

AUSTRALIAN CRIME COMMISSION V STODDART: THE END OF COMMON LAW SPOUSAL PRIVILEGE

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In Australian Crime Commission v Stoddart (2011) 282 ALR 620 the High Court held that a privilege against spousal incrimination does not exist at common law. This means that at common law a spouse can no longer invoke a privilege to refuse to answer a question, the answer to which may risk incriminating her or his spouse. This case note provides a brief outline of the key issue and the case, and an in-depth summary of the three High Court judgments. Finally, a short comment on the significance of the decision is provided, as well as an argument that the Court should have considered the policy justification behind the supposed privilege before deciding not to recognise it.

I INTRODUCTION

The High Court decision *Australian Crime Commission v Stoddart*,¹ which held that a privilege against spousal incrimination² does not exist at common law, overturns hundreds of years of generally accepted legal thought.³ In Australia, spouses are ‘competent’⁴ to testify for or against each other but are generally not ‘compellable’⁵ to testify for the prosecution in criminal cases.⁶ Furthermore, it

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¹ (2011) 282 ALR 620 (*‘Stoddart’*).

² Hereafter referred to as ‘spousal privilege’.

³ The decision also runs contrary to the Queensland Court of Appeal decision in *Callanan v B* [2005] 1 Qd R 348, the Federal Court decision in *Stoten v Sage* (2005) 144 FCR 487 and the Full Federal Court decision in *S v Boulton* (2006) 151 FCR 364.

⁴ ‘A person is competent if that person may lawfully be called to give evidence’: J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 8th Australian ed, 2010) 417 [13001].

⁵ ‘A person is compellable if that person can lawfully be obliged to give evidence’: Heydon, above n 4, 417 [13001].

⁶ The Northern Territory and Queensland are the only jurisdictions in which an accused’s spouse is absolutely compellable in criminal proceedings: *Evidence Act 1939* (NT) s 9; *Evidence Act 1977* (Qld) s 8. In the jurisdictions which use the *Uniform Evidence Act* (the Commonwealth, Australian Capital Territory, New South Wales, Tasmania and Victoria) spouses are generally compellable but in most cases the court must excuse them from giving evidence for the prosecution if certain criteria are met: *Evidence Act 1995* (Cth) s 18, cf s 19; *Evidence Act 1995* (NSW) s 18, cf s 19; *Evidence Act 2001* (Tas) s 18, cf s 19; *Evidence Act 2008* (Vic) s 18, cf s 19. The *Evidence Act 1929* (SA) s 21 is similar, except the court ‘may’ excuse a spouse (indeed, any ‘close relative’) from giving evidence for the prosecution if certain criteria are met. In Western Australia, a spouse is generally not compellable for the prosecution (but is compellable for the accused), although there are specific exceptions: *Evidence Act 1906* (WA) s 9. In all Australian jurisdictions a spouse is competent and compellable to give evidence for or against the other spouse in civil proceedings: *Evidence Act 1995* (Cth) s 12; *Evidence Act 1995* (NSW) s 12; *Evidence Act 1939* (NT) s 7; *Evidence Act 1977* (Qld) s 7; *Evidence Act*

was commonly thought that there was a common law privilege which meant that a witness could refuse to answer a question if she or he believed that the answer may risk incriminating her or his spouse (although not a de facto spouse),⁷ either in the current or independent proceedings.⁸ The decision in *Stoddart* means that unless a statute prevents otherwise, there is now nothing to stop spouses being forced to incriminate each other in judicial or non-judicial proceedings.⁹

II FACTS

On 3 April 2009, the first respondent, Mrs Stoddart, appeared in response to a summons issued pursuant to s 28(1) of the *Australian Crime Commission Act 2002* (Cth) ('ACC Act'). The summons required Mrs Stoddart to attend as a witness at the premises of the appellant, the Australian Crime Commission ('ACC'), to give evidence on oath or affirmation¹⁰ of 'federally relevant criminal activity'¹¹ involving persons including Mrs Stoddart's husband, Mr Stoddart. Mr Stoddart was previously self-employed as an accountant with several offices around Queensland and was being investigated for tax fraud. Under the ACC Act, failure to answer questions is an offence punishable on conviction by a fine not exceeding \$22,000 or imprisonment for a period not exceeding five years.¹²

During her examination, Mrs Stoddart was asked whether she was aware of invoices prepared at Mr Stoddart's practice for services provided by other entities. Mrs Stoddart's counsel objected that her client claimed the common law spousal privilege and chose not to answer the question. The second respondent, the ACC examiner, determined that this objection needed to be determined elsewhere and adjourned the examination.

III FEDERAL COURT PROCEEDINGS

On 14 May 2009, Mrs Stoddart commenced proceedings in the Federal Court. She sought an injunction restraining the ACC examiner from asking her questions relating to her husband and a declaration that the common law spousal privilege had not been abrogated by the ACC Act. At first instance Reeves J dismissed Mrs Stoddart's application, holding that while spousal privilege did exist at common law it was abrogated by the ACC Act.¹³ Mrs Stoddart appealed this decision to the Full Court. The Full Court¹⁴ upheld the appeal and granted a declaration that

1929 (SA) s 16; *Evidence Act 2001* (Tas) s 12; *Evidence Act 2008* (Vic) s 12; *Evidence Act 1906* (WA) s 7. Note: the *Evidence Act 1995* (Cth) applies in the Australian Capital Territory by virtue of *Evidence Act 1995* (Cth) s 4(1).

⁷ See, eg, *S v Boulton* (2006) 151 FCR 364, 375 [50] (Black CJ), 383 [119] (Jacobson J), 390 [172] (Greenwood J). It seems that the privilege also did not extend to other members of the witness's family: Heydon, above n 4, 865 [21550].

⁸ This is not the same as the statutory privilege for marital communications which exists in Western Australia: *Evidence Act 1906* (WA) s 18.

⁹ Spousal privilege is not included in any of the Evidence Acts in Australia, nor in any other Act.

¹⁰ *Australian Crime Commission Act 2002* (Cth) s 28(5).

¹¹ Defined in the *Australian Crime Commission Act 2002* (Cth) ss 4(1) and 4A.

¹² *Australian Crime Commission Act 2002* (Cth) ss 30(2) and 30(6); *Crimes Act 1914* (Cth) s 4AA(1). A witness who refuses or fails to answer a question of an ACC examiner is also in contempt of the ACC: *Australian Crime Commission Act 2002* (Cth) s 34A(a).

¹³ *Stoddart v Boulton* (2009) 260 ALR 268.

¹⁴ Spender and Logan JJ; Greenwood J dissenting.

the common law spousal privilege—whose existence was not in contention—had not been abrogated by the ACC Act.¹⁵

The ACC then appealed to the High Court, making two distinct submissions. Firstly, that there is no common law spousal privilege; secondly and alternatively, if the privilege does exist then s 30 of the ACC Act abrogates it. Mrs Stoddart argued that the privilege does exist at common law and that the principle of legality¹⁶ applies to it; thus, clear and definite statutory language is required to affect or negate it.

