



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Domestic Abuse and Family Proceedings Bill

24 September 2020

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Ms Linda Dillon (Deputy Chairperson)
Mr Doug Beattie
Ms Sinéad Bradley
Ms Jemma Dolan
Mr Gordon Dunne
Mr Paul Frew
Ms Emma Rogan
Miss Rachel Woods

Witnesses:

Dr Veronica Holland	Department of Justice
Ms Jane Maguire	Department of Justice

The Chairperson (Mr Givan): Members, please bear with me, and, at times, I might get Christine to provide some information. Again, I acknowledge the lateness of the consideration of some amendments and so on. We are where we are. We are looking at pages 79 to 147 of your meeting pack and pages 95 to 145 of the tabled pack.

At last week's meeting, the Committee discussed further information that was provided by the Department on a number of clauses in the Bill. The Committee agreed to request further clarification from the Department in relation to the term "affinity" and the text of the proposed departmental amendments for this meeting to enable the Committee to complete its deliberations on the provisions of the Bill. The Committee also agreed to seek the views of the Department on a potential amendment that the Committee is considering in relation to clause 9 and provided its preferred wording of the amendment to clause 25. The Department has provided the further information and the text of its proposed amendments, and those can be found at pages 95 to 120 of your tabled pack. A hard copy of the text of the amendments has also been provided today for members' benefit so that members can make easy reference to them.

The Committee will discuss, first, the issues that are covered in the Bill, so that is why we have Dr Veronica Holland and Ms Jane Maguire from the Department of Justice with us. They are here for members' benefit. They do not need to come to the table; they have microphones at the appropriate places where they are, so members can get further clarity on the amendments. Members, when accepting a clause or an amendment, we can express views or make comments. If we are not going down the route of amendments, we can make recommendations, for example, with regard to how a clause should be implemented or the outworkings of that, and that can then be reflected in the Committee report on the Bill.

The first area that we will go to is clauses 5 and 8, which deal with the meaning of "personal connection". The Committee agreed that it was content with other aspects of the meaning of "personal connection" and, at the meeting on 17 September, noted information from the Department that indicated that the terms "adoptive parent child", "foster parent child" and "kinship care child" would come within the scope of parental responsibility, but agreed to request a response to the specific questions that the Committee had raised regarding the term "affinity". The Department has responded, indicating that the provisions in the Bill on family members/relative, in terms of those who are covered in it and the terminology used, are similar to those in the Family Homes and Domestic Violence (Northern Ireland) Order 1998. That legislation was considered in the context of family member/relative for the Bill and contains similar references to relationships being of full-blood, half-blood or by affinity. It also contains references to step-relationships. The use of the term "affinity" in legislation refers to the relationship that each person in a marriage has to the relations of the other person. Departmental Solicitor's Office (DSO) advice was not sought on the matter.

The Department has indicated that an adopted child would, legally, be considered to be the child of an individual. The relationship between foster parent/child and kinship carer/child is captured in the context of parental responsibility rather than the term "affinity". That is considered appropriate, given that those relationships can be short- to medium-term and may cover many different individuals over a period of time, while kinship relationships can be difficult to determine in terms of the basis of the relationship. More generally, the issues of parental responsibility and affinity are two separate issues.

Do members have any views on clauses 5 and 18 in light of the additional information? Are members content? OK.

We will move on to clause 9, "Aggravation where relevant child is involved". The Committee raised two issues in relation to clause 9. First, it was agreed that we should request further clarification as to why the Bill does not consider a child as a victim in their own right and to what extent the proposed amendment that is being considered in conjunction with the Department of Health will address that. If there were multiple children in a home — for example, four children — and each was classed as a victim in their own right under this legislation, would one incident result in an offence against the victim and an offence against each child under this clause? In other words, would there be five separate offences?

At our meeting on 17 September, the Committee agreed that we were content with the further clarification provided by the Department in its correspondence dated 16 September but that we wished to see the text of the proposed amendment that is being considered in conjunction with the Department of Health. The Department has provided the text of the proposed amendment, which amends the child cruelty offence in section 20 of the Children and Young Persons Act (Northern Ireland) 1968. It is new clause 20(A) at annex A of the Department's letter.

The Department has outlined that this amendment will ensure that non-physical ill treatment of a child by someone with parental responsibility for them is criminalised. It will also ensure that current references to an offence around unnecessary suffering or injury to a child explicitly state that that relates to the suffering or injury being of a physical, or other, nature, again ensuring that non-physical behaviour is captured. That should enable matters such as isolation, humiliation, etc, to be captured. Assuming acceptance of the amendment, including by the Speaker, that would make it clear that it is an offence.

The Department has indicated that the child cruelty offence applies only to those under the age of 16. Having liaised with colleagues in the Department of Health, as well as police colleagues, the Department is not aware of similar child protection provisions that can be easily adjusted to explicitly deal with non-physical ill treatment of those aged 16 and 17 in the context of a parent-child relationship. The Department would welcome the views of the Committee on reducing the age threshold for the parental responsibility exclusion from under age 18 to under age 16 — clauses 11 and 17 — in order to ensure that non-physical abuse of 16- and 17-year-olds in a parent-child relationship is clearly provided for in legislation. In the absence of that, there is the possibility that it may not be possible to address the non-physical ill treatment of those aged 16 and 17 in that context. The Department has provided the text of that proposal, which is in the Department's letter.

There is a lot, still, to go through, Christine; it is all related. Bear with me, members.

The Department has outlined that the standard offence thresholds would apply, insofar as any behaviour would have to be considered to be abusive, be viewed as such by a reasonable person, and occur on two or more occasions. The Department also highlighted that the parental responsibility

exclusion in England and Wales is 16. It understands that that has not given rise to difficulties there and could be considered appropriate in that it is linked to a range of age-specific permissions, such as, for example, the school-leaving age, the age at which a person can live on their own, or the age at which a person can work in a licensed premises, get married, or join the armed forces with parental consent. Furthermore, any decision to charge an individual with the offence would be dependent on the particular circumstances of the case, and the reasonable person defence would also apply.

