

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

S CI 2014 4423.

BETWEEN

A.S. BY HER LITIGATION GUARDIAN MARIE THERESA ARTHUR

Plaintiff

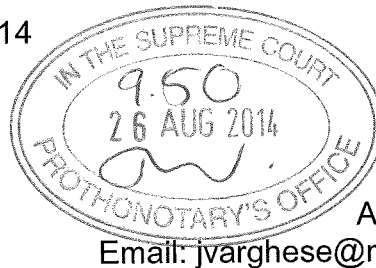
and

**MINISTER FOR IMMIGRATION AND BORDER PROTECTION
(AND OTHERS ACCORDING TO THE SCHEDULE)**

Defendants

WRIT

Date of document: 26 August 2014
Filed on behalf of: The Plaintiff
Prepared by:
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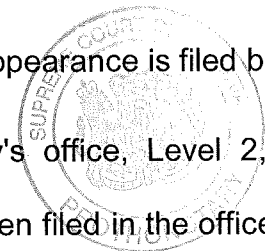
TO THE DEFENDANTS

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by –

- (a) filing a "Notice of Appearance" in the Prothonotary's office, Level 2, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and



(b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiff's address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiff may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

THE PROPER TIME TO FILE AN APPEARANCE is as follows –

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ out of Victoria and in another part of Australia, within 21 days after service;
- (c) where you are served with the writ in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in New Zealand under Part 2 of the Trans-Tasman Proceedings Act 2010 of the Commonwealth, within 30 working days (within the meaning of that Act) after service or, if a shorter or longer period has been fixed by the Court under section 13(1)(b) of that Act, the period so fixed;
- (e) in any other case, within 42 days after service of the writ.

FILED 26 August 2014



PROTHONOTARY

THIS WRIT is to be served within one year from the date it is filed or within such further period as the Court orders.

STATEMENT OF CLAIM

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PART A. PRELIMINARY

1. A.S. is a minor and sues by her litigation guardian Marie Theresa Arthur (aka Sister Brigid Arthur).
2. A.S. is currently detained, purportedly pursuant to section 189 of the *Migration Act 1958* (Cth) (**detention**).
3. A.S. is currently detained on Christmas Island at the 'Construction Camp alternative place of detention'.
4. A.S. brings the proceedings pursuant to Part IV of the *Supreme Court Act 1986* (Vic) on behalf of herself and every person who:
 - a. has been put in detention on Christmas Island in the period between 27 August 2011 and 26 August 2014 inclusive (the **relevant period**);
 - b. was injured and/or pregnant, during the relevant period, while in detention; and
 - c. has, during the relevant period, suffered an injury or an exacerbation of an injury as a result of the defendants' failure to provide him, her or his or her parents with reasonable health care;(collectively, **group members**).
5. There are more than seven group members as at the commencement of this proceeding.
6. The Minister for Immigration and Border Protection (**the Minister**) is the minister responsible for the administration of the *Migration Act 1958* (Cth).
7. The Secretary of the Department of Immigration and Border Protection (**the Secretary**) is, by his Department, responsible for 'entry, stay and departure arrangements for non-citizens'.
8. In this statement of claim, **injury** includes illness, whether physical or psychological.

PART B. NEGLIGENCE

Duty

9. The detention of the group members on Christmas Island was and is purportedly pursuant to section 189 of the *Migration Act*.
10. The group members are subject to an indefinite period of detention, being a period for so long as the defendants determine.

Particulars

- (i) The duration of detention is purportedly dictated by sections 196 and 198AD of the *Migration Act*.
 - (ii) Section 198AD provides that persons are to be removed from Australia 'as soon as reasonably practicable', which is a matter only within the control of the defendants.
 - (iii) By section 198AE of the *Migration Act*, the Minister may determine that section 198AD does not apply to a particular person but that section provides that the 'rules of natural justice do not apply' to the making of such a determination, and that the Minister does not have a duty to consider whether to make such a determination.
11. The group members will continue to be kept on Christmas Island, for so long as the defendants determine, unless they ask in writing to be removed from Australia.

