

THE ROLE OF THE QUALIFIED LEGAL REPRESENTATIVE IN FAMILY COURT PROCEEDINGS

AN FLBA GUIDE

1. For any new proceedings issued after 21 July 2022, the Court has jurisdiction to appoint a Qualified Legal Representative [QLR] to conduct a cross-examination of a party, or witness, that is now prohibited by reason of section 65 Domestic Abuse Act 2021 and the amendments made to the Matrimonial and Family Proceedings Act 1984.
2. Family Procedure Rules 2010 PD3AB addresses the prohibition of cross-examination and there is published statutory guidance concerning the jurisdiction of the court and the responsibilities of the QLR. That guidance is found at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1101848/final-statutory-guidance-role-of-the-qualified-legal-representative.pdf
3. The role of the QLR is different to the usual legal representation role that FLBA members will be used to as part of their everyday practice. There are, in our view, clear tasks that are the function of a QLR appointed by the court and those that are not. However, there are also wide areas of grey between the black and the white and this document aims to help FLBA members understand the scheme, what is their responsibility as a QLR, what is not, what *might* be and what to do if unsure and, importantly, what can be done if the court seeks to compel you to undertake a task that is not something falling within the statutory scheme.
4. Also attached to this document is a summary of the fees structure. It is the view of the committee that fees prescribed under the scheme are very low and serve as a disincentive to agreeing to sign-up for the QLR list and, even if having registered, to then accepting a QLR case.
5. It is important that FLBA members understand that the responsibilities of the QLR extend beyond simply turning up at court and conducting a cross-examination. Because the duties extend some way beyond just asking the prohibited questions, some FLBA members raised concern about the scope of their responsibilities and their insurance cover. We have attempted to address those questions in this document.

When can the Court Appoint a QLR?

6. The power of the court to appoint a QLR is described in the new part 4B of the Matrimonial and Family Proceedings Act 1984.
7. Before appointing a QLR, the court must be satisfied that cross-examination by a party representing themselves is (a) automatically prohibited or (b) the quality of the evidence will be diminished or a party or witness will be caused significant distress if in-person cross-examination is undertaken by a party.

When is Cross-Examination Automatically Prohibited?

8. Part 4B prohibits cross-examination of a victim, alleged victim, perpetrator or alleged perpetrator of domestic abuse by another person who was a victim, alleged victim, perpetrator or alleged perpetrator of that abuse. This prohibition applies automatically if:

- (i) A party to the case has been cautioned, charged with or convicted of a specified offence against the other party¹;
 - (ii) A protective on-notice injunction is in force between the parties², or
 - (iii) Where specified evidence is adduced demonstrating that a party or witness in the case has been the victim of domestic abuse carried out by another party to the proceedings³.
9. The lists of specified offences, on-notice injunctions and specified evidence are contained in the Prohibition of Cross-Examination in Person (Civil and Family Proceedings) Regulations 2022.
 10. Schedule 1 to the regulations contains a list of some 122 offences plus the incitement, aiding, abetting, counselling, procuring or conspiring to do those same offences. It is worth checking this list as there are a number of offences included that might not be obvious as offences involving domestic abuse.
 11. Schedule 2 to the regulations contains a list of on-notice injunctions that activate the automatic prohibition on cross-examination. This list includes non-molestation, occupation, harassment, forced marriage and FGM injunctions made in the Family Court but also contains the protective orders made in the criminal courts such as domestic violence protection orders, sexual harm prevention orders and criminal behaviour orders. Again, do refer to the schedule if unsure whether a type of order activates the prohibition.
 12. Schedule 3 to the regulations provides the list of specified evidence that activates the automatic prohibition on cross-examination. It includes copies of undertakings given under the 1996 Family Law Act, copies of a fact-finding judgment made in proceedings between the parties, a letter from a medical professional expressing the opinion that injuries or a condition are consistent with being a victim of domestic abuse, a letter from MARAC, a letter an independent domestic violence advisor or sexual violence advisor, a letter from a housing officer or local authority employee or an organisation supporting victims of domestic abuse. The schedule includes any evidence that satisfies the court a party has been the victim of domestic abuse “in the form that relates to economic matters”. Again, check the schedule if unsure.

