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

APPELLANTS' JOINT REPLY AND SUBMISSIONS ON THE NOTICE OF CONTENTION

These are the joint reply submissions of each appellant in the four related appeals. These submissions also address the respondent's notice of contention.

PART I: Certification

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

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PART II:

2 The respondent advances a radical argument. The respondent's argument is explicitly that prison officers have a plenary power to apply force by means of a prohibited weapon, whether inside or outside a prison, without regard to the criminal law or any other statutory constraint on their power, simply on the say-so of their commanding officer. That submission incorrectly elides three crucial distinctions: (1) between the use of force and the use of a weapon; (2) between the position of prisoners and the position of youth detainees; (3) between the position of the director of correctional services and the position of the superintendent of a youth detention centre. Each elision involves a departure from the statutory text and the proper process of statutory construction.

3 First, the question in this case is not whether the abstract use of force is authorised by statute; it is whether use of a prohibited weapon is authorised. The respondent's inversion of the grounds of appeal {RS[7]} deliberately distracts attention away from the basal proposition that use of a prohibited weapon is a criminal offence unless and until authorised by statute. The respondent's references to generic authorities on the use of force {RS[18]} or to the supposed abstract 'reasonableness' of the respondent's officers' conduct {RS[36]} are simply inapt in the face of the specific prohibition created by sec 6 of the *Weapons Act*. None of the 'consequences' pointed to by the respondent could justify the unauthorised and unlawful use of a prohibited weapon {cf RS[20]–[21], [42]}. Contrary to the respondent's submissions {RS[8]}, the appellants' grounds of appeal are independent and not cumulative. Unless the use of the prohibited weapon was otherwise authorised by statute, its use was unlawful whether or not it also amounted to 'enforced dosing'; similarly, if that use did amount to 'enforced dosing', it was unlawful whether or not use of the weapon was otherwise authorised by statute. Far from being 'unstated' {cf RS[37]} the analysis leading to that conclusion is set out explicitly in AS[28]–[33], [36]–[41]. That analysis makes plain why the superintendent's 'necessary or convenient' powers are indeed 'confined' by the 'scheme of the enactment' {cf RS[13]}.

4 Second, the respondent incorrectly asserts that the appellants were 'prisoners' {RS[31], [39]}. The assertion that the appellants were prisoners simply because they were 'in lawful custody' is not a proper reading of either the *Prisons Act* or the *Youth Justice Act*. Paragraph (a) of the definition of 'prisoner' in sec 5 of the *Prisons Act* refers to a person 'committed or remanded by a court and in lawful custody'. A young person not admitted to bail is 'detained at a

detention centre or other place approved by the Minister'; they are not 'remanded by a court': *Youth Justice Act* subsec 24(1). Subsection 65(2) of the *Youth Justice Act* confirms that detention in a detention centre is distinct from remand in a prison. As to para (b), a young person sentenced under the *Youth Justice Act* can be sentenced to a term of detention *or* a term of imprisonment: para 83(1)(l). None of the applicants was serving a term of imprisonment, rendering paragraph (b) of the definition inapplicable. The remarkable effect of the respondent's submissions is that, by a kind of definitional switch, all the protective provisions of the *Youth Justice Act* can be set at naught because young people in youth detention can simply be treated as adult prisoners {cf AS[16]–[17]}. Quite aside from its inconsistency with the text and purpose of the *Youth Justice Act*, that submission is also inconsistent with the text of the *Prisons Act*, which recognises in sec 21 the distinct category of 'youth prisoners' separate from youth detainees under the *Youth Justice Act*. That is because, as subsec 83(1) of the *Youth Justice Act* makes clear, terms of detention are distinct from terms of imprisonment. The category of persons 'in lawful custody' is therefore not the same as the category of persons in lawful custody under the *Prisons Act*.

5 Third, the respondent elides the distinction between the position of director of correctional services and the position of superintendent. That elision appears to depend on the erroneous contention in RS[31] that the director has plenary control over — and a plenary power to use force in — a youth detention centre. That contention is wholly inconsistent with the text and structure of the *Youth Justice Act*, under which it is the superintendent, not the director, to whom the management of the detention centre is entrusted: sec 151. Put simply, a youth detention centre is not an adult prison. That is why a prison officer is empowered only to 'assist' in an 'emergency situation' at a youth detention centre at the superintendent's request, and as a delegate of the superintendent's powers: subsec 157(2). There is no general authorisation for a prison officer to use force — let alone use a prohibited weapon — in a youth detention centre.

