

# HIGH COURT OF AUSTRALIA

KIEFEL CJ,  
GAGELER, KEANE, GORDON AND EDELMAN JJ

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## **Matter No D11/2019**

JOSIAH BINSARIS APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA RESPONDENT

## **Matter No D12/2019**

KEIRAN WEBSTER APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA RESPONDENT

## **Matter No D13/2019**

LEROY O'SHEA APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA RESPONDENT

## **Matter No D14/2019**

ETHAN AUSTRAL APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA RESPONDENT



*Binsaris v Northern Territory*

*Webster v Northern Territory*

*O'Shea v Northern Territory*

*Austral v Northern Territory*

[2020] HCA 22

*Date of Hearing: 18 March 2020*

*Date of Judgment: 3 June 2020*

D11/2019, D12/2019, D13/2019 & D14/2019

## **ORDER**

### **In each matter:**

1. *Appeal allowed with costs.*
2. *Set aside paragraph 1 of the orders made by the Court of Appeal of the Northern Territory on 18 February 2019 and paragraph 1 of the orders made by the Court of Appeal on 10 April 2019 and, in their place, order that:*
  - (a) *the appeal be allowed with costs;*
  - (b) *set aside paragraph 1(a) of the orders made by the Supreme Court of the Northern Territory on 21 March 2017 and in its place order that there be judgment for the plaintiff on the claim for damages for battery arising out of the use of CS gas at Don Dale Youth Detention Centre on 21 August 2014;*
  - (c) *set aside paragraph 1 of the orders made by the Supreme Court of the Northern Territory on 3 December 2018 and in its place order that the defendant pay the plaintiff's costs of and incidental to the proceedings 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); and*
  - (d) *the matter be remitted to another judge of the Supreme Court of the Northern Territory for assessment of damages.*

On appeal from the Supreme Court of the Northern Territory



## **Representation**

B W Walker SC with K E Foley and J A G McComish for the appellant in each matter (instructed by North Australian Aboriginal Justice Agency)

D A McLure SC with T J Moses for the respondent in each matter (instructed by Solicitor for the Northern Territory)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



## CATCHWORDS

**Binsaris v Northern Territory**  
**Webster v Northern Territory**  
**O'Shea v Northern Territory**  
**Austral v Northern Territory**

Tort – Battery – Statutory authorisation – Where CS gas (form of tear gas) used by prison officer in youth detention centre – Where prison officer called to assist at youth detention centre – Where detainees exposed to CS gas claimed damages for battery – Where device used to deploy CS gas prohibited weapon under *Weapons Control Act* (NT) – Whether deployment of CS gas by prison officer in youth detention centre lawful – Whether prison officer acting in course of duties as prison officer such that exemption for prescribed persons in s 12(2) of *Weapons Control Act* applied – Whether authorised by delegation of powers of superintendent of youth detention centre under s 157(2) of *Youth Justice Act* (NT) – Whether authorised by prison officer having powers of police officer under s 9 of *Prisons (Correctional Services) Act* (NT).

Words and phrases – "acting in the course of his or her duties", "battery", "bodily integrity", "breach of the peace", "bystander", "collateral damage", "detainees", "emergency situation", "ensure the safe custody and protection", "maintain discipline", "maintain order", "necessary or convenient", "police officer", "positive authority", "prescribed person", "prison officer", "prisoner", "prohibited weapon", "superintendent", "tortious liability", "use of force that is reasonably necessary", "youth detention centre".

*Prisons (Correctional Services) Act* (NT), ss 9, 62(2).

*Weapons Control Act* (NT), ss 6, 12.

*Youth Justice Act* (NT), ss 151(3), 152(1), 153, 154, 157(2), 159, 160.





1 KIEFEL CJ AND KEANE J. The Don Dale Youth Detention Centre is located in the Northern Territory. It was at the relevant time approved as a youth detention centre under s 148 of the *Youth Justice Act* (NT). On 21 August 2014 the appellants and others were detained in the Behavioural Management Unit of the detention centre when another detainee, Jake Roper, escaped from his cell, damaged property and caused a serious disturbance. The appellants Josiah Binsaris and Ethan Austral participated to the extent of damaging property in their cells. Details of the conduct which was engaged in are set out in the reasons of Gordon and Edelman JJ.

2 The superintendent of the detention centre contacted the Director of Correctional Services, who mobilised members of the Immediate Action Team, which included three prison officers from Berrimah Correctional Centre. Sometime after their arrival at the detention centre it became apparent that the situation, particularly as regards Jake Roper, could not be resolved. The Director of Correctional Services gave a direction to the prison officers that CS gas, a type of tear gas, could be deployed. A warning was read out to Jake Roper. It was not complied with. One of the prison officers deployed CS gas in bursts until Jake Roper ceased the offending conduct. The appellants were also exposed to the CS gas.

3 CS gas is deployed using a CS fogger. A CS fogger is a prohibited weapon under the *Weapons Control Act* (NT)<sup>1</sup>. Section 6(e) of that Act provides that a person must not "possess, use or carry ... a prohibited weapon except if permitted to do so by an exemption under section 12 ...". Section 12(2) provides in relevant part that s 6 does not apply to:

"a prescribed person acting in the course of his or her duties as a prescribed person in respect of a prohibited weapon ... that:

(a) is supplied to him or her by his or her employer for the performance of his or her duties as a prescribed person".

4 Section 12(1) lists the persons who are prescribed persons for s 12(2). They include an officer as defined in s 5 of the *Prisons (Correctional Services) Act* (NT) ("the Prisons Act") and a police officer<sup>2</sup>. They do not include a superintendent of a detention centre. The exemption provided by s 12(2) could only apply to the member of the Immediate Action Team who used the CS fogger if it was supplied

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1 *Weapons Control Act* (NT), s 3 "prohibited weapon"; *Weapons Control Regulations* (NT), reg 3, Sch 2, item 18.

2 *Weapons Control Act* (NT), s 12(1)(a), (c).

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to him for the performance of his duties as a prison officer and he was acting in the course of his duties as a prison officer when he used it.

5 An "officer" is defined by s 5 of the Prisons Act to mean a prison officer appointed under s 8(1) of that Act and includes the Director of Correctional Services and a person employed in a prison. Section 9 provides that:

"Every officer while acting as such is, because of his or her appointment, taken to be a police officer and to have the powers and privileges of a police officer for performing his or her duties as an officer."

6 The Prisons Act contains provisions respecting the use of weapons by prison officers. Section 62(2) provides:

"An officer may possess and use in a prison or police prison such firearms, weapons and articles of restraint as are approved by the Director as necessary to maintain the security and good order of a prisoner or a prison or police prison."

7 Section 62(1) provides that s 62 does not affect the operation of the *Firearms Act* (NT).

8 The action of the superintendent of the detention centre in seeking the assistance of prison officers is comprehended by s 157(2) of the *Youth Justice Act*, which provides that:

"A police officer or a prison officer ... if called upon by the superintendent of a detention centre to assist in an emergency situation ... is taken to have been delegated the powers of the superintendent necessary to perform the superintendent's functions under section 151(3)(c)."

9 Section 151(3)(c) provides that a superintendent of a detention centre "must 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". Section 152(1) provides that the "superintendent of a detention centre has the powers that are necessary or convenient for the performance of his or her functions".

10 Section 153(1) of the *Youth Justice Act* requires the superintendent of a detention centre to maintain discipline at the detention centre. Section 153(2) provides that the superintendent may use the force that is reasonably necessary in the circumstances, but s 153(3) states that that does not include the use of physical violence, enforced dosing with a medicine, drug or other substance, compelling a person to remain in a constrained or fatiguing position, or using handcuffs or other restraints. Section 153(4) provides a temporary exemption with respect to the use of handcuffs or other restraints in an emergency situation. Section 153(5) provides

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that a detainee may be isolated for the protection of others or for the good order or security of the detention centre. But nowhere does the *Youth Justice Act* mention that the use of weapons against detainees is permitted. Section 153 would suggest to the contrary.

11 The appellants brought proceedings in the Supreme Court of the Northern Territory against the Territory in which they claimed damages for assault and for battery. The primary judge, Kelly J, found the appellants' cases for battery to have been made out with respect to a later incident for the application of spit hoods and leg shackles to all four appellants, and another later incident for the application of spit hoods, leg shackles and handcuffs to three of the appellants<sup>3</sup>. Her Honour dismissed their other claims for assault and battery, including their claims for battery constituted by the use of the CS gas.

12 The principal question in those proceedings so far as concerned those claims was whether the use of CS gas was lawful, in the sense that it was authorised by statute. Kelly J held that the exemption provided by s 12(2) of the *Weapons Control Act* was engaged. The prison officer had delegated to him under s 157(2) of the *Youth Justice Act* all powers necessary or convenient to ensure the safe custody of detainees and others in the detention centre. No offence was committed<sup>4</sup>.

