that the RDA prohibits unlawful discrimination on the basis of race.

### **The Applicant**

- 7. As to paragraph 5 of the SOC the Respondent admits the Applicant is a First Nations woman of Aboriginal descent on her father's side.
- 8. As to paragraph 6 of the SOC the Respondent denies the allegation and says that in or around October 2002 and May 2004 the Department was informed that Karen Burns was Aboriginal.

9. As to paragraph 7 of the SOC, the Respondent admits that the Applicant was born on 27 August 2002.
10. As to paragraph 8 of the SOC the Respondent:
  - a. denies the allegation as it is not true as the Applicant was removed in accordance with an Interim Order that was made by the Children's Court pursuant to s 67 of the Act;
  - b. says that on 30 August 2002 the Respondent applied to the Children's Court for a Court Assessment Order (CAO) under s 39 of the Act to enable the Respondent to assess the immediate and medium-term child protection needs of the Applicant;
  - c. says that the Respondent sought the CAO as:
    - i. the Respondent had concerns that the Applicant was at risk of physical harm from her father, Norman Womal who had a history of engaging in severe domestic violence with the Applicant's seventeen-year-old mother Karen Burns; and
    - ii. the Applicant's mother, Karen Burns suffered from an intellectual disability which limited her ability to make safe parenting decisions and protect her baby;
  - d. says that on 30 August 2002, the Childrens Court made an Interim Order under s 67 of the Act granting temporary custody of the Applicant to the Chief Executive of the Respondent and ordering the Applicant's father, Mr Womal not to have direct or indirect contact with the Applicant for the period of the Interim Order;
  - e. says that from 1 September 2002, the Respondent placed the Applicant with her maternal great aunt, Colleen Nelson in Proserpine in accordance with the Interim Order and while the CAO application was before the Children's Court;
  - f. says that on 11 September 2002, the Childrens Court made a further Interim Order under s 67 of the Act granting temporary custody of the Applicant to the Chief Executive of the Respondent and ordering the Applicant's father, Mr Womal not to have direct or indirect contact with the Applicant for the period of the Interim Order;
  - g. says that from 16 September 2002 the Applicant resided with her maternal grandmother Debra Burns to assist the Applicant's mother with parenting and decision making;

- h. says that from 25 September 2002 the Applicant was placed with foster carers, Mr and Mrs Fatnowna who were both recorded as neither Aboriginal or Torres Strait Islander and Mr Fatnowna was recorded as having the background of 'Other South Sea Islander', while the Respondent completed assessments as to suitable family carers.
11. As to paragraph 9 of the SOC the Respondent:
- a. repeats and relies on paragraph 10 above;
  - b. admits that following the Applicant's removal as pleaded under paragraph 10.a above, a Child Protection Order (**CPO**) was made by the Children's Court, pursuant to s 59 of the Act;
  - c. says that this CPO was made by the Children's Court on 2 October 2002 granting short-term guardianship to the Chief Executive until 1 October 2004;
  - d. says that the Applicant's parents had contact with the Applicant during the period of the CPO.
12. As to paragraph 10 of the SOC the Respondent:
- a. repeats and relies on paragraph 10 and 11 above and denies that the Applicant was initially placed with foster carers, as she was initially placed with her maternal great aunt, Colleen Nelson;
  - b. does not admit whether the Applicant is aware of the race of her initial foster carers as this is outside the direct knowledge of the Respondent;
  - c. says that the Applicant was placed with non-Aboriginal foster carers from 25 September 2002 until 14 February 2003, while the Respondent conducted an assessment of the immediate and medium-term child protection needs of the Applicant and after the CPO was made, and while family care options were being explored; and
  - d. says that the Applicant was placed with family carers Erin Jobson and Kris Jobson, her maternal aunt and uncle from 14 February 2003 as the Respondent had assessed them as suitable family carers.
13. As to paragraph 11 of the SOC the Respondent:
- a. denies the allegations contained therein as they are not true;