IV HIGH COURT DECISION

By a five to one majority the High Court allowed the appeal¹⁷ and held that spousal privilege does not exist at common law. Due to their decision on the ACC's first submission, the majority did not deem it necessary to consider its second submission. Two majority judgments were delivered: a joint judgment by French CJ and Gummow J, and a joint judgment by Crennan, Kiefel and Bell JJ. Heydon J delivered a dissenting judgment. All three of the judgments followed a similar methodology: analysing the historical primary and secondary sources in order to determine whether spousal privilege does (or ever did) exist at common law.

A *French CJ and Gummow J*

French CJ and Gummow J began by noting that under the ACC Act Mrs Stoddart was a competent and compellable witness.¹⁸ Their Honours also observed that the ACC Act privilege against self-incrimination¹⁹ is founded on the common law and thus this privilege is 'restricted to the incrimination of the person claiming it and not anyone else.'²⁰ French CJ and Gummow J then outlined the distinctions between the concepts of competence, compellability and privilege, noting that

¹⁵ *Stoddart v Boulton* (2010) 185 FCR 409, 413 [30] (Spender J), 447 [163] (Logan J).

¹⁶ The principle of legality reflects the idea that 'Parliament must [when limiting the courts' role in securing fundamental common law rights] squarely confront what it is doing and accept the political cost': *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman). This principle has gained salience in Australian courts: see, eg (recently), *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *South Australia v Totani* (2010) 242 CLR 1, 28-9 [31] (French CJ); *Hogan v Hinch* (2011) 275 ALR 408, 419 [29] (French CJ); *Momcilovic v The Queen* (2011) 280 ALR 221, especially at 241-5 [42]-[51] (French CJ), 349 [441] (Heydon J), 370 [512] (Crennan and Kiefel JJ). See also *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 671 [182] (Crennan, Kiefel and Bell JJ).

¹⁷ The orders of the Full Court were set aside and in their place the order made by Reeves J at first instance (dismissing Mrs Stoddart's application with costs) was preferred. However, the ACC was ordered to pay Mrs Stoddart's costs of appeal to the High Court and the costs order against the ACC made in the Full Court was not disturbed: *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 629 [42] (French CJ and Gummow J), 683 [234] (Crennan, Kiefel and Bell JJ).

¹⁸ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 623 [10] (French CJ and Gummow J).

¹⁹ *Australian Crime Commission Act 2002* (Cth) ss 30(4) and (5).

²⁰ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 623 [11] (French CJ and Gummow J), quoting *In re Westinghouse Uranium Contract* [1978] AC 547, 637 (Lord Diplock).

only privilege was at issue in this case.²¹ Furthermore, the privilege claimed was one of spousal incrimination, not a privilege protecting marital communications.²²

Their Honours then turned to the Court of King's Bench decision in *R v Inhabitants of All Saints, Worcester*.²³ *All Saints* was argued to be the 'critical authority' in support of spousal privilege.²⁴ In *All Saints* a 'pauper', Esther Newman, was residing in the parish of Cheltenham, but a Court of Quarter Sessions had determined that, pursuant to the *Poor Relief Act 1662* (Eng),²⁵ she was to be settled in the parish of All Saints. (The *Poor Relief Act 1662* (Eng) required a parish to maintain its settled poor, with a wife undertaking the settlement of her husband). All Saints sought to avoid this result by establishing a subsequent marriage to George Willis, who had settlement in a third parish. However, Esther Newman would have retained her All Saints settlement if her marriage to George Willis was bigamous. Cheltenham sought to establish this fact by calling a witness, Ann Willis, to prove her earlier marriage to George Willis. Neither George nor Ann Willis were parties in the case, and nor did they have an interest in the decision. All Saints objected to the competency of Ann Willis but was unsuccessful in having her evidence struck out, as the court ruled that a wife was only incompetent to incriminate her husband in proceedings brought directly against him. However, the subsequent significance of the case is the obiter dicta comments of Bayley J, regarding the 'compellability' of Ann Willis. On this issue Bayley J commented that:

It does not appear that the witness objected to being examined, or demurred to any question. If she had thrown herself on the protection of the court on the ground that her answer to the question might criminate her husband, in that case I am not prepared to say that the court would have compelled her to answer; on the contrary I think she would have been entitled to the protection of the court.²⁶

French CJ and Gummow J held, relying on authorities such as *Riddle v The King*,²⁷ *Hoskyn v Metropolitan Police Commissioner*²⁸ and *S v Boulton*,²⁹ that this passage only referred to the compellability of Ann Willis 'in the ordinary sense of the term'.³⁰ That is, Bayley J was not referring to a privilege that a spouse witness could claim in response to particular questions.³¹ Therefore, the (alleged)

²¹ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 624-6 [19]-[28] (French CJ and Gummow J).

²² In an interesting aside their Honours noted that while equitable principles respecting the protection of confidences may apply—independently of the rules of evidence—to matrimonial confidences, equity does not protect confidential communications involving crime or fraud: *ibid* 625 [22] (French CJ and Gummow J) (citations omitted).

²³ (1817) 105 ER 1215 ('*All Saints*').

²⁴ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 627 [29] (French CJ and Gummow J), citing *S v Boulton* (2005) 155 A Crim R 152, 156 [15] (Kiefel J).

²⁵ 13 & 14 Car II c 12.

²⁶ *R v Inhabitants of All Saints, Worcester* (1817) 105 ER 1215, 1217-18 (Bayley J).

²⁷ (1911) 12 CLR 622, 627-8 (Griffith CJ) ('*Riddle*').

²⁸ [1979] AC 474, 485-9 (Lord Wilberforce) ('*Hoskyn*').

²⁹ (2005) 155 A Crim R 152, 159 [27] (Kiefel J).

³⁰ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 629 [41] (French CJ and Gummow J).

³¹ *Ibid*.

authority recognising spousal privilege did not actually support the proposition contended for.³²

B Crennan, Kiefel and Bell JJ

Crennan, Kiefel and Bell arrived at the same conclusion as French CJ and Gummow JJ, via substantially the same reasoning process. Interestingly, in an earlier case *S v Boulton*³³ that Kiefel J heard while sitting in the Federal Court, her Honour had doubted that the common law recognised a privilege against spousal incrimination. However, Kiefel J did not consider that the Court, constituted by a single judge, should depart from the decision of an intermediate appellate court (the Queensland Court of Appeal).

