

PART 23

RESTRICTION ON CROSS-EXAMINATION BY A DEFENDANT

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GENERAL RULES

When this Part applies

23.1. This Part applies where—

- (a) a defendant may not cross-examine in person a witness because of section 34 or section 35 of the Youth Justice and Criminal Evidence Act 1999^(a) (Complainants in proceedings for sexual offences; Child complainants and other child witnesses);
- (b) the court can prohibit a defendant from cross-examining in person a witness under section 36 of that Act^(b) (Direction prohibiting accused from cross-examining particular witness).

[Note. Under section 34 of the Youth Justice and Criminal Evidence Act 1999, no defendant charged with a sexual offence may cross-examine in person a witness who is the complainant, either—

- (a) in connection with that offence; or*
- (b) in connection with any other offence (of whatever nature) with which that defendant is charged in the proceedings.*

Under section 35 of the 1999 Act, no defendant charged with an offence listed in that section may cross-examine in person a protected witness, either—

- (a) in connection with that offence; or*
- (b) in connection with any other offence (of whatever nature) with which that defendant is charged in the proceedings.*

A ‘protected witness’ is one who—

- (a) either is the complainant or is alleged to have been a witness to the commission of the offence; and*

(a) 1999 c. 23; section 35 was amended by sections 139 and 140 of, and paragraph 41 of Schedule 6 and Schedule 7 to, the Sexual Offences Act 2003 (c. 42), section 148 of, and paragraphs 35 and 36 of Schedule 26 to, the Criminal Justice and Immigration Act 2008 (c. 4) and section 105 of the Coroners and Justice Act 2009 (c. 25).
 (b) 1999 c. 23.

- (b) *either is a child, within the meaning of section 35, or is due to be cross-examined after giving evidence in chief—*
 - (i) *by means of a video recording made when the witness was a child, or*
 - (ii) *in any other way when the witness was a child.*

Under section 36 of the 1999 Act, where neither section 34 nor section 35 applies the court may give a direction prohibiting the defendant from cross-examining, or further cross-examining, in person a witness, on application by the prosecutor or on the court's own initiative. See also rules 23.3 to 23.7.]

Appointment of advocate to cross-examine witness

23.2.—(1) This rule applies where a defendant may not cross-examine in person a witness in consequence of—

- (a) the prohibition imposed by section 34 or section 35 of the Youth Justice and Criminal Evidence Act 1999; or
- (b) a prohibition imposed by the court under section 36 of the 1999 Act.

(2) The court must, as soon as practicable, explain in terms the defendant can understand (with help, if necessary)—

- (a) the prohibition and its effect;
- (b) that if the defendant will not be represented by a lawyer with a right of audience in the court for the purposes of the case then the defendant is entitled to arrange for such a lawyer to cross-examine the witness on his or her behalf;
- (c) that the defendant must notify the court officer of the identity of any such lawyer, with details of how to contact that person, by no later than a date set by the court;
- (d) that if the defendant does not want to make such arrangements, or if the defendant gives no such notice by that date, then—
 - (i) the court must decide whether it is necessary in the interests of justice to appoint such a lawyer to cross-examine the witness in the defendant's interests, and
 - (ii) if the court decides that that is necessary, the court will appoint a lawyer chosen by the court who will not be responsible to the defendant.

(3) Having given those explanations, the court must—

- (a) ask whether the defendant wants to arrange for a lawyer to cross-examine the witness, and set a date by when the defendant must notify the court officer of the identity of that lawyer if the answer to that question is 'yes';
- (b) if the answer to that question is 'no', or if by the date set the defendant has given no such notice—
 - (i) decide whether it is necessary in the interests of justice for the witness to be cross-examined by an advocate appointed to represent the defendant's interests, and
 - (ii) if the court decides that that is necessary, give directions for the appointment of such an advocate.

(4) The court may give the explanations and ask the questions required by this rule—

- (a) at a hearing, in public or in private; or
- (b) without a hearing, by written notice to the defendant.

(5) The court may extend (even after it has expired) the time limit that it sets under paragraph (3)(a)—

- (a) on application by the defendant; or
- (b) on its own initiative.

(6) Paragraphs (7), (8), (9) and (10) apply where the court appoints an advocate.

(7) The directions that the court gives under paragraph (3)(b)(ii) must provide for the supply to the advocate of a copy of—

- (a) all material served by one party on the other, whether before or after the advocate’s appointment, to which applies—
 - (i) Part 8 (Initial details of the prosecution case),
 - (ii) in the Crown Court, rule 9.15 (service of prosecution evidence in a case sent for trial),
 - (iii) Part 16 (Written witness statements),
 - (iv) Part 19 (Expert evidence),
 - (v) Part 20 (Hearsay evidence),
 - (vi) Part 21 (Evidence of bad character),
 - (vii) Part 22 (Evidence of a complainant’s previous sexual behaviour);
- (b) any material disclosed, given or served, whether before or after the advocate’s appointment, which is—
 - (i) prosecution material disclosed to the defendant under section 3 (Initial duty of prosecutor to disclose) or section 7A (Continuing duty of prosecutor to disclose) of the Criminal Procedure and Investigations Act 1996(a),
 - (ii) a defence statement given by the defendant under section 5 (Compulsory disclosure by accused) or section 6 (Voluntary disclosure by accused) of the 1996 Act(b),
 - (iii) a defence witness notice given by the defendant under section 6C of that Act(c) (Notification of intention to call defence witnesses), or
 - (iv) an application by the defendant under section 8 of that Act(d) (Application by accused for disclosure);
- (c) any case management questionnaire prepared for the purposes of the trial or, as the case may be, the appeal; and
- (d) all case management directions given by the court for the purposes of the trial or the appeal.