- b. says that the Applicant was in the custody or guardianship of the Chief Executive of the Respondent for the following time periods:
    - i. from 30 August 2002 to 9 December 2004 due to the Applicant being assessed as a child in need of protection due to the Applicant's father, Mr Womal engaging in severe domestic violence with the Applicant's mother Karen Burns and Karen Burns' intellectual disability which limited her ability to make safe parenting decisions and protect her child;
    - ii. from 10 December 2004 to 8 December 2006 due to the Applicant being assessed as a child in need of protection due to Karen Burns' intellectual disability and history of volatile relationships, Karen Burns' current marriage which was characterised by violence and Mr Womal's criminal history and domestic violence history;
    - iii. from 18 March 2016 until 26 August 2020, where the Applicant turned 18 years old on 27 August 2020 due to the Applicant being assessed as a child in need of protection due to Debra Burns physically assaulting the Applicant. During this time Mr Womal lived in another city to the Applicant, was unwilling to care for her and advised the Respondent on or around 23 March 2016 that he had cancer and did not believe the Applicant was his child. Mr Womal was uncontactable from 18 March 2016 onwards. Karen Burns remained unable to care for the Applicant;
  - c. says that while the Applicant was in the custody or guardianship of the Chief Executive of the Respondent she was placed with family carers including her Aboriginal family members as much as possible;
  - d. says that the Applicant resided with her grandmother Debra Burns from 9 December 2006 until 18 March 2016 as part of a family arrangement which was formalised by consent orders issued by the Magistrates Court on 18 April 2007, under the *Family Law Act 1975*;
  - e. says in relation to this family arrangement that Debra Burns, Karen Burns and Norman Womal, the Applicant's father, all agreed to the Applicant residing with Debra Burns and having contact with both parents.
14. As to paragraph 12 of the SOC the Respondent:
- a. denies the allegations contained therein as they are not true;

- b. says the Respondent facilitated the Applicant spending time with her father from on or about 20 September 2002;
- c. says the Applicant's contact with her father was impacted by her father's ill health, the location where he resided, the Respondent not always having contact details for the Applicant's father, and at times her father deciding not to visit the Applicant or not seeking visits with the Applicant;
- d. says that on 18 March 2016 the Applicant's father informed the Respondent that he did not think he was her father;
- e. says that the Applicant was placed with her paternal aunt, Dorelle Womal, as a carer on various occasions from June 2004 to May 2005;
- f. says that from about 18 June 2003 the Respondent took a number of steps for the Applicant to have connection to her Aboriginal culture and family, including making arrangements for:
  - i. the Aboriginal and Islander Child Care Agency (AICCA) to work with the Applicant's father to develop a family tree for the Applicant;
  - ii. the Applicant's paternal uncle and aunt, Mr Womal's brother and sister, to act as respite carers for the Applicant;
  - iii. various case plans for the Applicant which incorporated:
    - 1. goals for the Applicant's cultural development and connections to indigenous heritage;
    - 2. the Applicant to spend time with staff from, over time several Aboriginal and Torres Strait Islander organisations for support in understanding her cultural identity; and
    - 3. the Applicant's father and the Applicant's paternal aunt, Dorelle Womal, were to provide for the Applicant's cultural needs including telling her family stories;
- g. says that the Respondent cannot plead further to the allegations in paragraph 12 of the SOC as the allegations contained therein are insufficient pleaded and/or particularised.



15. As to paragraph 13 of the SOC the Respondent:

- a. denies that the Applicant was separated from her siblings during her time in custody as this is not true;
- b. says that the Applicant resided with [REDACTED] when possible;
- c. says that the Applicant and [REDACTED]  
[REDACTED]  
[REDACTED]
- d. says that the Respondent encouraged the Applicant to have contact with her half-brother Norman Womal, her father's son, but this required the Applicant's father to arrange and facilitate contact;
- e. admits that the Applicant was at times placed with non-Indigenous carers and in residential group homes;
- f. says that the Applicant was only placed with non-Indigenous carers when there were no family carers or Indigenous placements that had been assessed and approved as safe;
- g. says that the Applicant was placed in residential group homes from in or around 2016 when there were no family or other carers available for the Applicant to be placed with;
- h. says that from 2016 several of the Applicant's family members, including the Applicant's father, were unwilling and/or unable to care for the Applicant;
- i. says that the Respondent cannot plead further to the allegations in paragraph 13 of the SOC as the allegations contained therein are insufficiently pleaded and/or particularised.

