

## CORAM CONFERENCE- 1 NOVEMBER 2022

### FACT FINDING HEARINGS AND DOMESTIC ABUSE IN PRIVATE LAW CHILDREN PROCEEDINGS

Gill Honeyman's notes:

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Vulnerable parties and witnesses in fact-finding hearings

Introduction

1. While the focus of this talk is fact-finding hearings, most of it also applies to other kinds of hearings in family proceedings.

FPR 3A and PD3AA are of “fundamental importance to the administration of family justice”:  
Re S (Vulnerable Party: Fairness of Proceedings) [2022] EWCA Civ 8

Vulnerability

What is it and how do we spot it?

2. The court has to consider making participation directions if a party's participation in the proceedings, or the quality of a witness's evidence, is likely to be diminished by reason of vulnerability. (FPR 3A.4&5)

3. FPR 3A.7 sets out the factors to be considered in particular, when the court is considering whether to make participation directions due to a person's vulnerability:

When deciding whether to make one or more participation directions the court must have regard in particular to—

(a) the impact of any actual or perceived intimidation, including any behaviour towards the party or witness on the part of—

(i) any other party or other witness to the proceedings or members of the family or associates of that other party or other witness; or

(ii) any members of the family of the party or witness;

(b) whether the party or witness—

- (i) suffers from mental disorder or otherwise has a significant impairment of intelligence or social functioning;
- (ii) has a physical disability or suffers from a physical disorder; or
- (iii) is undergoing medical treatment;
- (c) the nature and extent of the information before the court;
- (d) the issues arising in the proceedings including (but not limited to) any concerns arising in relation to abuse;
- (e) whether a matter is contentious;
- (f) the age, maturity and understanding of the party or witness;
- (g) the social and cultural background and ethnic origins of the party or witness;
- (h) the domestic circumstances and religious beliefs of the party or witness;
- (i) any questions which the court is putting or causing to be put to a witness in accordance with section 31G(6) of the 1984 Act ( );
- (j) any characteristic of the party or witness which is relevant to the participation direction which may be made;
- (k) whether any measure is available to the court;
- (l) the costs of any available measure; and
- (m) any other matter set out in Practice Direction 3AA.

4. This is a long list but not exhaustive. It includes both inherent characteristics and external factors.

5. It's important that we don't make gendered assumptions and recognise that some people may not want to admit to their vulnerability.

6. We need to be alert to vulnerability arising from, for example, neurodiversity, age, power imbalances and specific learning needs.

7. It's also vital that we discuss issues of vulnerability, and possible participation directions, with both clients and witnesses.

8. If you act for a 16.4 guardian, you also have a duty to consider these issues, and the guardian may well have useful insights.

9. The court needs to take the person's views into account before deciding what if any participation directions to make.

10. FFHs very often, but not always, relate to domestic abuse: definition at PD12J para 3. Remember FPR 3A.2A, which will apply where DA is an issue:

(1) Subject to paragraph (2), where it is stated that a party or witness is, or is at risk of being, a victim of domestic abuse carried out by a party, a relative of another party, or a witness in the proceedings, the court must assume that the following matters are diminished —

(a) the quality of the party's or witness's evidence;

(b) in relation to a party, their participation in the proceedings.

(2) The party or witness concerned can request that the assumption set out in paragraph (1) does not apply to them if they do not wish it to.

(3) Where the assumption set out in paragraph (1) applies, the court must consider whether it is necessary to make one or more participation directions.

11. This amounts to a presumption of vulnerability but only in respect of whether or not to make participation directions. This does not obviate the need to identify other aspects of vulnerability.

Remember witnesses as well as parties

12. Witnesses often provide their own statements or send detailed emails, although these may have been written by the party they are giving evidence for, so as the solicitor you may not have much contact with them. They may relate experiences that were traumatic. We need to explore any vulnerability issues with them.

When should we consider it?

13. a) At the outset;

b) At every stage of the process- don't leave it to the Ground Rules Hearing;

c) During the hearing itself;

d) If there's a FFH, it's still relevant for a later welfare hearing of course but depending on the findings, participation directions may need to be revisited.

Isn't it the judge's job?

14. The responsibility lies with the court to ensure a fair process, but we may well know more about the parties and witnesses than the judge does, at least before the hearing starts- so make sure to address any issues in your PD documents and submissions.

15. PD3AA provides:

1.3 It is the duty of the court (under rules 1.1(2); 1.2 & 1.4 and Part 3A FPR) and of all parties to the proceedings (rule 1.3 FPR) to identify any party or witness who is a vulnerable person at the earliest possible stage of any family proceedings.

1.4 All parties and their representatives are required to work with the court and each other to ensure that each party or witness can participate in proceedings without the quality of their evidence being diminished and without being put in fear or distress by reason of their vulnerability as defined with reference to the circumstances of each person and to the nature of the proceedings.

NB: this requirement isn't just about our own clients, but extends to other parties and witnesses.

And:

5.7 All advocates (including those who are litigants in person) are expected to be familiar with and to use the techniques employed by the toolkits and approach of the Advocacy Training Council. The toolkits are available at [www.theadvocatesgateway.org/toolkits](http://www.theadvocatesgateway.org/toolkits). Further guidance for advocates is available from the Ministry of Justice at <http://www.justice.gov.uk/guidance.htm>.

The judge is ultimately responsible but the consequences can be serious (and costly) if things go wrong.

16. Some recent examples, all of which are “heart-sink” cases.

Re N (A Child) [2019] EWCA Civ 1997

A successful appeal against a judge's refusal to order a re-hearing. The judge noticed M's difficulties with comprehension during FFH but the hearing continued and she made findings against M. Assessments prior to the welfare hearing confirmed the mother's vulnerability and need for an intermediary, but HHJ stood by the findings she had made. At para 54 of the CA judgment King LJ comments: “It is most unfortunate that those then representing the mother did not recognise the extent of her difficulties, such that they could have at least sought a psychological assessment of her, although in fairness to that legal team, Toolkit 4 specifically sets out that people with borderline learning disability “may not have been formally diagnosed and may be difficult to identify”. It is nevertheless worth highlighting the duty under PD3AA 1.3 for legal representatives actively to consider whether their client may be a vulnerable witness.”

Re M (A Child) [2021] EWHC 3225 (Fam)

Judd J set aside a fact-finding judgment where there had been no ground rules hearing and nobody had raised the issue of the mother's vulnerability. The judge had not found the mother's evidence credible, but the lack of special measures meant the process was fundamentally unfair. The judge had also failed to give sufficient consideration to whether the mother might have been vulnerable and over-dependent in the relationship.

B v P [2022] EWFC B18

An appeal from a DJ who was found to have made 'significant omissions' in her judgment in not referencing Part 3A FPR, Practice Directions 3AA or 12J, or the definition of domestic abuse in a case where such issues were critical. The absence of a PD3AA ground rules hearing to consider whether any special measures needed to be in place led to unsatisfactory aspects to the fact-finding hearing, such as the parties being able to observe each other throughout and the father at times addressing the mother directly. The fact-finding decision unsafe because of significant concerns as to whether the mother could have participated effectively in the hearing.

Explicit material

17. In Re M (a Child)(Private Law Children proceedings- Case Management-Intimate Images), K v L & another [2022] EWHC 986 (Fam) Knowles J gave guidance on how to approach the use of explicit material. One of the considerations for the court is the impact on a vulnerable party or witness of such material being deployed.

Expert evidence

18. At every stage, and as early as possible, consider whether you need an expert assessment of your client, or indeed another party or witness. In Re M the clinical psychologist who assessed the mother, following the appeal, diagnosed her with complex PTSD and recommended that she had an intermediary throughout the re-hearing, as well as other measures.

19. NB remember FPR25.6(b): applications for experts should be made no later than FHDRA.

Relevance to the substantive issues

20. Identifying vulnerability can be critical to the issues in the case: "The reason it was so important for the judge to give very careful consideration to the question of vulnerability in this case is because a vulnerable person may not act in the same way as someone more independent or confident if they are exploited or abused in a relationship. Such an individual may be so anxious for the relationship to succeed that they accept treatment that others would not. They may be easy to exploit. They may not even realise what is happening to them, and will cling to the dream of a happy family and relationship." Per Judd J in Re M (supra) §82, cited by Cobb J in Re B-B (Domestic Abuse Fact-Finding)(Rev 1) [2022] EWHC 108 (Fam).

What participation directions can look like

21. There's a list at FPR3A.8:

(1) The measures referred to in this Part are those which—

(a) prevent a party or witness from seeing another party or witness;

(b) allow a party or witness to participate in hearings and give evidence by live link;

(c) provide for a party or witness to use a device to help communicate;

(d) provide for a party or witness to participate in proceedings with the assistance of an intermediary;

(e) provide for a party or witness to be questioned in court with the assistance of an intermediary; or

(f) do anything else which is set out in Practice Direction 3AA.

22. PD3AA expands this list at §4.2: “In addition, the court may use its general case management powers as it considers appropriate to facilitate the party’s participation. For example, the court may decide to make directions in relation to matters such as the structure and the timing of the hearing, the formality of language to be used in the court and whether (if facilities allow for it) the parties should be enabled to enter the court building through different routes and use different waiting areas.”

23. In Re B-B (supra) Cobb J stressed the need for flexible arrangements to ensure that the participation directions truly meet the needs of the parties and the case. We need to be thoughtful and imaginative, and make sure that we suggest measures that will be effective.

Cross-examination by non-represented parties- cases issued after 21/7/22

24. Materials provided:

- S65 of Domestic Abuse Act 2021
- FPR PD3AB
- Prohibition of Cross-Examination in Person (Civil and Family Proceedings)

Regulations 2022

- Statutory Guidance on Qualified Legal Representatives appointed by the court

25. S65 DAA 2021 amends the Matrimonial and Family Proceedings Act 1984 (MFPA1984), inserting Part 4B, which sets out both automatic and discretionary reasons for prohibiting a party from cross-examining a witness or party. If the court makes an order prohibiting the cross-examination, the same procedure follows whether this was an automatic or discretionary prohibition.

#### Automatic prohibition

26. These prohibit cross-examination of victims and alleged victims of abuse by their alleged perpetrators AND vice versa in the following circumstances:

a) Any person involved in family proceedings who has an unspent conviction or caution for, or is charged with a “specified offence”, cannot cross-examine in person the victim of that offence/alleged offence (s31R(1) MFPA1984); equally the alleged victim cannot cross-examine in person the alleged perpetrator. (s31R(2)). Specified offences are listed in Schedule 1 of the Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022.

NB: The list includes Armed Services disciplinary offences that are DA related, violent or sexual.

b) S31S prohibits cross-examination by a person protected by an “on-notice protective injunction”; equally the person against whom that injunction is in force may not be cross-examined by the person who is protected by it.

NB: “Protective injunctions” include FMPOs, FGMPOs and restraining orders, amongst others: see Schedule 2 of the regulation.

c) S31(T) prohibits cross-examination in person where “specified evidence” is produced that a witness has been the victim of DA perpetrated by a party, or a party has been the victim of DA perpetrated by a witness. Either way the witness cannot be cross-examined by the party.

NB: The “specified evidence” is effectively the same as the evidence required for the purposes of accessing legal aid in family proceedings.

#### Discretionary prohibition

27. S31U MFPA1984 gives the court the discretion to prohibit cross-examination in person by a party if the automatic prohibitions don’t apply, but it appears to the judge that either the “quality condition” or the “significant distress condition” is met AND it would not be contrary to the interests of justice to give the direction.

28. Discretionary prohibitions can be lifted if there’s a change of circumstances

29. The court must give reasons for making or refusing to make, or lifting, a discretionary prohibition: make sure those reasons are recorded in the order.

#### Quality Condition

30. The quality condition is met if the quality of the evidence given by the witness is likely to be diminished if the cross-examination is conducted by the party in person, and improved if the court were to prohibit that cross-examination in person.

#### Significant Distress Condition

31. The significant distress condition is met if the cross-examination (or continued cross-examination) would be likely to cause significant distress to the witness or the party.
32. NB: PD3AB3.7: the direction can be made for reasons other than domestic abuse. It could apply if, for example, an unrepresented party might find it distressing to cross-examine an expert because of the subject matter. In care proceedings this could be an intervenor or a party who doesn't have PR and doesn't qualify for legal aid.

#### Factors to be considered

33. See s31U(5) for a list of factors, which is not exhaustive, to which the court must have regard when considering whether to make a discretionary prohibition.

#### Case management

34. C100 and C7 have been amended.

#### New forms:

EX740 to be completed by person making allegations of abuse

EX741 to be completed by the person accused of abuse

35. The court needs to consider this issue as early as possible and throughout the case. It follows that we need to raise the issue- whether automatic or discretionary- at or before the FHDRA if we can.

#### If the party is prohibited from cross-examining, what order can be made?

36. The court first considers whether there are any satisfactory alternatives. The judge is extremely unlikely to find that a satisfactory alternative is for them to put the party's questions for them. The court cannot itself cross-examine the witness.

37. If there isn't a satisfactory alternative, the prohibited party is invited to appoint a legal representative within a specified time.

38. If they don't, the court will appoint a qualified legal representative (QLR) from a list. It's entirely possible that both parties will end up with QLRs.

#### QLRs

39. The statutory guidance helpfully sets out the background to this role in section 1, before going on to explain it in section 2.

40. The QLR does not represent the prohibited party; they must put questions to the witness about the essence of the party's case, which may have a significant impact on the outcome of the case. They are not required to put the entire case and it's up to them whether they ask any questions that the prohibited party wants them to put.



