

**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

First Defendant

and

COMMONWEALTH OF AUSTRALIA

Second Defendant

**STATEMENT OF CLAIM (FILED PURSUANT TO THE ORDER OF HIS HONOUR
JUSTICE J FORREST MADE ON 18 AUGUST 2016)**

Date of document: 23 September 2016

Filed on behalf of: The Plaintiff

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CONTENTS

A. PRELIMINARY	4
A1. The Plaintiff	4
A2. Group Members	4
A3. Sub-Group	5
A4. The Respondents	6
A5. Other entities	7
B DUTIES	8

B1. Common law duty to all detainees	8
B.1.1 Conditions affecting all persons in detention – control.....	8
B.1.2 Conditions affecting all persons in detention – physical conditions.....	10
B.1.3 Vulnerability and reasonable foreseeability.....	13
B.1.4 Duty of care	15
B2. Duties to minors in Detention	15
B.2.1 Conditions specifically affecting minors in Detention	15
B.2.2 Vulnerability and reasonable foreseeability.....	16
B.2.3 Common law general duty to minors in detention	19
B.2.4 Common law and statutory educational duty to minors in detention ...	19
C. FACTS RELEVANT TO THE CLAIM OF A.S.....	22
C1. Detention of A.S. and her family.....	22
C.1.1 Initial detention on Christmas Island	22
C.1.2 Family separation	22
C.1.3 Detention in Darwin	23
C.1.4 Further detention on Christmas Island.....	24
C.1.5 Ongoing detention after transfer from Christmas Island.....	25
C2. Conditions of Detention of A.S. and her family.....	26
C3. Medical treatment of A.S. in detention.....	26
C4. Education and development of A.S. in detention.....	31
D. NEGLIGENCE	33
D1. Common Law General Duty of Care to Detainees.....	33
D.1.1 Breach of duty.....	33
D.1.2 Causation.....	37
D2. Common Law General Duty of Care to Minor Detainees	39

D.2.1	Breach of duty.....	39
D.2.2	Causation of injury (other than developmental delay).....	43
D.2.3	Causation of developmental delay.....	43
D3.	Common Law Educational Duty to Minor Detainees and Statutory	
	Educational Duty to Minor Detainees	46
D.3.1	Breach of duty	46
D.3.2	Causation	47
E.	FALSE IMPRISONMENT	48
E1.	The false imprisonment.....	48
E2.	Causation.....	49
F.	LOSS AND DAMAGE.....	51
F1.	Injury (other than developmental delay)	51
F2.	Developmental delay	52
F3.	False Imprisonment	53
F4.	Exemplary damages	53
G.	CLAIM FOR RELIEF	54
H.	QUESTIONS COMMON TO CLAIMS OF GROUP MEMBERS	55
	SCHEDULE	57
	Part I Facts common to M and F.....	57
	Part II Medical failures in respect of M.....	59
	Part III Medical Failures in Respect of F	64
	INDEX OF DEFINED TERMS	67

A. PRELIMINARY

A1. The Plaintiff

1. The Plaintiff (**A.S.**) is a minor and sues by her litigation guardian Marie Theresa Arthur (aka Sister Brigid Arthur).
2. Between on or about 26 July 2013 and 19 August 2014, A.S. was pursuant to section 189(3) of the *Migration Act 1958* (Cth) (**Migration Act**) placed in detention on Christmas Island.

A2. Group Members

3. 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 in detention on Christmas Island at any time in the period between 27 August 2011 and 26 August 2014 inclusive (the **Relevant Period**) whether or not they have since been released from detention;
 - b. suffered injury (including illness, whether physical or psychological or psychiatric) (**Injury**) and/or was pregnant, during the Relevant Period, while in detention; and
 - c. has, during the Relevant Period, suffered an injury or an exacerbation of an injury which is alleged to be as a result of the defendants' failure to provide him, her or his or her parents with reasonable care; and
 - d. has claimed that Australia owes him or her protection obligations under section 36 of the Migration Act;(collectively, **Group Members**).
4. There are more than seven Group Members as at the commencement of this proceeding.

A3. Sub-Group

5. A.S. and a subgroup of Group Members are persons who during all or part of the Relevant Period were minors, being persons who had not reached the age of 18 years (**Minor Group Members**).

Particulars

- (i) Under the common law a person is a minor until they attain the age of 18 years. Under the *Migration Act* (s 5) a person is a “minor” if they are less than 18 years old. Under the *Age of Majority Act 1972* (WA), a person who attains the age of 18 years after 1 November 1972 attains full age and full capacity.
 - (ii) A.S. was born on 23 January 2008, and therefore was a Minor Group Member from 26 July 2013 until the end of the Relevant Period.
 - (ii) Particulars in respect of other Minor Group Members will be given following the initial trial of A.S.’s claim.
6. A.S. and a subgroup of Group Members are persons who during all or part of the Relevant Period were minors who were also children of compulsory school age within the meaning the *School Education Act 1999* (WA) (**SE Act**) (**School-Age Group Members**).

Particulars

- (i) Under the SE Act, a “child of compulsory school age” means a child who under s 9(1) of the SE Act was required to be enrolled in an educational programme, and includes a child to whom s 10(2) of the SE Act applies;
- (ii) Under s 9(1) of the SE Act, a child was to be enrolled for each year of the compulsory education period for that child.
- (iii) Under s 6 of the SE Act:
 - (A) Prior to 31 December 2012, the compulsory education period for a child was from the beginning of the year in which the child reached the age of 6 years and 6 months until

the end of the year when the child reached the age of 17: SE Act, s 6(1)(a);

- (B) From 1 January 2013 to 31 December 2013, the compulsory education period for a child was from the beginning of the year in which the child reached the age of 5 years and 6 months until the end of the year when the child reached the age of 17: SE Act, s 6(1)(b);
- (C) From 1 January 2014 to the end of the Relevant Period, the compulsory education period for a child was from the beginning of the year in which the child reached the age of 5 years and 6 months until the end of the year when the child reached the age of 17 years and 6 months: SE Act, s 6(1)(c);
- (iv) A.S. was born on 23 January 2008, and therefore would reach the age of 5 years and 6 months on 23 August 2013, such that, pursuant to s 6(1)(b) of the SE Act the compulsory education period in respect of A.S. commenced at the beginning of 2013, and continued throughout the Relevant Period, so that A.S. was a child of compulsory school age on and from 26 July 2013.
- (v) Particulars in respect of other School Age Group Members will be given following the initial trial of A.S.'s claim.

A4. The Respondents

- 7. The Second Defendant (**Commonwealth**) is capable of being sued at common law, and/or by reason of ss 56 and/or 64 of the *Judiciary Act 1902* (Cth).
- 8. In the Relevant Period, the Commonwealth department responsible for the administration of the *Migration Act* (**the Department**) was:
 - a. between 17 August 2011 and 18 September 2013, known as the Department of Immigration and Citizenship ("DIAC"); and

- b. between 18 September 2013 and 26 August 2014, known as the Department of Immigration and Border Protection (“DIPB”).
9. The First Defendant (**the Minister**) is the Minister of the Crown in right of the Commonwealth responsible for the administration of the Migration Act, and for the Department.
10. The Commonwealth is vicariously liable for the acts and omissions of:
- a. its servants and agents, including officers and employees of the Department; and/or
 - b. the Minister.

A5. Other entities

11. At all material times in the Relevant Period, International Health and Medical Services Pty Ltd (**IHMS**) was contracted by the Commonwealth to provide health services to and in respect of persons in detention on Christmas Island.

Particulars

Contracts between the Commonwealth and IHMS dated 29 September 2006 [CTH.0065.0005] and 14 January 2009 [CTH.0065.0441] (**IHMS Contracts**).

12. At all material times in the Relevant Period, Serco Australia Pty Limited (**Serco**) was contracted by the Commonwealth to provide accommodation, security and recreational services to and in respect of persons in detention on Christmas Island.

Particulars

Contract between the Commonwealth and Serco dated 29 June 2009 [CTH.0065.0005] (**Serco Contract**).

B DUTIES

B1. Common law duty to all detainees

B.1.1 Conditions affecting all persons in detention – control

13. At all material times in the Relevant Period, the detention of A.S. and the Group Members on Christmas Island was and/or is purportedly pursuant to section 189(3) of the *Migration Act*.
14. At all material times in the Relevant Period, A.S. and Group Members were each a person who claims that he or she is:
 - a. a person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it; and/or
 - b. a person to whom Australia owes protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of that person being removed from Australia to a receiving country, there is a real risk that that person will suffer any of arbitrary deprivation of life, the death penalty, torture, cruel, inhuman or degrading treatment or punishment, as defined in s 5 of the Migration Act; and/or
 - c. a member of the same family unit as a person described in (a) or (b).
15. At all material times in the Relevant Period, the Plaintiff and Group Members were unable to leave detention on Christmas Island of their own accord.

Particulars

- (i) The Group Members were or are detained in facilities:
 - (A) with perimeter fences;
 - (B) with constant supervision of security guards preventing their escape or voluntary egress;
 - (C) where they were or are subject to application of force by the defendants and their servants and agents.
 - (ii) If the detention of A.S. or any of the Group Members was or is 'immigration detention' within the meaning of the Migration Act (the lawfulness of which is not admitted), section 197A of that Act made or makes it an offence to escape from such detention.
16. At all material times in the Relevant Period, while in detention on Christmas Island, the conditions to which A.S. and Group Members was subject was under the exclusive control of the Commonwealth and/or the Minister, together with their servants and agents including:
- a. Serco, which, by reason of the Serco Contract, controlled who was able to visit, telephone or otherwise contact them;
 - b. IHMS, which, by reason of the IHMS Contracts, controlled who was able to provide medical care to them.
17. At all material times in the Relevant Period, while in detention on Christmas Island, A.S. and the Group Members were prevented from accessing any:
- a. medical and health services;
 - b. recreational facilities,
- other than those that the Commonwealth and/or the Minister (and/or their servants and agents, including IHMS and Serco) chose to make available to them.

