

**DRAFT STATUTORY GUIDANCE ON THE CROSS-EXAMINATION PROVISIONS OF THE DOMESTIC ABUSE ACT 2021**

**SUBMISSION FROM THE FAMILY JUSTICE COUNCIL**

**Introduction**

1. The Family Justice Council welcomes the opportunity to comment on the draft Statutory Guidance to accompany s.65 of the Domestic Abuse Act 2021.
2. The Statutory Guidance provides an important supplement to the new Part 4B of the Matrimonial and Family Proceedings Act 1984 and the proposed Practice Direction 3B of the Family Procedure Rules. It provides essential guidance on the role of the qualified legal representative who may be appointed by the court to conduct cross-examination on behalf of a prohibited party, and the mechanisms by which qualified legal representatives will be identified, appointed and paid. It is crucial that the guidance provides sufficient detail to ensure that the matters it covers are clearly understood and that it can be implemented successfully and consistently throughout England and Wales.
3. The Family Justice Council is mindful of the findings of the Harm Panel report (*Assessing Risk of Harm to Children and Parents in Private Law Children Proceedings*, Ministry of Justice, 2020), that consistent implementation of measures to ensure that the risk of harm from domestic abuse is identified and addressed has been hampered by structural barriers including resource limitations, a pro-contact culture, silo working and the adversarial court process. The Council is concerned that the successful and consistent implementation of the cross-examination scheme should not be hampered by the same barriers. In our view the Statutory Guidance could be strengthened in order to reduce the risk of this occurring.

