SECTION 32 and SECTION 20BQ APPLICATIONS

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Introduction

At the end of this paper the reader should:

1. Know the legislative and authority background for section 32 and section 20BQ applications.
2. Know which application to be made.
3. Know the relevant issues when making the application.

Can Section 32 and Section 20BQ work together?

Kelly v Saadat-Talab [2008] NSWCA 213 applied Putland v The Queen (2004) 218 CLR 174, Gleeson CJ at 179-180. Held

1. Section 32 does not apply to Commonwealth matters,
2. Section 20 BQ was complete on its face, and
3. Section 20 BQ left no room for section 32 to be applied.

It is suggested that if the client is charged with a state and commonwealth offence together that both section 32 and section 20BQ should be run.

Psychiatrist v Psychologist – which one to use?

1. You can clearly use a Psychiatrist as they can diagnose.
2. If the Psychologist can diagnose then yes you can use a Psychologist.
3. It is suggested that if the Psychologist can not diagnose but there is other evidence that supports the criteria then yes you can use a Psychologist.
4. Ask the Psychologist if they can diagnose.

Suggested Questions to be asked of the report writer - what to ask for?

Based on the legislation and the case law the following questions are suggested. The questions are fluid and are subject to amendments to legislation and further case law. The questions should be adapted to the individual cases and to s. 32 or s.20BQ.

1. Is “the client”, now or at the time of the offence, developmentally disabled?
2. Is “the client”, now or at the time of the offence, suffering from a mental illness?
3. Is “the client”, now or at the time of the offence, suffering from a mental condition for which treatment is available in a mental health facility?
4. Is “the client” a mentally ill person?
5. The degree, if any, to which “the client” was, or is, disabled from being able to control his/her conduct?
6. What treatment plan would you suggest to effectively treat “the client” and to reduce future offending behaviour?
7. The effect a full-time custodial sentence will have on “the client”?

It is also suggested along with specific questions that the definitions from the statutes is also given to the report writer.

Diversion from the criminal law regime

If successful how will it affect their life?
If unsuccessful how will affect their life?
Take hints form the bench.

Section 32 Mental Health (Criminal Procedure) Act 1990

32 Persons suffering from mental illness or condition or cognitive impairment

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

(i) **cognitively impaired**, or
(ii) suffering from **mental illness**, or
(iii) suffering from a **mental condition for which treatment is available in a mental health facility,**

but is **not a mentally ill person**, and

(b) that, on an outline of the **facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate** to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,

the Magistrate may take the action set out in subsection (2) or (3).

(2) The Magistrate may do any one or more of the following:

(a) adjourn the proceedings,
(b) grant the defendant bail in accordance with the bail Act 2013,
(c) make any other order that the Magistrate considers appropriate.

(3) The Magistrate may make an order dismissing the charge and discharge the defendant:

(a) into the care of a responsible person, unconditionally or subject to conditions, or
(b) on the condition that the defendant attend on a person or at a place specified by the Magistrate:

(i) for assessment or treatment (or both) of the defendant's mental condition or cognitive impairment, or
(ii) to enable the provision of support in relation to the defendant's cognitive impairment, or

(c) unconditionally.

(3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the order being made, call on the defendant to appear before the Magistrate.

(3B) If the defendant fails to appear, the Magistrate may:

(a) issue a warrant for the defendant's arrest, or
(b) authorise an authorised officer within the meaning of the Criminal Procedure Act 1986 to issue a warrant for the defendant's arrest.

(3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:

(a) issue a warrant for the defendant's arrest, or
(b) authorise an authorised officer within the meaning of the Criminal Procedure Act 1986 to issue a warrant for the defendant's arrest.

(3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

(3) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).

(4B) A failure to comply with subsection (4A) does not invalidate any decision of a Magistrate under this section.

(4) The regulations may prescribe the form of an order under this section.

