

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Statement of Claim - Form 17 - Rule 8.06(1)(a)  
File Number: NTD64/2016  
File Title: Dylan Riley Jenkins & Anor v Northern Territory of Australia  
Registry: NORTHERN TERRITORY REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading 'Warwick Soden'.

Dated: 27/12/2017 9:48:09 AM ACST

Registrar

### Important Information

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

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## Fifth Statement of Claim

*Edited and refiled on 22 December 2017 pursuant to  
order 3 made by Justice White on 18 December 2017*

No. NTD64 of 2016

Federal Court of Australia  
District Registry: Northern Territory  
Division: General

### **Dylan Riley Jenkins**

First Applicant

### **Aaron Hyde**

Second Applicant

### **Northern Territory of Australia**

Respondent

## **I PARTIES**

### ***Group Members***

1. Each applicant brings this claim on his own behalf and on behalf of represented persons pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) being persons (**Group Members**) who at 27 November 2017:

1.1 were or had been at any time on or after 1 August 2006 detained in a youth detention centre of the Northern Territory of Australia within the meaning of the *Youth Justice Act* (NT) (**Act**) (**youth detention centre**); and

1.2 during the periods in which the Group Member was detained in a youth detention centre, suffered or allege to have suffered unlawful discrimination, by an act or omission of a “commissioner”, “superintendent” or “member of staff” as defined in paragraph 1.4, in breach of s 9(1) of the *Racial Discrimination Act 1975* (Cth) (**RDA**); and

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Filed on behalf of (name & role of party) Dylan Riley Jenkins, First Applicant and  
Aaron Hyde, Second Applicant

Prepared by (name of person/lawyer) Ben Slade

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1.3 claim damages for the impairment of their enjoyment of the human rights and fundamental freedoms described in sub-paragraph 114.15 as pleaded in paragraph 138; and

1.4 during the period or periods in which the Group Member was detained in a youth detention centre, suffered or allege to have suffered:

- (a) assault; and
- (b) battery; and/or
- (c) false imprisonment;

by an act or omission of:

- (d) before 9 September 2014, a director or, from 9 September 2014, a commissioner for the purposes of the Act or a person taken to have been delegated the director's or commissioner's powers necessary to perform the director's or commissioner's functions in respect of youth detention centres under the Act (**commissioner**);
- (e) a superintendent of a youth detention centre, a duly authorised delegate of a superintendent, or a person, pursuant to the Act, taken to have been delegated a superintendent's powers and functions necessary to perform a superintendent's functions under s 151(3)(c) of the Act (**superintendent**); or
- (f) a member of the staff of a detention centre or a person, pursuant to the Act, taken to be a member of the staff of a detention centre (**member of staff**); and

1.5 was not a plaintiff in any of the following proceedings in the Supreme Court of the Northern Territory:

- (a) No. 16 of 2016, Case Number: 21615113; and
- (b) No. 24 of 2016, Case Number: 21617890.

2. Each applicant and each Group Member is an "affected person" of the AHRC Complaint defined in the Fourth Originating Application of this proceeding within the meaning of s 3 of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

3. As at the date of the commencement of this proceeding, seven or more Group Members have claims against the respondent.

***First Applicant***

4. The first applicant was born on 11 September 1998 and is 19 years old.
5. The first applicant was detained in youth detention centres at various times and for various periods between in or about 2014 and on or about 9 September 2016, as follows:
  - 5.1 From 15 May 2014 to 16 May 2014 the first applicant was detained in Don Dale Youth Detention Centre, in its former location (**Old Don Dale**).
  - 5.2 From 7 March 2015 to 27 March 2015 the first applicant was detained in Don Dale Youth Detention Centre, in its current location (**New Don Dale**).
  - 5.3 From 7 April 2015 to 29 June 2015 the first applicant was detained at New Don Dale.
  - 5.4 From 24 August 2015 to 4 September 2015 the first applicant was detained at New Don Dale.
  - 5.5 From 18 September 2015 to 7 November 2015 the first applicant was detained at New Don Dale.
  - 5.6 From 29 November 2015 to 25 May 2016 the first applicant was detained at New Don Dale.
  - 5.7 From 7 July 2016 to 9 September 2016 the first applicant was detained at New Don Dale.
6. The first applicant is an Aboriginal person and was, at all relevant times while he was detained in youth detention centres, a child.

***Second Applicant***

7. The second applicant was born on 27 June 1996 and is 21 years old.
8. The second applicant was detained in youth detention centres at various times and for various periods between on or about 20 December 2011 and on or about 27 June 2014, as follows:
  - 8.1 From on or about 20 December 2012 to on or about 23 December 2014 the second applicant was detained at Old Don Dale.
  - 8.2 From 23 December 2012 to 24 December 2014 the second applicant was detained at Old Don Dale.

- 8.3 From 15 February 2012 to 6 April 2012 the second applicant was detained at Old Don Dale.
  - 8.4 From 3 May 2012 to 3 December 2012 the second applicant was detained at Old Don Dale.
  - 8.5 From 2 January 2013 to 22 June 2013 the second applicant was detained at Old Don Dale.
  - 8.6 From 13 July 2013 to 17 July 2013 the second applicant was detained at Alice Springs Youth Detention Centre.
  - 8.7 From 18 July 2013 to 20 September 2013 the second applicant was detained at Old Don Dale.
  - 8.8 From 3 November 2013 to 30 November 2013 the second applicant was detained at Old Don Dale.
  - 8.9 From 5 June 2014 to 27 June 2014 the second applicant was detained at Old Don Dale.
9. The second applicant is not an Aboriginal person and was, at all relevant times while he was detained in youth detention centres, a child.

***Respondent***

10. The respondent is liable to be sued pursuant to section 5 of the *Crown Proceedings Act* (NT).
11. Each commissioner, each superintendent and each member of staff was at all relevant times:
  - 11.1 a person in the service of, or an agent of, the respondent;
  - 11.2 acting in the performance or purported performance of his or her functions as a commissioner, superintendent or member of staff; and
  - 11.3 so acting where the performance or purported performance of his or her functions was in the course of his or her service of the respondent or was an incident of that service.
12. By reason of the matters pleaded in paragraph 11, the respondent is vicariously liable to the applicants and Group Members in respect of each tort alleged in this proceeding to have been committed by reason of an act or omission of a commissioner, superintendent or a member of staff.

13. Further, each commissioner, each superintendent and each member of staff was at all relevant times an employee or agent of the respondent acting in connection with his or her duties as an employee or agent.
14. By reason of the matters pleaded in paragraph 13, the respondent is vicariously liable to the applicants and Group Members in respect of each unlawful act in breach of the *Racial Discrimination Act 1975* (Cth) (**RDA**) alleged in this proceeding to have been committed by reason of an act or omission of a commissioner, superintendent or member of staff.

## II. RELEVANT PROVISIONS OF THE ACT AND REGULATIONS

15. The effect of the provisions of the Act and the *Youth Justice Regulations* (NT) (**Regulations**) that bear directly on the matters pleaded in this Statement of Claim is pleaded in paragraphs 16 to 47 below.

### ***Objects and Principles***

16. Section 3 sets out the objects of the Act, including the following:
  - 16.1 to specify the general principles of justice in respect of youth (s 3(a));
  - 16.2 to provide how a youth who has committed, or is alleged to have committed, an offence is to be dealt with (s 3(c));
  - 16.3 to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation (s 3(e)).
17. Section 4 of the Act provides for general principles that must be taken into account in the administration of the Act, including:
  - 17.1 the youth should be dealt with in a way that acknowledges his or her needs and will provide him or her with the opportunity to develop in socially responsible ways (s 4(b));
  - 17.2 a youth who commits an offence should be dealt with in a way that allows him or her to be re-integrated into the community (s 4(f));
  - 17.3 a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community (s 4(g));
  - 17.4 family relationships between a youth and members of his or her family should, where appropriate, be preserved and strengthened (s4(h));

- 17.5 a youth should not be withdrawn unnecessarily from his or her family environment and there should be no unnecessary interruption of a youth's education or employment (s4(i));
- 17.6 a youth's sense of racial, ethnic or cultural identity should be acknowledged and he or she should have the opportunity to maintain it (s 4(j));
- 17.7 a decision affecting a youth should, as far as practicable, be made and implemented within a time frame appropriate to the youth's sense of time (s 4(m));
- 17.8 punishment of a youth must be designed to give him or her an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways (s 4(n)).

***Immunity and limitation***

18. Substantive changes to Part 14 of the Act, relating to the time for starting proceedings, commenced on 9 September 2014.
19. Before 9 September 2014, section 215 of the Act provided:
- (1) *This section applies to a person who is or has been:*
- (a) *the Director; or*
- (b) *a superintendent of a detention centre; or*
- (c) *a probation officer; or*
- (d) *a surveillance officer; or*
- (e) *an employee, within the meaning of the Public Sector Employment and Management Act, performing functions under this Act.*
- (2) *The person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function, under this Act.*
- (3) *Subsection (2) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.*
- (4) *No proceedings may be commenced in relation to an act done or omitted to be done by the person under this Act more than 6 months after the act was done or the omission occurred.*

20. From 9 September 2014, section 215 of the Act provides:

- (1) *This section applies to a person who is or has been:*
  - (a) *the Commissioner; or*
  - (b) *a superintendent of a detention centre; or*
  - (c) *a probation and parole officer; or*
  - (e) *an employee, within the meaning of the Public Sector Employment and Management Act, performing functions under this Act.*
- (2) *The person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise or purported exercise of a power, or the performance or purported performance of a function, under this Act.*
- (3) *Subsection (2) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.*

21. From 9 September 2014, section 215A of the Act provides:

- (1) *Proceedings for an offence against this Act may be started only by:*
  - (a) *the Commissioner; or*
  - (b) *a person authorised by the Minister.*
- (2) *The proceedings must be started within 6 months after the date on which the Commissioner first became aware of the commission of the offence.*

22. From 9 September 2014, section 215B of the Act provides:

- (1) *Civil proceedings in relation to an act done or omitted to be done by a person under this Act must be started within 6 months after the act was done or omitted to be done.*
- (2) *However, subsection (1) does not prevent a court exercising its jurisdiction under section 44 of the Limitation Act.*

### **Regulations**

23. Section 217 relevantly provides that the Administrator may make regulations, not inconsistent with the Act, prescribing matters:

- 23.1 required or permitted by the Act to be prescribed; or



- 23.2 necessary or convenient to be prescribed for carrying out or giving effect to the Act.

***Explanation of rights and responsibilities***

24. Section 150 of the Act provides:

- (1) *As soon as practicable after a youth is admitted to a detention centre, he or she must be given an explanation of the rules of the centre and his or her rights and responsibilities as a detainee.*
- (2) *The explanation must be given in a language and manner the youth is likely to understand, having regard to the youth's age, maturity, cultural background and English language skills.*
- (3) *Any action taken is not unlawful only because of a failure to comply with this section.*
- (4) *For subsection (1), an explanation of the rights and responsibilities of a detainee must include:*
  - (a) *information about the consequences of breaching the rules of the detention centre; and*
  - (b) *information about the procedure for making a complaint.*

***Determinations and rules***

25. Regulation 30 of the Regulations provides:

- (1) *The Commissioner or Superintendent may make a determination in relation to any of the following:*
  - (a) *the management and operation of a detention centre;*
  - (b) *the maintaining of order within a detention centre;*
  - (c) *a grievance or complaint of a detainee;*
  - (d) *the health, welfare, safe custody and protection of a detainee.*
- (2) *A determination may relate to the conduct of persons (whether detainees or other persons) within the detention centre.*

- (3) *The Superintendent must ensure a copy of a determination relating to conduct of detainees is given to each detainee on admission to the detention centre or as soon as practicable after admission.*

26. Regulation 31 of the Regulations provides:

- (1) *Determinations relating to conduct of detainees may be referred to as rules of the detention centre.*
- (2) *The Superintendent must ensure a copy of the rules is posted in a place or places where detainees can access them.*
- (3) *If a detainee is unable to read and understand the rules, a member of staff must explain them to the detainee in a language and manner the detainee is likely to understand, having regard to the detainee's age, maturity, cultural background and English language skills.*
- (4) *A breach of the rules by a detainee may result in disciplinary action.*
- (5) *If a determination is amended or a new determination is made, the Superintendent must ensure all detainees are made aware of any change to the rules.*

***Use of force, restraint, searches, isolation and detainees at risk of self-harm***

27. Substantive amendments of Part 8 of the Act, relating to the use of approved restraints on detainees of youth detention centres, commenced on 1 August 2016 (**1 August 2016 amendments**) and 1 March 2017 (**1 March 2017 amendments**).

28. The 1 August 2016 amendments permitted the appropriate use of approved restraints defined as follows:

28.1 “appropriate” in relation to the use of an approved restraint, means using the restraint (section 151AA):

- (a) in the least restrictive or invasive way reasonable in the circumstances;  
and
- (b) for the minimum amount of time reasonable in the circumstances;

28.2 “approved restraint” means a mechanical device for restricting the movement of detainees approved by the Commissioner for Corrective Services (sections 151AA and 151AB).

29. The 1 March 2017 amendments added the following to the definition of “appropriate” in s 151AA:

- (c) *[and] in accordance with a determination made by the Commissioner under the Regulations in relation to the use of approved restraint.*

30. The 1 March 2017 amendments redefined “approved restraint” in s 151AB as follows:

*Only the following are approved restraints:*

- (a) *handcuffs;*
- (b) *ankle cuffs;*
- (c) *waist restraining belts.*

31. Section 151 of the Act provides:

- (1) *The [Commissioner of Corrective Services] must appoint an employee, within the meaning of the Public Sector Employment and Management Act, to be the superintendent for a detention centre.*
- (2) *The superintendent of a detention centre is responsible, as far as practicable, for the physical, psychological and emotional welfare of detainees in the detention centre.*
- (3) *The superintendent of a detention centre:*
  - (a) *must promote programs to assist and organise activities of detainees to enhance their wellbeing; and*
  - (b) *must encourage the social development and improvement of the welfare of detainees; and*
  - (c) *must maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise; and*
  - (d) *is responsible for the maintenance and efficient conduct of the detention centre; and*
  - (e) *must supervise the health of detainees, including the provision of medical treatment and, where necessary, authorise the removal of a detainee to a hospital for medical treatment.*

32. Regulation 69 of the Regulations provides:

- (1) *The Superintendent must maintain a comprehensive case management system to assess each detainee's needs in relation to education, vocational training and rehabilitation.*

- (2) *The Superintendent must ensure an appropriate programme of productive activities that addresses the identified needs of the detainee is available to each detainee.*

33. Section 152 of the Act relevantly:

- 33.1 grants the superintendent the powers necessary or convenient for the performance of his or her functions (section 152(1));
- 33.2 from 1 August 2016, permits the superintendent, to protect a detainee from self-harm, or to protect the safety of another person, to:
- a) use appropriately an approved restraint on the detainee (section 152(1A)(a)); or
  - b) authorise the appropriate use of an approved restraint on the detainee (section 152(1A)(b)).

34. Section 153 of the Act:

- 34.1 obliges the superintendent of a detention centre to maintain discipline at the detention centre (section 153(1));
- 34.2 permits the superintendent to use the force that is reasonably necessary in the circumstances to maintain discipline (section 153(2));
- 34.3 before 1 August 2016, provided that reasonably necessary force did not include:
- (a) striking, shaking or other form of physical violence (section 153(3)(a));
  - (b) enforced dosing with a medicine, drug or other substance (section 153(3)(b)); or
  - (c) compulsion to remain in a constrained or fatiguing position (section 153(3)(c)); or
  - (d) handcuffing or use of similar devices to restrict normal movement (section 153(3)(d));
- 34.4 before 1 August 2016, provided that despite subsection 153(3)(d) the superintendent may use handcuffs or a similar device to restrain a detainee if the superintendent is of the opinion that (section 153(4)):
- (a) an emergency exists, and

- (b) a detainee should be temporarily restrained to protect the detainee from self-harm or to protect the safety of another person;

until the superintendent is satisfied the emergency situation no longer exists.

34.5 from 1 August 2016, provides that reasonably necessary force does not include (section 153(3)):

- (a) striking, shaking or other form of physical violence (section 153(3)(a));
- (b) enforced dosing with a medicine, drug or other substance (section 153(3)(b)); or
- (c) compulsion to remain in a constrained or fatiguing position (section 153(3)(c)); or
- (d) use of approved restraints to restrict normal movement (section 153(3)(d));

34.6 from 1 August 2016, provides that despite subsection 153(3)(d) the superintendent may use appropriately or authorise the appropriate use of an approved restraint on a detainee if the superintendent is of the opinion that (section 153(4)):

- (a) an emergency exists, or
- (b) restraining a detainee would reduce a risk to the good order or security of the detention centre.

34.7 permits the isolation of a detainee from other detainees in the following circumstances (section 153(5)):

- (a) if the superintendent is of the opinion that the detainee should be isolated to protect the safety of another person (section 153(5)(a)); or
- (b) if the superintendent is of the opinion that the detainee should be isolated for the good order or security of the detention centre (section 153(5)(b)); and
- (c) the period of isolation:
  - (i) does not exceed 24 hours; or
  - (ii) with the approval of the Commissioner of Corrective Services, does not exceed 72 hours.

35. Before 1 August 2016, section 155 of the Act provided:

*The superintendent of a detention centre may approve handcuffs or a similar device to restrain normal movement to be used when escorting a detainee outside the detention centre.*

36. From 1 August 2016, section 155 of the Act provides:

*When a detainee is being escorted, whether inside or outside a detention centre, the superintendent of the detention centre may:*

- (a) use appropriately an approved restraint on the detainee; or*
- (b) authorise the appropriate use of an approved restraint on the detainee.*

37. Regulation 70 of the Regulations provides:

- 37.1 a member of staff must manage incidents of misbehaviour in the manner the member considers most appropriate, having regard to all the circumstances, including the interests of the detainee or detainees involved and the rules of the detention centre (regulation 70(1));
- 37.2 a practice that is prohibited by the rules of the detention centre must not be used in the discipline or control of behaviour of detainees (regulation 70(2)).

38. Regulation 71 of the Regulations permits the use of physical force:

- 38.1 if it is necessary to physically restrain a detainee for the protection of the detainee, other detainees or other persons; and
- 38.2 the force used must not exceed force that is reasonable in the circumstances.

39. Regulation 72 of the Regulations prohibits the isolation of a detainee in a cell except under section 153(5) of the Act, and requires continuous monitoring of a detainee isolated in a cell and written observations at intervals not exceeding 15-minutes during the period of isolation.

