

**For discussion
on 26 June, 2001**

LegCo Panel on Administration of Justice and Legal Services

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

Background

In 1988, the Law Reform Commission published a report on the competence and compellability of spouses in criminal proceedings. In 1990, the Administration introduced a Bill to amend the Criminal Procedure Ordinance (Cap. 221) to implement the recommendations made in the report but the Bill was defeated. The principal opposition to the Bill was based on the possible effect that compelling wives to testify against husbands would have upon wives and the family unit in Chinese society. Several members of the Legislative Council disagreed with the provision giving the court the power to exempt a wife from testifying. They considered that it was the wife who should decide whether or not to testify, not the court.

2. The social welfare sector was critical of the Bill's defeat. It was said that the legislators had acted according to outdated values : family situations were not the same as they were many years ago, and women were no longer totally dependent upon their spouses to the point of having to tolerate abuse.

3. The thrust of the recommendations of the Law Reform Commission was away from the rigidity of the common law position, where a spouse was excluded from giving evidence, towards a situation where that spouse would be competent in all cases to testify for the other spouse, compellable to testify for the other spouse in all cases, but compellable to testify against the other spouse only in cases involving offences that threatened their family.

4. In July 2000, the Administration prepared a Consultation Paper regarding the possible reintroduction of the Bill to implement the recommendations of

the Law Reform Commission. A copy of the Consultation Paper is at **Enclosure A**. The Consultation Paper was circulated to women's groups, social welfare organisations and other interested NGOs. A period of two (later extended to four) months was given for views to be submitted to the Administration.

5. As at the date of this paper the Administration has received 16 written submissions from the following organizations:-

- (a) Guardianship Board
- (b) Equal Opportunities Commission
- (c) Zonta Club of Hong Kong
- (d) Hong Kong Christian Service
- (e) Hong Kong Christian Council
- (f) The Society for the Rehabilitation of Offenders, Hong Kong
- (g) The Boys' & Girls' Association of Hong Kong
- (h) Mr Desmond Keane, SC
- (i) The Family Planning Association of Hong Kong
- (j) The Hong Kong Council of Social Services
- (k) JUSTICE
- (l) School of Law, City University
- (m) The Hong Kong Bar Association
- (n) The Family Law Association
- (o) Heung Yee Kuk New Territories
- (p) The Law Society of Hong Kong

6. A summary of the submissions is set out in **Enclosure B**.

Results of the consultation exercise

7. The Law Reform Commission made 18 recommendations. The principal recommendations were:-

- (a) a spouse would be competent, if he or she consented, to give evidence for the prosecution in all criminal proceedings against his or her spouse;
- (b) a spouse could, in certain types of criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse; and

- (c) a spouse could be compelled to give evidence for the defence of his or her spouse in all criminal proceedings.

8. The submissions clearly support the recommendation noted in paragraph 7(a) above. Four organizations opposed the recommendation in paragraph 7(b), namely the Law Society, JUSTICE, the Society for the Rehabilitation of Offenders, Hong Kong and the Heung Yee Kuk, New Territories. JUSTICE and Heung Yee Kuk, New Territories opposed the recommendation in paragraph 7(c).

9. The submissions for and against the recommendations noted in paragraph 7(b) and 7(c) above are further discussed below.

Spouse as compellable witness for prosecution and/or defence.

10. The submissions against compelling spousal testimony are as follows:-
- (a) JUSTICE considers that spouses should be competent witnesses for the prosecution as well as the defence but not compellable as witnesses for either the defence or the prosecution.
- (b) The Society for the Rehabilitation of Offenders, Hong Kong considers that a spouse should not be compelled to give evidence for the prosecution in any circumstances. In its view, it should be the spouse, not the court, who decides whether or not an individual should testify against his or her spouse.
- (c) The Law Society opposes the compellability of a spouse as a witness for the prosecution as it considers that this would infringe upon the sanctity of marriage. It would also compel a violation of the confidential relationship between husband and wife.
- (d) The Heung Yee Kuk, New Territories objects to compelling a spouse to testify for the prosecution or the accused spouse. It has submitted various reasons. Firstly, a spouse who is compelled to give evidence may conceal facts and may be uncooperative. That would undermine the integrity and credibility of the evidence and may mislead the court. Secondly, any

evidence is vital to the accused in any criminal proceedings. Therefore, compellability should be avoided so as not to affect the integrity and credibility of witnesses. Thirdly, as Hong Kong is a Chinese society, the recommendation may damage the harmony of the family relationship and even lead to breakdown of marriage.

11. Most respondents support the recommendations noted in paragraph 7(b) and 7(c) above. The submissions in favour of compelling spousal testimony are as follows:-

- (a) The Bar Association supports the proposals of the Law Reform Commission, which represents a change of their stance from ten years ago when the matter was last considered by them. However, they would like to know in due course what offences are deemed to “threaten” the family and/or how the concept of “threatening the family” is to be defined. Provided the proposals are limited in the way set out in the Consultation Paper, they do not wish to oppose the changes, which they consider sensible in the new century.
- (b) The Family Law Association is against the extension of compelling spousal testimony generally. However, the Association, by a majority, supports the proposals concerning compellability in cases involving physical or sexual violence against family members.
- (c) The Family Planning Association of Hong Kong agrees with the aim of the Criminal Procedure (Amendment) Bill 1990 to strike a balance between protecting the public interest and preserving matrimonial and domestic harmony. It supports the principal recommendation of the Law Reform Commission that a spouse should be compellable to testify for the other spouse in all cases but compellable to testify against the other spouse only in cases involving offences that threatened their family.
- (d) The Hong Kong Christian Service supports the proposal that a spouse, in certain criminal proceedings involving domestic affairs like domestic violence and incest, be compellable to give evidence for the prosecution against his or her spouse. The reason is that from their experience, in some cases, domestic violence must be stopped before counselling can be

conducted and the family relationship can be rebuilt. Further, the spouse is likely to be the sole witness in a domestic violence case.

- (e) The Hong Kong Christian Council supports the principal recommendations of the Law Reform Commission including the recommendation that a spouse should be compellable to testify for the other spouse and that a spouse should be compellable to testify against the other spouse only in cases involving offences threatening their family.

- (f) The Hong Kong Council of Social Services supports the recommendation that a spouse should be both competent and compellable to testify for the accused spouse. The Council takes the view that a spouse should be competent to testify against the accused spouse. But it suggests that support services must be provided to the testifying spouses so that they can make a well-considered decision and make adequate psychological preparation for any possible outcome arising from their choice. The Council suggests that, in the long term, spouses should be compellable to testify against their spouse in all cases on the ground that everyone in society, including a spouse, should be compellable to testify for the prosecution, and that compellability will eliminate the dilemma faced by a spouse. However, in view of the prevailing family values in Hong Kong, it suggests that a spouse should be compellable to give evidence only in cases involving the infliction of physical violence upon or sexual molestation of a child of the family.

