

DOMESTIC ABUSE AND FAMILY PROCEEDINGS BILL

EXPLANATORY AND FINANCIAL MEMORANDUM

INTRODUCTION

1. This Explanatory and Financial memorandum has been prepared by the Department of Justice in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly. The Memorandum needs to be read in conjunction with the Bill. It does not, and is not meant to be, a comprehensive description of the Bill. So where a clause or part of a clause does not seem to require an explanation or comment, none is given.

BACKGROUND AND POLICY OBJECTIVES

2. In March 2016 the Department of Justice published a seven year Strategy ‘Stopping Domestic and Sexual Violence and Abuse in Northern Ireland’, acknowledging the serious nature of domestic violence and abuse, as well as stressing the need to ensure that perpetrators are held to account for their actions. The strategy also provided new Government definitions for both domestic and sexual violence and abuse. These reflected a modern understanding of what domestic and sexual violence and abuse is and included specific reference to controlling and coercive behaviour, that is abusive behaviour. The Strategy outlined a commitment to consult on whether there was a need for a new criminal offence, to capture domestic abuse as criminal behaviour that can be addressed through the justice system.

CONSULTATION

3. Early in 2016 the Department launched a public consultation which sought views on whether a specific offence should be created to capture patterns of coercive and controlling behaviour in intimate relationships, in line with the new definition of domestic abuse contained within the Strategy. The public consultation was launched on 5 February 2016, when the Department issued over 500 consultation letters to a targeted stakeholder list. The Department offered to meet respondents to provide further detail and answer any questions they might have had. On foot of this five presentations were delivered to organisations and key stakeholders across Northern Ireland. The public consultation, which received 44 responses, closed on 29 April 2016.
4. Respondents generally agreed that creating a specific offence would be a positive step towards ensuring that certain types of abuse are not overlooked or treated less seriously. It was suggested that any offence should include mental, emotional and financial control. Respondents considered that having an offence in place would send a clear

message that domestic abuse in all its forms is a crime and will not be tolerated in society.

5. They recommended that the offence created should reflect the unique and specific nature of domestic violence and abuse. Respondents suggested that any new offence should reflect and recognise the course of conduct and pattern of behaviour involved. They were also of the view that an offence will provide the police with the opportunity to intervene early and perhaps stop the escalation of domestic abuse.
6. Respondents advocated a holistic approach to capturing evidence and proposed that innovative approaches should be considered to assist in building a portfolio of evidence for domestic abuse cases. It was highlighted that the offence in Northern Ireland should encapsulate situations where ex-partners are continuing to exert coercive control over their victim, even after separation.
7. A range of respondents stressed the need for a strong sentencing regime with the offence, to reflect the seriousness of domestic abuse/coercive and controlling behaviour and the significant adverse impact this type of abuse has on victims. All relevant consultation documentation, including the consultation paper, equality screening form and report on the summary of responses can be accessed through the Department of Justice website at www.justice-ni.gov.uk/consultations/domestic-abuse-offence-and-domestic-violence-disclosure-scheme.
8. DOJ officials provided the Justice Committee with written and oral briefings on the outcome of the public consultation in late October 2016. During the oral briefing the Committee expressed their support for the creation of a new robust offence to capture patterns of domestic abuse.
9. In addition to the above, in 2019, the Department consulted on options for legislation to protect victims of domestic abuse from being cross-examined by perpetrators in person in family proceedings. The consultation began on 31 July and closed on 24 September, although four organisations requested and were given further time to respond. Twenty responses were received.
10. The majority of respondents indicated strong support for an absolute statutory prohibition on cross-examination in person in family proceedings where a party has been convicted of, given a caution for, or is charged with a specified criminal offence against the witness to be cross-examined, and where an ‘on-notice protective injunction’ is in force against a party for the protection of the witness to be cross-examined. Half of the respondents (a majority of those who answered the particular question), suggested additional circumstances in which there should be an absolute prohibition.
11. The majority also strongly agreed that a court hearing family proceedings should have a discretionary power to prevent cross-examination in person where an absolute prohibition does not apply; and that, where a party is prohibited from carrying out cross-

examination, there should be provision for a court to appoint a publicly funded legal representative to carry out the cross-examination instead.

