

These notes refer to the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 (c.2) which received Royal Assent on 1 March 2021

Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 2 – Provision for Civil Proceedings

Section 35: Factors relevant to residence and contact orders

Section 35 amends Article 12A of the Children (Northern Ireland) Order 1995 to require a court considering whether to make a residence or contact order to consider any conviction of the person applying for the order for a domestic abuse offence involving the child. A domestic abuse offence involving the child is defined as meaning the new domestic abuse offence under section 1, if the offence is aggravated as provided for in section 9 and the aggravation relates to the child, or any other offence, which is aggravated as provided for in section 15 and the child is not the person against whom the offence was committed but the aggravation of the offence relates to the child.

Section 36: Prohibition of cross-examination in person in family proceedings

Section 36 inserts the following new Articles into the Family Law (Northern Ireland) Order 1993 to prohibit perpetrators of abuse from cross-examining their victims in person in certain circumstances in family proceedings, and vice versa, and give courts discretion to prohibit cross-examination in person in other circumstances where it would affect the quality of the witness's evidence or cause them significant distress.

It also imposes a duty on courts to appoint a qualified legal representative to conduct cross-examination on a party's behalf, where that party is prohibited from cross-examining in person, there is no satisfactory alternative means available for the witness to be cross-examined or the evidence to be obtained, and it appears that no other qualified legal representative is to act for the person.

New Article 11A defines the meaning of 'family proceedings' and 'witness' for the purpose of the inserted Articles, and provides that the Department of Justice may by regulations alter the former definition.

New Article 11B provides that, 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 the (alleged) victim of that offence. It also provides that the (alleged) victim may not cross-examine in person the (alleged) perpetrator. The prohibition will not apply to spent convictions, unless evidence in relation to the conviction is admissible in, or may be required in, the proceedings under Article 8(2), (3) or (4) of the Rehabilitation of Offenders (Northern Ireland) Order 1978. If cross-examination takes place in breach of this automatic prohibition, the validity of a decision of the court is not affected if the court was not aware of the conviction, caution or charge when the cross-examination took place.

New Article 11B(5) defines the meaning of ‘caution’ and ‘conviction’ and provides that a ‘specified offence’ is one specified in regulations made by the Department of Justice.

New Article 11B(6) makes clear that the prohibition applies even where a conviction has been discharged (either absolutely or conditionally).

New Article 11B(7) defines ‘offence’ and “provision” for the purposes of the Article.

New Article 11C provides that, 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. It also provides that a party who is protected by such an injunction may not cross-examine in person a witness against whom the injunction is in force. If cross-examination takes place in breach of this provision, the validity of a decision of the court is not affected if the court was not aware of the protective injunction when the cross-examination took place.

New Article 11C(4) and (5) provide that a ‘protective injunction’ is one specified in regulations made by the Department of Justice; and that a protective injunction is ‘on-notice’ in one of two instances: if the court is satisfied that there has been a hearing at which the person against whom the injunction is in force has had a chance to ask for it to be set aside or varied; or if the injunction was made at a hearing and the court is satisfied that both the person protected by it and against whom it is in force, had been informed about the hearing.

New Article 11D provides that, in family proceedings, where specified evidence is adduced that a party to the proceedings has been abusive towards a witness to whom that party is personally connected, that party may not cross-examine the witness in person. It also provides that, where specified evidence is adduced that a witness has been abusive towards a party to the proceedings, to whom the witness is personally connected, that party may not cross-examine the witness in person.

New Article 11D(3) and (4) provides that ‘specified evidence’ is evidence specified, or of a description specified, in regulations by the Department of Justice.

New Article 11D(5) provides that the meaning of ‘abusive behaviour’ and ‘personal connection’, provided for in sections 2, 4 and 5 of this Act, applies to this Article.

New Article 11E provides that, in family proceedings, in addition to the absolute prohibition on cross-examination in person under new Articles 11B–11D, a court has discretion to prohibit cross-examination in person by giving a direction to that effect. Such a direction can be given if it appears to the court that either the ‘quality condition’ or the ‘significant distress condition’ is met and it would not be contrary to the interests of justice to give the direction. The ‘quality condition’ is met if the quality of evidence given by the witness is likely to be diminished if the cross-examination is conducted by the party in person and is likely to be improved if a direction is given. The ‘significant distress condition’ is met if cross-examination in person is 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 by a person other than the party. A direction under this provision can be made on an application by a party to the proceedings or of the court’s own motion.

