COMPELLABILITY OF FAMILY MEMBERS OF AN ACCUSED

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[The evidentiary obligations of family members in a number of Australian jurisdictions have changed in recent years. This article examines new laws which explicitly address the conflict of public interest between obtaining evidence and protecting witnesses and their relationships. It identifies remaining inconsistencies and ambiguities and proposes further reforms.]

INTRODUCTION

In the last few years there have been significant improvements in the law governing availability of testimony of an accused's family members. By stressing a case-by-case determination, new and proposed laws resolve some of the anomalies and policy conflicts produced by the sometimes arbitrary categories of traditional legislation in this area.

Before the recent legislative changes, the laws in most Australian jurisdictions were roughly similar. A spouse of an accused was usually fully competent[1] to testify and, if willing, could testify for prosecution or defence. However, the spouse of an accused was usually fully compellable only by the defence. The prosecution could only compel testimony from the spouse of the defendant as to certain specified information or where the accused was charged with an offence in which a spouse or child of the marriage was a victim.[2] There was no special provision of any sort regarding the competence or compellability of parents or children of an accused. Family members, except spouses, were competent and compellable as ordinary witnesses.

This approach has been criticised on several grounds. The circumstances where a spouse was compellable for the Crown seemed arbitrary and did not take into account specific factors relating to the community's need for evidence and the gravity of the offence in the particular circumstances, nor was any account taken of the actual or likely harm to a marital relationship worth protecting. A spouse in a stable relationship could be compelled to give trivial evidence, even though testifying might lead to harm to the marriage. On the other hand, a spouse whose testimony was important in a serious case might not be compellable, even

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[1] Ligertwood, A. L. C., *Australian Evidence* (1988) 210; Waight, P. K., and Williams, C. R., *Cases and Materials on Evidence* (2nd ed. 1985) 71-4; Australian Law Reform Commission (A.L.R.C.), *Evidence Research Paper No. 1, Comparison of Evidence Legislation applying in Federal Court and Courts of the Territories* (1981) 29.

[2] See the summary in A.L.R.C., *Interim Report on Evidence, report No. 26* (1985) I, 100-1; A.L.R.C., *Evidence Research Paper No. 1* (1981) 14-29.

if giving evidence would cause no real risk to that marriage because, for example, the spouses were living apart.

It also seems anomalous to protect the marital relationship but not to protect other close family relationships which would be subjected to similar strain if testimony were compelled against an accused. Only the Northern Territory avoided this inconsistency, by making all family members including spouses competent and compellable without exception.[3]

When the spouse of an accused is competent but not fully compellable, the potential witness is forced to choose whether or not to testify for the prosecution. This may take enforcement of the criminal law away from public authorities and give control to an individual witness. A relative of an accused who must choose whether or not to testify for the prosecution faces a cruel conflict between personal loyalty and public duty. There is a risk that in choosing whether or not to testify the relative's will may be overborne by the accused.

The arguments for and against making a spouse or close family member of the accused fully compellable by prosecution and defence are fairly clear.[4] There is a perceived conflict between the community interest in having all relevant evidence available to identify and punish offenders and the community interest in stable family relationships, which can be disrupted if one family member is compelled to testify against another.

The arguments *against* making a spouse or close relative of an accused compellable are as follows: families involve confidential relationships which create feelings and duties of mutual loyalty. A compulsion to testify against an accused would disturb family peace and undermine the family relationship, thus harming the community interest in a stable family. If the relationship is disrupted, there is hardship for all members of the family, especially children. The public would find it repugnant to see a spouse or close relative compelled to incriminate the accused. The state is not justified in putting such a harsh burden on witnesses. In any event, the testimony will be of dubious value, either because a family member will be biased in favour of the accused or will be subject to undue influence by the accused.

The reasons *for* generally compelling testimony from close relatives, including spouses, emphasise the interest of society in identifying and punishing offenders, which requires all relevant evidence to be available. If close relatives are not compellable, there is a licence to commit crime in the presence of or against family members. It also means that like cases may not be treated alike; married and unmarried defendants may face different risks of conviction because the prosecution may not be able to compel the necessary witness against a married defendant. If a family member is compellable, then the family member does not face the burden of choosing whether to testify or not.

Beginning in the 1970s, these questions were examined by several law reform

[3] Evidence Act 1939 (N.T.) s. 9.

[4] A.L.R.C., *Evidence Research Paper No. 5, Competence and Compellability of Witnesses*, (1981) 83-5; Law Reform Commissioner of Victoria, *Report No 6, Spouse-Witnesses (Competence and Compellability)* (1976) 19-20; Western Australian Law Reform Commission, *Project 31, Report on Competence and Compellability of Spouses to Give Evidence in Criminal Proceedings* (1977) 23-5.

commissions and some legislative changes followed.[5] In 1978, Victoria amended section 400 of the Crimes Act 1958 (Vic.)[6] so that spouses and former spouses became competent and compellable for the prosecution,[7] subject to a right to apply for an exemption from the obligation to give evidence. The exemption is determined by balancing the risk of harm to the potential witness (or to the family relationship) against the need for the evidence in light of all the circumstances of the case. Section 400 also extended this right to seek an exemption to parents and children of an accused. Similar legislation was adopted in South Australia in 1983[8] and in a limited fashion in New South Wales in 1982.[9] Most recently the Australian Law Reform Commission (A.L.R.C.) in section 24 of the Draft Evidence Bill[10] also recommended compelling testimony from family members of an accused, subject to their right to seek exemption. All these provisions are set out in full at the end of this article.

The new legislative schemes clearly recognise the competing interests and require a specific case-by-case balancing of these interests. In South Australia, Victoria and under the A.L.R.C. proposal, the treatment of spouses and other family members is made consistent. All family members, including spouses, are fully compellable by the prosecution, but any family member, including a spouse, may be exempted from the obligation to testify for the prosecution in certain circumstances. Under all new and proposed legislation a spouse may sometimes have to testify for the prosecution in a situation where s/he would previously have been non-compellable, but a spouse may now be exempt in some circumstances where previous law could have compelled testimony. Family members other than spouses who were previously fully compellable for the prosecution may now sometimes be exempted from the obligation to testify. The circumstances in which an exemption may be granted require an express weighing of the specific competing individual and community interests identified above.

Not all problems are solved, of course.[11] It is still possible that if a spouse is compelled to testify there may be perjury as a result of bias or of undue influence

[5] A.L.R.C., *Evidence Research Paper No. 5* (1981) 69-71, 73-75, 88, 92, 101, 103; Law Reform Commissioner of Victoria, *op. cit.* n. 4, 24; Western Australian Law Reform Commission *op. cit* n. 4, 36-8; Waight, P. K. and Williams, C. R., *loc. cit.* n. 1; Ligertwood, *op. cit.* n. 1, 211.

[6] Crimes (Competence and Compellability of Spouse Witnesses) Act 1978 (Vic.) s. 2.

[7] Such persons were already made compellable for the defendant by the Crimes Act 1958 (Vic.) s. 399.

[8] Evidence Act 1929 (S.A.) s. 21 amended by Evidence Act Amendment Act (No. 2) 1983 (S.A.) s. 4.

[9] Crimes Act 1900 (N.S.W.) s. 407AA inserted by Crimes (Domestic Violence) Act 1982 (N.S.W.) Sch. 1(3).

[10] A.L.R.C., *Report No. 38, Evidence* (1987) 151-3.

