Mental Health and the Criminal Law[1]

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Fitness to be Tried - Cases

- In *Presser* Smith J (adopted in *Kesavarajah* (1994) 181 CLR 230) set out the following matters as the minimum standard an accused should be capable of in order to be fit for trial:

    - understand what it is that he/she is charged with
    - be able to plead to the charge and exercise his/her right of challenge
    - understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he/she did what he/she is charged with
    - be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he/she need not, of course, understand the purpose of all the various court formalities
    - be able to understand the substantial effect of any evidence that may be given against him/her
    - be able to make his/her defence or answer to the charge

- The test should be applied in reasonable and commonsense fashion:

    Presser [1958] VR 45

    Ngatayi (1980) 147 CLR at 8

    Kesavarajah (1994) 181 CLR 230

- In considering fitness the length of the trial and whether the accused will stay fit is relevant:

    Kesavarajah (1994) 181 CLR 230

    Robinson [2008] NSW CCA 64

- The test considers the fitness of the accused at the time of the trial not at the time the offence was committed:

    Dennison NSW CCA 3.3.1988

- Or subsequently at the time of an appeal:

    Rivkin (2004) 59 NSWLR 284 at [296]

    Wills (2007) 173 A Crim R 208 NSWCCA

- The question of fitness can be raised by an intellectual disability

    Mailes (2001) 126 A Crim R 20 (NSWCCA)

    Robinson [2008] NSW CCA 64 at [66]

    See also *Clarkson* (2007) 171 A Crim R 1 (NSWCCA) for a review of relevant cases.

- Where the question of fitness is raised the court must make a determination although neither the Crown nor the defence want the matter considered

    Kesavarajah (1994) 181 CLR 230

    Ngatayi (1980) 147 CLR at 9

[1] References are to the *Mental Health (Forensic Procedures) Act 1990* unless otherwise stated.

Zhang [2000] NSW CCA 344

Tier [2001] NSWCCA 53.

- Fitness to be raised in good faith:

  Tier [2001] NSWCCA 53.

- Where material before a court of appeal raises a question of fitness the court must quash the conviction unless satisfied that the trial court, acting reasonably, must have found the appellant fit to stand trial:

  RTI (2003) 58 NSWLR 438 at 449

  Rivkin (2004) 59 NSWLR 284 at 296

  Henley [2005] NSWCCA 126 at [4]

  Kirkwood [2006] NSW CCA 181

  Robinson [2008] NSW CCA 64

- The power of the court to dismiss a matter before conducting an inquiry under s.10(4) addresses the appropriateness of punishment – seeks to avoid unnecessary delays, costs and complications of fitness hearings where no punishment would ultimately be inflicted – 'punishment' includes conviction with no further penalty and orders of court after special hearing – equivalent to power of court to dismiss a charge without recording a conviction under s. 10 *Crimes (Sentencing Procedure) Act:*

  Newman [2007] NSWCCA 103

Special Hearings

- Prior to 1.1.2006 a special hearing was held before a jury unless the accused person elected to have then matter heard by a judge alone. Under s.21A, which commenced on 1.1.2006, a special hearing is held before a judge alone unless the accused person elects to have a jury.

- The cases emphasise following the mandatory procedures under the legislation.

  Zvonaric (2001) 127 A Crim R 9 (NSWCCA)

  Requirement to conduct special hearing as nearly as possible as if it were a trial requires indictment to be read out in open court - not sufficient to present indictment - usually insufficient to just tender statements.

  Subramaniam [2004] HCA 51, 10.11.2004 (includes a standard direction)

  Explanation to the jury at the commencement of the special hearing must include:

  - What unfitness to be tried means
  - Purpose of hearing
  - Available verdicts
  - Legal and practical consequences of verdicts
  - Explanation of normal procedures to help jury understand differences

  Under s.21(4) explanations mandatory and failure to give them caused miscarriage of justice.