- (g) The Guardianship Board supports the proposed reforms in respect of compellability provided that compellability for the prosecution was extended to cover crimes against mentally incapacitated adults living in the family and not limited to crimes against spouses, cohabitants and children. The Board supports the proposed reforms as desirable for various reasons. Firstly, in the absence of compellability, the accused spouse may coerce the other spouse into not testifying. Secondly, if victims of domestic violence had the choice whether or not they should testify, this would put the whole burden on them, so that it would be rare for them to agree to testify against their spouse. Thirdly, the aggressor in domestic violence can be punished like any other aggressor. When men learn that their wives can be compelled to give evidence against them, it may make them

think twice about being violent. It is hollow to talk about women losing their economic security if they are compelled to testify, when all they want is to have safety for themselves and their children. Fourthly, to stop women testifying against their spouses, when the marital relationship is already irretrievably damaged by violence, merely because they are spouses, does not serve the interests of justice. Fifthly, the reality is that even if the reform proposals are adopted, in minor assault cases where there has not been a pattern of violence, the prosecution may exercise their discretion not to compel the spouse to testify. However, it is in the serious assault cases that compellability of the spouse will be useful to break the cycle of violence. Sixthly, some women will be empowered and overcome their fear if they can successfully give evidence. Finally, compellability of a spouse may change the cynical police attitude that domestic violence is only a domestic dispute. The Board also suggests that the previous concession of the Administration in allowing the spouse or cohabitee to seek exemption from testifying for the prosecution should be removed, as this loophole may be used by offenders to force spouses or cohabitees to seek it in all cases.

Views of the Administration

12. The Administration considers that the question whether there should be a general rule of compellability involves a balancing of interests. In view of the arguments set out above, and the majority support from the community as shown in the consultation, it is considered that spouses should not be made compellable to testify against each other, save in the following exceptional cases :-

- (a) The offence charged involves an assault on, or injury or a threat of injury to, the wife or husband of the accused or an assault on, or injury or a threat of injury to, or causing the death of, a child of the family or a child under the age of 16 in respect of whom either spouse was acting in loco parentis.
- (b) The offence charged is a sexual offence alleged to have been committed in respect of a child of the family or a child under the age of 16 in respect of whom either spouse was acting in loco parentis.
- (c) The offence charged consists of attempting or conspiring to commit, or of

aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above.

13. The Administration also considers that, in view of the apparent majority public support, a spouse should be compellable to testify for the defence of a spouse, except in cases where the spouses are jointly tried.

14. The Administration therefore proposes to implement all the recommendations of the Law Reform Commission through legislation.

Legal Policy Division
Department of Justice
June 2001

**COMPETENCE AND COMPELLABILITY
OF SPOUSES IN CRIMINAL PROCEEDINGS**

CONSULTATION PAPER

INTRODUCTION

This paper seeks comments on a proposal to amend the law governing the competence and compellability of spouses in criminal proceedings.

THE PROBLEM

2. In 1996, following proceedings in the High Court in *R. v Wan Tak* HC 13/1996 the Hon. Mr. Justice Stuart Moore (as he then was) wrote to the Hon. J. F. Mathews, the then Attorney General, offering observations on that case. The defendant had allegedly murdered his mother-in-law by inflicting multiple cut and stab wounds. Mr. Justice Stuart Moore noted that it would have been easier to prove the case if the defendant's wife had been "competent" to give evidence (that is, recognised by the law as likely to give reliable evidence). The law, as it stands, would have prevented the wife from giving evidence for the prosecution assuming she was willing to do so. Consequently, although the wife's statement as a witness provided valuable information, she had to remain a silent spectator in the public gallery listening to the story of her mother's murder unfold, knowing full well that she could disprove a sizable part of the defence case.

3. In a more recent District Court case (DCCC 814/99), three defendants came before the court facing three charges. The first charge was conspiracy to defraud, contrary to common law and punishable under section 159C(6) of the Crimes Ordinance (Cap. 200) involving all three defendants. They pleaded not guilty to that charge. The prosecution applied to have the second and third charges left on the Court file and an order to that effect was made. The defence objected to the prosecution calling the husband of one of the defendants to give evidence against his

wife on the first charge, the ground was that the husband was not a competent witness to give evidence against his wife since they had been lawfully married and that marriage was still subsisting. In order to overcome this objection, the prosecution had to amend the first charge and add a fourth charge of conspiracy to defraud. The wife remained a defendant on the first conspiracy charge but she was not a defendant on the fourth conspiracy charge. Only the remaining two defendants were the defendants on the fourth charge. In the end, the prosecution offered no evidence for the first conspiracy charge so that the wife dropped out of the case. The trial proceeded only on the fourth charge against the remaining two defendants, who were acquitted. In his reasons for verdict, District Court Judge Sweeney referred to the “historical hangover” of the rule that spouses are neither competent nor compellable to give evidence against each other and recommended that the Department of Justice “look at this area of law with a view to legislative change”.

BACKGROUND AND ARGUMENT

4. In Hong Kong, the present law governing the competence and compellability of spouses to testify in criminal proceedings is governed by a mixture of statute and common law. At common law a person is not competent to give evidence for or against his or her spouse except in very limited circumstances, such as where that spouse is accused of inflicting violence on that person. Various statutory provisions have extended these exceptions to the common law rules to make a person competent to give evidence against his or her spouse, for example, where such spouse is charged with certain sexual offences or certain offences against a person under the age of 16. The Criminal Procedure Ordinance (Cap. 221) provides that a person is competent to testify on behalf of his or her spouse where that spouse is a defendant in a criminal trial. A person is not, under the present law, compellable to give evidence against his or her spouse under any circumstances. (See the **Annex** to this paper for further details.)

Law Reform Commission’s Recommendations

5. In a report published in 1988, entitled “Competence and Compellability of Spouses in Criminal Proceedings”, the Law Reform Commission recommended a number of changes to the law relating to the competence and compellability of the spouse, or former spouse, of an accused person to give evidence in criminal proceedings.

6. Generally, these changes would increase the availability of the testimony of spouses in criminal proceedings and would mean that spouses would be treated more like all other witnesses in terms of their competence and compellability to give evidence in such proceedings. Spouses would, however, remain subject to certain special rules, in recognition of their special relationship to each other.

7. A summary of the present law in Hong Kong, the position in other jurisdictions, and the Law Reform Commission’s recommendations with arguments for and against so recommending is attached at the **Annex**.

8. Before the Law Reform Commission made its recommendations, a City and New Territories Administration telephone survey, and a targeted written survey, were conducted in 1986 to gauge public opinion. The telephone survey tended to support the Commission’s position on competence. However, whilst the survey showed that making a spouse generally compellable to testify against the other spouse was likely to be unpopular, it did not test the Commission’s more limited recommendation that spouses should be compellable to testify for the prosecution in a limited category of cases affecting the family.

9. Ninety organisations responded to the written survey with results similar to those of the telephone survey. This survey did, however, show strong support for making a spouse generally compellable to testify in the defence of the other spouse.

10. The principal recommendations of the Law Reform Commission were –

- (a) a spouse would be able, if he or she consented, to give evidence for the prosecution in all criminal proceedings against his or her spouse;
- (b) a spouse could, in certain types of criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse; and
- (c) a spouse could be compelled to give evidence for the defence of his or her spouse in all criminal proceedings.

11. The thrust of the recommendations of the Law Reform Commission is away from the rigidity of the common law position, where a spouse was excluded from giving evidence, towards a situation where that spouse would be competent in all cases to testify for the other spouse, compellable to testify for the other spouse in all cases, but compellable to testify against the other spouse only in cases involving offences that threatened their family.

12. In recommending that a spouse should be a competent witness for the prosecution of the other spouse, the Commission considered the following –

- (a) that, in the interests of justice, all available evidence should be capable of being placed before the courts, especially considering that spouses are now precluded from testifying for the prosecution at trials for serious crimes such as murder, rape and robbery;
- (b) those in favour of maintaining the status quo argued that if a spouse was competent and did testify for the prosecution against the other spouse, the consequence could be marital discord. The Commission considered this argument was not relevant to the question whether that spouse should be treated as competent; and
- (c) there may be a small risk that a spouse might provide tainted

or biased testimony but the courts and juries are well equipped to gauge the reliability of evidence provided to them.