[11] One question which has arisen about section 21 in South Australia, and may arise in other jurisdictions, is the relation of the provisions granting exemptions or compelling testimony to other legislation. The old form of section 21 in South Australia expressly gave precedence to any other specific legislation which dealt with the competence or compellability of a spouse witness, but this language was not repeated in the amended section 21. In *Prestwood v. Shuttleworth* (1985) 39 S.A.S.R.125 a spouse compelled to testify by section 245 of the Community Welfare Act 1972 (S.A.) (which made spouses compellable as to offences under the Act) sought an exemption from testimony pursuant to section 21 of the Evidence Act. The court decided that the right to apply for exemption was available and that section 245 of the Community Welfare Act was impliedly repealed by the subsequent enactment of section 21 to the extent of any inconsistency. This is clearly correct since section 21 was certainly meant to be a comprehensive treatment of the question of compellability.

by the accused, but this goes to the weight of the testimony and can be adequately tested in the ordinary trial process as for any witness. It may still be harsh to compel a close relative to testify, as it may appear to force a witness to choose between contempt and perjury. However, compelling testimony pursuant to the new schemes may be less repugnant than previously, because the significant relevant factors will have been considered by the judge, and cases where compulsory testimony would create real hardship will presumably be excluded.

Criteria for Exemption

The legislative schemes in South Australia and in Victoria and the A.L.R.C. proposals make the compellability of the family member depend generally on weighing risks to the witness and/or to the family relationship against community interest in having the evidence available. The New South Wales provision considers many of the same factors, but does not expressly require a balance or weighing.

The Victorian legislation requires that an exemption be given if the interest of the community in obtaining the evidence 'is outweighed by' likelihood of damage to the relationship or harshness to the witness in light of all the circumstances of the case. The proposed legislation for the Commonwealth follows a similar format, though the issue is stated in the active voice: if the likelihood of harm outweighs the desirability of having the evidence, the person shall not be required to give evidence.

The South Australian legislation describes the relationship among the relevant factors with much greater complexity. Section 21 makes it possible for a witness who is a close relative of an accused to seek an exemption from the obligation to testify against the accused on the grounds that the nature and gravity of the offence and the need for the close relative's testimony are not a sufficient justification to expose the witness to a substantial risk of serious harm to the relationship with the accused or to the potential witness. Stating the relationship among the factors in the negative — 'not a sufficient justification' — makes the provision unnecessarily confusing. In a striking understatement, Prior J. in *Trzesinski v. Daire* stated that 'subsection (3) of section 21 is not the easiest of provisions to apply . . . The positive language within par (a) does not sit happily with the negative terms within par (b).'[12] Justice Prior restated the statutory requirements in two ways, neither of which, with respect, is much clearer than the statute itself.

> In essence, I think it is plain that if it does appear to a court that there is either a substantial risk of serious harm to the relationship between a prospective witness and the accused, or a substantial risk of serious harm of a material, emotional or psychological nature to the prospective witness, if the prospective witness were to give evidence, or evidence of a particular kind, there is an obligation on the court to consider whether that risk is justified, having regard to the matters particularised in par (b) of subs (3) . . . a court is required to do no more than consider whether

[12] (1986) 44 S.A.S.R. 43, 50.

any substantial risk of serious harm appearing to it, being one of the kinds particularised in par (a) of subs (3), it should permit that perceived risk to continue or become a reality by not granting, wholly or in part, an exemption in favour of the witness who seeks it, having regard to the matters alluded to in par (b).[13]

Certainly, the balance which section 21 seeks to achieve could be better expressed. The relevant factors would be more clearly articulated if the legislation simply required that the witness must testify unless the risk of harm to the witness or to the family relationship outweighs the public interest in having the evidence, having regard to the nature and gravity of the offence and the importance of the evidence.

Both the Victorian and the proposed Commonwealth legislation enumerate specific factors which may be considered relevant circumstances. Both include the nature of the offence, the importance of the evidence, the weight of the proposed witness's evidence, the nature of the relationship and whether any breach of confidence was involved. The Commonwealth adds as an additional element the gravity of the offence, and Victoria adds as an additional element (or repeats as an element) the effect on the relationship, the nature in law and fact of the relationship and the consequences of compelling testimony.

One factor which is specifically made relevant in the Victorian legislation and in the A.L.R.C. proposal is whether the testimony sought to be compelled would involve any breach of confidence or disclosure of any matter received in confidence by the potential witness. There is no specific reference to this factor in South Australia in section 21 or in the New South Wales legislation. The South Australian Attorney-General stated in Parliamentary debates that confidentiality was expressly excluded as a factor,[14] because a marital communication, while it might be regarded as confidential in a general sense, is not a privileged communication. It is clear, however, that the confidentiality of the information is relevant to the risk of harm to the relationship or to the prospective witness. Indeed, in the South Australian decision *Trzesinski v. Daire* the magistrate granted a wife an exemption pursuant to section 21 from testifying to communications between husband and wife which the prosecution sought to compel precisely on the basis that they were confidential marital communications. On appeal Prior J. rejected the existence in South Australia of any marital communication privilege, but recognized that compelling disclosure of confidential communication is relevant to the risk of harm to the relationship and to whether compelling such evidence is justified. In upholding the magistrate's grant of the exemption sought, Prior J. relied heavily on the Crown's inability to indicate the nature and relevance of any admissions made by the accused to the potential witness/spouse.

The New South Wales legislation is much more limited in scope; it applies to domestic violence offences only. It provides that a potential witness who voluntarily requests an exemption should be excused if the offence is minor and

[13] *Ibid.*
[14] South Australia, *Parliamentary Debates*, Legislative Council, 1 June 1983, 1772.

the evidence is not important or other evidence is available. Risk of harm is not a factor but the judge must be satisfied that an application for exemption is made freely, and independent of threat or improper influence. There is no express balancing of factors for and against exemption. The South Australian legislation lists the same factors as the New South Wales legislation, the nature and gravity of the harm and the importance of the evidence, but requires that they be considered or balanced against the likelihood of harm to the witness or the relationship.

Persons who may be exempted

In South Australia section 21 permits a 'close relative' of a person charged with an offence to apply for an exemption from the obligation to give evidence. Section 21(7)(a) defines close relative to include a spouse, a parent, or a child and section 21(7)(b) defines spouse to include a putative spouse within the meaning of the Family Relationships Act. The relationship of putative spouses exists if a couple has been cohabiting together as de facto husband and wife for five years or has a child together. This is a narrower definition than is usual for a de facto relationship.

The Victorian legislation applies to the wife, husband, mother, father or child of the accused. There is no specific recognition of de facto relationships. Former spouses are made generally competent and compellable and are not eligible to seek an exemption. The Crimes Act 1900 (N.S.W.) section 407AA applies only in connection with domestic violence offences and only to husband and wife, but includes as husband and wife persons living together on a *bona fide* domestic basis. The A.L.R.C. proposal for the Commonwealth applies to a spouse, de facto spouse, parent or child of a defendant, and includes specific definitions of the latter three relationships. Thus all the schemes include a parent, child or spouse of an accused and all but Victoria expressly include some form of de facto relationship. None include siblings, grandparents or grandchildren.

