



# The law on Custody Orders in WA is Changing

*The new Criminal Law (Mental  
Impairment) Act 2023 explained*



## What is a Custody Order?

A Custody Order can be made where a person accused of a crime is found Not Guilty on account of mental impairment (either at Trial or Special Proceeding) or the person is not fit to stand trial and is found to have committed the offence charged (or a statutory alternative).

A Custody Order means that the person must be detained in an authorised hospital, detention centre or prison for the protection of the community. The place of custody is determined by the Mental Impairment Review Tribunal.

A Custody Order can only be made if the offence carries the possibility of a term of imprisonment.

A Custody Order must be made if the offence that the person is found to have committed was a "serious offence" unless:

- the Court decides that any risk the person appears to present to the community can be managed under a Community Supervision Order (CSO); or
- the person was a child at the time of the offence and exceptional circumstances exist.

A person on a custody order is detained in an authorised hospital if they have a mental illness requiring treatment and their mental illness places themselves or others at a significant risk of harm. The Mental Impairment Review Tribunal may order that treatment can only be provided in an authorised hospital.

If the person's predominant disability is not a mental illness and they are over 16 they may be detained at a declared place (Bennett Brook Detention Centre). Where there are no available alternatives, the person will be detained in prison.

## Mental Health Advocacy Service

As well as a right to legal representation in proceedings before the Court and Tribunal, a person who is unfit to stand trial, or a supervised person under a CSO or Custody Order has a right to be visited or contacted by a mental health advocate.

A mental health advocate can:

- inquire into or investigate any matter relating to the conditions of a place where a person is detained or receives services;
- inquire or seek resolution of complaints about treatment, care and support offered to the person;
- assist persons in relation to proceedings before a Court or Tribunal;
- liaise with Guardians and Administrators;
- assist persons to access legal services;
- advocate for and facilitate access to other services;
- make complaints on behalf of a person.

## Limited Terms

Under the new legislation, a Court making a Custody Order must decide what the length of a term of imprisonment the Court would have imposed at sentencing if the person plead guilty to the offence, and set that as a Limiting Term for the Custody Order.

All people on existing Custody Orders will receive a Limiting Term, except, where a person was found Not Guilty on account of mental impairment (s 27 of the Criminal Code) for the offences of Murder or Manslaughter, the Limiting Term will be for the duration of life.

A Custody Order will end if:

- the Limiting Term expires; or
- it is cancelled by the Court; or
- the Mental Impairment Review Tribunal cancels all the conditions of a leave of absence order.

It can be extended before the end of its Limiting Term by application of the Attorney-General's Office to the Supreme Court.

## Extending Orders

A Custody Order can be extended before its Limiting Term expires. Six months prior to the expiry of a Custody Order, the Mental Impairment Review Tribunal will consider the need to extend the Custody Order.

The Tribunal will consider if it is "necessary that an extended Custody Order be made to ensure adequate protection of the community against an unacceptable risk that the person will commit a serious offence". The Tribunal will provide a report to the Attorney-General as soon as practicable about the need for an extended order.

After considering reports from the Tribunal, the Attorney-General's Office may apply to the Supreme Court of Western Australia for an extended order.

## The Mental Impairment Review Tribunal

The Mental Impairment Review Tribunal replaces the Mentally Impaired Accused Review Board.

The Tribunal reviews Custody Orders and Community Supervision Orders every 12 months. A supervised person can apply for another review 28 days after their most recent review.

A supervised person can appear before the Tribunal.

The Tribunal must have regard to:

- the degree of risk if the person is released;
- whether the person could comply with a leave of absence order;
- whether the person could care for their day-to-day needs if released;
- whether there are facilities or services in the community;
- the extent to which the person benefits from particular treatment;
- the principle of least restriction that is consistent with the need to protect the community;
- any statement by the supervised person;
- any victim impact statements; and
- any other relevant information.

After carrying out a review, the Tribunal can:

- confirm the order as it is;
- make a leave of absence order;
- vary the terms of a Community Supervision Order;
- cancel all the terms of a Community Supervision Order (meaning it no longer has effect);
- cancel all the conditions of a leave of absence order (meaning it no longer has effect);
- cancel a leave of absence order (meaning the person is detained under the Custody Order as it was originally imposed).

Changes to Custody Orders no longer require the review or approval of the Attorney-General. They can be made directly by the Tribunal itself.

## Legal Representation Services

Every person under the Act is entitled to receive legal representation in their matter. Organisations offering free legal representation services in this area are:

### Ruah Legal Services/MHLC

We offer holistic legal and social support in criminal law matters, fitness proceedings and matters before the Mental Impairment Review Tribunal, and are experts in mental health legal services.

☎ (08) 9328 8012

### Aboriginal Legal Service WA

Offer legal representation in criminal law matters across all jurisdictions for persons of Aboriginal or Torres Strait Islander descent.

☎ (08) 9265 6666

### Legal Aid WA

Offer legal representation in criminal law matters across all jurisdictions and matters before the Mental Impairment Review Tribunal.

☎ 1300 650 579

**The Criminal Law (Mental Impairment) Act 2023 is scheduled to commence on 1 September 2024.**

**Everyone is welcome. Everyone belongs.**



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