SPOUSAL COMPETENCE AND COMPELLABILITY IN CRIMINAL TRIALS IN THE 21ST CENTURY

WENDY HARRIS*

For many centuries the spouse of an accused occupied a privileged position in terms of giving evidence against his or her spouse in a criminal trial.[1] However, Australia in the 21st century presents a very different picture of adult relationships compared to the beginning of the 20th century and certainly those before. In the twenty years immediately preceding the beginning of the 21st century, divorce rates increased from 10 600 to 49 000 and men and women choosing to co-habit prior to marriage increased from 29% to 71%.[2] These figures do not reveal the full extent of men and women living in de facto relationships, couples in same sex de facto relationships or those in traditional Aboriginal marriages.[3]

This area of law raises both public and private policy issues concerning intimate family relationships and the criminal law. It is not surprising then that changing societal values will demand a review of the law and reform from to time. The Victorian Law Reform Commission noted that in the five years preceding its report in 1976, various law reform bodies had published eight reports on this area.[4] Four of those were from other Australian state jurisdictions.[5] At the Commonwealth level, the Australian Law Reform Commission included this area in its major review of the law of evidence in 1985.[6] Reviews are still continuing in a number of jurisdictions.[7]

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* LLB(Hons), LLM QUT, Lecturer in Law, Faculty of Law, Queensland University of Technology.

1 This article does not deal with the position of spouses giving evidence for the accused or where the spouse is a co-accused.

2 Australian Bureau of Statistics, *Marriages and Divorces, Australia* 23/8/01 <http://www.abs.gov.auststatsabs>.

3 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

4 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 7.

5 Western Australian Law Reform Commission, *Working Paper on Competence and Compellability of Spouses* (1974); South Australia Criminal Law and Penal Methods Reform Committee, 3rd Report (1975); Queensland Law Reform Commission, *Working Paper and Report No 19 on Evidence Bill* (1975); Tasmanian Law Reform Commission, *Working Paper on Competence and Compellability* (1976). In 1980, the New South Wales Law Reform Commission published a discussion paper, *Competence and Compellability*.

6 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985); Australian Law Reform Commission, *Evidence*, Report No 38 (1987).

7 South Australian Government, *Removing Legislative Discrimination against Same Sex Couples*, Discussion Paper <http://www.justice.sa.gov.au/news_detail.asp?id=54>; Queensland Law Reform

This paper will examine the extent to which the various jurisdictions in Australia have responded to these societal changes and in particular the position of relationships other than lawful marriages. In so doing, it is necessary to review the historical origins of the principles relating to the competence and compellability of the spousal witness to determine the continued relevance of the stated rationales.

I HISTORICAL PERSPECTIVE – ORIGINS AND RATIONALES

Much has been written about the origins of the various rules of evidence that apply to the competence, compellability and privileges that arise from the marital relationship.[8] The language can be confusing with some commentators and judges referring to a spouse's disqualification to give evidence as a privilege[9] whilst others refer to the privilege not to disclose marital communications in terms of non-compellability.[10] For the purposes of this paper the ability and obligation of the spousal witness will be discussed in terms of competence and compellability and the right of the witness not to disclose marital communications in terms of a marital privilege. Although it is apparent that the concepts are closely linked, it is submitted that the failure to clearly differentiate between these concepts has been the basis for some of the conflicting decisions in this area.

A *Competence and Compellability*

It has been long undisputed that at common law a spouse was incompetent to give evidence at a criminal trial against his or her spouse. The various authorities supporting that proposition are detailed in the judgement of Lord Wilberforce in *R v Hoskyn*[11] where it was noted that it was well established by the time of Coke in 1628. Those authorities based the incompetence on the doctrine of unity of husband and wife coupled with the privilege against self-incrimination, the danger of perjury and the repugnance likely to be felt by the public seeing one spouse testifying against the other.[12] Coke further suggested 'it might be a cause of implacable discord and dissention between the husband and the wife, and a means of great inconvenience.'[13]

There were some limited exceptions to the rule of competence. The most certain were cases involving rape or personal violence against the spousal witness. This exception was based on necessity in that the wife 'would have no protection except in the unlikely

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Commission, *The Receipt of Evidence By Queensland Courts: The Evidence of Children*, Report No 55, Part 2 (2002).

8 C E Weigall, 'Evidence of Wife against Husband' (1943) 17 *Australian Law Journal* 3; I A Wilson, 'Spouses as Witness in England and Queensland: During Marriage and After Divorce' (1986) 2 *Queensland Institute of Technology Law Journal* 51; L Katz, 'The Marital Communications Privilege in New South Wales' (1991) 7 *Australian Bar Review* 1; P Creighton, 'Spouse Competence and Compellability' [1990] *Criminal Law Review* 34; Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976).

9 *Wigmore on Evidence*, Vol 8 par 2228 cited in Weigell, above n 8, 4.

10 Weigell, above n 8, 5.

11 [1979] AC 474, 484-6 (Lord Wilberforce).

12 Ibid 484.

13 *Coke on Littleton* (1628), s 6b.

event of a third person being present.'[14] Other exceptions were the abduction of a woman with intent to marry her[15] and treason, the latter appearing to be in doubt.[16]

An issue which was not certain was the compellability of spouses in those limited cases where they were competent. Specifically, was a spouse an exception to the general rule that a competent witness was also a compellable witness? In *Riddle v R*,[17] in construing s 407 of the *Crimes Act 1900* (NSW), the High Court concluded that it was very doubtful that at common law a wife in such as case was compellable[18] and the better view was that they were not compellable.[19] In the United Kingdom, the view that prevailed from 1931 to 1979 was that a spouse who was competent at common law was also compellable.[20] The Court of Appeal decision in *R v Lapworth*[21] lead to conflicting decisions in Australia with some states preferring the English position to the obiter of the High Court in *Riddle*.[22] The position in all jurisdictions would appear to be settled after the House of Lords decision in *Hoskyn v R*[23] which overruled *R v Lapworth.* Their Lordships applied the general principles from the earlier decision of *R v Leach*,[24] concluding that a wife can never be a compellable witness against her husband unless expressly made so by statute.[25]

An interesting point made by Lord Wilberforce was that the word 'compellability' was of comparatively recent origin appearing first in the *Evidence Act 1851* (UK).[26] It is interesting also to speculate to what extent this erroneous view of the common law impacted on the development of the law in this area. As will be discussed later, statutory reforms in the area assumed the correctness of the proposition[27] and numerous cases and judges followed *R v Lapworth*, including the 'great judge'[28] Lord Goddard CJ presiding in the seminal decision of *R v Algar*.[29]

B *Privilege Against Disclosing Marital Communications*

Prior to the decision in *Shenton v Tylor*,[30] it had generally been assumed that at common law, communications between spouses whilst they were married were privileged to the

14 [1979] AC 474, 484 (Lord Wilberforce).

15 *R v Wakefield* (1827) 2 Lew.C.C. 279.

16 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) [9] and authorities cited therein at n 12.

17 [1911] 12 CLR 622.

18 Ibid 633 (Burton J); 640 (O'Connor J).

19 Ibid 629 (Griffith CJ).

20 *R v Lapworth* [1931] 1 KB 117 not following *R v Leach* [1912] AC 305.

21 Ibid.

22 *R v Phillips* [1922] SASR 276 following *R v Lapworth* [1931] 1 KB 117; *Sharp v Rodwell* [1947] VLR 82, 85 (Gaven Duffy J). For conflicting decisions within Queensland see Wilson, above n 8, 55-7.

23 [1979] AC 474 (Lord Edmund-Davies dissenting).

24 [1912] AC 305.

25 [1979] AC 474, 497 (Lord Salmon).

26 Ibid 486.

27 *Riddle v R* [1911] 12 CLR 622, 629 (Griffith CJ).