PROCEDURAL ISSUES

The schemes all have substantially similar grounds on which an exemption might be granted (or conversely, where testimony will be compelled) and all offer substantial improvement over previous approaches to compellability of relatives of an accused. However, as with any new legislation, there are issues not dealt with directly in the legislation which are left to the courts to resolve. The major area which is not addressed is procedure: how does a witness seek an exemption and how does the court go about determining the grounds for granting or denying an exemption?

The court must conduct some sort of inquiry to determine if the witness is eligible to seek an exemption and, if an exemption is sought, whether to grant it or not. What form should such an inquiry take? To answer this question, one might examine the *voir dire* procedures used in the many other situations where a similar preliminary inquiry is required, such as when a claim of privilege is raised or a determination of a witness's expertise is required.

Certainly the inquiry under section 21 is a *voir dire* in the sense of an inquiry outside the presence of the jury to determine preconditions for the receipt of relevant evidence. However, I refrain from using the term *voir dire* to describe the process under section 21 because that phrase may suggest a specific procedure and beg the question under discussion. In any event, it is probably not appropriate to draw too much on other *voir dire* procedures since '. . . the precise procedure depends very much on the nature of the issue and the extent of inquiry required to fairly determine it.'[15]

This paper will focus on the specific procedural issues which arise when a family member of an accused seeks an exemption from testifying for the prosecution. Some of the procedural gaps left by the legislation are relatively minor, but there is significant uncertainty over two important questions: the role of counsel, and the scope of the court's discretion in deciding whether or not to exempt. Very little attention has been paid to these questions in existing or proposed legislation and there has been virtually no judicial attention except in South Australia.[16]

When and how to seek an exemption?

Section 21(2) of the Evidence Act (S.A.) states that a prospective witness 'may apply to the court' for an exemption. In Victoria, section 400(3) permits a judge to exempt 'upon application made to him [sic]'. In New South Wales section 407AA(3) states that a judge may excuse if the 'husband or wife has applied to . . . the Judge'. Under the proposed Commonwealth law, the witness 'may object' (s. 24(5)) and the court shall hear and determine that objection (s. 24(6)). None of these provisions say anything about the form which such an application or objection might take. There is no indication whether written application is required or whether an oral request is sufficient. It appears to be the practice for such applications to be made orally, by the prospective witness, but there do not seem to be any formal practice directions or rules of court.

Regarding the time at which such an application might be made, only the A.L.R.C. draft legislation gives any guidance. Proposed section 24(3) requires that an objection be made before the witness gives evidence or as soon as practicable after a witness becomes aware of the right to object, whichever is later. Considering the South Australian provision in *R.v. Romano*, Cox J. stated

[15] Ligertwood, *op. cit.* n. 1, 36.

[16] In South Australia there are three significant unreported decisions and one reported case considering section 21. The first, *R. v. W.* (1983) 109 *Law Society Judgment Scheme* 483, briefly discussed the court's obligation under section 21(5). In *R. v. Romano* (unreported, Supreme Court of South Australia, 4 September 1984), Justice Cox denied applications for exemptions by the son and daughter of the accused, and, on the next day, 5 September 1984, gave a further ruling on some aspects of section 21. In *R. v. Morgan* (unreported, Supreme Court of South Australia, 22 October 1984), Justice Cox denied an application for an exemption by the 11-year-old son of a man accused of raping the boy's mother. *Trzesinski v. Daire* (1986) 44 S.A.S.R. 43 involved an application by the wife of the accused who sought an exemption from testifying as to occupancy by herself and her husband and her knowledge of certain premises where cannabis was allegedly found, and any admissions the accused may have made to her. She was compelled to give the first part of her testimony, but her application for exemption was granted as to any communications from the defendant.

> I cannot think that Parliament intended that a trial should in the ordinary course of things be delayed or interrupted simply because a witness takes an objection under that section . . .[17]

It appears that the form and timing of such an application is, by default, left to the court's discretion, which has focussed largely on avoiding delay. Concerns about delay or interruption of proceedings can be met by requiring pre-trial notice of the possibility of an application for exemption. The prosecution must surely know in advance if it will be relying on testimony from a close relative of the accused and if the potential witness is reluctant or fearful. Such a witness will almost certainly be subpoenaed. A notice in writing of the right to seek an exemption and the grounds for such an exemption could easily be included with the subpoena, and the onus could then be put on the prosecution to raise the question of exemption before trial.

Who may seek an exemption?

The proposed Commonwealth legislation states that 'a person who is a [family member] of the defendant may object'. In South Australia, section 21(2) provides that 'the prospective witness may apply to the court'. New South Wales refers to an 'application . . . made by that husband or wife'.[18] Victorian section 400(3) uses slightly different drafting which permits exemption of certain family members 'upon application' without stating who is to make such an application.

The only reported judicial decision in Victoria on section 400 of the Crimes Act asserts quite clearly that it is a right of the prospective witness to seek the exemption and must be asserted by the prospective witness. In *R. v. Sorby*[19] the court rejected an attempt by the defendant to seek an exemption for his spouse, who did not herself seek such an exemption. Should this issue arise in New South Wales or South Australia, the result would surely be the same, especially since the provisions in those jurisdictions are more clearly worded on this point.

What is the role of the judge?

Related to the question of when and how an application should be made is the requirement in South Australia that the judge 'satisfy himself [sic] that the prospective witness is aware of his [sic] right to apply for an exemption' (s. 21(5)). The Victorian legislation (s. 400(6)) and the A.L.R.C. proposal (s. 24(5)) have virtually identical provisions. There is no similar requirement in New South Wales.

The issue which arises is whether the judge must personally inform the witness or whether counsel's assurance or other information is sufficient.[20] In an early South Australian case, *R. v. W.*,[21] the Judge inquired of counsel whether the

17 Unreported, Supreme Court of South Australia, 5 September 1984.
18 Crimes Act 1900 (N.S.W.) s. 407AA(4).
19 [1986] V.R. 753.
20 A similar problem can arise in jurisdictions where a spouse is non-compellable if legislation requires a judge to warn or inform a prospective witness who is a spouse. See Evidence Act 1910 (Tas.) s. 85(9); Evidence Act 1977 (Qld) s. 8(6); Evidence Act 1906 (W.A.) s. 8(1)(b).
21 (1983) 109 *Law Society Judgment Scheme* 483.

prospective witness had been made aware of the relevant provisions of section 21. Sangster J. stated that had such an assurance been received it would have been sufficient to meet the requirements of sub-section 5. In the event, counsel was not able to give that assurance, and the judge stated his intention to draw the prospective witness's attention to her rights under section 21. In a later unreported ruling in *R. v. Morgan*,[22] and in the more recent reported case of *Trzesinski v. Daire*,[23] it has been made clear that it is the personal obligation of the Judge to enquire directly of the witness and to inform the witness of the right to apply for an exemption under section 21.

In *Morgan* Cox J. stated

> In my opinion, when it appears that a prospective witness is a close relative within the meaning of section 21 of the Evidence Act, the prospective witness ought to be brought into Court and his [sic] right to apply for an exemption under section 21 explained to him [sic] by the Judge. The witness should then be asked whether any such application is to be made.

Later in the judgment, Cox J. directly addressed 'the question whether the right of a person who falls within the scope of this section should be explained by the Judge personally'. It was put to the court that the assurance of Counsel would be sufficient. Cox J. stated: 'the better course is for the Judge to undertake this responsibility.' He later continued:

> I am of the opinion, therefore, that, at least as a general rule, it is better if the trial judge makes the necessary explanation and inquiries under subs. 5 of s. 21 for himself [sic], and satisfies himself [sic] from the prospective witness's own answers that the witness understands the questions that necessarily arise under s. 21 where a close relative is called to give evidence against a person charged with an offence.