The Committee was also concerned that, while there is an assumption in the clause that harm has been done with the reference to seeing, hearing or being present during an offence, it is not specific or clear enough. Noting the wording of section 5(5) of the Scottish legislation, which states:

For it to be proved that the offence is so aggravated, there does not need to be evidence that a child—

(a) has ever had any—

(i) awareness of A's behaviour, or

(ii) understanding of the nature of A's behaviour, or

(b) has ever been adversely affected by A's behaviour.

the Committee believed that, to ensure effective enforcement and prosecution, the wording of clause 9 needs to be strengthened to reflect that position more clearly. The Committee was of the view that the clause needed to be amended, either through the adoption of the Scottish wording, unless there was a specific reason not to use that wording, or wording that provides the same sort of clarity. The Committee sought confirmation from the Department on whether the Minister is content to table an amendment on that basis. The Committee also asked the Bill Clerk to prepare a draft amendment for consideration.

At its meeting on 17 September, the Committee noted the further clarification that had been provided by the Department on the child aggravator offence and the Department's view that an amendment akin to the Scottish legislation is not needed. The Committee also considered the text of the draft amendment that had been prepared by the Bill Clerk and agreed to provide the wording of the potential amendment and request the views of the Department on whether there would be any implications if it was added to the clause, what value it would add to the clause, and whether the Department would consider covering that in the explanatory and financial memorandum to provide greater clarity.

The Department responded and highlighted its previous advice that the child aggravation offence is wider locally than the Scottish offence, in that there is no requirement for a reasonable person to consider that the behaviour would adversely impact a child or that the child has to live with the victim or the offender. The Scottish legislation provides that the offence is aggravated if a child sees, hears or is present and a reasonable person would consider the behaviour likely to adversely affect a child. Proving the aggravation is then subject to a condition that, for the offence to be aggravated, there does not need to be evidence that the child has been aware of, understood or been adversely affected by the abuse.

The offence in the Domestic Abuse and Family Proceedings Bill is aggravated based on an objective fact: simply that the child hears, sees or was present, which is the first limb of the Scottish requirements. Turning purely on these facts, unlike the Scottish provision, which also requires a second limb of consideration of adverse effects, the clause does not raise the question of the child's awareness. The Department has expressed the view that the proposed Committee amendment would, therefore, introduce an unrelated adverse effect provision, which is unnecessary, would add nothing to the clause, and could risk giving rise to confusion by casting doubt on the effectiveness of clause 9. The Department has indicated that it will not support the amendment. It has also stated that any text in the explanatory and financial memorandum must reflect what is in the Bill.

Members, I ask you for your views on clause 9, including whether the Committee is content to support the Department's proposed amendment to the clause and the proposed amendments to clauses 11 and 17 to reduce the age threshold for the parental responsibility exclusion from "under 18 years of age" to "under 16 years of age", to ensure that non-physical abuse of 16- and 17-year-olds in a parent/child relationship is clearly provided for in legislation, and whether the potential Committee amendment is required in light of the further comments from the Department.

Apologies for that lengthy trek through all our considerations and where we are.

Ms Dillon: I am glad that you did that. I did not have time to go through it, so it will help us to clarify where we are with it. I support the reduction to age 16 in clauses 8, 11 and 17. The Committee discussed that, so there should not be a great challenge. However, I want to hear from Rachel, because it was she who suggested the amendment. I was not opposed to it, but, given the Department's explanation and the conversation that we had at last week's meeting on 17 September, at which I felt that we were getting confused about the amendment, I am concerned about going down that road. The explanations that we have also give me confidence that what is already there is better than any amendment that we could put forward. I am content that we do not go for that amendment, but I would like to hear from Rachel because it is her proposal, and I do not want to throw it out the window without hearing from her. I want to put it on the record that I am supportive of reducing the age to 16 and keeping clause 9 as it is.

The Chairperson (Mr Givan): OK. Thank you, Linda. Rachel, do you want to pick up on that?

Miss Woods: Aye. *[Laughter.]* On the first point about the age reduction, that, for me, changes the scope of the Bill drastically. Have there been any conversations with stakeholders, such as the Northern Ireland Commissioner for Children and Young People (NICCY) and the National Society for the Prevention of Cruelty to Children (NSPCC)? Does this now say that parents of 16- and 17-year-olds can be prosecuted under the domestic abuse offence? That is my first question.

The Chairperson (Mr Givan): Veronica, let us invite you in to deal with that straight away.

Dr Veronica Holland (Department of Justice): The change that is being suggested is only in the context of the child/parental responsibility relationship; it is not making any change in the Bill more generally. It is in relation to that specific element of it. Yes, as you say, the domestic abuse offence would then apply to parental/child relationships for 16- and 17-year-olds. The flip side is that, in the absence of reducing the parental responsibility exclusion from under the age of 18 to under the age of 16, our concern is that, potentially, ill treatment of a child that is non-physical abusive behaviour may not be sufficiently captured in other offences. That is why we are suggesting that the parental responsibility exclusion threshold be reduced, but it does not affect the provisions in the Bill in relation to 16- and 17-year-olds in other relationships.

Miss Woods: That is quite a change in terms of parental responsibility and who it applies to. We are now saying that parents could be, for want of a better word, "done" under the domestic abuse offence for ill treatment of a 16-year-old but not a 15-year-old, so it is recognising that abuse that can be done to 16- and 17-year-olds but not to a 15-year-old.

Dr Holland: I will explain the rationale. In our previous consideration of legislation, we felt that it was adequately captured in child protection legislation, and that, effectively, the behaviour was criminalised, albeit in a different guise. Having discussed it further with colleagues in the police, the PPS and Health, we have a clearer understanding that there are limitations. As I say, that is why the change is being brought forward. Our appreciation previously had been that it was captured under child protection legislation and that, if an individual as a parent was abusing a child non-physically, that was captured under other provisions. We now appreciate that, potentially, that is not the case. In terms of the criminalisation of it, it shifts the type of legislation that covers it, if that makes sense.

Miss Woods: OK. Lastly on that, has there been discussion on this change with stakeholders such as the NSPCC, NICCY or any of the child protection or children's rights organisations?

Dr Holland: We have not had discussions with them to date. That is because we wanted to take the Committee's views on the amendment in the first instance. Obviously, if the Committee was not minded to follow that, we did not want to have those discussions with stakeholders. We will certainly do that subsequent to this if the Committee is agreeable.