13 The appellants' appeals were dismissed by the Court of Appeal of the Supreme Court of the Northern Territory (Southwood J, Riley and Graham A-JJ)<sup>5</sup>. In relation to the use of CS gas, their Honours identified the sole issue before the primary judge to have been whether the deployment of the CS gas was outside the scope of the duties that the prison officer was performing at the detention centre on the day in question. Their Honours confirmed as correct the approach of the primary judge. The answer to that question, they said, lay in the correct interpretation of the relevant provisions of the *Weapons Control Act* and the *Youth Justice Act*<sup>6</sup>. The power given by s 152(1) of the *Youth Justice Act*, in combination with s 151(3)(c), which was delegated to the prison officer, to do what was necessary to maintain order and safety is to be understood as a very wide grant of power. The prison officer was acting within the scope of that power when he

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3 *LO v Northern Territory* (2017) 317 FLR 324.

4 *LO v Northern Territory* (2017) 317 FLR 324 at 344-345 [124]-[125].

5 *JB v Northern Territory* (2019) 170 NTR 11.

6 *JB v Northern Territory* (2019) 170 NTR 11 at 36 [109], 37-38 [112]-[115].

deployed the CS gas<sup>7</sup>. Neither the primary judge nor the Court of Appeal considered it necessary to take into account the provisions of the Prisons Act concerning the use of weapons by prison officers<sup>8</sup>.

14 In light of the approach taken by the courts below it is understandable that much of the argument on these appeals was directed to the extent of the delegable powers of the superintendent of the detention centre and the provisions of the *Youth Justice Act* as relevant to s 12(2) of the *Weapons Control Act*. But ss 152(1) and 157(2) of the *Youth Justice Act* do not speak to the question of whether a prison officer is acting in the course of his or her duties as a prison officer when a prohibited weapon is used, as s 12(2) requires if the exemption it provides is to apply. That question is answered by the provisions of the Prisons Act.

15 Section 12(2) of the *Weapons Control Act* provides that the prohibition on the use of a prohibited weapon, contained in s 6 of that Act, does not apply to a "prescribed person acting in the course of his or her duties as a prescribed person in respect of a prohibited weapon" that is supplied by the person's employer. It has not been doubted that the authorisation of the use of a CS fogger by the Director of Correctional Services satisfies the latter requirement. Nor has it been suggested that that authorisation overcomes the other requirements of s 12(2).

16 The relevant requirement of s 12(2), so far as concerns these appeals, is that at the time the prison officer deployed the CS fogger he was acting as a prison officer and in the course of his duties as a prison officer, not in some other capacity. The question is not what powers the prison officer had as the delegate of the superintendent of the detention centre. A superintendent of a detention centre, it will be recalled, is not a prescribed person for the purposes of s 12(2).

17 The words "in the course of duty" are generally understood to refer to a function, which is to say the "functions and proper actions which [the] employment authorizes"<sup>9</sup>. The words in s 12(2) "in the course of his or her duties" are expressly limited to the functions of a prison officer acting as such. Those functions and proper actions, which is to say those which are authorised, are to be found in the statute which governs prison officers, the Prisons Act.

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7 *JB v Northern Territory* (2019) 170 NTR 11 at 39 [118], 43-44 [133]-[135].

8 *LO v Northern Territory* (2017) 317 FLR 324 at 344-345 [124]; *JB v Northern Territory* (2019) 170 NTR 11 at 37-38 [113]-[115].

9 *Canadian Pacific Tobacco Co Ltd v Stapleton* (1952) 86 CLR 1 at 6; see also *Herscu v The Queen* (1991) 173 CLR 276 at 282.

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18           It is s 62 of the Prisons Act which deals with the circumstances in which a  
prison officer may use a weapon which has been approved by the Director of  
Correctional Services. It is only in these circumstances that it can be said to be part  
of the function or duty of a prison officer acting as such to deploy a CS fogger.  
Section 62(2) in effect provides that it is a proper function of a prison officer to  
use a weapon but only as necessary to maintain the security and good order of a  
prisoner or a prison and only in a prison or police prison. It is no part of a prison  
officer's function to use a weapon in a youth detention centre.

19           Contrary to arguments put by the respondent, s 9 of the Prisons Act does  
not alter the operation of s 62(2). Whilst s 9 provides prison officers with the  
powers and privileges of a police officer they are expressed to be only for the  
purposes of performing his or her duties as a prison officer. And a prison officer,  
by force of s 62(2), only has power to use a weapon in a prison.

20           The provisions of the *Weapons Control Act* and the Prisons Act did not  
authorise the use of a CS fogger in the detention centre. Its deployment was  
unlawful.

21           We agree with the orders proposed by Gordon and Edelman JJ.

- 22 GAGELER J. The Immediate Action Team called upon by the Superintendent of the Don Dale Youth Detention Centre to assist in the "emergency situation" in the Behaviour Management Unit of the Centre more fully described by Gordon and Edelman JJ comprised trained prison officers who acted under the command of the Director of Correctional Services. Together with masks, helmets, protective vests, shields and batons, the equipment bags they brought with them to the Detention Centre contained aerosol cannisters of CS gas. Confronted there with the situation of a detainee, Jake Roper, engaging in the exercise yard in violent and erratic behaviour assessed to pose a danger to staff of the Detention Centre and to himself, the Director authorised a member of the Immediate Action Team to deploy such amount of CS gas as was necessary to subdue him.
- 23 Deployment of the CS gas to subdue Jake Roper led to a common law action in battery being brought against the Northern Territory of Australia in the Supreme Court of the Northern Territory. The action was brought not by Jake Roper but by four other detainees who were exposed to the CS gas in their cells in the Behaviour Management Unit of the Detention Centre. The Northern Territory did not dispute that it was vicariously liable if the exposure of the other detainees to the CS gas constituted battery and did not dispute that their exposure to the CS gas constituted battery in the absence of lawful authority for the deployment of the CS gas.
- 24 In the Supreme Court of the Northern Territory, both at first instance<sup>10</sup> and in the Court of Appeal<sup>11</sup>, lawful authority for the deployment of the CS gas was found in provisions of the *Youth Justice Act* (NT) by which the prison officers who comprised the Immediate Action Team were taken to have been delegated powers of the Superintendent "necessary" to perform the function of the Superintendent to "maintain order and ensure the safe custody and protection of all persons ... within the precincts of the detention centre"<sup>12</sup>.
- 25 Like other members of this Court, I cannot read the provisions of the *Youth Justice Act* conferring powers on the Superintendent to maintain order and ensure safe custody and protection of persons within the Detention Centre as authorising an interference with the common law right of a detainee to bodily integrity protected by the tort of battery. In light of the principle of statutory construction that "[s]tatutory authority to engage in what otherwise would be tortious conduct must be clearly expressed in unmistakable and unambiguous language"<sup>13</sup>, the

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10 *LO v Northern Territory* (2017) 317 FLR 324.

11 *JB v Northern Territory* (2019) 170 NTR 11.

12 Sections 151(3)(c), 152(1) and 157(2) of the *Youth Justice Act*.

13 *Coco v The Queen* (1994) 179 CLR 427 at 436. See also *Wilson v Board of Fire Commissioners* (1950) 51 SR (NSW) 26 at 28-29.

statutory expression of the powers is too general to authorise conduct of that nature.

26 Faced with an absence of authority for the deployment of the CS gas under the *Youth Justice Act*, Mr McLure SC, who appears with Mr Moses for the Northern Territory, contends by notices of contention filed in the appeals by the detainees to this Court that an alternative source of authority for the deployment of the CS gas can be found in a section of the *Prisons (Correctional Services) Act* (NT) not addressed by the primary judge or the Court of Appeal. The application of the section of the *Prisons (Correctional Services) Act* is said to be established by factual findings made by the primary judge in the context of the *Youth Justice Act*. The detainees raise no procedural objection to the Northern Territory pursuing that contention in the appeals.

27 The section of the *Prisons (Correctional Services) Act* to which the Northern Territory points as an alternative source of authority for the deployment of the CS gas states that every prison officer acting in the capacity of a prison officer is "taken to be a police officer and to have the powers and privileges of a police officer for performing his or her duties as an officer"<sup>14</sup>. The duties of a prison officer include assisting in an emergency situation at a youth detention centre when called upon by its superintendent. And the powers of a police officer which the section confers on a prison officer performing those duties, the Northern Territory contends, extend to using such force as is reasonably necessary to prevent the commission of a crime in such an emergency situation.

28 The Northern Territory's contention that the section conferred an alternative source of authority for the deployment of the CS gas is, in my opinion, correct. The powers of a police officer in the Northern Territory include the common law powers of a constable<sup>15</sup>, and the common law powers of a constable include not only the power to prevent the commission of a crime in certain circumstances but the power to take reasonable steps to ensure the safety of persons in his or her custody<sup>16</sup> and the "right" and the "duty" to take steps reasonably necessary to stop a person from breaching the peace in the presence of the constable<sup>17</sup>.

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14 Section 9 of the *Prisons (Correctional Services) Act*.

15 Section 25 of the *Police Administration Act* (NT). See *Gardiner v Marinov* (1998) 7 NTLR 181 at 190; see also *Thomson v C* (1989) 67 NTR 11 at 13.

16 *Woodley v Boyd* [2001] NSWCA 35 at [37], quoting *Lindley v Rutter* [1981] QB 128 at 134.

17 *Albert v Lavin* [1982] AC 546 at 565; *Poidevin v Semaan* (2013) 85 NSWLR 758 at 763-764 [18]-[20].

