IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

No D11 of 2019

Between **JOSIAH BINSARIS**

Appellant

and

NORTHERN TERRITORY OF AUSTRALIA

Respondent

No D12 of 2019

Between **KEIRAN WEBSTER**

Appellant

and

NORTHERN TERRITORY OF AUSTRALIA

Respondent

No D13 of 2019

Between **LEROY O'SHEA**

Appellant

and

NORTHERN TERRITORY OF AUSTRALIA

Respondent

No D14 of 2019

Between **ETHAN AUSTRAL**

Appellant

and

NORTHERN TERRITORY OF AUSTRALIA

Respondent

JOINT SUBMISSIONS OF THE APPELLANTS

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These are the joint submissions of each appellant in the four related appeals.

PART I: Certification

1 These submissions are in a form suitable for publication on the internet.

PART II: Issues Arising

2 Two issues arise in these appeals, in each case concerning the use of significant force (the deployment of CS gas) in the youth justice setting in circumstances where no express authority is conferred by statute:

(a) CS gas, a form of tear gas made from o-chlorobenzylidene malononitrile, is a prohibited weapon under the *Weapons Control Act 2001* (NT). That Act relevantly exempts a 'prescribed person' acting in the course of their duties as a prescribed person in respect of a prohibited weapon that is supplied to them by their employer for the performance of their duties as a prescribed person. An officer under the *Prisons (Correctional Services) Act 1980* (NT) is a prescribed person; but not an officer under the *Youth Justice Act 2005* (NT). A prison officer may use in a prison or police prison an approved weapon as necessary to maintain the security and good order of a prisoner or a prison or police prison. The appellants were not prisoners, and Don Dale was not a prison or police prison within the meaning of the *Prisons Act*. The *Youth Justice Act* did not expressly authorise the use of weapons. Was the use of CS gas on the appellants at Don Dale lawful?

(b) Subsection 153(2) is the only general provision of the *Youth Justice Act* authorising the use of force in the conduct of a youth detention centre. It is limited to force that is reasonably necessary in the circumstances. By subsec 153(3), reasonably necessary force does not include physical violence or enforced dosing with a medicine, drug or other substance. By subsec 152(1), the superintendent of a detention centre has the powers that are necessary or convenient for the performance of his or her functions. Do the necessary or convenient powers of the superintendent extend to the use of force of a kind prohibited by subsec 153(3)?

PART III: Notice

3 No notice is required under sec 78B of the *Judiciary Act 1903* (Cth).

PART IV: Citations

4 The primary judgment is reported as *LO v Northern Territory of Australia* (2017) 317 FLR 324. The medium neutral citation is [2017] NTSC 22.

5 The judgment of the Court of Appeal is unreported. The medium neutral citation is *JB v Northern Territory of Australia* [2019] NTCA 1.

PART V: Facts

6 In August 2014, the appellants were detained at Don Dale youth detention centre in Darwin. Each appellant, together with two other detainees, was detained at the relevant time in the 'Behavioural Management Unit' (**BMU**) of Don Dale.

7 The BMU comprised five cells adjoining an enclosed exercise yard. Keiran Webster and Leroy O'Shea occupied the second cell, and Ethan Austral and Josiah Binsaris were in the fourth cell {CAB 235–6; CA[11]–[12]}. Jake Roper occupied the third cell and another detainee occupied the fifth cell: neither of them are involved in these proceedings.

8 On the evening of 21st August 2014, Jake Roper escaped from his cell — the door of which was unlocked — into the exercise yard, damaged property and caused a disturbance {CAB 236–7; CA[13]–[14]}. The other detainees remained confined in their cells. Leroy O'Shea and Keiran Webster were not involved in any disorderly conduct {CAB 237; CA[15]}.

9 As a result of communication between the superintendent of Don Dale (Russell Caldwell), the Director of Correctional Services (Ken Middlebrook) and the Acting General Manager of Berrimah Correctional Centre (Grant Ballantine), three prison officers at Berrimah who were members of the Immediate Action Team arrived at the BMU at about 8.30 pm {CAB 238; CA[18]–[19]}. The members of the Immediate Action Team were equipped with aerosol canisters of CS gas {CAB 238, 241; CA[19], [26]}.

