

NOTICE OF FILING AND HEARING

Filing and Hearing Details

Document Lodged: Originating Application Starting a Representative Proceeding under Part IVA
Federal Court of Australia Act 1976 [Human Rights Div 2.4 Exemption] - Form
19 - Rule 9.32

Court of Filing: FEDERAL COURT OF AUSTRALIA (FCA)

Date of Lodgment: 5/05/2023 3:34:06 PM AWST

Date Accepted for Filing: 15/05/2023 8:56:22 AM AWST

File Number: WAD109/2023

File Title: ██████████ BY HIS LITIGATION REPRESENTATIVE ██████████
██████████ & ORS v STATE OF WESTERN AUSTRALIA

Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA

Reason for Listing: To Be Advised

Time and date for hearing: To Be Advised

Place: To Be Advised

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.

**Originating application starting a representative proceeding under
Part IVA of the Federal Court of Australia Act 1976**

No. _____ of 2023

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

██████████ by his litigation representative ██████████ and another named in
the Schedule

Applicant

State of Western Australia

Respondent

To the Respondent

The Applicants apply for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place: Peter Durack Commonwealth Law Courts, Building 1, Victoria Avenue, Perth
Western Australia 6000

The Court ordered that the time for serving this application be abridged to

Date:

Signed by an officer acting with the authority
of the District Registrar

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

Representative action

1. The Applicants bring this proceeding on their own behalf and as representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth).
2. The Applicants and the Group Members are persons who:
 - (a) are, or have been at any time between 13 July 2022 to 6 March 2023 (the **Relevant Period**), detained in Unit 18 at Casuarina maximum security adult prison, which was declared to be a detention centre under section 13 of the *Young Offenders Act 1994* (WA) (**YO Act**); and
 - (b) while in detention, suffered or claim to have suffered:
 - (i) unlawful disability discrimination under one or more of sections 5, 6 22, 24, 31 and 123 of the *Disability Discrimination Act 1992* (Cth) (**DDA**); and/or
 - (ii) unlawful age discrimination under one or more of sections 14, 15, 26, 28 and 57 of the *Age Discrimination Act 2004* (Cth) (**ADA**),
 by an act or omission of:
 - (iii) the Minister of the Crown in right of Western Australia who was, during the Relevant Period, responsible for the administration of the YO Act (**Minister**);
 - (iv) the chief executive officer of the department of the Government of Western Australia that was, during the Relevant Period, principally assisting the responsible Minister in the administration of the YO Act (**CEO**);
 - (v) a superintendent of a detention centre at any time during the Relevant Period who was performing, or purporting to perform, the functions of a superintendent under the YO Act in respect of a detention centre at the relevant time (**Superintendent**); and/or
 - (vi) an officer performing functions under the YO Act in respect of a detention centre or a person purporting to perform those functions (**Officer**).

Details of claim and remedies sought

On the grounds stated in the accompanying affidavit of Stewart Levitt sworn on 5 May 2023 and the accompanying complaint, the Applicants, on their own behalf and on behalf of the Group Members, seek the relief set out in A and B, below.

A *Relief under s 46PO(4) of the Australian Human Rights Commission Act 1975 (Cth) (AHRCA)*

1. A declaration that, during the Relevant Period, the Minister, the CEO, Superintendents and/or Officers engaged in unlawful disability discrimination under sections 5, 6, 22, 24 and 31 of the DDA in relation to the Applicants and the Group Members for which the Respondent is vicariously liable.
2. A declaration that, during the Relevant Period, the Minister, the CEO, Superintendents and/or Officers engaged in unlawful age discrimination under sections 14, 15, 26 and 28 of the ADA in relation to the Applicants and the Group Members for which the Respondent is vicariously liable.
3. Orders requiring the Respondent to pay to the Applicants and to Group Members damages by way of compensation for loss and damage suffered by the Applicants and Group Members because of the unlawful disability discrimination referred to paragraph A1 above.
4. Orders requiring the Respondent to pay to the Applicants and to Group Members damages by way of compensation for loss and damage suffered by the Applicants and Group Members because of the unlawful age discrimination referred to paragraph A2 above.
5. Such further or other orders under the AHRCA, including orders for costs and interest, as the Court thinks fit.

B *Other relief*

1. Costs
2. Such further or other orders, including orders for interest, as the Court thinks fit.

Questions common to claims of group members

The questions of law or fact common to the claims of the Group Members are:

1. Whether the Minister, the CEO, Superintendents and/or Officers engaged in unlawful disability discrimination under sections 5, 6, 22, 24 and 31 of the DDA in relation to the Group Members.
2. Whether the Minister, the CEO, Superintendents and/or Officers engaged in unlawful age discrimination under sections 14, 15, 26 and 28 of the ADA in relation to the Group Members.
3. Whether the Respondent is vicariously liable for the unlawful disability discrimination referred to in question 1.
4. Whether the Respondent is vicariously liable for the unlawful age discrimination referred to in question 2.

Claim for interlocutory relief

The Applicants also claim interlocutory relief.

1. Pursuant to rule 9.63 of the Federal Court Rules 2011 (Cth) (**FCR**):
 - (a) [REDACTED] is appointed as the litigation representative of [REDACTED] in this proceeding with effect from the date of the filing of the originating application on 5 May 2023.
 - (b) [REDACTED] is appointed as the litigation representative of [REDACTED] in this proceeding with effect from the date of the filing of the originating application on 5 May 2023.
2. In the transcript of any hearings in this proceeding and in any documents filed and oral submissions made in this proceeding, references to the Applicants must be anonymised as follows:
 - (a) The Interested Person, being the father of [REDACTED].
 - (b) The person sought to be appointed as the litigation representative of [REDACTED]
[REDACTED]
 - (c) The Interested Person, being the mother and being the person sought to be appointed as the litigation representative of [REDACTED].

Legislation

The Applicants claim that the disability discrimination complained of is unlawful under sections 5, 6, 22, 24, 31 and 123 of the DDA.

The Applicants claim that the age discrimination complained of is unlawful under sections 14, 15, 26, 28 and 57 of the ADA.

Accompanying documents

On 30 September 2022, the Applicants lodged a representative complaint with the Australian Human Rights Commission (**AHRC**) in which they alleged that their treatment in the newly gazetted juvenile detention centre located at Casuarina maximum security adult prison, Unit 18, Prison, breached, among other things, the DDA and the ADA. A copy of the complaint is annexed hereto.

The notice of termination of the complaint was given by the delegate of the President of the AHRC on 6 March 2023. This, and the delegate's reasons for the decision, is annexed hereto.

Extension of time

Date of issue of notice under section 46PH(2) of the *Australian Human Rights Commission Act 1986* (Cth): 6 March 2023.

An extension of time under the *Australian Human Rights Commission Act 1986* (Cth) is not required.

Applicants' addresses

The Applicants' address for service is:

Place: Levitt Robinson
Ground Floor, 162 Goulburn Street
Surry Hills< NSW, 2010

Email: slevitt@levittrobinson.com

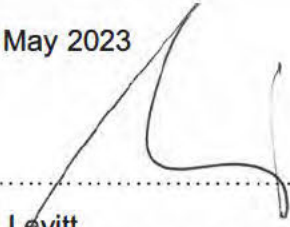
The Applicants' addresses are:

C/- Levitt Robinson
Ground Floor, 162 Goulburn Street
Surry Hills NSW, 2010

Service on the Respondent

It is intended to serve this application on the Respondent and on the Applicants in this proceeding (being the affected persons under a legal incapacity, [REDACTED] and [REDACTED] [REDACTED]

Date: 9 May 2023



.....

Stewart Levitt
Lawyer for the Applicants

SCHEDULE OF PARTIES

First Applicant: [REDACTED] by his litigation representative [REDACTED]

Second Applicant: [REDACTED] by his litigation representative [REDACTED]

AUSTRALIAN HUMAN RIGHTS COMMISSION

FILE NO: 2022-15309
2022-15509
2022-15511

Between

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

(together, the 'Named Complainants')

on their own behalf and on behalf of a wider class of people (the 'Group' or 'Group Members') all of whom are current or former detainees of Banksia Hill Detention Centre and/or the newly Gazetted juvenile detention centre located at Casuarina, max-security adult prison, Unit 18, both facilities operating under the *Young Offenders Act 1994 (WA)*, and, from the gazettal of Unit 18 on 13 July 2022, and, who on one or more occasion suffered discriminatory treatment and/or harassment because of their:

- i. race (in breach of the *Racial Discrimination Act 1975 (Cth)*); and/or,
- ii. age (in breach of the *Age Discrimination Act 2004 (Cth)*); and/or,
- iii. disability (in breach of the *Disability Discrimination Act 1992 (Cth)*)

Complainants

AND

The State of Western Australia
(Department of Justice)

Respondent

NOTICE OF TERMINATION

Issued under section 46PH(2) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA).

This complaint alleging unlawful discrimination under the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) has been terminated under section 46PH(1B)(b) of the AHRCA on the ground that I am satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Section 46PO(1) of the AHRCA provides that if a complaint has been terminated under section 46PH(1B)(b) of the AHRCA, an affected person may make an application to the Federal Circuit and Family Court of Australia (FCFCOA) or the Federal Court of Australia (FCA) alleging unlawful discrimination by one or more of the respondents to the terminated complaint.


The FCFCOA and FCA can award costs against either party in proceedings under section 46PO of the AHRCA.

Any application to the court must be made within 60 days of the date on this Notice of Termination.

Reasons for this decision are provided in Attachment A.

A copy of the complaint is provided at Attachment B.

DATED 6 March 2023.



Jodie Ball

Delegate of the President



Australian
Human Rights
Commission

ATTACHMENT A

Our ref: 2022-15309, 2022-15509 and 2022-15511

Your ref: SAL:DL:AG:DR:200301_576

6 March 2023

Mr Stewart Levitt
Senior Partner
Levitt Robinson Solicitors

Sent by email: slevitt@levittrobinson.com

Copied to: agebrayel@levittrobinson.com

bprentice-davidson@levittrobinson.com

Dear Mr Levitt

Termination of the complaint

I am writing to advise you of my decision regarding the complaint which has been accepted and progressed as a representative complaint against the State of Western Australia (Department of Justice) (**the Department**) made by [REDACTED]

[REDACTED] (together, the **'Named Complainants'**) on their own behalf and on behalf of a wider class of people (the **'Group'** or **'Group Members'**) all of whom are current or former detainees of Banksia Hill Detention Centre and/or the newly Gazetted juvenile detention centre located at Casuarina, max-security adult prison, Unit 18, both facilities operating under the *Young Offenders Act 1994* (WA) (**the YO Act**).

The complaint alleges that from the gazettal of Unit 18 on 13 July 2022, the Named Complainants and/or Group or Group Members on one or more occasion suffered discriminatory treatment and/or harassment because of their:

- i. race (in breach of the *Racial Discrimination Act 1975* (Cth)); and/or,
- ii. age (in breach of the *Age Discrimination Act 2004* (Cth)); and/or,
- iii. disability (in breach of the *Disability Discrimination Act 1992* (Cth)).

In a document titled "Annexure A", under the heading "A.1 Summary of Representative Complaint...", your office states that: "All the Named Complainants allege discrimination against the same Respondents in respect of age and disability and all, but [REDACTED] allege discrimination against the same Respondents in respect of their Aboriginal race."

This complaint has been accepted and progressed as a complaint alleging unlawful discrimination under the *Racial Discrimination Act 1975* (Cth) (**RDA**), *Disability Discrimination Act 1992* (Cth) (**DDA**) and the *Age Discrimination Act 2004* (Cth) (**ADA**).

Complaint documents

The Australian Human Rights Commission (**the Commission**) received the complaint on 30 September 2022. The complaint totals 104 pages, a copy of which was emailed to your office on 11 October 2022. Another copy is provided with this letter, marked as 'Attachment B'.

The Commission provided a copy of the complaint to the West Australian State Solicitor's Office (**SSO**), representing the Department, on 11 October 2022.

Respondent to the complaint

The complaint documents list the following entities and organisations as possible respondents:

- The State of Western Australia
- The Department of Justice
- The Department of Corrective Services
- The Department of Communities, including Disability Justice Services
- The Department for Child Protection and Family Support

As explained in the Commission's email of 11 October 2022, the Department of Communities, including Disability Justice Services and the Department for Child Protection and Family Support have not been accepted as respondents to the complaint as there are insufficient details of a reasonably arguable claim of unlawful discrimination under the ADA, DDA and/or the RDA against these entities.

As it relates to the 'Department of Corrective Services', I note that on 11 October 2022, SSO confirmed to the Commission that "*Corrective Services is a Division of the Department of Justice. It is not a Department. The correct Respondent is the State*

of Western Australia (Department of Justice).” In the circumstances, I consider that the correct respondent entity is the Department of Justice.

Therefore, as noted above, the complaint has been accepted and progressed as a complaint against the State of Western Australia (Department of Justice) only.

Other issues raised in the complaint

The complaint documents also make reference to alleged breaches of human rights under the *Convention on the Rights of the Child (CRC)*, the *Convention on the Rights of Persons with Disabilities (CRPD)*, the *International Covenant on Civil and Political Rights (ICCPR)*, the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, the *Universal Declaration on Human Rights (UDHR)*, the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*, and the *UN Guiding Principles on Business and Human Rights (UNGPs)*. However, as explained in the Commission’s email of 11 October 2022, these claims were not accepted as a complaint alleging a breach of human rights under the human rights provisions in the *Australian Human Rights Commission Act 1986 (Cth) (AHRCA)* because:

- The Commission can only consider complaints about alleged breaches of human rights under the international human rights instruments scheduled to, or declared under, AHRCA, where the alleged act was done by, or on behalf of, the Commonwealth.
- The ICESCR, CAT, UDHR, UNDRIP and the UNGPs are not scheduled to, or declared under, the AHRCA.
- While the CRC, CRPD and the ICCPR are scheduled to, or declared under, the AHRCA, the Commission has no power to inquire into alleged breaches of human rights under these instruments by a state government entity, such as the Department. There is no information before the Commission that supports that the alleged acts by the Department could be said to be done on behalf of the Commonwealth.

The complaint documents also refer to breaches of the YO Act. As previously advised, the Commission does not administer the YO Act.

My decision

Under section 46PH(1B)(b) of the AHRCA, the President must terminate a complaint if satisfied that there is no reasonable prospect of the matter being settled by conciliation.

The Commission asked the parties to advise of their views regarding conciliation. In summary, the following information has been provided to the Commission:

- In a letter dated 11 November 2022, the SSO noted that the State of Western Australia (**the State**) was not in a position to form a view about the prospects of conciliation. The SSO expressed concerns about the manner in which the complaint was drafted. The SSO advised that it raised these concerns with your office on 24 October 2022 and that in its letter of 7 November 2022, it requested your office to indicate if your office intended to respond to the deficiencies in the complaint, as identified in its letter.
- In a letter dated 28 November 2022¹, your office responded to the SSO's letter of 7 November 2022. In the letter, your office opined that the Named Complainants' perspective was that the complaint was capable of conciliation in its current form. The letter also set out the basis on which your office was instructed to resolve the complaint (**the Offer**). The Offer remained open for 14 days from the date of the letter at which point it was to lapse.
- In a letter dated 13 December 2022, your office advised the Commission that, as the SSO did not respond to your office's letter of 28 November 2022, the Named Complainants accepted that there were no prospects of the complaint being conciliated and requested that the complaint be terminated so that the matter could proceed to Court.
- In an email of 16 December 2022, the SSO advised the Commission that in the circumstances, the State was of the view that it would be appropriate for the complaint to be terminated.
- In a letter dated 16 December 2022, your office advised the Commission that your office appeared before her Honour Justice Banks-Smith in the Federal Court at Perth and that orders were made on the same date effectively *nunc pro tunc* appointing Litigation Guardians to represent all five Named Complainants. Your office also advised that "*Consent Orders for Discovery were made permitting the medical records of the [Named Complainants] to be*

¹ Your office provided a copy of this letter in an email to the Commission on 13 December 2022.

examined by forensic psychiatric experts ..., whose reports are likely to crystallize [sic] and focus on, the very matters with respect to which the Respondent is seeking greater particularity concerning the Complainants' disabilities and the nature and effect of the Respondents' discrimination". Your office submitted that it would be "inappropriate to terminate the complaint at this point as it would be pre-judging the outcome of the steps which the Court has permitted [your office] to put in process". I note that SSO was copied into this correspondence.

- In an email of 29 December 2022, the SSO advised the Commission that *"the respondent remains of the view that in all the circumstances of this matter the complaint should be terminated"*. I note that your office was copied into this email.
- On 18 January 2023, the SSO emailed the Commission a copy of its letter to your office dated 28 December 2022, responding to your office's letter of 16 December 2022. In the same email, which your office was copied into, the SSO advised that *"we consider the appropriate course is for the complaint in Commission to be terminated and the parties' and the Court's resources be focussed on the substantive matter"*.
- In a letter dated 19 January 2023, your office stated, among other things, that *"the decision as to whether to terminate the complaint should be reserved until 1 March 2023. This will allow the parties time to properly consider the merits of conciliation"*. I note that SSO was copied into this correspondence.
- In a letter dated 30 January 2023, the SSO wrote to your office setting out the Respondent's reasons as to why it *"remains of the view that there is no prospect of the matter being settled by conciliation and the complaint should be terminated to enable the substantive issues to be contested, should the Applicants choose to do so"*. I note that the Commission was copied into this correspondence.
- In a letter dated 1 March 2023, your office wrote to the Commission stating, among other things, that *"[t]he parties have now agreed that there are no prospects of the complaint being successfully conciliated before the Commission and so the complaint should be terminated pursuant to s46PH(1B)(b) of the [AHRCA]"*. I note that the SSO was copied into this correspondence.