41. QLRs are expected to complete Vulnerable Witness training within 6 months of going on the approved list.

42. The court will make directions about the documents the QLR can see (usually the whole bundle) and about the parts of the hearing they should attend.

Cross-examination by non-represented parties- cases issued before 21/7/22

43. These cases will continue as now. In most cases this means that the judge will need to ask the party's questions of any vulnerable parties or witnesses, which will generally be given to the judge in writing in advance.

44. Watch out for the party who is represented at the DRA but files notice of acting in person shortly before the FFH. Seek directions immediately- don't leave it to the day as the LiP may not have the skills to draft questions on the spot.

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**DOMESTIC ABUSE ACT 2021: CROSS-EXAMINATION**  
**SECTION 65 OF THE DOMESTIC ABUSE ACT 2021**

65. Prohibition of cross-examination in person in family proceedings

In the Matrimonial and Family Proceedings Act 1984, after Part 4A insert—

**"PART 4B**

**FAMILY PROCEEDINGS: PROHIBITION OF CROSS-EXAMINATION IN  
PERSON**

**31Q Prohibition of cross-examination in person: introductory**

In this Part—

"family proceedings" means—

- (a) proceedings in the family court,
- (b) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other, and
- (c) proceedings in the civil division of the Court of Appeal arising out of proceedings within paragraph (a) or (b);

"witness", in relation to any proceedings, includes a party to the proceedings.

**31R Prohibition of cross-examination in person: victims of offences**

(1) In family proceedings, no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence.

(2) In family proceedings, no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.

(3) Subsections (1) and (2) do not apply to a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974, unless evidence in relation to the conviction or caution is admissible in, or may be required in, the proceedings by virtue of section 7(2), (3) or (4) of that Act.

(4) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the conviction, caution or charge when the cross-examination took place.

(5) In this section—

"caution" means—

- (a) in the case of England and Wales—
  - (i) a conditional caution given under section 22 of the Criminal Justice Act 2003,

(ii) a youth conditional caution given under section 66A of the Crime and Disorder Act 1998, or

(iii) any other caution given to a person in England and Wales in respect of an offence which, at the time the caution is given, the person has admitted;

(b) in the case of Scotland, anything corresponding to a caution falling within paragraph (a) (however described) which is given to a person in respect of an offence under the law of Scotland;

(c) in the case of Northern Ireland—

(i) a conditional caution given under section 71 of the Justice Act (Northern Ireland) 2011, or

(ii) any other caution given to a person in Northern Ireland in respect of an offence which, at the time the caution is given, the person has admitted;

"conviction" means—

(a) a conviction by or before a court in England and Wales, Scotland or Northern Ireland;

(b) a conviction in service disciplinary proceedings (in England and Wales, Scotland, Northern Ireland, or elsewhere), including—

(i) in the case of proceedings in respect of a service offence, anything that under section 376(1) and (2) of the Armed Forces Act 2006 (which relates to summary hearings and the Summary Appeal Court) is to be treated as a conviction for the purposes of that Act, and

(ii) in the case of any other service disciplinary proceedings, a finding of guilt in those proceedings;

(c) a finding in any criminal proceedings (including a finding linked with a finding of insanity) that the person concerned has committed an offence or done the act or made the omission charged;

and "convicted" is to be read accordingly;

"service disciplinary proceedings" means—

(a) any proceedings (whether or not before a court) in respect of a service offence (except proceedings before a civilian court within the meaning of the Armed Forces Act 2006);

(b) any proceedings under the Army Act 1955, the Air Force Act 1955, or the Naval Discipline Act 1957 (whether before a court-martial or before any other court or person authorised under any of those Acts to award a punishment in respect of an offence);

(c) any proceedings before a Standing Civilian Court established under the Armed Forces Act 1976;

"service offence" means—

(a) a service offence within the meaning of the Armed Forces Act 2006, or

(b) an SDA offence within the meaning of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 (S.I. 2009/1059);

"specified offence" means an offence which is specified, or of a description specified, in regulations made by the Lord Chancellor.

(6) The following provisions (which deem a conviction of a person discharged not to be a conviction) do not apply for the purposes of this section to a conviction of a person for an offence in respect of which an order has been made discharging the person absolutely or conditionally—

(a) section 14 of the Powers of Criminal Courts (Sentencing) Act 2000;

(b) section 82 of the Sentencing Code;

(c) section 187 of the Armed Forces Act 2006 or any corresponding earlier enactment.

(7) For the purposes of this section "offence" includes an offence under a law that is no longer in force.

### **31S Prohibition of cross-examination in person: persons protected by injunctions etc**

(1) In family proceedings, no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction.

(2) In family proceedings, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom the injunction is in force.

(3) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the protective injunction when the cross-examination took place.

(4) In this section "protective injunction" means an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.

(5) For the purposes of this section, a protective injunction is an "on-notice" protective injunction if—

(a) the court is satisfied that there has been a hearing at which the person against whom the protective injunction is in force asked, or could have asked, for the injunction to be set aside or varied, or

(b) the protective injunction was made at a hearing of which the court is satisfied that both the person who applied for it and the person against whom it is in force had notice.

### **31T Prohibition of cross-examination in person: evidence of domestic abuse**

(1) In family proceedings, where specified evidence is adduced that a person who is a witness has been the victim of domestic abuse carried out by a party to the proceedings, that party to the proceedings may not cross-examine the witness in person.

(2) In family proceedings, where specified evidence is adduced that a person who is a party to the proceedings has been the victim of domestic abuse carried out by a witness, that party may not cross-examine the witness in person.

(3) In this section—

"domestic abuse" has the meaning given by section 1 of the Domestic Abuse Act 2021;

"specified evidence" means evidence specified, or of a description specified, in regulations made by the Lord Chancellor.

(4) Regulations under subsection (3) may provide that any evidence which satisfies the court that domestic abuse, or domestic abuse of a specified description, has occurred is specified evidence for the purposes of this section.

### **31U Direction for prohibition of cross-examination in person: other cases**

(1) In family proceedings, the court may give a direction prohibiting a party to the proceedings from cross-examining (or continuing to cross-examine) a witness in person if—

(a) none of sections 31R to 31T operates to prevent the party from cross-examining the witness, and

(b) it appears to the court that—

(i) the quality condition or the significant distress condition is met, and

(ii) it would not be contrary to the interests of justice to give the direction.

(2) The "quality condition" is met if the quality of evidence given by the witness on cross-examination—

(a) is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and

(b) would be likely to be improved if a direction were given under this section.

(3) The "significant distress condition" is met if—

(a) the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and

(b) that distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person.

(4) A direction under this section may be made by the court—

(a) on an application made by a party to the proceedings, or

(b) of its own motion.

(5) In determining whether the quality condition or the significant distress condition is met in the case of a witness or party, the court must have regard to, among other things—

(a) any views expressed by the witness as to whether or not the witness is content to be cross-examined by the party in person;

(b) any views expressed by the party as to whether or not the party is content to cross-examine the witness in person;

(c) the nature of the questions likely to be asked, having regard to the issues in the proceedings;

(d) any behaviour by the party in relation to the witness in respect of which the court is aware that a finding of fact has been made in the proceedings or in any other proceedings;

(e) any behaviour by the witness in relation to the party in respect of which the court is aware that a finding of fact has been made in the proceedings or in any other proceedings;

(f) any behaviour by the party at any stage of the proceedings, both generally and in relation to the witness;

(g) any behaviour by the witness at any stage of the proceedings, both generally and in relation to the party;

(h) any relationship (of whatever nature) between the witness and the party.

(6) Any reference in this section to the quality of a witness's evidence is to its quality in terms of completeness, coherence and accuracy.

(7) For this purpose "coherence" refers to a witness's ability in giving evidence to give answers which—

(a) address the questions put to the witness, and

(b) can be understood, both individually and collectively.

### **31V Directions under section 31U: supplementary**

(1) A direction under section 31U has binding effect from the time it is made until the witness in relation to whom it applies is discharged.

(2) But the court may revoke a direction under section 31U before the witness is discharged, if it appears to the court to be in the interests of justice to do so, either—

(a) on an application made by a party to the proceedings, or

(b) of its own motion.

(3) The court may revoke a direction under section 31U on an application made by a party to the proceedings only if there has been a material change of circumstances since—

(a) the direction was given, or

(b) if a previous application has been made by a party to the proceedings, the application (or the last application) was determined.

(4) The court must state its reasons for—

(a) giving a direction under section 31U;

(b) refusing an application for a direction under section 31U;

(c) revoking a direction under section 31U;

(d) refusing an application for the revocation of a direction under section 31U.

### **31W Alternatives to cross-examination in person**

(1) This section applies where a party to family proceedings is prevented from cross-examining a witness in person by virtue of any of sections 31R to 31U.

(2) The court must consider whether (ignoring this section) there is a satisfactory alternative means—

(a) for the witness to be cross-examined in the proceedings, or

(b) of obtaining evidence that the witness might have given under cross-examination in the proceedings.

(3) If the court decides that there is not, the court must—

(a) invite the party to the proceedings to arrange for a qualified legal representative to act for the party for the purpose of cross-examining the witness, and

(b) require the party to the proceedings to notify the court, by the end of a period specified by the court, of whether a qualified legal representative is to act for the party for that purpose.

(4) Subsection (5) applies if, by the end of the period specified under subsection (3)(b), either—

(a) the party has notified the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness, or

(b) no notification has been received by the court and it appears to the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness.

(5) The court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.

(6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.

(7) A qualified legal representative appointed by the court under subsection (6) is not responsible to the party.

(8) For the purposes of this section—

(a) a reference to cross-examination includes a reference to continuing to conduct cross-examination;

(b) "qualified legal representative" means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) in family proceedings.

### **31X Costs of legal representatives appointed under section 31W(6)**

(1) The Lord Chancellor may by regulations make provision for the payment out of central funds of sums in respect of—

(a) fees or costs properly incurred by a qualified legal representative appointed under section 31W(6), and

(b) expenses properly incurred in providing such a person with evidence or other material in connection with the appointment.

(2) The regulations may provide for sums payable under subsection (1) to be determined by the Lord Chancellor or such other person as the regulations may specify.

(3) The regulations may provide for sums payable under subsection (1)—

(a) to be such amounts as are specified in the regulations;

(b) to be calculated in accordance with—

(i) a rate or scale specified in the regulations, or

(ii) other provision made by or under the regulations.

### **31Y Guidance for legal representatives appointed under section 31W(6)**

- (1) The Lord Chancellor may issue guidance in connection with the role which a qualified legal representative appointed under section 31W(6) in connection with any family proceedings is to play in the proceedings, including (among other things) guidance about the effect of section 31W(7).
- (2) A qualified legal representative appointed under section 31W(6) must have regard to any guidance issued under this section.
- (3) The Lord Chancellor may from time to time revise any guidance issued under this section.
- (4) The Lord Chancellor must publish—
  - (a) any guidance issued under this section, and
  - (b) any revisions of that guidance.

### **31Z Regulations under Part 4B**

- (1) Any power of the Lord Chancellor to make regulations under this Part—
  - (a) is exercisable by statutory instrument,
  - (b) includes power to make different provision for different purposes, and
  - (c) includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision.
- (2) A statutory instrument containing regulations under this Part is subject to annulment in pursuance of a resolution of either House of Parliament."



ANNEX: NEW PRACTICE DIRECTION 3AB TO BE INSERTED AFTER PRACTICE DIRECTION 3AA

**Practice Direction 3AB – Prohibition of cross-examination in person in family proceedings under Part 4B of the Matrimonial and Family Proceedings Act 1984**

**1. Preamble, scope and interpretation**

1.1 Part 3A FPR and Practice Direction 3AA make provision in relation to vulnerable persons (parties and witnesses), including protected parties, in family proceedings.

1.2 Part 12 FPR and Practice Direction 12B make provision in relation to children and Practice Direction 12J makes provision in relation to parties or children who have experienced domestic abuse perpetrated by another party or where there is a risk of such abuse, in family proceedings.

1.3 In applying the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular those referred to in Annex A to this Practice Direction.

1.4 This Practice Direction applies where, in family proceedings—

(a) a party is automatically prohibited from cross-examining in person a witness under sections 31R, 31S or 31T of the 1984 Act; or

(b) the court gives a direction prohibiting a party from cross-examining (or continuing to cross-examine) in person a witness under section 31U of the 1984 Act.

1.5 The provisions of this Practice Direction do not apply in relation to family proceedings which were started before the day on which section 65 of the Domestic Abuse Act 2021 comes into force including any application made—

(a) within those proceedings; or

(b) involving or relating to those proceedings

on or after the day on which section 65 comes into force.

1.6 Part 4B of the 1984 Act (which comprises sections 31Q to 31Z) was inserted by section 65 of the Domestic Abuse Act 2021 and is set out at Annex B to this Practice Direction.

1.7 Section 31Q of the 1984 Act defines “witness” as including a party to the proceedings and section 31W(8)(b) defines “qualified legal representative”.

1.8 In this Practice Direction, “domestic abuse” has the same meaning as in sections 1 and 2 of the Domestic Abuse Act 2021.

**2. Raising the Issue of Automatic Prohibition of Cross-Examination in Person**

2.1 Sections 31R, 31S and 31T of the 1984 Act set out the circumstances in which a party in family proceedings is automatically prohibited from cross-examining in person a witness. If the court is informed or it appears to the court that such circumstances have arisen (or may arise) in relation to proceedings before it, the court must consider what directions, if any, to make (whether or not the court has made one or more participation directions).

