IN THE HIGH COURT OF AUSTRALIA
DARWIN REGISTRY

Between No D11 of 2019

JOSIAH BINSARIS

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

Between No D12 of 2019

KEIRAN WEBSTER

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

Between No D13 of 2019

LEROY O'SHEA

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

Between No D14 of 2019

ETHAN AUSTRAL

Appellant

NORTHERN TERRITORY OF AUSTRALIA

Respondent

RESPONDENT'S CONSOLIDATED SUBMISSIONS

PART I: PUBLICATION ON THE INTERNET

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

Solicitor for the Northern Territory
1st Floor, Old Admiralty Towers
68 The Esplanade
DARWIN NT 0800

Telephone: 08 8935 7861
Fax: 08 8935 7857
Email: MariaA.Pikoulos@nt.gov.au
Ref: Maria Pikoulos

PART II: ISSUES

2. These four appeals are concerned with the proper construction of several statutes in force in the Northern Territory on 21 August 2014.[1] The issues for determination are whether or not one or other of two statutory prohibitions was contravened by the use of CS gas at the Don Dale Detention Centre (**Don Dale**) on that date:

   (a) The first prohibition is under the *Weapons Control Act 2001* (NT) (**WCA**). Section 6 prohibited the possession, carriage and use of a prohibited weapon unless under an exemption or approval. The CS gas dispersal device, known as a fogger, was a prohibited weapon. The question is whether or not the exemption in s 12(2) applied. That question depends on whether or not prison officer Flavell, who used the fogger, was acting in the course of his duties as a prison officer when he did so.

   (b) The second prohibition is found in s 153(3)(b) of the *Youth Justice Act 2005* (NT) (**YJA**). That provision provided that *enforced dosing with a medicine, drug or other substance* is not reasonably necessary force which the superintendent may use to maintain discipline. Resolution of whether that prohibition was contravened depends on: (1) whether the use of CS gas was an enforced dosing; (2) whether the maintenance of discipline extends to acts intended to restore order in an emergency situation; and (3) whether the prohibition extends to prison officers.

PART III: NOTICE

3. Notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: FACTS

4. In addition to the facts identified by the appellants, the following additional unchallenged facts inform and contextualise the issues for determination:

   (a) Prison officers on the Immediate Action Team (**IAT**) are trained to use CS gas and it forms part of the kit supplied to them as prison officers when they are allocated to the IAT.[2]

---

[1] Since that date there have been substantial amendments to the relevant provisions of the *Youth Justice Act 2005* (NT) (**YJA**) and the *Prisons (Correctional Services) Act* (NT) (**PCSA**) has been replaced by the *Correctional Services Act 2014* (NT).

[2] Reasons for Judgment of Kelly J in *Binsaris v Northern Territory of Australia* [2017] NTSC 22 (**Trial Judgment**) at [75], [86], [116] Joint Core Appeal Book (**JCAB**) 37, 41, 52; Reasons for Judgment of the Court of Appeal in *Binsaris v Northern Territory of Australia* [2019] NTCA 1 (**Appeal Judgment**) at [19], [26] JCAB 238, 241; Affidavit of Wayne Phillips dated 26 August 2016 at [4]-[5] Respondent's Book of Further Materials (**RBFM**) 5; Affidavit of Phillip Flavell dated 25 August 2016 at [3]-[5] RBFM 7; Transcript of evidence of Kenneth Middlebrook (XXN) 29 September 2016 p295-296 RBFM 9-10;

(b) On 21 August 2014 CS gas was used in an area of Don Dale known as the Behaviour Management Unit (**BMU**) in accordance with the prison officers' training after a formal warning or proclamation was given to, and ignored by, Jake Roper.[3]

(c) The CS gas was used in circumstances where those responsible believed that they had considered and/or exhausted all other options available to them and determined that, in their opinion, the use of CS gas was the safest course of action.[4]

(d) Objectively, there was no alternative course of action to the use of CS gas involving less force and less risk to the safety of detainees and staff reasonably available in the circumstances to resolve the violent situation occurring in the BMU.[5]

(e) Following use of the gas, order and control of the BMU was restored and the appellants extracted. They have not alleged any long term ill effects from their exposure to the gas.[6]

PART V: APPLICABLE PROVISIONS, STATUTES, REGULATIONS

5. The respondent refers to the same provisions as relied on by the appellants.

PART VI: STATEMENT OF ARGUMENT

Introduction

6. These appeals proceed on the basis that CS gas was used by prison officers in the BMU on 21 August 2014 at the direction of the Director of Correctional Services in consultation with the superintendent of Don Dale in emergency circumstances where there was no alternative course of action involving less force and less risk to the safety of detainees and staff reasonably available. The appellants contend that the use of gas contravened two statutory prohibitions against its use found, alternatively, in s 153(3)(b) of the YJA, and s 6 of the WCA.

