Department of Finance
An Roinn Airgeadais
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FROM: **CLAIRE TAYLOR**
DOF DALO

DATE: **23 May 2024**

TO: **PETER HALL**
COMMITTEE CLERK

REFERENCE NUMBER GM-1164-2024

BRIEFING ON GENDER RECOGNITION AND OTHER CIVIL LAW REFORM (INCLUDING DEFAMATION).

Summary

Business Area:	DSO—Civil Law Reform
Issue:	The paper at Annex A, *Briefing on Gender Recognition and other Civil Law Reform (including Defamation)*, provides an update and background on relevant civil law reform areas as requested.
Restrictions:	None.
Action Required:	Committee to note ahead of scheduled attendance by DSO officials on 29 May 2024.
Officials Attending:	Michael Foster, Head of Civil Law Reform Martin Tyrrell, Policy Advisor, Civil Law Reform

BACKGROUND

Aside from its work on amending the law on marriage and civil partnerships (on which officials briefed the Committee on 17 April), Civil Law Reform Division is responsible for a range of other policy areas. These include gender recognition, defamation, private family law (including divorce), land law and private international law. The Committee has asked for an overview of civil law reform work, with particular focus on gender recognition and defamation.

KEY ISSUES

Gender Recognition—Gender recognition refers to legal recognition of a person in a gender other than that associated with their biological sex at birth. Gender recognition is governed by the Gender Recognition Act 2004 which also applies in England and Wales and in Scotland. The 2004 Act requires applicants to be aged 18 and over, have lived for at least two years in their preferred gender and have clinical reports supportive of their request. Applicants who can satisfy these criteria have their applications assessed by a Gender Recognition Panel comprising legal and clinical specialists and, if successful, receive a Gender Recognition Certificate (GRC). To date, most who have applied for a GRC have been successful, including around 75 people from this jurisdiction. Transgender groups and others have criticised the 2004 Act on account of the requirements it sets for applicants, notably the clinical evidence. A system based on self-identification has been advocated by some as a replacement. Under a self-identification system, people who wish to be officially recognised in their preferred gender need only make a formal statement to that effect. The debate on gender recognition has become highly polarised in the past decade and conflated with the wider debate on gender identity which includes the provision of clinical interventions such as hormone therapy and surgery and the age at which these might begin. These are separate policy issues for which the Department of Health (DOH) is responsible. Preliminary research commissioned by DOF found that, as expected, transgender stakeholders favoured replacement of the current gender recognition process with a system based on self-identification along with a lower age threshold or no age threshold. Other stakeholders favoured more modest changes or no changes.

Defamation. The Defamation Act (NI) 2022 amended defamation law in this jurisdiction by ending the presumption in favour of trial by jury and codifying the principal common law defences. Section 11 of the 2022 Act commits the Department to review both the working of the Act and developments in defamation law in this and other jurisdictions and report its findings to the Assembly by June 2024. The Review has been finalised and the Minister is currently considering the report. Its main findings to date are that the Act has been generally welcomed by local stakeholders although most believe it is too early to say what its long-term impact will be. Current issues relevant to defamation law include online defamation and Strategic Litigation Against Public Participation (SLAPPs). While other jurisdictions have introduced or are considering the introduction of anti-SLAPP legislation, opinions differed among stakeholders here as to what should be done here. Some thought existing arrangements were adequate to address SLAPPs, others that bespoke legislation was required.

NEXT STEPS

The Minister will review the findings of the research on gender recognition commissioned by the Department and consider what further work is achievable at present.

The Minister will consider the content of the Section 11 Report on the Defamation Act (NI) 2022 and defamation law in general and assess how to proceed.

The Minister, following a debate on a motion in the Assembly on Monday 20 May, has asked officials to begin some preliminary scoping work on the law relating to divorce with a view to developing policy proposals later in this mandate.

The Minister will, in due course, consider other aspects of civil law reform in terms of developing priorities for this mandate, and beyond.