28 *Hoskyn v R* [1979] AC 474, 498 (Lord Wilberforce); 507 (Lord Edmund-Davies).

29 [1954] 1 QB 279.

30 [1939] Ch 620.

extent that the witness spouse could not be compelled to divulge that information to the court.[31] That assumption can be attributed to various early textbook writers[32] and statements in a trio of cases[33] suggesting 'the happiness of the marriage state requires that the confidence between man and wife should be kept for ever inviolable'. However, those cases all dealt with competency and hence inadmissibility rather than privilege and the text references failed to distinguish competence from compellability.[34] An even wider view has been expressed at times, that marital communications were in fact inadmissible.[35]

However it has now been held that at common law there never existed a rule of privilege protecting marital communications between spouses.[36] That conclusion has been criticised[37] but not overruled.[38] The explanation for the lack of development of such a rule and any authority on point is readily apparent. The operation of the spousal incompetence rule in most cases would have made the spousal witness's evidence inadmissible and hence no issue of claiming privilege or being compelled to disclose marital communications would even arise. In the view of Wigmore, the privilege for marital communications did exist at common law, however it became indistinct from the incompetency rule due partly to the shared rationale of protecting domestic confidence by prohibiting their mutual disclosures.

> ... the true policy of the present privilege was perceived , and yet it was not enforced in the shape of any rule distinct for the old-established privilege of each not to testify against the other as a party or interested in the suit.[39]

In the learned author's view, once legislative changes were introduced in the period from 1840 to 1870 that abolished or modified the spousal incompetence rule, the existence of the privilege was perceived and then preserved by express enactment.[40] It seems that during that time of legislative change, it was considered that there was good reason for the privilege.[41] The Common Law Procedure Commissioners in their Second Report, gave strong support for the privilege:

> 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 communication between husband and wife, would be a far greater evil than the disadvantage which may

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31 Ibid 636 (Greene MR).

32 Ibid 633-6 (Greene MR), 644-6 (Luxmoore LJ).

33 *Monroe v Twisleton* (1802) 170 ER 250; *O'Connor v Marjoribanks* (1842) 4 Man & G 435 and *Doker v Hasler* Ry & M 198.

34 *Monroe v Twisleton* (1802) 170 ER 250, *O'Connor v Marjoribanks* (1842) 4 Man & G 435 and *Doker v Hasler* Ry & M 198.

35 W S Holdsworth, 'Notes' (1940) 56 *Law Quarterly Review* 137, 139-40.

36 *Shenton v Tyler* [1939] Ch 620, 635 (Greene MR); 652 (Luxmoore LJ).

37 W S Holdsworth, 'Notes' (1940) 56 *Law Quarterly Review* 137.

38 *Rumping v DPP* [1964] AC 814.

39 *Wigmore on Evidence* 1904-5, Vol iv, 3258 cited in *Shenton v Tyler* [1939] Ch 620, 636-8 (Green MR).

40 Ibid.

41 *Stapleton v Crofts* 18 QB 367, 374 (Erle J).

> occasionally arise from the loss of the light which such revelations might throw on questions in dispute.[42]

This suggests two related rationales for the privilege. First, to promote the utmost candour and confidence in marital communications and secondly, to avoid marital dissension.[43] The former has been dismissed on the basis that it could not be assumed that spouses are even aware of the privilege on entering into marriage and it is fanciful to suggest that they would be affected in their decision to marry or communicate with their spouse by the existence of the privilege.[44]

In any event, the Commissioners' recommendation found its way into the numerous legislative reforms of the middle to late 19th century.[45]

C *Divorced and Ex-Spouses*

In *R v Algar*[46] Lord Goddard CJ decided to was timely to review the state of law of competency in this area, as 'decrees of divorce and nullity are far more frequent than in former days'.[47] His Lordship confirmed previous decisions, holding that subject to the common law and statutory exceptions, 'incompetence continues after divorce in respect of matters which arose during the coverture.'[48] The previous decisions where based on 'the necessity of preserving the confidence of the conjugal relation'.[49] However his Lordship then acknowledged that like all principles, the reason on which it is founded may not be applicable to every case.[50] In any event, the Court then went on to hold that the same reasoning justified incompetence for a spouse of a marriage after a decree of nullity.[51]

This conclusion has been criticised as being an 'unwarranted' extension as the policy considerations of avoiding marital dissension and hardship are either absent or of negligible weight after the marriage has been terminated.[52] In Canada, this has led to the exemption being refused to spouses irreconcilably separated.[53]

As will be discussed below, despite the common law having a clear position on divorced spouses, early legislation failed to expressly provide for their position, which led to conflicting cases in the area. This has now been remedied in some jurisdictions.

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42 Second Report of the Common Law Procedure Commission (1853).

43 Katz, above n 8, 15,16; *Williamson v Williamson* (1921) 21 SR(NSW) 216, 218 (Street CJ).

44 Katz, above n 8, 16.

45 *Evidence Amendment Act 1853* (UK) s 3; *Criminal Evidence Act 1898* (UK) s 1(d).

46 [1954] 1 QB 279.

47 Ibid 285 (Lord Goddard CJ).

48 Ibid 286, 7 citing *Monroe v Twisleton* (1802) 170 ER 250, *O'Connor v Marjoribanks* (1842) 4 Man & G 435 and *Doker v Hasler* Ry & M 198.

49 Ibid 286.

50 Ibid.

51 Ibid 289.

52 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) [61].

53 *Salituro* (1990) 78 R (3d) 68.

In relation to marital privilege, the decision of *Shenton v Tyler*[54] discussed above would require a conclusion that there existed no common law privilege for former spouses for communications during the marriage. There would seem no justification for its application in any case if the only supportable rationale was avoidance of marital dissension.

D *Couples not Lawfully Married*

Despite some early authority to the contrary,[55] the weight of authority is that the special rules of competence and compellability applied only to lawfully married spouses.[56] In *R v Khan*,[57] Lord Glidewell reviewed the existing law on this question when considering the competence of the second wife of an accused in a polygamous Moslem marriage. His Lordship confirmed previous law that a woman living with the accused was competent if she has not been through a lawful ceremony of marriage or has been through a ceremony of marriage that is void because it is bigamous.[58] Although stating that exactly the same principles would apply to the second wife of a polygamous marriage, there is no attempt to explain the basis of the principle. In fact, his Lordship acknowledged the special position of a wife in a Moslem marriage and her obligation of secrecy but concluded, 'it was not material to the question of law which in the end we had to decide'.[59]

The case illustrates an approach based on precedent rather than principle and does little to enlighten on the weight to be attached to the various rationales which governed incompetency rules as applied to lawfully married spouses. However adopting the same approach, same sex de facto partners would not be within the ambit of the incompetency rules at common law.

In relation to Aboriginal traditional marriages, it has been held that an Aboriginal woman remains a competent and compellable witness even though she might 'say that, by the laws of the Aborigines, she is the prisoner's wife.'[60] Therefore at common law, parties to traditional marriages are treated as ordinary witnesses.

As no privilege for marital communications was held to exist for married spouses, clearly there existed no such privilege for de facto spouses, same sex de facto couples or spouses of traditional Aboriginal marriages.

It is difficult to tell to what extent social standards impacted upon the law relating to de facto spouses. However if the rationale for the special spousal rules is the maintenance

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54 [1939] Ch 620.

55 *Campbell v Tweenlaw* (1814) Pri 81 cited in *Monroe v Twisleton* (1802) 170 ER 250, 251 (Lord Alvanley).

56 *R v Algar* [1954] 1 QB 279, 287 (Lord Goddard CJ); *R v Fuzil Deen* (1895) 65 QLJ 302; *R v Byast* [1988] 2 Qd R 384.

57 (1987) 84 Cr App R 44.