Similarly to French CJ and Gummow J, Crennan, Kiefel and Bell JJ began their judgment by carefully outlining the distinction between the issues of competence, compellability and privilege, noting that spousal privilege could only be claimed in a case where a spouse was both competent and compellable.³⁴

Their Honours then proceeded to give a historical overview of the rule of competency. Crennan, Kiefel and Bell JJ explained how in medieval times the English courts developed a rule that parties were incompetent as witnesses in their own cause.³⁵ This rule was extended to disqualify other witnesses who had an interest in the case and also to spouses giving evidence for or against each other.³⁶ The latter rule³⁷ was expressed in Sir Edward Coke's *First Institute*,³⁸ with Coke stating its rationale as that husband and wife were regarded by law as 'one flesh'. That is, a husband and wife have 'a common or unified interest'.³⁹ The influential jurist Professor Wigmore later adopted slightly different reasoning, explaining the same rule on the basis of the 'repugnance' of the prospect of one spouse giving evidence against the other.⁴⁰ In *Hoskyn*, the House of Lords picked up both strands of reasoning in justifying the rule of spousal incompetency.⁴¹ Most importantly for the present analysis, Crennan, Kiefel and Bell JJ noted that the

³² Ibid.

³³ (2005) 155 A Crim R 152.

³⁴ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 671-2 [183]-[189] (Crennan, Kiefel and Bell JJ).

³⁵ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 673 [192]-[194] (Crennan, Kiefel and Bell JJ).

³⁶ Ibid 673 [194] (Crennan, Kiefel and Bell JJ).

³⁷ There was some suggestion that the rule is actually two separate rules. Namely, one rule preventing a spouse from giving evidence for the other (a 'disqualification') and a separate rule preventing a spouse from giving evidence against the other (a 'privilege'): *ibid* 674 [197]-[199] (Crennan, Kiefel and Bell JJ), citing John Henry Wigmore, *Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little, Brown, 1904) vol 3, 3034-7 [2227]-[2228].

³⁸ Sir Edward Coke, *The First Part of the Institutes of the Laws of England, or, A Commentary on Littleton* (1628 ed).

³⁹ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 673 [195] (Crennan, Kiefel and Bell JJ), citing Coke, *ibid*, 6b.

⁴⁰ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 673-4 [196], citing Wigmore, *ibid* n 37, 3035 [2227].

⁴¹ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 674 [196], quoting *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 488 (Lord Wilberforce).

matter of the testimony of a spouse, whether for or against the other spouse, has historically been treated as one of competence.⁴²

Next, their Honours turned to the issue of a spouse as a compellable witness. Crennan, Kiefel and Bell JJ observed that the 17th century jurist Michael Dalton's *Countrey Justice*⁴³ (and associated commentaries)⁴⁴ is often cited in support of the proposition that a spouse is a non-compellable witness against the other spouse.⁴⁵ However, their Honours regarded the relevant passage in *Countrey Justice*, when read in its context, as more accurately referring to the rule of incompetency.⁴⁶

Crennan, Kiefel and Bell JJ then turned to *All Saints*⁴⁷ and noted that it directly overruled an earlier case: *R v Inhabitants of Cliviger*.⁴⁸ In *Cliviger*, the court held that a wife was not competent to give evidence which might tend to *indirectly* incriminate her husband. Therefore, their Honours were able to summarise the ratio of *All Saints* as: 'the rule of competency does not extend to a case where the evidence of a spouse may only *indirectly* incriminate the other spouse.'⁴⁹ Perhaps more importantly, Crennan, Kiefel and Bell JJ agreed with French CJ and Gummow J that Bayley J's obiter in *All Saints* referred to whether a spouse was compellable as a witness, not whether she or he could invoke a spousal privilege.⁵⁰ This was based on two key factors. Firstly, Bayley J had referred on two occasions to a spouse seeking 'the protection of the court'.⁵¹ This, their Honours argued, suggested that Bayley J had in mind an exercise of the court's power, and '[t]he occasion for its exercise would be as to the question of [the spouse's] compellability as a witness.'⁵² Secondly, at the time of Bayley J's judgment the 'antecedent question' of the operation of the rule of competency had not been resolved. This explained why Bayley J expressed his view 'in notably tentative language'.⁵³ In Crennan, Kiefel and Bell JJ's view, '[t]hese matters do not suggest the existence at this point of a recognised, freestanding privilege in a spouse as a witness likely.'⁵⁴

⁴² *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 674 [199] (Crennan, Kiefel and Bell JJ) (citations omitted).

⁴³ Michael Dalton, *Countrey Justice* (1619) esp at 270.

⁴⁴ Sir Matthew Hale, *The History of the Pleas of the Crown* (2nd ed, 1778) vol 1, 301; S M Phillipps, *A Treatise on the Law of Evidence* (3rd ed, 1817) 67; Sir Thomas Noon Talfourd and Williams Dickinson, *A Practical Guide to The Quarter Sessions, and Other Sessions of the Peace* (S Sweet, 4th ed, 1838) 507.

⁴⁵ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 675-6 [203] (Crennan, Kiefel and Bell JJ).

⁴⁶ *Ibid* 676 [204]-[206] (Crennan, Kiefel and Bell JJ).

⁴⁷ *All Saints* was followed in *R v Inhabitants of Bathwick* (1831) 109 ER 1280.

⁴⁸ (1788) 100 ER 143 ('*Cliviger*'): *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 676-7 [207]-[209] (Crennan, Kiefel and Bell JJ).

⁴⁹ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 677 [210] (Crennan, Kiefel and Bell JJ) (emphasis added).

⁵⁰ *Ibid* 678 [212] (Crennan, Kiefel and Bell JJ).

⁵¹ *R v Inhabitants of All Saints, Worcester* (1817) 105 ER 1215, 1217-18 (Bayley J).

⁵² *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 678 [213] (Crennan, Kiefel and Bell JJ).

⁵³ *Ibid* 678 [214] (Crennan, Kiefel and Bell JJ), quoting *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 503 (Lord Edmund-Davies).

⁵⁴ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 678 [214] (Crennan, Kiefel and Bell JJ).

Cases of violence by one spouse against the other have always been treated as an exception to the rule of spousal competency.⁵⁵ However, the question of whether in such cases a spouse could be *compelled* to give evidence was raised in both *Riddle* and *Hoskyn*. In *Riddle*, the High Court did not express certainty on the subject, although the separate judgments tended towards the view that a spouse was not compellable.⁵⁶ In *Hoskyn*, a majority in the House of Lords held that in cases of violence by one spouse against the other a spouse was not a compellable witness.⁵⁷ (This decision was largely being based upon considerations of policy relating to marriage).⁵⁸ Importantly, Crennan, Kiefel and Bell JJ noted that in neither *Hoskyn* nor *Riddle* was reference made to the existence of a spousal privilege as a potential issue in cases of violence between spouses.⁵⁹

Lastly, their Honours disagreed that the policy considerations referred to in *Hoskyn* underlying the non-compellability of a spouse also pointed to the existence of a spousal privilege, as neither later applications of *Hoskyn*, nor the influential second report of the Common Law Commissioners in 1853,⁶⁰ supported this inference.⁶¹ What's more, the judgments in *All Saints* would have been expected to make explicit reference to the privilege if it existed.⁶²

Ultimately, then, Crennan, Kiefel and Bell JJ held that the question of the existence of spousal privilege had not been definitively addressed by the common law courts.⁶³ That is, there was not a 'sufficient foundation' for Mrs Stoddart's contention of the existence of a spousal privilege.⁶⁴

C Heydon J (dissenting)

Heydon J delivered the lengthiest judgment. His Honour began by noting three issues which would be determinative in deciding the appeal, the latter two not being addressed by the majority judgments. Firstly, does spousal privilege exist at common law? Secondly, can spousal privilege be invoked in non-judicial proceedings? Thirdly, does the ACC Act abrogate this privilege? However,

⁵⁵ Ibid 678-9 [216] (Crennan, Kiefel and Bell JJ), citing *The Trial of Mervin Lord Audley* (1631) 3 St Tr 401; *Bentley v Cooke* (1784) 99 ER 729.

