

## NOTICE OF FILING

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### Details of Filing

Document Lodged: Reply - Form 34 - Rule 16.33  
File Number: VID328/2020  
File Title: ALI YASMIN & ORS v COMMONWEALTH OF AUSTRALIA  
Registry: VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 7/09/2022 4:09:20 PM AEST

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Registrar

### Important Information

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Form 34  
Rule 16.33

## Reply

No. VID328 of 2020  
No. VID664 of 2020

Federal Court of Australia  
Registry: Victoria  
Division: General

**ALI YASMIN**

Applicant

**THE COMMONWEALTH OF AUSTRALIA**

Respondent

This Reply adopts the defined terms and acronyms used in the Consolidated Statement of Claim dated 19 February 2021 (**CSOC**).

In respect of the amended defence of the respondent filed 29 July 2022 (the **Amended Defence**), save for the admissions contained therein, the applicant joins issue with each and every allegation therein. In further answer to the Amended Defence, he says as follows.

### **A. Policies of the respondent**

1. As to paragraph 15, the applicant says that if the Benefit of the Doubt Policy did not, in its terms, apply to the applicant and the Group Members (which is denied), then the underlying objectives and principles leading to the Benefit of the Doubt Policy, namely the desirability of identifying and protecting vulnerable persons who were, or might be, less than 18 years of age, applied equally to the applicant and the Group Members.
2. As to paragraph 18, the applicant says that if the Youth Identification Policy did not, in its terms, apply to the applicant and the Group Members (which is denied), then the underlying objectives and principles leading to the Youth Identification Policy, namely the desirability of identifying and protecting vulnerable persons who were, or might be, less than 18 years of age, applied equally to the applicant and the Group Members.

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Filed on behalf of Ali Yasmin, the applicant by:

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3. As to paragraph 21, the applicant says that if the Youth Treatment Policy did not, in its terms, apply to the applicant and the Group Members (which is denied), then the underlying objectives and principles leading to the Youth Treatment Policy, namely the desirability of identifying and protecting vulnerable persons who were, or might be, less than 18 years of age, and ensuring that any detention of a person who was or may be a minor was a measure of last resort, applied equally to the applicant and the Group Members.
4. As to paragraph 24, the applicant says that if the AFP Youth Policy did not, in its terms, apply to the applicant and the Group Members (which is denied), then the underlying reasons and principles leading to the AFP Youth Policy, namely the desirability of protecting vulnerable persons who were, or might be, less than 18 years of age, applied equally to the applicant and the Group Members.
5. As to paragraph 28, the applicant says that if the CDPP Youth Prosecution Policy did not, in its terms, apply to the applicant and the Group Members (which is denied), then the underlying reasons and principles leading to the CDPP Youth Prosecution Policy, namely the desirability of protecting vulnerable persons who were, or might be, less than 18 years of age, applied equally to the applicant and the Group Members.
6. As to paragraph 30, the applicant says that if the Youth People Smuggling Policy did not, in its terms, apply to the applicant and the Group Members (which is denied), then the underlying reasons and principles leading to the Youth People Smuggling Policy, namely the desirability of identifying and protecting vulnerable persons who were, or might be, less than 18 years of age, applied equally to the applicant and the Group Members.

**B. Alleged detention pursuant to s 189(3) of the Migration Act**

7. Insofar as the respondent purports to rely on s 189(3) of the Migration Act as a basis for the detention of the applicant and the Group Members:
  - (a) he denies that the defendant has alleged a lawful basis of detention under s 189(3) of the Migration Act because:

- (i) s 189(3) of the Migration Act constitutes a discretionary power to detain; and
  - (ii) the respondent has not alleged that any officer exercised that power or that the exercise of that discretionary power was informed by considerations that made its exercise lawful;
- (b) further, he says that, having regard to the terms of the Amended Defence, at trial he will object to any attempt by the respondent to lead evidence:
- (i) that a particular person exercised or purported to exercise the power contained in s 189(3) of the Migration Act; or
  - (ii) of the basis for the exercise of that power.

**C. Alleged detention pursuant to s 250 of the Migration Act**

8. Further, and in the alternative, insofar as the respondent alleges that the detention of the applicant and the Group Members was authorised by s 189(1) or s 189(3) and s 196(1) of the Migration Act in conjunction with s 250 of the Migration Act (which is denied) then the applicant:
- (a) says that, on its proper construction, s 250(3) of the Migration Act does not suspend the obligations under s 198(2) of the Migration Act;
  - (b) in the alternative, says that s 250 of the Migration Act is invalid.

**D. Limitations issues**

**D.1 Western Australia**

9. Insofar as the respondent relies on a defence under the *Limitation Act 2005* (WA), he says the applicant and the Group Members:
- (a) were detained by the respondent in circumstances where the respondent knew or ought to have known that the applicant and the Group Members were minors;

**Particulars**

The applicant refers to and repeats paragraphs 2, 5 and Section E.3 of the CSOC.

- (b) were not removed by the respondent from Australia as soon as reasonably practicable as required by the Migration Act;

**Particulars**

The applicant refers to and repeats Section E.4 of the CSOC.

- (c) were detained by the respondent for a period longer that was reasonably practicable in order to investigate or facilitate their charging and prosecution, or potential charging and prosecution, as adults, notwithstanding that:
- (i) the respondent knew or ought to have known the applicant and the Group Members were minors;
  - (ii) further or alternatively, the respondent knew or ought to have known that:
    - (A) there was a risk that the applicant and the Group Members were minors;
    - (B) the respondent did not have any reliable evidence to show they were not minors;
    - (C) it was appropriate, and the usual policy of the respondent, where there was doubt about whether a detained person was a minor, to treat that person as a minor;
  - (iii) the respondent purported to rely on the Wrist X-Ray Procedure in circumstances where the respondent knew that the X-Ray Analysis was incapable of reliably determining the age of the applicant or the Group Members; and
  - (iv) the respondent had failed, and knew it had failed, to make reasonable inquiries as to the age of the applicant or the Group Members;

**Particulars**

The applicant refers to and repeats Sections E.4, E.5 E.7, E.10 and I of the CSOC.

