13. Extension Orders

Introduction

Pt 6 (ss 123 –144) of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 empowers the Supreme Court to make orders extending a person's status as a *forensic patient*. Making such an order is a means of preventative control that aligns with similar mechanisms such as the *Crimes (High Risk Offenders) Act* (CHROA). Applications can only be made by a "Minister administering the Act"[1] during the last six months of a forensic patient's limiting term or existing extension order. The Supreme Court's role is confined to determining whether a person's forensic status is extended or not. The patient's liberty remains under the control of the Mental Health Review Tribunal (MHRT) throughout the process including after an extension order is made. The Crown Solicitor invariably appears on behalf of the applicant and eligibility for a grant of Legal Aid for forensic patients is likely. The rules and regulations relating to civil proceedings conducted before the Supreme Court apply: s 134.

The application

At the earliest opportunity contact the Mental Health Advocacy Service of Legal Aid NSW (MHAS) (ph: 9745 4277) informing them an extension order is being considered. As the MHAS represent over 98% of forensic patients it's likely the patient is a client. These patients invariably experience a disability that effects their ability to understand and difficulties in reading and communicating are common. The MHAS can explain the process to the patient and gain instructions regarding consent to being examined by experts and accepting service.

An application is made by way of summons and must be supported by an affidavit annexing a report prepared by a psychologist or psychiatrist or medical practitioner addressing risk and ongoing management (s 125) and other supporting documentary evidence such as health care records. Section 138 allows the applicant Minister to require the production of documents and information which is admissible despite any contrary rule. Usually the summons will seek:

- an *interim extension order* for up to three months
- orders appointing two experts to examine the patient and furnish the court with reports of those examinations: s 126(5)(a)
- orders directing the patient attend those examinations: s 126(5)(b)
- an order that the patient be subject to an extension order which can be no greater than five years: s 128
- an order restricting access to the court's file for non-parties without leave.

The application must be served within two business days of filing: s 126(1). A directions hearing is listed by the Supreme Court for the time tabling of the preliminary hearing.

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[1] Minister for Health and Medical Research, Minister for Mental Health, Regional Youth and Women, Attorney General, and Minister for the Prevention of Domestic Violence. For full details of Ministerial responsibilities, see the Allocation of the Administration of Acts. Usually the Attorney General and/or the Minister for Mental Health make applications.

A forensic patient is deemed a 'person under legal incapacity': s 3 *Civil Procedure Act* 2005 (NSW). Accordingly, a tutor must be appointed for the proceedings to "carry on": cl 7.14 *Uniform Civil Procedure Rules* 2005 (NSW). A tutor will preferable be someone close to the patient such as a family member. Where such a person is not available a tutor may be gained through contacting the *Guardian Ad Litem* panel or on occasion Legal Aid arrange a tutor. A tutor certificate (cl 7.16 UCPR) and supporting affidavit indicating the tutor consents to act and has no interest in the matter must be filed so the tutor can act in that position.

Preliminary hearing — interim extension orders

Although not strictly required at a preliminary hearing, the court considers making an interim extension order that, if made, extends the patient's forensic status for no more than 3 months: s 131.

Usually, a preliminary hearing is conducted within half a day. The application is supported by a report and supporting documentation and the parties file and serve respective submissions. To be examined for the purpose of drafting that report the patient must provide consent.

The Supreme Court may make an order at a preliminary hearing where the "matters alleged in the supporting documentation would, if proved, justify the making of an extension order": s 130(b). Beech-Jones J (as his Honour then was) in *Attorney General for New South Wales v Kapeen [2017] NSWSC 226* at [15] per Beech-Jones J, described this as:

> To the extent that supporting documentation sets out factual matters and opinions on matters of fact the court does not, at this point, engage in any considered evaluation of whether those factual matters are well-founded but instead proceeds on the basis they are proven.

The Court's function at a preliminary hearing "is not to weigh the material or predict the ultimate result": *Attorney General of New South Wales v Beryalay by his tutor Jennifer Thompson (Preliminary) [2019] NSWSC 252* at [19] per Ierace J; *Attorney General for New South Wales v Tillman [2007] NSWCA 119* at [98]. Generally, this means witnesses are not called.

