### 立法會 Legislative Council

立法會CB(2)1167/02-03(01)號文件

檔 號: CB2/BC/11/01

《2002年證據(雜項修訂)條例草案》委員會

立法會秘書處擬備的背景資料簡介

有關配偶的作證資格及可否予以強迫作證與藉電視直播聯繫錄取海外證人證據的建議

目的

本文件旨在綜述司法及法律事務委員會("事務委員會")對《2002年證據(雜項修訂)條例草案》中下列兩項建議的商議結果——

- (a) 配偶的作證資格及可否予以強迫作證問題;及
- (b) 藉電視直播聯繫錄取海外證人的證據。

#### 配偶的作證資格及可否予以強迫作證

#### 事務委員會的討論

- 2. 政府當局曾在2000年7月就應否重新提出條例草案,以實施法律改革委員會("法改會")的下列主要建議發出諮詢文件 ——
  - (a) 如配偶同意,可在所有刑事訴訟中為控方作證指證另一方;
  - (b) 可強制配偶在某幾類刑事訴訟中,為控方作證指證另一方; 以及
  - (c) 可強制配偶為涉及刑事訴訟的另一方作證辯護。

事務委員會曾於2001年6月26日及2002年2月25日的會議上討論此事。

3. 政府當局於2001年6月26日向事務委員會匯報諮詢結果,並提議立法實施法改會的建議。當局提供事務委員會討論的文件(立法會CB(2)1889/00-01(01)號文件)載於附錄I。

- 4. 政府當局表示,諮詢文件曾送交兩個法律專業團體、婦女團體、社會福利組織及其他的非政府關注機構參閱。在各諮詢對象中,大部分(包括香港大律師公會)均支持建議。當中4個組織,包括香港律師會、國際司法組織(香港分會)、善導會及鄉議局則關注到,在某幾類刑事訴訟中,配偶可被強制為控方作證指證另一方。
- 5. 政府當局曾應委員的要求提供下列補充資料,供事務委員會 於2002年2月25日的會議上考慮 ——
  - (a) 刑事罪行一覽表(**附錄II**);依政府當局之見,在涉及一覽表所 列罪行時,有充分理據強迫配偶作證;及
  - (b) 有關海外普通法司法管轄區的經驗及相關法例在該等國家的發展情況的資料便覽(**附錄III**)。

#### 政府當局的修訂建議

6. 政府當局於2002年2月25日的會議上向事務委員會表示,有建議指被告人的配偶應有權向法院申請免除作證指證被告人的責任,當局接納此建議,以釋除不支持法改會建議者的疑慮。此項建議可消除反對者對有關建議會破壞"婚姻神聖基礎"的疑慮。

#### 法律專業團體的意見

- 7. 事務委員會曾徵詢兩個法律專業團體對建議的意見。香港大律師公會在上述兩次會議均有出席,亦支持法改會的建議,但表示,在有機會仔細研究有關的立法建議前,該會仍保留其最後立場。該會亦建議政府當局考慮以下事項 ——
  - (a) "家中子女"的涵義應予澄清,舉例說,該用詞會否包括繼子 女及寄養子女,原因是,不同法例對該詞有不同涵義。不同 普通法司法管轄區的判例法亦對該詞有不同詮釋;及
  - (b) 被告人可同時被控多項罪名,而當中只有一項涉及有充分理 據強迫配偶作證的罪行。當局應採取措施,確保有關方面除 可強迫被告人的配偶就該項有理據可強迫其作證的罪名為控 方作證外,不會強迫該作為證人的配偶為與其他罪名有關的 事項作證。大律師公會建議將不同的涉嫌罪行分開審訊。
- 8. 香港律師會在其2000年10月16日的函件中闡述其意見,現將意見概述如下 ——
  - (a) 同意配偶有資格在所有刑事訴訟中為控方作證指證其丈夫或妻子;
  - (b) 同意配偶可予強迫作證為其丈夫或妻子辯護。然而,若該配 偶未能做到,控方不得對此作出任何評論;及

(c) 反對強迫配偶為控方作證指證其丈夫或妻子,原因是此舉會 破壞婚姻的神聖基礎。

#### 事務委員會的意見

- 9. 一名委員對強迫配偶作證的建議表示有保留,認為這會損害婚姻制度。
- 10. 另一名委員大致上支持立法建議。對於法院可酌情免除被告人的配偶作證指證被告人的擬議規定(見上文第6段),該位委員詢問該項豁免可否延伸至適用於同居者。政府當局表示傾向於依循法改會的建議,不將同居者包括在內。法改會報告第22章"關於配偶的規定,應否亦適用於同居者?"的內容,載於**附錄IV**。
- 11. 事務委員會對立法建議並無特別立場,但預期有關法案提交立法會後會成立法案委員會。事務委員會2001年6月26日及2002年2月25日的會議紀要摘錄載於**附錄V及VI**。

#### 藉電視直播聯繫錄取海外證人的證據

- 12. 當局於事務委員會2002年3月20日的會議上,就下列立法建議 諮詢事務委員會的意見 ——
  - (a) 應否授權香港法庭於接獲刑事訴訟程序其中一方的申請後准 其援引透過電視直播聯繫所錄取海外證人的證據;及
  - (b) 在有其他司法管轄區提出要求時,准許香港的證人透過電視 直播聯繫向該司法管轄區的法庭作供。

政府當局向事務委員會提供的文件(立法會CB(2)1360/01-02(01)號文件) 載於**附錄VII**。

- 13. 應委員的要求,政府當局提供了下列資料 ——
  - (a) 對居住海外的證人未能或不願來港作證的情況所適用的擬議 安排。目前,唯一的途徑是,由香港法院發出請求書,或律 政司司長依據相互法律協助程序提出請求,向證人錄取證 供;
  - (b) 根據擬議安排,訴訟一方若希望法庭援引並聽取海外證人透 過電視直播聯繫作供,必須事先提出申請,並獲得香港法庭 批准。該方可決定是否循相互法律協助途徑,或不經海外機 關協助而私下作出安排;及
  - (c) 當局在高等法院設置一個具備可與海外作電視直播聯繫的設施的科技法庭,預計於2002年9月全面投入服務。

14. 主席總結時表示,有關法案提交立法會後會成立法案委員會予以研究。主席又要求政府當局在內務委員會成立法案委員會後提供資料,說明海外司法管轄區就藉電視直播聯繫錄取海外證人作供的資料,供法案委員會考慮。事務委員會2002年3月20日的會議紀要摘錄載於**附錄VIII**。

立法會秘書處 議會事務部2 2003年2月13日

立法會 CB(2)1889/00-01(01)號文件

## 立法會司法及法律事務委員會刑事訴訟中配偶的作證資格和可被強迫作證問題

#### 背景

1988年,法律改革委員會(法改會)發表了《刑事訴訟中配偶的作證資格和可否強制作證問題報告書》。1990年,政府提出條例草案,修訂《刑事訴訟程序條例》(第 221 條),以實施報告書的建議。然而,當時沒有通過條例草案,主要是顧及在中國人社會,強迫妻子指證丈夫可能會對妻子和家庭產生影響。此外,有幾位立法局議員對授權法庭豁免妻子作證的條文有所保留,認為作證與否應該由妻子本人,而不是由法庭決定。

- 2. 社會福利界批評立法局不通過法案,認為議員的觀念過時,香港的家庭多年來已經有所轉變,女性不再完全依賴配偶供養,也無須忍受虐待。
- 3. 法改會的建議,目的在於解除普通法中配偶不得作證的限制,使夫妻都有資格並可被強迫在所有案件為配偶作證辯護,而只有在危及家庭的罪行才可被強迫指證配偶。
- 4. 政府在 2000 年 7 月擬備了一份諮詢文件,再次提出條例草案實施 法改會的建議。諮詢文件(見附件 A)先後發給各婦女團體、社會福利機 構和有關的非政府機構徵詢意見。各有關機構可於兩個月內就諮詢文件 提交意見,其後諮詢期延長至四個月。

- 5. 截至擬備本文為止,政府共收到 16 份由下列團體提交的書面意見書-
  - (a) 監護委員會
  - (b) 平等機會委員會
  - (c) 香港崇德會
  - (d) 香港基督教服務處
  - (e) 香港基督教協進會
  - (f) 善導會
  - (g) 香港小童群益會
  - (h) 資深大律師甘達文
  - (i) 香港家庭計劃指導會
  - (i) 香港社會服務聯會
  - (k) 國際司法組織(香港分會)
  - (1) 香港城市大學法律學院
  - (m) 香港大律師公會
  - (n) 香港家庭法例會
  - (o) 新界鄉議局
  - (p) 香港律師會
- 6. 意見摘要載於**附件B**。

#### 諮詢結果

- 7. 法改會共提出 18項建議,主要建議如下一
  - (a) 夫妻一方同意便有資格在所有刑事訴訟指證配偶;
  - (b) 夫妻一方可被強迫在某些刑事訴訟指證配偶;

- (c) 夫妻一方可被強迫在所有刑事訴訟為配偶作證辯護。
- 8. 在收到的意見書中,上文第 7(a)段的建議明顯得到支持。至於第 7(b)段的建議,有四個團體表示反對,分別是香港律師會、國際司法組織(香港分會)、善導會及新界鄉議局。第 7(c)段的建議則受到國際司法組織(香港分會)及新界鄉議局的反對。
- 9. 下文進一步討論對第 7(b)及 7(c)段建議的正反意見。

#### 配偶可被強迫作控方及/或辯方證人

- 10. 反對強迫配偶作證的意見如下一
  - (a) 國際司法組織(香港分會)認為配偶應該有資格為控方及辯方 作證,卻不可被強迫為辯方或控方任證人。
  - (b) 善導會認為夫妻一方不論在什麼情況下都不該被強迫為控方 指證配偶。該會認為應該由夫妻自行決定是否指證配偶,而不 是由法庭決定。
  - (c) 律師會反對強迫夫妻一方為控方指證配偶,因為這會破壞婚姻 的神聖基礎,也損害夫妻之間的保密關係。
  - (d) 新界鄉議局反對強迫夫妻一方為控方或被控的配偶作證,原因如下。首先,被強迫作證的夫妻一方可能會隱瞞事實或採取不合作態度,影響證據的完整性和可信程度。第二,證據對所有刑事訴訟的被控人都十分重要,因此應該避免強迫作證,以免影響證人的誠信和可靠程度。第三,香港是中國人社會,建議會損害家庭的和諧關係,甚至會導致婚姻破裂。
- 11. 大部分回應諮詢文件的機構都支持上文第7(b)及(c)段建議。支持可強迫配偶作證的意見如下一
  - (a) 香港大律師公會支持法改會的建議,即改變了上次於十年前研究這個問題時的立場。不過,他們希望知道什麼罪行會被視為

"危及"家庭,以及/或會如何界定"危及家庭"的理念。只要建議會按諮詢文件所述的方式受到規限,他們不擬反對有關改革,並認為這是切合新世紀社會變遷的合理做法。

- (b) 香港家庭法例會不贊成把强迫配偶作證的一般規定延伸。不過,在涉及家庭成員被虐待或性侵犯的案件,該會大多數成員都支持配偶可被強迫作證的建議。
- (c) 香港家庭計劃指導會贊同《1990年刑事訴訟程序(修訂)條例草案》的目的:在保障公眾利益和維護婚姻家庭和諧兩者間求取平衡。該會支持法改會的主要建議:配偶可被強迫在所有案件為另一方作證辯護,但只有在危及家庭的案件才可被強迫指證配偶。
- (d) 香港基督教服務處支持建議,夫妻一方可被強迫在涉及家庭暴力及亂倫等家事的刑事訴訟中指證配偶。根據他們的經驗,某些案件是先要制止家庭暴力行為,才可以展開輔導工作和重建家庭關係。此外,配偶很可能是家庭暴力案件中的唯一證人。
- (e) 香港基督教協進會支持法改會的主要建議,包括應該強迫夫妻 為配偶作證辯護,只有危及家庭的案件才可強迫指證配偶。
- (f) 香港社會服務聯會支持法改會的建議:夫妻一方應該有資格和可被強迫為被控的配偶作證。該會認為夫妻一方應該有資格指證被控的配偶,但建議作證的一方必須得到支援,讓他們可以經過深思熟慮才作決定,並為這個決定可能引起的後果作好心理準備。該會建議長遠來說,夫妻一方應該可被強迫在所有案件指證配偶,因為人人(包括配偶)都可被強迫為控方作證,而且強迫作證會使配偶免於左右為難。不過,考慮到香港當前的家庭觀念,該會建議只有涉及暴力對待或性侵犯家中子女的案件,才可強迫配偶作證。
- (g) 監護委員會支持強迫作證的改革建議,但認為強迫為控方作證的規定,必須延伸至受害人是在家中居住而精神上無行為能力的成年人的案件,而不僅限於受害人是配偶、同居者及子女的案件。委員會認為改革建議可取,理由如下:第一,如果沒有

強迫作證的規定,被控的夫妻一方或會脅迫配偶不作證。第 二,讓家庭暴力的受害人選擇是否作證,會把整個重擔加在他 們身上,以致甚少會同意指證配偶。第三,可令家庭暴力者一 如 其 他 暴 力 者 受 到 懲 罰。 丈 夫 知 道 妻 子 可 被 強 迫 指 證 他 們 ,或 會 三 思 才 使 用 暴 力 。 妻 子 若 以 保 護 自 身 及 子 女 安 全 為 重 , 被 強 迫 作 證 會 失 去 經 濟 所 依 的 說 法 便 站 不 住 腳 。第 四 ,婚 姻 關 係 一 旦 因 為 配 偶 的 暴 力 行 為 而 破 損 得 無 法 挽 救 ,卻 因 為 妻 子 的 身 分 而不能指證丈夫,那便不能讓正義得以伸張。第五,對於沒有 慣性使用暴力的輕微毆打案,即使採納改革建議,控方事實上 也可以行使酌情權不用強迫配偶作證。正正是嚴重的毆打案需 要配偶可被強迫作證才會有效制止不斷的暴力行為。第六,一 些婦女挺身作證後變得堅強無懼。最後,強迫配偶作證,可以 改變 警方認為家庭暴力只不過是家庭糾紛的態度。委員會又建 議應該撤銷配偶或同居者豁免為控方作證的措施,因為犯事者 可以利用這個漏洞迫使配偶或同居者在所有案件都要求豁 免。

