

PRACTICE DIRECTION UPDATE: No. 5 of 2022

The amendment to an existing Practice Direction, and the new Practice Direction, supplementing the Family Procedure Rules 2010 are made by the President of the Family Division under the powers delegated to him by the Lord Chief Justice under Schedule 2, Part 1, paragraph 2(2) of the Constitutional Reform Act 2005, and are approved by Lord Bellamy QC, Parliamentary Under-Secretary of State, Ministry of Justice.

The provisions in this Practice Direction Update come into force as follows:

Provision	Coming into force date
Amendment to Practice Direction 2C and New Practice Direction 3AB	On the day on which section 65 of the Domestic Abuse Act 2021 comes into force.

Signed:

_____ Date: _____ 7 July 2022 _____
Sir Andrew McFarlane
The President of the Family Division

Signed:

_____ Date: _____ 7 July 2022 _____
Lord Bellamy QC
Parliamentary Under-Secretary of State, Ministry of Justice

PRACTICE DIRECTION 2C – JUSTICES’ LEGAL ADVISER

(1) In the Table, after the entry for “FPR rule 3.10” insert the following new row-

"Practice Direction 3AB"	
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NEW PRACTICE DIRECTION 3AB – PROHIBITION OF CROSS-EXAMINATION IN PERSON IN FAMILY PROCEEDINGS UNDER PART 4B OF THE MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984

(1) After Practice Direction 3AA insert new Practice Direction 3AB set out in the Annex to this Practice Direction Update.

ANNEX: NEW PRACTICE DIRECTION 3AB TO BE INSERTED AFTER PRACTICE DIRECTION 3AA

Practice Direction 3AB – Prohibition of cross-examination in person in family proceedings under Part 4B of the Matrimonial and Family Proceedings Act 1984

1. Preamble, scope and interpretation

1.1 Part 3A FPR and Practice Direction 3AA make provision in relation to vulnerable persons (parties and witnesses), including protected parties, in family proceedings.

1.2 Part 12 FPR and Practice Direction 12B make provision in relation to children and Practice Direction 12J makes provision in relation to parties or children who have experienced domestic abuse perpetrated by another party or where there is a risk of such abuse, in family proceedings.

1.3 In applying the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular those referred to in Annex A to this Practice Direction.

1.4 This Practice Direction applies where, in family proceedings—

(a) a party is automatically prohibited from cross-examining in person a witness under sections 31R, 31S or 31T of the 1984 Act; or

(b) the court gives a direction prohibiting a party from cross-examining (or continuing to cross-examine) in person a witness under section 31U of the 1984 Act.

1.5 The provisions of this Practice Direction do not apply in relation to family proceedings which were started before the day on which section 65 of the Domestic Abuse Act 2021 comes into force including any application made—

(a) within those proceedings; or

(b) involving or relating to those proceedings

on or after the day on which section 65 comes into force.

1.6 Part 4B of the 1984 Act (which comprises sections 31Q to 31Z) was inserted by section 65 of the Domestic Abuse Act 2021 and is set out at Annex B to this Practice Direction.

1.7 Section 31Q of the 1984 Act defines “witness” as including a party to the proceedings and section 31W(8)(b) defines “qualified legal representative”.

1.8 In this Practice Direction, “domestic abuse” has the same meaning as in sections 1 and 2 of the Domestic Abuse Act 2021.

2. Raising the Issue of Automatic Prohibition of Cross-Examination in Person

2.1 Sections 31R, 31S and 31T of the 1984 Act set out the circumstances in which a party in family proceedings is automatically prohibited from cross-examining in person a witness. If the court is informed or it appears to the court that such circumstances have arisen (or may arise) in relation to proceedings before it, the court must consider what directions, if any, to make (whether or not the court has made one or more participation directions).

2.2 Subject to paragraph 2.3, for the purposes of paragraph 2.1, the parties must complete Form EX740 or Form EX741 when the court directs that the proceedings be listed for a hearing where oral evidence may be given.

2.3 The court may direct that Form EX740 or Form EX741—

- (a) must be completed at any stage in the proceedings;
- (b) must only be completed by the party specified by the court; or
- (c) does not need to be completed.

3. Court Directions Regarding Cross-Examination In Person

3.1 The court must consider whether a party is automatically prohibited from cross-examining in person a witness under sections 31R to 31T of the 1984 Act, or, if not, whether to make a direction prohibiting a party from cross-examining in person a witness under section 31U of the 1984 Act.

3.2 The court's consideration under paragraph 3.1 must be as soon as possible after the start of proceedings and continues until the conclusion of the proceedings.