Transcript of evidence of Wayne Phillips (XXN) 29 September 2016 p315 RBFM 11; Transcript of evidence of Phillip Flavell (XXN) 30 September 2016 p342 RBFM 17.

[3] Trial Judgment at [96]-[99] JCAB 45.

[4] Trial Judgment at [77]-[79], [81]-[82], [85]-[86], [88]-[91], JCAB 37-44.

[5] Trial Judgment at [147], [152]-[153], [155](a)-(g), [166](e) JCAB 65, 67-68, 75.

[6] Trial Judgment at [104] JCAB 48.

Prohibition against enforced dosing

7. It is convenient to deal with the second appeal ground first, since it raises the key construction issues with respect to the YJA.

8. The appellants contend that s 153 of the YJA prohibited the use of CS gas. The argument is that the use of gas constituted an enforced dosing with a medicine, drug or other substance which sub-s (3)(b) prohibited, when used by a prison officer called upon in an emergency under s 157(2) of the Act to restore order. There are at least three steps in that analysis. *First*, the use of CS gas must be an *enforced dosing*. *Secondly*, the prohibition under s 153(3)(b) must operate irrespective of the purpose of the enforced dosing, or at least where the purpose is the restoration of good order and safe custody in a detention centre. *Thirdly*, the prohibition must extend beyond the superintendent and staff acting with the superintendent's authority to the Director of Correctional Services and prison officers called upon under s 157(2) of the YJA. Failure at any of those steps is fatal to the argument. The respondent contends that the argument must fail at each step.

Step 1: Enforced dosing

9. At first instance Kelly J doubted that the use of CS gas to control Jake Roper would constitute an *enforced dosing*.[7] CS gas is a chemical agent which was used for the purpose of "momentarily restraining a dangerous out of control detainee in an emergency for the mandatory purpose of maintaining order".[8] There is no suggestion that CS gas has any therapeutic or pharmacological use.[9] The appellants were not the target of the gas which was used to bring Jake Roper under control. It was deployed in several short bursts into the BMU using a fogger which is an aerosol dispersant device. The Court of Appeal agreed with Kelly J and reasoned that *other substance* in s 153(3)(b) was to be read, in accordance with the maxim *ejusdem generis*, by reference to the class of therapeutic interventions intended by the words "medicine" and "drug", a construction supported by the language of *dosing* which is most ordinarily used in a therapeutic context. The Court concluded that the use of CS gas in the above circumstances was not an enforced dosing within the meaning of s 153(3)(b).[10]

10. The appellants contend that *enforced dosing with a ... other substance* has a broader meaning and is not limited to therapeutic interventions. The single indicia urged in support of that reading is that ss 173-177 specifically, and Part

---

[7] Trial Judgment at [134] JCAB 59.

[8] Court of Appeal Judgment at [131] JCAB 297.

[9] Trial Judgment at [140]-[141] JCAB 62-63.

[10] Trial Judgment at [131] JCAB 58.

10 of the YJA generally, already deal with medical treatment for detainees and so, according to the argument, s 153(3)(b) must be directed to something else, at least in part. There is no force in that submission. Section 151(3)(e) imposes an obligation on the superintendent to supervise detainee health. That obligation is directed *exclusively* to the medical treatment of detainees. The placement of that provision outside of Part 10 answers the appellants' contention that Part 10 is where the Act deals exclusively with medical treatment. That contention cannot be maintained regardless, given the reference to medicine and drug in s 153(3)(b) itself. The relationship between Part 10 and Part 8 Division 2 (within which ss 151(3)(e) and 153(3)(b) sit) is better explained in terms of Part 10 being concerned with medical treatment of detainees generally whereas Part 8 Division 2 is concerned with the superintendent's responsibilities and powers (including as to detainee health) and their limits. There is an inevitable subject-matter overlap. However, Part 10 still has its own work to do. For example, the Director's powers under ss 176 and 177. So understood, the terms and existence of Part 10 do not assist the task of arriving at the proper meaning of the limit found in s 153(3)(b). On this view, the important role of s 153(3)(b) is to ensure that medical interventions are not used punitively.

