

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 1, Chapter 1 – Offence of Domestic Abuse

Section 1: The domestic abuse offence

This section makes it an offence for a person to engage in a course of behaviour (defined in section 4(4) as behaviour on at least two occasions) which is abusive of another person with whom they are at the time of the course of behaviour personally connected. Section 5 defines what two people are personally connected. For the purpose of this commentary, these personally connected persons will be referred to as “the accused” and their “partner/connected person”.

Subsection (2) provides that the offence is subject to two further conditions being met. The first of these conditions is that a reasonable person would consider that the course of behaviour would be likely to cause the partner/connected person to suffer physical or psychological harm, which includes fear, alarm and distress (see subsection (3)). The court would be entitled to take account of the circumstances of the case, for example any particular vulnerability of the partner/connected person, in considering whether the accused’s behaviour would be likely to cause them to suffer physical or psychological harm.

The second of these conditions is that the accused must either intend that the behaviour causes their partner/connected person to suffer harm or is reckless as to this. This condition could be met in a reckless situation where, for example, the accused is persistently verbally abusive and demeaning towards their partner/connected person but claims that they did not intend the behaviour to cause harm.

Section 2: What amounts to abusive behaviour

This section sets out what constitutes abusive behaviour for the purpose of the offence. The description is non-exhaustive and it therefore remains open to the court to determine in any individual case that the accused’s behaviour was abusive in some other way, beyond the ways described.

Subsection (2) provides that abusive behaviour includes behaviour which is violent or threatening (including both physical and sexual violence). Subsection (2) also covers behaviour directed at an individual, their child or any other person where the purpose of the behaviour is to have certain effects on the partner/connected person or where a reasonable person would consider it likely to have one or more of the effects.

Subsection (3) sets out, in connection with this latter aspect of the offence, the relevant effects that can indicate that behaviour is abusive. This is intended to ensure that, for example, psychological abuse, or controlling or coercive behaviour that could not previously have been prosecuted, falls within the definition of abusive behaviour (as well as violent or threatening behaviour) and constitutes a criminal offence.

Subsection (3)(a) deals with behaviour which makes the partner/connected person dependent on or subordinate to the accused. This could include, for example, preventing the partner/connected person from having access to money, forcing them to leave their job or education, taking charge of household decision-making to the exclusion of them or treating them as a domestic slave.

Subsection (3)(b) covers behaviour which has the effect of isolating a person from friends, family members or other sources of social interaction or support. This could include, for example, controlling a partner's or connected person's movements; access to their phone or other forms of communication; not allowing visits from, or to, the partner's or connected person's friends or family, or deliberately failing to pass on messages from friends or family.

Subsection (3)(c) refers to behaviour which has the effect of controlling, regulating or monitoring the day-to-day activities of a partner/connected person. This could include, for example, checking their phone, e-mail or social media use, controlling what clothes they can or cannot wear, or placing unreasonable requirements on them, for example, to prepare meals in a particular way at a particular time every day or to answer the phone within three rings.

Subsection (3)(d) deals with behaviour which has the effect of depriving or restricting the freedom of action of a partner/connected person. This addresses behaviour which strips that person of their autonomy, for example, preventing them from attending work or college, preventing them from leaving the house alone, insisting on accompanying them to medical appointments for no good reason, or taking decisions for them in relation to private, individual matters that a person would normally decide for themselves.

Subsection (3)(e) refers to behaviour which has the effect of frightening, humiliating, degrading or punishing a partner/connected person. This could include, for example, abusive name-calling, threats of self-harm, playing 'mind games' that cause the partner/connected person to doubt their self-worth, controlling a partner/connected person's access to the toilet or forcing them to eat food off the floor. It could include various sexually abusive behaviours.

Subsection (4)(a) provides that the reference to violent behaviour includes both physical and sexual violence. Subsection (4)(b) provides that reference in the section to a child means someone under 18 years of age.

Section 3: Impact of behaviour on victim

This section provides that the partner/connected person need not have actually suffered physical or psychological harm for the offence to be committed. It also states that it is not necessary for the effects of the behaviour covered by section 2(3) (such as dependency, subordination, isolation, control, etc.) to have actually been suffered by the partner/connected person for the offence to have been committed.