29       The prison officers who comprised the Immediate Action Team called upon to assist in the emergency situation in the Behaviour Management Unit of the Detention Centre acted there in their capacities as prison officers. The powers of the Superintendent delegated to them under the *Youth Justice Act* did not displace the powers of police officers which they had as prison officers. Those powers extended to using force reasonably necessary to end the breach of the peace which they found occurring at the Detention Centre.

30       Unlike other members of this Court, I do not think that deployment of CS gas at the Detention Centre was impliedly excluded from the powers which the members of the Immediate Action Team had as prison officers by a further provision of the *Prisons (Correctional Services) Act* which empowered a prison officer to "possess and use in a prison ... such ... weapons ... as are approved by the Director as necessary to maintain the security and good order of a prisoner or a prison"<sup>18</sup>. In my opinion, that further provision speaks only to the possession and use by a prison officer of a "weapon" to maintain the security and good order of a prisoner or to maintain the security and good order of a place declared to be a "prison" under the *Prisons (Correctional Services) Act*. The provision operates to confer standing authority on a prison officer to possess and to use an approved weapon for either of those purposes. Assuming the instrument used to deploy the CS gas to constitute a "weapon" within the meaning of the *Prisons (Correctional Services) Act*, the provision says nothing about the authority of a prison officer to possess or to use such a "weapon" for any other purpose. Whether possession and use of CS gas is open to a prison officer to restrain a breach of the peace by a detainee in an emergency situation in a youth detention centre approved under the *Youth Justice Act* turns on the context-specific question of whether the possession and use of the CS gas is reasonably necessary to achieve that result.

31       The Northern Territory, in my opinion, is also correct in its contention that the findings of the primary judge establish that the deployment of the CS gas was reasonably necessary to restrain conduct by Jake Roper which constituted a breach of the peace. In her careful and comprehensive reasons for judgment, her Honour found that the CS gas "was not used *on* the detainees in their cells" but "for the purpose of temporarily incapacitating Jake Roper so he could be taken back into safe custody ... in a way that avoided the risk of serious ... injury to Jake Roper and/or the prison officers"<sup>19</sup>. She agreed with the contemporaneously formed opinions of the Director and of the prison officers who comprised the Immediate Action Team that "use of the CS gas was the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and

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18   Section 62(2) of the *Prisons (Correctional Services) Act*.

19   (2017) 317 FLR 324 at 347-348 [139] (original emphasis). See also at 353 [166].



carried the least risk of serious injury to Jake Roper and to staff"<sup>20</sup>. The effect of the deployment of the CS gas on the other detainees was not ignored in that calculus but was, rather, reasonably assessed by the Director and the members of the Immediate Action Team to be outweighed by the risks of serious injury to Jake Roper and to staff. "Despite the fact that the inevitable consequence of using the gas was that detainees who were restrained in their cells would also be exposed to the gas", her Honour found, "it was both reasonable and necessary in the circumstances to use the gas to temporarily incapacitate Jake Roper and so bring the crisis to a close"<sup>21</sup>.

32 The upshot is that I accept that the deployment of the CS gas by a member of the Immediate Action Team for the purpose of temporarily incapacitating Jake Roper was within the power of a police officer which the member had under the *Prisons (Correctional Services) Act* when performing his duty as a prison officer of assisting in the emergency situation to which he had been called at the Detention Centre. Being within the power which he had when performing his duty as a prison officer, the deployment was exempt from criminal liability under the *Weapons Control Act* (NT)<sup>22</sup>.

33 It follows that I would accept that the power of a police officer which the member of the Immediate Action Team who deployed the CS gas had under the *Prisons (Correctional Services) Act* would provide the Northern Territory with a defence of lawful justification to such common law action in battery as might have been brought against it by Jake Roper. The question is whether that power provides the Northern Territory with a defence of lawful justification to the common law action in battery that has in fact been brought against it by the other detainees who were exposed to the CS gas.

34 Exposure of the other detainees to the CS gas could not be said to have been unintentional. Their exposure was understood by the Director and the members of the Immediate Action Team to be the inevitable consequence of the decision to deploy the CS gas for the purpose of incapacitating Jake Roper and was carefully weighed by the Director in making that decision.

35 Nor could it be said that deployment of the CS gas for the purpose of incapacitating Jake Roper was reasonably necessary to prevent greater harm to the other detainees themselves. Although the primary judge referred to expert evidence concerning the deployment of CS gas in a "hostage situation" ("where

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20 (2017) 317 FLR 324 at 349 [152]. See also at 338-340 [86]-[91], 352-353 [165].

21 (2017) 317 FLR 324 at 352-353 [165].

22 Section 12(2).

gas is deployed to temporarily incapacitate the hostage taker and rescue the hostage or hostages who will also, inevitably, be affected by the gas")<sup>23</sup>, she did not suggest that the emergency situation in the Behaviour Management Unit of the Detention Centre met that description. Her Honour made no finding that Jake Roper presented any risk of harm to any other detainee.

36 Two of the other detainees in the Behaviour Management Unit of the Detention Centre had played no part in creating the emergency situation to which the Immediate Action Team had been called. The other two had themselves engaged in violent and erratic behaviour. By the time the decision was made to deploy the CS gas for the purpose of incapacitating Jake Roper, however, all four of the other detainees were locked in their cells. There they were bystanders to the confrontation between Jake Roper and staff of the Detention Centre playing out in the adjacent exercise yard.

37 Conscious of the proximity of the other four detainees, the Director faced a choice between two evils in making the decision to deploy CS gas for the purpose of incapacitating Jake Roper to bring the emergency situation to an end. On the one hand was the risk of serious harm to Jake Roper and staff of the Detention Centre if CS gas were not deployed. On the other hand was the inevitability of the other detainees being exposed if CS gas were deployed. The Director chose the lesser evil, and the choice he made must be accepted on the findings of the primary judge not only to have been reasonable but also to have been necessary.

38 Mr Walker SC, who appears with Ms Foley and Mr McComish for the other detainees, submits that the common law power of a police officer to use such force as is reasonably necessary to restrain or prevent a breach of the peace confers no common law immunity from liability in battery to a bystander who is injured through the application of that force. He submits that police have no privilege to make "instrumental use" of a bystander so as to cause "collateral damage" to the bystander with impunity. Despite a surprising dearth of modern authority on the topic, I believe the submission to be correct.

39 The leading case on the common law power of a police officer to "interfere ... with an innocent person"<sup>24</sup> has been said to be *Humphries v Connor*<sup>25</sup>. There the Irish Court of Queen's Bench held that Sub-inspector Connor was not liable in tort for the assault of Miss Humphries in the assumed circumstance that he "necessarily

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23 (2017) 317 FLR 324 at 348 [140].

24 *Poidevin v Semaan* (2013) 85 NSWLR 758 at 763 [19], quoting Glanville Williams, "Arrest for Breach of the Peace" [1954] *Criminal Law Review* 578 at 590.

25 (1864) 17 ICLR 1.

and unavoidably" removed sectarian insignia from her clothing "doing her no injury whatever" and "thereby" protected her from "threatened violence, which would otherwise have been inflicted upon her" and "preserved the public peace, which would otherwise have been broken"<sup>26</sup>.

40 *Humphries v Connor* has been suggested to be authority for the proposition that at common law "a constable may commit what would otherwise be an assault upon an innocent person if that is the only way of preserving the peace"<sup>27</sup>. However, I do not think that its holding can be taken to absolve constables from liability in battery to all "innocent persons" whose rights to bodily integrity are necessitously interfered with to preserve the peace. Miss Humphries was not in the position of a mere bystander. Wittingly or unwittingly, Miss Humphries was a provocateur: she was creating by her conduct to which the act of Sub-inspector Connor was directed the imminent risks which his act averted. And Miss Humphries faced the prospect of greater harm to her own bodily integrity had Sub-inspector Connor not acted<sup>28</sup>.

41 The slightest intentional non-consensual interference with the physical integrity of a person can, of course, constitute a battery. Tortious liability for battery is nevertheless adapted to the reality that the price of living in a civil society is that some measure of physical contact must be taken to be "generally acceptable in the ordinary conduct of everyday life"<sup>29</sup>. Minor intentional physical contact between bystanders and police engaged in quelling breaches of the peace might sometimes, perhaps often, escape tortious liability on that basis. Examples in the case law include a passenger being bumped on public transport in the course of the conductor removing another drunk and disorderly passenger<sup>30</sup> and members of the

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26 (1864) 17 ICLR 1 at 5.

27 Glanville Williams, "The Defence of Necessity" (1953) 6 *Current Legal Problems* 216 at 230. See also Feldman (ed), *English Public Law* (2004) at 452.

28 See also *O'Kelly v Harvey* (1882) 10 LR Ir 285; (1883) 14 LR Ir 105; *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at 145-147 [97]-[98].

29 *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 at 73. See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218 at 233, 265-266, citing *Collins v Wilcock* [1984] 1 WLR 1172 at 1177; [1984] 3 All ER 374 at 378.

30 See *Spade v Lynn* (1899) 52 NE 747 at 748.

public being moved aside in a crowded public place in order to create a corridor for police or emergency services to gain access to an incident<sup>31</sup>.

42 There is, however, a difference between a police officer taking intentional action which involves minor and incidental physical contact with a bystander and a police officer taking intentional action which involves a calculated choice to do an act which it is known will cause harm to a bystander in order to avoid a risk of greater harm to the police officer or to someone else.

