

The Shopfront

YOUTH LEGAL CENTRE

Mental health and intellectual disability

Criminal proceedings in Local and Children's Courts

1 Introduction

The *Mental Health (Forensic Provisions) Act* sets out ways of dealing with criminal cases involving defendants with mental illnesses or cognitive impairments.

This fact sheet outlines the procedure which applies to **summary** proceedings (in the Children's or Local Court). This is set out in sections 32 and 33 of the *Mental Health (Forensic Provisions) Act*.

In matters which are dealt with on **indictment** (in the **District or Supreme Courts**) there are different and more complicated procedures, which will not be dealt with here.

2 What is a section 32 application?

Section 32 is a **diversionary** procedure in the *Mental Health (Forensic Provisions) Act* which allows the court to dismiss charges instead of proceeding 'according to law' in the normal way. It applies to defendants who have a mental illness, mental condition or cognitive impairment. Section 33 is similar but applies to mentally ill people who may require involuntary treatment.

A section 32 or 33 application can be made for charges being **dealt with summarily** (summary offences and indictable offences that are being dealt with summarily) in the Local or Children's Court. It does not apply to offences which are strictly indictable or where the DPP has made an election to deal with an offence on indictment.

See *Criminal procedure - an overview* fact sheet for an explanation of the difference between summary and indictable offences.

3 Definitions

Sections 32 and 33 of the *Mental Health (Forensic Provisions) Act* refer to "mental illness", "mentally ill person", "mental condition" and "cognitive impairment".

The terms "mental illness" and "mentally ill person" are defined in the *Mental Health Act 2007* (note that a person with a mental illness is not necessarily a "mentally ill person").

3.1 Mental Illness

According to Schedule 1 of the *Mental Health Act*:

"**mental illness** means a condition which 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)."

3.2 Mentally Ill Person

According to section 14 of the *Mental Health Act*:

"A person is a **mentally ill person** if the person is suffering from a 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.

In considering whether a person is a mentally ill person, the continuing condition of the person, including any likely deterioration of the person's condition and the likely effects of any such deterioration, are to be taken into account."

3.3 Cognitive impairment

According to section 32(6) of the *Mental Health (Forensic Provisions) Act*:

"**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."

3.4 Other Terms

The term "**mental condition**" is not defined, but could presumably include a mental disability that is not a mental illness or a developmental disability (for example, a personality disorder or perhaps a brain injury).

4 Section 32

4.1 Who does it apply to?

Section 32 of the *Mental Health (Forensic Provisions) Act* applies if it appears to the Magistrate that the defendant is (or was at the time of the alleged offence):

- (a) **cognitively impaired**; or
- (b) suffering from a **mental illness**; or
- (c) suffering from a **mental condition** for which treatment is available in a mental health facility;

but is **not a "mentally ill person"** within the *Mental Health Act*.

A Magistrate may make an order under section 32 if satisfied that the defendant comes within one of the above categories, and that it is **more appropriate to deal with the matter under section 32 than according to law**.

4.2 Types of orders

The orders made under section 32 are usually **final orders**, which involve dismissing the charge and discharging the defendant:

- (a) into the care of a responsible person, unconditionally or subject to conditions;
- (b) on the condition that the defendant attend a certain place for assessment and/or treatment; or
- (c) unconditionally.

4.3 When and how is a section 32 application made?

A section 32 order can be made at **any stage of the proceedings**, including after a defendant has pleaded (or been found) guilty.

A defendant **does not have to enter a plea** to make a section 32 application, and cannot be required to incriminate him/herself (eg. by admitting to allegations made by police).

Magistrates rarely make section 32 orders of their own volition. A person seeking a section 32 order must make an **application** to the court (usually through a lawyer).

The application will need to be supported by a **psychiatric or psychological report**. Usually there will also need to be a **case plan** (sometimes called a **support plan** or **treatment plan**).

4.4 What does the court take into account?

The defendant (or their lawyer) will be trying to convince the Magistrate that it is more appropriate to dismiss the charges under section 32 than to deal with them according to normal criminal procedures.

The **appropriateness** of dealing with someone under section 32 is not a matter of whether the defendant understands the court process, or knows the difference between right and wrong, although these factors can be relevant.

Other factors which might influence the Magistrate's decision are the seriousness of the alleged offence, the link between the alleged offence and the defendant's disability or mental illness, any prior criminal history, and how good the proposed support plan is.

4.5 Who is a "responsible person" and what do they have to do?

A Magistrate may make an order under section 32 to discharge the defendant into the care of a **"responsible person"**.

The responsible person does not need to be a mental health professional. For example, they can be a caseworker. They are responsible for co-ordinating the client's support plan by making sure they attend relevant appointments, take their medication etc.

The responsible person does not have to be present at court (although some Magistrates will require them to be there before making the order) and does not have to sign a copy of the order. The defendant is discharged into the care, but not the custody, of the responsible person.

When making a section 32 order, a Magistrate may ask the responsible person to make an undertaking (promise) to notify the court if the defendant breaches the conditions of the section 32 order. Generally, though, the responsible person has no legal obligation to report a breach.

4.6 What if there is no-one to nominate as a 'responsible person'?

Instead of releasing the defendant into the care of a 'responsible person' the court can order that the defendant attend a specified place or upon a specified person for assessment or treatment.