OPTIONS CONSIDERED

12. In exploring potential options officials have conducted benchmarking with other jurisdictions, in particular England, Wales and Scotland. The domestic abuse offence was not in place in the Republic of Ireland at the time of policy development.
13. There were four options considered, following the public consultation, on creating a specific domestic abuse offence:

Option 1: Status quo, this would involve making no changes to the legislative framework that is already in place.

Option 2: Creating a statutory aggravator of domestic abuse, this would enable an offence to be aggravated by constituting domestic abuse.

Option 3: Creating a new offence of domestic abuse.

Option 4: Introducing a Domestic Abuse Bill which would include:

- a domestic abuse offence;
- a statutory aggravator (that would apply in domestic abuse-related cases involving other offences);
- child aggravators (which would apply to the domestic abuse offence where the victim is under 18 or a where a child sees, hears or is present during an incident of abuse or they are used to abuse the connected person);
- extra-territorial jurisdiction for the offence; and
- a range of measures to reduce the potential for an individual to be further victimised during criminal proceedings.

Option 1 does not recognise the need to change the legislative framework to reflect the experience of victims and survivors of domestic violence and abuse in law nor identify the repetitive nature of this type of abuse.

Option 2 acknowledges that there is a need to recognise domestic abuse in law and provides for a statutory aggravation that an offence is aggravated by constituting abuse of a partner, ex-partner or family member. The aggravation could attract an enhanced sentence to a standard offence. However this option will not recognise the repetitive nature and cumulative effect of domestic abuse.

Option 3 recognises the victim's experiences in law. It reflects the repetitive nature of domestic violence and abuse as well as the cumulative effect it can have.

Option 4 is a combination of Options 2 and 3. It recognises the victim's experience in law, and also provides flexibility to progress cases both under an offence and with an associated aggravator without artificially grouping charges together. It will also provide for a range of measures associated with the offence, to reduce the potential for an individual to be further victimised during criminal proceedings. In addition, it will ensure compliance with the Istanbul

Convention (which requires a domestic abuse offence to be created for Northern Ireland and for extra-territorial jurisdiction (ETJ)) to be extended to this.

14. In relation to prohibiting cross-examination by perpetrators in person in family proceedings, the Department considered the options of (i) the status quo (no specific legislative provision), (ii) providing for an absolute prohibition on cross-examination in person by parties to family proceedings in specified circumstances; and (iii) providing a discretionary power for the court to prohibit cross-examination in person.
15. Option (i) would not sufficiently protect victims of domestic abuse from being cross-examined in person by the (alleged) perpetrator and in particular, would not allow the court to appoint a legal representative to carry out cross-examination instead. Options (ii) and (iii) together would best protect victims of domestic abuse by providing for an absolute prohibition in some cases whilst giving the court a power to prevent cross-examination in person in any cases where the automatic prohibition does not apply; while a power for the Department to specify evidence of abuse that, if adduced, would also lead to a prohibition would address the strong support in the consultation for extending the scope of circumstances in which there should be an absolute prohibition. In prohibiting cross-examination in person, it was considered necessary, to protect the Article 6 rights (right to a fair trial) of the party subject to the prohibition, to provide for the court to appoint a legal representative to carry out the cross-examination instead.

OVERVIEW

16. The Bill contains 39 clauses and is divided into three parts. Part one deals with domestic abuse (an offence and aggravation) and amendments and guidance. It is separated into three chapters. Part two deals with cross-examination in family proceedings. Part three deals with commencement and the short title of the Bill.

Part 1, Chapter 1 – Offence of Domestic Abuse

17. This gives effect to the intention to improve the operation of the justice system by creating an offence that recognises the experience of victims, the repetitive nature of abusive behaviour and the potential cumulative effect of domestic abuse.
18. It includes the creation of a new domestic abuse offence, two child aggravators associated with that offence, a statutory aggravation of domestic abuse associated with any other offence, and a number of associated changes to criminal procedures, evidence and sentencing in domestic abuse related cases.
19. The Bill will recognise in law that domestic abuse is often a course of behaviour which takes place over a period of time. The course of behaviour can consist of psychological and emotional abuse which either cannot be prosecuted or, at the very least, can be inherently challenging to prosecute under existing laws, as well as physical violence and threats which can be prosecuted under existing laws. The new domestic abuse offence will cover partners (including those in an intimate personal relationship), ex-

partners and family members. For the purpose of this Explanatory and Financial Memorandum these will be referred to as partner/connected person.

