Making Successful Section 32 Applications

Karen Espiner, Accredited Criminal Law Specialist
Younes + Espiner Lawyers
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A. INTRODUCTION

Preparing and presenting a section 32 application can be one of the more challenging elements of criminal law, particularly when dealing with serious offences. This paper unpacks the challenges a practitioner is likely to face in the preparation and presentation of section 32 applications.

A number of comprehensive and immensely helpful papers and resources relating to section 32 applications are already readily available online and I would encourage all criminal law practitioners to also seek out and consider these.[1] This paper does not simply re-state issues which have already been covered in previous papers and presentations, nor is it intended to be a "one-stop-shop" guide. Rather, it aims to be a practical guide to assist in preparing and presenting section 32 applications in the Local Court, with particular focus on recent legislative changes and important cases and principles.[2]

It is also important to note at the outset that this paper does not address a number of other legal avenues which may be available to defendants who suffer from mental health disorders such as section 33 applications, issues of fitness to plead (whether in the Local Court or higher Courts), the defence of not guilty by reason of mental illness, or non-insane automatism. Nor does it address the Commonwealth equivalent of section 32 applications:

[1] See, for example, the Local Court Bench Book (https://www.judcom.nsw.gov.au/publications/benchbks/local/mental_health_forensic_provisions_act.html), various resources by the Intellectual Disability Rights Service (www.idrs.org.au), various papers published on the Criminal CPD website (www.criminalcpd.net.au) and various papers and presentations by Jane Sanders from the Shopfront Youth Legal Centre and Karen Weeks from CMH Lawyers.

[2] I have endeavoured to state the law as at February 2020. Thank you in particular to Meg Connell for her invaluable assistance in the research and preparation of this paper.

section 20BQ applications. Again, the readily available online resources should be consulted for these types of matters.[3]

B. THE LEGISLATION

A number of important amendments were made to section 32 as a result of the *Justice Legislation Amendment Act 2017* (NSW).[4] Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) (**MHFP Act**) now states:[5]

> ***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. ~~developmentally disabled~~ 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, for assessment of the defendant's mental condition or treatment or both, or~~ 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.*

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[3] See, for example, 'The Defence of Mental Illness' chapter in 'Crime and Mental Health Law in New South Wales', authored by Dan Howard and Dr Bruce Westmore, as well as papers by (now) Beckett DCJ (https://www.publicdefenders.nsw.gov.au/Documents/Not%20guilty%20mental%20illness.pdf) and Troy Anderson and Emma Manea. (https://www.publicdefenders.nsw.gov.au/Documents/Not%20guilty%20mental%20illness.pdf).

[4] These amendments commenced on 28 August 2017 and were precipitated by the reform recommendations in the NSW Law Reform Commission's 2012 paper 'People with cognitive and mental health impairments in the criminal justice system – Diversion' (Report 135, 2012).

[5] For ease of reference, in this paper the 2017 amendments appear in red underlined text.

(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.*

(4) *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.*

(5) *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.

Other relevant sections of the MHFP Act are as follows:

32A Reports from treatment providers

(1) *Despite any law, a person who is to assess another person's mental condition or provide treatment to another person in accordance with an order under section 32 (3) (a "treatment provider") may report a failure to comply with a condition of the order by the other person to any of the following:*
(a) an officer of Community Offender Services, Probation and Parole Service,
(b) an officer of the Department of Justice,
(c) any other person or body prescribed by the regulations.

(2) *A treatment provider may include in a report under this section any information that the treatment provider considers is relevant to the making of a decision in relation to the failure to comply concerned.*
(3) *A report provided under this section is to be in the form approved for the time being by the Director-General of the Attorney General's Department.*

36 Means by which Magistrate may be informed

For the purposes of this Part, a Magistrate may inform himself or herself as the Magistrate thinks fit, but not so as to require a defendant to incriminate himself or herself.

Important definitions

The legislative definitions of a number of words and phrases in section 32 should be noted:

- *"cognitive impairment"* – see s.32(6) MHFP Act (above).

- *"mental condition"* means a condition of disability of mind not including either mental illness or developmental disability of mind: s.3 MHFP Act.

- *"mental health facility"* means a declared mental health facility or a private mental health facility: s.4 *Mental Health Act 2007* (NSW).

- *"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, or
    e) sustained or repeated irrational behaviour indicating the presence of any one or more of the symptoms referred to in paragraphs (a)–(d): s.4 *Mental Health Act*.