(6) In this section:

cognitive impairment means ongoing impairment of a person's comprehension, reasoning, adaptive functioning, judgment, learning or memory that materially affects the person's ability to function in daily life and is the result of damage to, or dysfunction, developmental delay or deterioration of, the person's brain or mind, and includes (without limitation) any of the following:

(a) intellectual disability,
(b) borderline intellectual functioning,
(c) dementia,
(d) acquired brain injury,
(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
(f) autism spectrum disorder.

DEFINITIONS

Cognitive impaired is defined in Section 32 (6) Mental Health (Criminal Procedure) Act 1990.

Mental condition is defined in Section 3 Mental Health (Criminal Procedure) Act 1990.

"mental condition" means a condition of disability of mind not including either mental illness or developmental disability of mind.

Mental illness is defined in Section 4 Mental Health Act 2007

"mental illness" means a condition that seriously impairs, either temporarily or permanently, the mental functioning of a person and is characterised by the presence in the person of any one or more of the following symptoms:
(a) delusions,
(b) hallucinations,
(c) serious disorder of thought form,
(d) a severe disturbance of mood,
(e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)-(d).

Section 16 (1) Mental Health Act 2007 (NSW)

A person is not a mentally ill person or a mentally disordered person merely because of any or more of the following:

…
(j) The person has an intellectual disability or developmental disability.
…

Mental Health Facility is defined in Section 4 Mental Health Act 2007.

A declared mental health facility under section 109 or a private mental health facility under division 2 of Part 2 of Chapter 5.

Section 20BQ Crimes Act 1914 (Cth)

Person suffering from mental illness or intellectual disability

(1) Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:

(a) that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and

(b) that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;

the court may, by order:

(c) dismiss the charge and discharge the person:

(i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or

(ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or

(iii) unconditionally; or

(d) do one or more of the following:

(i) adjourn the proceedings;
(ii) remand the person on bail
(iii) make any other order that the court considers appropriate.

(2) Where a court makes an order under paragraph (1)(c) in respect of a person and a federal offence with which the person has been charged, the order acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.

(3) Where a court makes an order under subsection (1) in respect of a person and a federal offence with which the person has been charged, the court must not make an order under section 19B, 20, 20AB or 21B in respect of the person in respect of the offence.

Relevant Authorities on Section 32

CONFOS v DPP [2004] NSWSC 1159 at [17]-[18] Howie J,

17 In order to determine whether it is more appropriate to deal with the applicant under Part 3 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 a 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.

18 Because the magistrate's jurisdiction under the Act involves a discretionary judgment, what weight is to be given to the various factors that touch upon that judgment will be very much a matter for the particular magistrate. It would be very difficult, if not impossible, for a defendant to convince this Court to intervene in the exercise of that discretion simply on the basis that the magistrate appeared to give more weight to one factor than another. As with any appeal against a discretionary judgment, the basis upon which this Court can intervene in the exercise of the power under s 32 is very limited. The question for this Court is whether the magistrate failed, either actually or constructively, to exercise the discretion conferred on the court by the section.

DPP v EL MAWAS [2006] NSWCA 154 at [75]-[80] McColl JA, Spigelman CJ and Handley JA agreeing.

75 *When one turns to s 32 it can be seen it requires the Magistrate to make at least three decisions. The first is to determine, in accordance with s 32(1)(a), whether the defendant is eligible to be dealt with under that section. That question clearly involves a finding of fact and is properly described as the jurisdictional question: see Singer v Berghouse (No 2) [1994] HCA 40;(1994) 181 CLR 201 at 208-209.*

76 The Magistrate must next determine whether, having regard to the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant (including presumably any information the Magistrate has garnered under s 36), "it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law. That decision clearly calls for the exercise of subjectivity or value judgments in which "…'no one [consideration] and no combination of [considerations] is necessarily determinative of the result' ": Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission at [19]. In my view, as Howie J concluded in Confos, it involves a discretionary decision in which the Magistrate is permitted latitude as to the decision which might be made, a latitude confined only by the subject matter and object of the Act: Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (at [19]).

