The *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 - summary proceedings

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1 Introduction

This paper has been prepared for the 2022 Public Defenders' Conference, as a companion to the paper on indictable matters prepared by Justice Mark Ierace.

This paper will focus on the application of the new *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 to the Local and Children's Courts. As well as the diversionary procedures under Part 3, I will comment on the possible role of fitness to be tried and mental health defences in summary matters, and will try to address some common myths.

For a more detailed discussion of the old *and* new diversionary provisions, including a comparative table and some discussion of the relevant case law, please see my May 2021 paper entitled "*What's new with section 32?*" at https://criminalcpd.net.au/wp-content/uploads/2021/09/Whats-new-with-section-32_-May-2021-edition.pdf

2 Overview of the diversionary provisions in the new Act

Part 3 of the *Mental Health (Forensic Provisions) Act* 1990 (MHFPA) has been replaced by Part 2 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (MHCIFPA).

In place of the old section 32 and 33 applications, we now have section 14 and 19 applications respectively.

Part 2 of the MHCIFPA applies to proceedings commenced on or after 27 March 2021. Part 3 of the old MHFPA continues to apply to proceedings already on foot as at that date, including new sequences added to old H numbers (see MHCIFPA, Schedule 2, Part 2, cl. 8).

As with the old MHFPA, the diversionary provisions in the MHCIFPA apply to matters being dealt with summarily in the Local or Children's Court. They do not apply to offences that are strictly indictable or where the DPP has made an election. Nor do they apply to Commonwealth offences, which continue to be dealt with under section 20BQ of the Commonwealth *Crimes Act*.

The main changes introduced by the new Act are:

- some new definitions;
- a list of factors a magistrate may consider when deciding whether diversion under section 14 is appropriate;
- an increase in the enforcement period of section 14 (formerly section 32) orders from 6 months to 12 months;
- the extension of section 19 (formerly section 33) orders to mentally disordered persons.

To the best of my knowledge there have been no reported judgments dealing with the new diversionary provisions. Given the similarity between the old and new provisions, in my view the case law on sections 32 and 33 continues to apply.

3 Definitions

3.1 Cognitive impairment

A definition of “cognitive impairment” was introduced into the MHFPA in 2017 to replace the narrower concept of “developmental disability”.

Section 5 of the MHCIFPA provides a slightly amended definition:

> (1) For the purposes of this Act, a person has a cognitive impairment if—
>
> > (a) the person has an ongoing impairment in adaptive functioning, and
> >
> > (b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
> >
> > (c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person’s brain or mind that may arise from a condition set out in subsection (2) or for other reasons.
>
> (2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons:
>
> > (a) intellectual disability,
> >
> > (b) borderline intellectual functioning,
> >
> > (c) dementia,
> >
> > (d) an acquired brain injury,
> >
> > (e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
> >
> > (f) autism spectrum disorder.

3.2 Mental health impairment

For the purpose of the new diversionary provisions, the current concepts of “mental illness” and “mental condition” have been replaced by the concept of “mental health impairment”, which is defined in MHCIFPA section 4 as follows:

> (1) For the purposes of this Act, a "person has a mental health impairment" if--
>
> > (a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and
> >
> > (b) the disturbance would be regarded as significant for clinical diagnostic purposes, and
> >
> > (c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.
>
> (2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons--
>
> > (a) an anxiety disorder,
> >
> > (b) an affective disorder, including clinical depression and bipolar disorder,
> >
> > (c) a psychotic disorder,
> >
> > (d) a substance induced mental disorder that is not temporary.
>
> (3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by--

(a) the temporary effect of ingesting a substance, or

(b) a substance use disorder.

The inclusion of "significant for clinical diagnostic purposes" is intended to screen out ordinary human emotions (see the Attorney-General's Second Reading Speech, Legislative Assembly Hansard, 3 June 2020, https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-110558').

It is clear that intoxication and "addiction" are excluded from the new definition. Whether a drug-induced psychosis is included is unclear. The typical amphetamine-induced psychosis, which resolves within a few days after ceasing to take the drug, might not meet the definition of "mental health impairment" because it is "caused solely by the temporary effect of ingesting a substance".

There is also a divergence of views as to whether a personality disorder is a mental health impairment and whether it is appropriate to deal with such a person under section 14. My understanding is that the new definition is intended to include personality disorders, as long as they cause the sort of disturbance and impairment referred to in section 4(1). For a helpful discussion of personality disorders and why they are, in many cases, to be regarded in the same way as mental illnesses, see *Brown v The Queen* [2020] VSCA 212.

3.3 Mental illness, mentally ill person, mentally disordered person

The concept of "mental illness" remains relevant to the question of whether a person is a "mentally ill person" for the purpose of section 19.

Terms such as "mental illness", "mentally ill person" and "mentally disordered person" are not defined in the MHCIFPA, but section 3(2) refers back to the definitions in the *Mental Health Act* 2007.

4 Part 2 Division 2 – section 14 applications

The former section 32 is now broken up into several different sections, mostly contained in Part 2 Division 2.

4.1 Eligibility criteria – section 12

Section 12 sets out the eligibility criteria for a diversionary order. These are the same as the old section 32, except the concepts of "mental illness" and "mental condition for which treatment is available in a mental health facility" have been replaced by "mental health impairment".

As well as being satisfied that defendant has a mental health or cognitive impairment ("the first limb"), the magistrate must also be satisfied that it is more appropriate to divert the defendant than deal with the matter according to law ("the second limb").

4.2 Order may be made at any time – section 9

As with section 32, an order may be made at any time during the proceedings.

