WHAT TO DO WHEN A SECTION 32 APPLICATION IS REFUSED

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1. INTRODUCTION

When making a Section 32 application[1] in the Local Court a practitioner must have alternative options prepared in the event the application fails.[2] This is particularly important in the case of traffic matters where resistance and opposition to the use of the diversionary regime is frequently encountered. The recent shooting death of a police officer in Tamworth by an alleged repeat traffic offender, reportedly subject to a conditional Section 32 order at the time[3], could make it more difficult to obtain Section 32 orders in the future.

Where a Section 32 application is unsuccessful a client will need to be advised in relation to their remaining options, including:

- making an application to have the Magistrate disqualify him/herself on the basis of actual or apparent (apprehended) bias;
- appealing to the Supreme Court;
- making a second Section 32 application in the Local Court;
- pleading guilty and making submissions on sentence; and
- making a second Section 32 application on appeal in the District Court

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[1] An application pursuant to s.32 *Mental Health (Forensic Provisions)* Act 1990, hereafter a "Section 32 application".

[2] Hopefully a well prepared Section 32 application will be successful. For assistance in preparing and making a Section 32 application see Weeks. K., *"To Section 32 or Not – Applications under s.32 Mental Health (Forensic Provisions) Act 1990 in the Local Court* (2010) 49(5) LSJ 49 . A copy can be downloaded at www.brrt.net.au (see the Mental Health section).

[3] *Court told shooting suspect to take medication,* Sydney Morning Herald 7 March, 2012 at http://www.smh.com.au/nsw/court-told-shooting-suspect-to-take-medication-20120306-1uieb.html

2. MAKING AN APPLICATION TO DISQUALIFY

Prior to the enactment of the *Mental Health (Criminal Procedure) Amendment* Act 2005 a Magistrate was required by s.34 of the Act (now repealed) to disqualify himself of herself for hearing the proceedings further if a Section 32 application was refused. Concerns in relation to "spurious applications" and "forum shopping", the practical difficulties which arose in regional courts and the delay in the finalisation of proceedings led to the repeal of the section[4].

Nevertheless the common law in relation to bias remains and a Magistrate can be asked to disqualify himself or herself on the basis of actual or apparent (apprehended) bias.

The Rule against Bias

The rule against bias is fundamental to natural justice[5] and reflects the principle that "justice should not only be done, but should manifestly … be seen to be done".[6]

Practitioners should think very carefully before an application to disqualify is made after a Magistrate refuses a Section 32 application. Some magistrates will react negatively to any suggestion they have not approached a matter with the impartiality and objectivity required of a judicial officer. A good ongoing working relationship with a Magistrate is particularly important to practitioners in smaller metropolitan or regional courts where they appear on a regular basis:

> "To say of a person who holds judicial office, that he has failed to observe a rule of natural justice, may sound to a lay ear as if it were a severe criticism of his conduct, which carries with it moral overtones"[7]

Furthermore, it might make it more difficult for the practitioner to persuade the Magistrate to extend leniency on sentence should a plea of guilty be entered after the Section 32 is refused. There is also the possibility that the application to disqualify

[4] Second Reading Speech, Parliamentary Debates, Legislative Assembly, 8 November 2005.
[5] Forbes. J.R.S. (2010) *Justice in Tribunals*, Third Edition, The Federation Press, at p.274.
[6] *R v Sussex Justices; Exparte McCarthy* [1924] 1 KB 256 at 259 per Hewatt LCJ as cited by Forbes J.R.S. (2010) Ibid. at p.282.
[7] *Mahov v Air New Zealand* [1984] AC 808 at 838 per Lord Diplock as cited by Forbes. J.R.S. (2010) Ibid. at p.279.

will suffer the same fate and the practitioner will be "back to square one". A Magistrate may well suspect there are ulterior motives behind a practitioner's application to disqualify:

> "An apprehension that a particular judge is likely to decide against the applicant is not the same as a reasonable apprehension of bias. Care must be taken to ensure that claims of bias do not become a facile form of "judge-shopping".[8]

Bias may be actual or apparent ("apprehended"). Assuming the client instructs a practitioner to proceed with an application to disqualify on the basis of bias, the practitioner ought to consider basing the application on apparent ("apprehended") bias rather than on actual bias.