11. The phrase *enforced dosing* suggests intentionally forcing a detainee to accept a dose of a medicine, drug or other substance, directed at that detainee. That does not reflect what happened during the incident in question. The CS gas was directed at Jake Roper, who was engaged in a violent disturbance in the exercise yard. Some of the gas had an effect on the appellants who were in their nearby cells. This was not an enforced dosing in the sense contemplated by s 153(3)(b).

Step 2: Discipline

12. A key component of the appellants' argument is that, contrary to the Court of Appeal's conclusion,[11] s 153(1) - (3) *codifies* the superintendent's power to use force in an emergency situation or to maintain order.[12] On that argument, ss 151(3)(c) and 152(1) confer no power to use force. That contention is incorrect for the reasons that follow.

13. Section 151(3)(c) imposes an obligation on the superintendent to maintain order and ensure the safe custody and protection of everyone in the detention centre. Section 152(1) gives the superintendent all necessary or convenient power to fulfil that obligation. In *Palmer v Australian Electoral Commission* [2019] HCA 24, Gageler J observed that the words *necessary or convenient* were of

[11] Appeal Judgment at [125] JCAB 293.

[12] Joint Submissions of the Appellants at [35].

"considerable latitude".[13] They are confined only by the scheme of the enactment.

14. Section 153(1) imposes a further obligation on the superintendent to maintain discipline. This obligation is different to, but will sometimes functionally overlap, the obligation in s 151(3)(c) to maintain safety.

15. Section 153(2) confirms that force is a means by which the superintendent may maintain discipline. That sub-s (2) is speaking only to force used to meet the duty to maintain discipline under sub-s (1) is made plain by the words "For subsection (1)". Subsection (3) then excludes from that authority four categories of actions.

16. The structure and text of ss 151 – 153 demonstrate that the obligation imposed on the superintendent by s 151(3)(c) and the power to fulfil it conferred by s 152(1), is distinct from the obligation and power conferred by s 153(1) – (3). If these were the same concept or if *discipline* wholly subsumed *order* and *safety,* then one or other of the duties found at ss 151(3)(c) or 153(1) would be unnecessary.

17. The relevant context is a statutory regime for the custody and management of youth offenders and those refused bail while facing criminal charges. Within the custodial context, there is an established distinction between disciplinary or punitive action on the one hand and management action or action to maintain or restore good order and security on the other. The distinction is reflected in judicial decisions,[14] and in analogous legislation.[15]

18. That distinction explains why the Victorian Court of Appeal in *Binse v Williams* found that there was implied in a general provision giving the governor responsibility for the management, security and good order of the prison power to use force as a prophylactic or preventative measure beyond what was authorised under specific provisions within the legislative scheme concerned with the use of restraints.[16] Similarly, in *Bromley v Dawes* a Full Court of the South Australian Supreme Court distinguished between a power of separate confinement as punishment for misconduct and a power of separate confinement to maintain order,[17] whereas in *McEvoy v Lobban* a Full Court of the Queensland

---

[13] *Palmer v Australian Electoral Commission* [2019] HCA 24 at [65]. See also *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 at [210].

[14] *Binse v Williams* [1998] 1 VR 381 at 390-392; *R v Gray* (1990) 45 A Crim R 364 at 370; *R v Walker* (1992) 60 A Crim R 463; *Bromley v Dawes* (1983) 34 SASR 73 at 105-106.

[15] See, eg, s 22 of the *Children (Detention Centres) Act 1987* (NSW).

[16] *Binse v Williams* [1998] 1 VR 381 at 390-392 (Charles JA with whom Tadgell JA and possibly Callaway JA agreed). See also *Kaufman v Smith* (2001) 124 A Crim R 259 at [32] (Eames J).

[17] *Bromley v Dawes* (1983) 34 SASR 73 at 105-106 (Mitchell ACJ with whom Legoe J and Mohr J separately agreed).