58 *R v Yacoob* (1981) 72 Cr App R 313.

59 (1987) 84 Cr App R 44, 50.

60 *R v Cobby* (183) 4 LR (NSW) 355, 356 (Windeyer J) cited in Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws,* Report No 31, (1986) [313]-[315]. See also MC Kriewaldt, 'The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia' (1960) 5 *University of Western Australia Law Review* 1.

and preservation of a stable relationship of commitment, there seems no good reason not to extend this to other relationships that share the qualities of a lawful marriage. As will be discussed later, by the late 20th century and 21st century social norms have changed substantially such that in many jurisdictions de facto spouses have the same status as lawfully married spouses in this area.

II EARLY STATUTORY REFORMS

Dissatisfaction and criticism of the common laws rules relating to the competence and compellability of spouses in the United Kingdom led to major reforms in the middle of the 19th century and later in the nineties of that century. The view held by many of the incompetency rules is reflected in the following quote from Wigmore:

> ... the fantastic spectacle of a fundamental rule of evidence, which never had a good reason for existence, surviving none the less through two centuries upon the strength of certain artificial dogmas- pronouncements wholly irreconcilable with each other, with the facts of life, and with the rule itself.[61]

During the period from 1872 to 1898, 27 Acts were passed concerning this issue.[62] In 1853, spousal incompetence was abolished in all civil cases.[63] In 1898, a new regime to govern this area for criminal trials was introduced which was adopted also in most Australian jurisdictions.[64]

A *Competence and Compellability*

The statutory schemes that governed the early 20th century in both United Kingdom and Australia provided for either total competence, with compellability for the prosecution based upon a list of prescribed offences, or both competence and compellability for the prosecution based upon such a list.[65] Most of the schemes expressly preserved the exceptions at common law where the spouse would have been compellable.[66] As discussed above, these provisions assumed incorrectly (as has now been held in both Australia and the United Kingdom) that the exceptions at common law made a witness both competent and compellable.[67]

The English legislation in its early form was further read down by the House of Lords construing the words 'may be called' with reference to the spousal witness as only making the spouse competent not compellable. In *R v Leach*,[68] the accused was charged with incest, one of the prescribed offences for which a spouse 'may be called' by the

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61 *Wigmore on Evidence*, Vol 8 par 2228 cited in Weigell, above n 8.

62 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 10.

63 *Evidence Amendment Act 1853* (UK)

64 *Criminal Evidence Act 1898* (UK).

65 For New South Wales generally see *Riddle v R* [1911] 12 CLR 622 and Katz, above n 8; Victoria generally see Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 12-17; UK generally see Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 10-12.

66 *Crimes Act 1891* (Vic) s 34; *Evidence Act 1898* (NSW) s 7.

67 See above.

68 (1912) AC 305.

prosecution. The House of Lords held that the legislation did not make the wife a compellable witness noting that:[69]

> If you want to alter the law which has lasted for centuries and which is almost ingrained in the English Constitution ... 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.

Further judicial statements in that case recognise the public interest behind the legislative changes seeking compellability for certain offences otherwise 'justice would be thwarted by the absence of the necessary evidence.'[70] This policy is also reflected in the lists of prescribed offences of most jurisdictions in Australia that by the middle of the 20th century included extensive offences where children or the spouse was the victim.[71]

B *Marital Communication Privilege*

As noted above, no privilege for marital communications existed at common law, however strong support had been given for such a principle. The Common Law Commissioners' recommendation for a privilege for marital communications was embodied in s 3 of the *Evidence Amendment Act 1853*.[72] The privilege was expressed in terms of non-compellability to disclose any communication made by the accused to the spouse witness during the marriage. The privilege applied in all civil cases not only those where the spouse was a party and was conferred on the witness alone.[73]

In 1898 when spousal incompetence was modified in criminal cases a similar provision was introduced in s 1(d) for criminal cases, 'to preserve the privilege conferred by s 3 of the Act of 1853.'[74] It was noted that otherwise a spouse called by the accused could be cross-examined by the crown and compelled to disclose marital communications made to him or her.[75] However no note was made as to whether the privilege could be claimed by a spousal witness called by the Crown where they were either competent or compellable.

Section 1(d) of the 1898 Act is worded as a proviso, 'provided that nothing in the Act ...' and would seem to override the competency provisions. In *R v Pitt*,[76] the English Court of Appeal held that where the spouse is a competent witness, once an election is made to enter the witness box they become an ordinary witness. However this was in the context of an application to have a witness declared hostile rather than the exercise

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69 Ibid 311 (Lord Halsbury).

70 Ibid 309 (Lord Loreburn).

71 K M Mack, 'Compellability of Family Members of an Accused' (1989) 17 *Melbourne University Law Review* 219; Australian Law Reform Commission, *Evidence (Interim Report)*, Report No 26 (1985), Vol 1 [251].

72 For legislative history see *Shenton v Tylor* [1939] 1 Ch 620, 627-9 (Greene MR); Katz, above n 8, 1-6.

73 *Shenton v Tylor* [1939] 1 Ch 620, 629.

74 Ibid.

75 Ibid (Greene MR).

76 [1983] 1 QB 25, 30.

of some claim of privilege. In *R v Ash*,[77] Hobhouse J seemed to assume that a witness who was made competent by the new provisions could claim the marital communications privilege where they were still married to the accused.[78] In that case, his Honour was considering the position of a divorced spouse under the new provisions. The position in relation to the compellable witness is not so clear, although again statutory interpretation would suggest a proviso would prevail. In Canada, there have been conflicting conclusions as to whether a compellable witness can claim the privilege.[79]

C *Divorced and Ex-Spouses*

At common law, the spousal incompetence rule extended to divorced and widowed spouses in relation to matters occurring during the marriage. However the reforming legislation appears to refer to only current husbands and wives. One approach would be to apply these provisions literally in which case the common law rule of incompetence would apply to ex-spouses whilst current spouses would be competent in the same proceedings.[80] This anomaly led English and New South Wales courts to conclude that 'the statues must apply *mutatis mutandis* to former spouses as well as existing spouses'[81] so that the competency provisions must be construed as including a former spouse after their divorce in relation to matters arising during the marriage.[82]

This conclusion was not easily arrived at given the earlier decision of *Shenton v Tylor*[83] where the English Court of Appeal was required to interpret the meaning of 'husband' and 'wife' in s 3 of the 1853 Act dealing with marital communications privilege. The case was a civil one against a widow to enforce a secret trust where the widow was refusing to answer interrogatories on the basis of marital communications privilege. The Court held that as the privilege was created by statute, the plain words of the section did not warrant 'extending the words of the section by construction so as to include widowers and widows and divorced persons.'[84]

That case can be distinguished on the basis that it was a civil case and dealt with a statutory provision relating to marital communications privilege. The New South Wales Court of Appeal in *Commonwealth Director of Public Prosecutions v Smiles* also distinguished it on the basis that s 407 of the *Crimes Act 1900* (NSW) which made spouses competent but not compellable was passed to alter the established common law rules relating to incompetency of spouses which had also applied to ex-spouses.[85] Further, adopting principles of statutory construction, a majority of the court held that the same words which appeared only once and applied to both competency and

77 (1985) 81 Crim App 294.

78 Ibid 304-6.

79 Katz, above n 8, 12; cf *Evidence Act 1977* (Qld) s 8(7).

80 *Commonwealth Director of Public Prosecutions v Smiles* (1993) 30 NSWLR 248, 250 (Meagher JA in dissent).

81 *R v Ash* (1985) 81 Crim App 294, 300 (Hobhouse J).

82 *Commonwealth Director of Public Prosecutions v Smiles* (1993) 30 NSWLR 248, 254 (Handley JA).

83 [1939] Ch 620.