Particulars

- (i) The group members are liable to be taken to a regional processing country pursuant to section 198AD of the *Migration Act* 'as soon as reasonably practicable', which is a matter only within the control of the defendants.

- (ii) The locations at and manner in which group members are kept in detention are otherwise the subject of decisions purported to be made under the *Migration Act*.

12. The group members are unable to leave detention.

Particulars

- (i) The group members are detained in facilities:

- (a) with perimeter fences;

- (b) with constant supervision of security guards preventing their escape;

- (c) where they are subject to application of force by the defendants and their servants and agents.

- (ii) If the detention of any the group members is 'immigration detention' within the meaning of the *Migration Act* (which is denied), section 197A of that Act makes it an offence to escape from such detention.

13. The group members are prevented from accessing any medical and health services other than those that the defendants choose to make available to them.

14. The group members are prevented from accessing any educational and recreation facilities, other than those that the defendants choose to make available to them.

15. The defendants together, and together with their servants and agents, exercised and continue to exercise exclusive control over the conditions of the detention of the group members.

Particulars

- (i) The defendants control who may have contact with the group members.

- (ii) So much as is known by A.S. prior to discovery, one or more of the defendants have entered into a contract or contracts with Serco Australia Pty Limited for the operation of places of immigration detention on Christmas Island.
 - (iii) So much as is known by A.S. prior to discovery, one or more of the defendants have entered into a contract or contracts with International Health and Medical Services Pty Limited for the provision of certain health services at places of immigration detention on Christmas Island.
16. By reason of the matters in paragraphs 9 to 15, the group members are dependent on the defendants for their physical and psychological health and wellbeing.
17. At all material times it was reasonably foreseeable to each defendant that:
- a. a person in detention in the conditions set out in paragraphs 10 to 14 could suffer injury or exacerbation of existing injury;
 - b. such injuries include physical and psychological injury.

Particulars

Particulars will be provided following discovery.

Duty to take reasonable care in detention

18. In the circumstances set out in paragraphs 9 to 17, the defendants each owed and owe separate a duty to each of the group members:
- a. to:
 - i. take reasonable care to ensure that their detention does not cause injury;
 - ii. provide reasonable health care in the event that they are injured or pregnant while in detention; and

- iii. exercise due care and skill in providing such care; and
- b. who are minors, to put them in detention only as a measure of last resort; and
- c. who are non-citizen children within the meaning of the *Immigration (Guardianship of Children) Act 1946* (Cth) to:
 - i. safeguard and promote the wellbeing of those group members;
 - ii. ensure that the best interests of the child are the paramount consideration in acting or not acting with respect to the group members;
 - iii. protect those group members from harm;
 - iv. provide for adequate care of those group members, including as to their welfare and development; and
 - v. provide effective medical, therapeutic or other remedial treatment for those group members; and
- d. who are children of 'compulsory school age' to enrol them in an 'educational programme' for their 'compulsory education period' within the meaning of the *School Education Act 1999* (WA);

(the **duty to take reasonable care**).

19. The duty to take reasonable care was not and is not delegable.

Statutory duty to detain minors only as measure of last resort

20. In addition to the duties set out in the paragraphs above, and in the circumstances set out in paragraph 9 to 17, the defendants each owed and owe separate duties to each of the group members who are minors to put them in detention only as a measure of last resort (the **statutory duty to detain minors only as a measure of last resort**).

Particulars

Section 4AA of the *Migration Act*.

21. The statutory duty of each of the defendants to detain minors only as a measure of last resort was not and is not delegable.

Statutory duty of guardianship

22. The Minister is the guardian of those group members who are non-citizen children within the meaning of the *Immigration (Guardianship of Children) Act 1946* (Cth) to the exclusion of those group members' parents and every other guardian.

Particulars

Sections 4AAA and 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth).

