



SCOTTISH LAW COMMISSION

(SCOT. LAW COM. No. 69)

THE LAW OF INCEST IN SCOTLAND

REPORT ON A REFERENCE UNDER SECTION 3(1)(e)
OF THE LAW COMMISSIONS ACT 1965

*Presented to Parliament by the Secretary of State for Scotland
by Command of Her Majesty
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The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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¹ Lord Hunter's term of office expired on 30 September 1981; his successor as Chairman of the Commission is the Hon Lord Maxwell.

**SCOTTISH LAW COMMISSION
CRIMINAL LAW: INCEST**

**Report on a reference under Section 3(1)(e)
of the Law Commissions Act 1965**

*To: The Right Honourable George Younger, M.P.
Her Majesty's Secretary of State for Scotland*

We have the honour to submit our Report on the Law of Incest in Scotland

(Signed) J. O. M. HUNTER *Chairman*
A. E. ANTON
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25 September 1981

THE LAW OF INCEST IN SCOTLAND

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List of Abbreviations of Sources referred to in the Report
(Excluding standard law reports)

- Alison *Principles and Practice of the Criminal Law of Scotland*, by A. J. Alison (2 vols.: vol. i, *Principles*, Edinburgh, 1832; vol. ii, *Practice*, Edinburgh, 1833).
- Burnett *A Treatise on Various Branches of the Criminal Law of Scotland*, by J. Burnett, Edinburgh, 1811.
- Hume *Commentaries on the Law of Scotland Respecting Crimes*, by Baron Hume, 4th edition by B. R. Bell, 2 volumes, Edinburgh, 1844.
- Macdonald *A Practical Treatise on the Criminal Law of Scotland*, by J. H. A. Macdonald (Lord Kingsburgh), 5th edition by J. Walker (later Lord Walker) and D. J. Stevenson, Edinburgh, 1948.
- Gordon *The Criminal Law of Scotland*, by Gerald H. Gordon, 2nd edition, Edinburgh, 1978.

THE LAW OF INCEST IN SCOTLAND

PART I INTRODUCTION

Terms of remit

1.1 On 9th February 1977 we received the following reference from your predecessor in terms of section 3(1)(e) of the Law Commissions Act 1965:—

“To review the law of Scotland on incest, to consider what changes in that law may be desirable, to report our findings and to make recommendations to the Secretary of State for Scotland on possible legislation to reform the law on incest.”

1.2 In our consultative Memorandum No. 44¹ we discussed the criticisms of the existing law, which derives from an Act of 1567,² and the need to provide a new and clear definition of the crime that would be generally acceptable. We proposed that incest should be retained as a separate crime but that the forbidden degrees to which it applies should be redefined. We also considered the question of penalties and whether help and treatment should be provided for the victim of incest and the other members of the victim's family.

1.3 We received a number of useful comments and criticisms and we are grateful to those who submitted them. The organisations and individual persons from whom we received comments are listed in Appendix VI to this Report. With the exception of one commentator who took the view that the law should continue to be based on Leviticus Chapter 18, all other commentators agreed that the law of incest was in need of immediate reform.

PART II SUMMARY OF THE PRESENT LAW

Incest Act 1567

2.1 The present law of incest is based on the Incest Act 1567 which provides that,

“Item Forsamekle as the abhominabill vile and fylthie lust of incest is swa abhominabill in the presence of God and that the samin eternall God be his expres word hes condampnit the samin and yit nottheles the said vice is swa vsit within this Realme and the word of God is in sic sort contempnit by the vsaris thairof that God be his iugementis hes occasioun to plague the Realme quhair the said vice is committit (without God of his mercy be mair gracious and remeid be prouydit that the said vice ceis in tyme cuming) Thairfoir our Souerane Lord with auisse and consent of my Lord Regent and thre Estatis of this present Parliament statutis and ordanis that quhatsumeuer persoun or personis committeris of the said abhominabill cryme of incest that is to say quhatsumeuer person or personis thay be that abuis thair body with sic personis in degre as Goddis word hes expreslie

¹ Published in April 1980—referred to in this Report as “the Memorandum” or “our Memorandum”.

² Incest Act 1567 (c.15).

forbiddin in ony tyme cuming as is contenit in the xvij Cheptour of Leuiticus salbe puneist” . . .¹

The language, as well as the terms of the foregoing provisions are thought to be sufficient in themselves to suggest that critical re-appraisal of this branch of the criminal law is necessary and indeed long overdue.

Application of the Incest Act 1567

2.2 In construing the 18th chapter of Leviticus, (which thus forms part of the law of Scotland), the text to be looked at is that of the Geneva Bible of 1562 which was the current text when the 1567 Act was passed.² This text is not readily available and in the case of *H. M. Advocate v. R. M.*³ in 1969, the court required to be furnished with copies from the National Library, “an advantage which might not be shared by all persons who were in doubt as to whether they were in the prohibited degrees or not.”

2.3 In the Geneva Bible, verses 6 to 17 of the 18th chapter of Leviticus (the only verses which are relevant to incest) are in the following terms:—

V.6 None shall come nere to anie of the kindred of his flesh to uncover (her) shame: I am the Lord.

V.7 Thou shalt not uncover the shame of thy father, nor the shame of thy mother: (for) she is thy mother, thou shalt not discover her shame.

V.8 The shame of thy fathers wife shalt thou not discover: (for) it is thy fathers shame.

V.9 Thou shalt not discover the shame of thy sister the daughter of thy father, or the daughter of thy mother, whether she be borne at home, or borne without: thou shalt not discover their shame.

V.10 The shame of thy sonnes daughter, or of thy daughters daughter, thou shalt not, I say uncover their shame: for it is thy shame.

V.11 The shame of thy fathers wives daughter, begotten of thy father (for) she is thy sister thou shalt not, (I say,) discover her shame.

V.12 Thou shalt not uncover the shame of thy fathers sister: (for) she is thy fathers kinsewoman.

V.13 Thou shalt not discover the shame of thy mothers sister: for she is thy mothers kinsewoman.

V.14 Thou shalt not uncover the shame of thy fathers brother: (that is,) thou shalt not go into his wife, (for) she is thine ante.

V.15 Thou shalt not discover the shame of thy daughter in lawe: (for) she is thy sonnes wife: (therefore) shalt thou not uncover her shame.

V.16 Thou shalt not discover the shame of thy brothers wife: (for) it is thy brothers shame.

¹ One commentator informed us that the 18th Chapter of Leviticus probably dates from the 11th century B.C. and was committed to writing about five centuries later.

² *Solicitor-General v. A.B.* 7 Adam 306, 1914 S.C. (J.) 38; *H.M. Advocate v. R.M.* 1969 J.C. 52.

³ 1969 J.C. 52.

V.17 Thou shalt not discover the shame of the wife and of her daughter, nether shalt thou take her sonnes daughter, nor her daughters daughter, to uncover her shame: (for) they are (thy) kinsfolkes, (and) it were wickednes.”

2.4 The forbidden degrees in incest are not restricted to the above relationships specified in Leviticus, since in the Full Bench case of *H. M. Advocate v. Aikman and Martin*,¹ it was decided that verse 6 is a general prohibition; that verses 7 to 17 are intended as illustrative examples; that where a relationship by consanguinity is mentioned, the corresponding relationship by affinity is meant to be covered; and that where a relationship between a man and woman is expressed, the corresponding relationship between a woman and a man is implied.²

2.5 The application of the law relating to incest is however restricted by section 13 of the Criminal Procedure (Scotland) Act 1938, the effect of which is that “carnal connection” between a man and a woman whose marriage to each other is authorised by the Marriage (Scotland) Act 1977, or would be so authorised on the death of any person, is not incest.³

The forbidden degrees

2.6 The combined effect of the extension of Leviticus by the courts and its restriction by the 1938 Act is that incest is committed by a male or female person⁴ who has intercourse with persons related to them as follows:—

Relatives of male person	Relatives of female person
(a) <i>by consanguinity</i>	(a) <i>by consanguinity</i>
Mother	Father
Daughter	Son
Grandmother	Grandfather
Granddaughter	Grandson
Great grandmother	Great grandfather
Great granddaughter	Great grandson
Sister	Brother
Aunt	Uncle
Niece	Nephew

¹ 1917 J.C. 8.

² This case, and other cases defining the prohibited degrees are fully discussed in the Memorandum, Part II.

³ The 1938 Act (c.48) refers to marriages authorised by the Marriage (Prohibited Degrees of Relationship) Acts 1907 to 1931. The 1907 Act was originally entitled the Deceased Wife's Sister's Marriage Act (c.47), but this title was altered by the Deceased Brother's Widow's Marriage Act 1921 (c.24), which provided that both Acts should be cited as the Marriage (Prohibited Degrees of Relationship) Acts 1907 and 1921. The Marriage (Prohibited Degrees of Relationship) Act 1931 (c.31) provided that it should be cited with the earlier Acts as the Marriage (Prohibited Degrees of Relationship) Acts 1907 to 1931. All three Acts were repealed and replaced by the Marriage (Enabling) Act 1960 (c.29), which in turn was repealed and replaced by the Marriage (Scotland) Act 1977 (c.15).

⁴ An accessory to incest will also be guilty of the offence, see para. 4.7 below.

(b) *by affinity*
Mother-in-law
Daughter-in-law
Grandmother-in-law
Granddaughter-in-law
Step-mother
Step-daughter
Step-grandmother
Step-granddaughter

(b) *by affinity*
Father-in-law
Son-in-law
Grandfather-in-law
Grandson-in-law
Step-father
Step-son
Step-grandfather
Step-grandson

2.7 The consanguineous relationships apply whether they are of the half blood or full blood and thus extend to cover relationships such as half-brothers or half-sisters, half-brothers or half-sisters of a parent, and children of a half-brother or sister. With regard to relationships by affinity it appears that, for the purposes of incest,¹ the relationship remains within the forbidden degrees even after the marriage which created the relationship has ceased to exist.

2.8 Apart from the above statutory prohibition, there is also some authority for the view that incest between direct ascendants and descendants or between siblings is a crime at common law.² This may be of some significance since it creates a doubt as to whether intercourse between certain illegitimate relations, particularly in the case of mother and son, which do not fall within the scope of the statute might nevertheless be regarded as incest at common law.³

PART III REASONS FOR RETAINING INCEST AS A CRIME

General background

3.1 In our Memorandum⁴ we stated that “Historically, the law of incest in Scotland derives from the dominant religious views in Scotland in the immediate post-Reformation period. However, our society now includes persons of various religious beliefs and of no religious belief. Punishment in these circumstances must be justified in terms of society’s present ends.” We also referred to the criticisms which have been made of the existing law and the need for reform.⁵ With one exception, all the individuals and organisations commenting on the Memorandum agreed that the law of incest was in need of immediate reform and that the 18th chapter of Leviticus should no longer be the basis for contemporary legislation.

¹ Forbidden relationships by affinity act as a prohibition for the purposes of marriage only after the marriage which created them has ceased to exist—Marriage (Scotland) Act 1977 (c.15), Sched. 1, para. 2. So long as the marriage exists, it is itself an impediment to any future marriage. The situation is, of course, different in relation to incest. In *H.M.A. v. McKee and McKee* (Glasgow High Court, February 1976, unreported), a charge of incest between a father-in-law and divorced daughter-in-law was held to be relevant.

² *H.M. Advocate v. Ryan* 1914 S.C. (J.) 108, per Lord Anderson at p. 113.

³ *H.M. Advocate v. McKenzie* 1970 S.L.T. 81, per Lord Walker at p. 85.

⁴ Memorandum, para. 6.6: see also paras. 0.2, 0.3 and 1.4 to 1.6.

⁵ The vagueness of the 1567 Act and the difficulty in applying it have long been recognised. The Incest Act of 1649 (A.P.S. 1649 c.16) sought to remedy some of these defects by providing a detailed list of prohibited degrees. After the Restoration of Charles II, the 1649 Act was repealed by the Act of 1661 (A.P.S. 1661 c.46) which annulled all proceedings of the 1649 parliament.

3.2 In accepting this proposition, it becomes necessary to determine whether there are any grounds for retaining incest as a criminal offence, and whether the requirements of modern society justify the intervention of the criminal law in this field of human behaviour. Most commentators agreed that incest should be retained as a separate crime and the few who wished to abolish it suggested that it be replaced by some analogous offence. In the Memorandum we suggested reasons for retaining the crime of incest; while some commentators accepted these reasons without comment, others maintained that a greater or lesser emphasis should be placed on some of these reasons or gave various and sometimes different reasons for the retention of incest.

3.3 Before considering such matters in detail, it might be helpful to examine three preliminary matters, namely whether incest is regarded as criminal in other legal systems, whether there is necessarily any relationship between incest and the law relating to marriage, and what is the effect of other relevant provisions of the criminal law.

The law of other countries

3.4 The problem of incest is not unique to Scotland and, although solutions adopted by other legal systems may be inappropriate for application in a Scottish context, they may sometimes offer guidance, especially if recently introduced or based on modern research. For this reason, we have provided in Appendix III to this Report short summaries of the position in England and Wales, New Zealand, Canada, France and Norway,¹ all of which have laws on incest or related offences. We have also summarised recent research and proposals for reforming the law of incest in Australia.² The law of England and Wales is currently under review and we noted with interest the evidence and proposals contained in the Working Paper on Sexual Offences published in October 1980 by the Home Office Criminal Law Revision Committee.

Relationship of incest to the law of marriage

3.5 The Marriage (Scotland) Act 1977 specifies forbidden degrees of relationship for the purposes of marriage³ and it might be suggested that the prohibited degrees for incest should be assimilated to them. Under the present law, a degree of relationship which is not prohibited for the purposes of marriage cannot act as a prohibited degree for incest (in terms of section 13 of the Criminal Procedure (Scotland) Act 1938). Conversely, however, the prohibited degrees in incest are more restricted than those for marriage in relation to certain adoptive and illegitimate relationships.⁴

3.6 It would be difficult to justify a law which declared that certain people could lawfully intermarry but that they would be guilty of incest if they had

¹ Further details of the law of these countries are given in Part V of the Memorandum, together with references to the law of Belgium and U.S.A. French law was altered by Loi 80-1041 of 23 December 1980.

² We are grateful to the Australian Attorney-General's Department for information on this matter.

³ See s. 2 and Sched. 1, reproduced in Appendix IV of this Report.

⁴ At present, adoptive relationships are not regarded as prohibited for the purposes of incest and there is some doubt regarding illegitimate relationships. See *H.M. Advocate v. McKenzie* 1970 S.L.T. 81 and para. 2.8 above.

sexual intercourse with each other, and we have no hesitation in concluding that the forbidden degrees for incest should not be wider than those for marriage. The question whether the forbidden degrees for incest can reasonably be narrower than those for marriage is more difficult. On the one hand it can be said that the policy considerations may be different. Marriage is concerned with a continuing relationship sanctioned by the law and having certain civil consequences whereas incest is concerned with what may be an isolated act of sexual intercourse. It may be justifiable in certain situations to forbid the one, yet not penalise the other. It is certainly not impracticable (as the present law demonstrates) or illogical to include certain relationships within the forbidden degrees for the purpose of marriage but not for the purpose of incest. Although few commentators made specific reference to the prohibited degrees for marriage,¹ the nature of the comments was in general such that, if the comments were accepted, the prohibited degrees for incest would differ from those for marriage. By implication, therefore, most commentators accepted that the law of incest might be narrower than the law of marriage in this respect. On the other hand it can be said that there is something odd about a law which provides that a man and a woman cannot marry, because of the closeness of their relationship, but that there is no objection to them living together and having sexual intercourse with each other as if they were man and wife. Our conclusion is that while it is not essential that the forbidden degrees for incest should be as wide as those for marriage, the factor just mentioned is one which can legitimately be taken into account in cases where the arguments are otherwise evenly balanced.

Other relevant offences

3.7 Apart from incest, there are other provisions of the criminal law which relate to sexual intercourse.

(a) With regard to females

(i) Rape is criminal in the case of any female victim, regardless of her age;² clandestine injury to women is the crime of having sexual intercourse with a female above the age of puberty who is unable to consent (for example, because she is asleep);³ in certain circumstances, the crime of fraud might extend to cover intercourse with a woman whose consent was obtained or induced by fraud.⁴ All of these are crimes at common law and the maximum penalty on indictment is life imprisonment. The factor common to all of them is the lack of consent on the part of the female.

(ii) Section 4 of the Sexual Offences (Scotland) Act 1976⁵ makes it an offence to have (or attempt to have) sexual intercourse with a girl of or above the age of 13 years and under the age of 16 years. The

¹ One commentator suggested that the prohibited degrees for incest and marriage should be the same.

² Hume, i. 301–302; Burnett, 101; Alison, i. 209; Macdonald, 119; Gordon, 33–03.

³ *Chas. Sweeney* (1858) 3 Irv. 109; *Wm. Thomson* (1872) 2 Couper 346; *H.M. Advocate v. Grainger and Rae* 1932 J.C. 40; Macdonald, 120; Gordon 33–21. Strictly speaking, this offence applies regardless of the age of the female, but intercourse with a female less than 12 years of age is rape at common law.

⁴ Gordon, 33–05.

⁵ c.67.

maximum penalty is 2 years imprisonment on indictment or 3 months imprisonment on summary complaint. This offence will normally only be charged where the female consents to intercourse, since otherwise such intercourse would constitute rape.