Similarly, in *Trzesinski v. Daire*, Prior J. endorses the view expressed by Cox J. in *Morgan*; 'this is not something to be left to counsel. It is a responsibility staying with the presiding judicial officer. It is not one for any counsel, whether that counsel be counsel for one of the parties to the proceedings or otherwise.'[24]

This does not mean that counsel may not discuss the witness's right to seek exemption with a prospective witness. Indeed, as I go on to argue later, such discussion is not only inevitable but essential. My understanding of these remarks in *Morgan* and in *Trzesinski v. Daire* is that, regardless of what other discussion might have taken place, the judge is still obliged to speak directly with the witness in order to be satisfied of the witness's understanding of the rights conferred by section 21. Though these decisions are in no way binding on the interpretation of the similar provisions in other jurisdictions, it seems likely that the same interpretation would be adopted for the reasons which were found persuasive in South Australia.

DETERMINING WHETHER TO GRANT OR DENY AN EXEMPTION

If the witness chooses to seek an exemption, what happens next? In South Australia section 21 gives virtually no guidance at all beyond indicating that any inquiry as to the grounds for an exemption must occur in the jury's absence.

[22] Unreported, Supreme Court of South Australia, 22 October 1984.
[23] (1986) 44 S.A.S.R. 43.
[24] *Ibid.* 45.

Section 21(3) merely states 'where it appears to the court' that certain factors exist, the judge 'may exempt the prospective witness'. The Victorian provision and the A.L.R.C. recommendation similarly give no guidance as to procedure. The implication from this legislative silence is that the court has a discretion to develop its own procedure and even to adopt different procedures as needed in different cases. The New South Wales legislation in section 407AA(7) expressly places virtually all questions of procedure in the judge's discretion. 'A judge or justice may conduct the hearing of an application . . . in any manner thought fit and . . . may obtain information on any matter in any manner thought fit.' It appears that, no matter what procedure a judge chooses in New South Wales, no error will be committed. However, this approach does not give the court any guidance in deciding what procedure it *should* adopt.

What procedures are best adapted to resolving the issues a court must address to determine whether to grant or deny an exemption? In this situation, as in other similar preliminary inquiries, 'ordinary trial procedure provides a presumptive model'[25] but a full trial procedure is obviously inappropriate in the preliminary inquiry by the court as to the existence of the relevant grounds for exemption. Establishing an appropriate procedure requires determining who should be present during any inquiry, who may participate in the inquiry and to what extent, whether other witnesses may be produced, whether the rules of evidence are binding, who has the onus of proof and what is the standard of proof and, most important, how much is within the court's discretion. Some of these issues have been addressed by the courts in South Australia but most of these questions are still completely open.

1. *Should the prospective witness have independent counsel*?

Prior to trial, lawyers for the prosecution or the defendant (or both) will have had some contact with a potential witness who is a close relative of an accused. In most situations it will be appropriate, if not necessary, to arrange for independent advice for the potential witness on the exemption issue. As Cox J. pointed out in *Morgan*, both prosecution and defence have obvious interests in the testimony of the potential witness and whether the witness seeks and is granted an exemption. This is one of the reasons why section 21(5) was interpreted to place an obligation on the judge to inform the potential witness of the right to seek an exemption. In *Romano* witnesses seeking exemption had testified at a prior trial against their father, the accused. The witnesses stated that they had not then understood their rights under section 21 as explained to them by counsel. Though the court in *Romano* was careful to avoid an inference critical to counsel, giving advice to a prospective witness may put counsel in a situation of conflict of interest.

Nothing in any of the legislation being considered bars a prospective witness from seeking his or her own legal advice. The question which arises is whether,

[25] Ligertwood, *op. cit.* n. 1, 36.

after the judge has informed the witness of rights under section 21, the witness should be given the opportunity to seek independent advice at that point. In *Romano*, dealing with the son of the accused who sought an exemption, Cox J. adjourned the case to enable the son to get legal advice. However, Cox J. was quite specific in stating that

> the course that I am taking in the case of Mr John Romano is to be regarded as quite exceptional. No doubt human ingenuity, and in particular that of the legal profession can always think of reasons why advice from a lawyer to a witness who makes a section 21 application might throw up some facet by way of evidence or argument that might otherwise be overlooked. However I cannot think that Parliament intended that a trial should in the ordinary course of things be delayed or interrupted simply because a witness takes an objection under that section and says either on his own initiative or in response to a question from defence counsel that he would like a lawyer to help him make his application.

In *Trzesinski v. Daire* Prior J. went even further and said that the magistrate should not have adjourned the hearing to enable the wife to be separately represented after the prosecutor outlined what he intended to elicit from her. Prior J. referred to Justice Cox's remarks in *Romano* and stated that 'there was no real justification for allowing counsel for the wife here. Rather the general rule of which Cox J. speaks in the passages cited from *Morgan's case* called for the inquiries to stay with the magistrate without any assistance from counsel.'[26]

Justice Prior's disapproval of adjourning the hearing to permit the wife to have independent advice is apparently based on the obligation of the court pursuant to section 21(5) to be satisfied of the witness's understanding of the right to apply for exemption. However, the ability of the court to meet its obligation is not impaired by independent counsel for the witness:

> [T]he role of counsel for a prospective witness does not conflict with this obligation of the court but rather enhances the court's ability to meet this obligation . . .. Prospective witnesses may well be confused or intimidated by direct questioning by the judge . . .. They may have questions or concerns which they are simply not able or willing to discuss clearly or effectively with the judge, especially in the presence of the spouse-accused. Either before or after the judge's own questioning to determine the witness's understanding of the right to seek exemption, counsel can further discuss the matter with the prospective witness and provide additional information to enable the court to satisfy itself of the witness's understanding.[27]

2. *Should the prospective witness be sworn?*

Whether or not a prospective witness has previously consulted counsel or whether the witness is able to obtain legal advice after being advised by the court of a right to seek exemption from testifying, there will be an inquiry as to the factual basis of the grounds for exemption. It is clear from the South Australian decisions *Trzesinski v. Daire* and *Morgan* that the judge may question the prospective witness about the relevant grounds which would be within the potential witness's knowledge. Presumably this procedure could be followed under the Victorian and proposed Commonwealth legislation, as they also require the court to consider information within the prospective witness's knowledge. The New South Wales legislation lists no factors within the wit-

[26] *Trzesinski v. Daire* (1986) 44 S.A.S.R. 43, 46.

[27] Mack, K.M., 'Case and Comment, *Trzesinski v. Daire*' (1987) 11 Criminal Law Journal 107, 109.

ness's knowledge as grounds for exemption, but the court's obligation to be satisfied that the application is made 'freely and independently of threat' would likely require information from the prospective witness.

Questioning of the prospective witness raises the issue of whether the prospective witness is to be sworn in order to give the information relevant to the grounds for the exemption sought. In the South Australian decision in *Romano* the accused's daughter was sworn but the next day Cox J. stated that 'It may well be, for instance, that there is no need to have the applicant sworn although I cannot see that that would do any harm.' In *Morgan* Cox J. went farther and stated 'I see no reason why the examination of the prospective witness should be made on oath.' This question was not discussed in *Trzesinski v. Daire* and has not been raised in any reported case interpreting the Victorian or New South Wales legislation.