The new section 9 adds "whether or not the defendant has entered a plea" and also makes clear that an order may be made on application or on the magistrate's own initiative.

The inclusion of "whether or not the defendant has entered a plea" is welcome, and may serve as a reminder that these provisions are diversionary and not just an alternative sentencing option. Diversion also includes accommodating defendants with cognitive and mental health impairments

who may have great difficulty with traditional criminal justice processes and especially with defended hearings, and who may even be unfit to be tried.

I am aware that many magistrates still insist on pleas being entered, or at least indicated. In most cases the rationale for this is case management, especially if there is a prospect of the charge being defended.

Occasionally a magistrate takes the view that, if a matter is to be defended or if there is a substantial dispute on the facts, the hearing should take place and the facts resolved before any section 14 type application. With respect, I believe this view is wrong in law and misapprehends the diversionary nature of the scheme (see "Some common myths" below).

4.3 Means by which magistrate may be informed – sections 10, 12

Section 12(2) provides for the magistrate to consider "an outline of the facts alleged in the proceedings or other evidence the magistrate considers relevant".

Section 10 provides: "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."

As to criminal history, it is permissible for the court to have regard to prior section 32-type orders, not just convictions. Matters that fall within section 15 of the *Children (Criminal Proceedings) Act* are not admissible "as to guilt or as to the imposition of a penalty", so they are generally inadmissible in defended hearings or sentence proceedings, but they may be admissible in a section 14 application.

4.4 Adjournment of proceedings – section 13

Section 13 provides for adjournment of proceedings for various purposes. These include enabling the person's mental health or cognitive impairment to be assessed, the development of a treatment or support plan or the identification of a responsible person.

4.5 Final orders – section 14

Section 14 sets out the final orders that a magistrate may make. These are identical to the final orders available under the old section 32(3).

> (1) A magistrate may make an order to dismiss a 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, treatment or the provision of support for the defendant's mental health impairment or cognitive impairment, or
> >
> > (c) unconditionally.

4.6 Factors that may be taken into account – section 15

Section 15 is a new provision setting out a list of factors that a magistrate may take into account. These largely reflect the common law on section 32. Note the use of "may" (not "must") and the inclusion of the catch-all "other relevant factors".

> In deciding whether it would be more appropriate to deal with a defendant in accordance with this Division, the magistrate may consider the following—
>
> > (a) the nature of the defendant's apparent mental health impairment or cognitive impairment,

(b) the nature, seriousness and circumstances of the alleged offence,

(c) the suitability of the sentencing options available if the defendant is found guilty of the offence,

(d) relevant changes in the circumstances of the defendant since the alleged commission of the offence,

(e) the defendant's criminal history,

(f) whether the defendant has previously been the subject of an order under this Act or section 32 of the Mental Health (Forensic Provisions) Act 1990,

(g) whether a treatment or support plan has been prepared in relation to the defendant and the content of that plan,

(h) whether the defendant is likely to endanger the safety of the defendant, a victim of the defendant or any other member of the public,

(i) other relevant factors.

4.7 Enforcement – sections 16, 17

Section 16 provides that a person may be called back before the court for failure to comply within 12 months of the order being made.

This is of course an increase from the 6-month period under section 32.

Section 17 replicates the old section 32A and provides that a "treatment provider" may report a person's failure to comply. It retains the flaws of the old provision, which does not reflect reality, e.g. it does not provide for the "responsible person" to report a breach, and provides for a report to be made to an officer of the Department of Communities & Justice (i.e. Community Corrections or Youth Justice NSW), who have never had a legal mandate to supervise section 32 orders. In practice, responsible persons or treatment providers generally report breaches directly to the court.

5 Part 2 Division 3 – section 19 applications

The former section 33 is split into several provisions which are mostly found in Division 3.

In substance these provisions are identical to the old section 33, except they now apply to "mentally disordered persons" as well as "mentally ill persons".

5.1 Application to "mentally disordered persons" as well as "mentally ill persons" – section 18

The definitions of "mentally ill person" and "mentally disordered person" are set out in *Mental Health Act* 2007 sections 14 and 15 respectively.

Essentially, these are people who require care, treatment or control for their own or others' protection from serious harm. The main difference between the two categories is that a "mentally disordered person" may or may not have a mental illness, and can only be subjected to involuntary treatment on a short-term basis.

Unlike section 12 (which requires the magistrate to consider whether it is more appropriate to deal with a defendant under section 14 than according to law), there is no "appropriateness" criterion here. However, the use of the word "may" in section 18 makes clear that the making of an order is discretionary.

5.2 Orders magistrate may make – sections 19-21

These are identical to the orders available under the old section 33 (except insofar as they now apply to mentally disordered persons). Section 19 provides:

> A magistrate may make one or more of the following orders--
>
> > (a) an order that the defendant be taken to, and detained in, a mental health facility for assessment,
> >
> > (b) an order that the defendant be taken to, and detained in, a mental health facility for assessment and that, if the defendant is found on assessment at the mental health facility not to be a mentally ill person or mentally disordered person, the defendant be brought back before a magistrate or an authorised justice as soon as practicable unless granted bail by a police officer at that facility,
> >
> > (c) an order for the discharge of the defendant, unconditionally or subject to conditions, into the care of a responsible person.

Section 20 allows the magistrate to make a Community Treatment Order in some circumstances.

Section 21 allows an authorised justice (i.e. sitting at a weekend bail court, for example) to make an order in similar terms to section 19 (a) or (b).

5.3 Enforcement – section 23

Although final orders under section 14 are enforceable for 12 months, the 6-month period has been retained for section 19 orders.

