

# Justice Health NSW Procedure

## **Custodial Mental Health Custodial Diversion Procedure**

Issue Date: 14 June 2024

# Custodial Mental Health Custodial Diversion Procedure

**Procedure Number** 6.151

**Procedure Function** Continuum of Care

**Issue Date** 14 June 2024

**Next Review Date** 14 June 2027

**Risk Rating** High

**Summary** This procedure outlines the responsibilities for diverting mentally ill and mentally disordered people at Long Bay Complex, Metropolitan Reception and Remand Centre and Silverwater Womens Correctional Centre, out of custody and into treatment in appropriate inpatient or community facilities

**Responsible Officer** Custodial Diversion Clinical Nurse Consultant

**Applies to**

- ☐ Administration Centres
- ☐ Community Sites and programs
- ☒ Health Centres - Adult Correctional Centres or Police Cells
- ☐ Health Centres - Youth Justice Centres
- ☒ Long Bay Hospital
- ☐ Forensic Hospital

**Other:** (free text section to describe where/who the document applies to; if document only applies to certain area of a facility then describe here; if all staff are subject to the document then include this here).

**CM Reference** PROJH/6151

**Change summary** First issue

**Authorised by** Service Director, Custodial Mental Health

## Revision History

| # | Issue Date | Number and Name                                       | Change Summary |
|---|------------|---|----------------|
| 1 | Month 2024 | Custodial Mental Health Custodial Diversion Procedure | First issue    |

## PRINT WARNING

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## 2. Preface

The Custodial Diversion Program is a service provided by Custodial Mental Health within the Long Bay Correctional Centre (LBCC) and Metropolitan Remand and Reception Centre (MRRC), and Silverwater Women's Correctional Centre (SWCC) Silverwater Correctional Complex that aims to divert mentally ill and mentally disordered people out of custody and into treatment in appropriate mental health inpatient or community services. The Custodial Diversion Clinical Nurse Consultant (CNC) is an integral part of Custodial Mental Health and works closely with the other clinicians in Justice Health NSW to provide integrated care for people experiencing mental ill-health in custody.

The operational principles for the Custodial Diversion Program are:

- the promotion of diversion to minimise the unnecessary exposure of mentally ill and mentally disordered people to the criminal justice system,
- well-reasoned and measured clinical recommendations to the courts so that the most appropriate range of dispositions is available to the courts,
- networking and linking mentally ill and mentally disordered people with the most appropriate mental health service or agency following their disposal from the courts,
- promoting the autonomy, self-determination, and the dignity of mentally ill and mentally disordered individuals within the confines of the law, and
- high professional standards with quality assurance programs to ensure a high standard of service provision.

This manual sets out the operational features of the service model and range of services provided to stakeholders. The Custodial Diversion Program provides a service to male and female offenders appearing at court via audio-visual link (AVL) from within the MRRC, LBH or SWCC.

There are three major state courts and six specialist courts in NSW. The three main courts are the Local, District and Supreme Courts. The specialist courts include the Drug Court, Children's Court and the Coroner's Court. Local Courts are the courts of general access in NSW. Local Courts in NSW have jurisdiction to deal with most criminal and summary prosecutions. More serious offences are referred to the District or Supreme Court after a committal hearing in the Local Court.

The Custodial Diversion Program focuses on summary offences or offences triable summarily (that is, triable by a Magistrate sitting alone) in the Local Court. People charged with more serious offences, called indictable offences, are not eligible for diversion under sections 14 or 19 of the Mental Health & Cognitive Impairment Forensic Provisions Act 2020. Where a person is charged with both summary and indictable offences, the person is eligible to have the summary offences dealt with under section 14 or 19.

The Custodial Diversion Program focuses on summary offences or offences triable summarily (that is, triable by a Magistrate sitting alone) in the Local Court. People charged with more serious offences, called indictable offences, are not eligible for diversion under sections 14 or 19 of the [Mental Health & Cognitive Impairment Forensic Provisions Act 2020](#). Where a person is charged with both summary and indictable offences, the person is eligible to have the summary offences dealt with under [section 14 or 19](#).

The Local Court generally only deals with summary offences but certain proceedings in relation to indictable offences, for example, mentions and bail hearings, do occur in the Local Court.

The Custodial Diversion CNC should not provide reports on patients charged solely with indictable offences. Where a Magistrate requests a report on a patient charged solely with indictable offences, the CNC should advise the Magistrate to request a Psychiatric Court Report from the Justice Health NSW Court Report Coordination Unit (CRCU) in the usual manner. Contact the Manager of the CRCU on [REDACTED] for more information.