23. By reason of his guardianship, and in addition to the duties set out in the paragraphs above, and in the circumstances set out in paragraph 9 to 17, the Minister owed and owes a duty to group members who are non-citizen children to:
- a. safeguard and promote the wellbeing of those group members;

- b. ensure that the best interests of the child are the paramount consideration in acting or not acting with respect to the group members;
- c. protect those group members from harm;
- d. provide for adequate care of those group members, including as to their welfare and development; and
- e. provide effective medical, therapeutic or other remedial treatment for those group members;

(the **statutory duty of guardianship**).

Particulars

- (i) Section 6 of the *Immigration (Guardianship of Children) Act 1946* (Cth).
- (ii) The statutory duty of guardianship is informed, *inter alia*, by:
 - (a) the *Children and Community Services Act 2004* (WA), including Division 2, Part 2 and section 28 of that Act; and
 - (b) the *United Nations Declaration on the Rights of the Child*, in particular arts 2, 3, 4, 6, 9, 19, 22, 24, 27, 28, 29, 34, 37 and 39.

24. The Minister's statutory duty of guardianship was not and is not delegable.

Statutory duty to enrol children in school

25. In addition to the duties set out in the paragraphs above, the Minister has a duty to group members who are children of 'compulsory school age' to enrol them in an 'educational programme' for their 'compulsory education period' within the meaning of the *School Education Act 1999* (WA) (the **statutory duty to enrol children in school**).

Particulars

Sections 9 and 10 of the *School Education Act 1999* (WA) and art 28 of the *United Nations Declaration on the Rights of the Child*.

26. At all material times it was reasonably foreseeable to the Minister that in respect of children of compulsory school age:
- a. a failure to enrol them in an educational programme for their compulsory education period within the meaning of the *School Education Act 1999* (WA) could cause them to develop injury or exacerbate existing injury;
 - b. such injuries include physical and psychological injury.
27. The Minister's statutory duty to enrol children in school was not and is not delegable.

Breach*Duty to take reasonable care in detention*

28. The Minister failed and continues to fail to take reasonable care to ensure that the detention to which the group members have been subject did not cause injury.

Particulars

- (i) Failing to make a residence determination within the meaning of the *Migration Act* even though he ought to have known that the group members were injured by, or alternatively, in, detention.
- (ii) Failing to make a determination under section 198AE of the *Migration Act* that section 198AD not apply to the group members even though he ought to have known that the group members were injured by, or alternatively, in, detention.
- (iii) Failing to make the determinations particularised above in a manner that would have been consistent with discharging his duty to take reasonable care, notwithstanding that the *Migration Act* in and of itself does not create a duty for him to do so.

Particulars specific to A.S.

- (iv) Failing to ensure that his servants or agents would not tell A.S. that she and her immediate family are liable to be removed to either Nauru or Manus Island at any time despite having giving an undertaking to her lawyers Maurice Blackburn in a letter dated 16 April 2014 that she would not be so removed.
- (v) Failing to ensure that his servants or agents would not separate A.S. from her mother when her mother was moved to Darwin to give birth to A.S.'s brother.

29. Each of the defendants failed and continues to fail to take reasonable care to ensure that the detention to which A.S. has been subject did not and does not cause injury.

Particulars

Failures relating to nature of group members' detention

- (i) Keeping the group members in detention:
 - (a) other than on mainland Australia, where the standard of care could be more readily met than on Christmas Island; alternatively
 - (b) on Christmas Island without also causing actions to be taken so that the standard of care can be met there.
- (ii) Failing to inform the group members of when they will be removed from detention.
- (iii) Failing to act upon the recommendations of the Minister's Council on Asylum Seekers and Detention that families, children and complex cases ought to be managed by detention on mainland Australia or community detention.

Medical failures

- (iv) Failing to stay apprised of the medical needs of the group members by *inter alia*:
 - (a) dissolving the Immigration Health Advisory Group (**IHAG**); and
 - (b) failing to replace IHAG with any other mechanism capable of providing similarly expert advice on the medical needs of the group members.
- (v) Failing to act upon the recommendations of IHAG.