40. Regulation 72(3) requires the superintendent to keep a journal recording the following particulars of isolation of a detainee:

- 40.1 the date and time a detainee is isolated;
- 40.2 the name of the detainee;
- 40.3 the reason why the detainee was isolated;

- 40.4 the time the on-call person in charge was notified and the name of that person;
  - 40.5 the observations of a member of staff at intervals not more than 15 minutes and the name of the person making the observation;
  - 40.6 the date and time of exercise periods and ablutions;
  - 40.7 details of any approval by the Commissioner for isolation exceeding 24 hours; and
  - 40.8 the date and time the detainee is released from the isolation cell.
41. Section 161 of the Act permits the superintendent of a detention centre to direct a detainee to submit to a search of his or her clothing and person, including a strip search, in the following circumstances:
- 41.1 if the superintendent believes on reasonable grounds that it is necessary in the interests of the security or good order of the detention centre (section 161(1)); or
  - 41.2 if the superintendent believes on reasonable grounds that a detainee may have a prohibited article in his or her possession (section 161(2)).
42. A search of a detainee must be conducted in accordance with the Regulations (section 161(3)).
43. Regulation 73 of the Regulations provides:
- 43.1 for section 161 of the Act, the Superintendent or a member of staff may search a detainee:
    - (a) when the detainee is admitted to the detention centre (reg 73(1)(a)); and
    - (b) on the detainee temporarily leaving, and returning to, the detention centre (reg 73(1)(b)); and
    - (c) on the detainee being transferred from the detention centre to a prison or another detention centre (reg 73(1)(c)); and
    - (d) on other occasions, and in the manner, directed by the superintendent as he or she considers necessary (reg 73(1)(d));
  - 43.2 the search must be conducted having regard to the detainee's dignity and self-respect (reg 73(2));

- 43.3 a member of staff may only search the detainee in the presence of another member of staff (reg 73(3));
- 43.4 if the search involves stripping the detainee of clothing, the search must be conducted by not less than 2 members of staff of the same gender as the detainee (reg 73(4));
- 43.5 a detainee must not be stripped of clothing and searched except by direction of the superintendent under s 161 of the Act (reg 73(5));
- 43.6 a detainee must not be stripped of clothing and searched (reg 73(6)):
- (a) in the sight or presence of a person of the opposite gender; or
  - (b) in the presence of another detainee, unless it is impracticable to move either the detainee to be stripped or the other detainee.
44. Regulation 74 of the Regulations requires the superintendent to maintain a search register and to record in the register the prescribed details of each search of a detainee or of a detainee's personal area or effects undertaken, including:
- 44.1 the name of the detainee;
  - 44.2 the names of the members of staff who carried out the search;
  - 44.3 the nature of the search, for example, the detainee's person, clothing or room;
  - 44.4 the date and time the search was carried out;
  - 44.5 the reason for the search;
  - 44.6 the results of the search.
45. Section 162 of the Act requires a superintendent to ensure that a detainee who is considered to be at risk of self-harm is dealt with in the manner prescribed in the Regulations.
46. Regulations 38 to 44 of the Regulations prescribe the manner in which a detainee who is considered to be at risk of self-harm is to be dealt with, including:
- 46.1 if a member of staff considers a detainee may be at risk of self-harm, the member of staff must (reg 41(1)):
    - (a) ensure the detainee is in view of a member of staff or a health professional at all times until:



- (i) the Emergency Management Protocol prepared under regulation 42 is implemented; or
    - (ii) an individual management plan for the particular detainee is implemented; and
  - (b) notify the superintendent or other person in charge of the detention centre at the time.
- 46.2 The superintendent or person in charge must immediately (reg 41(2)):
- (a) refer the detainee to a medical practitioner; and
  - (b) implement the Emergency Management Protocol or, if an individual management plan has been formulated for the particular detainee, that plan.
- 46.3 There must be an Emergency Management Protocol relating to the accommodation of detainees at risk of self-harm in an observation room and addressing the checking and furnishing of the observation room, the monitoring and recording of observations of the detainee, the clothing of the detainee and the provision of water and food (reg 42).
- 46.4 The superintendent must ensure the Emergency Management Protocol is implemented and maintained until an individual management plan is formulated for the detainee (reg 42(4)).
- 46.5 An Emergency Management Protocol yields to an individual management plan (reg 42(5)).
- 46.6 Regulation 43 of the Regulations requires a medical practitioner who assesses a detainee to be at risk of self-harm to formulate and document a culturally appropriate individual management plan in consultation with people who have relevant knowledge of the detainee and people who are likely to play a key role in the management of the detainee.
- 46.7 Regulation 43(4) of the Regulations requires that an individual management plan is updated as appropriate each time a health professional has contact with the detainee.
- 46.8 Regulation 44(1) of the Regulations provides that a detainee's 'at-risk status' may only be cancelled on the recommendation of a medical practitioner given after consultation with the Superintendent or an authorised member of staff.

- 46.9 Regulation 44(2) of the Regulations requires that the formerly at-risk detainee be given appropriate follow up attention by a medical practitioner or other appropriate health professional.

***Record keeping***

47. In addition to the matters referred to in paragraphs 40 and 44, the Act and Regulations require the following records to be kept:
- 47.1 Section 158 of the Act and regulation 33 of the Regulations requires the superintendent to keep a register containing particulars of every detainee in the detention centre.
- 47.2 From 1 August 2016, s 158A of the Act required the superintendent to keep a register containing particulars of the use of approved restraints.
- 47.3 Regulation 36 of the Regulations requires the superintendent to make an inventory of all property in the possession of a detainee when admitted to the detention centre.
- 47.4 Regulation 45 requires the superintendent to keep a visitor's book recording particulars of each person visiting a detainee at the detention centre.
- 47.5 Regulation 67 requires the superintendent to maintain a complaints register containing particulars of every complaint made by or on behalf of a detainee.

**III. DETERMINATIONS**

48. From time to time in the relevant period, the commissioner and/or the superintendent made determinations within the meaning of regulation 30 of the Regulations, usually entitled "directives", relating to various subjects including:

- 48.1 Operating procedures for youth detention centres;

***Particulars***

- a) *"Youth Detention and Remand Centres Procedures and Instructions"*.
- b) *Variations, amendments and supplements to the Youth Detention and Remand Centres Procedures and Instructions, issued from time to time.*

- c) *The applicants will provide further and better particulars of the date of issue and the details of relevant variations, amendments and supplements to the Youth Detention and Remand Procedures and Instructions following discovery and/or interrogatories.*

48.2 Use of force;

**Particulars**

- a) *Directive 3.2.2, "Use of Force", issued on 29 June 2015, replacement editions of Directive 3.2.2 issued on 1 January 2016, and 9 September 2016.*
- b) *The applicants will provide further and better particulars of the date of issue and the details of other relevant determinations relating to the use of force and relevant amendments to determinations relating to the use of force following discovery and/or interrogatories.*

48.3 Handcuffing or other restraint;

**Particulars**

- a) *Directive 3.1.5, "Handcuffing Detainees for Escort Purposes", issued 8 May 2012.*
- b) *Directive 3.1.6, "Use of Restraints", issued on 6 May 2015.*
- c) *Directive 3.2.1, "Use of Restraints", issued on 29 June 2015, replacement editions issued on 1 January 2016, 1 July 2016 and 30 November 2016.*
- d) *Directive 3.2.4, "Escorts", issued in January 2016.*
- e) *Directive 4.1.4, "High Security Unit Procedure DWN", issued on 1 January 2016.*
- f) *The applicants will provide further and better particulars of the date of issue of other relevant determinations relating to handcuffing or other restraint and the details of relevant amendments to determinations relating to handcuffing or other restraint following discovery and/or interrogatories.*

## 48.4 Searches;

**Particulars**

- a) *Standard Operating Procedure number: 9.4, "Detention Centre Searches", issued on 15 August 2013.*
- b) *Directive 3.2.6, "Searches", issued on 29 June 2015, replacement edition issued 9 June 2016.*
- c) *The applicants will provide further and better particulars of the date of issue and the details of relevant amendments to determinations relating to searches following discovery and/or interrogatories.*

48.5 Intensive Management Plans (**IMP**) or Individual Intensive Management Plans (**IIMP**) for detainees;**Particulars**

- a) *Directive 2.4.5, "Intensive Management Plan", issued on 14 November 2008, replacement edition issued 31 August 2011.*
- b) *Directive 3.4.2, "Individual Intensive Management Plans", issued on 29 June 2015.*
- c) *The applicants will provide further and better particulars of the date of issue and the details of relevant amendments to determinations relating to Intensive Management Plans and Individual Intensive Management Plans following discovery and/or interrogatories.*

## 48.6 Management of Swearing and Abusive Language.

**Particulars**

- a) *Memo from the Assistant General Manager, Juvenile Detention, "Management of swearing and abusive language by detainees", issued on 13 May 2010.*
- b) *Memo from the Assistant General Manager of Juvenile Detention, "Management of Swearing and Abusive Language", issued on 19 March 2012.*
- c) *The applicants will provide further and better particulars of the date of issue and the details of other relevant determinations relating to*

*the management of swearing and abusive language following discovery and/or interrogatories.*

48.7 Incident reporting and recording.

**Particulars**

*Relevant directives relating to incident reporting and recording are pleaded and particularised in paragraph 54.5.*

49. The use of force directives referred to in paragraph 48.2 included the requirements:

49.1 That force be used in detention centres as a last resort in the course of the following hierarchy of response:

- (a) Option 1: negotiation through verbal persuasion;
- (b) Option 2: change the officers dealing with the incident;
- (c) Option 3: refer to the senior officer in charge;
- (d) Option 4: low level physical control;
- (e) Option 5: assistance from the Critical Response Team.

49.2 That use of force be limited to the minimum amount necessary.

50. The effects of the restraint directives referred to in paragraph 48.3 included the following:

50.1 Directive 3.1.5 related to use of handcuffs for external escorts.

50.2 Directive 3.1.6 purported to authorise, without reference to the limitations in sections 153(4) and 155 of the Act:

- (a) the use of the following “approved” restraint devices:
  - (i) Key locking handcuffs and ankle cuffs;
  - (ii) Combination Sets – chain linked waist/hand/ankle and hand/ankle;
  - (iii) Waist restraining belt - leather/or other suitable material, handcuffs attached to belt, provision to attach ankle cuffs and lead strap;

- (iv) Restraint equipment – Velcro locking combination of individual sets - single/double hand/ankle restraints, and waist/hand/ankle/lead strap sets;
  - (v) Emergency Restraint Equipment – Emergency Restraint Chair.
- (b) The use of handcuffs for internal escort within detention centres with authorisation and to exempt such use from the requirement of recording in the Use of Restraints Register or reporting in the Integrated Offender Management System (**IOMS**).
- (c) Exempted use of handcuffs when the detainee is an inpatient in hospital or another medical clinic from the requirement of recording in the Use of Restraints Register or reporting in the IOMS.
- (d) Stipulated that handcuffs be applied with the arms together in front of the body of the detainee.
- (e) Stipulated that restraints were not to be applied as punishment.
- (f) Required restraints to be applied humanely in a manner that causes minimum discomfort.
- 50.3 The 29 June 2015 edition of directive 3.2.1 purported to authorise, without reference to the limits in sections 153(4) and 155 of the Act the use of restraints in substantially similar terms to directive 3.1.6.
- 50.4 The January 2016 edition of directive 3.2.1 made reference to the limits in sections 153(4) and 155 of the Act and purported to define ankle cuffs and waist restraining belts as “other similar devices” to handcuffs.
- 50.5 The August 2016 edition of directive 3.2.1 made reference to the limits in the provisions of the Act relating to handcuffs and approved restraints that commenced on 1 August 2016 and provided, among other things:
- (a) Only staff members in detention centres who have satisfactorily completed the nationally recognised training in de-escalation techniques and use of restraints will be authorised to use approved restraints;
  - (b) Approved restraints must not be used as punishment;

- (c) Use of restraint is a last resort after all other less restrictive options and techniques have been ineffective in controlling or defusing the situation or assisting the detainee to de-escalate his or her behaviour.
- (d) An approved restraint must be applied:
  - (i) as humanely as possible;
  - (ii) with minimum discomfort to the detainee;
  - (iii) in a manner which respects the dignity of the detainee;
  - (iv) for the minimum period of time reasonable in the circumstances; and
  - (v) to accord with the *United Nations Convention on the Rights of the Child*, while still meeting the duty of care obligations of the Northern Territory Department of Correctional Services.

51. The effect of the search directives referred to in paragraph 48.4 was to purport to authorise searches of the person and property of detainees by members of staff without reference to the requirement in s 161 that search be made by direction of the superintendent based on the superintendent's belief, on reasonable grounds, of the matter in s 161(1) or the matter in s 161(2).

52. The effect of Directive 2.4.5 referred to in paragraph 48.5(a) was to purport to authorise the isolation of detainees for behaviour management purposes pursuant to IMPs without reference to the limitations on the isolation of detainees contained in sub-section 153(5) of the Act and regulation 72(1) of the Regulations.

#### **Particulars**

- a) *The applicants refer to each edition of Directive 2.4.5 for its complete terms and effect.*
- b) *Directive 2.4.5 does not refer to the limits to the reasons for isolation contained in sub-sections 153(5)(a) and (b) of the Act.*
- c) *Directive 2.4.5 does not refer to the requirement in sub-section 153(5) that the superintendent have the opinion that the detainee should be isolated from other detainees for one of the reasons in sub-sections 153(5)(a) and (b) of the Act.*

- d) *Directive 2.4.5 does not refer to the limits to the length of the isolation of detainees in sub-section 153(5).*

53. The effect of Directive 3.4.2 referred to in paragraph 48.5(b) was to purport to authorise the isolation of detainees for behaviour management purposes pursuant to IIMPs without reference to the limitations on the isolation of detainees contained in sub-section 153(5) of the Act and regulation 72(1) of the Regulations.

**Particulars**

- a) *The applicants refer to Directive 3.4.2 for its complete terms and effect.*
- b) *Directive 3.4.2 does not refer to the limits to the reasons for isolation in sub-sections 153(5)(a) and (b) of the Act.*
- c) *Directive 3.4.2 does not refer to the requirement in sub-section 153(5) that the superintendent have the opinion that the detainee should be isolated from other detainees for one of the reasons in sub-sections 153(5)(a) and (b) of the Act.*
- d) *Directive 3.4.2 does not refer to the limits to the length of the isolation of detainees in sub-section 153(5).*

**Record keeping determinations**

54. From time to time in the relevant period, the commissioner and/or the superintendent made determinations within the meaning of regulation 30 of the Regulations which required the making and keeping of records on the matters the subject of the determination, including the following:

54.1 Use of force;

**Particulars**

- a) *The Use of Force directives referred to in paragraph 48.2, required:*
- i) *The maintenance of a register of incidents involving the use of force;*
- ii) *Details of each incident involving the use of force to be recorded in the register including the following:*
- (1) *Names of the officer(s) and detainee(s) involved;*
- (2) *Date and time of incident;*



- (3) *Nature of force used;*
  - (4) *Details of any injury and medical attention to any officer, detainee or other person; and*
  - (5) *An account of the event leading to the use of force and reasons for its use.*
- iii) *Visual recording using video-recording equipment of:*
- (1) *All cell extractions;*
  - (2) *All incidents where violence by the detainee is anticipated.*
  - (3) *From 1 January 2016, incidents that involve the removal of a detainee's clothes.*
- b) *The applicants will provide further and better particulars of determinations relating to the making of records of use of force following discovery and/or interrogatories.*

54.2 Handcuffing or other restraint;

**Particulars**

- a) *Directive 3.1.5, "Handcuffing Detainees for Escort Purposes", referred to in paragraph 48.3(a) required completion of the handcuff register for each use of restraints.*
- b) *Directive 3.1.6, "Use of Restraints", referred to in paragraph 48.3(b), required incidents involving the use of restraints to be recorded in the restraints register.*
- c) *Directive 3.2.1, "Use of Restraints", referred to in paragraph 48.3(c), required incidents involving the use of restraints to be recorded in the restraints register.*
- d) *The applicants will provide further and better particulars of determinations relating the making of records of the use of handcuffing or other restraint following discovery and/or interrogatories.*

## 54.3 Searches;

**Particulars**

- a) *Standard Operating Procedure number: 9.4, “referred to in paragraph 48.4, required records of searches of the detention centre including:*
- i) Date and description of areas searched;*
  - ii) Articles of contraband found;*
  - iii) Name of detainee if applicable;*
  - iv) Complaints if any raised by detainees regarding the conduct of the search;*
  - v) Discoveries of any tampering with, or damage to detention centre property.*
- b) *The applicants will provide further and better particulars of determinations relating to the making of records of searches following discovery and/or interrogatories.*

54.4 Intensive Management Plans (**IMP**) or Individual Intensive Management Plans (**IIMP**) for detainees;**Particulars**

- a) *Directive 2.4.5, “Intensive Management Plan”, referred to in paragraph 48.5(a) required employees to compile an IMP, which must be clearly defined and record the risk behaviours that need to be addressed and the reasons for alternative management and include, where applicable, details of:*
- i) Duration;*
  - ii) Behavioural standards to be achieved and maintained;*
  - iii) Recommendations for participation in interventions;*
  - iv) Accommodation requirements;*
  - v) Property the detainee is approved or prohibited to have;*
  - vi) Provision of meals;*

- vii) *Internal movement;*
  - viii) *External movement;*
  - ix) *Visits;*
  - x) *Health care;*
  - xi) *Telephone access; and*
  - xii) *Consequences of non-compliance.*
- b) *Directive 3.4.2, "Individual Intensive Management Plans", referred to in paragraph 48.5(b), required officers to compile an IIMP, which had the same requirements for recording of information as those required by Directive 2.4.5 for IMPs particularised in sub-paragraph 54.4(a).*

54.5 Incident reporting and recording.

**Particulars**

- a) *Directive number 1.7.6, "Incident Reporting and Recording", issued 31 March 2008, required all employees who were a witness to and/or involved in an incident to provide a written report to the superintendent before the completion of rostered duty.*
- b) *Directive number 3.1.1, "Incident Reporting and Recording – Youth Justice", issued 14 July 2015 replaced directive number 1.7.6 and required all employees directly or indirectly involved in notifiable incidents to provide a written report to the superintendent before the completion of rostered duty or within a timeframe approved by the superintendent.*
- c) *Standard Operating Procedure 9.1.01, "Assault Reporting Procedures", issued 7 January 2013 required the following steps to be taken when (a) a detainee complains to a member of staff that another detainee has assaulted him or her, or (b) when a member of staff complains that a detainee has assaulted him or her:*
  - i) *Photographs of injuries;*
  - ii) *Download of CCTV footage and maintenance of three DVD copies of footage of the incident;*

- iii) *Collection of IOMS (Integrated Offender Management System) reports from each member of staff involved.*
- d) *Standard Operating procedure 9.1.01, "Assault Reporting Procedures", issued 7 January 2013 requires, when a detainee alleges that a member of staff has assaulted him or her, the same steps as items (i), and (iii) of the particulars in sub-paragraph 54.5(c) but does not require the immediate downloading and maintenance of copies of CCTV footage of the incident.*
- e) *The applicants will provide further and better particulars of determinations relating to incident reporting and recording following discovery and/or interrogatories.*