B.1.2 Conditions affecting all persons in detention – physical conditions

18. During the Relevant Period, detention on Christmas Island was subject to physical conditions and daily routine exclusively determined by the Commonwealth and/or the Minister (and/or their servants and agents, including Serco).
19. During the Relevant Period, the physical conditions of, and daily routine pertaining to, detention on Christmas Island which were exclusively determined by the Commonwealth and/or the Minister (and/or their servants and agents, including Serco) had the following features (**Christmas Island Detention Conditions**):
- a. perimeter fences;
 - b. the standard of accommodation and the amenity provided to the persons in detention;

Particulars

- (i) The Commonwealth and/or the Minister (and/or their servants and agents, including Serco) assigned at their will families to rooms that were:
 - (A) in sets of temporary buildings;
 - (B) about 2.5 x 3 m in size;
 - (C) with limited natural lighting, insulation, ventilation and air-conditioning;
 - (D) subject to intrusions by the Commonwealth and/or the Minister (and/or their servants and agents, including Serco) at any times the latter determined and for purposes described as 'welfare checks'.
- (ii) There were no places other than the assigned rooms particularised in (i) in which families could enjoy privacy.
- (iii) There were no places in which families could cater for themselves.
- (iv) The amenity of the accommodation included:

- (A) the Commonwealth and/or the Minister (and/or their servants and agents, including Serco) allowing crabs, centipedes and vermin to enter and remain in accommodation quarters and common areas;
 - (B) pathways within and between sets of buildings comprised only of timber, dirt, gravel, loose stone or concrete;
 - (C) common areas where persons in detention could congregate and socialise that were:
 - (I) not furnished sufficiently having regard to the number of persons in detention;
 - (II) mouldy and otherwise in disrepair;
 - (III) open only at whatever times and accessible on conditions determined at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco);
 - (D) omnipresence of security guards and security cameras;
 - (E) being subject to overcrowding, by reason of the places of detention housing more people than their designed operational capacities.
- c. the quality, quantity and serving times of and conditions of access to food;

Particulars

- (i) Meals were available only at set times to persons who queued and presented identity cards.
 - (ii) The only food permitted for consumption was the food provided at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco).
- d. the occupational activities in which persons in detention on Christmas Island could participate;

Particulars

- (i) From time to time the Commonwealth and/or the Minister (and/or their servants and agents, including Serco) purported to offer occupational activities for persons in detention.
 - (ii) The activities were not run to schedules on which the activities were purported to be offered, or at all.
 - (iii) Participation in those activities was subject to conditions and limited to numbers of persons determined at the will of the Commonwealth and/or Minister (and/or their servants and agents, including Serco).
 - (iv) Persons in detention who attempted to organise their own activities were discouraged or prohibited from doing so at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco).
- e. whether there could be and conditions of access to clothes, toiletries, toys, stationery, and any other kinds of property or personal effects that a person in detention might reasonably require;

Particulars

- (i) All persons in detention who wished to access any kind of item (including an item that the person owned) other than that which was on their person or in their room were required to:
 - (A) make a written request for such item; or
 - (B) queue at locations designated at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco) at whatever times they determined, and make an oral request for that item; or
 - (C) trade 'points' which the person had accrued at whatever rate and subject to whatever conditions determined at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco) for such item, at locations designated at the will of them and at whatever times they determined.

- (ii) The provision of the item was at the discretion and on conditions imposed at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco).
- f. the times of day at which persons in detention were to retire and wake.

Particulars

- (i) Each evening, all persons in detention were required to be in their assigned rooms at whatever times and for whatever periods determined at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco).
- (ii) Each morning, all persons in detention had their rooms disturbed or intruded into by and at whatever times determined at the will of the Commonwealth and/or the Minister (and/or their servants and agents, including Serco).

B.1.3 Vulnerability and reasonable foreseeability

20. While in detention on Christmas Island each of A.S. and Group Members was dependent on either one or both of the Commonwealth and/or the Minister for their physical and psychological health and wellbeing.

Particulars

- (i) The dependency arose because of each of the matters pleaded in paragraphs 13 to 19, namely:
 - (A) the fact of detention, and the claim of a fear of persecution which resulted in seeking asylum (paragraphs 13 to 14);
 - (B) the lack of freedom to leave detention (paragraph 15);
 - (C) the control of their physical conditions, daily routine and the medical and recreational services they could access by the Commonwealth (paragraphs 16 to 19).

21. At all material times it was reasonably foreseeable to each of the Commonwealth and the Minister that a person in detention on Christmas Island in the conditions set out in paragraphs 13 to 20 could suffer injury or exacerbation of existing injury.

Particulars

- (i) Each of the defendants knew or ought to have known that:
 - (A) Each of A.S. and the Group Members were or are asylum seekers (and therefore of the matters pleaded in paragraph 14); and
 - (B) Immediately before entering detention, each of A.S. and the Group Members travelled more than 300km by boat over several days across open ocean waters;
 - (C) A.S. and the Group Members were detained involuntarily from the time of their arrival in Australia (and therefore of the matters pleaded in paragraph 16);
 - (D) None of A.S. and the Group Members knew when their period of detention would end until, if at all, soon before each was released;
 - (E) the Minister's Council on Asylum Seekers and Detention, had advised the defendants that there 'are substantial ongoing risk factors for physical and mental health problems in people in held detention on Christmas Island' [CTH.0055.0117 at .0120];
- (ii) In addition, the Commonwealth purported to provide medical services to A.S. and the Group Members while in detention, including by the IHMS Contracts.

B.1.4 Duty of care

22. By reason of the matters pleaded in paragraphs 13 to 21, each of the Commonwealth and the Minister owed and owe separately a duty of care to A.S. and each of the Group Members while they were in detention on Christmas Island, to:
- a. take reasonable care to ensure that their detention did not or does not cause injury, or exacerbate existing injury;
 - b. provide reasonable health care in the event that any of them suffered injury or were pregnant; and
 - c. exercise due care and skill in providing such care,
- (Common Law General Duty of Care to Detainees).**
23. The Common Law General Duty of Care to Detainees pleaded in paragraph 22 was not and is not delegable.

B2. Duties to minors in Detention**B.2.1 Conditions specifically affecting minors in Detention**

24. At all material times in the Relevant Period, while in detention on Christmas Island the parents of Minor Group Members (and School Age Group Members) were prevented from accessing for and on behalf of their respective children:
- a. any medical and health services;
 - b. any recreational facilities; and
 - c. any educational programs or facilities,

other than those that the Commonwealth and/or the Minister (and/or their servants and agents, including IHMS and Serco) chose to make available to them.

25. By reason of the matters pleaded in paragraph 24, the parents of Minor Group Members (and School Age Group Members) had limited ability to mitigate the negative impacts of any injury, or exacerbation of existing injury, to that Minor Group Member.
26. By reason of the matters pleaded in paragraphs 13 to 19 and 24 to 25, at all material times in the Relevant Period, the parents of Minor Group Members (and School Age Group Members) who were themselves in detention on Christmas Island were dependent upon either one or both of the Commonwealth and/or the Minister to provide for the physical and psychological health and wellbeing, and the development of the Minor Group Members who were their children.

B.2.2 Vulnerability and reasonable foreseeability

27. By reason of the matters pleaded in paragraphs 13 to 19 and 24 to 26, while in detention on Christmas Island Minor Group Members (and School Age Group Members) were dependent on either one or both of the Commonwealth and/or the Minister for:
 - a. their physical and psychological health and wellbeing; and
 - b. their physical, cognitive and psychological development.

Particulars

- (i) The dependency of A.S. and Minor Group Members on the Commonwealth and/or the Minister for their physical and psychological health and wellbeing arose from:
 - (A) the matters pleaded in paragraphs 13 to 19 (in respect of which the dependency is the same as that pleaded in paragraph 20); and/or

- (B) the matters pleaded in paragraphs 13 to 19, together with the matters pleaded in paragraphs 24(a)-(c) and 26 (in respect of which the dependency is greater than that pleaded in paragraph 20);
 - (ii) The dependency of A.S. and Minor Group Members on the Commonwealth and/or the Minister for their physical, cognitive and psychological development arose from the matters pleaded in paragraphs 13 to 19 together with the matters pleaded in paragraphs 24(b)-(c) and 26, and the fact that they were minors.
28. At all material times it was reasonably foreseeable to each of the Commonwealth and the Minister that a person who was a minor in detention on Christmas Island in the conditions set out in paragraphs 13 to 19 and 24 to 27 could suffer injury or exacerbation of existing injury.

Particulars

- (i) The particulars to paragraph 21 are repeated.
- (ii) In addition, the Commonwealth and the Minister knew or ought reasonably to have foreseen the heightened possibility of injury to the physical and psychological health and wellbeing of Minor Group Members arising because they were:
 - (A) younger and less physically, cognitively and psychologically developed than adults;
 - (B) dependent upon their parents, who were in turn dependent on the Commonwealth and/or the Minister (see paragraphs 20, 26 and 27).
- (ii) In addition, the Commonwealth and the Minister knew or ought reasonably to have foreseen the heightened possibility of injury to the physical and psychological health and wellbeing of Minor Group Members arising if reasonable care was not provided to their parents sufficient to ensure that their parents' detention did not or does not cause injury, or exacerbate existing injury and reasonable health care provided in the event that any of their parents suffered injury or were pregnant, given that it was foreseeable that injury to the parents would further exacerbate the already limited ability of those

parents to mitigate the negative impacts of any injury, or exacerbation of existing injury, to that Minor Group Member (see paragraph 25). The reasonable foreseeability of this kind of risk of injury is demonstrated by:

- (A) the advice given by the Departmental Health Advisory Group (DeHAG) and later the Immigration Health Advisory Group (IHAG), that 'detention conditions are harmful to the health, development and wellbeing of children and their parents' [CTH.0055.0135];
- (B) the contents of the Commonwealth Mental Health Policies that recognised '[r]esearch findings of clinical psychology and psychiatry suggest that the good mental health of parents and other primary care-givers can help to minimise the negative impacts that exposure to traumatic events has on minors' and 'parents and primary care-givers who are traumatised and distressed are unlikely to be able to meet the emotional needs of dependent minors' [CTH.0003.3101 at .3102];
- (C) of the advice of the Minister's Council on Asylum Seekers and Detention to the defendants that 'families, children and complex cases would be better managed if the detainees were transferred to mainland detention centres, APODs or in community detention. Specifically for children, there are a range of continuous adverse events and experiences that are cause for deep concern' [CTH.0055.0117 at .0120];
- (D) s 4AA of the Migration Act, which provides that the Parliament affirms as a principle that a minor shall only be detained (other than in community detention pursuant to a residence determination) as a measure of last resort;
- (E) Article 10 of the International Covenant on Economic, Social and Cultural Rights, and Articles 3, 4, 19, 20, 22, 24, 27, 28, 29, 31 and 39 of the United Nations Convention on the Rights of the Child.