20. By enabling a range of domestic abuse incidents, which take place over a period of time, to be prosecuted as a single course of behaviour within a new offence, the criminal law will better reflect how victims actually experience such abuse. The Bill will also ensure that a course of behaviour of entirely non-physical abuse of a person's partner/connected person is criminalised.
21. The Bill recognises the adverse effect abuse can have on children by including aggravations which will apply to the domestic abuse offence where the victim is under 18 or where a child sees, hears or is present during an incident of abuse or they are used to abuse the connected person, or a reasonable person would consider the abusive behaviour to adversely affect the child – enabling the sentencing to be increased up to the maximum available. The Bill also makes provision that a child cruelty offence will apply in relation to non-physical ill-treatment of a child.

Part 1, Chapter 2 – Aggravation as to Domestic Abuse

22. The Bill also provides for a statutory aggravation that an offence, other than the domestic abuse offence, is aggravated by constituting abuse of a partner/connected person where the person convicted of the offence either intended to cause, or else was reckless as to whether their actions would cause, physical or psychological harm to that person.

Part 1, Chapter 3 – Miscellaneous Provision

23. Along with the introduction of the new domestic abuse offence, the statutory aggravator and child aggravator a number of associated reforms to criminal procedure, evidence and sentencing are included within the Bill. These reforms are intended to reduce the possibility of an accused person using the processes of the justice system to further exert control and influence over their partner/connected person and will help to minimise the trauma for them while ensuring the proper administration of justice is achieved. The Bill also make provision for increased access to legal aid in primary family law proceedings for victims of abuse to help reduce the financial burden of settling the position of the care of their children through the courts, and to mitigate the risk of these proceedings being used as another way to perpetuate abuse.
24. The Chapter also makes provision in relation to a number of measures to improve the support and protection of victims as well as the operation of the Act. This includes the provision of interim protection measures to those affected by domestic abuse as well as powers to enable information to be shared with schools where there has been a domestic abuse incident affecting a child. The Bill also provides for the training of those involved in domestic abuse cases, data collection in relation to the new offence, an independent oversight function and reporting on the operation of the Act.

Part 2 – Provision for Civil Proceedings

Residence and contact orders.

25. The Bill amends the Children (Northern Ireland) Order 1995 to require a court considering an application for a residence or contact order, to consider any conviction of the party applying for the order for a domestic abuse offence involving the child.

Prohibition of cross-examination in person.

26. The Bill prohibits, in family proceedings, cross-examination in person by a party who has been convicted of, given a caution for, or is charged with a specified offence, of a witness who is the victim, or alleged victim, of that offence; and by a party against whom an on-notice injunctive order is in force for the protection of a witness. It also creates a power for the Department to specify evidence of domestic abuse that, if adduced by a party to family proceedings, would prohibit cross-examination in person by a party to whom the evidence relates. The Bill further gives a court a discretionary power to direct that a party may not cross-examine in person, if it considers that such cross-examination is likely to diminish the quality of evidence or cause significant distress to the witness to be cross-examined.
27. Where cross-examination is prohibited, the Bill makes provision enabling the court to appoint a legal representative to conduct the cross-examination on behalf of the party prohibited from so doing, the cost of which will be paid by the Department of Justice. It also allows the Department to issue guidance in connection with the role of the appointed legal representative.

COMMENTARY ON CLAUSES

Part 1, Chapter 1 – Offence of Domestic Abuse

Clause 1: The domestic abuse offence

This clause makes it an offence for a person to engage in a course of behaviour (defined in clause 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. Clause 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.

Clause 2: What amounts to abusive behaviour

This clause 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 conduct 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 currently be prosecuted under existing offences, falls within the definition of abusive behaviour (as well as violent or threatening behaviour).

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, 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.