3.3 An application for a direction under section 31U of the 1984 Act may be made orally or in writing, and if in writing, must be on the relevant court form. Relevant application forms are available from the HMCTS form finder service at [\[link\]](#).

3.4 The application for a direction must address—

- (a) why none of sections 31R to 31T of the 1984 Act apply to automatically prohibit cross-examination in person of the witness by the party;
- (b) how—
 - (i) the “quality condition” (see section 31U(2));
 - (ii) the “significant distress condition” (see section 31U(3));or both conditions, is or are met;
- (c) why it would not be contrary to the interests of justice for the court to give the direction; and
- (d) the matters set out at section 31U(5).

3.5 The court may make a direction under section 31U of the 1984 Act of its own motion or following an application made by a party to the proceedings under Part 18.

3.6 The court must, in its order, give reasons for—

- (a) making a direction prohibiting the cross-examination in person of the witness; or
- (b) refusing to make a direction prohibiting the cross-examination in person of the witness.

3.7 A direction prohibiting the cross-examination in person of the witness may be made for reasons other than domestic abuse.

4. Revocation of Court Direction given under Section 31U of the 1984 Act

4.1 Section 31V of the 1984 Act specifies that a court direction given under section 31U has a binding effect from the time it is made until the witness is discharged. Unless the court orders otherwise, discharge of the witness is not at the conclusion of their evidence but at the conclusion of the proceedings.

4.2 Save when giving their oral evidence, a court direction given under section 31U does not prohibit a witness from discussion with their own legal representative or any other person.

4.3 The court has the power under section 31V of the 1984 Act to revoke a direction given under section 31U before a witness is discharged if it is in the interests of justice to do so, either—

- (a) on an application by a party to the proceedings where there has been a material change of circumstances, or
- (b) of its own motion.

4.4 Before revoking a direction, the court may—

- (a) invite the parties to make representations in writing or at a hearing; and
- (b) make further directions.

4.5 The court must, in its order, give reasons for revoking or refusing to revoke a direction made under section 31U of the 1984 Act.

5. Alternative Means to Cross-Examination In Person

5.1 Where cross-examination in person is—

- (a) automatically prohibited under sections 31R to 31T of the 1984 Act, or
- (b) prohibited by a court direction given under section 31U of the 1984 Act,

the court must, under section 31W(2) of the 1984 Act, consider whether there is a satisfactory alternative means to—

- (i) cross-examining the witness in the proceedings; or
- (ii) obtaining the evidence that the witness might have given under cross-examination in the proceedings.

5.2 The court may—

- (a) invite the parties to make representations in writing or at a hearing concerning the suitability or otherwise of alternative means to cross-examination; and
- (b) make further directions.

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

5.4 Where the court considers that there is a satisfactory alternative means under paragraph 5.1, it must set out in its order—

- (a) what the satisfactory alternative means will be; and
- (b) its reasons for so deciding.

6. Qualified Legal Representative Appointed by the Court

6.1 If the court decides that there is no satisfactory alternative means of cross-examination under section 31W(2) of the 1984 Act, 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.

6.2 Having given the party the explanations at paragraph 6.1, the court must—

(a) invite the party to arrange for a qualified legal representative to act for them to cross-examine the witness, and specify the date by when the party must notify the court of the identity and contact details of such representative; and

(b) if the party notifies the court that they do not want or are unable to make such arrangements, or the party fails to so notify the court by the date specified—

(i) consider whether it is necessary in the interests of justice for the witness to be cross-examined by a court-appointed qualified legal representative to represent the party's interests; and

(ii) if the court decides that it is in the interests of justice, choose and appoint a qualified legal representative, from the court-maintained list of qualified legal representatives, to cross-examine the witness and make directions for such appointment.

6.3 Where the court, under section 31V of the 1984 Act, revokes a direction given under section 31U, the appointment of the court-appointed qualified legal representative will be terminated.

6.4 The court's appointment of a qualified legal representative does not preclude the court from making a direction that a witness or party should have the assistance of one or more of the measures in rule 3A.8.

6.5 For the avoidance of doubt, where more than one party to the proceedings is prohibited from cross-examining a witness in person, the court may appoint a qualified legal representative for each party that is so prohibited.

7. Court Directions to Court-Appointed Qualified Legal Representative

7.1 Unless the court directs otherwise, the directions that the court gives under paragraph 6.2(b)(ii) must—

(a) specify the witness or witnesses that are to be cross-examined by the court-appointed qualified legal representative;

(b) provide for the court-appointed qualified legal representative to be given access to the full court bundle or such parts of the court bundle as the court directs;

(c) specify the date by when the court-appointed qualified legal representative is to be given access to the court bundle under paragraph (b); and

(d) where there is no court bundle—

(i) provide for the court to prepare and provide the court-appointed qualified legal representative with a court bundle; and

(ii) specify the date by when the bundle should be provided.