**Section 1 of the Guidance**

1. Section 1 introduces the Guidance and sets out the legislative and policy background to the cross-examination scheme.
2. Section 1.1, as currently drafted, refers only to the automatic prohibition of perpetrators or alleged perpetrators of abuse from conducting direct cross-examination of their victims in family proceedings. We consider it essential that this section also refer to the prohibition of victims or alleged victims of abuse from having to conduct direct cross-examination of their perpetrators or alleged perpetrators; and to the fact that an alleged perpetrator or victim may be prohibited from cross-examining either automatically or by direction of the court. Both of these matters are referred to in section 1.3, but they need to be stated and kept in mind from the very outset of the guidance, as they frame the logic of the subsequent discussion and proposals.
3. The third paragraph of section 1.1 refers to the statutory role of the advocate and the principles and limitations which are distinctive to it. In our view, as elaborated further below, the Guidance could be much clearer and more specific about those principles and limitations in order to provide a more secure basis for the advocate’s actions and decisions.
4. In the Glossary of Terms in section 1.2 we take the definition of ‘qualified legal representative’ to mean that the person appointed to conduct cross examination must be a qualified barrister or solicitor with a current practising certificate, but this could be spelled out more clearly.
5. We suggest that the Glossary of Terms should also include a definition of ‘witness’.
6. In section 1.3 on p.4 of the draft Guidance there is a list of dot points which sets out the steps that must be followed under Part 4B of the MFPA prior to the appointment of a qualified legal representative to conduct cross-examination. The first dot point refers to the Court of Appeal decision in *Re K and H (Children)*, and includes a quotation to the effect that in ‘simple straightforward’ cases, questioning by the judge is likely to be the preferred option. However this quotation is taken out of context. The Court of Appeal decided this case in the absence of any ability for the court to appoint an advocate to conduct cross-examination and it is very unlikely it would have reached the same conclusion had that facility existed. It is wrong to suggest that the preferred option after the enactment of Part 4B will remain the same as the preferred option before its enactment.
7. We note that the proposed Practice Direction 3B clearly states in paragraph 5.3 that ‘The court’s consideration of a satisfactory alternative means to cross-examination in person under paragraph 5.1 does not include the court itself conducting the cross-examination on behalf of a party’.
8. The second dot point of the list on p.4 suggests that another option might be the use of pre-recorded evidence from prior proceedings. It is not clear what kind of pre-recorded evidence is envisaged here, and we fail to see how this would provide a satisfactory alternative to cross-examination by a qualified legal representative. If the pre-recorded evidence is simply evidence in chief, it does not substitute for the evidence being tested. If the pre-recorded evidence includes cross-examination of a party, that cross-examination was presumably for the purpose of different (perhaps criminal) proceedings, in which a different standard of proof and different legal tests apply, so the cross-examination may not be helpful to the family court. In this context, we note the Court of Appeal’s warning in *Re H-N* [2021] EWCA Civ 448 that family courts engaged in fact-finding should not attempt to apply criminal legal tests or concepts but keep in mind the very different objectives of fact-finding in private law children cases.
9. In any event, pre-recorded evidence may be available where a perpetrator of abuse is prohibited from cross-examining their victim, but it is very unlikely to be available where a victim of abuse is prohibited from having to cross-examining their perpetrator, or where a vulnerable witness is prohibited from having to cross-examine an expert witness.
10. The second paragraph of section 1.4, like paragraph 1.1, refers only to situations where a party would be cross-examined in person by their abuser. There should also be a reference to:
* situations where a party would be forced to cross-examine their abuser in person, and an explanation of the problems this created, including the traumatic effect on the victim and their inability effectively to challenge the evidence of the abuser.
* situations where a vulnerable party would be forced to cross-examine an expert witness who had provided an assessment to the court, and an explanation of the problems this created for both the party’s psychological wellbeing and the expert’s duty of care towards the party (see Jaime Craig, ‘The risks to litigants in person when cross-examining psychologist expert witnesses’, *Family Law* (January 2018) at <https://www.familylaw.co.uk/news_and_comment/the-risks-to-litigants-in-person-when-cross-examining-psychologist-expert-witnesses>).
1. In section 1.4.2, the last full paragraph on p.6 states that ‘The intention of the procedural protections in Part 4 of the MFPA is to give the court a range of tools to ensure that the prohibited party’s Article 6 and 8 ECHR rights are protected’. We are concerned that this wording gives the false impression that the prohibited party’s Article 6 and 8 rights are absolute and the only consideration for the court. The Guidance should acknowledge that rights under Articles 6 and 8 are qualified rights, and that the court also needs to consider the Article 6 and 8 rights of the other party and the Article 8 rights of the child, in order to strike an appropriate balance between them.
2. We suggest that the final paragraph of Section 1 of the draft Guidance introduces an impermissible gloss on the statute and should be deleted. The statutory scheme in Part 4B of the MFPA does not include any test of ‘necessary to adequately protect ECHR rights’. It is therefore ultra vires for such an additional test to be introduced by means of Statutory Guidance. The conditions for automatic and discretionary prohibitions specified in Part 4B, and only those conditions, govern the operation of the cross-examination scheme.