#### 政府的意見

- 12. 政府認為該否把強迫作證定為一般規則涉及平衡利益的問題。基於上文所述的理據和諮詢所顯示的社會大多數人士支持,政府認為不強迫夫妻互相指證最能切合香港社會利益和現行社會結構,除非一
  - (a) 控罪涉及毆打、傷害或威脅傷害被控人配偶,或毆打、傷害、 威脅傷害或引致子女或由夫妻一方充當父母的 16 歲以下兒童 死亡的罪行。
  - (b) 控罪是性罪行,而指稱受害人是被控人子女或由夫妻一方充當 父母的 16 歲以下兒童。
  - (c) 控罪指被控人企圖或串謀觸犯上述(a)或(b)項罪行,或協助、教唆、慫使、促致或煽動他人觸犯上述(a)或(b)項罪行。
- 13. 政府又認為基於社會大多數人的支持,為公眾利益起見,除非夫妻

- 一同受審,否則夫妻一方都應該可被強迫為配偶作證辯護。
- 14. 為此,政府建議立法實施法改會的全部建議。

律政司

法律政策科

2001年6月

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# 刑事訴訟中配偶的作證資格 和可否強制作證問題 諮詢文件

#### 問題

- 1. 1996年,女皇 訴 Wan Tak (1996年第 13 號)一案在高等法院審訊,期間不算長,審結後法官司徒冕去函當時的律政司馬富善,提出對這案的見解。被告人被控謀殺岳母,砍劈她致使身上多處受傷。司徒冕法官指出:要是被告人的妻子有"資格"作證,那麼證明對被告人的指控便容易得多。假設被告人的妻子願意作證,但現行法例又不容許她替控方作證,結果會是:雖然該名身為證人的妻子的供詞對審案有極大幫助,也只能留在公眾席旁聽母親被謀殺的案情,內心卻明白自己可以反駁辯方不少論據。
- 2. 在 較 近 期 的 一 宗 區 域 法 院 案 件 (DCCC 814/99)中 , 三 名 被 告 人 被 控 以 三 項 罪 名 。 三 名 被 告 人 同 時 被 控 的 首 項 控 罪 , 是 觸 犯 普 通 法中的串謀欺詐罪,可根據《刑事罪行條例》(第 200 章)第 159C(6)條 判 罰 。 他 們 不 認 罪 。 控 方 申 請 把 第 二 和 第 三 項 控 罪 記 錄 在 法 院 檔 案 中 , 法 院 也 頒 令 這 樣 做 。 辯 方 反 對 控 方 傳 召 其 中 一名被告人的丈夫出庭作供,就首項控罪指證妻子,理由是他 們是合法夫妻,而婚姻關係仍然存續,所以丈夫沒有資格作證 指證妻子。為了解決這個問題,控方必須修改首項控罪,加入 第四項串謀欺詐罪。該名妻子依然是首項串謀罪的被告人,但 並非第四項串謀罪的被告人,只有其餘兩名被告人才是第四項 控罪的被告人。最後,控方沒有就首項串謀罪舉證,該名妻子 因而得以脱罪。隨後的審訊只針對其餘兩名被告人的第四項控 罪 ,兩人其後獲裁定無罪。施允義法官在解釋為何這樣裁決時 指出:規定夫妻一方既沒有資格也不可強制作證指證另一方, 是"歷史遺留"的問題,他建議律政司"研究這方面的法例,以圖 修訂法例"。

#### 背景和論據

3. 本港刑事訴訟中關於配偶的作證資格和可否強制作證的現行法例,既受成文法又受普通法所規管。根據普通法,某人沒有資格為配偶作證辯護,或指證配偶,其中只有極少數的例外情況,例如:該人的配偶被控暴力對待該人。多項成文法規已經把這些普通法則的例外情況伸延,使某人有資格提供證據指證配偶,例如配偶被控觸犯了某幾類性罪行,或對 16 歲以下兒童作出一些犯罪行為。《刑事訴訟程序條例》(第 221 章)訂明:某人的配偶若是刑事訴訟的被告人,則該人有資格替配偶作證。根據現行法例,無論什麼情況下,都不可強制某人提供證據指證配偶。

#### 法律改革委員會(法改會)的建議和諮詢工作

- 4. 法改會在 1988 年公布的《刑事訴訟中配偶的作證資格和可否強制作證問題研究報告書》中,建議對關乎刑事訴訟中被告人的配偶或前配偶的作證資格,以及可否強制作證的法例作出一些修訂。
- 5. 一般說來,這些修訂讓配偶更有可能在刑事訴訟中作供,而且也表示在作證資格和可否強制作證方面,會把配偶視作與其他證人等量齊觀。不過,鑒於配偶彼此關係特殊,他們仍須受若干規則約束。
- 6. 關於本港現行法例、其他司法管轄區的情況,以及法改會的建 議連同支持和反對這些建議的論據摘要載錄於附件。
- 7. 法改會作出建議前,得到政務總署於 1986 年代表進行一項電話調查和指定受訪對象的問卷調查,以收集公眾意見。電話調查顯示:市民傾向於支持法改會在作證資格問題上的立場。但是,雖然調查結果顯示:強制配偶一般須作證指證另一方的做法可能不受歡迎,但法改會的另一項較為狹義的建議,即強制配偶在某幾類影響家庭的案件中為控方作證,則沒有受到質疑。

- 8. 共有 90 家機構對問卷調查 作出回應,所得結果與電話調查結果相若。這項調查確實顯示:受訪者大力支持強制配偶一般須提供證據為另一方辯護的做法。
- 9. 法改會的主要建議—
  - (a) 配偶如果同意的話,可以在所有刑事訴訟中為控方作證指證 另一方;
  - (b) 可強制配偶在某幾類刑事訴訟中,為控方作證指證另一方; 以及
  - (c) 可強制配偶為涉及刑事訴訟的另一方作證辯護。
- 10. 法改會建議的作用,是擺脫普通法有關配偶不得作證的僵化規定,改為配偶在各類案件中都有資格並可強制為另一方作證辯護,但只有在危及家庭的罪案中,才可強制配偶作證指證另一方。
- 11. 法改會建議應該把配偶定為合資格指證另一方的控方證人,是基於以下考慮一
  - (a) 為維護司法公正,所有取得的證據都應該得以呈堂。法改會特別留意到配偶目前禁止在嚴重罪行(例如謀殺、強姦和搶劫)的審訊中為控方作證;
  - (b) 贊成維持現狀的人認為如果配偶有資格作證並且確有為控方 指證另一方,可能會導致婚姻破裂。法改會認為這個論點與 到底配偶應否視為合資格證人(即會提供可信的證供)這個問 題無關。
  - (c) 少數配偶的證供或會失之偏頗,但是法院和陪審團應該有能力判斷證供是否可信。
- 12. 法改會也考慮到配偶一般可否強制為控方作證指證另一方的問題。法改會一方面須顧及維護婚姻制度和確認夫妻間私穩權的

公眾利益,另一方面也要顧 及保護配偶和子女並防止罪案的社會需要,在兩者間求取平衡。法改會因此沒有建議訂立一般原則,可強制配偶為控方作證,而建議應該只在若干特殊情況下,即被告人因暴力對待或性騷擾子女而威脅家庭本身,才可強制配偶為控方作證。

- 13. 相反,法改會建議應該強制配偶一般可為另一方作證辯護。即是說,被告人可以強制配偶為其作證。目前配偶可以為另一方作證辯護,但是不可以強制作證。法改會認為不論何時,被告人都應該有權為自己抗辯而要求呈示一切有關的證供,必要時包括配偶的證供。
- 14. 當局按照法改會的建議,於 1990 年 4 月 4 日向當時的立法局提交《 1990 年刑事訴訟程序(修訂)條例草案》。立法局專責小組成員經研究後支持條例草案的精神,而當局同意在當中加入容許被告人的配偶或同居者要求豁免作控方證人的條文。但是,條例草案在 17 票對 14 票及 9 票棄權的情況下不獲通過。條例草案支持者關注子女的利益和福利,認為在子女受身體或性虐待的案件中,"不可強制作證"的規定並不可取。反對者則擔心草案會對香港這個中國人佔大多數、傳統上家人關係緊密的社會結構,造成不良影響,所以最佳的做法還是由配偶自行決定是否作證。強制妻子指證丈夫可能等同要她離開家庭,奪去家庭給予她社會及經濟方面的保障,更不要說摧毀她的婚姻。
- 15. 如果《刑事訴訟程序(修訂)條例草案》於 1991 年獲立法局通過,法院便無須面對上述兩宗案件所出現的問題。

#### 1980 年的條例草案

16. 《1980年刑事訴訟程序(修訂)(第2號)條例草案》目的在於令配偶一般有資格指證另一方。當局在立法局專責小組會議後,撤回1980年的條例草案。行政立法兩局非官守議員在會上堅持一

- (a) 條例草案可能會損害夫 妻間的信任,令家庭破碎;以及
- (b) 被告人配偶提供的證供極不可信,因為既易受感情因素影響,又可能不是基於法律公義的原因而作證。

須注意的是:這條例草案的內容並不及《1990 年刑事訴訟程序 (修訂)條例草案》般深廣,後者不單提出配偶一般有資格指證另一方,某類案件還可強制作證。

#### 法律政策的角度

- 17. 社會福利署所提供的 1990/91 年度至 1998/99 年度的統計數字顯示:受虐待配偶個案的數目 10 年來普遍上升,而兒童受身體或性虐待的數目四年來也上升。從法律政策的角度而言,現在正是時候把現行法例的範圍擴大,落實《 1990 年刑事訴訟程序(修訂)條例草案》,更有效對付家庭暴力的問題。我們不應該讓犯錯的一方倚仗"配偶沒有資格作證"的規定得以逃避法律制裁,反之,應該讓配偶出庭指證。
- 18. 可強制作證的問題無疑較有資格作證的問題惹來更多爭議。 《1990年刑事訴訟程序(修訂)條例草案》沒有意圖大開方便之 門,使在任何情況下也可強制配偶作證,而只是為了在保障公 眾利益和維護婚姻家庭和諧兩者間取得更佳的平衡。

#### 諮詢意見

19. 由於這個課題的上次諮詢工作距今已約 14 年,期間兒童受身體或性虐待的個案增加,加上司徒冕法官和施允義法官分別於1996 年和 1999 年的評論,我們認為應該再次進行諮詢,以便當局在決定是否再次向立法會提交《1990 年刑事訴訟程序(修訂)條例草案》前,能夠清楚社會人士對這個課題的看法是否有變。歡迎各界人士就本諮詢文件和附件發表意見。請於 2000 年9 月 15 日或之前以書面提出。

### 刑事訴訟中配偶的作證資格和可否強制作證問題

#### 配偶作為辯方證人

#### 被告人配偶是否有資格為被告人作證

現行法律

1. 根據香港現行一般規則,被告人配偶有資格為被告人作證。

#### 其他司法管轄區的情況

2. 在英格蘭,除非夫妻二人一同被控,否則被告人配偶有資格為被告人作證辯護(《1984 年警察及刑事證據法令》第 80(1)和(4)條)。

#### 法律改革委員會(法改會)建議所持的理據

3. 法改會建議無須更改現行法律,認為不論任何案件,被告人配偶都應該有資格為被告人作證辯護。香港的《刑事訴訟程序條例》(第 221 章)第 54(1)條載有有關規定。其實,只要被告人配偶願意,就應該可以為被告人作證辯護,這是理所當然的。況且,法庭在衡量證據時,可自行考慮證人有沒有因為與被告人的關係而作出失實的證供。

#### 可否強制被告人配偶為被告人作證

#### 現行法律

4. 香港現行一般規則規定,不可強制被告人配偶為被告人作證。

#### 其他司法管轄區的情況

- 5. 在英格蘭,除非夫妻二人一同被控(《1984 年警察及刑事證據法令》第80(4)條),否則可強制被告人配偶為被告人作證(第80(2)條)。
- 6. 《加拿大證據法令》第 4(1)條規定,可強制被告人配偶為被告 人作證。
- 7. 在新西蘭,不論任何案件,都可強制被告人配偶為辯方作證 (《1908年證據法令》第 5(2)條)。
- 8. 在澳大利亞的維多利亞州、昆士蘭州和南澳大利亞州,法例規定可強制被告人配偶為辯方作證。

#### 法改會建議所持的理據

- 9. 反對可強制被告人配偶為被告人作證的論據是:可能入罪的有暴力傾向丈夫,或會使用暴力強迫妻子為他說謊。被告人配偶和其他家人受被告人威迫的機會無疑會較大,但其他證人也會遇到同樣的問題。不過,稱職的檢控人員應該可以在盤問證人時,識破證人有沒有被威迫捏造證供。
- 10. 只要看看被告人配偶需要被強制才願意為被告人作證這點,便可以明白贊成可強制被告人配偶為被告人作證的論據。常見的原因包括:被告人配偶的證供會對被告人有利,但不願意作證因也會令自己尷尬(例如會影響自己的社會地位或反映自己的道德操守或倫理觀念)、被告人配偶害怕出席審訊或被告人配偶怨恨被告人。如果被告人配偶怨恨被告人,那麼,被告人可能寧可不傳召配偶作證,因為有關證供可能對自己不利。但在其他兩個情況,只有強制被告人配偶為被告人作證,才可以確保所

有有關證據都得以呈堂,使被告人獲得公正的審訊。因此,為秉行公義,證人的疑慮僅屬次要的考慮因素。

- 11. 法改會在 1986 年進行的兩項民意調查顯示:反對可強制被告人 配偶為被告人作證的人佔多數。不過,法改會認為,為維護公 義起見,可能需要由法律改變市民對有關問題的看法。
- 12. 基於上述各點,法改會建議,除非夫妻二人一同被控,否則應該訂定一般規則,俾可強制被告人配偶為被告人作證辯護。

#### 被告人配偶是否有資格為與被告人一同受審的人作證

#### 現行法律

13. 根據現行法律,不論任何案件,被告人配偶都有資格為與被告人一同受審的人作證辯護,但必須獲得被告人的同意。不過,根據《刑事訴訟程序條例》(第 221 章)第 57 條,如果案件涉及暴力對待被告人配偶的罪行、叛逆罪、強迫婚姻罪或上述條例附表二所述罪行,則無須獲得被告人的同意。

#### 其他司法管轄區的情況

14. 在英格蘭,不論任何案件,即使未經被告人同意,配偶都有資格為同案被告人作證(《警察及刑事證據法令》第80(1)(b)條)。

#### 法改會建議所持的理據

15. 贊成必須獲得被告人同意的理據是:被告人可以保護自己,以免配偶作出的主問證據,或在被盤問時作出的證據,會對同案被告人有利,卻導致自己入罪。反對的理據是:如果被告人配偶願意為同案被告人作證,就不應該加以阻撓;規定必須獲得被告人的同意,可損害同案被告人把所有有利證據呈堂的權利,以至不能夠獲得公正的審訊。