2.2 Subject to paragraph 2.3, for the purposes of paragraph 2.1, the parties must complete Form EX740 or Form EX741 when the court directs that the proceedings be listed for a hearing where oral evidence may be given.

2.3 The court may direct that Form EX740 or Form EX741—

- (a) must be completed at any stage in the proceedings;
- (b) must only be completed by the party specified by the court; or
- (c) does not need to be completed.

### **3. Court Directions Regarding Cross-Examination In Person**

3.1 The court must consider whether a party is automatically prohibited from cross-examining in person a witness under sections 31R to 31T of the 1984 Act, or, if not, whether to make a direction prohibiting a party from cross-examining in person a witness under section 31U of the 1984 Act.

3.2 The court's consideration under paragraph 3.1 must be as soon as possible after the start of proceedings and continues until the conclusion of the proceedings.

3.3 An application for a direction under section 31U of the 1984 Act may be made orally or in writing, and if in writing, must be on the relevant court form. Relevant application forms are available from the HMCTS form finder service at [\[link\]](#).

3.4 The application for a direction must address—

- (a) why none of sections 31R to 31T of the 1984 Act apply to automatically prohibit cross-examination in person of the witness by the party;
- (b) how—
  - (i) the “quality condition” (see section 31U(2));
  - (ii) the “significant distress condition” (see section 31U(3));or both conditions, is or are met;
- (c) why it would not be contrary to the interests of justice for the court to give the direction; and
- (d) the matters set out at section 31U(5).

3.5 The court may make a direction under section 31U of the 1984 Act of its own motion or following an application made by a party to the proceedings under Part 18.

3.6 The court must, in its order, give reasons for—

- (a) making a direction prohibiting the cross-examination in person of the witness; or
- (b) refusing to make a direction prohibiting the cross-examination in person of the witness.

3.7 A direction prohibiting the cross-examination in person of the witness may be made for reasons other than domestic abuse.

#### **4. Revocation of Court Direction given under Section 31U of the 1984 Act**

4.1 Section 31V of the 1984 Act specifies that a court direction given under section 31U has a binding effect from the time it is made until the witness is discharged. Unless the court orders otherwise, discharge of the witness is not at the conclusion of their evidence but at the conclusion of the proceedings.

4.2 Save when giving their oral evidence, a court direction given under section 31U does not prohibit a witness from discussion with their own legal representative or any other person.

4.3 The court has the power under section 31V of the 1984 Act to revoke a direction given under section 31U before a witness is discharged if it is in the interests of justice to do so, either—

- (a) on an application by a party to the proceedings where there has been a material change of circumstances, or
- (b) of its own motion.

4.4 Before revoking a direction, the court may—

- (a) invite the parties to make representations in writing or at a hearing; and
- (b) make further directions.

4.5 The court must, in its order, give reasons for revoking or refusing to revoke a direction made under section 31U of the 1984 Act.

#### **5. Alternative Means to Cross-Examination In Person**

5.1 Where cross-examination in person is—

- (a) automatically prohibited under sections 31R to 31T of the 1984 Act, or
- (b) prohibited by a court direction given under section 31U of the 1984 Act,

the court must, under section 31W(2) of the 1984 Act, consider whether there is a satisfactory alternative means to—

- (i) cross-examining the witness in the proceedings; or
- (ii) obtaining the evidence that the witness might have given under cross-examination in the proceedings.

5.2 The court may—

- (a) invite the parties to make representations in writing or at a hearing concerning the suitability or otherwise of alternative means to cross-examination; and
- (b) make further directions.

5.3 A satisfactory alternative means to cross-examination in person does not include the court itself conducting the cross-examination on behalf of a party.

5.4 Where the court considers that there is a satisfactory alternative means under paragraph 5.1, it must set out in its order—

- (a) what the satisfactory alternative means will be; and
- (b) its reasons for so deciding.

## **6. Qualified Legal Representative Appointed by the Court**

6.1 If the court decides that there is no satisfactory alternative means of cross-examination under section 31W(2) of the 1984 Act, the court must, as soon as practicable, inform the party who is prohibited from cross-examining a witness in person of the following—

- (a) the prohibition and its effect;
- (b) that if the party will not be represented in the proceedings by their own legal representative, then that party is invited to arrange for a qualified legal representative to act for them for the purpose of cross-examining the witness;
- (c) that the party must notify the court of the identity and contact details of any such representative, by no later than the date specified by the court; and
- (d) that if the party does not want or is unable to make such arrangements, or if the party fails to so notify the court by the date specified, then—
  - (i) the court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party;
  - (ii) if the court decides that it is, the court will appoint a qualified legal representative, chosen by the court, to cross-examine the witness; and
  - (iii) such qualified legal representative will not be responsible to the party.

- 6.2 Having given the party the explanations at paragraph 6.1, the court must—
- (a) invite the party to arrange for a qualified legal representative to act for them to cross-examine the witness, and specify the date by when the party must notify the court of the identity and contact details of such representative; and
  - (b) if the party notifies the court that they do not want or are unable to make such arrangements, or the party fails to so notify the court by the date specified—
    - (i) consider whether it is necessary in the interests of justice for the witness to be cross-examined by a court-appointed qualified legal representative to represent the party's interests; and
    - (ii) if the court decides that it is in the interests of justice, choose and appoint a qualified legal representative, from the court-maintained list of qualified legal representatives, to cross-examine the witness and make directions for such appointment.
- 6.3 Where the court, under section 31V of the 1984 Act, revokes a direction given under section 31U, the appointment of the court-appointed qualified legal representative will be terminated.
- 6.4 The court's appointment of a qualified legal representative does not preclude the court from making a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8.
- 6.5 For the avoidance of doubt, where more than one party to the proceedings is prohibited from cross-examining a witness in person, the court may appoint a qualified legal representative for each party that is so prohibited.

## **7. Court Directions to Court-Appointed Qualified Legal Representative**

- 7.1 Unless the court directs otherwise, the directions that the court gives under paragraph 6.2(b)(ii) must—
- (a) specify the witness or witnesses that are to be cross-examined by the court-appointed qualified legal representative;
  - (b) provide for the court-appointed qualified legal representative to be given access to the full court bundle or such parts of the court bundle as the court directs;
  - (c) specify the date by when the court-appointed qualified legal representative is to be given access to the court bundle under paragraph (b); and
  - (d) where there is no court bundle—
    - (i) provide for the court to prepare and provide the court-appointed qualified legal representative with a court bundle; and
    - (ii) specify the date by when the bundle should be provided.

7.2 The directions the court gives under paragraph 6.2(b)(ii) may specify which hearing or hearings or which part or parts of any hearing the court-appointed qualified legal representative is required to attend.

7.3 The court may give such further directions as are necessary to assist the court-appointed qualified legal representative to carry out the cross-examination.

7.4 Before making any such directions, the court may invite representations from the party and the witness in writing or at a hearing.

## **8. Termination of Appointment of Court-Appointed Qualified Legal Representative**

8.1 The appointment of a qualified legal representative appointed by the court terminates—

- (a) at the conclusion of the proceedings; or
- (b) when the court so orders.

8.2 Following termination, unless the court directs otherwise, the qualified legal representative must be notified of the outcome of the hearing by the court. Notification may be by the court sending to the qualified legal representative a copy of the order, any reasons, the judgment or transcript.

## **9. Rules About Applications and Orders Made on Court's Own Initiative**

9.1 Subject to paragraphs 3.3 and 3.4 of this Practice Direction—

- (a) Part 18 applies to any application made under this Practice Direction; and
- (b) rule 4.3 applies where the court acts on its own initiative under this Practice Direction.

## **Annex A**

As noted at paragraph 1.3, in applying the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular—

- Part 1 FPR (Overriding Objective);
- Part 4 FPR (General Case Management Powers);
- Part 15 FPR (Representation of Protected Parties) and Practice Direction 15B (Adults Who May Be Protected Parties and Children Who May Become Protected Parties in Family Proceedings);
- Part 18 FPR (Procedure for Other Applications in Proceedings);
- Part 22 FPR (Evidence);

- Part 24 FPR (Witnesses and Depositions Generally);
- Part 25 FPR (Experts) and the Experts Practice Directions;
- Rule 27.6 FPR and Practice Direction 27A (Court Bundles);
- Part 30 FPR (Appeals) and Practice Direction 30A (Appeals).

## **ANNEX B**

### **MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984 — PART 4B**

#### **FAMILY PROCEEDINGS: PROHIBITION OF CROSS-EXAMINATION IN PERSON**

##### **31Q Prohibition of cross-examination in person: introductory**

In this Part—

“family proceedings” means—

- proceedings in the family court,
- proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other, and
- proceedings in the civil division of the Court of Appeal arising out of proceedings within paragraph (a) or (b);

“witness”, in relation to any proceedings, includes a party to the proceedings.

##### **31R Prohibition of cross-examination in person: victims of offences**

- In family proceedings, no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence.
- In family proceedings, no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.
- Subsections (1) and (2) do not apply to a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974, unless evidence in relation to the conviction or caution is admissible in, or may be required in, the proceedings by virtue of section 7(2), (3) or (4) of that Act.
- Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the conviction, caution or charge when the cross-examination took place.
- In this section—

“caution” means—

- (a) in the case of England and Wales—
  - (i) a conditional caution given under section 22 of the Criminal Justice Act 2003,
  - (ii) a youth conditional caution given under section 66A of the Crime and Disorder Act 1998, or
  - (iii) any other caution given to a person in England and Wales in respect of an offence which, at the time the caution is given, the person has admitted;
- (b) in the case of Scotland, anything corresponding to a caution falling within paragraph (a) (however described) which is given to a person in respect of an offence under the law of Scotland;
- (c) in the case of Northern Ireland—
  - (i) a conditional caution given under section 71 of the Justice Act (Northern Ireland) 2011, or
  - (ii) any other caution given to a person in Northern Ireland in respect of an offence which, at the time the caution is given, the person has admitted;

“conviction” means—

- (a) a conviction by or before a court in England and Wales, Scotland or Northern Ireland;
- (b) a conviction in service disciplinary proceedings (in England and Wales, Scotland, Northern Ireland, or elsewhere), including—
  - (i) in the case of proceedings in respect of a service offence, anything that under section 376(1) and (2) of the Armed Forces Act 2006 (which relates to summary hearings and the Summary Appeal Court) is to be treated as a conviction for the purposes of that Act, and
  - (ii) in the case of any other service disciplinary proceedings, a finding of guilt in those proceedings;
- (c) a finding in any criminal proceedings (including a finding linked with a finding of insanity) that the person concerned has committed an offence or done the act or made the omission charged;

and “convicted” is to be read accordingly;

“service disciplinary proceedings” means—

- (a) any proceedings (whether or not before a court) in respect of a service offence (except proceedings before a civilian court within the meaning of the Armed Forces Act 2006);



- (b) any proceedings under the Army Act 1955, the Air Force Act 1955, or the Naval Discipline Act 1957 (whether before a court-martial or before any other court or person authorised under any of those Acts to award a punishment in respect of an offence);
- (c) any proceedings before a Standing Civilian Court established under the Armed Forces Act 1976;

“service offence” means—

- (a) a service offence within the meaning of the Armed Forces Act 2006, or
- (b) an SDA offence within the meaning of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 ([S.I. 2009/1059](#));

“specified offence” means an offence which is specified, or of a description specified, in regulations made by the Lord Chancellor.

- (6) The following provisions (which deem a conviction of a person discharged not to be a conviction) do not apply for the purposes of this section to a conviction of a person for an offence in respect of which an order has been made discharging the person absolutely or conditionally—
  - (a) section 14 of the Powers of Criminal Courts (Sentencing) Act 2000;
  - (b) section 82 of the Sentencing Code;
  - (c) section 187 of the Armed Forces Act 2006 or any corresponding earlier enactment.
- (7) For the purposes of this section “offence” includes an offence under a law that is no longer in force.

**31S Prohibition of cross-examination in person: persons protected by injunctions etc**

- (1) In family proceedings, no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction.
- (2) In family proceedings, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom the injunction is in force.
- (3) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the protective injunction when the cross-examination took place.
- (4) In this section “protective injunction” means an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.
- (5) For the purposes of this section, a protective injunction is an “on-notice” protective injunction if—

- (a) the court is satisfied that there has been a hearing at which the person against whom the protective injunction is in force asked, or could have asked, for the injunction to be set aside or varied, or
- (b) the protective injunction was made at a hearing of which the court is satisfied that both the person who applied for it and the person against whom it is in force had notice.

**31T Prohibition of cross-examination in person: evidence of domestic abuse**

- (1) In family proceedings, where specified evidence is adduced that a person who is a witness has been the victim of domestic abuse carried out by a party to the proceedings, that party to the proceedings may not cross-examine the witness in person.
- (2) In family proceedings, where specified evidence is adduced that a person who is a party to the proceedings has been the victim of domestic abuse carried out by a witness, that party may not cross-examine the witness in person.
- (3) In this section—
  - “domestic abuse” has the meaning given by section 1 of the Domestic Abuse Act 2021;
  - “specified evidence” means evidence specified, or of a description specified, in regulations made by the Lord Chancellor.
- (4) Regulations under subsection (3) may provide that any evidence which satisfies the court that domestic abuse, or domestic abuse of a specified description, has occurred is specified evidence for the purposes of this section.

