

PROVISIONS TO ALLOW A REPLACEMENT JUDICIAL OFFICER IN CRIMINAL JURY TRIALS

Legal Aid NSW submission

to the Department of Justice

January 2015

Legal Aid NSW welcomes the opportunity to provide our views on the introduction of a regime for the replacement of a trial judge in a criminal jury trial in circumstances where the original judge dies, becomes ill or is otherwise unable to continue.

As a frontline service with extensive trial experience Legal Aid NSW is acutely aware of the issues and difficulties that could arise if a trial judge, who has been presiding over a trial that has been ongoing for some time, is unable to continue in the matter. This could create a challenging and trying situation for all concerned.

However, we note that it is rare for a judge to die or fall seriously ill mid-trial. The number of cases where a legally aided defendant has been affected by such a situation is very small. It is our experience that in the unusual case where a judge does fall ill mid-trial, this is commonly dealt with by an adjournment.

An adjournment offers a far simpler and less expensive solution than the proposed provision in cases of short term illness. Nor should such a provision be used in cases where the trial has overrun its estimate and it is more convenient for the original judge. If a provision is to be introduced, its application should be restricted to cases of death and prolonged illness.

Even in such limited cases, replacing the judicial officer will not always be the most effective or efficient response. The perceived benefits that are expected to flow from continuing the trial with a replacement judicial officer will be significantly reduced if, for example, witnesses need to be recalled, court tapes of evidence watched, or lengthy transcripts generated and read. It is possible that the decision to replace the judicial officer will give rise to an appeal point, adding the cost of an appeal to the total cost of the matter for the court system.

Our primary concern though is that a decision to replace the judicial officer may compromise the procedural fairness afforded to the defendant. For this reason we support the suggestions that any provision that is introduced should contain an “interests of justice” test and the decision to replace a judicial officer rather than adjourn the matter or restart the trial should be reserved for the Chief Justice or Chief Judge at Common Law. The fact that a replacement judge has not had the benefit of observing the demeanour of witnesses giving evidence will be relevant to the question of procedural fairness. The jury should be discharged if another judge does not take over the conduct of the trial within a reasonable time.

Legal Aid NSW would not support a provision that allows a judge to be replaced in circumstances where a complete court tape or full transcript of the trial to date is unavailable.

If new legislation is to be implemented Legal Aid NSW would welcome the opportunity to comment on the specific provisions of the proposed legislation.

Thank you for the opportunity to provide these comments. Should you require any further information, please contact Erin Gough, A/Executive Director, Strategic Policy, Planning and Community Partnerships at erin.gough@legalaid.nsw.gov.au.