## 3. Procedure Content

### 3.1 Referrals

- 3.1.1 There is a number of ways the Custodial Diversion CNC receives or identifies eligible patients for assessment to divert mentally ill and mentally disordered people out of custody.
- 3.1.2 Referrals to the program are received from mental health clinicians at MRRC, LBH and SWCC. A referral can be made once it is confirmed that the patient is:
  - Experiencing mental illness or disorder,
  - Charged with summary offences only, and
  - Not serving a sentence of imprisonment.
- 3.1.3 The clinician must create a waitlist for the Custodial Diversion CNC on PAS, *CLS-SIL-CL* requesting an assessment for suitability of court diversion.
- 3.1.4 Requests for court diversion assessment can also be received from a patient's legal representatives. The Custodial Diversion CNC must add the request to the Custodial Diversion CNC PAS waitlist.
- 3.1.5 The Custodial Diversion CNC also reviews the weekly Custodial Mental Health Priority Patient Flow List to review the status of patients waitlisted or admitted to the MHSU, LBH, SWCC and Hamden.
- 3.1.6 The Custodial CNC will identify patients who are not sentenced with summary offences by checking their outstanding charges in OIMS.
- 3.1.7 The Custodial CNC will prioritise patients according to their next court date and consult with the treating psychiatrist for appropriateness for court diversion and amend the note in the PAS waitlist for deadlines.
- 3.1.8 The Custodial Diversion CNC will triage all waitlisted patients via PAS, patients that are triaged as not appropriate for assessment, the CNC must record the outcome of the triage process in JHeHS and provide feedback via email to the referrer.
- 3.1.9 See 6.1 Custodial Diversion Flowchart

### 3.2 Assessment

- 3.2.1 Once the Custodial Diversion CNC has determined that a patient is eligible for court diversion, they will complete a mental health and risk assessment to assist in developing a court report and determining the patient's care needs.
- 3.2.2 The Custodial Diversion CNC must complete the following:
  - Obtain the patient's consent. Generally, the consent of the person or the person's guardian is required before any information regarding the client is released to the Court. If consent is not given, and the patient has capacity to give consent, the person proceeds through the normal court process. The Magistrate and the lawyer should be informed that the client refused to give consent for the disclosure of information and any recommendations to the Court. If the person poses a risk of serious harm to self or others, a duty of care prevails, and the treating psychiatrist or Clinical Director Custodial Mental Health should be consulted regarding a recommendation for a section 19. A written report should be given to the Court indicating, although there is no consent, nevertheless there are grounds to indicate that the person is mentally ill under the Mental Health Act 2007.

- Review the patients' health records to gather collateral information in relation to their:
  - mental health history,
  - current mental status,
  - mental health treatment,
  - previous community mental health service provider details,
  - identifying information, address and living arrangements, available support systems, and financial support; and
- Complete a comprehensive mental health and risk assessment.
- Identify the appropriate community mental health team or mental health facility to which responsibility for care will be transferred on release.
- See 6.1 Custodial Diversion Flowchart

### 3.3 Interventions

- 3.3.1 Following the completion of the assessment the Custodial Diversion CNC must prepare a mental health report for the Magistrate of the Local Court as per the Section 14 and Section 19 court report template in 6.2 and 6.3.
- 3.3.2 The report should be written using a formal but simple language and should include all relevant historical and clinical information available at the time of writing report. Refer to 6.2 and 6.3.
- 3.3.3 On completion of the court report, the Custodial Diversion CNC emails the report to the patient's treating consultant psychiatrist or psychiatric registrar. The treating consultant psychiatrist or psychiatric registrar reviews and sends an email of approval or recommended changes.
- 3.3.4 If the patient has not yet been seen by a psychiatrist, the on-call daytime consultant psychiatrist is contacted and asked to review the report for approval.
- 3.3.5 Reports to be uploaded on JHeHS under 4.1 Mental Health Legal once completed and approved by the psychiatrist.
- 3.3.6 Where there is a Justice Health NSW Court Liaison Officer at the Local Court, the Custodial Diversion CNC must contact them by telephone and fax or email a copy of the mental health report.
- 3.3.7 Where there is no Court Liaison Officer present in the Court, the Custodial Diversion CNC will contact the Registry of the Local Court and send a copy of the mental health report by email or fax to the Registry.
- 3.3.8 The Custodial Diversion CNC will forward copy of report to the patient Legal Representative where their detail are known.
- 3.3.9 The Custodial Diversion CNC will provide advisory and consultation services to the Magistrate to assist with the diversion process by being available to address any immediate issues that arise in court. This could include the Magistrate requesting that a patient be transferred to a specific Mental Health Facility or seek further clarification around the patient's referral to the Community Mental Health Team.
- 3.3.10 The Custodial Diversion CNC may on occasion, be asked to present the report directly to the court via AVL or telephone. This will be initiated by the Magistrate or Registrar.
- 3.3.11 Post court, the Custodial Diversion CNC must liaise with Corrective Services NSW (CSNSW) to check that a court outcome has been received by CSNSW. The court outcome is submitted directly to Sentence Administration and uploaded on to OIMS and the outcome is listed on JusticeLink. On receiving the court order, CSNSW facilitate release to the community or transfer to a hospital.
- 3.3.12 The Custodial Diversion CNC must liaise with the court registry to provide a copy of the court order.
- 3.3.13 The Custodial Diversion CNC must upload the court order into JHeHS under 4.1 Mental Health Legal and the outcome documented into the patient's JHeHS progress notes.
- 3.3.14 See 6.1 Custodial Diversion Flowchart