**31U Direction for prohibition of cross-examination in person: other cases**

- (1) In family proceedings, the court may give a direction prohibiting a party to the proceedings from cross-examining (or continuing to cross-examine) a witness in person if—
  - (a) none of sections 31R to 31T operates to prevent the party from cross-examining the witness, and
  - (b) it appears to the court that—
    - (i) the quality condition or the significant distress condition is met, and
    - (ii) it would not be contrary to the interests of justice to give the direction.
- (2) The “quality condition” is met if the quality of evidence given by the witness on cross-examination—
  - (a) is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and
  - (b) would be likely to be improved if a direction were given under this section.

- (3) The “significant distress condition” is met if—
- (a) the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and
  - (b) that distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person.
- (4) A direction under this section may be made by the court—
- (a) on an application made by a party to the proceedings, or
  - (b) of its own motion.
- (5) In determining whether the quality condition or the significant distress condition is met in the case of a witness or party, the court must have regard to, among other things—
- (a) any views expressed by the witness as to whether or not the witness is content to be cross-examined by the party in person;
  - (b) any views expressed by the party as to whether or not the party is content to cross-examine the witness in person;
  - (c) the nature of the questions likely to be asked, having regard to the issues in the proceedings;
  - (d) any behaviour by the party in relation to the witness in respect of which the court is aware that a finding of fact has been made in the proceedings or in any other proceedings;
  - (e) any behaviour by the witness in relation to the party in respect of which the court is aware that a finding of fact has been made in the proceedings or in any other proceedings;
  - (f) any behaviour by the party at any stage of the proceedings, both generally and in relation to the witness;
  - (g) any behaviour by the witness at any stage of the proceedings, both generally and in relation to the party;
  - (h) any relationship (of whatever nature) between the witness and the party.
- (6) Any reference in this section to the quality of a witness’s evidence is to its quality in terms of completeness, coherence and accuracy.
- (7) For this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which—
- (a) address the questions put to the witness, and
  - (b) can be understood, both individually and collectively.

**31V Directions under section 31U: supplementary**

- (1) A direction under section 31U has binding effect from the time it is made until the witness in relation to whom it applies is discharged.
- (2) But the court may revoke a direction under section 31U before the witness is discharged, if it appears to the court to be in the interests of justice to do so, either—
  - (a) on an application made by a party to the proceedings, or
  - (b) of its own motion.
- (3) The court may revoke a direction under section 31U on an application made by a party to the proceedings only if there has been a material change of circumstances since—
  - (a) the direction was given, or
  - (b) if a previous application has been made by a party to the proceedings, the application (or the last application) was determined.
- (4) The court must state its reasons for—
  - (a) giving a direction under section 31U;
  - (b) refusing an application for a direction under section 31U;
  - (c) revoking a direction under section 31U;
  - (d) refusing an application for the revocation of a direction under section 31U.

**31W Alternatives to cross-examination in person**

- (1) This section applies where a party to family proceedings is prevented from cross-examining a witness in person by virtue of any of sections 31R to 31U.
- (2) The court must consider whether (ignoring this section) there is a satisfactory alternative means—
  - (a) for the witness to be cross-examined in the proceedings, or
  - (b) of obtaining evidence that the witness might have given under cross-examination in the proceedings.
- (3) If the court decides that there is not, the court must—
  - (a) invite the party to the proceedings to arrange for a qualified legal representative to act for the party for the purpose of cross-examining the witness, and
  - (b) require the party to the proceedings to notify the court, by the end of a period specified by the court, of whether a qualified legal representative is to act for the party for that purpose.
- (4) Subsection (5) applies if, by the end of the period specified under subsection (3)(b), either—

- (a) the party has notified the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness, or
  - (b) no notification has been received by the court and it appears to the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness.
- (5) The court must consider whether it is necessary in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party.
- (6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.
- (7) A qualified legal representative appointed by the court under subsection (6) is not responsible to the party.
- (8) For the purposes of this section—
- (a) a reference to cross-examination includes a reference to continuing to conduct cross-examination;
  - (b) “qualified legal representative” means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) in family proceedings.

**31X Costs of legal representatives appointed under section 31W(6)**

- (1) The Lord Chancellor may by regulations make provision for the payment out of central funds of sums in respect of—
- (a) fees or costs properly incurred by a qualified legal representative appointed under section 31W(6), and
  - (b) expenses properly incurred in providing such a person with evidence or other material in connection with the appointment.
- (2) The regulations may provide for sums payable under subsection (1) to be determined by the Lord Chancellor or such other person as the regulations may specify.
- (3) The regulations may provide for sums payable under subsection (1)—
- (a) to be such amounts as are specified in the regulations;
  - (b) to be calculated in accordance with—
    - (i) a rate or scale specified in the regulations, or
    - (ii) other provision made by or under the regulations.

**31Y Guidance for legal representatives appointed under section 31W(6)**

- (1) The Lord Chancellor may issue guidance in connection with the role which a qualified legal representative appointed under section 31W(6) in connection with any family proceedings is to play in the proceedings, including (among other things) guidance about the effect of section 31W(7).
- (2) A qualified legal representative appointed under section 31W(6) must have regard to any guidance issued under this section.
- (3) The Lord Chancellor may from time to time revise any guidance issued under this section.
- (4) The Lord Chancellor must publish—
  - (a) any guidance issued under this section, and
  - (b) any revisions of that guidance.

**31Z Regulations under Part 4B**

- (1) Any power of the Lord Chancellor to make regulations under this Part—
  - (a) is exercisable by statutory instrument,
  - (b) includes power to make different provision for different purposes, and
  - (c) includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision.
- (2) A statutory instrument containing regulations under this Part is subject to annulment in pursuance of a resolution of either House of Parliament.

## **DOMESTIC ABUSE ACT 2021: CROSS-EXAMINATION**

### **Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022**

*(Made pursuant to ss31R(5), 31S(4), 31T(3) and (4) and 31Z(1)(b) of the Matrimonial and Family Proceedings Act 1984, and ss85F(5), 85G(4), 85H(3) and (4), 85N and 108(6) of the Courts Act 2003)*

#### **1. Citation, commencement, interpretation and extent**

- (1) These Regulations may be cited as the Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022.
- (2) These Regulations come into force on the day on which and immediately after sections 65 and 66 of the Domestic Abuse Act 2021 come into force.
- (3) In these Regulations—
  - “the 1984 Act” means the Matrimonial and Family Proceedings Act 1984;
  - “the 2003 Act” means the Courts Act 2003.
- (4) These Regulations extend to England and Wales.

#### **2. Specified offences**

The offences, including those under laws which are no longer in force, in the tables in Schedule 1 are specified offences for the purposes of—

- (1) section 31R(5) of the 1984 Act; and
- (2) section 85F(5) of the 2003 Act.

#### **3. Protective injunctions**

The injunctions, orders and interdicts in the tables in Schedule 2 are protective injunctions for the purposes of—

- (1) section 31S(4) of the 1984 Act; and
- (2) section 85G(4) of the 2003 Act.

#### **4. Specified evidence**

(1) Subject to paragraph (2), the forms of evidence described in Schedule 3 are specified evidence for the purposes of—

- (a) section 31T(3) and (4) of the 1984 Act; and
- (b) section 85H(3) and (4) of the 2003 Act.

(2) The evidence must show that domestic abuse has occurred between the party to the proceedings and the witness.

**SCHEDULE 1**  
**SPECIFIED OFFENCES**

Regulation 2

Table 1 – Offences under the law of England and Wales

Offence (England and Wales)	Statutory Provision
Kidnapping	Common law
False imprisonment	Common law
Perverting the course of public justice	Common law
Murder/manslaughter (of a child)	Common law
Incitement (pre 1 <sup>st</sup> October 2008) in relation to: (a) an indictable offence listed in this table; and (b) the offence of murder	Common law
Aiding, abetting, counselling or procuring the commission of: (a) an indictment offence listed in this table; or (b) the offence of attempted murder	Section 8 of the Accessories and Abettors Act 1861 (c 94 (24 & 25 Vict))
Conspiring or soliciting to commit murder	Section 4 of the Offences Against the Person Act 1861 (c 100 (24 & 25 Vict))
Threats to kill	Section 16 of the Offences against the Person Act 1861
Shooting or attempting to shoot, or wounding, with intent to do grievous bodily harm or to resist apprehension	Section 18 of the Offences against the Person Act 1861
Inflicting bodily injury with or without weapon	Section 20 of the Offences against the Person Act 1861
Attempting to choke, etc in order to commit or assist in the committing of any indictable offence	Section 21 of the Offences against the Person Act 1861
Using chloroform etc to commit or assist in the committing of any indictable offence	Section 22 of the Offences against the Person Act 1861
Maliciously administering poison, etc so as to endanger life or inflict grievous bodily harm	Section 23 of the Offences against the Person Act 1861
Maliciously administering poison, etc with intent to injure, aggrieve, or annoy any other person	Section 24 of the Offences against the Person Act 1861
Exposing child whereby life is endangered or health permanently injured	Section 27 of the Offences against the Person Act 1861
Causing gunpowder to explode, or sending to any person an explosive substance, or throwing corrosive fluid on a person, with intent to do grievous bodily harm	Section 29 of the Offences against the Person Act 1861
Assault occasioning bodily harm-common assault	Section 47 of the Offences against the Person Act 1861
Child destruction	Section 1 of the Infant Life (Preservation) Act 1929 (c 34 (19 & 20 Geo 5))
Cruelty to persons under sixteen	Section 1 of the Children and Young Persons Act 1933 (c 12 (23 & 24 Geo 5))
Allowing persons under 16 to be in brothels	Section 3 of the Children and Young Persons Act 1933



Causing or allowing persons under 16 to be used for begging	Section 4 of the Children and Young Persons Act 1933
Giving intoxicating liquor to children under 5	Section 5 of the Children and Young Persons Act 1933
Scandalous Conduct of Officer	Section 64 of the Army Act 1955 (c 18 (3 & 4 Eliz 2))
Disgraceful Conduct	Section 66 of the Army Act 1955
Offences of attempts and aiding and abetting in respect of an offence under sections 64, 66 or 69 Army Act 1955	Section 68 and 68A of the Army Act 1955
Conduct to the Prejudice of Military Discipline	Section 69 of the Army Act 1955
Civil offences where the corresponding offence under the law of England and Wales is listed in this table	Section 70 of the Army Act 1955
Scandalous Conduct of Officer	Section 64 of the Air Force Act 1955 (c 19 (3 & 4 Eliz 2))
Disgraceful Conduct	Section 66 of the Air Force Act 1955
Offences of attempts and aiding and abetting in respect of an offence under sections 64, 66 or 69 Air Force Act 1955	Section 68 and 68A of the Air Force Act 1955
Conduct to the Prejudice of Air Force Discipline	Section 69 of the Air Force Act 1955
Civil offences where the corresponding offence under the law of England and Wales is listed in this table	Section 70 of the Air Force Act 1955
Rape	Section 1 of the Sexual Offences Act 1956 (c 69 (4 & 5 Eliz 2))
Procurement of woman by threats	Section 2 of the Sexual Offences Act 1956
Administering drugs to obtain or facilitate intercourse	Section 4 of the Sexual Offences Act 1956
Intercourse with girl under 13	Section 5 of the Sexual Offences Act 1956
Intercourse with girl between 13 and 16	Section 6 of the Sexual Offences Act 1956
Buggery	Section 12 of the Sexual Offences Act 1956
Indecent assault on a woman	Section 14 of the Sexual Offences Act 1956
Indecent assault on a man	Section 15 of the Sexual Offences Act 1956
Fighting or Quarrelling	Section 13 of the Naval Discipline Act 1957 (c 53 (5 & 6 Eliz 2))
Cruelty or Scandalous Conduct by Officers	Section 36 of the Naval Discipline Act 1957
Disgraceful Conduct	Section 37 of the Naval Discipline Act 1957
Conduct to the prejudice of naval discipline	Section 39 of the Naval Discipline Act 1957
Offence of attempts and aiding and abetting in respect of an offence under sections 13, 36, 37 or 39 Naval Discipline Act 1957	Section 40 and 41 of the Naval Discipline Act 1957
Civil offences where the corresponding offence under the law of England & Wales is listed in this table	Section 42 of the Naval Discipline Act 1957
Indecent conduct towards young child	Section 1 of the Indecency with Children Act 1960 (c 33 (8 & 9 Eliz 2))
Procuring a miscarriage	Section 5(2) of the Abortion Act 1967 (c 87)
Theft	Section 7 of the Theft Act 1968 (c 60)
Blackmail	Section 21 of the Theft Act 1968

