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Magistrates Court Diversion List

Procedural Manual

Magistrates court of tasmania

**October 2014**

**Version 1.4**

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# 1. Background

The Diversion List (DL or the ‘List’) commenced operation as a mental health diversion pilot program in the Hobart registry of the Magistrates Court of Tasmania in 2007. An independent evaluation and review of the List was conducted in 2009, which recommended, *inter alia*, that the List be extended to other court registries in Tasmania and that the Procedural Manual guiding the functions and operations of the List be updated to reflect changes in procedure. The [Mental Health Diversion List Evaluation Report (Word 1.5 MB)](http://www.magistratescourt.tas.gov.au/__data/assets/word_doc/0019/381160/Evaluation_Final_Report_2009.docx) is accessible at the Magistrates Court of Tasmania website.

In 2013, the Magistrates Court extended the scope of the Diversion List to include persons with a cognitive disability or an Acquired Brain Injury. Consequently the state-wide intervention program was re-named the “Diversion List”.

Unlike some other mental health courts and court diversion programs, the DL is not a separate or distinct court and is not subject to any unique legislation. Instead, it operates as a specialist list and uses the provisions under the *Bail Act 1994* (Tas) and the *Sentencing Act 1997* (Tas) to divert eligible mentally ill defendants and/or defendants with impaired intellectual functioning away from the regular criminal justice system and into appropriate treatment in order to reduce their likelihood of reoffending. These defendants offend usually in a nuisance type way i.e. shoplifting, disorderly conduct and the like and they have traditionally been dealt with in the general lists where there is little time to consider the underlying reasons for their offending. They are usually repeat offenders. They present complex sentencing problems in the traditional court as they have no money and their offences are not serious enough for gaol or community service.

# 2. Purposes

## 2.1 Objectives

The main objectives of the MHDL are:

1. To provide an opportunity for eligible individuals to voluntarily address the mental health and/or cognitive disability needs associated with their offending behaviour;
2. To improve community safety and reduce recidivism by diverting persons with a mental illness or cognitive disability away from the criminal justice system and into appropriate treatment and support;
3. To improve the psychological and intellectual (and general) well-being of participants on the List by supporting them with their mental health and cognitive disability treatment;
4. To provide equitable and improved access to justice for persons with a mental illness or cognitive disability state-wide, including people in rural and remote locations;
5. To reduce the use of criminal justice sanctions for health-related behaviours;
6. To develop a shared approach to and commitment to ‘joined up’ service delivery between the Court and Forensic Mental Health Services; and
7. To reduce the total social cost of processing defendants in the criminal justice system whose repeat offending is attributable to mental illness and related problems.

## 2.2 Outcomes

The MHDL aims to achieve the following outcomes and will be evaluated to this extent.

1. **Modified and improved Court processes to reflect Court’s aspiration to improve access to justice:**

The prevalence of mental illness and cognitive disability in the criminal justice system is higher than that in the wider community. Defendants with mental health problems or cognitive disabilities present special challenges to the court process due to their complex needs: they often present as unreliable and have difficulty understanding court processes, they have difficulty attending and remembering appointments, and traditional sentences are unlikely to modify behaviour.

Modifying their engagement with the criminal justice process by focussing on treatment and support and corralling them into separate lists with dedicated Magistrates reduces the uncertainty in this process for defendants and for the support staff that provide expert advice to the court. This, in turn, has the potential of reducing the number of listings that have to be rescheduled in general court lists, improving listing potential for all Magistrates.

**Measures:**

* Number of DL participants compared against defendants with mental health or cognitive disability issues on the general lists.
* Modified procedures with savings in time and resources flowing to the Court.
1. **Achieve long-term savings for the Court and community by reducing reoffending**:

By utilising therapeutic jurisprudence techniques the potential exists to address the defendant’s mental illness or impaired intellectual functioning, improve the general health of defendants and improve the criminal justice response to the impairment. Additionally if special hearings under s 15 of the *Criminal Justice (Mental Impairment) Act 1999* are avoided by people voluntarily accepting engagement with the DL, defendants may get the support they need to address their criminogenic behaviour. Repeat and protracted appearances in the court over the longer term are therefore reduced, in turn providing savings to the Court and the community.