This type of order may be appropriate where there is no individual to nominate as a responsible person, but the client regularly attends a community mental health centre or other service. Where the defendant is not connected with any service, the court may order that the defendant attend their closest community mental health centre for treatment and/or support.

4.7 Case plan, support plan or treatment plan

Most Magistrates will not deal with charges under section 32 unless they are satisfied that the defendant is likely to receive appropriate treatment and follow-up. A good **case plan** is very important,

The terms "case plan", "support plan" and "treatment plan" are often used interchangeably. [You should try to avoid using the term 'treatment plan' in connection with a cognitive impairment such as an intellectual disability, which is not an illness and cannot be treated.]

A case plan will outline the treatment or support services that the defendant is receiving for their mental illness or cognitive impairment. It may also include engagement with social support services such as housing, education and employment. For defendants who are charged with serious or repeat offences, case plans should be as detailed as possible.

4.8 Consequences of a section 32 order

If a Magistrate makes a final order under section 32, this means the charge is dismissed (although, if the defendant breaches any conditions within 6 months of the order, they could be brought back to court to have the charges dealt with again).

A section 32 order **does not amount to a finding of guilt**, but nor is it equivalent to a finding of not guilty.

It does not count as a conviction and therefore does not form part of a person's criminal record. However, if the person is dealt with in court for another charge in the future, the court may be able to take previous section 32 orders into account.

4.9 Enforcement of orders

Until 2004, there was way of enforcing the conditions of a section 32 order. This often led Magistrates to decide that it was inappropriate to deal with a person under section 32.

Section 32 was amended in 2004 so that conditions can be enforced. So, for a period of **up to six months** after the making of the order, **if the person breaches conditions of the order, the person may be brought back to court** and the charges dealt with again.

Note that it is not an offence to breach conditions of a section 32 order and the person cannot be punished for this. However, it does mean that the Magistrate will have to reconsider how to deal with the original charges.

4.10 Reporting breaches of section 32 orders

Unlike probation officers or JJOs (who supervise orders such as good behaviour bonds), there is no-one with a legal mandate to supervise section 32 orders.

This means that no agency can be compelled to provide services. It also means that there is no legal obligation for a "responsible person" or treatment provider to notify the court if the person does not comply with their case plan.

Section 32A says that a “treatment provider” **may** report a breach to the court, without getting into legal trouble for breaching client confidentiality.

A responsible person, whether they are a treatment provider or not, may have to report a breach of the s32 order if they have made an undertaking to the court. **Otherwise, there is no legal obligation to report a breach.**

5 Section 33

5.1 Application of section 33

Section 33 is similar to section 32, but applies to a person who is, **at the time of the court appearance**, a “**mentally ill person**” within the *Mental Health Act*.

5.2 Types of orders

Section 33(1) says that a Magistrate may:

- (a) order that the defendant be taken by a police officer (or other officer such as a Corrective Services or a Juvenile Justice Officer) to a hospital and detained there for assessment;
- (b) as above, but with an additional condition that the defendant is to be brought back to court if he or she is **not** found to be a mentally ill or mentally disordered person; or
- (c) discharge the defendant into the care of a responsible person, unconditionally or subject to conditions.

Section 33(1A) also allows a Magistrate to make a Community Treatment Order for the mandatory treatment of the defendant. This order may be made only if the Magistrate could have made it under the *Mental Health Act*. The effect of this is that before an order can be made, a health care agency must have an appropriate treatment plan and be capable of implementing it.

An “authorised officer” (generally a Justice of the Peace sitting in place of a Magistrate at a weekend bail court) dealing with a bail application may also make an order under section 33(1)(a) or (b) for the defendant to be taken to hospital for assessment.

Unlike section 32, Magistrates usually use section 33 as an interim measure, to enable the defendant to get psychiatrically assessed (and, if necessary, treated) in the early stages of the case.

In many cases, the defendant will be brought back to court when they are discharged from hospital, so that the charges can be dealt with. This may involve dismissing the charges under section 32, or dealing with them according to normal criminal procedures.

However, charges can be finalised by dismissing them under section 33(1)(c).

5.3 Making a section 33 application

Like a section 32 application, an application to have charges dismissed under section 33 will need to be supported by a good psychiatric report and, if possible, a case plan.

Sometimes, there may be no psychiatric evidence available but it appears clear to the Magistrate or to the defendant’s lawyer that the defendant is very unwell. In this case, the Magistrate may order that the defendant be taken to hospital for assessment. Often, this will also include an order that the person be brought back to court if they are not found to be a “mentally ill person” and not admitted to hospital.

5.4 Consequences of a section 33 order

An order under section 33 will not always result in the court case being finalised.

If a Magistrate makes a **final order** under section 33(1)(c), this means the **charge is dismissed** (although, if the defendant breaches any conditions within 6 months of the order, it they could be brought back to court to have the charges dealt with again).

Like a section 32 order, a section 33 order **does not amount to a finding of guilt**, but nor is it equivalent to a finding of not guilty. It does not count as a conviction and therefore does not form part of a person's criminal record. However, if the person is dealt with in court for another charge in the future, the court may take previous section 32 or 33 orders into account.

5.5 Enforcement of orders

The defendant may be brought back before the court, within 6 months of the order, to be further dealt with in relation to the charge. This may happen if the defendant has breached a condition of the order.

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills, in association with Mission Australia and The Salvation Army.

This document was last updated in April 2018 and to the best of our knowledge is an accurate summary of the law in New South Wales at that time.

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