- (iii) Section 3 of the Sexual Offences (Scotland) Act 1976 makes it an offence to have sexual intercourse with a girl under the age of 13 years. The maximum penalty on indictment is life imprisonment, but the penalty for attempting the offence is restricted to maxima of 2 years imprisonment on indictment or 3 months imprisonment on summary complaint. The offence is committed whether or not the girl consented to the intercourse. Sexual intercourse with a girl under the age of puberty (i.e. 12 years) also constitutes the crime of rape at common law.¹

(b) *With regard to males*

- (i) It is not rape for a woman to force a male person to have intercourse with her.² A male person cannot be raped.
- (ii) Lewd, indecent and libidinous practices and behaviour towards a male under the age of puberty (i.e. 14 years) is a criminal offence at common law³ with a maximum penalty on indictment of life imprisonment. This crime would apply whether or not the boy consented to sexual intercourse.
- (iii) Sexual intercourse with a male over the age of 14 years against his consent could be charged as indecent assault, a common law offence with a maximum penalty of life imprisonment on indictment.⁴

3.8 As will be seen from the above, where the female consents to intercourse, no other relevant offence is committed if she is over the age of 16 years.⁵ In so far as the male is concerned it appears that no other relevant offence is committed if he consents to the act of intercourse and is over the age of 14 years. Incest is therefore the only provision of the criminal law which prohibits intercourse in such cases.

¹ Hume, i. 303; Alison, i. 213; Macdonald, 119; Gordon 33–14. Lewd, indecent and libidinous practices and behaviour is a common law crime (Gordon, 36–09) which would also cover intercourse with a girl under the age of puberty, but in practice, since such intercourse can also be charged as rape, the latter charge would always be preferred. The Sexual Offences (Scotland) Act 1976 (c.67), s. 5, makes statutory provision for penalising lewd practices with a girl above the age of 12 years and under the age of 16 years.

² Gordon 33–04. In the indictment in the case of *H.M. Advocate v. Edith Beaton and James Vaughan* 1979 S.L.T. 49, an incest case, the charge alleged that the two accused forced Mrs Beaton's 11-year-old son "to lie in bed with you and did force his penis into the vagina of you (Mrs) Beaton and did cause him to have incestuous intercourse with you". If the crime of incest were abolished, such behaviour could not be charged as rape of the male person, but only as lewd, indecent and libidinous practices and behaviour or indecent assault.

³ Gordon, 36–09.

⁴ Gordon, 29–24. It might be possible to extend the common law crime of shameless indecency to cover certain instances of intercourse between a woman and a male child, but this is conjecture; this crime is based on the statement that "all shamelessly indecent conduct is criminal"—Macdonald, 150; Gordon, 36–19; as a common law crime, the maximum penalty on indictment is life imprisonment.

⁵ If the female is aged between 13 and 16 years, the maximum penalty under section 4 of the Act of 1976 would be 2 years imprisonment.

Reasons for retaining incest as a crime

3.9 The reasons given in our Memorandum¹ for retaining incest as a separate crime can be grouped under four broad headings, namely—

- (a) the protection of members of the family, especially children, from psychological harm, molestation and injury;
- (b) the maintenance of the solidarity of the family and the strengthening of its fabric;
- (c) the recognition of the repugnance felt by significant numbers of the community and their strong opposition to the idea of sexual intercourse between certain closely related persons;
- (d) the reduction of the risk of the birth of children with defects of a genetic origin.

The above reasons are not given in any particular order of priority. Apart from one commentator who wished to retain incest on religious grounds, no further reasons were advanced in the comments submitted to us on consultation. The great weight of opinions expressed in the comments supported the retention of incest as a crime. We share the approach of this substantial body of opinion. The individual reasons, when taken together, lead us to the conclusion that incest should be so retained.

Protection of members of the family

3.10 In Part IV of our Memorandum we considered the psychological effects of incest. The comments which we received confirmed the evidence reviewed in the Memorandum² to the effect that incest can, and often does, cause psychological harm not only to the actual participants but to other members of the family, either at the time of the incident or later. The risk of inflicting such harm, and the effects which it may have are especially grave where one of the parties is a child or otherwise in a position of dependence or subject to the authority of the other party.

3.11 Where the sexual molestation involves a girl under the age of 16 years or a boy under 14 years, or involves an older person who does not consent, it may be possible to invoke other sanctions of the criminal law described in paragraph 3.7 above. Such measures do not, however, distinguish between the stranger and the offender who has abused his authority or breached familial trust, although admittedly such factors might be treated as aggravations when the penalty is being determined. In the circumstances we consider that the criminal law should provide specific safeguards designed to ensure that children or other dependent members of the family should not be exposed to the risks of such abuse within the family. Apart from any other injury which may be inflicted, including the risk of infection from disease, there is a risk of gross physical injury to young children arising from penetration. The solution which we recommend would, in addition to providing a measure of protection, also mark the disapproval by society of such conduct and differentiate between the offender who was a member of the family in a position of trust, on the one hand, and the offender who was a

¹ Memorandum, paras. 6.6 and 6.7.

² Memorandum, Part IV, and in particular paras. 4.2 to 4.11 and 4.22.

stranger, on the other. In our opinion it is not satisfactory to leave this latter distinction merely as a factor which might be considered in relation to penalty.

3.12 If, however, the molestation involves a girl over the age of 16 years or a boy over the age of 14 years, and that person consents to intercourse, no criminal offence (other than incest) is committed. In such circumstances if incest ceased to be a crime, the question of consent would become crucial in deciding whether or not an offence such as rape or indecent assault had been committed. This would pose difficulties, for, as stated in our Memorandum, it is an open question whether, in a family, one can usefully talk in terms of a daughter's (or son's) consent, particularly "if one takes into account the fact that the young girl in an incest situation is subject to a completely different set of conditions regarding defence, tolerance and participation from the child or maturing girl who meets a completely unrelated adult aggressor or a transient, perhaps even a known, sexual partner."¹ The Memorandum refers to the fact that a girl in an incest situation may become more and more acquiescent and it also discusses how "consent" to intercourse can be obtained by various methods and devices which apply only in the family situation. Finally, the direct and indirect consequences of a criminal prosecution from the point of view of the victim where the accused is a member of the family may also have an important bearing on whether or not she will admit that she "consented" to intercourse.

3.13 While the question of consent is usually considered against the background of a relationship between a father and a young daughter, it will apply equally where the victim is a boy or in any family relationship where one of the parties is under the authority of, or dependent on, or merely younger than another member of the family.²

3.14 Problems of the foregoing nature in relation to consent will not arise if the law of incest continues, as at present, to prohibit sexual intercourse with certain persons whether or not they consent to the act.

Maintenance of family solidarity

3.15 If incest gives rise to psychological or other direct harm, or results in a breakdown of trust among the members of a family, to that extent, incest must be regarded as attacking the solidarity of the family. But even if such consequences did not arise, it must be accepted that incest may in many cases result in disruptive rivalries and that its prohibition will therefore help to protect the fabric of the family. In the case of *Philp's Trs. v. Beaton*,³ Lord President Normand defined the family as a relationship in which the members "associate together on a footing of mutual trust, and may often share a common family life and home" and added: "it is important for the moral

¹ Memorandum, paras. 4.5 to 4.7 and 4.9, citing H. Maisch, *Incest* at p. 172.

² It might be argued that anyone in a position of authority, such as an employer, might use that position for sexual exploitation, but consideration of such matters is outwith the scope of this Report which is concerned with incest. In any event, a distinction can be made between the authority of an employer and that of a member of the victim's family.

³ 1938 S.C. 733 at pp. 745-746.

welfare of the family that it should be regarded as excluding the possibility of marriage between the members of the family bearing the relationship. It is in this sense that the prohibition may be called part of the law of nature that it is enjoined for the welfare of mankind associated in the normal family.” Although Lord Normand referred to marriage, his remarks may be applied analogously to sexual intercourse between members of a family.

3.16 We did not receive any comments or evidence which contradicted the above view. All the commentators who mentioned the point agreed that maintenance of family solidarity is most desirable and that incest militates against it. Unless, therefore, there are compelling reasons for removing the incest prohibition, we are confirmed in our opinion that it should be retained, if by doing so the solidarity of the family structure will be maintained or strengthened.

General opposition to the abolition of incest

3.17 In our Memorandum we expressed the belief that significant numbers of the community opposed the idea of sexual intercourse between persons who were closely related.¹ This belief has been confirmed by the overwhelming support we received for our proposal that incest be retained as a separate crime. Some commentators, in expressing their opposition to incestuous sexual relationships, referred to a taboo against incest which was variously described as ancient and universally prevalent, as representing public opinion, as a basic feeling that certain relationships are not fitting and as rendering sexual activity within the family unthinkable. Others referred to a basic public abhorrence of and repugnance to incest. As one commentator put it, “The purpose of making incest a specific crime is . . . to declare that . . . society regards it with a high degree of revulsion and disgust.” Another suggested that, “Until it can be shown more clearly that past abhorrence of incest is unjustified, it would seem inopportune to abandon what has traditionally, at least in Scotland, been regarded as an invaluable, if not critical, social regulator.” We have noted that in England and Wales the Criminal Law Revision Committee “favour the continued use of the term ‘incest’, considering that it will serve to mark the strong disapproval of such conduct generally felt in the community.”² Support for this latter view was contained in a number of comments we received, which opposed the abolition of incest on moral or religious grounds. One commentator, in rejecting the argument that the criminal law should not be used to enforce moral standards said that “part of the function of the criminal law must be to promote and maintain generally accepted standards of behaviour, thereby reflecting the public interest in preserving an ordered and stable society.” To this it may be added that the prohibition of incest by the criminal law is not merely an attempt to impose a certain view of private morality, but is concerned with the protection of the family and its weaker members and thus of society as a whole.

3.18 It is not necessary for our purposes to ask why an incest taboo exists, or why incest should be regarded as abhorrent or immoral. It is sufficient to

¹ Memorandum, para. 6.7.

² Working Paper on Sexual Offences, p. 46, para. 129.

accept from the comments which we received that there appears to be widespread opposition to the abolition of incest and support for its retention as a criminal offence. This is a factor to which we have felt bound to attach considerable importance.

The genetic effects of incest

3.19 The relevance of the genetic effects of incest as a factor supporting its retention as a criminal offence can be briefly stated as follows:— intercourse between certain related persons should be prohibited because the offspring of such persons are more liable to exhibit physical and mental abnormalities. In other words, the genetic argument does not relate to the actual act of intercourse, but to its possible consequences namely, the risk of conception, the risk that a live birth will follow, and the risk that the child may be deformed or defective.

(a) The risk of conception and birth

3.20 It is obvious that not every act of sexual intercourse will necessarily result in conception, nor every pregnancy produce a live birth. Failure to conceive may be a matter of chance or may be a consequence of one or both of the parties having taken contraceptive precautions or being infertile. In our Memorandum¹ we took leave to doubt whether contraceptive methods were likely to be used in the typical incest situation, a doubt which was shared by several commentators. It was suggested to us that ante-natal screening, such as amniocentesis, could be used to avoid the worst consequences of any foetal defects, but other commentators considered that there were practical difficulties in applying these tests in the context of incest. Even if it were to be assumed that such tests were available and were used, and did predict that a defective child would be born, the only remedy would be to terminate the pregnancy by way of an abortion, which might not be easily obtainable in all parts of Scotland, which might not be desired by the mother or which might cause her subsequent psychological harm. In any event, despite the existing availability of contraceptive measures, sterilization and abortion, children continue to be born as a result of incestuous intercourse. In these circumstances we do not accept the argument made by some commentators that the availability of contraception and abortion destroys the genetic argument for prohibiting incest. Logically if the genetic argument stood alone, there should be a defence based on the use of contraceptives or proof of sterility, but the genetic argument does not stand alone and we agree with the Criminal Law Revision Committee² that social and practical considerations preclude the criminal law from taking account of such matters. We do not favour basing criminal liability on the accident of conception or the failure to have an abortion.

(b) The risk of deformity or defect

3.21 In our Memorandum³ we discussed the relevant principles of heredity and concluded that the available evidence indicates that within certain

¹ Memorandum, para. 3.15.

² Working Paper, p. 42, para. 115.

³ Memorandum, paras. 3.2 to 3.11.

degrees, inbreeding gives rise to a significantly higher than normal risk of deformity or defect in any resulting children. The comments which we received from persons with expertise in this field confirmed that this was so and provided us with additional evidence to this effect.

3.22 It can, of course, be argued that it is inconsistent for the law to prohibit incest on genetic grounds but not to prohibit intercourse in other situations where there is a risk of producing genetically defective children. There are, however, significant differences between prohibiting sexual intercourse and marriage between certain relatives (such as brothers and sisters) and prohibiting intercourse and marriage between unrelated people on genetic grounds. First, the former prohibitions are, as we have shown, acceptable to public opinion. It is doubtful if the latter would be. Secondly, the former prohibitions can be taken into account by the parties before they have formed any attachment to each other. The latter could not always be, and could if enacted lead to much emotional anguish. Thirdly, a prohibition of sexual intercourse and marriage with certain near relatives is a very slight infringement of liberty. There are many other potential marriage partners in the world. A prohibition of any intercourse or marriage by a person carrying certain harmful genes would be a serious restriction of liberty. In short, prohibiting marriage between near relatives within the traditional incest taboo can be justified on genetic grounds and does no harm. Prohibiting certain other marriages could perhaps be justified on genetic grounds but would do harm. The balance of advantages and disadvantages is different in the two cases.

3.23 Some commentators argued that the number of defective children likely to be born as a result of incestuous unions was so small in proportion to the total number of children born each year that the genetic effects on the population as a whole, if the crime of incest were abolished, would be minimal. This, however, ignores the potentially tragic effects of avoidable genetic defects on the individuals concerned. We accept that incestuous intercourse between people who are closely related by blood does increase the risk of producing genetically defective children and, although we do not consider that the criminal law should, or could practicably, be extended to prohibit any act of intercourse where there is a genetic risk, we consider that the genetic argument can properly be taken into account in deciding whether the crime of incest should be retained to cover certain situations. It would, for example, be perverse to leave the genetic evidence wholly out of account in assessing the advantages and disadvantages of prohibiting sexual intercourse between adult brothers and sisters or mothers and sons.

3.24 In considering whether or not the criminal law should intervene to prohibit incest, we base our recommendation on a combination of all the factors discussed in paragraphs 3.9 to 3.23. We have not relied on, or given priority to, a single individual factor. The application or relative importance of the various factors, and their inter-relationship, may depend on the circumstances of particular cases. For the reasons given above, we accordingly recommend that:—

Incest should be retained as a separate criminal offence. (Recommendation 1)

PART IV SCOPE OF THE OFFENCE

The need for legislation: Sexual Offences (Scotland) Act 1976

4.1 Although we recommend that incest be retained as a separate criminal offence, it does not follow that we accept the present law in its entirety. As stated in Part II of this Report, the existing law is based on the Incest Act of 1567 as extended by judicial interpretation and restricted by section 13 of the Criminal Procedure (Scotland) Act 1938. There is also, as we have indicated, some authority for the view that incest between direct ascendants and descendants, or between siblings, is a crime at common law.¹ There is some doubt as to whether incest between certain illegitimate relations is a common law crime. In our view, the law requires amendment and restatement in modern statutory form, replacing the present legislative and common law provisions.² In particular, we consider that the prohibited degrees of relationships for the purposes of the crime of incest require to be revised to conform to the needs of modern Scottish society, and that legislative provision should be made for certain related offences.

4.2 In drafting a Bill to meet these purposes, we have noted that the Sexual Offences (Scotland) Act 1976³ consolidated all previous statutes relating to sexual offences in Scotland⁴ and it seems to us to be desirable that the reforms which we are recommending for incest be incorporated into that Act.⁵ Our intention is that the new provisions shall be in addition to the offences contained in the Act, rather than be available as possible alternatives to them.⁶ We are also aware that some parts of the 1976 Act may be considered to be in need of reform; since, however, these do not relate to incest or raise questions which are not confined to that crime, consideration of such matters is thought to be beyond the scope of our reference. In proposing amendments of existing legislation, including the Social Work (Scotland) Act 1968 and the Criminal Procedure (Scotland) Act 1975, we have confined ourselves to matters strictly consequential to enactment of the main proposals in this Report. We have, however, drawn attention to certain matters, consideration of which by those responsible may be advisable.

Definition of incest

4.3 As presently defined, incest is restricted to sexual intercourse—i.e. penetration of the vagina by the penis. It does not extend to other forms of sexual misconduct which may be extremely serious (such as anal or oral penetration, or penetration of the vagina by something other than the penis),

¹ See para. 2.8 above.

² See Draft Bill, Clause 1, s. 2A(3).

³ c.67.

⁴ The 1976 Act did not include some minor provisions of the Burgh Police (Scotland) Act 1892, (c.55) which is currently under review. Since 1976, there has only been one addition to the statute book, namely the Criminal Justice (Scotland) Act 1980, (c.62), s. 80, which deals with homosexual acts in private by males over 21.

⁵ Draft Bill, Clause 1.

⁶ Draft Bill, Sched. 1, para. 6. The 1976 Act, s. 19, states "This Act shall not exempt any person from any proceedings for an offence which is punishable at common law . . .". By incorporating incest into the 1976 Act and restricting it to the provisions of that Act (see Draft Bill, Clause 1, s. 2A(3)), it will not be possible to prosecute incest at common law and s. 19 will not apply.

or may be relatively trivial (such as exposure, or the making of indecent suggestions). Similarly it does not include homosexual offences. We do not condone such behaviour, which can cause undoubted harm and may give rise to a criminal prosecution under some other heading. It may well be that the provisions of the criminal law which protect children from sexual abuse (other than incest) require to be reviewed, but such a review is outwith the terms of our remit. If, however, the present definition of incest were to be altered, the difficulty would lie in knowing where to draw the line. In rape cases proof of penetration is required. The requirement is not only widely known and accepted by the courts, by juries and by the public, but also, as a general rule, it may be expected to provide a reasonably firm evidential base. We also consider that departure from penetration as the standard for incest might tend to weaken the incest taboo. Moreover, since the risk of conception and birth will normally occur only when penetration has taken place, reliance on some other standard would preclude reliance on the genetic factor as a legal and social justification for retention of the crime. While some commentators suggested that the definition of incest should not be restricted to penetration, a considerable majority agreed with the proposal in our Memorandum,¹ that incest should so be confined.

