



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 31**

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

**WORKING PAPER**

**FEBRUARY 1974**

## INTRODUCTION

The Law Reform Commission has been asked to consider and report on the law relating to the competence and compellability of spouses to give evidence in criminal proceedings.

The Commission having completed its first consideration of the matter now issues this working paper. The paper does not necessarily represent the final views of the Commission.

Comments and criticisms are invited. The Commission requests that they be submitted by the 1st May 1974.

Copies of the paper are being forwarded to the –

Chief Justice and Judges of the Supreme Court

Judges of the District Court

Solicitor General

Under Secretary for Law

Commissioner of Police

Law Society

Law School

Magistrates' Institute

Citizens' Advice Bureau of W.A.

Law Reform Commissions and Committees with which this Commission is in correspondence.

The Commission may add to this list.

A notice has been placed in *The West Australian* inviting those interested to obtain a copy of the paper and to submit comments.

The research material on which this paper is based is at the offices of the Commission and will be made available on request.

## TERMS OF REFERENCE

1. “To consider and report on the law as to the competence and compellability of husband and wife to give evidence in criminal proceedings.”

## THE LAW IN WESTERN AUSTRALIA

### Competence and Compellability

2. Section 8(1) of the *Evidence Act 1906* in effect makes the spouse of an accused a competent witness for the prosecution or defence in all criminal proceedings, but not compellable “except as in this Act it is otherwise provided”. The Act then provides for the exceptions which relate substantially to sexual offences.

3. Either the husband or the wife is compellable (under s.9(1)) for the prosecution or defence if the other spouse is charged with any of the following offences under the *Criminal Code*:

- (a) As a householder permitting or inducing the defilement of a young girl on the premises (s.186)
- (b) Procuring a woman or girl for prostitution (s.191)
- (c) Procuring the defilement of a woman or girl by threats, fraud or drugs (s.192)
- (d) Abduction of a girl under 18 with intent to defile (s.193)
- (e) 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)
- (f) Rape and attempted rape (ss.326, 327)
- (g) Indecent assault on a female (s.328)
- (h) Abduction of females (s. 329)
- (i) Abduction of girls under sixteen (s.330)

4. Either the husband or the wife is also compellable (under s.9(1)) on the hearing of a complaint against the other under the *Destitute Persons Relief Ordinance 1845* and (under s.10) in proceedings by indictment against the other for the non-repair of a highway or bridge,

a nuisance to a highway, river or bridge, or to enforce a civil right. But such complaint or proceedings would now be obsolete.

5. Another situation in which either the husband or wife is competent and compellable is when one of them is charged on the complaint of the other with an offence relating to the property of the complaining party (*Evidence Act* s.9(4) and see also *Criminal Code* s.35.).

6. The wife of an accused is compellable (under s.9(2)) for the prosecution or defence if the accused is charged with any of the following offences under the *Criminal Code*:

- (a) Unlawful carnal knowledge of girls (ss.185, 187)
- (b) Unlawful carnal knowledge of female idiots or female imbeciles (s.188)
- (c) Incest (s.197)

In addition, s.189 (indecent dealings with girls) and s.190 (unlawful carnal knowledge of girls by guardian etc.) of the *Criminal Code* provide that the wife of an accused is a compellable witness.

7. The wife may also be compellable if her husband is charged with an offence against her person, health or liberty. Section 9(5) of the *Evidence Act* law position but there is some doubt as to whether at common law on such a charge a wife was compellable or merely competent. See *Lapworth* [1931] 1 K.B. 117; *Boucher* (1952) 36 Cr. App. R. 152; *Sharp v. Rodwell* [1947] V.L.R. 82; *Miller* [1962] Qd. R. 594; *Netz* [1973] Qd. R. 13; but cf. *Riddle* (1911) 12 C.L.R. 622; *Leach* [1912] A.C. 305; *Byrne* [1958] Q.W.N. 18.

8. The husband of an accused is compellable under s.9(3) of the *Evidence Act* for the prosecution or defence if the wife is charged with incest under s.198 of the *Criminal Code*.

9. Section 71 of the *Justices Act 1902* also deals with competence and compellability. There is some conflict between the section and the provisions of the *Evidence Act*.

Subsection (1) and (2) of s.71 deal with evidence on committal and limit the compellability of the spouses to offence against morality. This would be contrary to part of s.9(1) and the whole

of s.10 of the *Evidence Act* (see paragraph 4 above) though not of consequence as these provisions are obsolete. But it could also be in conflict with s.9(5) (see paragraph 7 above).

Subsection (3) of s.71 makes the husband or wife of an accused competent and compellable on any complaint of a simple offence, that is “any offence (indictable or not) punishable on summary conviction” (*Justices Act*, s.4). This is certainly in conflict with s.8 of the *Evidence Act* (see paragraph 2 above). The *Evidence Act* was enacted after the *Justices Act* but s.71 of the *Justices Act* was amended in 1919, although only incidentally, after the enactment of the *Evidence Act*. The Commission has been informed that in practice s.71(3) of the *Justices Act* is not relied on.

