

**THE LAW REFORM COMMISSION OF HONG KONG**

**REPORT ON**

**COMPETENCE AND COMPELLABILITY OF  
SPOUSES IN CRIMINAL PROCEEDINGS  
(TOPIC 18)**

We, the following members of the Law Reform Commission of Hong Kong, present our report on Competence and Compellability of Spouses in Criminal Proceedings.

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1 March 1988

# THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

## COMPETENCE AND COMPELLABILITY OF SPOUSES IN CRIMINAL PROCEEDINGS

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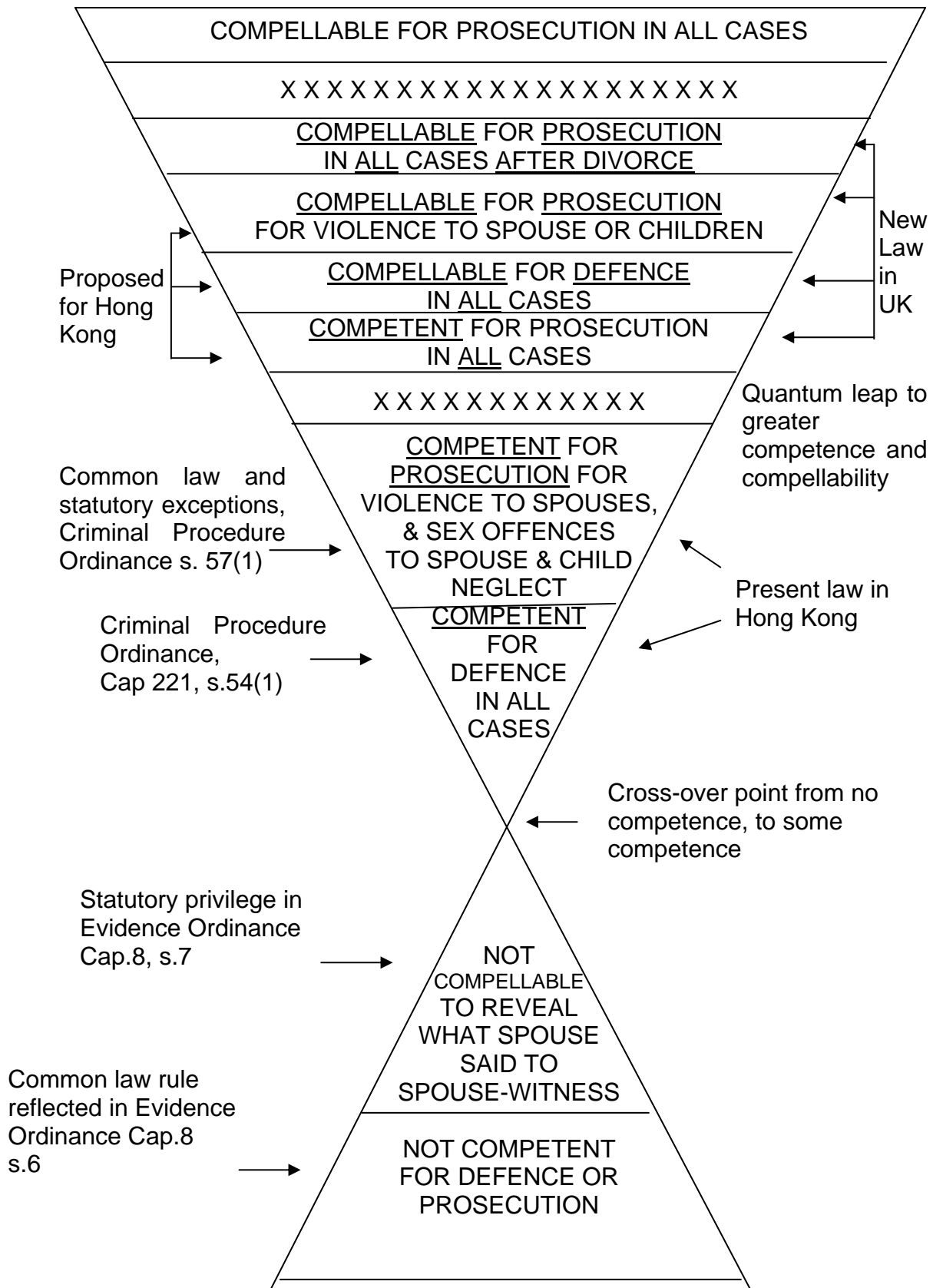
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**EXTENDING COMPETENCE & COMPELLABILITY OF SPOUSES**



# Chapter 1

## Introduction

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### 1.1 Terms of Reference

On 31st October 1985, the Chief Justice and Attorney General, under powers granted by the Governor-in-Council on 15 January 1980, referred to the Law Reform Commission ("the Commission") for consideration, the following question :-

*"To consider whether any changes in law and practice relating to the competence and compellability of the spouse or former spouse of the accused to give evidence in criminal proceedings are desirable and to make proposals in relation thereto".*

### 1.2 Establishment and work of Sub-committee

1.2.1 The Commission established a sub-committee under the chairmanship of Dr. Byron S.J. Weng to examine, investigate and report on the matters referred for consideration. The other members of the sub-committee were:-

Mr Lee Chik Yuet  
Urban Councillor

Mrs Rosanna Tam  
Legislative Councillor

Ms Anne Hughes  
Former Professor,  
University of  
Hong Kong

[From December 1985  
to June 1986]

Mr Andrew Hodge  
Former Deputy Crown Prosecutor,  
Attorney General's Chambers

[until May 1987]

Miss Fi-Lan Chua,  
District Court Judge

Mr. A. Duckett, Q.C.  
Deputy Crown Prosecutor,  
Attorney General's Chambers,

[from August, 1987]

1.2.2 The sub-committee held its first meeting on December 11, 1985 and met 16 times before issuing this report in December 1987.

### **1.3 Sub-committee's Method of Work**

1.3.1 In view of the social, familial, and cultural implications of the issues raised, it was considered appropriate to seek input from a wide cross-section of persons in Hong Kong.

#### **1.3.2 Telephone Survey**

A telephone survey was conducted on behalf of the Sub-committee by the City and New Territories Administration in April 1986. A random sample of 977 respondents aged 21 or over was interviewed. A summary of this survey is contained in Annexure 2.

#### **1.3.3 Questionnaire to Organisations and Selected Individuals**

A questionnaire was prepared by the Sub-committee and submitted to organisations and selected individuals and 90 completed questionnaires were received. A summary of the responses to the questionnaire is at Annexure 2.

#### **1.3.4 Value of the Surveys**

Much weight was attached by the sub-committee to the surveys. This was because the subject matter of the enquiry raised issues relating to social, moral, ethical and family values. The views of the ordinary man and woman in the street were felt to be of central importance. Only in two instances has the Report diverged significantly from the majority viewpoint revealed by the public opinion surveys. These relate to the compellability of a spouse to testify for the defence, (dealt with in Chapter 8) and to the privilege for marital communications (dealt with in Chapter 19).

Not every issue covered in this report was canvassed in the public opinion surveys because of the constraint on the length of questionnaire that was manageable in the case of a telephone survey/mail questionnaire survey. The sub-committee was advised by those with experience in conducting surveys that the length of questionnaire would affect the response rate and the quality of data, and the questionnaires for the surveys therefore could focus only on the main issues.

## **1.4 Scope of Enquiry**

1.4.1 Pursuant to the terms of reference, the questions to be considered are whether in criminal proceedings a spouse is or should be competent and/or compellable to give evidence either for or against his (or her) spouse, (or a co-accused) with or without the consent of the spouse, whether as a witness or as a jointly charged party, and whether there should be any distinction as regards matters occurring before, during or after the marriage. Ancillary matters that need to be considered include the question of spouses' privilege and of whether the failure of a party to testify may be commented upon by the judge or prosecution. A wider issue that is not explicitly within the terms of reference, but which arises out of recommendations of the sub-committee, is whether the treatment of children, parents, other relatives and cohabitants should be altered to accord with that of spouses, in relation to the giving of evidence.

1.4.2 This Report is concerned only with evidence given in criminal proceedings.

## **1.5 Division of Subject Matter**

The report draws a basic distinction between the spouse as a witness for the defence (Part II) and the spouse as a witness for the prosecution (Part III). Certain miscellaneous topics are then dealt with in Part IV. Part V contains a Summary of Recommendations.

The question of how best to divide the subject matter is a difficult one. It is discussed further in Chapter 2 (see especially para. 2.5). The problem arises because competence and compellability of spouses in criminal proceedings involves several sets of distinctive issues. For example, one such issue is that of the distinction between evidence for the defence on the one hand and evidence for the prosecution on the other. It is clear that factors which might lead one to favour compelling a spouse to testify for the defence of the other spouse would not necessarily lead one to favour compelling a spouse to testify for the prosecution of the other spouse. Another such issue concerns the problems that arise when a spouse is tried jointly with a third party. Should the normal rule of competence and compellability be modified in the case of a person who is jointly tried with a spouse? Another issue arises out of divorce. Should the rules (whatever they may be) relating to spouses continue to apply to a divorced spouse, and if so, only in relation to matters arising during the marriage, or also in relation to those arising before and after the marriage? And then there is the distinction between competence and compellability. Arguments supporting competence do not necessarily hold true for compellability. All of these, and other issues, have to be taken into account, and the problem is to know how best to divide them, without unduly complicating the Report or confusing the subject matter. As is explained in paragraph 2.5 below, the Report draws a basic distinction between the spouse as a witness for the defence and the spouse as a witness for the prosecution.

## **1.6 Definitions and terminology**

### **1.6.1 Competence**

A witness is competent if he may lawfully be called to give evidence. Most people are competent witnesses.

### **1.6.2 Compellability**

A witness is compellable if he can lawfully be obliged to be sworn and to truthfully answer all admissible questions - on pain of being punished for contempt of court if he refuses to do so, and for perjury if he lies. Most people are compellable witnesses.

### **1.6.3 Privilege**

A witness is privileged if - though competent and compellable - he may lawfully refuse to answer certain questions. Such privilege exists only in certain limited situations. In the absence of such privilege a witness can be forced to reveal all that he knows.

### **1.6.4 Spouse**

The Report is concerned with the position of both a husband and wife. For the sake of convenience, the discussion is sometimes formulated in terms of a wife giving evidence in criminal proceedings in which her husband is the accused, but what is said applies equally where the husband is giving evidence in proceedings in which his wife is the accused.

### **1.6.5 Concubine**

It has been held by the Court of Criminal Appeal in Hong Kong that the term "wife" includes a concubine for the purposes of the rules on competence and compellability (Reg. v. Chan Hing-cheung [1974] H.K.L.R. 196). References to a spouse or wife in the context of the existing law of Hong Kong therefore include a concubine.

### **1.6.6 Jointly Charged/Tried**

In discussions about this subject among lawyers, it is traditional to refer to persons who are co-defendants as being jointly "charged". Charged here means : " in the charge of the same jury". That is, this term generally means persons being tried jointly. However we are aware that the

expression "charged" may simply be understood to mean a person who has been charged, whether by the police or on the instructions of the Attorney General, with some offence. In this sense, it may be confusing to say that the issue is whether persons jointly charged may give evidence against the other. That is, they may have been jointly charged with an offence, but by the time of trial, the proceedings continue against one only e.g. because one has pleaded guilty or is being separately tried.

Accordingly, in order to avoid any ambiguity we have formulated our principles using the expression jointly "tried". That this is the intention and effect of the legislature in England is clear from section 80(4) of the Police and Criminal Evidence Act 1984, which says: "where a husband and wife are jointly charged with an offence, neither spouse shall at trial be competent or compellable....." (Underlining supplied).

### **1.6.7 Testify/Give Evidence**

This Report is concerned with people who appear in court to answer questions, from lawyers, relevant to the proceedings. The terms "give evidence", "be a witness", "testify" and "appear for" are used interchangeably, without distinction, to describe this function.

## **1.7 The Law In Other Countries**

In preparing this Report, the laws of various countries on competence were examined, together with reform proposals that have been put forward in certain countries. It is clear that there are marked differences in the law of the various Australian States, New Zealand, Canada and England. These differences have been accentuated by a multiplicity in recent years of proposals for reform, some of which have already been implemented. It is difficult to extract a common theme or link between the different jurisdictions. One cannot say, for example, that there has been a general tendency to do away with the special treatment of spouses under the rules of evidence in criminal proceedings. In some cases the special treatment has been extended to other family members. In other cases the court has been given a discretion to afford special treatment.

We have reviewed the laws of other countries, and benefited from the insights which these provide. We looked with particular care at the law of England, and many (though not all) of our recommendations mirror those implemented in the Police and Criminal Evidence Act 1984. However, we have not shied away from making suggestions that would, if implemented, make the law of Hong Kong at odds with that in England. The fact that many of the proposals are in line with the new English rules should therefore be viewed as an indication of a belief in the soundness of those rules, rather than as a sign of dependence upon England.

## **1.8 References to Statutory Provisions**

Throughout this Report references are made to statutory provisions in the Ordinances of Hong Kong and in England. For convenience the full text of these provisions is set out in Annexure 3 (Hong Kong) and Annexure 4 (England.)

## **1.9 Complexity and Uncertainty of the Law**

The law on competence and compellability of spouses in criminal proceedings in Hong Kong is complicated and in some instances, uncertain. Although certain English common law rules and certain U.K. statutes have close parallels in Hong Kong, there are local Ordinances to be considered. Accordingly, it is not safe to rely too heavily upon English cases, textbooks and treatises for an accurate statement of Hong Kong law. Where the law of Hong Kong appears to be uncertain we have drawn attention to this in the Report.

## **1.10 Purpose of the Reference**

The topic of competence of spouses has received much attention from law reform agencies throughout the Commonwealth in recent years, many reports have been published and in several cases changes in the law have followed. We have considered these and some of them are referred to in this Report. Nevertheless, these reports do not present uniform and consistent approaches or answers to the questions. We therefore approached the reference with an open mind, and, where it appears there are no clear cut and obvious solutions, we have proceeded with caution, rather than recommend change for the sake of change.

We have attempted to give due weight to the current social and political realities of Hong Kong. We are particularly conscious that one result of our recommendations (especially 25.7 and 25.8) will be viewed as making it easier for prosecutors to obtain criminal convictions. Some people will see this as a good thing. Others will feel that the resulting intrusion upon the marital relationship is unacceptable. We have endeavoured to make recommendations which take into account the competing values.

## **1.11 Acknowledgements**

We wish to acknowledge the assistance given to the sub-committee by the City and New Territories Administration in the conduct of the telephone survey. We would especially like to record our gratitude to Mr. K.K. Au, Senior Statistician, for his expert advice and guidance and for the many hours he spent with members of the sub-committee in preparing for and evaluating the survey. In addition, we wish to thank Mr. Au for his assistance in tabulating the results of the survey of organisations.

We also wish to acknowledge our indebtedness to those members of the legal profession who responded to a request to review a draft copy of the sub-committee's interim report. Their responses highlighted several shortcomings in the report and provided an invaluable perspective upon many of the issues. In particular, we wish to thank the Hong Kong Bar Association, the Law Society of Hong Kong, the Registrar of the Supreme Court, the Chief Magistrate, the Faculty of Law at the University of Hong Kong, Hong Kong Polytechnic, the Hong Kong Federation of Women's Lawyers, and the Hong Kong Association of Business and Professional Women and Mrs. Jill Spruce.

## CHAPTER 2

### The existing law on competence and compellability in Hong Kong

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#### 2.1 The Old Law : Spouses Not Competent and Not Compellable Witnesses

Originally, the general rule at common law was that neither a husband nor a wife was competent or compellable to give evidence either for or against one another in either civil or criminal proceedings, in respect of matters occurring either before or during the marriage. This rule no longer applies in civil proceedings, and in Hong Kong Section 5 of the Evidence Ordinance, Cap.8, provides:

*"5. In all proceedings before the court, the parties and the husbands and wives of the parties thereto, and the persons in whose behalf any proceedings may be brought, or instituted, or opposed, or defended, and the husbands and wives of such persons shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the proceedings."*

(Amended, 27 of 1937, Schedule)

On its face, and read literally, this section seems wide enough to cover criminal as well as civil proceedings. If so, it would mean that a spouse is competent and compellable as a general rule in all cases. It seems unlikely that such a revolutionary concept was intended by the legislature and certainly that is not the way in which the section has been interpreted in Hong Kong. Instead, it has been held that Section 6 of the Evidence Ordinance (considered below) provides a bar to the giving of evidence by one spouse against the other in criminal proceedings. (see R v CHAN Hing-cheung & Or [1974] HKLR 196, esp. pp. 206-207, see also YUNG Kit-mei v R, Cr. App. 1025/81). It is assumed in this Report that s.5 of the Evidence Ordinance is confined to civil proceedings. For the avoidance of doubt, this matter ought perhaps to be clarified in any legislation enacted in consequence of this Report - see recommendation 25.19.

## 2.2 The Present Law : In Criminal Proceedings Spouses Not Competent and Not Compellable for the Prosecution

The general rule in criminal proceedings is that, save in certain cases noted below in paragraphs 2.4 and 2.6, the spouse of the accused is neither competent nor compellable to give evidence for the prosecution, in respect of matters occurring before or during the marriage. This principle is confirmed by s. 6 of the Evidence Ordinance Cap. 8, which provides :

*"6. Nothing in this Ordinance shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceedings."*

## 2.3 Other Rules for Criminal Proceedings

Other rules of competence and compellability in criminal proceedings are as follows :

(a) The accused, as a witness for the prosecution

The general common law rule is that in criminal proceedings the accused is neither competent nor compellable for the prosecution. (R v Rhodes [1899] I.Q.B. 77).

This rule is preserved in section 10 of the Evidence Ordinance Cap. 8, which provides : "10. Nothing in this Ordinance shall render any person who in any criminal proceedings is charged with an indictable offence or any offence of the punishable on summary conviction compellable to give evidence for or against himself, or shall render any person in any proceedings compellable to answer any question tending to criminate himself."

(Amended, 50 of 1911; 62 of 1911, Schedule)

(b) A co-accused, as a witness for the prosecution

The general common law rule in England is that in criminal proceedings a co-accused is neither competent nor compellable for the prosecution, (R v Payne [1872] L.R.1. C.C.R. 349), unless the co-accused is tried separately, acquitted, is not proceeded against, or has pleaded guilty (see Phipson's Manual of the Law of Evidence, 10th edn., p.257). It is arguable that on a literal reading of section 5 of the Evidence Ordinance, Cap. 8, and section 57(1) of the Criminal Procedure Ordinance, Cap. 221, a jointly tried spouse may in theory be competent in Hong

Kong as a witness for the prosecution of the other spouse in cases of treason and Schedule 2 offences. [For a list of these offences, see para. 2.6 below, and Annexure 3.] However, in practice such a result seems unlikely to arise, and in any event, as noted above, the better view is that section 5 of the Evidence Ordinance is confined to civil proceedings.

(c) A spouse of an accused as a witness for the prosecution against a co-accused

The general common law rule is that, save in certain cases noted below in paragraph 2.7.1, in criminal proceedings the spouse of an accused is neither competent nor compellable to give evidence for the prosecution against the co-accused), (R v Thompson) [1872] L.R.1.C.C. R. 377) unless the accused is tried separately, acquitted, is not proceeded against, or has pleaded guilty in which cases the accused's spouse could testify for the prosecution of the co-accused.

## 2.4 Cases where a spouse is competent

A. A spouse is competent (not compellable) to give evidence for the prosecution, or defence, without the accused's consent, in cases of :

- (a) violence against the spouse (R v Verolla [1963] 1 QB 285),
- (b) possibly treason (R v Lord Mayor of London (1886) 16 QB1 772, 775)
- (c) possibly, forcible marriage (R v Wakefield (1827) 2 Law c.c 279)
- (d) offences under certain enactments listed in Schedule 2 of the Criminal Procedure Ordinance Cap. 221. This is by virtue of s.57(1) of the Criminal Procedure Ordinance. (The Section is reproduced in para. 2.6 below)
- (e) a charge under s.31 of the Theft Ordinance, Cap. 210. (Section 31, is reproduced in para. 2.6 below)

B. a spouse is competent (compellable) to give evidence for the defence, with the accused's consent, in all cases. This is by virtue of s. 54(1) of the Criminal Procedure Ordinance, Cap. 221, which provides as follows: -

*"54(1) Every person charged with an offence, and the wife or husband as the case may be of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:*

Provided as follows :

- (a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;
- (b) the failure of any person charged with an offence, or of the wife or husband as the case may be of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;
- (c) the wife or husband of the person charged shall not, save as in this section mentioned, be called as witness in pursuance of this section except upon the application of the person so charged;
- (d) nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage;
- (e) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;
- (f) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless
  - (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
  - (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own 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
  - (iii) he has given evidence against any other person charged in the same proceedings; (Amended, 50 of 1981, s.2)"

Apart from these cases, the spouse is not competent (or compellable) to give evidence for the prosecution of a spouse. This means the spouse is not allowed to give evidence even if he (or she) (and/or the accused spouse) wants him (or her) to do so.

## **2.5 ISSUES INVOLVED IN COMPREHENSIVE SUMMARY OF THE PRESENT LAW**

A comprehensive statement of the law, which takes account of all of the exceptions, must adequately cater for a number of variables. These include the distinctions between:

- (a) Common law and statute law.
- (b) Competence and compellability.
- (c) Evidence given for the defence and evidence given for the prosecution.
- (d) Evidence given with the accused's consent and evidence given without the accused's consent.
- (e) Proceedings against an accused tried solely and proceedings against an accused tried jointly.
- (f) Proceedings against an accused tried jointly with the spouse and proceedings against an accused tried jointly with a third party.
- (g) A divorced spouse and a spouse who is not divorced.

### **2.5.1 *Choosing The Proper Focus***

The existence of these variables means that any comprehensive statement of the law will inevitably be somewhat complex. There is also the problem of selecting the most appropriate focus for the Report. This problem was briefly referred to in paragraph 1.5 above. By adopting the distinction between competence on the one hand, and compellability on the other, as the primary focus, a statement of the law is produced which may blur or confuse the basic distinction between defence related considerations, on the one hand, and prosecution related considerations, on the other. The same problem arises when one focuses exclusively on any other distinction, such as the distinction between the defence and the prosecution, for then one may overlook or fail properly to highlight basic differences between competence and compellability. The solution adopted in this Report is to present at the outset, in paragraphs 2.6 and 2.12 below, a statement of the present law which focuses on the distinction between competence and compellability. This is because the present law tends to revolve around that distinction. But there is also presented in paragraph 2.11 below, a synopsis of the law which focuses on the distinction between evidence given for the defence and evidence given for the prosecution. Furthermore, the latter distinction is adopted thereafter as the basic focus of this Report. Thus, Part II covers the spouse as a witness for

the defence, while Part III covers the spouse as a witness for the prosecution. This, it appears to us, is where the primary distinction lies in relation to the various issues that have to be considered from the standpoint of reform.

## **2.5.2            *Statement of the Law Based On The Distinction Between Competence and Compellability***

The following paragraphs focus on the distinction between competence and compellability and summarise the present law under four headings :

- A.     Proceedings against the spouse
- B.     Proceedings against a co-accused of a spouse
- C.     Proceedings against a jointly tried spouse
- D.     Proceedings against a divorced spouse

Paragraph 2.12 contains a brief overview, in note form for ease of reference. It is hoped that this will assist the reader who wishes to have a convenient reference while reading the remainder of this Report. Paragraph 2.6 contains a detailed summary of the present law.

