NEW SOUTH WALES

LAW REFORM COMMISSION

DISCUSSION PAPER

ON

COMPETENCE AND COMPELLABILITY

1980

PREFACE

The Law Reform Commission is constituted by the Law Reform Commission Act, 1967. The Commissioners are:

Chairman: The Honourable Mr Justice J.H. Wootten.
Deputy Chairman: Mr R.D. Conacher.
Mr J.H.P. Disney.
Mr D. Gressier.
His Honour Judge T.J. Martin, Q.C.

Mr J.M. Bennett is Executive Member of the Commission.

Professor J.D. Heydon was a Commissioner from 11 August 1975 until 31 January 1978, and thereafter acted as consultant to the Commission. He was responsible in the first instance for the preparation of the draft of this Discussion Paper.

Although the Discussion Paper has in some places been drafted in the language of collective views, it has not been adopted by the Commission. It has not yet been considered by all members of the Commission and has not been concurred in by all who have considered it. For example, Appendix B expresses a conflicting view which has some support within the Commission.

The Discussion Paper is circulated at this stage in order that the Commission will have the benefit of outside views when it comes to formulate recommendations on the matters dealt with. The Commission will be most grateful for comment and criticism, whether on the Discussion Paper as a whole or any aspect of it, and whether in writing, or in discussion with a member of the Commission.

In making its report, the Commission will assume, unless otherwise advised, that any contributor of comment or criticism has no objection to the Commission quoting or referring to it, in whole or in part, or attributing it to him. Any desire for confidentiality or anonymity will of course be respected.

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SUMMARY OF CONTENTS

NOTE RE DRAFT BILL

The draft Bill in Appendix A is an amendment of the Evidence Act, 1898, which would give effect to certain views discussed in this paper. The section numbers (230-232) of the Bill are artificial and are used for convenience in distinguishing the draft from existing legislation.

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COMPETENCE AND COMPELLABILITY

A. Spouses

1.1 Incompetence of spouses at common law. This Discussion Paper examines the law as to the competence of witnesses - who may testify? It also examines the compellability of witnesses who can be compelled to testify at the instance of any party or a particular party? It does not discuss, except in passing, issues of privilege - which questions may a competent witness who is testifying refuse to answer? Some statutes which are phrased in the language of competence and compellability are more properly examples of rules relating to privilege, and are therefore not appropriately discussed here.[1]

The draft Bill (ss.230-2) makes provision for spouses, judges and other special cases; but s.230 ensures that every natural person is competent to give evidence, and s.231(1) that every competent person is compellable, subject in each case to any other enactment. Section 231(3) to (6) and s.232 would, if enacted, be examples of such "other enactments". Section 230(2) provides that s.230(1) shall not affect the law relating to the giving of evidence by such persons as children, ill persons, and those who do not appreciate the nature and obligation of an oath or affirmation. These persons are discussed elsewhere.[2]

At common law the spouse of a party was incompetent as a witness for or against him.[3] The incompetence applied

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1. Evidence Act, 1898, s.11.

2. See Sworn and Unsworn Evidence.

3. Bentby v. Croke (1784) 3 Doug.K.B. 422: 99 E.R. 729; Davis v. Dinwoody (1792) 4 Term Rep. 678: 100 E.R. 1241.

in respect of events occurring before and during the marriage, and continued even when the marriage was terminated in respect of events before termination.[4] In criminal cases some exceptions developed. First, a spouse was competent to testify against his, or more usually her, partner, in cases of personal violence carried out by the latter on the former.[5] The exception did not extend to crimes against the wife's property.[6]

Secondly, a spouse might have been competent in cases of treason.[7] Thirdly, a wife was a competent witness where she was abducted and married against her will.[8] Fourthly, in all cases where a wife is a competent witness against her husband she is also competent for him.[9]

As a rule a person who is competent as a witness is, by the common law, compellable to give evidence.[10] But

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4. Monroe v. Twisleton (1802) Peake Add.Cas. 219: 170 E.R. 250; O'Connor v. Marjoribanks (1842) 4 Man. & G. 435: 134 E.R. 179; cf. Beveridge v. Minter (1824) 1 C. & P. 364: 171 E.R. 1232.

5. Lord Audley's Case (1631) 3 St.Tr. 401.

6. R. v. Buttleton (1884) 12 Q.B.D. 266.

7. R. v Lord Mayor of London (1886) 16 Q.B.D. 772, at p.775; Director of Public Prosecutions v. Blady [1912] 2 K.B. 89, at p.92; cf. Taylor (1931), para. 1372.

8. R. v. Wakefield (1827) 2 Lew.C.C. 279: 168 E.R. 1154; Reeve v. Wood (1864) 5 B. & S. 364, at pp.368-9: 122 E.R. 876, at pp.868-9.

9. R. v. Sergeant (1826) Ry. & M. 352, at pp.354-5: 171 E.R. 1046, at p.1047.

10. Tilley v. Tilley [1949] P.240, at p.248, per Bucknill L.J.; see n.4 above; and R. v. Houkaman [1951] N.Z.L.R. 251; R. v. Boucher (1952) 36 Cr.App.Rep. 152, at p.154; R. v. Netz [1973] Qd.R. 622; cf. Riddle v. R. (1911) 12 C.L.R. 622.

in England the case of the spouse of the accused is exceptional, and the spouse is not compellable at the suit of the prosecution, even where the charge is of personal violence to the spouse.[11]

The rules as to the incompetence of spouses meant that co-accused B could not call the spouse of co-accused A whether or not co-accused A wanted this.[12]

1.1A Privilege of marital communications. A witness has a privilege by which he may refuse to disclose a communication between himself and his spouse.[13] The proposals in this Discussion paper have no bearing on this privilege.

1.1B Privilege against crimination of spouse. There is a second relevant privilege. The privilege is spoken of as one by which a witness is not bound to answer a question if the answer might have a tendency to expose the spouse of the witness to a criminal charge, penalty or forfeiture.[14] The privilege is, however, ill-defined. The tendency to criminate can hardly be the same as that relevant to the privilege against self-crimination by an answer of a witness to a question; the latter privilege is against giving

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11. Hoskyn v. Metropolitan Police Commissioner [1978] 2 W.L.R. 695.

12. R. v. Thompson (1872) L.R. 1 C.C.R. 377.

13. Evidence Act, 1898, s.11.

14. Cross on Evidence, 4th ed. (1974), pp.242, 243, 246. See also Phipson on Evidence, 10th ed. (1963), para. 611; Halsbury's Laws of England, 3rd ed., Vol.12 (1955), p.52, Vol.15 (1956), p.422; Civil Evidence Act 1968 (U.K.), s.14.

an answer which would itself be admissible (e.g., as an admission) in a prosecution of the witness,[15] but the answer of a witness would not be admissible against his spouse in another proceeding, unless indeed the witness had some special and unusual authority from his spouse. And it must be borne in mind that the privilege was developed at a time when, in a criminal proceeding, the spouse of the accused was in general incompetent to give evidence. The privilege has been applied so as to support a demurrer to a bill of discovery against husband and wife where discovery by the wife might have shown the husband to be guilty of a felony.[16] The privilege was said to be available in a case between the inhabitants of one parish and the inhabitants of another parish to determine in which of the parishes a pauper was settled: a woman claiming to be the wife of a man was asked questions to prove their marriage; the answers tended to show that the man had committed bigamy: had the woman objected she should not have been compelled to answer, but she did not object and the answers were properly received.[17] Wigmore concluded

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15. The privilege against self-crimination does not, that is to say, protect an answer which would be no more than a clue in the search for other evidence: Wigmore on Evidence, 3rd ed. (1940), s.2261. In the United States the privilege has been held to protect such an answer: see Wigmore on Evidence (1940), s.2261; Wigmore on Evidence, McNaughton rev. (1961), s.2260. In Cross on Evidence, 4th ed. (1974), at p.243, the passage for which R. v. Slaney ((1832) 5 C. & P. 213: 172 E.R. 944) is cited goes beyond the authorities offered in support.

16. Cartwright v. Green (1803) 8 Ves. 412: 32 E.R. 412.

17. R. v. All Saints, Worcester (1817) 6 M. & S. 194, 200, 201: 105 E.R. 1215, 1217, 1218, Bayley, J. Perhaps it would be better to say that this and Cartwright v. Green (above) are the cases on which the privilege is founded.

that in England the privilege was limited to such testimony only as disfavoured the legal interest of the spouse of the witness in the proceeding in which the attempt to elicit the testimony occurred.[18] The privilege appears to have this further peculiarity, that it is a privilege which may be claimed by the witness or by his spouse.[19] This privilege is not the immediate subject of this Paper, but the privilege, so far as it is the privilege of the witness, has an operation much like a rule against compellability. Indeed, in a criminal trial, there is a coalescence of the question of compellability at the suit of the Crown and the question of privilege. Whatever may be the outcome of our proposals on compellability, the privilege should (if it is preserved) be made consistent with it. Thus if the wife of the accused is compellable to give evidence on any description of criminal charge, she should not have a privilege to withhold her testimony criminating him on that charge, and the privilege should not enable the accused to exclude her testimony.

1.2 Statutory changes. The Evidence Act, 1898, s.6, provides: "In every legal proceeding in which witnesses are compellable to give evidence, every person offered as a witness and competent to give evidence shall, except as hereinafter provided,[20] be compellable to give evidence." This section is qualified by the Crimes Act, 1900 (N.S.W.), s.407, which provides:

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18. Wigmore on Evidence, 3rd ed. (1940), s.2234. But this is not consistent with what Bayley J. said in R. v. All Saints, Worcester (above). Presumably the testimony must also tend to show that the spouse is guilty of a crime or has incurred a penalty or forfeiture.

19. Wigmore on Evidence, 3rd ed. (1940), s.2241.

20. The relevant provisions are ss.9 and 11, but these are better regarded as having to do with privilege. There was another relevant provision, s.7 of the Act as passed in 1898; this section was one of the precursors of s.407 of the Crimes Act, 1900, and was repealed by the Crimes Act.

Para.1.2

Spouses

"Every party to a civil proceeding, inquiry in which evidence is or may be given, or arbitration, and the husband or wife of such party, shall be competent to give evidence in such proceeding, inquiry, or arbitration.

Every accused person in a criminal proceeding, and the husband or wife of such person, shall be competent, but save as hereinafter provided, not compellable, to give evidence in such proceeding in every Court:

Provided that:- ...

(3) The husband or wife of any accused person in a criminal proceeding shall be compellable to give evidence in such proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused:-

(a) where the offence charged is under any Act or Imperial Act by which the husband or wife of the accused is made a compellable witness in a proceeding in respect of the offence;

(b) where the offence charged is under the provisions of sections twenty-seven, forty-one, forty-two, fifty-four, sixty, one hundred and fourteen, or one hundred and eighteen of the Child Welfare Act, 1923, or any Act amending or replacing the said provisions."

The effect of these provisions in civil proceedings is that, subject to the small doubt discussed in paragraph 1.3, spouses of the parties are competent and compellable. Their effect in criminal proceedings is that spouses of accused persons are competent, but only compellable under s.407(3), so that common law instances of compellability, if any, have been abolished. That effect was established by a decision of the High Court in 1911 that even if the common law were that on the trial of a criminal charge involving violence to the wife of the accused, the wife

was not merely competent but also compellable against her husband which the court doubted, s.407 of the Crimes Act in its then form quite clearly made the wife of an accused although competent in all cases compellable in none.[21] Proviso (3) was added to s.407 in 1924, along with the words "save as hereinafter provided". The cases specified by s.407(3)(b) are now found in the Child Welfare Act, 1939, ss.67, 68, 69, 77, 85, 148 and 149, which concern parents permitting children to take part in dangerous exhibitions or performances, persons who employ or permit begging or entertaining by children without a licence, the keepers of brothels and opium dens in which children are found, parents who contribute to their children's offences by wilful default or failure to exercise due care, and maltreatment of children. Further, in any criminal proceedings authorized by the Married Persons (Property and Torts) Act, 1901, or by the Married Women's Property Act, 1893, the husband and wife shall be competent, and, except when defendant, compellable witnesses: Married Persons (Property and Torts) Act, 1901, s.21. And spouses are competent and compellable in proceedings under the Maintenance Act, 1964, Pt.II: see s.33.

It seems to follow that the accused's spouse is not a compellable defence witness except in these proceedings.[22] Section 407(3) makes it clear that the instances in which the spouse is compellable in criminal cases are instances where he or she is compellable both for the prosecution and the defence.[23]

The effect of s.407 is that the spouse of co-accused A is competent to testify for co-accused B, but is not compellable unless s.407(3) is satisfied.

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21. Riddle v. R. (1911) 12 C.L.R. 622.

22. R. v. Acaster (1912) 7 Cr.App.Rep. 187; R. v. Boal [1965] 1 Q.B. 402, at p.416.

23. See also R. v. Sergeant (1826) Ry. & M. 353: 171 E.R. 1046.

Spouses

1.3 Section 407: one doubt. One obscurity in s.407 is that spouses are expressly said to be competent but not (subject to exceptions) compellable in criminal proceedings; while they are expressly made competent in civil, but nothing is said as to compellability in civil. On expressio unius principles it presumably follows that they are compellable in civil proceedings; but the reasoning in Leach v. R.[24] may run counter to this, for the House of Lords there said that non-compellability in civil proceedings was an important common law rule which, if it was to be altered at all, had to be expressly altered. Section 407 should no doubt be read as a qualification of the Evidence Act, 1898, s.6, and as assuming its existence.[25] If the draft Bill were adopted, the effect of ss.230-1, coupled with the repeal of s.6 and s.407 would remove any doubt.