B.2.3 Common law general duty to minors in detention

29. By reason of the matters pleaded in paragraphs 13 to 19 and 24 to 28, each of the Commonwealth and the Minister owed and owe separately a duty of care to A.S. and each of the Minor Group Members while they were in detention on Christmas Island, to:
- a. take reasonable care to ensure that their detention did not cause injury, or exacerbate existing injury;
 - b. provide reasonable care in the event that any of them suffered injury; and
 - c. exercise due care and skill in providing such care,

(Common Law General Duty of Care to Minor Detainees).

30. The Common Law General Duty of Care to Minor Detainees pleaded in paragraph 29 was not and is not delegable.

B.2.4 Common law and statutory educational duty to minors in detention

31. At all material times in the Relevant Period, the SE Act:
- a. applied on Christmas Island, by operation of Part III Division I of the *Christmas Island Act 1958* (Cth) and the relevant register tabled in the Commonwealth parliament on 16 March 2000); and
 - b. obliged a parent (being a person with responsibility at law for the day to day care, welfare and development of a child) of a child of compulsory school age to enrol them in an educational programme for their compulsory education period (ss 9 and 10); and
 - c. further provided, by reason of the *School Education Regulations 2000* (WA) (in force pursuant to s 123 of the SE Act), that a child enrolled in a primary or secondary programme at a government school must be

provided with at least 25 hours and 50 minutes instruction during each week in which the school is open for instruction, which is to consist of at least 4 hours and 10 minutes of instruction per day;

- d. further provided that students must, on the days on which the school is open for instruction, attend school (s 23), and that a parent (being a person with responsibility at law for the day to day care, welfare and development of a child) must ensure that the student does so attend (s 38).

- 32. At all material times in the Relevant Period, A.S. and School Age Group Members were children of compulsory school age within the meaning the SE Act.

Particulars

The particulars to paragraph 6 are repeated.

- 33. At all material times in the Relevant Period, the Minister has or had responsibility for the day to day care, welfare and development of A.S. and the School Age Group Members.

Particulars

In addition to those matters set out in paragraphs 13 to 21 and 24 to 28, the Minister's responsibility is demonstrated by his capacity to provide or withhold access to goods and services to A.S. and the School Age Group Members necessary for their day to day care, welfare and development, including providing or withholding access to educational programmes.

- 34. At all material times it was reasonably foreseeable to each of the Commonwealth and the Minister that in respect of children of compulsory school age that:
 - a. a failure to provide them with reasonable educational programs and facilities; and/or

- b. a failure to enrol them in an educational programme for their compulsory education period within the meaning of the SE Act, could cause them to develop injury or exacerbate existing injury.

Particulars

An educational programme of the kind within the meaning of the SE Act is a protective factor against psychological and psychiatric injury.

35. By reason of the matters pleaded in paragraphs 13 to 21, 24(c), 26, 27(b), 28 and 34(a), each of the Commonwealth and the Minister owed and owe separately a duty of care to A.S. and each of the Minor Group Members while they were in detention on Christmas Island to:
- a. provide them with reasonable educational programs and facilities; and/or
 - b. exercise due care and skill in providing such care,
- (Common Law Educational Duty to Minor Detainees).**
36. The Common Law Educational Duty to Minor Detainees was not and is not delegable.
37. Further, or alternatively to paragraph 35, by reason of the matters pleaded in paragraphs 31 to 33 and 34(b) in the Relevant Period the Minister had a duty to A.S. and the School Age Group Members to:
- a. enrol them in an educational programme for their compulsory education period; and
 - b. ensure that they attended a school (as defined in the SE Act) on each day on which the school was open for instruction,

(Statutory Educational Duty to Minor Detainees).

38. The Statutory Educational Duty to Minor Detainees was not and is not delegable.

C. FACTS RELEVANT TO THE CLAIM OF A.S.

C1. Detention of A.S. and her family

C.1.1 Initial detention on Christmas Island

39. On or about 26 July 2013, A.S. arrived in Australia together with her father (**F**), and her mother (**M**), who was pregnant.
40. On or about 26 July 2013, A.S., F and M were placed in detention on Christmas Island purportedly pursuant to s 189(3) of the Migration Act.

Particulars

DIAC Section 189(3) Detention of Unlawful Citizens Who are in an Excised Offshore Place [CTH.0004.0002].

41. On or about 7 August 2013, A.S., F and M were inducted into the Christmas Island Immigration Detention Centre (**Christmas Island IDC**) by Serco.

Particulars

Serco Induction Process Confirmations [CTH.0026.0001 at .0166; ASR.001.203.0001 at .0053].

C.1.2 Family separation

42. On or about 11 or 12 August 2013, M was transferred from Christmas Island IDC (Aqua Camp) to Darwin (Darwin Airport Lodge Stage 3 (“DAL3”) camp).

Particulars

- (i) Serco In Possession Form [ASR.001.203.0001 at.0011].
 - (ii) Serco Reception Checklist [ASR.001.203.0001 at .0003].
43. By reason of the matters pleaded in paragraph 40, A.S. was separated from M (**Family Separation**).

44. Following the Family Separation, A.S. developed stuttering, nocturnal enuresis (bedwetting) and anxiety.

C.1.3 Detention in Darwin

45. On or about 16 August 2013, A.S. and F were transferred from Christmas Island to Darwin, and detained in the Darwin Airport Lodge Alternative Place of Detention (DAL).

Particulars

- (i) DIAC Statement of Identity travel authorisation [CTH.0026.0001 at .0228].
 - (ii) Serco Reception Checklist [CTH.0026.0001 at .0232].
46. On or about 28 August 2013, the Department recommended to the Minister that a residence determination in respect of three families (including the family of A.S.), such that they would reside in community detention.

Particulars

[ASR.001.101.0420].

47. On or about 2 September 2013, the Minister made a residence determination under s 197AB of the Migration Act in respect of three families who were in detention under s 189 of the Migration Act, which stated that the Minister considered it was in the public interest for these families to reside at a specified place, instead of being detained at a place covered by the definition of “immigration detention” in subsection 5(1) of the Migration Act (**Determination**).

Particulars

Tabling Statements to Parliament entitled “Determination under s 197AB of the Migration Act 1958”, signed by the Hon. Tony Burke (Minister for Immigration, Multicultural Affairs and Citizenship).

48. The family of A.S. (comprising at that time F, M, A.S. and B) was one of the three families the subject of the Determination.

49. The specified place referred to in the Determination in respect of A.S. (and her family) was U14, 145 Kingston Rd, Woodridge, Queensland, 4114.

Particulars

[CTH.0353.0184].

50. By reason of the Determination, the Department was obliged to ensure that A.S. (and her family) resided in community detention at U14, 145 Kingston Rd, Woodridge, Queensland, 4114, and did not remain in detention on Christmas Island.
51. On or about 19 September 2013, M gave birth to B.

Particulars

Northern Territory Birth Certificate [ASR.001.401.0071 at .0076].

52. Notwithstanding the Determination and the matters referred to in paragraph 48:
- a. on and from 2 September 2013, the Department continued to hold A.S. and her family in detention, and did not ensure that they resided in community detention at U14, 145 Kingston Rd, Woodridge, Queensland, 4114;
 - b. on 27 September 2013, an officer of the Department (Kirsty Sheppard) purported to “cancel” the referral to community detention.

Particulars of (b)

[CTH.0353.0184].

C.1.4 Further detention on Christmas Island

53. Further to the matters pleaded in paragraph 52, on or about 18 October 2013, A.S., F, M and B were transferred from Darwin (DAL) to Christmas Island (Construction Camp).

Particulars

- (i) Serco DAL Discharge/Transfer Checklist for A.S. [CTH.0026.0001 at .0254].
- (ii) Serco DAL Discharge/Transfer Checklist for N [ASR.001.203.0001 at .0049].

54. Between 18 October 2013 and about 19 August 2014, A.S., F, M and B remained in detention on Christmas Island.

Particulars

Between 19 and 23 August 2014, A.S., F, M and B were transferred from detention on Christmas Island to Bladin Alternative Place of Detention (Darwin):

- (i) Serco Request for Services Form [CTH.0026.0001 at .0160];
- (ii) Serco Initial Detainee Placement Risk Assessment [CTH.0026.0001 at .0153];
- (iii) Serco Detainee Discharge Checklist [CTH.0026.0001 at .0153];
- (iv) DIAC Detainee Placement Agreement [CTH.0026.0001 at .0102];
- (v) Serco Person in Detention Discharge Checklist [CTH.0026.0001 at .0097];
- (vi) Serco Reception Check List [CTH.0026.0001 at .0012].

C.1.5 Ongoing detention after transfer from Christmas Island

55. Between about 19 August 2014 and 15 January 2015, A.S., F, M and B remained in detention at immigration detention centres other than Christmas Island IDC.

Particulars

A.S. was released into the community following the grant of a bridging visa on 15 January 2015 [ASR.001.101.0437].

C2. Conditions of Detention of A.S. and her family

56. During the Relevant Period, the detention of A.S., F and M in Construction Camp on Christmas Island was (save for the period between 16 August 2013 and 18 October 2013 referred to respectively in paragraphs 45 and 53) subject to the Christmas Island Detention Conditions described in paragraph 19.

Particulars

Paragraph 19 is repeated.

C3. Medical treatment of A.S. in detention

57. On or about 26 July 2013, the Commonwealth (by its servant or agent IHMS) carried out a Health Induction Assessment (**26/07/13 HIA**) in respect of A.S.

Particulars

Health Induction Assessment [ASR.001.101.0097].

58. The 26/07/13 HIA did not include any, or any detailed, developmental assessment of A.S.
59. On or about 7 August 2013, following the induction of A.S. into the Christmas Island IDC referred to in paragraph 41 above, the Commonwealth (by its servant or agent IHMS) carried out:
- a. a further Health Induction Assessment in respect of A.S. (**07/08/13 HIA**); and
 - b. a screening Mental State Examination of A.S. (**07/08/13 Screening MSE**).