16. 法改會建議,不論被告人同意與否,配偶都應該有資格為與被告人一同受審的人作證。

#### 可否強制被告人配偶為與被告人一同受審的人作證

#### 現行法律

17. 香港現行法律規定,不可強制被告人配偶為與被告人一同受審的人作證辯護。

#### 其他司法管轄區的情況

18. 在英格蘭,不論任何案件,都可以強制被告人配偶為同案其他被告人作證,那麼,即使會導致被告人入罪,都可強制被告人 配偶為控方作證(《警察及刑事證據法令》第80(3)條)。

#### 法改會建議所持的理據

- 19. 反對可強制被告人配偶為與被告人一同受審的人作證的理據 是:被告人配偶可能實際上是被強制指證被告人,令有關同案 被告人脫罪。法改會認為,強制不願意作證的被告人配偶為同 案其他被告人作證,原則上是不對的。被告人配偶不願意為同 案其他被告人作證的理由很多,其中包括害怕導致被控的配偶 入罪。
- 20. 法改會認為,除非本來已經可強制被告人配偶為控方作證,否則不應該規定可強制被告人配偶為同案其他被告人作證。

#### 一同受審的夫妻是否有資格為對方作證

#### 現行法律

21. 根據現行法律,因相同罪名受審的夫妻有資格為對方作證。

#### 其他司法管轄區的情況

22. 在英格蘭,根據《1984年警察及刑事證據法令》第 80(1)(b) 條,一同被控的夫妻有資格為對方作證。

#### 法改會建議所持的理據

23. 法改會認為,有關法律沒有問題,無須改革,在同一法律程序中受審的夫妻應該有資格為對方作證。

#### 可否強制一同受審的夫妻為對方作證辯護

#### 現行法律

24. 現行法律規定不可強制一同受審的夫妻為對方作證辯護。

#### 其他司法管轄區的情況

25. 在英格蘭,可強制夫妻為對方作證(《1984 年警察及刑事證據法令》第80(2)條)。不過,如果夫妻二人一同被控,任何一方都不可以按照上述法令第80(1)(a)、(2)或(3)條的規定而有資格或可以強制在審訊中為另一方作證,除非擬作證一方因為已經認罪或因為其他原因而不會或不再會在審訊中被定罪(《1984 年警察及刑事證據法令》第80(4)條)。

#### 法改會建議所持的理據

26. 法改會認為,既然夫妻二人因同一罪名受審,那麼,雙方都享有被告人的一切權利和特權,包括不作證和不導致自己入罪的權利。

27. 因此,法改會認為,如果夫妻二人因同一罪名受審,那麼,規定可強制被告人配偶為被告人作證的一般規則就不應該適用,除非該配偶因為若干原因而不會或不再會在審訊中被定罪。

#### 配偶作為控方證人

#### 配偶是否有資格為控方作證

#### 現行法律

- 28. 配偶並無資格為控方作證,但下列情況例外
  - (c) 接普通法,案件屬於暴力對待配偶的罪行、叛逆罪及強迫婚姻罪;
  - (d) 按成文法《刑事訴訟程序條例》(第 221 章)第 57(1)條,案件屬附表二內所列法例下的罪行;以及
  - (e) 按成文法《盗竊罪條例》(第 210 章)第 31 條,案件屬夫妻 一方控告另一方或控罪涉及配偶一方的財產者。

#### 其他司法管轄區的情況

- 29. 在英格蘭,除夫妻二人一同被控的情況之外,配偶在任何案件中都有資格指證另一方(《警察及刑事證據法令》第80(1)條及(4)條)。
- 30. 根據《加拿大證據法令》第 4(2)條,配偶有資格為控方指證被控的另一方,而無須取得後者的同意。有關控罪可以是企圖或訂明的實質罪行,包括性騷擾、提出作性接觸的要求、性虐待、亂倫、獸交、令兒童道德敗壞、猥褻行為、性侵犯、拐帶、重婚、多配偶婚姻等。《加拿大證據法律令》第 4(4)條容許配偶就多類訂明罪行,指證被控告的另一方,這些罪行包括

刑事疏忽導致死亡、一級及二級謀殺罪、誤殺、殺嬰、企圖謀殺、襲擊罪等。

#### 法改會建議所持的理據

- 31. 不贊成把配偶有資格作證定為一般規則的論據包括:證供可能 因夫妻關係而失之偏頗、可能造成婚姻破裂、夫妻間的信任恐 怕會受破壞,並且令配偶在履行社會責任防止罪行和忠於配偶 兩者之間難作取捨。
- 32. 贊成配偶一般有資格作證的論點包括:法院在衡量證據時,可自行考慮證供會否失之偏頗,而有關證據又是否都應該全部呈堂。配偶如果願意作證,實在看不出予以阻止可有甚麼好處。
- 33. 法改會認為配偶如果願意,自當有資格為控方作證指證另一方。法改會因此建議配偶有資格在任何案件中為控方作證指證另一方。

#### 可否強制配偶為控方作證

#### 現行法律

34. 按照香港現行的法例,在任何情況下都不可強制配偶指證另一方。

#### 其他司法管轄區的情況

- 35. 在英格蘭,根據《1984年警察及刑事證據法令》第 80(3)條,涉及暴力對待配偶或 16 歲以下兒童、或性侵犯 16 歲以下兒童的案件,可強制配偶指證另一方。
- 36. 根據《加拿大證據法令》第 4(2)及(4)條,若干訂明的罪行可強制配偶為控方作證指證另一方。

37. 在澳大利亞維多利亞州,根據當地法律,可強制配偶為控方作證,除非獲得法官"全面的或就某一指定事項"准予豁免。這司法決定的準則另有條文規定。

#### 法改會建議所持的理據

- 38. 贊成配偶可強制為控方作證的理由很多,例如:配偶被強制指證另一方,因此不該受到對方怪責。夫妻一方如果受法例規定強制作證,便不存在應該忠於配偶還是應該忠於受害一方的問題。配偶如非強制作證,則可能會有部分相關事實無法呈堂。配偶證人的證供不可用以指證犯罪的另一方,因而讓夫妻一方肆無忌憚地在另一方的面前犯案,是極為不當的。捉拿罪犯並把他繩之於法的公眾利益,與維繫夫妻間婚姻關係的另一種社會利益比較,當會以前者為重。
- 39. 反對可強制配偶作證的理由如下:強制作證勢必損壞夫妻間的信任。可強制配偶作證,令另一方有被判有罪和受到懲罰之虞,可令配偶失去社會和經濟上的保障,家庭幸福不保。政府並無充分理由強迫夫妻面對必須指證另一方的困境。這不但與提倡夫妻互愛互信的做法背道而馳,且很可能要他們承受社會和經濟上的嚴重後果。
- 40. 法改會認為應否把強制作證定為一般規則涉及權衡利益的問題。一方面,維持婚姻制度和尊重夫妻間私隱符合社會利益,但另一方面檢控罪犯把他們繩之於法也同樣符合公眾利益。法改會在 1986 年進行的調查顯示: 民意反對可強制作證。法改會經衡量各方面意見後認為,為了香港的社會利益和考慮到現有的社會結構狀況,不該強制配偶為控方指證另一方,除非是以下情況: 配偶被指暴力對待或性侵犯家人,即子女或未滿 16 歲而由夫妻一方以父母身分管養的兒童。

#### 配偶是否有資格為控方作證,指證與另一方一同受審的人

現行法律

41. 被告人配偶無資格為控方作證,指證與被告人一同受審的人, 但如果案件涉及暴力對待被告人配偶的罪行、叛逆罪或強迫婚姻 罪和《盜竊罪條例》(第 210 章)第 31 條所述的罪行,則可作證。

#### 其他司法管轄區的情況

42. 在英格蘭,配偶有資格指證另一方的同案被告人(《1984 年警察及刑事證據法令》第80(1)(a)條)。

#### 法改會建議所持的理據

43. 法改會曾建議配偶有資格在所有案件中作證。為貫徹這項建議,法改會也建議配偶應該有資格為控方作證,指證任何與另一方一同受審的人。

#### 可否強制配偶為控方作證,指證與另一方一同受審的人

現行法律

44. 不可強制配偶為控方作證,指證與另一方一同受審的人。

#### 其他司法管轄區的情況

45. 在英格蘭,不可強制被告人配偶指證與被告人一同受審的人,除非控罪牽涉暴力對待該配偶,或暴力對待或性侵犯 16 歲以下兒童(《1984年警察及刑事證據法令》第 80(3)條)。

#### 法改會建議所持的理據

46. 法改會曾建議,不該把可強制配偶為控方作證定為一般規則。 為貫徹這項建議,法改會也建議不該強制配偶為控方作證,指 證另一方的同案被告人,但牽涉向妻子施用暴力,或對某年歲 以下兒童作出有損身體和性侵犯的行為,則不納入一般規則之 內。

#### 一同受審的夫妻是否有資格為控方作證指證配偶

#### 現行法律

47. 一同受審的夫妻,雙方都沒有資格為控方作證指證配偶。

#### 其他司法管轄區的情況

48. 在英格蘭,法律明文規定夫妻如因同一控罪而一同受審,則不得在審訊中指證對方,除非對方當時不再會因有關罪名入罪(《1984年警察及刑事證據法令》第80(4)條)。

#### 法改會建議所持的理據

- 49. 法改會同意,夫妻有自由按本身的意願作證是一項基本原則,但這個原則還是要讓另一個更重要的原則先行:兩人因同一控罪一同受審,任何一人都不能為控方作證。這會侵犯緘默權和免使自己入罪的特權。但假如夫妻一度一同被控,但現在不再會因有關罪名入罪,則情況便有所不同。
- 50. 法改會因此建議如果夫妻二人因同一罪名一同受審,就不該有資格為控方作證指證配偶,除非這名配偶證人不再會因有關罪名入罪。

#### 一同受審的夫妻可否強制為控方作證指證配偶

#### 現行法律

51. 在香港目前的刑事訴訟程序中,不可強制配偶為控方作證。

#### 其他司法管轄區的情況

52. 在英格蘭,不可強制夫妻任何一方在審訊中為控方作證指證有關控罪,除非這方因已認罪或其他任何理由而在審訊中不會、或不再會入罪(《1984年警察及刑事證據法令》第80(4)條)。

#### 法改會建議所持的理據

53. 法改會認為,強制配偶指證在同一案件被控的另一方,是有違免使自己入罪的規則和對辯制度所賦予被告的緘默權,故此是不能接受的。不過,若在審訊中其中一方因任何理由而不再會因有關罪行而入罪,那麼,上述因素便不適用。因此,在涉及性侵犯或暴力傷害家人的案件中,可強制配偶作證。

#### 保留夫妻通訊保密特權的規定

#### 現行法律

54. 在普通法中,夫妻之間的通訊是沒有保密權的,但雙方在婚姻 爭執調解過程中向中介人作出的陳述則不在此列。香港的《證 據條例》(第 8 章)第 7 條規定:在刑事法律程序中,不得強迫丈 夫披露妻子在婚姻存續期間向其作出的任何通訊,也不得強迫 妻子披露丈夫在婚姻存續期間向其作出的任何通訊。

#### 其他司法管轄區的情況

- 55. 英格蘭法律改革委員會在《民事訴訟特權研究報告書》(第 16 號報告書,1967年)中,批評《1853年證據(修訂)法令》第 3 條所載的保密特權(與香港《證據條例》第 7 條所載的相似)是不合邏輯的,因為它把披露夫妻通訊的特權賦予得到信任可保守秘密的一方,而非寄予信任的一方。
- 56. 加拿大法律改革委員會也作出了類似的批評。
- 57. 英格蘭刑法修訂委員會還建議,廢除《1898年刑事證據法令》第 1(d)條所載刑事訴訟中的類似保密特權(證據研究報告書:證據(一般),(1972年),Cmnd:4991)。英格蘭《1984年警察及刑事證據法令》第 80(9)條終於在刑事訴訟中廢除了這項保密特權。

#### 法改會建議所持的理據

- 58. 儘管 1986 年法改會委聘的意見調查結果顯示:多數人贊成保留這項特權,但法改會依然認為,在配偶受審的案件中,倘另一方可受強制為辯方或控方作供,那便應該廢除可拒絕透露配偶在婚姻存續期間對其作出的任何通訊的特權,否則上文所述的配偶證人可以拒絕回答涉及《證據條例》第 7 條所指的一類通訊問題,而可強制作證的規則也會變得毫無意義。
- 59. 法改會建議配偶受審而另一方可受強制為辯方或控方作證的案件,應該撤銷《證據條例》第 7 條所載可拒絕透露夫妻間通訊的特權,但其他案件則應予保留。

#### 配偶證人應該享有免使配偶入罪的特權

#### 現行法律

60. 在刑事訴訟中,似乎夫妻任何一方都無特權以回答可能導致配偶入罪為理由,拒絕回答問題。不過,有些司法界的意見主張在普通法上訂立一項由免於自招罪責特權引伸而來的特權,使證人可以拒絕提供可令配偶入罪的證據。

#### 其他司法管轄區的情況

- 61. 在英格蘭,夫妻任何一方在民事訴訟中都享有免使配偶入罪的特權(《1968年民事證據法》第 14條),但在刑事訴訟中卻無相同規定,《1984年警察及刑事證據法》並沒有觸及這個問題。
- 62. 愛爾蘭法律改革委員會認為當夫妻一方被控刑事罪時,配偶既然有權不受強制為控方作證,則這位配偶證人在作證時自然也有權避免使被控的配偶入罪。免使自己入罪的特權是基於一項原則,就是強制某人回答問題,可能因而使他/她受到刑事懲罰,是惹人反感的。強制某人使配偶入罪,比強制某人使自己入罪更令人反感(《配偶作證的資格及可強制性問題報告書》(LRC 13-1985))。

#### 法改會建議所持的理據

63. 法改會認為特權令到可強制配偶作證的原則變得沒有意義。但是,法改會基於上述原因(見第 30 至 32 段),贊成作為一般原則,在刑事訴訟中,除卻特殊情況外,不可強制配偶擔任控方證人,指證另一方。因此,可強制作證不容有免使配偶入罪的特權。法改會也注意到香港法例中也有其他條文,對規管範圍內的案件保障配偶享有的特權,例如《盜竊罪條例》(第 210 章)第 31(3)(a)條及《刑事罪行條例》(第 200 章)第 66 條。法改會認為建議訂立免使配偶入罪的法定特權,而訂明不適用於可強制配偶為控方作證的案件,是原則上合乎情理的。