### 3.4 Reintegration

#### Section 19

3.4.1 Where a patient has been granted a Section 19 the Custodial Diversion CNC must:

- See 6.4 for legal components of a Section 19 described as per the Act.
- Liaise with CSNSW to check that the s19 order has been received by CSNSW and a copy of the order has been received and uploaded to OIMS by CSNSW.
- Phone the patient flow manager at the receiving hospital to advise that a s19 has been granted and the patient will be transferred for assessment.
- Handover to the bed manager the patient's name, date of birth, diagnosis, current mental state and identified risks, treatment compliance and any other health or risk related concerns.
- Email a copy of the court report, medication chart, progress notes from JHeHS, and copy of the discharge summary if available to the relevant hospital patient flow email address.
- Document the order granted and the handover in the patient's JHeHS Progress Notes and upload the paperwork into JHeHS under 4.1 Mental health Legal for legal orders and reports and 3. Clinical Correspondence for clinical information.
- If the patient remains out of correctional custody the following morning, contact the Hospital Admissions to determine whether patient has been admitted or released back into police custody.
- Where the patient has been admitted, an enquiry must be made through the bed manager as to the name of the ward and contact number for the ward registrar.
- Advise the treating Justice Health NSW psychiatry registrar of the successful diversion and request a clinical handover be completed to the hospital psychiatric registrar or Mental Health CNC at the Emergency Department and provide the contact details from the enquiry as above.

3.4.2 In the event a successful s19 diversion is anticipated to arrive from court via CSNSW after 1630hrs, the Custodial Diversion CNC must complete the following prior to completing their shift:

- Inform the Patient Flow Manager of the external hospital of a potential diversion that may occur after the Court Diversion CNC has completed work hours.
- Provide a copy of the diversion report, medication chart, progress notes from JHeHS, and copy of the discharge summary if available to the relevant hospital patient flow email address in anticipation of potential diversion to the Patient Flow Manager of the external hospital.
- Liaise with CSNSW Sentence Admin to contact Primary Care nurses in the correctional centre or the Mental Health Assertive Care nurse (MHSU or MHU, LBH) to provide a court diversion outcome on the evening shift evening.
- Provide the Primary Care or Mental Health Assertive Care nurse with the relevant email address and contact details of the Patient Flow Manager to ensure a verbal handover is completed.
- Write a handover note in the patients JHeHS progress notes. This note is to be utilised by the Primary Care or Mental Health Assertive Care nurse in completing the verbal handover the Patient Flow Manager.
- Advise to the primary care nurse or Mental Health Assertive Care nurse to email patient flow unit at the receiving hospital of the patient's anticipated arrival from court.
- If nursing staff are not onsite in the evening, then the Custodial Diversion CNC is to provide a handover to the Patient Flow Manager at the external hospital at the next available business day.

#### Section 14



3.4.3 Where a patient has been granted a Section 14 the Custodial Diversion CNC must:

- Liaise with CSNSW to check that the s14 order has been received by CSNSW and a copy of the order has been received and uploaded to OIMS by CSNSW
- Contact the NSW Mental Health Line on 1800 011 511 to refer the patient to the relevant Community Mental Health Team (CMHT).
- Obtain contact details for the CMHT and email a copy of the section 14 order, court report, medication chart, recent and relevant JHeHS progress notes and a discharge summary either directly to CMHT or via NSW Mental Health Line depending on CMHT's procedure for referral.
- Document the order granted and the handover in the patient's JHeHS Progress Notes and upload the paperwork into JHeHS under 4.1 Mental health Legal for legal orders and court reports and 3. Clinical Correspondence for clinical information.
- See 6.4 for legal components of a Section 14 described as per the Act.

