

EXPLANATORY MEMORANDUM TO

THE PROHIBITION OF CROSS-EXAMINATION IN PERSON (FEES OF COURT-APPOINTED QUALIFIED LEGAL REPRESENTATIVES) REGULATIONS 2022

2022 No. 567

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 Sections 65 and 66 of the Domestic Abuse Act 2021 ('the 2021 Act') introduce new Part 4B into the Matrimonial and Family Proceedings Act 1984 ('MFPA 1984') and new Part 7A into the Courts Act 2003 ('CA 2003'), respectively. Those provisions operate in family and civil proceedings respectively to prohibit cross-examination in person between a party and a witness in specified circumstances, including where there is evidence of domestic abuse between them. Where the prohibition applies, a qualified legal representative may be appointed to cross-examine a witness on behalf of the prohibited party and will be paid out of central funds for the work undertaken. This Statutory Instrument prescribes the fixed fees that a qualified legal representative appointed under section 31W(6) of the MFPA 1984 and section 85K(6) of the CA 2003 can claim in family and civil proceedings respectively.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England and Wales.
4.2 The territorial application of this instrument is England and Wales.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

6. Legislative Context

- 6.1 This instrument is being made as part of the implementation of Part 5 of the 2021 Act. Section 65 of the 2021 Act introduces a new Part 4B into the MFPA 1984 which contains provision that prohibits a party to family proceedings from cross-examining a witness in person in specified circumstances. Section 66 of the 2021 Act introduces new Part 7A into the CA 2003 which makes similar provision in civil proceedings. The prohibition on cross-examination in person will automatically apply in three situations:

- (i) where a party has been convicted of, given a caution for, or (in relation to family proceedings only) is charged with a "specified offence";

- (ii) where a witness is protected by an on-notice “protective injunction” against another party; and
 - (iii) where “specified evidence” is adduced showing there has been domestic abuse between the party and witness.
- 6.2 The automatic prohibition operates reciprocally, meaning that the victim of the abusive behaviour may not cross-examine the perpetrator in person.
- 6.3 Where the automatic prohibition does not apply, the court may direct on application or of its own motion that a party be so prohibited where (a) it appears to the court that allowing cross-examination in person would diminish the quality of the witness’ evidence, or would be likely to cause either the party or the witness significant distress; and (b) it would not be contrary to the interests of justice to give the direction (see new sections 31U of the MFPA 1984 and section 85I of the CA 2003).
- 6.4 Where a party is prohibited from cross-examining a witness in person, 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. If the court decides that it is, it must appoint a qualified legal representative to conduct the cross-examination in the interests of the prohibited party (see sections 31W(6) MFPA 1984 and 85K(6) CA 2003). Power is conferred on the Lord Chancellor to make provision by regulations for the payment out of central funds (public purse) of sums to cover the properly incurred fees, costs and expenses of a court-appointed qualified legal representative, and it is under those powers that this instrument is made.
- 6.5 A separate negative statutory instrument¹ is being made, which prescribes the list of specified offences, protective injunctions and specified evidence that will ‘trigger’ the automatic prohibition referred to in paragraph 6.1.

7. Policy background

What is being done and why?

- 7.1 The amendments to the MFPA 1984 and the CA 2003 arose from a growing recognition amongst the judiciary, practitioners, domestic abuse support agencies and Government that existing court procedures in respect of cross-examination of victims of abuse or vulnerable parties more generally did not provide adequate protection.
- 7.2 Prior to the 2021 Act, the family court and the Family Division of the High Court had a range of powers to ensure difficult courtroom situations were handled sensitively for vulnerable parties or witnesses. This included, where appropriate, a judge putting questions to a witness directly, or accepting pre-recorded cross-examination from prior criminal proceedings. However, there were some cases in which these alternative forms of obtaining evidence were insufficient to thoroughly test the evidence in the case. There was no provision to allow the family courts to appoint a qualified legal representative to conduct the cross-examination in place of an unrepresented party. This led to situations where a witness would be cross-examined in person by their abuser, a situation which could, in the words of a former President of the Family Division, “*sometimes amount, and on occasion quite deliberately, to a continuation of the abuse.*”² The Government committed to legislate to address this

¹ The Prohibition of Cross-Examination in Person (Civil and family Proceedings) Specified Offences, Evidence and Protective Injunction Regulations 2022

² *Unheard voices: the involvement of children and vulnerable people in the family justice system*, lecture by Sir James Munby P (as he then was), Swansea University, 25 June 2015

issue, in relation to family proceedings, in its consultation ‘Transforming the Response to Domestic Abuse’³ and the draft Domestic Abuse Bill published in January 2019 included clauses similar to those in section 65 of the 2021 Act.