⁵⁶ *Riddle v The King* (1911) 12 CLR 622, 629 (Griffith CJ), 633-4 (Barton J), 640 (O'Connor J), cited in *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 680 [222] (Crennan, Kiefel and Bell JJ).

⁵⁷ *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 485-6 (Lord Wilberforce), 490-1 (Viscount Dilhorne), 496 (Lord Salmon), cited in *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 681 [225] (Crennan, Kiefel and Bell JJ).

⁵⁸ See, eg, *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 483, 487-9 (Lord Wilberforce), 496 (Lord Salmon), 494 (Viscount Dilhorne), cf 507 (Lord Edmund-Davies), cited in *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 681 [225]-[226] (Crennan, Kiefel and Bell JJ).

⁵⁹ But see *Hoskyn v Metropolitan Police Commissioner* [1979] AC 474, 502 (Lord Edmund-Davies), cited in *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 681 [225] (Crennan, Kiefel and Bell JJ).

⁶⁰ Great Britain Common Law Commissioners, *Second Report of Her Majesty's Commissioners for Inquiring into the Process, Practice, and System of Pleading in the Superior Courts of Common Law* (1853).

⁶¹ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 681-2 [227], [229] (Crennan, Kiefel and Bell JJ).

⁶² Ibid 682 [228] (Crennan, Kiefel and Bell JJ).

⁶³ Ibid 683 [231] (Crennan, Kiefel and Bell JJ).

⁶⁴ Ibid.

before addressing these questions Heydon J examined some preliminary issues which arose from the parties' arguments.

1 Preliminary issues

Heydon J noted that a rule of the common law does not have to be 'certain' before its existence can be recognised.⁶⁵ Furthermore, the recognition of a rule does not necessarily depend on a series of court decisions. Instead, a rule of the common law may be based on, inter alia, 'prior dicta, arguments by analogy, arguments seeking to avoid incoherence, moral criteria, the teachings of practical pressures, and the opinions of learned writers.'⁶⁶ His Honour believed this form of recognition provided authority for the existence of spousal privilege.⁶⁷

Next, Heydon J, similarly to the other judgments, outlined the distinction between the doctrines of competence, compellability and privilege, and (significantly) noted that the terms compellability and privilege are often used inaccurately in the various authorities.⁶⁸ Heydon J also observed the overlap between spousal non-compellability and spousal privilege, viewing this overlap as a 'suggestive factor'—though not conclusive—of the existence of the privilege.⁶⁹ The possible existence of a fourth, related doctrine was also remarked upon. This is the discretionary power of a trial judge to reject a question to a witness who is otherwise competent and compellable and cannot claim any privilege but who does not wish to give evidence adverse to another.⁷⁰ However, although there is some suggestion that this discretion exists in England,⁷¹ the Australian authorities do not support it.⁷²

2 Does spousal privilege exist at common law?

Heydon J commenced by noting that there is a question regarding whether a spousal privilege would extend to questions tending to expose the other spouse to the imposition of a civil penalty (as is the case for the privilege against self-incrimination).⁷³ However, this question was not in contention in the appeal and thus was not addressed.⁷⁴

⁶⁵ Ibid 629-30 [49]-[51] (Heydon J).

⁶⁶ Ibid 631 [55] (Heydon J).

⁶⁷ Ibid 632 [57] (Heydon J). Cf *PGA v R* [2012] HCA 21 (30 May 2012) [93] (Heydon J).

⁶⁸ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 632-3 [58]-[61] (Heydon J).

⁶⁹ Ibid 633 [62]-[63] (Heydon J).

⁷⁰ For example, where answering a particular question would be a breach of some ethical or social value and non-disclosure would be unlikely to result in serious injustice: see, eg, Law Reform Committee, *Privilege in Civil Proceedings*, Report No 16 (1967) Cmnd 3472, 3 [1].

⁷¹ *D v National Society for the Prevention for Cruelty to Children* [1978] AC 171, 227 (Lord Hailsham) (Lord Kilbrandon agreeing at 242), cf 239 (Lord Simon). Heydon J doubted the correctness of the authorities relied upon in this case (*Attorney-General v Clough* [1963] 1 QB 773 and *Attorney-General v Mulholland* [1963] 2 QB 477): *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 635-6 [66]-[67] (Heydon J).

⁷² *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 636 [68] (Heydon J), citing *McGuinness v Attorney-General (Vic)* (1940) 63 CLR 73, 104 (Dixon J); *Re Buchanan* (1964) 65 SR (NSW) 9.

⁷³ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 636-7 [69] (Heydon J).

⁷⁴ Ibid.

His Honour then turned to *All Saints*. It was regarding the interpretation of the obiter of Bayley J that Heydon J fundamentally disagreed with the majority judgments. His Honour opined that Bayley J's obiter did not refer to the issue of non-compellability. That is, if Ann Willis were not compellable she would not have been sworn in as a witness, yet Bayley J's assumption was that she had been sworn in and been asked a question.⁷⁵ What's more, the reference to the 'protection of the court' (a significant issue for Crennan, Kiefel and Bell JJ) could point to a privilege just as much as it could refer to compellability.⁷⁶ Lastly, when Bayley J commented that '[i]t does not appear that [Ann Willis] objected to be examined'⁷⁷ he meant that Ann Willis did not demur or object to answering a question. That is, Bayley J meant that a privilege had been waived.⁷⁸ Thus, Heydon J argued that Bayley J was referring to spousal privilege in this passage, not spousal compellability.⁷⁹ Moreover, his Honour opined that the eminent reputation which Bayley J held in the legal profession meant that his obiter comments should, prima facie, be afforded great weight.⁸⁰

Heydon J next undertook a detailed examination of the subsequent reception of Bayley J's obiter in academic works. Referring to the third and subsequent editions of Samuel Phillipps's *A Treatise on the Law of Evidence*,⁸¹ Heydon J noted that Bayley J's obiter is referred to in all but the eighth and ninth editions.⁸² Further, although the term 'compellable' is used to describe the right of a spouse to refuse to answer certain questions, Heydon J argued that this was actually a reference to privilege.⁸³ Similarly, all editions of John Taylor's *A Treatise on the Law of Evidence, as Administered in England and Ireland*⁸⁴ cite Bayley J's obiter in support of the proposition that a spouse is not 'compelled' to answer questions which tend to incriminate the other spouse.⁸⁵ A substantially similar proposition is also found in the fourth edition of Thomas Starkie's *A Practical Treatise on the Law of Evidence*,⁸⁶ the sixth through to twelfth editions of Henry Roscoe's

⁷⁵ Ibid 638 [77] (Heydon J).

