

For discussion
on 25 February 2002

LegCo Panel on Administration of Justice and Legal Services
Competence and Compellability of Spouses in Criminal Proceedings

At the meeting of the AJLS Panel on 26 June 2001, the Administration briefed members on the Administration paper on competence and compellability of spouses in criminal proceedings (LC paper No. CB(2) 1889/00 – 01(01)).

2. The Administration was requested to provide the following information/documents for the consideration of the Panel:

- (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 jurisdiction and the development of similar legislation in those countries.

..... 3. Copies of the requested information are attached.

4. The Administration has provided the above information to the Hong Kong Bar Association and the Hong Kong Law Society for their further comments. The Administration is waiting for the response of the two legal professional bodies.

Legal Policy Division
Department of Justice
February 2002

(a) A copy of the Criminal Procedure (Amendment) Bill 1990

(b) Copies of written submissions received by the Administration during the public consultation exercise

- 1) The Family Law Association
- 2) The Hong Kong Bar Association
- 3) The Law Society of Hong Kong
- 4) Mr Desmond Keane, SC
- 5) School of Law, City University
- 6) The Family Planning Association of Hong Kong
- 7) Guardianship Board
- 8) Equal Opportunities Commission
- 9) Zonta Club of Hong Kong
- 10) Hong Kong Christian Service
- 11) Hong Kong Christian Council
- 12) The Society for the Rehabilitation of Offenders, Hong Kong
- 13) The Boys' & Girls' Association of Hong Kong
- 14) The Hong Kong Council of Social Services
- 15) Heung Yee Kuk New Territories
- 16) JUSTICE

Annex C

- (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.

Annex D

- (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**.