54.6 Visual recording requirements.

**Particulars**

- a) *Standard Operating Procedure Number 002, Detainee BMU Placement, issued 2 November 2012, required video recording of the whole process of the movement of a detainee into the Behaviour Management Unit (BMU) including the following details to be stated by the member of staff making the recording:*
  - i) *The name of the person recording;*
  - ii) *The time, date and location;*
  - iii) *The name of the detainee(s) being recorded;*
  - iv) *A brief description of the incident taking place.*
- b) *Directive 3.2.2, "Use of Force", as described in particulars 54.1(a)(iii).*
- c) *The applicants will provide further and better particulars of determinations relating to visual recording requirements following discovery and/or interrogatories.*

54.7 Records of isolation.

**Particulars**

- a) *Memo from the General Manager of Juvenile Detention to Shift Supervisors and Senior Youth Workers at Don Dale, OIC, Alice*

*Springs issued 22 September 2011 replacing section 10.3.9 - 11 of the Procedures and Instructions Manual requiring written records to be made of the following:*

- i) In all cases where an isolation cell placement to a maximum of 24 hours is to extend through the night the relevant staff member is to complete an Officers Report detailing the management plan to include:
    - (1) Details of contact with the senior case worker or on-call manager;*
    - (2) The approved maximum time for isolation;*
    - (3) Any other details relevant to the particular detainee or episode including strategies to overcome the emergency management situation and future management of the detainee.**
  - ii) In all cases where an isolation cell placement is approved beyond 24 hours to a maximum of 72 hours, the relevant staff member is to attach a further Officers Report recording details of Director approval for the extension beyond 24 hours and any agreed changes to the management plan.*
- b) Standard Operating Procedure 5.2.4, "De-escalation rooms", Darwin Specific Procedure, DWN 4.3, issued November 2015 and amended in January 2016 requires:*
- i) The keeping of a detailed de-escalation journal for any detainee on a placement in a de-escalation room including:
    - (1) The information required to be recorded pursuant to regulations 72(2) and (3) of the Regulations; and*
    - (2) All activities and all decisions made in regard to a detainee's access to activities.**
  - ii) An incident report in IOMS must be completed upon commencement of the original placement of the detainee in the de-escalation room;*

- iii) *For placements extended beyond 24 hours the shift supervisor is to attach a further report to the original incident in IOMS with details of the Commissioner's approval for the extension and any agreed changes to the management plan.*
- c) *The applicants will provide further and better particulars of determinations relating to recording of matters for detainees in isolation following discovery and/or interrogatories.*

54.8 High security detainees.

**Particulars**

- a) *Directive number 3.4.1, "High Security Detainees", issued 29 June 2015 requires a record to be made in the appropriate journal of:*
  - i) *Significant events, which may include medical attention, shower, exercise, meals and any behaviour warranting officer intervention;*
  - ii) *Any time a detainee is denied any usually authorised item or activity.*
- b) *The applicants will provide further and better particulars of determinations relating to recording of matters relating to high security detainees following discovery and/or interrogatories.*

54.9 Isolation cell and room placements for swearing and abusive language.

**Particulars**

- a) *Memo from the Assistant General Manager, Juvenile Detention, "Management of swearing and abusive language by detainees", issued on 13 May 2010, which mandated room placements, security lounge placements or cell placements for detainees using foul or abusive language, required:*
  - i) *Placements to be recorded; and*
  - ii) *A case note regarding each instance; and*
  - iii) *In instances involving a security lounge placement or cell placements, a record in the security unit journal*

b) *Memo from the Assistant General Manager of Juvenile Detention, "Management of Swearing and Abusive Language", issued on 19 March 2012, which mandated BMU placements for detainees using foul or abusive language, required:*

- i) *An incident report stating the exact verbal abuse that the detainee has threatened or stated; and*
- ii) *A full BMU placement journal started for each offence, regardless of the duration.*

#### **IV. RESIDUAL LIBERTY**

55. At all times while the applicants and Group Members were lawfully in detention in youth detention centres, they retained a right to residual liberty being the right to enjoy all civil liberties that were not taken away expressly or by necessary implication by the lawful terms of their detention.

56. By reason of the matters in paragraph 55, each of the following circumstances constitutes wrongful imprisonment of a detainee:

56.1 The isolation of the detainee from other detainees unless the superintendent holds, or continues to hold, on reasonable grounds, one of the opinions referred to in section 153(5)(a) or section 153(5)(b) of the Act.

56.2 The isolation of the detainee from other detainees for more than 24 hours without the approval of the Commissioner of Corrective Services contrary to section 153(5) of the Act.

56.3 The isolation of the detainee from other detainees for more than 72 hours contrary to section 153(5) of the Act.

56.4 The use of a restraint that compels the detainee to remain in a constrained or fatiguing position and confined within an area delimited by the commissioner, superintendent or a member of staff contrary to section 153(3)(c) of the Act.

56.5 Before 1 August 2016, the use of a restraint on the detainee that restricted normal movement and confined the detainee within an area delimited by the commissioner, superintendent or a member of staff unless:

- (a) The superintendent held or continued to hold, on reasonable grounds, both of the opinions referred to in section 153(4)(a) and (b) of the Act; and

- (b) The device used to restrain the detainee was handcuffs or a similar device.
- 56.6 From 1 August 2016, the use of a restraint on the detainee that restricts normal movement and confines the detainee within an area delimited by the commissioner, superintendent or a member of staff, unless:
  - (a) The superintendent holds or continues to hold, on reasonable grounds, one of the opinions referred to in section 153(4) of the Act; and
  - (b) Either:
    - (i) The superintendent was using appropriately an approved restraint on the detainee as permitted by section 153(4)(a);  
or
    - (ii) The superintendent has authorised the appropriate use of the relevant approved restraint on the detainee as permitted by section 153(4)(b).
- 56.7 From 1 August 2016, the use of a restraint on the detainee that is not approved and confines the detainee within an area delimited by the commissioner, superintendent or a member of staff contrary to sections 153(4) and 151AB of the Act.
- 56.8 From 1 August 2016, the inappropriate use of an approved restraint on the detainee that confines the detainee within an area delimited by the commissioner, superintendent or a member of staff contrary to sections 153(4) and 151AB of the Act.
- 56.9 Isolation of a detainee under an IMP under directive 2.4.5 referred to in paragraph 52 unless section 153(5) of the Act had been complied with in full.
- 56.10 Isolation of a detainee under an IIMP under directive 3.4.2 referred to in paragraph 53 unless section 153(5) of the Act had been complied with in full.

## **V. BATTERY AND/OR ASSAULT**

- 57. By reason of the matters in paragraphs 34 to 36 and 41 to 43, each of the following circumstances constitutes battery of a detainee:
  - 57.1 The use of more than reasonably necessary force on a detainee contrary to section 153(2) of the Act;



- 57.2 Striking, shaking or using other forms of physical violence on the detainee contrary to section 153(3)(a) of the Act;
- 57.3 The enforced dosing with a medicine, drug or other substance, including the use of tear gas, pepper spray, capsicum spray and/or similar substances on the detainee contrary to sections 153(2) and 153(3)(b) of the Act;
- 57.4 The use of a dog to control the detainee contrary to section 153(2) of the Act;
- 57.5 The use of a restraint that compels the detainee to remain in a constrained or fatiguing position contrary to section 153(3)(c) of the Act;
- 57.6 The use of a restraint on the detainee that restricts normal movement unless:
- (a) Before 1 August 2016, the superintendent held or continued to hold, on reasonable grounds, both of the opinions referred to in section 153(4)(a) and (b); or
  - (b) From 1 August 2016, the superintendent holds or continues to hold, on reasonable grounds one of the opinions referred to in section 153(4) of the Act; or
  - (c) Before 1 August 2016, the detainee was being escorted outside the youth detention centre and the restraint device used was handcuffs or a similar device approved by the superintendent to restrain normal movement in those circumstances; or
  - (d) From 1 August 2016, the detainee was being escorted inside or outside the youth detention centre and:
    - (i) The superintendent was using appropriately an approved restraint on the detainee; or
    - (ii) The superintendent has authorised the appropriate use of an the relevant approved restraint on the detainee;
- 57.7 Before 1 August 2016, the use of a restraint on a detainee that was not handcuffs or a similar device on the detainee, including the use of ankle cuffs, waist belts and other devices referred to in directive 3.1.6 referred to in paragraph 50.2, contrary to section 153(4) of the Act;
- 57.8 From 1 August 2016, the use of a restraint on the detainee that is not approved contrary to sections 151AB, 153(3) and 153(4) of the Act;

- 57.9 From 1 August 2016, the use that is not appropriate of an approved restraint on the detainee contrary to sections 151AA and 153(4) of the Act;
- 57.10 A search of the detainee that involves physical contact with the person of the detainee in circumstances not authorised by section 161 of the Act, including a search purportedly in compliance with regulation 73(1) of the Regulations, to the extent that regulation 73 is inconsistent with section 161 of the Act;
- 57.11 A search of the detainee that involves physical contact with the person of the detainee in circumstances not authorised by section 161 of the Act, including a search purportedly in compliance with the directives referred to in paragraph 48 to the extent that the directives are inconsistent with s 161 of the Act; and
- 57.12 A search of the detainee that involves physical contact with the person of the detainee conducted in a manner that is not in accordance with the Regulations.
58. By reason of the matters in paragraphs 34 to 43 conduct of a superintendent or a member of staff of a youth detention centre that caused a detainee to apprehend that the superintendent or member of staff might make or cause physical contact with the detainee in the circumstances set out in subparagraphs 57.1 to 57.12 above constitutes assault of the detainee.
59. By reason of the matters in paragraphs 34 to 43 conduct of a superintendent or a member of staff of a youth detention centre that caused a detainee to apprehend that the superintendent or member of staff might make or cause physical contact with a detainee in the following circumstances constitute assault of the detainee:
- 59.1 Search of the detainee that involves the detainee being stripped of his or her clothing in circumstances not authorised by section 161 of the Act, including:
- (a) A search purportedly in compliance with regulation 73 of the Regulations, to the extent that regulation 73 is inconsistent with section 161 of the Act; and
  - (b) A search purportedly in compliance with the directives referred to in paragraph 48 to the extent that the directives are inconsistent with s 161 of the Act; and
- 59.2 Search of the detainee that involves the detainee being stripped of his or her clothing, conducted in a manner that is not in accordance with the Regulations.

**VI. FIRST APPLICANT'S INDIVIDUAL TORT CLAIMS**

60. In or about April 2016:

- 60.1 a number of members of staff threatened to spray tear gas in the first applicant's room in the High Security Unit (**HSU**) at New Don Dale;
- 60.2 entered the first applicant's room;
- 60.3 pushed the first applicant to the floor;
- 60.4 punched the first applicant twice to the back of his head, causing his face to strike the floor of the cell forcefully;
- 60.5 handcuffed the first applicant's hands behind his back; and
- 60.6 took hold of the first applicant.

***Particulars of matters in paragraph 60***

- a) *The respondent was obliged to keep records of incidents of this kind pursuant to the matters referred to in paragraphs 54.1 and 54.2. Accordingly, the details of this incident are better known to the respondent than to the first applicant.*
- b) *The first applicant will provide further and better particulars of the date, the personnel involved and other necessary particulars following discovery and/or interrogatories.*

61. Immediately following the matters described in paragraph 60:

- 61.1 the members of staff dragged the first applicant from the room;
- 61.2 while one of the members of staff forcefully pushed the first applicant's handcuffed arms up behind the first applicant's back.

62. Immediately following the matters described in paragraph 61 the members of staff:

- 62.1 dragged the first applicant into cell number 18, which had no closed circuit television monitoring;
- 62.2 one of the members of staff grabbed hold of the first applicant's throat;
- 62.3 forced the first applicant to the floor; and
- 62.4 kicked the first applicant in the ribs.

63. Immediately following the matters described in paragraph 62, a number of members of staff entered the cell carrying batons and shields and struck the first applicant with batons and shields.
64. Immediately following the matters in paragraph 63:
- 64.1 One of the members of staff tried to strip the first applicant of his clothing;
  - 64.2 The first applicant resisted being stripped of his clothing;
  - 64.3 One of the members of staff held the first applicant down on the floor;
  - 64.4 Several other members of staff stripped the first applicant of his clothes except his underpants;
  - 64.5 Members of staff removed the mattress and bedding from the cell;
  - 64.6 The members of staff locked the first applicant in the cell;
  - 64.7 The members of staff left the first applicant in his cell with no clothing, no mattress and no bedding overnight;
  - 64.8 The first applicant lay on the bare concrete bench overnight; and
  - 64.9 It was not until the following morning that a member of staff brought the first applicant a pair of shorts and a shirt to wear.
65. In the course of the incidents described in paragraphs 60 to 64, the members of staff assaulted and/or battered the first applicant.

**Particulars**

- a) *The first applicant had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre;*
- b) *The members of staff handcuffed the first applicant in circumstances where the superintendent did not hold the opinions required by s 153(4) of the Act and/or had not authorised the use of handcuffs;*
- c) *The members of staff struck and used other forms of physical violence on the first applicant contrary to section 153(3)(a) of the Act;*
- d) *The handcuffing of the first applicant with his hands behind his back compelled him to remain in a constrained and fatiguing position contrary to section 153(3)(c) of the Act;*

- e) *The first applicant suffered physical contact to his body by numerous members of staff of the detention centre numerous times;*
- f) *The first applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre;*
- g) *The members of staff used force that was not reasonably necessary contrary to section 153(2) of the Act;*
- h) *The members of staff did not comply with the requirements of the use of force directive referred to in paragraph 49;*
- i) *Further particulars may be provided following discovery and/or interrogatories.*

66. Immediately following the incidents referred to in paragraphs 60 to 64, the first applicant was isolated in a cell in the HSU for two days and was not permitted out of the cell at any time during that period.

67. The isolation of the first applicant described in paragraph 66 was unlawful.

#### **Particulars**

- a) *The superintendent did not hold the opinions required by s 153(5) of the Act.*
- b) *The isolation of the first applicant for more than 24 hours had not been approved by the commissioner, contrary to section 153(5) of the Act.*
- c) *The isolation of the first applicant infringed the residual liberty of the first applicant.*
- d) *Further particulars may be provided following discovery/or interrogatories.*

68. In addition to the occasion referred to in paragraphs 66 and 67, on several other occasions during his periods in a youth detention centre, the first applicant was kept isolated from other detainees, either:

68.1 Purportedly under s 153(5) of the Act;

68.2 Pursuant to Intensive Management Plans or Individual Intensive Management Plans imposed on the first applicant by the superintendent and/or members of staff of New Don Dale pursuant to Directives 2.4.5 and 3.4.2 referred to in paragraphs 52 and 53;

68.3 Lockdowns for management reasons;

68.4 As punishment;

68.5 In the course of regimes applied to detainees held in the HSU.

**Particulars of matters in paragraph 68**

- a) *The respondent was obliged to keep records of incidents of isolation of all detainees including the first applicant pursuant to the matters referred to in paragraph 40.*
- b) *The respondent was obliged to keep records of Intensive Management Plans and Individual Intensive Management Plans of all detainees, including the first applicant, pursuant to the matters referred to in paragraphs 54.4.*
- c) *The respondent was obliged to keep records of incidents pursuant to the matters referred to in paragraph 54.5 and of significant events for detainees in the HSU pursuant to the matters in paragraph 54.8.*
- d) *Accordingly, the details of periods and circumstances in which the first applicant was kept isolated from other detainees are better known to the respondent than to the first applicant.*
- e) *The first applicant will provide further and better particulars of the dates, the personnel involved and other necessary particulars of the isolation of the first applicant following discovery and/or interrogatories.*

69. The isolation of the first applicant described in paragraph 68 was unlawful.

**Particulars**

- a) *During the periods in which the first applicant was isolated from other detainees, pursuant to an isolation placement in purported reliance on s 153(5) or under an IMP or IIMP:*
  - i) *He was confined in a cell for periods exceeding 23 hours;*
  - ii) *He was usually only allowed out of the cell once in every 24 hour period to permit him to have a shower and a period of between 15 minutes and 1 hour of recreation in the recreation area of the HSU; and*
  - iii) *The recreation area of the HSU was enclosed and locked apart from the rest of the youth detention centre.*

- b) *The matters referred in particulars (a)(ii) and (a)(iii) were a continuation of and not a break from isolation*
- c) *The superintendent did not hold the opinions required by s 153(5) of the Act.*
- d) *On the occasions on which the first applicant was isolated for periods exceeding 24 hours, the isolation of the first applicant had not been approved by the commissioner contrary to section 153(5) of the Act.*
- e) *The isolation of the first applicant under IMPs or IIMPs was contrary to the requirements of section 153(5) of the Act.*
- f) *Periods of confinement in a cell for punishment or management purposes for periods shorter than 24 hours were not authorised by s153(5) of the Act because the superintendent did not hold the opinions required by s 153(5).*
- g) *The isolation of the first applicant in the circumstances described in particulars 69(a) to 69(f) infringed the residual liberty of the first applicant.*
- h) *Further particulars will be provided following discovery and/or interrogatories.*

70. By reason of the matters in paragraphs 55 and 56 and 66 to 69, the respondent falsely imprisoned the first applicant.

71. In or about July 2016, the first applicant was in a cell in the HSU and four or five members of staff of New Don Dale:

71.1 entered the cell;

71.2 picked the first applicant up and dropped him head first to the floor;

71.3 restrained the first applicant in handcuffs behind his back;

71.4 pushed and kicked the first applicant in his back while he was on the floor in handcuffs; and

71.5 dragged the first applicant to an isolation cell.

#### **Particulars**

- a) *The respondent was obliged to keep records of incidents of this kind pursuant to the matters referred to in paragraphs 54.1, 54.2, 54.5,*

*and 54.6. Accordingly, the details of this incident are better known to the respondent than to the first applicant.*

- b) The first applicant will provide further and better particulars of the date, the personnel involved and other necessary particulars following discovery and/or interrogatories.*

72. In the course of the incident described in paragraph 71, the members of staff assaulted and/or battered the first applicant.

**Particulars**

- a) The first applicant had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre.*
- b) The members of staff handcuffed the first applicant in circumstances where the superintendent did not hold the opinions required by s 153(4) of the Act and/or had not authorised the use of handcuffs.*
- c) The first applicant suffered physical contact to his body by numerous members of staff of the detention centre numerous times.*
- d) The first applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre.*
- e) The members of staff used force that was not reasonably necessary.*
- f) The members of staff struck and used other forms of physical violence on the first applicant contrary to section 153(3)(a).*
- g) Further particulars may be provided following discovery and/or interrogatories.*

73. On several occasions during his periods in a youth detention centre, the first applicant was handcuffed while remaining inside the youth detention centre.

**Particulars**

- a) The respondent was obliged to keep records of use of restraint pursuant to the matters referred to in paragraphs 47.2 and 54.2. Accordingly, the details of the handcuffing of the first applicant are better known to the respondent than to the first applicant.*



- b) *The first applicant will provide further and better particulars of the date, the circumstances and other necessary particulars following discovery and/or interrogatories.*

74. On each occasion referred to in paragraph 73 the superintendent or members of staff of the youth detention centre assaulted and battered the first applicant.