- (d) were deported to Indonesia following their release from detention before giving the applicant or the Group Members the opportunity to obtain independent legal

advice with respect to the possible existence of a cause of action arising out of the circumstances in which they had been detained and/or imprisoned;

### **Particulars**

The applicant refers to and repeats paragraph 92 of the CSOC.

- (e) were returned to Indonesia by the respondent, in circumstances where the respondent knew the applicant and the Group Members —
- (i) had low levels of education;
  - (ii) had limited English language ability;
  - (iii) had limited financial resources —

and consequently, were unlikely to be able promptly to access or to enforce any legal rights or entitlements they had as a consequence of the conduct of the respondent as alleged in the CSOS;

(hereafter, the **Impugned Commonwealth Conduct**).

10. The Impugned Commonwealth Conduct was in all circumstances “improper conduct” by the respondent, or by a person for whom the defendant is vicariously liable, for the purposes of s 38(2) of the *Limitation Act 2005* (WA).
11. The failure to issue this proceeding within the time required by s 16(d) of the *Limitation Act 2005* (WA) was attributable to the Impugned Commonwealth Conduct, and in particular the conduct alleged in subparagraphs 9(d) to (f) above.
12. Further, this proceeding could not reasonably have been commenced prior to:
  - (a) the termination on 25 March 2020 of the complaint made to the Human Rights Commission by the applicant, which enlivened the Court’s jurisdiction to hear the claims made in this proceeding relating to contraventions of the RDA; or
  - (b) further or alternatively, delivery of the judgment of the Court of Appeal of Western Australia on 29 June 2017 allowing the applicant’s appeal, setting aside his conviction and entering a judgment of acquittal (*Jasmin v R* (2017) 51 WAR 505).

13. In the premises, insofar as any cause of action alleged in the CSOC is otherwise precluded by provisions of the *Limitation Act 2005* (WA), the applicant hereby applies for an order pursuant to s 38(2) of the *Limitation Act 2005* (WA) extending the time by which any such action can be commenced to 18 May 2020, being a date within three years of the date when the action ought reasonably to have been commenced.
14. Further and in the alternative, the applicant:
- (a) was at all material times a child for the purposes of s 6A of the *Limitation Act 2005* (WA);
  - (b) was detained in an adult prison;
  - (c) was a victim of sexual abuse by an adult prisoner by reason of that detention;
  - (d) suffered psychiatric injury as a result of that sexual abuse; and
  - (e) is a person who has accrued a child sexual abuse cause of action within the meaning of s 6A(1) of the *Limitation Act 2005* (WA).

### **Particulars**

The applicant refers to and repeats the particulars to paragraph 151 of the CSOC. Further particulars to be provided prior to trial.

15. By reason of the matters alleged in paragraph 14 above, pursuant to s 6A(2), despite anything in the *Limitation Act 2005* (WA) or any other Western Australian legislation, no limitation period applies to the applicant's proceeding because it constitutes a child sexual abuse action.

## **D.2 Northern Territory**

16. Further:
- (a) the Impugned Commonwealth Conduct was in all circumstances "conduct of the respondent" for the purposes of s 44(3)(b)(ii) of the *Limitation Act 1981* (NT).
  - (b) the failure to institute this action within the time required by s 12(b) of the *Limitation Act 1981* (NT) was:
    - (i) a result of the Impugned Commonwealth Conduct, and in particular the conduct alleged in subparagraphs 9(d) to (f) above;

- (ii) reasonable in view of the Impugned Commonwealth Conduct and the circumstances alleged above and in the CSOC; and
  - (c) in all the circumstances of the case, it is just to grant an extension of time.
17. In the premises, insofar as any cause of action alleged in the CSOC is otherwise precluded by provisions of the *Limitation Act 1981* (NT), the applicant hereby applies for an order pursuant to s 44(1) of the *Limitation Act 1981* (NT) that the time for instituting the relevant action be extended to 18 May 2020.
18. Further and alternatively, he says that:
- (a) the applicant's claim and each claim by a Group Member constitutes an action for damages for personal injury arising from child abuse within the meaning of s 5A(1) and (6) of the *Limitation Act 1981* (NT); and
  - (b) pursuant to s 5A(2) of the *Limitation Act 1981* (NT), the action may be brought at any time and is not subject to any limitation under that Act.

### **D.3 Other jurisdictions**

19. Further, insofar as the respondent relies on cognate limitations legislation in other states or territories of Australia, the applicant relies on the provisions giving rise to a power to extend time for the commencement of any action under that legislation, and hereby applies for such an extension.

### **E. Miscellaneous**

20. As to paragraph 173, the applicant admits that the term DIAC Youth Policy is not defined in the CSOC and says that references to that term will be amended and replaced with the words "Youth Identification Policy".

Date: 7 September 2022




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Mark Geoffrey Barrow  
Ken Cush & Associates  
Solicitor for the Applicant



This pleading was prepared by Mr A T Strahan QC, Mr P A Tierney, Mr T K Jeffrie, Ms S C B Brenker and Ms H Canham of counsel.

**Certificate of lawyer**

I, Mark Geoffrey Barrow, certify to the Court that, in relation to the reply filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non-admission in the pleading.

Date: 7 September 2022

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Mark Geoffrey Barrow  
Ken Cush & Associates  
Solicitor for the Applicant