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Changes to legislation: There are currently no known outstanding effects for the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021, Section 38. (See end of Document for details)



2021 CHAPTER 2

PART 2 **N.I.**

Provision for civil proceedings

Cross-examination and special measures

PROSPECTIVE

Prohibition of cross-examination in person in civil proceedings generally **N.I.**

38 In the Civil Evidence (Northern Ireland) Order 1997, after Article 7 insert—

“Prohibition of cross-examination in person in civil proceedings

Prohibition of cross-examination in person: introductory

7A.—(1) For the purposes of Articles 7B to 7F—

“civil proceedings” means proceedings (other than proceedings which are family proceedings for the purposes of Article 12 of the Family Law (Northern Ireland) Order 1993), in—

- (a) the High Court, or
- (b) a county court,

exercising its civil jurisdiction,

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

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

Direction for prohibition of cross-examination in person

7B.—(1) In civil 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 it appears to the court that—

- (a) the quality condition or the significant distress condition is met, and
- (b) 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 the court's 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)—

- (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,

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- (d) any conviction or caution (of any kind) of which the court is aware for an offence committed by the party in relation to the witness,
- (e) any conviction or caution (of any kind) of which the court is aware for an offence committed by the witness in relation to the party,
- (f) 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,
- (g) 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,
- (h) any behaviour by the party at any stage of the proceedings, both generally and in relation to the witness,
- (i) any behaviour by the witness at any stage of the proceedings, both generally and in relation to the party,
- (j) 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 7B: supplementary

7C.—(1) A direction under Article 7B 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 7B 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 the court's own motion.

(3) The court may revoke a direction under Article 7B 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 7B,
 - (b) refusing an application for a direction under Article 7B,
 - (c) revoking a direction under Article 7B,
 - (d) refusing an application for the revocation of a direction under Article 7B.

Alternatives to cross-examination in person

7D.—(1) This Article applies where a party to civil proceedings is prevented from cross-examining a witness in person by virtue of Article 7B.

(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 7D(6)

7E.—(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 7D(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 7D(6)

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

(2) A qualified legal representative appointed under Article 7D(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 7A to 7E

7G.—(1) Any power of the Department of Justice to make regulations under Articles 7A to 7E includes power to make supplementary, incidental, consequential, transitional, transitory or saving provision.

(2) Regulations that contain (with or without other provisions) provision under Article 7A(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 7B to 7E 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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