  Knorr [2005] NSWCCA 70

  Followed *Subramaniam* – failure to explain legal and practical consequences of any verdict reached by the jury in the special hearing – miscarriage of justice – appeal allowed and verdict quashed.

  Minani (2005) 154 A Crim R 349 at [27] (NSWCCA)

Section 21(1) requirement that a special hearing is to be conducted as nearly as possible as if it were the trial of criminal proceedings, require a degree of formality

EK (2010) 208 A Crim R 157 (NSWCCA)

Section 306I *Criminal Procedure Act* permits tender of complainant's evidence at subsequent sexual assault trial - permitted under s.21(1)

Limiting Terms

- A Limiting term is the estimate of the total sentence not the NPP – no unfairness in this because person can be released prior to expiry of limiting term because of 6 monthly reviews - limiting term is the period beyond which a person cannot be detained [30]-[32]

  Mitchell (1999) 108 A Crim R 85 at [32] (NSWCCA)

  Mailes (2003) 142 A Crim R 353 (NSWSC)

- In setting the limiting term the court must have regard to sentencing principles

  Mitchell (1999) 108 A Crim R 85 at [35] (NSWCCA) - Court must have regard to any subjective mitigating factors that have been established - if a person's mental state means that such subjective factors were not, and because of that mental state could not be, present at relevant times, no presumption operates in the accused person's favour and no account can be taken of the absence of those subjective factors [51]

  Courtney (2007) 172 A Crim R 371 (NSWCCA) – take into account mental illness in accordance with normal sentencing practices: [13]

- Power and discretion of court to make order under s 27(b) detaining a person in a place other than a mental health facility after limiting term imposed and Tribunal found person not suffering from a mental illness nor from a mental condition for which treatment in hospital is available - court has discretion to make or not make an order – if no order made person entitled to be released - no power under s 27(b) to specify that only part of a limiting term is to be served in detention

  AN (No.2) (2006) 163 A Crim R 133 (NSWCCA)

- Legislature plainly intended MH(FP)Act to be read with Crimes (SP) Act and a practicable and workable interpretation given to both – [62] 'any other penalty' under s.23 includes disposition under Crimes (SP) Act and could include s.9 bond – [62] Court not required to deal with breach of bond under s.99 but may return to MH(FP) Act and impose a limiting term [51]

  Smith (2007) 169 A Crim R 265 (NSWCCA)

- No power to suspend sentence imposed as limiting term

  Warren [2009] NSW CCA 176 at [20]

Mental Illness Defence

37 Explanation to jury

If, on the trial of a person charged with an offence, a question is raised as to whether the person was, at the time of commission of the offence, mentally ill as referred to in section 38, the Court must explain to the jury the findings which may be made on the trial and the legal and practical consequences of those findings and must include in its explanation:

(a) a reference to the existence and composition of the Tribunal, and

(b) a reference to the relevant functions of the Tribunal with respect to forensic patients, including a reference to the requirements of this Act that the Tribunal may make an order for the release of a person detained in accordance with section 39 only if the Tribunal is satisfied, on the evidence available to it, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

38 Special verdict

(1) If, in an indictment or information, an act or omission is charged against a person as an offence and it is given in evidence on the trial of the person for the offence that the person was mentally ill, so as not to be responsible, according to law, for his or her action at the time when the act was done or omission made, then, if it appears to the jury before which the person is tried that the person did the act or made the omission charged, but was mentally ill at the time when the person did or made the same, the jury must return a special verdict that the accused person is not guilty by reason of mental illness.

(2) If a special verdict of not guilty by reason of mental illness is returned at the trial of a person for an offence, the Court may remand the person in custody until the making of an order under section 39 in respect of the person.

39 Effect of finding and declaration of mental illness

(1) If, on the trial of a person charged with an offence, the jury returns a special verdict that the accused person is not guilty by reason of mental illness, the Court may order that the person be detained in such place and in such manner as the Court thinks fit until released by due process of law or may make such other order (including an order releasing the person from custody, either unconditionally or subject to conditions) as the Court considers appropriate.