**Particulars**

- a) *On each occasion before 1 August 2016 referred to in paragraph 74, the handcuffing of the first applicant was unlawful as follows:*
- i) *It was contrary to section 155 of the Act; or, alternatively,*
  - ii) *The superintendent did not hold the opinions required by s 153(4) of the Act; or, alternatively,*
  - iii) *The superintendent had not authorised the use of handcuffs.*
- b) *On each occasion from 1 August 2016, the superintendent did not hold the opinions required by s 153(4) of the Act.*
- c) *On each occasion, the first applicant had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre, when he was instructed by members of staff to submit to handcuffing.*
- d) *The first applicant suffered physical contact to his body by members of staff of the detention centre on each occasion when he was placed in handcuffs and on each occasion when the handcuffs were removed.*
- e) *On each occasion, the first applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre when he was subjected to handcuffing.*
- f) *On each occasion, the first applicant submitted to handcuffing out of fear that he would be subjected to physical force by members of staff if he did not submit.*
- g) *Further particulars may be provided following discovery and/or interrogatories*

75. On several occasions during his periods in a youth detention centre, the first applicant was subjected to search of his clothing and person, including a strip search, including:
- 75.1 On admission to the youth detention centre;
  - 75.2 Before placement in isolation;
  - 75.3 Before placement in the HSU;
  - 75.4 Before departure from the youth detention centre for a temporary absence, under escort, to attend a medical or dental appointment or to appear in court;
  - 75.5 On return to the youth detention centre from a temporary absence, under escort, to attend a medical or dental appointment or to appear in court;
  - 75.6 On some occasions, when returning to an isolation cell from the recreation area;
  - 75.7 On some occasions, when the first applicant was detained in the HSU, on return to his cell from the recreation area of the HSU;
  - 75.8 On some occasions, when he was in the HSU but not in the isolation cells, for no apparent reason;
  - 75.9 Following visits from a friend or family member at the youth detention centre;
  - 75.10 On other occasions at random for no apparent reason.

***Particulars of matters in paragraph 75***

- a) *The respondent was obliged to keep records of search pursuant to regulation 74. Accordingly, the details of personal searches of the first applicant are better known to the respondent than to the first applicant.*
- b) *The first applicant will provide further and better particulars of the date, the circumstances and other necessary particulars of personal searches of the first applicant following discovery and/or interrogatories.*

76. On each occasion referred to in paragraph 75, the superintendent or members of staff of the youth detention centre assaulted and/or battered the first applicant.

**Particulars**

- a) *In the case of each strip search, the superintendent had not given a direction under s161 of the Act for the strip search as required by regulation 73(5).*
- b) *The superintendent did not hold an opinion, either:*
  - i) *that the search was necessary in the interests of the security or the good order of the detention centre as required by s 161(1) of the Act; or*
  - ii) *that the first applicant may have in his possession any article that is not permitted as required by s 161(2) of the Act.*
- c) *In the alternative to particular 76(b), if the superintendent did hold an opinion required by s 161(1) or 161(2) of the Act, he or she did not hold that opinion on reasonable grounds.*
- d) *On each occasion when the first applicant was instructed by members of staff to submit to a search of his clothing and person, he had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre.*
- e) *On each occasion when the first applicant was instructed by members of staff to submit to a strip search, he had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre.*
- f) *On some occasions the first applicant did not agree to undress himself for a strip search and members of staff forced the clothes off the first applicant.*
- g) *The first applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre when he was subjected to search of his clothing and person.*
- h) *The first applicant submitted to each search of his clothing and person out of fear that he would be subjected to physical force by members of staff if he did not submit.*

- i) *Further particulars may be provided following discovery and/or interrogatories.*

77. On several occasions during his periods in a youth detention centre, in addition to the incidents referred to in paragraphs 60 to 65 and 71 to 76, the first applicant was assaulted and battered by members of staff of the youth detention centre in the following ways:

- 77.1 Being grabbed by the throat and thrown to the floor,
- 77.2 Being punched and/or slapped to the upper body;
- 77.3 Being punched and/or slapped to the head;
- 77.4 Being gripped by the upper arm;
- 77.5 Being placed in ankle cuffs for escort outside the detention centre;
- 77.6 Being handcuffed with his hands behind his back;
- 77.7 While the first applicant was handcuffed behind his back, members of staff pushed the first applicant's hands up behind his back so that the first applicant was forced into a bending position and his shoulders were strained.
- 77.8 On each occasion of battery of the kind referred to in paragraphs 77.1 to 77.7 members of staff assaulted the first applicant by causing him to apprehend that imminent physical contact would be made with his body.

***Particulars of matters in paragraph 77***

- a) *The first applicant did not consent to physical contact being made with his body by any member of staff when the incidents referred to in this paragraph occurred.*
- b) *Ankle cuffs are not a similar device to handcuffs and the use of ankle cuffs on the first applicant before 1 August 2016 was unlawful in spite of the purported effect of the directives referred to in paragraphs 50.2, 50.3 and 50.4.*
- c) *Handcuffing the first applicant behind his back was in breach of the directives referred to in paragraph 50.2, 50.3, 50.4 and 50.5*
- d) *The respondent was obliged to keep records of incidents of these kinds pursuant to the matters referred to in paragraphs 54.1 and 54.2. Accordingly, the details of the dates and circumstances of*

*incidents of this kind are better known to the respondent than to the first applicant.*

- e) *The first applicant will provide further and better particulars of the date, the circumstances and other necessary particulars of personal searches of the first applicant following discovery and/or interrogatories.*

78. By reason of the matters in paragraphs 60 to 73 and 77.6, the first applicant suffered on each occasion deprivation of residual liberty, discomfort, humiliation, helplessness, indignity, frustration and outrage.
79. By reason of the matters in paragraphs 71 to 77.5, 77.7 and 77.8 the first applicant suffered on each occasion discomfort, humiliation, helplessness, indignity, frustration and outrage.
80. The first applicant claims damages for the injury and loss referred to in paragraphs 78 and 79.
81. Further, the first applicant claims aggravated damages.

***Particulars of claim for aggravated damages***

- a) *At the time of the matters described in paragraphs 60 to 77, the first applicant was an Aboriginal child.*
- b) *The first applicant's feelings of discomfort, humiliation, helplessness, indignity, frustration and outrage caused by the incidents described in paragraphs 60 to 66 were exacerbated by:*
- i) *the rough handling of him by the members of staff of the detention centre;*
  - ii) *members of staff of the detention centre removed the mattress from the cell in the HSU and it was uncomfortable for the first applicant to sit or lie down for extended periods;*
  - iii) *the cell in the HSU was small, only two and a half paces wide and five paces long;*
  - iv) *the cell had no fresh air and no heating or cooling;*
  - v) *during the matter described in paragraph 66, the first applicant was not taken out of the cell to allow him to have a shower;*

- vi) *members of staff used abusive language to the first applicant, calling him, "chicken" and "piece of shit";*
  - vii) *the first applicant was given no access to anything to read or anything to do;*
  - viii) *his status as a child and a detainee with no parent or other adult relative to comfort him;*
  - ix) *the lack of an effective means by which he could complain about the conduct of the members of staff involved in the incident or seek redress;*
  - x) *his fear of retribution if he did complain.*
- c) *The first applicant's feelings of discomfort, humiliation, helplessness, indignity, frustration and outrage caused by the incidents described in paragraphs 60 to 77 were exacerbated by:*
- i) *his status as a child and a detainee with no parent or other adult relative to comfort him;*
  - ii) *the lack of an effective means by which he could complain about the conduct of the superintendent or the members of staff involved in any incident or seek redress for that conduct;*
  - iii) *his fear of retribution if he did complain.*
- d) *The respondent's conduct in the incidents described in paragraphs 60 to 77 disregarded the limits on the power of the superintendent and members of staff.*
- e) *The respondent's conduct in the incidents described in paragraphs 66 to 69 was contrary to legal advice the respondent had received on 18 March 2014.*
- f) *Further particulars may be provided following discovery and/or interrogatories.*

82. Further, the first applicant was treated with contumelious disregard and the first applicant claims exemplary damages.

***Particulars of claim for exemplary damages***

- a) *The conduct of the members of staff described in paragraphs 60 to 77 showed a cruel and reckless disregard of the comfort and dignity of the first applicant;*
- b) *The conduct of the members of staff described in paragraphs 60 to 77 disregarded the limits on the power of the superintendent and members of staff;*
- c) *The respondent's conduct in the incidents described in paragraphs 66 to 69 was contrary to legal advice the respondent had received on 18 March 2014.*
- d) *Further particulars may be provided following discovery and/or interrogatories.*

**VII. SECOND APPLICANT'S INDIVIDUAL TORT CLAIMS**

83. In the late afternoon or early evening on a day in or about May or June 2012, the second applicant was removed from his room at Old Don Dale by a number of members of staff.
84. In the course of removing the second applicant from his room, the members of staff battered the second applicant by using handcuffs and by using more force than was reasonably necessary to remove him from his room, as follows:
- 84.1 When the members of staff arrived at his room, the second applicant presented his hands through the hatch in his cell door to accept handcuffs, indicating his preparedness to comply with the directions of the members of staff;
  - 84.2 The members of staff handcuffed the second applicant;
  - 84.3 A number of members of staff held the second applicant's handcuffed hands through the hatch, pulled down on the second applicant's arms so that his feet were levered from the floor on the pivot of the cell hatch so that the weight of the second applicant's body was supported by his shoulders;
  - 84.4 Members of staff entered the room and struck the second applicant in the ribs several times;

- 84.5 The members of staff slammed the second applicant's body to the floor of the cell;
- 84.6 The members of staff lifted the second applicant from the floor and carried the second applicant out of the cell;
- 84.7 The members of staff slammed the second applicant's head into the doorframe of the room and, as they passed through another doorway, slammed the second applicant's head into that doorframe.

***Particulars of matters in paragraph 84***

- a) *The members of staff handcuffed the second applicant in circumstances when the superintendent did not hold the opinion required by section 153(4) of the Act;*
- b) *The members of staff struck the second applicant and used other forms of physical violence on the applicant in breach of s 153(3)(a) of the Act.*
- c) *The respondent was obliged to keep records of incidents of this kind pursuant to the matters referred to in paragraphs 54.1, 54.2 and 54.5. Accordingly, the details of this incident are better known to the respondent than to the second applicant.*
- d) *The second applicant will provide further and better particulars of the date, the personnel involved and other necessary particulars following discovery and/or interrogatories.*
85. Following the matters described in paragraphs 83 and 84, the members of staff battered and falsely imprisoned the second applicant by:
- 85.1 Putting the second applicant face down on the ground, and kneeling on the second applicant's head and back; and
- 85.2 Handcuffing the second applicant to the fence of the basketball court with his arms above his head by attaching one end of a second pair of handcuffs to the chain of the handcuffs attached to the second applicant's wrists and attaching the other end of the second pair of handcuffs to the chain wire of the basketball court fence; and



85.3 Leaving the second applicant in that position for about 40 minutes to one hour.

***Particulars of matters in paragraph 85***

- a) *The members of staff used more than reasonably necessary force on the second applicant in breach of s 153(2) of the Act.*
- b) *The handcuffing of the second applicant to the fence was a form of physical violence on the applicant in breach of s 153(3)(a) of the Act.*
- c) *The position in which the second applicant was handcuffed to the fence caused him to lose feeling in his hands and was a constrained position and a fatiguing position contrary to section 153(3)(c) of the Act;*
- d) *The members of staff handcuffed the second applicant to the basketball court fence in circumstances where the superintendent did not hold the opinions required by section 153(4) of the Act;*
- e) *Further, and in the alternative to particular 85.3(d), the members of staff kept the second applicant handcuffed to the fence for longer than was reasonably necessary in the circumstances;*
- f) *The members of staff handcuffed the second applicant in circumstances when the superintendent did not hold the opinion required by section 153(4) of the Act;*
- g) *The respondent was obliged to keep records of incidents of this kind pursuant to the matters referred to in paragraphs 54.2 and 54.5. Accordingly, the details of this incident are better known to the respondent than to the second applicant.*
- h) *The second applicant will provide further and better particulars of the incident following discovery and/or interrogatories.*

86. Following the matters described in paragraph 85, the members of staff placed the second applicant in a cell in the Behaviour Management Unit (**BMU**) of the detention centre and required the second applicant to surrender all his clothing apart from his underpants.

87. In the course of the incidents described in paragraphs 83 to 86, the members of staff assaulted and/or battered the second applicant.

**Particulars**

- a) *The second applicant had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre;*
- b) *The second applicant suffered physical contact to his body by numerous members of staff of the detention centre numerous times;*
- c) *The second applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre;*
- d) *When offering his hands to be handcuffed as described in the particulars to paragraph 84, the second applicant did so out of fear that he would be subjected to physical force by members of staff if he did not do so;*
- e) *Members of staff stripped the second applicant of his clothing in circumstances where:*
  - i) *the second applicant was not at risk of self-harm within the meaning of s 162 of the Act;*
  - ii) *members of staff did not hold the opinion required in clauses 41 and 42 of the Regulations for the implementation of the Emergency Management Protocol; or*
  - iii) *in the alternative to sub-paragraphs 87(e)(i) and 87(e)(ii), members of staff did not comply with the Emergency Management Protocol.*

88. Following the matters described in paragraphs 83 to 87, the second applicant was isolated in the cell in the BMU for two to three weeks, as follows:

88.1 The second applicant was isolated in a cell on a 72-hour placement with no mattress or bedding.

88.2 After the conclusion of the 72-hour placement, the second applicant was isolated in a cell in the BMU for two to three weeks subject to an IMP.

**Particulars**

- a) *The respondent was obliged to keep records of isolation and IMPs pursuant to the matters referred to in paragraphs 40 and 54.4.*

*Accordingly, the details of this period of isolation are better known to the respondent than to the second applicant.*

- b) The second applicant will provide further and better particulars of the dates and circumstances of his isolation on this occasion following discovery and/or interrogatories.*

89. The isolation of the second applicant described in paragraph 88 was unlawful.

**Particulars**

- a) The isolation exceeded 72 hours contrary to section 153(5) of the Act.*
- b) During the periods in which the second applicant was isolated from other detainees, he was confined in a cell for periods exceeding 23 hours.*
- c) During the periods in which the second applicant was isolated from other detainees, he was usually only allowed out of the cell once in every 24 hour period to permit him to have a shower and a period of between 15 minutes and 1 hour of recreation in the recreation area of the BMU and he remained isolated from other detainees during this time.*
- d) On a number of days in which the second applicant was isolated in his cell in the BMU he was not allowed out of his cell for any period of time.*
- e) The recreation area of the BMU was enclosed and locked apart from the rest of the youth detention centre such that the second applicant remained isolated when outside his cell.*
- f) The isolation of the second applicant for more than 24 hours had not been approved by the director, contrary to section 153(5) of the Act.*
- g) The superintendent did not hold the opinions required by section 153(5) of the Act.*
- h) Further particulars may be provided following discovery and/or interrogatories.*

90. On several occasions, in addition to the occasion referred to in paragraphs 88 and 89, during his periods in a youth detention centre, the second applicant was kept isolated from other detainees.

**Particulars**

- a) The second applicant was subjected to numerous Intensive Management Plans which entailed isolating the second applicant from other detainees*

*for periods ranging from 1 day to several weeks in the BMU, including Intensive Management Plans for the following periods:*

- i) 13 June 2012 to 20 June 2012;*
  - ii) 11 February 2013 to 15 February 2013;*
  - iii) 18 February 2013 to 20 February 2013;*
  - iv) 8 March 2013 to 25 March 2013;*
  - v) 19 August 2013 to 23 August 2013.*
- b) Further particulars of Intensive Management Plans imposed on the second applicant will be provided following discovery and/or interrogatories.*
  - c) In purported performance of “at risk” procedures.*
  - d) Lockdowns for management reasons.*
  - e) As punishment.*
  - f) In the course of regimes applied to detainees held in the BMU.*
  - g) Further particulars of isolation of the second applicant will be provided following discovery and/or interrogatories.*

91. The isolation of the second applicant described in paragraph 90 was unlawful.

**Particulars**

- a) During the periods in which the second applicant was isolated from other detainees, he was confined in a cell for periods exceeding 23 hours.*
- b) During the periods in which the second applicant was isolated from other detainees, he was usually only allowed out of the cell once in every 24 hour period to permit him to have a shower and a period of between 15 minutes and 1 hour of recreation in the recreation area of the BMU and he remained isolated from other detainees during this time.*
- c) On a number of days in which the second applicant was isolated in his cell in the BMU he was not allowed out of his cell for any period of time.*
- d) The recreation area of the BMU was enclosed and locked apart from the rest of the youth detention centre such that the second applicant remained isolated when outside his cell.*

- e) *The superintendent did not hold the opinions required by s 153(5) of the Act.*
- f) *On the occasions on which the second applicant was isolated for periods exceeding 24 hours, the isolation of the second applicant had not been approved by the commissioner contrary to section 153(5) of the Act.*
- g) *The isolation of the second applicant under IMPs was contrary the requirements of section 153(5) of the Act.*
- h) *The isolation of the second applicant in the circumstances described in particulars 91(a) to 91(g) infringed the residual liberty of the second applicant.*
- i) *Further particulars will be provided following discovery and/or interrogatories.*

92. By reason of the matters in paragraphs 55 and 56 and 88 to 91 the respondent falsely imprisoned the second applicant.

93. On several occasions during his periods in a youth detention centre, in addition to the matters described in paragraphs 84 and 85, the second applicant was handcuffed while remaining inside the youth detention centre.

#### **Particulars**

- a) *On one occasion the second applicant was restrained in handcuffs at Old Don Dale for a period of about 6 to 8 hours.*
- b) *The respondent was obliged to keep records of use of restraint pursuant to the matters referred to in paragraphs 54.2 and 54.5. Accordingly, the details of the handcuffing of the second applicant are better known to the respondent than to the second applicant.*
- c) *The second applicant will provide further and better particulars of the date, the circumstances and other necessary particulars of the matter referred to in particular 93(a) and other occasions when he was handcuffed inside Old Don Dale following discovery and/or interrogatories.*

94. On each occasion referred to in paragraph 93 the superintendent or members of staff of the youth detention centre assaulted and battered the second applicant.