7.2 The directions the court gives under paragraph 6.2(b)(ii) may specify which hearing or hearings or which part or parts of any hearing the court-appointed qualified legal representative is required to attend.

7.3 The court may give such further directions as are necessary to assist the court-appointed qualified legal representative to carry out the cross-examination.

7.4 Before making any such directions, the court may invite representations from the party and the witness in writing or at a hearing.

8. Termination of Appointment of Court-Appointed Qualified Legal Representative

8.1 The appointment of a qualified legal representative appointed by the court terminates—

- (a) at the conclusion of the proceedings; or
- (b) when the court so orders.

8.2 Following termination, unless the court directs otherwise, the qualified legal representative must be notified of the outcome of the hearing by the court. Notification may be by the court sending to the qualified legal representative a copy of the order, any reasons, the judgment or transcript.

9. Rules About Applications and Orders Made on Court's Own Initiative

9.1 Subject to paragraphs 3.3 and 3.4 of this Practice Direction—

- (a) Part 18 applies to any application made under this Practice Direction; and
- (b) rule 4.3 applies where the court acts on its own initiative under this Practice Direction.

Annex A

As noted at paragraph 1.3, in applying the provisions of this Practice Direction, the court and the parties must also have regard to all other relevant rules and Practice Directions and in particular—

- Part 1 FPR (Overriding Objective);
- Part 4 FPR (General Case Management Powers);
- Part 15 FPR (Representation of Protected Parties) and Practice Direction 15B (Adults Who May Be Protected Parties and Children Who May Become Protected Parties in Family Proceedings);
- Part 18 FPR (Procedure for Other Applications in Proceedings);
- Part 22 FPR (Evidence);

- Part 24 FPR (Witnesses and Depositions Generally);
- Part 25 FPR (Experts) and the Experts Practice Directions;
- Rule 27.6 FPR and Practice Direction 27A (Court Bundles);
- Part 30 FPR (Appeals) and Practice Direction 30A (Appeals).

ANNEX B

MATRIMONIAL AND FAMILY PROCEEDINGS ACT 1984 — PART 4B

FAMILY PROCEEDINGS: PROHIBITION OF CROSS-EXAMINATION IN PERSON

31Q Prohibition of cross-examination in person: introductory

In this Part—

“family proceedings” means—

- proceedings in the family court,
- proceedings in the Family Division of the High Court which are business assigned, by or under section 61 of (and Schedule 1 to) the Senior Courts Act 1981, to that Division of the High Court and no other, and
- proceedings in the civil division of the Court of Appeal arising out of proceedings within paragraph (a) or (b);

“witness”, in relation to any proceedings, includes a party to the proceedings.

31R Prohibition of cross-examination in person: victims of offences

- In family proceedings, no party to the proceedings who has been convicted of or given a caution for, or is charged with, a specified offence may cross-examine in person a witness who is the victim, or alleged victim, of that offence.
- In family proceedings, no party to the proceedings who is the victim, or alleged victim, of a specified offence may cross-examine in person a witness who has been convicted of or given a caution for, or is charged with, that offence.
- Subsections (1) and (2) do not apply to a conviction or caution that is spent for the purposes of the Rehabilitation of Offenders Act 1974, unless evidence in relation to the conviction or caution is admissible in, or may be required in, the proceedings by virtue of section 7(2), (3) or (4) of that Act.
- Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the conviction, caution or charge when the cross-examination took place.
- In this section—

“caution” means—

- (a) in the case of England and Wales—
 - (i) a conditional caution given under section 22 of the Criminal Justice Act 2003,
 - (ii) a youth conditional caution given under section 66A of the Crime and Disorder Act 1998, or
 - (iii) any other caution given to a person in England and Wales in respect of an offence which, at the time the caution is given, the person has admitted;
- (b) in the case of Scotland, anything corresponding to a caution falling within paragraph (a) (however described) which is given to a person in respect of an offence under the law of Scotland;
- (c) in the case of Northern Ireland—
 - (i) a conditional caution given under section 71 of the Justice Act (Northern Ireland) 2011, or
 - (ii) any other caution given to a person in Northern Ireland in respect of an offence which, at the time the caution is given, the person has admitted;