The test for making an order at a preliminary hearing is the same as the test for making an extension order: s 122. Where an interim extension order is made, the court does not issue a warrant or any orders regarding the patient's liberty. Rather, where an order is made the patient remains under the control of the MHRT. Within the period in which the interim extension order is made the substantive hearing is conducted unless the application is withdrawn or revoked.

Prior to substantive hearing

During the period between the preliminary and substantive hearing the parties must:

- unless the Court makes orders appointing particular experts ("court appointed experts") and examinations, negotiate and agree on which experts shall examine the patient and how, when and where that will take place
- negotiate the matters at issue doing their best to confine these matters
- negotiate what documents should be provided to the Court noting that the Court has requested the parties confine materials to those that are relevant to the application and issues

- determine whether a “working folder” of documents be provided to the Court and if so, what materials should be in that folder
- agree on a timetable for filing and serving evidence and submissions noting the patient may provide an expert report
- agree on what witnesses will be required to give evidence at the substantive hearing and how their evidence might be given such as separately or together
- agree on appropriate hearing dates for the substantive hearing with consideration for the availability of witnesses and counsel and allowing sufficient time for the matter to be determined
- agree on the estimated time for the hearing noting up to one day is common.

A directions hearing is conducted during this period. Short minutes of order should be agreed and drafted prior to the directions hearing or shortly thereafter. The Court will usually provide a date for the hearing.

The applicant customarily arranges for the relevant documents and folders to be filed with the Court in accordance with the Court orders regarding timetabling.

Substantive hearing

The Court *must* have regard to a number of prescribed matters when determining an application for an extension order (s 127) and *may* have regard to other matters. The prescribed matters include:

- the safety of the community
- expert reports including the report tendered at the preliminary hearing: s 125
- reports drafted by the two experts appointed by the court: s 126(5)
- any other reports made in support of the application
- the patient’s level of compliance with any obligations imposed whilst a forensic patient
- the views of the court that imposed the limiting term
- orders of the Mental Health Review Tribunal
- any other information as to the risk the patient will pose in the future.

Other matters that are commonly considered include expert reports undertaken on behalf of the forensic patient, guardianship and financial management orders, the possibility the patient may be subject to orders under the *Mental Health Act* such as detention as an involuntary patient or subject to a community treatment order, and available family and other community based supports and accommodation.

The test

The two-tiered test under s 122 for making an extension order arises where the Court …”is satisfied to a high degree of probability that”:

a) the patient poses an unacceptable risk of causing serious harm to others if the patient ceases to be a forensic patient, and

b) the risk cannot be adequately managed by other less restrictive means.

Importantly, s 122 contains a note stating that "less restrictive means of managing a risk includes, but is not limited to, a patient being involuntarily detained or treated under the *Mental Health Act*".

The Court accepts that as the structure, language and key provisions for making an extension order have direct parallels with the *Crimes (High Risk) Offenders Act*, guidance is gained from the authorities and learning regarding that legislation: *Attorney General for New South Wales v Rohan (Preliminary)* *[2020] NSWSC 1610* at [18] per Hoeben CJ at CL.

High degree of probability

Satisfaction to a "high degree of probability" applies to both limbs of the two-tiered test, and has been held to import a standard of proof greater than the civil standard but less than the criminal: *Minister for Mental Health v Paciocco* *[2017] NSWSC 4* at [8] per Campbell J.

First limb: unacceptable risk

Whether the patient poses an unacceptable risk is assessed on the assumption they are not a forensic patient: *Attorney General for New South Wales v Rohan (Preliminary)* *[2020] NSWSC 1610* at [26] per Hoeben CJ at CL. That is, what, if any risk, would the patient pose if they did not carry the status of a forensic patient which provides the MHRT powers of control over the patient's liberty and autonomy. In predicting risk, the Court considered the period in which the forensic patient's status may be extended which is up to 5 years: at [27] citing *Tillman v Attorney General for the State of NSW* *[2007] NSWCA 327; (2007) 70 NSWLR 448; (2007) 178 A Crim R 133* at [8]. The patient's right to personal freedom is not a relevant consideration when determining the test of unacceptable risk: *Lynn v State of New South Wales* *[2016] NSWCA 57*.