Miss Woods: I am content to progress it, but I would very much welcome input from the organisations that raised the issue.

The Chairperson (Mr Givan): My problem with the change is that I have had no time to consider it, and we have not had any feedback. I do not feel that I can support making a change of that nature in the absence of the Committee going through a consultative process to get feedback. I certainly have

sympathy with the spirit behind it and what we are talking about, but I would be wary about putting my hand up for something that I have not been able to exhaustively test. I would like to know what the consequences would be.

Miss Woods: To come back on that, I am saying that I am content to progress that and look at what this means for the Bill. I am mindful that, when the previous Attorney General was here, there was a discussion about parental responsibility and protecting a child from nefarious activities, so, with the parental responsibility exclusion, would you have a 17-year-old who has cash restrictions because of parental responsibility now being able to take parents to court under this legislation? It is about trying to understand what the consequences are before — we got it last night — we make any decisions on it.

Mr Frew: Like you, Chair, I will remain mute on the age change, as we have not had time to consider it. That is no fault of the Department, because it is thinking these things through, too. We need to be guarded in how we proceed with giving the Department advice on that, because we need to look at it more thoroughly.

I will move on to the more specific issue in clause 9 around the child's awareness and the aggravation where a relevant child is involved. The confusion, for me anyway, last week was where we place this amendment. I am still of the mind that we need this amendment, and I would like the Department to explain to me how it could lead to confusion and how adding it could do damage to the effectiveness of clause 9. What I mean by that is: where do we place it?

We talked a lot last week about clause 9(2)(a)(ii), which states:

"A made use of the child in directing behaviour at B".

When you look at the explanatory notes, you see that that explicitly means that:

"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."

I get how that covers that piece. The child has been asked to, told or forced to act something out, but I think that we need this amendment in clause 9(2)(a)(i), which states:

"A directed behaviour at the child".

The explanatory notes state that subsection (2)(a)(i):

"provides that the aggravation applies where it is shown that, at any time in commissioning the offence, the accused directed behaviour at a child."

It goes on to explain:

"This could include the accused threatening violence towards a child to control or frighten the partner/connected person or being abusive towards the child."

That, to me, is the essence of coercive control, in that a penetrator will only have to threaten to abuse, hurt or to make a child witness to an offence against the victim to have a massive impact and effect on the victim and to coerce that victim.

That is why I think we need something, either by way of an amendment, or by it being explained in the explanatory memorandum, to say that the child does not necessarily have to be aware of the perpetrator's behaviour, understand the nature of the perpetrator's behaviour, or even be adversely affected by the perpetrator's behaviour. They could be downstairs, upstairs, watching TV or sleeping when a threat is implied to the victim. That threat will probably only have to be made once, but it could be repeated time and time again, and the child would have no consciousness of that threat being implied. I think that we need it in writing. I am not sure whether we need it, and I would be worried that we would do damage to the Bill. That is why I am leaving it open so that the Department can tell me whether there might be some room to have it in the explanatory memorandum. The explanatory note defines or explains the effect of a clause, so I do not understand why we cannot have an amendment that explicitly states that the child does not need to be aware or understand.

Dr Holland: That is coming back to the references to the child seeing, hearing or being present. We note in the letter that consideration is being given to those facts. If there was not an amendment, it would probably not be appropriate to make reference to it in the explanatory and financial memorandum. It is, perhaps, something that we could look at in the context of the guidance that is associated with the domestic abuse offence. That is going to be done under clause 25 more generally.

In terms of the position more generally, for clauses 8 and 9, the aggravation is very much on that factual basis of "see, hear or is present". As long as the child sees, hears or is present, that aggravation could apply. It is turning on that fact as opposed to any provision in relation to the awareness more generally.

It is something that we could look at in the guidance, if that provides any reassurance.

Mr Frew: Thank you very much for that; I really appreciate this engagement.

Clause 9(2)(b) actually weakens what I am trying to state with regard to the nature of coercive control, because it states that a child has to see, hear or be present during an incident, when we know that coercive control and the nature of it is not necessarily like that. That is why we need something stronger, and this amendment adds to that. We know that the perpetrator will be very sleekit — secretive, even — to the point where he may well do things whereby those three requirements:

" the child saw or heard, or was present"

might not be captured.

Dr Holland: In terms of those three elements, to us, the awareness provision is almost supplementary to that initial requirement and how the aggravation would apply. I fully appreciate where you are coming from, but none of those conditions requires the child to have been aware of what the behaviour may have been. For example, it could have been a very young child present, and the aggravation could still apply, although I fully appreciate the extent to which controlling and coercive behaviour more generally can apply in relation to children.

Ms Dillon: On Paul's point, I thought that we settled that last week if the explanatory note was changed. That was probably the Chair's view. We were all getting confused by the amendment. If it was confusing us, it would confuse anybody else, to be fair, because we are looking at this stuff day and daily.

I thought that the explanatory note could be changed. The points that Paul is making are exactly my concerns. If the explanatory note cannot be changed, we may well have to go back to looking at an amendment. I would not be content, because of the importance of this issue, that it is in only the guidance.

I used this example in previous meetings, and I will use it again for ease, but in the Hart case, the father brought peanuts into the home because one of the children had a nut allergy. The child did not have to be in the room, or in even the house, but the implication was, "I will harm the children by causing a potentially life-threatening injury to one of them". There was nothing said. The child, as I say, may not have been in the house when the peanuts were brought into the home, but the child was being used in that circumstance for coercive control. That is the kind of circumstance that Paul is talking about. I am sure that we could quote millions of examples, but I am quoting just that one because it is on record and is a case that people are familiar with.

Dr Holland: If it is helpful, we can look at the text in the explanatory memorandum and see what further clarification we can provide to deal with that issue.

Ms Dillon: It would be good if it was done in the explanatory note. If it cannot be, I would be concerned that *[Inaudible.]*

Dr Holland: Where I was coming from in saying that the explanatory note would be unable to deal with it was that, if you do not have a clause there, your explanatory note would not refer to it, if that makes sense. Certainly, we can look to see what further clarification we can provide to clause 9(2), which refers to a child seeing, hearing or being present for an incident of behaviour, on this issue more generally to try to deal with the concerns that are being raised.

