



## Briefing for the Public Petitions Committee

**Petition Number:** [PE01624](#)

**Main Petitioner:** Akri Jones

**Subject:** Definition of adultery

Calls on the Parliament to urge the Scottish Government to amend the current definition of adultery within legislation so that is not restrictive to gender status.

### Background

The current law relating to adultery is considered below in relation to i) marriages where spouses are of the opposite sex ('an opposite sex marriage'); ii) marriages where spouses are of the same sex ('a same sex marriage'); and iii) civil partnerships.

The petitioner lodged the same petition on 14 November 2014 ([PE01536](#)). It was closed by the previous Public Petitions Committee on 16 March 2015 on the basis that there was no intention to legislate further in this area in the current Parliamentary session. However, the Committee did advise that the petitioner could bring the petition back to the Parliament in the new session.<sup>1</sup>

The petitioner has resubmitted the petition with additional arguments regarding the Human Rights Act 1998 and the Equality Act 2010.

### Opposite sex marriages

The relevant legislation is the Divorce (Scotland) Act 1976 (c 39) (as amended) ('the 1976 Act'). Under section 1 it is possible to obtain a divorce if a marriage has broken down irretrievably.<sup>2</sup>

There are four sets of factual circumstances set out in the Act which can be used to prove that a marriage has broken down irretrievably. These are 1) adultery; 2) unreasonable behaviour; 3) non-cohabitation for one year with

<sup>1</sup> Official Report of the Public Petitions Committee, 3<sup>rd</sup> March 2015. See:

<http://www.scottish.parliament.uk/parliamentarybusiness/report.aspx?r=9824&i=90064>

<sup>2</sup> It is also possible to obtain a divorce if one of the spouses has been issued with a gender recognition certificate after the date of the marriage.

consent of the other spouse to divorce; and 4) non-cohabitation for two years. These are often referred to as the 'grounds for divorce'.

Adultery is not defined in the 1976 Act. Instead it is defined in the leading case of *MacLennan v MacLennan*<sup>3</sup> as voluntary sexual intercourse with a member of the opposite sex who is not the person's spouse. It requires "some degree of penetration of the female organ by the male organ."<sup>4</sup>

Accordingly, other sexual activity with a member of the opposite sex does not amount to adultery, nor does any sexual activity with a member of the same sex.

### **Same sex marriages**

Section 1 of the 1976 Act (containing the so-called 'grounds for divorce') applies to same sex marriages.<sup>5</sup>

Section 5(2) of the Marriage and Civil Partnership (Scotland) Act 2014 (asp 5) ('the 2014 Act') amends the 1976 Act to provide that adultery has the same meaning for the purposes of a same sex marriage as it does for an opposite sex marriage. With reference to the *MacLennan* case, this means that adultery relates to heterosexual intercourse only.

Accordingly, a spouse in a same sex marriage could (like a spouse in an opposite sex marriage) raise an action for divorce because the other spouse in the marriage has committed adultery, i.e. had sexual intercourse with a person of the opposite sex.

However, the 2014 Act does not extend adultery in same sex marriages to cover sexual activity between people of the same sex. On the other hand, this would be relevant in the context of the separate ground of unreasonable behaviour. Sexual activity with a member of the opposite sex falling outwith the definition of adultery would also be relevant in the context of this ground.

### **Civil Partnership Act 2004**

The Civil Partnership Act 2004 (c 33) created the concept of a civil partnership for same sex couples in the UK and granted civil partners rights very similar to those afforded to married couples. Even though a same sex couple can now marry, it is also still possible for them to enter into a civil partnership.

---

<sup>3</sup> 1958 SC 112.

<sup>4</sup> 1958 SC 112 at 113.

<sup>5</sup> By virtue of section 4 of the Marriage and Civil Partnership (Scotland) Act 2014 which defines marriage in existing legislation as including the marriage of a same sex couple. Section 1 of the 1976 Act refers to the factual circumstances which establish the irretrievable breakdown of a marriage.

The 2004 Act created grounds for dissolution of a civil partnership very similar to the grounds of divorce for marriage (section 44). However, the grounds for dissolution of a civil partnership do *not* include adultery.

Instead, the ground of 'unreasonable behaviour' has to be relied upon in relation to any sexual infidelity, whether with people of the same sex or the opposite sex.

## **Scottish Government Action**

### **The 2000 consultation**

In 2000, the then Scottish Executive [consulted](#)<sup>6</sup> on various issues associated with family law. It sought views on whether the so-called 'fault based' grounds for divorce, that is to say adultery and unreasonable behaviour, could be merged into a single fault basis.<sup>7</sup>

There was considerable opposition to this proposal and it was not proceeded with.<sup>8</sup>

### **Marriage and Civil Partnership (Scotland) Bill**

In the [Policy Memorandum](#) to the [bill](#) which became the 2014 Act ('the Bill') the Scottish Government discussed its approach to the definition of adultery. In particular it gave its reasons for rejecting possible alternatives to the approach taken in the Bill (at paras 127–143).

