



NSW Department of Communities and Justice (DCJ)

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Friday 25 June 2021

To Whom It May Concern

**Re: Court Appointed Questioners Summary Paper**

Please accept this letter as Domestic Violence NSW's feedback in response to the Court Appointed Questioners Summary Paper, in addition to our support of the submission prepared by Women's Legal Service NSW.

Domestic Violence NSW is the peak body for specialist domestic and family violence services in NSW, providing a representative and advocacy function for over 80 specialist domestic and family violence services, and the women, families and communities they support.

Our member services include crisis and refuge services, transitional accommodation and community housing providers, family support services, Aboriginal controlled organisations, specialist Culturally and Linguistically Diverse organisations, specialist homelessness service providers, men's behaviour change programs and networks, community organisations working with high-risk communities, specialist women's legal support services, women and children's support services, and Safe at Home programs.

Domestic Violence NSW acknowledges that we work on Aboriginal land, and pay respect to elders past, present and emerging. We also acknowledge the adverse impacts of colonisation on Aboriginal and Torres Strait Islander communities and the high rates of violence perpetrated against Aboriginal women and their children.

**Key concerns**

- **Domestic Violence NSW is concerned that insufficient time for consultation has been provided for this matter and we strongly encourage DCJ to conduct further consultation with the specialist domestic and family violence sector in the next stages of development.**
- **Of the six Court appointed questioner options provided, Domestic Violence NSW believes that option 1. Legal Practitioner is preferable, as lawyers have duties to the court regarding ethical practice and practice training in legislation and court practice.**

- **Regarding options 2-6, Domestic Violence NSW is concerned that if the person asking the questions is not trained and able to prevent inadmissible questions from being asked, there is limited effectiveness to this reform.**
- **Domestic Violence NSW believes that for all options, thorough training is required regarding trauma informed practice as well as the legislative requirements for allowable questions.**
- **Fair process and reduction of trauma should be the objectives of this reform.**
- **Domestic Violence NSW strongly suggests that further evidence as to the efficacy of similar reforms in the sexual assault space are taken into consideration in shaping these reforms.**

#### **Other issues to consider**

- Lawyers are the only professionals that currently have the correct skill set to cross examine witnesses, and the skills and duty to the court to prevent problematic questions.
- Lawyers are best placed to advise the questioner not ask inadmissible irrelevant or offensive questions.
- Does the proposed model allow them to do that, considering that the questioner would have no discretion as to the questions asked and would not be representing the person?
- If lawyers do the questioning, they need to:
  - Have discretion as to whether to put a question or not.
  - Have an opportunity to conference the client to get information about the case, so that they can determine later whether certain questions are impermissible.
  - If the lawyer is not allowed to advise the person of whether asking the question will be permissible or lead to damaging evidence, then perhaps judicial direction needs to be revisited?
  - If the person asks the lawyer to ask a question that is detrimental to that person's case, and ordinarily a competent solicitor would have advised the person against asking that question, but in the role of questioner is prohibited from providing that advice, then there should be protection for the solicitor from repercussions.
- What will the NSW Government propose for the professional rules/guidelines of lawyers to coincide with their new roles as questioners?
- If questioners represent and advise the perpetrator, would victims be upset that they are receiving free legal representation? Unrepresented litigants often get a lot of assistance from the judge (much more than if the Person had a legal rep). This is often difficult for victims as they might perceive judicial partiality. Is it beneficial to seek the person having their own legal representation rather than special treatment from the judge?
- The provisions need to allow the questioner to protect their own integrity, and either ask for judicial assistance if they believe that a question should not be asked or have the discretion to refuse to ask it.
- How would a lawyer feel comfortable that they are providing all relevant/material facts of the case to the Court? How would they treat the issue of a lawyer's duty to their client? If there is no duty to advise, then is there no duty to the client?
- If the lawyer is being instructed to only phrase the litigant's questions, and is not acting in any legal capacity, would this be the most cost-effective solution?

- Is there any provision that would allow the questioner to refuse to answer the question should they feel that it is offensive? Inappropriate? Irrelevant?
- Option 5 should be ruled out due to incapacity of Justices of the Peace to meet demand in the criminal law jurisdiction.

### Family law jurisdiction

- The family law regime recently grappled with this issue. As a result, we now have s102NA Family Law Act ([http://classic.austlii.edu.au/au/legis/cth/consol\\_act/fla1975114/s102na.html](http://classic.austlii.edu.au/au/legis/cth/consol_act/fla1975114/s102na.html) ).
- S102NA forbids a perpetrator from personally cross examining the victim, and mandates that a lawyer is appointed. No other persons other than a lawyer can be appointed. The Act aims to protect victims of family violence by requiring that cross examination must be conducted by a legal representative, either a privately retained practitioner or one funded through this scheme.
- The people asking the questions are not mere "questioners". They represent the perpetrator and advise him/her/them. This scheme is funded by the Commonwealth Government and is administered in New South Wales by Legal Aid NSW.
- The lawyer is allocated no more than 12 weeks before the trial, and once they are allocated, they represent the party for the whole of the trial (not just the isolated questioning). The legal profession agreed that if a lawyer is engaged, then they cannot be engaged only with respect to an isolated component of the case - they must represent the person for the whole matter.
- The need and associated funding the Australian Government initially allocated to this initiative was hugely underestimated.
- The justification behind the family law model is that lawyers have a duty to the Court of honesty and candour, both in the presentation of the facts and the law. They are also obliged to follow the rules of the Court, the etiquette of the Court and avoid engaging in acts that would in contempt of the court. If the lawyer is merely the mouthpiece of a litigant, with no discretion as to:
  - which questions should be asked, or
  - whether or not it would be appropriate to ask questions put by a litigant; and
  - no ability to advise the litigant.

### Sexual assault cases

It is essential that the efficacy of the current model in sexual assault cases is considered in developing this model. If research and evaluation is unavailable, then it should be undertaken.

**Domestic Violence NSW** welcomes the opportunity to discuss the options for Court Appointed Questioners, and requests that DCJ further consult with the specialist domestic and family violence sector regarding this matter, including potential co-design.

If you would like to discuss any aspect of this feedback, please contact me on (02) 9698 9777 or at [renata@dvnsw.org.au](mailto:renata@dvnsw.org.au).

Yours sincerely

Ms Renata Field, Policy and Research Manager, Domestic Violence NSW