> "A party who suspects actual bias should consider carefully before making that allegation. It is pointless, or worse, to make a grave charge, entailing a heavy burden of proof, when a more moderate approach would suffice … an allegation of apparent (or apprehended) bias usually serves as well, or better, than a more dramatic complaint … A finding of apprehended bias is enough to invalidate the decision …. No doubt there are cases in which a judge senses something worse, and some findings of apprehended bias are polite fictions….. But apprehended bias is a more tactful plea"[9].

Apparent (Apprehended) Bias

Should the practitioner suspect bias, any claim of bias and application to disqualify must be made without delay otherwise delay can be fatal[10].

The test for determining whether a Magistrate should be disqualified on the basis of apparent (apprehended) bias is:

> "whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide".[11]

In considering the issue, the practitioner ought to consider the question of whether a reasonable and informed bystander would suspect that the tribunal was biased.[12]:

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[8] Forbes. J.R.S. (2010) Ibid. at p.283.
[9] Ibid., at p.279.
[10] Ibid. at pp.303-304.
[11] *Johnson v Johnson* (2000) 201 CLR 488 at [11] as cited by the Judicial Commission of NSW, *Disqualification for Bias*, Civil Trials Bench Book, retrieved via http://www.judcom.nsw.gov.au/publications/benchbks/civil/disqualification_for_bias.html
[12] Forbes, J.R.S. (2010) Ibid. at p.279

> "A decision about bias is not to depend on a particular judge's opinion, but on an objective assessment of the impression that the tribunal's conduct would be likely to make on a hypothetical informed and reasonable observer"[13]

It is not necessary to prove that the observer would probably suspect bias[14]:

> "Deciding whether (an adjudicator) might not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how [he or she] will in fact approach the matter. The question is one of possibility (real and not remote), not probability .."[15]

If the application to disqualify on the basis of bias is successful the proceedings will be transferred to another Magistrate where the practitioner can make another Section 32 application or enter a plea(s) of guilty or not guilty on behalf of their client.

If the application is not successful, the Magistrate's decision refusing the application to disqualify could be taken up to the Supreme Court. Any error of law made by the Magistrate is refusing the Section 32 application can also be the subject of an appeal to the Supreme Court.

3. SUPREME COURT APPEAL

An appeal against a Magistrate's decision in refusing a Section 32 application in the Local Court can be taken to the Supreme Court pursuant to s.53(3)(b) *Crimes (Appeal and Review) Act* 2001[16]. Any person, against whom an interlocutory order has been made by the Local Court with respect to summary proceedings, may appeal to the Supreme Court but only on a question of law alone and only with leave of the Court. The narrow circumstances in which an appeal will lie to the Supreme Court probably explains the limited judicial consideration of Section 32 or its precursor[17].

[13] Forbes, J.R.S. (2010) Ibid. at p.280 citing *Webb v The Queen* (1994) 181 CLR 41 at 50-52.
[14] Forbes, J.R.S. (2010) Ibid. at p.280
[15] Forbes, J.R.S. (2010) Ibid. at p.281 citing *Ebner v OfficialTrustree in Bankruptcy* (2000) 205 CLR 337 at 345 per Gleeson CJ, Gummow and Hayne JJ & *Antouu v The Queen* (2006) 80 ALJR 497 at [82].
[16] hereafter "CARA".
[17] *DPP v El Mawas* [2006] NSWCA 154 per McColl JA at [59}

As Section 32 confers a very wide discretion[18] and gives Magistrates "powers of an inquisitorial or administrative nature"[19] it is necessary to demonstrate an error in the sense articulated by the *High Court in House v The King* (1936) 55 CLR 499[20]. In that case it was held:

> "… the judgment complained of, namely, sentence to a term of imprisonment, depends upon the exercise of a judicial discretion by the court imposing it. The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. Unlike courts of criminal appeal, this court has not been given a special or particular power to review sentences imposed upon convicted persons. Its authority to do so belongs to it only in virtue of its general appellate power. But even with respect to the particular jurisdiction conferred on courts of criminal appeal, limitations upon the manner in which it will be exercised have been formulated. Lord *Alverstone* L.C.J. said that it must appear that the judge imposing the sentence had proceeded upon wrong principles or given undue weight to some of the facts (*R. v. Sidlow*[).[21]

In *DPP v El Mawas*, the NSW Court of Appeal confirmed the diversionary powers have to be exercised in accordance with procedural fairness requirements.[22]

In accordance with procedural fairness, a party must be given an opportunity to address the court on relevant matters and reasons must be provided for a decision.[23]

Assuming the practitioner forms the view an error of law was made by the Magistrate in hearing and refusing a Section 32 application, the practitioner must give careful consideration as to whether it is worthwhile appealing to the Supreme Court given the potential liability of the client for a costs order if the appeal is unsuccessful.