See my May 2021 paper for a discussion of the circumstances in which a defendant dealt with under section 19 (or the old section 33) may be brought back before the court.

6 Options if a section 14 or 19 application is refused

If your section 14 or 19 application is refused, there may be a few options available.

6.1 In the Local or Children's Court

In many cases, the defendant will have already admitted the offence or pleaded guilty, and the matter will then proceed to sentence. It is not uncommon for a magistrate who has just refused a section 14 application to impose a non-conviction CRO.

If your client has pleaded not guilty, or has not entered a plea, you may of course proceed to a defended hearing. If the magistrate has heard evidence that may be prejudicial to your client's defence, it is open to you to ask them to disqualify themselves (however, the provision in the MHFPA that *required* the magistrate to disqualify themselves was repealed several years ago).

If your section 14 or 19 application fails and your client is unfit to be tried, *Mantell v Molyneux* [2006] NSWSC 955 is still good law and the court would be required to discharge the defendant.

It is also worth noting that you are not precluded from running another section 14 or 19 application if the matters are adjourned. Usually this would require a change of circumstances, for example, a worsening of the client's symptoms, or an updated report or a better case plan.

6.2 Appeals

If you wish to appeal to the District Court, you must first wait until your client has been sentenced in the Local or Children's Court. It is possible to make a section 14 application in a District Court appeal. However, you will need to lodge a conviction appeal and not simply a severity appeal (see the case of *Huynh v R* [2021] NSWCCA 148 and a paper I co-authored with Dev Bhutani and Arjun Chhabra at https://criminalcpd.net.au/wp-content/uploads/2021/09/Huynh-v-R-Implications-for-Discharge-and-Dismissal-final.pdf).

Section 53 of the *Crimes (Appeal and Review Act)* provides for an appeal to the Supreme Court against an interlocutory decision. Such an appeal must be brought on a question of law alone and requires leave.

7 Fitness to be tried and mental impairment defence in summary proceedings

7.1 Difference between superior and magistrates' courts

In his paper, Justice Ierace discusses the application of the MHCIFPA in superior courts. There is a new statutory regime for dealing with the question of fitness to be tried, and a new statutory "mental health impairment or cognitive impairment" defence.

Due to the structure of the MHCIFPA, these provisions do *not* apply to matters being dealt with summarily. Therefore it seems that the common law still applies in the Local and Children's Courts.

Because of the broad discretion available under section 14 and 19 (and their predecessors sections 32 and 33), the issues of fitness to be tried and mental health defences rarely fall to be determined in summary matters. However, they occasionally do arise.

7.2 Fitness to be tried

There is no statutory regime for assessing fitness to be tried, or for dealing with a defendant who is unfit, in summary matters.

In practice, issues of fitness are usually sidestepped by applying section 14 or 19 or their predecessors. The case law makes it clear that the court does not need to inquire as to the defendant's fitness when dealing with a section 14-type application: see *Mackie v Hunt* (1989) 19 NSWLR 130; *Mantell v Molyneux* [2006] NSWSC 955. However, that is not to say that the question of fitness is irrelevant to a section 14 or 19 application.

Actual or suspected unfitness often leads to a section 14 or similar disposition because of the difficulties involved in dealing with such a person "according to law". Most magistrates would prefer an unfit defendant to be subject to a section 14 order for 12 months (or even a section 32 order for 6 months) than to be simply discharged.

In *Mantell v Molyneux* [2006] NSWSC 955, the defendant, who had an intellectual disability and serious mental health problems, was charged with assault-type offences. She had a history of similar charges, some of which had been dealt with under section 32. This time the magistrate refused a section 32 application, on the grounds that 6 months was not long enough to achieve the long-term results required.

The defendant's legal representative then applied for a stay of proceedings on the grounds that the defendant was unfit to be tried. The magistrate refused the stay application but, on appeal to the Supreme Court, Adams J held that the defendant must be discharged because there was no regime in place to accord her a fair trial in the Local Court.

My view is that *Mantell v Molyneux* is still good law and that the common law criteria for assessing fitness, set out in *R v Presser* [1958] VR 45, continue to apply.

As there is no statutory regime for conducting a fitness inquiry in the Local and Children's Courts, different magistrates will approach this issue in different ways. My experience is that generally the magistrate will list the matter for a fitness hearing, at which the defence tenders an expert report and makes the expert available for cross-examination if required. The prosecution may request the defendant to see an expert briefed by them, but there is no obligation for the client to do so.

7.3 Defence of not guilty by reason of mental illness/impairment

Under the old MHFPA, there was some uncertainty as to the application of the "not guilty by reason of mental illness" (NGMI) defence in summary proceedings.

Although there was a general view that the common law NGMI defence was available in the Local Court, there was a divergence of views as to the consequences of a successful NGMI defence. On one view, Part 4 of the MHFPA did not apply to Local Courts and therefore a defendant found NGMI would have to be released.

Others held the view that Part 4 was applicable. In *R v McMahon* [2006] NSWDC 81, Berman DCJ was dealing with an appeal from the Local Court. After finding that the defence of mental illness was available to the appellant, his Honour then heard submissions as to what consequential orders should be made. While not expressly referred to in the judgment, this does appear to suggest that Part 4 of the MHFPA was applied. This view is further supported by remarks made by his Honour after reviewing of the history of the common law defence, (at [11]):

> "That is not to say that those who are not guilty on the grounds of mental illness should be entitled to walk free in society, and indeed the law has mechanisms in place to protect society and its members from those who are mentally ill. Those mechanisms have existed for many years. In the old English legislation which I have just mentioned it was provided that the person found to be insane was not set free but detained "until the King's pleasure be known". Now, in modern NSW, the [MHFPA] operates to govern the detention of those found not guilty on the grounds of mental illness."

