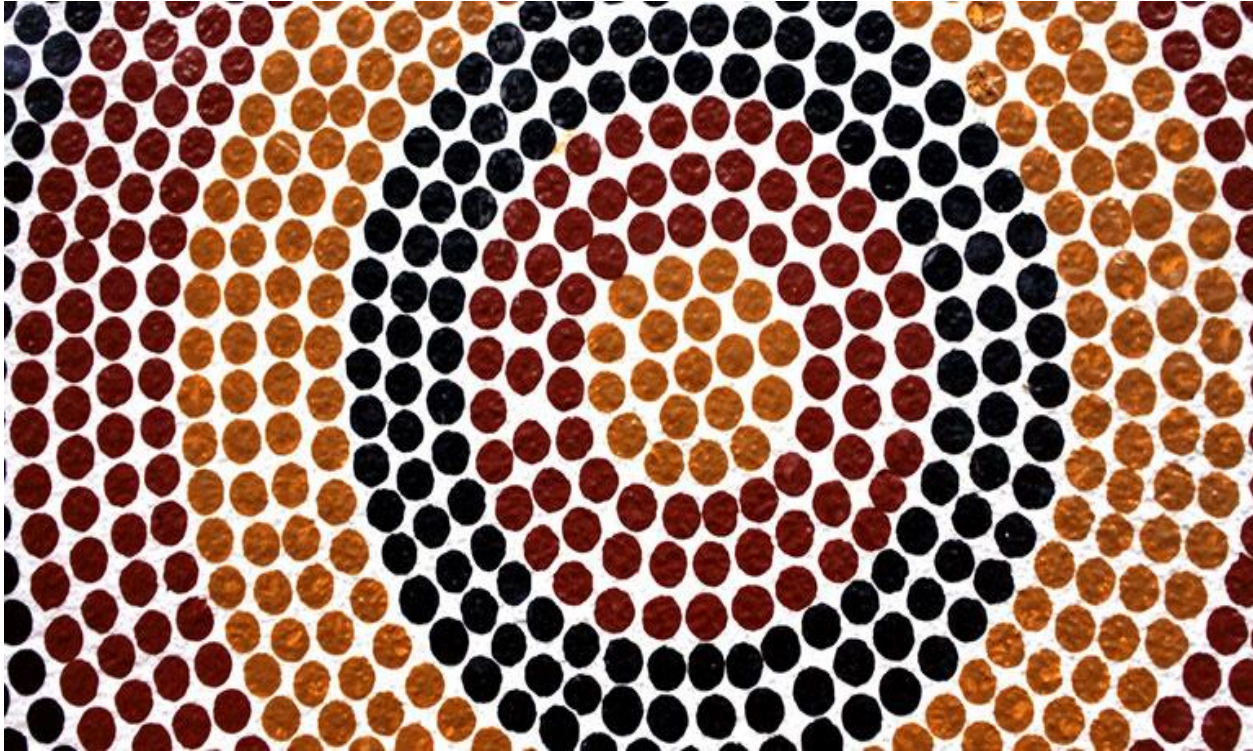


Extension orders of NSW unfit limiting term patients

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Acknowledgement of Country



We'd like to begin by acknowledging the Traditional Owners of the lands on which we meet today. We would also like to pay my respects to Elders past and present.

Case scenario

- Mr K is a 33 year old male of Maori heritage, with SCZ, mild ID, SUD, ADHD, ASPD
- Migrated to Aus 12 years old, early behavioural difficulties and substance use, offending from 14 yo (mainly property offences)
- **Index offence (2014):** 22 years old, B&E x 3 (at night) and stole various items (no violence)– limiting term of 3 years, 3 months from 2014
- **2017** – remained at Long Bay CC, extension of limiting term for 2 years
- **2019** – detained at MSU, extension of limiting term for 2 years
- **2021** – placed in SIL, extension of limiting term for 2 years
- Total time of orders: 9 years, 3 months



Introduction



Legal background

Unfit for trial and limiting terms in NSW
Preventative detention and extension orders



Cohort data

Characteristics of cohort subject to extension orders
Implications of results



Discussion points

Valid and effective regime?
Justified from an ethical and human rights perspective?

