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# SECTION 32 APPLICATIONS

# REVISITED

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## INTRODUCTION

Despite an increasing awareness of mental ill-health within the judiciary, legal profession and wider community, section 32 *Mental Health (Forensic Provisions)* Act 1990 ("section 32" and "MHFPA") is under-used.

Making appropriate and effective section 32 applications in the Local Court should be part of every criminal lawyer's practice.

However, great care is required to ensure section 32 applications are not viewed simply as a mechanism to avoid conviction. Making spurious section 32 applications discredits the diversionary regime and Magistrates may become increasingly reluctant to utilise the provisions.

Rather, the diversionary regime should be regarded as an important legislature measure that seeks to address the significant over-representation of people with cognitive or mental health impairments in the criminal justice system. If used effectively, the provision can be a useful tool to address one of the causes of crime. It can protect the community by reducing recidivism and it can improve lives.

To ensure the effectiveness of the diversionary regime, criminal law practitioners are encouraged to identify eligible clients and make section 32 applications in appropriate cases.

To maximise the chances of diversion, a criminal law practitioner requires a thorough understanding of their ethical obligations, the legislative framework and relevant caselaw.

In discharging their duties to a client, a practitioner will be required to consider alternatives to section 32 that permit consideration of a client's cognitive and mental health impairments.

Without thorough preparation a section 32 application is doomed to fail and a valuable opportunity to prevent a client's further contact with the criminal justice system may be lost.

This paper is to be read with previous papers prepared for Legalwise seminars in 2013[1] and 2016[2].

**SECTION 32 IS UNDER-USED**

In 2012 the New South Wales Law Reform Commission ("NSWLRC") identified a number of problems with section 32 and found it was under-used:

> "Section 32 appears to be used in a very small percentage of cases ….
> On the basis of the data available, it seems likely that there is scope for s32 to be used more extensively. Opportunities for diversion that might effectively prevent or reduce reoffending may be missed, and defendants who should be dealt with by way of diversion may instead be dealt with accordance to law. The data discussed in Chapter 4 on the percentage of people in prison with cognitive and mental health impairments would indicate that some of these defendants are ultimately incarcerated for repeat offending."[3]

Statistics recently provided by the Bureau of Crime Statistics and Research ("BOCSR") confirm less than 2 % of charges or people in the Local Court are

[1] K. Weeks (2013) *Mental ill-health and the criminal law. Section 32 applications – A holistic approach.* A copy can also be downloaded via www.cmhlaw.com.au on the Papers and Guides page.
[2] K. Weeks (2016) *The ethics of acting for clients with cognitive or mental health impairments*. A copy can also be downloaded via www.cmhlaw.com.au on the Papers and Guides page.
[3] NSWLRC (2012) Report 135 *People with cognitive and mental health impairments in the criminal justice system: Diversion* at [9.41] & [9.44], pp. 256-257

diverted from the criminal justice system pursuant to section 32 and 33 MHFPA[4]. The rate appears to be declining.

The BOCSR data for 2012 – 2015 is as follows[5]:

**NSW Local Criminal Court Statistics 2012 to 2015**

**Table 1.**
**Number of persons dismissed in the Local Court for reason of mental illness by year**

| Outcome | 2012 | 2013 | 2014 | 2015 |
|---|---|---|---|---|
| Dismissed due to mental illness/health | 1891 | 1805 | 1871 | 1978 |
| **All people finalised in the Local Court** | **108820** | **109411** | **114012** | **120544** |

**Table 2.**
**Number of charges dismissed due to mental illness in the Local Court by year**

| Outcome | 2012 | 2013 | 2014 | 2015 |
|---|---|---|---|---|
| Section 32 dismissal | 4256 | 4037 | 3961 | 3950 |
| Section 33 dismissal | 1171 | 1165 | 1300 | 2025 |
| Dismissed due to mental illness/health | 98 | 95 | 65 | 123 |
| **Total charges dismissed due to mental illness/health** | **5525** | **5297** | **5326** | **6098** |
| **All Local Court finalisations** | **240736** | **249279** | **255687** | **273204** |

Note: These figures are the number of charges brought, rather than the number of persons charged. A charge refers to an instance of a particular type of offence being charged against a person.