13. The Law Reform Commission also considered the question whether a spouse should become generally a compellable witness for the prosecution against the other spouse. The Commission sought to strike a balance between, on the one hand, the interests of society in upholding the institution of marriage and in preserving the privacy of the marital relationship, and, on the other hand, the need to protect the spouse and children and to prevent or detect crime. It therefore declined to recommend a general rule of compellability for the prosecution and instead recommended that a spouse should be compellable to testify against the other spouse in certain exceptional cases where the family itself was threatened by the accused spouse because of violence or sexual molestation of a child.

14. The Commission recommended that a spouse should generally be compellable to testify for the defence of a spouse. This would mean that an accused would be able to compel his or her spouse to testify on his or her behalf. At present the spouse can give evidence for the defence but cannot be compelled to do so. The Commission considered that the accused should always have the right to defend himself by calling for all relevant testimony, including that of his or her own spouse if necessary.

15. Following the recommendations of the Law Reform Commission, the Criminal Procedure (Amendment) Bill 1990 was introduced into the Legislative Council on 4 April 1990. The Bill was supported by the LegCo Ad Hoc Group which studied it, and the Administration agreed to insert a provision in the Bill to allow a spouse or a cohabitee of an accused to seek exemption from testifying on behalf of the prosecution. However, the Bill was defeated by a vote of 17 to 14 with 9 abstentions. Those who supported the Bill expressed concern about the interests and welfare of children and considered the existing “non-compellable” rules undesirable in child physical or sexual abuse cases. Those who opposed the Bill were concerned that there would be

adverse effects on the social fabric of Hong Kong, a primarily Chinese society with traditionally closely knit family units. It would be better to leave the decision to the spouse as to whether to testify against the other spouse. To force a wife to testify against her husband would be tantamount to banishing the wife from her family and the social and economic security that it provided let alone destroying their marriage.

16. Had the Criminal Procedure (Amendment) Bill 1990 been enacted, the problem that the court had to face in the two cases noted above would not have arisen.

The Criminal Procedure (Amendment) (No. 2) Bill 1980

17. The Criminal Procedure (Amendment) (No. 2) Bill 1980 sought to make spouses generally competent to testify against their husband or wife. The 1980 Bill was withdrawn from the Legislative Council following a LegCo Ad Hoc Group meeting at which UMELCO members expressed strong views –

- (a) that the Bill could adversely affect family unity by eroding the element of trust between spouses; and
- (b) that evidence given by the spouses of accused persons would be highly suspect as they could easily be affected by emotion or motivated by factors other than justice.

It should be noted that this Bill was not as far-reaching as the Criminal Procedure (Amendment) Bill 1990, which sought to make a spouse not only generally competent but also in some cases compellable to testify against his or her husband or wife.

The legal policy perspective

18. Statistics on battered spouse cases for the years 1990/91 to 1998/99 obtained from the Social Welfare Department show a general increase in such cases over the past 10 years. Statistics also show that physical and sexual abuse of children rose over the past four years. The

Administration therefore considers it desirable from a legal policy perspective to reintroduce the Criminal Procedure (Amendment) Bill 1990 to address more effectively the issue of domestic violence and child abuse. In such cases, an errant spouse should not be protected under the banner of “incompetence of spouse” and the other spouse should be allowed to give evidence against him or her.

19. The issue of compellability is no doubt more controversial than that of competence. The Criminal Procedure (Amendment) Bill 1990 did not seek to open the floodgates of compelling a spouse to give evidence in any situation. The aim was to strike a better balance between protecting the public interest in combating domestic violence and child abuse and preserving matrimonial and domestic harmony.

Consultation

20. Given that the last consultation on this subject was conducted some 14 years ago, and the increase in domestic violence and child physical and sexual abuse cases, together with the comments by Mr. Justice Stuart Moore in 1996 and District Court Judge Sweeney in 1999, it is considered that consultation should again be carried out to gauge social attitudes on this subject before a decision is made whether to reintroduce the Criminal Procedure (Amendment) Bill 1990 in the 2000-2001 legislative session. Comments on the proposals or recommendations in this paper and the **Annex** by 15 September 2000 would be greatly appreciated .

**COMPETENCE AND COMPELLABILITY
OF SPOUSES IN CRIMINAL PROCEEDINGS**

**SUMMARY OF LAW AND RECOMMENDATIONS
OF THE LAW REFORM COMMISSION**

THE SPOUSE AS A WITNESS FOR THE DEFENCE

(1) Spouse as a Competent Witness for the Accused

Present Law

1. The general rule in Hong Kong is that a spouse is a competent witness for an accused spouse.

Other Jurisdictions

2. In England, a spouse is competent to give evidence for the defence of an accused spouse except where the spouses are jointly charged (Police and Criminal Evidence Act 1984, section 80(1) and (4)).

Commission's Reasoning and Recommendation

3. The Law Reform Commission recommended that there be no change to the existing law. It was of the opinion that a spouse should be competent to give evidence for the defence of a spouse in every case. This is essentially the position in Hong Kong today, by virtue of section 54(1) of the Criminal Procedure Ordinance (Cap. 221). It seems right that a spouse should always be able, if he or she wishes, to give evidence for the defence of his or her spouse. The court can take account of the possibility of the evidence being tainted by interest when assessing its weight.

(2) Spouse as a Compellable Witness for the Accused

Present Law

4. The general rule in Hong Kong is that a spouse is not compellable to testify for the other spouse.

Other Jurisdictions

5. In England spouses are compellable to give evidence on behalf of each other (Police and Criminal Evidence Act 1984, section 80(2)), except where the spouses are jointly charged with an offence (section 80(4)).

6. In Canada, section 4 (1) of the Evidence Act provides that a spouse is compellable to testify on behalf of his or her accused spouse.

7. In New Zealand, the spouse is compellable for the defence in all cases (Evidence Act 1908, section 5(2)).

8. In Australia, the laws in the States of Victoria, Queensland and South Australia provide for compellability for the defence.

Commission's Reasoning and Recommendation

9. The argument against compellability is that a violent husband who was liable to conviction might force his wife to lie on his behalf. This is a possibility which exists as regards all witnesses, though the risk of such duress is no doubt greater in the case of a spouse and other family members. However, a competent prosecutor should be able, on cross-examination, to expose any testimony that had been fabricated under such conditions.

10. The arguments in favour of compellability become clear when considering the situation in which an accused would need to rely upon compulsion to have his spouse testify on his behalf. Such need may arise when the spouse witness had something to say which would favour the accused but was unwilling to say it because of personal embarrassment (e.g. it would reflect badly on the witness in some social, moral or ethical sense), or a fear of court proceedings, or spite. In the latter case, the accused might prefer not to call the spouse, rather than call a potentially hostile witness. But in the two

former cases, compellability would be the only way to ensure that the accused had a fair trial in which all relevant evidence was presented. The scruples of the witness must take second place to the dictates of justice.

11. Two opinion surveys carried out for the Law Reform Commission in 1986 showed that there were more people against compellability than in favour. However, the Law Reform Commission considered that this was an area where the law may need to lead public opinion in the interests of justice.

12. The Commission therefore recommended that as a general rule a spouse be compellable to testify for the defence of a spouse, except in cases where the spouses are jointly tried.

