Section 32 Applications in Summary Proceedings

Section 32 of the (*Mental Health) Forensic Provisions) Act (NSW)* 1990 allows Magistrates to divert persons with mental conditions into appropriate treatment. The result is that people with mental conditions are sent to get the treatment they need and avoid highly punitive outcomes within the criminal justice system.

Diversion under Section 32 means the client avoids a conviction together with the sentence and any associated mandatory punishment which may include for example licence disqualification. It should also be noted that a discharge under Section 32 does not represent a finding of guilt. In this sense a discharge under Section 32 is in some ways better from the client's point of view than a Section 10 and this is a comment that is often made by defence lawyers. It should be noted though that a Section 32 finding could itself have implications in certain circumstances. Certainly the fact that a given matter was dealt with pursuant to Section 32 does appear on an individual's record and could possibly appear when a prospective employer requests a check of an individual's criminal record - as increasingly occurs in both government and private sectors.

The prevalence of mental illness in society means that every advocate must be aware of the Section 32 option. This presentation is designed to clarify who is a suitable candidate for discharge and provide some guidance on the preparation and presentation of the application.

When to Make the Application

An application for discharge pursuant to Section 32 can be made "at any time during the course of proceedings before a Magistrate". This means that an application can be made even after a contested hearing and a finding of guilt. It should therefore be borne in mind that the client and his or her legal advisor need to decide whether to make the Section 32 application at the outset, or instead run a contested hearing first and keep the Section 32 route as a "Plan B". In either case the application needs to be prepared thoroughly ahead of time.

Medical Evidence

A Section 32 application will succeed or fail based on the medical evidence that is provided. The burden is on the defence lawyer to show why the Court should exercise its discretion. If the case which is presented is not sufficiently strong then the Section 32 application will fail - and it should be noted in this context that many Magistrates and prosecutors have what could at best be described as a cynical and less than positive attitude to these provisions. This is especially the case in respect of driving offences

where many Magistrates have shown a marked reluctance to deal with such matters by way of Section 32.

In this context it is also important to ensure that the psychiatrist or psychologist who has been retained to prepare the report is properly briefed on what should go into that document. As a preliminary matter it should be noted it is very important for the mental health professional to indicate that they have read and are prepared to be bound by the Expert's Code of Conduct. They would also of course list their qualifications. Failure to do so could well compromise the application at the outset.

The body of the report would include the diagnosis (and the basis for same, including any tests performed). The report would also express an opinion as to whether the condition caused or contributed to the offending behaviour that brought the defendant before the Court. Finally (and most importantly) the report will also include a Treatment Plan covering available treatments, how the treatment works and how successful it has been in other cases. It would also refer to a particular practitioner who would be responsible for the treatment and provide details as to where the treatment was to take place. This is particularly important in light of the very recent case of *DPP v Saunders (2017) NSW 760.*

Submissions

In a Section 32 application, a Magistrate must make three fundamental decisions. The first is whether Section 32 is potentially applicable. In other words does the defendant suffer from a mental illness or condition, or are they developmentally disabled? The second key issue, assuming the defendant does indeed suffer from such an illness or condition, is whether it is more appropriate to deal with the defendant pursuant to the provisions of the section rather than according to law. Finally, if discharge is indeed more appropriate what conditions should be attached to same?

If the defendant does indeed suffer such an affliction and the medical report is properly prepared, there should be little doubt in the mind of the Magistrate that the client was suffering from a mental illness at the time offending, but is not a mentally ill person for the purposes of Section 33.

Next comes the balancing test. In determining whether a Section 32 diversion is appropriate in the circumstances the court will seek to weigh two competing interests, namely the public interest in punishment with the competing public interest in diverting mentally disordered defendants from the criminal justice system and ensuring that these individuals receive appropriate treatment. It is important to note in this context that the judicial officer is not weighing the public interest against the private interest of the defendant. Instead they are weighing two *public interests,* these being the public interest in the defendant receiving an appropriate punishment as against the public interest in such an individual receiving appropriate care and treatment.

In coming to the decision, a judicial officer can have regard to a number of factors including the seriousness of the offence, the purposes of sentencing, the realistically available sentencing options in the event that the offence is proven and the proposed treatment plan.(DPP v El Mawas)

Seriousness of the Offence

In the case of more serious offences the public interest in punishing the offending behaviour will be greater (DPP v El Mawas) and other things being equal it will be harder to persuade a Magistrate to deal with the matter pursuant to Section 32 in the these circumstances. Nonetheless, it should always be remembered that Section 32 is available even in the cases of more serious offences.

In making submissions on this point, regard should be had to the aggravating and mitigating Section 21 A factors. Regarding punishment, it can be submitted that Section 32 is not a “free kick” and that the defendant will have to comply with the treatment regime and the Magistrate can also impose conditions with regard to the defendant’s freedom of movement and actions.

Counsel can also submit that the community’s best interests are served by placing rehabilitation at the centre of any response to the client’s offending behaviour. It can also be noted (with reference to appropriate case law including Confos and El Mawas) that mentally disordered defendants are often poor vehicles for general deterrence. This is something that is repeatedly mentioned in the leading cases on Section 32 and a defence lawyer should obviously make significant reference to this when making submissions on this point.

Sentencing Options and Outcomes

Criminal convictions can (perhaps especially frequently in NSW where judicial discretion has in many cases been severely restricted by Parliament) lead to automatic penalties which may be disproportionately severe in many cases. A situation where this frequently occurs is in respect of driving offences which more often than not carry with them quite severe automatic penalties. This is often something of a "bone of contention" in respect of these offences. Magistrates can be reluctant to deal with traffic matters pursuant to Section 32 at least partly because it is seen by some on the bench as a way of inappropriately avoiding mandatory penalties contained within the relevant legislation.

Final Comments

Section 32 is a provision that all criminal lawyers should have some familiarity with. There are many cases where its use is appropriate and where this is the case it is important to be as best prepared as we possibly can be to assist our clients. I am sure we have all seen cases where a potentially deserving Section 32 application has been refused. This is especially the case because many Magistrates have something of a negative attitude to such applications.

The importance of having a properly prepared Treatment Plan cannot be overstated. This is perhaps especially so in light of the recent Supreme Court decision in *Saunders*. There is little doubt that many of the applications succeed or fail based on the contents of the Treatment Plan. It is therefore absolutely crucial that this document comply with all the essential requirements of the legislation. As a practical matter, it is perhaps also helpful to make sure there is a clear heading "Treatment Plan" above the relevant paragraphs in the medical report that is handed up to support the application. This will hopefully make things clearer for the Magistrate, and perhaps also indicate that the mental health professional who has drafted the report has put a considerable degree of thought and preparation into the Plan. This cannot be emphasised enough. A well prepared and clearly set out Treatment Plan is crucial.

Section 32 applications still only make up a very small percentage of matters dealt with by the Local Court. This may suggest that the Section is being under-utilized by criminal defence lawyers and their clients. I would urge all practitioners to have regard to the possible utility of these provisions when taking instructions in criminal cases. The use of this section may be very much in their client's interests, and I would argue more often than not, in the interests of society more generally.

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