該否准許控方評論夫妻一方未有傳喚有資格作證又可強制作證的配偶作證

#### 現行法律

64. 在香港,控方不得就被告人沒有舉證,或被告人的妻子或丈夫沒有作證,作出任何評論(《刑事訴訟程序條例》(第 221 章)第 54(1)條)。

#### 其他司法管轄區的情況

65. 英格蘭的《1984年警察及刑事證據法》第 80(8)條規定,控方不得就被告人的妻子或丈夫沒有作證而作出任何評論。

#### 法改會建議所持的理據

66. 容許控方作出評論的理據在於若法律規定可強制某證人為辯方作證,原則上即表示證人的證供與案件有關,又有重要性。沒有傳召證人作證因此可能應該受到評論。法改會認為縱使被告人的配偶願意作證而且他/她的證供又對被告有利,被告人也可能基於許多理由而不願傳召他/她作證,而有關理由可能與案件全無關係(例如由於這人感到羞怯、尷尬、恐懼等)。再者,沒有作證本身並不能證明任何事情。同樣地,評論也不是有罪的證據。若容許主控官利用被告人的緘默,以合法的評論來中傷被告人,這對被告人並不公平。因此,法改會建議法律應該規定:被告人沒有要求傳召配偶出庭作證為他/她辯護,主控官不得加以評論。

#### 同居者該否受到與配偶相同的規則規管

#### 現行法律

67. 香港法律規定: 評定人身傷害賠償額及家庭暴力案件的同居者

地位,與已婚夫婦的地位相若(見《1986年法律修訂及改革(綜合)(修訂)條例》及《1986年家庭暴力條例》)。

#### 其他司法管轄區的情況

- 68. 英格蘭《1984 年警察及刑事證據法》所制定的規定,並沒有為同居者訂立特別條文。
- 69. 另一方面,南澳大利亞州的證據規定把同居者看待如配偶(《1929年證據法》第21條)。

#### 法改會建議所持的理據

70. 同居者的問題並沒有明文列入法改會的研究範圍。法改會認為 建議的重點在於讓法庭可以得到更多夫婦間的證供,把特別豁 免權擴大及於同居者,多少會有損原來的目的,因此不建議把 新規則擴大至同居者。(註:當《刑事訴訟程序(修訂)條例草 案》於 1990 年提交審議時,政府同意在委員會審議階段修訂條 例草案,容許配偶及同居者可向法院申請豁免指證被控的配偶 或同居者的義務。)

#### 夫妻一旦離婚(或分居),關於配偶的規定該否仍然適用

#### 現行法律

71. 現行法律規定:夫妻一旦離婚,又或婚姻宣告無效,雙方即不再受到關於配偶的特別規定所影響,例外情況是雙方都沒有資格就婚姻存續期間的某事指證對方,這是假定即使兩人的婚姻關係仍然維持,任何一方都沒有資格作證(Algar [1954年] 1 Q.B. 279)。如夫妻已經由法庭判決分居,則兩人仍受適用於配偶的規定所規限。

#### 其他司法管轄區的情況

- 72. 英格蘭的《1984 年警察及刑事證據法》第 80(5)條規定,所有訴訟的前配偶都一如其他證人,有資格並可強制就婚前婚後及期間發生的事情,為前配偶作證辯護或指證前配偶。
- 73. 澳大利亞塔斯馬尼亞州的規定更進一步。《1981 年證據修訂法》強制現配偶指證另一方在婚前所犯罪行。

#### 法改會建議所持的理據

74. 一項以法改會名義於 1986 年進行的意見調查顯示:較多人贊成離婚男女應該如未婚人士一樣看待,即使有關事情是在仍為夫妻期間發生的。法改會認為即使婚姻關係終止,強制前配偶就離婚前的事情作證可能令人反感,而且不公平,因為事情是在雙方關係密切又互相信任的期間發生的。法改會因此建議,除可強制配偶作證的案件外,不該強制夫妻在離婚或是在可以作廢的婚姻宣告無效之後,就婚姻存續期間的事情互相指證。經法庭判決分居的人士則應該繼續受分居前的規定所規限。

#### 該否就被告人的父母子女及其他親屬訂立特別的作證規定

#### 現行法律

75. 原則上,任何人士都有資格並可強制在刑事訴訟中作供。目前並無對被告人的配偶以外人士,如父母、子女及其他親屬訂立特別規定。

#### 其他司法管轄區的情況

76. 在英格蘭,除配偶外,並沒有為其他親屬訂立特別條文。

- 77. 澳大利亞維多利亞州的《1978 年刑事罪行(配偶證人作證資格及可強制性)法》賦予法官酌情處理權,即如果法官認為,除其他問題外,強制被告人的妻子、丈夫、父母或子女作證,對被告人與證人之間的關係可能造成的損害,或由此引起的痛苦大於強制證人作證,便可豁免上述人士在一般事情或就某項事情為控方作證。
- 78. 南澳大利亞州的《1929年證據法》第21條賦予法官相若權利, 豁免被告人的近親在上述類似情況下出庭指證被告。"近親"的定 義是配偶、父母或子女。
- 79. 愛爾蘭法律改革法改會建議(LRC 13-1985),刑事檢察處處長應該先考慮維多利亞州和南澳大利亞州規定的相若因素,然後才決定是否基於公眾利益,強制被告的子女或父母指證被告。

#### 法改會建議所持的理據

80. 上述問題並非法改會的研究範圍。未有仔細研究並徵詢公眾意見之前,法改會只建議日後由有關部門進一步研究。

#18673 (AD-QGO01)

## 刑事訴訟的配偶作證資格 和被強迫作證問題 諮詢文件

截至 2000 年 12 月 18 日 , 各機構回應諮詢文件的意見摘要如下。

#### 法律界的意見

#### 香港家庭法律協會

- 2. 香港家庭法律協會支持廢除夫妻沒有資格在刑事訴訟中指證配偶的普通法規則,除非夫妻二人是案中的共同被告人,並要保留免導致自己入罪的特權。
- 3. 該會不贊成把強迫配偶作證的一般規定延伸。不過,涉及家庭成員被虐待或性侵犯的案件,該會支持配偶可被強迫作證的建議。
- 4. 該會贊成保留夫妻之間的通訊保密特權,除非案件可強迫配偶作證。
- 5. 該會建議把普通法及法規(包括目前的建議)有關配偶作證資格、配偶被強迫作證及夫妻通訊的規定,延伸至沒有結婚的伴侶。

#### 資深大律師甘達文先生

6. 甘達文先生認為基於公眾利益,應該解除普通法規定的限制,採納法律改革委員會(法改會)的建議。不過,他建議制定條文,規定強迫 夫妻一方為控方指證配偶前,必須先取得律政司司長的同意。

#### 香港律師會

7. 律師會同意法改會的建議,讓配偶有資格在刑事訴訟擔任控方證

人。

8. 至於刑事訴訟可否強迫配偶為控方作證的問題,律師會同意被控人配偶可被強迫為被控人作證辯護,並且認為倘若被控人配偶未能為被控人作證辯護,控方不得因此作出評論。此外,律師會反對被控人配偶可被強迫為控方作證的建議,因為這會破壞婚姻的神聖基礎。

#### 香港大律師公會

9. 大律師公會原則上同意諮詢文件羅列的所有建議,但希望知道什麼罪行會被視為"危及"家庭,以及/或如何界定"危及家庭"的理念。

#### 社會福利團體的意見

#### 香港家庭計劃指導會

10. 家計會支持政府再次提交《1990 年刑事訴訟程序(修訂)條例草案》,並贊同條例草案的目的:在保障公眾利益和維護婚姻家庭和諧兩者間求取平衡。該會支持法改會的主要建議:配偶在所有案件都有資格並可被強迫為另一方作證辯護,但只有在危及家庭的罪案才可強迫配偶指證另一方。

#### 崇德 社

- 11. 崇德社贊成法改會的大部分建議,但不贊成下列兩項建議一
  - (a) 規定不論被控人是否同意,配偶都有資格為與被控人一同受審的人作證;
  - (b) 對於夫妻一方受審而配偶可被強迫為辯方或控方作證的案件, 《證據條例》第7條所載的夫妻通訊保密特權應予撤銷,但其 他案件則該保留。
- 12. 對於某些類別的刑事訴訟夫妻一方可被強迫指證配偶的建議,崇德會表示贊成,但也有一點保留。該會認為這項建議會對婚姻和家庭

造成嚴重的後遺症。她們關注到儘 管香港有些婦女已經無須因為依靠配偶供養而忍受虐待,但是仍有部分婦女,大都是從內地來港的新移民,極需丈夫供養而唯有強忍家庭暴力。該會建議進行調查收集更多數據,並應該特別關注新移民和低收入家庭的情況。

#### 香港基督教服務處

- 13. 香港基督教服務處贊成法改會的建議,夫妻一方有資格在所有刑事訴訟中指證配偶,因為被控人配偶應該享有與其他市民相同的權利。然而,該處建議必須向需要決定是否作供的配偶提供支援服務,讓他們可以經過深思熟慮才作決定,並為這個決定可能引起的後果作好心理準備。
- 14. 此外,該處反對夫妻一方可被強迫在所有刑事訴訟指證配偶的建議。這項建議在多方面來看都不恰當。第一,這樣會把可以補救的家庭關係破壞至無可挽救。第二,配偶未必是案中唯一或最重要的證人。第三,其他家人或會責備作證的配偶。再者,配偶作證後需要一段長時間才能平復所受的精神壓力。
- 15. 然而,該處支持建議,在涉及家庭問題如家庭暴力及亂倫的刑事訴訟,夫妻一方可被強迫指證配偶。這是因為從他們的經驗所得,某些案件必須先行制止家庭暴力,才能展開輔導工作,重建家庭關係。再者,配偶大多是家庭暴力案件的唯一證人。
- 16. 他們認為建議通過成為法例後,當局必須立刻向作證配偶提供充分支援服務,以免適得其反。

#### 香港基督教協進會

- 17. 香港基督教協進會(基協會)贊同法改會提出的下述改革建議一
  - (a) 夫妻一方可被強迫為配偶作證辯護;
  - (b) 夫妻一方有資格和可被強迫指證配偶;
  - (c) 被控人的配偶有資格和可被強迫指證與被控人一同受審的

人;以及

- (d) 一同受審的夫妻可被強迫指證配偶。
- 18. 基協會又支持取消夫妻之間的通訊保密特權,並按法改會所建議的方式訂定可免指證配偶的法定特權。
- 19. 然而,基協會贊同保留現行法律的規定:不論任何案件,被控人的配偶都有資格為與被控人一同受審的人作證辯護,但必須獲得被控人的同意。不過,根據《刑事訴訟程序條例》(第 221 章)第 57 條,如果案件涉及暴力對待被告人配偶的罪行、叛逆罪、強迫婚姻罪或上述條例附表二所述罪行,則無須獲得被控人的同意。基協會提出的理由是被控人應該有能力保護自己,免受配偶的證供影響自己的抗辯。

#### 善導會

- 20. 善導會支持配偶有資格在所有刑事訴訟指證另一方的建議。該會認為配偶作證會損害婚姻的論據欠缺說服力,因為引致犯罪者與配偶之間的婚姻破裂,主要是因被控一方的犯罪行為而不是雙方對簿公堂所致。
- 21. 然而,該會反對在任何情況下配偶都可被強迫為控方作證的建議,理由是儘管社會希望檢控犯事者並把他們定罪,但是否指證配偶應該由個人而不是由法庭來決定。

#### 香港小童群益會

- 22. 香港小童群益會支持建議,被控人的配偶在任何刑事訴訟都應該有資格指證被控人,但該會認為,除了涉及暴力對待及性騷擾子女或未滿 16 歲兒童的情況外,配偶應該可以自行選擇是否作證。
- 23. 該會認為不應該強迫配偶指證另一方,因為這樣做可能會對作證的一方或對家庭造成極大困擾。

# 香港社會服務聯會

# a. 信念

- 24. 香港社會服務聯會(社聯)所提的建議是基於以下信念一
  - (a) 修訂的法例應該以維繫家庭關係和尊重個別家庭成員的權利 為依歸;
  - (b) 條訂的法例應該基於保護配偶和家人安全的原則處理作證資 格和可否被強迫作證的問題;
  - (c) 配偶的證供應該交由法庭考慮;以及
  - (d) 配偶應該與其他市民一樣,在任何刑事訴訟都有資格作證和 可被強迫作證。

# b. 配偶作辯方證人

- 25. 社聯支持法改會的建議,被控人的配偶應該有資格和可被強迫為被控人作證辯護。
- 26. 社聯又支持法改會的建議,不論被控人是否同意,配偶都應該有資格為與被控人一同受審的人作證,但不可被強迫作證,除非被控人配偶可被強迫擔任控方證人。
- 27. 社聯還贊同夫妻如一同受審,雙方都應該有資格為配偶作證。不過,如果基於某些原因,一方不會或不再會在審訊中因該項罪名被定罪,則配偶不可被強迫作證。

# c. 配偶作控方證人

28. 社聯認為被控人的配偶應該有資格指證被控人,但建議必須為作證的配偶提供支援服務,好讓他們能夠經過深思熟慮才作出決定,並為決定可能引起的後果作好心理準備。

- 29. 社聯建議長遠來說,夫妻一方應該可被強迫在所有案件指證配偶,理由是社會的每一分子(包括夫妻),都應該可被強迫為控方作證,而強迫作證的規定可免除配偶陷入進退兩難的困境。不過,鑒於香港目前的家庭觀念,社聯建議只在涉及向一方子女施以暴力或性侵犯的案件,配偶才可被強迫作證。
- 30. 社聯支持法改會的建議,被控人的配偶應該有資格指證與被控人一同受審的人。不過,社聯認為,正如被控人的配偶指證被控人一樣,暫時來說配偶不該被強迫作證,除非案件涉及向兒童施以暴力或性侵犯的罪行。
- 31. 社聯建議夫妻如因同一罪名一同受審,任何一方都不該有資格為控方指證配偶,除非配偶證人已經不會因該項罪名被定罪,且案件涉及向兒童施以暴力或性侵犯的罪行。
- 32. 基於同一原則, 社聯建議夫妻如因同一罪名一同受審,雙方都不該可被強迫指證配偶,除非配偶證人已經不會因該項罪名被定罪,且案件涉及向兒童施以暴力或性侵犯的罪行。

#### d. 其他

- 33. 社聯贊同法改會的建議,對於夫妻一方受審而配偶可被強迫為辯方或控方作證的案件,《證據條例》第 7 條所載的夫妻通訊保密特權應予撤銷。
- 34. 社聯還贊同訂立免指證配偶的法定特權,但這項特權不適用於配偶可被強迫擔任控方證人的案件。
- 35. 社聯支持法改會的建議,控方不得就被控人未能傳召配偶作證而作出評論。
- 36. 社聯建議應該把有關的新規定延伸至同居者,因為沒有結婚但一起同居並育有子女的夫婦越來越多。