84 Ibid 652 (Luxmore LJ).

85 (1993) 30 NSWLR 248, 254 (Handley J).

compellability, made ex-spouses also non-compellable in relation to matters during their marriage.

The case was decided on essentially statutory construction grounds with little attention to underlying rationales. However after discussing the position in Canada (which is not based solely on statute), Justice Handley noted that while there are powerful reasons which have led the Canadian courts to hold that former spouses are competent witnesses, the policy reasons for making former spouses compellable are not as strong.

> There are many reasons why a divorced wife might prefer not to give evidence against her former husband including residual affection, concern for their children and continuing financial interests that might be prejudiced by a conviction. 86

Smiles did not deal with the application of the marital communications privilege to former spouses. That was expressly considered in *R v Ash*[87] where a divorced wife who had already given evidence for the Crown in relation to matters after the marriage was sought to be cross-examined by the defence in relation to matters during the marriage. After holding that the competency provisions extended to ex-spouses, Justice Hobhouse was required to consider whether the marital communications privilege in the proviso in s 1(d) of the 1898 Act also so extended. His Honour did not consider *Shenton v Tyler* decisive on this issue.[88] Although noting that statutory construction would normally require that the same words in the same section be construed in the same sense, he was able to take a different approach to the proviso. In his Honour's view the proviso was only making clear that the statute did not take away any privilege that previously existed. As no privilege existed for ex-spouses at common law, nor was it conferred by s 3 of the 1853 Act or the proviso itself, no privilege existed for ex-spouses.[89]

Given the narrow basis on which this case was decided, it is not decisive for those statutory provisions that are drafted in a way that confers a statutory privilege[90] rather than as a proviso that preserves existing privileges. Even then, issues still remain whether the privilege should be extended to ex-spouses and whether it is desirable for the same words to be construed differently in either the same section or different sections of an Act.[91] As discussed below, some jurisdictions have clarified these matters.

D *Couples Not Lawfully Married*

Early statutory reforms make reference to 'husband' and 'wife' with no definitions provided. However the cases cited earlier for the proposition that at common law the spousal incompetence rule only applied to lawfully married spouses were mostly decided after legislation was enacted and are equally applicable here.[92]

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86 Ibid 256. See also R Hollo, 'Case and Comment' (1994) *Criminal Law Journal* 115, 116-117.

87 (1985) 81 Crim App 294.

88 Ibid 305.

89 Ibid 305 – 306.

90 For example, *Evidence Amendment Act 1853* (UK) s 3, *Evidence Act 1977* (Qld) s11.

91 JD Heydon, *Cross on Evidence* (6th ed, 2000) [13240]-[13245]; Wilson, above n 8, 50.

92 *R v Algar* [1954] 1 QB 279, 287 (Lord Goddard CJ); *R v Byast* [1988] 2 Qd R 384, *R v Khan* (1987) 84 Cr App R 44; *R v Yacoob* (1981) 72 Cr App R 313.

In relation to the marital communications privilege, there does not appear to be any authority on point although based on the approach in *Shenton v Tylor*,[93] it is unlikely that it would be extended. A Canadian case based on legislation identical to s 3 of the Act of 1853 held that it did not apply to de facto spouses.[94]

III RECENT STATUTORY REFORMS

The 20th century in England saw continuing developments leading to a high degree of complexity[95] and culminating in a complete overhaul in the *Police and Criminal Evidence Act 1984* (UK).[96] Major reforms also took place in Australia in the later part of the 20th century mostly following on from comprehensive reports of law reform bodies.[97] Many of the reforms relate to the overriding approach to take to the spouse witness's competence and compellability. However the range of persons within the scope of the special rules has been the subject of reform and continues to be so into the 21st century.

The list approach, which assigns competence and compellability by reference to a list of offences or categories of offences, was adopted by most of the jurisdictions in Australia in the early statutory reforms. However this approach has received criticism on the basis that the lists are arbitrary, inconsistent from state to state and exclude consideration of relevant issues.[98] Such great diversity could lead to anomalous results and wide differences of opinion as to which crimes or categories should be specified. By way of example as at 1976, the Victorian list was confined to serious indictable offences presumably on the reasoning that where the offence is grave the interests of the spouses witness must give way. The Queensland list by comparison was confined to predominantly simple offences, in this case presumably on the basis that if the offence is minor, the witness spouse's interests will not be gravely affected and should give way.[99]

The list approach is still in place in a number of jurisdictions, including United Kingdom, Queensland and Western Australia. However an analysis shows that there is now some consistency in the list of offences. Public policy it seems has favoured the view that offences against children and domestic violence offences warrant spousal compellability. It reflects the law's duty to protect vulnerable persons in society particularly where the nature of the offence means that the only probable witnesses are within the family confines. It may also be 'a positive boon'[100] to a spouse to be directed by the court that they have no alternative but to testify therefore avoiding retribution or the cruel conflict between personal loyalty and public duty.[101]

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93 [1939] Ch 620.

94 *R v Coffin* (1954) 19 CR 222 cited in Katz, above n 8, 7.

95 Katz, above n 8, 12.

96 See Wilson, above n 8, 55, 59 for effects on spousal compellability.

97 See above n 2-6.

98 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 22-26; Mack, above n 71; Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) Vol 1 [251].

99 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 24.

100 *Hoskyn v R* [1979] AC 474, 507 (Lord Edmund-Davies in dissent).

101 Mack, above n 71, 220.

A discretionary approach has been adopted in various forms in the following jurisdictions: Victoria, South Australia, Australian Capital Territory, New South Wales and recently Tasmania.[102] On this approach all witnesses are competent and compellable for the prosecution however the court has a guided discretion to excuse otherwise compellable witnesses who come within defined categories. The discretion is based on a balance of competing policy considerations:

> [O]n the one hand the desirability of having all relevant evidence available to the courts and on the other the undesirability in the public interest - that the procedures for enforcing the criminal law should be allowed to disrupt marital and family relationships to a greater extent than the interests of the community really require; and that the community should make unduly harsh demands on its member by compelling them, where the general interest does not require it, to give evidence that will bring punishment upon those they love, betray their confidences, or entail economic or social hardship.[103]

A review of the various jurisdictions shows that although some of the jurisdictions have adopted the same overriding approach, there remain a number of differences, particularly as to the categories of witnesses covered by the special rules and the extension beyond lawfully married spouses.

A *United Kingdom*

The reforms introduced by the *Police and Criminal Evidence Act 1984* (UK) were based substantially on the proposals of the Criminal Law Revision Committee which considered that the previous rules on competence and compellability unnecessarily deprived the courts of the evidence of a wife prepared to testify against her husband.[104]

The list approach adopted in United Kingdom makes the spouse witness competent in all cases but compellable only where there is an assault or injury on the spouse or assault or sexual offence on a child under the age of 16.[105] The list has been criticised firstly as being too limited in that it does not include serious offences against non-spouses or those over 16 and second, as being too inflexible in that offences may have the same description but 'vary greatly in seriousness'.[106]

Section 80(5) expressly provides that former spouses are compellable as if the parties had never been married. The legislation refers to 'husband' and 'wife', which are not defined. Consequently it is likely that these terms will be interpreted in their strict sense as at common law, to exclude all de facto couples. There is no prohibition against comment about the failure of the spouse to testify nor is there any rule requiring the

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102 *Evidence Act 1929* (SA) s 21 (as amended by *Evidence Act Amendment Act (No2)* (1983); *Crimes Act 1958* (Vic) s 400 (as amended by *Crimes (Competence and Compellability of Spouse Witnesses) Act 1978* (Vic)); *Uniform Evidence Act 1995*.

103 Australian Law Reform Commission, *Evidence*, Report No 38 (1987) [80]; Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) 22; Mack, above n 71, 219, 220.