4.4 It will also be noted that section 63(1) of the Criminal Procedure (Scotland) Act 1975² provides that an attempt to commit any indictable crime shall itself be an indictable crime, and under any indictment which charges a completed crime, the accused may be lawfully convicted of an attempt to commit the crime: and under an indictment which charges an attempt, the accused may be convicted of the attempt, although the evidence be sufficient to prove the completion of the crime said to have been attempted. Conduct which constitutes attempted incest may therefore be prosecuted in its own right as a separate crime, in respect of which proof of penetration would not be required.

4.5 We therefore recommend that:

The present definition of incest, requiring penetration, should be retained and should not be extended to other forms of sexual misconduct.³
(Recommendation 2)

Persons who may be guilty of incest

4.6 Both parties to the act of intercourse are guilty of incest under the present law and we do not suggest that this be changed. We do not consider, however, that incest should be an offence of strict liability. This aspect of the matter will be discussed later⁴ in our recommendations dealing with the mental element in incest and the defences which should be available to the accused.

4.7 A person who is not related to either of the parties and who does not fall

¹ Memorandum, Proposal 10 and paras. 2.1 and 6.32.

² The corresponding provision for summary proceedings is the 1975 Act, s. 312(0).

³ See Draft Bill, Clause 1, s. 2A(1) which defines incest in terms of sexual intercourse.

⁴ See paras. 4.37 to 4.42 below and Recommendation 9.

within the forbidden degrees may be charged with incest on an art and part basis.¹

Relationships to which incest should apply

(i) Relationships by consanguinity

4.8 As stated in paragraph 2.6 above, the existing law of incest extends to the following relationships based on consanguinity—parents and children, grandparents and grandchildren, great-grandparents and great-grandchildren, uncles and nieces, aunts and nephews, brothers and sisters. These consanguineous relationships apply whether they are of the half blood or full blood.

4.9 In our Memorandum,² we proposed that these categories be retained with the tentative exception of that relating to great-grandparents and great-grandchildren. The comments which we received indicate that there is overwhelming support for continuing to include parents and children, grandparents and grandchildren, and brothers and sisters in the incest prohibition. We did not receive many comments concerning great-grandparents and great-grandchildren (a degree which is prohibited for the purposes of marriage), but those which we did receive, with one exception, opposed the exclusion of this relationship from the incest prohibition. The matter is perhaps one of marginal importance, but, in the absence of much support on consultation, we do not feel that a case for changing the law in this respect has been made out. We have therefore reconsidered our proposal and now conclude that the relationship of great-grandparent and great-grandchild should continue to remain one of the forbidden degrees for the purposes of incest. We specifically invited views on our suggestion that there should be no change in the present rule characterising sexual relationships between consanguineous uncles and nieces and aunts and nephews as incestuous. Comments were divided on this question although the preponderance favoured our proposal, and many of those opposing it were somewhat hesitant in their views. It was pointed out that in Scotland, it is not uncommon for an aunt or uncle to stand *in loco parentis* to nieces and nephews, and that such children are sometimes too old to be protected by the Sexual Offences (Scotland) Act 1976. Having given careful consideration to all the comments we received, we cannot justify recommending alteration of the existing law by removing this degree of relationship from the incest prohibition.

4.10 We therefore recommend that:

The prohibition against incest should extend to the following relationships based on consanguinity—

(i) Parents and children;

¹ In the case of *H.M. Advocate v. Beaton and Vaughan* (1979 S.L.T. 49), a case of incest between a mother and son, the male accused Vaughan did not fall within the forbidden degrees but was an active accessory in the incest between Mrs Beaton and her son. The court held that the Criminal Procedure (Scotland) Act 1975, s. 216, makes “a person who has abetted in the commission of the act between the actors, a person who has also to accept responsibility for the offence, in accordance with the general principle of our law.” We see no reason to question this statement of the law or to recommend any change.

² Memorandum, paras. 6.18 to 6.20 and Proposal 3.

- (ii) Grandparents and grandchildren;
 - (iii) Great-grandparents and great-grandchildren;
 - (iv) Brothers and sisters;
 - (v) Uncles and nieces, aunts and nephews,
- regardless of whether the relationship is of the full blood or of the half blood.¹ (Recommendation 3)

This does not represent any change in the present law and also corresponds exactly with the forbidden consanguineous degrees for marriage.

Illegitimate relationships

4.11 Under existing law it is possible that intercourse between an illegitimate child and his mother might be incestuous but it is not entirely clear whether intercourse with other blood relations of the child's parents would constitute a crime.² The Marriage (Scotland) Act 1977,³ for the purposes of marriage, has assimilated illegitimate and legitimate relationships with regard to the forbidden degrees, but it does not necessarily follow that intercourse would be treated as incest. In our Memorandum,⁴ we proposed that the illegitimate child should be placed with regard to incest in the same position as the legitimate child. One consequence of this proposal is that provision would require to be made to ensure that parties who were ignorant of the relationship should not be convicted—for example, the father of an illegitimate child may not know that he is the father, and the problem may be even more acute where other consanguine relatives are concerned. This will be discussed later when we consider the mental element in incest and the defences which should be competent to anyone charged with this offence.⁵ With the proviso regarding the mental element and defences, the many comments we received on this proposal unanimously supported it. We therefore recommend that:—

The illegitimate child should be placed with regard to incest in the same position as the legitimate child.⁶ (Recommendation 4)

(ii) *Relationships by adoption*

4.12 At present, a child who is subsequently adopted is governed by the law of incest in respect of his natural (i.e. non-adoptive) relations. Apart from providing the same defence regarding ignorance of the relationship as that afforded to the relatives of illegitimate children, we see no need to alter this basic rule. If our other recommendations are accepted, intercourse between persons related by full or half blood, whether legitimate or illegitimate (i.e. natural as opposed to adoptive relationships) will continue to be incest regardless of the fact that one of the parties may have been adopted into another family. The fact of adoption does not in our opinion remove the justification for treating intercourse between the natural relations as incestuous.

¹ See Draft Bill, Clause 1, s. 2A(1) and 2A(2)(a).

² See para. 2.8 above and Memorandum, paras. 2.11 and 6.21.

³ c.15, s.2(2)(b).

⁴ Memorandum, Proposal 4 and para. 6.21.

⁵ See paras. 4.37 to 4.42 below and Recommendation 9.

⁶ See Draft Bill, Clause 1, s. 2A(2)(b).

4.13 Under the existing criminal law, however, intercourse between adoptive relations does not come within the ambit of incest, (although marriage between adoptive parents and children is forbidden).¹ In our Memorandum, we tentatively proposed that sexual intercourse between relations by adoption should not be characterised as incest.² However, the genetic factor apart, it may be argued that the reasons which justify retention of the crime of incest³ can be applied equally to adoptive relationships, and especially to those of adoptive parents where the child was adopted at an early age. Indeed, in such circumstances the continuing relationship and bond between an adopted child and his parent may be indistinguishable from that of a natural child.

4.14 Although a sizeable minority of the comments we received were in favour of our tentative proposal that adoptive relationships should be excluded from incest, some of these commentators suggested that a separate statutory offence should be created to prohibit intercourse between adoptive relations. Presumably the characteristics of such an offence would require to be similar to those of incest. The majority of commentators, however, considered that adoptive relationships should be included in incest, at least as between parents and children. It was pointed out that on adoption the child, in law, for most purposes ceases to be the child of his natural parents and becomes the child of his adoptive parents. It was said to be an essential element of adoption that the adopted child should be fully taken into the family, and it was contended that the law should not make distinctions between adoptive and natural relationships.

4.15 We note that paragraph 1(1) of Schedule 2 of the Children Act 1975 provides that "In Scotland, a child who is the subject of an adoption order shall . . . be treated in law (a) where the adopters are a married couple, as if he had been born as a legitimate child of the marriage . . . (b) in any other case, as if he had been born as a legitimate child of the adopter . . . and as if he were not the child of any person other than the adopters or adopter." Paragraph 1(3) of the Schedule provided that "Sub-paragraph (1) does not apply in determining the prohibited degrees of consanguinity and affinity in respect of the law relating to marriage or in respect of the crime of incest, except that, on the making of an adoption order, the adopter and the child shall be deemed, for all time coming, to be within the said prohibited degrees in respect of the law relating to marriage."⁴ An adopted child may therefore be distinguished from a foster child, a step-child or other children in the custody, charge or care of an adult, in that only the former is accorded the legal status of a legitimate child of the adopter.

4.16 In the light of the comments we have received and after careful consideration of the arguments advanced by the majority of commentators, we have revised our views about excluding adoptive relationships from incest. We do not however accept that the crime of incest should be extended to all

¹ Marriage (Scotland) Act 1977, (c.15) s. 2(1) and Sched. 1.

² See Memorandum, Proposal 5 and paras. 2.9, 2.10, 6.22 and 6.23.

³ See para. 3.9 above.

⁴ c.72. These provisions have been consolidated in the Adoption (Scotland) Act 1978 (c.28), ss. 39 and 41, which comes into operation on a date or dates to be appointed.

the relationships which come within the prohibition in the case of natural children. It is important that there should be consistency between different areas of law, particularly if these areas may interact on one another as do the law of marriage and the law of incest. As stated in our Memorandum,¹ the Houghton Committee, which published its Report² in 1972, discovered that there was little support for a complete ban on marriage between siblings by adoption. Moreover, when the Marriage (Scotland) Act 1977 introduced a prohibition for the purposes of marriage, that prohibition was restricted to the relationship of parent and child. It would be unacceptable, and indeed absurd, to criminalise sexual intercourse between persons who may legally marry. Therefore, if the prohibited degrees for incest became wider than those for marriage, it would be necessary to amend the marriage laws to rectify the anomaly. We doubt if such a step is acceptable or would be seriously considered so soon after the enactment of the Marriage (Scotland) Act 1977 and we have therefore concluded that for this reason the scope of the crime of incest should be confined to the adoptive relationship of parent and child. As with marriage, however, the prohibition should continue in force even if the adoptive relationship ceases. In the words of the Children Act 1975 quoted above, "the adopter and the child shall be deemed, for all time coming, to be within the said prohibited degrees." We would amend that Act by adding a reference to incest.³ We are satisfied that a proposal of this nature will also be approved by the majority of commentators who wish to extend incest to include adoptive relationships.

4.17 We therefore recommend that:—

Sexual intercourse between an adopted child (or former adopted child) and an adoptive parent (or former adoptive parent) should be characterised as incest.⁴ (Recommendation 5)

(iii) Relationships by affinity

4.18 As stated in paragraph 2.6 above the following relationships by affinity are within the forbidden degrees for the purposes of incest: parents-in-law and children-in-law, grandparents-in-law and grandchildren-in-law, step-parents and step-children, step-grandparents and step-grandchildren. These degrees are also prohibited for the purpose of marriage.⁵

¹ Memorandum, para. 6.22.

² Report of the Departmental Committee on the Adoption of Children (1972) Cmnd. 5107, para. 332.

³ See Draft Bill, Sched. 1, paras. 5 and 7.

⁴ See Draft Bill, Clause 1, s. 2A(1).

⁵ The Marriage Enabling Bill introduced by the Baroness Wootton of Abinger sought to remove relationships by affinity from the marriage prohibition if both parties had attained the age of 21 years. This Bill, which was introduced into the House of Lords, was rejected by that House after the third reading on 14 May 1981 by 124 votes to 79. Lord Lloyd of Kilgerran had previously introduced a Bill which sought to allow step-parents and step-children to marry in certain circumstances. This Bill was introduced into the House of Lords but at the time of writing this Report it has not yet been given a second reading. On 17 July 1980, Royal Assent was given to the Edward Berry and Doris Eileen Ward (Marriage Enabling) Bill 1980 which was a Personal Bill authorising Edward Berry, a widower aged 62 years, to marry Doris Eileen Ward, his 58-year-old step-daughter.

4.19 In our memorandum,¹ we suggested that the retention of relationships by affinity within the scope of incest could no longer be justified. The reasons for this conclusion can be briefly stated as follows: other provisions of the criminal law may be available to protect children; there is less risk of harm to the solidarity of the family since in-laws rarely form part of the typical family household in contemporary Scottish society; the genetic argument does not apply; there is no evidence that such conduct meets with general disapproval, (as shown for example by the reluctance of juries to convict of such offences, and by the relatively minor sentences which have recently been imposed²).

4.20 A considerable majority of the comments we received supported our proposal while some of the others who opposed it only did so because they wished to protect young children from sexual abuse by adult members of the family. We accept that relationships by affinity should only be removed from the scope of incest if adequate alternative safeguards are provided to ensure the continuing protection of young children from sexual molestation. Bearing in mind that the only relationships by affinity with which the present law of incest is concerned are those of parent-child and grandparent-grandchild, it is possible to draw a distinction between children-in-law and step-children. In the case of the former, the relationship is only established when the child marries, hence the minimum age for a son-in-law (or daughter-in-law) is 16 years. On the other hand, a step-relationship is acquired by the child when his parent marries and it therefore includes children under the age of 16 years. While it may be argued that the latter require protection, especially since they will in many cases come under the care and authority of a step-parent, the same considerations do not apply to a child-in-law who is over 16 years of age and is married. Subject to the protection by other means of young children related by affinity, we do not consider that the general retention of relationships by affinity as forbidden degrees under the law of incest is the most appropriate means of achieving this particular protection.

Protection of step-children

4.21 We do not consider that incest is the appropriate remedy to protect step-children under 16 years of age. Incest, in our view, should be confined to relationships within which sexual intercourse is forbidden to both parties irrespective of age. Rather than including step-children within the scope of incest merely to afford them protection, we would prefer that means of protecting them be found from other provisions of the criminal law. The sanctions which the criminal law imposes on persons who have intercourse

¹ Memorandum, Proposal 2 and paras. 6.14 to 6.17 and 6.24.

² In *H.M. Advocate v. McKee*, an unreported case in 1976 involving a father-in-law and daughter-in-law, the jury returned a verdict of not proven in face of an admission and the birth of two children. Between 1971 and 1976 there was only one case where a father-in-law and daughter-in-law were convicted of incest, the male (aged 57) being fined £50 and the female (aged 19) being put on probation for 3 years. During the same period there were only two convictions involving step-fathers and step-daughters: in one instance, both parties were adults, only the male was prosecuted and on conviction, he was admonished. In the other case, the girl was aged 13 years and while the step-father was sentenced to 2 years imprisonment, this prosecution could also have been brought under section 4 of the Sexual Offences (Scotland) Act 1976 with the same result. See also the criticisms of incest prosecutions based on affinity by Lord Salvesen in *H.M. Advocate v. Ryan* 1914 S.C. (J.) 108 at p. 112 and by Lord Ormidale in *C. and W. v. H. M. Advocate* 1929 J.C. 1 at p. 2 (quoted in the Memorandum, para. 6.15).

with a child under the age of 16 years have been discussed in paragraph 3.7 above. To summarise, if the step-child does not consent to intercourse, or was a girl under the age of 13 years or a boy under the age of 14 years, the step-parent may be charged with an offence which, if taken on indictment, would have a maximum penalty of life imprisonment; if, however, a female step-child aged between 13 and 16 years consents to intercourse the maximum penalty for the step-father would be two years imprisonment, and if a male step-child aged 14 years or over consented, it would appear that his step-mother cannot be charged with an offence. Consent is an important issue in these last two instances although, (as discussed in paragraphs 3.12 to 3.14), in a family situation, as would arise in the case of step-parents, it may be difficult or impossible to establish whether true consent was given by the child. Apart from this problem, the other provisions of the law do not distinguish between offences committed by a stranger and those committed by a step-parent where there is the additional element of a breach of trust and authority. We also doubt if a maximum penalty of two years imprisonment is sufficiently high in the case of a step-father who uses his position to have intercourse with his step-daughter aged between 13 and 16 years. Such cases can be of a highly reprehensible character and very damaging to a teenage step-child and to the family as a whole.¹ We have therefore concluded that a specific offence should be created to penalise any step-parent who has intercourse with his or her step-child, whether or not the latter consented to the act.

4.22 The appropriate penalty for this offence will be discussed later,² but there are two further matters which require to be determined, namely (a) whether the statutory provision creating the offence should apply in circumstances where the marriage creating the step-relationship has been terminated by death or divorce—i.e. should it extend to former step-parents, and (b) whether the protection should cease when the step-child attains 16 years or some other age.

(a) *Former step-parents*

4.23 A step-relationship exists when there is a child of one of the parties to the marriage of which the other spouse is not the natural parent. It might therefore be argued that criminal liability of the step-parent in respect of behaviour affecting that child should only persist for the duration of the marriage and that, should the marriage be terminated by divorce or death of the child's natural parent, the child no longer requires the protection of a special statutory offence designed to protect step-children. This approach ignores the fact that when a step-relationship is created, a young step-child will probably consider the step-parent to be in a position of trust and authority, the nature of which will depend on the age and maturity of the child and the duration of the relationship. Even if the child is living outwith the family or is otherwise not accepted by the step-parent, it is probable that in most cases a certain degree of trust or authority will exist. A bond of this

¹ See e.g. *H.M. Advocate v. Cox* 1962 J.C. 27.

² See para. 5.6 below. We are concerned here only with parties who are legally married. If the couple are merely cohabiting, the child of one party does not become the step-child of the other, but such children would be protected by the recommendation we make in paras. 4.30 to 4.35 below.

nature is not broken merely because the marriage creating it has ceased to exist. In this respect, the step-relationship has similarities to adoption, in connection with which we have recommended that criminal responsibility should continue even if the adoptive relationship is brought to an end.¹ We therefore consider that the proposed new offence should apply also to former step-parents, and should not cease to have effect when the marriage creating the relationship is terminated.