## **2.6                PROCEEDINGS AGAINST THE SPOUSE**

### **2.6.1            COMPETENCE**

- (i)     For the prosecution

The general rule is that a spouse is not competent to testify for the prosecution against a spouse, with respect to matters occurring either before or during the marriage. (Pedley & Wellesley (1829) 3C&P 558).

- A.     Exceptions at Common Law

By way of exception to the above general rule, a spouse is competent at common law to give evidence against a spouse:

- (a)     in a case of a criminal charge involving personal violence by the accused against his or her spouse (Lord Audley's Case (1631) 3 State Tr. 401), or an offence against the liberty of the spouse (Cross, p. 176-8)). The "violence" exception, it has been held, does not cover wilful neglect to maintain, (Reeve v Wood (1864) 5 B&S 364), a husband's living off immoral earnings of his wife (DPP v Blady [1912] 2 KB 89), a husband's criminal libel on a wife (R v Lord Mayor of London (1886) 16 Q.B.D. 772) or a husband writing a letter to his wife threatening to murder her. (R v Yeo [1951] IAER 864.)

- (b) Possibly, treason. (see Cross, p. 167) (According to Halsbury's Statutes 3rd edn Vol. 12, Evidence, p. 869, "It has always been doubtful whether a wife was a competent witness against her husband without his consent on a treason charge, but the better opinion seems to be that she is not").
- (c) Possibly, abducting and marrying a girl against her will ('forcible marriage') (Cross, P. 167).

Apart from these cases, a spouse is not, at common law, competent to testify against a spouse - even in most serious crimes such as murder.

**B. Exceptions By Statute**

Section 57(1) of the Criminal Procedure Ordinance, Cap. 221 provides as follows :-

*"The wife or husband of a person charged with an offence under any enactment mentioned in the Second Schedule may be called as a witness either for the prosecution or defence, and without the consent of the person charged."*

The Second Schedule is as follows

<u>Chapter of referred to</u>	<u>Short Title</u>	<u>Enactments referred to</u>
Cap. 16	The Separation and Maintenance Orders Ordinance	The whole Ordinance
Cap. 200	The Crimes Ordinance	Part VI (Incest) and Part XII (Sexual and related offences)
Cap. 212	The Offences Against the Person Ordinance	ss. 26, 27, 43, 44 and 45, and in the case of any offence involving bodily injury to a child or young person under the age of 16 years, any other enactment in the Ordinance (see also Annexure 3).

Section 31 of the Theft Ordinance, Cap. 210 provides as follows :-

Husband and wife 1968, c.60, s.30.

31.(1) This Ordinance shall apply in relation to the parties to a marriage, and to property belonging to the wife or husband whether or not by reason of an interest derived from the marriage, as it would apply if they were not married and any such interest subsisted independently of the marriage.

(2) Subject to subsection (4), a person shall have the same right to bring proceedings against that person's wife or husband for any offence (whether under this Ordinance or otherwise) as if they were not married, and a person bringing any such proceedings shall be competent to give evidence for the prosecution at every stage of the proceedings.

(3) Where a person is charged in proceedings not brought by that person's wife or husband with having committed any offence with reference to that person's wife or husband or to property belonging to the wife or husband, the wife or husband shall be competent to give evidence at every stage of the proceedings, whether for the defence or for the prosecution, and whether the accused is charged solely or jointly with any other person:

Provided that -

- (a) the wife or husband (unless compellable at common law) shall not be compellable either to give evidence or, in giving evidence, to disclose any communication made to her or him during the marriage by the accused; and
- (b) her or his failure to give evidence shall not be made the subject of any comment by the prosecution.

(4) Proceedings shall not be instituted against a person for any offence of stealing or doing unlawful damage to property which at the time of the offence belongs to that person's wife or husband, or for any attempt, incitement or conspiracy to commit such an offence, unless the proceedings are instituted by or with the consent of the Attorney General:

Provided that -

- (a) this subsection shall not apply to proceedings against a person for an offence -
  - (i) if that person is charged with committing the offence jointly with the wife or husband; or

- (ii) if by virtue of any judicial decree or order (wherever made) that person and the wife or husband are at the time of the offence under no obligation to cohabit; and
- (b) this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for an offence, or the remand in custody or admission to bail of a person charged with an offence, where the arrest (if without a warrant) is made, or the warrant of arrest issues on an information laid, by a person other than the wife or husband.

### Attempts etc.

It is unclear whether inciting, being an accessory before the fact to, conspiring to commit, or attempting to commit any of the above offences in Cap. 200 and Cap. 212 also renders the spouse competent.

### Matrimonial Proceedings

Sections 8 and 11 of the Evidence Ordinance (See Annexure 3) make a spouse competent to give evidence of marital intercourse and adultery, respectively, but these provisions are obviously designed for matrimonial proceedings and no further attention is paid to them here.

#### (ii) For the Defence

The general rule now is that a spouse is competent to give evidence for the defence of a spouse. Specific authority for this exists as follows :

##### A. At Common Law

Although the position in Hong Kong is not entirely certain, it appears to be that at common law, a spouse is not competent to testify for the defence of an accused spouse, except in cases of:-

- (a) personal violence to the spouse
- (b) possibly, treason
- (c) possibly, forcible marriage - apparently, even without the consent of the accused spouse.

The logic of these exceptions in the context of the defence (as opposed to the prosecution) of a spouse is unclear : why should a spouse be

permitted to testify for the defence of an accused spouse only in cases involving violence against that spouse, or forcible marriage or treason?

Notwithstanding this uncertainty, section 57 (2) of the Criminal Procedure Ordinance apparently expressly preserves these exceptions in the context of the defence, when it provides that nothing in section 54 (which makes spouses competent for the defence, only with the accused's consent - see s. 54(1)(c)) "shall affect 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".

B. By Statute

- a) Without the consent of the accused spouse, a spouse may be called as a witness for the defence, in the case of any of the offences under any enactment mentioned in Schedule 2 of the Criminal Procedure Ordinance, Cap. 221. (s. 57(1), Criminal Procedure Ordinance).
- b) With the consent of the accused spouse, a spouse is a competent witness for the defence of a spouse in all cases, subject to the provisions of s. 54(1) Criminal Procedure Ordinance, Cap. 221.

**2.6.2**      ***COMPELLABILITY***

(i) For the Prosecution

The general rule is that all competent witnesses are also compellable. But this does not apply to spouses who are not compellable to testify against one another.

A. At Common Law

There are no exceptions to the non-compellability of spouses at common law. (Hoskyn v Metropolitan Police Commissioner [1978] 2 W.L.R. 695 (H.L.)). This means that a spouse is not compellable even in those special cases where a spouse is competent to give evidence for the prosecution against a spouse. In Hoskyn, the House of Lords held by a majority of four to one that a wife ought not to have been compelled to give evidence against her husband who was charged with wounding her with intent to do grievous bodily harm.

It may be noted that until the Hoskyn decision, it had sometimes been supposed that a spouse was compellable whenever he or she was competent, (R v Lapworth [1931] 1 K.B. 117; Tilley v Tilley [1949] P. 204,

248), although there were also authorities against this view.

### Effect of Giving Evidence

If a spouse, being competent though not compellable, gives evidence, she must complete it. She must answer questions put to her and may be treated as a hostile witness if she refuses to answer. (R v Pitt [1982] 3 A.E.R. 63 (C.A.)).

#### B. By Statute

There are no statutory exceptions to the non-compellability of spouses, giving evidence against one another. Although section 57(1) of the Criminal Procedure Ordinance provides that a spouse "may be called as a witness ... for the prosecution ... and without the consent of the person charged", this only makes a spouse competent. The House of Lords has held that compellability does not follow from such statutory competence : Leach v Rex [1912] A.C. 305.

It may be noted that even if a spouse was compellable (which is not the case), he or she would enjoy a privilege against disclosure of marital communications, as provided in section 7 of the Evidence Ordinance and s. 54(1)(d) of the Criminal Procedure Ordinance.

#### (ii) For the Defence

##### (a) At Common Law

At common law a spouse cannot be compelled to testify for the defence.

##### (b) By Statute

The Criminal Procedure Ordinance makes a spouse competent, but not compellable, for the defence. Section 54 provides that a spouse "shall be a competent witness for the defence", and section 57(1) provides that a spouse "may be called as a witness" for the defence in certain cases. But neither section makes the spouse compellable. Leach v R [1912] A.C. 305 is some authority, as Cross notes at p. 176, for the proposition that where a statute merely confers competence, compellability is not to be implied.

## 2.7 PROCEEDINGS AGAINST A CO-ACCUSED OF SPOUSE

[References to "a husband" and "a wife" include "wife" and "husband" mutatis mutandis].

### 2.7.1 **Competence**

- (i) For Prosecution of a Co-accused of Spouse:

If the husband and a co-accused are jointly charged, the wife is not competent to give evidence against the co-accused, [except for offences of violence against the spouse, treason, forcible marriage, Schedule 2 offences, (R v Thompson (1872) L.R. 1 C.C.R. 377 : R v Mount, R v Metcalfe (1934) 78 Sol. Jo. 225), and, *semble*, cases falling within s.31 of the Theft Ordinance, Cap. 210,]

UNLESS, as noted earlier, (para. 2.3(c)) –

- or (a) the husband pleads guilty  
or (b) the husband is indicted separately  
or (c) a nolle prosequi is entered in relation to the husband  
or (d) no evidence is offered against the husband and the judge thus directs a formal acquittal.

Another way in which the spouse may give evidence for the prosecution against the co-accused is if the husband calls her as a witness in his defence - in which case she may give evidence in chief which is damaging to the co-accused or may give such evidence under cross-examination.

- (ii) For Defence of a Co-Accused of Spouse

If the husband and a co-accused are jointly charged, the wife is competent to give evidence for the co-accused :

- (a) WITHOUT THE CONSENT of the accused husband, in the case of Schedule 2 Offences (Criminal Procedure Ordinance, s. 57(1)).  
(b) WITH THE CONSENT of the accused husband, in other cases (Criminal Procedure Ordinance, s. 54(1)(c))

### 2.7.2 **Compellability**

- (i) For Prosecution of a Co-Accused of Spouse

If the husband and a co-accused are jointly tried, the wife is not compellable to give evidence against the co-accused.

(ii) For Defence of a Co-Accused of Spouse

If the husband and a co-accused are jointly tried, the wife is not compellable to give evidence for the co-accused (see Cross, p. 179).

## **2.8 PROCEEDINGS AGAINST A JOINTLY TRIED SPOUSE**

### **2.8.1 Competence**

(i) For Prosecution

If a husband and wife are jointly tried neither is competent to give evidence against the other.

(ii) For Defence

If a husband and wife are jointly tried, each is competent to give evidence for the defence of the other,

(a) without the consent of the accused spouse (semble), in cases of personal violence, and possibly, treason, and forced marriage;

(b) with the consent of the accused spouse, in all cases. (s.54(1)(c), Criminal Procedure Ordinance).

### **2.8.2 Compellability**

(i) For Prosecution

If a husband and wife are jointly tried, neither is compellable to give evidence against the other.

(ii) For Defence

If a husband and wife are jointly tried, neither is compellable to give evidence for the other.

## **2.9 PROCEEDINGS AGAINST A DIVORCED SPOUSE**

### **2.9.1 Competence of Spouse**

(i) For Prosecution of Spouse

A divorced spouse is in the same position as a spouse and hence generally incompetent to testify against the former spouse, in respect to matters occurring during the marriage (R v Algar [1954] 1 QB 279), and possibly also in respect to matters occurring before the marriage (Monroe v Twistleton (1802) Peak Add. Cas. 219; see Cross, p. 179, n. 4), subject to the exceptions noted above (see 2.6.1. (i)).

(ii) For Defence of Spouse

Same as 2.6.2. (ii) supra - i.e. generally incompetent, save in exceptional cases noted above.

### **2.9.2 Compellability of Spouse**

(i) For Prosecution of Spouse

Same as 2.6.2 (i) supra - i.e. not compellable.

(ii) For Defence of Spouse

Same as 2.6.2 (ii) supra - i.e. not compellable.

#### Criticism

This position has been attacked on the ground that once the marriage has ended, there is no longer any marriage to be affected adversely by one former spouse giving evidence against another. Also, it seems unclear whether the statutory exception in s. 57(1) of the Criminal Procedure Ordinance, making a "wife" or "husband" competent in certain cases, includes a former wife or husband. If it does not, a former spouse is even less competent than a married spouse, since the common law incompetence would remain unaffected by the statutory exception.

#### Privilege Contrasted

By contrast, the privilege against disclosing confidential communications between spouses does not extend beyond a breakup of the marriage.

## 2.10 EXAMPLES

### 2.10.1 *Crime Against Third Party*

Mr A is charged with murdering Mr B, contrary to s. 2 of the Offences Against the Person Ordinance, Cap. 212, by running him down in his car. Mrs A was with him in the car at the time.

- (a) Mrs A is competent to give evidence for the defence of Mr A with Mr A's consent.
- (b) Mrs A is not compellable to give evidence for the defence of Mr A.
- (c) Mrs A is not competent to give evidence for the prosecution.
- (d) Mrs A is not compellable to give evidence for the prosecution.

### 2.10.2 *Violent Crime - common law*

Mr A is charged with causing grievous bodily harm to Mrs A, contrary to s. 19 of the Offences Against the Person Ordinance.

- (a) Mrs A is competent to give evidence for the defence of Mr A with his consent.
- (b) Mrs A is not compellable to give evidence for the defence of Mr A.
- (c) Mrs A is competent to give evidence for the prosecution, at common law.
- (d) Mrs A is not compellable to give evidence for the prosecution. (Hoskyn v Metropolitan Police Commissioner [1978] 2 W.L.R. 695 - overruling R v Lapworth [1931] 1 K.B. 117).

### 2.10.3 *Schedule 2 Offence - Accused Spouse*

Mr A is charged with keeping a vice establishment, contrary to s. 139 of the Crimes Ordinance.

- (a) Mrs A is competent to give evidence for the defence of Mr A without Mr A's consent.
- (b) Mrs A is not compellable to give evidence for the defence of Mr A.
- (c) Mrs A is competent to give evidence for the prosecution, because this is a Schedule 2 offence.
- (d) Mrs A is not compellable to give evidence for the prosecution.

**2.10.4. Schedule 2 Offence - A Co-accused of Spouse**

Mr A and Mr B are charged jointly with keeping a vice establishment, contrary to s. 139 of the Crimes Ordinance. In relation to Mr B,

- (a) Mrs A is competent to give evidence for the defence of Mr B, without Mr A's consent, since this is a Schedule 2 Offence.
- (b) Mrs A is not compellable to give evidence for the defence of Mr B.
- (c) Mrs A is competent to give evidence for the prosecution of Mr B, since this is a Schedule 2 Offence.
- (d) Mrs A is not compellable to give evidence for the prosecution of Mr B.

**2.10.5 Schedule 2 Offence - Jointly tried spouses**

Mr and Mrs A are charged and tried jointly with keeping a vice establishment, contrary to s. 139 of the Crimes Ordinance. In relation to each other,

- (a) Mrs A is competent to give evidence for the defence of Mr A, even without Mr A's consent.
- (b) Mrs A is not compellable to give evidence for the defence of Mr A.
- (c) Mrs A is not competent to give evidence for the prosecution of Mr A, even though this is a Schedule 2 offence.
- (d) Mrs A is not compellable to give evidence for the prosecution of Mr A.

**2.10.6 Schedule 2 Offence - Divorced Spouse**

Mr A is charged with keeping a vice establishment, contrary to s. 139 of the Crimes Ordinance. Jane, who was Mr A's wife at the time of the alleged offence, but who has since divorced Mr A :

- (a) is competent to give evidence for the defence of Mr A without his consent.
- (b) is not compellable to give evidence for the defence of Mr A.
- (c) is competent to give evidence for the prosecution of Mr A since this is a Schedule 2 Offence.
- (d) is not compellable to give evidence for the prosecution of Mr A.

- 2.11 Statement of the Law Based on the Distinction between the Defence and the Prosecution (See paragraph 2.5.1, above, for explanation of this approach)**
- 2.11.1 *Spouse as witness for Defence***
- (i) Competence
- At Common Law  
No, except violence, treason and forcible marriage.
- By Statute  
Yes, even without accused spouse's consent, in Schedule 2 crimes.
- Yes, with accused spouse's consent, in all crimes.
- (ii) Compellability
- At Common Law  
No.
- BY Statute  
No.
- 2.11.2 *Spouse as a Witness for the Defence of a Person who is Jointly Tried with the Accused Spouse***
- (i) Competence  
Yes, without accused spouse's consent in violence, treason, forcible marriage and Schedule 2 (Cap. 221) crimes. Yes, with accused spouse's consent in all crimes.
- (ii) Compellability  
No.
- 2.11.3 *Spouse as a Witness for the Defence of a Jointly Tried Spouse***
- (i) Competence  
Yes, without accused's spouse's consent in violence, treason, forcible marriage, and Schedule 2 (Cap. 221) crimes. Yes, with accused's spouse's consent in all crimes.
- (ii) Compellability  
No.

**2.11.4 Spouse as Witness for Prosecution**

(i) Competence

At Common Law

No, except violence, treason and forcible marriage.

BY Statute

No, except Schedule 2 (Cap. 221) crimes, and s. 31 of the Theft Ordinance, Cap. 210.

(ii) Compellability

At Common Law

No.

By Statute

No.

**2.11.5 Spouse as a Witness for the Prosecution of a Person who is Jointly Tried with the Accused Spouse**

(i) Competence

No, except violence, treason, forcible marriage and Schedule 2 crimes.

Perhaps yes, when husband is not implicated by the evidence of the spouse witness.

(ii) Compellability

No.

**2.11.6 Spouse as a Witness for the Prosecution of a Jointly Tried Spouse**

(i) Competence

No.

(ii) Compellability

No.

**2.12 OVERVIEW OF PRESENT LAW**

A. PROCEEDINGS AGAINST THE SPOUSE

(i) Competence of Spouse

(a) For Prosecution of Spouse

1. At Common Law  
No, except violence, treason and forcible marriage.
2. By Statute  
Yes, for Schedule 2 crimes.\* , and s. 31 of the Theft Ordinance, Cap. 210.

(b) For Defence of Spouse

1. At Common Law  
No, except violence, treason and forcible marriage.
2. By Statute  
Yes, even without accused's spouse's consent, in Schedule 2 crimes.\*  
Yes, with accused spouse's consent, in all crimes.

(ii) Compellability of Spouse

(a) For Prosecution of Spouse

1. At Common Law No.
2. By Statute No.

(b) For Defence of Spouse

(c)

1. At Common Law No.
2. By Statute No.

B. PROCEEDINGS AGAINST A CO-ACCUSED OF SPOUSE

(i) Competence of Spouse (e.g. Wife)

- (a) For Prosecution of Co-Accused (e.g. of Husband)  
No, except violence, treason, forcible marriage and Schedule 2 crimes.\* , and s. 31 of the Theft Ordinance, Cap. 210.

Perhaps yes, if husband is not implicated.

- (b) For Defence of (e.g. Husband's) Co-Accused  
Yes, without accused spouse's consent in violence, treason, forcible marriage and Schedule 2 Crimes.\*

Yes, with accused spouse's consent in all crimes.

- (ii) Compellability of Spouses (e.g. Wife)
  - (a) For Prosecution of Co-Accused (e.g. of Husband)  
No.
  - (b) For Defence of (e.g. Husband's) Co-Accused  
No.

C. PROCEEDINGS AGAINST A JOINTLY TRIED SPOUSE

- (i) Competence of Spouse
  - (a) For Prosecution of Spouse  
No.
  - (b) For Defence of Spouse  
Yes, without accused's spouse's consent in violence, treason, forcible marriage, and Schedule 2 Crimes.\*  
Yes, with accused's spouse's consent in all crimes
- (ii) Compellability of Spouse
  - (a) For Prosecution of Spouse           No.
  - (b) For Defence of Spouse               No.

D. PROCEEDINGS AGAINST A DIVORCED SPOUSE

- (i) Competence of Spouse
  - (a) For Prosecution of Spouse - same as A(i)(a) supra\*\*
  - (b) For Defence of Spouse - same as A(i)(b) supra\*\*
- (ii) Compellability of Spouse
  - (a) For Prosecution of Spouse - same as A(ii) (a) supra\*\*
  - (b) For Defence of Spouse - same as A(ii) (b) supra\*\*

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\* See para 2.6 above, where Schedule 2 crimes are set out.  
 \*\* In respect of matters occurring during the marriage.

## CHAPTER 3

# THE EXISTING LAW ON PRIVILEGED COMMUNICATIONS IN HONG KONG

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### 3.1 No common law privilege in respect of communications between spouses

Statements, written or oral, made by spouses during attempts at reconciliation of a matrimonial dispute, before an intermediary, such as a probation officer are privileged. (McTaggart v McTaggart [1949] P. 94; Mole v Mole [1951] P. 21, Pais v Pais [1971] P.119, Theodoropoulos v Theodoropoulos [1964] p. 311) This means that either spouse may object to disclosure of the statement by the other spouse or the intermediary. Subject to this, there is no privilege in respect of communications between spouses at common law. Thus, with the exception of the case just noted, there is no common law rule which :

- either (a) enables one spouse to prevent another spouse from revealing statements made :
  - either (i) by the spouse witness to the other spouse
  - or (ii) by the other spouse to the spouse witness
  - or (iii) by the other spouse to a third party in the presence of both spouses
  
- or (b) enables either spouse to prevent a third party from revealing statements made by either spouse in conversation
  - either (i) between the spouses themselves alone
  - or (ii) between the spouses themselves and the third party
  
- or (c) enables either spouse to refuse to answer a question on the ground that it would force him (or her) to reveal a statement made: -
  - either (i) by the spouse witness to the other spouse;
  - or (ii) by the other spouse to the spouse witness;
  - or (iii) by a third party to either spouse in the presence of both spouses.

### 3.2 Statutory Privilege

There is, however, a limited statutory privilege, which in Hong Kong is contained in section 7 of the Evidence Ordinance, which provides as follows :

*"7. In criminal proceedings, a husband shall not be compellable to disclose any communication made to him by his wife during the marriage nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage."*

This is a limited "privilege", in the sense that it deals only with the situation described in (c)(ii) in paragraph 3.1 above. The situations described in (a) and (b) and (c)(i) and (c)(iii) are not covered at all in this provision of Hong Kong legislation. Thus there is no privilege in those senses.

On the other hand, the privilege is wide in the sense that it is not limited to cases where the spouse-witness is the spouse of the accused. In other words, it applies even where the accused is not the spouse of the "spouse-witness", for example where Mrs A gives evidence at the trial of Mr B and is being asked about something said by Mr A to Mrs A.

In civil proceedings, there is also a statutory privilege contained in s. 65(1) of the Evidence Ordinance, which gives a spouse a right to refuse to answer any question or produce any document or thing if to do so would tend to expose the other spouse to proceedings for any criminal offence or for the recovery of a penalty. (This is the same as the U.K. Civil Evidence Act 1968, c.64, s.14, which is set out in paragraph 20.4 below.)

### 3.3 Statutory Privilege is Restricted

As noted above, the privilege conferred by s. 7 of the Evidence Ordinance covers only (c)(ii), and not (a), (b), (c)(i) or c(iii). Thus there is no privilege in the following situations :

(a) No privilege to prevent disclosure by spouse

Thus in the Scots case of H.M. Advocate v. H.D. [1953] S.C. (J) 65 an accused husband was unable to prevent his wife from waiving the statutory privilege and disclosing what he had said to her.