Particulars

Health Induction Assessment [ASR.001.110.0007],

Mental State Examination [ASR.001.110.0121].

60. The 07/08/13 HIA did not include any, or any detailed, developmental assessment of A.S.
61. The 07/08/13 Screening MSE was an inadequate screening of A.S.'s mental health, and contained minimal observations and no detail under assessment headings.
62. On or about 13 August 2013, M made a report of existing depression which was exacerbated by her pregnancy (**M's Initial Depression Complaint**), of which the Commonwealth (by its servant or agent Serco) was aware.

Particulars

[ASR.001.203.001 at .0034].

63. The Commonwealth did not (either itself, or by its agent IHMS) shortly after 13 August 2013 (after M's Initial Depression Complaint), or at any time thereafter:
 - a. conduct a re-screening of A.S.'s mental health; nor
 - b. refer A.S. to a specialist paediatric psychologist/psychiatrist.
64. On or about 17 August 2013 (following the transfer of A.S. from Christmas Island to Darwin referred to in paragraph 45), the Commonwealth (by its servant or agent IHMS) carried out a Mental State Examination Assessment (**17/08/13 MSE1**) in respect of A.S.

Particulars

Mental State Examination Assessment
[ASR.001.110.0122].

65. The 17/08/13 MSE1 was an inadequate screening of A.S.'s mental health, and contained minimal observations and no detail under assessment headings.

66. On or about 25 October 2013, M was referred to a psychologist for depression (**M's Depression Referral**).

Particulars

[ASR.001.201.0560].

67. The Commonwealth did not (either itself, or by its agent IHMS) shortly after 25 October 2013 (after M's Depression Referral), or at any time thereafter:
- a. conduct a re-screening of A.S.'s mental health; nor
 - b. refer A.S. to a specialist paediatric psychologist/psychiatrist.
68. On or about 28 November 2013, A.S. developed dental pain and was referred by IHMS (for and on behalf of the Commonwealth) to a dentist.

Particulars

The cause of the dental pain was a bulging abscess on left gum in association with a decayed pre-molar, caries, or both.

69. A.S. was not treated for the dental pain referred to in paragraph 68 by a dentist until on or about 14 February 2014.
70. On or about 21 February 2014, M completed a Mental State Examination and reported severe mental health issues (**M's Depression Worsening**) of which the Commonwealth (by its servant or agent IHMS) was aware.

Particulars

M's MSE [ASR.001.204.0215, ASR.001.204.0223].

71. The Commonwealth did not (either itself, or by its servant or agent IHMS), shortly after 14 February 2014 (after M's Depression Worsening), or at any time thereafter:
- a. conduct a re-screening of A.S.'s mental health;
 - b. refer A.S. to a specialist paediatric psychologist/psychiatrist.
72. On or about 23 February 2014, A.S. reported further dental pain.

Particulars

The pain was recorded by IHMS as associated with the gum abscess [CTH.0003.1981 at .2155].

73. A.S. was not referred by IHMS to a dentist for the dental pain referred to in paragraph 72 until on or about 27 August 2014.
74. On or about 22 May 2014, A.S. was referred by IHMS (for or on behalf of the Commonwealth) to a speech pathologist.
75. The Commonwealth did not (either itself, or by its servant or agent IHMS) shortly after 22 May 2014 ensure that A.S. was seen by a speech pathologist, and did not see a speech pathologist until over 4 months later.
76. On or about 20 June 2014, A.S. was placed on the medical transfer list.
77. On or about 6 to 7 July 2014, M made two threats of self-harm (**M's Suicide Threats**) of which Serco (as servant or agent of the Commonwealth) was aware.

Particulars

'Incident Detail Report' [ASR.001.001.0001 at .0014 and .0027].

78. The Commonwealth did not (either itself, or by its agent IHMS) shortly after 7 July 2014 (after M's Suicide Threats), or at any time thereafter:
 - a. conduct a re-screening of A.S.'s mental health;
 - b. ensure that A.S. was promptly seen by a specialist paediatric psychologist/psychiatrist to which it had referred her on 8 July 2014 (but instead sending her to an adult psychologist on 9 July 2014).
79. On or about 14 July 2014:
 - a. the Commonwealth (either itself, or by its servant or agent IHMS) procured Dr Jacqueline Scurlock to examine A.S.;

- b. Dr Scurlock observed A.S. had presented with stuttering, enuresis, sad affect, anorexia and cervical lymphadenopathy;
- c. Dr Scurlock recommended that A.S. be assessed by a child and adolescent psychiatrist on the mainland.

Particulars

Letter from Dr Scurlock [CTH.0003.2335].

- 80. The Commonwealth did not (either itself, or by its servant or agent IHMS) shortly after 14 July 2014 ensure that A.S. was assessed by a child and adolescent psychiatrist on the mainland.
- 81. On or about 29 July 2014, A.S. was provisionally diagnosed with psychiatric injury, namely:
 - a. Post-Traumatic Stress Disorder (DSM V 309.81);
 - b. Secondary Nocturnal Enuresis (DSM V 307.6);
 - c. Childhood Onset Fluency Disorder (Stuttering) (DSM V 315.5); and/or
 - d. alternatively, Major Depression with Anxiety,

of which provisional diagnosis the Commonwealth (either by itself, or by its servant or agent IHMS) was aware.

Particulars

Report of Dr Sarah Mares (29 July 2014). The Commonwealth was provided with the provisional diagnosis of Dr Mares shortly after the report was prepared.

- 82. The Commonwealth did not (either itself, or by its servant or agent IHMS) shortly after 29 July 2014 ensure that A.S. was provided with urgent paediatric psychiatric care.

83. On or about 12 August 2014, A.S. was seen by a specialist paediatric psychiatrist engaged by IHMS (for and on behalf of the Commonwealth) for the first time.

Particulars

IHMS medical records for A.S. [CTH.0003.1981 at .2108].

C4. Education and development of A.S. in detention

84. While in detention on Christmas Island, between 26 July 2013 and 11 to 12 August 2013, no arrangements were made for A.S. to undertake any educational programme, or attend a school (as defined in the SE Act).
85. While in detention in Darwin, A.S. arrangements were made for A.S. to attend Anula Primary School.

Particulars

- (i) A.S. attended primary school on 18, 19, 23, 25, 26 and 27 September 2013 (being the last day in Term 3 in the Northern Territory), and was marked absent on 20 and 24 September 2013.
 - (ii) A.S. attended primary school on 7, 8, 9, 10 and 11 October 2013 (being the first week in Term 4 in the Northern Territory).
86. While in detention on Christmas Island, after 18 October 2013:
- a. between 18 October 2013 and 19 December 2013 (being the last day of term 4 in Western Australia), no arrangements were made for A.S. to undertake any educational programme, or attend any school;
 - b. between 3 February 2014 and 11 April 2014 (being Term 1 in Western Australia) and between 28 April 2014 and 4 July 2014 (being Term 2 in Western Australia):
 - i. arrangements were made for A.S. to attend Christmas Island District High School (**CIDHS**), being a school as defined in the

SE Act), on a two week “roster”, for a total of about 20 days, or alternatively 30 days;

- ii. arrangements were not made for A.S. to attend school on each day (or for at least 25 hours per week on each week) when CIDHS was open for instruction;

Particulars

Drumsite School List 24/02/2014 – 07/03/2014 (CTH.0351.7216); Serco Personal Officer Case Notes (CTH.0026.0001 at .0206-.0207); School Lists for Phosphate Hill Children dated 21 April 2014 (CTH.0255.2970), and attached correspondence (CTH.0255.2968).

- c. between 21 July 2014 (being the first day of Term 3 in Western Australia) and 19 August 2014:

- i. no arrangements were made for A.S. to attend a school (as defined in the SE Act);
- ii. A.S. attended the Christmas Island Learning Centre (**CILC**) for 12 days.

Particulars

- (i) On 2 April 2014, the State of Western Australia advised the Commonwealth that it would not agree to expanded arrangements or provide the existing level of education services for “IMA” children on Christmas Island after 4 July 2014 (CTH.0001.0494).
- (ii) The Commonwealth took steps to establish the CILC (an educational facility to be operated by the Catholic Education Office of Western Australia to provide an education programme based on the WA curriculum [CTH.0001.0544], but it did not open until 30 July 2014;
- (iii) The CILC is not a “school” within the meaning of the SE Act, as it was not a school established by the State of Western Australia under s 55 of the SE Act,

and it was not a school registered under s 160 of the SE Act;

- (iv) A.S. attended the CILC between 30 July and 15 August 2014 (other than 14 August 2014): Attendance report (CTH.0348.7864).

D. NEGLIGENCE

D1. Common Law General Duty of Care to Detainees

D.1.1 Breach of duty

87. In breach of the Common Law General Duty of Care to Detainees, each of the Commonwealth and the Minister failed to ensure that the physical conditions of detention on Christmas Island were not such as were likely to cause or exacerbate injury to A.S. and some Group Members (**Conditions Breach**).

Particulars

- (i) The Christmas Island Detention Conditions (see [19]) were likely to cause or materially contribute to the development or exacerbation of psychiatric injury.
- (ii) In A.S., the psychiatric injury which manifested, as set out below, was psychiatric injury which was likely to be caused or exacerbated by the Christmas Island Detention Conditions:
 - (A) Post-Traumatic Stress Disorder (DSM V 309.81);
 - (B) Secondary Nocturnal Enuresis (DSM V 307.6), either stand alone or symptomatic of Major Depression with Anxiety;
 - (C) Childhood Onset Fluency Disorder (Stuttering), (DSM V 315.5) either stand alone or symptomatic of Major Depression with Anxiety; and/or
 - (D) Major Depression with Anxiety;

(Report of Dr Sarah Mares (29 July 2014); report of Dr Sarah Mares (30 August 2014)); report of Dr Teresa Flower (9 September 2015).

- (iii) In respect of A.S.'s family, the psychiatric injury which manifested, as set out below, was psychiatric injury which was likely to be caused or exacerbated by the Christmas Island Detention Conditions:
 - (A) the development or exacerbation of psychiatric injury to M in the form of Major Depression with melancholic features of postnatal onset (DSM V 296.23): Report of Dr Sarah Mares (29 July 2014); Report of Dr Sarah Mares (1 September 2014);
 - (B) the development of psychiatric injury to F in the form of moderate to severe Major Depression (DSM V 296.22): Report of Dr Sarah Mares (29 July 2014);
- (iv) Particulars in respect of the injury of other Group Members will be given following the initial trial of A.S.'s claim.