**Particulars**

- a) *On each occasion, the handcuffing of the second applicant was unlawful as follows:*
- i) *It was contrary to section 155 of the Act; or, alternatively,*
  - ii) *The superintendent did not hold the opinions required by s 153(4) of the Act; or, alternatively,*
  - iii) *The superintendent had not authorised the use of handcuffs.*
- b) *On each occasion, the second applicant had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre, when he was instructed by members of staff to submit to handcuffing.*
- c) *The second applicant suffered physical contact to his body by members of staff of the detention centre on each occasion when he was placed in handcuffs and on each occasion when the handcuffs were removed.*
- d) *On each occasion, the second applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre when he was subjected to handcuffing.*
- e) *On each occasion, the second applicant submitted to handcuffing out of fear that he would be subjected to physical force by members of staff if he did not submit.*
- f) *Further particulars may be provided following discovery and/or interrogatories.*
95. On several occasions during his periods in a youth detention centre, the second applicant was subjected to search of his clothing and person, including strip search, including:
- 95.1 On admission to the youth detention centre;
  - 95.2 Before placement in isolation;
  - 95.3 Before departure from the youth detention centre for a temporary absence, under escort, to attend a medical or dental appointment or to appear in court;

- 95.4 On return to the youth detention centre from a temporary absence, under escort, to attend a medical or dental appointment or to appear in court;
- 95.5 On some occasions, when the second applicant was detained in the BMU, on return to his cell from the recreation area of the BMU;
- 95.6 Following a visit from a friend or family member at the youth detention centre.
96. On each occasion referred to in paragraph 95, the superintendent or members of staff of the youth detention centre assaulted and/or battered the second applicant.

**Particulars**

- a) *In the case of each strip search, the superintendent had not given a direction under s 161 of the Act for the strip search as required by regulation 73(5).*
- b) *The superintendent did not hold an opinion, either:*
- i) *that the search was necessary in the interests of the security or the good order of the detention centre as required by s 161(1) of the Act; or*
  - ii) *that the second applicant may have in his possession any article that is not permitted as required by s 161(2) of the Act.*
- c) *In the alternative to particulars 96(b), if the superintendent did hold an opinion required by s 161(1) or 161(2) of the Act, he or she did not hold that opinion on reasonable grounds.*
- d) *On each occasion when the second applicant was instructed by members of staff to submit to a search of his clothing and person, he had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre.*
- e) *On each occasion when the second applicant was instructed by members of staff to submit to a strip search, he had a continuing apprehension that imminent physical contact would be made with his body by members of staff of the youth detention centre.*
- f) *The second applicant did not consent to any physical contact being made with his body by any member of staff of the youth detention centre when he was subjected to strip search.*

- g) *The second applicant submitted to each strip search out of fear that he would be subjected to physical force by members of staff if he did not submit.*
- h) *The respondent was obliged to keep records of search pursuant to regulation 74. Accordingly, the details of personal searches of the second applicant are better known to the respondent than to the second applicant.*
- i) *The second applicant will provide further and better particulars of the date, the circumstances and other necessary particulars of personal searches of the second applicant following discovery and/or interrogatories.*

97. On several occasions during his periods in a youth detention centre, in addition to the incidents referred to in paragraphs 83 to 87 and 93 to 96, the second applicant was assaulted and battered by members of staff of the youth detention centre in the following ways:

- 97.1 Being pushed into walls in the hallway leading to the BMU;
- 97.2 Having his body pushed;
- 97.3 Being punched in his upper body;
- 97.4 Being slapped around his head;
- 97.5 Being grabbed by his upper arms;
- 97.6 Being thrown to the floor;
- 97.7 Being handcuffed with his hands behind his back.
- 97.8 While the second applicant was handcuffed behind his back, members of staff pushed the second applicant's hands up behind his back so that the second applicant was forced into a bending position and his shoulders were strained.
- 97.9 Having handcuffs applied to his wrists in a manner that caused painful forceful contact of the metal of the handcuffs with the bony part of the second applicant's wrists.
- 97.10 On one occasion, being restrained in tightly applied "riot handcuffs" made of plastic material which dug into the flesh of the applicant's wrists and which were removed by being cut by the painful insertion of a scissor blade between the plastic handcuff material and the second applicant's flesh.



- 97.11 Having his clothes forcibly removed, including by cutting the clothes from his body with a knife.
- 97.12 On each occasion of battery of the kind referred to in paragraphs 97.1 to 97.11 members of staff assaulted the second applicant by causing him to apprehend that imminent physical contact would be made with his body.

***Particulars of matters in paragraph 97***

- a) *The second applicant did not consent to physical contact being made with his body by any member of staff when the incidents referred to in this paragraph occurred.*
- b) *The respondent was obliged to keep records of incidents of these kinds pursuant to the matters referred to in paragraphs 54.1 and 54.5. Accordingly, the details of the dates and circumstances of incidents of this kind are better known to the respondent than to the second applicant.*
- c) *The second applicant will provide further and better particulars of the date, the circumstances and other necessary particulars of personal searches of the second applicant following discovery and/or interrogatories.*
98. By reason of the matters in paragraphs 83 to 96, 97.7 and 97.10, the second applicant suffered on each occasion deprivation of residual liberty, discomfort, humiliation, helplessness, indignity, frustration and outrage.
99. By reason of the matters in paragraphs 95 to 97.6, 97.8, 97.9, 97.11 and 97.12 the second applicant suffered on each occasion discomfort, humiliation, helplessness, indignity, frustration and outrage.
100. The second applicant claims damages for the injury and loss referred to in paragraphs 98 and 99.
101. Further, the second applicant claims aggravated damages.

***Particulars of claim for aggravated damages***

- a) *At the time of the incidents described in paragraphs 83 to 89 the second applicant was 15 years old.*
- b) *The second applicant's feelings of discomfort, humiliation, helplessness, indignity and frustration caused by the incidents described in paragraphs 83 to 89 were exacerbated by:*

- i) *The rough handling of him by the members of staff of the detention centre;*
- ii) *Just before members of staff entered the second applicant's cell in the incident described in paragraphs 83 to 84 one of the youth justice officers said words to the effect of, "Don't take it easy on the little fucker".*
- iii) *The discomfort of the position in which he was handcuffed to the basketball court fence;*
- iv) *His hunger from not having eaten an evening meal and not receiving any food until about 10 am the next day;*
- v) *Members of staff refusing to allow the second applicant to go to the toilet while handcuffed to the fence of the basketball court;*
- vi) *Members of staff telling the second applicant while he was handcuffed to the fence of the basketball court that if he needed to go to the toilet he should "piss his pants";*
- vii) *The second applicant's embarrassment and discomfort at urinating in his clothing while handcuffed to the fence of the basketball court;*
- viii) *The refusal of members of staff to loosen the second applicant's handcuffs or allow him to adopt a more comfortable position, when he complained that his hands were swollen and sore;*
- ix) *The removal of all the second applicant's clothes before placing him in the cell at the BMU;*
- x) *The cell in the BMU had no mattress and the bed shelf was wet;*
- xi) *The second applicant had to use his underpants, as the only cloth available, to wipe the moisture from the wet bed shelf;*
- xii) *The second applicant was naked in the BMU cell with no blanket or other covering available;*
- xiii) *It was a cold night and the second applicant was cold;*
- xiv) *The second applicant was aware that he was under closed circuit television observation by a female member of staff and he had no means to cover his private parts;*

- xv) *The second applicant complained via intercom to the observing female member of staff that he was cold and she responded with words to the effect, "You're not allowed to have a blanket. You're supposed to pull yourselves to keep warm." The second applicant understood this to be an insulting suggestion that he should masturbate himself to keep warm. This comment was broadcast over the intercom and could be heard by all the other detainees in the BMU;*
  - xvi) *After his first night in the BMU, the second applicant was given bedding, blankets and clothing;*
  - xvii) *On each succeeding day after the first night, he was required to give back the bedding before he would be given his first meal of the day;*
  - xviii) *There were no taps in the BMU cell and unless members of staff brought water to the second applicant, his only means to quench his thirst was to drink the water in the toilet bowl and he did, in fact, drink water from the toilet;*
  - xix) *The cell was small, only two and a half paces wide and five paces long;*
  - xx) *The cell had no fresh air and no heating or cooling;*
  - xxi) *The cell was small and the second applicant was confined in the cell for up to 23 hours and 45 minutes each day and only permitted out of the cell for 15 minutes to have a shower;*
  - xxii) *Small increments of additional minutes out of the cell, up to a total of 30 minutes, were offered to the second applicant for good behaviour and reduced again for alleged poor behaviour or otherwise at the discretion of members of staff.*
- c) *The second applicant's feelings of discomfort, humiliation, helplessness, indignity frustration and outrage caused by the incidents described in paragraphs 83 to 97 were exacerbated by:*
- i) *His status as a child and a detainee with no parent or other adult relative to comfort him;*

- ii) *The lack of an effective means by which he could complain about the conduct of the superintendent or the members of staff involved in any incident or seek redress for that conduct;*
- iii) *His fear of retribution if he did complain.*
- d) *The respondent's conduct in the incidents described in paragraphs 83 to 97 disregarded the limits on the power of the superintendent and members of staff*
- e) *The respondent's conduct in the incidents described in paragraphs 88 to 92 was contrary to legal advice the respondent had received on 18 March 2014.*
- f) *Further particulars may be provided following discovery and/or interrogatories.*

102. Further, the second applicant was treated with contumelious disregard and the second applicant claims exemplary damages.

***Particulars of claim for exemplary damages***

- a) *The conduct of the members of staff described in paragraphs 83 to 88 and the particulars in paragraph 101(b) showed a cruel and reckless disregard of the comfort and dignity of the second applicant;*
- b) *The conduct of the observing female member of staff particularised in paragraph 101(b)(xv) was so outrageous and calculated to humiliate the second applicant that it requires curial condemnation.*
- c) *The conduct of the members of staff described in paragraphs 83 to 93 disregarded the limits on the power of the superintendent and members of staff.*
- d) *The respondent's conduct in the incidents described in paragraphs 88 to 92 was contrary to legal advice the respondent had received on 18 March 2014.*
- e) *Further particulars may be provided following discovery and/or interrogatories.*

**VIII. LIMITATIONS**

103. If necessary, which is not admitted, the first applicant seeks on his own behalf and on behalf of Group Members, pursuant to section 44(1) of the *Limitation Act* (NT), an extension of the time for instituting this action otherwise limited by s 215(4) of the Act, in force until 8 September 2014.
104. Additionally or alternatively, if necessary, which is not admitted, the first applicant seeks on his own behalf and on behalf of Group Members, pursuant to section 44(1) of the *Limitation Act* (NT), an extension of the time for instituting this action otherwise limited by s 215B of the Act.
105. If necessary, which is not admitted, the second applicant seeks on his own behalf and on behalf of Group Members, pursuant to section 44(1) of the *Limitation Act* (NT), an extension of the time for instituting this action otherwise limited by s 215(4) of the Act, in force until 8 September 2014.
106. Additionally or alternatively, if necessary, which is not admitted, the second applicant seeks on his own behalf and on behalf of Group Members, pursuant to section 44(1) of the *Limitation Act* (NT), an extension of the time for instituting this action otherwise limited by s 215B of the Act.

**IX. TORT CLAIMS OF GROUP MEMBERS**

107. Group Members, while detained in a youth detention centre, suffered:

- 107.1 assault; and
- 107.2 battery; and/or
- 107.3 false imprisonment;

by an act or omission of a superintendent or a member of staff for which the respondent is vicariously liable.

***Particulars***

*The material facts and particulars of Group Member claims will be provided after the initial trial of the applicants' claims and common issues.*

108. For the plaintiffs in any of the following proceedings in the Supreme Court of the Northern Territory:

- (a) No. 14 of 2015, Case Number: 21508784;
- (b) No. 15 of 2015, Case Number: 21508785;
- (c) No. 19 of 2015, Case Number: 21510204; and
- (d) No. 26 of 2015, Case Number: 21513348,

the tort claims in this action do not include:

- (e) any of their individual claims determined in those proceedings in the Supreme Court of the Northern Territory; or
- (f) any other cause of action arising out of the facts which were the subject of those proceedings in the Supreme Court of the Northern Territory.

109. The cognate claims of Group Members, which arise from the false imprisonment, assault, and/or battery of Group Members will be pleaded and particularised after an initial trial of the applicants' claims and common issues.

#### **X. RACIAL DISCRIMINATION ACT CLAIMS**

110. Section 9(1) of the RDA provides:

*It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.*

111. Section 9(2) of the RDA provides:

*A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the [International Convention for the Elimination of all forms of Racial Discrimination].*

112. At all relevant times approximately 90% of children detained in youth detention centres were Aboriginal.

113. At all material times during the detention of Group Members:
- 113.1 the RDA had application to the circumstances of the detention and to the acts and omissions of the commissioner, superintendent and/or members of staff as they were involved in the detention;
  - 113.2 the commissioner, superintendent and/or members of staff purported to operate youth detention centres;
  - 113.3 the commissioner, superintendent and/or members of staff had a duty to comply with, and apply, the law in relation to detainees, including the provisions of the Act, the Regulations, the RDA and the common law; and
  - 113.4 the commissioner, superintendent and/or members of staff asserted authority and control over the Group Members.
114. At all material times, in breach of the RDA, the respondent engaged in the following course of conduct which involved distinctions, exclusions or restrictions based upon the Aboriginality of the majority of the Group Members which had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the Group Member's human rights and fundamental freedoms in public life:
- 114.1 Acting to intimidate and humiliate the Group Members in breach of the principles in section 4(b) of the Act, and in breach of regulation 64 of the Regulations;

**Particulars**

- a) *The commissioners, superintendents and members of staff used and/or permitted members of staff at youth detention centres to use racist, derogatory and abusive terms when referring to and speaking to children in detention, including:*

*“black cunt”;*

*“stupid black cunt”;*

*“black camp dog”;*

*“camp dog”;*

*“little black poofter”;*

*“camp poofter”;*

*“monkeys”;*

*“dumb black monkeys”;*

*“little fuckers”;*

*“cunts”;*

*“little cunts”*

*“oxygen thieves”;*

*“useless fucking thieves”;*

*“waste of space”;*

*“fucking slut”;*

*“dumb”*

*“chicken”*

*“piece of shit”.*

- b) *Members of staff used racist, derogatory and abusive terms when referring to and speaking to Group Members over the radio communication system and intercom.*
- c) *Members of staff teased and belittled Group Members.*
- d) *Members of staff made comments to Group Members about them masturbating when they were showering or using the toilet.*
- e) *Members of staff threatened Group Members.*
- f) *Members of staff targeted certain Group Members for mistreatment by officers and other Group Members.*
- g) *Members of staff incited, induced, coerced, bribed or dared Group Members to engage in degrading and humiliating acts.*
- h) *Members of staff incited, induced, coerced or bribed Group Members to assault, batter and/or bully other Group Members.*
- i) *Members of staff told Group Members things about other Group Members that caused them to be angry with the other Group Member and physically or verbally fight with the other Group Member.*



- j) *Members of staff spoke of some Group Members in a way that caused other Group Members believe they were “weak” and cause fights with them.*
- k) *Members of staff issued unreasonable orders to Group Members and punished them for not complying with those orders.*
- l) *Members of staff punished Group Members disproportionately for minor infractions.*
- m) *Members of staff swore at Group Members but punished Group Members for swearing at members of staff.*
- n) *Commissioners, superintendents and members of staff permitted the conduct referred to in sub-paragraphs 114.1(a) to 114.1(m) above.*
- o) *Reports made to the commissioners, superintendents and/or members of staff of conduct referred to in sub-paragraphs 114.1(a) to 114.1(m) above were not investigated or acted on.*
- p) *Officers were not disciplined for conduct referred to in sub-paragraphs 114.1(a) to 114.1(m) above;*
- q) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.2 Unlawfully and inappropriately isolating and confining Group Members, in breach of the principles in subsections 4(b), 4(m) and 4(n) and of sections 153(5) and 156 of the Act, and/or regulations 64, 70 and 72 of the Regulations;

**Particulars**

- a) *Group Members were held in isolation for reasons other than those authorised by the Act, including:*
  - i) *behaviour management on an IMP or an IIMP;*
  - ii) *behaviour management through a cell placement;*
  - iii) *behaviour management through a room placement for minor infractions;*
  - iv) *when said to be at risk of self-harm;*

- v) *for punishment;*
  - vi) *to deal with resourcing and staffing issues;*
  - vii) *to accommodate detainees when the detention centre was overcrowded.*
- b) *Group Members were held in isolation for longer than was authorised by the Act.*
  - c) *Group Members were held in isolation without knowing when they were going to be allowed out of isolation.*
  - d) *Group Members were misled as to when they would be let out of isolation, then told that the time they were to be held there was extended.*
  - e) *Commissioners and superintendents failed to ensure the law was complied with in respect of isolation of Group Members.*
  - f) *Group Members were not given the opportunity to be heard in respect of disciplinary measures taken contrary to section 156 of the Act.*
  - g) *Commissioners and superintendents introduced and conducted a regime of behaviour management, including IMPs and IIMPs, that promoted and/or facilitated practices in breach of the Act and Regulations with respect to isolation*
  - h) *IMPs or IIMPs for individual Group Members did not comply with directive 2.4.5 or directive 3.4.2.*
  - i) *Individual management plans prepared for Group Members assessed to be at risk of self-harm were prepared and maintained in a manner that did not comply with regulation 43 of the Regulations.*
  - j) *Group Members were isolated without first attempting graduated non-violent de-escalation techniques.*
  - k) *Isolation for behaviour management, punishment and at risk classification continued to be used after it was observed to cause harm to Group Members and cause Group Members' behaviour to escalate.*

- l) Commissioners, superintendents and members of staff failed to have the appropriate regard to the interests of the Group Member and to the principles in sub-sections 4(b), 4(m) and 4(n) of the Act in managing misbehaviour.*
- m) The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.3 Before 1 August 2016, using unlawful, unreasonable, unnecessary and inappropriate force and restraint of Group Members in breach of sections 151(3)(c), 152(1A), 153(3), 153(4), 155 and 161 of the Act, and/or regulations 64, 70 and 71 of the Regulations;

**Particulars**

- a) Members of staff used force on Group Members without first attempting graduated non-violent de-escalation techniques.*
- b) Members of staff used restraints on Group Members without first attempting graduated non-violent de-escalation techniques.*
- c) Members of staff struck Group Members with their hands, fists and feet.*
- d) Members of staff restrained Group Members in a manner that:
 
  - i) constricted their breathing; and/or*
  - ii) injured the Group Member.**
- e) Members of staff applied force to Group Members in a manner that caused their heads and/or bodies to hit
 
  - i) the ground;*
  - ii) doorways;*
  - iii) walls; and/or*
  - iv) furniture.**
- f) Members of staff restrained Group Members and forcibly cut their clothing off with a knife-like instrument.*
- g) Members of staff restrained Group Members using devices that were handcuffs or similar devices in circumstances not authorised by s 153(4) of the Act.*