77 I do not, with respect to the primary judge, regard Howie J as having circumscribed the discretionary judgment exercised at the second stage of the s 32 inquiry. In Confos the Magistrate had rejected an application to deal with the defendant pursuant to s 32 because she concluded that notwithstanding the defendant's mental condition the offences with which he was charged were too serious: see Confos at [15]. Howie J recognised that the second stage inquiry under s 32 required balancing the purposes of punishment and the public interest in diverting a mentally disordered offender from the criminal justice system. His reference to the fact that the discretionary judgment could not be exercised properly without due regard to the seriousness of the offending conduct was, in my view, a proper reflection of the s 32(1)(b) requirement that the Magistrate have regard to the facts alleged in the proceedings.

78 Unlike the primary judge (at [56]), I do not regard Howie J's observations in Confos (at [17]) as having excluded from consideration "when considering the seriousness of the offending conduct, the degree to which the defendant is disabled from being able to control that conduct by limiting consideration to the 'seriousness of the offence' ". Howie J's references to the role of the seriousness of the offence were made to deal with the complaint in Confos that the Magistrate had fettered her discretion, in part, because of her reference to the seriousness of the offence: see Confos at [19].

79 *I accept the respondent's submission, which I do not believe the appellant gainsaid, that the s 32 diversionary regime is available to serious offenders as long as it is regarded, in the Magistrate's opinion, as more appropriate than the alternative. No doubt a Magistrate considering that question will consider whether proceeding in accordance with s 32 will produce a better outcome both for the individual and the community.*

80 *Once the Magistrate has determined that it is more appropriate to deal with the defendant in accordance with s 32, the Magistrate must determine which of the actions set out in subs (2) or (3) should be taken. As Brownie J said in Minister for Corrective Services v Harris & Anor subs (2) permits interlocutory orders to be made pending determination of the proceedings pursuant to s 32(3). The subs (3) decision is also a discretionary decision, akin to the discretion exercised by a sentencing judge.*

DPP v SAUNDERS [2017] NSWSC 760 (16 JUNE 2017) Hulme J. at [32] – [39]

32. In *Confos v Director of Public Prosecutions (NSW)* [2004] NSWSC 1159, Howie J dismissed an appeal from the refusal of a magistrate to deal with a case under s 32. He noted (at [17]) that a magistrate considering an application under that provision was performing "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". He described this as "a discretionary judgment upon which reasonable minds may reach different conclusions in any particular case". He also observed that the discretion "cannot be exercised properly without due regard being paid to the seriousness of the offending conduct".

33. The application of s 32 of the *Mental Health (Forensic Provisions) Act* was discussed in some detail in *Director of Public Prosecutions v El Mawas* [2006] NSWCA 154; 66 NSWLR 93. McColl JA explained (at 109-110 [75]-[80]) that when an application is made for a defendant to be dealt with under s 32, a magistrate is required to "make at least three decisions":

1. Whether the defendant is eligible to be dealt with under s 32. That is the case if it appears that the defendant is not a mentally ill person but who is (or was at the time of the alleged offending) developmentally disabled, or suffering from a mental illness, or suffering from a mental condition for which treatment is available in a mental health facility: s 32(1)(a).

2. Having regard to the facts alleged, or such other evidence as the magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of Part 3 than otherwise in accordance with the law: s 32(1)(b).

3. Once it has been determined that it is more appropriate to deal with the defendant under s 32, which of the actions set out in sub-ss (2) or (3) should be taken.

34. There are two cases which referred to the need for there being "an effective treatment plan". In *Perry v Forbes* (Supreme Court of New South Wales (Smart J), 21 May 1993, unrep), which was cited by the police prosecutor to the magistrate in the present case, Smart J said that there needed to be "an effective treatment plan and one which was likely to ensure that there would not be a repetition of the incident in question or the occurrence of some other unfavourable incident". This observation does not assist greatly in resolving the present case. His Honour did not elucidate what he considered would comprise "an effective treatment plan", although one may assume he had in mind a plan that is reasonably specific in detail.