Conflict of interests

Presenters have both been involved in preventative detention hearings and extension order hearings as legal counsel and expert witness



Unfit for Trial in NSW

- *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)*
 - Unfit for trial finding in District or Supreme Court (Division 2)
 - If unlikely to become fit within 12 months – Special Hearing
 - If likely to become fit within 12 months – MHRT
- Special Hearing (Division 3)
 - Modified trial process, defendant may elect judge alone
 - Findings:
 - Not guilty
 - Special verdict (APNCR)
 - On limited evidence, defendant committed the offence or an alternative offence
- Qualified finding of guilt
 - May be appealed
 - Does not constitute a basis for conviction at law
 - Limiting term to be imposed as “*the best estimate of the sentence that the court would have imposed*”
 - Deemed to be a forensic patient for the length of the term
 - Detention can be in a mental health facility, correctional centre, detention centre or other place

Extension Orders

- Extension orders introduced in 2013 under *Mental Health (Forensic Provisions) Bill 2013* (NSW) assented to on 27 November 2013.
- The Media Release from the Law Reform Commission, NSW on 7 June 2013 notes in respect of recommending extension orders:

*“...allowing the Supreme Court to order an extension of the term in **limited** circumstances.”*

- The Law Reform Commission observe (in the context of their recommendation to introduce an extension regime for forensic patients with limiting terms):

*“The MHRT estimates that there would only be **one or two cases** each year where a person found UNA will both pose an ongoing risk of harm to others at the expiry of their limiting term and that risk cannot be dealt with under the civil mental health system. However, those found UNA who received a limiting term represent only about 9% of forensic patients with finalised matters.”*

(Report 138, People with Cognitive and Mental Health Impairments in the Criminal Justice System, Criminal Responsibility and Consequence, [11.16], p 319)

Extension Orders

Extension orders (Part 6) *Mental Health & Cognitive Impairment Forensic Provisions Act 2020* (NSW):

- Forensic patients on limiting terms or extension orders could be subject to application for extension of term for up to 5 years
- Interim application, up to 3 months (application taken at its highest)
- No limit on the number of extension applications that can be made
- Test: “*unacceptable risk of serious harm to others*” and that risk cannot be “*adequately managed by less restrictive means*”
- Risk does not need to be more likely than not
- Mandatory considerations
- Final application requires two independent court appointed experts to provide a risk assessment.
- Interim application must be supported by a risk assessment report.
- Interplay between other regimes such as the *Child Protection (Offenders Registration) Act 2000* (NSW) and the *Child Protection (Offenders Prohibition) (NSW) Orders) Act 2004* (NSW)

Forensic patient legislation for other jurisdictions

Crimes Act 1900 (ACT)

Mental Health Act 2015 (ACT)

Mental Health Act 2016 (Qld)

Criminal Law Consolidation Act 1938 (SA)

Criminal Code Act 1983 (NT)

Criminal Justice (Mental Impairment) Act 1999 (Tas)

Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)

Criminal Law (Mental Impairment) Act 2023 (WA)

Crimes Act 1914 (Cth)

Preventative Detention/ Post Sentence Supervision

*Counter-Terrorism
Legislation Amendment
(High Risk Terrorist
Offenders) Act
2020 (Cth)*