- A person is a *"mentally ill person"* if the person is suffering from mental illness and, owing to that illness, there are reasonable grounds for believing that care, treatment or control of the person is necessary:
    a) for the person's own protection from serious harm, or
    b) for the protection of others from serious harm: s.14 *Mental Health Act*.

- A *"treatment provider"* is a person who is to assess another person's mental condition or provide treatment to another person in accordance with an order under section 32(3)(a): s.32A MHFP Act.

C. THE SECTION 32 TEST

The legislation makes clear that an application under section 32 requires a Magistrate to

make three decisions:

1. Whether the defendant is eligible to be dealt with under section 32 (**the jurisdictional question**).

2. Whether it is more appropriate to deal with the defendant in accordance with the provisions of section 32 than otherwise in accordance with law (**the balancing exercise**).

3. If so, which of the actions set out in section 32(2) or 32(3) should be taken.

Timing

A section 32 application can be made at any time during the course of the hearing of proceedings before a Magistrate.

There is no requirement for a plea to be entered prior to making a section 32 application, however often Registrars and Magistrates require a plea to be entered prior to the section 32 application being listed and/or made. Arguably this approach is inconsistent with section 36 MHFP Act, which states that a Magistrate may not require a defendant to incriminate himself or herself, however it is difficult to identify any actual prejudice to a defendant who is required to enter a plea prior to making a section 32 application given that they will be required to do so should the application be refused and it might therefore be wise for practitioners to take a more practical approach if faced with this situation.

In my experience it is not uncommon for Magistrates to have some hesitation in granting a section 32 application if a plea of not guilty has been entered (or indicated); ostensibly because a defendant has not acknowledged his or her wrongdoing. It should be remembered that section 32 is a diversionary process, however practitioners should nevertheless advise defendants of this possibility and obtain clear instructions from them about how to plead if required to do so.

Further section 32 applications

There is also no prohibition in the legislation on making more than one section 32 application in the Local Court, however a Magistrate may require submissions in support of a further

section 32 application being made.

If there has been a change in circumstances that would warrant the making of a further application, consideration should be given to this being pursued.

D. STEP 1: THE JURISDICTIONAL QUESTION

Whether a defendant is eligible to be dealt with under section 32 is a jurisdictional question and involves a finding of fact: ***DPP v El Mawas* (2006) 66 NSWLC 93** at [75].

The Court must be satisfied, on balance, that the defendant:

1. either <u>is</u> (at the time of making the section 32 application), or <u>was</u> (at the time of the alleged offence):
    - cognitively impaired, or
    - suffering from mental illness, or
    - suffering from a mental condition for which treatment is available in a mental health facility

and

2. is not a mentally ill person.

The jurisdictional question must be answered by reference to medical evidence, usually by way of an expert report from either a psychologist or a psychiatrist. Consideration should also be given to whether a more specialised psychologist or medical practitioner should be retained. A neuropsychologist, for example, might be required for a defendant with an intellectual disability or acquired brain injury, while a psycho-geriatrician might be required for a defendant with dementia.
A case worker or support worker may also be best placed to prepare a treatment / support plan for some defendants.

In ***Jones and Anor v Booth and Anor* [2019] NSWSC 1066** the Supreme Court (Johnson J, sitting alone) provided some important guidance on whether an expert medical report should be obtained by a psychologist or psychiatrist. That guidance is found from [43]

onwards and can be summarised as follows:

- The *Evidence Act* does not apply to section 32 applications: s.36 MHFP Act.

- A Magistrate should consider the qualifications and expertise of the author of any expert medical report, together with the contents of the report, to determine whether the report should be admitted at the inquiry and, if so, what weight should be given to it.

- A Magistrate would fall into error if a blanket approach was adopted so that only reports of psychiatrists could be received. The type of report which may be appropriate will depend very much on the particular case.

- There is no bright line test which delineates areas where a psychological report can or cannot be received.

Things to ensure the expert report includes (Part 1)

Insofar as the jurisdictional question is concerned, practitioners should therefore ensure that the author of the expert report:

- Acknowledges that he or she has read and will be bound by the *Expert Code of Conduct* [6]

- Annexes their CV to the report, or otherwise outlines their qualifications and expertise

- States the relevant diagnosis/es, including the basis for that diagnosis/es (for example, whether any psychometric or other testing was undertaken)

- Confirms that the relevant diagnosis/es falls under the definition of either a cognitive impairment, a mental illness or a mental condition

- Confirms (if applicable) that treatment for the relevant mental condition is available in a mental health facility (see ***Edwards v DPP [2012] NSWSC 105*** at [16]) and

- Confirms that the defendant is not a mentally ill person.

