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of Western Australia



OFFICE of the CHIEF PSYCHIATRIST

Community of Practice

Duty of Care and Restraint in Mental Health & Emergency – Legal & Clinical Perspectives

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Introduction

Today's presentation:

1. Powers of detention and restraint available under the *Mental Health Act 2014* (MH Act) during a referral to a place other than an authorised hospital.
2. Defences available to a charge of unlawful detention or restraint under:
 - *The Criminal Code* (WA)
 - Common law doctrine of necessity.



Non-authorised vs Authorised

- Authorised hospital:
 - MH Act section 541
- List of authorised hospitals on Chief Psychiatrist's website:
<https://www.chiefpsychiatrist.wa.gov.au/wp-content/uploads/2022/05/Authorised-Hospitals-Register-as-at-18-May-2022.pdf>
- Non-authorised:
 - Emergency Department
 - GP surgery
 - Non-authorised hospital ward



Duty of Care

- **An obligation not a power.**
- An obligation to take reasonable steps to not cause foreseeable harm to another person or their property.
- Cause-and-effect relationship, such that the action of the healthcare professional causes harm to the patient.



Duty of Care

- Healthcare professionals have an obligation to carry out two fundamental roles:
 - provide patients with information on the risks of treatment; and
 - treat patients according to standards supported by their profession.
- High Court cases:
 - *Rogers v Whitaker* (1992) 175 CLR 479
<https://jade.io/summary/mnc/1992/HCA/58>
 - *Hunter and New England Local Health District v McKenna* [2014] HCA 44
<https://jade.io/summary/mnc/2014/HCA/44>



***Mental Health Act 2014* – powers of detention and restraint**

- The powers of detention and restraint under the MH Act may only be relied upon for the detention or restraint of the following persons:
 - (a) persons being provided with treatment or care in an authorised hospital; and
 - (b) persons suspected of being in need of treatment under the MH Act, and who are referred for an examination by a psychiatrist.

Pathway for Person Referred under MH Act for Examination – Non-authorised



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Form 1A Referral Order (s. 26)

Referral for examination by a psychiatrist at place other than authorised hospital

Person cannot be restrained

Form 3A Detention Order (s. 28)

Allows the person to be detained to take to place for examination

Can be detained for 24 hours

Person cannot be restrained

Form 3B Continuation of Detention Order (s. 28)

Detention can be extended further 24 hours up to 72 hours metro / 144 hours outside metro

Person cannot be restrained

Form 1A Referral Order (s. 58)

Once at place of examination the person may be detained for 24 hours from time received

Reasonable force may be used to restrain to detain

Form 3B Continuation of Detention Order (s. 59)

Detention can be extended for further 48 hours for examination if outside metro area

Reasonable force may be used to restrain to detain

Form 4A – Transport Order (s. 29)

Order to transport person to place specified in the order

Person may be apprehended and reasonable force may be used

Pathway for Person Referred under MH Act for Examination – Non-authorised



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Form 1A – Referral Order (MH Act s. 26)

- A Form 1A referral order is an order referring a person for an examination by a psychiatrist.
- **The person cannot be detained or restrained** prior to the person being received at a place other than an authorised hospital for examination by a psychiatrist.
- Once the person is received into a place other than an authorised hospital (e.g. ED), **the person may be detained for up to 24 hours from the time received** (MH Act s. 58); **and reasonable force may be used to detain the person** (MH Act s. 172).

Form 3A - Detention Order (MH Act s. 28)

- A Form 3A detention order enables a person to be detained for up to 24 hours before being taken to a place other than an authorised hospital for examination by a psychiatrist.
- **The person cannot be restrained.**

Form 3B - Continuation of Detention Order (MH Act s. 28)

- A Form 3B continuation of detention order enables a person's detention under a Form 3A to be continued for a further 24 hours up to a maximum of 72 hours if the person is in the metropolitan area or 144 hours if the person is outside the metropolitan area prior to the person being received at a place other than an authorised hospital.
- **The person cannot be restrained.**

Form 3B - Detention for examination at place that is not an authorised hospital outside metro area (MH Act s. 59)

- A person being detained under section 58 at a place other than an authorised hospital outside the metropolitan area may be detained for a further 48 hours on a Form 3B.
- **Reasonable force may be used to detain the person** (MH Act s. 172).