(b) Protection beyond the age of 16 years

4.24 In our Memorandum we specifically asked whether protection should be extended beyond the age of 16 years in the case of step-children.² The comments which we received were deeply divided on this question, although the majority favoured extending the age beyond 16 years. Those in favour of a 16 year age limit pointed out that most children have matured by 16 years, that sexual relations with 16 year olds are not uncommon and that, (apart from the prohibited degrees), 16 is the permitted age for marriage in Scotland. The majority of commentators gave various reasons for extending the protection beyond the age of 16 years, although there was no unanimity as to what the appropriate age should be, and opinions differed as between 18 years and 21 years. The general tenor of the reasoning for extending protection beyond 16 years was that few children achieve true independence from parental control or are capable of making a mature reasoned decision in respect of their parents at that age.

4.25 We have also noted that when the protection of males from homosexual conduct was recently considered and the law on homosexual offences altered by the Criminal Justice (Scotland) Act 1980, it was decided that males should be protected until they reached the age of 21 years.³ The age limits in the Sexual Offences (Scotland) Act 1976, a consolidating Act derived from earlier legislation, appear to indicate a somewhat ambivalent approach in that, although the prohibition against intercourse with girls contained in section 4(1) does not apply to girls aged 16 years or over, section 1(a) makes it an offence to procure any woman under the age of 21 for the purpose of having unlawful sexual intercourse with any other person or persons.⁴ Finally, in 1981, the Marriage Enabling Bill which sought to remove relationships by affinity from the prohibited degrees for marriage, did not apply to persons under the age of 21 years.⁵

4.26 We have not found this an easy matter to resolve, particularly in view of the conflicting opinions expressed to us regarding the appropriate age limit to which protection should be afforded. After careful consideration of all the

¹ There is under the existing law a corresponding continuing prohibition on marriage between former adoptive parents and children—see para. 4.15.

² Memorandum, Proposal 6 and para. 6.25. Proposal 6 also referred to adopted children but this need not be pursued further in view of Recommendation 5 of this Report that intercourse between adoptive parents and children should be characterised as incest.

³ c.62, s. 80(1)—“a homosexual act in private shall not be an offence provided that the parties consent thereto and have attained the age of 21 years.”

⁴ c.76, ss. 1(a) and 4(1) are derived respectively from ss. 2(1) and 5(1) of the Criminal Law Amendment Act 1885.

⁵ This Bill was rejected by the House of Lords at its Third Reading on 14 May 1981.

relevant factors, including the important factor that the permitted age for marriage in Scotland is at present 16, we are not convinced that it is necessary to make special provision in the criminal law extending protection to step-children who have reached the age of 16 years from sexual abuse by their step-parents.

4.27 Having thus defined the limits of the proposed offence protecting step-children, we do not intend that it should be an offence of strict liability. There may be occasions when the natural parent of a child fails to disclose the relationship to his or her spouse. The latter may not know of the existence of the child, or may believe that the child is related to some other member of his spouse's family. Similarly, it is possible that the step-parent, although aware of the relationship, is unaware of, or is mistaken about the exact age of the child. In these circumstances we take the view that the accused should escape criminal liability. This aspect of the matter will be considered later when we examine the mental element in incest and the defences which should be available to an accused person.¹

4.28 To an extent, our proposal to remove relationships by affinity from the forbidden degrees for the purposes of incest is contingent on our proposal concerning the protection of step-children. We accordingly recommend that:

The crime of incest should not be constituted by intercourse between a person and the relatives of his or her spouse.² (Recommendation 6)

It should be a separate offence for any step-parent or former step-parent to have sexual intercourse with his or her step-child under the age of 16 years.³ (Recommendation 7)

4.29 We note that these recommendations do not coincide with the prohibited degrees for marriage. If they are accepted, it will follow that intercourse between a parent-in-law and child-in-law, or between a grandparent-in-law and grandchild-in-law will cease to be a criminal offence, although the parties will still be prohibited from marrying. The same situation will obtain for intercourse between a step-parent and a step-child aged 16 or over, or between a step-grandparent and step-grandchild. We do not however consider that it is essential for the law of incest or related crimes to be assimilated exactly with the law of marriage in this respect since, (as explained in paragraphs 3.5 and 3.6 above), the reasons which are relevant for the purpose of prohibiting or nullifying marriage do not necessarily justify punishing the act of sexual intercourse as a criminal offence.

Other relationships

4.30 In addition to the proposals relating to incest and to adopted and step-children, we also referred in our Memorandum⁴ to the need to protect other children, such as foster children, or any child in the custody, charge or care of an adult. We further stated that adequate protection could in our opinion be given without including such children within the scope of the crime

¹ See paras. 4.37 to 4.42 and Recommendation 9.

² See Draft Bill, Clause 1, s. 2A(3).

³ See Draft Bill, Clause 1, s. 2B.

⁴ Memorandum, paras. 6.22 and 6.25, footnote 3.

of incest. This part of the Memorandum provoked considerable comment all of which favoured making special provision to protect children in these categories.

4.31 The considerations which lead us to believe that a special offence should be created for this purpose in preference to extending the law of incest, or leaving the matter to other existing provisions of the criminal law, are similar to those which have caused us to recommend that a separate offence be created to protect young step-children. These may be stated briefly as follows—the crime of incest applies equally to both parties to the act of intercourse, regardless of their age, whereas the intention here is to protect young children; other provisions of the criminal law fail to take specifically into account the element of breach of a position of authority and trust; under the existing law, the maximum penalty for an offence involving a consenting girl aged 13 to 16 is limited to 2 years imprisonment; the question of the child's "consent" becomes crucial; and there is no prohibition of intercourse with a consenting boy aged 14 years or over.

Scope of the new offence

4.32 The difficulty in creating the new offence lies in defining the persons or the relationships to which it should apply. Some commentators suggested that the offence should protect children who are under the care and protection of an adult or of someone in a position of trust, or who are in a dependent position in the family. Others proposed that the offence should apply to adults who are *in loco parentis* or who exploit a position of quasi-parental authority or guardianship. The Report of the Australian Royal Commission on Human Relationships,¹ in dealing with this problem refers to "father substitutes" and "mother substitutes". Section 131 of the New Zealand Criminal Code makes it an offence for a man to have intercourse with a girl who is his foster daughter or ward and who is "living with him as a member of his family, or not being his . . . foster daughter or ward . . . (is) living with him as a member of his family and is under his care or protection."² In relation to ill-treatment of children, section 12(1) of the Children and Young Persons (Scotland) Act 1937³ applies to "any person who has attained the age of 16 years and has the custody, charge or care of any child or young person under that age." Similarly section 11(1) of the Sexual Offences (Scotland) Act 1976,⁴ (which relates to the seduction or prostitution of girls under the age of 16) applies to "any person having the custody, charge or care of a girl under the age of 16 years".

4.33 After careful consideration, we have decided that the provision creating the offence should apply to any person of or over the age of 16 years who has intercourse with any male or female child under the age of 16 years provided that the accused is both a member of the same household as the child and is in a position of trust or authority in relation to the child. We have noted that, in defining children who may be in need of compulsory care, section 32(2)(e) of

¹ Published 1977. See Vol. 5, Chap. 17, para. 23.

² The full wording of this section is given in Appendix III to this Report.

³ c.37.

⁴ c.67.

the Social Work (Scotland) Act 1968¹ states as one of the conditions that “the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes the crime of incest has been committed by a member of that household.” In specifying children who may be referred to the Reporter, sections 168 and 364 of the Criminal Procedure (Scotland) Act 1975² include “any child who is, or who is likely to become a member of the same household as the person who has committed” certain specified offences. So far as we are aware, the use of this phrase in these statutes has not caused any difficulty and we would not seek to define it further. It will exclude casual visitors, babysitters and the like who are not members of the household, and the word “household” will not extend to institutions such as residential schools or children’s homes.

4.34 The second condition is that the accused must also be in a position of trust or authority in relation to the child. We prefer this phrase as being less restrictive than custody, charge and care. An adult such as a friend of the child’s mother, or a relative by marriage living in the same household might establish a relationship of trust or authority over the child and yet claim that, in the strict sense, only the child’s parent can be in custody, charge or care of the child. We would not attempt to give an exhaustive or comprehensive definition of the words “trust or authority”; rather we would prefer that these words be given their ordinary meaning and that it be left to the court to decide as a matter of fact whether the relationship between the accused and the child can properly be described as being one of authority or trust.

4.35 Unlike step-children who may not marry their step-parents,³ the children protected by this offence are not prohibited from marrying adults whose only relationship is that they are living in the same household and are in a position of trust and authority. It would be an absurd and unacceptable anomaly to allow two persons to marry but prohibit sexual intercourse between them. We therefore consider that the protection given by this offence should cease when the child reaches his or her sixteenth birthday, (the age of marriage in Scotland). Since an accused person might have some doubt as to the child’s age, we take the view that he should be entitled to an acquittal if he proves that he believed on reasonable grounds that the child was of or over the age of 16 years. This matter is further discussed later.⁴

4.36 We therefore recommend that:

If any person over the age of 16 years is in a position of trust or authority in relation to a child under the age of 16 years and is a member of the same household, it should be a criminal offence for that person to have sexual intercourse with the child.⁵ (Recommendation 8)

The mental element—defences

4.37 As stated in our Memorandum, under the present law, the mental element required for incest is that the parties should have knowledge of the

¹ c.49. This section is also discussed at para. 6.10 below.

² c.21 as amended by the Criminal Justice (Scotland) Act 1980 (c.62), Sched. 7, para. 34.

³ See para. 4.18 above.

⁴ See paras. 4.39 to 4.42 and Recommendation 9.

⁵ See Draft Bill, Clause 1, s. 2C.

fact that the relationship exists between them, although it is not necessary for them to know that the law regards intercourse within that relationship as incestuous.¹ We do not intend that our proposed offences (relating to incest, step-children or other children) should depart from this basic rule by imposing strict liability upon the accused. In our view, the guilt of the accused should continue to depend on his knowledge of the facts.

4.38 In many instances, such as father–daughter incest, establishing knowledge of the relationship will be a simple matter and the issue will not be of critical importance in the proceedings. Difficulties may arise in other cases, for example, where an adopted child may not know his consanguine relatives. These difficulties will increase if illegitimate relationships are included in incest and we could envisage that the consanguine relatives, including the father, of an illegitimate child may not know of the relationship. Similarly, in the case of step-children, it is possible that a step-parent may be unaware that the other party is the child of his spouse.²

4.39 Apart from knowledge of the relationship, the accused's knowledge as to the age of the other party will also be relevant in relation to our proposed offences concerning step-children or other children in a position of trust or authority.

4.40 The question thus arises as to how knowledge is to be proved, or conversely whether knowledge should be presumed in the absence of counter-proof by the accused. If it were argued that the onus of proof should lie on the prosecution, the standard required is proof beyond reasonable doubt. Since knowledge is a state of mind which can only be established by the accused making an admission, or from surrounding facts and circumstances, it may be difficult, if not impossible, for the Crown to discharge the burden and as a consequence, the accused will escape prosecution or conviction.

4.41 In relation to other sexual offences, we observe that the tendency of the Sexual Offences (Scotland) Act 1976 is to create a strict offence in the first instance and thereafter provide the accused with a defence, which if established by him, entitles him to an acquittal. For example, section 4 (which creates the offence of having intercourse with a girl aged 13 years but under 16 years) provides that in certain circumstances it shall be a defence to the charge if the accused had reasonable cause to believe that the girl was of or above the age of 16 years.³ The standard of proof required of the accused, being the balance of probabilities, is not so high as the standard demanded of the Crown.⁴ We consider that the 1976 Act adopts a proper and appropriate approach for dealing with offences of this nature, since the matters available as a defence are likely to be peculiarly within the knowledge of the accused.

¹ Memorandum, para. 2.2.

² See para. 4.27 above.

³ Similar examples are found in the 1976 Act, ss. 6, 8 and 10(2).

⁴ The decision in *Lambie v. H.M. Advocate* 1973 J.C. 53 which related expressly to special defences of alibi, self-defence and incrimination, the sole purpose of which was held to be to give fair notice, would not appear to apply to such a provision.

Moreover, if the offences proposed by us were stated in this way, (and were inserted into the 1976 Act) it would also ensure a measure of consistency.

4.42 We take the view that the mental element should be specified by means of express statutory defences since failure to do so expressly and specifically might cause difficulty to the courts in interpreting the nature of the new statutory offences, particularly when deciding whether some form of dolus or mental element was to be assumed, or whether strict liability was intended. We therefore consider that in addition to making provision for the accused's state of knowledge as to the age or relationship of the other party, it is important to ensure that the offences cannot be interpreted as applying to persons who lack the necessary *mens rea* to commit them. In particular a person who was subjected to an act of intercourse forcibly and against his or her will (e.g. a man whose resistance was overcome by means of an assault or a woman who was raped) should not be liable to conviction. Similarly, the offences should not apply to a person who was unable to consent or object to the act, for example, because he or she was asleep, drugged or unconscious, or to a victim of impersonation.¹ While we are satisfied that there is a long established practice on the part of the Crown not to prosecute such persons²—and we have no reason to believe that this practice will be discontinued—we take the view that the necessary safeguards should be expressly incorporated in any legislation following upon this report. We accordingly recommend that provision be made to prevent the conviction of a person who did not consent to the act of intercourse or who was the victim of impersonation or some similar subterfuge. For the reasons given in paragraphs 4.40 and 4.41 above, we consider that a provision of this nature should take the form of a defence, which, if established by the accused will lead to an acquittal.

4.43 We therefore recommend that:

- (a) **Where relationship or age is a relevant factor, it should be a defence to the charge that the accused did not know of, and had no reason to suspect, the relationship of the other party, or believed on reasonable grounds that the other party was of or over the age of 16;**
- (b) **it should be a defence to the charge that the accused did not consent to have sexual intercourse or to have sexual intercourse with the other party.**³ (Recommendation 9)

Foreign marriages

4.44 Finally, it must be recognised that in certain other countries, it may be permissible for persons to marry although their relationship to each other falls within the prohibited degrees for incest in Scotland. If parties who had been

¹ See para. 3.7 above.

² There is no reported case of a rape (or assault) victim being charged with incest. In *H.M. Advocate v. Beaton and Vaughan* (1979 S.L.T. 49) the male child who was the victim of the offence was not charged with incest and in three recent unreported cases where one of the parties was forced to have incestuous intercourse, namely *H.M. Advocate v. Wallace* (1980), *H.M. Advocate v. Simpson* (1981) and *H.M. Advocate v. Aitchison* (1981) the unwilling parties were not charged with incest.

³ See Draft Bill, Clauses 1, ss. 2A(1), 2B and 2C.

so married were to come to visit or reside in Scotland, they would, in the absence of provision to the contrary, be liable to prosecution if intercourse took place. Similar considerations apply if any foreign legal system permits a marriage to take place where the parties, or one of them, is less than 16 years of age. In our view, it is neither acceptable nor practical to seek to apply the criminal law to cases of this nature. We would hope that such persons would not be prosecuted, but in the event of a prosecution taking place, we recommend that the parties should not be convicted if they prove they are married and that the marriage is recognised as valid by Scots law.¹

PART V PENALTIES, PROCEDURE AND EVIDENCE

Penalties and procedure

5.1 At present, incest cases are only prosecuted in the High Court where the maximum penalty is life imprisonment.² In practice, the maximum penalty is seldom imposed and in our analysis of 48 persons convicted between April 1971 and December 1976,³ the disposals were as follows:

Life imprisonment	1
5 years imprisonment	5
4 years imprisonment	6
3 years imprisonment	8
2½ years imprisonment	3
2 years imprisonment	5
Under 2 years imprisonment (the lowest sentence being 1 month)	10
Fine (£50)	1
Probation	3
Admonition	1
Hospital Order	5

5.2 In order to place these disposals in perspective it is relevant to consider them in relation to the general sentencing powers of the courts. Unless otherwise specified by statute, the maximum penalties which the courts may impose are: High Court of Justiciary—life imprisonment; Sheriff and Jury (indictment)—2 years imprisonment or an unlimited fine (unless the case is remitted to the High Court for sentence); Sheriff summary court—3 months imprisonment or a fine of £1,000.⁴ The nature of the sentence (as anticipated and imposed) and the choice of court are to some extent interrelated. In our

¹ See Draft Bill, Clause 1, ss. 2A(1)(b), 2B(c) and 2C(ii).

² In para. 2.1 of the Memorandum, we stated that incest was only triable in the High Court. We have since received a helpful note from a member of the Crown Office staff querying the accuracy of that statement and suggesting that incest cases are always taken in the High Court because of prosecuting policy and practice, rather than as a matter of law. We have not pursued this point further in view of the recommendations made in this part of the Report.

³ Memorandum, paras. 1.11, 6.29, 6.30 and Appendix II; we have reproduced Appendix II at the end of this Report for ease of reference.

⁴ Criminal Procedure (Scotland) Act 1975 (c.21), s. 289. We have not referred to the district court which we considered inappropriate for crimes and offences of this nature.

Memorandum, we invited comment on the question of sentence¹ and also proposed that incest should be triable in the Sheriff Court.²

5.3 Most commentators agreed that the present maximum penalty for incest (i.e. life imprisonment) should be retained, partly to mark the gravity of the offence in exceptional cases and partly to allow the court flexibility in sentencing by providing a wide range of sentences. We would in any event hesitate to suggest reducing the maximum penalty lest this should be taken as a tacit lessening of disapproval of the offence. The quality of the offence may often be indistinguishable from that of rape and the effects on the victim may be even more serious. Finally, it would be anomalous to reduce the penalty when life imprisonment is the maximum penalty under section 3 of the Sexual Offences (Scotland) Act 1976,³ and for lewd practices with a male under 14 years of age. We therefore conclude that the present maximum penalty for incest should be retained.

5.4 It does not, however, follow that all cases will merit the maximum penalty and a considerable majority of the commentators were in favour of proceedings in cases of incest being taken in the Sheriff Court (with lesser penalties) where the circumstances were such as to make this course appropriate. It was pointed out that such flexibility could result in the offence being dealt with in a less formal manner, thus minimising the stress on the child as well as on the family in general. In other instances, summary procedures may be more suitable for a young offender than the more formal and protracted solemn procedure. We agree with these views and also take into account the fact that incest may involve siblings or other young offenders where the gravity of the offence may be relatively minor. Finally, as illustrated in paragraph 5.1 above, the penalties which are actually imposed often fall within the competence of the Sheriff Court.