In all the circumstances, I have decided to terminate the complaint under section 46PH(1B)(b) of the AHRCA, as I am satisfied that there is no reasonable prospect of the matter being settled by conciliation.

Possible further action

The AHRCA says that after a complaint is terminated, the person(s) affected by the alleged discrimination may be able to apply to the Federal Circuit and Family Court of Australia (**FCFCOA**) or the Federal Court of Australia (**FCA**) to have the allegations decided by the court.

If the Named Complainants and/or the class members apply to the FCFCOA or the FCA, they will need to attach the following documents to the application:

- the enclosed Notice of Termination;
- this letter (Attachment A); and
- the enclosed copy of the complaint (Attachment B).

Any application to the court must be made within 60 days of the date on the Notice of Termination.

If a matter proceeds to court, the FCFCOA and FCA can award costs against either party. Information about the court or the court process is available from a court registry or from its websites at www.fcfoa.gov.au and www.fedcourt.gov.au.

Please provide a copy of this letter to your clients for their records.

Yours sincerely



Jodie Ball

Delegate of the President



Australian
Human Rights
Commission

COMPLAINT FORM *

The Australian Human Rights Commission investigates and conciliates complaints about discrimination and breaches of human rights.

We will need to contact you about your complaint, so please provide your name and contact details, including one contact number if possible. If you do not provide this information we may not be able to deal with your complaint.

We will use the information you provide to assess, investigate and/or conciliate your complaint. We will usually provide a copy of your complaint (excluding your contact details) to the person or organisation you are complaining about and, if necessary, others who have relevant information about your complaint. By completing and submitting this form you consent to the Commission using your information for these purposes. If you have any questions about this or need help to complete this form please contact our National Information Service on 1300 656 419 or 02 9284 9600.

Your personal information will be used and stored in accordance with the *Privacy Act 1988* (Cth). The Commission's privacy policy is available at www.humanrights.gov.au.

Part A – About you, the complainant *

Title: Mr.
First name: [REDACTED]
Last name: [REDACTED]
Address: c/o - Levitt Robinson, Ground Floor, 162 Goulburn St
Suburb: Surry Hills
State/Territory: NSW
Postcode: 2010
Email: dlevitt@levittrobinson.com
Phone (AH):
Phone (BH): (02) 9286 3133
Mobile: 0406 252 404
Fax: (02) 9283 0005
TTY:

If you require assistance to participate in the complaint process, please outline the assistance you require:

If you are complaining on behalf of someone else, please provide the following details about this person.

Title: Other persons matching the description of "Group Members"
appearing at Annexure A

First name:

Last name:

Address:

Suburb:

State/Territory:

Postcode:

What is their relationship to you?

Please advise if they need assistance to participate in the complaint process and the kind of assistance they need:

If someone is assisting you with the complaint, for example, a legal representative, advocate or union representative, please provide the following details about this person. *

Title: Mr

First name: Stewart

Last name: Levitt

Position: Solicitor

Organisation: Levitt Robinson

Address: Ground Floor, 162 Goulburn Street

Suburb: Surry Hills

State/Territory: NSW

Postcode: 2010

Email: slevitt@levittrobinson.com; dlevitt@levittrobinson.com

Phone (BH): (02) 9286 3133

Mobile: 0406 252 404

Fax: (02) 9283 0005

TTY:

Please advise if they need assistance to participate in the complaint process and the kind of assistance they need:

Part B – Who is the complaint about? *

Respondent 1 *

Name of person or organisation: The Department of Justice

ABN of organisation (if relevant):

Address: Department of Justice Head Office, David Malcolm Justice
Centre, Level 23, 28 Barrack Street

Suburb: Perth

State/Territory: Western Australia

Postcode: 6000

Email:

Phone (BH): 13 67 57/ (08) 9264 1600

Mobile:

Fax:

TTY:

What is your relationship to this respondent? Government Department in charge of the Complainant while in its custody and under its care and control.

Respondent 2 *

Name of person or organisation: The Department of Corrective Services

ABN of organisation (if relevant):

Address: Department of Justice Head Office, David Malcolm Justice
Centre, Level 23, 28 Barrack Street

Suburb: Perth

State/Territory: Western Australia

Postcode: 6000

Email:

Phone (BH): 13 67 57/ (08) 9264 1600

Mobile:

Fax:

TTY:

What is your relationship to this respondent? Government Department in charge of the Complainant while in its custody and under its care and control.

Note: If you are complaining about more than two people or organisations, please provide information about each additional person or organisation. (see attached sheet with details of additional Respondents)

Part C – What are you complaining about? *

For information about the types of complaints the Commission can consider, please go to <https://www.humanrights.gov.au/complaints/complaint-guides/information-people-making-complaints>.

I am complaining because I believe:
(Please select at least one reason below)

- I have been discriminated against because of my**
 - Age
What is your age? Please refer to Annexure A
 - Disability
What is your disability? Please refer to Annexure A
 - Association with a person with a disability
What is the person's disability?
 - Status as a person with a disability who uses an assistance animal or disability aid or has a carer
 - Sex
What is your sex?
 - Pregnancy
 - Breastfeeding
 - Marital or relationship status
What is your marital or relationship status?
 - Family responsibilities
 - Sexual orientation
What is your sexual orientation?
 - Gender identity
What gender do you identify as?
 - Intersex status

- Race (this includes colour, national origin, descent or ethnic origin)
What is your race/national or ethnic origin/descent? Please refer to

Annexure A

- I have been sexually harassed
- I have experienced racial hatred

What is your race/national or ethnic origin/descent?

- I have been discriminated against in my employment because of my

- Trade union activity
- Criminal record
What is your criminal record?
- Religion
What is your religion?
- Political opinion
What is your political opinion?

- My human rights have been breached by a Commonwealth government body.

- I have been victimised because I made, or tried to make, a complaint about discrimination

When did the alleged event(s) happen? Please refer to Annexure A

Note: The President of the Commission can decide not to investigate into a complaint alleging unlawful discrimination where the complaint is lodged more than six months after the alleged event(s) happened. If the event(s) being complained about happened more than six months ago, please explain the reasons for the delay in making a complaint to the Commission.

For complaints alleging human rights breaches and discrimination in employment under the ILO Convention, the relevant time frame is twelve months.

Reason(s) for delay: Please refer to Annexure A

What happened?

Describe the event(s) that you want to complain about. We need to know what you say happened, where it happened and who was involved. Please give us all the dates and other details that you can remember.

If you are complaining about employment, please tell us when you commenced employment, your job title and whether you are still employed.

Please refer to Annexure A

Supporting documents

Please attach copies of any documents that support the claims in your complaint. For example - letters, separation certificate, doctors certificate. If you cannot do this, please tell us about the documents or other information and how this information can be obtained.

Please refer to Annexure A

How do you think this complaint could be resolved?

For example, a complaint may be resolved with an agreement that a respondent will change its procedures, introduce training or policies on anti-discrimination, take other action to prevent possible discrimination and/or by payment of compensation.

Please refer to Annexure A

Have you made a complaint to another organisation?

For example, a state anti-discrimination or equal opportunity agency, a worker's compensation agency, an ombudsman or the Fair Work Commission.

Yes

If yes, you must provide the name of the agency, the date the complaint was made, the status of the complaint, or outcome of the complaint. Please also attach copies of relevant documents, including a copy of your complaint and any letters you have received from the agency.

No

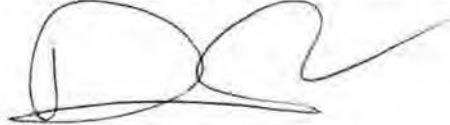
Were you referred to the Commission by another organisation?

If so, what organisation?

Part D – Lodging the complaint * *

Please send the complaint form to the Commission by:

Post: Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001
Fax: 02 9284 9611
Email: complaints@humanrights.gov.au

Signature: 

Date: 29 September 2022



Australian
Human Rights
Commission

COMPLAINT FORM *

The Australian Human Rights Commission investigates and conciliates complaints about discrimination and breaches of human rights.

We will need to contact you about your complaint, so please provide your name and contact details, including one contact number if possible. If you do not provide this information we may not be able to deal with your complaint.

We will use the information you provide to assess, investigate and/or conciliate your complaint. We will usually provide a copy of your complaint (excluding your contact details) to the person or organisation you are complaining about and, if necessary, others who have relevant information about your complaint. By completing and submitting this form you consent to the Commission using your information for these purposes. If you have any questions about this or need help to complete this form please contact our National Information Service on 1300 656 419 or 02 9284 9600.

Your personal information will be used and stored in accordance with the *Privacy Act 1988* (Cth). The Commission's privacy policy is available at www.humanrights.gov.au.

Part A – About you, the complainant *

Title: Mr
First name: [REDACTED]
Last name: [REDACTED]
Address: c/o - Levitt Robinson, Ground Floor, 162 Goulburn St
Suburb: Surry Hills
State/Territory: NSW
Postcode: 2010
Email: dlevitt@levittrobinson.com
Phone (AH):
Phone (BH): (02) 9286 3133
Mobile: 0406 252 404
Fax: (02) 9283 0005
TTY:

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Part B – Who is the complaint about? *

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Name of person or organisation: The Department of Justice

ABN of organisation (if relevant):

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I have been sexually harassed

I have experienced racial hatred

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Trade union activity

Criminal record
What is your criminal record?

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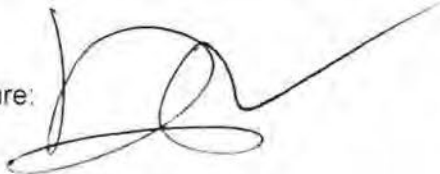
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Date: 29 September 2022



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ANNEXURE A

A.1 Summary of Representative Complaint lodged under section 46PB (1b)(2)(b)(ii) & section 46PB of the Australian Human Rights Commission Act 1986 (Cth).

1. This is a joint Representative Complaint made by [REDACTED] [REDACTED] [REDACTED] (together the 'Named Complainants') on behalf of a wider class of people (the 'Group' or 'Group Members') all of whom are current or former detainees¹ of Banksia Hill Detention Centre ('BHDC') and/or, the newly Gazetted juvenile detention centre located at Casuarina, maximum security adult prison, Unit 18, both facilities operating under the *Young Offender's Act 1994* (WA) ('YOA'), and, from the gazettal of Unit 18 on 13 July 2022, and, who on one or more occasions suffered discriminatory treatment and/or harassment *because of* their:
 - i. Race (in breach of the *Racial Discrimination Act 1975* (Cth) ('RDA'); and/or,
 - ii. Age (in breach of the *Age Discrimination Act 2004* (Cth) ('ADA'); and/or,
 - iii. Disability (in breach of the *Disability Discrimination Act 1992* (Cth) ('DDA')).(the 'Representative Complaint')
2. All the Named Complainants allege discrimination against the same Respondents in respect of age and disability and all, but [REDACTED] allege discrimination against the same Respondents in respect of their Aboriginal race.

A.1 Period subject to the complaints

3. The Named Complainants submit that their complaints should span the period from the gazettal of Unit 18 to Casuarina Prison on 13 July 2022 and include the operations of BHDC during an intersecting period from 13 July 2022 to 20 July 2022 and up to the present in respect of their treatment in Unit 18, since the discriminatory conduct complained of is and has been of a continuing nature.
4. It is submitted that there is no delay in bringing the complaints, because of the continuing nature of the matters that are the subject of the complaints in respect of claims for serious human rights abuses, against the Respondents, by the Named Complainants and wider Group, all of whom are all juvenile offenders, sent to Unit 18:
 - i. on remand from BHDC;
 - ii. on a court-ordered sentence from BHDC; or
 - iii. directly – that is not ever having been detained at BHDC.

A.2 Respondents – Individual Respondents, Relevant Governmental Departments & Agencies

5. The Representative Complaint is made against the State of Western Australia ('WA')² (the Government of Western Australia³) which is, and was at all material times, able to be sued pursuant to sections 3 and 5 of the *Crown Suits Act 1947* (WA).

¹ YOA, s 4, defines "detainee" as a "young person who is detained in a detention centre." The term also describes a young person, who is alleged to be an offender and/or who is remanded in custody, prior to being dealt with by the Courts.

² *Crown Suits Act 1947* (WA), s 5(2).

³ *Ibid*, s 3.

6. The Respondents to the claims for discrimination based on race and/or age and/or disability discrimination include:
 - i. The Department of Justice ('DOJ') from 13 July 2022 and continuing.
 - ii. The Department of Corrective Services ('DCS') from 13 July 2022 and continuing, which is located within the 'Community and Juvenile Justice Division' of the DOJ, covering all juvenile remand and detention services in WA's Juvenile Custodial Services Directorate, responsible for the governance, administration, and regulation of Youth Justice Services ('YJS').
 - iii. The Department of Communities ('DOC') from 13 July 2022 and continuing, including Disability Justice Services ('DJS') responsible for the provision of 'in-reach services', tailored supports and/or alternative placements for justice involved with "intellectual disability, cognitive impairment, or autism"⁷ covering inmates at BHDC.
 - iv. The Department for Child Protection and Family Support (2013 - 2017) and the Department for Child Protection and Family Support ('DCPFS') created on 17 May 2013, as a new name for the Department for Child Protection from 13 July 2022 and continuing.
(subparagraphs 7((i)-(iv) together 'the Government Department/Agency Respondents')

A.3 Relevant international human rights instruments, declarations, principles, and standards

7. The discriminatory conduct particularized by reference, respectively to age, disability and/or race toward the Named Complainants and the wider Group, by the Relevant Juvenile Justice Agencies and Respondents, also contravenes the following international human rights instruments, declarations, principles, and standards, to which the Commonwealth of Australia is a contracting party, and has ratified, and on whom the obligations are binding at international law such as:
 - i. The **Convention on the Rights of the Child** (UNGA resolution 44/25, entry into force 2 September 1990) A/44/49 ('CRC');
 - ii. The **Convention on the Rights of Persons with Disabilities** (UNGA resolution 61/106, entry into force 3 May 2008) A/RES/61/106 ('CRPD');
 - iii. The **Optional Protocol to the Convention on the Rights of Persons with Disabilities** which the Australian Commonwealth Government acceded to on 21 August 2009 and which allows people within Australia to make complaints to the UN Committee on the Rights of Persons with Disabilities about breaches of the CRPD by Australia.
 - iv. The **International Covenant on Civil and Political Rights** (UNGA Resolution 2200A (XXI), 16 December 1966, entry into force 23 March 1976) 999 UNTS 171. Australia signed: 18 December 1972, ratified on 13 August 1980 (ICCPR).
 - v. The **First Optional Protocol to the ICCPR** which the Australian Commonwealth Government acceded to in 1991 and allows people within Australia to make complaints to the UN Human Rights Committee about breaches of the ICCPR by Australia.
 - vi. The **International Covenant on Economic, Social and Cultural Rights** (UNGA resolution 2200A (XXI), 16 December 1966, entry into force 3 January 1976) 993 UNTS 3. Australia signed: 18 Dec 1972, ratified: 10 Dec 1975 (ICESCR).
 - vii. The **Convention against Torture and Other Cruel, Inhuman or Degrading**

⁷WA Government, Department of Communities, Disability Justice Service Brochure (February 2020).

Treatment or Punishment (UNGA resolution 39/46, entry into force 26 June 1987) A/39/51 (1984) ('CAT' or 'International Torture Convention') and Australia accepted the individual complaints procedures to the CAT Committee on 28 January 1993.

viii. the **Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** ('OPCAT') (which aims to improve how people's human rights are protected when they are detained. It does this by providing for a rigorous process of independent inspections of all places of detention wherever located internationally. In so doing, OPCAT enables a light to be shone on the conditions experienced by people in detention)⁹ ratified by the Australian government on 21 December 2017.

ix. the **International Convention on the Elimination of All Forms of Racial Discrimination** (UNGA resolution 2106 (XX), entry into force 4 January 1969) 660 UNTS 195 ('CERD') and Australia accepted the individual complaints procedures to the CERD Committee on 28 January 1993.