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Annex A – *Briefing on Gender Recognition and Other Civil Law Reform (including Defamation).*

Briefing on Gender Recognition and Other Civil Law Reform

INTRODUCTION

1. The purpose of this briefing paper is to provide an overview of work that falls within the remit of Civil Law Reform Division (CLRD), within Departmental Solicitors Office (DSO). CLRD is a small policy unit, currently comprising two members of staff, that provides advice and support to the Minister on a range of civil law matters. Typically, those areas include private family law, marriage and civil partnership, the law of tort (including defamation), private international law, land law and other discrete areas of civil law.

2. CLRD has finalised policy on a proposed Marriage and Civil Partnership Bill (upon which the Committee was briefed on 17th April 2024), and has finalised advice to the Minister on the outcome of a stakeholder engagement that concluded at the start of February on defamation (with a statutory report also finalised for consideration). The Minister has also asked officials to begin some preliminary scoping work on the law relating to divorce in this jurisdiction. On top of those issues, officials monitor other aspects of law within the remit of CLRD, and provide advice, draft Assembly questions and correspondence for approval and undertake work on active cases in the courts.

3. The bulk of this briefing paper deals with 2 of the issues that the Committee has flagged as being of particular interest to it at this stage – gender recognition and defamation – but touches also on other aspects of relevant civil law reform that are ongoing within the office.

Gender Recognition

4. Gender recognition is the legal recognition of a transgender person in their preferred gender, the gender other than that associated with their biological sex. The Gender Recognition Act 2004 governs gender recognition in this

jurisdiction. It is an act of the Westminster Parliament that also applies in England and Wales and in Scotland. As gender recognition is a devolved matter, we could introduce our own gender recognition policy and legislation.

5. Gender recognition refers solely to the legal recognition of a person in their preferred gender. It is one part of a wider debate on gender identity. The wider gender identity debate includes issues such as clinical interventions (e.g. hormone therapy and surgery) and the age at which it is appropriate for these to begin, and the extent to which people who identify as a preferred gender can access places and services exclusive to that gender. For example, can a person born male but identifying as female access women-only space, play women's sports, or be part of a women-only shortlist. None of these wider issues is a policy responsibility of the Department of Finance. The Department is responsible only for the legal recognition of a person in their preferred gender.

6. Although gender recognition is a distinct issue, it is naturally relevant to the wider debate on gender identity. For example, a person who has been officially recognised in their preferred gender might use this formal recognition to seek access to clinical services or access to single sex space.

7. The 2004 Act made it possible, for the first time, for a person to be legally recognised in their preferred gender. Subsequent debate on legal gender recognition has focused primarily on how, if at all, that Act—and the gender recognition process it established— should be amended.

Gender Recognition—the current process

8. The Gender Recognition Act 2004 requires that a person who wishes to be legally recognised in their preferred gender must be at least eighteen years of age, have lived in their preferred gender for at least two years, and be able to provide authoritative clinical evidence that formal gender recognition is appropriate. Applicants apply to a Gender Recognition Panel made up of legal and clinical specialists. The Panel determines, on the basis of the evidence provided, whether the applicant should be permitted to change their official

gender and receive a Gender Recognition Certificate (GRC). The vast majority of applicants have been successful and include (since the scheme became operational in 2005) around 75 people ordinarily resident in this jurisdiction.

The Gender Recognition Debate

9. Critics of the 2004 Act, including most organisations representative of transgender people, have suggested that the criteria it sets for gender recognition are onerous and intrusive. There has been criticism, for example, both of the obligation to provide clinical evidence and the practical difficulty of obtaining it given that the relevant professional expertise is relatively scarce. Critics of such requirements have instead advocated a system based on self-identification. Under a self-identification system, a person seeking legal recognition in their preferred gender generally makes a formal statement of their intention to live permanently in that gender. The mainstream debate on gender recognition since the 2010s has centred primarily on whether the clinical approach of the 2004 Act should remain unchanged, or be replaced by a self-identification approach, or be replaced by a system that combines elements of both (e.g. self-identification after a trial period living in the preferred gender).

10. A number of countries now base gender recognition on self-identification including the south of Ireland where, since legislation was introduced in 2015, 900 people have officially changed their gender.

