

Hobart Magistrates Courts Mental Health Diversion List

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The Mental Health Diversion List ("the List") was established as a pilot program at the Hobart Magistrates Court in May 2007, to deal with defendants who have pleaded guilty to offences arising out of their mental illness.

The List is the first "problem solving" court to operate in Tasmania. It operates within the existing resources of the Hobart Magistrates Court and utilises the existing services of Forensic Mental Health Liaison officers attached to the court. There is currently no specific legislative basis for the List, relying instead on the broad powers conveyed by the *Bail Act 1994 (Tas)*.

In examining the development of the List it is useful to consider its features, the ways it attempts to address the problems of offenders and the involvement of victims in the process. While there are some early problems a partial pro bono evaluation of the List has outlined some positive aspects.

How the List started

The Tasmanian Government Department of Justice Annual Report 2006-2007 reported that in Tasmania the prison population rose from 442 in 2002-2003 to 534 in 2006-2007. The cost of maintaining a prisoner per day has risen from \$159.00 in 2002-2003 to \$222.00 in 2006-2007. Those types of statistics and the well known problems involved in dealing with offenders who

suffer from mental illnesses and then subsequently end up in prison or on remand, have prompted examinations into the “problem solving court” approaches as outlined in a number of works by contributors in Australia in recent years including Michael King¹ and Arie Frieberg².

Professor Frieberg dealt with the history of a number of problem oriented courts including a Mental Health court saying they developed:

“In response to a crisis in mental health care in the community, over crowded gaols and the failure of traditional criminal justice and treatment agencies to deal adequately with the mentally ill.”

The Tasmanian situation is no different to anywhere else and it was against this background that the discussions about the introduction of the List commenced.

In 2006 a number of dedicated stakeholders including the Hobart Magistrates, the Officer-in-Charge of Prosecutions in Hobart, Legal Aid and Forensic Mental Health Services staff discussed the potential of such a List and submitted a proposal to the Court Management Group of the Tasmanian Magistrates Court.

The proposal suggested a monthly-specialised Court List for offenders with a mental illness to be dealt with in a separate court list to operate within existing resources and legislation and relying on the collaborative approach of the stakeholders and a positive response from Mental Health Services.

The Court Management Group approved the pilot of the List for 12 months commencing in May 2007.

¹ King MS, ‘Problem Solving Court Programs in Western Australia’ Paper presented to the ‘Sentencing: Principles, Perspectives and Possibilities’ Conference, Canberra, 10-12 February 2006, <http://law.anu.edu.au/nissl/King.pdf>

² Frieberg ‘Innovations in the Court System’, ‘Crime in Australia International Connections’ Conference, Australian Institute of Criminology, 30 November 2004 and ‘Problem Oriented Courts: Innovative solutions to intractable problems’, presented to the 2001 AIJI Magistrates Conference

General background including the Procedural Manual for the List can be accessed on the courts website at:

http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion

Who is eligible to appear in the Mental Health List?

The List deals with defendants whose offending is linked to their mental illness.

The Meaning of Mental Illness

- (1) A mental illness is a mental condition resulting in -
 - (a) serious distortion of perception or thought; or
 - (b) serious impairment or disturbance of the capacity for rational thought; or
 - (c) serious mood disorder; or
 - (d) involuntary behaviour or serious impairment of the capacity to control behaviour.

- (2) A diagnosis of mental illness may not be based solely on -
 - (a) antisocial behaviour; or
 - (b) intellectual or behavioural nonconformity; or
 - (c) intellectual disability; or
 - (d) intoxication by reason of alcohol or a drug³.

³ See section 4 of the *Mental Health Act Tasmania* 1996

How does an offender get into the List?

Applications for referral are usually made at first or subsequent mention to any Magistrate in general court lists and can be made by:

- Defendants
- Tasmania Police
- Solicitors
- Case Managers
- Other Service Providers
- and anyone with a genuine interest in the welfare of the defendant

Applications for referral may be made verbally but must provide the Magistrate sufficient details to justify referral to the Diversion List based on the eligibility criteria.

The defendant must consent to referral to the List after the process is explained.

What happens when Defendants are referred into the List?