**Released back to Police Custody**

3.4.4 Where a patient has been released back into Police Custody the Custodial Diversion CNC must:

- Contact CSNSW sentence administration to determine whether the patient has been granted bail and released.
- If the patient has been release on bail:
  - Contact the NSW Mental Health Line on 1800 011 511 to refer the patient to the Community Mental Health Team (CMHT).
  - Obtain contact details for the CMHT and email a copy of the diversion report, medication chart, recent and relevant JHeHS progress notes and a discharge summary either directly to CMHT or via NSW Mental Health Line depending on CMHT's procedure for referral.
  - Document the handover in the patient's JHeHS Progress Notes and upload the paperwork into JHeHS under 4.1 Mental health Legal for legal orders and court reports and 3. Clinical Correspondence for clinical information.
- If the patient has returned to custody:
  - Create a waitlist for the Custodial Diversion CNC on PAS (CLS-SIL-CL).
  - Inform the treating team of the patient return to custody.
  - Check that the patient has been placed on the relevant CNC nurse waitlist.
- See 6.1 Custodial Diversion Flowchart

**3.5 Governance**

3.5.1 The Custodial Diversion CNC must record appointment details of all completed mental health assessments in PAS and CHIME. Additional data is collected in a [Custodial Diversion Spreadsheet](#) daily and emailed to Mental Health Outcomes Coordinator each week.

3.5.2 The data collected must include the following:

- The number of patients screened following referral from other clinicians,
- The number of patients screened following Custodial Diversion CNC identification,
- The number of patients assessed following screening,
- The number of reports sent to Court each day,
- The Court outcome of each patient for whom a report was sent, for example, section 14 or 19, and
- The total number of clients diverted from custody to mental health treatment in the community.

3.5.3 The Key Performance Indicator (KPI) for the Custodial Diversion Program is the number of successful diversions and is in line with the SCCLS service.



## 4. Definitions

### **Must**

Indicates a mandatory action to be complied with.

### **Should**

Indicates a recommended action to be complied with unless there are sound reasons for taking a different course of action.

### **Duty Solicitor**

Is a legal aid solicitor working at local court on the day in this allocated role.

### **Indictable Offences**

Are more serious criminal offences. Indictable offences are more serious criminal charges than summary offences and the penalties are often a lot greater.

Like summary offences, indictable offences start in a lower court and then they are usually committed up to a higher court for either a trial or sentence. If an accused person pleads not guilty, their case will be heard in a higher court by a Judge and jury. If the accused person pleads guilty, their case will be heard in the higher court by a Judge.

In some cases which involve a less serious indictable offence, it is possible for a Magistrate in a lower court to hear and decide a case against an accused person, just like they would if it was a summary offence. This can occur where both the accused person and the prosecution consent and where the court believes it is appropriate of the offences to be dealt with by a Magistrate.

Charges labelled as 'strictly indictable offences' cannot be finalised in the local court and must be committed to a higher court, such as the District Court or the Supreme Court, with no option to elect by either the accused or the prosecutor.

### **Table Offences**

Some offences can be tried as summary or indictable offences. The Criminal Procedure Act 1986 (NSW) identifies a number of summary offences which can be tried on indictment. These are called "table offences".

Some offences are not listed as table offences, but the legislation specifies that they are: Indictable offences which can be dealt with summarily, or Summary offences which can be dealt with on indictment.

### **Section 14**

Orders Magistrate may make:

- (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.

(2) An order to dismiss a charge against a defendant does not constitute a finding that the charge against the defendant is proven or otherwise.

## Section 19

Orders Magistrate may make

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.

## Summary Offences

Section 3 of the Criminal Procedure Act 1986 (NSW) simply defines a summary offence as an “offence that is not an indictable offence”. A summary offence is a minor criminal offence that the local courts deals with 'summarily'. They are generally punishable and dealt with a maximum penalty of two years' imprisonment.