(3) Spouse as a Competent Witness for a Person who is Jointly Tried with the Accused Spouse

Present Law

13. The present law is that a spouse is competent to testify for the defence of a person jointly tried with the other spouse. However, the consent of the accused spouse is required in all cases except crimes of violence against the spouse, treason, forcible marriage and Second Schedule offences pursuant to section 57 of the Criminal Procedure Ordinance (Cap. 221).

Other Jurisdictions

14. In England, the spouse is now competent in all cases to testify for a co-accused of the accused spouse, even without the latter's consent (Police and Criminal Evidence Act, section 80(1)(b)).

Commission's Reasoning and Recommendation

15. The argument in favour of requiring the accused's consent is that it enables the accused to protect himself against the possibility that his spouse may give evidence, either in chief or under cross-examination, that favours the co-accused but incriminates himself. The counter-argument is that where a spouse is willing to testify for a co-accused, the law should not impede this by putting up the accused's consent as an obstacle. This could result in a denial

of justice to the co-accused, who is entitled to have all the evidence that may assist him, presented to the court.

16. The Law Reform Commission recommended that the spouse should be a competent witness for someone who is jointly tried with the accused spouse, regardless of whether the accused spouse consents.

(4) Spouse as a Compellable Witness for a Person Who is Jointly Tried with the Accused Spouse

Present Law

17. A spouse is not compellable to testify for the defence of a co-accused who is jointly tried with the accused spouse under present law in Hong Kong.

Other Jurisdictions

18. In England, a spouse is compellable to testify for a co-accused in any case where she would be compellable on behalf of the prosecution even though the result might be that she would incriminate the spouse (Police and Criminal Evidence Act, section 80(3)).

Commission's Reasoning and Recommendation

19. The argument against making a spouse compellable to testify for someone who is jointly tried with the accused spouse is that a spouse might effectively be compelled to testify against the accused spouse, in favour of the person being tried with the accused spouse. The Law Reform Commission was of the view that it would be wrong in principle to compel an unwilling spouse to testify for a co-accused of the accused spouse. There are many factors that might cause a spouse to shy away from testifying for a co-accused, including the fear of incriminating the accused spouse.

20. The Commission recommended that there should be no compellability in such situation except in cases where the spouse is already a compellable witness for the prosecution.

(5) A Spouse who is Jointly Tried with the Other Spouse : Competence

Present Law

21. A spouse is competent to testify for a spouse who is also being tried for the same offence.

Other Jurisdictions

22. In England, a spouse is competent to testify for a jointly accused spouse by virtue of section 80(1)(b) of the Police and Criminal Evidence Act 1984.

Commission's Reasoning and Recommendation

23. There is no problem in this area of the law that requires reform. The Commission recommended that a spouse should be competent to testify for a spouse who is jointly tried in the same proceedings.

(6) A Spouse Who is Jointly Tried with the Other Spouse : Compellability

Present Law

24. A spouse is not a compellable witness for the defence when jointly tried with the other spouse.

Other Jurisdictions

25. In England, spouses are compellable to give evidence on behalf of each other (Police and Criminal Evidence Act 1984, section 80(2)). However, where a husband and wife are jointly charged with an offence, neither spouse shall at the trial be competent or compellable by virtue of section 80(1)(a), (2) or (3) of the same Act to give evidence in respect of that offence unless that spouse is not, or is no longer, liable to be convicted of that offence at the trial as a result of pleading guilty or for any other reason (Police and Criminal Evidence Act 1984, section 80(4)).

Commission's Reasoning and Recommendation

26. The Law Reform Commission was of the view that where the spouse witness is also on trial for the same offence as the accused spouse, the spouse witness is entitled to all of the rights and privileges of an accused. These include the right of an accused not to give evidence and not to incriminate himself.

27. The Commission therefore recommended that the general rule that a spouse be compellable for the defence should not apply where the spouse is being jointly tried for the same offence with the other spouse, except where for any reason the spouse is not, or is no longer, liable to be convicted of that offence at the trial.

THE SPOUSE AS A WITNESS FOR THE PROSECUTION

(7) Spouse as a Competent Witness for the Prosecution

Present Law

28. A spouse is not a competent witness for the prosecution except –
- (a) at common law in cases of crimes of violence against the spouse, treason and forcible marriage;
 - (b) by statute under section 57(1) of the Criminal Procedure Ordinance (Cap. 221), in the case of offences under the enactments mentioned in the Second Schedule; and
 - (c) by statute under section 31 of the Theft Ordinance (Cap. 210), in the case of proceedings by one spouse against the other spouse or the other spouse's property.

Other Jurisdictions

29. In England a spouse is now competent to testify against the other spouse in all cases except where the spouses are jointly charged (Police and Criminal Evidence Act 1984, section 80(1) and (4)).

30. In Canada, pursuant to section 4(2) of the Evidence Act, a spouse

is competent to testify for the prosecution against an accused spouse without the latter's consent on a charge of the prescribed attempted or substantive offences which include sexual interference, invitation to sexual touching, sexual exploitation, incest, bestiality, corrupting children, indecent act, sexual assault, abduction of person, bigamy, polygamy and so on. Section 4(4) of the Evidence Act allows a spouse to testify against an accused spouse on the prescribed offences including criminal negligence causing death, first and second degree murder, manslaughter, infanticide, attempted murder, assault and so on.

Commission's Reasoning and Recommendation

31. The arguments against a general rule of competence include the danger of the evidence being tainted by interest, the risk of causing marital discord, the fear of violating the confidentiality of the marital relationship and the problem of placing the spouse in a dilemma of choosing between the duty to society to prevent crime and loyalty to the spouse.

32. The arguments in favour of general competence include the fact that the court can take into account the danger of bias when assessing the weight of the evidence, and the desirability of having all relevant evidence before the court. Where a spouse is willing to testify, it is difficult to see what interests are served by preventing the spouse from doing so.

33. The Commission was of the opinion that a spouse should always be competent to testify for the prosecution of a spouse, if willing to do so. The Commission therefore recommended that a spouse should be competent to testify for the prosecution of the other spouse in all cases.

(8) Spouse as a Compellable Witness for the Prosecution

Present Law

34. A spouse is not compellable to testify against the other spouse in any circumstances under present law in Hong Kong.

Other Jurisdictions

35. In England, section 80(3) of the Police and Criminal Evidence

Act 1984 makes a spouse compellable to testify against the other spouse in cases of violence to the spouse or a person under 16, or of a sexual offence against a person under 16.

36. In Canada, a spouse is compellable to testify for the prosecution against an accused spouse on certain prescribed offences by virtue of section 4(2) and (4) of the Evidence Act.

37. In Victoria, Australia a spouse is compellable for the prosecution unless the judge exempts him or her either generally or in relation to a particular matter. Criteria are prescribed for such judicial determination.

Commission's Reasoning and Recommendation

38. The reasons for making a spouse compellable for the prosecution are many. The following are some examples. The spouse who is compelled to testify against a spouse cannot be blamed by the other for doing so. A spouse torn between loyalty to a spouse and loyalty to an endangered party would have no conflict of loyalties if the law compelled testimony. Relevant facts may be withheld from the court if a spouse is not compellable. It is wrong to give a spouse what is in effect a licence to commit a crime in the presence of a spouse, without the risk of the testimony of the spouse witness being used in the prosecution of the accused spouse. The interest of society in the detection and punishment of offenders outweighs the competing interest of society and of the parties to a marriage in preserving the marital relationship.

