St.Mary's
FAMILY LAW SPECIALISTS

Qualified Legal Representatives: The law and the current reality

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The Domestic Abuse Act 2021 seeks in the words of the Home Office to:

'further improve the effectiveness of the justice system in providing protection for victims of domestic abuse and bringing perpetrators to justice.'

As part of that stated, and objectively entirely justifiable aim, it sought to do the following (in so far as is relevant to this article):

- *Establish a statutory definition of domestic abuse;*
- *Prohibit perpetrators of abuse from cross-examining their victims in person in the civil and family courts in England and Wales;*
- *Create a statutory presumption that victims of domestic abuse are eligible for special measures in the criminal, civil and family courts.*

The act itself specifically brings in Rule 3A[1], PD3AA[2] and PD3AB[3] into the Family Procedure Rules together with an amendment to the Matrimonial and Family Proceedings Act 1984. These rules and amendments now create the mechanism through which oral evidence in cases, which include either proven or alleged domestic abuse, must be managed.

This article will seek to explain in a staged manner how the court is likely to approach this with a particular emphasis on the issue of Qualified Legal Representatives (QLRs).

Is there an automatic prohibition?

As per the aims of the legislation, s65 Domestic Abuse Act 2021 inserts into the Matrimonial and Family Proceedings Act 1984 an automatic bar on some parties being able to cross-examine another party.[4] The prohibition applies in all family proceedings, not just s8 private children, but also extends into matrimonial finance and applications for injunctions. The legislation only applies to cases that started on or after 21 July 2022.

The legislation now provides that the following is prohibited:

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[1] https://www.justice.gov.uk/courts/procedure-rules/family/parts/part-3a-vulnerable-persons-participation-in-proceedings-and-giving-evidence
[2] https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-3aa-vulnerable-persons-participation-in-proceedings-and-giving-evidence
[3] https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-3ab-prohibition-of-cross-examination-in-person-in-family-proceedings-under-part-4b-of-the-matrimonial-and-family-proceedings-act-1984
[4] https://www.legislation.gov.uk/ukpga/2021/17/section/65/enacted

1. Cross examination by persons convicted of (or given a caution for) a 'specified offence'. Similarly the victim of that specified offence is prohibited from cross examining the person convicted or cautioned[5];

2. Cross examination by either person against whom an on-notice protective injunction is in force, or a person who is protected by an on-notice protective injunction[6];

3. Cross examination by either the victim or the perpetrator where 'specified evidence' has been adduced that there has been domestic abuse[7].

The list of specified offences is comprehensive and contains not only domestic abuse related offences.[8] The list can be found in the *Prohibition of Cross Examination in Person Regulations 2022* at Schedule 1. The same 2022 regulations also contain definitions of what is meant by protective injunctions as well as 'specified evidence'. The definition of specified evidence appears similar to that which is required to qualify for legal aid by the legal aid agency.

There are thus now three headers under which either a victim or a perpetrator may now be automatically debarred from cross examining the other. This opens the theoretical possibility that both parties (if both in person) are debarred from cross-examining the other or being cross examined by them.

Is there a discretionary ground to prohibit cross examination?

If the automatic presumption applies then the court will move to consider how else to deal with evidence. PD3AB 3.1 provides that the court must consider whether a party is automatically prohibited from cross-examining in person a witness '*as soon as possible after the start of proceedings and continues until the conclusion of the proceedings'.* The court also is obliged to consider whether any of the discretionary grounds apply if the automatic grounds do not.

The legislation contains a discretion for the court for all cases that do not fall within the automatic categories. S31U MFPA 1984 now provides that the court MAY give a direction prohibiting a party from cross-examining a witness in person if:

1. The quality condition or the significant distress condition is met, AND
2. It would not be contrary to the interests of justice to give the direction.