88. In breach of the Common Law General Duty of Care to Detainees, each of the Commonwealth and the Minister failed to do the following while A.S. and Group Members were in detention on Christmas Island (each a **Medical Care Failure Breach**):

- a. adequately assess and monitor the condition of A.S. and Group Members to determine whether, and to what extent, they suffered from injury which might be caused or exacerbated by detention on Christmas Island;

Particulars

- (i) In respect of A.S:
 - (A) the Commonwealth failed to conduct adequate psychiatric assessment of A.S. upon the commencement of her detention (see [59(b)], [61]);
 - (B) the Commonwealth failed to rescreen A.S. for psychiatric injury following:

- (I) M's Initial Depression Complaint in August 2013 (see [62]-[63] above);
 - (II) M's Depression Referral on 25 October 2013 (see [66]-[67] above);
 - (III) M's Depression Worsening on about 21 February 2014 (see [70]-[71] above);
 - (IV) M's Suicide Threats on 7 July 2014 (see [77]-[78] above);
 - (C) the Commonwealth failed to have A.S. assessed by a child and adolescent psychiatrist on the mainland (see [79]-[80] above).
 - (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.
- b. have in place a system for the assessment and monitoring of the condition of A.S. and Group Members to determine whether, and to what extent, they suffered from injury which might be caused or exacerbated by detention on Christmas Island;

Particulars

- (i) In respect of A.S, the particulars to sub-paragraph (a) are repeated.
- (ii) In addition, the Commonwealth failed to stay apprised of the medical needs of A.S. and the group members:
 - (A) dissolving the Immigration Health Advisory Group (IHAG);
 - (B) failing to replace IHAG with a similar body consisting of independent advisors to provide a formal mechanism for the independent monitoring of the health care needs of A.S. and the group members.
- (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.

- c. provide A.S. and Group Members with timely access to adequate medical services for injuries which should have been identified had an adequate assessment and monitoring system been in place;

Particulars

- (i) In respect of A.S.:
- (A) the Commonwealth failed to provide A.S. with specialist paediatric psychiatric services, immediately, or reasonable time, after:
- (I) M's Initial Depression Complaint in August 2013 (see [62]-[63] above);
- (II) M's Depression Referral on 25 October 2013 (see [66]-[67] above);
- (III) M's Depression Worsening on about 21 February 2014 (see [70]-[71] above);
- (IV) M's Suicide Threats on 7 July 2014 (see [77]-[78] above).
- (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.

- d. provide A.S. and Group Members with timely access to adequate medical services for injuries which it had identified;

Particulars

- (i) In respect of A.S.:
- (A) the Commonwealth delayed, or failed to prevent delays in the provision to A.S. of specialist paediatric psychiatric services between 29 July and 12 August 2014 (see [82]-[83] above);
- (B) the Commonwealth delayed, or failed to prevent delays in the provision of dental services between:
- (I) 28 November 2013 and 14 February 2014 (see [68]-[69] above); and
- (II) 23 February and 27 August 2014 (see [72]-[73] above);

- (C) the Commonwealth failed to have A.S. assessed by a child and adolescent psychiatrist on the mainland (see [79]-[80] above).
 - (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.
- e. have in place a system for the medical treatment of A.S. and Group Members which was capable of ensuring that they were provided with timely access to adequate medical services in respect of injuries;

Particulars

- (i) In respect of A.S., the particulars to sub-paragraphs (c) and (d) are repeated, and further:
 - (A) there was no specialist child and adolescent psychiatrist, or paediatric psychiatrist, located on, or reasonably proximate to, Christmas Island;
 - (B) the only dental facility on Christmas Island was located at North-West Point in a converted van;
 - (C) there was no specialist speech pathologist located on, or reasonably proximate to, Christmas Island;
- (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.

D.1.2 Causation

89. Each of the breaches of the Common Law General Duty of Care to Detainees pleaded in paragraphs 87 to 88 above (the Conditions Breach and Medical Care Failure Breaches) caused or materially contributed to A.S. and some Group Members suffering injury.

Particulars

- (i) A.S. suffered psychiatric injury, being the development of:

- (A) Post-Traumatic Stress Disorder (DSM V 309.81);
- (B) Secondary Nocturnal Enuresis (DSM V 307.6), either stand alone or symptomatic of Major Depression with Anxiety;
- (C) Childhood Onset Fluency Disorder (Stuttering), (DSM V 315.5) either stand alone or symptomatic of Major Depression with Anxiety; and/or
- (D) Major Depression with Anxiety;
(Report of Dr Sarah Mares (29 July 2014); report of Dr Sarah Mares (30 August 2014)); report of Dr Teresa Flower (9 September 2015).

- (ii) Particulars in respect of the claims of Group Members who suffered injury as a result of the identified breaches of the Common Law General Duty of Care to Detainees will be given following the initial trial of A.S.'s claim.

90. Further, or alternatively, the breaches of the Common Law General Duty of Care to Detainees pleaded in paragraphs 87 to 88 above (the Conditions Breach, Medical Care Failures Breaches) materially caused or contributed to A.S. and some Group Members suffering exacerbation to injury previously suffered by them.

Particulars

- (i) A.S. suffered:
 - (A) exacerbation to psychiatric injury, being the exacerbation of the injuries particularised in Particular (ii) to paragraph [87].
 - (B) exacerbation of dental pain associated with recurrence and prolongation of infection and associated pain: Report of Dr Ian Hewson (13 April 2016)).
- (ii) Particulars in respect of the claims of Group Members who suffered exacerbation to existing injury as a result of the identified breaches of the Common Law General Duty of Care to Detainees will be given following the initial trial of A.S.'s claim.

D2. Common Law General Duty of Care to Minor Detainees

D.2.1 Breach of duty

91. The breaches of the Common Law General Duty of Care to Detainees pleaded in paragraphs 87 to 88 above (the Conditions Breach and Medical Care Failure Breaches) were also breaches of the Common Law General Duty of Care to Minor Detainees.
92. In further breach of the Common Law General Duty of Care to Minor Detainees, the Commonwealth and the Minister:
- a. failed to ensure that A.S. was not separated from her parents (**Separation Breach**).

Particulars

- (i) A.S. was separated from M for 5 days ([42] to [43] above);
 - (ii) This claim of breach raises an individual issue in A.S.'s claim. The legal representatives for A.S. do not presently know whether other Group Members endured a similar experience.
- b. failed to do the following (each a **Family Care Breach**):
 - i. ensure that the physical conditions of detention on Christmas Island were not such as were likely to cause or exacerbate injury to A.S.'s parents (F and M), such that their ability to mitigate the negative impacts of any injury, or exacerbation of existing injury to A.S. were further adversely affected;

Particulars

- (i) In respect of A.S.'s family, the psychiatric injury which manifested, as set out in Particular (ii) to paragraph 87), was psychiatric injury which was likely to be caused or exacerbated by the Christmas Island Detention Conditions, namely:

- (A) the development or exacerbation of psychiatric injury to M in the form of Major Depression with melancholic features of postnatal onset (DSM V 296.23): Report of Dr Sarah Mares (29 July 2014); Report of Dr Sarah Mares (1 September 2014);
- (B) the development or exacerbation of psychiatric injury to F in the form of moderate to severe Major Depression (DSM V 296.22): Report of Dr Sarah Mares (29 July 2014);
- (ii) the psychiatric injury of M and F (referred to in (i) above) adversely affected their ability to mitigate the negative impacts of A.S.'s psychiatric injury, which manifested, as set out in Particular (ii) to paragraph 87), namely:
 - (A) Post-Traumatic Stress Disorder (DSM V 309.81);
 - (B) Secondary Nocturnal Enuresis (DSM V 307.6), either stand alone or symptomatic of Major Depression with Anxiety;
 - (C) Childhood Onset Fluency Disorder (Stuttering), (DSM V 315.5) either stand alone or symptomatic of Major Depression with Anxiety; and/or
 - (D) Major Depression with Anxiety;
- (iii) Particulars in respect of the injury of the parents of other Minor Group Members will be given following the initial trial of A.S.'s claim
- ii. ensure that reasonable care was provided to A.S.'s parents (F and M) so as to avoid injury, or the exacerbation of existing injury to them, such that their ability to mitigate the negative impacts of any injury, or exacerbation of existing injury to A.S. were further adversely affected.

Particulars

- (i) Particulars of the failures to provide reasonable care to each of F and M are set out in the Schedule.
- (ii) Each of those failures involved a breach by the Commonwealth and the Minister of the Common

Law General Duty of Care to Detainees in respect of
F and M.

93. In further breach of the Common Law General Duty of Care to Minor Detainees, each of the Commonwealth and the Minister failed to ensure that the physical conditions of detention on Christmas Island were not such as to cause or exacerbate developmental delay in A.S. and some Minor Group Members (**Developmental Conditions Breach**).

Particulars

- (i) The Christmas Island Detention Conditions (see [19]) were likely to cause or materially contribute to the development or exacerbation of developmental delay in A.S., being:
 - (A) below average / weak non-verbal perceptual reasoning skills;
 - (B) reduced development of attentional and executive skills, leading to:
 - (I) reduced capacity to deal and manage with tasks requiring effortful control of attention and complex higher-level processing of information;
 - (II) poor regulation of emotional and behavioural responses within the home environment and social interaction with peers;
 - (C) weak / borderline working memory skills;
 - (D) below average academic development;(Report of Dr Renee Testa (2 May 2016).)
 - (ii) Particulars in respect of developmental delays of Minor Group Members will be given following the initial trial of A.S.'s claim.
94. In further breach of the Common Law General Duty of Care to Minor Detainees, each of the Commonwealth and the Minister failed to do the following (each a **Developmental Medical Failure Breach**):

- a. adequately assess and monitor the development of A.S. and Group Members to determine whether, and to what extent, their development might be delayed or otherwise adversely affected by detention;

Particulars

- (i) In respect of A.S.:
 - (A) the Commonwealth failed to conduct an adequate initial assessment of her development (see [57]-[58], [59(a)]-[60] above);
 - (B) the Commonwealth failed reasonably regularly to monitor A.S.'s development for the purpose of determining whether she had reached appropriate developmental milestones for her age at an appropriate time.
 - (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.
- b. provide A.S. and Group Members with timely access to adequate remediation in respect of developmental affectations which it should have identified.