1.4 Outline of proposals. It appears from the above brief survey of the present law of competence and compellability that, while questions of competence are dealt with well enough, further inquiry is necessary as to whether there are not fundamental defects in the law of compellability. At least it appears that it needs to be tidied up and it may be that it needs substantive change. There is a strong argument in favour of a widening of the compellability of spouses in criminal cases, so that they would always be compellable for the defence, and a less strong argument that they should be compellable for the prosecution much more often than at present. A view which it is proposed to explore in this Paper is that an accused's spouse should be compellable against the accused:

> (a) where the crime charged is one of violence against the witness spouse or a person under 18 who was a member of the same household as the accused;

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24. [1912] A.C. 305; cf. Gosselin v. R. (1903) 33 S.C.R. 255.

25. See n.13 above.

(b) where the crime charged involves sexual misconduct allegedly committed against the witness spouse or a person under 18 who was a member of the same household as the accused;

(c) where the court considers that it is in the public interest for the spouse to testify.

Sections 230-2 in the draft Bill would give effect to each of those matters. Spouses whose marriage has terminated would be made completely compellable.

The question whether the court should be able to comment on the silence of the spouse is discussed elsewhere in connection with a discussion of judicial comment on the silence of the accused.[26] Here questions of principle relevant to the issue of how far spouses should be compellable are discussed.

1.5 Historical explanation for non-compellability. Wigmore offered this historical explanation for the rule of non-compellability of spouses.

> "Possibly the true explanation is, after all, the simplest one, namely, that a natural and strong repugnance was felt (especially in those days of closer family unity and more rigid paternal authority) to condemning a man by admitting to the witness stand against him those who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance, and were almost numbered among his chattels. In a day when the offence of petit treason by a wife or a servant - violence to the head of the household - was still recognized, it would seem unconscionable that the law itself should abet (as it were) a testimonial

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26. The Accused as a Witness.

> betrayal which came close enough to petit treason, and should virtually permit a wife to cause her husband's death. This process of thought (though it leaves unexplained the compellability of a son) is at least consistent with several features of the situation, namely with the half-recognition of a privilege against servants' testimony, with the fact that the early cases all deal with the privilege for a wife's testimony against her husband (not the husband's against the wife), and with the fact that the privilege is recorded for a half a century before the disqualification [i.e., incompetence] is mentioned."[27]

1.6 The basis of the common law rules of competence: traditional arguments. This paragraph considers some traditional arguments for the common law incompetence of spouses. Blackstone said that if spouses "were admitted to be witnesses for each other, they would contradict one maxim of the law, 'nemo in propria causa testis esse debet'; and if against each other they would contradict another maxim, nemo tenetur seipsum accusare'".[28] Hume said that the wife's evidence must be excluded, "however willing [she be] to depone: For if she be willing to appear ..., it can only be from one of two motives; out of affection to the man, and to save him by her perjury, or to convict him, for the gratification of deadly malice".[29] The theory of the unity of husband and wife which underlies Blackstone's statement is now a totally discredited fiction.[30] The view

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27. Wigmore, para.2227.

28. I, p.420.

29. Hume, Commentaries on the Law of Scotland Respecting Crimes (4th ed., 1844), II, p.349, quoted in Draft Scottish Code, p.49.

30. Co. Litt. 6b (1628); Director of Public Prosecutions v. Blady [1912] 2 K.B. 89, at p.92.

that the testimony of spouses were tainted by interest cannot survive the statutory abolition of incompetence on grounds of interest;[31] this abolition has had entirely satisfactory consequences over the long period it has been in operation. The risk of biased evidence[32] goes to weight rather than admissibility. The battle was fought and won generations ago: there is now no limit to the competence of the spouse.

1.7 The basis of the common law rules of compellability: modern considerations: (a) confidential relationship. One argument is that to compel the accused's spouse to be a witness "would compel a violation of the confidential relationship between husband and wife".[33] But not every aspect of the matrimonial relationship is confidential. The present law gives to a spouse a privilege against being compelled to disclose communications between them.[34] But is there not, on current standards in the community, a relationship of trust and confidence between spouses going beyond mere respect for confidentiality as regards communications? Would it not be felt that a spouse would betray that relationship if, by giving evidence against the other, he had a part in drawing down criminal punishment on the other? And if there is a betrayal and it is compelled by the law, would not the community pay too high a price, even in pursuit of the clear public

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31. See now Evidence Act, 1898, s.5. The incompetence of spouses survived the first English precursor of this legislation, the Evidence Act 1843: see Stapleton v. Crofts (1852) 18 Q.B. 367: 118 E.R. 137.

32. Davis v. Dinwoody (1792) 4 Term Rep. 678, at p.679: 100 E.R. 1241.

33. V.L.R.C. 6 (1976), para.35.

34. See Evidence Act, 1898, s.11(1).

interest in the suppression of crime? Some kinds of criminal conduct, for example petty shoplifting, would evoke an affirmative answer to all these questions. Other kinds of criminal conduct, for example a husband being an accessory to the rape of his wife by a stranger, would call for a negative answer to the second and third of these questions. Where then should the limits of compellability be drawn? And how should they be drawn? Can it be done for all cases prospectively by Parliament? Or should Parliament establish criteria on which in some cases a court would decide? Is there some other way? These are amongst the questions to which this Paper is addressed.

1.8 The basis of the common law rules of compellability: modern considerations: (b) peace within families. The incompetence of spouses was often said to lead to "the preservation of the peace of families";[35] it is based on "the interest which the public have in the preservation of domestic peace and confidence between married persons".[36] To admit a spouse's evidence "might be a cause of implacable discord and dissension between the husband and the wife and a means of great inconvenience ...."[37]

In Riddle v. R.[38] Griffith C.J. said:

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35. Stapleton v. Crofts (1852) 18 Q.B. 367, at p.369: 118 E.R. 137, at p.138, per Lord Campbell C.J.

36. Stapleton v. Crofts (1852) 18 Q.B. 367, at p.370: 118 E.R. 137, at p.138, per Wightman J.; see also Monroe v. Twisleton (1802) Peake Add.Cas. 219: 170 E.R. 250.

37. Co. Litt. 1st Inst. 6b.

38. (1911) 12 C.L.R. 622, at p.631.

> "[A dangerous] argument ab inconvenienti [was used] ... that it would be extremely dangerous and undesirable, in cases where the husband is guilty of violence to his wife, and she might be the only witness, that she should not be compellable to give evidence. On the other hand, it might be extremely inconvenient, and tend to disturb the peace of a great many families, if for every breach of the criminal law, however trivial, committed by a husband against his wife a stranger should be allowed to intervene and compel her to come into Court and give evidence against her husband."

But responses have been made to this kind of argument. Erle J. said:

> "if this ground of exclusion existed, it would apply to other witnesses, as well as to parties, their domestic peace being equally important. But it is clear with respect to witnesses, not parties, that they cannot refuse to be examined on any ground derived from marriage, and that husbands and wives may initially contradict and discredit each other upon matters full of family dissension ...."[39]

In a case of trover by a deceased person's personal representatives against his widow. Maule J. said:

> "if the question had arisen between third parties, the widow might clearly have been called to prove she had pledged the plate

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39. Stapleton v. Crofts (1852) 18 Q.B. 367: 118 E.R. 137, at p.140.

> with her husband's consent, or by his authority. That puts an end, therefore, to the sacredness of conjugal communications as the foundation of the rule ...."[40]

And there was no rule "that a wife cannot be a witness to give testimony in any degree to criminate her husband".[41] Hence in a pauper's settlement case, evidence may competently be given by a wife which tends to prove her husband's bigamy; what she said in the settlement case could not be used against the husband in a bigamy prosecution.[42] It follows that husbands and wives may give contradictory testimony in a proceeding, because "it may well be doubted whether the competency of a witness can depend upon the marshalling of the evidence, or the particular stage of the cause at which the witness may be called".[43] In short, the rule of incompetence only prevented one spouse testifying in proceedings to which the other was a party.

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40. O'Connor v. Marjoribanks (1842) 4 Man. & G. 435, at p.440: 134 E.R. 179, at p.181.

41. R. v. Bathwick (Inhabitants) (1831) 2 B. & Ad. 639, at p.647: 109 E.R. 1280, at p.1284, per Lord Tenterden C.J.; cf. R. v. Clivinger (Inhabitants) (1788) 2 T.R. 263: 100 E.R. 143.

42. R. v. All Saints, Worcester (Inhabitants) (1817) 6 M. & S. 194: 105 E.R. 1215; R. v. Bathwick (Inhabitants) (1831) 2 B. & Ad. 639: 103 E.R. 1280. Distinguish the compellability now under discussion from the privilege discussed in para.1.1B above.

43. R. v. Bathwick (Inhabitants) (1831) 2 B. & Ad. 639, at p.646: 109 E.R. 1280, at p.1283, per Lord Tenterden C.J. See Annesley v. Lord Anglesea (1743) 17 How.St.Tr. 1276; R. v. All Saints, Worcester (Inhabitants) (1817) 6 M. & S. 194: 105 E.R. 12.

Para.1.8

Spouses

One may ask how far the law of evidence can or should promote marital happiness in preference to assisting the search for truth. The answer perhaps is that though the non-compellability of spouses does not necessarily increase domestic happiness, compellability might reduce it; it might give the accused one more grievance in quarrels which destroy the marriage. To some Wigmore's conclusions seem better based.

> "When one thinks of the manifold circumstances of life that contribute to cause marital dissension, the liability to give unfavourable testimony appears as only a casual and minor one, not to be exaggerated into a foundation for so important a rule. It is incorrect to assume that there exists in the normal domestic union an imminent danger of shattering an ideal state of harmony solely by the liability to testify unfavourably."[44]

A further point was made by the English Common Law Commission in 1853.[45] They said:

> "What, then, is the mischief here to be apprehended? The possibility of resentment of a husband against a wife for testifying to facts prejudicial to his interest. But it is obvious that such resentment could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf. Such instances ... would be very rare; and we do not think that a regard to the feelings of individuals of this class, or the amount of mischief likely to arise from a disregard of them, is sufficient to compensate for the loss which in many cases may result from the exclusion of the evidence."

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44. Wigmore, para.2228.

45. 2nd Report, p.13, quoted by Wigmore, para.2228.

Spouses

The Common Law Commission was considering the position in regard to civil proceedings. Whether it would have taken the same attitude in respect of criminal proceedings against a spouse is open to argument.

Three final points may be made. If a wife is competent and chooses to testify, no doubt the accused will blame the witness. But if the spouse is compellable, it is perhaps less likely that the accused will blame the witness, who can correctly say that she was compelled to give evidence truthfully by sanctions for contempt and perjury.

Secondly, a loyal wife may dislike testifying against her husband. But she may also feel a duty to protect members of the family or even outsiders from injuries which they are powerless to protect themselves from at the husband's hands. Compellability would terminate this conflict of loyalties.

Thirdly, if the husband is a violent brute, does not a law which gives a choice to the wife put her at risk of violence or threats of violence from the husband.[46]

1.9 The basis of the common law rules of compellability: modern considerations: (c) hardship to the spouse. A further argument against compellability has been put thus:

> "if the wife is not willing to give 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 .... The law ought to recognise that, as between spouses, conviction and punishment may have consequences of the most serious economic

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46. Cf. Hoskyn v. Metropolitan Police Commissioner [1978] 2 W.L.R. 695, 720A, Lord Edmund Davies.

> 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."[47]

There is some force in this argument. As might be expected, it made no appeal whatever to Bentham or to Wigmore. The latter's distaste for the sporting theory of litigation is well known.[48] And Bentham said of the argument:[49]

> "Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes! - Think? answers the legislator; yes, indeed, I think of it and in thinking of it, what I think of besides, is, what you ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? It depends altogether upon yourself: preserve your innocence."

1.10 The basis of the common law rules of compellability: modern considerations: (d) pointlessness. A further argument against compellability is that its aim - the admission of more evidence for the prosecution - may be thwarted. A wife on good terms with her husband and determined to help him will either commit contempt by silence, or, more likely, perjure herself; and the latter course will make more difficult the jury's task by putting before it untrustworthy evidence. It is too much to expect such a spouse to be a satisfactory witness.

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47. 11th Report (1972), para.147.

48. See Wigmore, para.2228.

49. Bentham (1827), Bk.IX, Pt.IV, ch.5, s.4, para.1.

Spouses

Bentham said of this argument:[50]

> "If applied to the testimony [of a spouse] considered in respect of the danger of falsehood, apart from the consideration of the sanction, it is an objection to all testimony - if it applies to the case of the wife, considered with respect to her presumable unwillingness to do an act whereby her husband may sustain a prejudice, it applies with still greater force against all the instances on which a man's own testimoney is permitted to be called for against himself; it applies to one of the characteristic features of the practice of the courts styled courts of equity."

1.11 The basis of the common law rules of compellability: modern considerations: (e) public opinion. A further argument for non-compellability is this.