10. Both statutes use the words “husband” and “wife”. At common law, the rule regarding the incompetency of spouses to testify against each other applied even after the marriage had been terminated, as to events which had occurred during the marriage. Whether this rule would still apply is open to question. (See discussion in *Cross on Evidence*, Aust. Ed. 1970, 193-5).

### **Communications between spouses**

11. Under s.18 of the *Evidence Act* a husband or wife who is a witness cannot be compelled to disclose any communication made to him or her by the other spouse during marriage. This privilege is that of the witness, not of the accused, and applies whether or not the accused is the spouse of the witness. Section 18 is however expressly made subject to s.9 and a spouse could be compelled to disclose a marital communication such as an admission or confession of one of the sexual crimes referred to in paragraph 3 above.

The privilege has been held in England not to exclude evidence from third parties who know of the marital communication (*Rumping v. D.P.P.* [1964] A.C. 814).

### **THE LAW ELSEWHERE**

12. The law differs substantially from jurisdiction to jurisdiction.

13. In **New South Wales** the spouse of an accused is a competent witness for the prosecution or defence in all cases, but is compellable only when the accused is charged with some offences under the *Child Welfare Act 1939* (*Crimes Act 1900*, s.407).

14. In **Victoria** the spouse of an accused is a competent witness for the prosecution or defence in all cases (*Crimes Act 1958*, ss.399 and 400(1)), and is compellable for the prosecution in respect of specified offences, mainly of a violent or sexual character, against children under the age of sixteen years (*Crimes Act 1958*, s.400(3)) and in proceedings for the grant or revocation of bail, (*Crimes Act 1958*, s.400(3A)).

15. In **Queensland** the spouse of an accused is a competent witness for the defence in the case of all indictable offences (*Criminal Code*, s.618A), and is competent for the prosecution when when the charge is for one of a number of sexual offences (*Criminal Code*, ss.212-220, 222, 223, 347, 349-353, 360 and 363). The spouse is compellable for the prosecution or defence in the case of all simple offences (*Evidence and Discovery Act 1867*, s.5 and see *Finglas v. Cahill* [1961] Qd. R. 323).

16. In **South Australia** the spouse of an accused is a competent witness for the defence in all cases (*Evidence Act 1929*, s.18) and for the prosecution in respect of a number of offences against the spouse or his child including rape, other sexual offences, assault, failure to maintain and offences relating to venereal disease (*Evidence Act*, s.21). The spouse is compellable (under s.21 of the *Evidence Act*) only as regards the age or relationship of a child of the husband or wife but the operation of any statute or rule of law relating to compellability is preserved.

17. In **Tasmania** the spouse of an accused is a competent witness for the defence in all cases (*Evidence Act 1910*, s.85) and for the prosecution on charges of rape, abduction and unlawful publication of defamatory matter (*Criminal Code Act 1924*, ss.185 to 192 and s.214). The spouse is compellable only on a charge of incest (*Criminal Code Act*, s.133) and on charges brought for the enforcement of certain civil rights (*Evidence Act*, s.86).

18. In **New Zealand** the spouse of an accused is compellable witness for the defence in all cases (*Evidence Act 1908*, s.5 (2)) and is competent for the prosecution on charges of offences against the person or property of the witness, bigamy, and cruelty to a child

(*Evidence Act*, s. 5(3)). In addition a wife is a competent witness for the prosecution if her husband is charged with a specified morality offence against a woman or child who is a descendant of him or his wife or is under his or her protection (*Evidence Act*, s5(4)).

19. In **England** the spouse of an accused is a competent witness for the defence in all cases (*Criminal Evidence Act 1898*, s.1), 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, most sexual offences (*Criminal Evidence Act 1898*, s4(1)) and bigamy (*Criminal Justice Administration Act 1914*, s.28(3)). The spouse is compellable either for the prosecution or defence only in those cases where he or she would be compellable at common law (see paragraph 7 above) and in proceedings on indictment for a nuisance to a highway or for the enforcement of a civil right (see paragraph 4 above).

20. The English Criminal Law Revision Committee has recently recommended (11th report, 1972, Cmnd. 4991, paragraphs 143-157) that the spouse of an accused should be a compellable witness for the accused in all cases, a competent witness for the prosecution in all cases, and compellable for the prosecution if the accused is charged with an offence of violence against the spouse, or an offence of violence or a sexual offence against a child under the age of sixteen years belonging to the same household as the accused.

### **Communications between spouses**

21. In each of the above jurisdictions a witness cannot be compelled to disclose a communication made to him or her by his or her spouse. In New South Wales, in addition, the witness cannot be compelled to disclose communications by the witness to his or her spouse (*Evidence Act*, s.11(1)).