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

Clause 3: Impact of behaviour on victim

This clause 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 clause 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 clause 1(2)(a) in relation to physical or psychological harm and clause 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, clause 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 clause 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.

Clause 4: Meaning of behaviour etc.

This clause 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 clause 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.

Clause 5: Meaning of personal connection

This clause 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 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.

Clause 6: Establishing connection by notice

This clause 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.

Clause 7: How notice is to be served

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

Clause 8: Aggravation where victim is under 18

This clause 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.

Clause 9: Aggravation where relevant child is involved

This clause 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 clause 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 2(A) 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 2(B) sets out that nothing in this subsection 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 (3) and (4) 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 (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.

Clause 10: Behaviour occurring outside the UK

This clause 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)).

Clause 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.

Clause 12: Defence on the grounds of reasonableness

This clause 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.

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 clause affects the broader requirement for the prosecution to prove beyond reasonable doubt that the offence has been committed.

Clause 13: Alternative available for conviction

This clause 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.

Clause 14: Penalty for the offence

This clause 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

Clause 15: Aggravation as to domestic abuse

This clause 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.

Clause 16: What amounts to the aggravation

Clause 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.

Clause 17: Exception regarding the aggravation

Clause 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 clause 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.

Clause 18: Meaning of personal connection

This clause 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.

Clause 19: Establishing connection by notice

This clause 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.

Clause 20: How notice is to be served

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

Part 1, Chapter 3 – Miscellaneous Provision

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

This clause amends the child cruelty offence in Section 20 of the Children and Young Persons Act 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.

Clause 22: No right to claim trial by jury

This clause 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.

Clause 23: Special measures directions

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

Clause 24: Prohibition of cross-examination in person

This clause 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 clause 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 clause 15).

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

Clause 25: Meaning of offence involving domestic abuse etc.

As noted above, clauses 22 and 23 amend the Criminal Evidence (Northern Ireland) Order 1999. This clause 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 clause 1, as well as any other offence where there is a specification that it is aggravated by reason of involving domestic abuse (under clause 15).

Clause 26: Interim protection for the victim

This clause provides that the Department may by regulations, within two years of commencement, make provision in relation to protecting or supporting victims and that this may relate to court orders or other such measures.

Clause 27: Eligibility requirement for civil legal aid

This clause provides for a waiver of the financial eligibility rules that would otherwise apply in determining a person’s application of civil legal services to enable them to be represented in proceedings, or to receive advice or assistance relating to prospective proceedings, under Article 8 of the Children (Northern Ireland) Order 1995. These proceedings involve contact, residence and other 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.

Clause 28: Guidance about domestic abuse

This clause provides that the Department of Justice in Northern Ireland must issue guidance about Part 1 of the Bill (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, to whoever it considers appropriate. 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 clause also provides that, in supporting the operation of Part 1 of the Bill, the Department of Justice may bring forward regulations to enable information to be shared with a school to advise that a child had seen, heard or was present during an incident of domestic abuse.

Clause 29 - 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 Bill. 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.

Clause 30 – Training

This clause places a duty on the Department of Justice to ensure that sufficient training is made available to police and criminal justice agencies to ensure effective operation of the Act. It names the Police Service of Northern Ireland, the Public Prosecution Service and the Northern Ireland Courts and Tribunal Service specifically but notes that the duty is not limited to these organisations. The training must be provided annually and would be mandatory for all those involved in the disposal of domestic abuse cases in policing and criminal justice agencies, including but not limited to the agencies listed. The provision also requires the Department of Justice to publish the uptake of training by each relevant organisation at the end of each year.

Clause 31 – Independent oversight

This new clause would require the Department, within one year of commencement of the Act, to appoint an independent person (for a minimum period of seven years) to contribute to the development of the guidance under section 25 and review, report and make recommendations in relation to the operation of Part 1. The independent person would be required to produce an annual report for the Department to lay and publish. Should the independent oversight function stop after seven years there is a requirement on the Department to review, report and make recommendations in relation to the operation of Part 1 of the Bill every three years.