- (vi) Failing to act in response to the 'Letter of Concern' written in or around November 2013 by certain agents or former agents of IHMS.
- (vii) Failing to ensure that adequate medication was and is available to the group members.
- (viii) Failing to ensure that necessary hearing aids, spectacles, prostheses and other similar aids were and are available to the group members.
- (ix) Destroying medications that were in the possession of the group members when they first arrived in Australia without recording what those medications were and to whom they belonged.

[There are no particulars (x) or (xi) to this paragraph.]

- (xii) Failing to make and keep available medical facilities that are fit for purpose and adequately stocked.
- (xiii) Failing to take preventative measures for common infectious diseases.
- (xiv) Failing to keep accurate records of group members' health.
- (xv) Destroying medical records that were in the possession of the group members when they first arrived in Australia without recording what those medications were and to whom they belonged.

[There are no particulars (xvi)-(xix) to this paragraph.]

- (xx) Allowing health care decisions to be made other than by reference to the best interest of the group members.

[There are no particulars (xxi)-(xxiv) to this paragraph.]

Disability care failures

- (xxv) Failing to provide reasonable facilities for group members with disabilities.

Human rights failures

(xxvi) Acting in a manner inconsistent with human rights within the meaning of the *Australian Human Rights Commission Act 1986* (Cth) by:

- (a) not having reasonable regard to Article 7 of Schedule 2 to the *Australian Human Rights Commission Act 1986* (Cth) (the International Covenant on Civil and Political Rights).
- (b) not having reasonable regard to Principles 2, 4, 5, 6, 8, 9 of Schedule 3 to the *Australian Human Rights Commission Act 1986* (Cth) (the United Nations Declaration on the Rights of the Child).

Detention of minors

(xxvii) Detaining group members who are minors other than as a measure of last resort.

Education failures

(xxviii) Failing to enrol group members who are children of compulsory school age to enrol them in an educational programme for their compulsory education period.

30. Each of the defendants failed and continues to fail to provide reasonable health care to the group members who have been or are injured, or were or are pregnant while in detention.

Particulars

Failures relating to nature of group members' detention

- (i) Keeping the group members in detention:
 - (a) other than on mainland Australia, where the standard of care could be more readily met than on Christmas Island; alternatively

- (b) on Christmas Island without also causing actions to be taken so that the standard of care can be met there.

[There is no particular (ii) to this paragraph.]

- (iii) Failing to act upon the recommendations of the Minister's Council on Asylum Seekers and Detention that families, children and complex cases ought to be managed by detention on mainland Australia or community detention.

Medical failures

- (iv) Failing to stay apprised of the medical needs of the group members by *inter alia*:
 - (a) dissolving the Immigration Health Advisory Group (**IHAG**); and
 - (b) failing to replace IHAG with any other mechanism capable of providing similarly expert advice on the medical needs of the group members.
- (v) Failing to act upon the recommendations of IHAG.
- (vi) Failing to act in response to the 'Letter of Concern' written in or around November 2013 by certain agents or former agents of IHMS.

[There are no particulars (vii)-(ix) to this paragraph.]

- (x) Failing to prescribe necessary medication, or make available in a timely way medication that had been prescribed or was or is required.
- (xi) Failing to ensure that medical facilities available to group members met Royal Australian College of General Practitioners' Standards for General Practice, or alternatively, Standards for Immigration Detention Centres.
- (xii) Failing to make and keep available medical facilities that are fit for purpose and adequately stocked.

[There is no particular (xiii) to this paragraph.]

(xiv) Failing to keep accurate records of group members' health.

[There is no particular (xv) to this paragraph.]

(xvi) Failing to ensure adequate numbers of appropriately-qualified general practitioners were and are available to group members as their circumstances required and require.

(xvii) Failing to ensure adequate numbers of appropriately-qualified psychologists and other mental health practitioners were and are available to group members as their circumstances required and require.