[6] Set out in the *Uniform Civil Procedure Rules* 2005 (Schedule 7).

E. STEP 2: THE BALANCING EXERCISE

Assuming that the Magistrate is satisfied that a defendant is eligible to be dealt with under section 32, consideration will turn to whether it is more appropriate to deal with the defendant in accordance with the provisions of section 32 than otherwise in accordance with law.

This stage of the inquiry requires the performance of a balancing exercise. It is a discretionary judgment upon which reasonable minds may differ.

There is no exhaustive list of relevant considerations. Section 36 MHFP Act (extracted and discussed above) allows a Magistrate to inform himself or herself as they see fit. What is relevant will depend on the factual circumstances of the particular case.

Some issues which impact on the Magistrate's determination and which should be addressed in oral and/or written submissions include:

- ***The public interest***
  The Court must balance two public interests, which to some extent pull in different directions. On the one hand, consideration must be given to the purposes of punishment and the public interest in those charged with a criminal offence facing the full weight of the law. On the other hand, consideration must also be given to the public interest in diverting a defendant suffering from a mental illness, mental condition or cognitive impairment from the criminal justice system with the object of ensuring that the community is protected from the conduct of such persons: ***Confos v DPP*** **[2004] NSWSC 1159** at [17], *DPP v El Mawas* at [71].

  Diversion into treatment does not mean that a defendant is not exposed to punishment. While an order under section 32(3) is not custodial in the strict sense, it may (and often does) involve the imposition of conditions which restrict or prescribe a defendant's actions. This means that the Court retains a 6-month period of supervisory jurisdiction (discussed further below).

- ***The seriousness of the offending***
  While it is appropriate to have regard to the seriousness of the offence(s), the fact that offending is properly characterised as serious is not a reason for an order under

section 32 not to be made: *DPP v El Mawas* at [79]. A Magistrate should have regard to the particular acts giving rise to the offence(s) before the Court, rather than the type of offence(s): *Confos v DPP* at [21].

A Magistrate is also required to consider the realistically available penalty which might otherwise be imposed if the section 32 application were refused and the defendant were dealt with according to law. If a defendant would likely receive a community-based sentence, this factor ought properly be taken into account in the balancing exercise: ***Mantell v Molyneux* [2006] NSWSC 955** at [40].

- ***The causal connection to the offending***
  There is no requirement in the legislation that there be a causal connection between the offending conduct and the person's mental illness, mental condition or cognitive impairment, though it often greatly assists if there is such a connection.

  If there is such a connection, this should explicitly be stated in the expert report.

- ***Issues of deterrence in sentencing***
  General deterrence may have less weight in sentencing persons who are cognitively impaired, or suffer from a mental illness or condition. For this reason, the need for general deterrence in respect of a certain class of offence may not be a relevant, or particularly significant, consideration in determining whether to deal with a particular defendant pursuant the section 32: *Confos v DPP* at [20].

  In ***Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194** McLellan CJ at CL summarised the principles which are to be applied when sentencing an offender who is "suffering from a mental illness, intellectual handicap or other mental problems" (at [177]). The following principles, outlined in that case, have equal application in section 32 applications:

  - Where the state of a person's mental health contributes to the commission of the offence in a material way, the offender's moral culpability may be reduced. Consequently the need to denounce the crime may be reduced with a reduction in the sentence.

- It may also have the consequence that an offender is an inappropriate vehicle for general deterrence resulting in a reduction in the sentence which would otherwise have been imposed.

- It may reduce or eliminate the significance of specific deterrence.

McLellan CJ at CL went on to state (at [178]) that:

> *…the mental health problems of an offender need not amount to a serious psychiatric illness before they will be relevant to the sentencing process. The circumstances may indicate that when an offender has a mental disorder of modest severity it may nevertheless be appropriate to moderate the need for general or specific deterrence.*

- ***Community safety and the limited duration of a section 32 order (6 months)***
  In considering the public interest it is also appropriate to consider whether a defendant poses a risk to members of the community. If so, conditions should be imposed to address the offending behaviour in order to minimise the risk of reoffending and therefore increase community safety.

  While at first blush this argument would appear to favour the making of a section 32 order, a practical issue which often arises is that a section 32 order is only enforceable for 6 months.