(2) The Court is not to make an order under this section for the release of a person from custody unless it is satisfied, on the balance of probabilities, that the safety of the person or any member of the public will not be seriously endangered by the person's release.

(3) As soon as practicable after the making of an order under this section, the Registrar of the Court is to notify the Minister for Health and the Tribunal of the terms of the order.

- Raising the Defence: The 'defence' of mental illness may be raised by defence counsel or the prosecution. Where the defence has been raised on the evidence the trial judge will have a duty to leave the defence although the matter was not raised by the accused.

  Ayoub (1984) 10 A Crim R 312, CCA(NSW)

  See also *Falconer* (1990) 171 CLR 30 at 62-3

  > It used to be said that it was for the defence to raise a plea of insanity and not for the prosecution. That is probably still the case, but we think that the position has now been reached where it is only realistic to recognize that, if there is evidence of insanity, the prosecution is entitled to rely upon it even if it is resisted by the defence. … we can see no reason why, if there is evidence which would support a verdict on the grounds of insanity, the prosecution should not be able to rely upon it in asking for a qualified acquittal as an alternative to conviction.

- Explanation to Jury – s.37: The purpose of the explanation to the jury is to ensure the jury understand the legal and practical consequences of a finding of not guilty by reason of mental illness – particularly with respect to the role of the Court and the Tribunal and the protection of the community

  PCB [2012] NSWSC 482 per Johnson J at [89]

  Rodriguez [2010] NSWSC 198 per Johnson J at [56]

  Coleman [2010] NSWSC 177 per Hall J at [69]-[79]

- s.38 Finding Offence Committed by Accused: The trier of fact must first be satisfied beyond reasonable doubt that the offence was committed by the accused before turning to the question of mental illness.

  PCB [2012] NSWSC 482 per Johnson J at [45]

  Rodriguez [2010] NSWSC 198 Johnson J at [32]

  McDonald [2012] NSWSC 875 per Bellew J at [58]

- Onus / Burden of Proof: Mental illness must be proved on the balance of probabilities regardless of who raises the defence

Mizzi (1960) 105 CLR 659 at 664–665

Ayoub (1984) 2 NSWLR 511 at 515

Jennings [2005] NSWSC 789, 11.8.2005 per Kirby J at [26], [28

Rodriguez [2010] NSWSC 198 per Johnson J at [32]

Melehan [2010] NSWSC 210 per Schmidt J at [27]

McDonald [2012] NSWSC 875 per Bellew J at [57]

- Use of Expert Evidence: Medical evidence not essential but usually adduced – trier of fact not bound to accept and act upon expert evidence, but not entitled to disregard it capriciously - ought not reject unanimous medical evidence unless there is evidence which can cast doubt upon the medical evidence

Rodriguez [2010] NSWSC 198 Johnson J at [45]

- Test for Mental Illness: The test is the common law test as established in *M'Naghton* (1843) 8 ER 718 and *Porter* (1933) 55 CLR 182 at 189–190

McDonald [2012] NSWSC 875 per Bellew J

[55] … In order to rely upon that defence, it must be established that at the time of the commission of the relevant act the accused was labouring under such a defect of reason from disease of the mind as to not know the quality and nature of the act he was doing or, if he did know it, that he did not know that what he was doing was wrong (see generally *M'Naghton* (1843) 8 ER 718).

[56] The test was formulated by Dixon J in *Porter* (1933) 55 CLR 182 at 189–190 in the following terms:

> The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know, in this sense, whether his act was wrong if, through a disease or defect or disorder of the mind, he could not think rationally of the reasons which, to ordinary people make, that act right or wrong?
>
> If, through the disordered condition of the mind, he could not reason about the matter with a moderate degree of sense and composure, it may be said that he could not know that what he was doing was wrong. What is meant by wrong? What is meant by wrong is wrong having regard to the everyday standards of reasonable people.