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[18] *DPP v El Mawas* per Spigelman CJ at [4] and *Mantell v Molyneux* [2006] NSWSC 955 per Adams J at [40].
[19] *DPP v El Mawas* per McColl JA at [74]
[20] *Mantell v Molyneux* [2006] at [38]
[21] *House v The King* per Dixon, Evatt and McTiernan JJ
[22] *DPP v El Mawas* per McColl JA at [73]
[23] See *Procedural Fairness*, Judicial Commission of New South Wales, Bench Books, retrieved via http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/procedural_fairness.html/?searchterm=procedural%20fairness. Section 32(4A) also requires the Magistrate to provide reasons.

Furthermore, even if the appeal is successful the matter is likely to be remitted back to the Magistrate with an order the proceedings be determined in accordance with law. Some magistrates may not welcome the practitioner back with open arms and may simply refuse a further Section 32 application on a lawful basis (for example, because, after the balancing exercise takes place, it is more appropriate for the client to be dealt with in accordance to law or because the offence is too serious).

If the practitioner decides there is no merit in making an application to disqualify or in appealing to the Supreme Court, having the charge(s) finalised by way of a plea(s) of guilty is likely to be the best option.

Furthermore, once the client is convicted and/or sentence in the Local Court, the client has a further option of appealing to the District Court where a Second 32 application can be made. From a practical point of view making a second Section 32 application in the Local Court may not be possible.

4. MAKING A SECOND SECTION 32 APPLICATION IN THE LOCAL COURT

There is no prohibition on making more than one Section 32 application in the Local Court. However, it may be difficult to persuade a Magistrate to hear a second 32 application when he or she has rejected the first. Given the practical difficulties that can arise in an application to disqualify on the grounds of bias and the limitations in an appeal to the Supreme Court, it may be that a practitioner is effectively prevented from making a second or subsequent Section 32 application in the Local Court after the exercise of the discretion has been refused.

Nevertheless, practitioners are encouraged to consider making a further Section 32 application where a reasonable period of time has elapsed and/or there has been a change in circumstances. It may be that a client has settled into a treatment program and real improvements have been in his/her mental health.

A section 32 application can be made at any stage of the proceedings[24]. Assuming a plea of guilty has not already been entered and it is not necessary to traverse a plea, the client also has the option of entering a plea of not guilty and having the

[24] s.32(1)

matter set down for hearing. A further Section 32 application could then be made prior to or after the hearing.

5. PLEADING GUILTY AND MAKING SUBMISSIONS ON SENTENCE

When making a Section 32 application in the Local Court, a practitioner must be well prepared to make submissions on sentence should the application fail. In many cases, a practitioner will receive instructions to proceed by way of a plea of guilty and proceed to sentence. Any reports and other material tendered in the unsuccessful Section 32 application can be used in mitigation of sentence.

For many years the common law and more recently sentencing legislation, has permitted courts to take into account an offender's mental health or cognitive impairments on sentence[25].

The mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to sentencing process.[26] In a recent decision of the Supreme Court it was said by Schmidt J:

> "An offender who is mentally ill may plainly enough be able to understand the wrongfulness of his or her actions and still be unable to make reasonable judgements or control his or her faculties or emotions"[27].