Supreme Court distinguished between a power of separate confinement as punishment for misconduct and a power of separate confinement in the exercise of a general management and security power.[18] In each case, a general duty and power of the kind found in s 151(3)(c) was held to authorise force despite the existence of (and non-compliance with) other provisions in the legislative scheme dealing with force for the purpose of discipline. In these cases, the power was implied from the duty without recourse to a provision like s 152(1). The operation of s 152(1) confirms rather than detracts from the suitability of that reasoning here. The Court of Appeal's judgment accords generally with those authorities.[19] The construction preferred by the appellants does not and it is to be borne in mind that the YJA (and s 151(3)(c) in particular) was enacted in the context of this established approach to the interpretation of powers of this kind.

19. Section 157(2) is another compelling textual indicator in support of the Court of Appeal's approach to the relationship between ss 151(3)(c) and 153. For present purposes, what is important is that s 157(2) is an emergency provision. It operates only in circumstances where the superintendent has called upon external law enforcement assistance to deal with or to prevent an emergency situation arising. What is contemplated by the provision is the deemed conferral or delegation of power to use force to control or prevent a riot or another kind of emergency. What is delegated is the power necessary to perform the superintendent's functions under s 151(3)(c), *not* under s 153. If ss 151(3)(c) and 152 confer no power to use force, as contended by the appellants, then what is the utility of the deemed delegation of power referrable solely to s 151(3)(c)? Further, the effect of the appellants' argument must be that external law enforcement called to assist under s 157(2) have no power to use force at all.

20. The constructional choice urged by the appellants may be tested against its consequences to determine whether it provides a coherent construction of the Act, bearing in mind that the YJA imposes obligations on the superintendent which fall to be exercised in a custodial environment accommodating dangerous youths for whom custody is the only option available.[20] On the appellants' view that s 153(3) contains categories of actions which are always unlawful irrespective of circumstance or rationale, the following consequences emerge:

    (a) Striking or any form of physical violence is always prohibited. This means that in an emergency, officers could not push, tackle or physically restrain

---

[18] *McEvoy v Lobban* (1990) 2 Qd R 235 at 236-237 (Macrossan CJ with whom Lee J agreed), 238 (Thomas J with whom Macrossan CJ and Lee J agreed). See also *R v Gray* (1990) 45 A Crim R 364 at 370 (Byrne J); *R v Walker* (1992) 60 A Crim R 463 at 467 (Williams J).

[19] Cf *Hamzy v Commissioner of Corrective Services (NSW)* (2011) 80 NSWLR 296.

[20] *Youth Justice Act*, s 4(c). See generally as to the significance of a custodial context, *Jarrott v Maughan* (1987) 28 A Crim R 148 at 151 (Slattery CJ at CL).

one detainee who was assaulting another detainee or member of staff, or who was attempting to escape.[21]

(b) Although physically restraining a detainee is always prohibited, counterintuitively, mechanical restraints could be applied in some circumstances: s 153(4). However, unless there is an implication drawn, despite the terms of s 153(3)(a), physical restraint could not be used to apply mechanical restraints.

(c) If there is an implication drawn from the terms of s 153(4) that reasonable physical force may be used to apply handcuffs, then staff remain limited in what they can then do with the handcuffed detainee.[22] How is an aggressive detainee who has been handcuffed to be returned to their room or to another place without using force? Further, staff are compelled to escalate force to the use of handcuffs on every occasion, including where a momentary physical restraint would be sufficient and handcuffs excessive.

(d) There is no power to use force of any kind to prevent a detainee escaping or damaging property.

(e) There is no power to use force of any kind in respect of an uncooperative detainee. So a detainee persistently disrupting school for every other detainee within the detention centre, refusing to return to their room at night, or preventing staff from accessing part of the detention centre could not be removed or brought under control with force of any kind.

(f) There is no power to take preventative measures involving force. A detainee with a history of assaulting another detainee cannot be kept apart from that other detainee with any force unless and until the superintendent is satisfied that an emergency situation exists by which stage it may be too late.

21. The examples could be multiplied. Their individual and cumulative force is to demonstrate that the appellants' construction would produce an unworkable regime. If the provisions of s 153 are construed as "an exhaustive code controlling and regulating"[23] the use of force generally, then the scheme of the Act imposes an impossible burden on the superintendent. The scheme would

---

[21] As to escape, staff could exercise the specific grant of power under s 167 but only once the detainee had escaped.