  Other sentencing options such as Conditional Release Orders (CROs), Community Correction Orders (CCOs) and Intensive Correction Orders (ICOs) give the Court the ability to oversee the psychological treatment of a defendant for much longer than 6 months, leading some Magistrates to view section 32 orders as “six-month band aids” which do not guarantee more longer-term treatment.
  The limited duration of a section 32 order is a relevant factor for a Magistrate to consider: ***Quinn v Director of Public Prosecutions* [2015] NSWCA 331** at [31]; *Mantell v Molyneux* at [47].

  In 2007 the NSW Law Reform Commission (**NSWLRC**) undertook a general review of the criminal law and procedure applying to people with cognitive and mental health

impairments.[7] As part of that general review, consideration was given to the duration of section 32 orders. The NSWLRC ultimately recommended that the normal period of section 32 orders remain as 6 months but with the ability, in appropriate cases and to ensure the length of the plan is sufficient for the plan to operate, for the order to be extended up to a total of 12 months.

It is disappointing that the *Justice Legislation Amendment Act 2017* (NSW) did not adopt this recommendation. Despite this, however, one practical way around the limited duration of section 32 orders is to propose that, instead of determining the matter to finality immediately, the proceedings be adjourned under section 32(2)(a) to a later date, perhaps in 3 or 6 months, with treatment to continue in the interim. This means that the 6-month timeframe during which compliance can be supervised would not commence until the matter returns to Court. It would also allow the defendant to further demonstrate their commitment to treatment and ability to not reoffend prior to a section 32 order being made.

- ***Whether a section 32 order has been made previously***
  There is no prohibition in the legislation on a defendant being dealt with under section 32 on multiple occasions. Despite this, however, it may be more difficult to persuade a Magistrate that it is more appropriate to make a section 32 order for a second or subsequent instance of offending. That said, this will largely depend on the facts of the case, and the defendant's subjective circumstances.

  In such situations submissions should often address any change in the mental illness, mental condition(s) or cognitive impairment since the previous section 32 order was made, as well as previous compliance with treatment. Practitioners should also remember to address community safety.

- ***The efficacy and specificity of a treatment (or support) plan[8]***
  Although technically there is no requirement under the MHFP Act for a treatment (or support) plan, the Court will generally require such a plan. While there is no caselaw directly on this point, a number of cases refer to the importance of a Magistrate being provided with a treatment plan when considering the appropriateness of making a

[7] Resulting in the NSW Law Reform Commission's 2012 paper 'People with cognitive and mental health impairments in the criminal justice system – Diversion' (Report 135, 2012).
[8] The phrase 'support plan', rather than 'treatment plan', should be used for defendants who have a cognitive impairment.

section 32 order (see, for example, ***Perry v Forbes*** **(Unreported, Supreme Court of New South Wales. Smart J, 21 May 1993)** at 16; ***Khalil v His Honour, Magistrate Johnson*** **[2008] NSWSC 1092** at [85]).

Magistrates frequently express unhappiness about the specificity and comprehensiveness of a treatment (or support) plan and it is not uncommon for section 32 applications to be either refused or adjourned on the basis of an unsatisfactory plan. For this reason, practitioners should ensure to provide the Magistrate with a comprehensive, clear and effective treatment (or support) plan.

Things to ensure the expert report includes (Part 2)

Insofar as the balancing exercise is concerned, practitioners should ensure that the author of the expert report:

- Addresses in detail (if applicable) the causal connection between the offending conduct and the person's mental illness, mental condition or cognitive impairment.

- Includes a comprehensive treatment plan which outlines what ongoing or future treatment is recommended, addressing for example:

    - Who the proposed treatment provider is to be
    - The treatment type (i.e. cognitive behavioural therapy, dialectical behaviour therapy, alcohol counselling etc)
    - The frequency and duration of proposed treatment
    - The use of prescribed medication (if applicable).

F. STEP 3: WHAT ACTION CAN BE TAKEN?

If a Magistrate is satisfied both that a defendant is eligible to be dealt with under section 32, and that it is more appropriate to do so, the Magistrate may take the action set out in subsections (2) or (3).

If finalising the matter, the Magistrate may make an order dismissing the charge and

discharging the defendant:

- into the care of a responsible person unconditionally: s.32(3)(a) MHFP Act,

- into the care of a responsible person subject to conditions: s.32(3)(a) MHFP Act,

- on the condition that the defendant attend on a person or at a place specified by the Magistrate, either
    - for assessment and/or treatment of the defendant's mental condition or cognitive impairment, or
    - to enable the provision of support in relation to the defendant's cognitive impairment: : s.32(3)(b) MHFP Act, or

- unconditionally: s.32(3)(c) MHFP Act.

