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Bills Committee on Evidence (Miscellaneous Amendments) Bill 2002

Background Brief prepared by Legislative Council Secretariat

**Proposals relating to competence and compellability of spouses and evidence
from overseas via live television link**

Propose

This paper gives a summary of the deliberations of the Panel on Administration of Justice and Legal Services (AJLS) in respect of the following two proposals in the Evidence (Miscellaneous Amendments) Bill 2002 -

- (a) Competence and compellability of spouses; and
- (b) Evidence from overseas via live television link.

Competence and compellability of spouses

Discussions of the AJLS Panel

2. In July 2000, the Administration prepared a Consultation Paper regarding the possible reintroduction of the Bill to implement the principal recommendations of the LRC as follows -

- (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.

The AJLS Panel discussed the matter at its meetings on 26 June 2001 and 25 February 2002.

3. On 26 June 2001, the Administration reported the outcome of the consultation exercise to the AJLS Panel and proposed to implement the recommendations of LRC through legislation. The paper provided for discussion of the Panel (LC Paper No. CB(2)1889/00-01(01)) is in **Appendix I**.

4. According to the Administration, the Consultation Paper was circulated to the legal professional bodies, women's groups, social welfare organisations and other interested NGOs. Most consultees, including the Hong Kong Bar Association supported the recommendations. Four organisations, namely the Law Society of Hong Kong, JUSTICE, the Society for the Rehabilitation of Offenders, Hong Kong and Heung Yee Kuk, expressed concern that a spouse could, in certain types of criminal proceedings, be compelled to give evidence for the prosecution against his or her spouse.

5. At the request of members, the Administration provided the following additional information for the Panel's consideration at its meeting on 25 February 2002 -

- (a) a list of the crimes which in the opinion of the Administration justified compelling spousal testimony (**Appendix II**); and
- (d) an information note on experience in overseas common law jurisdiction and the development of similar legislation in those countries (**Appendix III**).

The Administration's revised proposal

6. The Administration advised the Panel at its meeting on 25 February 2002 that in order to address the concerns of those who did not support the LRC recommendations, it would agree to the proposal that a spouse of an accused should have the right to apply to the court to be excused from testifying against the accused. This proposal would address concerns about the "sanctity of marriage".

Views of the legal professional bodies

7. The Panel sought the views of the legal professional bodies on the proposal. While the Hong Kong Bar Association which attended the two meetings supported the proposal of LRC, it would like to reserve its final position until it had the chance to consider the legislative proposal in detail. It also suggested that the Administration should consider the following two issues -

- (a) the meaning of "a child of the family" should be clarified, e.g. whether it would include step children or foster children, bearing in mind that the reference carried different meanings under different pieces of legislation. There were also different interpretations under case law in common law jurisdictions; and

- (b) an accused person might be concurrently charged for different offences of which only one came within the list of crimes justifying spousal testimony. Safeguards should be introduced to ensure that while the spouse of the accused was compellable to give evidence for the prosecution in relation to that particular charge which justified compellability, the witness spouse would not be compelled to give evidence on matters relating to the other charges. The Bar Association proposed that there should be separate trials for different alleged offences.

8. The views of the Law Society of Hong Kong are set out in a letter dated 16 October 2000 and also summarised below -

- (a) it agreed that a spouse would be competent to give evidence for the prosecution in all criminal proceedings against his or her spouse;
- (b) it agreed that a spouse could be compelled to give evidence for the defence of his or her spouse. However, the failure of the spouse to do so should not be subject of any comment by the prosecution; and
- (c) it opposed that a spouse should be compelled to give evidence for the prosecution of his or her spouse as it infringed upon the sanctity of marriage.

Views of AJLS Panel

9. A member had reservations about the legislative proposal concerning compellability as it would impact adversely on the institution of marriage.

10. Another member was in general support of the legislative proposal. With regard to the proposed provision for the court's discretion to exempt a spouse from testifying against the accused spouse (paragraph 6 above), the member asked whether the discretion would also apply to cohabitees. The Administration indicated that it was inclined to follow the LRC's recommendation that cohabitees should not be included. A copy of Chapter 22 of the LRC Report on "Should cohabitees be governed by the same rules as spouses" is in **Appendix IV**.

11. The Panel did not have a position on the legislative proposal but expected that a Bills Committee would be formed upon introduction of the relevant bill into LegCo. Extracts from the minutes of the Panel meetings on 26 June 2001 and 25 February 2002 are in **Appendices V and VI**.

Evidence from overseas via live television (TV) link

12. At its meeting on 20 March 2002, the Panel was consulted on the following legislative proposal -

- (a) a Hong Kong court be empowered, upon application, to allow a party to criminal proceedings to adduce the evidence of a witness overseas via live television link; and
- (b) witnesses in Hong Kong be permitted to give evidence via live television link to an overseas court upon the request of other jurisdictions.

The Administration's paper presented to the Panel (LC Paper No. CB(2)1360/01-02(01)) is in **Appendix VII**.

13. In response to members' request for information, the Administration provided the following information -

- (a) the proposed arrangements would apply to situations where a witness was resident abroad and where the witness was unable or reluctant to come to Hong Kong to testify. At present, the only alternative was to take evidence by way of a letter of request issued by the Hong Kong court or by a request made by the Secretary for Justice under mutual legal assistance procedures;
- (b) under the proposed arrangement, adducing and hearing evidence of an overseas witness by live TV link would require the prior approval of the Hong Kong court, upon application of a party to the proceedings who wished to resort to such arrangements. The party might decide whether he wanted to make the arrangements using the mutual legal assistance channel or by private arrangement without the assistance of any overseas authority; and
- (c) a technology courtroom equipped with overseas TV link facilities was being installed in the High Court and expected to be in full operation by September 2002.

14. The Chairman concluded that the relevant bill would be studied by a Bills Committee upon its introduction into LegCo. The Chairman also requested the Administration to provide information on the arrangements in overseas jurisdictions for the giving of evidence by overseas witness via live TV link for the consideration of the Bills Committee, if formed by the House Committee. An extract from the minutes of the Panel meeting on 20 March 2002 is in **Appendix VIII**.

LC Paper No. CB(2)1889/00-01(01)

**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, cohabitees 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 cohabitants 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.

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Appendix II

- (c) A list of the crimes which in the opinion of the Administration justify compelling spousal testimony**

(c) Crimes which justify compelling spousal testimony

The Administration considers that a spouse should be compellable to testify against his or her accused spouse or spouse's co-accused, (for the prosecution), or on behalf of the co-accused, only in the following circumstances:-

- (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 who was at the material time under the age of 16;
- (b) the offence charged is a sexual offence* alleged to have been committed in respect of a child of the family who was at the material time under the age of 16; and
- (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).

*“Sexual offence” means an offence under Part VI or XII of the Crimes Ordinance (Cap. 200). The offences are -

Part VI

Incest by men,
Incest by women of or over 16

Part XII

Rape,
Non-consensual buggery,
Assault with intent to commit buggery,
Homosexual buggery with or by man under 21,
Buggery with girl under 21,

Buggery with mentally incapacitated person,
Homosexual buggery committed otherwise than in private,
Procuring others to commit homosexual buggery,
Gross indecency with or by man under 21,
Gross indecency by man with male mentally incapacitated person,
Gross indecency by man with man otherwise than in private,
Procuring gross indecency by man with man,
Bestiality,
Procurement by threats,
Procurement by false pretences,
Administering drugs to obtain or facilitate unlawful sexual act,
Indecent assault,
Intercourse with girl under 13,
Intercourse with girl under 16,
Intercourse with mentally incapacitated person,
Abduction of unmarried girl under 16,
Abduction of unmarried girl under 18 for sexual intercourse,
Abduction of mentally incapacitated person from parent or
guardian for sexual act,
Trafficking in persons to or from Hong Kong,
Control over persons for purpose of unlawful sexual intercourse or
prostitution,
Causing prostitution,
Procurement of girl under 21,
Procurement of mentally incapacitated person,
Detention for intercourse or in vice establishment,
Causing or encouraging prostitution of, intercourse with, or
indecent assault on, girl or boy under 16,
Causing or encouraging prostitution of mentally incapacitated
person,
Living on earnings of prostitution of others,

Keeping a vice establishment,
Permitting girl or boy under 13 to resort to or be on premises or vessel for intercourse,
Permitting young person to resort to or be on premises or vessel for intercourse, prostitution, buggery or homosexual act,
Permitting mentally incapacitated person to resort to or be on premises or vessel for intercourse, prostitution or homosexual act.
Letting premises for use as a vice establishment,
Tenant etc. permitting premises or vessel to be kept as a vice establishment,
Tenant etc. permitting premises or vessel to be used for prostitution,
Indecent conduct towards child under 16,
Soliciting for an immoral purpose,
Public display of signs advertising prostitution,
Indecency in public.

Appendix III

- (d) An information note on experience in overseas common law jurisdictions and the development of similar legislation in those countries**

(d) Experience in overseas common law jurisdictions and the development of similar legislation in those countries

(1) England

1. The competence and compellability of the spouse of an accused is governed by section 80 of the *Police and Criminal Evidence Act 1984* (**Appendix A**).

2. Under section 80(1)(a), the spouse of the accused is competent to give evidence for the prosecution, subject to section 80(4) (i.e. where a husband and wife are jointly charged with an offence, neither spouse is competent or compellable to give evidence in respect of the offence unless that spouse is not liable to be convicted of that offence at the trial). Under section 80(1)(b), the spouse of the accused is competent to give evidence on behalf of the accused or any person jointly charged with the accused.

3. Under section 80(2), the spouse of the accused is compellable to give evidence on behalf of the accused, subject to section 80(4) (see above).

4. Under section 80(3), subject to section 80(4) (see above), the spouse of the accused is compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused only in respect of specified offences including assault on or injury, or a threat of injury, to the spouse of the accused or a person under 16, a sexual offence committed in respect of a person who is under 16, or attempting or conspiring to commit such offences.

(2) Canada

5. Under section 4(1) of the *Canada Evidence Act* (**Appendix B**) a spouse is both competent and compellable to testify on behalf of his or her accused spouse. However, the spouse is incompetent to testify for a co-accused where her testimony could harm her spouse (*R. v. Thompson* (1872), 12 Cox C.C. 202) but otherwise appears to be competent and compellable to testify on behalf of her spouse's co-accused (*R. v. Barlett* (1844), 1 Cox C.C. 105).

6. Under section 4(2), a spouse is both competent and compellable to

testify for the prosecution against an accused spouse without the latter's consent on a charge of specified attempted or substantive offences, including sexual interference, invitation to sexual touching, sexual exploitation, incest, bestiality, corrupting children, vagrancy, failure to fulfil the duties of parents or guardians, abandoning a child, indecent acts, sexual assault, abduction, bigamy, and polygamy.

7. Under section 4(3), no spouse is compellable to disclose any communication made to him or her by his or her spouse during their marriage.

8. Under section 4(4), when the complainant or victim is under 14, a spouse is both competent and compellable to testify against an accused spouse for the prosecution, without the consent of the accused spouse, in respect of specified offences including criminal negligence causing death, first and second degree murder, manslaughter, infanticide, attempted murder, and assault.

(3) New Zealand

9. Under section 5(2)(b) of the *Evidence Act 1908* (**Appendix C**), the spouse of a person charged with an offence is a competent and compellable witness for the defence but shall not be called as a witness under the subsection except upon the application of the person so charged.

10. Under section 5(3), the spouse of the accused is competent but not compellable to testify for the prosecution where the offence charged is an offence against the spouse, or bigamy, or an offence in respect of the property of the spouse, or cruelty to a child.

11. Section 5(4) provides that the wife of a person charged with an offence is a competent witness for the prosecution in respect of specified offences, if the offence is committed or alleged to have been committed against the child or grandchild of the accused or his wife, who is under 21 and under the care of the accused or his wife when the offence is committed. The specified offences include rape, attempted rape, incest, sexual intercourse with a girl under care or protection, sexual intercourse with a girl under 12, indecency with a girl under 16, and indecent assault on a woman or girl.

(4) Australia

12. At common law a spouse is generally incompetent except where the

alleged crime is treason or personal violence towards the spouse. However, statutory provisions in all jurisdictions make a spouse generally competent. The position varies from jurisdiction to jurisdiction regarding the compellability of spouses in criminal cases.

Commonwealth

13. Under section 12 of the *Evidence Act 1995* (**Appendix D**), a spouse is competent and compellable to give evidence for the prosecution.

14. Section 18 provides that a spouse may object to being required to give evidence as a witness for the prosecution. The court must uphold the objection if it finds that the nature and extent of the likely harm caused to the spouse giving evidence or to the relationship between the spouse and the defendant outweighs the desirability of having the evidence given (section 18(6)).