[22] If an implication may be drawn from the terms of s 153(4) that physical force and violence may be used to achieve the purposes of that provision despite the apparently unqualified terms of s 153(3)(a) then this invites attention to why a similar implication is not open in respect of s 151(3)(c).

[23] *Refrigerated Express Lines (A/asia) Pty Ltd v Australian Meat and Livestock Corporation (No 2)* (1980) 44 FLR 455 at 469 (Deane J).

demand of the superintendent that he or she maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre (with a failure to do so perhaps actionable in negligence), while at the same time impractically fettering his or her power to take steps necessary to meet that obligation. A scheme in those terms "involves such inconvenient consequences in the day-to-day control of prisons that the Parliament cannot have intended such a result".[24] It would leave the superintendent "lamentably failing in his duty" by not moving "appropriately to control riots or to prevent their outbreak or to restrain an unruly prisoner or violence amongst the inmates of the prison or to prevent the destruction of prison property".[25] The facts of this case are just one example of how the appellants' construction of the Act would disfigure the statutory regime.

22. Once it is recognised that s 153(2) is not the only power to use force under the YJA whether generally or at all, then the appellants' reliance on the *Anthony Hordern* principle fails.[26] Properly construed, s 153(2) does not manifest an intention that it is the only power to use force.[27] No repugnancy arises from the operation of s 151(3)(c) with s 152(1) on the one hand and s 151(2) on the other, as separate authorisations to use force.

23. The result that s 151(3)(c) is construed, like similar provisions have been in the past, to authorise force does not mean that the executive is free to disregard statutory safeguards or limits.[28] The safeguards on the use of force under s 151(3)(c) are inbuilt within the nature of the power itself.[29] The force which is used must be reasonable. That is an incident of the purpose for which the power is directed: to maintain order and ensure safe custody. Disproportionate force or force which is not necessary to obtain that purpose is never authorised. One can see that same constraint reflected in the terms of reg 71 and in analogous powers at common law.[30]

24. This construction of the operation of ss 151(3)(c) and 152(1) is not at odds with the construction given to necessary or convenient powers elsewhere.[31] "Where ... the legislature confers a function in general terms, a grant of [necessary or convenient] power ... will, generally speaking, have a commensurably wide

---

[24] *R v Gray* (1990) 45 A Crim R 364 at 370 (Byrne J).

[25] *McEvoy v Lobban* (1990) 2 Qd R 235 at 236-237 (Macrossan CJ with whom Lee J agreed).

[26] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [59] (Gummow and Hayne JJ), [165] (Heydon and Crennan JJ with whom Gleeson CJ agreed).

[27] *Kaufman v Smith* (2001) 124 A Crim R 259 at 47.

[28] Cf Joint Submissions of the Appellants at [35].

[29] By analogy *Williams v the Queen* (1986) 161 CLR 278 at 292.

[30] See, eg, *Woodley v Boyd* [2001] NSWCA 35 at [37] (Heydon JA).

[31] Cf Joint Submissions of the Appellants at [32].

scope".[32] What the legislature has done in s 151(3)(c) is confer power in general terms qualified by a purpose and the nature of the power being exercised. Whether the power is exercised reasonably remains subject to review under the criminal and civil law.

25. This result does not create an anomaly in s 153(4)-(5).[33] As explained in *Edwards v Tasker* (2014) 34 NTLR 115 at [29]-[34] and in the Appeal judgment at [122]-[123], those provisions are not concerned with punitive or disciplinary action. The purpose of their insertion in s 153 is "to ensure that a superintendent does not evade the restrictions on disciplinary measures imposed by s 153(3) of the Act by exercising his powers under s 152(1) of the Act to inflict a de facto punishment upon a detainee".[34] In this context, there is a role for careful scrutiny to ensure that one head of power is not abused in order to avoid the limits under another.[35]

Step 3: Extension to prison officers

26. The final step in the appellants' argument is the extension of the limitations said to exist in s 153(3) to persons other than the superintendent on whom the duty under sub-s (1) is imposed.