This is because a reasonable person test applies both in section 1(2)(a) in relation to physical or psychological harm and section 2(2)(c)(ii) in relation to ‘relevant effects’. It is therefore sufficient that a reasonable person would consider it likely that the behaviour would result in the partner/connected person suffering physical or psychological harm, or experiencing a ‘relevant effect’. So, for example, section 2(2)(c) would cover behaviour which a reasonable person would consider likely to frighten, humiliate, degrade, punish or intimidate the partner/ connected person, irrespective of whether they actually suffer fear, humiliation, degradation, punishment or intimidation.

In turn, this section clarifies that evidence is not prevented from being presented of actual harm, or effects arising, as a result of the alleged course of behaviour or the effects that the behaviour actually had on the partner/connected person. Such evidence therefore remains relevant in the case.

Section 4: Meaning of behaviour etc.

This section further explains what is meant by behaviour for the purposes of Chapter 1. Subsection (2) provides that behaviour includes saying or otherwise communicating something as well as doing something (including an intentional failure to do, say, or otherwise communicate something). This could include, for example, a failure to pass on times and dates of appointments or social occasions, a failure to feed a family pet or a failure to speak to or communicate with an individual.

Subsection (3) clarifies that behaviour is directed at a person if it is directed in any way. This would include, for example, behaviour involving or towards property or behaviour that affects the ability to acquire, use, maintain money or other property or to obtain goods or services. This could relate to shared property or property belonging to parents. Property will also include pets or other animals (for example agricultural livestock) whether belonging to the victim or others.

The section also provides that behaviour directed at a person includes behaviour carried out with or through a third party, for example by spying on or reporting on the activities of a partner/connected person. The third party’s involvement could be unwitting or unwilling, as they may be entirely unaware that their

behaviour was helping the accused to abuse their partner/connected person or they may have been coerced into participating in the abuse.

Section 5: Meaning of personal connection

This section defines what two people are personally connected for the purposes of Chapter 1. Subsection (2) provides that two people are personally connected if they are, or have been, married or civil partners or they live together (or have lived together) as if spouses of each other. Two people are also personally connected if they are or have been in an intimate personal relationship with each other or are family members. The term “intimate personal relationship” is intended to cover relationships between two individuals (including young/teenage and same-sex relationships), although the relationship need not be sexual or long-term.

Subsection (3) sets out that a family member covers a person’s parent, grandparent, child, grandchild or sibling. A family member also covers the parent, grandparent, child, grandchild or sibling of the person that they are in a relevant relationship with. Subsection (4) defines that two people are in a relevant relationship if they are married or are in a civil partnership, or they live together as if spouses. Subsection (5) makes provision for the inclusion of half-blood relationships, relationships by affinity and stepchildren when considering family membership.

Section 6: Establishing connection by notice

This section provides a process for establishing, by means of a proposal made by the prosecution in proceedings for the offence, that two individuals are personally connected. The personal connection will be taken to be established unless challenged under the process set out for this.

Section 7: How notice is to be served

This section provides for the service of notices where a relationship, that is two individuals being personally connected, is challenged under section 6. It sets out the process to be applied and the meaning of key terms and their application.

Section 8: Aggravation where victim is under 18

This section provides that an allegation may be specified alongside the domestic abuse offence that it is aggravated because the accused’s partner/connected person was under 18 at the time of any of the behaviour by virtue of which the offence is constituted. This could enable sentencing to be increased up to the maximum available.

Subsection (2) and (3) sets out that, where the charge together with the aggravation is proved, the court must state on conviction that it is aggravated and take the aggravation into account when determining the sentence, as a factor that increases the seriousness of the offence. The court is also required to state

how the aggravation has affected the sentence and in recording the conviction show it as aggravated by reason of the partner/connected person being under 18.

Subsection (4) makes it clear that if the aggravation is not proved, but the charge is proved, conviction is as if the aggravation were not referred to alongside the charge.

Section 9: Aggravation where relevant child is involved

This section provides that an allegation may be specified alongside the domestic abuse offence that it is aggravated, through involving a child (under 18) who is not the accused or the partner/connected person. This includes the child of either person.

Subsection (2) sets out that the domestic abuse offence is aggravated by reason of involving a relevant child if any or all of the aspects set out at (2)(a) - (2)(c) are met.