10 The decision to deploy CS gas was taken by Mr Middlebrook {CAB 241; CA[27]}. It was the behaviour of Jake Roper, not the appellants, that led to the deployment of the gas {CAB 242–3; CA[31]}. The gas was deployed into the enclosed exercise yard of the BMU by a member of the Immediate Action Team (Prison Officer Flavell) {CAB 242; CA[30]}. Prison Officer Flavell initially deployed three short bursts of gas, followed by another burst lasting two seconds {CAB 46; SC[98]}. He waited about one minute, and when Jake Roper remained non-compliant he deployed six further bursts of gas {CAB 46; SC[99]}. After the last burst, Jake Roper came within sight and lay on the ground, at which point members of the Immediate Action Team entered the BMU and removed him {CAB 46; SC[100]}. Once Jake Roper was secured, the cells inside the BMU were unlocked and the other detainees were then removed {CAB 47, SC[101]}. The primary judge did not consider it necessary to make a finding about how long it took to

remove the appellants from their cells, but video evidence of the incident suggested the process took about 5 minutes {CAB 47–8; SC[103]}. The detainees (including the appellants) were handcuffed behind their backs and taken to the basketball court adjoining the exercise yard of the BMU where they were hosed down to remove the residue of the CS gas {CAB 243; CA[32]}.

11 It is common ground that the article used to deploy the CS gas (described as a 'fogger') was a prohibited weapon under the *Weapons Act* {CAB 273; CA[95]}. The status of a CS fogger as a prohibited weapon is unsurprising given the health effects of CS gas. The Material Safety Data Sheet for the CS gas fogger stated (in the 'emergency overview' section): 'Acute eye, skin, digestive and respiratory system irritation may occur. Vapors released at high concentrations may have an anesthetic effect and will displace air in confined spaces' {AFM 6.12}. The Material Safety Data Sheet identified various potential health effects, including (in relation to inhalation): 'Moderate to Severe irritation. Cough, rhinorrhea, sneezing, chest lightness, and laryngospasm may occur shortly following exposure due to irritant effects' {AFM 6.13}. A course document used to train the Immediate Action Team included the following in its list of the physiological effects of CS gas: 'extreme burning of the eyes', 'irritation of nose and throat', 'tightness of the chest – difficulty breathing, possible feeling of suffocation', 'nausea, vomiting in higher concentrations', '60 seconds – total incapacitation may occur' {AFM 28}.

12 The Court of Appeal determined, first, that the CS gas was deployed by a prison officer (Prison Officer Flavell) acting within the scope of the power granted to the superintendent under subsec 152(1) of the *Youth Justice Act*, and delegated to the prison officer under subsec 157(2) of the Act; and, second, that the officer was acting within the scope of his duties as a prison officer when he deployed the gas {CAB 298; CA[135]}. It is the correctness of the legal conclusions embodied in those findings that the appellants dispute.

PART VI: Argument

13 These appeals concern the interaction of three statutes of the Northern Territory — namely, the *Youth Justice Act*, the *Weapons Act* and the *Prisons Act* — in a context of the utmost social and legal sensitivity, namely the application of force by the state against young people in detention. The relevant versions of the statutes are those in force in August 2014.

14 On the Court of Appeal's construction, the duty of the superintendent of a detention centre to 'maintain order' under para 151(3)(c) of the *Youth Justice Act*, in conjunction with the 'necessary or convenient' power in subsec 152(1), gave rise to a plenary power to use force —

including use of a weapon — without regard to any constraints on the use of force otherwise imposed by the *Youth Justice Act* or by any other statute; including those contained in the *Weapons Act* and the *Prisons Act*. That construction is contrary to long-established principles that require clear words before Parliament is taken to have infringed fundamental rights, particularly the basic right to liberty of the subject. It is contrary to the deep-seated constitutional principle that an officer of the executive has no power to dispense with a generally applicable penal statute (here, the *Weapons Act*) simply because it was 'necessary'.