5.5 In our Memorandum, we recommended that any proceedings in the Sheriff Court should be taken by way of indictment,⁴ so that, on conviction, the Sheriff could remit the case to the High Court for sentence if he decided that a term of imprisonment in excess of two years was warranted. In the light of the comments which we have received, we are persuaded that very exceptionally, cases of minimal culpability may arise which, while justifying prosecution, only merit a sentence within the competence of the summary court. It is not, however, competent to remit a summary case to a superior court for sentence and the institution of summary proceedings irrevocably limits the sentence to the maximum available in the summary court. In order to ensure that any decision to take summary proceedings is only reached after careful deliberation and full consideration of the consequences, we have therefore decided that they should only be competent on the express direction of the Lord Advocate.⁵

¹ Memorandum, para. 6.28 and Proposal 8.

² Memorandum, para. 6.31 and Proposal 9.

³ c.67. S. 3 relates to unlawful sexual intercourse with a girl under 13 years of age.

⁴ Memorandum, Proposal 9.

⁵ See Draft Bill, Clause 1, s. 2D(1).

5.6 In so far as prosecution and penalty are concerned, we see no reason to differentiate between incest and the new offences recommended by us for the protection of step- and other children. The nature and gravity of the penalty will invariably depend on the circumstances of the offence and of the offender. As with incest, some cases will merit a heavy penalty whereas others may be less serious. In our view, which is supported by many of the commentators, the considerations leading to our conclusions as to the appropriate penalty and mode of prosecution for incest apply equally to these other offences.

5.7 We therefore recommend that:

It should be competent to prosecute incest and the offences contained in Recommendations 7 and 8 on indictment in the High Court and Sheriff Court and, on the direction of the Lord Advocate, on a summary complaint in the Sheriff Court.¹ (Recommendation 10).

5.8 In order to provide suitable penalties for the new offences we have recommended, we do not consider it necessary to create statutory exceptions to maximum penalties otherwise available. Inherent in this recommendation is the fact that the sheriff, in indictment cases, may remit the accused to the High Court for sentence if he considers that a sentence of 2 years imprisonment is inadequate.²

5.9 We therefore recommend that:

The maximum penalties for incest and for the offences contained in Recommendations 7 and 8 should be as follows (a) on indictment in the High Court—life imprisonment; (b) on indictment in the Sheriff Court, (unless remitted to the High Court for sentence)—2 years imprisonment; (c) on summary conviction in the Sheriff Court—3 months imprisonment.³ (Recommendation 11)

5.10 These penalties are the maxima which the courts could impose, and it is not necessary to specify the lesser alternative penalties.⁴ In particular, we do not wish to suggest alternative fines, the level of which would require to be periodically revised independently of any general review of fines which the Secretary of State is empowered to make in terms of section 289D of the Criminal Procedure (Scotland) Act 1975.

5.11 Finally, since we consider that a flexible approach towards treatment of the crime of incest is desirable, we do not intend that our recommendations about prosecution and penalty should be taken as precluding the alternative measures discussed later in Part VI of this Report.

¹ See Draft Bill, Clause 1, s. 2D(1).

² Criminal Procedure (Scotland) Act 1975, (c.21), s. 104.

³ See Draft Bill, Clause 1, s. 2D(5).

⁴ Criminal Procedure (Scotland) Act 1975, (c.21), ss. 193 and 394 give the court power to impose lesser penalties including an unlimited fine on indictment or a fine of £1,000 on summary complaint.

Summary procedure—time limits

5.12 The effect of section 331(2) of the Criminal Procedure (Scotland) Act 1975 is that it is not competent on a summary complaint to convict anyone of an offence under the Sexual Offences (Scotland) Act 1976 or of incest in respect of a child under the age of 17 years unless the offence was wholly or partly committed within six months of the commencement of the proceedings.¹ If our recommendation² is accepted, the new offences which we suggest will be incorporated into the Sexual Offences (Scotland) Act 1976.

5.13 We understand that evidence of incest often may not come to light until some considerable time after the offence has been committed and we are informed that in a comparable position, summary proceedings are sometimes precluded under section 4 of the Sexual Offences (Scotland) Act 1976 (intercourse with a girl aged 13 to 16) only because evidence of the offence is not discovered until after six months have elapsed, perhaps, for example, when a child is born.

5.14 To avoid this difficulty, we therefore recommend that it should be competent to commence summary proceedings (in terms of Recommendation 10) at any time within the period of 6 months from the date on which evidence sufficient to justify them comes to the notice of the Lord Advocate.³ We would retain the existing definition of commencement of proceedings as the date on which a warrant to apprehend or cite the accused is granted, if such warrant is executed without undue delay.⁴

5.15 Finally, so that the court may determine the date on which sufficient evidence came to the notice of the Lord Advocate, we recommend that a certificate of the Lord Advocate shall be conclusive evidence to this effect.⁵

Exclusion orders

5.16 Two commentators suggested that if anyone were convicted of incest with a child, the courts should have the power to exclude that person from having any authority over that child.⁶ In our view, however, this situation is adequately covered by the provisions of the present law enabling a local authority to take compulsory measures of care in relation to a child and, if necessary, to assume the parental rights and powers of a parent or guardian.⁷ We accordingly make no recommendation on exclusion orders.

¹ Criminal Procedure (Scotland) Act 1975, (c.21), s. 331(2) and Sched. 1, paras. (a) and (b) as amended by the Sexual Offences (Scotland) Act 1976, (c.67), Sched. 1.

² See para. 4.2 above.

³ See Draft Bill, Clause 1, s. 2D(2).

⁴ Criminal Procedure (Scotland) Act 1975, (c.21), s. 331(3): see Draft Bill, Clause 1, s. 2D(3).

⁵ See Draft Bill, Clause 1, s. 2D(4). This type of certification is not uncommon.

⁶ Cf. Sexual Offences (Scotland) Act 1976, s. 11(4) which provides that "where at the trial of any offence under this Act it is proved to the satisfaction of the court that the seduction or prostitution of a girl under the age of 16 years has been caused, encouraged or favoured by her father, mother, guardian . . . it shall be in the power of the court to divest such person of all authority over her and to appoint any person or persons willing to take charge of such girl to be her guardian until she has attained the age of 21 years, or such less age as the court may direct."

⁷ Social Work (Scotland) Act 1968, ss. 16 and 32 as amended. See paras. 6.9–6.11.

Evidence

5.17 We received various comments relating to the nature of the evidence which should be admitted in incest cases.¹ In our Memorandum,² we discussed the effects of the criminal process on the child witness. We also mentioned that the Thomson Committee³ had rejected a proposal that someone other than the child should appear in court. However, the committee expressed the hope that steps could be taken to avoid all unnecessary delay in bringing such cases to court, that parents involved in such cases should receive expert child guidance and other help both before and after the trial and that “everything possible would be done . . . to create an atmosphere of reassurance where children are being examined.” Various commentators expressed concern about the effect on a child who is required to give evidence in court, especially if that child is also the victim of the offence. In certain circumstances, it may be highly desirable in the interests of justice that the child’s evidence should be tested in court, and indeed in certain cases the child’s evidence will be indispensable. Unless the offender is to escape prosecution, no one has been able to suggest a satisfactory alternative which would avoid the child appearing in court. Steps can, however, be taken to minimise the harm to the child and in this connection we would adopt the recommendations of the Thomson Committee referred to above. We also observe that sections 166 and 169 of the Criminal Procedure (Scotland) Act 1975⁴ give the court a discretion to hear the evidence of a child in camera and to decide whether any relaxation should be allowed in the restrictions regarding the publication of the child’s identity in the public press.⁵ We did not receive any criticism of the way in which the courts are exercising their discretion in these matters.

PART VI ALTERNATIVES TO PUNISHMENT AND PROSECUTION

General

6.1 In our Memorandum⁶ we stated our belief that the decision to prosecute and punish in incest cases should take account of the potential effects of the criminal process on the victim and the family and we made a tentative proposal that as an alternative to prosecution and punishment, provision should be made within the criminal process to secure help and treatment for

¹ One commentator suggested that where the accused has any previous convictions for indecency, it should be competent to lead evidence of these convictions in the course of the trial so that the jury could take account of them when reaching their verdict. Another suggestion was that authenticated extracts of birth, marriage or death certificates whether issued in the United Kingdom or elsewhere, should act as sufficient proof of all the matters contained therein. Neither of these suggestions applies exclusively to incest and we shall consider them further as part of the general review which we are currently undertaking into the law of evidence—see Memorandum No. 46: The Law of Evidence (issued on 4 September 1980).

² Memorandum, paras. 4.15 to 4.19.

³ Criminal Procedure in Scotland (Second Report) (1975) Cmnd. 6218, paras. 43.31 and 43.32.

⁴ These sections relate to solemn proceedings: the corresponding summary provisions are ss. 362 and 374.

⁵ We have also been informed that the current practice of the Scottish press is to omit direct references to incest and to describe the charge as a sexual offence involving a child without specifying further details.

⁶ Memorandum, paras. 6.33 to 6.39 and Proposal 11.

the victim and other members of the family. We also referred to a Canadian scheme whereby, as a result of pre-sentence investigation and evaluation, a treatment plan was formulated and the accused were not imprisoned.

6.2 In considering this proposal it becomes necessary to assess various conflicting factors and draw a proper balance between them. One commentator maintained that welfare and treatment are the function of other organisations and that confusion of authoritarian justice with social welfare and treatment only leads to the effect of each being weakened. While we see some force in this argument, we do not accept it without reservation, especially in relation to victims or other members of the family.

6.3 Some commentators argued that if one of the values which the law of incest seeks to maintain is the integrity of the family, prosecution may be counter-productive and may contribute to the dissolution of the family. Others, however, doubted the wisdom of continuing to maintain the cohesion of a family within which incest had been taking place over a long period. It was suggested that it might be more therapeutic in some situations of this kind to give members of the family a fresh start in new surroundings.

6.4 It was also put to us that if prosecution and punishment were not the inevitable consequence of reporting incest, more cases would be made known to the authorities. Unfortunately while some commentators advised us that there were many cases of unreported incest, when we sought to quantify the incidence of such cases we were generally referred to varying estimates none of which could be verified with any degree of accuracy.¹

6.5 A further consideration is that it may be necessary to draw distinctions between treatment of the offender and treatment of the victim. In the case of the offender, treatment may be used as an alternative to prosecution and punishment or in addition to it. On the other hand, treatment of the victim, which evoked considerable support from commentators, may be approached as a separate issue regardless of any decision which may be taken about prosecuting the offender.

6.6 In assessing whether treatment may be appropriate, it is a prior requirement that suitable treatment facilities are available. The commentators who mentioned this matter were agreed that treatment should only be given by suitably trained people and the general consensus was that a team should be formed for this purpose consisting of people with psychiatric and social work skills. We were advised that similar facilities are provided to deal with certain cases of mental illness and that special arrangements also exist for dealing with cases of non-accidental injury to children.

6.7 In relation to treatment facilities for incest cases, it is no doubt a matter for consideration whether any resources allocated for this purpose should be

¹ One psychiatrist who did provide figures, informed us that he had come across 38 cases, of which only "a few" were made known to the police, where patients being questioned by him had admitted, or claimed to have had an incestuous relationship at some time in their lives. These figures would require further scrutiny, but even taken at face value, it is not clear to what extent, if any, they may be indicative of the pattern of unreported incest in Scotland as a whole.

so specialised that their use would be restricted to incest or whether they should be available in other cases where children are at risk. The question also arises whether existing facilities could be readily adapted for this purpose.

6.8 We have mentioned the above matters because they arise directly or indirectly out of comments made to us. We must emphasise, however, that our reference requires us to review the law on incest and to make recommendations on possible legislation to reform it. It is not our function under this reference to make recommendations on social work services or practice.

Treatment of the victim and family: Reporter to the Children's Panel

6.9 Our primary concern is with the child victim and any other child of the family who may be at risk. Apart from other existing remedies, any person who has reasonable cause to believe that a child may be in need of compulsory measures of care, protection or treatment may inform the Reporter to the Children's Panel accordingly.¹ In addition, a discretionary power is given to the court to refer to the Reporter any child under the age of 17 years who is the victim of incest or of an offence against the Sexual Offences (Scotland) Act 1976. The court may also refer to the Reporter any child who is, (or who is likely to become), a member of the same household as a person convicted of (i) incest in relation to a child under 17 years of age or (ii) an offence against the Sexual Offences (Scotland) Act 1976 in relation to a child under 17 years of age or (iii) incest in relation to a female aged 17 years or over.² This latter power does not apply if the victim of incest is a male over the age of 17 years and although the matter may not fall strictly within the terms of our reference, we suggest that it is for consideration whether steps should be taken to remove this anomaly.³

Effect of referral

6.10 Whether the referral is by the court or by any other person, if the Reporter decides that the child is in need of compulsory measures of care, he must arrange to bring the case before a hearing of the children's panel.⁴ At such a hearing, if the child or his parent refuses to accept the grounds of referral as stated by the Reporter (or if the child does not understand them), the hearing must direct the Reporter to apply to the Sheriff for a finding as to whether the grounds are established "having regard" to section 32 of the Social Work (Scotland) Act 1968.⁵ This latter section provides that a child may be in need of compulsory measures of care if certain conditions are

¹ Social Work (Scotland) Act 1968, (c.49), s. 37(1).

² Criminal Procedure (Scotland) Act 1975, (c.21), ss. 168, 364 and Sched. 1 as amended by the Sexual Offences (Scotland) Act 1976, (c.67), Sched. 1, and the Criminal Justice (Scotland) Act 1980, (c.62), Sched. 7. It will be noted that we recommend incorporating incest into the 1976 Act.

³ For example by amending ss. 168(1)(c) and 364(1)(c) of the Criminal Procedure (Scotland) Act 1975.

⁴ Social Work (Scotland) Act 1968, (c.49), s. 39(3).

⁵ *Ibid.*, s. 42(2)(c).

satisfied.¹ In general the conditions are the same as those described in paragraph 6.9 above which entitle the court to refer a child to the Reporter.² If however, the court has referred such a child to the Reporter, it is required to certify that the offence is an established ground for the purposes of section 32.³ In theory these provisions might appear to conflict with each other since on the one hand the court has certified that the grounds for referral have been established, whereas on the other, if the parent or child refuses to accept the grounds, the panel must direct the Reporter to apply to the Sheriff for a finding as to whether the grounds are established. We understand, however, that it is virtually unknown for a child or parent in this position to challenge the grounds for referral, and that in practice this point does not cause any difficulty. In any event, this apparent anomaly is not restricted to incest and, as the matter may not fall strictly within the terms of our reference, we make no recommendation beyond suggesting that it might be examined further should the Social Work (Scotland) Act 1968 be reviewed.

6.11 If the child has been referred to the Reporter by some other person who has reasonable cause to believe that the child is in need of compulsory measures of care,⁴ the grounds of referral will not be certified by the court and the procedure discussed in paragraph 6.10 above will obtain. It follows that if the grounds for referral are based on a conviction for incest (or other sexual offence) and are not accepted by the parent or child, an application must be made to the Sheriff for a finding as to whether the grounds have been established. In our opinion, it should not be necessary to have a further judicial enquiry in such cases and we therefore suggest that it is for consideration whether such a conviction should be treated as an established ground for referral as if it had been so certified by the court.

Powers to take children to a place of safety

6.12 The above provisions come into effect when a child has been referred to the Reporter, but occasions can arise where it may be necessary to take

¹ Apart from the conditions relating to incest and sexual offences, the other conditions, in brief, are that the child must be beyond parental control, or is falling into bad associations, or is exposed to moral danger, or is likely to be caused unnecessary suffering or impairment to health through lack of care or is the victim of certain specified offences or has failed to attend school regularly or has committed an offence.

² Our attention has been drawn to two possible anomalies. First, while the court may refer any child who is, or who is likely to become, a member of the same household as a person convicted of incest with a female aged 17 years or over, the corresponding provision in section 32(e) of the 1968 Act is restricted to female children who are members of the same household. It is, as we have said, for consideration whether steps should be taken to remove this anomaly. Second, under section 32(d) of the 1968 Act, a child will be considered as being in need of compulsory measures of care if he or she is a member of the same household as another child under 17 years who is the victim of incest or an offence under the Sexual Offences (Scotland) Act 1976, but no corresponding provision is given to the court to refer such children to the Reporter in terms of the Criminal Procedure (Scotland) Act 1975, ss. 168 and 364, which only apply where the child is (or is likely to become) a member of the same household as the offender. We would not suggest that this rule should be altered. Unlike the child who is a member of the same household as the offender, the fact that the child and the victim come from a common household and the offender does not come from that household (and may indeed be a stranger to it) does not constitute the same *prima facie* case that the child will be at risk. We would not therefore favour giving the court which tries the offender the power to refer such a child to the Reporter.

³ Criminal Procedure (Scotland) Act 1975, ss. 168 and 364.

⁴ Social Work (Scotland) Act 1968, (c.49), s. 37(1).

immediate interim steps to protect the child. At present, this can be effected under section 37(2) of the Social Work (Scotland) Act 1968 which empowers a constable (or other person authorised by the court or a justice of the peace) to take a child to a place of safety where he may be detained until arrangements are made to bring him before a hearing of the children's panel. This step may only be taken in certain circumstances, and in relation to incest and other sexual offences these are that (a) the child is, or is believed to have been the victim of incest or an offence under the Sexual Offences (Scotland) Act 1976 or (b) the child is a member of the same household as a child in respect of whom such an offence has been or is believed to have been committed or (c) the child is, or is likely to become, a member of the same household as a person who has committed or is believed to have committed such an offence.¹ There is no provision for taking a child to a place of safety if he is a member of the same household as a person aged 17 years or over in respect of whom the offence of incest has been or is believed to have been committed by a member of that household. We suggest that this omission could perhaps be considered in any future review of the 1968 Act so that the power to take children to a place of safety corresponds with the conditions which allow the court to refer such children to the Reporter.