In *R v Hemsley*[28] the Court of Criminal Appeal described the ways in which mental illness is relevant in sentencing:

> "Mental illness may be relevant – and was relevant in the present case – in three ways. First, where mental illness contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced; there may not then be the same call for denunciation and the punishment warranted may accordingly be reduced: *Henry* at [254]; *Jiminez* [1999] NSWCCA 7 at [23]; *Tsiaras* [1996] 1 VR 398

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[25] For a detailed discussion on the legal principles see New South Wales Law Reform Commission, Consultation Paper 6 (2010) *People with Cognitive and Mental Health Impairments in the Criminal Justice System : Criminal Responsibility and Consequences,* Chapter 8 Sentencing: Principles and Options, retrieved via http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cp06chp8. See also the discussion by Dan Howard SC and Dr. Bruce Westmore (2010) *Crime & Mental Health Law in New South Wales* LexisNexis Butterworths at pp.520-557.
[26] *DPP (Cth) v De La Rosa* [2010] NSWCCA 194 at [178]; *David Morse (OSR) v Chan & Anor* [2010] NSWSC 1290 at [72] per Schmidt J.
[27] *David Morse (OSR) v Chan & Anor* at [69]
[28] [2004] NSWCCA 228 per Grove J Dowd J & Sperling J

> at 400; *Lauritsen* [2000] WASCA 203; (2000) 114 A Crim R 333 at [51]; *Israil* [2002] NSWCCA 255 at [23]; *Pearson* [2004] NSWCCA 129 at [43].
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> Secondly, mental illness may render the offender an inappropriate vehicle for general deterrence and moderate that consideration: *Pearce* (NSW CCA, 1 November 1996, unreported); *Engert* (1995) 84 A Crim R 67 at 71 per Gleeson CJ; *Letteri* (NSW CCA, 18 March 1992, unreported); *Israil* at [22]; *Pearson* at [42].
>
> Thirdly, a custodial sentence may weigh more heavily on a mentally ill person: *Tsiaras* at 400; *Jiminez* at [25]; *Israil* at [26].
>
> A fourth, and countervailing, consideration may arise, namely, the level of danger which the offender presents to the community. That may sound in special deterrence; *Israil* at [24].[29]

Submissions on Sentence

A number of submissions in mitigation of sentence can be made by the practitioner on sentence in relation to a client with mental health or cognitive impairments. They include:

- the offence was impulsive, without planning or pre-meditation, consistent with the cognitive impairments associated with the disorder or illness diagnosed;

- where mental illness contributes to the commission of the offence in a material way, the client's moral culpability may be reduced, there may not be the same call for denunciation and the punishment warranted may accordingly be reduced[30]. However, the existence of a causal relationship will not automatically result in a lesser sentence.[31]

- the client is an inappropriate vehicle for general deterrence and his/her illness may moderate that consideration[32];

- greater weight can be given to rehabilitation[33];

- the risk of re-offending is low (if the client has responded well to treatment);

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[29] *R v Hemsley* at [33]-[36]
[30] *David Morse (OSR) v Chan & Anor* at [70]; *R v Hemsley* [2004] NSWCCA 228 at [33]-[36] *R v Henry* [1999] NSWCCA 111 at [254]; *R v Jiminez* [1999] NSWCCA 7 at [23];
[31] *R v Engert* (1995) 84 A Crim R 67 per Gleeson CJ at 71.
[32] *R v Hemsley* at [33]-[36]; *David Morse (OSR) v Chan & Anor* at [70] ; *R v Pearce* NSWCCA Unreported 1 November 1996; *R v Engert* at 71 per Gleeson CJ;
[33] *R v Engert* (1995) 84 A Crime R 67 per Gleeson CJ at [71]

- a custodial sentence will weigh more heavily on the mentally ill client[34];

However, practitioners must be aware that any danger which their client may present to the community may sound in special deterrence.[35]

Section 10

In appropriate cases a practitioner may be able to persuade a Magistrate to exercise his or her discretion pursuant to Section 10 *Crimes (Sentencing Procedure) Act* 1999[36] after a Section 32 application is refused[37].

Section 10(3) CSPA provides:

> In deciding whether to make an order referred to in subsection (1), the court is to have regard to the following factors:
>
> (a) the person's character, antecedents, age, health and mental condition ...