Particulars

- (i) In respect of A.S.:
 - (A) the Commonwealth failed to prevent a 4 month delay in the provision of speech pathology services after 22 May 2014 (see [74]-[75] above);
 - (B) the Commonwealth failed to provide A.S. with access to an occupational therapist to address her reduced development of attentional and executive skills;
 - (C) the Commonwealth failed to provide A.S. with regular and adequate schooling (see [84]-[86] above).
- (ii) Particulars in respect of the claims of Group Members will be given following the initial trial of A.S.'s claim.

D.2.2 Causation of injury (other than developmental delay)

95. Each of the following breaches of the Common Law General Duty of Care to Minor Detainees was caused by or materially contributed to A.S. suffering injury:
- a. the breaches pleaded in paragraph 92(a) (the Separation Breach);
 - b. the breaches pleaded in paragraph 92(b) (the Family Care Breaches);

Particulars of injury

The particulars of A.S.'s psychiatric injury set out in [89] are repeated.

96. Further, or alternatively, each of the following breaches of the Common Law General Duty of Care to Minor Detainees was caused or materially contributed to A.S. suffering exacerbation to injury previously suffered by her.
- a. the breaches pleaded in paragraph 92(a) (the Separation Breach);
 - b. the breaches pleaded in paragraph 92(b) (the Family Care Breaches);

Particulars of injury

The particulars of A.S.'s psychiatric injury set out [89] are repeated.

D.2.3 Causation of developmental delay

97. Each of the following breaches of the Common Law General Duty of Care to Minor Detainees caused or materially contributed to A.S. suffering developmental delay:
- a. the breaches pleaded in paragraph 87 to 88 (the Conditions Breach and Medical Care Failure Breaches);

- b. the breaches pleaded in paragraphs 93 to 94 above (the Developmental Conditions Breach and the Developmental Medical Failure Breaches);
- c. the breaches pleaded in paragraph 92(a) (the Separation Breach) and 92(b) (the Family Care Breaches).

Particulars of developmental delay

- (i) A.S. suffered developmental delay, being:
 - (A) below average / weak non-verbal perceptual reasoning skills;
 - (B) reduced development of attentional and executive skills, leading to:
 - (I) reduced capacity to deal and manage with tasks requiring effortful control of attention and complex higher-level processing of information;
 - (II) poor regulation of emotional and behavioural responses within the home environment and social interaction with peers;
 - (C) weak / borderline working memory skills;
 - (D) below average academic development;
 (Report of Dr Renee Testa (2 May 2016).)
- (ii) The developmental delays were:
 - (A) partly consequent upon the psychiatric injury caused or exacerbated, by the breaches of the Common Law General Duty of Care to Minor Detainees pleaded in paragraphs 87 and 88 (the Conditions Breach and Medical Care Failures Breaches) (see [87], Particular (ii); [84(a)], Particular (i); [84(b)], Particular (i); [84(c)], Particular (i); [84(d)], Particular (i)(A); [84(e)], Particular (i) above).
 - (B) partly consequent upon the breaches pleaded in paragraphs 93 to 94 above (the Developmental Conditions Breach and the Developmental Medical Failure Breaches), absent any psychiatric injury (see [93],

Particular (i); [94(a)], Particular (i); [94(b)], Particular (i);

(C) partly consequent upon the Separation Breach pleaded in paragraph 92(a) and the Family Separation Breaches pleaded in paragraph 92(b), which were partial causes of the psychiatric injury (or its exacerbation) which was in turn a partial cause of the developmental delay (see [92(a)], Particular (i); [92(b)], Particulars (i)-(ii)).

(iii) Particulars in respect of any developmental delays of Minor Group Members as a result of the identified breaches of the Common Law General Duty of Care to Minor Detainees will be given following the initial trial of A.S.'s claim.

98. Further, or alternatively, each of the following breaches of the Common Law General Duty of Care to Minor Detainees was a cause of A.S. and some Minor Group Members suffering exacerbated developmental delay:

- a. the breach pleaded in paragraph 87 to 88 (the Conditions Breach and the Medical Failures Breaches);
- b. the breaches pleaded in paragraphs 93 to 94 above (the Developmental Conditions Breach and the Developmental Medical Failure Breaches); and
- c. the breaches pleaded in paragraph 92(a) (the Separation Breach) and 92(b) (the Family Care Breaches).

Particulars

(i) A.S. suffered exacerbation to developmental delays, being the exacerbation of the developmental delay particularised in Particular (c)(i) to paragraph 97 after its onset.

(Report of Dr Renee Testa (2 May 2016).)

(ii) Particulars in respect of the claims of Minor Group Members who suffered exacerbation to developmental delay as a result of the identified breaches of the Common Law General Duty of Care

to Minor Detainees will be given following the initial trial of A.S.'s claim.

D3. Common Law Educational Duty to Minor Detainees and Statutory Educational Duty to Minor Detainees

D.3.1 Breach of duty

99. In breach of the Common Law Educational Duty to Minor Detainees, each of the Commonwealth and the Minister failed to make adequate arrangements for A.S. and School Age Group Members to undertake an appropriate educational programmes or attend school (the **Educational Breach**).

Particulars

- (i) In relation to A.S.:
 - (A) A.S. was not sent to school at all between 26 July 2013 and 18 December 2013 when she was in detention on Christmas Island (see [84], [86(a)] above);
 - (B) A.S. was only sent to school sporadically after 18 October 2013 on a 2 week roster (see [86(b)] above);
 - (C) A.S. was sent to a high school (CIDHS), and not a school appropriate for her age;
- (ii) Particulars in respect of the claims of School Age Group Members will be given following the initial trial of A.S.'s claim.

100. In breach of the Statutory Educational Duty to Minor Detainees, each of the Commonwealth and the Minister failed to ensure that A.S. and School Age Group Members attended a school (as defined in the SE Act) on each day on which the school was open for instruction (the **Statutory Educational Breach**).

Particulars

- (i) In relation to A.S.:

- (A) A.S. was not sent to school at all between 26 July 2013 and 12 August 2013 (see [84], [86(a)] above);
 - (B) A.S. was only sent to a school (within the meaning of the SE Act) sporadically after 18 October 2013 on a 2 week roster, and not every day the school was open (see [86(b)] above);
 - (C) From 21 July 2014, A.S. was sent to the CILC which is not a school (within the meaning of the SE Act) (see [86(c)] above);
- (ii) Particulars in respect of the claims of School Age Group Members will be given following the initial trial of A.S.'s claim.

D.3.2 Causation

101. Each of the following breaches caused or materially contributed to A.S. and some Minor Group Members suffering developmental delay:

- a. the breach of the Common Law Educational Duty to Minor Detainees pleaded in paragraph 99 (the Educational Breach); and
- b. the breach of the Statutory Educational Duty to Minor Detainees pleaded in paragraph 100 (the Statutory Educational Breach).

Particulars

The particulars to paragraph 97 are repeated.

102. Further, or alternatively, each of the following breaches caused or materially contributed to A.S. and some Minor Group Members suffering exacerbation of developmental delay:

- a. the breach of the Common Law Educational Duty to Minor Detainees pleaded in paragraph 99 (the Educational Breach); and
- b. the breach of the Common Law Educational Duty to Minor Detainees pleaded in paragraph 100 (the Statutory Educational Breach).

Particulars

The particulars to paragraph 98 are repeated.

E. FALSE IMPRISONMENT

E1. The false imprisonment

103. From 2 September 2013, or a reasonable period thereafter to enable the Determination to be implemented, the Commonwealth and the Minister failed to implement the Determination in respect of A.S. and her family, by failing to ensure that A.S. (and her family) did not remain in detention, but instead reside in community detention at U14, 145 Kingston Rd, Woodridge, Queensland, 4114 (**Determination Non-Implementation**).

Particulars

Paragraphs 47 to 55 are repeated.

104. By reason of the Determination Non-Implementation, A.S. and her family:
- a. remained subject to the Christmas Island Detention Conditions whilst she was on Christmas Island;
 - b. were deprived of the personal liberty and that they would otherwise have had in community detention, and the following conditions of community detention (**Community Detention Conditions**):
 - i. lack of perimeter fencing;
 - ii. lack of monitoring by detention guards;
 - iii. relative independence of movement;

Particulars

- (i) Community detention enables detainees to move independently around in the community;

- (ii) Community detention enables to detainees independently to engage in schooling, activities (including recreational activities) and social events;
- iv. lack of control over routines.

Particulars

- (i) Community detention enables detainees to plan and cook their own meals;
 - (ii) Community detention enables detainees to book, and organise their own transportation to, appointments (including medical facilities);
 - (iii) Community detention enables detainees themselves to get their children to school on each school day.
105. By reason of the Determination Non-Implementation, from 2 September 2013, the Commonwealth and the Minister falsely imprisoned A.S. until she was released into community detention on 15 January 2015 (the **False Imprisonment**).

E2. Causation

106. Were it not for the False Imprisonment (and had the False Imprisonment ceased earlier):
- a. A.S. would not have been subject to the Christmas Island Detention Conditions for an extended period of time, and would have experienced the Community Detention Conditions for a longer period of time (and from a younger age);
 - b. A.S. would not have experienced the matters referred to in paragraphs 66 to 83 in the same way (as A.S.'s family would have been able to ensure that prompt medical attention was obtained); and
 - c. A.S. would have been able to attend school on each day that a school was open for instruction for a longer period of time (and from a younger age).

107. By reason of the matters pleaded in paragraph 106, the False Imprisonment caused or materially contributed to:

a. A.S. sustaining injury (or exacerbation to injury);

Particulars

- (i) A.S. suffered psychiatric injury, being the development of:
 - (A) Post-Traumatic Stress Disorder (DSM V 309.81);
 - (B) Secondary Nocturnal Enuresis (DSM V 307.6), either stand alone or symptomatic of Major Depression with Anxiety;
 - (C) Childhood Onset Fluency Disorder (Stuttering), (DSM V 315.5) either stand alone or symptomatic of Major Depression with Anxiety; and/or
 - (D) Major Depression with Anxiety;
(Report of Dr Sarah Mares (29 July 2014); report of Dr Sarah Mares (30 August 2014)); report of Dr Teresa Flower (9 September 2015).)
- (ii) The psychiatric injury was exacerbated by the duration of detention on Christmas Island.

b. A.S. suffering developmental delays (or exacerbation to developmental delays).