The statutory context

15 At the relevant time, Don Dale was a 'youth detention centre' for the purposes of the *Youth Justice Act*. Youth detention centres are created by ministerial approval pursuant to sec 148 of the *Youth Justice Act*. Youth detention centres are not prisons or police prisons, which are created by ministerial declaration under sec 10 of the *Prisons Act*. Moreover, the appellants were each 'detainees' within the meaning of subsec 5(1) of the *Youth Justice Act*, as they were youths lawfully detained in a detention centre. Importantly, it is undisputed that the appellants were not 'prisoners' within the meaning of the *Prisons Act*. Accordingly, the care and management of the appellants while in detention was governed by the *Youth Justice Act*, not the *Prisons Act*.

16 The *Youth Justice Act* recognises the particular needs and vulnerabilities of young people in the justice system, including those in detention. These needs and vulnerabilities are reflected in sec 4 of the Act, which sets out 18 general principles that must be taken into account in the administration of the Act. These general principles recognise (for example) the need to take into account the youth's ongoing development (paras 4(b), (n)) and the youth's age and maturity (para 4(d)). The principles emphasise the importance of family relationships (paras 4(h), (i)) sense of racial, ethnic or cultural identity (para 4(j)) and, for Aboriginal youth in particular, involvement of the youth's community (para (o)). The principles include a clear statement that a youth should only be kept in custody as a last resort and for the shortest appropriate period of time (para 4(c)). The *Prisons Act* contains no statement of general principles of this kind.

17 Moreover, the *Youth Justice Act* imposes specific obligations and constraints on those charged with the custody of youth detainees that are not found in the legislation applicable to adult prisoners. In addition to the general principles in sec 4, the *Youth Justice Act* requires that the explanation given to a youth detainee upon admission to a detention centre of the rules and his or her rights and responsibilities be given 'in a language and manner the youth is likely to

understand having regard to the youth's age, maturity, cultural background and English language skills' (subsec 150(2)); contains specific provisions dealing with the use of restraints (secs 153, 155); expressly provides for the management of 'at risk' detainees (sec 162); and expressly authorises youth detainees to make complaints (sec 163).

18 Part 8 of the *Youth Justice Act* concerns 'Youth detention centres'. Division 2 governs, among other things, the obligations and responsibilities of the superintendent. Under subsec 151(2), the superintendent is responsible for the 'physical, psychological and emotional welfare' of detainees. Under para 151(3)(b), the superintendent has a statutory obligation to 'encourage the social development and improvement of the welfare of detainees'. Under para 151(3)(c), the superintendent has a statutory obligation to 'maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise'. Under para 151(3)(e), the superintendent 'must supervise the health of detainees, including the provision of medical treatment'. No such obligations are imposed on the director of a prison under the *Prisons Act*. The statutory role of the superintendent of a detention centre is therefore fundamentally different to the statutory role of the director of a prison, reflecting again the distinctive nature of the regime for the care and management of detainees established by the *Youth Justice Act*.

19 Section 152 provides for the powers of the superintendent. Relevantly, subsec 152(1) provides that the superintendent 'has the powers that are necessary or convenient for the performance of his or her functions'.

20 Section 153 deals with discipline, the use of force, and the isolation of detainees. Subsections (2) and (3) concern the use of force. They are the only general provisions of the *Youth Justice Act* that in terms authorise the use of force. Subsection (4) concerns the temporary use of restraints in an emergency situation. Subsection (5) concerns the use of isolation. The provisions of sec 153 are quite different from the use of force provisions applicable in adult prisons. Insofar as they concern the use of force, secs 60 and 62 of the *Prisons Act* confer a broader and less prescriptive power, whereas the *Youth Justice Act* sets out the parameters for the use of force in a more detailed way with express constraints on its use.

21 Section 157 deals with delegation of the superintendent's powers or functions. Subsection 157(2) relevantly provides that if a prison officer is 'called upon by the superintendent of a detention centre to assist in an emergency situation', they are 'taken to have been delegated the

powers of the superintendent necessary to perform the superintendent's functions' under para 151(3)(c). That is to say, what is delegated to the prison officer are the powers of the superintendent (not other powers) which are necessary (not 'convenient') for the exercise of the superintendent's functions of maintaining order and ensuring the safe custody and protection of all persons within the precincts of the detention centre.