43 For much of the history of the common law, police officers and other "peace officers" were subject to the general doctrine that "any public officer whom the law charges with a discretion and responsibility in the execution of an independent legal duty is alone responsible for tortious acts which he may commit in the course of his office and that for such acts the government or body which he serves or which appointed him incurs no vicarious liability"<sup>32</sup>. Over time, the practice in relation to a public officer appointed by the Crown came to be that "in a proper case, the Crown [would] defend its officer and become responsible for any damages awarded"<sup>33</sup>. But persistence of the common law doctrine did much to explain the reluctance of the common law to visit tortious liability on public officers whose conscientious discharge of official duties to safeguard the interests of the public on occasions required them to make the hard choice of sacrificing the interests of some in order to preserve the greater interests of others. History had thrown up memorable instances where catastrophes had ensued because necessary hard choices had not been made by public officers for fear of incurring personal liability<sup>34</sup>. Hence, the provision to a "public champion" of a defence of public necessity<sup>35</sup>.

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31 See *R (Laporte) v Chief Constable of Gloucestershire Constabulary* [2007] 2 AC 105 at 141-142 [83].

32 *Little v The Commonwealth* (1947) 75 CLR 94 at 114. See also *Enever v The King* (1906) 3 CLR 969 at 975-978; *Attorney-General for New South Wales v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 252, 283-284, 303-304.

33 *The Commonwealth v Mewett* (1997) 191 CLR 471 at 543, quoting Robertson, *The Law and Practice of Civil Proceedings By and Against the Crown and Departments of the Government* (1908) at 351. See also *New South Wales v Ibbett* (2006) 229 CLR 638 at 650 [41].

34 eg *Respublica v Sparhawk* (1788) 1 US 357 at 363.

35 Fleming, *The Law of Torts*, 9th ed (1998) at 103-104.

44 Beginning in the latter part of the twentieth century, however, legislation applicable in each State and Territory has come to impose liability on the Crown for torts committed in the performance of independent functions of office by officers of the Crown, and by police officers in particular<sup>36</sup>. In some legislative schemes the liability of the Crown for those torts is vicarious; in others it is in substitution for that of a police officer. The policy informing that widespread legislative development has been "the acceptance of responsibility by the State for harm done to citizens by State officials in carrying out the will of the State"<sup>37</sup>. The legislative development, and the underlying legislative acceptance of public responsibility for torts committed by police officers, are appropriate to be factored into the contemporary expression of the common law of Australia<sup>38</sup>.

45 The decision of the House of Lords in *Burmah Oil Co Ltd v Lord Advocate*<sup>39</sup> illustrates that an act constituting an interference with a common law right of property undertaken lawfully by the Crown as a matter of public necessity can still give rise to a common law entitlement to compensation. There private property was destroyed in the exercise of prerogative power in a time of war in order to prevent it from falling into enemy hands. The utilitarian notion that "the property of a few" could be destroyed so that "the property of many and the lives of many more could be saved" was not wholly rejected in that it was accepted to justify the existence and exercise of the prerogative power<sup>40</sup>. But it was moderated by the

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36 Section 64B of the *Australian Federal Police Act 1979* (Cth); s 6, Pt 3 and Pt 4 of the *Law Reform (Vicarious Liability) Act 1983* (NSW), and s 213 of the *Police Act 1990* (NSW); s 10.5 of the *Police Service Administration Act 1990* (Qld); s 65 of the *Police Act 1998* (SA); s 84 of the *Police Service Act 2003* (Tas); ss 74 and 75 of the *Victoria Police Act 2013* (Vic); s 137 of the *Police Act 1892* (WA); Pt VIIA of the *Police Administration Act* (NT).

37 New South Wales, Law Reform Commission, *Outline Report of the Law Reform Commission on Proceedings By and Against the Crown*, LRC 24 (1975) at 14.

38 cf *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 59-60 [18]-[20], 61-63 [23]-[27].

39 [1965] AC 75.

40 [1965] AC 75 at 112, quoting *United States v Caltex (Philippines) Inc* (1952) 344 US 149 at 154.

principle of distributive justice that "the loss to the individual must be made good at the public expense"<sup>41</sup>.

46 In my opinion, application of similar reasoning should result in an entitlement to compensation against the Crown for physical harm inflicted on a bystander through action of a police officer undertaken to avoid a risk of greater harm to the police officer or to someone else. If the bystander is not contributing to the risk avoided through the action of the police officer and is not personally at risk of greater harm, the harm caused to the bystander through the police officer's interference with the bystander's bodily integrity ought in principle be compensable at public expense.

47 In working my way to that result, I have benefited from recent academic writing exploring the general topic of "necessity" as a defence to an action in tort in the United Kingdom<sup>42</sup> and the United States<sup>43</sup>. Although I have found them to have no direct utility, I have also considered the concepts of "incomplete privilege"<sup>44</sup> and "conditional fault"<sup>45</sup> developed in academic and professional writing in the United States by reference to *Vincent v Lake Erie Transportation Co*<sup>46</sup>.

48 To my mind, the informing principle is that the burden of the necessitous infliction of harm on an individual by a public officer in the performance of a public function in the public interest should in fairness be borne by the public. That principle is implicit in the common law reasoning in *Burmah Oil* and is embraced within the legislative imposition of liability for the tortious conduct of a police officer on the Crown.

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41 [1965] AC 75 at 107, quoting *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* 1963 SC 410 at 475.

42 Virgo, "Justifying Necessity as a Defence in Tort Law", in Dyson, Goudkamp and Wilmot-Smith (eds), *Defences in Tort* (2015) 135, esp at 146-147.

43 Simons, "Self-Defense, Necessity, and the Duty to Compensate, in Law and Morality" (2018) 55 *San Diego Law Review* 357, esp at 373.

44 See Bohlen, "Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personality" (1926) 39 *Harvard Law Review* 307.

45 See Keeton, "Conditional Fault in the Law of Torts" (1959) 72 *Harvard Law Review* 401.

46 (1910) 124 NW 221. See *Restatement (Third) of Torts: Intentional Torts to Persons, Tentative Draft No 5* (2020), §26 and §44.

49           Doctrinally, my preferred analysis is to focus on the scope of the common law "privilege" or "immunity" attendant on the common law "power", or "right" and "duty", of a police officer to use force reasonably necessary to restrain or prevent a breach of the peace. The attendant common law immunity is unquestionably such as to provide a defence to a claim in battery by the wrongdoer who is the target of the force. The attendant common law immunity, in my opinion, is not such as to provide a defence to a claim in battery by a bystander who suffers collateral harm by reason of the necessitous use of force. The bystander is entitled to damages at common law to compensate for the harm for the simple reason that the use of force has interfered with the bystander's bodily integrity. The interference is tortious in the absence of a defence. The tortious liability and concomitant entitlement to an award of compensatory damages by a court administering the common law is unaffected by the circumstance that a court administering equity would decline to restrain the tortious but necessitous use of force by pre-emptive injunction.

50           Therefore rejecting the notices of contention, I would allow the appeals and make the consequential orders proposed by Gordon and Edelman JJ.

51 GORDON AND EDELMAN JJ. The Northern Territory deals with prisoners and prisons under the *Prisons (Correctional Services) Act* (NT). It deals separately with detention of youth, as young as ten<sup>47</sup>, in detention centres under the *Youth Justice Act* (NT)<sup>48</sup>. These appeals concern the use in a youth detention centre of a CS gas dispersal device, known as a CS fogger, a prohibited weapon under the *Weapons Control Act* (NT)<sup>49</sup>. CS gas is a form of tear gas that disables those who breathe it by inducing uncontrollable burning and tearing of the eyes, and intense irritation of the nose and throat, causing profuse coughing and difficulty breathing. A CS fogger was used in the Don Dale Youth Detention Centre ("the Detention Centre") on 21 August 2014. The appellants were detainees in the Detention Centre and they were exposed to the CS gas.

52 The *Weapons Control Act* provides that a person must not, among other things, "possess, use or carry" a prohibited weapon except, relevantly, if permitted to do so by an exemption under s 12<sup>50</sup>. Section 12(2)(a) exempts a "prescribed person acting in the course of his or her duties as a prescribed person in respect of a prohibited weapon" that is "supplied to him or her by his or her employer for the performance of his or her duties as a prescribed person". An officer under the *Prisons (Correctional Services) Act* is a prescribed person<sup>51</sup>. Thus, a prison officer<sup>52</sup> under the *Prisons (Correctional Services) Act* may use in a prison or police prison weapons 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<sup>53</sup>. A CS fogger is a weapon that may be used by prison officers in a prison

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47 See *Criminal Code* (NT), ss 38, 43AP, 43AQ.

48 The relevant versions of the statutes are those which were in force on 21 August 2014.

49 *Weapons Control Act*, s 3 definition of "prohibited weapon", read with *Weapons Control Regulations* (NT), reg 3 and Sch 2, item 18. It was common ground that a CS fogger was such a prohibited weapon.

50 *Weapons Control Act*, s 6.

51 *Weapons Control Act*, s 12(1)(a).

52 In s 5 of the *Prisons (Correctional Services) Act*, "officer" is defined as "a prison officer appointed under section 8(1) and includes the Director and a person, other than a prisoner, employed in a prison".