In *David Morse (OSR) v Chan Anor* Schmidt J said:

> "The conclusion that an order under s 32 of the *Mental Heath Act* 2007 was not available did not preclude the exercise of the discretion under s 10. In determining whether the discretion should be exercised, his Honour considered the factors specified in s 10(3) …
>
> … It seems to me that contrary to the tenor of the plaintiff's argument, it must be the case that there may be circumstances where a just and proper exercise of the instinctive synthesis involved in the sentencing exercise, will result in the conclusion that while an application brought under s 32 of the *Mental Health Act* has not been made out, the exercise of a discretion under s 10 of the *Crimes (Sentencing Procedure) Act*, is properly available. As well as all of the other matters which must be considered in the sentencing exercise, that will necessarily require a consideration of the evidence as to the nature of the offence, the defendant's mental illness and its consequences, both at the time of the offence and at sentencing, as well as the other matters referred to in s 10(3)....
>
> It is a consideration of those matters in the light of the objective seriousness of the offences in question, which may bring a s 10 bond into the range of sentences properly available for a particular offence. "[38]

[34] *R v Hemsley* at [33]-[36]; *David Morse (OSR) v Chan & Anor* at [70];
[35] R v Israil at [24]
[36] Hereafter "Section 10" and the "CSPA".
[37] For example, in traffic offences where many Magistrates refuse to use the diversionary regime.
[38] *David Morse (OSR) v Chan & Anor* at [91], [96] & [97].

A decision to exercise the discretion in the case of serious offences does not necessarily involve error although it will be more difficult to obtain a Section 10 in such cases.[39]

The exercise of the discretion does not require a causal nexus between the mental illness and the offence [40] as Section 10(3) is not as limited as s.21A(3)(j) (see further below).

Section 10(3) permits consideration of a mental illness which has only arisen after the offence was committed[41]:

> "Full awareness of the consequences of an offender's actions, at the time that the actions which resulted in the commission of the offence occurred, may be absent where a mental disorder or abnormality results in less control of an offender's cognitive facilities or emotional restraints; in a lack of ability to make reasoned or ordered judgments; or in a limited appreciation of the wrongfulness of the act, or of its moral culpability, which although falling short of avoiding criminal responsibility, does justify special consideration upon sentencing. Whether it is inexpedient to inflict any punishment (other than nominal punishment) on an offender suffering a mental illness when being sentenced, or whether it is expedient to release the offender on a good behaviour bond, may raise these and other considerations as to the offender's state at the time of sentence, given the mental illness suffered[42]

Section 21A

Section 21A(3) lists the mitigating factors which can be taken into account on sentence and provides:

> The mitigating factors to be taken into account in determining the appropriate sentence for an offence are as follows:
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> … (h) the offender has good prospects of rehabilitation, whether by reason of the offender's age or otherwise …
>
> … (j) the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability…

As noted above, in *David Morse (OCR) v Chan* the Supreme Court confirmed s.21A(3)(j) is more strict than s.10(3) in its requirements[43]. While "disability" was found to include mental illness, s.21A(3)(j) is confined to a mental illness which has

[39] Ibid at [92]
[40] Ibid at [66].
[41] Ibid at [74]
[42] Ibid at [75]
[43] Ibid at [56]

the result that the offender "was not fully aware of the consequences of his or her actions"[44].

Nevertheless, as noted above the significance of mental illness of an offender in the sentencing exercise has long been accepted at common law [45] and practitioners should be familiar with the relevant case law.

In the event the client is not satisfied with the sentence ultimately imposed by the Local Court, a second Section 32 application can be made on appeal in the District Court.

6. MAKING A SECOND SECTION 32 APPLICATION IN THE DISTRICT COURT

Should a client be sufficiently resourced, a further Section 32 application can be made in the District Court on appeal against conviction and/or sentence which is heard *de novo*.

Of all the options available to a client after an unsuccessful Section 32 application, making a second Section 32 application on appeal will be the better option in most cases. The client cannot face a worse result on appeal. As practitioners would be aware, the Court must indicate if a more severe sentence is contemplated on appeal (known as a *Parker direction*[46]). In many respects the client will have nothing to lose by appealing apart from the time and cost involved.

While there is no automatic right of appeal against a Magistrate's refusal to make a Section 32 order, practitioners will be aware that any person who has been convicted or sentenced by the Local Court has an automatic right of appeal to the District Court against the conviction or sentence (or both)[47].