(xviii) Failing to ensure that group members consulted with and were attended to by medical practitioner specialists in appropriate facilities as their symptoms required and require.

(xix) Failing to act on the recommendations of medical practitioners.

(xx) Allowing health care decisions to be made other than by reference to the best interest of the group members.

(xxi) Failing to diagnose injuries.

(xxii) Failing to treat, or arrange timely treatment, of injuries.

(xxiii) Moving group members who were transferred to mainland Australia for medical treatment back to detention on Christmas Island either without medical review, or where medical treatment could not be completed, or both.

[There are no particulars (xxiv)-(xxv) to this paragraph.]

Human rights failures

(xxvi) Acting in a manner inconsistent with human rights within the meaning of the *Australian Human Rights Commission Act 1986* (Cth) by:

- (a) not having reasonable regard to Article 7 of Schedule 2 to the *Australian Human Rights Commission Act 1986* (Cth) (the International Covenant on Civil and Political Rights).
- (b) not having reasonable regard to Principles 2, 4, 5, 6, 8, 9 of Schedule 3 to the *Australian Human Rights Commission Act 1986* (Cth) (the United Nations Declaration on the Rights of the Child).

Detention of minors

- (xxvii) Detaining group members who are minors other than as a measure of last resort.

Education failures

- (xxviii) Failing to enrol group members who are children of compulsory school age to enrol them in an educational programme for their compulsory education period.

Particulars specific to A.S.

- (xxix) Failing to diagnose and treat the conditions particularised in paragraph 35.

31. Each of the defendants failed and is continuing to fail to exercise due care and skill in providing the health care that it did or does provide.

Particulars

A.S. repeats the particulars to paragraph 30.

Statutory duty to detain minors only as measure of last resort

32. Further and in the alternative to paragraphs 29 to 31, each of the defendants detained A.S. and the group members who were minors other than as a measure of last resort.

Particulars

- (i) The transcript of the press conference and subsequent 'clarification' media release from the Minister of 8 November 2013, in which he stated that the defendants operate a 'no exceptions policy' in relation to detention of group members as part of their 'offshore processing' policy.
- (ii) Further particulars will be provided after discovery.

Statutory duty of guardianship

33. The Minister has failed and continues to fail to discharge his statutory duty of guardianship to group members who are non-citizen children.

Particulars

A.S. repeats the particulars to paragraphs 28 to 32.

Statutory duty to enrol children in school

34. The Minister has failed and continues to fail to enrol children of compulsory school age in an educational programme for their compulsory education period.

Injury

35. As a result of the negligence of each of the defendants, A.S. has suffered injuries.

Particulars

Physical injuries

- (i) recurrent dental abscesses; and
- (ii) recurrent allergic reactions.

Psychological injuries

- (iii) post-traumatic stress disorder;
- (iv) separation anxiety disorder;
- (v) secondary nocturnal enuresis;
- (vi) childhood onset fluency disorder (stuttering); and further or in the alternative to the above
- (vii) major depression with anxiety.

36. As a result of the negligence of each of the defendants, A.S. will require medical, dental and psychiatric treatment.

Particulars

Particulars will be provided prior to trial.

37. Each of the defendants has acted and continues to act in a manner exhibiting a contumelious disregard of A.S.'s rights.

Particulars

Prolonged continuing breach

- (i) Each defendants' breach of their duties is continuing, and A.S. refers to paragraph 30 and the particulars to that paragraph.
- (ii) In the case of A.S., the defendants' breaches have been continuing since about 26 July 2013.