#### *Remove the specific concept of adultery from divorce law*

One alternative approach (along with the lines of what was proposed in 2000) was removing adultery as a way of demonstrating the irretrievable breakdown of marriage.

The Scottish Government said this approach would require further consultation and that the Bill was not the appropriate legislation to make such a major change to divorce.

The Government also noted that, for a small number of spouses, it may be important for a civil court to find that the other spouse was adulterous (Policy Memorandum, para 138).

#### *Expand the definition of adultery to cover sexual activity between people of the same sex*

---

<sup>6</sup> Scottish Executive. (2000) *Parents and Children*. Edinburgh: Scottish Executive.

<sup>7</sup> *Ibid*, paras 4.8 and 4.9.

<sup>8</sup> Scottish Executive. (2001) *Parent and Children: Analysis of Responses*. Edinburgh: Scottish Executive. (See analysis of responses to question 4).

A second alternative was to extend the definition of adultery so that it would cover sexual activity between people of the same sex as well as heterosexual intercourse.

The Government rejected this idea. Its reasons included that the existence of the unreasonable behaviour ground meant that any change to the law in this regard would not confer any additional rights. In other words, it is already open to a spouse to seek a divorce on the grounds of unreasonable behaviour, which could include sexual activity between people of the same sex (Policy Memorandum, para 142).

The Government also noted that it would have to define what further sexual activity (between same sex people and opposite sex people) would be covered by any expanded definition. It envisaged that this would not be without its difficulties (Policy Memorandum, para 142).

Lastly, the Government said that it was unclear what effect the change would have on the small number of people for whom adultery forms a useful part of divorce law (Policy Memorandum, para 142).

*Remove the clarification of the definition of adultery from the Bill (now the 2014 Act)*

As noted above, under section 5(2) of the 2014 Act, adultery in the context of same sex marriage is given the same definition as in the context of a marriage between people of the opposite sex (see page 2 above).

The Scottish Government considered removing this provision from the Bill and leaving the courts to determine what would amount to adultery in the context of a same sex marriage. The Government said this approach was not satisfactory given the opportunity existed to clarify the matter by legislation (Policy Memorandum, para 143).

## **The Scottish Government's current position**

On 23<sup>rd</sup> November 2016, SPICe contacted the Scottish Government to clarify its current position on the legal definition of adultery. The Government said that it had no plans at present to review this area of the law.<sup>9</sup>

## **Scottish Parliament Action**

### **Marriage and Civil Partnership (Scotland) Bill**

The definition of adultery came up during the Equal Opportunities Committee's consideration of the Bill at Stage 1. For example,

---

<sup>9</sup>Email from Simon Stockwell (Scottish Government, Directorate for Justice, Family and Property Law Branch) to SPICe, dated 23<sup>rd</sup> November 2016. See also: [http://www.parliament.scot/S5\\_JusticeCommittee/General%20Documents/20160622MfCSLA-FLA2006.pdf](http://www.parliament.scot/S5_JusticeCommittee/General%20Documents/20160622MfCSLA-FLA2006.pdf) (at para 28).

“...the definition of adultery in the bill is confusing because the Government went back to the definition of adultery between a man and a woman. The bill makes marriage acceptable between two men or two women, but it uses the definition of adultery only between a man and a woman.”<sup>10</sup> (Evangelical Alliance)

Other stakeholders, including the Equality Network, believed that the approach to the issue in the Bill was the correct one. However, the Equality Network suggested that, as a longer term goal, the law might benefit from reform.<sup>11</sup>

The Equal Opportunities Committee made no specific recommendations on this topic. It was also not the subject of any amendments at Stage 2 and 3 of the Bill.

SPICE contacted the Equality Network on 21 November 2016, and their position on this remains the same, including that any change in definition would require consultation.

## **The approach in England and Wales**

In England and Wales, adultery and unreasonable behaviour are both grounds for divorce (Matrimonial Causes Act 1973 (c 18), section 1). Adultery is also defined in the current law as sexual intercourse between a man and a woman.

The Marriage (Same Sex Couples) Act 2013 (c 30) introduced marriage for same sex couples in England and Wales. No changes were made in this legislation to the existing definition of adultery.