39. Arguments against making a spouse compellable include the following. It would compel a violation of the confidential relationship between husband and wife. It would compel a spouse to endanger his (or her) economic or social security, and that of his (or her) family by forcing him (or her) to place his (or her) spouse in jeopardy of conviction and punishment. The state is not justified in imposing on husbands and wives the extreme hardship of giving evidence against their spouses, contrary to the promotion of affection and marital duty, and with the likelihood, in many cases, of bringing upon themselves disastrous social and economic consequences.

40. The Commission was of the view that the question whether there should be a general rule of compellability involves a balancing of interests. On the one hand, there is the interest of society in upholding the institution of

marriage and in recognising the privacy of the marital relationship, and, on the other hand, there is the interest of society in prosecuting and convicting offenders. An opinion survey carried out for the Commission in 1986 showed that the weight of opinion was against general compellability. The Commission recommended that the interests of the community and the existing social fabric of Hong Kong would be best served by not making spouses compellable to testify against each other, save in exceptional cases such as where a spouse is accused of inflicting physical violence upon or sexually molesting members of his family, namely a child of the family or a child under the age of 16 in respect of whom either spouse was acting in loco parentis.

(9) Spouse as a Competent Witness for the Prosecution of a Person Who is Jointly Tried with the Accused Spouse

Present Law

41. A spouse is not a competent witness for the prosecution of a person who is being jointly tried with the accused spouse, except for offences of violence against the spouse, treason or forcible marriage, or cases falling within section 31 of the Theft Ordinance (Cap. 210).

Other Jurisdictions

42. In England, a spouse is competent to testify against a co-accused of the accused spouse (Police and Criminal Evidence Act 1984, section 80(1)(a)).

Commission's Reasoning and Recommendation

43. In keeping with the Commission's recommendation to make spouses competent in all cases, the Commission also recommended that a spouse should be a competent witness for the prosecution of anyone being tried jointly with the other spouse.

(10) Spouse as a Compellable Witness for the Prosecution of a Person who is Jointly Tried with the Accused Spouse

Present Law

44. A spouse is not a compellable witness for the prosecution of a person who is jointly tried with the accused spouse.

Other Jurisdictions

45. In England, a spouse is not compellable to testify against someone who is jointly charged with the accused, unless the offence involves violence against the spouse or violence or a sexual offence against a child under 16 (Police and Criminal Evidence Act 1984, section 80(3)).

Commission's Reasoning and Recommendation

46. The Commission, in keeping with its recommendation that as a general rule a spouse should not be compellable for the prosecution, recommended that a spouse should also not be a compellable witness for the prosecution of a co-accused of the other spouse. The exceptions to the general rule are offences which involve violence against a spouse and physical or sexual abuse of a child under a certain age.

(11) A Spouse Who is Jointly Tried with the other Spouse as a Competent Witness for the Prosecution of that Spouse

Present Law

47. A spouse who is jointly tried with the other spouse is not a competent witness for the prosecution of that spouse.

Other Jurisdictions

48. In England, a spouse is expressly prohibited from testifying against a spouse in a trial where they are being jointly tried for the same offence unless that spouse is no longer in peril of conviction for that offence (Police and Criminal Evidence Act 1984, section 80(4)).

Commission's Reasoning and Recommendation

49. The Commission agreed that the basic principle that a spouse should be free to testify in any way he or she wishes must take second place to the overriding principle that, whenever two persons are being jointly tried for

the same offence, neither is available as a witness for the prosecution. This would offend the right to silence and the privilege against self-incrimination. The situation would be different where the spouse, albeit once jointly charged, was no longer in peril of conviction for that offence.

50. The Commission accordingly recommended that a spouse should not be a competent witness for the prosecution of a spouse when the two spouses are being jointly tried for the same offence, except where the spouse witness is no longer in peril of conviction for that offence.

(12) A Spouse Who is Jointly Tried with the Other Spouse as a Compellable Witness for the Prosecution of that Spouse

Present Law

51. A spouse is not a compellable witness for the prosecution in criminal proceedings in Hong Kong.

Other Jurisdictions

52. In England, a spouse is not compellable to give evidence for the prosecution in respect of an offence for which both spouses are jointly tried unless the spouse is not, or is no longer, liable to be convicted of the offence at the trial as a result of pleading guilty or for any other reason (Police and Criminal Evidence Act 1984, section 80(4)).

Commission's Reasoning and Recommendation

53. The Commission was of the view that to compel a spouse witness to testify against a co-accused spouse would be contrary to the rule against self-incrimination and the accused's right to silence in an adversarial system and is therefore unacceptable. Where, however, the spouse for any reason is no longer liable to be convicted of that offence at the trial, these considerations no longer apply and the Commission recommended that the spouse should be compellable in those cases involving sexual offences or offences of violence against the family.

(13) Retaining Provision for Privileged Communications Between Spouses

Present Law

54. In common law, there is no privilege in respect of communications between spouses except statements made by spouses during attempts at reconciliation of a matrimonial dispute before an intermediary. In Hong Kong, section 7 of the Evidence Ordinance (Cap. 8) provides that, in criminal proceedings, a husband shall not be compellable to disclose any communication made to him by his wife during the marriage nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage.

Other Jurisdictions

55. In England, the Law Reform Committee in its Report on Privilege in Civil Proceedings (Sixteenth Report, 1967) criticised the privilege contained in section 3 of the Evidence (Amendment) Act 1853, (which is similar to that contained in section 7 of Hong Kong's Evidence Ordinance) as illogical inasmuch as it gives the liberty to disclose to the spouse in whom confidence was reposed and not to the spouse who reposed the confidence.

56. The Law Reform Commission of Canada echoed the same criticism.

57. The Criminal Law Revision Committee in England also recommended the abolition of the similar privilege in criminal proceedings contained in section 1(d) of the Criminal Evidence Act 1898 (Evidence Report: Evidence (General), (1972), Cmnd: 4991). The privilege was eventually abolished in criminal proceedings in England by virtue of section 80(9) of the Police and Criminal Evidence Act 1984.

Commission's Reasoning and Recommendation

58. An opinion survey conducted on behalf of the Law Reform Commission in 1986 showed that a majority of interviewees was in favour of retaining the privilege. The Commission, however, was of the view that the

privilege enjoyed by a spouse not to reveal any communication made to him or her by the spouse during the marriage should be abolished in those cases where the spouse is a compellable witness for the defence or the prosecution in the trial of a spouse. Otherwise, the spouse witness could refuse to answer specific questions touching upon a communication of the kind prescribed by section 7 of the Evidence Ordinance, and such compellability would be rendered meaningless.

59. The Commission recommended that the privilege against revealing marital communications provided for in section 7 of the Evidence Ordinance should be abolished in those cases where the spouse is a compellable witness for the defence or the prosecution in the trial of a spouse, but otherwise it should be retained.

(14) A Spouse Witness should have a Privilege Against Incrimination of a Spouse

Present Law

60. It appears that a spouse has no privilege in criminal proceedings to refuse to answer questions on the ground that the answer might tend to incriminate the other spouse. However, there are judicial dicta supporting the existence of a general common law privilege against giving evidence by a spouse which would tend to incriminate the other spouse, by extension of the privilege against self-incrimination.

Other Jurisdictions

61. In England, a spouse enjoys a privilege against incrimination of a spouse in civil proceedings (Civil Evidence Act 1968, section 14). However, there is no equivalent provision in the U.K. in criminal proceedings. The Police and Criminal Evidence Act 1984 does not touch upon this question.