Source: NSW Bureau of Crime Statistics and Research
Reference: kr16-13958
*Please retain this reference number for future correspondence*
***NOTE:*** *Data sourced from the NSW Bureau of Crime Statistics and Research must be acknowledged in any document (electronic or otherwise) containing that data. The acknowledgement should take the form of* **Source: NSW Bureau of Crime Statistics and Research**

[4] The data provided did not distinguish between s32 and s33.
[5] Based on data provided to the writer by BOSCR in April 2016. The assistance of Ms Kylie Routledge is acknowledged.

According to the BOCSR data

- In 2012 1.8% of all *charges* in the Local Court were dismissed pursuant to section 32 or section 33 MHFPA;

- In 2015 this had fallen to 1.4% of all charges.

Similarly if one looks at the percentage of *people* diverted pursuant to section 32 and 33 MHFPA:

- In 2012 1.7% of all people appearing before the Local Court received a s.32 or s.33 order;

- In 2015 this had fallen to 1.6%

**OVER-REPRESENTATION**

The very small percentage of charges or people diverted via section 32 and 33 MHFPA does not correlate with the percentage of people in the criminal justice system with cognitive and mental health impairments.

After reviewing the available data in 2012 the NSWLRC concluded that while there were significant gaps:

> "The data in relation to cognitive and mental health impairments in the prison population is probably the most comprehensive data ….If we rely on Butler and Allnutt's 2003 analysis, it would appear that the rate of mental health impairment in prisoners is more than triple the rate in the general population, with the rate of over-representation varying, in some cases significantly, depending on the actual mental health impairment concerned. For example, the

> rate of psychosis in sentenced and reception prisoners is much greater than the apparent rates in the general population – possibly as much as 21 times the rate in the general population".[6]

For further information see the detailed discussion in the author's 2016 paper.[7]

In enacting the diversionary regime it is clear the intent of the legislature was to address the over-representation of people with cognitive and mental health impairments in the criminal justice system. When legislation amending section 32 was introduced into Parliament in 2005, it was said:

> "It is estimated that close to one in five people in Australia will be affected by a mental illness at some stage of their lives. The trend over the past five years indicates a substantial increase in the numbers of people with a mental illness who come before the courts. The prevalence of mental illness in the New South Wales correctional system is substantial and indicative of the high incidence of defendants in court who have mental illness ….
>
> … The purpose of s.32 of the Act is to allow defendants with a mental condition, a mental illness or a developmental disability to be dealt with in an appropriate treatment and rehabilitative context enforced by the court".[8]

Criminal defence lawyers must be in a position to identify clients eligible for section 32 diversion given the high possibility a practitioner will take instructions from a client with cognitive or mental health impairments.

## IDENTIFYING AN ELIGIBLE CLIENT

The difficulties faced by a practitioner in identifying a client with cognitive and mental health impairments is addressed in detail in the author's 2013 paper.[9]

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[6] Ibid at 4.131 p. 90.
[7] Ibid p.2
[8] Parliamentary Debates, *Legislative Assembly*, 8 November 2005 at p.19214
[9] p.8

The NSWLRC identified the need for criminal law practitioners to explore the possibility of a section 32 application in a client's matter:

> "Lawyers who do not have specialist skills, or specialist help and support, may decide that a s32 application is difficult, time consuming, and not remunerative. They may therefore prefer not to explore that avenue, but instead focus their attention on arguments relating to mitigation of sentence in a way that takes into account the defendants impairment and other issues. This may be an effective short term strategy for both lawyer and client but, because the client's criminogenic issues are not addressed through the provisions of services, there may be reoffending". [10]

In an earlier Consultation Paper the NSWLRC said:

> "Obviously, s32 will fail at the outset if defendants cannot be systematically and effectively identified as potential candidates for its diversionary measures. It is not a foolproof method of detection to leave the responsibility solely in the hands of the defendant's legal representative…
>
> Defendants with a cognitive impairments remain at risk of missing out on the benefits of these diversionary measures in the absence of a more systemic means of assessing their impairment".[11]

While numerous recommendations were made by the NSWLRC, thus far the NSW government has failed to act and the prison population continues to grow.