In the initial period between referral and appearance discussions take place between the Prosecutors, Forensic Mental Health officers and Defence Counsel.

The List operates as a normal court but with less formality. The defendants appear to answer the charges in the normal way. If the defendant is appearing for the first time eligibility is confirmed by the Forensic Mental Health Liaison officer and the defendant's Counsel if he/she is represented. The defendant's situation is outlined and recommendations are made to the

court for the future disposal of the matters with adjournments to enable the defendant to be referred for treatment or an update of present treatment programs.

Defendants on the List generally plead guilty to the offences and are bailed to complete a treatment plan that has been devised by the defendant, Mental Health Services and the Court Liaison staff. Court Liaison staff, lawyers for the defendants and the List's dedicated prosecutor meet monthly between each court sitting to review the defendant's progress, consider complainants' views if necessary and consider recommendations for therapeutically sound outcomes for those defendants who do well during the period of their bail. Where people are not represented by a private solicitor or already receiving assistance from Legal Aid solicitors, they are offered assistance at court by Legal Aid.

The evaluator, who conducted an early pro-bono evaluation of the list made the following comments:

"It is an open court and the public and media may attend. In the courtroom all parties are seated along the bar table facing the Magistrate, with Forensic Mental Health court liaison officers usually seated between prosecution and the defendant and their lawyer. The level of formality exercised in hearings is more relaxed than in general Lists, but still retains certain protocols and resembles a normal court."⁴

Bail Conditions used

Common Bail conditions imposed from time to time in the progression of matters through the List may include one or more of the following:

⁴ Graham. H., *"A foot in the revolving door"? A preliminary evaluation of the Tasmania's Mental Health Diversion List*

- 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 Service (MHS).
- 3 Must attend all appointments as directed by the Court Liaison Officer of FMHS or an officer of the MHS.
- 4 Must attend 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 with⁵

Victims

Victims are briefed by prosecutors about the intended course of the charges. Early indications suggest most are supportive of the proposals suggested.

Evaluation

As earlier indicated a criminology masters student attached to the University of Tasmania conducted a preliminary assessment of the effectiveness of the List in November 2007. It was a pro bono evaluation designed fundamentally

⁵ See *Bail Act 1994 (Tasmania)* Section 7(4)

to meet certain academic criteria. The data sources used in this study included:

- Courtroom observation of the List sittings;
- Interviews with practitioners;
- A defendant interview;
- Project team meeting observation; and
- Court documentation.

The preliminary evaluation found that the positive perceptions of the defendants and practitioners, promising defendant dispositions and treatment outcomes, teamwork and collaboration suggested that some important progress had been achieved by the List.

The evaluation continued:

“It looks, however, like problem solving is occurring in the Diversion List as a successful component of therapeutic jurisprudence. The positive perceptions of defendants and practitioners, as well as promising defendant dispositions and treatment outcomes, team work and collaboration all suggest that some important progress has already been made. The use of therapeutic interventions to achieve better justice outcomes for people with a mental illness through the Mental Health Diversion List pilot project is a welcome development in the Tasmanian criminal justice system. It embodies great capacity and promising potential for the future.”⁶

The outcomes

Statistics were collected and analysed from hearings and court documentation over the period 24 May 2007 to 17 April 2008, over a total of eleven sittings. There were a total of 67 participants in the List as at 17 April, charged with a

⁶ “A foot in the revolving door” supra

total of 408 criminal charges. Twelve defendants were deemed ineligible for the List at a fairly early stage and referred back to the General Lists.

Of the 67 participants in the List as at 17 April 2008, the majority of participants were facing only one or two criminal charges (36%). Seventy-two per cent of the defendants faced six charges or less. Overall, the three largest categories of criminal charges represented in the Diversion List were stealing/burglary charges (25%), road traffic and motor vehicle regulatory offences (19%) and offences against justice procedures (18%).

Most of the referrals were received from lawyers (43%), followed by Forensic Mental Health Services staff (22%), Mental Health Services staff including psychiatrists and case managers (20%), Magistrates (11%) and Police (4%).

In the stealing/burglary offences category, however, one defendant represented over 61% of all stealing/burglary offences. Also, it should be noted that the twenty-six defendants (42%) who committed the offences against justice procedures were mainly people with fewer than five charges each. In terms of legal representation, 64% of defendants had a lawyer employed by Legal Aid, 29% had a private lawyer, and 7% were unrepresented.