53 *Prisons (Correctional Services) Act*, s 62(2). See also s 5 definition of "Director".



or a police prison if approved by the Director as necessary to maintain security and good order.

53 But a detention centre is not a prison; detainees in a youth detention centre are not prisoners. And the superintendent or other staff member of a detention centre under the *Youth Justice Act* is not a prescribed person under the *Weapons Control Act*. The issue in these appeals is whether the use of a CS fogger in the Detention Centre on 21 August 2014 was lawful. The answer is no. The use of the CS fogger by a prison officer in the Detention Centre was not authorised by the *Weapons Control Act*, the *Youth Justice Act* or the *Prisons (Correctional Services) Act*. The appeals against the decision of the Court of Appeal of the Supreme Court of the Northern Territory<sup>54</sup>, which held that the use of the CS fogger was lawful, should be allowed. In place of that Court's orders dismissing the appeals in respect of that issue, there should be orders allowing the appeals to that Court and judgment for the appellants for damages to be assessed in respect of their claim for battery by being exposed to CS gas intentionally and deliberately discharged by a prison officer at the Detention Centre on 21 August 2014.

54 These appeals are to be resolved by applying the fundamental principles of statutory interpretation, which require reading the text of the relevant provisions in their context, paying proper regard to the overall purposes and objects of the statutes, which, in the case of the *Youth Justice Act*, the legislature has stated expressly. They do not turn on engaging or applying any wider principle.

55 These reasons summarise the facts relevant to these appeals and the procedural history, set out the applicable provisions of the three Acts in issue, and then explain why use of the CS fogger in the Detention Centre was unlawful.

## Facts

56 In August 2014, the appellants were detained at the Detention Centre in Darwin, an establishment approved as a youth detention centre under the *Youth Justice Act*<sup>55</sup>.

57 On the evening of 21 August 2014, the appellants, together with two other detainees, were detained in the Behavioural Management Unit ("the BMU") of the Detention Centre. The BMU consisted of five cells adjoining an enclosed exercise yard. The first cell was vacant. The appellants Keiran Webster and Leroy O'Shea occupied the second cell. The appellants Josiah Binsaris and Ethan Austral occupied the fourth cell. Jake Roper occupied the third cell. Another detainee

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54 *JB v Northern Territory* (2019) 170 NTR 11.

55 *Youth Justice Act*, s 148.

occupied the fifth cell. The last two detainees are not involved in these proceedings.

58 Jake Roper, the detainee in the fifth cell, Josiah Binsaris and Ethan Austral used toilet paper to cover the cameras in their cells, kicked their cell doors, yelled various statements, broke the lights in their cells and removed the metal brackets attached to the lights. Jake Roper smashed a hole in the metal mesh of his cell door, put his hand through the hole and opened the door, which was not locked but could only be opened from outside the cell, and went into the exercise yard. There, Jake Roper, among other things, damaged property, broke windows and caused a disturbance.

59 Josiah Binsaris and Ethan Austral smashed a hole about the size of a soccer ball in the metal mesh on their cell door. They used a metal bracket taken from the light in their cell to chip pieces of concrete render from the walls to throw at staff entering the BMU. They remained in their cell. Keiran Webster and Leroy O'Shea played cards in their cell.

60 Just after 5.00 pm, a youth justice officer telephoned the Deputy Superintendent and Assistant General Manager of the Detention Centre, James Sizeland, and told him that detainees in the BMU were being disorderly and throwing pieces of concrete at staff. Mr Sizeland instructed the youth justice officer to monitor the situation and give the detainees time to calm down. At 7.45 pm, Russell Caldwell, the Superintendent of the Detention Centre, telephoned Mr Sizeland and told him that the detainees in the BMU had not settled and were becoming increasingly aggressive and violent towards youth justice officers. At about 8.00 pm, Mr Sizeland, and two youth justice officers who had a good relationship with the detainees in the BMU, arrived at the Detention Centre. Mr Sizeland formed the opinion that his presence was aggravating Jake Roper and he withdrew.

61 Mr Caldwell telephoned the Director of Correctional Services, Ken Middlebrook, and told him about the situation. Mr Middlebrook called Grant Ballantine, the Acting General Manager of Berrimah Correctional Centre, an adult prison, and asked him to mobilise members of the Immediate Action Team ("the IAT"), a dog handler and a general-purpose dog, and to send them to the Detention Centre. Mr Middlebrook drove to the Detention Centre.

62 Three members of the IAT arrived at the Detention Centre at about 8.30 pm. They were equipped with masks, helmets, protective vests, shields, batons and CS foggers. Mr Sizeland asked them to remove glass that had come through the corridor but when they attempted to do so, projectiles were thrown at them and then their vision was impeded when Jake Roper directed a fire extinguisher nozzle through a broken window and discharged dry powder at them.

63 When Mr Middlebrook arrived at the Detention Centre, Mr Caldwell escorted him to the dining area at the end of a corridor that led to the BMU. Mr Caldwell and Mr Sizeland briefed Mr Middlebrook. Mr Middlebrook observed youth justice officers attempting, unsuccessfully, to talk to Jake Roper and to recover debris from the BMU. Mr Middlebrook's suggestion that the general-purpose dog be deployed through the basketball court door to the BMU, to distract Jake Roper so that the IAT could go in and restrain him, did not work. The door could not be opened because Jake Roper had damaged the lock by hitting it with a fire extinguisher. There was what the *Youth Justice Act* refers to as "an emergency situation"<sup>56</sup>.

64 Mr Middlebrook, on Mr Sizeland's recommendation and in the presence of Mr Caldwell, purportedly authorised the deployment of CS gas by the IAT. Before the CS gas was deployed, one member of the IAT, a prison officer, read out the following:

"On the orders of the Officer in Charge of the Prison and the powers invested in me, you are ordered to stop your actions and do as I instruct you immediately. If you fail to do so chemical agents and physical control will be used to restore the security and good order of the Prison."

65 Jake Roper did not comply. One member of the IAT, a prison officer, deployed the CS gas. The first deployment, three short bursts of less than one second each into the BMU, followed by another burst lasting two seconds, did not render Jake Roper compliant. After a second deployment of about six short bursts of CS gas into the BMU Jake Roper became compliant. The IAT entered the BMU and removed Jake Roper. Once Jake Roper was secured, the cells inside the BMU were unlocked and the detainees removed. All of the appellants were exposed to and affected by the CS gas. The detainees, including the appellants, were handcuffed behind their backs and taken to the basketball court, where they were hosed down to remove the residue of the CS gas. The appellants were then transferred to Berrimah Correctional Centre and, later, to Holtze Correctional Centre.

### **Procedural history**

66 Each appellant commenced a proceeding in the Supreme Court of the Northern Territory against the respondent, the Northern Territory of Australia, claiming damages for assaults and batteries alleged to have been committed by prison officers and youth justice officers during the incident in the Detention Centre on 21 August 2014 as well as other incidents which occurred after the

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<sup>56</sup> *Youth Justice Act*, ss 153(4)-(5), 157(2).

appellants were transferred to Berrimah Correctional Centre and, later, to Holtze Correctional Centre. Some of their claims were successful.

67 The trial judge entered judgment for Josiah Binsaris, Keiran Webster and Ethan Austral on the claims for damages for the acts of battery consisting of placing a spit hood on each of them, placing leg shackles on each of them, and handcuffing each of them with their hands behind their backs, rather than in front, on their way to the medical area at Berrimah Correctional Centre on 22 August 2014. The trial judge also entered judgment for each appellant on their claims for damages for the acts of battery consisting of placing a spit hood on each of them and placing leg shackles on each of them when travelling to Holtze Correctional Centre on 25 August 2014. Each appellant was awarded \$5,000 damages for each claim. Josiah Binsaris and Ethan Austral were also awarded aggravated damages of \$2,000 each. Keiran Webster and Leroy O'Shea were awarded aggravated damages of \$7,000 each.

68 The trial judge entered judgment for the Territory on the remaining claims including, relevantly, the claim by all appellants for damages for battery arising out of the use of the CS gas at the Detention Centre on 21 August 2014. The trial judge found that the prison officer who deployed the CS gas was acting in the course of his duties, having been called upon to assist in an emergency situation at the Detention Centre under s 157(2) of the *Youth Justice Act* and directed by Mr Middlebrook to deploy the gas. The trial judge found that the exemption under s 12(2) of the *Weapons Control Act* was engaged and, as a result, the prison officer was not prohibited from using the CS gas by s 6 of that Act. The trial judge also held that the prison officer had been delegated all powers necessary or convenient for ensuring the safe custody of detainees and the safety and protection of the detainees and others in the Detention Centre.

69 The appellants appealed to the Court of Appeal against, among other things, the dismissal of their claims for battery arising out of their exposure to CS gas. Their appeals were dismissed (Southwood J and Graham A-J, Riley A-J agreeing). The appellants appeal to this Court against the dismissal of those appeals in relation to their exposure to CS gas.

70 It is necessary to address the *Weapons Control Act* and the *Youth Justice Act* before turning to the *Prisons (Correctional Services) Act*.

### ***Weapons Control Act***

71 The *Weapons Control Act* regulates "weapons (other than firearms) and body armour"<sup>57</sup>. Section 6 provides that a person must not, among other things,

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57 *Weapons Control Act*, long title.