8. It is important to recognise that the suite of Commonwealth Anti-Discrimination legislation was enacted to implement the Commonwealth's binding obligations at international law and domestically implement the content of the various international human rights instruments that it had signed and ratified, namely pursuant to the principle of *Pacta Sunt Servanda* ('Every treaty in force is binding upon the parties to it and must be performed by them in good faith') as provided by Article 26 of the 1969 of the *Vienna Convention of the Law on Treaties* which came into force internationally on 27 January 1980 and Australia acceded to on 13 June 1974 ('**Vienna Convention**').
9. Relevantly, Article 27 of the Vienna Convention provides that "*Internal Law and Observance of Treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. Notwithstanding Australia is a federation of largely legislatively autonomous States and Territories, nonetheless, there exists an overriding obligation at international law (as well as in principle and morally as basic standards of human dignity and decency reasonably expected by persons living in liberal and civilised democracies under the rule of law) that all Australian governments must govern, legislate, regulate and implement and enforce legislation and regulation consistent with principles of international human rights law in particular those IIIRL instruments that are binding on Australia in international law.*
10. Other relevant international human rights instruments that are not technically binding at international law, but which are arguably binding through the principles of customary international law and which Australia has endorsed and approved in its voting capacity in the UN General Assembly or UN Human Rights Council including:
 - i. the 1948 **Universal Declaration on Human Rights** ('UDHR') which Australia voted in favour of its adoption on 10 December 1948;
 - ii. the 2007 **United Nations Declaration on the Rights of Indigenous Peoples** ('UNDRIP') which Australia endorsed in 2009;
 - iii. the 2011 **UN Guiding Principles on Business and Human Rights** ('UNGPs'), Australia co-sponsored the resolution at the UN to adopt the UNGPs, and in early 2016, in response to Australia's November 2015 Universal Periodic Review, the Government committed to progress national consultations on further implementation

of the UN Guiding Principles on Business and Human Rights.⁵

11. The principles in the above conventions are supplemented by several other United Nations instruments. Among these are the Standard Minimum Rules for the Administration of Juvenile Justice 1985 (**Beijing Rules**), the Guidelines for the Prevention of Juvenile Delinquency 1990 (**Riyadh Guidelines**) and the Rules for the Protection of Juveniles Deprived of their Liberty 1990 (**Havana Rules**). These three instruments do not have the same status as the CRC. They are not regarded as treaties, but they are internationally accepted minimum standards to which States should have regard when setting up or amending their existing juvenile justice system. Setting policies and drafting legislation that incorporates the minimum standards assists States to comply with the obligations imposed upon them by the CRC.
 - i. The **Beijing Rules** are expressly acknowledged in the Preamble to the CRC. Relevantly, the Rules state that: the juvenile justice system shall emphasise the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence (Rule 5.1); juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults (Rule 13.4); and while in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical that they may require in view of their age, sex and personality (Rule 13.5).
 - ii. The **Havana Rules** also acknowledge the Beijing Rules in a statement of 'Fundamental Perspectives' and rules 28 to 30 relevantly provide that: The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations; In all detention facilities juveniles should be separated from adults, unless they are members of the same family. Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned; and Open detention facilities for juveniles should be established. Open detention facilities are those with no or minimal security measures.
 - iii. The **Riyadh Guidelines** require that emphasis be placed on prevention policies that facilitate the successful socialisation and integration of all children, in particular through the family, the community, peer groups, schools, vocational training and work, as well as through voluntary organisations. Prevention programmes should include support for particularly vulnerable families and the involvement of schools in teaching basic values, including information about the rights and responsibilities of children and parents under the law.

A.4 Remedies sought

12. Declarations that the named Respondents have respectively engaged in conduct which contravenes the *Racial Discrimination Act 1975* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth).

⁵ See Department of Foreign Affairs and Trade webpage 'Australia's commitment to human rights': <https://www.dfat.gov.au/international-relations/themes/human-rights>

13. Orders restraining the named Respondents from continuing to engage in the impeached discriminatory conduct.
 - i. Monetary compensation for hurt, humiliation and distress.
 - ii. A statement of regret by the State of Western Australia for the pain and suffering, hurt, humiliation and distress, caused by the impeached discriminatory conduct.
 - iii. Costs and ancillary orders.

A. BACKGROUND TO REPRESENTATIVE COMPLAINT

B.1 *Gazettal of Unit 18 as a 'detention centre' within Casuarina adult maximum-security prison*

14. In or around July 2022, various statements were made by representatives of the Named Respondents regarding the 'unprecedented' damage caused by juveniles to their cells in Banksia Hill Detention Centre ('BHDC').
15. On 13 July 2022, the Western Australian Government published the Government Gazette titled 'Prisons (Casuarina) Order 2022' wherein a part of Casuarina Prison was gazetted as a new juvenile detention unit and an extension of BHDC (hereafter referred to as '**Unit 18**').⁶
16. The designation of the Casuarina Unit 18 was made pursuant to section 13 of the YOA, however, the YOA does not identify the characteristics which should be regarded when distinguishing a juvenile detention centre from an adult prison.
17. Former WA Chief Justice Wayne Martin's decision in *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia* ('**Wilson**') emphasised that the YOA properly construed requires that, when the Minister is exercising the discretionary powers under s.13 of the YOPA to declare a place a detention centre, they are required to or must, take into account (i.e. a mandatory consideration) whether:
 - i. the place to be declared as a detention centre is a prison or has the characteristics of a prison;
 - ii. young persons would be **exposed to contact with adults detained in the facility**; and,
 - iii. whether the facility is **suitable** for young persons.
18. On or about 20 July 2022, approximately 17 youth detainees were forcibly transferred under duress whilst forcibly sedated and restrained in arm and leg shackles/chains from BHDC to the newly gazetted Unit 18 and which was widely reported in the media (potentially due to the Respondents leaking to the media) which further exacerbated and compounded the pain, suffering, hurt, humiliation and distress of the Child Detainee Complainants and the Family Member Complainants.
19. Of the original 17 Child Detainees transferred:
 - i. 12 were First Nations/Indigenous/Aboriginal individuals; and,

⁶ See Appendix I: Western Australian Government Gazette: 'Prisons (Casuarina) Order 2022' [2013] WASC 157.

- ii. All 17 child detainees had some form of diagnosed disability which were known to the Respondents at all material times during the Relevant Period.⁸

B.2 The Young Offenders Act 1994 (WA) in light of international legal obligations

20. The main statute that governs the treatment of juvenile detainees in Western Australia is the Young Offenders Act 1994 (WA) (**'YOA'**), and its corresponding regulations: Young Offenders Regulations 1995 (WA) (**'YOR'**). In addition to the YOA and YOR, there are three other sets of rules that govern juvenile detainees: the Youth Custodial Rules (previously the Juvenile Custodial Rules), Standing Orders, and Operational Procedures (OICS 2012). All of these rules derive their authority from the YOA and the YOR, which must be consistent with their objectives and general principles (Young Offenders Act 1994 (WA), ss.196 and 181).
21. The objectives and general principles of the YOA are contained in sections 6 and 7 of the YOA and recognise:
 - i. juveniles in the justice system should be afforded higher levels of protection than adults,
 - ii. juvenile offenders should be treated differently from adult offenders, and
 - iii. juveniles require the consideration of specific matters that only affect children.
22. Parliamentary debates and the second reading speech in Parliament, emphasised that the criminal justice system must be modified to accommodate the specific factors relevant to children including; age and maturity; a recognition that much juvenile offending is transitory and minor; and that young offenders should not be given a greater punishment than an adult for a similar offence (Parliamentary Debates, 1994).
23. Finally, in addition to the legislation and the three sets of rules, there is a national set of model service standards for juvenile custodial facilities that embodies many of the international standards (AJJA 1999). Although not binding, the Western Australian Department of Corrective Services agrees that the management of juvenile detention centres should be consistent with the principles of these model standards (OICS, 2013b).
24. This three-layered system of laws, rules and standards govern the treatment of juveniles in juvenile detention centres, and in so doing, govern the use of solitary confinement, the use of force, the use of restraints and other (in)formal policies, which impact the Named Complainants in detention.

B.4 Criticisms of the YOA – in relation to the designation of 'detention centre' under s 13

25. Under Section 13 of the YOA, the Minister is authorised to declare and/or revoke any place a 'detention centre', effective from the date of publication in the West Australian Gazette on July 13, 2022. All the Named Complainants contend that the Minister's interpretation of the broad power conferred on him under section 13 in respect of Unit 18 undermines the objectives of the YOA and flies in the face of Australia's international legal obligations. The Ministers' failure to turn his mind to the 'suitability' of Casuarina – or more appropriately the

⁸See Appendix 2: Excel spreadsheet containing details of cohort of detainees transferred to the Casuarina Unit 18 Adult Prison Facility on 20 July 2022.

lack thereof – as evidence of discrimination based on age, race, and disability to which they have been subject at Unit 18. While the YOA does not identify the characteristics which distinguish a detention centre from a prison, it does not stand to reason that literally any place can be a ‘detention centre’ as, “while it is clear that the Act draws a distinction between a prison and a detention centre, the identification of the essential characteristics of each is more elusive. The Act makes no attempt to define the essential characteristics of a detention centre, or to contrast those characteristics with the characteristics of a prison.”⁹

26. According to principles of statutory interpretation, the power to Gazette any place a ‘detention centre’ must be ‘read down’ to comply with the general principles of juvenile justice, as well as statutory minimums with respect to ‘child safety’ – in fact, Martin CJ’s decision in *Wilson* also reiterated the ‘suitability’ of a proposed site as a mandatory consideration, “I have concluded that the Act properly construed requires the Minister to take into account whether the place to be declared as a detention centre is a prison or has the characteristics of a prison, whether young persons would be exposed to contact with adults detained in the facility, and whether the facility is suitable for young persons. The requirement that the Minister take into account the suitability of the place for the detention of young persons carries with it the requirement that the Minister take into account the objectives specified in s 6, and the other principles specified in s 7, to the extent that they bear upon the suitability of the particular place as a place for the detention of young persons.”¹⁰
27. The facts surrounding the current transfer are distinguishable from those in *Wilson v Joseph Michael Francis, Minister for Corrective Services for the State of Western Australia 2013, WASC 157* for the following reasons – it was born out of *mutine*, rather than *exceptional* circumstances – namely, months of solitary confinement in BHDC’s euphemised ISU, and a practice synonymous with psychological subjugation, cruel and unusual punishment, and/or torture at law.
28. Despite the attempt by the Respondents to present the transfer as a win-win for the Named Complainants and wider Group, who would enjoy a ‘new’ ‘light’ ‘airy’ ‘purpose-built’ and ‘secure’ unit, ‘one-on-one’ ‘therapeutic and/or intensive supports’, ‘access to programmes and services at least as good as’ those at BHDC, and the juvenile detainees at BHDC who would benefit from the resumption of a more normal routine.¹¹ It is unsurprising that neither of these benefits have eventuated.
29. The only ‘support’ offered to affected persons by custodial staff in Unit 18 is profoundly untherapeutic – relegation to a ‘padded cell’ for solitary confinement in tear-proof clothing, and/or being placed in 3-point restraints, being denied ‘privileges’ such as phone calls and/or visitors, and even bedding. The likelihood of Casuarina exacerbating rather than alleviating chronic staff shortages was foreshadowed by Martin CJ in *Wilson* – as less suitable due to its being further away from BHDC than Hakea, and significantly more difficult to access. In fact, the criticism levelled against Hakea prison in the case of *The State of WA v B-IJG* could be applied to Unit 18 – “The two units were not intended to be and are not a facility. Rather, they were built as part of a facility, namely the Hakea adult prison facility, so in that sense they could not be properly described as a facility... when that is considered in

⁹ *Wilson* per Martin CJ at 154

¹⁰ *Wilson* per Martin CJ at 156

¹¹ Christine Gimbey, Assistant Commissioner, DCO: “By having this cohort of detainees moved...this cohort of detainees at the moment are causing so many critical incidents at Banksia Hill and the damage that they’re causing impacts the ability to have a normalised routine for everybody else, so it means that the other detainees don’t get access to education and programmes and being able to play footy on the oval and all of those things that Banksia Hill was designed for. So, by removing this cohort of detainees into this secure environment will mean that they’re able to get all of those therapeutic interventions that they should get while they’re in custody with us.”

combination with the regimes including in particular the paucity of education programs, recreational programs and rehabilitation programs, and also including the extensive lockdowns in a cell, and outside of a cell but locked in a unit, which I have mentioned, the facility and its conditions or regimes are very harsh and onerous for young detainees in my view. Also in my view, the facility and its regimes do not satisfy the requirements and properly serve the purposes of the statutory framework in the Young Offenders Act for a juvenile detention centre.¹²

B.3 Operation of a detention centre as a service under the DDA, ADA, and RDA

30. The ADA, DDA, and RDA define “services” to include “services of the kind provided by a government, a government authority or a local government body”.¹³
31. The Complainants contend the management and administration of a juvenile detention centre under, or purportedly under, the YOA falls within the definition of the provision of a service under the DDA, ADA and the RDA and relies on two decisions of the Full Court of the Federal Court of Australia as follows:
 - i. in *Rainsford v Victoria* (2005) 144 FCR 279, 296 [54]-[55]:

“In discharging their statutory duties and functions and exercising their powers with respect to the management and security of prisons, the respondents were also providing services to prisoners. The fact that prisoners were unable to provide for themselves because of their imprisonment meant that they were dependent in all aspects of their daily living on the provision of services by the respondents. Although the provision of transport and accommodation would ordinarily constitute the provision of services, whether the acts relied on by Mr Rainsford will constitute services for the DDA will depend upon the findings of fact, which are yet to be made and, in particular, the identification of the acts that are said to constitute such services.”
 - ii. in *Rainsford v Victoria* (2008) 167 FCR 26 (Tamberlin, North and Mansfield JJ) at 29 [9] stating:

“...although the meaning of ‘service’ is not simple to resolve, and the matter was not argued in depth, we see some strength in the view that the provision of transport and accommodation, even in a prison, may amount to a service or facility.”
32. In the alternative the Complainants will contend that the management of a juvenile detention centre pursuant to the objectives and principles of the YOA, stipulated in sections 6 and 7 thereof, constitutes ‘a service’ in terms of the requisite culturally appropriate therapeutic rehabilitation to re-integrate young people back into society as well as recognising and enhancing their cultural identity, rather than just incarceration in a prison.
33. The Complainants therefore contend that the operations of a juvenile detention centre under the YOA and YOR is distinguishable from the findings in *Rainsford v Victoria (No 2)* [2004] FMC 707 relating of the operation of a prison (at [11]-[15], [19]-[20], [26]).

¹² See Appendix 6: Social media post by WA Parliamentarian Brad Pettit MJA, following visit to Unit 18.

¹³ See subsection 4(1)(f) of the ADA, subsection 4(1)(f) of the DDA, subsection 3 of the RDA.

B.4 Intersection of race, age and disability discrimination

34. This Representative Complaint demonstrates the intersectionality between age, race, and disability discrimination. Given the low socio-economic conditions of most of the Child Detainee Complainants' childhoods they have suffered special and structural disadvantage on various and intersecting fronts.
35. In justification for the transfer of the Named Complainants to Unit 18, the Respondent's characterised each of them as an aberrant 'group of approximately twenty' of the most 'disruptive', 'aggressive', 'destructive' and/or 'dangerous' juvenile offenders, who have wreaked 'unprecedented' damage on BHDC's ISU, rendering it 'unsafe', 'uninhabitable' and unfit for purpose.
36. The Respondents' portrayal of the Named Complainants and wider Group Members as 'forensic criminal offenders' rather than children who lack criminal capacity¹⁴ and are suffering from disability and/or structural disadvantage/intergenerational trauma... (this list is not exclusive) capitalises on and even orchestrates the rhetoric of the victim discourse and its conservative supporters to great effect, using both as a fulcrum for increased powers. However, the damage was a response to inordinate periods of lockdown, upwards of 23 hours a day, a direct result of the incapacity to provide appropriate and safe supervision for the detainees due to shortages of staff. As such the attribution of blame to the Named Complainants, all of whom suffer from either a pre-existing mental disorder or cognitive impairment and/or the manifestations of other mental disorders directly related to their time in custody, demonstrates the intersection between race, age and disability related discrimination.
37. The Respondents have been on notice of the unacceptable conditions in ISU from January 2022,¹⁵ as it was the subject of Justice Hylton Quail's ire in early 2022, who said at the February 2022 sentencing of Named Complainant, ██████████, "the boys experience of detention has been one of prolonged systematic dehumanisation and deprivation... they have not met the bare minimum standard the law requires and the court expects... there is a causal link between treatment at BHDC and the assaults on Public Officers..."
38. The toxic cycle of charges, convictions and penalties for alleged detention offences by the Named Complainants in Unit 18, who are often profoundly traumatised and/or persons with disabilities and/or of limited age-related cognitive/psycho-social development, enhance, aggravate and exacerbate extant disaffection caused by a lack of liberty, the absence of due process or a finding of guilt, removal from family and community life, psycho-social isolation, exposure to criminogenic factors in custody, and disruption to school attendance as well as cruel inhuman punishment.
39. As such, the 'unprecedented' damage wrought on ISU was the reasonably foreseeable result of the Respondents' inaction in the wake of the damning March 2022 Office of the Inspector of Custodial Services ('OICS') Report on ISU, in which the poor quality of life experienced by the Named Complainants in ISU, includes: the overuse of separation, segregation, and

¹⁴ Romer D. "Adolescent Risk Taking, Impulsivity, and Brain Development: Implications for Prevention" in *Dev Psychol* (2010) Vol. 52 Issue 3, p. 263-276.

¹⁵ See 2021 Inspection of the Intensive Support Unit at Banksia Hill Detention Centre, Office of the Inspector of Custodial Services 141, <https://www.oics.wa.gov.au/wp-content/uploads/2022/04/Inspection-of-Banksia-Hill-Detention-Centre-ISU-CORRECTED.pdf>

confinement as a 'behaviour management tool' synonymous with psychological punishment, psychological subjugation, cruel, and inhumane punishment.¹⁶

40. Douglas Reynolds, ex-President of the Children's Court in WA reiterated the Respondent's role in the crisis saying, *"this is not a situation where children have been treated properly at Banksia and then completely out of the blue, unforeseeably commit... or engage in behaviour where they cause so much damage"*.
41. As such, attempts to 'pin the blame' on the 'small problematic group of detainees' and their destruction of property and/or aggression toward custodial staff is an exercise in 'political spin', which ignores the significant contribution YJS made to their 'behavioural problems.
42. In fact, the correlation between self-harm and suicidal ideation on the one hand, and solitary confinement on the other, is well-established. OICS incumbent Inspector Eamon Ryan, Inspector, spoke of the profound, detrimental effect of months of solitary confinement in ISU saying, *"they are spending less than one hour outside of their cell...when you turn that on its head that's 23 hours locked in a cell with no other human interactions. I was really concerned that we would end up with a youth suicide... and those concerns have not gone away"*¹⁷.