⁷⁶ Ibid.

⁷⁷ *R v Inhabitants of All Saints, Worcester* (1817) 105 ER 1215, 1217 (Bayley J).

⁷⁸ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 638-9 [78] (Heydon J).

⁷⁹ Ibid 639 [82] (Heydon J).

⁸⁰ Ibid 639-41 [84]-[87] (Heydon J).

⁸¹ Phillipps, above n 44, 69; (4th ed, 1820) vol 1, 83; (5th ed, 1822) vol 1, 80; (6th ed, 1824) vol 1, 75; (7th ed, 1829) vol 1, 80; (8th ed, 1838) 165; (9th ed, 1843) vol 1, 73; (10th ed, 1852) vol 1, 73.

⁸² *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 641-2 [90] (Heydon J).

⁸³ Ibid.

⁸⁴ John Pitt Taylor, *A Treatise on the Law of Evidence, as Administered in England and Ireland* (A Maxwell & Son, 1848) vol 2, 907 [997]; (2nd ed, 1855) vol 2, 1064 [1234], 1131-2 [1308]; (3rd ed, 1858) vol 2, 1105 [1234], 1174 [1308]; (4th ed, 1864) vol 2, 1165 [1234], 1236 [1308]; (5th ed, 1868) vol 2, 1188-9 [1234], 1260 [1308]; (6th ed, 1872) vol 2, 1188 [1234], 1258 [1308]; (7th ed, 1878) vol 2, 1150 [1369], 1223 [1453]; (8th ed, 1885) vol 2, 1164 [1369], 1242 [1453]; (9th ed, 1897) vol 3, 892 [1369], 960 [1453]; (10th ed, 1906) vol 2, 973 [1368], 1052-3 [1453]; (11th ed, 1920) vol 2, 923 [1368], 997 [1453]; (12th ed, 1931) vol 2, 860-1 [1368], 925-6 [1453]. *Cartwright v Green* (1803) 32 ER 412 is also cited in these texts in support of this proposition.

⁸⁵ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 642-4 [91]-[93] (Heydon J).

⁸⁶ Thomas Starkie, *A Practical Treatise on the Law of Evidence* (V & R Stevens and G S Norton, 4th ed, 1853) 204 n (s).

*Roscoe's Digest of the Law of Evidence in Criminal Case*⁸⁷ and the eleventh through to twentieth editions of *Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius*.⁸⁸ By contrast, the third and subsequent editions of Edmund Powell's *The Principles and Practice of the Law of Evidence*⁸⁹ and fifth and subsequent editions of William Best's *The Principles of the Law of Evidence*⁹⁰ raise doubt regarding whether the law was settled in this area.⁹¹ However, in all of the editions of Sir James Stephen's *A Digest of the Law of Evidence*,⁹² a proposition in support of spousal privilege is included. Furthermore, Heydon J argued that 'a statement by Stephen was seen as authoritative independently of its sources.'⁹³

Heydon J then turned to more recent academic works. His Honour noted that the first through to tenth editions of Sidney Phipson's *The Law of Evidence*⁹⁴ contain a passage in support of spousal privilege,⁹⁵ as do all the editions of *Halsbury's Laws of England*.⁹⁶ However, the second through to tenth editions of Ernest

⁸⁷ Henry Roscoe and David Power, *Roscoe's Digest of the Law of Evidence in Criminal Cases* (V & R Stevens, Sons, 6th ed, 1862) 141; (7th ed, 1868) 146; (8th ed, 1874) 150; (9th ed, 1878) 153; (10th ed, 1884) 153; (11th ed, 1890) 142-3; (12th ed, 1898) 132-3; cf (13th ed, 1908) 127.

⁸⁸ Henry Roscoe, William Mills and Sir William Markby, *Roscoe's Digest on the Law of Evidence on the Trial of Actions at Nisi Prius* (V & R Stevens, Sons, 11th ed, 1866) 106; (12th ed, 1870) 176; (13th ed, 1875) 186; (14th ed, 1879) 168; (15th ed, 1884) vol 1, 159; (16th ed, 1891) vol 1, 168; (17th ed, 1900) vol 1, 171; (18th ed, 1907) vol 1, 169; (19th ed, 1922) vol 1, 151; (20th ed, 1934) vol 1, 173.

⁸⁹ Edmund Powell, Edmund Fuller Griffin and John Culter, *The Principles and Practice of the Law of Evidence* (Butterworths, 3rd ed, 1869) 90-1; (4th ed, 1875) 110; (5th ed, 1885) 118; (6th ed, 1892) 123; (7th ed, 1898) 102; (8th ed, 1904) 97; (9th ed, 1910) 223.

⁹⁰ W M Best, *The Principles of the Law of Evidence* (H Sweet, 5th ed, 1870) 174 [126]; (6th ed, 1875) 175 [126]; (7th ed, 1883) 123 [126]; (8th ed, 1893) 114 [126]; (9th ed, 1902) 114 [126]; (10th ed, 1911) 115 [126]; (11th ed, 1911) 118 [126]; (12th ed, 1922) 116 [126].

⁹¹ Heydon J disagreed as to the authors' reasons for supposing there to be ambiguity in the law: *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 646-7 [98]-[100] (Heydon J).

⁹² Sir James Fitzjames Stephen, *A Digest of the Law of Evidence* (Macmillan, 1876) art 120; (2nd ed, 1881) art 120; (3rd ed, 1887) art 120; (4th ed, 1893) art 120; (5th ed, 1899) art 120; (6th ed, 1904) art 120; (7th ed, 1905) art 120; (8th ed, 1907) art 120; (9th ed, 1911) art 120; (10th ed, 1922) art 120; (11th ed, 1925) art 120; (12th ed, 1936) art 129.

⁹³ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 649 [105] (Heydon J), citing *Ex parte Bottomley* [1909] 2 KB 14, 21 (Phillimore J); *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107, 123 (Isaacs J); *In re Overbury, decd*; *Sheppard v Matthews* [1955] Ch 122, 126 (Harman J).