(b) Intercepted communication may be revealed

In Rumping v DPP [1964] A.C. 814 the House of Lords held the prosecution could introduce a letter admitting a crime

written from the accused to his wife, which had been intercepted by the police. Since it had been intercepted before it was received by the spouse, no privilege attached to it.

(c)(i) No privilege to refuse to reveal statements of the spouse witness

The privilege does not apply to communications made by the spouse witness; it only applies to communications made to the spouse witness by the other spouse. As Sir Wilfried Greene M.R. said in Shenton v Tyler [1937] 1 Ch. 620, at 628 - 9 : "The statutory privilege, therefore, extends only to communications made to the witness, and does not protect those made by the witness".

Thus, for example, suppose that Mr and Mrs A had a conversation in which Mr A had entered a room holding a blood-stained knife, and had said to Mrs A, "I have just killed the maid", to which Mrs A had replied "You always said you would kill that girl one day". If Mr A was on trial for the maid's murder, section 7 would enable him to refuse to reveal what Mrs A had said to him ((c)(ii)) but it would not enable Mr A to refuse to reveal what he had said initially to Mrs A ((c)(i)). Nor of course, would it enable Mr A to prevent Mrs A from revealing what Mr A had said to her ((a) (i)) or, what she had said to him ((a) (ii)) , if she chose to do so in the course of giving evidence on his behalf, (e.g. in cross examination) .

Similarly, if the gardener of Mr X's household was on trial for the murder of the maid, and Mr X was a witness (for the prosecution or defence), s. 7 would enable him to refuse to reveal anything said to him by Mrs X ((c)(ii)), but it would not enable him to refuse to reveal anything said by him to Mrs X ((c)(i)).

### **3.4 Third Party may Reveal Communication**

Section 7 of the Evidence Ordinance does not enable either spouse to prevent a third party from revealing anything said by either spouse to the other spouse.

### **3.5 Privilege Dies with End of Marriage**

The privilege cannot be claimed after the marriage has ended, even as regards communications made during marriage (Shenton v Tyler [1939] Ch. 620).

### 3.6 Waiver of Privilege

The privilege is that of the witness (see Her Majesty's Advocate v H.D. [1953] SC(J)65), and not of the accused and may be waived by the spouse witness to whom the communication was made - who, as Sir Wilfrid Green M.R. said in Shenton v Tyler [1939] 1 Ch. 620 at p. 635- 6:- "can, accordingly, if he or she desires, disclose all confidential communications made to him or her by his or her spouse, however unwilling that spouse may be to have the disclosure made".

### 3.7 Privilege Against Self-Incrimination

There are judicial dicta to support the existence of a common law privilege against giving evidence which would tend to incriminate one's spouse by extension of the privilege against incrimination of oneself: (Cross. p. 384 6th ed. 1985), and Bruce and McCoy, *Criminal Evidence in Hong Kong*, (1987), page 111). There is some doubt about these dicta. Cross points out that the common law requirement to warn a spouse witness that if she testifies she can be cross-examined, and cannot refuse to answer questions, (R v Pitt [1983] 3 All E.R. 63), would be futile if she actually had a privilege.

Section 54(1)(e) of the Criminal Procedure Ordinance provides :-

- (e) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged.

If the common law privilege exists as an extension of the privilege against self incrimination, does it follow that the abolition of the latter removes also the former?

It is unclear whether the possible privilege against incriminating one's spouse referred to above has survived this provision in Hong Kong, in regard to cases where the question would tend to incriminate the witness as to the offence charged. (Presumably, the privilege, if it exists, against incrimination in relation to offences outside the offence charged, would be unaffected.).

## CHAPTER 4

# REASONS ADVANCED FOR AND AGAINST COMPETENCE

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Over the years, various arguments have been advanced both for and against competence and compellability of spouses, in relation to the giving of evidence either for or against the other spouse. Many of these have been canvassed in the reports and working papers of the law reform agencies which have considered the issue. Some have been advanced in judicial decisions. Others have originated in textbooks and law journals

A brief summary of the various arguments for and against competence is given below. The arguments concerning compellability are presented in Chapter 5. The presentation is not intended to imply that each of the arguments stated is necessarily considered convincing or acceptable. No attempt is made in this summary to assess the relative strength of the competing arguments. Nor are any conclusions drawn in these two chapters as to which side of the debate emerges as the winner. When so many competing arguments are raised, the process of arriving at a conclusion is not simply a matter of counting points or balancing the relative weight on each side. Whatever position is favoured, the result will reflect a value judgement, in which various social, cultural, ethical, familial, moral and emotional factors may play a part. An attempt has been made in chapters 7-14 of this Report to articulate as many of these factors as seem likely to bear upon a rational choice, and on the basis of this a possible solution is proposed. The primary purpose of the summary is to present for the convenience of the reader an overview of the main competing arguments.

The method adopted in this chapter is to present first the reasons that may be advanced for making a spouse competent, together with the counter arguments to those reasons. Second, the reasons that may be advanced against competence are presented, together with the counter arguments to those reasons.

### **A. Possible Reasons for Making a Spouse Competent For the Defence and/or Prosecution**

#### **4.1 *WEIGHT NOT ADMISSIBILITY***

The Courts can assess the weight of evidence that may be tainted by interest.

*Counter argument*

This only addresses one aspect of the matter. It is not simply a question of evidence tainted by interest

#### **4.2 PRIVILEGE NOT INCOMPETENCE**

The confidential relationship between spouses might justify a rule of privilege or a power of exemption from testifying, but not a rule of incompetence.

*Counter argument*

Incompetence is a simple solution which ensures that all parties are treated alike. It avoids leaving the prosecution and defence in doubt up until the trial about the extent of available evidence from a spouse.

#### **4.3 VOLUNTARY TESTIMONY**

If a spouse, being free to, does give evidence against an accused spouse, voluntarily, the marital relationship is presumably either beyond salvaging or not placed at risk in the eyes of the parties, so that marital harmony is not a reason for preventing such testimony from being given.

*Counter argument*

For every spouse who is willing so to testify, there will be many more who are unwilling, and these should not be placed in the predicament of having to refuse to testify. Such refusal may be interpreted wrongly as a sign of a cover up, whereas it may be based on a genuine fear of unwittingly being responsible for a conviction which might otherwise be obtained.

#### **4.4 ALL EVIDENCE**

The Court should always have all the available evidence before it, and any rule which excludes evidence is inherently undesirable.

*Counter argument*

This is the question at issue. Sometimes, the policy factors against the giving of evidence outweigh there in its favour.

#### **4.5           UNCERTAINTY**

The present law, whereby a spouse is competent in some cases but not in others, leads to uncertainty. A general rule of competence for the defence or prosecution would be clear, simple and certain.

##### *Counter argument*

The rules are not particularly complex. Simplicity is not the sole virtue to be considered.

#### **4.6           ILLOGICALITY**

The present law, whereby a spouse is competent for certain crimes, is illogical since it ignores the fact that the crimes will vary in gravity.

##### *Counter argument*

This is true. It is a compromise.

#### **4.7.           EXCESSIVE CONCERN FOR MARITAL PEACE**

The present law, which prevents a willing spouse from giving evidence against a spouse, (except in certain cases) shows excessive concern for the preservation of the marital relationship.

##### *Counter argument*

That is the question at issue

#### **4.8           NO REASON WHY NOT**

The rule against competence and compellability was never framed as a particular rule for spouses, based on policy. Originally all parties were considered incompetent witnesses because they had an "interest" which tainted their evidence. When parties generally became competent, spouses were left with incompetent status - presumably because their interest was considered especially strong.

##### *Counter argument*

Evidence should not be admitted if it is inherently unreliable or if its being adduced produces undesirable social consequences or if there are policy reasons for not disclosing it, as when the Crown claims a privilege against giving evidence on certain matters in the interests of state security. Spouse's testimony is inherently unreliable, its production may affect marital

stability, and the state should not be seen to be placing a higher degree of importance upon its success in prosecutions for crimes against the state than upon the stability of marriages of citizens who are presumed innocent until proven guilty.

#### **4.9.            *WOULD NOT BE MADE INCOMPETENT TODAY***

If rules of evidence were being framed today, without influence from the traditions of the past, it is unlikely that spouses would be made incompetent (or non-compellable). "Today, it would seem almost ludicrous to suggest that a man or woman should be permitted to give evidence for or against a third party if he or she so wished but should have a lesser degree of freedom of choice merely because his or her spouse was the person charged with the commission of the offence" (Law 'Reform Commission of Tasmania, Report No. 1(1977)).

#### *Counter argument*

This is not necessarily true in everyone's eyes. It is a highly subjective opinion.

### **B.            Possible Reasons for Not Making a Spouse Competent**

#### **4.10            *BIAS***

The testimony of spouses is tainted by interest. The bias of each spouse would create a risk of perjury and erroneous verdicts.

#### *Counter argument*

The argument that the spouse would be biased loses force when it is realised that other persons such as parents, children and fiancée's might also be biased, but they share no such legal incapacity.

#### **4.11            *MARITAL DISCORD***

To admit a spouse's evidence against a spouse might be a cause of implacable discord and dissension between the husband and the wife and so contravene the public interest in upholding stable marital relationships.

#### *Counter argument*

The state's interest in prosecuting crime overrides the stability of marriages.

#### **4.12            MARITAL WEAPON**

To give spouses power to give evidence would arm them with a weapon which might be used for dangerous purposes.

*Counter argument*

This is always possible as regards any witness. It is not a reason for denying such testimony to the court.

#### **4.13            CONFIDENTIAL RELATIONSHIP**

To allow the spouse of the accused to be a witness would lead to a violation of the confidential relationship which should exist between husband and wife.

*Counter argument*

See 4.11 above.

#### **4.14            DILEMMA**

To allow a spouse to testify against a spouse places the spouse in a dilemma. Should she side with her mate, in the interests of her marriage and family, or should she side with the state, in the interests of serving the ends of the legal system? When the alleged crime is apparently "victimless", (for example, tax evasion, speeding, or possession of pornographic material), the choice may be particularly difficult.

*Counter argument*

See 4.11 above.

## CHAPTER 5

# REASONS ADVANCED FOR AND AGAINST COMPELLABILITY

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The issue of compellability is more controversial than that of competence. Consequently it has attracted more attention from competing theorists. There are numerous arguments ranged on both sides of the issue.

The method adopted in this chapter, as in Chapter 4, is to present first the possible reasons for making a spouse compellable for the prosecution or defence, and to consider the counter arguments to these reasons. Next, the possible reasons that may be advanced for not making a spouse compellable are considered, together with the counter arguments to these reasons.

### **A. Possible Reasons for Making a Spouse Compellable for Prosecution and/or Defence**

#### **5.1 NO BLAME**

The spouse who is compelled to testify against a spouse cannot be blamed by the other for doing so.

#### *Counter argument*

The argument that a compellable spouse cannot be blamed by the accused spouse for testifying breaks down when one considers that an accused who is ready to blame a spouse for testifying would expect a compellable spouse to do no more than discharge the obligation to appear as a witness. In the accused's eyes, compellability would hardly be seen as an excuse for incriminating testimony. If the accused did not expect the spouse witness to commit perjury, he would at least expect her to be discrete in her answers. He would blame her for revealing more than he felt she should have.

#### **5.2 SOLVED DILEMMA**

A spouse torn between loyalty to a spouse and loyalty to an endangered party would have no conflict of loyalties if the law compelled testimony.

#### *Counter argument*

The argument that compellability solves the dilemma of a spouse witness breaks down in light of 5.1 above. The compellable spouse witness is now in a worse dilemma: the court is forcing her to testify, but her husband expects her to do so without incriminating him.

### **5.3. RELEVANT EVIDENCE**

Relevant facts may be withheld from the Court if a spouse is not compellable.

#### *Counter argument*

The argument that relevant evidence may be withheld from the court if a spouse does not give evidence merely begs the question at issue. Any rule whereby evidence is excluded will have the effect of denying evidence to the court (e.g. forced confessions). The question is whether the exclusion is justified, notwithstanding that its effect is to deny evidence to the court.

### **5.4 ILLOGICAL - OTHER RELATIONSHIPS**

There is no logic in protecting the relationship of spouses, but not similarly protecting that of co-habitees, parents and children, brothers and sisters, partners, principals and fiduciaries, and friends.

#### *Counter argument*

The argument that it is illogical to protect marriages but not other relationships such as parents and children, or brothers and sisters, cuts both ways. If the concept of relationship as a bar to compulsory incrimination is itself a valid one, then logic would be on the side of extending the rule against compellability to other relationships, as has been done in Victoria and South Australia, rather than abolishing the rule for spouses.

### **5.5. ILLOGICAL - UNSTABLE MARRIAGES**

Spouses are protected even if they do not get along with each other, or the marriage is on the verge of collapse in any event.

#### *Counter argument*

The argument that the rule against compellability protects even unstable relationships is weakened by the consideration that an unstable marriage stands in even greater need of protection than a stable marriage.

## 5.6 **ILLOGICAL - CIVIL CASES**

A spouse is compellable in civil cases for either party and there is no relevant distinction between civil and criminal cases.

### *Counter argument*

The argument that no marital discord problems are alleged to arise when spouses give evidence against each other in civil cases, ignores the fundamental differences between civil and criminal proceedings. Mrs. A may testify that Mr. A drove negligently, and this may establish Mrs. A's right to substantial damages from Mr. A's insurers. No marital discord is likely to arise from such a suit. Even where Mrs. A testifies against Mr. A in such a way as to harm him financially, (as where Mrs. A testifies that Mr. A did publish a statement libellous of Mr. B), there are factors which make the likelihood of marital discord less than where Mrs. A testifies against Mr. A in criminal proceedings :-

- (i) criminal proceedings may result in a fine and/or imprisonment, with attendant social disgrace and long-term consequences of coping with a criminal record; civil proceedings result, at worst, in an award of damages;
- (ii) criminal proceedings are the result of state or police initiative, and place the accused in a highly vulnerable position. If he is innocent, he may obtain no redress from the state for his legal costs, loss of business, and the mental and physical trauma involved (assuming it is not a case of malicious prosecution). Civil proceedings are initiated by private citizens and carry built-in redress mechanisms for the defendant (substantive defences, awards of costs, counterclaims and other procedural safeguards), which act both as restraints upon wholly unwarranted suits, and as vehicles for enabling him to restore himself to his original position.
- (iii) one reason why marital discord does not apparently result from compellability in civil proceedings may be that it would be very rare for a spouse to be compelled to testify in civil proceedings. The practical realities in civil litigation are such that counsel would not call upon Mrs. A to testify against Mr. A unless he was sure that she was willing to do so, or was prepared to have her treated as a hostile witness. Compellability in civil proceedings loses much of its relevance when the problems of relying upon an unco-operative witness are considered. A prosecutor in criminal proceedings may be less reticent in calling a reluctant spouse when he knows that he can point to her non-co-operation as evidence of her covering-up for a "guilty" spouse. A civil complainant has a personal stake to lose and would be unlikely to take such a risk.

## **5.7 ILLOGICAL - SPOUSES NOT PARTIES**

A spouse can be compelled to give evidence which incriminates the other spouse in civil or criminal proceedings to which that other spouse is not a party. Thus Mrs. A can be compelled to testify that Mr. A was at the scene of a robbery, at the trial of Mr. B for murder, when Mr. A is not charged with murder. This must cause just as much marital disharmony and yet the law does not prevent it (R v All Saints, Worcester (Inhabitants) (1817) 6 M & S, 194, 105 E.R. 1215).

### *Counter argument*

The argument that it is illogical to protect spouses from being compelled to testify against each other, when they are free to give incriminating testimony in proceedings in which neither spouse is the accused, cuts both ways. It may be said that a spouse should never be required to incriminate a spouse in any criminal proceedings, even where the spouse is not an accused.

## **5.8 LICENSES TO COMMIT CRIME**

It is wrong to give a spouse what is in effect a license to commit a crime in the presence of a spouse, without the risk of the testimony of the spouse witness being used in a prosecution against the guilty spouse.

### *Counter argument*

The argument that non-compellability gives a license to commit crime in the presence of a spouse overlooks the fundamental principle of our criminal justice system that an accused is presumed innocent until proven guilty. If one starts with the presumption that all accused are guilty, and that married accused commit their crimes in the presence of conniving spouses, it is not difficult to move from there to the proposition that no spouse should be protected from giving evidence about this crime which is presumed to have been committed, and to have been committed in the presence of the spouse. But if one starts with the presumption that all accused are innocent, and that people do not get married in order to connive in each other's crimes, it is less easy to shift to the proposition that all spouses should be made to testify against one another. The fact of innocence (for until disproven, it is a fact) and the sanctity of marriage (a basic institution in society) are bedrock principles which are recognised and protected by the legal system. They reflect the moral and societal values which underlie the community as a whole. The burden lies upon those who would make inroads upon these principles, to establish a case for doing so. The burden does not lie upon those who believe in a presumption of innocence or in sanctity of marriage to make out a case for their beliefs. Anything which tends to undermine those principles is inherently suspect. Compelling a spouse to testify against a spouse because there must be no licence for spouses to commit crime in each other's

presence represents an assault upon both the presumption of innocence and the presumed sanctity of marriage. As such it is an illegitimate argument.

## **5.9 PUBLIC INTEREST**

It is in the public interest that the criminal law should be enforced and persons who are witnesses to prove an offence, should not be at liberty to prevent enforcement.

### *Counter argument*

The argument that it is in the public interest that the criminal law should be enforced begs the very question at issue, which is one of competing values. Is the "captured criminal" argument so strong that it should prevail over every other value and principle in society? Does it mean that all citizens should be subject to arbitrary search and seizure, to eavesdropping, wiretapping, and detention without trial upon suspicion, because this would lead to the incarceration of some criminals who might otherwise escape detection? The answer, we must suppose, is emphatically negative. Where then, does one draw the line? Is the sanctity of marriage a principle which must be overridden in the interests of the criminal law or does the fulfilment of our desire to capture all criminals take second place to the fulfilment of our desire to uphold marriage relationship as an important institution? It is question of where we place our highest values. Do we regard the prize of a captured criminal as eminently more worthwhile than the prize of an unspoiled marriage? This question is considered further below. It is sufficient to note here that it is not answered by merely stating one side of the argument, as though that was a resolution of the issue.

## **5.10. THE BALANCE OF INTERESTS FAVOURS COMPELLABILITY**

The interest of society in the detection and punishment of offenders outweighs the interest of society and of the parties to a marriage in preserving the marital relationship.

### *Counter argument*

The argument that it is more important to convict offenders than save marriages breaks down when one considers that a spouse who loves the other spouse would be more likely to withhold evidence (without appearing to commit contempt), or even commit perjury, rather than "betray" the spouse. A spouse who was ready to incriminate a spouse would do so voluntarily, and there is no need for a rule of compellability (competence would suffice).

## **5.11. ALL RELEVANT EVIDENCE**

It is desirable that all available evidence which might lead to a correct verdict should be before the Court.

*Counter argument*

The argument that all available evidence should be before the court begs the question at issue, which is "are there policy considerations in the case of a marital relationship to which the normal rule in favour of admitting all available evidence is subordinate?" This argument advances the issue no further than to say that the testimony of a spouse should be available unless there is some reason why it should not be available.

**5.12.            *WRONG CONVICTIONS***

If a competent spouse whose evidence would be favourable to the accused can avoid testimony, the accused may be wrongly convicted or wrongly acquitted.

*Counter argument*

This argument overlooks the fact that the spouse's evidence may be inherently unreliable (because of motives of revenge or protection) so that if the spouse gives evidence, the accused may still be wrongly convicted or wrongly acquitted.

**5.13.            *UNPUNISHED CRIMES***

The decision to prosecute or not could depend on whether a spouse was willing to testify voluntarily, and if not, a serious offence might go unpunished.

*Counter argument*

This argument begs the question at issue - which is whether there are policy considerations requiring protection of the marital relationship which outweigh the public interest in seeing that all crimes are prosecuted successfully.

**5.14.            *SUSPICION OF BIAS***

A competent, but non-compellable spouse who does give evidence against a spouse may be suspected of bias. A compellable spouse could not be subject to such suspicion.

*Counter argument*

In some people's eyes any spouse who testifies against his or her spouse may be regarded with suspicion. Compellability does not mean that everything damaging must inevitably be revealed.

#### **5.15 TRUTH MORE IMPORTANT**

The search for truth is more important than the need to promote marital happiness.

##### *Counter argument*

This is the question at issue. To state it, is merely to make an affirmation of one side of the argument. Some would say that truth is itself a relative matter and that preserving marital relationships generally, from the threat of being invaded in the search for truth about a crime, is more important to the welfare and stability of society as a whole than the possibility of discovering a piece of truth that might otherwise pass undetected.

#### **5.16. RISK TO MARRIAGE OVERRATED**

A sound marriage will not be weakened by a spouse's unfavourable testimony. This point is made by Wigmore on Evidence (1940), when he observes at para. 2228 that, "It is incorrect to assume that there exists in the normal domestic union an imminent danger of shattering an ideal state of harmony solely by the liability to testify unfavourably."

##### *Counter argument*

This is a highly subjective opinion. Statistical evidence would need to be presented before it could be taken at face value. If the accused spouse perceives the testimony of a spouse as amounting to a public betrayal (and it is not difficult to understand why it might be so perceived) the damage to the relationship might be irreparable.

#### **5.17. MARITAL DISCORD BASED ON DUBIOUS BASIS**

The English Law Commission observed in 1853 (2nd Report, p. 13, quoted by New South Wales L.R.C.D.P., 1980, p. 22) that the resentment which a husband might feel against his wife for testifying against him "could only be felt by persons prepared to commit perjury themselves and to expect it to be committed in their behalf". This is not a sound basis for avoiding such resentment.

##### *Counter argument*

This assumes that every accused person is guilty. An innocent husband (and every accused is presumed innocent until proven guilty) might

well feel resentment (a) towards a system which compelled his spouse to testify against him, and (b) towards his spouse for so testifying, if he is in fact innocent. It matters little whether her damaging testimony was due to mistake, a desire for revenge or through clever questioning by the prosecution. Even if the accused is guilty (and this should not be presumed), he might expect his wife not to incriminate him, without necessarily committing perjury. The two things are not inevitably linked. One does not have to commit perjury in order to be acquitted. Pleading not guilty to a crime is not itself necessarily perjury, even if the court subsequently pronounces a conviction. The issue is not whether the accused committed the crime, but whether a jury is satisfied that the evidence establishes that he did so, and whether this evidence is fairly adduced in procedurally correct legal proceedings.

### **5.18. A GUILTY SPOUSE DOES NOT DESERVE PROTECTION**

Bentham rejected the argument that a wife should not be compelled to testify against her husband, because he felt that if a man was guilty he should not expect mercy from anyone. He observed :-

*“Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes! - Think? answers the legislator; yes, indeed, I think of it and in thinking of it, what I think of besides, is, what you ought to think of it. Think it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? It depends altogether upon yourself : preserve your innocence.”*

[Bentham (1827), Bk.IX, Pt.IV, ch.5, s.4, para.1, quoted by the New South Wales, L.R.C., D.P. (1980), p.24]

#### *Counter argument*

This argument (which seems to gain little from the pseudo-moralistic posturing of its author) assumes the guilt of the accused before he is tried. It is not difficult to see where its weakness lies, by rephrasing it slightly :-

*“Oh! but think what must be the suffering of my wife, if compelled by her testimony [that I had thrown out some business records] to bring destruction on my head, by disclosing [a fact which the prosecutor was able to use to convince the jury, wrongly, that I was evading taxes]”.*

Every successful appeal against conviction speaks volumes about the possibility of wrong convictions. A spouse who unwittingly becomes the cause of such a conviction would feel much hardship.