6 **Enforced dosing** – The respondent's 'enforced dosing' argument mischaracterises the appellants' submissions on this construction question and thus does not address the core difficulty with the Court of Appeal's construction of para 153(3)(b) of the *Youth Justice Act*, namely that it impermissibly narrows the broad statutory language. Contrary to the respondent's submissions at RS[10], the appellants' construction relies on the plain words of para 153(3)(b) itself (in particular, the breadth of the words 'or other substance'). The appellants do not say that medical treatment is exclusively dealt with in Part 10 {cf RS[10]}. Rather, the appellants point to

secs 176 and 177 as provisions which, in authorising therapeutic administration of a medicine or drug, are consistent with (rather than contrary to) a reading of para 153(3)(b) that is not limited to therapeutic interventions. What the respondent does not explain is why para 153(3)(b) should be construed as limited to therapeutic interventions, when the express words impose no such limitation. Moreover, limiting the scope of para 153(3)(b) to therapeutic interventions not only leaves the words 'other substance' with no work to do, it renders any distinction between 'medicine' and 'drug' nugatory. If 'medicine' is limited to a chemical substance given for a therapeutic purpose, 'drug' must have a broader meaning to have utility. That broader meaning could only be a chemical substance given for any purpose (i.e. not limited to therapeutic purposes). However, the respondent's construction does not permit such an approach. Accordingly, what the respondent's construction really does is read the entire provision as if it only refers to 'medicine'. So, too, the respondent's reading of para 153(3)(b) as only operating where the enforced dosing is 'directed' at a detainee {RS[11]} has no foundation in the statutory language and should not be accepted.

7 **The notice of contention should be rejected** – Neither subsec 8(2) nor sec 9 of the *Prisons Act* provide any defence to the appellants' claims. The deployment of CS gas was not lawful for the reasons set out in the appellants' primary submissions. So far as subsec 8(2) is concerned, the deployment could not become lawful simply by the fiat of the director of correctional services {cf RS[44]}. The law 'has no place for a general defence of superior orders or of Crown or Executive fiat': *A v Hayden* (1984) 156 CLR 532 at 593 (Deane J); *White v Director of Military Prosecutions* (2007) 231 CLR 570 at 592 [37] (Gummow, Hayne and Crennan JJ). The director, just as much as prison officers, was bound by the geographic and circumstantial limitations on the use of weapons imposed by subsec 62(2) of the *Prisons Act*.

8 So far as sec 9 of the *Prisons Act* is concerned, the argument appears to be that (1) a prison officer is taken to have the powers and privileges of a police officer, (2) a police officer is a prescribed person under the *Weapons Act*, (3) there are no geographical or circumstantial constraints on the use of a weapon by a police officer, (4) therefore there are no geographical or circumstantial constraints on the use of a weapon by a prison officer {RS[29], [32], [42]}. That argument cannot succeed for at least four reasons.

9 First, sec 9 of the *Prisons Act* focusses attention on the duties of the prison officer 'while acting as such'. What is granted are the 'powers and privileges of a police officer for performing

his or her duties as an officer' ('officer' being defined to mean 'prison officer' appointed under the *Prisons Act*). In other words, sec 9 does not create a freestanding entitlement to exercise the powers of a police officer independently of the scheme of the *Prisons Act*.

10 Second, and relatedly, within the scheme of the *Prisons Act* sec 62 is the specific provision authorising the use of force and the use of weapons. That authorisation is limited. On ordinary principles of statutory construction (in particular, the *Anthony Hordern* principle), the general provision in sec 9 cannot be used to evade the express limitations prescribed by the specific provision, namely sec 62 {cf RS[37]–[38]}.

11 Third, the exemption in subsec 12(2) of the *Weapons Act* is for a 'prescribed person acting in the course of his or her duties as a prescribed person', and in respect of a weapon 'supplied to him or her by his or her employer for the performance of his or her duties as a prescribed person'. Here, the relevant officers were acting in the course of their duties as prison officer*s*, not as police; and the weapon was supplied to them by their employer for the performance of their duties as prison officers, not as police.

12 Fourth, if it is contended that the relevant officers were acting otherwise than as prison officers, the respondent cannot overcome:

(a) the Court of Appeal's holding {CAB 298; CA[135](iii)} that 'Prison Officer Flavell was acting within the scope of his duties as a prisoner [sic] officer when he deployed the CS gas which was supplied to him by his employer for the purposes of assisting in an emergency situation at the detention centre', if it now be contended that some other duties were engaged; and

(b) the trial judge's finding {CAB 58; SC[131]} that the CS gas canister 'was a weapon issued to them for use in the course of their duties as prison officers'.

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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