62. The Law Reform Commission of Ireland thought that the right of a spouse witness not to incriminate an accused spouse in testimony is a logical corollary of the right of a spouse not to be compelled to testify for the prosecution when the other spouse is accused of a criminal offence. The privilege against self-incrimination is based on the principle that it is repellent that a man should be compelled to give answers exposing himself to the risk of

criminal punishment. It is more repellent that a person should be compelled to incriminate his or her spouse (Report on Competence and Compellability of Spouse as Witness (LRC 13-1985)).

Commission's Reasoning and Recommendation

63. The Commission considered that the problem with the privilege is that it would render the compellability of a spouse to testify meaningless. For the reasons noted in paragraphs 38 - 40 above, the Commission favoured the general principle that the spouse should not be a compellable witness for the prosecution of the other spouse in criminal proceedings other than in exceptional cases. In respect of this narrow range of compellability, there is no place for a privilege against incrimination of a spouse. The Commission also noted that there are other provisions in the Laws of Hong Kong which preserve the spouse's privilege in relation to cases falling within their ambit. For example, section 31(3)(a) of the Theft Ordinance (Cap. 210) and section 66 of the Crimes Ordinance (Cap. 200). The Commission considered it logical in principle to recommend the creation of a statutory privilege against incrimination of a spouse which should not, however, apply in cases where the spouse is a compellable witness for the prosecution.

(15) Not Allowing the Prosecution to Comment upon the Failure of a Spouse to call a Competent and Compellable Spouse to Give Evidence

Present Law

64. In Hong Kong, the failure of any person charged with an offence, or of the wife or husband, as the case may be, of the person so charged, to give evidence shall not be made the subject of any comments by the prosecution (Criminal Procedure Ordinance (Cap. 221), section 54(1)).

Other Jurisdictions

65. In England, section 80(8) of the Police and Criminal Evidence Act 1984 provides that the failure of the wife or husband of the accused to give evidence shall not be made the subject of any comment by the prosecution.

Commission's Reasoning and Recommendation

66. The argument for allowing the prosecution to comment is that if the law provides that a witness can be compelled to give evidence for the defence, it follows as a matter of principle that the testimony of that witness is considered relevant and important. Not to call such a witness might then be a matter of comment. The Commission considered that a defendant may not want to call his or her spouse for many reasons, even if the spouse was favourable and willing, and these reasons may have nothing to do with the case (such as timidity, embarrassment, fear, etc.). In addition, failure to give evidence is not, in itself, evidence of anything. Likewise, comment is not evidence of guilt. It would therefore be unfair to allow a prosecutor to take advantage of the reticence of the accused by casting aspersions in the form of permitted comment. The Commission recommended that the law should provide that the failure of any person charged with an offence to call his or her spouse as a witness for the defence should not be made the subject of comment by the prosecutor.

(16) Cohabitees

Present Law

67. The law of Hong Kong affords cohabitees a status similar to that of married persons in matters affecting the assessment of damages for personal injuries and in cases of domestic violence (see Law Amendment and Reform (Consolidation) (Amendment) Ordinance 1986; Domestic Violence Ordinance 1986).

Other Jurisdictions

68. In England, the rules made under the Police and Criminal Evidence Act 1984 do not make special provision for cohabitees.

69. South Australia, on the other hand, treats cohabitees on a similar basis to spouses for certain purposes of the rules of evidence (Evidence Act 1929, section 21).

Commission's Reasoning and Recommendation

70. The question of cohabitees was not expressly included in the Commission's Terms of Reference. The Commission was of the view that

their proposals were designed mainly to enhance the availability of testimony within the context of marriage. It would be undermined somewhat by extending the special exemptions to cohabitants. Therefore it did not recommend that the new rules be extended to cohabitants. (Note: following the introduction of the Criminal Procedure (Amendment) Bill 1990, the Administration agreed at the Committee Stage to amend the Bill to allow spouses and cohabitants to apply to the court for an exemption from the obligation to give evidence against the accused spouse or cohabitant.)

(17) Rules Affecting Spouses Continue to Apply once the Parties have ceased to be (or live together as) Husband and Wife

Present Law

71. The present law is that once spouses are divorced, or if their marriage has been annulled, they cease to be affected by the special rules for spouses, except that they are incompetent to give evidence against one another about a matter which occurred during the marriage, assuming they would have been incompetent to do so had the marriage still subsisted (Algar [1954] 1 Q.B. 279). If spouses are judicially separated, they remain subject to the rules for spouses.

Other Jurisdictions

72. In England, section 80(5) of the Police and Criminal Evidence Act 1984 makes an ex-spouse competent and compellable to give evidence for or against the ex-spouse in all cases, in the same way as any other witness as regards matters occurring before, during or after the marriage.

73. Tasmania, Australia goes even further. The effect of its Evidence Amendment Act 1981 is to compel a present spouse to testify against a spouse where the offence was committed before the marriage.

Commission's Reasoning and Recommendation

74. The opinion survey conducted on behalf of the Commission in 1986 showed that a majority of interviewees preferred to see divorced spouses treated in the same way as unmarried persons, even as regards matters arising during the marriage. The Commission took the view that even after the

relationship has terminated, the spectacle of a former spouse being compelled to testify as to pre-divorce matters (i.e. matters which occurred while the intimacy and trust existed) might be considered offensive and unfair. It is therefore recommended that persons who have been married should not be compellable to testify against each other after divorce or annulment of a voidable marriage, as regards matters occurring during the marriage, except in those cases where spouses would be compellable. Persons who are judicially separated should continue to be subject to the same rules as would have applied to them before separation.

(18) Special Rules recommended for Evidence of Children, Parents and Other Relatives of an Accused

The Present Law

75. The general rule is that all persons are competent and compellable to testify in criminal proceedings. There are no special rules regarding children, parents and other relatives of the accused other than spouses.

Other Jurisdictions

76. No special provision is made for relatives other than spouses in England.

77. In Victoria, Australia, the Crimes (Competence and Compellability of Spouse Witnesses) Act 1978 gives a judge a discretion to exempt an accused's wife, husband, mother, father or child from giving evidence on behalf of the prosecution, either generally or in relation to a particular matter if, for example, he considers the interest of the community in obtaining the evidence to be outweighed by the likelihood of damage to the relationship in question, or by the harshness involved in compelling the witness to testify.

78. Section 21 of South Australia's Evidence Act 1929 gives the judge similar power to exempt a close relative from the obligation to give evidence against the accused in the proceedings before the court. The expression "close relative" is defined to mean a spouse, parent or child.

79. In Ireland, the Law Reform Commission there suggested (LRC 13 – 1985) that the Director of Public Prosecutions should decide if the child or parent should be compelled to give evidence in the public interest against the accused after considering factors similar to those prescribed in Victoria and South Australia.

Commission's Reasoning and Recommendation

80. The above issue was not within the terms of reference of the Commission. Without the benefit of a careful study and appraisal of public opinion on the issue, the Commission recommended that further attention be given to this question by the appropriate authorities in due course.

**Consultation Paper on the Competence and Compellability
of Spouses in Criminal Proceedings**

The following is a summary of submissions made by consultees who responded to the consultation paper as at 18 December 2000.

SUBMISSIONS FROM THE LEGAL PROFESSION

The Hong Kong Family Law Association

2. The Family Law Association supports the abolition of the common law rule that husbands and wives are incompetent to testify against each other in criminal proceedings, except where they are joint defendants, and retaining the privilege against self-incrimination.