Destroying or damaging property	Section 1 of the Criminal Damage Act 1971 (c 48)
Threats to destroy or damage property	Section 2 of the Criminal Damage Act 1971 (c 48)
The offence of conspiracy in relation to: (a) an indictable offence listed in this table; and (b) the offence of murder	Section 1 of the Criminal Law Act 1977 (c 45)
Violence for securing entry	Section 6 of the Criminal Law Act 1977
Inciting girl under 16 to have incestuous sexual intercourse (pre-2004)	Section 54 of the Criminal Law Act 1977
Indecent photos of children	Section 1 of the Protection of Children Act 1978 (c 37)
Attempting to commit an offence in relation to: (a) an indictable offence listed in this table; and (b) the offence of murder	Section 1 of the Criminal Attempts Act 1981 (c 47)
Abduction of child by parent, etc	Section 1 of the Child Abduction Act 1984 (c 37)
Abduction of child by other persons (not parent, etc)	Section 2 of the Child Abduction Act 1984
Affray	Section 3 of the Public Order Act 1986 (c 64)
Fear or provocation of violence	Section 4 of the Public Order Act 1986
Intentional harassment, alarm or distress	Section 4A of the Public Order Act 1986
Harassment, alarm or distress	Section 5 of the Public Order Act 1986
Offence of sending letters etc with intent to cause distress or anxiety	Section 1 of the Malicious Communications Act 1988 (c 27)
Common assault and battery	Section 39 of the Criminal Justice Act 1988 (c 33)
Possession of indecent photos of child	Section 160 of the Criminal Justice Act 1988
Intimidation etc of witnesses, jurors and others	Section 51 of the Criminal Justice and Public Order Act 1994 (c 33)
Breach of non-molestation order	Section 42A of the Family Law Act 1996 (c 27)
Breach of forced marriage protection order	Section 63CA of the Family Law Act 1996
Harassment	Section 2 of the Protection from Harassment Act 1997 (c 40)
Stalking	Section 2A of the Protection from Harassment Act 1997
Putting people in fear of violence	Section 4 of the Protection from Harassment Act 1997
Stalking involving fear of violence or serious alarm or distress	Section 4A of the Protection from Harassment Act 1997
Offences committed outside the United Kingdom (putting people in fear of violence or stalking involving fear of violence etc)	Section 4B of the Protection from Harassment Act 1997
Breach of a restraining order	Section 5 of the Protection from Harassment Act 1997
Abduction of children in care etc	Section 49 of the Children Act 1989 (c 41)
Racially or religiously aggravated assault	Section 29 of the Crime & Disorder Act 1998 (c 37)
Racially or religiously aggravated criminal damage	Section 30 of the Crime & Disorder Act 1998

Racially or religiously aggravated public order offences	Section 31 of the Crime & Disorder Act 1998
Racially or religiously aggravated harassment etc	Section 32 of the Crime & Disorder Act 1998
Improper use of public electronic communications network	Section 127 of the Communications Act 2003 (c 21)
Rape	Section 1 of the Sexual Offences Act 2003 (c 42)
Assault by penetration	Section 2 of the Sexual Offences Act 2003
Sexual assault	Section 3 of the Sexual Offences Act 2003
Causing a person to engage in sexual activity without consent	Section 4 of the Sexual Offences Act 2003
Rape of a child under 13	Section 5 of the Sexual Offences Act 2003
Assault of a child under 13 by penetration	Section 6 of the Sexual Offences Act 2003
Sexual assault of a child under 13	Section 7 of the Sexual Offences Act 2003
Causing or inciting a child under 13 to engage in sexual activity	Section 8 of the Sexual Offences Act 2003
Sexual activity with a child	Section 9 of the Sexual Offences Act 2003
Causing or inciting a child to engage in sexual activity	Section 10 of the Sexual Offences Act 2003
Engaging in sexual activity in the presence of a child	Section 11 of the Sexual Offences Act 2003
Causing a child to watch a sexual act	Section 12 of the Sexual Offences Act 2003
Child sex offences committed by children or young persons	Section 13 of the Sexual Offences Act 2003
Arranging or facilitating commission of a child sex offence	Section 14 of the Sexual Offences Act 2003
Meeting a child following sexual grooming etc	Section 15 of the Sexual Offences Act 2003
Sexual Communication with a child	Section 15A of the Sexual Offences Act 2003
Abuse of position of trust: sexual activity with child	Section 16 of the Sexual Offences Act 2003
Abuse of position of trust: causing or inciting a child to engage in sexual activity	Section 17 of the Sexual Offences Act 2003
Abuse of position of trust: sexual activity in the presence of a child	Section 18 of the Sexual Offences Act 2003
Abuse of position of trust: causing a child to watch a sexual act	Section 19 of the Sexual Offences Act 2003
Sexual activity with a child family member	Section 25 of the Sexual Offences Act 2003
Inciting a child family member to engage in sexual activity	Section 26 of the Sexual Offences Act 2003
Paying for sexual services of a child	Section 47 of the Sexual Offences Act 2003
Causing or inciting child prostitution or pornography	Section 48 of the Sexual Offences Act 2003
Controlling a child in relation to sexual exploitation	Section 49 of the Sexual Offences Act 2003
Arranging or facilitating sexual exploitation of a child	Section 50 of the Sexual Offences Act 2003
Causing or inciting prostitution for gain	Section 52 of the Sexual Offences Act 2003
Controlling prostitution for gain	Section 53 of the Sexual Offences Act 2003
Trafficking into the UK for sexual exploitation	Section 57 of the Sexual Offences Act 2003
Trafficking within the UK for sexual exploitation	Section 58 of the Sexual Offences Act 2003

Trafficking out of the UK for sexual exploitation	Section 59 of the Sexual Offences Act 2003
Administering a substance with intent	Section 61 of the Sexual Offences Act 2003
Committing an offence with intent to commit a sexual offence	Section 62 of the Sexual Offences Act 2003
Trespass with intent to commit a sexual offence	Section 63 of the Sexual Offences Act 2003
Offence of voyeurism	Section 67 of the Sexual Offences Act 2003
Female genital mutilation	Section 1 of the Female Genital Mutilation Act 2003 (c 31)
Assisting girl to mutilate own genitalia	Section 2 of the Female Genital Mutilation Act 2003
Assisting a non-UK person to mutilate overseas a girl's genitalia	Section 3 of the Female Genital Mutilation Act 2003
Failure to protect a girl from risk of female genital mutilation	Section 3A of the Female Genital Mutilation Act 2003
Breach of a Female Genital Mutilation protection order	Section 5A and paragraph 4 of Schedule 2 of the Female Genital Mutilation Act 2003
Trafficking people for exploitation	Section 4 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (c 19)
Causing or allowing child or vulnerable adult to suffer serious physical harm or death	Section 5 of the Domestic Violence, Crime and Victims Act 2004 (c 28)
Fighting or threatening behaviour	Section 21 of the Armed Forces Act 2006 (c 52)
Disgraceful conduct of a cruel or indecent kind	Section 23 of the Armed Forces Act 2006
Offence of attempt, encouraging and assisting, and aiding and abetting in respect of an offence under sections 21 or 23 Armed Forces Act 2006	Section 39 to 41 of the Armed Forces Act 2006
Offence of criminal conduct where the corresponding offence under the law of England & Wales is listed in this table	Section 42 of the Armed Forces Act 2006
Offence of attempt, conspiring, encouraging and assisting, and aiding and abetting in respect of a relevant offence under section 42 Armed Forces Act 2006 (criminal conduct where the corresponding offence under the law of England and Wales is listed in this table)	Section 43-47 of the Armed Forces Act 2006
Encouraging or assisting an offence (inchoate offences) in relation to: (a) an indictable offence listed in this table; and (b) the offence of murder	Section 44 to 46 of the Serious Crime Act 2007 (c 27)
Possession of extreme pornographic images	Section 63 of the Criminal Justice and Immigration Act 2008 (c 4)
Possession of prohibited images of children	Section 62 of the Coroners and Justice Act 2009 (c 25)
Offence of forced marriage	Section 121 of the Anti-social Behaviour, Crime and Policing Act 2014 (c 12 )
Slavery, servitude and forced or compulsory labour, or human trafficking (or committing offence with intent to commit such an offence)	Sections 1, 2 and 4 of the Modern Slavery Act 2015 (c 30)
Disclosing (or threatening to disclose) private sexual photographs and films with intent to cause distress	Section 33 of the Criminal Justice and Courts Act 2015 (c 2)

Strangulation or suffocation	Section 75A of the Serious Crime Act 2015 (c 9)
Strangulation or suffocation committed outside the United Kingdom	Section 75B of the Serious Crime Act 2015
Controlling or coercive behaviour in an intimate or family relationship	Section 76 of the Serious Crime Act 2015
Controlling or coercive behaviour in an intimate or family relationship committed outside the United Kingdom	Section 76A of the Serious Crime Act 2015
Breach of stalking protection order etc	Section 8 of the Stalking Protection Act 2019 (c 9)
Breach of domestic abuse protection order	Section 39 of the Domestic Abuse Act 2021 (c 17)

## SCHEDULE 2

### PROTECTIVE INJUNCTIONS

Regulation 3

Table 1 – Protective injunctions and other orders under the law of England and Wales

Protective injunctions (England and Wales)	Statutory Provisions or other law (England and Wales)
Injunction	Common law
Occupation order	Sections 33, 35, 36, 37 or 38 of the Family Law Act 1996
Non-molestation order	Section 42 of the Family Law Act 1996
Forced marriage protection order	Section 63A of the Family Law Act 1996
Injunction	Section 3A of the Protection from Harassment Act 1997
Restraining order	Section 5A of the Protection from Harassment Act 1997
Female genital mutilation protection order	Paragraph 1 of Schedule 2 to the Female Genital Mutilation Act 2003
Sexual harm prevention order	Section 103A of the Sexual Offences Act 2003
Service restraining order	Section 229 of the Armed Forces Act 2006
Violent offender order	Section 98 of the Criminal Justice and Immigration Act 2008 (c 4)
Domestic violence protection order	Section 28 of the Crime and Security Act 2010 (c 17)
Stalking protection order or interim stalking protection order	Section 1 or 5 of the Stalking Protection Act 2019
Criminal behaviour order	Section 330 of the Sentencing Act 2020 (c 17)
Sexual harm prevention order	Sections 343 and 345 of the Sentencing Act 2020
Restraining order	Sections 359 and 360 of the Sentencing Act 2020
Domestic abuse protection order	Section 28 or 31 of the Domestic Abuse Act 2021

## SCHEDULE 3

### Specified Evidence

## Regulation 4

### Interpretation

1

For the purposes of this Schedule—

“A” means the person who committed, or was alleged to have committed, domestic abuse against B;

“appropriate health professional” means—

- (a) a medical practitioner licensed to practise by the General Medical Council;
- (b) a health professional who is registered to practise in the United Kingdom by—
  - (i) the Nursing and Midwifery Council;
  - (ii) the General Dental Council; or
- (c) a paramedic, practitioner psychologist, radiographer or social worker registered to practise in the United Kingdom by the Health and Care Professions Council;

“B” means the person who was the victim, or alleged victim, of domestic abuse committed by A;

“expert report” means a report by a person qualified to give expert advice on all or most of the matters that are the subject of the report;

“housing association” has the same meaning as in section 1(1) of the Housing Associations Act 1985;

“local authority” means—

- (a) in relation to England, a county council, district council, a London borough council, the Court of Common Council of the City of London, or the Council of the Isles of Scilly
- (b) in relation to Wales, a county council, county borough council or community council; or
- (c) in relation to Scotland, a council constituted under section 2 of the Local Government etc (Scotland) Act 1994; or
- (d) in relation to Northern Ireland, a district council established in accordance with section 1 of the Local Government Act (Northern Ireland) 1972;

“protective injunction” means an injunction, order or interdict specified in Schedule 2 to these Regulations;

“public authority” has the same meaning as in section 6 of the Human Rights Act 1998;

“refuge” means—

- (a) a refuge established for the purpose of providing accommodation for victims of, or those at risk of, domestic abuse; or

- (b) a residential home established and maintained by a public body for any other purpose that also provides accommodation to the victims of, or those at risk of, domestic abuse.

Evidence

2

Evidence of a court order binding over A in connection with a specified offence.

3

A domestic violence protection notice issued and currently in force against A for the protection of B under section 24 of the Crime and Security Act 2010.

4

A domestic abuse protection notice issued and currently in force against A for the protection of B under section 22 of the Domestic Abuse 2021.

5

An undertaking given in England and Wales under section 46 or 63E of the Family Law Act 1996 (or given in Scotland or Northern Ireland in place of a protective interdict or injunction) by A for the protection of B, provided that a cross-undertaking relating to domestic abuse was not given by B.

6

A copy of a finding of fact, made in proceedings in the United Kingdom, that there has been domestic abuse between A and B.

7

An expert report produced as evidence in proceedings in the United Kingdom for the benefit of a court or tribunal confirming that B was assessed as being a victim of domestic abuse by A.

8

A letter or report from an appropriate health professional confirming that that professional, or another appropriate health professional—

(1) has examined B in person, following a report of domestic abuse by A; and

(2) in the reasonable professional judgement of the author or the examining appropriate health professional, B has, or has had, injuries or a condition consistent with being a victim of domestic abuse.

9

A letter or report from—

(1) the appropriate health professional who made the referral described below;

(2) an appropriate health professional who has access to the medical records of B; or

(3) the person to whom the referral described below was made;

confirming that there was a referral by an appropriate health professional of B, following a report of domestic abuse by A, to a person who provides specialist support or assistance for victims of, or those at risk of, domestic abuse.

10

A letter from any person who is a member of a multi-agency risk assessment conference (or other suitable local safeguarding forum) confirming that B has experienced domestic abuse by A.

11

A letter from an independent domestic violence advisor confirming that they are providing, or have provided, support to B, following a report of domestic abuse by A.

12

A letter from an independent sexual violence advisor confirming that they are providing, or have provided, support to B relating to domestic abuse of a sexual nature by A.

13

A letter from an officer employed by a local authority or housing association (or their equivalent in Scotland or Northern Ireland) for the purpose of supporting tenants containing—

(1) a statement to the effect that, in their reasonable professional judgement, B is a victim of domestic abuse by A;

(2) a description of the matters relied upon to support that judgement; and

(3) a description of the support they provided to B.

14

(1) A letter from an organisation providing domestic violence or support services.