22 The *Weapons Act* regulates the use of weapons other than firearms. Section 6 relevantly provides that a person must not, among other things, 'possess, use or carry' a prohibited weapon 'except if permitted to do so by an exemption' under sec 12. Subsection 12(1) identifies classes of 'prescribed persons' for the purposes of the exemption in subsec 12(2). These include 'an officer as defined' in sec 5 of the *Prisons Act*; but not the superintendent or a youth justice officer under the *Youth Justice Act*.

23 The *Prisons Act* regulates, among other things, the use of force, and use of weapons, by prison officers. Part 16 is entitled 'Security of prisoners and prisons'. Within that Part, subsec 62(2) provides that a prison officer 'may possess and use in a prison or police prison such firearms, weapons and articles of restraint as are approved by the Director [of Correctional Services] as necessary to maintain the security and good order of a prisoner or a prison or police prison'. Subsection 62(3) provides that a prison officer 'may use such reasonable physical force and restraint against a prisoner as he or she considers necessary to maintain the security and good order of a prisoner or a prison or police prison'.

The use of CS gas on the appellants at Don Dale was not lawful

24 The starting point in the **first ground of appeal** is that sec 6 of the *Weapons Act* prohibits the use of a weapon. Use of a weapon is a criminal offence. The prohibition in sec 6 is subject to an exemption in para 12(2)(a) for a 'prescribed person acting in the course of his or her duties as a prescribed person in respect of a prohibited weapon or body armour that ... is supplied to him or her by his or her employer for the performance of his or her duties as a prescribed person'. That focuses attention on whether the person using the weapon is a 'prescribed person'; whether they are 'acting in the course of his or her duties *as a prescribed person*'; and whether the weapon was supplied to them 'for the performance of his or her duties *as a prescribed person*'. Prison officers are, but youth justice officers are not, 'prescribed persons' within the meaning of subsec 12(1).

25 No provision of the *Youth Justice Act* expressly authorised the use of any weapons at all (let alone use of a CS gas fogger), whether by a prison officer or otherwise. The *Prisons Act* only authorised the use of weapons 'in a prison ... as necessary to maintain the security and good order of a prisoner or a prison': subsec 62(2). Yet the Court of Appeal dismissed the requirements of subsec 62(2) of the *Prisons Act* as a 'straw man' that 'may be disregarded', and which 'did not affect the interpretation of the exemption granted' by subsec 12(2) of the *Weapons Act* {CAB 283, 285; CA[113], [115]}. The Court of Appeal reasoned that, provided prison officers are acting within the scope of their duties, then any possession or use of a weapon which has been supplied to them by their employer for the performance of those duties fell within the exemption {CAB 285–6; CA[115]}.

26 With respect, the Court of Appeal's reasoning left unexamined the scope of the prison officer's duties, and failed to grapple both with the text of subsec 62(2) of the *Prisons Act*, which imposed a geographic and circumstantial limit on the authorised use of weapons by prison officers; and with the text of subsec 12(2) of the *Weapons Act*, which exempted only a limited class of officers acting in a limited range of circumstances from the criminal offence that would otherwise be committed against sec 6 of that Act. Likewise, the court failed to grapple with the fact that what was delegated to a prison officer under subsec 157(2) of the *Youth Justice Act* were the *powers* (not duties) of the superintendent *necessary* (not convenient) to perform the *superintendent's functions* (not prison officers' functions) under para 151(3)(c) of the *Youth Justice Act*.[1] The court was explicit that the powers being exercised were those arising under the *Youth Justice Act*, not the *Prisons Act* {CAB 298; CA[135]}. However, those powers under the *Youth Justice Act* did not include any exemption from the operation of the *Weapons Act* because the superintendent was not a 'prescribed person' under that Act: so much was recognised by the court {CAB 295–6; CA[130]}. Nor did those powers confer any *duty* upon the prison officers in their capacity *as prison officers* under the *Prisons Act*.