Particulars

- (i) A.S. suffered developmental delay, being:
 - (A) below average / weak non-verbal perceptual reasoning skills;
 - (B) reduced development of attentional and executive skills, leading to:
 - (I) reduced capacity to deal and manage with tasks requiring effortful control of attention and complex higher-level processing of information;
 - (II) poor regulation of emotional and behavioural responses within the home

environment and social interaction with peers;

(C) weak / borderline working memory skills;

(D) below average academic development;

(Report of Dr Renee Testa (2 May 2016).)

- (ii) The psychiatric injury was exacerbated by the duration of detention on Christmas Island.

F. LOSS AND DAMAGE

F1. Injury (other than developmental delay)

108. A.S. suffered injury by and as a result of:

- a. the breaches of duty pleaded in Sections D1, D2 and D3 of this Statement of Claim;
- b. her False Imprisonment by the Commonwealth pleaded in Section E of this Statement of Claim.

Particulars

- (i) A.S. suffered psychiatric injury, being the development of:
 - (A) Post-Traumatic Stress Disorder (DSM V 309.81);
 - (B) Secondary Nocturnal Enuresis (DSM V 307.6), either stand alone or symptomatic of Major Depression with Anxiety;
 - (C) Childhood Onset Fluency Disorder (Stuttering), (DSM V 315.5) either stand alone or symptomatic of Major Depression with Anxiety; and/or
 - (D) Major Depression with Anxiety;

(Report of Dr Sarah Mares (29 July 2014); report of Dr Sarah Mares (30 August 2014)); report of Dr Teresa Flower (9 September 2015).)

- (ii) Sections D1, D2 and D3 are repeated, and set out the way in which each breach of duty caused or contributed to the aforesaid injury.
- (iii) Section E2 is repeated, and sets out the way in which the false imprisonment caused or contributed to the aforesaid injury.

109. A.S. will require ongoing medical, dental and psychiatric treatment for the injury pleaded in paragraph 108.

Particulars

A.S. will require:

- (i) ongoing psychiatric and psychological counselling;
- (ii) consultations with a dentist.

F2. Developmental delay

110. A.S. suffered developmental delay by and as a result of:

- a. the breaches of duty pleaded in Sections D1, D2, and D3 of this Statement of Claim;
- b. her False Imprisonment by the Commonwealth pleaded in Section E of this Statement of Claim.

Particulars

- (i) A.S. suffered developmental delay, being:
 - (A) below average / weak non-verbal perceptual reasoning skills;
 - (B) reduced development of attentional and executive skills, leading to:
 - (I) reduced capacity to deal and manage with tasks requiring effortful control of attention and complex higher-level processing of information;
 - (II) poor regulation of emotional and behavioural responses within the home

environment and social interaction with peers;

(C) weak / borderline Working Memory skills;

(D) below average academic development;

(Report of Dr Renee Testa (2 May 2016).)

(iii) Sections D1, D2, and D3 are repeated, and set out the way in which each breach of duty caused or contributed to the aforesaid developmental delay.

(iv) Section E2 is repeated, and sets out the way in which the false imprisonment caused or contributed to the aforesaid developmental delay.

111. A.S. will require ongoing medical, dental and psychiatric treatment for the injury pleaded in paragraph 110.

Particulars

A.S. will require:

(i) consultations with a neuropsychologist;

(ii) consultations with an occupational therapist;

(iii) consultations with a speech pathologist;

(iv) integration support and learning modification through schooling;

(Report of Dr Renee Testa (2 May 2016).)

F3. False Imprisonment

112. A.S. repeats the allegations pleaded in paragraph 105.

F4. Exemplary damages

113. Each of the defendants acted in a manner exhibiting a contumelious disregard of A.S.'s rights.

Particulars

(i) The false imprisonment continued on and from 2 September 2013 to 15 January 2015, and thus involved a prolonged continuing tort.

- (ii) The Minister by his servants and agents told A.S.'s parents 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 given 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 injury.

G. CLAIM FOR RELIEF

A.S. claims on behalf of herself:

1. Damages for the breaches pleaded in Sections D1, D2, and D3 of this Statement of Claim and for the False Imprisonment pleaded in Section E of this Statement of Claim, including exemplary damages;

And A.S. claims on behalf of herself, and Group Members:

2. Damages for the breaches pleaded in Sections D1, D2, and D3 of this Statement of Claim;
3. Interest;
4. Costs; and
5. Such other orders as the Court thinks fit.

H. QUESTIONS COMMON TO CLAIMS OF GROUP MEMBERS

1. Does either Defendant owe:
 - a. the Common Law General Duty of Care to Detainees to A.S. and Group Members?
 - b. the Common Law General Duty of Care to Minor Detainees to A.S. and Minor Group Members?
 - c. the Common Law Educational Duty of Care to Minor Detainees to A.S. and Minor Group Members?
 - d. the Statutory Educational Duty of Care to Minor Detainees to A.S. and Minor Group Members?
2. If either of the Defendants owe any of the duties referred to in question 1, which of those are non-delegable?
3. Did either Defendant breach the Common Law General Duty of Care to Detainees by failing to ensure that the physical conditions of detention on Christmas Island were not such as to cause or exacerbate:
 - a. injury (the Conditions Breach)?
 - b. developmental delay in Minor Group Members (the Developmental Conditions Breach)?
4. Did either Defendant breach the Common Law General Duty of Care to Detainees by:
 - a. failing to adequately assess and monitor the condition of A.S. and Group Members to determine whether, and to what extent, they suffered from injury which might be caused or exacerbated by detention on Christmas Island;
 - b. failing to have in place a system for the assessment and monitoring of the condition of A.S. and Group Members to determine whether, and to

what extent, they suffered from injury which might be exacerbated by detention on Christmas Island;

- c. failing to provide A.S. and Group Members with timely access to adequate medical services for injuries which should have been identified had an adequate assessment and monitoring system been in place;
- d. failing to provide A.S. and Group Members with timely access to adequate medical services for injuries which it had identified;
- e. failing to have in place a system for the medical treatment of A.S. and Group Members which was capable of ensuring that they were provided with timely access to adequate medical facilities in respect of injuries;

(the Medical Conditions Failure Breaches)?

- 5. Did either Defendant breach the Common Law Educational Duty of Care to Minor Detainees by failing to make adequate arrangements for A.S. and School Age Group Members to undertake an appropriate educational programmes or attend school?
- 6. Did either Defendant breach the Statutory Educational Duty by failing to ensure that A.S. and School Age Group Members attended a school (as defined in the SE Act) on each day on which the school was open for instruction?

Dated 23 September 2016

Maurice Blackburn

Solicitors

for

the

plaintiff

SCHEDULE

Part I Facts common to M and F

- S1. On or about 26 July 2013, F and M (who was pregnant) arrived in Australia, together with F and A.S.
- S2. On or about 26 July 2013, F and M (together with A.S.) were placed in detention on Christmas Island purportedly pursuant to s 189(3) of the Migration Act.

Particulars

DIAC Section 189(3) Detention of Unlawful Citizens Who are in an Excised Offshore Place [CTH.0004.0002].

- S3. On or about 7 August 2013, F, M and A.S. were inducted into the Christmas Island IDC by Serco.

Particulars

Serco Induction Process Confirmations [CTH.0026.0001 at .0166; ASR.001.203.0001 at .0053].

- S4. On or about 11 or 12 August 2013, M was transferred from Christmas Island IDC (Aqua Camp) to Darwin (Darwin Airport Lodge Stage 3 ("DAL3") camp).

Particulars

- (i) Serco In Possession Form [ASR.001.203.0001 at.0011].
- (ii) Serco Reception Checklist [ASR.001.203.0001 at .0003].

- S5. On or about 16 August 2013, A.S. and F were transferred from Christmas Island to Darwin, and detained in the Darwin Airport Lodge Alternative Place of Detention (DAL).

Particulars

- (i) DIAC Statement of Identity travel authorisation [CTH.0026.0001 at .0228].
- (ii) Serco Reception Checklist [CTH.0026.0001 at .0232].

S6. On or about 19 September 2013, M gave birth to B.

Particulars

Northern Territory Birth Certificate [ASR.001.401.0071 at .0076].

S7. On or about 18 October 2013, A.S., F, M and B were transferred from Darwin (DAL) to Christmas Island (Construction Camp).

Particulars

- (i) Serco DAL Discharge/Transfer Checklist for A.S. [CTH.0026.0001 at .0254].
- (ii) Serco DAL Discharge/Transfer Checklist for N [ASR.001.203.0001 at .0049].

S8. Between 18 October 2013 on or about 19 August 2014, A.S., F, M and B. remained in detention on Christmas Island.

Particulars

Between 19 and 23 August 2014, A.S., F, M and B were transferred from detention on Christmas Island to Bladin Alternative Place of Detention [Darwin]:

- (i) Serco Request for Services Form [CTH.0026.0001 at .0160];
- (ii) Serco Initial Detainee Placement Risk Assessment [CTH.0026.0001 at .0153];
- (iii) Serco Detainee Discharge Checklist [CTH.0026.0001 at .0153];
- (iv) DIAC Detainee Placement Agreement [CTH.0026.0001 at .0102];
- (v) Serco Person in Detention Discharge Checklist [CTH.0026.0001 at .0097];

(vi) Serco Reception Check List [CTH.0026.0001 at .0012].

- S9. Between about 19 August 2014 and 15 January 2015, A.S., F, M and B remained in detention at immigration detention centres other than Christmas Island IDC.

Particulars

A.S. was released into the community by way of bridging visa on 15 January 2015 [ASR.001.101.0437].

Part II Medical failures in respect of M

Facts

- S10. On or about 13 August 2013, M made a report of existing depression which was exacerbated by her pregnancy (that is, M's Initial Depression Complaint), of which Serco (as agent of the Commonwealth) was aware.

Particulars

[ASR.001.203.001 at .0034].