- 37. 社聯不贊同法改會的建議,建 議指不得強迫曾經結為夫婦的人在離婚或是在可以作廢的婚姻宣告無效之後,就婚姻賡續期間的事情互相指證,除非是可強迫配偶作證的案件。社聯建議夫妻一旦離婚,有關夫妻的所有規定便不再適用,離婚的配偶不僅在某些案件可被強迫作證,更在所有刑事訴訟有資格作證和可被強迫作證。
- 38. 社聯贊同不需要為被控人的父母、子女及其他親屬訂立特別規定。

# 法定團體提交的意見

# 平等機會委員會

- 39. 平等機會委員會(平機會)贊同法改會的建議,但提出兩個需要關注的問題。
- 40. 首先,強迫配偶在某類案件作證,對要與肆虐丈夫共住的婦女造成一定壓力。這些婦女只能有兩個選擇:一是由於擔心個人或子女的人身安全而拒絕作證,以致觸犯藐視罪而要面對入獄;或是挺身作證,然後忍受可能是身體上和經濟上的惡果。因此,平機會建議透過立法或行政措施,設立某些組織或機制,向這類婦女提供保護和協助。
- 41. 其次,根據《性別歧視條條》(第 480 章)從婚姻狀況歧視的角度來看,"配偶"的定義應該延伸至包括普通法定義上的配偶。

# 監護委員會

- 42. 監護委員會(監委會)認為,應該更詳細交代修改有關法律的理據, 即是幫助家庭暴力或性虐待受害人,否則立法會會視為只是借改革建 議來撤除對犯罪者的一貫保障。
- 43. 監委會支持強迫作證的改革建議,但認為强迫指證的範疇不應僅局限於配偶、同居者和兒童的案件,還應該延伸至侵犯家中精神上無

行為能力成年人的罪行。監委會建 議,在擬議的纒擾和騷擾法例制定後,配偶也應該可被強迫在纒擾和騷擾案指證配偶,而非僅僅限於暴力對待和性虐待家人的案件。

- 44. 監委會認為改革建議可取,理由是:第一,沒有強迫作證,被控人有可能脅迫配偶不得作證。第二,把是否作證的抉擇交給家庭暴力受害人,是把整個重擔加在受害人身上,因而鮮會同意指證配偶。第三,這樣可以令家庭暴力者如同其他暴力者般受到懲罰。第四,婚姻關係因暴力破壞至無可挽救的地步,卻因為是配偶的關係而不得指證被控人,這種做法不能讓正義得以伸張。此外,丈夫知道妻子會被強迫作供指證他們,或會三思才使用暴力。暴力行為一定會帶來嚴重的後果,欺凌弱小也會有所顧忌。有關改革還有助保障婦女安全和防止兒童受到家庭暴力的心理影響。部分婦女挺身作證後變得堅強無懼。最後,准許強迫配偶作證可能有助改變警務人員以為家庭暴力只是家庭糾紛的觀念。
- 45. 監委會還對某些反對改革的論據表示意見。擔心配偶作證後會失去丈夫供養的問題上,監委會認為妻子和子女的人身安全比較得到供養更為重要。雖然監委會承認犯罪者很可能對被強迫作證的配偶作出報復,但相信加強警方的專門訓練可以預先防備實際威脅而有助保護婦女的安全。監委會表示,有人擔心婦女被強迫作證可能受到丈夫更差的對待,這點可以透過加強對家庭暴力受害者的保護和支援來解決。
- 46. 監委會強烈要求檢討《家庭暴力條例》(第 189 章),原因是條例只能為某類家庭成員提供保障。

#### 新界鄉議局

- 47. 鄉議局反對有關建議,不贊同强迫夫妻一方指證配偶或為被控的配偶作證辯護。
- 48. 鄉議局提出多個理由:第一,被强迫作證的配偶可能隱瞞真相或採取不合作態度,影響證供的完整性和可信程度,還可能誤導法庭。第二,任何證供對刑事訴訟的被控人都很重要,因此,為確保證人的誠信

和可靠程度,應該避免強迫作證。此外,香港是個中國人社會,有關 建議會損害和諧家庭關係,甚至導致婚姻破裂。該局還表示,由於文化

和傳統習俗的不同,其他司法地區的做法未必適用於香港。

49. 不過,鄉議局贊同假若被控人的配偶同意作證,那便有資格作供

指證被控人。

其他方面提交的意見

香港城市大學

50. 城市大學趙文宗博士提出意見,反駁以侵擾家庭和破壞中國傳統

文化理由反對法改會建議的論據。

51. 趙博士認為家庭屬於私人領域,因此不該受到公法侵擾的說法理

據不足。秉行公義才是保障家庭成員權利的唯一標準。諮詢文件可以

視為邁向這個方向的第一步。他論定不該死守有違公正原則的中國傳

統觀念。

國際司法組織(香港分會)

該 會 認 為 配 偶 應 該 有 資 格 , 但 不 應 該 被 強 迫 擔 任 控 方 或 辯 方 的 證

人。

該會還認為被控人的配偶應該有資格,但不應該被強迫指證與被

控人一起受審的人。

54. 該會贊同法改會的建議,認為與被控人一同受審的人如果要求被

控 人 的 配 偶 擔 任 證 人 , 必 須 先 得 到 被 控 人 同 意 的 規 定 應 該 廢 除 。

檔號: LP/615/00

2001年6月

#35198

(c) 政府認為具充分理由可以强制配偶作證的罪行列表

# (c) 可強制配偶作證的罪行

政府認為只有在下列情況下,夫婦一方才可受強制指證他或她的配偶被告人或配偶的同案被告(為控方作證),或為同案被告作證 –

控罪涉及襲擊、傷害或威脅傷害被告人的妻子或丈夫;或襲擊、傷害 或威脅傷害該家庭的子女,或引致該子女死亡,而在關鍵時間內有關 子女未滿 16 歳;

控罪屬於性罪行\*,受害人是該家庭的子女,而在關鍵時間內有關子女 未滿 16 歲;以及

控罪指被告試圖或串謀作出,或協助、教唆、勸使、誘使或煽動他人作出上述(a)或(b)段所列的罪行。

\*"性罪行"是指《刑事罪行條例》(第 200 章)第 VI 或第 XII 部分指明的罪行。有關罪行為一

# 第 VI 部

男子亂倫,

16歲或以上女子亂倫

#### 第 XII 部

強姦,

未經同意下作出的肛交,

意圖作出肛交而襲擊,

由 21 歲以下男子作出或與 21 歲以下男子作出同性肛交,

與21歲以下女童作出肛交,

與精神上無行為能力的人作出肛交,

非私下作出的同性肛交,

促致他人作出同性肛交,

由 21 歲以下男子作出或與 21 歲以下男子作出嚴重猥褻作為,

男子與男性精神上無行為能力的人作出嚴重猥褻作為,

男子與男子非私下作出的嚴重猥褻作為,

促致男子與男子作出嚴重猥褻作為,

獸交,

以威脅促致他人作非法的性行為,

以虚假藉口促致他人作非法的性行為,

施用藥物以獲得或便利作非法的性行為,

猥褻侵犯,

與年齡在13歲以下的女童性交,

與年齡在16歲以下的女童性交,

與精神上無行為能力的人性交,

拐帶年齡在16歲以下的未婚女童,

拐帶年齡在18歲以下的未婚女童為使她與人性交,

拐帶精神上無行為能力的人離開父母或監獲人為使其作出性行 為,

販運他人進入或離開香港,

控制他人而目的在於使他與人非法性交或賣淫,

導致膏淫,

促致年齡在21歲以下的女童與人非法性交,

促致精神上無行為能力的人與人非法性交,

禁錮他人為使他與人性交或禁錮他人於賣淫場所,

導致或鼓勵 16 歲以下女童或男童賣淫;導致或鼓勵他人與其性交 或向其猥褻侵犯, 導致或鼓勵精神上無行為能力的人賣淫,

依靠他人賣淫的收入為生,

經營賣淫場所,

准許年齡在 13 歲以下的女童或男童經常前往或置身於處所或船隻 以與人性交,

准許青年經常前往或置身於處所或船隻以作出性交、賣淫、肛交或同性性行為,

准許精神上無行為能力的人經常前往或置身於處所或船隻以作出性交、賣淫或同性性行為,

出租處所以供用作賣淫場所,

租客等准許處所或船隻經營作賣淫場所,

租客等准許處所或船隻用作賣淫,

向年齡在16歲以下的兒童作出猥褻行為,

為不道德目的而唆使他人,

公開展示宣傳賣淫的標誌,

在公眾地方的猥褻行為。

(d) 海外普通法司法管轄區的經驗和這些國家類似法例的發展情況的資料文件

(d) 海外普通法司法管轄區的經驗和這些國家類似法例的發展情況

# (1) 英格蘭

- 1. 被告人配偶的作證資格和可否強制作證問題必須以《1984 年警察及刑事證據法令》第80條為依歸(附錄 A)
- 2. 根據第 80(1)(a)條,被告人的配偶有資格為控方作證,但不得抵觸第 80(4)條的規定(即假若丈夫與妻子被共同控以同一罪行,除非作證的配偶不會在審訊中被判有罪,否則配偶沒有資格或不能被強制就有關罪行作證)。根據第 80(1)(b)條,被告人的配偶有資格為被告人或與被告人被共同控以同一罪行的人作證。
- 3. 根據第 80(2)條,被告人的配偶可以被強制為被告人作證,但不得抵觸第 80(4)條的規定(見上文)。
- 4. 根據第 80(3)條,在不抵觸第 80(4)條的情況下(見上文),被告人的配偶只可以就某些指明罪行,被強制為控方或與被告人被共同控以同一罪行的人作證。有關的指明罪行包括襲擊或傷害或威脅傷害被告人的配偶或 16 歲以下的人,對 16 歲以下的人作出的性罪行,以及企圖或串謀作出上述罪行。

# (2) 加拿大

5. 根據《加拿大證據法令》第 4(1)條(附錄 B),被告人的配偶有資格也可被強制為被告人作證。不過,假如被告人配偶的證供可能損害被告人,則該配偶便沒有資格為同案的其他被告人作證[R. v Thompson (1872),12 Cox C.C. 202]。但如果所作證供不會損害被控的配偶,則有資格並可被強制為同案的其他被告人作證[R. v Barlett (1844),1 Cox C.C. 105]。

- 6. 根據第 4(2)條,被告人的配偶無須取得被告人的同意,也有資格並可被強制就下列指明罪行為控方指證被告人。有關控罪可以是訂明的企圖或實質罪行,包括性騷擾、提出作性接觸的要求、性虐待、亂倫、獸交、令兒童道德敗壞、流浪、不履行父母或監護人職責、遺棄兒童、猥褻行為、性侵犯、拐帶、重婚和多配偶婚姻等。
- 7. 根據第 4(3)條,任何人不得被強制披露在婚姻期間其配偶向他或她所傳達的任何信息。
- 8. 根據第 4(4)條,假如投訴人或受害人年齡在 14 歲以下,被告人的配偶無須取得被告人的同意,也有資格並可被強制就指明罪行,為控方指證被告人。這些罪行包括刑事疏忽導致死亡、一級及二級謀殺、誤殺、殺嬰、企圖謀殺和襲擊。

# (3) 新西蘭

- 9. 根據《1908年證據法令》第 5(2)(b)條(附錄 C),被告人的配偶有資格也可被強制為辯方作證人。不過除非是被告人提出申請,否則,不得依據該款傳召被告人配偶作證。
- 10. 根據第 5(3)條,如控罪涉及針對配偶的罪行、重婚、有關配偶財產或殘酷對待兒童,被告人配偶有資格但不可被強制為控方作證。
- 11. 第 5(4)條規定,被告人的妻子有資格就若干指明罪行為控方作證,如果有關罪行是針對或聲稱針對被告人或妻子的子女或孫或外孫作出,而且犯罪時,有關的子女或孫或外孫未滿 21 歲,且受被告人或妻子的照顧。這些指明罪行包括強姦、企圖強姦、亂倫、與受照顧或保護的女童性交、與 12 歲以下女童性交、向 16 歲以下女童作猥褻行為,以及非禮女性或女童。

# (4) 澳大利亞

12. 在普通法上,配偶一般都沒有作證資格,除非指稱的罪行屬叛逆罪或暴力對待配偶罪行。不過,所有司法管轄區的成文法一般都訂明被告人的配偶有作證資格。至於在刑事案件中可否強制配偶作證則各司法管轄區都有不同做法。

## 澳大利亞聯邦

- 13. 根據《1995 年證據法令》第 12 條(附錄 D),配偶有資格也可被強制為控方作證。
- 14. 第 18 條訂明配偶可反對為控方作證。假如法庭裁斷為控方作證對作證配偶或配偶與被告人之間的關係可能造成損害,而損害的性質或程度遠超於讓配偶作證帶來的好處,則法庭必須接納該項反對。(第 18(6)條)。
- 15. 第 19 條規定,第 18 條不適用於澳大利亞首都地區法律下的指明罪行,當中包括傷害 16 歲以下的人的身體、性罪行、危害受僱兒童、疏忽照顧兒童、未經授權把兒童帶走,以及家庭暴力等罪行。

#### 澳大利亞首都地區

16. 根據《1971 年證據法令》(法令)第 66(1)條(附錄 E)的一般規則,除了第 66(3)條指定的例外情況,在刑事訴訟中,被告人的配偶有資格但不可被強制為控方作證。第 66(3)條規定的例外情況為:假如控罪涉及傷害人身罪或性侵犯 16 歲以下兒童的罪行、或危害受僱兒童罪、或家庭暴力等罪行,則可強制配偶在刑事訴訟中為控方作證。

## 新南威爾士

17. 根據《1995年證據法令(新南威爾士)》第 12 條(附錄 F),配偶有資格也可被強制為控方作證。

- 18. 《1995年證據法令(新南威爾士)》第18條(附錄 F)與澳大利亞聯邦的《1995年證據法令》第18條的條文相同(見上文第14段及附錄 D)。因此,配偶也可反對在新南威爾士以證人身分為控方作證(第18(7)條)。
- 19. 第 19 條訂明,第 18 條並不適用於《 1998 年兒童及少年人(照顧及保護)法令(新南威爾士)》第 222 條(危害受僱兒童罪)、第 223 條(若干獲批准聘用兒童的僱主)、第 227 條(虐待兒童及少年人)或第 228 條(疏忽照顧兒童及少年人)所指的若干罪行。
- 20. 《1986年刑事程序法令》第 104條(附錄 F)規定,假如法庭信納配偶並非因受到恐嚇而拒絕作證,又確立事實的證據對案情相對並不重要,或者有其他證據可以確立那些事實,加上罪行屬輕微性質,則可豁免配偶作證。