27 The Court of Appeal was driven to the proposition that, by reason of subsec 152(1) of the *Youth Justice Act*, it was a sufficient authorisation that the superintendent had the 'powers that are necessary or convenient for the performance of his or her functions'. The court considered

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[1] This choice of statutory policy may be contrasted with the situation in NSW, where a correctional officer dealing with riot or disturbance at a youth detention centre does indeed have 'the same functions and immunities in relation to the control of detainees at the detention centre *as he or she has in relation to the*

that to be a 'very wide grant of power which is intended to ensure the superintendent has adequate capacity to perform his or her wide ranging functions and duties under the Act'; which included 'very broad powers to maintain order' {CAB 288; CA[118]}. The court also said that the word 'necessary' should be 'construed liberally' {CAB 298; CA[134]}.

28 With respect, that cannot be correct for five reasons. First, the Court of Appeal did not have regard to the fact that the powers under consideration touched the liberty of the subject in its most emphatic form, because they concerned the application of force by the state. The right to personal liberty is, as Fullagar J described it, 'the most elementary and important of all common law rights': *Trobridge v Hardy* (1955) 94 CLR 147 at 152. Given the nature of the supposed power and its effect upon the liberty of the subject, the court's 'very wide' and 'liberal' construction {CAB 288, 298; CA[118], [134]} is 'not a construction which presents as at all probable': *Strickland v Commonwealth Director of Public Prosecutions* (2018) 93 ALJR 1; [2018] HCA 53 at [71] (Kiefel CJ, Bell and Nettle JJ). That is particularly so where the force is to be used against youth detainees in the care of the state.

29 Second, the Court of Appeal erred in relying on subsec 152(1) to subvert subsec 157(2), a provision that specifically deals with the delegation of the superintendent's powers to prison officers in these circumstances and uses the language of 'necessary' rather than 'necessary or convenient'. The Court of Appeal considered this textual difference to be 'of no particular consequence' {CAB 298; CA[134]}. To the contrary, the difference is material. The legislature, in dealing specifically with the situation of a police officer or prison officer being called upon by the superintendent to assist in an emergency situation or prevent an emergency situation from arising, confined the scope of the delegated powers to those 'necessary to perform the superintendent's functions' under para 151(3)(c). This legislative choice limited the scope of the delegated powers in two ways. It limited the delegated powers to specific functions (those under para 151(3)(c)) and further limited the delegated powers to those 'necessary to perform' those functions. In these circumstances, the scope of the powers delegated to the police or prison officer is to be determined by reference to subsec 157(2) only. The plain textual difference between subsecs 157(2) and 152(1) is impermissibly airbrushed away by the Court of Appeal's approach.

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control of inmates in a correctional centre': *Children (Detention Centres) Act 1987* (NSW) subpara 26(3)(b)(ii).

30 Third, the Court of Appeal did not have regard to the fact that its conclusion led to an officer of the executive being able to dispense with the penal provisions of the *Weapons Act* in the absence of any exemption in that Act itself, on the ground that the dispensation was 'necessary' {cf CAB 298; CA[135]}. At least since the case of the Seven Bishops[2] and the Bill of Rights 1689, the Anglo-Australian constitutional tradition has set its face against the proposition that an officer of the executive can dispense with generally applicable penal statutes simply because it seemed 'necessary'. That incapacity is of some significance for the rule of law in a parliamentary democracy. The principle is fundamental, 'though it seems sometimes to be forgotten when executive governments or their agencies are fettered or frustrated by laws which affect the fulfilment of their policies': *A v Hayden* (1984) 156 CLR 532 at 580 (Brennan J). Put shortly, it is never a 'necessary' or 'convenient' power for an executive officer to dispense with a penal statute.

31 Fourth, clear and unambiguous words are necessary before the legislature will be taken to have detracted from fundamental rights. The implication 'must be necessary, not just available or somehow thought to be desirable': *X7 v Australian Crime Commission* (2013) 248 CLR 92 at 149 [142] (Hayne and Bell JJ). 'To give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used': *Potter v Minahan* (1908) 7 CLR 277 at 304 (O'Connor J). It was wrong in principle to construe broad and general language as creating a maximal, rather than minimal, interference with the liberty of the subject {cf CAB 288, 298; CA[118], [134]}.