Subsection (2)(a)(i) provides that the aggravation applies where it is shown that, at any time in commissioning the offence, the accused directed or threatened to direct behaviour at a child. This could include the accused threatening violence towards a child to control or frighten the partner/connected person or being abusive towards the child.

Subsection (2)(a)(ii) provides that the aggravation applies where it is shown that, in committing the offence, the accused made use of the child in directing behaviour at their partner/connected person. This could apply where the accused encourages or directs a child to spy on or report on the day-to-day activities of a partner/connected person. The involvement of the child could be unwittingly or unwillingly.

The aggravation would apply to the involvement of any child in the domestic abuse offence (apart from when the child is the partner/connected person, which would be caught by section 8). This would include, for example, the accused or victim's own child, another child living in or visiting the household, or a neighbour's child.

Subsection (2)(b) provides that the aggravation applies where a child saw, heard or was present during a single incident of the course of behaviour. This could, for example, be a verbal abuse incident or a physical assault and the child need not necessarily be in the same room as the accused and partner/connected person.

Subsection (2)(c) provides that the aggravation applies where a reasonable person considers that the course of behaviour, or an incident of behaviour which the accused directed at a victim as part of the course of behaviour, to be likely to adversely affect the child.

Subsection (3) provides that there does not need to be evidence that a child ever had any awareness, or understanding of the nature, of the accused's behaviour or to have been adversely affected by it.

Subsection (4) sets out that nothing in this section prevents evidence from being led about a child's observations of, or feelings as to, the accused's behaviour, or a child's situation arising from of the accused's behaviour.

Subsections (5) and (6) sets out that, where the charge together with the aggravation is proved, the court must state on conviction that it is aggravated and take the aggravation into account when determining the sentence, as a factor which increases the seriousness of the offence. The court is also required to state how it has affected the sentence and in recording the conviction shows it as aggravated by reason of involving a person being under 18 (who is not the accused or the partner/connected person).

Subsection (7) makes it clear that if the aggravation is not proved, but the charge is proved, conviction is as if the aggravation were not referred to alongside the charge.

Section 10: Behaviour occurring outside the UK

This section provides that domestic abuse offence would be constituted by virtue of the course of behaviour if it consists of or includes behaviour which occurred in a country outside the United Kingdom. The behaviour would need to constitute the domestic abuse offence if it occurred in Northern Ireland and the accused would need to be habitually resident in Northern Ireland or be a UK national (as defined in subsection (2)).

Section 11: Exception where responsibility for children

Subsection (1) provides that the domestic abuse offence does not apply where a person has parental responsibility for another person who is under 16 years of age. It is considered that there are other provisions that deal with, and should more appropriately be used for, direct abuse of a child or young person by their parent or other carer. This includes section 21.

Section 12: Defence on the grounds of reasonableness

This section provides that it is a defence for the accused to show that the course of behaviour was, in the particular circumstances, reasonable. This may apply where, for example, the accused acted to prevent their partner from associating with certain persons or frequenting certain places if they are recovering from alcohol or drug addiction or to restrict their freedom of movement for their own safety due to the effects of suffering from dementia. It is expected the defence would apply in very limited circumstances.

Subsection (2) allows for the accused to adduce evidence that is enough to raise an issue as to whether the course of behaviour was reasonable, with the prosecution then needing to disprove this version of events.

Nothing in this section affects the broader requirement for the prosecution to prove beyond reasonable doubt that the offence has been committed.

Section 13: Alternative available for conviction

This section provides that, where the court is not satisfied that the domestic abuse offence has been committed, it can convict the accused of a specified alternative offence of harassment or putting people in fear of violence under the Protection from Harassment (Northern Ireland) Order 1997. It also makes clear that this section does not affect provisions in section 6(2) of the Criminal Law Act (Northern Ireland) 1967 in relation to alternative verdicts on trial on indictment.

Section 14: Penalty for the offence

This section provides that the maximum penalty on summary conviction (that is in a magistrates' court) is 12 months' imprisonment or a fine up to the statutory maximum (that is, £5,000). Where a case is tried on indictment (that is, in the Crown Court) the maximum penalty is 14 years' imprisonment or a fine or both. The nature of the penalties is intended to reflect the cumulative nature of the offence over time, that it may cover both physical and psychological abuse and also the intimate and trusting nature of the relationships involved.