## **Human rights**

### **The petitioner’s arguments**

The petitioner argues that the Scottish adultery rules breach:

- Article 1 of the United Nations’ Universal Declaration on Human Rights - “all human beings are born free and equal in dignity and rights”
- Article 8 of the European Convention on Human Rights<sup>12</sup> (the Convention) – i.e. the right to respect for private and family life
- Article 9 of the Convention – the right to freedom of thought, conscience and religion

---

<sup>10</sup> Meeting of the Equal Opportunities Committee, 5 September 2013 at: <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=8860&mode=pdf>

<sup>11</sup> The fullest explanation of the Equality Network’s position can be found in its submission to the Scottish Government on the draft bill. See: <http://www.equality-network.org/wp-content/uploads/2013/08/Equality-Network-marriage-bill-consultation-response.pdf>

<sup>12</sup> The European Convention on Human Rights was adopted in 1950 by members of the Council of Europe (an intergovernmental body which is not part of the EU). It protects a range of civil and political rights.

- Article 14 of the Convention – the prohibition of discrimination in the application of other Convention rights

In relation to Articles 8 and 9 of the Convention, the petition notes that:

“Another important argument is ... the protection of religious beliefs under Article 9. The current definition of adultery prohibits a person to exercise this right when their religion states that adultery needs to be cited as grounds for divorce ... this is reinforced by Article 8 ...”

## **Scope of the protections in the Human Rights Act/Scotland Act**

The Human Rights Act brings the Convention into UK law by:

- Requiring all legislation to be interpreted and given effect as far as possible in a way which is compatible with the Convention (section 3)
- Making it unlawful for a public authority to breach the Convention and allowing court cases to be brought if it does so (sections 6 and 7)
- Requiring UK courts/tribunals to take account of Convention rights in all cases that come before them (section 2)

UK legislation can only be declared incompatible with the Convention (leaving the law as it is until remedied). In contrast, Scottish Parliament legislation or Government action can be struck down if it breaches the Convention.<sup>13</sup>

Other human rights treaties are important from a policy perspective, but are not incorporated into domestic UK law by the Human Rights Act.

## **The Convention**

Since the HRA only incorporates the Convention into UK law, a key question is whether the current adultery rules breach Convention rights.

In that regard relevant questions would include:

- **Whether the Convention is designed to cover definitions of adultery?** The European Court of Human Rights recently reiterated that there is no European consensus on granting same-sex couples the right to marry, and hence no obligation to allow such marriages.<sup>14</sup> Similar arguments might be made in relation to adultery.
- **What the petitioner’s arguments are as regards Articles 8 and 9 of the Convention?** In other words, in what way do the adultery rules affect the petitioner’s right to private and family life/freedom of religion?
- **Whether there is any discrimination under Article 14 since one can divorce due to “unreasonable behaviour”?** Article 14 only applies if there has been a breach of another Convention right.

<sup>13</sup> Sections 29(2)(d) and 57(2) of the Scotland Act 1998

<sup>14</sup> See [Chapin and Charpentier v. France](#)

The definition of adultery received little attention during the passage of the Marriage and Civil Partnership (Scotland) Bill through the Scottish Parliament.<sup>15</sup> However, the then Cabinet Secretary for Health and Wellbeing, Alex Neil, did indicate in oral evidence to the Equal Opportunities Committee that, "...everything in the bill has been human rights law proofed. We do not believe that any aspect of the bill would be open to a successful human rights challenge".

Also, the UK Government submitted a human rights compliance [summary](#) to the UK Parliament's Joint Committee on Human Rights in relation to the - equivalent English Marriage (Same Sex Couples) Bill. This argued that the Bill complied with the Convention on the basis that:

- The definition of adultery (limited to heterosexual sex) does not lead to discrimination as it applies equally to both homosexual and heterosexual couples
- Evidence of adultery is not a prerequisite for getting a divorce and hence there is no breach of Article 12 of the Convention<sup>16</sup>
- Even if one accepts that the current definition of adultery can lead to discrimination, there are objective justifications in the current rules (namely the uncertainty which could flow from redefining adultery)

## **Equality Act 2010**

The petitioner argues that 'equality within marriage should mean that there should be equality with divorce, but as the law stands there is no equality in adultery laws'. Further that the restrictive definition of adultery is direct discrimination as it treats one part of society less favourably than another, and is thus in breach of the Equality Act 2010.

However, given that the definition of adultery applies to both types of marriage, it is difficult to see who is being treated less favourably.

**Sarah Harvie-Clark, Angus Evans and Nicki Georghiou**  
**Senior Researchers, SPICe**

### **28 November 2016**

SPICe research specialists are not able to discuss the content of petition briefings with petitioners or other members of the public. However if you have any comments on any petition briefing you can email us at [spice@scottish.parliament.uk](mailto:spice@scottish.parliament.uk)

Every effort is made to ensure that the information contained in petition briefings is correct at the time of publication. Readers should be aware however that these briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

<sup>15</sup> ([Official Report, 3 October 2013](#) column 1592)

<sup>16</sup> i.e. the right to marry/found a family which could be read as covering a right to divorce