# Draft Adoptions with a Foreign Element (Scotland) Regulations

**Submission to the Scottish Government**

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The Equality Network is a network of around one thousand lesbian, gay, bisexual and transgender (LGBT) individuals and organisations in Scotland, working for LGBT equality. The Equality Network's policy work is based on consultation with LGBT communities across Scotland, and reflects the concerns that LGBT people have raised with us.

We welcome the opportunity to respond to the Scottish Government's consultation on the draft Adoptions with a Foreign Element (Scotland) Regulations. Our response covers only the part of the proposals which we believe could have a specific LGBT equality impact.

## Regulation 15 and schedule 1

We are concerned by the current provisions of schedule 1 to the Regulations, given the rule in regulation 15 that a person is not to be considered suitable as a prospective adopter of a child resident abroad, if the person, or any member of their household aged 16 or over, has been convicted of an offence specified in schedule 1.

We do not oppose the exclusion of people as prospective adopters on grounds of certain criminal convictions, but we think that the effect of schedule 1 as it stands could be discriminatory on grounds of sexual orientation.

This is because schedule 1 includes any offence specified in schedule 1 to the Criminal Procedure (Scotland) Act 1995, which itself includes any offence under Part I of the Criminal Law (Consolidation) (Scotland) Act 1995.

As far as we can see, contrary to the title of schedule 1 to the Criminal Procedure (Scotland) Act 1995, Part I of the Criminal Law (Consolidation) (Scotland) Act 1995 includes a number of offences that can be committed against people over the age of 17.

From an LGBT equality perspective, our main concern is with the offences in section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 (the “homosexual offences”).

Those offences include (at section 13(5)(a)) consensual sexual acts between men, that are offences solely because they occurred otherwise than in private – for example in a parked car. If a person (or any member of their household) has been convicted of such an offence, regulation 15 and schedule 1 would appear to bar the person from adopting a child resident abroad.

In contrast, the corresponding criminal charge for consensual sexual acts between two people of opposite sex, or between two women, done otherwise than in private, would be a charge of public indecency or breach of the peace, which are not included in schedule 1 to the Regulations, and so would not result in a bar from adoption.

We think there is a further problem, in that, historically, section 13 of the Criminal Law (Consolidation) (Scotland) Act 1995 included offences that have later been found to be inconsistent with the European Convention on Human Rights, and have been repealed. These included consensual sexual acts between men in private where more than two people took part or were present (offence repealed in 2001), and consensual sexual acts in private between two men aged over 16, but where one or both was aged under 21 (offence repealed in 1994), or where one or both was aged under 18 (offence repealed in 2001).

As far as we can see, historical convictions for any of these offences will result in the person being barred from adopting a child resident abroad. The same behaviour between a man and a woman, or between two women, was never an offence, and so obviously will not be a bar.

These discriminatory offences no longer exist, and are now clear breaches of articles 8 and 14 of the European Convention on Human Rights. In our view, to bar a person from consideration as a potential adopter of a child resident abroad, for a historical conviction under one

of these offences, could also breach that person's ECHR rights. If so, schedule 1 as it stands would not be ECHR-compliant.

We suggest that a partial solution to this might be to amend schedule 1 to the Regulations to make it clear that paragraph 2 only applies to offences that involved a child under 17, not to other offences that might be caught by schedule 1 to the Criminal Procedure (Scotland) Act 1995.

We believe that there may be other problems with paragraph 2(b) of schedule 1 to the Regulations.

We think that there is probably an error in paragraph 2(b)(i). Contrary to the description in brackets at the end of that paragraph, section 5 of Criminal Law (Consolidation) (Scotland) Act 1995 includes offences involving sexual intercourse with a girl under 13 years old. We suggest that perhaps the reference in paragraph 2(b)(i) should be to section 5(3) of the 1995 Act, rather than to the whole of section 5. That would be consistent with paragraph 52 of schedule 3 to the Sexual Offences Act 2003 which specifies offences which result in a notification requirement as a sex offender.

We are concerned that all convictions for sodomy appear to be excluded from paragraph 2 if the offender was under 20 at the time of the offence (paragraph 2(b)(iii)). Male rape is charged as sodomy in Scotland. We do not see why convictions for male rape should be dealt with differently from rape of a woman (paragraph 1 of the schedule). We think that a person who was convicted of sodomy for a male rape done at the age of 19 should be dealt with in the same way, under regulation 15 and schedule 1, as a person who was convicted of rape done at the age of 19.

However, a charge of sodomy may also be used where consensual sexual acts between adult men occur otherwise than in private, and a conviction for that activity should not result in a bar from adoption under these Regulations (for the same reasons outlined above in the context of section 13(5)(a) of the Criminal Law (Consolidation) (Scotland) Act 1995). These different uses of the charge of sodomy are the reason why paragraph 43 of schedule 3 to the Sexual Offences Act 2003 makes a distinction between sodomy where everyone involved was over 16 and was a willing participant, and other convictions for sodomy, and we

suggest that schedule 1 to the Regulations should make a similar distinction.

These issues result from the current complex structure of, and historical discrimination within, sexual offences law in Scotland. We accept that the number of cases in practice where the discriminatory effect would apply is likely to be very small. However, the impact of the discrimination, if it applied to a prospective adopter, would be very significant, barring them from adopting under these Regulations. For that reason, we would urge the Scottish Government to try to ensure that schedule 1 does not result in discrimination on grounds of sexual orientation, and is ECHR-compliant.

Some of paragraph 2 of schedule 1 to the Regulations is similar to paragraph 3 of part 1 of schedule 3 to the (English) Adoption Agencies Regulations 2005 (SI 2005/389) and we would have the same concerns about the effect in England of that paragraph.