## TAKING INSTRUCTIONS

Taking detailed instructions from a client will assist a practitioner to identify whether a client might be eligible for section 32 diversion.

A checklist of matters that should canvassed with a client at the initial conference is detailed in the author's 2010 paper published in the *Law Society Journal*.[12]

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[10] Ibid at [9.58] p.261.
[11] NSWLRC (2010) Consultation Paper 7 *People with cognitive and mental health impairments in the criminal justice system: Diversion* at p.49.
[12] K Weeks, *To Section 32 or not – applications under s.32 Mental Health (Forensic Provisions) Act 1990 in the Local Court*, LSJ May 2010. A copy can be downloaded via www.cmhlaw.com.au on the Papers and Guides page.

Any family history of mental illness should be explored with a client given the genetic basis for many psychiatric disorders, together with any psychosocial stressors such as trauma or history of abuse.

The presence of substance abuse should ring alarm bells given comorbidity. Substance abuse and comorbidity is extensively discussed in the author's 2013 paper.[13] Be aware that a client's mental health difficulties can sometimes be traced back to early childhood well before substance use commences.

Difficulties that can arise early in the client engagement, including a client's capacity to provide instructions, is considered in detail in the author's 2016 paper.[14]

## ADVISING A CLIENT

A criminal law practitioner must have regard to his/her ethical obligations when advising a client of their options in relation to a criminal charge[15].

Acting in the best interests of the client is one of the practitioner's fundamental duties to a client[16].

A practitioner is also duty bound to assist a client to understand relevant legal issues and to make an informed choice about action to be taken[17].

[13] K Weeks (2013) Ibid at pp.23-26.
[14] Ibid at p.10.
[15] For a detailed discussion see the author's 2016 paper, Ibid, at p.13.
[16] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (*hereafter the "Uniform Rules"), Rule 6.
[17] Ibid, Rule 7.1 & 7.2

Accordingly, a practitioner may need to consider and advise the client in relation to the following (in no particular order):

- whether the client should make a section 32 application;

- if the client is "*mentally ill*" within the meaning of the *mental Health* Act 2007, whether an application should be made under section 33 MHFPA. Given the risk of a client losing their liberty (a client can be detained involuntarily) a practitioner must tread carefully in relation to such clients;

- whether the client has capacity to instruct the practitioner[18];

- whether the client is fit to stand trial according to the *Presser* requirements;[19]

- whether a plea of guilty should be entered at the earliest opportunity to maximise the discount available on sentence;

- whether a plea of not guilty should be entered and the prosecution put to proof;

- whether the client had the necessary mens rea to commit the offence;[20]

- whether the common law defence of insanity is available;[21]

Other defences or partial defences may need to be considered.

[18] K Weeks (2016) Ibid at p.10. See also The Law Society of New South Wales (2016), *When a client's mental capacity is in doubt: A practical guide for solicitors",* downloadable via https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf.
[19] See further K Weeks (2016) at pp.10-13
[20] Ibid at p.18
[21] Ibid at p.15.

## PREPARATION & PRACTICAL DIFFICULTIES

Running a section 32 application is more complex and time consuming that running a sentence matter.

Gathering evidence to support a section 32 application, including a report and treatment plan, and the procedural difficulties that can arise are considered in detail in the author's 2013 paper[22].

Making a section 32 application in respect to a major traffic offence or serious offence will require very careful attention.

Without an appropriate report and treatment plan a section 32 application is doomed to fail.

It is the practitioner's responsibility to organise the required material. Advising a client to collect material from their health professional is fraught with danger. For example, a section 32 application is likely to be refused if the report fails to specify the eligibility criteria in s.32(1)(a) MHFPA accurately[23].

A section 32 application may also be refused if there is an inadequate mechanism for the effective supervision of an order[24].

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[22] K Weeks (2013) Ibid at pp.13-16.
[23] See *DPP v Edwards* [2012] NSWSC 105 and *Khalil v His Honour Magistrate Johnson Anor; [2008] NSWSC 1092;*
[24] See for example the remarks of Acting Local Court Magistrate Mulroney in *NSW Police v Smith* [2016] NSWLC 24.

