

Cross-examination of survivors and perpetrators of domestic abuse in the Family Court

This legal guide explains the law which prevents survivors of domestic abuse from being cross-examined (questioned) by the abuser, or from having to cross-examine the abuser.

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For some types of hearings, such as fact finding hearings and final hearings, parties and witnesses will give evidence to the judge. This involves going into the witness box, swearing that you are going to tell the truth and answering questions. Cross-examination is when one party or their lawyer questions another party or another party's witness.

This guide is about what happens when a party does not have a lawyer to do the questioning for them. Protection for survivors of domestic abuse from being cross-examined by the perpetrator or having to cross-examine the perpetrator in the family courts is available. The protection now available means that the survivor of domestic abuse will be asked questions by someone else instead of the abuser. It does not mean the survivor will not be asked questions at all. If a survivor of domestic abuse does not have a lawyer, then the protection means someone else will ask questions of the abuser, instead of the survivor having to do this.

This guide does not cover the civil or criminal courts. For information on protections available in the criminal courts see **From report to court: a handbook for adult survivors of sexual violence**.

In addition to the protections explained in this guide, survivors of domestic abuse may also be entitled to special measures to help them take part in court proceedings. For further information see: **Special measures in the family and criminal courts**.

Both parties are represented by lawyers

If both you and the other party in your case have lawyers then the lawyers will ask the questions, and you do not need to read the rest of this guide.

I have a lawyer, but the other party does not

If the other party in the case does not have a lawyer then the other party will cross-examine you themselves, unless the court stops this with a court order. Read the rest of this guide for information on whether the other party might be prohibited from cross-examining you directly.

Your lawyer will cross-examine the other party for you.

The other party has a lawyer, but I do not

If the other party has a lawyer then their lawyer will cross-examine you.

You will cross-examine the other party yourself unless the court makes an order stopping you from from doing this. Read the rest of this guide for information on whether you might be prohibited from cross-examining the other party directly.

Both parties are not represented by lawyers

If neither you or the other party have lawyers then you will have to ask each other questions directly unless the court makes an order stopping this from happening. Read the rest of this guide to find out whether this might apply to your case.

Cases which started on or after 21 July 2022

New laws came into effect on 21 July 2022 to protect survivors of domestic abuse during cross-examination. However, these laws only apply to cases that started on or after 21 July 2022. If your case started before this date then go to: Cases which started before 21 July 2022.

The law which started on 21 July 2022 will prohibit perpetrators of domestic abuse and victims of domestic abuse from having to cross-examine each other directly. The court will consider alternatives to direct cross-examination, set out below.

For some cases there is an automatic ban on direct cross-examination. This means direct cross-examination will always be prohibited if certain criteria are met.

For some cases there is discretionary ban on direct cross-examination. This means it will be up to the judge hearing the case to decide whether or not a party should be prohibited from directly cross-examining the other party.

We have explained the automatic ban and discretionary ban further below.

Automatic ban on cross-examination in person

In the following situations, the perpetrator and victim will always be prohibited from cross-examining each other:

1. A person who has been convicted, cautioned or charged with a domestic abuse offence cannot cross-examine the victim of that offence. The victim of that offence cannot cross-examine the perpetrator. This means that if the other party has been convicted, cautioned, or charged with a domestic abuse offence against you then they cannot directly cross-examine you, and you cannot directly cross-examine them. You can find a list of the domestic abuse offences here: www.legislation.gov.uk/uksi/2022/568/schedule/1/made.

2. A person who is the subject of a protective injunction cannot directly cross-examine is the person protected by that injunction. The person protected by the injunction cannot directly cross-examine the perpetrator. This means that if you have a protective injunction against the other party then they cannot directly cross-examine you, and you cannot directly cross-examine them.

The protective injunction must have been on notice. This means the perpetrator must have been told about the hearing when the injunction was made before the hearing happened.

Protective injunction includes non-molestation orders, occupation orders, restraining orders, domestic violence protection orders and many other orders. For a full list of the types of orders that count as a protective injunction see: www.legislation.gov.uk/uksi/2022/568/schedule/2/made

3. Where there is evidence of domestic abuse perpetrated by a party, that party may not directly cross-examine the person who is the victim of that abuse. The person who has experienced the abuse cannot directly cross-examine the perpetrator. This means if you have evidence of domestic abuse from the other party then they cannot directly cross-examine you, and you cannot directly cross-examine them.