It appears that there is no requirement that the witness must be sworn, and the practice in South Australia is that ordinarily it will not be done, though in any particular instance the court retains the power to require the information to be given on oath. Logically, if the grant of an exemption depends on the existence or not of relevant facts, and the potential witness is the source of those facts, his or her credibility is in issue and s/he should be sworn. There is always the possibility that the prospective witness will say something during the inquiry which will be relevant to the charge and which is inconsistent with later sworn testimony. It may be that the use of such a statement would be barred by those provisions which prohibit comment to the jury on the fact of seeking an exemption. However, if a statement at the inquiry could be used at trial, then it is important that the witness be sworn.

3. *Who should be present during this inquiry and what role may they take?*

All of the legislation being discussed requires that the jury be absent during any inquiry about an exemption and prohibits comment to the jury on whether there has been an application for an exemption or whether such application has been granted or refused. Except for New South Wales, no mention is made in the legislation of any other participants.

Must the defendant be personally present during the determination of a witness's request for exemption? In *Romano*, *Morgan*, and *Trzesinski v. Daire* in South Australia and in the Victorian case of *Sorby*, there is neither a specific mention as to the presence of the defendant, nor any challenge to the presence of the defendant.

The New South Wales legislation specifically requires that the defendant spouse be *absent* when an exemption is sought and that defence counsel be present, though there is no statement of what role defence counsel may take. Removing the defendant may be necessary to prevent intimidation of the potential witness, in a context where the defendant is alleged to have been violent towards the witness. However, removing the defendant may limit the defendant's ability to confront the witness and to protect the defendant's interest in the relationship and in the availability of evidence at trial. The exclusion of the

defendant also raises a practical problem of inability to instruct counsel. A witness seeking an exemption is not directly testifying against the defendant, since it is in the defendant's interest to suppress testimony which the prosecution seeks to compel. However, the witness may, in the course of the inquiry, give information which is adverse to the defendant; an absent defendant is unable to effectively respond.

Should defendant's counsel or Crown counsel or the prospective witness's own counsel be present? This is only addressed in the New South Wales legislation, which requires defence counsel to be present. It appears from the few cases that prosecution and defence counsel were present, and no challenge was raised to their presence.

The South Australian provision, the Victorian legislation and the A.L.R.C. proposal are all silent on whether any counsel may question a prospective witness or make submissions. The New South Wales legislation states that the judge 'may conduct the hearing' on an exemption 'in any manner thought fit and . . . may obtain information on any matter in any manner thought fit.'[28] This provision makes clear what the other legislation implies by silence, that the courts are to develop their own procedures. From the available information, it does not appear that the courts have developed a set pattern for the conduct of such inquiries.

In South Australia in *Morgan* Cox J. stated that 'the procedure to be followed under section 21 of the Evidence Act is one for the judge alone.' It has not been suggested that this means that the prospective witness must be questioned *in camera*, but rather it appears to relate to the participation which may be permitted to any counsel who are present. In *Romano*, when the daughter of the accused sought an exemption, the court used a fairly elaborate procedure of swearing the witness, submitting the witness to questioning by the court, defence counsel and counsel for the Crown, and hearing submissions from all counsel. This elaborate procedure was explicitly rejected by Cox J. in reasons given the next day in *Romano*, and later in *Morgan*. These remarks were repeated with approval in *Trzesinski v. Daire*.

Nothing in any of the legislation prohibits such an elaborate procedure. The adversary system, under which the common law operates, makes the fundamental assumption that the best way to resolve questions is to have them thoroughly tested by opposing parties. However, the view of the court appears to be that any risk of loss of relevant information is outweighed by the undue elaboration of the procedure, the hardship on the witness, the cost in time and distraction from the central issues. Exposing an already reluctant or fearful 'prospective' witness to cross examination at this preliminary stage might undo the very protection which the legislation gives. However, if questioning by counsel of the prospective witness is permitted, then independent counsel for the prospective witness is essential.

Another possible role for counsel in the procedure for determining whether a

[28] Crimes Act 1900 (N.S.W.) s. 407AA(7).

prospective witness should be relieved of the obligation to testify is making submissions to the court. In *Trzesinski v. Daire* and in *Romano* submissions were made by both counsel on the issue. In his September 5th 1984 comments in *Romano*, Justice Cox suggested that 'perhaps . . . there is no proper place . . . for submissions by counsel for Crown and the defence. I do not mean by that to say that such things would necessarily be refused.' Justice Cox later remarked in *Morgan* that 'the procedure to be followed under section 21 of the Evidence Act is one for the judge alone. When he [sic] has heard what the witness has to say, he [sic] will consider the issues that are thrown up . . . and grant or refuse the prospective witness's application as he [sic] thinks proper.'

To refuse to hear submissions from counsel would be too extreme. Even if counsel are properly excluded from questioning the prospective witness, there is still a role for counsel, including any counsel who may be acting for the prospective witness, to be heard in argument on the weight to be given and conclusions to be drawn from the court's inquiry into the circumstances relevant to an exemption. For example, one of the factors which the court must consider in all the new and proposed legislation is the importance of the prospective witness's evidence. Clearly, counsel for the Crown in seeking to present the witness will have information to offer on this point which the court cannot discover merely by inquiry from the witness. Similarly, on the question of harm which may occur to the relationship, counsel for the defence may be able to submit views to the court which might not arise from the court's own inquiry of the prospective witness.

In enacting these new legislative schemes, Parliament has put an obligation on the courts to have regard to certain factors. Adequate consideration of these factors requires counsel's assistance.

4. *May other witnesses be heard on the grounds for exemption?*

Another possibility which might arise in an inquiry to determine grounds for an exemption is that of hearing witnesses other than the prospective witness. This possibility was alluded to in *Romano*. There is nothing in any of the legislation which would prohibit such a procedure, and any superior court of record has inherent power to receive such evidence. In South Australia and Victoria where emotional or psychological harm is a factor for the court to consider, medical evidence may be offered. Such evidence, in the form of written reports has apparently been accepted and considered in some cases in South Australia. However, given the concern which has been expressed about unnecessary elaboration of procedures, it is unlikely that a court would ordinarily accept the submission of additional witnesses or evidence. Courts should be flexible, however, and permit additional evidence where it is helpful.

5. *Should rules of evidence be applied?*

Another procedural issue in an inquiry to determine grounds for exemption is whether the rules of evidence would apply. The New South Wales provision expressly states that the rules of evidence are not applicable; the point is not

addressed in other legislation. An application of the rules of evidence would be inappropriate for the informal inquiry envisioned by Cox J. in his remarks in *Romano* and *Morgan*, and this is probably the best view. For example, many of the relevant factors might require testimony in the form of opinion or in terms of personality or character, which strict application of the rules of evidence would exclude.

6. *Who bears the burden of proof?*

Another point which arises in the proceedings to determine grounds for an exemption is the question of burden of proof. Ordinarily, when relevant evidence is sought to be excluded, the onus is on the party seeking to exclude. Since the person seeking to exclude relevant evidence in an application for exemption is the prospective witness, the evidential burden of adducing evidence and the persuasive burden of proving facts sufficient to obtain an objection should be on the prospective witness.