"possess, use or carry ... a prohibited weapon except if permitted to do so by an exemption under section 12 or an approval". A "prohibited weapon" is "an article prescribed by regulation to be a prohibited weapon"<sup>58</sup> and, as noted above, it was common ground that a CS fogger is a prohibited weapon<sup>59</sup>.

72 Section 12(2) relevantly provides:

"Section[] 6 ... [does] not apply to a prescribed person acting in the course of his or her duties as a prescribed person in respect of a prohibited weapon ... that:

(a) is supplied to him or her by his or her employer for the performance of his or her duties as a prescribed person ..."

73 This exemption from the operation of s 6 requires two conditions to be met: that a prescribed person is acting in the course of their duties as a prescribed person in respect of the prohibited weapon and that the weapon has been supplied to them by their employer for the performance of their duties as a prescribed person. Section 12(1) lists five classes of persons as "prescribed persons". Two of the five classes of listed persons are "an officer as defined in section 5 of the *Prisons (Correctional Services) Act*"<sup>60</sup> and "a police officer ..." <sup>61</sup>. Youth justice officers are not prescribed persons. Nor is the superintendent of a youth detention centre.

74 There was no dispute that the CS fogger was provided to the members of the IAT for the performance of their duties as prison officers and that the exemption in s 12(2) applied to them if they used the CS fogger acting in the course of their duties as prison officers. The issue is whether they were authorised to use the CS fogger against the detainees in the Detention Centre.

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58 *Weapons Control Act*, s 3 definition of "prohibited weapon".

59 *Weapons Control Act*, s 3 definition of "prohibited weapon", read with *Weapons Control Regulations*, reg 3 and Sch 2, item 18.

60 *Weapons Control Act*, s 12(1)(a).

61 *Weapons Control Act*, s 12(1)(c).

***Youth Justice Act***

75 The *Youth Justice Act* provides for "justice in relation to youths who have committed or are alleged to have committed offences, and for related matters"<sup>62</sup>. A "youth" is a person under 18 years of age or, in the absence of proof as to age, a person apparently under 18 years of age<sup>63</sup>.

76 The Act provides a particular regime for dealing with youth to whom it applies<sup>64</sup>. Understandably, given the age of the offenders and alleged offenders (some potentially as young as ten<sup>65</sup>), the regime differs in substantial respects from that established for adult prisoners in the *Prisons (Correctional Services) Act*.

77 That the regime of the *Youth Justice Act* is calibrated to deal with youth offenders is addressed in the objects of the Act and the expressly stated general principles that must be taken into account in the administration of the Act. The objects of the Act<sup>66</sup> include:

- "(a) to specify the general principles of justice in respect of youth;
- (b) to provide for the administration of justice in respect of youth;
- (c) to provide how a youth who has committed, or is alleged to have committed, an offence is to be dealt with;
- ...
- (e) to ensure that a youth who has committed an offence is given appropriate treatment, punishment and rehabilitation ..."

78 The general principles set out in s 4 include:

- "(c) a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time;

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62 *Youth Justice Act*, long title.

63 *Youth Justice Act*, s 6(1).

64 See, eg, *Youth Justice Act*, s 3(c).

65 See *Criminal Code*, ss 38, 43AP, 43AQ.

66 *Youth Justice Act*, s 3.

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- (d) a youth must be dealt with in the criminal law system in a manner consistent with his or her age and maturity and have the same rights and protection before the law as would an adult in similar circumstances;

...

- (f) a youth who commits an offence should be dealt with in a way that allows him or her to be re-integrated into the community;
- (g) a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community ..."

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The Act contains specific provisions for dealing with youths who have committed or are alleged to have committed offences. It includes provisions relating to the apprehension and remand of youths<sup>67</sup>; the diversion of youths, who are believed on reasonable grounds to have committed offences, away from being charged with an offence<sup>68</sup>; and the establishment of a Youth Justice Court<sup>69</sup> with its own jurisdiction and procedures<sup>70</sup>, as well as specific principles and considerations the Youth Justice Court must have regard to when sentencing youth offenders (which include the general principles set out in s 4 of the Act), specific sentencing options and other kinds of orders<sup>71</sup>. Those sentencing options include "detention *or* imprisonment"<sup>72</sup> (emphasis added). A youth aged less than 15 years may not be sentenced to a term of imprisonment<sup>73</sup>. These provisions about sentencing reflect and reinforce the distinction drawn by the legislation between detention and imprisonment.

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**67** *Youth Justice Act*, Pt 2, which, by reason of s 12, applies despite the provisions of any other Act.

**68** *Youth Justice Act*, Pt 3.

**69** *Youth Justice Act*, Pt 4.

**70** *Youth Justice Act*, Pt 5.

**71** *Youth Justice Act*, Pt 6.

**72** *Youth Justice Act*, s 83(1)(i)-(l).

**73** *Youth Justice Act*, s 83(3).

80 Part 8 of the Act deals with youth detention centres. The Minister may approve an establishment to be a youth detention centre for the Act<sup>74</sup>. A "detainee" is defined as a youth lawfully detained in a detention centre<sup>75</sup>. A youth cannot be admitted to a detention centre except in accordance with the Act<sup>76</sup>. A detainee is a youth who has committed an offence and is ordered to serve a term of detention<sup>77</sup> or who is alleged to have committed an offence and is not admitted to bail<sup>78</sup>.

81 The Director of Correctional Services must appoint "the superintendent for a detention centre"<sup>79</sup> and Div 2 of Pt 8 provides what the superintendent is required to do in relation to the detention centre. Again, the provisions differ in substantial respects from those in the *Prisons (Correctional Services) Act*. The superintendent of the detention centre "is responsible, as far as practicable, for the physical, psychological and emotional welfare of detainees in the detention centre"<sup>80</sup>. The superintendent, among other things, "must 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"<sup>81</sup>. The superintendent's powers include the powers "necessary or convenient for the performance of his or her functions"<sup>82</sup>.

82 Section 153 regulates one of the most important aspects of the superintendent's function of maintaining order and ensuring the safe custody and protection of all persons who are within the precincts of the detention centre: the superintendent's duty to maintain discipline. Section 153(1) provides that "[t]he superintendent of a detention centre *must* maintain discipline at the detention centre" (emphasis added). For that purpose, the superintendent is empowered to

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74 *Youth Justice Act*, s 148 and s 5(1) definition of "detention centre".

75 *Youth Justice Act*, s 5(1) definition of "detainee".

76 *Youth Justice Act*, s 149.

77 *Youth Justice Act*, s 83(1)(l).

78 *Youth Justice Act*, s 24.

79 *Youth Justice Act*, s 151(1) and s 5(1) definition of "Director".

80 *Youth Justice Act*, s 151(2).

81 *Youth Justice Act*, s 151(3)(c).

82 *Youth Justice Act*, s 152(1).



"use the force that is *reasonably necessary* in the circumstances"<sup>83</sup> (emphasis added). However, "[r]easonably necessary force does not include"<sup>84</sup>:

- "(a) striking, shaking or other form of physical violence; or
- (b) enforced dosing with a medicine, drug or other substance; or
- (c) compulsion to remain in a constrained or fatiguing position; or
- (d) handcuffing or use of similar devices to restrain normal movement."

Taken together, these exclusions show that corporal punishment is not permitted. That is unsurprising given that the Act deals with the detention of youth, some as young as ten, and given the objects and general principles for the administration of the Act.

83 Section 153(4) and (5) further regulate the powers of the superintendent. Section 153(4) provides for the only substantial exercise of force by the superintendent, which is to restrain a detainee by the use of handcuffs or a similar device, if the superintendent is of the opinion that "an emergency situation exists" and that "a detainee should be temporarily restrained to protect the detainee from self-harm or to protect the safety of another person". And, as the sub-section provides, that power only subsists "until the superintendent is satisfied the emergency situation no longer exists". Section 153(5) then provides that if the superintendent "is of the opinion that a detainee should be isolated from other detainees", "to protect the safety of another person" or "for the good order or security of the detention centre", the superintendent may isolate that detainee for a period not exceeding 24 hours or, with the approval of the Director of Correctional Services, a period not exceeding 72 hours. As every grant of power carries with it all the powers necessary to exercise the power so conferred<sup>85</sup>, the superintendent may use reasonably necessary force to apply the handcuffs or other restraint, and to isolate a detainee for safety reasons. But, again, that conferral of powers does not permit or authorise some wider class of acts.

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83 *Youth Justice Act*, s 153(2).

84 *Youth Justice Act*, s 153(3).

85 *Attorney-General of NSW v Collector of Customs for NSW* (1908) 5 CLR 818 at 834; *Grassby v The Queen* (1989) 168 CLR 1 at 16.

84 The terms of s 153(4) and (5) make clear that "discipline" in s 153 is not used in the sense of inflicting punishment<sup>86</sup>. Discipline is used, and is to be seen, as a subset of order. That is its natural meaning in this context. Discipline is defined as "[t]he orderly conduct and action which result from training" or "[t]he order maintained and observed among ... persons under control or command, such as ... the inmates of ... a prison" or "[a] system or method for the maintenance of order"<sup>87</sup>. The Territory's only example of discipline that was said not to be concerned with order was adherence to rules in relation to dress. But dress standards and uniforms are tools and manifestations of discipline with a view to good order.