See also:

Pratt [2009] NSWSC 1108 per RA Hulme J at [19]-[21]

Fili [2010] NSWSC 712, R A Hulme J at [16]

Melehan [2010] NSWSC 210 Schmidt J at [26]-[30]

Rodriguez [2010] NSWSC 198 Johnson J at [33][-34]

Coleman [2010] NSWSC 177 Hall J at [22][-27]

Ethical Issues: Special Hearings and Mental Illness Defence

- The accused wishes to give evidence even though he/she is mentally ill

Smith [1999] NSWCCA 126 at [54]

> [54] I do not consider that the Act provides that a respect in which a special hearing is not to be conducted as if it were an ordinary trial, is that all decisions about the conduct of the accused person's defence at the special hearing are to be made by the counsel or solicitor of a legally represented accused, to the exclusion of the accused. If an accused person at a special hearing is able to communicate and communicates that he wishes to give evidence (or make a statement), then I do not

consider that the judge at the special hearing makes an error of law, if he permits the accused person to give evidence (or make a statement), even though counsel for the accused person is opposed to such a course.

- Counsel entitled to raise mental illness defence in a special hearing over objection of client:

Dezfouli [2007] NSWCCA 86 at [44]-[46]

[44] During the course of the special hearing Mr Toner informed the Court:

> I'm in a somewhat unusual situation in this hearing, given that – albeit that I'm here to represent the best interests of Mr Dezfouli, I'm not bound by his instructions, but as I indicated to your Honour at the commencement of the proceedings, I would do my best to reflect Mr Dezfouli's wishes if I could accommodate both obligations under the Act, to the Court and to him. Now this morning, Mr Dezfouli indicated a number of things ... he is not at all that keen for me to communicate it to you at all because of his view, that you and I and the Crown are part of a broad conspiracy in relation to him ... (T 162).

[45] In his closing address to the jury, Mr Toner said this:

> What I will be saying to you are things Mr Dezfouli would not like me to say, but have to be said. He doesn't think he is insane and what I am saying to you is that there is no doubt that he is (T 427.11)

[46] The scheme of the Act is designed to ensure that an accused person's interests are protected in circumstances in which it is recognised that because of mental illness or incapacity he or she lacks the capacity to make reasoned forensic decisions. The special hearing was conducted by Mr Toner in an endeavour to advance the appellant's interests as he perceived them to be. Counsel was not required to follow the appellant's instructions.

Local Court – Summary Proceedings

Section 32 (NSW)

Some introductory matters

- The text of the relevant sections are set out at the back of this paper. A good summary as to the application of section 32 can be found in:

  Section 32: Step by Step Guide to Making a Section 32 Application for a Person with Intellectual Disability, Intellectual Disability Rights Service (IDRS) 2011

  http://www.idrs.org.au/_education/_s32Guide/IDRS_Section_32_Guide_online.pdf

- Section 32 applies to all criminal proceedings in the Local Court which are summary matters and matters before the Children's Court except 'serious children's indictable offences'.

Jurisdictional Question

- In *DPP v El Mawas* [2006] NSWCA 154 McColl JA (Spigelman CJ and Handley JA agreeing) said that there are at least 3 decisions to be made by the Court in dealing with a section 32 application:

  - Whether the defendant is eligible to be dealt with under the section, which involves a finding of fact and is properly described as the jurisdictional question (i.e. what the relevant mental condition is): at [75];

  - Whether, having regard to the facts alleged in the proceedings or such evidence as the Magistrate may consider relevant it would be more appropriate to deal with the defendant pursuant to section 32, rather than in accordance with the law: at [76]; and

  - If it is more appropriate to deal with the defendant pursuant to section 32 which of the actions set out in sub-sections (2) or (3) should be taken: at [80].