**Measures:**

* Reduced levels of recidivism for participants on the DL and post-participation.
* Reduced number of special hearings under s 15 of the *Criminal Justice (Mental Impairment) Act 1999* presided over by the Court.
1. **Improved coordination between the Court, other criminal justice agencies and health service providers:**

The operation of the DL depends on supportive and effective relationships between judicial officers, Court registry staff, mental health and disability officers, prosecutors, lawyers and assorted health and welfare professionals. A shared approach to addressing the needs of defendants will assist the program to become a valued feature of the criminal justice landscape.

**Measures:**

* Level of satisfaction with DL received from consumers and key stakeholders.
* Level of commonality of purpose and procedure among the key stakeholders involved in delivery of the List.

# 3. Eligibility

## 3.1 Target Population

The Diversion List is a specialist court targeting defendants who have a mental illness and/or impaired intellectual functioning. The following eligibility guidelines apply:

1. The defendant is charged with a summary offence or an indictable offence triable summarily.
2. The defendant has not been charged with an excluded criminal offence that involves serious violence or serious sexual assault, unless the court, at its discretion, considers the harm minor.
3. The defendant has (or is likely to have) a mental illness, intellectual disability, acquired brain injury, autism spectrum disorder and/or a neurological impairment, including dementia.
4. The impairment/s cause/s a substantially reduced capacity in at least one of the areas of self-care, self-management, social interaction or communication.
5. A connection exists between the mental impairment and/or mental illness and the offending behaviour, the defendant being likely to derive benefit from participation in a problem-solving court process.
6. There is no formal requirement that the defendant plead guilty to any offence before he or she is accepted onto the program, however the objective facts of the offence cannot be contested;
7. The defendant may not be eligible if the defendant, based on the opinion of Forensic Mental Health Services (Court Liaison) staff, has exhausted all reasonable and available treatment and/or support services for the mental illness and/or impaired intellectual functioning.
8. The defendant consents to participate in the List, including attending court regularly and following the reasonable directions of FMHS (Court Liaison) staff.

### 3.2 Existing Orders

The existence of any current community-based orders will not automatically disqualify a defendant for consideration for referral to the Diversion List program.

# 4. Diversion List Referral Processes

## 4.1 Referrals from the General List

Early referrals to the DL are encouraged in order to maximise the opportunity for therapeutic interventions. It is therefore anticipated that applications for referral to the List will be made, where possible, at a defendant’s first appearance before a Magistrate. This does not preclude applications being made at any point along the criminal justice process prior to finalisation.

### 4.1.1 Applications for referral

Applications for referral can be made to a Magistrate by:

* Defendants
* Tasmania Police (including Police Prosecution Services)
* Solicitors
* Forensic Health Services (Court Liaison) staff
* Mental Health Case Managers
* Other Service Providers
* Anyone with a genuine interest in the welfare of the defendant

A Magistrate retains the option to refer a defendant to the DL despite the absence of any application.

Applications may be made verbally and must provide the Magistrate with sufficient detail to justify referral to the List, based on the eligibility guidelines.

### 4.1.2 Matters considered in referral

When considering an application to refer a person to the program, a Magistrate may take into account:

* The opinion of court-based service providers,
* The nature of the charges,
* The wishes of the complainant, or
* Any other matter the Court considers being relevant.

There is no formal requirement to plead guilty to any offence before an individual is accepted onto the program. However, the Court needs to know that the matter is not under dispute nor likely to be contested.

Notwithstanding the above, where a defendant has existing matters before the Court, the referring Magistrate may decide, in consultation with defence counsel and the prosecutor, whether all or only some matters should be transferred to the Diversion List.

### 4.1.3 Explanation of process to defendant

Before a defendant is referred to the Diversion List, the referring Court ought to confirm that the defendant has received information on the program and the related treatment and support processes and understands that participation is voluntary. The Court may be adjourned in order for the defendant to consult with a Forensic Mental Health Court Liaison Officer (FMHCLO) for this purpose. The defendant’s legal representative should be present at consultations between the defendant and the FMHCLO.

### 4.1.4 Consent

The defendant, or defendant’s guardian, is required to consent to assessment for the program. If consent is not given, the defendant will remain in the normal court process. Consent is to be provided in writing in accordance with the approved form. (See Appendix A).