32 Fifth, the Court of Appeal's construction of the 'necessary or convenient' power is at odds with this Court's construction of similar powers, which emphasise their ancillary and incidental nature. Such a power may provide a 'subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions': *Shanahan v Scott* (1957) 96 CLR 245 at 250 (Dixon CJ, Williams, Webb and Fullagar JJ). It may add that which is 'reasonably required or legally ancillary to the accomplishment' of the specific powers elsewhere provided: *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at 452 [51] (Gaudron, Gummow and Callinan JJ). But it cannot 'add a means of carrying [statutory powers] into effect which the Act itself does not contemplate': *Willocks v Anderson* (1971) 124 CLR 293 at 299 (Barwick CJ, Menzies, Windeyer, Owen, Walsh

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[2] *R v Sancroft* (1688) 12 St Tr 183.

and Gibbs JJ). The approach mandated by those authorities was correctly summarised in *Northern Land Council v Quall* [2019] FCAFC 77 at [107] (Griffiths and White JJ; Mortimer J agreeing).

33 Contrary to the approach taken by the Court of Appeal in the present case, on no view could the ancillary 'necessary or convenient' power in subsec 152(1) grant, by a side wind, a power to infringe the liberty of the subject, to use coercive force, and to dispense with the generally applicable penal law.

The necessary or convenient powers of the superintendent did not extend to the use of force of a kind prohibited by subsec 153(3) of the *Youth Justice Act*

10 **34** The **second ground of appeal** flows from the first. Subsection 153(2) is the only general provision of the *Youth Justice Act* that authorises the use of force by officers in the conduct of a detention centre.[3] It is expressly qualified by subsec 153(3), which provides that '[r]easonably necessary force does not include' specified matters including 'striking, shaking or other form of physical violence' or 'enforced dosing with a medicine, drug or other substance'. The use of CS gas constituted such an enforced dosing, and was thus unlawful.

35 The Court of Appeal erred in holding that subsec 153(3) 'excludes four categories of conduct from the use of reasonably necessary force which may be exercised for the purpose of maintaining discipline, not for the purpose of maintaining order'. {CAB 289–90; CA[121]}. It erred in yoking the superintendent's duty to maintain order in para 151(3)(c) with the 'necessary
20 or convenient' power in subsec 152(1), so as to hold that this 'mandatory obligation extends to doing what is "necessary or convenient" to stop or bring to a halt a riot, or anarchy or violence should it occur' {CB 294; CA[126]}. Put simply, contrary to the court's view, the legislature had indeed 'codif[ied] the only powers (or force) which the superintendent may exercise in an emergency situation or to maintain order' {cf CAB 293; CA[125]}. That being so, the executive was not free to disregard safeguards built into regulatory interventions affecting the liberty of the subject: *Bunning v Cross* (1978) 141 CLR 54 at 77 (Stephen and Aickin JJ); *Lee v The Queen* (2014) 253 CLR 455 at 472 [50] (French CJ, Crennan, Kiefel, Bell and Keane JJ). Even in an emergency, the laws are not silent.

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[3] Other sections provide limited authorisations for the use of reasonable force in specified circumstances: secs 33 (identifying procedure), 159 (buccal swabs), 160 (alcohol or drug testing), 175 (medical sample).

36 Four points must be emphasised. First, the disjuncture drawn by the Court of Appeal between 'discipline' and 'order' is inapt. It is inconsistent with the court's own recognition that riot or disturbance demonstrates a 'temporary failure or break down in discipline' {CAB 294; CA[128]}. The text and context of sec 153 make clear that the section is not concerned with discipline in any narrow sense. Subsection (3) is expressed broadly and is not in terms confined to 'discipline'. Subsection (4) refers to an 'emergency situation' and to the need to 'protect the detainee from self-harm or to protect the safety of another person'; none of which are apt to describe a disciplinary situation. Thus, the purpose of the subsection cannot have been, as the court below concluded, 'to ensure that a superintendent does not evade ... restrictions on disciplinary measures' {CAB 303, 291; CA[141], [123]}. Further, subsec (5) refers expressly to 'order'. The court's 'disciplinary' construction cannot be sustained in light of subsecs 153(4) and (5); nor can the similar construction proffered in *Edwards v Tasker* (2014) 34 NTLR 115, which the Court of Appeal and the trial judge followed {CAB 299, 303; CA[136], [143]}. The correct and preferable construction of sec 153 is that it is concerned with the limits on the permissible use of force generally, and that there is no disjuncture between 'discipline' and 'order': *both* are encompassed within subsec (1).

