

Tuesday, December 13, 1988

Summary of  
Report on Competence and Compellability  
of Spouses in Criminal Proceedings

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1. Introduction

The Law Reform Commission today published its report on competence and compellability of spouses in criminal proceedings after some three years' work, first by a Sub-committee of the Commission chaired by Dr Byron S. Y. Weng, and then by the Commission itself.

The report makes recommendations for certain changes in the law relating to the competence and compellability of the spouse or former spouse of an accused person to give evidence in criminal proceedings.

Generally speaking, these changes would increase the availability of the testimony of spouses in criminal proceedings and would mean that spouses would be treated more like all other witnesses in terms of their competence and compellability to give evidence in such proceedings.

Spouses would, however, remain subject to certain special rules, in recognition of their special relationship to each other.

The publication of this report follows a detailed study of the law and a wide-ranging consultation of public opinion.

The Sub-committee which examined the subject included in its membership a practising barrister, a crown prosecutor, a legislative councillor and two university professors.

They met on 16 occasions and consulted a wide range of persons and organisations to obtain their views on the current state of the law and how it might be improved.

2. The spouse as a witness for the prosecution

The report makes a number of recommendations relating to the spouse as a witness for the prosecution.

First, the report recommends that a spouse should be competent to testify for the prosecution of the other spouse in all cases.

At present a spouse is only able to testify for the prosecution of a spouse, in certain exceptional cases. The commission considers that a spouse should always be competent to testify for the prosecution of a spouse, if willing to do so.

Second, the report recommends that in certain cases a spouse should be compellable to testify for the prosecution of a spouse.

These exceptional cases would be where the offence charged involves an assault on or injury or a threat of injury to the spouse, or causing the death of or injury to a child of the family, or a sexual offence in respect of such a child, including a child under 16 in respect of whom either spouse was acting as parent.

The commission considered carefully the need to balance, on the one hand, the interest of society in upholding the institution of marriage and in recognising the privacy of the marital relationship, and on the other hand, the need to protect the spouse and children and prevent crime.

The commission believes that its recommendation strikes a proper balance between these competing interests and would result in an improvement upon the law at present, which fails to recognise the vulnerable position of battered spouses and abused children.

As a corollary of this reform, the report recommends the abolition of the existing privilege against revealing marital communications in those cases where the spouse is a compellable witness.

The report also makes certain recommendations regarding persons being jointly tried with the accused, (including a co-accused spouse), which are considered necessary and consequential upon the reforms recommended above.

### 3. The spouse as a witness for the defence

The report makes a number of recommendations relating to the spouse as a witness for the defence.

First, the report says that there should be no change in the existing law that a spouse is competent to give evidence for the defence of a spouse in every case.

The report goes on to say that a spouse should generally be compellable to testify for the defence of a spouse. This would mean that an accused would be able to compel his or her spouse to testify on his or her behalf.

At present the spouse can give evidence for the defence but cannot be compelled to do so. The commission considers that the accused should always have the right to defend himself by calling for all relevant testimony, including that of his or her own spouse if necessary.

This rule should not apply however where both spouses are being tried together for the same offence. In such cases the spouse witness should, the report says, continue to be competent to testify for the co-accused

spouse, but should not be compellable, except where for any reason the accused spouse is not, or is no longer, liable to be convicted of the offence at the trial.

The report also makes recommendations regarding the giving of evidence by a spouse for a co-accused jointly charged with accused spouse, which are consequential upon the above reforms.

#### 4. Privilege against incrimination of a spouse

The report recommends the creation of statutory privilege against incrimination of a spouse. At present there is doubt as to whether such a privilege exists at common law.

The effect of the privilege would be that a spouse who is giving evidence for the defence or the prosecution could refuse to answer any question on the ground that the answer might incriminate the other spouse.

However, the report says that the privilege would cease to apply in those cases where the spouse is to be made a compellable witness for the prosecution - e.g. in cases of violence against the Spouse. If the privilege was allowed to operate in such cases, it would effectively negate the purpose of making the spouse a compellable witness.

#### 5. Comments upon the failure to call a spouse

The report says 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.

The commission considered 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.

A defendant may have many reasons for not wanting to call a spouse to give evidence, and these may not necessarily reflect adversely upon <sup>his</sup> evidence. Such comment should not, the report says, be permitted.