### 4.1.5 Referral to the Diversion List

Following the granting of consent, the Magistrate may either:

1. Bail the defendant to attend the next scheduled listing of the Diversion List:

**OR**

1. If the period between the date of the current appearance and the next scheduled Diversion List is two weeks or more bail the person to the next Diversion List with the following bail conditions: -
* That the defendant report to the Forensic Mental Health Court Liaison Officer for the purpose of assessment for suitability for participation in the Diversion List Program; and
* That the defendant comply with the reasonable directions of the Forensic Mental Health Court Liaison Officer; and
* Any other conditions which the Magistrate deems necessary, e.g. residence requirements.

# 5. The Diversion List

In the Hobart and Launceston registries of the Court, the DL sits twice a month and each sitting is presided over by dedicated magistrates assigned to the List. The Diversion List in Burnie and Devonport sits less often but a dedicated magistrate is also assigned to these lists. The List is conducted in open court. It should be noted that DL Magistrates also preside over general lists.

The frequency of sittings may be altered depending on demand.

## 5.1 Preliminary Assessment

If the defendant has been referred from the general list without assessment, the Diversion List Magistrate may adjourn the proceedings in order for the defendant to undertake a brief preliminary assessment. The purpose of the preliminary assessment is to enable the Forensic Mental Health Court Liaison Officer to provide a verbal report to the same court session concerning a person’s eligibility for the program and their mental health or cognitive impairment needs.

### 5.1.1 Options following preliminary assessment

Following preliminary assessment the Magistrate may:

1. Immediately refer the person to the diversion program in which case the court proceedings may be adjourned to allow the participant to obtain treatment in accordance with a treatment plan that is to be developed (bail conditions shall reflect this agreed program);

**OR**

1. Adjourn any court proceedings to allow a full assessment of the person’s suitability to be referred to the program.

If the preliminary assessment does not indicate a current mental or cognitive impairment, or the Magistrate deems that the person should not be dealt with through the program, the defendant will be returned to the normal court process.

There are no rights of appeal to a Magistrate’s decision to not refer a defendant into the diversion program, although the defendant retains the option of making an application that he or she is unfit to stand trial pursuant to the *Criminal Justice (Mental Impairment) Act 1999* or pursuing a defence through section 16 of the *Criminal Code Act 1924*.

## 5.2 Full Assessment

The purposes of a full assessment are to determine the defendant’s eligibility and suitability for the diversion program and enable the preparation of a proposed treatment plan.

A full assessment will allow a written report on the defendant to be provided by the Forensic Mental Health Court Liaison Officer to the next scheduled Diversion List, if the Court determines it necessary. The report ought to indicate the proposed treatment plan and anticipated length of treatment.

### 5.2.1 Options following full assessment

Following full assessment the Magistrate may:

1. Refer the person to the diversion program in which case the court proceedings are adjourned to allow the participant to obtain treatment in accordance with the tailored treatment plan. The bail conditions will reflect this agreed program. (A sample set of bail conditions appears at Appendix C). The Magistrate may include bail conditions, which require the defendant to attend scheduled List days during treatment for the purposes of reviewing their progress;

**OR**

1. If the full assessment does not indicate a current mental or cognitive impairment, or the Magistrate deems that the person should not be dealt with through the program, the defendant will be returned to the normal court process.

There are no rights of appeal to a Magistrate’s decision to not refer a defendant into the diversion program, although the defendant retains the option of making an application that he or she is unfit to stand trial pursuant to the *Criminal Justice (Mental Impairment) Act 1999* or pursuing a defence through section 16 of the *Criminal Code Act 1924*.

The ultimate discretion to admit a person to the program lies with the Magistrate.

## 5.3 Consent to participation

The person, or person’s guardian, is required to provide written consent to participation in the diversion program, in accordance with the approved form. This form also includes the participant’s consent to sharing of necessary information between service providers in aid of their treatment. (See Appendix A).

If consent is not given, the person will be referred back to the normal court process.

A flowchart representing the process and key milestones of the List appears at Appendix B.

