



CHANGES TO CUSTODY ORDERS FACTSHEET

This information will help you understand how your custody order will change when new laws start in September 2024.

About the new law

From 1 September 2024, the *Criminal Law (Mental Impairment) Act 2023* will apply in Western Australia (WA). This will be the new law that applies to a person with mental impairment who is charged with a criminal offence in WA.

This new law will apply to all custody orders. It will apply to a custody order given to a person under the old law and a custody order given to a person after the new law starts.

What is the old law?

The old law is the *Criminal Law (Mentally Impaired Accused) Act 1996*. This old law will finish when the new law starts on 1 September 2024.

Under the old law, a person charged with a criminal offence can be given a custody order because of their mental impairment.

A custody order under the old law is for an unlimited time. This means there is no end date for the order.

What is the new law?

Under the new law, a person charged with a criminal offence can still be given a custody order. However, the order must have a 'limiting term' set. This means it must have an end date.

When the new law starts, any custody order given under the old law must be changed so it has a limiting term. This means it will have an end date.

Although under the new law all custody orders will have an end date, some people can be kept in custody after the end date.

There is more information about this later in this factsheet.

Does it matter why I got my custody order?

You may have been given a custody order under the old law because you were found unfit to stand trial, or because you were found not guilty on account of unsoundness of mind.

It does not matter why you were given your custody order. Under the new law it must be changed so it has a limiting term.



Setting the limiting term for old custody orders

What is the limiting term?

The limiting term is the longest period of time you can spend in custody under your custody order.

Who sets the limiting term?

After the new law starts you will be taken back to the court that gave you the custody order and that court will set the limiting term for your order.

However, if you were given a custody order after being found not guilty on account of unsoundness of mind for an offence of murder or manslaughter, you will not be taken back to court for the limiting term to be set. Instead, the limiting term will be set automatically. There is more information about this later in this factsheet.

How do I get my old custody order into court to set the limiting term?

You do not need to do anything to get your old custody order into court to set the limiting term. This will be organised by the Office of the Director of Public Prosecutions (DPP) as soon as possible after the new law starts.

The DPP will make an application to the court, asking for the limiting term to be set for your custody order. You will be told about the application including the date, time and place where it will be considered by the court.

How long will my limiting term be?

The length of your limiting term will be decided by the court.

The court will set the limiting term to be the same length of time as the term of imprisonment or detention you would have been given if you had pleaded guilty to the charge and been sentenced.

Can the court consider my mental impairment when setting the limiting term?

When deciding the length of your limiting term, the court can consider the facts and seriousness of the offence and your personal circumstances.

However, the court cannot consider any mental impairment you may have had at the time of the offence, or at the time you received the custody order, or that you may have currently.

This means the court will mainly consider the type of offence and how serious it is, to decide the length of your limiting term.

Will the court look at all the evidence again when setting the limiting term?

No, when the court sets your limiting term, it will only consider information that helps to decide the term of imprisonment or detention you would have been given if you had pleaded guilty to the charge and been sentenced.

This means it will not consider or reconsider all the evidence in your case when setting your limiting term.

When will my limiting term start?

After the court decides the length of your limiting term, it will decide when your limiting term should start.

The start date will usually be the date when you were originally given your custody order. However, if you were taken into custody on an earlier date, the court can decide that your limiting term should start on this earlier date.

What limiting term will be set if I am on a custody order for murder or manslaughter?

Under the new law, there are special rules if you were given a custody order because you were found not guilty on account of unsoundness of mind, for an offence of murder or manslaughter.



The special rules are that you will not be taken back to court for a limiting term to be set on your old custody order. Instead, a limiting term of life will automatically be set.

However, you or the DPP can apply to the court to ask for a limiting term that is less than life.

How do I apply to the court for a limiting term less than life?

If you have automatically been given a limiting term of life, you can apply to the court for a term that is less than life. You can do this any time after the new law starts.

The application must be to the Supreme Court as this was the court that dealt with your offence of murder or manslaughter.

The court can give you a limiting term that is less than life if it is satisfied of two things. Firstly, that giving you a life term would be clearly unjust, taking into account the facts of the offence and your personal circumstances. Secondly, that you are unlikely to be a threat to the safety of the community when you are released from custody.

If satisfied of these two things the court will set a limiting term for the offence that is less than life.

Will I be released when my limiting term ends?

Usually, you must be released when your limiting term ends. However, an 'extended custody order' can be made to keep you in custody after your limiting term ends.

What is an extended custody order?

An extended custody order is an order of the Supreme Court that means you can be kept in custody even if your limiting term has ended.

When making an extended custody order, the court sets a new limiting term. This is the longest period of time you can spend in custody under your extended custody order.

How is an extended custody order made?

The Attorney General can apply to the Supreme Court for an extended custody order.

When deciding whether to make an extended custody order, the court will consider whether there is a risk you will commit a serious offence if you are released from custody. It will also consider whether you should be kept in custody to protect the community from this risk.

To help make this decision, the court must consider your current mental state. This means the court will ask for you to be assessed by a psychiatrist, psychologist, or other expert and for a report to be provided to the court.

What if my limiting term ends before an extended custody order is made?

The court can make a temporary custody order to keep you in custody while it considers the application for an extended custody order. This is called an 'interim custody order'.

If I am still mentally unwell, will I be released?

If your limiting term has ended and you have not been given an interim custody order or extended custody order, you must be released from custody.

However, if your doctor assesses you and decides you need to continue to receive mental health treatment, you could be held in hospital as an involuntary patient under the *Mental Health Act 2014*. This is not the same as a custody order. You should speak to your Mental Health Advocate or lawyer about what this means.

Will I get compensation for any extra time in custody?

If the time you have spent in custody under your custody order is longer than your limiting term, there is nothing you can do. There is no option of compensation for you under the new law.

Where can I get legal help?

If you have questions about your old custody order and what will happen under the new laws, speak to your lawyer.

If you do not have a lawyer, you can ask for legal help from one of the following services.

RUAH Legal Services and Mental Health Law Centre



Freecall 1800 620 285
(08) 9328 8012
ruahlegal.org.au

Legal Aid WA



Infoline 1300 650 579
Legal Yarn 1800 319 803
legalaid.wa.gov.au

Aboriginal Legal Service



Freecall 1800 019 900
(08) 9265 6666
als.org.au

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