An appeal against conviction and/or sentence does not look at whether a Magistrate committed an error. In determining an appeal against conviction and/or sentence the

[44] Ibid at [56]
[45] *DPP v El Mawas* per McColl JA at [71]
[46] *Parker v DPP* (1992) 28 NSWLR 282 at 295
[47] ss.11 & 20 CARA

District Court may exercise any function that the Local Court could have exercised in the Local Court proceedings[48]. This includes making a Section 32 order[49].

When lodging an appeal, a practitioner will need to decide whether to lodge a "severity appeal" or an "all grounds" appeal. In one appeal in which the writer was involved Registry staff at Burwood Local Court insisted the appeal had to be lodged as an "all grounds" appeal as a conviction had been entered and a Section 32 application sought an order without conviction. Elsewhere, registry staff have been ambivalent. There are advantages and disadvantages with both.

Severity Appeal

The advantage of lodging a "severity appeal" is the appeal (and any Section 32 application) is likely to be heard and determined with little delay thus minimising the cost to the client.

An appeal against sentence is by way of a rehearing of the evidence given in the Local Court proceedings, although fresh evidence may be given on appeal.[50]

All Grounds Appeal

The advantage of lodging an "all grounds appeal" is that transcripts will be available to the Court and practitioner[51] which may assist the practitioner when it comes to making submissions on a Section 32 application for a second time . However, significant delay could be encountered in the preparation of transcripts and/or obtaining a hearing date and the practitioner and the client must be aware of the risk of escalating costs.

An appeal against conviction is by way of rehearing on the basis of the evidence given in the Local Court proceedings[52]. Fresh evidence may be given only by leave.

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[48] ss.11 CARA
[49] see also *Mackie v Hunt* (1989) 19 NSWLR 130 at 139 per Campbell J
[50] s.17 CARA
[51] s.18(3) CARA
[52] s.18(1) CARA.

Leave may only be granted by the Court if it is satisfied it is in the interests of justice to do so.[53]

7. CONCLUSION - DON'T DESPAIR !

Practitioners may be reluctant to make further Section 32 applications on behalf of clients after a Section 32 application is refused. This is to be discouraged. Every Section 32 application will be heard and determined differently and the practitioner will learn something each time. Given the wide discretion given to Magistrates, the latitude permitted as to the decision that might be made and the breadth of the inquiry involved[54], different Magistrates will approach the provisions in different ways and vastly different results will be obtained:

> "It is a discretionary judgment upon which reasonable minds may reach different conclusions in any particular case"[55].

Many people come into contact with the criminal justice system because of cognitive and mental health impairments. The diversionary regime has been described as a legislative innovation"[56] embodying a "therapeutic justice initiative"[57] reflecting a "failure of social services and traditional court systems to cope with major social problems"[58]. Section 32 orders have the potential to produce positive outcomes.[59] Achieving a positive outcome is the primary objective of the criminal law practitioner and the practitioner is of fundamental importance to the diversionary regime:

> "Obviously, s.32 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 a defendant's legal representative … Defendants with a cognitive impairment remain at risk of missing out on the benefits of these diversionary measures in the absence of a more systematic means of assessing their impairment".[60]

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[53] s.18(2) CARA
[54] *DPP v El Mawas* per McColl JA at [74]
[55] *DPP v Confos* [2004] NSWSC 1159 per Howie J at [17]
[56] Gotsis T. & Donnelly H. Judicial Commission of NSW, Monograph 31, *Diverting Mentally Disordered Offenders in the NSW Local Court,* March 2008, at p. 29.
[57] Ibid. at p. 20.
[58] Ibid. at p.20 citing Frieberg, A. *Non-adversarial approaches to criminal justice* (2007) 16(4) Journal of Judicial Administration 205 at 217.
[59] 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.
[60] New South Wales Law Reform Commission Consultation Paper 7 People *with Cognitive and Mental Health Impairments in the Criminal Justice System: Diversion* (2010) at p.49.

Fearless advocacy is the duty of the advocate and practitioners should not despair if they fail to persuade a Magistrate to utilise the diversionary regime on one or more occasions. Eventually a practitioner will have success in making Section 32 applications. In doing so, practitioners may be of valuable assistance to their clients and the wider community in identifying and addressing any underlying reasons for offending conduct and in overcoming some of the adverse outcomes that are far too often associated with mental ill-health.

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