The new MHCIFPA is structured in such a way that the new statutory defence, and the procedure for dealing with a defendant after such a defence is successfully raised, applies only to superior courts.

It therefore appears that the common law defence (based on the *M'Naghten* rules) still applies in the Local and Children's Courts, and a person found NGMI in summary proceedings would have to be released.

8 Commonwealth offences - section 20BQ

Section 20BQ of the Commonwealth *Crimes Act* applies to Commonwealth offences.

It is broadly similar to section 32 of the MHFPA and section 14 of the MHCIFPA, but there are some important differences:

- It applies to a defendant with a "mental illness" (within the meaning of the law of the relevant State or Territory) or "intellectual disability".
- It applies only if the person has the illness or disability *at the time of the court appearance* (with intellectual disability and most types of mental illness, this will not be an issue, but it may exclude people who had a temporary episode of mental illness at the time of the offence).
- A diversionary order may be made "for a specified period that does not exceed 3 years".

- There appears to be no Commonwealth equivalent to section 19 of the NSW Act. Presumably a person who is currently a "mentally ill person" could be dealt with under 20BQ, but it is questionable whether the power to make "such other orders as the court sees fit" under subsection (1)(d)(iii) would empower the court to send someone to hospital against their will.

Because of the more restrictive nature of section 20BQ, there have been attempts to make section 32 applications in relation to Commonwealth offences, arguing that section 32 was available to fill in the gaps where section 20BQ does not apply. However, section 32 was ruled inapplicable in Commonwealth matters by the Court of Appeal in *Kelly v Saadat-Talab* [2008] NSWCA 213.

9 Some common myths about diversion

9.1 "Some offences are just too serious"

The seriousness of the alleged offence is relevant but not determinative. In *DPP v El Mawas* (2006) 66 NSWLR 93, [2006] NSWCA 154, the Court of Appeal affirmed that there is a broad discretion available and did not expressly rule out section 32 for serious offences.

9.2 "The illness/condition/disability must have caused the offending"

Again, causal link is relevant but not determinative: *DPP v El Mawas* (2006) 66 NSWLR 93, [2006] NSWCA 154.

9.3 "The defendant knows the difference between right and wrong so diversion is not appropriate"

A person who "knows the difference between right and wrong" and is capable of forming mens rea can still be appropriately dealt with under section 32 or section 14.

Remember that impaired judgment is a feature of many mental illnesses. Even if the defendant was not so unwell as to lack mens rea at the time of the alleged offence, the illness may have impaired his/her ability to make rational choices about his/her behaviour.

The Intellectual Disability Rights Service (IDRS) has a step-by-step guide to section 32 applications which is very helpful in explaining links between cognitive impairment and offending behaviour (although the legal content is now outdated). See the section on "Clients with intellectual disability" at http://www.idrs.org.au/s32/_guide/p040_1_1_ClientsWithID.php#.YiLcjatBxyw.

However, if a person was so impaired at the time of the offence that they could *not* form mens rea, this would be a powerful argument in favour of diversion.

It is worth noting that, in *Sullivan v Director of Public Prosecutions (NSW)* [2020] NSWSC 253, Hamill J said (at [48]), that "s32 is not merely a diversionary scheme with a protective purpose, but also a provision that ensures that criminal liability is not attributed to somebody who was mentally ill at the time of the offence.''

Sullivan concerned an application to annul a Local Court conviction following a successful application to the Minister under section 5 of the *Crimes (Appeal and Review) Act*. This case is mainly about annulment applications and is worth reading for that reason.

9.4 "Section 32 is inappropriate for traffic or other strict liability offences"

See *Police v Deng* [2008] NSWLC 2, where the defendant was discharged under section 32 for an offence of negligent driving occasioning death.

Some magistrates have expressed the view that diversion is not appropriate for strict liability offences which do not require proof of mens rea. This view has no basis in law and fortunately is not as widely-held as it used to be.

Another view is that section 32 is inappropriate for traffic offences because it does not allow the court to impose any disqualification and therefore the protection of the community is compromised. With respect to those who hold it, this view rests on a misguided assumption that disqualifying a mentally ill defendant will actually stop them from driving. In such a case it could be argued that requiring the defendant to obtain treatment for 6-12 months would better promote road safety than simply fining and disqualifying the defendant without any follow-up.

The magistrate or prosecutor may refer the matter to the Transport for NSW (formerly the RMS) after a successful section 32 or 14 application, so they can consider whether the defendant is a fit and proper person to hold a licence. This is what occurred in *Deng*. This may result in TfNSW requiring the defendant to provide medical or psychiatric evidence that they are fit to drive. In my experience, clients are usually able to retain their licences as long as they remain in treatment and do not continue to drive while acutely unwell.

9.5 "It's all about treatment vs punishment"

Although a section 32 (and now a section 14) application is often said to be a balancing exercise between treatment and punishment (See in *DPP v El Mawas* (2006) 66 NSWLR 93, [2006] NSWCA 154), remember that these provisions are *diversionary*, not simply a sentencing option.

If a matter is dealt with according to law, it does not automatically follow that the defendant will be convicted and sentenced.

For example, the defendant may be unfit to be tried, and therefore able to apply for a permanent stay or discharge on the basis that they will never receive a fair hearing (as was the case in *Mantell v Molyneux*). Or maybe the client lacks mens rea and would have a NGMI-type defence available.