- 7.3 In comparison, in the civil courts, prior to the 2021 Act, there were no specific provisions in the Civil Procedure Rules 1998 (‘the CPR’) dealing with vulnerable parties or witnesses in civil proceedings. The court has an overriding objective in proceedings to deal with cases fairly and to manage cases actively, but there were no specific rules or Practice Directions on the issue of vulnerability. The court only had a broad power to control how evidence is put before it, including limiting the extent of any cross-examination.
- 7.4 The Civil Justice Council (‘the CJC’) - an advisory body, chaired by the Master of the Rolls, responsible for overseeing and co-ordinating the modernisation of the civil justice system - conducted a consultation on the support available to vulnerable parties and witnesses in September 2019 and its final report⁴ was published in February 2020. Various recommendations were made, including that the overriding objective in Part 1 of the CPR be amended to ensure all parties are able to participate fully in proceedings and that all witnesses are able to give their best evidence. An amendment to Part 1 of the CPR and a new Practice Direction 1A (Participation of Vulnerable Parties or Witnesses) made under rule 1.1 of the CPR⁵ were introduced in April 2022, to give effect to the CJC’s recommendations.
- 7.5 The Government also accepted the CJC’s recommendations in relation to the prohibition of cross-examination in civil proceedings, which it has now legislated for in section 66 of the 2021 Act.
- 7.6 These Regulations prescribe the fixed fees payable to court-appointed qualified legal representatives under the devised fee scheme. Regulation 1 defines the respective case types for the purposes of calculating the appropriate fee in either family or civil proceedings and Regulation 3 makes provision for payment of an additional fixed ‘bolt-on’ fee where the bundle of documents for a cross-examination hearing exceeds 350 pages. A qualified legal representative may also claim a fixed fee where at least 30 minutes of preparatory work was undertaken for a preliminary or cross-examination hearing which was subsequently cancelled (regulation 5). Procedural provision relating to claims for and the payment of fees is made in regulations 6 and 7.
- 7.7 The Schedule to the Regulations contains 5 tables. Tables 1 to 4 prescribe the fixed fees payable in family or civil proceedings in accordance with the case type, the type of hearing and the level of judge before whom the matter is heard. Table 5 prescribes the bolt-on fee payable in both family and civil proceedings.
- 7.8 The fixed fees introduced are based on those recoverable under the current legal aid ‘Family Advocacy Scheme’ (‘the FAS’). The FAS is a scheme where the overall fee for a case is made up of several component parts payable for different events such as hearings and conferences, plus some additional bolt-on payments for example for large bundles.

³ The joint Home Office and Ministry of Justice consultation ‘Transforming the Response to Domestic Abuse’ available at <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>

⁴ *Vulnerable Witnesses and parties within civil proceedings – current position and recommendations for change* <https://www.judiciary.uk/wp-content/uploads/2020/02/VulnerableWitnessesandPartiesFINALFeb2020-1-1.pdf>

⁵ <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part01/practice-direction-1a-participation-of-vulnerable-parties-or-witnesses>

7.9 After considering various fee-paying models, the Government decided to implement a fixed-fee model because it achieves an appropriate balance between the nature of the work the qualified legal representative is expected to undertake and protecting the public purse. The fixed-fees payable are based on current legal aid FAS final hearing day fees, with a 25% uplift for the first full day of advocacy after any preliminary hearings.

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

9.1 As this instrument does not amend another instrument, no consolidation of legislation is required.

10. Consultation outcome

10.1 In developing the approach to and the fees specified in this instrument, the department consulted representative bodies for legal professionals that could be appointed as qualified legal representatives. The Bar Council, the Family Law Bar Association, the Law Society, Chartered Institute of Legal Executives, and Resolution provided comments, which were taken into account in the development of the scheme.

11. Guidance

11.1 There are no plans to issue specific guidance for this instrument, but the Lord Chancellor will publish Statutory Guidance on the Role of the Court-Appointed Qualified Legal Representative. This Guidance will be published pursuant to the Lord Chancellor's powers under section 31Y(1) of the MFPA 1984 and section 85M(1) of the CA 2003. The Family Procedure Rule Committee will be making rules as to practice and procedure relating to the prohibition of cross-examination in person and the appointment of a qualified legal representative.

11.2 The judiciary and Her Majesty's Courts and Tribunals Service staff in the family and civil courts will be provided with operational guidance on any procedural changes. In addition, Her Majesty's Courts and Tribunals Service will provide information for victims about the provisions in the 2021 Act.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 There is no, or no significant, impact on the public sector.

12.3 An Impact Assessment has not been prepared for this instrument because no, or no significant, impact on the private, public or voluntary sectors is foreseen. However, our current estimate of the annual costs in England and Wales of appointing publicly funded qualified legal representatives in civil and family proceedings is approximately between £10.2 and £11.1m

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

- 14.1 The Ministry of Justice and Her Majesty's Courts and Tribunals Service plan to monitor implementation of the provisions in sections 65 and 66 of the 2021 Act to check their effective operation after the measures come into force.

15. Contact

- 15.1 In relation to section 65 of the 2021 Act, Shan Maraj at the Ministry of Justice email: shan.maraj@justice.gov.uk can be contacted with any queries regarding the instrument.
In relation to section 66 of the 2021 Act, Tajinder Bhamra at the Ministry of Justice email: tajinder.bhamra1@justice.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Abigail Plenty and Laura Beaumont (Jobshare), Deputy Director for Vulnerability Policy, at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 James Cartlidge, Parliamentary Under-Secretary of State at the Ministry of Justice, can confirm that this Explanatory Memorandum meets the required standard.