

**FAMILY PROCEDURE RULE COMMITTEE CONSULTATION ON PROPOSED NEW PRACTICE DIRECTION 3B TO PROVIDE GUIDANCE ON THE CROSS-EXAMINATION PROVISIONS IN THE DOMESTIC ABUSE ACT 2021**

**RESPONSE FROM THE FAMILY JUSTICE COUNCIL**

**Introduction**

1. The Family Justice Council welcomes the opportunity to comment on proposed new Practice Direction 3B.
2. This response focuses, as requested, on the proposed terms of the Practice Direction. The Council notes that it also intends to provide a response to the Ministry of Justice on the draft statutory guidance to accompany section 65 of the Domestic Abuse Act 2021.
3. One matter that the Council wishes to bring to the attention of both the FPRC and the MoJ relates to the list of domestic violence offences set out at Annex C. The Council was surprised to note that this list does not include breach of a Domestic Violence Protection Notice or Domestic Violence Protection Order. We are sure this is an oversight which we hope will be remedied in the ultimately published regulations.
4. In response to Question 1 of the consultation, the Council considers that the draft Practice Direction could be clarified and include greater detail, and would benefit from further expansion in several respects. Specific information on these areas is set out in the remainder of this response.

**Paragraph 2 – Raising the Issue of Automatic Prohibition on Cross-Examination in Person**

1. We suggest that further guidance could be provided in paragraph 2.1 on the means by which the court may be informed that the circumstances set out in sections 31R, 31S and 31T of the 1984 Act have arisen or may arise. In particular, it should be made clear that relevant information may be provided at any stage of the proceedings, and by means not confined to the Cafcass or Cafcass Cymru safeguarding letter. A non-exhaustive list of who may provide relevant information to the court would be helpful here (e.g. either of the parties, Cafcass or Cafcass Cymru, a local authority social worker, a specialist domestic abuse advocate, or any witness in the proceedings).

**Paragraph 3 – Court Directions Regarding Cross-Examination in Person**

1. We are not convinced that either para 2 or para 3.1 as currently drafted fully conveys the intention set out in paras 15 and 16 of the consultation document of encouraging the court to be proactive to consider whether a party is automatically prohibited from cross-examining in person under ss 31R-31T. We suggest that this may be addressed by specifying in para 3.1: “In every case where there are allegations of domestic abuse, the court must consider…”
2. In line with this, we also suggest that para 3.2 should specify that the court may make directions of its own motion under any of ss 31R-31U, or on application under s 31U.
3. We agree that it is sensible to provide in para 3.3 that an application for a direction under s 31U may be made orally or in writing.
4. There should be a cross-reference in para 3.3 to s 63 of the Domestic Abuse Act 2021 and rule 3A.2A of the Family Procedure Rules which automatically assume that an alleged victim of domestic abuse is a vulnerable party – that is, the ‘quality condition’ and the ‘significant distress’ condition in s 31U are automatically assumed to be met in the case of alleged victims of domestic abuse.
5. In addition to this, the paragraph should make clear that parties other than victims of domestic abuse may fulfil the criteria for a discretionary direction under s 31U. We would like to see specific reference made to circumstances of learning disability or significant mental health difficulties that create vulnerability. This does not mean, for example, that the fact that a party is accompanied by an intermediary automatically means that the relevant conditions will be made out. However, we suggest that if the court is ordering a psychological or psychiatric assessment of a party, it should at the same time consider whether to make a direction under s 31U.

**Paragraph 4 – Revocation of Court Direction Given Under Section 31U**

1. We do not foresee any difficulties with this paragraph.

**Paragraph 5 – Alternative Means to Cross-Examination in Person**

1. We are in full agreement with the FPRC’s view that judges should not conduct the cross-examination themselves on behalf of a party.

**Paragraph 6 – Qualified Legal Representative Appointed by the Court**

1. We do not agree that the date by which the legal representative’s details should be supplied to the court by the party should not be specified so as to provide a degree of flexibility to take account of the specific circumstances of the case. We believe there is real scope for the process of appointing a qualified legal representative to be exploited by a perpetrator of domestic abuse to (further) delay proceedings and increase stress and financial pressure on the victim. We are aware that this has been the early experience under the equivalent Australian scheme. We are therefore of the view that the Practice Direction should specify in para 6.1(c) that the party must notify the court of the identity and contact details of any such representative within 7 days unless otherwise directed in the interests of justice.
2. We consider that para 6 also needs to address the foreseeable situation where a party refuses to cooperate with their appointed legal representative. This again would have the effect of delaying proceedings and creating further stress and pressure for the victim of abuse while the legal representative sought directions from the court as to how to proceed. In order to obviate this undesirable possibility, we suggest that the Practice Direction should specify that where the court has made a direction under para 6.2(b)(ii):
* the party on whose behalf the legal representative has been appointed must confirm within 7 days whether they will cooperate with the conduct of cross-examination on their behalf;
* if the party declines to cooperate with their appointed legal representative, the matter will be listed for hearing on the basis of no cross-examination of the relevant witness or witnesses by or on behalf of that party.

**Paragraph 7 – Court Directions to Qualified Legal Representative**

1. We are firmly of the view that para 7.1 should provide that the whole of the court bundle should be provided to the appointed legal representative by default, rather than only those documents that are ‘material to the proceedings and the cross-examination’. This will preclude any argument and any need for the court to spend time determining which documents are ‘material’ and which are not, and will enable the legal representative to prepare properly for the cross-examination. We suggest that documents should only be excluded from disclosure to the appointed legal representative if one of the parties provides sufficient reasons, accepted by the court, as to why it should be excluded.
2. We consider that it would be helpful for the Practice Direction to provide further detail in para 7.2 as to the kind of directions the court may make, for example:
* what is agreed between the parties
* which witness or witnesses is or are to be cross-examined by the appointed legal representative
* the scope of cross-examination in relation to any of the witnesses
* the time allowed for cross-examination
* how the appointed legal representative may seek further directions from the court if required.
1. We further consider that the Practice Direction should specify that the court would normally hold a Ground Rules Hearing after the qualified legal representative has been appointed and before trial, and that such a hearing may be conducted remotely.
2. More generally, and as indicated at para 9 above, we would welcome explicit articulation between Practice Direction 3B and Practice Direction 3AA, in the text of both Practice Directions.

**Family Justice Council**

8 February 2022