



**THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA**

Project No 31

**Competence and Compellability of Spouses
as Witnesses in Criminal Proceedings**

REPORT

JANUARY 1977

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972*.

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APPENDIX II List of persons who commented on the working paper.

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TERMS OF REFERENCE

1.1 The Commission was asked to consider and report on the law as to the competence and compellability of husband and wife to give evidence in criminal proceedings.

WORKING PAPER

2.1 The Commission issued a working paper on 8 February 1974. The names of those who commented on the working paper are set out in Appendix II and the paper itself is reproduced as Appendix III.

INTRODUCTION

3.1 At common law there was a rule that a person interested in the outcome of proceedings could not be a competent witness. This applied in both civil and criminal proceedings. In other words, such a person could not give evidence even though he wished to do so and even though what he would have to say would have been relevant. Because the common law regarded a man and his wife as legally one person, it followed that the spouse of any person interested fell within the same rule.

3.2 Although the legal fiction of the unity of husband and wife has since been abandoned, the interest of the spouse to the outcome of proceedings continued to be a factor resulting in his or her incompetence. A major exception to this rule of incompetence arose where a husband was charged with an offence against the person, health or liberty of his wife. It would seem that there was a corresponding rule rendering the husband competent when his wife was charged with a similar offence.¹

3.3 Given that a spouse was in these special cases a competent witness, a further question arose as to whether he or she could be compelled to give evidence either by the prosecution or the defence. This doubt, apparently has not yet been resolved.²

¹ In. *R. V Lapworth* [19301 All ER Rep 340 at 341, Avory J. refers to the rule as applying to both husband and wife.

² See paragraph 4.17 below, see also the working paper, paragraph 7, and the report of the Victorian Law Reform Commissioner, *Spouse - Witness (Competence and Compellability)*, Report No. 6, 1976, paragraph 10. The Commissioner considers that the weight of authority favours the view that the spouse is compellable.

3.4 In England in the nineteenth century it came to be recognised that a person's interest in the proceedings raised merely a question as to the weight of his evidence. As a result, the disqualification of interested persons was abolished in civil proceedings by the middle of the nineteenth century.³ In addition to providing that interested persons were competent to give evidence in civil proceedings, it was also provided that they were compellable. Corresponding legislation was enacted in Western Australia by 1855.⁴

3.5 In England, during the second half of the nineteenth century there was a piecemeal removal of the disqualification of accused persons and their spouses from giving evidence in criminal proceedings. This removal of the disqualification culminated in the *Criminal Evidence Act 1898*, which is still in force. Under that Act accused persons and their spouses are competent witnesses for the defence in all cases at every stage of the proceedings. The spouse of an accused was also made a competent witness for the prosecution under the 1898 Act and later Acts in respect of a number of offences, the most important being certain offences relating to children, some sexual offences and bigamy. There is no general statutory provision whereby the spouse of an accused is compellable, but in some rare and virtually obsolete cases - such as proceedings on indictment for a nuisance to a highway or for the enforcement of a civil right - spouses were made compellable.⁵

3.6 In Western Australia the law developed in a similar pattern. However, there have been some significant departures. Unlike the present law in England, the spouse of an accused is a competent witness for the prosecution as well as for the defence in all cases.⁶ On the question of compellability, s.8(1) of the *Evidence Act 1906* lays down a general rule that the spouse of an accused is not a compellable witness, but exceptions to this general rule are provided in the *Evidence Act*. The offences referred to in those provisions are mainly of a sexual nature, or relate to the taking advantage of females, or involve the property of the spouse of an accused. There are also provisions in the *Criminal Code* and the *Justices Act 1902* which provide for the compellability of the spouse of an accused in certain cases. As the general rule of non-compellability established by s.8(1) of the *Evidence Act* is expressed to be subject only to the

³ The *Evidence Act 1851* (UK) (14 & 15 Vict., c.99), s.2 and The *Evidence Amendment Act 1853* (UK) (16 & 17 Vict., c.83) s.1.

⁴ An Ordinance to amend the Law of Evidence (16 Vict., No.9) s.2 and an Ordinance for the further amendment of the Laws with respect to Evidence (18 Vict., No. 14) , s.1. See now s.7 of the *Evidence Act 1906* which provides that the parties and the husbands and wives of the parties are competent and compellable on behalf of either or any of the parties to civil proceedings.

⁵ The *Evidence Act 1877* (UK), s.1.

⁶ See paragraph 4.1 below.

exceptions in that Act, there are difficulties in reconciling this section with the exceptions in the *Criminal Code* and the *Justices Act*.⁷

PRESENT LAW IN WESTERN AUSTRALIA

Competence

4.1 The spouse of an accused is a competent witness for the prosecution or the defence at every stage of criminal proceedings. This is provided for in s.8(1) of the *Evidence Act*. Although this provision is general in its application, a similar provision is found in s.71(3) of the *Justices Act* with respect to trials in Courts of Petty Sessions.

Compellability

4.2 Section 8(1) of the *Evidence Act* lays down a general rule of non-compellability in somewhat obscure language. The subsection provides, in part:

“8. (1) Except as in this Act it is otherwise provided, every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, [is] not a compellable witness at every stage of the proceedings whether the person so charged is charged solely or jointly with any other person ...”

A number of exceptions to that general rule of non-compellability are provided by ss.9 and 10 of the *Evidence Act*.

4.3 Section 9(1) of the *Evidence Act* provides that the husband or wife of an accused is compellable for the prosecution or the defence if the accused is charged with certain offences under the *Criminal Code*⁸ which relates to taking advantage of females.

4.4 Section 9(4) of the *Evidence Act* provides that the husband or wife of an accused is compellable for the prosecution or the defence when one spouse is charged on the complaint

⁷ See paragraphs 4.9 to 4.19 below.

⁸ A householder permitting or inducing the defilement of a young girl on his premises (s.186), procuring a woman or girl for prostitution (s.191) procuring the defilement of a woman or girl by threats, fraud or drugs (s.192), abduction of a girl under 18 years with intent to have unlawful carnal knowledge (s.193), detaining a woman or girl to defile or in a brothel or suffering a woman under 21 years to be in a brothel (s.194) offences defined in Chapter 32 which include rape or attempted rape (ss.325, 327), indecent assault on a female (s.328) abduction of females (ss.329, 330).

of the other with an offence relating to the property of the complaining party: e.g. stealing, *Criminal Code*, s.371.

4.5 Section 10 of the Act provides:

“10. On the trial of any indictment or other proceeding for the non-repair of any public highway or bridge, or for a nuisance to any public highway, river, or bridge, and of any other indictment or proceeding instituted for the purpose of trying or enforcing a civil right only, every defendant to such indictment or proceeding, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.”

These proceedings were common law offences designed to enforce a civil right where this affected the public.⁹ Because a spouse would have been competent and compellable in a civil nuisance action between individuals,¹⁰ it no doubt seemed logical to apply the same rule in respect of criminal wrongs which were essentially civil in their nature and affected the public generally. However, nowadays the enforcement of civil rights affecting the public is by way of civil proceedings brought by or through the Attorney General. In these proceedings, as in any other civil proceedings, the spouse of a defendant would be compellable. Section 10 would therefore appear to be unnecessary.

4.6 It is possible that s.10 may be held to apply to certain statutory offences, for example, s.207 of the *Criminal Code*, where the act happens to involve an interference with a public highway, river or bridge. On the other hand, as s.10 was initially adopted in Western Australia prior to the enactment of the *Criminal Code*,¹¹ it could be argued that it was meant only to apply to common law offences involving nuisances. In addition, the court may lean against such an interpretation on the ground that it could result in the compellability of not only the spouse of an accused, but the accused himself.

4.7 Section 9(2) of the *Evidence Act* provides that the wife of an accused is compellable for the prosecution or the defence if the accused is charged with unlawful carnal knowledge¹² or with incest.¹³ When the wife is charged with incest¹⁴ the husband is compellable for the prosecution or the defence under s.9(3) of the *Evidence Act*.

⁹ See *R. v Stephens* [1861-73] All ER Rep Ext 2059.

¹⁰ See paragraph 3.4 above.

¹¹ *Criminal Evidence Act 1899*, s.7

¹² *Criminal Code*, ss.185, 167 and 186.

¹³ *Criminal Code*, s.197.

4.8 Section 9(5) of the *Evidence Act* provides that:

“Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.”

The meaning of the subsection is obscure. The subsection received consideration in the case of *Harris v Markham*¹⁵ which is discussed in paragraphs 4.14 to 4.19 below.