(2) The letter must confirm that the organisation—

(a) is situated in the United Kingdom;

(b) has been operating for an uninterrupted period of 6 months or more; and

(c) provided B with support in relation to their needs as a victim of domestic abuse by A.

(3) The letter must contain—

(a) a statement to the effect that, in the reasonable professional judgement of the author of the letter, B is a victim of domestic abuse by A;

(b) a description of the matters relied upon to support that judgement;

(c) a description of the support provided to B; and

(d) a statement of the reasons why B needed that support.

15

A letter or report from an organisation providing domestic abuse support services in the United Kingdom confirming—

(1) that B was refused admission to a refuge;



(2) the date on which B was refused admission to the refuge; and

(3) that B sought admission to the refuge because of allegations of abuse by A.

16

A letter from a public authority confirming that B was assessed as being a victim of domestic abuse by A (or a copy of that assessment).

17

Evidence which the court is satisfied demonstrates that B has been the victim of domestic abuse by A in the form of abuse which relates to economic matters.

## **STATUTORY GUIDANCE**

### **QUALIFIED LEGAL REPRESENTATIVE APPOINTED BY THE COURT**

#### **Section 1 - Introduction**

##### **1. Introduction**

- 1.1. What is in this Guidance?
- 1.2. Glossary of Terms
- 1.3. Legislation
- 1.4. Policy Background
  - 1.4.1. Prohibiting cross-examination in person
  - 1.4.2. Procedural protections

#### **Section 2 - Role of the Qualified Legal Representative**

##### **2. Court-Appointed Qualified Legal Representative: Remit and Responsibilities**

- 2.1. Purpose of the Role
- 2.2. Eligibility
- 2.3. Appointment of the Qualified Legal Representative by the Court
  - 2.3.1. Extent of the Appointment
  - 2.3.2. Declining and Terminating Appointments

##### **3. Duties and responsibilities**

- 3.1. Applying the Essence and Significant Impact Test from the Outset
- 3.2. Reviewing the Bundle
- 3.3. Working with the Court and Prohibited Parties
- 3.4. Attendance at Court
- 3.5. Conducting the Cross-Examination

##### **4. Termination of the Appointment of the Court-Appointed Qualified Legal Representative**

##### **5. Further Guidance**

- 5.1. Applying to be on the Court List and Registration for Work
- 5.2. Remuneration for Court-Appointed Qualified Legal Representatives and Registration with the Legal Aid Agency

## **Section 1 – Introduction**

### **1. Introduction**

#### **1.1 What is in this Guidance?**

The Lord Chancellor has issued this statutory guidance about the role of qualified legal representatives appointed by the court under section 31W(6) of the Matrimonial and Family Proceedings Act 1984 (the 1984 Act) and section 85K(6) of the Courts Act 2003 (the 2003 Act). This guidance is published pursuant to the Lord Chancellor's powers under section 31Y(1) of the 1984 Act and section 85M(1) of the 2003 Act. This guidance will apply in all family and civil proceedings where a qualified legal representative is appointed by the court, and such representatives must have regard to its provisions pursuant to section 31Y(2) of the 1984 Act and section 85M(2) of the 2003 Act. Provisions in the 1984 Act referred to in this guidance relate to family proceedings and those in the 2003 Act relate to civil proceedings, but the role of the qualified legal representative is the same in both court jurisdictions.

Under Part 4B of the 1984 Act and Part 7A of the 2003 Act, perpetrators or alleged perpetrators of abuse and victims or alleged victims of abuse are prohibited from conducting in-person cross-examination of each other in family and civil proceedings, in limited, specified circumstances. If certain criteria are met, the court may appoint one or more qualified legal representatives to conduct the cross-examination in the place of the perpetrator or alleged perpetrator or in place of the victim or alleged victim. The role of the qualified legal representative, as set out in the 1984 Act and 2003 Act, is substantially different from that of a lawyer instructed by a party and operates subject to specific limitations. This document is intended to provide guidance about the role, including about the fact that the qualified legal representative is not responsible to the prohibited party. This document also sets out guidance on how the role will operate in practice.

Whilst the qualified legal representative appointed by the court must have regard to this guidance, the guidance does not seek to restrict the exercise of the qualified legal representative's professional judgment. However, it does set out principles and limitations which are distinctive to this statutory role and which must be reflected in the qualified legal representative's actions and decisions.

The guidance will also help to provide clarity about the qualified legal representative's role for the benefit of the court, the parties and their representatives in cases where such a qualified legal representative may be or has been appointed by the court.

## 1.2 Glossary of Terms

The following key terms will be used throughout this guidance.

<b>1984 Act</b>	Matrimonial and Family Proceedings Act 1984
<b>1999 Act</b>	Youth Justice and Criminal Evidence Act 1999
<b>2003 Act</b>	Courts Act 2003
<b>2021 Act</b>	Domestic Abuse Act 2021
<b>Civil proceedings</b>	As defined at section 85(E) of the 2003 Act:  (a) proceedings in the county court;  (b) proceedings in the High Court, other than:  (i) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other, and  (ii) proceedings in the exercise of its jurisdiction under the Extradition Act 2003; and  (c) proceedings in the civil division of the Court of Appeal arising out of civil proceedings within paragraph (a) or (b)
<b>ECHR</b>	European Convention on Human Rights

<b>Family proceedings</b>	As defined at section 31Q of the 1984 Act:  (a) proceedings in the family court;  (b) proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other; and  (c) proceedings in the civil division of the Court of Appeal arising out of proceedings within paragraph (a) or (b)
<b>Perpetrator</b>	Encompasses both perpetrators and alleged perpetrators
<b>Prohibited Party</b>	In family proceedings, the party prohibited from cross-examining in person the witness/es by:  <ul style="list-style-type: none"> <li>• any of sections 31R, 31S, or 31T of the 1984 Act; or</li> <li>• a court direction given under section 31U(1) of the 1984 Act.</li> </ul> In civil proceedings, the party prohibited from cross-examining in person the witness/es by:  <ul style="list-style-type: none"> <li>• any of sections 85F, 85G, or 85H of the 2003 Act; or</li> <li>• a court direction given under section 85I(1) of the 2003 Act.</li> </ul>
<b>Qualified Legal Representative</b>	As defined at section 31W(8)(b) of the 1984 Act and section 85K(8)(b) of the 2003 Act: a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) in family and civil proceedings respectively
<b>Victim</b>	Encompasses both victims and alleged victims

<b>Witness</b>	“Witness”, in relation to any proceedings, includes a party to the proceedings as defined at section 31Q of the 1984 Act and section 85E of the 2003 Act
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### 1.3 Legislation

#### Family and Civil Proceedings

Section 65 of the 2021 Act inserts new Part 4B into the 1984 Act. Part 4B prohibits perpetrators or alleged perpetrators of abuse from personally cross-examining their victims<sup>1</sup> or alleged victims in family proceedings. The prohibition (where automatic) also applies in reverse, to prevent a victim from having to cross-examine his or her abuser or alleged abuser.

Section 66 of the 2021 Act inserts a new Part 7A into the 2003 Act which makes similar provision in civil proceedings.

The Part 4B and Part 7A prohibitions of cross-examination in person automatically apply in the following situations:

- In family proceedings, where a party has been cautioned for, charged with or convicted of a specified offence against the victim or alleged victim, they cannot cross-examine in person the victim or alleged victim of that offence and vice versa (that is, if the victim or alleged victim is also a party, they cannot cross-examine in person the perpetrator) (section 31R of the 1984 Act);
- In civil proceedings, where a party has been cautioned for, or convicted of a specified offence they cannot cross-examine in person the victim of that offence and vice versa (that is, if the victim is also a party, they cannot cross-examine in person the perpetrator) (section 85F of the 2003 Act);
- In family or civil proceedings no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction and vice versa (that is, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom

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<sup>1</sup> We have used the term “victim” throughout this guidance to refer to a person who has been subject to abuse. Sections 31R and 31T of the 1984 Act and sections 85F and 85H of the 2003 Act refer to “victim”. We acknowledge that some prefer alternative terms.

the injunction is in force) (section 31S of the 1984 Act and section 85G of the 2003 Act);  
or

- In family or civil proceedings where specified evidence is adduced that a person who is a witness has been the victim of domestic abuse carried out by a party to the proceedings, that party to the proceedings may not cross-examine the witness in person and vice versa (that is, where specified evidence is adduced that a person who is a party to the proceedings has been the victim of domestic abuse carried out by a witness, that party may not cross-examine the witness in person (section 31T of the 1984 Act and section 85H of the 2003 Act).

The lists of specified offences, on-notice protective injunctions and specified evidence are set out in the Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022<sup>2</sup>.

Where none of the automatic prohibitions set out above apply, the court has the power to direct that a party be prohibited from carrying out in person cross-examination where it appears to the court that allowing cross-examination in person would be likely to affect the quality of the witness' evidence or is likely to cause either the party or the witness significant distress and it would not be contrary to the interests of justice to give such a direction. This is a wide discretion and might apply, for example, in situations where domestic abuse is alleged but the allegations do not trigger any of the automatic prohibitions, where litigants in person have to cross-examine expert witnesses, or for reasons other than domestic abuse. The court must state its reasons for giving a direction, refusing an application for a direction, revoking a direction given or refusing an application to revoke a direction (section 31V(4) of the 1984 Act and section 85J(4) of the 2003 Act).

The “**quality condition**” is met if the quality of evidence given by the witness on cross-examination:

- is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and
- would be likely to be improved if a direction were given by the court.

The “**significant distress condition**” is met if:

- the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and
- that distress is likely to be more significant than would be the case if the witness were cross-examined other than by the party in person.

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<sup>2</sup> [The Prohibition of Cross-Examination in Person \(Civil and Family Proceedings\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

## Consideration of Alternatives to Cross-Examination in Person

Prohibiting a party from undertaking cross-examination in person has the potential to impact that party's ability to effectively put their case to the court. Articles 6 and 8 of the ECHR must be observed – the right to obtain a fair hearing and the right to family life. Part 4B of the 1984 Act and Part 7A of the 2003 Act therefore include certain protections which apply where a prohibition operates, whether automatically or following a direction given by the court:

- Before appointing a qualified legal representative, section 31W of the 1984 Act and section 85K of the 2003 Act require the court to first consider whether there is a “satisfactory alternative” means for the witness to be cross-examined, or of otherwise obtaining the evidence that the witness might have given under cross-examination. It should be noted that cross-examination by the judge on behalf of a party would not be a satisfactory alternative for these purposes<sup>3</sup>.
- If the court concludes that there is no satisfactory alternative under section 31W of the 1984 Act or section 85K of the 2003 Act, it must invite the prohibited party to arrange for a qualified legal representative to conduct the cross-examination and require the party to notify the court within a specified time whether a qualified legal representative is to so conduct the cross-examination.
- If the party does not appoint such a representative or notifies the court that no such representative is to act for the party, then under section 31W(5) of the 1984 Act or section 85K(5) of the 2003 Act, the court must consider whether it is necessary in the interests of justice for the court to appoint a qualified legal representative to conduct the cross-examination (section 31W(6) of the 1984 Act and section 85K(6) of the 2003 Act). If the court decides that it is, it must appoint a qualified legal representative, chosen by the court, to cross-examine the witness.
- Where the court makes an appointment pursuant to section 31W(6) of the 1984 Act or section 85K(6) of the 2003 Act, the qualified legal representative is publicly funded and paid from central funds as set out in section 31X of the 1984 Act and section 85L of the 2003 Act. They will be paid in accordance with the remuneration scheme set out in the Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022<sup>4</sup>.

It is this last scenario (where the court appoints a qualified legal representative, having taken the prior necessary steps and come to the required conclusions) which this guidance is concerned with. It does not apply where a party appoints their own qualified legal representative at the invitation of the court.

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<sup>3</sup> See paragraph 5.3 of the FPR Practice Direction 3AB.

<sup>4</sup> S.I. 2022/567.



## 1.4 Policy Background

The amendments to the 1984 Act arose from a growing recognition amongst the judiciary, practitioners, domestic abuse specialists and Government that existing court procedures did not adequately protect victims of abuse in the family and civil courts.

Prior to the passing of the 2021 Act, the family court and the Family Division of the High Court had utilised a range of powers to ensure difficult courtroom situations were handled sensitively for vulnerable parties. This included, where appropriate, a judge putting questions to a witness directly, or accepting pre-recorded cross-examination from prior criminal proceedings. However, there were some cases in which these alternate forms of evidence or carrying out of cross-examination were insufficient to thoroughly test the evidence in the case. In these instances, family courts were unable to appoint a qualified legal representative who would be paid out of central funds to conduct the cross-examination in place of a party. This led to situations where a party would be cross-examined in person by their abuser, situations which could, in the words of the former President of the Family Division, “*sometimes amount, and on occasion quite deliberately, to a continuation of the abuse.*”<sup>5</sup> The provisions of section 65 of the 2021 Act were designed to address these concerns.

In relation to civil proceedings, in April 2018, the Independent Inquiry into Child Sexual Abuse (CSA) recommended that victims and survivors of CSA in civil court cases, where they are claiming compensation in relation to the abuse they suffered, should be afforded the same protections as vulnerable witnesses in criminal court cases. Following that, the Government commissioned the Civil Justice Council (CJC) to consider the issues raised by this recommendation. After a public consultation and views from experts, the CJC published their report: “Vulnerable Witnesses and parties within civil proceedings – current position and recommendations for change”, in February 2020. The Government accepted the CJC’s recommendations in relation to the prohibition of cross-examination by a self-represented party, which it has now legislated for by the provisions in section 66 of the 2021 Act.