# 6. The Diversion Program

## 6.1 The Treatment Plan

Forensic Mental Health Court Liaison Officers will provide the Magistrate with details of a treatment plan after consultation with the participant and relevant service providers.

During the program, participants will be supported by the Court Liaison Officer, who will provide advice to participants and service providers, and liaise with them in regard to service delivery and the participant’s progress.

## 6.2 Court Review

As part of the diversion program, participants will be required to attend court hearings in order that the Magistrate and other parties (such as their lawyer and prosecution) may review their progress on the treatment plan and their compliance with bail conditions. A participant’s bail conditions will include the need to attend the scheduled court listings as required, and while the frequency of court review will be determined by the Magistrate in consultation with the Court Liaison Officer and the participant, participants in the program will normally need to attend interim court reviews on a monthly basis.

For each court review hearing the Court Liaison Officer will provide the Magistrate with a verbal report outlining the participant's progress on the program since their referral to the program or since the last interim review. This will address issues regarding progress against goals, appropriateness/availability of treatment and any issues of non-compliance – e.g. absences, attitude, and failure to take prescribed medication. Detailed information will not be required unless the Court Liaison Officer believes there are specific issues that the Magistrate and Court need to be alerted to.

### 6.2.1 Participants

Attendees at the Diversion List court review hearings will include:

* The Magistrate
* Police Prosecution
* Defence Lawyers (including Legal Aid)
* Forensic Mental Health Court Liaison Officers
* The defendant
* Health professionals that may be treating the defendant, including Mental Health and Disability Service case workers, psychologists, psychiatrists, etc. and
* Any other person the Magistrate deems relevant to proceedings.

As far as possible, the case should be heard by the same Magistrate throughout a defendant’s period on the diversion program. The Magistrate, police prosecution and defence lawyers may use the information provided during the interim court review to determine the nature of a defendant’s further participation in the program.

### 6.2.2 Participant Attendance

The Magistrate may excuse the defendant from appearing in Court for their reviews. However, all participants are required to appear for a final determination at the end of the adjournment period.

Non-appearance at a DL hearing without the leave of the Court may prevent further participation in the program.

### 6.2.3 Pre-Court Case Conferences

A pre-court case conference is usually conducted prior to a defendant’s appearance for formal court review and provides an opportunity for all relevant parties, excluding the Magistrate and defendant, to discuss a participant’s progress on the program. These conferences are usually attended by the Forensic Mental Health Court Liaison Officer, police prosecution and the defendant’s legal representative. The conference is not to be considered as part of the formal List proceedings.

A case conference provides an opportunity for the sharing of information about a defendant’s progress and allows the Forensic Mental Health Court Liaison Officer, in consultation with prosecution and defence counsel (and others if need be), to develop appropriate recommendations to the Magistrate in relation to possible adjustments that may be made in order to assist or address behaviour and progress.

The Magistrate, however, retains the right at all times to make the final decisions about the participant’s involvement in the diversion program.

### 6.2.4 Program Compliance

**Interim Court Reviews**

Program compliance at interim DL reviews may result in any one or combination of the following options:

* Verbal encouragement being provided to the participant; or
* Adjustments to the treatment plan and/or supervision requirements, if recommended by the Court Liaison Officer;
* Conferral of a reward that the Court considers appropriate in the circumstances; or
* Finalisation of the defendant’s participation on the diversion program.

**Final Court Review**

Where the participant has been fully or substantially compliant with the treatment or intervention plan, the Forensic Mental Health Court Liaison Officer will provide a verbal or written report to the Court that describes the participant’s involvement and progress throughout their time with the program.

As part of the exercise of sentencing discretion, a Magistrate may take into account the defendant’s compliance with and involvement in the diversion program when considering a final disposition. Arriving at a final disposition may include discussions in open court involving defence counsel and police prosecutions about the value of withdrawing criminal charges in the event that the participant has successfully completed the program.

The DL does not affect the full option of sentencing orders available to a Magistrate under the *Sentencing Act 1997*.

### 6.2.5 Program Non-compliance

In the context of defendants with a mental illness or impairment, failure to comply with a condition of a bail order may be considered to be a commonplace, and, therefore, expected part of a defendant’s behaviour on an order, and in fact may be symptomatic of the mental issues the defendant is contending with. For this reason, failure to comply with a condition of bail is generally not dealt with in the same way as a traditional “breach” of a bail order. That is, failure to comply with an order may not be considered a separate offence, unless of course the Magistrate, based on the information provided to the Court, determines that the non-compliance is of a serious enough nature to warrant the laying of separate charges.