Analysis of the statutory formulae confirm this. The Victorian legislation and A.L.R.C. proposals are similar and both suggest that the burden is on the prospective witness. In Victoria the statute requires that the judge shall exempt 'if but only if' the community interest in having the evidence is outweighed by the likely damage to the relationship and/or the harshness of compelling the testimony. The decision in *Sorby* emphasising that it is a right of the potential witness to seek exemption, and not of the defendant to exclude the testimony, further supports the conclusion that the burden is on the witness.

Under the A.L.R.C. proposal an exemption shall be granted if the likelihood and nature of harm to the prospective witness or the relationship outweighs the desirability of having the evidence sworn. Since it is the prospective witness who seeks to exclude, and who is really the only one who can show the facts necessary to justify an exemption and because those facts must 'outweigh' other factors, the burden of proof must be on the prospective witness.

The New South Wales provision has a different formula. There is no balancing as such. If the court is satisfied that the application is free and independent of threat, it should be granted, though regard should also be given to the importance of the facts and seriousness of the offence. These latter factors are peculiarly within the prosecution's knowledge; this suggests that the persuasive burden is on the prosecution to show necessity to compel the testimony once a voluntary application is made.

In South Australia, for a witness to be exempt, it must appear to the court that there is insufficient justification to expose the witness to a risk of serious harm. This suggests the onus is on the prospective witness. This was the view of the opposition in the South Australian Parliament during their debates on section 21 and was one reason stated for their objection to this legislation.[29] In *Trzesinski v. Daire* the magistrate appeared to treat the matter as though the burden were on the prospective witness and, on appeal, Prior J. did not dispute this view.

[29] South Australia, *Parliamentary Debates*, Legislative Council, 11 May 1983, 1448-9.

It is possible to interpret the statutory language of section 21 to reach a different conclusion. The statute itself says that a court 'may exempt' if the importance of the evidence and the nature and gravity of the offence are insufficient to justify exposing the witness to a serious risk of substantial harm. By putting it in terms of insufficiency of justification, section 21 could be read to suggest that, once a risk of substantial harm is shown by the applicant, then the burden of persuasion shifts to the Crown to show justification to compel. It does not appear that this argument has been made to the court, and there is no specific decision on this point.

If the burden of proof is on the applicant, that is another strong reason for a prospective witness to be afforded independent counsel.

7. *What is the standard of proof?*

Another issue which is not clearly addressed is the standard of proof which is required before the grounds for an exemption are made out. The New South Wales legislation says that a witness for whom certain factors exist should be excused.[30] In Victoria, the legislation requires that a court 'shall exempt'[31] a witness if the community interest in the evidence is outweighed by other factors. In the A.L.R.C. proposals, if the court 'finds' that certain factors outweigh others then the prospective witness 'shall not be required' to testify.

The statement in section 21 is that if the grounds 'appear to the court' the court 'may exempt'. This issue of standard of proof has not been directly addressed in any of the decided cases in South Australia. In the Parliamentary Debates on section 21 it was suggested in passing by a member of the opposition that the effect of this section was to put the onus on the prospective witness to the balance of probabilities.[32] There is nothing to justify this suggestion in the wording of section 21 itself, nor can the wording of the similar provisions in New South Wales, Victoria or the A.L.R.C. proposals be related to an established rule such as the balance of probabilities.

8. *Should written reasons for the decision to grant or deny an application for exemption be required?*

In New South Wales, section 407AA(5) Crimes Act specifically requires written reasons in a prescribed form, apparently in order to facilitate the witness's understanding of what has happened. This is consistent with the view that it is uniquely the judge's obligation to make sure the witness understands the right to seek an exemption. In South Australia, Victoria and in the A.L.R.C. proposals, there is no provision as to the form in which the judge's decision must be expressed. Of course, having independent counsel would facilitate the witness's understanding of the judge's decision to grant or deny an exemption.

Ordinarily, if the witness is informed of the right to seek exemption by the

30 Crimes Act 1900 (N.S.W.) s. 407AA(4).
31 Crimes Act 1958 (Vic.) s. 400(3).
32 South Australia, *Parliamentary Debates*, Legislative Council, 11 May 1983, 1948.

court, then that discussion and any inquiry which followed would be part of the transcript. Certainly, there is no requirement that the matter be dealt with *in camera*. Equally, however, there is nothing in any of the legislation to prohibit a court from conducting such an inquiry *in camera* or off the record if it appeared suitable to do so and the court otherwise has power to do so. The only express restriction might be section 407AA(6) in New South Wales which requires the presence of defence counsel. Since it is possible that a ruling on an application for exemption might be challenged, some record of the inquiry, the relevant facts as found by the judge and the weighing of the statutory grounds and the conclusion the judge reaches ought to be made.

9. *May the grant or denial of an application for exemption be challenged?*

Neither the legislation nor the cases directly consider a witness's ability to challenge an adverse ruling on an application for exemption, nor does any of the legislation discuss whether prosecution or defendant can challenge a ruling on an application for exemption. Presumably, these questions, should they arise, would be governed by the availability of a writ of prohibition or an interlocutory appeal. In Victoria, *R. v. Sorby* suggests that the defendant would not have a justiciable interest, but the issue has not directly arisen there or in any reported case in New South Wales.

However, in South Australia it is clear that the ruling of a court or a magistrate on an application for exemption from testimony may be challenged on appeal from a conviction. A remark by Cox J. to the effect that the parties may not have a legitimate interest in the issue that arises under section 21 was relied on to argue that the ruling could not be challenged on appeal. However, Prior J. in *Trzesinski v. Daire* rejected that argument and stated quite clearly that the defendant was entitled to challenge the magistrate's denial of his wife's application for exemption which required the wife to give testimony incriminating the defendant.

For purposes of appeal, at least in South Australia, the defendant is treated as having a justiciable interest. This is inconsistent with severely limiting the role of counsel for the parties in the initial inquiry on the basis that the prospective witness has the only legal interest in an application for exemption. Since appeal by the defendant is allowed, it would be a much more efficient use of judicial time to have a full initial inquiry with defence counsel's participation rather than refusing to hear counsel's contentions until appeal.

SCOPE OF THE COURT'S DISCRETION

In New South Wales, section 407AA(4) provides that the judge 'may excuse' if satisfied that, in light of certain factors, the spouse-witness 'should be excused'. In South Australia, section 21(3) also uses the words 'may exempt' rather than the mandatory 'shall' exempt. As a matter of ordinary statutory intepretation, the word 'may' indicates a power or a discretion[33] in the court.

[33] Acts Interpretation Act 1901 (Cth) s. 33(1); Acts Interpretation Act 1897 (N.S.W.) ss 423, 31, 32; Acts Interpretation Act 1915 (S.A.) s. 34.

Indeed, the opposition in the South Australian Parliament expressed a strong view that section 21 imported a very wide discretion in a judge and that this was a major fault in the legislation.[34]

The court in *Romano* described the conclusion reached when applying section 21, stating that it was 'not satisfied' of the existence of a substantial risk and 'was satisfied' of the importance of the evidence. Therefore, it was justifiable to expose the witness to a slight risk and she was not exempt from the obligation to testify. In *Morgan*, the court stated that it would be up to the judge to grant or refuse the prospective witnesses application 'as he [sic] thinks proper'. This language was quoted by Prior J. in *Trzesinski v. Daire*.[35] Prior J. stated that he 'share[d] the magistrate's view that there was not material before him which would justify a total exemption from giving evidence.'[36] These statements show the court's view that section 21 gives a broad discretion to exempt when certain circumstances exist, rather imposing a duty or obligation to exempt in those circumstances.