“conviction” means—

- (a) a conviction by or before a court in England and Wales, Scotland or Northern Ireland;
- (b) a conviction in service disciplinary proceedings (in England and Wales, Scotland, Northern Ireland, or elsewhere), including—
 - (i) in the case of proceedings in respect of a service offence, anything that under section 376(1) and (2) of the Armed Forces Act 2006 (which relates to summary hearings and the Summary Appeal Court) is to be treated as a conviction for the purposes of that Act, and
 - (ii) in the case of any other service disciplinary proceedings, a finding of guilt in those proceedings;
- (c) a finding in any criminal proceedings (including a finding linked with a finding of insanity) that the person concerned has committed an offence or done the act or made the omission charged;

and “convicted” is to be read accordingly;

“service disciplinary proceedings” means—

- (a) any proceedings (whether or not before a court) in respect of a service offence (except proceedings before a civilian court within the meaning of the Armed Forces Act 2006);

- (b) any proceedings under the Army Act 1955, the Air Force Act 1955, or the Naval Discipline Act 1957 (whether before a court-martial or before any other court or person authorised under any of those Acts to award a punishment in respect of an offence);
- (c) any proceedings before a Standing Civilian Court established under the Armed Forces Act 1976;

“service offence” means—

- (a) a service offence within the meaning of the Armed Forces Act 2006, or
- (b) an SDA offence within the meaning of the Armed Forces Act 2006 (Transitional Provisions etc) Order 2009 ([S.I. 2009/1059](#));

“specified offence” means an offence which is specified, or of a description specified, in regulations made by the Lord Chancellor.

- (6) The following provisions (which deem a conviction of a person discharged not to be a conviction) do not apply for the purposes of this section to a conviction of a person for an offence in respect of which an order has been made discharging the person absolutely or conditionally—
 - (a) section 14 of the Powers of Criminal Courts (Sentencing) Act 2000;
 - (b) section 82 of the Sentencing Code;
 - (c) section 187 of the Armed Forces Act 2006 or any corresponding earlier enactment.
- (7) For the purposes of this section “offence” includes an offence under a law that is no longer in force.

31S Prohibition of cross-examination in person: persons protected by injunctions etc

- (1) In family proceedings, no party to the proceedings against whom an on-notice protective injunction is in force may cross-examine in person a witness who is protected by the injunction.
- (2) In family proceedings, no party to the proceedings who is protected by an on-notice protective injunction may cross-examine in person a witness against whom the injunction is in force.
- (3) Cross-examination in breach of subsection (1) or (2) does not affect the validity of a decision of the court in the proceedings if the court was not aware of the protective injunction when the cross-examination took place.
- (4) In this section “protective injunction” means an order, injunction or interdict specified, or of a description specified, in regulations made by the Lord Chancellor.
- (5) For the purposes of this section, a protective injunction is an “on-notice” protective injunction if—

- (a) the court is satisfied that there has been a hearing at which the person against whom the protective injunction is in force asked, or could have asked, for the injunction to be set aside or varied, or
- (b) the protective injunction was made at a hearing of which the court is satisfied that both the person who applied for it and the person against whom it is in force had notice.

31T Prohibition of cross-examination in person: evidence of domestic abuse

- (1) In family proceedings, where specified evidence is adduced that a person who is a witness has been the victim of domestic abuse carried out by a party to the proceedings, that party to the proceedings may not cross-examine the witness in person.
- (2) In family proceedings, where specified evidence is adduced that a person who is a party to the proceedings has been the victim of domestic abuse carried out by a witness, that party may not cross-examine the witness in person.
- (3) In this section—
 - “domestic abuse” has the meaning given by section 1 of the Domestic Abuse Act 2021;
 - “specified evidence” means evidence specified, or of a description specified, in regulations made by the Lord Chancellor.
- (4) Regulations under subsection (3) may provide that any evidence which satisfies the court that domestic abuse, or domestic abuse of a specified description, has occurred is specified evidence for the purposes of this section.

31U Direction for prohibition of cross-examination in person: other cases

- (1) In family proceedings, the court may give a direction prohibiting a party to the proceedings from cross-examining (or continuing to cross-examine) a witness in person if—
 - (a) none of sections 31R to 31T operates to prevent the party from cross-examining the witness, and
 - (b) it appears to the court that—
 - (i) the quality condition or the significant distress condition is met, and
 - (ii) it would not be contrary to the interests of justice to give the direction.
- (2) The “quality condition” is met if the quality of evidence given by the witness on cross-examination—
 - (a) is likely to be diminished if the cross-examination (or continued 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.

