



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Criminal:REad852232

20 May 2014

The Hon. Brad Hazzard, MP
Attorney General, Minister for Justice
Level 31 Governor Macquarie Tower
1 Farrer Place
SYDNEY NSW 2000

Dear Attorney General,

Replacement Jurors

I write to you on behalf of the Criminal Law Committee of the Law Society of New South Wales ("the Committee"). The Committee appreciates the opportunity to comment on a proposal to amend the *Jury Act 1977* ("Act") set out in a letter from the former Attorney General dated 26 March 2014.

The Committee notes that it is proposed to amend the Act to take account of situations where a juror is unable to continue before there is substantial progress in the trial, that is prior to any evidence being adduced.

In considering the proposal, the Committee's first query is what is meant by the words "before there is substantial progress in the trial, that is prior to any evidence being adduced". If these words are taken literally it would seem to imply that the proposal would enable a substitute juror to be empanelled at any time up to and including the swearing of the first witness. The Committee's view is that the ultimate decision on this issue should be based on the fact that all members of the jury have heard the same material whether it be evidence, addresses or directions of law from the judge.

The Committee queries further whether it is proposed that a substitute juror can be empanelled and sworn after the trial judge makes his/her preliminary remarks and after the parties have opened. It is the Committee's view that this should not be permitted as it will be far too late in the proceedings and could give rise to a miscarriage of justice on some occasions. The Committee submits that all jurors should be entitled to have the benefit of these stages of the trial before embarking upon listening to the evidence. The Committee further submits that repeating those stages for the benefit of the new juror also raises other problems including a further waste of court time and difficulties in ensuring that the new juror is told exactly the same things by the trial judge and counsel.

In response to the three questions posed in the letter, the Committee submits the following:

Do you consider that a trial could continue with a jury of 11 from a preliminary stage and if so, do you consider that this could give rise to a perceived miscarriage of justice?

Section 22 of the Act currently provides that a trial can continue with a jury of 11. However, judges have and should continue to have a wide discretion to decide whether a trial proceeds with a jury of 11 or whether the jury panel as a whole ought to be discharged and a fresh jury empanelled (see s 53C of the Act). In the Committee's experience judges typically request input into this decision from the Crown and also from the defence.

What would be your view in relation to amending the *Jury Act 1977* to provide for the replacement of a single juror at a preliminary stage of a trial?


The Committee opposes the proposed amendment for the reasons set out above.

If you are in favour of an amendment, what would you consider to be an appropriate cut off point in the trial for a single juror's replacement?

If the proposal is adopted, the Committee submits that the "preliminary stage" should be defined so that a fresh juror could be empanelled only if the judge has not yet made his/her preliminary remarks or directions and the parties have not opened in the trial.

Once again, the Committee appreciates the opportunity to provide these comments. Should your office wish to discuss this submission further, please contact policy lawyer, Alex Dimos on (02) 9926 0310 or alex.dimos@lawsociety.com.au.

Yours sincerely,



Michael Tidball
Chief Executive Officer