When Can the Court Appoint a QLR for other reasons?

13. Where none of the automatic prohibitions set out above apply, the court has the power to direct that a party be prohibited from carrying out in-person cross-examination where it appears to the court that allowing cross-examination in person would be likely to affect the quality of the witness’ evidence⁴ or is likely to cause either the party or the witness significant distress⁵ and it would not be contrary to the interests of justice to give such a direction. This might be because a litigant in person has to cross-examine an expert or for reasons other than domestic abuse⁶.
14. The Court must give reasons if making a direction on the basis of the ‘quality condition’ or the ‘significant distress condition’. The statutory guidance describes:

¹ Section 31R MFPA 1984

² Section 31S MFPA 1984

³ Section 31T MFPA 1984

⁴ Section 31U(2) MFPA 1984

⁵ Section 31U(3) MFPA 1984

⁶ See page 6 of the statutory guidance.

The “quality condition” is met if the quality of evidence given by the witness on cross-examination:

- is likely to be diminished if the cross-examination (or continued cross-examination) is conducted by the party in person, and
- would be likely to be improved if a direction were given by the court.

The “significant distress condition” is met if:

- 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
- 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.⁷

Are there any alternatives to the appointment of a QLR?

15. Preventing a party from asking questions to challenge the evidence of another party has the potential to interfere with the article 6 and article 8 rights of the litigant. Therefore, *before* a QLR is appointed the court:

- (a) Must consider if there is any satisfactory alternative means by which the witness might be cross-examined or of otherwise obtaining the evidence. The judge asking questions is not to be treated as a satisfactory alternative method.
- (b) If there is no satisfactory alternative mean, the Court must invite the party to appoint their own QLR within a specified period.
- (c) If the party notifies the Court that they will not appoint their own QLR, and the court is satisfied that it is necessary in the interests of justice to appoint a QLR, then the Court must do so.⁸

16. It is important to remember that the role of QLR is not limited to an appointment by the court. A litigant in person is to be asked by the court if they will appoint their own QLR privately. It may be that the court will hope the litigant will appoint a lawyer to represent them for the whole of the hearing but it is possible for the litigant to appoint a QLR and conduct the non-prohibited part of the hearing for themselves. A ‘private’ instruction as a QLR is not the same as representing the party for the whole hearing on a direct access basis. We are unaware of any proposal by the Bar Standards Board to require those taking on the role of a QLR, whether appointed by the Court or appointed privately, to undertake any direct access training or something similar, even though you will not have a professional client instructing you if you act as a QLR. In our view, FLBA members should not accept instruction as a private QLR unless direct access trained.

What do you need to do to become a QLR?

17. All court appointed QLRs must have a current practising certificate and have undertaken advocacy and vulnerable witness training that is provided or approved by their professional body (or have made a commitment to attend such training within six months of having registered on the court list of qualified legal representatives).

⁷ See page 6 of the statutory guidance

⁸ Section 31W MFPA 1984

18. QLRs with the appropriate training will need to register their interest in undertaking this work with Her Majesty's Courts and Tribunals Service (HMCTS). Local courts will maintain a list of QLRs available to undertake the cross-examination work in family proceedings. HMCTS will be responsible for managing and keeping the list up to date.
19. It has become common for those registered to receive requests from HMCTS to act as QLRs in hearings that are significant distances from their usual place of work. Please refer to the QLR fee scheme document attached to this guide to assist you in deciding whether to accept such appointments that may well lead to you making a financial loss.

What are your responsibilities as a QLR?