**Section 2 of the Guidance**

1. Section 2 sets out details of the scheme for the appointment and regulation of qualified legal representatives.
2. As indicated above, we do not agree with the contention in section 2.2 that the appointment of an advocate by the court ‘is most likely to occur in cases which are particularly factually complex or sensitive’. The Guidance should not be premised on this assertion or assumption, which is likely to reproduce and reinforce the barriers to effective and consistent protection from harm identified by the Harm Panel report.
3. The second paragraph of section 2.1 says that an appointed advocate’s role is not to be a legal representative and not to be an *amicus curiae*, but it does not sufficiently specify what exactly the role is and what it entails. It will be difficult for the appointed advocate not to stray into acting as the prohibited party’s representative generally if it is not clear where the boundary lies and what the advocate can and cannot do. The touchstone offered in the previous paragraph of ‘ensuring the fairness of the proceedings is maintained’ is open to very wide interpretation.
4. Likewise, the ‘essence and significant impact’ test suggested in sections 2.2 and 2.3 does not resolve the issue. First, this test is taken from a different context. *Re S-W* [2015] EWCA Civ 27 was a public law case in which the issue concerned the judge making final orders at a case management hearing. The quoted paragraph from Munby LJ was strictly *obiter* and did not relate to the circumstances of a party being prohibited from cross-examining another party in person. The Statutory Guidance places an unwarranted emphasis on the words of Munby LJ and erects them into a test which is not authorised by the primary legislation.
5. Secondly, reliance on this ‘test’ appears to be predicated on its application to an alleged perpetrator of domestic abuse cross-examining their victim. It is not clear that it would be adequate to ensure the fairness of proceedings where the qualified legal representative is appointed to cross-examine an alleged perpetrator on behalf of a victim of domestic abuse, or to cross-examine an expert witness on behalf of a vulnerable party.
6. Thirdly, the test itself is open to wide interpretation and may be difficult to apply in practice. What constitutes the ‘essence’ of a party’s case may be hard to determine in the case of a litigant in person who has little understanding of the relevant legal and factual issues. And what parts of the witness’s evidence may have a ‘significant’ impact on the outcome of proceedings may likewise be difficult to determine and subject to diverse opinions when a child’s welfare is at stake.
7. We suggest that the Guidance should draw from the experience in criminal proceedings, appropriately adapted to the context of family proceedings, to provide more detail on the role of the appointed advocate. Sufficient guidance for advocates is essential to ensure that the rights of prohibited parties are protected, that children are protected from the risk of future harm, and that advocates are protected from the risk of professional liability. A nationally approved explanation for prohibited parties of the role of the appointed advocate would also be welcome.
8. With regard to section 2.3.1, we are of the view that the appointed advocate would normally be required to read the full court bundle in order sensibly to conduct the cross-examination. The remuneration provided to advocates should reflect this and include time for reading the bundle and preparation on that basis before the hearing.
9. With regard to section 2.3.3, we are of the view that the appointed advocate would normally be required to meet with the prohibited party in order sensibly to conduct the cross-examination and to assist the court. The appointed advocate must understand the case they are being asked to present and with litigants in person, this is very likely to require eliciting through conversation with the party rather than being evident on the papers. This is even more likely to be the case where the prohibited party requires an interpreter or an intermediary to communicate with the court. Whether or not written information on the role of the advocate, as suggested above, is provided to the prohibited party, it will also be necessary for the advocate to explain to or to check the party’s understanding of the nature of their professional relationship and obligations. Furthermore, it is difficult to see how prohibited parties could be afforded procedural justice or the protection of their Article 6 rights if they are denied the opportunity to meet with the advocate who will conduct cross-examination on their behalf. The notion that a victim of domestic abuse should be further disempowered in proceedings by not being able to meet with the advocate appointed to cross-examine their abuser is not something that the Statutory Guidance should encourage or endorse. Meetings with parties before the relevant hearing should also be built into the fee structure for advocates.
10. Section 4 proposes that each court should maintain a list of lawyers interested in undertaking cross-examination work. We consider this to be unrealistic for three reasons. First, it is not clear what resources will be provided to courts to enable them to establish and manage these lists. Current resources are unlikely to be sufficient to accommodate this significant new task. Secondly, we are concerned that cross-examination work is unlikely to be attractive to sufficient numbers of suitably qualified lawyers. Given that there are currently areas where lawyers willing to do legal aid work are in short supply, it is predictable that some courts will find themselves with few if any lawyers on their list, rendering the scheme locally unviable. Thirdly, we believe that the work is more likely to be attractive to barristers than to solicitors, but barristers are not geographically tied in the same way that solicitors’ firms are. Would barristers be expected to write and express an interest to all the courts where they might possibly attend?