104 Eleventh Report, Evidence (General) Cmnd.4991, (1972) [143-157].

105 *Police and Criminal Evidence Act 1984* (UK) ss 80(1), (2A) and (3).

106 Creighton, above n 8, 35-6.

judge to warn the spouse witness of his or her rights although that has been held to be desirable.[107]

The marital communications privilege once provided by s 1(d) of the *Criminal Evidence Act 1898* (UK) has now been repealed.[108] It had been repealed in civil cases since 1968. In recommending abolition the Law Reform Commissioners had argued that 'it is unrealistic to suppose that candour of communication between husband and wife is influenced today by the statutory provisions.'[109]

B *Queensland*

Queensland's current legislative approach to the spouse witness rules is to make the spouse competent for the prosecution in all cases but only compellable for prescribed offences.[110] Those offences included those where the wife would have been 'competent or compellable' at common law. This phrase generated a number of judicial interpretations but was probably adopted in an abundance of caution in light of the uncertain state of the common law on this matter as discussed above.[111] The other prescribed offences are offences against children as listed in the schedule to the Act. Most of these are in the nature of 'child abuse' offences.[112] The same criticisms of limited scope and inflexibility, which were made in relation to the list in the United Kingdom, can be made here. Section 8(6) requires the presiding judge to advise the spouse witness of their non-compellability, as is the practice at common law.[113] There is no legislative prohibition on comment on the spouse's election not to give evidence where they are no compellable.[114]

The statutory privilege against disclosing marital communications is preserved in s 11 of the Act. Its terms and effect are similar to those of the English 1853 Act as discussed above, except that it only applies to criminal proceedings. Section 8(7)(b) of the *Evidence Act 1977* (Qld) clarifies the relationship between spousal compellability and the privilege, by providing that 'nothing in the section shall affect the operation of section 11'. Therefore a witness spouse giving evidence for the Crown, whether non-compellable or compellable, could claim the privilege.

The range of persons covered by the spouse witness rules is essentially the same as at common law. Neither the *Evidence Act 1977* (Qld) nor any applicable legislation contain a definition for wife or husband. Therefore former spouses were competent and compellable to the same extent as lawfully married spouses in respect of matters occurring during the marriage. As to privilege, there is some doubt as to whether the

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107 *R v Pitt* [1983] QB 25.

108 *Police and Criminal Evidence Act 1984* (UK) s 80(9).

109 Law Reform Commission, *Privilege in Civil Proceedings*, Report No 16 (1967) 7.

110 *Evidence Act 1977* (Qld) ss 8(2), (4), (5). Prior to 1977 the spouse was not competent except for prescribed offences: *Evidence and Discovery Act 1892* (Qld) s 3. The *Evidence (Protection of Children) Amendment Act 2003* (Qld) (assented to on 18 September 2003, awaiting proclamation) proposes major changes in this area.

111 Wilson, above n 8, 55-6; J Forbes, *Statute Law in Queensland* (3rd ed, 2002) 75-6.

112 Forbes, above n 111, 75.

113 *Demirok v R* (1977) 137 CLR 20, 27.

114 *R v Parker* (Unreported, Queensland Court of Appeal, Fitzgerald P, Pincus and Thomas JJ, 4 November 1993).

privilege extended to former spouses. The cases of *Shenton v Tyler*[115] and *R v Ash*[116] both would suggest that it should not so extend. However as discussed above those cases are distinguishable in that the first was a civil case and both cases were decided on a point of statutory construction. Neither analyse the underlying rationale for the privilege or the relationship between the privilege and the competence and compellability rules. Given the privilege and spouse witness rules have a shared rationale and the undesirability of giving different meaning to the same words in a statute, there is a good argument for construing s 11 to include former spouses.[117] Other jurisdictions have made the position in relation to former spouses clear, usually excluding them from the rules' ambit.[118] In so far as the rules would apply to lawfully married couples that are no longer in a stable relationship, the Queensland jurisdiction goes beyond what is necessary to satisfy the underlying rationale of the rules. However in practice an estranged spouse may be less inclined to exercise those rights and privileges to the accused spouse's advantage.

Recent legislative changes modified a number of Queensland statutes that affect the position of couples that are not lawfully married. The *Discrimination Law Amendment Act 2002* (Qld) inserted a definition of spouse into the *Acts Interpretation Act 1954* (Qld) which extends the meaning to de facto partners including same sex partners.[119] However as the *Evidence Act 1977* (Qld) refers to 'husband' and 'wife' it does not apply. This omission would seem to be deliberate rather than an oversight. It reflects a policy that no further exemptions should be made for non-compellability in favour of increased evidence before the court. In so doing it fails to take into account societal changes and the underlying rationale for the spousal rules.

The above conclusion about present policy considerations is further supported by proposed legislation before the Queensland Parliament that treats lawfully married spouses the same as ordinary witnesses by removing non-compellability and marital communications privilege.[120] This approach ignores all historical rationales for the spousal rules. It is ironic that the changes are in legislation, which has as its objectives the improvement of treatment of children in the criminal justice system.[121] The previous provisions already had this effect, as a spouse was made compellable in relation to offences against children under 16. However in so far as the proposed changes apply to all offences, it may have the effect of causing indirect disadvantage to the child because of the potential damage to the relationship between the parents and potential economic and emotional hardship should the parent get convicted.

For a short time in Queensland's legislative history non-compellability applied to female Aborigines.[122] Aboriginal traditional marriages are not expressly recognised in the present legislation dealing with spousal compellability and the present policy

115 [1939] Ch 620.

116 (1985) 81 Crim App 294

117 Wilson, above n 8, 60.

118 *Police and Criminal Evidence Act 1984* (UK); *Evidence Act 1906* (WA) s 9(2); *Crimes Act 1958* (Vic) s 400(2).

119 *Acts Interpretation Act 1954* (Qld) s32DA.

120 *Evidence (Protection of Children) Amendment Act 2003* s 56.

121 Explanatory Notes, Evidence (Protection of Children) Amendment Bill 2003 (Qld).

122 *Aborigines and Torres Strait Islanders' Affairs Act 1965 (*Qld).

favoured by the government as discussed above indicates limitation on exemptions rather than extension.

C *Western Australia*

The list approach adopted in Western Australia again only makes the spouse witness compellable for defined offences.[123] However the list of offences goes beyond those against the spouse or a child and includes offences against the property of the spouse and various drug and traffic offences. It would seem that a policy decision has been made that these offences are of sufficient concern to the public interest that the feelings and interests of the spouse witness must give way. However it may also reveal 'the time-honoured way of adding piecemeal to the list' when the occasion demands.[124]

Former spouses are made compellable at all stages of the proceeding.[125] The legislation refers to 'husband' and 'wife' which are not defined. Consequently it is likely that these terms will be interpreted in their strict sense as at common law to exclude all non-lawfully married couples. A judge is required to advise a non-compellable witness of their right not to give evidence.[126]

Section 18 of the *Evidence Act 1906* (WA) provides a privilege of communications made to the spouse witness by the accused during the marriage. It applies to both civil and criminal proceedings other than matrimonial causes and family proceedings. Unlike s 9 no express reference is made to former spouses. The legislature may have assumed on the basis of *Shenton v Tyler*[127] that the statutory privilege did not so extend in any case. The other point of note is that, unlike the Queensland legislation, the compellability provisions prevail as s 18 is made subject to s 9.

It should be noted that the Law Reform Commission of Western Australia has considered the discretionary approach. The Commission thought the approach inappropriate due to the unpredictability of trial preparation in not knowing whether a witness would be compellable, the discretion being exercised in some cases by lay justices of the peace and the discretion being exercised differently at the committal and at the later trial.[128]

D *Northern Territory*

The Northern Territory has implemented a regime that ignores all historical rationales for both the incompetence rule and marital communications privilege. Pursuant to s 9 (5) of the *Evidence Act 1930* (NT) the husband or wife of the accused is competent and compellable to give evidence for the Crown in all cases. Further, s 9(6) removes the statutory marital communication privilege by providing that a husband or wife shall be compellable to disclose communications made between the parties during the marriage.