⁹⁴ Sidney L Phipson, *The Law of Evidence* (Stevens and Haynes, 1892) 111; (2nd ed, 1898) 194; (3rd ed, 1902) 181; (4th ed, 1907) 193; (5th ed, 1911) 198; (6th ed, 1921) 211; (7th ed, 1930) 205; (8th ed, 1942) 198; (9th ed, 1952) 213; (10th ed, 1963) 264 [611]. The eleventh edition did not contain this passage because the *Civil Evidence Act 1968* (UK) s 14(1)(b) 'made the question of privilege at common law academic, at least in civil cases': *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 650 [107] (Heydon J). This statement was also included in Sidney L Phipson, *Manual of the Law of Evidence* (Stevens and Haynes, 1908) 48; (3rd ed, 1921) 58; (4th ed, 1928) 87; (5th ed, 1935) 94-5; (6th ed, 1943) 95; (7th ed, 1950) 81; (8th ed, 1959) 81; (9th ed, 1966) 93; (10th ed, 1972) 99-100.

⁹⁵ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 649-50 [106] (Heydon J).

⁹⁶ Lord Halsbury (ed), *Halsbury's Laws of England* (Butterworths, 1910) vol 13, 574 [784]; (2nd ed, 1934) vol 13, 729 [804]; (3rd ed, 1956) vol 15, 422 [760]; (4th ed, 1976) vol 17, 167-8 [240]; (5th ed, 2009) vol 11, 735-6 [974]. However, the reissue of the fourth edition expressed doubt regarding the existence of the privilege: (4th ed, 1990) vol 11(2), 993 [1186].

Cockle's *Leading Cases on the Law of Evidence*⁹⁷ express more uncertainty regarding the position.⁹⁸

Lastly, Heydon J looked at Sir Rupert Cross's *Cross on Evidence*⁹⁹ (United Kingdom edition).¹⁰⁰ His Honour observed that in the first through to fifth editions Cross cites *All Saints* in support of the proposition that spousal privilege exists at common law and also provides policy arguments in support of this position.¹⁰¹ Moreover, Heydon J argued that 'Cross had immense influence on the judges of his generation ... [and t]o contend that any statement of his on the common law is erroneous is to assume a very heavy burden of persuasion.'¹⁰² (His Honour did not believe that the ACC had discharged this burden).¹⁰³ However, the sixth and subsequent editions of the text (which were not edited by Cross) state that spousal privilege does not exist at common law.¹⁰⁴ This was due to reliance on two new cases: *Rio Tinto Zinc Corp v Westinghouse Electric Corp*¹⁰⁵ and *R v Pitt*.¹⁰⁶ Heydon J disagreed that these cases supported the proposition that spousal privilege does not exist at common law, though.¹⁰⁷ Ultimately, his Honour believed that academic writings *are* capable of constituting the common law in their own right¹⁰⁸ and that the weight of academic authority is in favour of spousal privilege.¹⁰⁹ That is, the common law supported the existence of spousal privilege.

Heydon J recognised that there is not a 'vast quantity' of case law authority which supports Bayley J's obiter. However, his Honour did believe that spousal

⁹⁷ Ernest Cockle, *Leading Cases on the Law of Evidence* (Sweet and Maxwell, 2nd ed, 1911) 235; (3rd ed, 1915) 290, 292; (4th ed, 1925) 312, 314; (5th ed, 1932) 318, 320; (6th ed, 1938) 331, 333; (7th ed, 1946) 331, 333; (8th ed, 1952) 304, 306; (9th ed, 1957) 295; (10th ed, 1963) 111; cf (1st ed, 1907) 211.

⁹⁸ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 650-1 [110] (Heydon J).

⁹⁹ Sir Rupert Cross, *Cross on Evidence* (Butterworths, 1958).

¹⁰⁰ In the eighth Australian edition of *Cross on Evidence*, which Heydon J edited, his Honour states that '[t]he [self-incrimination] privilege extends to answers tending to incriminate the witness's spouse': Heydon, above n 4, 865 [25155]; see also *Stoddart v Boulton* (2010) 185 FCR 409, 437 [125]-[126] (Greenwood J). Cf David Lusty, 'Is There a Common Law Privilege against Spouse-incrimination?' (2004) 27 *University of New South Wales Law Journal* 1, 21-2 who argues that spousal privilege 'is not a mere adjunct' to the privilege against self-incrimination, but is 'entirely separate and [has] different doctrinal foundations'; see also *Stoddart v Boulton* (2010) 185 FCR 409, 446 [158] (Logan J).

¹⁰¹ Cross, above n 99, 229-30; (2nd ed, 1963) 231-2; (3rd ed, 1967) 229-30; (4th ed, 1974) 245-6. Heydon J also cited Sir Rupert Cross and Nancy Wilkins, *An Outline of the Law of Evidence* (Butterworths, 1964) 75-6; (2nd ed, 1968) 75; (3rd ed, 1971) 79-80; (4th ed, 1975) 83; (5th ed, 1980) 99-100; *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 656 [130] (Heydon J).

¹⁰² *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 654 [118] (Heydon J); see also 653-4 [115]-[117] (Heydon J).

¹⁰³ *Ibid* 654 [118] (Heydon J).

¹⁰⁴ Sir Rupert Cross and Colin Tapper, *Cross on Evidence* (Butterworths, 6th ed, 1985) 384; (7th ed, 1990) 422; (8th ed, 1995) 458; (9th ed, 1999) 426-7; (10th ed, 2004) 452; (11th ed, 2007) 456; (12th ed, 2010) 425.

¹⁰⁵ [1978] AC 547, 637-8 (Lord Diplock).

¹⁰⁶ [1983] QB 25, 30 (Peter Pain J).

¹⁰⁷ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 655-6 [123]-[129] (Heydon J).

¹⁰⁸ *Ibid* 657-60 [133]-[138] (Heydon J). Heydon J also noted 'pointers to a state of 'professional opinion which recognises the existence of the privilege' (eg cases which assumed the privilege, legislation which assumed the existence of the privilege at common law): at 660-1 [140].

¹⁰⁹ *Ibid* 657 [132] (Heydon J).

privilege had been applied or approved in several cases in the United Kingdom,¹¹⁰ United States of America,¹¹¹ Canada,¹¹² Australia¹¹³ and New Zealand.¹¹⁴ Moreover, Heydon J contended that the relative lack of authority was due to the fact that the privilege was so commonly accepted that there was no need to cite any further authorities.¹¹⁵ Overall, then, his Honour argued that the weight of authority, both judicial and non-judicial, is that spousal privilege does exist at common law.¹¹⁶

3 *Can spousal privilege be invoked in non-judicial proceedings?*

Heydon J considered spousal privilege to be ‘at least as important a privilege as legal professional privilege’¹¹⁷ and as reflecting ‘greater altruism than the privilege against self-incrimination.’¹¹⁸ His Honour also viewed the policy arguments for spousal non-compellability as supporting the existence of spousal privilege and thus its importance in the law of evidence.¹¹⁹ Therefore, spousal privilege should be treated as a rule of substantive law and not merely a rule of evidence.¹²⁰ As such, it can be invoked in non-judicial proceedings.

4 *Does the ACC Act abrogate spousal privilege?*

Heydon J agreed with Tompkins J in *Hawkins v Sturt*¹²¹ that the principle of legality applied to spousal privilege.¹²² Furthermore, his Honour found no ‘explicit language’ or ‘necessary implication’ in the ACC Act which could be

¹¹⁰ *R v Hamp* (1852) 6 Cox CC 167, 170 (Lord Campbell CJ); *Lamb v Munster* (1882) 10 QBD 110, 112-3 (Stephen J).