Even in the case of an accused who would, on the spouse's evidence alone, be convicted, the hardship to the spouse is not lessened by Bentham's self-righteous indignation against the guilty accused.

#### **5.19. UNJUST TO BACHELORS**

One guilty party who happens to be married may escape conviction when the only evidence against him is that of his spouse, whilst another would be convicted if he happens to be a bachelor, and so cannot preclude incriminating testimony under the spouse-protection rule.

##### *Counter argument*

This is true, but it is a function of the marital relationship which, ex hypothesis, is deemed worthy of protection. The issue here is whether other relationships (e.g. fiancées or cohabitantes) might also be thought worthy of such protection.

#### **5.20. AGGRIEVED HUSBAND**

A husband might feel aggrieved if he could not compel his possibly estranged wife to give evidence for him.

##### *Counter argument*

This assumes that compellability itself guarantees that all available evidence will be revealed in testimony. There is a limit to what a witness can be compelled to reveal.

#### **5.21. GRUDGES**

An estranged husband or wife should not be able to deny his or her spouse the benefit of evidence which may be essential to establish that spouse's innocence, as he is when merely competent, but not compellable for the defence.

##### *Counter argument*

See 5.20 above.

#### **5.22 RISK TO CO-ACCUSED**

As regards evidence against a co-accused, the husband or wife of an accused person, when not a co-accused with that person, should be

made compellable to give evidence on behalf of any co-accused in the proceedings as if the witness and the accused spouse were not husband and wife, because an accused man cannot properly be required to run the risk of being wrongly convicted in order to spare the witness from hardship of possibly incriminating the spouse.

*Counter argument*

This depends on how highly one values the marital relationship. It also assumes that compellability would result in the revelation of all the evidence. (See 5. 20 above)

**B. Possible Reasons for Not Making a Spouse Compellable**

**5.23 CONFIDENTIAL RELATIONSHIP**

It would compel a violation of the confidential relationship between husband and wife.

*Counter argument*

In modern society, when divorce rates are high, where extra-marital sex and infidelity are common, where the nuclear family revolving around the relationship of a man and a woman exists alongside other types of relationships - including single parent families, homosexuality, lesbianism and commune style living, it is no longer appropriate (if it ever was) to place such importance upon the husband and wife relationship and to afford it such exclusive confidentiality.

**5.24 DOMESTIC DISRUPTION**

It would compel a spouse to endanger his (or her) economic and social security, and that of his (her) family, by forcing her to place the spouse in jeopardy of conviction and punishment.

*Counter argument*

The argument that compulsory evidence of spouses would cause marital discord could also be used to prevent any evidence by a spouse,

- (i) which incriminated a spouse even when not an accused in the proceedings;
- (ii) in any civil proceedings,

and yet the law does not so provide, and no one suggests that great marital discord is caused thereby.

**5.25            *POINTLESS***

It is pointless. A spouse might rather commit contempt (by silence) or perjury than jeopardise the other spouse.

*Counter argument*

This is true, but it might work in some cases.

**5.26            *PUBLIC OPINION - REPUGNANCE***

Public opinion would be offended by the spectacle of one spouse being compelled to testify against the other.

*Counter argument*

The argument that public opinion would not favour compelling a spouse to testify against a spouse breaks down if it appears that public opinion either is not so strong on the issue or is in any event not soundly based.

**5.27            *DILEMMA***

It is wrong to put a wife into a position where she may have to choose between incriminating her husband and committing perjury.

*Counter argument*

The state has a duty to prosecute crime, and the sensitivity of spouses must be subordinated to the overriding needs of the state in this regard.

**5.28            *THE STATE'S ROLE-MARITAL HARDSHIP***

The state is not justified in imposing on husbands and wives the extreme hardship of giving evidence against their spouses, contrary to the promptings of affection and marital duty, and with the likelihood, in many cases, of bringing upon themselves disastrous social and economic consequences.

*Counter argument*

See 5.27 above.

## **5.29           BIAS AND SELF INCRIMINATION**

It would offend the maxims that no one should be a witness in his own cause ("nemo debet esse testis in propria causa") and that no one is bound to incriminate himself ("nemo tenetur se ipsum accusare").

### *Counter argument*

These maxims must not be used to cloak crime and impede its prosecution

## **5.30           ERRONEOUS VERDICTS**

The danger that the spouse might give perjured evidence increases the risk of erroneous verdicts.

### *Counter argument*

This can be assessed by the judge and jury.

## **5.31           DEEP ROOTED**

The rule against compellability is deep-rooted should not be changed for the sake of change. As Lord Halsbury observed in Leach v R [1912] A.C. 305 at P. 311: - "If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution, in the sense that every would say, 'To call a wife against her husband is a thing that cannot be heard of' - to suggest that that is to be dealt with by inference, and that you should introduce a new system of law without any specific enactment of it, seems to me to be perfectly monstrous."

### *Counter argument*

The argument that the rule against compellability is deep-rooted breaks down if it is shown to be generally productive of undesirable consequences. A bad rule should be changed, however deep-rooted it is.

## **5.32           BALANCE OF INTERESTS FAVOUR NON-COMPELLABILITY**

The potential harm to marital peace resulting from compellability outweighs the possible benefits to society in obtaining convictions for offences.

### *Counter argument*

This begs the question at issue.



## **CHAPTER 6**

# **SUMMARY OF THE OPTIONS FOR REFORM IN HONG KONG**

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### **6.1 Introduction**

The New South Wales Law Reform Commission in its Discussion Paper on Competence and Compellability (1980), page 42 presented six possibilities for the law on the compellability of the spouse for the prosecution :

- 1) To make spouses compellable in all cases;
- 2) To make spouses not compellable in any case;
- 3) To make spouses compellable in enumerated offences;
- 4) To make spouses compellable in broad categories of offences
- 5) To make spouses compellable where the court so directs;
- 6) To make no change in the existing law.

The Australian Law Reform Commission, in its Evidence Reference Research Paper No. 5 (1979), p.80, added a further approach :

- 7) To make spouses compellable except where the court directs otherwise.

The New South Wales Law Reform Commission preferred a combination of options 4 and 5. The Victorian Law Reform Commission and the Australian Law Reform Commission favoured option 7, and this had been adopted in Victoria.

### **6.2 Hong Kong Options : An Overview**

In the context of Hong Kong, where a spouse is merely not compellable to give evidence for the prosecution in criminal proceedings, but also is not competent to do so, save in certain exceptional cases, there are, in theory, additional variables to be considered when attempting a comprehensive statement of the options for reform. It is helpful to distinguish between proceedings against the spouse, a co-accused, a jointly accused spouse and a divorced spouse. When all of the possible permutations are considered, it emerges that there are many different options for reform. All of

these are presented below. Many of them are more theoretical than real. The most likely options for Hong Kong are

- (1) To make spouses compellable in all cases.
- (2) To make spouses compellable for the defence in all cases and for the prosecution in certain cases only.
- (3) To make spouses competent in all cases.
- (4) To make no change in the existing law.

Each of these options is explored further in the remainder of this report.

### **6.3 The Options**

The following options are theoretically possible (the underlined options are those that have been implemented in England in the Police and Criminal Evidence Act 1984; those with an asterisk are the ones recommended by the sub-committee in the ensuing chapters and relevant paragraph numbers are given in brackets to the places where the relevant recommendation is made in the text below) .

#### ***PROCEEDING AGAINST THE SPOUSE***

1. To make no change in the existing law.
2. To make spouses not competent or compellable in any case to give evidence for or against each other.
3. To make spouses competent and compellable for the prosecution and defence, in all cases, in the same way as other witnesses.
4. To make spouses competent in all cases, but compellable in none.
- \*5. To make spouses competent (para 7.6) and compellable (para 8.8) in all cases, for the defence, and
  - either a) neither competent nor compellable for the prosecution in any cases;
  - or b) competent in all cases for the prosecution, but not compellable in any case, for the prosecution;
  - \*or c) competent in all cases for the prosecution (para 13.7) and compellable for the prosecution : -

- either (i) in specified offences;
- \*or (ii) in specified categories of offence (para 14.19)
- or (iii) where the court in its discretion direct;
- or (iv) in all cases, unless the court, in its discretion, otherwise directs.

6. To make a spouse competent for the defence in all cases, either A) with consent of the accused spouse or B) without the consent of the accused spouse, and compellable for the defence in none, AND

- either a) neither competent nor compellable for the prosecution in any case;
- or b) competent in all cases for the prosecution but not compellable in any case for the prosecution;
- or c) competent in all cases for the prosecution and compellable for the prosecution :-

- either (i) in specified offences;
- (ii) in specified categories of offence;
- or (iii) where the court, in its discretion, directs;
- or (iv) in all cases, unless the court, in its discretion, otherwise directs.

7. To make spouses competent and compellable in all cases, for the prosecution, and

- a) neither competent nor compellable for the defence in any cases;
- or b) competent but not compellable for the defence in all cases;
- or c) competent and compellable for the defence;

- either (i) in specified offences;
- or (ii) in specified categories of offence;
- or (iii) where the court directs;
- or (iv) in all cases unless the court otherwise directs.

8. To make a spouse competent for the prosecution in all cases, but compellable for the prosecution in none, AND

- a) neither competent nor compellable for the defence in any case;
- or b) competent but not compellable for the defence in all cases;
- or c) competent and compellable for the defence;

- either (i) in specified offences;
- or (ii) in specified categories of offence;

- or (iii) where the court directs;
- or (iv) in all cases unless the court otherwise directs.

9. Wherever a divorced spouse is made compellable to distinguish between :-

- a) evidence in regard to matters occurring before the marriage - compellable;
- b) evidence in regard to matters occurring during the marriage - not compellable.

10. Not to make the distinction in paragraph 9 above

#### **6.4 PROCEEDINGS AGAINST A CO-ACCUSED OF THE SPOUSE**

1. To make no change in the existing law.
2. To make a spouse not competent or compellable to give evidence for or against a co-accused of the accused spouse in any case.
3. To make a spouse competent and compellable to give evidence for and against a co-accused of a spouse in all cases,

- either A) with the consent of the accused spouse;
- or B) without the consent of the accused spouse.

4. To make a spouse competent in all cases, but compellable in none :-

- either A) with the consent of the accused spouse;
- or B) without the consent of the accused spouse

5. To make a spouse competent and compellable in all cases, for the defence of the co-accused :-

- either A) with the consent of the accused spouse
- or B) without the consent of the accused spouse, AND

either a) neither competent nor compellable for the prosecution in any case;

or b) competent in all cases for the prosecution but not compellable in any case for the prosecution;

or c) competent in all cases for the prosecution and compellable for the prosecution :-

- either (i) in specified offences;

- or (ii) in specified categories of offence;
- or (iii) where the court, in its discretion, directs;
- or (iv) in all cases, unless the court, in its discretion, otherwise directs.

6. To make a spouse competent for the defence of the co-accused in all cases,

- either A) with the consent of the accused spouse
- or B) without the consent of the accused spouse, and compellable for the defence of the co-accused in none, AND

- a) neither competent nor compellable for prosecution of the co-accused in any case;
- or b) competent, but not compellable in any case for the prosecution of the co-accused;
- or c) competent in all cases for the prosecution and compellable for the prosecution of a co-accused : -

- either (i) in specified offences;
- or (ii) in specified categories of offence;
- or (iii) where the court, in its discretion directs;
- or (iv) in all cases, unless the court otherwise directs.

7. To make spouse competent and compellable for the defence of the co-accused in those cases where the spouse would be competent and compellable for the prosecution of the accused spouse,

- either A) with the consent of the accused spouse;
- B) without the consent of the accused spouse.

8. To make a spouse competent and compellable in all cases to give evidence for the prosecution against a co-accused of a spouse,

- either A) with the consent of the spouse;
- or B) without the consent of the spouse, AND

- a) neither competent nor compellable for the defence of the co-accused in any case;
- or b) competent, but not compellable for the defence of the co-accused in any case;
- or c) competent and compellable for the defence of a co-accused :

- either (i) in specified offences;
- or (ii) in specified categories of offence;
- or (iii) where the court directs;

or (iv) in all cases unless the court otherwise directs.

9. To make a spouse competent for the prosecution of the co-accused in all cases, but compellable for the prosecution of the co-accused in none, AND

either a) neither competent nor compellable for the defence of the co-accused in any case;

either A) with the consent of the accused spouse

or B) without the consent of the accused spouse

or b) competent, but not compellable for the defence of the co-accused in any case;

or c) competent and compellable for the defence of a co-accused :-

either (i) in specified offences;

or (ii) in specified categories of offence;

or (iii) where the court directs;

or (iv) in all cases unless the court otherwise directs.

\*10. To make a spouse competent for the defence of the co-accused in all cases even without the consent of the spouse (para. 9.7) and compellable for the defence of the co-accused in those cases where the spouse is already compellable for the prosecution (para. 10.6).

\*and Competent for the prosecution of the co-accused in all cases (para. 15.6) and compellable for the prosecution of the co-accused in the case of those offences where the spouse is compellable against the other spouse (para. 16.6).

\*11. Wherever a divorced spouse is made compellable, to distinguish between :

a) evidence in regard to matters occurring before the marriage - compellable;

b) evidence in regard to matters occurring during the marriage - not compellable.  
(para. 23.7)

12. Not to make the distinction in paragraph 11 above.

## **6.5 PROCEEDINGS AGAINST A JOINTLY TRIED SPOUSE**

1. To make no change in the existing law.

2. To make a spouse not competent and not compellable in any case (UK).
- \*3 To make a spouse competent (para 11.5) but not compellable (para 12.6) for the defence, and neither competent (para 17.6) nor compellable (para 18.7) for the prosecution.
4. To make a spouse competent and compellable for the prosecution and defence in all cases, in the same way as other witnesses,
- either A) with the consent of the co-accused spouse;  
or B) without the consent of the co-accused spouse.
5. To make a spouse competent in all cases but compellable in none :
- either A) with the consent of the co-accused spouse;  
or B) without the consent of the co-accused spouse.
6. To make a spouse competent and compellable in all cases for the defence,
- either A) with the consent of the co-accused spouse;  
or B) without the consent of the co-accused spouse, and
- either a) neither competent nor compellable for the prosecution in any case;  
or b) competent, but not compellable for the prosecution in all cases,  
or c) competent and compellable for the prosecution
- either (i) in specified offences;  
or (ii) in specified categories of offences;  
or (iii) where the court, in its discretion, directs;  
or (iv) in all cases, unless the court, in its discretion, otherwise directs.
- 7 To make a spouse competent and compellable in all cases to give evidence for the prosecution against a co-accused spouse,
- either A) with the consent of the spouse;  
or B) without the consent of the spouse, and
- either a) neither competent nor compellable for the defence of the co-accused spouse in any case;  
or b) competent, but not compellable for the defence of the co-accused spouse in any case;  
or c) competent and compellable for the defence of a co-accused spouse :-

- either (i) in specified offences;
- or (ii) in specified categories of offences;
- or (iii) where the court directs;
- or (iv) in all cases unless the court otherwise directs.

8. Wherever a divorced spouse is made compellable, to distinguish between :
  - a) evidence in regard to matters occurring before the marriage - compellable;
  - b) evidence in regard to matters occurring during the marriage - not compellable.
9. Not to make the distinction in paragraph 8 above.

## **6.6. PROCEEDINGS AGAINST A DIVORCED SPOUSE**

1. To make no change in the existing law.
2. To make an ex-spouse not competent and not compellable to give evidence for or against ex-spouse in any case.
- \*3 To make an ex-spouse competent and compellable to give evidence for or against the ex-spouse in all cases, in the same way as any other witness:-
  - either a) as regards matters occurring during the marriage;
  - \*or b) as regards matters occurring before or after the marriage (para. 23.6);
  - or c) as regards matters occurring before, during or after the marriage  
and
  - either (A) subject to the privilege for spousal communications during marriage;
  - \*or (B) overriding any privilege for spousal communications (para. 19.8)

## **PART II : THE SPOUSE AS A WITNESS FOR THE DEFENCE**

### **CHAPTER 7**

## **SHOULD THE SPOUSE BE A COMPETENT WITNESS FOR THE ACCUSED?**

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### **7.1 The Present Law**

The general rule in Hong Kong today is that a spouse is a competent witness for the accused. In other words, a spouse can testify in favour of the other spouse who is accused of a crime, if he or she wishes to do so, assuming of course, that the accused calls him or her as a witness.

7.2 There is one limitation under present law: the spouse of the person charged shall not "save as in this section mentioned, be called as witness in pursuance of this section except upon the application of the person so charged". (Criminal Procedure Ordinance, s. 54 (1)(c).) The meaning of this subsection is obscure. At first sight it seems to be saying that a spouse cannot give evidence for the defence of the spouse unless the accused spouse calls the spouse. There must be few cases where counsel for the defence would seek to call a witness for the defence against the wishes of his client, so that the subsection seems otiose. Upon closer examination, however, it appears that the subsection is dealing with the case of a spouse giving evidence where there is a co-accused; what the subsection is saying is that although anyone may be called to give evidence for the defence of an accused and a co-accused, the spouse of the accused shall not be called to give evidence for the co-accused unless the spouse makes application for her to do so. This aspect of the matter is considered further in Chapters 9 and 10.

### **7.3 The Question of Reform**

There is no suggestion that the present law unsatisfactory or in need of reform.

### **7.4 Public Opinion**

In the telephone survey (see Annexure 2) no distinction was drawn between giving evidence for the accused and for the prosecution. However, 43% of the respondents thought that the spouse of an accused

should be allowed by the law to give evidence in courts in every case if he/she wants to, 19% said the spouse should not be allowed to give evidence and the remaining 38% either said they didn't know or had no comment. Among those respondents (19% of total) who said that the spouse should not give evidence in every case, 62% thought that the spouse should be allowed to give evidence in certain specified cases.

## **7.5 The Position in England**

In England, a spouse is competent to give evidence for the defence of an accused spouse (see Police and Criminal Evidence Act 1984, s.80(1)), except where the spouses are jointly charged (s. 80(4)). The position of spouses jointly charged is considered further in Chapters 11 and 12.

## **7.6 The Recommendation**

We recommend no change to the existing law, in respect of the above matters. We are of the opinion that a spouse should be competent to give evidence for the defence of a spouse in every case. This is essentially the position in Hong Kong today, by virtue of s. 54(1) of the Criminal Procedure Ordinance. It seems correct that a spouse should always be able, if he or she wishes, to give evidence for the defence of his or her spouse. The court can take account of the possibility of evidence being tainted by interest in assessing its weight.

## CHAPTER 8

# SHOULD THE SPOUSE BE A COMPELLABLE WITNESS FOR THE ACCUSED?

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### 8.1 The Present Law

The general rule in Hong Kong today is that a spouse is not compellable to testify for the other spouse. In other words, a spouse who is accused cannot compel the other spouse to come and testify as a witness for the defence.

### 8.2 The Question of Reform

Many jurisdictions have made the spouse compellable to testify for the defence in criminal proceedings, including Canada, England and several Australian States. The Law Reform Commission of Ireland, in its Report on Competence and Compellability of Spouses as Witnesses (LRC 13 - 1985) recommends that, except in cases where spouses are jointly accused, one spouse should be compellable to give evidence for the other spouse when the latter is charged with a criminal offence. The Commission stated:

*"The Commission is firmly of the view that it would be intolerable if a person accused of a criminal offence were unable to compel testimony from the other spouse which might help to disprove the charge." (ibid, page 52.)*

We are impressed by this viewpoint and have carefully considered whether the law in Hong Kong should be changed in the light of it.

### 8.3 Arguments Against Compellability

Against compellability, it may be said a violent husband who was liable to conviction might force his wife to lie on his behalf. This is a possibility which exists as regards all witnesses, though the risk of such duress is no doubt greatest in the case of spouses and other family members. One would assume, however, that a competent prosecutor would be able, on cross examination, to explode any testimony that had been fabricated under such conditions.

## 8.4 Arguments In Favour of Compellability

The arguments in favour of compellability become clear when one considers the situations in which an accused would need to rely upon compulsion to have his spouse testify on his behalf. Most probably it would be when the spouse witness had something to say which would favour the accused but was unwilling to say it because of personal embarrassment (e.g. it would reflect badly on the witness in some social, moral or ethical sense) or because of a fear of court proceedings or because of spite. In the latter case, the accused might prefer not to call the spouse, rather than call a potentially hostile witness. But in the other two situations (and there are no doubt others like them) compellability would be the only solution to ensure that the accused had a fair trial in which all relevant evidence was presented. The scruples of the witness must take second place to the dictates of justice.

## 8.5 Public opinion

In the telephone survey, the following question was posed:

*“Do you think the spouse of an accused should be compelled by laws to give evidence in courts in every case even if he/she does not want to testify?”*

It is perhaps unfortunate that the question did not clearly differentiate between giving evidence for the defence on the one hand and the prosecution on the other. One can appreciate that some respondents may have assumed one position while others may have assumed the other in giving their answers.

In the telephone survey, only 19% of the respondents took the view that the spouse of an accused should be compelled by law to give evidence in courts in every case even if he/she does not want to testify, when asked this question in the abstract. 45% said that they should not be compelled and 36% either said they didn't know or had no comment. However, among those respondents (45% of total) who said the spouse should not be compelled to give evidence in every case, 36% thought that the spouse should nevertheless be compelled in certain cases. These cover serious crimes.

It is interesting to observe that when the question was again asked through a factual example (and was specifically addressed to giving evidence for the defence), the percentage in favour of compellability rose from 19% to 29%, while the percentage against rose from 45% to 46%, only 25% gave “don't know/no comment” answers.

In the survey of organisations, in response to the direct question on this issue (which did explicitly relate to evidence for the defence) only 47% of respondents favoured compellability for the defence, while 53% opposed it. (Of the 32 Magistrates who responded, only 38% favoured compellability,

while 62% were opposed to it.) Strangely, however, in response to the hypothetical fact situation on the same issue, 52% favoured compellability and only 47% opposed it. (The magistrates' position remained unchanged.) This suggests a measure of vacillation.

8.6 We, have found it difficult to evaluate these results. At first sight, they seem to suggest a luke-warm response, if not antipathy, towards making a spouse compellable to testify for the defence. The telephone survey question on this issue suffers from its ambiguity, a point which is reinforced by the shift in opinion which occurred in the results to the hypothetical question. The response in the survey of organisations was heavily weighted by the magistrates who opposed compellability by a wide margin (62%).

The sub-committee's initial views on this issue were similar to those reflected in the law in England, Canada, Victoria, Queensland and South Australia, and proposed in Ireland - namely in favour of compellability for the defence. The sub-committee then found that the results of its own survey suggested that public opinion might be opposed to such views.

We feel that there is a heavy onus upon us to justify any marked deviation from the views expressed by the public. We adhere to our recommendation in this instance because we are convinced that the principle that an accused should have an unfettered right to defend himself outweighs considerations of convenience, courtesy and even the possibility of coercion which arise when a spouse is compelled to testify. We believe that in practice the number of cases in which an unwilling spouse would be compelled to testify by the defence would be very small. It is tempting to conclude that the public response to the specific fact situation (which shows a slight majority favouring compellability) is more reliable than the response to the abstract question. We prefer to justify our recommendation simply by reference to the principle involved.

This was one of the most difficult questions we faced. The question was discussed at length by the sub-committee. On the one hand, it was recognised that the spontaneous reactions of the general public as evidenced in the surveys are extremely important. They are entitled to be accorded the greatest weight. On the other hand, the sub-committee felt (and we agree) that this is an area where the law may need to lead public opinion in the interests of justice. On balance we believe that the sub-committee's initial impressions were the correct ones.