- (3) The “significant distress condition” is met if—
 - (a) the cross-examination (or continued cross-examination) of the witness by the party in person would be likely to cause significant distress to the witness or the party, and
 - (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.
- (4) A direction under this section may be made by the court—
 - (a) on an application made by a party to the proceedings, or
 - (b) of its own motion.
- (5) In determining whether the quality condition or the significant distress condition is met in the case of a witness or party, the court must have regard to, among other things—
 - (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.
- (6) Any reference in this section to the quality of a witness’s evidence is to its quality in terms of completeness, coherence and accuracy.
- (7) For this purpose “coherence” refers to a witness’s ability in giving evidence to give answers which—
 - (a) address the questions put to the witness, and
 - (b) can be understood, both individually and collectively.

31V Directions under section 31U: supplementary

- (1) A direction under section 31U has binding effect from the time it is made until the witness in relation to whom it applies is discharged.
- (2) But the court may revoke a direction under section 31U before the witness is discharged, if it appears to the court to be in the interests of justice to do so, either—
 - (a) on an application made by a party to the proceedings, or
 - (b) of its own motion.
- (3) The court may revoke a direction under section 31U on an application made by a party to the proceedings only if there has been a material change of circumstances since—
 - (a) the direction was given, or
 - (b) if a previous application has been made by a party to the proceedings, the application (or the last application) was determined.
- (4) The court must state its reasons for—
 - (a) giving a direction under section 31U;
 - (b) refusing an application for a direction under section 31U;
 - (c) revoking a direction under section 31U;
 - (d) refusing an application for the revocation of a direction under section 31U.

31W Alternatives to cross-examination in person

- (1) This section applies where a party to family proceedings is prevented from cross-examining a witness in person by virtue of any of sections 31R to 31U.
- (2) The court must consider whether (ignoring this section) there is a satisfactory alternative means—
 - (a) for 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.
- (3) If the court decides that there is not, the court must—
 - (a) invite the party to the proceedings to arrange for a qualified legal representative to act for the party for the purpose of cross-examining the witness, and
 - (b) require the party to the proceedings to notify the court, by the end of a period specified by the court, of whether a qualified legal representative is to act for the party for that purpose.
- (4) Subsection (5) applies if, by the end of the period specified under subsection (3)(b), either—

- (a) the party has notified the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness, or
 - (b) no notification has been received by the court and it appears to the court that no qualified legal representative is to act for the party for the purpose of cross-examining the witness.
- (5) 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.
- (6) If the court decides that it is, the court must appoint a qualified legal representative (chosen by the court) to cross-examine the witness in the interests of the party.
- (7) A qualified legal representative appointed by the court under subsection (6) is not responsible to the party.
- (8) For the purposes of this section—
- (a) a reference to cross-examination includes a reference to continuing to conduct cross-examination;
 - (b) “qualified legal representative” means a person who, for the purposes of the Legal Services Act 2007, is an authorised person in relation to an activity which constitutes the exercise of a right of audience (within the meaning of that Act) in family proceedings.

31X Costs of legal representatives appointed under section 31W(6)

- (1) The Lord Chancellor may by regulations make provision for the payment out of central funds of sums in respect of—
- (a) fees or costs properly incurred by a qualified legal representative appointed under section 31W(6), and
 - (b) expenses properly incurred in providing such a person with evidence or other material in connection with the appointment.
- (2) The regulations may provide for sums payable under subsection (1) to be determined by the Lord Chancellor or such other person as the regulations may specify.
- (3) The regulations may provide for sums payable under subsection (1)—
- (a) to be such amounts as are specified in the regulations;
 - (b) to be calculated in accordance with—
 - (i) a rate or scale specified in the regulations, or
 - (ii) other provision made by or under the regulations.

31Y Guidance for legal representatives appointed under section 31W(6)

- (1) The Lord Chancellor may issue guidance in connection with the role which a qualified legal representative appointed under section 31W(6) in connection with any family proceedings is to play in the proceedings, including (among other things) guidance about the effect of section 31W(7).
- (2) A qualified legal representative appointed under section 31W(6) must have regard to any guidance issued under this section.
- (3) The Lord Chancellor may from time to time revise any guidance issued under this section.
- (4) The Lord Chancellor must publish—
 - (a) any guidance issued under this section, and
 - (b) any revisions of that guidance.

31Z Regulations under Part 4B

- (1) Any power of the Lord Chancellor to make regulations under this Part—
 - (a) is exercisable by statutory instrument,
 - (b) includes power to make different provision for different purposes, and
 - (c) includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision.
- (2) A statutory instrument containing regulations under this Part is subject to annulment in pursuance of a resolution of either House of Parliament.