- S11. On 15 August 2013, M first attended a Farsi Women's Wellbeing Group facilitated by a counsellor (Shona Lawrence) and/or psychologist (Rosemary O'Reilly).

Particulars

[ASR.001.201.0590].

- S12. Notwithstanding M's Initial Depression Complaint, it was only on or about 25 October 2013, that M was referred to a psychologist for depression (that is, M's Depression Referral), being scheduled to see a psychologist on 6 November 2013 (11 days after the referral).

Particulars

[ASR.001.201.0560].

- S13. On 6 November 2013, M missed the psychological appointment because the incorrect room was entered on her appointment slip, and the appointment was rescheduled for 22 November 2013 (14 days later).

Particulars

[ASR.001.201.0590 at .0672; ASR.001.201.0560].

- S14. On or about 22 November 2013, M first attended an appointment with a psychologist (Narelle Stratford), and attended fortnightly appointments between that date and 24 January 2014.

Particulars

6 December 2013 [ASR.001.201.0590 at .0662], 20
December 2013 [.0660], 10 January 2014 [.0654], 24
January 2014 [.0639] and 27 February 2014 [.0622].

- S15. Between 24 January 2014 and 21 February 2014, the Commonwealth did not provide any psychological services to M.

Particulars

- (i) M attended a New Parent Group session with a nurse on 14 February 2014, but this related to baby care, hygiene, food handling and other aspects of infant care [ASR.001.201.0590.0634];
- (ii) M's scheduled appointment with Narelle Stratford on 7 February 2014 was cancelled because Narelle Stratford was on sick leave [ASR.001.201.0590 at .0627] and no alternative was provided.

- S16. On or about 21 February 2014, M completed a Mental State Examination and reported severe mental health issues (that is, M's Depression Worsening) of which IHMS (as servant or agent for the Commonwealth) was aware.

Particulars

M's MSE [ASR.001.204.0215 and .0223] noted she was in the "extremely severe" range for depression, anxiety and stress

- S17. On 27 February 2014, M attended a consultation with a psychologist (Narelle Stratford), at which it was noted that follow ups were to be booked as M's "DASS was very high".

Particulars

[ASR.001.201.0590 at .0622].

- S18. Between 27 February 2014 and 8 July 2014, no arrangements were made by IHMS (for and on behalf of the Commonwealth) for provision of psychological services to M.

Particulars

- (i) M attended a Mothers Group on 6, 12 and 19 April 2014, but this focussed on building parenting skills [ASR.001.201.0590];
- (ii) M attended a Children's Creative Group on 30 April 2014, but this was focussed on art [ASR.001.201.0590].

- S19. Between 27 February 2014 and 8 July 2014, Serco (for and on behalf of the Commonwealth) became aware of indicators that M's mental health was poor.

Particulars

[ASR.001.203.0001 at .0071, .0074, .0075, .0076 and .0077].

- S20. On or about 6 to 7 July 2014, M made two threats of self-harm (that is, M's Suicide Threats) of which Serco (as servant or agent of the Commonwealth) was aware.

Particulars

[ASR.001.001.0001 at .0014 and .0027].

- S21. On or about 8 July 2014, M attended a mental health appointment with a psychologist (Helen Goss).

Particulars

[ASR.001.201.0590 at .0599].

- S22. On or about 9 July 2014, Nurse Justice Jasi for IHMS (for and on behalf of the Commonwealth) carried out a self-harm risk assessment (using F as a translator) and a Mental Health Risk Assessment in respect of M.

Particulars

[ASR.001.201.0590 at .0597]

- S23. Between 10 July 2014 and 13 July 2014, M attended daily mental health appointments with IHM, at the end of which it was noted that M would remain on high imminent observation with Serco.

Particulars

[ASR.001.201.0590 at .0592-0596].

- S24. On or about 29 July 2014, M was provisionally diagnosed with psychiatric injury, namely Major Depression with melancholic features, of postnatal onset (DSM V 296.23).

Particulars

Report of Dr Sarah Mares (29 July 2014).

Breach

- S25. In breach of the Common Law General Duty of Care to Detainees, each of the Commonwealth and the Minister failed to do the following while M was in detention on Christmas Island:
- a. provide M with timely access to adequate medical facilities in respect of injuries which it had identified;

Particulars

- (i) In respect of M:
 - (A) the Commonwealth failed to arrange for psychological services and/or prevent delays in the provision to A.S. of psychological services in the periods between
 - (I) 13 August and 22 November 2013 (see [S10] to [S14] above); and

- (II) 24 January 2014 and 21 February 2014 (see [S15] above);
 - (III) 27 February 2014 and 8 July 2014 (see [S18] above).
- (B) the Commonwealth failed to arrange for provision of psychological services which were adequate to her condition (or diagnose her psychiatric injury set out in [S24] above), notwithstanding knowledge of:
- (I) M's Depression Initial Complaint in August 2013;
 - (II) M's Depression Referral on 25 October 2013;
 - (III) M's Depression Worsening on about 21 February 2014;
 - (IV) the further indicators referred to in paragraph S19.
- b. have in place a system for the medical treatment M which was capable of ensuring that they were provided with timely access to adequate medical facilities in respect of injuries.

Particulars

- (i) In respect of M, the particulars to sub-paragraph (a) are repeated.
- (ii) Further, there were no, or no sufficient specialist psychiatrists with appropriate qualifications (being membership of the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Australian College of Mental Health Nurses) located on, or reasonably proximate to, Christmas Island, and inadequate facilities for ensuring minimal delay in obtaining such services for M.

S26. The breach of the Common Law General Duty of Care to M pleaded in paragraph S25 above caused or materially contributed to M's injury being exacerbated.

Particulars

Exacerbation of psychiatric injury to M in the form of Major Depression with melancholic features of postnatal onset (DSM V 296.23): Report of Dr Sarah Mares (29 July 2014); Report of Dr Sarah Mares (1 September 2014).

Part III Medical Failures in Respect of F

Facts

- S27. Between 10 September 2013 and 17 October 2013, F attended the Farsi Men's Wellbeing Group, facilitated by a counsellor and/or psychologist.

Particulars

[CTH.0004.0563.0676].

- S28. Between 16 October 2013 and 17 July 2014, Serco and IHMS (for and on behalf of the Commonwealth) became aware of indicators that F's mental health was poor.

Particulars

[SER.113.001.0235 at .0455, .0454, .0453, .0452, .0449, .0448 and .0445; CTH.0004.0563 at .0682, .0708].

- S29. On or about 29 July 2014, F was provisionally diagnosed with psychiatric injury, namely moderate to severe Major Depression (DSM V 296.22).

Particulars

Report of Dr Sarah Mares (29 July 2014).

- S30. F was seen by a psychologist engaged by IHMS (for and on behalf of the Commonwealth) on 12-15 August 2014.

Particulars

[CTH.0004.0563 at .0582, .0581].

Breach

S31. In breach of the Common Law General Duty of Care to Detainees, each of the Commonwealth and the Minister failed to do the following while F was in detention on Christmas Island:

- a. adequately assess and monitor the condition of F to determine whether, and to what extent, he suffered from injury which might be caused or exacerbated by detention on Christmas Island;
- b. provide F with timely access to adequate medical facilities in respect of injuries which it should have identified;

Particulars to (a) and (b)

- (i) In respect of F, the Commonwealth failed to arrange for provision of psychological services which were adequate to his condition (or diagnose his psychiatric injury set out in [S29] above), notwithstanding knowledge of the indicators referred to in paragraph S28.
- c. have in place a system for the medical treatment of F which was capable of ensuring that he was provided with timely access to adequate medical facilities in respect of injuries.

Particulars

- (i) In respect of F, the particulars to sub-paragraph (a) are repeated.
- (ii) Further, there were no, or no sufficient specialist psychiatrists with appropriate qualifications (being membership of the Royal Australian and New Zealand College of Psychiatrists, the Australian Psychological Society, the Australian College of Mental Health Nurses) located on, or reasonably proximate to, Christmas Island, and inadequate facilities for ensuring minimal delay in obtaining such services for M.

S32. The breach of the Common Law General Duty of Care to F pleaded in paragraph S31 above caused or materially contributed to M's injury.

Particulars

Psychiatric injury to F in the form of moderate to severe Major Depression (DSM V 296.22): Report of Dr Sarah Mares (29 July 2014).

INDEX OF DEFINED TERMS

<p><i>O</i></p> <p>07/08/13 HIA26</p> <p>07/08/13 Screening MSE26</p> <p><i>1</i></p> <p>17/08/13 MSE127</p> <p><i>2</i></p> <p>26/07/13 HIA26</p> <p><i>A</i></p> <p>A.S.4</p> <p><i>C</i></p> <p>Christmas Island Detention Conditions....10</p> <p>Christmas Island IDC22</p> <p>Common Law Educational Duty to Minor Detainees21</p> <p>Common Law General Duty of Care to Detainees15</p> <p>Common Law General Duty of Care to Minor Detainees19</p> <p>Commonwealth6</p> <p>Community Detention Conditions48</p> <p>Conditions Breach33</p> <p><i>D</i></p> <p>Department6</p> <p>Determination23</p> <p>Determination Non-Implementation48</p> <p>Developmental Conditions Breach41</p> <p>Developmental Medical Failure Breach42</p> <p><i>E</i></p> <p>Educational Breach.....46</p>	<p><i>F</i></p> <p>F 22</p> <p>False Imprisonment.....49</p> <p>Family Care Breach39</p> <p>Family Separation22</p> <p><i>G</i></p> <p>Group Members 4</p> <p><i>I</i></p> <p>IHMS7</p> <p>IHMS Contracts7</p> <p><i>M</i></p> <p>M 22</p> <p>M’s Depression Referral.....28</p> <p>M’s Depression Worsening.....28</p> <p>M’s Initial Depression Complaint27</p> <p>M’s Suicide Threats29</p> <p>Medical Care Failure Breach.....34</p> <p>Migration Act 4</p> <p>Minister7</p> <p>Minor Group Members.....5</p> <p><i>R</i></p> <p>Relevant Period..... 4</p> <p><i>S</i></p> <p>School-Age Group Members5</p> <p>SE Act5</p> <p>Separation Breach39</p> <p>Serco7</p> <p>Serco Contract8</p> <p>Statutory Educational Breach47</p> <p>Statutory Educational Duty to Minor Detainees.....21</p>
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