While the case law does not expressly support this approach, it is appropriate to ask the magistrate to turn their mind to these issues, and take a pragmatic look at what might actually happen if the section 32 or 14 application is refused, rather than focusing exclusively on the likely penalty in the event of conviction.

9.6 "The facts must be admitted, or findings of fact made, before the application can be determined" or "The magistrate must take the police facts at their highest"

This is a very persistent myth that misapprehends the diversionary nature of section 14. Remember that:

- Section 9 makes it clear that the defendant does not have to enter a plea.
- Section 12(2) provides for the magistrate to consider "an outline of the facts alleged in the proceedings or other evidence the magistrate considers relevant".

- Section 10 provides: "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".

See also the following from the judgment of McColl JA in *DPP v El Mawas* (2006) 66 NSWLR 93, [2006] NSWCA 154:

> "[74] In exercising the Pt 3 jurisdiction, the magistrate is given powers of an inquisitorial or administrative nature to inform herself or himself as the magistrate thinks fit: s 36. That power, which would clearly have to be exercised in accordance with procedural fairness requirements, demonstrates the breadth of the inquiry a magistrate is entitled to undertake in determining whether to send a defendant along the diversionary route, or leave him or her to be dealt with in accordance with law."

If there is a significant dispute about the facts, it is open to you to provide additional evidence, as long as you are not effectively turning the application into a defended hearing. For example, you may have been served with a brief or some footage which contradicts aspects of the police facts or at least casts them in a different light. You may also have an ERISP which clearly shows that your client was mentally impaired at the relevant time.

9.7 "You must always have a treatment plan"

Firstly, a word about terminology. The MHCIFPA refers to a "treatment or support plan" (see section 7). For a person with a cognitive impairment (which is not an illness and cannot be "treated"), it is an inappropriate term. More it is appropriate to refer to a "case plan" or "support plan", not a "treatment plan".

In practice, the court usually won't grant a section 14 application unless you can present them with a solid plan to treat and/or support the defendant and to address the (alleged) offending behaviour.

The existence of a treatment or support plan is one of the factors that the magistrate may consider under section 15, but neither the Act nor the common law makes this mandatory.

The Supreme Court in *Perry v Forbes & Anor* (1993, NSWSC, unreported) emphasised the need for a case plan in the context of serious and/or repeat offences. See also *DPP v Albon* (2000) NSWSC 896 and a summary of the case law in *Saunders v Director of Public Prosecutions (NSW)* [2017] NSWSC 760 at [34] – [37].

If you are dealing with a minor offence which would normally be dealt with by way of fine (or s10 or 10A), be mindful that one of the relevant considerations in a section 14 application is the likely penalty if the offence is proved and dealt with according to law. In this case an unconditional dismissal may be appropriate and there is no need for a detailed case plan.

A support or treatment plan may also be unnecessary if the court is dealing with an old offence and the defendant has since obtained treatment or achieved some stability. This was the case in *Sullivan v Director of Public Prosecutions (NSW)* [2020] NSWSC 253.

After hearing submissions from the prosecution that a section 32 disposition was inappropriate, Hamill J said (at [48]):

> "Whilst there is considerable force in these submissions, I accept Ms Epstein's submission that s 32 has another purpose. That purpose arises in a case, and this may be one of them, where the accused person suffered from the mental illness at the time of the offence. There may be cases where the condition has either been treated by the time of the hearing or has otherwise resolved. In such cases, it is open to the Magistrate to dismiss the charge unconditionally: s

32(3)(c). In this respect, s 32 is not merely a diversionary scheme with a protective purpose, but also a provision that ensures that criminal liability is not attributed to somebody who was mentally ill at the time of the offence."

9.8 "The responsible person must be a named individual"

This is not the case, although the person or agency must be clearly identified: *Saunders v DPP* [2017] NSWSC 760.

Also be mindful that the responsible person:

- need not be a psychiatrist or mental health professional;
- doesn't have to be at court or to sign anything;
- can't be compelled to provide services: *Minister for Corrective Services v Harris & Karpin* (1987) SCNSW, unreported;
- may report a breach but can't be compelled to do so;
- does not have to undertake to the court to report non-compliance (although, in practice, some magistrates will refuse to make a section 32 or 14 order without such an undertaking).

9.9 "The application must be refused because the 6-month time limit on enforceability is not long enough"

It is permissible for the matter to be adjourned to keep the defendant under supervision for longer: *Mantell v Molyneux* [2006] NSWSC 955.

Now, of course, the new Act has extended this period to 12 months, and section 13 makes it clear that the proceedings can be adjourned for any reason the magistrate considers appropriate in the circumstances.

9.10 "The defendant must be present at court for an order to be made"

A section 14 or 19 (or 32 or 33) order may be made in the absence of the defendant. It is not a bond and doesn't have to be entered into.

However, orders shouldn't be made in chambers without the parties being heard: *DPP v Wallman* [2017] NSWSC 40.

9.11 "A psychologist can't diagnose a mental illness" or "The court cannot give any weight to assessments based on information self-reported by the defendant"

In practice, I find that most magistrates (and even police prosecutors) will accept diagnoses made by clinical or forensic psychologists. The reluctance to accept psychologists' opinions seems to be more prevalent in the superior courts and has been the subject of some recent case law.

***Taitoko v R* [2020] NSWCCA 43**

This case has been relied upon by the ODPP of late. Although it is unhelpful for the defence, in my view it is not authority for the proposition that psychologists can *never* diagnose psychiatric illnesses.

Mr Taitoko sought leave to appeal against a sentence imposed by the District Court. One of the grounds of appeal was that the sentencing judge failed to give appropriate weight to the unchallenged psychologist's report tendered on behalf of the offender.