Treatment of the accused

6.13 With regard to treatment for the accused, it would be inappropriate in a reference of this nature to discuss broad penological issues which involve questioning the general aims and purposes of criminal prosecution. Nor would it be appropriate to evaluate here, on a general or philosophical basis, the respective merits of treatment and punishment. We can only recommend that each case be examined on its own merits and that if it is thought that the accused might benefit from treatment, consideration should be given as to whether that treatment might be more appropriate as an alternative to prosecution or as an alternative to punishment. It is also a prerequisite that suitable treatment facilities exist² and that the accused is willing to be treated, since in the absence of either of these factors, (and especially the former), some other disposal of the case would seem likely to be more appropriate.

(a) As an alternative to prosecution

6.14 One commentator suggested that there was a need to remove incest cases from the criminal courts and have them heard before a new Family Court. Such a suggestion raises considerations of legal and social policy extending far beyond the matters referred to us. In any event, since no such specialised family courts presently exist in Scotland, we regard it as impracticable to propose that a new type of court be established specifically to deal with incest and related offences. We have, therefore, restricted our consideration of this question to treatment as an alternative to prosecution within the framework of the existing criminal justice system.

6.15 We accept that a conflict of interests might arise if an outside agency became involved in treatment while the prosecuting authorities were still

¹ See Social Work (Scotland) Act 1968, (c.49), s. 37(2), which also provides for other circumstances in which the child may be taken to a place of safety.

² See paras. 6.6 and 6.7 above.

conducting enquiries into the case. In order to prevent such a situation occurring, we would wish to make it clear that, in our view, priority must be given to the requirements of the prosecutor who will always retain an overriding interest. In particular, we regard as undesirable any derogation from the absolute discretion of the Lord Advocate either in relation to the investigation of the offence or the decision to prosecute. We are content that it be left to the prosecuting authorities in the first instance to decide whether treatment of the accused is a suitable alternative to prosecution.

6.16 It was put to us that before making his decision, the Procurator Fiscal should obtain a social enquiry report on the accused and that he should also consult the Reporter if a child has been involved. There are various practical difficulties which will probably preclude the former course; in so far as the latter is concerned, we understand that such consultations frequently take place and we would commend this practice. Various commentators suggested that the Crown adopt a flexible approach and should bear in mind the possible consequences of a prosecution for the victim and the unity of the family. On the other hand, no one thought that the Crown should ignore the gravity of the offence or the possibility of a recurrence if the accused was not prosecuted. Clearly a balance must be sought between these and other conflicting factors and we are satisfied from the comments which we have received from officials in the Crown Office and from Procurators Fiscal that these factors are in practice fully weighed before a decision to prosecute is taken. We see no reason to think that this practice will be discontinued—indeed, Crown Office officials have indicated to us that they are willing to take part in discussions concerning the provision of suitable treatment facilities and participation in any worthwhile pilot scheme.

6.17 One difficulty which would require to be overcome is that of ensuring that the accused persists in his treatment. While the threat of prosecution may induce him to accept treatment as an alternative, once that threat is removed, there will be no compulsion upon him to continue with it. It must be borne in mind that the decision to prosecute cannot, and should not, be delayed for longer than is necessary and that when a decision not to prosecute is intimated to the accused, it is irrevocable. This situation does not exist to the same extent when treatment is undertaken as an alternative to punishment.¹

(b) As an alternative to punishment

6.18 Although some views were expressed that treatment should not be provided within the criminal process and should be discounted as a factor in determining sentence, we agree with what was the weight of opinion on consultation, namely that the court should at least consider treatment as an alternative to punishment, if it should deem this course to be appropriate. In expressing this view, we would stress that we do not wish to detract from judicial discretion in the matter of sentence.

6.19 In order to assess whether treatment is desirable, the judge will require full information about the accused and his family background, and we concur with the comments we received recommending that it should be compulsory

¹ See para. 6.20 below.

for the court to obtain a social enquiry report for this purpose in every case.¹ We do not regard this proposal as interfering with the discretion of the judge in determining the ultimate sentence. It might also be beneficial to obtain psychiatric or medical reports about the offender or other members of his family, if reports of this nature are not provided by the prosecution or defence. We doubt, however, whether such reports are needed in every case and we prefer that the judge should exercise his discretion in this respect. We therefore recommend that, while the court should not be bound to obtain a psychiatric or medical report, if such a report is presented by one of the parties, or is provided as a result of judicial discretion, the court should take account of any information which it contains before passing sentence.²

6.20 Where the court decides that the accused should undergo treatment as an alternative to a custodial or other sentence, there are various ways of ensuring that such treatment is not evaded by the accused. The court might place the accused on probation, making it a condition that the accused should be willing to accept treatment. Any subsequent failure on his part to do so would thus be a breach of probation. Alternatively, the court could defer sentence for a specified period on condition that the accused agrees to treatment during the interim period. If thereafter the accused does not accept treatment, the court may reconsider the matter when the case is called for sentence on the deferred date. Finally, if the court is satisfied that the accused requires psychiatric treatment, it may wish to consider making an order that he be sent to a suitable hospital.³ These measures all provide a degree of certainty that the accused will not be able to avoid treatment and in this respect it might be considered that they are likely to be more effective as alternatives to punishment than as alternatives to prosecution.

6.21 In conclusion, although we have discussed treatment as an alternative to punishment, it should not be overlooked that if a custodial sentence is imposed, it may be possible to give the accused psychiatric or medical care during the course of his imprisonment.

6.22 For the reasons given in paragraph 6.8, any recommendations in this part of our Report must be confined to possible reform by legislation of the law of incest in which we would include related matters of criminal procedure. It would be beyond our functions and beyond our terms of reference to make recommendations on administrative matters such as the provision of help and treatment for those involved in incest cases or to suggest, even in general terms, that financial or other resources should be allocated to this task. So far as legislation on procedure is concerned, we recommend that:

Provision should be made to require the court, before passing sentence on a person convicted of incest or of an offence mentioned in Recommendation 7 or 8, to obtain a social enquiry report about that person's circumstances and to take into account that report and any other information before it which is relevant to his character and condition. (Recommendation 12)

¹ See Draft Bill, Clause 1, s. 2D(6)(a).

² See Draft Bill, Clause 1, s. 2D(6)(b).

³ Criminal Procedure (Scotland) Act 1975, (c.21), ss. 175 and 376.

PART VII SUMMARY OF PRINCIPAL RECOMMENDATIONS

- 1 Incest should be retained as a separate criminal offence. (Paragraph 3.24).
- 2 The present definition of incest, requiring penetration, should be retained and should not be extended to other forms of sexual misconduct. (Paragraph 4.5 and Draft Bill, Clause 1, Section 2A(1)).
- 3 The prohibition against incest should extend to the following relationships based on consanguinity:
 - (i) parents and children;
 - (ii) grandparents and grandchildren;
 - (iii) great-grandparents and great-grandchildren;
 - (iv) brothers and sisters;
 - (v) uncles and nieces, aunts and nephews,regardless of whether the relationship is of the full blood or of the half blood. (Paragraph 4.10 and Draft Bill, Clause 1, Section 2A(1) and 2A(2)(a)).
- 4 The illegitimate child should be placed with regard to incest in the same position as the legitimate child. (Paragraph 4.11 and Draft Bill, Clause 1, Section 2A(2)(b)).
- 5 Sexual intercourse between an adopted child (or former adopted child) and an adoptive parent (or former adoptive parent) should be characterised as incest. (Paragraph 4.17 and Draft Bill, Clause 1, Section 2A(1)).
- 6 The crime of incest should not be constituted by intercourse between a person and the relatives of his or her spouse. (Paragraph 4.28 and Draft Bill, Clause 1, Section 2A(3)).
- 7 It should be a separate offence for any step-parent or former step-parent to have sexual intercourse with his or her step-child under the age of 16 years. (Paragraph 4.28 and Draft Bill, Clause 1, Section 2B).
- 8 If any person over the age of 16 years is in a position of trust or authority in relation to a child under the age of 16 years and is a member of the same household, it should be a criminal offence for that person to have sexual intercourse with the child. (Paragraph 4.36 and Draft Bill, Clause 1, Section 2C).
- 9
 - (a) Where relationship or age is a relevant factor, it should be a defence to the charge that the accused did not know of, and had no reason to suspect, the relationship of the other party, or believed on reasonable grounds that the other party was of or over the age of 16;
 - (b) it should be a defence to the charge that the accused did not consent to have sexual intercourse or to have sexual intercourse with the other party. (Paragraph 4.43 and Draft Bill, Clause 1, Sections 2A(1), 2B and 2C).

10 It should be competent to prosecute incest and the offences contained in Recommendations 7 and 8 on indictment in the High Court and Sheriff Court and, on the direction of the Lord Advocate, on a summary complaint in the Sheriff Court. (Paragraph 5.7 and Draft Bill, Clause 1, Section 2D(1)).

11 The maximum penalties for incest and for the offences contained in Recommendations 7 and 8 should be as follows (a) on indictment in the High Court—life imprisonment; (b) on indictment in the Sheriff Court, (unless remitted to the High Court for sentence)—2 years imprisonment; (c) on summary conviction in the Sheriff Court—3 months imprisonment. (Paragraph 5.9 and Draft Bill, Clause 1, Section 2D(5)).

12 Provision should be made to require the court, before passing sentence on a person convicted of incest or of an offence mentioned in Recommendation 7 or 8, to obtain a social enquiry report about that person's circumstances and to take into account that report and any other information before it which is relevant to his character and condition. (Paragraph 6.22).

APPENDIX 1

**Incest and Related Offences
(Scotland) Bill**

ARRANGEMENT OF CLAUSES

Clause

1. Incest and related offences.
2. Consequential amendments and repeals.
3. Short title, commencement and extent.

SCHEDULES

- Schedule 1—Consequential amendments.
Schedule 2—Enactments repealed.

Incest and Related Offences (Scotland) Bill

DRAFT

OF A

BILL

TO

Make provision for Scotland in respect of incest and related offences.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Incest and related offences.

1. After section 2 of the Sexual Offences (Scotland) Act 1976 there shall be inserted the following sections—

“Incest

2A. (1) Any male person who has sexual intercourse with a person related to him in a degree specified in column 1 of the Table set out at the end of this subsection, or any female person who has sexual intercourse with a person related to her in a degree specified in column 2 of that Table, shall be guilty of incest, unless the accused proves that he or she—

(a) did not know and had no reason to suspect that the person with whom he or she had sexual intercourse was related in a degree so specified; or

EXPLANATORY NOTES

Clause 1

This clause implements the proposals contained in paragraphs 4.1 and 4.2 namely that the law should be restated in modern statutory form and that it should be incorporated into the Sexual Offences (Scotland) Act 1976.

Section 2A

Subsection (1)

This subsection implements Recommendations 2, 3 and 5 by defining incest as sexual intercourse between specified persons who are related by consanguinity or adoption.

Paragraph (a) of subsection (1)

This paragraph implements Recommendation 9 by providing an accused person with a defence to the charge if he or she proves that he or she did not know and had no reason to suspect that the person with whom he or she had sexual intercourse was related to him or her within the forbidden degrees. This matter is discussed in paragraphs 4.37, 4.38 and 4.40 to 4.43. (Cf. also the Mental Health (Scotland) Act 1960, sections 96(2) and 97(2)).

Incest and Related Offences (Scotland) Bill

- (b) did not consent to have sexual intercourse or to have sexual intercourse with that person; or
- (c) was married to that person, at the time when the sexual intercourse took place, by a marriage entered into outside Scotland and recognised as valid by Scots law.

TABLE
DEGREES OF RELATIONSHIP

Column 1	Column 2
<i>1. Relationships by consanguinity</i>	
Mother	Father
Daughter	Son
Grandmother	Grandfather
Granddaughter	Grandson
Sister	Brother
Aunt	Uncle
Niece	Nephew
Great grandmother	Great grandfather
Great granddaughter	Great grandson
<i>2. Relationships by adoption</i>	
Adoptive mother or former adoptive mother.	Adoptive father or former adoptive father.
Adopted daughter or former adopted daughter.	Adopted son or former adopted son.

(2) For the purpose of this section, a degree of relationship exists in the case of a degree specified in paragraph 1 of the Table—

(a) whether it is of the full blood or the half blood; and

(b) even where traced through or to any person of illegitimate birth.

EXPLANATORY NOTES

Paragraph (b) of subsection (1)

This paragraph implements Recommendation 9 by providing a defence to an accused who did not consent to the act of intercourse or who was the victim of impersonation or similar subterfuge.

Paragraph (c) of subsection (1)

This paragraph implements the proposal in paragraph 4.44 by providing accused persons with a defence to a charge of incest if they can prove that at the time when intercourse took place, they had entered into a marriage outside Scotland which is recognised as valid by Scots law.

Table

The table lists the relationships by consanguinity in accordance with Recommendation 3 and the relationships by adoption in accordance with Recommendation 5. These correspond to the relationships by consanguinity and adoption within which marriage is prohibited by the Marriage (Scotland) Act 1977.

Paragraph (a) of subsection (2)

This paragraph implements that part of Recommendation 3 which refers to relationships of the full blood and half blood. It provides that a consanguineous relationship exists whether it is of the full blood or the half blood. Again this is in line with the Marriage (Scotland) Act 1977.

Paragraph (b) of subsection (2)

This paragraph implements Recommendation 4. It places illegitimate children in the same position as legitimate children with regard to incest. This too is in line with the Marriage (Scotland) Act 1977.

Incest and Related Offences (Scotland) Bill

(3) For the avoidance of doubt incest may not be committed otherwise than by virtue of this section.

Intercourse
with step-child
under 16.

2B. Any step-parent or former step-parent who has sexual intercourse with his or her step-child or former step-child under the age of 16 years shall be guilty of an offence, unless the accused proves that he or she—

- (a) did not know and had no reason to suspect that the person with whom he or she had sexual intercourse was a step-child or former step-child; or
- (b) believed on reasonable grounds that that person was of or over the age of 16 years; or
- (c) did not consent to have sexual intercourse or to have sexual intercourse with that person; or
- (d) was married to that person, at the time when the sexual intercourse took place, by a marriage entered into outside Scotland and recognised as valid by Scots law.

EXPLANATORY NOTES

Subsection (3)

This subsection, by restricting incest to the definition contained in section 2A, replaces the present legislative and common law provisions as proposed in paragraph 4.1. In addition, since section 2A does not include any relationships by affinity, this subsection also implements Recommendation 6.

Section 2B

This section implements Recommendation 7. If relationships by affinity are removed from incest, intercourse between a step-parent and step-child will cease to be incestuous. This section creates a specific offence to protect step-children until they have reached the age of 16 years. The reasons are fully discussed in paragraphs 4.18 to 4.26.

Paragraph (a)

This paragraph implements Recommendation 9 by providing an accused person with a defence to the charge if he or she proves that he or she did not know of and had no reason to suspect the existence of the relationship. This matter is discussed in paragraphs 4.27, 4.37, 4.38 and 4.40 to 4.43.

Paragraph (b)

This paragraph implements Recommendation 9 by providing an accused person with a defence to the charge if he or she proves that he or she had reasonable grounds for believing that the other party to the act of intercourse was of or over 16 years of age. This matter is discussed in paragraphs 4.27, 4.37, 4.39 to 4.43.

Paragraph (c)

This paragraph implements Recommendation 9 by providing a defence to an accused who did not consent to the act of intercourse or who was the victim of impersonation or similar subterfuge.

Paragraph (d)

This paragraph implements the proposal in paragraph 4.44 by providing accused persons with a defence to a charge under section 2B, if they can prove that at the time when intercourse took place, they had entered into a marriage outside Scotland which is recognised as valid by Scots law.

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Intercourse of person in position of trust with child under 16.

- 2C. Any person of or over the age of 16 years who—
- (a) has sexual intercourse with a child under the age of 16 years;
 - (b) is a member of the same household as that child; and
 - (c) is in a position of trust or authority in relation to that child,
- shall be guilty of an offence, unless the accused proves that he or she—
- (i) believed on reasonable grounds that the person with whom he or she had sexual intercourse was of or over the age of 16 years; or
 - (ii) did not consent to have sexual intercourse or to have sexual intercourse with that person; or
 - (iii) was married to that person, at the time when the sexual intercourse took place, by a marriage entered into outside Scotland and recognised as valid by Scots law.

Proceedings and penalties for offences under ss. 2A–2C.

2D. (1) Proceedings in respect of an offence under section 2A, 2B or 2C of this Act may be brought on indictment or, if the Lord Advocate so directs, on a summary complaint before the sheriff.

(2) Summary proceedings in pursuance of this section may be commenced at any time within the period of 6 months from the date on which evidence sufficient in the opinion of the Lord Advocate to justify the proceedings comes to his knowledge.

EXPLANATORY NOTES

Section 2C

This section implements Recommendation 8 and makes it an offence for any person over the age of 16 years to have intercourse with a child under 16 years of age, provided that (first) the accused is a member of the same household and (second) is in a position of trust or authority over that child. Both conditions must apply in order to convict the accused. The offence is discussed in paragraphs 4.30 to 4.36. The expressions “in a position of trust or authority” and “member of the same household” are not defined, but are discussed in paragraphs 4.33 and 4.34.

Head (i)

This implements Recommendation 9 by providing an accused person with a defence to the charge if he or she proves that he or she believed on reasonable grounds that the child was of or over the age of 16 years. This matter is discussed in paragraphs 4.35, 4.37, 4.39 to 4.43.

Head (ii)

This implements Recommendation 9 by providing a defence to an accused who did not consent to the act of intercourse or who was the victim of impersonation or similar subterfuge.