Ms Dillon: I think that the explanatory note would be for clause 9(2)(a)(ii) in relation to the issues that Paul and I are talking about. That refers to making use of the child, and that means that the child may know nothing about it. It is not just making use of them through what is already there around spying or giving information on a parent or anything like that. Making use of a child can include the implied threat of the harm that a person will do to a child if someone does not behave in a certain way. Paul can speak for himself on that.

Mr Frew: That is where I got confused last week. Subsection (2)(a)(ii) refers to the offence where:

"A made use of the child".

The explanatory note talks about the child being used, whereas subsection (2)(a)(i) refers to the offence where:

"A directed behaviour at the child".

That is different, and that to me is a threat to harm the child. So, I think that it sits better in subsection (2)(a)(i). Subsection 2(b) talks about the child seeing, hearing or being present, and that is what does the damage for me. It does not give me any reassurance whatsoever. If the explanatory notes could clarify subsection (2)(b), that would be helpful, and it could also be added to the explanatory notes for subsection (2)(a)(i), where it states:

"This could include the accused threatening violence towards a child to control or frighten the partner/connected person or being abusive towards the child."

At the end of that, you could add:

"even if the child has not been aware or is understanding of the nature of A's behaviour."

To me, it can fall in either of those two places to clarify the whole of clause 9. I do think that that is required. I suppose, the question that I have for the Department is this: how does it see that this would do damage in either creating confusion or casting doubt on the effectiveness of clause 9? How would that actually work?

Dr Holland: You would be bringing a provision into the Bill, and, because of the way in which it is constructed, we do not have a provision akin to the Scottish one where a reasonable person would consider that the child is aware of. The amendment that is being proposed in the Scottish Bill is on foot of that earlier element in that Bill, if you know what I mean. They have a bit prior to the awareness amendment that we are talking about, the two being connected. We do not have that element in our Bill, so it is considered that that additional bit is unnecessary. Certainly, we can have further discussions with counsel to see whether there is something that we could cover in the explanatory notes that might provide further clarification if that is helpful.

Mr Frew: I will lay it on the line here. I still think that the explanatory note is a second-best option, and I would rather see something in the Bill. If you can convince me that the explanatory note is the place for it to be, so be it, but I am still of the mind that we really want to try to amend the legislation itself. I will leave it there.

Ms S Bradley: On those two points, we have gone round on whether it should be in the Bill, whether that filters it and then the explanatory note. I did believe that we were looking at a change in the explanatory note, which I do not really see. There is clearly still work to be done.

On the age reduction, my understanding of this — I stand to be corrected — is that the reduction in age, basically, is a meeting point where we say that the Bill would not service children of that age, but by a reduction in the age we create a further net to safeguard that 17- and 18-year-old that does not exist. However, I think that the wise way to proceed on this is, as has been suggested, to have conversations with NICCY and all those stakeholders who specifically look at that age profile. My thinking of it is not clear enough for me to be able to give an assertion at this time.

Miss Woods: We have had long conversations about this, and I apologise, but I am going to put in a bit of a curve ball. What if we remove the child needing to see, hear or be present during an incident, and replace it with a reasonable person test? I will try to tease that out. If there is a victim, say, with a

dependent child, suffering economic or financial abuse, which is obviously in the Bill, leading to financial strain and an inability to provide for the child, and furthermore there is psychological abuse or coercive control, which are obviously in the Bill, where the child has never witnessed behaviour such as the financial abuse or coercive control, but the effects on the victim have had a knock-on effect on the child, a reasonable person would assume that the child had been adversely affected. There is no requirement for the child to see, hear or be present, but a reasonable person could say that domestic abuse had occurred against B by A, and that it is aggravated under clause 9.

My apologies; that is another way, rather than adding something in, as it is in Scotland. I appreciate that there are some additional hoops to jump through in the Scottish Act when the child sees, hears or is present during an incident, plus the reasonable person would consider it abuse. However, if we removed the "sees, hears or is present" condition, and just talked about the reasonable person test, which is not in our Bill, could that cover all the issues that we are batting back and forth?

Mr Frew: That is a very natural progression of thought process on this. I always said, even last week, that I have a problem with 9(2)(b). Subsection 9(1) says that:

"the offence is aggravated by reason of involving a relevant child."

Then we go down to 9(2)(b), and that clarifies and restricts it so that:

"the child saw or heard, or was present during"

the abuse. To me, that is the damaging bit. That is the bit I have a problem with, and I sought an amendment to try to fix or strengthen it. That is not a curve ball, that is just a natural progression of thought, to be honest with you. I am there with Rachel: if we cannot insert what I call "the awareness and understanding test" on the child into the Bill, the next logical step is to remove the bit I have a problem with, which is:

"the child saw, heard or was present".

The Chairperson (Mr Givan): I will get Veronica's view on that in a moment. I want to understand, Paul, your position and Rachel's as to why this needs to be in the Bill. Give me the scenario that requires this. I will be honest, I am not convinced. My position is that I entirely agree with the Department on this. Explain to me why this needs to be in.

Mr Frew: I will use Linda's scenario. That paints a picture where the child does not need to see, hear or be present. I also use Rachel's example, with regard to the financial aspect. The child does not need to see, hear or be present. And then I use my example, whereby the perpetrator threatens to rape — this is very harsh — the victim in front of a child. We all have heard that before. That is horrendous, but the child does not need to see, hear or be present when the threat is implied. That threat will last a lifetime. I do not see that we have sufficiently covered that threat, or any of the scenarios that we have painted, when you have a clause like 9(2)(b). To me, it is the damage that 9(2)(b) does that could well — in all three scenarios that I painted, having 9(2)(b) in the Bill could hurt that case.