11. Self-identification has also been criticised, including on the grounds that if offers too easy and unevidenced a route to gender recognition. In addition, the debate on gender recognition has inevitably become part of the wider debate on gender identity, a debate that has in recent years become highly polarised. In the late 2010s, for example, the Westminster Government had been expected to move to a self-identification system. Instead, however, and partly in response to a perceived growth in criticism of self-identification, it opted (in 2021) to make only minor changes to the 2004 Act, leaving its clinical and other requirements unchanged. More recently, in 2023, Westminster intervened to prevent the Scottish Government from introducing self-identification.

Local opinion on the Gender Recognition Act 2004

12. In 2021, the Department commissioned researchers from the School of Psychology at Queen's University, Belfast to assess how people here regard the 2004 Act and their opinions on change. The research was intended to inform decision-making on future gender recognition policy. It comprised focus groups, interviews and survey research.

13. The main findings were that transgender people were, as expected, generally critical of the Gender Recognition Act 2004, including its three main requirements—clinical evidence; a two-year minimum trial period in the preferred gender; and an age threshold of 18. Their preference was for self-identification, no trial period and either a lower minimum age of 16 or no minimum age.

14. Respondents who were not from the transgender community typically favoured either more modest change (e.g. self-identification but with a minimum age of 18) or no change to the requirements of the 2004 Act.

15. The Report of the research project can be accessed at https://www.finance-ni.gov.uk/publications/queens-university-belfast-gender-recognition-act-gra-2004-evaluation

16. The Minister is currently reflecting on these findings and it will be for her to decide whether policy change and therefore legislation would be appropriate. Legislation would require Executive and, in time, Assembly agreement as well as full public consultation.

<u>Defamation</u>

17. The Defamation Act (NI) 2022 received Royal Assent on 6 June 2022. Its principal changes are the removal of the presumption in favour of trial by jury in defamation cases and the replacement of the three common law defences

(justification, fair comment and the 'Reynolds defence') with equivalent statutory defences (truth, honest opinion and publication in the public interest).

18. In addition, Section 11 of the 2022 Act requires that the Department carry out a review of defamation law in this jurisdiction and elsewhere and formally report its findings to the Assembly by June 2024 (i.e. two years after Royal Assent).

19. The Section 11 Review began in 2023 and is currently progressing towards its June deadline. The final report considers how the Act has been performing since Royal Assent and reflects on the main issues current in defamation law, including: online defamation; libel tourism; access to justice; alternative dispute resolution (ADR); the serious harm test; and strategic lawsuits against public participation (SLAPPs). In the context of defamation law, a SLAPP action is a defamation claim without obvious merit than is brought principally to deter a particular defendant by embroiling them in prolonged, costly and unpredictable legal action. SLAPP actions are possible in areas other than defamation law including the law on copyright, environmental protection, freedom of information and data protection.

20. The Review has drawn on a number sources including initial specialist reactions to the content and operation of the 2022 Act, developments in law and policy in the south, England and Wales and Scotland, and the views of stakeholders. Findings to date in these areas are summarised below.

Commentary on the Operation of the Defamation Act (NI) 2022

21. Regarding the operation of the 2022 Act, most who have commented, including Mike Nesbitt MLA whose Private Member's Bill (PMB) led directly to the Act, were of the view that it was too soon to comment definitively on its impact. The general view was that too little time had passed since Royal Assent, particularly given that the number of defamation actions in our courts is typically small.

22. With regard to the content of the Act, the ending of the presumption in favour of jury trials has been generally welcomed as a measure with the potential to save

time and cost and end something of the perceived uncertainty of defamation actions, notably the awards made to successful claimants. Codification of the defences was also largely welcomed.

23. Criticism focused more on what had not been included in the Act, particularly the serious harm test that was a feature of the Defamation Act 2013, which applies in England and Wales. The serious harm test is intended as a means of excluding claims that lack merit at an early stage. There was also criticism of the 2022 Act's coverage of online defamation, which some perceived as inadequate.