4.9 The *Criminal Code* and the *Justices Act* also contain sections which provide that the spouse of an accused is compellable: see paragraphs 4.10 to 4.19 below.

4.10 The sections of the *Criminal Code*¹⁶ which provide for the competence and compellability of the spouse of an accused correspond with ss.9(1) to 9(4) of the *Evidence Act* with two exceptions, ss.189 and 190. Both s.189 and s.190 provide that the wife of an accused is a competent and compellable witness where the accused is charged with the offence defined in the section.¹⁷ As there is no provision in the *Evidence Act* making these sections exceptions to the general rule of non-compellability found in s.8(1) of the *Evidence Act*, the sections appear to be in conflict with that general rule which applies “Except as in this Act it is otherwise provided”.

4.11 The apparent conflict between ss.189 and 190 of the *Criminal Code* and s.8(1) of the *Evidence Act* may be resolved by the application of recognised principles of statutory construction.¹⁸ It would seem that the *Criminal Code* provisions constitute additional exceptions to the general rule stated in s.8(1) of the *Evidence Act*.

¹⁴ *Criminal Code*, s.198.

¹⁵ [1975] WAR 93.

¹⁶ Husband or wife of accused competent and compellable - ss.35, 186, 191, 192, 193, 194, Chapter 32 - see s.331. Wife of accused competent and compellable - ss.185, 187, 188, 189, 190, 197. Husband of accused competent and compellable - s.198.

¹⁷ i.e. s.189 - indecent dealing with girls under 16 years and others; s.190 - defilement by guardian.

¹⁸ The relevant rule is that where a specific provision is inconsistent with a later general provision the former provision may be read as a proviso or exception to the general provision. Section 190 and s.8(1) commenced operation on the same day (30 December 1913) and if the rule were to apply when the special provision and the general provision commence operation on the same day there would be no conflict between s.190 and s.8(1) of the *Evidence Act*, as the former would constitute an exception to the latter.

In the case of s.189, which commenced operation at a later date than s.8(1), the inference is that the special provision constitutes an exception to the earlier general provision.

4.12 In committal proceedings in Courts of Petty Sessions, it is logical that the question of compellability should be linked to the situations where the spouse can be compelled to give evidence at the trial. Otherwise, the position would arise where evidence available at the committal hearing would not coincide with evidence available at the trial. It may well be that the specific provisions in the Code¹⁹ do apply to committal proceedings, but, in any event, s.71(1) and (2) of the *Justices Act*, which apply specifically to committal proceedings, lead to the same result. Section 71(1) provides that the spouse of an accused shall be competent but not compellable except “as in the *Criminal Code* is otherwise provided”. Section 71(2) provides that on a complaint of an indictable offence against morality, the spouse is compellable for those offences for which the spouse would be compellable on the trial.

4.13 A possible anomaly may arise out of s.10 of the *Evidence Act*. This provision renders a spouse compellable to give evidence on the trial of any indictment or other proceeding involving, for example, non-repair of public highways or bridges.²⁰ As suggested in paragraphs 4.5 and 4.6 above, the problem may be more apparent than real since the courts may hold that s.10 is obsolete.

4.14 Section 71(3) of the *Justices Act* provides that on any complaint of a simple offence - that is, an offence, whether indictable or not, which is tried summarily²¹ - or other matter the spouse of an accused is a competent and compellable witness. This subsection provides a rule of compellability which is much wider than that applicable in trials on indictment and committal proceedings. It therefore appears to constitute a wider departure from the general provision of non-compellability in the *Evidence Act*, and the reconciliation of that Act with the *Justices Act* poses considerable problems. Some of these problems were adverted to in the leading case on this topic, *Harris v Markham*.²²

4.15 In that case the defendant was charged with assaulting his wife. Assault is an indictable offence triable summarily and the defendant elected to be tried summarily. The

¹⁹ See paragraph 4.10 above, n.16 above

²⁰ If the phrase “or other proceeding” were interpreted to include committal proceedings, no difficulty would arise. But, if it refers to other proceedings by way of trial only, then the situation would arise where the spouse would be compellable at the trial but not at the committal hearing. Section 71(1) would not render the spouse compellable at the committal stage because this is not a situation where he or she is compellable by virtue of some provision in the Code. Section 71(2) would not apply as these are not moral offences.

²¹ Under s.4 of the *Justices Act* ‘simple offence’ means any offence (indictable or not) punishable on summary conviction by fine, imprisonment or otherwise.

²² [1975] WAR 93.

wife declined to testify at the trial. However, the Stipendiary Magistrate ruled that she was both competent and compellable, and on her evidence the defendant was convicted. He appealed on the ground that his wife was not a compellable witness.

4.16 The husband's argument appears to have been that s.71(3) of the *Justices Act* did not apply to this case, but that the general rule of non-compellability in s.8(1) of the *Evidence Act* held priority. However, the husband's argument would not hold if the case fell within s.9(5) of the *Evidence Act*, as the rule in s.8(1) is enacted "Except as in this Act it is otherwise provided", and s.9(5) provides that "Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person."

4.17 The problem then was to decide what type of case was intended to fall within s.9(5). This in turn depended on the construction to be given to the words "without the consent of that person". If this referred to the consent of the witness, the only cases falling within s.9(5) would be those where the spouse could at common law be compelled to give evidence against the accused spouse. Where the accused has committed offences relating to the person, health or liberty of the witness, the witness spouse is competent at common law to give evidence²³, but Burt J.²⁴ was of the view that it was by no means clear whether the witness was in these cases compellable.²⁵

4.18 On the other hand the phrase could be interpreted as referring to the consent of the accused, and it was this view that Burt J. preferred.²⁶ Because the spouse in this case could have given evidence at common law, she being competent by virtue of the nature of the offence, and because that evidence was not conditioned on the consent of the accused, he held that this particular case fell within s.9(5).²⁷ Consequently, the general rule of non-compellability contained in s.8(1) of the *Evidence Act* was excluded, and Burt J. was therefore free to determine whether the case fell within any other statutory provision, or the common law. As s.71(3) of the *Justices Act* dealt precisely with this situation, the offence being tried

²³ See paragraph 3.2 above.

²⁴ Burt J. delivered the leading judgment, in which Lavan and Jones JJ. the other members of the court, concurred

²⁵ [1975] WAR 93 at 94.

²⁶ *Ibid.*, at 98-99.

²⁷ *Ibid.*, at 99.

summarily, it was held that the spouse was a compellable witness²⁸ and it was unnecessary to reach any decision as to whether she would have been compellable at common law.

4.19 It was therefore unnecessary to resolve the apparent conflict between s.8(1) of the *Evidence Act* and s.71(3) of the *Justices Act*. The result is that, in any case where a simple offence does not fall within s.9(5) of the *Evidence Act* - for example, where the accused is charged with any offence other than one relating to the person, health or liberty of his or her spouse - the apparent conflict remains unresolved.

Co-accused

4.20 The situation might arise where two persons are charged jointly, and the spouse of one of those accused has information relevant to the offence. In those cases where the spouse of an accused is a compellable witness by or against that accused, the spouse is also a compellable witness by or against the co-accused.²⁹

4.21 However, the position as regards non-compellability is not so clear. Section 8(1) of the *Evidence Act*, which lays down the general rule of non-compellability, speaks of it as applying to ‘every stage of the proceedings’ and “whether the person so charged is charged solely or jointly with any other person”. It could be argued therefore that where the spouse of an accused is not a compellable witness by or against that accused, the spouse is also not a compellable witness by or against the co-accused. There are no reported decisions on the point.

The effect of annulment, dissolution or separation on compellability

4.22 At common law, it appears that the rule regarding the competence and compellability of spouses to testify against each other applied even after a divorce, or dissolution of a voidable marriage.³⁰ However, this may only apply to “matters arising, or conversations that

²⁸ Ibid., at 99.

²⁹ See s.9 of the *Evidence Act 1906*.

³⁰ A marriage was voidable, for example, if either party was of unsound mind; see *Matrimonial Causes Act 1959* (Cwth) s.21(1) (b) The *Family Law Act 1975* (Cwth) which takes the place of the *Matrimonial Causes Act 1959* (Cwth) has dropped the concept of a voidable marriage.

have passed, during the marriage”,³¹ and it may not apply, for example, to matters arising after the termination of the marriage. In the case of a void marriage, such as a bigamous marriage or a marriage by persons within the prohibited degrees of relationship, the parties are regarded as never having been husband and wife, so that either is competent and compellable to be called against the other.³² There appears to be no common law authority as to the effect of a separation.