Over the period 24 May 2007 to 17 April 2008, 32 of the 62 participants reached finalisation of their cases. Sixteen cases (50%) were disposed of without conviction under s7(f) of the *Sentencing Act 1997*. In nine cases (28%) the prosecution tendered no evidence and charges were discontinued, four cases were disposed of with a suspended sentence (12%) and two cases (6%) were disposed without conviction under s7(h) of the *Sentencing Act 1997*

The average number of appearances prior to finalisation was 2.9 with 21 of the 32 finalised cases being disposed of in three to five hearings having first

been referred to the List. Eleven cases involved two hearings or less before disposition.

The vast majority of participants suffered from a major mental illness. Of those accepted onto the program, 42% had a diagnosis of schizophrenia, 24% were diagnosed with bi-polar disorder, 11% with a psychosis not otherwise specified, 7% from post-traumatic stress disorder, 7% had a personality disorder, 5% suffered from depression, 2% were diagnosed with obsessive-compulsive disorder and a further 2% fell into the 'other' category.

The majority of participants received treatment from Mental Health Services (64%), followed by private psychiatrists (13%), Forensic Mental Health Services (11%), private psychologists (5%), General Practitioners (5%) and Disability Services (2%).

Strengths of the List

A key observation by the researcher regarding the therapeutic jurisprudential nature of the Mental Health Diversion List is the openness to contributions from all involved in the court. This open contribution means that the defendants with a mental illness are welcome and encouraged to speak during their proceedings.

The researcher continued:

“There were many moments during proceedings that were light hearted, encouraging and, in some instances, rather moving. Many defendants expressed emotions such as joy, relief, deep thankfulness, and pride about personal progress made. On a light hearted note, an elderly defendant commenced her case by declaring her special effort in dressing for the occasion. In reply to which a lawyer noted to the court that he particularly liked her accessorising with a 'lovely' diamante handbag - causing her to beam with pride.

From observation, hearing all the voices in the court process did achieve open communication, receptive authority, and problem solving that would not usually be possible in a normal court. The expression of heightened emotions by defendants was handled skilfully by the court team who demonstrated a good awareness of the capacity and needs of the individual.

In the first six months, the successes of the Mental Health Diversion List include:

- The commitment and work of key practitioner stakeholders.
- High levels of collaboration and communication between all parties involved.
- Increased practitioner job satisfaction.
- Problem solving, flexibility and individual attention to defendant cases in the court hearings.
- The consultation of complainants/victims as part of the court process.
- Positive defendant outcomes and progress achieved thus far through treatment.

The therapeutic problem solving approach adopted in the Mental Health Diversion List pilot project is working well."⁷

As with any collaborative initiative, much of the success of the program can be attributed to the co-operation of the stakeholders. Mental Health Services have provided constructive input with a large number of the defendants on the program. Informal feedback indicates that their strong co-operation is a result of their ability to have input into the process and that the reporting procedures are not onerous (compared to, for example, the preparation of court reports). While it had been anticipated that some service providers might be reluctant to fully participate in the program, it has been a pleasing development that to date, all service providers, both private and public, have been fully co-operative.

While a more difficult construct to accurately assess, it is believed that the Diversion List has saved a significant number of hearing hours for those defendants who chose to participate in the program as opposed to running a

⁷ "A foot in the revolving door" supra

mental health defence hearing. It is estimated that some 14 defendants could potentially have run such a hearing.

Some problems identified

The researcher identified the following issues:

- Decentralised and uncoordinated data collection, and impact on resources and workload.
- Continuity of supervision and sittings in light of having one presiding Magistrate only;
- The capacity of the List during its pilot stage;
- Unrepresented defendants; and
- The title of the List.

Expressions of support

One legal practitioner who appears frequently in the List commented as follows:

“From our perspective, it would be worth mentioning that our need for expert reports has reduced. We are not seeking psychiatric reports as often (which cost around \$1000 a pop) where the offences are minor. This is particularly the case where the client is already known to forensic mental health. I haven’t got any figures about this. It is still early days. This obviously frees up funds for other purposes.