35. In *Khalil v His Honour, Magistrate Johnson* [2008] NSWSC 1092, Hall J said (at [85](5)):

> "In formulating the judgment for which s 32(1)(b) calls, a proposed course of treatment, including, in particular, the existence and contents of a treatment plan, may be considered and given such weight as the Magistrate considers appropriate in making that judgment ... "

36. This, again, highlights the significance of there being a "treatment plan" but does not otherwise assist as to its content and whether particular persons or places need to be nominated. Again, however, the concept of there being “a plan” signifies the need for some detail about the proposed assessment and/or treatment of the alleged offender.

37. Finally, in *Quinn v Director of Public Prosecutions* [2015] NSWCA 331, Basten JA (at [7]) endorsed what had been said by Adams J in *Mantell v Molyneux* [2006] NSWSC 955; 68 NSWLR 46 at [47]- [48] to the effect that in deciding whether to proceed by way of diversion under s 32 it was appropriate (if not required) that a magistrate have regard to the consequences of making an order under s 32(2) or (3), including the manner in which any potentially appropriate condition might be formulated and might operate. (Macfarlan JA agreed (at [11]); Adamson J stated as much at [31].) While not stated explicitly in the legislation, I infer that, like in the cases just referred to, it was contemplated that a magistrate would be provided with a plan containing some detail as to what was proposed for assessment of the defendant’s mental condition or treatment or both.

38. It is clearly discernible from the terms of s 32 that its purpose is to allow, in appropriate cases, for accused persons with a developmental disability, a mental illness, or a mental condition for which treatment is available in a mental health facility, to be diverted from the criminal justice system. Such diversion may or may not be subject to conditions. It may be into the care of a responsible person or subject to a requirement that the person receives assessment of a mental condition and/or treatment.

39. The decision whether to divert such a person in any of the permissible ways is discretionary and is based upon a consideration of a variety of factors. Those factors include the seriousness of the alleged offence, the purposes of punishment, the public interest in diverting mentally disordered persons from the criminal justice system, and the proposed treatment plan.

EDWARDS v DPP [2012] NSWSC 105 at [16] – [20] Hislop J:

16 The pre-conditions clearly require evidence that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

(a) suffering from a mental condition;

(b) for which treatment is available in a mental health facility;

(c) but is not a mentally ill person.

17 Dr Westmore expressly provides evidence in his report of facts (a) and (c). He does so in clear terms. However, he ignores the requirement that it be established that treatment is available in a mental health facility for the plaintiff's mental condition. As his Honour observed, this requirement is as much an essential ingredient in enlivening the court's jurisdiction as are any of the other tests. Dr Westmore merely says that because the plaintiff suffers from a mental condition, he could be considered under s 32 if the court felt it were appropriate.

18 If, as the parties accepted, Dr Westmore is an experienced practitioner, then the inference to be drawn is that the omission of a reference to the availability of treatment in a mental health facility for the plaintiff's condition was deliberate. Otherwise the appropriate inference is that,

through an inadvertent omission, or because he had a fundamental misconception as to the requirements of the section he had not considered whether treatment was available in a mental health facility for that mental condition.

19 The absent evidence cannot be supplied by inference from the "treatment plan" suggested by Dr Westmore. The treatment plan provides no basis for any such inference. It consists of a number of components, namely a referral to the general practitioner, Dr Fong, for the plaintiff's various medical problems, a rehabilitation programme to enter into sobriety so as not to aggravate his existing brain damage and a referral to a medical health service for support due to stress, depression and the risk of relapsing back into alcohol abuse. None of these interventions, on its face, involves the provision of treatment for the mental condition of alcohol related organic brain damage.

20 In my opinion, it was well open to his Honour to conclude that there was a lack of evidence of an essential pre-condition. The application pursuant to s 32 was correctly dismissed.

Mario Licha
Barrister
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