Dr Holland: Our concern in relation to the removal of 9(2)(b) would be that you are removing a provision where the only condition is essentially that the child is somewhere where the child sees it, the child hears it or the child is present for it. It could be something that is very indirect and not obvious but is very controlling and very coercive behaviour and has a severe impact on the partner or family member in question. The removal of that provision would significantly detrimentally impact on those types of situations where the child may not necessarily be aware of what is going on. The other concern is that the removal of that, and its substitution with the awareness provision, would come back to the condition that a reasonable person would consider that that would adversely impact on the child. Obviously, if you have very explicit or obvious physical or non-physical behaviour, it could be made out that would adversely impact on the child. Because of the nature of controlling and coercive behaviour, emotional abuse or financial abuse etc, whether or not you could sufficiently argue that it could be considered — coming back to that wording — to "adversely impact on the child" —. A lot of behaviours may not necessarily be obvious.

Mr Frew: Yes, but remember that clause 9 is all about the aggravation of the crime. It is not about the crime to the child, it is about the aggravation.

Dr Holland: For the aggravation to apply, the reasonable person has to consider that it would adversely impact on that child.

Mr Frew: I disagree completely on that. It is about how it would affect the victim, not the child. That is where the aggravation should be. It is about how it impacts on the victim, who is always named as "B". Subsection 9(1) says:

"It may be specified as an allegation alongside a charge of the domestic abuse offence against a person ("A") that the offence is aggravated by reason of involving a relevant child."

Full stop, leave it there. Then it goes on to say:

"For the purposes of subsection (1), the domestic abuse offence is aggravated by reason of involving a relevant child if —

(a) at any time in the commission of the offence —

(i) A directed behaviour at the child, or

(ii) A made use of the child in directing behaviour at B".

End of, leave it there. I do not know why we have to add in that the child saw, heard or was present. I really have a problem with 9(2)(b) and, because of that, we have sought to clarify that with an amendment which gives an awareness and understanding test to the child; they do not need to have an awareness or understanding. Whilst we include 9(2)(b), we need the awareness and understanding of the child to be addressed. That is where I am at. It is all about the aggravation in clause 9, not the actual crime against the child.

The Chairperson (Mr Givan): Veronica, do you want to come back on that?

Dr Holland: With regard to the two scenarios being put forward, as I have said, we would have significant concerns about the removal of 9(2)(b), given the types of scenarios that it covers. There is a separate issue of whether or not we agree with the amendment that was proposed by the Committee. As we have set out, we do not consider that to be necessary. My view would be to remove 9(2)(b) and replace it with the amendment, as opposed to having 9(2)(b) with the amendment. The removal of 9(2)(b) would have significant implications around the types of cases that could be brought forward, where it would be aggravated by virtue of — . Again, coming back to the fact that that aggravation is simply that the child has been there. There does not have to be any impact on the child; the child does not have to be aware of it. It is simply turning on the fact that the child saw, heard or was present in those scenarios where the child has been present for that abuse. We have significant concerns about (b) being removed.

The Chairperson (Mr Givan): Just so that I can clear this up, Paul is saying that it should only be about the victim. The offence and the charge taken is the offence against the victim.

Dr Holland: The aggravation is in relation to the child.

The Chairperson (Mr Givan): The aggravation is because a child is involved. What we are proposing here in this legislation is that we are creating a new offence on what has been done to the victim. If you are going to add a penalty or so on because it relates solely to the victim, then increase the penalty. The aggravation here is the different factors, and that is the child. I am trying to get my head around it, Paul, when you say that it is about the victim. The purpose of the Bill —.

Dr Holland: Clause 9 is simply the aggravation in relation —.

The Chairperson (Mr Givan): It is an additional factor to take into account.

Dr Holland: Almost, in a sense, it is not that they are separate, but, effectively, you have the domestic abuse offence on its own right and you have the aggravation. The focus on the aggravation is on how can we increase the sentencing for the underpinning domestic abuse offence because there has been the involvement of a child in a range of guises.

The Chairperson (Mr Givan): The child does not need to be aware of it. The Bill just needs to be as currently drafted.

Dr Holland: It just needs to be there. I suppose that was why we did not incorporate that element of it. At the outset, we did consider the Scottish provisions and the changes that were made. Because there is a child present in that situation we were keen to have an aggravator which was, in itself, sufficient in our mind, for consideration to be given by the court to increase the sentencing that may otherwise have been attributable for that offence. We are of the view that the Scottish provisions are more limiting than ours, in that you have to bring in the reasonable-person aspect.

The Chairperson (Mr Givan): And the awareness.

Dr Holland: Yes.

Ms Dillon: The more that we talk, the more I go back to the explanatory note. I am going to completely confuse the issue now and go back to the first point on the 16- and 17-year-olds. The point that you are making that the child could take their parent for financial abuse, I do not think is right. In clause 9, it is only around an aggravating factor. It is potentially different in the other clauses, but not in that one. We would have fewer concerns about that, given that it is a fact and needs to be in there for that reason. The 16- or 17-year-old should not be considered an adult if they are still living in the home and can potentially still be used against their parent in whatever form, whether it is domestic abuse —.

Dr Holland: By way of clarification on the change in the age for parental responsibility exclusion, we are not suggesting that there is any change to the aggravating factors for that very reason. By and large, we consider children to be under the age of 18.

Ms Dillon: On that point, we should have fewer concerns, but I wanted to throw that out there for the other members who had concerns on that.

I keep coming back to changing the explanatory note. I am not precious about whether it is changed on clause 9 (2)(a)(i) or clause 9 (2)(a)(ii); this gets very confusing. I would really like that, somewhere in the explanatory note, it states about the use of a child around implied hurt or injury. I do not know what the wording would be around that. Stephanie would probably be the better person to come in on that. That is something that I was going to suggest, Chair. Could Stephanie come in and give us an idea whether the explanatory memorandum could be changed there? I know that the Department has a view, but is that possible and is that something that could work, in your view?

The Chairperson (Mr Givan): We can bring Stephanie in, but her contribution is always done in a closed session.

Ms Dillon: Oh, sorry.

The Chairperson (Mr Givan): You are OK.

Dr Holland: Do you want us to step out?

The Chairperson (Mr Givan): No. Let us deal with this.

Ms Dillon: We want to get through it.