## **8.7 The Position In England**

In England spouses are compellable to give evidence on behalf of each other (Police and Criminal Evidence Act, 1984, s.80(2)), except where the spouses are jointly charged with an offence (ibid, s.80(4)) (compare paras. 12.4, 13.6, 17.4 and 18.4).

## 8.8 The Recommendation

We are of the opinion that a spouse should be able to compel his or her spouse to testify on behalf of the accused. The accused should always have the right to defend himself by calling for all relevant testimony. The arguments in favour of compellability seem to outweigh those against it. We recommend that a spouse be compellable to testify for the defence of a spouse as a general rule, except in cases where both spouses are tried together (The latter situation is covered in Chapter 12 below) .

## **CHAPTER 9**

# **SHOULD THE SPOUSE BE A COMPETENT WITNESS FOR A PERSON WHO IS JOINTLY TRIED WITH THE ACCUSED SPOUSE?**

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### **9.1 The Present Law**

The present law is that a spouse is competent to testify for the defence of a person jointly tried with the other spouse. However, the consent of the accused spouse is required in all cases, except crimes of violence against the spouse, treason, forcible marriage and Schedule 2 crimes.

### **9.2 The Question of Reform**

The main issue here is whether the consent of the accused spouse should be required.

### **9.3 Arguments In Favour of Consent**

The argument in favour of requiring the accused's consent is that it enables the accused to protect himself against the possibility that his spouse may give evidence, either in chief or under cross examination, that favours the co-accused but incriminates himself.

### **9.4 Arguments Against Consent**

The argument against requiring the accused's consent is that it presupposes that the accused has some property in the spouse as a witness. This is not so. Furthermore such a veto amounts to a gagging power and seems inconsistent with current social attitudes concerning the rights of parties to a marriage.

### **9.5 Public Opinion**

Public opinion was not specifically canvassed on this particular issue.

## **9.6 The Position In England**

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

## **9.7 The Recommendation**

We believe that where a spouse is willing to testify for a co-accused, the law should not impede this by putting up the accused's consent as an obstacle. This could result in a denial of justice to the co-accused, who is entitled to have all the evidence that may assist him, presented to the court.

We are of the opinion that the spouse should be a competent witness for someone who is jointly tried with the accused, regardless of whether the accused spouse consents.

## **CHAPTER 10**

# **SHOULD THE SPOUSE BE A COMPELLABLE WITNESS FOR A CO-ACCUSED WHO IS JOINTLY TRIED WITH THE ACCUSED SPOUSE?**

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### **10.1 The Present Law**

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

### **10.2 The Question of Reform**

The question here is whether to apply the same rule suggested in chapter 8 (compellability of a spouse for the defence) to the person who is tried with the accused? The question arises because a spouse might find herself effectively being compelled to testify against her spouse, in favour of the person being tried with her spouse.

### **10.3 Public Opinion**

Public opinion was not expressly canvassed on this particular issue.

### **10.4 The Position In England**

In England the Criminal Law Revision Committee recommended that a spouse should be compellable to testify for a co-accused in any case where she would be compellable on behalf of the prosecution even though the result might be that she would incriminate the spouse. (see Eleventh Report Evidence (General) (1972), para. 155.) This may be justified on the theory that in such cases the prosecution can itself compel the spouse to testify against the accused, so that the accused is no worse off, as regards the risk of adverse testimony which might flow from cross examination by the prosecution of the spouse who testifies for the co-accused. This recommendation is now embodied in the Police and Criminal Evidence Act, s. 80 (3)).

## **10.5 Danger That Spouse Is Indirectly Compelled To Testify Against Spouse**

We do not favour making a spouse compellable to testify for someone who is jointly tried with the accused spouse, except where the spouse is a compellable witness for the prosecution. Making a spouse compellable for a co-accused in all cases, could result in the spouse witness effectively being indirectly compelled to testify against the accused spouse, under questioning from the co-accused who seeks to put the blame upon the accused.

The situation is different from competence, considered in Chapter 9, which only affects a willing witness. It is only where a witness is unwilling to testify that it becomes necessary to invoke a rule of compellability. The Sub-committee is of the view that it is wrong in principle to compel an unwilling spouse to testify for a co-accused of the accused spouse. The factors that might cause a spouse to shy away from testifying for a co-accused are many and varied. They certainly include the fear of incriminating the spouse, and on that ground alone, there is sufficient justification for refusing to implement a rule of compellability.

We favour the English position, whereby the spouse is not compellable to testify for the co-accused, except in cases where she is compellable for the prosecution. In the latter cases, since she can already be compelled to give evidence against the accused, it can hardly be said that the accused is exposed to a danger to which he would not otherwise be exposed, by compelling the spouse to testify for a co-accused.

## **10.6 Recommendation**

A spouse should not be compellable to testify for the defence of a co-accused jointly tried with the accused spouse, except in those cases where, under the recommendations made in this report, (see para. 14.20). a spouse would be a compellable witness for the prosecution - i.e. in cases of a violent or sexual offence against the spouse or a child of the family under 16, or a child under the age of 16 in respect of whom either spouse was acting in loco parentis.

## CHAPTER 11

# SHOULD A SPOUSE WHO IS JOINTLY TRIED WITH THE OTHER SPOUSE BE A COMPETENT WITNESS FOR THAT SPOUSE?

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### 11.1 The Present Law

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

### 11.2 The Question of Reform

There is no particular problem which calls for reform on this issue.

### 11.3 Public opinion

Public opinion favoured competence of a spouse to testify for the spouse in a general sense (see Chapter 7 above). Public opinion on the specific issue of jointly accused spouses was not separately canvassed.

### 11.4 The Position In England

A spouse is competent to testify for a jointly accused spouse in England by virtue of s.80(1)(b) of the Police and Criminal Evidence Act 1984.

### 11.5 The Recommendation

We are of the view that a spouse should always be competent to testify for the defence of an accused spouse (see chapter 7), and there is no reason why this rule should be different where the two spouses are being tried together. Present law allows this.

A spouse should be competent to testify for a spouse who is jointly tried in the same proceedings.

## **CHAPTER 12**

# **SHOULD A SPOUSE WHO IS JOINTLY TRIED WITH THE OTHER SPOUSE BE A COMPELLABLE WITNESS FOR THE DEFENCE OF THAT SPOUSE?**

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### **12.1 The Present Law**

A spouse is not presently a compellable witness for the defence of a jointly tried spouse.

### **12.2 The Question of Reform**

In chapter 8 we recommended that a spouse be made compellable to testify for the defence. Are there any factors which would militate against such a rule where the spouse-witness is also being tried for the same offence?

### **12.3 Public opinion**

Public opinion was not specifically solicited upon this issue.

### **12.4 The Position In England**

In England spouses are compellable to give evidence on behalf of each other (Police and Criminal Evidence Act, 1984, s.80(2)), except where the spouses are jointly charged with an offence (ibid, s.80(4)). The latter subsection provides that "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." (Compare paras. 8.7, 13.6, 17.4 and 18.4)

### **12.5 Right to Silence**

In Chapter 8, we recommended that a spouse should be compellable to testify for the defence of a spouse. However, that was in a

situation where the spouse witness was not also on trial. Where the spouse witness is also on trial for the same offence as the accused spouse, the spouse witness is entitled to all of the rights and privileges of an accused. These include the right of an accused not to give evidence and not to incriminate himself. Just because the evidence of the spouse witness is being sought on behalf of the other spouse should not mean that the accused spouse-witness loses the normal protections enjoyed by other accused persons. We are of the view that an accused should never be compellable to testify for or against anyone, including a spouse.

## **12.6 The Recommendation**

It is recommended that the general rule proposed in Chapter 8 that a spouse be compellable for the defence should not apply where the spouse is being jointly tried for the same offence with the other spouse, except where for any reason the spouse is not, or is no longer liable to be convicted of that offence at the trial.

## **PART III : THE SPOUSE AS A WITNESS FOR THE PROSECUTION**

### **CHAPTER 13**

## **SHOULD THE SPOUSE BE A COMPETENT WITNESS FOR THE PROSECUTION**

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### **13.1 The Present Law**

A spouse is not a competent witness for the prosecution except (a) at common law in cases of crimes of violence against the spouse, treason and forcible marriage, (b) by statute under s.57(1) of the Criminal Procedure Ordinance, Cap. 221, in the case of offences under enactments mentioned in the Second Schedule (see paragraph 2.6.1 above), and (c) by statute under s. 31 of the Theft Ordinance, Cap. 210, in the case of proceedings by one spouse against the other or where a spouse is charged with an offence with reference to the other spouse or the other spouse's property.

### **13.2 The Question of Reform**

Present law makes the spouse competent only in the specified cases referred to in the previous paragraph. These do not include murder of a child, infanticide, child destruction or concealment of birth (since these are not within the Second Schedule to the Criminal Procedure Ordinance, Cap. 221). Nor do they include murder or lesser acts of violence towards third parties. Finally, the spouse is also not competent in all crimes against property or involving fraud, except under the Theft Ordinance, s. 31 as described above. Should a spouse be made competent in all cases?

This is one of the central issues arising out of the terms of reference. This question and the one raised in the next chapter, go to the heart of the special rules affecting spouses as witnesses in criminal proceedings. Traditionally, the marriage relationship was thought to justify treating spouses differently from other witnesses. The unity of the family, and particularly of husband and wife, made it revolting to contemplate their condemning one another, and suggested that anything they said in support of each other would be tainted by interest. The need to respect the confidential relationship, to preserve peace within families, and to avoid putting a spouse in a difficult dilemma, were additional factors which seemed to justify these special rules.

The question arises whether in today's changed society, in which divorce is not an uncommon occurrence, and in which women are considered equal to men in terms of legal position and social rights, there is a continuing place for these rules. In particular, does the interest of the state in prosecuting crime not now claim pride of place over the interest of the state in preserving the sanctity of the marital relationship? These, and other questions, are what has no doubt caused this present enquiry to be instigated, not only in Hong Kong, but in many other jurisdictions throughout the common law world. The various competing arguments are summarised in Chapter 4.

### **13.3 Arguments Against Competence**

The arguments advanced against a general rule of competence include the danger of the evidence being tainted by interest, the risk of causing marital discord, the fear of violating the confidentiality of the marital relationship and the problem of placing the spouse in a dilemma of choosing between a duty to society to prevent crime and loyalty to the spouse. These arguments are weakened by the ability of the court to assess the weight of such evidence, and the fact that when one is considering competence (as opposed to compellability) the assumption is that the spouse is willing to testify. In such a case, arguments that seek to rely upon the sanctity of the marriage and confidentiality inevitably ring hollow. If the spouse wants to testify, it must be assumed that a decision regarding the effect of this on the marital relationship has been taken by one (or both) of the parties to that relationship.

### **13.4 Arguments In Favour of Competence**

The arguments in favour of general competence include the fact that the court can take into account the danger of bias when assessing the weight of the evidence, the desirability of having all relevant evidence before the court, and the lack of any clear policy reason for making spouses incompetent. If the laws of evidence were being drafted today for the first time, free from the traditions of the past, it is unlikely that spouses would be made incompetent in a system in which most other persons are competent. Perhaps the most compelling reason in favour of general (as opposed to limited) competence, is that where a spouse is willing to testify, it is difficult to see what interests are served by preventing the spouse from doing so. Considering that the crimes for which the spouse is presently not competent include murder, robbery, and other acts of violence against third parties, the need to ensure that all relevant evidence is before the court to assist it in deciding upon guilt or innocence in such cases would appear to outweigh considerations based upon the niceties of preserving marital relationships.

### **13.5 Public opinion**

In the telephone survey, 43% of the respondents favoured a general rule of competence for spouses, and only 19% opposed it. And of this 19%, there were 62% who favoured a rule of competence in certain crimes.

In reference to specific examples, 61% favoured a rule of competence against a spouse for murder of a party, and 63% favoured such a rule for fraud.

In the survey of organisations, 63% favoured a rule of competence against a spouse for all cases.

On the whole, the weight of public opinion is clearly in favour of making spouses competent to testify against each other.

### **13.6 The Position In England**

In England a spouse is now competent to testify against the other spouse in all cases (Police and Criminal Evidence Act 1984, s.80(1)), except where the two spouses are jointly charged (*ibid*, s.80(4)).(Compare paras. 8.7, 12.4, 17.4 and 18.4)

### **13.7 The Recommendation**

We are of the opinion that a spouse should always be competent to testify for the prosecution of a spouse, if willing to do so.

A spouse should be competent to testify for the prosecution of the other spouse in all cases.

### **13.8 The Need for Corroboration**

Some spouses may testify against a spouse out of malice. In order to provide the accused with a measure of protection against this danger, we considered whether an accused should not be convicted upon the uncorroborated evidence of the spouse alone, and that independent evidence must always be produced, in addition, by way of corroboration. This would place the spouse in a similar position, as regards the rules of evidence, to an accomplice. The objection to this is that it unduly complicates the law by adding another class to what one commentator described as "the historically troublesome concept of corroboration" (Ms. Janice Brabyn). On balance, we feel that the matter is best left to the discretion of the judge to give a direction appropriate to the case.

## **CHAPTER 14**

# **SHOULD THE SPOUSE BE A COMPELLABLE WITNESS FOR THE PROSECUTION?**

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### **14.1 The Present Law**

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

### **14.2 The Question of Reform**

As noted in chapter 13, the question whether a spouse should be competent or compellable to testify for the prosecution goes to the root of this Report. The issues regarding compellability include many of those affecting competence. Other issues, unique to compellability, are also raised. Underlying all of these is one basic question: should the interest of the state in prosecuting crime override the interest of the state in respecting the marriage institution or vice versa? One commentator upon a draft of this report preferred to see this question rephrased as "should the interest of the State in prosecuting crime override the conscience of the individual in refusing to testify against a spouse?", or "should the interest of the State in prosecuting crime override the interest of the State in providing a judicial system which is seen to be based on just procedures?" (Mr. R.J. Wickins). In whatever way the question is put, it is not an easy one to answer. The competing arguments are summarised in Chapter 5.

### **14.3 The Marriage Relationship and the Common Law**

In his Hamlyn Lecture entitled 'The Inheritance of the Common Law', (London, Stevens & Sons, 1950), Richard O'Sullivan devotes a separate chapter to 'The Family'. He observes that "the household is a mean between the individual and the city or the kingdom." He explains that the relation of husband and wife is something other and deeper than the simple relation of citizen and citizen which is the foundation of politics. He quotes the remark of St. German that "The house of Everyman is to him as his castle and fortress as well for defence against injury as for his repose ....". He remarks upon of the conception that the Common Law had of the unity and autonomy of the family. "The family was in a sense an imperium in imperio, a separate domain in which King's Writ did not seek to run .... The law had a profound respect for the institution of the Family and for the status and the dignity of the parents who give life to the community." (Ibid, pages 33-43.)

These observations touch upon the present enquiry; two questions immediately arise. Was this respect for the family (of which the marital union is the focus) ever a part of the culture and civilisation of the people of Hong Kong? If so, does it continue to be so today?

The first question is properly one for historians and social anthropologists. But it seems reasonable to suggest that it should be answered in the affirmative. The family in traditional Chinese society has occupied a central position which is at least as important, if not more so, than in western societies. The marital relationship may have been regarded differently, particularly in its polygamous features and the apparently subservient role of the woman, but as no less sacred and deserving of respect from the state.

The second question is one on which different views may be expressed. It was because of this that the sub-committee placed special importance on the public opinion surveys. Their results are analysed below.

#### **14.4 Arguments In Favour of Compellability**

Some people say that a spouse should be compellable to testify against the other spouse. The suggestion is not a new one. Jeremy Bentham, in 1827, strongly criticised the rule against compellability, especially the notion that it would impose hardship on a spouse to compel him or her to testify against the other spouse:

*"Oh! but think what must be the suffering of my wife, if compelled by her testimony to bring destruction on my head, by disclosing my crimes! - Think? answers the legislator; yes, indeed, I think of it and in thinking of it, what I think of besides, is, what you ought to think of it. Think of it as part of the punishment which awaits you, in case of your plunging into the paths of guilt. The more forcible the impression it makes upon you, the more effectually it answers its intended purpose. Would you wish to save yourself from it? It depends altogether upon yourself: preserve your innocence."*

14.5 We have carefully considered the arguments in favour of a general rule of compellability (see Chapter 5), but we are not persuaded by them. In fact, we see serious objections to such a dramatic change as to make spouses compellable against each other. To suggest that a compelled spouse is spared the fear of recrimination from a belligerent accused spouse seems rather naive. The bitterness and resentment felt, for example, by the husband who has been sent to prison because of his wife's testimony, is more likely to be directed against the wife whom he saw testifying against him in court, than against the system which compelled her to be there. The system did not, after all, compel her to say what she did say in the way in which she said it, or at least that is how the husband will view matters, most probably. In

any event, any argument which relies upon speculation as to what a wife will or will not fear or what a husband will or will not do seems far too conjectural to provide a base on which to found an inroad of this kind.

### **Illogicality of Not Protecting Other Family Members**

14.6 It is true that the present law is somewhat illogical in protecting only the marital relationship, while not affording similar protection to brothers, sisters, mothers, fathers and other family relations. Surely, whatever arguments there are against making spouses compellable against each other, must also apply as between parents and children, it may be suggested. While this cannot be denied, it is not a reason for denying protection to spouses. Whether it is a reason for extending protection to parents and children (as has been done in the Australian States of South Australia and of Victoria, and as has been recommended by the Canadian Law Reform Commission, for example) is considered in chapter 24.

### **Absurdity of Protecting Failed Marriages: Discretionary Exemption**

14.7 It is also true that the present law 'protects' marriages that may have already failed. However, unless the judge is to be given a discretion to override the protection in those cases where he feels it appropriate (or, as in Victoria, to extend exemption in appropriate cases), it does not seem right to expose all married persons to the rigours of compellability because of the failings of a few. The case for a discretionary exemption is at first sight attractive, since it seems to enable the judge to tailor the rule to fit the circumstances of the case. We believe, however that the process of determining whether a particular spouse should be exempt would be fraught with difficulty and uncertainty and could result in inconsistencies as between different judges.

### **Contrast with Civil Proceedings**

14.8 It is true that spouses are compellable in civil proceedings and the institution of marriage does not appear to have suffered to any significant degree because of this. We recognise, however, fundamental differences between civil and criminal proceedings, and does not find the analogy to be a close one. Moreover, the occasions on which a spouse would be compelled to testify against another spouse in civil proceedings appear to be exceedingly rare.

## **Evidence In Other Proceedings**

14.9 We note the illogicality of providing that a spouse may be compelled to testify against a spouse incidentally, through giving evidence in other proceedings (civil or criminal) in which the spouse is not involved. The question is whether it is appropriate to remove this illogicality by providing for compellability in all proceedings against spouses.

## **Licence to Commit Crimes In Private**

14.10 Another argument that is sometimes raised in favour of a general rule of compellability is : "Why should a spouse have a privilege to commit a crime in the presence of a spouse, free from the risk of having the testimony of the spouse witness produced in court?" We do not favour any rule which shields criminals from punishment or which serves to obstruct the prosecution and conviction of the guilty. However, we believe that to pose the question in this way is tendentious and misleading. It suggests that the rule of non-compellability allows the commission of a crime by a spouse in the presence of a conniving spouse. If one takes this as a starting point, it is not difficult to make the sanctity of marriage appear as nothing short of a cloak to hide all manner of sins. Spouses, so the argument goes, must be made to testify against each other because they are always guilty and will always protect one another. To take such a position is to damn the multitude for the sins of the few. Marriage is a basic and respected institution in our society. The vast majority of married persons do not commit crimes. The rules which govern a society should reflect the needs and aspirations of the vast majority. They should not be styled in peculiar fashion to meet the problems posed by a tiny minority. There is a further matter to be considered. It is a basic principle of our criminal justice system that every accused is presumed innocent until proven guilty. This includes a spouse who is accused of committing a crime. To make spouses compellable to testify against each other because it is felt they would otherwise hide each other's crimes in effect turns the presumption of innocence upon its head. For these reasons we reject the reasoning underlying the question put at the beginning of this paragraph.

## **Balancing the Interests of the Public and the Family**

14.11 In the final analysis the question of whether there should be a general rule of compellability involves a balancing of interests. On the one hand there is the interest of society in upholding the institution of marriage and in recognising the privacy of the marital relationship, and on the other hand, there are the interests of society in prosecuting and convicting offenders. The weight given to one or other of these interests will reflect one's sense of priorities. A society which is rampant with crime, and close to a complete breakdown of law and order, could scarcely tolerate too much attention being paid to the niceties of marriage relationships or the sensibilities of married persons. We assume that this is not an apt description of the state

of affairs in Hong Kong at the present time. If this is correct, it hardly seems the appropriate climate in which to introduce new rules on the ground that the marriage relationship could be used as a cover for crime.

## **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.

## 14.17 Public Opinion

In the telephone survey, only 19% of respondents were generally in favour of compellability, and 45% were opposed - though of the latter, 36% favoured compellability in certain cases.

In reference to specific examples, the breakdown of opinion was as follows :-

	<u>For compellability</u>	<u>Against compellability</u>	<u>No View</u>
Murder of 3rd party	31%	47%	22%
Fraud	28%	48%	24%
Assault on Wife	35%	44%	21%
Assault on Child of Spouse	50%	30%	20%

Thus, when faced with specific examples, more people favoured compellability, but the weight of opinion continued to oppose it.

In the survey of organisations only 10% of respondents were generally in favour of compellability, and 32% were opposed. However, 58% favoured compellability in certain cases, as follows:-

Violence against spouse	86%
Violence against child	96%
Violence against anyone under 16	50%
Violence against anyone	29%
Sex offences against child of spouse(s)	96%
Sex offences against anyone under 16	50%
Sex offences against anyone	21%
Drug offences	27%
Economic crimes	11%
Treason	29%

[Base: Number of respondents favouring compellability in certain cases: 52]

The sub-committee interpreted these results as warranting a general rule against compellability, with certain exceptions. The sub-committee arrived at this result only after lengthy consideration of the issues.

The question whether it would ever be useful to compel an unwilling spouse to testify against his or her spouse, against his or her will, figured prominently in these discussions. The value of such testimony might be small, while the damage done to the party compelled to give it, as well as to the relationship itself, might be large. On the other hand, in cases of alleged violence against members of the family, the law ought probably to adopt more than a purely passive role. On balance the sub-committee believed that in exceptional cases, compellability is appropriate. We endorse the sub-committee's interpretation and its choice of exceptions.

#### **14.18 The Position In England**

As noted, the recommendation proposed by the sub-committee reflects the position in England under the Police and Criminal Evidence Act, 1984, subject to the express reference to causing death of a child, and with a restriction to children of the family or a child under 16 in respect of whom either spouse was in loco parentis. We endorse the sub-committee's choice of exceptions. These are set out in para. 14.20 below.

#### **14.19 Warning to the Spouse**

If the non-compellable spouse does elect to give evidence, she must complete it and cannot hide behind the barrier of non-compellability. In light of this, the question arises whether the spouse-witness should be advised by the court of the "privilege" of non-compellability and the consequences of giving evidence. At common law, such a warning is considered desirable (see R v Pitt (1982) 75 Cr. App. R. 254). We do not consider that legislation should make such a warning mandatory, although one commentator on a draft of this report had made this suggestion. The matter is discussed in para. 19.8, below, in the context of privilege.