Part 1, Chapter 2 – Aggravation as to Domestic Abuse

Section 15: Aggravation as to domestic abuse

This section provides that any offence (other than the domestic abuse offence) may be aggravated because it involves domestic abuse. The aggravation could be specified alongside charges for all sorts of offences, for example criminal damage, assault, grievous bodily harm, threats to damage property or threats to kill, etc.

Subsections (3) and (4) require that, where the charge as well as the aggravation is proved, the court must state on conviction that it is aggravated and take the aggravation into account when determining the sentence, as a factor which increases the seriousness of the offence. The court is also required to state how the aggravation has affected the sentence and record the conviction in a manner which shows that the offence was aggravated by reason of involving domestic abuse.

Subsection (5) makes it clear that if the aggravation is not proved, but the charge is proved, conviction is as if the aggravation were not referred to alongside the charge.

Section 16: What amounts to the aggravation

Section 16 sets out the conditions required for the domestic abuse aggravator to apply. This requires that a reasonable person would consider that the offence would be likely to cause the accused's partner or a connected person to suffer physical or psychological harm (including fear, alarm and distress). A further condition is that the accused either intended the offence to cause their partner/

connected person to suffer physical or psychological harm, or was reckless as to whether or not this would be caused.

Subsection (3) provides that the offence itself does not have to have been committed against the accused's partner/connected person, rather it can be against a third party with the purpose of abusing their partner or a connected person. Also harm does not have to have been caused to the partner/connected person as a result of the offence, rather that a reasonable person would consider that harm would be likely to be caused. As such, the aggravation could be in effect where, for example, the accused commits criminal damage against the friend of their partner, or a connected person, with the intent of causing psychological harm to their partner or a connected person. Subsection (4) ensures that evidence of actual harm remains relevant in the case.

Section 17: Exception regarding the aggravation

Section 17 provides that an offence cannot be aggravated if the partner/connected person is under 16 and the accused has parental responsibility for them. As set out at section 11, it is considered that there are other provisions that deal with, and should more appropriately be used for, direct abuse of a child or young person by their parent or other carer.

Section 18: Meaning of personal connection

This section defines what two people are personally connected for the purposes of Chapter 2. Subsection (2) provides that two people are personally connected if they are, or have been, married or in a civil partnership or they live together (or have lived together) as if spouses of each other. Two people are also personally connected if they are or have been in an intimate personal relationship with each other or are family members. The term "intimate personal relationship" is intended to cover relationships between two individuals (including young/teenage and same-sex relationships), although the relationship need not be sexual or long-term.

Subsection (3) sets out that a family member covers a person's parent, grandparent, child, grandchild or sibling. A family member also covers the parent, grandparent, child, grandchild or sibling of the person that they are in a relevant relationship with. Subsection (4) defines that two people are in a relevant relationship if they are married or are in a civil partnership, or they live together as if spouses. Subsection (5) makes provision for the inclusion of half-blood relationships, relationships by affinity and stepchildren when considering family membership.

Section 19: Establishing connection by notice

This section provides a process for establishing, by means of a proposal made by the prosecution in proceedings for the offence, that two individuals are personally connected. The personal connection will be taken to be established unless challenged under the process set out for this.

Section 20: How notice is to be served

This section repeats the provision at section 7 for the purpose of the aggravator. This provides for the service of notices where a relationship is challenged under section 19. It sets out the process to be applied and the meaning of key terms and their application.

Part 1, Chapter 3 – Miscellaneous Provision

Section 21: Meaning of ill-treatment etc. in offence provision

This section amends the child cruelty offence in Section 20 of the Children and Young Persons Act (Northern Ireland) 1968, making clear that non-physical ill treatment of a child (aged under 16), by someone with parental responsibility for them, is an offence. It also provides that references to an offence around unnecessary suffering or injury to a child explicitly state that this relates to the suffering or injury being physical or otherwise, again ensuring that non-physical behaviour is captured.

Section 22: No right to claim trial by jury

This section amends Article 29(1) of the Magistrates' Courts (Northern Ireland) Order 1981, the effect of which is to prohibit those accused of the domestic abuse offence before a magistrates' court from the right to elect for trial by jury at Crown Court. This currently covers offences such as intimidation, making or possessing petrol bombs, possession of offensive weapon with intent to commit an offence as well as unnecessary suffering and fighting in relation to the welfare of animals.