However, section 21 does not create an unfettered discretion to grant or deny an exemption to a close relative. As section 21 is drafted, a court only acquires the power to exempt if certain circumstances exist and if the relevant statutory factors are considered in the correct relationship to each other. In *Trzesinski v. Daire* Prior J. identified clear error in the magistrate's failure properly to consider the factors as required by section 21.[37]

Both the Victorian legislation and the A.L.R.C. proposal use the mandatory 'shall exempt'. This language suggests that once certain facts are found to exist, the exemption must be granted (or conversely, that the testimony must be compelled, in the absence of certain statutorily described circumstances). However, the condition which is the precondition to exemption is itself a balance among competing factors, a determination whether certain factors outweigh others. Even if the court 'shall' exempt, if the balance falls one way, there is still a very wide scope for a kind of discretion or judgment in weighing and evaluating these factors.

As a practical matter, regardless of statutory language, the choice to compel or exempt is very much up to the judge and virtually unreviewable on appeal, so long as there is a record showing consideration of the relevant factors and a conclusion as to which ones outweighed others.

CONCLUSION

Section 400 Crimes Act (Vic.), section 407AA Crimes Act (N.S.W.), section 21 Evidence Act (S.A.), and the A.L.R.C. proposal are important steps forward in rationalising the law on competence and compellability of family members of the accused. They do away with arbitrary distinctions, create a general rule of competence and compellability for all witnesses other than the accused, and

[34] South Australia, *Parliamentary Debates*, Legislative Council, 11 May 1983, 1948.
[35] (1986) 44 S.A.S.R. 43, 45.
[36] *Ibid.* 50.
[37] *Ibid.* 51.

articulate criteria for compellability which relate directly to those community interests which are relevant to protecting spouses and other family members as witnesses. The court's power to exempt is directly linked to the protection of family values which the community wants to uphold. Except in New South Wales, there is a policy of balancing requirements of criminal prosecution against needs of a prospective witness. In New South Wales, in the specific context of domestic violence, the legislation reflects a clear policy to protect a prospective witness's choice not to testify if the witness's evidence is not essential and the offence is minor. Though the particular policy goals of these legislative schemes may differ, all are clearer and more rational about the relevant factors than the previous law (which is still current law in some Australian jurisdictions).

Unfortunately many procedural aspects of the way a judge is to make the determination required by these new provisions are uncertain. It may not have been appropriate for the legislature to set out in detail many of the procedural steps which have been raised in this paper; they may be more appropriately developed as rules of court, or guidelines, but they must be formulated clearly somewhere, so that the exemptions are granted or denied on a consistent basis.

In conducting the inquiry to determine the factual circumstances relevant to an application for exemption, courts should not lightly disregard the procedural framework for resolving disputes developed by the common law. All features of common law trial or *voir dire* procedure may not be necessary in all applications for exemption by family members but there must be some comprehensive consideration of the procedural questions raised here.

The court's desire to minimise interruption and delay and to avoid undue complexity or elaboration of procedure is laudable, but it can be carried too far. The emphasis on inquiry by the judge alone, without assistance of counsel in argument or to aid the potential witness is misplaced. It may create a simpler process, but if it results in a witness failing to gain a deserved exemption, it denies to the family member of the accused the very protection from the hardship of a court process which the legislature sought to give. Unduly limiting the role of counsel flies in the face of the adversary process which is a fundamental value of the Australian legal system. The helplessness of lay persons acting to represent their own interests in court is axiomatic. Certainly, the ability of an 11-year-old child, as in *Morgan*, to protect his or her own interests is extremely limited. Counsel for a prospective witness assists the courts and the prospective witness.

> Counsel for a prospective witness can advise the prospective witness in determining whether to seek an exemption, the possible consequences of seeking such an exemption, and the effects if the exemption is granted, in full or in part, or denied. If exemption is desired, counsel can assist with identifying relevant facts, presenting them effectively on behalf of the witness, and effectively relating significant facts to the legal issues which the court must consider in deciding whether to grant or deny an exemption in whole or in part. In order to make the protection which Parliament has created effective, the availability of counsel to such a prospective witness is an appropriate method to carry out these provisions.[38]

[38] Mack, *loc. cit.*

Rules or guidelines must be developed which recognise the need of a family member of an accused who is a prospective witness to have independent advice, made available at an early stage to avoid undue delay. This is especially true since it appears that the witness bears the burden of proof of facts justifying an exemption to the Judge's satisfaction. Guidelines or rules of court must clarify the role of counsel in the court's inquiry regarding grounds for exemption. Certainly all counsel (including counsel for the prospective witness) should be permitted to make submissions, but perhaps, ordinarily, only the court should question the prospective witness directly. Ordinarily the witness would be unsworn, but adequate record should be made of the proceedings, the decision itself, and the grounds on which the decision is based. Consideration should be given to allowing the witness or the Crown to challenge an adverse ruling, if present interlocutory proceedings do not.

Without witnesses there could be no trials and certainly no fair trials. Their convenience and protection has often received little attention in the trial process. Now, there is greater concern about the difficulty faced by a prospective witness who is a close family member of the accused. For family members of an accused (and the community) to get the true benefit of these improved legislative schemes, clear procedures must be formulated so that the determination of when to compel and when to exempt will be made as fairly as possible.

APPENDIX A

CRIMES ACT (VIC.)

400 (1) Nothing in this section shall operate to compel any person charged with an offence (in this section called 'the accused') to give evidence in any proceedings wherein such charge is heard.

(2) Subject to sub-section (3), the wife, former wife, husband or former husband of the accused shall be a competent and compellable witness for the prosecution at every stage of the proceedings against the accused, including proceedings for the grant, variation or revocation of bail, as if the marriage had never taken place.

(3) In any proceedings against the accused, the presiding judge or justice shall exempt the accused's wife, husband, mother, father or child (in this section called the 'proposed witness') from giving evidence on behalf of the prosecution, either generally or in relation to a particular matter, if, but only if, he is satisfied upon application made to him in the absence of the jury (if any) that, having regard to all the circumstances of the case, the interest of the community in obtaining the evidence of the proposed witness is outweighed by —

(a) the likelihood of damage to the relationship between the accused and the proposed witness; or

(b) the harshness of compelling the proposed witness to give the evidence; or

(c) the combined effect of the matters mentioned in paragraphs (a) and (b).

(4) Without restricting the generality of the phrase 'all the circumstances of the case' in sub-section (3), such circumstances shall include —

(a) the nature of the offence charged;

(b) the importance in the case of the facts which the proposed witness is to be asked to depose to;

(c) the availability of other evidence to establish those facts and the weight likely to be attached to the proposed witness's testimony as to those facts;

(d) the nature, in law and in fact, of the relationship between the proposed witness and the accused;

(e) the likely effect upon the relationship and the likely emotional, social and economic consequences if the proposed witness is compelled to give the evidence; and

(f) any breach of confidence that would be involved.

(5) The fact that a proposed witness has applied for or been granted an exemption pursuant to this section shall not be made the subject of any comment to the jury by the prosecution or by the presiding judge.

(6) Where the husband, wife, mother, father or child of the accused is called as a witness for the prosecution, the presiding judge or justice shall satisfy himself that the person so called is aware of his or her right to apply for an exemption pursuant to this section.

APPENDIX B

EVIDENCE ACT 1929 (S.A.)