B. NAMED ("LEAD") COMPLAINANTS

C.1 [REDACTED]; Indigenous Male

Relevant Background

43. [REDACTED]
44. [REDACTED] has been diagnosed with:
 - i. ADHD
 - ii. PTSD;
 - iii. Fetal Alcohol Syndrome Disorder ("FASD");
 - iv. Suicidal ideation;
 - v. Non suicidal self injury.
45. [REDACTED] is and has been in the care of the Department of Communities since he was 8 years old.
46. At age 11, [REDACTED] to live with his grandmother, [REDACTED] [REDACTED] who remains his primary guardian and responsible adult at the time of filing this complaint.
47. [REDACTED] has been detained at Unit 18 within Casuarina Prison since 20 July 2022.
48. At both facilities, [REDACTED] was provided with prescription drugs to treat his ADHD and PTSD and was supplied with orlanzapine as a sleep aid. As such, he was known by the Respondents (either actually or constructively), their officers, agents, and employees to be a person suffering with several complex disabilities.

¹⁶ Then President of the Children's Court, DJ Reynolds, in his address to the 2013 "National Youth Health Conference."

¹⁷ Eamon Ryan OICS Inspector on 730

49. On 20 August 2022, whilst detained in Unit 18, ██████ attempted to overdose on his medication and was taken to Fiona Stanley Hospital for treatment.

Breaches of Anti-Discrimination Legislation in respect of ██████

Racial discrimination

50. ██████ alleges that the failure to inform his grandmother and responsible adult, ██████ of his transfer to Unit 18 constitutes racial discrimination in that, as an Indigenous Australian, his strong family values and extended family structure is well known.
51. As a young adolescent male, it was unreasonable for the DCS to transfer ██████ to Unit 18 without first consulting and/or informing his grandmother who had been his primary guardian since he was 11 years old. Rather than inform his responsible adult, that being his grandmother, DCS only informed the DCPFS of ██████ transfer to Unit 18, who then failed to inform ██████ directly. It is also contended that the DCS failed and/or refused ██████ access to consult with a non-custodial Indigenous support person prior to his transfer.
52. In circumstances where it was known to the DCS and the DCPFS that ██████ was ██████ responsible adult and a prominent Indigenous elder within her community, and that she had been active in caring for and support ██████ during his incarceration at BHDC, the failure to inform her of ██████ transfer stands to show the collective Respondent's disregard for local Indigenous custom and in turn, has denied ██████ the right to fully participate in his cultural identity as an Indigenous Australian, in breach of section 9 of the RDA.
53. By denying ██████ access to his family and culture, the aforementioned Respondents have also breached sections 6 and 7 of the Young Offenders Act 1994 (WA).
54. Since his transfer to Unit 18, Youth Custodial Officers and Prison Officers have routinely berated, abused, and disparaged ██████ typecasting epithets including "black dog", "black cunt" and "little abo shit", which is alleged to be a breach of section 9 and 18C of the RDA.
55. ██████ also claims that he is a victim of systemic/institutional racial discrimination (see page 39).

Disability discrimination

56. ██████ contends that his transfer to an adult maximum-security prison constitutes disability discrimination, in breach of section 5 and 6 of the DDA in that, the DCS, even apprised of his PTSD, behaved towards him in a way that would foreseeably illicit a response that is a function of his disability, without making any allowance or adjustments for him.
57. In the month leading up to his transfer to Unit 18, the DCS confined ██████ to the Intensive Support Unit ("ISU") within BHDC and provided him with limited access to services, recreation, and socialization.
58. Having regard to ██████ PTSD, a condition that was known by the DCS to be aggravated by extended periods of time spent in confinement, it was unreasonable for the DCS to

require [REDACTED] to behave in his cell in ISU, particularly in circumstances where it is foreseeable that [REDACTED] could not, or would not comply, by reason of his disability. As a consequence of the imposition of confinement, [REDACTED] reacted with the predictable and foreseeable response of causing damage to his cell and as a result, was labelled "difficult" by the DCS and was transferred to Unit 18 as punishment.¹⁸

59. Further, on 20 July 2022, Youth Custodial Officers at BHDC attempted to transport [REDACTED] from BDHC to Unit 18 and, by reason of his PTSD and subsequent claustrophobia, [REDACTED] was unable to do so. As punishment for his noncompliance, [REDACTED] was placed in 3-point restraints and harassed by YCOs into consuming sleeping tablets in order to sedate him into compliance.
60. The Youth Custodial Officers ("YCOs") at BHDC, for which the DCS are vicariously liable for, had either actual or constructive knowledge that [REDACTED] was a person suffering from ADHD and PTSD and for which he was prescribed medication. Having regard to his disability, it was unreasonable for YCOs to expect [REDACTED] to comply with the transfer, in the absence of any reasonable adjustments being made for him, that being that he was provided access to the support services needed to deal with his PTSD, and the failure to make said adjustments for [REDACTED] prior to his transfer resulted in [REDACTED] being punished with sedation and restraints, in contravention of section 6 of the DDA.
61. Furthermore, notwithstanding:
 - i. That prior to being transferred to unit 18 [REDACTED] spent approximately 79 days locked in the Intensive Support Unit ("ISU") at BHDC; and
 - ii. since arriving at Unit 18, [REDACTED] reports being locked in his cell for protracted periods, only to be let out for 40 minutes a day.
62. Having regard to [REDACTED] PTSD, a condition which was brought on by the extended periods in which he spent in isolation whilst detained at BHDC, the requirement that he spend 23 hours and 20 minutes a day confined to his cell was/is not reasonable (and likely not lawful vis-à-vis Justice Tottle's IYZ decision) in circumstances where it is reasonably foreseeable that periods of extended confinement would significantly and severely aggravate [REDACTED] Disabilities and cause him to involuntarily "act-out".
63. Despite having knowledge (actual or constructive) of [REDACTED] Disabilities and [REDACTED] previous three attempted suicides at the BHDC prior to the Transfer, the Respondents have abjectly failed, and continue to fail, to provide [REDACTED] with regular access to any culturally appropriate psychological/psychiatric and/or therapeutic support in the Casuarina Unit 18 Adult Prison Facility. The denial of appropriate mental and psychological treatment during the course of his stay in the Casuarina Unit 18 Adult Prison Facility, has had the effect of disadvantaging [REDACTED] to the extent that it has exacerbated and aggravated [REDACTED] Disabilities and mental illness. [REDACTED] has subsequently attempted suicide by overdosing on sleeping pills after which [REDACTED] was transported to Fiona Stanley Hospital for a physical check-up and was returned to Unit 18 that same night without having received any psychological support.

¹⁸ See *Bikink v R* per Ipp J; established "confinement in a cell for a substantial period is a severe form of punishment for offences committed in prison." Ipp J went on to add that "...the lockdown conditions are very close to those imposed on persons who have committed prison offences, yet the prisoners in the lockdown category are subject to those conditions without having committed prison offences and have to endure them for a longer period than offenders who are sentenced to solitary confinement under the Prisons Act.

64. It is also contended that the failure to make any reasonable attempt to assist [REDACTED] in accessing the support of his family, specifically, his responsible adult and grandmother, [REDACTED], constitutes disability discrimination in that the isolation from his family resulted in an aggravation of [REDACTED] mental illness.
65. In the circumstances, the failure to provide [REDACTED] with access to regular and adequate therapeutic services and/or treatment, coupled with the undue restrictions placed on his contact and communication with close family and having regard to his disability, constitutes direct disability discrimination, in breach of section 5 of the DDA, in that the isolation and disconnection imposed upon him in Unit 18 has caused him to suffer emotional deprivation and where it is reasonably foreseeable that such emotional deprivation is likely to result in [REDACTED] engaging in self-harm and suicidal ideation, as has eventuated.
66. [REDACTED] also relies on a claim of institutional disability discrimination (see page 45).

Age discrimination

67. It is contended that [REDACTED] incarceration at BHDC and his forcible transfer to, and incarceration at, the Casuarina Unit 18 Adult Prison Facility constitutes indirect age discrimination in contravention of sections 14 and 28 of the ADA because:¹⁹
- i. in requiring [REDACTED] to reside within an adult maximum-security prison, he has been treated less favourably than an adult prisoner in circumstances that are the same or not materially different (for example, compared to adult prisoners generally or more specifically compared to adult prisoners residing in the general population at Casuarina Prison), including due to some or all of the Respondents' Duty/Standard of Care Failures,
 - ii. the Respondents have enacted the less favourable treatment detailed at (a) and (b) above, because of:
 - a) [REDACTED] age; or
 - b) a characteristic that appertains or is generally imputed to persons of [REDACTED] age; or,
 - c) a characteristic that is generally imputed to persons of [REDACTED] age,
 - d) and the term/s were not reasonable, having regard to, inter alia, the following:
 - e) the objectives and principles in sections 6 and 7 of the YOA;
 - f) the relevant international instruments referred to above;
 - g) the duty and standard of care owed to [REDACTED] under both statute, the common law as informed by the relevant international instruments referred to above;
 - h) the Respondents' Duty/Standard of Care Failures.
68. By reason of his incarceration within the Casuarina Unit 18 Adult Prison Facility, a status which coincides with his age [REDACTED] has been refused and/or practically precluded from accessing the same conditions, services and/or facilities as those offered to adult prisoners within Casuarina Prison. For example, adult prisoners at Casuarina Adult Prison (a non-exhaustive list):²⁰
- i. have reasonable access to age-appropriate prison guards and management;
 - ii. have reasonable access to educational and rehabilitation services;
 - iii. have reasonable access to their legal representatives;
 - iv. have reasonable out-of-cell times for recreation and socialising;
 - v. are not subjected to protracted lockdowns in solitary confinement in their cells;
 - vi. have reasonable access to their families

¹⁹ Which the Complainants reserve their rights to seek permission to amend pursuant to section 46PA of the AHIRC Act.

²⁰ Ibid.

69. As a consequence of his incarceration within Unit 18 and the treatment which he received during his adolescence, coinciding with his being 16 years of age, [REDACTED] was subjected to indirect age discrimination in contravention of section 15 of the ADA because the conditions to which he was subjected to by the DCS within Unit 18 deprived him of reasonable educational opportunity despite school attendance being compulsory in the State of Western Australia for children from the ages of 5 to 16, under section 9(1) of the *School Education Act 1999 WA* and representations on the Western Australian Department of Education website that, "Every child from pre-primary to year 12 is guaranteed a place at the local public school."
70. By denying [REDACTED] reasonable access to academic education, the DCS breached section 13 of the International Covenant on Economic, Social and Cultural Rights (NY, 1972), articles 13, 17 28 and 29 of the Convention on the Rights of the Child (NY, 1989) and articles 9, 21, 24 and 26 of the Convention on the Rights of Persons with Disabilities (NY, 2008), all of which Australia had ratified.
71. [REDACTED] also relies on the claim of institutional/systemic ageism, particularised at page 41, of which he avers that he is a victim.

C. [REDACTED] Indigenous Male

Relevant Background

72. [REDACTED] Indigenous male, born on [REDACTED]
73. [REDACTED] has been detained at BHDC on remand since 3 May 2008 and was transferred to Unit 18 within Casuarina Prison on 20 July 2022.
74. [REDACTED] was detained in the ISU unit at BHDC for approximately 2 months before his transfer to Unit 18.
75. In or around June 2022, [REDACTED] attempted to commit suicide by hanging in his cell in ISU at BHDC.²¹
76. During his incarceration in both BHDC and Unit 18, [REDACTED] has also attempted self-harm and actual self-harm, using various sharp materials to cut his wrists.

Breaches of Anti-Discrimination Legislation in respect of [REDACTED]

Disability discrimination

77. It is alleged that in respect of [REDACTED] the Western Australian Department of Corrective Services ("DCS") did not make reasonable adjustments by way of ensuring that he had appropriate clinical or mental health treatment or support services at Unit 18, even though it was foreseeable that, because of his disability, without such adjustment and

²¹ R45.8† Suicidal ideation may be assigned as a principal diagnosis if the clinician has confirmed that there is no underlying mental disorder. See for example, <https://www.health.wa.gov.au/-/media/Files/Corporate/general-documents/Clinical-coding/Index-coding-rules/WACR-031869.pdf>

support, he would be treated less favourably than a person without the disability would be, in contravention of section 5 and 6 of the *Disability & Discrimination Act 1992* (Cth) (“DDA”).

78. Despite being apprised of his previous attempt to commit suicide by hanging in his ISU cell at BHDC, the Named Respondents failed to divert him to an appropriate juvenile mental facility, such as the Bentley Adolescent Unit, where he would be supported by trained medical staff equipped to deal with his disability.
79. Instead, ██████ was transferred to Unit 18 wherein the DCS failed and/or refused to provide ██████ with regular clinical, psychological support or any confidential spaces to speak openly with his psychologist when provided. They also made no reasonable attempt to assist him to access timely mental health services after occasions of actual self-harm within Unit 18, despite having clearly satisfied the criteria for DSM-5 suicidal ideation, namely, attempted suicide, attempted and actual self-harm.
80. Further, the DCS, being apprised of his disability, would have known that ██████ was a person in need of regular psychological support and the failure to provide him access to such services was unreasonable in circumstances where it was entirely foreseeable and predictable that he would be disadvantaged and be dealt with in a punitive manner. For manifestations of his suicidal ideations, which is a function of his mental disability, ██████ confined to his cell for protracted periods of time during which he was placed in 3-point restraints and a tear proof jacket overnight.
81. ██████ also alleges that his incarceration in Unit 18 constitutes disability discrimination in that,
- in circumstances where ██████ had already attempted suicide by hanging at BHDC, it would have been known by the DCS that he was a person with a disability and that it was reasonably foreseeable that prolonged periods of confinement and/or isolation from his close parental family would result in an aggravation of his mental illness.
82. Despite being apprised of disability, the DCS has:
- i. cancelled multiple scheduled visits between ██████ and his mother, ██████, and other close family members, citing alleged “operational constraints” and “staffing shortages” within Unit 18 as the basis for cancellation;
 - ii. locked ██████ in his cell for extended periods of time due to rolling lockdowns;
 - iii. failed to make adjustments for the inability of his closest family to visit him at reasonable intervals by ensuring adequate telephone access; and
 - iv. placed undue restrictions on ██████ access to human contact and socialisation with other juvenile detainees, his lawyer and/or psychologist
- all of which have resulted in his being treated less favourably than an inmate in detention without his disability.²²
83. ██████ also relies on a claim of institutional disability discrimination, as particularized at page 46.

Age discrimination

²² Appendix 3: Letter of complaint from ALS to Christine Gurbey on behalf of ██████, treatment within Unit 18

84. It is contended that DCS has breached section 14 of the the *Age Discrimination Act 2004* (Cth) (“ADA”) in that, by requiring ██████ to reside within an adult maximum-security prison, he has been treated less favourably than those adult prisoners residing in the general population at Casuarina Prison. By reason of his incarceration within Unit 18, a status which coincides with his age, ██████ been practically precluded from accessing the same conditions, services and/or facilities as those offered to adult prisoners within Casuarina prison. For example, adult prisoners at Casuarina Adult Prison (the below list is not exhaustive):
- i. have reasonable access to age-appropriate prison guards and management;
 - ii. have reasonable access to educational and rehabilitation services;
 - iii. have reasonable access to their legal representatives;
 - iv. have reasonable out-of-cell times for recreation and socialising;
 - v. are not subjected to protracted lockdowns in solitary confinement in their cells;
 - vi. have reasonable access to their families
85. ██████ also claims indirect age discrimination, in contravention of section 15 of the ADA because:
- i. in detaining and incarcerating ██████ at BHDC and the Casuarina Unit 18 Adult Prison Facility, and then forcibly transferring ██████ to the Casuarina Unit 18 Adult Prison Facility, the responsible Respondents (either jointly, severally or vicariously) imposed the term or condition that Anthony was to be subjected to the Respondents’ Duty/Standard of Care Failures including the failing to provide culturally safe, culturally appropriate and culturally competent treatment, “which recognises and enhances [his] cultural identity” (s.6(f) YOA); and,
 - ii. in considering the forcible transfer of ██████ to the Casuarina Unit 18 Adult Prison Facility, the responsible Respondents’ failed to provide a culturally safe, culturally appropriate and culturally competent trauma-informed therapeutic model of care and treatment and an environment that was not located within a Maximum Security Adult Prison;
 - iii. Because of his age and/or disability and/or race, the ██████ was not able to comply with the term/s because he would (and did and continues to) suffer serious disadvantage from being forcibly transferred to the Casuarina Unit 18 Adult Prison Facility; and
 - iv. The term/s were not reasonable, having particular regard to, inter alia, the following:
 - a) the objectives and principles in sections 6 and 7 of the YOA;
 - b) the relevant international instruments referred to above;
 - c) the duty and standard of care owed to ██████ under both statute, the common law as informed by the relevant international instruments referred to above;
 - d) the Respondents’ Duty/Standard of Care Failures.
86. ██████ alleges that he has been subjected to indirect age discrimination, in contravention of section 15 of the *Age Discrimination Act 2004* (Cth) (“ADA”) because the undue restrictions placed on his access to his closest family in Unit 18, specifically, his mother, ██████, was unreasonable in circumstances where a juvenile’s connection to family is well known to have an effect on their development.
87. On 20 July 2022, ██████ was transferred from BHDC to Unit 18, without his mother’s knowledge. ██████ attended BHDC for her scheduled visit with ██████, only to be told that he was no longer held on site. Staff at BHDC then refused and/or failed to transfer ██████ visit over to Unit 18, causing for her scheduled visit with ██████ to be cancelled. The act of transferring ██████ on the day in which he had a visit scheduled

with his mother, and in the absence of any prior consultation with his mother prior to his transfer, was unreasonable in circumstances where it was likely to deprive him of the right to know and be cared for by his mother.²³

88. Even [REDACTED] telephone access to his mother was obstructed for periods of time, with [REDACTED] recalling being told that the phones in his unit were "not working" for approximately one week.
89. By denying [REDACTED] reasonable access to his close family, specifically his mother, the DCS has breached articles 3, 9, 14 and 18 of the Convention on the Rights of the Child (NY, 1989).
90. As a consequence of his incarceration within Unit 18 and the treatment which he received during his adolescence, coinciding with his being 14 years of age, [REDACTED] was subjected to indirect age discrimination in contravention of section 15 of the ADA because the conditions to which he was subjected to by the DCS within Unit 18 deprived him of reasonable educational opportunity despite school attendance being compulsory in the State of Western Australia for children from the ages of 5 to 16, under section 9(1) of the *School Education Act 1999 WA* and representations on the Western Australian Department of Education website that, "*Every child from pre-primary to year 12 is guaranteed a place at the local public school.*"
91. By denying [REDACTED] reasonable access to academic education, the DCS breached section 13 of the International Covenant on Economic, Social and Cultural Rights (NY, 1972), articles 13, 17 28 and 29 of the Convention on the Rights of the Child (NY, 1989) and articles 9, 21, 24 and 26 of the Convention on the Rights of Persons with Disabilities (NY, 2008), all of which Australia had ratified.
92. [REDACTED] also relies on the claim of institutional/systemic ageism, particularised at page 41, of which he avers that he is a victim.