# 北部地區

21. 依據《證據法令(北部地區)》第 9(5)條(附錄 G),在所有法律程序中即使沒有被告人的同意,也可強制被告人配偶為控方或辯方作證。 另根據第 9(6)條,配偶有資格也可被強制披露在婚姻期間夫婦間傳達的任何信息。

## 昆士蘭

22. 根據《1997年證據法令(昆士蘭)》第 8(1)條(附錄 H),每名被告人的配偶都有資格為控方或辯方作證。只有當控罪涉及附表 2 所載的罪行是對 16 歲以下的人作出時,則如法令第 8(4)條所規定,才可強制配偶為控方或辯方作證。附表 2 所列罪行包括:性罪行、殺人或侵害人身罪等。

#### 南澳大利亞

23. 根據《1929年證據法令(南澳大利亞)》第 21(1)條(附錄 I),被告人的配偶是"近親",一般都有資格也可被強制為控方或辯方作證。但第 21(2)條訂明,配偶"可以向法院申請豁免指證"被告人。在酌情決定

是否"完全或部分"豁免配偶作證時,法官須考慮多項因素,包括不給予豁免對損害配偶和婚姻關係的風險(第 21(3)條)。然而,即使會有這類風險,法庭也可基於罪行的性質和嚴重性和配偶證供的重要性而拒絕批准豁免。(Trzesinski 訴 Daire(1986) 21 A Crim R)

#### 塔斯馬尼亞

- 24. 根據《1910年證據法令(塔斯馬尼亞)》第85(3A)條(附錄 J),如某人在被告人觸犯指稱罪行時與被告人已有婚姻關係,但在審訊時已沒有婚姻關係,該人可被強制在刑事訴訟中指證被告人或同案被告人。
- 25. 除第 85(7)條及 86 條另有規定外,某人如在指稱罪行發生時和被告人受審時與被告人已有婚姻關係,則不可被強制在刑事訴訟中作證。第 85(7)條列明可以強制配偶作證的罪行包括:亂倫、對 16 歲以下兒童所犯的若干罪行(性罪行、拐帶、纏擾和襲擊)、暴力對待或威脅暴力對待 16 歲以下兒童、暴力對待或威脅暴力對待配偶,以及侵奪配偶財產的罪行。第 86 條列明配偶可被強制作證的程序,包括以公訴程序強制執行民事權利。

#### 維多利亞

26. 根據《1958年證據法令(維多利亞)》第 24條(附錄 K),配偶一般都有資格也可被強制作證。《1958年證據法令(維多利亞)》第 400(3)條(附錄 K)訂明,假如法庭信納取得配偶證供的社會利益,並不能補償對被告人與配偶關係可能造成的損害,或者強制證人作證顯然過於嚴苛,則法院便須豁免配偶為控方作證。

#### 西澳大利亞

27. 根據《1906年證據法令(西澳大利亞)》第 9(1)(a)及(b)條(附錄L),被告人的配偶有資格也可被強制分別為控方、被告人或任何與被告人一同受審的人作證。

28. 根據第 9(1)(c)條,只有當被告人被控觸犯附表 2(附錄 L)所述條文下的罪行,或觸犯侵奪配偶財產罪行時,才可以強制配偶為控方作證。

29. 納入附表 2 的罪行包括:《刑法》所指的罪行(性罪行、侵害人身的罪行,以及虐待兒童等)、《1974 年道路交通法令(西澳大利亞)》所指的罪行(危險駕駛和鹵莽駕駛等)、《1892 年警察法令(西澳大利亞)》所指的罪行(疏忽、不小心或狂亂駕駛或騎單車)、《1947 年兒童福利法令(西澳大利亞)》所指的罪行(行為不當或疏忽導致兒童成為少年犯或需要受照顧和保護),以及《1981 年濫用藥物法令(西澳大利亞)》所指的罪行(可公訴罪行)。

## 法定條文列表

30. 為方便議員審議,現將上述普通法適用區中有關配偶有資格也可被強制作證的法定條文列表載於附錄 M。

律政司

法律政策科

2002年2月25日

#47041 v.2



# 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]

BETT 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 Power of this section—

constable to

(a) in any place to which at the time when he proposes stop and to exercise the power the public or any section of the persons, public has access, on payment or otherwise, as of right vehicles etc. 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.

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 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:
  - (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
- (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 PART VIII to be or to have been his age at that time.

- (7) In subsection (3)(b) above "sexual offence" means an offence under the Sexual Offences Act 1956, the Indecency with 1956 c. 69. Children Act 1960, the Sexual Offences Act 1967, section 54 of 1960 c. 33. the Criminal Law Act 1977 or the Protection of Children Act 1967 c. 60. 1978.
- (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 (communi- 1898 c. 36. cations between husband and wife) and section 43(1) of the Matri- 1965 c. 72. monial Causes Act 1965 (evidence as to marital integrated) shall cease to have effect.
  - 81.—(1) Cro Louit Rules may make provision for— Advance

    (a) rejuring any party to proceedings before the court to notice of disclose to the other party or parties any expert evidence in dence which he proposes to adduce in the proceedings; Crown Court, and
    - (b) prohibiting a party who fails to comply in respect of any evidence with any requirement imposed by victue of paragraph (a) above from adducing that evidence without the leave of the 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 1955 c. 18. Naval Discipline Act 1957 or a disciplinary court con- 1955 c. 19. stituted under section 50 of the said Act of 1957; 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:

# 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.

R.S., 1985, c. C-5, s. 4; R.S., 1985, c. 19 (3rd Supp.), s. 17.

# 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.

Ås 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

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]];

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

II(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

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



# Commonwealth Consolidated Acts

APPENDIX D

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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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# Commonwealth Consolidated Acts

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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:

EVIDENCE ACT 1995 SECT 18 Compellability of spouses and others in criminal proceedings gener. 第2頁, 2頁

- (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 <u>Crimes Act 1900</u> 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;
- an offence that is a domestic violence offence within the meaning of the <u>Domestic Violence Act 1986</u> of the Australian Capital Territory or an offence under <u>section 27</u> of that Act.

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 <u>Part 3</u> or Part 3A of the <u>Crimes Act 1900</u> which is committed against a person under the age of 16 years;
  - (b) with an offence against <u>section 133. 134, 135, 139</u> or <u>140</u> of the <u>Children's Services Act</u> <u>1986</u>; or
  - (c) with a domestic violence offence within the meaning of the <u>Domestic Violence Act 1986</u> or an offence under <u>section 27</u> 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

2 Competence and compellability

xcept 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.

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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, <u>section 24, 27, 28, 29, 30, 33, 33A, 35, 39, 41, 42, 43, 44, 46, 47, 48, 49, 58, 59</u> or <u>61</u> of the <u>Crimes Act 1900</u> 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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0000063

Reprint Number: REPE00'

## 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 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.

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(idence 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 <u>proceeding</u> (not being a <u>criminal proceeding</u>) and a person on whose behalf such a <u>proceeding</u> is brought or defended is competent and compellable to give evidence on behalf of either or any of the parties to the <u>proceeding</u>.
- (2) The husband or wife of a party to a <u>proceeding</u> (not being a <u>criminal proceeding</u>) and the husband or wife of a person on whose behalf such a <u>proceeding</u> 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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## Queensland Consolidated Acts

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#### **EVIDENCE ACT 1977 - SECT 8**

## Witnesses in a criminal proceeding

- 8.(1) In a <u>criminal proceeding</u>, 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 <u>criminal proceeding</u>, 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 <u>criminal proceeding</u>, the husband or wife of each person charged is compellable to give evidence on behalf of that person.
- (4) In a <u>criminal proceeding</u>, 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 <u>criminal proceeding</u>, 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 <u>criminal proceeding</u> 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 or 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 http://www.austlii.edu.au/au/legis/sa/consol\_act/ea192980/s21.html

# EVIDENCE ACT 1929 - SECT 21 Competence and compellability of witnesses the accused must satisfy himself or herself that the prospective witness-

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- (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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Turn History On

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) <u>Subsection (4)</u> 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 oceedings, 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
  - (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
- (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
- (10) Where in criminal proceedings the defendant gives evidence, he may be asked, and be required to answer, any juestion 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 stablish that he has committed or been charged with any offence other than that with which he is then charged, or that he
  - (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

- (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 <u>subsection (10)</u> (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:	
End of valid time period for this component:	01 Feb 1997
- or 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 -

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

tart of valid time period for this component:	01 Feb 1997
and of valid time period for this component:	Not yet determined

No. 3674 s. 2-

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.

# -vidence Act 1958

Version No. 136

Evidence Act 1958

Act No. 6246/1958

Version incorporating amendments as at 15 July 2001

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Evidence Act 1958

Act No. 6246/1958

Version incorporating amendments as at 15 July 2001

An Act to consolidate the Law of Evidence.

3. 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.

# rimes Act 1958

Version No. 157

Crimes Act 1958

Act No. 6231/1958

Version incorporating amendments as at 17 October 2001

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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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vidence Act 1906

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

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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 http://www.slp.wa.gov.au/statutes/swans.nsf/be0189448e381736482567bd0008c67c/cb32b82db5feefae48256f 01/11/2001

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.]

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[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
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s. 192(1), (3) and (4)	Procuring unlawful carnal knowledge of a person by threats, intimidation or drugs
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s. 294	Acts intended to maim, disfigure or disable, do grievous bodily harm, or resist or prevent arrest
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s. 295	Preventing or obstructing escape or rescue from a wreck
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s. 297	Grievous bodily harm
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s. 299	Attempting to cause an explosion likely to endanger life or possessing an explosive substance with intent to endanger life

s. 300	Endangering life by unlawful administration of poison etc., with intent to injure or annoy
s. 301(1)	Unlawful wounding
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s. 302	fundangering life or health by failing to provide necessaries
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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
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. 320	Child under 13: Sexual offences against
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s. 56	Failure to report an accident involving a vehicle whereby bodily injury is caused

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## Part 3 — Offence under the Police Act 1892

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

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

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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)

<sub>11</sub>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					
3 ·	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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http://www.slp.wa.gov.au/statutes/swans.nsf/be0189448e381736482567bd0008c67c/10ea4c496d892c984825t 01/11/2001

# 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	Police and Criminal Evidence Act 1984	Canada Evidence Act (R.S. 1958, c. C-5)	Evidence Act 1908		Evidence Act 1971	Evidence Act 1995	Evidence Act 1929	Evidence Act 1977	Evidence Act		Evidence Act 1958	
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. 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)	s. 8(4)		No specific provision		s. 9(1)(b)

#36079 v.1

## 法律改革委員會 刑事訴訟中配偶的作證資格 及可否予以強制作證問題報告摘錄

### <u>第 22 章</u>

## 關於配偶的規定,應否亦適用於同居者?

#### 22.1 引言

有人認為,關於配偶的任何規定亦應適用於以夫妻形式生活在一起的人,雖然兩人實際上仍未結婚 一 這類人士有時簡稱為「同居者」。這種說法不無道理。香港法律規定,在有關評定人身傷害賠償額的事宜上(見1986年法律修正及改革(綜合)(修訂)條例(條例績號40/86) 第3條)及家庭暴力案件中(見1986年家庭暴力條例(條例編號48/86) 第2條),同居者的地位與已婚人士的地位相似。因此我們知道,在提供證據方面,建議同居者與配偶一視同仁,並非一項嶄新大騰的意念。

## 22.2 研究範圍

我們知道同居者的問題並沒有明文列入我們的研究範圍,故此不願離題討論。可是,討論配偶自然會論及同居者。事實上,正正因為有人認為無論從那方面着眼,同居者都與夫妻無異,故有可否將關於配偶的規定伸展至適用於同居者的問題。小組委員會有見及此,又相信將問題一併考慮,沒有加以忽視,會使本身工作更為圓滿,故此已就這問題搜集了市民的意見。

#### 22.3 民意

在電話調查中,35%受訪者認為應將同居者僚已婚人士一樣看待,28%認為不應一視同仁,37%則表示不知道或不予置評。前者的主要理由是:「他們(實際上)是夫妻」,後者則認為:「他們在法律上並沒有婚姻關係」(見附錄2)

在機構調查中,37%受訪者認為應將同居者像已婚人士一樣看待,62%並不認為應該這樣。

## 22.4 英國及其他地方的情況

英國1984年警察及刑事證據法的新規定並沒有為同居者訂立特別條文。另一方面,其他司法地區(例如南澳大利亞州,見1983年證據法修訂法(第2號)第4條;新南威爾士州,見1900年刑事罪行法第407AA條,1982年第116號法例增訂此條文)在證據規則的若干規定上,則將同居者待如配偶。

#### 22.5 互相衝突的意見

#### 22.6 建議

我們認為不應將新規則的適用範圍擴大,使同時適用於同居者。

#### 司法及法律事務委員會於2001年6月26日的會議摘錄

#### X X X X X X

- V. 刑事訴訟中配偶的作證資格和可否強制作證問題 (立法會CB(2)1889/00-01(01)及(02)號文件;法律改 革委員會("法改會")於1988年發表的《刑事訴訟中配 偶的作證資格和可否強制作證問題研究報告書》(隨 附於立法會CB(2)1889/00-01號文件))
- 15. <u>副法律政策專員</u>向委員簡介政府當局的文件 (立法會CB(2)1889/00-01(01)號文件)。<u>副法律政策專員</u>表示,法改會的建議的主旨,是使夫婦都有資格並可被強迫在所有案件為配偶作證辯護,但只有在涉及危及家庭的罪行的案件中才可被強迫指證配偶。他請委員注意政府當局的文件第12至14段,有關段落載明政府當局對應否把強迫作證定為一般規則此問題的立場。文件附件則載有現行法律及法改會建議的摘要。
- 16. <u>副法律政策專員</u>又告知委員,政府當局曾於 1990年提出《1990年刑事訴訟程序(修訂)條例草案》,修 訂《刑事訴訟程序條例》(第221章),以實施法改會報告 書所載的建議,但該條例草案未獲通過。政府當局有意 再度提出條例草案,以實施有關建議。
- 17. <u>主席</u>請香港大律師公會("大律師公會")就此事發表意見。
- 18. 黎士傑先生表示,大律師公會支持法改會的建議,改變了上次在10年前研究此問題時的立場。他解釋,鑒於時間變遷,加上人們對婚姻的神聖基礎及家庭價值等事物的態度亦已轉變,大律師公會現時認為法改會的建議明智可取。然而,大律師公會認為,在實施法例上的修訂時,應確定新規則將適用於哪些罪行。舉例而言,應在法例中清楚界定哪些罪行會被視為"危及"家庭,另一做法是在法例附表中列明該等特定罪行。
- 19. <u>劉慧卿議員</u>表示,她尤其贊同監護委員會在回應政府當局諮詢時所表達的意見。監護委員會支持強迫作證的改革建議,但認為強迫為控方作證的規定,必須延伸至受害人是在家中居住而精神上無行為能力的成年人的案件,而不僅限於受害人是配偶、同居者及子女的案件。