A practitioner will also need to consider whether reports from a treating clinical psychologist and/or psychiatrist are required, in addition to reports from a forensic psychologist and/or psychiatrist. It is the author's experience that treating health professionals are not great report writers and they lack a sufficient understanding of the legal issues that may arise.

Beware of using reports from psychologists. Some Magistrates will take the view that a lack of medical qualifications means a psychologist is unable to provide certain opinions.

It is advisable the practitioner requests a treating health professional to include in the report an undertaking to advise the Court of any non-compliance. This will assist the practitioner to submit any section 32 order can be effectively supervised.

Once the application has been prepared and is ready for hearing, a practitioner should make enquiries with colleagues about the bench if the practitioner is unfamiliar with the Local Court where the application will be heard.

Every Magistrate deals with section 32 applications differently. Practitioners need to be flexible when presenting a section 32 application given the discretionary nature of the diversionary regime. There is and can be no script!

Be aware that some Magistrates will seek a plea before a section 32 application is heard[25]. Be prepared to argue that a section 32 application can be made without a plea being entered.

[25] This appears to be the practice at Burwood Local Court.

In *Perry v Forbes Anor*[26] Smart J said that Part 3 MHFPA:

> "… has operation in proceedings whether or not a plea is entered and whether or not a defendant is fit to plead. That is clear from s.32 and from the scheme of the Act. It was so decided in Mackie v Hint (1989) 19 NSWLR 130"

## THE LEGISLATIVE FRAMEWORK

It is essential the practitioner is familiar with the provisions in Part 3 MHFPA including the jurisdictional criteria in s.32(1)(a). A copy of the provisions is attached.

The first step in a section 32 application is satisfying the jurisdictional criteria. In circumstances where the criteria is addressed in a report the jurisdictional criteria will often be conceded by the practitioner[27].

In the case of Commonwealth offences, practitioners must be aware the eligibility criteria for a s.20BQ application is more restrictive[28].

The second step in a section 32 application requires a Magistrate to conduct a balancing exercise in determining whether section 32 diversion is more appropriate than dealing with an accused in accordance to law – s.32(1)(b) MHFPA . This is where a section 32 application will succeed or fail. The public interest in paramount. A Magistrate is required to:

> "…balance the public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals suffering from any of the mental conditions referred to in s 32(1) or mental illness (s.33) with the object of ensuring that the community is protected from the conduct of such persons"[29]

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[26] Supreme Court of NSW, Unreported 21 May 1993
[27] Ibid pp.16-26.
[28] Crimes Act 1914. See further K Weeks (2013) Ibid at p.33
[29] Ibid. per McColl JA at [71]

In *Confos v DPP*[30] the balancing exercise was described by Howie J in the following terms:

> "…the Magistrate has to perform a balancing exercise; weighing up, on one hand, the purposes of punishment and, on the other, the public interest in diverting the mentally disordered offender from the criminal justice system. It is discretionary judgment upon which reasonable minds may reach different conclusions in any particular case. But it is one that cannot be exercised properly without due regard being paid to the seriousness of the offending conduct for which the defendant is before the court. Clearly the more serious the offending, the more important will be the public interest in punishment being imposed for the protection of the community and the less likely will it be appropriate to deal with the defendant in accordance with the provisions of the Act. It should be emphasised that what is being balanced is two public interests, to some extent pulling in two different directions. It is not a matter of weighing the public interest in punishment as against the private interest of the defendant in rehabilitation" [31].

There are numerous considerations and some are mandatory. Mandatory considerations include:

- the Facts;
- objective seriousness of the alleged offence(s);
- any antecedents;
- the likely sentencing outcomes available upon conviction;
- the six-month period during which breach proceedings can be commenced in respect of any non-compliance;
- whether the need for general deterrence militates against section 32 diversion;

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31 [2004] NSWSC 1159 at [17].

- the existence and contents of a treatment plan;

- whether there is evidence the implementation of the treatment plan will reduce the risk of reoffending.