85 Section 154(1) provides that if the superintendent of a detention centre is of the opinion that "an emergency situation exists", and that "a detainee should be temporarily transferred to a prison to protect the safety of another person", the superintendent "may apply by telephone to a magistrate for approval to transfer the detainee". Such an application can only be made in relation to a detainee who is 15 years of age or older<sup>88</sup>. And it is only if the magistrate approves the transfer that the superintendent may arrange for the detainee to be transferred from the detention centre to a prison and, subject to an extension of the period of transfer by a magistrate, the period of transfer must not exceed 24 hours<sup>89</sup>. Section 154 therefore reinforces what is otherwise apparent from the text and structure of the Act. That is, it reinforces the conclusion that the statutory regime in the *Youth Justice Act* for dealing with youth detainees is particular and the superintendent's powers in dealing with detainees not only are limited, but are different and separate from those that may be used in connection with prisoners and prisons under the *Prisons (Correctional Services) Act*.

86 Section 157(2) of the *Youth Justice Act* provides:

"A police officer or a prison officer within the meaning of the *Prisons (Correctional Services) Act*, if called upon by the superintendent of a detention centre to assist in an emergency situation or in preventing an emergency situation from arising, is taken to have been delegated the

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86 See, eg, *The Oxford English Dictionary*, 2nd ed (1989), vol IV at 735, "discipline", verb meaning 2.

87 *The Oxford English Dictionary*, 2nd ed (1989), vol IV at 735, "discipline", noun meanings 4, 5a and 5b.

88 *Youth Justice Act*, s 154(2).

89 *Youth Justice Act*, s 154(3)-(8).

powers of the superintendent necessary to perform the superintendent's functions under section 151(3)(c)."

Section 157(2) does not enlarge the powers that may be exercised by persons referred to in the provision beyond "the powers of the superintendent necessary to perform the superintendent's functions under section 151(3)(c)". It is those powers of the superintendent that are delegated, not some larger class of powers. What s 157(2) does is provide a mechanism by which the superintendent, in an emergency, may use additional skilled resources, namely police and prison officers, to fulfil the superintendent's function of maintaining order and ensuring the safe custody and protection of all persons within the detention centre.

### ***Prisons (Correctional Services) Act***

87 The *Prisons (Correctional Services) Act* provides for "the control and conduct of prisons and prisoners"<sup>90</sup>. A "prison" or a "police prison" is a place, premises or institution declared by the Minister by *Gazette* notice to be a prison or a police prison<sup>91</sup>. A youth detention centre under the *Youth Justice Act* is not a prison or a police prison. A "prisoner" is a person "committed or remanded by a court and in lawful custody", a person "under a sentence of imprisonment" or "a detainee under the *Serious Sex Offenders Act* [(NT)]"<sup>92</sup>. A detainee in a youth detention centre under the *Youth Justice Act* is not a prisoner.

88 Under Pt 2 of the Act, the Minister may appoint the Director of Correctional Services<sup>93</sup> and, subject to the *Prisons (Correctional Services) Act* and the directions of the Minister, the Director has "the control of all prisons and police prisons, and the custody of all prisoners, in the Territory"<sup>94</sup>.

89 The Director may appoint a public sector employee to be a prison officer<sup>95</sup>. An "officer" is defined as a "prison officer appointed under section 8(1) and

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90 *Prisons (Correctional Services) Act*, long title.

91 *Prisons (Correctional Services) Act*, s 5 definition of "police prison" and "prison", and s 10.

92 *Prisons (Correctional Services) Act*, s 5 definition of "prisoner".

93 *Prisons (Correctional Services) Act*, s 6(1).

94 *Prisons (Correctional Services) Act*, s 6(2).

95 *Prisons (Correctional Services) Act*, s 8(1).

includes the Director and a person, other than a prisoner, employed in a prison"<sup>96</sup>. Officers are "subject to the directions of the Director in the performance of their duties and functions and exercise of their powers"<sup>97</sup>.

90 Section 9 provides:

"Every officer *while acting as such* is, because of his or her appointment, taken to be a police officer and to have the powers and privileges of a police officer for performing his or her duties as an officer." (emphasis added)

91 Within Pt 16, s 60 provides that the Director "may order that such precautions as he or she thinks fit be taken to maintain the security and good order of a prisoner, prison or police prison". Section 62, also in Pt 16, addresses the possession and use of weapons and s 62(2) provides:

"An officer may possess and use in a prison or police prison such firearms, weapons and articles of restraint as are approved by the Director as necessary to maintain the security and good order of a prisoner or a prison or police prison."

92 As is readily apparent, the *Youth Justice Act* and the *Prisons (Correctional Services) Act* address different subject matters and address them in different ways. It is against this statutory framework that the Territory's submissions are to be considered.

### **The Territory's submissions**

93 The Territory submitted that the use of CS gas by prison officers in the Detention Centre was lawful on either or both of two bases. The first was that the *Youth Justice Act* permitted the use of CS gas against detainees in the Detention Centre. Second, the Territory submitted that the powers and privileges of police officers, granted to prison officers by s 9 of the *Prisons (Correctional Services) Act*, permitted the use of force, including the application of CS gas against detainees in the Detention Centre, such that the prohibition in s 6 of the *Weapons Control Act* did not apply to the use of CS gas against detainees in the Detention Centre. Both contentions are rejected.

### **Use of CS gas not authorised under the *Youth Justice Act***

94 The Territory correctly submitted that, pursuant to s 8(2) of the *Prisons (Correctional Services) Act*, prison officers are subject to the directions of the

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96 *Prisons (Correctional Services) Act*, s 5 definition of "officer".

97 *Prisons (Correctional Services) Act*, s 8(2).

Director in the performance of their duties and functions and exercise of their powers under that Act. It is uncontroversial that one way in which the Director directs the performance of prison officers' duties is that provided by s 62(2) of the *Prisons (Correctional Services) Act*.

95 But the next step in the Territory's argument is without legal foundation. The Territory submitted that when, pursuant to s 157(2) of the *Youth Justice Act*, the superintendent of a detention centre calls upon a prison officer, within the meaning of the *Prisons (Correctional Services) Act*, to assist in an emergency situation or in preventing an emergency situation from arising, the prison officer brings with them all of their existing powers as a prison officer. That is, the Territory assumed that the powers of an officer under the *Prisons (Correctional Services) Act* attach to the person and not to the performance of that person's designated role or functions as a prison officer. That directs attention to s 62(2) of the *Prisons (Correctional Services) Act*. The Territory's submission in relation to s 62 was that it does not impliedly forbid the use of CS gas in a youth detention centre. That submission, focusing on a possible prohibition arising from s 62, is misdirected; the Territory must identify positive authority for the use of CS gas. The use of CS gas on a person, absent power, is unlawful as a battery<sup>98</sup>. The Territory's submission is contrary to the terms of s 62 and misconceives the significance of s 62 in the context of the applicable statutory schemes.

96 The power of an officer under s 62(2) of the *Prisons (Correctional Services) Act* – to possess and use such firearms, weapons and articles of restraint as are approved by the Director of Correctional Services – is not a power to use those same firearms, weapons and articles of restraint in a detention centre against youth detainees. The words "may possess and use *in a prison or police prison*" (emphasis added) and "as necessary to maintain the security and good order of *a prisoner or a prison or police prison*" (emphasis added) make this clear. And the power to use those same firearms, weapons and articles of restraint against youth detainees in a detention centre is not found in the *Youth Justice Act*.

97 Nothing in s 157(2) of the *Youth Justice Act* picks up or extends the limited powers of prison officers, in relation to the possession and use of weapons against prisoners in a prison or a police prison, given by s 62(2) of the *Prisons (Correctional Services) Act*. Nothing in s 157(2) of the *Youth Justice Act* permits prison officers to use those weapons against youth detainees in a detention centre. On the contrary, s 157(2) of the *Youth Justice Act* provides that if a prison officer, within the meaning of the *Prisons (Correctional Services) Act*, is called upon by the superintendent of a detention centre *to assist* in an emergency situation or in preventing an emergency situation from arising, that prison officer is taken to have been delegated the powers of the superintendent necessary to perform the

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98 See also *Weapons Control Act*, s 6.

superintendent's functions under s 151(3)(c) of the *Youth Justice Act*. Those powers do not include the power to use a CS fogger on detainees.

98 The delegation of the superintendent's powers to prison officers in s 157(2) of the *Youth Justice Act* does not disrupt the careful scheme of that Act. The delegation provides for prison officers to take operational leadership in an emergency, including by directing detention centre employees to take certain steps. Thus, the delegation enhances the statutory scheme by providing for more skilled resources at short notice with all of the powers of the superintendent to perform functions under s 151(3)(c). It supports the superintendent's powers, rather than enlarging or supplanting them.

99 The Territory's contention that when prison officers are called upon by the superintendent of a detention centre to assist in defined circumstances, those prison officers bring with them the powers granted to them under the *Prisons (Correctional Services) Act* (including s 62(2)), would require words to be read into s 157(2) of the *Youth Justice Act*. Section 157(2) would have to be read as including words to the effect that "in addition, all of the powers of a prison officer in relation to a prisoner in a prison apply in relation to detainees in a detention centre". That is contrary to the express terms of s 157(2), other provisions of the *Youth Justice Act* and the scheme of the Act. There is no basis for reading the Act in that way<sup>99</sup>.