- 20. <u>劉慧卿議員</u>指出,正如政府當局的文件第10段 所述,有4個團體分別基於不同原因反對強迫配偶作證。 她表示,政府當局在草擬條例草案供立法會審議時,應 考慮各方提出的不同意見。
- 21. <u>副法律政策專員</u>表示,當局擬提交的條例草案,主要目的是處理可否強制被告作證的問題。條例草案不會大開方便之門,使在任何情況下也可強制配偶作證,因為有關做法會受規限,只在某幾類影響家庭(例如涉及對家庭成員使用暴力或性侵犯)的罪案中,才可強制配偶作證指證另一方。該等特殊情況在政府當局的文件第12段中已有說明。
- 22. <u>副法律政策專員</u>補充,政府當局仍需繼續研究條例草案的內容。他表示,當局打算於2002年下半年向立法會提交條例草案。
- 23. <u>曾鈺成議員</u>指出,現時情況是根據普通法,只有在極少數的情況下,某人才有資格作證,為其配偶辯護或指證對方。他詢問能否透過立法只給予配偶指證其被指控配偶的資格,來解決大部分政府當局所預見的問題。
- 24. <u>副法律政策專員</u>解釋,有資格作證此問題的爭議性遠低於強制作證的問題。有意見認為,夫妻一方如受法例規定強制作證,在應該忠於被指控配偶還是忠於受害一方此問題上,會面對較少矛盾。現行建議規定只在有限情況下才強制配偶作證,這是為了在維護婚姻制度的社會利益和對罪犯加以檢控及定罪的公眾利益兩者之間取得平衡。
- 25. <u>法律顧問</u>指出,在審議《1990年刑事訴訟程序 (修訂)條例草案》時,政府當局同意對條例草案作出修 訂,訂明容許被告人的配偶或同居者要求獲得豁免作控 方證人。根據建議的修訂條文,法庭獲授權在其認為適 當的時候作出豁免。他建議政府當局在擬備條例草案 時,亦應考慮此條文。
- 26. <u>主席</u>在總結討論時,要求政府當局提供下列資料/文件,供事務委員會於適當時候再作考慮——
  - (a) 《1990年刑事訴訟程序(修訂)條例草案》的 文本;
  - (b) 政府當局在公眾諮詢期收集所得的書面意 見;

(c) 政府當局認為可強制配偶作證的罪案一覽 表;及

政府當局

政府當局

- (d) 載述設有同類法例的海外普通法司法管轄 區在此方面的發展及有關經驗的參考便 覽。
- 27. <u>主席</u>建議政府當局亦應向法律專業團體提供上 述資料/文件,供其就此事項進一步提出意見。她要求 當局就諮詢結果提供書面報告,讓事務委員會在適當時 候研究。

 $\mathbf{X}$   $\mathbf{X}$   $\mathbf{X}$   $\mathbf{X}$   $\mathbf{X}$   $\mathbf{X}$ 

## 司法及法律事務委員會於2002年2月25日的會議摘錄

### X X X X X X

- V. 刑事訴訟中配偶的作證資格和可否強制作證問題 (立法會 CB(2)1889/00-01(01)、1134/01-02(01)及 (02)、1202/01-02(01)號文件)
- 25. <u>主席</u>請委員注意先前已送交他們參閱的文件, 以及在會議席上提交的香港律師會2002年2月25日函件 (立法會CB(2)1202/01-02(01)號文件)。
- 26. 應主席之請,<u>副法律政策專員</u>向委員簡介政府當局擬備的文件(立法會CB(2)1134/01-02(02)號文件),當中載有事務委員會上次在2001年6月26日會議上討論刑事訴訟中配偶的作證資格和可否強制作證問題時所索取的以下資料:
  - (a) 《1990年刑事訴訟程序(修訂)條例草案》的文本;
  - (b) 政府當局在公眾諮詢期間收集所得的書面意 見;
  - (c) 政府當局認為具充分理由可強制配偶作證的罪 行一覽表;及
  - (d) 有關海外普通法司法管轄區的經驗和該等國家 類似法例的發展情況的資料文件。
- 27. <u>副法律政策專員</u>表示,為釋除事務委員會及部分在公眾諮詢中提供意見者的憂慮,政府當局已提出另一項建議,在定於短期內提交立法會審議的條例草案中加入一項豁免條文,訂明法庭有權酌情豁免被告人的配偶為控方或代表同案被控人作證。
- 28. <u>副法律政策專員</u>又表示,當局是根據澳洲法例 建議授予法庭酌情權作出豁免的。在南澳洲,被告人的 配偶可向法庭申請豁免履行指證妻子或丈夫的責任。在 酌情決定法庭是否完全或局部豁免配偶作證時,法官須 考慮多項因素,包括不給予豁免對配偶和其與被告人的 婚姻關係所造成損害的風險。他補充,除上述規定外, 擬議條例草案大致上以不獲前立法局通過的《1990年刑 事訴訟程序(修訂)條例草案》,以及法律改革委員會("法 改會")在1988年有關刑事訴訟中配偶的作證資格和可否 強制作證問題的報告書中建議為藍本。

- 29. <u>副法律政策專員</u>再請委員注意政府當局的文件附件C,當中載列多項具充分理由可強制配偶作證的罪行。政府當局認為只有在下列情況下,被告人的妻子或丈夫才可被強制作證指證被告人或其同案被告,或為同案被告作證:
  - (a) 控罪涉及襲擊、傷害或威脅傷害被告人的妻子 或丈夫;或襲擊、傷害或威脅傷害該家庭的子 女,或引致該子女死亡,而在關鍵時間內有關 子女未滿16歲;
  - (b) 控罪屬於性罪行,受害人是該家庭的子女,而在關鍵時間內有關子女未滿16歲("性罪行"是指《刑事罪行條例》(第200章)第VI或XII部所載的罪行);及
  - (c) 控罪指被告企圖或串謀作出,或協助、教唆、 勸使、誘使或煽動他人作出(a)或(b)段所列的罪 行。
- 30. 主席請大律師公會就上述事項發表意見。
- 31. 黎士傑先生表示,一如大律師公會在先前提交的意見書中解釋,該會普遍支持政府當局擬議法例修訂所依據的基本原則。然而,該會希望在有機會詳細研究有關的法例建議之後,才決定對此事的最終立場。他建議政府當局考慮下列兩項事宜:
  - (a) 應澄清"該家庭的子女"的涵義,例如是否包括 繼子女或寄養子女,當中必須緊記一點,就是 該詞在不同的法例中有不同的涵義。在普通法 司法管轄區的判例法中,亦對該詞有不同銓 釋;及
  - (b) 被告人可能同時被控數項不同罪行,而當中只一項屬於具充分理由可強制配偶作證的罪行。當局應採取措施,確保被告人的配偶只被強制就該項具充分理由可強制其作證的罪行為控方作證,而不被強制就關乎其他控罪的事宜作證。大律師公會建議就被告人涉嫌干犯的不同罪行分開審訊。
- 32. <u>李柱銘議員</u>表示,他對於有關強制被告人配偶作證的法例建議有所保留。他認為有關建議一旦實施,

## 經辦人/部門

會損害婚姻制度。妻子被迫作證指證其被控告的丈夫所可能蒙受的損害風險,亦應納入考慮範圍。

- 33. <u>主席</u>指出,律師會認為強制配偶指證被告人的 建議會破壞婚姻的神聖基礎,亦是該會反對有關建議的 原因之一。
- 34. 關於政府當局文件附件C所列的罪行,<u>李柱銘議</u>員提出以下疑問:
  - (a) 在刑事法中,犯人不一定須對他人身體造成實際傷害,或甚至與他人有身體接觸,才算干犯襲擊罪。令他人感到受威脅或恐懼的行為亦足以構成襲擊罪;
  - (b) 丈夫襲擊妻子後可能會得到妻子原諒。在此情 況下實不宜強制妻子指證丈夫;及
  - (c) 《刑事罪行條例》第XII部指明的其中一項性罪 行是"出租處所以供用作賣淫場所",此項罪行 的受害人是否亦必須是該家庭的子女,這點並 不清晰。
- 35. <u>副法律政策專員</u>就上文(c)項作出回應時表示,根據有關建議,可強制配偶指證被告人的性罪行是《刑事罪行條例》第VI或XII部所載的罪行,而該等罪行的受害人是該家庭的子女,在關鍵時間內未滿16歲。
- 36. <u>副法律政策專員</u>補充,政府當局在為條例草案的擬稿作最後定稿時會考慮李柱銘議員提出的各點意見。他指出,建議中授權法官可行使酌情權豁免配偶作證的條文可能有助消除有關的關注事項。他又指出,將會納入條例草案的建議大致上是根據法改會的建議作出。該等建議已獲社會人士包括當局就此事諮詢的婦女團體廣泛支持。
- 37. 在與襲擊控罪有關的事項方面,<u>黎士傑先生</u>認 為很難界定嚴重及輕微暴力罪行。此外,就可否強制作 證一事而言,有關方面亦很難提出理由指輕微暴力罪行 不應列為可強制作證的罪行。
- 38. <u>余若薇議員</u>表示,她大致上支持有關的法例建議。關於法庭可酌情豁免被告人的配偶指證被告人的擬議條文,她詢問該情權會否亦適用於在關係上與已婚者無異的同居者。
- 39. <u>副法律政策專員</u>回應時表示,政府當局曾考慮同居者的問題,並傾向依循法改會的建議,不把同居者列為可受惠於法庭酌情豁免權的人士。他補充,在普通法中配偶一詞的涵義並不包括同居者。

- 40. 主席查詢有關修訂法例的時間。<u>副法律政策專員</u>回應時表示,擬議條例草案會在2002年5月15日提交立法會審議。在此期間,政府當局正在等待兩個法律專業團體就修訂建議提出意見。
- 41. <u>主席</u>表示她預計立法會會在適當時間成立法案委員會,詳細審議該條例草案。

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## 立法會 CB(2)1360/01-02(01)號文件

# 立法會司法及法律事務委員會 2002年3月20日討論文件

## 海外證人透過電視直播聯繫作證

## 引言

政府建議修訂法例讓海外證人可以在刑事法律程序中透過電視直播聯繫作證。

## 背景

- 2. 海外證人雖然願意作證,但可能基於種種原因而未能或不願意來港出庭作證。若要法庭和法律程序的各方前赴證人的居住地,則不但開支龐大,而且相當費時。如證人未能或不願意來港作證,目前唯一的做法是由香港法院發出請求書,或由律政司長依照相互法律協助程序提出請求,從而向證人錄取證供。這個做法涉及的工作包括要求被請求協助的司法管轄區的有關機關向證人進行查問,以及把所錄取證供以書面方式在香港呈堂,獨自些都會耽延香港法庭取得證供。此外,除非律師親赴海外盤問證人,又或安排代表在當地代為盤問證人,否則便無從透過盤問證人,又或安排代表在當地代為盤問證人,否則便無從透過盤問證人確定證供是否真確。讓海外證人在外地透過電視直播聯繫向香港法庭作證,將大大減少安排證人來港作證而對證人帶來的不便,也可大大減省旅費支出,而且還可讓法庭安排對證人進行盤問,以及讓法庭有機會觀察證人的言行舉止。
- 3. 現時,容許透過電視直播聯繫作證的國家有一
  - (a) 英國(《1988年刑事審訊法令》第32條)

- (b) 加拿大(《加拿大證據 法令》第 C-5 章第二部)
- (c) 澳洲新南威爾士省(《1998 年證據(話音及音像聯繫)法令》)
- (d) 澳洲維多利亞省(《1997 年證據(音像及話音聯繫)法令》第3條)
- (e) 澳洲西澳洲省(《1906年證據法令》)
- (f) 澳洲聯邦(《1987年刑事事官相互協助法令》
- 4. 1998 年當局就有關建議諮詢香港律師會及大律師公會的意見,兩會均原則上表示支持。建議其後因資源問題而押後處理,但問題現已獲得解決。高等法院現正設立一個具備先進技術的法庭,庭內裝置海外電視直播聯繫設施,預計會於 2002 年 9 月全面投入服務。我們認為現應重新提出讓海外證人透過電視直播聯繫作證的建議。我們目前正就這項建議諮詢律師會、大律師公會、香港大學和城市大學法律學院的意見。

### 建議

#### 基本原則

- 5. 根據建議,香港法院會獲賦予權力因應申請而批准刑事法律程序的任何一方傳召海外證人透過電視直播聯繫作證,並在聆訊當天聽取證供。證人作證的細節安排,以及提請海外有關機關給予批准的事宜,將會與法庭批准有關申請的角色分開。
- 6. 香港與有關海外司法管轄區無須訂立雙邊條約方可使有關一方安排己方證人透過電視直播聯繫作證。不過,若有這樣的條約,則必須遵照條約的條文辦理。法庭將要求有關一方證明讓海外證人透過電視直播聯繫作證,並不抵觸有關海外司法管轄區的本地法律,而且亦已取得海外司法管轄區中央機關的同意。
- 7. 至於透過電視直播聯繫取得的海外證據(口頭證據、文件證據

和實證)可否接納為證據,會由香港法院決定,猶如該等證據 是在香港法庭上取得一樣。透過電視直播聯繫作證的證人所享有 的保障,與他們親身在香港法庭上作證而享有的保障相同。

- 8. 有關一方可決定循相互法律協助途徑還是透過私下安排而無須海外機關的協助,以作出所需的安排。
- 9. 在相互法律協助途徑方面,政府建議修訂《刑事事宜相互法律協助條例》(第 525 章)和《證據條例》(第 8 章),以分別授權律政司司長和高等法院原訟法庭,請求海外機關或法院協助透過電視直播聯繫向海外證人取證。
- 10. 此外,政府也認為如接獲其他司法管轄區的請求,也應容許香港證人透過電視直播聯繫向海外法庭作證。假如我們願意在這方面作出相同安排,香港法院便會有更強的理據要求透過電視直播聯繫取證。
- 11. 政府有需要進行立法,以訂定在刑事法律程序中使用電視直播聯繫系統向海外證人取證的程序,並就所得證供可否接納為證據的問題,以及高等法院原訟法庭和律政司司長就使用電視直播聯繫取證事向海外司法管轄區請求協助或提供協助的權力,作出相關規定。