The other thing from our clients’ point of view is that we can allay a lot of their fears at an early stage. Because of the co-operative approach we are able to give a clearer indication of what they can expect when the matter resolves. Given their vulnerability, this is a real boon. Even when relatively well our clients can find facing court very stressful.

I also think the model is providing a structure that makes the services more accountable. It is encouraging to see people being case-

managed and supervised where that may not otherwise have been the case. Although there will always be clients who have less insight into their situation and do not like being treated differently to the 'mainstream' others are happy that the underlying cause of their offending is acknowledged in a more understanding environment."⁸

The Future

We are looking at the data collection situation and the rotation of more Magistrates through the List. The impact on resources will be monitored; however we are dealing to a large extent with defendants who are already known to the court system and often to Forensic Mental Health officers. Obviously feel good stories, expression of support and anecdotal experiences are not enough of themselves to support an argument for the continuation of the List. We are confident we can provide a data collecting methodology which will meet the criticisms. We have no present intention to expand the scope of the List and will continue to deal with eligible low level offenders with relevant mental health issues.

We are confident that the List can make a positive contribution to the criminal justice system in Tasmania.

Michael Hill
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⁸ Kate Cuthbertson – Legal Aid Commission.

I acknowledge that this Paper could not have been presented without the assistance and work done by the following: Julian Whayman (former officer in charge Prosecution Section Hobart), Senior Constable Steve Patterson, Victor Stojcevski, Marita O'Connell, Kim Barnes, Kate Cuthbertson and Hannah Graham

Hobart Magistrates Court Mental Health Diversion List Data Summary Sheet

1. Name: _____ 2. Date of Referral: _____

3. D.O.B. _____ 4. Gender: Male Female

5. Referring Agent

- | | | |
|---|---|---|
| <input type="checkbox"/> Magistrate | <input type="checkbox"/> FMHS | <input type="checkbox"/> Court Official |
| <input type="checkbox"/> Police/Prosecution | <input type="checkbox"/> Self-Referral | <input type="checkbox"/> Probation |
| <input type="checkbox"/> Lawyer | <input type="checkbox"/> Family/Friend | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> MHS | <input type="checkbox"/> NGO/Private Health Service | _____ |

6. Complaint No: _____

7. Charges: _____

8. Diagnosis:

- | | | |
|---|---|---------------------------------------|
| <input type="checkbox"/> Schizophrenia | <input type="checkbox"/> Personality Disorder | <input type="checkbox"/> Anxiety |
| <input type="checkbox"/> Bi-Polar/Mood Disorder | <input type="checkbox"/> PTSD | <input type="checkbox"/> Other: _____ |
| <input type="checkbox"/> Psychosis NOS | <input type="checkbox"/> Depression | |

9. Type of Service Intervention:

- | | | |
|--|---|--------------------------------------|
| <input type="checkbox"/> MHS | <input type="checkbox"/> GP | <input type="checkbox"/> NGO |
| <input type="checkbox"/> FMHS | <input type="checkbox"/> Private Psychiatrist | <input type="checkbox"/> A&DS |
| <input type="checkbox"/> Inpatient Admission | <input type="checkbox"/> Disability Services | <input type="checkbox"/> Other _____ |

Administration:

10. Accepted Rejected for MHDL Consent gained SP Form Completed

Reason not accepted: _____

11. Fitness to stand trial concerns 12. Possible Sec 16 defence
13. Rearrested during program 14. Date of Disposition _____

Appearance Dates: _____

15. Number of appearances in court before MHDL? 16. Substance Abuse issues:

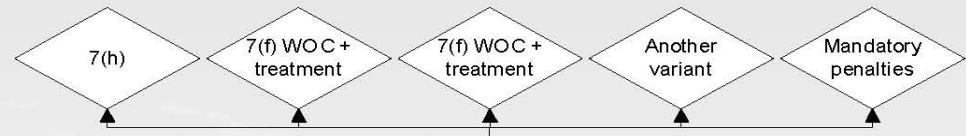
17. Total Number of Appearances in MHDL: 18. Total Number of Months on the Program:

17. Disposition: _____

19 Satisfactorily completed the program Unsatisfactorily completed the program

Reason for non-completion: _____

Most matters will have the number of return dates and frequency recommended by FMH based on medical needs / reports required / treatment plans



Eligibility
(as per TCMHDL Procedural Manual 4/07)

2.3 Participants will have impaired intellectual or mental functioning arising from:

- mental illness as per 2.3.1
- intellectual disability
- a personality disorder
- ABI
- a neurological disorder including dementia

2.3.1 Definition of mental illness
As per section 4 of the Mental Health Act 1996
Meaning of 'Mental Illness'

(1) A mental illness is a mental condition resulting in-

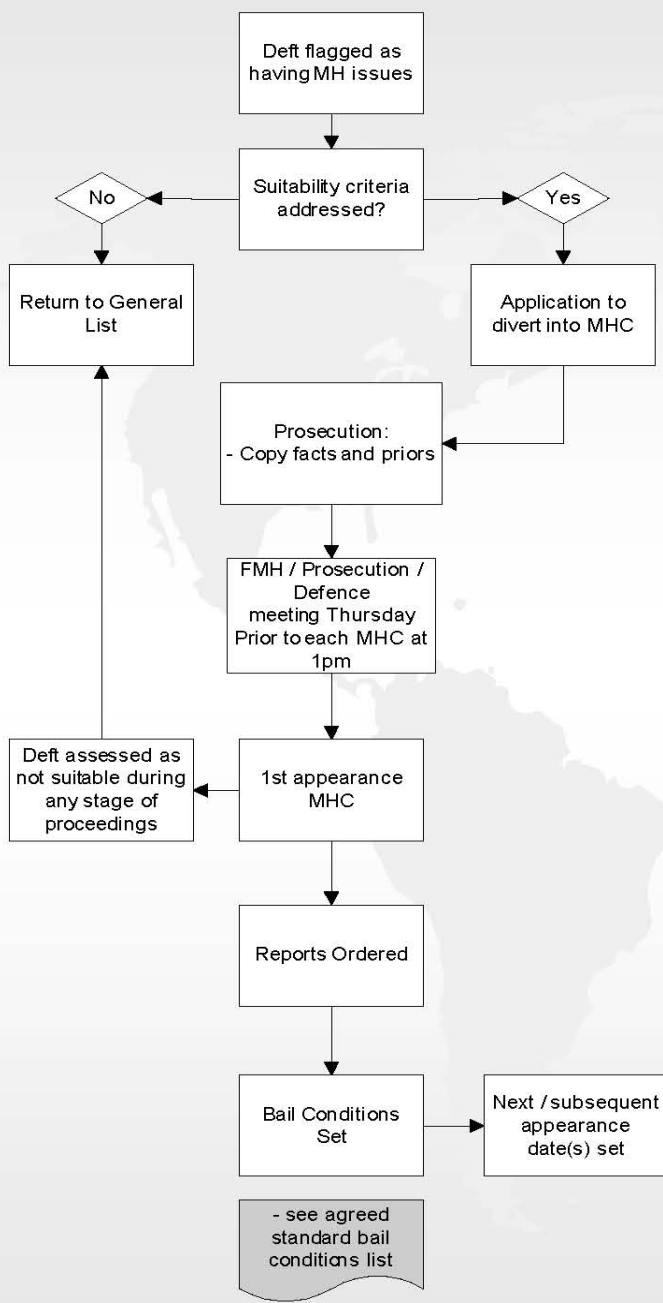
- (a) serious distortion of perception or thought; or
- (b) serious impairment or disturbance of the capacity for rational thought; or
- (c) serious mood disorder; or
- (d) involuntary behaviour or serious impairment of the capacity to control behaviour

(2) A diagnosis of mental illness may not be based solely on-

- (a) antisocial behaviour; or
- (b) intellectual or behavioural nonconformity; or
- (c) intellectual disability; or
- (d) intoxication by reason of alcohol or a drug

2.3.2 Exclusionary Offences

- All indictable matters;
- Sex related offences; and
- Offences involving the infliction of actual bodily harm that, in the court's opinion, was not minor harm



- see agreed standard bail conditions list

FMH reports are verbal to the court only

Mental Health Court - Prosecution Process Flow		
Version 2	14/05/2008	SGP