Racial discrimination

93. [REDACTED] also claims to be a victim of systemic/institutional racism (see page 40).

C.3 [REDACTED]; Caucasian Male

Relevant Background

94. Mr. [REDACTED]
95. [REDACTED] has been diagnosed with:
 - i. ADHD;
 - ii. PTSD; and
 - iii. Fetal Alcohol Syndrome Disorder ("FASD")
96. Whilst incarcerated in BHDC, [REDACTED] to be resuscitated twice after hanging himself and sustained a traumatic brain injury as a result.

²³ Article 7 of the Convention on the Rights of the Child.

97. [REDACTED] was transferred to Unit 18 on or around 17 August 2022 and returned to BHDC approximately one week later, on 23 August 2022 after he used the 3-point restraints he was wearing to choke himself and needed to be resuscitated.
98. On his return to BHDC, [REDACTED] was involuntarily admitted by his psychologist to Bentley Adolescent Unit for 72 hours.

Breaches of Anti-Discrimination Legislation in respect of [REDACTED]

Age discrimination

38. Whilst incarcerated in the Casuarina Unit 18 Adult Prison Facility, [REDACTED] reports having regular contact, both oral and physical, with adult prisoners. [REDACTED] reports being supervised by a mix of Youth Custodial Officers ("YCOs") and Casuarina Prison Officers at a ratio he describes as being, "50/50".
39. Whilst in the supervision of Prison Officers, [REDACTED] has been subjected to unlawful assaults by Prison Officers one of which resulted in a dislocated shoulder as a result of excessive force applied and was subjected to prolonged periods in which he was left in three (3)-point restraints, both of which are features that are attributed to the management of adult offenders.
40. It is contended that [REDACTED] incarceration at BHDC and his forcible transfer to, and incarceration at, the Casuarina Unit 18 Adult Prison Facility constitutes indirect age discrimination in contravention of section 14 and section 28 of the ADA, including as follows (a non-exhaustive list):²⁴
- a. in requiring [REDACTED] to reside within an adult maximum-security prison, he has been treated less favourably than an adult prisoner in circumstances that are the same or not materially different (for example, compared to adult prisoners generally or more specifically compared to adult prisoners residing in the general population at Casuarina Prison), including due to some or all of the Respondents' Duty/Standard of Care Failures,
 - b. and the Respondents have enacted the less favourable treatment detailed at (a) and (b) above, because of:
 - i. [REDACTED]; or
 - ii. a characteristic that appertains or is generally imputed to persons of [REDACTED] or,
 - iii. a characteristic that is generally imputed to persons of [REDACTED]
41. By reason of his incarceration within the Casuarina Unit 18 Adult Prison Facility, a status which coincides with his age, [REDACTED] has been refused and/or practically precluded from accessing the same conditions, services and/or facilities as those offered to adult prisoners within Casuarina Prison. For example, adult prisoners at Casuarina Adult Prison (a non-exhaustive list):²⁵
- a. have reasonable access to age-appropriate prison guards and management;
 - b. have reasonable access to educational and rehabilitation services;
 - c. have reasonable access to their legal representatives;
 - d. have reasonable out-of-cell times for recreation and socialising;

²⁴ Which the Complainants reserve their rights to seek permission to amend pursuant to section 46PA of the MHRC Act.

²⁵ Ibid.

- e. are not subjected to protracted lockdowns in solitary confinement in their cells;
 - f. have reasonable access to their families
42. The conduct of the DCS outlined above is also alleged to constitute a breach of section 15 of the ADA because, the requirement that [REDACTED] reside in a unit within an adult maximum-security prison is unreasonable in circumstances where he is a juvenile and where the facility in which he was transferred to was not equipped to address his specific adolescent developmental needs.
43. [REDACTED] also relies on the claim of institutional/systemic ageism, particularised at page 41, of which he avers that he is a victim

Disability discrimination

99. Despite being apprised of [REDACTED] previous attempts to hang himself in his cell, Youth Custodial Officers (“YCOs”) and/or Prison Officers tasked with the care and supervision of [REDACTED] discriminated against him based on his disability in that they:
- i. Failed and/or refused [REDACTED] access to his treating psychologist;
 - ii. Failed and/or refused [REDACTED] access to adequate recreation and socialisation;
 - iii. Failed and/or refused to facilitate visits and communication between [REDACTED] and members of his ‘unofficial’ family; and
 - iv. Failed and/or refused to provide [REDACTED] with adequate treatment which, at times, presented as being acute.
100. The conduct of the DCS described above is contended to have aggravated [REDACTED] mental illness and to have caused him to fashion a rope out of the spare bed sheet he had in his cell. In circumstances where it was known that [REDACTED] already hung himself twice, it was believed that [REDACTED] fashioning of the rope was a symptom of his disability.
101. However, rather than provide [REDACTED] with sufficient treatment for manifestations of his mental illness, YCOs and/or Prison Officers imposed upon [REDACTED] punitive treatment. [REDACTED] reports being violently abused, placed in 3-point restraints, and left isolated on the floor of his cell for approximately one hour as punishment for fashioning the rope. [REDACTED] then used the restraints to choke himself unconscious, after which he again needed to be resuscitated.
102. The YCOs and/or Prison Officers again failed to make any adjustment for [REDACTED], that being by facilitating access to adequate treatment, but instead, take him to Fiona Stanley Hospital for treatment of his physical injuries. It is not until [REDACTED] is transferred back to BHDC, that he is given the opportunity to see his psychologist who then has him involuntarily admitted to the Bentley Adolescent Unit for a 72-hour psych hold.
103. It is contended that by failing to make any reasonable adjustments for [REDACTED] whilst in Unit 18, as has been expounded upon above, the DCS has breached sections 5 of the *Disability Discrimination Act 1992* (Cth) (“DDA”).
104. Further, the above conduct of the DCS is also alleged to constitute a breach of rule 204 and 208 of the Youth Custodial Rules, section 11D of the Young Offenders Act and also a breach of the Western Australian Government’s obligations under international conventions, namely, Articles 1, 2, 5, 7, 12, 14 – 16 of the Convention on the Rights of Persons with Disabilities (NY, 2008), Articles 7 and 9 of the International Convention on Civil and Political Rights and the Convention on the Rights of the Child (NY, 1989), all of which Australia has ratified.

105. It is also contended that [REDACTED] transfer to, and incarceration within, the Casuarina Unit 18 Adult Prison Facility and the BHDC constitutes indirect disability discrimination in contravention of sections 6 and 24 of the DDA as follows:
- i. Because of [REDACTED] age and/or disability and/or race, [REDACTED] was not able to comply with the term/s because he would (and did and continues to) suffer serious disadvantage from being forcibly transferred to the Casuarina Unit 18 Adult Prison Facility; and
 - ii. The requirements or conditions were not reasonable, having particular regard to, inter alia, the following:
 - a) the objectives and principles in sections 6 and 7 of the YOA;
 - b) the relevant international instruments referred to above;
 - c) the duty and standard of care owed to [REDACTED] under both statute, the common law as informed by the relevant international instruments referred to above;
 - d) the Respondents' Duty/Standard of Care Failures.
106. [REDACTED] also relies on a claim of institutional disability discrimination, as contained at page 45.

C.4 [REDACTED]; Indigenous Male

Relevant Background

107. Mr. [REDACTED] [REDACTED] Indigenous male, [REDACTED] [REDACTED]
108. [REDACTED] ordinarily resides in Kalgoorlie with his mother and siblings.
109. [REDACTED] was detained in Unit 18 between 20 July 2022 and 17 August 2022 and on 17 August 2022, [REDACTED] was returned to BHDC after a series of self-harm attempts within Unit 18.
110. It is contended that suicidal ideation and non-suicidal self-injury (NSSI), both constitute a mental disability for the purposes of the DDA

Breaches of Anti-Discrimination Legislation in respect of [REDACTED]

Racial discrimination

111. It is contended that [REDACTED] incarceration in, and forcible transfer to, the Casuarina Unit 18 Adult Prison Facility, as well as his prior incarceration in the BHDC, constitutes racial discrimination in contravention of section 9 of the RDA in circumstances where:
- i. as a First Nations/ Indigenous/ Aboriginal Australian, his association to his land and connection to family is characteristic of his racial/cultural identity and yet the Casuarina Unit 18 Adult Prison Facility is an unreasonably long way away from his home, family and Country in Kalgoorlie (approximately 625km away);
 - ii. as a First Nations/ Indigenous/ Aboriginal Australian, his strong family values and extended family structure are characteristic of his racial/cultural identity, and therefore the Respondents' failure to inform and consult with both his family and his legal representatives about the Transfer constitutes less favourable treatment on the basis of his race;
 - iii. as a First Nations/ Indigenous/ Aboriginal Australian the isolation from his kith and kin and family roots had resulted in his suffering emotional deprivation and much more limited access to family support than would be available to an inmate whose family lived

within closer proximity and visiting distance to the Casuarina Unit 18 Adult Prison Facility.

112. It is also contended that the DCP has made no reasonable attempt to make an adjustment for the inability of his closest family to visit him at reasonable intervals or provide adequate alternatives for the lack of visitation by way of increased telephone access.
113. Even the limited '10-minutes per day' telephone access to which [REDACTED] is entitled per day in the Casuarina Unit 18 Adult Prison Facility has been significantly curtailed and obstructed by the purported "operational" requirements of the facility.
114. On a date between 20 and 27 July 2022, [REDACTED] reports being on the phone to his father for his birthday when the phone cut out before the 10-minute limit was reached.
115. Despite [REDACTED] entitlement to two 10-minute phone calls per day, [REDACTED] complaint and request to two Senior Prison Officers to be allowed to make another call to his father on [REDACTED] birthday was denied and (as [REDACTED] reports) resulted in [REDACTED] being unlawfully physically assaulted by the two Senior Prison Officers which caused him to sustain an injury to his lip, red marks on his neck and scratches on his arms.
116. In the circumstances, the requirement that [REDACTED] be imprisoned in a facility so far from his home, Country and family; and the undue restrictions placed on his access to family, constitutes racial discrimination in that it is reasonably foreseeable that such isolation and disconnection from family would result in [REDACTED] suffering from a higher level of emotional deprivation than his Caucasian counterparts, given that the proportion of Caucasian children detained in Unit 18 during the same period is negligible.²⁶
117. As a young adolescent male, it was unreasonable for the DCS to transfer [REDACTED] to Unit 18 without first consulting and/or informing his responsible adult and mother, [REDACTED]. Rather than inform his responsible adult, the DCS failed and/or refused [REDACTED] access to consult with a non-custodial Indigenous support person prior to his transfer.
118. By denying [REDACTED] access to his family and culture, the aforementioned Respondents have also breached sections 6 and 7 of the *Young Offenders Act 1994 (WA)*.
119. [REDACTED] also claims to be a victim of systemic/institutional racism (see page 39).

Disability discrimination

120. The treatment described above alleged to constitute racial discrimination is also alleged against the DCS to constitute disability discrimination in that, because of the emotional deprivation [REDACTED] has suffered, it becomes more likely that, as has eventuated, his emotional and mental condition would deteriorate, and that he would engage in self-harm and develop suicidal ideation, as has eventuated.
121. In further contravention of section 5 of the *Disability Discrimination Act 1992 (Cth)* ("DDA"), by failing to make reasonable adjustments for [REDACTED] in Unit 18, the DCS has directly discriminated against him, in that he:

²⁶ As at 20 July 2022, there were 12 Indigenous detainees in Unit 18 and 5 non indigenous detainees. As at 17 August 2022, there were 11 Indigenous detainees in Unit 18 and 2 non indigenous detainees.

- i. Is isolated from his roots and family with severe and undue restrictions on human contact, particularly with close family members and most significantly, his parents;
- ii. Is locked in his cell for extended periods of time due to rolling lockdowns; and
- iii. In insufficiently treated by appropriately qualified and skilled clinicians for his manifestations/symptoms of mental illness;

all of which have resulted in his being treated less favourably than an inmate in Unit 18 without his disability.

122. [REDACTED] also contends that he has been subjected to direct and indirect disability discrimination, within the purview of section 5 and 6 of the DDA, as he has been made to comply with requirements or conditions with which, because of his disability, he is unable to meet or comply and because of his noncompliance, he has been subjected to punitive forms of punishment within Unit 18.

123. Since his transfer to Unit 18 on 20 July 2022, [REDACTED] reports experiencing numerous rolling lockdowns whereby he has been confined to his cell and subjected to solitary confinement for days and weeks.

124. On 16 August 2022, he stated, "I can't remember the last time I was allowed outside in the fresh air". According to [REDACTED] it was the protracted period spent in solitary confinement which caused him to feel "angry" and as though he was "going mad". In circumstances where the nexus between solitary confinement and psychological stress is well documented and having regard to [REDACTED] recount of his own mental state in confinement, it is fair to suggest that [REDACTED] is a person suffering from a situational disability and the subsequent property damage caused to his MPU cell within Unit 18 is a manifestation of his disability.²⁷

125. Rather than making reasonable adjustments for [REDACTED] disability, that is, by decreasing the amount of time spent in confinement, Youth Custodial Officers within Unit 18 further disadvantaged him by extending the period in which he was to be confined to the MPU cell, and further punished him by restricting his access to the radio and television and refused him reasonable access to showers, toilets and/or soap and towels.

126. [REDACTED] also relies on a claim of institutional disability discrimination, which he avers he is a victim of (see page 45).

Age discrimination

127. [REDACTED] reports completing handwritten complaint forms regarding his treatment within Unit 18 only to have those complaints "ripped up" in front of him when handed to Youth Custodial Officers ("YCOs") and/or Prison Officers in Unit 18. It is alleged that this constituted direct age discrimination, in breach of section 14 of the *Age Discrimination Act 2004* (Cth) ("ADA") because the mistreatment of [REDACTED] YCOs and/or Prison Officers is based upon their belief in his:

- i. Immaturity;
- ii. Inexperience;
 - a. Vulnerability;
 - b. Ignorance of his civil rights;
 - c. Lack of credibility, and

²⁷ See Appendix 4: ALS letter of complaint re treatment of [REDACTED] in Unit 18.

d. Lack of social and legal standing,

all of which are incidents of [REDACTED] age, and, due to these factors, the Youth Custodial Officers and/or Prison Officers believed that they could treat him less favourably than they would have been able to treat an adult prisoner.

- 128 [REDACTED] also suffered direct age discrimination by reason of the treatment he received by Casuarina Prison Officers within Unit 18. [REDACTED] reports being told by Prison Officers, "wait until you go next door, you will be raped in the arse" and "youse little c**ts – you will be tickled in the arse". The comments made by Prison Officers are contended to constitute direct age discrimination to the extent that they have been made by Prison Officers in circumstances where there is an inherent power balance between them and [REDACTED] as an adolescent, and are said to prey on [REDACTED] vulnerabilities which are incidental to his youth.
129. [REDACTED] also relies on the claim of institutional/systemic ageism, particularised at page 41, of which he avers that he is a victim.