21 (1) A close relative of a person charged with an offence shall be competent and compellable to give evidence for the defence and shall, subject to this section, be competent and compellable to give evidence for the prosecution.

(2) Where a person is charged with an offence and a close relative of the accused is a prospective witness against the accused in any proceedings related to the charge (including proceedings for the grant, variation or revocation of bail, or an appeal at which fresh evidence is to be

taken) the prospective witness may apply to the court for an exemption from the obligation to give evidence against the accused in those proceedings.

(3) Where it appears to a court to which an application is made under subsection (2) —
  (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,
  the court may exempt the prospective witness, wholly or in part, from the obligation to give evidence against the accused in the proceedings before the court.

(4) Where a court is constituted of a judge and jury —
  (a) an application for an exemption under this section shall be heard and determined by the judge in the absence of the jury; and
  (b) the fact that a prospective witness has applied for, or been granted or refused, an exemption under this section shall not be made the subject of any question put to a witness in the presence of the jury or of any comment to the jury by counsel or the presiding judge.

(5) The judge presiding at proceedings in which a close relative of an accused person is called as a witness against the accused shall satisfy himself that the prospective witness is aware of his right to apply for an exemption under this section.

(6) This section does not operate to make a person who has himself been charged with an offence compellable to give evidence in proceedings related to that charge.

(7) In this section —
'close relative' of an accused person means a spouse, parent or child;
'spouse' includes a putative spouse within the meaning of the Family Relationships Act, 1975.

APPENDIX C

CRIMES ACT 1900 (NSW)

Compellability of spouses to give evidence in certain proceedings

407AA (1) In this section —
  (a) a reference to the husband or wife of an accused person includes a reference to a person living with the accused person as the husband or wife of the accused person on a bona fide domestic basis although not married to the accused person;
  (b) a reference to a domestic violence offence committed upon the husband or wife of an accused person includes a reference to an offence of failing to comply with a restriction or prohibition specified in an order under section 547AA where that husband or wife was the aggrieved spouse of the accused person, as referred to in section 547AA; and
  (c) a reference to a child assault offence is a reference to —
    (i) an offence under, or mentioned in, section 19, 24, 27, 28, 29, 30, 33, 33A, 35, 39, 41, 42, 43, 44, 46, 47, 48, 49, 58, 59, 61, 61B, 61C, 61D, 61E, 66A, 66B, 66C, 66D, 493 or 494 committed upon a child under the age of 18 years; or
    (ii) an offence of attempting, or of conspiracy or incitement, to commit an offence referred to in subparagraph (i).

(2) Except as provided in subsection (3), the husband or wife of an accused person in a criminal proceeding shall, where the offence charged is a domestic violence offence (other than an offence constituted by a negligent act or omission) committed upon that

husband or wife, be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused person.

(2A) Except as provided in subsection (3), the husband or wife of an accused person in a criminal proceeding shall, where the offence charged is a child assault offence (other than an offence constituted by a negligent act or omission) committed upon —

(a) a child living in the household of the accused person; or

(b) a child who, although not living in the household of the accused person, is a child of the accused person and that husband or wife,

be compellable to give evidence in the proceeding in every Court, either for the prosecution or for the defence, and without the consent of the accused person.

(3) The husband or wife of an accused person shall not be compellable to give evidence for the prosecution as referred to in subsection (2) or (2A) if that husband or wife has applied to, and been excused by, the Judge or Justice.

(4) A Judge or Justice may excuse the husband or wife of an accused person from giving evidence for the prosecution as referred to in subsection (2) or (2A) if satisfied that the application to be excused is made by that husband or wife freely and independently of threat or any other improper influence by any person and that —

(a) it is relatively unimportant to the case to establish the facts in relation to which it appears that that husband or wife is to be asked to give evidence or there is other evidence available to establish those facts; and

(b) the offence with which the accused person is charged is of a minor nature.

(5) A Judge or Justice shall, when excusing the husband or wife of an accused person from giving evidence under subsection (4), state the reasons for so doing and cause those reasons to be recorded in writing in a form prescribed by regulations made under subsection (9).

(6) An application under this section by the husband or wife of an accused person to be excused from giving evidence shall be made and determined in the absence of the jury (if any) and the accused person but in the presence of the legal representative (if any) of the accused person.

(7) A Judge or Justice may conduct the hearing of an application under this section in any manner thought fit and is not bound to observe rules of law governing the admission of evidence but may obtain information on any matter in any manner thought fit.

(8) The fact that the husband or wife of an accused person in a criminal proceeding has applied under this section to be excused, or has been excused, from giving evidence in the proceeding shall not be made the subject of any comment by the Judge or by any party in the proceeding.

(9) The Governor may make regulations, not inconsistent with this Act, prescribing the form of a record required to be made as referred to in subsection (5).

APPENDIX D

AUSTRALIAN LAW REFORM COMMISSION DRAFT EVIDENCE BILL
Part III — Witnesses
Division 1 — Competence and compellability of witnesses

Competence and Compellability

18 Except as otherwise provided by this Act —

(a) every person is competent to give evidence; and

(b) a person who is competent to give evidence about a fact is compellable to give that evidence.

Compellability of spouses, &c, in criminal proceedings

24 (1) This section applies only in a criminal proceeding.

(2) A person who is the spouse, the de facto spouse, a parent or a child of a defendant may object to being required to give evidence as a witness for the prosecution.

(3) The objection shall be made before the witness gives evidence or as soon as practicable after the witness becomes aware of his or her right so to object, whichever is the later.

(4) A witness who is the spouse, the de facto spouse, a parent or a child of a defendant may object to being required to give evidence of a communication made between the witness and that defendant.

(5) Where it appears to the court that a witness may have a right to make an objection under subsection (2) or (4), the court shall satisfy itself that the witness is aware of that provision as it may apply to the witness.

(6) If there is a jury, the court shall hear and determine the objection in the absence of the jury.

(7) Where, on an objection under subsection (2) or (4), the court finds that —

(a) the likelihood of the harm that would or might be caused, whether directly or indirectly, by the witness giving evidence or giving evidence of the communication, as the case may be, to —

(i) the person who made the objection; or

(ii)the relationship between that person and the defendant concerned; and

(b) the nature and extent of any such harm,

outweigh the desirability of having the evidence given, the person shall not be required to give the evidence.

(8) For the purposes of subsection (7), the matters that the court shall take into account include —

(a) the nature and gravity of the offence for which the defendant is being prosecuted;

(b) the substance and importance of any evidence that the person might give and the weight that is likely to be attached to it;

(c) whether any other evidence concerning the matters to which the evidence of the witness would relate is reasonably available to the prosecutor;

(d) the nature of the relationship between the defendant and the person; and

(e) whether, in giving the evidence, the witness would have to disclose matter that was received by the witness in confidence from the defendant.

(9) Where the objection has been determined, the prosector may not comment on the objection, on the decision of the court in relation to the objection or on the failure of the person to give evidence.

(10) In this section —

(a) a reference to a child is a reference to a child of any age and includes a reference to an adopted child and an ex-nuptial child;

(b) a reference to a parent, in relation to a person, includes a reference to an adoptive parent of that person and, in relation to a person who was an ex-nuptial child, also includes a reference to the natural father of that person; and

(c) a reference to the de facto spouse of a person is a reference to a person of the opposite sex to the first-mentioned person who is living with the first-mentioned person as that person's husband or wife although they are not legally married to each other.