4.23 In Western Australia the provisions of the *Evidence Act*, *Criminal Code* and the *Justices Act* refer to the “husband” or “wife”. There appears to be no doubt that the terms refer to parties to a lawful marriage and not to one which is void, such as a bigamous marriage or a marriage by persons within the prohibited degrees of relationship. The only difficulty arises with respect to the effect of divorce. *Cross on Evidence* submits that the expressions “... may be taken to include a divorced husband or wife testifying to matters occurring during the marriage.”³³ This view would be consistent with the common law view expressed above. However, there is authority³⁴ for the view that the words “husband” or “wife” do not include a divorced person.

Communications between spouses

4.24 A new and separate issue arises where a husband or a wife is giving evidence, on compulsion or otherwise, as to whether he or she has a privilege against disclosure of communications made during the marriage by the other spouse. Section 18 of the *Evidence Act* provides in part:

“18. Subject to the provisions of section nine, a husband shall not be compellable in any proceeding to disclose any communication made to him by his wife during the marriage, and a wife shall not be compellable in any proceeding to disclose any communication made to her by her husband during the marriage ...”

The section does not apply to statements made by the witness to his or her spouse, and it has been held that it does not exclude evidence from third parties as to the marital

³¹ See *R. v Algar* [1953] 2 All ER 1381 at 1383, where the Court of Criminal Appeal approved *Monroe v Twisleton* [1802] Peake, Add Cas 219.

³² *Wells v Fisher* [1831] 1 Mood & R 99.

³³ Cross, *Cross on Evidence* (Aus. Ed. 1970) at 194.

³⁴ *Shenton v Tyler* [1939] 1 All ER 827, which was a case concerning the creation of a trust. However, the section under consideration was similar to s.18 of the *Evidence Act 1906* (WA).

communication.³⁵ The privilege is that of the witness³⁶ and not of the accused, and may be waived by the witness. It applies whether or not the accused is the spouse of the witness.

4.25 As s.18 is expressly made subject to s.9 of the *Evidence Act*, where the accused is the spouse of the witness the witness could be compelled to disclose marital communications regarding offences falling within that section. Under s.18 if a husband and wife discuss a crime committed by any person, and the wife is called to give evidence, she must disclose the statements she made to her husband, but not those made by him to her. However, if the accused is the wife's husband, and the offence is one falling within s.9 of the *Evidence Act*, there is no privilege and the wife can be compelled to disclose all marital communications.

THE LAW ELSEWHERE

Introduction

5.1 The law in the other States of Australia, New Zealand and England varies substantially from jurisdiction to jurisdiction. The relevant enactments and their salient features are discussed in paragraphs 13 to 21 of the working paper and are briefly outlined in the following paragraphs.

Competence

5.2 With regard to competence, New South Wales and Victoria, like Western Australia, provide that a witness spouse is competent in all cases for the prosecution and the defence. The other States of Australia, England and New Zealand recognise the competency of the spouse for the defence, but for the prosecution only in the case of specified offences, mainly offences of a sexual nature and offences involving children.

Compellability

5.3 As to compellability, New Zealand has provided for compellability for the defence in all cases. In Australia all the States, other than Victoria,³⁷ have provided for compellability for

³⁵ See *Rumping v Director of Public Prosecutions* [1962] 3 All ER 256 where the prosecution sought to give in evidence a letter from the accused to his wife in the possession of the police. It was held that the letter was admissible.

³⁶ See *Her Majesty's Advocate v H.D.* [1953] SC (J) 65.

the defence in specified cases. Compellability for the prosecution is in no jurisdiction recognised as a general principle and is limited to certain specified offences. Victoria has cast the widest net by providing for the compellability of the spouse of the accused for the prosecution in the case of a number of offences, mainly of a violent or sexual nature, against children under the age of sixteen years and in proceedings for the granting or revocation of bail.

Communications between spouses

5.4 In the other Australian States, in New Zealand and in England, a husband or wife who is a witness cannot be compelled to disclose a communication made to him or her by his or her spouse. As in Western Australia the provisions are of general application and apply whether or not the witness is the husband or wife of the accused. In addition, in New South Wales the witness cannot be compelled to disclose communications by the witness to his or her spouse.³⁸

PROPOSALS FOR THE REFORM OF THE LAW ELSEWHERE

England

Present law

6.1 The present law in England and its history were referred to in the introduction to this report.³⁹ The husband or wife of an accused is a competent witness for the defence in all cases⁴⁰ and is competent for the prosecution in respect of a number of offences, the most important being neglect to maintain, certain offences relating to children, some sexual offences and bigamy. The husband or wife of an accused is compellable either for the prosecution or the defence only in those cases where he or she is compellable at common law and in proceedings upon indictment for a nuisance to a highway or for the enforcement of a civil right. A husband or wife cannot be compelled to disclose any communication made to the witness by the other spouse during the marriage.⁴¹

³⁷ See paragraph 6.16 below.

³⁸ *Evidence Act 1898* (NSW), s.11(1).

³⁹ See paragraphs 3.1 to 3.5 above.

⁴⁰ *Criminal Evidence Act 1896* (UK), s.1.

⁴¹ *The Evidence Amendment Act 1853* (UK), s.3.

6.2 In 1972 the English Criminal Law Revision Committee submitted a report, including a draft Bill, on the law relating to evidence.⁴² Clause 9 of the draft Bill deals with the competence and compellability of the husband or wife of an accused. The recommendations of the Committee have not, as yet, been implemented.

Competence

6.3 The Committee concluded that the fact of marriage should not affect the competence of a witness. This would mean that the husband or wife of an accused should be competent as a witness for the prosecution and the defence in all cases.⁴³ The Committee said that the law would be showing excessive concern for the preservation of the marital relationship if it were to say that a husband or wife willing to give evidence could not do so. However, as the Committee recommended that a co-accused should not be competent for the prosecution,⁴⁴ it also recommended that there should be an exception as to the competence of the spouse as a witness for the prosecution where the spouse is being tried jointly with the accused.⁴⁵

Compellability

6.4 The Committee recommended that the husband or wife of an accused should be compellable for the prosecution where the offence charged involved assault on or a threat of violence to the wife or husband of the accused.⁴⁶ The Committee considered that compellability was justified in such cases by the public interest in the punishment of violence. Moreover, the Committee recommended that the husband or wife of an accused should be compellable in the case of an offence of violence towards, or a sexual offence against, a child under sixteen years belonging to the same household as the accused.⁴⁷ The Committee reasoned that:

“The seriousness of some of these cases seems to us to make it right to strengthen the hand of prosecuting authorities by making the wife compellable, especially as the wife may be in fear of her husband and therefore reluctant to give evidence unless she can

⁴² Eleventh Report *Evidence (General)* (Cmnd. 4991).

⁴³ *Ibid.*, clause 9(1) draft Bill.

⁴⁴ *Ibid.*, clause 4(1) draft Bill.

⁴⁵ *Ibid.*, clause 9(1) draft Bill.

⁴⁶ *Ibid.*, paragraph 149, clause 9(3) (a) draft Bill.

⁴⁷ *Ibid.*, paragraph 150, clause 9(3) (a) and (b) draft Bill.

be compelled to do so. In the case of violence towards the children compellability seems to us even more important than in cases of violence towards the wife herself. For although violence towards children may be easier to detect than violence towards the wife, it is likely to be harder to prove it in court against the spouse responsible, especially if the child is unable to give evidence. Another reason for giving the wife no choice whether to give evidence is that she may have been a party to the violence or at least have acquiesced in it, although it is not proposed to prosecute her. For similar reasons we think that the wife should be compellable on a charge of a sexual offence against a child under sixteen belonging to the accused's household."⁴⁸

6.5 However, the Committee did not recommend that compellability be extended to offences against children under sixteen years outside the household of the accused. The Committee said:

“.....on the whole we think it excessive to extend compellability so far and to apply it, for example, to a common assault on a boy of fifteen having nothing to do with the family. Short of this it would be difficult to draw the line satisfactorily without great complication. Besides, part of the reason for applying compellability to offences against children of the household is that offences committed in the family may be harder to prove if the unoffending spouse is free to choose whether to give evidence, whereas in the case of an offence outside the family other evidence is likely to be available.”⁴⁹

6.6 The Committee also recommended that the husband or wife of an accused should be compellable for the accused in all cases unless the husband or wife is jointly charged and tried with the accused.⁵⁰

Co-accused

6.7 The Committee recommended that the spouse of an accused person should be competent to give evidence on behalf of a co-accused, but compellable by the co-accused only where compellable on behalf of the prosecution.⁵¹

The effect of annulment, dissolution or separation on compellability

6.8 The Committee recommended that a person who had been but was no longer married to the accused should be compellable to give evidence as if that person and the accused had never married. However, the Committee did not recommend that married persons judicially

⁴⁸ Ibid., paragraph 150.