- h) Members of staff restrained Group Members using devices that were not handcuffs or similar devices.*
- i) Members of staff handcuffed Group Members to escort them within the detention centre in breach of s 153(4) of the Act.*
- j) Members of staff handcuffed Group Members with their hands behind their backs to escort them within the youth detention centre in breach of s 153(3)(c) and (d) of the Act and regulation 64 of the Regulations.*
- k) While Group Members were handcuffed with their hands behind their backs and being escorted within the youth detention centre, officers pulled Group Members hands up in a manner that forced the Group Member into a bended position facing the floor, placed strain on his or her shoulders and caused pain in breach of s 153(3)(c) and regulation 64 of the Regulations.*
- l) While Group Members were handcuffed with their hands behind their backs and being escorted within the youth detention centre, officers pulled Group Members shorts and/or underwear up forcefully from behind in a manoeuvre known as a “wedgie”, such that the Group Member’s underpants and shorts placed pressure on the Group Member’s genitals and anus, causing pain and discomfort, and held them in that position while the Group Member was being escorted.*
- m) Superintendents and members of staff required Group Members to submit to searches, including strip searches, conducted as a routine measure and not on any reasonably grounded belief by the superintendent of the matters in s 161 of the Act.*
- n) Members of staff targeted individual Group Members for mistreatment by officers and other Group Members.*
- o) Superintendents and members of staff used restraints as punishment.*
- p) Group Members were not given the opportunity to be heard in respect of disciplinary measures taken in breach of s 156 of the Act.*

- q) *Commissioners, superintendents and staff failed to have the appropriate regard to the interests of the Group Member in managing misbehaviour.*
- r) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.4 From 1 August 2016 using unlawful, unreasonable, unnecessary and inappropriate force and restraint of Group Members in breach of sections 151AA, 151(3)(c), 152(1A), 153(3), 153(4), 155 of the Act, and/or regulations 64, 70 and 71 of the Regulations;

**Particulars**

- a) *Members of staff used force on Group Members without first attempting graduated non-violent de-escalation techniques.*
- b) *Members of staff used restraints on Group Members without first attempting graduated non-violent de-escalation techniques.*
- c) *Members of staff struck Group Members with their hands, fists and feet.*
- d) *Members of staff restrained Group Members in a manner that*
  - i) *constricted their breathing; and/or*
  - ii) *injured the Group Member.*
- e) *Members of staff applied force to Group Members in a manner that caused their heads and/or bodies to hit:*
  - i) *the ground;*
  - ii) *doorways;*
  - iii) *walls; and/or*
  - iv) *furniture.*
- f) *Members of staff restrained Group Members and forcibly cut their clothing off with a knife-like instrument.*
- g) *Members of staff handcuffed Group Members with their hands behind their backs in breach of s 153(3)(c) and (d) of the Act and regulation 64 of the Regulations.*

- h) While Group Members were handcuffed with their hands behind their backs and being escorted within the youth detention centre, officers pulled Group Members hands up in a manner that forced the Group Member into a bended position facing the floor, placed strain on his or her shoulders and caused pain in breach of s 153(3)(c) and regulation 64 of the Regulations.*
- i) While Group Members were handcuffed with their hands behind their backs and being escorted within the youth detention centre, officers pulled Group Member's shorts and/or underwear up forcefully from behind in a manoeuvre known as a "wedgie", such that the Group Member's underpants and shorts placed pressure on the Group Member's genitals and anus, causing pain and discomfort, and held them in that position while the Group Member was being escorted.*
- j) Superintendents and members of staff required Group Members to submit to searches, including strip searches, conducted as a routine measure and not on any reasonably grounded belief by the superintendent of the matters in s 161 of the Act.*
- k) Members of staff targeted individual Group Members for mistreatment by officers and other Group Members.*
- l) Superintendents and members of staff used restraints as punishment.*
- m) Group Members were not given the opportunity to be heard in respect of disciplinary measures taken in breach of s 156 of the Act.*
- n) Commissioners, superintendents and staff failed to have the appropriate regard to the interests of the Group Member in managing misbehaviour.*
- o) The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.5 Ignoring and/or trivialising the needs and rights of Group Members;

**Particulars**

- a) Members of staff intimidated and abused detainees as particularised in paragraph 114.1.*

- b) *Members of staff subjected detainees to extended periods of unlawful isolation as particularised in paragraph 114.2.*
- c) *Members of staff used force and restraint without regard to regulation 64 of the Regulations as particularised in paragraphs 114.3 and 114.4.*
- d) *Superintendents and members of staff punished Group Members for breaking the “rules” despite that:*
  - i) *In breach of s 150 of the Act the rules of the detention centre or detainees’ rights and responsibilities were not explained to Group Members; and*
  - ii) *Rules changed from shift to shift.*
- e) *Superintendents and members of staff took disciplinary measures against Group Members without giving them an opportunity to be heard contrary to s 156 of the Act.*
- f) *Members of staff prevented Group Members from making telephone calls.*
- g) *Superintendents and members of staff required Group Members to submit to searches, including strip searches conducted as a routine measure and not on any reasonably grounded belief by the superintendent of the matters in s 161 of the Act.*
- h) *Group Members were unnecessarily observed by officers and other Group Members in showers and toilets.*
- i) *In the BMU, the HSU and isolation cells Group Members were unnecessarily observed using the toilet by officers directly or via CCTV.*
- j) *In the BMU, the HSU and isolation cells Group Members were observed by officers and other detainees while in the shower.*
- k) *Officers restrained Group Members and forcibly cut off their clothing with a knife-like instrument.*
- l) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

## 114.6 Subjecting Group Members to sub-standard living conditions;

**Particulars**

- a) *Arunda House in Alice Springs:*
  - i) *had no education facilities;*
  - ii) *had no external recreation facilities;*
  - iii) *had very limited amenities.*
  
- b) *Isolation cells at Old Don Dale:*
  - i) *were extremely hot in warm weather conditions;*
  - ii) *were extremely cold in cool weather conditions;*
  - iii) *had no ventilation;*
  - iv) *received minimal natural light;*
  - v) *provided no way of seeing outside other than the sky through a high window;*
  - vi) *smelt of faeces;*
  - vii) *lacked access to clean, drinkable water;*
  - viii) *lacked facilities to wash hands.*
  
- c) *Isolation cells at New Don Dale:*
  - i) *were extremely hot in warm weather conditions;*
  - ii) *lacked ventilation;*
  - iii) *received minimal natural light;*
  - iv) *provided no way of seeing outside other than the sky through a high window;*
  - v) *smelt of faeces;*
  - vi) *lacked access to clean, drinkable water;*
  - vii) *lacked facilities to wash hands.*
  
- d) *Rooms and isolation cells in the high security unit at New Don Dale:*
  - i) *were extremely hot;*



- ii) *lacked ventilation.*
    - e) *The Commissioner, Superintendent and Assistant Superintendent failed to:*
      - i) *conduct repairs and maintenance necessary to provide adequate living conditions;*
      - ii) *undertake capital works necessary to provide adequate living conditions.*
    - f) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.7 Depriving Group Members of appropriate food, water, toilet and hygiene facilities, clothing and bedding;

**Particulars**

- a) *Members of staff withheld from Group Members items including:*
  - i) *food;*
  - ii) *water;*
  - iii) *use of toilets;*
  - iv) *toilet paper;*
  - v) *clothing;*
  - vi) *mattresses;*
  - vii) *bedding;*
  - viii) *blankets.*
- b) *On some occasions due to the withholding of water, Group Members were forced to drink water from toilets.*
- c) *Members of staff ignored intercom calls from Group Members to request the items referred to in particular 114.7(a) above while Group Members were being held in isolation or lockdown.*
- d) *Officers delayed in providing the items referred to in particular 114.7(a) above when they were requested by Group Members.*

- e) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.8 Depriving Group Members of appropriate education, personal development resources, health assessment and care;

**Particulars**

- a) *Group Members were unnecessarily prevented from attending school when they were subject to isolation or behaviour management under IMPs or IIMPs.*
- b) *Group Members prevented from attending school were not provided educational materials or assistance.*
- c) *Group Members were not provided vocational training.*
- d) *Group Members were not provided rehabilitation programmes.*
- e) *In breach of regulation 69 of the Regulations, commissioners, superintendents and members of staff failed to provide for and facilitate the assessment and Group Members ongoing needs in relation to education, vocational training and rehabilitation.*
- f) *Commissioners, superintendents and members of staff failed to provide for and facilitate consistent and ongoing case management.*
- g) *Commissioners, superintendents and members of staff failed to provide timely or adequate medical assessment and treatment.*
- h) *Commissioners, superintendents and members of staff failed to provide timely or adequate mental health assessment and treatment.*
- i) *Commissioners, superintendents and members of staff failed to provide adequate recreation facilities at Old Don Dale, Arunda House and Alice Springs Youth Detention Centre.*
- j) *Group Members held in the High Security Unit at New Don Dale were deprived of access to adequate recreation activities.*
- k) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.9 Depriving Group Members of family and community support, cultural development opportunities, emotional support and counselling;

**Particulars**

- a) *Contact with family members, friends and community was withheld from Group Members as part of:
  - i) *Punishment regimes;*
  - ii) *Behaviour management regimes.**
- b) *Group Members were not permitted to touch visiting family members and other visitors.*
- c) *Members of staff were present at visits to Group Members.*
- d) *Group Members were transferred from locations where their family and community members could visit them to locations where their family and community members could not visit them.*
- e) *Where counselling was provided to Group Members it was on a short-term, inconsistent and/or ad hoc basis.*
- f) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.10 Depriving Group Members of complaint and grievance processes;

**Particulars**

- a) *The complaint and grievance processes were not explained to Group Members.*
- b) *Members of staff led Group Members to believe that members of staff had the authority to treat Group Members in a way that amounted to mistreatment.*
- c) *Members of staff failed to facilitate, process or forward complaints by Group Members or their legal representatives as required by regulation 66 of the Regulations.*
- d) *Superintendents failed to deal with complaints by Group Members or their legal representatives as required by regulation 66.*
- e) *Legal education of Group Members was hindered.*

- f) *Commissioners, superintendents and members of staff failed to investigate incidents, reports and/or complaints raised by Group Members, the Professional Standards Unit, the Children's Commissioner, and legal services representing Group Members of:*
  - i) *Mistreatment of Group Members by members of staff; and/or*
  - ii) *Other breaches by members of staff of their duties and/or obligations.*
- g) *Commissioners, superintendents and members of staff failed to ensure that CCTV footage of Group Members being mistreated by officers was retained.*
- h) *Commissioners and superintendents failed to appropriately discipline officers for:*
  - i) *Mistreatment of Group Members; and/or*
  - ii) *Other breaches of their duties and/or obligations.*
- i) *Disciplinary action that was taken against members of staff for mistreating Group Members did not reflect the seriousness of the mistreatment.*
- j) *Commissioners, superintendents and members of staff employed, re-employed and/or maintained the employment of staff unsuited to their roles.*
- k) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.11 Depriving Group Members of protection from batteries, assaults, isolation and intimidation, and security of their person and property in breach of sections 151, 152, 153 of the Act;

**Particulars**

- a) *Commissioners, superintendents and members of staff acted and permitted officers and other staff to act in the performance of their duties contrary to the:*
  - i) *Act,*

- ii) *Regulations,*
  - iii) *Relevant determinations and directives,*
  - iv) *Relevant procedures manuals, and*
  - v) *Relevant standard operating procedures.*
- b) *Commissioners, superintendents and members of staff failed to investigate incidents, reports and complaints raised by Group Members, the Professional Standards Unit, the Children's Commissioner and legal services representing Group Members of:*
  - i) *Mistreatment of Group Members by members of staff; and/or*
  - ii) *Other breaches by members of staff of their duties and/or obligations.*
- c) *Commissioners, superintendents and members of staff failed to appropriately discipline members of staff for:*
  - i) *Mistreatment of Group Members; and/or*
  - ii) *Other breaches of their duties and/or obligations.*
- d) *Where disciplinary action was taken against members of staff it did not reflect the seriousness of the mistreatment or breach.*
- e) *Commissioners, superintendents and members of staff employed, re-employed and/or maintained the employment of officers:*
  - i) *Known to have mistreated Group Members, or*
  - ii) *Otherwise unsuited to their role.*
- f) *Commissioners, superintendents and members of staff employed, re-employed and/or maintained the employment of staff against the objection of the Professional Standards Unit.*
- g) *Commissioners, superintendents and members of staff failed to ensure that officers were adequately trained in:*
  - i) *Graduated non-violent de-escalation techniques;*
  - ii) *The safe use of force;*

- iii) *The safe use of restraints;*
  - iv) *Cultural awareness;*
  - v) *The effects of trauma on adolescents;*
  - vi) *The effects of isolation;*
  - vii) *The indicators of an adolescent being at risk of self-harm or harm to others.*
- h) *Commissioners, superintendents and members of staff permitted staff who were not adequately trained in the matters set out in particular 114.11(g) above:*
- i) *To use force and restraint on Group Members;*
  - ii) *To exercise discretion as to when to use force and restraint on Group Members;*
  - iii) *To isolate Group Members;*
  - iv) *To classify a Group Member as “at risk” for the purposes of regulations 41 to 44 of the Regulations.*
- i) *Commissioners, superintendents and members of staff failed to ensure the superintendent, assistant superintendent and all officers and staff were aware of their duties and obligations under the:*
- i) *Act,*
  - ii) *Regulations,*
  - iii) *Relevant determinations or directives,*
  - iv) *Relevant procedures manuals,*
  - v) *Relevant standard operating procedures, and*
  - vi) *Relevant codes of conduct.*
- j) *Commissioners, superintendents and members of staff failed to ensure that the practices of members of staff were compliant with the:*
- i) *Act,*
  - ii) *Regulations,*

- iii) *Relevant determinations or directives,*
  - iv) *Relevant procedures manuals,*
  - v) *Relevant standard operating procedures, and*
  - vi) *Relevant codes of conduct.*
- k) *Commissioners, superintendents and members of staff adopted a punitive rather than therapeutic or rehabilitative approach to the management Group Members and youth detention.*
  - l) *Commissioners, superintendents and members of staff maintained a punitive rather than therapeutic or rehabilitative approach to the management Group Members and youth detention after it became evident and observable that that approach was counterproductive and harmful to Group Members.*
  - m) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.12 Before 1 August 2016, subjecting Group Members to unlawful, arbitrary and disproportionate punishment in breach of sections 151(3)(c), 152(1A), 153(3), 153(4), 153(5), 155 of the Act, and/or regulations 70, 71 and 72 of the Regulations;

**Particulars**

- a) *The applicants repeat particulars 114.1(k), 114.1(l), 114.1(n), 114.2(a), 114.2(f), 114.2(k), 114.3(o), 114.3(p), 114.5(d), 114.5(e), 114.9(a) and 114.14(b).*
- b) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.13 From 1 August 2016, subjecting Group Members to unlawful, arbitrary and disproportionate punishment in breach of sections 151AA, 151(3)(c), 152(1A), 153(3), 153(4), 153(5), 155 of the Act, and/or regulations 70, 71 and 72 of the Regulations;

**Particulars**

- a) *The applicants repeat particulars 114.1(k), 114.1(l), 114.1(n), 114.2(a), 114.2(f), 114.2(k), 114.4(l), 114.4(m), 114.5(d), 114.5(e), 114.9(a) and 114.14(b).*

- b) *The applicants may provide further and better particulars following discovery and/or interrogatories*

114.14 Arbitrarily and unreasonably isolating Group Members from their families and Country in breach of the principles in sub-sections 4(h), (i) and (j) of the Act;

***Particulars***

- a) *Group Members were transferred from locations where their family and community members could visit them to locations where their family and community members could not visit them.*
- b) *Contact with family members, friends and community was withheld from Group Members as part of:*
  - i) *Punishment regimes;*
  - ii) *Behaviour management regimes.*
- c) *The applicants may provide further and better particulars following discovery and/or interrogatories.*

114.15 Acting in contravention of the human rights of Group Members, as embodied in sections 150 to 153 of the Act, regulations 71 to 73 of the Regulations, and item 1.4 of the Australasian Juvenile Justice Administrators, *Juvenile Justice Standards 2009*, including:

- (a) The right to be treated in accordance with standards dictated by the fundamental notions of human dignity and essential equality.
- (b) The following rights recognised in the *International Convention for the Elimination of all forms of Racial Discrimination*:
  - (i) Article 5(a): the right to equal treatment before the tribunals and all other organs administering justice;
  - (ii) Article 5(b): the right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution.



- (c) The following rights recognised in the *International Covenant on Civil and Political Rights*:
- (i) Article 7: the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment.
  - (ii) Article 9: the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
  - (iii) Article 10.1: All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
  - (iv) Article 10.3: Juvenile offenders shall be ... accorded treatment appropriate to their age and legal status.
  - (v) Article 24: Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his or her status as a minor, on the part of his or her family, society and the State.
  - (vi) Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.
- (d) The following rights recognised in the *Convention on the Rights of the Child*:
- (i) Article 37(a): No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.
  - (ii) Article 37(b): No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.
  - (iii) Article 37(c): Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the

human person, and in a manner which takes into account the needs of persons of his or her age.

- (iv) Article 40(1): The right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- (e) The following rights recognised in the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty*:
  - (i) Article 24: relating to minimum standards of information which must be provided to detainees as part of the admission process.
  - (ii) Article 31: juveniles in detention should be afforded access to facilities and services that meet all the requirements of health and human dignity.
  - (iii) Article 34: which mandates access to sanitary installations of a sufficient standard to enable every juvenile to fulfil their physical needs in privacy, cleanliness and decency.
  - (iv) Article 37: which mandates that every detention facility must ensure that youth detainees be given access to suitable food and that clean drinking water be available to detainees at any time.
  - (v) Article 64: restraints should only be used in exceptional circumstances, where all other control methods have been exhausted and failed, and only as explicitly authorised and specified by law and regulation and for the shortest possible period of time.
  - (vi) Article 87: which requires all personnel of juvenile detention centres to respect and protect human dignity and fundamental rights of all juveniles, and prohibits the infliction, instigation or toleration by personnel of any act of torture or

any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever.

115. The acts described in paragraph 114 involved distinctions, exclusions, and restrictions within the meaning of s 9(1) of the RDA because what was done by commissioners, superintendents and members of staff in the course of conduct described in paragraph 114 was persistently seriously below the standard of conduct required of them, which was to comply with the Act, the Regulations, lawful determinations, the common law and in conformity with the Australian Juvenile Justice Standards and human rights of Group Members.
116. The distinctions, exclusions and restrictions described in paragraph 114 were based upon the Aboriginality of the majority of Group Members as follows:
- 116.1 The course of conduct described in sub-paragraphs 114.2 to 114.4 and 114.11 to 114.13 involved systemic contraventions of the Act.
- 116.2 The conduct described in paragraph 114 was contrary to the objects of the Act referred to in paragraph 16 and the principles of the Act referred to in paragraph 17.
- 116.3 The respondent received the following reports at the following dates:
- (a) Youth Justice Advisory Committee (**YJAC**) Annual Reports for the years 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015, 2015-2016.
  - (b) Review of the Northern Territory Youth Justice System, September 2011 (**2011 Review**).
  - (c) Professional Standards Unit, Department of Correctional Services, Report to Commissioner of Corrective Services, 19 September 2014 (**PSU Report**);
  - (d) Vita, Michael, Review of the Northern Territory Youth Detention System Report, January 2015 (**Vita Report**);
  - (e) Office of the Children's Commissioner Northern Territory, Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre, August 2015 (**Children's Commissioner's 2015 Report**);

- (f) Hamburger, K., Ferris, A., Downes, L., Hocken, J., Ellis-Smith, T & McAllister., N (2016). A safer Northern Territory through correctional interventions: Report of the review of the Northern Territory Department of Correctional Services, 31 July 2016 (**Hamburger Report**);
- (g) Office of the Children's Commissioner Northern Territory, Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre, August 2016 (**Children's Commissioner's 2016 Report**).