27. The YJA specifically addresses the attendance of police and prison officers in response to an emergency at a detention centre. Section 157(2) automatically confers on those persons the powers of the superintendent necessary to perform the superintendent's functions under s 151(3)(c). As noted above, the effect of the appellants' contention is that ss 151(3)(c) and 152(1) confer no power to use force and consequently, police and prison officers called to assist under s 157(2) would have no such power at all.

28. Even if it is correct that s 153(3)(b) limits the power of the superintendent, it does not follow that powers of police and prison officers are equally limited, even if they are also delegated the powers of the superintendent under s 157(2).

29. The primary source of authority for prison officers is s 9 of the *Prisons (Correctional Services) Act* (NT) (**PCSA**).[36] That section conferred on prison officers, while acting as prison officers, the powers and privileges of a police officer for performing his or her duties as an officer. Then as now, the powers and privileges of police officers in the Northern Territory were governed

---

[32] *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority* (2015) 227 FCR 95 at [210]. See also *Morton v Union Steamship Company of New Zealand Ltd* (1951) 83 CLR 402 at 410.

[33] Cf Joint Submissions of the Appellants at [36].

[34] Court of Appeal Judgment at [141] JCAB 302-303.

[35] *Kaufman v Smith* (2001) 124 A Crim R 259 at [44] (Eames J).

[36] Notice of Contention RBFM 31, 49, 67, 85.

substantially by the common law supplemented by specific powers (none of which are presently relevant) under the *Police Administration Act 1978* (NT) (**PAA**) and specific immunities such as s 27(a)-(e) of sch 1 to the *Criminal Code Act 1983* (NT). The PAA says nothing about the use of firearms or weapons of any kind, including CS gas. At common law, a police officer has power to use force including lethal force to prevent the commission of a criminal offence or a breach of the peace.[37] That power is not qualified such that it is not exercisable within a detention centre. The controlling factor is whether or not the degree of force used is reasonable in the circumstances.[38]

30. Prison officers have duties outside of a prison. Under s 6(2) the Director has not merely the control of prisons but also the custody of all prisoners in the Territory, including those outside of a prison. By s 14 a prison officer has the power to arrest an escaped prisoner outside of a prison. By s 15(1), prisoners must be conveyed to a prison after sentencing. While on remand or during the currency of their sentence, prisoners may be lawfully outside of the prison under the supervision and control of prison officers in transit or when attending medical appointments, court appointments or for other reasons.[39]

31. A youth detained under ss 65(2) of the YJA (court remand) or 83(1)(i)-(l) of the YJA (sentence of imprisonment or detention) is a prisoner within the meaning of the PCSA. The definition of a prisoner under s 5 of the PCSA includes a person "committed or remanded by a court and in lawful custody". Lawful custody includes where a prisoner is lawfully outside a prison or police prison (s 11(b). A youth remanded to a detention centre under s 65(2) or committed to serve a term of detention under s 83(1)(i)-(l) is lawfully outside a prison. The appellants and Jake Roper were prisoners within the meaning of the PCSA. The significance of this, so far as the present matter is concerned, is that by force of s 6(2) the Director had control of the custody of all prisoners in the Territory, including the detainees in the BMU. That control is why the Director appoints the superintendent under s 151(1) of the YJA and why the Director's approval or authority is required for certain actions under the YJA.[40] The scope of the responsibilities and duties of the Director extends to the control of youth detainees.

32. The powers of police officers and prison officers are not diminished by anything contained in the YJA. There is no express or necessary abridgment of these common law powers and s 167 of the YJA assumes the survival of police powers

---

[37] *Woodley v Boyd* [2001] NSWCA 35 at [37] (Heydon JA); *Thomson v C* (1989) 67 NTR 11 at 13; *R v Turner* [1962] VR 30 at 36; *Poidevin v Semaan* (2013) 85 NSWLR 758 at [18]-[20]; *New South Wales v Tysyk* (2008) NSWCA 107 at [80]-[100] (Campbell JA).

[38] *Woodley v Boyd* [2001] NSWCA 35 at [37] (Heydon JA).

[39] PCSA ss 55, 58, and 63.

[40] See, eg, YJA, ss 153(5), 157(1)(b), 164(4), 176(2). This list is not exhaustive.

to arrest an escapee. The question is then whether or not prison officer Flavell, who deployed the CS gas, was acting as and performing the duties of a prison officer so as to engage s 9. As to this:

(a) Officer Flavell was acting pursuant to a direction given to him by Director Middlebrook under s 8(2) of the PCSA;

(b) Both officer Flavell and Director Middlebrook were in attendance pursuant to a request for assistance in accordance with s 157(2) of the YJA; and

(c) Director Middlebrook had ultimate control of the custody of the detainees.