Head (iii)

This implements the proposal in paragraph 4.44 by providing accused persons with a defence to a charge under section 2C if they can prove that at the time when intercourse took place, they had entered into a marriage outside Scotland which is recognised as valid by Scots law.

Section 2D

This section makes provision for the method of prosecution, penalties and other procedural matters in relation to the offences created by sections 2A, 2B and 2C.

Subsection (1)

This subsection implements Recommendation 10 by providing that the offences created by sections 2A, 2B and 2C may be prosecuted on indictment in the High Court or Sheriff Court, and, on the direction of the Lord Advocate, on a summary complaint in the Sheriff Court. This matter is discussed in paragraphs 5.4 and 5.5.

Subsection (2)

This subsection implements the proposal in paragraphs 5.12 to 5.14 and prevents summary proceedings from becoming time barred (in terms of section 331(2) of the Criminal Procedure (Scotland) Act 1975) because proceedings have not been instituted within six months of the occurrence of the offence. This subsection substitutes a different time limit, namely six months from the date on which evidence sufficient in the opinion of the Lord Advocate to justify proceedings comes to his knowledge. The reasons for making this provision are given in paragraphs 5.12 to 5.14.

Incest and Related Offences (Scotland) Bill

(3) Subsection (3) of section 331 of the Criminal Procedure (Scotland) Act 1975 (date of commencement of summary proceedings) shall have effect for the purposes of subsection (2) above as it has effect for the purposes of that section.

(4) For the purposes of subsection (2) above, a certificate of the Lord Advocate as to the date on which the evidence in question came to his knowledge is conclusive evidence of the date on which it did so.

(5) Subject to subsection (6) below, a person guilty of an offence under section 2A, 2B or 2C of this Act shall be liable—

- (a) on conviction on indictment in the High Court of Justiciary, to imprisonment for any term of imprisonment up to and including life imprisonment;
- (b) on conviction on indictment before the sheriff, to imprisonment for a term not exceeding 2 years; and
- (c) on summary conviction, to imprisonment for a term not exceeding 3 months.

(6) Before passing sentence on a person convicted of any such offence, the court shall—

- (a) obtain information about that person's circumstances from an officer of a local authority or otherwise and consider that information; and
- (b) take into account any information before it which is relevant to his character and to his physical and mental condition."

EXPLANATORY NOTES

Subsection (3)

This subsection prevents any undue delay in the taking of summary proceedings and determines the date on which proceedings are deemed to be commenced. Although subsection (2) above alters the rule regarding time limits, this subsection ensures that summary proceedings under section 2A, 2B or 2C will otherwise conform to the normal procedure for summary prosecution for a statutory offence. This is discussed in paragraph 5.14.

Subsection (4)

This subsection allows the court to determine the date on which sufficient evidence came to the notice of the Lord Advocate, should this be required under subsection (2) of this section. This matter is discussed in paragraph 5.15.

Subsection (5)

This subsection provides the penalties on conviction for an offence under section 2A, 2B or 2C and implements Recommendation 11. These penalties accord with the normal powers of the court and are discussed in paragraphs 5.3 to 5.6 and 5.8. Nothing in this subsection will prevent the sheriff, in indictment cases, remitting the accused to the High Court for sentence if he holds that a sentence in excess of two years imprisonment is deserved. The penalties specified in this subsection are the maxima which the court can impose and it is not necessary to suggest alternative or lesser penalties—see paragraphs 5.10 and 5.11.

Subsection (6)

This subsection provides that the court must (a) obtain a social enquiry report and (b) take account of any medical, psychiatric or other report (which it has instructed to be obtained or is placed before it by either of the parties), before passing sentence on the accused. This provision applies in every case and is not restricted to cases where the court wishes to impose a sentence of imprisonment. This matter is discussed in paragraphs 6.18 and 6.19 and implements Recommendation 12.

Incest and Related Offences (Scotland) Bill

Consequential
amendments and
repeals.

2.—(1) The enactments specified in Schedule 1 to this Act shall have effect subject to the amendments set out in that Schedule, being amendments consequential on the provisions of this Act.

(2) The enactments specified in Schedule 2 to this Act are hereby repealed to the extent specified in the third column of that Schedule.

Short title,
commencement
and extent.

3.—(1) This Act may be cited as the Incest and Related Offences (Scotland) Act 1981.

(2) This Act shall come into operation at the expiration of the period of one month beginning with the date on which it is passed.

(3) This Act extends to Scotland only.

EXPLANATORY NOTES

Incest and Related Offences (Scotland) Bill

SCHEDULES

SCHEDULE 1

CONSEQUENTIAL AMENDMENTS

The Social Work (Scotland) Act 1968 (c.49)

1. In section 32(2)(e) (children in need of compulsory measures of care), for the words from “in respect” to “incest” there shall be substituted the words “aged 17 years or over in respect of whom an offence under section 2A of the Sexual Offences (Scotland) Act 1976”.

The Criminal Procedure (Scotland) Act 1975 (c.21)

2. In section 171(3) (presumption and determination of age of child), for the words “(b) to” there shall be substituted the words “(c) and” and after the word “section” there shall be inserted “2A,”.

3. In section 331(2) (statutory offences time limit), after the words “mentioned in” there shall be inserted the words “paragraph (d) of”.

4. In section 368(3) (presumption and determination of age of child), for the words “(b) to” there shall be substituted the words “(c) and” and after the word “section” there shall be inserted “2A,”.

The Children Act 1975 (c.72)

5. In Schedule 2 (status conferred in Scotland by adoption), at the end of paragraph 1(3) there shall be added the words “and incest.”.

The Sexual Offences (Scotland) Act 1976 (c.67)

6. At the beginning of section 4(1) (intercourse with girl between 13 and 16), there shall be added the words “Without prejudice to sections 2A to 2D of this Act”.

The Adoption (Scotland) Act 1978 (c.28)

7. At the end of section 41(1) (status conferred in Scotland by adoption), there shall be added the words “and incest.”.

EXPLANATORY NOTES

1. This amendment is required as a consequence of incorporating incest into the Sexual Offences (Scotland) Act 1976 as section 2A of that Act. If the child is under 17, paragraph (d) of section 32(2) of the Social Work (Scotland) Act 1968 will now apply, and section 32(2)(e) requires to be amended accordingly. The apparent anomaly of restricting section 32(2)(e) to female children is discussed in paragraphs 6.9 and 6.10.

2. Section 171(3) relates to proceedings on indictment. This amendment is required because of the incorporation of incest into the Sexual Offences (Scotland) Act 1976 and the consequential repeal of paragraph (b) of Schedule 1 to the Criminal Procedure (Scotland) Act 1975. The repeal is achieved by Schedule 2 below. Section 171(3) refers to Schedule 1 to the 1975 Act and to the Sexual Offences (Scotland) Act 1976.

3. This amendment is required as a consequence of incorporating incest into the Sexual Offences (Scotland) Act 1976 and of altering the time limits for summary proceedings under proposed sections 2A, 2B and 2C of that Act by section 2D(2) of this Bill.

4. Section 368(3) relates to summary proceedings, but otherwise it is in the same terms as section 171(3); the reasons for this amendment are the same as noted above for amending that section.

5. This amendment is required as a consequence of including intercourse between an adopted child (or former adopted child) and an adoptive parent (or former adoptive parent) in the prohibited degrees for incest as proposed by section 2A of this Bill. The necessity for the amendment is discussed in paragraph 4.16.

6. This amendment is required as a consequence of incorporating incest and the other related offences into the Sexual Offences (Scotland) Act 1976. It ensures that proposed sections 2A, 2B and 2C are in addition to the offences mentioned in that Act, rather than alternatives to them. This matter is discussed in paragraph 4.2.

7. The Adoption (Scotland) Act 1978 is not yet in force. Section 41(1) consolidates paragraph 1(3) of Schedule 2 to the Children Act 1975 and it therefore requires to be amended in the same way as paragraph 1(3) is amended by paragraph 5 of this Schedule.

Incest and Related Offences (Scotland) Bill

SCHEDULE 2

ENACTMENTS REPEALED

Session and Chapter.	Short Title.	Extent of Repeal.
1567 c.15.	The Incest Act 1567.	The whole Act.
1 & 2 Geo. 6 c.48.	The Criminal Procedure (Scotland) Act 1938.	Section 13.
1975 c.21.	The Criminal Procedure (Scotland) Act 1975.	In Schedule 1, paragraph (b).

EXPLANATORY NOTES

Section 13 is rendered unnecessary by virtue of section 2A(3) of this Bill. In future, if the prohibited degrees of marriage are altered, it may be necessary to amend the prohibited degrees for incest. References to section 13 are contained in paragraphs 2.5 and 3.5.

Schedule 1, paragraph (b) refers to incest and requires to be repealed as a consequence of incorporating incest into the Sexual Offences (Scotland) Act 1975 to which paragraph (a) of Schedule 1 relates.

APPENDIX II

Incest Statistics

Number of cases made known to the Police 1951-1978

Year	Rape	Assault with Intent	Indecent Assault	Incest
1951	18	18	287	20
1952	22	16	284	35
1953	27	23	259	20
1954	26	22	254	32
1955	21	20	259	42
1956	23	16	229	27
1957	35	32	281	23
1958	27	31	299	23
1959	34	39	405	27
1960	40	33	381	41
1961	40	50	381	39
1962	42	49	452	41
1963	55	43	438	18
1964	39	66	542	47
1965	58	57	527	33
1966	64	48	506	44
1967	101	76	669	33
1968	81	88	708	44
1969	91	100	725	25
1970	77	110	605	33
1971	102	92	674	44
1972	131	91	601	31
1973	101	140	618	36
1974	120	121	701	32
1975	141	146	691	49
1976	184	146	805	33
1977	178	156	807	42
1978	166	164	946	23

Number of persons proceeded against for incest and convicted

Year	Persons proceeded against		Persons convicted	
	M.	F.	M.	F.
1951	6	—	5	—
1952	15	—	8	—
1953	10	—	9	—
1954	18	—	13	—
1955	7	—	5	—
1956	16	1	14	—
1957	9	—	7	—
1958	13	—	9	—
1959	13	—	9	—
1960	14	—	12	—
1961	24	—	21	—
1962	8	—	7	—
1963	13	—	13	—
1964	9	—	8	—
1965	14	2	11	1
1966	15	—	13	—
1967	8	—	7	—
1968	15	—	14	—
1969	8	—	7	—
1970	6	—	6	—
1971	21	2	14	1
1972	11	—	10	—
1973	12	1	10	1
1974	13	—	11	—
1975	15	1	11	—
1976	6	—	3	—
1977	11	—	11	—
1978	17	3	14	3

Examination of incest cases reported to Crown Office between April 1971 and December 1976

<i>(a) The relationship involved</i>	<i>No. of Cases</i>
Father–daughter incest	40
Step-father–step-daughter incest	3
Mother–son incest	1
Brother–sister incest	3
Uncle–niece incest	4
Father-in-law–daughter-in-law incest	1
TOTAL	<hr/> 52 <hr/>

(b) *Father–daughter incest*

Of the 40 cases, there were only 4 acquittals and in one case a plea of guilty to a lesser charge was accepted by the Crown. In no case was a daughter prosecuted although 4 could be described as having been “adult” at the start of the course of incest.

<i>Ages of daughters</i>				
Under 10 years	10–12 years	13–15 years	16–17 years	18–19 years
8	14	26	3	1

<i>Ages of fathers</i>			
29–35 years	36–40 years	41–45 years	46–49 years
12	14	9	5

Two-thirds of the fathers were between the ages of 29 and 40; the youngest father was 29; the oldest was 49.

<i>Sentences Imposed</i>		
Imprisonment	Hospital Orders	Probation
33	2	1

<i>Lengths of Sentences</i>				
Under 2 years	2 years	2½ years	3 years	4 years
7	4	3	7	6
	5 years		Life Imprisonment	
	5		1	

(c) *Step-father and step-daughter incest*

Two convictions resulted from the 3 cases reported. In the first case, where the parties were aged 32 and 13, the sentence imposed was one of 2 years imprisonment. In the other case both parties were adult, the step-daughter being 25 and the step-father 43. He alone was prosecuted and received an admonition.

(d) *Mother–son*

The one case reported involved a mother and her illegitimate son who was adult but, like his mother, mentally retarded. Both were prosecuted and a guardianship order made under the Mental Health (Scotland) Act 1960 in respect of both.

(e) *Brother-sister incest*

Three cases were reported with the following results.

Age of Brother	Age of Sister	Sentence
19 years	14 years	Hospital Order
32 years	15 years	3 Years imprisonment
16 years	14 years	Probation

(f) *Uncle-niece incest*

One of the four cases reported led to an acquittal; the niece was not prosecuted.

Age of Uncle	Age of Niece	Sentence
31 years	15 years	18 months
20 years	14 years	18 months
47 years	17 years	1 month

(g) *Father-in-law and daughter-in-law*

Both parties in the only case reported were prosecuted and pled guilty. The male was 57 and the female 19. He was fined £50 and she was put on probation for a period of 3 years.

APPENDIX III¹

Summary of the law of other countries

1. *England and Wales*

The law relating to incest is to be found in the Sexual Offences Act 1956:—²

Section 10(1) “It is an offence for a man to have sexual intercourse with a woman whom he knows to be his granddaughter, daughter, sister or mother.

(2) In the foregoing subsection ‘sister’ includes half-sister, and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through lawful wedlock.”

Section 11(1) “It is an offence for a woman of the age of 16 or over to permit a man whom she knows to be her grandfather, father, brother, or son to have sexual intercourse with her by her consent.

(2) In the foregoing subsection ‘brother’ includes half-brother and for the purposes of that subsection any expression importing a relationship between two people shall be taken to apply notwithstanding that the relationship is not traced through unlawful wedlock.”

It will be noted that the prohibited degrees apply only to relationships by consanguinity and there is a seeming anomaly in that while grandfather–granddaughter intercourse is proscribed, grandmother–grandson intercourse is not. The penalty for the offence is imprisonment not exceeding seven years (or life imprisonment where committed with a girl under 13) and the penalty for attempt is imprisonment not exceeding two years (or seven years where committed with a girl under 13). Furthermore, if the offender is convicted of incest, or attempted incest with a boy or girl under the age of eighteen the court may “divest that person of all authority over the girl or boy . . . (and) if that person is the guardian of the girl or boy, remove that person from the guardianship . . . (and) may appoint a person to be the guardian of the girl or boy during his or her minority or any less period.”³

As noted in paragraph 3.4 of this Report, the law of incest is currently being reviewed by the Criminal Law Revision Committee which published a Working Paper on Sexual Offences in October 1980.

2. *New Zealand*

The law relating to incest is found in section 130 of the Criminal Code:—⁴

Section 130(1) “Incest is sexual intercourse between—

(a) Parent and child; or

(b) Brother and sister, whether of the whole blood or of the half blood, . . . ; or

¹ See paras. 3.4 and 4.32.

² c.69. The Memorandum, paras. 5.2 and 5.3 give some historical background and further comment.

³ Sexual Offences Act 1956, s. 38, as amended by the Guardianship Act 1973 (c.29).

⁴ See also Memorandum, paras. 5.4 to 5.6 for further background.

(c) Grandparent and grandchild—
where the person charged knows of the relationship between the parties.

- (2) Every one of or over the age of sixteen years who commits incest is liable to imprisonment for a term not exceeding ten years.”

The prohibition extends to cover illegitimate relationships. In addition, section 131, which relates to “sexual intercourse with a girl under care or protection” provides—

“(1) Every one is liable to imprisonment for a term not exceeding seven years who has or attempts to have sexual intercourse with any girl, not being his wife, who is under the age of twenty years and who—

(a) Being his step-daughter, foster daughter, or ward, is at the time of the intercourse or attempted intercourse living with him as a member of his family; or

(b) Not being his step-daughter, foster daughter, or ward, and not being a person living with him as his wife, is at the time of the intercourse or attempted intercourse living with him as a member of his family and is under his care or protection.

- (2) It is no defence to a charge under this section that the girl consented.”

3. *Canada*

The law relating to incest is found in section 142 of the Criminal Code:—¹

Section 150(1) “Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

- (2) Every one who commits incest is guilty of an indictable offence and is liable to imprisonment for fourteen years.

(3) Where a female person is convicted of an offence under this section and the court is satisfied that she committed the offence by reason only that she was under restraint, duress or fear of the person with whom she had the sexual intercourse, the court is not required to impose any punishment upon her.

- (4) In this section, ‘brother’ and ‘sister’, respectively, include half-brother and half-sister.”

No male person under the age of fourteen years can be convicted of incest.

In addition, section 153(1)(a) states that every male person who has “illicit sexual intercourse with his step-daughter, foster daughter or female ward” is guilty of an indictable offence and is liable to imprisonment for two years.

4. *France*

French law does not recognise incest as a separate criminal offence but in dealing with sexual offences in general, the penalties are more severe if the

¹ Canadian law is discussed in paras. 5.4 to 5.6 of the Memorandum.

offender is an ascendant relative of the victim or is in a position of authority over the victim. The law in this respect was recently altered by Statute 80–1041 of 23 December 1980.

Prior to that date, it was a criminal offence for an ascendant relative to commit an act of indecency with an unmarried minor of either sex above the age of 15 years.¹ It was held in 1955 that this applied to illegitimate as well as legitimate relationships. The new statute, while decreasing the penalties, widened the offence to include adoptive ascendant relatives and anyone in a position of authority over the victim. While the code² specifies teachers, officials, ministers of religion and some other persons as being persons in a position of authority, these are intended only as illustrative examples and the court will consider each case on its merits—for example, it has been held that a step-father falls within this category as does the co-habitee of the child's mother.³

Similarly, the minimum and maximum penalties for rape and for acts of indecency accompanied by violence, coercion or surprise are substantially increased if the offender is a legitimate, illegitimate or adoptive ascendant relative or is in a position of authority over the accused.⁴ The new statute defined rape as sexual penetration of any nature (“tout acte de pénétration sexuelle de quelque nature qu'il soit) achieved by violence, coercion or surprise, and thus includes homosexual rape.