3. The Association opposes the extension of compelling spousal testimony generally, however the Association supports the proposals concerning limited compellability in cases involving physical or sexual offences against family members.

4. The Association supports retaining the general privilege from revealing spousal communications, except in cases where testimony can be compelled.

5. The Association recommends extending the common law and statutory rules (including current proposals) relating to spousal competence, compellability and communications, to non-married couples.

Mr. Desmond Keane, SC

6. In Mr. Keane's view, it is desirable in the public interest to move away from the rigidity of the common law position towards the recommendations made by the Law Reform Commission (LRC). However, he suggested that a requirement of the consent of the Secretary of Justice before a spouse is compelled to give evidence for the prosecution should be enacted.

Law Society of Hong Kong

7. In respect of the competence of the spouse as a witness for the prosecution in criminal proceedings, the Law Society agrees with the LRC's recommendations.

8. In respect of the compellability of the spouse as a witness for the prosecution in criminal proceedings, while the Law Society agrees that a spouse should be compellable to give evidence for the accused spouse it considers that the failure of the wife or the husband of the accused to give evidence should not be made the subject of any comment by the prosecution. On the other hand, it opposes the recommendation that a spouse be compellable to give evidence for the prosecution of his or her spouse as it infringes upon the sanctity of marriage.

Hong Kong Bar Association

9. The Association agrees in principle with all the proposals set out in the consultation paper. However, it would like to see which offences are deemed to "threaten" the family and/or how the concept of "threatening the family" is to be defined.

SUBMISSIONS FROM SOCIAL SERVICES GROUPS

The Family Planning Association of Hong Kong

10. The Association supports the reintroduction of the Criminal Procedure (Amendment) Bill 1990. It agrees with the aim of the Bill, namely, to strike a balance between protecting the public interest and preserving matrimonial and domestic harmony, and supports the principal recommendation of the LRC that a spouse should be competent in all cases to testify for the other spouse, compellable to testify for the other spouse in all cases, but compellable to testify against the other spouse only in cases involving offences that threatened their family.

Zonta International

11. While the Club agrees with most of the recommendations made by the LRC, it disagrees with the following two recommendations:

- (a) a spouse be made a competent witness for someone who is jointly tried with the accused spouse, regardless of whether the accused spouse consents or not;
- (b) the privilege against revealing marital communications provided for in section 7 of the Evidence Ordinance be abolished in those cases where the spouse is a compellable witness for the defence or the prosecution in the trial of a spouse, but otherwise be retained.

12. The Club agrees with, but has reservations about, the recommendation that a spouse could, in certain types of criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse. It takes the view that the recommendation would have serious after-effects on matrimonial and domestic matters. The concern of the Club is that notwithstanding that some women in Hong Kong are no longer dependent on their spouses so that they must tolerate abuse, there are still a number of women in Hong Kong, particularly a great majority of new immigrants from the mainland, who rely so heavily on their husband that there is no other alternative than to tolerate domestic violence. The Club suggests that a survey should be conducted to gather more statistics and particular attention should be paid to the new immigrants and families of low income groups.

Hong Kong Christian Service

13. The Service agrees with the recommendation of the LRC that a spouse should be competent to give evidence for the prosecution in all criminal proceedings against his or her spouse because a spouse should be entitled to the same rights as other citizens. But it suggests that support services should be provided to spouses who need to decide whether to testify or not so that they can make a well-considered decision and make adequate psychological preparation for the possible outcome of their decision.

14. However, it opposes the proposition that a spouse could, in all criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse. It considers this undesirable from

various aspects. Firstly, it could cause a remediable family relationship to be irretrievably broken down. Secondly, the spouse may not be the sole or most important witness in a case. Thirdly, other members of the family may place blame on the spouse who testifies. Further, it takes a long time for the spouse who testifies to recover from the mental pressure he or she suffers.

15. Nevertheless, it supports the proposition that a spouse could, in certain criminal proceedings involving domestic affairs such as domestic violence and incest, be compelled to give evidence for the prosecution against his or her spouse. The reason is that, from its experience, in some cases, domestic violence must be stopped before counselling can be conducted and the family relationship can be rebuilt. Further, the spouse is likely to be the sole witness in a domestic violence case.

16. It suggests that once the recommendations are passed into law, relevant authorities must provide adequate support services to the spouse. Otherwise, the recommendation will backfire.

Hong Kong Christian Council

17. The Council agrees with the following changes proposed by the LRC :

- (a) the compellability of a spouse as a witness for the defence of the other spouse;
- (b) the compellability and competency of a spouse as a witness for the prosecution of the other spouse;
- (c) the compellability and competency of a spouse as a witness for the prosecution of a person who is jointly tried with the accused spouse; and
- (d) the compellability of a spouse who is jointly tried with the other spouse as a witness for the prosecution of that spouse.

18. It also supports abolishing the provision for privileged

communications between spouses and creating a statutory privilege against incrimination of a spouse in the manner suggested by the LRC.

19. However, the Council supports retaining the present law that a spouse is competent to testify for the defence of a person jointly tried with the other spouse but with the requirement of the consent of the other spouse in all cases except crimes of violence against the spouse, treason, forcible marriage and Second Schedule offences pursuant to s.57 of the Criminal Procedure Ordinance (Cap.221). The reason submitted is that the accused spouse should be in position to protect himself or herself against evidence given by the other spouse that may be detrimental to his/her defence.

The Society for the Rehabilitation of Offenders, Hong Kong

20. The Society supports the recommendation that a spouse should be competent to give evidence for the prosecution in all criminal proceedings against his or her spouse. It sees little force in the argument that a spouse who testifies may damage his or her marriage as the marital relationship between an offender and his or her spouse is ruined mainly by the criminal behaviour not by confrontation in court.

21. However, it objects to the recommendation that a spouse can be compelled to give evidence for the prosecution in any circumstances. Their rationale is that it should be the spouse, not the court, who decides whether or not an individual should testify against his or her spouse even if society is interested in prosecuting and convicting offenders.

The Boys' and Girls' Clubs Association of Hong Kong

22. The Association supports the recommendation that a spouse should be competent to testify against the accused spouse in any criminal proceeding but the spouse should be left with a choice whether or not to testify except in cases involving infliction of physical violence upon or sexual molestation of children in the family or children under the age of 16.

23. The Association submits that a spouse should not be compellable to testify for the other spouse as compellability in such case

may cause great distress to the testifying spouse or the family.

The Hong Kong Council of Social Service

a. Beliefs

24. The suggestions of the Council are based on the following beliefs:

- (a) the paramount consideration of the amended law should be to maintain family relationships and respect the rights of individual members of a family;
- (b) the amended law should deal with the issue of competency and compellability on the principle of protecting the security of spouses and family members;
- (c) the evidence of the spouse should be placed before the court for consideration; and
- (d) in any criminal proceedings, spouses should be as competent and compellable to testify as other citizens.

b. Spouse as a witness for the defence

25. The Council supports the recommendation of the Law Reform Commission that a spouse should be both competent and compellable to testify for the accused spouse.

26. The Council also supports the recommendation that the spouse should be a competent witness for someone who is jointly tried with the accused spouse, regardless of whether the accused spouse consents, but not a compellable witness except in cases where the spouse is already a compellable witnesses for the prosecution.