16. As to paragraph 14 of the SOC the Respondent:

- a. denies the Applicant received a sporadic and disruptive schooling;
- b. says that during the Applicant's schooling years she was only in the Respondent's custody or guardianship from 18 March 2016 until 26 August 2020;
- c. says that the Applicant was always encouraged to attend school by the Respondent;

- d. says that the schools and/or educational institutions attended by the Applicant while she was in the Respondent's custody or guardianship included:
- i. North Mackay State School in 2016 until the Applicant was involved in physical altercation and suspended for 20 days pending exclusion;
  - ii. Holy Spirit Christian College until April 2017 when the Applicant refused to return to the school and refused other schooling options offered to her including Whitsunday Anglican School and boarding school;
  - iii. Kutta Mulla Gorrina School in Mackay, that places an emphasis on understanding the essential features of Aboriginal and Torres Strait Islander culture, in or about June 2018; and
  - iv. Skilling Queenslanders for Work, Youth Skills Program, in or about 22 October 2018.

#### **Alleged Discrimination against the Applicant**

17. As to paragraph 15 of the SOC the Respondent:
- a. repeats and relies on the admissions, denials and non-admissions pleaded in paragraphs 10 to 16 above and denies that the matters set out under paragraphs 8 to 14 of the SOC were wholly or partly because of or a function of the Applicant's race;
  - b. cannot plead further to the allegations because paragraph 15 of the SOC does not plead or particularise how the matters alleged in paragraphs 8 to 14 of the SOC occurred wholly or partly because of or a function of the Applicant's race.
18. As to paragraph 16 of the SOC the Respondent:
- a. denies that it has contravened s 9 of the RDA, repeating and relying on paragraphs 10 to 17 above;
  - b. says that at all material times, the Respondent based its actions on an assessment of the safety, wellbeing and best interests of the Applicant;
  - c. cannot plead further to the allegations in paragraph 16 of the SOC, as paragraphs 8 to 14 and 16 of the SOC are insufficiently pleaded and/or particularised in relation to a contravention of s 9 of the RDA, where the pleading is evasive or ambiguous, is likely to cause prejudice, embarrassment and/or delay to the Respondent, and/or fails to disclose a reasonable cause of action under s 9 of the RDA.

19. As to paragraph 17 of the SOC the Respondent:
- a. denies the allegations contained therein as they are not true;
  - b. says that the Applicant's [REDACTED]
  - c. says that [REDACTED] was assessed as a child in need of protection and removed from the care of her parents on 16 December 2016;
  - d. says that shortly after [REDACTED] was born both the Applicant and [REDACTED] were cared for by [REDACTED] paternal family members;
  - e. says that the Applicant was unable to remain in this placement as [REDACTED] paternal family were unwilling to continue to care for the Applicant from on or about April 2017;
  - f. says that the Respondent therefore sourced an alternative placement option for the Applicant;
  - g. says that the Respondent did not prevent the Applicant from having a relationship with her [REDACTED];
  - h. says that the Respondent actively encouraged and facilitated contact between the siblings even when the Applicant was living with different family members and/or carers to [REDACTED].
20. As to paragraph 18 of the SOC the Respondent:
- a. repeats and relies on the denials pleaded in paragraph 19 above, and denies that the matters set out under paragraph 17 of the SOC were wholly or partly because of or a function of the Applicant's race;
  - b. cannot plead further to the allegations because paragraph 18 of the SOC does not plead or particularise how the matters alleged in paragraph 17 of the SOC occurred wholly or partly because of or a function of the Applicant's race.
21. As to paragraph 19 of the SOC the Respondent:
- a. denies that it has contravened s 9 of the RDA, repeating and relying on paragraphs 19 to 20 above;
  - b. cannot plead further to the allegations in paragraph 19 of the SOC, as paragraphs 17 and 19 of the SOC are insufficiently pleaded and/or particularised in relation to a contravention of s 9 of the RDA, where the pleading is evasive or ambiguous, is