Leeming JA (with Hoeben CJ and Lonergan J agreeing) addressed this ground from [112]:

> [112] Mr Cohen's report is mentioned above. It is plain that he expressed opinions regarding – and indeed purported to diagnose – psychiatric conditions. He was not qualified to do this.
>
> [113] As was observed during the hearing in this Court, this is far from the first occasion where this has occurred. In *R (Cth) v Petroulias (No 36)* [2008] NSWSC 626, Johnson J observed at [164]:
>
> > "A number of psychologists gave oral evidence. In approaching their evidence, I keep in mind that it is important that psychologists do not cross the barrier of their expertise. It is appropriate for persons trained in the field of psychology to give evidence of the results of psychometric and other psychological testing, and to explain the relevance of those results, and their significance so far as they reveal or support the existence of brain damage or other recognised mental states or disorders. It is not, however, appropriate for them to enter into the field of psychiatry: *R v Peisley* (1990) 54 A Crim R 42 at 52."
>
> [114] Those views were endorsed in this Court in *WW v R* [2012] NSWCCA 165 at [58]. That is not to deny that in some cases a psychologist's opinion may be persuasive: see for example *Masters v R* [2019] NSWCCA 233 at [11]-[12]. Where, as in the present case, a psychologist's report is tendered without objection, then it formed part of the evidence before the sentencing judge to be given such weight as it deserved, as Johnson J observed in *Jung v R* [2017] NSWCCA 24 at [41]-[42].

Leeming JA concluded (at [120]) that the sentencing judge had given the psychological report due weight, and was entitled to find that it did not support the defendant's submission that there was a causal link between the offender's mental health and his moral culpability. It was significant that the psychological assessment was prepared more than 20 months after the event and there was no contemporaneous psychiatric evidence that the offender suffered from a mental illness at the time of the offence.

***Lam v R* [2015] NSWCCA 143**

This case has also been used to argue against the validity of diagnoses made by psychologists. However, it is *not* authority for the proposition that a psychologist cannot diagnose a mental illness or condition.

This case was a sentence appeal. The issue was whether the sentencing judge had erred by rejecting a psychologist's opinion that the accused suffered from a depressive disorder which was causally related to his involvement in the offences.

The psychologist had given an opinion based on the history provided by the offender. The sentencing judge rejected the psychologist's opinion largely because he did not accept the history given by the offender.

Hoeben CJ at CL, with whom both Johnson J and Beech-Jones agreed, at [58]:

> *"His Honour's rejection of the opinion of Dr Jacmon was based on his Honour's rejection of the history upon which that opinion was based. That is a legitimate basis for rejecting the conclusions in an expert's report."*

Further, at [73]:

> *"The facts in dispute were resolved in a way adverse to the applicant. Since the opinion of Dr Jacmon was predicated on a resolution of the facts favourable to the applicant, the rejection of the applicant's position substantially undermined that opinion. That made the findings by the sentencing judge almost inevitable. The process which took place did not involve any denial of procedural fairness."*

Hoeben CJ at CL also expressed a view that the particular psychologist (not psychologists in general) lacked the qualifications and experience to arrive at particular conclusions. His Honour's further comments at [74]-[83] are clearly *obiter* but were nonetheless said to have been provided for the "guidance of lower courts".

His Honour accepted that the psychologist could give opinions, including that the applicant's "functioning was impaired by a major depressive disorder", that were based on the results of tests performed and the history provided [at 79]:

> *The first part of the conclusion, i.e. that the applicant's "functioning was impaired by a major depressive disorder at clinically significant levels", was a conclusion available to Dr Jacmon based on the BDI test results. The history taken by Dr Jacmon could also inform that conclusion.*

However, his Honour rejected an opinion as to the *cause* of that impairment on the basis that the psychologist was not appropriately qualified [at 79]:

> *Where I have difficulty is in understanding how Dr Jacmon could reach the next conclusion, i.e. "the impairment is likely to have resulted from the breakup with his long term girlfriend in Hong Kong". That is a medical diagnosis for which I can find no basis in the specialised knowledge or training available to Dr Jacmon.*

His Honour also rejected the opinion linking the condition and the offending as being beyond the psychologist's expertise. [80]

The psychologist in *Lam* had a Bachelor of Science and a Master's and a Doctorate in Education. "His work history and published research showed that he had considerable experience and expertise in the treatment of depression and other psychological ailments" (see para [78] of the judgment). However, he was not a clinical or a forensic psychologist.

It is suggested that more weight may be given to the opinion of a clinical forensic psychologist, who will generally have greater expertise in diagnosing mental conditions.

***Masters v R* [2019] NSWCCA 233**

Per Hamill J (with whom Bathurst CJ and McFarlan J agreed):

> [9] The applicant's case on sentence included a body of evidence going to these mental health issues. This included the contents of a pre-sentence report which referred to the fact that there was no formal diagnosis but that he had been treated for "anxiety and depression" since 2010. The report also referred to the fact that the applicant was "weaning off" one medication and changing to another but that he did "not follow the GP's directions for the change in medication". A report from a psychologist, Kris North, was tendered. It referred to a relevant history going back to the applicant's school years when he had symptoms of Attention Deficit Hyperactivity Disorder (ADHD) resulting in "poor frustration tolerance and general impulsivity". At the time of the offending (and sentence), Ms North expressed the opinion that the applicant was suffering from social anxiety disorder, major depressive disorder (severe recurrent episode, with anxious distress) and alcohol use disorder.
>
> [10] Each of these diagnoses was based on the applicant's history and presentation, and reference was made to the relevant parts of the standard and current diagnostic tool (DSM-5). In his judgment, the sentencing Judge questioned the psychologist's expertise to provide those diagnoses "other than to say that the offender meets the criteria" and noted that Ms North was "not a trained medical practitioner (such as a psychiatrist)".
>
> [11] There are no doubt cases in which the existence and nature of an offender's mental condition is controversial, or where the evidence of a psychiatrist may be more persuasive than that of a psychologist and this is