## 5. Related documents

### Legislations

[Health Records and Information Privacy Act 2002](#) (NSW)

[Mental Health Act 2007](#) (NSW)

[Mental Health and Cognitive Impairment Forensic Provisions Act 2020](#) (NSW)

[Mental Health and Cognitive Impairment Forensic Provisions Regulation 2021](#) (NSW)

### Justice Health NSW Policies, Guidelines and Procedures

[1.230 Health Care Interpreter Services – Culturally and Linguistically Diverse Patients and d/Deaf Patients](#)

[1.263 Medical Holds](#)

[1.380 Clinical Care of People Who May Be Suicidal](#)

[1.434 Working with Family and Carers](#)

[4.030 Requesting and Disclosing Health Information](#)

[PAS Waiting List Priority Level Protocol](#)

### Justice Health NSW Forms

[JUS020.015 Consent to Release Health Information](#)

[JUS020.083A Consent to Obtain Health Information for Continuation of Care](#)

NSW Health Policy  
Directives and Guidelines

[GL2014\\_002](#) *Mental Health Clinical Documentation Guidelines*

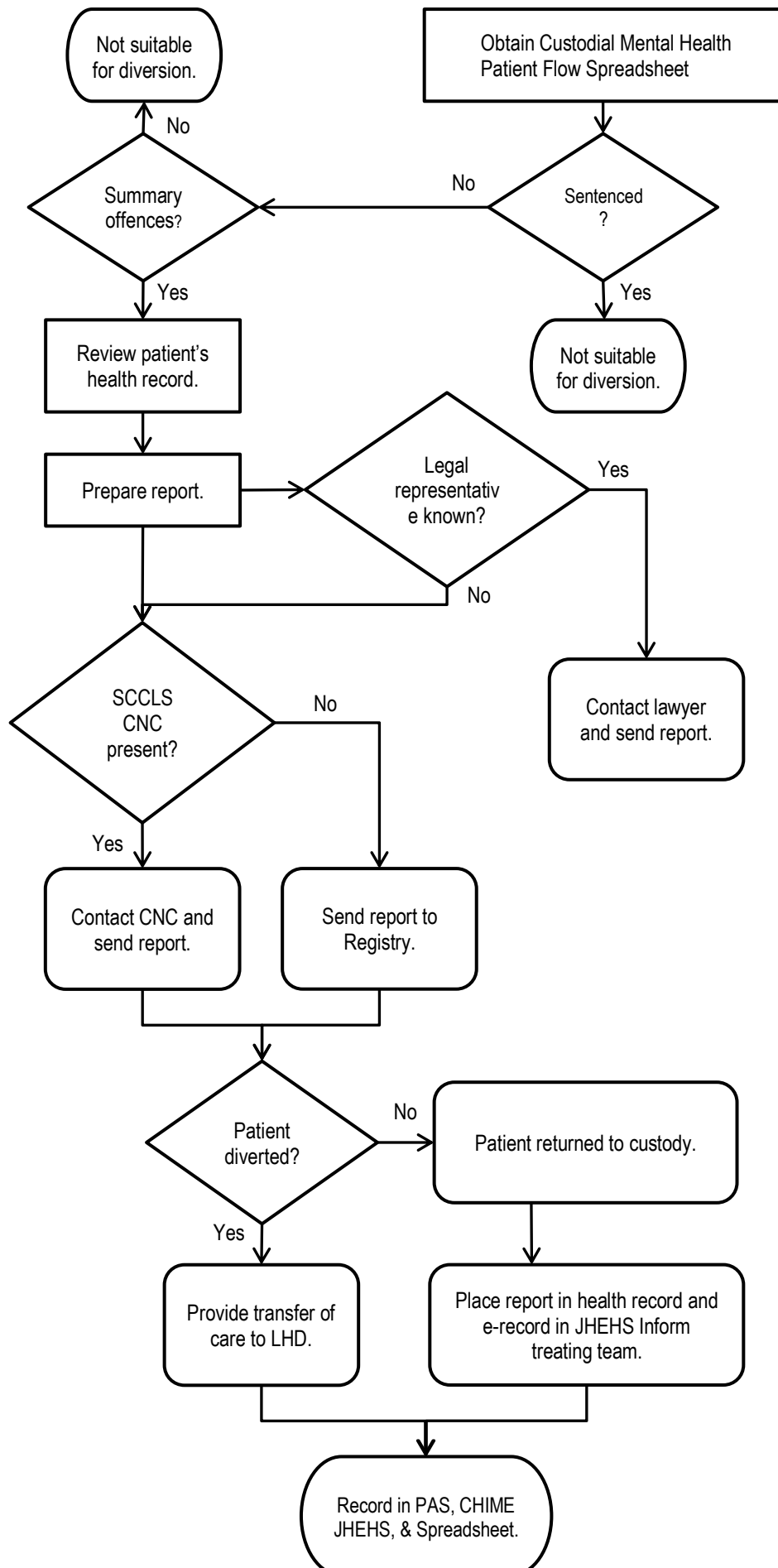
[PD2019\\_020](#) *Clinical Handover*

[NSW Health Privacy Manual for Health Information](#)