likely to cause prejudice, embarrassment and/or delay to the Respondent, and/or fails to disclose a reasonable cause of action under s 9 of the RDA.

22. As to paragraph 20 of the SOC the Respondent:

- a. does not admit the allegation contained therein as despite making reasonable enquiries, the Respondent remains uncertain as to the truth or otherwise of the allegations against it;
- b. says that in or about 2017 the Applicant requested more contact with her paternal family including her half-brother Norman Womal;
- c. says that in or about 2016 the Applicant's father resided in Townsville, and informed the Respondent he did not wish to be reunified with the Applicant and subsequently the Respondent did not have contact details for the Applicant's father;
- d. says that in or about 2017 the Applicant requested to reside with her father in Townsville but he rejected this request;
- e. says that in or about 2017 the Applicant's paternal aunt Dorelle Womal was not able to care for the Applicant as Ms Womal already had another young person living with her;
- f. says that in or about October 2017 the Applicant self-placed with her paternal cousin Mariah;
- g. says that in or about December 2017 the Applicant self-placed with her sister in Toowoomba but the Applicant later advised the Respondent that her sister had asked her to leave;
- h. says that in or around 2017 the Respondent:
  - i. took steps to improve the Applicant's connection to her paternal family including working with the Applicant's paternal family regarding her family tree;
  - ii. through an Indigenous staff member, with close family ties to the Womal family, created an Aboriginal life storybook for the Applicant to assist the Applicant to learn about traditional customs and common used words of respect.
- i. cannot plead further to the allegations in paragraph 20 of the SOC as it is inadequately particularised, where it is ambiguous as to: what requests were made of

the Respondent; when and to whom they were made; and which relatives the Applicant requested to connect with, and is it is likely to cause prejudice and/or embarrassment to the Respondent.

23. As to paragraph 21 of the SOC the Respondent:

- a. says that the allegations contained therein and/or what constitutes Family Healing is insufficiently pleaded and/or particularised, is evasive or ambiguous, and is likely to cause the Respondent prejudice and/or embarrassment;
- b. says that the term “Family Healing” is not a term used within the Act or within the Respondent’s processes and procedures;
- c. says in relation to the child protection interventions for the Applicant, the Respondent facilitated and managed processes from the time of the Applicant’s removal of:
  - i. assessing the strengths and needs of the Applicant;
  - ii. assessing the risks and safety needs of the Applicant;
  - iii. engaging in family group meetings and case planning, which amongst other matters sought to:
    1. provide information to and involve members of the family group (including parents);
    2. receive information from members of the family group;
    3. determine the resources available within the family group and wider network of support that can be mobilised for the case plan, including maintaining connections with the child and assisting the child with connections with family and community members; and
    4. addressing issues raised by the family group members,  
where the assessments identified at 23c.(i) and (ii) above, inform the development of case plans (where case plans address the child’s protection and care needs), which include the outcomes and actions required to: reduce the risk of harm to the child; identify critical areas of need; and build on strengths within the family group; and
  - iv. undertaking reviews as needed,  
where the safety, wellbeing and best interests of the Applicant has been paramount;