Form 4A – Transport Order (s. 29)

- A Form 4A enables a person, who is referred for examination by a psychiatrist, to be taken to the place specified in the order.
- **The person may be apprehended and reasonable force may be used** (MH Act s. 149).



Emergency Psychiatric Treatment

- Defined in the MH Act, as treatment provided to:
 - save the person's life; or
 - prevent the person from behaving in a way that is likely to result in serious physical injury to the person or to another person.
- Cannot be relied upon to restrain a person for the purpose of preventing them from leaving either a non-authorised or an authorised setting.
- Definition of “treatment” under section 4 of the MH Act expressly excludes bodily restraint, as well as seclusion.



The Criminal Code (WA) - Emergency

- Section 25 of the Criminal Code:

A person is not criminally responsible for an act done, or an omission made, in an emergency if:

- The person believes:
 - circumstances of **sudden and extraordinary emergency** exist;
and
 - doing the act or making the omission is a necessary response to the emergency;
- the act or omission is a **reasonable response** to the emergency in the circumstances as the person believes them to be; and
- there are **reasonable grounds** for those beliefs.



Doctrine of Necessity

Elements:

1. The action must have been done to avoid an irreparable evil (such as **imminent peril to life or serious injury**) to the person or others.
2. The person(s) carrying out the action must have acted from an **honest and reasonable belief** that the individual was placing themselves or others in a situation of imminent peril.
3. The action must have been **proportionate to the 'evil' or harm** about to occur - the person(s) who carried out the action must have responded in a manner consistent with how a reasonable person would have responded in the circumstances.



Summary

- MH Act
 - See pathway and associated explanation.
- Section 25 Criminal Code and doctrine of necessity
 - whether the circumstances of a case will fall within the provisions of section 25 of the Criminal Code or satisfy the elements of the doctrine of necessity will depend upon the **specific circumstances** of the case.
 - It may be necessary to seek legal advice if you are unsure about a specific set of circumstances.