Prohibition against the use of a prohibited weapon

33. It is uncontroversial that the CS gas fogger used by officer Flavell on 21 August 2014 was a prohibited weapon within the meaning of s 3 of the WCA and item 18 of Sch 2 of the *Weapons Control Regulations 2001* (NT). Section 6(e) of the WCA prohibits the possession, use or carriage of a prohibited weapon "except if permitted to do so by an exemption under section 12 or an approval". The explicit qualifications to the prohibition recognise and preserve legitimate purposes for which weapons exist and are used in the community. As explained in the second reading speech introducing the legislation, "[T]his bill does not interfere in any way with the legitimate rights and needs of ... anyone else who has a need to lawfully possess [weapons] to do their job".[41] Under s 12(2) there is an automatic exemption for classes of persons identified by Parliament as having such a legitimate right or need. These are law enforcement agencies and include police officers and prison officers within the meaning of s 5 of the PCSA. It is uncontroversial that prison officer Flavell who used the fogger and Director Middlebrook who gave the direction to do so were prescribed persons.

34. The terms of the automatic exemption under s 12(2) reflects the objective of preserving the needs of law enforcement personnel to perform their duties. The language in s 12(2)(a) is echoed in the corresponding exemption for an employer of a prescribed person at s 12(3) so that both employer and employee are protected. It is uncontroversial that officer Flavell was supplied with the CS gas fogger by his employer, the respondent, for the performance of his duties as a prison officer allocated to the Immediate Action Team.[42]

35. The issue in contention is whether or not officer Flavell was acting in the course of his duties as a prison officer.[43] The appellants contend that he was not, and

---

[41] Northern Territory, *Parliamentary Debates*, Legislative Assembly, 6 June 2001, 7963 (Michael Reed, Minister for Police, Fire and Emergency Services).

[42] See the references at fn 2 above.

[43] Joint Submissions of the Appellants at [12].

could not have been, because there was no statutory power available authorising him to use CS gas to restore order in a detention centre. There are three steps in that analysis: (1) there is no power under the YJA to use CS gas in a detention centre; (2) there is no power under the PCSA Act to use CS gas in a detention centre; and (3) an absence of express statutory power means an absence of duty. This argument fails at each step in the analysis.

Step 1: YJA

36. The first step in the appellants' analysis is that there is no express power under the YJA to use CS gas. This is a derivative of the argument already considered above by which the appellants contend that there is a statutory prohibition against the use of CS gas found in s 153(3)(d) of the YJA. If, as the respondent contends, ss 151(3)(c) and 152(1) authorise force to be used, the controlling factor is reasonableness. Reasonableness in the circumstances determines whether physical force, restraints, or CS gas are authorised under s 151(3)(c). This approach appears throughout the Act.[44] And it is a familiar drafting approach to qualify the force which is authorised solely or predominantly by reference to necessity or reasonableness or a derivative.[45]

Step 2: PCSA

37. The second step in the appellants' analysis is that there is no power under the PCSA to use CS gas in a detention centre. For the appellants, the analysis of the PCSA begins and ends with s 62(2) of the Act.[46] The appellants observe that, while s 62(2) authorises force in the nature of firearms, weapons, or articles of restraint, it is qualified, relevantly, by a geographic limit (in a prison) and a circumstantial or purposive limit (to maintain the security and good order of a prisoner or a prison or police prison). The appellants reason from that to a negative implication that the PCSA does not authorise possession or use of these articles outside of a prison or for any purpose other than to maintain the security and good order of a prisoner or a prison or police prison. The analysis leading to that conclusion is left unstated.

38. There is an obvious parallel between the appellants' argument concerning s 62(2) of the PCSA and that concerning s 153(3) of the YJA considered above. In each case, the appellants contend that the provision, which contains a relevant limitation, codifies exclusively its subject matter such that other provisions of the Act must be read down so as not to permit what it forbids. And in each case the

---

[44] YJA, ss 30(10)(b), 31(11), 33(9), 159(4)(a), 160(7)(a), 175(3)(a).