New Article 11E(5) sets out factors that the court must consider when deciding whether or not the ‘quality condition’ or ‘significant distress condition’ is met. This covers views expressed by the witness or the party; the nature of the questions likely to be asked; any finding of fact that has been made about the party’s or witness’s behaviour; how the party or witness is acting; and any relationship between the witness and the party. The list is not exhaustive.

New Article 11E(6) and (7) define what is meant by the quality of a witness’s evidence.

New Article 11F provides more detail in relation to directions made under new Article 11E. This covers how long a direction may last and the circumstances in which a court may revoke a direction. The court is required to state its reasons for giving, refusing, revoking, or refusing to revoke a direction.

New Article 11G provides for alternatives to cross-examination in person where a party to family proceedings is prohibited from doing so. First, the court must consider if there is a satisfactory alternative means for the witness to be cross-examined, or of obtaining evidence that the witness might have given under cross-examination. If not, the court must invite the party to arrange, within a specified time, for a qualified legal representative to cross-examine the witness on the party’s behalf, and to notify the court of the arrangements. If the party does not make such an arrangement within the specified time or the court has not received any notification of such an arrangement, the court must consider if it necessary in the interests of justice, to appoint a qualified legal representative to cross-examine the witness in the interests of the party. A qualified legal representative appointed by the court is not responsible to the party other than acting in the interests of the party in accordance with the provision.

New Article 11G(8) explains what is meant by ‘cross-examination’ and ‘qualified legal representative’.

New Article 11H requires the Department of Justice to pay the fees, costs and expenses properly incurred by a qualified legal representative appointed under new Article 11G, and that the Department may specify in regulations the sums or rates payable.

New Article 11I provides that the Department of Justice may issue, and subsequently revise, guidance about the role of a qualified legal representative appointed under new Article 11G. It also requires the qualified legal representative to have regard to such guidance and for the Department to publish the guidance and any revisions to it.

New Article 11J provides that regulations under new Articles 11A–11I are subject to negative resolution other than regulations under new Article 11A(2) to amend the definition of ‘family proceedings’, a draft of which must be laid before and approved by the Assembly.

Section 37: Special measures directions in family proceedings

Section 37 inserts new Articles 11K and 11L into the Family Law (Northern Ireland) Order 1993 to require rules of court for family proceedings to make specific provision for special measures for victims of domestic abuse. The section sets out the provision that rules of court must make.

Paragraph (1) of new Article 11K provides that rules of court must make provision to enable a court hearing family proceedings to make a special measures direction in relation to a party or witness (P) who is, or is at risk of, being subjected to abusive behaviour carried out by another party, a relative of a party (except P), or a witness, who is personally connected to P.

Paragraph (2) requires such court rules to provide for the court to consider, either on the application of a party, or of the court’s own motion, whether one or more special measures directions should be made.

Paragraph (3) provides that the rules may also include provision about what factors the court is to take into account when considering whether a special measures direction should be made including but not limited to the availability of the special measures in question and any views expressed by P.

Paragraphs (4) and (5) define various meanings for the purposes of this Article.

New Article 11L provides that the Department of Justice may make regulations, which are to be subject to draft affirmative procedure, to amend the definition of ‘family proceedings’ in paragraph (5) of new Article 11K.

Section 38: Prohibition of cross-examination in person in civil proceedings generally

Section 38 inserts the following new Articles into the Civil Evidence (Northern Ireland) Order 1997 to give a court hearing civil proceedings a discretionary power to prohibit cross-examination in person and includes provision for the court to appoint a publicly-funded legal representative to conduct the cross-examination instead.

New Article 7A defines the meaning of ‘civil proceedings’ and ‘witness’ for the purpose of the inserted Articles, and provides that the Department of Justice may by regulations alter the former definition.