Finally, the penalty for acts of indecency against minors under the age of 15 years, where there is no violence, is doubled if the offender is an ascendant relative or has authority over the victim.⁵

5. *Norway*

The law relating to incest is to be found in section 207 of the Penal Code as amended by the Statute of 15 February 1963.⁶ Anyone who has sexual intercourse with a descendant (but not ascendant) relative or with a brother or sister, is guilty of incest, provided the relationship is based on consanguinity. Incest does not apply if the parties are only related by marriage. In the case of brothers and sisters, the provision does not apply to persons under 18 years of age. In addition, under section 199 of the Code, it is a criminal offence to commit an indecent act (other than sexual intercourse) if the other person is a descendant relative of the offender or a step-child, foster-child, ward or pupil who is subject to his authority or supervision. This section also applies if the offender is the victim's doctor, teacher, minister or superior and has misused his position of authority.

6. *Australia*⁷

Incest is an offence in all Australian States and Territories although there is

¹ Code Pénal, Article 331, second paragraph.

² Code Pénal, Article 333.

³ See the annotated version of the Code Pénal published by the Librairie Dalloz, Article 333.

⁴ Code Pénal Articles 332 and 333 as amended by Statute 80–1041 of 23 December 1980.

⁵ Code Pénal, Article 331, first para. and Article 333.

⁶ For further details and background information, see Memorandum, paras. 5.16 and 5.17.

⁷ See paras. 3.4 and 4.32 above.

no uniformity in the content of the law.¹ Since criminal law is retained within the plenary powers of the State Parliaments, it is outwith the legislative competence of the Commonwealth Parliament except in regard to any territory which the latter accepts and which is surrendered to it, placed under its authority, or otherwise acquired by it.² In 1975, officials of the Commonwealth Attorney-General's Department presented proposals to revise and reform the criminal law of the Australian capital territory.³ With regard to incest, the following provisions were proposed:—

“70. Incest

- (1) A person who has sexual intercourse with a person under the age of 18 and to whom he or she is related, commits an offence.
- (2) For the purposes of sub-section (1), two persons are related to each other only if one is the mother, sister, daughter, granddaughter, father, brother, son or grandson of the other, whether the relationship is of the half-blood or the full-blood or is or is not traced through lawful wedlock.
- (3) It is a defence under this section that the person charged—
 - (a) did not know that the person with whom the offence is alleged to have been committed was related to him or her;
 - or
 - (b) believed, on reasonable grounds, that the other person was of or above the age of 18.”

These proposals have not been implemented.

The most recent proposals for reforming the law of incest were made in the Report of the Royal Commission on Human Relationships, published in 1977. After discussing the social aspects of incest and the interests which the incest law protects, the Report concluded that there is no justification for the intervention of the criminal law in incestuous behaviour between consenting adults.⁴ The Report, however, recommends that father–daughter incest should be prohibited where the girl is under 17 years of age, as should brother–sister incest where one party is under that age and there is more than 5 years age difference between them.⁵ The Report further stated,⁶ “it is clear that girls are equally in need of protection from father substitutes. The same opportunities for exploitation can exist in relation to father substitutes, and the same harmful results can follow. We therefore propose that the age of consent of 17 should apply in relation to adoptive parents, guardians, foster parents, step-parents and *de facto* husbands and wives of the child's mother and father. The same age should also apply in relation to boys, as a protection

¹ Royal Commission on Human Relationships, (published in Canberra, 1977), Vol. 5, Chap. 17 which also gives details of some of the provisions for incest in the different States.

² A draft criminal code for these Territories was published in 1969 containing *inter alia* provisions on incest. Details are given in para. 5.7 of the Memorandum. The code was not implemented.

³ Attorney-General's Department: Report of the Working Party on Territories Criminal Law: A.G.D.S. Canberra 1975.

⁴ Report, Vol. 5, Chap. 17, paras. 5 to 17.

⁵ Report, Vol. 5, Chap. 17, para. 22.

⁶ In para. 23.

against sexuality with mother substitutes, although statistics indicate that such offences are rare.” The Report also proposes¹ that in addition to any criminal sanction, the needs of each particular family should be examined and that a child protection agency social worker should assess the family situation in order to decide how the child’s interests could best be served.

We have been informed that the Royal Commission’s proposals were met with an immediate and critical response and that there is no immediate prospect of their implementation.

¹ In para. 26.

APPENDIX IV

Forbidden Degrees for Marriage¹

Marriage (Scotland) Act 1977 (c.15)

2.—(1) A marriage between a man and any woman related to him in a degree specified in column 1 of Schedule 1 to this Act, or between a woman and any man related to her in a degree specified in column 2 of that Schedule shall be void if solemnised—

- (a) in Scotland; or
 - (b) at a time when either party is domiciled in Scotland.
- (2) For the purposes of this section a degree of relationship exists—
- (a) in the case of a degree specified in paragraph 1 of Schedule 1 to this Act, whether it is of the full blood or the half blood; and
 - (b) in the case of a degree specified in paragraph 1 or 2 of the said Schedule, even where traced through or to any person of illegitimate birth.

(3) Where a person is related to another person in a degree not specified in Schedule 1 to this Act that degree of relationship shall not, in Scots law, bar a valid marriage between them; but this subsection is without prejudice to—

- (a) the effect which a degree of relationship not so specified may have under the provisions of a system of law other than Scots law in a case where such provisions apply as the law of the place of celebration of a marriage or as the law of a person's domicile; or
- (b) any rule of law that a marriage may not be contracted between persons either of whom is married to a third person.

¹ See para. 3.5 above.

SCHEDULE 1
Degrees of Relationship

Column 1

Column 2

1. *Relationships by consanguinity*

Mother;	Father;
Daughter;	Son;
Father's mother;	Father's father;
Mother's mother;	Mother's father;
Son's daughter;	Son's son;
Daughter's daughter;	Daughter's son;
Sister;	Brother;
Father's sister;	Father's brother;
Mother's sister;	Mother's brother;
Brother's daughter;	Brother's son;
Sister's daughter;	Sister's son;
Father's father's mother;	Father's father's father;
Father's mother's mother;	Father's mother's father;
Mother's father's mother;	Mother's father's father;
Mother's mother's mother;	Mother's mother's father;
Son's son's daughter;	Son's son's son;
Son's daughter's daughter;	Son's daughter's son;
Daughter's son's daughter;	Daughter's son's son;
Daughter's daughter's daughter;	Daughter's daughter's son.

2. *Relationships by affinity*

Mother of former wife;	Father of former husband;
Daughter of former wife;	Son of former husband;
Former wife of father;	Former husband of mother;
Former wife of son;	Former husband of daughter;
Former wife of father's father;	Former husband of father's mother;
Former wife of mother's father;	Former husband of mother's mother;
Mother of father of former wife;	Father of father of former husband;
Mother of mother of former wife;	Father of mother of former husband;
Daughter of son of former wife;	Son of son of former husband;
Daughter of daughter of former wife;	Son of daughter of former husband;
Former wife of son's son;	Former husband of son's daughter;
Former wife of daughter's son;	Former husband of daughter's daughter.

3. *Relationships by adoption*

Adoptive mother or former adoptive mother;	Adoptive father or former adoptive father;
Adopted daughter or former adopted daughter;	Adopted son or former adopted son.

APPENDIX V¹

Extracts from The Social Work (Scotland) Act 1968 and The Criminal Procedure (Scotland) Act 1975

Social Work (Scotland) Act 1968 (c.49)

Section 32(1) A child may be in need of compulsory measures of care within the meaning of this Part of this Act if any of the conditions mentioned in the next following subsection is satisfied with respect to him.

- (2) The conditions referred to in subsection (1) of this section are that—
- (a) he is beyond the control of his parent; or
 - (b) he is falling into bad associations or is exposed to moral danger; or
 - (c) lack of parental care is likely to cause him unnecessary suffering or seriously to impair his health or development; or
 - (d) any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975 has been committed in respect of him or in respect of a child who is a member of the same household; or
 - (dd) the child is, or is likely to become, a member of the same household as a person who has committed any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975; or
 - (e) the child, being a female, is a member of the same household as a female in respect of whom an offence which constitutes the crime of incest has been committed by a member of that household; or
 - (f) he has failed to attend school regularly without reasonable excuse; or
 - (g) he has committed an offence; or
 - (h) he is a child whose case has been referred to a children's hearing in pursuance of Part V of this Act.
- (3) For the purposes of this Part of this Act "care" includes protection, control, guidance and treatment.

Section 37(1) Where any person has reasonable cause to believe that a child may be in need of compulsory measures of care he may give to the reporter such information about the child as he may have been able to discover.

- (1A) Where a local authority receive information suggesting that a child may be in need of compulsory measures of care, they shall—
- (a) cause enquiries to be made into the case unless they are satisfied that such enquiries are unnecessary; and
 - (b) if it appears to them that the child may be in need of compulsory measures of care, give to the reporter such

¹ See paras. 6.9 to 6.12 above.

information about the child as they may have been able to discover.

- (2) A constable or any person authorised by any court or by any justice of the peace may take to a place of safety any child—
- (a) in respect of whom any of the offences mentioned in Schedule 1 to the Criminal Procedure (Scotland) Act 1975 has been or is believed to have been committed; or
 - (b) who is a member of the same household as a child in respect of whom such an offence has been or is believed to have been committed; or
 - (c) who is, or is likely to become, a member of the same household as a person who has committed or is believed to have committed such an offence; or
 - (d) in respect of whom an offence under section 21(1) of the Children and Young Persons (Scotland) Act 1937 has been or is believed to have been committed; or
 - (e) who is likely to be caused unnecessary suffering or serious impairment of health because there is, or is believed to be, in respect of the child a lack of parental care,

and any child so taken to a place of safety or any child who has taken refuge in a place of safety may be detained there until arrangements can be made for him to be brought before a children's hearing under the following provisions of this Part of this Act; and, where a child is so detained, the constable or the person authorised as aforesaid or the occupier of the place of safety shall forthwith inform the reporter of the case.

- Section 39(1) Where the reporter decides that no further action on the case is required, he shall, where he considers this to be the proper course, so inform the child and his parent and the person who brought the case to his notice, or any of those persons.
- (2) Where the reporter considers it to be the proper course, he shall refer the case to the local authority with a view of their making arrangements for the advice, guidance and assistance of the child and his family in accordance with Part II of this Act.
 - (3) Where it appears to the reporter that the child is in need of compulsory measures of care, he shall arrange a children's hearing to whom the case shall stand referred for consideration and determination.
 - (4) Where the reporter has arranged a children's hearing in pursuance of the last foregoing subsection, he shall request from the local authority a report on the child and his social background and it shall be the duty of the authority to supply the report which may contain information from any

such person as the reporter or the local authority may think fit.

- (5) Where the reporter has decided that no further action on the case is required, or has taken action in pursuance of subsection (2) of this section, he shall not thereafter take action under subsection (3) of this section in relation to the same facts.

Section 42(1) Subject to the provisions of subsections (7) and (8) of this section, at the commencement of a children's hearing, and before proceeding to the consideration of the case, it shall be the duty of the chairman to explain to the child and his parent the grounds stated by the reporter for the referral of the case for the purpose of ascertaining whether these grounds are accepted in whole or in part by the child and his parent.

(2) Thereafter—

- (a) where the child and his parent accept the grounds stated by the reporter for the referral the hearing shall proceed;
- (b) where the child and his parent accept those grounds in part and the children's hearing consider it proper so to do the hearing may proceed in respect of the grounds so accepted; and
- (c) in any other case, unless they decide to discharge the referral, the children's hearing shall direct the reporter to make application to the sheriff for a finding as to whether such grounds for the referral, as are not accepted by the child or his parent, are established having regard to the provisions of section 32 of this Act.
- (3) It shall be the duty of the chairman of a children's hearing who have made a direction under the last foregoing subsection to explain to the child and his parent the purpose for which the application to the sheriff is being made, and to inform the child that he is under an obligation to attend the hearing of the application, and where a child fails to attend at the hearing of the application the sheriff may issue a warrant for the apprehension of the child; and any warrant so issued shall be authority for bringing him before the sheriff and for his detention in a place of safety until the sheriff can hear the application, but a child shall not be detained under this subsection for a period exceeding seven days or after the sheriff has disposed of the application.
- (4) An application under subsection (2) of this section shall be heard by the sheriff in chambers within twenty-eight days of the lodging of the application and, without prejudice to their right to legal representation, a child or his parent may be represented at any diet fixed by the sheriff for the hearing of the application.
- (5) Where a sheriff decides that none of the grounds in respect

of which the application has been made has been established for the referral of a case to a children's hearing, he shall dismiss the application and discharge the referral in respect of those grounds.

- (6) Where the sheriff is satisfied on the evidence before him that any of the grounds in respect of which the application has been made has been established he shall remit the case to the reporter to make arrangements for a children's hearing for consideration and determination of the case, and where a ground for the referral of the case is the condition referred to in section 32(2)(g) of this Act, the sheriff in hearing the application shall apply to the evidence relating to that ground the standard of proof required in criminal procedure.
- (7) Where a children's hearing are satisfied that the child for any reason is not capable of understanding the explanation of the grounds of referral required by subsection (1) of this section, or in the course of, or at the conclusion of that explanation, it appears not to be understood by the child, the hearing shall, unless they decide to discharge the referral, direct the reporter to make application to the sheriff for a finding as to whether any of the grounds for the referral have been established, and the provisions of this section relating to an application to the sheriff under subsection (2)(c) thereof shall apply as they apply to an application under that subsection.
- (8) The acceptance by a parent of the grounds of referral shall not be a requirement to proceeding with a case under this section where the parent is not present.

Criminal Procedure (Scotland) Act 1975 (c.21)

Section 168 Any court by or before which a person is convicted of having committed any offence—

(a) under section 21 of the Children and Young Persons (Scotland) Act 1937;

(b) mentioned in Schedule 1 to this Act; or

(c) in respect of a female person aged 17 years or over which constitutes the crime of incest,

may refer—

(i) the child in respect of whom the offence mentioned in paragraph (a) or (b) above has been committed; or

(ii) any child who is, or who is likely to become, a member of the same household as the person who has committed the offence mentioned in paragraph (b) or (c) above,

to the reporter of the local authority in whose area the child resides and certify that the said offence shall be a ground

established for the purposes of Part III of the Social Work (Scotland) Act 1968.

Section 364 is in similar terms to section 168.

SCHEDULE 1

OFFENCES AGAINST CHILDREN UNDER THE AGE OF 17 YEARS TO WHICH SPECIAL PROVISIONS APPLY

- (a) Any offence under the Sexual Offences (Scotland) Act 1976.
- (b) Any offence in respect of a child under the age of 17 years which constitutes the crime of incest.
- (c) Any offence under section 12, 15, 22 or 33 of the Children and Young Persons (Scotland) Act 1937.
- (d) Any other offence involving bodily injury to a child under the age of 17 years.

APPENDIX VI

List of organisations and individuals who submitted comments on Memorandum No. 44

Approved Schools Association, Scotland.
Association of Chief Police Officers (Scotland).
Association of Directors of Social Work.
Association of Police Surgeons of Great Britain.
Association of Scottish Police Superintendents.
D. W. Batchelor, Crown Office.
Professor R. Bluglass, Midland Centre for Forensic Psychiatry.
British Agencies for Adoption and Fostering (Scottish Region).
British Association of Social Workers, Scottish Committee.
Convention of Scottish Local Authorities.
D. J. Cusine, Faculty of Law, Aberdeen University.
Professor J. H. Edwards, Professor of Genetics, University of Oxford.
Episcopal Church of Scotland Social Service Board.
Eugenics Society.
Faculty of Advocates.
Faculty of Law, University of Aberdeen.
Faculty of Law, University of Glasgow.
Professor D. S. Falconer, A.R.C. Unit of Animal Genetics, University of
Edinburgh.
Free Presbyterian Church of Scotland, Church Interests' Committee.
Dr Stanley C. Freedlander.
Dr R. W. Furness, Department of Zoology, University of Glasgow.
Sheriff G. H. Gordon.
Law Society of Scotland.
Lawyers Christian Fellowship.
Mrs Jane Lloyd, Family Therapist and Psychiatric Worker.
Lothian Area Speciality Advisory Group, Working Group in Child and
Adolescent Psychiatry.
Professor J. K. Mason, Department of Forensic Medicine, University of
Edinburgh.
Medical Women's Federation.
Professor D. R. Newth, Regius Professor of Zoology, University of Glasgow.
Ainslie J. W. Nairn, W.S.
Procurators Fiscal Society.
Dr J. A. Raeburn, Department of Human Genetics, Western General
Hospital, Edinburgh.
Professor F. W. Robertson, Department of Genetics, University of Aber-
deen.
Royal College of Psychiatrists.
Scottish Association for the Study of Delinquency.
Scottish Child Law Group.
Scottish Council for Civil Liberties.
Scottish Council for Racial Equality.
Scottish Law Agents Society.
Scottish Legal Action Group.
Sheriffs Principal.

Rev R. R. Sinclair.

Society for the Study of Human Biology.

Dr M. S. S. Small, Consultant in Child and Adult Psychiatry, Gartnavel
Royal Hospital Psychiatric Services, Glasgow.

H. D. Strang, Attorney-General's Department, Canberra.
Strathclyde Community Relations Council.

Dr F. Wasoff, Department of Criminology, University of Edinburgh.

Dr R. Williams, Department of Psychiatry, Western General Hospital,
Edinburgh.

A. Wither, Procurator Fiscal, Elgin.

We are also grateful to the various officials in the Crown Office and the Scottish Home and Health Department who commented on the Memorandum. The views expressed were not represented as being formal comment on behalf of either of the Departments concerned.