⁴⁹ Ibid., paragraph 151.

⁵⁰ Ibid., paragraph 153.

⁵¹ Ibid., paragraph 155.

separated or not cohabiting should be compelled to give evidence except in the circumstances referred to in paragraphs 6.4 to 6.7 above.⁵²

Communications between spouses

6.9 The Committee recommended that the privilege relating to marital communications be abolished.⁵³ The recommendation followed that of the English Law Reform Committee's Sixteenth Report which recommended that the privilege should be abolished in civil proceedings⁵⁴ and which was implemented in 1968.⁵⁵

Although the Committee recognised that there might be a case for preserving the privilege in criminal proceedings and in fact extending it to communications made by the witness to the other spouse, it concluded that it would be undesirable that witnesses in criminal proceedings should enjoy greater privileges than witnesses in civil proceedings.

Queensland

Present Law

6.10 The husband or wife of an accused person is a competent witness for the defence in the case of all indictable offences⁵⁶ and is competent for the prosecution when the charge is for one of a number of sexual offences.⁵⁷ The husband or wife is compellable for the prosecution or the defence in the case of all simple offences.⁵⁸

6.11 In November 1975 the Queensland Law Reform Commission submitted a report on the law relating to evidence.⁵⁹ The report, amongst other matters, made recommendations for the reform of the law relating to the competence and compellability of husbands and wives and communications between husbands and wives. A bill implementing the recommendations of the Queensland Law Reform Commission is at present before the Queensland Parliament.

⁵² Ibid., paragraph 156-157.

⁵³ Ibid., paragraph 173, clause 16(2) draft Bill.

⁵⁴ *Privilege in Civil Proceedings* (Cmnd. 3472) at paragraphs 42-43.

⁵⁵ *Civil Evidence Act 1968* (UK), s.16(3)

⁵⁶ *Criminal Code* (Qld), s.618A.

⁵⁷ Ibid., ss. 212-220, 222, 223, 347, 349-353, 360 and 363.

⁵⁸ *Evidence and Discovery Act 1867* (Qld), s.5 and see *Finglas v Cahill* [1961] Qd P 323.

⁵⁹ *Evidence* (QLRC 19).

Competence

6.12 The Commission recommended that the husband or wife of a person charged with an offence should be competent to give evidence for the prosecution or for the defence, including a co-accused.⁶⁰ This change would bring the law in Queensland into line with the existing law in Western Australia in this respect.

Compellability

6.13 The Commission recommended that the husband or wife of an accused should be compellable to give evidence on behalf of his or her spouse.⁶¹

6.14 The Commission further recommended that the husband or wife of an accused should be compellable to give evidence for the prosecution where the offence charged is a serious one involving a child under seventeen years and of the same household as the accused, and only in those cases. The serious offences referred to by the Commission include cases of actual or threatened violence to the person, sexual offences and offences of neglect.⁶² As it was considered to be wrong to deny a co-accused a right given to the prosecution, the Commission recommended that a husband or wife should be compellable on behalf of a co-accused in the same circumstances as the husband or wife is compellable for the prosecution.⁶³

Communication between spouses

6.15 The Commission recommended the retention in criminal proceedings, of the rule that a husband or wife is not compellable to disclose any communications made to him or her by the other spouse during the marriage. The Commission recommended that the privilege should expressly apply to cases where the accused is the spouse of the witness and has been charged with an offence which would render the witness spouse compellable.⁶⁴ It was not suggested

⁶⁰ Ibid., at 9.

⁶¹ Ibid., at 10.

⁶² Ibid., at 10-11.

⁶³ Ibid., at 11.

⁶⁴ Ibid., at 15.

that the privilege should extend, however, to statements by the witness spouse to his or her marriage partner.

Victoria

Present Law

6.16 The spouse of an accused is a competent witness for the prosecution or the defence in the case of all offences.⁶⁵ The spouse of an accused is compellable for the prosecution in respect of a number of specified offences, mainly of a violent or sexual character against children under the age of sixteen years,⁶⁶ and in proceedings for the grant or revocation of bail.⁶⁷ However, apart from the possible common law exception,⁶⁸ the spouse of an accused is never compellable for the accused or a co-accused.⁶⁹

6.17 In November 1976 the Law Reform Commissioner of Victoria submitted a report on the law relating to the competence and compellability of spouses.⁷⁰ The Victorian Government is considering the report.

Competence

6.18 The Commissioner recommended that the present law in Victoria should not be altered in this respect and that the spouse of an accused should continue to be a competent witness for the prosecution and the defence in all cases.⁷¹

Compellability

6.19 The Commissioner recommended that the spouse of an accused, unless he or she is a co-accused, should be compellable to give evidence on behalf of the accused.⁷² The

⁶⁵ *Crimes Act 1958* (Vic), ss.399 and 400(1).

⁶⁶ *Ibid.*, s.400(3).

⁶⁷ *Ibid.*, s.400(3A).

⁶⁸ See paragraph 3.3 above and n.2 above.

⁶⁹ The extension as to compellability made by s.9 of the *Crimes Act 1967* (Vic) related only to compellability by the prosecution. Section 9 was enacted following the recommendation of the Victorian Statute Law Revision Committee in 1966: see *Report upon the Competence and Compellability of Spouses to give Evidence*. That Committee had confined its attention to cases where the absence of compellability for the prosecution had worked injustice.

⁷⁰ Law Reform Commissioner, *Spouse - Witnesses (Competence and Compellability)*, Report No. 6.

⁷¹ *Ibid.*, paragraph 39.

Commissioner also recommended that the spouse⁷³ of an accused, unless he or she is a co-accused, should be compellable to give evidence on behalf of the prosecution, except where the judge, magistrate or justice presiding is satisfied that the interest of the community in obtaining the evidence is outweighed by the likelihood of damage to the relationship or the harshness of compelling the spouse to give evidence.⁷⁴ The Commissioner listed a number of circumstances which should be taken into account when the judge, magistrate or justice is considering exercising the discretion.⁷⁵

Co-accused

6.20 The Commissioner recommended that the spouse of an accused should be compellable to give evidence on behalf of a co-accused in all cases, except of course, where the spouse was a co-accused.⁷⁶

Effect of dissolution of marriage on compellability

6.21 The Commissioner recommended that a person who had been, but was no longer, married to the accused should be compellable to give evidence as if they had never been married.⁷⁷

Communication between spouses

6.22 The Commissioner recommended that communications between spouses should not be privileged in criminal proceedings. He considered that the power of the court to grant an exemption to the spouse from giving evidence at all would be sufficient to deal with the confidentiality problem. In the case of a spouse-witness called for the accused spouse or a co-

⁷² Ibid., paragraph 40.

⁷³ The recommendations in this respect are intended to cover other relationships: see paragraph 7.45 below.

⁷⁴ The Law Reform Commission of Canada has made a similar recommendation: see *Report on Evidence, 1975*, at 89-90. Clause 57 of the draft bill attached to the report provides that a spouse would not be compellable if the trial judge considered that:

“.....having regard to the nature of the relationship, the probable probative value of the evidence and the seriousness of the offence charged, the need for a person’s testimony is outweighed by the possible disruption of the relationship or the harshness of compelling the person to testify.”

⁷⁵ Law Reform Commissioner, *Spouse - Witnesses (Competence and Compellability)* Report No. 6, paragraph 56.

⁷⁶ Ibid., paragraph 59.

⁷⁷ Ibid., paragraph 65.

accused, he considered that all facts necessary to make out a defence should be allowed to be put forward.⁷⁸

DISCUSSION AND RECOMMENDATIONS

Competence

7.1 At present the husband or wife of an accused is a competent witness for the prosecution and the defence.⁷⁹ In the working paper⁸⁰ the Commission said that in this regard there appeared to be little, if any, dissatisfaction with the existing law. Comments in response to the working paper did not reveal any information to change the Commission's view that there do not appear to be any practical defects in the existing law.

7.2 The Commission agrees with the English Criminal Law Revision Committee that the law would be showing excessive concern for the preservation of the marital relationship if it were to prevent the husband or wife of an accused from testifying if he or she is willing to do so.⁸¹ Competence in all cases was recommended by the Queensland Law Reform Commission,⁸² and the Victorian Law Reform Commissioner.⁸³

7.3 The Commission recommends that the husband or wife of an accused should continue to be a competent witness for the prosecution or the defence, including a co-accused, in all criminal proceedings.

