Briefing for the Public Petitions Committee

**Petition Number:** PE1536

**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.

**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.¹

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 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 MacLennan² 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.”³

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¹ 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.

² 1958 SC 112.

³ 1958 SC 112 at 113.
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.

**In same sex marriages**

Section 1 of the 1976 Act (containing the so-called ‘grounds for divorce’) applies to same sex marriages.\(^4\)

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.

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.

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\(^4\) 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.
Scottish Government Action

The 2000 consultation

In 2000 the then Scottish Executive consulted on various issues associated with family law. In this consultation it asked for 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.

There was considerable opposition to this proposal and it was not proceeded with.

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 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 that there would have to be a consultation on this specific proposal, given the responses to previous consultations.

Furthermore, the Government did not think that the Bill was the right bill in which to be making such a major change to divorce.

The Government also noted that it appeared 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

A second alternative approach which the Government considered 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, as discussed above, it is already open to a spouse to seek a divorce on the grounds of unreasonable behaviour (Policy Memorandum, paragraph 142).

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6 Ibid, paras 4.8 and 4.9.
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, paragraph 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, paragraph 142).

**Remove the clarification of the definition of adultery from the Bill**

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, paragraph 143).

**The Scottish Government’s current position**

On 15 January 2015, 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.8

**Scottish Parliament Action**

When the Equal Opportunities Committee considered the Bill at Stage 1 it did receive some evidence from stakeholders commenting on the approach to the definition of adultery as it appears in the legislation. For example,

“…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.”9 (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.10

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8 Telephone call on 15 January 2015 between Sarah Harvie-Clark (SPICe) and Liam Rankin (Scottish Government, Directorate for Justice, Family and Property Law Branch).
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.

**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.

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16 January 2015

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