15. Section 19 provides that section 18 does not apply to specified offences under the law of the Australian Capital Territory including an offence against a person under 16, sexual offences, and the offences of endangering children in employment, neglect of children, unauthorized removal of children, and domestic violence.

Australian Capital Territory

16. The general rule under section 66(1) of the *Evidence Act 1971 (ACT)* (**Appendix E**) is that, subject to the exception provided by section 66 (3), a spouse of an accused is a competent but not a compellable witness in a criminal proceeding in which the accused is charged. The exception provided by section 66 (3) is that a spouse is a compellable witness in the criminal proceeding if the offence charged involves offences against the person or sexual offences committed against a person under 16, or endangering children in employment, or domestic violence.

New South Wales

17. Under section 12 of the *Evidence Act 1995 (NSW)* (**Appendix F**), a spouse is competent and compellable to give evidence for the prosecution.

18. Section 18 of the *Evidence Act 1995 (NSW)* (**Appendix F**) is similar to section 18 of the *Evidence Act 1995* of the Commonwealth (see paragraph 14 above and **Appendix D**).

Accordingly, a spouse may also object to being required to give evidence as a witness for the prosecution in New South Wales (section 18(7)).

19. Section 19 provides that section 18 does not apply to certain offences under sections 222 (endangering children in employment), 223 (certain employers of children to be authorised), 227 (child and young person abuse) or 228 (neglect of children and young persons) of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)*.

20. Section 104 of the Criminal Procedure Act 1986 (**Appendix F**) provides that a spouse may be excused from being required to give evidence if the court is satisfied that the objection to testify is made by the spouse independently of any threat and the evidence to establish the facts is relatively unimportant to the case or where there is other evidence to establish those facts and the offence is of a minor nature.

Northern Territory

21. Under section 9(5) of the *Evidence Act (NT)* (**Appendix G**), the spouse of an accused person is compellable to give evidence in all proceedings, either for the prosecution or for the defence, and without the consent of the accused. Under section 9(6), a spouse is competent and compellable to disclose communications made between the husband and the wife during the marriage.

Queensland

22. Under section 8(1) of the *Evidence Act 1977 (Qld)* (**Appendix H**), the spouse of each person charged is competent to give evidence for the prosecution or the defence. A spouse is a compellable witness for the prosecution or for the defence only when, as provided by section 8(4) of the Act, the offence charged against that person is among those set out in Schedule 2 and is committed against a person under 16. The offences set out in Schedule 2 include sexual offences, homicide, or offences against the person.

South Australia

23. Under section 21(1) of the *Evidence Act 1929* (**Appendix I**), the spouse, as a “close relative” of an accused, is generally a competent and compellable witness for both the defence and the prosecution. However, under section 21(2), the spouse “may apply to the court for an exemption from the obligation to give evidence against” the accused. The discretion so to exempt the spouse,

“wholly or in part”, requires the judge to consider, among other things, the risk of harm to the spouse and the relationship if no exemption were granted (section 21(3)). Even if there is such a risk, the court may refuse to grant the exemption if exposure to the risk is justified by the nature and gravity of the offence and the importance of the spouse’s evidence (*Trzesinski v Daire* (1986) 21 A Crim R).

Tasmania

24. Under section 85(3A) of the *Evidence Act 1910 (Tas)* (**Appendix J**), a person who was married to the accused at the time of the alleged offence but not at the time of trial is compellable to give evidence in any criminal proceedings against the accused or a co-accused.

25. A person who was married to the accused both at the time of the alleged crime and at the time of trial is not a compellable witness in criminal proceedings except as provided in sections 85(7) and 86. Section 85(7) specifies offences for which a spouse is compellable to be a witness including incest, certain offences committed against a person under 16 (sexual offences, abduction, stalking, assaults), violence or threat of violence to a person under 16, and violence or threat of violence to the spouse, and offences against the property of the spouse. Section 86 specifies proceedings in which a spouse is compellable to give evidence including proceedings by indictment to enforce civil rights.

Victoria

26. A spouse is generally a competent and compellable witness under section 24 of the *Evidence Act 1958 (Vic)* (**Appendix K**). Under section 400 (3) of the *Crimes Act 1958 (Vic)* (**Appendix K**), the court must exempt the spouse from giving evidence for the prosecution if it is satisfied that the interest of the community in obtaining the evidence of the spouse is outweighed by the likelihood of damage to the relationship between the accused and the spouse, or by the harshness of compelling the proposed witness to give the evidence.

Western Australia

27. Under section 9(1)(a) and (b) of the *Evidence Act 1906 (WA)* (**Appendix L**), a spouse is competent and compellable to give evidence on behalf of the prosecution, the defendant, or any person being tried jointly with the defendant.

28. Under section 9(1)(c), a spouse is only compellable to give evidence for the prosecution in cases where the accused is charged in respect of an offence under a provision mentioned in the Second Schedule (**Appendix L**) to the Act, or an offence against the property of the spouse.

29. The Second Schedule includes offences under the Criminal Code (sexual offences, offences against the person, child abuse and so on), offences under the *Road Traffic Act 1974 (WA)* (dangerous driving, reckless driving and so on), *Police Act 1892 (WA)* (negligent, careless or furious driving or riding), *Child Welfare Act 1947 (WA)* (misconduct or neglect causing a child to become an offender or be in need of care and protection) and *Misuse of Drugs Act 1981 (WA)* (indictable offences).

Table of statutory provisions

30. To facilitate members' consideration, a table of statutory provisions related to the competence and compellability of spouses in the above common law jurisdictions is attached at **Appendix M**.



Police and Criminal Evidence Act 1984

1984 CHAPTER 60

An Act to make further provision in relation to the powers and duties of the police, persons in police detention, criminal evidence, police discipline and complaints against the police; to provide for arrangements for obtaining the views of the community on policing and for a rank of deputy chief constable; to amend the law relating to the Police Federations and Police Forces and Police Cadets in Scotland; and for connected purposes.

[31st October 1984]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I

POWERS TO STOP AND SEARCH

- 1.—(1) A constable may exercise any power conferred by this section—
- (a) in any place to which at the time when he proposes to exercise the power the public or any section of the public has access, on payment or otherwise, as of right or by virtue of express or implied permission; or
 - (b) in any other place to which people have ready access at the time when he proposes to exercise the power but which is not a dwelling.

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PART VIII

Time for
taking
accused's
evidence.

79. If at the trial of any person for an offence—

(a) the defence intends to call two or more witnesses to the facts of the case ; and

(b) those witnesses include the accused,

the accused shall be called before the other witness or witnesses unless the court in its discretion otherwise directs.

Competence
and
compellability
of accused's
spouse.

80.—(1) In any proceedings the wife or husband of the accused shall be competent to give evidence—

(a) subject to subsection (4) below, for the prosecution ; and

(b) on behalf of the accused or any person jointly charged with the accused.

(2) In any proceedings the wife or husband of the accused shall, subject to subsection (4) below, be compellable to give evidence on behalf of the accused.

(3) In any proceedings the wife or husband of the accused shall, subject to subsection (4) below, be compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused if and only if—

(a) the offence charged involves an assault on, or injury or a threat of injury to, the wife or husband of the accused or a person who was at the material time under the age of sixteen ; or

(b) the offence charged is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age ; or

(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.

(4) Where a husband and wife are jointly charged with an offence neither spouse shall at the trial be competent or compellable by virtue of subsection (1)(a), (2) or (3) above 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.

(5) In any proceedings a person who has been but is no longer married to the accused shall be competent and compellable to give evidence as if that person and the accused had never been married.

(6) Where in any proceedings the age of any person at any time is material for the purposes of subsection (3) above, his age at the material time shall for the purposes of that provision be

deemed to be or to have been that which appears to the court to be or to have been his age at that time. PART VIII

(7) In subsection (3)(b) above "sexual offence" means an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978. 1956 c. 69. 1960 c. 33. 1967 c. 60. 1977 c. 45. 1978 c. 37.

(8) 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.

(9) Section 1(d) of the Criminal Evidence Act 1898 (communications between husband and wife) and section 43(1) of the Matrimonial Causes Act 1965 (evidence as to marital intercourse) shall cease to have effect. 1898 c. 36. 1965 c. 72.

81.—(1) Crown Court Rules may make provision for—

- (a) requiring any party to proceedings before the court to disclose to the other party or parties any expert evidence which he proposes to adduce in the proceedings; and
- (b) prohibiting a party who fails to comply in respect of any evidence with any requirement imposed by virtue of paragraph (a) above from adducing that evidence without the leave of the court.

Advance notice of expert evidence in Crown Court.

(2) Crown Court Rules made by virtue of this section may specify the kinds of expert evidence to which they apply and may exempt facts or matters of any description specified in the rules.

Part VIII—supplementary

82.—(1) In this Part of this Act—

Part VIII—interpretation.

"confession", includes any statement wholly or partly adverse to the person who made it, whether made to a person in authority or not and whether made in words or otherwise;

"court-martial" means a court-martial constituted under the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957 or a disciplinary court constituted under section 50 of the said Act of 1957; 1955 c. 18. 1955 c. 19. 1957 c. 53.

"proceedings" means criminal proceedings, including—

- (a) proceedings in the United Kingdom or elsewhere before a court-martial constituted under the Army Act 1955 or the Air Force Act 1955;

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Canada Evidence Act (R.S. 1958, c. C-5)

An Act respecting witnesses and evidence

Accused and spouse

4. (1) Every person charged with an offence, and, except as otherwise provided in this section, the wife or husband, as the case may be, of the person so charged, is a competent witness for the defence, whether the person so charged is charged solely or jointly with any other person.

Idem

(2) The wife or husband of a person charged with an offence against subsection 50(1) of the Young Offenders Act or with an offence against any of sections 151, 152, 153, 155 or 159, subsection 160(2) or (3), or sections 170 to 173, 179, 212, 215, 218, 271 to 273, 280 to 283, 291 to 294 or 329 of the Criminal Code, or an attempt to commit any such offence, is a competent and compellable witness for the prosecution without the consent of the person charged.

Communications during marriage

(3) No husband is compellable to disclose any communication made to him by his wife during their marriage, and no wife is compellable to disclose any communication made to her by her husband during their marriage.

Offences against young persons

(4) The wife or husband of a person charged with an offence against any of sections 220, 221, 235, 236, 237, 239, 240, 266, 267, 268 or 269 of the Criminal Code where the complainant or victim is under the age of fourteen years is a competent and compellable witness for the prosecution without the consent of the person charged.

Saving

(5) Nothing in this section affects a case where the wife or husband of a person charged with an offence may at common law be called as a witness without the consent of that person.

Failure to testify

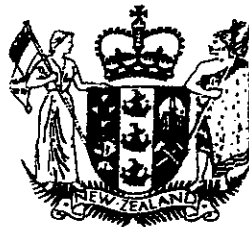
(6) The failure of the person charged, or of the wife or husband of that person, to testify shall not be made the subject of comment by the judge or by counsel for the prosecution.

REPRINTED STATUTES OF NEW ZEALAND

With Amendments Incorporated

VOLUME 2

*Each principal Act in this volume shows the date in
1979
as at which it has been reprinted*



THE HONOURABLE J. K. McLAY, LL.B., M.P.,
ATTORNEY-GENERAL

The Transport Licensing Appeal Authority and the Transport Charges Appeal Authority, see s. 163 of the Transport Act 1962, reprinted 1974, Vol. 3, p. 2675:

The Waitangi Tribunal, see s. 4 (6) of the Treaty of Waitangi Act 1975.

As to evidence before the Army Courts Martial, see ss. 116–120 of the New Zealand Army Act 1950.

As to evidence before Air Force Courts Martial, see ss. 116–120 of the Royal New Zealand Air Force Act 1950.

The New Zealand Army Act 1950 and the Royal New Zealand Air Force Act 1950 have been repealed by s. 208 (2) of the Armed Forces Discipline Act 1971 from a date to be fixed. See s. 1 (2) of that Act. For the corresponding sections in that Act relating to evidence before Courts Martial, see ss. 147–149.

As to the admissibility of a telegram as evidence, see s. 87 of the Post Office Act 1959, reprinted 1970, Vol. 3, p. 2155.

As to evidence of financial or property transactions, see s. 21 of the Inland Revenue Department Act 1974.

As to evidence of adultery and proof of birth, death, or marriage for matrimonial proceedings, see ss. 69 and 70 of the Matrimonial Proceedings Act 1963.

As to evidence before the Real Estate Agents Licensing Board, see s. 14 of the Real Estate Agents Act 1976.

As to evidence in civil or criminal proceedings (other than prosecutions for indictable offences) under the Customs Acts, see s. 302 of the Customs Act 1966.

Competency of Witnesses

3. Witness interested, or convicted of offence—No person shall be excluded from giving evidence in any proceeding on the ground that he has or may have an interest in the matter in question, or in the result of the proceeding, or on the ground that he has previously been convicted of any offence.

Cf. 1905, No. 16, s. 3

4. Evidence of party, or of wife or husband of party, in civil cases—In any civil proceeding the parties thereto and the persons on whose behalf such proceeding is brought or defended, and the husbands and wives of such parties or persons respectively, shall, subject to the provisions of this Act, be competent and compellable to give evidence on behalf of either or any of the parties to such proceeding:

Provided that nothing herein shall render any person compellable to answer any question tending to criminate himself.

Cf. 1905, No. 16, s. 4

As to evidence in divorce proceedings, see s. 69 of the Matrimonial Proceedings Act 1963.

[5. Evidence of accused and wife or husband in criminal cases—(1) Except as provided by or under this or any other Act, neither the person charged with any offence nor the wife or husband, as the case may be, of the person so charged shall be a competent or compellable witness for the

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prosecution or defence in any proceeding in connection with the offence.

(2) Where any person is charged with an offence, whether solely or jointly with any other person, the person so charged shall be a competent witness for the defence, and the wife or husband, as the case may be, of the person so charged shall be a competent and compellable witness for the defence, at every stage of the proceedings:

Provided that—

- (a) A person so charged shall not be called as a witness in pursuance of this subsection except upon his own application:
 - (b) The wife or husband of a person so charged shall not be called as a witness in pursuance of this subsection except upon the application of the person so charged:
 - (c) A person charged and called as a witness in pursuance of this subsection may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged:
 - (d) A person charged and called as a witness in pursuance of this subsection is liable to be cross-examined like any other witness on any matter, though not arising out of his examination in chief; but so far as the cross-examination relates to any previous conviction of the person so charged, or to his credit, the Court may limit the cross-examination as it thinks proper, although the proposed cross-examination may be permissible in the case of any other witness:
 - (e) Every person called as a witness in pursuance of this subsection shall, unless otherwise ordered by the Court, give his evidence from the witness box or other place from which the other witnesses give their evidence:
 - (f) *Repealed by s. 5 (2) of the Crimes Amendment Act 1966.*
- (3) The wife or husband of a person charged with an offence shall be a competent but not compellable witness for the prosecution, and without the consent of the person charged, at every stage of the proceedings, where the offence charged is—
- (a) An offence against the wife or husband or affecting the person or liberty of the wife or husband, whether the marriage took place before or after the time of the alleged offence; or
 - (b) Bigamy; or

- (c) An offence in respect of the property of the wife or husband for which proceedings are taken by virtue of the **[[Matrimonial Property Act 1976]]**;
[[or]]

[[d) An offence against section 195 of the Crimes Act 1961.]]

[(4) The wife of a person charged with an offence shall be a competent but not compellable witness for the prosecution, and without the consent of the person charged, at every stage of the proceedings, where the person against whom or in respect of whom the offence is alleged to have been committed is a woman or a child under the age of 21 years at the time of the alleged offence who—

- (a) Is a daughter or grand-daughter or son or grandson of the person charged or of his wife . . .; or
(b) Was at the time of the alleged offence under the care or protection of the person charged or of his wife,—
and the offence is an offence, or an attempt to commit an offence, under any of the provisions of sections 128 to 135 or sections 140 to 142 of the Crimes Act 1961.]

(5) Where any person is charged with an offence jointly with any other person, he shall be a competent and compellable witness for the prosecution against the other person, and without the consent of the other person, or for the defence of the other person, at every stage of the proceedings, if—

- (a) The proceedings against him have been stayed or, in the case of an offence punishable on summary conviction, the information against him has been withdrawn or dismissed; or
(b) He has been acquitted of the offence; or
(c) He has pleaded guilty to the offence; or
(d) He is being tried separately from the other person:

Provided that any person who is the wife or husband of the other person so charged shall not be a compellable witness for the prosecution against the other person in any case, and shall not be a competent witness for the prosecution against the other person except as provided in subsections (3) and (4) of this section:

Provided also that no person who is the wife or husband of the other person so charged shall be called as a witness for the defence in pursuance of this subsection except upon the application of that other person.

(6) Where 2 or more persons are jointly charged with any offence, the evidence of any person called as a witness for the

prosecution or the defence in pursuance of this section may be received as evidence either for or against any of the persons so charged.

(7) The provisions of this section shall not affect the operation of any other provision of this Act or of any other enactment, but shall apply notwithstanding any rule of law to the contrary.]

Cf. Criminal Evidence Act 1898, ss. 1, 4 (U.K.)

This section was substituted for ss. 5 and 5A by s. 2 (1) of the Evidence Amendment Act 1952 (s. 5A having previously been inserted by s. 2 of the Evidence Amendment Act 1950).

In subs. (3) (c) the word "or" was added by s. 2 (2) of the Evidence Amendment Act 1962 and the Matrimonial Property Act 1976, being the corresponding enactment in force at the date of this reprint, has been substituted for the repealed Married Women's Property Act 1952.

In subs. (3), para. (d) was added by s. 2 (1) of the Evidence Amendment Act 1962.

Subs. (4) was substituted for the original subs. (4) (as amended by s. 2 of the Evidence Amendment Act 1958, and s. 411 (1) of the Crimes Act 1961) by s. 2 (3) of the Evidence Amendment Act 1962.

In subs. (4) (a) the words "whether the relationship is traced through lawful wedlock or not" were omitted by s. 12 (2) of the Status of Children Act 1969.

As to the giving of evidence which tends to criminate a defendant in proceedings under the Customs Acts, see s. 297 of the Customs Act 1966.

5A. This section was inserted by s. 2 of the Evidence Amendment Act 1950 and repealed by s. 2 (1) of the Evidence Amendment Act 1952.

Privilege of Witnesses

6. Communications during marriage—A husband shall not be compellable in any proceeding to disclose any communication made to him by his wife during the marriage, and a wife shall not be compellable in any proceeding to disclose any communication made to her by her husband during the marriage.

Cf. 1905, No. 16, s. 6

As to evidence as to adultery, see s. 69 of the Matrimonial Proceedings Act 1963.
As to evidence of non-access, see s. 15 of the Evidence Amendment Act 1945.

7. Repealed by s. 90 (1) of the Matrimonial Proceedings Act 1963.

8. Communications to clergymen and medical men—

(1) A minister shall not divulge in any proceeding any confession made to him in his professional character, except with the consent of the person who made such confession.

(2) A physician or surgeon shall not, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient is the matter in dispute) any communication



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EVIDENCE ACT 1995 SECT 12

12 Competence and compellability

Except as otherwise provided by [this Act](#):

- (a) every person is competent to give evidence; and
- (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

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EVIDENCE ACT 1995 SECT 18

18 Compellability of spouses and others in criminal proceedings generally

- (1) This section applies only in a criminal proceeding.
- (2) A person who, when required to give evidence, is the spouse, de facto spouse, parent or child of a defendant may object to being required:
 - (a) to give evidence; or
 - (b) to give evidence of a communication between the person and the defendant;

as a witness for the prosecution.

- (3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.
- (4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.
- (5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.
- (6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:
 - (a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person or to the relationship between the person and the defendant, if the person gives the evidence; and
 - (b) the nature and extent of that harm outweighs the desirability of having the evidence given.
- (7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:
 - (a) the nature and gravity of the offence for which the defendant is being prosecuted;
 - (b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;
 - (c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor;
 - (d) the nature of the relationship between the defendant and the person;
 - (e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.
- (8) If an objection under this section has been determined, the prosecutor may not comment on:

- (a) the objection; or
- (b) the decision of the court in relation to the objection; or
- (c) the failure of the person to give evidence.

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EVIDENCE ACT 1995 SECT 19

19 Compellability of spouses and others in certain criminal proceedings

Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:

- (a) an offence against a provision of Part III or IIIA of the Crimes Act 1900 of the Australian Capital Territory, being an offence against a person under the age of 16 years;
- (b) an offence against section 133, 134, 135, 139 or 140 of the Children's Services Act 1986 of the Australian Capital Territory;
- (c) an offence that is a domestic violence offence within the meaning of the Domestic Violence Act 1986 of the Australian Capital Territory or an offence under section 27 of that Act.

↑
Repealed

Note: This section differs from section 19 of the NSW Act.

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EVIDENCE ACT 1971 - SECT 66

PART 10 PART 10-EVIDENCE IN CRIMINAL PROCEEDINGS

66. Competency and compellability of witnesses in criminal proceedings

- (1) In a criminal proceeding, the person charged and the husband and wife of the person charged are competent witnesses but, except as provided by subsection (3), are not compellable witnesses.
- (2) Nothing in subsection (1) makes the person charged with an offence liable to be called as a witness on behalf of the prosecution.
- (3) In a criminal proceeding in which a person is charged-
 - (a) with an offence against Part 3 or Part 3A of the Crimes Act 1900 which is committed against a person under the age of 16 years;
 - (b) with an offence against section 133, 134, 135, 139 or 140 of the Children's Services Act 1986; or
 - (c) with a domestic violence offence within the meaning of the Domestic Violence Act 1986 or an offence under section 27 of that Act; the husband or wife of the person charged is a compellable witness in the proceeding.

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EVIDENCE ACT 1995 - SECT 12

12 Competence and compellability

Except as otherwise provided by [this Act](#):

- (a) every person is competent to give evidence, and (b) a person who is competent to give evidence about a fact is compellable to give that evidence.

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EVIDENCE ACT 1995 - SECT 18

18 Compellability of spouses and others in criminal proceedings generally

(1) This section applies only in a criminal proceeding.

(2) A person who, when required to give evidence, is the spouse, de facto spouse, parent or child of a defendant may object to being required:

(a) to give evidence, or

(b) to give evidence of a communication between the person and the defendant,

as a witness for the prosecution.

(3) The objection is to be made before the person gives the evidence or as soon as practicable after the person becomes aware of the right so to object, whichever is the later.

(4) If it appears to the court that a person may have a right to make an objection under this section, the court is to satisfy itself that the person is aware of the effect of this section as it may apply to the person.

(5) If there is a jury, the court is to hear and determine any objection under this section in the absence of the jury.

(6) A person who makes an objection under this section to giving evidence or giving evidence of a communication must not be required to give the evidence if the court finds that:

(a) there is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the defendant, if the person gives the evidence, and

(b) the nature and extent of that harm outweighs the desirability of having the evidence given.

(7) Without limiting the matters that may be taken into account by the court for the purposes of subsection (6), it must take into account the following:

(a) the nature and gravity of the offence for which the defendant is being prosecuted,

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it,

(c) whether any other evidence concerning the matters to which the evidence of the person would relate is reasonably available to the prosecutor,

(d) the nature of the relationship between the defendant and the person,

(e) whether, in giving the evidence, the person would have to disclose matter that was received by the person in confidence from the defendant.

(8) If an objection under this section has been determined, the prosecutor may not comment on:

(a) the objection, or

(b) the decision of the court in relation to the objection, or (c) the failure of the person to give evidence.

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EVIDENCE ACT 1995 - SECT 19

19 Compellability of spouses and others in certain criminal proceedings

Section 18 does not apply in proceedings for an offence against or referred to in the following provisions:

section 25 (Child abuse), 26 (Neglect of children), 51 (Endangering children in employment) or 52 (Certain employers of children to be authorised) of the Children (Care and Protection) Act 1987

section 407AA (Compellability of spouses to give evidence in certain proceedings) of the Crimes Act 1900. Note. This section differs from section 19 of the Commonwealth Act.

Repeated

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CRIMINAL PROCEDURE ACT 1986 - SECT 104

104 Compellability of spouses to give evidence in certain proceedings

(1) In this section:

- (a) a reference to the husband or wife of an accused person includes a reference to a person living with the accused person as the husband or wife of the accused person on a bona fide domestic basis although not married to the accused person, and
- (b) a reference to a domestic violence offence is a reference to a domestic violence offence within the meaning of the Crimes Act 1900, and
- (c) a reference to a domestic violence offence committed on the husband or wife of an accused person includes a reference to an offence of contravening a prohibition or restriction specified in an apprehended violence order that was made against the accused person and in respect of which the husband or wife was the protected person, and
- (d) a reference to a child assault offence is a reference to:
 - (i) a prescribed sexual offence committed on a child under the age of 18 years, or
 - (ii) an offence under, or mentioned in, section 24, 27, 28, 29, 30, 33, 33A, 35, 39, 41, 42, 43, 44, 46, 47, 48, 49, 58, 59 or 61 of the Crimes Act 1900 committed on a child under the age of 18 years, or
 - (iii) an offence that, at the time it was committed, was a child assault offence for the purposes of this section or section 407AA of the Crimes Act 1900, or
- (iv) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in subparagraph (i), (ii) or (iii), and
- (e) a reference to a child assault offence committed on a child includes a reference to an offence of contravening a prohibition or restriction specified in an apprehended violence order that was made against the accused person and in respect of which that child was the protected person.

(2) The husband or wife of an accused person in proceedings in any court:

- (a) for a domestic violence offence (other than an offence arising from a negligent act or omission) committed on the husband or wife, or
- (b) for a child assault offence (other than an offence arising from a negligent act or omission) committed on:
 - (i) a child living in the household of the accused person, or
 - (ii) a child who, although not living in the household of the accused person, is a child of the accused person and the husband or wife,

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compellable to give evidence in the proceedings, either for the prosecution for the defence, without the consent of the accused person.

(3) The husband or wife of an accused person is not compellable to give evidence for the prosecution as referred to in subsection (2) if the husband or wife has applied to, and been excused by, the court.

(4) A court may excuse the husband or wife of an accused person from giving evidence for the prosecution as referred to in subsection (2) if satisfied:

- (a) that the application to be excused is made by that husband or wife freely and independently of threat or any other improper influence by any person, and
- (b) that it is relatively unimportant to the case to establish the facts in relation to which it appears that the husband or wife is to be asked to give evidence, or there is other evidence available to establish those facts, and
- (c) that the offence with which the accused person is charged is of a minor nature.

(5) When excusing the husband or wife of an accused person from giving evidence under subsection (4), the court:

- (a) must state the reasons for doing so, and
- (b) must cause those reasons to be recorded in writing in a form prescribed by the regulations.

(6) An application under this section by the husband or wife of an accused person to be excused from giving evidence is to be made and determined in the absence of the jury (if any) and the accused person, but in the presence of the accused person's counsel.

(7) A court may conduct the hearing of an application under this section in any manner it thinks fit, and is not bound to observe rules of law governing the admission of evidence but may obtain information on any matter in any manner it thinks fit.

(8) The fact that the husband or wife of an accused person in proceedings for an offence has applied to be excused, or has been excused, from giving evidence in the proceedings is not to be made the subject of any comment by the court or by any party in the proceedings.

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EVIDENCE ACT

Agency: Northern Territory Attorney-General's Department

Type : Act

Parent :

NORTHERN TERRITORY OF AUSTRALIA

EVIDENCE ACT

As in force at 26 September 2001

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PART IIA - VULNERABLE WITNESSES

PART II - WITNESSES**6. Witness not disqualified by interest or crime**

No person shall be excluded from giving evidence in any proceeding on the ground -

- (a) that he has or may have an interest in the matter in question or in the event of the proceeding; or
- (b) that he has previously been found guilty of any crime or offence.

7. Parties, their wives and husbands compellable as witnesses in civil proceedings

In any proceeding (not being a criminal proceeding), any party thereto and any person on whose behalf the proceeding is brought or defended, and the husband or wife of any such party or person respectively, shall, subject to the provisions of this Act, be competent and compellable to give evidence on behalf of either or any of the parties to the proceeding.

8. Evidence as to adultery

- (1) A witness in any proceedings who, being a party, voluntarily gives evidence on his own behalf or, whether he is a party or not, is called by a party may be asked, and is bound to answer a question the answer to which may show, or tend to show, adultery by or with the witness where proof of that adultery would be material to the decision of the case.
- (2) Except as provided by subsection (1), a witness in proceedings (whether a party to the proceedings or not) is not liable to be asked, or bound to answer, a question the answer to which may show, or tend to show, that the witness has committed adultery.

9. Competency and compellability to give evidence in criminal proceedings

- (1) Every accused person in a criminal proceeding shall be competent, but, subject to this section, not compellable, to give evidence in the proceeding in every Court.
- (2) Any person charged with an indictable offence shall not be liable -
 - (a) to be called as a witness on behalf of the prosecution; or
 - (b) without the leave of the Judge, to be questioned on cross-examination as to his previous character or antecedents.
- (3) The failure of an accused person to give evidence, shall not be made the subject of any comment by the Judge or by counsel for the Crown.
- (4) Where 2 or more persons are being tried together before a Judge and jury, and comment is made, by or on behalf of any of them, upon the failure of any of them to give evidence, the Judge may make such observations to the jury in regard to the comment or failure to give evidence as he thinks fit.

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

(6) A husband or wife shall be competent and compellable to disclose communications made, whether before or after the commencement of this Act, between the husband and the wife during the marriage.

(7) An accused person who is called as a witness shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed or been found guilty of or been charged with any offence other than that with which he is then charged, or is of bad character, unless -

(a) the proof that he has committed or been found guilty of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b) he has personally or by his counsel asked questions of the witnesses for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(c) he has given evidence against any other person charged with the same offence.

9A. - 9B. [Repealed]

9C. Particular form of corroboration warning not to be given

On the trial of a person for an offence in which evidence is given by a child, the Judge is not to warn the jury, or suggest to the jury in any way, that it is unsafe to find the person guilty on the uncorroborated evidence of that child because children are classified by the law as unreliable witnesses.

10. Incriminating questions

Nothing in this Act shall render any witness compellable to answer any question tending to criminate himself.

11. [Repealed]

12. Communications to clergymen and medical men

(1) A clergyman of any church or religious denomination shall not, without the consent of the person who made the confession, divulge in any proceeding any confession made to him in his professional character.

(2) A medical practitioner shall not, without the consent of his patient, divulge in any civil proceeding (unless the sanity of the patient is the matter in dispute) any communication made to him in his professional character by the patient, and necessary to enable him to prescribe or act for the patient.

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EVIDENCE ACT 1977 - SECT 7

Parties, their wives and husbands as witnesses

7.(1) Each of the parties to a proceeding (not being a criminal proceeding) and a person on whose behalf such a proceeding is brought or defended is competent and compellable to give evidence on behalf of either or any of the parties to the proceeding.

(2) The husband or wife of a party to a proceeding (not being a criminal proceeding) and the husband or wife of a person on whose behalf such a proceeding is brought or defended is competent and compellable to give evidence on behalf of either or any of the parties to the proceeding.

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EVIDENCE ACT 1977 - SECT 8

Witnesses in a criminal proceeding

8.(1) In a criminal proceeding, each person charged is competent to give evidence on behalf of the defence (whether that person is charged solely or jointly with any other person) but is not compellable to do so.

(2) In a criminal proceeding, the husband or wife of each person charged is competent to give evidence for the prosecution or on behalf of the defence.

(3) In a criminal proceeding, the husband or wife of each person charged is compellable to give evidence on behalf of that person.

(4) In a criminal proceeding, the husband or wife of each person charged is compellable to give evidence for the prosecution or on behalf of the defence where--

(a) the offence charged against that person is under any provision mentioned in schedule-2 or is an attempt to commit or an attempt to procure the commission of such an offence; and

(b) the person against or in respect of whom the offence charged is alleged to have been committed was at the time of the commission of the offence under the age of 16 years.

(5) In a criminal proceeding, the husband or wife of each person charged is compellable to give evidence for the prosecution or on behalf of the defence wherever at common law he or she would have been competent or compellable to give evidence for the prosecution.

(6) Where the husband or wife of a person charged is competent but not compellable to give evidence for the prosecution or on behalf of the defence, the presiding judge, stipendiary magistrate or justice shall before the witness gives evidence and, where the proceeding is being conducted before a jury, in the absence of the jury, inform the witness that the witness is not compellable to give evidence if unwilling to do so.

(7) Nothing in this section shall--

(a) make the husband or wife of a person charged competent or compellable to give evidence for the prosecution or compellable to give evidence for the defence in a criminal proceeding in which that husband or wife is also charged; or

(b) affect the operation of section-11.

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EVIDENCE ACT 1929 - SECT 21

21 Competence and compellability of witnesses

21. (1) A close relative of a person charged with an offence shall be competent and compellable to give evidence for the defence and shall, subject to this section, be competent and compellable to give evidence for the prosecution.

(2) Where a person is charged with an offence and a close relative of the accused is a prospective witness against the accused in any proceedings related to the charge (including proceedings for the grant, variation or revocation of bail, or an appeal at which fresh evidence is to be taken) the prospective witness may apply to the court for an exemption from the obligation to give evidence against the accused in those proceedings.

(3) Where it appears to a court to which an application is made under subsection (2)-

(a) that, if the prospective witness were to give evidence, or evidence of a particular kind, against the accused, there would be a substantial risk of-

(i) serious harm to the relationship between the prospective witness and the accused; or

(ii) serious harm of a material, emotional or psychological nature to the prospective witness; and

(b) that, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is insufficient justification for exposing the prospective witness to that risk,

the court may exempt the prospective witness, wholly or in part, from the obligation to give evidence against the accused in the proceedings before the court.

(3a) If the prospective witness is a young child, or is mentally impaired, the court should consider whether to grant an exemption under subsection (3) even though no application for exemption has been made and, if of opinion that such an exemption should be granted, may proceed to grant the exemption accordingly.

(4) Where a court is constituted of a judge and jury-

(a) an application for an exemption under this section shall be heard and determined by the judge in the absence of the jury; and

(b) the fact that a prospective witness has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question put to a witness in the presence of the jury or of any comment to the jury by counsel or the presiding judge.

(5) The judge presiding at proceedings in which a close relative of an accused person is called as a witness against

the accused must satisfy himself or herself that the prospective witness-

(a) is aware of his or her right to apply for an exemption under this section; or

(b) is incapable, by reason of age or mental impairment, of understanding his or her right to apply for an exemption under this section.

(6) This section does not operate to make a person who has himself been charged with an offence compellable to give evidence in proceedings related to that charge.

(7) In this section-

"close relative" of an accused person means a spouse, parent or child;

"spouse" includes a putative spouse within the meaning of the *Family Relationships Act 1975*.

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Evidence Act 1910 (No. 20 of 1910)

Requested: 01 Nov 2001, Consolidated as at: 01 Nov 2001

PART IV - WITNESSES GENERALLY

Division 1 - Competency and compellability of witnesses

Evidence in criminal proceedings

85. (1) This section applies to all legal proceedings in which a person is charged with having committed an offence.

(2) For the purposes of this section -

"criminal proceedings" means legal proceedings to which this section applies;

"defendant" means a person charged as referred to in subsection (1).

(3) In this section, a reference to the spouse of the defendant is a reference to a person who is the husband or wife of the defendant by virtue of a lawfully celebrated marriage ceremony -

(a) at the time the defendant is alleged to have committed the offence with which he is charged and at the time when he is tried for that offence; or

(b) at the time when the defendant is tried for the offence with which he is charged but not at the time when the defendant is alleged to have committed the offence.

(3A) A person who was the husband or wife of the defendant by virtue of a lawfully celebrated marriage ceremony at the time when the defendant is alleged to have committed the offence with which he is charged but not at the time when the defendant is tried for that offence may be compelled to give evidence in any criminal proceedings against the defendant and against any person jointly charged with the defendant.

(4) In criminal proceedings, the defendant has a right to give evidence on his own behalf and on behalf of any person who is jointly charged with him if that person requests him to do so, but in no circumstance may the defendant be compelled to give evidence in the proceedings.

(5) Subsection (4) has effect notwithstanding that the defendant is the spouse of a person who is jointly charged with the defendant.

(6) In criminal proceedings, the spouse of the defendant may -

(a) at the request of the prosecutor, give evidence for the prosecution;

(b) at the request of the defendant, give evidence for the defendant; and

(c) at the request of any person who is jointly charged with the defendant, give evidence for that person -

, except as provided in subsection (7) and in section 86, that spouse may not be compelled to give evidence in the proceedings, whether for the prosecution, the defendant, or any person jointly charged with the defendant.

(7) Subject to subsections (4) and (5), in criminal proceedings, the spouse of the defendant may be compelled to give evidence against the defendant and against any person jointly charged with the defendant where -

(a) the defendant is charged with having committed incest; or

(b) the defendant is charged with having committed a crime under section 124, 125, 125A, 126, 127, 127A, 128 or 129 of the Criminal Code or under any provision of Chapter XIX or XX of that Code against a person who, at the time of the alleged crime, had not attained the age of 16 years; or

(ba) the defendant is charged with having committed an offence under the Police Offences Act 1935 involving an assault on, or the threat of violence to, a person who, at the time of the alleged offence, had not attained the age of 16 years; or

(c) the defendant is charged with having committed assault against, or any other offence involving violence or the threat of violence to, the spouse; or

(d) the proceedings were instituted as the result of a complaint by that spouse against the defendant for an offence alleged to have been committed by the defendant against or in relation to the property of that spouse.

(8) The prosecutor shall not, in any criminal proceedings, comment on the failure of the defendant to give evidence in the proceedings, but he may comment on the failure of any other person, including the spouse of the defendant, to give evidence in the proceedings.

(9) Where in criminal proceedings the spouse of the defendant proposes to give in the proceedings evidence which the spouse is competent to give but may not be compelled to give, it is the duty of the judge or other person presiding over the proceedings to explain to the spouse, in the absence of the jury (if any), that the spouse is not obliged to give that evidence if the spouse does not wish to do so.

(10) Where in criminal proceedings the defendant gives evidence, he may be asked, and be required to answer, any question put to him in cross-examination even though the answer would tend to incriminate him as to the offence with which he is charged, but he shall not be asked, and, if asked, shall not be required to answer, any question tending to establish that he has committed or been charged with any offence other than that with which he is then charged, or that he is of bad character, unless -

(a) proof that he has committed or has been convicted of that other offence would, apart from this section, be admissible in evidence to establish that he is guilty of the offence with which he is charged;

(b) he has, personally or by his counsel, asked questions of the witnesses for the prosecution in order to establish his own good character or has given evidence of his own good character;

(c) the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of any witness for the prosecution; or

(d) he has given evidence against any other person charged with the same offence as that with which he is charged and tried jointly with him.

(11) Subject to subsection (12), where in criminal proceedings -

(a) the defendant has personally or by his counsel asked questions of the kind referred to in subsection (10)(b);

(b) the nature or conduct of the defence is such as is referred to in subsection (10)(c); or

(c) the defendant has given evidence referred to in subsection (10)(d) -

the prosecutor, and, where the defendant has given evidence against any other person jointly charged with him, that other person, may adduce evidence in order to establish that the defendant is of bad character or has been convicted or charged with any offence other than that with which he is charged, notwithstanding that the case of the prosecutor or of the other person charged may already be closed.

(12) Where a person, including the defendant, is called to give evidence in criminal proceedings, he shall, unless the judge or other person presiding over the proceedings otherwise orders, give that evidence from the witness-box or other place provided for the purpose in the court where the proceedings are held.

(13) In criminal proceedings, a defendant is not entitled to give evidence by means of an unsworn statement.

Start of valid time period for this component:	01 Feb 1997
End of valid time period for this component:	Not yet determined

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Evidence Act 1910 (No. 20 of 1910)

Requested: 24 Jan 2002, Consolidated as at: 24 Jan 2002

PART IV - WITNESSES GENERALLY

Division 1 - Competency and compellability of witnesses

Evidence by spouse of defendant in proceedings by indictment to enforce civil rights

6. On the trial of any indictment or other proceeding -

- (a) for the non-repair of any public highway or bridge;
- (b) for a nuisance to any public highway, river, or bridge; or
- (c) instituted for the purpose of trying or enforcing a civil right only -

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

Start of valid time period for this component:	01 Feb 1997
End of valid time period for this component:	Not yet determined

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S. 24 amended by No. 9230 s.

24. *Parties and husbands and wives may be witnesses* On the trial of any issue joined or of any matter or question or on any inquiry arising in any suit action or proceeding in any court or before any person having by law or by consent of parties authority to hear receive and examine evidence, the parties thereto, and the persons in whose behalf any such suit action or proceeding is brought or defended, and the husbands, former husbands, wives and former wives of such parties and persons respectively, shall (except as hereinafter excepted) be competent and compellable to give evidence either in person or by deposition according to the practice of the court on behalf of either or any of the parties to the said suit action or proceeding.

Evidence Act 1958

Version No. 136

Evidence Act 1958

Act No. 6246/1958

Version incorporating amendments as at 15 July 2001

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Version No. 136

Evidence Act 1958

Act No. 6246/1958

Version incorporating amendments as at 15 July 2001

An Act to consolidate the Law of Evidence.

S. 400 substituted by No. 7546 s. 9, amended by Nos 7994 s. 3, 8338 s. 6, 8410 s. 2(a)(b), 9019 s. 2(1)(Sch. item 44), substituted by No. 9230 s. 3

400. Wife or husband etc. of the accused to be competent and compellable witnesses

(1) Nothing in this section shall operate to compel any person charged with an offence (in this section called "the accused") to give evidence in any proceedings wherein such charge is heard.

(2) Subject to sub-section (3), the wife, former wife, husband or former husband of the accused shall be a competent and compellable witness for the prosecution at every stage of the proceedings against the accused, including proceedings for the grant, variation or revocation of bail, as if the marriage had never taken place.

S. 400(3) amended by No. 57/1989 s. 3(Sch. item 42.36).

(3) In any proceedings against the accused, the presiding judge or magistrate shall exempt the accused's wife, husband, mother, father or child (in this section called the "proposed witness") from giving evidence on behalf of the prosecution, either generally or in relation to a particular matter, if, but only if, he is satisfied upon application made to him in the absence of the jury (if any) that, having regard to all the circumstances of the case, the interest of the community in obtaining the evidence of the proposed witness is outweighed by--

- (a) the likelihood of damage to the relationship between the accused and the proposed witness; or
- (b) the harshness of compelling the proposed witness to give the evidence; or (c) the combined effect of the matters mentioned in paragraphs (a) and (b).

(4) Without restricting the generality of the phrase "all the circumstances of the case" in sub-section (3), such circumstances shall include--

- (a) the nature of the offence charged;
- (b) the importance in the case of the facts which the proposed witness is to be asked to depose to;
- (c) the availability of other evidence to establish those facts and the weight likely to be attached to the proposed witness's testimony as to those facts;
- (d) the nature, in law and in fact, of the relationship between the proposed witness and the accused;
- (e) the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and
- (f) any breach of confidence that would be involved.

S. 400(5) amended by Nos 25/1989 s. 19(h), 35/1996

s. 453(Sch. 1 item 16.11).

(5) The fact that a proposed witness has applied for or been granted an exemption pursuant to this section shall not be made the subject of any comment to the jury by the prosecution or by the presiding judge.

S. 400(6) amended by No. 57/1989 s. 3(Sch. item 42.37).

(6) Where the husband, wife, mother, father or child of the accused is called as a witness for the prosecution, the presiding judge or magistrate shall satisfy himself that the person so called is aware of his or her right to apply for an exemption pursuant to this section.

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Crimes Act 1958

Version No. 157

Crimes Act 1958

Act No. 6231/1958

Version incorporating amendments as at 17 October 2001

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Version No. 157

Crimes Act 1958

Act No. 6231/1958

Version incorporating amendments as at 17 October 2001

An Act to consolidate the Law Relating to Crimes and Criminal Offenders.

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Evidence Act 1906

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9 Spouses and ex-spouses of accused persons in criminal cases

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9. Spouses and ex-spouses of accused persons in criminal cases

(1) In any criminal proceeding (and at every stage of the proceeding), the wife or husband of a defendant shall, subject to this Act, be —

(a) competent to give evidence on behalf of the prosecution, the defendant or any person being tried jointly with the defendant;

(b) compellable to give evidence on behalf of the defendant or any person being tried jointly with the defendant; and

(c) compellable to give evidence on behalf of the prosecution against the defendant or any person being tried jointly with the defendant if —

(i) the defendant is charged with an offence under a provision mentioned in the Second Schedule or under a repealed Code section;

(ii) the defendant is charged with attempting or conspiring to commit, or with inciting the commission of, an offence under a provision mentioned in the Second Schedule or under a repealed Code section;

(iii) the defendant is charged on the complaint of the wife or husband with an offence committed with respect to the property of the wife or husband; or

(iv) the wife or husband is compelled, under another enactment, to give that evidence.

(2) In any criminal proceeding (and at every stage of the proceeding), a former wife or former husband of a defendant shall, subject to this Act, be competent and compellable to give evidence on behalf of the prosecution, the defendant or any person being tried jointly with the defendant.

(3) A reference in subsection (1) or (2) to a person being tried jointly with the defendant includes a reference to a person appearing with the defendant at a preliminary hearing under, Part V of the *Justices Act 1902*.

(4) Nothing in this section shall operate to compel a defendant in any criminal proceeding to give evidence in the proceeding.

(5) If the wife or husband of a defendant in any criminal proceeding is called as a witness for

the prosecution but is not a compellable witness for the prosecution, it is the duty of the judge to inform the wife or husband that she or he is not compellable to give evidence on behalf of the prosecution if she or he is unwilling to do so.

(6) In subsection (1) —

“repealed Code section” means a repealed section of *The Criminal Code* that, before it was repealed, enacted an offence constituted by acts or omissions that are substantially the same as the acts or omissions that constitute an offence under a section of *The Criminal Code* that is mentioned in Part 1 of the Second Schedule.

[Section 9 inserted by No. 48 of 1991 s.7; amended by No. 71 of 2000 s.5.]

Note: This is not an authorised version. The only authorised version is the hardcopy (printed) version published under authority of the Government Printer, available from the State Law Publisher, 10 William St Perth W.A. 6000

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Evidence Act 1906

4/Jan/2001 - Current
Copyright[Purchase this Title](#)**StreetSmart Street Directory - New Edition***[First Schedule omitted under the Reprints Act 1984 s.7(4)(f).]***The Second Schedule**

[Section 9]

Part 1 — Offences under *The Criminal Code*

Provision	Description of offence
s. 58	Threatening a person who is to give, or has given, evidence before Parliament
s. 68	Going armed in public so as to cause fear
s. 74	Threatening violence in relation to a dwelling house
s. 98	Undue influence of an elector
s. 123	Threatening a juror or corruption of or by a juror
s. 128	Threatening a witness before a Royal Commission or public inquiry
s. 144	Using force to rescue a person undergoing, or liable to, strict security life imprisonment
s. 186	Occupier or owner permitting a young person to be on premises for unlawful carnal knowledge
s. 191	Procuration
s. 192(1), (3) and (4)	Procuring unlawful carnal knowledge of a person by threats, intimidation or drugs
s. 199	Abortion
s. 278 (as read with s.	Wilful murder

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s. 279 (as read with s. 282)	Murder
s. 280 (as read with s. 287)	Manslaughter
s. 281 (as read with s. 287)	Killing on provocation
s. 281A (as read with s. 287A)	Infanticide
s. 283	Attempt to murder
s. 288	Procuring, inducing or aiding suicide
s. 290	Killing an unborn child
s. 292	Disabling in order to commit an indictable offence or facilitate the flight of an offender
s. 293	Stupefying in order to commit an indictable offence or facilitate the flight of an offender
s. 294	Acts intended to maim, disfigure or disable, do grievous bodily harm, or resist or prevent arrest
s. 294A	Offences relating to dangerous goods on aircraft
s. 295	Preventing or obstructing escape or rescue from a wreck
s. 296	Intentionally endangering the safety of persons travelling on a railway
s. 296A	Intentionally endangering the safety of persons travelling on an aircraft
s. 297	Grievous bodily harm
s. 298	Causing an explosion likely to endanger life
s. 299	Attempting to cause an explosion likely to endanger life or possessing an explosive substance with intent to endanger life

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s. 300	Endangering life by unlawful administration of poison etc., with intent to injure or annoy
s. 301(1)	Unlawful wounding
s. 301(2)	Unlawful administration of poison etc., with intent to injure or annoy
s. 302	Endangering life or health by failing to provide necessities
s. 303	Endangering the life or health of a servant or apprentice under 16
s. 304	Endangering the life or health of a child under 7 by abandonment or exposure
s. 305	Setting mantraps
s. 306	Causing bodily harm by unlawful act or by omission to perform duty
s. 307	Endangering the safety of persons travelling on a railway by unlawful act or omission to perform duty
s. 308	Sending or taking an unseaworthy ship to sea
s. 309	Endangering the safety of persons on board a steam vessel by unlawful act or omission to perform a duty relating to machinery
s. 310	Offence by engineer where there is a contravention of section 309
s. 313	Common assaults
s. 317	Assaults occasioning bodily harm
s. 317A	Assaults with intent
s. 318	Serious assaults
s. 318A	Assaulting or threatening a member of the crew of an aircraft
s. 320	Child under 13: Sexual offences against
s. 321	Child of or over 13 and under 16: Sexual offences against

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s. 321A	Child under 16: Sexual relationship with
s. 322	Child of or over 16: Sexual offences against by person in authority etc.
s. 322A	Juvenile male: Sexual offences against
s. 323	Indecent assault
s. 324	Aggravated indecent assault
s. 325	Sexual penetration without consent
s. 326	Aggravated sexual penetration without consent
s. 327	Sexual coercion
s. 328	Aggravated sexual coercion
s. 329	Relatives and the like: Sexual offences by
s. 330	Incapable person: Sexual offences against
s. 332	Kidnapping
s. 333	Deprivation of liberty
s. 336	Procuring apprehension or detention of persons not suffering from mental illness or impairment
s. 337	Unlawful detention or custody of persons who are mentally ill or impaired
s. 338A	Threats with intent to influence
s. 338B	Threats
s. 338C	False statements as to the existence of threats or plans to harm persons or property
s. 343	Child stealing
s. 344	Desertion of a child
s. 391 (as read with s.	Robbery

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s. 394	Assault with intent to commit robbery
s. 395	Assault with intent to steal
s. 396	Demanding property with threats with intent to steal
s. 397	Demanding property with threats with intent to extort or gain
s. 399	Procuring execution, destruction etc., of documents by violence or restraint or by threats
s. 444	Criminal damage
s. 449	Casting away, destroying or endangering vessels
s. 451	Obstructing or damaging railways
s. 451A	Endangering the safe use of aircraft
s. 451B	Unlawful interference with mechanism of aircraft
s. 454	Causing explosion likely to do serious damage to property
s. 455	Attempting to cause explosion likely to do serious damage to property
s. 456	Attempts to damage or obstruct mines
s. 457	Interfering with marine signals
s. 458	Interfering with navigation works

Part 2 — Offences under the *Road Traffic Act 1974*

Provision	Description of offence
s. 54	Failure to stop when a vehicle is involved in an accident
s. 56	Failure to report an accident involving a vehicle whereby bodily injury is caused

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s. 57	Failure of the owner etc., to identify the driver or person in charge or control of a vehicle involved in an accident
s. 59	Dangerous driving causing death or grievous bodily harm
s. 59A	Dangerous driving causing bodily harm
s. 60	Reckless driving
s. 61	Dangerous driving

Part 3 — Offence under the *Police Act 1892*

Provision	Description of offence
s. 57	Negligent, careless or furious driving or riding

Part 4 — Offence under the *Child Welfare Act 1947*

Provision	Description of offence
s. 31A	Misconduct or neglect causing a child to become an offender or be in need of care and protection

Part 5 — Offences under the *Misuse of Drugs Act 1981*

Provision	Description of offence
s. 6(1)	Indictable offences concerned with prohibited drugs
s. 7(1)	Indictable offences concerned with prohibited plants
s. 33(1)	Attempting, or inciting another, to commit, or becoming an accessory after the fact to, an indictable offence under section 6(1) or 7(1)

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s. 33(2)

Conspiring with another to commit an indictable offence under section 6(1) or 7(1).

[Second Schedule inserted by No. 48 of 1991 s.10; amended by No. 14 of 1992 s.15(2); No. 82 of 1994 s.13 (4); No. 69 of 1996 s.31; No. 15 of 1998 s.6(1); No. 69 of 2000 s.14(1) ¹⁰.]

[Third Schedule repealed by No. 70 of 1988 s.44.]

The Fourth Schedule

[Section 57]

Column 1	Column 2
Name of Department or Officer	Names of Certifying Officers
The Commissioners of the Treasury	Any Commissioner, Secretary, or Assistant Secretary of the Treasury
The Commissioners for executing the office of Lord High Admiral	Any of the Commissioners for executing the office of Lord High Admiral or either of the Secretaries to the said Commissioners
Secretaries of State	Any Secretary or Under Secretary of State
Committee of Privy Council for Trade	Any member of the Committee of Privy Council for Trade, or any Secretary or Assistant Secretary of the said Committee
The Poor Law Board	Any Commissioner of the Poor Law Board, or any Secretary or Assistant Secretary of the said board.

The Fifth Schedule

[Section 61]

Column 1	Column 2
Name of Officer, Department, Body or Board	Names of Certifying Officers
The Governor	The Governor or his Private Secretary
The Governor in Executive Council	The Clerk of the Executive Council

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Table of Statutory Provisions in Various Jurisdictions on
"Competence and Compellability of Spouses in Criminal Proceedings"

	UK	Canada	New Zealand	Australia								
				Common-wealth	ACT	NSW	SA	QLD	NT	Tasmania	VIC	WA
Act	<i>Police and Criminal Evidence Act 1984</i>	<i>Canada Evidence Act (R.S. 1958, c. C-5)</i>	<i>Evidence Act 1908</i>	<i>Evidence Act 1995</i>	<i>Evidence Act 1971</i>	<i>Evidence Act 1995</i>	<i>Evidence Act 1929</i>	<i>Evidence Act 1977</i>	<i>Evidence Act</i>	<i>Evidence Act 1910</i>	<i>Evidence Act 1958</i>	<i>Evidence Act 1906</i>
Competent for Prosecution	s. 80(1)(a)	s. 4(2) and (4)	s. 5(3)	s. 12	s. 66(1)	s. 12	s. 21(1)	s. 8(2)	s. 9(5) and (6)	No specific provision	s. 24	s. 9(1)(a)
Competent for Defence	s. 80(1)(b)	s. 4(1)	s. 5(2)									
Compellable for Prosecution	s. 80(3)	s. 4(2) and (4)	s. 5(3) and (4)	s. 18 and 19	s. 66(3)	s. 19	s. 21(2) and (3)	s. 8(4)	s. 9(5) and (6)	s. 85(7)	s. 24	s. 9(1)(c)
Compellable for Defence	s. 80(2)	No specific provision	s. 5(2)				s. 21(1)			No specific provision		s. 9(1)(b)

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APPENDIX M

**Extract from the Report of the Law Reform Commission on
Competence and Compellability of Spouses in Criminal Proceedings**

CHAPTER 22

SHOULD COHABITEES BE GOVERNED BY
THE SAME RULES AS SPOUSES?

22.1 Introduction

An argument could be made for saying that whatever rules are applied to spouses should apply equally to persons living together as husband and wife, though not actually married - sometimes referred to by the shorthand expression 'cohabitees'. The law of Hong Kong affords such cohabitees a status similar to that of married persons in matters affecting the assessment of damages for personal injuries (see Law Amendment and Reform (Consolidation) (Amendment) Ordinance 1986, Ord. No. 40/86, s.3) and in cases of domestic violence (see Domestic Violence Ordinance 1986, Ord. No. 48/86, s.2). We recognise therefore that it would not be suggesting a radically new concept to recommend that cohabitees be treated in the same way as spouses in relation to the giving of evidence also.

22.2 The Terms of Reference

We are conscious that the question of cohabitees was not expressly included in our terms of reference and we are reluctant to stray beyond our allocated territory. The question is, however, a natural appendage to the main issue, and indeed it is precisely because some people feel that cohabitees are to all intents and purposes identical to spouses that the possibility of extending rules regulating spouses to them arises. The sub-committee recognised this, and in the belief that its task would be more completely performed by considering this question, rather than ignoring it, public opinion on this question was canvassed.

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22.3 Public Opinion

In the telephone survey, 35% of the respondents thought that cohabitees should be treated in the same way as married persons and 28% thought that they should not and 37% did not know or preferred not to comment. The main reason given by the former was "they are (in effect) husband and wife" and that by the latter was that "they have no legal marital relationship". (see Annexure 2)

In the survey of organisations, 37% of respondents thought that cohabitees should be treated in the same way as married persons and 62% thought not.

22.4 The Position in England and Elsewhere

The new rules in England, under the Police and Criminal Evidence Act 1984 do not make special provision for cohabitees. On the other hand, some other jurisdictions (e.g. South Australia, see Evidence Act Amendment Act (No. 2), 1983, s.4; New South Wales, see Crimes Act 1900, s.407AA, as inserted by Act No. 116 of 1982) do treat cohabitees on a similar basis to spouses for certain purposes of the rules of evidence.

22.5 Conflicting Opinions

It is apparent that there is not a consistent and overwhelming body of opinion in favour of treating cohabitees in the same way as spouses. There is however a significant body of opinion in favour of this result. In Hong Kong the traditional attitudes towards concubinage and polygamy may account for part of the responses in favour of extending the rules to cohabitees. It is important not to adopt a moralistic response, based perhaps upon religious concepts of matrimony, as a way of ignoring the closeness and mutual trust that may be generated within the cohabitation relationship. It is these qualities, rather than

the label of marriage, which the special rules are designed to protect. At the same time, it is perhaps difficult to use arguments based on the 'sanctity of marriage' to support this result when the parties themselves have not sanctified their relationship with the orthodox ceremony of marriage. The matter is not, however, susceptible to an easy answer and we can see the force of the argument (put, for example, by the Hong Kong Federation of Women Lawyers, in a submission) that cohabitees, as defined in the Domestic Violence Ordinance, Cap. 189, should be put in the same position as legally married persons. On balance, however, we believe that the main thrust of our proposals, which are designed to enhance the availability of testimony within the context of marriage, would be undermined somewhat by extending the special exemptions to cohabitees.

22.6 The Recommendation

We do not recommend that the new rules be extended to cohabitees.

**Extract of minutes of meeting of Administration of Justice
and Legal Services Panel held on 26 June 2001**

X X X X X X

V. Competence and compellability of spouses in criminal proceedings
(LC Paper Nos. CB(2)1889/00-01(01) and (02); Report on Competence and Compellability of Spouses in Criminal Proceedings published by the Law Reform Commission (LRC) in 1988 (attached at LC Paper No. CB(2)1889/00-01))

15. Deputy Solicitor General (DSG) briefed members on the Administration's paper (LC Paper No. CB(2)1889/00-01(01)). DSG said that the thrust of the LRC's recommendations was that a spouse would be both competent and compellable in all cases to testify for the other spouse, but compellable to testify against the other spouse only in cases involving offences that threatened their family. He drew members' attention to paragraphs 12 to 14 of the Administration's paper, which set out the Administration's position on whether there should be a general rule relating to spouse as compellable witness. A summary of the present law and the recommendations of the LRC were set out in the Annex to the paper.

16. DSG also informed members that the Administration had introduced a Bill in 1990, the Criminal Procedure (Amendment) Bill 1990, to amend the Criminal Procedure Ordinance (Cap. 221) to implement the recommendations made in the LRC Report, but the Bill was defeated. It was the intention of the Administration to reintroduce the Bill to implement the relevant recommendations.

17. The Chairman sought the views of the Hong Kong Bar Association on the matter.

18. Mr Edward LASKEY said that the Bar Association supported the proposals of the LRC, which represented a change of its stance 10 years ago when the matter was considered by the Bar Association. He explained that the present position of the Bar Association was that the proposals of the LRC were sensible, given the change of time and people's attitudes in relation to, for instance, the sanctity of marriage and family values. Nonetheless, the Bar Association felt that in implementing the legislative changes, there should be certainty as to the offences to which the new rules would apply. For instance, it would be desirable to clearly define in the law the offences which were deemed to "threaten" the family, or alternatively to provide a schedule setting out such specific offences.

19. Ms Emily LAU said that she particularly shared the views expressed by the Guardianship Board in response to the Administration's consultation exercise. The Board supported the proposed reform in respect of compellability, provided that compellability as witness for the prosecution was extended to cover crimes against mentally incapacitated adults living in the family, and not only limited to crimes against spouses, cohabitees and children.

20. Ms Emily LAU pointed out that, as stated in paragraph 10 of the Administration's paper, four organisations had raised objection to compelling spousal testimony for different reasons. She said that the Administration should take into account all the different views put forward when preparing the Bill for the scrutiny of LegCo.

21. DSG said that the intended Bill would endeavour to address the concerns about spouse as compellable witness. The Bill would not open the floodgates of compelling a spouse to give evidence in any situation, as compellability would be subject to restrictions, i.e. spouses should not be compellable to testify against each other, except in a limited category of cases affecting the family, such as cases involving physical or sexual violence against family members. The exceptional situations were explained in paragraph 12 of the Administration's paper.

22. DSG added that the Administration had yet to work on the contents of the Bill. He advised that the Administration intended to introduce the Bill into LegCo in the latter half of 2002.

23. Mr TSANG Yok-sing pointed out that the present position was that at common law, a person was not competent to give evidence for or against his or her spouse except in very limited circumstances. He asked whether by enacting legislation to provide for competence alone, of a spouse to testify against the other accused spouse, would solve most of the problems envisaged by the Administration.

24. DSG explained that the issue of competence was much less controversial than compellability. It was thought that the spouse who was torn between loyalty to his or her accused spouse on the one hand, and loyalty to an endangered party on the other, would suffer less conflict of loyalty if the law compelled his or her testimony. The present proposal to compel spousal testimony only in limited circumstances was to strike a balance between the interest of society in upholding the institution of marriage and the public interest of prosecuting and convicting offenders.

25. Legal Adviser pointed out that in the course of scrutinising the Criminal Procedure (Amendment) Bill 1990, the Administration agreed to introduce an amendment to the Bill to allow a spouse or a cohabitee of an accused to seek exemption from testifying for the prosecution. Under the proposed

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amendment provision, the court would be empowered to grant exemption as it saw fit. He suggested that the Administration should also take such a provision into consideration when preparing the Bill.

26. In concluding the discussion, the Chairman requested the Administration to provide the following information/documents for the consideration of the Panel in due course -

- (a) a copy of the Criminal Procedure (Amendment) Bill 1990;
- (b) copies of written submissions received by the Administration during the public consultation exercise;
- (c) a list of the crimes which in the opinion of the Administration justified compelling spousal testimony; and
- (d) an information note on experience in overseas common law jurisdictions and the development of similar legislation in those countries.

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27. The Chairman suggested that the Administration should also provide the above information/documents to the legal professional bodies for their further comments on the subject. She requested the Administration to provide a written report on the outcome of consultation for the Panel's consideration in due course.

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Appendix VI

Extract from minutes of meeting of Administration of Justice and Legal Services Panel held on 25 February 2002

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V. Competence and compellability of spouses in criminal proceedings
(LC Paper Nos. CB(2)1889/00-01(01); 1134/01-02(01) and (02);
1202/01-02(01))

25. The Chairman drew members' attention to the papers circulated to members, and a letter dated 25 February 2002 from the Law Society of Hong Kong (LC Paper No. CB(2) 1202/01-02(01)) which was tabled at the meeting.

26. At the invitation of the Chairman, Deputy Solicitor General (DSG) briefed members on the paper prepared by the Administration (LC Paper No. CB(2)1134/01-02(02)) which contained the following information as requested by the Panel when the issue of competence and compellability of spouses in criminal proceedings was last discussed at the meeting on 26 June 2001 -

- (a) a copy of the Criminal Procedure (Amendment) Bill 1990;
- (b) copies of written submissions received by the Administration during the public consultation exercise;
- (c) a list of the crimes which in the opinion of the Administration justified compelling spousal testimony; and
- (d) an information note on experience in overseas common law jurisdictions and the development of similar legislation in those countries.

27. DSG advised that with a view to addressing the concern of the Panel and some of the respondents in the public consultation, the Administration further proposed to add to the bill, which was scheduled to be introduced into LegCo shortly, an exemption provision to provide the court the discretion to exempt the spouse of an accused from giving evidence for the prosecution or on behalf of the co-accused.

28. DSG further said that the proposed discretion of the court to grant exemption was based on Australian legislation. In South Australia, a spouse might apply to the court for an exemption from the obligation to give evidence against his or her accused spouse. The discretion of the court to exempt the spouse wholly or in part required the judge to consider, inter alia, the risk of harm to the spouse and the relationship if no exemption was granted. He

added that apart from the above provision, the proposed bill was largely modelled on the previous Criminal Procedure (Amendment) Bill 1990 which was not passed by LegCo, and the recommendations of the Law Reform Commission (LRC) in its report in 1988 on the competence and compellability of spouses to testify in criminal proceedings.

29. DSG further drew members' attention to Annex C to the Administration's paper which set out a list of the crimes which justified compelling spousal testimony. In the opinion of the Administration, a spouse should be compelled to testify against his or her spouse or spouse's co-accused, or on behalf of the co-accused, only in the following circumstances -

- (a) the offence charged involved 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 who was at the material time under the age of 16;
- (b) the offence charged was a sexual offence alleged to have been committed in respect of a child of the family who was at the material time under the age of 16 ("sexual offence" meant an offence under Part VI or XII of the Crimes Ordinance (Cap. 200)); and
- (c) the offence charged consisted 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).

30. The Chairman sought the Bar Association's views on the subject.

31. Mr Edward LASKEY said that as explained in its previous submission, the Bar Association was in general support of the principles underlying the legislative changes proposed by the Administration. However, it would like to reserve its final position until it had the chance to consider the legislative proposals in detail. He suggested that the Administration should consider the following two issues -

- (a) the meaning of "a child of the family" should be clarified, e.g. whether it would include step children or foster children, bearing in mind that the reference carried different meanings under different pieces of legislation. There were also different interpretations under case law in common law jurisdictions; and
- (b) an accused person might be concurrently charged for different offences of which only one came within the list of crimes justifying spousal testimony. Safeguards should be introduced to ensure that while the spouse of the accused was compellable to give evidence

for the prosecution in relation to that particular charge which justified compellability, the witness spouse would not be compelled to give evidence on matters relating to the other charges. The Bar Association proposed that there should be separate trials for different alleged offences.

32. Mr Martin LEE said that he had reservations about the legislative proposal concerning compellability. In his view, the proposal, if implemented, would impact adversely on the institution of marriage. The risk of harm which might be done to a wife compelled to testify against her accused husband should also be considered.

33. The Chairman pointed out that the adverse effect on the sanctity of marriage was also a reason adduced by the Law Society in opposing to the proposal of compellability of spousal testimony against the accused.

34. Referring to the offences set out in Annex C to the Administration's paper, Mr Martin LEE raised the following queries -

- (a) In criminal law, the offence of assault did not necessarily require actual bodily harm being done or even body touching. An act which put somebody in threat or fear sufficed for it to amount to an assault;
- (b) A husband who assaulted his wife might subsequently get the forgiveness from his wife. It would be undesirable to compel the wife to give evidence against the husband under such circumstances;
- (c) one of the sexual offences specified in Part XII of the Crimes Ordinance was "letting premises for use as a vice establishment". Whether the commission of this offence had to be also in relation to a child of the family was not clear.

35. In response to (c) above, DSG said that under the proposal, the sexual offences which compelled spousal testimony against the accused were offences under Part VI or XII of the Crimes Ordinance and such offences were alleged to have been committed in respect of a child of the family who was at the material time under the age of 16.

36. DSG added that the Administration would consider the points raised by Mr Martin LEE in finalizing the drafting of the bill. He pointed out that the proposed provision empowering the judge to exercise a discretion to exempt a spouse from giving evidence might help address the concern. He also pointed out that the proposals which would be included in the bill generally followed

the LRC's recommendations which had secured the wide support of the community, including woman organizations consulted on the subject.

37. On the issue concerning assault charges, Mr Edward LASKEY opined that it would be difficult to define serious and minor offences committed with violence. Also, as far as compellability was concerned, it would be difficult to argue that offences committed with minor violence should not count.

38. Ms Audrey EU said that she was in general support of the legislative proposals. With regard to the proposed provision for the court's discretion to exempt a spouse from testifying against the accused spouse, she asked whether the discretion would also apply to co-habitees living in a state equivalent to a spousal relationship.

39. DSG replied that the Administration had considered the issue of co-habitation and was inclined to follow the LRC's recommendation that co-habitees should not be included. He added that the common law meaning of spouses did not include co-habitees.

40. In response to the Chairman's enquiry about the legislative timetable, DSG advised that the proposed bill would be introduced into LegCo on 15 May 2002. Meanwhile, the Administration was waiting for the response of the two legal professional bodies to the revised proposals.

41. The Chairman said that she expected that a Bills Committee would be formed in due course to scrutinize the bill in detail.

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**For discussion
on 20 March 2002**

**LegCo Panel on Administration of Justice and Legal Services
The giving of evidence by overseas witnesses via live TV link**

Introduction

The Administration proposes to amend the law to provide for the giving of evidence by overseas witnesses in criminal proceedings via live TV link.

Background

2. Overseas witnesses may, while willing to give evidence, be unable or reluctant to come to Hong Kong to testify for various reasons. It would be expensive and time-consuming for the court and all parties to travel to the country where a witness resides. Where the witness is unable or reluctant to come to Hong Kong to testify, the only present alternative is to take his evidence by way of a letter of request issued by the Hong Kong court or by a request made by the Secretary for Justice under mutual legal assistance procedures. This involves the delay of questioning the witness in the presence of an authority in the requested jurisdiction and presenting his evidence in written form in Hong Kong. Nor can such evidence be tested in cross-examination unless counsel travels to the overseas place to conduct the cross-examination or arranges for a representative in that place to cross-examine the witness on his behalf. Allowing an overseas witness to give evidence from abroad via live TV link to a Hong Kong court would significantly reduce inconvenience to the witness and the travel costs associated with bringing him to Hong Kong to testify. It would also enable the court to facilitate cross-examination and observe the demeanour of the witness.

3. The taking of evidence via live TV link is permitted in –

(a) the UK (section 32 of the Criminal Justice Act 1988)

(b) Canada (Part II of Chapter C-5 of Canada Evidence Act)

- (c) New South Wales, Australia (Evidence (Audio and Audio Visual Links) Act 1998)
- (d) Victoria, Australia (section 3 of the Evidence (Audio Visual and Audio Linking) Act 1997)
- (e) Western Australia (Evidence Act 1906)
- (f) Commonwealth, Australia (Mutual Assistance in Criminal Matters Act 1987)

4. The Law Society and the Bar Association were consulted in 1998 and both supported the proposal in principle. The proposal was postponed due to a resources problem which has now been resolved. A technology courtroom, which will be equipped with overseas TV link facilities, is being installed in the High Court and is expected to be in full operation by September 2002. We are of the view that this matter be reactivated. We are in the process of consulting the Law Society, Bar Association and the law faculties of the University of Hong Kong and City University on the current proposals.

The proposal

General principles

5. Under the proposal, the court in Hong Kong will be empowered, upon application, to grant approval to a party to criminal proceedings to adduce evidence of an overseas witness via live TV link and to hear the evidence on the hearing date. The practical arrangements for the evidence to be given, and for the obtaining of the approval of the overseas authority concerned, will be separate from the role of the court in giving the approval.

6. A bilateral treaty between Hong Kong and the overseas jurisdiction concerned is not needed for a party to make arrangement for his witness to give evidence via live TV link. However, if such a treaty exists, its terms must be respected. The court will require the party concerned to satisfy it that the taking of evidence of an overseas witness via live TV link does not infringe the domestic law of the overseas jurisdiction concerned and that the consent of the central authority of the overseas jurisdiction has been obtained.

7. The admissibility of overseas evidence (oral, documentary and

real) adduced via live TV link will be determined by the Hong Kong court as if such evidence is physically adduced in a Hong Kong court. Witnesses giving evidence via live TV link will enjoy the same protection which they would have if they were giving evidence in a Hong Kong court.

8. The party may decide whether he wants to make the required arrangements using the mutual legal assistance channel or by private arrangement without the assistance of any overseas authority.

9. Regarding the mutual legal assistance channel, the Administration proposes to amend the *Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)* and the *Evidence Ordinance (Cap.8)* respectively to empower the Secretary for Justice and the Court of First Instance to make a request to an overseas authority or court to assist in the taking of the evidence of an overseas witness via live TV link.

10. It is also considered that witnesses in Hong Kong should be permitted to give evidence via live TV link to an overseas court upon the request of other jurisdictions. Hong Kong courts would be in a stronger position to obtain live TV link evidence if we are prepared to reciprocate.

11. Legislation is required to provide for the procedure regarding the use of the live TV link system for the purpose of taking evidence of an overseas witnesses in criminal proceedings, the admissibility of evidence so adduced, and the power of the Court of First Instance and the Secretary for Justice to request assistance from or provide assistance to an overseas jurisdiction to take evidence via live TV link.

Legislative proposal

12. Details of the proposed legislation are at **Annex A**. This may be varied in the light of the responses received during the consultation exercise.

Department of Justice
Legal Policy Division
March 2002

Detailed proposal

(For the sake of easy reference, in this paper, witnesses giving live TV link evidence under private arrangement will be referred to as “non-MLA witnesses” and witnesses giving live TV link evidence under formal arrangements between governments will be referred to as “MLA witnesses”).

1. For the purpose of discussion, the proposal can be conveniently divided to cover four situations, namely —

- (a) Hong Kong court and non-MLA overseas witnesses;
- (b) Hong Kong court and MLA overseas witnesses;
- (c) overseas court and non-MLA Hong Kong witnesses; and
- (d) overseas court and MLA Hong Kong witnesses.

Hong Kong court and non-MLA overseas witnesses

2. The Hong Kong court would, upon application, have the discretion to grant leave for evidence to be taken via live TV link. The court would not on its own motion arrange for a witness to give evidence via live TV link (this is the same position as in New South Wales and the UK). As in most criminal proceedings, it is a matter for the party concerned to secure the attendance of his witness.

3. An overseas witness need not give evidence in a courtroom setting. This would provide greater flexibility to the parties concerned. This is the position in the UK and Australia. It would be a requirement that a Hong Kong court will not permit the examination of an overseas witness via live TV link unless the court is satisfied that no injustice will be caused. A further safeguard can also be provided by empowering the court to specify that, as a condition of the grant of leave, the witness should give evidence in the presence of a specified person who can attest to the court as to the circumstances in which the evidence is given.

4. An application for leave by any party for evidence to be given via live TV link would be made to the Registrar of the High Court, the Registrar of the District Court or the First Clerk of the magistracy (depending on where the proceedings are to take place) by way of a notice within 28 days after the date of —

- (a) the committal for trial of the defendant; or
- (b) the consent to the preferment of a bill of indictment in relation to the case; or

(c) the order of transfer under section 88 of the *Magistrates Ordinance* (Cap. 227); or

(d) the setting down of the case for trial before a magistrate.

The notice must also be sent to all other parties to the proceedings who may object to the application within 14 days of receiving the notice. The court may then decide the application without a hearing. If the court decides to hold a hearing, it must notify all parties concerned of the time and place of the hearing. The 28-day period of application may be extended by an application in writing, specifying the grounds for the extension, sent to the Registrar or First Clerk.

5. The court should not grant leave unless it is satisfied that –

- the person who is to give the evidence is not the accused;
- the person is not in Hong Kong;
- the evidence cannot more conveniently be given in the court in Hong Kong;
- facilities are available;
- the overseas location where the evidence is to be given is properly and adequately equipped with the necessary facilities;
- the provision of evidence by an overseas witness in this manner is not in contravention of the law of the place where the witness is to give evidence;
- no injustice would be caused and all other parties have been given an opportunity to object.

The court may grant leave subject to conditions and may give directions as to how the evidence is to be taken, the setting of the place where the witness is giving evidence, and the person who will attest as to the circumstances in which evidence is given. The court, as a matter of international comity, would also require the applicant to obtain the consent of the relevant overseas authority of the jurisdiction concerned in respect of the taking of evidence via live TV link in that jurisdiction, or to satisfy the court that the overseas authority does not object to the taking of evidence in that jurisdiction via live TV link.

6. The court will not interfere with the manner in which the arrangement to take evidence is made. The applicant will be responsible for obtaining the necessary clearance from the overseas authority and making all necessary arrangements to facilitate his witness to give evidence to the Hong Kong court via live TV link.

7. Regarding the hearing, the following will apply–

- (i) The live TV link system must enable the court to see the witness clearly and allow the court to see the whole room if the court so wishes.
- (ii) The place where an overseas witness is giving evidence would, for the purposes of the criminal proceedings, be deemed to be a part of the courtroom. Hong Kong law relating to evidence, procedure, contempt of court and perjury would apply since the witness would be giving evidence in Hong Kong criminal proceedings and a Hong Kong court cannot apply overseas law. Further, for a non-MLA witness, the Hong Kong court, though remote, is the only court that is supervising the witness and in charge of the proceedings. When submitting to the jurisdiction of the Hong Kong court voluntarily, the witness should consider the consequences and any civil and criminal liabilities that may arise under the law of the place in which the evidence is being given. This is the position in the UK, New South Wales, Victoria and Western Australia.
- (iii) An oath or affirmation would be administered by the court in Hong Kong or by a person authorized by the Hong Kong court at the place where the evidence is to be given.

8. The *Criminal Procedure Ordinance (Cap.221)* (“CPO”) would be amended to give effect to the above. The Chief Justice will be empowered to make a new set of rules under the CPO to provide for the details of the procedure including the production and handling of real or documentary evidence.

9. The *Evidence Ordinance (Cap. 8)* would also be amended to provide that real or documentary evidence produced in accordance with the procedure under the CPO (or rules made under the CPO) during the process, which may not be transmitted to the court simultaneously, shall be admitted in evidence as if it were produced in the courtroom during the process.

Hong Kong court and MLA overseas witnesses

10. No distinction will be made between MLA and non-MLA witnesses regarding the procedures for obtaining the leave of the court for the use of the live TV link system to examine an overseas witness and for the conduct of the hearing. Therefore, paragraphs 2 to 7 above will also apply to MLA witnesses.

11. This exercise would provide the option of live TV link as a means of taking evidence in MLA matters. It is not intended to expand the existing MLA regime or to confer on anybody a right that he does not currently possess. The arrangement will follow the existing practice regarding the obtaining of evidence

under the *Mutual Legal Assistance in Criminal Matters Ordinance (Cap. 525)* (“*MLACMO*”) and Part VIIIA of the *Evidence Ordinance*.

12. After leave has been obtained from the Hong Kong court in accordance with the procedure mentioned in paragraph 5 above, if it is considered that assistance from an overseas authority is needed or the overseas authority insists that a formal request be made, the Secretary for Justice may make such request to the relevant overseas authority under the *MLACMO*. The *MLACMO* would be amended for this purpose.

13. Alternatively, a request may also be made by the Court of Instance to a foreign court or tribunal under Part VIIIA of the *Evidence Ordinance*. The *Evidence Ordinance* will be amended accordingly.

14. We consider that Hong Kong law on evidence, procedure, contempt of court and perjury should apply, as the witness would be giving evidence in Hong Kong criminal proceedings, but that the requested jurisdiction may also give the witness fundamental rights and immunities which the Hong Kong court will need to respect. An oath would be administered by the requested jurisdiction with the assistance of their judicial authorities. Since a foreign authority is involved, the execution of the request would be subject to the law of the requested jurisdiction over which the Secretary for Justice or the Court of First Instance would have no control. They would forward special requests, if any, for the consideration of the requested jurisdiction.

15. The *Evidence Ordinance* would be amended to provide that any witness testimony and thing produced during the process would be admissible as if it is physically adduced in the Hong Kong courtroom concerned.

Overseas court and non-MLA Hong Kong witnesses

16. A foreign court has no criminal jurisdiction in Hong Kong but, provided that the way in which evidence is taken does not contravene any law in force in Hong Kong, there is no law to prohibit the taking of evidence from Hong Kong. It is up to the foreign court concerned to decide whether it wants to take evidence from a person in Hong Kong via live TV link and for the person to decide whether he wants to be a witness. The Hong Kong government would not provide any assistance to a foreign court nor would it give the witness any special protection. Although the Hong Kong authorities would expect to be notified of a proposal to take evidence in criminal proceedings as a matter of international comity, we consider that it is unnecessary to legislate for an otherwise lawful activity.

17. There may be questions as to whether an overseas lawyer will be practising law in Hong Kong. We are of the view that if the live TV link room were to be a part of the overseas court then a lawyer who examined the witness via the link would be practising law in the overseas court, not in Hong Kong.

Overseas court and MLA Hong Kong witnesses

18. To facilitate reciprocity with other jurisdictions, we propose to extend the scope of the existing law to enable Hong Kong to assist an overseas authority in respect of giving evidence via live TV link. The *MLACMO* and the *Mutual Legal Assistance in Criminal Matters Regulation, Cap. 525 sub. leg.* will be amended to empower the Secretary for Justice to act upon a request from an overseas authority for the examination of a witness in Hong Kong via live TV link.

19. The proposal includes the following –

- (a) To empower the Secretary for Justice to authorize evidence to be taken via live TV link, and sending things produced during the examination process to the requesting authority.
- (b) Where the Secretary for Justice authorizes the taking of evidence and sending things produced during the process, the proceedings would be conducted before a magistrate.
- (c) The magistrate would take the oath of the witness and be responsible for the identification of the witness appearing before him, the drawing up of minutes indicating the date and place of the hearing, taking things received during the process and sending them to the Secretary for Justice. The Secretary for Justice would be responsible for sending the things to the requesting jurisdiction.
- (d) Since an open court setting may not be appropriate in the case of a link-up where the court is sitting in another jurisdiction and the court may wish to conduct proceedings in camera, a magistrate would have the power to conduct the hearing in camera if the requesting jurisdiction so requests or if the magistrate sees fit.
- (e) The person giving evidence would be entitled to be accompanied by a legal representative. There may be issues involving the application of Hong Kong law such as a magistrate's power to order a person to attend before the court.
- (f) Without changing the position under the existing section 10(6)-(14) of the *MLACMO*, the law of the requesting jurisdiction would apply unless it is otherwise agreed by the requesting court, the magistrate and the witness, in which case the law of Hong Kong will apply.

20. Part VIII of the *Evidence Ordinance* will also be amended to enable the Court of First Instance to act upon a request from an overseas jurisdiction in so far as it relates to criminal proceedings. The purpose of the proposed amendment would be –

- (a) to empower the court to make an order regarding the examination of witnesses by a requesting court via live TV link; and
- (b) regarding the privilege of a witness under the existing section 77(2) of the *Evidence Ordinance*, to provide that if examination is given via live TV link, the person would also be exempt from giving the evidence if his claim for exemption is upheld by the requesting court which is communicated to the court sitting in Hong Kong via the live TV link.

Legal Policy Division
Department of Justice
March 2002

Appendix VIII

Extract from minutes of meeting of Administration of Justice and Legal Services Panel held on 20 March 2002

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VI. The giving of evidence by overseas witnesses via live TV link (LC Paper Nos. CB(2)1360/01-02(01) & (02))

29. SASG introduced the paper prepared by the Administration on the proposal to amend the law to provide for the giving of evidence by overseas witnesses in criminal proceedings via live TV link (LC Paper No. CB(2)1360/01-02(01)). The general principles and details of the legislative proposal were explained in the paper. He added that the Administration was in the process of consulting the legal professional bodies and the law faculties of the University of Hong Kong and the City University on the relevant proposal.

30. The Chairman informed members that the Law Society had advised in writing (LC Paper No. CB(2)1360/01-02(02)) that it was considering the legislative proposal and would prepare a submission in due course. The Bar Association supported the proposal in principle.

31. In reply to the Chairman's enquiry about the intended ambit and application of the proposed legislative proposal, Deputy Director of Public Prosecutions (DDPP) said that the proposed arrangements were intended to cover situations where a witness was resident abroad and where the witness was unable or reluctant to come to Hong Kong to testify. At present, the only alternative was to take evidence by way of a letter of request issued by the Hong Kong court or by a request made by the Secretary for Justice under mutual legal assistance procedures. This involved delay in questioning the witness in the requested jurisdiction and presenting the evidence in written form in Hong Kong. Allowing an overseas witness to give evidence from abroad via live TV link to a Hong Kong court would significantly reduce inconvenience to the witness and the travel costs associated with bringing him to Hong Kong to testify. It would also enable the court to facilitate cross-examination and observe the demeanour of the witness.

32. DDPP added that under the proposed legislation, adducing and hearing evidence of an overseas witness by live TV link would require the prior approval of the Hong Kong court, upon application of a party to the proceedings who wished to resort to such arrangements. The party might decide whether he wanted to make the arrangements using the mutual legal assistance channel or by private arrangement without the assistance of any overseas authority.

33. Referring to paragraph 10 of the Administration's paper on reciprocal arrangements between Hong Kong and overseas jurisdictions, Mr Albert HO asked why witnesses in Hong Kong should be "permitted" to give evidence via live TV link to an overseas court.

34. DDPP replied that it was generally anticipated that there would be a private voluntary arrangement. But there might be situations where mutual legal assistance was sought from a requesting overseas jurisdiction to have evidence taken of a witness in Hong Kong via live TV link, through order of the court in Hong Kong. Also, the arrangements for giving of evidence via live TV link would necessitate the use of court facilities in Hong Kong.

35. The Chairman asked how often requests were received from overseas jurisdictions.

36. The Deputy Principal Government Counsel (International Law Division) replied that at present, requests were received about once a month, and it was becoming more prevalent for overseas jurisdictions to make such requests to Hong Kong.

37. DDPP supplemented that similar legislation was available in most other common law jurisdictions to give effect to the giving of evidence by live video-link. He said that in Singapore, for example, technology in video link was used not only for the purpose of taking evidence from overseas witnesses, but also for the purpose of preliminary proceedings where the parties, though available locally, did not have to appear in court in person.

38. In reply to Mr Albert HO, DDPP advised that High Court Judges at present had the power under the High Court Rules to permit the mode of evidence taking by live TV link to be used in civil proceedings on a voluntary basis.

39. In response to the Chairman's question on the legislative timetable, DDPP said that a Bill was expected to be introduced into LegCo in May 2002. He added that a technology courtroom, which would be equipped with overseas TV link facilities, was being installed in the High Court and was expected to be in full operation by September 2002.

40. The Chairman said that she expected that the details of the legislative proposal would be looked at by a Bills Committee in due course. She suggested that the Administration should start gathering information on the arrangements adopted in overseas jurisdictions to facilitate consideration of the Bills Committee when set up.

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