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Fairer laws needed for people with mental health or cognitive impairments

The definitions of fitness to stand trial and the defence of insanity should be changed according to the latest report from the Tasmanian Law Reform Institute (TLRI) at the University of Tasmania.

“Mental health and cognitive impairment affect people’s ability to participate in ordinary processes of the criminal justice system,” report author and TLRI Researcher Dr Rebecca Bradfield said.

“Reform is needed to ensure that vulnerable defendants in the criminal justice system have access to a regular trial wherever possible.”

The TLRI reviewed the defence of insanity in s 16 of the *Criminal Code* and fitness to plead set out in the *Criminal Justice (Mental Impairment) Act 1999* for dealing with people who are not criminally responsible either because they are unfit to stand trial or because they have been found not guilty by reason of insanity.

The *Criminal Justice (Mental Impairment) Act 1999* has not been reviewed since its commencement on 14 May 1999 and does not reflect contemporary understandings of mental health.

The report states that forensic orders – which can be used by the court following a special hearing or a finding of ‘not guilty by reason of insanity’ in a regular trial – tend to lead to longer restrictions on freedom.

“People who are placed on forensic orders are generally subject to much longer restrictions on liberty than if they had been found guilty and sentenced in the usual way,” Dr Bradfield said.

Forensic orders are indefinite orders and can only be removed or changed by the Supreme Court.

A key recommendation of the report is to replace indefinite orders with a time limit. The time limit would be based on the court’s best estimate of the length of the person’s sentence if she or he had been found guilty at a normal trial. This could be extended for community safety.

The report also recommends that the test of 'fitness to stand trial' takes a more supportive approach.

"The current focus of the fitness test is on a person's cognitive capacity or intellectual ability to understand features of the criminal trial," Dr Bradfield said.

"The fitness test does not give adequate recognition to whether the accused can participate meaningfully in his or her trial.

"The TLRI recommends a shift from the current focus on cognitive capacity to a supported decision-making approach."

The report also recommends renaming 'defence of insanity', which came into use in the 18th century, to fit current medical knowledge and language. The recommended term is 'defence of mental or cognitive impairment'.

The report, released today, complements recent TLRI reports addressing how Tasmania's justice system can better meet the needs of persons with communication difficulties or impaired decision-making capacity.

The report can be found at <https://www.utas.edu.au/law-reform/publications/completed-law-reform-projects> under the tab 'Review of the Defence of Insanity in s 16 of the Criminal Code and Fitness to Plead.'

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