#### **14.20 The Recommendation**

We are of the opinion that as a general principle the spouse should not be a compellable witness for the prosecution of the other spouse in criminal proceedings. However, there should be an exception to this general rule 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 causing the death of or injury to a child of the family or a child under the age of 16 in respect of whom either spouse was acting in loco parentis;
- (b) the offence charged is a sexual offence alleged to have been committed in respect of a child of the family or a child under the

age of 16 in respect of whom either spouse was acting in loco parentis;

- (c) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above.

The above exceptions are similar to those contained in s. 80 of the Police and Criminal Evidence Act 1984 in England, with the addition of a specific reference, for the avoidance of doubt, to causing death of a child in paragraph (a), and with the limitation to children of the family or to children in respect of whom either spouse was in loco parentis.

## **CHAPTER 15**

# **SHOULD THE SPOUSE BE A COMPETENT WITNESS FOR THE PROSECUTION OF A PERSON WHO IS JOINTLY TRIED WITH THE ACCUSED SPOUSE?**

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### **15.1 The Present Law**

A spouse is not a competent witness for the prosecution of a person who is being jointly tried with the accused spouse, except for offences of violence against the spouse, treason or forcible marriage, or, semble, cases falling within s. 31 of the Theft Ordinance, Cap. 210 (see paragraph 2.7 above).

### **15.2 The Question of Reform**

We have already recommended that a spouse should remain competent for the defence of a spouse (in all cases) and should become competent for the prosecution of a spouse (in all cases). Should a different rule apply where the accused spouse is jointly tried with a third party?

### **15.3 The Position In England**

It appears from s. 80(1)(a) of the Police and Criminal Evidence Act 1984 that a spouse is competent to testify against a co-accused of the accused spouse.

### **15.4 Public Opinion**

Public opinion was not canvassed directly upon this issue.

### **15.5 A General Rule of Competence**

In keeping with the proposed policy of making spouses generally competent in all cases (see Chapters 7 and 13 above), we are of the opinion that a spouse should be competent to testify against a person who is being jointly tried with the accused spouse. There should, furthermore, be no question of obtaining the accused's consent to such testimony.

It is, of course, possible that either directly or under cross examination, the spouse will give testimony that is damaging to the spouse.

## **15.6        The Recommendation**

A spouse should be a competent witness for the prosecution of anyone being tried jointly with the other spouse.

## **CHAPTER 16**

# **SHOULD THE SPOUSE BE A COMPELLABLE WITNESS FOR THE PROSECUTION OF A PERSON WHO IS JOINTLY TRIED WITH THE ACCUSED SPOUSE?**

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### **16.1 The Present Law**

A spouse is not a compellable witness for the prosecution of a person who is jointly tried with the accused spouse (paragraph 2.7.2 above).

### **16.2 The Question of Reform**

The issue here is similar to that raised in chapter 14. The question is whether a spouse should as a general rule be compellable to testify against anyone who is jointly tried with the other spouse, and, if not, whether there should be the same exceptions, as in the case where a spouse gives evidence against the other spouse (Chapter 14).

### **16.3 Public Opinion**

Public opinion was not canvassed directly upon this question.

### **16.4 The Position In England**

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

### **16.5 Consistency**

We believe that in keeping with our recommendation in chapter 14 that a spouse should not be compellable for the prosecution as a general rule (with exceptions), a spouse should similarly not be compellable to testify against a person who is jointly tried with the accused spouse, except in the cases set out in paragraph 14.20 above.

## **16.6 The Recommendation**

A spouse should not be a compellable witness for the prosecution of a co-accused of the other spouse, unless the offence involves violence or sex, as set out in paragraph 14.20 above.

## CHAPTER 17

# SHOULD A SPOUSE WHO IS JOINTLY TRIED WITH THE OTHER SPOUSE BE A COMPETENT WITNESS FOR THE PROSECUTION OF THAT SPOUSE?

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### 17.1 The Present Law

The present law is that a spouse who is jointly tried with the other spouse is not a competent witness for the prosecution of that spouse. We have not heard of any case where, on the joint trial of husband and wife, the prosecution has sought to call one spouse as a Crown witness against the other. This would offend the right to silence and the privilege against self-incrimination. A person who is an accused and a spouse cannot be called by the prosecution to give evidence against the other accused spouse in the same proceedings.

It is assumed that s. 5 of the Evidence Ordinance, Cap. 8, only applies to civil proceedings, so that it is not necessary to consider the theoretical possibility that s. 5 renders a spouse competent to testify for the prosecution against a spouse jointly charged with the other spouse (See paras. 2.2 and 2.3 above).

It is an interesting question whether Section 31(3) of the Theft Ordinance, Cap. 210, (see para. 2.6 above) may be interpreted as already rendering one spouse competent for the prosecution against the other spouse where they are being tried together for the same offence, provided it is "with reference to" the spouse who wishes to testify for the prosecution. This seems, however, more hypothetical than real. It presupposes (1) two spouses being jointly tried (2) for an offence that is "with reference to" one of the spouses, (3) where the spouse to whom the offence is "with reference" wishes to testify against the other spouse. In practice, the prosecution would not be permitted to call an accused spouse to testify against the other, unless the former had already been convicted or acquitted, or a *nolle prosequi* has been filed. (R v Grant and others (1945) 30 Cr. App. R. 99; R v Sharrock and others (1948) 32 Cr. App. R. 124; Archbold, Criminal Pleading Evidence and Procedure, 42nd edn., para. 4-279.) The basic common law principle that an accused is not competent to testify as a witness for the prosecution against a co-accused in the same trial applies in Hong Kong.

## **17.2 The Question of Reform**

Should a spouse be made generally competent to testify against a spouse who is being tried with that spouse? The issues are similar to those raised in chapters 13 and 15.

## **17.3 Public Opinion**

Public opinion was not canvassed directly upon this question.

## **17.4 The Position In England**

At common law in England, a spouse was not generally competent to testify against a spouse (save in certain cases) (compare paras. 8.7, 12.4, 13.6 and 18.4). The question of spouses on joint trial was not separately considered by the Criminal Law Reform Committee in its Eleventh Report (Cmnd 4991, 1972). However, a spouse is now expressly prohibited from testifying against a spouse in a trial where they are being jointly tried for the same offence by section 80(4) of the Police and Criminal Evidence Act 1984 (see Annexure 4).

## **17.5 Objections**

We can see no compelling reasons for changing or making an exception to the existing rule that the prosecution cannot call one accused to give evidence against a co-accused. The fact that a spouse might be willing to testify against a co-accused spouse does not appear to be a sufficient reason. The basic principle that a spouse should be free to testify in any way he or she wishes, must take second place to the overriding principle that whenever two persons are being jointly tried for the same offence, neither is available as a witness for the prosecution (except under cross-examination, if either testifies in his own defence). It should be noted, however, that where the spouse, albeit once jointly charged, is now no longer in peril of conviction for that offence, we see no reason why our principal recommendation (paragraph 13.7) should not apply. Thus a spouse who is no longer in peril of conviction for the offence should be competent for the prosecution. In this respect we are satisfied that a provision in terms of Section 80(4) of the Police and Criminal Evidence Act would be appropriate.

## **17.6 The Recommendation**

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

## **CHAPTER 18**

# **SHOULD A SPOUSE WHO IS JOINTLY TRIED WITH THE OTHER SPOUSE BE A COMPELLABLE WITNESS FOR THE PROSECUTION OF THAT SPOUSE?**

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### **18.1 The Present Law**

A spouse is not a compellable witness for the prosecution under the law at present in Hong Kong. (The theoretical possibility that s. 5 of the Evidence Ordinance might be interpreted to apply to criminal proceedings has already been rejected - see paras. 2.2 and 2.3 above).

### **18.2 The Question of Reform**

In view of our recommendation in chapter 17 that a spouse should not be competent to testify for the prosecution of the other spouse when the two spouses are being jointly tried, the question of compellability does not, of course, arise. However, we have considered the question of compellability on its own merits, in case our recommendation on competence is not accepted.

Should the fact that a spouse witness is also accused make any difference to the general rule recommended in chapter 14 that spouses should not be compellable to testify against each other, except in certain cases?

### **18.3 Public Opinion**

This issue was not separately canvassed in the questionnaires.

### **18.4 The Position In England**

The position in England is that a spouse is not compellable to testify against the other spouse where the spouses are jointly charged (Police and Criminal Evidence Act, 1984, s. 80(4)) (Compare paras. 8.7, 12.4, 13.6 and 17.4). By virtue of s. 80(4) of the Police and Criminal Evidence Act 1984, where a husband and wife are jointly charged with an offence, neither spouses shall at the trial be competent or compellable to give evidence in respect of that offence for the prosecution unless that spouse is not, or is no

longer, liable to be convicted of the offence at the trial as a result of pleading guilty or for any other reason.

## **18.5 The Need for Exceptions**

It might be suggested that a spouse should be compellable to testify against a jointly-accused spouse in the case of crimes of violence and sexual offences against young persons, as in the case of spouse-witnesses who are not themselves on trial (see chapter 14). This would be on the ground that the public interest in seeing such offences punished overrides any possible interest of the accused spouse witness.

We do not accept this argument. It is as much in the public interest, as it is in the interest of an accused, that a trial should be fair and unoppressive. To compel a person to testify against himself is contrary to the nature of the adversarial system. To compel a spouse to testify against the other spouse is regarded as unacceptable. To compel a spouse witness to testify against a co-accused spouse would be objectionable on both of these counts.

## **18.6 Privilege Against Self-Incrimination**

We recommended in Chapter 14 that a spouse should not as a general rule be compellable to testify against a spouse. It follows that this principle should apply equally where the two spouses are jointly tried. The only question is whether there should be an exception in the same cases mentioned in Chapter 14 (paragraph 14.20). We believe that the answer should be in the negative. This is because the privilege against self-incrimination and the accused's right to silence might be jeopardised by a rule which required an accused to testify at his own trial, albeit as a witness for the prosecution of a fellow accused. These principles should not be weakened even where offences against the spouse or persons under 16 are involved. Where however the spouse for any reason is no longer liable to be convicted of that offence at the trial, these considerations no longer apply and consequently the spouse should be compellable in those cases involving sexual offences or offences of violence against the family.

## **18.7 The Recommendation**

A spouse who is jointly tried with the other spouse should not be a compellable witness for the prosecution of the other spouse. Where the spouse is not, or is no longer, liable to be convicted of that offence at the trial, for any reason, the normal rule of compellability in certain cases (specified in paragraph 14.20) should apply.

## **PART IV : MISCELLANEOUS**

### **CHAPTER 19**

## **SHOULD THE PROVISION FOR PRIVILEGED COMMUNICATIONS BETWEEN SPOUSES BE RETAINED?**

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### **19.1 The Present Law**

In Hong Kong a spouse is not compellable to disclose a communication made to him by his spouse (see Section 7, Evidence Ordinance). The present law is set out in chapter 3, and section 7 is set out in paragraph 3.2.

### **19.2 The Question of Reform**

If a spouse is to be made compellable to testify against the other spouse in certain cases (as recommended in chapter 14), should the existing 'privilege' (which is essentially a rule of non-compellability) give way or be allowed to stand?

### **19.3 Privilege is a Rule of Non-Compellability**

Although the rule enshrined in s. 7 of the Evidence Ordinance is referred to as a "privilege", this tends to divert attention from the fact that it operates as a rule of non-compellability.

As such, it adds nothing to the common law, either vis-a-vis a spouse giving evidence against a spouse (since such a spouse is already neither generally competent nor compellable), or giving evidence for a spouse (since such a spouse is competent but (already) not compellable) to give evidence. In other words, a spouse-witness in criminal proceedings involving the other spouse does not need this "privilege", in order to be non-compellable, either for or against the other spouse.

## 19.4 Historical Origins of the Privilege

The "privilege" is actually a by-product of the erosion of the original rule that spouses were neither competent nor compellable to testify for or against each other in criminal proceedings.

The original position in England was that no party to a civil action, no accused person in criminal proceedings and no husband or wife of such a party or person could give evidence at all. The rule that a spouse was not a competent witness was explained by reference to bias as a party, interest, and public policy. The incompetence of spouses, in particular, was variously explained as being to preserve the peace of families, because of the legal policy of marriage, because their interests are absolutely the same, and because of the presumption of bias. This was not a rule of privilege; it was a matter of not being competent.

In criminal matters there were certain exceptions to this rule recognised at common law : notably a wife could give evidence in cases of personal injury to her at the hands of the husband and in cases of abduction and forced marriage.

So long as this was the rule, it followed that evidence of communications passing in confidence between the spouses would never (save in the exceptional cases) be given by the spouses themselves. It might, however, have been given by third parties who overheard or intercepted the communication, although such situations seem not to have appeared in reported cases prior to Rumping v D.P.P. [1964] A.C. 814.

This general rule affecting civil and criminal proceedings was progressively abrogated in England by a series of nineteenth century statutes which removed interest as a bar (Lord Denman's Act, 6 & 7 Vict. c.85), and later removed the bar constituted by being party to an action (Lord Brougham's Act, 14 & 15 Vict. c.99). But these changes did not affect the special disqualification which precluded a spouse from giving evidence for or against a spouse in criminal proceedings.

The Evidence Act 1843 (Lord Denman's Act) removed the incompetence of witnesses on the ground of interest - but it left untouched the incompetence of parties themselves and their husbands and wives.

The Evidence Act 1851 (14 & 15 Vict. c.99) (Lord Brougham's Act) made parties themselves competent, but it left untouched the incompetence of the husbands and wives of parties. By section 2, the Act made parties to a suit (except in certain cases) both competent and compellable to give evidence, though (by section 3) it was provided that a person charged with a criminal offence was not competent or compellable to give evidence for or against himself or compellable to answer any question tending to incriminate himself. Moreover, nothing contained in the Act was in any criminal proceeding to render a husband or a wife competent or compellable to give evidence for or against each other. In other words, the

Act expressly left spouses not competent and not compellable to testify against each other.

The matter was then examined by the Common Law Commissioners who reported in favour of making spouses competent and compellable to give evidence for or against one another in civil cases, but "that all communications between them should be held to be privileged".

The reason given for the latter recommendation was as follows: "The question how far the communications of married persons inter se should be matter of testimony in courts of justice, stands on very different ground. So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity, and compelling the public disclosure of confidential communications between husband and wife, would be a far greater evil than the disadvantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute".

These recommendations were accepted and spouses were made competent and compellable in civil proceedings, by the Evidence Amendment Act 1853 (also called Lord Brougham's Act); it was provided in s.3 that "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose communication made to her by her husband during the marriage".

According to Viscount Radcliffe in a dissenting opinion in Rumping v D.P.P. [1964] A.C. 814, this provision was intended to protect the position of husband and wife and to make sure that their new liberty to give evidence was not treated as having compromised the general principle of the inviolability of marriage confidence. That inviolability, it may be noted, was not grounded in a privilege, as such, but in a lack of competence and a non-compellability to give evidence.

Lord Reid in Rumping had more difficulty in understanding this provision. He said, at pages 833 - 834:-

*"It is a mystery to me why it was decided to give this privilege to the spouse who is a witness: it means that if that spouse wishes to protect the other he or she will disclose what helps the other spouse but use this privilege to conceal communications if they would be injurious, but on the other hand a spouse who has become unfriendly to the other spouse will use this privilege to disclose communications if they are injurious to the other spouse, but conceal them if they are helpful".*

The majority in Rumping confirmed the view expressed by the Court of Appeal in Shenton v Tyler [1939] 1 Ch. 620 that there never was at common law a rule of privilege for spousal communications under which no person at all could give any evidence of any communication between the

spouses, which was separate and distinct from the rule that one spouse was incompetent to give evidence concerning the other; Lord Morris observed, at p.851:-

*"The cases to which I have so far referred furnish ample authority for the proposition that at common law in civil cases a spouse would not be admitted as a witness either for or against the other spouse, and good reasons are assigned as the basis of this rule. But I discern no authority for the different proposition that no evidence may be given by anyone in regard to a communication made between a husband and a wife".*

Only where a spouse-witness is giving evidence in a case where the accused is not the other spouse, does the "privilege" have any impact on the common law. Such a case is beyond the scope of terms of reference of this report.

It is clear that if it should be decided that a spouse should be made compellable to give evidence for and/or against a spouse, then the above "privilege" (which essentially stands as a rule of non-compellability) will have to be overridden if the reform is to have its intended effect, at least in cases involving spouses who are giving evidence for or against a spouse.

## **19.5 The Position in England and Other Countries**

Any suggestion that the existing privilege should give way to a rule of compellability may be criticised for overlooking the sanctity of marriage. The need to respect the integrity and confidences of marriage is important. Some may say that this need should prevail over the need to obtain all the available evidence for the prosecution. As the English Law Reform Committee observed in its Report on Privilege in Civil Proceedings (Sixteenth Report, (1967)), in regard to the privilege contained in s.3 of the Evidence (Amendment) Act 1853, (which is similar to that contained in s.7 of Hong Kong's Evidence Ordinance) :-

*"The decision whether there should be any absolute privilege at all involves a value judgment and depends upon the social and religious importance which one attaches to the institution of marriage." (Para. 42)*

The Committee pointed out that as framed the privilege was illogical inasmuch as it "gives the liberty to disclose to the spouse in whom confidence was reposed and not to the spouse who reposed the confidence." (Para. 42). The Committee continued :

*"If a privilege for communications between spouses were to be retained, we think that it should clearly be that of the communicator and waivable by the communicator alone. There can be no breach of marital confidence if the spouse who made*

*the communication is willing that it should be disclosed. There would, however, have to be a provision that the privilege should not apply in proceedings between spouses. On the other hand, there is, we think, great force in the contention that such a privilege is of little practical importance and would have a minimal effect upon marital relations." (Ibid)*

The Law Reform Commission of Canada made a similar criticism of the privilege in a Study Paper, prepared for its Law of Evidence Project :-

*"The rule as it presently exists does not make sense. It is clear that if the rationale is to encourage frank communications, the privilege is given to the wrong person. According to the section, it is the spouse who is giving evidence who has the privilege, but if we wish to encourage frankness in communication, it would be the person who made the communication who would have the privilege and not the recipient. Further, the privilege does not cover private or confidential acts done in the presence of the spouse. Nor does it embrace the family unit and include communications with minor or dependent children."*

The Criminal Law Revision Committee recommended abolition in England of the similar privilege in criminal proceedings contained in s.1 (d) of the Criminal Evidence Act 1898. In paragraph 173 of its Report, the Committee observed :-

*"Clause 16 abolishes certain unimportant privileges which exist in criminal proceedings.... These are ..... (ii) the right to decline to disclose a communication made to the witness by his wife during the marriage (there is no privilege against disclosing a communication made by the witness to his wife)..... We have no doubt that these privileges should be abolished in criminal proceedings..... In the case of communications between spouses there may be a case for preserving the privilege and extending it to communications made by the witness to his wife, and the former might be given the right to prevent the wife from disclosing the communication; ....."*

In the end the Committee recommended abolition of the privilege, and was influenced by the fact that it had already been abolished in England in civil proceedings by the Civil Evidence Act 1968. The Committee concluded that "it would in our view be undesirable that witnesses in criminal proceedings should enjoy greater privileges in these respects than witnesses in civil proceedings" (Evidence Report : Evidence (General), (1972), Cmnd: 4991). The privilege was abolished in criminal proceedings in England by s.80 (9) of the Police and Criminal Evidence Act 1984.

The issue was re-examined by the Law Reform Commission of Ireland in its Report on Competence and Compellability of Spouses as

Witnesses (LRC 13 - 1985). The Commission noted that abolition of the privilege had been recommended in Ontario, but that it had been upheld by the Supreme Court of the United States. The Commission however did recommend its abolition in Ireland, partly in view of the new privilege not to incriminate the other spouse, which it also recommended. The Commission observed:

*“The Commission is of the view that there may be more to be said for the present law than has been conceded by its critics. That law respects the confidentiality of marital communications to the extent that the testifying spouse does but not more so. Not only may this be the right balance but it avoids the thorny problem of distinguishing confidential and non-confidential communications. However the Commission believes that the confidentiality of marital communications would be preserved in most cases by the exercise of the same judicial discretion as obtains in respect of other confidential relationships, such as that of doctor and patient. The recognition of a privilege not to incriminate one's spouse (which is proposed below) will ensure that a spouse will not be bound to disclose a marital communication which would incriminate the other spouse. Even if the statutory provisions by virtue of which a spouse may refuse to disclose a communication made by the other spouse are repealed, a privilege rooted in the Constitution based on the right to privacy in a marital context, may remain. Accordingly the commission recommends that section 3 of the Evidence Amendment Act 1853 and section 1(d) of the Criminal Justice (Evidence) Act 1924 should be repealed (page 72).”*

## **19.6 Public Opinion**

In the telephone survey, 38% of the respondents were in favour of retaining the privilege against communicating statements made to the spouse witness by the other spouse. 27% opposed the privilege and 35% did not know or preferred not to comment.

In the survey of organisations, 73% of respondents were in favour of the privilege, and 22% were against.

It seems that there is a large disparity in the results of the two surveys. However, it is noticeable that the percentage against the privilege are approximately the same (27% and 22%), and the percentage in favour of the privilege is higher than that against. However, it is noted that a much higher percentage of “don't know/no comment” responses was found in the telephone survey possibly because, unlike organisation respondents, many respondents in the telephone survey might not understand the issue and could not offer any view.

## **19.7 The Privilege Should Be Abolished Partially**

Notwithstanding the views expressed in the public opinion surveys, we are of the view that the privilege enjoyed by a spouse not to reveal any communication made to him or her by the spouse during the marriage should be abolished in those cases where the spouse is a compellable witness for the defence or the prosecution in the trial of a spouse. The privilege would negate the value of making a spouse compellable in those cases where evidence of a communication was sought. The spouse witness, although compelled to give evidence generally, could refuse to answer specific questions touching upon communications of the kind prescribed by section 7 of the Evidence Ordinance. In many cases evidence of such communications would be exactly the type of evidence being sought from the spouse. Without it, compellability would become essentially meaningless. However, there would seem to be no convincing reasons for abolishing the privilege altogether. Only in those cases where the spouse is a compellable witness for the defence or prosecution should it be removed. Thus, for example, in cases where a spouse is giving evidence at the trial of a third party the privilege should remain. The importance of respecting the sanctity of marriage in such cases outweighs the benefits to be derived from abolishing the privilege.

## **19.8 Informing the Spouse of the Law**

The sub-committee was attracted to a suggestion made by Ms. Janice Brabyn, of the University of Hong Kong, that the presiding judge or magistrate should inform the spouse of, inter alia, the matrimonial privilege regarding communications. Ms. Brabyn pointed out that as a matter of principle, spouses should be given the opportunity to make informed choices. If the institution of marriage is worthy of special protection and regard, the effectiveness of that protection and regard in particular cases should not depend upon the chance presence of knowledge or ignorance of legal rights on the part of defendants or witnesses involved in a trial. The sub-committee felt unpersuaded that such a warning should be mandated by legislation. We agree. Ultimately the matter is, we feel, best left to be handled by the judge or presiding magistrate, who exercises overall discretion to ensure that the proceedings are fairly conducted. For example, where the accused is not legally represented, it is to be expected that some such warning would be issued by the presiding judicial officer. (See also the suggestion made by the court in R v Pitt (1982) 75 Cr. App. R. 254 that the spouse should be warned that if she testifies she will be treated like an ordinary witness, and cannot hide behind the barrier of non-compellability.)