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123 *Evidence Act 1906* (WA) s 9(1)(c).

124 Creighton, above n 8, 36.

125 *Evidence Act 1906* (WA) s 9(2).

126 *Evidence Act 1906* (WA) s 9(5).

127 [1939] Ch 620.

128 Law Reform Commission of Western Australia, *Report on Competence and Compellability of Spouses to Give Evidence*, Project No 31 (1977) [7.13].

It would be merely theoretical to discuss whether the compellability and privilege provisions extend to former spouses or de facto partners as the nature of a couple's relationship is irrelevant for the purposes of the legislation. The public policy of having all relevant information before the court clearly overrides any concessions to a witness's feelings and interests.

E *Victoria*

The Victorian legislature was the first in Australia to introduce a discretionary approach to compellability whereby the spouse witness is compellable in all cases for the prosecution but could apply for an exemption in whole or part from giving evidence based on a number of factors. The 1978 amendments to the *Crimes Act 1958* (Vic)[129] substantially adopted the recommendations of the Victorian Law Reform Commission.[130] This approach was fundamentally based on two premises, 'first that the true test is the relative importance of the public interest in obtaining the evidence and second, the view that a method of determining compellability by reference to the type of offence is unsatisfactory'.[131] Section 400(3) identifies the competing interests that must be balanced by requiring that an exemption can only be granted where the community interest in obtaining the subject evidence is outweighed by the likelihood of damage to the relationship between the accused and the witness and/or the harshness of compelling the witness to give evidence. The concept of harshness would include the emotional, social and economical consequences of being compelled to give evidence.[132] The non-exhaustive factors listed in s 400(4) which provide further guidance in the exercise of discretion include the nature of the offence, the importance of the witness's evidence in light of other evidence available, the relationship between the witness and the accused and any breach of confidence that would be involved.

Section 400 reflects the Commission's conclusion that of the various rationales for the limited competence and compellability rules, only two, the public policy of maintaining stable marital relationships and the avoidance of hardship to the spouse witness may justify non-compellability.[133] The relevant circumstance to consider is not only the nature of the relationship in law but also in fact.[134] In the case of a marriage that is 'beyond salvage' the policy considerations which justify exemption will be 'either absent or of negligible weight'. This is clearly so where the marriage is terminated. Consequently it was recommended and enacted that former spouses are competent and compellable at all stages and no provision for exemption is made.[135]

It was also recommended that de facto spouses be allowed to apply for an exemption. There is no justification given in the report as to why the exemption should be extended

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129 Sections 399, 400.

130 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976).

131 'Report of Victorian Law Reform Commission of the Law of Evidence Relating to the Competence and Compellability of Spouse Witnesses' (1977) 51 *Australian Law Journal* 3.

132 *Crimes Act 1958* (Vic) s 400(4)(e).

133 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) [32-36].

134 *Crimes Act* 1958 (Vic) s 400(4)(d).

135 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) [60- 63], *Crimes Act 1958* (Vic) s 400(2).

to this class of witness or to the other recommended classes of parents and children of the accused.[136] Presumably it was because the twin justifications of stable family relationships and hardship apply equally to those categories.[137] In any event the legislature did not adopt the extension of the exemption to de facto spouses but did extend the exemption to parents and children.

In relation to marital communications privilege, s 27 of the *Evidence Act 1958* (Vic) provides that the privilege applies only in civil proceedings. However a similar outcome for criminal proceedings is possible. Breach of confidence is one circumstance to which the court may have regard in exercising its discretion to grant an exemption.[138] As an exemption may be granted in whole or part, a court could in its discretion grant the spouse witness an exemption from disclosing communications made by the accused in confidence.[139] This same outcome would be not be available to former spouses or de facto spouses who cannot be granted any exemption from testifying.

In relation to procedural matters, the application for exemption must take place in the absence of the jury and the fact of making an application or being granted an exemption cannot be made the subject of comment to the jury by the prosecution or the judge.[140] Section 400(6) requires the judge to be satisfied that the witness is aware of his or her right to apply for an exemption. A failure to expressly advice the witness may be grounds for an appeal but will not necessarily give rise to a miscarriage of justice.[141]

More recently the Victorian Commission considered the adoption or reforming of the *Evidence Act 1995* (Cth) (Uniform Evidence Act) in Victoria.[142] But for one qualification, the Commission recommended adoption of the competence and compellability provisions.[143] That qualification related to the extension of the rules to de facto spouses, which the Commission considered was a broader policy issue requiring further consideration.[144] In that regard, it is notable that in legislation recently introduced whose objects include the recognition of 'the rights and obligations of partners in domestic relationships where there is mutual commitment to an intimate personal relationship and shared life as a couple, irrespective of the gender of each partner',[145] no amendments were made to the relevant provisions of the *Crimes Act 1958* (Vic) dealing with the spousal rules of competence and compellability.

136 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) [54-56].

137 Mack, above n 71, 219-220.

138 *Crimes Act 1958* (Vic) s 400(4)(f).

139 Law Reform Commission of Victoria, *Spouse Witnesses (Competence and Compellability)*, Report No 6 (1976) [35]; *Trzesinski v Daire* (1986) 44 SASR 43.

140 *Crimes Act 1958* (Vic) s 400(3), (5); see generally Mack, above n 71, 224 –36.

141 *T v R* (1999) 73 ALJR 460.

142 Victorian Law Reform Commission, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries* (1996).

143 *Evidence Act 1995* (Cth) ss 18, 19 discussed below.

144 Victorian Law Reform Commission, *Review of the Evidence Act 1958 (Vic) and Review of the Role and Appointment of Public Notaries* (1996) [2.1.1].

145 *Statute Law Further Amendment (Relationships) Act 2001* (Vic).

F *South Australia*

In 1983, major amendments to the *Evidence Act 1929* (SA) resulted in the removal of marital communications privilege and the establishment of a new discretionary regime for spousal compellability. Section 21 is similar to the Victorian provision with a few differences.[146] Of most significance is the range of persons who may seek exemption from compellability, which extends to close relatives of the accused. Close relative is defined in the section to include a spouse, parent or child. Spouse is further defined to include a putative spouse, that is, a de facto husband or wife who have been cohabiting for 5 years or have a child together.[147]

Former spouses are not expressly referred to in the provisions. However to the extent that an argument based on the common law rules that spouse includes former spouses could be made, the factors to which the court must have regard when granting an exemption would generally exclude former spouses. Section 21(3) requires the court to consider the risk of serious harm to the relationship between the witness and the accused and the risk of serious harm of a material, emotional or psychological nature to the prospective witness. This risk will usually be absent in divorced spouses. However it has been commented that notwithstanding divorce, a former spouse may have residual affection, concern for their children and continuing financial interests that might be prejudiced by a conviction.[148]

The discretionary regime in South Australia reflects a continued recognition of the rationale of the desirability of maintaining stable adult relationships and has extended this to the wider family relationship. In extending the definition to putative spouses, the legislature has been prepared to acknowledge present community attitudes and practices. However it should be noted that the adoption of the putative spouse definition over alternative de facto definitions reflects a conservative approach. It is only those de facto couples of lengthy cohabitation or with children who will be treated the same as married couples for the purposes of the exemption.[149] This definition would potentially cover couples to a traditional Aboriginal marriage that are not otherwise recognised. The existing definition does not extend to same sex de facto partners regardless of the period of cohabitation. This issue at time of writing was presently under review by the South Australian Government.[150]

In relation to proceedings under the *Family and Community Services Act 1972* (SA), s 245 provides that a wife and husband are competent and compellable both for and against each other. Husband and wife are broadly defined to include a polygamous marriage provided it was legal in the place the marriage was solemnised.[151] However, it has been held that the exemption provisions in the *Evidence Act 1929* (SA) will prevail over these provisions.[152]

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146 Mack, above n 71, 222-6.