Defendants' conduct

- (iii) The Minister by his servants and agents told A.S. on at least one occasion on or about 7 July 2014 that she and her immediate family are liable to be removed to either Nauru or Manus Island at any time despite having giving an undertaking to her lawyers Maurice Blackburn in a letter dated 16 April 2014 that she would not be so removed, such conduct carried out knowing that or without regard as to whether it would cause and/or exacerbate psychological injury.
- (iv) The defendants on 23 July 2014 and again on 24 July 2014 either limited or denied the lawyers for A.S. and the group members, and the medical advisors which the lawyers considered necessary, access to the group members to advise and obtain instructions on their rights, such limitation or denial being:
 - (a) unreasonable; and or alternatively
 - (b) unlawful.
- (v) The defendants operated and continue to operate a practice of moving group members who have been transferred to mainland Australia for medical treatment back to detention on Christmas Island and explaining to the group members that their medical treatment could be

completed on Christmas Island, knowing or having no regard to the fact that such completion of medical treatment was impossible.

- (vi) The defendants operated and continue to operate a practice of moving group members from and into and out of detention centres:
 - (a) without notice;
 - (b) before dawn;
 - (c) without informing the lawyers for those group members who the defendants are on notice have retained lawyers; and
 - (d) without otherwise affording the group members reasonable facilities to obtain legal advice.

Causation

- 38. Each defendant's breach of the:
 - a. duty to take reasonable care in detention; and
 - b. statutory duty to detain minors only as measure of last resort;caused or made a material contribution to A.S.'s injuries.
- 39. The Minister's breach of his statutory duty of guardianship caused or made a material contribution to A.S.'s injuries.
- 40. The Minister's breach of the statutory duty to enrol children in school caused or made a material contribution to A.S.'s injuries.

PART C. RELIEF SOUGHT

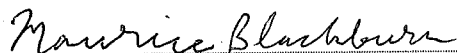
A.S. claims on behalf of herself and the group members:

1. Declarations that each of the defendants has breached and are continuing to breach their duties towards the group members.
2. Damages, including exemplary damages.
3. Interest.
4. Permanent injunctions restraining each of the defendants from detaining the group members on Christmas Island.
5. Costs.
6. Such other orders as the Court thinks fit.

PART D. QUESTIONS COMMON TO CLAIMS OF GROUP MEMBERS

1. Which of the defendants owe:
 - a. a duty to take reasonable care to the group members?
 - b. a statutory duty to detain minors as a measure of last resort to the minor group members?
2. Does the Minister owe:
 - a. a statutory duty of guardianship to group members who are non-citizen children?
 - b. a statutory duty to enrol children in school to group members who are children of compulsory school age within the meaning of the *School Education Act 1999 (WA)*?
3. Did any of the defendants breach their:
 - a. duty to take reasonable care;
 - b. statutory duty to detain minors only as a measure of last resort; to the group members?
4. Did the Minister breach his:
 - a. statutory duty of guardianship to group members who are non-citizen children?
 - b. statutory duty to enrol children in school to group members who are children of compulsory school age within the meaning of the *School Education Act 1999 (WA)*?

Dated 26 August 2014



Maurice Blackburn
Solicitors for the plaintiff

1. Place of trial – Melbourne.
2. Mode of trial – Judge and jury.
3. This writ was filed for the plaintiff by Maurice Blackburn, Level 10, 456 Lonsdale Street, Melbourne Vic 3000.
4. The address of the plaintiff is c/- Christmas Island Immigration Detention Centre, Murray Road, Christmas Island WA 6798.
5. The address for service of the plaintiff is c/- Maurice Blackburn, Level 10, 456 Lonsdale Street, Melbourne Vic 3000.
6. The address of each defendant is c/- Australian Government Solicitor, Level 21, 200 Queen Street, Melbourne Vic 3000.



IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

**COMMON LAW DIVISION
MAJOR TORTS LIST**

S CI 2014

SCHEDULE OF PARTIES

BETWEEN

A.S. BY HER LITIGATION GUARDIAN MARIE THERESA ARTHUR

Plaintiff

and

**MINISTER FOR
IMMIGRATION AND BORDER PROTECTION**

First Defendant

**SECRETARY OF THE DEPARTMENT OF
IMMIGRATION AND BORDER PROTECTION**

Second Defendant

COMMONWEALTH OF AUSTRALIA

Third Defendant



26 August 2014