[45] *Criminal Code Act 1983* (NT) sch 1 ss 27-28; PCSA s 16(2).

[46] Joint Submissions of the Appellants at [25]-[26].

appellants read the exclusive subject matter of the provision broadly without sufficient regard to the text, context or purpose of the provisions of the Act.

39. Section 62 appears within Part 16 of the PCSA which is headed: "Security of prisoners and prisons". The heading is not part of the Act. Within that part, the Director is authorised to take precautions to maintain security and good order of a prisoner, prison or police prison (s 60). Similarly, a prison officer may take such precautions not inconsistent with s 60 as he or she thinks necessary to maintain the security and good order of a prisoner, prison or police prison (s 61(1)). In addition to s 62(2), an officer may use such reasonable physical force and restraint against a prisoner as he or she considers necessary to maintain the security and good order of a prisoner or a prison or police prison (s 62(3)). As the appellants observe, a youth detention centre is not a prison. In so far as these powers are directed towards the security and good order of a prison, they are irrelevant. However, the appellants are incorrect to assert that a youth detainee is not a prisoner within the meaning of the PCSA: see above at [31].

40. Outside of Part 16, the PCSA contains a number of other provisions authorising force. These include ss 9, 14, 16, 75(3), 76, and 95A(5). The broadest of those powers is s 9, the scope of which is considered above at paragraph [29]. On its face, s 62(2) is a power directed to maintaining order and security in a prison. It provides explicit authority to use certain articles or tools to do so. However, the subsection says nothing about force outside of a prison context. The use of force outside of a prison is not a subject-matter with which it is concerned.

41. As noted above at [30], prison officers have duties outside of a prison. The broad range of circumstances in which prison officers may be called upon to manage and control prisoners (including using force) outside of a prison or to use force against non-prisoners tells against reading s 62(2) as either a purposive or geographic limit on the power to possess or use firearms, weapons, or articles of restraint. Similarly, the existence of specific power to use force outside of a prison such as that under s 14 tells against reading s 62(2) as a geographic restriction on the possession or use of weapons, firearms or articles of restraint within a prison.

42. The role of s 9 of the PCSA is to be understood in the context of the varied circumstances in which a prison officer may be called upon to use force. It is a general power intended to ensure that prison officers have the powers needed in the wide-ranging circumstances in which they operate within prisons and without. The scope of the power is made referable to those of police. It is not to be qualified by the explicit limits of the more limited power under s 62(2). Reading the PCSA so that the limits under s 62(2) apply to force used throughout the Act would have a number of significant adverse consequences:

(a) There would be no power for a prison officer escorting a prisoner in transit between prisons to apply an article of restraint such as handcuffs or leg shackles to the prisoner or even to possess them as a precautionary measure.

(b) A prison officer outside of a prison would have authority to arrest an escaped prisoner but not to be in possession of handcuffs.

(c) There would be no power to move a firearm, weapon, or article of restraint between prisons.

(d) There would be no power to possess or use a firearm, weapon, or article of restraint for training purposes inside or outside a prison.

Step 3: Duty

43. The appellants' fixation with the power conferred on prison officers under s 62(2) distorts attention from the relevant inquiry which is the scope of an officer's duties. There can be no serious question that responding to requests for assistance at a detention centre within s 157(2) of the YJA is within the duties of a prison officer.

44. The Director may give directions to prison officers in the performance of their duties and functions and exercise of their powers. On 21 August 2014 Director Middlebrook authorised and directed officer Flavell to use CS gas. Officer Flavell was acting in the course of his duties under that direction. He had authority to use force under both s 151(3)(c) of the YJA and s 9 of the PCSA not subject to any relevant limitation. Accordingly, officer Flavell was acting in the course of his duties and so the exemption under s 12(2) applied to him. Once it is recognised that, on proper construction, these powers are not confined in the manner advanced by the appellants then no question of any impermissible dispensation with a penal provision arises.[47]

Part VII: Notice of contention or cross-appeal

45. The notice of contention has been addressed above at paragraphs [28]-[32] and [42].

[47] Cf Joint Submissions of the Appellants at [30].

Part VIII: Estimate of time for respondent's oral argument

46. The respondent's oral argument is estimated to take ninety minutes.

Dated: 1 November 2019

David McLure

Trevor Moses