

## **DRAFT STATUTORY GUIDANCE**

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

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

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

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# **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 MFPA) and section 85K(6) of the Courts Act 2003 (the CA). This Guidance is published pursuant to the Lord Chancellor's powers under section 31Y(1) of the MFPA and section 85M(1) of the CA. 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 MFPA and section 85M(2) of the CA. Provisions in the MFPA referred to in this Guidance relate to family proceedings and those in the CA relate to civil proceedings, but the role of the qualified legal representative is the same in both court jurisdictions.

Under Part 4B of the MFPA and Part 7A of the CA, 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 a qualified legal representative to conduct the cross-examination in the place of the perpetrator or alleged perpetrator or in place of the victim or alleged victim. There may also be instances in family proceedings where the court may need to appoint two qualified legal representatives in the case, one to cross-examine on behalf of the victim and the other to cross-examine on behalf the perpetrator. The role of the qualified legal representative, as set out in the MFPA and CA, 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>Qualified Legal Representative</b>	As defined at section 31W(8)(b) of the MFPA and section 85K(8)(b) of the CA: 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>Perpetrator</b>	Encompasses both perpetrators and alleged perpetrators.
<b>Victim</b>	Encompasses both victims and alleged victims
<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 MFPA; or</li> <li>• a court direction given under section 31U(1) of the MFPA.</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 CA; or</li> <li>• a court direction given under section 85I(1) of the CA.</li> </ul>
<b>Witness</b>	“Witness”, in relation to any proceedings, includes a party to the proceedings as defined at section 31Q of the MFPA and section 85E of the CA.
<b>MFPA</b>	Matrimonial and Family Proceedings Act 1984
<b>Family proceedings</b>	As defined at section 31Q of the MFPA: <ul style="list-style-type: none"> <li>(a) proceedings in the family court;</li> <li>(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</li> <li>(c) proceedings in the civil division of the Court of Appeal arising out of proceedings within paragraph (a) or (b)</li> </ul>

<b>Civil proceedings</b>	As defined at section 85(E) of the CA: (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>CA</b>	Courts Act 2003
<b>DAA</b>	Domestic Abuse Act 2021
<b>YJCEA</b>	Youth Justice and Criminal Evidence Act 2021
<b>ECHR</b>	European Convention on Human Rights

### 1.3 Legislation

#### Family and Civil Proceedings

Section 65 of the Domestic Abuse Act 2021 (the DAA) inserts new Part 4B into the MFPA. 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 DAA inserts a new Part 7A into the CA which makes similar provision in civil proceedings.

The Part 4B and Part 7A prohibitions of cross-examination in person automatically apply in three 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 MFPA);
- 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 CA);

<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 MFPA and sections 85F and 85H of the CA refer to “victim”. We acknowledge that some prefer alternative terms.

- 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 the injunction is in force (section 31S of the MFPA and section 85G of the CA); 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 MFPA and section 85H of the CA).

The lists of specified offences, on-notice protective injunctions, and specified evidence are in [xx D/N Insert name of regulations and attach link when available ].

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 involving litigants in person having 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 MFPA and section 85J(4) of the CA.

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 by the court.

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.

### **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 MFPA and Part 7A of the CA 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 MFPA and section 85K of the CA 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>2</sup>.

- If the court concludes that there is no satisfactory alternative under section 31W of the MFPA or section 85K of the CA, 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 MFPA or section 85K(5) of the CA, 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 MFPA and section 85K(6) of the CA). 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 MFPA or section 85K(6) of the CA, the qualified legal representative is publicly funded and paid from central funds as set out in section 31X of the MFPA and section 85L of the CA. They will be paid in accordance with the remuneration scheme set out in the [xx D/N Insert name of regulations and link when available].

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.

#### **1.4 Policy Background**

The amendments to the MFPA 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 DAA, 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, the 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, a situation which could, in the words of the former President of the Family Division, “*sometimes amount, and on occasion quite*

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<sup>2</sup> See paragraph 5.3 of the FPR Practice Direction 3AB.

*deliberately, to a continuation of the abuse.*<sup>3</sup> The provisions of section 65 of the DAA 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 DAA.

Similar protections to prohibit inappropriate in person cross-examination exist in criminal proceedings under sections 34 - 38 of the Youth Justice and Criminal Evidence Act 1999 (YJCEA). These provisions have been in force for over twenty years, at the time of publication. Sections 34 and 35 of the YJCEA 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 MFPA and Part 7A of the CA, 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 DAA therefore, to a large extent, replicate the provisions in sections 34 - 38 of the YJCEA to provide broad parity in the cross-examination protections in the family, civil, and criminal court jurisdictions.

#### **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 the 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.

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<sup>3</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.

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 MFPA and section 85K of the CA 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>4</sup> Further, an individual has the right, to confront a party or witness who makes an allegation.<sup>5</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>6</sup>

**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>7</sup>

The intention of the procedural protections in Part 4 of the MFPA and Part 7A of the CA 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.

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<sup>4</sup> *Regner v. the Czech Republic* App No 35289/11 at [146].

<sup>5</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>6</sup> *ibid* at [58].

<sup>7</sup> Per Lord Dyson MR (as he then was) in *Re K and H (Children)* [2015] EWCA Civ 543 at [47].

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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