(8) Where the defendant has given a defence statement—

- (a) section 8(2) of the Criminal Procedure and Investigations Act 1996 is modified to allow the advocate, as well as the defendant, to apply for an order for prosecution disclosure under that subsection if the advocate has reasonable cause to believe that there is prosecution material concerning the witness which is required by section 7A of the Act to be disclosed to the defendant and has not been; and
- (b) rule 15.5 (Defendant’s application for prosecution disclosure) applies to an application by the advocate as it does to an application by the defendant.

(9) Before receiving evidence the court must establish, with the active assistance of the parties and of the advocate, and in the absence of any jury in the Crown Court—

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- (a) 1996 c. 25; section 3 was amended by section 82 of, and paragraph 7 of Schedule 4 to, the Regulation of Investigatory Powers Act 2000 (c. 23) and section 32 of, and paragraphs 20 and 21 of Schedule 36 to, the Criminal Justice Act 2003 (c. 44). It is further amended by section 271 of, and paragraph 39 of Schedule 10 to, the Investigatory Powers Act 2016 (c. 25), with effect from a date to be appointed. Section 7A was inserted by section 37 of the Criminal Justice Act 2003 (c. 44). It, too, is amended by section 271 of, and paragraph 39 of Schedule 10 to, the Investigatory Powers Act 2016 (c. 25), with effect from a date to be appointed.
 - (b) 1996 c. 25; section 5 was amended by section 119 of, and paragraph 126 of Schedule 8 to, the Crime and Disorder Act 1998 (c. 37), in respect of certain proceedings only, and by section 33 of, and paragraph 66 of Schedule 3, paragraphs 20 and 23 of Schedule 36 and Parts 3 and 4 of Schedule 37 to, the Criminal Justice Act 2003 (c. 44). Section 6 was amended by paragraphs 20 and 24 of Schedule 36 and Part 3 of Schedule 37 to the Criminal Justice Act 2003 (c. 44). For transitional provisions and savings see paragraph (2) of Schedule 2 to S.I. 2005/950.
 - (c) 1996 c. 25; section 6C was inserted by section 34 of the Criminal Justice Act 2003 (c. 44).
 - (d) 1996 c. 25; section 8 was amended by section 82 of, and paragraph 7 of Schedule 4 to, the Regulation of Investigatory Powers Act 2000 (c. 23) and section 38 of the Criminal Justice Act 2003 (c. 44). It is further amended by section 271 of, and paragraph 39 of Schedule 10 to, the Investigatory Powers Act 2016 (c. 25), with effect from a date to be appointed.

- (a) what issues will be the subject of the advocate’s cross-examination; and
 - (b) whether the court’s permission is required for any proposed question, for example where Part 21 or Part 22 applies.
- (10) The appointment terminates at the conclusion of the cross-examination of the witness.

[Note. See section 38 of the Youth Justice and Criminal Evidence Act 1999(a). Under section 38(8) the references in that section to a ‘legal representative’ are to a representative who is an advocate within the meaning of rule 2.2.]

Under section 38(7) of the 1999 Act, where the court appoints an advocate Criminal Procedure Rules may apply with modifications any of the provisions of Part I of the Criminal Procedure and Investigations Act 1996. A summary of the disclosure requirements of the 1996 Act is at the end of Part 15 (Disclosure). Under section 5 of that Act, in the Crown Court the defendant must give a defence statement. Under section 6, in a magistrates’ court the defendant may give such a statement but need not do so. Under section 6C, in the Crown Court and in magistrates’ courts the defendant must give a defence witness notice indicating whether he or she intends to call any witnesses (other than him or herself) and, if so, identifying them. Under section 8 a defendant may apply for prosecution disclosure only if the defendant has given a defence statement.]

APPLICATION TO PROHIBIT CROSS-EXAMINATION

Exercise of court’s powers

23.3.—(1) The court may decide whether to impose or discharge a prohibition against cross-examination under section 36 of the Youth Justice and Criminal Evidence Act 1999—

- (a) at a hearing, in public or in private, or without a hearing;
- (b) in a party’s absence, if that party—
 - (i) applied for the prohibition or discharge, or
 - (ii) has had at least 14 days in which to make representations.

(2) The court must announce, at a hearing in public before the witness gives evidence, the reasons for a decision—

- (a) to impose or discharge such a prohibition; or
- (b) to refuse to do so.

[Note. See section 37 of the Youth Justice and Criminal Evidence Act 1999(b).]