Program non-compliance at interim court reviews may result in any one or combination of the following options:

* Verbal sanctions being provided to the participant; or
* Adjustments to the treatment plan and/or supervision requirements, if recommended by the Court Liaison Officer; or
* Exclusion from further participation in the diversion program.

**Warrant of Arrest**

Where a defendant fails to attend a court review as specified by the Court, the Court may issue a warrant of arrest. In such cases, the DL participant will re-enter the criminal justice process through the general list. Any decision on whether to refer the participant back to the Diversion List will be made by the relevant Magistrate hearing the matter.

**Exclusion from the Diversion Program**

Where the participant has been excluded from participation in the Diversion Program:

* Their matters are returned to the normal court process;
* Non-compliance on the program does not adversely affect the determination of their matters through the normal court process; and
* The defendant retains the option of making an application that he or she is unfit to stand trial pursuant to the *Criminal Justice (Mental Impairment) Act 1999* or pursuing a defence through section 16 of the *Criminal Code Act 1924*.

# APPENDIX A – Diversion List Consent Form



I………………………………………………… Date of Birth…………………......

of ………………………………………………………………….......................................

consent to an assessment for the purpose of determining my eligibility for, and participation in, the Diversion List program.

The Diversion List has been explained to me.

I understand that my involvement in the Diversion List is voluntary and that I can cease participation at any time and return to the normal court process.

As part of the assessment of my eligibility for the Diversion List, and in order to assist with court reviews of my progress, I further give consent for the following agencies, bodies and individuals to exchange personal information about me during my involvement and for the purposes of program evaluation:

 **Y/N**

|  |  |
| --- | --- |
| **Forensic Mental Health Services** |  |
| **Mental Health Services** |  |
|  **The Magistrates Court of Tasmania** |  |
|  **Hospital & Ambulance Services** |  |
|  **Disability Services** |  |
| **CMD Court Diversion officers** |  |
|  **Mental Health Tribunal** |  |
| **Tasmania Prison Service** |  |
| **Community Corrections** |  |
|  **Prosecution and Legal Counsel**  |  |
|  **Guardianship Board** |  |
|  **Alcohol & Drug Services** |  |
|  **Housing Tasmania** |  |
|  **Child, Youth & Family Services** |  |
|  **Medical Practitioners** |  |
|  **Family Members** |  |
|  **Correctional Health** |  |
|  **Psychologist/Counsellor** |  |
|  **Other****(please specify)** |  |

I understand that information provided for evaluation purposes will be de-identified so that I cannot be identified personally.

I understand that this consent will expire 12 months from the date of signing. I also understand that I may withdraw this authorisation, in writing, at any time prior to the expiry date, except where action has already been taken on the basis of this authorisation.

I have had this form fully explained to me.

Dated at …………………………………………this………day of …………… 20…………..

……………………………………………… …………………………………………………….

 (Signature of Client) (Signature of Witness)

…………………………………………… …………………………………………………….

 Print Name Print Name

…………………………………………… …………………………………………………….

…………………………………………… …………………………………………………... Address Address

(**NB: Copy of signed original to client)**

#  APPENDIX B – Sample Bail Conditions

Sample Bail Conditions

1 Must report to the court liaison officer of forensic mental health services (FMHS) as directed by an officer of that service.

2 Must obey reasonable directions of the court liaison officer of FMHS or an officer of the mental health services (MHS).

3 Must attend all appointments as directed by the court liaison officer of FMHS or an officer of the MHS.

4 Must attend all drug and alcohol counselling as directed by the court liaison officer or an officer of the MHS.

5 Must submit to drug and alcohol testing as directed by the court liaison officer or an officer of the MHS.

6 Must take medication as prescribed.

7 Must reside at…

8 Must not drink alcohol.

9 Must not take illicit or illegal drugs.

10 Must attend rehabilitation programs as directed by the court liaison officer of FMHS or an officer of the MHS.

11 Must not associate with…