District Court unlawful detention case

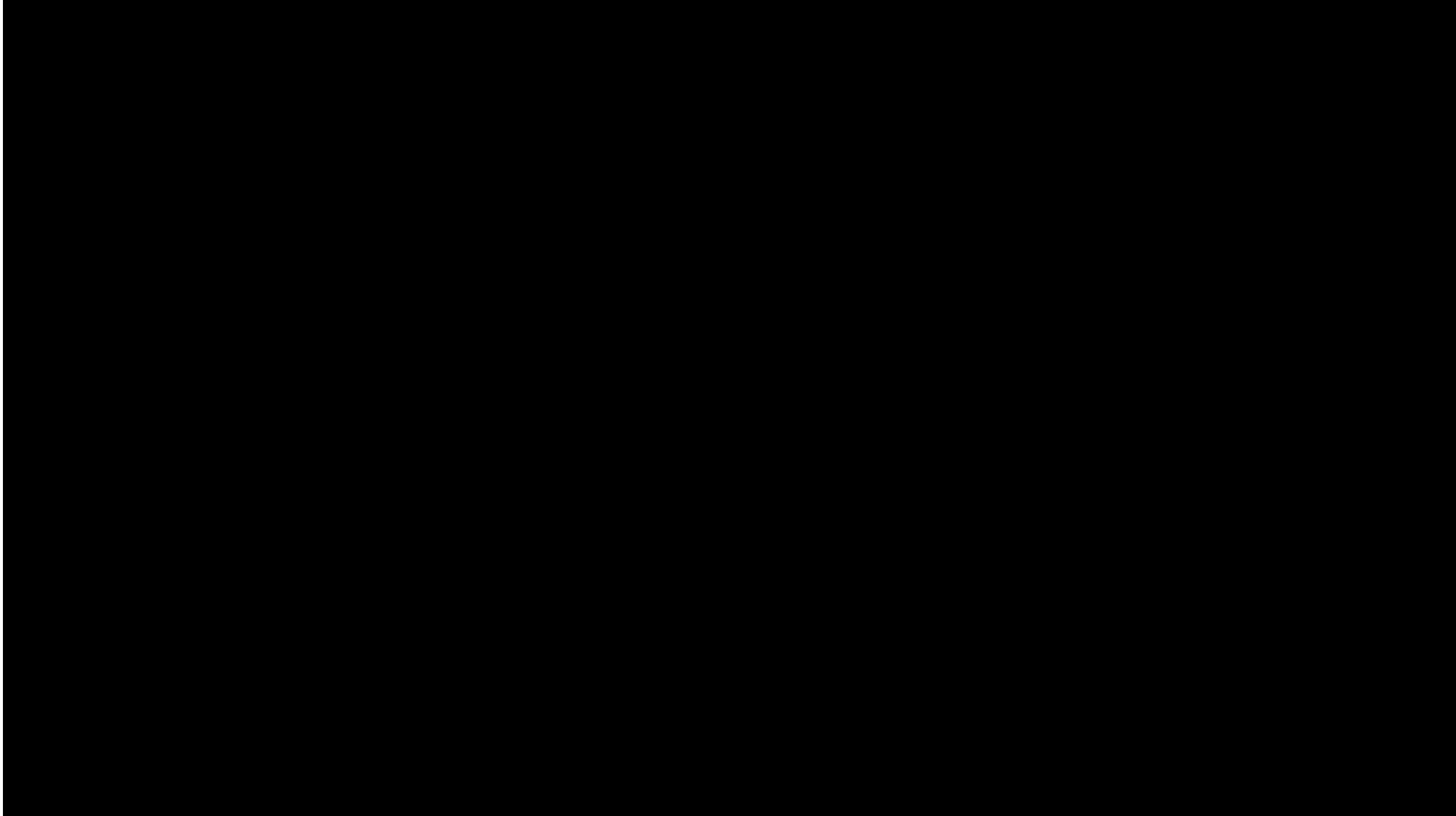
- District Court Judge Linda Black:
 - use of force is predicated on a right to detain - **no right to detain; no right to use any force** at all
 - man was unlawfully brought back into the hospital, and force was unlawfully applied to him
 - unlawfully detained and put onto a stretcher and kept in hospital overnight
- The court found the man was held at SCGH unlawfully, and he was not guilty of causing grievous bodily harm.

Simulated Film

Thanks to Prof. Daniel Fatovich. (2018)



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Question 1



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- Emergency Departments are NOT authorised units.
- Sandy remains in the ED awaiting a bed. After more than 72 hours and she is getting progressively more distressed and frustrated.
- Sandy starts getting aggressive, wanting to leave, vents her frustration by banging her head against the wall and lashing out at staff.
- All measures to try and meet her needs and de-escalation fails

-What are some of the legal implications for the ED staff?



Question 2

- She wants a cigarette and refusing all offers of nicotine replacement therapy (NRT) and health wide policy where staff are no longer allowed to accompany patients out for a cigarette?
- What are some of the legal frameworks we need to consider when deciding whether they can leave?**

Case 2



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- A 24 year old man presents with intoxicated brought in by police with alcohol voicing suicidal ideation. He had a BAL of 0.18%. When he arrived, he denies suicidality and wants to leave.
 - **What are the factors that we need to consider to determine risk and capacity in the ED?**
 - **If it was determined that he had capacity and allowed to leave and an adverse event occurred, what are some of the legal concepts we need to consider?**



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Note: *The information in this presentation cannot be considered as legal advice but rather, outlines the broader legal context and parameters. If legal advice is required, processes may be sought via health services.*