116.4 The YJAC Annual Reports identified the following concerns:

- (a) The 2010-2011 Annual Report noted:
  - (i) The Alice Springs Youth Detention Centre approved in March 2011 was in breach of the Act because of its co-location with an adult prison;
  - (ii) Non-compliance at Alice Springs Youth Detention Centre with the requirements of s 150 and s 151(3)(c) of the Act; and
  - (iii) The need for better staff training.
- (b) The 2011-2012 Annual Report noted that the concerns raised in the 2010-2011 Annual Report remained.
- (c) The 2012-2013 Annual Report noted that Old Don Dale, Alice Springs Youth Detention Centre and Arunda House were all seriously deficient in their physical layout and fell far short of Australian Juvenile Justice Association standards.
- (d) The 2014-2015 Annual Report noted continuing concerns about the inadequacy of the Alice Springs Youth Detention Centre facilities.
- (e) The 2015-2016 Annual Report noted:
  - (i) Concerns about the treatment of detainees in isolation;
  - (ii) Inappropriate use of handcuffs for escort from the HSU to the school and recreation areas;
  - (iii) The unsuitability of the facilities to house young people.

- 116.5 The 2011 Review noted the lack of attention to the rehabilitation objects of the Act and failure to provide case management and productive activities required by regulation 69 of the Regulations,
- 116.6 The PSU Report to the Commissioner identified:
- (a) Mistreatment of detainees by members of staff, including:
    - (i) swearing at detainees;
    - (ii) speaking to detainees in a condescending or abusive fashion;
    - (iii) lying to detainees and tricking them into doing things;
    - (iv) teasing and belittling detainees;
    - (v) threatening detainees;
    - (vi) locking detainees up for the slightest thing;
    - (vii) blocking CCTV surveillance and threatening a detainee;
    - (viii) withholding food;
    - (ix) withholding privileges;
    - (x) withholding food, bedding, clothes etc as a punishment;
    - (xi) failing to provide meals at reasonable times;
    - (xii) failing to release detainees from their cells for exercise;
  - (b) Some Youth Justice Officers had a bullying/standover attitude;
  - (c) Lollies and chocolates were used to bribe detainees;
  - (d) Some male Youth Justice Officers at the Don Dale Youth Detention Centre had a “Boys Club” mentality and attitude;
  - (e) Officers “protected” by the Assistant General Manager were mistreating detainees, breaching operating rules, ignoring directions from and were abusive towards more senior officers, and failing to perform their duties;
  - (f) Lack of clarity in “rules” for detainees and inconsistency in their application from shift to shift;

- (g) Senior management failed to follow through on promises to detainees in BMU;
- (h) Inadequate screening of Youth Justice Officers;
- (i) Inadequate training of Youth Justice Officers, including inadequate training in physical restraint of detainees and no ongoing practice or renewal of learned skills;
- (j) Some Youth Justice Officers demonstrated no concept of following rules and policy;
- (k) A lot of staff did not follow or care about directives or Standard Operating Procedures;
- (l) No current procedures manual had been approved for detention centres since 2011 despite audit recommendations;
- (m) Some staff were not fulfilling their duties;
- (n) Staff were sleeping while on duty;
- (o) Shift supervisors and management failed to supervise Youth Justice Officers;
- (p) Management failed to provide structure and direction for detainees and staff;
- (q) Management failed to investigate or act on complaints of staff about the conduct of other staff;
- (r) Its investigation of recent major incidents in detention centres showed:
  - (i) Mistreatment of detainees and failure to effectively communicate and manage detainees were significant causal factors;
  - (ii) Members of staff failed to attempt to de-escalate incidents before calling for intervention;
  - (iii) The incidents were most probably entirely preventable by appropriate communication and providing detainees with a regular routine to keep them occupied.

- (s) The report concluded:

*“It should be obvious to anyone that if you treat youths like animals by not communicating, threatening, belittling them, withholding food and other entitlements they will react in an aggressive way.”*

116.7 The Vita Report identified, among other things,

- (a) requirements of the Act and Regulations were not being complied with in respect of behaviour management plans, particularly those of detainees held in the Don Dale BMU;
- (b) behaviour management plans were poorly implemented;
- (c) detainees were managed for excessive periods in isolation;
- (d) overreliance on isolation of detainees at Don Dale;
- (e) management of high-risk detainees, especially those subjected to behaviour management planning, lacked consistency and direction;
- (f) isolation of detainees does not assist with behavior management;
- (g) basic rights of isolated detainees were withheld for inappropriate periods of time;
- (h) decision-making in the detainee classification system lacked objectivity and stakeholder participation, and the system was not linked to appropriate case management, incentive schemes, behaviour management or case planning;
- (i) case management was un-coordinated and delivered by untrained staff in a very basic fashion;
- (j) staff training was “grossly inadequate” and significantly below Australian training standards;
- (k) some staff did not have an understanding of when and how to use force, in part due to inadequate training;
- (l) lack of appropriate training contributed to poor decision-making in major incidents investigated;
- (m) inappropriateness of the Behavioural Management Unit facilities at Don Dale Youth Detention Centre;

- (n) poor and inadequate infrastructure;
- (o) incidents in the BMU investigated were contributed to by the poor facilities, poor management and poor oversight;
- (p) centre procedures and standard operating procedures were “non-existent, outdated and inadequate”, despite this being highlighted in several internal reports, audits and reviews;
- (q) youth detention centres operated in “a climate of daily crisis”.

116.8 Children’s Commissioner’s 2015 Report identified:

- (a) inappropriate and unhygienic conditions in the BMU;
- (b) a wide range of practices at Don Dale Youth Detention Centre, which breached the applicable legislative and operating procedure framework, comprised of:
  - (i) the Act and Regulations;
  - (ii) Department of Correctional Services Directive 2.4.5 regarding the use of Intensive Management Plans; and
  - (iii) a procedure manual, Youth Detention and Remand Centres Procedures and Instructions.
- (c) Breaches in relation to isolation of detainees on an Intensive Management Plan included:
  - (i) reasons for isolation;
  - (ii) approvals for isolation;
  - (iii) length of isolation;
  - (iv) monitoring of isolated detainees;
  - (v) the process for developing Intensive Management Plans;
  - (vi) the content of Intensive Management Plans; and
  - (vii) procedural fairness to detainees in relation to Intensive Management Plans.
- (d) Inadequate processes in staff selection and training.



116.9 The Hamburger Report reported:

- (a) The condition of the premises at New Don Dale was unacceptable;
- (b) Incidents in detention centres, rather than indicating the increased dangerousness of detainees (the view advanced by detention centre staff), were attributable to:
  - (i) flaws in the approach to management and rehabilitation of detainees;
  - (ii) shortcomings in the security of the facilities;
  - (iii) a lack of leadership and supervision of staff;
  - (iv) complacency and/or lack of staff training; and
  - (v) lack of understanding in the management of detainees.
- (c) Breaches of the statutory and policy framework governing the management of detainees considered at-risk or in need of de-escalation, including:
  - (i) the principle of using the least restrictive method was not applied to detainees who were either acting out or at-risk;
  - (ii) little or no attempt to talk down or de-escalate detainees involved in incidents or acting out;
  - (iii) the only option applied by staff was placement in “de-escalation” and observation cells, which entailed separate confinement;
  - (iv) once placed in separate confinement, detainees spent the maximum 24 hours in isolation, regardless of changes in their behaviour; and
  - (v) while youth were confined in the “de-escalation” or observation cells, staff made 15 minute observations of them via CCTV monitors - this practice did not comply with monitoring prescribed in the At-Risk Manual, which required continuous CCTV monitoring or physical checks at intervals not exceeding 15 minutes.
- (d) Spit hoods were still in use, and this was totally unacceptable.

- 116.10 The Children's Commissioner's 2016 Report identified:
- (a) Systemic and departmental level failings in dealing with those young persons placed at risk;
  - (b) Mistreatment of young people placed at risk, including:
    - (i) improper and excessive use of restraints;
    - (ii) use of a cutting tool to remove clothing from detainees classified at risk;
  - (c) Inadequate staff training;
  - (d) Unsuitable physical infrastructure.
- 116.11 Despite the matters identified in the reports referred to in paragraphs 116.3 to 116.10, the commissioner, the superintendent and members of staff, persisted in the conduct described in paragraph 114.
- 116.12 The commissioners, superintendents and members of staff used and/or permitted members of staff at youth detention centres to use racist and abusive terms on a regular or frequent basis when referring to and speaking to children in detention.
- 116.13 Officers made and were permitted to make racially derogatory comments when referring to and speaking to Group Members over the radio communication system and intercom so that they could be heard by Group Members.
- 116.14 Reports made to the commissioners, superintendents and/or members of staff of the use of racially derogatory language when referring to and speaking to children in detention were not investigated or acted on.
- 116.15 Officers were not disciplined for using racist terms when referring to and speaking to children in detention.
- 116.16 Indigenous Group Members were instructed by officers and school teachers not to speak their Indigenous language but rather to speak English.
- 116.17 Group Members who had difficulty speaking English were referred to by officers in derogatory terms including "dumb black kid".

116.18 The commissioners, superintendents and members of staff performed their roles in a manner that exhibited:

- (a) An “us and them” attitude;
- (b) A preference for confrontation over engagement;
- (c) Aggression, use of force, restraint and isolation and otherwise punitive measures disproportionate to the circumstances; and
- (d) A sense of impunity, impervious to the reactions and perceptions of Group Members.

116.19 Pursuant to s 18 of the RDA, when an act is done for 2 or more reasons, and one of the reasons is the race of a person, whether or not it is the dominant reason or a substantial reason for doing the act, then, for the purposes of the RDA the act is to be taken to be done for the reason of race.

116.20 The commissioners, superintendents and members of staff would not have engaged in, persisted in and permitted the repeated, systematic and comprehensive breaches of the Act, the Regulations, directives and the human rights of Group Members described in paragraph 114 above, if the detainees had not been predominantly of the Aboriginal race.

117. The conduct described in paragraph 114 had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the Group Members’ human rights and fundamental freedoms in public life as set out in subparagraph 114.15.

## **XI. FIRST APPLICANT’S INDIVIDUAL RDA CLAIM**

118. The incident described in paragraphs 60 to 66 followed a protest by the first applicant arising after he had been given his evening meal of stew and rice in his room without bread and without a knife, fork or any other implement with which to eat the meal and the continued refusal of members of staff to give the first applicant bread or any eating utensil when the first applicant requested bread and a knife and fork.

119. The first applicant reacted to the matter described in paragraph 118 by damaging fixtures and fittings within his room, including the television.

120. Members of staff responded to the behaviour of the first applicant described in paragraph 119 in the manner described in paragraphs 60 to 66.

121. While the first applicant was isolated in a cell in the HSU as described in paragraph 66, the first applicant:
- 121.1 Was deprived of a mattress for the whole period, so that it was uncomfortable for him to sit or lie down in the cell;
  - 121.2 Was forcibly stripped down to his underwear and deprived of clothing until the following day;
  - 121.3 Was not permitted to have sheets, blankets or pillows;
  - 121.4 Had access to a toilet in the cell but no separate facility for drinking water and he relied on members of staff to bring him food and water;
  - 121.5 Asked for water and a mattress and, when he did so, members of staff laughed at him and did not bring a mattress or water;
  - 121.6 Was confined in a small area only two and a half paces wide and five paces long;
  - 121.7 Had no fresh air and no heating or cooling in the cell; and
  - 121.8 Was not taken out of the cell to allow him to have a shower.
122. On or about the night of 26 July 2016, following the broadcast of an ABC Four Corners program, "Australia's Shame", which featured reference to violent treatment by members of staff of a former detainee of youth detention centres named Dylan Voller, and which had been watched that night by the first applicant, other detainees and members of staff, two members of staff standing outside the first applicant's room said in the hearing of the first applicant words to the effect of, "I think we might have a new Dylan Voller here," and, "Good-night Dylan Voller", which the first applicant understood to be a threat to treat him with violence in a manner similar to that depicted in the ABC Four Corners program.
123. The conduct of members of staff described in paragraphs 60 to 77, 118 and 120 to 122 are instances, particular to the first applicant, of the conduct described in paragraph 114.

**Particulars**

- a) *The conduct described in paragraphs 60 to 65:*
  - i) *Involved unlawful, unreasonable, unnecessary and inappropriate use of force and restraint of the kind described in paragraph 114.3;*

- ii) *Involved depriving the first applicant of appropriate food, water, toilet and hygiene facilities, clothing and bedding of the kind described in paragraph 114.7;*
  - iii) *Was a consequence of depriving the first applicant of protection from batteries, assaults, intimidation, and depriving him of security of his person of the kind described in paragraph 114.11;*
  - iv) *Subjected the first applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - v) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), c(i), c(ii), c(iii), c(iv), c(v), c(vi), (d)(i), d(ii), d(iii), d(iv), e(v), and (e)(vi).*
- b) *The conduct described in paragraphs 66 to 69:*
- i) *Involved unlawful, unreasonable, unnecessary and inappropriate isolation and confinement of the first applicant of the kind described in paragraph 114.2;*
  - ii) *Ignored and trivialised the needs and rights of the first applicant of the kind described in paragraph 114.5 particular (b)*
  - iii) *Subjected the first applicant to sub-standard living conditions of the kind described in paragraph 114.6 particulars (c) and (d);*
  - iv) *Was a consequence of depriving the first applicant of protection from isolation of the kind described in paragraph 114.11;*
  - v) *Subjected the first applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - vi) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(ii), (d)(iii), (d)(iv), and (e)(vi).*
- c) *The conduct described in paragraph 71:*
- i) *Involved unlawful, unreasonable, unnecessary, unreasonable and inappropriate use of force and restraint of the kind described in paragraphs 114.3 and 114.4;*

- ii) *Was a consequence of depriving the first applicant of protection from batteries, assaults, intimidation, and depriving him of security of his person of the kind described in paragraph 114.11;*
  - iii) *Subjected the first applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - iv) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(ii), (d)(iii), (d)(iv), (e)(v), and (e)(vi).*
- d) *The conduct described in paragraph 73 and 74:*
- i) *Involved unlawful, unreasonable, unnecessary and inappropriate use of force and restraint of the kind described in paragraph 114.3;*
  - ii) *Was a consequence of depriving the first applicant of protection from batteries, assaults, intimidation, and depriving him of security of his person of the kind described in paragraph 114.11;*
  - iii) *Subjected the first applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - iv) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(ii), (d)(iii), (d)(iv), (e)(v), and (e)(vi).*
- e) *The conduct described in paragraphs 75 and 76:*
- i) *Involved unlawful, unreasonable, unnecessary and inappropriate use of force of the kind described in paragraph 114.3 particular (m), and paragraph 114.4 particular (j);*
  - ii) *Involved ignoring and/or trivialising the needs and rights of the first applicant of the kind described in paragraph 114.5 particular (g);*
  - iii) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(iii), (d)(iii), (d)(iv) and (e)(vi).*

- f) *The conduct described in paragraph 77:*
- i) *Involved unlawful, unreasonable, unnecessary and inappropriate use of force and restraint of the kind described in paragraphs 114.3 and 114.4;*
  - ii) *Was a consequence of depriving the first applicant of protection from batteries, assaults, intimidation, and depriving him of security of his person of the kind described in paragraph 114.11;*
  - iii) *Subjected the first applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraphs 114.12 and 114.13;*
  - iv) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(iii), (d)(iv), (e)(v), and (e)(vi).*
- g) *The conduct described in paragraphs 118 and 121:*
- i) *Involved intimidating and humiliating acts of members of staff of the kind referred to in paragraph 114.1;*
  - ii) *Involved ignoring and/or trivialising the needs and rights of the first applicant of the kind referred to in paragraph 114.5*
  - iii) *Subjected the first applicant to substandard living conditions of the kind described in paragraph 114.6 particulars (c) and (d).*
  - iv) *Involved depriving the first applicant of appropriate food, water, toilet and hygiene facilities, clothing and bedding of the kind described in paragraph 114.7;*
  - v) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (d)(i), (d)(ii), (d)(iii), d(iv), (e)(ii), (e)(iii), (e)(iv) and (e)(vi).*
- h) *The conduct described in paragraph 122:*
- i) *Involved intimidating and humiliating acts of members of staff of the kind referred to in paragraph 114.1;*
  - ii) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(i), (c)(iii), (c)(iv), (d)(i), (d)(iii), d(iv), and (e)(vi).*

- i) *Further and better particulars may be provided following discovery and/or interrogatories.*

124. In addition to the matters described in paragraphs 60 to 77 and paragraphs 118 to 122, during the periods in which he was detained in youth detention centres, the first applicant was subjected to the following conduct with the following effects on the human rights of the first applicant:

124.1 Intimidating and humiliating acts of members of staff of the kind referred to in paragraph 114.1;

**Particulars**

- a) *Members of staff frequently addressed the first applicant in abusive terms, including:*

*“chicken”;*

*“piece of shit”;*

*“little cunt”;*

*“useless fucking thief”.*

- b) *On one occasion, a member of staff named Mr Trent offered to give the first applicant a packet of cigarettes as a bribe to assault and batter another detainee, Tyson Coffison.*
- c) *Members of staff made unreasonable demands on the first applicant by directing him to clean up rubbish dropped by another detainee.*
- d) *Members of staff punished the first applicant disproportionately for infractions of the rules by subjecting him to periods of confinement in his cell for 2 hours or more for minor infractions of rules.*
- e) *Members of staff teased and belittled the first applicant, including by throwing objects, such as wads of wet toilet paper at him.*
- f) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.2 The matters described in paragraph 124.1 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(iii), (c)(iv), (c)(v), (d)(i), (d)(iii), (d)(iv) and (e)(vi).



124.3 Ignoring and/or trivialising the needs and rights of the first applicant of the kind described in paragraph 114.5;

**Particulars**

- a) *Members of staff intimidated and abused the first applicant as particularised in paragraph 124.1;*
- b) *Superintendents and members of staff punished the first applicant for breaches of the rules despite that the rules of New Don Dale were not explained to the first applicant and rules changed from shift to shift with the change of members of staff;*
- c) *Superintendents and members of staff subjected the applicant to punishment, including lockdown in his cell, lockdown in HSU cells, confinement to the high security area of New Don Dale, isolation placements and isolation pursuant to IMPs and IIMPs without giving the first applicant an opportunity to be heard;*
- d) *While the first applicant was in the HSU and, in particular, when he was in isolation or under an IMP or an IIMP, the first applicant's access to telephone calls was restricted;*
- e) *Members of staff unnecessarily observed the first applicant when he used the toilets and showers in the HSU;*
- f) *Members of staff unnecessarily observed the first applicant via CCTV when he used the toilets and showers in the HSU;*
- g) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.4 The matters described in paragraph 124.3 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (d)(i), (d)(ii), (d)(iii), (d)(iv), (e)(i), (e)(ii), (e)(iii), (e)(iv) and (e)(vi).