27. The Council also agrees that where a spouse is jointly tried with the other spouse that spouse should be a competent witness for the other spouse but, except where for any reason the spouse is not or is no longer liable to be convicted of that offence at the trial, not a compellable

witness.

c. Spouse as a witness for the prosecution

28. The Council takes the view that a spouse should be competent to testify against the accused spouse. But it suggests that support services must be provided to the testifying spouses so that they can make a well-considered decision and make adequate psychological preparation for any possible outcome arising from their choice.

29. The Council suggests that, in the long term, spouses should be compellable to testify against their spouse in all cases on the ground that everyone in society, including a spouse, should be compellable to testify for the prosecution, and that compellability will eliminate the dilemma faced by the spouse. However, in view of the prevailing family values in Hong Kong, it suggests that a spouse should be compellable to give evidence only in cases involving the infliction of physical violence upon or the sexual molestation of the children of either spouse.

30. The Council supports the recommendation that a spouse should be competent to testify for the prosecution of a person who is jointly tried with the accused spouse. But it submits that, as in case of a spouse as witness against the accused spouse, in the short term, the spouse should not be compellable witness except in cases involving the infliction of physical violence upon or the sexual molestation of children.

31. The Council suggests that a spouse should not be a competent witness for the prosecution of a spouse when the two spouses are being jointly tried for the same offence, except where the spouse witness is no longer in peril of conviction for that offence and the case involves the infliction of physical violence upon or the sexual molestation of children.

32. Based upon the same principle, the Council suggests that a spouse should not be a compellable witness for the prosecution of a spouse when the two spouses are being jointly tried for the same offence, except where the spouse witness is no longer in peril of conviction for that offence and the case involves the infliction of physical violence upon

or the sexual molestation of children.

d. Others

33. The Council agrees with the recommendation that the privilege against revealing marital communications contained in section 7 of the Evidence Ordinance should be abolished in those cases where the spouse is a compellable witness for the defence or the prosecution in the trial of spouse.

34. It also agrees with the creation of a statutory privilege against incrimination of a spouse which would not apply in cases where the spouse is a compellable witness for the prosecution.

35. It supports the recommendation that the prosecution should not be allowed to comment upon the failure of a spouse to call a spouse to give evidence

36. The Council suggests that the new rules should be extended to govern the position of cohabitantes since increasing numbers of couples cohabit like a family and raise children together without marriage.

37. The Council disagrees with the recommendation of the LRC that persons who have been married should not be compellable to testify against each other after divorce or annulment of a voidable marriage, as regards matters occurring during the marriage, except in those cases where spouses would be compellable. The Council suggests that once the spouses are divorced, the rules relating to spouses are no longer applicable and the divorced spouse is both a competent and compellable witness not only in cases where spouses would be compellable but in any criminal proceedings.

38. The Council agrees that no special rules are needed for the children, parents and other relatives of an accused.

SUBMISSIONS FROM STATUTORY BODIES

Equal Opportunities Commission

39. The Commission agrees with the recommendations of the LRC. Nevertheless, the Commission raises two concerns.

40. Firstly, compellability of spouses in certain types of cases would put pressure on women who have to live with abusive males. The choice for such women is to face going to prison for contempt for refusing to testify, for fear of physical safety to themselves or to their children, or testifying and then suffering the consequences. The consequences may be physical as well as economic. Therefore, the Commission suggests the introduction of some framework or mechanism whereby such women can be provided with protection and assistance, whether through legislative or administrative means.

41. Secondly, from the perspective of marital status discrimination under the Sex Discrimination Ordinance, Cap.480, the definition of “spouse” should extend to de facto (or common law) spouses.

Guardianship Board

42. The Board considers that the justification for the change of the law, namely helping victims of domestic violence or sexual abuse, should be dealt with in a more detailed way. Otherwise, the reform recommendation would be regarded by LegCo as a ploy to remove the traditional protection of offenders.

43. The Board supports the proposed reforms in respect of compellability provided that compellability for the prosecution was extended to cover crimes against mentally incapacitated adults living in the family and not just limited to crimes against spouses, cohabitees and children. It suggests that if a proposed stalking and harassment law was enacted, spouses should be compellable for the prosecution for stalking and harassment also, and not just for physical and sexual abuse against family members.

44. The Board supports the proposed reforms as desirable for various reasons. Firstly, in the absence of compellability, the accused spouse may coerce the other spouse into not testifying. Secondly, to give victims of domestic violence the choice whether or not they should

testify, will put the whole burden on them, so that it would be rare for them to agree to testify against their spouse. Thirdly, the aggressor of domestic violence can be punished like any other aggressor. Fourthly, to stop women testifying against their spouses, when the marital relationship is already irretrievably damaged by the violence, just because they are spouses, does not serve the interests of justice. Further, when men know that their wives will be compelled to give evidence against them, it may make them think twice about being violent. When the response to their abuse is tough and consistent, bullies would be less violent. Also, the reforms protect the safety of the women and protect the children against the psychological impact of the domestic violence. Some women will be empowered and get over their fear if they successfully give evidence. Finally, allowing compellability may shift the cynical police attitude that domestic violence is only a domestic dispute.

45. The Board also addresses some arguments against reform. In reply to the fear of loss of economic security of the testifying spouse, the board asserts that the need of the spouse for protection of her own safety and her children outweighs the need for economic security. While the Board admits that offenders are more likely to carry out revenge against their spouse who are forced to give evidence against them, it believes that more expert training of the police for predicting the risk of threats being actually carried out would help to protect the women. The Board says that the concern that women may be treated worse by their husbands if they are forced to give evidence can be met by stronger protection and support for victims of domestic violence.

46. The Board urges a review of the Domestic Violence Ordinance (Cap.189) as the Ordinance protects only a limited class of family members.

Heung Yee Kuk, New Territories

47. The Heung Yee Kuk objects to the recommendation that a spouse can be compelled to testify for the prosecution of the accused spouse and can be compelled to testify for the accused spouse.

48. Various reasons are submitted by the Heung Yee Kuk. Firstly, a spouse who is compelled to give evidence may conceal facts

and may be uncooperative. That would undermine the integrity and credibility of the evidence and may mislead the court. Secondly, any evidence is vital to the accused in any criminal proceedings. Therefore, compellability should be avoided to ensure the integrity and credibility of witnesses. Further, as Hong Kong is a Chinese society, the recommendation may damage the harmony of the family relationship and even lead to breakdown of marriage. It is further submitted that the practice of other jurisdictions may not be applicable to Hong Kong due to differences in culture and tradition.

49. Nevertheless, the Heung Yee Kuk agrees that a spouse, if he or she consents, is competent to testify against the accused spouse.

SUBMISSIONS FROM OTHER SECTORS

City University of Hong Kong

50. Dr. Andy Chiu of the City University commented on two arguments against the recommendations of the Law Reform Commission, namely, interference with family and destruction of traditional Chinese culture.

51. Dr. Chiu considers that the assertion that the family falls within the private domain so that it should not be subject to public interference is unjustified. Doing justice should be the only criteria in the protection of the rights of the family members. The consultation paper can be regarded as the first step towards this direction. He concludes that a traditional Chinese value which is contrary to the principle of fairness should no longer be upheld.

JUSTICE

52. JUSTICE is of the view that spouses should be competent witnesses for the prosecution as well as the defence but not compellable as witnesses either for the defence or the prosecution.

53. It takes the view that spouses should be competent but not compellable as witnesses for the prosecution of persons jointly charged with the accused spouse.

54. It supports the recommendation that the requirement for the consent of the accused spouse be abolished in cases where a jointly tried person wishes to call the other spouse as a witness.

Ref : LP/615/00

June 2001

#15189v2