### **DISCUSSION**

22. There would appear to be little if any dissatisfaction with the existing law regarding the competence of the spouse of an accused to testify either for the prosecution, or the defence in all cases. Regarding compellability however, particularly compellability for the prosecution, there is considerable difference of opinion. In none of the jurisdictions referred to in this paper is the spouse of the accused either compellable in all cases or not compellable

in all cases. In all of them the spouse is compellable in specified areas, but these areas vary from jurisdiction to jurisdiction.

23. The case against the compellability of spouses for the prosecution, or in favour of greater restriction to the areas of such compellability, was stated by the English Criminal Law Revision Committee as follows:

“.....if the wife if not willing to give the evidence, the state should not expose her to the pitiful clash between the duty to aid the prosecution by giving evidence, however unwillingly, and the natural duty to protect her husband whatever the circumstances. It has been argued strongly in support of this view that the law ought to recognise that, as between spouses, conviction and punishment may have consequences of the most serious economic and social kind for their future and that neither of them should in any circumstances be compelled, against his or her will, to contribute to bringing this about. It is also pointed out that there is at least a considerable likelihood that the result of more compellability will be either perjury or contempt by silence” (Cmnd. 4991, paragraph 147).

24. These arguments no doubt do apply particularly to husband and wife but they could apply to other relationships as well, such as parent and child or indeed any persons closely related whether by family ties or otherwise.

25. The English Committee summed up the argument for more compellability as “the straightforward one that, if it is left to the wife to choose whether to give evidence against her husband, the result may be that a dangerous criminal will go free” (Cmnd. 4991, paragraph 147).

26. The Committee went on to say that “it might be argued that the wife should be compellable in very serious cases such as murder and spying or perhaps in all serious cases of violence but pointed out that “the law has never, except perhaps in treason, made the seriousness of an offence by itself a ground for compellability” (Cmnd. 4991; paragraph 152).

27. Another view contrary to making the seriousness of the offence the basis for compellability was that apparently taken by the legislators in Queensland and Western

Australia when they enacted provisions making spouses compellable on charges of simple offences (see paragraphs 15 and 9 above). And in so far as the case against compellability is based on the avoidance of distress in the home (see paragraph 23 above), it would support this view.

28. One of the main arguments in favour of compellability in selected areas is the argument of convenience, this is, that it would be harder to prove the offence otherwise. The English Criminal Law Revision Committee in justifying its recommendation which was admittedly a compromise, put the argument thus:

“...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” (Cmnd. 4991, paragraph 151).

29. This would also seem to be part at least of the rationale behind compellability on charges of sexual offences in the other jurisdictions. With sexual offences there is the additional factor that corroboration is required either by statute or as a matter of established practice, thus making it all the harder to prove the offence without the evidence of the spouse.

30. If difficulty of proof is to be the basis for the compellability of spouses in selected areas, it is at least arguable that in *any* particular case in which it would be difficult to prove an offence without the evidence of the spouse, he or she should be compellable. It may, for example, be difficult to prove a murder unless the accused's spouse is compelled to testify. The “difficulty of proof” argument would thus in effect support a case for compellability generally.

31. The main argument against compellability in specified areas is the difficulty in determining the areas. The differences that exist in the jurisdictions considered emphasise this difficulty.

32. Regarding the compellability of the spouse on behalf of the accused, the English Committee said it had no doubt that the accused's spouse should be made compellable in all

cases. “The only possible argument against this” according to the Committee “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 and in any event to have very little weight compared with the argument that the husband might feel a great grievance if he could not compel his possibly estranged wife to give evidence for him” (Cmnd. 4991, paragraph 153).

33. The question of whether communication between spouses should be privileged from disclosure at the option of the witness raises a different issue. The principle is whether the witness should be forced into a breach of confidence. Moreover on this issue the law in the various jurisdictions is uniform except that in Western Australia the privilege has been expressly made subject to provisions relating to compellability (see paragraph 11 above). Note also that the English Criminal Law Revision Committee has recommended the abolition of the privilege (Cmnd. 4991, paragraph 173).

## **SUMMARY OF ISSUES**

34. The following questions arise, and the Commission would welcome comment.

### **Compellability for the prosecution**

- (1) Should the spouse of an accused be compellable for the prosecution in all cases?
- (2) If the answer to (1) is “NO”, should the spouse of the accused be compellable for the prosecution in some cases?
- (3) If the answer to (2) is “YES”, in which cases or areas should the spouse be compellable?

### **Compellability for the defence**

- (4) Should the spouse of an accused be compellable for the defence in all cases?

- (5) If the answer to (4) is “NO”, should the spouse of the accused be compellable for the defence in some cases?
- (6) If the answer to (5) is “YES, in what cases or areas should the spouse be compellable?

**Marital communications**

- (7) Should communications between spouses be privileged at the option of the witness?
- (8) If the answer to (7) is “YES”, should the privilege be subject to any provisions relating to compellability?