> "[T]here is the necessity of paying due regard to public opinion. It is most important that the rules of evidence should meet with general esteem, for the confidence in the administration of justice is essential to the well being of any community .... [P]ublic opinion might be horrified by the spectacle of one spouse being compelled to testify against the other ...."[51]

Of this argument it might be said that there should be limits to the extent to which public opinion which is not soundly based should be taken into account. Further, Bentham asserted, and his view may still be right, that "the probability is, that an institution so repugnant to

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50. Bentham (1827), Bk.IX, Pt.IV, ch.5, s.4, para.1.

51. Cross-Gobbo (1970), p.196.

moral sentiments is not generally known ...."[52] Nevertheless, as recently as last year, three of five Law Lords thought that the public would find the competence of a wife to give evidence against her husband in criminal proceedings repugnant and a fourth found her full compellability to do so repugnant to him.[53]

1.12 Deeprootedness of the rules. Any change by which the incidence of compellability of a wife to testify against her husband is increased must acknowledge the deep inroad this would make into the traditional attitudes of lawyers. These were most fully expressed in the judgments delivered in the House of Lords in Leach v. R.[54] In that case it was held that a statute making spouses competent witnesses against each other could not be held to render them compellable in the absence of clear words, for the non-compellability of the spouse was a fundamental and deep-rooted principle. The Earl of Halsbury said:[55]

> "If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that everybody would say, 'To call a wife against her husband is a thing that cannot be heard of' - to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous."

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52. Bentham (1827), Bk.IX, Pt.IV, ch.5, s.4, para.1.

53. Hoskyn v. Metropolitan Police Commissioner [1978] 2 W.L.R. 695, at pp.702, 708 (2 passages) and 720.

54. [1912] A.C. 305.

55. At p.311.

Of this it might be said that traditional rules should not be accepted simply because of their deeprootedness if they can be shown to produce harm. Law reform involves the reform of ancient or well-settled law as well as of modern or insecurely-based law.

1.13 Replies to the arguments against compellability. Some replies to the above arguments against compellability turn on the view that any instance of non-compellability entails the possibility of facts being withheld from the court.

> "If essential witnesses are excluded, there is the certain evil of deciding without knowledge, and there is the probable evil of shaking confidence in the law: these evils are certain ...."[56]

Wigmore said:

> "if Doe has committed a wrong against Roe and Doe's wife's testimony is needed for proving that wrong, Doe, the very wrongdoer, is to be licensed to withhold it and thus to secure immunity from giving redress because Doe's own marital peace will be thereby endangered - a curious piece of policy by which the wrongdoer's own interests are consulted in determining whether justice shall have its course against him."[57]

1.14 Some anomalies. In recognizing substantial areas where spouses are not compellable, our law is open to some criticism on grounds of anomaly.

(a) A man and a woman living together without being married are compellable against each other.

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56. Stapleton v. Crofts (1852) 18 Q.B. 367, at p.377: 188 E.R. 137, at p.141.

57. Wigmore, para.2228.

(b) Parents are compellable against children and vice versa; the same applies to various other intimate relationships such as brothers and sisters, grandparents and grandchildren, and so on.

(c) Friends are compellable against each other.

(d) Partners are compellable against each other.

(e) A fiduciary is compellable against his principal.

(f) Spouses are not compellable (though they are competent) no matter how bad the terms on which they live and no matter how near breakdown or termination their marriage is.

1.15 Another anomaly. Wigmore said:[58]

> "If the fear of causing marital dissension or disturbing the domestic peace were genuinely the ground of the privilege, then the privilege should apply to testimony which in any way disparages or disfavors the other spouse, irrespective of his being a party to the cause, for the wife's public assertion of a husband's fraud or perjury (for example) must tend plainly to that apprehended effect, even though the husband be not legally charged at the moment."

But the law does not extend so far.[59] The fact that it does not provides an argument that the rule of non-compellability is insecurely based.

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58. Wigmore, para.2234.

59. R. v. All Saints, Worcester (Inhabitants) (1817) 6 M. & S. 194: 105 E.R. 1215. See also the cases cited in para.1.8, nn.41-3.

Spouses

1.16 Injustice. Bentham has argued that the operation of the rules is unjust; for like cases are not treated alike.

> "Two men, both married, are guilty of errors of exactly the same sort, punishable with exactly the same punishment. In one of the two instances (so it happens), evidence sufficient for conviction is obtainable, without having recourse to the testimony of the wife; in the other instance, not without having recourse to the testimony of the wife. While the one suffers, ... to what use, with what consistency, is the other to be permitted to triumph in impunity?"[60]

1.17 A danger. Bentham pointed to one danger of the rule:

> "A law which excludes the testimony of the wife, in the case of a prosecution against the husband for mischief done to any other individual, or to the state, is ... a law authorizing him to do, in the presence and with the assistance of the wife, every kind of mischief, that excepted by which she herself would be a sufferer. The law, which ... affords its protection to the wife, - with what consistency can it ... refuse its protection to every human creature besides? [Lawyers have said:] Let us ... grant to every man a license to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle: and, as far as depends upon us, let us convert that castle into a den of thieves."[61]

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60. Bentham (1827), Bk.IX, Pt.IV, ch.5, s.4, para.1.

61. Bentham (1827), Bk.IX, Pt.IV, ch.5, s.4, para.1.

Para.1.18

Spouses

1.18 Risk of competent and non-compellable witnesses being thought unreliable. There is another adverse consequence of a rule by which some competent witnesses are not compellable. In an early Scottish case on the competence, but not compellability, of a daughter to testify against her father, Lord Meadowbank spoke to this effect:[62]

> "he was at present disposed to consider the option asserted to the child on such an occasion, as something anomalous and unbecoming: That it rather lies with the law to determine, in this conflict between private and public obligations, and not to leave it to the child to make a choice; which, if he gives evidence, renders him in some measure an ultroneous witness, and exposes him to the distressing suspicion of being actuated by improper feelings against his parent. This is not a matter which should be left to the decision of the individual, but ought to be settled by a rule, according to general views of what is best, whether to maintain sacred the domestic relation, or to make it yield to considerations of public duty. The law has decided in favour of the former, in the case of husband and wife: and in favour of the latter, in the case of brother and sister; and it ought in like manner to cut short the controversy, and exclude all discretion, in the case of parent and child."

Since there is little pressure to restrict the competence of spouse witnesses, in present circumstances this is an argument for making all witnesses compellable. To some extent it loses force since the abolition of disqualification for interest; but not entirely. The argument is that the existence of an option to testify will mean that

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62. According to Hume, Commentaries on the Law of Scotland Respecting Crimes (4th ed., 1844), II, p.346, n.3; (Cunningham's Case), quoted in Draft Scottish Code, para.6.5, p.49.

all who, being called by the prosecution, exercize it by choosing to testify are bound to be motivated by ill-will towards the accused, or to be thought to be so motivated. The argument seeks to avoid all witnesses being tainted by the qualities of some.

1.19 Complex consequences. The complexity of our law can be shown thus. Assume A and B are charged with (1) assaulting Mrs. A; (2) murdering Mrs. A's father who tries to protect her; (3) assaulting Mrs. A's young son, who also tries to protect her, in such a way as to infringe the Child Welfare Act, 1939, s.149. Mrs. A will be competent against A on all three charges. She will not be compellable on the first, in view of the decision in Riddle v. R.[63] as to the effect of the Crimes Act, 1900, s.407. Mrs. A will be compellable against A on the third charge, but not on the second. She will be both competent and compellable against B on all three charges. If A and B are tried together, as is likely, substantial artificiality and confusion in the trial must result.

1.20 Absence of ill-effects in civil cases. A party's spouse is competent and compellable in civil cases. It is not asserted that this is a cause of marital disharmony. Why should marital disharmony be caused by an extension of the civil law to criminal cases? Admittedly the consequences of a successful criminal prosecution are often serious for the accused, but so may be the consequences for the loser of civil litigation.

1.21 The law in other Australian jurisdictions. In all jurisdictions the spouse is competent and compellable in civil proceedings.[64] As regards criminal proceedings, the Tasmanian Law Reform Commission has summarized the law in other Australian jurisdictions as follows.[65]

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63. (1911) 12 C.L.R. 622; see above, para.1.2.

64. Cross-Gobbo (1970), p.192.

65. Tasmanian L.R.C. (1977), pp.3-5.

Spouses

"2. THE EXISTING LAW IN TASMANIA

A. Competent

(1) For the prosecution

Rape, abduction and kidnapping (Sections 185-192, Criminal Code).

Unlawful publication of defamatory matter (Section 214, Criminal Code).

Ill-treatment of children (Section 178 of the Code, as amended by Criminal Code Act 1975, Section 4).

(2) For the defence

Section 85 of the Evidence Act 1910 provides that every person charged with an offence and the wife or husband, as the case may be, of the person so chargd shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person.

There are, however, a number of provisos, of which the more important seem to be that a person so charged shall not be called as a witness except upon his own application, and, the wife or husband of the person charged shall not be called as a witness except on the application of the person charged.

B. Compellable

The spouse is compellable for the prosecution only in respect of the following offences:-

Incest (Criminal Code section 133).

Bigamy - (Commonwealth Marriage Act 1961 section 94(6)).

Spouses

> Those offences in which the spouse was compellable at common law, namely, in cases of personal violence to the other spouse.[66]

Section 86 of the Evidence Act 1910 provides that on the trial of any indictment or other proceeding:-

> For the non-repair of any public highway or bridge or for a nuisance to same or to a river; or
>
> Instituted for the purpose of trying or enforcing a civil right only,

every defendant to such indictment or proceedings, and the wife or husband of any such defendant, shall be admissible witnesses and compellable to give evidence.

3. THE EXISTING LAW IN OTHER AUSTRALIAN STATES ....

VICTORIA

A. Competent

The spouse is competent for both prosecution and defence in respect of all offences (Sections 400 and 399 respectively Crimes Act 1958).

B. Compellable

The spouse is apparently compellable for the prosecution in respect of the following offences:-

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66. The summary was compiled before the decision of Hoskyn v. Metropolitan Police Commissioner [1978] 2 W.L.R. 695.

Para.1.21

Spouses

Specified offences mainly of a violent or sexual character against children under sixteen. (Crimes Act 1958 section 400(3)).

(NOTE:) We are informed that conflicting interpretations of the meaning of this section in the Victorian Supreme Court have cast doubts on whether all the offences specified are 'compellable' offences, if committed against persons under the age of sixteen years, or whether only some of the specified offences are so covered.)

Criminal proceedings involving each other's property, taken by one spouse in the course of deserting the other. (Marriage Act 1958 section 160).

Bigamy (Commonwealth Marriage Act section 94(6)).

Those offences in which the spouse was compellable at Common Law, namely, in cases of personal violence to the other spouse.[67]

Additionally, in proceedings for the grant or revocation of bail (Crimes Act 1958 section 400(3A)) ....

WESTERN AUSTRALIA

The position appears to be complex and not altogether clear, at any rate, as far as compellability is concerned, since there appears to be some conflict between different statutes. However, the position would appear to be as follows:-

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67. See n.66.

Spouses

A. Competent

The spouse is competent for both the prosecution and the defence in respect of all criminal proceedings (section 8(1) Evidence Act 1906).

B. Compellable

It seems that the spouse is compellable for both prosecution and defence for certain specified offences including rape and many other sexual offences, and also, abduction (Criminal Code section 9(1)); also, when one spouse is charged on the complaint of the other with an offence in relation to the property of the complaining party (Evidence Act section 9(4) and Criminal Code section 35).

At common law the wife may also be compellable if her husband is charged with an offence against her person, health or liberty. There is, however, some doubt in Western Australia as to whether the wife is compellable or merely competent under the common law, which is preserved by section 9(5) of the Evidence Act.[67A]

SOUTH AUSTRALIA

A. Competent

The spouse is competent for the prosecution in respect of offences against the other spouse and children of the marriage, including rape, other sexual offences, assaults, failure to maintain, and offences relating to venereal disease (Evidence Act 1929 section 21).

67A. See n.66.

Spouses

Also, in criminal proceedings by a wife for the protection of her property.

The spouse is compellable for the defence in all cases (Evidence Act section 18).

B. Compellable

As regards the age or relationship of a child of the husband or wife. The direction of any statute or rule of law relating to compellability is also preserved (Evidence Act 1929 s.21)."

In Queensland the Evidence Act 1977, ss.7 and 8, provide that spouses are competent for an accused spouse, a co-accused and the prosecution; compellable for the accused; and compellable for the prosecution in respect of certain offences against persons under 16, and in all cases where compellability exists at common law.

1.22 Proposals for reform in Australia. There are no proposals for change of the present arrangements in civil proceedings, that the spouse of a party is competent and compellable.

The Victorian Law Reform Commissioner recommended[68] that in criminal proceedings the spouse should be competent in all cases, and compellable for the defence, and also for the prosecution unless the judge otherwise orders.[69]

The South Australian Criminal Law and Penal Methods Reform Committee[70] recommended that in criminal proceedings

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68. V.L.R.C. 6 (1976).

69. See below, para.1.29.

70. Third Report (1975), pp.175-80.

the spouse should be competent in all cases but as a rule should not be compellable for the prosecution or for a co-accused. There should be compellability in the existing instances, and where a child under 16 is assaulted.

The Law Reform Commission of Western Australia recommended[71] that in criminal proceedings the spouse should continue to be competent for prosecution and defence in all cases; should be compellable in all cases for the defence except where the spouses are jointly charged; and should be compellable for the prosecution in serious sexual offences and offences of violence or physical harm, including many specifically listed offences. 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.

1.23 The law in non-Australian jurisdictions, and proposals for reform. In England in criminal proceedings the spouse is competent for the defence in all cases, and for the prosecution in certain specified offences (principally relating to children and to sexual matters). The spouse is, in criminal proceedings, compellable only under any common law head that may survive Hoskyn v. Metropolitan Police Commissioner,[72] and in indictments for nuisance on a highway.[73] The Criminal Law Revision Committee recommended that in criminal proceedings a spouse should be competent for both prosecution and defence in all cases; compellable for the defence in all cases; and compellable for the prosecution where presently compellable and where violence has occurred towards children under sixteen in the same household as the accused.

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71. W.A.L.R.C. 31 (1977), para.8.1.

72. [1978] 2 W.L.R. 695.

73. See principally Criminal Evidence Act 1898, ss.1 and 4(1).

Para.1.23

Spouses

In Canada in criminal proceedings the spouse is competent and compellable for the defence in all cases, but competent and compellable for the prosecution only in particular cases.[74] The Law Reform Commission of Canada recommended that the spouse should be competent and compellable in all criminal proceedings, but that the court should have a discretion to declare a witness non-compellable if the witness had family or similar ties to the accused.[75]

In New Zealand in criminal proceedings a spouse is competent for the prosecution in respect of specified offences, and compellable for the defence in all cases.[76]

The rule of non-compellability in criminal proceedings has been reversed in some American codes.[77] The Federal Rules (1975), r.501, leaves the matter to the common law.[78] Under Scots law the accused's spouse is competent only where the accused is charged with a crime injurious to the spouse's person or property, or bigamy, or incest or bodily injury to a young person, or by statute; and the accused's spouse is compellable only in the first of these instances.[79]

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74. Canada Evidence Act, s.4.

75. Draft Canada Code (1976), ss.54 and 57.

76. Evidence Act 1908 (N.Z.), s.5(2).

77. E.g., Model Code (1942), r.215 (no non-compellability save for a privilege in respect of confidential communications; Uniform Rules (1953), rr.23(2) and 28).

78. Cf. Funk v. United States 344 U.S. 604 (1953) and Hawkins v. United States 358 U.S. 74 (1958).

79. Criminal Procedure (Scotland) Act 1975, ss.141, 143, 346 and 348.

Para.1.23

Spouses

The Scottish Law Commission proposed, in its draft Evidence Code,[80] the following Articles:

> "6.4 In any criminal cause, if the accused take competent objection, the spouse of that accused shall not be permitted to answer a question inculpating that accused.
>
> 6.5 Such object is competent unless
>
> (a) the accused is charged with a crime injurious to the property or person of the spouse,
>
> (b) where the accused is charged with bigamy,
>
> (c) where the accused is charged with incest or with any offence involving moral or bodily injury to a person under seventeen years of age, or
>
> (d) where the accused is charged with an offence under an enactment which provides that the spouse is a competent witness, or that an offence is one to which this Article applies."

There is something unsatisfactory about this or any other scheme which turns on competence depending on the consent of the accused. If there is some fundamental public policy which justifies exceptions to a general rule of competence and compellability, it seems that it must exist quite independently of the accused's wishes in a particular case. An objection by the accused will be made if his wife's evidence is likely to be against him, quite independently of whether or not the marriage will survive. A decision by the wife to testify against the accused, however, may well be thought to be a sign that the marriage is not going to survive. The Scottish Law Commission cite among the advantages of the proposal that "the privilege against answering [incriminating] questions is conferred

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80. Draft Scottish Code, ch.6.

upon the person who has an interest to enforce it".[81] But the self -interest of the accused is not equivalent to any public interest in the sanctity of marital communications.[82]

1.24 Compellability for the defence. There seems little reason why, for what it is worth, the law should not be changed so that the accused's spouse should be compellable for the defence in all cases. The reasoning of the English Criminal Law Revision Committee in support of this conclusion is persuasive.

> "It is surprising that the spouse should not be [compellable] now. 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 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. No doubt the accused would prefer, if possible, to avoid calling his wife, if she was reluctant to give evidence, for fear that her evidence would be unfavourable to him because of the compulsion; but if she could in fact give true evidence which would be in his favour, he would probably think that, however reluctant she was to give evidence, the truth would emerge if she did so."[83]

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81. Draft Scottish Code, para.65, p.51.

82. The Scottish Law Commission's proposals have not yet been adopted, despite recent major statutory consolidation: see Criminal Procedure (Scotland) Act 1975, ss.141, 143, 346 and 348.

83. 11th Report (1972), para.153.

The view expressed in this paragraph is given effect to in the draft Bill.

1.25 The choices open: general. What should be the law? Are the "heroic dimensions given to the conjugal flame by the sentimentality of English lawyers"[84] the correct ones?

1.25A Competence. Is there any case for restricting the competence of spouses? In 1958 the United States Supreme Court held the accused's spouse not to be a competent witness for the prosecution on the ground that "[a]dverse testimony given in criminal proceedings would be likely to destroy almost any marriage".[85] Cross's comment on this reasoning is forceful:[86] "can it be seriously maintained that many marriages would be saved from destruction if persons who were willing and anxious to do so were restrained from testifying against their spouse?"

So is the English Common Law Practice Commission's apothegm: "It seems difficult to assign any reason why the law should be more tender of the domestic happiness of married persons than they are themselves disposed to be."[87]

It may also be noted that if restraining a spouse from testimony against the accused saves marriages in criminal proceedings, it ought also to do so in civil proceedings where reputation, or large amounts of property, are at stake; yet to change the civil law would wrench it sharply in a direction advocated by no-one.

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84. Bentham (1827), Bk.9, Pt.IV, ch.5, s.4, para.1.

85. Hawkins v. United States 358 U.S. 74, at p.87, per Black J.

86. Cross (1974), p.162.

87. 2nd Report, p.11, quoted by Wigmore, para.601.

Spouses

The competence of a spouse as a witness for the prosecution became the law of New South Wales in 1891. So far as we know, it has been fully accepted and we have never heard of any claim that the long-established change should be reversed.

We therefore propose that the law relating to competence should stay as it is: in both civil and criminal proceedings the spouse of a party should be competent to give evidence.

1.25B Civil proceedings: compellability. On this also we propose that the law should stay as it is: in civil proceedings the spouse of a party should be compellable to give evidence on call by any party. It will be recalled that it was mentioned in paragraph 1.3 that there is a small doubt as to what the law is, and that doubt should be removed.

1.25C Criminal proceedings: compellability for accused spouse. We propose that in criminal proceedings the spouse of an accused person should be compellable to give evidence on call by that accused person.

1.25D Criminal proceedings: compellability for prosecution. There seem to be six possibilities for the law on the compellability of the spouse for the prosecution:

(a) To make spouses compellable in all cases.

(b) To make spouses not compellable in any case.

(c) To make spouses compellable in enumerated offences.

(d) To make spouses compellable in broad categories of offences.

(e) To make spouses compellable where the court so directs.

(f) To make no change in the existing law.

Para.1.25D

Spouses

Option (a) would seem to be inappropriate, at least at present. Whether or not there is any overriding consideration against making spouses compellable in all cases, option (a) may depart too far from public opinion, and would certainly go further than anything so far done or proposed in any Anglo-Australian jurisdiction.

The argument for option (b) has been put thus:

> "in these days, when wives are so much less under the domination of their husbands, a wife should be made competent only, so that the choice whether to give evidence would be left to her. The result would no doubt be that in many cases it would depend on her whether there was a prosecution or not. We recognize the force of the argument that this would be right in policy, especially because the wife might think that by refraining from giving evidence she would have a better hope that her husband would treat her well in future."[88]

For reasons given above,[89] option (b) is arguably undesirable; it would narrow the present law of New South Wales.

That law is an instance of option (c). That option has the advantage of precision. But it is likely to produce anomalies in that some offences may be excluded which are in substance, but not technically, identical with those which are included. And it looks merely to the formulation of the charge, not to the facts on which the charge is based, nor to the actual state of the marriage. This has been the traditional approach in Australia and no jurisdiction has made the same choice as any other.[90] It would require a fine judgment to make

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88. 11th Report (1972), para.149.

89. Paras 1.6-1.20.

90. See above, para.1.21.

all the relevant choices accurately on a single occasion, and power to add to the list to cover instances within the broad principle would be desirable.

For these reasons there is much to be said for option (d). This produces some uncertainty, but judges will have power to mould compellability depending on the needs of particular cases before them.

Option (e) would perhaps produce even more uncertainty.

The case against option (f) is similar to that against option (b). If it is argued that there has been no demand for change, reference is made to the point made by the Victorian Law Reform Commissioner as to the number of Law Reform Agencies which have considered the problem in recent years.[91]

The draft Bill combines options (d) and (e). It would give the court a power to compel a spouse to testify if in the interest of justice there were an overriding need for the evidence. Factors which would be relevant to the exercize of that discretion are listed.

1.26 General categories of compellability: violence to the spouse. The English Criminal Law Revision Committee proposed that the wife should be compellable in instances of violence towards her. This corresponds with the position formerly developed at common law, which was abolished for New South Wales by s.407 of the Crimes Act, 1900,[92] and was terminated for England by the House of Lords in 1978.[93]

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91. V.L.R.C. 6 (1976), para.2.

92. See above, para.1.2.

93. See above, para.1.1.

Para.1.26

Spouses

> "[T]he public interest in the punishment of violence requires ... compellability .... It is true that the wife may still refuse to give evidence even though compellable; but the fact that there is compellability should make it easier to counter the effect of possible intimidation by her husband and to persuade her to give evidence ...."[94]

The South Australian Criminal Law and Penal Methods Reform Committee said:[95]

> "It has been suggested that a spouse should not be compellable to give evidence against an accused person in the case of minor assaults upon the spouse, which may be regarded as part of the wear and tear of married life .... We do not agree with the contention. A charge for an assault of a minor nature is unlikely to be laid unless it is laid by the spouse or unless the spouse has complained to the police concerning the assault. If a charge is then laid and the spouse refuses to give evidence and is not compellable to give evidence, it is unlikely that any future complaint will be taken seriously, and perhaps a call for help when a serious assault, involving possible loss of life, takes place may be ignored. This may occur in any event when an unwilling spouse fails to come up to his or her proof upon the hearing of a complaint for assault, but it is even more likely that pressure to desist from giving evidence will be brought by one spouse upon the other if the spouse making the complaint is not compellable ...."

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94. 11th Report (1972), para.149.

95. (1975), 3rd Report, ch.8, para.11.2.

Spouses

Section 232(4)(a)-(d) of the draft Bill would give effect to the proposal of the English Committee and the view of the South Australian Committee.

1.27 General categories of compellability: violence and sexual misconduct towards children in the same household as the accused. The English Criminal Law Revision Committee proposed that the wife should be compellable in cases of violence and sexual misconduct towards children in the same household as the accused. If such a proposal were adopted, s.232(4)(g) of the draft Bill would give effect to it; it differs only in providing for a higher age than 16, namely 18. This is the age of majority for general purposes.[96] It is the age when education often ceases and children leave home, or are likely to be able to afford to leave home if they want to.

> "The seriousness of some of these cases[97] 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 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

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96. Seventeen was the age proposed by the Queensland Law Reform Commission: Q.L.R.C. 19, p.10; this was consistent with relevant provisions of the Queensland Criminal Code.

97. They include, e.g., "battered baby" cases.

> have acquiesced in it, although it is not proposed to prosecute her .... [It can be argued that compellability in sexual offences] would be unnecessary because some of these offences may not be serious and it may be better for all those concerned, parent or child, that the offence should be overlooked than that it should be exposed in court and the offender punished, especially as the marriage might as a result be broken up. It has been argued that for this reason it is better to leave it to the wife to judge whether she should give the evidence. On the other hand some sexual offences may have worse effects than all but the most serious offences of violence."[98]

1.28 Other general categories of compellability. What about other cases? As to offences other than those involving violence to the spouse, the matter seems less serious. Property crimes between husband and wife raise quite different difficulties from those between strangers or other family members. The ownership of matrimonial property is often a matter of much obscurity.

What of offences against children not part of the accused's household? On this the English Criminal Law Revision Committee said:

> "This would have the desirable effect of giving further protection to children, and the proposed limitation would exclude some cases where compellability might be thought desirable in any event - for example, if the offence was against a neighbour's child visiting the spouses' house or against a nephew or niece of the offender. But 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.

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98. 11th Report (1972), para.150.

> 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.
>
> ... It might be argued that the wife should be compellable in very serious cases such as murder and spying and perhaps in all serious cases of violence; but the law has never, except perhaps in treason, made the seriousness of an offence by itself a ground for compellability, and we do not favour doing so now."[99]

If such a view as that were adopted, s.232(4) of the draft Bill would give effect to it. The Bill also contains for discussion s.232(5)-(6) which would enable the courts to reach cases not covered by s.232(4). That is, cases of violence against the spouse and children under 18 are important cases where it might be thought the case for compellability was stronger; in other cases where evidence was not readily available, the court would have power to order a witness to testify, balancing the importance of the evidence, the availability of other evidence, the seriousness of the crime, and the likelihood that the spouse would attempt to tell the truth.

1.29 Discretion. Could one justify a proposal to grant a discretion to the court to determine compellability, outside crimes of violence against the spouse and children in the same household, and sexual crimes against children in the same household? The traditional course of listing particular offences may be thought to produce technicality and anomaly. Indeed, opinions differ widely

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99. 11th Report (1972), paras 151-2.

on what those offences should be even as between each Australian jurisdiction and England. Further, as the Victorian Law Reform Commissioner recently explained:

> "[t]o name a crime, though it conveys what basic elements of criminal behaviour are referred to, does not provide any information as to what, in any future instance, will prove to be the weight of any of the [relevant] policy considerations .... Furthermore such a naming does not provide sufficient information to enable anything more than an intuitive judgment to be formed as to what, in future, will be the proportion of instances of the named crime in which the balance of policy considerations will prove to be in favour of compellability.
>
> ... By way of illustration one may take the crime of attempted murder of a person under 16, which is one of the items in the present Victorian list. Merely to know that this is the crime to be considered for listing, does not tell us, in relation to any particular case that may arise in the future,
>
> (i) Whether the evidence of the accused's spouse will be of real importance to the reaching of a correct verdict
>
> - or -
>
> (ii) Whether a marital or family relationship of real value will exist or, if existing, will be likely to be disrupted by calling the accused's spouse as a witness for the prosecution
>
> - or -
>
> (iii) Whether the affections, or the social or economic circumstances, of the accused's husband or wife

> will be such that having regard to the kind of sentence likely to result from a conviction, it would be unduly harsh to compel him or her to give evidence for the prosecution.

... It is true, of course, that to know that the crime charged is attempted murder of a person under 16 tells us that there is a high degree of likelihood that the enforcement of the criminal law against the person accused will be found, when the facts are known, to be of great importance to the community. But the general indication thus given by the name of the offence may, in some cases, prove misleading. For example, the facts on which the charge is based may be found to be that a mother, after agonizing mental struggles, has attempted to take the life of a much loved child to save it from protracted suffering, and has then attempted to take her own life or has given herself up to the police. The label, moreover, can be misleading in an opposite direction. For example, the unimpressive label of 'common assault' may refer to a sadistic infliction of protracted terror which has caused permanent psychiatric injury. And even if unusual situations such as these be disregarded, there remains the difficulty that the name of the crimes gives no information at all as to whether, in any particular case that may arise, there will, or will not, be counter-vailing policy considerations ....

... Perhaps the most striking demonstration of how difficult it is to formulate a satisfactory list is provided by the following comparison:

(a) In Victoria the list is confined, in the main, to indictable offences against the person carrying very

heavy maximum penalties, and even these serious offences are covered only where they are committed against persons under 16.

(b) In Queensland on the other hand, the list comprises all simple offences, and little else;[100] and in Western Australia the list at one time included, if it does not now include, all offences punishable on summary conviction.

The reasoning on which the Victorian provision was based was presumably, that where the offence can be a grave one the feelings and interest of the accused's spouse must give way. And the reasoning on which the Queensland and Western Australian provisions were based was, presumably, that when the offence is a minor one the feelings and interests of the accused's spouse are not likely to be gravely affected and should give way. But the conclusion, for present purposes, should be that the listing method is unsatisfactory because it involves reliance upon general reasoning from inadequate information."[101]

To make spouses compellable in cases involving general kinds of serious crime rather than particular listed crimes would overcome some of the problems of technicality and anomaly. It would seem that the risk of these serious crimes in fact being excusable or trivial is slight, for in really hard cases there is unlikely to be a prosecution. However, it is arguable that the alternative recommended by the Victorian Law Reform Commissioner

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100. Under the law in force before 1977: now see para. 1.21.

101. V.L.R.C. 6 (1976), paras 46-9.

is preferable, namely that compellability should depend on the court's discretion after considering such factors as the seriousness of the crime, the importance of punishing the particular offender, the risk of a happy marriage being up upset, the importance in the case of the facts to which the witness is capable of testifying and the availability of alternative methods of proof of those facts.[102]

The Law Reform Commission of Western Australia opposed the notion of compellability depending on the victim being a child of the household.[103] They asked:

> "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?
>
> Would the son's friend who accompanied him to his home for the holiday be regarded as a child of the same household?
>
> Would the rule apply to an offence committed against a child of the household outside the privacy of the accused's home?
>
> 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?"

Answers to the first three questions might be: Yes, probably not, yes. An answer to the fourth might be that a child not related to the household will usually have parents or guardians to look after his interests and it

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102. V.L.R.C. 6 (1976), para.56.

103. W.A.L.R.C. 31 (1977), para.7.18.

will probably be possible to get evidence of offences committed against him by a husband otherwise than from the husband's wife. But a child within a household may be deterred from complaint to the police, so that injuries heal and the memories of other children fade before the authorities are asked to intervene.

1.30 Persons other than spouses. The Victorian Law Reform Commissioner went further: he proposed that all witnesses should be compellable, but that lawful or de facto spouses, and parents and children, should be exempted from obligation to testify if the court considered that in the circumstances this was justified.[104] The Law Reform Commission of Canada went further still, for the class to be exempted was persons "related to the accused by family or similar ties".[105]

Apart from the vagueness of the latter formulation, these proposals have the merit, on the face of it, of increasing the evidence before the court by making compellability the general rule. But they seem to go too far. First, they involve a radical change in the law, a change to which it is unclear how public opinion will respond. Secondly, it seems more strongly supportable to have a strict rule, at least in the cases of violence to spouses and children and sexual cases involving children, and confine any discretion to other cases. This would make the law simpler to administer. Thirdly, a special regime for family members and others beyond spouses seems unsatisfactory. The present law has none.

Parents are compellable against children and vice versa, one friend against another, a lover against his beloved. There is no discussion in the literature of the need for any change in these rules, and no public complaint

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104. V.L.R.C. 6 (1976), para.56.

105. Draft Canada Code (1975), s.57.

about them that we know of. In Scotland parents and children were formerly incompetent, and then became non-compellable; the present law provides for competence and compellability.[106] It would not accord with modern basic principles to extend incompetence or non-compellability. Though this produces anomalies if we compare the law of husband and wife,[107] the anomalies are caused by the law of husband and wife, not the law as to other relationships.

The South Australian Criminal Law and Penal Methods Reform Committee said:[108]

> "It has been pointed out to us that there is a significant section of the community, particularly amongst aboriginals, where persons who have not gone through a legally recognized ceremony of marriage have been living together for many years in the like circumstances as if they were husband and wife. It has been submitted that if two people live together as though they were husband and wife for a period of three years or more there should be sufficient evidence of the permanence of their relationship to entitle each to whatever protection the law gives against competence or compellability of a spouse to give evidence against the other.
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> There is force in the submission that the statute law for many purposes, including the granting of pensions and of compensation, has recognized relationships between

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106. Wigmore, para.2228.

107. See above, para.1.14

108. (1975), 3rd Report, paras 11.1, 11.5.

> man and woman as giving rise to rights notwithstanding that the relationship has not been entered into with the formality of the law relating to marriages. It is suggested that the law should also recognize that such associations imply a confidential relationship between the parties which should bring whatever benefits the relationship of marriage implies. There are of course other confidential relationships, for example the relationship of brothers and sisters in the same household, the relationship of men living together as homosexuals. It seems to us that in the main, it is not desirable to extend the situations on which the prosecution of persons accused of crime may be impeded because witnesses cannot be compelled to give evidence ...."

There is great weight in that conclusion, although the matter is one of considerable difficulty, particularly in regard to de facto spouses. The length of time for which a relationship has endured is no necessary guide to its permanency. Further, the problem is one affecting many areas of the law, and should not be dealt with piecemeal as part of the law of evidence. Finally, if a partly discretionary test of compellability such as that contained in draft s.232 were adopted, the greater the number of people who were subject to such a test, the harder it would be to prepare for a trial, the more often would the court have to consider its discretion, and the more time would be consumed.[109] Discussion is invited.

1.31 A discretion: one advantage. If difficulty of proof is to be a factor in deciding whether a spouse should be compellable, as the Criminal Law Revision Committee accepted in deciding to recommend that a spouse be compellable to testify on charges of offences against children in the

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109. See Draft Canada Code (1975), p.80, per Commissioner La Forest.

accused's household,[110] should this be a more general consideration? Section 232(6) would permit this. It would be a factor which the court would be able to consider in exercising its discretion under s.232(5) and (6)(b).

1.32 Narrowing non-compellability: broken marriages. The South Australian Criminal Law and Penal Methods Reform Committee said:[111]

> "It has further been submitted that if a family unit, whether constituted by a lawful marriage or by a de facto relationship, has irretrievably broken down, the protection against competence and compellability to give evidence should not be given to a spouse, as the purpose of protection should be to preserve the family as a fundamental unit of society ....
>
> Where the marriage has irretrievably broken down there is no need to preserve the rule against compellability. However it is unlikely that when this has happened the person who could object to giving evidence will object. If he or she does refuse, it will probably be for the protection of children of the marriage, and we do not think that an objection on this ground should be discouraged."

1.33 The problem of spouses whose marriage has terminated. At common law it was held in Monroe v. Twisleton[112] that a divorced spouse was incompetent in the same way as a

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110. Above, para.1.27.

111. (1975), 3rd Report, paras 11.1, 11.5.

112. (1802) Peake Add.Cas. 219: 170 E.R. 250. Cf. void marriages: Wells v. Fisher (1831) 1 Mood. & Rob. 99: 174 E.R. 34.

spouse whose marriage continued. The same applies to a widow or widower suing the deceased spouse's estate.[113] This view is justifiable only by the need to prevent confidential communications being revealed, but it applies so as to prevent proof by the ex-spouse of evidence of acts and of non-confidential communications. Even as to confidential communications, it may be doubted whether happily married persons would make fewer confidential statements because of the possibility of their revelation if the marriage terminates. If in s.407 the words "husband" and "wife" included divorced spouses, widows and widowers, then that incompetence would no longer exist. But there is contrary authority.[114] This, of course, has the ludicrous result that competence and compellability is more restricted when a marriage is over than while it subsists.[115] Further, the words "husband" and "wife" in the English equivalent[116] to the Evidence Act, 1898, s.11, which confers a privilege in respect of marital communications, have been held not to include widows, widowers and divorced persons.[117] At least in England, this entails giving the same words different meanings in different parts of the same Act.[118]

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113. O'Connor v. Marjoribanks (1842) 4 Man. & G. 435: 134 E.R. 179.

114. R. v. Algar [1954] 1 Q.B. 279 (voidable marriage); Moss v. Moss [1963] 2 Q.B. 799, at p.804.

115. For criticism of the law, see Anon. (1959).

116. Criminal Evidence Act 1898, s.1(d).

117. Shenton v. Tyler [1939] Ch. 620.

118. The Criminal Evidence Act 1898, ss.1, 1(d) and 4(1).

Para.1.33

Spouses

These difficulties should be resolved by legislation so as to make spouses whose marriage has terminated competent and compellable. This would be achieved if legislation such as ss.230 and 231 were passed. They make all natural persons competent and compellable, subject to s.232, which creates some exceptions in respect of "present" spouses. The risk of spitefully motivated testimony by the divorced spouse[119] is slight, and normally such a risk does not result in the exclusion of evidence but goes only to weight.[120]

The special position of a spouse in reference to compellability would thus cease on divorce. Should there be like provisions to cover the case of spouses who are not cohabiting? We think not. Such a provision would complicate legislation; and it would raise an additional collateral issue for the court to decide - and a difficult one. Further, such provisions would serve little purpose, as the English Criminal Law Revision Committee has explained.

> "For if the parties are judicially separated or otherwise not cohabiting, and if there is little prospect that they will become reconciled, the spouse in question is likely to be willing to give evidence; and if there is a prospect of reconciliation, it may be better to avoid the risk of spoiling this prospect by compelling the spouse to give evidence when he or she would not have been compellable in the ordinary case."[120A]

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119. Cross (1974), p.162.

120. Cf. V.L.R.C. 6 (1976), para.65.

120A. 11th Report (1972), para.156.

Spouses

1.34 Criminal proceedings: compellability for co-accused. We suggest for discussion that in criminal proceedings the spouse of an accused person should be compellable to give evidence on call by another accused person in like circumstances to those in which the spouse would be compellable on call by the prosecution. The draft Bill by s.232(3), (4) and (5) would achieve this. The English Criminal Law Revision Committee stated:

> "In favour of making her so it is argued that the interests of justice require that B should be able to compel anybody not being tried with him to give evidence on his behalf and the fact that the witness happens to be A's wife should make no difference, even though the result might be her incriminating A. Against this it is argued that, since the prosecution cannot call Mrs. A as a witness in order that she may incriminate A, it is wrong that they should be able to compel her to incriminate him by cross-examination if she is called by B. We think that the argument against compellability is the stronger. We considered a possible compromise by which Mrs. A should be compellable on behalf of B only if A consented. Then A could give his consent if Mrs. A could help B's defence without incriminating A. But on the whole we are opposed to this, because it might be procedurally awkward, and embarrassing for A's defence, if it were necessary to ask him in court whether he consented to his wife's giving evidence, especially if he agreed at first that she should do so but changed his mind before the time came to call her because of evidence given meanwhile. But we propose that Mrs. A should be compellable on behalf of B in any case where she would be compellable on behalf of the prosecution even though the result might be that she would incriminate A. Here the argument mentioned above against making her compellable for B in general does not apply; and although the general arguments

> for compellability on behalf of the prosecution (in particular the possibility of intimidation by the witness's husband) do not apply either, it seems wrong to deny to the co-accused a right which is given to the prosecution."[121]

It seems right that the accused person cannot properly be required to face an increased chance of conviction simply to avoid the witness suffering hardship or to save another person's marriage.[122] But to make the spouse of A compellable on behalf of B "would be an indirect way of making a spouse compellable to give evidence against the other in circumstances in which he or she is not now so compellable".[123] This would be so because of the prosecution's power to cross-examine the spouse. The co-accused's spouse is of course competent to testify for the other co-accused even though the spouse might incriminate her partner. But the compromise of leaving the spouse to decide whether to testify is one possible balance between the interests of the two co-accused persons.[124]

1.35 Drafting. The words in s.232(4)(a)-(c), "assault", "battery", and "a threat of violence, personal injury or other harm to" the spouse are intended to overcome doubts that arose in applying the common law exception as to personal violence against a spouse. The common law exception

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121. 11th Report (1972), para.155.

122. See V.L.R.C. 6 (1976), para.58.

123. South Australian Criminal Law and Penal Methods Reform Committee, 3rd Report, (1975), para.11.3. See also Q.L.R.C. 19, p.10.

124. Cf. V.L.R.C. 6 (1976), para.58; W.A.L.R.C. 31 (1977), para.7.30.

included buggery,[125] and attempted murder by poisoning,[126] but not written threats of murder.[127]

1.36 "At the material time or any earlier time". The English Criminal Law Revision Committee's draft s.9(3) requires that the victim of the violence or sexual offence be a member of the same household as the accused "at the material time". Section 232 is so drawn as to deal with the following problem raised by the Queensland Law Reform Commission:[128]

> "a number of not uncommon factual situations could be envisaged where it would be exceptionally difficult to say whether the phrase 'of the same household' applied or not .... As we see it, the problem ... would arise where there is a broken home and a child is living with one spouse who is separated from the other. If the latter attacked the child, it might not be possible to say that the child is of his household so as to make the former spouse a compellable witness."

It would be enough if the victim was a member of the same household as the accused at the time of the offence or any previous time.

1.37 Section 232(7): warning to spouse. In Demirok v. R.[129] the High Court held that in Victoria it is improper

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125. R. v. Blanchard [1952] 1 All E.R. 114.

126. R. v. Verolla [1963] 1 Q.B. 285.

127. R. v. Yeo [1951] 1 All E.R. 864.

128. Q.L.R.C. 19, p.12.

129. (1977) 14 A.L.R. 198.

for a spouse who is competent but not compellable and who does not wish to testify to be asked about her name, address and marital state in the presence of the jury. In that State there is a prohibition on comment by counsel or court when a spouse elects not to testify; there is also provision for the witness's intention to testify or not to be ascertained in the absence of the jury. Gibbs J. suggested that in the absence of such provisions it was probably not wrong for a competent but non-compellable spouse to be called, and that there was probably no duty resting on the court to ascertain her willingness to testify in advance of being called. A warning might be desirable,[130] but it was not compulsory.[131] Gibbs J. said that in Victoria, once the spouse's unwillingness to testify was established, there was no legitimate purpose in putting her in the box.

> "The fact that she was a wife and therefore not a compellable witness would already have been found by the judge. The fact that she declined to give evidence would also have been established. If she were then called to the witness box it could not be for the purpose of giving evidence but only to serve some tactical purpose of the prosecution. That would seem to me illegitimate."[132]

The accused person might be injured by the revelation that the spouse did not wish to testify: the jury might infer her evidence was favourable to the proseuction.

Section 232(7) is so drawn as to adopt a like procedure to that operating in Victoria. It provides also that the non-compellable spouse who does not wish to testify should not have to enter the box in the presence

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130. R. v. Acaster (1912) 7 Cr.App.Rep. 187, at pp.189-90.

131. R. v. Houkaman [1951] N.Z.L.R. 251, at p.253.

132. At pp.206-7.

of the jury. The question whether judicial comment be permitted on the spouse's silence is discussed elsewhere. But if permitted, that comment would not be given in every case. It would not be given if there were a good reason for the spouse not to testify, e.g., that she was mentally weak or could cast little light on the issue.[133] It seems unnecessarily theatrical for her to be questioned before the jury to show that she is not willing to testify. It would add nothing legitimate or worthwhile to any right to comment.

B. Special Cases other than Spouses

2.1 Section 231(3)(a) to (i): sovereigns and members of Parliament. These paragraphs have two purposes. The first is to preserve the common law rules:

(a) that our own sovereign is a competent but not a compellable witness; and

(b) that a foreign sovereign is a competent but not a compellable witness.[134]

Rule (a) is justified by the special respect due to the office of the Queen, the Governor-General and the Governor. Rule (b) is justified by considerations of international comity. The second purpose is to clarify what is at present doubtful. The Lieutenant Governor, the Governor or Lieutenant Governor of another State, and Administrators should be in the same position as the Queen, the Governor-General and the Governor. A foreign head of state other than a sovereign should be in the same position as a foreign sovereign. As to members of Parliament and other

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133. The Accused as a Witness.

134. See Megarry (1973), pp.94-7; Cross (1974), pp.162-3.

legislatures, it seems that they should not be compellable while Parliament is sitting, for this may interfere with legislative proceedings.[135]

It may be argued that there should be a special protection or privilege as regards some things done by the Governor or coming to his knowledge in the course of his office. Amongst other things, at least in some cases advice given to him at a meeting of the Executive Council probably should not be made the subject of evidence in court.[136] But such a special protection or privilege should apply to evidence howsoever adduced, that is, whether by oral evidence of the Governor, of an Executive Councillor, a secretary to the Council or anyone else, or by documentary evidence, e.g., a minute book. Rules of this kind are not rules about competence or compellability. The matter is covered by the Evidence (Amendment) Act, 1979.

2.2 Section 231(3)(k) and (4): judges. Judges are competent, but not compellable, to testify about matters on

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135. See May (1957), p.77: "the privilege of exemption of a Member [of the House of Commons] from attending as a witness has been asserted by the House upon the same principle as other personal privileges viz., the paramount right of Parliament to the attendance and service of its Members ...." But, as there reported, the "privilege" is often waived, for "the withdrawal of a witness might affect the course of justice ...."

136. See R. v. Turnbull [1958] Tas.S.R. 80; Sankey v. Whitlam & Ors (1978) 53 A.L.J.R. 11.

which they are presently, or have been, judicially engaged.[137] According to Halsbury, "A judge or magistrate who is sitting with others may leave the bench and give evidence, but he should not return to the bench or take any further part in the trial in a judicial capacity."[138]

Halsbury also asserts[139] that "inferior judges" are compellable[140] and also that court officers are compellable.[141] There is some doubt as to the meaning of the term "inferior judge"; for example a doctor who is a member of a statutory tribunal to determine the nature and cause of a workman's medical condition is not compellable.[142]

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137. Taylor (1931), para.1379; R. v. Anderson (1680) 7 How.St.Tr. 811, at p.874; R. v. Earl of Thanet (1799) 17 How.St.Tr. 821; R. v. Gazard (1838) 8 C. & P. 595: 173 E.R. 633; Hurpurshad v. Sleo Dyal (1876) L.R. 3 Ind.App. 259, at p.286; R. v. Antrim [1901] 2 I.R. 133, at p.141; Mitchell v. Croydon Justices (1914) 30 T.L.R. 526; Hennessy v. Broken Hill Pty. Co.Ltd. (1926) 38 C.L.R. 342; Zanatta v. McCleary [1976] 1 N.S.W.L.R. 230. See Wigmore, para.1909, nn.1 and 2.

138. Halsbury, Evidence (1976), para.232, n.4 and cases there cited, and para.236, n.1 and cases there cited; see also Trial of the Regicides (1660) Kel. 7, at p.12: 84 E.R. 1056, at p.1059.

139. Evidence (1976), para.236.

140. R. v. Harvey (1858) 8 Cox C.C. 99; cases discussed in McKinley v. McKinley [1960] 1 All E.R. 476; Zanatta v. McCleary [1976] 1 N.S.W.L.R. 230, 237.

141. McKinley v. McKinley [1960] 1 All E.R. 476.

142. Ward v. Shell-Mex and B.P. Ltd. [1952] 1 K.B. 280.

Para.2.2

Special Cases other than Spouses

What is the basis of the common law?

Cleasby B. said:

> "With respect to those who fill the office of Judge it has been felt that there are grave objections to their conduct being made the subject of cross-examination and comment (to which scarcely any limit could be put) in relation to proceedings before them; and, as everything which they can properly prove can be proved by others, the courts of law discountenance, and I think I may say prevent them being examined."[143]

Similarly, a South African judge has remarked:

> "it is almost impossible to imagine a Judge or magistrate leaving the bench, going into the witness box to give evidence for or against a prisoner, returning to the bench, and at the conclusion of the evidence and argument, solemnly commenting upon the demeanour of himself in the witness box or without any comment accepting the evidence given by himself."[144]

Plainly, where trial is by jury, it will be difficult for the jury to distinguish between the judge's testimony, his directions on law, and his comments on the weight of the evidence generally. The following problems have also been pointed to as arguments for the incompetence of judges in cases in which they are involved:[145]

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143. Duke of Buccleugh v. Metropolitan Board of Works (1872) L.R. 5 H.L. 418, at p.433.

144. Ex p. Minister of Justice: Re R. v. Demingo 1951 (1) S.A. 36, at p.43, per Centlivres C.J.

145. Law Reform Commission of Canada (1972), p.3.

Para.2.2

Special Cases other than Spouses

> "If his evidence is contradicted or his credit attacked, does he join in determining the acceptability of his own testimony? Does the judge determine the limits to his own cross-examination? Could counsel conduct an effective cross-examination without fear of offending his trier of fact? Would the judge's testimony carry unfair weight with the jury? To permit a judge or juror to be a competent witness would be fundamentally inconsistent with the requirement that a tribunal must be seen to be impartial .... [R]endering them incompetent would work no hardship as the occasion will seldom arise in which their testimony is essential and, when it does, suitable arrangements for another arbiter could be made."

Other arguments against a judge being allowed to testify turn on the incompatibility of judicial office with the function of a witness. The appearance of judicial impartiality will be damaged by appearing to act as a partisan, for one side's cause against the other's. While he testifies there will be no one to control the relevance and admissibility of his testimony. It is undesirable that he should be placed in a position where counsel can be allowed to attack his veracity, particularly in cross-examination. The jury may give his testimony undue weight.

On the other hand, Wigmore has put these criticisms in perspective.[146]

> "The force of the objections would be most seen and would arise to an appreciable degree only when the judge became a principal witness, - as ... where the judge had been an eye-witness of a murder. In all such instances (which are rare enough), the usefulness of his testimony would be known

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146. Wigmore, para.1909.

> beforehand, and his own discretion and the parties' would be trusted to send the cause before another judge for trial. But in the ordinary instance the judge's testimony is desired for merely formal or undisputed matters, such as the proof of execution of a certificate or of the administration of an oath or of a deceased witness' former testimony."

In sum, the considerations which underlie s.231(3)(k) and (4) may be put in this way:

(a) the giving of evidence by a judge should not be allowed significantly to impair the discharge of his functions as a judge;

(b) he should not be open to examination for the purpose of upsetting a prior decision of his as a judge; and

(c) he should not be examined so as to disclose matter which ought to be kept secret, e.g., matter concerning proceedings under the Mental Health Act, 1958.

These special considerations apply not only to judges in the ordinary sense of the word, but to all persons in public office whose function it is to determine judicially disputes between persons on matters of legal right. Therefore, not only judges of the Supreme Court or the District Court, but also members of the Industrial Commission, the Crown Employees Appeal Board and the Workers Compensation Commission, and magistrates, should be subject to whatever rules are appropriate for judges in the ordinary sense. Other office-holders in like case should be similarly treated: see s.231(5).

Considerations (b) and (c) above go to questions of special protection or privilege or exclusion on grounds of public policy, not to competence or compellability. Thus evidence of the manner in which a judge reached his decision (other than his published reasons) should not be admitted for the purpose of upsetting his decision on appeal, whether elicited by oral examination of the judge,

of his associate, or of some person with whom he discussed the case, or offered by way of documentary evidence, e.g., rough notes by the judge for his own use.[147] But these matters are not relevant to legislation on competence and compellability.

Occasions when the problem of a judge being witness in a case in which he is judge will very rarely arise. He should not be compellable. The possibility of embarrassment is too great. If his evidence is essential, and he is unwilling to be witness, it is better that the case should be re-heard by another judge. His competence should not depend on the consent of the parties. It should rather be for the judge to decide whether he can, consistently with his function as judge, play the part of a witness. He should make that decision, and decide whether he will give evidence, in the character of judge, not in the character of a witness or a potential witness. This should be so in order that the same avenues of appeal or review will be open on these decisions as are open on his other procedural decisions in the case.

In the result, s.231(3)(k) proceeds on the view that the law should be as follows where a question arises whether a judge should be witness in a case in which he is judge.

(a) In exceptional circumstances, and on application by a party, the judge may, if he thinks fit, give evidence.

(b) Subject to (a), there should be no special rules about the competence or compellability of the judge to give evidence.

What of a judge giving evidence in case A (in which he is not a judge) about case B (in which he was or is a judge)? Section 231(4) proceeds on the view that he

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147. Zanatta v. McCleary [1976] 1 N.S.W.L.R. 230. And see Patterson v. Barnes (1965) 39 A.L.J.R. 507.

should be competent, and should be at liberty to give evidence if he is willing to do so, subject however to such privileges, protections and rules of exclusion as are needed to safeguard special considerations (b) and (c) mentioned above.

What if he is not willing to give evidence? There are risks of embarrassment and risks of impairing public confidence in the judiciary. These risks can be guarded against to some extent by the laws relating to abuse of process (i.e., where the evidence could satisfactorily be given by another witness) and oppressive subpoenas.

However, s.231(4) proceeds on the view that the risks are so great that a party seeking to compel a judge to give evidence about a case in which he was or is judge should first have to get leave from the Supreme Court. Where the judge is of District Court or superior rank, the application for leave should be made to the Court of Appeal. In other cases the application should be made to the Court in a Division.[148] Because of the obscurity of the borderline between inferior judges and others, s.231 does not draw the distinction.[149] Under s.231 court officers will remain compellable.

2.3 Arbitrators. It has been held that where arbitrators disagree and the matter is referred to an umpire, one of

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148. See also Model Code (1942), r.302; Uniform Rules (1953), r.42; cf. California Code (1965), ss.703-4 (which renders a judge compellable); Federal Rules (1975), r.605 (which renders a judge incompetent). Cf. draft Canada Code (1975), s.55(1). On the distinction between judges of District Court or superior rank and other judges, compare Supreme Court Act, 1970, s.48.

149. It was doubted by Samuels J.A. in Zanatta v. McCleary [1976] 1 N.S.W.L.R. 230, at p.237.

the arbitrators is a competent witness before the umpire.[150] From the moment of the umpire's appointment, each arbitrator becomes functus officio. Lord Hewart C.J. contemplated arbitrators giving evidence on a much wider basis. He said:[151]

> "Certainly there are many cases in the books which show that in some circumstances and for some purposes an arbitrator may be called to give evidence about matters relating to the arbitration, and one knows from one's own experience that sometimes an arbitrator is called to give evidence upon matters relating to the issue in controversy between the parties."

An arbitrator may also be called as a witness in legal proceedings to enforce his award, but may not be asked questions as to his grounds for decision.[152]

In short, then, it seems that under the present law arbitrators are competent and compellable but questions about their reasons for award are generally rejected. This is a matter of privilege or of an exclusionary rule, not of compellability. The present law does not seem bad in any way, nor does it call for any treatment in an Evidence Act. The fact that A and B have engaged C to arbitrate on some difference should not affect D's right to compel C to give evidence where the evidence is relevant in proceedings to which D is a party. A and B may properly limit C's powers as they affect the A-B dispute, by agreement.

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150. Bourgeois v. Weddell & Co. [1924] 1 K.B. 539; see also Cerrito v. North Eastern Timber Importers, Ltd. [1952] 1 Lloyd's Rep. 330.

151. At p.546.

152. Duke of Buccleugh v. Metropolitan Board of Works (1872) L.R. 5 H.L. 418; see also Hennessy v. Broken Hill Pty.Co.Ltd. (1926) 38 C.L.R. 342; Nokes (1967), pp.192-3.

Para.2.4

Special Cases other than Spouses

2.4 Jurors. First, let us consider the problem of admitting a juror's evidence to impugn a verdict. A verdict cannot be impugned by what a juror says happened during the jury's retirement. That is, a juror is not allowed to give evidence as to what occurred during the jury's deliberations or as to his reasons for decision; though he may give evidence that he did not assent to the verdict as reported by the foreman if he could not hear it.[153]

Martin B. said:

> "There can be no doubt as to the inconvenience and uncertainty which will arise if jurymen are permitted to give evidence to defeat their verdicts. If one juryman is admissible all are admissible, and their evidence may be conflicting, and great inconvenience arise.[154]

Further, as Atkin L.J. has said, the purposes of the rule are "to secure the finality of decisions arrived at by the jury, and ... to protect the jurymen themselves and prevent them being exposed to pressure[155] to explain the reasons which actuated them in arriving at their verdict. To my mind it is a principle which it is of the highest importance in the interests of justice to maintain."[156] Other

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153. Ellis v. Deheer [1922] 2 K.B. 113; Boston v. W.S. Bagshaw & Sons [1967] 2 All E.R. 87; R. v. Roads [1967] 2 All E.R. 84. See generally Nokes (1967), pp.193-4 and cases there cited.

154. Duke of Buccleugh v. Metropolitan Board of Works (1872) L.R. 5 H.L. 418, at p.449.

155. Emanating principally, but not only, from unsuccessful litigants.

156. Ellis v. Deheer [1922] 2 K.B. 113, at p.121.

points customarily made are that frankness in the jury room must not be discouraged, and that public confidence in jury verdicts should not be undermined.[157] However, it is possible to show misconduct during retirement, e.g., hustling halfpence in a hat,[158] by the evidence of a man who looked into the jury room through a window.[159] And the evidence of a juror is admissible to rebut the impugning evidence of a stranger.[160] Probably a bad case would upset the present law. Thus a court could hardly close its eyes to a juror's evidence that one juror had successfully bribed all the others or had overborne their will by threats.

The present law is absurd. There may be good reasons of policy why there should as a rule be no examination of the means by which a jury reached its verdict.[161] If there should not be such an examination, the evidence of jurors and of strangers impugning the verdict should alike be inadmissible. If there should be such an examination, all relevant evidence should be admissible.

The extent to which a verdict is impugnable should not depend on questions of competence and compellability. There is force in the view that evidence (whether oral or otherwise and, if oral, whether of a juror or anyone else) about things done by a jury while in retirement to consider their verdict should not be admissible on the question whether their verdict should be set aside, unless the court, by reason of exceptional circumstances (including the facts to be proved by the evidence in question), so orders; and that there should not be any other restriction on competence, compellability or admissibility.

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157. R. v. Armstrong [1922] 2 K.B. 555, at p.568.

158. Parr v. Seames (1735) Barnes 438: 94 E.R. 993.

159. Vaise v. Delaval (1785) 1 T.R. 11: 99 E.R. 944.

160. Cornish v. Daykin (1845) 5 L.T.O.S. 130.

161. See Campbell (1962); Anon. (1963).

Para.2.4

Special Cases other than Spouses

Some would say that such a provision should not be treated as part of the law of evidence. Certainly it seems inappropriate to treat of it in the course of dealing with competence and compellability.[162]

So far we have discussed evidence to impugn a verdict. There may be other occasions for evidence of what happened in the jury room. For example, a juror may be charged with embracery in the jury room (Jury Act, 1977, s.67). The draft Bill proceeds on the view that on these other occasions there should not be any special restriction on competence, compellability or admissibility.

What of the question of a juror giving evidence in a trial in which he is juror? The present general rule appears to be that, in matters other than what takes place in the jury room, a juror may testify.[163] Thus he may give expert evidence of value;[164] he may say whether a document is forged.[165] Two arguments are usually put against permitting a juror to be competent. One is "that the opposing

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162. See also draft Canada Code (1975), s.55.

163. To the like effect is Model Code (1942), r.302; cf. Uniform Rules (1953), r.43; Federal Rules (1975), r.606.

164. R. v. Rosser (1836) 7 C. & P. 648: 173 E.R. 284.

165. Manley v. Shaw (1840) Car. & M. 361: 174 E.R. 543. This case is authority for the proposition that a juryman is competent but not compellable. See also Bennet v. Hundred of Hartford (1650) Style 233: 82 E.R. 671; Fitz-James v. Moys (1663) 1 Sid. 133: 82 E.R. 1014; Wright v. Crump (1702) 7 Mod. 1: 87 E.R. 1055; R. v. Heath (1774) 18 How.St.Tr. 1, at p.123; R. v. Antrim Justices [1895] 2 I.R. 603, at p.657; R. v. Blick (1966) 50 Cr.App.Rep. 280; Mangano v. Farleigh Lettheim Pty.Ltd. (1965) 65 S.R. (N.S.W.) 228.

counsel will be embarrassed by a fear of offending the juror, so that an adequate cross-examination or impeachment would be prevented". The other is "that the juror, sitting afterwards as a judge of the facts, would be disposed to give excessive weight to his own testimony and in general to treat too favourably the testimony of the side whose partisan he had been made".[166] One answer put by Wigmore to both points was that counsel had a right to examine and challenge any juror of the kind indicated. This is not perhaps as convincing an answer in New South Wales where the existence and exercise of rights of challenge and of examination before challenge are less extensive than in the United States. And at the time for challenge no one may intend to call him. Another answer to the second point is that the bias of the juror would be counteracted by other jurors. The problem rarely arises, however, because when a man is an important witness the fact is usually foreseeable, and he would not be made part of the jury. The sort of evidence a juror would give would be relatively minor, and often little harm would be done by him giving evidence.

Conceivably it might sometimes save time and trouble, and do no harm, if a juror could give evidence on some point not in controversy. But in general the roles of witness and juror would appear to be incompatible. Not only is there the impossibility of dealing impartially with questions of credit, referred to above, there is the risk that the juror-witness will supplement or qualify in the jury room what he said in court. Justice would not appear to be done. Hence s.231(6) proceeds on the basis that a juror cannot be a witness if any party objects, and even if no party objects he cannot be a witness unless the court gives leave. Section 231(6) will also ensure that the court has power to prevent the calling of witnesses being used oppressively or vexatiously to disrupt a trial.

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166. Wigmore, para.1910.

Special Cases other than Spouses

2.5 Diplomats. The draft Bill makes no provision for diplomats. The Diplomatic Privileges and Immunities Act 1967 (Cth) confers immunity (which may be waived by the sending State) on heads of mission, members of the diplomatic, administrative and technical staffs of the mission, and members of their families forming part of their respective households (see s.4 and Articles 31(2) and 37 of the Vienna Convention on Diplomatic Relations). Other statutes give immunity to representatives and other officers of international organizations.[167] The draft Bill makes no provision for the problem met by these statutes. So far as they are valid exercises of Commonwealth power (and we have 111111son to doubt their validity), they will prevail over any inconsistent New South Wales legislation.

2.6 Advocates. A person ought not to act as witness and advocate in the same case[168] but an advocate is a competent witness.[169] He is clearly competent with reference to matters arising in earlier proceedings.[170] It seems he is not compellable, except possibly with reference to former proceedings at the instance of the client.[171]

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167. E.g., International Organisations (Privileges and Immunities) Act 1963 (Cth).

168. R. v. Brice (1819) 2 B. & Ald. 606: 106 E.R. 487; R. v. Secretary of State for India, ex p. Ezekiel [1941] 2 K.B. 169; see also Stones v. Byron (1846) 4 Dow. & L. 393: 16 L.J.Q.B. 32: 75 R.R. 881; Dunn v. Packwood (1847) 11 Jur. 242; Best (1922), paras 184-6.

169. Halsbury, Barristers (1973), para.1187; Curry v. Walter (1796) 1 Esp. 456: 170 E.R. 418.

170. See Sworn and Unsworn Evidence.

171. Guinea's Case (1841) Ir.Circ.Rep. 167.

Para.2.6

Special Cases other than Spouses

The view that counsel should be incompetent underlies some of the decisions.[172] Is it sound? One principal argument for incompetence was put by Udall arguendo in Stones v. Byron:[173]

> "it would be a practice attended with the most mischievous consequences if an attorney or any other person, acting as the advocate of a party, could afterwards present himself before the jury as a witness to support those statements he had been making in the course of his speech. The characters of an advocate and a witness should be sedulously kept apart. The one was a person zealously and warmly espousing the interests of his client; the other a person sworn fairly and impartially, without bias or favour to either party, to tell the truth of what he had witnessed or heard. The jury might have considerable difficulty in separating those statements which they had heard from a person as advocate, from those which they had heard from the same person as witness."

Another argument for incompetence is that the advocate's evidence may be tainted by "the general emotional partisanship which exists in favor of the client".[174] Even if this is not so, the public may think the evidence to be so tainted, and public respect for and confidence in the profession will therefore fall.

But the considerations the other way seem stronger.

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172. Above, n.168.

173. (1846) 4 Dow. & L. 393: 16 L.J.Q.B. 32: 75 R.R. 88, at p.882; quoted by Best (1922), para.184.

174. Wigmore, para.1911.

Para.2.6

Special Cases other than Spouses

The draft Bill accords with Best's reasoning:[175]

> "there are cases in which the advocate might be the sole repository of the most important evidence. And it is no answer to this to say, that if aware of that fact he ought to decline to act professionally in the cause; for it not infrequently happens, especially in criminal courts, that facts bearing most powerfully on the issue appear relevant in the course of a trial, though at its commencement it was impossible to see their relevancy.
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> ... [I]t would be very dangerous to allow a party who knows that important, perhaps the only important, evidence against him will be given by an advocate, to shut that person's mouth by retaining him as his counsel; and if it be said that no counsel should accept the retainer under such circumstances, the answer is, that the question is not what the honour of the bar exacts, but what the law will allow. Professional privileges may be abused, and the supposed impeccability of every member of a numerous profession is an unsafe basis of legislation."

The draft Bill proceeds on the view that an advocate should be competent and compellable. This will be achieved by ss.230(1) and 231(1). So far as the proof of matters arising in former proceedings is concerned, there seems to be no problem. At present an advocate is clearly competent in these circumstances and may be compellable.[176] As to the proof of matters arising in the very proceeding in which the advocate is engaged, however undesirable it may be that he should testify, he is at present competent. He ought to be compellable if Best's reasoning

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175. Best (1922), para.184.

176. Above, n.171. See also Brown v. Foster (1857) 1 H. & N. 736: 156 E.R. 1397.

is accepted; for he may be able to prove some material fact, and it is too much to hope that every advocate, assuming him to be competent but not compellable, will be willing to testify whenever professional propriety dictates that he should. There is another argument in favour of compellability. A party who conducts his own cause may also be a witness in it.[177] Since an advocate only does for a party what the party would do were he able, the rules as to parties giving evidence may properly be the same as those regarding advocates giving evidence.[178]

The consequence of making advocates compellable is that one party could call the other's advocate. But it is hard to see how this could be oppressive, for it would rarely be done; the witness would not be benignly disposed to the party calling him and his testimony would normally be quite unpredictable. The witness would in most cases be prevented from reporting admissions made by his client by the operation of legal professional privilege.

2.7 Surveyors. There is authority that a surveyor appointed to assist the court ought not to be called as a witness.[179] There seems to be no justification for any general provision to be made.

2.8 "Natural person", corporations and s.230(1). In s.230 (1), which, subject to any enactment, makes every natural person competent to give evidence, the words "natural person" have two consequences. One is to remove the doubt which existed at common law as to whether a person under sentence of death could testify.[180] Crimes carrying the

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177. Cobbett v. Hudson (1852) 1 E. & B. 11: 118 E.R. 341.

178. See Best (1922), para.186.

179. Broder v. Saillard (1876) 24 W.R. 456.

180. R. v. Webb (1867) 11 Cox C.C. 133; cf. R. v. Fitzgerald (1884, unrep.: see Taylor (1931) p.849, n.(i)).

death penalty are few in kind and unheard of in prosecution; but if the category ever in future became important, there seems to be no special reason to render such persons incompetent, for though in some cases they might have strong hopes of pardon or commutation if they gave evidence of a certain kind, this is a ground for treating the evidence cautiously, not for excluding it.

The other consequence is to avoid the absurdity of language which ordinarily embraces corporations as well as natural persons. This absurdity has been avoided on the construction of the word "witness" in a statute, and the same construction should be given to "person" or "persons". In Master Jacob's words:

> "A corporate body cannot enter the witness box; it cannot take the oath, for it cannot be held capable of holding a religious belief, nor can it affirm, for it cannot on conscientious grounds have a religious belief. It cannot hear the questions that may be put to it, nor can it answer them by word of mouth. The attribute of a witness is a human attribute, not capable of belonging to a legal person .... [T]he person in a statute must be construed in the light of a consideration of the objects of the statute."[181]

Evidence may be given by an officer or agent of the company which operates as an admission effective against it. We do not think these propositions of the present law require more elaborate underpinning in statutory form, but the legislation should be saved from absurdity by the word "natural".

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181. Approved by the Court of Appeal in Penn-Texas Corporation v. Murat Anstall [1964] 1 Q.B. 40, at pp.53-4, 70, and 73.

APPENDIX A

DRAFT BILL

Competence.

230. (1) Subject to any enactment, a natural person is competent to give evidence.

(2) Subsection (1) does not affect the law relating to the giving of evidence by -

(a) a child of tender years;

(b) a person mentally incapable of giving evidence; Cf. L.R.C. 20, p.49, s.163D.

(c) a person under such a handicap of body or mind, by way of coma, paralysis or otherwise, whether or not induced by any drug or by medical or other treatment, that he is unable to receive communications or to answer questions;

(d) a person for the time being, by reason of illness, drunkenness or otherwise, incapable of understanding questions or giving rational answers; or

(e) a person who does not appreciate the nature and obligation of an oath or affirmation.

Compellability.

231. (1) Subject to this Part and any other enactment, a person competent to give evidence is compellable to give evidence.

(2) Where a person not compellable to give evidence nonetheless gives evidence at a trial or on another occasion for the taking of evidence, he is thenceforward compellable to give evidence on that occasion.

(3) In any legal proceeding the following are competent but not compellable to give evidence -

Appendix A

(a) the Queen;

(b) the Governor;

(c) the Lieutenant Governor;

(d) the Governor or Lieutenant Governor of another State;

(e) the Governor-General;

(f) an Administrator of the Government of this State, another State, or the Commonwealth;

(g) a member of Parliament while Parliament is sitting;

(h) a member of the legislature of the Commonwealth, a Territory of the Commonwealth, or another State, while it is sitting;

(i) a foreign sovereign;

(j) a foreign head of state (other than a sovereign);

(k) a judge with respect to a proceeding in which he is judicially engaged, where the circumstances are exceptional and a party has made application for the judge to testify.

(4) A Judge is not compellable to give evidence in a proceeding in which he is not judicially engaged about a proceeding in which he was or is judicially engaged without the leave of the Court of Appeal (where the judge is of District Court or superior rank) or the Court in a Division (in other cases).

(5) In this section "judge" means a person in public office whose function it is to determine judicially disputes between persons on matters of legal right.

(6) A person serving as a juror at a trial shall not be competent to testify in that trial unless -

(a) no party objects; and

(b) the court gives leave.

Wife or husband of accused as witness.

232. (1) This section applies in relation to a criminal legal proceeding.

(2) Where a present wife of an accused person is called to give evidence by the prosecution or by another accused person, she shall not be compellable to give evidence.

(3) Subsection (2) does not apply to a wife of an accused person where, by reason of the accused person's pleading guilty, or for any other reason, he is not liable to conviction in the proceeding.

(4) Subsection (2) does not apply where the accused person is charged with an offence involving -

(a) an assault on;

(b) a battery of;

(c) other harm to;

(d) a threat of violence, personal injury or other harm to; or

(e) sexual misconduct in respect of -

a person at any time and that person -

(f) was at that time wife of the accused person; or

(g) was at that time under the age of 18 years and at that or any earlier time belonged with the accused person to the same household.

(5) Subsection (2) does not apply where, in the opinion of the court, the interests of justice outweigh the importance of respecting the bond of marriage.

(6) In forming its opinion under subsection (5), the court shall have regard to -

(a) the nature of the conduct charged;

(b) the importance of the facts to which the wife may depose, and the availability of another mode of proof of those facts;

(c) the likely weight of the wife's testimony;

(d) the effect on the marriage of compelling the wife to testify;

(e) the hardship to the wife of testifying;

(f) the effect on any child of the marriage; and

(g) any other relevant factor.

(7) Where a wife of an accused person is called to give evidence and subsection (2) applies -

(a) the court shall explain to her (in the absence of the jury, if any) that she is not required to give evidence unless she consents; and

(b) where there is a jury, she shall not be required to give or withold her consent in the presence of the jury.

(8) This section applies in relation to a husband of an accused person as it applies in relation to a wife of an accused person.

REPEALS

Crimes Act, 1900, s.407(3).
Evidence Act, s.5.
Evidence Act, s.6.

APPENDIX B

A CASE AGAINST THE PROPOSAL TO PROVIDE FOR THE COMPELLABILITY OF A SPOUSE OF AN ACCUSED AT THE INSTANCE OF THE PROSECUTION OR A CO-ACCUSED

The main argument for legislating for the compellability of a spouse of an accused person at the instance of the prosecution or a co-accused is the principle that all relevant evidence should be available for the disposal of litigation and that therefore all relevant witnesses should be compellable at the instance of any party. The principle is supported by arguments as to the need for logical consistency, completeness, simplicity and the removal of anomalies and complexities.

Notwithstanding such appeals to principle and to logic, there persists a feeling of repugnance against compelling one spouse to give evidence against the other when that other is accused in criminal proceedings. The reasons given at different periods of history for the non-compellability (and indeed incompetence) of spouses, although doubtless appropriate at those periods, may not carry a great deal of weight today. Nevertheless, the feeling of repugnance does persist. It may well be brought about by a feeling about the special nature of the marriage relationship. That special nature still survives notwithstanding immense changes in recent social history. No matter how it was viewed in the past, today it is seen as one involving a shared life and a special intimacy between two persons. The fact that persons involved in other special relationships, such as the parental, may be compelled to give evidence against one another, is no doubt explainable by history, but affords little reason, except by appeal to the need for consistency and removal of anomaly, for changing the law as to spouses. The argument from anomaly in regard to de facto spouses is a little stronger. However, it could also be taken as an argument for removing compellability from those who are held to be genuinely within that relationship. It is not a particularly strong reason for altering the position in regard to de jure spouses.

There does not appear to be any evidence in the form of polls or surveys as to just how widespread this feeling of repugnance is amongst the general community. However, even though English appellate judges may not be in such matters representative of the community at large, it is no

Appendix B

doubt of some significance that four out of five Law Lords in 1978 in the case of Hoskyn v. The Director of Public Prosecutions[1] referred to in paragraph 1.11 gave expression to a feeling of repugnance in this connection. Three attributed the feeling to the public at the thought of competence of the wife, whilst one felt it himself at the thought of compulsion, at any rate in trivial cases. The fifth, Lord Edmund-Davies, felt no such repugnance.

A number of the quotations from authorities contained in the Paper as to the illogicality and the anomaly of the spouse's position come from a time when, or a place where, the spouse was not only not compellable but also incompetent. Indeed, that is substantially the current position not only in England but also in South Australia and Tasmania. It is perhaps not surprising that the English Criminal Law Reform Committee in its Eleventh Report merely recommended that the spouse be made competent at the instance of the prosecution and refrained from advising general compellability.[2] Again, this position doubtless provides the reason for at least some of the number of inquiries conducted into the matter by Law Reform Agencies. In New South Wales, however, for over 80 years the law has been that evidence may be given against an accused by his or her spouse.

It could be argued that New South Wales has lived with the competence of the spouse of an accused for that period without the break-up of the institution of marriage. One obvious answer is that it is one thing for a spouse to make the choice to give evidence and quite another to be compelled to do so.

Finally, it may be suggested that logic, and the removal of inconsistency and anomaly are not the last words in the matter of law reform. To quote from Lord Devlin:

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1. [1978] 2 W.L.R. 695.

2. 11th Report (1972), paras 148-152.

incorporated in a statute. The discretion is whether or not to admit evidence obtained by illegal means. The reason for creating that discretion is that there are conflicting and nicely balanced principles involved and the discretion is a compromise between them. Instead of either rejecting all or none of such evidence, the court is to apply its discretion after considering such aspects as the importance of the evidence, the seriousness of the charge, the nature of the illegality. The draft Bill contained in this Paper provides for a similar compromise solution to the problem of the compellability of a spouse, which also involves conflicting principles. But the principle of avoiding the harshness of compulsion of the testimony of a spouse, which is in any case available if voluntary, so far outweighs the principle of compulsory availability of all testimony, that there is no sufficient justification for imposing the compromise of the discretionary decision, with its unsatisfactory features.

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s.230	1.1,1.3,1.33
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s.230(2)	1.1
s.231	1.1,1.3,1.33,2.2
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s.231(3)	1.1
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ABBREVIATIONS

Accused as a Witness, The	N.S.W. Law Reform Commission Discussion Paper on The Accused as a Witness (1980).
Anon. (1959)	Anon. "R. v. Algar" [1959] Crim. L.R. 685.
Anon. (1963)	Anon. "Misconduct in the Jury Room" (1963) 37 A.L.J. 107.
Bentham (1827)	Bentham, A Rationale of Judicial Evidence, (Hurst and Clarke, London, 1827).
Best (1922)	Phipson (ed.), Best's Principles of the Law of Evidence (12th ed., Sweet and Maxwell, London, 1922).
Blackstone	Kerr (ed.), Commentaries on the Laws of England of Sir William Blackstone (4th ed., John Murray, London, 1876).
California Code (1975)	California Evidence Code (1975).
Campbell (1962)	Campbell, "The Secret Chamber of the Law: Some Comments on Civil Jury Trial" (1962) 36 A.L.J. 119.
Cross (1974)	Cross Evidence (4th ed., Butterworths, London, 1974).
Cross-Gobbo (1970)	Gobbo (Aust. ed.), Cross on Evidence (Butterworths, Sydney, 1970).
Draft Canada Code (1975)	Law Reform Commission of Canada, Report on Evidence (1975).
Draft Scottish Code	Scottish Law Reform Commission Draft Evidence Code (First Part) (Memorandum No.8).

Abbreviations

11th Report (1972)	English Criminal Law Revision Committee, 11th Report, Evidence (General) (1972, Cmnd. 4991).
Federal Rules (1975)	Federal Rules of Evidence for the United States Courts and Magistrates (1975).
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