

**SECTION 32 MENTAL HEALTH (CRIMINAL PROCEDURE)
ACT – SUMMARY OF PRINCIPLES**

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IMPORTANT CASES ON SECTION 32

Mackie v Hunt (1989) 19 NSWLR 130.

Perry v Forbes & Anor Supreme Court of New South Wales, Unreported, 21 May 1993.

Director of Public Prosecutions v Albon [2000] NSWSC 896.

Director of Public Prosecutions v Confos [2004] NSWSC 1159.

Director of Public Prosecutions v El Mawas (2006) 66 NSWLR 93.

Mantell v Molyneux (2006) 165 A Crim R 83.

SECTION 32 MENTAL HEALTH (CRIMINAL PROCEDURE) ACT

The Operation of Section 32

Section 32 has a diversionary purpose.¹ It applies at any time after the commencement of proceedings and during the course of the hearing.²

Part 3 of the Act operates whether or not a plea has been entered.³

Even where a defendant is unfit to plead, he or she may still be diverted under s 32.⁴

The Enquiry

In exercising jurisdiction under Part 3, a Magistrate is given powers of an inquisitorial or administrative nature to inform herself or himself as the Magistrate thinks fit.⁵

This power has to be exercised in accordance with the requirements of procedural fairness.⁶

A Balancing Exercise

A Magistrate is to consider whether proceeding in accordance with s 32 will produce a better outcome both for the individual and the community.⁷

In order to determine whether it is more appropriate to deal with the applicant under Part 3 a Magistrate has to perform a balancing exercise.⁸

A Magistrate weighs up, on one hand, the purposes of punishment and, on the other, the public interest in diverting the mentally disordered offender from the criminal justice system.⁹

It is not a matter of weighing the public interest in punishment as against the private interest of the defendant in rehabilitation.¹⁰ What is balanced is two public interests, to some extent pulling in two different directions.¹¹

¹ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [39].

² Section 32(1) *Mental Health (Criminal Procedure) Act*.

³ *Perry v Forbes & Anor* Supreme Court of New South Wales, Unreported, 21 May 1993; *DPP v El Mawas* (2006) 66 NSWLR 93 at [62].

⁴ *Mackie v Hunt* (1989) 19 NSWLR 130; *Perry v Forbes & Anor* Supreme Court of New South Wales, Unreported, 21 May 1993.

⁵ Section 36 *Mental Health (Criminal Procedure) Act*; *DPP v El Mawas* (2006) 66 NSWLR 93 at [74]; *Mantell v Molyneux* (2006) 165 A Crim R 83 at [40].

⁶ *DPP v El Mawas* (2006) 66 NSWLR 93 at [74].

⁷ *DPP v El Mawas* (2006) 66 NSWLR 93 at [79].

⁸ *DPP v Confos* [2004] NSWSC 1159 at [17]; *DPP v El Mawas* (2006) 66 NSWLR 93 at [71].

⁹ *DPP v Confos* [2004] NSWSC 1159 at [17]; *DPP v El Mawas* (2006) 66 NSWLR 93 at [71].

¹⁰ *DPP v Confos* [2004] NSWSC 1159 at [17].

¹¹ *DPP v Confos* [2004] NSWSC 1159 at [17].

The weighing up of these interests cannot be exercised properly without due regard to the seriousness of the offending conduct for which a defendant is before the court.¹²

THE DECISIONS INVOLVED IN MAKING A DETERMINATION PURSUANT TO SECTION 32

Section 32 requires a Magistrate to make three decisions.¹³

*1. Whether the defendant is eligible to be dealt with under the section.*¹⁴

This is called the jurisdictional question¹⁵ and involves a finding of fact.¹⁶

*2. Whether it is more appropriate to deal with the defendant in accordance with the provisions of the Part than otherwise in accordance with law.*¹⁷

A Magistrate has regard to the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant.¹⁸

This is a subjective decision or value judgment, in which no one consideration and no combination of considerations is necessarily determinative of the result.¹⁹

In considering whether diversion is “more appropriate” than proceeding according to law, a Magistrate is bound to consider the realistically available sentencing outcomes in the event of conviction.²⁰

This second stage inquiry under s 32 requires balancing the purposes of punishment and the public interest in diverting a mentally disordered offender from the criminal justice system.²¹

*3. If it is more appropriate to deal with the defendant according to s 32, which of the actions set out in subsections (2) or (3) should be taken.*²²

S 32(2) permits interlocutory orders to be made pending determination of the proceedings pursuant to s 32(3).²³

¹² *DPP v Confos* [2004] NSWSC 1159 at [17].

¹³ *DPP v El Mawas* (2006) 66 NSWLR 93 at [75].

¹⁴ Section 32(1)(a) *Mental Health (Criminal Procedure) Act*.

¹⁵ *DPP v El Mawas* (2006) 66 NSWLR 93 at [75].

¹⁶ *DPP v El Mawas* (2006) 66 NSWLR 93 at [75].

¹⁷ Section 32(1)(b) *Mental Health (Criminal Procedure) Act*.

¹⁸ Section 32(1)(b) *Mental Health (Criminal Procedure) Act*.

¹⁹ *DPP v El Mawas* (2006) 66 NSWLR 93 at [76].

²⁰ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [40].

²¹ *DPP v El Mawas* (2006) 66 NSWLR 93 at [77].

²² *DPP v El Mawas* (2006) 66 NSWLR 93 at [80].

²³ *Minister for Corrective Services v Harris & Anor* Supreme Court, Unreported, 10 July 1987; referred to in *DPP v El Mawas* (2006) 66 NSWLR 93 at [80].

Section 32(2) can only be exercised when a Magistrate has made the decision required by s 32(1)(b)²⁴ (which is that it would be more appropriate to deal with the defendant under Part 3 than according to law).

