



Briefing for the Public Petitions Committee

Petition Number: [PE1599](#)

Main Petitioner: Richard Morris

Subject: Adult Consensual Incest (ACI)

Calls on the Parliament to urge the Scottish Government to amend the law against incest so that it is not applicable in the cases where participants are both consenting adults over the age of 21. In addition, for those who have been convicted in such circumstances to have both the custodial and non-custodial elements of their sentences reviewed with a view to being quashed in light of any change to the law.

Background – the current law

The current law

The Criminal Law (Consolidation)(Scotland) Act 1995 (as amended) ('the 1995 Act') is the main piece of legislation which regulates the law of incest in Scotland.

Incest

Prohibited relationships

Section 1(1) of the 1995 Act provides that sexual intercourse with certain blood relatives constitutes incest.¹ For men the list of relatives is as follows: mother, daughter, grandmother, granddaughter, sister, aunt, niece, great grandmother and great granddaughter. For women there is a parallel list.²

¹ Section 1 of the 1995 Act is a consolidation version of section 2A of the Sexual Offences (Scotland) Act 1976, as inserted by the Incest and Related Offences (Scotland) Act 1986. Prior to the 1986 Act the law of incest was based on the Incest Act 1567 which incorporated into Scots criminal law chapter 18 of the Book of Leviticus, using the version of the text of the Geneva Bible of 1562 (*HM Advocate v RM* 1969 JC 52). Note that, despite the provisions of the 1995 Act, the 1986 Act was not repealed until 2011, via para 15, schedule 7 of the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13).

² Section 1(1) applies whether the relationship is one of half blood or full blood (1995 Act, section 1(2)(a)). It also applies even where the relationship can be traced through or to any

In addition, sexual intercourse with an adoptive parent or former adoptive parent, or adopted child or former adoptive child, is incest (1995 Act, section 1(1)).

Defences

An offence is committed unless one of the three recognised defences to the charge is proved. These are as follows (1995 Act, section 1(1)):

- the accused did not know or had no reason to suspect the person with whom he or she had sexual intercourse was related to the degree specified in section 1
- the accused did not consent to sexual intercourse or sexual intercourse with that person
- the accused and the person in question were married at the time the sexual intercourse took place, by a marriage which took place outside Scotland and which is recognised as valid in Scots law

Incest relates to sexual intercourse only

The offence of incest is tied specifically to “sexual intercourse”, a phrase long-recognised as meaning penile-vaginal intercourse.³ Accordingly the offence is not applicable to sexual activity between members of the same sex or indeed other sexual activity between a male and female not falling within that definition.

Step-parents

Under section 2 of the 1995 Act it is also an offence for a step-parent, or a former step-parent, to have sexual intercourse with a step-child, or former step-child in certain circumstances. Again, there are defences to the charge which may apply.

Sexual abuse of trust

Sections 42-45 of the Sexual Offences (Scotland) Act 2009 (asp 9) (‘the 2009 Act’) contains a separate offence of sexual abuse of trust, which is broader in

person whose parents are not, or have not been, married to each other (1995 Act, section 1(2)(b)).

³ MacLennan v MacLennan 1958 SC 105, per Lord Wheatley at 112.

scope than the offences discussed so far, in terms of the type of sexual activity covered, but the offence is directed at sexual activity with under 18s.⁴

The Sex Offenders Register

Anyone who has been convicted of a sexual offence which is listed within Schedule 3 of the Sexual Offences Act 2003 ('the 2003 Act') is automatically placed on the Sex Offenders Register.⁵ The length of time a person is placed on the register is dictated by the sentence they receive for the crime which placed them on the register.

Incest and sexual intercourse with a step-child (or former step-child) are relevant sexual offences for the purposes of the register, where the person (other than the offender) is under 18 (2003 Act, schedule 3, paras 49 and 50). The offence of sexual abuse of trust (contained in sections 42–45 of the 2009 Act) is also a relevant offence in certain circumstances (2003 Act, schedule 3, para 59ZK).

Previous reviews of this area of law in Scotland

The last major review of the law of incest in Scotland was by the Scottish Law Commission (SLC). It published a [report](#) on the topic in 1981. This was implemented via the Incest and Related Offences (Scotland) Act 1986 (c 36), the provisions of which were later consolidated in the 1995 Act.

In 2007, the SLC also published a [report](#) on rape and certain other sexual offences, which was implemented in the 2009 Act. In the [Discussion Paper](#) which preceded the report the SLC asked whether, given other sexual offences (both existing and proposed), there should continue to be a separate offence of incest.⁶ In its report (para 5.3) the SLC summarised its final position as follows:

“Although some consultees considered that there was no need for a separate offence and others were unsure, the majority favoured retaining the offence. However, there was no suggestion from those consultees that the current definition of incest should be expanded. Accordingly we make no proposal for any change to the existing law in relation to the offence of incest.”

⁴ Subject to several available defences, an offence is committed where one person (A) engages in sexual activity with another person (B) who is under 18, the two people share a household and one of a number of further conditions is satisfied. These conditions include if A and B are members of the same household and A has (or had, or fulfils) “parental rights or parental responsibilities” (PRRs) in respect of B, or if A treats B as a child of A’s family. For more on who has, or can acquire, PRRs see the following SPICe briefing: <http://www.scottish.parliament.uk/parliamentarybusiness/88334.aspx>

⁵ In addition, if a judge deems there to be a significant sexual element to any crime they can also place that person on the Register.

⁶ See paras 6.10–6.30 of the Discussion Paper for a thorough discussion of key policy considerations associated with any change to the existing law.

England and Wales

The law relating to sexual offences in England and Wales was reviewed between 1999 and 2002.⁷ The 2003 Act replaced the offence of incest with two new wider groups of offences – familial child sex offences (sections 25–29) and sex with an adult relative (sections 64–65).

Scottish Government and Scottish Parliament Action

There has been no recent government action or parliamentary consideration of this area of law, other than the 2009 Act, as ready discussed.

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⁷ An independent review group was set up by the UK Government in 1999. The group produced a consultation paper entitled “Setting the Boundaries” in 2000. The UK Government subsequently produced a White Paper entitled “Protecting the Public” (Cm 5668) in 2002.