- In *Khalil v His Honour, Magistrate Johnson and Anor* [2008] NSWSC 1092 Hall J said:

http://www.lawlink.nsw.gov.au/scjudgments/2008nswsc.nsf/aef73009028d6777ca25673900081e8d/faf0da6ca2c5b0c6ca2574e3007b5c96?OpenDocument

[85] The legislative framework and the general purpose and policy of s 32 was considered in detail by McColl JA in *El Mawas* at [47] to [58]. The provisions of s 32 themselves, together with the analyses of Spigelman CJ and McColl JA in that case, enable a number of propositions to be formulated as follows:

(1) The nature of the powers exercised by a magistrate under the Pt 3 jurisdiction are of an inquisitorial or administrative nature and the magistrate may inform himself or herself as he or she things fit: s 36 of the Act, see McColl JA in *El Mawas* at [74].

(2) A defendant may seek to put before a Magistrate who is exercising the jurisdiction under Pt 3 of the Act, evidentiary material (eg, medical reports) directed to each of the two matters arising under s 32, namely:

(a) one of the three facts set out in s 32(1)(a); and

(b) that "it would be appropriate to deal with the defendant" in the manner set out in s 32.

(3) A Magistrate exercising the jurisdiction under Pt 3 may have regard to any evidentiary material produced on behalf of a defendant on matters relevant to s 32(1)(a) and (b) as well as to "an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant …": s 32(1)(b).

(4) The powers under Pt 3 are to be exercised in accordance with procedural fairness requirements: *El Mawas* per McColl JA at [74].

(5) In formulating the judgment for which s 32(1)(b) calls, a proposed course of treatment, including, in particular, the existence and contents of a treatment plan, may be considered and given such weight as the Magistrate considers appropriate in making that judgment: see discussion on this aspect in *El Mawas* by Spigelman CJ at [10].

(6) In addition to receiving evidentiary materials or relevant information, it is necessary that a Magistrate during the course of a hearing in relation to the application of s 32 permit the defendant or his or her legal representative to make submissions relevant to matters arising under or in terms of the two "stages" prescribed by s 32(1) (a) and (b).

(7) In formulating the judgment for which s 32(1)(b) calls, the seriousness of the alleged offence or offences is always a matter that is entitled to be given weight: *El Mawas* per Spigelman CJ at [7]. As observed by Howie J on *Confos* at [17], the more serious the offending, the more important will be the public interest in punishment being imposed for the protection of the public and the less likely will it be appropriate to deal with the defendant in accordance with the provisions of the Act.

- Section 32 applies to persons who are not mentally ill (see section 33 for procedures for persons who are mentally ill). A Mentally ill person is defined under the *Mental Health Act* 2007:

14 Mentally ill persons

(1) A person is a mentally ill person if the person is suffering from 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.

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

Is it more appropriate to deal with them under s,32

- Magistrate has wide discretion, with inquisitorial powers, exercised in accordance with procedural fairness, to determine this question

- Must balance the "public interest in those charged with a criminal offence facing the full weight of the law against the public interest in treating, or regulating to the greatest extent practical, the conduct of individuals suffering from any of the mental conditions referred to in s 32(1) or mental illness (s 33) with the object of ensuring that the community is protected from the conduct of such persons."

El Mawas (2006) 66 NSWLR 93 at [71]-[76]

http://www.lawlink.nsw.gov.au/scjudgments/2006nswca.nsf/000000000000000000000000000000000/eb4219f0094ed44cca25718e001995c2?opendocument

Confos v DPP [2004] NSWSC 1159 per Howie J at [17]-[18]

http://www.lawlink.nsw.gov.au/scjudgments/2004nswsc.nsf/000000000000000000000000000000000/27ed08c4c514f8b5ca256f5c0074e562?opendocument

Section 20BQ (Cth)

- Section 20BQ is set out at the back of this paper.
- Similar provisions in the *Crimes Act* (Cth) apply to federal offences. The significant difference is that where charges are dismissed conditionally the final order can apply for 3 years under the Commonwealth provisions but only up to 6 months under the state provisions.

