

# Section 32 Discharge

*Section 32 Mental Health (Forensic Provisions) Act (NSW)1990*

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Section 32 is a provision that allows a Magistrate to divert persons with mental conditions away from the legal system and into treatment. The result is that people with mental difficulties are sent to compulsory treatment and avoid what would otherwise be highly punitive outcomes in the criminal justice system.

Diversion under s32 means the client avoids a conviction and sentence and any mandatory punishment that may apply, such as disqualification from driving. A discharge under s32 is not a finding of guilt.<sup>1</sup> This means that a s32 discharge can be a better result for the client even than a discharge under s10 Crimes (Sentencing Procedure) Act.

The increasing frequency of mental illness within our society means that every advocate needs to be aware of the s32 option. This article is designed to clarify who is a suitable candidate for discharge and provide some guidance on the preparation and presentation of the application.

## When To Make the Application

An application for discharge under s32 can be made '*at any time during the course of proceedings before a Magistrate*'.<sup>2</sup> This means that an application can be made even after a contested hearing and a finding of guilt. So the client must decide whether to make the application up front, or to attempt to obtain an outright dismissal at a hearing and keep the application as Plan B. In either case, the application needs to be prepared ahead of time.

## Medical Evidence

Your application will succeed or fail based on the medical report that you provide. Remember the burden is on you to show why the court should exercise its discretion. If you don't bring the case, you fail.

When requesting the report you should ask the psychiatrist or psychologist to cover the following five matters:

1. The Expert Witness Code of Conduct NSW - a statement that the author has read and agrees to be bound by it,
2. The Qualifications of the author, usually their curriculum vitae is attached
3. Diagnosis – including basis for it (tests performed),
4. Opinion of whether the condition caused or contributed to the offending, and
5. A Treatment Plan – covering available treatments, how the treatment works and how successful it has been in other cases.

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<sup>1</sup> s32(4) Mental Health (Forensic Provisions) Act 1990

<sup>2</sup> s32(1) Mental Health (Forensic Provisions) Act 1990

## The Submissions

Section 32 is a discretionary provision that requires the Magistrate to make three decisions:

1. **Jurisdiction** – Is the Defendant developmentally disabled or suffering from a mental illness or condition?
2. **The Balancing Test** – Is it more appropriate to deal with the Defendant under the section than otherwise according to law?
3. **Conditions** – If discharge is more appropriate, then what conditions should be placed on the discharge?

### Jurisdiction

If your medical report covers the five matters listed above, then the court should have no difficulty finding that the defendant was suffering from a mental illness at the time of the offending, but is not a mentally ill person for the purposes of s33.

### The Balancing Test

In determining whether a discharge is more appropriate, the court must balance the purposes of punishment against the public interest in diverting mentally disordered offenders from the criminal justice system.<sup>3</sup>

The court can have regard to the following factors:

- The seriousness of the Offence (the particular facts alleged rather than the type of offence),<sup>4</sup>
- The Purposes of sentencing,
- The realistically available sentencing options in the event the offence is proved,<sup>5</sup>
- The Proposed Treatment Plan<sup>6</sup>

### Seriousness of the Offence

Discharge under s32 is available to serious offenders provided the Magistrate regards it as more appropriate than the alternative.<sup>7</sup> Defence counsel will submit that a discharge will produce a better outcome both for the individual and the community.

To determine seriousness, the court will have regard to the aggravating and mitigating factors in s21 Crimes (Sentencing Procedure) Act. The court will then consider the available sentencing options, bearing in mind that a custodial sentence may be particularly onerous on a person with a mental condition.

<sup>3</sup> DPP v El Mawas (2006) 66 NSWLR 93 at [77]

<sup>4</sup> DPP v Confos [2004] NSWSC 1159 at [21]

<sup>5</sup> Mantell v Molyneux (2006) 165 A Crim R 83 at [40]

<sup>6</sup> DPP v El Mawas (2006) 66 NSWLR 93 at [10]

<sup>7</sup> DPP v El Mawas (2006) 66 NSWLR 93 at [79]

## Purposes of Sentencing

Section 3A *Crimes (Sentencing Procedure) Act* gives the following purposes for which a court may impose a sentence on an offender:

- (a) *to ensure that the offender is adequately punished for the offence,*
- (b) *to prevent crime by deterring the offender and other persons from committing similar offences,*
- (c) *to protect the community from the offender,*
- (d) *to promote the rehabilitation of the offender,*
- (e) *to make the offender accountable for his or her actions,*
- (f) *to denounce the conduct of the offender,*
- (g) *to recognise the harm done to the victim of the crime and the community.*

These factors can be summarized as punishment, rehabilitation and deterrence and counsel should deal with each of them.

### Punishment

Counsel submits that although dismissal under s32 provides a diversionary route, a defendant can still be exposed to punishment as the court may impose conditions restricting the Defendant's freedom of movement and actions.<sup>8</sup> The Magistrate retains supervisory jurisdiction for 6 months after a the order is made.<sup>9</sup>

### Rehabilitation

Counsel will submit that the rehabilitation of the defendant would be best served by discharging the Defendant on condition that she attend on her psychiatrist and comply with the treatment plan. Rehabilitation is of particular importance for a defendant with a mental condition because compliance is often a major issue. Counsel should emphasize that a discharge with conditions to follow the treatment plan may be the best result for the community, the police and the defendant.

### Deterrence

Counsel will submit that mentally disordered defendants are not an appropriate vehicle for general deterrence.<sup>10</sup> Nor is specific deterrence worthwhile since the defendant would be punished for their mental illness rather than their voluntary conduct.

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<sup>8</sup> DPP v El Mawas (2006) 66 NSWLR 93 at [73]

<sup>9</sup> s32(3A) Mental Health (Forensic Provisions) Act 1990

<sup>10</sup> DPP v Confos [2004] NSWSC 1159 at [20]

## Sentencing Options & Outcomes

Criminal convictions often lead to automatic penalties (such as disqualification from driving) which may be excessive in a particular case. They can also have extracurial effects on defendants with professional qualifications. It could have a devastating impact not just on the Defendant, but on the family. In effect, they would all be punished for one member's mental condition.

Counsel could further submit that conditions imposed under s32 could in fact be more onerous than conditions imposed under non-punitive bonds such as those made under s9, 10 or 12 as the court has the option of imposing conditions that restrict the Defendant's freedom of movement and actions.

## The Treatment Plan

The most important part of the medical evidence is the proposed treatment plan. This is because the court is considering not what happened in the past, but what they will do in the future to deal with the defendant.

The report needs to explain what treatment is available, how it will work and how it has worked for other patients. This is a lot of information but once a health care provider has produced one report, it is usually much easier for them to provide future reports because they have already collated the information.

## Conclusion

Written submissions should be prepared that cover all of the abovementioned matters. The final submission will be that it is more appropriate for the court to discharge the defendant into the care of her psychiatrist or psychologist rather than to proceed otherwise according to law.

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