124.5 Depriving the first applicant of appropriate food, water, toilet and hygiene facilities, clothing and bedding of the kind described in paragraph 114.7.

**Particulars**

- a) *During the times that the first applicant was in isolation he had no access to food or water unless it was brought to him by members of staff;*

- b) *On some occasions when the first applicant was in isolation, he was deprived of toilet paper, clothing, mattresses, bedding and blankets;*
- c) *On some occasions when the first applicant was in isolation he was not allowed out of his cell for a shower;*
- d) *On most occasions when the first applicant was in isolation, he was only allowed out of his cell for a short period each day for a shower;*
- e) *While the first applicant was in his cell in isolation, he had no direct access to clean, potable water;*
- f) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.6 The matters described in paragraph 124.5 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(i), (c)(iii), (c)(iv), (c)(v), (d)(i), (d)(iii), (d)(iv), (e)(ii), (e)(iii), (e)(iv) and (e)(vi).

124.7 Depriving the first applicant of appropriate education, personal development resources, health assessment and care of the kind described in paragraph 114.8.

### **Particulars**

- a) *During the times that the first applicant was in isolation or subject to behaviour management under IMPs or IIMPs, he:*
  - (i) *Was prevented from attending school; and*
  - ii) *Was not provided with educational materials or assistance.*
- b) *During the times that the first applicant was in the HSU he was;*
  - i) *Not provided vocational training;*
  - ii) *Not provided rehabilitation programs; and*
  - (iii) *Deprived of access to adequate recreation facilities.*
- c) *The first applicant's ongoing needs in relation to education, vocational training and rehabilitation were not assessed or provided for.*
- d) *The first applicant was not given consistent and ongoing case management.*

- e) *The first applicant was not given timely or adequate medical assessment and treatment.*
- f) *The first applicant was not given timely or adequate mental health assessment and treatment.*
- g) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.8 The matters described in paragraph 124.7 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(iii), (c)(iv), (d)(iv), and (e)(ii).

124.9 Depriving the first applicant of family and community support, cultural development opportunities, emotional support and counselling of the kind described in paragraph 114.9.

***Particulars***

- a) *During the times that the first applicant was in isolation or subject to behaviour management under IMPs or IIMPs visits from family members and access to use of the telephone were restricted.*
- b) *During the times that the first applicant was housed in the HSU visits from family members and access to use of the telephone were restricted.*
- c) *The first applicant was not given any long term or consistent counselling.*
- d) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.10 The matters described in paragraph 124.9 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(iii), (c)(iv), (c)(v), (d)(iii), (d)(iv), (e)(ii) and (e)(vi).

124.11 Depriving the first applicant of complaint and grievance processes of the kind described in paragraph 114.10.

***Particulars***

- a) *The complaint processes were not explained to the first applicant;*

- b) *Superintendents and members of staff ignored, or failed to act on complaints lodged by the first applicant;*
- c) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.12 The matters described in paragraph 124.11 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(i), (b)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(iii), (d)(iv), (e)(i) and (e)(vi).

124.13 Arbitrarily and unreasonably isolating the first applicant from his family of the kind described in paragraph 114.14.

#### **Particulars**

- a) *During the times that the first applicant was in isolation or subject to behaviour management under IMPs or IIMPs visits from family members and access to use of the telephone were restricted.*
- b) *During the times that the first applicant was housed in the HSU visits from family members and access to use of the telephone were restricted.*
- c) *Further and better particulars may be provided following discovery and/or interrogatories.*

124.14 The matters described in paragraph 124.13 contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (c)(iii), (c)(iv), (c)(v), (d)(iii), (d)(iv), (e)(ii) and (e)(vi).

125. The conduct described in paragraphs 123 and 124 had the effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of the first applicant's human rights in public life as described in particulars 123(a)(v), 123(b)(vi), 123(c)(iv), 123(d)(iv), 123(e)(iii), 123(f)(iv), 123(g)(v) and 123(h)(ii), and paragraphs 124.2, 124.4, 124.6, 124.8, 124.10, 124.12 and 124.14.

126. By reason of the matters in paragraphs 112 to 117 and 123 to 125 the Respondent breached s 9(1) of the RDA in relation to the first applicant.

127. The first applicant has suffered loss and damage by reason of the Respondent's breach of the RDA.

#### **Particulars of loss and damage**

- a) *The matters in paragraph 78 and 79;*

- b) *Insult, humiliation and distress by reason of the matters in paragraphs 118, 121, and 124;*
- c) *Impairment of the first applicant's enjoyment of the human rights and fundamental freedoms described in paragraph 125.*

128. The first applicant claims damages under s 46PO of the AHRC Act in respect of the matters in paragraph 127.

129. Further, the first applicant claims aggravated damages under s 46PO of the AHRC Act in respect of the matters in paragraph 127.

***Particulars of claim for aggravated damages***

- a) *The first applicant repeats the matters in the particulars to paragraph 81;*
- b) *The conduct described in paragraphs 118 and 120 to 122 heightened the first applicant's sense of injury by the insulting and humiliating manner in which it was done.*
- c) *By engaging in the conduct described in paragraph 124 commissioners, superintendents and members of staff, disregarded and failed to respect the first applicant's human rights and fundamental freedoms.*
- d) *Further and better particulars of the first applicant's claim for aggravated damages for breach of the RDA may be provided after discovery and/or interrogatories.*

**XII. SECOND APPLICANT'S INDIVIDUAL RDA CLAIM**

130. The conduct of commissioners, superintendents and members of staff described in paragraphs 83 to 97 are instances, particular to the second applicant, of the conduct described in paragraph 114.

***Particulars***

- a) *The conduct described in paragraphs 83 to 87:*
  - i) *Involved unlawful, unnecessary and inappropriate use of force and restraint of the kind described in paragraph 114.3;*
  - ii) *Involved depriving the second applicant of appropriate food, water, toilet and hygiene facilities, clothing and bedding of the kind described in paragraph 114.7;*

- iii) *Was a consequence of depriving the second applicant of protection from batteries, assaults, intimidation, and depriving him of security of his person of the kind described in paragraph 114.11;*
  - iv) *Subjected the second applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - v) *Contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(ii), (d)(iii), (d)(iv), (e)(v), and (e)(vi).*
- b) *The conduct described in paragraphs 88 to 91:*
- i) *Involved unlawful and inappropriate isolation and confinement of the second applicant of the kind described in paragraph 114.2;*
  - ii) *Ignored and trivialised the needs and rights of the second applicant of the kind described in paragraph 114.5 particular (b)*
  - iii) *Subjected the second applicant to sub-standard living conditions of the kind described in paragraph 114.6 particular (b);*
  - iv) *Was a consequence of depriving the second applicant of protection from isolation of the kind described in paragraph 114.11;*
  - v) *Subjected the second applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - vi) *Contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(ii), (d)(iii), (d)(iv), and (e)(vi).*
- c) *The conduct in paragraphs 93 and 94:*
- i) *Involved unlawful, unnecessary and inappropriate use of force and restraint of the kind described in paragraph 114.3;*
  - ii) *Was a consequence of depriving the second applicant of protection from batteries, assaults, intimidation, and depriving*

- him of security of his person of the kind described in paragraph 114.11;*
- iii) *Subjected the second applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - iv) *Contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(ii), (d)(iii), (d)(iv), (e)(v), and (e)(vi).*
- d) *The conduct in paragraphs 95 and 96:*
- i) *Involved unlawful, unnecessary and inappropriate use of force of the kind described in paragraph 114.3 particular (k);*
  - ii) *Involved ignoring and/or trivialising the needs and rights of the second applicant of the kind described in paragraph 114.5 particular (g);*
  - iii) *Contravened the human rights of the first applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(iii), (d)(iii), (d)(iv) and (e)(vi).*
- e) *The conduct in paragraph 97:*
- i) *Involved unlawful, unnecessary and inappropriate use of force and restraint of the kind described in paragraph 114.3;*
  - ii) *Was a consequence of depriving the second applicant of protection from batteries, assaults, intimidation, and depriving him of security of his person of the kind described in paragraph 114.11;*
  - iii) *Subjected the second applicant to unlawful, arbitrary and disproportionate punishment of the kind described in paragraph 114.12;*
  - iv) *Contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(i), (d)(iii), (d)(iv), (e)(v), and (e)(vi).*
- f) *Further and better particulars may be provided following discovery and/or interrogatories*

131. In addition to the matters described in paragraphs 83 to 97 and 130, during the periods in which he was detained in youth detention centres, the second applicant was subjected to the following conduct with the following effects on the human rights of the second applicant:

131.1 Intimidating and humiliating acts of members of staff of the kind referred to in paragraph 114.1;

**Particulars**

a) *Members of staff frequently addressed the second applicant in abusive terms, including:*

*“little cunt”;*

*“fucker”.*

b) *On one occasion, members of staff including an officer named Mr Kelleher, incited the second applicant and another detainee, Ashley Richards, to assault and batter a detainee named Zane Pascoe, by telling the second applicant and Ashley Richards that Zane Pascoe was a rapist. The second applicant was given a 24 hour isolation placement as punishment for punching Zane Pascoe.*

c) *On another occasion following the matter referred to in particular (b), members of staff, including Mr Kelleher, offered to give the second applicant and Ashley Richards chocolates as a bribe to assault and batter Zane Pascoe. The second applicant was given a 72 hour isolation placement as punishment for hitting Zane Pascoe to the head.*

d) *Members of staff tried to turn the second applicant against other detainees by telling the second applicant that the other detainees had said unkind things about the second applicant.*

e) *Members of staff made unreasonable demands on the second applicant by directing him to clean up rubbish dropped by other detainees.*

f) *Members of staff punished the second applicant disproportionately by subjecting him to periods of confinement in his cell for 2 hours or more for minor infractions of rules.*



- g) *Members of staff teased, belittled and humiliated the second applicant by:*
- i) *making sexual remarks such as a comment by a female member of staff to the effect,*  
*“You’re only little boys, the type of dicks I like are big black dicks”;*
  - ii) *accusing the second applicant of masturbating;*
  - iii) *offering the second applicant bribes of food or sweets if he co-operated and then refusing to pay the bribe;*
  - iv) *lying to the second applicant by telling him that a period of isolation or other punishment would shortly end and then extending the isolation or other punishment;*
- h) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.2 The matters described in paragraph 131.1 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (b)(ii), (c)(i), (c)(iii), c(iv), (c)(v), (d)(i), (d)(iii), d(iv) and (e)(vi).

131.3 Ignoring and/or trivialising the needs and rights of the second applicant of the kind described in paragraph 114.5;

#### **Particulars**

- a) *Members of staff intimidated and abused the second applicant as particularised in paragraph 131.1;*
- b) *Superintendents and members of staff punished the second applicant for breaches of the rules despite that the rules of Old Don Dale were not explained to the second applicant and rules changed from shift to shift with the change of members of staff;*
- c) *Superintendents and members of staff subjected the second applicant to punishment, including confinement in his cell, confinement in BMU cells, confinement to the BMU area of Old Don Dale, isolation placements and isolation pursuant to IMPs without giving the second applicant an opportunity to be heard;*

- d) *While the second applicant was in the BMU and, in particular, when he was in isolation or under an IMP, the second applicant's access to telephone calls was restricted;*
- e) *Members of staff unnecessarily observed the second applicant when he used the toilets and showers in the BMU;*
- f) *Members of staff unnecessarily observed the second applicant via CCTV when he used the toilets and showers in the BMU;*
- g) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.4 The matters described in paragraph 131.3 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (c)(i), (c)(ii), (c)(iii), (c)(iv), (c)(v), (d)(i), (d)(ii), (d)(iii), (d)(iv), (e)(i), (e)(ii), (e)(iii), (e)(iv) and (e)(vi).

131.5 Depriving the second applicant of appropriate food, water, toilet and hygiene facilities, clothing and bedding of the kind described in paragraph 114.7.

#### **Particulars**

- a) *During the times that the second applicant was in isolation he had no access to food or water unless it was brought to him by members of staff;*
- b) *Frequently, when the second applicant was in isolation, he was deprived of toilet paper, clothing, mattresses, bedding and blankets;*
- c) *On some occasions when the second applicant was in isolation he was not allowed out of his cell for a shower;*
- d) *On most occasions when the second applicant was in isolation, he was only allowed out of his cell for a short period each day for a shower;*
- e) *While the second applicant was in his cell in isolation, he had no access to handwashing facilities;*
- f) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.6 The matters described in paragraph 131.5 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (c)(i), (c)(iii), (c)(iv), (c)(v), (d)(i), (d)(iii), (d)(iv), (e)(ii), (e)(iii), (e)(iv) and (e)(vi).

131.7 Depriving the second applicant of appropriate education, personal development resources, health assessment and care of the kind described in paragraph 114.8.

***Particulars***

- a) *During the times that the second applicant was in isolation or subject to behaviour management under IMPs, he:*
  - i) *Was prevented from attending school; and*
  - ii) *Was not provided with educational materials or assistance.*
- b) *During the times that the second applicant was in the BMU he was;*
  - i) *Not provided vocational training;*
  - ii) *Not provided rehabilitation programs; and*
  - iii) *Deprived of access to adequate recreation facilities.*
- c) *The second applicant's ongoing needs in relation to education, vocational training and rehabilitation were not assessed or provided for.*
- d) *The second applicant was not given consistent and ongoing case management.*
- e) *The second applicant was not given timely or adequate medical assessment and treatment.*
- f) *The second applicant was not given timely or adequate mental health assessment and treatment.*
- g) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.8 The matters described in paragraph 131.7 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (c)(iii), (c)(iv), (d)(iv), and (e)(ii).

131.9 Depriving the second applicant of family and community support, cultural development opportunities, emotional support and counselling of the kind described in paragraph 114.9.

**Particulars**

- a) *During the times that the second applicant was in isolation or subject to behaviour management under IMPs visits from family members and access to use of the telephone were restricted.*
- b) *During the times that the second applicant was housed in the BMU visits from family members and access to use of the telephone were restricted.*
- c) *The second applicant was forbidden to touch or be touched by family members when they visited.*
- d) *The second applicant was not given any long term or consistent counselling.*
- e) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.10 The matters described in paragraph 131.9 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (c)(iii), (c)(iv), (c)(v), (d)(iii), (d)(iv), (e)(ii) and (e)(vi).

131.11 Depriving the second applicant of complaint and grievance processes of the kind described in paragraph 114.10.

**Particulars**

- a) *The complaint processes were not explained to the second applicant;*
- b) *Superintendents and members of staff ignored, or failed to act on complaints lodged by the second applicant;*
- c) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.12 The matters described in paragraph 131.11 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (b)(i), (b)(ii), (c)(iii), (c)(iv), (c)(v), (c)(vi), (d)(iii), (d)(iv), (e)(i) and (e)(vi).

131.13 Arbitrarily and unreasonably isolating the second applicant from his family of the kind described in paragraph 131.14.

***Particulars***

- a) *During the times that the second applicant was in isolation or subject to behaviour management under IMPs visits from family members and access to use of the telephone were restricted.*
- b) *During the times that the second applicant was housed in the BMU visits from family members and access to use of the telephone were restricted.*
- c) *Further and better particulars may be provided following discovery and/or interrogatories.*

131.14 The matters described in paragraph 131.13 contravened the human rights of the second applicant described in sub-paragraphs 114.15(a), (c)(iii), (c)(iv), (c)(v), (d)(iii), (d)(iv), (e)(ii) and (e)(vi).

132. The conduct described in paragraphs 130 and 131 had the effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of the second applicant's human rights in public life as described in particulars 130(a)(v), 130(b)(vi), 130(c)(iv), 130(d)(iii) and 130(e)(iv) and paragraphs 131.2, 131.4, 131.8, 131.10, 131.12 and 131.14.
133. By reason of the matters in paragraphs 112 to 117, 130 to 132 the Respondent breached s 9(1) of the RDA in relation to the second applicant.
134. The second applicant has suffered loss and damage by reason of the Respondent's breach of the RDA.

***Particulars of loss and damage***

- a) *The matters in paragraphs 98 and 99;*
  - b) *Impairment of the second applicant's enjoyment of the human rights and fundamental freedoms described in paragraph 114.15.*
  - c) *Insult, humiliation and distress by reason of the matters in paragraph 131.*
135. The second applicant claims damages under s 46PO of the AHRC Act in respect of the matters in paragraph 134.

136. Further, the second applicant claims aggravated damages under s 46PO of the AHRC Act in respect of the matters in paragraph 134.

***Particulars of claim for aggravated damages***

- a) *The second applicant repeats the matters in the particulars to paragraph 101;*
- b) *By engaging in the conduct described in paragraph 131 commissioners, superintendents and members of staff, disregarded and failed to respect the second applicant's human rights and fundamental freedoms.*
- c) *Further and better particulars of the second applicant's claim for aggravated damages for breach of the RDA may be provided after discovery and/or interrogatories.*

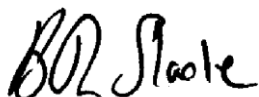
**XIII. RDA CLAIMS OF GROUP MEMBERS**

137. Group Members, while detained in a youth detention centre, suffered one or more of the conduct of commissioners, superintendents and staff members described in paragraphs 114 to 116 with the effects described in paragraph 117.
138. Group Members claim damages for impairment of their enjoyment of the human rights and fundamental freedoms described in paragraph 114.15.
139. For the plaintiffs in any of the following proceedings in the Supreme Court of the Northern Territory:
- (a) No. 14 of 2015, Case Number: 21508784;
  - (b) No. 15 of 2015, Case Number: 21508785;
  - (c) No. 19 of 2015, Case Number: 21510204; and
  - (d) No. 26 of 2015, Case Number: 21513348,

the RDA claims in this action do not include any claims arising out of the facts which were the subject of those proceedings in the Supreme Court of the Northern Territory.

140. The cognate claims of Group Members, which arise from unlawful discrimination against Group Members in breach of s 9(1) of the RDA for which the respondent is vicariously liable will be pleaded and particularised after an initial trial of the applicants' claims and common issues.

Date: 11 December 2017



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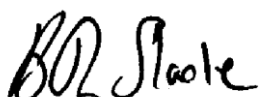
Signed by Ben Slade  
Lawyer for the Applicants

This pleading was prepared by Paul Batley of Counsel and Fiona McLeod of Senior Counsel.

### **Certificate of lawyer**

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

Date: 11 December 2017



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Signed by Ben Slade  
Lawyer for the Applicants