The evidence of domestic abuse has to be from a list of the types of evidence the court will accept. For a full list of the type of evidence that the court will accept see: www.legislation.gov.uk/uksi/2022/568/schedule/3/made.

Discretionary ban on cross-examination in person

If the automatic ban on cross-examination does not apply, the court still has the option of banning one party from directly cross-examining the other. The court can do this if:

- you would not be able to give your best evidence if the perpetrator directly cross-examined you, and banning direct cross-examination by the perpetrator would help you give your best evidence; or
- you will be significantly distressed by being directly cross-examined by the perpetrator, or having to directly cross-examine the perpetrator yourself, and having someone else carry out the cross-examination will mean you will be less distressed.

In both situations, the judge will need to be sure that it is not against the interests of justice for the court to ban direct cross-examination. This means that the judge will need to be sure that the ban would not lead to an unfair outcome.

Prohibited party meaning

If the automatic or discretionary ban applies, then the person banned is known as the prohibited party. This is because that person is prohibited from cross-examining a party or witness themselves.

What the court has to do

The court should consider if anyone should be a prohibited person as soon as possible after the start of the case. The court can consider a ban on direct cross-examination later in the case if necessary, including while the cross-examination is happening. This could be, for example, if the perpetrator is charged or cautioned for an offence, or if an injunction is made against him, after the case has started.

To help the judge decide whether there should be a prohibition the court might ask you to complete a form EX740. If you are the person accused of abuse, the court will ask you to complete Form EX741.

The court can ban direct cross-examination without any party making an application, or can do this after an application is made. When making any order the court must give the reasons for making the ban or refusing to ban direct cross-examination.

If the court decides to ban direct cross-examination then the ban will remain until the end of the case unless the court makes an order to end the ban.

How to apply for a ban on direct cross-examination

At any stage in the case you can fill in form EX740 to ask the court to ban someone from cross-examining someone in person.

The purpose of the EX740 is to give the court the information it needs to understand whether the automatic ban should apply, and if not whether the discretionary ban should apply. You might want to include information on:

- The perpetrator's behaviour towards you
- The way he makes you feel
- How you react when he is abusive towards you
- How you might react if he were to question you
- The impact being questioned by the perpetrator will have on your ability to give evidence
- The impact it would have on you if you were required to cross-examine the perpetrator

What happens after direct cross-examination is banned

When the court makes an order banning direct cross-examination it has to consider how questioning will happen if this is not done by the prohibited party. The court will consider whether there is another person who could do the cross-examination instead of the prohibited person. The court may invite you to write your suggestions for how this could be done, or the court could ask you at a hearing.

When the court considers who might be a suitable alternative to ask questions on behalf of the prohibited person, this does not include the judge. This means the judge should not ask questions on behalf of a prohibited party.

Appointing a qualified legal representative (QLR)

If there is no one else who can conduct the cross-examination, then the court must tell the prohibited party that:

- They are banned from cross-examining the other party/witness directly
- That if they are unrepresented they can arrange for a lawyer to act for them to carry out the cross-examination and they need to let the court know who that person is
- If they don't want to do that, or cannot, or fail to respond then the court has to consider whether it is necessary in the interests of justice for a qualified legal representative to be appointed to cross-examine the witness
- If it is necessary then the court will appoint a qualified legal representative

The court appoints a qualified legal representative from the list of lawyers who have said they are willing to do this work. The court will let the parties and the qualified legal representative know. The court will make any directions that are necessary for the qualified legal representative so that the cross-examination of the witness is carried out.

If both parties need a qualified legal representative, then the court can appoint one for each party.

In some circumstances the court can end the ban on cross-examination in person. If the court does this, it must set out the reasons in the order. If this is suggested in your case you should seek legal advice.

The cost of the qualified legal representative is paid for from public funds. The prohibited party will not have to pay for the qualified legal representative's work.

What will a qualified legal representative do?

A qualified legal representative is not the same as a lawyer for one of the parties. They are not responsible to the prohibited party.

A qualified legal representative has a limited role in the case. They are only there to carry out the cross-examination of the person or persons who the prohibited party is banned from questioning.

The qualified legal representative will read through the court papers. They will be provided with a copy of the court bundle. If there is no court bundle because the parties are representing themselves, the court staff will prepare and send the bundle to the qualified legal representative.