20. The statutory guidance states:

The court-appointed qualified legal representative's central purpose is to ensure that the fairness of the proceedings is maintained, by carrying out the cross-examination which the prohibited party is prohibited from performing.⁹
21. As a QLR appointed by the court, you are not "responsible to the party"¹⁰ but are required to cross-examine "in the interests of the party"¹¹.
22. But *what does that mean?* The statutory guidance states:

"Although they will advance the interests of the prohibited party' during the cross-examination, the qualified legal representative must not attempt to present the prohibited party's entire case and should not take instructions from the prohibited party in the manner that a party's own lawyer ordinarily would. However, the qualified legal representative is expected, in most cases, to meet with the prohibited party to elicit relevant information that will form the basis of the cross-examination and inform the drafting of the position statement."¹²
23. The Bar Council issued a document to assist barristers concerning matters of professional conduct and ethics arising from an appointment under section 38(4) Youth Justice and Criminal Evidence Act 1999, the criminal jurisdictions equivalent of the QLR. The two schemes are very similar. The ethical and professional conduct advice provided for the criminal scheme is, in our view, applicable to the family court scheme. In our view, the breadth of the role in family proceedings is wider given the need for a QLR in the Family Court to ask questions about welfare matters rather than cross-examine solely on matters of fact. Also, there may frequently be more than one QLR in family court proceedings. The Bar Council document, that was last reviewed in March 2020, can be found at:
<https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/Court-appointed-legal-representatives-June-2021.pdf>
24. The statutory guidance to the Family Court QLR scheme states "there are unlikely to be ethical complexities for court-appointed qualified legal representatives who are not responsible to the prohibited party and who do not have a contractual relationship with them"¹³. The questions that have already been raised by FLBA members about the role of the QLR casts doubt on this optimistic assertion and

⁹ See page 11 of the statutory guidance.

¹⁰ See section 31W(7) MFPA 1984

¹¹ See section 31W(6) MFPA 1984

¹² See page 12 of the statutory guidance.

¹³ See page 13 of the statutory guidance.

the FLBA can foresee times when difficulties may well arise. We have drawn some useful information from the Bar Council criminal scheme document. We refer to it in the footnotes to this document but the assistance we give in the paragraphs below amends the content of the Bar Council criminal scheme document to reflect the family jurisdiction scheme. We have also highlighted important parts of the statutory guidance to the family scheme, to assist with the professional conduct and ethics issues that arise for a QLR in the Family Court. We have attempted to simplify the main duties and add some useful further information.

25. Our summary of your responsibilities when acting as a QLR are:

- (i) Counsel will be appointed by the Court and not the client and may be required to act with more limited information as to the nature of the case and the matters in issue. Accordingly, counsel will be placed in a situation that will be alien to normal practice and additional considerations will apply.¹⁴
- (ii) It is apparent from the statutory scheme that in relation to the appointment of qualified legal representative:
 - Your appointment is made in the interests of justice,
 - you are not the representative of the court that appoints you, and
 - whilst not responsible to him or her, you are appointed to represent the interests of the party relevant to the cross-examination you are to undertake.¹⁵
- (iii) The role of a court appointed QLR is undoubtedly limited to the proper performance of their duty as a cross-examiner of a particular witness. Therefore, it should not be thought that a QLR has a free-ranging remit to conduct the trial on the prohibited party's behalf. Their professional duty and their statutory duty is to ensure that they are in a position properly to conduct the cross-examination. The important thing to note is that the QLR must ensure that s/he performs his/her duties in accordance with the words of the statute.¹⁶
- (iv) As a court-appointed QLR, you will not have a contractual relationship with the client and, therefore, the Bar Council standard contractual terms (or chambers' equivalent terms) will not apply.¹⁷
- (v) Your core duties will continue to apply. In particular, those of most relevance to you as a court-appointed QLR are your duties to the court (CD1), to act with honesty and integrity (CD3) and to maintain your independence (CD4). As noted below, in certain circumstances the principle of client confidentiality (CD6) may also be engaged.¹⁸
- (vi) It is essential that only legal representatives with appropriate experience should be appointed. The BSB Handbook provisions prevent counsel from accepting any instructions if to do so would cause him to be professionally embarrassed, which includes having insufficient experience or competence

¹⁴ §2 of the Bar Council advice for the criminal scheme.

¹⁵ §10 of the Bar Council advice for the criminal scheme and page 12 of the statutory guidance to the family scheme.

¹⁶ Page 12 of the statutory guidance to the family scheme.

