

Competence and Compellability of Spouses to Give Evidence in

Terms of Reference

In 1972 the Committee 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.

Background of Reference

At common law there was a rule that persons interested in the outcome of proceedings could not be competent witnesses. A major exception to this rule of incompetence arose where a person was charged with an offence against the person, health or liberty of their spouse. The law in Western Australia at the time of the Commission's inquiry stated that the spouse of an accused was a competent witness for the prosecution or the defence at every stage of criminal proceedings.¹ However, the law governing the compellability of an accused's spouse to give evidence in criminal proceedings was not as clear.

There are two opposing interests at issue when considering compellability: namely, the public interest in the detection and punishment of offenders, and the interest of society and the parties to a marriage in preserving marriage and its confidential nature. The general rule was that a person could not be compelled to give evidence against their spouse, but there were exceptions of uncertain extent to this rule.² For instance, a spouse was compellable in regard to specific offences, mainly of a sexual nature or involving the property of the spouse of the accused. Further, a spouse was possibly compellable when the accused was charged with an offence against the person, health or liberty of the spouse and in the case of offences tried summarily.

When the Committee was reconstituted as a Commission in 1973 it took over the conduct of the project.

Nature and Extent of Consultation

The Commission issued a working paper in February 1974, copies of which were circulated to the Chief Justice, judges of the Supreme and District Courts, the Solicitor General, the Commissioner of Police and a number of legal and community organisations. A notice was also placed in *The West Australian* newspaper inviting submissions from interested parties.

Several submissions were received in response to the Commission's working paper, including submissions from the Chief Justice of Western Australia and the Law Society. The Commission delivered its final report, outlining its recommendations, in January 1977.³

Recommendations

After extensive examination of the issues, the law in other jurisdictions and consideration of submissions, the Commission concluded that the law in this area be amended in certain respects. In summary, the Commission recommended 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.
- 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.

¹ *Evidence Act 1906 (WA)* s 8(1). For a comprehensive overview of the relevant law in Western Australia at the time of the inquiry, see Law Reform Commission of Western Australia, *Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings*, Project No 31 (1977) ch 4.

² *Evidence Act 1906 (WA)* ss 9–10.

³ Law Reform Commission of Western Australia, *Competence and Compellability of Spouses as Witnesses*, Project No 31 (1977).

Criminal Proceedings

- 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 the report.
- Consideration should be given to providing for the husband or the 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 the report.
- 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.
- 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.
- Where a marriage has been dissolved the husband or wife of an accused should be compellable as if they had never been married.
- Where a marriage is void either party should be compellable in all cases.
- 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.
- 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.
- The privilege should be that of the witness.
- 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 1906* (WA) should be lifted.
- The legislation should be introduced in such a way as to remove the following anomalies:
 - (a) the discrimination between compellability of a husband and the compellability of a wife;
 - (b) the inconsistencies between the provisions of the *Evidence Act* and the specific provisions in the *Criminal Code* and the *Justices Act*
 - (c) the unnecessary duplication of statutory provisions with regard to committal hearings;
 - (d) the uncertainty surrounding the application of s 9(5) of the *Evidence Act*; and
 - (e) the obsolete provision, s 10 of the *Evidence Act*.
- The provision as to non-compellability should not be extended to relationships other than husband and wife.

A comprehensive list of the Commission's recommendations may be found in chapter seven of the final report.

Legislative or Other Action Undertaken

The *Acts Amendment (Evidence) Act 1991* (WA) implemented the Commission's recommendations.⁴

⁴ In *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999) the Commission recommended that the *Evidence Act 1906* (WA) and related legislation be redrafted to conform with the *Evidence Act 1995* (Cth) whilst retaining certain advantages of the current Western Australian legislation. Discussion on how such legislative reform might affect the question of competence and compellability of spouses in criminal proceedings may be found in: Standing Committee on Uniform Legislation and Intergovernmental Agreements, *Evidence Law* (13 November 1996) paras 5.1–5.2.