



Fitness to Stand Trial

in Western Australia

Criminal Law (Mental Impairment) Act 2023 (WA)

The information in this brochure applies after the commencement of the Criminal Law (Mental Impairment) Act 2023 (WA) comes into operation on 1 September 2024.



What is Fitness to Stand Trial?

If a person is accused of a crime, they are presumed to have the mental capacity to understand and take part in the Court process to determine whether they are guilty or not guilty of the offence.

This means that the person charged with an offence must be capable of understanding what they have been charged with, can instruct a lawyer to represent them and can understand that they must plead guilty or not guilty to the charge and follow the Court process.

What makes a person unfit to stand trial?

A person's fitness to stand trial can be questioned at any time before or during a trial.

The question may be raised by the Police or Prosecution, the accused person themselves, their lawyer, or the presiding Judge or Magistrate.

A person is not fit to stand trial if because of a mental impairment, such as intellectual disability, mental illness, acquired brain damage or dementia the person is unable to:

- understand the nature of the charge;
- give instructions to their lawyer;
- understand the requirement to plead to the charge or the effect of a plea;
- understand the purpose of the trial;
- understand or exercise the right to challenge the appointment of jurors;
- follow the course of the trial;
- understand the substantial effect of evidence presented by the prosecution in the trial;
- decide whether or not to give evidence if they wish to do so;
- properly defend the charges.

Who decides if a person is mentally fit?

The Judge or Magistrate will decide if the accused person is fit to stand trial.

Before making their decision, they may take other steps, such as:

- ordering the person to be examined by a psychiatrist or other expert;
- ordering a report, by a psychiatrist or other expert, to be submitted to the Court;
- adjourning the proceedings and, if there is a jury, discharging the jury; and/or
- making any other order the Court thinks is appropriate.

The Judge or Magistrate may also have regard to support measures that may be available to enable the accused person to be fit to stand trial.

Support measures are any measures that can facilitate the accused to participate in proceedings in Court such as; a person they can have near them in Court, a communication partner, or communication device.

What happens if a person is found to be unfit to stand trial?

If the Judge or Magistrate decides that the accused person is fit to stand trial or is fit with support measures, the proceedings will continue as usual with any support measures required.

If the Judge or Magistrate decides that the accused person might become fit in 6 months, they can adjourn the matter for that period of time (this can be extended up to 12 months in certain circumstances).

If a Magistrate decides that the accused person is not fit to stand trial, they must release the person from the charge or order a Special Proceeding take place. If a Judge decides that the person is not fit to stand trial, they must order a Special Proceeding.

What are Special Proceedings?

The purpose of the Special Proceeding is for the Court to decide whether the accused person was guilty or not guilty of the offence charged on the evidence that is available to the Court.

Special Proceedings may be conducted with or without a hearing and must be conducted like an ordinary criminal trial to the extent possible taking into account the needs and capacity of the accused person.

The Special Proceedings operate as if the accused person plead Not Guilty to the offence. The accused person can raise any legal defence to the charge and may also give evidence in the proceedings.

After a Special Proceeding, the Court may find that the accused person-

- is not guilty of the charged offence;
- is not guilty on account of mental impairment (s 27 Criminal Code); or
- committed the offence charged or another offence that the accused person might be found to have committed.

What can a Court Order after a Special Proceeding finding?

If the accused person is found to be Not Guilty of the charged offence, they are taken to be Not Guilty and are released from the charge.

If the accused person is found to be Not Guilty by reason of mental impairment, they are taken to be Not Guilty as if they had raised the defence of "not guilty on account of mental impairment" in the Criminal Code.

If the accused person is found to have committed the offence or another offence they are not convicted of the offence, however, the Court must make one of the following orders:

- release the person unconditionally (unless the offence was a “serious offence”);
- order a Community Supervision Order (CSO); or
- make a Custody Order.

What is a Community Supervision Order (CSO)?

A CSO is an order that the person resides in the community but must comply with conditions set by the Court for the protection of the community. A CSO can last up to 5 years and be extended by request of the Attorney-General.

A person on a CSO must be supervised by a supervising officer and comply with conditions imposed by the Court. These can include:

- requirement to undergo medical treatment;
- reside in a specified place;
- not leave WA;
- be subject to electronic monitoring or a curfew;
- comply with restrictions protecting victims of the offence.

A CSO remains in place until its term expires, it is cancelled, or the Mental Impairment Review Tribunal cancels all conditions of the order.

A CSO can be extended before its term expires. 3 months prior to the expiry of a CSO, the Mental Impairment Review Tribunal will consider the need to extend the CSO, they will provide a recommendation to the Attorney-General’s office. After considering the reports from the Tribunal, the Attorney-General’s office may apply to the Supreme Court of Western Australia for an extended order.

All extended CSO’s will have a Limiting Term and must be reviewed annually by the Supreme Court.

What is a Custody Order?

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.

For more information on Custody Orders, see our brochure *The Law on Custody Orders in Western Australia is changing*.

About Ruah Legal Services

Ruah Legal Services launched in 2019 when the Mental Health Law Centre (MHLC) merged with Ruah Community Services. MHLC has been helping Western Australians with mental illness for more than 20 years. MHLC continues its important work as a specialist centre of Ruah Legal Services. We are an independent, not for profit, community legal service and Western Australia's experts in mental health law.

If you have a legal issue connected to a mental illness and you are experiencing financial hardship, our qualified and experienced lawyers can give you free confidential advice and represent you in court.

We specialise in involuntary treatment and matters under the *Mental Health Act 2014 (WA)*. We can also advise on:

- Criminal matters
- Guardianship and Administration
- Mentally Impaired Accused Review Board hearings
- Responding to Restraining Orders
- Care and Protection matters
- Mental Health Tribunals

To find out if you are eligible for assistance please call our Telephone Advice Line or visit ruahlegal.org.au.

Need legal advice? Call our Telephone Advice line

Monday to Friday 9am to 4pm

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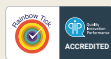
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Ruah Legal Services acknowledges and respects the traditional Aboriginal and Torres Strait Islander owners of the land on which we work, the first people of this country. We pay our respects to their culture and their Elders past, present and future.

Everyone is welcome. Everyone belongs.



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