The Chairperson (Mr Givan): You have given the reason that the explanatory and financial memorandum always follows what is in the legislation, and I take that point. You cannot put something into an EFM which is not in legislation. The Committee needs to decide if it wants to change the legislation. It will then naturally flow into the EFM. Some members have a view of what needs to be in it, and others are differing. The only area where the awareness issue comes into play, if we do not change the amendment, is in the guidance. Personally, I feel that an EFM cannot flow and accommodate members' views if we do not introduce an amendment to legislation. If this is going to be addressed outside legislation, then I suspect that, at best, it will be the guidance that will make it clear what the Committee is trying to convey about the awareness issue.

Ms Dillon: Could you add the reasonable person and not remove it. Would that be a potential problem?

Dr Holland: That comes back to what the original suggestion was. Our view is that we do not think that that provision is needed because we do not have the two limbs that Scotland has. Obviously, there would not be anything to stop the Committee or a member tabling an amendment.

The Chairperson (Mr Givan): OK, members?

Mr Frew: The least that I would expect is a change in the explanatory notes. I will not take the Department at face value with regard to what is included in the guidance. If we are going to go down that road then we can always put an amendment into the Bill to say that the guidance should include something, and we do not want to go there.

The Chairperson (Mr Givan): You might.

Ms Dillon: I am not necessarily directing at the Department that it would not put it in. I will be less cynical. I think, in fairness, that if the Committee really thought that it was important, then we might. It is just that the guidance is only guidance, and that is where I become concerned, because it is about how it plays out at the other end.

Mr Frew: Yes.

Miss Woods: Chair, to confirm, I was not suggesting that we remove 9(2)(b) completely without replacing it with anything. It was that if 9(2)(b) is a sticking point, could it be replaced with a reasonable-person test to cover all of these aspects that we are talking about?

The Chairperson (Mr Givan): Again, I take the point about the reasonable-person test. The Scottish model is a poorer version of what this Bill is trying to do. I accept the argument that the Department is putting forward, and that is my personal view on it, and therefore, why would it be necessary?

Listen, members are going to have to come to a view on it, because we have debated this week after week and at length. At some point you have to decide what you are going to do on it and whose opinion you are going to take as the one that you feel you should flow with. I take the view that this an aggravating factor, where a child has been involved, and on that basis, this Bill, as drafted, does not require awareness to be an issue, and to put in an amendment to say so will just create unnecessary legislation.

Mr Frew: To add to that, it actually does mention in the explanatory notes, in one place, that the child could be "unwittingly or unwillingly" involved. That is the explanatory note on subsection (2)(a)(ii). So, if it is good enough for it to be there and it not going to do violence to the Bill, then why would it do violence to the Bill or a clause 9 somewhere else by including it somewhere else? The very fact that you have included it in the note on 9(2)(a)(ii), but not on 9(2)(a)(i) is enough to worry me, so even if that line —.

Dr Holland: If it helps the Committee, we can certainly talk to the Legislative Counsel. Paul, if you are saying — and apologies, I cannot recall, even though we wrote it — that there is reference to that in the explanatory memorandum on 9(2)(a)(ii), then we can ask the Legislative Counsel whether a similar sentence could be included with regard to 9(2)(b), if that is helpful?

Mr Frew: Yes, that would.

Ms Dillon: I do not think that it is not in the legislation. I just think that somebody has looked at it and decided what "made use of" or what "directed at" means. Look at it again, given all of the examples that have been given here, would be my view, and to change the —.

Dr Holland: Certainly, as we have said, 9(2)(b) simply is about whether the child sees, hears or is present, and, by virtue of that, the child does not need to be aware. That sentence could potentially — we will look at the sentence that refers to 9(2)(a)(ii) — be replicated for 9(2)(b), as well. However, as I have said, we will have discussions with the Legislative Counsel with regard to that.

Mr Frew: Sorry, but it is 9(2)(a)(i).

Dr Holland: 9(2)(a)(i).

Mr Frew: Yes. So, it is explained for 9(2)(a)(ii) but not 9(2)(a)(i), and I just do not understand why it would not be in 9(2)(a)(i) when the directed behaviour at the child is where it needs to be "unwittingly" and "unaware of", so it is nearly as if —.

Dr Holland: So, you are saying that there is a reference with regard to clause 9(2)(a)(ii), but you essentially think that it should be covering 9(2)(a) generally?

Mr Frew: Yes.

Dr Holland: We will certainly have that conversation with counsel.

Mr Frew: The last sentence of the paragraph on subsection 9(2)(a)(ii) states:

"The involvement of the child could be unwittingly or unwillingly."

It ends there with a full stop.

The Chairperson (Mr Givan): If Paul has provided a solution, then I will give a hearty "Amen" to that.

Dr Holland: We will certainly look at that and do what we can do.

The Chairperson (Mr Givan): OK. We are doing the formal clause-by-clause scrutiny next week, so no pressure.

The other aspect is around section 20 of the Children and Young Persons Act (Northern Ireland) 1968. It is to do with a proposed amendment that has been worked up with Health. The Department's letter is where you will find the proposed text. Christine, for members' benefit, do you want to remind us on this issue?

The Committee Clerk: Yes. The Department's letter dated 23 September provides the wording of a proposed new clause that amends the Children and Young Persons Act (Northern Ireland) 1968. It is really whether the Committee is content or has any further questions on that proposed amendment. The Department is highlighting that it:

"will ensure that non-physical ill treatment of a child, by someone with parental responsibility for them, is criminalised. It will also ensure that current references to an offence around unnecessary suffering or injury to a child explicitly state that this relates to the suffering or injury being of a physical or otherwise nature, again ensuring that non-physical behaviour is captured. This should enable matters such as isolation, humiliation ... etc. to be captured. Assuming acceptance of the amendment, including by the Speaker, this would make clear that it is an offence."

However, the Department has also highlighted the issue that was covered earlier: that this amendment would only apply to those under the age of 16. The Department has put forward a proposal regarding changing the age. To ensure that non-physical abuse of 16- and 17-year-olds in a parent-child relationship is clearly provided for in legislation, it has put forward amendments to clauses 11 and 17. It is whether the Committee has any views on that specific clause. It would apply to the child cruelty offence for those under the age of 16. I think that, from the views expressed, you need more time to consider the other issue.

Ms Dillon: This is where it becomes an issue.

The Committee Clerk: So it is whether you have anything further that you want to ask the departmental officials on these proposals, or you just need more time to consider.