## **19.9 Recommendation**

The privilege against revealing marital communications contained in section 7 of the Evidence Ordinance should be abolished in

those cases where the spouse is a compellable witness for the defence or the prosecution in the trial of a spouse, but otherwise it should be retained.

## CHAPTER 20

# SHOULD A WITNESS SPOUSE HAVE A PRIVILEGE AGAINST INCRIMINATION OF A SPOUSE?

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### 20.1 The Present Law

It appears that a spouse has no privilege in criminal proceedings to refuse to answer questions on the ground that the answer might tend to incriminate the other spouse, although, as noted in paragraph 3.2 above, there is a statutory privilege in civil proceedings under s. 65 of the Evidence Ordinance, and, as noted in paragraph 3.7 above, there are judicial dicta to support the existence of a general common law privilege against giving evidence which would tend to incriminate one's spouse, by extension of the privilege against incrimination of oneself. Section 65 of the Evidence Ordinance provides, in relevant part, as follows:-

*65. (1) The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for the recovery of a penalty -*

- (a) shall apply only as regards criminal offences under the law of Hong Kong and penalties provided for by such law; and*
- (b) shall include a like right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty.*

### 20.2 The Question of Reform

Given the nature of the marital relationship and the recommendation in chapter 19 to abolish partially the privilege for confidential communications, should such a privilege be created in criminal proceedings or if it exists, be modified?

### 20.3 Public Opinion

Public opinion was not canvassed upon this issue.

## 20.4 The Position in England

In civil proceedings, a spouse in England now enjoys a privilege against incrimination of a spouse. Section 14 of the Civil Evidence Act, 1968 implements the recommendation of the Law Reform Committee that the privilege against self-incrimination be extended to include incrimination of a spouse. (Law Reform Committee, Sixteenth Report (Privilege in Civil Proceedings, (1967), para. 9). It provides:

*"The right of a person in any legal proceedings other than criminal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person to proceedings for an offence or for recovery of a penalty -*

- (a) *shall apply only as regards criminal offences under the law of any part of the United Kingdom and penalties provided for any such law; and*
- (b) *shall include a light right to refuse to answer any question or produce any document or thing if to do so would tend to expose the husband or wife of that person to proceedings for any such criminal offence or for the recovery of any such penalty."*

As already noted a similar provision is contained in the Hong Kong Evidence Ordinance, Cap. 8, s. 65.

There is no equivalent provision in the U.K. in criminal proceedings, although the English Criminal Law Revision Committee recommended that there should be, except that a spouse should not be entitled to refuse to answer a question or to produce a document or thing on the ground that to do so would tend to prove the commission of the offence charged. (See Criminal Law Revision Committee, Eleventh Report: Evidence (General)(1972) Draft Criminal Evidence Bill, clause 15(3).) The Police and Criminal Evidence Ordinance does not touch upon this question.

## 20.5 The Position In Ireland

The Law Reform Commission of Ireland recently recommended extending the privilege against self-incrimination to incrimination of a spouse. In its Report on Competence and Compellability of Spouses as Witnesses (LRC 13-1985), the Commission states:

*"The privilege against self-incrimination is based on an old principle that it is repellent that a man should be compelled to*

*give answers exposing himself to the risk of criminal punishment. If such a privilege did not exist, witnesses might be more reluctant to come forward to testify. It is not within the scope of this Report to examine whether this privilege is justified. But, given its existence, the Commission considers that it should extend to answers tending to incriminate the spouse of a witness. It shares the view expressed by the England Law Reform Committee that it is more repellent that a person should be compelled to incriminate his or her spouse, than that that person should be compelled to incriminate himself or herself.*

*The Commission believes that the right of a spouse-witness not to incriminate an accused spouse in testimony is a logical corollary of the right of a spouse not to be compelled to testify for the prosecution when the other spouse is accused of a criminal offence. It may, of course, result in some injustice if relevant evidence is withheld from the court of trial. The injustice is likely to be most acute where a witness who might exculpate an accused refuses to answer a question because it might incriminate that witness's spouse. However the fact that such a privilege is invoked is likely to tell in favour of the accused. Under the present law, evidence exculpating an accused may be withheld where a witness claims that he would be incriminated or where one of several accused persons exercises his right not to testify. So no new departure of principle is involved in recognising the right of a witness not to give evidence incriminating his or her spouse, even where this evidence might exculpate an accused."*

(Ibid, pages 73-74, footnotes omitted.)

Accordingly the Commission recommended that a witness in criminal (or civil) proceedings should have the same right to refuse to answer any question or produce any document or thing tending to incriminate his or her spouse as he enjoys not to incriminate himself.

However, the Commission recommended that the privilege not apply where the spouse is called as a witness by the accused spouse (ibid, page 75). Where parties are divorced or judicially separated the Commission would restrict the privilege to events occurring during marriage (ibid, page 75).

## **20.6 The Proper Context**

The above proposals must be viewed in the context of the Commission's Report, in which it is recommended that a spouse not be

compellable for the prosecution. No exceptions are made. The problem with the privilege is that it would tend to contradict a rule of compellability. It would become meaningless to make a spouse compellable if he or she could raise the privilege. This raises the question, if a spouse is compellable in some cases (as we recommend in chapter 14), would not a privilege against incrimination defeat the rule of compellability? The answer, it is suggested, is 'Yes' at least, to the extent of compellability. If it is accepted that the physical well being of the family members attracts a higher priority than the sanctity of the marriage institution, so that a spouse should in principle be compellable to testify against the other spouse in cases where family members are exposed to violence or sexual abuse then there is no place for a privilege against incrimination of a spouse, at least in those cases. As to the question of other offences, we are impressed by the argument of the Law Reform Commission of Ireland that "the right of a spouse-witness not to incriminate an accused spouse in testimony is a logical corollary of the right of a spouse not to be compelled to testify for the prosecution when the other spouse is accused of a criminal offence" (Ibid, page 74). It is also noted that the English Criminal Law Revision Committee recommended a privilege in criminal proceedings for spouses, except in relation to the offence charged (supra, para. 20.4). It is also noted that s. 31(3)(a) of the Hong Kong Theft Ordinance, Cap. 210, expressly preserves the spouse's privilege in relation to cases falling within its ambit. (See also Crimes Ordinance, Cap. 200, s. 66) We can see no objections in principle or logic to the creation of such a privilege (assuming it does not already exist at common law), subject to the limitation in favour of an overriding rule of compellability in the cases already noted.

## **20.7 Informing the Spouse of the Law**

The sub-committee was impressed with the recommendation of Ms. Janice Brabyn, already referred to in paragraph 19.8 above, that the court should inform the spouse of the law affecting the giving of testimony. In the present context, the question arises whether the spouse should be informed of the consequences of deciding to testify, in particular the absence (if that be the law) of any right to refuse to answer any question the answer to which might incriminate the other spouse and the possibility of such questions being asked during the course of cross-examination. We would repeat our views (see paras. 14.19 and 19.8 above) that such a warning seems desirable but is best left to the discretion of the presiding judicial officer.

## **20.8 The Recommendation**

We recommend the creation of a statutory privilege against incrimination of a spouse which should not, however, apply in cases where the spouse is a compellable witness for the prosecution.

## CHAPTER 21

# SHOULD COMMENTS UPON FAILURE OF A SPOUSE TO CALL A COMPETENT AND COMPELLABLE SPOUSE TO GIVE EVIDENCE BE ALLOWED?

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### 21.1 Introduction

Suppose a husband is on trial for theft. The police give evidence that his wife was outside the shop. The husband's defence is that he came out of the shop empty handed. He does not call his wife to testify on his behalf. Assuming the proposals made in this Report are adopted, she would be competent and compellable to testify on his behalf if he calls her as a witness. Suppose he does not call her. Should the prosecutor be allowed to comment upon that failure to call this competent and compellable witness?

### 21.2 Present Law

Comment is not presently allowed by the prosecution, by virtue of s. 54(1) of the Criminal Procedure Ordinance which provides : -

*"the failure of any person charged with an offence, or of the wife or husband as the case may be of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution."*

This does not however prevent comment by the prosecution upon the failure of an accused who gives evidence to call a competent witness (other than his spouse) to give evidence upon a matter of which the accused has suggested that this witness has personal knowledge.

### 21.3 The Issue

In the light of the recommendations rendering a spouse compellable for the defence, should the law be changed to allow comment upon the failure of an accused to call a spouse to testify for the defence?

### 21.4 Public Opinion

Public opinion was not solicited upon this issue.

## **21.5 The Position In England**

The Criminal Law Revision Committee in its 11th Report on Evidence recommended that the existing ban in England on comment should be lifted. But this was not done in the Police and Criminal Evidence Act 1984 (1984, C. 60) which, instead, provides in s. 80(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."*

## **21.6 Comment Should not be Allowed**

The majority of the Sub-committee was of the view that there were cogent reasons why such comment should be prohibited. It might be suggested that if the law provides (as it is proposed that it should) that a witness can be compelled to give evidence for the defence, it follows that the testimony of that witness is considered relevant and important, as a matter of principle. Not to call such a witness might then be a matter of comment, and the jury should have their attention drawn to it where the prosecutor feels that this is helpful to his case. If the spouse is to become a compellable witness for the defence, the law relating to witnesses generally should be applicable. The spouse ceases to be entitled to special treatment by virtue merely of being a spouse.

We recognise the force of that argument. However, we share the view of the sub-committee on this issue that there are circumstances in Hong Kong which might make it undesirable to allow comment on a failure of a spouse to call a spouse as a witness. In the peculiar context of Hong Kong, defendants and their wives generally come from the lower strata of society and have had little or no education. They do not know their rights, and they are easily put at a disadvantage by a lawyer trained at cross examination. Even if a defendant is represented it is forbidden for a lawyer to teach a client what to say. A defendant may have many reasons for not wanting to call his wife, sometimes even if she was favourable and willing. These reasons may have nothing to do with the case; yet he may find it embarrassing to reveal certain things to strangers e.g. adultery or a personality defect. Another reason may be a legal tactical one. We consider there are many reasons (such as timidity, embarrassment, fear etc.) why a spouse would be reluctant to call a spouse, and it would be unfair to expose the accused to the risk that an over-zealous prosecutor would take unfair advantage of this natural reticence by casting aspersions in the form of permitted comment. These considerations should prevail over the logical conclusion that a compellable spouse should testify or invite comment for not doing so assuming that an appropriate factual foundation for such comment has been laid by the prosecution.

There is a further objection. The failure to give evidence is not, in itself, evidence of anything. It should not be used in such a way as to prejudice a spouse. The law gives an accused person a shield in that a prosecutor may not cross-examine him so as to reveal his previous convictions and bad character. This is to avoid prejudice. The fact that a person has stolen before is not evidence that he is guilty of the present charge of theft. He loses his shield if he attacks the character of a prosecution witness or gives evidence of his own good character. Sometimes a defence necessarily requires such an attack e.g. policeman has framed him and planted a packet of drugs. In such a situation where the prosecutor acquires the right to cross-examine the defendant, the latter may decide not to go into the box in order to prevent the prosecutor eliciting prejudicial evidence of his bad character i.e. previous convictions. This shield, provided by statute, is only given to the defendant and not to his spouse, although in the nature of their intimate relationship one would expect the spouse to know of his previous convictions.

The right to elicit evidence on previous bad character of a defendant from a spouse or to comment on failure to call a spouse may, in the hands of an overzealous and less discriminating prosecutor, be a devastating and unfair weapon. It is unfair because : -

- (1) comment (whether by judge or prosecutor or co-defendant); and
- (2) prejudicial evidence of bad character; and
- (3) the mere fact of failure of a defendant or his spouse to go into the box,

is not evidence of guilt. It can be devastating because juries who are not lawyers, taught to divorce real evidence from prejudicial matter, are all too human and open to human susceptibilities.

While it may sometimes be helpful to the jury to have the benefit of the evidence from a spouse in some situations, the fact that she was not called is not evidence in the case. It would be wrong to have the prosecutor use the right to comment adversely so as to give the impression that such failure to call a spouse to give evidence can only have a guilty explanation. It cannot be right or just to be allowed to bolster a weak prosecution case by creating a feeling of prejudice and speculation against the defendant.

It is not as though the prosecutor is severely prejudiced by not having the right of comment. It has always been the law that the failure of an accused or his spouse to give evidence can be commented on by a co-defendant or, in his discretion, by a judge.

Comment made by the prosecution to the magistrate, or even to the jury, though it is improper and should be checked by the court will not, however, necessarily invalidate a conviction: see Ross v Boyd 10 SLT 750 (See also Phipson on Evidence pg 699).

The judge's right of comment is carefully scrutinised and sparingly exercised to avoid giving an impression that failure to give evidence, or to call a spouse to give evidence is synonymous with guilt. (See R v Naudeer (1984) 80 Cr. App. R. 9.)

Not only has the legislature in England maintained this situation; this is also explicit in s. 31(3)(b) of Theft Ordinance of Hong Kong (Cap. 210).

## **21.7        The Recommendation**

It is recommended that the law should provide that the failure of any person charged with an offence to call his spouse as a witness for the defence should not be made the subject of comment by the prosecutor.

## **CHAPTER 22**

# **SHOULD COHABITEES BE GOVERNED BY THE SAME RULES AS SPOUSES?**

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### **22.1 Introduction**

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

### **22.2 The Terms of Reference**

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

### **22.3 Public Opinion**

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

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

## **22.4 The Position in England and Elsewhere**

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

## **22.5 Conflicting Opinions**

It is apparent that there is not a consistent and overwhelming body of opinion in favour of treating cohabittees in the same way as spouses. There is however a significant body of opinion in favour of this result. In Hong Kong the traditional attitudes towards concubinage and polygamy may account for part of the responses in favour of extending the rules to cohabittees. It is important not to adopt a moralistic response, based perhaps upon religious concepts of matrimony, as a way of ignoring the closeness and mutual trust that may be generated within the cohabitation relationship. It is these qualities, rather than the label of marriage, which the special rules are designed to protect. At the same time, it is perhaps difficult to use arguments based on the 'sanctity of marriage' to support this result when the parties themselves have not sanctified their relationship with the orthodox ceremony of marriage. The matter is not, however, susceptible to an easy answer and we can see the force of the argument (put, for example, by the Hong Kong Federation of Women Lawyers, in a submission) that cohabittees, as defined in the Domestic Violence Ordinance, Cap. 189, should be put in the same position as legally married persons. On balance, however, we believe that the main thrust of our proposals, which are designed to enhance the availability of testimony within the context of marriage, would be undermined somewhat by extending the special exemptions to cohabittees.

## **22.6 The Recommendation**

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

## CHAPTER 23

# SHOULD THE RULES AFFECTING SPOUSES CONTINUE TO APPLY ONCE THE PARTIES HAVE CEASED TO BE (OR LIVE TOGETHER AS) HUSBAND AND WIFE?

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### 23.1 The Present Law

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

### 23.2 The Question of Reform

The question that arises is whether spouses who are divorced (or separated) should be treated in all respects as unmarried persons.

### 23.3 Public Opinion

In the telephone survey, 59% of the respondents thought that the spouse of the accused who had been divorced should be treated in the same way as other witnesses in giving evidence.

In the survey of organisations, 50% of respondents thought that divorced spouses should be treated in the same way as other witnesses, as regards the giving of evidence against each other, in respect of matters occurring during the marriage, while 49% were opposed to this. As regards matters occurring prior to or after the marriage, 70% favoured treating divorced spouses in the same way as unmarried persons, as against 30% who thought spouses should be treated differently.

### 23.4 The Position In England

In England, the Police and Criminal Evidence Act 1984 provides that in any proceedings a person who has been but is no longer married to the accused should be competent and compellable to give evidence as if that

person and the accused had never been married. In Tasmania, the effect of the Evidence Amendment Act 1981 goes even further, in that a present spouse is compellable to testify against a spouse where the offence was committed before the marriage.

## **23.5 Public Opinion**

It appears that the majority of respondents to the public opinion surveys would prefer to see divorced spouses treated in the same way as unmarried persons, even as regards matters arising during the marriage. The sub-committee was uncertain whether this view reflected a desire to minimise the impact of the present law (which precludes spouses from giving evidence save in certain cases and prevents any compulsion of spouses against each other) by restricting its application to “married” persons, or whether it indicated a general feeling that divorced spouses should be deprived of all the “benefits” of marriage in this respect. If the former view is correct, then it is at least arguable that the implementation of the recommendations in this Report, which would make spouses competent in all cases and compellable in certain cases to testify against each other, could result in a softening of attitudes towards divorced spouses. We prefer to adopt this interpretation of the results of the survey, and would preserve the protection afforded to divorced spouses in respect of matters occurring during the marriage.

## **23.6 Balancing the Arguments**

On the one hand it could be argued that once spouses are divorced, they should be treated in the same way as all other witnesses. This is now the position in England. There is no longer a marriage to be protected. It could hardly be suggested that married couples derive comfort or strength in their marriage from the knowledge that what passes between them would be protected by the special rules of evidence once they were divorced.

On the other hand, the reason for giving spouses exemption from the ordinary rules is based in part upon respect for the intimacy and trust which the marriage relationship is supposed to foster. It is precisely because of this intimacy that acts and communications between the spouses are, presumably, open and off-guard. Ideally, marriage is a relationship in which both parties can interact without inhibition or fear of outside intrusion. For this reason, the spectacle of a former spouse being compelled to testify as to pre-divorce matters might be considered offensive and unfair. These matters occurred while the intimacy and trust existed. The fact that subsequently the relationship has terminated can not affect the circumstances prevailing at the time it was still in existence.

On balance we prefer this view of the matter. In arriving at this conclusion, we took into account that if our recommendation that spouses be generally competent is accepted (see para. 13.7) the only situation in which the pre-divorce limitation will apply is where a divorced spouse is unwilling to

testify as to matters occurring during the marriage. A willing divorced spouse who is prepared to divulge these matters would be free to do so (subject to the rules on privilege - see Chapters 19 and 20) We feel that the wishes of a divorced spouse who, notwithstanding the fact of divorce, prefers not to divulge matters that took place during the marriage should be entitled to the same respect as these of spouses who are still married.

## **23.7           The Recommendation**

We recommend that persons who have been married should not be compellable to testify against each other after divorce or annulment of a voidable marriage, as regards matters occurring during the marriage, except in those cases where spouses would be compellable (see para. 14.20 above). Persons who are judicially separated should continue to be subject to the same rules as would have applied to them before separation.

## **CHAPTER 24**

# **SHOULD SPECIAL RULES BE DEvised FOR EVIDENCE OF CHILDREN, PARENTS AND OTHER RELATIVES OF AN ACCUSED?**

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### **24.1 Introduction**

The position of children and parents of an accused are not within our terms of reference. Nevertheless, the issue is so closely connected to the position of spouses, and has been considered by other law reform agencies in the context of the law relating to spouses giving evidence in criminal proceedings. We consider it is justifiable to highlight the issues involved, although no firm recommendation on the topic has been made, apart from suggesting that the matter should be considered further by an appropriate body.

### **24.2 The Present Law**

There are no special rules regarding persons other than spouses. The general rule is that all persons are competent and compellable to testify in criminal proceedings. This includes the children, parents and other relatives of the accused. Thus the prosecution can compel the six-year-old daughter of an accused to testify against her father; similarly the mother of an accused could be compelled to testify against her son.

### **24.3 The Question of Reform**

Should the present law be changed, either to make specified relatives not compellable to testify against an accused relative, or to give the court a discretion not to compel such a witness in certain cases?

### **24.4 Public Opinion**

Public opinion was not canvassed on this issue.

### **24.5 The Position in England**

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

## 24.6 The Position Elsewhere

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

In Ireland, the Law Reform Commission in its Report on Competence and Compellability of Spouses as Witnesses has recommended that:

*"A parent or child of an accused should not be compelled to give evidence for the prosecution incriminating that accused unless a certificate from the Director of Public Prosecutions is tendered stating that he personally has examined the case and having considered the hardship of compelling the witness to testify, the importance of the evidence that witness could give and the gravity of the offence charged, believes that it is in the public interest that the evidence be heard: where a person is in loco parentis to a child the relationship of parent and child should be deemed to exist. (LRC 13-1985, pp. 62-63)."*

## 24.7 The Emotional Trauma

There can be no doubt that it would be traumatic for a parent or child to be compelled to testify against a child or parent. Are the interests of the state best served by obtaining evidence at all costs, even if this causes an affront to reasonable members of society, because of its seeming insensitivity and intrusive character? What would the reaction be in Hong Kong if parents were called to testify as to triad links of their children or vice versa? (Present law allows this.) These are difficult questions to answer and we are reluctant to make assumptions without the benefit of a more careful study and appraisal of public opinion on this issue. However, if we do not make an attempt to come to grips with the issue, it is unlikely that any other body will be in a better position to do so within the foreseeable future.

Many of the arguments concerning spouses apply equally to children and parents. If spouses should not be compellable to testify against each other (save in certain cases) because of the closeness of the relationship, its importance in society, the hardship caused by holding otherwise and the alienation of society engendered by procedures which are viewed as oppressive, then it can equally be said that children should not be

compelled to testify against their parents and vice versa. Other issues, peculiar to the situation of children and parents, also would appear to arise.

## **24.8 The Recommendation**

This question is beyond the terms of reference of the Commission. If our recommendations are implemented, a logical case could then be made for altering the law to provide that the parents and children of an accused should not be compelled to testify for the prosecution, except in the cases specified in chapter 14 (exceptions to the rule governing spouses). We recommend that further attention be given to this question by the appropriate authorities in due course.

## PART V

### CHAPTER 25

## SUMMARY OF RECOMMENDATIONS

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### PREFATORY

The main changes in the law proposed by our recommendations are highlighted following each recommendation. Briefly, they are:

- (a) to make a spouse compellable for the defence of a spouse (in all cases) instead of merely competent, as at present.
- (b) to make a spouse competent for the prosecution of a spouse in all cases, instead of only in some cases, as at present.
- (c) to make a spouse compellable for the prosecution of a spouse in certain cases, instead of in no cases, as at present.
- (d) to make a spouse compellable for the prosecution of a co-accused of the other spouse in certain cases, instead of in no cases, as at present.
- (e) to make the privilege against revealing marital communications inoperative in those cases where a spouse is a compellable witness, but otherwise to retain the privilege.
- (f) to introduce a new statutory privilege against incrimination of a spouse, except for cases where the spouse is a compellable witness.