Other considerations include:

- whether there is causal nexus between the mental condition or mental illness and the alleged offence;

- the degree of planning involved and the extent to which the accused was rendered unable to control his/her actions;

- whether a section 32 order has been made previously;

- whether any section 32 order can be effectively supervised by the Court. Has a treatment provider given an undertaking to advise the court of any non-compliance?

- the strength of the prosecution's case. Is a conviction likely ? Does the client have a defence? Did the client lack the necessary mens rea ?

For further information see the detailed discussion of the relevant considerations in the author's 2013 paper.[32]

Practitioners should also be familiar with s.36 MHFPA which provides:

[32] Weeks K (2013) Ibid at pp.26 - 31

> "For the purposes of this Part, a Magistrate may inform himself or herself as the Magistrate thinks f**it, but not so as to require a defendant to incriminate himself or herself"**

In the authors experience some Magistrates have insisted a client accept the alleged Facts at the commencement of a section 32 application!

## CASELAW

At the very least, practitioners should be familiar with the Court of Appeal's decision in *DPP v El Mawas* [2006] NSWCA 154.

Familiarity with the following decisions will also be helpful:

- *Mackie v Hunt* (1989) 19 NSWLR 130;
- *Perry v Forbes Anor*, Supreme Court of NSW, Unreported 21 May 1993, Smart J;
- *DPP v Albon,* Supreme Court of NSW, Unreported, 13 September 2000, Dowd J;
- *Confos v DPP* [2004] NSWSC 1159;
- *Mantell v Molyneux* [2006] NSWC 955;
- *Khalil v His Honour Magistrate Johnson Anor;* [2008] NSWSC 1092;
- *DPP v Edwards* [2012] NSWSC 105;
- *DPP v Soliman* [2013] NSWSC 346;
- *DPP v Lopez-Aguilar* [2013] NSWSC 1019;

- *Quinn v DPP* [2015] NSWSC 331

## AFTER A SECTION 32 APPLICATION IS REFUSED

When preparing a section 32 application for hearing, a practitioner must also prepare for the application to be refused.

In many cases where an application fails, the matter will proceed directly to sentence.

However, a practitioner and the client will need to carefully consider all alternatives before advising a client to plead guilty or not guilty.[33]

Practitioners should not assume that the only course available to a client is to plead guilty after a section 32 application is refused.

## CONCLUSION

Dealing with clients with cognitive and mental health impairments can be difficult and challenging:

[33] See further K Weeks (2013), *What to do after a s.32 application is refused,* Law Society Journal February 2013 at p.66

> "Cases involving an element of mental disorder or mental illness sometime occasion difficulties for courts and the accused's legal representatives … Explaining and making applications to have s.32 applied may be difficult"[34].

Criminal defence practitioners are in a unique position to facilitate and assist in the identification, diagnosis and treatment of clients with cognitive and mental health impairments and their diversion from the criminal justice system.

However, practitioners must be acutely aware of the serious consequences that can arise, especially for the client, if the mental ill-health of a client is not adequately identified, diagnosed or treated.

The diversionary regime created by section 32 *Mental Health (Forensic Provisions) Act* 1990[35] (hereafter "s.32") has been described as a legislative innovation"[36] embodying a "therapeutic justice initiative"[37]. Section 32 orders have the potential to produce positive outcomes[38] and improve lives.

Given the over representation of people with cognitive and mental health impairments in the criminal justice system, knowing when and how to run an appropriate section 32 application is essential for all criminal law practitioners appearing in the Local Court, regardless of experience.

The author trusts the information in this paper provides practitioners with some assistance given the challenges and complexity of the area.

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[34] Perry v Forbes, Ibid.
[35] Hereafter the "MHFPA".
[36] Gotsis T. & Donnelly H. Judicial Commission of NSW, Monograph 31, "Diverting Mentally Disordered Offenders in the NSW Local Court, March 2008, at p. 29.
[37] Ibid. p. 20.
[38] Douglas L., O'Neill C. and Greenberg D. "Does Court Mandated Outpatient Treatment of Mentally Ill Offenders Reduce Criminal Recidivism*?* A Case Control Study*",* 2006, as cited by T Gotsis & H Donnelly, Ibid. p. 29.

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