- d. says that the focus of the case management process for the Applicant included ‘reunification’, where the case management process included both supervised and unsupervised contact between the Applicant and her parents in accordance with the goals and objectives of the case plans;
  - e. says that ‘reunification’ is the process of working with one or both parents, to safely return a child to their care;
  - f. says a decision to reunify a child will only be made once immediate harm indicators are resolved, risk of future harm sufficiently reduced, and at least one parent is assessed as likely to be able and willing to meet the child’s need of safety, belonging and wellbeing in the near future; and
  - g. while repeating and relying on the objections in relation to ‘Family Healing’ in paragraphs 23a. and 23b. above, denies that it made no, or no adequate attempts to facilitate ‘Family Healing’ with the Applicant’s Indigenous family, repeating and relying on the actions of the Respondent as pleaded in paragraphs 14, 15, 19 and 22, 23c. and 23d. above.
24. As to paragraph 22 and 23 of the SOC the Respondent:
- a. denies the allegations contained therein as they are untrue;
  - b. repeats and relies on paragraphs 14, 15, 16.d.iii, 19 and 22 above;
  - c. says that the Respondent took steps to facilitate the Applicant’s cultural connection to her paternal family including by regularly consulting with the Independent Aboriginal or Torres Strait Islander entity for the Applicant as required by s 83 of the Act.
25. As to paragraph 24 of the SOC the Respondent:
- a. repeats and relies on the denials and non-admissions pleaded in paragraphs 22 to 24 above and denies that the matters set out under paragraphs 20 to 23 of the SOC were wholly or partly because of or a function of the Applicant’s race;
  - b. cannot plead further to the allegations because paragraph 24 of the SOC does not plead or particularise how the matters alleged in paragraphs 20 to 23 of the SOC occurred wholly or partly because of or a function of the Applicant’s race.

26. As to paragraph 25 of the SOC the Respondent:
- a. denies that it has contravened s 9 of the RDA, repeating and relying on paragraphs 22 to 25 **Error! Reference source not found.** above;
  - b. cannot plead further to the allegations in paragraph 25 of the SOC, as paragraphs 20 to 23 and 26 of the SOC are insufficiently pleaded and/or particularised in relation to a contravention of s 9 of the RDA, where the pleading is evasive or ambiguous, is likely to cause prejudice, embarrassment and/or delay to the Respondent, and/or fails to disclose a reasonable cause of action under s 9 of the RDA.
27. As to paragraphs 26 to 33 of the SOC the Respondent:
- a. says that there is no allegation against the Respondent that the Respondent is required to plead to as the Applicant has failed to disclose a reasonable or identifiable cause of action against the Respondent;
  - b. reserves its right to make an application to the Court to have these paragraphs struck out on this basis;
  - c. under cover of that objection does not admit the allegations therein.

### **Group members**

28. As to paragraph 34 of the SOC the Respondent:
- a. says that the Respondent is unable to plead to the allegations contained therein due to the insufficient and ambiguous pleading and particularisation of the Applicant's and Group Members' claims against the Respondent, repeating and relying on paragraphs 17 and 18 above;
  - b. under cover of that objection does not admit the allegations contained therein.
29. As to paragraph 35 of the SOC the Respondent:
- a. says that there is no allegation against the Respondent that the Respondent is required to plead to as the Applicant has failed to disclose a reasonable or identifiable cause of action against the Respondent;
  - b. the Respondent reserves its right to make an application to the Court to have this paragraph of the SOC struck out on this basis.
  - c. under cover of that objection does not admit the allegations contained therein.

30. As to paragraphs 36 to 41 of the SOC the Respondent:
- a. says that there is no allegation against the Respondent that the Respondent is required to plead to as the Applicant has failed to disclose a reasonable or identifiable cause of action against the Respondent;
  - b. the Respondent reserves its right to make an application to the Court to have these paragraphs within the SOC struck out on this basis;

under cover of that objection does not admit the allegations therein.

Date: 15 March 2024



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Signed by Catriona McPherson  
Assistant Crown Solicitor  
For GR Cooper  
Lawyer for the Respondent

This pleading was prepared by C Murdoch KC and N A-Khavari, Counsel for the Respondent



**Certificate of lawyer**

I Catriona McPherson 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: 15 March 2024



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Signed by Catriona McPherson  
Assistant Crown Solicitor  
For GR Cooper  
Lawyer for the Respondent