¹⁷ §15 of the Bar Council advice for the criminal scheme

¹⁸ §16 of the Bar Council advice for the criminal scheme

to handle such a matter (Handbook, rC21.8). Do not accept an appointment as a QLR if you consider you do not have sufficient experience.¹⁹

- (vii) In carrying out your duties to the Prohibited Party, it is important that you are clear as to the purpose and the parameters of any questions you ask of the witness(es). It is not difficult to foresee a situation where questions asked without the benefit of detailed instructions from the party may receive answers which may either harm his or her case or open-up previously unexplored and unhelpful areas of evidence. Given the limitations upon your role and the more restricted input that you receive from the Prohibited Party, this situation may, in some cases, be unavoidable. However, if you make the prohibited party aware of the nature of the questions you intend to ask, the danger of this arising will be mitigated. Where it does then occur, you are less likely to be at fault.²⁰
- (viii) Where you are appointed by the court, your appointment terminates at the conclusion of the proceedings or when the court so orders. The witness(es) you are required to cross-examine should be named in the order appointing you. However, there remains the possibility that the judge may intervene during the trial to make a direction preventing the party from cross-examining other witnesses. Where the task of a court appointed QLR is extended in this way, it is important that you obtain certainty from the trial judge as to the basis on which you are appointed to act by ensuring each witness is named in a further order. You must be careful to ensure that you remain within the scope of the duties and obligations of a court appointed QLR and do not become the instructed advocate in the ordinary sense. You should also ensure that the Prohibited Party is aware and understands that this is the case.²¹
- (ix) The Court is likely to direct the QLR to attend a pre-trial ground rules hearing. Where there is a point of law or admissibility which can be properly taken within the scope of your appointment, you should make the appropriate submissions, whether of your own volition or at the invitation of the trial judge. This would include, for example, questions relating to the sexual history of the witness or whether a particular line of cross-examination may raise the need for further disclosure of evidence. It will be your duty to raise in advance any points of law or procedure relevant to the conduct of the cross-examination.²²
- (x) You should also make representations concerning any proposed participation directions that will have an impact on the conduct of your cross-examination.
- (xi) The QLR will need to meet with the prohibited party to understand the essence of the prohibited party's case and agree with the prohibited party and/or the Court the issues that will be covered in the cross-examination.²³

¹⁹ §19 of the Bar Council advice for the criminal scheme

²⁰ §21 of the Bar Council advice for the criminal scheme

²¹ §22 of the Bar Council advice for the criminal scheme and page 14 of the statutory guidance to the family scheme.

²² §26 and §32 of the Bar Council advice for the criminal scheme and page 16 of the statutory guidance to the family scheme.

²³ Page 16 of the statutory guidance to the family scheme.

- (xii) You should ask the prohibited party to confirm whether he or she stands by the account given in a police interview or in a statement made to the court. If the prohibited party has provided a police interview and a statement, you should consider whether there are any significant differences between the content of the interview and the statement, and if so, ask the party what case he or she is to run at the trial.²⁴
- (xiii) A prohibited party's refusal to be represented may have its origin in mental health issues. In such cases you may not be able to obtain any assistance from the party and may also not be assisted by comments in interview or a completed statement. In such circumstances you may not be able to do more than advance such submissions and put to the witness such lines of challenge as are apparent to you from the papers and are appropriate to your appointment. Where this arises, the QLR must bring to the court's attention any issues relating to the prohibited party's capacity to participate fully in and understand the proceedings. The qualified legal representative must also alert the court to the potential need for participation directions or special measures such as a registered intermediary.²⁵
- (xiv) As a court appointed QLR you should seek such further information as is required (from the court, the other party and the prohibited party you are appointed to assist) in order to be able to properly fulfil your role. This will include obtaining and familiarising yourself with the relevant papers in the case. This may include obtaining and considering additional papers relevant to the prohibited party's case. It will also require the issues in the party's case to be identified with sufficient clarity to enable you to discharge the duty of putting that case to the witness(es). You may seek guidance from Court as to the apparent issues in the case.²⁶
- (xv) Information sought from the prohibited party should be limited to such matters as will be relied upon in evidence during their case. You should not seek instructions from the party as to the conduct of the case more generally.²⁷
- (xvi) Where the party does not co-operate in identifying the issues in the case, you are entitled to rely on an account given in interview, or on the content of a statement, insofar as the party has confirmed that its contents reflect his or her case.²⁸
- (xvii) Where the prohibited party does not cooperate, the qualified legal representative may have to confine the cross-examination to matters that the judge directs are relevant as far as can be ascertained from the court papers in the proceedings. The QLR should then relay what these matters are to the prohibited party.²⁹

²⁴ §28 of the Bar Council advice for the criminal scheme

²⁵ §31 of the Bar Council advice for the criminal scheme and page 17 of the statutory guidance to the family scheme.