> reflected in various judgments of this Court [*Footnote: Cf WW v R [2012] NSWCCA 165 at [58]-[60]; Lam v R [2015] NSWCCA 143 at [78]-[82]; Jung v R [2017] NSWCCA 24 at [39]; Zuffo v R [2017] NSWCCA 187 at [73]*]. However, there is no suggestion that the prosecution required Ms North for cross-examination, objected to her report or challenged her expertise.
>
> [12] Further, in some cases, in spite of the absence of a medical degree, a sentencing Judge may find a psychologist's opinion more persuasive than that of medically qualified experts. [*Footnote: See for example R v Kelsall [2015] NSWSC 480 at [21], [28]-[60], especially at [46], [60]. See also, and generally, R v Billy Krey [2019] NSWSC 762*.]

***Jones v Booth* [2019] NSWSC 1066**

A psychologist (Jones) prepared a psychological report in relation to a defendant for an application under section 32 of the *Mental Health (Forensic Provisions) Act*. A magistrate initially expressed reluctance to rely on the report because in the magistrate's view, the psychologist was not qualified to opine on matters set out in section 32. The proceedings were adjourned and the came before a different magistrate, who accepted the psychological report and granted the section 32 application.

Jones sought declaratory relief in the Supreme Court to the effect that he was qualified to report on matters under section 32. He claimed that the first magistrate's comments had impacted upon solicitors' willingness to engage him on section 32 applications.

Johnson J dismissed the application for declaratory relief, but made helpful comments in relation to the capacity of psychologists to make diagnoses:

> [55] … The Local Court should consider the qualifications and expertise of the author of any report which is sought to be tendered at the hearing of an application under s.32 MHFP Act, together with the contents of the report, to determine whether the report should be admitted at the inquiry and what weight should be given to it.
>
> …
>
> [57] A magistrate would fall into error if a blanket approach was adopted so that reports of psychiatrists only could be received on applications under s.32 MHFP Act. The type of report which may be appropriate will depend very much on the particular case.
>
> …
>
> [59] As the present case makes clear, there are areas where a psychologist may report and conduct testing which bear upon these issues. In reality, there is no bright line test which delineates, for the purpose of s.32 MHFP Act, areas where a psychological report can or cannot be received.
>
> …
>
> [63] It may be accepted that psychologists play a significant part in the provision of reports for applications under s.32 MHFP Act, and the operation of treatment plans for individual defendants who may be subject to a s.32 order.

Johnson J also made further comments that support the capacity of psychologists to make diagnoses:

- That psychologists frequently report on conditions (especially within the realm of cognitive impairment) by administering well-recognised tests: [58].
- A number of leading cases (e.g. *El Mawas*) on section 32 involved the reliance on psychologist reports: [62].

- Although there exist cases which criticise reliance upon psychologists' reports, there is also case law which criticises the undue rejection of psychologists' reports: [64]-[66], citing *R v Whitbread* (1995) 78 A Crim R 452 at 460-461; *R v Arnold* [2004] NSWCCA 294 at [63]-[64].

***Luque v R* [2017] NSWCCA 226**

While this case is not directly relevant to the qualifications of psychologists, it is helpful.

Hamill J set out three factors a sentencing judge should consider when dealing with evidence of an offender's mental condition or intellectual impairment:

1. The Court ought not to approach task in unduly technical or restrictive way [114]
2. An offender relying on evidence of psychiatric issues for mitigation is not setting out to establish a defence of mental illness or substantial impairment and is not required to prove that they did not understand what they were doing, or that they did not know that what they were doing was wrong [115]
3. Circumspection with which a sentencing Judge may treat self-serving (hearsay) statements made by an offender to an expert witness ought not to equate to a devaluation of the opinion provided by the expert. [116]

***Lloyd v R* [2022] NSWCCA 18**

This is a recent case in which it was held that the sentencing judge failed to give adequate consideration to *Bugmy* factors.

A psychological report had been tendered on behalf of the offender, with no objection from the Crown.

While this case does not squarely address the qualifications of psychologists to make diagnoses, there are some helpful comments made by McCallum JA, who delivered the lead judgment in the CCA.

It is clear that her Honour regarded the psychologist as appropriately qualified to offer a clinical opinion. For example (at [23]), her Honour says: "…. under the heading "summary and clinical opinion", Ms Hübner gave a careful explanation, plainly drawing on her extensive education and clinical experience, of the likely impact of such matters."