100 The terms of s 152(1) of the *Youth Justice Act* do not assist the Territory. The conferral, by s 152(1), on the superintendent of all powers "necessary or convenient" for the performance of the superintendent's functions does not provide any broader power that would authorise the use of a CS fogger. The phrase "necessary or convenient" indicates an ancillary power to carry into effect what is enacted in the statute, that is, to enable the superintendent to perform the functions which are prescribed by the Act. Those functions are subject to identified limits. And beyond those functions and limits, the Act does not permit or authorise the commission of some wider class of acts. Thus, the conferral of powers necessary or convenient to enable the superintendent to perform their statutory functions does not give the superintendent general authority to commit what would otherwise be crimes or torts against detainees<sup>100</sup>.

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99 *Mann v Paterson Constructions Pty Ltd* (2019) 93 ALJR 1164 at 1200 [159]; 373 ALR 1 at 41-42.

100 *Shanahan v Scott* (1957) 96 CLR 245 at 250, quoted in *Willocks v Anderson* (1971) 124 CLR 293 at 298-299; *Pelechowski v Registrar, Court of Appeal (NSW)* (1999) 198 CLR 435 at 452 [51]; *Palmer v Australian Electoral Commission* (2019) 93

101 The use of a CS fogger is not ancillary to the superintendent's function in s 151(3)(c) of maintaining order and ensuring the safe custody and protection of all persons within the precincts of the detention centre. Section 151(3)(c) does provide that the superintendent "must 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". However, the superintendent's duty to "maintain discipline at the detention centre"<sup>101</sup> and, in discharging that duty, the superintendent's entitlement to "use the force that is reasonably necessary in the circumstances"<sup>102</sup> is not at large and does not extend to authorising the use of CS gas against detainees<sup>103</sup>. A prison officer or a police officer "assisting" the superintendent under s 157(2), with the delegated powers of the superintendent, is not permitted to use a CS fogger.

102 That conclusion is reinforced by the express terms of s 153(3), (4) and (5) and by other provisions in Div 3 of Pt 8 of the *Youth Justice Act* authorising the use of force that is reasonably necessary for specified purposes. Maintaining order and ensuring the safe custody and protection of all persons within the precincts of the detention centre under s 151(3)(c) must be performed in accordance with s 153(3). The fact that s 153(3) prohibits the use of certain force – force that seriously impinges on the bodily integrity of detainees – also compels the conclusion that the use of a CS fogger is prohibited. In addition, the use of a CS fogger goes beyond handcuffing or use of a similar device, or imposed isolation, which are permitted by s 153(4) and (5) respectively and then only in certain circumstances.

103 Section 159 authorises the use of force that is reasonably necessary to enable a sample by buccal swab of a youth detained for a crime to be taken. Similarly, s 160 authorises the use of force that is reasonably necessary to ensure that a sufficient quantity of a detainee's blood, breath or urine may be obtained when the superintendent tests for alcohol or an illicit drug or substance present in the body of a particular detainee or detainees in certain (limited) circumstances. These provisions in Div 3 of Pt 8 reinforce that the use of force against detainees

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ALJR 947 at 958 [65]; 372 ALR 102 at 115; cf *Morton v Union Steamship Co of New Zealand Ltd* (1951) 83 CLR 402 at 410.

101 *Youth Justice Act*, s 153(1).

102 *Youth Justice Act*, s 153(2).

103 See *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581-582 [11].

must be authorised in specific terms. There is no specific authorisation for the use of CS gas.

**Prison officer in the detention centre not acting as a prison officer**

104 As has been seen, s 9 of the *Prisons (Correctional Services) Act* provides that while a prison officer is acting "as such", they are "taken to be a police officer and to have the powers and privileges of a police officer for performing his or her duties" as a prison officer. The Territory submitted that when prison officers are directed by the Director of Correctional Services to attend a detention centre, they are acting under a direction given pursuant to s 8(2) of the *Prisons (Correctional Services) Act* and so are acting "as such", namely, as prison officers (with the powers of police officers), in the detention centre. Thus, it was said that s 9 of the *Prisons (Correctional Services) Act* applied to authorise the prison officer's use of the CS fogger in the Detention Centre. That submission should be rejected.

105 The powers and privileges of a police officer are limited. At common law, police have the power to use reasonable force to prevent the commission of an offence or to apprehend a person suspected of having committed an offence<sup>104</sup>. There were no findings in the courts below, nor was it contended in this Court, that when the CS gas was used the appellants or Jake Roper were committing an offence that justified its use. Nor was there any finding that the appellants, as distinct from Jake Roper, were participating in a breach of the peace at the time of the use of the CS gas. There was, therefore, no evidence that a police officer could have lawfully used CS gas in the circumstances.

106 Moreover, the powers and privileges conferred on a prison officer by s 9 of the *Prisons (Correctional Services) Act* are subject to the limits prescribed by s 62(2) of that Act. The powers and privileges described in s 9 are conferred only when an officer is acting "as such". A prison officer who is not acting under s 62(2) of the *Prisons (Correctional Services) Act* (and the members of the IAT were not) is not acting "as such", as required by s 9.

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<sup>104</sup> *R v Turner* [1962] VR 30 at 36; *Woodley v Boyd* [2001] NSWCA 35 at [37]; *Dowse v New South Wales* (2012) 226 A Crim R 36 at 51 [52]. See also *Criminal Code*, s 27.



### **The prohibition under the *Weapons Control Act***

107 CS gas is a prohibited weapon<sup>105</sup> which a person cannot possess, use or carry except if permitted to do so, relevantly, by an exemption under s 12(2) of the *Weapons Control Act*. A police officer<sup>106</sup>, as well as a prison officer<sup>107</sup>, is listed as a prescribed person and is exempt, when acting in the course of their duties as a prescribed person, from the prohibition on possessing, using or carrying a CS fogger if it is supplied to them for the performance of their duties as a prescribed person<sup>108</sup>. The Territory submitted that by reason of the exemption in s 12(2), immediately upon arrival at the Detention Centre the prison officers (or police officers) called upon by the superintendent to assist were empowered to use force, including by a CS fogger, which is otherwise prohibited under the *Weapons Control Act*. That submission should be rejected. It is contrary to the express terms of the *Weapons Control Act*.

108 Section 12(2) of the *Weapons Control Act* makes clear that the exemption "in respect of" a prohibited weapon applies only where the weapon (such as a CS fogger) is supplied to a prison officer or police officer "for the performance of his or her duties" as a prison officer or police officer. The *Weapons Control Act* does not provide an exemption for the use of weapons outside those limited purposes. There is nothing in the *Weapons Control Act* that suggests that those purposes include the use of CS gas on youths in a detention centre. On the proper construction of the *Weapons Control Act*, that Act allows the use of prohibited weapons such as a CS fogger by police or prison officers only when that use is for the performance of their police officer or prison officer duties, not when they are called to assist in youth detention centres as a delegate of the superintendent.

109 The prison officers attending the Detention Centre have not been charged with violating s 6 of the *Weapons Control Act* and their potential criminal liability under that provision is not in issue. The issue here is whether the prison officers committed a battery, which directs attention to whether they acted with positive authority and the possible sources of that authority. Even if the prison officers attending the Detention Centre were within the exemption in s 12(2) of the *Weapons Control Act* (and they were not), any exemption from the prohibition in

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105 *Weapons Control Act*, s 6. See also *Weapons Control Act*, s 3 definition of "prohibited weapon", read with *Weapons Control Regulations*, reg 3 and Sch 2, item 18.

106 *Weapons Control Act*, s 12(1)(c).

107 *Weapons Control Act*, s 12(1)(a).

108 *Weapons Control Act*, s 12(2)(a).

s 6 would not grant them positive authority to engage in what was a battery. It remains the case that, without any positive authority, such as that conferred in the context of prisons or police prisons by s 62(2) of the *Prisons (Correctional Services) Act*, the use of CS gas on the appellants was a battery and therefore unlawful.

### **Conclusion**

110 For those reasons, the Court of Appeal erred in holding that the deployment of CS gas by a prison officer at the Detention Centre on 21 August 2014 was not an unlawful battery of the appellants.

### **Enforced dosing**

111 In light of the views reached above, it is unnecessary to address the question of whether the use of CS gas in the Detention Centre constituted "enforced dosing with a medicine, drug or other substance" contrary to s 153(3)(b) of the *Youth Justice Act*.

### **Orders**

112 For those reasons, each appeal should be allowed with costs. In each appeal, paragraph 1 of the orders made by the Court of Appeal on 18 February 2019 and paragraph 1 of the orders made by the Court of Appeal on 10 April 2019 should be set aside and in their place, order that:

- (a) the appeal be allowed with costs;
- (b) set aside paragraph 1(a) of the orders made by the Supreme Court of the Northern Territory on 21 March 2017 and in its place order that there be judgment for the plaintiff on the claim for damages for battery arising out of the use of CS gas at Don Dale Youth Detention Centre on 21 August 2014;
- (c) set aside paragraph 1 of the orders made by the Supreme Court of the Northern Territory on 3 December 2018 and in its place order that the defendant (the Northern Territory of Australia) pay the plaintiff's costs of and incidental to the proceedings 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); and
- (d) the matter be remitted to another judge of the Supreme Court of the Northern Territory for assessment of damages.