*Criminal Code (Cth),
Division 105A*

*Crimes High Risk
Offenders Act 2002
(NSW)*

*Terrorism High Risk
Offenders Act 2017
(NSW)*

*Serious Sex Offenders
Act 2013 (NT)*

*Terrorism (Preventative
Detention) Act 2005
(Qld)*

*Dangerous Prisoners
(Sexual Offenders) Act
2003 (Qld)*

*Criminal Law (High Risk
Offenders) Act 2015
(SA)*

*Terrorism (Preventative
Detention) Act 2005
(SA)*

*Dangerous Criminals
and High Risk Offenders
Act 2021 (Tas)*

*Terrorism (Preventative
Detention) Act (Tas)*

*Serious Sex Offenders
(Detention and
Supervision) Act 2009
(Vic)*

*Terrorism (Community
Protection) Act 2003
(Vic)*

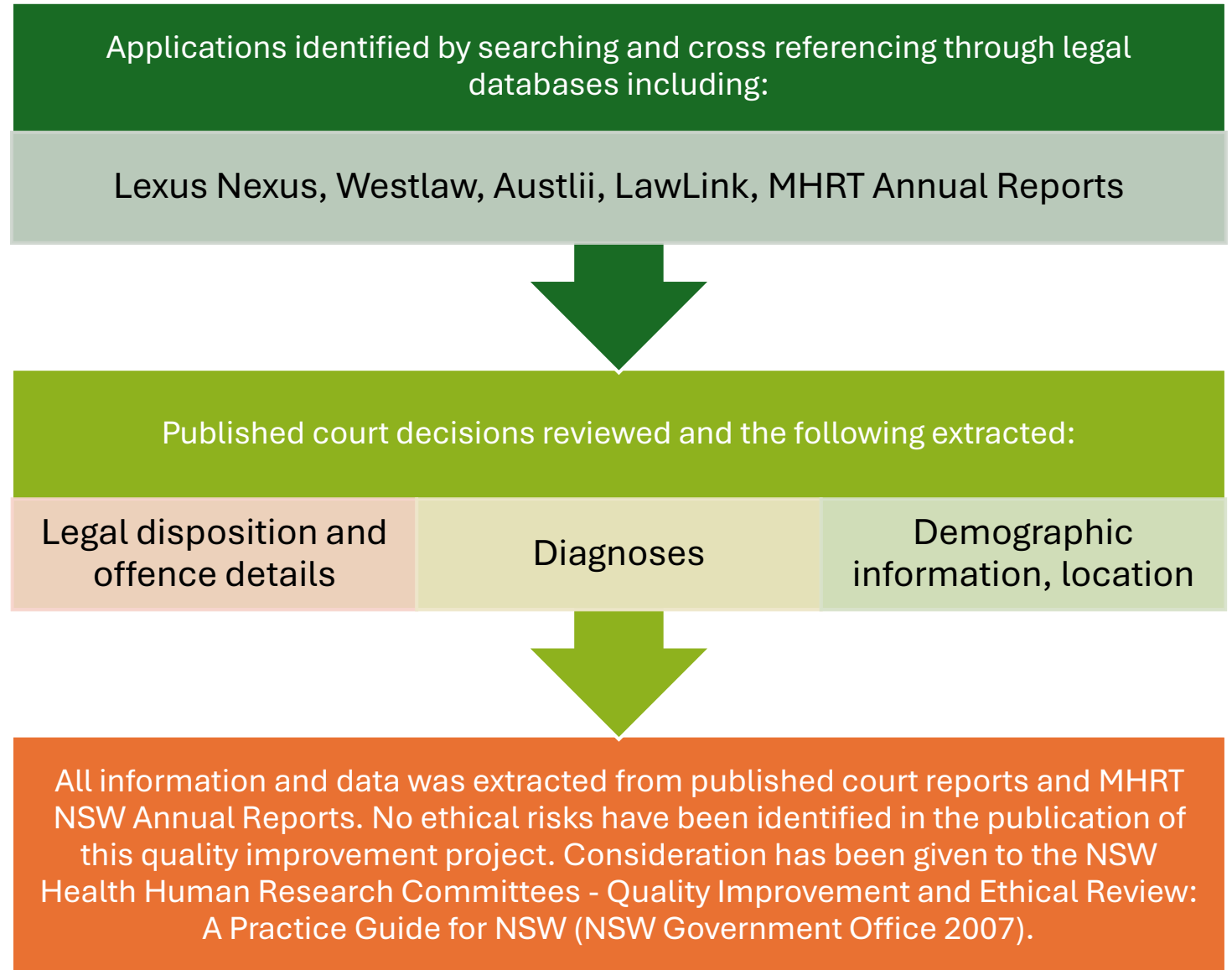
*High Risk Serious
Offenders Act 2020
(WA)*

*Terrorism (Preventative
Detention) Act 2006
(WA)*



Cohort Data

Methods





Cohort data - applications

	Number of reported applications	Number of defendants	Dismissed or withdrawn	Interim orders	Final orders	Custody at time of application	Detained in hospital or other
Total	123	41	7 dis (6%) 2 died, 2 WD**	65 (52%)	51 (41%)	42 (34%)	33 (27%)

- 123 applications involving 41 applicants
- Only 6% of the applications were unsuccessful
- 61% applications, applicant was in custody or detention
- 51 final orders were made out of 123 applications

**did not proceed to hearing on application

Cohort data – final orders



	Final Orders	3 years or more	Less than 3 years	2 year orders or less	Third order	Fourth order	Fifth order
Total	51	22 (43%)	29 (57%)	27 (53%)	4	2	1

- 22 of the 51 final orders were for 3 years and more (43%)
- 29 of the 51 final orders were less than 3 years (57%)
- 7 involved a third or more applications for final order (14%)

Example: Mr P, limiting term 2 y 6m, 4 extension orders totalling 10 y, 10 m (total **13 y 4 m** so far...)