Clause 32 – Report on the operation of this Act

This clause requires the Department of Justice to prepare a report on the operation of the domestic abuse offence, child aggravators and generic aggravator, which is to include a range of information as regards number of cases, convictions and average length of time for disposal of cases. The report must deal with how court business is arranged, awareness raising and activities to support the Act. It also requires the report to be laid and published not more than two years after commencement, and thereafter, at intervals of not more than three years. The report should also identify the number of offences recorded within each police district in Northern Ireland.

Part 2 – Provision for Civil Proceedings

Clause 33: Factors relevant to residence and contact orders

Clause 33 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 clause 1, if the offence is aggravated as provided for in clause 9 and the aggravation relates to the child, or any other offence, which is aggravated as provided for in clause 15 and the child is not the person against whom the offence was committed but the aggravation of the offence relates to the child.

Clause 34: Prohibition of cross-examination in person in family proceedings

Clause 34 insert 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 clauses 2, 4 and 5 of this Bill, 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.

Clause 35: Special measures directions in family proceedings

Clause 35 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 clause 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.

Clause 36: Prohibition of cross-examination in person in civil proceedings generally

Clause 36 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.

Clause 37: Special measures directions in civil proceedings generally

Clause 37 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 clause 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. 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 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

Clause 38: Commencement

This clause makes provision for the commencement of the provisions of the Bill 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.

Clause 39: Short title

This clause provides the short title for the Bill.

FINANCIAL EFFECTS OF THE BILL

28. It is considered that a significant proportion of current domestic abuse related offences will come within the remit of the new offence once in place. It is anticipated that the creation of a new domestic abuse offence will lead to a 2 - 4% uplift in the annual number of domestic abuse incidents and crimes already recorded by police. Working on this assumption using the mid point of 3%, and including costs for the automatic eligibility for consideration for special measures provision, this would lead to increased costs of around £1.2m to the criminal justice system per annum. The payment of fees, costs and expenses to a court-appointed qualified legal representative in family and civil proceedings where there is a prohibition of cross-examination in person is currently estimated to incur costs of no more than £50,000 per year.

HUMAN RIGHTS ISSUES

29. All proposals have been screened and are considered to be Convention compliant.

EQUALITY IMPACT ASSESSMENT

30. In accordance with its duty under section 75 of the Northern Ireland Act 1998, the Department conducted screening exercises on the proposals, concluding that they did not have significant implications for equality of opportunity and that an equality impact assessment was therefore not necessary. This is based on the fact that the offence and the prohibition of cross-examination in person in family (and civil) proceedings would apply equally to all section 75 categories, albeit that a higher proportion of offenders and victims are male and female respectively.

SUMMARY OF THE REGULATORY IMPACT ASSESSMENT

31. No direct costs will be created for the private or voluntary sectors. Ultimately it may result in modest savings to employers in the private and voluntary sectors.

DATA PROTECTION IMPACT ASSESSMENT/DATA PROTECTION BY DESIGN

32. A Data Protection Impact Assessment has been carried out. This noted that the Department of Justice will not collect, use, store or share any personal data arising from the creation of the new offence. However, criminal justice agencies investigating and prosecuting the new offence will need to collect and process personal data on victims, witness and the accused. The data will be processed in line with the robust procedures and protocols already in place for investigating and prosecuting other existing criminal offences.

RURAL NEEDS IMPACT ASSESSMENT

33. A Rural Needs Impact Assessment has been carried out. This noted that the new offence and other provisions in the Bill will apply to all areas of Northern Ireland, both urban and rural. We do however consider that specific action may be required to raise awareness of the new offence in rural areas and that innovative approaches and methods may be required to raise the profile of the offence.
34. Although not a barrier, it should be noted that the context of the rural environment in which a potential victim and perpetrator live will have relevance with regards to the offence, and its potential impact. For example, victims' social isolation may be compounded by geographical isolation, particularly where abuse may include control of access to a car, money, checking mileage. The context of domestic abuse in a rural setting will be recognised and referenced in the guidance and training associated with the offence for police and prosecutors.

LEGISLATIVE COMPETENCE

At Introduction the Minister for Justice had made the following statement under section 9 of the Northern Ireland Act 1998:

“In my view the Domestic Abuse and Family Proceedings Bill would be within the legislative competence of the Northern Ireland Assembly.”



**Northern Ireland
Assembly**

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