#### 立法建議

12. 立法建議的詳情載於**附件 A**,但會因應在諮詢階段所收集到的意見而作出修改。

律政司 法律政策科 2002月3月

#### 建議詳情

(為方便參閱,在本文件中,凡指按私下安排透過電視直播聯繫作證的證人,均稱為"不屬相互法律協助安排的證人",而根據各地政府之間所作的正式安排而透過電視直播聯繫作證的證人,則稱為"屬於相互法律協助安排的證人")。

- 1. 為方便進行討論,現將本建議按以下四種情況劃分,分別為一
  - (a) 香港法院與不屬相互法律協助安排的海外證人;
  - (b) 香港法院與屬於相互法律協助安排的海外證人;
  - (c) 海外法院與不屬相互法律協助安排的香港證人;以及
  - (d) 海外法院與屬於相互法律協助安排的香港證人。

## 香港法院與不屬相互法律協助安排的海外證人

- 2. 香港法院可酌情批准透過電視直播聯繫取證的申請。法院不會主動安排證人透過電視直播聯繫作證(與澳洲新南威爾士省及英國的情況相同)。一如在大多數的刑事法律程序,有關的一方須確保其證人出席聆訊。
- 3. 海外證人無須在法庭環境中作證,這讓法律程序的各方可更靈活行事。英國及澳洲的情況正是如此。然而,香港法院必須信納海外證人透過電視直播聯繫接受訊問不會造成不公,否則不會容許這樣做。此外,為提供多一重保障,法院將會獲授權指明一項批准條件,規定證人須在一名指明人士陪同下作證,而該名人士是可以向法院證明證人是在何種情況下作證的。

- 4. 法律程序的任何一方若要 提出讓證人透過電視直播聯繫作證的申請,須在以下日期後 28 天內,以書面通知向高等法院司法常務官、區域法院司法常務官或裁判法院書記長(視乎進行法律程序的地方而定)提出有關申請一
  - (a) 將被告人交付審訊的日期;或
  - (b) 同意就案件提出公訴書擬稿的日期;或
  - (c) 《裁判官條例》(第 227 章)第 88 條所指的移交令的日期;或
  - (d) 案件編定於裁判官席前審訊的編定當日。

該通知書亦須送交所有其他各方當事人,其他各方當事人可以在接獲通知書的 14 天內反對有關申請。法庭可未經聆訊即就申請作出決定。但如果法庭決定進行聆訊,則必須將聆訊的時間及地點通知有關的各方當事人。在 28 天內提出申請的期限,可以書面申請延展,申請書須指明延期的理由,並送交司法常務官或書記長。

- 5. 法庭須在信納下述理由的情況下方可給予批准一
  - 作證的人並非被告;
  - 該人不在香港;
  - 證人不能循更方便的途徑在香港法院作證;
  - 有 設 施 可 供 使 用 ;
  - 供作證之用的海外地方設有所需的設施,而該等設施均屬完備恰當的;
  - 海外讚人以這種方式作證,並沒有與作證地的法律相抵

觸;

- 這樣做不會造成不公,而其他各方當事人已給予提出反 對的機會。

法庭可施加條件才給予批准,並可就取證的方法、證人作證的地方的環境,以及由誰人證明作證情況等事宜給予指示。基於國際禮節,法庭亦須規定申請人就在有關司法管轄區透過電視直播聯繫取證一事,徵得該管轄區的有關機關同意,或規定申請人須令法庭信納該海外機關不反對透過電視直播聯繫在其司法管轄區取證。

- 6. 法庭不會干預安排取證的方式。申請人將負責向海外機關取得所需的批准並作出一切必要的安排,以使其證人可透過電視直播聯繫在香港法院作證。
- 7. 就聆訊而言,以下情況適用-
  - (i) 電視直播聯繫系統必須能讓法庭清楚看見證人; 法庭如欲看到整個房間,也可讓法庭這樣做。
  - (ii) 就刑事法律程序而言,海外證人作證的地方,將視作法庭的一部分。由於證人在香港的刑事法律程序中作證,而香港的法院又不能引用海外的法律,因此,與證據、程序、藐視法庭和作假證供有關的香港法律會適用。另外,對於不屬相互法律協助安排的證人來說,香港法院雖然距離遙遠,但卻是唯一監督證人和負責處理該刑事法律程序的法院。當證人自願接受香港法院的司法管轄權管轄時,須考慮根據作證地的法律可能產生的後果,以及本身的民事和刑事責任。這是英國、澳洲新南威爾士省、維多利亞省和西澳洲省的情況。
  - (iii) 證人可由香港法院或由香港法院所授權的人士在作證地

#### 為他宣誓。

- 8. 《刑事訴訟程序條例》(第 221 章)將會予以修訂,使上述安排得以施行。終審法院首席法官會獲授權根據《刑事訴訟程序條例》制定一套新規則,為有關的程序,包括提交及處理實物和文件證據的程序,訂定細則。
- 9. 當局亦會修訂《證據條例》(第 8 章),訂明在作證過程中根據《刑事訴訟程序條例》(或根據《刑事訴訟程序條例》制定的規則)所訂程序呈交的實物或文件證據,雖然不能同步轉交法庭,但仍須接納為證據,猶如它們是在作證過程中在法庭上呈堂一樣。

#### 香港法院與屬於相互法律協助安排的海外證人

- 10. 就要求法庭准許透過電視直播聯繫系統訊問海外證人的程序和進行聆訊的程序而言,屬於相互法律協助安排的證人與不屬相互法律協助安排的證人,兩者沒有不同之處,因此,上文第 2 至7 段同時適用於屬於相互法律協助安排的證人。
- 11. 本建議會為相互法律協助事宜提供使用電視直播聯繫系統為另一項取證的方法,其用意不是擴大現時相互法律協助的範圍,或授予任何人他現時沒有的權利。有關安排會按照現時根據《刑事事宜相互法律協助條例》(第 525 章)和《證據條例》第 VIIIA 部取得證據的現行規定辦理。
- 12. 在根據上文第 5 段所述的程序獲香港法院的准許後,如認為需要取得海外機關的協助或海外機關堅持須提出正式請求,則律政司司長可根據《刑事事宜相互法律協助條例》向有關的海外機關提出請求。《刑事事宜相互法律協助條例》會為此而予以修訂。
- 13. 另一方面, 高等法院原訟法庭亦可根據《證據條例》第

VIIIA 部向海外的法庭或審裁處 提出請求。據此,我們會修訂《證據條例》。

- 14. 我們認為有關證據、程序、藐視法庭和作假證供的香港法律應當適用,這是因為證人是在香港的刑事法律程序中作證,但被請求協助的司法管轄區亦可給予證人基本權利和免受起訴權,而香港法院必須予以尊重。至於證人的宣誓則由被請求協助的司法管轄區在其司法機關的協助下進行。由於涉及海外機關,請求的執行仍須按被請求協助的司法管轄區的法律辦理,對此律政司司長或原訟法庭無從控制。律政司或原訟法庭如有需要可提出特別請求,供被請求協助的司法管轄區考慮。
- 15. 我們會就《證據條例》作出修訂,訂明證人在作證過程中所作的證供和所呈交的任何物件可接納為證據,猶如有關證供和物件是在香港法庭呈堂一樣。

## 海外法院與不屬相互法律協助安排的香港證人

- 16. 海外法院在香港沒有刑事司法管轄權,但只要取證的方式並無抵觸香港任何有效的法律,香港目前並沒有法律禁止海外法院從香港取證。有關的海外法院可自行決定是否透過電視直播聯繫向身處香港的人取證,而有關人士也可自行決定是否願意充當證人。香港政府不會向海外法院提供任何協助,亦不會向證人提供任何特別保護。雖然香港當局會期望對方按國際禮節告知擬於刑事法律程序中取證的計劃,但我們認為無須為本來是合法的事立法。
- 17. 這樣可能涉及海外律師是否在香港執業的問題。我們認為如果電視直播室是海外法院的一部分,則律師透過電視直播聯繫訊問證人,是在海外法院執業而非在香港執業。

### 海外法院與屬於相互法律協助 安排的香港證人

18. 為與其他司法管轄區的互惠合作,我們建議擴大現行法律的範圍,讓香港可在透過電視直播聯繫作證的事宜上協助海外機關。《刑事事宜相互法律協助條例》和《刑事事宜相互法律協助規例》(第 525 章,附屬條例)將予修訂,賦權律政司司長應海外機關的請求,安排該機關透過電視直播聯繫訊問在香港的證人。

#### 19. 建議包括以下各點 -

- (a) 賦權律政司司長授權透過電視直播聯繫取證,以及把訊問過程中所呈交的物件交給請求協助的機關。
- (b) 如律政司司長授權取證和交付訊問過程中所呈交的物件,有關程序會在裁判官席前進行。
- (c) 裁判官會替證人宣誓,並負責確認證人身分,擬備列明 聆訊日期和地點的記錄,以及收取在作證過程中所呈交 的物件,然後交給律政司司長。律政司司長將負責把該 等物件交給請求協助的司法管轄區。
- (d) 透過電視直播聯繫進行的聆訊未必適合採用公開法庭的形式,因為聆訊是在另一司法管轄區的法庭內進行,而有關的法庭可能希望以非公開形式進行聆訊。有鑑於此,如請求協助的司法管轄區要求以非公開形式進行聆訊,又或裁判官認為這樣做是適當的,裁判官將會獲授權進行非公開形式的聆訊。
- (e) 作證的人有權在其法律代表的陪同下作證。這是由於過程當中可能會出現一些涉及適用香港法律的問題,例如 裁判官命令某人出庭應訊的權力。
- (f) 在不改變現行《刑事事宜相互法律協助條例》第 10(6)-(14)條的規定的原則下,請求協助的司法管轄區的法律 將予以適用,除非請求協助的法庭、主理的裁判官和證

人另有協定,那就可以採用香港的法律。

- 20. 《證據條例》第 VIII 部亦會作出修訂,以使原訟法庭在接獲海外司法管轄區的請求時,只要有關的請求與刑事法律程序有關,則原訟法庭可應請求行事。建議修訂的目的在於一
  - (a) 賦權法院可就請求協助的法庭擬透過電視直播聯繫訊問證人一事,作出命令;以及
  - (b) 關於證人根據現行《證據條例》第 77(2)條所享有的特權事,規定如訊問是透過電視直播聯繫的方式進行,而該證人豁免作證的索請已獲得請求協助的法庭接納,並透過電視直播聯繫知會在香港召開的法庭,則該證人亦可獲豁免作證。

律政司 法律政策科 2002年3月

#48646 v.2 LPD (#40940 v1 AD)

## 司法及法律事務委員會於2002年3月20日的會議摘錄

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- VI. 海外證人透過電視直播聯繫作證 (立法會CB(2)1360/01-02(01)及(02)號文件)
- 29. <u>高級助理法律政策專員</u>闡述政府當局就修訂法例以規定海外證人在刑事法律程序中透過電視直播聯繫作證的建議所擬備的文件(立法會CB(2)1360/01-02(01)號文件)。文件解釋了立法建議的基本原則及詳情。他補充,政府當局正就建議諮詢法律專業團體、香港大學和城市大學的法律學院。
- 30. 主席告知委員,律師會曾在函件(立法會CB(2)1360/01-02(02)號文件)中表示該會正考慮有關的立法建議,並會於適當時候擬備意見書。大律師公會原則上支持建議。
- 31. 主席詢問立法建議的擬議適用範圍。<u>副刑事檢控專員</u>回答時表示,擬議安排旨在針對在海外居住但未能或不願來港出庭作證的證人而設。目前唯一的做法是由香港法院發出請求書,或由律政司司長依照相互法律協助程序提出請求,向證人錄取證供。此舉涉及要求獲請求協助的司法管轄區查問證人,並將所錄取的證供以書面方式在香港呈堂,這些都會耽延香港法庭取得證供。讓海外證人在外地透過電視直播聯繫向香港法庭作證,將大大減少安排證人來港作證對其帶來的不便及這方面的旅費支出,同時還可讓法庭安排盤問證人,使法庭有機會觀察證人的言行舉止。
- 32. <u>副刑事檢控專員</u>補充,根據立法建議,訴訟一方如希望法庭援引並聽取海外證人透過電視直播聯繫作供,必須事先提出申請,並得到香港法庭批准。該方可自行決定循相互法律協助途徑,或不經海外機關協助而私下作出安排。
- 33. 何俊仁議員提述政府當局文件第10段所載有關香港與海外司法管轄區之間的交互安排,他詢問為何應"容許"香港證人透過電視直播聯繫向海外法庭作證。
- 34. <u>副刑事檢控專員</u>答稱,一般預期有人會私下作 出自願安排,但亦可能有海外司法管轄區要求相互法律 協助,請香港法庭作出命令透過電視直播聯繫向在香港

的證人取證。再者,安排透過電視直播聯繫作證亦須動 用香港法庭的設施。

- 35. <u>主席</u>詢問當局曾接獲多少宗海外司法管轄區的 有關要求。
- 36. <u>副首席政府律師(國際法律科)</u>答稱,目前大約每 月接獲一宗要求,而海外司法管轄區向香港作出此類要 求亦越來越普遍。
- 37. <u>副刑事檢控專員</u>補充,大部分其他普通法司法管轄區均有類似法例,容許透過視象直播聯繫作證。他表示,以新加坡為例,視象聯繫科技不單用於向海外證人取證,亦應用於初步法律程序中,讓與訟雙方雖身在當地,卻可無須親自出庭應訊。
- 38. <u>副刑事檢控專員</u>回答何俊仁議員時表示,目前,根據《高等法院規則》,高等法院法官有權准許在 民事法律程序中,按自願原則,以電視直播聯繫取證。
- 39. 對於主席有關立法時間表的問題,<u>副刑事檢控事員</u>回應時表示預期可於2002年5月向立法會提交條例草案。他補充,當局現正在高等法院設置一個具備先進科技的法庭,庭內裝設海外電視直播聯繫設施,預計於2002年9月全面投入服務。

政府當局

40. <u>主席</u>表示,她預期有關的法案委員會會於適當時候研究立法建議的詳情。她建議政府當局開始蒐集關於海外司法管轄區所作安排的資料,待法案委員會成立後供其考慮。

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