An adjournment under s 32(2)(a) cannot be made for the purpose of considering whether it is more appropriate to divert a defendant rather than dealing with him or her in accordance with law.²⁵

The s 32(3) decision is also a discretionary decision, akin to the discretion exercised by a sentencing judge.²⁶

FACTORS THAT CAN BE CONSIDERED IN MAKING A DETERMINATION PURSUANT TO SECTION 32

In exercising the discretion under s 32, a Magistrate must take into account the whole of the legislative scheme that it embodies.²⁷

A Magistrate can factor the following in to a decision whether to proceed under s 32:

- The range of outcomes that would be appropriate in the event of conviction.²⁸

The realistically available sentencing options in the event the offence is proved could even be of decisive significance in a matter.²⁹

- The effect of any orders that might be made under s 32(3).³⁰
- That orders pursuant to the Act can only last for six months.³¹
- The proposed treatment plan.³²

The Court cannot factor into a decision whether to proceed under s 32:

- That a defendant is unfit to be tried.³³

²⁴ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [43].

²⁵ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [43].

²⁶ *DPP v El Mawas* (2006) 66 NSWLR 93 at [80].

²⁷ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [47].

²⁸ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [48].

²⁹ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [40].

³⁰ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [47].

³¹ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [47].

³² *Perry v Forbes & Anor* Supreme Court of New South Wales, Unreported, 21 May 1993; *DPP v Albon* [2000] NSWSC 896; *DPP v El Mawas* (2006) 66 NSWLR 93 at [10].

³³ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [49].

THE OFFENCE AND THE EXERCISE OF THE SECTION 32 DISCRETION

The Facts

A Magistrate should have regard to the following:

- The facts alleged in the proceedings.³⁴
- The particular facts of the offence with which a defendant is charged, rather than the type of offence.³⁵

The Seriousness of the Offence

It is appropriate for a Magistrate to have regard to the seriousness of the offence when considering whether to proceed under s 32.³⁶

Section 32 is available to serious offenders as long as a Magistrate regards it as more appropriate than the alternative.³⁷ A Magistrate considering this question will consider whether proceeding in accordance with s 32 will produce a better outcome both for the individual and the community.³⁸

The more serious the offending, the more important the public interest in punishment being imposed for the protection of the community, and the less likely will it be appropriate to deal with the defendant in accordance with the provisions of the *Mental Health (Criminal Procedure) Act*.³⁹

When considering the seriousness of the offending conduct, a Magistrate can take into account the degree to which a defendant is disabled from being able to control that conduct.⁴⁰

General Deterrence and Section 32

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 under s 32.⁴¹

³⁴ Section 32(1)(b) *Mental Health (Criminal Procedure) Act*.

³⁵ See the analysis in *DPP v Confos* [2004] NSWSC 1159 especially at [21].

³⁶ *Perry v Forbes & Anor* Supreme Court of New South Wales, Unreported, 21 May 1993; *Mantell v Molyneux* (2006) 165 A Crim R 83 at [40]; *DPP v El Mawas* (2006) 66 NSWLR 93 at [6]-[7].

³⁷ *DPP v El Mawas* (2006) 66 NSWLR 93 at [79].

³⁸ *DPP v El Mawas* (2006) 66 NSWLR 93 at [79].

³⁹ *DPP v Confos* [2004] NSWSC 1159 at [17].

⁴⁰ *DPP v Confos* [2004] NSWSC 1159 at [17]; *DPP v El Mawas* (2006) 66 NSWLR 93 at [78].

⁴¹ *DPP v Confos* [2004] NSWSC 1159 at [20].

SECTION 32 AND PUNISHMENT

Although s 32 provides a diversionary route, a defendant can still be exposed to punishment.⁴²

While an order under s 32(3) is not custodial in the strict sense, it may involve the imposition of conditions restricting a discharged defendant's freedom of movement and actions.⁴³

Compliance with those conditions is ensured by a Magistrate retaining a supervisory jurisdiction for 6 months after a s 32(3) order is made.⁴⁴

THE LENGTH OF SECTION 32 ORDERS

A matter may be brought back before a Magistrate if there are breaches of a conditional discharge in the period of 6 months after the making of the order.⁴⁵

This limit is, in substance, correct if a Magistrate makes an order dismissing the charge under s 32(3).⁴⁶

However, a Magistrate can also take action under s 32(2) adjourning the proceedings, granting bail with or without conditions or making "any other order that the Magistrate considers appropriate."⁴⁷

If a Magistrate makes a determination that diversion is appropriate under s 32(1), the Magistrate can deal with the defendant under s 32(2) and then, when satisfied that the discretion under s 32(3) should be exercised, do so at that point.⁴⁸ This can extend by a considerable margin the six months' limit.⁴⁹

DISQUALIFICATION OF A MAGISTRATE

Although s 34 *Mental Health (Criminal Procedure) Act* has been removed (which provided for the automatic disqualification of a Magistrate in certain circumstances), the common law obligation on Magistrates to disqualify themselves where appropriate continues to apply.⁵⁰

⁴² *DPP v El Mawas* (2006) 66 NSWLR 93 at [73].

⁴³ *DPP v El Mawas* (2006) 66 NSWLR 93 at [73].

⁴⁴ Sections 32(3A)-(3D) *Mental Health (Criminal Procedure) Act*.

⁴⁵ Sections 32(3A)-(3D) *Mental Health (Criminal Procedure) Act*.

⁴⁶ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [42].

⁴⁷ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [42].

⁴⁸ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [45].

⁴⁹ *Mantell v Molyneux* (2006) 165 A Crim R 83 at [45].

⁵⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 8 November 2005 (Alison Megarrity, Parliamentary Secretary).