Other documents and  
resources

## 6. Appendix

## 6.1 Custodial Diversion Flowchart



## 6.2 Court Report Template



Health  
Justice Health and  
Forensic Mental Health Network

### Date

The Presiding Magistrate

xxxxxx Local Court

xxxxxxxxx Street

xxxxxx NSW xxxx

### Strictly Confidential Custodial Diversion Clinical Nurse Consultant's Report

RE: xxxxxx, xxxxxx

MIN:

DOB:

Court Hearing Date:

### INTRODUCTION

This report is prepared at the request of xxxxxx treating team. The writer was asked to assess xxxxxx for suitability of diversion from custody on the grounds of Section 14 of the Mental Health Cognitive Impairment and Forensic Provisions Act 2020. I had the opportunity to approach xxxxxx on xxxxxxxx in the Mental Health Screening Unit at the Metropolitan Reception and Remand Centre.

### CONSENT & CONFIDENTIALITY

I explained the nature and the purpose of the assessment to xxxxxx. I also highlighted to him that I would be submitting a court report to Your Honour. xxxxxx did give him consent for this report to be completed and presented.

### ADDITIONAL SOURCES OF INFORMATION

In preparation for this report, the following sources of information were available:

1. Justice Health & Forensic Mental Health Network medical records
2. Electronic records from Justice Health Electronic Health System (JHeHS)
3. Electronic records from Corrective Service NSW Offender Information Management System (OIMS)
4. Clinical presentation discussed with Dr xxxxxx, Consultant Forensic Psychiatrist.

### BACKGROUND

### PSYCHIATRIC HISTORY

### SUBSTANCE USE HISTORY

### CURRENT PRESENTATION

## Mental State Examination

Appearance:

Behaviour:

Speech:

Mood:

Affect:

Thought Content:

Thought Form:

Perception:

Cognition:

Insight and Judgement:

## CLINICAL IMPRESSION

Established Diagnoses: xxxxxxxx

## CONCLUSIONS & RECOMMENDATIONS

### Community Management

- The writer has formally referred xxxxxx via telephone to the xx Community Mental Health Team, who have agreed to accept the referral.
- xxxxxx must contact the xx CUSTODIAL MENTAL HEALTH T via the Mental Health Telephone Assessment Line on 1800 011 511 within 24 hours of release from custody. This number has been provided to xxxxxx.
- xxxxxx must reside at xx and must provide the xx CUSTODIAL MENTAL HEALTH T updated contact details should she relocate.
- xxxxxx must adhere to all prescribed medication.
- xxxxxx must attend xx CUSTODIAL MENTAL HEALTH T for case management and psychiatric assessment as directed.
- Xxxxxx is strongly encouraged to engage with drug and alcohol services in the community.
- Should xxxxxx not comply with these conditions, the xx local court will be notified of a breach.

### Custodial Management

Should xxxxxx be remanded or remain in custody his/her mental health needs will continue to be met by Justice Health & Forensic Mental Health Network.

Yours Sincerely,

CC: Defence Solicitor  
Prosecution  
JH File



*Please contact the Justice Health & Forensic Mental Health Network Medico Legal Manager on 9289 5168 before you release this report to the patient/client, as consideration will need to be given to the effect its content might have on him/her and/or third parties.*

### 6.3 Section 19 Court Report Template



Health  
Justice Health and  
Forensic Mental Health Network

**Date**

The Presiding Magistrate

xxxxxx Local Court

xxxxxx Street

xxxxxx NSW xxxxx

**Strictly Confidential**  
**Custodial Diversion Clinical Nurse Consultant's Report**

RE: **xxxxxxx, xxxxxx**

MIN:

DOB:

Court Hearing Date:

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#### INTRODUCTION

This report is prepared at the request of xxxxxx treating team. The writer was asked to assess xxxxxx for suitability of diversion from custody on the grounds of Section 19(b) of the Mental Health & Cognitive Impairment Forensic Provisions Act 2020.

I had the opportunity to approach xxxxxx on 19th August 2022 in the xxxxxxxxxxxx.