²⁶ Page 16 of the statutory guidance to the family scheme.

²⁷ Page 16/17 of the statutory guidance to the family scheme and §37 of the Bar Council advice for the criminal scheme.

²⁸ §38 of the Bar Council advice for the criminal scheme

²⁹ Page 17 of the statutory guidance to the family scheme

- (xviii) The extent to which a positive case can or should be put in cross-examination is to be assessed in accordance with the usual principles and is a matter in respect of which you must exercise your judgment.³⁰
- (xix) The overall extent of the cross-examination is likewise a matter for you to assess in light of all relevant circumstances. However, to effectively protect the prohibited party's article 6 and article 8 rights, the QLR must put the essence of the prohibited party's case to the witness on those parts of the witness' case that may have a significant impact on the outcome of the proceedings.³¹
- (xx) The prohibited party may suggest questions to the QLR that he or she wishes to be put to the witness. Although the QLR may take such suggestions into consideration, ultimately questions should only be put to the witness if they relate to the essence of the prohibited party's case, and they are on those parts of the witness' case which may have a significant impact on the outcome of the proceedings.³²
- (xxi) The QLR must ensure that he or she is fully conversant with the evidence and issues in the case and has obtained sufficient information about the prohibited party's case to be able to cross-examine and test the evidence effectively.³³
- (xxii) The QLR must ensure that the cross-examination carried out provides the court with sufficient information to reach a conclusion on the issues that arise during the case.³⁴
- (xxiii) It is recommended that the QLR should prepare a brief position statement to help identify and narrow the issues that will be the focus of the cross-examination.³⁵
- (xxiv) Many of the issues that may arise can only be taken on a case-by-case basis. You should bear in mind the limitations of your role and be alert not to stray into acting as the prohibited party's legal representative generally. The two roles are different and latter falls outwith the scope of your appointment.³⁶
- (xxv) The QLR must make clear that they cannot give advice or represent the prohibited party throughout the case but are appointed by the court to carry out a very limited role. The QLR cannot help with preparing documentation or assist in complying with directions.³⁷
- (xxvi) The court appointed QLR will need to explain to the prohibited party that they cannot promise the confidentiality that usually attaches to lawyer-client relationships (legal professional privilege) and that there are obligations in family proceedings to disclose material that is unhelpful to the prohibited party's case.³⁸

³⁰ §39 of the Bar Council advice for the criminal scheme

³¹ §40 of the Bar Council advice for the criminal scheme and page 15 of the statutory guidance to the family scheme.

³² Page 15 of the statutory guidance to the family scheme.

³³ Page 15 of the statutory guidance to the family scheme.

³⁴ Page 15 of the statutory guidance to the family scheme.

³⁵ Page 16 of the statutory guidance to the family scheme.

³⁶ §34 of the Bar Council advice for the criminal scheme

³⁷ Page 16 of the statutory guidance to the family scheme.

³⁸ Page 16 of the statutory guidance to the family scheme.

(xxvii) Should you become unable to fulfil your role as a QLR, you should inform the court immediately so an alternative QLR can be appointed. The termination of your appointment occurs by the making of a further court order.³⁹

What are NOT your responsibilities as a QLR?