Compellability

The dilemma

7.4 The question of the compellability of spouses as witnesses is a more difficult one than the question of competence. There are two opposing interests at issue when considering compellability, namely the interest of society in the detection and punishment of offenders,

⁷⁸ Ibid., paragraph 68.

⁷⁹ See paragraph 4.1 above.

⁸⁰ See paragraph 22 of the working paper.

⁸¹ See paragraph 6.3 above.

⁸² See paragraph 6.12 above.

⁸³ See paragraph 6.18 above.

and the interest of society and of the parties to a marriage in preserving marriage and its confidential nature.

7.5 Compellability in all cases is favoured by the Chief Justice of Western Australia, The Hon. Sir Lawrence Jackson. In his comments to the Commission he summarised the arguments in favour of compellability, as follows:

- “1. All relevant evidence as to guilt or innocence should be available to the court, so that a correct decision is more likely to be arrived at; and this is a more important consideration for the public good than the risk of harming or disrupting marital relations.
2. The present rules are arbitrary in their application to spouses. There are other relationships which may be just as closely knit, where no such protection is given - e.g. parent and child, brothers and sisters, close friends ... or persons who have lived together for a long time, either of the same sex or of different sexes but unmarried.
3. Where a spouse is competent but not compellable he or she is faced with an election which is often difficult or invidious; and if the choice is to give evidence, it is hard to avoid an inevitable inference of hostility to the accused which may be quite unjustified.”

7.6 The Commission has been unable to obtain reliable information as to the extent to which non-compellability has resulted in police investigations being discontinued or charges being withdrawn or dismissed. However, it may be assumed that such difficulties are likely to be encountered in practice. For example, in *Harris v Markham*, referred to above,⁸⁴ the wife refused to give evidence at the trial and was finally compelled to do so.

7.7 Those who are opposed to the principle of compellability or to any further extensions to its present application argue that the consequences of compelling a spouse to give evidence could be harsh. Not only may the spouse suffer considerable distress, but the confidential relationship between husband and wife could be invaded and even the very existence of the marriage threatened. The harm to society as a result of compulsion could outweigh the benefit of facilitating the conviction of an offender. In reference to the argument that other relationships are not protected, they would point to the uniqueness of the marriage relationship with its special obligations and responsibilities which society has an interest in preserving. They would also emphasise the difficulty in deciding where to draw the line in the case of other relationships. They would accordingly argue that only in exceptional

⁸⁴ See paragraphs 4.15 to 4.19 above.

circumstances should a husband or wife be compelled to give evidence against his or her spouse.

7.8 There is also the very real possibility that a spouse who has been compelled to give evidence might mislead the court by giving untruthful evidence in an effort to protect the accused. To the extent that this is so, the argument that a correct decision is more likely to be arrived at if all witnesses who have relevant evidence can be compelled to give that evidence tends to lose some of its force.

7.9 Until the present time the law has endeavoured to strike a balance between these opposing interests and the arguments for and against them. In as much as it has adhered to a general rule of non-compellability, albeit with specific statutory exceptions, the law has seemed to favour the policy of the preservation of marriage over that of reaching a verdict by consideration of all available evidence. There is some difficulty in deciding the extent to which simple offences provide an exception to this general approach⁸⁵ and in reconciling the various statutory provisions.⁸⁶

7.10 The arguments for and against compellability pose a real dilemma. In the absence of reliable information as to the effect of compellability on the preservation of marriage and on the interests of society, the Commission does not consider that the law should go so far as to provide for compellability in all cases or non-compellability in all cases. The Commission agrees with the basic approach of the existing law - to strike a compromise between the two opposing views. However, it sees a need to revise the principles upon which to determine where the line should be drawn and to clarify the relevant provisions.

Judicial discretion

7.11 One way of striking a balance would be to leave the matter in each case to the judicial discretion of the judge, magistrate or justice of the peace presiding at the trial or hearing. If such a measure were to be adopted it would be desirable to provide a number of guidelines such as -

⁸⁵ See paragraphs 4.14 to 4.19 above.

⁸⁶ See paragraphs 4.9 to 4.13 above.

- (i) whether or not it was expedient in the interests of the public and criminal justice that the spouse be compelled to give evidence;
- (ii) whether or not compelling the spouse of an accused to give evidence could contribute to a breakdown of the marital relationship;
- (iii) whether or not compelling the spouse of an accused to give evidence could cause unnecessary distress or embarrassment to the witness or the accused.

7.12 The Commission notes that in a recent amendment of the law relating to evidence in rape trials in Western Australia, the admission of evidence relating to the victim's previous sexual experiences, disposition and reputation is left to the discretion of the court.⁸⁷ However, the issue in such cases is a narrow one concerning relevancy of evidence.

7.13 As noted above,⁸⁸ the Victorian Law Reform Commissioner favours a general rule of compellability of spouses, tempered by judicial discretion. So too does the Law Reform Commission of Canada.⁸⁹ However, this Commission considers that there are at least three reasons why a judicial discretion may be inappropriate. Firstly, the grant of a judicial discretion would lead to unpredictability in that the parties would not know until the trial whether the husband or wife of an accused would be compellable. This would lead to uncertainty in preparing cases for trial, as the parties would not know what evidence it would be necessary for them to call. Probably this could be overcome by providing a procedure for the determination of the discretion a reasonable time before the trial or hearing. However, interlocutory proceedings are not, as yet, part of the criminal procedure in Western Australia. Secondly, in the particular context of summary courts, it may not be appropriate to confer a discretion which could sometimes be exercised by lay justices of the peace. Thirdly, the possibility would exist of the discretion being exercised at the trial in a different manner to the way in which it was exercised in the committal proceedings.

⁸⁷ *Evidence Act 1906*, s.36A and s.36B as introduced by the *Evidence Act Amendment Act 1976*. This Act has not yet been proclaimed.

⁸⁸ See paragraph 6.19 above.

⁸⁹ See n.74 above.

Compellability on behalf of the accused spouse

7.14 The English Criminal Law Revision Committee recommended that the husband or wife of an accused ought to be compellable to give evidence on behalf of an accused in all cases, unless jointly charged with the accused. The Queensland Law Reform Commission⁹⁰ and the Victorian Law Reform Commissioner⁹¹ made a similar recommendation. The English Committee said:

“The only possible argument against this seems to be that the wife ought not to be put into a position where she may have to choose between incriminating her husband and committing perjury. But this argument seems to us quite unacceptable in these days...”⁹²

7.15 The Commission agrees with the reasoning of the English Criminal Law Revision Committee, and accordingly recommends that the law should provide for the husband or wife of an accused to be compellable to give evidence on behalf of the accused in every case except where the two spouses are jointly charged. In this latter situation the general rule that “every person charged with an offence . . . shall be a competent but not a compellable witness”⁹³ should prevail.

Compellability on behalf of prosecution

7.16 At present a spouse of an accused is compellable for the prosecution in the case of an indictable offence only where the charge is of certain sexual offences, offences relating to the taking advantage of females, or offences involving the property of the accused spouse.⁹⁴ In the case of offences tried summarily, the spouse is compellable in the case of assault upon him or her by the other spouse, and possibly is compellable in the case of all other offences tried summarily.⁹⁵ In balancing the arguments for and against compellability, the Commission takes the view that the range of indictable offences for which a spouse is compellable is too narrow, but that the supposed rule in respect of simple offences is too broad.

⁹⁰ See paragraph 6.13 above.

⁹¹ See paragraph 6.19 above.

⁹² Eleventh Report *Evidence (General)* (Cmnd. 4991), paragraph 153.

⁹³ Section 8(1) of the *Evidence Act 1906*.

⁹⁴ See paragraphs 4.2 to 4.13 above.

⁹⁵ See paragraphs 4.14 to 4.19 above.

7.17 The Commission has given consideration to the possibility of adopting the proposals in England⁹⁶ and Queensland⁹⁷ to extend compellability to serious offences committed against a child of the same household as the accused. This would include sexual offences, violent offences, and offences of endangering the health or interfering with the liberty of the child. Its most obvious application would be to cases of child-battering.

7.18 However, an extension limited in this way could give rise to difficulties of definition and to anomalies. The following questions may illustrate the difficulties -

- (1) At what age does a person cease to be a child for the purposes of the rule?
- (2) Would a son who normally resides at boarding school but who is at home for two weeks holiday or less be regarded as a child of the same household?
- (3) Would the son's friend who accompanied him to his home for the holiday be regarded as a child of the same household?
- (4) Would the rule apply to an offence committed against a child of the household outside the privacy of the accused's home?
- (5) On what logical basis can a distinction be drawn between offences committed against a child of the household and another child not related to the household?

