



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC:JWrg240621

24 June 2021

Ms Karen Wallace
Executive Director
Court Services
Courts, Tribunals and Service Delivery
Department of Communities and Justice
PO Box A1150
Sydney South 1235

By email: PRL.Enquiries@justice.gov.au

Dear Ms Wallace,

Court appointed questioners

Thank you for seeking the Law Society's views on proposed options for implementing changes to the *Criminal Procedure Act 1986*.

Section 289VA, due to commence on 1 September 2021, prohibits an unrepresented accused in proceedings for domestic violence offences and related apprehended domestic violence order proceedings from directly examining the complainant. A complainant may be examined by a person appointed by the court or through the use of court technology (s289VA(2)).

The Department has advised that the use of court technology is not a feasible option and seeks feedback on six options relating to court appointed questioners.

Options 1 and 2

The Law Society is strongly opposed to Options 1 and 2. We informally advised the Department that this was our position shortly after the amendments passed.

The Law Society's view is that it is not appropriate for a legal practitioner to undertake the role of questioner as provided for in s289VA of the *Criminal Procedure Act 1986*, because of the inherent conflict with a practitioner's legal, professional, and ethical obligations.

Section 289VA(4) stipulates that the person appointed by the court is limited to asking the complainant only the questions that the accused person requests, and is therefore acting merely as a mouthpiece for the accused. This would be inconsistent with Rule 17.1 in the Australian Solicitors' Conduct Rules.¹

¹ A solicitor representing a client in a matter that is before the court must not act as the mere mouthpiece of the client or of the instructing solicitor (if any) and must exercise the forensic judgments called for during the case independently, after the appropriate consideration of the client's and the instructing solicitor's instructions where applicable.

The provisions of s289VA also create practical and ethical conflict for a practitioner who is engaged for the stated limited purpose. The limited terms of engagement preclude a practitioner from acting in the client's interests, including restraining the practitioner from testing the allegations of the complainant. This creates inconsistency with the obligations to act in the best interests of the client and to avoid any compromise to their integrity and professional independence.²

The suggestion in Option 2 that "legal practitioners would act as court appointed questioners in more complex court matters", heightens our concerns.

This accords with the Law Society's long-held position in relation to legal practitioners not undertaking the role of questioner under s294A of the *Criminal Procedure Act 1986*. If, despite our objections, the Department proceeds with Options 1 or 2, the Law Society will need to consider carefully whether it should issue guidance to legal practitioners that they should not accept the role of questioner.

Options 3-6

We note that the Government has committed to implementing a "mouthpiece" model by 1 September 2021. On this basis we consider that Option 6, the use of senior staff members in the Department's Courts, Tribunal and Service Delivery Division, is the most appropriate option. This option is currently used in proceedings where s294A applies. The Courts, Tribunal and Service Delivery Division should be adequately funded to cope with the additional demand.

We note that those undertaking the role of questioner should receive appropriate training and direct access to counselling; as both the subject matter of the proceedings and the nature of the questions asked may be very confronting. Safeguards should be implemented to ensure that the questioner has no prior association with the parties.

The Law Society contact for this matter is Rachel Geare, Senior Policy Lawyer, who can be reached on (02) 9926 0310 or at rachel.geare@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'J Warner', followed by a horizontal line extending to the right.

Juliana Warner
President

² Australian Solicitors' Conduct Rules 4.1.1 and 4.1.4.