Developments in other jurisdictions

24. The Department has taken particular account of the following developments in other jurisdictions.

    i. Department of Justice (DOJ) in Dublin aims to amend the Defamation Act 2009. Its work to date has included a General Scheme for amending the 2009 Act based on an earlier review of that Act which reported in 2022. The General Scheme made proposals in respect of all of the main issues in defamation law noted earlier in this briefing paper including SLAPPs where a dismissal process is advocated to identify and strike out relevant actions at an early stage before costs can accumulate.

    ii. In England and Wales, the Ministry of Justice (MOJ) considers the Defamation Act 2013 as working well and as intended. MOJ's principal interest has been in SLAPPs. Following a call for evidence on the nature and extent of SLAPPs, it concluded that SLAPPs represent a '*pernicious form of litigation…designed to silence criticism and investigation conducted in the public interest*.' In 2023, the Economic Crime and Corporate Transparency Act was amended to include anti-SLAPP measures in relation to economic crime. More recently, The Strategic Litigation Against Public Participation Bill, a PMB sponsored by Wayne David MP that aims to counter SLAPPs in general (i.e. SLAPPs as they

affect all aspects of law and policy, not just defamation), has received the support of the Westminster Government and progressed to Committee stage. Our interest in this PMB relates solely to how it will affect defamation law and it is that aspect of it that we intend to keep in view.

iii. In Scotland, The Defamation and Malicious Publications (Scotland) Act 2021 ended the presumption in favour of trial by jury, introduced of a serious harm test, and replaced existing common law defences with equivalent statutory defences. Commentators note that the Act could make it possible, in the case of online defamation, for an action to be taken against a person who likes or reposts a particular statement.

Stakeholder Opinion

25. The Department sought stakeholder contributions between 13 November 2023 to 26 January 2024, including from those who had given evidence during the passage of the earlier Defamation Bill. Fourteen submissions were received. In addition, DOF officials held an online meeting with Mike Nesbitt MLA.

26. Stakeholder responses tended to divide into those who thought the existing arrangements were generally adequate and little or no change required, and those who thought that further change was needed. Moreover, stakeholders who were involved in the law as practitioners or academics tended to favour modest change or no change whereas stakeholders in the media favoured more significant amendments.

27. Online defamation is, as noted earlier, one of the main current issues in defamation law. There is ongoing debate, for example, as to who should be held accountable for what is published online. The majority opinion among stakeholders is that online hosts are not comparable to conventional publishers and should not be held automatically responsible for the comments posted by those who use their services. Some, however, thought that there were situations where an online host might become liable such as when they failed

to act on defamatory comments or failed to block a habitual maker of defamatory statements despite repeated complaint. A common view was that the complaints and notification services provided by online hosts are not always particularly user-friendly and might be improved. The process for obtaining takedown orders and Norwich Pharmacal orders (to identify anonymous and pseudonymous posters) were seen as costly and time-consuming, another possible area for change.

28. A majority of stakeholders favoured bespoke legislation of some kind to address the phenomenon of SLAPPs—sometimes the type of legislation that is in progress in England and Wales and in the south, sometimes a more modest approach. The features of such legislation include a rapid early dismissal process whereby a defendant can request that an action be considered as a possible SLAPP and struck down if it is confirmed to be so, and an arrangement whereby costs to the defendant are minimised but could be considerable to the claimant. Not all were supportive of this type of arrangement. Some alleged that SLAPPs were uncommon in this jurisdiction and that existing arrangements were adequate to address them. There was also, among some at least, a perception that anti-SLAPP processes are weighted in favour of defendants and could result in legitimate claims being deterred.

29. Libel tourism was generally accepted as not being a particular problem here although there was concern that this could change should anti-SLAPP legislation be introduced elsewhere on these islands leaving this jurisdiction the outlier.

30. Finally, the costs of defamation actions, and the potentially negative effect of these on access to justice, have meant a continuing interest in ADR. Stakeholders were generally positive in their view of ADR but resistant to its becoming compulsory.

Next Steps

31. The Department is on schedule to deliver its report to the Assembly by the statutory deadline of June 2024. The Minister is currently considering the report's content and on that basis will decide if further policy development is required at this time.

The Singapore Convention

32. The Singapore Convention of 2019 applies solely to international commercial disputes that have been resolved through mediation. It establishes a framework for the recognition and enforcement of such agreements. Thirteen states have to date ratified the Convention—Belarus, Ecuador, Fiji, Georgia, Honduras, Japan, Nigeria, Qatar, Saudi Arabia, Singapore, Sri Lanka, Turkey, and Uruguay. However, other UN Conventions have had a slow start and gone on to become well-established. To date, neither the EU as a bloc nor any individual EU member state has either signed or ratified the Convention. The EU has its own Mediation Directive which applies across all member states and which applied in the UK prior to Brexit.