In addition to creating anomalies, distinctions of this sort give rise to practical difficulties, uncertainty, and possible delays during trials while the question of compellability is argued before a judge in the absence of the jury.

7.19 Apart from the technical difficulties and anomalies connected with the limited extension proposed in England and Queensland, the Commission considers that compellability is warranted on general policy grounds over a wider range of circumstances. The Commission can see no real justification for limiting compellability to offences against children of the accused's household. If a child of the household deserves protection against sexual offences and offences of violence, so equally should a child living elsewhere; and if a child deserves protection, so equally, in the view of the Commission, should an adult. The reason given by the English Criminal Law Revision Committee for limiting compellability to

⁹⁶ See paragraphs 6.4 and 6.5 above.

⁹⁷ See paragraph 6.14 above.

offences against a child of the household was that in the case of an offence outside the family other evidence is likely to be available.⁹⁸

However, as the Commission pointed out in the working paper,⁹⁹ if difficulty of proof is to be the basis of the compellability of spouses in selected areas, compellability should extend to every case where it would be difficult to prove an offence without the evidence of the spouse. It may, for example, be difficult to prove a murder unless the accused's spouse is compelled to testify.

7.20 The Commission accordingly considers that the interests of society in the detection and punishment of those who commit serious sexual offences and offences involving personal violence or harm (including attempts or offences which include as an element the threat or fear of personal violence) justifies compellability of the spouse. This should be so irrespective of whether or not the victim is a member of the household or is a child.

7.21 The fact that, as between spouses, conviction and punishment may have consequences of the most serious economic and social kind for their future,¹⁰⁰ is, in the Commission's view, outweighed by the need to detect and punish those who commit offences against the person.

7.22 Table I of Appendix I of this report sets out a list of offences in respect of which the Commission recommends the spouse of an accused should be compellable by the prosecution. Compellability on behalf of the accused with regard to all offences has been recommended earlier.¹⁰¹ The list, which is not intended to be exhaustive, covers not only offences where an intent to inflict actual injury is a necessary ingredient, but also cases involving negligence (e.g. *Road Traffic Act 1974*, s.59 - dangerous driving causing death), cases where a person's life or health is endangered (e.g. *Criminal Code*, s.296A - endangering person in aircraft, and s.302 - endangering life or health by failing to provide necessaries), and cases where the offence is against a person's liberty even though no actual physical harm results (e.g. *Criminal Code*, s.333 - deprivation of liberty). Some of the offences are triable summarily (e.g. assault), and the Commission's recommendation is intended to cover these categories whether or not the offence is tried summarily.

⁹⁸ See paragraph 6.5 above.

⁹⁹ See the working paper, paragraph 30.

¹⁰⁰ This was pointed out by the English criminal Law Revision Committee: see the Eleventh Report *Evidence (General)* (Cmnd. 4991), paragraph 147.

¹⁰¹ See paragraph 7.15 above.

7.23 There are other offences than those listed in Table I which to some extent involve personal harm or the possibility thereof. Examples of such offences are listed in Table II of Appendix I. A case could be made for including these in Table I. For example, selling adulterated food (*Police Act 1892*, s.83) may well cause severe harm to persons. On the other hand, the actual offence might be comparatively trivial, and in these circumstances it could be thought that it was undesirable to compel the spouse to give evidence. The Commission therefore merely puts them forward for the consideration of the Government.

7.24 The Commission considered whether the spouse of an accused should be compelled to give evidence for the prosecution in cases where the offence is one against property, but decided against recommending such a step. It considers that more information is required as to the real need to extend compellability to such offences, and to the effects of compellability on the marriage relationship before a decision can properly be made.

7.25 The Commission accordingly suggests that the Government consider introducing a scheme whereby the authorities concerned (e.g. the police, the Crown Law Department, the courts and the Community Welfare Department) monitor cases where compellability of a spouse has occurred and cases where, had it occurred, it could have made a significant difference to the outcome.

Compellability of spouse for or against co-accused

7.26 Under the present law, where a person is charged solely with an offence, he or she can compel the spouse of any other person to give evidence on his or her behalf. However, as the Commission noted in paragraph 4.21 above, the situation is different where two or more persons are jointly charged. It appears that where, for example, two men (X and Y) are jointly charged, X can compel Mrs. Y to give evidence on his behalf only in cases where Y could himself compel Mrs. Y to give evidence. Similarly, it appears that the prosecution can compel Mrs. Y to give evidence against X only in those circumstances in which Mrs. Y would have been compellable against Y.

7.27 The Commission recommended in paragraph 7.15 above, that the accused should be able to compel his or her spouse to give evidence in all cases except where the spouses are

jointly charged. The question then arises whether, where two persons (X and Y) are jointly charged, X should likewise be able in all cases to compel Y's spouse to give evidence on X's behalf, even though Y did not call him or her. The difficulty in permitting this is that Y's spouse could give evidence either on examination or cross-examination which would tend to incriminate Y.

7.28 In the face of this difficulty, the English Criminal Law Revision Committee recommended that a co-accused should be able to compel the spouse of an accused to give evidence on his behalf only in those cases where the prosecution could compel the spouse to give evidence for it.¹⁰² A similar recommendation was made by the Queensland Law Reform Commission.¹⁰³ If such a recommendation were adopted, where X and Y are jointly charged, X could compel Mrs. Y to give evidence on his behalf if he is charged with an offence in respect of which the prosecution could compel Mrs. Y to give evidence against Y.

7.29 On the other hand, the Victorian Law Reform Commissioner recommended that the co-accused should be able to compel the spouse of any other accused to give evidence on his behalf in all cases.¹⁰⁴ The Commissioner said:

“For though the community can properly be called on to regard its interest in securing a conviction as being outweighed by the hardship that the witness would incur, an accused man cannot properly be required to run the risk of being wrongly convicted in order to spare the witness from hardship.”¹⁰⁵

7.30 This Commission agrees with the Victorian Law Reform Commissioner. It is true that, if the English and Queensland approach were implemented, the co-accused could apply for a separate trial pursuant to s.624 of the *Crimina Code*. If a separate trial were to be granted, then he would be able to compel the spouse to give evidence on his behalf. However, the granting of a new trial is in the discretion of the court, and the Commission does not consider that the right of the co-accused to call whatever witness he wishes should be dependant on the granting of such an application.

¹⁰² See paragraph 6.7 above.

¹⁰³ See paragraph 6.14 above.

¹⁰⁴ See paragraph 6.20 above.

¹⁰⁵ Law Reform Commissioner, *Spouse - Witnesses (Competence and Compellability)*, Report No. 6, paragraph 58.

7.31 The Commission accordingly recommends that the spouse of an accused should be made compellable to give evidence on behalf of any co-accused in the proceedings as if the witness and the accused spouse were not husband and wife. This, of course, is not intended to apply to the case where the persons jointly charged are husband and wife.

7.32 The question also arises whether the prosecution should be permitted to compel the spouse of an accused to give evidence against a co-accused. At present, it does not appear that the prosecution can do so, except where the spouse is compellable against the accused.¹⁰⁶ The Commission considers that this restriction should remain, and recommends accordingly.

Effect of annulment, dissolution or separation on compellability

7.33 In Western Australia it is unclear whether existing statutory provisions referring to husband and wife apply where a marriage has been terminated, and if so to what extent.¹⁰⁷ As the basis for non-compellability is the preservation of the marital relationship, it follows that once that relationship has been dissolved the need for non-compellability no longer exists. Accordingly, the Commission recommends that where a marriage has been dissolved the parties should be compellable as if they had never been married.

7.34 In the case of a void marriage the parties are regarded as never having been married and either party was regarded at all times as a competent and compellable witness at common law. The Commission sees no reason to alter this position.

7.35 A more difficult question is whether persons who are married but separated ought to be compellable as witnesses against each other. Although proceedings for judicial separation cannot now be instituted,¹⁰⁸ orders may be made providing that the spouses are no longer bound to perform marital services or render conjugal rights.¹⁰⁹ Moreover, whether or not there is such an order, spouses may separate by agreement or otherwise: e.g. by one spouse leaving the other or by one spouse forcing the other to leave the matrimonial home by his or her conduct, deliberate or otherwise.

¹⁰⁶ See paragraph 4.21 above.

¹⁰⁷ See paragraph 4.23 above.

¹⁰⁸ *Family Law Act 1975* (Cwth) , s.8(2) and (3).

