

DRAFT STATUTORY GUIDANCE

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 Significance 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 Registering with the Legal Aid Agency



2. Court Appointed Qualified Legal Representative : Remit and Responsibilities

2.1 Purpose of the Role

The purpose of the cross-examination provisions in the DAA 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 DAA 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:

- a) they are not a representative of the court which appoints them but they are accountable to the court;
- b) they are appointed to cross-examine in the interests of the party (section 31W(6) of the MFPA and section 85K(6) of the CA ; and
- c) they are not responsible to the party (section 31W(7) of the MFPA and section 85K(7) of the CA). 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 advocate to the court 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.

While this is a unique role, it is not a new one, already being well established in criminal proceedings under section 38 of the YJCEA (see section 1). It is a role which is not unlike the role of a qualified legal representative in criminal proceedings under provisions in section 38 of the YJCEA . However, while the advocate in the equivalent criminal scheme is only ever appointed to represent 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 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. 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 in criminal proceedings were examined in the case of *ABBAS v CPS* 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 YJCEA) 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 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 Higher Rights of Audience. They must have undertaken advocacy and vulnerable witness/domestic abuse training (or have made a commitment to attend such training within six months) that is provided or approved by their professional body and must have the necessary skills and experience in cross-examining vulnerable witnesses in contested hearings. Qualified legal representatives with additional specialist domestic abuse training such as coercive and controlling behaviour, economic abuse, psychological abuse and post-separation abuse can also register on the court list of qualified legal representatives.

2.3 Appointment of the Qualified Legal Representative by the Court

Local courts will maintain a list of qualified legal representatives available to undertake the cross-examination work in family proceedings. HMCTS will contact the next 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 referral, 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 solicitors 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 a witness or witnesses specified in the court order whom the prohibited party is prevented from questioning in person. Witnesses that are to be cross-examined will be named in the same order which directs the appointment of 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 should 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, for any other reason, they will also need to inform the court immediately. In such instances, 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 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)* [2015] EWCA Civ 27 at [57] 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 he or she wishes to be put to the witness. The qualified legal representative may take such suggestions into consideration, but 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' evidence 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, has obtained sufficient information about the 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 two court-appointed qualified legal representatives to cross-examine on behalf of each party) has access to the full case bundle and by when it must be supplied. The appointed qualified legal representative must ensure that he or she is fully familiar with the contents of the case 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 party and the court the issues that will be covered in the cross-examination. Establishing the matters 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. 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 also 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 proceedings to disclose material that is unhelpful to the party's case.

The prohibited party may suggest questions he or she wishes to be put to the witness or witnesses. 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 likely to enable the court to be provided with information to allow it to reach a proper 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 cross-examination, at no stage should the qualified legal representative take or be bound by 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 explain 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 apparent, the qualified legal representative should bring to the court's attention any issues relating to the party's capacity to participate fully in and understand the proceedings. The qualified legal representative should also alert the court to the potential need for special measures or an 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..

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 may give directions on which hearings the qualified legal representative should attend.

3.5 Conducting the Cross-Examination

The qualified legal representative should then 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, with due regard paid to any vulnerabilities known to the qualified legal representative.

The qualified legal representative is not expected to make submissions to the court on behalf of the 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, the court will maintain a list of qualified legal representatives. Local courts will operate 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 should write to their local courts. Similarly, lawyers who wish to come off the list should also write to their local courts in good time to inform the court 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 those who currently undertake legal aid work.

5.2 Remuneration for Court Appointed Qualified Legal Representatives and Registration with the Legal Aid Agency

The fee 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 which are at [\(add link when available\)](#). Fees will be paid out of central funds and payments will be administered by the Legal Aid Agency.

In order to receive payment for work undertaken as an advocate under the Cross-Examination Advocacy Scheme (CAS), the advocate must be set up with a legal aid account number. For the purpose of clarity, the CAS is not a legal aid scheme, but payments are issued by Legal Aid Agency through a legal aid account number.

Advocates with existing legal aid accounts do not need to apply for a new account. Only advocates with no active legal aid account need to apply.

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

Update your details with LAA - GOV.UK (www.gov.uk)

If you are a solicitor advocate, you should complete form AC1A. The following document should also be submitted, without these documents, we will not be able to create the account number.

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

o A copy of their certificate of High Rights of Audience

If you are a barrister in independent practice, you should complete form AC1B and submit the following documents:

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

All completed application forms should be emailed to:

ProviderRecords-London@justice.gov.uk

Further details on how to claim for work is set out in Costs Guidance. produced jointly by MoJ and the Legal Aid Agency which is available at [xxxxx \(add link when available\)](#).

DRAFT