Morrison v Behrooz [2005] 155 A Crim R 110 (SASC)

Query whether the section applies where a plea of guilty has been entered

Boonstoppel v Hamidi [2005] 155 A Crim R 163 (SASC)

When considering whether to impose conditions upon a dismissal consider facts such as seriousness of offence, general deterrence and need for supervision or treatment of offender

Kelly v Saadat-Talab (2008) 72 NSWLR 305

http://www.lawlink.nsw.gov.au/scjudgments/2008nswca.nsf/000000000000000000000000000000000/6976134e8d539305ca2574b800226b61?opendocument

Where federal provisions apply state provisions do not apply – although substantial overlap between commonwealth and state provisions one difference is that federal provisions refer only to person who is suffering from mental illness whereas state provisions extend to person suffering mental illness at time of offence

Future Proposals – Law Reform

- NSWLRC Report 135 *People with Cognitive and Mental Health impairments in the Criminal Justice System – Diversion* suggests that there may well be substantial law reform in many of the areas covered by this paper. Some of the recommendations of that Report follow.

Chapter 5: Defining cognitive and mental health impairment
The definitions of cognitive and mental health impairment used in the criminal law are inconsistent and outdated - recommend two separate definitions of cognitive impairment and of mental health in part because of the need to focus on the particular, and different, requirements of people with cognitive impairment and to ensure that their interests do not become subsumed by a focus on mental health.

Chapter 9: Diversion in the Local Court – s 32
Recommend a number of reforms to broaden the section's scope and improve its operation – the new definitions as recommended above will include the full range of people with cognitive and mental health impairments - the current section gives no guidance to a court in deciding whether to divert - recommend including a non-exhaustive list of relevant factors relevant to assist but not unduly fetter the decision to divert – amending s.32 to increase and clarify diversion option - removing power to discharge into care of a responsible person because rarely used role is ill defined and service providers and family members are unwilling to take on the role – recommend court should be able to extend length of diversion plan beyond 6 months for up to 12 months.

9.1 The existing provision in s 32(1) *Mental Health (Forensic Provisions) Act 1990* (NSW) that excludes a mentally ill person from the application of s 32 should be removed.

9.2 (1) Section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) should be amended to provide that the court must take into account the factors listed in (2) when making a decision concerning:

(a) whether diversion is appropriate
(b) which diversionary option is appropriate for the defendant
(c) the length and nature of a diversion plan, and the frequency of any reporting requirements associated with that plan.

(2) The court must take into account the following factors, together with any other matter that the court considers relevant:

(a) the nature of the defendant's cognitive or mental health impairment
(b) the nature, seriousness and circumstances of the alleged offence
(c) any relevant change in the circumstances of the defendant since the alleged offence
(d) the defendant's history of offending, if any
(e) the defendant's history of diversionary orders, if any, including the nature and quality of the support received during those orders, and the defendant's response to those orders
(f) the likelihood that proposed orders will reduce the likelihood, frequency and/or seriousness of offending
(g) whether or not it is appropriate to deal with the defendant according to law in all the circumstances of the case including:
(i) the options that are available to the court if the defendant is dealt with according to law, and
(ii) any additional impact of the criminal justice system on the defendant as a result of their cognitive or mental health impairment
(h) the defendant's views about any proposed course of action, taking into account the defendant's degree of understanding
(i) the availability of services appropriate to the defendant's needs
(j) the family and community supports available to the defendant
(k) the benefits of diversion to the defendant and/or the community
(l) the desirability of making the order that has the least restrictive effect on the defendant that is appropriate in the circumstances of the case.

Chapter 10: Diversion in the Local Court – s 33
Section 33, like s 32, is used infrequently, and there is a high rate of return to court - we anticipate that the recommendations and improvements to assessment and court support, will increase the use of these orders in appropriate cases and will also address problems of recidivism - recommend power of courts to refer people for assessment be extended to people who appear to be mentally disordered – clarify that a person referred to a mental health facility can come back to court to be dealt with

(NSW) Mental Health (Forensic Provisions) Act 1990

Part 3 Summary proceedings before a Magistrate relating to persons affected by mental disorders

31 Application

(1) This Part applies to criminal proceedings in respect of summary offences or indictable offences triable summarily, being proceedings before a Magistrate, and includes any related proceedings under the Bail Act 1978, but does not apply to committal proceedings.