¹¹¹ *State v Briggs* 9 RI 361, 366 (Durfee J) (SCRI, 1869); *Commonwealth v Reid* 4 Am L Times Rep 141, 147, 149-50 (Paxson J) (1871); *Williams v State* 69 Ga 11 (SC Ga, 1882); *Woods v State* 76 Ala 35, 39-40 (Moore J) (SC Ala, 1884); *Watson v State* 61 S 334, 335 (SC Ala, 1913); *State v Deslovers* 100 A 64, 71-2 (SCRI, 1917).

¹¹² *Millette v Little* (1884) 10 Ont Pr Rep 265, 266 (Galt J). Obiter dicta approval: *Gosselin v The King* (1903) 33 SCR 255, 279-80 (Mills J); *Attorney-General v Kelly (No 2)* (1915) 9 WWR 863, 866 (Galt J); *Bell v Klein* [1954] 1 DLR 225, 229-30 (Clyne J); *R v Mottola* [1959] OR 520, 525 (Morden JA; Porter CJO and LeBel JA agreeing); *R v McGinty* (1986) 27 CCC (3d) 36, 51, 58 (McLachlin JA); *Thomson Newspapers Ltd v Canada (Director of Investigation and Research; Restrictive Trade Practices Commission)* [1990] 1 SCR 425, 472-3 [50] (Wilson J); *R v S(RJ)* [1995] 1 SCR 451, 491 [57] (Iacobucci J).

¹¹³ *Callanan v B* [2005] 1 Qd R 348; *Stoten v Sage* (2005) 144 FCR 487; *S v Boulton* (2006) 151 FCR 364. Obiter dicta approval: *Tinning v Moran* (1939) 38 IAR (NSW) 148, 151; *Re Intercontinental Development Corp Pty Ltd* (1975) 1 ACLR 253, 259 (Bowen CJ); *Re Robert Stirling Pty Ltd (in liq) and the Companies Act (No 2)* [1979] 2 NSWLR 723, 726 (Kearney J); *Navair Pty Ltd v Transport Workers’ Union of Australia* (1981) 52 FLR 177, 193 (Evatt J); *Metroplaza Pty Ltd v Girvan NSW Pty Ltd (in liq)* (1992) 37 FCR 91, 91 (Foster J); *Re New World Alliance Pty Ltd; Sycotext Pty Ltd v Baseler* (1993) 47 FCR 90, 96 (Sheppard J); *Trade Practices Commission v Abbco Iceworks Pty Ltd* (1994) 52 FCR 96, 125 (Burchett J); *Australian Securities and Investments Commission v United Investment Funds Pty Ltd* (2003) 46 ACSR 386, 387 [2] (Finkelstein J).

¹¹⁴ *Hawkins v Sturt* [1992] 3 NZLR 602, 610 (Tomkins J).

¹¹⁵ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 664 [151] (Heydon J).

¹¹⁶ *Ibid* 665 [152] (Heydon J).

¹¹⁷ *Ibid* 665 [155] (Heydon J).

¹¹⁸ *Ibid* 665 [156] (Heydon J).

¹¹⁹ *Ibid* 665-8 [157]-[163] (Heydon J).

¹²⁰ *Ibid* 668 [164] (Heydon J).

¹²¹ [1992] 3 NZLR 602, 610 (Tompkins J).

¹²² *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 668 [165] (Heydon J).

construed as modifying or abolishing the privilege.¹²³ That is, the ACC Act did not abrogate spousal privilege¹²⁴ and therefore Mrs Stoddart could claim it in the ACC proceedings.

V COMMENT

Stoddart is one of a number of recent High Court judgments where the Court has been willing to consider whether generally accepted legal principles actually have any historical support. For example, in *Kirk v Industrial Court of NSW*,¹²⁵ the High Court held that, despite conventional thought for over one hundred years, a state Parliament cannot legislate to prevent its Supreme Court from issuing prerogative writs and equitable remedies in order to correct jurisdictional errors. More recently, in *PGA v The Queen*,¹²⁶ the High Court held that if the marital exemption to rape was ever part of the common law in Australia, it had ceased to be so by at least the time of the enactment of s 48 of the *Criminal Law Consolidation Act 1935* (SA) in 1935. (That is, the common law marital exemption to rape was not only abolished in 1991 in *R v L*¹²⁷, as was commonly believed).

Prior to *Stoddart*, examinations in which spousal privilege could have been invoked only arose infrequently. As mentioned, under the various Evidence Acts spouses are generally non-compellable to testify against each other in criminal cases.¹²⁸ Therefore, if a potential witness spouse believes that her or his testimony runs the risk of incriminating the accused spouse, she or he will refuse to testify¹²⁹ or apply to the court to be excused from testifying.¹³⁰ That is, the need for the privilege does not arise.¹³¹ However, spousal privilege was seemingly still available as a protection in civil trials, trials where neither spouse was a party and proceedings not covered by the various Evidence Acts. An example of the last of these scenarios is investigative bodies such as the ACC,¹³² which generally operate under statutes which limit the common law rules of evidence.¹³³ As such, remaining common law rights (for example, witness

¹²³ Ibid 668 [167] (Heydon J).

¹²⁴ Ibid 669 [169] (Heydon J).

¹²⁵ (2010) 239 CLR 531.

¹²⁶ [2012] HCA 21 (30 May 2012).

¹²⁷ (1991) 174 CLR 379.

¹²⁸ In cases where a spouse *is* compellable as a witness on behalf of the prosecution, it is likely that this would be viewed as an abrogation of the common law spousal privilege: David Lusty, 'Case and comment: Callanan v B' (2005) 29 *Criminal Law Journal* 182, 186 n 44.

¹²⁹ Western Australia.

¹³⁰ Commonwealth, Australian Capital Territory, New South Wales, South Australia, Tasmania and Victoria.

¹³¹ See also *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 661 [142] (Heydon J).

¹³² See also the New South Wales Crime Commission and Crime and Misconduct Commission (Queensland) (investigates corruption in the public service as well), which are bodies similar to the ACC. Furthermore, there are a number of state investigative bodies whose role is to investigate corruption and promote integrity in the public service: see, eg, Independent Commission Against Corruption (New South Wales); Integrity Commission (Tasmania); Corruption and Crime Commission (WA).

¹³³ See, eg, Australian Crime Commission Act 2002 (Cth) Pt 2, Div 2; Independent Commission Against Corruption Act 1988 (NSW) Pt 4, Divs 2-3; New South Wales Crime Commission Act 1985 (NSW) Pt 2, Div 2 (see especially s 13A); Crime and Misconduct Act 2001 (Qld) Ch 3,

privileges) retain an important place in the operation of these bodies' investigations and examinations.¹³⁴ The High Court's decision in *Stoddart*, in abolishing one of these important safeguards, means that the balance has swung even further away from the individual's common law rights.