C.5 [REDACTED] [REDACTED] Indigenous Male

Relevant Background

- 130 [REDACTED] [REDACTED] [REDACTED], Indigenous male.
131. At age 4, [REDACTED] was removed from his mother's care and placed into the care of the Department of Communities.
- 132 [REDACTED] is the victim of child abuse which he suffered in his foster home.
133. At age 14, [REDACTED] was in a motorbike accident which left him with a neurological injury.
- 134 [REDACTED] also suffers from severe claustrophobia and a recent history of suicidal ideation and self-harming which constitute diagnoses under the DSM-V of Suicidal Ideation and non-suicidal self-injury (NSSI)
135. On 20 July 2022, [REDACTED] was transferred out of BIHDC and placed into Unit 18 where he stayed until on or around 23 August 2022.
- 136 [REDACTED] was moved back to BIHDC at the request of a Casuarina medical officer after he attempted suicide by hanging in his cell in Unit 18 twice in a one-hour period.
- 137 [REDACTED] also has a history of self-harming when incarcerated.

Breaches of Anti-Discrimination Legislation in respect of [REDACTED]

Race discrimination

- 138 [REDACTED] claims to be a victim of systemic/institutional racism (see page 39).

Age discrimination

- 139 [REDACTED] suffered age discrimination in breach of section 15 of the *Age Discrimination Act 2004* (Cth) (“ADA”) because of the undue restrictions placed on his ability to maintain connections to his closest family within Unit 18.
140. Prior to his transfer to Unit 18, [REDACTED] aunty, [REDACTED] had an arrangement with BHDC whereby she would be transported to and from BHDC so that she could maintain a meaningful relationship with [REDACTED]. However, upon his admission to Unit 18, this arrangement was not carried over, and as such, [REDACTED] was practically precluded from visiting [REDACTED].
141. By requiring [REDACTED] move from BHDC to Unit 18, in circumstances where his aunty had no means of visiting him at Unit 18 and having regard to the fact that the importance of maintaining family connections in adolescence is widely recognized, it was unreasonable for the DCS to transfer [REDACTED] to Unit 18 where it was foreseeable that he would have much more limited access to family support.
142. It is also contended that the DCS failed to make any reasonable attempt to make an adjustment for the inability of his closest family to visit him at reasonable intervals, by increased telephone access and/or increased access to his brother, [REDACTED] who was also detained in Unit 18 at the same time as [REDACTED]. Instead, [REDACTED] reports that his requests to telephone his aunty were often refused and that Youth Custodial Officers and/or Prison Officers refused his requests to say goodbye to his brother prior to [REDACTED] release.
143. As a consequence of his incarceration within Unit 18 and the treatment which he received during his adolescence, coinciding with his being 15 years of age, [REDACTED] was subjected to indirect age discrimination in contravention of section 15 of the ADA because the conditions to which he was subjected to by the DCS within Unit 18 deprived him of reasonable educational opportunity despite school attendance being compulsory in the State of Western Australia for children from the ages of 5 to 16, under section 9(1) of the *School Education Act 1999 WA* and representations on the Western Australian Department of Education website that, “Every child from pre-primary to year 12 is guaranteed a place at the local public school.”
144. By denying [REDACTED] reasonable access to academic education, the DCS breached section 13 of the International Covenant on Economic, Social and Cultural Rights (NY, 1972), articles 13, 17, 28 and 29 of the Convention on the Rights of the Child (NY, 1989) and articles 9, 21, 24 and 26 of the Convention on the Rights of Persons with Disabilities (NY, 2008), all of which Australia had ratified.
- 145 [REDACTED] also relies on the claim of institutional/systemic ageism, particularised at page 41, of which he avers that he is a victim.

Disability discrimination

- 146 [REDACTED] whose claustrophobia is brought on by prolonged periods spent in solitary confinement, reports being placed in his cell for “days” with no adequate out of cell time. Having regard to his disability, and where it was foreseeable that extended periods in confinement would result in an aggravation of his mental illness, it was unreasonable for the DCS to expect [REDACTED] to comply with the terms of his confinement, especially where it was foreseeable that his compliance would result in an increase in [REDACTED] suicidal ideations and

attempts at self-harm. As is evidenced by the event where [REDACTED] succeeded in hanging himself twice in his cell within a one-hour period.

147. It is also contended that [REDACTED] has been subjected to direct disability discrimination, within the purview of section 5 of the *Disability & Discrimination Act 1992* (Cth) (“DDA”) by reason of the DCS’s failure to make reasonable adjustments for his disability, that is, by ensuring he has access to adequate mental health services and treatment. After the first hanging incident in his cell in Unit 18, [REDACTED] was not offered any psychological service but rather, was placed back into his cell where he eventually attempted suicide for a second time. It was not until a medical officer at Casuarina Prison put in a request to have [REDACTED] transferred back to BHDC that he received adequate psychological treatment.

148. The conduct described above, combined with the DCS’s failure to ensure that [REDACTED] had sufficient access to family connections and support is also alleged to constitute a contravention of section 6 of the DDA as he has been forced to comply with conditions that he, by reason of his disability, is unable to do and as a result of his non-compliance, has suffered from a deterioration in his mental state.

149. [REDACTED] also claims to be a victim of institutional disability discrimination (see page 45).

C. INSTITUTIONAL/SYSTEMIC RACISM IN BREACH OF SECTION 9 OF THE RACIAL DISCRIMINATION ACT 1975 (CTH)

150. The following Named Complainants – [REDACTED] bring their complaints as representative complaints in respect of institutional or systemic racial discrimination supplementary to their other complaints particularised herein.

151. Despite the indigenous population of Western Australia comprising just 3.5 – 4 percent of the State’s total, indigenous youth make up two-thirds (68.67 per cent to be specific) of young people in detention.²⁸ The population of Unit 18 is no exception, with approximately 71% of the first detainees transferred on 20 July 2022 – as do the substantive procedural human rights violations affecting the aforementioned Named Complainants, all of whom are Indigenous, children, and disabled.²⁹

152. As Indigenous Australians, each of the forenamed Complainants suffered special disadvantage because of:

- i. the brutal mistreatment of their forebears;
- ii. transgenerational trauma;
- iii. systemic disadvantage in the delivery of essential services to them, including access to public health, education, and support for them and their families.
- iv. They are vulnerable people because of their own and their families’ inferior access to financial and community resources, and to educational opportunity which would facilitate vocational opportunity.
- v. They do not have equal access to bespoke, independent legal representation.

²⁸ <https://www.wa.gov.au/sites/default/files/2021-01/2020-quarter3-youth-custodial.pdf>

²⁹ Wendy O’Brien and Fitz-Gibbon. *International Journal of Children’s Rights* 26 (2018) 197-227, p202.

153. For Named Complainant [REDACTED] and other First Nations/Indigenous/Aboriginal Child Detainee Complainants and Group Members from regional parts of Western Australia and where there is a predominant Indigenous population, their transportation to incarceration in both the BHDC and the Casuarina Unit 18 Adult Prison Facility involve forced removal by the State from family, Country and culture and thereby is analogous the experience of Stolen Generations and therefore is likely to trigger the multi-layered and intersecting legacies of intergenerational trauma from the impacts of colonisation.³⁰
154. Furthermore, the implied racial vilification by Premier McGowan, and the Individual Respondents referring publicly in the media to the Lead Complainants racial identity in a derogatory and defamatory manner only serves to exploit and reinforce dangerous racial stereotypes about Aboriginal males being “disruptive” and “dangerous” and thereby deserving to be imprisoned and even in shackles in a perverted analogy to the iconic haunting pictures of group of male Aboriginal slaves in leg arm and neck irons and chains.
155. The combined effect of the foregoing nullifies or impairs the abovementioned Indigenous Complainants’ recognition, enjoyment, or exercise on an equal footing, of access to practical equality before the law; access to educational and vocational opportunity; to social and cultural development; and to mental health and growth, based upon their Aboriginal descent.

D. INSTITUTIONAL/SYSTEMIC AGEISM IN BREACH OF SECTIONS 14 AND 15 OF THE AGE DISCRIMINATION ACT (CTH)

156. In addition to the other claims made herein, all the Named Complainants bring a Representative Complaint in respect of institutional ageism constituted by the named Respondents’ wilful policy of ignoring the separate age-related interests of children, by making no or no adequate allowance for the needs of children under their care, including the named Complainants and Group Members, to grow, develop and mature, disrespecting their right to healthy physical and mental development.³¹
157. By reason of the fact that the Respondents, knowing that education is a mandatory and an essential ingredient for the development of children into adulthood, have impaired the Complainants’ access to foundational knowledge and skills, and frustrated their future ability to realise vocational opportunities, wilfully stifling the Complainants’ access to education and its consequential benefits.
158. The Respondents failed to treat each of the Named Complainants, all of whom is, or has been under the Respondent’s control in Unit 18, differently from adults prisoners within Casuarina Prison and without regard for their individual immaturity, experience, and underdeveloped behavioural and social skills, all referable to their age; and imposed conditions and/or required them to behave and/or to be subjected to practices which, particularised in the body of these complaints, have been likely to have and in fact, have had and do have, the effect of disadvantaging them and persons of their age, because of the foreseeably traumatic effect on their healthy development of such conditions, requirements and practices, at Unit 18.

³⁰ See McCilade, n 6 274, “Incarceration remains a pivotal tool used to facilitate dispossession and oppress and subdue Indigenous resistance to colonialism. Aboriginal children were also separated from their mothers and placed or detained in missions that resembled prison-like institutions”

³¹ See Appendix 7: Australian Human Rights Commission calls for ‘Government action needed to protect children in detention’

159. The administration of youth justice through the same institutions as adult corrections, has blurred the lines between the different needs of juvenile and adult offenders, and has resulted in the Named Complainants being treated more harshly than their juvenile counterparts at BHDC and/or their adult counterparts at Casuarina Prison.¹²³³ The State's *failures in loco parentis* have them fail in its 'duty to provide necessities of life' for the Named Complainants in Unit 18.
160. Whilst the YOA (ss. 19, 21, 118A, 118 and 178) draws a clear distinction between a 'prison' created under the *Prisons Act 1981* (WA) (the '**Prisons Act**') and a detention centre, it does not adequately define the *characteristics* of a detention centre. Given that a rehabilitative culture in a therapeutic environment best protects staff rather than a punishment culture within an environment which resembles a prison, Unit 18 is less fit for purpose than BHDC's ISU *because of its* location inside an adult maximum-security prison, which combined with the requirement to keep adult and juvenile offenders "completely separate" despite their proximity to one another, gives rise to significant logistical, operational, and/or practical impediments to their delivery inside Unit 18.
161. The Casuarina Prison regime was designed for adults not children, and Unit 18's 'nested' location augments, and/or, adds to the negative by-products associated with ISU by: - exacerbating chronic staff shortage by spreading them across two locations; impeding access to family, social and/or 'official visitors; and/or restricting, if not altogether, obstructing the delivery of essential services, including education.
162. The 'knock on' effect of staff shortages is to maximise the criminogenic and/or harmful potential of exposure to adult prisoners, and/or adult custodial staff.
163. Though section 11E of the YOA allows for Prison Officers to assist in the exercise of duties at the request of the CEO, it does not allow for Prison Officers to *replace* YCOs in the day-to-day management of juveniles, as it would offend against the 10 National Principles of Child Safety, the Australian Juvenile Justice Administrators ('AJJA') Minimum Standards of Juvenile Justice 2009, and other safeguards in furtherance of its international legal obligations, namely United Nations Rules for the Protection of Juveniles Deprived of their Liberty United Nations Standard Minimum Rules for Non-Custodial measures United Nations Standard Minimum Rules for the Administration of Juvenile Justice.
164. The Prison Officers who make up the shortfall of YCOs at Unit 18, lack youth-centric training and/or qualifications and are not required to obtain the Working with Children Checks (WWCCs), mandatory for any individual who works with juveniles. There is no crossover between the units of study to qualify as a 'youth custodial officer' vs a 'prison officer', in recognition of the needs of children as distinct from those of adults, and renders the delivery of 'culturally appropriate and/or adapted', 'trauma-informed'¹²³⁴, and/or 'age-

¹²³³ Office of the Inspector of Custodial Services, Inspection of the Intensive Support Unit at Banksia Hill Detention Centre', OICS report (2021) 141, 12.

¹²³⁴ Judge Hylton Quail is quoted saying that a juvenile would fare better in an adult prison than in a youth detention centre, due to the 'inhumane circumstances' at Banksia Hill. A Styles and I. Pilar, "Caged, isolated, scared: Why Perth Children's Court president would rather send kids to an adult prison", WA Today, 10 February 2022. <https://www.watoday.com.au/national/western-australia/caged-isolated-scared-why-perth-children-s-court-president-would-rather-send-kids-to-an-adult-prison-20220131-p59504.html>

¹²³⁵ A 'trauma informed' perspective acknowledges the vulnerability of children to factors beyond their control, and offending behaviours as the by-products of socio-economic disadvantage and/or inter-generational trauma. 'Trauma-informed' interventions must be embedded in organisations to be effective, culturally responsive programmes for the majority indigenous population.

appropriate' programmes and/or services in Unit 18, even more remote than at BHDC's ISU, maximising the harmful, criminogenic potential of Unit 18.

165. Ineffective needs assessment, and the lack of appropriately adapted programs and/or services, renders transfer to Unit 18, yet another lost opportunity for early, effective intervention. The Named Complainants all contend that the failure to provide diagnostic services and/or clinical treatment which it was their human right to receive, and/or did not receive any/or any adequate treatment or adjustment, to optimise or facilitate their beneficial development. Further, they were and have been subjected to physical and psychological abuse and/or trauma by YCOs and/or Prison Officers who lack the appropriate training and skills, and whose conduct towards them included the imposition of conditions or requirements contra-indicated for children afflicted with such impairments and disorders.
166. The harmful potential of siloed institutional responses to the Named Complainants mental and/or physical health is even greater at Unit 18 than at BHDC, exacerbated by the immutably adult nature of Unit 18, its built environment, operational philosophy, and the inevitable exposure to Prison Officers who are even less equipped than YCOs, at dealing with the Named Complainants complex needs, as evidenced by the use of the following practices in Unit 18, with profound, deleterious effects:
- i. Minimisation of the Named Complainants psychic distress as 'attention seeking behaviour', and/or failure to appreciate 'acute situational crises' which precludes any effective, therapeutic intervention.
 - ii. Failure to appreciate the strong correlation between the Named Complainants transfer to Unit 18, and skyrocketing rates of self-harm, suicidal ideation and/or attempted suicide.
 - iii. Insufficient qualified staff to conduct ARMS assessments, results in failure to recognise a change in the Named Complainants' 'at risk' status.
 - iv. Insufficient and/or ineffectual cell integrity checks allows for the Named Complainants to employ a variety of creative methods of self-harm and/or suicide, often at the same time, or in close succession, for example ingesting glass, overdosing on sedatives, setting fire to the Unit.
 - v. Lack of communication between staff onsite at Unit 18, and those at BHDC, compromises continuity and/or quality of care.
 - vi. Lack of coordination between staff onsite at Unit 18, and those at BHDC, together with the lack of regard for family and/or responsible adults concern, to 'contain' the situation.
 - vii. Limited contact with non-custodial staff, and the lack of regard for the Named Complainants' desire to lodge complaints about their mistreatment, means they have little, if any, recourse.
 - viii. Failure to provide clear lines of responsibility for youth at Unit 18 and those at BHDC, means that parents and/or 'responsible adults' are 'bounced around', compounding

anxiety and distress. Denial of contact with family, community, culture disproportionately affect the Named Complainants, as well as the majority indigenous wider Group.

167. The combined effect of the abovementioned discrimination based on race, age and/or disability results in the following negative by-products:
- a. the foreseeable aggravation of their age and/or disability related vulnerabilities, including but not limited to the months of unlawful solitary confinement to which they had been subject in the months leading up to their transfer, and to which they continue to be subject in Unit 18.
 - b. the immutably adult nature of Unit 18 renders rehabilitation of the Named Complainants even more remote than it would have been, had they remained at BHDC, and results in harsher and/or more severe punishment on the Named Complainants, than those meted out at BHDC.
 - c. more restricted access to family and/or special visitors, as well as 'shorter phone calls' has a more marked effect on the majority, indigenous Named Complainants, for whom the connection to family, land, culture, and community is well-established.
 - d. the provocation and aggravation of the Named Complainant's developmental immaturity, underlying disability, trauma-based behavioural issues and cognitive impairments, results in an actual and/or constructive forms of entrapment whereby compounding trauma directly correlating with detention offences, resulting in more punitive treatment, and increasing trauma...*ad infinitum*...

E. INSTITUTIONAL/SYSTEMIC DISABILITY DISCRIMINATION IN BREACH OF SECTIONS 5 AND 6 OF THE *DISABILITY DISCRIMINATION ACT 1992* (CTH)

168. As at 20 July 2022 – the date the first cohort of detainees were transferred to Unit 18 – all detainees had some form of recognised disability, and this position has not materially altered.

169. By reason of that fact, the Named Complainants claim against the Respondents for institutional/systemic disability discrimination both within the purview of section 5 and 6 of the *Disability Discrimination Act 1992* (Cth) ("**DDA**") on their own behalves, and on behalf of the wider Group Members, who had or have cognitive impairments or mental disorders, for which they:

- i. did not receive diagnostic services or clinical treatment which it was their human right to receive;
- ii. did not receive any/or any adequate treatment or adjustment, to optimise or facilitate their beneficial development;
- iii. subjected to prolonged periods of confinement to their cell;
- iv. subjected to oppressive lockdowns;
- v. subjected to excessive use of restraints and prolonged periods in restraints; and
- vi. they were and have been subjected to physical and psychological abuse and/or trauma by YCOs and/or Prison Officers engaged by the DCS, who lacked the appropriate training and skills, and whose conduct towards them included the imposition of conditions or requirements contra-indicated for children afflicted with such impairments and disorders ("**disabilities**").