#### 25.1 THE SPOUSE AS A WITNESS FOR THE DEFENCE

A spouse should be competent to give evidence for the defence of a spouse in every case. (Para. 7.6)

[This would represent no change to the existing law]

25.2 A spouse should be compellable to testify for the defence of a spouse as a general rule, except in cases where both spouses are being tried together for the same offence. (Para. 8.8)

[This would make spouses compellable when under existing law they are at most only competent]

25.3 A spouse should be a competent witness for a person who is jointly tried with the accused, regardless of whether the accused spouse consents. (Para. 9.7)

[This would represent a change only to the extent of doing away with the need for consent]

25.4 A spouse should not be compellable to testify for the defence of a co-accused jointly tried with the accused spouse, except in these cases where, under the recommendations made in this report (see para. 14.20), a spouse would be a compellable witness for the prosecution - i.e. in cases of a violent or sexual offence against the spouse or a child of the family under 16 or a child under the age of 16 in respect of whom either spouse was acting in loco parentis. (Para. 10.6)

[This would represent a change to the extent of the requirement of compellability]

25.5 A spouse should be competent to testify for a spouse who is jointly tried in the same proceedings. (Para. 11.5)

[This would represent no change to the existing law]

25.6 The general rule proposed in Chapter 8 that a spouse be compellable for the defence, should not apply where the spouse is being jointly tried with the other spouse for the same offence, except where for any reason the spouse is not, or is no longer, liable to be convicted of that offence at the trial. (Para. 12.6)

[This would represent no change to the existing law]

## **THE SPOUSE AS A WITNESS FOR THE PROSECUTION**

25.7 A spouse should be competent to testify for the prosecution of the other spouse in all cases. (Para. 13.7)

[This would widen competence beyond the present "exceptional" cases]

25.8 A spouse should not be compellable to testify against the other spouse, as a general rule. There should be an exception to this general rule 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 causing the death of or injury to a child of the family or a child under the age

of 16 in respect of whom either spouse was acting in loco parentis;

- (b) the offence charged is a sexual offence alleged to have been committed in respect of a child of the family or a child under the age of 16 in respect of whom either spouse was acting in loco parentis;
- (c) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above. (Para. 14.20)

[This would make a spouse compellable in certain cases, whereas at present a spouse is never compellable to testify for the prosecution]

25.9 A spouse should be competent to testify on behalf of the prosecution of anyone being jointly tried with the other spouse. (Para. 15.6)

[This would represent a change to the existing law]

25.10 A spouse should not be compellable to testify against a co-accused of the other spouse, unless the offence involves violence or sex, as set out in paragraph 14.20 above. (Para. 16.6)

[This would make a spouse compellable in certain cases, whereas at present a spouse is never compellable to testify for the prosecution]

25.11 A spouse should not be a competent witness for the prosecution of a spouse when the two spouses are being jointly tried for the same offence, except where the spouse witness is no longer in peril of conviction for that offence. (Para. 17.6)

[This would represent no change to the existing law]

25.12 A spouse who is jointly tried with the other spouse should not be a compellable witness for the prosecution of the other spouse. Where the spouse is not, or is no longer, liable to be convicted of that offence at the trial, for any reason, the normal rule of compellability in certain cases (specified in paragraph 14.20) should apply. (Para. 18.7)

[This would represent no change to the existing law]

## **MISCELLANEOUS**

25.13 The privilege against revealing marital communications contained in section 7 of the Evidence Ordinance should be abolished in those cases where the spouse is a compellable witness for the defence or the

prosecution, in the trial of a spouse, but otherwise it should be retained. (Para. 19.9).

[This would represent no change to the existing law, except in cases where the spouse is made a compellable witness]

25.14 There should be created a statutory privilege against incrimination of a spouse which should not however apply in cases where the spouse is a compellable witness for the prosecution. (Para. 20.8)

[This would create a statutory privilege where it is doubtful if one exists at common law]

25.15 The failure of any person charged with an offence to call his spouse as a witness for the defence should not be made the subject of comment by the prosecutor. (Para. 21.7)

[This would represent no change to the existing law]

25.16 The special rules applicable to spouses with respect to the giving of evidence in criminal proceedings should not be extended to cohabitees. (Para. 22.6)

[This would represent no change to the existing law]

25.17 Persons who have been married should not be compellable to testify against each other after divorce or annulment of a voidable marriage, as regards matters occurring during the marriage, except in those cases where spouses would be compellable (see para. 14.20 above). Persons who are judicially separated should continue to be subject to the same rules as would have applied to them before separation. (Para. 23.7)

[This would change the law to the extent spouses are made compellable]

25.18 Further attention be given to the question whether the parents and children of an accused should not be compelled to testify for the prosecution. (Para. 24.8)

25.19 Section 5 of the Evidence Ordinance should be amended to make it clear that it only applies to civil proceedings. (Para. 2.1 )

[This would represent no change to the existing law]

**List of Persons who received a copy of the  
draft Interim Report**

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The Hong Kong Bar Association

The Law Society of Hong Kong

Registrar, Supreme Court

The Federation of Women's Lawyers

JUSTICE

The Department of Law, University of Hong Kong

The Department of Law, Hong Kong Polytechnic

Jacqueline P Leong (Barrister)

Ester Toh (Barrister)

The Hong Kong Magistrates' Association

Alan Hoo (Barrister)

Hong Kong Association of Business and Professional Women

**SUMMARY OF THE PUBLIC OPINION SURVEYS**

**Introduction**

In view of the social, familial and cultural implications of the issues raised by this subject, it was considered important to seek input from a wide cross-section of persons in Hong Kong.

Two types of public opinion survey were employed - a telephone survey and a written survey of organisations.

**A. The Telephone Survey**

A telephone survey was conducted on behalf of the sub-committee by the City and New Territories Administration in April 1986. A random sample of 977 respondents aged 21 or over was interviewed on the telephone.

Telephone interviews were conducted in the Chinese language between 1800 - 2200 hours during the period 14 April to 17 April 1986. The survey was based on a systematic random sample of residential telephone numbers from current telephone directories. Within the household(s) of a selected telephone number, a respondent aged 21 or over was randomly selected for interview.

Of the 2349 telephone calls made, 1772 households were successfully contacted representing a contact rate of 75%. The unsuccessful calls of 577 were mainly cases where telephones were disconnected/out of order or nobody answered the phones after three attempts were made at different times and on different dates. Among the contacted households, 977 respondents aged 21 or over were successfully interviewed, representing a completion rate of 55%. Of the remaining, 105 (6%) were partial responses, 267 (15%) refused to be interviewed and 423 (24%) were cases where the randomly selected respondent could not be contacted for various reasons.

A copy of the actual questions put, together with a detailed breakdown of the responses received, is contained in the Annexure to the Report of the sub-committee. This is available for consultation at the Secretariat of the Law Reform Commission of Hong Kong, 1st Floor, Queensway Government Offices, Hong Kong. The following is a brief summary of the responses received.

### **Competence of spouses in giving evidence**

43% of the respondents thought that the spouse of an accused should be allowed by the law to give evidence in courts in every case if he/she wants to, 19% said the spouse should not be allowed to give evidence and the remaining 38% either said they didn't know or had no comment.

Among those respondents (19% of total) who said that the spouse should not give evidence in every case, 62% thought that the spouse should be allowed to give evidence in certain cases.

### **Compellability of spouses in giving evidence**

19% of the respondents took the view that the spouse of an accused should be compelled by laws to give evidence in courts in every case even if he/she does not want to testify. 45% said that they should not be compelled and 46% either said they didn't know or had no comment.

Among those respondents (45% of total) who said the spouse should not be compelled to give evidence in every case, 36% thought that the spouse should nevertheless be compelled in certain cases.

### **Reaction to possible consequences of the issues in question**

56% of the respondents agreed with the suggestion that if spouses are compelled to testify against one another in courts, the marital relationship will be affected because spouses will not be frank with one another. On the other hand, 20% disagreed with the saying and the remaining 24% gave "don't know/no comment" answers.

61% of the respondents agreed with the suggestion that it is not right to allow spouses to give evidence against one another in courts because they may conceal the facts or have biased views; the percentage is higher among people in the younger age. On the other hand, 18% disagreed with the saying and the remaining 21% gave "don't know/no comment" answers.

38% of the respondents agreed that the spouse of an accused should be allowed by the law to refuse to give evidence about a statement made to him/her by the accused on the ground that this is a privileged communication. 27% said the spouse should not be allowed and the remaining 35% gave "don't know/no comment" answers.

### **Reaction to specified cases**

Having asked questions on the respondents' knowledge of and general reaction to the issues in question, the interviewer was instructed to give a standard brief explanation to the respondents (Page 3 of the

questionnaire refers). With such a background knowledge, respondents were asked to express their views on specified cases. Details of the responses in these cases may be found in the Annexure referred to above.

### **Effect of divorce and position of cohabitees on the issues in question**

The present law is that even after divorce, a former spouse cannot generally testify (and can never be compelled to testify) against the other spouse, in respect of matters occurring during the marriage. However, 59% of the respondents thought that the spouse of the accused who has been divorced should be treated in the same way as other witnesses in giving evidence and the main reason for saying so was that the couple no longer have husband and wife relationship.

As regards unmarried persons living together as man and wife, 35% of the respondents thought that they should be treated in the same way as married persons and 28% thought that they should not. The main reason given by the former was "they are (in effect) husband and wife" and that by the latter was "they have no legal marital relationship".

### **Summary of findings**

Only 22% of the respondents can be considered as knowledgeable about the existing law.

43% of the respondents considered that the spouse of an accused should be allowed by the law to give evidence in courts in every case if he/she wants to, and 19% thought that the spouse should not be allowed.

Only 19% of the respondents thought that the spouse should be compelled by the law to give evidence in every case even if he/she does not want to testify, and 45% thought that the spouse should not be compelled.

56% of the respondents agreed with the saying that if spouses are compelled to testify against one another in courts, the marital relationship will be affected because spouses will not be frank with one another.

61 % of the respondents agreed with the saying that it is not right to allow spouses to give evidence against one another in courts because they may conceal the facts or have biased views.

38% of the respondents agreed that the spouse of an accused should be allowed by the law to refuse to give evidence about a statement made to him/her by the accused on the ground that this is a privileged communication.

After an explanation of the present law given to respondents, more of them tended to think, in response to a specified case, that the spouse

of an accused should be allowed to give evidence if he/she is willing to do so (over 60% as compared with 43% in response to a general question asked before giving the explanation).

59% of the respondents thought that the spouse of the accused who has been divorced should be treated in the same way as other witnesses in giving evidence.

35% of the respondents thought that unmarried persons living together as man and wife should be treated in the same way as married persons and 28% thought that they should not.

Further references to the details of the responses is contained in the Report as and where the issues in question are discussed.

## **B. The Survey of Organisations**

A questionnaire was prepared by the sub-committee and submitted to organisations and selected individuals. Ninety completed questionnaires were received and analysed. A list of the organisations consulted and a detailed summary of the responses (together with general comments made in some responses) is contained in the Annexure to the Report of the sub-committee, referred to above.

The results of this survey showed that 58% favoured making spouses compellable to testify against one another in certain cases; that 63% favoured making spouses generally competent; that 53% favoured compellability for the defence; that 73% favoured a continuation of the spousal privilege against disclosure of communications; that 70% favoured treating divorced spouses as other witnesses as regards matters occurring before and/or after the marriage, while 50% favoured such treatment as regards matters occurring during the marriage; and that 62% were opposed to treating unmarried cohabittees in the same way as spouses.

Further reference to the details of the responses as contained in the Report as and where the issues in question are discussed.

## **C. Conclusions**

The surveys provided valuable guidance to the sub-committee. The preparation of the surveys helped the sub-committee to identify and formulate the key issues. The responses to the questions gave the sub-committee a perspective of the likely public reaction to the various options for reform that were being considered. The recommendations of the sub-committee and the Commission's Report generally reflect the majority views emerging from the surveys. In two instances, discussed in the Report, the recommendations diverge from the majority opinion (see para. 1.3.4, and Chapter 8, and Chapter 19).

The Commission wishes to acknowledge its indebtedness to the City and New Territories Administration, and especially to Mr. K.K. Au, Senior Statistician, for assistance in the preparation, conduct and analysis of the public opinion surveys.

**Relevant existing statutory provisions in Hong Kong**

**CAP. 221 Criminal Procedure 1982 Ed.**

**Evidence**

Competency of witnesses in criminal cases. 54(1) Every person charged with an offence, and the wife or husband as the case may be of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:

1898 c. 365.1 Provided as follows -

- (a) a person so charged shall not be called as a witness in pursuance of this section except upon his own application;
- (b) the failure of any person charged with an offence, or of the wife or husband as the case may be of the person so charged, to give evidence shall not be made the subject of any comment by the prosecution;
- (c) the wife or husband of the person charged shall not, save as in this section mentioned, be called as witness in pursuance of this section except upon the application of the person so charged;
- (d) nothing in this section shall make a husband compellable to disclose any communication made to him by his wife during the marriage, or a wife compellable to disclose any communication made to her by her husband during the marriage;
- (e) a person charged and being a witness in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to criminate him as to the offence charged;
- (f) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any

offence other than that wherewith he is then charged, or is of bad character, unless -

- (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
- (ii) he has personally or by his advocate 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
- (iii) he has given evidence against any other person charged in the same proceedings; (Amended, 50 of 1981, s. 2)

(g) every person called as a witness in pursuance of this section 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. (14 of 1906 s.2, incorporated. Amended, 20 of 1948, s.4)

(2) Notwithstanding any rule of law, the right of a person charged to make a statement without being sworn is hereby abolished. (Added, 34 of 1972, s.9)

Calling of wife or husband 1898, c.36 s. 4, Second Schedule.

57. (1) The wife or husband of a person charged with an offence under any enactment mentioned in the Second Schedule may be called as a witness either for the prosecution or defence and without the consent of the person charged. (Amendment, 50 of 1911, s.4 and 20 of 1948 s.4).

(2) Nothing in section 54 shall affect 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. (Amendment, 20 of 1948, s.4.)

(14 of 1906, s.5, incorporated)

	<u>SECOND SCHEDULE</u>		[s.57]
<u>Chapter of Ordinance</u>	<u>Short Title</u>	<u>Enactments referred to</u>	
	Cap. 16	The Separation and Maintenance Orders Ordinance.	The Whole Ordinance
[cf.1908 c.67, s.27 and 1914 c.58, s.28(3)]	Cap. 200	The Crimes Ordinance	Part VI (Incest) and Part XII (Sexual and related offences)
	Cap. 212	The Offences against the Person Ordinance	ss. 26, 27, 43, 44 and 45 and, in the case of any offence involving bodily injury to a child or young person under the age of 16 years, any other enactment in the Ordinance.

(14 of 1906, Schedule, incorporated. Amended, 29 of 1952, s.4; 21 of 1970, Second Schedule, and 1 of 1978, s. 8)

Specifically, the effect of the above provisions is that the wife or husband of a person charged with an offence under any of the following enactments, may be called as a witness for the prosecution, without the consent of the person charged in the case of the following offences: -

- (a) Separation and Maintenance Orders Ordinance  
 Cap. 16. The follow certain behaviour by a husband is listed as constituting grounds for applying for either non-cohabitation, custody or maintenance orders.
- a) aggravated assault
  - b) desertion
  - c) persistent cruelty to the wife or children
  - d) wilful neglect
  - e) insistence on sexual intercourse while suffering from venereal disease
  - f) forced prostitution
  - g) being an habitual drunkard or drug addict

The reference to this Ordinance is strange, since the Ordinance does not actually create any criminal offences. It is unclear whether the effect of s.57(1) is that the wife may give evidence against the husband on an

application for any of the orders under the Separation and Maintenance Order Ordinance.

- (b) Crimes Ordinance, Cap. 200, Part VI (Incest), Part XII (Sexual and related offences).

**PART VI**  
**Incest**

- 47. Incest by men
- 48. Incest by women of or over 16
- 49. Test of relationship
- 50. Prosecution of offences
- 51. Sanction of Attorney General

**PART XII**  
**Sexual and Related Offences**  
**Interpretation**

117. Interpretation

**Sexual offences**

- 118. Rape
- 119. Procurement of woman by threats
- 120. Procurement of woman by false pretences
- 121. Administering drugs to obtain or facilitate intercourse
- 122. Indecent assault on a woman
- 123. Intercourse with girl under 13
- 124. Intercourse with girl under 16
- 125. Intercourse with defective
- 126. Abduction of unmarried girl under 16
- 127. Abduction of unmarried girl under 18 for sexual intercourse
- 128. Abduction of defective from parent or guardian for sexual intercourse

**Exploitation of women for sexual purposes**

- 129. Trafficking to or from Hong Kong in women
- 130. Control over woman for purpose of unlawful sexual intercourse or prostitution
- 131. Causing prostitution of woman
- 132. Procurement of woman under 21
- 133. Procurement of defective
- 134. Detention of woman for intercourse or in vice establishment
- 135. Causing or encouraging prostitution of, intercourse with, or indecent assault on girl under 16
- 136. Causing or encouraging prostitution of defective
- 137. Man living on earnings of prostitution
- 138. Woman exercising control over prostitute
- 139. Keeping a vice establishment

**Use of premises, etc. for illicit sexual purposes**

- 140. Permitting girl under 13 to resort to or be on premises or vessel for intercourse
- 141. Permitting girl under 16 to resort to or be on premises or vessel for prostitution or intercourse
- 142. Permitting defective to resort to or be on premises or vessel for prostitution or intercourse
- 143. Letting premises for use as a vice establishment

- 144. Tenant etc. permitting premises or vessel to be kept as a vice establishment
- 145. Tenant etc. permitting premises or vessel to be used for prostitution

**Miscellaneous offences and provisions**

- 146. Indecent conduct towards child under 14
- 147. Soliciting for an immoral purpose
- 148. Indecency in public
- 149. Conviction for offence other than that charged
- 150. Proof of exceptions
- 151. Power of search in case of man living on earnings of prostitution
- 152. General power of search
- 153. Seizure and forfeiture in respect of vice establishment

- (c) Offences Against the Person Act, Cap. 212,
  - s. 26 (Exposing child whereby life is endangered)
  - s. 27 (Ill-treatment or neglect by those in charge of child or young person)
  - s. 43 (Stealing child under 14 years)
  - s. 44 (Unlawful transfers of possession, custody or control of other persons for valuable consideration)
  - s. 45 (Bigamy)

Any offence under the Ordinance involving bodily injury to a child or young person under the age of 16 years.

**Relevant existing statutory provisions in Hong Kong**

CAP. 8 Evidence 1979 Ed.

Evidence of parties. [cf.1951 c.99, s.2; 1853 c.83, s.1] 5. In all proceedings before the court, the parties and the husbands and wives of the parties thereto, and the persons in whose behalf any proceedings may be brought, or instituted, or opposed, or defended, and the husbands and wives of such persons shall, except as hereinafter excepted, be competent and compellable to give evidence, either viva voce or by deposition, according to the practice of the court, on behalf of either or any of the parties to the proceedings.

(Amended, 27 of 1937, Schedule)

Evidence of husband and wife. [cf.1851 c.99 s.3; 1853 c.83, s.2.] 6. Nothing in this Ordinance shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband, in any criminal proceedings.

Privilege of husband and wife. 1853 c.83, s.3. 7. In criminal proceedings, a husband shall not be compellable to disclose any communication made to him by his wife during the marriage nor shall a wife be compellable to disclose any communication made to her by her husband during the marriage.

(Amended, 9 of 1908, s.2, and 25 of 1969, s.2)

Evidence of access. 1949 c.100. 8. (1 ) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them at any period.

(2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.

(Added, 37 of 1950, Schedule)

No incapacity from crime or interest. 1843 c.85, s.1. 9. No person offered as a witness in any proceedings shall be excluded by reason of incapacity from crime or interest from giving evidence, either in person or by deposition, according to the practice of the court, on the trial or hearing of any proceedings or at any stage thereof.

(Amended, 50 of 1911, s.4)

Exception as to defendant in criminal proceedings. [cf.1851 c.99 s.3.] 10. Nothing in this Ordinance shall render any person who in any criminal proceedings is charged with an indictable offence or any offence punishable on summary conviction compellable to give evidence for or against himself, or shall render any person in any proceedings compellable to answer any question tending to criminate himself.

(Amended, 50 of 1911; 62 of 1911, Schedule)

## **Hong Kong Theft Ordinance (Cap. 210)**

Husband and  
wife.  
1968, c.60,  
s.30

31. (1) This Ordinance shall apply in relation to the parties to a marriage, and to property belonging to the wife or husband whether or not by reason of an interest derived from the marriage, as it would apply if they were not married and any such interest subsisted independently of the marriage.

(2) Subject to subsection (4), a person shall have the same right to bring proceedings against that person's wife or husband for any offence (whether under this Ordinance or otherwise) as if they were not married, and a person bringing any such proceedings shall be competent to give evidence for the prosecution at every stage of the proceedings.

(3) Where a person is charged in proceedings not brought by that person's wife or husband with having committed any offence with reference to that person's wife or husband or to property belonging to the wife or husband, the wife or husband shall be competent to give evidence at every stage of the proceedings, whether for the defence or for the prosecution and whether the accused is charged solely or jointly with any other person:

Provided that –

- (a) the wife or husband (unless compellable at common law) shall not be compellable either to give evidence or, in giving evidence, to disclose any communication made to her or him during the marriage by the accused; and
- (b) her or his failure to give evidence shall not be made the subject of any comment by the prosecution.

(4) Proceedings shall not be instituted against a person for any offence of stealing or doing unlawful damage to property which at the time of the offence belongs to that person's wife or husband, or for any attempt, incitement or conspiracy to commit such an offence, unless the proceedings are instituted by or with the consent of the Attorney General:

Provided that -

- (a) this subsection shall not apply to proceedings against a person for an offence -

- (i) if that person is charged with committing the offence jointly with the wife or husband; or
  - (ii) if by virtue of any judicial decree or order (wherever made) that person and the wife or husband are at the time of the offence under no obligation to cohabit; and
- (b) this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for an offence, or the remand in custody or admission to bail of a person charged with an offence, where the arrest (if without a warrant) is made, or the warrant of arrest issues on an information laid, by a person other than the wife or husband.

**Extract from the U.K. Police and  
Criminal Evidence Act 1984**

**Police and Criminal Evidence Act 1984, s.80**

- 80. Competence and compellability of accused's spouse**
- (1) In any proceedings the wife or husband of the accused shall be competent to give evidence :-
    - (a) subject to subsection (4) below, for the prosecution; and
    - (b) on behalf of the accused or any person jointly charged with the accused.
  - (2) In any proceedings the wife or husband of the accused shall, subject to subsection (4) below, be compellable to give evidence on behalf of the accused.
  - (3) In any proceedings the wife or husband of the accused shall, subject to subsection (4) below, be compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused if and only if :
    - (a) the offence charged involves an assault on, or injury or a threat of injury to, the wife or husband of the accused or a person who was at the material time under the age of sixteen; or
    - (b) the offence charged is a sexual offence alleged to have been committed in respect of a person who was at the material time under that age; or
    - (c) the offence charged consists of attempting or conspiring to commit, or of aiding, abetting, counselling, procuring or inciting the commission of, an offence falling within paragraph (a) or (b) above.
  - (4) Where a husband and wife are jointly charged with an offence neither spouse shall at the trial be competent or compellable by virtue of subsection (1)(a), (2) or (3) above to give evidence in respect of that offence unless that spouse is not, or is no longer, liable to be convicted of that offence at the trial as a result of pleading guilty or for any other reason.
  - (5) In any proceedings a person who has been but is no longer married to the accused shall be competent and compellable to

give evidence as if that person and the accused had never been married.

- (6) Where in any proceedings the age of any person at any time is material for the purposes of subsection (3) above, his age at the material time shall for the purposes of that provision be deemed to be or to have been that which appears to the court to be or to have been his age at that time.
- (7) In subsection (3)(b) above "sexual offence" means an offence under the Sexual Offences Act 1956, the Indecency with Children Act 1960, the Sexual Offences Act 1967, section 54 of the Criminal Law Act 1977 or the Protection of Children Act 1978.
- (8) The failure of the wife or husband of the accused to give evidence shall not be made the subject of any comment by the prosecution.
- (9) Section 1(d) of the Criminal Evidence Act 1898 (communications between husband and wife) and section 43(1) of the Matrimonial Causes Act 1965 (evidence as to marital intercourse) shall cease to have effect.

Criminal Evidence Act 1898, s 1 (d) . See Vol 8, p 865; that provision is also repealed, together with other provisions of that Act, by s 119(2) and Sch 7, Part V, post.

Matrimonial Causes Act 1965 s 43(1). See Vol 17, p 218; that provision is also repealed by s 119(2) and Sch 7, Part V, post.

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