¹⁰⁹ *Ibid.*, s.114(2)

7.36 It could be argued that where spouses have separated, whether or not a spouse has obtained a judicial order that he or she is no longer bound to cohabit with the other spouse,¹¹⁰ there is no longer any family unity to protect by allowing non-compellability. However, there may be considerable difficulty in deciding what would be a sufficient separation to justify alteration of the general rule against non-compellability. In cases where separation is merely de facto and neither party has obtained a non-cohabitation order under the *Family Law Act 1975* (Cwth), the Commission considers that what chances of reconciliation there are should not be reduced by applying the compellability rule to the parties as if they were no longer married to each other. In cases where a non-cohabitation order has been granted, it could be argued that there has been a more tangible interference with the family relationship. However, such an order does not affect the legal status of the parties to the marriage. Moreover, even in such cases it cannot be said with certainty that there has been an irretrievable breakdown of the marriage with no chance of a reconciliation. On balance, the Commission recommends that a spouse should not be made a compellable witness against his or her spouse simply because the spouses are separated, whether or not a non-cohabitation order has been made.

Communications between spouses

7.37 At present a spouse giving evidence, whether or not under compulsion, is not required to disclose communications made to that spouse by his or her marriage partner. The privilege does not extend to marital communications made by the witness spouse. The basis for the privilege is the preservation of the intimate and confidential nature of communication within a marriage. The Commission recognises the need to maintain a feeling of confidence between spouses and recommends that not only should the existing privilege remain, but that it should extend to all marital communications including those made by the witness spouse.

7.38 On the other hand, in certain cases policy demands that the ends of justice should prevail over the preservation of marriage. For example, it has been recommended above¹¹¹ that, although a spouse generally ought not to be compellable to give evidence against the accused marriage partner, an exception ought to be made in the case of certain serious offences. It has also been recommended that the spouse of an accused should be compellable to give evidence on behalf of the accused in every case except where the two spouses are

¹¹⁰ See paragraph 7.35 above.

¹¹¹ See paragraphs 7.20 to 7.22 above.

jointly charged.¹¹² It would be consistent with the existing law¹¹³ to exclude the privilege where the spouse is compellable to give evidence by the prosecution or the accused spouse, and the Commission accordingly recommends that this position be maintained.

7.39 The privilege is that of the witness and not the accused.¹¹⁴ For example, if X is on trial and Mrs. Y is called to testify as to some communication made to her by her husband, the release of that communication may affect the marriage of Mr. and Mrs. Y. The choice as to the release of that information ought to belong to Mrs. Y, not X. Logically, the privilege should be that of the witness even where his or her spouse is the accused unless, of course, the charge is one which renders the witness compellable.

Comment by the prosecution

7.40 Section 8(1) (c) of the *Evidence Act* provides that the failure of the husband or wife of an accused to give evidence shall not be made the subject of any comment by the prosecution. The English Criminal Law Revision Committee recommended that a similar prohibition in s.1(b) of the *Criminal Evidence Act 1898*¹¹⁵ should be lifted.¹¹⁶

7.41 The Committee outlined the following arguments against lifting the prohibition -

- (i) That inexperienced prosecutors might use the freedom without sufficient discrimination.
- (ii) That the real reason for failure to call the husband or wife might have been fear that he or she might deliberately be unhelpful.
- (iii) That in practice the husband or wife might be called unnecessarily in order to avoid adverse comment on failure to call him or her.¹¹⁷

7.42 However, it was persuaded by the argument to the contrary, namely that:

“...if the accused puts forward a defence which, if true, his wife would be able to corroborate by her evidence, and she is not called, it is natural that the prosecution should be able to comment on this just as they may on the failure of the defence to call

¹¹² See paragraph 7.15 above.

¹¹³ See paragraph 4.25 above.

¹¹⁴ See paragraph 4.24 above, n.36 above.

¹¹⁵ 61 and 62 Vict. c.36

¹¹⁶ Eleventh Report. *Evidence (General)* (Cmnd. 4991) , at paragraph 154.

¹¹⁷ *Ibid.*, at paragraph 154.

somebody else who would have been able to corroborate his evidence if it was true.”¹¹⁸

7.43 The Commission, having considered the arguments for and against lifting the prohibitions agrees with the English Criminal Law Revision Committee that the prosecution should be able to comment on the failure of the defence to call the accused’s spouse. The Commission recommends that s.8(1) (c) of the *Evidence Act* be amended accordingly.

Removal of existing anomalies

7.44 If the foregoing recommendations are implemented by legislation, not only would the underlying policy of the law be reformed but also various technical anomalies would be removed. These anomalies are -

- (a) Certain provisions in the *Criminal Code* discriminate between compellability of a husband and compellability of a wife. For example, s.187 refers to the wife only as a compellable witness, while s.198 refers to the husband. The reason for the discrimination is in these cases obvious. Section 187 creates the offence of unlawful carnal knowledge of a girl under sixteen and it is most unlikely that the wife would ever be in the position of an accused. Section 198 relates to incest by an adult female and it would be unusual for the husband to be charged with this offence. However, it ought not to be overlooked that any person may be charged as a party to any of these offences. Consequently, although a female cannot physically have unlawful carnal knowledge with a girl under sixteen, she can be guilty as a party under s.7 of the Code for aiding and abetting a man to do so. In these circumstances it is odd that a wife could be compelled to give evidence against her husband charged with unlawful carnal knowledge, but if the wife is charged as a party to such an offence committed by someone other than her husband, the husband cannot be compelled to testify against his wife. Furthermore, there are provisions in the Code which relate to the wife’s compellability only, where it would seem possible for the wife herself to be a principal offender. For example, s.189 relates to indecent dealing with a girl under sixteen but provides that only the wife of an accused shall be compellable.

¹¹⁸ Ibid., at paragraph 154.

- (b) There are several inconsistencies between the provisions of the *Evidence Act* and specific provisions in the *Criminal Code* and *Justices Act* dealing with the question of compellability of spouses. Section 8(1) of the *Evidence Act* provides a general rule of non-compellability of spouses subject only to the exceptions in ss.9 and 10 of the *Evidence Act*. The specific provisions in the Code and *Justices Act* do not cause difficulty provided they fall within the exceptions in ss.9 and 10 of the *Evidence Act*. However, it will be recalled that ss.189 and 190 of the Code go beyond the exceptions in the *Evidence Act* for certain specified offences, and s.71(3) of the *Justices Act* purports to create a wide exception applicable to all simple offences. There is authority for the view that s.71(3) and the *Evidence Act* are not inconsistent with each other provided the offence falls within the common law line of cases excluded from the latter Act.¹¹⁹ However, this does not provide a satisfactory answer for those simple offences not falling within this particular common law area. It may be possible that the apparent inconsistencies will be clarified by case law. But this may take time and could involve the parties in considerable expense.
- (c) At present, there is an unnecessary duplication of statutory provisions in the *Evidence Act* and s.71(1) and (2) of the *Justices Act* relating to committal proceedings.¹²⁰
- (d) Section 9(5) of the *Evidence Act* which provides for the application of the Act in cases where the spouse “may at common law be called as a witness” creates considerable difficulties in its interpretation and scope.¹²¹ This provision would be repealed if the Commission’s recommendations were enacted.
- (e) Section 10 of the *Evidence Act* appears now to be obsolete.¹²² It would be repealed as a consequence of the enactment of the Commission’s proposals.

¹¹⁹ See paragraphs 4.14 to 4.19 above.

¹²⁰ See paragraph 4.12 above.

¹²¹ See paragraphs 4.14 to 4.19 above.

¹²² See paragraphs 4.5 and 4.6 above.

Other relationships

7.45 In his comments to the Commission¹²³, the Chief Justice of Western Australia, The Hon. Sir Lawrence Jackson, referred to the possible anomaly of the law's protecting spouses from compellability whilst not providing similar protection to parties to other relationships - e.g. de facto marriages, parents and children. Both the Victorian Law Reform Commissioner and the Law Reform Commission of Canada accepted that this was anomalous and recommended that the occasions and criteria for non-compellability should be identical with regard to a wider range of relationships. Thus the Victorian Report refers to ". . . the husband, wife, parent, child or de facto spouse . . ."¹²⁴; and the Canadian Report goes further by referring to ". . . a person who is related to the accused by family or similar ties...."¹²⁵

7.46 The Commission considers that, strictly speaking, the question of compellability in such circumstances is outside its terms of reference. Nevertheless, it considers that such a change in the law would not be warranted at the present time. Compellability in such cases has been the rule from the earliest times, and the Commission is not aware of any evidence that this has caused harsh or disruptive effects to society or to the administration of the criminal law. Moreover, the Commission notes that both the Victorian and Canadian Reports recommend this extension of non-compellability in a context where judicial discretion is to govern the question. For reasons set out above,¹²⁶ the Commission does not consider that the judicial discretion approach is a desirable one.