37 Second, for the reasons advanced above in relation to the first ground, it is not open to construe the incidental 'necessary or convenient' power as a plenary authorisation to use force in disregard of the express limits set by subsec 153(3). The Court of Appeal therefore erred in holding that the legislature 'has not otherwise sought to limit the power granted to a superintendent' under subsec 152(1) {CAB 293; CA[125]}. The principle of legality required the court to prefer 'the choice of that construction, if one be reasonably open, which involves the least interference with that liberty': *NAAJA v Northern Territory* (2015) 256 CLR 569 at 582 [11] (French CJ, Kiefel and Bell JJ). The construction which involves the least interference with liberty is also consistent with the plain meaning of subsec 153(3), namely that the '[r]easonably necessary force does not include' the specified matters, whatever the circumstance in which the need to use force may arise. The same conclusion follows if (contrary to the Court of Appeal's approach) subsec 157(2) (rather than subsec 152(1)) is the locus of the relevant power.

38 Third, and relatedly, the court's construction is at odds with the *Anthony Hordern* principle and the *generalia specialibus non derogant* rule. That is to say, because the legislature has explicitly given a power 'by a particular provision which prescribes the mode in which it

shall be exercised and the conditions and restrictions which must be observed, it excludes the operation of general expressions' in the same statute 'which might otherwise have been relied upon for the same power': *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7 (Gavan Duffy CJ and Dixon J). No provision of the *Youth Justice Act* other than subsec 153(2) contained any general authorisation for the use of force. It was wrong to construe the incidental 'necessary or convenient' power as creating such an authorisation. Thus, it was indeed 'possible to say that the statute in question confers only one power to take the relevant action' {cf CAB 286; CA[116]}. It would be surprising if the qualifications and exceptions to the only general provision were not themselves generally applicable to the use of such force. It would be even more surprising if those restrictions could be evaded by invoking the incidental 'necessary or convenient' power in subsec 152(1). In this respect, subsec 152(1) is the general provision, and sec 153 is the specific: the former cannot derogate from the latter. The court therefore erred in holding that the *generalia specialibus non derogant* principle 'has no application in this case' {CAB 287; CA[117]}.

39 Fourth, while the court correctly recognised that '"[d]osing" has a wide enough meaning to include the deployment of CS gas that occurred on 21 August 2014, and "other substance" is wide enough to include gas' {CAB 296; CA[131]}, nothing in the context of the *Youth Justice Act* required departure from that plain meaning {cf CAB 296–7; CA[131], [132]}. To the contrary, the context strongly suggests that para 153(3)(b) is not concerned only, let alone centrally, with the therapeutic administration of a medicine or drug (because that would be authorised by secs 173–7), but rather should be read in accordance with its plain meaning. The process of construction leading to the conclusion that the deployment of CS gas does not fall within the meaning of 'dosing', is unclear. The court appears to have construed 'dosing' as limited to medicine or drugs or other substances that are directly administered {CAB 296; CA[131]}, yet no foundation in the text, context or purpose of the *Youth Justice Act* is identified for such a limitation.

40 The court also appears to have construed 'dosing' as limited to the administration of substances for therapeutic purposes {CAB 296; CA[131]}. Again, no statutory foundation for such a limitation is identified. Indeed, the very existence of secs 173–7 of the *Youth Justice Act* (within Part 10, entitled 'Medical treatment for detainees') tells against any attempt to relate 'enforced dosing' to therapeutic interventions. The Court of Appeal's reasoning focuses instead

on what it considered to be 'generally understood' about the way enforced dosing of medicine and drugs occurs in a detention context, and by reference to the particular facts of this case (emphasising that the CS gas would not have been released if a 'choice' had been made by Jake Roper, the detainee whose conduct led to its deployment) {CAB 296–7; CA [131]}. Such an approach ignores the words 'or other substance' in para 153(3)(b) altogether, and in any event is a plain departure from the permissible process of statutory construction.