11. In our view, it would be more rational and realistic for the list/s of qualified legal representatives to be set up and managed by HMCTS, the Legal Aid Agency or some other administering agency on a national or regional basis.
12. It is also not clear in section 4 what is meant by a ‘rota’ system. If this simply means that advocates should be called upon in turn with the aim that everyone on the list should receive approximately equal amounts of work, it will be difficult to achieve given the likely differences in availability when appointments come to be made. ‘Busy’ lawyers will rarely be appointed, while those with less work coming from elsewhere (perhaps due to being more junior or less skilled) will end up with a higher volume of appointments.
13. We would suggest that what is required is effectively a duty lawyer scheme, whereby participating lawyers would commit to being available for appointment on one or two days per month. Given the expected volume of appointments, we estimate that 2 lawyers per day will need to be available for every court. In order to make the scheme workable, the remuneration structure should include payment for each day of being ‘on duty’ for appointment. A suitable daily rate should cover the opportunity cost of being unavailable for other work if no appointment is made. If an appointment is made the payment would cover the receipt of directions, reading the bundle and meeting with the prohibited party. A further payment would then be made for preparing for and conducting cross-examination during each hearing required.
14. We endorse the proposal in section 5 that court appointed advocates should have sufficient training, skills and experience to conduct cross-examination of or on behalf of vulnerable parties. However we foresee several logistical difficulties with the proposal as currently set out and suggest that it requires further development.
15. First, we consider that the eligibility criteria should be made more specific. What advocacy and vulnerable witness training will qualify? What are the ‘necessary’ skills and ‘sufficient’ experience required for inclusion in the scheme? Further specification is necessary in order to ensure a consistently high quality of advocacy across England and Wales.
16. Secondly, what infrastructure will be put in place to ensure that lawyers wishing to participate in the scheme are able to access the necessary training? We are aware, for example, that the Family Law Bar Association has recently introduced specialist vulnerable witness advocacy training, but this is only just being rolled out with relatively few places available over the coming few years. There is a risk that limited availability of training could restrict the number of lawyers eligible to conduct cross-examination. Will the implementation of s.65 of the Domestic Abuse Act be accompanied by increased training provision?
17. Thirdly, how will eligibility be verified? The need to do so will necessarily impose an administrative cost which reinforces the suggestion made above that the scheme should be professionally administered at a regional or national level rather than being delegated to each court. If verification of eligibility is left to local courts to perform, we are concerned that the standards applied will be inconsistent, or possibly in some cases will not be applied at all, especially if very few lawyers put themselves forward to participate.
18. Fourthly, it is important that the cost to the potential advocate of meeting the eligibility criteria does not operate as a disincentive to participation in the scheme. This needs to be addressed both in the remuneration provided, which must reflect the level of skill and experience required, and in the cost of training. If training costs are too high relative to the level of remuneration being offered, it would be rational for lawyers to decline to participate in the scheme. Consideration should be given not only to the availability of training, as indicated above, but also to the cost of training and the question of whether subsidisation of training costs is required.
19. Section 7 envisages that funding for the scheme will be administered by the Legal Aid Agency, meaning that participants in the scheme will need to be registered with the LAA. We foresee two difficulties with this proposal. First, it may operate as a disincentive for solicitors who do not currently hold a legal aid contract. Registration for the scheme must be sufficiently straightforward – and separate from and less onerous than the requirements for obtaining a legal aid contract – in order to obviate this risk.
20. Secondly, it is not clear how individual barristers will gain registration. At present, barristers do not have a direct relationship with the LAA; payment to them is channelled via the solicitor whose legal aid contract covers their work on the relevant case. Yet we believe that barristers are more likely than solicitors to put themselves forward for the advocacy scheme, and so some new mechanism will need to be devised to enable them to obtain payment. Given this, it is not clear why payments should be administered by the LAA rather than, for example, the current payment arrangements for criminal law being extended to family proceedings.
21. The court appointed advocates’ fee scheme policy and rates are to be set out in separate regulations and we are aware that the Ministry of Justice is consulting separately with the Law Society and Resolution on this issue. We draw attention to the points made above about the need for the remuneration structure to be sufficiently attractive to incentivise an adequate number of high calibre advocates to participate. As suggested above, this should cover availability, receiving directions, reading the bundle, meeting with the prohibited party, preparing for cross-examination and conducting cross-examination, as well as attendance on other hearing days if required. The payment structure would need to accommodate preparation that had been undertaken even if the matter is settled or the hearing and cross-examination does not proceed for any other reason.

**Family Justice Council**

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