Similar protections to prohibit inappropriate in person cross-examination exist in criminal proceedings under sections 34 - 38 of the 1999 Act. These provisions have been in force for over twenty years, at the time of publication. Sections 34 and 35 of the 1999 Act automatically prohibit persons charged with certain offences from cross-examining in person the complainant or witness to the offence, while sections 36 and 37 empower the court to make a direction prohibiting the defendant from personally cross-examining a witness in prescribed circumstances. Section 38 outlines the steps the court is to take where the prohibition applies including, as is the case under Part 4B of the 1984 Act and Part 7A of the 2003 Act, the court appointing an advocate to conduct the cross-examination. In exactly the same way as is now the case in family and civil proceedings, such advocate appointed to conduct the cross-examination is not responsible to the accused. Sections 65 and 66 of the 2021 Act therefore, to a large extent, replicate the provisions in sections 34 - 38 of the 1999 Act to provide broad parity in the cross-examination protections in the family, civil, and criminal court jurisdictions.

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<sup>5</sup> *Unheard voices: the involvement of children and vulnerable people in the family justice system*, lecture by Sir James Munby P (as he then was), Swansea University, 25 June 2015.

#### 1.4.1 Prohibiting cross-examination in person

The first element of the provisions is the prohibition itself, the primary purpose of which is to ensure that no victim of abuse should endure being cross-examined in person by their abuser or have to endure cross-examining their abuser themselves in a courtroom setting. Such cross-examination can cause severe distress, re-traumatise the victim and has the potential to form a continuation of abuse including controlling behaviours. It can often involve confrontational exchanges, and heightened anxiety, all in an unfamiliar environment with strangers present. There will very frequently be a lot at stake for the victim both in terms of their own safety and that of any children. It can affect the quality of the evidence given, thereby impacting on both parties' ability to put their case forward and, in turn, the court's ability to effectively render justice. The purpose of the provisions is to ensure that every victim has confidence that the court will be able to offer them every protection needed to allow them to give their best evidence and participate in proceedings safely.

The prohibition can arise automatically in specified situations or at the court's discretion (see above at 1.3). The automatic prohibitions, together with the court's discretion, ensure that adequate protections can be provided to all who need them.

#### 1.4.2 Procedural protections

The second element of the provisions are the procedural protections set out at section 31W of the 1984 Act and section 85K of the 2003 Act which are intended to protect the Article 6 and 8 rights of all parties in cases where a prohibition applies, whether automatically or following a direction given by the court. The application of these protections is intended to work in a sequenced way. First, the court considers whether there is a satisfactory alternative means for the witness to be cross-examined or of obtaining the evidence that might have been given under cross-examination. If there is not, the court invites the prohibited party to arrange for a qualified legal representative to cross-examine the witness. It is only if no such appointment is made, that the court must consider if it is necessary, in the interests of justice, for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party. If the court decides it is in the interests of justice, the court must itself appoint a qualified legal representative to cross-examine the witness in the interests of the party.

**Article 6(1) of the ECHR** guarantees the right to a hearing which is procedurally fair, and this includes affording each party a reasonable opportunity to present their case and evidence under conditions which do not place them at a substantial disadvantage as compared to the other party.<sup>6</sup> Further, an individual has the right to confront a party or witness who makes an allegation.<sup>7</sup> Whilst this is not the right to ask "*unlimited questions of a witness merely with a view to testing the evidence*", the Court of Appeal has held that a court must be "*alert to ensure that no parent (and therefore any party) is denied the right to put the essence of their case to witnesses on those parts of their evidence that may have a significant impact on the outcome.*"<sup>8</sup>

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<sup>6</sup> *Regner v. the Czech Republic* App No 35289/11 at [146].

<sup>7</sup> Per Sir James Munby P (as he then was) in *Re S-W (Children) (Care Proceedings: Final care order at case management hearing)* [2015] EWCA Civ 27 at [57].

<sup>8</sup> *ibid* at [58].

**Article 8 of the ECHR** guarantees the right to private and family life shall not be interfered with except as is necessary and in accordance with the law. The courts have held that, in the context of family court matters, the parties' Article 8 rights "*can only be vindicated by their having an effective and correct determination*" of the factual issues before the court.<sup>9</sup>

The intention of the procedural protections in Part 4 of the 1984 Act and Part 7A of the 2003 Act is to give the court a range of tools to ensure that the prohibited party's Article 6 and 8 ECHR rights are protected. The provisions set out a path for the court to find the tool that will protect these rights in each case. Before a court can consider whether to appoint a qualified legal representative, it must first consider whether the evidence can be elicited by alternative means. It must then offer the prohibited party an opportunity to arrange their own legal representation for the purposes of the cross-examination.

It is only after those options have been explored and determined to be insufficient that the court will turn its mind to the possibility of appointing a qualified legal representative to cross-examine the witness in order to protect Article 6 and 8 ECHR rights. The rights of a party under Articles 6 and 8 of the ECHR are more likely to be protected if a qualified legal representative is appointed in cases, for example, which involve complicated evidential matters, complex medical evidence or other expert evidence, or where questioning of a witness is required that may be distressing or potentially challenging. In such instances, questioning by a qualified legal representative is more likely to elicit evidence that will enable the court to reach a properly informed decision, which itself is in the best interests of the parties.

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<sup>9</sup> Per Lord Dyson MR (as he then was) in *Re K and H (Children)* [2015] EWCA Civ 543 at [47].

## **Section 2 - Role of the Qualified Legal Representative**

### **2. Court-Appointed Qualified Legal Representative: Remit and Responsibilities**

#### **2.1 Purpose of the Role**

The purpose of the cross-examination provisions in the 2021 Act is to ensure that no victim or alleged victim will be directly cross-examined by their abuser or alleged abuser or have to cross-examine their abuser or alleged abuser themselves. For this reason, the cross-examination provisions automatically prohibit cross-examination in person by a 'prohibited party' (as defined in section 1 of this guidance) in specified circumstances. Where the automatic prohibitions do not apply, the provisions give the court the power to make a direction prohibiting cross-examination in person if certain criteria are met.

Where cross-examination in person is prohibited, either automatically or following a court direction, the 2021 Act provisions enable the court to appoint a qualified legal representative (as defined in section 1 of this guidance) to conduct the cross-examination if certain conditions are met. The appointment of a qualified legal representative by the court will only occur in cases where there are no satisfactory alternative means of eliciting the evidence, where the prohibited party has not appointed their own qualified legal representative and where the court considers it to be in the interests of justice to make its own appointment.

**The court-appointed qualified legal representative's central purpose is to ensure that the fairness of the proceedings is maintained, by carrying out the cross-examination which the prohibited party is prohibited from performing.**

In determining whether to appoint a qualified legal representative, the court must consider whether it is in the interests of justice for the witness to be cross-examined by a qualified legal representative appointed by the court to represent the interests of the party. Where the court decides to make an appointment, it is important for the qualified legal representative to remember that:

- they are not a representative of the court which appoints them but they are accountable to the court;
- they are appointed to cross-examine in the interests of the party (section 31W(6) of the 1984 Act and section 85K(6) of the 2003 Act); and
- they are not responsible to the party (section 31W(7) of the 1984 Act and section 85K(7) of the 2003 Act). As qualified legal representatives are not appointed to act for the prohibited party in the way that ordinary legal advocates do, they do not have the traditional 'lawyer-client' relationship with the prohibited party and therefore are not responsible to the prohibited party. Although they will advance the interests of the prohibited party' during the cross-examination, the qualified legal representative must not attempt to present the prohibited party's entire case and should not take instructions from the prohibited party in the manner that a party's own lawyer ordinarily would. However, the qualified legal representative is expected, in most cases, to meet with the prohibited party to elicit relevant information that will form the basis of the cross-examination and inform the drafting of the position statement.

Qualified legal representatives do not have a free-ranging remit. They are not appointed to act as an 'advocate to the court' (also known as 'amicus curiae') who are most commonly appointed to assist the court on specific legal issues by furnishing information or advice regarding questions of law or fact. A qualified legal representative appointed by the court sits somewhere between these two more traditional roles, and they must remain conscious of the limited and unique purpose of their role in family and civil proceedings.

The role of the qualified legal representative in family and civil proceedings is a new role but is not unlike the role of an advocate appointed by the court in criminal proceedings under the provisions of section 38 of the 1999 Act (see section 1). However, while the advocate in the equivalent criminal scheme is only ever appointed to cross-examine the witness in the interests of the accused, the qualified legal representative in family or civil proceedings may be appointed by the court to cross-examine a witness on behalf of *either* party. There may also be instances in family or civil proceedings where the court may need to appoint more than one qualified legal representative in the case, for example, one to cross-examine in place of the perpetrator and the other to cross-examine in place of the victim. So, the circumstances in which a qualified legal representative may be appointed in family and civil proceedings are wider than in the criminal courts.

The parameters of the role of a qualified legal representative appointed by the court in criminal proceedings were examined in the case of *ABBAS v Crown Prosecution Service*<sup>10</sup> where Lady Justice Hallet stated:

*'The role of a section 38 advocate is, undoubtedly, limited to the proper performance of their duty as a cross-examiner of a particular witness. Sections 36 and 38 of the 1999 Act are all about protecting vulnerable witnesses from cross-examination by the accused. Therefore, it should not be thought that an advocate appointed under section 38 has a free-ranging remit to conduct the trial on the accused's behalf. Their professional duty and their statutory duty would be to ensure that they are in a*

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<sup>10</sup> [2015] EWHC 579 (Admin) at [44].

*position properly to conduct the cross-examination. It means also that their appointment comes to an end, under section 38, at the conclusion of the cross-examination, save to the extent that the court otherwise determines. Technically the lawyer no longer has a role in the proceedings thereafter.’*

Thus, there are unlikely to be ethical complexities for court-appointed qualified legal representatives who are not responsible to the prohibited party and who do not have a contractual relationship with them.

## **2.2 Eligibility**

It is essential that court-appointed qualified legal representatives are sensitive and understanding with regard to the needs and vulnerabilities of the witness when conducting the cross-examination. They must be adept at using techniques for cross-examination to help enable vulnerable witnesses to give their best and most accurate evidence. This is in the interests of the witnesses themselves and in the interests of justice.

All court-appointed qualified legal representatives must have a current practising certificate and have undertaken advocacy and vulnerable witness training (or have made a commitment to attend such training within six months of having registered on the court list of qualified legal representatives – see section 2.3) that is provided or approved by their professional body. They must also have the necessary skills and experience in cross-examining vulnerable witnesses in contested hearings. Qualified legal representatives with additional specialist domestic abuse training on matters such as coercive and controlling behaviour, economic abuse, psychological abuse and post-separation abuse are also eligible to undertake this work.

Solicitors do not need to have a Higher Rights of Audience qualification to appear or conduct cross-examination in either the family court or the county court. However, a Higher Rights of Audience qualification will be needed to appear in proceedings in ‘higher courts’, which for these purposes are:

- the High Court (the Family Division for family proceedings, or the Queen’s Bench Division or Chancery Division for civil proceedings); and
- the civil division of the Court of Appeal.

## **2.3 Appointment of the Qualified Legal Representative by the Court**

Qualified legal representatives with the appropriate training as set out in section 2.2 will need to register their interest in undertaking this work with Her Majesty’s Courts and Tribunals Service (HMCTS). Local courts will maintain a list of qualified legal representatives available to undertake the cross-examination work in family and civil proceedings. HMCTS will be responsible for managing and keeping the list up to date. Further information on registering onto the court list of qualified legal representatives can be found at:

HMCTS will contact the first qualified legal representative on the list and if that qualified legal representative is unable to accept the appointment, HMCTS will then contact the next qualified legal representative as it appears on the list and, if necessary, will work down the

list until a qualified legal representative who can accept the appointment is found. This system allows for good practice and ensures that qualified legal representatives can be quickly engaged when required in a transparent manner. Once the qualified legal representative is contacted by the court and has agreed to accept the appointment, a court-generated order will be provided outlining the extent of his or her appointment and in particular that:

- the qualified legal representative is accountable to the court and not to the prohibited party;
- the appointment of the qualified legal representative terminates at the conclusion of the proceedings or when the court so orders;
- the appointment is personal to the qualified legal representative appointed by the court and not to the Chambers or solicitor's firm of that representative; and
- the qualified legal representative may only claim for the costs of preparing for and conducting the cross-examination.

### **2.3.1 Extent of Appointment**

As the qualified legal representative is appointed by the court specifically to protect the prohibited party's Article 6 and 8 rights, their appointment extends only as far as the prohibition affects those rights. In practice, this means that the qualified legal representative's role will be limited to the cross-examination of the witness or witnesses whom the prohibited party is prevented from questioning in person. The witness or witnesses that are to be cross-examined will be specified in the same court order which appoints the qualified legal representative.

The statutory appointment of the qualified legal representative will begin when this is made by the court. This appointment will terminate at the conclusion of the proceedings or when the court so orders. This is aimed at ensuring that the qualified legal representative's appointment concludes at the end of the entire proceedings, rather than at the conclusion of individual hearings. This means that the judge will not need to revert to the start of the process of prohibiting the cross-examination each time and appointing a qualified legal representative when a ban on cross-examination in person is necessary. If further cross-examination affected by the prohibition is required, the court will recall the same qualified legal representative, or (where that is not possible) appoint a new qualified legal representative.