41 As in any case involving statutory construction, one must begin, and end, with the statutory text: *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ). Having satisfied itself of the ordinary meaning of the text (specifically, that 'dosing' and 'other substance' encompassed the use of CS gas on the appellants), the Court of Appeal was not justified by any contextual or purposive reason in departing from that ordinary meaning. To the contrary, every contextual and purposive factor supported the ordinary meaning of the text and the construction advanced by the appellants. Thus, because the force authorised by subsec 153(2) 'that is reasonably necessary in the circumstances' could not include 'enforced dosing with a medicine, drug or other substance' within the meaning of subsec 153(3), the use of CS gas on the appellants at Don Dale was not lawful. In reaching this conclusion, it should be noted that the CS gas was not deployed in the open air. Rather, it was deployed in a confined space. Moreover, the appellants were not just confined to the BMU itself, but were locked inside their cells at the time. They had no means to escape the effects of the CS gas. Their exposure was enforced and continued until the cells were unlocked and they were removed from their cells. For a chemical substance to be sprayed into a confined area where youth detainees are held and have no option but to be exposed to the effects of the substance, is plainly 'enforced dosing' within the meaning of para 153(3)(b).

PART VII: Orders

42 If the appellants succeed in this Court, they should be awarded their costs, including the costs of the trial. Kelly J's orders of 3 December 2018 were based (a) on the appellants' failure on the issue now on appeal {AFM 96–7; SC[7]–[8]}, and (b) a Calderbank offer which, if the appellants succeed, was reasonable of them not to have accepted {AFM 100–3; SC[19]–[23]}. Kelly J has viewed that Calderbank correspondence and has made adverse findings about the appellants' behaviour and credibility {CAB 28, 30–1, 151; SC[44], [52], [53], [56], [58], [393]}. In particular, the judge's finding that *each* appellant had 'a motive to … minimise their own

misbehaviour' is striking, given the finding that Leroy O'Shea and Keiran Webster were not relevantly involved in any misbehaviour {CAB 31–2, 237; SC[60]–[61], CA[15]}. In those circumstances, the matter should be remitted to a different judge for assessment of damages.

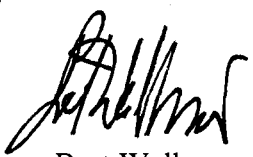
43 The appellants seek the following orders in each appeal:

1. The appeal be allowed with costs.
2. Paragraph 1 of the orders of the Court of Appeal made 18 February 2019, and the orders of the Court of Appeal as to costs made 10 April 2019, be set aside, and in their place it be ordered that:
   (a) The appeal be allowed with costs.
   (b) Paragraph 1(a) of the orders made by the Honourable Justice Kelly on 21 March 2017, and paragraph 1 of the orders of the Honourable Justice Kelly as to costs made 3 December 2018, be set aside.
   (c) In place of paragraph 1(a) of the orders of the Honourable Justice Kelly made 21 March 2017, it be ordered that judgment be given for the plaintiff on the claim for damages for battery arising out of the use of CS gas at Don Dale on 21 August 2014.
   (d) In place of paragraph 1 of the orders of the Honourable Justice Kelly made 3 December 2018, it be ordered that the defendant is to pay the plaintiff's costs of and incidental to the proceeding to be taxed on the standard basis (These costs are to include the costs of all interlocutory proceedings other than those which have been the subject of separate costs awards).
   (e) The matter be remitted to another judge of the Supreme Court for assessment of damages.

PART VIII: Time Estimate

44 It is estimated that up to 2.5 hours will be required for the appellants' oral argument.

4th October 2019



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ANNEXURE – LIST OF LEGISLATION

Prisons (Correctional Services) Act 1980 (NT) – version as in force at 1 July 2013

Weapons Control Act 2001 (NT) – version as in force at 21 September 2011

Youth Justice Act 2005 (NT) – version as in force at 1 July 2014