New Article 7B provides a discretionary power for the court to give a direction prohibiting cross-examination in person. Such a direction can be given if it appears to the court that either the ‘quality condition’ or the ‘significant distress condition’ is met and it would not be contrary to the interests of justice to give the direction. The ‘quality condition’ is met if the quality of evidence given by the witness is likely to be diminished if the cross-examination is conducted by the party in person and is likely to be improved if a direction is given. The ‘significant distress condition’ is met if cross-examination in person is likely to cause significant distress to the witness or party, and that distress is likely to be more significant than would be the case if the witness were cross-examined by a person other than the party. A direction under this provision can be made on an application by a party to the proceedings or of the court’s own motion.

New Article 7B(5) sets out factors that the court must consider when deciding whether or not the ‘quality condition’ or ‘significant distress condition’ is met. This covers views expressed by the witness or the party; the nature of the questions likely to be asked; any finding of fact that has been made about the party’s or witness’s behaviour; how the party or witness is acting; and any relationship between the witness and the party. The list is not exhaustive.

New Article 7B(6) and (7) define what is meant by the quality of a witness’s evidence.

New Article 7C provides more detail in relation to directions made under new Article 7B. This covers how long a direction may last and the circumstances in which a court may revoke a direction. The court is required to state its reasons for giving, refusing, revoking or refusing to revoke a direction.

New Article 7D provides for alternatives to cross-examination in person where a party to civil proceedings is prohibited from doing so. First, the court must consider if there is a satisfactory alternative means for the witness to be cross-examined or of obtaining evidence that the witness might have given under cross-examination. If not, the court must invite the party to arrange, within a specified time, for a qualified legal representative to cross-examine the witness on the party’s behalf, and to notify the court of the arrangements. If the party does not make such an arrangement within the specified time, or the court has not received any notification of such an arrangement, the court must consider if

it necessary in the interests of justice, to appoint a qualified legal representative to cross-examine the witness in the interests of the party. A qualified legal representative appointed by the court is not responsible to the party other than acting in the interests of the party in accordance with the provision.

New Article 7D(8) explains what is meant by ‘cross-examination’ and ‘qualified legal representative’.

New Article 7E requires the Department of Justice to pay the fees, costs and expenses properly incurred by a qualified legal representative appointed under new Article 7D, and that the Department may specify in regulations the sums or rates payable.

New Article 7F provides that the Department of Justice may issue, and subsequently revise, guidance about the role of a qualified legal representative appointed under new Article 7D. It also requires the qualified legal representative to have regard to such guidance and for the Department to publish the guidance and any revisions to it.

New Article 7G provides that regulations under new Articles 7A to 7E are subject to negative resolution other than regulations under new Article 7A(2) to amend the definition of ‘civil proceedings’, a draft of which must be laid before and approved by the Assembly.

Section 39: Special measures directions in civil proceedings generally

Section 39 inserts new Articles 7H and 7I into the Civil Evidence (Northern Ireland) Order 1997 to require rules of court for civil proceedings to make specific provision for special measures for victims of specified offences. The section sets out the provision that rules of court must make.

Paragraph (1) of new Article 7H provides that rules of court must make provision to enable a court hearing civil proceedings to make a special measures direction in relation to a party or witness (P) who is the victim, or alleged victim, of a specified offence (to be specified in regulations made by the Department of Justice).

Paragraph (2) requires such court rules to provide for the court to consider, either on the application of a party or of the court’s own motion, whether P’s evidence or (if a party) participation in the proceedings, is likely to be diminished because P is the victim, or alleged victim, of a specified offence; and if so, whether one or more special measures directions should be made.

Paragraph (3) provides that the rules may also include provision about what factors the court is to take into account when considering whether a special measures direction should be made including but not limited to the availability of the special measures in question and any views expressed by P.

Paragraph (4) provides that a person is the victim of a specified offence if another person has been convicted of, or given a caution for, the offence; and that a

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person is the alleged victim of a specified offence if another person has been charged with the offence.

Paragraphs (5) to (7) define various meanings for the purposes of this Article.

New Article 7I provides that the Department of Justice may make regulations to amend the definition of ‘civil proceedings’ in new Article 11H(5), a draft of which must be laid before and approved by the Assembly. It further provides regulations made (only) under new Article 11H(5) to specify offences are subject to negative resolution.