The main issue in this case was the weight to be given to a psychological or psychiatric opinion that was based largely on information self-reported by the defendant. McCallum JA said:

> [42] "I make these observations in the context that, in the principal passage addressing the *Bugmy* submission, the judge accepted the factual premise of that submission. Accordingly, this Court can and should proceed on the same factual basis. The reason I raise the issue is that, elsewhere in the judgment, his Honour said, "this is a self-report without any confirmatory evidence, although his prior history clearly indicates that this man has had a long history of drug abuse." The import of those remarks is unclear. Ms Hübner's report was tendered without objection and admitted without qualification. The history given to her by the applicant was relevant because it provided the basis on which she was able to give evidence of assistance to the Court. That is not to say that the judge was obliged to accept the facts asserted without critical analysis. However, in the absence of any objection by the Crown, to the extent that the judge was minded to doubt the facts stated, procedural fairness required that his Honour identify any such doubt so as to give the applicant an opportunity to address it.
>
> [43] The judge's remark that part of the history was "self-report without any confirmatory evidence" echoes a concern expressed in the decision in *Qutami v R* [2001] NSWCCA 353 (Qutami). In that case, Smart AJ made a "general observation" at [58] that "very considerable caution should be exercised" in relying

upon statements made by a prisoner to a psychiatrist or a psychologist when the prisoner does not give evidence. His Honour said, "in many cases only very limited weight can be given to such statements" and continued at [59]:

> "There has been a noticeable and disturbing tendency of more recent years for prisoners on a sentence hearing not to give evidence and to rely on statements made to experts. Prisoners should realise that if this course is taken great caution will be exercised in respect of the weight, if any, given to those statements."

[44] Spigelman CJ agreed with those observations at [79]. The third judge, Simpson J, was silent on the issue. Her Honour agreed with the orders proposed by Smart AJ but did not express her agreement with his Honour's reasons.

[45] Smart AJ's general observation in *Qutami* is sometimes mistaken for a principle. It is not. If it were, it would be a wrong principle which required correction. Leaving aside the fact that the rules of evidence do not apply to proceedings on sentence unless the court so directs, the weight to be given to particular kinds of evidence in such proceedings cannot be pre-empted as a matter of principle. The weight and cogency of the evidence is always a matter for the individual assessment of the sentencing judge.

[46] The current practice of the District Court is to require any report prepared by a mental health expert to be served in advance of the sentence hearing: District Court Criminal Practice Note 20, cl 15. The clear purpose of that practice is to afford the Crown an opportunity to consider whether to accept or challenge the contents of such reports. In cases where a report is not challenged, the correct approach is as stated by Allsop P (with whom Price J agreed at [101]) in *Devaney v R* [2012] NSWCCA 285 at [88] (cited by Hamill J in *Luque v R* [2017] NSWCCA 226 at [116] and Fullerton J in *Pym v R* [2014] NSWCCA 182 at [79] (Hoeben CJ at CL and Price J agreeing at [1] and [2]):

> "It is one thing to discount admissible statements made to a psychiatrist or psychologist if the offender is not prepared to give evidence to the same effect: *Qutami* at 377 [58]-[59] and 380 [79] and [83] and *Palu* at 184-185 [40] and 175 [1] and [2] (although care needs to be taken not effectively to exclude admissible evidence by a process going beyond an assessment of weight); it is quite another to lessen the effect of the opinion of a professional psychiatrist, without cross-examination, when that opinion is based on history. In most cases, a psychiatrist will form a diagnosis from what is said to her or him; that is the very nature of the professional expertise being deployed. Part of the professional skill of the psychiatrist is the assessment of the history - how it accords with hypothesised and formed views of the professional. To say that the applicant was manipulating the psychiatrists is to criticise the professional opinions of the psychiatrists and should be put to them. The sentencing judge should not have diminished the weight of the psychiatrists who came to the view that the applicant had some insight into his condition."

[47] I would particularly endorse his Honour's observation that care needs to be taken not to exclude admissible evidence "by a process going beyond an assessment of weight". Where the report of a mental health professional is admitted without objection, qualification as to its use or cross-examination of the author, no principle of law requires the sentencing judge to exercise "very considerable caution" before relying on its contents absent evidence from the offender. It is by no means beyond debate that the court is the only forum in which a reliable medical history can be obtained. To sweep aside the considered opinions of medical experts with clinical experience in taking psychosocial histories and assessing their significance is, with respect, a lawyerly arrogance."

10 Services for people with mental health and cognitive impairments in the courts

10.1 Justice Health Court Liaison Service

Most criminal lawyers would be aware of the Mental Health Court Liaison Service run by Justice Health. It operates in several Local and Children's Courts across NSW (I am not sure of the exact number; the Justice Health website appears out-of-date and unclear).

Those of you who have access to this service may know how helpful they can be in performing assessments (with additional input from psychiatrists if necessary), making referrals and assisting to formulate treatment/case plans for section 32 applications.

Unfortunately the service is still not available at all Local and Children's Courts, and is generally not equipped to assess cognitive impairments.

10.2 Justice Advocacy Service (JAS)

The Justice Advocacy Service (JAS) is run by the Intellectual Disability Rights Service (IDRS).

JAS provides support for victims, witnesses, suspects and defendants in the NSW criminal justice system who may have a cognitive impairment.

Referrals may be made by calling 1300 665 908. Further information is available at https://idrs.org.au/jas/.

JAS was also involved in delivering the Cognitive Impairment Diversion Program (CIDP) and will be involved with a new diversionary program which is likely to commence soon.

10.3 Cognitive Impairment Diversion Program (CIDP) and its replacement

The Cognitive Impairment Diversion Program (CIDP), which commenced in 2017 as a pilot program at Penrith and Gosford Local Courts.

Under the CIDP, screening and assessments were performed by psychologists employed by the Justice Health Court Liaison Service. Additionally, CIDP support workers provided case management with a view to linking people with NDIS services if eligible. Additionally, diversionary orders made under section 32 at the conclusion of the program could be monitored by Community Corrections.

The CIDP's funding was not extended beyond 30 June 2020. However, in mid-2021 the Attorney-General announced funding for a similar program to be rolled out in several Local Courts.

I understand that the new program is likely to start operating in the next few months at the Downing Centre, Parramatta, Blacktown, Penrith, Gosford and Lismore Local Courts.