#### CONSENT & CONFIDENTIALITY

I explained the nature and the purpose of the assessment to xxxxxx. I also highlighted to him that I would be submitting a court report to Your Honour. xxxxxx did give his consent for this report to be completed and submitted.

#### ADDITIONAL SOURCES OF INFORMATION

In preparation for this report, the following sources of information were available:

1. Justice Health & Forensic Mental Health Network medical records
2. Electronic records from Justice Health Electronic Health System (JHeHS)
3. Electronic records from Corrective Service NSW Offender Information Management System (OIMS)
4. Clinical presentation discussed with Dr xxxxxx, Consultant Forensic Psychiatrist.

#### BACKGROUND

## PSYCHIATRIC HISTORY

## SUBSTANCE USE HISTORY

## CURRENT PRESENTATION

### Mental State Examination

Appearance:

Behaviour:

Speech:

Mood:

Affect:

Thought Content:

Thought Form:

Perception:

Cognition:

Insight and Judgement:

## CLINICAL IMPRESSION

## CONCLUSIONS & RECOMMENDATIONS

### Community Management

Should the Court choose to send **XXXX** under Section 19 (b) of the Mental Health & Cognitive Impairment Forensic Provisions Act 2020 this writer will contact the Psychiatric Registrar or Nurse Manager at the **XXXXXX** Hospital to formally refer **XXXXXX** and forward all relevant clinical information.

### Custodial Management

Should **xxxxxx** be remanded or remain in custody **his/ her** mental health needs will continue to be met by Justice Health & Forensic Mental Health Network.

Yours Sincerely,

CC: Defence Solicitor  
Prosecution  
JH File

*Please contact the Justice Health & Forensic Mental Health Network Medico Legal Manager on 9289 5168 before you release this report to the patient/client, as consideration will need to be given to the effect its content might have on him/her and/or third parties.*

#### 6.4 Comparative table: diversionary provisions in Mental Health (Forensic Provisions) Act 1990 (MHFPA) vs Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (MHCIFPA)

This table below is a comparative table from the previous Act to the new Act in relation to diversionary provisions. Patients charged with historical charges that allegedly occurred prior to the commencement of the new Act are subjected to the previous Act in relation to court diversion.

| Definitions   |   |
|---|---|
| Previous legislation<br><i>Mental Health (Forensic Provisions) Act 1990</i>   | New legislation<br><i>Mental Health and Cognitive Impairment Forensic Provisions Act 2020</i>   |
| <b>Cognitive impairment - sec 32(6)</b><br><b>cognitive impairment</b> means ongoing impairment of a person's comprehension, reasoning, adaptive functioning, judgment, learning or memory that materially affects the person's ability to function in daily life and is the result of damage to, or dysfunction, developmental delay or deterioration of, the person's brain or mind, and includes (without limitation) any of the following:<br>(a) intellectual disability,<br>(b) borderline intellectual functioning,<br>(c) dementia,<br>(d) acquired brain injury,<br>(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,<br>(f) autism spectrum disorder. | <b>Cognitive impairment - sec 5</b><br>(1) For the purposes of this Act, a person has a cognitive impairment if—<br>(a) the person has an ongoing impairment in adaptive functioning, and<br>(b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and<br>(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.<br>(2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons:<br>(a) intellectual disability<br>(b) borderline intellectual functioning,<br>(c) dementia,<br>(d) an acquired brain injury,<br>(e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,<br>(f) autism spectrum disorder. |
| Mental illness - MHFPA does not define this term and nor does it refer back to definition in MHA  | <b>Mental health impairment - sec 4</b><br>(1) For the purposes of this Act, a "person has a mental health impairment" if--<br>(a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and<br>(b) the disturbance would be regarded as significant for clinical diagnostic purposes, and<br>(c) the disturbance impairs the emotional wellbeing, judgment or behaviour of the person.<br>(2) A mental health impairment may arise from any of the following disorders but may also arise for other reasons--<br>(a) an anxiety disorder,<br>2<br>(b) an affective disorder, including clinical depression and bipolar disorder,<br>(c) a psychotic disorder,  |