33. The Westminster Government has signed and wishes to ratify the Singapore Convention. If it does so, ratification will create obligations in this jurisdiction. We will be bound by the Convention with regard to policy and legislation relevant but only with regard to the highly specialised policy area that it covers. (However, Article 13 of the Convention does permit jurisdictions within a State Party that have their own legal system to be exempted from the terms of the Convention. Therefore, we could, in theory, exempt ourselves if there was support for so doing).

34. The Singapore Convention is niche and is unlikely to raise any particular controversy. Ratification may benefit the relatively small number of people and businesses here that enter into international commercial agreements but only if the Convention can establish itself internationally. However, for most people it will have no effect or little effect on their lives.

35. The first stage in the ratification process was a public consultation led by Ministry of Justice (MOJ) in London in 2022. Consultation, which included stakeholders in this jurisdiction, was overwhelmingly supportive of ratification.

36. Parliamentary scrutiny of the Convention is expected to begin before the summer and ratification will proceed thereafter. The Convention will take effect six months after ratification which may mean early-2025. This timetable may be subject to change due to the decision to call a General Election in the UK on 4 July 2024

No-fault divorce

37. A number of Assembly questions have prompted fresh consideration of the issue of no-fault divorce in this jurisdiction. In addition, a motion calling for the Minister of Finance to consider amendments to the Matrimonial Causes (NI) Order 1978 to introduce no-fault divorce was supported by the Assembly on 20 May 2024. Currently, our divorce system is based around the irretrievable breakdown of a marriage, and the reasons for granting a divorce in our courts are centred around a mix of fault and no-fault grounds. A majority of divorces currently proceed on a no-fault basis – either 2 years separation with the consent of both parties to the marriage or 5 years separation. However, a significant number of divorces proceed on the basis of proof of fault – most commonly unreasonable behaviour, but also adultery and (rarely) desertion.

38. It has been argued that the fault grounds for divorce should be reviewed on the basis that a blame culture during divorce can be toxic and can have an adverse affect on both the parties to the divorce and others, including children. In England and Wales, recent legislative reform has led to the creation of what is described as a no-fault divorce system that came into effect in 2022. There have been some calls for this jurisdiction to adopt a similar approach.

Next Steps

39. This is an issue that the Minister is interested in considering further and she has asked officials to undertake some preliminary scoping work to identify the issues and to develop initial options for future examination. Work on that will commence shortly and it is the longer-term plan to develop policy later in this mandate, subject to available resources and competing civil law reform policies.

Land law

40. CLRD, among other areas, has responsibility for the substantive land law in this jurisdiction. Currently, there is no available expertise in this complex policy area, but nevertheless, officials frequently provide advice to the Minister on a range of issues. These typically relate to work carried out by the NI Law Commission some years ago on both land law and the law relating to apartments. To date, none of the recommendations in either report have been advanced, due to their complexity and the need for a suitably equipped Bill team to take forward the intricate recommendations contained in both reports.

41. Queries on these are occasionally fielded by CLRD on behalf of the Minister, and tend to focus on matters including the regulation of property management companies, the wider law relating to leaseholders (frequently in relation to the ownership or occupancy of apartments) and discrete questions on substantive land law (for example, ground rents legislation and other elements emanating from the Land Law report).

42. Currently, these matters are not priorities during this mandate, both in the context of available resources and in terms of work ongoing in other important policy areas, but the Committee may wish to note these types of issue.

Miscellaneous

43. Of final note for the Committee to be aware that CLRD is involved in other work, including active court cases where existing policies are challenged. For example, the law relating to parenthood is the subject of an ongoing judicial review (although the Department's role is secondary in this regard to that of the

relevant GB Department that has responsibility for the reserved matter of surrogacy and assisted fertilisation). There are other issues in which reform may be considered desirable but cannot currently proceed for different reasons including the lack of a legislative vehicle, or lack of expertise/resource. CLRD officials are frequently called upon to provide advice on these types of issues, and that can impact on ongoing policy work.