

**Extract of Law Reform Commission's Report on
Competence and Compellability of Spouses in Criminal Proceedings**

Other Arguments

14.12 Other arguments are sometimes advanced in favour of a general rule of compellability. Some of these were summarised in Chapter 5, where the counter-arguments were also noted. We have considered these arguments and counter-arguments and, on balance, are firmly of the opinion that the interests of the community and the existing social fabric of Hong Kong would be best served by not making spouses compellable to testify against each other, save in exceptional cases. These cases will now be discussed.

Exceptional Cases Where Compellability Required

14.13 We consider that there is a need for an exception to the rule of non-compellability where the family itself is threatened by the spouse. Where a spouse is accused of inflicting physical violence upon or sexually molesting members of his own family, any law which shields spouses from giving evidence in court ceases to protect the family unit and instead makes it easier for its members to be abused. The sacred citadel of family intimacy, which in normal circumstances the law unholds, becomes a potential torture chamber in which the law fears to tread, or upon which it turns a blind eye. We endorse with some qualification the position adopted in England in the Police and Criminal Evidence Act 1984. The Act makes a spouse compellable to testify against the other spouse in cases of violence to the spouse or a person under 16, or a sexual offence against a person under 16. Persons under 16 is quite general and would include persons who are not children of either spouse and who are not members of the household of either spouse.

14.14 We would restrict the exception to the spouse and children of the family, including a child under 16 in respect of

whom either spouse was acting in loco parentis. As the Hong Kong Bar Association pointed out to the Sub-committee, the rationale behind the exceptions to the general rule should be consistent with the basic concept of "upholding the institution of marriage and recognizing the privacy of the marital relationship". The protection of the immediate family (namely, the other spouse and children of the family) of an accused spouse from physical violence and sexual abuse are clearly necessary as the family fabric is generally one of continuing existence. The physical well-being of the family members therefore attracts a higher priority than the sanctity of the marriage institution. This sort of protection is therefore an exception to, rather than a derogation from, the general rule of non-compellability.

To extend this exception to include all persons under sixteen would effectively undermine the basis of the general rule. The criteria then becomes a consideration of the nature of the offence rather than the protection of immediate family members who are under the indirect influence or control of the accused spouse. There are a great variety of crimes on our statute books that are equally, if not more, odious than offences of violence or sexual offences against young persons. The justification for widening the net could therefore be applied with more force to other offences (e.g. drug trafficking, homicide etc.). The result would be the introduction of "new rules on the ground that the marriage relationship could be used as a cover for crime" (compare our comments in para. 14.11). The exceptions would finally abrogate the rule.

The preponderance of public opinion is in favour of exceptions in the case of violence or sexual offences against a child of the family (96%), whereas those favouring the extension to all young persons is substantially less (50%).

We therefore submit that the protection of the other spouse and the child of the family should be the maximum parameters of departure from the general rule. Any further extension would result in a gradual degeneration of the basic rationale behind non-compellability.

Causing Death Should be Covered

14.15 The English legislation refers to assault on or injury or a threat of injury, to the spouse. No doubt this would include the killing of a person under 16. For the avoidance of any doubt in the matter (and we merely wish to preclude legalistic arguments over the meaning of 'assault' and 'injury') it seems advisable to explicitly cover causing death.

Possible Need for Limitation in the Case of Trivial Offences

14.16 As the proposal stands, a spouse would be compellable against the other spouse even where a minor offence against a child, such as a father beating his son who misbehaved, was involved. We were concerned that this might be going too far. The question of where precisely to draw the line is a difficult one. We realise that "anomalies must inevitably arise if an attempt is made to make a spouse compellable for the prosecution in some cases and not in others", as the Law Reform Commission of Ireland observed in its Report on Competence and Compellability of Spouses as Witnesses (LRC 13 - 1985, page 49). Faced with a clear expression of public opinion in favour of compellability in certain cases (and only certain cases) we considered carefully whether an attempt should be made to make a delineation. We did not wish to cast the net too widely. As one commentator on the sub-committee's interim report observed, "family members denouncing each other in criminal cases for the greater good of society has connotations of totalitarian regimes." (Mr. R.J. Wickins). Only where the offence is a serious one upon the spouse or child should an inroad be made upon the general rule of non-compellability. The solution to this problem may be found in the good sense of prosecutors who would be unlikely to seek to compel a reluctant spouse to testify in cases where the assault was trivial. This seems, on balance, preferable to the alternative solution, which would be to attempt to define precisely the degree of severity which would bring the compellability rule into play.