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|   | <p>(d) a substance induced mental disorder that is not temporary.</p> <p>(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--</p> <p>(a) the temporary effect of ingesting a substance, or</p> <p>(b) a substance use disorder</p>  |
| <p><b>Sec 3 – mental condition</b></p> <p>"mental condition" means a condition of disability of mind not including either mental illness or developmental disability of mind</p>  | <p>Term not used in MHCIFPA. See definition of "mental health impairment"</p>  |
| <p><b>Mentally ill person - sec 14 Mental Health Act (definition adopted by MHFPA s3)</b></p> <p>(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--</p> <p>(a) for the person's own protection from serious harm, or</p> <p>(b) for the protection of others from serious harm.</p> <p>(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.</p> | <p>Mentally ill person - sec 14 Mental Health Act</p> <p>(definition adopted by MHCIFPA s3(2))</p> <p>(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--</p> <p>(a) for the person's own protection from serious harm, or</p> <p>(b) for the protection of others from serious harm.</p> <p>(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.</p> |
| <p>Mentally disordered person - MHFPA does not define this term and nor does it refer back to definition in MHA</p>   | <p><b>Mentally disordered person - sec 15 Mental Health Act (definition adopted by MHCIFPA s3(2))</b></p> <p>A person (whether or not the person is suffering from mental illness) is a mentally disordered person if the person's behaviour for the time being is so irrational as to justify a conclusion on reasonable grounds that temporary care, treatment or control of the person is necessary--</p> <p>(a) for the person's own protection from serious physical harm, or</p> <p>(b) for the protection of others from serious physical harm.</p>   |
| <b>Procedural matters</b>   |  |
| <p><b>Sec 32(3) – orders magistrate make</b></p> <p>(3) The Magistrate may make an order dismissing the charge and discharge the defendant:</p> <p>(a) into the care of a responsible person, unconditionally or subject to conditions, or</p> <p>(b) on the condition that the defendant attend on a person or at a place specified by the Magistrate:</p> <p>(i) for assessment or treatment (or both) of</p> <p>(ii) to enable the provision of support in</p>   | <p><b>Sec 14(1) - Orders magistrate may make</b></p> <p>(1) A Magistrate may make an order to dismiss a charge and discharge the defendant—</p> <p>(a) into the care of a responsible person, unconditionally or subject to conditions, or</p> <p>(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 condition or cognitive</p>   |

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| relation to the defendant's cognitive impairment, or<br>(c) unconditionally   | impairment, or<br>(c) unconditionally.  |
| <p><b>Sec 32A – Reports from treatment providers</b></p> <p>(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:</p> <p>(a) an officer of Community Offender Services, Probation and Parole Service,</p> <p>(b) an officer of the Department of Justice,</p> <p>(c) any other person or body prescribed by the regulations.</p> <p>(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.</p> <p>(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.</p> | <p><b>Sec 17 – Reports from treatment providers</b></p> <p>1) Despite any law, a person who is, in accordance with an order under section 14, to assess another person's mental condition or provide treatment to another person (a "treatment provider" ) may report a failure to comply with a condition of the order by the other person to any of the following--</p> <p>(a) an officer of the Department of Communities and Justice,</p> <p>(b) another person or body prescribed by the regulations.</p> <p>(2) A treatment provider may include in the report information that the treatment provider considers is relevant to the making of a decision in relation to the failure to comply with the condition.</p> <p>(3) The report is to be in the form approved for the time being by the Secretary of the Department of Communities and Justice.</p> |
| <p><b>Sec 33(1) Orders magistrate may make</b></p> <p>(a) may order that the defendant be taken to, and detained in, a mental health facility for assessment, or</p> <p>(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 unless granted bail by a police officer at that facility, or</p> <p>(c) may discharge the defendant, unconditionally or subject to conditions, into the care of a responsible person.</p>  | <p><b>Sec 19 - Orders magistrate may make</b></p> <p>A Magistrate may make one or more of the following orders—</p> <p>(a) an order that the defendant be taken to, and detained in, a mental health facility for assessment,</p> <p>(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,</p> <p>(c) an order for the discharge of the defendant, unconditionally or subject to conditions, into the care of a responsible person.</p>  |
| <p><b>Sec 33(1A)–(1C) - power to make CTO</b></p> <p>(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</p>  | <p><b>Sec 20 - Community treatment orders</b></p> <p>(1) Without limiting section 19(c), 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</p>   |

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| <p>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.</p> <p>(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.</p> <p>(1C) A Magistrate must, before making an order under subsection (1A), notify the Secretary of the Ministry of Health, or a person authorised by the Secretary of the Ministry of Health for the purposes of this section, of the proposed order.</p> | <p>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.</p> <p>(2) The Mental Health Act 2007 (other than section 51(1) and (2)) applies to and in respect of the defendant and a community treatment order as if the order had been made by the Tribunal under that Act.</p> |
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