

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* (which until recently was called the *Mental Health (Criminal Procedure) Act*) sets out ways of disposing of criminal cases involving defendants with mental illnesses or intellectual disabilities.

This document deals with the procedure which applies to **summary** proceedings (in the **Children's or Local Courts**). 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 in this document.

2 Definitions

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

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"!).

2.1 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)."

2.2 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.”

2.3 Other Terms

The term “**developmentally disabled**” is not defined, but is generally understood to include an intellectual disability but not an acquired brain injury.

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

3 Section 32

3.1 Application of section

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) **developmentally disabled**; 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 who is satisfied that the defendant falls within one of the above categories, and that it is **more appropriate to deal with the matter under this section than according to law**, can make various procedural or final orders.

3.2 Types of orders

Procedural orders include adjourning the proceedings or granting bail. These types of orders are rarely made under section 32, because the court has the power to make these orders anyway, regardless of the person’s mental condition.

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.

3.3 Making a section 32 application

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 solicitor). The application will need to be supported by a **psychiatric or psychological report and a case plan**.

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).

The defendant (or their solicitor) 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 and the defendant's prior criminal history.

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** or **treatment plan** is very important.

3.4 Implications 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, it could mean that they are 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 will be able to take previous section 32 orders into account.

If the defendant is discharged into the care of a **"responsible person"**, the responsible person does not have any legal obligations. However if the responsible person has made an undertaking (promise) to notify the court if the defendant breaches the s32 order, they would be expected to honour this.

3.5 Enforcement of orders

Until 2004, there was no mechanism for enforcing the conditions of a section 32 order. This often led Magistrates to decide that it was inappropriate to deal with a person under the section.

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.

Section 32A allows “treatment providers” to report compliance problems to Probation and Parole and Juvenile Justice Officers. A treatment provider can report non-compliance under s 32A without getting into legal trouble for breaching confidentiality.

4 Section 33

4.1 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*.

4.2 Types of orders

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. This may include the additional condition that if the defendant is not found to be a mentally ill or mentally disordered person, he or she is to be brought back to court; or
- (b) discharge the defendant into the care of a responsible person, unconditionally or subject to conditions; or
- (c) make a community treatment order, for the mandatory treatment of the defendant, under the *Mental Health Act*. The 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. The Magistrate must notify the Chief Health Officer before making any such order.

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 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 Magistrate will want the defendant brought back to court when they are well enough, 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.

4.3 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.

Clearly there will be some cases where there may not be any psychiatric evidence available but it appears clear to the Magistrate or to the defendant's solicitor that the defendant is mentally ill. In this case, the Magistrate may order that the defendant be taken to hospital for assessment. Generally, this will also include an order that, if the person is not found to be a "mentally ill person" and is not admitted to hospital, the person be brought back to court for the charges to be dealt with.

4.4 Implications of a section 33 order

If a Magistrate makes a **final order** under section 33, this means the **charge is dismissed** (although, if the defendant breaches any conditions within 6 months of the order, it could mean that they are 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 will be able to take previous section 33 orders into account.

4.5 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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This document was last updated in April 2009 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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