[5] S31R MFPA 1984
[6] S31S MFPA 1984
[7] S31T MFPA 1984
[8] Prohibition of Cross Examination in Person (Civil and Family Proceedings) Regulations 2022 Schedule 1 https://www.legislation.gov.uk/uksi/2022/568/schedule/1/made

The quality condition is defined as being met if *the quality of the evidence given by the witness on cross examination:*

a) Is likely to be diminished if the 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

The significant distress condition is defined as being met if:

a) *The cross examination of the witness by the party in person would be likely to cause significant distress to the witness or the party;*
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.*

It is notable that both of these grounds are wide in their scope but that also the court can determine that the conditions are met either by an application by a party, but also of its own motion. The grounds also apply part way through a party's evidence, not just from the outset, giving the court the power to prohibit further cross examination that has started. Also notably these conditions apply to witnesses as well as to the party themselves.

S31U(5) provides a list of conditions that the court must have regard to, *among other things,* when considering if the quality condition or the significant distress condition are met. These are the following:

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.

There is further clarification within the section that the quality of a witness evidence relates *'to its quality in terms of completeness, coherence and accuracy.'* Similarly coherence is said to refer to *'a witnesses ability in giving evidence to give answers which*

address the questions put to the witness and can be understood, both individually and collectively.

In the event that a direction under the discretionary grounds is made it has a binding effect from the time it is made until the witness is discharged, notably it is not just at the conclusion of their evidence.[9] If the court grants or refuses an application under the discretionary grounds it predictably has to state its reasons for doing so.[10]

One of the grounds apply – What next?

In the event that the court determines that either one of the automatic grounds or a discretionary ground apply, and an individual should be prevented from cross-examining a witness in person, then the court is required to consider whether there is a satisfactory alternate means for[11]:

a) *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*

It is unclear from the act what was thought could constitute a 'satisfactory alternative' but it is likely to be limited to:

1. Does the party have sufficient funds to be able to pay for representation to undertake that cross examination for them (not QLRs at this stage);
2. Is there a video recorded interview by the police where the victim makes a complaint about the alleged behaviour, however it is unlikely the police would have cross examined a victim in interview.

The act provides that parties may be invited to make representations about what might constitute 'satisfactory alternatives.' Crucially PD3AB explicitly says that:

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

However confusingly the explanatory notes to the 2021 act provides the following[12]:

> *Firstly, the court must consider whether there is a "satisfactory alternative" means for the witness to be cross-examined, or of obtaining the evidence that the witness might have given under cross-examination.* ***An example of this might include the judge putting questions to the witness, where appropriate.***

[9] s4.1 PD3AB justice.gov.uk/courts/procedure-rules/family/practice_directions/practice-direction-3ab-prohibition-of-cross-examination-in-person-in-family-proceedings-under-part-4b-of-the-matrimonial-and-family-proceedings-act-1984#4
[10] S31V(4) MFLA 1984
[11] S31W MFLA 1984
[12] https://www.legislation.gov.uk/ukpga/2021/17/pdfs/ukpgaen_20210017_en.pdf

Anecdotally it is understood that different judges are interpreting these disparate sentences in different ways. The statute doesn't specifically prevent the judge asking pre-prepared questions, however that could be argued to be the intent of PD3AB. However the situation is at best unclear, which is unhelpful as this was the crux of the problem the legislation really sought to resolve.

There is no satisfactory alternative – What next?

If the court goes through the process and determines that a ground to prohibit cross examination (either automatic or discretionary) exists and that there is no 'satisfactory alternative' then r6.1 PD3AB provides that *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.*

If the lay party fails to appoint a QLR of their own volition, then r5 & 6 s31W MFPA 1984 provides that the court must consider if it is necessary for the witness to be cross-examined by a QLR appointed by the court. If the court decides that it is necessary then the court must appoint such a QLR (as chosen by the court) to cross examine the witness in the interests of the party.

Notably the QLR is not responsible to the party, merely to the court. There is no contractual relationship between the two and the QLR is not required to give submissions, just the cross examination of specified witnesses. Of course the court could conclude that more than one QLR is required for multiple parties.