26. As explained above, your duties as a QLR are limited to the cross-examinations of the witness(es) you are directed to undertake and essential preparation for those cross-examinations, that may include legal submissions and ancillary applications.
27. It may be that the court will ask you to perform other tasks, such as the drafting of court orders⁴⁰ or invite you to assist in negotiations between the parties or to liaise with CAFCASS or a local authority. It is our advice that you politely refuse such invitations, to ensure that you are not acting beyond the scope of the statute because (i) your role as a QLR is not governed by your chambers' normal terms and conditions and (ii) you should not be undertaking any task that might fall outside of the scope of your professional insurance in cases where there is no professional client and no contractual relationship with the client under the direct access scheme, especially if you are not authorised to conduct work on a direct access basis. To do so may put you in breach of your professional conduct responsibilities (see below).
28. There are many tasks that could be seen as preparatory to the conduct of a cross-examination. It is impossible to list all here. As set out above, these will have to be considered on a case-by-case basis. You will have to use your professional judgment in these 'grey' areas. It is easy to see how you might need documents that have not yet been produced to conduct a competent cross-examination. In your discussions with the prohibited party, it may be that further witnesses not yet warned appear to be necessary. Our view is that the prohibited party should be told it is his or her responsibility to raise such matters with the court and you should endeavour to restrict your role to the preparation and conduct of the cross-examination of the witnesses named in the court order appointing you as QLR.
29. The court will need to be alive to the witnesses, and the documents, that might be needed and make disclosure and attendance directions before you are appointed, and not rely on litigants representing themselves to know what they should be seeking by way of disclosure orders. In our view, any case that is likely to need a QLR will require the court to actively case manage and think ahead to what the QLR will require. Otherwise, the duties on the QLR that we set out at 25(ix), (x), (xiv) and (xxi) may lead to the QLR having to make applications to adjourn the case.

What does your BMIF cover if you are acting as a QLR and are there any Professional Conduct Issues to Avoid?

30. The BSB handbook states:

'rS24

You may only supply *legal services* if you are appointed or instructed by the *court* or instructed:

³⁹ Page 18 of the statutory guidance to the family scheme.

⁴⁰ It may be that you should ask to be provided with a copy of any draft order before it is drawn to ensure that hearing dates and times are properly recorded, as this is necessary for you to claim your fees.

- .1 by a *professional client* (who may be an employee of the *client*); or
 - .2 by a *licensed access client*, in which case you must comply with the *licensed access rules*; or
 - .3 by or on behalf of any other *client*, provided that:
 - .a the matter is *public access instructions* and:
 - i you are entitled to provide public access work and the *instructions* are relevant to such entitlement; and
 - .ii you have notified the *Bar Standards Board* that you are willing to accept *instructions* from lay *clients*; and
 - .iii you comply with the *public access rules*; or
 - .b the matter relates to the *conduct of litigation* and
 - i you have a litigation extension to your *practising certificate*; and
 - .ii you have notified the *Bar Standards Board* that you are willing to accept *instructions* from lay *clients*.’
31. Under its terms of cover, the Bar Mutual Indemnity Fund “shall indemnify the Insured against any and all claims which are first made against the Insured during the Period of Insurance in respect of any and every description of Civil Liability whatsoever arising out of or in any way in connection with the Insured Practice whensoever and wheresoever the act or omission or other circumstances or event giving rise to such liability may have occurred.”
 32. We have discussed the Family Court QLR scheme with a representative of the BMIF. We have been informed, as the barrister is instructed by the court and it is a role “arising out of or in any way in connection with the insured practice”, that barristers will be insured for the tasks performed under the instruction of the court.
 33. The BMIF will look at every claim on its own facts so the information provided in this paragraph should be taken as an informal but reassuring guide. We have been informed that you are likely to be covered even if you go beyond the role fixed by the statutory scheme and perform tasks that do not fall within it. You are likely to be covered by the BMIF if you are authorised to conduct direct access work and act without a formal contract in place with the prohibited party for the tasks undertaken outside of the QLR scheme. We have also been advised that you are likely to be covered by your BMIF insurance even if you are not direct access authorised and perform tasks that do not fall within the statutory QLR scheme as you have been instructed by the Court.
 34. However, you must be extremely careful before agreeing to undertake any role that, in your own judgment, exposes you to a risk of falling outside of the responsibilities and duties we have described in this guide. Undertaking work that does not fall within the instruction of the court could put you in breach of rs24 as set out above.

Darren Howe KC
 July 2023
 On behalf of the FLBA QLR Sub-Committee