Perhaps what is surprising about *Stoddart*, then, is the willingness of the majority to overturn years of generally accepted thought—and apparently place Australia out of line with other common law countries¹³⁵—without engaging in an analysis of the policy behind the supposed privilege. It is axiomatic to state that there was considerable uncertainty regarding whether spousal privilege existed at common law. Therefore, to paraphrase Dowsett J in *Stoten v Sage*,¹³⁶ given the uncertain nature of the authorities the ultimate decision to recognise or reject spousal privilege is surely very much a matter of policy.¹³⁷

Stoddart does represent a large crack in the crumbling legal fiction that a husband and wife are one person (the doctrine of unity). This doctrine sprung from the biblical notion of a husband and wife being 'one flesh'.¹³⁸ Based on this notion, to force one spouse to give evidence against the other is effectively to force the spouse to give evidence against her or himself. The doctrine of unity is arguably objectionable in modern society. Still, however, there are compelling underlying principles behind it. With respect, it is submitted that the majority judgments do not adequately engage with these.

Fundamentally, spousal privilege can be justified on the basis of two key policy rationales.¹³⁹ Firstly, spousal privilege advances the same principle as the privilege against self-incrimination. That is, it avoids spouse witnesses facing the 'cruel trilemma of [accusation of one's spouse], perjury or contempt'.¹⁴⁰ Moreover, as Heydon J contends, this argument has (even) 'more force in the case of a spouse not wholly motivated by selfish considerations, but by considerations touching the protection of another and the maintenance of family unity.'¹⁴¹ Therefore, recognising the privilege is likely to encourage testimony from spouses

Pt 1; Integrity Commission Act 2009 (Tas) Pt 7, Div 2; Corruption and Crime Commission Act 2003 (WA) Pt 6, Div 1; Pt 7.

¹³⁴ Cf *Callanan v B* [2005] 1 Qd R 348, where the Queensland Court of Appeal held that spousal privilege should have been allowed to be invoked in proceedings brought under the *Crime and Misconduct Act 2001* (Qld); but see *Stoten v Sage* (2005) 144 FCR 487, where Dowsett J held that that spousal privilege did exist at common law but had been abrogated by the ACC Act s 30.

¹³⁵ See above n 110-12, 114 (although it is acknowledged that there is not a wealth of authority in these jurisdictions and the issue is probably not definitively settled).

¹³⁶ (2005) 144 FCR 487

¹³⁷ *Ibid* 493 [14] (Dowsett J).

¹³⁸ Holy Bible (King James version), *Old Testament*, Genesis 11 24; *New Testament*, Matthew XIX 5-6, Mark X 8. See also *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 673 [195] (Crennan, Kiefel and Bell JJ), quoting Coke, above n 38, 6b.

¹³⁹ See generally George P Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press, 1993) 81; Amanda H Frost, 'Updating the Marital Privileges: A Witness-Centred Rationale' (1999) 14 *Wisconsin Women's Law Journal* 1.

¹⁴⁰ *Murphy v Waterfront Commission of New York Harbor* 378 US 52, 55 (Goldberg J) (1964); *Brannigan v Davison* [1997] AC 238, 249 (Lord Nicholls); *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498 (Mason CJ, Toohey J).

¹⁴¹ *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 668 [163] (Heydon J).

(at least in cases where the other spouse is not facing a criminal investigation or trial) and is probably unlikely to result in the loss of much truthful testimony.¹⁴²

Secondly, spousal privilege preserves marital harmony. Committed familial relationships—which most persons choose to formalise via marriage—form the building blocks of all human societies.¹⁴³ To undermine these relationships by forcing spouses to potentially incriminate each other is a step that requires compelling justification.¹⁴⁴ Indeed, as most Australian jurisdictions preserve spousal non-compellability to a large extent—presumably on the basis of policy reasons—it is hard to see why these policy reasons should not also support the common law spousal privilege.¹⁴⁵ (Certainly this is the case in the jurisdictions where a spouse is prima facie compellable, but ‘must’ (*Uniform Evidence Act* jurisdictions¹⁴⁶) or ‘may’ (South Australia¹⁴⁷) be excused from giving evidence for the prosecution if certain criteria relating to the prospect of harmful consequences from giving evidence are met). That is, spousal non-compellability and privilege are arguably synonymous in terms of basic principle.¹⁴⁸

In the wake of *Stoddart* we will have to wait and see what impact the High Court’s decision has on marital relationships, and whether in fact there will actually be any corresponding beneficial impact in criminal investigations and trials.

¹⁴² See, eg, Richard O Lempert, ‘A Right to Every Woman’s Evidence’ (1981) *Iowa Law Review* 725, 731; Frost, above n 139, 29-31. However, the question is then why is the line drawn at spouses? Why not extend the privilege to protect all witnesses in close relationships (eg de facto spouses)? In response, Cross argues ‘the line must be drawn somewhere’: Cross, above n 99, 230; with Lusty continuing that ‘it is perfectly logical that it was drawn at de jure spouses by the common law’: Lusty, above n 100, 41. This argument was also examined and rejected in *S v Boulton* (2006) 151 FCR 364, 371-5 [29]-[50] (Black CJ), 381-3 [100]-[119] (Jacobson J), 390 [172] (Greenwood J). Of course, in any event this is now a moot point.

¹⁴³ See also Janice Brabyn, ‘A Criminal Defendant’s Spouse as a Prosecution Witness’ [2011] *Criminal Law Review* 613, 616, quoted in *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 667 [162] (Heydon J); Linda J Waite, ‘Does Marriage Matter?’ (1995) 32 *Demography* 483.

¹⁴⁴ Cf *Trammel v United States* 445 US 40, 48-53 (Burger CJ) (1980).

¹⁴⁵ See also *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 667 [162] (Heydon J); Lusty, above n 100, 38.

¹⁴⁶ Pursuant to the *Uniform Evidence Act* s 18(6), this is where the court finds that:

- a) ‘There is a likelihood that harm would or might be caused (whether directly or indirectly) to the person, or to the relationship between the person and the accused, if the person gives the evidence; and
- b) The nature and extent of that harm outweighs the desirability of having the evidence given’.

¹⁴⁷ Pursuant to the *Evidence Act 1929* (SA) s 21(3), this is where it appears to the court:

- a) ‘That, if the prospective witness were to give evidence, or evidence of a particular kind, against the accused, there would be a substantial risk of—
 - (i) Serious harm to the relationship between the prospective witness and the accused; or
 - (ii) Serious harm of a material, emotional or psychological nature to the prospective witness; and
- b) That, having regard to the nature and gravity of the alleged offence and the importance to the proceedings of the evidence that the prospective witness is in a position to give, there is insufficient justification for exposing the prospective witness to that risk’.

¹⁴⁸ Lusty, above n 100, 20.