¹²³ See paragraph 7.5 above.

¹²⁴ Law Reform Commissioner, *Spouse – Witnesses (Competence and Compellability)*, Report No. 6, paragraph 56.

¹²⁵ Law Reform Commission of Canada, *Report on Evidence*, draft Bill, Clause 57.

¹²⁶ See paragraphs 7.11 to 7.13 above.

SUMMARY OF RECOMMENDATIONS

8.1 The Commission recommends that -

- Competence* (1) the husband or wife of an accused should continue to be a competent witness for the prosecution or the defence, including a co-accused, in all criminal proceedings;
(paragraph 7.3)
- Compellability on behalf of the accused spouse* (2) the husband or wife of an accused should be compellable to give evidence on behalf of the accused in every case except where the two spouses are jointly charged;
(paragraph 7.15)
- Compellability on behalf of prosecution* (3)(a) the husband or wife of an accused should be compellable to give evidence on behalf of the prosecution with regard to serious sexual offences and offences involving personal violence or harm (including attempts or offences in which an element is the threat or fear of personal violence) including the offences listed in Table I of Appendix I of this report;
(paragraphs 7.20 to 7.22)
- (b) consideration should be given to providing for the husband or wife of an accused to be compellable to give evidence on behalf of the prosecution in comparable sorts of cases including those offences listed in Table II of Appendix I of this report;
(paragraph 7.23)
- Compellability of spouse for or against co-accused* (4)(a) the spouse of an accused should be compellable to give evidence on behalf of a co-accused in all cases, unless the spouse is a co-accused;
(paragraph 7.31)
- (b) the spouse of an accused should be compellable to give evidence for the prosecution against a co-accused only where the spouse would be compellable against the accused;
(paragraph 7.32)
- Effect of annulment, dissolution or separation on compellability* (5)(a) where a marriage has been dissolved the husband or wife of an accused should be compellable as if they had never been married;
(paragraph 7.33)

(b) where a marriage is void either party should be compellable in all cases;

(paragraph 7.34)

(c) a spouse should not be made a compellable witness against his or her spouse simply because the spouses are separated, whether or not a non-cohabitation order has been made;

(paragraph 7.36)

Communication between spouses

(6) (a) all marital communications should be privileged except where the spouse of an accused is compellable to give evidence on behalf of the prosecution or the accused;

(paragraphs 7.37 and 7.38)

(b) the privilege should be that of the witness;

(paragraph 7.39)

Comment by the prosecution

(7) the prohibition on comment by the prosecution on the failure of the husband or wife of an accused to give evidence in s.8(1) (c) of the *Evidence Act* should be lifted;

(paragraph 7.43)

Removal of existing anomalies

(8) the legislation should be introduced in such a way as to remove the following anomalies -

(a) the discrimination between compellability of a husband and compellability of a wife,

(paragraph 7.44(a))

(b) the inconsistencies between the provisions of the *Evidence Act* and the specific provisions in the *Criminal Code* and *Justices Act*,

(paragraph 7.44(b))

(c) the unnecessary duplication of statutory provisions with regard to committal hearings,

(paragraph 7.44(c))

(d) the uncertainty surrounding the application of s.9(5) of the *Evidence Act*,

(paragraph 7.44(d))

(e) the obsolete provision, s.10 of the *Evidence Act*;

(paragraph 7.44(e))

Other relationships

(9) the provision as to non-compellability should not be extended to relationships other than husband and wife.

(paragraph 7.46)

(Signed) DAVID K. MALCOLM *Chairman*

ERIC FREEMAN *Member*

R.W. HARDING *Member*

5 January, 1977

APPENDIX I**TABLE I**

Suggested list of offences in which the Commission recommends that the husband or wife of an accused ought to be compellable to give evidence on behalf of the prosecution.

Section	Criminal Code
37	Treason
38	Accessory to treason
39	Intent to commit treasonable crimes
58	Threats to do injury to witnesses before Parliament
68	Going armed so as to cause fear
74	Threatening violence near a dwelling-house
78	Piracy
79	Attempted piracy with violence
98	Undue influence of an elector
123	Threats to a juror
128	Threats to a witness before a Royal Commission
144	Using force to rescue prisoner
179	Assaulting or arresting a minister
183	Indecent dealing with children under 14
185	Defilement of girls under 13
186	Householder permitting defilement of young girls on his premises
187	Defilement of girls under 16 and others
188	Defilement of idiots
189	Indecent dealing with girls under 16
190	Defilement by guardian, teacher etc.
191	Procuration
192	Procuring defilement of a woman by threats
193	Abduction of a girl with intent to have carnal knowledge
194	Detaining a woman or girl with intent to defile
195	Permitting boys under 18 to be in brothels
196	Conspiring to defile
197	Incest by man
198	Incest by female
199	Attempt to procure abortion
200	Attempt by woman to procure abortion
201	Supplying instruments, drugs etc.
207	Common nuisance endangering lives
262-267	Harm resulting from failures to comply with duties
277	Unlawful killing being wilful murder (278) murder (279) manslaughter (280)
285	Written threats to murder
286	Conspiracy to murder
288	Procuring or aiding suicide
290	Killing unborn child
292	Disabling in order to commit an indictable offence

293	Stupefying in order to commit an indictable offence
294	Unlawful wounding with intent
294A	Carrying dangerous things on aircraft
295	Preventing or obstructing escape from a wreck
296	Endangering person on railways
296A	Endangering person in aircraft
297	Grievous bodily harm
298	Causing explosion likely to endanger life
299	Attempting to cause explosion likely to endanger life
300	Maliciously administering poison
301	Unlawful wounding
302	Endangering life by failing to provide necessaries
303	Endangering servants
304	Abandoning children
305	Setting mantraps
306	Negligent acts causing harm
307	Endangering safety of persons travelling by railway
308	Sending or taking unseaworthy ships to sea
309-310	Tampering with ship's machinery
313-318A	Various assaults including assaults triable summarily under Ch.XXXI
322	Aggravated assault
324	Assault on person to hinder his freedom of trade or work
325	Rape
327	Attempted rape
328	Indecent assault on females
329	Abduction
330	Abduction of girls under 16
332	Kidnapping
333	Deprivation of liberty
334-335	Deprivation of liberty by falsifying records
336	Deprivation of liberty under mental health law
337	Deprivation of liberty of mental patient
338	Threats to do injury
343	Child stealing
344	Desertion of children
391	Robbery
394	Attempted robbery accompanied by threats of violence
395	Assault with intent to steal
396	Demanding property with threats with intent to steal
397	Demanding property with threats with intent to extort or gain
399	Procuring execution of deeds by threats of violence
463A	Threats to endanger safety of persons on aircraft
463B	False statements relating to aircraft

Road Traffic Act 1974

56	Duty to report accident whereby bodily injury is caused
59	Dangerous driving causing death, injury etc.
60	Reckless driving
61	Dangerous driving

Police Act 1892

- 57 Negligent or furious driving
- 96(8) Discharging firearm, letting off fireworks
- (10) Using a shanghai or sling to the annoyance or danger of any person

TABLE II

List of offences in which the Commission recommends that consideration be given to providing that the husband or wife of an accused ought to be compellable to give evidence on behalf of the prosecution.

Section	Criminal Code
140	Delay to take person arrested before magistrate
208	Poisoning water-holes
Chapter XXIV	Offences against public health
Police Act 1892	
83	Selling adulterated food
Road Traffic Act 1974	
54	Duty to stop in case of accident etc.
57	Duty of owner to identify driver of vehicle involved in accident
Health Act 1911	
129	Pollution of water supply
182	Nuisances
203	Selling unwholesome food
205A	Contamination of food
208	Contamination of milk
226	Sale of patented medicines which have been prohibited from sale
264	Exposure of infected persons and things
267	Selling infected things or letting house where infected person lodging
285	Infection in schools
310	Conveying infection of venereal disease
338	Parent or guardian of child to provide medical treatment for child

APPENDIX II

List of persons who commented on the working paper

Mr. R.H. Burton S.M.

Citizens Advice Bureau of W.A. Inc.

The Hon. Sir Lawrence Walter Jackson, Chief Justice of Western Australia Law Society of
Western Australia

Mr. P.L. Seaman