The Chairperson (Mr Givan): Is the concern here that the issue around child cruelty is needed, but it creates this consequence that you are flagging up?

Dr Holland: Yes. Essentially, you would not have this issue if the child cruelty offence applied to those under the age of 18. However, because it applies only to under-16s, it leaves less protection for 16- and 17-year-olds. While we fully appreciate the concerns about the reduction of the parental responsibility exclusion and the potential in relation to parental responsibility, as I say, the flip side of that is that, if we do not reduce the parental responsibility exclusion threshold, there are lesser protections available in relation to 16- and 17-year-olds, albeit that, as I say, we fully appreciate the concerns about that coming under the auspices of the domestic abuse offence as opposed to child protection legislation.

The Chairperson (Mr Givan): Notwithstanding the dilemma that it creates in that respect, you still want to go with this amendment?

Dr Holland: Yes.

The Chairperson (Mr Givan): We then need to decide if we want to address non-physical abuse for 16- and 17-year-olds.

Dr Holland: The difficulty in that context is that, because of the scope of the Bill, you are straying into child protection provisions. While we are doing this amendment — there is a linkage with the child aggravator and the child aspect — we would not be able to do something material from a child protection perspective through this Bill. That is part of the reason why we are looking at this as well. It is to try to ensure as much coverage as possible.

Ms Dillon: On a point of clarity, is what you are really saying, Veronica, that, if we do not change it from 18 to 16 in this Bill, we cannot put in something else to protect that age group, because of the scope of the Bill?

Dr Holland: Yes. That is my view of it. It would obviously be a matter for the Speaker but, given that we are dealing with the domestic abuse offence and family proceedings, this is definitively Health territory; it is not Justice territory.

Mr Frew: I am still mute on the age thing, because I have not had enough time to consider it. We also need to see exactly what is being repealed from the 1968 Act. We have the wording of the new clause, which, I think, removes the words from "including" to "derangement", but we do not actually know all the wording in between.

Dr Holland: I should have brought that provision with me. From memory, it deals with examples of non-physical ill-treatment. There are three or four references, as I say, to "mental derangement" and a number of other terms. It is therefore considered that, because we are basically saying "physical or otherwise", we are including physical harm plus anything that is non-physical. Essentially, the terminology that was referenced there by way of examples is no longer needed. You could still include it, but it is not necessary to have it there.

The Chairperson (Mr Givan): I will separate that into two parts. Are members content with the amendment that has been put forward that deals with the cruelty aspect — the wording of it and what it is trying to achieve?

Members indicated assent.

The Chairperson (Mr Givan): OK. Then the issue that we need to look at is whether we want to pursue the non-physical aspect for 16- and 17-year olds.

Mr Frew: Chair, I was mute because I am not satisfied. We have not had enough time to look at it.

Mr Dunne: Too late.

Dr Holland: If it is helpful, we can share the extract from the letter to the Committee in relation to that with NICCY and NSPCC, and ask them to come back with some views on that ahead of next week's Committee meeting.

The Chairperson (Mr Givan): OK. Members, I am just keen to tease this one out. There is a procedural issue for me, irrespective of getting that response back next week, because of the change that is being talked about, the fact that we did not go out and seek views on it and so on. I appreciate that, when we come to amendments, we are not doing that either, but I am going to have difficulty with what is being talked about. Are we doing the formal clause-by-clause scrutiny next week, Christine?

The Committee Clerk: We are.

The Chairperson (Mr Givan): Are there amendments on trying to achieve that for 16- and 17-year olds?

Dr Holland: Yes. The amendment simply replaces "18" with "16". It is a simple amendment.

The Chairperson (Mr Givan): OK.

Dr Holland: There is nothing more to it than that.

The Committee Clerk: If the Committee feels that it has not had time to look at the amendment, it can simply note it. It does not have to reach a decision on it.

The Chairperson (Mr Givan): OK, members. So that we know, for next week, what it is we are doing on that aspect, the amendment will be there, but members should decide in advance of that and in the absence of the feedback. If we get it, we get it, but it is difficult for the Committee to have deliberated the way it should have done, in my opinion, in order for it to be the Committee's considered position. Maybe it is the Department's amendment to bring in and explain on the Floor of the House. Procedurally, that is a more appropriate way to vote on it, in my view.

Christine, is there any other element in this section that needs to be clarified?

The Committee Clerk: No. We await the Department coming back with possible amendment wording for next week in relation to —.

The Chairperson (Mr Givan): Clause 9 and the "unwittingly" comment.

Dr Holland: As I say, we will have discussions with counsel on that. We will also see whether we can get the views of NSPCC and NICCY, with a view to having that with the Committee for your session next week.

The Chairperson (Mr Givan): Members are content, then, with the proposed amendment that has been worked up with Health on cruelty.

Mr Frew: Just before you go, I do not want to waste anybody's time, but it is very important to clarify whether that sentence:

"The involvement of the child could be unwittingly or unwillingly"

refers to the child or to either the perpetrator or victim. That needs to be clarified too in the wording.

Dr Holland: I do not have the wording in front of me, Paul, but my recollection is that it would be the child. Basically, while the child is involved in the abusive behaviour, he or she, effectively, knows nothing about it.

Mr Frew: OK.

The Chairperson (Mr Givan): OK. Clause 13 deals with alternative available for conviction. The Committee requested further information and detail from the Department on why clause 13 is necessary, how it would work in practice, including the provision of a scenario or example illustrating that, and what the implications would be if it were removed from the Bill. The Committee was also concerned that the wording of the clause did not clearly reflect the explanation of the purpose of the clause provided by departmental officials and asked the Department to reflect on how it could be changed or enhanced to better reflect its purpose.

The Committee, at its meeting on 17 September, considered the further information provided by the Department and noted that it will amend the explanatory and financial memorandum to include the scenario as an example and will include that in the guidance that is being produced on the new offence. The Committee agreed that, in light of the further information and action to be taken by the Department, it is content with clause 13 as drafted.

The Committee also agreed to request further information on the burden of proof or evidential test required to meet the test of personal connection. The Department has outlined further information on that in its letter dated 23 September, which members have.

Members, that information for you to note unless there are any other points that you wish to make about clause 13.