#### 6. Co-habitees not included

The report says that the special rules which apply to spouses with respect to the giving of evidence in criminal proceedings, (and which, for example, enable a spouse to avoid giving evidence sometimes), should not be extended to co-habitees.

The commission noted a body of public opinion in Hong Kong that seemed to favour treating co-habitees in the same way as spouses.

At the same time, it was difficult to use arguments based on the sanctity of marriage to support special rules for co-habitees, considering that

the parties themselves have not actually entered into a marriage.

On balance, the Commission believes that the main thrust of its proposals, which are designed to enhance the availability of testimony within marriage, would be undermined somewhat by extending the special rules and exemptions to co-habitees.

#### 7. What happens when a marriage ends

Under the present law, once spouses are divorced, or if their marriage is annulled, they cease to be affected thereafter by the special rules affecting 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 subsisted.

Spouses who are judicially separated remain subject to the rules for spouses. The report recommends one change to this position when it suggests that even after divorce or annulment former spouses should be compellable to testify for the prosecution even on matters occurring during the marriage, in those situations where spouses are compellable, e.g. crimes of violence against the spouse or sexual offences against children of the marriage who are under 16.

#### 8. Parents testifying against children

The position of children giving evidence against their parents and vice versa was not within the Commission's terms of reference.

However, the Commission observed that if its proposals were to be implemented then a logical case could 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, save in the exceptional cases referred to above, - as for example where a parent has committed a crime of violence against a child.

The report recommends that further attention be given to this question by the appropriate authorities in due course.

#### 9. Public opinion surveys

Much weight was attached by the sub-committee and the Commission to public opinion in the formulation of its recommendations.

This was because the subject matter of the enquiry raises issues concerning social, moral, ethical and family values. The views of the ordinary man and woman in the street were felt to be of central importance.

Two public opinion surveys were carried out. One was a telephone survey in which approximately 1,000 persons were interviewed. The other was a questionnaire which was sent to organisations and

individuals, and to which 90 responses were received.

A summary of the results of the surveys is shown in annexure 2 of the report. What the public thought about each issue is also. Considered separately under each topic in the report.

In two instances the report diverges from the weight of public opinion, and these are highlighted in the report in chapter 8, (dealing with compellability of a spouse to testify for the defence) and in chapter 19 (dealing with the privilege for marital communications).

In regard to the first, the Commission is of the view that an accused should have an unfettered right to defend himself, even to the extent of being able to compel a spouse to testify on his behalf - though in practice it is recognised that the number of cases in which an unwilling spouse would be compelled to testify would be very small. (it should perhaps be pointed out that being compelled to testify does not mean one is compelled to say something which is not true; it simply means one must go into the witness box and truthfully answer whatever questions are put to one by counsel for the defence and the prosecution.)

In regard to the other case where the report diverges from public opinion, the report recommends a partial abolition of the privilege against communicating statements made to the spouse witness by the other spouse.

Public opinion was in favour of retaining the privilege. The commission is not altogether opposed to the privilege, and in fact in chapter 20 recommends the creation of a wider. Statutory privilege against incrimination of a spouse, under which a spouse could refuse to say anything which might incriminate the other spouse.

However, both this. New privilege and the existing privilege against communicating statements made to the spouse should give way, the report says, in those cases where it has been recommended that the spouse should be made compellable to testify for the prosecution of the other spouse.

These are cases where the accused spouse was charged with an offence of violence against the spouse or children of the family or sexual offences involving such children, who are under 16.

In such cases the report recommends that a spouse-witness should be compellable for the prosecution, and in such cases the privilege should not apply. (If it did apply, it would effectively negate the aspect of compellability of the spouse-witness.) In other words, the privilege question is closely tied to the compellability question and the two must be viewed together.

## 10. Summary

The report's recommendations, if implemented, would to some extent increase the opportunities for spouses to give evidence in criminal proceedings involving the other spouse.

At the same time, due weight is given to the sanctity of marriage as an institution, and the report does not go so far as to suggest that the position of spouses should be made exactly the same as other witnesses.

In certain cases, spouses would continue to be entitled to decline to testify for the prosecution of a spouse, by virtue of the marriage. A spokesman for the Law Reform Commission said that the Commission would welcome comment on the report.' any "views should be sent to:

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The report at may be purchased from Government Publications Centre, G/F, General Post Office Building, Connaught Plaza, Central.