170. Coincidentally, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has been holding Public Hearings in Perth between 19 – 27 September 2022 in which stories of disabled children were children-with-disability being woefully and appallingly mistreated in BHDC similar to the discriminatory conduct complained of herein.³⁵

171. The combined effect of the foregoing stands in evidence of the fact that, by reason of their disability and the Named Respondent's failure to make reasonable adjustments for the Named Complainants said disabilities – that is, by way of providing an appropriate, therapeutic environment and disability services; the DCS has treated the Named Complainants and wider Group Members less favourably than a person without the disability, and by reason of their less favourable treatment, detainees within Unit 18 suffer from an exacerbation of their disabilities.³⁶

F. CONCLUSION

172. The Respondent's employment of the same methods, with less restrictions, in an inherently worse location, namely Unit 18, is inextricably linked to the skyrocketing rates of self-harm and attempted suicide, a 'contagion effect' emerge among the Named Complainants, whereby they employ the same method of self-harm and/or suicide, at the same time, or in close succession. Relying on general words to the authorise restrictive practices offends against the principle of legality *ad means* that the Named Complainants, all of whom have intellectual and cognitive impairments, do not have the benefit of safeguards under regulatory frameworks for restrictive practices and /or involuntary treatment.

173. The combined effect of the abovementioned complaints is the intersection of unlawful discrimination based on age and/or race and/or disability and has led to the Named Complainants and wider Group being in a state of acute situational crisis, exacerbated by cruel and inhumane conditions which compounds their significant extant trauma, adding vicarious trauma and/or post-traumatic stress disorder ('PTSD') to the list of pre-existing mental disorders and/or cognitive impairments.

174. The failure to provide a therapeutic environment to treat Named Complainants' chronic disabilities and instead enforce a punitive governance and regulatory regime that foreseeably, significantly and unnecessarily aggravates and exacerbates existing mental illness and psychological injuries and creates further injuries, ongoing loss and damage, for example, the common use of mechanical restraints on Named Complainants, prolonged periods of forced isolation and/or solitary confinement, which amounts to cruel and unusual punishment and/or torture at international law, as evidenced in the following vicious cycle:

1. Increase in frequency and/or severity of detention offences, which leads to Increase in duration, frequency, and severity of cruel and unusual punishment, such as: use of force, and/or use of mechanical restraints, and/or use of chemical agents, and/or use of 'straight jackets', 3-point restraints, handcuffs, and/or use of chemical agents including pepper spray.

³⁵ *Ibid*

³⁶ See Appendix 5: Extract from Hansard dated 11 August 2022 which details the staggering number of suicide attempts and self-harm in Unit 18, in comparison to Banksia Hill Detention Centre, a mere 11 days after the first transfer of detainees occurring on 20 July 2022.

ii. Skyrocketing rates of self-harm and/or attempted suicide, increasing in seriousness.

175. The Named Complainants' deterioration in Unit 18 follows a similar tragic trajectory: transfer precipitates a rapid and acute deterioration in their mental and/or physical health; a critical incident and/or serious incidents of self-harm, suicidal ideation, and/or attempted suicide ensues; admission to hospital for 'emergency' treatment for between 1 and 72 hours; returned to solitary confinement at Unit 18 and left in mechanical restraints; whereupon the process starts again, beginning with a critical incident of a more serious nature. The negative by-products of detention in Unit 18 are: perpetuation of vicarious trauma inter-generational trauma (FASD), post-traumatic stress disorder ('PTSD'), and other recognised manifestations of mental disability, and/or onset of traumatic brain injury, and/or acute and severe deterioration in mental and/or physical health, emergence of co-morbidities, additional diagnoses.

G. AUTHORITY TO ACT SIGNED BY [REDACTED]
RESPONSIBLE ADULT FOR [REDACTED]

AUTHORITY TO ACT & RELEASE DOCUMENTS

TO: STEWART LEVITT, LEVITT ROBINSON SOLICITORS

I, [REDACTED], grandmother and legal guardian of [REDACTED] [REDACTED] [REDACTED]
[REDACTED] HEREBY APPOINT Stewart Alan Levitt of LEVITT ROBINSON
SOLICITORS, Ground Floor, 162 Goulburn Street, Surry Hills, NSW 2010, as [REDACTED] [REDACTED], to
act on my behalf in relation to preparing and conducting either individual or representative proceedings,
as advised, seeking compensation in a claim against the Western Australian Government, Western
Australia Correctional Services and Department of Justice, Western Australia Department of Child
Protection and/or the Western Australia Department of Communities, regarding my treatment and
detention in Banksia Hill Detention Centre.

I hereby authorise and direct any and all service providers and organisations [REDACTED] has been involved
with to provide to his legal representatives, Levitt Robinson Solicitors, any and all information,
documents, reports and records of whatsoever kind and nature and whether (and both) in hard or soft
copy, relating to or referring to his health (mental or physical), and to the provision of lead or other
services to [REDACTED]

Partner: Stewart A Levitt

Employed Solicitors: Angelique Gebrayel, Dana Levitt and Quyên Nguyễn

[REDACTED]
Date: 22 August 2022

H. AUTHORITY TO ACT SIGNED BY [REDACTED]



AUTHORITY TO ACT & RELEASE OF DOCUMENTS

**TO: STEWART LEVITT. LEVITT ROBINSON
SOLICITORS**

I, [REDACTED]
HEREBY APPOINT **Stewart Alan Levitt of LEVITT
ROBINSON SOLICITORS**, Ground Floor, 162 Goulburn
Street, Surry Hills, NSW 2010, as my lawyer, to act on my
behalf in relation to preparing and conducting either
individual or representative proceedings, as advised, seeking
compensation in a claim against the Western Australian
Government, Western Australia Correctional Services and
Department of Justice, Western Australia Department of Child
Protection and/or the Western Australia Department of
Communities, regarding my treatment and detention in
Banksia Hill Detention Centre.

I hereby authorise and direct any and all service providers and
organisations I have been involved with to provide to my legal
representatives, Levitt Robinson Solicitors, any and all
information, documents, reports and records of whatsoever
kind and nature and whether (and both) in hard or soft copy,
relating to or referring to my health (mental or physical), and
to the provision of legal or other services to me.

Partner: Stewart A Levitt
Employed Solicitors: Angelique Gebrayel, Dana Levitt and
Quyên Nguyễn

[REDACTED]
Date: 23-9-2022 .

I. AUTHORITY TO ACT SIGNED BY [REDACTED]

AUTHORITY TO ACT AS NEXT FRIEND

To whom it may concern

Re: [REDACTED]

I, [REDACTED] authorise and appoint Mr Gerry Georgatos of 12/8 Robin Street Menora, 6050 WA to act as my 'next friend' and to represent my interests in relation to individual or representative proceedings filed on my behalf against the State of Western Australia and Ors.

[REDACTED] is fully competent and qualified to understand and protect the rights of me, [REDACTED] and has no interests adverse to my own interests.

Dated: 2

Signature
[REDACTED]

Signature
Gerry Georgatos

AUTHORITY TO ACT & RELEASE OF DOCUMENTS

TO: STEWART LEVITT, LEVITT ROBINSON SOLICITORS

I, [REDACTED] [REDACTED] [REDACTED] HEREBY APPOINT Stewart Alan Levitt of LEVITT ROBINSON SOLICITORS, Ground Floor, 162 Goulburn Street, Surry Hills, NSW 2010, as my lawyer, to act on my behalf in relation to preparing and conducting either individual or representative proceedings, as advised, seeking compensation in a claim against the Western Australian Government, Western Australia Correctional Services and Department of Justice, Western Australia Department of Child Protection and/or the Western Australia Department of Communities, regarding my treatment and detention in Banksia Hill Detention Centre.

I hereby authorise and direct any and all service providers and organisations I have been involved with to provide to my legal representatives, Levitt Robinson Solicitors, any and all information, documents, reports and records of whatsoever kind and nature and whether (and both) in hard or soft copy, relating to or referring to my health (mental or physical), and to the provision of legal or other services to me.

Partner: Stewart A Levitt

Employed Solicitors: Angelique Gebrayel, Dana Levitt and Quyên Nguyễn

[REDACTED]

Date: 11 September 2022

J. AUTHORITY TO ACT SIGNED BY [REDACTED]

K. AUTHORITY TO ACT SIGNED BY [REDACTED] RESPONSIBLE
ADULT FOR [REDACTED]

AUTHORITY TO ACT & RELEASE DOCUMENTS

TO: STEWART LEVITT, LEVITT ROBINSON SOLICITORS

I, [REDACTED], aunt and legal guardian of [REDACTED] [REDACTED] [REDACTED] [REDACTED] HEREBY APPOINT Stewart Alan Levitt of LEVITT ROBINSON SOLICITORS, Ground Floor, 162 Goulburn Street, Surry Hills, NSW 2010, as [REDACTED] lawyer, to act on my behalf in relation to preparing and conducting either individual or representative proceedings, as advised, seeking compensation in a claim against the Western Australian Government, Western Australia Correctional Services and Department of Justice, Western Australia Department of Child Protection and/or the Western Australia Department of Communities, regarding my treatment and detention in Banksia Hill Detention Centre.

I hereby authorise and direct any and all service providers and organisations [REDACTED] has been involved with to provide to his legal representatives, Levitt Robinson Solicitors, any and all information, documents, reports and records of whatsoever kind and nature and whether (and both) in hard or soft copy, relating to or referring to his health (mental or physical), and to the provision of lead or other services to [REDACTED]

Partner: Stewart A Levitt

Employed Solicitors: Angelique Gebrayel, Dana Levitt and Quyen Nguyễn

[REDACTED]

Date: 17 August 2022

L. APPENDIX 1: WESTERN AUSTRALIAN GOVERNMENT GAZETTE



Western
Australian
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YOUNG OFFENDERS ACT 1994

**YOUNG OFFENDERS
(DETENTION CENTRE)
ORDER 2022**

PRISONS ACT 1981

**PRISONS (CASUARINA)
ORDER 2022**

Young Offenders Act 1994

Young Offenders (Detention Centre) Order 2022

Made by the Minister under the *Young Offenders Act 1994* section 13.

1. Citation

This order is the *Young Offenders (Detention Centre) Order 2022*.

2. Commencement

This order comes into operation as follows —

- (a) clauses 1 and 2 — on the day on which this order is published in the *Gazette*;
- (b) the rest of the order — on the day after that day.

3. Departmental facilities declared

Under the *Young Offenders Act 1994*, section 13(1), those parts of the buildings and enclosures on Reserve No. 31874, being portion of Lot 520 on Deposited Plan 59904 (held by the Western Australian Land Information Authority established by the *Land Information Authority Act 2006*), known as Unit 18 set out on the sketch in the Schedule hereto, but not being parts of a prison under the *Prisons Act 1981*, are declared to be a detention centre under that Act.

Schedule

Map of Casuarina Prison, Unit 18 circled in black to be declared as a Young Offenders Detention Centre. (A larger copy of this map is provided as Attachment 1 with Unit 18 highlighted in yellow).



Hon. BILL JOHNSTON, MLA,
Minister for Mines and Petroleum;
Energy; Corrective Services;
Industrial Relations.

Dated 12 July 2022.

Prisons Act 1981

Prisons (Casuarina) Order 2022

Made by the Minister under the *Prisons Act 1981* section 5.

1. Citation

This order is the *Prisons (Casuarina) Order 2022*.

2. Commencement

This order comes into operation as follows —

- (a) clauses 1 and 2 — on the day on which this order is published in the *Gazette*;
- (b) the rest of the order — on the day after that day.

3. Order revoked

The *Prisons (Casuarina) Order 2011* made under the *Prisons Act* section 5 and published in the *Gazette* on 18 March 2011 p.909 and 910 is revoked.

4. Prison declared

Under the *Prisons Act 1981* section 5(1), portion of Reserve No. 31874, being portion of Lot 520 on Deposited Plan 59904 (held by the Western Australian Land Information Authority established by the *Land Information Authority Act 2006*), and the buildings and enclosures on it, other than the parts of them known as Unit 18 as set out on the sketch in the schedule hereto, are declared to be a prison, called the Casuarina Prison, under that Act.

Schedule

Map of Casuarina Prison, area not shaded in black to be declared as a Prison (*A larger copy of this map is provided as Attachment 2 with area to be declared a Prison highlighted in yellow*).



Hon. BILL JOHNSTON, M.L.A.,
Minister for Mines and Petroleum;
Energy; Corrective Services;
Industrial Relations.

Dated 12 July 2022.

M. APPENDIX 2: PROFILES OF DETAINEES TRANSFERRED TO UNIT 18 ON OR
AROUND 20 JULY 2022

Date of transfer: 20 July 2022 : 17 detainees - 12 First Nation - 5 non Indigenous

No.	Detainee	Age	Race	Disability
1	[REDACTED]	16	New Zealand	self harm
2	[REDACTED]	14	Aus. Aboriginal	self harm
3	[REDACTED]		Australian	
4	[REDACTED]	15	Aus. Aboriginal	FASD PTSD
5	[REDACTED]	17	Australian	CEO FASD ADHD Dyslexia Communication disorder
6	[REDACTED]	17	Aus. Aboriginal	Self harm
7	[REDACTED]	15	Aus. Aboriginal	
8	[REDACTED]	14	Australian	CEO Intellectual learning disorder ADHD
9	[REDACTED]	15	Aus. Aboriginal	CEO FASD GAD PTSD active threat of self harm
10	[REDACTED]	17	Aus. Aboriginal	FASD
11	[REDACTED]	16	Aus. Aboriginal	CEO ASD
12	[REDACTED]	16	Aus. Aboriginal	FASD ARMS
13	[REDACTED]	16	Aus. Aboriginal	CEO FASD ADHD
14	[REDACTED]	15	Aus. Aboriginal	Neurological & traumatic brain injury & self harm
15	[REDACTED]	17	Aus. Aboriginal	
16	[REDACTED]	17	Aus. Aboriginal	self harm
17	[REDACTED]	14	Australian	CEO NDIS Intellectual disability

N. APPENDIX 3: LETTER OF COMPLAINT FROM ALS TO CHRISTINE GINBEY
ON BEHALF OF [REDACTED]



Aboriginal Legal Service of Western Australia Limited

ACN: 617 555 843

25 July 2022

Christine Ginbey
Acting Deputy Commissioner Women and Young people
Department of Justice
By email: Christine.Ginbey@justice.wa.gov.au

CC: Eamon Ryan
Inspector of Custodial Services
By email: Eamon.Ryan@oics.wa.gov.au

Jacqueline McGowan-Jones
Commissioner for Children and Young People
By email: Jacqueline.McGowan-Jones@ccyp.wa.gov.au

Dear Ms Ginbey

Concerns in relation to visits for children in Unit 18 – Casuarina Prison

As you know, the Aboriginal Legal Service of Western Australia Ltd ('ALSWA') acts for many of the children transferred from Banksia Hill Detention Centre ('BHDC') to Unit 18 Casuarina Prison ('Unit 18') on 20 July 2022.

ALSWA has the following concerns in relation to the difficulties faced by both lawyers and family members in visiting the children.

Lack of information provided

ALSWA was not informed which clients were going to be transferred and when the transfer was scheduled. The day after the transfer, ALSWA was provided with some of the names of children who had been transferred, but in several instances this information was provided by other children in Unit 18, from child protection case workers, external lawyers and others. This is most disappointing. It is essential that all children who have been transferred (or will be in the future) have appropriate access to independent legal advice in relation to the transfer, the conditions in Unit 18 and any other legal matters.

ALSWA also understands that family members were not informed about their children being transferred which has caused significant distress and worry.



Aboriginal Legal Service of Western Australia Limited

ACN: 617 555 843

Further, ALSWA is prepared to assist all children in Unit 18, including non-ALSWA clients, and will facilitate referrals to Legal Aid WA for any non-Aboriginal children.

Official visits

On 20 July 2022 ALSWA Managing Lawyer, Civil Law and Human Rights Unit, Alice Barter, requested urgent official visits with three clients. The visits were booked for 22 July 2022, between 8.45am and 9.45am. Despite Ms Barter arriving at Casuarina at 8.25am, she did not see her first client until 9.18am in the Adult Social Visits area. This area is not confidential and not appropriate for legal visits. Due to the limited time available, Ms Barter was unable to see her other two clients. She requested an e-visit with [REDACTED] to be scheduled for the afternoon on the same day but did not receive a confirmation of the request and the e-visit did not take place. Ms Barter then arranged for a different ALSWA lawyer, Ms Lexi Lachal, to visit [REDACTED] on 25 July 2022.

On 25 July 2022, ALSWA lawyers, Ms Lachal and Ms Rhela Belton also experienced delays seeing clients despite arriving for the visit on time. Further, Ms Lachal was not able to see [REDACTED] as he had a family visit booked for the same time.

Family visits

ALSWA is instructed by [REDACTED], the mother of [REDACTED], that she has also experienced difficulty seeing her son. On Saturday 23 July 2022, [REDACTED] had a social visit booked with [REDACTED], however, when she arrived she was informed that the visit was cancelled due to an incident in Unit 18.