Mr Frew: That has clarified a lot of the stuff that I was concerned about.

The Chairperson (Mr Givan): OK. Thank you.

Clause 22 deals with special measures directions. The Committee, at its meeting on 10 September, agreed to request confirmation that the Department intends to adopt the recommendation of Women's Aid and the Gillen review regarding a guarantee of special measures in the Family Court.

The Committee, at its meeting on 17 September, noted the additional information provided by the Department and agreed to consider the clause further when the wording of the Department's proposed amendment to require court rules to make specific provision in relation to special measures in family and civil proceedings for victims of domestic abuse and other offences was available. The Department has provided the text of the draft amendments, and they are new clauses 26A and 26C at annex A of the Department's letter. The Department had previously indicated that the court rules would make provision so that victims of domestic abuse were automatically eligible for consideration of special measures in family and civil proceedings. It will be for the court hearing the proceedings to determine whether it is necessary to make a direction for special measures in an individual case.

In correspondence dated 9 September, the Department also outlined its intention, with the agreement of the Department of Finance, to amend article 12A of the Children (Northern Ireland) Order 1995 so that a court considering an application for a contact or residency order will be specifically required to have regard to the conviction of the party applying for the order for the new domestic abuse offence where the child aggravator has been applied. The Department has provided the text of that proposed amendment, and it can be found in members' packs.

The Chairperson (Mr Givan): Members, I ask for your views on clause 22 and whether the Committee is content to support the Department's proposed amendments to require court rules to make specific provision in relation to special measures in family and civil proceedings for victims of domestic abuse and other offences and/or the proposed amendment to article 12A of the Children (Northern Ireland) Order 1995. Are Members content?

Members indicated assent.

The Chairperson (Mr Givan): Clause 25 deals with guidance about domestic abuse. The Committee agreed, at its meeting on 10 September, that it wanted the text of clause 25(1) changed from "may" to either "will" or "must" in relation to the provision of guidance by the Department and agreed to ask the Department for confirmation of whether the Minister was content to table such an amendment. The Committee also asked the Bill Clerk to prepare a draft amendment.

The Committee, at its meeting on 17 September, noted that the Minister had agreed to table an amendment to change the word "may" to "must" in clause 25 and that the Department was instructing counsel to draft the amendment. The Committee also considered the draft amendments prepared by the Bill Clerk and agreed to provide its preferred wording for the amendment to the Department.

The Department has provided alternative wording that would amend clause 25(1) and clause 25(3). The proposed amendment provides that the Department must issue guidance on Part 1 of the Bill and such other matters as it considers appropriate, keep the guidance under review and revise it should it consider revision necessary in light of the review. That ensures that the change requested by the Committee is dealt with in both parts of the clause as appropriate. The Department has also highlighted that, given the duty imposed, the Interpretation Act (Northern Ireland) 1954 automatically

requires the guidance to be revised from time to time, as the occasion requires, in the absence of this. The text of the amendment can be found in the Department's letter.

Are members content to support the Department's proposed amendment to clause 25?

Members indicated assent.

The Chairperson (Mr Givan): Clause 26 concerns the prohibition of cross-examination in person. The Committee, at its meeting on 10 September, agreed to request confirmation that it is the Department's intention to adopt the recommendation of Women's Aid in relation to an automatic prohibition of cross-examination in any family proceedings where there are allegations of domestic abuse or where the perpetrator has admitted to domestic abuse, and the recommendations in the Gillen review relevant to court proceedings in domestic abuse cases.

At the 17 September meeting, the Committee noted the additional information that had been provided by the Department, which confirmed that, in relation to the recommendation of Women's Aid, provision has already been made in the Bill for an automatic prohibition to apply where there is other specified evidence of domestic abuse. The other types of evidence of domestic abuse will be specified in regulations that the Department will consult on. In cases where an automatic prohibition does not apply, a court will have a discretionary power to prohibit cross-examination in person. The Committee agreed to consider the clause further when it received the wording of the proposed amendment, which is to require court rules to provide for a court hearing or civil proceedings to have a discretionary power to prohibit cross-examination in person, together with a proposed minor amendment to require a court considering whether to exercise its discretionary power to prohibit cross-examination in person to have regard to findings of fact made in civil or criminal proceedings as well as family proceedings. The Department has provided the text of the draft amendment: it is new clause 26B at annex A of the Department's letter.

The Department has also drawn the attention of the Committee to a small error in relation to clause 26, which occurred while the Bill was being processed prior to its introduction, and has provided the text of an amendment to correct it. The draft amendment is at annex A of the Department's letter.

Members, what are your views on clause 26? Are you content to support the Department's proposed amendment to require court rules to provide for a court hearing civil proceedings to have a discretionary power to prohibit cross-examination in person and to require a court considering whether to exercise its discretionary power to prohibit cross-examination in person to have regard to findings of fact made in civil or criminal proceedings as well as family proceedings, and/or the amendment to correct the processing error that has occurred?

Members indicated assent.

The Chairperson (Mr Givan): The Department has advised that it intends to bring forward three further minor and somewhat technical drafting amendments to clauses 8, 10 and 13. They do not make any policy changes. The amendments to clauses 8 and 10 tidy a small aspect of the wording in each place, particularly to reflect the position that the course of behaviour under the main offence is not the sole element of the domestic abuse offence. The amendment to clause 13, which deals with an alternative offence as to the domestic abuse offence, would insert provision, for the avoidance of doubt, to reflect the Criminal Law Act 1967, which contains general provisions for alternative verdicts in indictment proceedings. That is to ensure that there is no risk of implying that the provisions in the 1967 Act are ousted by what is contained in clause 13. The Department has provided the text of the proposed amendments, which are found at in the Department's letter. Members are asked to note the three proposed minor technical amendments, unless they require further information. The formal Questions on the amendments will be put during the formal clause-by-clause consideration.

That concludes the informal consideration of the Bill. We will do the formal clause-by-clause consideration next week, notwithstanding the fact that we will have an update on clause 9 and further information on clauses 11 and 17, which deal with the 16- and 17-year-old issue, at that meeting.

The Chairperson (Mr Givan): I thank the departmental officials for being here and for their advice on the Bill.

Dr Holland: Thank you.