147 *Family Relationships Act 1975* (SA).

148 R Hollo, 'Case and Comment' (1994) 18 *Criminal Law Journal* 115, 116-117.

149 South Australian Government, *Removing Legislative Discrimination against Same Sex Couples*, Discussion Paper <http://www.justice.sa.gov.au/news_detail.asp?id=54> [4.1.2].

150 Ibid.

151 *Family and Community Services Act 1972* (SA) s 6(2).

152 *Prestwood v Shuttleworth* (1985) 39 SASR 125.

The court is required to ensure that the witness is aware of his or her right to apply for an exemption.[153] Where the witness is incapable of understanding his or her right because of age or mental impairment, the court should consider an exemption without the need for an application.[154] An application for exemption is made in the absence of a jury, if any, and the fact of the application or exemption must not be the subject of comment or question by counsel or the judge in the presence of the jury.[155]

Although the marital communications privilege has been removed the court may still grant an exemption in relation to testifying as to such communications under s 21. Although breach of confidence is not a factor to be expressly considered,[156] in *Trzesinki v Daire*,[157] Prior J upheld a magistrate's decision granting a wife an exemption from testifying as to marital communications because disclosure of confidential communications was relevant to the risk of harm to the relationship between the wife and the accused husband.[158]

G *New South Wales, ACT, Tasmania, Federal Courts*

After a thorough review of the law of evidence by the Australian Law Reform Commission,[159] the Commonwealth Government introduced the *Evidence Act 1995* (Cth) which applies to all federal courts and the courts of the Australian Capital Territory. The New South Wales legislature passed almost identical legislation in its *Evidence Act 1995* (NSW) and more recently Tasmania followed suit with its *Evidence Act 2002* (Tas).[160]

1 *Uniform Evidence Act*

Section 12 of the *Uniform Evidence Act* provides that all persons are competent and compellable unless otherwise provided in the Act. However later provisions set up a regime for particular classes of witnesses, which has features of both the discretionary and list approach. Under s 18 (subject to s 19) a court may, upon objection being made by the witness, grant exemption to a spouse, de facto spouse, parent or child of an accused[161] where there is a likelihood of harm directly or indirectly to the witness or the relationship between the witness and the accused and the nature and extent of that harm outweighs the desirability of having the evidence given.[162] Section 18(7) lists matters that the court must take into account which are essentially the same as the Victorian

153 *Evidence Act 1929* (SA) s 21(5)(a). See *R v C* (1993) 60 SASR 467 and *T v R* (1999) 73 ALJR 460, above n 141 as to consequences of failure to ensure.

154 *Evidence Act 1929* (SA) s 21(3a).

155 *Evidence Act 1929* (SA) s 21(4); see generally Mack, above n 71, 224 –36.

156 Compare *Crimes Act 1958* (Vic) s 400(4)(f).

157 (1986) 44 SASR 43.

158 Ibid 50.

159 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985); Australian Law Reform Commission, *Evidence*, Report No 38 (1987). See generally S Odgers, *Uniform Evidence Law* (Lawbook Co, 5th ed, 2002) [1.1.20].

160 Commenced 1 July 2002. Hereafter all three pieces of legislation will be referred to as the *Uniform Evidence Act*.

161 *Uniform Evidence Act* s 18(6).

162 *Uniform Evidence Act* s 18(2).

legislation.[163] The court is to satisfy itself that an affected witness is aware of the effect of the exemption provisions[164] and must hear any objection in the absence of a jury, if any.[165] A prosecutor is prohibited from commenting on the fact of an objection being made, the decision of the court on the matter and the failure to give evidence by the witness.[166] A judge or other party may comment on that failure but cannot suggest the failure was because the accused was guilty or the witness believed that the accused was guilty.[167]

Section 19 lists offences where the witness is not allowed an exemption and is therefore completely compellable. For the Commonwealth legislation, these relate to specified offences against children under 16 years of age and other acts of 'domestic violence' under laws of the Australian Capital Territory. This reflects policy similar to the list jurisdictions that there are some offences where the public interest overrides all other considerations.[168]

As to the categories of persons who may claim exemption, former spouses are clearly excluded by the fact that an objection can only be made when the witness is within the relevant category at the time when required to give evidence. De facto couples may seek exemption where they fall within the definition in the Dictionary Part 1, which requires cohabitation between a man and a woman on a genuine domestic basis. This is a wider and less prescriptive meaning then that adopted in the South Australian legislation. In recommending this definition the Commission noted that the task of assessing the existence of the required relationship was 'difficult but manageable'. However the term had been considered and ruled on in a number of decisions of the Administrative Appeals Tribunal and Federal Court.[169] The Commission also considered the extension of the exemption to other categories of witness concluding that the dual rationale of maintenance of family stability and avoidance of hardship justified the extension to parents and children of the accused. In reaching this conclusion, the Commission further applied three practical criteria of: need for provision, effect on time and costs of trials, and ease of application. These criteria further supported the extension to the de facto spouse, parents and children of the accused.[170] However it was concluded that the rationale of supporting family relationships and the application of practical criteria did not support the extension to 'intimate personal relationships' as suggested by one dissenting member.[171]

Clearly the adopted definition of de facto spouse does not extend to same-sex de facto couples, regardless of the stability of that relationship. The position in New South Wales has recently changed and is discussed below. There is also some political

163 Mack, above n 71, 222-3.

164 *Uniform Evidence Act* s 18(4).

165 *Uniform Evidence Act* s 18(5).

166 *Uniform Evidence Act* s 18(8).

167 *Uniform Evidence Act* s 20(3),(4).

168 Australian Law Reform Commission, *Domestic Violence*, Report No 30 [74].

169 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [533].

170 Ibid [533-4].

171 Ibid [536].

dissatisfaction in the Australian Capital Territory as to the current status of same sex couples that may result in further changes in that jurisdiction.[172]

The *Uniform Evidence Act* definition may encompass traditional Aboriginal marriages. The majority concluded that the extension should extend to this category however they were not expressly dealt with in light of the forthcoming Report on Aboriginal Customary Law.[173] That report concluded that traditionally married persons should be compellable to give evidence for and against each other in criminal cases to the same extent as persons married under the general law. Similarly any privilege relating to marital communications should extend equally to traditionally married persons.[174] However the Commission subsequently reported that its recommendations had not been the subject of comprehensive response or implementation at the federal level.[175] No changes were made to the relevant provisions of the *Uniform Evidence Act* arising from the recommendations. It may have been considered that the open definition of de facto covered traditional marriages.

Marital communications privilege is not expressly recognised in the *Uniform Evidence Act*. However, under s 18(2)(b) a witness may object to and be given exemption from giving evidence of a communication between the person and the defendant. This would cover more communications than only those made 'by' the accused.[176] The confidential nature of any disclosure is a factor the court is required to take into account in the balancing exercise.[177] As previously noted, comparable provisions in South Australia have been used to grant exemption solely for a communication between spouses.[178] However it is clear that the provisions should not be read down to incorporate any common law presumptions or the old concept of marital communications privilege.[179]

It should be noted that the strict compellability provisions in s 19 would prevail over the limited marital communications exemption that has been recognised under s 18.[180]

2 *New South Wales*

In 2002, the New South Wales legislature introduced reforms to numerous pieces of legislation to assimilate same-sex de facto relationships with heterosexual relationships.[181] The Dictionary Part 1 meaning of de facto was amended so that s 18 of the *Evidence Act 1995* (NSW) now extends to same-sex de facto spouses.