### **2.3.2. Declining and Terminating Appointments**

It is important that the court-appointed qualified legal representative does not have a conflict of interest in the case. Should there be a conflict of interest, the qualified legal representative must inform the court immediately that they are unable to accept the appointment. Should a situation arise where a court-appointed qualified legal representative is unable to undertake the cross-examination at any time during the proceedings, they will also need to inform the court immediately. In such instance, the court will terminate the qualified legal representative's appointment and appoint a new qualified legal representative. The

termination of a qualified legal representative's appointment in a case will be confirmed by a court order.

### **3. Duties and Responsibilities**

Cases requiring the appointment of a qualified legal representative will differ from each other, therefore this guidance does not set out a prescriptive list of duties the appointed qualified legal representative must undertake as the work required will vary according to the facts of the case. However, qualified legal representatives should be guided throughout their involvement by the key principles identified in the essence and significant impact test.

#### **3.1 Applying the Essence and Significant Impact Test from the Outset**

Sir James Munby P (as he then was) in the Court of Appeal case *Re S-W (Children) (Care Proceedings: Final care order at case management hearing)*<sup>11</sup> set out the importance of putting the essence of the prohibited party's case to witnesses on those parts of their evidence that may have a significant impact on the outcome of the proceedings.

To effectively protect the prohibited party's Article 6 and 8 rights, the qualified legal representative must put the essence of the prohibited party's case to the witness, on those parts of the witness' case that may have a significant impact on the outcome of the proceedings. The prohibited party may suggest questions to the qualified legal representative that he or she wishes to be put to the witness. Although the qualified legal representative may take such suggestions into consideration, ultimately questions should only be put to the witness if they relate to the essence of the prohibited party's case, and they are on those parts of the witness' case which may have a significant impact on the outcome of the proceedings. The qualified legal representative must be prepared and equipped to be able to carry out cross-examination so as to achieve this purpose.

To carry out the cross-examination role effectively, and in line with their professional responsibilities, the qualified legal representative will need to undertake such preparatory work as is necessary to conduct the cross-examination, such as reading court papers. The qualified legal representative must ensure that he or she is fully conversant with the evidence and issues in the case and has obtained sufficient information about the prohibited party's case to be able to cross-examine and test the evidence effectively. The qualified legal representative must ensure that the cross-examination carried out provides the court with sufficient information to reach a conclusion on the issues that arise during the case.

#### **3.2 Reviewing the Bundle**

The court will direct that the qualified legal representative (or qualified legal representatives in instances where there are more than one court-appointed qualified legal representative) has access to the full court bundle, or such parts of the bundle as directed by the court and

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<sup>(11)</sup> [2015] EWCA Civ 27 at [57].



by when access is to be given. Where there is no court bundle, HMCTS will prepare and provide the qualified legal representative with a court bundle. The court-appointed qualified legal representative must ensure that he or she is fully familiar with the contents of the court bundle and evidence so as to be able to cross-examine the witness or witnesses effectively, and to ensure that the essence of the prohibited party's case is properly put to the witness or witnesses.

### **3.3 Working with the Court and Prohibited Parties**

From the outset of the appointment, the court and the appointed qualified legal representative should clearly establish the practical extent of the prohibition. The court will issue an order in accordance with paragraph 2.3, in particular, identifying the witness or witnesses to be cross-examined by the qualified legal representative.

The qualified legal representative will need to meet with the prohibited party to understand the essence of the prohibited party's case and agree with the prohibited party and the court the issues that will be covered in the cross-examination. Establishing the issues that will be covered in the cross-examination can be done, for example, during a preliminary hearing if the qualified legal representative is appointed sufficiently early. The qualified legal representative should seek such further information as is required from the court and the prohibited party in order to be able to properly discharge his or her responsibilities. This may include obtaining and considering additional papers relevant to the prohibited party's case prior to the hearing with the cross-examination. The qualified legal representative may also seek guidance from the judge as to the apparent issues in the case. As part of this process, the qualified legal representative may need to make submissions to the court regarding the key issues relevant to the interests of the prohibited party's case.

It is recommended that the qualified legal representative should prepare a brief position statement to help identify and narrow the issues that will be the focus of the cross-examination.

The court will make clear to the prohibited party that the qualified legal representative is not their lawyer and that they are appointed by the court only to cross-examine a certain witness or certain witnesses. The qualified legal representative must also clearly communicate the limited nature of their role and their relationship with the prohibited party. They must make clear that they do not have a contractual relationship with the prohibited party. Additionally, the qualified legal representative must make clear that they cannot give advice or represent the prohibited party throughout the case but are appointed by the court to carry out a very limited role. The qualified legal representative cannot help with preparing documentation or assist in complying with directions. The court-appointed qualified legal representative will need to explain to the prohibited party that they cannot promise the confidentiality that usually attaches to lawyer-client relationships (legal professional privilege) and that there are obligations in family and civil proceedings to disclose material that is unhelpful to the prohibited party's case.

The prohibited party may suggest questions he or she wishes to be put to the witness or witnesses and the qualified legal representative may take such suggestions into consideration. Ultimately, however, questions should only be put to the witness if they relate to the essence of the prohibited party's case, and they are likely to provide the court with

information to enable it to reach a conclusion on the issues that it has to determine. Whilst the qualified legal representative should ascertain details of the case that the prohibited party wishes to advance, so as to inform his or her approach to the cross-examination, at no stage should the qualified legal representative take instructions from the prohibited party.

There may be instances that arise where the prohibited party may not cooperate with the court-appointed qualified legal representative and may decline to provide required information that will form the basis of the cross-examination. Where this occurs, the qualified legal representative may have to confine the cross-examination to matters that the judge directs are relevant as far as can be ascertained from the court papers in the proceedings. The qualified legal representative should then relay what these matters are to the prohibited party. There may also be instances where a prohibited party's refusal to cooperate with the qualified legal representative is due to their lack of capacity. This may mean that the qualified legal representative is unable to elicit any assistance or information from the prohibited party. In such situations, the qualified legal representative may only be able to cross-examine the witness on issues that are apparent from the case papers. Where this arises, the qualified legal representative must bring to the court's attention any issues relating to the prohibited party's capacity to participate fully in and understand the proceedings. The qualified legal representative must also alert the court to the potential need for participation directions or special measures such as a registered intermediary.

In most cases the need for the qualified legal representative to deal directly with the **other party** on substantive issues will be limited. Particular care should be taken when the other party is not legally represented, or where the other party is also the witness to be cross-examined. In any direct dealings with the other party or their representative, the qualified legal representative should clearly communicate the limited nature of their role and their relationship to the prohibited party and the court.

### **3.4 Attendance at Court**

The qualified legal representative will, of course, need to attend the substantive fact-finding hearing where the cross-examination is to take place. There may be other hearings which take place between their appointment by the court and the cross-examination/re-examination that require the qualified legal representative's presence. In deciding whether it is necessary to attend these hearings, the qualified legal representative should apply the essence and significant impact test as set out at paragraph 3.1.

For example, a qualified legal representative would need to attend a preliminary hearing scheduled to determine the issues which are to be covered in cross-examination. By comparison, they would not need to attend a hearing of an application made by either party which does not relate to the issues for cross-examination or is unlikely to affect the conduct of the cross-examination.

The qualified legal representative should use their judgement to determine the relevant hearings that will require their attendance. Where evidence is to be given over several days by various witnesses (other than the witness the qualified legal representative has been appointed to cross-examine), the qualified legal representative will likely only need to attend when evidence which may touch on the essence of the prohibited party's case, or when a key part of the witness' evidence, is being heard. The judge may consider the extent to

which the qualified legal representative's attendance is required and give directions on which hearings the qualified legal representative must attend.

### **3.5 Conducting the Cross-Examination**

The qualified legal representative should prepare questions which put the 'essence' of the prohibited party's case to the witness, on those parts of the witness' case which may have a significant impact on the outcome of the proceedings. Questions put in cross-examination must be for the purpose of testing the evidence of the witness or witnesses, of putting the prohibited party's case to the witness and enabling the court to be provided with evidence to enable it to make a properly informed decision on the issues that it has to determine.

The qualified legal representative retains the discretion to manage the cross-examination as it develops (i.e. to formulate questions and act dynamically in response to answers given by the witness), so that the cross-examination satisfies the essence and significant impact test. But the court-appointed qualified legal representative must always keep in mind the limited nature of their role and avoid the instinct to act as advocate for the prohibited party's wider case. The qualified legal representative must be cognisant of the fact that the cross-examination of a witness must always be conducted with sensitivity and with due regard to any vulnerabilities of the witness known to the qualified legal representative.

The qualified legal representative is not expected to make submissions to the court on behalf of the prohibited party for whom they are conducting the cross examination.

## **4. Termination of the Appointment of the Court-Appointed Qualified Legal Representative**

The appointment of a qualified legal representative appointed by the court will be terminated at the conclusion of the proceedings or when the court so orders. Following termination, unless the court otherwise directs, the qualified legal representative will be notified of the outcome of the hearing by the court.

## **5. Further Guidance**

### **5.1 Applying to be on the Court List and Registration for Work**

As set out earlier in this guidance, local courts will maintain a list of qualified legal representatives available to undertake the cross-examination work in family proceedings and civil proceedings. This system allows for good practice and ensures that qualified legal representatives can be quickly engaged, when required, in a transparent manner. Qualified legal representatives interested in undertaking cross-examination work and wishing to be registered on the court-maintained list of qualified legal representatives should write to their local courts. Similarly, qualified legal representatives who wish to come off the list should also write to their local courts in good time to notify that they wish to be taken off the list. The list will be reviewed on a quarterly basis by the courts.

All court-appointed qualified legal representatives will need to be registered with the Legal Aid Agency in order to undertake cross-examination work in family and civil proceedings, though this work is not limited to lawyers who currently undertake legal aid work.

## **5.2 Remuneration for Court-Appointed Qualified Legal Representatives and Registration with the Legal Aid Agency (LAA)**

The remuneration scheme for qualified legal representatives has been designed to incentivise the right activities that the cross-examination function necessitates and to reduce the likelihood of qualified legal representatives going beyond their very specific remit which is limited by statute. The fee rates, structure and rules are set out in regulations the Prohibition of Cross-Examination in Person (Fees of Court-Appointed Qualified Legal Representatives) Regulations 2022<sup>12</sup>. Fees will be paid out of central funds and payments will be administered by the LAA. Claims for payment must be made within 3 months of the hearing, subject to any exceptional circumstances laid out to LAA.

In order to receive payment for work undertaken as a qualified legal representative under the remuneration scheme, qualified legal representatives must be registered with the LAA and have a legal aid account number. For the purpose of clarity, the remuneration scheme is not a legal aid scheme, but payments will be issued by the LAA through a legal aid account number.

Qualified legal representatives with existing legal aid accounts do not need to apply for a new account. Only qualified legal representatives with no active legal aid account need to apply.

Detailed guidance on applying for an account with the LAA is published at:

Update your details with the LAA - GOV.UK ([www.gov.uk](http://www.gov.uk))

### Solicitors

Qualified legal representatives who are solicitors who are part of an existing firm with an active legal aid contract and account do not need to apply for a new account. Only solicitors who are not part of an existing firm with an active legal aid contract and account need to apply for an account.

Solicitors who do not have a legal aid account or a certificate of High Rights of Audience must complete and send the following form and documents. You must tick the box for 'committal hearings' on the form.

- A completed AC1A form.
- A copy of their indemnity insurance.
- A copy of their Vat Certificate (If Vat registered).

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<sup>12</sup> [The Prohibition of Cross-Examination in Person \(Fees of Court-Appointed Qualified Legal Representatives\) Regulations 2022 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

- Confirmation that you do not have a certificate of Rights of High Audience and you are applying for an account under the 'Prohibition of Cross-Examination in Person Qualified Legal Representative Scheme'.

### Solicitor-Advocates

Qualified legal representatives who are solicitor-advocates with existing legal aid accounts for either themselves as an individual or as part of a contracted legal aid firm, do not need to apply for a new account. Only solicitor-advocates with no active legal aid account need to apply for an account.

Solicitor-advocates who do not have a legal aid account must complete and submit the following form and documents without which the LAA will not be able to create and issue a legal aid account number:

- Form AC1A.
- A copy of their indemnity insurance.
- A copy of their Vat Certificate (if Vat registered).
- A copy of their certificate of Higher Rights of Audience (where applicable).

### Barristers

Qualified legal representatives who are barristers with existing legal aid accounts do not need to apply for a new account. Only barristers with no active legal aid account need to apply for an account.

Barristers in independent practice must complete and submit the following documents without which the LAA will not be able to create and issue with a legal aid account number:

- Form AC1B.
- A copy of their practising certificate or a letter from the Bar Standards Board confirming that they have completed their first six months of their pupillage.
- A copy of their VAT certificate (if VAT registered) (the individual VAT certificate and not that of their company).

### CILEX Practitioners

Qualified legal representatives who are CILEX Practitioners (CILEX Litigator & Advocate) with existing legal aid accounts do not need to apply for a new account. Only CILEX Advocates with no active legal aid account need to apply for an account.

CILEX practitioners who do not have a legal aid account must complete and submit the following form and documents without which the LAA will not be able to create and issue a legal aid account number:

- Form AC1A.
- A copy of their Rights of Audience Certificate (Family or Civil Proceedings)

All completed application forms and documents should be submitted by email to:

ProviderRecords-London@justice.gov.uk

Further details on how to claim payment for work undertaken is set out in costs guidance produced jointly by MoJ and the LAA which is available at: