LAW REFORM COMMISSIONER

Report No. 6

SPOUSE—WITNESSES

(Competence and Compellability)

MELBOURNE
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PREFACE

1. By letter dated the 6th February 1974 the Honourable the Attorney-General, acting under Section 8 (b) of the Law Reform Act 1973, referred to the Law Reform Commissioner, for investigation and report, the matter of the procedural law, civil and criminal.

2. Pursuant to this general reference the following Working Papers have been circulated and the following Reports submitted:

Criminal Procedure (Miscellaneous Reforms)	Working Paper No. 1 Report No. 2
Delays in Supreme Court Actions	Working Paper No. 3 Report No. 4

3. The present Report is submitted in further implementation of the general reference of 6th February 1974.

4. It is desired to acknowledge the assistance received from the members of the Law Reform Advisory Council and from Mrs. J. P. Palmer (Legal Assistant to the Commissioner) and Miss E. L. Russell (Secretary to the Commissioner) in the preparation of this Report.

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REPORT

SPOUSE-WITNESSES

(Competence and Compellability)

SECTION 1. INTRODUCTORY.

1. During the first half of last century it became widely recognized that the rules of the Common Law governing the competence and compellability of husbands and wives to give evidence for and against their spouses were highly unsatisfactory[1]. In consequence, during the middle years of that century, drastic reforms in those rules were enacted both in England and in Victoria. These, however, were found to have been insufficient to solve the social and personal problems that arise in this area of the law. There ensued a series of limited statutory extensions of competence or compellability; and then, in the nineties, a second body of sweeping reforms was enacted. But these, too, were found to leave serious problems unsolved and, once again, a series of amending Acts followed, the latest major one in Victoria being the Crimes Act 1967.

2. Despite this long history of legislative amendments the rules governing the competence and compellability of husbands and wives to give evidence for and against their spouses still constitute a problem area of the law, as is demonstrated by the following list of important papers dealing with this area that have been published by law reform bodies during the last four to five years:—

(i) England — Criminal Law Revision Committee — Report No. 11, Sections 143-157 (1972).
(ii) Canada — Law Reform Commission — Study Paper on Evidence — Competence & Compellability (1972).
(iii) Western Australia — Law Reform Commission — Working Paper on Competence & Compellability of Spouses (1974).
(iv) South Australia — Criminal Law and Penal Methods Reform Committee — 3rd Report, Ch. 8, Sec. 11 (1975).
(v) Queensland — Law Reform Commission — Working Paper and Report No. 19 on Evidence Bill (1975).
(vi) Canada — Law Reform Commission — 1st Report & Evidence Code, Sections 54 and 57 (1976).
(vii) Canada — Ontario — Law Reform Commission — Report on Law of Evidence (1976).
(viii) Tasmania — Law Reform Commission — Working Paper on Competence and Compellability (1976).

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[1] Compare Second Report of Common Law Commission (1853) pp. 10-13.

SECTION 2. CIVIL PROCEEDINGS.

3. Under the restrictive rules of the Common Law governing competence to give evidence in civil proceedings it was not only the parties and those having a legal interest in the event of the suit who were excluded[2]. In addition —

(a) The husband or wife of a party was incompetent to give evidence, whether for or against his or her spouse[3] and

(b) The husband or wife of any person disqualified by interest was, in general, incompetent to give evidence[4].

4. In the middle years of last century, however, all these restrictions on the competence of parties and interested persons, and of their husbands and wives, to give evidence in civil proceedings were abolished, both in England[5] and in Victoria[6], by legislation which expressly provided that the classes of persons previously incompetent should be both competent and compellable. It is considered that these reforms in relation to civil proceedings have worked satisfactorily; and in consequence no further changes in relation to such proceedings are recommended in this report, save for a clarifying provision referred to hereafter (see paragraph 65).

SECTION 3. CRIMINAL PROCEEDINGS.

Sub-section 1. The Common Law Rules.

5. Under the restrictive rules of the Common Law governing competence to give evidence in criminal proceedings it was not only the accused who was excluded. In addition, subject only to limited exceptions, the wife or husband of the accused was incompetent to give evidence, either for or against the accused. And this incompetence extended to preclude the wife or husband of one accused from giving evidence for a co-accused if that evidence could, even remotely, tell for or against the accused spouse[7].

6. Though it is clear that only limited exceptions existed at Common Law to the general rule as to the incompetence of spouses in criminal proceedings, there is much doubt and difference of opinion as to the precise extent of those exceptions: compare per Duffy J. in Sharp v. Rodwell (1947) V.L.R. 82 at p. 89.

7. The most important Common Law exception, according to some of the widest statements of its scope, allowed one spouse to give evidence against or in favour of the other whenever the offence charged was one against or

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[2] Compare Best on Evidence, 7th edn. (1883) pp. 138-9.
[3] Cross on Evidence, Austn. edn. p. 180.
[4] Starkie, The Law of Evidence, 3rd edn. (1842) p. 550.
[5] 3 & 4 W. 4, c. 42: 6 & 7 V.c. 85; 14 & 15 V.c. 99: 16 & 17 V.c. 83: 32 & 33 V.c. 68.
[6] Law of Evidence Consolidation Act 24 Vict. No. 100.
[7] Archbold, Criminal Pleadings 19th edn. p. 304: Taylor on Evidence 10th edn. (1906) p. 969: R. v. Thompson, L.R. 1 C.C.R. 377.

affecting the person or liberty of the proposed witness[8]. On the other hand this exception has been said by high authority to have extended only to cases in which the charge against the accused spouse was one of having caused bodily injury to, or used personal violence against, the proposed witness[9]. But whatever be the categories of primary offences comprised within this exception, the cases indicate that it extended to attempts and conspiracies to commit those offences[10]; and it seems likely, therefore, that it extended also to inciting, or being accessory before the fact to, the commission of them.

8. A second exception related to the abduction of a woman with intent to marry her contrary to statutory provisions such as Sections 61 and 62 of the Crimes Act 1958. In such a case, if the marriage took place, the wife was a competent witness, either against her husband or in his defence, at least where her consent to the marriage had been procured by force or fraud and there was no subsequent voluntary cohabitation[11].

9. There is authority for saying that charges of treason constituted a third Common Law exception, but the weight of authority is against that view[12].

10. A further question upon which authority is divided is whether spouses who, under the Common Law exceptions, were competent to give evidence, were compellable at common law to do so. The weight of authority favours the view that they were[13].

11. The English and Victorian legislation referred to in paragraph 4 above, which, in the middle of last century, made the parties and their spouses competent and compellable witnesses in civil proceedings, expressly

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[8] Compare R. v. Wakefield, 2 Lewin C.C. 279 per Hullock B. at p. 287: Taylor, The Law of Evidence, 10th edn. (1906) p. 974: R. v. Blady (1912) 2 K.B. 89: Sharp v. Rodwell (1947) V.L.R. 82, 85: R. v. Blanchard (1952) 1 All E.R. 114: R. v. Verolla (1963) 1 Q.B. 285: Moss v. Moss (1963) 2 Q.B. 799 and Note in 79 L.Q.R. 473-4: Halsbury, Laws of England, 3rd edn. Vol. 10, p. 483.

[9] Compare Reeve v. Wood, 5 B. & S. 364, 367-8: R. v. Lord Mayor of London L.R. 16 Q.B.D. 772: Stephen, Digest of the Law of Evidence, 5th edn. p. 126: Riddle v. The King, 12 C.L.R. 622, 632-3, 639: Phipson, Law of Evidence, 11th edn. Sec. 1481: Cross on Evidence, Austn. Edn, pp. 181, 188-9: 11th Report of Criminal Law Revision Committee, Sec. 144.

[10] Compare R. v. Wakefield, 2 Lewin C.C. 279: Sharp v. Rodwell (1947) V.L.R. 82: R. v. Verolla (1963) 1 Q.B. 285: R. v. Deacon (1973) 1 W.L.R. 696.

[11] Starkie, Law of Evidence, 3rd edn. (1842) pp. 552-3: R. v. Wakefield, 2 Lewin C.C. 1 and 279: Taylor, The Law of Evidence, 10th edn. (1906) p. 974.

[12] Best on Evidence, 7th edn. (1883) pp. 179-180: Taylor, The Law of Evidence, 10th edn. (1906) p. 976 n.3: Halsbury 3rd edn. Vol. 10, Sec. 883 n.(a).

[13] Compare R. v. Stocks, 5 S.R. (N.S.W.) 628: R. v. Lapworth (1931) 1 K.B. 117: Sharp v. Rodwell (1947) V.L.R. 82: Tilley v. Tilley (1949) P. 240, 248: The King v. Houkamau (1951) N.Z.L.R. 251: R. v. Boucher (1952) 36 Cr. App. R. 152: R. v. Netz (1973) Q.R. 13: Cross on Evidence, 3rd edn. p. 150: but see Riddle v. The King, 12 C.L.R. 622: R. v. Phillips (1922) S.A.S.R. 276: R. v. Byrne (1958) Q.W.N. 18: R. v. Miller (1962) Q.R. 594: R. v. Sokal (1973) Q.R. 301.

provided that nothing therein should render a person charged in any criminal proceeding, or the spouse of a person so charged, competent or compellable to give evidence either for or against such person. Accordingly, both here and in England, the Common Law rules continued to apply in criminal proceedings, the accused being incompetent in all cases, and the spouse of the accused, also, unless the case could be brought within one of the Common Law exceptions. But as early as the eighteen-seventies there began the series of legislative extensions of competence and compellability in criminal proceedings which has continued to the present time and is still continuing (see paragraphs 1 and 2 above).

Sub-section 2. English Statutes Relaxing Restrictions.

12. In England, during the period between 1872 and the passing of the Criminal Evidence Act 1898 (61 & 62 V.c. 36), twenty-seven Acts were passed rendering accused persons or, more commonly, both accused persons and their spouses, competent to give evidence in criminal proceedings in respect of particular categories of offences[14]. Of these Acts perhaps the most important were:—

(a) The Criminal Law Amendment Act 1885 (48 & 49 V.c. 69) which, by Section 20, made the accused person and his or her spouse competent but not compellable in criminal proceedings for rape, indecent assault, procuration, carnal knowledge, abduction, unlawful detention, brothel keeping and acts of gross indecency.

(b) The Married Women's Property Act 1882 and the amending Act of 1884 (47 V.c. 14) whereby it was provided that in criminal proceedings brought by a husband or wife against his or her spouse for the protection and security of his or her property the husband and wife should each be competent and, "except when defendant, compellable to give evidence"[15].

13. By the Criminal Evidence Act 1898 (61 and 62 V.c. 36) the twenty-seven enactments referred to in paragraph 12 were, with the exception of the Evidence Act 1877, superseded or impliedly repealed[16], and were replaced by general legislation the basic provisions of which are still in force in England.

14. The legal position established by the passing of this Act of 1898 may be summarized as follows:—

(a) The accused person, and his or her wife or husband, remained competent and compellable witnesses for the prosecution or the defence in cases within the Evidence Act 1877 (see note 15).

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[14] Details are set out in Taylor on Evidence 10th edn. (1906) at pp. 976-8.

[15] Compellability was provided for in one other of the 27 Acts, namely The Evidence Act 1877 (40 & 41 V.c. 14) which related to the trial of indictments and other proceedings for the non-repair of public highways and bridges, or for nuisance to a public highway, river or bridge, or instituted for the purpose of trying a civil right only.

[16] Compare Archbold 25th edn. pp. 443 & 449: Charnock v. Merchant (1900) 1 Q.B. 474: Halsbury 3rd edn. Vol. 10, Sec. 881, note (h).

(b) The wife or husband of an accused person remained a competent and compellable witness for the prosecution or the defence in cases within the Common Law exceptions (see paragraphs 7 to 9 above).

(c) The wife or husband of an accused person was made competent for the prosecution or the defence (but not compellable) in the case of offences under six enactments listed in a Schedule to the 1898 Act. The six enactments covered:—

(i) Neglect to maintain, or desertion of, the accused's wife or any of his family (5 Geo. 4. c. 83).

(ii) Offences against the Poor Law (Scotland) Act 1845 (8 & 9 V.c. 83).

(iii) Rape, indecent assault on females, fraudulent procuring of girls under 21, carnal knowledge of girls under 12, abduction and detention of females for gain, marriage or carnal knowledge, and abduction and detention of girls from the custody of parents or guardians (24 & 25 V.c. 100, Secs. 48-55).

(iv) Offences prosecuted by a husband or wife against his or her spouse for the protection and security of his or her property (45 & 46 V.c. 75 Secs. 12 & 16).

(v) Carnal knowledge of girls under 16, procuration and detention of females for carnal knowledge, abduction of girls under 18 for carnal knowledge, brothel keeping and related offences and acts of gross indecency with males (48 & 49 V.c. 69).

(vi) Cruelty to children under 16 by their custodian and offences relating to the employment of children (57 & 58 V.c. 41).

(d) In cases not governed by any of the special rules stated in (a), (b) and (c) above the accused person and his or her wife or husband were made competent witnesses for the defence, but only upon the application of the particular accused who, or whose spouse, was to be called as a witness. They were not made competent for the prosecution nor were they made compellable[17].

15. Since the passing of the Criminal Evidence Act 1898 numerous changes have been made in England to the legislative scheme which it established.

(i) The scheduled enactments (see paragraph 14 (c) above) have been changed from the original six statutes to the following three[18]:—

(a) Infant Life (Preservation) Act 1933 (relating to child destruction);

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[17] Leach v. R. (1912) A.C. 305.
[18] Archbold 38th edn. Secs. 506 and 2760.

(b) Children & Young Persons Act 1933, First Schedule (relating to certain offences committed against children and young persons and in particular certain offences of cruelty and neglect by custodians together with assault, battery, murder, manslaughter, infanticide, exposure of infants and child stealing).

(c) National Assistance Act 1948 Sec. 5 (persistent failure to maintain).

(ii) The wife or husband of a person charged with bigamy has been made a competent witness for the prosecution or the defence without the consent of the accused but has not been made compellable[19].

(iii) The wife or husband of a person charged with an offence under the Sexual Offences Act 1956 or the Indecency with Children Act 1960 Sec. 1 not covered by any of the Common Law exceptions is now a competent witness for the prosecution or the defence but has not been made compellable[20].

(iv) In proceedings by a husband or wife against his or her spouse for any offence whatever the party bringing the proceedings is now a competent witness for the prosecution but has not been made compellable[21].

(v) In proceedings brought against a married person otherwise than by his or her spouse for an offence with reference to his or her spouse or that spouse's property, that spouse is a competent witness for the prosecution or the defence, but has not been made compellable[22].

16. The result of this long series of English enactments modifying, but not abolishing, the Common Law rules as to competence and compellability in criminal proceedings has been to create a high degree of complexity which does not appear to be justified by relevant policy considerations.

Sub-section. 3. Victorian Statutes Relaxing Restrictions.

17. In Victoria, in the years following the removal of restrictions on competence in civil proceedings by our Law of Evidence Consolidation Act, 24 Vict. No. 100 (see paragraph 4 above) legislation in the colony removing like restrictions in particular categories of criminal proceedings was not nearly so common as it was in England (compare paragraph 12 above). There were, however, some Acts of this kind in Victoria, of which the following may be mentioned:—

(a) Explosives Act 1885 Sec. 40 — making a person charged in respect of an offence against the Act committed by another person competent,

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[19] Criminal Justice Administration Act (1914) Sec. 28 (3): Archbold 38th edn. Sec. 3766.
[20] See Sec. 39 of the first of these two Acts and Sec. 1 (2) of the later Act.
[21] Theft Act 1968, Sec. 30 (2): Archbold 38th edn. Sec. 508(a).
[22] Theft Act 1968, Sec. 30 (3).

if he thought fit, to give evidence as an ordinary witness. (See repealing provisions in Explosives Act 1960, Sec. 2.)

(b) Married Women's Property Act 1884 — making husband and wife competent (but not compellable) to give evidence against each other in criminal proceedings brought for the protection and security of the property of one of them. (Compare now, Crimes Act 1958 Sec. 95.)

(c) Marine Board Act 1887 Sec. 57 — making a Master or other person charged with certain offences relating to seaworthiness competent to give evidence in support of certain statutory defences in the same manner as any other witness. (Compare now Marine Act 1958, Sec. 97.)

(d) Merchandise Marks Act 1889 Sec. 10 — making an accused person and his or her spouse competent, in prosecutions under the Act, to give evidence in the same manner as an ordinary witness, if the accused thought fit. (Repealing provisions were enacted in Goods Act 1937.)

(e) Crimes Act 1891, Sec. 51 — making the husband and wife of the first marriage competent but not compellable to give evidence for or against the accused in trials for bigamy. (See now Crimes Act 1967 Sec. 8 (a) and Crimes Act 1958 Sec. 400 (1) and Marriage Act 1961-1973 (Cwth.) Sec. 94.

(f) Marriage Act 1901 — impliedly rendering the wife of the accused a competent witness for the prosecution on a charge against the husband or father of deserting and going to reside outside Victoria. (Compare now Maintenance Act 1965 Sec. 43.)

18. The first general legislation in Victoria removing restrictions on competence in criminal proceedings was enacted in 1891. By Section 34 of the Crimes Act of that year it was provided that in any criminal proceedings

(i) an accused person might be called as a witness, either for the prosecution or for the defence[23], but not without his consent;

and

(ii) the wife or husband of an accused person might be called as a witness either for the prosecution or for the defence[23]; but not without the consent of the accused spouse except in those cases[24] in which the spouse proposed to be called might have been compelled to give evidence before the enactment of Section 34.

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[23] See R. v. Buck and Burns, 22 V.L.R. 66.

[24] The only such cases would appear to have been those falling within the Common Law exceptions described in paragraphs 7 to 9 above; compare so far as concerns the enactments referred to in paragraph 17 above, Leach v. R. (1912) A.C. 305.

19. By the Crimes Act 1915 No. 2 these general provisions of 1891 (as re-enacted in the 1915 Consolidation) were repealed and replaced by general provisions as to competence and compellability closely following those of the English Criminal Evidence Act 1898. The main differences were that in the Victorian provision of 1915:—

(a) There was no schedule of enactments to which special rules were applied[25].

(b) There was provision for the case of spouses jointly charged and for prosecutions for bigamy[26].

(c) There was no provision that the legislation was to apply notwithstanding any enactment currently in force[27].

20. The legal position in relation to competence and compellability that was established by the passing of the Crimes Act 1915 No. 2 may be summarized as follows:—

(a) The wife or husband of an accused person remained a competent and compellable witness for the prosecution or the defence in cases within the Common Law exceptions (see paragraphs 7 to 9 above).

(b) It was re-enacted that in prosecutions for bigamy the husband and wife of the first marriage were competent but not compellable witnesses for the prosecution or the defence (compare paragraph 17 (e) above.)

(c) In relation to offences other than bigamy the special enactments currently in force conferring competence on accused persons or their spouses[28] (and any which may have imposed compellability) continued to do so.

(d) In addition to any competence otherwise existing competence was conferred as follows[29]:—

  (i) The accused and his or her wife or husband were made competent (but not compellable) for the defence upon the application of the accused who, or whose spouse, was to be called.

  (ii) It was provided that in bigamy cases, and also in cases in which spouses were jointly charged, this requirement of consent by an accused person should not apply to prevent the calling of his or her spouse as a witness.

21. By Section 13 of the Crimes Act 1949 (No. 5379), as amended by Act 5602, the competence of the accused's wife to be a witness for the prosecution was extended. It was enacted that she should be competent without

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[25] See paragraph 14 (c) above.
[26] Compare Crimes Act 1891 (Vic.) Sec. 51 and 4 & 5 Geo. V. c. 58 Sec. 28 (3).
[27] See Sec. 6 (1) of the English Criminal Evidence Act 1898.
[28] Compare the enactments mentioned in paragraph 17 above.
[29] See Section 432 of the Crimes Act 1915 (introduced by the Crimes Act 1915 No. 2.).

his consent (but not compellable) to be a witness for the prosecution where one of certain specified offences was alleged to have been committed against a girl who was under 16 at the time and who was the daughter or grand-daughter (whether traced through lawful wedlock or not) of the accused or of his wife, or under his or her care and protection. The specified offences were:—

(i) Rape, carnal knowledge and incest and
(ii) Attempting to commit and assaulting with intent to commit, one of those offences and
(iii) Indecent assault.

22. By Section 8 of the Crimes Act 1967 (No. 7546) the competence of the husband and wife of an accused person to be a witness for the defence was extended by repealing the requirement in the provisions adopted from the English Act of 1898 (see paragraph 20 (d) (i) above) that the proposed witness be called on the application of the accused spouse. At the same time there were repealed the provisions making exceptions to this requirement of consent in the cases of bigamy[30] and of spouses jointly charged (see paragraph 20 (d) (ii) above).

23. By Section 9 of the Crimes Act 1967 the provisions of Section 13 of the Crimes Act 1949 (which had, in the meantime, been embodied in Section 400 of the Crimes Act 1958) were repealed and replaced by new provisions whereby the husband or wife of an accused person was made:—

(i) competent to be a witness for the prosecution in all cases without the consent of the accused spouse[31];
(ii) compellable to give evidence for the prosecution where the offence charged against the accused spouse fell within any one of four categories.

24. These four categories[32] were:—

A. Any of the following offences, when alleged to have been committed against a person who at the time, was aged under 16 years[33].

(1) Murder (death).

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30 By the Marriage Act 1961-1973 (Cwlth) Sec. 94 the spouse of the accused has been made a compellable witness for the defence or the prosecution in bigamy cases.

31 Compare also Sec. 95 (2) of the Crimes Act 1958 as enacted by the Crimes (Theft) Act 1973.

32 The penalty indicated in relation to each offence is that which attached to it at the time of the passing of the Act of 1967.

33 Conflicting views have been expressed by Menhennitt J. (in R. v. De Maio — 15/7/74) and Nelson J. (in unreported cases) as to whether this age limit relates to all the 30 offences listed in category A or only to the offence numbered 30 therein. The view that the limit applies to all, has been adopted here as being the more literal construction of the provision and the one that gives effect to the views expressed in the Report of the Parliamentary Statute Law Revision Committee which led to the enactment of the provision. See further R. v. Papaluca (McInerney J. 21/11/75) and R. v. Demirok (Young C. J. 31/8/76).

(2) Manslaughter (15 years or a fine or both).
(3) Infanticide (15 years or a fine or both).
(4) Poisoning or wounding etc. with intent to murder (20 years).
(5) Attempting to poison, shoot, drown, suffocate etc. with intent to murder (15 years).
(6) Destroying or damaging buildings with explosives with intent to murder or whereby life is endangered (15 years).
(7) Setting fire to or destroying a ship etc. with intent to murder or whereby life is endangered (20 years).
(8) Attempted murder (15 years).
(9) Preventing or impeding the saving of the life of a shipwrecked person (15 years).
(10) Wounding etc. or shooting at a person with intent to do grievous bodily harm or to resist or prevent lawful arrest or detention (15 years).
(11) Unlawfully wounding (3 years).
(12) Attempting to choke etc. in order to enable an indictable offence to be committed (15 years).
(13) Using chloroform or another drug for the purpose last mentioned (7 years).
(14) Administering poison so as to endanger life or cause grievous bodily harm (10 years).
(15) Administering poison with intent to injure or annoy (2 years).
(16) Ill-using an apprentice or servant so that life is endangered or health is, or is likely to be, permanently injured (2 years).
(17) Abandoning or exposing a child under the age of two years (3 years).
(18) Causing burns or grievous bodily harm by explosion (15 years).
(19) Assault occasioning actual bodily harm (4 years).
(20) Common assault (2 years).
(21) Rape (20 years).
(22) Attempted rape and assault with intent to rape (10 years).
(23) Incest (20 years or 7 years, according to the relationship).
(24) Attempted incest and assault with intent to commit incest (10 years or 5 years, according to the relationship).
(25) Carnal knowledge of a female inmate of a mental institution by an employee of the institution or an attempt thereat, or assault with intent (5 years).
(26) Indecent assault on a female (3 years).
(27) Buggery (15 years or 20 years).
(28) Attempt thereat or assault with intent (10 years).
(29) Indecent assault on a male (10 years).
(30) Gross indecency by one male with another (3 years).

B. (1) Carnal knowledge of a girl under 10 (20 years).
(2) Attempt thereat or assault with intent (10 years).

(3) Carnal knowledge of a girl between 10 and 16 (10 years or 15 years).
(4) Attempt thereat or assault with intent (3 years or 5 years).
(5) Taking or detaining a child under 16 by force or fraud (5 years).
(6) Taking or enticing away such a child (2 years).
(7) Act of gross indecency with or in the presence of a girl under 16 or being in any way party to the commission of such an act (2 years or 3 years).

C. (1) Neglecting to provide for a child under 15 in the accused's care or custody (£200 or 12 months).
(2) Ill-treating or exposing any child under 15 or causing or procuring any such child to be so treated (£200 or 12 months). (See Children's Welfare Act 1958, Sec. 71 which has been replaced by Social Welfare Act 1970 Sec. 81.)

D. Any offence on the prosecution of which the wife or husband of an accused person might lawfully have been compelled to give evidence before the passing of the Crimes Act 1915 No. 2[34].

25. By Section 3 of the Crimes (Amendment) Act 1970 (No. 7994) it was provided that the husband and wife of a person charged with one of the offences in Category A above should be a compellable witness for the prosecution in any proceedings for the grant or revocation of bail.

26. By Section 6 of the Crimes Act 1972 (No. 8338) there was added to Category A above the offence of unlawfully inflicting grevious bodily harm, which carries a penalty of 7 years.

27. By Section 2 of the Crimes (Amendment) Act 1973 (No. 8410) there was added to Category A above the offence of kidnapping for ransom or gain, which carries a penalty of 20 years.

28. By an indirect effect of Section 2 of the Crimes (Capital Offences) Act 1975 (No. 8679) there was added to Category A above the crime of treason, the penalty for that crime and for murder being reduced to imprisonment for life.

Sub-section 4. The Position Now in Victoria.

29. The Victorian legislation referred to in sub-section 3 above, operating in conjunction with the surviving rules of the Common Law as to competence and compellability in criminal proceedings, has produced a complex legal situation. And as is the case under the materially different rules operating in England in this area of the law, the complexity does not appear to be justified by relevant policy considerations (compare paragraph 16 above).

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[34] This category would appear to comprise only the Common Law exceptions referred to in paragraphs 7 to 9 above.

30. There has, it is true, been a simplification here of the situation regarding competence. The husband or wife of an accused person has been made competent, whatever the crime charged, to be called as a witness by the accused spouse, or to be called, without the consent of the accused spouse, as a witness for the prosecution or a co-accused[35].

31. In relation to compellability of the husband or wife of an accused person, however, there is extreme complexity.

(a) In cases falling within the Common Law exceptions to the general rule of exclusion, it would appear that the accused's husband or wife is compellable for the defence and compellable for the prosecution. But there is uncertainty upon this point, and also as to what crimes fall within the scope of the Common Law exceptions[36].

(b) Where compellability is not imposed under the Common Law exceptions

(i) The husband or wife is not compellable, whatever be the crime charged, to be a witness either for the accused spouse or for any co-accused.

(ii) The husband or wife is not compellable to be a witness for the prosecution where the crime charged is not an offence against the person e.g. where the charge is one of burglary, theft, malicious damage to property, perjury, forgery, counterfeiting, or tax evasion.

(iii) As regards crimes against the person the husband or wife is compellable to be a witness for the prosecution if, but only if, the crime charged

a. Is one of the offences against the person listed in one of the categories A., B., and C. referred to in paragraph 24 above, and

b. Is alleged to have been committed against someone under 16 (or, in some cases, a lesser age).

(iv) The two conditions of compellability stated in (iii) above involve that the husband or wife is not made compellable for the prosecution where what is charged is

a. Inciting, being an accessory before the fact to, conspiring to commit, or (subject to a few express exceptions) attempting to commit, a crime listed in one of the categories A., B., and C.

— or —

b. One of the many offences against the person — some of them extremely serious — which are not listed in any of the

[35] Crimes Act 1958 Sections 399 and 400 (1) as amended. An accused person is made competent only for the defence and only upon his or her own application: Section 399. And these limitations apply even where spouses are being tried together, so that each is not only an accused person but also the spouse of an accused person.

[36] See paragraphs 7 to 10 above.

categories A., B., and C. e.g. procuration of women to become prostitutes or inmates of brothels in Victoria or elsewhere, procuration by intimidation, fraud or drugs, abduction or detention of a woman by force or from motives of lucre with intent to have carnal knowledge of her, destruction of aircraft with intent to kill, assaulting crew members on board an aircraft, causing an explosion, sending explosives or throwing corrosive fluid with intent to do grievous bodily harm, placing obstacles on railway lines or removing rails or sleepers with intent to endanger the safety of persons in trains, using firearms to prevent or resist lawful arrest or detention, assault with intent to commit a felony or drunken driving causing death.

— or —

c. An offence against the person, listed in one of the categories A., B., and C. (e.g. wounding with intent to do grievous bodily harm) which is committed against any person, however defenceless, who is more than 16 years old.

SECTION 4.—POLICY CONSIDERATIONS.

32. In the course of the long period, down to the middle of last century, during which the competence of witnesses in criminal proceedings was governed solely by the rules of the Common Law, five main reasons were relied upon as justifying the rule that the spouse of the accused could not be called as a witness.

33. In the first place it was said that, as the interests of the spouse would ordinarily be identical with those of the accused, the spouse, like the accused, should be excluded from giving evidence; since the bias of each would create a manifest danger of perjury and therefore of erroneous verdicts[37]. As was pointed out by Blackstone[38], however, the Court of Chancery received the evidence of parties and their spouses and did not appear to find difficulty in assessing it. And now that all our civil courts have had the advantage of over a century's experience of receiving and weighing the evidence of parties and their spouses, it is clear that the advantages of allowing such evidence to be given far outweigh any disadvantages arising from the fact that such witnesses have an interest in the result of the proceedings.

34. That same period of experience warrants the rejection, also, of a second argument[39] which was sometimes relied upon, that to confer on

[37] Bacon, Abridgement 3rd edn. "Evid". 1: 2 Hawk. P.C. Ch. 46 Sec. 67: Gilbert on Evidence 6th edn. p. 118: Starkie, Law of Evidence 3rd edn. p. 549: Phillips, Law of Evidence 9th edn. pp. 43 & 69: Second Report of the Common Law Commission (1853) pp. 11-12.

[38] 3 Bl. Comm. p. 382.

[39] Starkie, Law of Evidence 3rd edn. p. 70.

spouses the power to give evidence would arm them with a weapon which might be used for dangerous purposes.

35. A third argument relied upon was that to allow the spouse of the accused to be a witness would compel a violation of the confidential relationship which should exist between husband and wife[40]. But this argument, though it may support the maintenance of a rule of privilege, or the granting of a power of exemption, in relation to confidential communications made between spouses, can not support a rule excluding spouses from the witness box.

36. A fourth reason relied upon was that to admit the evidence of spouses "might be a cause of implacable discord and dissention between the husband and the wife" and so contravene the public policy of maintaining stable marital relationships[41]. And the fifth was that the state was not justified in imposing on husbands and wives the extreme hardship of giving evidence against their spouses, contrary to the promptings of affection and marital duty, and with the likelihood, in many cases, of bringing upon themselves disastrous social and economic consequences[42].

37. Each of these last two reasons, it is submitted, has real weight, but only in relation to the question of whether the spouse should be compelled to give evidence against the accused. This limitation is involved in the very formulation of the fifth reason. And it applies also to the fourth, since the giving of evidence in favour of the accused creates no threat to the relationship; and where the spouse chooses to give evidence against the accused without being compelled to do so, the marital relationship will ordinarily be already beyond salvaging[43].

38. Though close consideration has been given to this area of the law in recent times by many law reform bodies[44], no new policy considerations of real weight have been brought forward to supplement the old arguments by which the Common Law rules of exclusion were sought to be supported[45].

SECTION 5. SHOULD THE COMPETENCE OF SPOUSE-WITNESSES BE RESTRICTED?

39. In the light of what has been said in Section 4 above it is submitted that there is no case for restricting in any way the general grant of

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40 Starkie, Law of Evidence, 3rd edn. p. 70: Phillips, Law of Evidence 9th edn. p. 69.
41 See Co. Litt. 1st Inst. 6b and the authorities cited in note 37.
42 Bacon, Abridgement 3rd edn. "Evid." 1: Hawkins P.C. Vol. 2 Ch 46, Sec 67. Compare also Criminal Law Revision Committee 11th Report Sec. 147: Statute Law Revision Committee Report of 11/5/66, Sec. 6.
43 Compare Second Report of the Common Law Commissioners (1853) pp. 12-13: Criminal Law Revision Committee, 11th Report Sec. 148: Law Reform Commission of Canada, Study Paper on Evidence (1972) Pt. 1, p. 6.
44 See paragraph 2 above.
45 Compare Criminal Law Revision Committee, Report No. 11 Sec. 148, in which an additional argument was considered and rejected.

competence for the spouses of accused persons that was made by the Crimes Act 1967[46]. That grant was made on the recommendation of the Chief Justice's Law Reform Committee[47] and the Statute Law Revision Committee[48]; provisions granting the same general competence to spouses have been enacted in New South Wales[49] and Western Australia[50]; and the enacting of similar legislation has been proposed in England, South Australia, Queensland, and Canada[51].

SECTION 6. SHOULD THE COMPELLABILITY OF SPOUSE-WITNESSES BE EXTENDED?

Sub-section 1. Compellability to be a Witness for the Accused Spouse.

40. Under Victorian law, the husband or wife of an accused person, though competent to give evidence on behalf of that person, is not compellable to do so, unless it be in cases falling within the Common Law exceptions[52]. An estranged husband or wife is therefore able to deny his or her spouse the benefit of evidence which may be essential to establish that spouse's innocence. The existence of this right to refuse to go into the witness box and give evidence for one's accused spouse cannot be justified except in the special case in which the husband or wife so refusing is a co-accused with his or her spouse. It has been recommended by law reform bodies in England, in South Australia and in Queensland that, except in that special case, the husband or wife of an accused person should be made compellable to give evidence on behalf of that person as if they were not husband and wife[53]; and it is the *recommendation* of this Report that such an extension of compellability be enacted in Victoria.

Sub-section 2. Compellability to be a Witness for the Prosecution.

41. In this area there are complex and difficult problems, — both as to policies and as to procedures.

42. It has been pointed out by the Criminal Law Revision Committee in Section 147 of its 11th Report[54] that to determine whether it is desirable that the spouse of an accused person should be a compellable witness for

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46 See now Sections 399 and 400 of the Crimes Act 1958 as amended by the 1967 Act.
47 Report dated 1/6/65 p. 6.
48 Report dated 11/5/66 para. 20.
49 Crimes Act 1900 (N.S.W.) Sec. 407.
50 Evidence Act 1906-1967 (W.A.) Sec. 8.
51 See references (i) (iv) (v) and (vi) in paragraph 2 above.
52 See paragraph 31 clauses (a) and (b) (i) above. Note, however, the Marriage Act 1961-1973 (Cwth.) Sec. 94.
53 See references (i) (iv) and (v) in paragraph 2 above.
54 See also Criminal Law & Penal Methods Reform Committee of South Australia 3rd Report p. 176.

the prosecution will commonly require a weighing of conflicting policy considerations. In favour of compellability reliance may be placed upon:—

(i) The desirability that the criminal law should be enforced against offenders, and that those individuals who happen to be necessary witnesses to prove an offence should not be at liberty to prevent enforcement.

(ii) The desirability that all available evidence which might conduce to a right verdict should be before the Court.

But as against these policy considerations reliance may be placed upon:—

(i) The undesirability that the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require.

(ii) The undesirability that the community should make unduly harsh demands on its members by compelling them, where the general interest does not require it, to give evidence that will bring punishments upon those they love, or betray their confidences, or entail economic or social hardships.

43. To weigh conflicting policy considerations such as these and to determine whether on balance, it is desirable, or undesirable, that the spouse of an accused person should be compellable to give evidence for the prosecution, is likely to be a difficult task, even where full information is available as to the circumstances of the particular case. But the course that has so far been adopted in Victoria has not been to provide for the determination of this question of compellability in the light of the particular facts of each case. It has been to formulate lists of particular offences and categories of offences, and to impose compellability in the case of all offences so listed[55].

44. In a number of other jurisdictions a like procedure has been adopted of formulating lists of particular offences, or categories of offences, but the lists show a remarkable diversity[56].

45. The existence of this great diversity draws attention to basic difficulties that are inherent in the listing method, namely that any attempt to specify crimes, or categories of crime, in which spouse-witnesses shall be compellable for the prosecution will necessarily produce anomalous results in many situations, and that there is room for wide differences of opinion as to which crimes or categories should be specified[57].

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[55] See Crimes Act 1958 Sec. 400 (3) as amended; and see paragraphs 23 to 28 and 31 above.

[56] See, in N.S.W., Crimes Act 1900 Sec. 407 and Child Welfare Act 1939-1969: in Queensland, Evidence & Discovery Act 1867-1967 Sec. 5 and Criminal Code Secs. 35 and 618A: in South Australia, Evidence Act 1929-1974 Secs. 18-21: in Western Australia, Evidence Act 1906 Secs. 8 & 9, Criminal Code Secs. 189 & 190 and Justices Act 1902 Sec. 71: in Tasmania, Criminal Code Act Sec. 133 and Evidence Act 1910 Secs. 85 & 86.

[57] Compare Working Paper (Project No. 31) of Western Australian Law Reform Commission at p. 10.

46. To 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 policy considerations referred to in paragraph 42 above. 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.

47. 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.

48. 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 her own life or 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 crime 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 under the heads referred to in paragraph 47 above.

49. 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

those serious offences are covered only where they are committed against persons under 16[58].

(b) In Queensland on the other hand, the list comprises all simple offences, and little else[59]; and in Western Australia the list at one time included, if it does not now include, all offences punishable on summary conviction[60].

The reasoning on which the Victorian provision was based was, presumably, that where the offence can be a grave one the feelings and interests 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.

50. It is submitted that the difficulties inherent in the listing method are so substantial and intractable that the procedure should be abandoned and replaced by a procedure under which, in those special cases in which a genuine problem arises, the question whether the spouse of an accused person is compellable to be a witness for the prosecution is determined by the judge or magistrate or justice, at the hearing, upon a weighing of the relevant policy considerations in the light of the circumstances of the particular case.

51. Such a solution was suggested in 1972 by the Law Reform Commission of Canada in Part I of its Study Paper on Evidence, where the following passage appears:—

> "It is recognised that in some cases it may appear harsh to require family members to testify against an accused, and the solution may be to give the trial judge the right, after weighing the competing interests of family harmony and society's protection in the particular case, to exempt such a witness from any of the civil or criminal consequences of not testifying."

52. It will be observed that the suggestion so made was not confined to spouse-witnesses but related to the wider class of "family members".

53. The solution proposed in the Study Paper has been adopted by the Canadian Commission in its Report No. 1 on Evidence and in Section 57 of its Draft Evidence Code, which is in the following terms:

> "57. In a criminal proceeding, a person who is related to the accused by family or similar ties is not compellable to be a witness for the prosecution if, having regard to the nature of the relationship, the

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58 See Crimes Act 1958, Sec. 400 (as amended).
59 See note 56 above.
60 Justices Act 1902 (W.A.) Sec. 71 (3).

probable probative value of the evidence and the seriousness of the offence charged, the need for a person's testimony is outweighed by the possible disruption of the relationship or the harshness of compelling the person to testify."

54. It might be objected that such a provision would leave the prosecution uncertain as to what evidence it would be able to elicit. But that is its situation to-day whenever it calls the accused's spouse or a member of the family. The prosecution can never be sure that there will not be a fictitious loss of memory, or a change of story or a refusal to give evidence. As a matter of drafting, the expression "family or similar ties" in the Canadian draft may, indeed, be thought to be too wide and too uncertain; but it is submitted that a power to exempt ought to be made applicable where the witness is the husband or wife, parent or child, or "de facto" spouse of the accused[61].

55. Some other changes would, it is thought, be desirable to give effect to what has been said above as to the policy considerations that need to be taken into account and to fit the Canadian draft into the background of Victorian law. In particular, with the substantial assimilation of the situation of spouse-witnesses to that of ordinary witnesses, there will be insufficient justification for retaining the general prohibition against comment upon the failure to call a spouse-witness (Crimes Act 1958, Sec. 399 (b)). But on the other hand the exercising of the right to make application for exemption ought not to be discouraged by fear of comments prejudicial to the accused. Furthermore Sec. 400 (2) of the Crimes Act 1958 will need to be replaced by a more appropriately worded provision.

56. In the light of the foregoing it is *recommended* that the existing provisions of the Crimes Act 1958 relating to the compellability of the spouse of an accused person to be a witness for the prosecution should be replaced by a provision in the following form or to a like effect:

(1) That except as provided in the following sub-section the husband or wife of an accused person, when not a co-accused with that person, shall be compellable to give evidence on behalf of the prosecution as if the witness and the accused were not husband and wife.

(2) That the husband, wife, parent, child or de facto spouse of an accused person shall be exempted from obligation to give evidence on behalf of the prosecution, either generally or in relation to a particular matter, if, but only if, the judge or magistrate or justice is satisfied, upon application made to him in the absence of the jury, if any, that, having regard to all the circumstances including, —

(i) The nature of the conduct charged

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[61] Compare Third Report of Criminal Law & Penal Methods Reform Committee of South Australia at p. 176 where reference is made to the definition of "de facto" relationships for the purposes of Workers Compensation legislation in that State.

(ii) The importance in the case of the facts which the witness is to be asked to depose to
(iii) The availability of other evidence to establish those facts and the weight likely to be attached to the witness' testimony as to those facts
(iv) The nature, in law and in fact, of the relationship between the proposed witness and the person charged
(v) The likely effect upon the relationship and the likely emotional, social and economic consequences if the witness is compelled to give the evidence, and
(vi) Any breach of confidence that would be involved,

the interest of the community in obtaining the evidence is outweighed by the likelihood of damage to the relationship and/or the harshness of compelling the giving of the evidence.

(3) That the fact that a person has applied for or been granted an exemption under (2) above shall not be made the subject of any comment to the jury by the prosecution or by the judge.
(4) That the reference in Section 399 (b) of the Crimes Act 1958 to the wife or husband of a person charged be repealed.
(5) That for Sec. 400 (2) of the Crimes Act 1958 there be substituted the following provision:—
'(2) Where the husband, wife, parent, child or de facto spouse of the person charged is called as a witness for the prosecution the judge, magistrate or justice shall satisfy himself that the witness is aware of his or her right to apply to be exempted.'

Sub-section 3. Compellability to be a Witness for a Co-accused being Tried Jointly with the Spouse of the Witness.

57. Where the person desiring to call the witness is a co-accused who is being tried jointly with the husband or wife of the proposed witness, conflicting considerations arise. On the one hand the interests of the co-accused B require that he should be able to compel the witness to give evidence on his behalf despite the witness' relationship to the accused A. On the other hand the evidence which the witness will be called to give, or what he or she will say under cross-examination by the prosecution, may be incriminatory as against A; and it may be argued that A's wife or husband should not be compellable to incriminate A.

58. The problem presented is a difficult one[62]. It is submitted, however, that the husband or wife of an accused person ought to be a compellable witness not only for that accused, but also for any co-accused being tried jointly with that accused. Moreover it is not considered that there should be

[62] Compare the discussion in Sec. 155 of the 11th Report of the Criminal Law Revision Committee.

any power of exemption in this case such as has been recommended in relation to the calling of witnesses for the prosecution. For though the community can properly be called on to regard its interest in securing a conviction as being outweighed by the hardship that the witness would incur, an accused man cannot properly be required to run the risk of being wrongly convicted in order to spare the witness from hardship.

59. It is therefore *recommended* that the husband or wife of an accused person, when not a co-accused with that person, should be made compellable to give evidence on behalf of any co-accused in the proceedings as if the witness and the accused spouse were not husband and wife.

SECTION 7. PERSONS NO LONGER HUSBAND AND WIFE.

60. It would appear that the Common Law doctrine of the incompetence of husbands and wives to be witnesses for or against each other became extended so far as to render the parties to a former marriage incompetent, after its dissolution or, in the case of a voidable marriage, after its annulment, to give evidence for or against each other as to events which took place while the marriage was on foot[63].

61. This extension of the Common Law doctrine was, it is submitted, unwarranted. For the policy considerations which, in the case of a subsisting marriage, used to be regarded as justifying the rule of exclusion[64], are either absent or of negligible weight, after the marriage has been terminated. Indeed the only basis upon which the extension was sought to be justified in the cases was that it would protect, and therefore tend to promote, confidential communications between spouses[65]. But the extension excluded evidence of acts and of non-confidential communications, as well as evidence of matrimonial confidences. And even as to these last, it is not easy to suppose that the extent to which they occur could be materially affected by a spread of knowledge that if a marriage should be terminated a former spouse would be allowed (or would not be allowed) to give evidence of what was confided to him or her during the marriage. Furthermore the contention that there is a special degree of harshness in compelling the disclosure of confidential communications between spouses loses its force where the marriage has been terminated.

62. Not only does the extension lack an adequate basis in policy considerations; it also creates great difficulties as to the construction and effect of the legislation now in existence relaxing the Common Law restrictions

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[63] See Second Report of Common Law Commission (1853) p. 12: Cross on Evidence, Aust. edn. pp. 180-1, 193-5 and cases there cited: "Monroe v. Twistleton To-day" by Rupert Cross, 1959 Crim.L.R. 262: "R. v. Algar" 1959 Crim.L.R. 685.

[64] Compare paragraphs 32-36.

[65] Compare Monroe v. Twistleton, Peake Add. Cas. 219: O'Connor v. Marjoribanks 4 M. & G. 435.

upon competence and compellability. For that legislation is expressed to apply only to "husbands" and "wives"; it says nothing in terms about former spouses. There has been much dispute as to whether its language can properly be construed as applying to them[66]. And if it can not be, then we have the anomaly that in many situations competence and compellability are more restricted where the marriage is at an end than when it is still on foot. These difficulties, it may be observed, arise in relation to civil as well as criminal proceedings; and similar difficulties would arise under any future legislation in the form recommended in paragraphs 40, 56 and 59 of this Report.

63. The Criminal Law Revision Committee, in Section 157 of its 11th Report, said that it was convinced that there was no good reason for keeping in existence the Common Law rule extending incompetence to former spouses; and in the draft Bill which it proposed, the Committee included a provision putting an end to the extension in criminal cases.

64. It is considered that the Committee's view of the extension was correct and should be acted upon in Victoria. And for reasons indicated in paragraph 62 above it is submitted that the abolition of the extension should be expressed to apply to civil as well as criminal proceedings.

65. It is therefore *recommended* that legislation should be enacted in the following form or to a like effect:—

> "In any civil proceeding any person who has been but is no longer married to a party, and in any criminal proceeding any person who has been but is no longer married to the accused or one of the accused, shall be competent and compellable to give evidence as if that person and the party or the accused (as the case may be) had never been married."

66. Legislation in this form would not, it is considered, alter the existing law relating to the right to claim privilege for communications between husband and wife. For the only right of that kind that exists[67] is the one conferred by Section 27 of the Evidence Act 1958[68], and it has been held, in relation to the corresponding English section, that the privilege is conferred only upon parties to subsisting marriages[69].

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66 Shenton v. Tyler (1939) Ch. 271 and 620: Note, 55 L.Q.R. 329: R. v. Algar (1954) 1 Q. B. 279: Articles in 1959 Crim.L.R. referred to in Note 63 above: Moss v. Moss (1963) 2 Q.B. 799: Cross on Evidence, Aust. edn. pp. 193-5, 295-6: and compare Moore v. Whyte No. 2, 22 S.R. (N.S.W.) 570, 583.

67 See R. v. Rumpling (1964) A.C. 814.

68 The terms of the section are:— "27. No husband shall be compellable to disclose any communication made to him by his wife during the marriage; and no wife shall be compellable to disclose any communication made to her by her husband during the marriage".

69 Shenton v. Tyler (1939) Ch. 271, 276: S.C. on appeal (1939) Ch. 620, 641 and 652. See however, Cross on Evidence Austn. edn. pp. 194-5 and 295-7: Note, 55 L.Q.R. 329: and Articles in 1959 Crim.L.R. referred to in Note 63 above.

67. When the Victorian legislature, in 1967, enacted that the husband or wife of the accused should be a competent witness for the prosecution in all cases[70], it also enacted, by words of exception introduced into Section 399 (e) of the Crimes Act 1958[71], that cross-examination of, or imputations against, such a spouse-witness should not enable the Crown to put the accused's prior convictions or character before the jury. This amendment of Section 399 (e) had been recommended by the Statute Law Revision Committee because of the danger that "a spouse who has been ill-treated will take unfair advantage of the right to tender evidence in an endeavour to have the other spouse convicted"[72]. This danger seems likely to be increased rather than decreased where the marriage has been terminated; and it is therefore *recommended* that the legislation proposed in paragraph 65 should be accompanied by an amendment of Section 399 (e) extending the words of exception therein to cover a former spouse of the accused as well as his or her wife or husband.

SECTION 8. PRIVILEGE FOR COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

68. Although legislation in the form recommended in paragraph 65 above would not, it is considered, conflict with the provisions of Section 27 of the Evidence Act 1958 as to privilege for communications between spouses, there would be conflict between Section 27 and each of the provisions as to compellability recommended in paragraphs 40, 56 and 59 above. It is submitted that in these conflicts it would be desirable that the new provisions should prevail. For in the first place, where the spouse-witness is called by the prosecution (see paragraph 56), the power of exemption to be given to the court will be sufficient to enable justice to be done. And secondly, when the spouse-witness is called by the accused spouse or a co-accused (see paragraphs 40 and 59) the privilege should not be allowed to prevent the putting forward of facts necessary to make out a defence.

69. One method of dealing with this conflict would be to enact in relation to the provisions recommended in paragraphs 40, 56 and 59 above, that they shall have effect notwithstanding anything in Section 27 of the Evidence Act 1958. This, however, would leave Section 27 operative to entitle any married person to refuse to give evidence of any communication received from his or her spouse during the marriage, not only when called as a witness in civil proceedings, but also when called in criminal proceedings in which the spouse is not an accused person. It will not often occur that in criminal proceedings against third persons evidence of any such communication between a witness and his or her spouse will constitute

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70 See paragraph 23 (i) above.
71 See Crimes Act 1967 Section 8 (b).
72 Report dated 11th May 1966.

admissible evidence. Ordinarily it will be inadmissible as being mere hearsay. But in those special situations in which it is admissible the recipient of the communication ought not, it is considered, to have the right to deprive either the prosecution or the defence of the benefit of the evidence. It is therefore *recommended* that in order to prevent such a use of the privilege and, at the same time, to resolve the conflict referred to in paragraph 68 above, Section 27 should be amended by confining its operation to civil proceedings; and a consequential repeal of Sec. 400 (4) of the Crimes Act 1958 will be desirable.

70. A study of the question whether further or other changes are desirable in the law relating to privilege for confidential or other communications between spouses has not been made in this Report because the view has been taken that such a study would more appropriately be made as part of a general enquiry into the law relating to privilege for all categories of confidential communications.

SECTION 9. SUMMARY OF RECOMMENDATIONS.

71. The recommendations made in this Report are that legislation should be enacted in the following form or to a like effect:—

(1) That the husband or wife of an accused person when not a co-accused with that person, shall be compellable to give evidence on behalf of that person as if they were not husband and wife (paragraph 40).

(2) That the husband or wife of an accused person when not a co-accused with that person, shall be compellable to give evidence on behalf of any co-accused in the proceedings as if the witness and the accused spouse were not husband and wife (paragraph 59).

(3) (a) That except as provided in 3 (b) hereunder the husband or wife of an accused person, when not a co-accused with that person, shall be compellable to give evidence on behalf of the prosecution as if the witness and the accused were not husband and wife (paragraph 56).

(b) That the husband, wife, parent, child or de facto spouse of an accused person shall be exempted from giving evidence on behalf of the prosecution either generally or in relation to a particular matter, if, but only if, the judge or magistrate or justice is satisfied upon application made to him in the absence of the jury, if any, that, having regard to all the circumstances including —

(i) The nature of the conduct charged

(ii) The importance in the case of the facts which the witness is to be asked to depose to

(iii) The availability of other evidence to establish those facts and the weight likely to be attached to the witness' testimony as to those facts

(iv) The nature, in law and in fact, of the relationship between the proposed witness and the person charged

(v) The likely effect upon the relationship and the likely emotional, social and economic consequences if the witness is compelled to give the evidence, and

(vi) Any breach of confidence that would be involved,

the interest of the community in obtaining the evidence is outweighed by the likelihood of damage to the relationship and/or the harshness of compelling the giving of the evidence (paragraph 56).

(c) That the fact that a person has applied for or been granted an exemption under (b) above shall not be made the subject of any comment to the jury by the prosecution or by the judge (paragraph 56).

(d) That the reference in Section 399 (b) of the Crimes Act 1958 to the wife or husband of a person charged be repealed (paragraph 56).

(e) That for Sec. 400 (2) of the Crimes Act 1958 there be substituted the following provision:—

'(2) Where the husband, wife, parent, child or de facto spouse of the person charged is called as witness for the prosecution the judge, magistrate or justice shall satisfy himself that the witness is aware of his or her right to apply to be exempted' (paragraph 56).

(4) That in any civil proceeding any person who has been but is no longer married to a party, and in any criminal proceeding any person who has been but is no longer married to the accused or one of the accused, shall be competent and compellable to give evidence as if that person and the party or the accused (as the case may be) had never been married (paragraph 65).

(5) That Section 399 (e) of the Crimes Act 1958 be amended by extending the words of exception therein to cover a former spouse of the accused as well as his or her wife or husband (paragraph 67).

(6) That Section 27 of the Evidence Act 1958 be amended so as to confine its operation to civil proceedings, and Sec. 400 (4) of the Crimes Act 1958 be repealed (paragraph 69).

DATED the 22nd day of November, 1976.

T. W. SMITH
(LAW REFORM COMMISSIONER)

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