32 Persons suffering from mental illness or condition

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate:

(a) that the defendant is (or was at the time of the alleged commission of the offence to which the proceedings relate):

(i) developmentally disabled, or

(ii) suffering from mental illness, or

(iii) suffering from a mental condition for which treatment is available in a mental health facility,

but is not a mentally ill person, and

(b) that, on an outline of the facts alleged in the proceedings or such other evidence as the Magistrate may consider relevant, it would be more appropriate to deal with the defendant in accordance with the provisions of this Part than otherwise in accordance with law,

the Magistrate may take the action set out in subsection (2) or (3).(2) The Magistrate may do any one or more of the following:

(a) adjourn the proceedings,

(b) grant the defendant bail in accordance with the Bail Act 1978,

(c) make any other order that the Magistrate considers appropriate.

(3) The Magistrate may make an order dismissing the 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 of the defendant's mental condition or treatment or both, or

(c) unconditionally.

(3A) If a Magistrate suspects that a defendant subject to an order under subsection (3) may have failed to comply with a condition under that subsection, the Magistrate may, within 6 months of the order being made, call on the defendant to appear before the Magistrate.

(3B) If the defendant fails to appear, the Magistrate may:

(a) issue a warrant for the defendant's arrest, or

(b) authorise an authorised officer within the meaning of the Criminal Procedure Act 1986 to issue a warrant for the defendant's arrest.

(3C) If, however, at the time the Magistrate proposes to call on a defendant referred to in subsection (3A) to appear before the Magistrate, the Magistrate is satisfied that the location of the defendant is unknown, the Magistrate may immediately:

(a) issue a warrant for the defendant's arrest, or

(b) authorise an authorised officer within the meaning of the Criminal Procedure Act 1986 to issue a warrant for the defendant's arrest.

(3D) If a Magistrate discharges a defendant subject to a condition under subsection (3), and the defendant fails to comply with the condition within 6 months of the discharge, the Magistrate may deal with the charge as if the defendant had not been discharged.

(4) A decision under this section to dismiss charges against a defendant does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with under subsection (2) or (3).

(4B) A failure to comply with subsection (4A) does not invalidate any decision of a Magistrate under this section.

(5) The regulations may prescribe the form of an order under this section.

32A Reports from treatment providers

(1) Despite any law, a person who is to assess another person's mental condition or provide treatment to another person in accordance with an order under section 32 (3) (a treatment provider) may report a failure to comply with a condition of the order by the other person to any of the following:

(a) an officer of Community Offender Services, Probation and Parole Service,

(b) an officer of the Department of Human Services,

(c) any other person or body prescribed by the regulations.

(2) A treatment provider may include in a report under this section any information that the treatment provider considers is relevant to the making of a decision in relation to the failure to comply concerned.

(3) A report provided under this section is to be in the form approved for the time being by the Director-General of the Attorney General's Department.

33 Mentally ill persons

(1) If, at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, it appears to the Magistrate that the defendant is a mentally ill person, the Magistrate (without derogating from any other order the Magistrate may make in relation to the defendant, whether by way of adjournment, the granting of bail in accordance with the Bail Act 1978 or otherwise):

(a) may order that the defendant be taken to, and detained in, a mental health facility for assessment, or

(b) may 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 person be brought back before a Magistrate or an authorised officer, or

(c) may discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.

(1A) Without limiting subsection (1) (c), at the commencement or at any time during the course of the hearing of proceedings before a Magistrate, the Magistrate may make a community treatment order in accordance with the Mental Health Act 2007 for implementation by a declared mental health facility in relation to the defendant, if the Magistrate is satisfied that all of the requirements for the making of a community treatment order at a mental health inquiry under that Act (other than the holding of an inquiry) have been met in respect of the defendant.

(1B) The provisions of the Mental Health Act 2007 (other than section 51 (1) and (2)) apply to and in respect of the defendant and that order as if the order had been made by the Tribunal under that Act.