On 25 July 2022 [REDACTED] and two other family members had a visit booked with [REDACTED] at 8:45am. [REDACTED] and her family arrived at 8:30am for the visit. [REDACTED] and her family were not brought up to the visits area until approximately 9:45am. [REDACTED] and her family were then only able to see [REDACTED] for approximately two (2) minutes. When Ms [REDACTED] visit was cut short she complained to the Youth Custodial Officers ('YCO') and was told by a female YCO words to the effect that 'it's not our fault, it's his fault for being in here'.

The confining of visits to just one hour per day is totally inadequate to accommodate both social and official visits. In addition, official visits should not encroach on the time scheduled for children to see family. It is suggested that separate times be arranged for official and social visits. Further, the time allocated for official visits need to be extended and recognise that most lawyers cannot visit children between 8.45 and 9.45 am because of court commitments; ie official visits also need to be available in the afternoon. The official visits area needs to be configured to ensure that all conversations are private and confidential.



Aboriginal Legal Service of Western Australia Limited

ACN: 617 555 843

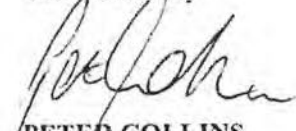
Telephone calls

ALSWA has been instructed that children in Unit 18 are able to make two 10-minute telephone calls per day. This limitation is inappropriate and punitive. Given the traumatic circumstances of the children transferred to Unit 18, the importance of regular telephone calls to family and loved ones cannot be underestimated.

ALSWA requests that these concerns are addressed as a matter of urgency.

The writer can be contacted at pcollins@als.org.au.

Yours faithfully



PETER COLLINS
Director Legal Services
Aboriginal Legal Service of WA Ltd

O. APPENDIX 4: LETTER OF COMPLAINT FROM ALS TO CHRISTINE GINBEY
ON BEHALF OF [REDACTED]



Aboriginal Legal Service of Western Australia Limited

ACN: 617 555 843

Our ref: AVB:2022/13061

1 September 2022

Christine Ginbey
Acting Deputy Commissioner for Women and Young People
By email: Christine.Ginbey@justice.wa.gov.au

CC: Office of the Inspector of Custodial Services
By email: corporate@oics.wa.gov.au

Commissioner for Children and Young People
By email: jacqueline.megowan-jones@ccyp.wa.gov.au

Dear Acting Deputy Commissioner

██████████ ██████████
Complaint about treatment at Unit 18, Casuarina Prison

The Aboriginal Legal Service of Western Australia (Ltd) ('ALSWA') acts for ██████████
██████████

We are instructed to make a complaint about the treatment of ██████████ at Unit 18, Casuarina Prison between 20 July 2022 and 17 August 2022.

Complaint about conditions

We are instructed:

- ██████████ experienced significant lockdowns while in Unit 18;
- On many days he was only allowed out of his cell to make a 10-minute phone call;
- On 26 July 2022 ██████████ was not allowed out of his cell until 5pm and then he was locked down again after approximately 30 minutes;
- He was only allowed outside in the fresh air a few times, he instructed on 16 August 2022 that he 'couldn't remember the last time he was allowed outside in the fresh air';
- He was in an MPU cell for approximately two weeks, he instructs this felt like 'two months';
- In the MPU cells he was not given any towels or soap, so he had to use his shirt to dry himself after showering;
- While in the MPU cell, ██████████ smashed his toilet, so it no longer functioned. He then needed to be allowed out of his cell to use the toilet, which was often not facilitated, meaning he was forced to hold on which caused him to have stomach pains;
- After smashing his cell, he was locked in his cell with no access to radio or television;
- His mental health deteriorated when confined, he instructs he was 'going mad and

getting angry’;

- He was not allowed to bring any of his possessions such as CDs, photos and posters from his cell at Banksia Hill Detention Centre to Unit 18;
- One of the Casuarina Prison Officers said to the children in Unit 18 ‘Wait until you go next door, you will be raped in the arse’;
- One of the SOG Officers said to the children in Unit 18 ‘Youse little cunts – you will be tickled in the arse’;
- ██████████ received no education during this period;
- ██████████ only had limited access to his psychologist;
- He was not getting enough food and he smashed his cell because he was hungry;
- The cameras in the cells made him feel very uncomfortable;
- On 15 August 2022 ██████████ was locked in his cell all day except for two ten-minute phone calls and was not able to shower due to tradespeople working in the unit and there not being any hot water.

Complaint of excessive force

We are instructed:

- On a date between 20 and 27 July 2022 ██████████ was on the phone speaking to his dad for his birthday;
- The phone cut out and ██████████ asked for another phone call;
- He then had an altercation with two Senior Officers, Phil and Kev who slammed him on the ground, where there was broken glass, and strangled him around the neck;
- ██████████ had a injured lip, two visible red marks on his neck and scratches on his arms.

██████████ instructs he feels like he has been treated like a dog while in Unit 18.

We request that the above allegations be investigated and a written response be provided to us.

Please advise what the legislative basis for ██████████ confinement between 20 July 2022 and 17 August 2022 was. Further, please provide us with ██████████ cell placement history and records of his out of cell hours for the period 20 July 2022 until 17 August 2022.

Please ensure all correspondence in relation to this matter is directed to Alice Barter at abarter@alsw.org.au. **We also request that this matter not be discussed with our client without an ALSWA staff member present.**

Yours faithfully



ALICE BARTER
Managing Lawyer
Civil Law and Human Rights Unit

P. APPENDIX 5: EXTRACT FROM HANSARD DATED 11 AUGUST 2022

BANKSIA HILL DETENTION CENTRE—UNIT 18, CASUARINA —
SUICIDE ATTEMPTS AND SELF-HARM

647. **Hon Dr BRAD PETTITT** to the parliamentary secretary representing the Minister for Corrective Services:

I refer to media reports that four youth detainees from unit 18 at Casuarina Prison were taken to hospital last week after swallowing shards of glass.

- (1) How many children were involved in the self-harm attempt reported in the media, and how many of those children were taken to hospital?
- (2) Have the children who were taken to hospital since been returned to unit 18, and are they being provided with appropriate mental health support?
- (3) Please provide the latest number of suicide attempts and self-harm cases in July and August, to date, respectively, at —
 - (a) Banksia Hill Detention Centre; and
 - (b) unit 18, Casuarina Prison.

Hon MATTHEW SWINBOURN replied:

I thank the member for some notice of the question. The following information has been provided to me by the Minister for Corrective Services.

- (1) Four children were involved. One young person attended hospital and was returned the same day with no further medical intervention required.
- (2) Yes.
- (3)
 - (a) For the month of July 2022, there were 36 reported minor self-harm attempts and one attempted suicide attempt at Banksia Hill. There have been three minor self-harm attempts and nil attempted suicide attempts at Banksia Hill from 1 to 8 August 2022.
 - (b) From 20 July to 31 July 2022, there have been two minor self-harm attempts and two attempted suicide attempts at unit 18 from 1 to 8 August 2022. There have been 11 minor self-harm attempts and one attempted suicide attempt at unit 18.

**Q. APPENDIX 6: SOCIAL MEDIA POST BY WA PARLIAMENTARIAN BRAD
PETTIT MLC FOLLOWING VISIT TO UNIT 18 AND DATED 31 AUGUST 2022**

4:38 ↶

5G 🔋



BRADPETTITMLC

Posts

Follow

bradpettittmlc BANKSIA HILL & UNIT 18 !! And potentially the longest post I've ever written 🙄

A week ago yesterday, my staff and I were taken on a tour of Banksia Hill Detention Centre and the newly-gazetted child detention facility, Unit 18, at the adult maximum-security Causarina Prison.

I have been highly critical of the conditions at both facilities and WA's youth justice system more broadly. Too often politicians are quick to speak on issues without actually doing the work to listen to or visit with communities that are impacted by these issues, so I felt it was important for me to accept this invitation from the Department and have a look for myself.

Given everything that I've learned about WA's youth detention system from stakeholders and through Parliamentary Questions, I prepared myself to be shocked. But this experience was nothing short of gut wrenching.

Here are some reflections I wrote after our visit 🙄 🙄 🙄

It was the starkness of the cells that stuck me.

A small room grimly covered in graffiti. A dirty plastic mattress, a toilet without a lid and a tiny shower over the top of it. Nothing personal or warm. Nothing to hint that this was a place built for a child. Nothing to encourage rehabilitation.

Visiting a children's prison redefined the meaning of bleak. Standing inside that cell for only a few minutes made me want to run. I can only imagine how it must feel for a highly traumatized child to be locked in there for what must feel like an endless amount of time.

As we were informed by our tour guides, this is the place where, on a good day, children at Banksia Hill have to spend a minimum of 13 hours locked inside. On a bad day, kids could spend nearly all 24 hours of their day in this cell.

Banksia is a sprawling campus built in 1987 and it shows. The buildings and its infrastructure are tired and, as we were told again and again, large parts of it are not fit for purpose. However, I question whether a prison or criminal response for deeply traumatized children with cognitive disabilities is ever "fit for purpose."

CONTINUED IN COMMENTS 🙄





Comments



bradpettitmlc 1) There are massive security fences the kids have learned to jump and run along the top of, resulting in regular prison-wide lockdowns. Most of the cells were in ruin. The need for new investment was apparent to not only keep workers, visitors, and the kids safe, but also provide genuine trauma-informed education and rehabilitation.



Disturbingly, these works seem to be haphazardly planned with a serious lack of urgency. Despite being told that some of these works are what will enable the young children transferred to Unit 18 to come back to Banksia, they are not intended to be fully completed until 2025/26. In the meantime, kids are being indefinitely held at a maximum-security adult prison with no clear timeline on when they will return.

Banksia was bad, but Unit 18 was worse. It felt like the guards outnumbered the kids 4 to 1, including the Special Operations Group who are dressed in full riot gear. We were in Unit 18 for no more than 20 minutes, but in that time there were three critical incidents that involved kids being restrained and locked down. It was truly horrifying.

During one of the incidents we were instructed to seek refuge in the prison staff room. There we saw another 8 or so education, mental health, Aboriginal Support Officers, and other support workers already in the room who were unable to do their work during lockdowns.

I have known that WA's youth detention system is broken for some time, but this visit demonstrated just how drastically the State Government has failed these children. Many of the prison and support staff were doing their best with the facilities and resources they have been given, but the youth justice system is lurching from crisis to crisis with no real meaningful end reforms in sight.

The way we treat children who come into contact with the justice system is fundamentally broken. By the time they reach prison, we have already failed them.

1w 7 likes Reply Send





Comments



bradpettittmlc 2) Successive WA State Governments have ignored the best pediatric and mental health evidence on kids who commit offending behaviour, leaving WA in this current situation that sees a punitive and criminal response to what is very clearly a problem that stems from desperately under-funded health, mental health, education, and housing systems.



I'm not claiming to have all the answers. But as someone who has no formal training in youth justice whatsoever, it was clear to me that what WA is currently doing with kids at Banksia and Unit 18 is miserably failing.

As even the tour guides acknowledged, these problems and the opportunities for intervention start long before these kids end up in prison. Nearly all of the children at Banksia Hill have a severe neurological condition. Most of these kids are coming from traumatic backgrounds where they've had little continuity in housing, education, or access to health and mental health care.

Instead of continuing with criminal responses to these kids, the State Government should be investing in what we know are these basic human needs essential for healthy development.

We also need to invest in drastically reforming Banksia to a trauma-informed model of care right now. It is not acceptable that kids are transferred to a maximum-security adult facility – as terrifying and bleak as you would expect – because the Banksia is not up to scratch. These kids should not be pushed to the wayside as the "too-hard" cohort that the State Government keeps characterising them as. They deserve continued access to the health, mental health, education, and housing services they so desperately need to give them the opportunity to thrive.

When we left Unit 18, the Commissioner turned to us and asked us for solutions. He told us that he was open to new ideas, but he was working within the constraints of their reality. Other than restating the need for more investment early in their lives and investing in upgrading Banksia with greater urgency, I was overwhelmed and didn't really know what to





Comments



say at the time.

1w 7 likes Reply Send

View 2 more replies



bradpettittmlc 3) A couple days later @aboriginallegalservicewa who represents several of the detained children won a Supreme Court legal challenge against the Department of Justice's use of rolling lockdowns in children's detention. They released a very practical list of recommendations of where WA can start:



- Department of Justice should act immediately to provide adequate numbers of staff, professionals and youth workers and ensure the young people in detention are not being locked down in their cells. This could be in partnership with ALSWA's YEP program, Wungening Aboriginal Corporation, Non-Government Organisations with expertise in youth work and specialist paediatricians and psychiatrists/psychologists
- All children in detention, wherever they are held, should have access to holistic medical and mental health services as well as education and recreation
- In the long-term, the government should invest in early intervention, therapeutic culturally-appropriate trauma-informed support for children across the State
- BHDC and Youth Justice to be managed by the Department of Communities to shift the focus away from punishment and towards a recovery-oriented approach
- Youth custodial officers to be replaced with youth justice officers with a new JDF and youth work/social work backgrounds and to wear plain clothes
- The current case management team to be integrated into the youth justice teams
- Staff/child ratio increased. Hire casual staff to assist with this
- Staff and children to be based in teams in one unit with minimal movement to provide stability and continuity
- All staff trained in trauma informed care





Comments



This could be in partnership with ALSWA's YEP program, Wungening Aboriginal Corporation, Non-Government Organisations with expertise in youth work and specialist paediatricians and psychiatrists/psychologists

⇒ All children in detention, wherever they are held, should have access to holistic medical and mental health services as well as education and recreation

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⇒ BHDC and Youth Justice to be managed by the Department of Communities to shift the focus away from punishment and towards a recovery-oriented approach

⇒ Youth custodial officers to be replaced with youth justice officers with a new JDF and youth work/social work backgrounds and to wear plain clothes

⇒ The current case management team to be integrated into the youth justice teams

⇒ Staff/child ratio increased. Hire casual staff to assist with this

⇒ Staff and children to be based in teams in one unit with minimal movement to provide stability and continuity

⇒ All staff trained in: trauma-informed care; culturally-appropriate care for Aboriginal children and other CALD groups; working with people with disability; and de-escalation

⇒ At least 5% Aboriginal staff to be employed

⇒ Aboriginal cultural advisors to be employed

⇒ Partnership with ACCOs

⇒ No use of the Special Operations Group unless a serious emergency

⇒ Every child to be outside of their cell for at least 12 hours a day


⇒ Every child to have access to paediatricians, GPs, psychiatrists and psychologists on a daily basis including screening on admission

1w 9 likes Reply Send



R. APPENDIX 7: AUSTRALIAN HUMAN RIGHTS COMMISSION CALL FOR
'GOVERNMENT ACTION NEEDED TO PROTECT CHILDREN IN
DETENTION'

Government action needed to protect children in detention

 Children's Rights

Thursday 21 July, 2022

Joint statement from:

June Oscar AO

Aboriginal and Torres

Strait Islander Social

Justice Commissioner

Anne Hollonds

Australia's

National Children's

Commissioner

Lorraine Finlay

Australia's

Human Rights

Commissioner

The Australian Human Rights Commission is deeply concerned about the safety and wellbeing of 17 teenagers who were moved yesterday from Banksia Hill youth detention centre to the adult, maximum security Casuarina Prison in Western Australia.

This is not a safe or suitable option for these young people, many of whom have experienced cruel and degrading conditions already in their treatment at Banksia Hill, including long periods in isolation and inadequate care for their complex needs. They require immediate assessments for mental health concerns and appropriate, ongoing care.

It is time for all Australian governments to change their punitive approach to youth justice in favour of systems that recognise the needs of children and provide them with appropriate care and rehabilitation. We must urgently prioritise trauma-informed programs of diversion and rehabilitative pathways.

The Commission has long raised these issues with state and federal governments. The Commission has urgently advocated for improvements to the youth justice system with the new federal government, and with the previous federal government.

The community expects youth detention programs that are effective and well resourced. The current punitive approach does not keep our communities safe, with the evidence showing it leads to higher rates of recidivism. It is not an effective use of taxpayer dollars, and it fails to protect the rights of children.

Australia is out of step with rest of world, where many countries have systems focused on early intervention and diversion in place for young offenders. All the evidence shows these to be more effective approaches to rehabilitation and community safety.

The issue brings into focus Australia's commitments under the United Nations Convention on the Rights of the Child and the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, which mandate better protections for the rights of children in detention.

National leadership is required, with cooperation from all Australian governments to ensure youth justice systems protect the rights of children, offer them real pathways to rehabilitation, use taxpayer money effectively, and protect the community through lower rates of recidivism.

Commissioner Oscar said: "Prison is no place for children. This approach will only perpetuate the cycle of trauma and youth offending".

Australia's National Children's Commissioner Anne Hollonds recently visited Banksia Hill Detention Centre and said, "This current crisis at Banksia Hill is just the pointy end of the long-term failure of child wellbeing policy and systems in this country.

"These are children in need of care and treatment for complex disabilities and serious mental health problems. Instead of receiving the care they need, these children are incarcerated in harmful conditions with life-long negative impacts on their health, education, and wellbeing.

"Other countries have found ways to support the welfare of children instead of imprisoning them. Australia needs to make our children a national priority."

Australia's Human Rights Commissioner Lorraine Finlay said: "The latest crisis at Banksia Hill is sadly not an isolated issue. The problems in our juvenile justice systems are well known and have been highlighted repeatedly over many years. By failing to address these long-standing issues we are failing our children and our communities."