Section 23: Special measures directions

This section amends Part 2 of the Criminal Evidence (Northern Ireland) Order 1999.

Subsection (2) amends Article 5(4) (witnesses eligible for assistance on grounds of fear or distress about testifying) of the 1999 Order to ensure that the complainant of a domestic abuse offence, as well as any other offence (for example, criminal damage, assault, grievous bodily harm, threats to damage property or threats to kill, etc.) where there is a specification that it is aggravated by reason of involving domestic abuse, is eligible for assistance, such as the use of live links or screens at court, in relation to those proceedings, unless they have informed the court that they do not wish to be eligible for such assistance.

Subsection (3) amends Article 13(4)(a) of the 1999 Order (evidence given in private) to ensure that where proceedings relate to a domestic abuse offence, or any other offence where there is a specification that it is aggravated by reason of involving domestic abuse, a special measures direction may provide for the exclusion of persons from court when the witness is giving evidence.

This section is tied to Section 25 which sets out the meaning of an offence involving domestic abuse.

Section 24: Prohibition of cross-examination in person

This section amends the Criminal Evidence (Northern Ireland) Order 1999, the effect of which is to prohibit the accused from cross-examining a partner/connected person in person, where they are to give evidence. This applies in relation to the domestic abuse offence under section 1, as well as any other offence (for example, criminal damage, assault, grievous bodily harm, threats to damage property or threats to kill, etc.) where there is a specification that it is aggravated by reason of involving domestic abuse (under section 15).

This section is tied to Section 25 which sets out the meaning of an offence involving domestic abuse.

Section 25: Meaning of offence involving domestic abuse etc.

As noted above, sections 23 and 24 amend the Criminal Evidence (Northern Ireland) Order 1999. This section inserts a new Article 3A to the 1999 Order, which sets out the meaning of an “offence involving domestic abuse” for the purpose of the Order. This includes the domestic abuse offence under section 1, as well as any other offence where there is a specification that it is aggravated by reason of involving domestic abuse (under section 15).

Section 26: Information-sharing with schools etc.

Section 26 provides that the Department of Justice may bring forward regulations to enable information to be shared with an education provider about an incident of domestic abuse concerning a child who is a pupil or a student of that provider. The section sets out the extent and nature of the what may be provided for in regulations, including what is deemed to be an education provider (to include pre-school education provision, schools and colleges as well as facilities or settings that provide education or training, who are pupils or students and what is deemed to be a domestic abuse incident concerning a child

The section also makes provision that the regulations can set out circumstances in which information can be shared, deals with enabling powers around unauthorised disclosure of information as well as the offences and penalties associated with this.

Section 27: Protective measures for victims of abuse

This section provides that the Department may, by regulations, make provision to bring forward steps or measures to protect victims of domestic abuse, including through new Domestic Abuse Protection Notices and Orders (though not necessarily limited to this). The section sets out that regulations may cover both alleged and proven behaviour, the age thresholds that would apply, provision around the giving of notices and making of orders, conditions to be met and what requirements (including restrictions or prohibitions) may be

imposed. The section also sets out that regulations may include provision about who may make applications for orders, proceedings in which orders may be made or applications may not be needed, notification requirements, the making of orders and appeals. The regulation making powers can also cover geographic extent, breaches, powers of arrest as well as offences and penalties. Regulations may provide for such further matters as are considered appropriate and may also include provision amending statutory provisions.

Section 28: Eligibility of victims for civil legal aid

This section provides for a waiver of the financial eligibility rules that would otherwise apply in determining a person's application for civil legal services to enable them to be represented as a respondent in proceedings under Article 8 of the Children (Northern Ireland) Order 1995. These proceedings involve contact, residence, specific issues and prohibited steps orders relating to the care of children by people with parental responsibility for them. The waiver would apply in circumstances where the person is a victim of domestic abuse, and where the person bringing the application against them is their abuser.

Section 29: Proposals as to availability of civil legal aid

This section requires the Department of Justice to bring forward a report setting out proposals to reduce the cost for the victim of defending proceedings brought against them by an abusive partner, and for making it more difficult for abusers to access civil legal services to bring vexatious applications and to perpetuate their abuse through the courts.