Application to prohibit cross-examination

23.4.—(1) This rule applies where under section 36 of the Youth Justice and Criminal Evidence Act 1999 the prosecutor wants the court to prohibit the cross-examination of a witness by a defendant in person.

(2) The prosecutor must—

- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
- (b) serve the application on—
 - (i) the court officer,
 - (ii) the defendant who is the subject of the application, and
 - (iii) any other defendant, unless the court otherwise directs.

(3) The application must—

(a) 1999 c. 23; section 38 was amended by section 109 of, and paragraph 384(f) of Schedule 8 to, the Courts Act 2003 (c. 39).
 (b) 1999 c. 23; section 37 was amended by section 109 of, and paragraph 384(e) of Schedule 8 to, the Courts Act 2003 (c. 39).

- (a) report any views that the witness has expressed about whether he or she is content to be cross-examined by the defendant in person;
- (b) identify—
 - (i) the nature of the questions likely to be asked, having regard to the issues in the case,
 - (ii) any relevant behaviour of the defendant at any stage of the case, generally and in relation to the witness,
 - (iii) any relationship, of any nature, between the witness and the defendant,
 - (iv) any other defendant in the case who is subject to such a prohibition in respect of the witness, and
 - (v) any special measures direction made in respect of the witness, or for which an application has been made;
- (c) explain why the quality of evidence given by the witness on cross-examination—
 - (i) is likely to be diminished if no such prohibition is imposed, and
 - (ii) would be likely to be improved if it were imposed; and
- (d) explain why it would not be contrary to the interests of justice to impose the prohibition.

[Note. The Practice Direction sets out a form of application for use in connection with this rule.]

Application to discharge prohibition imposed by the court

23.5.—(1) A party who wants the court to discharge a prohibition against cross-examination which the court imposed under section 36 of the Youth Justice and Criminal Evidence Act 1999 must—

- (a) apply in writing, as soon as reasonably practicable after becoming aware of the grounds for doing so; and
 - (b) serve the application on—
 - (i) the court officer, and
 - (ii) each other party.
- (2) The applicant must—
- (a) explain what material circumstances have changed since the prohibition was imposed; and
 - (b) ask for a hearing, if the applicant wants one, and explain why it is needed.

[Note. Under section 37 of the Youth Justice and Criminal Evidence Act 1999, the court can discharge a prohibition against cross-examination which it has imposed—

- (a) on application, if there has been a material change of circumstances; or*
- (b) on its own initiative.]*

Application containing information withheld from another party

23.6.—(1) This rule applies where—

- (a) an applicant serves an application for the court to impose a prohibition against cross-examination, or for the discharge of such a prohibition; and
 - (b) the application includes information that the applicant thinks ought not be revealed to another party.
- (2) The applicant must—
- (a) omit that information from the part of the application that is served on that other party;
 - (b) mark the other part to show that, unless the court otherwise directs, it is only for the court; and

- (c) in that other part, explain why the applicant has withheld that information from that other party.
- (3) Any hearing of an application to which this rule applies—
 - (a) must be in private, unless the court otherwise directs; and
 - (b) if the court so directs, may be, wholly or in part, in the absence of a party from whom information has been withheld.
- (4) At any hearing of an application to which this rule applies—
 - (a) the general rule is that the court must consider, in the following sequence—
 - (i) representations first by the applicant and then by each other party, in all the parties' presence, and then
 - (ii) further representations by the applicant, in the absence of a party from whom information has been withheld; but
 - (b) the court may direct other arrangements for the hearing.

[Note. See section 37 of the Youth Justice and Criminal Evidence Act 1999.]

Representations in response

- 23.7.**—(1) This rule applies where a party wants to make representations about—
- (a) an application under rule 23.4 for a prohibition against cross-examination;
 - (b) an application under rule 23.5 for the discharge of such a prohibition; or
 - (c) a prohibition or discharge that the court proposes on its own initiative.
- (2) Such a party must—
- (a) serve the representations on—
 - (i) the court officer, and
 - (ii) each other party;
 - (b) do so not more than 14 days after, as applicable—
 - (i) service of the application, or
 - (ii) notice of the prohibition or discharge that the court proposes; and
 - (c) ask for a hearing, if that party wants one, and explain why it is needed.
- (3) Representations against a prohibition must explain in what respect the conditions for imposing it are not met.
- (4) Representations against the discharge of a prohibition must explain why it should not be discharged.
- (5) Where representations include information that the person making them thinks ought not be revealed to another party, that person must—
- (a) omit that information from the representations served on that other party;
 - (b) mark the information to show that, unless the court otherwise directs, it is only for the court; and
 - (c) with that information include an explanation of why it has been withheld from that other party.

Court's power to vary requirements

- 23.8.**—(1) The court may—
- (a) shorten or extend (even after it has expired) a time limit under rule 23.4 (Application to prohibit cross-examination), rule 23.5 (Application to discharge prohibition imposed by the court) or rule 23.7 (Representations in response); and

- (b) allow an application or representations required by any of those rules to be made in a different form to one set out in the Practice Direction, or to be made orally.
- (2) A person who wants an extension of time must—
- (a) apply when serving the application or representations for which it is needed; and
 - (b) explain the delay.