Cohort data

- *types of offences*

Type of Offence	Number	Comments
Sexual offences	17 (41%)	1 CAM only (?serious offence)
Child sexual offences	13 (32%)	
Wounding/GBH	10 (24%)	
Murder/manslaughter	5 (12%)	2 murder, 3 manslaughter
Fire	2 (5%)	
Other	8 (20%)	Break and enter, robbery etc

Cohort data – applicants

Mental health and cognitive disorders

Number of defendants	Cognitive impairment	Mental illness	Both	Neither	SUD	PD	Paedophilia
41	33 (80%)	21 (51%)	14 (34%)	2 (4.9%)	27 (66%)	11 (27%)	5 (12%)

80% of the defendants had a cognitive impairment

66% of the defendants had comorbid substance use problems

51% of the defendants had a serious mental illness

Cohort data – cognitively impaired applicants

Total	Mental Illness	Any co-morb	SUD	PD	Sexual Offence
33	14 (42 %)	31/33 (95%)	20 (49%)	8 (24%)	15 (45%)



95% of the cognitively impaired applicants had a co-morbid diagnosis



49% had substance use disorders



24% had a diagnosed personality disorder

Implications of results

Applications are rarely unsuccessful

- ? reflecting the low threshold to make an order (civil standard and serious risk of harm) or disadvantage of applicants, risk assessment is weighted to identify risk

Applicants are small group of highly complex individuals with significant disability

- unable to advocate for themselves
- reflecting barriers to accessing timely supports and gaps in services
- often forced to participate in multiple expert assessments (at least 3 per final application)

Significant proportion are subject to more than one order

- detained or under supervision for many years post sentence

Over-representation of sexual offences

- ? community concern but also potentially due to lack of programs for cognitively impaired and mentally ill persons who commit sexual offences and/or engage in other complex behaviours

Orders are resulting in ongoing detention (not just community supervision) beyond nominated sentence period

- detention can continue for several years beyond any equivalent sentence period ?proportionality

Discussion

Significant reliance on expert evidence using risk assessment tools, with inherent limitations, and not validated for some groups (cognitive impairment, First Nations), arguably can't reliably differentiate risk of serious harm from non serious harm

A group of the most disadvantaged individuals are captured often resulting in prolonged detention, which is countertherapeutic and harmful, individuals least well placed to advocate for self against the State

Rehabilitation is said to be the justification but many in the group cannot benefit from typical rehabilitation programs (limited modified rehabilitation programs) and need support (ie. support services, supported accommodation)

Lower, differential threshold, for unacceptable risk (no serious sexual or violence offence requirement, serious harm to others) not comparative to other HRO legislation, slippery slope – ie. one recent application involved I/O child abuse material only

What difference is being made? What evidence is there that this small group have a lower risk of reoffending post extension? Is the loss of liberty, dignity and privacy for the group justified by the outcome? Cost-benefit to community? Effectiveness of ongoing detention re a group not considered a vehicle for deterrence?

Punitive strategies are being used to solve a problem of lack of services (stop gap measures like continued detention in custody) to replace appropriate therapeutic supports, mental health and other services, this can have the opposite effect of allowing for further delay in providing appropriate community supports (reduced pressure on the relevant services)

Discussion cont...

Powers of compulsion for certain agencies to produce documents

No prohibition on publication of the name of the defendant (see s 162 *Mental Health Act 2007* (NSW)(MHA) and *Attorney General of NSW v Huckstadt (No 2)* [2017] NSWSC 595)

Admissibility issues under s 138 MHCIFP Act

Practice Note SC CL 12 requires defendant to enter into agreed facts with the plaintiff (AG)

Information sharing pursuant to ss 118, 138, 139, 161 MHCIFP Act and ss 162A & 189 MHA

International human rights treaties and proportionality



Future Directions

Health lead agency for CI forensic patients on limiting terms

Dedicated units for detention (where necessary) and rehabilitation of unfit defendants

All offenders with CI and MI flagged early in court process, assessed for fitness and if appropriate, immediately redirected to Health run therapeutic units and offered treatment (+/-fitness restoration if appropriate) and discharge planning commenced

Unfit offenders in NSW treated similarly to other jurisdictions, ie. stay of proceedings and diversion into appropriate services

Summary of Key Points

- Ongoing detention and supervision will always look like an easier option compared to implementing effective interventions and supports
- Continued incarceration of vulnerable offenders is harmful and can increase risk to the community over the longer term
- Preventative detention abrogates fundamental human rights and further disadvantages an already disadvantaged population
- Expensive legal regimes are being used instead of adequately funding public health services



Questions or comments?