If an order is made under section 32(3)(a) discharging the defendant into the care of a responsible person, the 'responsible person' must be identified and specifically nominated in the court order: ***Director of Public Prosecutions (NSW) v Saunders*** **[2017] NSWSC 760** at [40].

If a section 32 conditional discharge order is made (that is, either an order under section 32(3)(a) which is made subject to conditions, or an order under 32(3)(b)), the person upon whom or the place upon which the defendant is to attend must be identified with some precision. It is not sufficient to impose a condition requiring a person to undergo assessment and/or treatment by *a* psychiatrist at a *named* mental health facility: *Director of Public Prosecutions (NSW) v Saunders* at [43]-[44] because this would render the enforceability of such an order "virtually nugatory" (at [47]).

It is also best practice for:

- the proposed treatment provider to undertake to supervise the defendant and report any breaches of the order to the Court during the duration or the order if and when they occur: s.32A MHFP Act, and

- the defendant to consent to the proposed treatment provider notifying either the Court or Community Corrections in the event of a breach.

Things to ensure the expert report includes (Part 3)

Practitioners should also ensure that either the author of the expert report, or the proposed treatment provider (if someone different):

- Confirms (if they are to be the treatment provider) that they undertake to supervise / treat the defendant and report any breaches of the order to the Court during the duration of the order.

G. PRACTICAL THINGS TO CONSIDER

Checklist for letter of instruction to the medical expert

Practitioners should ensure that their letter of instruction to the medical expert:

- Tells the medical expert when the section 32 application is listed and when the report needs to be served on the prosecutor.

- Specifically asks the expert to address each of the matters raised above under the subheadings ‘Things to ensure the expert report includes’.

- Asks the expert to address others matters such as the following:
    - the date(s) on which the defendant has attended upon the expert,
    - how the defendant engaged with the assessment process,
    - diagnosis/es and prognosis,
    - possible consequences to the defendant (and, by extension, to the community) if any mental illness / mental condition is untreated,
    - the likely outcome if the defendant receives treatment / support,
    - the defendant’s prospects of rehabilitation and likelihood of reoffending.

- Annexes the following:
    - a copy of the police facts sheet and the defendant’s criminal and/or traffic record,

- any other relevant police material such as ERISP transcripts or CCTV footage,
- any other relevant medical material such as hospital discharge summaries, previous medical reports / letters etc, and
- a copy of the relevant legislation.

Checklist of what evidence / material to provide in support of the section 32 application

Practitioners should ensure that the Magistrate is provided with all relevant evidence / material in support of the section 32 application, which may include the following:

- The expert report.
- Any other relevant medical records / reports.
- Any other material which the expert had regard to when writing their report.
- An outline of the proposed treatment plan (as a separate document, if it would assist the Magistrate).
- Letter from the defendant.
- Character references / other subjective material.
- Any other summary documents or other material which would assist the Magistrate, such as a chronology or outline of treatment,

It may also be of assistance to the Magistrate to prepare either written submissions or an outline of submissions, rather than relying solely on oral submissions.

H. ENFORCEABILITY OF SECTION 32 CONDITIONAL DISCHARGE ORDERS

If the Court becomes aware that any conditions of a section 32 conditional discharge order are not being fulfilled, it may, within six months of the order being made:

- issue a call-up notice requiring the defendant to appear before the Magistrate: s.32(3A) MHFP Act,

- issue a warrant if the defendant fails to appear in accordance with the call-up notice: s.32(3b) MHFP Act, or

- issue a warrant if the whereabouts of the defendant is unknown: s.32(3C) MHFP Act.

Breach proceedings

In breach proceedings, the Magistrate may deal with the charge(s) as if the defendant had not been discharged. Breach proceedings must be commenced within 6 months of the order being made: s.32(3D) MHFP Act.

Importantly, section 32 orders do not include a condition that the defendant be of good behaviour. Accordingly, committing further offences does not automatically result in a breach of a section 32 conditional discharge order. A breach must result from a failure of the defendant to comply with the conditions attached to the order.

I. CONCLUSION

Given the prevalence of mental health issues in the community and the adverse consequences which often flow from a criminal charge and/or conviction, practitioners should be alive to the underlying reasons for a defendant's offending behaviour and be able to identify defendants who may benefit from the diversionary scheme provided for by section 32.

Section 32 orders represent a practical and valuable way to divert a defendant into treatment and, for this reason, have the real potential to produce positive outcomes both for the defendant and for the wider community and should be pursued in appropriate cases.

Karen Espiner, Younes + Espiner Lawyers
Accredited Criminal Law Specialist