The qualified legal representative will meet with the prohibited party to understand their case, and to agree the issues that will be covered in the cross-examination. The qualified legal representative can also ask the judge for guidance on the key issues in the case. They may also prepare a position statement to set out the issues that will be the focus of the cross-examination.

The qualified legal representative will attend the hearing when the cross-examination is taking place. They may also attend other hearings to prepare for the hearing when there is due to be cross-examination.

At the hearing the qualified legal representative will ask questions on behalf of the prohibited party. The qualified legal representative does not have to ask every question that the prohibited party wants them to ask. They will ask questions about the essence of the prohibited party's case.

Cases which started before 21st July 2022

Many people are involved in cases which started before 21st July 2022. For these people, the new rules on prohibition of direct cross-examination do not apply.

If you are one of the parties in a case which started before 21st July 2022 then it is possible that you will be cross-examined by the perpetrator of abuse. If there is a hearing when there will be cross-examination, for example, a fact finding hearing or final hearing, then you can make an application to the court for the court to consider what steps to take in preparation for cross-examination.

In children cases, you can make this application using form C2. In financial cases, you can use form D11.

In your application, you can explain whether you would meet any of the criteria for the automatic ban set out above. You might also include:

- The perpetrator's behaviour towards you
- The way he makes you feel
- How you react when he is abusive towards you
- How you might react if he were to question you
- The impact being questioned by the perpetrator will have on your ability to give evidence
- The impact it would have on you if you were required to cross-examine the perpetrator

The judge will have to decide whether to take any steps to avoid direct cross-examination and, if so, what those steps may be. It is not possible for the court to appoint a lawyer to do the cross-examination. But you could ask a judge to do the following:

- Make directions to limit the issues that you can be cross-examined about
- Direct that you and the perpetrator have to submit your questions in advance and someone else in the case will ask the questions, this could be the judge
- Direct that the court will decide what questions are allowed or not

- Decide that the judge will ask the questions prepared by the parties
- If the child is represented, request that their representative cross-examines one or other party putting the questions of the parent. The court cannot force the representative for the child to do this if they disagree.

You can also make sure the court has considered other special measures such as screens in court, giving evidence by video and other steps to help you feel safer at court. For further information see: **Special measures in the family and criminal courts.**

Useful contacts

Legal advice and support

FLAWS (for advice and support on applying for non-molestation or occupation orders)

www.flaws.org.uk

LawWorks Clinic Network

www.lawworks.org.uk

Law Centres Network

www.lawcentres.org.uk

Advocate

www.weareadvocate.org.uk

Support Through Court

www.supportthroughcourt.org

Domestic abuse

Police (emergency)

999

National domestic abuse helpline

www.nationaldahelpline.org.uk

Rape Crisis

www.rapecrisis.org.uk

National Stalking Helpline

www.suzylamplugh.org

Galop (for LGBT+ people)

www.galop.org.uk

FORWARD (for advice and support on FGM)

www.forwarduk.org.uk

Respond (for people with learning difficulties affected by abuse or trauma)

www.respond.org.uk

DeafHope (for deaf people affected by abuse)

www.deaf-hope.org

Other related issues

Shelter (advice on housing and homelessness)

www.shelter.org.uk

Disability Law Service (advice for people with disabled people)

www.dls.org.uk

MIND (support for people experiencing mental health problems)

www.mind.org.uk

Samaritans

www.samaritans.org

For free, confidential, legal advice on family or criminal law, contact Rights of Women's legal advice lines.

National family law advice

Women who live in England and Wales in need of family law advice, call 020 7251 6577

London family law advice

Women who live or work in London in need of family law advice, call 020 7608 1137

Criminal law advice

Women who live in England and Wales in need of criminal law advice, call 020 7251 8887

You can find the opening times here: www.rightsofwomen.org.uk/get-advice



labyrinth
project

The law is complex and may have changed since this guide was produced. This guide provides general information only for the law in England and Wales. You should seek up-to-date, independent legal advice. Rights of Women does not accept responsibility for any reliance placed on the legal information contained in this guide.

This guide has been developed as part of the Labyrinth Project, which is contributing to system change for women by building capacity and forging stronger networks of support and shared learning locally and nationally. You can learn more about the project here: www.solacewomensaid.org/our-partnerships/labyrinth-project and access more resources developed through the project here: www.womancentre.co.uk

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