

*Status: This version of this provision is prospective.*

**Changes to legislation:** *There are currently no known outstanding effects for the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021, Section 36. (See end of Document for details)*



## 2021 CHAPTER 2

### PART 2

#### Provision for civil proceedings

##### *Cross-examination and special measures*

PROSPECTIVE

#### **Prohibition of cross-examination in person in family proceedings**

**36** In the Family Law (Northern Ireland) Order 1993, after Article 11 insert—

*“Prohibition of cross-examination in person in family proceedings*

#### **Prohibition of cross-examination in person: introductory**

**11A.**—(1) For the purposes of Articles 11B to 11I—

“family proceedings” means—

- (a) proceedings which are family proceedings for the purposes of Article 12 (family proceedings rules), or
- (b) proceedings in a court of summary jurisdiction sitting to hear domestic proceedings within the meaning of Article 88 of the Magistrates' Courts (Northern Ireland) Order 1981,

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

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(2) The Department of Justice may by regulations amend this Article so as to alter the definition of “family proceedings” in paragraph (1).

### **Prohibition of cross-examination in person: victims of offences**

**11B.—**(1) 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.

(2) 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.

(3) Paragraphs (1) and (2) do not apply to a conviction that is spent for the purposes of the Rehabilitation of Offenders (Northern Ireland) Order 1978 unless evidence in relation to the conviction is admissible in or may be required in the proceedings by virtue of Article 8(2), (3) or (4) of that Order.

(4) Cross-examination in breach of paragraph (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.

(5) In this Article—

“caution” means—

(a) 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,

(b) 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,

(c) in the case of Scotland, anything corresponding to a caution falling within paragraph (b) (however described) which is given to a person in respect of an offence under the law of Scotland,

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“conviction” means—

- (a) wherever occurring in Northern Ireland, Scotland, or England and Wales—
  - (i) a conviction by or before a court, or
  - (ii) 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,
- (b) wherever occurring within or outside the United Kingdom, a conviction in service disciplinary proceedings,

“service disciplinary proceedings” means—

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

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

(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 Article 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) Article 6 of the Criminal Justice (Northern Ireland) Order 1996 or any corresponding provision,
- (b) section 187 of the Armed Forces Act 2006 or any corresponding provision.

(7) For the purposes of this Article—

“offence” includes an offence under a law that is no longer in force,  
“corresponding provision” means a corresponding statutory provision or any other corresponding legislative provision (and includes an earlier provision or a provision applying in any part of the United Kingdom).

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### **Prohibition of cross-examination in person: persons protected by injunctions etc.**

**11C.**—(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 paragraph (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 Article, “protective injunction” means an order, injunction or interdict specified, or of a description specified, in regulations made by the Department of Justice.

(5) For the purposes of this Article, 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.

### **Prohibition of cross-examination in person: evidence of domestic abuse**

**11D.**—(1) In family proceedings, where specified evidence is adduced that a person who is a party to the proceedings has engaged in behaviour that was abusive of a witness to whom that party is personally connected, that party may not cross-examine the witness in person.

(2) In family proceedings, where specified evidence is adduced that a person who is a witness has engaged in behaviour that was abusive of a party to the proceedings to whom the witness is personally connected, that party to the proceedings may not cross-examine the witness in person.

(3) In this Article, “specified evidence” means evidence specified, or of a description specified, in regulations made by the Department of Justice.

(4) Regulations under paragraph (3) may provide that any evidence which satisfies the court that a person has engaged in abusive behaviour, or abusive behaviour of a specified description, is specified evidence for the purposes of this Article.

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(5) The following apply for the purposes of this Article as they apply for the purposes of Chapter 1 of Part 1 of the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021 (to give meanings to certain expressions)—

- (a) section 2 (as read with section 3(2)) of that Act,
- (b) sections 4 and 5 of that Act.

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

**11E.—**(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 Articles 11B to 11D 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 Article.

(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 Article 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)—

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- (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 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 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 Article 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.

#### **Directions under Article 11E: supplementary**

**11F.—**(1) A direction under Article 11E 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 Article 11E 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 Article 11E 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

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- (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 Article 11E,
  - (b) refusing an application for a direction under Article 11E,
  - (c) revoking a direction under Article 11E,
  - (d) refusing an application for the revocation of a direction under Article 11E.

### **Alternatives to cross-examination in person**

**11G.**—(1) This Article applies where a party to family proceedings is prevented from cross-examining a witness in person by virtue of any of Articles 11B to 11E.

(2) The court must consider whether (ignoring this Article) 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) Paragraph (5) applies if, by the end of the period specified under paragraph (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.

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(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 paragraph (6) is not responsible to the party except in so far as acting in the interests of the party by virtue of this Article.

(8) For the purposes of this Article—

(a) a reference to cross-examination includes a reference to continuing to conduct cross-examination,

(b) “qualified legal representative” means a legal representative who has a right of audience in relation to the proceedings before the court.

#### **Costs of legal representatives appointed under Article 11G(6)**

**11H.**—(1) The Department of Justice must pay such sums as the Department may determine in respect of—

(a) fees or costs properly incurred by a qualified legal representative appointed under Article 11G(6), and

(b) expenses properly incurred in providing such a person with evidence or other material in connection with the appointment.

(2) Regulations made by the Department of Justice may provide for sums payable under paragraph (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.

#### **Guidance for legal representatives appointed under Article 11G(6)**

**11I.**—(1) The Department of Justice may issue guidance in connection with the role which a qualified legal representative appointed under Article 11G(6) in connection with any family proceedings is to play in the proceedings, including (among other things) guidance about the effect of Article 11G(7).

(2) A qualified legal representative appointed under Article 11G(6) must have regard to any guidance issued under this Article.

(3) The Department of Justice may from time to time revise any guidance issued under this Article.

(4) The Department of Justice must publish—



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- (a) any guidance issued under this Article, and
- (b) any revisions of guidance issued under this Article.

### **Regulations under Articles 11A to 11H**

**11J.**—(1) Any power of the Department of Justice to make regulations under Articles 11A to 11H includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations that contain (with or without other provisions) provision under Article 11A(2) may not be made unless a draft of the regulations has been laid before and approved by a resolution of the Assembly.

(3) Regulations that contain provision under Articles 11B to 11H are subject to negative resolution (except where they are required by paragraph (2) to be laid in draft before and approved by a resolution of the Assembly).”.

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