Section 19 of the *Evidence Act 1995* (NSW) specifies it own legislation that will prevail over the s 18 exemption provisions. Its effect is similar to the *Uniform Evidence Act* for

172 AAP Newsfeed, 'ACT: Democrats to Seek Changes to ACT Partner Laws', 11 March 2003.

173 Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) [536].

174 Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws*, Report No 31 [315-6].

175 Australian Law Reform Commission, *20 Years*, Vol 2.

176 Compare *Evidence Act 1977* (Qld) s 11; see generally Katz, above n 8.

177 *Uniform Evidence Act* s 18(7)(e).

178 Above n 157.

179 *Glasby v R* (2000) 115 A Crim R 465.

180 Contrast *Evidence Act 1977* (Qld) s 8(7).

181 *Miscellaneous Acts Relationships Amendment Act 2002* (NSW) No 73.

the Australian Capital Territory in so far as it lists child abuse and neglect offences, child assault offences and domestic violence offences. Reference is made to s 104 of the *Criminal Procedure Act 1986* (NSW) that sets up a separate regime for compellability.[182] For child assault offences and domestic assault offences within s 104, a spouse of the accused is compellable for the prosecution subject to being excused by the court. Before excusing the witness the judge must be satisfied of a number of matters: that the application for excusal has been made freely by the witness, that the witness's evidence is relatively unimportant to the case or there is other evidence available and that the offence is of a minor nature.[183] Procedurally, the accused is to be absent when the application is made but not his or her counsel, the judge has strict recording requirements, the court may inform itself as it seems fit and no comment is allowed as to the application or excusal by the judge or any party.[184]

Since 2002, the range of persons who could apply for an excusal from compellability under s 104 has been extended.[185] Spouse in s 104(1) is defined to include a person with whom the accused has a de facto relationship within the meaning of the *Property (Relationships) Act 1984* (NSW). That Act clearly extends the meaning to same-sex de facto couples, as it only requires a cohabitation of two adult persons who are not related. A list of factors is then further provided as guidance for the judge's determination. Notably there is no prescribed length of cohabitation although this is one factor the judge may consider.[186]

3 *Tasmania*

Prior to the commencement of the *Uniform Evidence Act* from July 2002,[187] the Tasmanian legislature had made numerous amendments over recent years to the compellability provisions of the now repealed *Evidence Act 1910* (Tas) to ensure certainty as to the range of persons covered.[188] Spouse was defined to include only lawfully married spouses at the time of trial.[189] De facto couples are clearly excluded by this definition, as are same sex couples and Aboriginal marriages. Former spouses were specifically excluded under s 85(3A). The list approach was adopted in that spouses were made non-compellable except for prescribed offences under s 85(7), s 85A and s 86. The first two provisions generally cover incest, sexual and assault offences against a child under 16 and assault offences against the spouse or the property of the spouse. Section 86 covered miscellaneous minor out-dated offences.

Section 94 of the repealed 1910 Act provided a marital communications privilege to communication made by one spouses to the other during the marriage. This has now been usurped by the limited continuation of this privilege in s 18 of the *Uniform Evidence Act*.

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182 Previously *Crimes Act 1900* (NSW) s 407AA.

183 *Criminal Procedure Act 1986* (NSW) s 279(4).

184 *Criminal Procedure Act 1986* (NSW) ss 104 (6),(5),(7),(8).

185 *Miscellaneous Acts Relationships Amendment Act 2002* (NSW) No 73.

186 *Property (Relationships) Act 1984* (NSW) s 4.

187 *Evidence Act 2001* (Tas).

188 See generally PK Waight and CR Williams, *Evidence Commentary and Materials* (Lawbook Co, 6th ed, 2002) 52.

189 *Evidence Act 2001* (Tas) s 85(3).

No changes have been made to the definition of de facto from the original *Uniform Evidence Act*. Section 19 of the current legislation, like its New South Wales counterpart, lists its own state legislation where no exemption can be claimed.

That list of offences is essentially the same as that under the old legislation with the exclusion of s 86 (minor out-dated offences).

IV CONCLUSION

The early development of the laws relating to competence and compellability of spouses was dominated by decisions based on precedent rather than principle, erroneous assumptions as to the law and assumptions about the marital relationship. By contrast recent developments have been dominated by law reform reviews and legislative changes. The most significant features to emerge are the lack of uniformity between the various jurisdictions and the role that policy plays. The lack of uniformity relates not only to the approach taken generally to the competence and compellability of special witnesses but also as to the range or persons who will receive different treatment under the law.

Some jurisdictions (Northern Territory and potentially Queensland) have determined that the public policy of having all the evidence before the court outweighs all other considerations. This has the advantage of creating certainty in pre-trial preparation and saving court time, as there are no questions of fact to be determined or any judicial discretion to be exercised. However it ignores historical rationales and more importantly, modern rationales for the rules. It also potentially raises increased applications for declarations of hostility and contempt against unwilling witnesses.

At the other end of the continuum are those jurisdictions (Western Australia and Queensland, at present), which recognise and adhere to the historical rationales of the rules making exception only for those offences that the legislature has deemed it serious enough to justify compellability. Despite earlier inconsistencies, at present there does seem to be some uniformity in offences on the various lists, being predominantly offences against children and domestic violence offences. However the list approach remains an inflexible one and prone to arbitrariness from time to time. To the extent that all persons within the defined category in law are generally non-compellable, regardless of their situation in fact, this approach goes beyond what is necessary to satisfy the modern rationales of avoidance of marital dissension and hardship.

The discretionary approach has the advantage of attempting to apply the spousal compellability rules in a principled way to meet a number of the accepted rationales. It identifies the key factors, extrapolated from the rationales and competing policy interests, which the court must consider in carrying out the balancing exercise in granting an exemption from compellability. Some jurisdictions have thought it prudent to put beyond the court's discretion selected offences where other considerations, such as protecting vulnerable members of society, demand compellability (Tasmania and Australian Capital Territory). The discretionary approach works case-by-case rather than making assumptions about the state of any given marital relationship and the effect compellability may or may not have in relation to any given offence.

The categories of witnesses to be covered by the rules raise their own policy issues including those of discrimination. Some of these can be avoided by making all witnesses compellable regardless of their relationship with the accused. No group is discriminated against and the court is not deprived of any evidence. This is the approach taken in Northern Territory and potentially Queensland, although it does ignore the rationale for the rules.

If it is accepted that there is a continued rationale for the rules, the question is where to draw the line. In addition to the rationale for the rule, practical matters such as proof and court efficiency must be considered and perhaps a compromise reached. Should the category be defined by relevant factors and left to the court's discretion or prescribed by legal definition? Greater discretion suggests more court time in ascertaining relevant facts. However a list of legally defined categories has potential for a piecemeal approach. Certainly the current preference in all jurisdictions is the latter, with arguments for extension left to law reform bodies, peer groups, and government policy.

There is a discernible trend in the 21st century in most jurisdictions, which provide special rules, to recognise that parties to a genuine de facto relationship should have all the same rights and privileges as lawfully married couples. However again there is lack of uniformity as to the meaning of the term 'de facto' and the extent to which it accommodates same sex relationships and Aboriginal marriages.

It is disappointing that on such an important issue as spousal compellability there is such a lack of uniformity throughout Australia. However in many ways this is to be expected given the competing public and private interests that need to be balanced in this area and the sensitive nature of the topic. It is clear that in the future, the continued social or legal need for rules for special categories of witnesses will require examination from time to time. Furthermore the categories of witnesses, offences and relevant factors in exercising discretion (where there is one) will require review to meet that continued need. Notwithstanding these rules in their various forms have been in existence for many centuries, their scope and extent remain flexible to meet changes in social practices, values and attitudes subject only to the practicality of implementing the regime and government policy.