(1C) A Magistrate must, before making an order under subsection (1A), notify the Director-General of the Department of Health, or a person authorised by the Director-General of the Department of Health for the purposes of this section, of the proposed order.

(1D) If, at the commencement or at any time during the course of the hearing of proceedings under the Bail Act 1978 before an authorised officer, it appears to the authorised officer that the defendant is a mentally ill person, the authorised officer (without derogating from any other order under the Bail Act 1978 that the officer may make in relation to the defendant):

> (a) may order that the defendant be taken to, and detained in, a mental health facility for assessment, or
>
> (b) may 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 officer.

(2) If a defendant is dealt with at the commencement or at any time during the course of the hearing of proceedings before a Magistrate or authorised officer in accordance with this section, the charge which gave rise to the proceedings, on the expiration of the period of 6 months after the date on which the defendant is so dealt with, is to be taken to have been dismissed unless, within that period, the defendant is brought before a Magistrate to be further dealt with in relation to the charge.

(3) If a defendant is brought before a Magistrate to be further dealt with in relation to a charge as referred to in subsection (2), the Magistrate must, in dealing with the charge, take account of any period during which the defendant was in a mental health facility as a consequence of an order made under this section.

(4) The fact that charges are to be taken to have been dismissed under subsection (2) does not constitute a finding that the charges against the defendant are proven or otherwise.

(4A) A Magistrate is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1) or (1A).

(4B) An authorised officer is to state the reasons for making a decision as to whether or not a defendant should be dealt with by an order under subsection (1D).

(4C) A failure to comply with subsection (4A) or (4B) does not invalidate any decision of a Magistrate or authorised officer under this section.

(5) The regulations may prescribe the form of an order under this section.

(5A) An order under this section may provide that a defendant:

> (a) in the case of a defendant who is a juvenile, be taken to or from a place by a juvenile justice officer employed in the Department of Human Services, or
>
> (b) in the case of any defendant, be taken to or from a place by a person of a kind prescribed for the purposes of this section.

(6) In this section, a reference to an authorised officer is a reference to an authorised officer within the meaning of the Criminal Procedure Act 1986.

36 Means by which Magistrate may be informed

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.

(CTH) *Crimes Act* 1914

Division 8—Summary disposition of persons suffering from mental illness or intellectual disability

20BQ Person suffering from mental illness or intellectual disability

(1) Where, in proceedings in a State or Territory before a court of summary jurisdiction in respect of a federal offence, it appears to the court:

(a) that the person charged is suffering from a mental illness within the meaning of the civil law of the State or Territory or is suffering from an intellectual disability; and

(b) that, on an outline of the facts alleged in the proceedings, or such other evidence as the court considers relevant, it would be more appropriate to deal with the person under this Division than otherwise in accordance with law;

the court may, by order:

(c) dismiss the charge and discharge the person:

(i) into the care of a responsible person, unconditionally, or subject to conditions, for a specified period that does not exceed 3 years; or

(ii) on condition that the person attend on another person, or at a place, specified by the court for an assessment of the first-mentioned person's mental condition, or for treatment, or both, but so that the total period for which the person is required to attend on that other person or at that place does not exceed 3 years; or

(iii) unconditionally; or

(d) do one or more of the following:

(i) adjourn the proceedings;

(ii) remand the person on bail;

(iii) make any other order that the court considers appropriate.

(2) Where a court makes an order under paragraph (1)(c) in respect of a person and a federal offence with which the person has been charged, the order acts as a stay against any proceedings, or any further proceedings, against the person in respect of the offence.

(3) Where a court makes an order under subsection (1) in respect of a person and a federal offence with which the person has been charged, the court must not make an order under section 19B, 20, 20AB or 21B in respect of the person in respect of the offence.

20BR Means by which court may be informed

For the purposes of this Division, a court of summary jurisdiction may inform itself as the court thinks fit, but not so as to require the person charged to incriminate himself or herself.