Determining what is "unacceptable" is an evaluative task that takes into consideration the legislative objects especially the protection of the community. Consideration is given to the likelihood of the risk occurring and the gravity of consequential harm. Where the harm is great (such as killing) but the likelihood of that harm occurring is remote the test may be satisfied. That may be compared to the gravity of harm associated with aggravated break where the likelihood of that occurring similarly being remote, the test might not be satisfied: *Attorney General for NSW v MZ* *[2017] NSWSC 1773*.

First limb: serious harm

The type of harm posed is confined to harm to the community and does not include harm to the patient. Unlike the *CHROA*, the type of harm is not described. Harm is not confined to a particular type of offending such as violence or level of offending such as grievous bodily harm. As such, the Act has a far wider reach than the *CHROA*: *Attorney General of New South Wales v Kereopa* *[2017] NSWSC 411* at [11]-[12] per Davies J. "Harm" may concern physical or psychological harm and may arise in the absence of violence: *Attorney General of New South Wales v Kereopa (No 2)* *[2017] NSWSC 928* per RA Hulme JA and *Attorney General for New South Wales v Kereopa* *[2019] NSWSC 1339* per Harrison J. Extension orders may be made where both the offending leading to the imposition of the limiting term and the risk of harm did not involve personal violence.

Second limb: risk cannot be adequately managed by other less restrictive means

The first limb must be satisfied before moving to second limb. The applicant must then prove a negative test, that is, that the risk cannot be managed by less restrictive means. Remaining a forensic patient is the most restrictive means by which a forensic patient might be managed.

There are many less restrictive means available for managing risk, including mechanisms such as family support (including accommodation), NDIS support (including 24 hour supported living arrangements) and community based NGOs.

Formal mechanisms may involve elements of managing risk that are less restrictive than forensic status. Such powers under the *Mental Health Act* include the power to detain within a mental health facility or community treatment orders. Often concern is raised regarding these mechanisms as they do not require the Court or the MHRT's authority for involuntary treatment to cease. A person can only be detained in a mental health facility whilst they satisfy the statutory test for being a mentally ill person or mentally disordered person: ss 14 and 15 respectively. Those terms are based on legal rather than medical definitions. Detention of a mentally disordered person is confined to three working days whilst a mentally ill person may continue to be detained whilst they satisfy the definitional requirements. Where those tests are not satisfied, which may result from clinical improvement, the person cannot be detained. That may be undertaken by those detaining and treating such as the treating doctor. Similarly, where those implementing a community treatment order do not believe a further order is required, on expiration of an existing six or twelve month order, there is no power for the MHRT to order a further CTO without an application being made.

Other orders include Guardianship Orders, which may involve coercive powers including the power to keep a person at a particular place and return a person to that place if they abscond. Financial Management Orders usually made by the MHRT or Guardianship Division of NCAT are often a less restrictive consideration.

In *Attorney General of NSW v Doolan by his tutor Jennifer Thompson (No 2)* *[2016] NSWSC 107* at [96]ff per Adamson J explores the second limb of the test in detail comparing the various alternative less restrictive means for managing risk. Her Honour noted the powers of the MHRT to oversee and determine a patient's liberty, and considered the Minister and the Attorney General's right to be heard in regard to leave and release important especially in light of the underlying need to safeguard the community: at [122].

Making an extension order

The Court may decide to either make an extension order or dismiss the application: s 127. On making an extension order the Court does not make orders or issue a warrant for the patient to be taken to any place or detained in a prison as is often the case for those captured by the *CHROA*. The Court only decides whether the order is made or not. Where and how the patient is cared and detained remains a decision of the MHRT: s 129.

After an extension order is made

An interim extension order or an extension order may be varied or revoked following an application by the patient or Minister or on recommendation of the MHRT: s 133. The MHRT cannot order unconditional release for forensic patients subject to such orders: s 83(3). An existing extension order cannot be extended beyond the period of the order. That is, an extension order made for a period of three years cannot be extended beyond that period. Rather, a further application must be made for the forensic patient's status to increase beyond

the three-year period: *Minister for Mental Health v Paciocco* *[2018] NSWSC 277* per Fullerton J.

Costs may be awarded in favour but not against the forensic patient: s 136.

Appeals exist as a matter of right regarding extension orders and must be made within 28 days after the decision, may go to a question of law, fact or both and does not stay the operation of the extension order: s 135. Appeals in regard to interim extension orders fall within the domain of s 101 *Supreme Court Act*: *Attorney General of New South Wales v WB* *[2020] NSWCA 7*.