There are then some set directions as specified in r7 PDA 3AB including access to a bundle, provision for them to attend on set dates and specifying who is to be cross examined. Crucially (to the volume of representatives available) is the requirement that the appointment only terminates at the conclusion of the proceedings or when so ordered by the court. They are required to be told the outcome of the hearing.[13] QLRs are provided

[13] R8.2 PD3AB

with detailed guidance from the Lord Chancellor[14] which goes beyond the scope of this article.

The current reality & concluding thoughts

As above this current regime only applies to proceedings that started on or after 21 July 2022 and thus it is only now that cases will now be starting to filter into contested fact-finding hearings where QLRs may be present.

There can be no doubt as to the sense behind this legislation. The effect of the LASPO cuts was to heavily reduce the availability of legal aid within all types of family law work save for public law cases. This then led to a rise in litigants in person, many of whom were accused of domestic abuse by their ex-partners. This legislation very obviously seeks to limit the impact of the victim either being cross examined, or having to cross examine the perpetrator of their abuse.

The reality is that the automatic bars on cross examination are very broad, realistically encompassing all cases where one party has managed to secure legal aid. Even when those automatic grounds are not met the discretionary grounds are also extremely broad, to seek to protect those who didn't fall within the automatic grounds.

The legislation therefore appears to be well meaning and will no doubt bring within it those victims (or alleged victims) it sought to protect. The difficulty however (and the crux of the likely problem) is that it will bring in too many individuals into the scheme than the system can cope with.

As above this system applies to all family law proceedings. Everyone who works in this area knows how pressed all courts and all representatives are, and have been for a long time. To a large extent this will not apply to public law proceedings (there is funding often available) but it may occasionally apply to some interveners within those proceedings, or wider family members who do not get legal aid.

Of particular relevance is that the type of hearings undertaken will not simply be fact-finding hearings in s8 proceedings. The cross examination need not be about the alleged abuse itself. Financial remedy proceedings rarely involve contested issues of domestic violence, however given the scope of the barriers within the statute, the cross examination may need to be about the pre-prepared case the party is running. The QLR by implication would need to be a financial remedy practitioner to know how to undertake that cross examination, including how those arguments might be framed for the court in closing submissions, which they would never end up giving.

The most common occurrence will however be within s8 applications (fact-finding hearings and final hearings) and in final hearings for FLA injunction applications. The statistics published by CAFCASS suggest that in since April 2022 CAFCASS has received 36,487 new private law cases. In February 2023 there were over 33,000 open cases new private law cases

[14]https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1101848/final-statutory-guidance-role-of-the-qualified-legal-representative.pdf

were received by CAFCASS. In Nottingham Family Court alone some 944 cases have been issued for a s8 order in the past year.

It is not clear from the statistics how many of those will fall within one of either the automatic or discretionary grounds, however it is likely to be a significant percentage. Thus this represents an enormous increase in the demand for publicly funded legal services, for all hearings requiring evidence to be given, at a time when the system is struggling to meet the demands that already exist.

Sadly the problem is even more stark. Anecdotally the take up to become QLRs has been very low. Advocates appear to have been put off by the perceived lower rates of pay (not actually correct when the figures are considered) or just a lack of need to undertake such work. It is also perceived to be a different type of role, not formally having a client and not actually putting the case of your client. Anecdotally the lists held by the court are very short or non-existent when they are surely soon going to need to be extensive to manage the upcoming demand.

It is unclear how the supply can or will be increased to meet that demand. Thus whilst the intentions may be good the reality may become that very little will change and courts will return to having to undertake the cross examination itself. The court when undertaking the test in r6.2 PD3AB may simply say that it is not in the interests of justice as it will cause too much delay or too much uncertainty even try and have a QLR appointed. The ambiguity raised above regarding whether the judge can actually ask pre-prepared questions (as historically was the case) will become a more pressing issue with judges likely forced to decide whether to take a pragmatic approach or strictly apply r5.3 PD3AB meaning a logjam is created.

I hope that in 12 months the worries expressed here are entirely unfounded, but it is hard to see how they will be given there doesn't seem to be a satisfactory alternative available at present to the inherent problems this legislation has created, albeit with entirely justifiable aims.