Section 29 comes into operation the day after Royal Assent.

Section 30: Guidance about domestic abuse

This section provides that the Department of Justice in Northern Ireland must issue guidance about Part 1 of the Act (that is the domestic abuse offence and aggravation) or any such other matters as it considers appropriate as to criminal law or procedure relating to domestic abuse in Northern Ireland. The Department must keep any issued guidance about domestic abuse, under this section, under review and revise that guidance as necessary in light of review. A person exercising public functions to whom the guidance relates must have regard to it in the exercise of those functions. The guidance (including revised guidance) must be published.

Section 31: Guidance on data collection

This provides that the Department of Justice may issue guidance to relevant bodies about the sort of information which it seeks to obtain from them for the purpose of the assessment by it of the operation of Part 1 of the Act. It also requires the Department of Justice to have regard to information which it obtains from the relevant bodies in relation to the operation of Part 1 when determining the steps (if any) that could be taken by it for the purpose of ensuring

the effectiveness of the operation of legislation around the new offence. The relevant bodies are the PSNI, the Public Prosecution Service other bodies as the Department considers appropriate.

Section 32: Training within relevant bodies

This section places a duty on the Police Service of Northern Ireland, the Public Prosecution Service and any additional public body that has functions within the Criminal Justice System in Northern Ireland (specified by the Department in Regulations), to ensure that training on the effect of Part 1 of the Act is provided to personnel, as it considers appropriate.

Subsection (2) places a duty of the Department of Justice for training Northern Ireland Courts and Tribunal staff as an Agency of the Department, as well as any additional agency that has functions within the criminal justice system in Northern Ireland and which the Department selects in connection with this section.

Subsection (3) requires that training must be provided at least annually and would be mandatory for personnel/staff that have responsibilities for dealing with cases involving domestic abuse, to ensure the effective discharge of their responsibilities in relation to such cases.

Subsection (4) requires the Department of Justice to publish a statement setting out the level of participation in training by personnel/staff in each relevant organisation, within 18 months from the day on which Chapters 1 and 2 come into operation, and annually thereafter.

Section 33: Independent oversight of this Part

This section requires the Department, within one year of Royal Assent of the Act, to appoint an independent person to report and make recommendations in relation to the operation of Part 1 and to advise and make recommendations on the content and review of the guidance under section 30. The independent person is required to produce their first report within two years of Chapter 1 and 2 coming into operation, for the Department to lay the report at the Assembly and publish it. Annual reports are then required. The Department of Justice may specify by regulations, a date on which the oversight function stops. This must not be before seven years from the day on which Chapter 1 and 2 came into operation.

Section 33 comes into operation the day after Royal Assent.

Section 34: Report on the operation of this Part

This section requires the Department of Justice to prepare a report on the operation of the domestic abuse offence, child aggravators and generic aggravator.

Subsection (2) sets out that the report is to set out a range of information including: the number of offences recorded by the Police Service of Northern

Ireland (broken down by police district); the number of files submitted to the Public Prosecution Service; prosecutions; convictions; and the average length of time for disposal of cases.

Subsection (3) provides that the report must include information about the level of training under section 32. Subsection (3) and (4) set out that the report must also include information about how court business is arranged; the experience at court of witnesses; awareness raising; activities to support the operation of Part 1; any issuing, review or revision of guidance by the Department under section 28; and anything else considered appropriate by the Department.

Subsection (5) also requires the report to be laid at the Assembly and published.

Subsection (6) provides that there are ongoing reporting requirements, with each reporting period three years after the previous one. The first reporting period is two to three years after Chapters 1 and 2 come into operation. The reporting requirement would no longer apply if regulations to this effect were brought forward, with ten years after the domestic abuse offence comes into operation being the earliest that this can take effect.

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

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

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.

Part 3 – Commencement and Short Title

Section 40: Commencement

This section makes provision for the commencement of the provisions of the Act and gives the Department of Justice powers to make such transitional, transitory or savings provisions as the Department considers appropriate when bringing those provisions into operation.

Section 41: Short title

This section provides the short title for the Act which is the Domestic Abuse and Civil Proceedings Act (Northern Ireland) 2021.